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abtl REPORT

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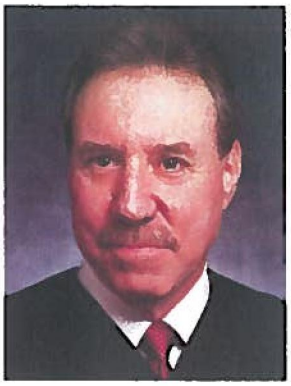
Brown Bag Lunch with Magistrate Judges Karen Crawford and David Bartick

By Mathieu Blackston

Judge Crawford



Judge Bartick

Although their practice areas prior to taking the bench were different, two of the Southern District of California's newest magistrate judges have the same view of their role – to efficiently facilitate cases for the parties and the court. Magistrate Judge Karen Crawford spent the bulk of her career before joining the bench as a commercial litigator, most recently with the international law firm of Duane Morris. Prior to joining the bench, Magistrate Judge David Bartick spent 26 years as a prominent criminal defense attorney.

On May 7, the two judges sat down with local attorneys and shared their views of their roles as magistrate judges and provided pointers for how attorneys can most efficiently utilize their magistrate's courtrooms to resolve their clients' disputes. The brown bag lunch was sponsored by the San Diego Chapters of ABTL and the Federal Bar Association. During the luncheon, the judges discussed the value of early neutral evaluation conferences, the role of case management conferences, and the work they expect attorneys to do before bringing discovery disputes to the court.

(see "Crawford and Bartick" on page 5

Appellate Court Makes Clear: A Defendant Who Files a Meritless Anti-SLAPP Motion Does Not Get Fees Just Because the Plaintiff Dismisses Its Complaint in Response

Brett Weaver

A Strategic Lawsuit Against Public Participation — or "SLAPP" as it is better known — is a civil action aimed at preventing citizens from exercising their First Amendment rights or punishing those who have done so.[1] The plaintiff's purpose in filing a SLAPP "is not to win the lawsuit but to detract the defendant from his or her own objective."[2] In response to the problems created by such meritless lawsuits, California's Legislature enacted Code of Civil Procedure section 425.16, et seq. – the "anti-SLAPP statute" — "to prevent SLAPPs by ending them early without great cost to the SLAPP target."[3]

Most litigators in California are familiar with the basics of the anti-SLAPP statute. In a nutshell, a defendant may bring a special motion to strike any cause of action in the plaintiff's

(see "Anti-Slapp Motions" on page 12)

Inside

No Class Certification In Call Recording Cases

By Jay Ramsey and Shannon Petersen, Sheppard Mullin Richter & Hampton LLP

In recent years, illegal call recording class actions have flooded California courts. In them, consumers complain that a company violates the law when it records calls without first providing notice that they may be recorded. In *Hataishi v. First American Home Buyers Protection Corp.*, 223 Cal. App. 4th 1454 (2014), the California court of appeal made it much more difficult to certify a class action in such cases.

In *Hataishi,* the defendant recorded all calls with its sales department. For inbound calls, an electronic notice played notifying customers that their calls may be recorded. For outbound calls, no electronic notice played. The plaintiff sued, alleging a single cause of action for violation of California Penal Code section 632. Section 632 prohibits a party from recording or monitoring a "confidential communication" without the consent of all parties to the conversation and imposes a statutory penalty of up to $5,000 per violation. The plaintiff claimed that the two outbound calls placed by sales representatives to her were recorded without her consent.

The court of appeal held that a plaintiff may pursue a claim under Section 632 only if she had "an objectively reasonable expectation" that the conversation was not being overheard. This standard proved the undoing of the class claims. The court held that each plaintiff's objectively reasonable expectations would turn on individualized inquiries, including the length of the class member's experience with the defendant, whether the class member had ever been notified that her calls with defendant may be recorded, and each class member's experience with other businesses that record or monitor calls.

The plaintiff's own experience illustrated that individualized inquiries were necessary. She placed 12 inbound phone calls to the defendant's sales department, and each time she received an electronic notice that her call may be recorded. Not once did the plaintiff tell the defendant that she refused to be recorded and she never terminated the call to avoid being recorded. In addition, the plaintiff also testified that she had participated in "dozens and dozens and dozens" of telephone calls with other companies where she understood her call could be recorded.

These facts, the court held, affected the plaintiff's objectively reasonable expectations. "A jury could rationally reach a different conclusion concerning another plaintiff who has not had the same experience." Individualized issues thus predominated, precluding certification of a class.

To save the class claims, the plaintiff attempted to add a claim under Penal Code section 632.7, which differs from Section 632 in two key respects: (1) Section 632.7 applies only to telephone conversations where at least one party is on a cellphone or a cordless phone; and (2) Section 632.7 prohibits the recording or monitoring of the call without consent *even if* the call is not a "confidential communication." The court, however, held that individualized inquiries were also necessary under Section 632.7 to determine whether the consumer was on a cellphone or cordless phone.

Despite this decision, plaintiffs continue to file call recording class actions in large numbers. *Hataishi* will make it difficult for these plaintiffs to certify any class.

(see "New and Noteworthy" on page 11)