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abtl REPORT

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Making CACI Work for You

Every trial lawyer recognizes the fundamental importance of jury instructions, but few realize how they can contribute to the creation and revision of the jury instructions that are used throughout California. This article is designed to share that information and generate informed improvements in our civil jury instructions.

Justice Martin Tangeman

CACI (pronounced "Casey") stands for "California Civil Jury Instructions." They are the official civil jury instructions approved by the Judicial Council of California for use in the state of California. CACI's goal is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror. (See Cal. Rules of Court, rule 2.1050.)

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Conducting Speech and Talking Conduct

First Amendment Challenges to Economic Regulations

The government cannot compel students to say the Pledge of Allegiance. But can it force a restaurant owner to disclose whether the food she sells contains genetically modified ingredients? Or to inform her workers of their rights to meal and rest breaks? The government can't prevent a gossip columnist from publishing who attended a black-tie party at the restaurant. But if it prevents the restauranteur from selling a list of attendees to third-party marketers, has it unconstitutionally prohibited her speech, or the speech of the marketers? These issues are hotly contested in light of recent developments in First Amendment law. In what some scholars have deemed "First Amendment opportunism," *see* Leslie Kendrick, "First Amendment Expansionism," 56 Wm. & Mary L. Rev. 1199, 1200 & n.1 (2015), businesses have brought a number of novel challenges to economic regulations that also impact, or arguably impact, their speech. This article surveys some of the hottest spots of contention.

Christine Van Aken

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Making CACI Work for You

The CACI Committee

The Judicial Council Advisory Committee on Civil Jury Instructions is one of 24 advisory committees to the Judicial Council. The committee is charged by rule of court to regularly review case law and statutes affecting jury instructions and to make recommendations to the Judicial Council for updating, revising, and adding instructions and verdict forms to CACI. (Cal. Rules of Court, rule 10.58.)

By rule of court, the CACI committee must include members from the following categories: (1) appellate court justice; (2) trial judge; (3) attorney whose primary area of practice is civil law; and (4) law professor whose primary area of expertise is civil law. A majority must be judicial officers. (Cal. Rules of Court, rule 10.58.) All members are appointed by the Chief Justice and have been selected for their interest and expertise in civil litigation. The committee is supported by a full-time staff attorney.

The CACI Process

The staff attorney receives proposals from members of the bench and bar and also develops proposals based on emerging case law and new legislation. The staff attorney does the initial research, collects and compiles comments and suggestions, and makes a recommendation with regard to each proposal. If the recommendation to add or revise an instruction or verdict form is favorable, the staff attorney prepares a draft instruction or verdict form.

The committee meets every six months, in January and July. The work product from each six-month cycle is considered a "release." The committee presents each release to the Judicial Council for approval. (The committee is currently processing Release 29.)

A Recent Case Study

Creating and revising jury instructions is a dynamic process. CACI 2334 is illustrative. It addresses a claim for bad faith insurance practice when the insurer has rejected a policy-limits settlement demand and there is a subsequent judgment against the insured in excess of the policy limits.

The original version of CACI 2334 was drafted by the CACI task force and approved by the Judicial Council in 2003. It included an "unreasonably rejected" element:

2. That [*name of defendant*] unreasonably failed to accept a reasonable settlement demand for an amount within policy limits.

But the committee majority adopted a proposal to remove "unreasonably" from CACI 2334 in January 2007 after extensive debate. This revision was not done in response to any case holding CACI 2334 was incorrect statement of the law. It was done in response to public comment.

Like its predecessor, the January 2007 revised instruction was not directly addressed by the courts. But it did not escape criticism.

In 2014, the instruction returned to the CACI committee in the form of a proposal to re-insert the controversial element. A working group recommended deferring any changes while closely monitoring the issue. At its July 2014 meeting, the full committee adopted the recommendation to defer.

The committee did not have long to wait. On October 17, 2014, the Fourth Appellate District published Graciano, in which the court stated:

A claim for bad faith based on alleged wrongful refusal to settle also requires proof the insurer unreasonably failed to accept an otherwise reasonable offer within the time specified by the third party for acceptance.

At its July 2015 meeting, the committee agreed that Graciano now compelled it to restore the "unreasonably rejected" element to CACI 2334. A revised CACI 2334 was drafted, approved by majority vote, and posted for public comment. Many comments were received, both opposing and supporting the proposed change. After reviewing the comments, the chair decided to pull the instruction from the release for further deliberation.

In the next cycle, an amendment to CACI 2334 was proposed to restore the unreasonably related element as follows:

3. That [*name of defendant*]'s failure to accept this settlement demand was unreasonable;

At its January 2016 meeting, the committee initially voted to adopt the controversial element.

But when the committee posted the proposed revision for public comment, numerous attorneys who represent plaintiffs in lawsuits against insurers objected to it. They argued: (1) No court had specifically stated that CACI 2334 was wrong or incomplete, so there was no reason to change it; and (2) the language from Graciano should be ignored because it is dicta.

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Making CACI Work for You

As a result of these comments, the committee decided to reject the proposed change to CACI 2334. The instruction stands now without the "unreasonably rejected" element.

The committee believes that the bench and bar should be advised that CACI 2334 could be insufficient as currently written. It recently revised the Directions for Use to put CACI users on notice of the continuing controversy: "[T]he committee has elected not to change the elements of the instruction . . . [until] there [is] a definitive resolution from the courts . . . . [T]he need for an additional element requiring the insurer's rejection of the demand to have been unreasonable is a plausible, but unsettled, requirement." Meanwhile, CACI users will have to decide whether CACI 2334 should be modified in each particular case and the committee continues to welcome input.

Your Role as a Contributor

All comments and suggestions are welcome. As discussed above, CACI instructions and verdict forms are revised every six months. Committee staff collects proposals, contributions, and suggestions from lawyers and judges all year long. In the most recent cycle, the committee proposed revisions to more than 30 existing instructions (including CACI 2334), and eight new instructions. In recent years, entire new chapters have been added, including instructions and verdict forms on trade secrets, construction law and whistleblower protection.

If you think that CACI instructions or verdict forms can be improved, are wrong, or that new instructions or verdict forms are needed, you should submit your proposals to the committee for consideration. By expanding the reach of CACI, we can all contribute to the advances of CACI, to the benefit of all CACI users.

Proposals for changes and additions to CACI may be sent by e-mail to:
civiljuryinstructions@jud.ca.gov.

The Honorable Martin J. Tangeman has been the chair of the Judicial Council Advisory Committee on Civil Jury Instructions since 2014, and a member since 2006. He is an Associate Justice of the Second District Court of Appeal, Division Six.

TIMOTHY CRUDO AND
ANDREW SCHALKWYK

Prosecuting the Corporate Mind:

It is an age-old principle of corporate law: corporations can act only through their agents. *Ensley v. City of Nashville*, 61 Tenn. 144, 146 (1872) ("Corporations can only act through their agents, and must be held accountable for their acts, otherwise citizens may be ruined through irresponsible citizens.") Companies therefore are generally liable, both civilly and criminally, for the conduct of agents acting on their behalf. But what about their thoughts? Do corporations think only through their agents, or do they have a mind of their own? The answer is more than a philosophical one, and it can have real consequences, as shown by two recent federal criminal trials in the Northern District of California

Timothy Crudo

In the olden days, it was accepted under the common law that "a corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities." 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765). The modern view is quite different, and criminal prosecutions of corporations have been widely accepted for more than a century. In the seminal case, *N.Y. Central & H.R.R. Co. v. United States*, 212 U.S. 481, 492–93 (1909), the railroad argued that as a corporation it could not be held liable for payments of illegal rebates. The Supreme Court rejected the argument, quoting a contemporary treatise: "[s]ince a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously." At least for offenses where the crime consisted in purposely doing the thing prohibited (in *N.Y. Central* it was paying a rebate), the Supreme Court saw "no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents."

But corporations often act through the acts of a combination of employees. What happens where no individual agent has the knowledge or intent necessary to be held

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Prosecuting the Corporate Mind

criminally responsible for the corporation's act – can the corporation still be legally culpable? More recently, courts have considered the aggregation of individual employees' knowledge in evaluating corporate knowledge. This doctrine of "corporate collective knowledge" traces back primarily to the First Circuit's decision in *United States v. Bank of New England*, 821 F.2d 844 (1st Cir. 1987). In that criminal case, which involved alleged violations of the Currency Transaction Reporting Act by the Bank of New England, the government had to prove that the bank had acted "willfully." Proof of willfulness required evidence that the bank had "knowledge" of the reporting requirement and, separately, the "specific intent" to commit the crime. On the issue of knowledge, the court applied the "collective knowledge" doctrine and determined that the bank knew everything that all of its employees knew, even if no single agent had sufficient knowledge to meet the elements of the offense: "So, if Employee A knows one facet of the currency reporting requirement, B knows another facet of it, and C a third facet of it, the bank knows them all." *Id.* at 855. The court determined that the specific intent element could be satisfied either through the willful failure of a bank employee to file the necessary reports or through the bank's own "flagrant indifference" to its reporting obligations. *Id.* at 857.

Andrerw Schalkwyk

Since *Bank of New England*, courts have applied the collective knowledge doctrine to determine what a corporation knew. But few have applied that doctrine to determine what a corporation intended, and there has been little discussion of whether specific wrongful intent of a corporation can be found without the prosecution identifying a particular individual who had such intent. The idea raises some profound philosophical problems. If, as *N.Y. Central* and many later cases have held, the actions, motives, and intent of an individual can be attributed to a corporation for purposes of criminal culpability, what evidence is needed to prove that the corporation itself had such intent even if no individual employee did?

As the First Circuit observed in the language above taken from *Bank of New England*, knowledge can exist in discrete portions. It can be measured, combined, and added to. Although the corporate collective knowledge doctrine has been criticized (See e.g. Thomas A. Hagemann & Joseph Grinstein, The Mythology of Aggregate Corporate Knowledge: a Deconstruction, 65 Geo. Wash. L. Rev. 210, 226-36 (1997)), there is some logic to the idea that employees' knowledge can be "collected" and attributed as a whole to the corporation.

But can intent be similarly combined and accumulated? Whereas sufficient knowledge is primarily a question of quantity, sufficient intent is a question of quality. If a specific intent is required for finding culpability of a specific intent crime, can the otherwise innocent intent of individuals be combined to create a collective intent that is of a distinctly different – *i.e.*, guilty -- character? In other words, can the corporation be deemed to have the necessary criminal intent if none of its agents does?

There is scant law on the question, itself perhaps a clue to the answer. One case that did address the question of corporate willfulness is *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730 (W.D. Va. 1974), which upheld a criminal conviction that a trucking company knowingly and willfully violated federal regulations concerning driver safety. The court held that because the corporation knew, under the collective knowledge doctrine, that it was not complying with its duties under the regulations and declined to act on that knowledge, there was sufficient evidence to find that it had thereby acted willfully, a holding consistent with the later result in *Bank of New England*.

But other cases have noted the problem with attributing intent to a corporation absent an individual wrongdoer who harbors the required state of mind. In *Saba v. Compagnie National Air Fr.*, 78 F. 3d 664, 670 n. 6 (D.C. Cir. 1996), the court cited *Bank of New England* for the proposition that while knowledge of facts by employees could be attributed to the corporation, "the proscribed intent (willfulness) depended on the wrongful intent of specific employees." *See also, e.g., First Equity Corp. v. Standard & Poor's Corp.*, 690 F. Supp. 256, 260 (S.D.N.Y. 1988) ("A corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual."); *Gutter v. E.I. Dupont De Nemours*, 124 F. Supp. 2d 1291, 1311 (S.D. Fla. 2000) ("The knowledge necessary to form the requisite fraudulent intent must be possessed by at least one agent and cannot be inferred and imputed to a corporation based on disconnected facts known by different agents.")

Even *T.I.M.E.* itself has been cited for the idea that, unlike knowledge, "specific intent cannot be similarly aggregated [and therefore] there must be evidence from which a jury could reasonably determine that at least one agent of LBS had the specific intent to join the conspiracy to defraud the government." *United States v. LBS Bank-New York, Inc.*, 757 F. Supp. 496, 501 n. 7 (E.D. Pa. 1990). In one case decided shortly before Bank of New England the court, in a bench trial, was required to determine whether the defendant corporation intended to commit mail fraud. Citing *T.I.M.E.*, the court determined that to find the defendant liable "for fraud, I must find that a[n] employee had the specific intent required" by the statute." *Louisiana Power and Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781 (E.D. La. 1986). (That said, the court found the company had committed fraud based on the fact that the corporation was "blind[] to obvious truths" and so violated the mail fraud statute, without identifying, or even discussing, an individual employee's specific intent.) Similarly, in *State v. Zeta Chi Fraternity*, 696 A.2d 530 (N.H.

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Douglas Dexter

On EMPLOYMENT

The California Fair Employment and Housing Council is in the final stages of implementing regulations (the "Regulations") regarding employers' consideration of employee and applicant conviction history in employment decisions. The Regulations recognize two types of restrictions on employers' consideration of criminal history. First, they acknowledge the Labor Code's prohibitions against using specified criminal history, including arrests, dismissed or expunged convictions, and juvenile adjudications. Second, the Regulations prohibit using other criminal history if doing so would have an "adverse impact" on individuals within a protected class. This article focuses upon the latter analysis and its potential implications for disparate treatment claims. As discussed below, the Regulations encourage a case-by-case conviction assessment rather than an across-the-board ("bright line") prohibition to avoid adverse impact presumptions. But decisions based upon such a case-by-case assessment may be more subject to disparate treatment scrutiny, i.e., that the assessment was tainted by bias.

Statistical Adverse Impact Presumptions

Employment decisions can be found to have an adverse impact if an employer uses facially neutral selection procedures that disproportionately exclude applicants or employees based on protected classifications. While the plaintiff bears the burden of proving adverse impact, the Regulations establish a presumption that the burden is satisfied by state or national statistics showing substantial disparities in convictions within the protected class. So, rather than relying upon the employer's selection decisions within its own applicant pool—an inherently smaller cross-section less subject to statistical analysis—the Regulations authorize external statistical evidence that is more accessible. Of course, studies showing disparities in U.S. incarceration and hiring rates among gender and racial groups are prevalent. For example, according to a 2014 report by the Prison Policy Initiative (*available at* https://www.prisonpolicy.orgreports/rates.html), the 2010 U.S. Census showed that African Americans are incarcerated five times more than Whites nationally, and Hispanics nearly two times more often—even though Whites comprise 64% of the U.S. population, African Americans comprise 13%, and Hispanics comprise 16%.

An employer may rebut this statistical presumption by showing a persuasive basis to expect a markedly different result after accounting for particular circumstances such as the geography, conviction(s), and position at issue. For example, an employer might try to show that incarceration rates for accountants are equal for African Americans and Whites in the geographic area. Since those kinds of statistics are less readily available than general incarceration statistics, employers may need to conduct their own surveys.

Justifying Adverse Impact

If the employee establishes an adverse impact, the employer must justify its policy or practice as job-related and consistent with business necessity. The policy or practice must pertain to successful performance of and fitness for the job, and be tailored to the nature and age of the offense and the position sought.

The Regulations break this analysis down depending upon whether the policy or practice is either (1) a *bright-line conviction disqualification*, or (2) *an individualized assessment* of persons convicted of the offense. The former must tailor the excluded offenses to "distinguish between applicants or employees that do and do not pose an unacceptable level of risk," and have "a direct and specific negative bearing on the person's ability to perform the duties." The Regulations establish a rebuttable presumption that a bright-line standard prohibiting convictions 7 years or more old is not sufficiently tailored to meet the "job-related and consistent with business necessity" defense. But, employers who adopt an individualized-assessment approach will be considering individual circumstances and qualifications. Such an assessment may itself result in claims of disparate treatment (i.e., intentional discrimination).

Douglas Dexter

The Regulations further provide that, even if an employer satisfies the "job-related and consistent with business necessity" defense, employees or applicants may still prevail if they can demonstrate that the employer could have used a less discriminatory approach, such as a narrower conviction list.

Regardless of the exclusion policy, the Regulations require that the employer provide advance notice of any adverse action and the reason, along with a reasonable opportunity to challenge the decision. If the individual shows the conviction record is incorrect, the record cannot be considered.

The Regulations confirm that employers should evaluate the specific types of convictions that bear on particular jobs or employment decisions, rather than considering convictions generally. For example, a theft conviction may be more relevant to a job handling money or valuables, but may be less relevant to a remote telemarketing job. Employers should avoid disqualifying applicants based on old or trivial convictions. Any decision to consider criminal history should be well-documented, includ-

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Conducting Speech and Talking Conduct

Commercial Speech and the Central Hudson Test

It wasn't until 1967 that the Supreme Court accorded advertising and other kinds of commercial speech—often defined as, but not limited to, speech that proposes a commercial transaction—any First Amendment Protection at all. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). Even then, the Court framed its rationale for extending protection to advertising as focused on the right of the consumer to obtain valuable commercial information, and the corresponding right of the advertiser to share it. In light of the "subordinate position" of commercial speech on the "scale of First Amendment values," *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), the Supreme Court has articulated an intermediate-scrutiny test for determining the constitutionality of restrictions on commercial speech, which survive only if they directly advance a substantial governmental interest and are not more extensive than necessary to serve that interest, *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

In the years after *Virginia State Board of Pharmacy* announced protection for commercial speech and *Central Hudson* announced a level of scrutiny, the circuit courts routinely applied the test to strike down some restrictions on advertising (such as New York's refusal to let Bad Frog Brewery use a picture of a frog making a rude gesture with webbed fingers on the brewery's beer labels, *Bad Frog Brewery, Inc. v. New York State Liquor Authority*, 134 F.3d 87 (2d Cir. 1998)) while upholding others (such as a prohibition on sending unsolicited "spam" faxes, *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54 (9th Cir. 1995)). But the results of Supreme Court cases applying *Central Hudson* have grown increasingly one-sided: The Court has not affirmed a restriction on commercial speech since 1995's *Florida Bar v. Went For It, Inc.* upheld by a 5-4 majority Florida's prohibition on direct-mail solicitation by attorneys within 30 days of an accident. 515 U.S. 618. Indeed, since 1995 the Court has repeatedly noted criticism of *Central Hudson* while continuing to apply this test. *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999).

In 2011, the Court struck down a Vermont law that prohibited pharmacies from selling doctors' prescribing records and prevented pharmaceutical manufacturers from using these records to market prescription drugs. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). Once again, the Court's treatment of *Central Hudson* was at best opaque: it first determined that the Vermont law was invalid as a content-based and speaker-based restriction on speech, and then noted that it had no reason to determine whether the speech at issue—the sale and use of prescription records for uncontestably commercial purposes—was or wasn't commercial speech because Vermont's law would fail under the *Central Hudson* test. Many commercial speech laws are content-based or speaker-based—for example, the contents of prescription drug labels are extensively regulated, and credit reporting agencies are forbidden from selling targeted marketing lists of consumers who meet particular credit-score criteria. 21 U.S.C. § 352; *Trans Union Corp. v. Federal Trade Commission*, 245 F.3d 809 (D.C. Cir. 2001). Did the Supreme Court intend with *Sorrell* to subject these laws to new and increased scrutiny? The circuits aren't certain. A panel of the Ninth Circuit recently concluded that *Sorrell* compels "heightened judicial scrutiny" for content- or speaker-based restrictions on commercial speech, yet confusingly noted in a footnote that this heightened scrutiny need not be strict scrutiny, and courts could continue to employ the *Central Hudson* framework. *Retail Digital Network LLC v. Appelsmith*, 810 F.3d 638 (2016). Some business plaintiffs contended that *Retail Digital* increased the level of scrutiny for restrictions on their speech, but *Retail Digital* was vacated when the Ninth Circuit took the case en banc. The case was reargued on January 19, 2017 and a decision is pending. The Federal Circuit suggested that any content-based or viewpoint-based restriction should receive strict scrutiny, regardless whether commercial speech is involved, in *In re Tam*,

> *"After Sorrell, the Supreme Court wasn't quite finished surprising observers of its First Amendment jurisprudence."*

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JOSEPH MAUCH

On TRADEMARKS

Infringement and Social Media

A client recently came to me with a trademark problem. The client was a small-but-growing company that was trying to expand and formalize its social media presence. It had discovered that its trademark was already taken on a popular social media platform. Despite the fact that the other user had not posted in years and appeared to be a phishing site, the platform would not remove the other user, and my client was struggling to get anyone's attention through the platform's online submission forms.

This is a common problem. We all know about the explosion in use of social media by both individuals (including but not limited to those infamous millennials) and companies. But not every company has its usernames, channels, handles, and pages perfectly coordinated with its trademarks and branding campaign. As they try to do so, they often encounter existing users employing the same or similar marks, whether those users are outright infringers, bona fide users, or somewhere in between.

The process to try to address these existing users is far from certain and often frustrating for clients. You may be familiar with the Digital Millennium Copyright Act, often referred to as the "DMCA." The DMCA was enacted in 1998 to, among other things, provide a procedure for copyright owners to report infringement on the internet and a safe harbor for internet service providers who comply with the procedure. This has resulted in a uniform, streamlined process to stop and "take down" infringing uses of copyrights across more or less all social media platforms. But the DMCA only applies to copyrights, not trademarks.

I conducted a very non-scientific survey of a dozen of the most popular social media sites to determine (1) whether they had a process for reporting trademark infringement and (2) whether those processes were similar across the various platforms. The answer is that most but not all of the twelve sites had a process in place, but, for those that did, the process was not at all uniform. Thus, unlike for copyright infringement, a trademark owner dealing with an infringing username (or other form of trademark infringement) faces a different process and potentially different outcome depending on the particular social media site in question.

During my "investigation," I was also reminded of another issue I had previously encountered with the procedures for reporting and taking down infringing trademarks on social media sites. The online submission forms used by many of the platforms contain, without explanation, a field for the registration number of the trademark in question. These sites thus require, or at least appear to require, that the trademark at issue be registered. As you may know, trademark rights accrue based on "use in commerce," not based on registration. Federal registration provides certain benefits, but it not required to assert trademark infringement. An unsophisticated owner of an unregistered trademark could easily be led to believe that he or she had no rights to stop an infringing user on the site in question.

There are, of course, benefits and burdens to establishing a more uniform process for trademark owners to report and redress infringement on social media platforms. Of course, any mandated or voluntary process would have to provide some incentive – negative or positive – to encourage adoption and compliance by social media platforms. In the case of the DMCA, that incentive was a safe harbor from secondary liability. Such a safe harbor could also work in the trademark context, but – and this is a potential topic for another column – the threat of secondary liability for copyright infringement in the late 1990s was more profound than it is for trademark infringement today.

Joseph Mauch

The benefits of a uniform process would include increased transparency to rights holders and content creators regarding procedures and outcomes, as well as increased legal certainty for social media platforms considering whether they may face liability in a particular situation. Such a process could also provide the benefit of an improved procedure for purported infringers to submit a "counter-notice" justifying their use.

On the burden side are a number of legitimate arguments that revolve around the central point that a more formalized process is not necessarily a better process – for the platform, the claimant, or the alleged infringer. For example, a DMCA-like process would put the platform in an adjudicative position in highly fact-specific, territory-specific disputes that may turn on whether the purported owner or the purported infringer is "using the mark in commerce" (which is likely one of the reasons why the platforms prefer registered marks).

In sum, a trademark owner like my client who is trying to remove and/or take over an infringing username faces a process which, for better or for worse, is neither perfect nor uniform across the ever-increasing spectrum of social media platforms. Time will tell if we ever see a Digital Millennium Trademark Act.

Joe Mauch is a Partner at Shartsis Friese LLP, and has extensive experience in a number of areas of business litigation, with a particular focus on intellectual property.

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Prosecuting the Corporate Mind

1997), the New Hampshire Supreme Court cited to *T.I.M.E.* in upholding the conviction of a college fraternity, finding that there was sufficient evidence that fraternity members were aware of the facts surrounding underage drinking. Because the fraternity's "mental state depend[ed] on the knowledge of its agents," the fraternity could be said to have acted recklessly in conscious disregarded of the risks involved. *Id.*, at 535.

Fast forward to 2016, when simultaneous corporate criminal trials were unfolding in the Northern District of California against PG&E (Case No. 3:14-cr-00175) and FedEx (Case No. 14-cr-00380). PG&E was accused primarily of violating the Pipeline Safety Act. FedEx was accused of conspiring with online pharmacies to deliver illegal prescriptions. No individuals were prosecuted in either case. The corporations alone stood trial.

Both corporate defendants argued that when prosecuting a corporation for a specific intent crime the government must prove that at least one individual acting on behalf of the corporation had the sufficient intent necessary for conviction. Both lost on the issue. In *PG&E*, the court brushed aside concerns raised with the collective knowledge doctrine, focusing instead on collective intent. The court ultimately followed *T.I.M.E.*, noting the similarity in the regulatory violations at issue in both cases. The Court held that because *PG&E* had an affirmative legal duty to follow safety regulations (such as the Pipeline Safety Act) and "where the knowledge of the corporation's employees demonstrates a failure to discharge that duty, the corporation can be said to have 'willfully' disregarded that duty." *PG&E*, 2015 WL 9460313 at *5. In *FedEx*, the court cited to the *PG&E* order and, without further discussion, held that FedEx had "failed to identify controlling authority that calls into doubt any instructions on 'collective knowledge' or 'collective intent.'" *United States v. FedEx,* No. C14-00380 CRB, slip op. at 2 (N.D. Cal. Apr. 18, 2016).

The result in *FedEx* was perhaps more surprising, given that the charges there involved a conspiracy to distribute illicit drugs rather than the type of regulatory and/or reporting violation at issue in *PG&E, T.I.M.E.*, and *Bank of New England*. *PG&E* was accused of not fulfilling affirmative regulatory obligations imposed by law, and distilling corporate intent from collective knowledge in such cases is perhaps not that big a jump from already accepted concepts of "reckless disregard" or willful blindness. (The nature of the charged crimes in *PG&E* was crucial in the court's decision on the collective intent instruction.) *FedEx*, on the other hand, was accused of agreeing to commit affirmative acts with the knowledge and intent to achieve an unlawful result, the first time that the collective intent doctrine had ever been applied in a criminal prosecution to a non-regulatory offense.

To be fair to the *FedEx* trial court, the case resolved before it was required to rule on the final instruction for corporate intent, and perhaps it would have ruled differently. (Its prior ruling on collective intent occurred during pretrial skirmishing.) We will see whether the rulings in *PG&E* and *FedEx* embolden prosecutors to pursue criminal charges against corporate defendants in the absence of at least one culpable individual. Criminal prosecutions against corporations are rare enough, especially when no individual is prosecuted as well, and even with the favorable rulings on collective intent the ultimate result in *PG&E* and *FedEx* may cause prosecutors to think twice before prosecuting a corporation standing alone.

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On EMPLOYMENT

ing an articulation of the job duties and circumstances warranting conviction consideration.

The employer then must decide whether to use bright-line or individualized assessment standards. If the former, the employer must be meticulous in choosing the convictions to be excluded. If the latter, the employer should establish an assessment process that will withstand scrutiny under both adverse impact and disparate treatment analyses. Ideally, employers should design their screening systems so that assessors are blind to candidates' demographics.

Particularly when added to recent developments under local "ban the box" laws, the Regulations counsel in favor of reviewing hiring practices and application forms to ensure compliance with each of these laws. Hiring and human resource personnel should be well trained in the collection and usage of criminal conviction histories. Employers should ultimately consider whether criminal background checks have advantages that outweigh the litigation risks.

Doug Dexter chairs the Employment Practice Group at Farella Braun + Martel LLP, where he represents and advises employers concerning employment relations.

Peggy Otum

On ENVIRONMENTAL LAW

Resisting Environmental Rollbacks:

California Environmental Law During the Trump Administration

Donald Trump's election and Scott Pruitt's confirmation as administrator of the U.S. Environmental Protection Agency (EPA) have obviously shifted the federal government's environmental regulatory stance. The extent to which this shift will affect environmental policy, regulation, and enforcement in California is not so certain. Governor Jerry Brown and California policymakers have forcefully stated that California will take a stand against environmental regulatory rollbacks. Some of the reasons why California can effectively take this stand are embedded in federal environmental law.

The Trump administration's first moves towards filling in a regulatory agenda included explicit direction to federal agencies to cut regulations. Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs)—which has been called the "one in, two out" or "2-for-1" order—requires that "for every one new regulation issued, at least two prior regulations be identified for elimination." The order also capped "the total incremental cost of all new regulations" for this fiscal year at zero. On February 24, President Trump signed another executive order requiring agencies to establish Regulatory Reform Task Forces to identify regulations that are outdated, unnecessary, or ineffective, as well as regulations that "impose costs that exceed benefits," "eliminate jobs, or inhibit job creation," or "create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies."

Federalism Cuts Both Ways

In addition to pressing for regulatory cuts, Trump administration officials have pointed to the importance and even primacy of states in environmental regulation under the U.S.'s federal system. Scott Pruitt said on his first day at EPA that "[f]ederalism matters …. Congress has been very prescriptive in providing in many instances a very robust role … of the states."

Much of modern federal environmental law is structured around federalism principles, with regulatory standards typically set at the federal level and implemented by the states. For example, under the Clean Air Act, EPA establishes maximum concentrations for pollutants in ambient air, and states devise implementation plans to achieve those levels. States retain power to regulate more stringently under many federal laws, including the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act (RCRA). States also are granted either primary or parallel enforcement powers. In many cases, federal laws provide for EPA delegation of implementing authority to state agencies. Therefore, while the Trump administration may cite states' authority over environmental matters as a basis for reducing federal standard-setting and oversight, this authority can also be wielded by states that wish to impose and enforce more stringent environmental protections.

Like other states, California has been delegated authority to implement federal environmental programs, and historically it has been a particularly active regulator in many areas. As long as the political will remains and resources are available, there is little reason to believe that California's environmental regulatory activity will ebb.

California has particular power over regulation of vehicle emissions because the original Clean Air Act recognized California's early efforts to control vehicle emissions by allowing the state to set its own standards—provided that EPA grants a waiver. If a waiver is granted, then other states may also adopt California's standard. EPA has granted waivers more than 100 times.

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But EPA has said no to the waiver on one occasion and may do so again. During the George W. Bush administration, EPA denied a waiver for greenhouse gas emission standards. When asked by Senator Kamala Harris at his confirmation hearing in January whether he would commit to recognizing California's authority to issue its own vehicle standards, Scott Pruitt said that he "would not want to presume the outcome" of review of waiver requests. His testimony therefore suggested that requests may face increased scrutiny, even raising the question of whether EPA might rescind existing waivers.

If recently introduced legislation is enacted, California could further insulate itself from federal rollbacks by preventing certain changes in federal standards from being implemented in the state. On February 22, California state senators introduced a package of three "Preserve California" bills. One bill, the "California Environmental, Public Health, and Workers Defense Act of 2017" (SB 49), would set "baseline federal standards" based on policies and rules in effect during the Obama administration under the Clean Air Act, Endangered Species Act, Safe Drinking Water Act, and Clean Water Act. The law would bar state and local agencies from revising regulations to be less stringent than the baseline federal standards.

It is foreseeable that this law would be challenged if enacted. Its validity would likely depend on an assessment of the powers granted to states or retained by the federal government by a particular statute.

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808 F.3d 1321 (2015) (en banc), but that suggestion is dicta since the Federal Circuit acknowledged that the speech at issue in that case—the proposed registration of a trademark for a band name, "The Slants," which the PTO had rejected as disparaging—was expressive speech as well as commercial speech. (In any event, the Supreme Court granted review of *In re Tam*, and a decision is pending. *Lee v. Tam*, S. Ct. No. 15-1293 (argued Jan. 18, 2017).) In other circuits, courts have treated *Sorrell* as a continuation rather than a shift, and have continued to apply *Central Hudson* to content- and speaker-based restrictions on commercial speech. *See, e.g.*, *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1055 (8th Cir. 2014) (rejecting as-applied challenge to specified advertising practices targeting car-accident victims).

After *Sorrell*, the Supreme Court wasn't quite finished surprising observers of its First Amendment jurisprudence. In *Reed v. Town of Gilbert*, the Court considered a local sign ordinance that banned all outdoor signs without a permit but then exempted 23 categories of signs from the permit requirement, and many of the categories were defined by reference to their content. 135 S. Ct. 2218 (2015). (Election-related signs, for instance, were treated differently than signs announcing church services, which in turn were treated differently than signs announcing an ideological message.) In light of the seemingly needless content-based distinctions made by the town's elaborate sign code, it was no surprise that the Supreme Court struck down the code—but the breadth of its holding was news: "Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny." Taken at its face, that statement might seem to compel courts to apply strict scrutiny to content-based commercial speech regulations, such as guidelines for the content in a securities registration statement, yet *Reed* does not even mention *Central Hudson*, much less declare it overruled. Did *Reed* demolish *Central Hudson* sub silentio? The federal courts to have considered that proposition have rejected it so far. *Contest Promotions LLC v. City & County of San Francisco*, No. 16-CV-06539-SI, 2017 WL 76896 (N.D. Cal. Jan. 9, 2017); *Peterson v. Village of Downers Grove, Illinois*, No. 14 C 09851, 2016 WL 427566 (N.D. Ill. Feb. 4, 2016); *CTIA-The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048 (N.D. Cal. 2015); *California Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM AGRX, 2015 WL 4163346 (C.D. Cal. July 9, 2015).

> *"...government is now more susceptible to First Amendment claims because these lighter-touch regulations, often relate to information and disclosures."*

Conduct or Speech?

Another important question in the universe of commercial speech challenges is whether the government has regulated protected expression or mere conduct. Here, too, business and professional plaintiffs have taken aim at new targets, with mixed success. In *National Association of Manufacturers v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013), the prominent business group successfully challenged an NLRB rule providing that failing to post notification of employee rights under the National Labor Relations Act may be found to be an unfair labor practice. While ordinary economic legislation governing the relationship between workers and employers receives only rational basis review, the D.C. Circuit analyzed this requirement under the First Amendment because of its speech component and struck it down under the line of Supreme Court compelled-speech cases that prevents the government from requiring schoolchildren to say the Pledge of Allegiance. The panel was unpersuaded by the NLRB's claims that this was merely the NLRB's own speech and thus not analogous to a compelled oath of allegiance at all. (The en banc D.C. Circuit subsequently overruled a portion of the panel's reasoning, holding that compelled factual disclosures in the commercial speech context should be analyzed under *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), which accords relatively deferential review to compelled disclosures. See *American Meat Institute v. U.S. Department of Agriculture*, 760 F.3d 18 (2014) (en

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banc)). But the International Franchise Association, represented by the exceedingly talented former U.S. Solicitor General Paul D. Clement, had less success in persuading the Ninth Circuit that the City of Seattle had targeted the expressive conduct of franchisors—who in entering into franchise agreements typically identified themselves with a trademark, brand, or other message—by limiting a minimum wage increase to franchisee employers. The Ninth Circuit determined that the minimum wage increase had only an incidental effect on speech and did not target expressive activity. *International Franchise Association, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015).

Another example of novel First Amendment speech/conduct problems, and of mixed success, is the question of professional licensing requirements. In *Liberty Coins, LLC v. Goodman*, precious metals dealers in Ohio challenged the state's licensing requirement as a restriction on their speech because the requirement to obtain a license was triggered by "holding oneself out," or promoting oneself, as a dealer—an instance of speech. The district court granted a preliminary injunction, 977 F. Supp. 2d 783 (S.D. Ohio 2012), but the Sixth Circuit ultimately reversed, finding that the statute did not regulate speech but merely used speech as a way to identify who was a regular dealer in precious metals, a course of conduct that could be regulated. By contrast, the D.C. Circuit struck down Washington, D.C.'s licensing requirement for tour guides, who were required to take an exam and pay a fee before giving tours for money. *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014). The D.C. Circuit assumed that the regulation of tour guides was a regulation of conduct and not speech, but found that the incidental burden on tour guides' speech was so great, and the District's empirical justification for its regulations so thin, that the regulation failed intermediate scrutiny—especially because, the D.C. Circuit noted, the free market would likely do as good a job as an exam requirement of weeding out bad or unreliable tour guides giving tours to vulnerable tourists. Could a similar claim be made about lawyers, therapists, or the many other kinds of licensed professionals whose job involves speech and counseling?

The conduct/speech distinction is also central in a First Amendment case recently decided by the Supreme Court. *Expressions Hair Design v. Schneiderman*, 2017 WL 1155913 (S. Ct. Mar. 28, 2017) . Plaintiffs there challenged New York State's law, similar to that of nine other states, which prohibits merchants from charging a "surcharge" to customers who pay with credit cards but permits them to give a "discount" to customers who pay with cash. . While that law appears to have little to do with speech, the plaintiff merchants contend that because a surcharge and a discount are actually the same thing in economic terms, they are in effect permitted to charge two different prices to credit card and cash customers but forbidden only from telling customers that they surcharge credit card customers. The Second Circuit disagreed with the merchants and reversed the district court, finding the New York law a classic regulation on conduct, 808 F.3d 118 (2d Cir. 2015), and the Fifth Circuit reached the same conclusion, *Rowell v. Pettijohn*, 816 F.3d 73 (5th Cir. 2016). But the Eleventh Circuit and a California district court agree with the merchant plaintiffs that the statute in effect regulates only how merchants describe their prices and not what they charge. *Dana's Railroad Supply v. Attorney General of Florida*, 807 F.3d 1235 (11th Cir. 2015); *Italian Colors Restaurant v. Harris*, 99 F. Supp. 3d 1199 (E.D. Cal. 2015). The Supreme Court held that because New York's regulatory scheme permitted the merchants to charge credit card customers a higher price than cash customers, and prohibited communicating that price differential in some ways but not others, it regulated speech, not conduct. 2017 WL 1155913 at *6. Because the Second Circuit had not addressed the merits of the plaintiffs' First Amendment challenge, the Court remanded. *Id.* at *7.

Speech in the business or professional context is also at issue in an ongoing saga in the Eleventh Circuit, in the case colloquially known as "Docs v. Glocks." In *Wollschlaeger v. Governor of the State of Florida*, a group of doctors has mounted First Amendment and Due Process Clause vagueness challenges to a Florida prohibition on doctors' harassment of patients by asking them questions about gun ownership that do not relate to patient safety; the doctors maintain that they are censoring

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themselves by refraining from asking their patients about their gun ownership and storage at all because they do not know what constitutes harassment or relevance under the law. After a single three-judge panel of the Eleventh Circuit sua sponte issued three different opinions in an 18-month period, each upholding the Florida prohibition but applying a different standard of review to the same speech regulation, the full Eleventh Circuit took the case en banc and reversed the panel, striking down the Florida prohibition. 848 F.3d 1293 (11th Cir. 2017). Notably, the en banc Eleventh Circuit did not decide what standard of review should apply to restrictions on professional speech. Instead it rejected rational basis review and held that the Florida law would fail either intermediate or strict scrutiny. But in the course of rejecting rational basis review, it expressly disagreed with the Ninth Circuit's recent application of rational basis review to California's prohibition on the practice of sexual orientation change therapy on minor patients in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Perhaps this division among the circuits about the scrutiny applied to medical or therapeutic speech restrictions will be resolved by the Supreme Court.

This brief article offers only a taste of the variety of First Amendment cases that business or commercial plaintiffs have brought in recent years. The legal scholar Amanda Shanor argues that there is an underappreciated reason why we may see even more of such challenges: In Shanor's view, because government has moved away from command-and-control regulation to what she calls "lighter touch forms of governance"—compare a ban on offering high-rate mortgage loans with mandatory Truth in Lending disclosures, or compare a ban on off-label uses of prescription drugs with a ban on the marketing of off-label uses—government is now more susceptible to First Amendment claims because these lighter-touch regulations, intended to foster choice by market actors through nudges instead of commands, often relate to information and disclosures. Amanda Shanor, "The New Lochner," 2016 Wis. L. Rev. 133. And because First Amendment jurisprudence is so complex, and because the rights of commercial speakers are now firmly embedded in First Amendment law (even though the full scope of those rights is still up for debate), these cases will no doubt continue to challenge litigators and judges alike.

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