Due to the increase in bankruptcy filings during the recent economic downturn, a number of our clients have received a “Creditors’ Committee Solicitation Form” from the Office of the United States Trustee. These forms bear the seal of the United States Department of Justice and urgently request the “signature of a nominating party” with little other explanation. This article provides some background on creditors’ committees to help you make an informed decision about whether or not to serve on one.

Perhaps the most succinct description of the role of a creditors’ committee is contained in the legislative history to §1102 of the bankruptcy code: “[creditors committees] will be the primary negotiating body for the formulation of the plan or reorganization...they will represent the classes of creditors from which they are selected [and] will provide supervision of the debtor [and] will protect their constituents interests.” Creditors’ committees generally consist of persons who affirmatively respond to the solicitation form and hold the largest claims against the debtor.

If you or your company is listed among the twenty largest creditors of a chapter 11 debtor, your response to the solicitation from the United States Trustee will determine whether you will ultimately be among the pool of creditors from which...
Points from the President

RICK COHEN

I’m very excited about this quarter’s issue of Points and Authorities.

Having just come out of a serious recession, many of our readers are finding themselves, for the first time, in the precarious position of being a creditor to an insolvent business. For most of us, navigating the bankruptcy realm is, at best, confusing. Four articles in this issue, written by members of our Litigation and Insolvency and Financial Solutions Practice Groups, shed light on the fundamentals of being a creditor in bankruptcy. Who is considered a creditor? How does a creditor assert its rights in a bankruptcy? What is a creditors’ committee, and how does one decide whether or not to serve? If, ultimately, a creditor does receive a judgment, how is it collected? The answers to these and other questions appear on the pages that follow, to help you become a more informed, prepared creditor.

Another area of ongoing concern to our clients is compliance with the Americans with Disabilities Act and the Disabled Persons Act, two pieces of legislation that are intended to ease access by the disabled to buildings open to the public. Unfortunately, these Acts have also been seized upon as opportunities to extract statutory and compensatory damages from businesses that are in technical violation of the legislations’ terms. Two members of our Labor and Employment and Litigation Practice Groups, sort out how to respond in these cases and minimize related costs.

A topic of epic concern, yet under-discussed in our home state of California, is the issue of water—where it comes from, where it’s going, who gets to use it, and who is making those decisions. This issue is skillfully analyzed by Howard Ellman, a member of the Firm’s Real Estate Practice Group, and an expert on land use and water rights issues.

Please feel free to contact the authors should you have questions about any of the topics discussed in this quarter’s Points and Authorities.

Rick Cohen
President and Chief Executive Officer
A CREDITOR’S THUMBNAIL GUIDE TO BANKRUPTCY
JOSEPH M. WELCH AND DANIEL H. SLATE

If you provide goods, services, credit or money to others and expect (or hope) to be paid for what you provide, then you are a “creditor.” Your right to payment is your “claim.” In order to better manage risks, creditors should be especially careful when dealing with those who are (or may become) insolvent, i.e. with liabilities exceeding assets or generally not able to pay debts as they fall due. Federal bankruptcy law often intervenes in such relationships by, among other things: imposing an automatic stay, requiring certain payments already made to creditors be returned, avoiding or reducing liens, re-writing contracts and discharging debtors from future personal obligations. Like competitors at any good sporting event, creditors must be prepared—on offense and defense—to improve their position in bankruptcy.

I. Creditor Offense

Creditors typically choose whether, and how aggressively, to enforce claims against: (1) the debtor’s bankruptcy estate, (2) the debtor, (3) co-borrowers or guarantors and (4) any collateral. Some options, however, are lost if not pursued quickly. Fear of violating the automatic stay, which could result in punishment, often results in an inability to move and uninformed creditors pay a price.

The automatic stay is a very broad and powerful injunction, stopping any and all actions a creditor might want to take against a debtor and her assets. The stay is imposed immediately when the bankruptcy case is filed. The automatic stay is intended to protect the debtor—and all other creditors—from an overreaching creditor who grabs first. For example, without the automatic stay, a creditor holding a $100,000 first trust deed in a $1 million asset could foreclose on that asset and deprive the debtor and other creditors from $900,000 in equity.

Actions taken in violation of the automatic stay are void in California and the Ninth Circuit. Those who violate the stay willfully can be sanctioned with damages, costs, attorneys’ fees and under certain circumstances, even punitive damages. There are numerous exceptions to the automatic stay, however and the automatic stay eventually terminates by operation of law. Creditors can get relief from the automatic stay to go about their business, especially when the bankruptcy estate is not harmed in the process. An informed approach can help creditors stay on offense and get paid promptly.

1. Claims against the Estate

When a debtor files for bankruptcy protection, virtually all the debtor’s interests and assets become property of the bankruptcy estate. Creditors must generally file a proof of claim, with supporting documents, to get paid. Not all claims are treated equally, however. Claims are paid based on their status—secured, priority or unsecured—where a lower status claim is typically paid only if and when all claims of higher priority are paid in full. Claims supported by both (1) a valid security interest and (2) value in property are paid first to the extent of the value of the property. Claims preserving the estate or benefiting all creditors (e.g., for goods provided to a debtor shortly before or during bankruptcy) receive priority status and get paid before other unsecured claims. Moreover, claims against the estate arising after bankruptcy (including rent) are often given priority status and a debtor in possession or trustee who decides to assume or assign certain contracts or leases in default must typically cure all defaults, compensate for various losses caused by default (e.g., attorneys’ fees) and provide adequate assurance of future performance to hedge against future defaults.

When there is not enough to pay an entire class of claims, creditors in that class share pro rata. As a result, timely filing a claim may be the difference between sharing with other creditors and getting nothing. A creditor does not need relief from stay to file a proof of claim or bring a motion against the estate.

2. Claims against the Debtor

The main goal for an individual debtor in bankruptcy is to get a discharge from future personal liability in exchange for giving up all non-exempt property. A discharge relieves the debtor from any obligation to make payment on her debts. Creditors have a couple tools to prevent a debtor from getting a discharge. If a debtor is less than completely forthcoming when preparing her bankruptcy schedules—hoping to conceal assets from creditors—creditors can sue the debtor in bankruptcy to deny her entire discharge, which benefits all creditors. In addition, certain claims automatically survive bankruptcy, such as domestic support obligations, and others can be made non-dischargeable when based upon the debtor’s fraud, embezzlement or other bad acts that happened before bankruptcy.

As with filing a proof of claim, there are strict deadlines for bringing an action against a debtor, and the automatic stay does not prevent creditors from bringing these actions in the bankruptcy court. On the other hand, if the creditor does not file its action against a debtor on time, the creditor will be prohibited from pursuing those claims against the debtor. There is not much a creditor can do about an honest debtor’s “fresh start.” But informed and prepared creditors have a number of options to stop abusive bankruptcies, keep debtors from “gaming the system,” and prevent an undeserved windfall.

3. Claims against Third-Parties

Creditors often look to co-borrowers or guarantors to help satisfy their claims. With limited exceptions, the automatic stay protects only a debtor in bankruptcy and her property. In many instances,
SO I HAVE A JUDGMENT, NOW WHAT?
HOW CREDITORS CAN USE RECEIVERS TO COLLECT ON JUDGMENTS

MATTHEW SEROR

As any successful litigant can attest, obtaining a money judgment in one’s favor can be a hollow victory if there is no realistic chance of collecting on it. After expending significant resources to get a judgment, the successful litigant who now has a money judgment against the defendant is left with the inescapable question, “So now what?”

A judgment is only as valuable as the judgment debtor behind it. The judgment represents only the obligation to pay, and in many instances a judgment debtor may refuse to honor the judgment. A judgment creditor is left with few options—the creditor can commence collection proceedings; can record it in the county where the debtor resides and wait (and hope) for eventual payment; or can choose to simply hold the judgment and take no other immediate action. After concluding the litigation, a judgment creditor may be reluctant to immediately begin collection proceedings, which can be very costly. That said, judgment creditors must understand the reality that absent some action, the debtor is not likely to satisfy the judgment voluntarily. This puts the judgment creditor in a very precarious position.

One remedy that is often overlooked by creditors is the appointment of a post-judgment receiver to aid in the execution of a judgment. Post-judgment receivers can be a valuable tool to judgment creditors seeking to collect on a judgment, and can often act more quickly and efficiently than a judgment creditor acting alone. Even the act of seeking the appointment of a receiver can provide a powerful incentive for the judgment debtor to satisfy the judgment. Given the foregoing, in appropriate circumstances, judgment creditors should strongly consider the appointment of a post-judgment receiver to aid in the execution of a judgment.

California law provides for the appointment of post-judgment receivers. In most instances, a post-judgment receivership operates very similarly to the way a pre-judgment receivership would, with the same requirements for appointment, qualification, powers, rights and duties. However, post-judgment receivers differ from pre-judgment receivers in two significant ways. First, in a typical pre-judgment receivership, absent specific court authority to the contrary, the receiver is charged with maintaining the status quo during the pendency of the action. The post-judgment receiver, on the other hand, is inherently empowered to immediately commence the liquidation of the judgment debtor’s assets to satisfy the judgment creditor’s judgment.

The second significant difference between pre-judgment and post-judgment receivers centers on the principle that post-judgment receivers, unlike pre-judgment receivers, work directly for the benefit of one of the parties—the judgment creditor. Indeed, a post-judgment receiver’s mandate is to liquidate the assets of the debtor for the benefit of the creditor. The concept of the receiver working directly for the benefit of one the parties presents an inherent contradiction with the notion that a receiver must remain neutral.

In one of the only reported decisions on this issue, the California Court of Appeals held in Morand v. Superior Court of the City and County of San Francisco that: “The [post-judgment] receiver is not, except in a technical sense, an officer of or instrumentality of the court, but represents and is an agent of the judgment debtor, the judgment creditor at whose instance he was appointed, and such other judgment debtors [sic] as may have caused the receivership to be extended to their claims.”

The appointment of a post-judgment receiver can also provide a judgment creditor with numerous advantages. In many instances, a receiver will be able to act more swiftly and efficiently in taking possession of a judgment debtor’s assets. A receiver can obtain banking records and other financial data almost immediately, while a judgment creditor proceeding without the benefit of a receiver may have to wait months for formal responses to subpoenas for such information. Moreover, if assets are located, a receiver will be able to quickly seize and secure those assets for the benefit of the judgment creditor.

Pursuing the collection on a judgment through the use of a receiver can also result in a partial shifting of the costs. Unaided by a receiver, a judgment creditor would have to incur costs in connection with its collection activities. While some of these fees could be added to the amount of the unpaid judgment, and therefore recoverable, the judgment creditor would have to advance these costs initially. However, if a receiver is appointed, the receiver’s fees are paid out of the receivership estate, which is funded from the proceeds derived from the receiver’s sale of the debtor’s assets. This operates to shift the costs of collection from the judgment creditor to the judgment debtor, or at least, the assets of the judgment debtor.

Finally, in some instances, the appointment of a post-judgment receiver is not just an advantage, but rather a requirement. Certain categories of assets, most notably intellectual property, including domain names and trademarks, cannot be levied upon and sold by a judgment creditor without the appointment of a receiver. In these cases, the appointment of a receiver represents the only way to liquidate these assets, which could represent significant value.

The appointment of a post-judgment receiver in aid of execution represents a powerful tool available to judgment debtors who find themselves with unpaid judgments in their favor. The appointment of a receiver provides not only the logistical and legal avenues for liquidating a judgment debtor’s assets to satisfy a judgment, but even the act of seeking the appointment of a receiver will often cause the debtor to satisfy the judgment. For these reasons, judgment creditors should consider the appointment of a receiver when attempting to collect on a judgment.

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an informed creditor can dismiss a debtor in bankruptcy from a lawsuit and continue claims against third-parties. Moreover, a debtor’s discharge does not help co-borrowers or guarantors. Creditors that pressure co-borrowers and guarantors often get paid much sooner than others.

4. Claims against Collateral

A creditor with a valid security interest in property can often foreclose on that property, which serves as collateral, and get paid from the proceeds. In most instances, creditors must obtain relief from the automatic stay by showing the bankruptcy court the property both (1) has no equity for the estate and (2) is not necessary for an effective and timely reorganization.14 In some instances, the stay will automatically terminate upon certain events.15 If the creditor is not completely paid from the collateral, then it can often pursue the other three options discussed above.

II. Creditor Defense

Taking a bankruptcy notice to mean that nothing further can be done can be a serious mistake. In fact, creditors should be vigilant in the bankruptcy case to watch out for motions or lawsuits that adversely affect their claims or security interests.

Many chapter 11 or 13 debtors use bankruptcy to avoid or strip junior liens against their residence where such liens are not supported by any value. Very often these motions are supported by the debtor’s (grossly understated) declaration and are decided very quickly. The vigilant creditor who timely objects and proves even $1 in value above senior secured debt may entirely preserve its junior lien.16 Ignoring these motions often results in lost security interests and claims being converted from secured to unsecured.

A major policy consideration in bankruptcy is equitable distribution of assets. Along these lines, trustees or “debtors in possession” can sue creditors to recover potentially preferential payments. For example, if a debtor completely pays off friends and family just in time before bankruptcy while giving arms-length creditors nothing but a cold shoulder, a trustee can sue those friends/family to recover the money they received, even on legitimate debts, and then redistribute those funds (less fees, of course) to pay every creditor their pro rata share. Preference actions are great in theory, but often dismal in practice. Some trustees or debtors in possession sue everyone who received more than $5,850 in the aggregate within 90 days of bankruptcy, while the debtor is presumed insolvent.17 There are numerous defenses that can completely insulate a creditor from any liability—payments made in the ordinary course of business for example—and many cases can be settled for a small fraction of alleged preference payments.18

Finally, chapter 11 or 13 debtors typically file plans of reorganization to alter various contract or state law rights. Creditors should immediately seek bankruptcy counsel to make sure their rights are adequately protected. Defending against a reorganization plan can be difficult and nuanced. Failure to do so, however, may be extremely costly.

Summary

In sum, creditors in bankruptcy can (and should) be equipped to safely pursue claims and avoid pitfalls. With the volume of bankruptcy cases pending (and looming), creditors must know how to maneuver on both offense and defense. Uninformed creditors who do neither may ultimately face their own insolvency concerns as they walk away from or hand over needed working capital.

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the creditors’ committee is selected. The appropriate response to the solicitation requires the consideration of a number of factors.

Committee members are not paid for their time, but can be reimbursed for actual expenses incurred in the performance of their duties. They are fiduciaries for the entire class they represent and are required by the bankruptcy code to provide information to their constituents. Nevertheless they must often sign a non disclosure agreement regarding information they obtain while serving on the committee.

Despite the lack of financial remuneration for what can be a time-consuming role, the risk of fiduciary liability and the potential for being whipsawed by disclosure issues, many of our clients still opt to serve on creditors’ committees. The reasons for that decision vary, but are most often based upon one or more of the following factors:

**Desire to be heard.** Many creditors understand that the likelihood of having a voice in the reorganization process is greatly enhanced by serving on a committee. Since bankruptcy courts are courts of equity, the vast majority of judges pay particular attention to positions espoused by committees in order to counterbalance the arguments of the debtor or other parties adverse to the interests of unsecured creditors. Thus, effective communicators can use their ability to create a consensus among committee members to insure that their issues can be heard.

**Networking/gathering of industry-specific expertise.** Creditors don’t often have the opportunity to get a glimpse of the inner-workings of industry peers. The potential for fixing what went wrong while working with committee members involved in the same business niche can be a challenge that is hard to resist, particularly when a successful reorganization could enhance future business opportunities with the debtor.

**Cost-sharing.** Creditors’ committees hire counsel and often other professionals at the cost of the bankruptcy estate. While this arrangement does affect the ultimate distribution to creditors, it also permits a pooling of resources that saves individual creditors from bearing the cost of hiring an attorney to become educated about complex cases that are often large and difficult to comprehend without historical perspective.

Since a client’s decision whether to serve on a committee is often best made with reference to the results of other cases in a similar industry, here is a quick look at some recent cases in which this Firm has represented the unsecured creditors’ committee:

**Retail Cases.** Buchalter Nemer represented the unsecured creditors’ committee in the following four cases, each in a slightly different retail sector:

- **In re Active Wallace Group, Inc.:** The committee of this skate shop and ski products retailer included Nike USA, Sole Technology, One Distribution and Hurley International. The committee assisted in the streamlining of business operations while the debtor was being marketed for sale, participated in the ultimate sale of a substantial portion of the assets to a third party, and is continuing to monitor the liquidation of remaining assets.

- **Home Organizers, Inc. (Closet World):** The committee of this retailer of home organization products consisted of various construction and advertising-related companies, including Contractors Wardrobe and Money Mailer. The committee negotiated the dismissal of the bankruptcy cases will full payment to all unsecured creditors.

- **Banner Bedding:** The committee of this mattress and bedding retailer included Simmons Company, Tempur-Pedic, Inc. and Color Ad, Inc. The committee monitored the streamlining of business operations and ultimately negotiated the terms of a consensual plan of reorganization that resulted in enhanced business opportunities between creditors and the surviving business entity.

- **In re 944 Media, LLC:** The committee of this entertainment and lifestyle publisher consisted of printing and advertising-related creditors, including Trend Offset Printing. The committee participated in the negotiation of the sale of a substantial portion of the debtor’s assets to a third party and is currently involved in the liquidation of remaining assets.

**Medical Industry.** The Firm represented the unsecured creditors’ committee of these hospitals:

- **In re Brotman Medical Center:** The committee of this hospital consisted of various suppliers, including Professional Hospital Supply, Sodexho, Inc. and Medtronic Xomed/USA. The committee was co-proponent of a plan of reorganization that will result in a substantial payment of unsecured claims and was also instrumental in reducing the secured claim held by Prime Healthcare Services Los Angeles, LLC from approximately $18 million to $10 million.

- **In re Karykeion:** The committee of this community hospital consisted of various medical suppliers and service providers, including Advanced Medical Analysis, LLC and Pharmacy Healthcare Solutions, Ltd. The committee assisted in the streamlining of business operations while the debtor was being marketed for sale and participated in the ultimate sale of a substantial portion of the estate’s assets.

**Real Estate Cases.** The Firm represented the unsecured creditors’ committee (or, the equity committee) in the following cases:

- **In re Benjamin and Gail Catlin:** The committee of creditors in this individual bankruptcy case of one of Sacramento’s most prominent real estate developers consisted of creditors holding guaranty claims against the debtor, including US Bank National Association, Mechanics Bank and SWD Land Company. The committee participated in the streamlining of debtor’s business operations and negotiated the terms of a plan of reorganization that created a liquidating trust that will operate the estate’s most valuable assets until they can be liquidated. The committee also selected the liquidating trustee and a number of committee members are now members of the liquidating trust’s oversight committee.

- **In re Real Estate Partners, Inc.:** The committee consisted of equity holders that invested in various real estate entities in this consolidated case concerning an fraudulent investment scheme. The committee investigated various causes of action, obtained the recovery of certain properties for the benefit of the estate and was the proponent of a plan of reorganization that will permit the proceeds of litigation claims and other assets to be distributed to unsecured creditors.

Ultimately, the decision whether to serve on a creditors’ committee will require an analysis of a number of factors, including those described in this article. Since many of our attorneys are regularly involved in these issues, don’t hesitate to call one of us to assist you with this decision.

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one impaired class of claims. A class of claims can accept a plan if half in number and two-thirds in dollar amount of the total claims in the class, vote to accept. In a real estate case, the consenting-impaired class that debtors most often try to obtain is the class of general unsecured claims. Also, typically in real estate cases, the class of unsecured creditors is not large, either by number or dollar amount. While aggregate trade claims may total less than $1 million, the secured creditor’s unsecured deficiency claim may be (and often is) many multiples of that. If the deficiency claim is included in the class of general unsecured claims, the secured creditor can swamp the votes of the other unsecured claimants and control the class vote. By ensuring a vote to reject the plan, the secured creditor may deprive the borrower of the necessary consenting impaired class, and prevent confirmation.

To deal with this problem, borrowers have long tried to separately classify large deficiency claims. The problem with this tactic is that case law requires similar claims to be classed together. Most courts have held that absent specific business reasons, unsecured deficiency claims are substantially similar to other general unsecured claims, and must be classed together. Borrowers’ attempts to separately classify deficiency claims to obtain confirmation are derisively dismissed as gerrymandering.

Two recently published opinions by the same Bankruptcy Judge, however, may provide borrowers with a clearer path to separately classify deficiency claims. In In re Loop 76, LLC, a single asset real estate case decided on November 22, 2010, a secured creditor had a total claim against the borrower of $23 million. It also held the secured guarantee of a third party. The property securing the claim was valued at only $17 million. Accordingly, the claim was bifurcated into two: a secured claim for $17 million, and an unsecured deficiency claim for $6 million. The borrower’s plan separately classified the deficiency claim from the general unsecured claims. Had they been classed together, the secured creditor would have controlled the general unsecured class, and may have defeated confirmation of the plan.

The secured creditor objected to the classification, arguing that the deficiency claim was substantially similar to the general unsecured claims, that they must be classed together, and that the borrower was impermissibly gerrymandering the classes to obtain acceptance. The Court disagreed noting that while similar claims may be classed together, the Bankruptcy Code requires that dissimilar claims must not be classed together. The Court went on to hold that because the creditor held a third party guarantee, it had an independent source of payment for its deficiency claim. According to the Court, that difference was sufficient to mandate separate classification of the deficiency claim. The ruling permitted the borrower to obtain an accepting impaired class (the general unsecured class) and confirm the plan over the secured creditor’s objection.

Five months later, on April 14, 2011, the same Judge made a similar ruling in In re Red Mountain Machinery Co. Again, he permitted confirmation of a plan over the primary secured creditor’s objection that the borrower impermissibly separately classified its unsecured deficiency claim. Again, the basis for the ruling was that the creditor had an independent source of payment for its deficiency claim, rendering it dissimilar from other unsecured claims, and mandating separate classification.

Since many, if not most, commercial lenders obtain third party guarantees or otherwise have recourse to third parties to support loans, the impact of these rulings could be widespread. If permitted to stand, they will alter the playing field by removing a significant strategic bankruptcy bargaining chip traditionally held by a creditor. The Loop 76 order has already been appealed to the Ninth Circuit Bankruptcy Appellate Panel. The secured creditor in Red Mountain also intends to appeal the ruling in that case. If the rulings are upheld on appeal, they may be binding on all bankruptcy courts in the Ninth Circuit, and will provide support for extension to other circuits. Stay tuned for further developments.

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The Disabled Persons Act: The Rules Have Changed, But the Game Remains the Same

Arthur Chinski and William Miller

While employers have to contend with many issues under the Americans with Disabilities Act concerning their employees, they are also challenged by the accessibility of the buildings in which their employees work. In 1990, Congress enacted Title III of the American’s with Disabilities Act ("ADA") in an attempt to eliminate “barriers” to disabled individuals’ access to places of public accommodation (all public business affecting commerce, regardless of size). Under the ADA, all existing places of public accommodation, and any new construction, must comply with the technical requirements of the ADA Standards for Accessible Design. However, existing structures must only make alterations that are “readily achievable” to comply with the law. To determine what is “readily achievable,” courts have adopted what is essentially a cost-benefit analysis.

Although the goals of Title III of the ADA are laudable, the ADA was quickly seized upon by enterprising plaintiffs’ lawyers, and career plaintiffs, as a way to make money by forcing quick settlements. Critics of Title III of the ADA cite the damage scheme under the law as creating an incentive for filing suits by allowing for the recovery of attorneys’ fees. In California, the problem is exacerbated by the fact that, while the ADA only allows for injunctive relief and attorneys’ fees, most complaints in California couple ADA claims with a violation of the Unruh Civil Rights Act, which allows plaintiff to claim compensatory damages of at least $4,000.

The Unruh Civil Rights act has been recently amended by the passage and enactment of the “Disabled Persons Act” ("DPA”) in January 2009. The DPA applies to “construction related accessibility claims.” In essence, the DPA is the California Legislature’s attempt to balance enforcement of the ADA, with the reality of how the law was being exploited. The DPA makes several key changes in the law that has effected how facilities cases are litigated:

THE DISABLED PERSONS’ ACT HAS HAD AN EFFECT ON HOW CASES ARE LITIGATED, BUT...

1. The Standard for Statutory Damages: The test for determining whether an individual plaintiff has been damaged has changed. Under the old law, plaintiffs could allege a $4,000 statutory penalty for each violation they encountered. Under the DPA, the standard is that a statutory penalty can be assessed based on the number of “particular occasions” an individual “actually” encountered a barrier to accessibility and was either deterred from access or suffered embarrassment and harassment because of the barrier. Civil Code § 55.56. This new standard has led to increased litigation, as several defendants have been successful in asserting that while a violation may have existed, it did not deter plaintiff or cause him or her any embarrassment or harassment.

2. Attorneys’ Fees: Because the DPA awards fees to the “prevailing party” it has been argued that the attorneys’ fees provision in the DPA is “bilateral” meaning that either a successful plaintiff or defendant can recover attorneys’ fees. Several courts have disagreed concerning the interpretation and application of the DPA’s fee provision, and the issue remains an open question. See Jankey v. Poop Deck, 537 F.3d 1122 (9th Cir. 2008) (holding that a party who settles a case under the ADA is the prevailing party and is entitled to attorneys’ fees); see generally Sceper v. Trucks Plus, 2009 U.S. Dist. LEXIS 102445 (applying the “new” Unruh Civil Rights act and allowing full attorneys fees where three violations were discovered). What is certain is that if a plaintiff is able to establish even a technical violation of the access laws, the defendant can and will be held liable for plaintiff’s attorneys’ fees regardless of whether statutory damages are appropriate.

(3) Certified Accessibility Specialists: The final significant change brought about by the DPA is the creation of a new state agency, and certification for access specialists (a “CAsp”). Civil Code § 55.51 et seq. Simply put, a business can now elect to have a certified access specialist do an audit of its place of public accommodation, and certify it is compliant with the ADA and applicable state laws and regulations. Once the certificate is issued, it can be displayed by a business as a deterrent to potential plaintiffs.

Additionally, a certification provides a business with certain rights if it is sued, including a stay of proceedings until an early evaluation of the case can be conducted by the Court. These measures are meant to minimize the cost of any litigation to a business that has been certified. It does not, however, make a business immune from suit.

...THE GAME REMAINS THE SAME

While the DPA has certainly provided businesses with a potential new defense to statutory damages, it really has not changed the volume or nature of the lawsuits. Plaintiffs have simply shifted their allegations to allege multiple visits to a business. One change that we have noticed is the rise in pro per lawsuits. Given the uncertainty surrounding the issue of attorneys’ fees, several career plaintiffs seem to have severed ties with their attorneys and are now directly filing suits against businesses.

As a result, even with the new defenses available to businesses, the cost-benefit analysis still does not typically favor defending a case to trial. The primary deterrent is attorneys’ fees. Even if no statutory damages are ultimately awarded, if there are violations of the ADA, or other applicable California accessibility laws, in a business requiring remediation, the plaintiff can still be the “prevailing party” and be awarded his or her attorneys’ fees.

In every instance, because of the relatively low damages sought in most Title III claims, an effective and efficient strategy in managing such claims is necessary to address any problems with the property in question and to resolve the case as cost-effectively as possible. To that end, below are three actions that a business entity should take if faced with a Title III or DPA claim (or both).

1. Assess Where and When the Complaint was Served

Accessibility claims are filed in both State and Federal Courts. Regardless of where the matter is filed, it is important to get it to counsel quickly. In most cases, a responsive pleading to a complaint must be served within 20 to 30 days of service. Further, many defendants try to settle Title III or DPA complaints before answering.

Continued on page 10
We all know that development, industry and even life itself depends upon a reliable water supply. Most Californians also know that distribution issues constrain the water supplies available to the southern half of the state. Indeed, we have heard so much about the problem that most folks have tuned the issue out. It is a point of no small irony that the threat of supply constraint has become far more acute in a year of bountiful precipitation.

While nature has provided us with water, the California Legislature created new state bureaucracies and directed existing ones to take the water away, applying it to preservation and resurrection of the Sacramento-San Joaquin Delta Ecosystem, at the expense of other stakeholders. Although the legislation pays lip service to the “co-equal” goal of preserving supplies for consumptive use, water dedicated to Delta restoration flows down to the San Francisco Bay and thence to the ocean. That water is not available for “consumptive use” by farmers, homeowners or industry. As much of it has been committed to such uses in the past, there’s no way to sugarcoat the pill—we now must get by with less.

Responding to the legislative directive, the State Water Resources Control Board prepared a Draft Delta Flow Criteria Report (July 20, 2010) for the Sacramento-San Joaquin Delta Ecosystem. The Report was intended to identify the flows required to support a restoration of the Delta ecosystem without regard to the competing claims on the water required to meet that end. The Report concluded with a recommendation that an additional 5,000,000 acre feet be allowed to flow through the Delta to start healing the environmental injuries inflicted over the last one-hundred years.

While declaring a need for balance and to “ensure the reasonable protection of beneficial uses which may entail balancing of competing beneficial uses of water including municipal and industrial uses, agricultural uses and other environmental uses …,” the Report states that the goal of Delta restoration can only be achieved by allowing an amount of water to flow through the Delta roughly equivalent to all of the appropriations currently taking place.

The State Board has established a benchmark against an unattainable and utopian objective. How that can be done without significantly impairing the interests south of the Delta—while drastically curtailing vested use north of it—is left to the reader’s imagination.

One can argue that it is a good idea to start an analysis by setting a benchmark. But the numeric criteria determinations in this report must be considered in the following context:

- There is sufficient scientific information to support the need for increased flows to protect public trust resources; there is uncertainty regarding specific numeric criteria.

The reference to “public trust” in this context serves as code words for fish, i.e., salmon, Delta smelt, etc.

The Report and related actions by the Delta Water Master constitute the first salvos in what promises to be a protracted war. Interests north of the Delta from which most of the flows originate will invoke the area of origin provisions of the California Water Code, §§ 10505.5 and 11460 et seq. The first of these sections requires the State Water Resources Control Board to assure that any permit or license “… shall provide, that the application, permit, or license shall not authorize the use of any water outside of the county of origin which is necessary for the development of the county.” (Emphasis added) The section includes no criteria for determining “necessary” or “development” in context.

Sections 11460 et seq. impose a similar requirement on the Department of Water Resources (the agency responsible for running the State Water Project and other state water conduits), using different but equally vague and undefined terms.

The courts will face the burden of reconciling interpretation of the Delta protection legislation with the area-of-origin statutes. No matter how that conflict ultimately resolves itself, however, the bottom line is clear: exports south of the Delta will be reduced. Nor is that all.

The Delta Smelt litigation demonstrated the power of the Endangered Species Act to commandeer water for the benefit of species considered threatened or endangered by the authors of a biological opinion, with no countervailing demands or uses having any part in the equation. Decisions under the public trust doctrine have a similar effect and do not necessarily depend upon something even as marginally definitive as a biological opinion. In its landmark decision declaring the public trust in Mono Lake—and thus curtailing diversion of water from tributary streams—the California Supreme Court stated:

“[t]he public uses [protected by the public trust doctrine] are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. [Citation] There is a growing public recognition that one of the most important public uses ... is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.”
The Real Drought Has Just Begun

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The public trust doctrine has been held to be a “background principle” of property law as applied to water rights. Thus application of it cannot be considered a “taking.” It constitutes an inherent, intrinsic limitation on water rights derived from contracts, regardless of the words in those contracts. See Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003.

Stripped to its essence, this means that parties who hold contracts for delivery of water from the State Water Project (or from agencies whose supply depends on such contracts) hold those rights subject to an unstated limitation that defies precise definition and that can be invoked pretty much at random. When you look at the picture in its totality, the rights to water that originate through the Delta are subject to an area of origin limitation, poorly defined and using general terms, but establishing a statutory priority, endangered species and public trust limitations, and the new requirement for preservation of massive instream flows to restore the ecological health of the Delta itself.

All of this portends years of litigation and regional strife. In the short term, it means that the due diligence examination to assess the availability of water for any project or development south of the Delta now requires much more investigation and critical examination than was previously thought to be the case. No longer can one rely upon a will-serve letter or a supply contract.

The examiner must dig deep and consider the particular allotment of water back to its source in an attempt to gauge its vulnerability to diminution by application of generally stated principles and platitudes.

The degree of threat this structure poses for agriculture and development activities south of the Delta cannot be overstated, representing a significant constraint on all water-dependent economic activity—obviously including public and private development. Those engaged in such activities must now look well beyond the paper record to assess the degree of risk to the water supplies on which they rely that the new and preemptive supply constraints pose to their particular endeavors.

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