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DAILY APPELLATE REPORT

CIVIL LAW

Civil Procedure: In applying contempt standard, imposition of burden of proof on plaintiffs is improper where defendants had burden of proving substantial compliance with consent decrees. *Jeff D. v. Otter*, U.S.C.A. 9th, DAR p. 7517

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Torts: Husband suffers compensable claim for loss of consortium despite testimony that his relationship with his wife was not hurt after her accident. *Mealy v. T-Mobile Inc.*, C.A. 2nd/3, DAR p. 7497

CRIMINAL LAW

Criminal Law and Procedure: Prior out-of-state indecent exposure conviction does not render defendant subject to felony sentencing under Penal Code section 314. *People v. Eckard*, C.A. 2nd/1, DAR p. 7533

Criminal Law and Procedure: Gang sentencing enhancement is properly applied where expert testimony shows defendant's attack of witness was committed for benefit of criminal street gang. *People v. Galvez*, C.A. 2nd/6, DAR p. 7528

Summaries and full texts appear in insert

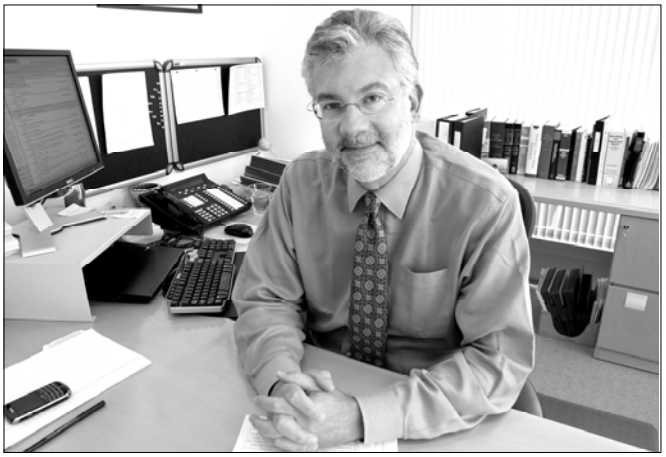
BRIEFLY

In a closely watched infringement case, a unanimous federal jury in San Francisco on Tuesday affirmed the validity of Fremont-based Volterra Semiconductor Corp.'s key patents for flip chip integrated power switches used in voltage regulators. Plaintiff Volterra, represented by Farella Braun + Martel LLP, prevailed on infringement claims against defendant Infineon Technologies AG, represented by lawyers at McDermott Will & Emory LLP. Volterra said it will now proceed to a damages phase in the litigation while Infineon promised an appeal to the Federal Circuit.

UC Berkeley Law Professor Goodwin Liu withdrew his name Wednesday from consideration for the 9th U.S. Circuit Court of Appeals. Senate Republicans filibustered his nomination last week, preventing him from getting a confirmation vote. In withdrawing, Liu cited the needs of his family and the importance that the open 9th Circuit seat get filled, according to the liberal advocacy group People for the American Way.

Daily Journal Nominations

The Daily Journal is currently accepting nominations for our annual list of the 100 most influential lawyers in California, and for the Top Real Estate Development Deals/Lawyers of the year. To receive nomination forms, email nominations@dailyjournal.com and specify which forms you want.



Susan McRae / Daily Journal

Mark E. Haddad, a partner at Sidley Austin LLP, represents a pharmaceutical executive in a similar case.

Pharmaceutical GC's Acquittal Evokes Sighs of Relief by Lawyers

Prosecution Was Based On Counsel's Advice In FDA Investigation

By Mandy Jackson
Daily Journal Staff Writer

After Reid H. Weingarten won an acquittal for a former associate general counsel at GlaxoSmithKline on criminal charges related to an investigation into off-label drug marketing, his inbox was flooded with congratulatory e-mails.

Most of those messages were from lawyers who watched the case closely for two reasons. First, the prosecution of Lauren Stevens was an example of the federal government's increased scrutiny into fraud in the health care arena. Second, the charges against Stevens were based on the legal advice she solicited and the advice she gave her company during the investigation, so the case set off alarm bells for practicing attorneys everywhere.

Weingarten, a partner at Steptoe & Johnson LLP in Washington, D.C. and lead counsel on Stevens' defense team, said there was intense interest in the case from pharmaceutical companies and in-house counsel alike.

"I've won a lot of big cases, but I don't know if I've gotten more e-mails following an acquittal," Weingarten said.

Despite Stevens' acquittal, lawyers don't expect fewer indictments of in-house and outside counsel or other executives, particularly in health care-related industries, where the U.S. Department of Justice is cracking down on fraud.

> 'General counsels should take the message that they're going to be scrutinized. How you produce records is going to be closely monitored.'
>
> — *Peter J. Henning*

The government's charges against Stevens came out of a U.S. Food and Drug Administration investigation of GlaxoSmithKline's marketing practices for the anti-depressant Wellbutrin in 2002 and 2003. The drugmaker was accused of off-label marketing, the illegal practice of promoting a drug for uses not approved by the FDA.

Stevens, who faced six charges of obstruction, concealing and falsifying documents, and making false statements to the FDA, used an advice-of-counsel defense, arguing she relied on the advice of outside counsel in all her communications with the FDA in its investigation.

In his May 10 judgment of acquittal, which came before defense attorneys argued their case to the jury, U.S. Judge Roger W. Titus of the District of Maryland agreed with Stevens. Titus found she acted in good faith by consulting outside lawyers as she prepared responses to the FDA's inquiries. The judge said the government's prosecution of Stevens has "serious implications for the practice of law."

"A lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her, and a client should never fear that its confidences will be divulged unless its purpose in consulting the lawyer was for the purpose of committing a crime or a fraud," Titus said.

The Stevens case was the first motion for acquittal granted by Titus in his seven-and-a-half years on the bench. He said Stevens could be convicted by a reasonable jury, "only with a jaundiced eye and with an inference of guilt that's inconsistent with the presumption of innocence."

Weingarten said the Titus ruling was "the right result" and marked a dramatic end to his client's closely watched case. But the acquittal may not signal the end of prosecutions for lawyers who represent federally regulated companies in general.

"I think the government has a real appetite — in health care and life sciences, in particular — to bring this to a more personal level for business executives," said David M. Deaton, partner at O'Melveny & Myers LLP in Los Angeles. "That overall initiative will probably not be slowed."

Titus' ruling may mean prosecutors will

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GUEST COLUMN

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The need for innovative lending options raises consumer protection issues that the government has yet to resolve.

As peer-to-peer lending companies are increasing the number of loans arranged directly between borrowers and lenders without the intermediation of traditional financial institutions, Congress and the Securities and Exchange Commission are seeking to find the proper mechanisms to regulate such investments for the general consumer. While some regulatory efforts have taken shape, it is still unclear how the federal government will balance its desire to protect consumers with the need for innovative lending options in the market.

The lending of money to friends, family and community members has been around long before financial institutions, but the modern form of person-to-person lending is characterized by Internet platforms where prospective borrowers put up requests for loans, disclose their credit rating and the reason they need the money in an effort to attract lenders. The two largest U.S. peer-to-peer lending companies, Prosper and Lending Club, have funded almost $500 million in loans combined. These lending companies make their money from origination fees on the loans which range from 0.5 percent to 4 percent depending on the borrower's credit rating.

The benefit to borrowers is evident to those looking to pay off credit card debt; indeed, the average interest rate these borrowers face on credit cards currently exceeds 14 percent, while interest rates on 36-month loans from Lending Club, for instance, currently average 10.85 percent. For lenders, peer-to-peer lending offers higher returns than bank deposits and other investments. Of course, as with any loan, some lenders have been

See Page 4 — PEER-TO-PEER

SEC OKs Incentives For Fraud Tips

By Robert Iafolla
Daily Journal Staff Writer

WASHINGTON — Over the objections of the business lobby, a divided Securities and Exchange Commission approved a controversial program Wednesday to reward whistle-blowers who deliver inside information about securities violations.

While the SEC modified the program in response to corporate criticism that it would undermine companies' internal compliance programs, it stopped short of requiring whistle-blowers to simultaneously report to the commission and their companies in order to qualify for a bounty.

In-house counsel and other attorneys are generally prohibited from being whistle-blowers under the program. Even when they qualify for a limited exception to the prohibition, they cannot be rewarded for information protected by the attorney-client privilege.

Enforcement of securities law is growing nationwide, including in California, home to more than 1,500 publicly traded companies.

The commission developed rules to implement the whistle-blower program created by the Dodd-Frank Act, which Congress passed last year in response to the financial system meltdown of 2008. The program calls for whistle-blowers to collect between 10 percent and 30 percent of fines of more than $1 million for voluntarily providing the SEC with original information that leads to a securities law enforcement action.

Corporate critics, led by the U.S. Chamber of Commerce, argued that whistle-blowers will chase the promise of a cash bounty and go straight to the SEC, rather than use the internal compliance processes companies set up under the Sarbanes-Oxley Act, a 2002 law designed to prevent corporate fraud.

SEC Chairman Mary Schapiro said the final rules, which the commission passed on a 3-2 party-line vote, strike a balance between encouraging whistle-blowers to inform their companies and allowing them to go directly to the SEC.

"This makes sense, as well, because it is

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Three Counties Team to Consolidate Asbestos Cases

By Ciaran McEvoy
Daily Journal Staff Writer

Seeking to clear a backlog of litigation as the courts face deep cuts, a movement is afoot to consolidate all asbestos lawsuits pending in Los Angeles, Orange and San Diego counties before a single judge.

A petition, backed by presiding judges Lee S. Edmon of Los Angeles, Thomas J. Borris of Orange County and Kevin A. Enright of San Diego, was filed last week with the Administrative Office of the Courts. Superior Court Judge Carolyn B. Kuhl, the supervising judge of Los Angeles County's civil courts, appears to be the driving force behind the move.

Los Angeles, which currently has 270 pending asbestos cases, will be the biggest beneficiary if the coordination wins approval. Orange County has 26 pending asbestos cases, while San Diego has just one.

The move drew inspiration from the success of San Francisco County Superior Court, which sent its asbestos cases to one judge. That consolidation, begun in January 2010, cut the number of active asbestos cases by 41 percent — from 1,534 at the start of the year to 902 at year's end.

If the request is approved, a Los Angeles Superior Court judge would hear all three counties' asbestos cases for pretrial purposes. Legal experts expect that would streamline the discovery process and settle cases more efficiently at a time when courts' 2011-12 budget has been cut by $200 million.

"The good is that usually when you do any kind of consolidation like that... you have humongous savings in terms of discovery costs," said Georgene M. Vairo, a professor

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MORE NEWS

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A Wordly Perspective

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Law Firm Business

Lance Armstrong Adds Lawyer

Amid renewed scrutiny of alleged doping, Armstrong has tapped Keker & Van Nest LLP.

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Katie, Bar the Door: The Privilege to Resist Unlawful Police Conduct

By Michael C. McMahon

This month, the Indiana Supreme Court upheld the criminal conviction of Richard Barnes, stating, "We hold that there is no right to reasonably resist unlawful entry by police officers." That conclusion provoked immediate reaction and criticism across the nation.

Barnes was convicted of three misdemeanors, including battery on a police officer and resisting an officer who was in the lawful performance of his duties. Police had gone to his apartment in response to a 911 call that Barnes was throwing things around his apartment, but had not struck anyone. When an officer attempted to enter the apartment, Barnes shoved him into a wall. The officers shot Barnes with a Taser and placed him in a choke hold.

At trial, Barnes requested a jury instruction on the right of a person to reasonably resist a warrantless, unlawful entry into his home. The trial judge refused to give such an instruction and the jury convicted Barnes.

The appellate court reversed the convictions, concluding the refusal to give the instruction was prejudicial error. The Indiana Supreme Court then transferred the appeal to their court for review. On May 12, 2011, that court affirmed Barnes' conviction and sentence. The court found "it unwise to allow a homeowner to adjudge the legality of police conduct in the heat of the moment," and declined "to recognize a right to resist unlawful police entry into a home...."

Arguably, Barnes was treated unfairly because Indiana had previously authorized his defense and the change of law was applied retroactively to his case. The court could have taken a less activist approach and simply held, as a matter of law, that the police had done nothing unlawful or unreasonable when responding to a domestic violence call, to warrant the giving of such a jury instruction. Justice Brent E. Dickson filed a dissenting opinion urging such judicial restraint. Justice Robert D. Rucker wrote a separate dissent asserting that the "right to resist unlawful entry" into a home is based upon the Fourth Amendment, not just the common law rule.

If Justice Rucker (whose dissent was joined by Justice Dickson) is right, the case presents an issue of federal constitutional law that can now be submitted to the U.S. Supreme Court in a petition for certiorari.

It appears that a majority of the states recognize the right to resist an unlawful arrest or an unlawful entry. But in 1957, the California Legislature criminalized the use of force or any weapon to resist an unlawful arrest by an officer. (Penal Code Section 834a.) California courts have consistently held that Section 834a prohibits forceful resistance to unlawful, as well as lawful, arrests. Although state statutes are presumed not to alter the common law unless the statute expressly provides, the legislative history of Section 834a strongly supports the conclusion that it was intended to limit the common law right to resist an unlawful arrest. California also criminalizes evasive driving, even if the officer's traffic stop is unlawful.

The state Supreme Court has ruled that Section 834a does not violate the Fourth or 14th Amendment by shifting the controversy regarding the legality of an arrest from the streets to the courtroom. Unlike Section 834a, which applies only to forceful resistance, Penal Code Section 148 penalizes even passive delay or obstruction of a *lawful* arrest, such as refusal to cooperate. However, Section 148 allows passive resistance to an unlawful arrest or entry. Thus it appears that the California Legislature has preserved the right to resist an unlawful arrest by non-forceful means, such as running away or refusing to open a door. The Indiana case, in contrast, involved the use of force (shoving the officer) and did not involve an unlawful arrest.

> The existence of a constitutional right to forcefully resist seems unclear.

California continues to recognize the right to forcefully resist and defend against an officer's use of excessive force. This includes the right to use reasonable force to protect a family member or to "prevent an illegal attempt by force to take or injure property in his lawful possession." (Penal Code Section 693.) It appears this section would apply if officers were attempting an unlawful forcible entry into a home or an automobile.

Under our system of federalism, Indiana and California are permitted to limit a common law defense, unless that defense is based upon a federal constitutional right. Indeed, many other states have adopted views similar to those now in place in Indiana. For similar reasons, unless the right to use force to resist unlawful police conduct is rooted in the Fourth Amendment, Barnes has no federal right to vindicate by certiorari or federal habeas. A purely common law right will not be upheld by a federal court.

In 2008, the U.S. Supreme Court held that a "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." (*District of Columbia v. Heller* (2008) 554 U.S. 570, 635.) The court concluded that self-defense in the home was one of the core rights protected by the Second Amendment. Nevertheless, it is doubtful, however, that a majority of the Court would find a federal constitutional right to use deadly force to resist an unlawful police entry into your home. Presumably, a state could create such a right, although it might make it more difficult to recruit qualified officers. And, if the state right to use deadly force purported to extend to federal officers, the federal government would likely challenge it.

Barnes might find encouragement in some older decisions of the U.S. Supreme Court. The Court has stated that, if an officer has no lawful right to arrest, a person may resist the illegal attempt to arrest him using no more force than is absolutely necessary to repel such an the illegal assault. (*Bad Elk v. United States* (1900) 177 U.S. 529.) The Court has also stated that, "One has an undoubted right to resist an unlawful arrest, and courts will uphold the right of resistance in proper cases." (*United States v. Di Re* (1948) 332 U.S. 581, 594.) Just last week, in *Kentucky v. King* (No. 09-1272), the U.S. Supreme Court appeared to condone passive resistance by noting that if any occupant chooses to open the door and speak with police, the occupant need not allow the officers to enter the premises. The Court did not elaborate on the source of the right to deny entry.

In any event, the existence of a constitutional right to forcefully resist seems unclear. For this reason, Barnes would likely lose if he were to assert his claim in a federal habeas proceeding. His best shot would be to present the federal claim in a petition for certiorari. Such a petition will draw numerous amici on both sides, and would become a case of great notoriety. And the petition will more likely be granted if Barnes can also show that the federal circuit courts are divided on the issue. In the absence of such a split, the Supreme Court generally prefers to let the issue percolate through the lower courts. The court also prefers cases that are factually straight-forward, which permits the court to issue opinions that will have an effect on future cases. Since the court's docket is shrinking, it is important that it take cases that allow it to paint with a broader brush. They will not take Barnes' case merely because it may have been wrongly decided in the state court or because they disagree with the public policy conclusions of the Indiana Supreme Court.

The conclusion of the state court in *Barnes v. Indiana* is either right or it isn't. If it is merely a statement of state law and policy, this is probably the end of the road for Barnes. If, on the other hand, a right to forcefully resist is implicit in the Fourth Amendment, this is only the beginning.

Michael C. McMahon is a State Bar certified specialist in both criminal and appellate law.

What Warrants a Warrant

By Louis J. Shapiro

Thinking back to our law school days in criminal procedure, we can recall the infamous "exigent circumstances" exception to the search warrant requirement. Under this exception, officers may enter a home without a warrant to render emergency assistance when someone is facing imminent bodily danger (*Bringham City*, 547 U.S. at 403), or if they are in hot pursuit of a fleeing suspect (*U.S. v. Santana*, 427 U.S. 38, 42-43, or for the need to prevent the "imminent destruction of evidence."

But what if the police's conduct alone causes the exigent circumstances? Does that in any way detract from the exigency? The U.S. Supreme Court recently addressed this issue in *Kentucky v. King*, 2011 DJDAR 6953 (May 16, 2011).

In the past, all courts have agreed that precluding the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would be too much of a stretch on the Fourth Amendment.

However, over time, the lower courts became concerned that in certain situations, the police were trying to circumvent the warrant requirement by *impermissibly* creating the exigent circumstances. Therefore, the lower courts developed different tests to determine whether the police had impermissibly created the exigent circumstances, thus rendering the evidence obtained inadmissible.

The problem, however, was that there was no single uniform test. As a result, U.S. Supreme Court created its own test: "The exigent circumstances applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment." In other words, so long as the police's actions are in compliance with the Fourth Amendment, any exigent circumstances that they trigger will be lawful and provide an exception to the warrant requirement.

In *Kentucky*, the police knocked on an apartment door after they smelled marijuana coming from inside. The door was not opened, and the officers heard movement in the apartment that led them to believe that drug-related evidence was being destroyed. They entered the apartment by force and recovered narcotics.

> Perhaps it is the age of terrorism or the rise of narcotics that has accounted for the [U.S. Supreme] Court to tighten its grip on the Fourth Amendment.

In applying its test, the Supreme Court ruled that the officers were in compliance with the Fourth Amendment when they knocked on the door. The resident did not have to open the door. The knock triggered the "movement in the apartment," or the exigent circumstances. Since the police were in compliance with the Fourth Amendment when they triggered the exigent circumstances, their conduct was "permissible" and they had a right to enter the premises without a warrant.

Justice Ruth Bader Ginsberg, however, brings a dose of reality to the table. In her dissent, she keenly identifies the flaw in the majority's idealistic test: "In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant."

Her concern is that the test gives the police broad discretion to trigger exigent circumstances at their convenience in order to avoid having to obtain a warrant. Because of that realistic fear, she proposes that "the urgency must exist when the police arrive at the scene, not subsequent to their arrival, prompted by their own conduct." She further explains the Court is lightening the heavy burden that police generally have to carry in order to avoid obtaining a warrant, which goes to the very heart of the Fourth Amendment.

To many, this ruling comes as a surprise. The requirement of the police to obtain a warrant prior to entry of a residence is one of the most sacred principles and protections guaranteed by the Constitution. Everyone, from legal scholar to *Law & Order* enthusiast is familiar with this notion. The Supreme Court's ruling shows an obvious pulling-away from that which has been held strongly by many, for so long. Perhaps it is the age of terrorism or the rise of narcotics that has accounted for the Court to tighten its grip on the Fourth Amendment.

Let us remember though, that safety above all is: "[T]he ability to be secure in our persons, houses, papers, and effects, against unreasonable searches and seizures..." — a direct quote from the Fourth Amendment.

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Peer-to-Peer Lending and Developments in SEC Regulation

Continued from page 1

burned on these non-recourse loans and lost their investments. Critics became concerned that these lenders were being swayed by unverifiable claims by borrowers.

In 2008, the SEC exercised its oversight authority based on the agency's determination that peer-to-peer lending company loans are

> The two largest U.S. peer-to-peer lending companies, Prosper and Lending Club, have funded almost $500 million in loans combined.

securities. By issuing Prosper a "cease and desist" order on Nov. 24, 2008, the SEC declared that Prosper violated Sections 5(a) and (c) of the Securities Act of 1933, which prohibit the offer or sale of securities without an effective registration statement or a valid exemption from registration. In the order, the SEC concluded that pursuant to the U.S. Supreme Court's decision in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946), an investment contract exists if there is present "an investment of money in a common enterprise with profits to come solely from the efforts of others."

In the *Howey* case, Howey Co. was offering the sale of portions of citrus groves coupled with a service contract for cultivating, marketing and remitting the net proceeds to the investor. The Court found that Howey was "offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by Howey. They are offering this opportunity to persons who reside in distant localities and who lack the equipment and experience requisite to the cultivation, harvesting and marketing of the citrus products. Such persons have no desire to occupy the land or to develop it themselves; they are attracted solely by the prospects of a return on their investment."

With respect to Prosper, the SEC determined that a common enterprise exists because lenders and borrowers are dependent upon Prosper to engage in new loans or to complete the timely repayment of loans. Further, lenders are relying upon the efforts of Prosper to realize any return on their investment since the borrowers and lenders are not allowed direct contact with each other. Therefore, according to the SEC, such an investment contract is a security that must be registered.

Prosper shut down for nine months and reopened in July 2009 after complying with securities registration requirements, which cost Prosper roughly $5 million. Clearly, the consequences of SEC regulation for Prosper are significant. Prosper has argued that the SEC is stifling the industry by treating it as a complicated securities product instead of a typical bank loan. Prosper has lobbied for legislation that would place the peer-to-peer lending industry under the jurisdiction of Consumer Financial Protection Bureau.

Certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act indicate that Congress is addressing this issue. The Dodd-Frank Act was created to more strictly regulate financial markets, increase regulatory oversight, and increase transparency for consumers. Section 989(F)(a) of the Dodd-Frank bill mandates a Government Accountability Office (GAO) study that examines the current peer-to-peer lending regulatory structure, state and federal regulators' responsibility for oversight of peer-to-peer lending markets, existing studies of peer-to-peer lending, and consumer privacy, anti-laundering, and risk management issues. The results of the GAO study must be presented to Congress by July 21, 2011.

It remains to be seen whether the SEC will relinquish oversight of peer-to-peer lending to the Consumer Financial Protection Bureau. Ultimately, government regulation will need to balance the goal of maximizing consumer protection with the risk that regulation will stifle innovative ideas by making it too costly for innovators to enter the market.

Associated Press

A screen shot of the Prosper.com Web site.