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The Right Tool for Trade Relations with China

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GUEST COLUMN

The right tool for trade relations

By Anna Han
and Colleen Chien

In life, it's important to have the right tool for the job, and trade is no different. The technology and intellectual property issues at the heart of the recent trade dispute between the United States and China are complex and nuanced. Tariffs not only are a big stick good for shaking at partners, but also, as the stock market's dramatic reaction shows us, capable of great collateral damage. And so, as an alternative to the blunt instrument of tariffs, we propose some surgical policy interventions, unilateral and bilateral, for moving forward.

See Page 5 — TARIFFS

DAILY APPELLATE REPORT

CIVIL LAW

Civil Procedure: Court has discretion to withhold 'extraordinary remedy' of mandamus relief even where clear legal error exists below, if prejudicial impact on petitioner is not great. *Bozic v. USDC - CASD,* USCA 9th, DAR p. 3669

Civil Procedure: Summary judgment reversed where party opposing summary judgment makes prima facie showing of material fact. *Welborne v. Ryman-Carroll Foundation,* C.A. 2nd/2, DAR p. 3680

Civil Procedure: Confidential brief analogous to ex parte communication that allows for arbitration award to be reviewed by court. *Baker Marquart LLP v. Kantor,* C.A. 2nd/2, DAR p. 3685

CRIMINAL LAW

Criminal Law and Procedure: Evidence is sufficient to establish conspiracy where circumstantial evidence showing that defendant was major actor in conspiracy is sufficient to lead reasonable jury to convict for conspiracy. *U.S. v. Garrison,* USCA 9th, DAR p. 3674

WEEKLY APPELLATE REPORT Podcast

Hosted by Rulings Editor Brian Cardile

'Janus' and the 'Government Could Not Work' Doctrine
SCOTUS seems poised to invalidate compelled public union dues on First Amendment grounds, but some argue the Court's skeptical eye overlooks an implicit doctrine unifying much of its historic jurisprudence, namely that compelled transfers of money (e.g. taxes, minimum wage laws) are regular governmental functions not meriting heightened judicial scrutiny. Nikolas Bowie (Harvard Law School) explains the argument, and his forthcoming paper on the 'Government Could Not Work' doctrine.

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New York Times News Service

U.S. Solicitor General Noel Francisco conceeded to the U.S. Supreme Court that a clearly race- or religion-based classification banning immigrants would be unlawful.

Lawyers: prior decisions may clinch travel ban fate

By Chase DiFeliciantonio
Daily Journal Staff Writer

Both sides made significant concessions during oral arguments Wednesday in front of the U.S. Supreme Court over the legality of President Donald J. Trump's most recent ban on nationals of certain countries entering the U.S., according to experts and observers.

But one immigration expert said a 2017 high court action allowing the latest incarnation of Trump's proclamation banning entry of certain foreigners into the U.S. to go into effect may be the most significant indicator of how the justices will rule.

"I'm not sure that the oral arguments today necessarily swayed one justice one way or the other," said Stephen W. Yale-Loehr, a professor of immigration law practice at Cornell Law School. "What could be more telling is the fact that last fall the Supreme Court let the travel ban 3.0 go into effect pending a decision by the court by a vote of 7-2."

"It's going to be a close case, but the government might well win," Yale-Loehr added. *Trump et. al. v. Hawaii et al*,, 17-965.

The arguments focused on the interpretation of a broad statute in the U.S. immigration code that empowers the president to suspend the entry of or place restrictions on foreigners seeking to enter the U.S. The more conservative justices wanted to ensure the president had the authority in an emergency to make quick decisions about immigration while the more liberal justices expressed concerns about discriminating against immigrants on religious grounds.

"The Trump administration's strongest point was that there is a strong statutory delegation," said Joseph Tartakovsky, a fellow in constitutional law at the Claremont Institute for the Study of Statesmanship and Political Philosophy.

"Hawaii's strongest point was to read the law in the way that the administration suggests would essentially give the president latitude to rewrite immigration law in any way that he wishes," Tartakovsky added.

"If the president actually did make that statement — 'I want to keep out a particular race or a particular religion, no matter what' — that would undermine the facial legitimacy of the action," said U.S. Solicitor General Noel Francisco, arguing on behalf of the Trump administration in response to a hypothetical question from Justice Sonia Sotomayor about the legality of excluding Jewish people from the U.S.

Francisco's answer was important, according to Tartakovsky, who said the solicitor general also suggested previous iterations of the ban might not have been defensible.

"I was surprised by the concession by the solicitor general's office that clearly a race- or religion-based classification would be unlawful." said Kevin Johnson, dean of the UC Davis School of Law. "It suggested that even when a president is exercising that kind of power in the name of national security, the solicitor general recognized there were limits to the exercise of that authority."

Counsel for Hawaii and the other respondents in the case also made significant concessions and agreed the president did have broad powers to exclude certain people from the country but argued they were reserved for emergency situations that were not currently taking place, Tartakovsky said.

"The president's going to get a pass absolutely on, you know, what he says the emergency is. But the ultimate question is: Can you go to Congress and get any legislative impediment removed?" said Neal Katyal, a partner at Hogan Lovells LLP in Washington, D.C. who argued on behalf of Hawaii and the other respondents in the case.

Katyal added that Trump's order "flatly violated" sections of the Immigration Nationality Act prohibiting discrimination. "It says there shall be no discrimination on the basis of nationality with the issuance of visas," he added.

"There are competing provisions," Johnson said, referring to the different sections of the Immigration and Nationality Act under review in the case. "One says you can exclude people in certain classes if you deem it in the national interest. There's another one saying we don't discriminate in our immigration laws in granting visas based on nationality. What the court is trying to do is reconcile those two statutory provisions."

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Jury awards punitive damages

Company lawyers blamed for malicious harassment inquiry

By Andy Serbe
Daily Journal Staff Writer

LOS ANGELES — A superior court jury hit Fidelity National Management Services LLC with a $1.95 million punitive damages verdict on Wednesday, finding that the company — including veteran attorney superiors — maliciously conducted an investigation of a sexual harassment claim by a paralegal against an in-house lawyer.

While the original verdict on April 13 granting the plaintiff $250,000 was not unanimous, every juror agreed some punitive damages were warranted.

Soledad Albarracin sued her supervisor, now-retired attorney Robert Gardner Wilson, and their former employer, claiming he followed her to her hotel room, propositioned her and tried to kiss her during a company retreat in Colorado Springs.

The suit also accused the company of sweeping the incident under the rug and firing her as retaliation for the complaints. *Albarracin v. Wilson et al.*, BC642922 (L.A. Super. Ct., filed Feb 6, 2016).

After a two-week trial in front of Los Angeles County Superior Court Judge Samantha P. Jessner, the jury awarded past damages for emotional distress, retaliation, and wrongful termination but no future damages.

"I hope that this is a good example of what corporations can face if they don't treat employees fairly in harassment or any other claims. It's a great example of our system — 12 people looking at facts and deciding to send a message," said Mike Arias of Arias Sanguinetti Wang & Torrijos LLP, who represented Albarracin.

"This result goes to show what happens with preparation and hard work and not giving up," said co-counsel Griselda S. Rodriguez of Rodriguez & Tran LLP. This was the first trial for Rodriguez, who conducted the emotional direct examination of Albarracin.

Henry L. Sanchez of Jackson Lewis PC, who led the defense team, declined to comment on the verdict.

In his argument for punitive damages, Arias called the company's conduct reprehensible and highlighted its $7.665 billion in 2017 revenue. He also pointed out they had no problem flying witnesses in from locations across the country to testify about his client's supposed incompetence at work.

"How many days of that revenue will it take to teach them that you do not do what you did in this case?" Arias asked.

"If it doesn't hurt, they'll do it again," he added.

Arias also reminded the jury that during the company's investigation they did not take notes of statements, and that the head of corporate human resources said she treated the complaint differently because it took place outside of the workplace at a retreat.

In his arguments against punitive damages, Sanchez insisted the company did everything in its power to

See Page 2 — JURY

Thiel agrees not to fund any more Gawker suits

By Steven Crighton
Daily Journal Staff Writer

A settlement announced Wednesday as part of the ongoing bankruptcy of Gawker LLC represents a ceasefire between the defunct media company and billionaire Peter Thiel.

Thiel has agreed not to purchase assets made available at auction in Gawker's bankruptcy, prompted by the media group's inability to pay a $31 million settlement it reached with former professional wrestler Terry Bollea after an adverse jury verdict. Thiel, who largely bankrolled Bollea's legal costs over the course of litigation, also agreed not to fund litigation against anyone who purchases Gawker's assets. *Gawker LLC,* 16-11700, (S.D.N.Y., filed June 10, 2016)

In exchange, Gawker has agreed to drop a request for an investigation into Thiel and his involvement in the lawsuit. The filing also notes the ongoing presence of Thiel, who submitted a bid for the media company's assets in January, may potentially create a "chilling effect" that could negatively impact the value of the assets for sale.

Glen Rothstein, an entertainment attorney at Rothstein Law APC not involved in the matter, said potential bidders would likely be much more reserved if Thiel hadn't agreed to step away from the bankruptcy. Rothstein said there was otherwise no guarantee that Thiel, who reportedly set out to destroy Gawker after it published a piece publicly outing him as gay, wouldn't continue his legal crusade against Gawker's inheritors.

"Thiel's presence in the whole thing has just been a sort of fly in the ointment," Rothstein said. "By having him still in the mix, it would get in the way of others trying to buy the remaining assets and cast a shadow over the closure."

With Thiel gone, Rothstein said interested parties could bid more freely, likely increasing the perceived value of the available assets.

Brian Kabateck, a partner at Kabateck, Brown & Kellner LLP not involved in the matter, said as rare as individual litigation funding is, individuals using their reputation for litigation funding as a bargaining chip in a settlement agreement is even rarer.

"I have questions about whether or not it's even necessarily constitutional," Kabateck said. "I get non-disclosure agreements, but an agreement not to fund anybody who

See Page 4 — BILLIONAIRE

Legal incubators can help bridge the justice gap

By Maria Hall

Twice a month, Attorney Monique Moncayo leads a free consumer debt workshop at Norwalk Courthouse in Los Angeles. The attendees have been sued by creditors. Most have never been to court before.

Monique converses with her audience in "Spanglish," a shorthand blend of Spanish and English commonly heard in Norwalk and in nearby East Los Angeles, where Monique grew up. They respectfully address her as *abogada* and *doctora*. She cannot give specific legal advice, because that could invoke an attorney-client relationship. But she can, and does, explain the legal process, their options, potential consequences and resources. With that knowledge, she gives them power to make informed decisions about next steps.


HALL

Monique is not a legal aid lawyer. She calls herself a "social justice solo." And she loves her work. She earns a living by helping people in her own community, which is the reason she went to law school. While building a client base, she earns stipends from Community Legal Services to lead the workshops. She is also paid on a per diem basis to handle court appearances for the nonprofit law firm, Eviction Defense Network. Opportunities like these provide Monique with needed cash flow and acculturate her to the practice of law while she develops her business.

A proud millennial, Monique embraces the gig economy and entrepreneurism. She does not shy away from hard work or public service. A 2016 graduate of Southwestern Law School, she received the Woolverton Public Service Award for her demonstrated extraordinary dedication to public interest law activities while at Southwestern including contributing over 200 hours of pro bono work as a law student. Today, with a toddler and a baby who is still nursing, solo practice is the perfect way that Monique can fulfill her dream of giving back to her community, on her own schedule and on her own terms.

Despite the term "solo," Monique is not alone. She is a member of the Los Angeles Incubator Consortium. Its mission is to provide training and support to new solo lawyers so they can build financially viable law practices in underserved communities.

As a member of the consortium's fourth cohort, Monique is surrounded by a team of 12 other solos practicing in a variety of areas, mentors, coaches, law school representatives, law librarians, and pro bono directors representing six legal aid organizations, who are all cheering her on and investing in her financial success and well-being.

The Los Angeles Incubator Consortium came into being as a pilot project in 2015, in response to a request for proposals published by the California State Bar's Access to Justice Commission. The request offered seed funds for legal incubator programs to serve lower and modest means communities. The idea was to help bridge the "justice gap," i.e., to provide affordable legal services to people who are not eligible for free legal aid, but cannot afford to hire a lawyer at market rates.

Laura Cohen, director of Southwestern Law School's Public Service Programs, drafted a blueprint for the initial Los Angeles proposal. She was joined by Luz Herrera (at the time, assistant dean of clinical education at UCLA School of Law, and now at Texas A&M Law School). They garnered support from three law schools, five legal aid organizations and the Los Angeles Law Library.

Over three years later, the consortium and its "social justice solos" are flourishing. Loyola Law School took the place originally occupied by Pepperdine, and along with UCLA and Southwestern Law Schools, they supply the program with funding, expertise and select recent law graduates.

Yes, consortium attorneys have student loans. In a perfect world, their pro bono hours would be credited against their loans. Since it is not a perfect world — yet — most subscribe to income-based repayment plans, which they find to be manageable.

One unforeseen, yet welcomed, surprise is the stunning diversity of consortium lawyers.

Law is the least diverse profession in the country, with 88 percent of lawyers identifying as "white." Of the 40 attorneys who are enrolled or have completed their year with the consortium, 40 percent are immigrants or first-generation Americans. They collectively speak *19 different* languages. More than half are women. One is transgender. Eleven speak fluent Spanish, and 25 percent identify as Latino, 17 percent Asian and 10 percent African-American. While Latinas represent a mere 1.4 percent of lawyers in the country, they represent 22 percent of the consortium's lawyers.

The Bay Area Legal Incubator in Oakland is also exceptionally diverse. Of its first three cohorts, 19 percent identify as Latino; 38 percent as Asian; and 17 percent as biracial. One is transgender; 58 percent are female. More than 50 percent are immigrants or first-generation Americans who collectively speak nine different languages.

Why are California's legal incubator programs so attractive to diverse lawyers? Some confide they do not feel welcome in traditional law firm settings, especially when they are self-conscious about their accents. Others had a childhood dream to start their own law firm or other business. Still others, like Monique, simply want to be their own boss, choose their own clients and cases, and set their own fees, priorities and schedule.

The Los Angeles Incubator Consortium's lawyers all share a passion for social justice. The 27 solo attorneys in the consortium's first three cohorts contributed a total of 4,472 pro bono hours, roughly 165 hours each during their year in the program.

At times, the consortium has been successful to receive grant funding to help support the attorneys as they build their solo practices. In 2017, California Bar Foundation awarded the consortium and Legal Aid Foundation of Los Angeles a grant for a videoconference clinic project. Legal Aid Foundation provided the technology and supervision, and consortium attorneys earned $75 per hour to give free legal consultations to people online who could not travel due to distance, age, disability or other hardship.

As a society, we can no longer afford the external costs of failing to provide competent legal services to so many people. We need a new model, one that does not rely on pro bono as charity, but instead integrates it into the everyday lives of thousands of "social justice solos" like Monique.

If we are ready to move beyond catch phrases and are truly serious about access to justice, eliminating bias, enhancing diversity and helping new lawyers earn a living, we have found one way to do it: put more resources into creating more team-like, supportive settings like legal incubators.

Maria Hall *is an attorney in Beverly Hills, and is the attorney development director for the Los Angeles Incubator Consortium. She currently serves as the co-president of the Los Angeles Chapter of the National Lawyers Guild and as vice president of the board of the Mexican American Bar Foundation.*

Los Angeles is set to begin licensing sidewalk vending

By Pooja S. Nair

Before this measure was passed, Los Angeles was the only major city in the U.S. with a strict prohibition on any type of street vending, and without any citywide licensing program for vendors.

The Los Angeles City Council approved a measure to begin the process of legalizing and licensing sidewalk vending in an 11-4 vote on April 17. The measure, Council File No. 13-1493, directs the city attorney's office to prepare the ordinance establishing the Sidewalk Vending Program. It is expected that the ordinance will be presented in July and the program would go into effect in early 2019.

Before this measure was passed, Los Angeles was the only major city in the U.S. with a strict prohibition on any type of street vending, and without any citywide licensing program for vendors. The first proposal to license sidewalk vending in Los Angeles was introduced for debate over five years ago, but has been stalled due to controversy and uncertainty about how to move forward.

An earlier version of the street vending measure included many restrictions on vending. The most controversial restriction was a veto power for brick-and-mortar businesses to reject a license for vendors on their streets. The veto power would have granted businesses blanket authority to ban vendors on the public sidewalks outside of their business. While this veto power was supported by business groups, particularly in the Hollywood area, it was strongly opposed by vendors, culminating in a protest in Downtown Los Angeles. Ultimately, the veto power was removed from the directive to the city attorney's office.

Other contemplated restrictions include the creation of no-vending zones in certain areas, a cap on the number of stationary sellers per block, and restrictions as to when and where vendors can set up. Until the ordinance is drafted, it is unclear what restrictions will remain in place.

Before 2017, street vending in Los Angeles was a misdemeanor offense, and many vendors were arrested and charged with unlawfully vending. This led to immigration consequences, with undocumented street vendors picked up on federal immigration charges. On Jan. 31, 2017, the City Council voted to decriminalize street vending. This action changed street vending without a permit from a misdemeanor to an offense subject only to a citation. However, it left both vendors and law enforcement in a confusing limbo where street vending in Los Angeles is not legal, but also not criminal. The Los Angeles County Department of Public Health website states: "illegal vending is a serious public health hazard to our communities throughout Los Angeles County." The department urges individuals to report vendors selling food without a sticker or health permit.

Los Angeles and other cities in California have struggled to come up with licensing programs that appeal to local constituents, who often see the expansion of street vending as undesirable for their locations. In light of this prolonged process, the state of California is considering a law to regulate street vending on a statewide level and pre-empt local regulations from cities.

Current state law permits local authorities in California to adopt requirements regulating any type of street vending, including regulating the time, place, and manner of vending. State Sen. Ricardo Lara introduced Senate Bill 946 in February. The proposed bill would restrict cities' ability to ban and regulate sidewalk vending. Cities would only be able to restrict street vending if the restriction was "directly related to objective healthy, safety, or welfare concerns." The bill would also prevent cities from limiting sidewalk vending to certain locations. In terms of criminalization, the bill would require the dismissal of criminal prosecutions under local ordinances regulating street vending, and make any violations of local regulations on vending punishable only by citations.

The current status of street vending remains uncertain, both in Los Angeles and at the state level. The proposed city and state regulations will have a significant effect both on street vendors and on the local communities of residents and business owners.

Pooja S. Nair *is a business litigator at TroyGould PC and a member of the firm's food and beverage department.*


NAIR

Tariffs are a big stick, but they cause great collateral damage

Continued from page 1

The U.S. trade representative's premise for the sanctions is nothing new — that U.S. companies are tired of Beijing's use of discretionary administrative approvals, joint venture requirements, and other mechanisms to pressure the transfer of technology to Chinese companies. While some of these complaints may have merit, they ignore the steady improvements that China has made, and overlook more tailored solutions — supported by China's willingness to dialogue to stem the unwanted transfer of technology — that do not involve a trade war.

For starters, instead of imposing tariffs to punish China for closing its markets in the past, newly implemented policies for trade in China make it more likely than ever that the U.S. could just directly ask China to open its market in the near future.

China has prevented foreign companies from investing in certain sectors and required joint ventures in others, previously using an Investment Catalogue to designate investments as either encouraged, permitted, or prohibited (e.g. pertaining to anything involving media content or internet services). In 2018, Beijing transitioned to a "Negative List" approach that relaxes restrictions. Given recent comments by President Xi Jinping about China's willingness to further open its markets, there is room to push for more access to various industries so foreign investors can enter China as wholly owned enterprises. Already, wholly foreign owned auto production will be allowed.


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Next, while the challenge U.S. trade representative launched against China with the World Trade Organization last month focuses on licensing requirements that put foreigners at a disadvantage, some context is in order. The 2001 Technology Import and Export Administrative Regulations do require foreigners to protect Chinese importers against claims of infringement, and award Chinese companies that improve a patented technology the right to those improvements. But even in the U.S., these types of terms are not uncommon. Indemnities are particularly important when the licensor is large and the licensee is small, lacking the ability to defend against an infringement claim. And even in the U.S., "grant back" clauses which strip improvers of their rights have raised antitrust concerns as improper extensions of the patent monopoly. Both requirements stem from the historical fact that in the past, Chinese enterprises simply did not have the capability to assess the validity of IP or the leverage to push back on grant back clauses. But Chinese companies are far more sophisticated now and capable of making their own deals. The U.S. can remind China that it's time to grow up and let perfectly capable Chinese companies decide for themselves.

While some of these complaints may have merit, they ignore the steady improvements that China has made, and overlook more tailored solutions ... that do not involve a trade war.

Finally, to address the frequent complaint that China's processes and approvals for foreign investment are impossibly opaque, there are signals that greater transparency is possible. China recently took the unusual step of releasing published judicial decisions, with a particular focus on intellectual property. This is a welcome development, but to authoritatively vet complaints of selective denials of intellectual property protection or its low quality — trade participants need hard data. China should move to release and improve accessibility of all administrative decisions — for example, of China's State Intellectual Property Office — pertaining to IP grants and challenges

If China won't act, the U.S. has its own tools.

Chinese investments in U.S. companies are currently subject to review by the Committee on Foreign Investment, an inter-agency committee that reviews transactions that could result in control of a U.S. business by a foreign person. In recent years, numerous Chinese investments in the U.S. have been subject to review and in some instances, blocked. But a more intentional focus on technology-transfer concerns could discourage or limit purchases by foreign investors of sensitive or critical technology.

Additionally, if the U.S. wants to prevent foreign investors from forming U.S. entities and hiring top scientists and engineers (something the investment committee does not police), it has another tool. Extensive Export Administration Regulations, first developed during the Cold War and administered by the Departments of State, Commerce and Treasury, can prevent the exportation of technology by U.S. companies partially or wholly owned by the Chinese. These regulations can be further amended and enforced in a way that serves the national interest of the U.S. to prevent siphoning off of U.S. technology.

In the long-term, though, Beijing's most effective means of technology transfer may be its own, long-term, consistent promotion of innovation, and coordination with Chinese companies to attract foreign technology talents. An example of this is China's "Made in China 2025" strategy and its increased efforts to attract skilled foreign workers.

To compete effectively, Washington should likewise work to support U.S. companies by making deep and stable commitments to expanded funding for basic research and development in critical areas, streamlined regulation, investing in STEM education and the pipeline, and consistently supporting high-skilled work visas to ensure that the United States remains the best environment for not only innovation but innovators.

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