September 2015
Vol. 1, No. 1

GIBSON DUNN
California Supreme Court Mid-Year Round-Up

Overview

The California Supreme Court Round-Up previews upcoming cases and summarizes select opinions issued by the Court. This edition includes opinions issued January through August 2015. Each entry contains a description of the case, as well as a substantive analysis of the Court's decision.

Select Civil Decisions

1. ***Fluor Corp. v. Super. Ct.*, S205889 (4th App. Dist., 208 Cal.App.4th 1506.) This case presents the following issue: Are the limitations on assignment of third-party liability insurance policy benefits recognized in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934 inconsistent with the provisions of Insurance Code section 520?**

   Decided Aug. 20, 2015 (____). Cantil-Sakauye, C.J., for a unanimous Court. The Court reversed and held that Insurance Code section 520 bars an insurer from refusing to honor an insured's assignment of policy coverage for injuries that predate the assignment. Fluor Corporation ("Fluor") was sued over the years for personal injury caused by asbestos exposure at its sites. Fluor tendered these suits to its insurer, Hartford, which provided general liability coverage to Fluor and accepted defense of the claims. Fluor later restructured, and the new entity sought coverage under the Hartford policies. Hartford denied coverage, arguing that only Fluor was its named insured, and the policies contained provisions that prohibited the assignment of any policy interest without written consent, which Fluor failed to obtain. This case required the Court to consider its decision in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934 ("*Henkel*"), which held that an insurance policy's consent-to-assignment clause was enforceable and precluded the insured's transfer of the right to invoke coverage without the insurer's consent, even after the coverage-triggering event had occurred. In overruling *Henkel*, the Court evaluated the legislative history of section 520 and held that section 520, which was not considered in *Henkel*, specifically restricts an insurer's ability to limit an insured's right to transfer or assign a claim for insurance coverage after a loss has occurred. In reaching this conclusion, the Court was particularly concerned with protecting the free assignment of insurance protection "as part of corporate recombinations," which in turn foster economic activity.


Daniel M. Kolkey
415.393.8240
dkolkey@gibsondunn.com


Julian W. Poon
213.229.7758
jpoon@gibsondunn.com


Theane Evangelis
213.229.7726
tevangelis@gibsondunn.com


Jennafer M. Tryck
949.451.4089
jtryck@gibsondunn.com


Lauren G. Escher
415.393.8313
lescher@gibsondunn.com

2. ***Lee v. Hanley*, S220775 (4th App. Dist., 227 Cal.App.4th 1295.) This case presents the following issue: Does the one-year statute of limitations for actions against attorneys set forth in Code of Civil Procedure section 340.6 apply to a former client's claim against an attorney for reimbursement of unearned attorney fees advanced in connection with a lawsuit?**

   Decided Aug. 20, 2015 (____). Liu, J. for a 5-2 Court (Corrigan, J., dissenting, joined by Chin, J.). The Court ruled that the one-year limitations period of Code of Civil Procedure section 340.6(a) applies to claims that necessarily depend on proof that an attorney violated a professional obligation in the course of delivering professional services. Section 340.6(a) provides that "[a]n action against an attorney for a wrongful act[], other than for actual fraud, arising in the performance of professional services shall be commenced within one year" after the plaintiff discovers her claim. Here, the plaintiff sued her attorney more than one year after he informed her that he would not return allegedly unearned attorney's fees. The trial court sustained the attorney's demurrer, holding that section 340.6(a) barred the plaintiff's claims. The Court of Appeal reversed and the Supreme Court affirmed, holding that trial courts must examine "the conduct alleged and ultimately proven" in order to determine whether a claim "aris[es] in the performance of professional services." The Court then concluded that in this case the plaintiff's complaint could be construed to allege that the attorney was liable for the "garden-variety" tort of conversion. To prove conversion, the plaintiff would not necessarily have to prove the attorney violated his professional duty to refund unearned fees, or any other professional obligation. Thus, at the pleading stage, section 340.6(a) did not bar her claim.

3. ***Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.*, S211645 (1st App. Dist., 216 Cal.App.4th 1444.) This case presents the following issue: After an insured has secured a judgment requiring an insurer to provide independent counsel to the insured (see *San Diego Fed. Credit Union v. Cumis Ins. Society Inc.* (1984) 162 Cal.App.3d 358), can the insurer seek reimbursement of defense fees and costs it considers unreasonable and unnecessary by pursuing a reimbursement action against independent counsel or must the insurer seek reimbursement only from its insured?**

   Decided Aug. 10, 2015 (61 Cal.4th 988). Cuellar, J. for a unanimous Court (Liu, J., concurring). The Court affirmed in part, reversed in part, and held that, "under the circumstances of [this] case," an insurer may seek reimbursement of fees and costs directly from independent counsel, rather than from the insured, but reserved the question whether in other cases "an insurer that breaches its defense obligations has any right to recover excessive fees it paid" to independent counsel. Here, J.R. Marketing, Noble Locks, and several of their employees ("J.R. Marketing") were sued in multiple states under various tort theories. J.R. Marketing's liability insurer, Hartford Casualty Insurance Company ("Hartford"), denied that it had a duty to defend the actions. Represented by independent counsel, J.R. Marketing sought and secured an order holding that Hartford had breached its duty to defend and thus had to pay its counsel's past and future invoices. That order, which was drafted by independent counsel and adopted by

Acclaimed as a litigation powerhouse, Gibson Dunn has a long record of outstanding successes. In awarding its 2014 Litigation Department of the Year Finalist honors, *The American Lawyer* noted our "cascade of litigation triumphs" and our wins of "seemingly unwinnable defense verdicts." This award followed our unprecedented back-to-back wins as the 2010 and 2012 Litigation Department of the Year.

The National Law Journal named Gibson Dunn to its 2014 Appellate Hot List, which recognized law firms demonstrating "outstanding achievements before the U.S. Supreme Court, federal circuit courts and state courts of last resort.

Benchmark Litigation named Gibson Dunn its 2015 Appellate Firm of the Year and California Litigation Firm of the Year.

Law360 named Gibson Dunn to its 2015 California Powerhouse list, noting that with the firm's "deep California roots and penchant for tackling high-stakes matters, Gibson Dunn has helped shape the Golden State economy and legal landscape by notching landmark trial victories, blazing a trail in appellate work and steering multibillion-dollar transactions."

the trial court, also expressly provided that Hartford could subsequently challenge independent counsel's bills in a separate reimbursement proceeding. The trial court sustained the law firm's demurrer to Hartford's complaint in the subsequent reimbursement suit on the ground that Hartford lacked standing, and the Court of Appeal affirmed. In reversing, the Court held that if independent counsel representing an insured was "operating under a court order that expressly provided that the insurer would be able to recover payments of excessive fees," and independent counsel "sought and received from the insurer payment for time and costs that were fraudulent, or were otherwise manifestly and objectively useless and wasteful when incurred," the independent counsel "should be directly responsible for reimbursing" the insurance company. The Court grounded its decision in "principles of restitution and unjust enrichment," but expressly limited its holding to the "particular facts and procedural history of this litigation" in which the trial court adopted an order drafted by independent counsel that "expressly provided" for "a subsequent reimbursement action." Justice Liu concurred, emphasizing that on remand "it will be Hartford's burden to show not only that the fees it seeks to recover . . . were not 'objectively reasonable at the time they were incurred . . . ,' but also that the fees were not incurred" for the benefit of independent counsel's client. Justice Liu also stated that the "trial court on remand should apply a presumption that [the] fees were incurred primarily for the insured's benefit."

4. ***Sanchez v. Valencia Holding Co. LLC*, S199119 (2nd App. Dist., 201 Cal.App.4th 74.) This case presents the following issue: Does the Federal Arbitration Act (9 U.S.C. § 2), as interpreted in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. __ [131 S.Ct. 1740, 179 L.Ed.2d 742], preempt state law rules invalidating mandatory arbitration provisions in a consumer contract as procedurally and substantively unconscionable?**

Decided August 3, 2015 (61 Cal.4th 899). Liu, J. for a majority of the Court (Chin, J., concurring in the judgment). The Court reversed and held that *Concepcion* required enforcement of a class action waiver in the consumer arbitration agreement at issue, but that unconscionability rules were applicable to other provisions of the arbitration agreement, and that under those rules the agreement was not unconscionable. The arbitration agreement, which was part of the plaintiff's purchase of a used Mercedes-Benz vehicle from the defendant car dealership, provided that the defendant would advance arbitration fees up to $2,500 (excluding attorney's fees), granted the parties a right to appeal at their cost to a panel of three arbitrators in various circumstances, reserved the right of the parties to seek relief in small claims court, and contained a class action waiver, among other things. The Court of Appeal found the arbitration agreement to be unenforceable because, inter alia, it was unfairly one-sided in favor of the defendant. The Supreme Court reversed, holding that unconscionability remains a valid defense to a petition to compel arbitration, even after *Concepcion*, so long as unconscionability rules do not discriminate against arbitration and are enforced even-handedly. The Court held that the agreement had "some degree of procedural unconscionability," but that the arbitration process was not substantively unconscionable, as it provided benefits for both parties, and the

provisions favoring the defendant were warranted due to legitimate commercial needs. The Court also held that finding the class waiver to be unconscionable "would run afoul of *Concepcion*" and that the Consumer Legal Remedies Act's anti-waiver provision was preempted to the extent it bars class waivers in arbitration agreements covered by the Federal Arbitration Act.

5. ***In re Estate of Duke*, S199435 (2nd App. Dist., 201 Cal.App.4th 559.) This case presents the following issue: Should the "four corners" rule (see *Estate of Barnes* (1965) 63 Cal.2d 580) be reconsidered in order to permit drafting errors in a will to be reformed consistent with clear and convincing extrinsic evidence of the decedent's intent?**

Decided July 27, 2015 (61 Cal.4th 871). Cantil-Sakauye, C.J., for a unanimous Court. The Court reversed and held that an unambiguous will may be reformed to conform to the testator's intent if clear and convincing evidence establishes that the will contains a mistake in the testator's expression of intent at the time the will was drafted, and also establishes the testator's actual specific intent at the time the will was drafted. There, the decedent prepared a will providing that, upon his death, his wife would inherit his estate and that if he and his wife died at the same time, the estate should be distributed to specific charities. The will contained no provision on the disposition of the estate if, as occurred in this case, the decedent outlived his wife. After decedent's death, two charities petitioned for probate offering extrinsic evidence that the decedent intended the estate to be distributed to the charities in the event he outlived his wife. The probate court deemed the will unambiguous, declined to consider the extrinsic evidence, and granted summary judgment for the decedent's nephews. The Court of Appeal affirmed. In reversing this decision, the Court's analysis proceeded in four steps: First, the Court reviewed the statutory and judicial development of the laws governing the admission of extrinsic evidence regarding wills, concluding that the Legislature had "codified legal principles developed by the courts" and had "taken steps to ensure that its enactments do not restrict the admissibility of extrinsic evidence beyond the principles established by the courts." Second, the Court considered whether the common law rule categorically barring reformation of wills was warranted in light of the evolution of the law of probate and modern theories of interpretation of writings, concluding that there was no sound basis to forbid the reformation of unambiguous wills in certain circumstances. Third, the Court evaluated principles of stare decisis to conclude that a change in the law was warranted. The Court acknowledged the existing law allowing ambiguous wills to be clarified through the admission of extrinsic evidence and reasoned that application of a similar rule to unambiguous wills would ensure certainty, predictability, and stability in the law of wills. Finally, the Court determined that reformation was potentially available in the instant case with respect to the theory of mistake articulated by the parties.

6. ***DKN Holdings LLC v. Faerber*, S218597 (4th App. Dist., Div. 2, 225 Cal.App.4th 1115.) This case presents the following issues: (1) Can parties who are jointly and severally liable on an obligation be sued in separate actions? (2) Does the opinion of the Court of Appeal in this case conflict with the opinion of this [C]ourt in *Williams v. Reed* (1957) 48 Cal.2d 57?**

   Decided July 13, 2015 (61 Cal.4th 813). Corrigan, J. for a unanimous Court. The Court reversed and held, consistent with *Williams v. Reed* (1957) 48 Cal.2d 57, that the rule against splitting a cause of action does not bar a claimant from bringing separate suits against each individual who is jointly and severally liable on a contract until the obligation has been satisfied in full. In this case, DKN Holdings ("DKN") signed a commercial lease with three individuals, Caputo, Faerber, and Neel, each of whom agreed to be jointly and severally liable on the lease. After DKN was sued by Caputo for various tort and contract claims, DKN cross-complained against Caputo for breach of the lease and obtained a judgment in its favor. Shortly before the judgment was awarded, however, DKN also sued Faerber and Neel for breach of the lease. Faerber demurred, arguing that DKN's suit against him was barred by the judgment in the *Caputo* action under the doctrine of claim preclusion. The Court of Appeal agreed, but the Supreme Court reversed and ruled that the Court of Appeal's decision was premised on a misunderstanding of the rules governing claim preclusion, which bar successive suits between the same parties (or parties in privity), and issue preclusion, which does not require identity or privity of all parties. The Court held that because each jointly-and-severally-liable individual remains independently, not derivatively, liable for the full amount of the obligation, there was no privity between the parties and thus, no claim preclusion with respect to DKN's second suit. In so holding, however, the Court noted that nothing stopped Faerber from asserting *issue* preclusion against DKN.

7. ***People v. Grewal*, S217896, S217979 (5th App. Dist., unpublished opinion.) This case presents the following issue: Are the Internet café games at issue in these cases "slot machine[s] or device[s]" under Penal Code section 330b, subdivision (d)?**

   Decided June 25, 2015 (61 Cal.4th 544). Chin, J. for a unanimous Court. The Court affirmed and held that the Internet cafe games at issue in the five consolidated cases were subject to Penal Code section 330b, subdivision (d), on the ground that they constituted a "slot machine or device" and were thus outlawed in California. The devices at issue operated at several Internet cafes. In each of the five consolidated cases, the business sold a product (either Internet time or telephone cards) and, along with the product, customers were provided with the opportunity to play sweepstake games, with the possibility of winning prizes, including substantial cash prizes. The devices at issue were prohibited by the plain language of section 330b, subdivision (d). First, the devices required the insertion of "money or coin, or other object" or "other means," namely the insertion of a PIN or the swiping of a magnetic card. Second, the "so-called chance element" was met, that is, "the requirement that any potential to win a prize must be based on hazard, chance or other outcome of operation unpredictable to the user" of the

device. The Court rejected the argument that consideration was lacking, noting that section 330b "does not directly specify that consideration is an element."

8. ***California Building Industry Assn. v. City of San Jose*, S212072 (6th App. Dist., 216 Cal.App.4th 1373.) This case presents the following issue: What legal standard applies to a facial constitutional challenge to inclusionary housing ordinances that require set-asides or "in lieu" fees as a condition of approving a development permit? (See *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, 670.)**

Decided June 15, 2015 (61 Cal.4th 435). Cantil-Sakauye, C.J., for a unanimous Court (Werdegar, J., concurring; Chin, J., concurring). The Court affirmed and held that the City of San Jose's inclusionary housing ordinance does not impose "exactions" on developers' properties in violation of the Takings Clause of the Federal or California Constitutions. That ordinance "requires all new residential development projects of 20 or more units to sell at least 15 percent of the for-sale units at a price that is affordable to low or moderate income households." Rather than "require the developer to dedicate any portion of its property to the public or to pay any money to the public," the ordinance's set-aside condition, "like many other land use regulations, . . . simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale." The Court concluded that the inclusionary housing ordinance falls within the broad discretion of municipalities to "regulate the use of real property to serve the legitimate interests of the general public and the community at large." In reaching this conclusion, the Court rejected the argument that the City of San Jose must "show that the ordinance's inclusionary housing requirements are reasonably related to the impact on affordable housing attributable to such developments."

9. ***South Coast Framing v. W.C.A.B.*, S215637 (4th App. Dist., unpublished opinion.) This case presents the following issue: Does a claim for workers' compensation death benefits have a separate and distinct causation standard and burden of proof requiring that an industrial injury constitute a "material factor" contributing to the employee's death, or does the standard require only that the industrial injury be a "contributing cause"?**

Decided May 28, 2015 (61 Cal.4th 291). Corrigan, J. for a unanimous Court. The Court reversed and held that an industrial injury "proximately causes" death within the meaning of Labor Code section 3600 where the injury is a "contributing cause" of death. In this case, decedent's workers' compensation doctor prescribed him various drugs (including the antidepressant Elavil) to treat neck and back injuries suffered after falling in the course of employment. His personal doctor prescribed him two additional, unrelated drugs (Xanax and Ambien). Decedent later died of a drug overdose. Small quantities of Elavil and large quantities of Xanax and Ambien were found in his bloodstream and urine. Decedent's family sought workers' compensation death benefits. The medical expert who appeared before the Workers' Compensation Judge ("WCJ") testified that, although Xanax and Ambien were more likely responsible for decedent's death than Elavil, Elavil

might have "put [him] over the edge." The WCJ awarded death benefits, finding that Elavil "proximately caused" decedent's death within the meaning of Labor Code section 3600. The Court of Appeal reversed, concluding that industrial causation was lacking because Elavil was not a "material factor" contributing to decedent's death. The Supreme Court reversed the Court of Appeal, holding that unlike tort causation, industrial causation pursuant to Labor Code section 3600 requires only that industrial injury be a "contributing," rather than "material," cause of death. The less restrictive causation standard results from the unique aims of the workers' compensation system, which include: (1) ensuring that the cost of industrial injuries is part of the cost of goods rather than a burden on society; (2) guaranteeing prompt, limited compensation as an inevitable cost of production; and (3) spurring increased industrial safety. The Court concluded that substantial evidence supported the WCJ's conclusion that Elavil "contributed" to decedent's death.

10. ***In re Cipro Cases I & II*, S198616 (4th App. Dist., 200 Cal.App.4th 442.) This case presents the following issue: May a suit under the Cartwright Antitrust Act (Bus. & Prof. Code, § 16720 et seq.) be brought to challenge "reverse exclusionary payments" made by pharmaceutical manufacturers to settle patent litigation with generic drug producers and prolong the life of the patents in question?**

Decided May 7, 2015 (61 Cal.4th 116). Werdegar, J. for a unanimous Court. The Court reversed and held, consistent with *Federal Trade Commission v. Actavis, Inc.* (2013) 570 U.S. ___ [133 S.Ct. 2223], that "reverse payment" settlement agreements are subject to antitrust scrutiny under the Cartwright Antitrust Act. The Court first determined, by relying on the reasoning set forth in *Actavis*, that the policies underlying the patent laws do not support immunizing such settlements from antitrust scrutiny. Turning to the nature of antitrust scrutiny to be applied, the Court set forth a burden-shifting rule-of-reason test with the goal of determining whether the settlement offered consideration for elimination of any portion of the period of competition that would have been expected had the patent been litigated; if the settlement did offer such consideration, the agreement violated the Cartwright Act. The plaintiff first bears the burden of establishing a prima facie case of anticompetitive behavior by showing (1) the settlement includes a limit on the settling generic challenger's entry into the market; (2) the settlement includes financial consideration to the generic challenger; (3) the consideration exceeds the value of goods and services provided by the generic challenger to the brand; and (4) the consideration exceeds the brand's expected remaining litigation costs. The burden then shifts to the defendant to identify procompetitive justifications for the settlement. If the plaintiff can then show that those justifications are unsupportable, then the settlement agreement would be an unreasonable restraint of trade under the Cartwright Act.

11. ***Williams v. Chino Valley Independent Fire District*, S213100 (4th App. Dist., 218 Cal.App.4th 73.) This case presents the following issue: Is a prevailing defendant in an action under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) required to show that the plaintiff's claim was frivolous, unreasonable, or groundless in order to recover ordinary litigation costs?**

Decided May 4, 2015 (61 Cal.4th 97). Werdegar, J. for a unanimous Court. The Court reversed and held that Government Code section 12965, subdivision (b) (describing fee and cost recovery in state Fair Employment and Housing Act ("FEHA") actions) is an express exception to Code of Civil Procedure section 1032's rule allowing cost recovery as a matter of right, and also held that defendants must satisfy the standard set forth by the U.S. Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Under the *Christiansburg* standard, a prevailing defendant is only awarded fees and costs if "the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." In reaching this conclusion, the Court analogized to the federal Americans with Disabilities Act ("ADA"), which courts have interpreted as giving trial courts discretion to award "a reasonable attorney's fee . . . and costs" as an express exception to Federal Rule of Civil Procedure 54(d)'s award of costs as a matter of right. The Court also drew a parallel between the wording of the FEHA and ADA discretionary award provisions, concluding that *Christiansburg*'s asymmetrical cost standard applies to both attorney fees *and* costs under the FEHA. This conclusion extends the holding in *Christiansburg*, as well as some state court decisions, which only applied the standard to attorney's fees. The Court, however, found that the text, legislative history of, and policy behind Government Code section 12965 plainly support a requirement that discretionary cost awards be constrained by *Christiansburg*'s frivolous, unreasonable, or groundless standard.

12. ***Berkeley Hillside Preservation v. City of Berkeley (Logan)*, S201116 (1st App. Dist., 203 Cal.App.4th 656.) This case presents the following issue: Did the City of Berkeley properly conclude that a proposed project was exempt from the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) under the categorical exemptions set forth in California Code of Regulations, title 14, sections 15303, subdivision (a), and 15332, and that the "Significant Effects Exception" set forth in section 15300.2, subdivision (c), of the regulations did not operate to remove the project from the scope of those categorical exemptions?**

Decided March 2, 2015, modified May 28, 2015 (60 Cal.4th 1086). Chin, J. for a unanimous Court (Liu, J., concurring, joined by Werdegar, J.). The Court reversed and held that: (1) a project's potentially significant environmental effect is not alone sufficient to trigger the unusual-circumstances exception to the California Environmental Quality Act's ("CEQA") categorical exemptions; and (2) the substantial-evidence standard governs review of an agency's determination that the exception does not apply. Under CEQA and its guidelines, certain projects are categorically exempt because they have been determined to have no significant

environmental effect. Under Guidelines section 15300.2, subdivision (c), however, categorical exemptions "shall not be used . . . where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." The City of Berkeley determined that a couple's construction of a house was categorically exempt, and found no unusual circumstances. Project opponents presented evidence that planning deficiencies would require unapproved work, potentially causing an environmental effect. The Superior Court upheld the City's determination. The Court of Appeal reversed, holding that a potential environmental effect "'is itself an unusual circumstance,'" and held that the fair-argument standard governed its review. It then found that the unusual-circumstances exception applied because the record contained substantial evidence of a fair argument that the project may have a significant environmental effect. The Court held this reasoning was flawed, explaining that such an interpretation "read[s] the phrase 'due to unusual circumstances' out of the regulation," and renders ineffective all categorical exemptions. Thus, challengers must separately show that unusual circumstances exist. It is insufficient to show that a project, or unapproved work related to a project, may have a significant environmental effect. Challengers must show that the project, as approved by the agency, will have such an effect. Further, the Court explained, agency findings that no unusual circumstances exist are factual in nature and must be reviewed for substantial evidence. Only if an agency finds that unusual circumstances exist should reviewing courts apply the fair-argument standard to determine whether the agency evaluated the project's environmental effects as required by law.

13. ***State Dept. of Health v. Super. Ct. (Center for Investigative Reporting)*, S214679 (3rd App. Dist., 219 Cal.App.4th 966.) This case presents the following issue: In the context of a request under the Public Records Act (Gov. Code, § 6250) for citations issued by the Department of Public Health to state facilities housing the mentally ill and the developmentally disabled, can the public accessibility provisions for citations issued under the Long-Term Care Act (Health & Saf. Code, § 1417 et seq.) be reconciled with the confidentiality provisions of the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.) and the Lanterman Developmental Disabilities Services Act (Welf. & Inst. Code, § 4500 et seq.), and, if so, how?**

Decided Feb. 19, 2015 (60 Cal.4th 940). Liu, J. for a unanimous Court. The Court reversed and held that the Department of Public Health ("DPH") must disclose citations for patient care violations that DPH issued to state-owned long-term health care facilities and may only redact the information required by the Long-Term, Health, Safety and Security Act of 1973 (the "Long-Term Care Act"). The Center for Investigative Reporting filed a Public Records Act request for citations issued by DPH. The department disclosed heavily redacted citations, redacting not only the names of the affected patients or residents, as required by the Long-Term Care Act, but also substantial portions describing the nature of the violations, citing its obligation under the Lanterman-Petris-Short Act and Lanterman Developmental Disabilities Services Act (together "Lanterman Act") to not release confidential information obtained in the course of providing services to mentally ill and developmentally disabled individuals. Noting that it had recently

emphasized the importance of harmonizing potentially inconsistent statutes, the Court reversed the Court of Appeal's attempt to harmonize the statutes, holding that the two were in direct conflict and could not be harmonized without doing violence to each. Applying the rules when faced with two irreconcilable statutes—later enactment supersedes earlier, and more specific provisions take precedence over more general—the Court held that the Long-Term Care Act was the more specific statute, as it described in detail the permissible redactions that could be applied to DPH citations, whereas the Lanterman Act applied to all information gathered in the course of treatment of mentally ill and developmentally disabled individuals, and held that the Long-Term Care Act was the later-enacted statute. Accordingly, the Court concluded the Long-Term Care Act created an exception to the general confidentiality provisions of the Lanterman Act, and that the former statute governed the disclosure of the citations.

14. ***Richey v. Autonation*, S207536 (2d App. Dist., 210 Cal.App.4th 1516.) This case presents the following issues: (1) Is an employer's honest belief that an employee was violating company policy or abusing medical leave a complete defense to the employee's claim that the employer violated the Moore-Brown-Roberti Family Rights Act (Gov. Code §§ 12945.1, 12945.2)? (2) Was the decision below to vacate the arbitration award in the employer's favor consistent with the limited judicial review of arbitration awards?**

Decided Jan. 29, 2015 (60 Cal.4th 909). Chin, J. for a unanimous Court. The Court reversed and held that an employee is not deprived of his or her unwaivable statutory right to reinstatement under the Moore-Brown-Roberti Family Rights Act ("CFRA") (Gov. Code §§ 12945.1, 12945.2) when an arbitrator, relying on substantial evidence, finds the employee was dismissed for violating company policy. The employee in this case was granted leave under the CFRA and the Family and Medical Leave Act after he injured his back. But the employee was found to have deliberately ignored a letter from the employer stating that outside employment while on leave was a violation of company policy. While on leave, the employee was seen working at a restaurant, and the employee was subsequently fired. An arbitrator concluded that an employer can terminate an employee if it has an honest belief that the employee is abusing medical leave, and that there was overwhelming evidence in this case that the employer fired the employee for violating company policy. In upholding the arbitrator's decision, the Court did not decide whether the honest-belief defense is cognizable under California employment law. The Court concluded only that even if the arbitrator exceeded his powers in accepting that defense and such an error could serve as a basis for vacating the arbitration award, plaintiff failed to show that the error was prejudicial. Relying on regulations stating that an employee has no greater right to reinstatement than if he or she had been continuously employed during the leave period, the Court concluded that the arbitrator's finding that the employee was fired for violating company policy was a legally sound basis for upholding the arbitrator's award.

15. ***Mendiola v. CPS Security Solutions*, S212704 (2d App. Dist., 217 Cal.App.4th 851.) This case presents the following issue: Are the guards that defendants provide for construction site security entitled to compensation for all nighttime "on-call" hours, or may defendants deduct sleep time depending on the structure of the guards' work shifts?**

Decided Jan. 8, 2015 (60 Cal.4th 833). Corrigan, J. for a unanimous Court. The Court affirmed and held: (1) security guards who work shifts of 24 hours or more under the Industrial Welfare Commission's ("IWC") Wage Order No. 4 must be compensated for their sleep time; and (2) on the facts of this case, security guards were entitled to compensation for on-call time. Unlike the IWC's Wage Order No. 5 (covering residential care workers) and Wage Order No. 9 (covering ambulance drivers), Wage Order No. 4 does not provide an explicit exclusion from hours worked for sleep time, and the Court rejected defendant's argument that Wage Order No. 4 implicitly adopts the federal sleep-time exemption. While the federal Fair Labor Standards Act ("FLSA") allows an employer and employee to agree to exclude "a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked," agreements to exclude sleep time from compensable hours worked are permitted under California law only when specifically authorized by law. The Court emphasized: "Federal regulations provide a level of employee protection that a state may not derogate. Nevertheless, California is free to offer greater protection." For this reason, California courts should not import federal standards into California law absent "convincing evidence" that the IWC intended to do so, and *Seymore v. Metson Marine, Inc.* (2011) 194 Cal.App.4th 361 incorrectly concluded that the FLSA's sleep-time exception extends to all employees who work 24-hour shifts. Under California law, whether on-call time is compensable depends upon the level of control the employer exercises over the employee. In view of seven relevant factors—including the presence of on-site living requirements, geographic restrictions on guards' movement, fixed time limits for responding to calls, and difficulties trading on-call time—defendant maintained sufficient control over its security guards to render the guards' on-call time compensable.

Select Pending Civil Cases[1]

Cases Fully Briefed But Not Yet Argued

1. ***The Gillette Co. v. Franchise Tax Bd.*, S206587 (1st App. Dist., 209 Cal.App.4th 938.) Petition granted January 16, 2013. This case presents the following issue: Were multistate taxpayers required to apportion business income according to the formula set forth in Revenue and Taxation Code**

---

1 Summaries of pending civil cases are excerpted from the California Supreme Court website. The summaries are intended to inform the public and the press of the general subject matter of the case. They do not necessarily reflect the views of the Court, or define the specific issues that will be addressed by the Court.

section 25128 as amended in 1993 or could they elect to apportion income according to the formula set forth in former Revenue and Taxation Code section 38006 pursuant to the adoption of the Multistate Tax Compact in 1974?

2. ***Baltazar v. Forever 21, Inc.*, S208345 (2nd App. Dist., 212 Cal.App.4th 221.) Petition granted March 20, 2013. This case presents the following issue: Is an employment arbitration agreement unconscionable for lack of mutuality if it contains a clause providing that either party may seek provisional injunctive relief in the courts and the employer is more likely to seek such relief?**

3. ***Webb v. Special Electric Co., Inc.*, S209927 (2nd App. Dist., 214 Cal.App.4th 595.) Petition granted June 12, 2013. This case presents the following issues: (1) Should a defendant that supplied raw asbestos to a manufacturer of products be found liable to the plaintiffs on a failure-to-warn theory? (2) Was the trial court's decision to treat defendant's pre-trial motions for nonsuit and for a directed verdict as a post-trial motion for judgment notwithstanding the verdict procedurally improper, and, if so, was it sufficiently prejudicial to warrant reversal?**

4. ***City of Perris v. Stamper*, S213468 (4th App. Dist., 218 Cal.App.4th 1104.) Petition granted November 13, 2013. This case presents the following issues: (1) In this eminent domain case, was the constitutionality of the dedication requirement—that the city claimed it would have required in order to grant the property owner permission to put the property to a higher use—a question that had to be resolved by the jury pursuant to article I, section 19, of the California Constitution? (2) Was the dedication requirement a "project effect" that the eminent domain law required to be ignored in determining just compensation?**

5. ***Coker v. JP Morgan Chase Bank, N.A*., S213137 (4th App. Dist., 218 Cal.App.4th 1.) Petition granted November 20, 2013. This case presents the following issues: (1) Do the anti-deficiency protections in Code of Civil Procedure section 580b apply to a borrower who engages in a "short sale" of real property when the lender approved the sale and reconveyed its deed of trust to facilitate the sale on the condition that the borrower remain liable for any outstanding balance on the loan following the sale? (2) Does a borrower's request that the creditor release its security interest in real property to facilitate a short sale result in a waiver of the protection of the "security first" rule set forth in Code of Civil Procedure section 726?**

6. ***Barry v. State Bar of California*, S214058 (2nd App. Div., 218 Cal.App.4th 1435.) Petition granted November 26, 2013. This case presents the following issue: If the trial court grants a special motion to strike under Code of Civil**

Procedure section 425.16 on the ground that the plaintiff has no probability of prevailing on the merits because the court lacks subject matter jurisdiction over the underlying dispute, does the court have the authority to award the prevailing party the attorney fees mandated by section 425.16(c)?

7. ***California Building Industry Assn. v. Bay Area Air Quality Management Dist.*, S213478 (1st App. Dist., 218 Cal.App.4th 1171.) Petition granted November 26, 2013. The Court limited review to the following issue: Under what circumstances, if any, does the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?**

8. ***Nickerson v. Stonebridge Life Ins. Co*., S213873 (2nd App. Dist., 219 Cal.App.4th 188.) Petition granted December 11, 2013. The Court limited review to the following issue: Is an award of attorney fees under *Brandt v. Superior Court* (1985) 37 Cal.3d 813 properly included as compensatory damages where the fees are awarded by the jury, but excluded from compensatory damages when they are awarded by the trial court after the jury has rendered its verdict?**

9. ***F.P. v. Monier*, S216566 (3rd App. Dist., 222 Cal.App.4th 1087.) Petition granted April 16, 2014. The Court limited review to the following issue: Is a trial court's error in failing to issue a statement of decision upon a timely request reversible per se?**

10. ***Quesada v. Herb Thyme Farms, Inc.*, S216305 (2nd App. Dist., 222 Cal.App.4th 642.) Petition granted April 30, 2014. The Court limited review to the following issue: Does the Organic Foods Production Act of 1990 (7 U.S.C. § 6501 et seq.) preempt state consumer lawsuits alleging that a food product was falsely labeled "100% Organic" when it contained ingredients that were not certified organic under the California Organic Products Act of 2003 (Food & Agr. Code, § 46000 et seq.; Health & Saf. Code, § 110810 et seq.)?**

11. ***People v. Miami National Enterprises*, S216878 (2nd App. Dist., 223 Cal.App.4th 21.) Petition granted May 21, 2014. This case presents the following issue: Is a payday loan company owned by a federally recognized Indian tribe entitled to tribal sovereign immunity, and thus exempt from state regulation, if the day-to-day management of the business is handled by a third-party management company that is not affiliated with the tribe and pays the tribe a small percentage of the gross revenues?**

12. ***Reserve v. Superior Court*, S217738 (3rd App. Dist., 224 Cal.App.4th 828.) Petition granted June 25, 2014. The Court limited review to the following issues: (1) Do the geological testing activities proposed by the Department of Water Resources constitute a taking? (2) Do the environmental testing activities set forth in the February 22, 2011 entry order constitute a taking? (3) If so, do the precondemnation entry statutes (Code Civ. Proc., §§ 1245.010-1245.060) provide a constitutionally valid eminent domain proceeding for the taking?**

13. ***Center for Biological Diversity v. Department of Fish & Wildlife*, S217763 (2nd App. Dist., 224 Cal.App.4th 1105.) Petition granted July 9, 2014. This case presents the following issues: (1) Does the California Endangered Species Act (Fish & Game Code, § 2050 et seq.) supersede other California statutes that prohibit the taking of "fully protected" species, and allow such a taking if it is incidental to a mitigation plan under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)? (2) Does the California Environmental Quality Act restrict judicial review to the claims presented to an agency before the close of the public comment period on a draft environmental impact report? (3) May an agency deviate from the California Environmental Quality Act's existing conditions baseline and instead determine the significance of a project's greenhouse gas emissions by reference to a hypothetical higher "business as usual" baseline?**

14. ***Ramos v. Brenntag Specialties, Inc.*, S218176 (2nd App. Dist., 224 Cal.App.4th 1239.) Petition granted July 9, 2014. This case presents the following issue: Are negligence and strict liability claims by an employee of a processing company against a supplier of raw materials for injuries allegedly suffered in the course of processing those materials barred by the component parts doctrine?**

15. ***Centinela Freeman Emergency Medical Associates v. Health Net of California*, Inc., S218497 (2nd App. Dist., 225 Cal.App.4th 237.) Petition granted July 16, 2014. This case presents the following issues: (1) Does the delegation—by a health care service plan ("HMO") to an independent physicians association ("IPA"), under Health and Safety Code section 1371.4, subdivision (e)—of the HMO's responsibility to reimburse emergency medical service providers for emergency care provided to the HMO's enrollees relieve the HMO of the ultimate obligation to pay for emergency medical care provided to its enrollees by non-contracting emergency medical service providers, if the IPA becomes insolvent and is unable to pay? (2) Does an HMO have a duty to emergency medical service providers to protect them from financial harm resulting from the insolvency of an IPA which is otherwise financially responsible for the emergency medical care provided to its enrollees?**

16. ***deSaulles v. Community Hospital of the Monterey Peninsula*, S219236 (6th App. Dist., 225 Cal.App.4th 1427.) Petition granted July 23, 2014. This case presents the following issue: When plaintiff dismissed her action in exchange for the defendant's payment of a monetary settlement, was she the prevailing party for purposes of an award of costs under Code of Civil Procedure section 1032, subdivision (a)(4), because she was "the party with a net monetary recovery," or was defendant the prevailing party because it was "a defendant in whose favor a dismissal is entered"?**

17. ***In re Transient Occupancy Tax Cases*, S218400 (2nd App. Dist., 225 Cal.App.4th 56.) Petition granted July 30, 2014. This case presents the following issue: When a customer books a hotel room through an online travel company, should the occupancy tax levied on the rent charged by the hotel be calculated based on the retail rate paid by the customer or on the wholesale amount that the hotel receives from the online travel company after that company has deducted its markup and fees?**

18. ***City of Montebello v. Vasquez*, S219052 (2nd App. Dist., 226 Cal.App.4th 1084.) Petition granted August 13, 2014. This case presents the following issue: Did votes by city officials to approve a contract constitute conduct protected under Code of Civil Procedure section 425.16 despite the allegation that they had a financial interest in the contract?**

19. ***Haver v. BNSF Railway Co.*, S219919 (2nd App. Dist., 226 Cal.App.4th 1104, opn. mod. 226 Cal.App.4th 1376b.); *Kesner v. Superior Court*, S219534 (1st App. Div., 226 Cal.App.4th 251.) Petitions granted August 20, 2014. *Haver* and *Kesner* present the following issue: If an employer's business involves either the use or the manufacture of asbestos-containing products, does the employer owe a duty of care to members of an employee's household who could be affected by asbestos brought home on the employee's clothing?**

20. ***Sandquist v. Lebo Automotive, Inc.*, S220812 (2nd App. Dist., 228 Cal.App.4th 65.) Petition granted November 12, 2014. This case presents the following issue: Does the trial court or the arbitrator decide whether an arbitration agreement provides for class arbitration if the agreement itself is silent on the issue?**

21. ***Bristol-Myers Squibb Co. v. Super. Ct.*, S221038 (1st App. Dist., 228 Cal.App.4th 605.) Petition granted November 19, 2014. This case presents the following issues: (1) Did the plaintiffs in this action who are not residents of California establish specific jurisdiction over their claims against the nonresident pharmaceutical drug manufacturer? (2) Does general jurisdiction exist in light of *Daimler AG v. Bauman* (2014) 571 U.S. __ [134 S.Ct. 746, 187 L.Ed.2d 624]?**

22. ***McLean v. State of California*, S221554 (3rd App. Dist., 228 Cal.App.4th 1500.) Petition granted November 25, 2014. This case presents the following issues: (1) When bringing a putative class action to recover penalties against an "employer" under Labor Code section 203, may a former state employee sue the "State of California" instead of the specific agency for which the employee previously worked? (2) Do Labor Code sections 202 and 203, which provide a right of action for an employee who "quits" his or her employment, authorize a suit by an employee who retires?**

23. ***Solus Industrial Innovations, LLC v. Super. Ct.*, S222314 (4th App. Dist., 229 Cal.App.4th 1291.) Petition granted January 14, 2015. This case presents the following issue: Does federal law preempt a district attorney's attempt to recover civil penalties under California's unfair competition law based on an employer's violation of workplace safety standards that resulted in the deaths of two employees?**

24. ***Ardon v. City of Los Angeles*, S223876 (2nd App. Dist., 232 Cal.App.4th 175.) Petition granted March 11, 2015. This case presents the following issues: (1) Does inadvertent disclosure of attorney work product and privileged documents in response to a Public Records Act request waive those privileges and protections? (2) Should the attorney who received the documents be disqualified because she examined them and refused to return them?**

Cases With Merits Briefing Underway

1. ***Kilby v. CVS Pharmacy, Inc./Henderson v. JPMorgan Chase Bank NA*, S215614 (9th Cir., 739 F.3d 1192.) Request for certification granted March 12, 2014. The questions presented are: For purposes of Industrial Welfare Commission Wage Order No. 4-2001 section 14(A) and Wage Order No. 7-2001 section 14(A), (1) Does the phrase "nature of the work" refer to an individual task or duty that an employee performs during the course of his or her workday, or should courts construe "nature of the work" holistically and evaluate the entire range of an employee's duties? And if the courts should construe "nature of the work" holistically, should the courts consider the entire range of an employee's duties if more than half of an employee's time is spent performing tasks that reasonably allow the use of a seat? (2) When determining whether the nature of the work "reasonably permits" the use of a seat, should courts consider any or all of the following: the employer's business judgment as to whether the employee should stand, the physical layout of the workplace, or the physical characteristics of the employee? (3) If an employer has not provided any seat, does a plaintiff need to prove what would constitute "suitable seats" to show the employer has violated section 14(A)?**

Gibson Dunn
Counsel for
Amicus Curiae
Wal-Mart Stores

2. ***Gaines v. Fidelity National Title Ins. Co.*, S215990 (2nd App. Dist., 222 Cal.App.4th 25.) Petition granted April 16, 2014. This case presents the following issue: Was this action properly dismissed for the failure to bring it to trial within five years or should the period during which the action was stayed for purposes of mediation have been excluded under Code of Civil Procedure section 583.340, subdivision (b) or (c)?**

3. ***926 North Ardmore Avenue v. County of Los Angeles*, S222329 (2nd App. Dist., 229 Cal.App.4th 1335.) Petition granted January 14, 2015. This case presents the following issue: Does Revenue and Taxation Code section 11911 authorize a county to impose a documentary transfer tax based on a change in ownership or control of a legal entity that directly or indirectly holds title to real property?**

Gibson Dunn
Counsel for
Appellant

4. ***Dynamex Operations West, Inc. v. Super. Ct.*, S222732 (2nd App. Dist., 230 Cal.App.4th 718.) Petition granted January 28, 2015. This case presents the following issue: In a wage and hour class action involving claims that the plaintiffs were misclassified as independent contractors, may a class be certified based on the Industrial Welfare Commission definition of employee as construed in *Martinez v. Combs* (2010) 49 Cal.4th 35, or should the common law test for distinguishing between employees and independent contractors discussed in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 control?**

5. ***Lafitte v. Robert Half Internat., Inc.*, S222996 (2nd App. Dist., 231 Cal.App.4th 860.) Petition granted February 25, 2015. This case presents the following issue: Does *Serrano v. Priest* (1977) 20 Cal.3d 25 permit a trial court to anchor its calculation of a reasonable attorney's fees award in a class action on a percentage of the common fund recovered?**

Gibson Dunn
Counsel for
Appellant

6. ***Augustus v. ABM Security Services, Inc.*, S224853 (2nd App. Dist., 233 Cal.App.4th 1065.) Petition granted April 29, 2015. This case presents the following issues: (1) Do Labor Code section 226.7 and Industrial Welfare Commission Wage Order No. 4-2001 require that employees be relieved of all duties during rest breaks? (2) Are security guards who remain on call during rest breaks performing work during that time under the analysis of *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833?**

7. ***Mendoza v. Nordstrom*, S224611 (9th Cir., 778 F.3d 834.) Request for certification granted April 29, 2015. The questions presented are: (1) California Labor Code section 551 provides that "[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven." Is the required day of rest calculated by the workweek, or is it calculated on a rolling basis for any consecutive seven-day period? (2) California Labor**

Code section 556 exempts employers from providing such a day of rest "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." Does that exemption apply when an employee works less than six hours in any one day of the applicable week, or does it apply only when an employee works less than six hours in each day of the week? (3) California Labor Code section 552 provides that an employer may not "cause his employees to work more than six days in seven." What does it mean for an employer to "cause" an employee to work more than six days in seven: force, coerce, pressure, schedule, encourage, reward, permit, or something else?

8. ***Baral v. Schnitt*, S225090 (2nd App. Dist., 233 Cal.App.4th 1423.) Petition granted May 13, 2015. This case presents the following issue: Does a special motion to strike under Code of Civil Procedure section 425.16 authorize a trial court to excise allegations of activity protected under the statute when the cause of action also includes meritorious allegations based on activity that is not protected under the statute?**

9. ***Gerard v. Orange Coast Memorial Medical Center*, S225205 (4th App. Dist., 234 Cal.App.4th 285.) Petition granted May 20, 2015. This case presents the following issues: (1) Is the health care industry meal period waiver provision in section 11(D) of Industrial Welfare Commission Order No. 5-2001 invalid under Labor Code section 512(a)? (2) Should the decision of the Court of Appeal partially invalidating the Wage Order be applied retroactively?**

10. ***Gerawan Farming v. Agricultural Labor Relations Board (United Farm Workers of America)*, S227243 (5th App. Dist., 236 Cal.App.4th 1024.) Petition granted Aug. 19, 2015. This case presents the following issues: (1) Does the statutory "Mandatory Mediation and Conciliation" process (Lab. Code, §§ 1164-1164.13) violate the equal protection clauses of the state and federal Constitutions? (2) Do the "Mandatory Mediation and Conciliation" statutes effect an unconstitutional delegation of legislative power? (3) May an employer oppose a certified union's request for referral to the "Mandatory Mediation and Conciliation" process by asserting that the union has "abandoned" the bargaining unit?**

11. ***Tri-Fanucchi Farms v. Agricultural Labor Relations Board (United Farm Workers of America)*, S227270 (5th App. Dist., 236 Cal.App.4th 1079.) Petition granted Aug. 19, 2015. This case presents the following issues: (1) May an employer assert as a defense to a request for collective bargaining under the Agricultural Labor Relations Act (Lab. Code, § 1140, et seq.) that the certified union has "abandoned" the bargaining unit? (2) Did the Board err in granting "make whole" relief (Lab. Code, § 1160.3) as a remedy for the employer's refusal to bargain with the union?**

12. ***Williams v. Superior Court (Marshalls of CA)*****, S227228 (2nd App. Dist., 236 Cal.App.4th 1151.) Petition granted Aug. 19, 2015. This case presents the following issues: (1) Is the plaintiff in a representative action under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) entitled to discovery of the names and contact information of other "aggrieved employees" at the beginning of the proceeding or is the plaintiff first required to show good cause in order to have access to such information? (2) In ruling on such a request for employee contact information, should the trial court first determine whether the employees have a protectable privacy interest and, if so, balance that privacy interest against competing or countervailing interests, or is a protectable privacy interest assumed? (See *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360.)**

California Appellate Law Group Co-Chairs:

Theodore J. Boutrous, Jr. – Los Angeles, Co-Chair, National Appellate and Constitutional Law Practice Group (213.229.7000, tboutrous@gibsondunn.com)
Daniel M. Kolkey – San Francisco (415.393.8420, dkolkey@gibsondunn.com)
Julian W. Poon – Los Angeles (213.229.7758, jpoon@gibsondunn.com)
Theane Evangelis – Los Angeles (213.229.7726, tevangelis@gibsondunn.com)