



DAILY APPELLATE REPORT

CIVIL LAW

Attorneys: Attorneys for plaintiffs cannot avoid liability in malicious prosecution action merely by showing that they took passive role in case as standby counsel. *Cole v. Patricia A. Meyer & Associates APC*, C.A. 2nd/4, DAR p. 7659

Civil Procedure: Lawsuit is not barred on grounds of claim preclusion where plaintiffs in second action sought remedy that was unavailable to party in prior case. *Harris v. County of Orange*, U.S.C.A. 9th, DAR p. 7670

Civil Rights: Review of excessiveness of fine under Eight Amendment requires consideration of individualized culpability of property's owner even if not required under statute. *United States v. Ferro*, U.S.C.A. 9th, DAR p. 7698

Constitutional Law: First Amendment mandates that media be allowed to witness entire process of inmate's execution. *The Associated Press v. Otter*, U.S.C.A. 9th, DAR p. 7695

Employment Law: Civil Service Reform Act precludes district court jurisdiction over petitioners' claims because Congress intended CSRA review scheme to provide exclusive avenue to judicial review. *Elgin v. Dept. of Treasury*, U.S. Supreme Court, DAR p. 7680

Insurance: Insurer's duty of good faith and fair dealing may be premised on insurer's failure to effectuate settlement where insured's liability was reasonably clear. *Du v. Allstate Insurance Co.*, U.S.C.A. 9th, DAR p. 7705

CRIMINAL LAW

Criminal Law and Procedure: Defendant's ineffective assistance of counsel claims fail where defendant could not show that trial counsel's conduct was both deficient and prejudicial. *Leavitt v. Arave*, U.S.C.A. 9th, DAR p. 7692

Criminal Law and Procedure: Good faith exception to officers' execution of warrant on defendant's home does not apply where officers' reliance on warrant was 'entirely unreasonable.' *U.S. v. Grant*, U.S.C.A. 9th, DAR p. 7710

Criminal Law and Procedure: Antiterrorism and Effective Death Penalty Act of 1996 proscribes using federal habeas review as vehicle to second-guess reasonable decisions of state courts. *Parker v. Matthews*, U.S. Supreme Court, DAR p. 7676

Full rulings and summaries are online by 4 p.m. the day they are issued. www.dailyjournal.com

BRIEFLY

Moving to fill Northern District bench vacancies, President Barack Obama on Monday nominated Alameda County Superior Court Judge Jon S. Tigar and Deputy Assistant Attorney General William H. Orrick III for federal trial court robes. Tigar is a former commercial litigator at Kecker & Van Nest LLP. He got his law degree from UC Berkeley School of Law in 1989. Orrick formerly worked at Coblenz Patch Duffy & Bass LLP. He was awarded his law degree cum laude from Boston College Law School in 1979.

Justices will decide securities case issue

Amgen asks high court to answer whether plaintiffs must prove materiality early on

By Robert Iafolla
Daily Journal Staff Writer

WASHINGTON — The U.S. Supreme Court agreed Monday to hear a Southern California biotechnology company's challenge to a judgment allowing investors to band together and collectively sue the company for allegedly manipulating its stock price.

Despite Amgen Inc.'s arguments to the contrary, the 9th U.S. Circuit Court of Appeals held that the investors don't have to show they took the company's alleged misrepresentations into account in order for a district judge to certify them as a class. In other words, the circuit ruled plaintiffs don't need to demonstrate the misrepresentations were material in order to sue as a group.

Overtuning the 9th Circuit decision on materiality could shift the playing field for securities class actions.

"If the Supreme Court should hold that proof of materiality is a prerequisite for class certification, it would greatly strengthen the defendant's hand and further weaken class-action procedures," said James D. Cox, a professor at Duke University School of Law and an expert on securities law.

Class certification is especially critical in securities fraud cases, legal experts said. Failure can make it economically infeasible for plaintiffs to pursue their claims. Conversely, success grants plaintiffs enormous leverage to pressure defendants to settle.

Plaintiffs filed more than 750 securities fraud class actions in the 9th Circuit between 1996 and 2011, or nearly one out of every four filed nationwide, according to data collected by the

Stanford Securities Fraud Class Action Clearinghouse for an amicus brief urging the court to take the case. Those class actions have led to about \$7.6 billion in settlements.

Connecticut Retirement Plans and Trust Funds filed a fraud-on-the-market lawsuit against Amgen claiming the Thousand Oaks-based biotech giant covered up safety concerns about a pair of its products used to treat anemia, thus artificially pumping up the price of its stock. That class would cover anyone who purchased Amgen stock between the April 2004 date of the first alleged lies and the May 2007 date when the truth was purportedly revealed and the stock price dropped.

Specifically, the investors claim Amgen downplayed the U.S. Food and Drug Administration's concerns about the company's drugs, concealed details about a cancelled clinical

See Page 2 — SECURITIES

ASSESSING THE IMPACT



Robert Levins / Daily Journal

Catherine Lhamon was hired by Public Counsel in 2009 to create an impact litigation division.

Public Counsel flexes muscle

Nation's largest legal nonprofit has tackled increasingly bigger issues

By Jason W. Armstrong
Daily Journal Staff Writer

Public Counsel's Shashi Hanuman didn't mince words in a May 21 public statement about a letter the legal nonprofit shot off to the Los Angeles planning department assailing the environmental study of the city's massive downtown Farmers Field football stadium project.

"The neighborhoods around downtown need to stay affordable," said Hanuman, the organization's director of community develop-

ment. "The draft report does not sufficiently analyze how the project will affect rents and housing prices" in surrounding areas.

The nonprofit's letter, co-written with the Legal Aid Foundation of Los Angeles, was the latest in a three-year string of bolder, more controversial stands Public Counsel has taken on issues like housing protections for poor people, immigrants' rights and imbalanced educational opportunities for children. But while the organization gets a big chunk of its private donations from law firms — and experts say big firms can be reluctant to donate

to public interest groups involved in highly contentious issues due to fears of offending clients — Public Counsel said it recently has seen its contributions increase.

Last year, donations fueled 33 percent of Public Counsel's \$8.76 million budget revenues, a 1 percent increase from the previous year. The group's overall revenue, which also includes a series of fees, grants and interest on lawyer trust accounts, increased \$600,000 since 2010.

O'Melveny & Myers LLP, for example,

See Page 6 — PUBLIC

GUEST COLUMN



Martin Kenney is a professor in the Department of Human and Community Development at UC Davis and a Senior Project Director at the Berkeley Roundtable of the International Economy at UC Berkeley.

Venture capital: a dysfunctional system?

During these the dark days of economic gloom in the U.S. and Europe, the U.S. venture capital-financed innovation system is widely admired and even envied globally. The roll call of new firms that received venture capital financing is incredible. Silicon Valley is a core symbol of the American brand of capitalism, in which a complex alchemy of venture capital, world-class universities, and a diverse population of talented people combine to produce a dynamic brew of innovative start-ups and new technologies.

Venture capitalists serve the function of recycling a small portion of institutional investors' funds into risky new ventures that, when considered as part of a portfolio, should have greater returns than common stock or some other benchmark. The social benefit is that new ventures capable of providing new growth are

assisted during their earliest and most risky period. Importantly, this is a private sector solution through which entrepreneurs, venture capitalists and institutional investors can benefit, as well as society.

During the last five years, among some venture capitalists, limited partners and outside observers, there have been increasing murmurs of disquiet concerning the operation of the venture capital system.

Last month, the Kauffman Foundation, an organization that is normally bullish on entrepreneurship, on the basis of its \$250 million portfolio of VC investments, released a startling report on its performance. The report provides conclusive evidence that for most limited partners, today's VC model is dysfunctional and probably, given the problems, not economically sustainable.

See Page 6 — GROWING

MORE NEWS

Litigation

Cyberbully Crackdown

Laws set to take effect July 1 address cyberbullying in our school system. By Dean A. Olson and Matthew T. Kramer of Morris Polich & Purdy LLP

Litigation

Litigating Terabytes



DOJ's recently issued guidance on eDiscovery doesn't even mention the open-file approach to digital discovery. By Matthew Umhofer of Skadden, Arps, Slate, Meagher & Flom LLP

Corporate

'Birther' in Close Judge Race

A constitutional attorney who champions conservative causes and brought a lawsuit challenging Barack Obama's birthplace is in a close San Diego County Superior Court judge race.

Government

Nominee is Closer

9th U.S. Circuit Court of Appeals nominee Andrew D. Hurwitz crossed a crucial procedural threshold Monday, leaving him a step from the federal bench.

DEAL MAKERS

MERGERS & ACQUISITIONS

Skadden, Goodwin assist in purchase of oil software vendor

Calgary-based Paradigm Ltd., which sells oil drilling and production optimization software, is being purchased by London-headquartered private equity investment group Apax Partners and Baltimore-based growth equity firm JMI Equity for approximately \$1 billion in cash, Apax and JMI announced Monday. Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates represented Paradigm with a team led by Palo Alto-based M&A partner Amr Razzak. The Skadden team also included Palo Alto M&A partner Kenton J. King, Palo Alto executive compensation and benefits partner Joseph M. Yaffe and Los Angeles partners K. Kristine Dunn and Karen L. Corman. San Francisco-based partner Bradley A. Bugdanowitz of Goodwin Procter LLP represented JMI. Kirkland & Ellis LLP represented Apax.

Latham & Watkins helps drive \$335 million fuel deal

Indiana-based crude oil processor Calumet Specialty Products Partners LP signed an agreement last week to acquire Royal Purple Inc., a Texas-based manufacturer of automotive, motorcycle, marine and industrial lubricants, for \$335 million. Latham & Watkins LLP provided legal counsel to Calumet with Los Angeles-based partner Pardo Zomorodi advising on tax matters. The deal is expected to close by mid-July. Hallett & Perrin PC, based in Dallas, provided legal counsel for Royal Purple and Milwaukee-based Cleary Gull Inc. acted as Royal Purple's financial advisor.

Sullivan & Cromwell represents in used clothing company sale

Washington-based secondhand clothing company Savers Inc., owned by Freeman Spogli & Co., is being purchased by TPG Capital, Leonard Green & Partners LP and Savers chairman Thomas Ellison in a deal announced last week valued at approximately \$1.7 billion. Sullivan & Cromwell LLP represented Ellison and Savers CEO Ken Alterman, who will remain in his position, with Los Angeles M&A partner Alison S. Ressler working on the Sullivan & Cromwell team. Latham & Watkins LLP represented Leonard Green & Partners with a team led by Los Angeles partner Jason H. Silvera that included Los Angeles finance partner John M. Jameson and associates Ashran Jen, Jordan A. Miller, Sean C. Denvir and Paul Y. Chan. Bingham McCutchen LLP represented Savers and Cleary Gottlieb Steen & Hamilton LLP represented TPG. The deal is expected to close in July. Ellison is slated to continue as chairman.

Coblentz advises shareholders in medical company sale

MeadWestvaco Corp., a large packaging and office products company based in Virginia, completed its acquisition of Switzerland-based medical company AARDEX Group SA last week. San Francisco firm Coblentz, Patch, Duffy & Bass LLP represented some AARDEX

shareholders, with corporate partner Paul Escobosa handling cross-border negotiations among the U.S., Switzerland and Belgium. MeadWestvaco was represented by in-house counsel. AARDEX's Medication Event Monitoring System collects and analyzes patient readings during clinical trials.

Hogan Lovells handles ESPN Asia deal for News Corp.

New York-based News Corp. agreed to buy The Walt Disney Co.'s 50 percent stake in the pan-Asian sports joint venture, ESPN STAR Sports last week. The companies formed the sports media group, which currently operates 28 broadcast networks in India and across Asia, 16 years ago. The terms of the deal were not disclosed. The Hogan Lovells team advising News Corp. was led by Los Angeles managing partner Stephen H. Kay with assistance from associates Robert L. Efthimos and Lorig S. Kalaydjian. A New York team from White & Case LLP advised Disney.

Winston & Strawn assists in sale of SF bakery to Starbucks

Seattle-based Starbucks Corp. announced last week it is purchasing La Boulange, a bakery with 19 locations in and around San Francisco, for \$100 million. Winston & Strawn LLP, led by San Francisco-based partner James E. Topinka, represented investment firm Next World Group, the San Francisco-based lead investor in La Boulange. The deal is expected to close in the third quarter of this year. Next World Group invested in La Boulange in 2006. Attorneys in the Seattle office of Davis Wright Tremaine LLP represented Starbucks.

FINANCINGS

Paul Hastings, Latham aid with pharmaceutical offering

Novato-based BioMarin Pharmaceutical Inc., which develops therapies for chronic and debilitating diseases and medical conditions, received legal counsel from Paul Hastings LLP in last week's underwritten offering of 6.5 million shares of common stock. The company expects to raise approximately \$249 million before costs. San Francisco-based securities and capital markets partner Thomas R. Pollock led the Paul Hastings team, which also included corporate associates Samantha H. Eldredge in Palo Alto and Aliza M. Cohen in San Francisco. Bank of America Merrill Lynch and Barclays acted as underwriters, with Orange County-based Latham & Watkins LLP partner B. Shayne Kennedy and associate Matthew S. Davis-Ratner representing the underwriters.

— Andrew McIntyre

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Entertainment Studios Inc. names first general counsel

By David McAfee
Daily Journal Staff Writer

Entertainment Studios Inc., a Los Angeles-based broadcast syndication company headed by comedian Byron Allen, announced Monday the addition of its first general counsel. The appointment is effective immediately.

Mark P. DeVitre was most recently general counsel at StarGreetz Inc., where he worked for two years. Prior to joining StarGreetz, he was senior vice president of business affairs and operations at Warner Bros. Entertainment Inc., senior vice president of operations at FX

Network and general manager of Fox Movie Channel. Entertainment Studios, which operates six cable networks, including Carstv, Recipe.tv, Comedy.tv, Mydestination.tv, Pets.tv and Es.tv, is expanding its reach to include scripted programming, DeVitre said. "Entertainment Studios has a lot of interesting projects going on," he said. "It's been a really quiet player for many years, building up a really great business. I'm excited to be here for what I think will probably be its rocket-propelled launch into new areas of the business."

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Public Counsel assumes a more aggressive stance

Continued from page 1

opped its Public Counsel contribution from \$35,000 in 2011 to \$50,000 this year.

"In theory, firms could be reticent to get involved" with public interest law organization work involving hot-button issues, said Deborah L. Rhode, Ernest W. McFarland Professor of Law at Stanford Law School who is an expert in public policy and ethics and has written a book studying lawyers' pro bono work.

In the 2000s, she said, some firms experienced "pushback" for representing Guantanamo Bay defendants pro bono, with critics suggesting that other firm clients "pull their business" because of the controversial nature of the case involving terrorism defendants. But the firms didn't lose business as a result, and Rhode said lawyers at other firms in fact began trying to solicit Guantanamo-related work.

She said "there's often a tradeoff involved" when firms take up highly contentious pro bono issues.

"You get more visibility with the more high-profile cases," she said. Also, the public interest organization is perceived as "doing important work."

Hernan Vera, who spearheaded Public Counsel's culture shift four years ago when he took the reins as president and CEO, said that since the group began litigating more aggressively, "there hasn't been pullback" from donors or law firms that partner with it on pro bono matters.

"If anything, it's increased the excitement from supporters that we're doing more."

The 42-year-old public-interest law office of the Los Angeles County and Beverly Hills bar associations previously partnered with law firms on major civil rights issues but tended to take matters for thousands of individual clients on a case-by-case basis. But in 2009 it significantly increased and broadened its litigation efforts when it brought on board Catherine Lhamon, the American Civil Liberties Union of Southern California's hard-charging former assistant legal director, to head Public Counsel's newly created impact litigation division.

"I think over the past few years — and especially with Catherine being head of impact litigation and with leadership giving her free rein to develop a docket consistent with its overall goals — [Public Counsel] has become a very major force in the civil rights community," said Mark D. Rosenbaum, chief counsel of the ACLU of Southern California.

In the past three years, Lhamon — whose ACLU resume included successfully defending a desegregation program for Los Angeles public schools and fighting racial profiling of students by Los Angeles sheriff's deputies — strengthened the organization's courtroom presence in a flurry of closely followed cases. Those have included serving as co-counsel for the National Association for the Advancement of Colored People, the Community Action League — an Antelope Valley residents' group — and several low-income people in a suit accusing

the cities of Lancaster and Palmdale of harassing and intimidating black and Latino families who use Section 8 housing vouchers.

The 2011 case spurred a February settlement with Palmdale, which agreed to end discrimination against poor residents, including withdrawing a city-funded investigator who collected information on families receiving Section 8 help. The county also agreed to take steps to end harassment of such residents. Claims against Lancaster are pending.

In another big case, Public Counsel, the ACLU of Southern California and Morrison & Foerster LLP represented three middle schools in a suit against the Los Angeles Unified School District and the state, contending deep budget cuts and a rash of teacher layoffs at three low-performing campuses violated students' rights to a fair and equal education. In an October 2010 settlement, the district agreed to cap the number of teachers laid off from any single campus and to protect up to 45 low-performing district schools from suffering teacher layoffs during budget cuts.

It's increased the excitement from supporters that we're doing more.'

— Hernan Vera

Last July, in another headline-grabbing case, Public Counsel and Locke Lord Bissell & Liddell LLP reached a settlement with the U.S. Department of Housing and Urban Development and the owners of the Holiday Venice apartment complex that Public Counsel said enabled hundreds of residents of one West Los Angeles' last affordable housing developments to hang onto their low-rent privileges.

Lhamon described Public Counsel's impact litigation boost as "exciting" and said it's "the right way to respond to the civil rights needs of the community."

After Vera took the organization's helm in 2008, replacing Dan Grunfeld, the group's president and CEO for a decade, he said he developed a "strategic plan" with board members and staff to "increase effectiveness" and expand issues "we've been working on for 40 years."

He said, "The main one that had the most support from the board and staff was developing a more aggressive litigation strategy."

Michael Soller, Public Counsel's spokesman, declined to discuss specific dollar amounts but said the group got "a financial commitment from the board to expand the scope of the work" and increased its fundraising to make it happen.

Grunfeld, now co-managing part-

ner of the Los Angeles and Palo Alto offices of Kaye Scholer LLP, said impact litigation "has always been part and parcel of what Public Counsel has been involved in."

"It goes back to the olden days of Public Counsel," he said. "What has changed in recent years is the fact that impact litigation has become a dedicated project with more resources."

Public Counsel's concern about the Farmers Field project's impact on dwindling housing in downtown Los Angeles was its chief reason for jumping into the imbroglio over whether the development meets environmental standards, Vera said. Developer Anschutz Entertainment Group has said the project will be environmentally friendly, with a range of "green" details, but in their 77-page letter, Public Counsel and Legal Aid urged Los Angeles officials to revise and recirculate the development's voluminous draft environmental report. They argued the report made only " cursory mention" of the project's impact on surrounding housing.

Armbruster Goldsmith & Delvac LLP partner William F. Delvac, an attorney for AEG, said his client isn't "overly concerned" about the letter. "We believe the EIR is legally adequate and its conclusions are supported."

Vera said his group's decisions to criticize the AEG project and to wage increasingly aggressive litigation hasn't led to trepidation among firms or companies that support Public Counsel. AEG isn't one of the group's donors. He said firms view the matters as ways to "showcase their legal skills" and to "have an enormous impact for good on the community."

David A. Lash, managing counsel of public interest and pro bono services at O'Melveny & Myers, said he'd be surprised if any "one stand or case or issue" would "have a major negative impact" on the group. Lash, who sits on the board of directors for public interest firm Bet Tzedek, has worked on cases with Public Counsel.

Carole E. Handler, of-counsel with Lathrop & Gage LLP and a former board member for Public Counsel who now sits on Bet Tzedek's board, said other California legal assistance nonprofits are gravitating toward taking bigger stands on issues affecting their clients and have recently formed impact litigation divisions to more aggressively tackle litigation.

Like Public Counsel, Bet Tzedek launched its impact litigation arm three years ago.

"I think our culture has changed," Handler said. "The kinds of people who go into public services and work for pro bono services... are very cognizant of the increasing disparity in incomes and the inability of people to accomplish things as individuals."

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Growing disquiet surrounding venture capital system

Continued from page 1

See <http://www.kauffman.org/uploadedFiles/vc-enemy-is-us-report.pdf>.

After painstaking portfolio analysis, the conclusion of the Kauffman Foundation authors is quite simple and even stark, "based on our data, we've reached the conclusion that the LP investment model is broken." Their portfolio of venture investments is not out-performing, more liquid public market benchmarks. When the Kauffman results are combined with the recent spate of openly predatory IPOs culminating with the Facebook debacle, it seems legitimate to ask whether the current venture capital system is self-destructing.

From the limited partners' perspective, what do they identify as dysfunctional?

First, it is widely known that since venture capital investing is "home run business," and there are comparatively few home runs, returns are highly skewed. There is also path-dependence, so very successful venture capital firms attract the best entrepreneurs, thereby reinforcing their earlier success. Given the finite number of good deals and an objective limit to the amount of capital the best firms can deploy effectively, most limited partners cannot invest in the best VC firms and therefore, if investment managers have a mandated percentage for venture capital, they will be forced to invest in less successful VC firms that will almost certainly have inferior performance.

Second, the "2 and 20" investment structure (2 percent management fee

and 20 percent share of appreciated capital that goes to venture partners) provides a concrete motivation for venture capitalists to raise as much capital as possible, after all their management fee increases as their managed capital increases. If the venture capitalists simply placed the funds in a small capital mutual fund after 10 years of compounding, they would be rewarded with 20 percent of whatever appreciation occurred — even if they did nothing! In other words, the VCs receive a handsome income from the management fee regardless of their performance. Moreover, as the Kauffman report reveals, all things being equal, the larger the fund, the less well it performs. Put simply, the venture capitalist's return increases, as that of their investor tends to decrease!

Most important, the preponderance of the venture funds, after fees etc., did not perform significantly better than a comparable small capital public equity portfolio.

Third, and most important, the preponderance of the venture funds, after fees etc., did not perform significantly better than a comparable small capital public equity portfolio. If this is the case, then the institutional investment managers are not meeting their fiduciary responsibility when they tie up capital for a decade with punitive early exit clauses and no better returns.

If we accept the conclusions of the Kauffman Report about the plight of the limited partners and combine them with the disappointing performances of deliberately over-hyped recent public offerings such as those in nanotechnology, Clean Technology, Groupon and Facebook, then there are reasons for concern about whether this remarkable American innovation for funding high-potential firms is being destroyed by insider greed. Further, can financial advisors any longer advise their clients to invest in venture capital or venture capital-financed IPOs?

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