GIBSON DUNN

California Supreme Court Round-Up
September 2017-April 2018

May 2018

Overview

The California Supreme Court Round-Up previews upcoming cases and summarizes select opinions issued by the Court. This edition includes opinions handed down from September 2017 through April 2018, organized by subject. Each entry contains a description of the case, as well as a substantive analysis of the Court's decision.

Civil Cases Decided

Civil Procedure

1. ***F.P. v. Monier*, S216566 (3d App. Dist., 222 Cal.App.4th 1087). 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?**

   Decided November 27, 2017 (3 Cal.5th 1099). Chin, J., for a unanimous Court. The Court affirmed, holding that a trial court's error in failing to issue a requested statement of decision is not reversible per se but instead is subject to harmless error review. The trial court had failed to comply with Code of Civil Procedure section 632, which requires a court that has held a bench trial on questions of fact to "issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party." In holding that the harmless error standard applied, the Court looked to the statute's legislative history and a separate statutory provision (section 475) that likewise precludes reversal absent prejudice. The Court concluded that there is nothing in the plain language of section 632 or in its legislative history suggesting that the failure to issue a statement of decision is reversible per se. On the contrary, the Legislature removed a provision (which was only in effect for two years) requiring that an action be retried for noncompliance. Nor is there anything suggesting that the Legislature intended to override section 475, the provision that precludes reversal absent prejudice. Such a construction of section 632 also avoids conflict with the California Constitution, which precludes reversal unless the error resulted in a miscarriage of justice. The Court also rejected defendant's arguments that the failure to issue a statement of decision necessarily constitutes a failure to decide the case. Instead, the harmless error test should be applied to determine if there was a miscarriage of justice in a particular case.

2. ***Hernandez v. Restoration Hardware*, S233983 (4th App. Dist., 245 Cal.App.4th 641). This case presents the following issue: Must an unnamed class member**


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


Kirsten Galler
213.229.7681
kgaller@gibsondunn.com


Michael Holecek
213.229.7018
mholecek@gibsondunn.com


Jennafer M. Tryck
949.451.4089
jtryck@gibsondunn.com

intervene in the litigation in order to have standing to appeal? (See *Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199.)

Decided January 29, 2018 (4 Cal.5th 260). Chin, J., for a majority of the Court (Liu, J., concurring). The Court affirmed and held that, under Code of Civil Procedure section 902 and *Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199, unnamed class members lack standing to appeal a class action settlement, judgment, or attorneys' fees award unless they intervene in the action before it becomes final. The Court rejected the plaintiff's argument that *Eggert* should be overruled in light of changes to federal class action practice and procedure, which allow absent class members to appeal their overruled objections to proposed class settlements without formally intervening. The Court declared that "[o]ur state common law, legislation, and procedural rules of court differ significantly from the federal common law and procedural rules," and that adhering to *Eggert*'s "bright-line rule" promoted judicial economy and the finality of class settlements, protected class members' interests, and was justified by stare decisis. Accordingly, unnamed class members can only appeal pursuant to Code of Civil Procedure section 902 if they are "parties of record," i.e., if they intervene or file a motion to vacate the judgment in the proceedings below. Justice Liu concurred in the Court's judgment, but wrote separately to highlight that 75 years of experience with class actions has provided sound reasons for the Legislature to revisit section 902. For example, once a settlement is reached, the plaintiffs and defendants are no longer adversaries, and the class representative(s) cannot effectively represent objecting class members' interests.

3. ***Newport Harbor Ventures v. Morris Cerullo World Evangelism*, S239777 (4th App. Dist., 6 Cal.App.5th 1207). This case presents the following issues: (1) May a motion to strike under the anti-SLAPP statute be brought against any claim in an amended complaint, including claims that were asserted in prior complaints? (2) Can inconsistent claims survive an anti-SLAPP motion if evidence is presented to negate one of the claims?**

Decided March 22, 2018 (4 Cal.5th 637). Chin. J., for a unanimous Court. The Court affirmed and concluded that, subject to a trial court's discretion under Code of Civil Procedure section 425.16(f), California's anti-SLAPP statute, a defendant must move to strike a cause of action within 60 days of service of the earliest complaint that contains that cause of action. In this case, plaintiffs raised new causes of action in their third amended complaint. Within 60 days, defendants moved to strike the complaint under section 425.16, and plaintiffs argued the motion was untimely because it was not brought within 60 days of the earlier complaints. The trial court agreed, and denied the motion as untimely; the Court of Appeal affirmed. The Supreme Court also affirmed, holding that section 425.16(f) "should be interpreted to permit an anti-SLAPP motion against an amended complaint if it could not have been brought earlier, but to prohibit belated motions that could have been brought earlier (subject to the trial court's discretion to permit a late motion)." In so holding, the Court disapproved of *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, to the extent that it is inconsistent with the Court's opinion.

The American Lawyer named Gibson Dunn a Finalist in its 2018 Litigation Department of the Year competition, noting that over the past decade, "Gibson Dunn's army kept on overpowering, outmaneuvering, and plain old clobbering its opponents in court." This award followed our unprecedented three wins in this biennial competition – as the 2016, 2012, and 2010 Litigation Department of the Year – and 2014 Finalist honors.

Chambers USA: America's Leading Lawyers for Business 2018 ranked Gibson Dunn in Tier 1 nationwide in the category of Appellate Law and Tier 1 in California Litigation: Appellate.

Employment & Labor

4. ***Tri-Fanucchi Farms v. ALRB (UFW)*, S227270 (5th App. Dist., 236 Cal.App.4th 1079). 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?**

   Decided November 27, 2017 (3 Cal.5th 1161). Liu, J., for a unanimous Court. The Court affirmed in part and reversed in part, holding that the Agricultural Labor Relations Act ("ALRA") does not permit an employer to unilaterally declare that it will refuse to engage with a union because it believes the union has abandoned its employees, and also holding that the Court of Appeal did not accord sufficient deference to the Agricultural Labor Relations Board ("ALRB") on the issue of make-whole relief. The ALRB had filed an administrative complaint under the ALRA after Tri-Fanucchi Farms refused to bargain with the United Farm Workers of America ("UFW") because Tri-Fanucchi claimed that the UFW had abandoned its role as the exclusive collective bargainer for Tri-Fanucchi employees. The ALRB held abandonment is not a defense under the ALRA and awarded Tri-Fanucchi's employees make-whole relief. The Court of Appeal upheld that ruling, but reversed the make-whole relief order, holding that Tri-Fanucchi's refusal furthered the ALRA's purposes by spurring judicial review of the "unsettled and controversial" abandonment issue. The Supreme Court relied on the companion case *Gerawan Farming, Inc. v. ALRB (UFW)* (2017) 3 Cal.5th 1118, to hold that an employer cannot assert an abandonment defense under the ALRA because the power to select a union representative is reserved to employees and labor organizations alone. On the make-whole relief, the Court held the Court of Appeal erred in overruling the ALRB's holding. The Court first noted that the ALRB has wide discretion to make remedial orders under the ALRA and that the ALRB's remedial orders are subject to limited judicial review. It then adopted the standard set forth in *F & P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667, for make-whole relief cases involving nontechnical refusals to bargain, as was the case here. Under that standard, the ALRB appropriately weighed the extent to which Tri-Fanucchi's litigation advanced the ALRA's purposes against the risks and harms caused by the litigation and its attendant delays.

5. ***Gerawan Farming v. ALRB (UFW)*, S227243 (5th App. Dist., 236 Cal.App.4th 1024). 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?**

The preeminence of the group is underscored by its placement on *The National Law Journal*'s 2017 Appellate Hot List, which recognized 20 firms that "posted hard-fought wins at the U.S. Supreme Court or in federal circuit courts."

Benchmark Litigation in 2018 recognized Gibson Dunn as the Appellate Firm of the Year.

Law360 named Gibson Dunn a 2017 Appellate Practice Group of the Year.

U.S. News - Best Lawyers® "Best Law Firms" recognized Gibson Dunn as the 2018 Appellate Law Firm of the Year.

Decided November 27, 2017 (3 Cal.5th 1118). Liu, J., for a unanimous Court. The Court reversed, holding that the Mandatory Mediation and Conciliation ("MMC") process under the ALRA neither violates equal protection nor unconstitutionally delegates legislative power. The Court also held that an employer may not oppose a union's MMC request by challenging the union's certification on the basis of abandonment. In 1992, the Agricultural Labor Relations Board certified the UFW as the exclusive bargaining representative of Gerawan Farming Inc.'s employees. The UFW was largely absent from 1995 until 2012, at which point the parties resumed negotiations. Having failed to reach a voluntary agreement, the UFW filed an MMC request with the ALRB. After mediation failed, the mediator submitted a report establishing the contractual terms, and the ALRB adopted it in its final order. Gerawan petitioned the Court of Appeal for review of the ALRB's order, arguing that the MMC statutory scheme was unconstitutional. The Court of Appeal agreed, holding that "the MMC statute on its face violates equal protection principles," and "improperly delegated legislative authority." Alternatively, the Court of Appeal held that "abandonment may be raised defensively" by an employer in response to a union's demand to invoke MMC on grounds that MMC is "a postbargaining process" different from ordinary collective bargaining. In reversing this decision, the Supreme Court rejected Gerawan's substantive due process claim, having found no authority that compulsory interest arbitration is unconstitutional. The Court also held that MMC does not on its face violate equal protection because the Legislature had a rational basis for enacting the MMC statute "to facilitate collective bargaining agreements" and "further[] the goal of 'ensuring stability'" in the agricultural industry. Moreover, the mere possibility of differential treatment among similarly situated agricultural employers is insufficient to declare the MMC statute facially unconstitutional. The Court also reversed the trial court's finding of improper delegation of legislative authority. Citing *Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983) 35 Cal.3d 184, 190, the Court held that the MMC statute (1) does not "leave[] the resolution of fundamental policy issues to others," where the decisions of the mediator and the ALRB "relate only to the parties' 'economic relations' and rights"; and (2) does not "fail[] to provide adequate direction for [its] implementation" where the statute provides adequate guidance and procedural safeguards that protect the parties from arbitrary or unfair action. Finally, the Court held that "an employer may not defend against a union's MMC request by challenging the union's certification as bargaining representative on the basis of abandonment." In so doing, the Court gave significant weight to the ALRB's determination that employers may not invoke abandonment as a defense to the MMC process under the ALRA.

6. ***Solus Industrial Innovations v. Superior Court*, S222314 (4th App. Dist., 229 Cal.App.4th 1291). 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?**

Decided February 8, 2018 (4 Cal.5th 316). Cantil-Sakauye, C.J., for a unanimous Court. The Court reversed, holding that the federal Occupational

Safety and Health Act ("OSHA") does not preempt claims under California's Unfair Competition Law ("UCL") or Fair Advertising Law ("FAL") asserting violations of workplace health and safety standards because California has a workplace health and safety plan approved by the U.S. Secretary of Labor. In reaching its holding, the Court first explained that the field impliedly preempted by OSHA is narrow, such that "once the state plan is adopted and approved, state law has the effect of broadly preempting parallel federal law." The Court also determined that OSHA is meant only to establish "a nationwide floor" for enforcement of workplace safety standards, which states are free to supplement. And the Court explained that federal regulations permit states to implement modifications to their approved plans without first obtaining federal approval. Accordingly, in this case, because the district attorney's UCL and FAL claims sought only to enforce already-approved state health and safety standards, and because the district attorney did not need to first obtain federal approval to use the UCL and FAL as supplementary enforcement mechanisms, the Court held that the district attorney's UCL and FAL claims were not impliedly preempted. The Court also found no evidence of obstacle preemption or express preemption.

7. ***Alvarado v. Dart Container Corp. of Cal.*, S232607 (4th App. Dist., 243 Cal.App.4th 1200). This case presents the following issue: What is the proper method for calculating the rate of overtime pay when an employee receives both an hourly wage and a flat sum bonus?**

Decided March 5, 2018, as modified April 25, 2018 (4 Cal.5th 542). Chin, J., for a unanimous Court. The Court reversed, holding that the proper calculation of overtime pay when an employee receives both an hourly wage and a flat sum bonus is to divide the amount of the bonus by the number of non-overtime hours worked during the pay period and then add the employee's regular hourly wage to that rate. The total should then be multiplied by 1.5 to determine the employee's overtime rate. Alvarado received a $15.00-a-day bonus for each weekend day worked. He argued that his employer's calculation method for overtime pay was improper because the employer divided the bonus by all hours worked in the pay period, including overtime hours, to determine the hourly-rate value of the bonus, as opposed to dividing the bonus only by all *non-overtime* hours worked in the pay period. The Court first held that the Division of Labor Standards Enforcement ("DLSE") policy providing for a method of overtime calculation was a regulation void due to the DLSE's failure to adopt it in accordance with the Administrative Procedure Act. The Court nevertheless looked to the DLSE's interpretation of its policy as persuasive authority, and section 49.2.4.2 of the DLSE's manual states that to calculate the hourly rate equivalent of a flat-sum bonus, the employer must divide the bonus by the "maximum legal regular hours worked during the period to which the bonus applies." While the Court agreed that bonuses should not be divided by overtime hours worked, the Court clarified that the number of non-overtime hours used for the division should be the number of hours *actually worked*, not the maximum number of non-overtime hours that exist in a workweek. Thus, the "regular rate of pay" for purposes of overtime pay calculations is equal to the employee's base hourly salary plus any bonus received divided by the number of hours actually worked in the pay period. The Court also

held that a determination as to how to factor a bonus into an overtime calculation applies retroactively.

8. ***Dynamex Operations West v. Superior Court*, S222732 (2nd App. Dist., 230 Cal.App.4th 718). 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?**

Decided April 30, 2018 (4 Cal.5th 903). Cantil-Sakauye, C.J, for a unanimous Court. The Court affirmed, holding that the "suffer or permit to work" definition of employment as construed in *Martinez v. Combs* (2010) 49 Cal.4th 35, properly applies to the question whether a worker should be considered an employee or an independent contractor for purposes of the obligations imposed by California wage orders. In this wage and hour class action, delivery drivers filed a complaint against Dynamex Operations West, alleging that Dynamex had misclassified its drivers as independent contractors instead of employees. In certifying a class action, the trial court relied on *Martinez*'s holding that, under the applicable wage order, "[t]o employ" means "(a) [t]o exercise control over the wages, hours, or working conditions, or (b) to suffer or permit to work; or (c) to engage, thereby creating a common law employment relationship." The trial court rejected Dynamex's contention that the multifactor standard set forth in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1983) 48 Cal.3d 341, is the only appropriate standard under California law to distinguish employees from independent contractors in the wage order context. The Court of Appeal affirmed, as did the Supreme Court. First, the Court rejected the argument that the "suffer or permit to work" standard applies only in "joint employee" contexts, holding that the origin and history of the "suffer or permit to work" language makes clear that the standard is intended to apply broadly. Second, the Court held that it is appropriate to look to the "ABC" test to determine whether a worker is properly classified. Under this test, a worker is properly classified as an independent contractor "only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." The Court thus departed from the decades-old multifactor *Borello* test, noting that the "suffer or permit to work" standard "will provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis."

Law Firms

9. ***Heller Ehrman LLP v. Davis Wright Tremaine LLP*, S236208 (9th Cir., Nos. 14-16314, 14-6315, 14-16317, 14-16318). This case presents the following issue: Whether a dissolved law firm retains a property interest in legal matters that are in progress, but not completed, at the time of the firm's dissolution.**

   Decided March 5, 2018 (4 Cal.5th 467). Cuéllar, J., for a unanimous Court. The Court held that law firms have no property interest in legal matters handled on an hourly-fee basis when the firm dissolves and its former partners take the legal matters to a new firm. After petitioner Heller Ehrman dissolved, the Bankruptcy Court plan administrator filed proceedings against the partners' new law firms, arguing that Heller Ehrman retained a property interest in the legal fees from matters that the firm was working on before dissolution. In holding that Heller Ehrman did not have a property interest in the hourly fees charged after the matter was taken on by a new firm, the Court determined that Heller Ehrman did not have a sufficiently strong expectation in continuing the legal matter for the interest to amount to a cognizable property interest. A firm's expectation of continuing work on a legal matter is merely a unilaterally-held presumption. A client paying on an hourly basis retains the ability to change the terms of the bargain for legal services or to change law firms at any time. Dissolution does not place a firm in the position to claim a property interest in work it has not performed. Client matters belong to the client, not the law firm, and the latter may not assert an ongoing interest in the matters once they have been paid and discharged. In a dissolution, a law firm has an interest only in the time it spends preserving the legal matter for transfer—e.g., filing motions for continuances—the time it spends effectuating the transfer to another firm, and in collecting fees for work done pre-transfer. *Jacobsen v. Wikholm* (1946) 29 Cal.2d 24, 28–29.

Tort Law

10. ***T.H. v. Novartis Pharmaceuticals Corp.*, S233898 (4th App. Dist., 245 Cal.App.4th 589). The Court limited review to the following issue: May the brand name manufacturer of a pharmaceutical drug that divested all ownership interest in the drug be held liable for injuries caused years later by another manufacturer's generic version of that drug?**

    Decided December 21, 2017 (4 Cal.5th 145). Cuéllar, J., for a majority of the Court (Corrigan J., concurring in part and dissenting in part, joined by Cantil-Sakauye, C.J. and Kruger, J.). The Court affirmed, holding that a brand-name drug manufacturer owes a duty of reasonable care in ensuring that its label provides adequate warnings, regardless of whether the user has taken the brand-name or generic version of the drug, and may be liable even after the brand-name drug manufacturer sells its rights in the drug to a successor manufacturer. Plaintiffs were diagnosed with developmental delays and autism after their mother had taken a generic form of Brethine in 2007. They alleged that Novartis Pharmaceuticals, which had sold its rights to the drug to a successor manufacturer

in 2001, knew or should have known of the drug's risks to fetal brain development and unreasonably failed to update its warning label. The trial court sustained Novartis's demurrer, and the Court of Appeal reversed. In affirming, the Supreme Court held that, under federal law, a brand-name drug manufacturer is solely responsible for providing and updating the warning label, and thus is liable when deficiencies in its label foreseeably and proximately cause injury. The Court declared that Novartis could reasonably have foreseen that an inadequate label could mislead physicians about the safety of the generic version of the drug, which was required to carry the same label as the brand-name version. The Court also held that selling drug rights did not automatically extinguish Novartis's liability as a matter of law. Plaintiffs had alleged that the label was deficient at the time Novartis transferred its rights to the successor manufacturer, which was using the same label it had inherited when Plaintiffs' mother was prescribed the drug. While the successor manufacturer may be jointly liable, the Court explained that a brand-name manufacturer could avoid long-term liability by including an indemnification provision in the contract transferring its rights to the successor manufacturer.

Select Pending Civil Cases[1]

1. ***Black Sky Capital, LLC v. Cobb*, S243294 (4th App. Dist., 12 Cal.App.5th 887). This case presents the following issue: Does Code of Civil Procedure section 580d permit a creditor that holds both a senior lien and a junior lien on the same parcel of real property arising from separate loans to seek a money judgment on the junior lien after the creditor foreclosed on the senior lien and purchased the property at a nonjudicial foreclosure sale?**
2. ***Boling v. Public Employment Relations Bd.*, S242034 (4th App. Dist., 10 Cal.App.5th 853). This case includes the following issues: (1) When a final decision of the Public Employment Relations Board under the Meyers-Milias-Brown Act (Gov. Code, §§ 3500 et seq.) is challenged in the Court of Appeal, what standard of review applies to the Board's interpretation of the applicable statutes and its findings of fact? (2) Is a public agency's duty to "meet and confer" under the Act limited to situations in which the agency's governing body proposes to take formal action affecting employee wages, hours, or other terms and conditions of employment?**
3. ***California Building Industry Assn. v. State Water Resources Control Bd.*, S226753 (1st App. Dist., 235 Cal.App.4th 1430, mod. 236 Cal.App.4th 529). This case presents the following issues: (1) Does Water Code section 181 permit the State Water Resources Control Board to approve its annual fee under the waste discharge permit program by a majority of the quorum? (2) Does Proposition 26 apply to the waste discharge permit program fee? (3) Does the Board have the initial burden of demonstrating the validity of its**

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1 Pending civil cases are organized alphabetically. Summaries of pending civil cases are excerpted from the California Supreme Court's 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.

fee? (4) Is the fee, which is based on balancing the fees and costs of the waste discharge permit program, an invalid tax unless it separately balances the fees and costs of each of the eight program areas within the program?

4. ***Chen v. L.A. Truck Centers, LLC*, S240245 (2d App. Dist., 7 Cal.App.5th 757). This case presents the following issue: Must a trial court reconsider its ruling on a motion to establish the applicable law governing questions of liability in a tort action when the party whose presence justified that choice of law settles and is dismissed?**
5. ***City of Morgan Hill v. Bushey*, S243042 (6th App. Dist., 12 Cal.App.5th 34). This case presents the following issue: Can the electorate use the referendum process to challenge a municipality's zoning designation for an area, which was changed to conform to the municipality's amended general plan, when the result of the referendum—if successful—would leave intact the existing zoning designation that does not conform to the amended general plan?**
6. ***Connor v. First Student, Inc.*, S229428 (2d App. Dist., 239 Cal.App.4th 526). This case presents the following issue: Is the Investigative Consumer Reporting Agencies Act (Civ. Code, § 1786 et seq.) unconstitutionally vague as applied to background checks conducted on a company's employees, because persons and entities subject to both that Act and the Consumer Credit Reporting Agencies Act (Civ. Code, § 1785.1 et seq.) cannot determine which statute applies?**
7. ***De La Torre v. CashCall*, S241434 (9th Cir., 854 F.3d 1082). The question presented is: Can the interest rate on consumer loans of $2,500 or more governed by California Finance Code section 22303 render the loans unconscionable under section 22302?**
8. ***Delano Farms Co. v. California Table Grape Com.*, S226538 (5th App. Dist., 235 Cal.App.4th 967). This case presents the following issue: Under Article 1, section 2, subdivision (a), of the California Constitution, can the California Table Grape Commission compel unwilling produce growers to contribute for generic commercial advertising?**
9. ***Dr. Leevil, LLC v. Westlake Healthcare Center*, S241324 (2d App. Dist., 9 Cal.App.5th 450). The court limited review to the following issue: Does Code of Civil Procedure section 1161a require a purchaser of real property at a foreclosure sale to perfect title before serving a three-day notice to quit on the occupant of the property?**
10. ***FilmOn.com v. Doubleverify, Inc.*, S244157 (2d App. Dist., 13 Cal.App.5th 707). This case presents the following issue: In determining whether challenged activity furthers the exercise of constitutional free speech rights on a matter of public interest within the meaning of Civil Code section 425.16, should a court take into consideration the commercial nature of that speech, including the identity of the speaker, the identity of the audience and the intended purpose of the speech?**
11. ***Flo & Eddie, Inc. v. Pandora Media, Inc.*, S240649 (9th Cir., 851 F.3d 950). The questions presented are: (1) Under section 980(a)(2) of the California**

Gibson Dunn
for Defendant and
Respondent

Civil Code, do copyright owners of pre-1972 sound recordings that were sold to the public before 1982 possess an exclusive right of public performance? (2) If not, does California's common law of property or tort otherwise grant copyright owners of pre-1972 sound recordings an exclusive right of public performance?

12. ***Frlekin v. Apple, Inc.*, S243805 (9th Cir., 870 F.3d 867). The question presented is: Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as 'hours worked' within the meaning of California Industrial Welfare Commission Wage Order No. 7?**
13. ***Gerard v. Orange Coast Memorial Medical Center*, S241655 (4th App. Dist., 9 Cal.App.5th 1204). This case includes the following issues: (1) Did Senate Bill 327 constitute a change in the law or a clarification in the law? (2) Is the Industrial Wage Commission Wage Order No. 5, section 11(D) partially invalid to the extent it authorizes health care workers to waive their second meal periods on shifts exceeding 12 hours? (3) To what extent, if any, does the language of Labor Code section 516 regarding the "health and welfare of those workers" affect the analysis?**
14. ***Goonewardene v. ADP, LLC*, S238941 (2d App. Dist., 5 Cal.App.5th 154). This case presents the following issue: Does the aggrieved employee in a lawsuit based on unpaid overtime have viable claims against the outside vendor that performed payroll services under a contract with the employer?**
15. ***Hassell v. Bird*, S235968 (1st App. Dist., 247 Cal.App.4th 1336). This case presents the following issues: (1) Does an on-line publisher have a right to notice and an opportunity to be heard before a trial court orders removal of on-line content? (2) Does the statutory immunity provided by 47 U.S.C. 230(c)(1) and (e)(3) bar a trial court from enjoining a website publisher's actions and potentially enforcing the court's order by way of contempt or other sanctions?**
16. ***Heckart v. A-1 Self Storage, Inc.*, S232322 (4th App. Dist., 243 Cal.App.4th 525). This case presents the following issue: Was a self-storage facility's storage rental agreement, which included provisions arguably meeting the definition of "insurance" (see Ins. Code, §§ 22, 1758.75), subject to regulation under the Insurance Code when the principal purpose of the agreement between the parties was the rental of storage space rather than the shifting and distribution of risk?**
17. ***Heimlich v. Shivji*, S243029 (6th App. Dist., 12 Cal.App.5th 152). This case presents the following issue: When a party to an arbitration proceeding makes an offer of compromise pursuant to Code of Civil Procedure section 998 and obtains a result in the arbitration more favorable to it than that offer, how, when, and from whom does that party request costs as provided under section 998?**

18. ***Jarman v. HCR Manor Care, Inc.*, S241431 (4th App. Dist, 9 Cal.App.5th 807). This case presents the following issues: (1) Does Health and Safety Code section 1430, subdivision (b), authorize a maximum award of $500 per "cause of action" in a lawsuit against a skilled nursing facility for violation of specified rights or only $500 per lawsuit? (2) Does section 1430, subdivision (b), authorize an award of punitive damages in such an action?**

19. ***K.J. v. Los Angeles Unified School Dist.*, S241057 (2d App. Dist., nonpublished opinion). This case presents the following issue: Does the Court of Appeal lack jurisdiction over an appeal from an order imposing sanctions on an attorney if the notice of appeal is brought in the name of the client rather than in the name of the attorney?**

20. ***Kim v. Reins Internat. California, Inc.*, S246911 (2d App. Dist., 18 Cal.App.5th 1052). This case presents the following issue: Does an employee bringing an action under the Private Attorneys General Act (Lab. Code, § 1698 et seq.) lose standing to pursue representative claims as an "aggrieved employee" by dismissing his or her individual claims against the employer?**

21. ***Kim v. Toyota Motor Corp.*, S232754 (2d App. Dist., 243 Cal.App.4th 1366, mod. 244 Cal.App.4th 643b). This case includes the following issue: Is evidence of industry custom and practice admissible in a strict products liability action?**

22. ***King v. CompPartners, Inc.*, S232197 (4th App. Dist., 243 Cal.App.4th 685). This case presents the following issues: (1) Is a claim by an injured worker for medical malpractice brought against a workers' compensation utilization review company barred by workers' compensation as the exclusive remedy? (2) Does a workers' compensation utilization review company that performs medical utilization reviews on behalf of employers owe a duty of care to an injured worker? (3) Did the Court of Appeal err in finding that plaintiffs should be given leave to amend their complaint in this case?**

23. ***Lawson v. Z.B., N.A.*, S246711 (4th App. Dist., 18 Cal.App.5th 705). This case presents the following issue: Does a representative action under the Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) seeking recovery of individualized lost wages as civil penalties under Labor Code section 558 fall within the preemptive scope of the Federal Arbitration Act (9 U.S.C. § 1 et seq.)?**

24. ***Liberty Surplus Ins. Corp. v. Ledesma & Meyers Construction Co., Inc.*, S236765 (9th Cir., 834 F.3d 998). The question presented is: Whether there is an "occurrence" under an employer's commercial general liability policy when an injured third party brings claims against the employer for the negligent hiring, retention, and supervision of the employee who intentionally injured the third party.**

25. ***Lopez v. Sony Electronics, Inc.*, S235357 (2d App. Dist., 247 Cal.App.4th 444). This case presents the following issue: Does the six-year limitations period in Code of Civil Procedure section 340.4, which governs actions based on birth and pre-birth injuries and is not subject to tolling for minority, or the two-**

year limitations period in Code of Civil Procedure section 340.8, which applies to actions for injury based upon exposure to a toxic substance and is subject to tolling for minority, govern an action alleging pre-birth injuries due to exposure to a toxic substance?

26. ***McClain v. Sav-On-Drugs*, S241471 (2d App. Dist., 9 Cal.App.5th 684, mod. 10 Cal.App.5th 749). This case includes the following issue: Can a purchaser of products allegedly exempt from sales tax but for which the retailer collected sales tax reimbursement bring an action to compel the retailer to seek a sales tax refund from the State Board of Equalization and remit the proceeds to purchasers?**
27. ***Melendez v. San Francisco Baseball Associates LLC*, S245607 (1st App. Dist., 16 Cal.App.5th 339). The court limited review to the following issue: Is plaintiffs' statutory wage claim under Labor Code section 201 subject to mandatory arbitration pursuant to section 301 of the Labor Management Relations Act because it requires the interpretation of a collective bargaining agreement?**
28. ***Meza v. Portfolio Recovery Associates*, S242799 (9th Cir., 860 F.3d 1218). The question presented is: Under section 98, subdivision (a), of the Code of Civil Procedure, must an affiant in a limited jurisdiction matter be physically located and personally available for service of process at an address provided in the affiant's declaration that is within 150 miles of the place of trial?**
29. ***Montrose Chemical Corp. v. Superior Court*, S244737 (2d App. Dist., 14 Cal.App.5th 1306). This case presents the following issue: When continuous property damage occurs during several periods for which an insured purchased multiple layers of excess insurance, does the rule of "horizontal exhaustion" require the insured to exhaust excess insurance at lower levels for all periods before obtaining coverage from higher level excess insurance in any period?**
30. ***National Shooting Sports Foundation, Inc. v. State of California*, S239397 (5th App. Dist., 6 Cal.App.5th 298). This case presents the following issues: (1) Can a statute be challenged on the ground that compliance with it is allegedly impossible? (2) If so, how is the trial court to make that determination?**
31. ***Noel v. Thrifty Payless, Inc.*, S246490 (1st App. Dist., 17 Cal.App.5th 1315). This case presents the following issue: Must a plaintiff seeking class certification under Code of Civil Procedure section 382 or the Consumer Legal Remedies Act demonstrate that records exist permitting the identification of class members?**
32. ***OTO, L.L.C. v. Kho*, S244630 (1st App. Dist., 14 Cal.App.5th 691). This case presents the following issues: (1) Was the arbitration remedy at issue in this case sufficiently "affordable and accessible" within the meaning of *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109 to require the company's employees to forego the right to an administrative Berman hearing on wage claims? (2) Did the employer waive its right to bypass the Berman hearing by**

Gibson Dunn for Continental Casualty Company, Columbia Casualty Company, Centennial Insurance Company, and Lamorak Insurance: Real Parties in Interest

waiting until the morning of that hearing, serving a demand for arbitration, and refusing to participate in the hearing?

33. ***Pitzer College v. Indian Harbor Ins. Co.*, S239510 (9th Cir., 845 F.3d 993). As restated by the Court, the questions presented are: (1) Is California's common law notice-prejudice rule a fundamental public policy for the purpose of choice-of-law analysis? (2) If the notice-prejudice rule is a fundamental public policy for the purpose of choice-of-law analysis, can the notice-prejudice rule apply to the consent provision in this case?**

34. ***Plantier v. Ramona Municipal Water Dist.*, S243360 (4th App. Dist., 12 Cal.App.5th 856). This case presents the following issue: Were ratepayers seeking to challenge the water district's method of calculating wastewater service fees required to exhaust administrative remedies by participating in the public hearing required by California Constitution, Article XIII D, section 6?**

35. ***Rand Resources, LLC v. City of Carson*, S235735 (2d App. Dist., 247 Cal.App.4th 1080). The Court limited review to the following issues: (1) Did plaintiffs' causes of action alleging the breach of and interference with an exclusive agency agreement to negotiate the designation and development of a National Football League (NFL) stadium and related claims arise out of a public issue or an issue of public interest within the meaning of Code of Civil Procedure section 425.16? (2) Did plaintiffs' causes of action arise out of communications made in connection with an issue under consideration by a legislative body?**

36. ***Samara v. Matar*, S240918 (2d App. Dist., 8 Cal.App.5th 796). This case includes the following issue: When a trial court grants a summary judgment motion on two alternative grounds, and the Court of Appeal affirms the judgment on only one ground and expressly declines to address the second, does the affirmed judgment have preclusive effect as to the second ground?**

37. ***Scholes v. Lambirth Trucking Co.*, S241825 (3rd App. Dist., 10 Cal.App.5th 590). This case presents the following issue: Are the double damages provisions of Civil Code section 3346 applicable to negligently caused fire damage to trees?**

38. ***Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.*, S232946 (2d App. Dist., 244 Cal.App.4th 590, mod. 245 Cal.App.4th 63b). This case presents the following issues: (1) May a court rely on non-legislative expressions of public policy to overturn an arbitration award on illegality grounds? (2) Can a sophisticated consumer of legal services, represented by counsel, give its informed consent to an advance waiver of conflicts of interest? (3) Does a conflict of interest that undisputedly caused no damage to the client and did not affect the value or quality of an attorney's work automatically (i) require the attorney to disgorge all previously paid fees, and (ii) preclude the attorney from recovering the reasonable value of the unpaid work?**

Gibson Dunn
for Plaintiff and
Respondent

39. ***Sierra Club v. County of Fresno*, S219783 (5th App. Dist., 226 Cal.App.4th 704). This case presents issues concerning the standard and scope of judicial review under the California Environmental Quality Act. (CEQA; Pub. Resources Code, § 21000 et seq.)**

40. ***Southern California Gas Leak Cases*, S246669 (2d App. Dist., 18 Cal.App.5th 581). This case presents the following issue: Can a plaintiff who is harmed by a manmade environmental disaster state a claim for negligence against the gas company that allegedly caused the disaster if the damages sustained are purely economic?**

41. ***Stewart v. San Luis Ambulance, Inc.*, S246255 (9th Cir., 878 F.3d 883). The questions presented are: (1) Under the California Labor Code and applicable regulations, is an employer of ambulance attendants working twenty-four hour shifts required to relieve attendants of all duties during rest breaks, including the duty to be available to respond to an emergency call if one arises during a rest period? (2) Under the California Labor Code and applicable regulations, may an employer of ambulance attendants working twenty-four hour shifts require attendants to be available to respond to emergency calls during their meal periods without a written agreement that contains an on-duty meal period revocation clause? If such a clause is required, will a general at-will employment clause satisfy this requirement? (3) Do violations of meal period regulations, which require payment of a "premium wage" for each improper meal period, give rise to claims under sections 203 and 226 of the California Labor Code where the employer does not include the premium wage in the employee's pay or pay statements during the course of the violations?**

42. ***Stoetzl v. State of California*, S244751 (1st App. Dist., 14 Cal.App.5th 1256). This case includes the following issue: Does the definition of "hours worked" found in the Industrial Wage Commission's Wage Order 4, as opposed to the definition of that term found in the federal Labor Standards Act, constitute the controlling legal standard for determining the compensability of time that correctional employees spend after signing in for duty and before signing out but before they arrive at and after they leave their actual work posts within a correctional facility?**

43. ***Sweetwater Union School Dist. v. Gilbane Building Co.*, S233526 (4th App. Dist., 245 Cal.App.4th 19). This case presents the following issues: (1) Is testimony given in a criminal case by persons who are not parties in a subsequent civil action admissible in that action to oppose a special motion to strike? (2) Is such testimony subject to the conditions in Evidence Code section 1290 et seq. for receiving former testimony in evidence?**

44. ***T-Mobile West LLC v. City and County of San Francisco*, S238001 (1st App. Dist., 3 Cal.App.5th 334, mod. 3 Cal.App.5th 999). This case presents the following issues: (1) Is a local ordinance regulating wireless telephone equipment on aesthetic grounds preempted by Public Utilities Code section 7901, which grants telephone companies a franchise to place their equipment in the public right of way provided they do not "incommode the public use of**

the road or highway or interrupt the navigation of the waters"? (2) Is such an ordinance, which applies only to wireless equipment and not to the equipment of other utilities, prohibited by Public Utilities Code section 7901.1, which permits municipalities to "exercise reasonable control as to the time, place and manner in which roads, highways, and waterways are accessed" but requires that such control "be applied to all entities in an equivalent manner"?

45. ***Troester v. Starbucks Corp.*, S234969 (9th Cir., nonpublished order). The question presented is: Does the federal Fair Labor Standards Act's *de minimis* doctrine, as stated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) and *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984), apply to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197?**

46. ***Union of Medical Marijuana Patients, Inc. v. City of San Diego*, S238563 (4th App. Dist., 4 Cal.App.5th 103). This case presents the following issues: (1) Is the enactment of a zoning ordinance categorically a "project" within the meaning of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)? (2) Is the enactment of a zoning ordinance allowing the operation of medical marijuana cooperatives in certain areas the type of activity that may cause a reasonably foreseeable indirect physical change to the environment?**

47. ***United Auburn Indian Community of Auburn Rancheria v. Brown*, S238544 (3rd App. Dist., 4 Cal.App.5th 36). This case presents the following issue: May the Governor concur in a decision by the Secretary of the Interior to take off-reservation land in trust for purposes of tribal gaming without legislative authorization or ratification, or does such an action violate the separation of powers provisions of the state Constitution?**

48. ***United Educators of San Francisco etc. v. California Unemployment Ins. Appeals Bd.*, S235903 (1st App. Dist., 247 Cal.App.4th 1235). This case presents issues concerning the entitlement of substitute teachers and other on-call paraprofessional employees to unemployment insurance benefits when they are not called to work during a summer school term or session.**

49. ***United Riggers & Erectors, Inc. v. Coast Iron & Steel Co*., S231549 (2d App. Dist., 243 Cal.App.4th 151). The Court limited review to the following issue: May a contractor withhold retention payments when there is a good faith dispute of any kind between the contractor and a subcontractor, or only when the dispute relates to the retention itself?**

50. ***Voris v. Lampert*, S241812 (2d App. Dist., nonpublished opinion). This case presents the following issue: Is conversion of earned but unpaid wages a valid cause of action?**

51. ***Wilson v. Cable News Network, Inc.*, S239686 (2d App. Dist., 6 Cal.App.5th 822). This case presents the following issue: In deciding whether an employee's claims for discrimination, retaliation, wrongful termination, and defamation arise from protected activity for purposes of a special motion to**

strike (Code of Civ. Proc., § 425.16), what is the relevance of an allegation that the employer acted with a discriminatory or retaliatory motive?

52. ***Wishnev v. Northwestern Mutual Life Ins. Co.*, S246541 (9th Cir., 880 F.3d 493). The questions presented are: (1) Are the lenders identified in Article XV of the California Constitution (Cal. Const., art. XV, § 1) as being exempt from the restrictions otherwise imposed by that article, nevertheless subject to the requirement in section 1916-2 of the California Civil Code that a lender may not compound interest "unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith?" (2) Does an agreement meet the requirement of section 1916-2 if it is comprised of: (a) an application for insurance signed by the borrower, and (b) a policy of insurance containing an agreement for compound interest that is subsequently attached to the application, thus constituting the entire contract between the parties pursuant to section 10113 of the California Insurance Code?**

Ted Boutrous and Julian Poon appear on the cover of the most recent (seventh) edition of the Internal Operating Practices and Procedures of the California Supreme Court. To access the Court's booklet, please click here.

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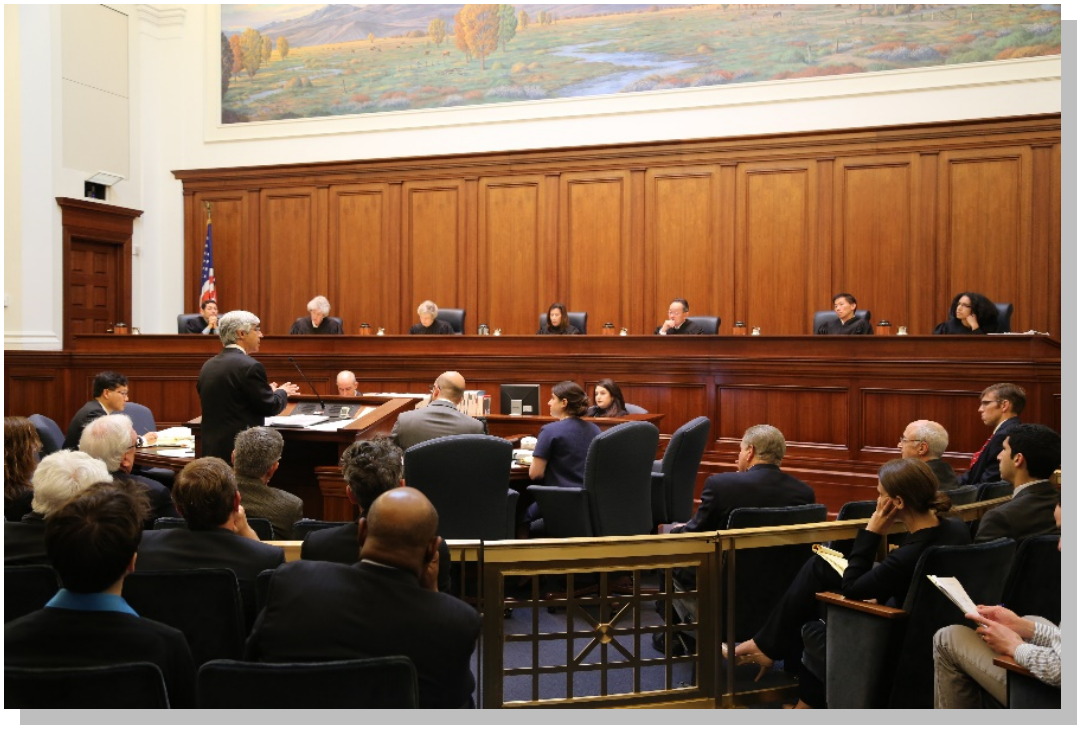

California Appellate Practice Group Co-Chairs:

Theodore J. Boutrous, Jr. – Los Angeles, Global Co-Chair, Litigation 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)