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Los Angeles lawyer Eric A. Webber is the Association’s 2011-12 president
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Steven L. Gleitman, Esq.
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Biography available at lawyers.com or by request.

Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 1/4 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.
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There must be some culture somewhere in the world for which 33 is a lucky number. I mention this because I am the 33rd chair of the Los Angeles Lawyer Editorial Board. I am not saying this is lucky, but one can hope. Maybe someone can research the significance of the number 33 and let me know—but please spare me any bad news. I broke a mirror a while ago, and I am almost through the seven years of bad luck. I do not want to start that again. Not that I am superstitious. Knock on wood.

There are law firm partners today who were not even born yet in 1978, the year the magazine was launched. I was, and I can state that the old days were not necessarily as good as many proclaim. There were no iAnythings, eWhatvers, or You Name It dot.coms. Before becoming an attorney, I applied for a job for which the sole test was whether I could use this new thing called a mouse to direct the cursor in a more or less straight line across the screen. I was not hired, and thus the tech revolution was forced to go on without me. Eventually I walked into a seating of the LSAT. I thought they were paying us to fill out a product survey.

So I became a lawyer. Now, as part of my responsibilities for Los Angeles Lawyer, I am writing my first From the Chair column. If you want to read a wonderfully written and very thoughtful first column, do what I did: Go to http://www.lacba.org/lalawyer to look at the past issue archives. My predecessors have done a great job every year writing all the things that should be written.

In fact, I struggled mightily to figure out what you would want to read. I came up with Ernest Hemingway and James Michener. But as it happens, I am more Scott Adams (Dilbert) and Gary Larson (The Far Side). So I gave up on you and focused on what I would want to write. Then I remembered that the things we worry about most are the ones that generally cause us the least trouble. That insight led me to a new philosophy of life: Worry about everything.

Here is what I am worrying about now: How are we doing in making the magazine a valuable tool for your practice? Is the magazine covering the legal topics most germane to all aspects of the profession? And, most important, how’s my hair? (Regrettably it seems to be going the way of the rainforests. Well, not exactly, since to my knowledge no one is clear-cutting my hair to make room for agriculture, or to make furniture for IKEA, but you get my drift.)

Despite the tone of this month’s column, not all my columns this bar year will be so lighthearted. Even if I am the most humorous and irreverent employee of a national bank, per outgoing chair Michael Geibelson. (Thanks, I think.) Los Angeles Lawyer is a serious, award-winning legal journal with a hardworking professional staff and dedicated board of volunteer editors who work to make every issue meaningful, valuable, and sometimes even provocative. All without publishing pictures of Lindsay Lohan.

As an in-house, transactional lawyer, I am not as attuned to the breaking issues in litigation and the courts that occupy real lawyers. In my world, the line between law and business is often blurred. I hope to use my time as chair of the Editorial Board to bring more of that world to the pages of the magazine. But civil procedure wonks should not sweat it; the magazine will still take good care of you.

I urge you to e-mail me at swensonatlal@aol.com to let me know your thoughts about Los Angeles Lawyer. I am looking forward to an informative and evocative—or at least entertaining—year.

Ken Swenson

Ken Swenson is in-house counsel for Bank of America in Los Angeles. He is the 2011-12 chair of the Los Angeles Lawyer Editorial Board.
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ADMITTEDLY, THE NAME IS A BIT CONFUSING: the Barristers Section of the Los Angeles County Bar Association. Despite the misleading name, however, the Barristers Section has earned a first-class reputation among the more established lawyers in the Los Angeles legal community. After all, the Barristers recently celebrated its 80th birthday and can brag that its former presidents include Margaret M. Morrow, U.S. District Court judge in the Central District of California; Ronald L. Olson, partner in the Munger, Tolles, & Olson law firm; and Lee Smalley Edmon, presiding judge of the Los Angeles Superior Court.

Thus, when I had the pleasure of attending LACBA’s reception honoring young attorneys newly admitted to the California Bar this spring, I was distressed by the number of young lawyers who had to ask, “Who are the Barristers?”

The Barristers are the young lawyers of the Association. They are what many consider the low men and women on the totem pole: the document reviewers, the cite checkers, the up-all-nighters because the partner needed that memo yesterday. But Barristers face more than computer screens and short deadlines. Today, Barristers are networking their way through a difficult legal job market. They are paying back significant loans and considering 401(k) options. They continue to struggle with their decision to go into private practice as opposed to government service—and vice versa. They are writing their first motion, making their first appearance, and taking their first deposition. As new attorneys, Barristers share these key traits and concerns and are therefore uniquely suited to counsel, commiserate, and celebrate with one another over cocktails.

Even more important than who Barristers are, is what the Barristers Section does. With its membership in mind, the section strives to accomplish its mission “to further the personal and professional development of our members, to promote public service, and to provide a forum for addressing legal and social issues of importance in our profession and community.” For example, this past year, the Barristers presented a program called Planning Your Financial Future that featured speakers on financial planning and loan consolidation for new lawyers; trained over 100 young lawyers to work at a one-day clinic assisting immigrants in gaining legal status; and hosted a jobs panel program in which legal recruiters and local career services departments spoke about the state of the legal job market in Los Angeles.

The opportunities that a Barristers membership provides are invaluable. Barristers programs offer members the chance to connect to one another, to potential mentors, to government officials, to a possible job opportunity, to the state and federal bench, to other young professionals, and to the Los Angeles community at large. Moreover, Barristers programs are designed to educate members from the perspective of a new attorney. Most important are the skills learned and relationships forged through involvement in the section, which will set new attorneys on their way to a thriving legal career.

As the incoming president of the Barristers Section, I hope to continue its legacy of helping new attorneys in Los Angeles discover who Barristers are, what we do, and why new attorneys should join us. Even more, I hope to encourage new attorneys to join the Barristers so that they can be more involved in their legal community. How can a new attorney take part?

First, join LACBA at www.lacba.org. Then, if you are eligible, sign up for the Barristers Section. Members who are 36 years old or younger or have practiced five years or less are eligible for membership in the Barristers. For first-year new admittees, it costs nothing more in addition to your LACBA dues, and after that, only an additional $35—and for that amount you receive all the educational, networking, and pro bono opportunities offered by the section. Finally, the Barristers Executive Board employs a committee system to plan its programming, and it needs new and enthusiastic lawyers to join committees and help plan programs and events. If you are interested in getting involved, please review the descriptions of the committees below and e-mail your resume, along with a list of the committees on which you would like to serve, to Hannah Robey at LACBA (hrobey@lacba.org).

The following Barristers committees are available for volunteers:

• The Bench and Bar Committee brings young attorneys together with members of the Los Angeles state and federal bench. This committee is chaired by Joshua Ritter of the Los Angeles County District Attorney’s office.

• The Community Outreach Committee works to connect young attorneys and law students to community building opportunities. It is chaired by Philip Monahan of Meyer, Olson, Lowy & Meyers, LLP and Erin Pfaff of Wildman Harrold Allen & Dixon LLP.

• The Government Relations Committee provides a forum for new and young lawyers to develop leadership skills by interacting with elected officials from across the political spectrum. The committee is chaired by Elizabeth Hanks of Paul Hastings.

• The Legal Profession Committee, chaired by Alison Pear of Troy Gould PC, presents programming on the hot-button issues facing the legal profession today, including the state of the legal job market.

• The Networking Committee hosts monthly mixers and plans events to raise money and awareness on behalf of various charities in the Los Angeles area that are involved with LACBA. It is chaired by Ori Blumenfeld of the Law Offices of Michael Jay Berger and Damon Thayer of Jenner & Block.

• The Pro Bono Committee, chaired by Devon Myers of White & Case LLP, connects Barristers with local pro bono opportunities through collaborations with local legal services programs.

• The Professional Development Committee hosts several educational programs annually that are designed to deliver continuing education to new and young attorneys. It is chaired by Adam Luotto of Weinberg, Roger & Rosenfeld.

I urge newer and younger attorneys to participate in an 80-year tradition of excellence.

Sarah Luppen, the 2011-12 president of the Los Angeles County Bar Association, is an associate at Simpson Thacher & Bartlett LLP, where she focuses on general business litigation.
AN INTERNSHIP MAY SOUND LIKE A GREAT OPPORTUNITY for both parties, but California employers should assess the relationship with a careful eye. In this economic climate, talented college and professional school graduates are having difficulty finding full-time employment and may be willing to try an unpaid internship to build up their resumes. A law firm may want to offer help to a client’s son or daughter who is thinking of going to law school, but may the student work for free?

On April 7, 2010, the California Division of Labor Standards Enforcement (DLSE) issued an opinion letter addressing the requirements employers must meet in order to utilize unpaid interns. The letter responded to an inquiry from an attorney on behalf of Year Up, a nonprofit organization dedicated to developing information technology skills in at-risk 18- to 24-year-olds. Year Up has created a program for young adults to enter an 11-month intensive educational and training program in exchange for college credit and stipends. Businesses pay Year Up a fixed fee to accept a trainee while dedicating a supervisor to guide and educate the learner. The enrollee is not guaranteed a job after completion of the program. The attorney asked whether the businesses involved in the training segment of the program would have to pay the interns as employees.

No California or federal statute or regulation pertains directly to the exemption of interns from minimum wage and overtime requirements. After a lengthy review of related opinion letters and cases, the DLSE concluded that the interns enrolled in the Year Up program were not employees under California law and therefore were exempt from coverage under California’s minimum wage law. In reaching its conclusion, the DLSE followed the criteria of the federal Department of Labor (DOL) for determining whether the interns are exempt from minimum wage coverage and examined the totality of the circumstances surrounding their activities.

The six criteria used by the DOL to assess whether an intern is exempt from the Fair Labor Standards Act come from the U.S. Supreme Court’s 1947 opinion in Walling v. Portland Terminal Company. In order for an internship to be considered an unpaid position, six factors must be established: 1) the training is similar to vocational school, 2) the training is for the benefit of the trainee, 3) the trainee is not replacing a normal employee and works under supervision, 4) the sponsor of the trainee does not derive any immediate benefit from the trainee, 5) the trainee is not entitled to a job after completion of training, and 6) the sponsor and the trainee understand that the trainee is not entitled to wages (although a stipend may be permitted).

In the past, the DLSE also used an additional five factors to review intern or trainee issues, which included whether the intern would receive academic credit for training. The Year Up opinion letter made clear that only the six established DOL factors would be considered. Thus, despite the common perception that academic credit replaces wages, the student internship must be reviewed under the same test as a graduate internship.
requires close supervision rather than performing substantial independent work...[that] may offset any advantage perceived to be received by the employer.11 Year Up requires its employers to state in writing that no employee will be displaced by the intern.

The fourth factor considers whether the employer will significantly benefit from the intern’s work. The DLSE focuses on whether the advantage or benefit the employer receives from the work performed by the intern is immediate. So long as trainees are closely supervised and do not assume the duties of regular employees, no immediate benefit is established. In the case of the Year Up partners, each for-profit company enrolled in the program paid over $22,000 to Year Up to sponsor an intern. This payment is made in addition to the significant costs in employee time that is dedicated to training and supervision of the intern.

To satisfy the fifth step of the DOL test, any unpaid internship should confirm in writing to the participant that no job is guaranteed at the conclusion of the training. Another item that may be covered in a written agreement is the final step reviewed by the DLSE, which is that the company and trainees understand that no wages are due for the training. The DLSE has established that students who perform work during their educational studies are not employees if they receive no compensation or credit toward fees.5 Year Up pays its students a modest stipend to cover some living expenses during the program. The stipend is controlled by Year Up rather than the company with which the intern is placed. Recognizing that the DOL has viewed reasonable stipends as appropriate in training programs, the DLSE approved the stipend paid to Year Up’s interns. It is unclear whether the average California employer would be able to pay a stipend directly to an intern.

For-Profit Companies

The six stringent criteria make it difficult for employers—particularly for-profit companies—to have properly classified unpaid interns. A 2010 New York Times article regarding internships quoted Nancy J. Lepink, the acting director of the federal Labor Department’s Wage and Hour Division, as stating, “There aren’t going to be many circumstances in which for-profit companies can have unpaid internships and still be in compliance with the law.”6

Despite the legal issues, many for-profit companies rely upon unpaid interns as a way to minimize costs and provide opportunities to eager unemployed individuals who are willing to work for free, often with the hope of securing a paid position. For example, a cursory review of online job source Craigslist Los Angeles under the internship category yields a plethora of unpaid positions, including in the legal field. It is not difficult to find listings for law firms that include one or more conditions that are not likely to pass the DOL’s six-factor test.7 Unless the company can meet those six factors, an intern who works without pay for the purpose of gaining work experience is an employee.

Some employers would rather not sort out the legal complications associated with an unpaid internship. These firms may have a standard policy of paying interns. According to one study, intern pay ranges from minimum wage for undergraduates to $25 an hour for graduate students.8 Furthermore, federal and state wage laws permit subminimum wages for a specific group of inexperienced workers. California Wage Orders permit payment for learners of an occupation of 85 percent of the minimum wage, but not less than $6.80 per hour.9 The state subminimum wage may be paid for the first 160 hours of labor only. These state rules conflict with federal wage laws that permit the payment of a lower-than-minimum wage only to individuals under 20 years of age.10 So if the learner is 20 years old or older, a California employer must pay him or her the federal minimum wage of $7.25 per hour for the first 160 hours of work. After the first 160 hours, the learner employee must be paid the California minimum wage of $8 per hour.

Whether compensated or not, internships often reward interns. According to an article in the New York Times, 75 percent of the 10 million students enrolled in four-year universities in the United States work as an intern at least once before graduating.11 A survey of students in 2010 by the National Association of Colleges and Employers found that 42 percent of graduates with internships who applied for jobs received offers, compared with 30 percent of students who had no internship experience.12 Starting salaries are often higher for those who complete internships.13

Although internships may benefit interns, attorneys for employers should advise consideration of the legal implications of unpaid internships. Legal violations can occur as a result of misclassifying an employee as an unpaid intern—for example, a wage claim. The California minimum wage is currently $8 per hour, and California law prohibits the waiver of minimum wage by an employee. Failure to pay wages can result in a claim before the state labor commissioner for unpaid wages, waiting time penalties (up to 30 days of wages), interest, and attorney’s fees, not to mention claims for overtime and meal and rest period violations. Other problems may arise. For example, if an employer misclassifies an employee as an intern, that person may have claims for ben-
benefits. In a case against Microsoft, the court determined that a massive group of contractors should have been classified as employees and were owed 401k and stock options. Another issue is the immigration status of the intern. If the intern is not an employee, it is unlikely that the employer will complete a U.S. Citizenship and Immigration Services Form I-9 for that person. Therefore, the employer will not know whether the intern has the legal right to work in this country. Civil penalties can result from an employer’s failure to collect this information on an employee.

Other workplace issues affect interns. Federal and state antiharassment laws protect employees from discrimination and harassment based upon a protected characteristic. An intern may be protected by these laws if the intern is determined to be an employee. Interns may be young and inexperienced; it may be worthwhile for an employer to make it clear that the company’s antiharassment policy protects and applies to everyone in the workplace. Also, interns may not be covered by worker’s compensation insurance. General liability coverage would apply if an intern is injured at the work premises, just as when a third party is injured. If enrolled in a college program, the intern may be covered by school insurance.

One way to address some of these issues is with a written agreement, signed by the intern, that covers the six factors outlined by the DLSE. In particular, the agreement should make it clear that the intern will not receive benefits or wages and that the training received will be for the educational benefit of the intern, who will be closely supervised by an employee.

Perhaps there is no such thing as free work. If the tasks that the intern is to perform would otherwise be performed by an employee, it may be wise to hire and pay an intern in order to avoid any tangle with the DLSE. The employee may be classified as temporary and not eligible for benefits. Counsel for employers should also advise on the difference between a volunteer and an intern. A volunteer intends to provide services for public service, religious, or humanitarian objectives, without expecting pay.

As our national economy continues to crawl toward a recovery, companies will search out creative methods to find labor at reduced rates. Students and graduates will continue to look for resume builders until they find the right job. As mutually beneficial as internships may seem, employers must beware. Unless the DLSE internship test is met, an employer that hires an unpaid worker may face liability.

5 DLSE ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL §43.6.8 [hereinafter DLSE MANUAL].
9 See W FC Wage Order No. 4-2001 §4.
10 20 U.S.C. §206(g).
13 Id.
14 LAB. CODE §1194(a).
15 Vizcaino v. Microsoft Corp., 97 F. 3d 1187 (9th Cir. 1996).
Registering Personal Names as Federal Service Marks

IN EARLY 2011, NEWS OUTLETS AND BLOGS reported that an application filed by Sarah Palin to register her name as a federal service mark was wending its way through the registration process of the U.S. Patent and Trademark Office. On May 17, 2011, the PTO issued a Notice of Publication for the SARAH PALIN service mark. In doing so, the PTO provided a topical opportunity for an analysis of the federal registration process and enforcement procedures for personal-name trademarks and service marks as well as the scope of rights that they convey.

The Palin application faced some early challenges on its way to registration. The PTO preliminarily refused the application on the ground that the evidence submitted by Palin did not demonstrate the use of SARAH PALIN as a service mark. To overcome this hurdle, Palin was required to demonstrate that she uses her name not just to identify herself as a public figure but to identify the source of the specific services set forth in her application.

If, as in the case of Palin’s application, the applicant claims that he or she has already started using the proposed service mark in commerce, the application must include one or more “specimens” demonstrating how the applicant uses the mark on or in connection with the services set forth in the application. Palin submitted three specimens to demonstrate her use of SARAH PALIN in connection with “Educational and entertainment services, namely, providing motivational speaking services in the field of politics, culture, business and values”; “Information about political elections”; and “Providing a website featuring information about political issues.”

The specimen of use of a trademark on tangible goods—such as consumable items like food, or durable items like washing machines—often consists of a photocopy or photograph of the mark on a label or a container or placed directly on the goods. Services, by their nature, cannot be labeled or sold in containers. Accordingly, the PTO will accept a specimen that demonstrates “the mark as actually used in connection with the services recited in the application—not merely Palin herself.7

Acceptable specimens of use for services may include newspaper and magazine advertisements, brochures, signs, billboards, or printouts from Web sites.3

To demonstrate the use of SARAH PALIN in connection with “[i]nformation about political elections,” Palin submitted a copy of a news story dated January 11, 2010, and published on the Foxnews.com Web site. The story featured a captioned photograph of Palin and announced in its headline: “Palin to Join Fox as Contributor.”4 To demonstrate the use of SARAH PALIN in connection with “[p]roviding a website featuring information provided about political issues,” Palin submitted a copy of her Facebook profile page, which prominently featured Palin’s name and image on the cover of her book America by Heart, and included many short posts on political topics.5 The PTO rejected both specimens, stating that neither “show[ed] use of the mark SARAH PALIN in relation to the services.”6

The PTO’s Objections

The crux of the PTO’s objections was the distinction between the use of a personal name to identify an individual and the use of a personal name as something more. In order to register SARAH PALIN as a federal service mark, it was not enough for Palin to demonstrate the use of her name to identify herself as a public figure. Palin needed to convince the PTO that SARAH PALIN is used in a manner that would be perceived by consumers as identifying the services recited in the application—not merely Palin herself.7

The PTO correctly characterized the page from Foxnews.com as “a news story…about Ms. Palin” and rejected it as a specimen of use for providing “information about political elections.” The Trademark Trial and Appeal Board (TTAB), the administrative tribunal that hears disputes concerning pending federal trademark applications, affirmed a similar decision by the PTO in 1983 when boxer Ray (Boom Boom) Mancini applied to register BOOM BOOM for “entertainment services, namely, conducting professional boxing exhibitions and matches.”8 As specimens of use, Mancini submitted, among other things, newspaper articles about himself that also featured him in captioned photographs.9 The PTO decided—and the TTAB agreed—that the specimens “showed only that the words ‘BOOM BOOM’ had been used as a nickname to refer to the applicant and that no other use had been demonstrated.”10

A 1977 case involving an application to register JOHNNY CARSON as a service mark illustrates where Mancini—and, perhaps, Palin’s application—went astray.11 Talk show host and comedian Johnny Carson sought to register his name for “entertainment services, namely, the rendering of entertainment to the general public by way of personal performances at shows such as monologues, comedy routines and the hosting of guest appearances of others.” The PTO refused the application on the ground that the submitted specimens

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showed use of the proposed mark JOHNNY CARSON “only to identify the individual who performs or will perform the services claimed rather than as a mark used to identify and distinguish services rendered by the applicant.” 12 Thus, the PTO took the position that the specimens of use did not demonstrate the use of Johnny Carson’s name as a service mark.

One of the specimens submitted in support of Carson’s application consisted of “copies of a page from a newspaper wherein appears a picture of applicant together with the words: ‘JOHNNY CARSON is in the Congo Room at Del Webb’s hotel Sahara with Bette Midler.’” The TTAB agreed with the PTO that this specimen, which appears to have been included in a brief news story, did not show the use of JOHNNY CARSON as service mark “[i]nasmuch as these specimens contain no reference whatsoever to any services to be performed by applicant….” 13

The TTAB, however, disagreed with the PTO’s rejection of additional specimens consisting of newspaper advertisements featuring “the designation ‘JOHNNY CARSON’ in connection with the words ‘IN CONCERT,’” along with information as to the time and place of the performances and how tickets could be purchased.” These newspaper ads, the TTAB held, did more than merely identify Carson. Rather, the ads demonstrated the use of JOHNNY CARSON “in close association with a clear reference…to entertainment services to be performed by him, together with information as to how members of the public may avail themselves of such services.” The specimens, therefore, were sufficient to establish that the designation JOHNNY CARSON was used by the applicant not only as a name to identify Carson but also as a service mark to identify his entertainment services.14

The news story about Palin, like the news stories about Mancini and Carson, did not utilize Palin’s name as a mark to identify services. Instead, the story merely identified Palin as an individual who entered into a business relationship with Fox News. Nevertheless, this flaw did not signify the end of the line for Palin’s application. Palin was able to overcome the examining attorney’s objections by submitting a substitute specimen consisting of “a photograph of the video or film frame when the mark is used” during two appearances by Palin as a commentator on Fox News.15 The specimens show Palin delivering her commentary, along with an on-screen graphic prominently featuring her name, the topic about which she was speaking (for example, “Sarah Palin on Delaware Senate candidate Christine O’Donnell”), and indicating that the commentary was being shown on Fox News.

The examining attorney also objected to the use of Palin’s Facebook page as a “specimen for ‘[p]roviding a website featuring information about political issues.’” Characterizing the Facebook specimen as mere “ postings on Facebook,” the examining attorney stated that “[t]he specimen does not show use of the mark as ‘providing a website featuring…’. Rather the proposed mark merely appears as a posting name.”

Palin’s Facebook profile page arguably demonstrated that she does, in fact, use her name to provide information about political issues. For example, the Facebook page of Palin’s Facebook page as inasmuch as these specimens contain no reference whatsoever to any services to be performed by applicant….” 13

Moreover, the name Sarah Palin is featured prominently on her Facebook page. It does seem unlikely, however, that a series of posts on Facebook about political issues can fairly be characterized as “providing a website featuring information about political issues.” Rather, Facebook provides the Web site in question, while Palin provides content on an individual page of that Web site. In that sense, Palin’s Facebook page is analogous to, if not the equivalent of, providing a blog rather than a Web site.

To overcome the PTO’s objections to the Facebook specimen, Palin submitted substitute specimens consisting of pages from the SarahPAC Web site.16 Like the Facebook page, the pages from the SarahPAC site submitted by Palin make prominent use of the name Sarah Palin. The specimens also feature numerous links to pages on the SarahPAC site providing, among other things, Palin’s comments and opinions on political issues.

Thus Palin surmounted the PTO’s challenges to her specimens of use. If Palin’s application survives the subsequent opposition period, during which any member of the public who believes he or she will be harmed by the registration of a mark may oppose the registration, the Sarah Palin name will become a registered service mark.

Rights and Exemptions

Although a federal registration is not necessary to enforce trademark rights, registration confers the presumption that the registrant has the right to prevent any person from using an identical or similar mark in connection with goods or services in a manner likely to cause consumer confusion as to the source, association, or sponsorship of the goods or services.17 For the purposes of trademark infringement, whether and how Palin can prevent others from using her mark must be considered with reference to the services described in Palin’s service mark registration: information about political elections; providing a Web site featuring information about political issues; and offering motivational speaking services in the field of politics, culture, business, and values.

Actionable infringement of a trademark or service mark generally occurs when an identical or similar mark is used on goods or services that are directly competitive with, or closely related to, the goods or services of the trademark owner. Directly competitive and related uses of the SARAH PALIN mark might include Web sites, newspapers, or magazines addressing political elections or political issues; a service providing, representing, or training motivational speakers; or perhaps even the services of a Sarah Palin impersonator. In theory, trademark infringement law might not reach uses of the SARAH PALIN mark on goods or services that are very different from those described in Palin’s service mark registration, such as car rental services, for example.

Fortunately for Palin and others similarly situated, famous marks get extra protection under the federal Trademark Dilution Revision Act. The TDRA allows the owner of a famous mark to prevent the use of a similar mark that “impairs the distinctiveness of the famous mark” or “harms the reputation of the famous mark” even if no consumers are likely to be confused, and regardless of “the presence or absence…of competition, or of actual economic injury.”18

Given the amount of news coverage Palin received as the result of her 2008 vice presidential campaign and subsequent activities in the public eye, the Sarah Palin name is certainly famous in the everyday sense of the word. For the purposes of the TDRA, a mark is famous “if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.”19 While it is questionable whether the SARAH PALIN mark is widely recognized by the general consuming public as the source of any type of Web site, it would not be much of a stretch to imagine that the mark is famous within the definition of the TDRA with respect to the other services described in Palin’s service mark registration.

Once she clears the fame hurdle, Palin might be able to use the TDRA to prevent uses of her name on goods and services that are far afield from information about political elections, motivational speaking, and Web site services. For example, dilution law might enable Palin to prevent the unauthorized use of her name on a line of hunting knives.

Palin’s ability to exclude others from making use of her name is not unlimited, however. Important exceptions have been carved out of
trademark infringement and dilution law for certain types of expression. The TDRRA explicitly exempts “any fair use,” which includes “nominative fair use” and “descriptive fair use.” Nomintative fair use is the use of another's trademark to identify the trademark owner’s goods or services. Descriptive fair use is the use of a trademarked term to describe another’s goods or services—for example, the use of the word “apple” by a supermarket to describe the fruit, not the computers.

The fair use exemption also applies to the use of a trademark:

- In connection with comparative commercial advertising.
- To identify, parody, criticize, or comment upon the trademark owner or the goods or services of the trademark owner—so long as the trademark is not used to designate the source of goods or services other than those of the trademark owner.
- In all forms of news reporting and news commentary.
- In any noncommercial use.20

Moreover, parallel defenses under common law are applicable to trademark infringement claims.

Right of Publicity

The rights conferred by Palin’s registration certificate also do not offer protection against the unauthorized use of Palin’s likeness, voice, signature, or other aspects of her persona other than her name. Even if Palin were to assert a common law trademark infringement claim—a claim that does not rely on her service mark registration—to prevent the unauthorized use of her likeness, she would have to show that the unauthorized use is likely to cause consumers falsely to believe that Palin was associated with or approved or endorsed the product or service in connection with which her image was used.21

Where trademark law falls short, however, right of publicity laws may take up the slack—at least in the 19 states that have enacted statutes protecting the right of publicity22 and the 12 states that recognize a common law right of publicity.23 State right of publicity laws can be used to prevent others from using a celebrity’s name and image for commercial gain, regardless of whether any consumers are likely to be deceived as the result of the use.24 While laws governing the right of publicity are not uniform from state to state, generally a prima facie case of infringement of the right of publicity requires a plaintiff to show that:

- The defendant’s use of some aspect of the plaintiff’s identity or persona—including name, nickname, voice, likeness, signature, or performing style—was unauthorized and in some way identifies the plaintiff.
- The use “misappropriates[es] the economic value generated by the celebrity’s fame.”25

Plaintiffs’ claims for the infringement of their right of publicity have addressed a wide array of unauthorized uses, such as the commercial exploitation of sound-alike musical performances in television advertisements,26 portraits depicting performers printed on T-shirts,27 a famous catchphrase used to market portable toilets,28 and photographs of a surfing competition to illustrate a clothing catalog.29

Clearly Sarah Palin’s name and likeness have economic value ripe for exploitation by unauthorized merchandisers and purveyors of goods and services. In April 2010, ABC News reported that, since leaving office at the end of July 2009, Palin had earned an estimated $12 million from publishing deals and television appearances, including the reality show Sarah Palin’s Alaska.30

As with trademark infringement law and dilution law, right of publicity law would not allow Palin to prevent the use of her name and image by the media in connection with newsworthy stories.31 California’s right of publicity statute, for example, explicitly exempts the unauthorized use of another’s name or likeness “in connection with any news, public affairs, or sports broadcast or account, or any political campaign.”32 Moreover, other uses of Palin’s name and image could be considered political speech protected by the First Amendment as a result of Palin’s prior and current involvement in the political process.

Even speech that would appear at first glance to be purely commercial can fall into the category of protected political speech. In 1998 the Second Circuit ruled that the New York Metropolitan Transit Authority could not refuse to display on the sides of city buses an advertisement calling New York magazine “[p]ossibly the only good thing in New York” for which then-mayor Rudy Giuliani had not taken credit.33 The court did not decide whether the advertisement violated the mayor’s rights of publicity but also did not rule out the possibility that it constituted protected political speech: “While the Advertisement served to promote the sales of a magazine, it just as clearly criticized the most prominent member of the City’s government on an issue relevant to his performance of office, subtly calling into question whether the Mayor is actually responsible for the successes of the City for which he claims credit.”34

The litigants in what is known as the Schwarzenegger Bobblehead Case faced similar issues. In 2004, two corporations formed by Arnold Schwarzenegger, then the governor of California, filed a right of publicity and copyright infringement suit to prevent the sale of Arnold Schwarzenegger bobblehead dolls.35 The dolls, which were inscribed with Schwarzenegger’s name, portrayed the former movie star and then politician as a bobblehead figure in a gray business suit and holding an assault rifle, with an ammunition belt slung over his shoulder.36 Three months into the lawsuit, the parties reached a settlement.37

In twin law review articles published in 2005, lead counsel for the parties addressed the legal merits of their respective clients’ positions. Counsel for the defendant doll manufacturer opined that the most “significant and dramatic issue” posed by the litigation was “whether the sale of the Schwarzenegger bobblehead doll fell squarely within the rights of the [dollmaker] defendants to appropriate a celebrity-politician’s likeness as a form of expression protected under the First Amendment or violated plaintiff’s rights of publicity under California law.”38 The defendant’s counsel likened the bobblehead dolls to a “three-dimensional political cartoon” deserving First Amendment protection as core political speech. The doll, he argued, communicated “multiple messages about Schwarzenegger, including his dual personas as celebrity and politician, and about the phenomenon of celebrity-politicians itself in our celebrity-obsessed society.” He further declared that the bobblehead doll, with its “distortion of [Schwarzenegger’s] celebrity image for the purpose of caricature and parodic effect,”39 passed California’s “transformative” balancing test, pursuant to which an artistic rendering of a celebrity’s likeness may give rise to liability for the violation of the celebrity’s right of publicity if the image is little more than a literal likeness of the celebrity with no added expression, meaning, or message.40

For his part, counsel for the entities suing on behalf of Schwarzenegger argued that the dolls communicated “no discernable political message” and were “primarily, if not entirely, a depiction and imitation of Schwarzenegger, and were created and sold by the doll company in order to profit from an unauthorized use of Schwarzenegger’s name and likeness, which have tremendous value in the marketplace.”41

It is not difficult to imagine a scenario in which the types of issues raised in the Schwarzenegger Bobblehead Case were applied to an unauthorized commercial use of Sarah Palin’s name and likeness. Like Schwarzenegger, Palin can be viewed as having dual personas: the former politician and governor of Alaska who was a candidate for vice president of the United States and who continues to act, if somewhat peripherally, in the political arena; and the entertainer who was the focus of a reality show that did not directly or primarily address political issues. If Palin hopes to prevent others from making unauthorized commercial use of her name and image, it may be her role as an entertainer,
rather than as a political figure, that turns out to be her saving grace.

1 If, at the time of filing, the applicant has not started using the applied-for mark in commerce, the applicant must certify his or her intent to do so in the future. “Intent to use” applications cannot mature to registration until the applicant submits a specimen of use for each class of goods or services.


3 See TMEP §1301.04 et seq.

4 See http://www.foxnews.com/politics (Jan. 11, 2010).


6 As a specimen of the use of SARAH PALIN in connection with “providing motivational speaking services in the field of politics, culture, business and values,” Palin submitted a copy of a page of the Washington Speakers Bureau Web site promoting Palin as a speaker, represented exclusively by the WSB, and providing contact information for the WSB. The examining attorney apparently found this to be an acceptable specimen for Palin’s motivational speaking services.

7 TMEP §1301.02(b).


9 See id. at 1048.

10 Id. at 1047-48.


12 Id.

13 Id. at $55.

14 Id. See also In re Ames, 160 U.S.P.Q. (BNA) 214 (TTAB 1968) (NEAL FORD & THE FANATICS was registrable as a service mark because the mark was used in advertisements that prominently featured a photographic portrait of the musical group and gave the name, address, and telephone number of the group’s booking agent and identified the group and its services;); Presley’s Estate v. Russo, 513 F. Supp. 1339, 1363 (D. N.J. 1981) (ELVIS, ELVIS IN CONCERT, and ELVIS PRESLEY are all “protectable service marks” because all were “used in advertising, such as for performance, concerts, and on records, to identify a service.”).

15 TMEP §1301.02(d) (“The title of a continuing series of presentations (e.g., a television or movie ‘series,’ a series of live performances, or a continuing radio program), may constitute a mark for either entertainment services or educational services.”).


23 See id. at §6:3.

24 See Solomon, supra note 21, at 1205 (“The purpose of the right of publicity is to prevent a third party from taking some aspect of a person that has market value and for which the third party would normally have to pay.”).


27 Comedy III Prods., 25 Cal. 4th at 395.


29 Downing v. Abercrombie & Fitch, 265 F. 3d 994 (9th Cir. 2001).


31 J. THOMAS MCCARTHY, 1 THE RIGHTS OF PUBLICITY AND PRIVACY §4:25 (2d ed. 2010).

32 CIV. CODE §3344(d).


34 Id. at 131.


36 See Ochoa, supra note 35, at 552.

37 Id. at 547.


39 Id. at 593-95.


the California Legislature enacted the “freeze and seize” statute, which allows the government to freeze “any asset or property that is in the control” of a criminal defendant charged with certain white collar offenses.1 The statute, codified at Penal Code Section 186.11,2 was “intended ‘to establish a process in which the assets of those alleged to have committed aggravated white collar crime could be frozen at the time of their arrest to secure the assets in order to pay restitution for the crime victims....’”3

Section 186.11 represents a marked expansion of previous civil and criminal forfeiture laws because it does not require the government to show any nexus between the property and criminal activity.4 Thus, the government can obtain a pretrial freeze of any of the defendant’s assets, even those outside the court’s jurisdiction.5

This powerful tool in the government’s arsenal can be used to cripple the businesses of defendants, cut off their access to personal bank accounts, and even freeze their homes. However, with the great power of Section 186.11 comes a horde of procedural responsibilities, requiring the government to follow deadlines and standards usually reserved for civil law. The statute instructs prosecutors to publish notices in newspapers, appoint

by Kelly C. Quinn

In 1995, the California Legislature enacted the “freeze and seize” statute, which allows the government to freeze “any asset or property that is in the control” of a criminal defendant charged with certain white collar offenses. The statute, codified at Penal Code Section 186.11, was “intended ‘to establish a process in which the assets of those alleged to have committed aggravated white collar crime could be frozen at the time of their arrest to secure the assets in order to pay restitution for the crime victims....’”

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receivers when necessary, and properly record lis pendens, among other duties.7

Perhaps as a consequence of these procedures being so unusual in criminal proceedings, in actual practice, property is frequently frozen without governmental compliance with civil rules and in violation of due process.8 Thus, practitioners should carefully scrutinize any pretrial attempts by the government to freeze a defendant’s property under Section 186.11. Defective freeze orders are often permitted to stand unchallenged because defense counsel, as well as prosecutors and judges, are all similarly unaware of the procedural requirements. While criminal practitioners and even courts may find Section 186.11’s procedural requirements seemingly of a third-party bank is not permissible by law and should be avoided or challenged.

In the second scenario, the government physically seizes property, by use of a search warrant, that it intends to hold until the court imposes a postconviction levy. This is unlawful because Section 186.11, while being known as the “freeze and seize” statute, does not actually allow for pretrial seizure of property.9 Instead, the statute intends for the court to enjoin the disposition of assets pending the outcome of a criminal case.10 Moreover, in People v. Green—one of the few cases to address the “freeze and seize” statute11—the court rejected the practice of seizing a defendant’s property pursuant to a search warrant for future levy under Section 186.11. The

The temporary order terminates automatically when a preliminary injunction is issued or denied. Under Section 186.11, a temporary restraining order is meant to be filed “in conjunction with or subsequent to the filing of the petition [for preliminary injunction].” Thus, the statute itself contemplates that the temporary restraining order will not be the sole pretrial basis for the freeze.

Strange and foreign to criminal law practice, the statute must be fully understood so that all parties can ensure that the due process rights of defendants are protected.

Freezing Property under the Statute

The first hurdle arises when property that the government intends to levy is seized using a search warrant. The use of a search warrant to freeze property in possession of a third party or to physically seize property are two typical, but ultimately impermissible, scenarios under Section 186.11.

In the first scenario, the government will freeze a defendant’s property—typically a bank account—through a search warrant. The search warrant generally will seek the seizure of the money in the accounts. Instead of actually seizing the funds, the affiant asks that the bank hold the accounts “in suspension,” thereby effectively freezing them. However, a search warrant is not the proper procedure to freeze property in possession of a third party. Penal Code Section 1536 requires an officer to acquire and retain custody of items seized pursuant to a search warrant. Therefore, any attempt to seize a bank account, pursuant to a search warrant, and then leave the account in the possession of a third-party bank is not permissible by law and should be avoided or challenged.

Green court found that the only property that can be levied pursuant to Section 186.11 “is property that is subject to a preliminary injunction,” not property seized pursuant to a search warrant.12 According to Green, “a preliminary injunction is a statutory precondition to a levy.”13 The court even drew a bright line: “[N]o petition, no preliminary injunction; no preliminary injunction, no levy.”14 If the government wants to use Section 186.11 to levy a defendant’s property or assets after conviction, it must comply with Section 186.11’s pretrial procedures. Simply seizing property pursuant to a search warrant is not sufficient.

There are two proper methods for freezing property under Section 186.11(c)(2). One is seeking a temporary restraining order pending a hearing on a petition for a preliminary injunction (which may be sought ex parte upon a showing of good cause). The other is pursuing a preliminary injunction to freeze property pending the outcome of the underlying criminal case. Both of these options prohibit a defendant from transferring any interest in the property.

Generally, for a temporary restraining order, due process dictates that defendants should be given notice and the opportunity to be heard before the government takes their property.15 However, in special circumstances involving overriding state interests, the government may be justified in postponing notice and hearing until after the taking has occurred.16

A temporary restraining order may be issued by the court, ex parte, pending that hearing in conjunction with or subsequent to the filing of the petition upon the application of the prosecuting attorney. The temporary restraining order may be based upon the sworn declaration of a peace officer with personal knowledge of the criminal investigation that establishes probable cause to believe that aggravated

White collar crime has taken place and that the amount of restitution and fines established by this section exceeds or equals the worth of the assets subject to the temporary restraining order. The declaration may include the hearsay statements of witnesses to establish the necessary facts. The temporary restraining order may be issued without notice upon a showing of good cause to the court.17

To justify taking the unusual step of freezing a defendant’s property without prior notice or an opportunity to be heard, the government must provide sufficient evidence to the court to show 1) probable cause that aggravated white collar crimes have taken place, and 2) good cause to issue the temporary restraining order without notice.18 In practice, many ex parte restraining orders fail to address why an ex parte hearing is necessary. These orders are signed with regularity despite the fact that they are devoid of the requisite showing of good cause. In People v. Sokol, a recent case in Los Angeles that remains ongoing,19 the government filed three successive ex parte petitions, in three different courts, without setting forth a single fact—or even mentioning—why there
1. Penal Code Section 186.11’s forfeiture provisions are narrower than previously enacted state and federal forfeiture provisions.
   True. False.

2. Under Section 186.11, the government can freeze the property of any defendant charged with a felony.
   True. False.

3. The “freeze and seize” statute was enacted to secure assets for the payment of restitution to victims.
   True. False.

4. Section 186.11 contains detailed procedural requirements for the freezing of property.
   True. False.

5. The government can only freeze property under Section 186.11 that is located within the trial court’s jurisdiction.
   True. False.

6. The government can use Section 186.11’s procedures to physically seize the property of a defendant.
   True. False.

7. Prosecutors can freeze a defendant’s property by obtaining a temporary restraining order.
   True. False.

8. A petition for a temporary restraining order to be issued ex parte must show good cause.
   True. False.

9. Section 186.11 requires that a temporary restraining order be filed in conjunction with, or subsequent to the filing of, a petition for a preliminary injunction.
   True. False.

10. The government must serve the notice of a petition for a preliminary injunction only on the defendant.
    True. False.

11. Under Section 186.11, the notice of a petition for a preliminary injunction must be published in a newspaper of general circulation for three successive weeks.
    True. False.

12. The failure to give proper notice of a petition seeking to take a defendant’s property can constitute a denial of due process.
    True. False.

13. Section 186.11 specifically authorizes the government to file successive petitions for temporary restraining orders.
    True. False.

14. When served with a proper petition for a preliminary injunction, defendants must file a verified claim stating the nature of their interest.
    True. False.

15. A third party cannot claim an interest in frozen property.
    True. False.

16. A defendant or third party has the right to a hearing within 10 days of filing a claim.
    True. False.

17. Courts cannot consider hearsay evidence at the hearing on the petition for a preliminary injunction.
    True. False.

18. A court may not release any frozen property to a defendant before the trial.
    True. False.

19. A court may release funds to victims for restitution after the issuance of a preliminary injunction.
    True. False.

20. When defendants are convicted of two or more white collar felonies, their property can be used to compensate their victims even if no preliminary injunction was issued.
    True. False.
was good cause for an ex parte hearing. Yet, each court signed the order freezing the defendant’s property, despite the obvious defect.

Moreover, since the government can obtain the orders ex parte, these “temporary” orders are often kept in place for months, or even years, without the filing of a petition for a preliminary injunction. Temporary restraining orders are, as the name implies, meant to be a holding action until the government can obtain a preliminary injunction. They should last only for a limited time, which is usually that period in the case pending a court’s consideration whether to order a preliminary injunction.20

The temporary order terminates automatically when a preliminary injunction is issued or denied.21 Under Section 186.11, a temporary restraining order is meant to be filed “in conjunction with or subsequent to the filing of the petition [for preliminary injunction].”22 Thus, the statute itself contemplates that the temporary restraining order will not be the sole pretrial basis for the freeze.23

Proper Notice

Determining what constitutes proper notice for the preliminary injunction requires a careful reading of the “freeze and seize” statute. Section 186.11(e)(3) specifically states to whom and how the notice must be supplied: A notice regarding the petition shall be provided, by personal service or registered mail, to every person who may have an interest in the property specified in the petition. Additionally, the notice shall be published for at least three successive weeks in a newspaper of general circulation in the county where the property affected by an order issued pursuant to this section is located. The notice shall state that any interested person may file a verified claim with the superior court stating the nature and amount of their claimed interest. The notice shall set forth the time within which a claim of interest in the protected property is required to be filed.24 A failure of notice may constitute a denial of due process.25 Further, Section 186.11(g)(1) specifically states that the court lacks the authority or jurisdiction to issue a preliminary injunction or appoint a receiver if the government fails to follow the notice requirements in Section 186.11(e)(3). The type of notice required by the statute, which includes publication, is not the usual mandate for a district attorney’s office to follow. As a result, notice under the statute is often not done properly.

To compound this problem, when a court determines that the government has failed to comply with the notice requirements, the government sometimes simply dismisses and refiles the orders while continuing to freeze the property. In the Sokol case, a Los Angeles deputy district attorney admitted in response to a question that she, and others in her office, had dismissed and refiled these orders “numerous times” while holding a defendant’s property.26

Nothing in Section 186.11 authorizes subsequent petitions. In fact, to find that it does so would be in direct contradiction to the time requirements set forth in the statute. If the government were allowed to freeze property and then, faced with its failure to comply with the statute’s procedural requirements, permitted to simply and repeatedly dismiss and refile while holding defendants’ property, the defendants would be denied their right to a hearing within 10 days.27 This would be contrary to the procedural requirements not only of Section 186.11 but also basic notions of due process, because the property of defendants would be taken without a timely hearing.

While procedural problems seem to plague Section 186.11 freeze orders, defendants have been properly served with a petition for preliminary injunction in a number of cases. If this happens, defendants must act quickly to protect their rights. A defendant can file a “verified claim stating the nature and amount of his or her interest in the property or asset.”28 This should be filed within 30 days of the first publication of the notice or within 30 days of receiving actual notice.29 Section 186.11 specifically provides that an innocent third party, including a spouse, can also file a verified claim to the frozen asset within the same time.30

Once a defendant, or third party, has filed a verified claim, he or she has “the right to have the court conduct an order to show cause hearing within 10 days of the service of the request for hearing upon the prosecuting agency…. Upon a showing of good cause, the hearing shall be held within two days of the service of the request for hearing upon the prosecuting agency.”31

At the hearing, the court is permitted to use any reliable evidence, including possible hearsay, to “weigh the relative degree of certainty of the outcome on the merits and the consequences to each of the parties of granting the interim relief. If the prosecution is likely to prevail on the merits and the risk of dissipation of assets outweighs the potential harm to the defendants and the interested parties, the court shall grant injunctive relief.”32 The statute also sets forth a list of factors to aid the court in making this determination.33

The court may also consider “a defendant’s request for the release of a portion of the property affected by this section in order to pay reasonable legal fees in connection with the criminal proceeding, any necessary and appropriate living expenses pending trial and sentencing, and for the purpose of posting bail. The court shall weigh the needs of the public to retain the property against the needs of the defendant to a portion of the property.”34 A court may properly freeze a defendant’s property pending trial only after it analyzes and addresses all these considerations.
People v. Stark, 131 Cal. App. 4th 184 (2005) (finding that the law governing sales by receivers appointed in civil cases applies in cases involving Penal Code §186.11).

12 Green, 125 Cal. App. 4th at 370.

13 Id. at 371-72.

14 Id. at 370.

15 U.S. CONST. amend. V and XIV; CAL. CONST. art. 1, §7(a); see also Calvert v. County of Yuba, 145 Cal. App. 4th 613 (2002).


17 PENAL CODE §186.11(g)(1).

18 Id.


20 San Diego Water Co. v. Pacific Coast S.S. Co., 101 Cal. 216, 218 (1894); see also CODE CIV. PROC. §527.6 (noting that a temporary restraining order is in effect for 15 days).


22 Pursuant to the statute, a preliminary injunction can remain in place “pending the outcome of the criminal proceedings.” PENAL CODE §186.11(g)(1).

23 See id. See also People v. Green, 125 Cal. App. 4th 360, 370 n.7 (2004) (“To be strictly accurate, section 186.11 permits a levy on ‘the property or assets subject to the preliminary injunction or temporary restraining order….’ In practice, however, any temporary restraining order will have been superseded by the grant or denial of a preliminary injunction.”).

24 PENAL CODE §186.11(e)(3).


27 See PENAL CODE §186.11(g)(2); see also CODE CIV. PROC. §527.

28 PENAL CODE §186.11(e)(6).

29 Id.

30 Id.

31 Id. According to this provision, the court should consider:

(A) The public interest in preserving the property or assets pendente lite. (B) The difficulty of preserving the property or assets pendente lite where the underlying alleged crimes involve issues of fraud and moral turpitude. (C) The fact that the requested relief is being sought by a public prosecutor on behalf of alleged victims of white collar crimes. (D) The likelihood that substantial public harm has occurred where aggravated white collar crime is alleged to have been committed. (E) The significant public interest involved in compensating the victims of white collar crime and paying court-imposed restitution and fines.

32 Id.

33 Id. at 370-72.

34 PENAL CODE §186.11(g)(4).
A POTENTIAL CLIENT RELATES that she purchased a 4,850 square-foot home for $6.8 million. She and the seller engaged the same real estate broker. The property included a detached, 1,000 square-foot guest house. The parties used standard forms provided by the California Association of Realtors (CAR), and the forms state that at the time of sale, the sellers were unaware of any violations of the building code, construction defects, or problems with the house.

A few months after the purchase, the first rainstorm arrived, and water poured everywhere. A forensic investigation disclosed multiple construction defects, and there was evidence of prior damage that had been painted over. When repairs started, a city building inspector arrived and informed the client that her detached guest house was not permitted and had to be demolished. The cost of repair of the water damage was $600,000.

The unpermitted guest house was demolished, reducing the useable square footage of the property. The purchase price was approximately $1,400 per square foot, leading to the conclusion that the value of the guest house was $1.4 million (with an adjustment for the value of the land).

Two measures of damages are likely to apply. One is the out-of-pocket rule under Civil Code Section 3343, which may so limit recovery that filing suit may not be worth the effort. The other is the benefit-of-the-bargain measure under Civil Code Section 3333. Knowing which measure to apply is difficult.

The out-of-pocket measure of damages under Section 3343—which provides the measure of damages for fraud involving the purchase, sale, or exchange of property—is “the difference between the actual value of that with which the defrauded person parted

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and the actual value of what was received.”

Section 3343 also specifically disallows recovery of “any amount measured by the difference between the value of property as represented and the actual value thereof.” In other words, the section does not permit plaintiffs to recover the benefit-of-the-bargain damages of Section 3333, which states, “[T]he measure of damages...is the amount which will compensate for all the detriment....”

The rules seem simple, but the case law shows that their application is anything but. While courts have held that Section 3343 provides the exclusive measure of damages for a party that has been defrauded in the purchase, sale, or exchange of property, some courts have carved out exceptions in cases in which the fraud has been committed by a fiduciary.

When considering an action, therefore, a threshold issue is whether the broker acted as a fiduciary. A listing agent represents the seller and is a fiduciary to the seller but not to the buyer. The person representing the buyer is called (confusingly) a seller’s agent and is a fiduciary to the buyer but not the seller. A dual agent represents the buyer and seller and is a fiduciary to both parties. Whether the broker or agent is a fiduciary has been a contested issue, and have fashioned remedies that provide even more compensation to aggrieved plaintiffs.

First, if the broker or agent is a fiduciary, a breach of fiduciary duty has been committed by the broker or agent. A listing agent representing the seller and a dual agent representing the buyer and seller, as in the example involving the potential client and her guest house.

The distinctions are critical for an evaluation. First, if the broker or agent is a fiduciary, a breach of fiduciary duty has been held to be a species of constructive fraud. Second, if the cause of action seeks recovery of damages for fraud, whether constructive or actual, some inconsistencies exist in the case law about whether Section 3343 or 3333 applies. In Salahutdin v. Valley of California, Inc., the court found that the plaintiff is entitled to recover damages against the fiduciary under Civil Code Sections 1709 and 3333, arguing that the “faithless fiduciary...makes[s] good the full amount of the loss of which his breach of faith is a cause.”

Section 1709 provides that “one who willfully deceived another with the intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers.” Civil Code Sections 3333 and 1709 provide the benefit-of-the-bargain measure for damage, which is substantially broader than the damages recoverable under Section 3343. In addition, when applying this measure of damages, many courts have not limited recovery to the benefit of the bargain and have fashioned remedies that provide even more compensation to aggrieved plaintiffs. In the example, the client who lost the guest house and had to make repairs may establish all of the elements of fraud and yet recover nothing from the seller. The only remedy is to rescind the sale and get the money back in exchange for releasing the property.

Section 3343 also may leave the plaintiff uncompensated for the $600,000 in repairs, although those damages could be recoverable under different theories of liability. For example, in Central Mutual Insurance Company v. Schmidt, the court held that the cost of repair is not a measure of damages under Section 3343. Indeed, while Section 3343(a)(1) permits the recovery of amounts reasonably and necessarily expended as a result of the fraud, recovery of costs of repair is not included. Instead, the recoverable damages are “expenditures which were reasonable under the circumstances...insofar as they have been lost or rendered fruitless because of the deceit.”

For example, in Garrett v. Perry, the plaintiff purchased a ranch and filed suit against the seller for fraud. In addition to awarding the plaintiff damages for the difference between the amount paid for the ranch and its actual value, the court held that the plain-
tiff was also entitled to the costs of operating and improving the ranch that were incurred prior to the plaintiff losing the ranch to foreclosure. The court held that since these expenditures were not offset by any income from the ranch (the condition of which made it impossible for the plaintiff to earn a profit), they were reasonable expenditures that were “lost or rendered fruitless because of the deceit.” In the example, however, the repairs undertaken by the client to fix the water damage are not expenditures that have been lost or rendered fruitless because of the deceit. Therefore, the repairs in the example are not recoverable under Section 3343.

**Brokers**

The attorney considering the example, however, should remember that the potential client has a claim against the broker for fraud. If the court applies the tort measure of damages against a fiduciary under Sections 1709 and 3333, the buyer is not limited to recovering just the difference between the actual value of the property and the price she paid. Rather, she can recover “all detriment proximately caused” by the fraud. Whether this detriment is measured as the benefit of the bargain or by some other measure, the buyer has the potential to reap a much greater recovery against the broker. A finding of fraud will, however, vitiate the broker’s insurance coverage, making the collection on the judgment difficult.

In fact, many courts have departed from a strict benefit-of-the-bargain approach and fashioned remedies that award plaintiffs the damages proximately caused by the deceit. In Fragale, the court held that with respect to the plaintiffs’ claims against the sellers, there was no evidence of out-of-pocket damages. However, the court did permit recovery against the broker, who acted as a dual agent. That recovery was measured by the cost of repair, since such an “award effectively places the [plaintiffs] in the position they would have enjoyed if [the broker’s] false representation had been true; it enables them to place the property in the condition which they believed existed at the time of purchase.”

Similarly, in Pepitone v. Russo, the plaintiff had been defrauded by her broker into a purchase of a motel that was encumbered by undisclosed loans and deeds of trust. As a result, the plaintiff lost the motel to foreclosure. The court held that the plaintiff was entitled to not only the difference between the purchase price of the motel and the undisclosed loans but also the additional expenses that the plaintiff incurred in trying to prevent the foreclosure. The court noted that although the plaintiff had not sought future profits, those losses are recoverable under Sections 3333 and 1709 in an appropriate case.

In Strebel v. Brenlar Inc., the plaintiff was living in a home in San Bruno and entered into a transaction to purchase a new home in Sonoma. However, neither the sellers nor the dual agent broker initially disclosed to the plaintiff that there were tax liens on the Sonoma property that prevented the sale. After the contract was signed, the plaintiff learned of the liens, but the broker assured him that the sellers were taking care of them. Expecting the Sonoma deal to close, the plaintiff sold his home in San Bruno. The liens were not removed on the Sonoma house, and the plaintiff’s purchase could not proceed. The plaintiff looked for alternative housing in Sonoma, but property values had increased, and the plaintiff could no longer afford to purchase another home. The court awarded damages against the broker measured as the lost appreciation on the plaintiff’s home. The court measured the appreciation damages not by the date of the fraud but by the date of trial.

In Strebel, the plaintiff asserted claims for negligence and for fraud, but an unhappy buyer can assert additional causes of action, including negligent misrepresentation and breach of contract. A claim of negligent misrepresentation, however, will not broaden the scope of the potential damages, because

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recovery for negligent misrepresentation is limited to the out-of-pocket measure of damages.26 On the other hand, the standard CAR forms obligate the seller to disclose “all known material facts and defects affecting the property,” so the seller’s failure to disclose known defects is a breach of contract.

Breach of Contract

Civil Code Section 3300 provides that the damages for breach of contract are “all the damages that were proximately caused by the dual agent’s breach and are reasonably foreseeable.”27 None of the leading cases that involve undisclosed defects in connection with the sale of real property discuss the remedy of breach of contract except to the extent that a buyer seeks to rescind the purchase. There are a number of reasons why. The first is that a claim for fraud in the inducement is relatively easy to prove compared to a claim for breach of contract. Those provisions most likely do not bar a defrauded purchaser from bringing suit for fraud. The standard CAR form provides for the right of inspection but also mandates certain disclosures by the seller. Further, the forms also contain provisions that discuss the buyer’s inspection and state that the buyer is not responsible for any conditions at the subject property. In fact, in commercial practice and in case law,28 as-is clauses merely relieve the seller from liability for any conditions at the subject property. In fact, in commercial practice and in case law,28 as-is clauses merely relieve the seller from making an investigation into potential problems and from making repairs for problems that the buyer identifies. The CAR form as-is provision does not relieve the seller from the duty to disclose known defects or problems with the property and therefore an aggrieved buyer will be more motivated to pursue an action against a broker, who may have adequate financial resources or insurance.

In most instances, however, a claim for breach of contract is not covered by insurance. While a claim for fraud is also not covered by insurance, a claim for negligent misrepresentation will most likely trigger insurance coverage. Therefore, the buyer can best maximize the potential recovery by asserting claims for negligent misrepresentation and fraud against the seller and the broker. In addition, the buyer can also recover punitive damages on a fraud claim, whereas fraud damages are not recoverable in an action for breach of contract. On the other hand, as a practical matter, a claim for breach of contract is relatively easy to prove compared to a claim for fraud. To prove a claim for breach of contract, a buyer need only prove that a seller breached the warranty and representation that all known defects had been disclosed. In the example, this would address the undisclosed construction defects.

Finally, the attorney in the example will need to determine whether contract provisions in the purchase and sale agreement preclude a claim for breach of contract. Those provisions most likely do not bar a defrauded purchaser from bringing suit for fraud. The standard CAR form provides for the right of inspection but also mandates certain disclosures by the seller. Further, the forms also contain provisions that discuss the buyer’s inspection and state that the buyer is not relying on any representations by the seller or its agent. CAR forms also provide that the property is being sold as-is, without any representations or warranties. Sellers and agents often mistakenly believe that as-is provisions protect the seller from liability for any conditions at the subject property. In fact, in commercial practice and in case law,28 as-is clauses merely relieve the seller from making an investigation of potential problems and from making repairs for problems that the buyer identifies. The CAR form as-is provision does not relieve the seller from the duty to disclose known defects or problems with the property and does not ordinarly bar a claim for fraud.

In Manderville v. PCG&S Group, Inc.,29 the parties used a CAR form that included a provision that the agreement was integrated, that all understandings between the parties were incorporated into the agreement, and that the buyer was advised to investigate the laws limiting development of the property, including zoning. The seller’s broker argued that this exculpatory language precluded, as a matter of law, the buyers’ showing of justifiable reliance as an element of the buyers’ claim for fraud in the inducement.30 The
court concluded that the exculpatory clauses did not automatically preclude a fraud claim.31 In so holding, the court relied in part on Civil Code Section 1668, which holds that a contract that purports to exempt a party from responsibility for that party’s own fraud is against public policy.32 Whether an exculpatory provision in the CAR form and the buyer’s investigation will bar a claim for fraud depends on the nature of the investigation and whether the buyer, in the exercise of reasonable diligence, would have been able to discover the falsity of the representations.33

Another CAR form provision requires the buyer and the seller to first mediate any dispute and to submit the dispute to arbitration if mediation does not work. The arbitration provision is only binding, however, if the parties initial it. If the buyer in the example wants to sue the seller and the broker, there could be a venue conflict. The buyer may face two separate proceedings—one in arbitration against the seller and the other against the broker in court. The buyer, however, can request that the court stay one of the proceedings until the other is completed.34 The attorney reviewing the potential lawsuit in the example must therefore consider not only how damages may be measured but also which CAR form provisions apply (depending on which provisions were initiated by whom).

An unhappy buyer who has been defrauded in connection with the purchase of residential real property has a number of factors to consider in asserting a claim. Under Sections 3333 and 1709, the potential client in the example can recover against the broker all damages that were proximately caused by the deception. Since the courts have tailored many types of remedies to fully compensate a party defrauded by a fiduciary, the client may recover not only the cost of repair but also the difference between the value of the residence as represented and its actual value. Regardless of whether the recovery is limited by the out-of-pocket measure of damages under Section 3343 or permitted by the more expansive measure available under Sections 3333 and 1709, the attorney representing the defrauded client should be prepared to offer evidence and experts to testify as to value and damages.

1 See http://www.car.org/legal/standard-forms.
2 See, e.g., Alliance Mortgage Co. v. Rothwell, 10 Cal. 4th 1188, 1250 (1993).
3 Civ. Code §3343(a). Additional recovery is available under the section for amounts that were actually and reasonably expended in reliance on the fraud, for loss of use of the property if the loss of use was proximately caused by the fraud, and, in some circumstances, for lost earnings.
4 Civ. Code §3343(b)(1).
6 California courts are divided on this issue. See, e.g., Fragale, 110 Cal. App. 4th at 236 (departing from the Section 3343 measure of damages when the fraud is committed by a fiduciary); but see Hensley v. McSweeney, 90 Cal. App. 4th 1081, 1086-87 (2001) (applying Section 3343 measure of damages when the fraud is committed by a fiduciary). The California Supreme Court has not decided the issue. See Alliance, 10 Cal. 4th at 1250.
7 See Civ. Code §§2079 et seq.
8 Salahudin v. Valley of Cal., Inc., 24 Cal. App. 4th 553, 562 (1994). Salahudin may be a factually limited case. Most subsequent cases measure value as of the date of sale.
9 Id. at 567.
10 Id. at 565-66.
11 Fragale, 110 Cal. App. 4th at 236.
12 See Alliance Mortgage Co. v. Rothwell, 10 Cal. 4th 1226, 1250 (1995).
13 Nee v. Bennett, 212 Cal. App. 2d 494, 497-98 (1963); but see Garrett v. Perry, 53 Cal. 2d 178, 186 (1959). While values must ordinarily be considered at the time of the fraudulent transaction, the court can consider circumstances occurring after the transaction that operate to increase or decrease the damages.)
14 Fragale, 110 Cal. App. 4th at 237.
15 Evid. Code §813(a) (The owner of real property can offer his or her opinion as to the value of the property. However, that opinion is still subject to challenge pursuant to Evidence Code §814, and if the owner does not have a sufficient foundation for his or her opinion, then the opinion might be considered worthless.).
16 Id. at 186.
19 Id. at 186.
20 CACI 1924.
23 Id. at 690 n.3.
25 Id. at 749. See also, e.g., Walsh v. Hooker & Ray, 212 Cal. App. 2d 450 (1963) (The plaintiff was not limited to recovering only the secret profit realized by his stockbroker; Salahudin v. Valley of Cal., Inc., 24 Cal. App. 4th 553, 568 (1994) (The court measured the benefit-of-the-bargain damages against the broker not from the date of the transaction but from the date of discovery of the fraud.).
27 The standard CAR form includes an attorney’s fees provision. However, even assuming the buyer does not pursue a claim for breach of contract and only pursues claims for fraud and negligent misrepresentation, the prevailing party would still be entitled to an award of attorney’s fees, since the claim arose out of the transaction.
29 Manderville, 146 Cal. App. 4th 1486.
30 Id. at 1489.
31 Id. at 1501-04.
32 Id. at 1500-01. Civ. Code §1668.
33 Manderville, 146 Cal. App. 4th at 1500-01.
34 Code Civ. Proc. §§1281.2 et seq.
FOR 141 YEARS, the false patent marking of products has been against the law. Since 1952, federal law has prohibited false patent marking and provided for a $500 fine for each violation. In 2009, after the Federal Circuit decided in Forest Group, Inc. v. Bon Tool Company to apply the $500 penalty on a per-article basis, hundreds of lawsuits alleging false marking have been filed, making it more important than ever that attorneys representing patent owners, licensees, and manufacturers understand how to counsel their clients on this issue. In the aftermath of Forest Group, at least one court found the false marking provision unconstitutional, and Congress is debating ways to amend the law, adding to the possibility of confusion and increasing the need for clear advice.

Until Forest Group, the false patent marking law was largely ignored, because the penalties under the law as it was interpreted were relatively small. However, the new interpretation of Forest Group has considerably increased the risk of litigation for patent owners, licensees, manufacturers, and even sellers of patented goods with marked patent numbers. These parties will need to ensure that their goods bear valid, applicable, and enforceable patent numbers. Those who face suits by false patent marking opportunists or counterclaims from anyone they sue for patent infringement. Attorneys for patent holders should be aware, however, that the reasons for placing patent numbers on products remain compelling.

Manufacturers can benefit from having applicable patent numbers marked on products. A mark can deter copying, thereby helping manufacturers avoid litigation. Patent law encourages marking by providing that in the event of a failure to mark, “[N]o damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only...”
for infringement occurring after such notice.”

In view of this provision, patent holding manufacturers often mark their patented goods and packaging with applicable patent numbers, and patent owners that license patent rights will typically include a clause in the license agreement requiring licensees to mark goods.

If goods within the public domain are falsely marked, potential competitors may be dissuaded from entering the market. “Congress intended the public to rely on marking as a ‘ready means of discerning the status of intellectual property embodied in an article of manufacture or design.’” Acts of false marking deter innovation and stifle competition in the marketplace. False marks may also deter scientific research when an inventor sees a mark and decides to forgo continued research to avoid possible infringement. False marking can cause unnecessary investment in design or costs incurred to analyze the validity or enforceability of a patent whose number has been marked upon a product with which a competitor would like to compete.

Under 35 USC Section 292, a fine of not more than $500 for every offense may be imposed for false patent marking. To encourage enforcement, the law has a qui tam provision, allowing any person to sue for the penalty, in which event half of the fine goes to the person suing and the other half to the government. The statute provides a fine of $500-per-offense penalty, allowing a range of penalties, the statute provides that ‘any person may sue for the penalties for false marking on a per article basis.” On the other hand, the court added, “This does not mean that a court must fine those guilty of false marking $500 per article marked. The statute provides a fine of ‘not more than $500 for every such offense’...By allowing a range of penalties, the statute provides district courts the discretion to strike a balance between encouraging enforcement of an important public policy and imposing disproportionately large penalties for small, inexpensive items produced in large quantities. In the case of inexpensive mass-produced articles, a court has the discretion to determine that a fraction of a penny per article is a proper penalty.”

Despite that discretionary caveat, the Federal Circuit considerably raised the stakes for those who may have knowingly and falsely marked their products with expired or inapplicable patent numbers. After Forest Group, a case that involves 100,000 widgets could yield a $50 million penalty. Unsurprisingly, the Forest Group argued to the Federal Circuit that “interpreting the fine of § 292 to apply on a per article basis would encourage ‘a new cottage industry’ of false marking litigation by plaintiffs who have not suffered any direct harm.” In response, the Federal Circuit stated, “This, however, is what the clear language of the statute allows. Section 292(b) provides that “[a]ny person may sue for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States.” Manufacturers can question whether anyone is harmed by the inclusion of one or more expired patent numbers on articles, but the law currently exposes manufacturers that do not keep their patent number marks up-to-date to lawsuits inspired by Forest Group.

Subsequent Cases

There have been attempts to mitigate the Forest Group decision. In Pequignot v. Solo Cup Company, a patent attorney sued the Solo Cup Company for falsely marking 21 billion hot and cold drink cup lids and sought an award of $500 per item, for the sum of $10.5 trillion. Ruling for the defendant, the Federal Circuit determined that the plaintiff had failed to raise any issues of material fact that Solo Cup Company intentionally deceived the public, even though it knew that some of the patent numbers were expired. The court stated, “[U]nder Clontech and under Supreme Court precedent, the combination of a false statement and knowledge that the statement was false creates a rebuttable presumption of intent to deceive the public, rather than irrevocably proving such intent...Although the presumption cannot be rebutted by ‘the mere assertion by a party that it did not intend to deceive,’ id., Clontech does not stand for the proposition that the presumption is irrebuttable.”

An important fact in the case was that Solo Cup had obtained advice from its patent attorney about what to do with expensive molds bearing patent numbers that would last 15 to 20 years. The advice was that when molds wore out, they would be replaced with molds not bearing the expired patent numbers. Also, at the advice of its patent counsel, Solo began to use language on its packaging that stated, “This product may be covered by one or more U.S. or foreign pending or issued patents. For details, contact www.solocup.com.” The Federal Circuit considered the advice regarding the replacement of worn molds with new ones without expired patent numbers to be a reasonable measure “to reduce costs and business disruption.” However, the language “This product may be covered by one or more U.S. or foreign pending or issued patents” is probably ill advised because it is almost an admission that some of the patents do not apply.

Another case, Stauffer v. Brooks Brothers, Inc., involved a patent attorney who had purchased some bow ties from the clothier that were marked with expired patent numbers. The attorney brought a qui tam action against Brooks Brothers. In a decision reversing the district court, the Federal Circuit decided that the attorney had standing to bring suit, even though he personally did not suffer any injury, because the government had a legitimate interest in ensuring that its laws were enforced, and that standing of the government inured to the attorney as a private party. The Federal Circuit further decided that the U.S. government should have been allowed to intervene in the lawsuit. With that, the Federal Circuit remanded the case back to the trial court for further consideration.

More recently, the U.S. District Court for the Northern District of Ohio, in Unique
Product Solutions, Ltd. v. Hy-Grade Valve, Inc.,22 found the false marking statute unconstitutional under the take care clause of the U.S. Constitution. The court reasoned that the statute “essentially represents a wholesale delegation of criminal law enforcement power to private entities with no control exercised by the Department of Justice” and, therefore, does not provide “sufficient control to enable the President to ‘take Care that the Laws be faithfully executed.’”23 The U.S. has filed a motion to intervene and for reconsideration in this case. The decision is also subject to appeal. A prior district court looking at the constitutionality of the false patent marking statute did not find it lacking, so it is unclear how the constitutionality of the statute will ultimately be resolved.

Bills to End Nuisance Suits

Until the law is clarified, individuals may continue to bring false patent marking suits, even though they are not personally injured. They must still prove, however, that the patent holder had an intention to deceive, and even if deceitful intent is established, courts have the discretion to determine the per-article penalty.

It has been suggested that the exposure to defendants in false patent marking suits has been overblown.24 A Freedom of Information Act request revealed 100 false patent marking settlements ranging from $2,000 to $350,000, with an average of about $60,000.25 While these may not be particularly dramatic numbers, these nuisance suits also involve significant cost to defendants in time, aggravation, and attorney’s fees.

In response to the patent suits, bills to amend Section 292 were introduced in the 111th session of Congress. None passed. In the Senate, the Patent Reform Act of 2009, introduced by Senator Patrick Leahy, proposed amending Subsection 292(b) to read:

A person who has suffered a competitive injury as a result of a violation of this section.

In the 112th Congress, the Senate moved fairly promptly to pass a patent reform bill. It continues to allow the U.S. government—but only the government—to take advantage of the $500-per-offense penalty. Private enforcers would no longer have a share in the spoils. Under S. 23, the Patent Reform Act of 2011, “Any person who has suffered a competitive injury as a result of a violation” of the false marking statute would be able to file a civil action, but recovery would be limited to “damages adequate to compensate for the injury.”28

Advice for Manufacturers

Until the law is changed, those who mark products with patent numbers should protect themselves. These precautions include carefully verifying patent marks. This may involve patent attorneys, engineers, and supervisors who can document their good faith belief that the manufacturer’s patent marks are reasonable. Decisions should be documented as to which products are covered by which patents, and steps should be taken to audit the process and remove patent numbers that no longer apply.

One option is to include expected expiration dates next to patent numbers. A date gives clear notice that the patent is no longer in effect, and thereby thwarts an assertion of deceit. Even under this option, however, diligence is necessary. A failure to pay maintenance fees, for example, or reexamination not be used. These phrases imply that the patent owner has not gone to the trouble to determine whether a particular article is covered by a patent. Shifting this burden to the public may not protect the manufacturer.

Some patent owners may decide that the reward of maximizing potential damage recovery in an infringement case is not worth the risk of a false marking suit. If they so conclude, they may stop patent marking. This action also halts the beneficial public relations that come from identifying products as patented. In addition, if patent owners decide to stop marking, notice is lost, and new policy must still be created to identify infringers and place them on notice promptly, since damages are dependent on notice.

Another procedural issue for patent holders is due diligence in transactions. When licensing patents, licensors should put controls in place to ensure that patent numbers are not used on inapplicable articles or past their expiration date. Licensees, who are gener-
ally required to apply patent numbers to licensed articles, may be resistant to accepting such clauses. It seems unlikely that patent owners with active license programs will agree to allow licensees to forego patent marking. An active license program usually means that the potential for infringement is high. Also, the presence of licensee products in the market may make it more difficult for the patent owner to detect infringers and put them on notice promptly. Thus, the loss of damage recovery before notice could be significant. Some form of indemnification for licensees may be an acceptable middle ground.

Those who are accused of infringement and choose to resolve the dispute by entering into a license with the patent owner need to be particularly careful. If the accused infringer has previously argued that its products were not covered by the patent at issue, entering into a license that would require marking those products with the patent number could result in false patent marking exposure. In this situation, resistance to agreeing to patent marking may be warranted.

Patent attorneys should encourage the businesses they advise to audit each marked item they are selling to discover whether the markings are proper. If needed, corrective action should be taken. As is generally the case, reasonable steps taken early can avoid large potential exposure to marking suits later. Should a client business face a suit, settlement data can be consulted to help determine an appropriate settlement amount. In addition, for public policy reasons the settlement may be structured to cover all possible false patent marking claims for any patents marked on any of the company’s products. The federal government has approved global settlement terms as long as they did not seek to excuse any future acts of false patent marking. Thus, handled correctly, a suit for false patent marking can serve to resolve all potential past claims. Reasonable steps going forward can protect against potential future claims.

Until relief comes from Congress, the false patent marking statute remains a choice weapon for qui tam plaintiffs looking for susceptible defendants. For the present, however, patent attorneys should advise manufacturers to ensure that when goods are marked, they are marked correctly.

2 35 U.S.C. §292. Violations include falsely claiming that something is patent pending, marking articles with expired patent numbers, marking articles with patent numbers that do not apply, using the patent number of a third-party owner without the consent of that party, or applying any other patent markings that are false.


7 DONALD S. CHISUM, CHISUM ON PATENTS §20.03(7)(c)(vii) (2009).


10 See Clontech Labs., Inc., 406 F. 3d at 1352.

11 Id. at 1352. (citing Seven Cases of Eckman’s Alterative v. United States, 239 U.S. 510, 517–18 (1916)).

12 Clontech Labs., Inc., 406 F. 3d at 1352–53.

13 Id. at 1352.


15 Icon Health & Fitness, Inc. v. Nautilus Group, Inc., No. 1:02 CV 109 TC, 2006 WL 753002, at *16 (D. Utah Mar. 23, 2006) (a penalty for each week that false marking occurred); see also Brosse v. Sears, Roebuck & Co., 455 F. 2d 763, 766 n.4 (5th Cir. 1972) (A court may limit the fine to each day, week, or month the articles were produced.); Krieger v. Colby, 106 F. Supp. 124, 131 (S.D. Cal. 1952) (Each day products were falsely marked constituted a separate offense.). These cases fall in line with several early false marking cases, in which penalties were imposed for each day that products were falsely marked. See, e.g., Hoyt v. Computing Scale Co., 96 F. 250, 251 (S.D. Ohio 1899); Hotchkiss v. Samuel Capples Wooden-Ware Co., 55 F. 1018, 1021 (E.D. Mo. 1891). All these cases are cited in Forest Group.


17 Forest Group, Inc. v. Bon Tool Co., 590 F. 3d 1295, 1304 (Fed. Cir. 2009).

18 Id. at 1303.


20 Clontech Labs., Inc. v. Invitrogen Corp., 406 F. 3d 1347 (Fed. Cir. 2005).


23 Id. at 12-13.


25 Id.

26 See http://www.govtrack.us.


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

Yours truly,

[Signature]

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The Myth of Unavailability: A Lawyer-Created Fiction

A SURPRISING, FALSE NOTION HAS TAKEN HOLD among some attorneys that they may file a self-executing “notice of unavailability” that momentarily excuses them from litigating in active superior court civil cases. Like baseless urban legends that arise mysteriously and never go away, a belief persists that there is authority for a practice that an attorney may unilaterally disengage from legal representation for a self-selected period. In fact, there is neither legal authority nor court procedures that allow counsel to check out of representation to suit their own convenience by filing a “notice of unavailability.”

Copied over and over again and passed from one attorney to another, the typical “notice of unavailability” served on opposing counsel and filed in the superior court states that an attorney [W]ill be unavailable for any settlement negotiations, depositions, court hearings, or other appearances, including, but not limited to, summary judgment and/or summary adjudication hearings. Purposefully scheduling a conflicting proceeding without good cause is sanctionable conduct. Tenderloin Housing Clinic, Inc. v. Sparks, 8 Cal. App. 4th 299, 307 (1992).

Whether the motivation behind such notices is benign or self-serv- ing, there is no authority—including Tenderloin—that lends any weight to such a notice. This attorney-created device is no more than a handy crutch for counsel who choose to ignore their professional obligations and the common courtesies that should be extended between attorneys to consult with one another regarding scheduling of case-related matters. There is no judicial sanction for these notices, and they have never been condoned by any court.

Having lost patience with counsel who have frustrated courts with “notices of unavailability,” the court of appeal in Carl v. Superior Court1 went to great lengths to repudiate reliance on Tenderloin as authority for such notices, to explain its disapproval of their filing, and to admonish counsel to stop utilizing this practice. The appellate court in Carl affirmed the denial of a writ of mandate seeking to overturn a trial court ruling striking as untimely a petitioner’s challenge under Code of Civil Procedure Section 170.3(d), which counsel contended was properly filed late because he had filed a “notice of unavailability” excusing himself from litigating for a period of time.

First, the Carl court commented that it “appears to be common practice in the trial courts for litigants to file a ‘notice of unavailability’ under the guise of Tenderloin.” Such a notice “purports to advise the other parties to the action—as well as the court—that the deliverer will not be available for a prescribed period of time and that no action may be taken during that period which adversely affects the availability of counsel. To the extent that this practice attempts to put control of the court’s calendar in the hands of counsel—as opposed to the judiciary—it is an impermissible infringement of the court’s inherent powers.”2

In strong language, the court stated that the “purported function of this ‘notice’ was to arrest the power of the superior court to issue any order that would require or impose upon petitioner any legal obligation to act. Simply put, petitioner essentially argues that by filing a ‘notice of unavailability’ he unilaterally called a litigation timeout.”3 The court reasoned that counsel cannot on their own enjoin the superior court from issuing orders and, further, it is beyond an attorney’s power to extend statutory times imposed by the court to act.

Finally, the Carl court put to rest the misplaced reliance on Tenderloin as the source of entitlement to file “notices of unavailability.” In directly repudiating the idea that attorneys can abdicate professional responsibilities during the litigation process, the court concluded that “Tenderloin, of course, merely holds that a trial court may impose sanctions against an attorney who conducts litigation in bad faith and solely for the purpose of harassment. There, among other things, the sanctioned attorney purposefully set discovery for times when he knew opposing counsel was on vacation and unavailable in order to gain an unfair tactical advantage in the litigation. Nothing in Tenderloin, however, expressly condones the practice that has grown up around its name. It has simply been made up.” For the appellate courts, “a ‘notice of unavailability’ is not a fileable document under the rules of court and will be returned to counsel.”4

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2 Id. at 75.
3 Id.
4 Id. at 77.
5 See Gov’t Code §68607.

Michael L. Stern is a Los Angeles Superior Court judge.
THE CATHEDRAL OF OUR LADY OF THE ANGELS
555 W. Temple St., Los Angeles, California

Thursday, October 6, 2011 - 5:30 p.m. Mass
Celebrant: Archbishop Jose Gomez
Homilist: Scott Santarosa, S.J.

RECEPTION FOLLOWING IN THE CATHEDRAL CONFERENCE CENTER

History of the Red Mass
The Red Mass was first celebrated in Paris in 1245 and began in England about 1310 during the reign of Edward I. The entire Bench and Bar would attend the Red Mass together at the opening of each term of Court. The priest and the judges of the High Court wore red robes, thus the Eucharistic celebration became popularly known as the Red Mass.

The tradition of the Red Mass has continued in the United States. Each year in Washington, D.C. the members of the United States Supreme Court join the President, and members of Congress in the celebration of the Red Mass at the National Shrine of the Immaculate Conception. The Mass is attended by government officials, judges, members of the legal profession and their supporters and is open to all faiths.

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