ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT ORANGE COUNTY

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Q&A with the Honorable Deborah C. Servino
By Hon. Kathleen E. O'Leary

Editorial Note: Before her appointment to the Orange County Superior Court in August 2009, Judge Servino was an attorney with the Office of the Attorney General. There she handled felony criminal appeals, petitions for writs of habeas corpus, and State Court matters when the DA was recused. She appeared before the United States District Court, Ninth Circuit, California Courts of Appeal, California Supreme Court, and United States Supreme Court. Prior to the AG's Office, Judge Servino was an associate in the business litigation section of Rutan & Tucker from October 1996 to September 1997. From August 1995 to September 1997, she was a clerk for Ninth Circuit Judge Melvin Brunetti. Judge Servino received her law degree from UC Berkeley School of Law in 1995. She received her Bachelor of Arts in Political Science, cum laude, from Duke University. Judge Servino joined the ABTL-OC Judicial Advisory Council in 2023.

Q: **Judge Servino, you have served in a number of different assignments in the fifteen plus years you have been on the Superior Court. Can you tell us a little bit about those assignments and what you found most interesting about those assignments?**

A: My assignments have included North Justice Panel (Criminal), Juvenile Truancy, Juvenile Justice, Juvenile Dependency, Family Law, Appellate Division (appeals from lim-

-Continued on page 4-

- IN THIS ISSUE -

Rules of Civility: Lessons from our Local Courts
By Andrew A. Wood and Andrew Castro

"We will not keep looking the other way when attorneys practice [with incivility] . They will be called out and immortalized in the California Appellate Reports." (*Masimo Corp. v. The Vanderpool Law Firm, Inc.* (2024) 101 Cal.App.5th 902.) Thus did our own Fourth Appellate District reiterate its commitment to reining in the rising incivility in our profession.

No one questions that we must zealously advocate for our clients or that doing so sometimes requires taking a firm tone with our adversaries. But too often this balancing act devolves into strident condescension and, in the worst cases, overt hyper-aggression. This is what our appellate Court in *Masimo*—addressing overt name-calling—called out, and what our own State bar now tries to curb by imposing new proposed Rules of Professional Conduct. This article examines recent cases illustrating uncivil conduct the Fourth District and other appellate courts have recently highlighted, and it examines proposed Rule of Professional Conduct 8.4.2. It concludes with thoughts on strategies our members might employ in order to meet our court's, and the Bar's, expectations while also meeting our clients'.

"Courts have had to urge counsel to turn down the heat on their litigation zeitgeist far too often." (*Lasalle v. Vogel* (2019) 36 Cal.App.5th 127, 134 [citing cases] (*Lasalle*).) "[W]hile the factual scenarios of these cases differ, they are all variations on a theme of incivility that the bench has been decrying for decades, with very little success." (*Ibid.*) Our Fourth District has been outspoken in calling for change and calling out incivility in its opinions. (See, e.g., *ibid*; *Shapell Socal Rental Properties, LLC v. Chico's FAS, Inc.* (2022) 85 Cal.App.5th 198, 219, *as modified (Oct. 31, 2022), as modified on denial of reh'g (Nov. 15, 2022)* (*Shapell*); *Masimo Corp. v. The Vanderpool Law Firm, Inc.* (2024) 101 Cal.App.5th 902 (*Masimo*).)

-Continued on page 5-

President's Message
By Andrew R. Gray

It is both an honor and a privilege to serve as President of ABTL's Orange County Chapter. Following in the footsteps of Ken Parker, our 2024 President, and a host of impressive attorneys who have grown this organization into Orange County's premier bar organization, I can only hope to continue our organization's growth and its leadership in the Orange County bar.

Plans are coming together for an outstanding year of programing, which will feature opportunities to facilitate the communication among local judges and attorneys, and a continuing effort to promote the civility and professionalism that makes Orange County such a wonderful place to practice. The highlight of the year, of course, will be our 51st Annual Seminar, which will be held at the beautiful Wailea Beach Resort in Maui from October 8-12, 2025. ABTL has been hosting an amazing seminar in Hawaii every other year since 1974, and this return to Maui will give our membership an opportunity to support the people of Maui who have been such gracious hosts for us throughout the years, as they continue to recover from the devastating fires of 2023. More details on the Annual Seminar will be available soon, but the planning committee, including Amy Laurendeau and Len Polyakov from our Orange County Chapter, are engaged with some exciting potential speakers who will address topics related to high-stakes litigation and trial. Put the dates on your calendar now—this event will sell out—and be on the lookout for registration starting in April.

In addition, we are looking forward to excellent dinner programs throughout the year. Our next program, scheduled for Wednesday, March 19, brings us an opportunity squarely in line with our organizational mission—to "promote competence, ethics, professionalism, and civility in the legal profession." Justice Brian Currey and Michael Mallow—the leaders who promoted the adoption of civility guidelines by the California bar—will be joined by Orange County's own Justice Joanne Motoike for a presentation entitled: "Enough Already! Addressing the Rude, Crude, and Biased in California's Legal Profession." This should be an engaging conversation about a topic that regularly impacts our trial practice. Thanks to Jeff Singletary, this year's dinner program chair, for putting this event together. He is hard at work organizing engaging speakers and topics for the remainder of our dinner programs this year, including an upcoming presentation that will highlight significant changes that will soon impact trial lawyers throughout California starting in 2026.

And while the Seminar and our dinner programs offer a tremendous opportunity to grow our professional skills and learn about key issues affecting business trial lawyers, my experience

-Continued on page 7-

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False Advertising Class Actions and the Reasonable Consumer Standard: The Ninth Circuit's *Whiteside* Decision Complicates the Analysis Under Federal Rule 12

By Abby Meyer

I. Introduction to Consumer-Driven False Advertising Class Actions

When a consumer brand goes to market and formulates its brand strategy, it must decide, among other things, how it will differentiate itself and its products from other brands and products in its category. To this end, the brand may use descriptive phrases (i.e., plant-based, organic, reef-friendly, Made in the U.S.A.) or "romance" language and puffery (luxurious and smooth, best ever) as differentiators. When making branding decisions, companies should bear in mind that their advertising claims are regulated (federally by FTC and/or FDA) and there is significant enforcement activity focused on marketing statements. Consumers are among these "enforcers," as they can file putative class action lawsuits alleging that false or misleading marketing claims violate state consumer protection statutes or common law. Depending on the claim asserted, consumers can seek equitable relief such as an injunction to stop or change the marketing statement, or may be able to pursue money damages. Companies can also be liable for the attorneys' fees of a successful consumer-plaintiff.

Consumer-plaintiffs target labeling or advertising statements that they claim are either actually untrue (the product is labeled as "free of" an ingredient but testing shows it contains that ingredient), or that have the tendency to mislead even if true (marketing claims that a product is recyclable and while technically true, no recycling centers can actually accept and process the product). These putative class actions may target express claims appearing on packaging as well as product claims that may reasonably be inferred or implied by elements of the product's marketing (the packaging gives the overall impression that a food item is healthy to eat, but in fact it contains so much sugar as to be unhealthy; i.e., "health halo" litigation). Hundreds of these putative class actions are filed every year and for high volume products in particular, place at risk millions of dollars on certified class claims.[1] This article will address the "reasonable consumer" standard which is used to evaluate these consumer class action claims, including the trajectory and application of this standard in the Ninth Circuit at the motion to dismiss phase.

-Continued on page 8-

Tips on Civil Appellate Practice: Avoiding Common Errors

By Hon. Kathleen E. O'Leary and Thomas N. Fay

The stereotype of an appellate practitioner (or sometimes an appellate justice) is a lawyer sitting alone in a dim office, dusting off old books and reciting Latin phrases, far removed from the arena of the trial court (and also sunlight). With that stereotype come adjectives: arcane, boring, nerdy. We acknowledge we may be unable to dissuade you from this point of view. In fact, some parts of this article may even confirm it.

Nevertheless, you may find a time when you are unable to avoid filing something in the Court of Appeal. What to do? While the best bets are always to carefully review the Rules of Court, local rules, and a secondary source like the *Rutter Guide to Civil Writs and Appeals*, or to consult with an experienced appellate attorney, we have compiled a few common errors in civil appellate practice to avoid, organized by subject matter.

Writs

1) Remember to make a showing of irreparable harm.

Writ relief is roughly comparable to ex parte relief in the trial court. In general, to "jump the line" and get relief from the Court of Appeal without waiting for an appealable order or judgment, you need to show that your client will suffer irreparable harm if the court doesn't intervene, and that the matter cannot wait for the ordinary appellate process. This requirement is critical to the success or failure of writ petitions; it is quite common for the Courts of Appeal to summarily deny a writ petition not because the panel concludes the trial court's order is correct, but simply because there is no showing of exigency or irreparable harm. Do not treat it as a pro forma allegation, included in your petition as a formality.

2) Bring your writ petition on time.

Unlike ordinary notices of appeal, the timeliness of which can generally be ascertained by reference to just two Rules of Court (8.104 and 8.108), the timeliness of writ petitions is governed by a patchwork scheme of statutes and rules, depending on the type of writ relief sought and the type of order challenged by your writ petition. So-called "statutory writs," those that are specifically authorized by a statute, typically come with specified, very short

-Continued on page 10-

YLD Update
By Katie Rosoff and Allie O'Hara

The co-chairs of this year's Young Lawyers Division ("YLD") committee are Allie O'Hara from Latham & Watkins LLP and Katie Rosoff from Schilling Law Group, PC.

ABTL's YLD introduces lawyers practicing ten years or less to their ABTL chapter and helps these lawyers develop relationships with other young lawyer members. Over the course of the year, YLD hosts events like Happy Hours, Judicial Mixers, Brown Bag lunches, and MCLE events.

In June 2024, we hosted a happy hour at Puesto in Irvine, sponsored by Consilio. Everyone in attendance enjoyed thoughtful conversation over tacos and drinks on a Tuesday summer evening, and all attendees had a fantastic time. We look forward to hosting another Happy Hour in the coming months.

For the remainder of the 2025 calendar year, along with another Happy Hour, the YLD co-chairs intend to host a Brown Bag lunch with one of the judges sitting on the local bench. Brown bag lunches are a unique opportunity to learn from members of the Orange County bench in a small setting and receive insight and advice that will help you grow as an attorney. We also hope to grow our committee and bring in a Vice Chair who will assist with planning and organizing our yearly events.

If you would like to get more involved with the planning of YLD events, please reach out to Katie or Allie, and they will get you involved in the Planning Committee. The YLD Committee looks forward to another fun and educational year. We will look forward to seeing you at our events!

♦ *Catherine ("Katie") Rosoff is a litigation associate at Schilling Law Group and can be reached at Catherine.Rosoff@schillinglawgroup.com.*

♦ *Allie O'Hara is an associate at Latham & Watkins and can be reached at allie.o'hara@lw.com.*

-Q&A: Continued from page 1-

ited Civil, misdemeanor, and traffic cases), and Unlimited Civil. What I found most interesting about the assignments was that the different types of cases often overlapped or crossed over. For example, there are civil cases that are based on criminal cases, family law cases, or probate cases. Some of the juvenile cases that I presided over had parents who had cases in Family Law or were defendants or victims in criminal cases. Each of my assignments provided me with a better foundation for my next assignment.

Q: You have very diverse practice experience having been both a civil litigator and a criminal prosecutor. Were there certain skills you developed as a lawyer that you find useful in your role as a judge?

A: As a civil litigator and as an attorney at the AG's Office, I developed my legal research and writing skills. I use these skills weekly in ruling on Law and Motion matters as a judge on the Unlimited Civil Panel.

Q: Is there something you've learned as a judge that you wish you had known when you were a practicing attorney?

A: I wish I knew when I was a practicing attorney that Civil judges do not have assistance from their legal research attorneys for motions in limine.

Q: You seem like a person who really enjoys her job. What do you love most about being a judge?

A: I love that there is nothing "cookie-cutter" about my job. I get to see different attorneys, parties, jurors, and types of cases. The variety keeps things interesting.

Q: What qualities, skills, or characteristics do you think judges in the trial court should possess?

A: I think that judges in the trial court should have good listening skills, empathy, and humility. They should work hard and be efficient and organized.

Q: What about at the appellate court?

A: As an appellate practitioner, I appreciated appellate court justices who were collegial, had excellent legal research and writing skills, and understood the entire judicial process.

Q: You were the OCSC Judicial Extern Committee Chair for a number of years. Coordinating the extern program as well as you do calls for a lot of time. What motivated you to take on this additional responsibility?

A: During the Summer after my first year of law school, I was a judicial extern with United States District Court Judge Gary L. Taylor. I wrote about three bench memoranda per week for Judge

-Continued on page 5-

-Q&A: Continued from page 4-

Taylor's law and motion calendar. Each week, I observed Judge Taylor's law and motion calendar, along with the proceedings in his courtroom. I received plenty of feedback on those memoranda from Judge Taylor's judicial law clerks. By the end of the Summer, I had improved my legal research and writing and was comfortable with the Bluebook. I saw the legal system from the judge's perspective. Most importantly, Judge Taylor mentored me and supported me in getting a judicial clerkship with Judge Brunetti. I experienced first-hand the value of a judicial externship. My work with the OCSC judicial extern program is my way of paying it forward.

Q: You speak fluent Taiwanese. How did you acquire that skill?

A: My parents spoke Taiwanese at home. I learned English from "Sesame Street" and in preschool. When my grandparents moved from Taiwan to California, I mostly spoke Taiwanese with my grandmother. While she understood English, she felt more comfortable speaking with me in Taiwanese.

Q: I know you have said you wanted to be a lawyer from a very early age, but did you ever consider another career path?

A: When I was young, I considered being a doctor. However, I could not stand the sight of blood. So, that career path was short-lived.

Q: You are clearly a very busy person professionally, what do you do to have fun when you aren't working?

A: My family and I are foodies and enjoy different cuisines. I also like exercising, hiking, and traveling.

Thank you, Judge Servino, for taking the time to participate in this interview.

-Rules of Civility: Continued from page 1 -

In *Lasalle*, plaintiff's counsel took his opponent's default on barely 24 hours' written notice and without giving any oral warning. (*Lasalle*, *supra*, 36 Cal.App.5th at p. 131.) After the trial court refused to vacate the default, Justice Bedsworth led the Fourth District's strong admonition that the plaintiff's counsel had both an ethical and statutory obligation to warn opposing counsel that it was about to seek default and give them another chance to file a responsive pleading. (*Id*. at p. 135.) In reversing the judgment and awarding costs to the defendant, the Court reiterated *Lasalle*'s urge of a return to professionalism and expressed the hope that before seeking a default counsel "will act with 'dignity, courtesy, and integrity.'" (*Id*. at p. 141.)

In 2022, three years after *Lasalle*, the Fourth District had to flag similar conduct in *Shapell*. The Court homed in on the fact that the plaintiff's counsel knew that defendant was represented by counsel yet did not serve the complaint or the request for entry of default and default judgment on counsel even though "[i]t would have been easy enough . . . to do so." (*Shapell*, *supra*, 85 Cal.App.5th at p. 214; see *id.* at p. 213 ["The obligation to advise opposing counsel of an impending default is part of an attorney's responsibility to the court and the legal profession and takes precedence over the obligation to represent the client effectively"].) Citing *Lasalle*, the Court's analysis was simple: "Here, '[d]ignity, courtesy, and integrity were conspicuously lacking.'" (*Ibid*.) Thus, the Court reversed the trial court's denial of the defendant's motion to set aside default and default judgment, awarded costs, and remanded for further proceedings. (*Id*. at p. 219.)

Shapell is notable because the Fourth District also lamented the trial court's role in the matter, and it instructed the Presiding Judge of the Orange County Superior Court to assign the case to a different judge on remand, given the trial court had "completely ignored the ethical and statutory violation committed by [the plaintiff]'s counsel" in failing to let the defendant's counsel know he intended to seek default. (*Ibid*.)

The Fourth District lamented that, had the plaintiff's counsel complied with his ethical obligations, or, had the trial court recognized counsel's failure to do so, "the unlawful detainer action in all probability would have by now been decided on the merits," sparing much time and expense. (*Ibid*.) The Fourth District's observation makes sense, as court's generally want cases decided the merits, not slight technicalities that can be obviated by discretion and professional courtesy.

Even though *Lasalle* and *Shapell* were respectively published in 2019 and 2022, incivility persists into 2024.

In May 2024, the Fourth District yet again had to "deplore the lack of civility that has flourished in the legal profession in recent decades." (*Masimo*, *supra*, 101 Cal.App.5th at p. 910.) By this point, the Court was exasperated: it flagged its *Lasalle* opinion from 2022 as one entirely dedicated to "tracing the dete-

-Continued on page 6-

-Rules of Civility: Continued from page 5-

rioration in the way attorneys now address and behave toward each other" (*ibid*) before proceeding to call out the *Masimo* defendant's firm for incivility and award costs and discovery sanctions against it.

In reaching that disposition, the Court discussed how the defendant's firm advised its client to stonewall discovery, refused to meet and confer, and sent rude emails to the plaintiff's counsel that included remarks like, "You are joking right?" and "…this may be the stupidest thing I've ever seen." (*Id*. at p. 911.) Looking at those remarks, the Court explained that "[c]ivility is not about etiquette… [or] bad manners. Incivility slows things down, it costs people money – money they were counting on their lawyers to help them save. And it contravenes the Legislature's directive that 'all parties shall cooperate in bringing the action to trial[.]'" (*Ibid* citing Code Civ. Proc., § 583.130.)

Looking to the future, the Fourth District explained, "we will not keep looking the other way when attorneys practice like this. They will be called out and immortalized in the California Appellate Reports." (*Id.* at p. 911; see also *Snoeck v. ExakTime Innovations, Inc.* (2023) 96 Cal.App.5th 908, *reh'g denied (Oct. 25, 2023), review denied (Jan. 24, 2024)* [negative multiplier to an attorney fee award is appropriate where the attorney's actions were "pervasively uncivil"] (*Snoeck*).)

Finally, in November 2024 the Fourth District found itself forced to step in yet again. In *Young v. Hartford* (Case No. G064034, Nov. 12, 2024), respondent's counsel moved for sanctions for a frivolous appeal, in support of which she attached various uncivil letters from appellant's counsel. While the Court ultimately dismissed the appeal on other grounds and denied the request for sanctions, it spent several pages again emphasizing the judiciary's expectations for civility. It then found, "[Appellant's] counsel's letter appears to reflect a disturbing lack of interest in these principles, particularly in his belittling comments" in which he accused respondent's counsel of acting as the "civility police" and demanding respondent's counsel "stop wasting my time complaining that I have hurt your feelings." It concluded that the letter "transformed what otherwise would have been a straightforward denial of a sanctions motion, fit only for a footnote, into a close call consuming pages of this opinion. . .[it] served only to imperil counsel's interests and those of his clients, rather than advancing them."

While reduced fee awards, discovery sanctions, and a dose of publicity in the Appellate Reports might curb some incivility, in August 2023, the bar petitioned the California Supreme Court for, among other things, a new Rule of Professional Conduct, proposed rule 8.4.2. (See *Snoeck*, *supra*, 96 Cal.App.5th at p. 922, fn. 9.) Currently, lawyers are bound by the Rules of Professional Conduct and guided by aspirational civility guidelines. And mandatory continuing legal education requirements now include civility training. So, if approved, what will the new rule add?

According to the petition, paragraph (a) of proposed rule 8.4.2 would "prohibit lawyers, in the course of representing a client, from engaging in incivility in the practice of law." Proposed paragraph (b) defines "incivility" as "significantly unprofessional conduct that is abusive or harassing and shall be determined based on all the facts and circumstances surrounding the conduct."

The comments to the proposed rule suggest the Bar's intention to assist compliance by (1) identifying civility resources where practitioners can find further guidance on what may constitute "significantly unprofessional conduct that is abusive or harassing," (2) explaining that a lawyer does not violate the proposed rule by "standing firm in the position of the client, protecting the record for subsequent review, or preserving professional integrity," and (3) reminding lawyers that a violation of the proposed rule may also violate rule 8.4(d) regarding conduct that is prejudicial to the administration of justice. (See proposed Comments 1 through 3.)

Second, proposed comment [4] clarifies that the rule does not apply to speech or conduct protected by the First Amendment or Article I, section 2 of the California Constitution. Yet the proposed comment also clarifies that violation of an attorney's duties under subdivision (b) of Business and Professions Code section 6068 (duty to respect our courts) and subdivision (f) of section 6068 (duty to advance no fact prejudicial to the honor or reputation of a party or witness) may constitute "incivility" as used in proposed rule 8.4.2. Additionally, the proposed comment cross-references the advisory comment to Canon 3B of the California Code of Judicial Ethics and notes that judges must ensure that lawyers under their direction and control be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others.

Finally, the Bar proposes to add teeth to the rule by allowing initiation of disciplinary investigation or proceedings for violations.

The proposed rule and mandatory civility training in continuing legal education represent an effort to instill a culture of courtesy and professionalism in the legal profession. But members have shared strategies that can improve civility without the need for another rule or more training.

Armed with the Court's repeated direction—and perhaps the Bar's enforcement—how can we carry out our professional responsibilities for civility while continuing to zealously advocate for our clients' interests? Our members have shared that relationships are key to civility. This includes mentoring junior attorneys, talking to colleagues before acting in the heat of the mo-

-Continued on page 7-

-Rules of Civility: Continued from page 6-

ment, and getting involved in professional organizations. Mentorship is essential to our profession.

Many agree that young associates learn best not through the various classroom trainings and tests they must pass on professional responsibility but through in-the-moment coaching.

Attorneys at all levels also can benefit from connecting with others when facing difficult situations. For example, one member and partner at a local firm shared that they strive to have another partner or senior attorney review strongly worded letters or briefs before finalizing. This helps avoid long-term consequences to the short term satisfaction from taking an overzealous tone when caught up in the heat of the moment. Bouncing ideas off a trusted colleague can help us reframe the issue and gain perspective, which can reduce the chances of doing something that might later seem less than civil.

Others have shared that having strong connections with members of the legal community allows them to leverage rapport and mutual respect in tense situations. It is always nice to see opposing counsel as a peer, not an enemy. We are more likely to treat them accordingly. This is yet another reason why ABTL's mission of fostering relationships among bench and bar is vital to our profession.

♦ *Andrew A. Wood is a partner at Allen Matkins and is a member of the ABTL-OC Board of Governors and the ABTL Report Editor.*

♦*Andrew Castro is an associate in Allen Matkins' San Francisco office.*

-President's Message: Continued from page 2-

has been that the most impactful aspect of our organization is the chance to engage with the judiciary and leading business trial practitioners in Orange County. These interactions lead to professional relationships that provide an opportunity for growth and create a respectful business litigation community. For me, those relationships now include this years' officers: Charity Gilbreth (Vice President), Justin Owens (Treasurer), and Alejandro Ruiz (Secretary). I hope that I will soon have the opportunity to meet many more of our members soon. I look forward to seeing you at our next event!

♦*Andrew Gray is a litigation partner in the Orange County office of Latham & Watkins LLP*

Mark Your Calendars

March 19, 2025
Dinner Program
Enough Already! Addressing the Rude, Crude, and Biased in CA's Legal Profession

May 21, 2025
Robert Palmer Wine Tasting Dinner Program in Support of Public Law Center

September 3, 2025
Dinner Program

October 8 – 12, 2025
51st Annual Seminar – *Wailea Beach Resort, Maui, Hawaii*

November 12, 2025
Dinner Program and Orange County Superior Court Stuffed Animal Drive

-False Advertising: Continued from page 3-

II. The "Reasonable Consumer" Standard

Putative class action plaintiffs in California commonly assert that the brand has violated California's Unfair Competition Law (UCL) and/or Consumers Legal Remedies Act (CLRA). The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. Similarly, the CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." Cal. Civ. Code § 1770. Claims for violation of these statutes are governed by the reasonable consumer standard.[2] *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008), citing *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 506-07 (2003).

The reasonable consumer test is an objective one. The reasonable consumer is not the "least sophisticated consumer" or an "unwary consumer," but rather the standard is meant to approximate the interpretation or perspective of "the ordinary consumer within the larger population." *Hill v. Roll International Corp*., 195 Cal. App. 4th 1295, 1300-01 (2011). Thus there must be a likelihood that the consumer-plaintiff's proffered interpretation of a challenged claim will be shared by "a significant portion of the general consuming public or of targeted customers, acting reasonably in the circumstances." *Lavie,* 105 Cal. App. 4th at 508.

To state a claim for relief, plaintiffs must allege that the reasonable consumer would be deceived by the alleged false or misleading marketing. Deficient pleading of this standard creates opportunities for defendant-companies to seek dismissal of putative class action complaints at the motion to dismiss phase.

III. Trajectory and Application of the Reasonable Consumer Standard in the Ninth Circuit Through Motion To Dismiss Caselaw

Because alleging that the reasonable consumer would be deceived is a pleading requirement, it goes without saying that a failure to plead this entirely opens a claim to attack and dismissal under Federal Rule 12(b)(6). When the consumer-plaintiff does plead the reasonable consumer would be deceived, but the brand asserts that the allegations are implausible under *Twombly*, the motion to dismiss analysis becomes more complicated. In this respect, the Ninth Circuit has shifted its guidance over time, expanding (and most recently, contracting, *see infra*) what the district courts may consider as part of the Rule 12(b)(6) analysis.

The leading Ninth Circuit case in this area is *Williams, supra*, and it arguably sets a high bar for obtaining dismissal at the pleadings phase. There, the consumer-plaintiffs challenged a fruit snack product that used the words "Fruit Juice" juxtaposed with images of oranges, peaches, strawberries, and cherries on the front of the packaging. 552 F.3d at 936. The plaintiffs contended that this juxtaposition was misleading because the product contained no juice from any of the pictured fruit. *Id.* Instead, the only juice was from white grape juice from concentrate. *Id.* The complaint was dismissed under Rule 12(b)(6) and the Ninth Circuit reversed. The Ninth Circuit noted that "whether a business practice is deceptive will usually be a question of fact not appropriate for decision" and this was not one of the "rare" situations where "granting a motion to dismiss is appropriate." *Id.*, at 938-39. Critical to the reasonable consumer analysis, the court concluded that the consumer should not "be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box." *Id*. at 939.

Nearly a decade later, the Ninth Circuit again addressed the reasonable consumer standard in its *Ebner* decision. *Ebner v. Fresh, Inc.*, 838 F.3d 958 (9th Cir. 2016). In that case, the plaintiff asserted that the product net weight statement on a twist-up lip balm product was misleading because not all of the balm was accessible and usable due to product design. *Id.*, at 962. Thus, the plaintiff argued, she was deprived of the full value of her purchase. *Id.* Applying the reasonable consumer standard, Judge Selna dismissed the complaint. The Ninth Circuit affirmed the dismissal, finding that the "reasonable consumer understands the general mechanics of these dispenser tubes and further understands that some product may be left in the tube to anchor [it] in place." *Id.*, at 965. The court distinguished *Williams*, finding it inapplicable because in this set of facts, "[a]part from the accurate weight label, there are no other words, pictures, or diagrams adorning the packaging, as there were in *Williams*, from which *any* inference could be drawn or on which *any* reasonable belief could be based about how much of the total lip product can be accessed by using the screw mechanism." *Id.*, at 966. In other words, the plaintiff's interpretation of the net weight statement was "not plausible." *Id.*

Another notable development came in the Ninth Circuit's decision f *Moore v. Trader Joe's Co.*, 4 F.4th 874 (2021). This case dealt with a specialty food product, 100% New Zealand Manuka Honey. The plaintiff asserted that the product label was false and deceptive because it "actually consists of only between 57.3% and 62.6% honey derived from Manuka flower nectar." *Id.*, at 876. Relevant to the outcome here, Manuka Honey producers "have created a scale to grade the purity" of this honey, which scales from 5+ to 26+. *Id.*, at 877. Higher grades are more expensive. *Id.*, at 878. Trader Joe's Honey had a grade of 10+ and sold "for the comparatively low price of $13.99 per jar." *Id.* In affirming dismissal of the complaint, the Ninth Circuit determined that the reasonable consumer "should take into account all the information available to consumers and the context in which that information is provided and used." *Id.*, at 882 (internal citations omitted). The full context available to the consumer, including price point, precluded the plausible conclusion that the honey in the product was 100% sourced from a single floral source. *Id.*, at 882-83.

Then last summer, the Ninth Circuit issued its *McGinity* decision. *McGinity v. P&G*, 69 F.4th 1093 (9th Cir. 2023). That case involved a putative greenwashing claim wherein the plain-

-Continued on page 9-

-False Advertising: Continued from page 8-

tiff asserted that the statement "Nature Fusion" on a bottle of Pantene Pro-V shampoo misled him into believing the product was "natural" and did not contain synthetic ingredients. *Id.*, at 1096. The Ninth Circuit affirmed dismissal of the complaint, finding that the meaning of "Nature Fusion" was at best ambiguous and therefore the additional context of the ingredients list could be considered to dispel the ambiguity. *Id.*, at 1098. The court distinguished *Williams*, determining that there was no misleading statement on the front of pack, i.e., the Pantene bottle did not say "all natural" or "100% natural." *Id.* In context, the complaint failed to state a claim.

From these decisions, the Ninth Circuit collectively has instructed that inaccurate information on the front of a package cannot be cured by information found elsewhere (*Williams*), the brand must speak for liability to attach (*Ebner*), context counts (*Moore*), and when a label is ambiguous, the consumer should read information on the back of the packaging to clarify meaning (*McGinity*).

IV. The Ninth Circuit's *Whiteside* Adds A New Dimension To The Analysis

While the Ninth Circuit's more recent reasonable consumer decisions have permitted district courts to consider an expanding amount of information to assess whether a pleaded claim of deception is plausible, the Ninth Circuit's recent *Whiteside* decision takes a step backwards. *Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771 (9th Cir. 2024). This case involved a baby wipe product that was labeled as "plant-based." The district court had dismissed the action after applying *Ebner* and *Moore*, finding that the context provided by the statement of ingredients on the back-of-pack dispelled any plausible consumer confusion that the product was entirely plant-based.

The Ninth Circuit reversed in part. Relevant to this article, the Court noted that "a product's back label may be considered at the pleadings stage if the front label is ambiguous," citing *McGinity*. *Id.*, at 778. But, how should the courts determine that the front label is ambiguous? *Id*, at 780. The court set out this criteria:

> a front label can be unambiguous for FRCP 12(b)(6) purposes even if it may have two possible meanings, so long as the plaintiff has plausibly alleged that a reasonable consumer would view the label as having one unambiguous (and deceptive) meaning.

Id. In other words, even if a label claim could have two meanings (i.e., could "plant-based" mean all plant-derived or mean that it has some plant-derived ingredients), the district courts should effectively ignore one of those meanings if the plaintiff plausibly alleges that the reasonable consumer wouldn't infer it. This decision seems to ask judges to set legal pleadings above commonsense when deciding Rule 12 motions. It remains to be seen how the district courts will make sense of, and apply, this latest authority. For companies, though, whereas the prior seminal cases provided guidance for planning and managing class action risks, *Whiteside* would seem to make it more difficult to do so, short of using language that the Ninth Circuit doesn't think means anything (*McGinity*), or by intentionally creating ambiguity on front of pack (i.e., by using asterisks near potentially ambiguous terms, as discussed in *Whiteside*).

V. Conclusion

The reasonable consumer standard plays an important gatekeeping role at the Rule 12(b) phase of federal litigation. The historical aspects of the standard are navigable with case outcomes being driven by the unique set of statements that a company has actually made about its product. *Whiteside* muddles the area of law and may make it harder to achieve Rule 12 dismissals. The consumer class action plaintiffs' bar has already begun to respond to the *Whiteside* decision by sending pre-litigation CLRA demand letters to many companies that use "plant-based" on their packaging, demanding significant individual settlements. Thus while the reasonable consumer standard may be academically interesting and important for class action litigators, it has real, tangible impact on businesses and therefore warrants attention by these stakeholders too.

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[1.] In this context, damages are based on the "price premium" or additional amount that a brand was able to charge for a product due to its purportedly false or misleading marketing, and this price premium is multiplied by the volume of sales for the time period at issue.

[2.] And others as well, including California's False Advertising Law and New York's General Business Law.

-Civil Appeals: Continued from page 3-

deadlines (on the order of a few days). These deadlines can be jurisdictional, meaning there is often nothing the court can do if you miss the deadline. "Common law" writs (i.e., any writ not expressly authorized by a statute) and any statutory writ without a specified deadline are generally expected to be filed within the time a notice of appeal would be due from the same order (typically 60 days from service of the notice of entry of the order).

The Court of Appeal retains discretion to hear writs past that 60-day window, but rarely exercises that discretion absent extraordinary circumstances. Don't count on it. Moreover, just filing your writ petition within the 60-day window doesn't necessarily make it timely. Writ procedure is governed by the doctrine of laches, and even a short delay *within* the 60-day window may be enough to bar relief, depending on the circumstances. The practice tip here is that writ relief is emergency relief, and it is to be treated accordingly. As soon as the necessity for a writ petition is apparent, completing and filing the writ should be the first priority for any practitioner.

3) Remember that the court needs time to rule.

Writ petitions, filed late in the day, requesting an immediate stay of a hearing or order going into effect the next day create significant logistical challenges for the court. While the court does its utmost to handle urgent writ petitions as expeditiously as possible, filing too late may even prevent the court from granting relief quickly enough to be effective. Sometimes a time crunch is unavoidable, but in such situations it is useful to call the court clerk and advise the court that an urgent writ petition is imminent. This allows the court to ready itself for quick action if necessary and avoids situations in which the court cannot act due to the unavailability of justices, staff attorneys, or clerks.

Appeals

1) Understand the appealability rules.

In most civil cases (excluding probate and family court matters), appellate jurisdiction is controlled by Code of Civil Procedure section 904.1. Section 904.1 specifies the types of orders and judgments from which an appeal can be taken. If an appeal is taken from a non-appealable order, the Courts of Appeal lack jurisdiction to hear it and must dismiss it on their own motion. There is no appellate jurisdiction via stipulation or waiver on the part of the respondent. Instead, the proper method for challenging a non-appealable order is a writ petition. Taking an appeal from a non-appealable order often wastes time and money and can even forfeit your client's ability to challenge the order via a writ petition because of the passage of time. Make sure the order you are appealing is appealable.

Conversely, make sure any order adverse to your client is *not* appealable before you decide not to file a notice of appeal or allow the time for appeal to expire. Failure to timely appeal from an appealable order prevents the Court of Appeal from considering any later challenges to that order, including in connection with an appeal properly taken from a subsequent appealable order or judgment.

2) Make sure your notice of appeal is timely.

If you miss a deadline, all is not necessarily lost in the Court of Appeal. Generally, the Courts of Appeal prefer to resolve cases on the merits rather than by procedural forfeitures, and therefore treat extension requests and motions to vacate default fairly liberally.

The exception to this rule is the notice of appeal. Failure to file a notice of appeal on time, even if late by a single day, almost always results in dismissal of the appeal and permanent loss of the party's appellate rights. Code of Civil Procedure section 473, subdivision (b), the usual vehicle for courts to relieve attorneys of the consequences of their excusable mistakes, is not available. Nor can the error be excused by the other side's stipulation, or by estoppel, waiver, or forfeiture. The exceptions to this rule are few and far between. Best not to rely on them. Filing your notice of appeal well before the deadline is the ideal way to keep oneself from running afoul of this rule.

3) Understand and follow the statement of decision procedure.

At the conclusion of any "trial on a question of fact by the court," the trial court must announce its tentative decision. The parties then have 10 days to request a statement of decision. The procedure for preparation of the statement of decision (and objections thereto) is governed by Rules of Court, rule 3.1590. Understanding and obeying these rules is essential to setting up an appeal for two reasons.

First, following the rules properly will result in the predictable issuance of an appealable judgment. The statement of decision itself is a separate, usually non-appealable document, as the rules make clear. If the steps prescribed by rule 3.1590 are carefully followed, the parties can avoid confusion over which document triggers the timeline for their appeal.

Second, a statement of decision can give an appellant a useful starting point for explaining precisely how the trial court erred and can often simplify the preparation of the opening brief.

4) Include all relevant materials in the record.

One of the most basic rules of appellate practice is that if something is not in the record, it didn't happen. Make sure, in selecting documents and hearing transcripts to include in the record, to include everything you might need to rely upon in making your arguments on appeal. As the respondent, do not simply acquiesce to the appellant's designation of the record; ensure at the outset that everything you will need is included in the record by, if necessary, filing your own designation of the record.

-Continued on page 12-

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-Civil Appeals: Continued from page 10-

5) Cite to the record.

A corollary to the rule that things not found in the record didn't happen is the rule that every fact about the case asserted in your brief should be accompanied by a citation to the record, ideally to the precise page and line. The failure to cite to the record can, in more extreme cases, lead to forfeiture of issues or even of the appeal itself. Poor or sparse citations to the record can have adverse consequences on your chances on appeal even when the citations are sufficient to avoid forfeiture. It is a practical reality that in working up the case, the court will often rely upon the brief with the more detailed and useful record citations. Better that it be your brief and not opposing counsel's brief.

5) Discuss the standard of review.

The role of the Court of Appeal is to review the trial court's work. Thus, in almost all cases in the Court of Appeal, every question raised by the parties already has been answered by a judge. The amount of deference the Court of Appeal grants to these previous answers depends on the standard of review and varies widely, from essentially no deference at all to a nearly irrebuttable presumption of correctness. The standard of review can, and often does, determine the result of the appeal. Your brief should make clear which standard of review applies and how the court should apply it to your case.

This is only a starting point for practicing in the Courts of Appeal, but understanding and avoiding these mistakes will put you well ahead of the curve—no Latin phrases or dusty old books required.

♦ *Hon. Kathleen E. O'Leary is Presiding Justice of the Fourth District Court of Appeal, Division Three.*

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