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Business Litigation in the San Francisco Superior Court System

Located in one of the major commercial centers in California, the San Francisco Superior Court has a relatively high volume of business litigation on a per capita basis. The San Francisco Superior Court has addressed the needs of the business litigation community by implementing specific court systems. In this article, I describe the history and function of two of the major aspects of the San Francisco Superior Court that help deal with the caseload of business litigation: the recently expanded complex litigation departments, and the system for obtaining a single-assignment judge.

Complex Litigation

In March of 1996, then-Chief Justice Lucas appointed the Judicial Council Business Court Study Task Force to consider the merits of adopting some form of specialized court tribunal for business and commercial disputes. The Task Force conducted extensive study and analysis and recommended against implementation of a specialized court for business cases. Instead, the Task Force recommended that the Judicial Council consider and evaluate the use of complex litigation departments in

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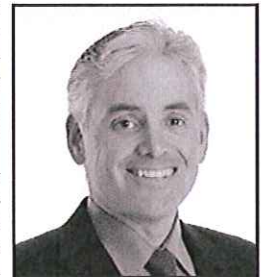
Hon. David L. Ballati

Playing the § 3295 Card in Fraud Cases

Many experienced business litigators think of their sport as a leveraged negotiation. Client imperatives in business mandate a constant re-evaluation of every case through the prism of the cost and risk of proceeding through trial. Settlement value, while not empirically determined, is real enough to the litigants and therefore the litigators. Accordingly, counsel's stock in trade is to continually hone existing weapons, and to develop new ones which can be used to enhance leverage over their opponent. A motion pursuant to California Civil Code § 3295 for discovery of financial information belongs in the tool box of any counsel representing business plaintiffs.

For both sides, but more commonly defendants, motions for summary judgment or summary adjudication provide the clearest way to raise risks to the other side. Whether or not such a motion has a high likelihood of allowing a pretrial exit for a party, it can be partially justified by the leverage it creates in settlement negotiations. However, such motions increase fees for clients and, particularly when brought in California state court, suffer from a number of shortcomings. Motions for summary judgment or summary adjudication now require a minimum of 75 days' notice. Cal. Code Civ. Proc. § 437c(a). The opposing party can often easily avoid summary judgment by identifying just a single triable issue of fact. *Id.* § 437c(c). And a party can always ask the judge for additional time in which to conduct discovery. *Id.* § 437c(h). Besides these procedural disadvantages, it is well understood by practitioners that California state court judges are typically more reluctant than their federal counterparts to grant motions for summary judgment.

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Playing the § 3295 Card in Fraud Cases

There are a number of other tactics available to litigators, short of a motion for summary judgment, which can help increase leverage over one's opponent. A preliminary injunction motion, for example, forces an early evaluation by a neutral judge, who must determine the likelihood of success on the merits. Such a determination, independent of the remedy achieved, can be the death knell of a defendant's case, or at least force the commencement of serious settlement talks. A *Daubert* motion can gut the plaintiff's case if successful, by obtaining a ruling barring expert testimony which makes it practically impossible to establish liability, causation, or damages.

From the plaintiff's side, a seldom-used, but potentially devastating, tactic to increase leverage over a defendant in cases involving potential punitive damages is a motion



Steve Steinberg

establishing the right to pretrial discovery of financial information pursuant to California Civil Code § 3295 ("Section 3295"). Such a motion is technically a discovery motion, but like a motion for a preliminary injunction, it requires the Court to evaluate the merits of the plaintiff's case. Although the remedy is no more than an order establishing the right to take financial discovery, a finding in favor of the plaintiff on a Section 3295 motion more or less ensures that the issue of punitive damages will go to the jury.

Therefore, the motion can be a potent weapon to bring a corporate defendant to the settlement table.

California Civil Code § 3295

Section 3295, entitled "Protection of evidence of financial condition," provides as follows:

(a) The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294 [providing for exemplary/punitive damages in cases of oppression, fraud, and/or malice], prior to the introduction of evidence of:

(1) The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence.

(2) The financial condition of the defendant.

...

(c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision.... Upon motion by the plaintiff supported by appropriate affidavits...the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294.

Generally speaking, Section 3295 provides for pretrial

discovery of a defendant's financial condition or wrongfully gained profits where a plaintiff can show a substantial likelihood of prevailing on its claim for punitive damages.

Note that such a motion does not suffer from the same deficiencies as a motion for summary judgment, cited above. As a discovery motion, a Section 3295 motion can be brought on just 16 court days' notice, and cannot be postponed by the defendant's asking for additional time in which to conduct discovery. Moreover, since the practical effect of granting such a motion is to simply permit certain discovery to take place, a judge can be expected to be much more willing to grant it without fearing a reversal on appeal, or that he/she has decided the case on the merits erroneously.

The Legal Standard Applied to a Section 3295 Motion

As cited above, Section 3295(c) requires a finding that there is a "substantial probability" that the plaintiff will prevail on its claim for punitive damages. In *Jabro v. Superior Court*, the California Court of Appeals interpreted this standard as follows:

Before a court may enter an order permitting discovery of a defendant's financial condition, it must (1) *weigh the evidence* submitted in favor of and in opposition to motion for discovery; and (2) make a finding that it is *very likely the plaintiff will prevail* on his claim for punitive damages. In this context, we interpret the words "substantial probability" to mean "very likely" or "a strong likelihood" just as their plain meaning suggests. We note that the Legislature did not use the term "reasonable probability" or simply "probability," which would imply a lower threshold of "more likely than not."

95 Cal. App. 4th 754, 758 (2002) (emphasis added). The *Jabro* court's reliance on plain meaning is intuitive, but there is still room for enterprising plaintiffs to try to lower the showing required to a "prima facie" case, by arguing California Supreme Court precedent touching on the issue.

Though the *Jabro* court distinguished it, plaintiffs can argue for the application of *College Hospital, Inc. v. Superior Court*, 8 Cal. 4th 704 (1994). There, the California Supreme Court interpreted language in Code Civ. Proc. § 425.13 that is identical to the "substantial probability" language in Section 3295(c), to require only a *prima facie* showing, or evidence of a *triable claim* for punitive damages. *Id.* at 719-20. This interpretation of the language in Section 3295(c) would also be consistent with Section 3295(a), which explicitly requires only a *prima facie* case of liability for punitive damages in order to introduce evidence of a defendant's financial condition or wrongfully gained profits at trial. Plaintiff's practitioners can argue "why would a plaintiff have to meet a higher burden to conduct pretrial discovery into a defendant's financial condition and profits than to present such information to the jury at trial?" Such a result would be inconsistent with the general rule that discovery is permitted regarding not only evidence that might be admissible at trial, but also of any matter "reasonably calculated to lead to the

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discovery of admissible evidence.” Cal. Code Civ. Proc. § 2017.010.

Jabro explicitly distinguishes *College Hospital*, but Weil and Brown questions the rationale for doing so. Compare *Jabro*, 95 Cal. App. 4th at 758-59 with *The Rutter Group*, California Civil Procedure Before Trial, ¶ 8:339.7 (2007). Given the conflict of authorities, it is not surprising that we have personally seen multiple instances of courts applying one or the other standard when considering a Section 3295 motion. If confronted with clear evidence of fraud, a court has little incentive to disallow financial discovery, and the plaintiff can reasonably hope for a fair assessment of that evidence in a ruling on the motion for financial discovery.

Potential Rulings/Fallout from a Section 3295 Motion

Regardless of the standard applied to a motion pursuant to Section 3295, if such a motion is granted, it can have significant ramifications for a case. A ruling in favor of the plaintiff virtually guarantees that the issue of punitive damages will go to the jury at trial, thus raising the stakes considerably higher. The Court’s ruling on the motion must necessarily make an explicit finding that the plaintiff has established a “substantial probability” that it will prevail on a fraud claim or other claim for punitive damages. Whether interpreted to mean “very likely” or “a strong likelihood,” or merely a *prima facie* showing, such a ruling can pierce through a defense counsel’s underselling of a case to its client, and is sure to have an impact in the corporate boardroom.

Beyond the basic finding on the plaintiff’s claim for punitive damages, a Section 3295 motion invites the court to make certain evidentiary findings concerning the elements of the claim. For example, in *Accton Technology Corp. v. Micro Linear Corp.*, the court not only found that there was a substantial probability that Accton would prevail on its punitive damages claim, but made affirmative findings of Micro Linear’s intentional misrepresentations. While such findings do not constitute a determination on the merits, and cannot be used at trial, they can reasonably be expected to have a powerful influence on a defendant’s decision-makers.

Upon winning a motion pursuant to Section 3295, the plaintiff will be permitted to conduct certain discovery into the defendant’s financial condition and/or wrongfully gained profits, which may include deposing the CFO. The nature and extent of the discovery allowable will depend upon the aggressiveness of the litigators involved and the discovery adjudicator, which may be a judge, commissioner, or referee. There are no reported cases on limits having been imposed on plaintiffs after a grant of a Section 3295 motion.

Depending on the case, the discovery itself may arguably not be as important as the ruling to get such discovery, since it comes with the finding of a substantial likeli-

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Keeping Corporate Secrets: Whose Information Is It Anyway?

When faced with a grand jury subpoena for documents, a corporation has a number of choices to make about what information, if any, to produce and when to produce it. But what happens to those documents (and who has control of the information contained therein) once the corporation has turned them over in response to a government subpoena? Understanding what can happen to information produced to the government is critical to any company’s assessment of how closely its secrets will be kept — if at all. Because many large-scale civil cases now begin their lives as a spin-off from criminal investigations (particularly in securities and antitrust), today’s business litigators need to have a working understanding of how grand jury secrecy rules affect their cases.

Grand Jury Secrecy

The requirement of grand jury secrecy is set forth in Rule 6(e) of the Federal Rules of Criminal Procedure, which provides that grand jurors, government attorneys (and those who work with them) and grand jury personnel “shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.” Fed. R. Crim. P. 6(e)(2). Grand jury witnesses themselves are exempt from this requirement (though upon a showing of “compelling necessity” some courts have imposed limited restrictions on disclosure by grand jury witnesses).

This traditional policy of nondisclosure seeks to: (1) prevent the escape of prospective indictees, (2) ensure the freedom of grand jury deliberations, (3) prevent subordination of perjury and tampering of witnesses, (4) encourage candor of witnesses, and (5) protect those ultimately exonerated from unwanted publicity. See *U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958).

By its terms, Rule 6(e) only prohibits disclosure of “matters occurring before the grand jury.” Although Rule 6(e) does not define the term “matters occurring before the grand jury,” in the exercise of their discretion, courts have interpreted this phrase broadly to include any items what would “reveal the nature, scope, or direction of the grand jury.” *In re Grand Jury Proceedings*, 851 F.2d 860, 867 (6th Cir. 1988). This secrecy extends to “not only the direct revelation of grand jury transcripts but also the disclosure of information which would reveal the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations



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