ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl

LOS ANGELES

REPORT

SUMMER 2021

HITTING THE PAUSE BUTTON: STAYS PENDING APPEAL

Alana H. Rotter

When clients receive an adverse judgment, among the first questions they're likely to ask are, "How do we stay the judgment while we appeal?" and, "Do we need to post a bond?" This article provides some answers.

Is a bond a prerequisite to appealing?

Posting a bond is *not* a prerequisite to appealing in California. The role of a bond is just to stay enforcement of a judgment while the appeal is pending, in situations where the stay is not automatic. The first step in answering whether a bond is necessary, therefore, is to determine whether the judgment is automatically stayed by filing a notice of appeal.

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— INSIDE —

THE POST-AMG LANDSCAPE: FTC ENFORCEMENT POWER UNDER SECTION 13(b)

Michael L. Mallow

Colm A. Moran

In *AMG Capital Management LLC v. FTC*, 141 S. Ct. 1341 (2021) the Supreme Court unanimously held that the Federal Trade Commission does not have authority under Section 13(b) of the Federal Trade Commission Act (15 U.S.C. § 53) to obtain monetary relief. The FTC, however, still has certain powers to obtain injunctive relief under Section 13(b). This article will focus on the circumstances, if any, under which the FTC can obtain injunctive relief based solely on past conduct.

Background: The rise and fall of monetary relief under Section 13(b)

Section 13(b) of the FTC Act was enacted in 1973. For several decades following its enactment, the FTC rarely sought monetary relief. Indeed, in 2003, the FTC issued a policy statement providing that the agency did "not view monetary disgorgement or restitution as routine remedies" under Section 13(b) and would only seek such relief in "exceptional cases." Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45821 (Aug. 4, 2003). But the 2003 Policy Statement was withdrawn in 2012. Press Release, Fed. Trade Comm'n, FTC Withdraws Agency's Policy Statement on Monetary Remedies in Competition Cases; Will Rely on Existing Law (July 31, 2012),

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PRESIDENT'S MESSAGE

Susan Leader

I am happy to report that after a 17-month Covid hiatus from all in-person gatherings, we were able to enjoy our first in-person program on July 14 at The Yard at the Omni hotel. It was not our traditional dinner format, but thanks to the careful planning of Executive Director Linda Sampson and dinner chair Robert Wallin, we were able to combine a COVID-friendly social hour with cocktails and hors d'oeuvres and a short program by Jeff Kessler on college athletics in the Supreme Court. This was our first but hopefully not last in-person gathering this year: We plan to host our members-only judicial reception on September 22 outside at the Omni hotel downtown and to present a more traditional dinner program in November.

As noted in my last report, we are fortunate to boast an increasingly diverse and growing membership, and I would like to welcome all of our new members and new firms, including Perkins Coie, Elkins Kalt, and King & Spalding.

Our collaboration with the bench is ongoing. I'm excited to announce that we are sponsoring a new diversity inclusion working initiative spearheaded by Los Angeles Superior Court Judges Eric Taylor and Ruth Kwan. The goal is to promote the development of oral advocacy and courtroom experience for underrepresented members of the bar who face barriers because of their race, sex, gender or sexual identity, disability, religion or any other reason. Our members will serve as faculty in an ongoing series of lectures, mini seminars and taped trainings that will be available for free on the court's website. Please reach out to me or Linda Sampson (abtl@abtl.org) if you are interested in participating.

Finally, planning for the ABTL seminar in Hawaii this October is well under way. We are thrilled to have Justice Anthony Kennedy joining us this year as our keynote speaker. The hotel is sold out, but registration remains open for those who are interested.

Again, it was great seeing many of you last month and I look forward to connecting again at our upcoming events. In the meantime, stay safe and well, and thank you again for your support in these unprecedented times.

Susan Leader

ABTL President, 2021

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Is the judgment automatically stayed?

The default rule is that perfecting an appeal (i.e., filing a timely notice of appeal) automatically stays all trial court proceedings on the order appealed from, including enforcement proceedings. (Code Civ. Proc., § 916.) But there are many exceptions to the default rule, requiring close analysis.

Most notably, the Code of Civil Procedure broadly recites that perfecting an appeal does not stay enforcement of an order or judgment for "[m]oney or the payment of money." (*Id.*, § 917.1, subd. (a)(1).) Staying enforcement of such orders or judgments requires posting a bond or taking other affirmative steps, as discussed below.

This money-judgment carveout to the automatic stay is not as all-encompassing as it first appears, though: Some orders and judgments directing the payment of money *are* automatically stayed on appeal.

For example, an award solely for attorney fees and costs pursuant to Code of Civil Procedure section 1021 is automatically stayed pending appeal. (*Id.*, § 917.1, subd. (d); *Ziello v. Superior Court* (1999) 75 Cal.App.4th 651, 654–655.) An award of prevailing party attorney fees under the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.) falls into this category. (*Chapala Management Corp. v. Stanton* (2010) 186 Cal.App.4th 1532, 1546.)

On the other hand, an award of attorney fees to a defendant who prevails on an anti-SLAPP motion is *not* automatically stayed. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1431–1432.) Likewise, an appeal does not automatically stay a Code of Civil Procedure section 998 cost award—except that it does, as to amounts that would otherwise have been awarded as routine costs. (*Id.*, § 917.1, subd. (a)(2).)

And, public entities and officers benefit from the automatic stay even as to money judgments. No bond is required to stay enforcement of a judgment against the State of California, state agencies, departments, or officers in an official capacity, against counties, cities, districts, or their officers in an official capacity, or the United States or its agencies or officers. (Code Civ. Proc., § 995.220.) Trial courts also have discretion to dispense with bond requirements "when the appellant is an executor, administrator, trustee, guardian, conservator or other person acting in another's right." (*Id.*, § 919.)

Myriad other exceptions to the automatic stay rule appear at Code of Civil Procedure sections 917.15–917.5. Among other things, a judgment directing the assignment or delivery of personal property or real property is not stayed pending appeal unless the defendant posts an undertaking in a sum to be determined by the trial court. (*Id.*, §§ 917.2, 917.4.) The same is true as to a judgment appointing a receiver. (*Id.*, § 917.5.)

If the judgment or order at issue directs the performance of more than one type of act not subject to the automatic stay—for example, if it requires the defendant to pay money and return property—obtaining a stay requires complying with the requirements of "each" applicable section. (Code Civ. Proc., § 917.6.) Section 917.6 has not been meaningfully discussed in a published decision, making it questionable whether a multipronged judgment could be *partially* stayed by compliance with only one of the applicable stay sections.

There are also nonstatutory stay rules. For example, as the Supreme Court recently described, under California common law, a prohibitory injunction is not stayed pending appeal, while a mandatory injunction is stayed. (*Daly v. San Bernardino County Board of Supervisors* (2021) 11 Cal.5th 1030.)

What are options for obtaining a stay?

The most common way to obtain a stay is to post a bond from an admitted surety insurer. Under such a bond, if the appealed judgment is affirmed or the appeal dismissed, and the appellant fails to pay it within 30 days of the remittitur, the judgment can be enforced against the person or company that issued the bond. (Code Civ. Proc., § 917.1.)

A bond issued by an admitted surety insurer must be for 1.5 times the amount of the judgment. (Code Civ. Proc., § 917.1.) The judgment amount for these purposes includes any cost award (which, in turn, includes contractual or statutory attorney fees). (*Ibid.*) If the cost and fee amounts have not been determined yet, they can be handled later through a separate bond.

A sophisticated bond broker will be able to walk your client through the mechanics of obtaining and posting a bond from an admitted insurer, including what collateral is necessary.

But a bond from an admitted surety insurer is far from the only way to obtain a stay. There are multiple other possible paths, depending on the specifics of the case. They include:

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Temporary stay by trial court. The trial court has discretion to stay enforcement of a judgment until 10 days beyond the last date on which a notice of appeal could be filed. (Code Civ. Proc., § 918.) This temporary stay can avoid the need for a bond while postjudgment motions are pending, since timely postjudgment motions extend the deadline to file a notice of appeal. Even if postjudgment motions aren't being filed, this short stay provides time to arrange for a bond or other option for a more permanent stay.

Courts routinely grant Code of Civil Procedure section 918 stays, unless the judgment creditor can show prejudice.

Stipulation. Consider asking the plaintiff to stipulate to a stay without a bond, or with a bond in an amount less than that required by statute. The Code of Civil Procedure expressly allows such stipulations. (*Id*., § 995.230.)

Many plaintiffs would refuse, but if the defendant is a large company with more than sufficient assets to pay the judgment, there may be room to negotiate. For example, plaintiffs may be willing to forego a bond in exchange for defendant paying them a portion of what a bond premium would cost (money that the defendant would have to spend either way).

Assuming the defendant is sufficiently creditworthy, plaintiffs have an incentive to cooperate because bond premiums, the cost of obtaining a letter of credit as collateral, fees and interest incurred to borrow funds to provide security for a bond, and fees and interest expenses to borrow funds to deposit in lieu of an undertaking are all recoverable costs on appeal unless the court determines that the bond was unnecessary. (Cal. Rules of Court, rule 8.278(d)(1)(F).) Indeed, under the California rule's federal analog, Federal Rule of Appellate Procedure 39, the United States Supreme Court recently affirmed a $2.2 million cost award reflecting the prevailing appellants' costs to obtain an appeal bond. (*City of San Antonio, Texas v. Hotels.com*, L.P. (2021) 539 U.S. __ [141 S.Ct. 1628, 209 L.Ed.2d 712].)

Moreover, if the plaintiff declines to stipulate, that fact can be helpful in its own right. When a defendant prevails on appeal and seeks its bond premiums as a recoverable cost, a plaintiff that refused to stipulate to a stay will be hard-pressed to object on the ground that the bond was unnecessary.

Bond by personal sureties. As an alternative to an admitted surety insurer, personal sureties can bond a judgment. (See Code Civ. Proc., § 995.510.) There are several differences when personal sureties are involved. A personal surety bond must be twice the amount of the judgment (as compared to 1.5 times for an admitted surety insurer bond). (*Id.*, § 917.1.) And, the bond must be executed by two sureties, not just one. (*Id.*, § 995.310.) Personal sureties must be California residents and own real property in California or be "householders" in the state. (*Id.*, § 995.510.) Court officers and members of the bar are not eligible, nor can the debtor be his or her own surety. (*Ibid.*)

If two sureties sign the bond, each must have a net worth of at least the amount of the bond in real or personal property situated in California, excluding judgment-proof property. (Code Civ. Proc., § 995.510.) If the bond is executed by more than two sureties and exceeds $10,000, any one surety's worth may be less than the amount of the bond, so long as the sureties' aggregate worth is at least twice the amount of the bond. (*Ibid.*)

Personal sureties must provide affidavits of qualification, and the respondent may object to a bond if the affidavits are deficient (Code Civ. Proc., § 995.520), potentially subjecting the sureties to discovery. And as with an admitted insurer bond, personal sureties become liable if the judgment is affirmed on appeal and the appellant fails to pay upon receipt of the remittitur.

Deposit. Defendants can forego a bond entirely, and avoid bond premiums, by depositing money with the court instead. (Code Civ. Proc., § 995.710.) The deposit must be at least equal to the amount that would be required for an admitted surety bond; it may be made in cash or statutorily specified securities. (*Ibid.*) The court must hold cash in an interest-bearing account and pay interest on demand. (*Id.*, §§ 995.710, 995.740.)

Supersedeas. In an extreme case, to preserve the status quo where the defendant is unable to post the requisite bond or deposit, the Court of Appeal has power to stay enforcement of the judgment without a bond via a writ of supersedeas.

For example, in *Davis v. Custom Component Switches, Inc.* (1970) 13 Cal.App.3d 21, 26–27, the appellate court stayed enforcement of a judgment where the respondent was pursuing a writ of execution that would force a sale of a business's assets and leave the appellants with no meaningful recovery if they prevailed on appeal, and where the appellants could not afford a bond. Similarly, in *Estate of Murphy* (1971) 16 Cal.App.3d 564, 568–569, the court stayed distribution of trust assets where

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"the task of recovering the property and redistributing it would be enormous" if the property were distributed and appellants later prevailed on appeal, and as to some of the appellants, the undertaking fixed by the trial court "may be prohibitive."

The appellate court can also use its supersedeas power to stay enforcement of a prohibitory injunction or otherwise freeze events that could impact the efficacy of an appeal. (Code Civ. Proc., § 923 [noting a reviewing court's power to "stay proceedings during the pendency of an appeal or to issue a writ of supersedeas," to "preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction"]; see, e.g., *Advanced Real Estate Services, Inc. v. Superior Court* (2011) 196 Cal.App.4th 338, 341 [staying a planned sale of the Orange County Fairgrounds].)

A petition for a writ of supersedeas must be filed in the Court of Appeal, *after filing the notice of appeal*, and must show (a) that the appellant would suffer irreparable harm absent a stay, and (b) that the appeal raises substantial questions on which the appellant's position has merit. Such petitions are rarely granted, but on the right facts are worth considering.

When does the stay need to be in place?

Absent a stay, a California state court judgment is enforceable upon entry. (Code Civ. Proc., § 683.010.)

That makes it prudent to ask the plaintiff to stipulate to stay enforcement (at least temporarily), or to ask the trial court for a temporary stay under Code of Civil Procedure section 918, *before judgment is entered*. Otherwise, there is a risk that the plaintiff will begin enforcement procedures before the defendant posts a bond or otherwise arranges for a more permanent stay.

If the plaintiff won't stipulate to a stay, it is also prudent to have your client start talking to a bond broker when the jury renders its verdict or the court issues its ruling, rather than waiting for entry of judgment. It can take some time to get a bond in place.

Counsel should also be aware of a wrinkle in stay timing in cases where there will be postjudgment motions. For judgments that would be automatically stayed by filing an appeal, it may be tempting to file the notice of appeal immediately to trigger the stay.

But there is case law holding that a notice of appeal divests the trial court of jurisdiction to rule on motions for judgment notwithstanding the verdict, motions to vacate the judgment, and motions for reconsideration. (See *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 50–51; *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc*. (1996) 43 Cal.App.4th 630, 641; *Weisenburg v. Molina* (1976) 58 Cal. App.3d 478, 486, abrogated on another ground by *Adams v. Murakami* (1991) 54 Cal.3d 105, 111; but see *Foggy v. Ralph F. Clark & Associates, Inc*. (1987) 192 Cal.App.3d 1204, 1211 [disagreeing with *Weisenburg*, and holding that appeal does not divest court of jurisdiction to rule on JNOV motion].) A temporary stipulated or section 918 stay is a good alternative to filing a hasty appeal and potentially depriving the trial court of jurisdiction to rule on postjudgment motions.

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https://www.ftc.gov/news-events/press-releases/2012/07/ftc-withdraws-agencys-policy-statement-monetary-remedies [https://perma.cc/YKM5-RUA5]. Since then, the FTC has recovered well over $11 billion in monetary relief. *See* Fed. Trade Comm'n, *FTC Refunds to Consumers*, Tableau (July 30, 2021), https://public.tableau.com/app/profile/federal.trade.commission/viz/Refunds_15797958402020/RefundsbyCase [https://perma.cc/AZ99-M838]. In light of *AMG*, however, the FTC has acknowledged in the vast majority of its pending Section 13(b) cases that monetary relief is not available to it. *See, e.g., FTC v. Am. Future Sys., Inc.*, No. 20-2266, 2021 U.S. Dist. LEXIS 140330, *1 n.1 (E.D. Pa. July 26, 2021); *FTC v. Elec. Payment Solutions of Am., Inc.*, No. CV-17-02535-PHX-SMM, 2021 U.S. Dist. LEXIS 155081, *21, *47 (D. Ariz. Aug. 11, 2021); Lauren Margolies et al., *Post-AMG Scorecard (Updated): Different Roads Forward for the FTC in Pending Cases*, JD SUPRA (June 18, 2021), https://www.jdsupra.com/legalnews/post-amg-scorecard-updated-different-9567684/ [https://perma.cc/92P8-R98M]. (However, there is legislation pending in Congress that would grant the FTC authority to seek monetary relief under Section 13(b). *See* H.R. 2668, which was passed by the US House of Representatives on July 20, 2021.)

Injunctive Relief under Section 13(b)

Section 13(b) authorizes the FTC to seek injunctive only where a defendant "is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b)(1). It is well established that injunctive relief cannot be based solely on past conduct. Injunctions are only authorized under the statute when there is "ongoing or imminent illegal conduct." *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 155 (3d Cir. 2019). Indeed, in *AMG* the Supreme Court recognized that the FTC Act "focuses upon relief that is prospective, not retrospective," and it noted "the words 'is violating' and 'is about to violate' (not 'has violated') setting forth when the Commission may request injunctive relief." *AMG*, 141 S. Ct. at 1348 (2021); *see also FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 774 (7th Cir. 2019) ("Section 13(b) serves a . . . forward-facing role: enjoining ongoing and imminent future violations."); *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) (holding that Section 13(b) "contemplate[s] ongoing or future violations" and thus "an injunction will issue only if the wrongs are ongoing or likely to recur"). Section 13(b)'s focus on ongoing or imminent conduct requires the FTC to come forward with "some evidence that the defendant 'is' committing or 'is about to' commit a[] violation" of the FTC Act before it may obtain injunctive relief. *Shire*, 917 F.3d at 156.

While it is statutorily clear that the FTC may only obtain injunctive relief when a defendant "is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission," there is disagreement among courts regarding the circumstances under which past conduct will meet the threshold for injunctive relief. On the one hand, the Ninth Circuit, for example, has long relied on a "cognizable danger" standard for such injunctive relief. *See, e.g., Evans Prods. Co.*, 775 F.2d at 1087. Under this standard, injunctive relief is available if there is "some cognizable danger of recurrent violation." *See, e.g., id.*; *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). On the other hand, the Third Circuit's recent decision in *Shire* announced a higher standard for the FTC. In *Shire*, the Third Circuit held that Section 13(b)'s "about to violate" language requires the FTC to establish "impending conduct" and not a "mere suspicion that such conduct may yet occur." *Shire*, 917 F.3d at 156.

The impact of the differing standards for injunctive relief used by, for example, the Ninth Circuit and Third Circuit is currently playing out in various district courts across the country. For example, the United States District Court for the District of Columbia recently partially granted a motion to dismiss touching on this issue in *FTC v. Facebook, Inc.*, __ F.Supp. 3d __, 2021 WL 2643627 (D.D.C. June 28, 2021). In *Facebook*, the FTC filed an antitrust action against Facebook challenging Facebook's "policies that prevent[ed] interoperability between Facebook and certain other apps that it saw as threats, thereby impeding their growth into viable competitors." *Facebook* at *1. In addition to other remedies, the FTC sought injunctive relief. *Id*. Facebook, however, had discontinued the practices in question in 2013. *Id*. In partially granting Facebook's motion to dismiss, the district court held that even if such conduct by Facebook were actionable, "it occurred nearly eight years ago, rendering an injunction under Section 13(b) unavailable as a matter of law." *Id*. at *8.

Conversely, in *FTC v. Neora LLC*, No. 3:20-cv-1979 (N.D. Tex. Aug. 2, 2021), 2021 WL 3398153, the United States District Court for the Northern District of Texas recently applied a more lenient standard to the FTC's claim for injunctive relief. In *Neora*, the defendant argued that as a matter of law the FTC was

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not entitled to injunctive relief for conduct that had ceased six years earlier. In denying the defendant's motion for judgment on the pleadings, the district court ruled that the FTC need only establish that the defendant's past conduct gives rise "to a 'fair inference of a reasonable expectation of continued violations' absent restraint." *Neora* at 6 (*citing Federal Trade Commission v. Southwest Sunsites, Inc.*, 665 F.2d 711, 723 (5th Cir. 1982)). The court went on to rule that "past conduct can give rise to a reasonable inference of current or future violations, either in conjunction with other circumstances or where the past violations are extensive." *Neora* at 6.

While it is always difficult to litigate against the FTC, the *AMG* decision makes clear that the FTC's authority to pursue what it believes are violations under the FTC Act is limited. For more than a decade the FTC successfully fought off efforts by defendants to curtail its perceived right to pursue monetary relief under Section 13(b), notwithstanding that its overreach was so blatant it culminated in a unanimous Supreme Court curtailing future violations of its authority. It appears the next round of challenges to the FTC's overreach of authority under 13(b) will focus on the FTC's use of 13(b) to obtain permanent injunctions against defendants based solely on historical conduct. Given the clear language of 13(b) itself, which expressly applies only to current and future conduct and the pending conflict between the circuits, this will likely be the next opportunity for the Supreme Court to rein in the FTC and preclude it from exercising powers Congress has not authorized.

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YOUNG LAWYERS DIVISION UPDATE

Jonathan Slowik

Christina Maria Assi

Robert Glassman

The Young Lawyers Division started off its Q2 programming with a bang, hosting an exclusive discussion in April with former Senator and U.S. Attorney Doug Jones. Moderated by ABTL board member Suzelle Smith, the discussion covered a broad range of topics spanning Senator Jones's unique experience that includes more than three decades as a trial lawyer and serving as a juror in the first impeachment trial of President Trump.

Also in April, the YLD kicked off its Brown Bag Lunch series, where the section hosts discussions for up to 20 people with members of the state and federal bench. The YLD has hosted three lunches so far: April 29 with Judges Eric Taylor and Lawrence Riff of the Los Angeles Superior Court ("Justice Restored: What to Expect When We Get Back to Court"); May 27 with Justices John L. Segal and Brian M. Hoffstadt of the Court of Appeal ("Appetite for Appeals?"); and July 23 with Judge David J. Cowan of the Los Angeles Superior Court and Justice John Shepard Wiley of the Court of Appeal ("Dos and Don'ts for New Lawyers"). We are only halfway through the series, so be sure to look out for our upcoming programs in September (with District Judges Philip S. Gutierrez and André Birotte Jr. of the Central District of California), October (with Magistrate Judges Karen L. Stevenson and Maria A. Audero of the Central District of California) and November (with Judge Daniel J. Buckley of the Los Angeles Superior Court). CLE credit is available. We hope to see you soon!

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BEST PRACTICES FOR REMOTE DEPOSITIONS

Samuel Cortina

While remote depositions rose in popularity (and necessity) during the pandemic, many clients and attorneys are now voluntarily opting for them—even as travel and social distancing restrictions are scaled back—due to their efficiency and cost-savings. This article provides guidance on how to make these depositions not just efficient but also effective.

The Mechanics of Remote Depositions. How do remote depositions differ in practice from in-person depositions?

First and foremost, the participants—the deponent, the taking attorney and her team, the defending attorney and her team, the court reporter, and the videographer—are typically not in the same room, and instead, are connected to each other through a videoconference platform like Zoom or Webex. Discovery vendors generally have their own proprietary version of the platform that is more suitable for a deposition where just the witness is spotlighted.

Dealing with exhibits presents another stark difference, as the taking attorney cannot physically hand the deponent the exhibit that she intends to introduce. One option for a remote deposition is for the taking attorney to arrange for exhibits to be printed and shipped in advance. This practice is highly discouraged, however, because it is costly and invites the curious party to preview the sealed documents.

The more typical practice is to handle exhibits electronically. This requires the taking attorney to upload each of her expected exhibits to a file-sharing platform prior to the deposition, and then, either she or the vendor will publish specific exhibits as the deposition proceeds. When the exhibit is published, it is displayed on the screen for all participants to view simultaneously, and either the witness or the taking attorney will have control over the exhibit. The full exhibits are also made available to all of the parties on the file-sharing platform but not until they are published.

The final major difference is that there is no lunch provided! Just kidding. But it is important to know that breaks are different. They often take place through a breakout room your vendor provides where each member of your team can click into and out of a separate virtual room distinct from the one that is being used for the deposition. Alternatively, you can have your own preferred videoconference platform available to your team and keep it open during the deposition (just make sure you've muted yourself on the deposition platform).

Other than those items, most else is the same, including that each on-the-record word is transcribed and the transcripts hold the same weight as in-person deposition transcripts.

Tips on Taking Remote Depositions. Remote depositions are undoubtedly efficient. They save time and resources on travel and printing, and they are easier to schedule. When attorneys balk at taking remote depositions, it is because they are concerned about losing the natural connection, flow, and nonverbal read of an in-person deposition. But those limitations are not immutable. Below are tips that will help you maximize the benefits of a remote deposition by minimizing the technical "fourth wall"; the less that technology interferes with the deposition, the more it will feel like you are taking it in person.

First, enter into a remote deposition protocol in advance of the deposition. The protocol should establish clear instructions for the foreseeable and flexibility for the unforeseeable. Some common terms include prohibiting the deponent from communicating with anybody during the deposition (especially via text or instant messaging) and prohibiting others from being in the same room as the deponent. It is also helpful to identify the vendor who will be used for the deposition, require that the participating parties register with the vendor and become familiar with the deposition software before the deposition, and establish how the parties will address technical difficulties that arise (i.e., on-the-record, off-the-record, agreement that time spent addressing technical difficulties will not count towards any time limit, agreement to address and resolve issues in good faith, etc.).

Second, do a dry run of your vendor's software at least a couple of days before the deposition. The dry run helps you confirm that you have appropriate audio and video settings, and it allows you to familiarize yourself with identifying and publishing exhibits, using exhibits that have been published, and entering and exiting the breakout room.

Third, employ a uniform naming mechanism for the file names of the exhibits you intend to use. The preferred approach is to use the date prefix and the Bates number of the document as the file name—i.e., 19870628_Bates0001—because it makes the documents easily

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sortable and identifiable. You should also use the same naming convention to describe documents in your written outline.

Fourth, consider whether the added cost of a virtual support technician is appropriate. Technical and human errors are bound to happen. Most vendors make a support technician available during the deposition for an added cost, so if the deposition you are taking is particularly important or will run up against a time limit, it may be worthwhile to make that technician available for the entire deposition (or even the first couple of hours).

Fifth, be patient and flexible. Everybody is working out the kinks of this new practice, and courts are uninterested in hearing counsel bicker with each other, especially over technical aspects of a remote deposition.

Tips on Defending Remote Depositions. Defending a remote deposition is not that different from defending an in-person deposition—i.e., while you need to be attentive, your actual participation is limited. Nevertheless, there are some best practices that you should follow to make sure your witness is prepared and protected during a remote deposition.

Some of those best practices include (a) conducting a dry-run of the deposition software with your witness so the witness feels comfortable with the format and is not distracted by it, (b) arranging for your witness to have an appropriate background and a quiet place for the deposition where she can focus on the questions asked, and (c) instructing your witness that she may scroll through an exhibit on the virtual screen and that she should not feel constrained by the fact that only one page of an exhibit displays at a time (even if the taking attorney wishes to direct her attention to only one page).

It is likewise important for you, as the defending attorney, not to feel restricted by the deposition format. For instance, if you do not have access to a document or cannot see the screen, you should ask the taking attorney to hold questions until you do have access or can view the document. Keep in mind that, just as it is important for the taking attorney, you should similarly be flexible and agreeable as technical and human errors arise.

Unusual Incidents. The rise of remote depositions has led to some unusual incidents. Those experienced by my firm include a husband standing behind the computer screen audibly feeding his wife answers to the questions posed to her; a defending attorney answering a call from his bank on the record because he thought he was on mute; a witness having a personal and private conversation with his son intermittently throughout the deposition; a witness abruptly leaving the deposition because his phone battery died and having to move to a location closer to the outlet to continue, which delayed the deposition because the documents were not readily available on his phone; and a witness taking the deposition from his phone in his car (though the deposition was suspended for that reason). Following the best practices set out above could have avoided these problematic events.

To close, while remote depositions are limited in certain ways that in-person depositions are not, there are best practices you can follow that will help you make this now-ubiquitous event not just efficient but also effective.

***Samuel Cortina** is an associate at King & Spalding LLP.*

U.S. SUPREME COURT UPDATE: CASES OF INTEREST IN OCTOBER TERM 2020 (PART 2)

The United States Supreme Court decided a number of cases on its October Term 2020 docket that are of particular interest to the ABTL membership. This second installment of a two-part article summarizes cases that involve the most prominent issues of interest to civil litigators before the Court this past Term.

John F. Querio

Selene Houlis

ANTITRUST

The NCAA's eligibility rules regarding compensation of student-athletes violate federal antitrust law under full rule of reason review.

National Collegiate Athletic Association v. Alston, __ U.S. __, 141 S. Ct. 2141 (2021)

This case presented one of the most high-profile issues of the Supreme Court's Term: whether the NCAA's amateurism requirement violates the Sherman Act. Creating a conflict with several other circuits, the Ninth Circuit held that the NCAA's requirements surrounding compensation of student-athletes violate federal antitrust law. This ruling came on the heels of the Ninth Circuit's 2015 decision in *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), cert. denied, 137 S. Ct. 277 (2016), which held that the NCAA violated the Sherman Act by not permitting schools to pay student-athletes the full cost of attendance. *O'Bannon* was the first decision by a federal court to determine that an aspect of the NCAA's amateurism rules violated the antitrust laws.

While *O'Bannon* was pending, NCAA Division I basketball and football players filed this class action, arguing that the NCAA student-athlete payment limits are an anticompetitive restraint of trade. The case was assigned to the district judge who presided over *O'Bannon*. The district court applied the rule of reason, which uses a burden-shifting framework to evaluate whether a defendant's restraint of trade is justified by procompetitive benefits that cannot be achieved through substantially less restrictive alternatives. The district court found that the student-athlete payment limits at issue restrain the market for student-athlete labor but that these limits also have procompetitive effects since amateur college sports could not exist without some such limits. The court concluded that the limits were more restrictive than necessary to maintain the distinction between college and professional sports because those limits include restrictions on education-related benefits even though the distinction between college and professional sports is that student-athletes do not receive unlimited payments unrelated to education. The district court issued a permanent injunction invalidating most NCAA limits on payments related to education, requiring the NCAA to permit some types of cash payments to student-athletes, and allowing individual athletic conferences to set limits for payments related to education and cash payments that the NCAA would not be permitted to cap. The Ninth Circuit affirmed, holding that the district court's changes to the NCAA rules would be virtually as effective as the NCAA's current rules.

In a unanimous opinion authored by Justice Gorsuch, the Supreme Court upheld the district court's injunction. Citing the NCAA's monopsony power in the market for student-athlete labor and the conceded anticompetitive effect its restrictions on student-athlete compensation had on the price and quantity of that labor, the Court held that those restrictions must be analyzed under full rule of reason analysis to determine whether they violate the Sherman Act. Conducting that analysis, the Court concluded that the district court struck the correct balance in upholding the NCAA's restrictions on student-athlete compensation that are unrelated to education but striking down such restrictions that are related to education, and in according the NCAA considerable leeway in defining the limits of education-related compensation and how its new rules would be administered. The Court confirmed that the NCAA's compensation rules need not be the least restrictive means of achieving the NCAA's asserted procompetitive objective of promoting amateurism in college sports, but held that the district court was correct to find that there are substantially less restrictive ways of achieving those objectives.

In a separate concurrence, Justice Kavanaugh went further and

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condemned the NCAA's business model as exploiting student-athletes without letting them enjoy any of the fruits of their labor. As he put it, "Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law."

The Court's opinion and Justice Kavanaugh's concurrence have already produced seismic effects on the market for college sports and student-athlete labor. Shortly after the Court issued its opinion, the NCAA announced that it would start allowing student-athletes to receive compensation for their labor (not just education-related compensation). Where these developments will lead is anybody's guess, but it is fair to say that *Alston* will be seen as a watershed moment in college sports history.

APPELLATE PROCEDURE

District courts lack discretion to deny or reduce appellate costs deemed "taxable" in district court under Federal Rule of Appellate Procedure 39(e).

City of San Antonio, Texas v. Hotels.com, L.P., __ U.S. __, 141 S. Ct. 1628 (2021)

This case presents an everyday—but nonetheless important—question of appellate procedure: whether a district court has discretion to depart from the default rule that the losing party on appeal must pay all of the prevailing party's taxable costs, such as bond premiums.

The City of San Antonio brought a class action suit in district court on behalf of Texas municipalities against a group of online travel companies for failure to pay hotel occupancy taxes. The district court ruled for San Antonio and awarded unpaid taxes, interest, and penalties. The travel companies then voluntarily posted bonds to stay enforcement of the judgment after negotiating with San Antonio regarding the amount of the bonds. The district court approved the bonds and stayed enforcement of the judgment.

The travel companies appealed to the Fifth Circuit, which reversed and ordered San Antonio to pay the travel companies' appellate costs as taxed by the clerk. The travel companies sought approximately $900 in costs at the Fifth Circuit and did not seek other costs under Federal Rule of Appellate Procedure 39(e) (including their bond premiums) or request permission to seek further relief under Rule 39(e) on remand. Back in the district court, the travel companies sought over $2 million in interest and bond premiums under Rule 39(e). San Antonio objected and sought to reduce or strike the bond-related costs, but the district court rejected San Antonio's argument, relying on Fifth Circuit precedent that district courts have no discretion to reduce an award of appellate costs.

Relying on its earlier precedent, the Fifth Circuit affirmed and held that district courts lack discretion to reduce or strike appeal bond costs. In so deciding, the Fifth Circuit rejected the position of every other circuit that has confronted this question.

Often the largest single item of appellate costs is the premium the appellant must pay to secure a bond to stay enforcement of the judgment. Here, San Antonio argued the district court should have broad equitable discretion to rely on the size of the premium and other factors to refuse to award the bond premiums as costs or to reduce that amount. The Supreme Court, in a unanimous opinion by Justice Alito, rejected that argument based on the text and structure of Federal Rule of Appellate Procedure 39. The Court held that Rule 39 vests discretion in the courts of appeals to deny, reduce, or allocate costs in a manner that deviates from the default rules established by Rule 39(a). But for that very same reason, the Court concluded that district courts cannot also possess discretion to do the same thing. The Court's opinion provides needed clarity regarding how losing parties on appeal should ask for taxable costs to be reduced or denied for equitable reasons.

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CIVIL PROCEDURE

Class members whose credit reports containing false information were not disseminated to third parties lack Article III standing to sue in federal court for violation of the Fair Credit Reporting Act because they have not suffered concrete harm of the type traditionally recognized as providing a basis for a lawsuit in American courts.

TransUnion LLC v. Ramirez, __ U.S. __, 141 S. Ct. 2190 (2021)

This case is the latest iteration in the Supreme Court's ongoing project to rein in Article III standing, especially in consumer protection and class action litigation. In *Spokeo, Inc. v. Robins*, __ U.S. __, 136 S. Ct. 1540 (2016), the Court held that Article III standing's injury-in-fact element requires the plaintiff to show that an alleged violation of law caused or presented a material risk of a concrete and particularized harm. In this case, the Court elaborated on that requirement in the class action context.

Plaintiff Sergio Ramirez sued TransUnion under the Fair Credit Reporting Act (FCRA), claiming that it erroneously included in his credit report a match of his name to a name on the government's terrorist watch list and that this report was provided to an auto dealer while he was attempting to obtain credit for a vehicle purchase, resulting in his humiliation and embarrassment. Ramirez sought to represent a class of 8,185 people whose TransUnion credit reports similarly included an erroneous match to a name on the watch list, but he stipulated that less than 25% of that class had a credit report disseminated to a third party during the class period. The district court certified the class, and the case proceeded to trial, resulting in a jury verdict of more than $60 million in damages. The Ninth Circuit reduced the punitive damages award but otherwise affirmed, concluding that all class members sufficiently demonstrated Article III standing and that the class was properly certified.

In a 5-4 opinion by Justice Kavanaugh, the Supreme Court reversed. The majority held that while the 1,853 class members whose credit reports had been disseminated to third parties had Article III standing to pursue an FCRA claim (because they had suffered a concrete harm akin to common-law defamation), the 6,332 class members whose credit reports had not been so disseminated had not suffered any concrete injury-in-fact and so lacked Article III standing. The Court did not address class certification and left it to the lower courts on remand to decide how the class should proceed.

The Court's opinion is likely to stand as a significant impediment to many consumer protection class actions in federal court, especially those based on bare violations of statutory or regulatory requirements without any proof of concrete injury to the class. However, the true significance of this ruling may be that it accelerates the trend of plaintiffs bringing such actions in state court, where standing requirements are much looser.

SECURITIES LAW

A defendant in a securities class action can rebut the presumption of classwide reliance recognized in *Basic Inc. v. Levinson* by pointing to the generic nature of the alleged misstatements to show that the statements had no impact on the price of the security, even though that evidence is also relevant to the substantive element of materiality. But the defendant bears the ultimate burden of persuasion to rebut the *Basic* presumption.

Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System, __ U.S. __, 141 S. Ct. 1951 (2021)

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Supreme Court established a presumption of classwide reliance in securities fraud class actions where an alleged misrepresentation by the defendant is material. This *Basic* presumption was founded on the efficient market hypothesis (i.e., the theory that in an efficient market with well-functioning trading infrastructure and information pathways, all relevant information is quickly incorporated into the price of a company's stock). Plaintiffs now routinely invoke this presumption in order to secure class certification in class actions premised on fraudulent misrepresentations by the securities issuer. More recently, in *Halliburton Co. v. Erica P. John Fund, Inc*., 573 U.S. 258 (2014), the Court clarified that a defendant must have an opportunity to rebut the *Basic* presumption at the class certification stage by showing that the alleged misrepresentation did not have an impact on the price of the relevant security.

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This case addressed (a) whether a defendant may rebut the *Basic* presumption by pointing to the generic nature of the alleged misstatements, even though the evidence is also relevant to the substantive element of materiality (which is a merits issue and generally not a suitable ground for opposing class certification), and whether a defendant seeking to rebut the presumption has the (b) ultimate burden of persuasion or only a burden of production.

These questions arose out of a securities class action against Goldman Sachs and three of its former executives. Plaintiffs were Goldman Sachs shareholders who alleged that, prior to the 2008 economic downturn, defendants engaged in securities fraud by making statements that they had "extensive procedures and controls that are designed to identify and address conflicts of interest" and that their "clients' interests always come first," all while laboring under undisclosed conflicts of interest. The district court granted class certification, concluding that defendants failed to rebut the *Basic* presumption even though they presented evidence that Goldman's stock price did not decline on dates when the press reported on Goldman conflicts of interest. The Second Circuit reversed, holding that the district court should have applied a preponderance-of-the-evidence standard in assessing whether defendants bore their burden of persuasion to rebut the *Basic* presumption and that the district court failed to consider some of defendants' price impact evidence. On remand, the district court again granted class certification. This time, the Second Circuit affirmed, noting that defendants' attempt to rebut by highlighting the generic and aspirational character of the alleged misstatements would impermissibly allow defendants to litigate the merits issue of materiality at the class certification stage.

The Supreme Court vacated the Second Circuit's opinion, in an opinion by Justice Barrett. The Court held that district courts must consider the generic nature of the alleged misstatements in assessing whether those statements had any impact on the stock price, and confirmed that defendants do bear the burden of persuasion to rebut the *Basic* presumption by showing lack of price impact (although the Court made clear that it thought the allocation of this burden should rarely make any difference). Because it was unclear whether the Second Circuit had considered the generic nature of defendants' alleged misrepresentations, the Court remanded for the Second Circuit to undertake that inquiry.

While this opinion clarifies some open questions of federal securities class action procedure, on its own it may not have much impact. Its significance lies more in what it reveals about the direction the Supreme Court is going in federal securities class action law. The Court's opinion demonstrates the majority's continuing skepticism of securities class actions and a desire to rein them in, but also possibly a reluctance to make any radical moves in this area.

TAKINGS

A state law granting labor union organizers the right to access a landowner's private property for limited times without permission or compensation effects a per se physical taking of the landowner's right to exclude under the Takings Clause of the Fifth Amendment.

Cedar Point Nursery v. Hassid, __ U.S. __, 141 S. Ct. 2063 (2021)

California law permits union organizers to access the premises of an agricultural employer for 3 hours per day for up to 120 days each year in order to try to unionize farmworkers. Organizers are not required to request consent from or give notice to the employer/property owner; they are required only to file a Notice of Intent to Take Access with California's Agricultural Labor Relations Board (ALRB). In this case, union organizers invoked this authority 62 times in one year—sometimes conducting protests at 5:00 a.m. on the property of Cedar Point Nursery. Fowler Packing Company, a large produce grower, denied access to organizers on three consecutive days, resulting in organizers filing an unfair labor practice charge against Fowler with the ALRB. Cedar Point and Fowler sought declaratory and injunctive relief in district court, arguing that enforcement of the regulation effects an uncompensated taking under the Fifth and Fourteenth Amendments. The district court dismissed for failure to state a plausible Takings Clause claim.

On appeal, the Ninth Circuit affirmed, holding that there was no "classic taking in which government directly appropriates private property" and that there was no *per se* physical taking because no permanent physical invasion was authorized by the regulation. The Ninth Circuit emphasized the fact that the regulation permitted entrance onto property only for limited periods of time. Eight judges dissented from the denial of rehearing en banc.

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The Supreme Court reversed the Ninth Circuit, in a 6-3 opinion authored by Chief Justice Roberts. The Court held that the California law effects an uncompensated *per se* physical taking of the landowners' right to exclude others from their property, and thus requires payment of just compensation under the Takings Clause. The majority rejected the state's argument that only a law effecting a permanent physical invasion of property could constitute a *per se* physical taking, concluding that temporary physical invasions equally amount to *per se* physical takings, with the difference in duration accounted for in the calculation of the amount of compensation due. The majority also dismissed the dissent's concern that its holding would imperil health and safety inspection access regulations on the basis that such regulations are consistent with longstanding background restrictions on property rights and thus do not constitute physical takings requiring the payment of just compensation.

The Court's opinion constitutes a ringing endorsement of private property rights, especially the right of a property owner to exclude others' access to its property. Future Takings Clause challenges to other aspects of state regulation of property rights (for instance, beachfront access for the public in California) will therefore likely find a sympathetic audience in the *Cedar Point* majority.

UPDATE ON PART 1

In *BP P.L.C. v. Mayor & City Council of Baltimore*, __ U.S. __, 141 S. Ct. 1532 (2021), the Supreme Court held, in a 7-1 opinion written by Justice Gorsuch, that 28 U.S.C. § 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court when the removing defendant premises removal in part on the federal-officer removal statute, 28 U.S.C. § 1442, or the civil-rights removal statute, 28 U.S.C. § 1443.

In *Nestlé USA, Inc. v. Doe*, __ U.S. __, 141 S. Ct. 1931 (2021), the Supreme Court held, in an 8-1 opinion by Justice Thomas, that the plaintiffs could not sue Nestlé and Cargill under the Alien Tort Statute (ATS) for allegedly aiding and abetting child slavery on cocoa plantations in Africa because that would violate the presumption against extraterritoriality given that the plaintiffs pled no more than general corporate activity by Nestlé and Cargill in the United States.

In separate opinions, Justices Thomas, Alito, Gorsuch, and Kavanaugh stated or strongly indicated that they would hold in a future case that federal courts may not recognize new causes of action under the ATS that were not already in existence when the ATS was enacted in 1789. Justices Alito and Gorsuch also stated their view that domestic U.S. corporations are not immune from liability under the ATS.

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