

PERSPECTIVES

SCHERER SMITH & KENNY LLP
THE STRENGTH OF PARTNERSHIP

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Scherer Smith & Kenny LLP serves mid-sized and fast-growing entrepreneurial companies. From complex litigation to business, real estate, intellectual property and employment law, our team brings strategic thinking, pragmatism and intense dedication to our clients' success.



Trademarks: Protecting Your Company's Valuable Asset

As general counsel to small and medium-sized companies, we encourage our clients to take every measure possible to establish and enforce their brands in the marketplace. Unfortunately, all too often one of the simplest and most effective tools for corporate branding is overlooked.

We are talking, of course, about federal trademark registration. A "trademark" (or "service mark") is a distinctive name, logo, slogan or packaging that identifies your unique product or service to the public with its unique source — your business. The value of a federally registered trademark cannot be overstated, serving the dual roles of sword and shield: it empowers you to police the misuse of your brand name while simultaneously establishing your exclusive rights in and to the name. In today's competitive marketplace, trademarks are an integral part of every business's identity and obtaining a federal trademark registration is the best way to ensure the protection your brand deserves.

Were you aware that without the proper protection, you risk limiting your legal rights and opening the door for competitors to misuse your brand? Imagine if a competitor, using your same or similar brand name, engaged in the sale of a grossly inferior product that consumers were constantly confusing with your product. Worse yet, imagine a "late-comer" competitor unfairly trading on the established goodwill of your business by producing a similar product under a similar name and diverting your hard earned business its way. The damage may be irreparable. Proper protection may prevent this from happening or give you the tools to stop it if it does.

Even if you have not yet begun using your brand name in the marketplace, you can still reserve use of your intended brand name by filing an "Intent to Use" application, which states that you will begin using the mark in the future. This is an important tool for those clients in the development stage of their business because a trademark search will reveal the availability (or lack thereof) of your intended brand name, and could influence a decision whether to invest substantial time and money into a new brand name. Additionally, a competitor may discover your pending application and decide to choose a different name.

We consistently advise our clients that the advantages of federal trademark registration greatly outweigh its cost. Some additional advantages include:

- Protecting your brand, which will help with raising money from investors
- Strengthening your negotiating power with competitors.
- Decreasing the chances that someone else will begin using the same or similar trademark.
- Suing for infringement in Federal Court, which allows you to recover lost profits, damages, costs, treble damages and attorney fees.
- Using your registration as prima facie evidence of the validity of your registered mark, of the registration of the mark, of your ownership of the mark, and of your exclusive right to use the registered mark.
- Eliminating certain infringement defenses based on your claim of ownership to your mark.

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William M. Scherer

This is our final quarterly *Perspectives* of 2010. The Holidays and end of the year are just ahead, with 2011 just over the horizon, and I am struck by how differently this year has felt as the seasons passed by. They say that California has no seasons, and this is largely true. Certainly, we enjoy a temperate climate of few extremes, and little that takes us by surprise. But while that may be true of the weather, it has hardly been true of our recent economy and its icy blasts and ups and downs.

One of the great pleasures of my job is the opportunity to talk on a daily basis with clients and colleagues whose businesses span all number of industries, services, and professions. At least several times each month, my day ends pleasantly in the warm interior of one of the City's bars or restaurants, where I meet clients to discuss our mutual observations, business

We recommend that you consider taking this vital precaution to protect your most valued investment, your business! For more detailed information on protecting your brand through trademark registration please refer to our article "Using Trademarks to Protect Your Company's Brand" at:

http://www.sfcounsel.com/articles/protect_company_brand.php.

Please contact Brandon D. Smith at bds@sfcounsel.com or Heather G. Sapp at hgs@sfcounsel.com if you would like to discuss the value of trademark registration to your business.

— Written by Heather Sapp



Employment Legislation Alert: New Workplace Posting Requirements

Effective October 8, 2010, all California employers must post, in a conspicuous location frequented by employees, a new notice concerning workers' compensation rights and obligations entitled "Notice to Employees – Injuries Caused by Work."

Failure to post the notice can result in a misdemeanor and up to \$7,000 in civil penalties.

Employers must also distribute a new "Your Rights to Workers' Compensation Benefits" pamphlet to all new employees who start work on or after October 8, 2010, at the time of hire or before the end of the first pay period.

Please contact Denis S. Kenny at dsk@sfcounsel.com or Gabe S. Levine at gsl@sfcounsel.com to obtain more information about this legislation and about other workplace posting requirements. We also recommend that you visit the California Chamber of Commerce's website at:

<http://www.calbizcentral.com/Store/Pages/Workers-Compensation-Regulations-QA.aspx>.



Passage of Expedited Trials Legislation Effective January 1, 2011

Gov. Arnold Schwarzenegger recently signed legislation authorizing optional one-day jury trials under simplified rules in civil cases. AB 2284 (the "Expedited Jury Trials Act," which will be added as Sections 631.01-630.12 to the Code of Civil Procedure) passed both houses unanimously despite California's highly partisan political arena.

The prospect of shorter and less costly trials, and the voluntary nature of the process, attracted support from a broad mix of divergent interest groups including the Consumer Attorneys of California, the Civil Justice Association of California, and the Consumers Union on the one hand, and the California Defense Counsel, the California Chamber of Commerce, and the insurance industry on the other. The Judicial Council also endorsed the bill.

AB 2284 is a response to many long-standing problems with our legal system. Competent attorneys representing any party in a civil dispute will at some point uniformly repeat the same mantra to their clients along the following lines: More than 90 percent of all lawsuits that are filed get resolved at some point before they go to trial. Gone are the days when people can expect to "have their day in court" to ensure that justice is served. The Courts are backlogged with cases and even if or when you get assigned to a courtroom 12-24 months after you file, getting to or through trial is often time and cost-prohibitive. That's why the sound business decision for most parties to make is to compromise their respective positions and agree to an out-of-court settlement.

Under AB 2284, if both sides agree, civil trials can be heard before an eight-member jury, six of whom must agree on a verdict. Each side will be limited to three hours to present witnesses and evidence, with the object of conducting the entire trial, from jury selection to verdict, in one day. The parties may enter into a "high/low agreement," stipulating in advance to a floor and/or ceiling on damages, which would not be disclosed to the jury. The right of appeal would be limited, similar to judicial review of arbitration awards.

opportunities, and personal interests over dinner or cocktails. In addition to being a wonderful opportunity to check in on the challenges and opportunities in our changing lives, it also provides a barometer of sorts with which to gauge the degree of optimism people have about the future. Based solely on this unscientific and wholly personal pursuit, I have good news: the economy is getting better, clients are excited – or at least very interested – about the opportunities around them, and most look forward to 2011 with optimism.

When I first wrote to you in our inaugural edition of *Perspectives*, 2010 looked cold and bleak. Although there may have been "green shoots" in the economy, many of my clients had yet to see any benefit from them, and my firm's workload reflected that. Substantial amounts of time were spent on workouts, disputes among owners of companies whose profitability had declined, employment disputes based on layoffs and reductions in force, and the review of debt instruments designed to maintain cash flow.

As spring turned to summer, and the second and third editions of *Perspectives* were delivered to you, my colleagues and I sensed a thaw – conference calls and dinner conversation moved on from stark discussions of layoffs and tight cash flow to quiet optimism that a feeling of stability had returned to their businesses. Through our firm's door came an evolving workload that now included substantially more purchase agreements, trademark applications, licensing agreements, and commercial leases.

As I write this article today, a significant majority of our clients are – should I say it? – yes, optimistic about 2011. I have recently received multiple inquiries about our availability to work on mergers and acquisitions and strategic partnerships and joint ventures.

We view AB 2284 as providing a potentially valuable resource for clients to use as a litigation control mechanism. In theory, this legislation allows for plaintiffs and defendants alike to get their day in court much more quickly, with greater finality, using fewer personal and court resources and providing greater access to justice.

However, many questions remain. The parties' agreement to use the expedited trial procedures may be made only after a lawsuit has been filed. Consequently, how likely are adversaries involved in contentious disputes to agree to anything at the outset of litigation, let alone to this expedited procedure? And, as a practical matter, these procedures would not be recommended for high stakes or complex disputes. Rather, smaller, less complex personal injury and other civil matters would seem to be most impacted. So, like a lot of legislation, this may be yet another example of form over substance.

We plan to closely follow this legislation and applicable case law and continue to update our clients on important developments. In the meantime, please contact Denis S. Kenny at dsk@sfcounsel.com or Gabe S. Levine at gsl@sfcounsel.com to discuss these or any other litigation-related questions you may have.

— *Written by Denis S. Kenny*



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We are carrying out a greater number of private financings now than in the past 18 months. And certain of our clients are hiring again. Light-heartedness has returned to my conversations.

Certainly I know these descriptions are not uniformly true. Many clients and businesses in many industries continue to have terrible difficulties and struggle through the tough economic landscape. Insolvencies remain and continue. We are engaged in substantial amounts of litigation to recover monies lost in unpaid obligations.

However, on a general and relative level, at least compared to where 2010 started, the economy has passed from hard-bitten winter to a more expectant spring of a more comfortable environment in the months ahead. It translates to easier smiles and better discussions. And I much prefer helping our clients in their aspirational endeavors, as opposed to the hard realities of a declining environment.

As we reach the end of the year, Scherer Smith & Kenny LLP wishes you a very healthy and joyous Holiday season, and a prosperous new year! We look forward to helping you realize your aspirations.