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Q&A With Robins Kaplan's Michael Geibelson

Law360, New York (August 25, 2011) -- Michael A. Geibelson is a partner in the Los Angeles office of Robins Kaplan Miller & Ciresi LLP. He handles the prosecution and defense of claims for misappropriation of trade secrets and fraud, and class claims involving unfair competition and false advertising, including under California's Unfair Competition Law and False Advertising Law.

His trial experience ranges from misappropriation claims concerning customer lists, to fraud claims for cattle ranchers, to representing owners of buildings with welding product defects, shipowners whose ship went aground, and nonprofits suing for violations of the Clean Water Act. Geibelson is the 2011-2012 chairman of the California State Bar's litigation section.

Q: What is the most challenging case you have worked on and what made it challenging?

A: "It was a dark and stormy night" ... and the M/V New Carissa, a freighter two football fields long, went aground in heavy surf on a beach in southwestern Oregon. Our foreign shipowner client was sued by the state of Oregon in a small town that had been battered by decades of unemployment after the lumber mills closed. We had the task of explaining why it was faulty nautical charts, unpredicted weather and negligent local ship pilots that caused the grounding. But those are just bad facts.

The real challenge was dealing with Oregon's discovery and trial rules. The state sought over $340 million, to compensate every Oregonian for despoiling their beaches. There are no interrogatories. There's no expert discovery. Summary judgment is a waste of time because parties can successfully oppose the motion based only upon a lawyer's declaration that "I have an expert who will say [fill in opinion here]." There's no obligation to disclose trial witnesses in advance, much less the calculation of damages. And to top it off, we had a bad dial-up connection with which to find maritime articles written years ago with which to cross-examine someone called to the stand yesterday afternoon.

With all that said, the Pancake Mill Restaurant and Pie Shoppe in North Bend, Ore., made the six-week challenge of trial manageable. Indeed, it remains the only place where I have had the luxury of being asked: "The usual?" (Banana chocolate chip pancakes.)

Q: What aspects of your practice area are in need of reform and why?

A: The proper scope of discovery needs to be reassessed in light of the often crushing cost of electronic discovery. This is particularly true in the prosecution of trade secret actions and the defense of class actions where the cost of discovery often rivals, and interferes with, the cost of early resolution.

What is “reasonably calculated to lead to the discovery of admissible evidence” is invariably a factually intensive inquiry. And while the probative value of evidence that might be found and the policy of granting liberal discovery are given substantial consideration, relatively little time or energy is spent analyzing whether the cost of that discovery justifies the exercise. Regardless of whether the hard costs are borne by the party propounding the discovery or responding to it, the soft costs and interference with business can never be recouped. As a result, e-discovery, and the “gotcha” sanctions that sometimes follow it, are too often wielded as a threat requiring settlement rather than a pursuit of justice and truth.

Q: What is an important case or issue relevant to your practice area and why?

A: Kwikset Corp. v. Superior Court (Benson) (2011) 51 Cal.4th 310. California is commonly referred to as a “litigation hellhole.” The Unfair Competition Law (Business and Professions Code Section 17200 or UCL) is invariably part of the reason.

Before 2004, a person could bring a UCL action on behalf of the general public, without suffering any actual injury. Without any real standing requirement, the law was abused by unscrupulous lawyers who exacted settlements from businesses big and small. Early nominal settlements made sense to avoid the much greater cost of litigating with interested lawyers and uninterested plaintiffs.

In 2004, the law’s standing requirement was amended to require a plaintiff to show an injury in fact and the loss of money or property as a result of the unfair competition. But in Kwikset, the California Supreme Court recently held that “ineligibility for restitution is not a basis for denying standing.” Quoting a prior decision, the court continued that “Injunctions are ‘the primary form of relief available under the UCL to protect consumers from unfair business practices,’ while restitution is a type of ‘ancillary relief.’” While the court may have stated the intent of the law, in practice, restitution reigns supreme. Modest injunctive relief is more commonly the exit strategy for cases not worth continuing.

While some class actions serve salutary purposes, the practical effect of the Kwikset decision is to expose the statute to the abuse that its amendment was designed to remedy. At a minimum, it limits the courts’ ability to dismiss a professional plaintiff’s action at the pleading stage. And because of the limits of California’s summary judgment statute, the decision will have the effect of delaying the determination of the action until the class-certification stage, after both sides are often too deep into the case to resolve it on what would have been reasonable terms earlier.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Gail Lees, Gibson Dunn & Crutcher LLP: Gail and I have represented co-defendants in a class action over the past five years. During that time, I invariably found her to be a consummate professional who sees the whole case at once. She speaks with purpose whenever she opens her mouth. And her knowledge of the law is rivaled only by her cleverness in drawing upon it. Despite the stakes of the case, she was never disagreeable even when she disagreed (strongly at times) with me or anyone else involved. Above all else, she served her client very well.

Q: What is a mistake you made early in your career and what did you learn from it?

A: The very first case I tried was a fraud and negligence case related to a veterinarian’s sale of vaccines that were intended to prevent respiratory disease in calves. Instead, they produced basketball-sized abscesses in our clients’ cattle and caused illness and death.

Over the course of pretrial proceedings and expert discovery, I reveled in learning everything there was to know about bovine respiratory disease in Holsteins. About how to prevent it. About milk quality. About feed. About weather. About crates. About all the details of our theory of liability and the defense's response.

Then I made the mistake I can't repeat — I felt obliged to teach the jury everything that I had learned. But Bovine Respiratory Disease 101 was totally unnecessary. As Albert Einstein eloquently put it: "Everything should be made as simple as possible, but not simpler."

We had dead cattle. Lots of them. We had pictures, big pictures, of dead ones, sick ones, ones with basketball-sized wounds on their necks. We had other ranches with the same problem with the same vet with the same vaccine. We had a map of all the adverse reactions to the vaccine that occurred around the country. And we had proof that the vaccine, our vaccine, was being made in a bus that was driven from state to state to avoid federal licensing laws. The rest was just numbers.

Fortunately, the jury overlooked the mistake in awarding substantial compensatory and punitive damages. Then, in the hallway after four weeks of trial, the first question from a juror disclosed what at least one of them was focused on instead of veterinary medicine: "Where do you guys get your suits?"