The Newsletter of the Federal Bar Association / Orange County Chapter Fall 2013

Patent Infringement Litigation: The Patent "Troll" Phenomenon

By Michael J. Stimson and Martha K. Gooding[1]

Patent trolls – more politely called patent assertion entities (PAEs) or non-practicing entities (NPEs) – have changed the patent infringement litigation landscape. They also continue to make headlines, although not always of the positive kind. PAEs do not make or sell products that incorporate the patented invention and are generally defined as entities whose primary business model is buying patents for the purpose of suing on them. President Obama called them out in his March 2013 Google-sponsored "fireside hangout" for "hijack [ing]" the ideas of others and "extort[ing]" money, suggesting they are one of the problems that remain to be addressed after the 2011 patent reform legislation. A White House Task Force on High-Tech Patent Issues followed that up with a series of legislative recommendations and executive actions "designed to protect innovators from frivolous litigation and ensure the highest-quality patents in our system."[2] Congress has held hearings on abusive litigation by PAEs, and several bills were recently introduced with the intention of curbing PAE litigation through, for example, greater attorneys' fee shifting or expanded administrative post-grant review procedures for certain types of patents. Academics have weighed in, too; one recent study concluded that PAEs have a net negative effect on innovation and imposed direct costs on U.S. businesses of $29 billion in 2011 alone.[3] Even Chief Judge Randall Rader, of the Court of Appeals for the Federal Circuit, has called for greater control of patent trolls.[4]

Of course, PAEs are not without their defenders. PAEs insist that they benefit the patent system and in fact encourage innovation by providing a market for patents (which in turn benefits and rewards inventors) and consolidating patents into portfolios that manufacturers can license as a whole rather than negotiating patent thickets piecemeal. As for purportedly inflated PAE damages awards, it is noteworthy that the median damages award from 2006-2011 de-

(*Continued on Page 7*)

Inside:

Message From The Editor

This issue marks the return of the Newsletter of the Federal Bar Association, Orange County Chapter, following a brief recess. My involvement with the Newsletter began in 2003, when Assistant United States Attorney Lawrence Kole served as Editor-in-Chief. I continued to work in an assisting capacity through Larry's tenure, and through that of my dear friend John Mark Jennings, who preceded me as Editor-in-Chief. I am indebted to Larry and John Mark for the lessons they taught along the way, and humbled by the high standards for quality set by them.

A bar association newsletter can go one of two directions: It can find its way to the "circular file" without delay, or it can become a resource worthy of a few moments' review every time it appears in the mailbox. To ensure that our Newsletter becomes the latter, we rely on quality articles like those presented here—the collaborative efforts and hard work of our colleagues here in Orange County. We are very grateful for the excellent contributions, authored by some of our chapter's most accomplished members, which reignite the Newsletter in this issue. In this issue, our contributors cover a variety of topics, from patent litigation and class action practice through a practical discussion of emergency and administrative motion practice in California's federal courts. This issue concludes with interviews of two prominent law school deans in anticipation of their upcoming program on the United States Supreme Court's 2013-2014 term.

The Newsletter should serve not only as a report on the current events in the Federal Bar Association, but a forum for the exchange of ideas among the members of our impressive and diverse legal community. And so I encourage you to contact me with *your* ideas—whether they are fully-developed articles, topics for articles that are in the exploratory phase, or simply suggestions about how we can make the Newsletter more useful to you in future issues. Our authors and staff invest a great deal of time and effort into producing the Newsletter; our hope is that it will be a valuable resource for you for years to come.

I look forward to reading your contributions in the coming year.

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Matthew K. Wegner

FBA/OC NEWSLETTER SUBMISSIONS

Matthew K. Wegner
Brown, Wegner & Berliner LLP
2603 Main Street, Suite 1050
Irvine, California 92614
mwegner@bwb-lawyers.com
(949) 705-0080

Eric Landau
FBA/OC President

Message From The President

By Eric Landau*

Whether you make an occasional appearance or practice exclusively in federal court, the FBA/OC is committed to meeting the needs of all federal practitioners and serving as a bridge between our local federal bench and the bar. We do so by hosting or sponsoring a series of events throughout the year that offer opportunities to meet and hear from our local federal judges, to enable networking, and by providing continuing legal education in substantive areas that reflect the diversity of our federal practices. We also recognize the importance of serving the needs of other constituents of the federal court system and the broader community by supporting and highlighting pro bono opportunities for federal practitioners. Thanks to the efforts of a hard working board, the support of our membership, and the continuing commitment of our local federal judges, the FBA/OC has once again been able to provide you with a terrific roster of programs so far this year, which has won us the national Presidential Achievement Awards three years in a row, with much more to come.

The Central District has been the venue for many high-profile intellectual property cases over the years and our membership includes many of the finest intellectual property lawyers in the country. So it was fitting that in April the FBA/OC co-sponsored the 2013 IP Program Advanced Complex Litigation Series together with the Federal Circuit Bar Association. The program took place at Whittier Law School and focused on the advanced skills that are increasingly necessary in complex IP litigation. A distinguished panel comprised of in-house counsel, experienced IP lawyers and a number of Central District judges, made for a terrific program.

In May, we had an excellent turnout for our Pro Bono luncheon program at Seasons 52 in South Coast Plaza, where some of our local judges spoke on the many pro bono opportunities in the Bankruptcy and District Courts, including Chief Magistrate Judge Suzanne Segal who travelled from Los Angeles to discuss the Central District's Pro Bono Civil Rights Panel. We heard from attorneys who have volunteered in some of the programs, including the Ninth Circuit Pro Bono Program, as well as from a representative of the Public Law Center, who discussed the recently launched Pro Se clinic at the Santa Ana Courthouse. No matter what your area of practice, there are many ways for federal practitioners in Orange County to give back to the community through pro bono work and there are links on our chapter website as well as the Central District's website for more information.

(*Continued on Page 4*)

(*Continued from Page 3*)

Also in May, we sponsored a well-attended Civil Practice Seminar program featuring Judge Tucker and Magistrate Judge Nakazato who offered invaluable tips from the bench for federal civil practitioners. Whether you are about to appear in federal court to argue a motion for the first time or are a seasoned veteran, there were many helpful take away tips from the program.

Summer is typically our busiest time of year with the arrival of summer associates at many of our members' firms and this year was no exception. Attendance at our summer "Bench and Bar" luncheons was terrific. In June, our members were treated to a talk by Judge Selna on his learning experience as a judge in "The Education of a District Judge" and in July, we enjoyed the observations of Bankruptcy Judge Clarkson in a talk wonderfully titled "Tolerance for Legal Ambiguity or How I Learned to Stop Worrying and Love Incertitude." Both events underscore how much our members benefit from the active involvement and support of our local federal judges.

Now, for a look at what is ahead:

Preview of the 2013-2014 Supreme Court Term: The new Supreme Court term traditionally begins on the first Monday in October and it is likely to be another year of blockbuster decisions by the high court. Be sure to join us for lunch on September 17 at the Hyatt Regency Irvine for a preview of significant cases to watch in the upcoming term. The Preview will be presented by two distinguished constitutional scholars who also lead two of Southern California's finest law schools: Erwin Chemerinsky, Founding Dean and Distinguished Professor of the University of California, Irvine School of Law, and Deanell Reece Tacha, Duane and Kelly Roberts Dean of the Pepperdine School of Law. Don't miss the interviews of both of our presenting Deans later in this newsletter and a sneak peak of what to expect from the Preview.

Annual Judges' Night: The success of our chapter is a direct result of the extraordinary involvement and commitment of time to our programming by our district, magistrate and bankruptcy judges. Our annual dinner event honoring all of the judges of the Central District and the Ninth Circuit will take place on October 17 at the Fairmont Newport Beach, and will feature both a report on the state of the Central District by our Chief Judge and presentation of the thirteenth annual Judge Alicemarie H. Stotler Award.

Criminal Practice Seminar: For those members of our chapter who practice criminal law and anyone with an interest in the nuts and bolts of federal criminal practice in this District, look out for a flyer on our annual criminal practice seminar to be held at Whittier Law School in November.

Behind the Books: Whether you are a newly admitted attorney or an experienced practitioner, our "Behind the Books" program is a terrific way to get an insider's view of our own federal courthouse in Santa Ana beyond the courtrooms where we go to argue motions and engage in trials. The tour typically includes a back office look at the clerk's office, the U.S. Marshal's cell block, and thanks to our local judges, a visit to a judge's chambers. Check our website for a flyer with all the details on this program, which will take place in November.

Swearing in Ceremony: As in past years, the FBA/OC will sponsor a swearing-in ceremony and welcome for our newest colleagues, freshly admitted to the California and Central District bars, all of whom we hope will join us as members of FBA/OC as they begin their professional journeys.

Special thanks to all of our contributors to this issue of the FBA/OC newsletter and in particular for the efforts of our editor Matt Wegner, Roman Darmer, and assistant editor Rhianna Hughes.

Finally, thank you to each of our members for your continuing support of our FBA/OC chapter. Our chapter is always looking for new ways to serve you, so please reach out to me or any board member if there are particular programs that would be of interest to you. I look forward to seeing you at an FBA/OC event in the coming months.

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*Eric Landau is a partner in the Irvine office of Jones Day, and is President of the Federal Bar Association, Orange County chapter.

Comcast Corp. v. Behrend: An Echo of Dukes

By Kenneth G. Parker and William O'Neill*

The recent United States Supreme Court decision, *Comcast Corp. v. Behrend*,[1] can be described as an echo of the reverberations felt in courts post-*Wal-Mart Stores, Inc. v. Dukes*.[2] Though the *Behrend* opinion did not receive the same publicity as *Dukes*, class action litigants should be aware of its implications.

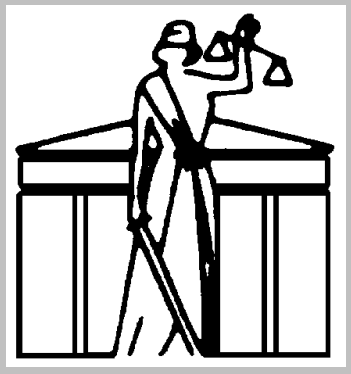
The *Dukes* Court touched upon, but did not decide, whether expert opinions should be subject to the *Daubert* standard at the class certification phase.[3] This issue cuts across most class action disciplines because plaintiffs frequently rely on expert testimony to satisfy the requirements of Rule 23. But what kind of analysis should a court undertake to determine whether a class should be certified when the evidence of damages is primarily or exclusively expert-generated? And to what extent can a court entertain arguments pertinent to the merits of the case in the course of evaluating whether certification is appropriate?

These are not insubstantial questions. When the *Dukes* court touched on these points, the opinion mandated that courts conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim," and suggested without deciding that *Daubert* applied at the class certification stage. Shortly after *Dukes*, the Ninth Circuit addressed the intersection of *Daubert* and the "rigorous analysis" standard and concluded that while it was appropriate to apply *Daubert* at the certification stage, it was inappropriate to limit analysis simply to an expert opinion's admissibility rather than the full breadth of the expert analysis.[4] The Eighth Circuit addressed a similar issue and refused to require the defendant's requested "full and conclusive *Daubert* inquiry" at the class certification stage, but did approve the district court's "focused *Daubert* inquiry" concerning the experts' areas of expertise and reliability of analysis.[5] The *Behrend* Court was supposed to provide a workable framework for the *Daubert*/rigorous analysis intersection because it granted certiorari to address whether an expert's model had to be admissible under *Daubert* for purposes of class certification. (*Continued on Page 8*)

Newsletter Editors

Matthew K. Wegner
Editor-in-Chief

Rhianna S. Hughes
Assistant Editor



FBA/OC UPCOMING EVENTS

- **Preview of the 2013-2014 Supreme Court Term**
  Sept. 17, 2013
- **Annual Judge's Night and Presentation of the 13th Annual Alicemarie H. Stotler Award**
  October 17, 2013
- **Criminal Practice Seminar***
- **Behind the Books***

*** Please check www.fbaoc.com for further details.**

Avoiding Close Calls: Navigating the Local Rules for Seeking Quick Administrative Relief in the Northern and Central Districts of California

By Roman E. Darmer and Jeremy S. Close*

It is a situation that many lawyers will find themselves in at some point in their careers: You need more time to file a pleading or need other administrative relief, there is insufficient time to file a regularly noticed motion, and either you cannot get a hold of opposing counsel to obtain a stipulation, or opposing counsel just won't cooperate. While litigants in the Northern District of California have a set procedure for getting such administrative relief through a local rule, litigants in the Central District of California must navigate murkier waters for *ex parte* motions, which are often supplemented by individual judges' standing orders. And while some attorneys have called for the Central District to adopt a uniform local rule for motions for administrative relief, a comparison of the procedures in the Northern and Central Districts reveals that there is value in how both Districts handle these situations.

Under the Northern District's Local Rule 7-11, a party may bring an expedited motion for administrative relief by following particular procedures. The rule is meant to address "miscellaneous administrative matters, not otherwise governed by a federal statute, federal or local rule or standing order of the assigned judge." While the rule specifically states that the procedure may be used for motions to exceed applicable page limits and motions to file documents under seal, some Northern District judges have specified in their standing orders that a Rule 7-11 motion may also be made to continue hearings, request special status conferences, modify briefing schedules, or make other procedural changes.

Procedurally, the Northern District allows the moving party five pages to specify the action requested and to provide a reasoned argument, and the motion must be delivered to the non-moving party on the same day – even if the motion is manually filed. If the

(*Continued on Page 9*)

Patent Trolls (*Continued from Page 1*)

clined (from $8.7 million to $4.0 million) from the prior five-year period,[5] and that of the top three civil verdicts in 2012, all happened to be patent cases, but *none* of them involved a PAE.[6]

So the debate continues. But wherever one comes out on the "net benefit vs. net detriment" issue, it is clear PAEs will remain part of the patent landscape and will continue to fundamentally affect what we do as lawyers and judges. This article considers some of the issues posed by PAE litigation and some of the on-going efforts to address them.

Patent Damages. Because PAEs do not practice the patented invention, they have no sales and cannot seek lost profits as a measure of infringement damages; they can only seek damages in the form of a reasonable royalty. Consequently, a jury that finds a PAE's patent infringed is not asked to consider data on the PAE's sales, profit margins, or market share to determine the profits it would have made but for the infringement. Instead, the jury is instructed to imagine a "hypothetical" royalty negotiation between the PAE and the defendant just before infringement began and to award as damages the "reasonable royalty" to which they would have agreed. Although the Federal Circuit has insisted that the hypothetical royalty exercise must rest on "sound economic and factual predicates,"[7] it also has acknowledged that the reasonable royalty calculus "necessarily involves an element of approximation and uncertainty."[8]

One might expect that the "hypothetical negotiation" construct would yield lower damages than a lost profits analysis, or that juries would award, on average, greater damages to a competitor-plaintiff (a "practicing" entity that sues a competitor for making or selling infringing products) than to a PAE. Not so. In fact, according to a recent patent litigation study, on average PAE plaintiffs recovered far more over the last decade in reasonable royalty damages than did businesses that sued competitors for patent infringement seeking lost profits.[9] Evidently, when asked to imagine the results of a hypothetical negotiation, many jurors are able to imagine some hefty sums.

The Federal Circuit has made significant efforts in recent years to ensure that reasonable royalty damages reflect economic reality – or as the Court put it, that damages proof is tied "to the claimed invention's footprint in the market place."[10] For example, the Court has underscored the narrowness of the "entire market value rule," which permits a patentee to base royalty damages on the entire revenues generated by an infringing product, even though the patented feature is only one of many incorporated into the product. (Think of cell phones or computers, where only one feature or component is accused of infringing the patent.) The Court has put more teeth into its long-standing rule that patentees may invoke the "entire market value rule" only if they prove the patented feature was "the basis" for customer demand for the product.[11] Indeed, the Court recently underscored that it is not enough to "merely show" that a patented feature or method is "valuable, important or even essential" to the use or commercial viability of an accused, multi-component product; in cases involving multi-component products, patentees may calculate damages based on sales of the entire product only if they show that "the demand for the entire product is attributable to the patented feature."[12]

In addition, the Court has prohibited use of the so-called "25% rule of thumb," under which damages experts assumed that a "reasonable royalty" would be 25% of the alleged infringer's profits.[13] It also has insisted that damages experts who rely on royalty rates in other, pre-existing patent licenses as evidence of what the parties would have agreed upon in the hypothetical negotiation must show that the other licenses truly are comparable to the hypothetical license.[14] Thus, an expert who opines that the reasonable royalty rate for one or two patents-in-suit would be the same royalty rate paid for a patent portfolio license covering dozens of licenses and other types of intellectual property or know-how is likely to have difficulty surviving a *Daubert* challenge.

(*Continued on Page 10*)

Comcast (*Continued from Page 5*)

The Court's opinion, though, did not actually rule on the admissibility issue – a point criticized intensely by the dissent. Instead, the opinion addressed whether a party seeking to maintain a class action must satisfy Rule 23's requirements through evidentiary proof, even where such analysis may overlap with the merits of the underlying claim.[6] The *Behrend* majority concluded that because the damages model fashioned by the plaintiffs' expert failed to establish that damages could be measured on a class-wide basis, the plaintiffs had not satisfied the requirement that common issues "predominate" over individual issues of particular class members. Accordingly, certification of the class was improper. By reaching this conclusion, the *Behrend* majority did not resolve the broader question of whether the *Daubert* standard for admissibility of expert testimony applies at the class certification stage.

Background Facts and Procedural History

The plaintiffs in *Behrend* brought an antitrust suit alleging that the defendant cable company attempted to monopolize the cable market in Philadelphia through a series of "swap" transactions with cable providers in other markets.[7] The putative plaintiffs proposed four different theories of antitrust impact in their motion for class certification, each of which allegedly increased cable subscription prices in the Philadelphia area.[8]

To establish class-wide damages, the plaintiffs relied on a regression model that compared actual cable prices in Philadelphia-area counties to prices in control counties with greater competition.[9] The plaintiffs' "model did not isolate damages resulting from any one theory of antitrust impact," but instead measured all four, ultimately concluding that the two million potential class members had been harmed in excess of $875,000,000.[10] The district court certified the two-million-member class under Rule 23(b)(3) on only one of the four theories, but rejected the remaining three because they were incapable of class-wide proof.[11]

On appeal, the Third Circuit affirmed the district court's decision in its entirety.[12] Citing the *Dukes* opinion, the Third Circuit noted that although district courts must engage in a "rigorous analysis" at the certification stage, they may not engage in a merits inquiry for any other pretrial purpose.[13] The appellate court concluded that the *Behrend* plaintiffs satisfied the requirements of Rule 23 simply by providing a "method to measure and quantify damages on a class-wide basis."[14] In the Third Circuit's view, it was unnecessary to decide whether the expert's methodology was a "just and reasonable inference or speculative."[15]

Accordingly, the Third Circuit focused on whether the plaintiffs could establish the elements of their claim at trial through proof common to the class. With respect to the issue of damages, the Third Circuit found that the plaintiffs had established through their expert witnesses that there was a method by which damages could be measured on a class-wide basis. The majority stated in a footnote that district courts need not apply *Daubert* to experts at the certification stage where the analysis would turn class certification into a mini-trial.[16] Comcast again appealed.

The Supreme Court granted certiorari on the question of "whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[17]

Supreme Court: Damages Model Insufficient for Rule 23's Requirements

The parties devoted most of their briefing to the *Daubert* issues,[18] which, as it turned out, was for naught. The *Behrend* Court declined to address those issues and instead focused on the substantive question of whether the plaintiffs' expert's damages model was sufficient to demonstrate that damages could, in fact, be determined on a class-wide basis.

Writing for the majority, Justice Scalia empha-
(*Continued on Page 13*)

Close Calls (*Continued from Page 6*)

moving party is unable to secure a stipulation for the relief sought, it must submit a declaration explaining why a stipulation could not be obtained. Parties wishing to oppose or support the motion also have only five pages to succinctly make their counter arguments, and they must file their briefs no later than four days after the motion has been filed. The court considers the motion submitted for immediate determination, without hearing, on the day after the opposition is due (*i.e.*, 5 days after the motion is filed).

The Central District has no such Local Rule for administrative procedures. Rather, a party would typically need to seek expedited relief through an *ex parte* application under Local Rule 7-19. Unlike the Northern District's local rule for administrative motions, Local Rule 7-19 is fairly sparse in its procedural requirements. For instance, there is no stated page limit for the memorandum of points and authorities, meaning the moving party – and the opposing party – may submit a 25-page brief, as allowed under Local Rule 11-6. The memorandum must explain the reasons for seeking an *ex parte* order and must contain, if known, the name, address, telephone number and e-mail address of opposing counsel. The two districts do have similar requirements for attempting to obtain agreement among the parties for the relief sought. The Northern District requires the parties to attempt to stipulate to the relief sought, while the Central District requires that the moving party advise the court in writing of its "good faith efforts" to contact counsel for other parties in the case to advise them of the date and substance of the proposed application, and whether those parties will oppose the application.

Due to the lack of procedural guidelines provided by the Central District's Local Rule 7-19, many Central District judges have expanded their procedures in their standing orders, requiring the moving party to pay close attention to the requirements of its particular judge. Litigants may also be wary of seeking such relief in the Central District, as many of the judges make it clear in their standing orders that *ex parte* motions are not readily welcome, unless they are seeking "extraordinary relief," which might not include the types of administrative relief contemplated by the Northern District's Local Rule 7-11. In fact, many of the judges' standing orders cite to a leading Central District case in which the court held that an *ex parte* application is only justified when: (1) the evidence shows that the moving party's cause will be irreparably prejudiced under regular noticed motion procedures; and (2) it is established that the moving party is without fault in creating the crisis that requires *ex parte* relief. *Mission Power Engineering Co. v. Continental Casualty Co.,* 883 F. Supp. 488 (C.D. Cal. 1995). This case heavily criticized the overuse of *ex parte* applications as a threat to the adversarial system given that the opposition may not be provided with a fair opportunity to be heard. Nearly half of the Central District judges cite *Mission Power Engineering* or otherwise mention this extraordinary relief requirement within their standing orders. A few Central District judges also threaten sanctions in response to the misuse of *ex parte* applications.

Another difference between the two districts' procedures is the right to a hearing. While the Northern District decides all administrative motions on the papers, the Central District's local rule is silent on a party's right to a hearing on an *ex parte* motion, giving the individual judges' discretion as to whether they will allow a hearing. Many Central District judges are reluctant to grant hearings in connection with *ex parte* applications, and the majority state in their standing orders that *ex parte* applications are normally considered on the papers. Some Central District judges have standing orders that explicitly decline to offer hearings on any *ex parte* applications.

Because the Central District's Local Rule 7-19 also does not specify the timing for opposing or deciding *ex parte* motions, many judges set the timing in their standing orders. While the Northern District gives a non-moving party four days to oppose an administrative motion, Central District judges often require that any opposition to an *ex parte* application be filed within 24 hours, or one court day after the application is served. Other Central District judges

(*Continued on Page 12*)

Patent Trolls (*Continued from Page 7*)

These and similar judicial pronouncements are often viewed as the Federal Circuit's own efforts at patent reform, intended to "rationalize" patent damages and curb excessive damages awards attributed to the PAE phenomenon.

Joinder of Defendants. PAEs can gain significant leverage by suing, in a single lawsuit, multiple defendants that sell similar products. Broad joinder favors the PAE plaintiff by allowing it to minimize litigation costs while maximizing the potential settlement amounts or damages awards. But, as the Federal Circuit has noted, broad joinder can prejudice defendants, for example, by unfairly reducing the time each defendant is given to present its non-infringement defenses.[15]

The 2011 America Invents Act ("AIA") sought to redress the inequity by forbidding multiple defendants from being sued in a single infringement action unless the claims against them relate to the same product or process. In practice, however, the salutary effect of this change can be blunted by courts' broad latitude to manage their cases. As a matter of judicial economy and efficiency, most courts faced with a series of new filings involving the same patents are consolidating the separate cases for all pre-trial proceedings.[16] One court recently suggested consolidation might even extend to a joint trial on common issues, leaving only the infringement determination for separate trials.[17] As a practical matter, such consolidation can leave PAEs with most of the leverage and efficiencies they enjoyed before the AIA.

Patent Prosecution. For at least the past decade, both the number of patent applications and the number of patents issued has steadily increased. As a consequence, patent examiners may have less time to scrutinize each application – a circumstance that may be exacerbated by the effects of the current sequester. The patent office is attempting to address the problem by increasing its examiners corps by well over 1,000 examiners.[18] Nevertheless, inevitably, some patents issue that should not. In fact, the problem may be getting worse. A recent study indicates that the allowance rate for patent applications has increased sharply over the last three years, suggesting a lowering of the standards for granting patents.[19] Given the strong correlation between the number of patents granted and the number of patent infringement cases filed (simply put, more patents means more litigation), this may leave businesses facing something akin to a perfect storm: an increasing quantity of patent litigation and a decreasing quality in the patents asserted.[20] Judge Richard Posner of the Seventh Circuit, who sometimes sits by designation in patent actions in the District Court, recently spoke publicly on this issue, suggesting that the PTO does a poor job of evaluating patents, too many patents are granted, and the presumption of validity should be eliminated.[21]

One particularly troubling problem is patents whose claim language vaguely delineates the scope of the patent coverage.[22] Some PAEs are able to exploit vague patents by asserting them against products that bear no relation to what was actually invented and described in the patents. Vague patents increase the likelihood of expensive litigation and raise the specter of patentees reaping infringement damages for products outside the scope of the patented invention. By failing to give businesses proper notice of their scope, vague patents also hamper businesses' ability to avoid wasting time and resources designing and selling potentially infringing products. Although the USPTO now allows the public to submit prior art in connection with pending patent applications, if the scope of an application is vague or unrelated to its written description, the public will likely find it difficult, if not impossible, to identify it as a candidate for such pre-grant submissions. A similar problem may diminish the utility of post-grant review; given the time limit of nine months to file, businesses will likely have difficulty identifying which patents to challenge, particularly if the PAE waits nine months to file suit.

Whatever their flaws or merits, it is a safe bet that PAEs are not going away. At the same time, trial courts are increasingly willing to implement

(*Continued on Page 11*)

Patent Trolls (*Continued from Page 10*)

creative and flexible case management techniques that make it easier to identify meritless cases early on, or at least narrow and refine the issues in ways that make patent infringement actions more amenable to settlement or summary adjudication. And, of course, the Federal Circuit will continue to make further important refinements in the patent law. Without a doubt, PAEs and patent reform will continue to be the focus of intense interest and debate.

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[1] Michael J. Stimson and Martha K. Gooding are partners in Jones Day's Irvine, California office. The views expressed here are the authors' and not those of Jones Day, its clients, or the FBA/OC. The authors thank their colleague, Michelle Stover, for her assistance in preparing this article.

[2] http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues.

[3] James Bessen and Michael J. Meurer, *The Direct Costs from NPE Disputes* (Boston Univ. School of Law, Working Paper No. 12-34, 2012), *available at* http://www.bu.edu/law/faculty/scholarship/workingpapers/2012.html.

[4] Randall R. Rader, Chief Judge of the United States Court of Appeals for the Federal Circuit, The State of Patent Litigation, Address at the E.D. Texas Judicial Conference (September 27, 2011), *available at* http://www.patentlyo.com/files/raderstateofpatentlit.pdf.

[5] *See* PRICEWATERHOUSECOOPERS LLP, *2012 Patent Litigation Study: Litigation Continues to Rise Amid Growing Awareness of Patent Value*. 7 (2012), http://www.pwc.com/en_US/us/forensic-services/publications/assets/2012-patent-litigation-study.pdf.

[6] *See The Top 100 Verdicts of 2012*, THE NATIONAL LAW JOURNAL, March 4, 2012, at 14 (citing *Carnegie Mellon Univ. v. Marvell Tech*. (W.D. Pa.)($1.69 billion); *Apple v. Samsung* (N.D. Cal.)($1.04 billion); *Monsanto v. duPont* (E.D. Mo.) ($1 billion)). Of course, not all these verdicts survived JMOL motions intact.

[7] *Riles v. Shell Exploration and Prod. Co.*, 298 F.3d 1302, 1311 (Fed. Cir. 2002).

[8] *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1325 (Fed. Cir. 2009) (citation omitted).

[9] PRICEWATERHOUSECOOPERS LLP, *supra* note 4, at 7, 11.

[10] *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010).

[11] *Rite Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1549 (Fed. Cir. 1995) (citation omitted) ("We have held that the entire market value rule permits recovery of damages based on the value of a patentee's entire apparatus containing several features when the patent-related feature is the 'basis for customer demand.'"); *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1320 (Fed. Cir. 2011) ("The Supreme Court and this court's precedents do not allow consideration of the entire market value of accused products for minor patent improvements simply by asserting a low enough royalty rate. . . . For the entire market value rule to apply, the patentee *must* prove that the patent-related feature is the basis for customer demand") (citations omitted).

[12] *LaserDynamics, Inc. v. Quanta Computer*, 694 F.3d 51, 67-68 (Fed. Cir. 2012).

[13] *Uniloc*, 632 F.3d at 1315 ("Evidence relying on the 25 percent rule of thumb is thus inadmissible under *Daubert* and the Federal Rules of Evidence, because it fails to tie a reasonable royalty base to the facts of the case at issue.")

[14] *See, e.g.*, *ResQNet.com,* 594 F.3d at 868-874; *Lucent Techs.,* 580 F.3d at 1327-28.

[15] *See, e.g., In re EMC Corp.*, 677 F. 3d 1351, 1355 (Fed. Cir. 2012).

[16] *See Norman IP Holdings, LLC v. Lexmark International, Inc.*, No. 11-cv-00495, ECF No. 253 at 6-10 (E.D. Tex. Aug. 10, 2012), for Chief Judge Leonard E. Davis' explanation of how pretrial consolidation promotes judicial efficiency.

[17] *See CEATS, Inc. v. Cont'l Airlines, Inc*., No. 6:10-cv-00120, Dkt. No. 888 (E.D. Tex. Feb. 14, 2012) (order denying motion for separate trials).

[18] UNITED STATES PATENT AND TRADEMARK OFFICE, PATENT EXAMINERS (2013), *available at* http://www.uspto.gov/dashboards/patents/kpis/kpiExaminers.kpixml. One commentator has suggested, however, that given high attrition rates among examiners at the patent office, this level of new hires will do no more than allow the patent office to keep even. Mark A. Lemley, *Fixing the Patent Office*, *in* INNOVATION POLICY AND THE ECONOMY 83, 89 (Josh Lerner and Scott Stern eds., 2013).

[19] Christopher Anthony Cotropia et. al., *Patent Applications and the Performance of the U.S. Patent and Trademark Office* (Richmond School of Law Intellectual Prop. Inst., Research Paper No. 2013-01, 2013), *available at*http://ssrn.com/abstract=2225781.

[20] PRICEWATERHOUSECOOPERS LLP, *supra* note 4, at 6.

[21] Ryan Davis, *7th Circ.'s Posner Calls For Crackdown on Patent Proliferation*, LAW 360 (May 14, 2013), http://www.law360.com/articles/439755.

[22] *See* Mark A. Lemley, *supra* note 17, at 84.

Close Calls (*Continued from Page 9*)

require that an opposition be filed at a specified time on the first business day following service of the application, though these times vary among the judges and may be 12:00 p.m., 3:00 p.m., or 5:00 p.m. And while the Northern District considers an administrative motion submitted for immediate determination on the day after the opposition is due, it is not always clear when an individual Central District judge considers an *ex parte* application ripe for a decision, particularly when his or her standing orders do not specify a timeline for submitting an opposition. Some Central District judges simply state that an *ex parte* application shall stand submitted until further order of court.

Some attorneys practicing in the Central District may wish the local rules included a uniform procedure for seeking administrative relief, but the Northern District's local rule is not without its issues. The Northern District has sought to create an expedited procedure to deal with common requests for relief, but the procedure may not give the litigant sufficient time to obtain the relief it needs, as the rule requires a five day period before the motion is deemed submitted for determination. These timing issues may also discourage the non-moving party from stipulating to the relief requested, particularly in contentious litigation where a party seeks to delay proceedings or deadlines. Furthermore, the Northern District's local rule may lead to abuse, with litigants overloading the courts with motions that are not sufficiently "administrative" in nature and which were never intended to be covered under the local rule. This alone may be reason for the non-moving party to decline a request for a stipulation, and may force all parties in the case to file oppositions. And while the five-page briefing limit and four-day opposition period may reduce the effects of improper motions on non-moving parties, the court itself will still be burdened by taking the time to deny these motions and explain why they are improper.

Similarly, the procedures available for seeking administrative relief in the Central District have issues, as there is a lack of uniformity, widely varying procedures among the individual judges, often unclear procedures on how to oppose the motions, and potential for abuse by forcing a non-moving party to respond to lengthy points and authorities in only a few hours' time. However, the fact that many judges have a stated distaste for *ex parte* applications may lead to more cooperation between the parties in agreeing to stipulations and may discourage litigants from filing superfluous motions, lest they face the wrath of the judge (and possible sanctions). The Central District's variation also appears to give the court more flexibility, and may even allow a quicker decision for the moving party, as there is no five-day waiting period. This may be crucial for the party that has overlooked an important deadline and needs an immediate continuance. There are pros and cons in the different ways the two districts handle administrative motions, and the perfect local rule has yet to be crafted.

"[T]he fact that many judges have a stated distaste for *ex parte* applications may lead to more cooperation between the parties in agreeing to stipulations and may discourage litigants from filing superfluous motions..."

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*Roman E. Darmer is a partner in the Irvine office of Jones Day. Jeremy S. Close is an associate in the Irvine office of Jones Day.

Comcast (*Continued from Page 8*)

sized that courts may need to look beyond the pleadings before resolving the class certification question. Citing *Dukes*, the majority stated again that it may be necessary for courts to "probe behind the pleadings before coming to rest on the certification question," in order to satisfy the required "rigorous analysis."[19]

The Court faulted the lower courts for refusing to conduct this work. As the Court noted, by "refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry."[20]

The Court then analyzed the plaintiffs' expert's damages model and found it wanting. The model itself purported to measure damages from all four potential theories of antitrust impact. But because (i) the district court permitted plaintiffs to proceed on only one theory and (ii) the experts' report made no attempt to identify the damages attributable to the one remaining theory, then (iii) the expert's model could not establish that the putative damages of the proposed class related to that theory were susceptible to class-wide measurement.[21] The Court explained that at the certification stage, "any model supporting a plaintiff's damages case must be consistent with its liability case."[22] If the model could not measure "those damages attributable to [a specific] theory," then that model could not "possibly establish that damages [were] susceptible of measurement across the entire class for purposes of Rule 23(b)(3)."[23]

Not surprisingly, the dissent directed its initial criticism toward what the dissent saw as the majority's failure to address the question on which certiorari had been granted—whether *Daubert* applies at the class certification stage.[24] The dissent also took issue with the majority's holding that a class could not be certified given Plaintiffs' failure to demonstrate that damages could be measured on a common class-wide basis. The dissent contended that "[r]ecognition that individual damage calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal," with "[l]egions of appellate decisions across a range of substantive claims."[25] The dissent then attempted to limit the majority's holding by suggesting that the majority's opinion was "good for this day and case only" and that the decision "breaks no new ground."[26] It is likely that the dissent's analysis is more wishful thinking than precedent-diminishing.

This is particularly true because the Court's post-*Behrend* actions leave little doubt that the *Behrend* opinion will itself echo across the class action spectrum rather than confine itself simply to antitrust behavior.[27] Indeed, the Court vacated and remanded for reconsideration two cases in light of *Behrend* within days of its decision, including a products liability case[28] and a wage and hour class action.[29]

> "The *Behrend* decision will likely increase the number of *Daubert* challenges to expert reports at the class certification stage."

The wage and hour case ("*RBS*") is particularly interesting because, at first blush, it does not appear to involve precisely the same issues *Behrend* considered. Indeed, the *RBS* matter confronted the lower hurdle of Rule 23(a)(2) commonality and did not place damages at issue, but the defendants did argue for more particularized class certifications since the plaintiffs advanced four different liability theories addressing two different classes (exempt and non-exempt). Some court observers believe that the portion of the *Behrend* opinion that will most effect cases like *RBS* is the following statement: "The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event."[30] It will be worth following how the *RBS* district court interprets its required actions in light of the *Behrend* decision.

(*Continued on Page 14*)

Comcast (*Continued from Page 13*)

With the intersection of *Dukes* (which did consider Rule 23(a)(2)), the *Behrend* decision, and now the grant/vacate/remand of *RBS*, it appears that the dissent may be correct that the *Behrend* decision broke no new ground, but the dissent is incorrect to assume the *Behrend* analysis would be limited to simply the case at issue.

Takeaway

The *Behrend* decision will likely increase the number of *Daubert* challenges to expert reports at the class certification stage. This will not be a change in jurisdictions such as the Fifth Circuit and the Seventh Circuit, where challenges to expert testimony deemed "critical" to class certification is already routinely subject to *Daubert* analysis.[31]

In the end, the Court reaffirmed the "rigorous analysis" standard from *Dukes*, which will continue to mandate district courts to look beyond the pleadings to resolve the class certification requirements, even if such analysis overlaps with the merits of the underlying case. The *Behrend* case also suggests that plaintiffs in putative class action suits may need to tie their damages models to their specific theory of liability in order to certify a class. Defendants opposing class certification should challenge damages models that do not correlate with the plaintiffs' theory of liability.

More generally, the *Behrend* decision re-affirms what all litigants know: Class certification will remain a major battleground in class action lawsuits. In any case involving individualized determinations of damages, defendants would be well advised to argue that damages cannot be established on a class-wide basis as part of their predominance challenge to class certification.

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* Kenneth G. Parker is a partner in the Orange County office of Haynes and Boone LLP. William O'Neill is an associate in the Orange County office of Haynes and Boone LLP.

[1] 133 S.Ct. 1426 (March 27, 2013).
[2] 131 S. Ct. 2541 (2011)
[3] 131 S. Ct. 2541, 2553-54.
[4] *Ellis v. Costco Wholesale Corp*., 657 F.3d 970 (9th Cir. 2011)
[5] *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 612-14 (8th Cir. 2011).
[6] 133 S.Ct. 1426, 1432.
[7] *Id*. at p. 1430.
[8] *Id*. at p. 1430-31.
[9] *Id.*
[10] *Id.*
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] 655 F.3d 182, 215 n. 18 (3rd. Cir. 2011).
[17] 567 U.S., at ——, 133 S.Ct. 24 (2012). This is a different question than the one put forth in Comcast's petition: "[W]hether a district court may certify a class action without resolving 'merits arguments' that bear on [Rule] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23 (b)(3)." 133 S.Ct. 1426, 1435 (Ginsberg dissent).
[18] *Id.*
[19] *Id.* at p. 1429.
[20] *Id.* at pp. 1432-33.
[21] *Id*. at pp. 1430-31.
[22] *Id*. at p. 1433.
[23] *Id.*
[24] *Id.* at p. 1435 (Ginsburg dissent) ("This case comes to the Court infected by our misguided reformulation of the question presented.").
[25] *Id*. at p. 1437 (Ginsburg dissent).
[26] *Id*.
[27] Class action litigants are also directed to the subsequent United States Supreme Court decision of *Genesis Healthcare Corp. v. Symczyk*. 133 S. Ct. 1523 (2013).
[28] *Whirlpool v. Glazer*, No. 12-322 (U.S. Apr. 1, 2013).
[29] *Ross v. RBS Citizens, N.A.*, No. 12-165 (U.S. Apr. 3, 2013).
[30] 2013 WL 1222646 at *7 (emphasis in original) (quoting Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011)).
[31] *Messner v. Northshore Univ. Health Sys*., 669 F.3d 802 (7th Cir. 2012); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 323 n.6 (5th Cir. 2005).

INTERVIEW: DISCUSSIONS WITH TWO DEANS

*Interviewer: Erna Mamikonyan**

Erwin Chemerinsky is Founding Dean of the University of California at Irvine School of Law.

UCI Law has been in the spotlight as the most recently opened law school in California, and for the extremely high bar pass rate of its first graduating class, but looking back, what was your first reaction when you were invited to launch a brand-new law school in Orange County?

I was not looking to leave Duke. We had only been there for a few of years. But the more I talked to people at UCI, the more excited I got for what's really a once-in-a-lifetime opportunity—to be a part of creating something that will be here long after I'm gone.

What has been your vision for UCI Law since its inception?

There has always been two parts to the vision from the beginning. One was articulated by the Chancellor and the provost long before I was involved. They wanted this to be a top 20 law school by every measure from the outset. The other is my vision that law school should be about preparing students to be lawyers at the highest level of the profession. So, I wanted us to look for better ways to do a much better job of training our law students to be lawyers than law schools traditionally do.

Many say that it takes decades to achieve a premier law school status, but UCI is steadily growing to be one of the nation's top law schools. What, in your opinion, has helped it achieve so much in a few short years?

The tremendous support from the Chancellor and the provost, and the Orange County legal community. The reality is creating a top law school is expensive. We have to recruit top faculty. The school is ultimately determined on the quality of the faculty and the students. For the faculty, no one is going to take a pay-cut to come here. Most new law schools hire primary entry level faculty with a few senior level faculty. We've hired overwhelmingly experienced faculty with few junior faculty. This is the most expensive way to go about it, but the university provided the support and the community provided the support. We decided in order to attract students, we would start very small, and we would raise enough money to give them scholarships to come here. We succeeded. We got terrific students to come here. But that requires the financial support from the community to do that. And so I think that the financial support provided by our university and by the Orange County community has been the most important in the successes we have had.

What is new this year at UCI Law?

We're always adding new faculty. We have four wonderful new faculty joining us: Benjamin van Rooij is coming to us from the Netherlands. He is the leading expert on China law in the world and he is going to be the head of our China Law Institute. Doug NeJaime is joining us from Loyola Law School and is an expert on sexual orientation law, which is constitutional law. And we have 2 new clinical professors, Annie Lai, who will work in the immigrant rights clinic, and Jane Stover, who will be creating our domestic violence clinic.

The school is expanding in terms of students. We're aggressively launching our building campaign. We have a wonderful facility, but we're outgrowing it, and we have to build a new building. And we're going to formally launch the campaign to raise money to build our new building.

The Federal Bar Association/OC Chapter is very excited to have you and Dean Deanell Reece Tacha, the recently appointed Dean of Pepperdine School of Law, at its Supreme Court Update Program on September 17th at (*Continued on Page 16*)

the Hyatt Regency in Irvine. Can you give us a preview of some of the most significant issues facing the Court in its new term that you might be discussing at the event?

To this point, the Supreme Court has granted review in 27 cases. The case that I am personally most interested in is the one I'm going to argue in the Supreme Court, *United States v. Apel*. It's a case that came from our Appellate Litigation Clinic. Two third-year students, Matthew Plunkett and Selwyn Chu, argued the case in the Ninth Circuit in April 2012.

It involves whether or not for a person to peacefully protest on Pacific Coast Highway right outside the Vandenberg Air Force Base. Legally it's a public road, Pacific Coast Highway, that runs outside the gate of the military base, but technically, officially it's a part of the military base, but can the government exclude somebody from it.

We won in the Ninth Circuit, and the United States government sought Supreme Court Review and Monday of this week the Supreme Court granted review and I'll be arguing the case in December. There's an important case in terms of campaign finance before the Court. In terms of whether the government can limit campaign contributions. The Supreme Court since 1976 said that it's OK for the government to limit contributions, but they cannot limit expenditures. This now raises the question, is it unconstitutional to limit contributions as well? There's a major case that involves whether or not voters in a state can prohibit affirmative action. The voters in Michigan cast the initiative, essentially identical to California's proposition 209 that says that there cannot be discrimination or preferences given based on race or gender.

And a lawsuit was brought that says it's unconstitutional to prohibit affirmative action, and the United States Court of Appeals for the Sixth Circuit declared it unconstitutional. The Supreme Court granted review. So those are a few of the cases.

What social impact do you believe the decisions will have?

I think the finance cases are enormously important because, to me, they have such an effect on politics. If the Supreme Court says that there can't be contribution limits, you then have enormous contributions directed at candidates that risk corruption or the appearance of corruption.

In terms of affirmative action, I think there is the question: "Can the voters in a state say that colleges and universities can consider any factor, but not race or gender?" Race and gender, especially race, can be so crucial in the context of finding out who a person is and to say that a college or university can consider anything but not that aspect of a person's background--is that unconstitutional? And the case I'm going to argue, *Apel*, is really about the right to protest on public streets.

In your view, what has been the biggest surprise of the current Supreme Court term?

Clapper v. Amnesty International. This involves whether or not lawyers, businesspeople, journalists can bring a challenge to a law that allows the National Security Agency to intercept communications in those in the United States and foreign countries. And the Supreme Court 5-4 said that because plaintiffs couldn't show that their conversations were affected, they couldn't bring a challenge to this. This means nobody can bring a challenge, even it's unconstitutional.

Dean Chemerinsky, thank you again for speaking with me. The FBA/OC Chapter is looking forward to a terrific Supreme Court Update program in September.

Of course! I am too. I've known Dean Tacha for almost 20 years. I met her when she was a judge for the United States Court of Appeals for the Tenth Circuit. I would go to every Tenth Circuit conference since 1996, so I got to know her through that. I've done many programs with her throughout the years. I think she's just wonderful.

* * * *

Deanell Reece Tacha was recently appointed Dean of Pepperdine University's School of Law, following a distinguished career as a Judge sitting on the Tenth Circuit Court of Appeals.

Good morning, Dean Tacha, thank you so much for taking the time out of your busy schedule to speak with me. You had a very unique path to becoming Dean of Pepperdine University's School of Law from your seat as Chief Judge of the United States Court of Appeals for the Tenth Circuit. How did you decide to leave your position as Chief Judge of the Tenth Circuit for the academy?

Well, it was a really difficult decision because I loved the Court. I loved my colleagues. I loved the work. I was in legal education and in higher education prior to my appointment to the bench. I had been the vice-Chancellor for academic affairs and on the law school faculty at Kansas. And I had completed a very long tenure on the 10th Circuit, and I saw the many changes and challenges that were confronting legal education and I thought that both my experience and my interests might provide me a perspective to perhaps be useful back in legal education. And so when I became eligible for senior status, actually a number of inquiries came to me about my interest in coming back to legal education. And I initially said "Oh, no." But when Pepperdine began to call and talk to me, I decided I'd explore. And the rest is history. I decided to do it. I think it is interesting to be in legal education right now. I absolutely love working with the students and with our faculty. I have been very, very gratified by the response of the Southern California legal community to some of the issues in legal education and have enjoyed working with the Orange County Bar, the Los Angeles Bar, the Beverly Hills Bar, the various bar associations around, because I think it is so important for the profession and legal education to join together to address some of the issues that are so critical to the future of both legal education and of the profession.

Founded in 1969, Pepperdine School of Law has been one of the biggest success stories among California law schools, in terms of rankings, bar passage rates, and job placement. What do you attribute that success to?

Well, I think it is several things. I think that the leadership at this law school in the last decade has had a vision of enhancing excellence and making real commitments to the law school. And I can take no credit for that. But Dean Starr did a magnificent job. The university administration, President Benton, and the provost have made big commitments to the law school in times when a lot of higher education wasn't doing that. We've also been able to hire some truly world-class faculty members here. And we've recruited some really outstanding students. So, those are the components. We have, of course, the number one dispute resolution program in the country for nine years running, and alternative dispute resolution—arbitration, negotiation, mediation—are all such important parts of the legal profession. So, we are able to draw a student body based on that strength as well. And then, our mission: Because we are a Christian law school, we have the new bar institute on law, religion and ethics where a lot of our students come to us because we do a lot of work in global justice. We do a lot of work in ethics. We try to bring to all of our programming a sense of the law as a professional calling and one that requires the highest ethical and service standards.

In what ways do you feel your judicial background will help you as Dean of Pepperdine Law?

Let me start with the transferrable skills. Being a judge is in some ways a life-long learning process, because every case you pick up requires you to learn a great deal about something you may or may not have known about. So, your legal education is the backdrop to continued life-long learning. And the thing that I think is most transferrable for me is to have seen that over the 25 years that I was a judge. I was continually learning. So, it is not as much about the subject matter as it is

(*Continued on Page 18*)

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about that analytical and legal doctrinal backdrop for problem-solving going forward. And so one of the things that I have tried to bring to Pepperdine is a sort of "practical/scholarly" approach to what legal education ought to look like for the future. We cannot remain the same. The information is going to change dramatically, literally daily.

What is new this year at Pepperdine?

We've hired some fabulous new faculty who will join us in the Fall, and we have some that have joined us this past year. We also initiated this preceptor program which pairs everyone else with a practicing lawyer or judge for the full year. We are teaching required professionalism courses to everyone else. We are running our own bar preparation course that is doing very well. We have just started a two-calendar year JD/Certificate for Dispute Resolution so that a student can complete both the JD and the Certificate for Dispute Resolution in two calendar years. So, they began the day after graduation and they will finish in two years.

The FBA/OC Chapter is very excited to have you and Dean Erwin Chemerinsky, of UCI Law, at its Supreme Court Update Program in September. What are a few of most significant issues facing the Court next term that you anticipate discussing at the event?

They'd only as of yesterday granted cert on 28 cases. It's a little hard to sort out what is going to be the most important. It looks like to me there is a very important prayer case, establishment clause case, it seems to me, which is a legislative prayer practice. You know, It's kind of "what can you do in the public square?" So, I think that is going to be an important one. But, there is also a standing case and an environmental case that probably sounds like a lot of procedure, but I think that might be really important—who has standing to bring environmental challenges. Then there are several capital cases on this agenda which I really hadn't paid attention to. The court hasn't been doing as much in death penalty work in the last couple of terms. But, they've granted cert at least two, and I think it is three, capital cases.

Do you see any of these to have social impact as they come down? Which one do you find would have the biggest impact depending on how it comes down from the court?

You know, at the ones I looked through, so far, and it is very early on, they won't grant cert until much later in the summer on a lot of them. So, we will know a lot more by September. But so far, it doesn't look to me like the ones they've granted cert on are the kind of blockbuster cases that they have this term, none of which have come out yet.** But I could be wrong about that and there are several really important procedural ones, but the rest of the world outside the legal world won't be watching those quite so much. There is a campaign contribution one which could be very important. So that could have some impact. Especially assuming it gets decided here in the next year, because of the election cycle coming up.

* * * *

*Erna Mamikonyan will complete her third year of law school at UC Irvine School of law in 2014, and is a summer associate at Jones Day.

**The Interviews transcribed herein were conducted early in Summer 2013.

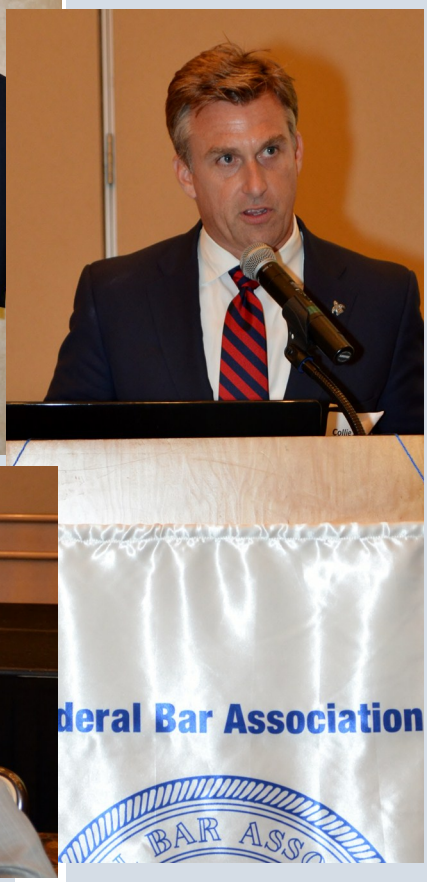
PREVIEW OF THE 2013-2014
UNITED STATES SUPREME COURT TERM

Tuesday, September 17, 2013
Hyatt Regency
17900 Jamboree Blvd., Irvine, California

11:30 a.m. to 12 noon
Registration and Reception

12 noon to 1:30 p.m.
Lunch and Program

(visit www.fbaoc.com *for details*)



Members of the federal bench and bar in attendance at various 2013 FBA/OC events.

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ANNUAL JUDGES' NIGHT

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