California Antitrust and Unfair Competition Law Update

by: Thomas Greene, Chief Assistant Attorney General
California Department of Justice
Thomas A. Papageorge, Head Deputy District Attorney
Los Angeles District Attorney's Office

CALIFORNIA DEVELOPMENTS: SUBSTANTIVE LAW

Cartwright Act

Freeman Issue of Cartwright Act/Sherman Act Conspiracy Allegations Revisited

Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133 (9th Cir. 2003)

The continuing controversy over the requisite evidence to establish an antitrust conspiracy under the Cartwright Act and Sherman Act took another turn in *Freeman v. San Diego Ass'n of Realtors,* 322 F.3d 1133 (9th Cir. 2003). In 1999, the Fourth District Court of Appeal, analyzing a joint venture of real estate brokerage associations in San Diego, had concluded "the complaint does not establish the plurality of separate entities necessary to a price fixing claim" because "only separate entities pursuing separate economic interests can conspire" for these antitrust purposes, and no such allegation was present. *Freeman v. San Diego Ass'n of Realtors,* 77 Cal. App. 4th 171, 193 (1999).

However, the Ninth Circuit has now reviewed the same facts under Sherman Act section 1 and found "the associations are not a single entity, and so their joint venture is not immune from scrutiny under section 1." And the U.S. Supreme Court has recently denied certiorari in this case. *Freeman,* 322 F.3d at 1145.

DCA Rules on Availability of Defense Attorney Fees and Costs in Cartwright Act Cases

Carver v. Chevron U.S.A., Inc., 97 Cal. App. 4th 132 (2002).

A prevailing plaintiff may recover "a reasonable attorneys' fee together with the costs of the suit" under the Cartwright Act. Cal. Bus. & Prof. Code § 16750(a). However, the court of appeal has held the attorneys' fee provision of the Cartwright Act is "a unilateral fees clause" which by "the section's plain language does not create any reciprocal right on the part of a prevailing defendant to such an award. . . ." *Carver v. Chevron U.S.A., Inc.,* 97 Cal. App. 4th 132, 144 (2002). A prevailing defendant in a Cartwright Act action may recover costs of suit (but not attorneys' fees) under the pre-trial offer of compromise provisions of Code of Civil Procedure section 998. *Id.* at 154.

Covenants Not to Compete (Business & Professions Code § 16600 et seq.)

Supreme Court Limits Use of Anti-Suit Injunction in Non-Competition Covenant Litigation

Advanced Bionics Corp. v. Medtronic, Inc., 29 Cal. 4th 697 (2002), *modified en banc, reh'g denied*.

The California Supreme Court has determined that considerations of interstate comity and judicial restraint must play an important role in the choice of law and forum in cases involving non-competition covenants. In *Advanced Bionics Corp. v. Medtronic, Inc.*, 29 Cal. 4th 697 (2002), the Court addressed an employment contract case where the parties originally contracted in Minnesota and the employee moved to California prior to the alleged

breach of a covenant not to compete. The Supreme Court reversed a temporary restraining order granted below, ruling "California courts have the same power as other courts to issue order that assist in protecting their jurisdiction" but "enjoining proceedings in another state requires an exceptional circumstance that outweighs the threat to judicial restraint and comity principles." This case did not present such a case, but "Advanced Bionics remains free to litigate the California action . . . ." *Id.* at 707-08.

DCA Rejects Doctrine of Inevitable Disclosure in Non-Competition Context
Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443 (2002).

In further support of California's general policy against most non-competition covenants, the Court of Appeal has rejected the doctrine of inevitable disclosure of trade secrets, which doctrine often has the effect of converting confidentiality agreements between employers and employees into after-the-fact covenants not compete. In *Whyte v. Schlage Lock Co.,* 101 Cal. App. 4th 1443 (2002), the court analyzed the competing trade regulation policies and concluded: "California public policy strongly favors employee mobility . . . the doctrine of inevitable disclosure 'creates a de facto covenant not to compete' and 'runs counter to the strong public policy in California favoring employee mobility.'" *Id.* at 1462.

Unfair Practices Act (Business & Professions Code § 17000 et seq.)

Below-Cost Pricing for Single Product/Service Can Support California Predatory Pricing Case
Fisherman's Wharf Bay Cruise Corp. v. Super. Ct. (Blue and Gold Fleet, Inc.), 114 Cal. App. 4th 309 (2003).

The First District Court of Appeal has found California's sales-below-cost statute (Bus. & Prof. Code § 17043) significantly different from Sherman Act predatory pricing law in cases alleging below-cost pricing for individual products or services within overall-profitable lines of business.

In an antitrust and unfair practices dispute between two providers of sightseeing cruises on San Francisco Bay, the trial court granted the defendant's motion for summary adjudication of plaintiff's UPA allegation of below-cost pricing. Bus. & Prof. Code § 17043. The lower court based its ruling on Sherman Act § 2 analysis focusing on the profitability of the entire line of products or services at issue (relying on *Int'l Travel Arrangers v. NWA, Inc.,* 991 F.2d 1389 (8th Cir. 1993). The First District reversed, concluding: "But these *federal* authorities .. . do not convince us that below-cost pricing for even a limited number of customers ... falls outside the reach of our *state's* antitrust law simply because the overall enterprise remains profitable." *Fisherman's Wharf Bay Cruise Corp.*, 114 Cal. App. 4th at 325 (emphasis in original). Because of the specific language of section 17043, "cases brought under the UPA focus literally on whether the defendant sold '*any article or product*' at less than cost." *Id.* at 326.

The Court of Appeal noted that plaintiff still faces a substantial factual and legal burden of proving intent of injuring competitors, and the tendency or capacity to injure the plaintiff, among other issues. But these are issues of material fact which require full, rather than summary, adjudication, and the court was unwilling "to allow . . . any alleged commercial predatory to seek refuge in such a 'price averaging' safe harbor." *Id.* at 330.

Unfair Competition Law (Business & Professions Code §17200)

California Supreme Court Limits UCL Restitution/Disgorgement Claims in Major Opinions

Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116 (2000).
Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134 (2003).

The unfair competition law authorizes the court to make orders necessary "to restore to any person in interest any money or property" acquired by means of unfair competition. (Bus. & Prof. Code, § 17203.) This UCL restitution authority has been analyzed and limited by the California Supreme Court in *Kraus v. Trinity Management Servs., Inc.,* 23 Cal. 4th 116 (2000), and *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003).

The basic authority to restore to victims any money or property taken by means of unfair competition is well established. "Through the UCL [section 17203] a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices in order to protect the public and restore to the parties in interest money or property taken by means of unfair competition." *Kraus* at 126; *Korea Supply* at 1144. Restitution under section 17203 is an independent remedy and is not contingent on the issuance of an injunction. *ABC Int'l Traders v. Matsushita Elec. Corp.,* 14 Cal. 4th 1247 (1997).

Prior to *Kraus* and *Korea Supply*, California courts had generally, although not universally, endorsed broad interpretations of this restitutionary remedy. Today it is clear that: (1) UCL restitution is available only to those with an ownership interest in money or property unlawfully taken, and not for non-restitutionary disgorgement, absent class certification; (2) *cy pres* or fluid recovery is unavailable in private representative actions under the UCL, although it is available in class actions involving the UCL (and perhaps in public actions); and (3) general damages are not recoverable under the UCL.

Direct victim restitution v. disgorgement. In previous years section 17203 was widely interpreted to permit disgorgement beyond direct victim restitution, including surrender of all money or property unlawfully obtained even though not all is to be restored to victims, or surrender of all profits from unfair competition regardless of whether those profits represent money taken directly from victims. *See* discussions in *People v. Powers*, 2 Cal. App. 4th 330 (1992), citing *Fletcher v. Security Pac. Nat. Bank*, 23 Cal. 3d 442, 451-52 (1979) (construing identical language in section 17535); *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App. 3d 432 (1988); *People v. Toomey*, 157 Cal. App. 3d 1 (1984).

In *Korea Supply,* the California Supreme Court clarified its discussion of this issue in *Kraus* and restricted the UCL remedy to direct victim restitution only: "[W]e held in *Kraus* that while restitution was an available remedy under the UCL, disgorgement of money obtained through an unfair business practice is an available remedy in a representative action only to the extent that it constitutes [direct] restitution. We reaffirm this holding here in the context of an individual action under the UCL." *Korea Supply*, 29 Cal. 4th 1134, 1145 at 1145. A UCL plaintiff must demonstrate the victims' ownership interest in the money or property in order to obtain restitution: "Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." *Id.* at 1148.

However, the Court acknowledged that disgorgement can occur in public enforcement actions (via civil penalties), and in the context of class action *cy pres* funds. *Id.* at 1148, n.6.

Previously the Court in *Kraus* had noted that "the Legislature . . . has authorized disgorgement into fluid recovery fund in class actions." 23 Cal. 4th at 137. The court of appeal has subsequently held "[w]here a class has properly been certified, a plaintiff in a UCL action may seek disgorgement of unlawful profits into a fluid recovery fund." *Corbett v. Super. Ct.*, 101 Cal. App. 4th 649, 655 (2002).

***Cy pres* restitution unavailable in representative actions.** *Cy pres* relief, or "fluid recovery," where any restitution that cannot be returned to the direct victims is distributed to an alternative use to benefit the class of victims, is unavailable in private representative UCL actions, absent class certification. In *Kraus*, 23 Cal. 4th 116, the California Supreme Court held that disgorgement into a fluid recovery fund is not a remedy available in a representative unfair competition law action, defined as "a UCL action that is not certified as a class action in which a private person is the plaintiff and seeks disgorgement and/or restitution on behalf of persons other than or in addition to the plaintiff." The *Kraus* Court determined that "the Legislature has not accompanied [the general authority for restitution] with authorization for fluid recovery in representative UCL actions." *Id.* at 126.

Although the Court found no statutory basis for UCL *cy pres* relief, the Court made no holding with respect to fluid recovery in non-representative UCL actions, including public law enforcement actions, and thus the status of fluid recovery as a public remedy under section 17203 is unclear. *Id.* Previous opinions authorizing public prosecutors to obtain fluid recovery are found in *People v. Powers*, 2 Cal. App. 4th 330 (1992); *People v. Parkmerced*, 198 Cal. App. 3d 683 (1989); and *State of California v. Levi Strauss & Co.* (1986) 41 Cal. 3d 460 (1986) (antitrust application of "fluid recovery" doctrine). *See also* discussions in *Fletcher Security Pac. Nat. Bank,* 23 Cal. 3d 451-52 (construing section 17535); *Allied Grape Growers v. Bronco Wine Co.*, 203 Cal. App. 3d 432 (1988); *People v. Toomey*, 157 Cal. App. 3d 1 (1984). The *Kraus* Court rejected *Powers*, *Parkmerced,* and *Levi Strauss & Co.* to the extent that they supported fluid recovery in private representative UCL actions, but the Court did not extend its holding beyond the context of those private actions (despite concern over such a possible result expressed in the concurrence and dissent of Justice Werdegar; *Kraus,* 23 Cal. 4th at 148.

Direct victim restitution under the UCL remains uncontroversial even after the *Kraus* opinion. *See Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 950 (2002); *Prata v. Super. Ct. (Bank One)*, 91 Cal. App. 4th 1128, 1137 (2001), and the court of appeal has confirmed the availability of cy pres restitutionary authority in a UCL matter certified as a class action *see Corbett v. Superior Court*, (Bank of America), 101 Cal. App. 4th 649, 655 (2002).

See C. Varner, The Korea Supply Decision: Monetary Relief Remedies Under the UCL, 12:1 Competition, 53 Vol. 12, No. 1, Summer 2003.

Issue of UCL "Unfairness" Standard After *Cel-Tech* Revisited by Courts of Appeal

Smith v. State Farm Mut. Auto. Ins. Co., 93 Cal. App. 4th 703 (2001).
Cmty. Assisting Recovery, Inc. v. Aegis Sec. Ins. Co., 92 Cal. App. 4th 886 (2001).
Searle v. Wyndham Int'l, Inc., 102 Cal. App. 4th 1327 (2002).
Gregory v. Albertson's, Inc. 104 Cal. App. 4th 845 (2002).
Scripps Clinic v. Superior Court (Thompson), 108 Cal. App. 4th 917 (2003).
Pastoria v. Nationwide Ins., 112 Cal. App. 4th 1490 (2003).

Several recent appellate cases have addressed the issue of the scope and content of the "unfairness" standard under the Unfair Competition Law, after the California Supreme Court's statement in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163 (1999), that private competitor antitrust claims using the "unfairness" theory must allege a sufficient relationship to the antitrust laws and policies. Several courts have limited the *Cel-Tech* principle to its private antitrust context, while others have indicated that the principles behind the *Cel-Tech* decision may also apply in other contexts, including consumer protection cases.

In *Smith*, the Second District noted: "As [the Supreme Court] itself acknowledged, we are not to read *Cel-Tech* as suggesting that such a restrictive definition of 'unfair' should be applied in the case of an alleged *consumer* injury. . . . [T]he *Cel-Tech* court's comments did not signal a retreat (at least in noncompetitor cases) from its earlier statements in *Barquis v. Merchant Collections Association*." 93 Cal. App. 4th at 721, n.23. The *Smith* court applied the equitable tests of *People v. Casa Blanca Convalescent Homes, Inc.* and *FTC v. Sperry & Hutchinson Co.*, in determining that some of plaintiff's allegations of unfair insurance practices could go forward. *Id*. at 721.

In *Community Assisting Recovery*, the Second District addressed defendant insurance companies' practice of paying earthquake claims based on replacement value less depreciation, rather than fair market value. The court specifically determined that the *Casa Blanca* test of unfairness applies, rather than the private antitrust standard of *Cel-Tech*, However, the court of appeal found insufficient evidence of unfair activities on the facts alleged in *Community Assisting Recovery* to support a section 17200 claim.

And in *Searle v. Wyndham Int'l, Inc.*, 102 Cal. App. 4th 1327 (2002), the Fourth District ultimately sustained a demurrer to a hotel patron's UCL challenge to room service charge practices, but assumed in its analysis that the traditional *Casa Blanca*-style equitable principles governed the "unfairness" analysis.

Other courts of appeal, interpreting the *Cel-Tech* doctrine of antitrust "unfairness" in private competitor litigation, have begun to analyze ways in which the plaintiff's allegations of anti-competitive conduct are or must be "tethered" to specific antitrust statutes or other provisions of law. In *Gregory v. Albertson's, Inc.*, 104 Cal. App. 4th 845 (2002), the appellate court considered a private plaintiff's UCL claim that a major food retailer kept a supermarket location in a mall unopened to preclude competition. The court considered the statutory provisions governing mall usage and community redevelopment and concluded that the plaintiff had not adequately linked her claim of unfairness to "the statutory scheme of [antitrust laws]." *Id.* at 857.

In *Scripps Clinic,* 108 Cal. App. 4th 917, the Fourth District Court of Appeal considered claims arising out of group boycott and unfair competition allegations against an HMO, and concluded the plaintiff's case insufficiently demonstrated an incipient violation of an antitrust law or the policy or spirit of an antitrust law.

Finally, in *Pastoria,* 112 Cal. App. 4th 1490, the Second District reviewed dismissal of claims by insureds against health insurance companies which allegedly failed to warn the insureds of "imminent material changes" in a health insurance policy at the time the policy was purchased. The appellate court reversed and reinstated the allegations under all three prongs of the UCL: unlawfulness, fraudulence, and unfairness. As to unfairness, the court found the allegations raised actionable issues under either a *Cel-Tech*-based theory

(requiring a theory "tethered" to legislative policy) or the equitable balancing approach utilized in *Smith,* 93 Cal. App. 4th at 718.

Prosecutors' UCL Civil Penalty Authority Analyzed by Courts of Appeal

People v. Fremont Life Ins. Co., 104 Cal. App. 4th 508 (2002).

People v. First Fed. Credit Corp., 104 Cal. App. 4th 721 (2002).

The California Attorney General and district attorneys (and designated city attorneys) share concurrent authority to obtain substantial civil penalties for violations of the UCL. *See* Bus. & Prof. Code §§ 17206, 17207 and analogous provisions of the false advertising law, Bus. & Prof. Code § 17500 *et seq*. Two recent opinions have provided further insights into the proper measurement of and requisite proof for those civil penalties.

In *Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, the Fourth District undertook a detailed analysis applying the penalty factors in section 17536(b) and 17206(b) to insurance company practices and upheld $2,543,000 in civil penalties. And in *First Fed. Credit Corp.* 104 Cal. App. 4th 721 (2002), the court upheld $200,000 in civil penalties against a small business, and further concluded that "evidence of a defendant's financial condition . . . is not essential to the imposition of the statutory penalties, making the issue of a defendant's financial inability a matter for the defendant to raise in mitigation." *Id*. at 726.

Supreme Court Upholds Prosecutors' Right to Pursue UCL Claims During PUC Case

People v. Pac. Bell, 31 Cal. 4th 1132 (2003).

The California Supreme Court has held that state prosecutors (including district attorneys and the Attorney General) may proceed against a public utility under the unfair competition and false advertising laws even when the Public Utilities Commission is taking action on the same conduct.

The district attorneys of Alameda, Monterey, and San Mateo counties jointly sued Pacific Bell under the UCL and the false advertising statute. Bus. & Prof. Code § 17500 for alleged deceptive sales practices relating to bundled packages of telephone services such as caller identification and custom calling. At the same time the Public Utilities Commission was also pursuing administrative action against Pacific Bell based on the essentially the same subject matter. The court of appeal concluded that Public Utilities Code section 1759 barred the prosecutors' UCL case as duplicative and potentially conflicting.

The Supreme Court reversed, concluding: "[W]here [as here] the PUC does not possess exclusive regulatory authority over a matter, district attorneys are authorized to initiate actions against public utilities that have violated the law . . . because as a general matter the Legislature intended in these situations for the enforcement authority of the PUC to be shared with public prosecutors." *Id*. at 1151.

The Supreme Court concluded that the superior court can tailor its proceedings and remedies to avoid any actual conflicts in such circumstances. However, the Court expressly reserved the question of whether private plaintiffs acting under the UCL would be able to proceed simultaneously with the PUC. *Id*. at 1154, n.12.

Supreme Court Extends *Broughton* Rule of Inarbitrability of Injunctive Claims to UCL

Cruz v. Pacificare Health Sys., Inc., 30 Cal. 4th 303 (2003).

In *Broughton v. Cigna Healthplans*, 21 Cal. 4th 1066 (1999), the California Supreme Court had ruled that the injunctive relief claims of an action brought under the Consumer Legal Remedies Act are not arbitrable, notwithstanding the provisions of the Federal Arbitration Act. In *Cruz*, the Supreme Court concluded that *Broughton* was controlling in differentiating injunctive relief claims from other claims under section 17200. Thus the Federal Arbitration Act did not compel arbitration of the injunction claims in a private attorney general action against a healthcare provider. However, as with the Consumer Legal Remedies Act claims in *Broughton*, the disgorgement, restitution, and unjust enrichment claims in the *Cruz* case were fully arbitrable pursuant to the FAA. 30 Cal. 4th at 307.

<u>False Advertising Law (Business & Professions Code §17500)</u>

U.S. Supreme Court Concludes Certiorari Improvidently Granted, Restoring *Kasky v. Nike* Opinion on Boundaries of Commercial/Non-Commercial Speech

Kasky v. Nike, Inc., 27 Cal. 4th 939 (2002), *cert. dismissed as improvidently granted*, *Nike, Inc. v. Kasky,* 539 U.S. 654 (2003).

In a dramatic appellate development, the U.S. Supreme Court, after hearing arguments, has determined that it improvidently granted *certiorari* in the closely watched false advertising case of *Kasky v. Nike, Inc.*, 539 U.S. 654 (2003). Coupled with the subsequent settlement of the case by the parties, the Supreme Court's decision effectively restored the California Supreme Court opinion on these issues.

In a case of wide-ranging significance for both false advertising and the Unfair Competition Law, the California Supreme Court had held the application of those laws to a manufacturer's claims made as part of an advertising campaign addressing labor practice issues. In the California case, defendant Nike, a shoe manufacturer, argued that statements in its advertisements answering charges about its overseas labor practices were, at least partly, non-commercial speech and thus not subject to regulation by California's false advertising and unfair competition laws. The court of appeal found the speech at issue to be partly non-commercial speech and thus not subject to traditional trade regulation. *Kasky v. Nike, Inc.*, 79 Cal. App. 4th 165 (2000).

Commercial speech issues. Reversing the court of appeal, the California Supreme Court held that the defendant's statements were commercial speech for First Amendment purposes and thus were subject to regulation under state trade regulation laws. "[W]hen a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, these public statements are commercial speech that may be regulated to prevent consumer deception." *Kaskey v. Nike, Inc.*, 27 Cal. 4th at 969. In this connection, the Court noted: "[n]either the UCL nor the false advertising law on its face violates the state Constitution's free speech provision as an impermissible regulation of commercial speech." *Id*. at 959.

In reaching this decision, the Court offered guidance on determining the commercial or non-commercial nature of such speech. The Court noted that First Amendment and equivalent California protections are parallel on this issue of determining the character of speech, and confirmed that "commercial speech that is false or misleading is not entitled to First

Amendment protection and may be prohibited entirely." *Id.* at 954 (internal quotations omitted). The Court found that categorizing a particular statement as commercial or non-commercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message; and further found that advancing a particular economic transaction is not a necessary condition for speech to be commercial. The Court held that, where the speaker is a seller of goods or services and directs a message to buyers regarding the "operations, goods, or services" of the speaker's business for the purpose of maintaining sales and profits, that speech is commercial in nature and may be regulated by unfair competition and false advertising statutes. *Id.* at 969.

Governing principles of UCL and false advertising. In addition to its holding regarding regulation of such advertising, the *Kasky* opinion is significant for its restatement of the broad interpretive principles governing the UCL and the false advertising law, including the capacity to deceive standard, standards for unlawful, unfair, and fraudulent practices, and that "'[a]ny violation of the false advertising law . . . necessarily violates the UCL.'" *Id*. at 950 (brackets in original). Included in this restatement is the Court's succinct summary of the broad dual scope of section 17200: "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *Id.* at 949. Of particular note, the Supreme Court clearly restated its traditional formulation of the capacity to deceive doctrine governing California false advertising and deception law, declaring once again that false advertising covers "not only advertising which is false, but also advertising which although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public." *Id*. at 951 (internal punctuation omitted).

California Courts Define and Apply the Anti-SLAPP Statute Defense

Navellier v. Sletten, 29 Cal. 4th 82 (2002).
Equilon Enters. v. Consumer Cause, Inc., 29 Cal. 4th 53 (2002).
City of Cotati v. Cashman, 29 Cal. 4th 69 (2002).

In 1992 the California Legislature enacted Code of Civil Procedure section 425.16, commonly known as the "anti-SLAPP statute" (referring to so-called "Strategic Lawsuits Against Public Participation"), in order to "curtail lawsuits brought primarily to 'chill the valid exercise of . . . freedom of speech and petition for redress of grievances' and to 'encourage continued participation in matters of public significance.'" Cal. Code Civ. Proc., § 425.16(a) (1992); *see Gallimore v. State Farm Fire & Casualty Ins. Co.*, 102 Cal. App. 4th 1388, 1395 (2002).

The anti-SLAPP statute provides a potential defense for cases brought under Business and Professions Code sections 17200 et seq. and 17500, in that a defendant may seek dismissal of unfair competition or false advertising claims under those statutes if the defendant can demonstrate the lawsuit would improperly chill rights of free speech or petition for redress and does not have a bona fide factual basis. As the California Supreme Court has described it, the statute provides that lawsuit "against a person arising from any act of that person in furtherance of the person's right of petition or free speech . . . shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." *Navellier,* 29 Cal. 4th at 88-89; *Equilon Enters., Inc.* 29 Cal. 4th 53; *Cashman*, 29 Cal. 4th at 69.

The anti-SLAPP statute establishes a two-step process for determining whether an action is a SLAPP and thus subject to dismissal. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity" [the "arising from" element]. . . . If the court finds that such a showing has been made, it must then determine whether a plaintiff has demonstrated a probability of prevailing on the claim [the "minimal merit" element]." *Equilon Enters.*, 29 Cal. 4th at 67. Once a defendant moving to strike has demonstrated that the challenged lawsuit is one "arising from" its protected free speech activity, it is unnecessary for that defendant to prove that the plaintiff had a subjective intent to chill protected constitutional activities. *Id.* at 67-68.

Defendants in California unfair competition and false advertising lawsuits are increasingly seeking to use motions for dismissal under the anti-SLAPP statute as a defense strategy in cases brought under sections 17200 and 17500. Most frequently the California courts of appeal have affirmed denial of anti-SLAPP motions in this context, finding the anti-SLAPP statute does not apply to lawsuits challenging untrue or misleading commercial speech. *See, e.g.*, *Consumer Justice Cntr. v. Trimedica Int'l, Inc.*, 107 Cal. App. 4th 595 (2003) (lawsuit alleging false advertising of dietary supplement "Grobust" not subject to anti-SLAPP statute); *Nagel v. Twin Labs.*, 109 Cal. App. 4th 39 (2003) (alleged false ads for weight-loss product were strictly commercial speech and not subject to protection from anti-SLAPP law). However, other defendants have found success in motions to dismiss under section 425.16 in business law matters. *See, e.g.*, *Navellier*, 106 Cal. App. 4th 763 (on remand, court of appeal dismissed plaintiff's fraud and breach-of-contracts as without sufficient merit); *1-800 Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568 (2003) (contact lens company's suit against optometrist for inducing breach of contract dismissed).

California Courts Split on "Reasonable" and "Unsophisticated" Consumers

Lavie v. Proctor & Gamble Co., 105 Cal. App. 4th 496 (2003).
Brockey v. Moore, 107 Cal. App. 4th 86 (2003).

After the demise of the doctrine of *caveat emptor*, a traditional principle governing FTC section 5 and the state "Little FTC Acts" has been that the law protects even "trusting and credulous" consumers as well as those who are more sophisticated. *See F.T.C. v. Standard Educ. Soc'y,* 302 U.S. 112, 118 (1937). The traditional deception standard required only proof of the tendency or capacity to deceive unsophisticated or trusting consumers as to a material fact, as these laws protect consumers who are not suspicious or sophisticated. Thus, even statements that would not mislead wary consumers still may have the requisite tendency or capacity to deceive. *See Standard Educ. Soc'y*, 302 U.S. at 118; *Exposition Press v. F.T.C.,* 295 F.2d 869 (2d Cir. 1971); *Aronberg v. F.T.C.,* 132 F.2d 165, 176 7th Cir. 1942) ("[t]he law is not made for experts but to protect the public, — that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions").

Many California courts interpreting sections 17500 and 17200 have traditionally embraced the general philosophy that consumer protection is not limited to wary or well-informed audiences. *Comm. on Children's Television v. Gen. Foods Corp.*, 35 Cal. 3d 197, 210-14 (1983) (these statutes protect "particularly susceptible and naive audiences," e.g., children); *People v. Wahl*, 39 Cal. App. 2d Supp. 771 (1940) (Section 17500 exists to "protect the general public who reads advertisements and are unlikely to know the facts"). These traditional federal and state formulations are often described as the "unsophisticated person"

standard: a statement is deceptive and unlawful if it has the tendency or capacity to deceive unsophisticated or trusting consumers as to a material fact.

In the past two decades new federal and state standards have been proposed for use in determining whether a statement is deceptive to its target audience. In 1983, the Federal Trade Commission, in a Policy Statement sent to Congress indicating its interpretation of "deception," proposed that a statement or advertisement should be considered deceptive under section 5 if it is "likely to mislead consumers, *acting reasonably in the circumstances*, in a material respect." *Kraft, Inc. v. F.T.C.*, 970 F.2d 311 314 (7th Cir.1992) (emphasis added); *see* Federal Trade Commission Policy Statement on Deception, letter from FTC Chairman James C. Miller III, Oct. 14, 1983, 5 Tr.Reg.Rep. (CCH), ¶ 50,455; *see also Thompson Medical Co.*, 104 F.T.C. 648 (1984).

Although some commentators were skeptical of such claims. See, e.g., dissenting opinions of Commissioners Pertschuk and Bailey, FTC Policy Statement. The FTC has insisted that this is merely a restatement of previous FTC precedent and not an increase in the proof threshold for such cases. *See Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984).

The California Supreme Court has not addressed this aspect of state deception law since the FTC's adoption of its 1983 deception standard. The seminal California precedent on this issue, the California Supreme Court's opinion in *Comm. on Children's Television*, was briefed before the 1983 FTC deception standard was released, and appears to endorse the more traditional formulation that even unsophisticated persons (e.g., children) are protected.

Thus, until recently, the law in California remained generally consistent with the traditional unsophisticated person standard. Although two federal courts opined that California would adopt the "consumer acting reasonably in the circumstances" standard. *See Freeman v. Time, Inc.*, 68 F.3d 285 (9th Cir. 1995); *Haskell v. Time*, 965 F. Supp. 1398) (E.D. Cal. 1997). California courts appeared to use variations on the traditional standard, such as statements that "reasonable reliance"on a misrepresentation is not an element of a section 17500 deception case. *See*, *e.g.*, *People v. Orange County Charitable Servs.*, 73 Cal. App. 4th 1054 (1999) ("reasonable reliance" on misrepresentation not required); *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332-33 (1998).

In 2003 the First District Court of Appeal directly addressed this aspect of deception law in *Lavie v. Proctor & Gamble Co.*, 105 Cal. App. 4th 496 (2003), and concluded that the trial court properly applied the "reasonable consumer" standard based on the FTC Policy Statement, rather than the traditional "least sophisticated person" standard. *Id.* at 506-07. "[T]he standard applied in UCL and false advertising cases is that of the ordinary consumer acting reasonably under the circumstances. Where the advertising or practice is targeted to a particular group or type of consumers, either more or less sophisticated than the ordinary consumer, the question whether it is misleading to the public will be viewed from the vantage point of members of the targeted group. . . ." *Id.* at 512. However, "a 'reasonable consumer' need not be 'exceptionally acute or sophisticated'" nor "need a reasonable consumer necessarily be wary or suspicious of advertising claims." *Id.* at 510. *See also South Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 878) (standard used was "a business practice 'likely to deceive' a reasonable consumer to whom the practice was directed," but applied in a business-to-business context).

However, other California appellate courts continue to subscribe to the traditional standard of *Standard Education Society* that the law must protect the trusting and credulous, as well as the sophisticated. The Third District Court of Appeal has recently reached a conclusion at odds with the First District's *Lavie* opinion. In *Brockey v. Moore*, 107 Cal. App. 4th 86, 100 (2003), the court of appeal criticized the "reasonable consumer" principles of *Freeman* and *Haskell*, and noted "[w]e are not persuaded that these cases accurately reflect California law." *Id*. at 100.

Until the California Supreme Court addresses this issue directly, there will be uncertainty as to whether California courts should use the more traditional "unsophisticated person" standard or the alternative formulation of the "consumer acting reasonably in the circumstances."

Ultimately, the distinction between the 1983 deception statement and more traditional federal and state law on unsophisticated consumers may be less significant than might first appear, since the sophistication of the target audience is considered in determining whether the statement at issue has the capacity to deceive. *Lavie,* 105 Cal. App. 4th at 510; FTC Policy Statement, at 9, and concurring statement of Commissioner Douglas.) For example, in *Brockey*, the Third District found statements targeted at unsophisticated consumers to be deceptive, even under a "reasonable consumer" standard, noting: "Where as here, a statement is targeted at unsophisticated members of the public, it is appropriate to adjust the 'reasonable consumer' standard' accordingly." *Id*. at 101-02. The court also rejected any requirement of survey evidence or extrinsic evidence to prove an advertisement's tendency to mislead.

Allegations of UCL Misuse – Public Agencies' Actions Against UCL Abuse

Public agencies, legislators, small business persons, and others have expressed concern over allegations of abuse of the UCL, California's principal consumer protection statute. Recent well-publicized lawsuits and attempted settlements by the Trevor Law Group and several others represent troubling examples of misuse of the UCL, e.g.:

1. *Consumer Enforcement Watch Corp. v. Porter Automotive, et al.*, L.A. Super. Ct. No. BC 281 693. A newly-formed for-profit organization (CEWC), represented by the Trevor Law Group, of Beverly Hills, filed nine omnibus UCL lawsuits naming 1596 car repair centers (and thousands of "Doe" defendants) based solely on BAR Web site information about possible law violations, and sent unethical settlement demands making material misrepresentations.

2. *CEWC v. Blue Banana, et al*. (L.A. Super.Ct. No. BC 286891, filed Dec.12, 2002). CEWC and Trevor Law Group filed single omnibus UCL lawsuit naming more than 1000 Southern California restaurants (and thousands of "Doe" defendants) based solely on health services Web site information about possible law violations, and sent unethical settlement demands making material misrepresentations.

The Attorney General, the California District Attorneys Association, and the Los Angeles District Attorney's Office, among others, have stated that misguided or abusive cases using the UCL's private right of action have a significant impact on law enforcement and the protection of the general public. These inappropriate lawsuits generate damaging appellate precedent; interfere with legitimate law enforcement investigations and prosecutions; and undermine judicial and public respect and support for the UCL. Prosecutors have alleged that abuses of this kind harm all legitimate users of the UCL and should not be tolerated.

Public agencies have responded vigorously to protect the public and the statute itself from misuse. The California law enforcement community has taken action on multiple fronts to stop bad faith and abusive uses of the UCL:

1. ***State Bar of California v. Damian Trevor, et al.*** (State Bar Case Nos. 02-TE-13107, 02-TE-13108, 02-TE-13416, filed March 12, 2003). State Bar disciplinary actions filed against Trevor Law Group partners Damian Trevor, Allan Hendrickson, and Shane Han, on charges of unlicensed practice and acts of moral turpitude and dishonesty including forming a corporation to perpetrate fraud, malicious prosecution, unlawful fee splitting, and multiple misrepresentations. Administrative law judge ordered all three attorneys on involuntary inactive enrollment status on May 23, 2003. Defendants resigned the State Bar, July 10, 2003.

2. ***People v. Trevor Law Group, et al.*** (L.A. Super. Ct., filed Feb. 26, 2003). California Attorney General's Office filed civil law enforcement action under the UCL for injunctive relief, civil penalties, and restitution, alleging unlawful and unfair business practices, including abusive litigation, misrepresentations, inadequate diligence, misjoinder, and other violations. The action is moving toward default judgment at the time of publication.

3. **LADA *Amicus Curiae* Participation Seeking Dismissal of TLG cases**. (See brief of *amicus curiae* Los Angeles District Attorney's Office.) Los Angeles District Attorney's Office filed *amicus curiae* brief in support of defense motions to dismiss Porter Automotive, et al. lawsuits on grounds of equitable authority and misjoinder. Cases dismissed by Judge Carl West, Dept. C-311, on March 28, 2003. (*See* Statement of Decision, April 1, 2003.) *Blue Banana* restaurant cases voluntarily dismissed by plaintiff CEWC on April 8, 2003.

AG, CDAA, and others are considering legislative alternatives with the intention of preserving the UCL while minimizing claimed abuses. In the joint Senate/Assembly Judiciary Committees hearing on UCL matters (January 14, 2003), Attorney General Bill Lockyer and the California District Attorneys Association (CDAA) both indicated concern over apparent UCL abuses and the intention to seek legal remedies and narrowly-crafted legislative solutions, as appropriate. The AG and CDAA have urged the state Legislature to use care in fine-tuning the UCL to protect against the bad faith uses of the UCL while preserving the statute as the cornerstone of California consumer protection. *See also* California Law Revision Commission, Unfair Competition Litigation, 26 Cal. L. Revision Comm'n Reports 191 (1996).

CALIFORNIA AND FEDERAL DEVELOPMENTS: PROCEDURAL LAW

Highly Regarded Group Issues Manual for Managing Electronic Evidence

The Sedona Principles: Best Practices & Principles for Addressing Electronic Document Production (March 2003)

The highly regarded Sedona Conference has now begun publishing papers on topics of particular concern to those litigating complex cases. The first in this series is a thoughtful paper on electronic document production. This 46-page monograph can be most easily accessed at http://www.thesedonaconference.org/publications_html. This is a clearly written, succinct handbook on the management of electronic materials in discovery, particularly in federal court. This is a potentially very useful manual to use when briefing clients on

the complexities of preservation and discovery of electronic materials, and some courts have already referenced this publication in cases involving disputes over electronic materials.

The armature of the publication is a series of principles. Some, like suggestions that electronic materials are discoverable or that counsel should confer early in the litigation process concerning preservation of electronic materials, are non-controversial. Others suggesting that the primary source of electronic evidence should be "active" data easily available on a large institution's servers will be welcomed by those representing large companies but questioned by many plaintiffs. Particularly in price-fixing cases in which e-mail going back several years may be critical –and typically available only on back-up tapes—this principle is likely to skew toward the defense. Another principle which plaintiffs may bridle at suggests that spoliation remedies should only be applied upon the "showing of a clear duty to preserve."

Notwithstanding the fact that the principles were apparently written primarily for those representing large institutions, the publication is full of very practical suggestions on the management of electronic materials. For example, there are thoughtful comments on the use of key word strategies to respond to requests for e-mail. There are also practical suggestions on the frequently nettlesome problems associated with preserving privilege claims for electronic materials. A glossary is provided which is complete, clear and very useful.

Because the report was finalized in March 2003, there is a potential trap in the discussion of cost shifting under Rule 26(b)(2)(iii). The monograph concludes that "[a]bsent special circumstances, costs of electronic discovery involving extraordinary efforts... [including review of back-up tapes]...should be allocated to the requesting party", citing *Rowe Entm't, Inc. v. William Morris Agency*, 205 F.R.D 421, 431 (S.D.N.Y. 2002). *Rowe* indeed supports this proposition. However, a more recent case, *Zubulake v. UBS Warburg, LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003), modifies *Rowe* using a 7-factor test that does not automatically shift costs from responder to requester.

Failure to Preserve and Produce Electronic Materials Results in Liability, Payment of Fees

Metropolitan Opera Assn. v. Local 100, Hotel Employees and Rest. Employees Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003)

Metropolitan Opera arose from an action by the Met against a union for seeking to embroil the opera company in an organizing struggle between the union and the food service operator serving Lincoln Center. The opinion contains a lengthy exegesis of the sins of Local 100's attorneys in stonewalling paper and electronic discovery, which closes with liability being found against the union plus a requirement that it pay many of the Met's legal fees. In summary, the court found that:

- "counsel knew that the Union's files were in disarray and that it had no document retention policy but failed to cause a retention policy to be adopted to prevent destruction of responsive documents, both paper and electronic;
- counsel failed to explain to the non-lawyer in charge of the client's production that a document included a draft or other non-identical copy and included documents in electronic form;
- the non-lawyer the Union put in charge of document production failed to speak to all persons who might have relevant documents, never followed up with the people he did speak to...and failed to contact all of the Union's Internet service

providers ("ISPs") to attempt to retrieve deleted e-mails as counsel represented to the court;

- no [litigation counsel] ever doubled back to inquire of the Union employee in charge of document production whether he conducted a search and what steps he took to assure complete production;"
- "shortly after Met counsel announced they might seek permission to have a forensic expert examine the Union's computers in an attempt to retrieve deleted e-mails, the Union replaced those computers without notice." *Id.* at 181-82.

The court found that ultimately this was a "failure of defendant and its counsel to establish a coherent and effective system to faithfully and effectively respond to discovery requests. *Id.* at 221. At "a minimum," counsel was required to implement a "reasonable procedure to distribute discovery requests to all employees and agents of the defendant potentially possessing responsive information, and to account for the collection and subsequent production of the information to plaintiffs." Further, "[c]ounsel had a duty to explain to their client what types of information would be relevant and responsive to discovery requests and ask how and where relevant documents may be maintained." *Id.* at 221.

The court concluded that in failing to supervise the client's work, litigation counsel failed to comply with Rule 26(g) which requires that counsel in signing a discovery response certifies that "to the best of the signer's knowledge, information and belief, formed after reasonable inquiry, the disclosure is complete and correct as of the time it is made." According to the Advisory Comments, cited by the court, this means "that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand." *Id.* at 222.

This case illuminates the responsibility of litigation counsel to properly oversee a client's discovery process arising most directly from Rule 26(g). The court makes clear that the obligation includes both a clear communication of what is required plus the need to "double back" to make sure that the client is fulfilling its obligations. The case provides useful guidance to litigators on their obligations to oversee the client's response to discovery. The case also makes abundantly clear that this obligation extends to the preservation and production of electronic materials on potential pain of terminating sanctions and payment of the other side's fees.

New Test Articulated for Cost-Shifting in the Production of Electronic Evidence
Zubulake v. UBS Warburg LLC, 2003 217 F.R.D. 309, 316 (S.D.N.Y. 2003) (*Zubulake I*);
Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake II*).

This pair of decisions by District Judge Shira Scheindlin, a jurist who has taken a particular interest in electronic discovery,[1] thoughtfully address key problems in the production of electronic materials, particularly the allocation of costs of making available back-up tapes containing potentially probative e-mail. The decisions arose from a battle between a highly-paid former equities trader and her employer over alleged gender discrimination.

---

1 Shira A. Scheindlin & Jeffrey Rabkin, Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?, 41 B.C. L. Rev. 327 (2000).

In *Zubulake I*, Judge Scheindlin used a three-step approach to the analysis of the appropriate scope and the allocation of costs of electronic discovery. First, she concluded that it is crucial to "thoroughly understand the responding party's computer system, both with respect to active and stored data". With respect to data that is kept in "an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data." Only when back-up material is "relatively inaccessible" should cost-shifting be considered.

Second, because a "cost-shifting analysis is so fact-intensive" restoration of a "small sample of the requested back-up tale is a sensible approach in most cases."

Third, with respect to materials which are so inaccessible that a cost-shifting analysis may be appropriate, she reviews the then "gold standard" case of *Rowe*, 205 F.R.D at 431, noting that *Rowe* had generally led to the shifting of discovery costs to requesters. Critically, she concludes that the *Rowe* factors are inconsistent with the federal rules. The court then articulates a new seven-factor test:

"1. The extent to which the request is specifically tailored to discover relevant information;

2. The availability of such information from other sources;

3. The total cost of production, compared to the amount in controversy;

4. The total cost of production, compared to the resources available to each party;

5. The relative ability of each party to control costs and incentive to do so;

6. The importance of the issues at stake in the litigation; and

7. The relative benefits to the parties of obtaining the information." *Zubulake I,* 217 F.R.D. at 316.

The court makes plain that the seven factors cannot be "weighted equally." The first two factors are the most important. *Id. at 322.* The court also notes that the basic balancing of interests required can only be done if there is real evidence of what may be available on back-up tapes.

At the conclusion of *Zubulake I*, the court directed that UBS produce all e-mail available on its servers, the "active" electronic material, and all information on its back-ups on optical disk, so-called "near" active material because it can be easily searched. These steps were to be at UBS's expense; no cost-shifting was appropriate for these materials.

Consistent with her second principle, the court also ordered UBS to restore a small sample of tapes for review by the plaintiff.[2] Based on what was uncovered by this effort, the court promised to apply its new 7-factor test to determine if cost-shifting for the remaining tapes would be appropriate.

In *Zubulake II*, the court again notes reports that the *Rowe* factors consistently shift the costs of producing electronic materials to the requester. *Zubulake II*, 216 F.R.D. at 284, n.

---

2 This approach was pioneered in *McPeek v. Ashcroft*, 202 F.R.D. 31 (D.C. Civ. 2001).

34. Using the results of the restoration of five back-up tapes, the judge then applies her new 7-factor test to the facts of this case.

With respect to the first factor, the extent to which the request is tailored to uncover relevant information, the court found that the restored e-mail, while useful, did not reveal that UBS's manager disliked the plaintiff specifically because of her gender. *Id.* at 286. As to the second factor, availability of relevant information from other sources, the court reached the "unavoidable conclusion that there are a significant number of responsive emails that now exist only on back-up tapes. *Id.* at 287. In weighing these first two factors, the court found that "direct evidence of discrimination may only be available through restoration" and, "[a]s a result, the marginal utility of this additional discovery may be quite high." *Id.* at 287

Turning to factors three, four and five, dealing with costs, the court concluded that the plaintiff might be able to sustain some costs, and that the costs generally were minor compared to the size of the claim. As to factor six, the public importance of the litigation, the court rated this factor as "neutral" because although discrimination is important, this was not a novel case. Finally, with respect to the last factor, the relative benefits to the parties, it was more in the interests of the requester than the responder to obtain potentially inculpatory e-mails.

Ultimately the court concluded the requester should pay 25% of the costs of recovering e-mail from UBS's back-up tapes. This applied to the electro-mechanical aspects of the process, and not to UBS's costs in privileging this material. *Id.* at 289-91. Conceptually, the court noted that "[t]he point is simple: technology may increasingly permit litigants to reconstruct lost or inaccessible information, but once restored to an accessible form, the usual rules of discovery apply." *Id.* at 291. However, in this latter regard, the court footnoted with approval a suggestion in the Sedona Principles that "claw-back" agreements allowing parties to forego privilege review without losing privilege are a practical approach to reducing such costs. *Id.* at 290 n.81.

It is very likely that Judge Scheindlin's test will be widely endorsed by other courts. Taken together, her factors recognize the new realities of electronic discovery while honoring the policies driving the federal discovery system. Certainly it will likely become a counterpoint to the *Rowe* test which generally favors shifting costs to requesters, which in most cases means plaintiffs. It is particularly important to note Judge Scheindlin's focus on the specific electronic system under review. This suggests the need to take 30(b)(6) depositions to determine just how electronic material is saved and how accessible that material may be. This, in turn, suggests the need to do this early in the discovery process and with adequate support from consultants in order to ask the questions needed to support one's analysis.

On October 2, Judge Scheindlin decided another case in which plaintiffs demanded that Credit Suisse reconstruct much of its back-up materials in a securities case. *Xpedior Credit Trust v. Credit Suisse First Boston*, 309 F. Supp. 2d 459 (S.D.N.Y. 2003). Using her new test, the court concluded that cost-shifting was not appropriate, relying primarily on the importance of the evidence and the size of the claims.

Filing of State Class Actions for a National Class Forbidden by Federal Order
In re Bridgestone/Firestone, Inc., 333 F.3d 763 (7th Cir. 2003).

This case seems to stand ordinary ideological expectations on their heads. In this case,

Circuit Judge Easterbrook opines that a federal order should issue precluding the filing of any national class action in any state court even if the class representatives were not named representatives in a class action pending in federal court. For a reputedly conservative jurist this is a striking use of federal power against state courts.

The decision arose from products litigation arising from alleged problems with Bridgestone and Firestone tires. In an earlier decision, the court found that a national class could not be certified over the opposition of the tire manufacturers. *In re Bridgestone/Firestone, Inc.,* 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003). According to the Seventh Circuit, class actions then sprang up in numerous state courts, many seeking the certification of national classes. Relying on principles of preclusion, the court opines that "when federal litigation is followed by many duplicative state suits, it is sensible to handle the preclusive issue once and for all in the original case, rather than put the parties and state judges through an unproductive exercise." 1333 F.3d at 766. The court appears to be most concerned that at some point plaintiffs might find a court in which they can win, thereby mooting the federal process. Easterbrook then writes that the Anti-Injunction Act, 28 U.S.C. § 2283, "permits a federal court to issue an injunction that will stop such a process in its tracks and hold *both* sides to a fully litigated outcome, rather than perpetuating an asymmetric system in which class counsel can win but never lose." *Id.* at 767.

Perhaps most striking in the opinion is the court's determination that all potential class members are bound by the court's order. While noting that the district court "did not offer unnamed class members the opportunity to opt out of " class certification, all such people are bound by the court's order even though they admittedly received no notice of the certification. Having been swept into the class, albeit without notice or real opportunity to opt out, the court determined that "What such a person [a non-named class member] now lacks is the right to represent a national class of others similarly situated; that's the upshot of a fully contested litigation in which every potential class member was adequately represented on this issue." *Id.* at 768. The court concludes that "[o]ur prior judgment is binding *in personam* with respect to the unnamed class members."

Reported perspectives differ dramatically on this case. Plaintiffs' counsel argued that the decision was a victory because the court refused to enjoin statewide, as opposed to national, classes. See Gary Young, Class action 'tort reform' ruling, National Law Journal (July 7, 2003). On the other hand, a Vanderbilt University law professor found it "problematic" that the federal rules were used to preclude states from exercising their traditional prerogatives. *Id.*

All-*Cy Pres* Class Settlement Proper Under California Law

In re Vitamin Cases, 107 Cal. App. 4th 820 (2003).

This case arose from a settlement of California claims against vitamin manufacturers for price-fixing. Because of the large number of small claims expected, the totality of the settlement was directed at non-profit institutions as a way of efficiently providing value back to the victims of the illegal conduct. In a well reasoned decision, Justice Haerle of the First District Court of Appeal concludes that such settlements can be proper under California law.

Those challenging the settlement argued that any class settlement had to allow individual claimants to secure relief. Then, and only then, they argued, could residue funds be distributed to charities as a form of *cy pres* relief for non-claiming victims. Challengers relied primarily on the argument that California Code of Civil Procedure section 384(b) required that individual claims be resolved before *cy pres* settlement strategies were appropriate. The

court concluded that § 384(b) "does not *require* that individual class members receive a portion of the award, but instead *assumes* that the terms of the judgment so provide." *Vitamin Cases,* 107 Cal. App. 4th at 827 (emphasis in original).

The court also concluded that due process does not require individual awards so long as "the notice explains that the proposed settlement provides solely for the distribution of funds to nonprofit organizations and foundations, states that there will be no payments to individual California consumers, and informs the class members of their options of opting out or objecting." *Id.* at 829.

In reaching its conclusion, the court focused on the practical problems of distributing class settlements when the recoveries are small and the class numerous. The court noted, for example, that virtually every consumer in California might have a legitimate claim and that the costs of distributing funds to each of them would consume a significant portion of the settlement.

This pragmatic decision aligns California practice with federal law. *See e.g.*, *New York v. Reebok Int'l. Corp.*, 903 F. Supp. 532 (2nd Cir. 1995).

Multistate Classes of Indirect Purchasers of Copper Cannot Be Certified Because of Potential Intra-Class Conflicts, Complexity of Proof of Pass-on and Failure of the Trial Court to Address Potential Conflicts with the Laws of Other States.

J.P. Morgan & Co. v. Super. Ct. (Heliotrope Gen., Inc.) 113 Cal. App. 4th 195 (2003).
Global Minerals & Metals Corp. v. Super. Ct. (Nat. Metals), 113 Cal. App. 4th 836 (2003).

In these related cases, plaintiffs alleged violations of the Cartwright Act arising from agreements to boost the price of copper and copper-based securities on the London Metals Exchange and the U.S. Commodities Exchange (COMEX). Multistate class actions were brought on behalf of copper purchasers in nineteen states and the trial court certified litigation classes for purchasers of new copper and for purchasers of scrap or recycled copper. *J.P. Morgan* involved a challenge to the certification of a class of purchasers of new copper while *Global Minerals* focused on a putative class of purchasers of scrap or recycled copper. Certifications of both classes were overturned on the same day by the same panel of the Fourth District Court of Appeal.

In *J.P. Morgan*, the court focused initially on conflicts among potential class members. Starting its analysis, the court noted that the issue of a pass-on defense among class members is unresolved, citing *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.*, 191 Cal. App. 3d 1341, 1351 (1987). With this case in mind, the court concluded that:

> This was a complicated and multi-level business structure in which proposed class members were operating, in both buyer and seller capacities, and over a long period of time. Although the trial court found such challenges should go to the weight of the evidence , and need not be resolved at the stage of a motion to certify the class, we think this analysis is incomplete, because the wide-ranging evidence presented of the nature of this industry made it impossible to overlook the potential conflicts between class members, even at the preliminary class certification stage. *J. P. Morgan*, 113 Cal. App. 4th at 215.

Turning to issues of classwide injury and proof of injury, the court focused on the assumption by plaintiffs' expert that defendants had caused injuries to the class. *Id.* at 217. However, prior to certification, defense discovery uncovered the fact that putative class

members did not "uniformly and predictably price their transactions" on the basis of the indexes allegedly covered by illegal agreements. In addition, some class member hedged forward prices or engaged in other loss mitigation strategies. Finally, the court questioned whether the pricing formulae of the class representative were typical of other businesses in the putative class. In the end, quoting *Lockheed Martin Corp. v. Super. Ct.* (Carrillo) 29 Cal. 4th 1096, 1111 (2003), the *J.P.* Morgan court concluded that "[t]he questions respecting each individual class member's right to recover that would remain following any class judgment appear so numerous and substantial as to render any efficiencies attainable through joint trial of common issues insufficient, as a matter of law, to make a class action certified on such a basis advantageous to the judicial process and the litigants." 113 Cal. App. 4th at 219.

On choice of law issues, the appellate court concluded that the contacts of one defendant with California fell "short of a clear demonstration that the hundreds or thousands of proposed class members from states other than California, who conducted their business in other states, nevertheless have brought themselves within the protection of the California Cartwright Act." *Id.* at 221. Against this background, the appellate court scored the trial court for failing to examine potential conflicts in the state laws of states within which class members were located. *Id.* at 222.

The analysis in *Global Minerals* closely parallels that of *J.P. Morgan*. Together, these cases suggest a road map for challenging certification of indirect purchaser classes. Defense discovery should be aimed at surfacing complexities in the distribution of the product. A major focus should be on intermediaries who are both buyers and sellers of the price-fixed product or products containing the price-fixed product in order to support arguments that class members are in conflict with each other. Finally, these cases suggest the crucial importance of analyzing statutes outside of California, focusing on potential conflicts with California law.

Plaintiffs can be expected to vigorously challenge the premise of this decision that these issues must be resolved at the class certification stage instead of when case proceeds or settlements are to be distributed. They will also distinguish these cases based on the peculiarly complex nature of the copper distribution system. Pragmatically, plaintiffs will also need to focus experts on causation even at the class certification stage, rather than simply allowing an expert to assume a causal link between the alleged illegal conduct and injuries to the class or classes.

Ninth Circuit Clarifies Scope of No-Opt Out Class Settlements Involving Non-Incidental Individual Claims

Molski v. Gleich, BP America, 307 F.3d 1155 (9th Cir. 2002).

Molski was a class action challenging problems confronting the handicapped in accessing ARCO service stations and mini-marts. A settlement was reached using a no-opt out class, which compromised the potential monetary claims of some class members. The case gave the Ninth Circuit the opportunity to clarify the sweep of *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

The court started by noting that its prior case law allowed for non-opt out classes under FRCP 23(b)(2) when claims for monetary damages were "incidental to the primary claim for injunctive or declaratory relief." *Probe v. State Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1240 (9th Cir. 1998). Rejecting

challengers' assertion that *Ortiz* articulated a *per se* rule against individual damages in 23(b)(2) actions, the court found that the Supreme Court in *Ortiz* "implicitly recognized" a distinction between incidental and non-incidental monetary claims.

Turning from the *per se* challenge, the court then assessed whether the proposed settlement compromised "substantial" monetary claims. First, the court noted that the actual damages, particularly those involving psychological injuries, were "not incidental because the determination of such damages requires fact-specific individualized findings." *Molski*, 307 F.3d at 1168. Second, the California Legislature had provided for treble damages on statutory claims. The court noted that it had held that "statutory treble damages are substantial and, thus, render the action to be a hybrid suit, in which minimum due process requires the right of opt-out", citing *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). *Id.* at 1169. Relying on the state statutory right of aggrieved disabled persons to seek exemplary awards, the court concluded, quoting *Ortiz*: "...Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law." *Ortiz*, 527 U.S. at 845. On this basis, the court found that the proposed settlement improperly allowed "actual and statutory damages to be released under the consent decree without granting class members the right to opt-out."

The Ninth Circuit went on to conclude that the class notice was insufficiently clear on the scope of the proposed release of claims. However, the key value in this case is the rejection of a *per se* approach to *Ortiz* and an update on analysis of "incidental" vs. "substantial" claims in Rule 23(b)(2) class actions.

Pre-Certification Communications with Potential Class Members Protected Commercial Speech

Parris v. Super. Ct. (Lowe's H.I.W., Inc.), 109 Cal. App. 4th 285 (2003).

This case arose from a class action challenging assertedly improper practices by Lowe's with respect to overtime pay and pay due at the time of termination. Relying on *Atari, Inc. v. Super. Ct.* (Carson),166 Cal. App. 3d 867 (1985), plaintiffs' counsel sought court authorization for pre-certification communications with putative class members. Plaintiffs also sought to compel answers to interrogatories demanding the names and addresses of potential class members.

On the first issue, plaintiffs relied on two published decisions authorizing a gate-keeper role for trial courts for pre-certification communications: *Atari* and *Howard Gunty Profit Sharing Plan v. Super. Ct. (Greenwood),* 88 Cal. App. 4th 572, 575-76 (2001). The court rejected these cases, finding that regulation of such communications constituted an impermissible "prior restraint" on commercial speech. *Parris*, 109 Cal. App. 4th at 295-99. It concluded that "[b]ecause no judicial approval was needed for the proposed percertification communication with potential class members, [plaintiffs'] motion for leave to engage in such communications should have been dismissed by the trial court on that ground." *Id.* at 299.

However, on the second issue, discovery, the court was not dealing with constitutional issues. In this second context, the court explicitly approved the weighing process used in *Howard Gunty*. *Id.* at 300. On the propriety of pre-certification discovery, the trial court must "expressly identify any potential abuses of the class action procedure that may be created if discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances." *Id.* at 301. According to the appellate court, the trial judge must "prepare 'a carefully crafted order demonstrating [its] weighing of any abuses or

potential abuses against the rights of the parties, including potential class members, and the integrity of the litigation process,'"citing *Howard Gunty*, 88 Cal. App. 4th at 581 (brackets in original).

"Fact Work Product" of Counsel Underlying 30(b)(6) Statements May Be Produced in Price-Fixing Case

In re Vitamins Antitrust Litigation, 211 F.R.D. 1 (D.C. Cir. 2002).

Defendants in a price-fixing action responded to demands under Federal Rules of Civil Procedure 30(b)(6) for witnesses most knowledgeable about the alleged conspiracy with a series of written statements which were to be used in lieu of live testimony. Those offering the testimony were not necessarily individuals who had participated in the alleged illegal conduct. After deposing the proffered witnesses, plaintiffs demanded the material underlying their written statements, including investigative materials.

The trial court first distinguished between "opinion work product" which contains the opinions, judgments and thought processes of counsel from "fact work product". Opinion work product receives almost absolute protection, whereas fact work product is only conditionally privileged under Rule 26(b)(3). The court endorsed the approach of a special master to require defendants to produce the material underlying the written reports for *in camera* inspection to determine if there was fact work product separable from opinion work product. To facilitate this review, defense counsel were ordered to "highlight such portions of the notes which they contend represent opinion work product before producing the Source Materials." *Vitamins*, 211 F.R.D. at 7. Defendants requested that there should be "spot checks" to determine if individual pieces of information met the standards of Rule 26(b)(3), a request that was denied.

On the basic question of whether the defense had to turn over the source material used to prepare the written 30(b)(6) testimony, the court found that, assuming that the material was fact work product, plaintiffs had met the requirements of Rule 26(b)(3) because (1) the evidence showed that "a significant portion of documents created by the alleged conspirators which provide evidence of the conspiracy have been destroyed; (2) the "majority" of those who had allegedly participated in the conspiracy had invoked their Fifth Amendment privilege; and (3) the written statements contain "inconsistencies and equivocations" with respect to key issues. *Id*. at 5. Taken together, the court concluded, these facts support the conclusion that plaintiffs had a "substantial need" for the materials but an "inability to obtain substantial equivalents to the materials without undue hardship." *Id*. at 6. This met the standard of Rule 26(b)(3), and the material ordered made available to plaintiffs.

This case illustrates problems confronting a corporation with inside information about a conspiracy, often generated by an internal investigation conducted to appease prosecutors, trying to limit civil exposure by denying that information to civil plaintiffs. Assuming that fact work product undergirds statements by 30(b)(6) witnesses, this case is a road map to securing this information under Rule 26(b). Note particularly that the factors supporting the unavailability of the evidence, notably the invocation of the Fifth Amendment and conflicting stories, are likely to be the norm rather than the exception.

New Rules Adopted by the U.S. Supreme Court to Take into Account Security Screening Procedures

Effective May 1, 2003, the U.S. Supreme Court adopted amendments to Supreme Court Rules 13.5, 25.2, 25.3, 29.2, 29.3, 30.2, 32, 39.2 and 44.6. Revisions to the Rules of the Supreme Court of the United States, 211 F.R.D. 499 et seq. The driving reason for the changes, all involving filing dates, is the delays engendered by security screening of U.S. Mail and courier packages after 9/11. For example, the Clerk's Comment on amended Rule 13.5 states that "because of the mail screening procedures presently in place, the date an application for an extension of time is received by the clerk is not in the control of the petitioner". 211 F.R.D. at 500. To address this problem, the amended rule requires that the application be filed 10 days before the final filing date. This change puts the filing date in the control of the petitioner because filing is typically effectuated when a brief is put into the mail. Therefore, according to the clerk, the timing of the filing is both clear and "within the petitioner's control".

Similar changes are made throughout the Supreme Court's rules. Although mail screening has improved dramatically in Washington, D.C., these changes typically give attorneys on the Pacific coast a bit more time to file. As a consequence, be sure to check these amended rules to determine when, in fact, individual filings need to be at the post office.

Securities and Exchange Commission Amends its Rules of Practice in Accordance with Sarbanes-Oxley to Impose New Obligations on Attorneys

Section 307 of the Sarbanes-Oxley Act of 2002 required the Securities and Exchange Commission to issue rules codifying minimum standards of conduct for attorneys appearing before the commission. The SEC articulated these standards in amendments to 17 CFR 205, made final on August 5, 2003. It will come as a surprise to antitrust practitioners that they may be covered by these new rules.

The key is the section 205.2 definition of "Appearing and Practicing before the Commission". If you are "[a]dvising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission". 17 CFR 205.2(a)(1)(iv) The explanatory notes indicate that the attorney must know that his or her work product will be submitted to the commission in order to meet the standard.

The most likely scenario for an antitrust practitioner to get caught up in this new regulation is if he or she is consulted on disclosures associated with an on-going case or internal investigation. If you are covered by this regulation, you are obligated to go up the chain of authority within the corporation to seek an "appropriate response". 17 CFR 205.2(b). If you do not comply, penalties range from civil penalties to debarment from practice before the SEC. 17 CFR 205.6.

Plain-English Jury Instructions Adopted by the Judicial Council

In a victory for clarity, the Judicial Council of California has adopted "plain English" jury instructions for California trial courts. The council's press release on the new instructions offered an example of the striking differences between the new and old instructions. An old general instruction read: "Failure of recollection is common. Innocent misrecollection

is not uncommon." The new instruction reads: "People often forget things or make mistakes in what they remember."

In a victory for the State Bar Antitrust and Unfair Competition Law Section, the council adopted instructions developed by the section for the Cartwright Act and Unfair Practices Act. There are also instructions for economic interference torts. Like the instructions developed by the section, each instruction is accompanied by a discussion entitled "Sources and Authority". This is both complete and succinct, and operates as a "Gilbert's Outline" for California competition law. If you are drafting a memo or brief, this is a very useful resource for yourself; it is also a great resource to offer a colleague who has limited experience in the area.

Historically, competition law instructions tended to be somewhat *ad hoc*. However, under new Cal. Rule of Court 855(e), it is "recommended that the judge use the Judicial Council instruction unless he or she finds that a different instruction would more accurately state the law and be understood by jurors." While this recommendation does not foreclose other instructions, it does create a presumption that the council's new instructions are appropriate in most situations.

The instructions are available (PDF format) at:
http://www.courtinfo.ca.gov/reference/4_34juryinst.htm.

California Supreme Court Adopts a Bright Line Test for Fee-Sharing
Chambers v. Kay, 29 Cal. 4th 142 (2002).

This case was generated by a fee-sharing agreement entered into between two attorneys who were not partners or associates but who shared space. Without informing the client, they entered into an agreement under which one lawyer would perform specified legal services and receive 16.5% of any ultimate fee.

Interpreting Cal. Rule of Prof. Cond. 2-200(A)(1), a unanimous California Supreme Court concluded that since the client had not provided written consent to the agreement, it was void. This left the attorney with the option of pursuing a suit for quantum meruit.

The U.S. Supreme Court Further Limits Punitive Damages
State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408(2003).

The U.S. Supreme Court took another step in throttling back the use of punitive damages in *Campbell*. The court took three steps that are important. First, the Court reaffirmed its use of the so-called *Gore* factors in assessing punitive damages. Using these factors, courts can determine and weigh the reprehensibility of the defendant's conduct. *Campbell,* 538 U.S. at 419, citing *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 576-77 (1996). In making this determination, courts can appropriately pose a series of questions:

- Was the harm physical as opposed to economic?
- Was the defendant indifferent or did it recklessly disregard others' rights or safety?
- Was the plaintiff financially vulnerable?
- Was the conduct repeated or only an isolated incident?
- Did the harm result from intentional malice, deceit or trickery, or mere accident?

The Court concluded that the existence of only one of these factors may not be sufficient to support a punitive award and that "an absence of all of them renders any award suspect." *Id.* at 419.

Second, the Court focused on the fact that the case was "a platform to expose and punish. the perceived deficiencies of [defendant's] operations throughout the country." *Campbell,* 538 U.S. at 409. Focusing on this issue, the Court found that the forum state was imposing its law on other states, concluding that as a general matter, a State has no legitimate interest in punishing a defendant for conduct committed outside of the State's jurisdiction. *Id.* at 421.

Finally, the Court addressed the size of punitive damage verdicts. The Court again declined "to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* at 425. However, it went on to re-endorse a prior statement that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* at 425. The Court then suggested that even these ratios should be reserved for cases in which the compensatory award was relatively small, indicating that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425.

Ultimately, the Court found excessive the punitive damage award in this case which represented a 145-to-1 ratio of punitive damages to a substantial compensatory award. Using the proper analysis, the Court concluded that the case "would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429.

This case is important for at least two major reasons. First, although the Court disclaims any arithmetic test for the propriety of a punitive award, it strongly reaffirms prior cases endorsing a 4-to-1 ratio as the approximate limit on the ratio of punitive damages to compensatory damages. Second, the case directly attacks the use of a single case to address a national pattern of misconduct. This will be used to lower punitive damage claims but it may also be used as authority to evidence of bad conduct in locations outside of the forum state.

Effects of Joint Defense and Joint Interest Agreements Clarified; DCA approves use of *In Camera* Inspections to Determine Whether Disclosures Remain Confidential.

OXY Resources Cal. LLC v. Super. Ct. (EDG Resources, Inc.), 115 Cal. App. 4th 874 (2004).

OXY Resources arose from a challenge to the purchase of a power plant. Two companies entered into an agreement to transfer the plant by way of an exchange of assets. In the course of negotiating the sale, the buyer and seller executed a joint defense or joint interest agreement to facilitate exchanges of confidential information, particularly documents and records covered by the attorney-client and work product privileges. A third company challenged the deal on the basis that it assertedly had a right of first refusal with respect to any sale of the plant, irrespective of how the deal was denominated. In discovery, the plaintiff sought and obtained from the trial court an order directing the buyer and seller to make available these materials to the challenger.

The First District Court of Appeal reversed, characterizing this as a case of first impression with respect to the use of joint defense or joint interest agreements in the context

of a business transaction. At the outset, the court noted that such agreements do not themselves create a privilege that does not already exist. As a consequence, "the party seeking to invoke the doctrine must first establish that the communicated information would otherwise be protected from disclosure by a claim of privilege." *Id.* at 890. Citing to Evidence Code section 912(d), the court noted that the privilege is not lost by disclosure to another "when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer. . .was consulted. . ." *Id.*

Applying these principles to joint interest agreements, the court opined that while it is "essential that participants in an exchange have a reasonable expectation that information disclosed will remain confidential", any disclosures must also "be reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted." *Id.* at 891. Although *in camera* review of communications protected by the attorney-client privilege is unnecessary because that privilege can be determined from the relationship rather than the content of the communication, judicial review of the actual communications among parties pursuant to a joint interest agreement is essential in order to determine if they meet the "reasonably necessary" standard. *Id.* at 896.

Turning to whether joint interest or joint defense agreements are limited to situations in which litigation has begun, the *Oxy Resources* court concludes that no such limitation is contemplated by either sections 912 or 952 of the Evidence Code, noting that "[t]he need to exchange privileged information may arise in the negotiation of a commercial transaction." *Id.* at 897. The court then quotes with approval *Hewlett-Packard Co. v. Bausch & Lomb, Inc.,* 115 F.R.D. 308, 311 (N.D. Cal. 1987) 115 Cal. App. 4th at 898 (brackets in original): '[b]y refusing to find waiver in [commercial] settings courts create an environment in which businesses can share more freely information that is relevant to their transactions. This policy lubricates business deals and encourages more openness in transactions of this nature."

Finally, the court addresses who may assert a claim of privilege in the context of a joint defense or joint interest agreement, concluding that "a party need not be in possession of documents to assert a claim of privilege, provided there has been no waiver of a privilege." *Id.* at 901.

This is an extremely important case because it provides substantial support for joint interest or joint defense agreements. The one caveat is that not all communications pursuant to such agreements are covered but only those that can be argued later advance the interests of the lawyers in representing or counseling their clients.

New Rules Adopted by the California Judicial Council.

The Judicial Council continues to articulate new, clearer rules in a series of rules effective January 1, 2004. Major changes include:

Rule 212, relating to trial setting, is amended to add a new subdivision j to articulate specific criteria for the setting of trial dates. Factors explicitly include: recent major amendments in the pleadings, dates proposed by the parties and schedule conflicts for lawyers and their clients.

In a similar vein, Rule 375, relating to continuances of trial dates, is amended to clarify standards for granting such requests. These include the addition of a new party without sufficient time to prepare, conflicting trials and whether all parties have agreed to the continuance.

Rule 204, relating to trial delay goals, is amended to provide greater flexibility in the setting of trial dates. Specifically, the amended rule puts greater emphasis on the use of case management conferences to set realistic trial dates rather than arbitrary time-frames established by rule.

Rules 243.1 - 243.2, relating to sealed records, put the burden on those seeking confidentiality to make specific factual and legal showings. Given the sensitive nature of many business records, these rules add much needed clarity to the standards for protecting and disclosing such records.