

# SPECIAL SECTION

Hot Issues Alerts

## Reducing The Cost And Duration Of Litigation *Comments On The Final Report Of The American College Of Trial Lawyers Task Force On Discovery And Of The Institute For The Advancement Of The American Legal System*

By Thomas A. Gottschalk

On reading the principles recommended in this Report for improving the pretrial phases of litigation in both federal and state courts, two words came to mind.

The first is, "audacious." Many lawyers' groups like LCJ have struggled over the past decades to urge changes in one federal rule of civil procedure or

another with occasional success and often disappointment. The 29 principles recommended by the American College's Task Force and the Denver Institute (IAALS) constitute a breathtaking proposal to rethink almost the whole body of pretrial management rules and procedures, including pleadings and discovery.

The second word is, "dubious." I have to ask whether we are kidding ourselves. Are there too many vested interests in the current rules and procedures developed under them? Is there so much inevitable resistance to change? Are the differing viewpoints on the proper role of litigation in American society so fundamental and polarized that the effort that is proposed to be put forward will be a likely waste of whatever time corporations and their counsel may invest in it?

Certainly, there will be some who will worry that the motivation of reducing the cost and duration of litigation may further limit access to justice, which is already restricted for the most part to those litigants who can afford counsel. There will also be those who choose to use litigation to effect changes in public policy and who may be alarmed that putting constraints on discovery, in particular, may "chill" their lawsuits and hence their influence.

One can imagine a media concern that the effect of these principles will be to reduce public scrutiny of corporate conduct by narrowing discovery to focus on those material issues of fact which are genuinely disputed. However, discovery will still occur with respect to the allegations of the parties, and because litigation will be more con-



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trolled and less costly, we will likely see more cases filed and going to trial, which actually should increase public and media scrutiny of conduct challenged in court.

So, the dialogue over the purposes that our pretrial procedures should serve could very well morph into a debate over the fundamental values relating to the purpose and mission of our courts – whether they are serving the public they are intended to serve and how they are serving the public.

On reflection, if the recommended principles were put into place I think we would see not only an increase in the claims being brought and tried, especially smaller claims, but the impact of litigation on those sued, especially smaller businesses and individuals, would be less devastating with respect to the costs of defense and therefore the ability to choose trial over settlement.

My experience when at General Motors was that, over time, fewer and fewer claims were being filed and essentially only those with major damage potential were pursued in part because the transactional costs of litigation – motion practice and discovery – precluded plaintiffs' counsel from pursuing smaller claims and forced defen-

dants into settlements of claims that were filed.

The cost of litigation has made resort to courts less of an option for aggrieved persons even when their claims have merit and recourse to trial less of an option for defendants who believe they are not liable.

So, I believe corporations in general would agree that the effort to revise and reform our civil pretrial rules is past due.

Those of us who believe that over time rules and procedures need to be revisited in light of our experience and changes occurring in the external environment should be encouraged that many past reform efforts have in fact succeeded. In my career, that certainly happened in the substantive area of antitrust. It has happened with the development of due process limits on punitive damage awards. We have seen reform in the class action arena as well as in securities suits. Other examples can be cited. A sustained effort to educate and advocate, with broad support from the corporate community and defense bar especially, can contribute to meaningful and worthwhile changes in

### HIGHLIGHTS

#### Law Firms

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**Some Of The Above Partner With Corporate Counsel By Providing Us With Financial And Editorial Support.**

\* Supporting Law Firms

*Thomas A. Gottschalk, Chairman of the Board, Institute for Legal Reform (U.S. Chamber of Commerce) and Of Counsel, Kirkland & Ellis LLP, served as Executive Vice-President for Law & Public Policy, General Motors Corporation (2001-2007). This article is based on remarks made by Mr. Gottschalk at a panel on May 5, 2009 at the 2009 Spring Membership Meeting of Lawyers for Civil Justice (LCJ). A copy of the Final Report of the American College of Trial Lawyers Task Force on Discovery and of the Institute for the Advancement of the American Legal System can be found by going to the copy of this article posted on our Web site.*

## Partners Notes

### Akin Gump Expands International Corporate Transactions Practice

Matthew D. Roazen, the former deputy general counsel and chief international counsel at Alfa Bank in Moscow, has joined Akin Gump Strauss Hauer & Feld in Moscow as a partner in the international corporate transactions practice.

A transactional lawyer by training, with an emphasis on corporate finance, mergers and acquisitions and private equity, Mr. Roazen also has significant experience in managing and providing strategic advice in a wide variety of litigation and arbitration matters.

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Richard K. Welsh has joined Akin Gump Strauss Hauer & Feld LLP in Los Angeles as a partner in the litigation practice.

Mr. Welsh is a trial lawyer who represents companies in diverse industry sectors including energy, telecommunications, entertainment, video-gaming, finance, satellite, real estate and retail in matters ranging from high-stakes class actions and novel insurance coverage disputes to commercial contract and tort disputes involving billions of dollars of potential liability. He is currently lead counsel in the Northern District of California for one of the largest energy companies in the world in a dispute involving property damage claims allegedly resulting from global warming and related insurance coverage litigation in Virginia arising from that suit.

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For the second year in a row, *Turn-*

*arounds & Workouts* has named Fred S. Hodara to its annual list of Outstanding Restructuring Lawyers. The bankruptcy industry publication has also named Abid Qureshi to its annual list of Outstanding Young Bankruptcy Lawyers.

Mr. Hodara heads the financial restructuring practice at Akin Gump Strauss Hauer & Feld LLP. He was recognized for his representations of the official committee of unsecured creditors of Washington Mutual, Inc. and WMI Investment Corp.; the informal noteholder committee of Mrs. Fields; an informal second lien lender group of

Recycled Paper Greetings; and the steering committee of lenders of Philadelphia Newspapers.

A partner in Akin Gump's financial restructuring practice, Mr. Qureshi was recognized for his work on high-profile litigation matters in connection with the Chapter 11 filings of Calpine Corporation, TOUSA, Wellman, IdleAire Technologies, Propex, Lehman Brothers Holdings, Pliant Corporation and Philadelphia Newspapers, as well as for his leading role in the U.S. proceedings related to the collapsed Bear Stearns hedge funds.

### Lowenstein Pro Bono Program Ranks First For Fourth Consecutive Year

For the fourth consecutive year, Lowenstein Sandler has earned an A+ rating from New Jersey Law Journal for its pro bono work. The firm ranks first in New Jersey for the number of pro bono hours per attorney, donating a total of 19,117 hours firmwide in 2008, or more than 78 hours per attorney.

"Pro bono service remains a cornerstone of our work as a firm," says Kenneth Zimmerman, member of the firm and chair of the Lowenstein Center for the Public Interest. "Our continued recognition in this area and the expansion of our pro bono program underscores Lowenstein Sandler's ongoing commitment to serving individuals and organizations that would otherwise have difficulty securing legal representation. It further represents the firm's commitment to address the increased needs of individuals and organizations in the communities in which we live and work."

*New Jersey Law Journal* recognized

the firm for an extensive body of pro bono work, including the October 2008 establishment of the Lowenstein Center for the Public Interest.

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Fifteen Lowenstein Sandler attorneys have been selected for inclusion in the 2009 edition of *New Jersey Rising Stars*, an annual list that recognizes the state's top up-and-coming lawyers.

The firm's 2009 Rising Star honorees are: Nicole Bearce Albano, member of the firm; Michael J. Hahn, counsel; Jason Halper, counsel; Eric H. Horn, associate; Vanessa A. Ignacio, senior counsel; David E. Leit, member of the firm; Matthew M. Oliver, member of the firm; Anthony O. Pergola, member of the firm; Nicholas San Filippo, IV, member of the firm; Gina M. Sarracino, counsel; Khizar A. Sheikh, associate; John S. Stolz, member of the firm; S. Jason Teele, counsel; Katherine Varker, associate; Michael P. Vito, member of the firm.

### Cost Of Litigation

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the legal environment.

Moreover, the principles recommended in this Report are very important reforms that are worth putting forward a major effort. They encourage courts to more actively manage litigation, which in and of itself can cure much of the wasteful abuse that occurs when counsel unrestrained use the tools of litigation to inflict expense on their opponents to pressure submission or settlement. Corporations know that the time a case pends is a key driver of its cost, so the longer cases wait for a resolution the greater the pressure to settle and the greater the dissatisfaction with the litigation process.

"Proportionality" is a key concept in the recommended principles, which can go far to assure that a small claim can be fairly decided without allowing it to fester and be "prepared" as though millions were at stake, or even worse, not ever pursued.

A major cause of the inefficiency and cost of litigation, especially in discovery, is the current federal system, which countenances mere "notice" pleading followed by discovery of anything that may be relevant to the subject matter. The principles recognize that this system discourages ever getting to the nub of a lawsuit. Again, "proportionality" is the key principle, and it is implemented by requiring more fact-based pleading, discovery directed at proving or disproving material facts in issue, and motions to better define and sort out the key issues that require trial.

I join with others in urging us all to get behind this effort and participate in the dialogue it invites. The recommended principles touch on most, nearly all, of the issues corporate counsel and others have had with the civil justice system and puts them out for public debate with the goal of improving the system. Seven of the principles, for example, deal with improvements in the area of electronic discovery.

As frequent users of the courts, as

plaintiffs and defendants, corporations should accept that the burden of proof for change will very much be placed on us. Our goal must not be to try to co-opt or control the process. The courts are in charge of the rules.

But, we must participate. Working through LCJ, the Chamber, and other groups, our experience, our viewpoints, and most importantly our data, should be put on the table to inform the discussion that will ensue with the courts and other participants. Corporations in this instance should put aside their usual reluctance to invest in collecting data and reporting it to neutral experts for synthesis and analysis. RAND, IAALS, and others will be collecting data to show cost and other trends that will inform where and what types of reform are most needed. It is vital that corporations cooperate in these surveys and respond accurately, fully, and promptly.

We need also to participate in conferences and hearings when opportunities are presented.

Finally, we need to be realistic about both the process and possible outcomes. Ours is a pluralistic society. There will be many viewpoints expressed and proposals put forward. We likely will not get a system we as corporations design, but we can put the spotlight on where the abuses are occurring, where things are broken, and keep pushing for improvements that at the end of the day may produce a greatly improved civil justice system for everyone concerned.

Corporations are both plaintiff and defendant in small, medium, and big cases. Our interest is in a system that produces predictable, just results based on competent evidence in a manner that is proportionate to the interests at stake in the litigation and that is efficiently managed. That is what the Final Report lays out in its 29 principles.

The corporate community has every reason to be an engaged, thoughtful, data-based voice in support of reforms that bring all litigants and society as a whole closer to realizing the ideals of a civil justice system – increased access, fair and efficient procedures, and just outcomes.

### BNSF

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commitments and more, *GI Jobs* magazine consistently names us one of America's 50 Most Military Friendly Employers.

**Editor: How do you collaborate on your core goals with other businesses?**

**Nober:** Our environmental commitment extends beyond our own network to include relationships with our suppliers, shippers and others in our industry. The U.S. Environmental Protection Agency established the SmartWay Transport Partnership in 2004 as a voluntary, public-private partnership in the ground freight industry. BNSF is a member of this partnership. By 2012, the initiative aims to reduce 33 million to 66 million metric tons of carbon dioxide emissions and up to 200,000 tons of nitrogen oxide emissions per year. Achieving these reductions will save up to 150 million barrels of oil annually.

BNSF is the only railroad to have

joined the Global Environmental Management Initiative, an organization of leading companies dedicated to fostering global environmental, health and safety excellence. The group has approximately 40 member companies representing \$915 billion in annual sales, 2.5 million employees and 3,034 manufacturing facilities around the world. *Fortune* 500 companies in this initiative have been able to help smaller companies apply leading-edge environmental practices.

With generations of ingenuity and innovation behind us and a clear vision of progress and stewardship going forward, we are proud to provide efficient and cost-effective connections for people and businesses across the nation and throughout the world.

**Editor: In your role, how important do you think it is for your counterparts in other companies and their senior management to "go public" and tell the story of the role of business in restoring sustainable economic growth and stability?**

**Nober:** It is not only part of their responsibilities, but also an obligation as citizens in a free-market country.

*Please email the author at tom.gottschalk@kirkland.com with questions about this article.*