February 2013

Arnold & Porter LLP is pleased to present our first issue of Lit Alerts. A monthly circular, Lit Alerts will summarize significant developments in commercial litigation that may be of interest to in-house counsel with responsibility for litigation. We hope you find this information helpful.

In This Issue

Experts: California Supreme Court Moves Closer To Daubert Standard

California state courts have long been considered more liberal than the federal courts in allowing questionable expert testimony so long as the expert relies on "generally accepted" methodology. In *Sargon Enterprises, Inc. v. University of Southern California*, No. S191550 (Cal. Nov. 26, 2012), however, the California Supreme Court strongly affirmed the courts' "gatekeeping" role when it comes to admissibility of experts. In *Sargon*, the plaintiff dental implant company had actual profits of only $100,000, but sought $1 billion in lost profits, claiming it would have grown exponentially but for the defendant's actions. Plaintiff's expert relied on financial data and market surveys from the largest dental implant companies to calculate plaintiff's damages.

The trial court held that the expert's testimony did not establish that plaintiff's product would have been as successful as those of the largest competitors, and granted the university's motion to exclude the expert at trial. The intermediate appeals court reversed, based on the traditional California standard, but the California Supreme Court found that the expert was properly excluded. In so doing, the court infused its longstanding version of the "general acceptance" test with a healthy dose of the "gatekeeping" language of *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 573 (1993).

Sedona Conference Publishes Guidance On Social Media Discovery

The Sedona Conference, long an authority for many courts on best practices for eDiscovery, has just published its Primer on Social Media. The Primer explains that its purpose is to "provide primary instruction to the bar and bench in the basics of social media and the law, from definitions, to the use of social media in business, to the discovery of social media in litigation, to professional responsibilities lawyers have in relation to their own use of social media." Topics covered by the Primer include: (1) the benefits and risks of using social media, (2) development of a social media policy, (3) privacy and user expectations, (4) regulatory considerations, (5) preservation and collection guidance for social media, (6) preservation and guidance in light of the Stored Communications Act, and (7) review and production.

Diversity Jurisdiction: A Dissolved Corporation Has No Principal Place Of Business; 11th Circuit Weighs In On Circuit Split

"[A] dissolved corporation has no principal place of business," and therefore is only a citizen of the state in which it was incorporated for diversity jurisdiction purposes, the Eleventh Circuit Court of Appeals held recently, agreeing with the Third Circuit. *Holston Investments, Inc. B.V.I. v. LanLogistics Corp.*, 677 F.3d 1068, 1071 (11th Cir. 2012), cert. petition voluntarily dismissed (Oct. 25, 2012). In the case before it, the plaintiff was a citizen of Florida, and the defendant's corporate headquarters had been in Florida. *Id*. at 1069. The court nonetheless concluded that diversity jurisdiction existed, because the plaintiff's suit was filed after the defendant-corporation had been dissolved and thus lost authority to conduct business in Florida. *Id*. at 1069-70.

In adopting this "bright-line rule," the Eleventh Circuit rejected the fact-based approaches of the Second, Fourth, and Fifth Circuits. In the Second Circuit, for example, the court must determine the state in which the corporation last conducted business to determine the dissolved corporation's principal place of business, which could differ from what was the active corporation's principal place of business. *Id*. at 1070-71. Similarly, in the Fourth and Fifth Circuits, the last state in which the corporation conducted business is the dissolved corporation's principal place of business--unless a "substantial period of time" has passed, in which case it ceases to have a principal place of business. *Id*. at 1070.

For more information, please contact your Arnold & Porter attorney or one of the following:

Kenneth Chernof, Partner
Washington, DC
tel: +1 202.942.5940
Kenneth.Chernof@aporter.com

Phil Horton, Partner
Washington, DC
tel: +1 202.942.5787
Philip.Horton@aporter.com

John Lombardo, Partner
Los Angeles
tel: +1 213.243.4120
John.Lombardo@aporter.com

Brussels | Denver | London | Los Angeles | New York

Northern Virginia | San Francisco | Silicon Valley | Washington DC

arnoldporter.com