GIBSON DUNN

California Supreme Court Round-Up
May 2018 – December 2018

February 2019

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 May through December 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. ***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?**

   Decided June 25, 2018 (5 Cal.5th 322). Cantil-Sakauye, C.J., for a unanimous Court. The Court affirmed, overruling its prior decision in *People v. Skidmore*, 27 Cal. 287, and held that when a trial court enters a judgment on two alternative grounds, and the Court of Appeal affirms the judgment on only one ground and expressly declines to address the second ground, neither claim nor issue preclusion prevents the party against whom judgment was entered from rearguing the second ground. In this case, the plaintiff sued both the dentist who recommended a dental implant and the surgeon who performed the implantation. The surgeon moved for summary judgment, which the trial court granted on the grounds that the plaintiff's suit was untimely and the plaintiff could not show causation. The plaintiff appealed the grant of summary judgment, and the Court of Appeal affirmed on the timeliness ground, but expressly declined to consider the causation issue. The dentist subsequently moved for summary judgment himself, which the trial court granted on the ground that the aforementioned Court of Appeal decision precluded the trial court from reconsidering the causation issue. The plaintiff then appealed this grant of summary judgment, and the Court of Appeal reversed and remanded, concluding that because the original Court of Appeal decision was based on timeliness, it was not "on the merits," and thus claim preclusion did not apply. The Court of Appeal further held that issue preclusion did not apply. In reaching its conclusion, the Court of Appeal invited the Supreme Court to revisit *Skidmore*, in which the Supreme Court had held broadly that when a trial court decides a particular issue in reaching a judgment, and an appellate court affirms the judgment without addressing that particular issue, the affirmance nonetheless has a preclusive effect on that issue. In this case, the Supreme Court accepted the Court of Appeal's invitation and overruled *Skidmore*. The Supreme Court


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The 2019 edition of *Benchmark Litigation* ranked Gibson Dunn in Tier 1 in the U.S. litigation category of Appellate.

Law360 named Gibson Dunn a 2018 Practice Group of the Year for Appellate, marking the firm's "seventh appearance on Law360's annual list of top appellate groups since 2011." The firm was recognized for having "won big at the U.S. Supreme Court" in multiple cases and for having "secured significant appellate wins . . . outside the high court."

U.S. News – Best Lawyers® named Gibson Dunn the 2018 "Law Firm of the Year" for Appellate Practice in its "Best Law Firms" survey. Only one law firm is recognized in each national practice area.

reasoned that it was unfair to litigants—and out of step with modern claim and issue preclusion jurisprudence—to afford finality to a trial court ruling that evades appellate review. Accordingly, the Supreme Court affirmed the Court of Appeal's judgment on alternative grounds, holding that neither claim nor issue preclusion prevented the plaintiff from arguing the causation issue in opposition to the dentist's summary judgment motion.

Real Estate & Landlord-Tenant

2. ***Dr. Leevil, LLC v. Westlake Health Care Ctr.*, 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?**

Decided December 17, 2018 (6 Cal.5th 474). Chin, J., for a unanimous Court. The Court reversed and held that Code of Civil Procedure section 1161a requires purchasers of property to perfect title before serving a three-day notice to quit upon a tenant. In this case, an LLC purchased a promissory note and deed of trust to a property at a foreclosure sale, which property was occupied by a tenant. The next day, the LLC served a three-day notice to quit on the tenant, and five days later, recorded title to the property. Soon thereafter, the LLC initiated an unlawful detainer action against the tenant. The trial court held that under Code of Civil Procedure section 1161a, an owner that acquires title to a property in the manner described above may immediately serve a notice to quit on the property's possessor, and need only perfect title before initiating an unlawful detainer action. The Court of Appeal affirmed, but the Supreme Court reversed. First, the Court noted that section 1161a uses a conjunctive "and" preceding the condition that requires perfecting title before serving a notice to quit, and that the language setting forth the condition is in the past tense, implying an already-completed perfection of title before service. Second, the Court noted that requiring purchasers to perfect title before serving notices to quit on tenants would prevent tenants from having to vacate premises unnecessarily or risk incurring damages. The Court further held that Civil Code section 2924h did not permit the LLC to retroactively perfect title, since section 2924h requires recording title for such title to be perfect. In this case, the LLC did not record title to the property until after serving the notice to quit.

Employment & Labor

3. ***Jazmina Gerard, et al., v. Orange Coast Memorial Med. Ctr.*, S241655 (4th App. Dist., 9 Cal.App.5th 1204). This case presents the following issue: Were health care employers permitted to allow their employees who worked shifts longer than 12 hours to voluntarily waive one of their two meal periods under Labor Code section 512 and Industrial Welfare Commission Order No. 5, or were the meal periods unwaivable because they lasted longer than 12 hours?**

LEADING FIRM

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

The National Law Journal named Gibson Dunn to its 2018 Appellate Hot List, which recognized 22 firms that "won key matters before the U.S. Supreme Court and federal courts of appeal."

The American Lawyer named Gibson Dunn a Finalist in its 2018 Litigation Department of the Year competition, following the firm's unprecedented three wins in this biennial competition — as the 2010, 2012 and 2016 Litigation Department of the Year — and 2014 Finalist honors.

Decided Dec. 10, 2018 (6 Cal.5th 443). Liu, J., for a unanimous Court. The Court affirmed and held that health care employees whose shifts last more than 12 hours may voluntarily waive one of their two meal periods. Labor Code section 512 states that employers must provide employees with two meal periods if the employees work more than 10 hours in a day, but that employees may waive the second meal period only "if the total hours worked is no more than 12 hours." Despite that provision, the Industrial Welfare Commission adopted Order No. 5, which allows health care employees to waive one of their two meal periods even if their shifts lasted *more than* 12 hours. A group of health care employees sued their employer, claiming that they were entitled to penalties, unpaid wages, and injunctive relief because their employer allowed them to waive a second meal period even if they worked more than 12 hours. The employees' principal argument was that the Industrial Welfare Commission could not enact an order inconsistent with the text of Labor Code section 512. The Court rejected the employees' argument. Because another provision of the Labor Code in effect at the time Order No. 5 was adopted—section 516—allowed the Industrial Welfare Commission to adopt orders with respect to meal periods "[n]otwithstanding any other provision of law," the Industrial Welfare Commission was permitted to allow health care employees to waive one of their two meal periods, even if their shifts lasted more than 12 hours.

4. ***Troester v. Starbucks Corp.*, S234969 (9th Cir. No. 14-55530). 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?**

Decided August 26, 2018 (5 Cal.5th 829). Liu, J., for a unanimous Court. (Cuéllar, J., and Kruger, J., filed concurring opinions.) In response to the question certified by the Ninth Circuit, the Court held that the Fair Labor Standards Act's de minimis doctrine has not been incorporated into California's wage-and-hour statutes or Industrial Welfare Commission wage orders. It concluded that there is no support in the text or history of California's wage laws for incorporation of such a doctrine, and it noted that California's employment laws are generally more protective of employees than federal laws are. As to the question of whether the de minimis principle could nevertheless be applied to wage-and-hour claims as a "background legal principle," the Court declined to articulate a bright-line rule. Instead, it held that on the facts of the case before it—where the plaintiff employee regularly performed four to ten minutes of work after clocking out—the de minimis doctrine did not bar a wage-and-hour claim. The Court observed that prior California caselaw has required strict compliance with the terms of the wage-and-hour laws and that, over time, seemingly short periods can add up to a significant period of uncompensated time. The Court concluded that California law does not "allow employers to require employees to routinely work for minutes off the clock without compensation," but left open the question "whether there are wage claims involving employee activities that are

so irregular or brief in duration" that employers are not expected to compensate employees for those activities. Justice Cuéllar wrote separately to emphasize that although employers may not treat "regular minutes worked by employees" as "rounding errors," California law "stops well short of requiring employer analysis of every fractional second." Justice Kruger wrote separately to emphasize that the Court had not held "that the de minimis doctrine has no role to play under *any* circumstance," and described several scenarios in which a minute or two of uncompensated work might be considered de minimis.

Tort Law & Consumer Protection

5. ***Hassell v. Bird*, S235968 (1st App. Dist., 247 Cal.App.4th 1336). This case presents the following issue: Can a consumer-review website be required to remove defamatory reviews from its website as a result of a court order in a case to which it was not a party, or does such an order violate the Communications Decency Act of 1996 or principles of due process?**

Decided July 2, 2018 (5 Cal.5th 522). Cantil-Sakauye, C.J., for a plurality of the Court (Kruger, J., concurring, Liu, J., dissenting, Cuéllar, J., dissenting, joined by Stewart, J.). The Court reversed and held that a consumer-review website cannot be required to remove defamatory reviews from its website by an injunction issued in a case to which the website's operator was not a party. A law firm sued a former client for defamation after she posted a negative review about the law firm on the Yelp consumer-review website. When the former client did not answer the complaint, the law firm sought a default judgment. The trial court's order not only required that the negative review be removed by the former client, but also required that Yelp remove the negative reviews, even though it was not a party to the lawsuit. Yelp sought to vacate the order, arguing that it violated its due process rights and section 230 of the Communications Decency Act of 1996 (the "Act"), which gives computer-service providers like Yelp immunity from liability and injunctive relief for information published on their websites by another source. The trial court denied Yelp's motion and the Court of Appeal affirmed. A plurality of the Supreme Court reversed, ruling in Yelp's favor based on section 230 of the Act. Because section 230 gives computer-service providers like Yelp broad immunity, the law firm could not create an end-run around section 230 by deciding not to name Yelp as a party to its suit. Justice Kruger concurred in the result, but wrote separately to explain her views on the limits of section 230 and courts' authority to order nonparties to take action. Justice Liu, by contrast, would have affirmed the judgment, and dissented, explaining that no due process violation occurred and that Yelp had no right to immunity from the trial court order under the Act. Justice Cuéllar and Justice Stewart also dissented, writing separately to explain that they would vacate the judgment and remand the case for further proceedings to determine whether Yelp aided and abetted the former client's defamatory conduct such that an injunction would be proper under California law. The United States Supreme Court declined to take up this case, denying a petition for certiorari on January 22, 2019.

6. ***De La Torre v. Cashcall*, S241434 (9th Cir. No. 14-17571). 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?**

   Decided Aug. 13, 2018 (5 Cal.5th 966). Cuéllar, J., for a unanimous Court. Consumers brought a California Unfair Competition Law ("UCL") class action in federal court against a lender who provided consumer loans that carried an APR between 96 and 135 percent. The consumers asserted that these interest rates were unconscionable under California law. The lender argued that the rates were immune from unconscionability analysis. The Ninth Circuit requested that the Supreme Court resolve an unsettled question of California law: Can the interest rate on a consumer loan of $2,500 or more render the loan unconscionable under California's Financial Code? The Court explained that Financial Code section 22303 sets interest rate caps only on consumer loans of less than $2,500. But notwithstanding section 22303, section 22302 provides that the unconscionability doctrine, codified by section 1670.5 of the Civil Code, applies to all consumer loans. Thus, nothing in sections 22302 or 22303, or the unconscionability doctrine itself, supported the lender's position that interest rates on loans of $2,500 or more are immune from unconscionability analysis merely because they are not subject to scrutiny under section 22303. To the contrary, the Court explained that the Legislature's purpose in enacting these provisions was to free larger loans from rigid usury rate regulation while maintaining the more flexible unconscionability doctrine. Therefore, the Court held that interest rates on consumer loans of $2,500 or greater, as with any other contractual provision, may render the loans unconscionable.

7. ***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?**

   Decided June 28, 2018 (5 Cal.5th 428). Liu, J., for a majority of the Court (Chin, J., concurring). The Court reversed and held that Civil Code section 3531, which states that "[t]he law never requires impossibilities," announces a principle of statutory interpretation, but does not provide a means to invalidate another statute. In 2007, the Legislature amended the definition of "unsafe handguns" in the Unsafe Handgun Act, Penal Code sections 31900-32110, to include semiautomatic pistols that do not have a safety feature called "dual placement microstamping," which involves placing the pistol's identifying information on both the pistol and its cartridge cases. The National Shooting Sports Foundation sought declaratory and injunctive relief on the basis that the dual placement microstamping technology mandated by section 31910(b)(7)(A) was "impossible to implement" and that the provision was therefore unenforceable under Civil Code section 3531. The Court rejected this argument, holding that section 3531 is "an interpretative canon for construing statutes, not a means for invalidating them." The Court explained that, if supported by legislative intent, impossibility of compliance could create an "implied exception to a statutory requirement" that would render the statute inoperative in specific instances. Regarding Penal Code section 31910(b)(7)(A), the Court concluded, as a matter of statutory

interpretation, "Neither the text nor the purpose of the Act contemplates that a showing of impossibility can excuse compliance with the statutory requirement once the statute goes into effect." In a concurring opinion, Justice Liu criticized the majority for holding that "no court may construe Penal Code section 31910(b)(7)(A) narrowly to 'excuse compliance,'" and argued that courts should be free to find exceptions to the section based on impossibilities not contemplated by the Legislature.

8. ***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?**

   Decided Aug. 27, 2018 (6 Cal.5th 21). Kruger, J., for a majority of the Court (Dato, J., concurring, joined by Liu, J.). The Court affirmed and held that industry custom and practice evidence is sometimes relevant and admissible in strict products liability actions because it may shed light on "whether a product embodies excessive preventable danger." Plaintiff was injured after he lost control of his Toyota pickup truck and drove off the road. Plaintiff's truck did not have a feature called vehicle stability control ("VSC"), and he argued that his injuries would have been prevented if Toyota had included VSC as a standard feature in its pickup trucks. Before trial, plaintiff filed a motion in limine seeking preclusion of industry custom and practice evidence regarding implementation of VSC. The Court acknowledged that custom and practice evidence is irrelevant and inadmissible if used to establish that the manufacturer "acted as a reasonably prudent manufacturer would have under the circumstances," because a manufacturer may be strictly liable for defects regardless of its conduct. The Court observed, however, that design defects may be established using the risk-benefit test, which asks juries to evaluate "the relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs." The Court then concluded that, although custom and practice "is [not] categorically admissible," "[d]epending on the circumstances," such evidence "may aid the jury's understanding of these complexities and trade-offs, and thus may provide some assistance in determining whether the manufacturer has balanced the relevant considerations correctly." In his concurring opinion, Justice Dato stated that the trial court committed error by declining to provide a limiting instruction regarding the admissibility of custom and practice evidence, but that the error was harmless.

9. ***Connor v. First Student, Inc.*, S229428 (2d App. Dist., 239 Cal.App.4th 526). This case presents the following issue: Does the Investigative Consumer Reporting Agencies Act's ("ICRAA") overlap with the Consumer Credit Reporting Agencies Act ("CCRAA") render the ICRAA unconstitutionally vague, in violation of due process, as it applies to employer background checks?**

   Decided Aug. 20, 2018 (5 Cal.5th 1026). Chin, J., for a unanimous Court. The Court affirmed and held that, despite its overlap with the CCRAA, the ICRAA is not unconstitutionally vague in the context of employer background checks. The Legislature enacted the ICRAA and CCRAA in 1975 to control consumer

background reports, including employer background checks. Originally, the ICRAA applied exclusively to consumer reports discussing a consumer's character, provided that the report's information was obtained through personal interviews. The CCRAA, on the other hand, applied to any consumer report discussing consumer credit information, except those involving personal interviews. A 1998 amendment abolished the personal interview requirement from the ICRAA, making both the ICRAA and CCRAA applicable to certain consumer reports discussing both character and credit information. Plaintiff sued her employer, a transit company, for conducting a background check on her character and credit credentials without obtaining her written authorization, as required by the ICRAA. Defendant moved for summary judgment, claiming that the ICRAA is unconstitutionally vague because, in cases like plaintiff's, a potential employer must comply with its mandates as well as those of the CCRAA. The Court rejected the vagueness challenge, reasoning that there is nothing unclear or onerous about a mandate that an employer comply with both laws when requesting consumer reports containing both credit and character information. The language of both statutes unambiguously covers the kind of consumer reports at issue, and in situations in which the statutes overlap, employers can satisfy the requirements of both without undermining the purposes of either.

Insurance

10. *Liberty Surplus Insurance v. Ledesma & Meyer Construction*, S236765 (9th Cir. No. 14-56120). 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.

Decided June 4, 2018 (5 Cal.5th 216). Corrigan, J., for the Court (Liu, J. concurring). A third-party student sued a school's contractor for negligent hiring, retention, and supervision of an employee who allegedly abused the student. The employer's insurer sought declaratory relief in federal court, contending it had no obligation to defend the employer. The Ninth Circuit requested that the Supreme Court resolve a question of California law: When a third party sues an employer for negligent hiring, does the suit allege an "occurrence," defined as "an accident," under a commercial general liability policy? Under California law, an accident is an unexpected happening or cause, and includes general negligence. The Court acknowledged that the employee's intentional misconduct was beyond the scope of insurance coverage, but held that the misconduct did not preclude coverage for the employer in negligent hiring claims because the focus is on the employer's negligence, and not the employee's conduct. So long as the employer's negligent conduct was a substantial factor in causing the third party's injuries, and the employer did not intend for the employee to engage in misconduct, the policy covers the employer. Therefore, an employer's negligent hiring may be covered by a policy that provides a defense for bodily injury caused by an accident. The Court observed that denying coverage would leave employers without coverage for negligent hiring claims whenever the employee's conduct is deliberate.

California Constitution

11. *Delano Farms Company v. California Table Grape Commission*, S226538 (5th App. Dist., 235 Cal.App.4th 967). This case presents the following issue: Does the Ketchum Act's collection of assessments on shipments of California table grapes, which are used to fund advertisement promoting all California grapes equally, amount to government speech, or does it implicate the right to free speech of growers and shippers of these grapes under article I, section 2 of the California Constitution?

Decided May 24, 2018 (4 Cal.5th 1204). Cantil-Sakauye, C.J., for a unanimous Court. The Court affirmed the Court of Appeal's ruling that the Ketchum Act's compelled-subsidy scheme constitutes government speech and therefore avoids review under Article I, Section 2 of the California Constitution. Attempting to increase California table grape consumption, the 1967 Ketchum Act established the California Table Grape Commission ("Commission"), a public corporation funded by an assessment on shipments of California table grapes. The Commission advertises California table grapes generally, without mentioning specific producers or grape kinds. Five growers and shippers of these grapes sued, arguing that the Act's assessments force them to engage in speech—i.e., that all California grapes are of equal or comparable quality—that they find objectionable. In assessing the growers' and shippers' argument, the Court considered principally whether the state exercised substantial control over the message at issue. The Court held that the message constituted public speech. It originated in the California Legislature, and the Commission is a public corporation subject to oversight by the public and various state actors. Due to the public nature of the speech at issue, the Court concluded that the plaintiffs' right to free speech under Article I, Section 2 of the California Constitution was not implicated. The Court noted, however, that the analysis would have been different had the Commission's advertisements significantly hampered plaintiffs' ability to speak or had the potential to be wrongly attributed to plaintiffs.

Environmental

12. *Sierra Club v. County of Fresno (Friant Ranch)*, 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.)

Decided Dec. 24, 2018 (6 Cal.5th 502). Chin, J., for a unanimous Court. The Court affirmed the Court of Appeal's holding that a county-approved environmental impact report ("EIR") failed to include sufficient detail to inform the public about the proposed project under CEQA and did not "substantively connect a project's air quality impacts to likely health consequences." The Court first determined the standard of review when courts consider whether an EIR includes enough detail to satisfy CEQA's requirements. It recounted that de novo review is appropriate to determine whether statutorily defined procedural requirements were met, while a "more deferential standard"—i.e., "substantial

evidence"—was appropriate when "factual questions predominate." Acknowledging that the distinction is "not always so clear," the Court applied de novo review in determining that the EIR here was "inadequate as an informational document" as it generally outlined some of the project's unhealthy symptoms but did not give any sense of the nature and magnitude of those symptoms, or explain why such an analysis was infeasible. The EIR made it "impossible for the public to translate the bare numbers provided into adverse health impacts or to understand why such translation is not possible." The Court also affirmed the Court of Appeal's ruling that the EIR's use of the term "substantial" to describe the project's proposed mitigation efforts, without explanation or factual support, was inadequate to satisfy CEQA's disclosure requirements. The Court reversed, however, the determination that the EIR "improperly deferred mitigation measures" to the lead agency, and concluded that the agency "may leave open the possibility of employing better mitigation efforts consistent with improvements in technology."

Select Pending Civil Cases[1]

1. ***Abbott Laboratories v. Superior Court*, S249895 (4th App. Dist., 24 Cal.App.5th 1, mod. 24 Cal.App.5th 927b). This case presents the following issue: Does a district attorney have the authority to recover restitution and civil penalties under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) for violations occurring outside his or her territorial jurisdiction?**
2. ***B.B. v. County of Los Angeles*, S250734 (2d App. Dist., 25 Cal.App.5th 115, mod. 25 Cal.App.5th 1006a). This case presents the following issue: May a defendant who commits an intentional tort invoke Civil Code section 1431.2, which limits a defendant's liability for non-economic damages "in direct proportion to that defendant's percentage of fault," to have his liability for damages reduced based on principles of comparative fault?**
3. ***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?**
4. ***Bottini v. City of San Diego*, S252217 (4th App. Dist., 27 Cal.App.5th 281). This case includes the following issue: Does the "substantially advances" formula used in *Landgate, Inc. v. California Coastal Com'n* (1998) 17 Cal.4th 1006 or the *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 test (see *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528) determine whether there has been a regulatory taking under the California Constitution?**
5. ***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?**
6. ***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?**
7. ***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 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?**

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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.

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for Plaintiff and
Respondent

(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?

8. ***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?**
9. ***Gonzalez v. Mathis*, S247677 (2d App. Dist., 20 Cal.App.5th 257). This case includes the following issue: Can a homeowner who hires an independent contractor be held liable in tort for injury sustained by the contractor's employee when the homeowner does not retain control over the worksite and the hazard causing the injury was known to the contractor?**
10. ***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?**
11. ***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?**
12. ***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?**
13. ***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?**
14. ***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?**
15. ***Kirzhner v. Mercedes-Benz USA, LLC*, S246444 (4th App. Dist., 18 Cal.App.5th 453). This case presents the following issue: When a consumer chooses restitution as a remedy for a defective vehicle under the Song-Beverly Consumer Warranty Act (Civ. Code, § 1790 et seq.), is the consumer entitled**

to receive registration fees paid after the time of sale as part of the restitution payable under Civil Code sections 1794 and 1793.2(d)(2)(B)?

16. ***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?**
17. ***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?**
18. ***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?**
19. ***Monster Energy Co. v. Schechter*, S251392 (4th App. Dist., 26 Cal.App.5th 54). The Court limited review to the following issues: (1) When a settlement agreement contains confidentiality provisions that are explicitly binding on the parties and their attorneys and the attorneys sign the agreement under the legend "APPROVED AS TO FORM AND CONTENT," have the attorneys consented to be bound by the confidentiality provisions? (2) When evaluating the plaintiff's probability of prevailing on its claim under Code of Civil Procedure section 425.16, subdivision (b), may a court ignore extrinsic evidence that supports the plaintiff's claim or accept the defendant's interpretation of an undisputed but ambiguous fact over that of the plaintiff?**

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

20. ***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?**

21. ***National Lawyers Guild v. City of Hayward*, S252445 (1st App. Dist., 27 Cal.App.5th 937, mod, 28 Cal.App.5th 372e). This case presents the following issue: Does the California Public Records Act permit a public agency to shift the cost of redacting exempt information from electronic records to the party making the request for the records although the cost of redaction cannot be required for paper records?**

22. ***Nationwide Biweekly Administration. Inc. v. Superior Court*, S250047 (1st App. Dist., 24 Cal.App.5th 438). This case presents the following issue: Is there a right to a jury trial in a civil action brought by the People, acting through representative governmental agencies, pursuant to the Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.) or the False Advertising Law (Bus. & Prof. Code, § 17500, et seq.), because the People seek statutory penalties, among other forms of relief?**

23. ***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?**

24. ***Oman v. Delta Air Lines, Inc.*, S248726 (9th Cir. 889 F.3d 1075). As restated by the Court, the questions presented are: (1) Do California Labor Code sections 204 and 226 apply to wage payments and wage statements provided by an out-of-state employer to an employee who, in the relevant pay period, works in California only episodically and for less than a day at a time? (2) Does California minimum wage law apply to all work performed in California for an out-of-state employer by an employee who works in California only episodically and for less than a day at a time? (See Cal. Labor Code, §§ 1182.12, 1194; Cal. Code Regs., § 11090(4).) (3) Does the *Armenta*/*Gonzalez* bar on averaging wages apply to a pay formula that generally awards credit for all hours on duty, but which, in certain situations resulting in higher pay, does not award credit for all hours on duty? (See *Gonzales v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 155 Cal. Rptr. 3d 18; *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 37 Cal. Rptr. 3d 460.)**

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

26. ***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?**

27. ***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?**

28. ***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?**

29. ***Rockefeller Technological Investments (Asia) VII v. Changzou Sinotype Technology Co., Ltd.*, S249923 (2d App. Dist., 24 Cal.App.5th 115). The Court limited review to the following issue: Can private parties contractually agree to legal service of process by methods not expressly authorized by the Hague Convention?**

30. ***Sandoval v. Qualcomm Inc.*, S252796 (4th App. Dist., 28 Cal.App.5th 381). This case presents the following issue: Can a company that hires an independent contractor be liable in tort for injuries sustained by the contractor's employee based solely on the company's negligent failure to undertake safety measures or is more affirmative action required to implicate *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198?**

31. ***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?**

32. ***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?**

33. ***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?**

34. ***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?**

35. ***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?**

36. ***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"?**

37. ***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?

38. ***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?**

39. ***Villanueva v. Fidelity National Title Co.*, S252035 (6th App. Dist., 26 Cal.App.5th 1092). The Court limited review to the following issues: (1) Insurance Code section 12414.26 provides: "No act done, action taken, or agreement made pursuant to the authority conferred by Article 5.5 (commencing with Section 12401) or Article 5.7 (commencing with Section 12402) of this chapter shall constitute a violation of or grounds for prosecution or civil proceedings under any other law of this state heretofore or hereafter enacted which does not specifically refer to insurance." Does this statute provide immunity to an underwritten title company for charging consumers for services for which there have been no rate filings with the Insurance Commissioner? Stated otherwise, by charging unfiled rates, did Fidelity act "pursuant to the authority conferred by Article 5.5?" (2) Does the Insurance Commissioner have exclusive jurisdiction over any action against an underwritten title company for services charged to the consumer, but not disclosed to the Department of Insurance?**

40. ***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?**

41. ***Ward v. United Airlines, Inc.*, S248702 (9th Cir. 889 F.3d 1068); *Vidrio v. United Airlines, Inc.* (889 F.3d 1068). As restated by the Court, the questions presented are: (1) Does California Labor Code section 226 apply to wage statements provided by an out-of-state employer to an employee who resides in California, receives pay in California, and pays California income tax on her wages, but who does not work principally in California or any other state? (2) The Industrial Wage Commission Wage Order 9 exempts from its wage statement requirements an employee who has entered into a collective bargaining agreement (CBA) in accordance with the Railway Labor Act (RLA). (See Cal. Code Regs., tit. 8, § 11090(1)(E).) Does the RLA exemption in Wage Order 9 bar a wage statement claim brought under California Labor Code section 226 by an employee who is covered by a CBA?**

42. ***White v. Square, Inc.*, S249248 (9th Cir. 891 F.3d 1174). The question presented is: Does a plaintiff suffer discriminatory conduct, and thus have statutory standing to bring a claim under the Unruh Act, when the plaintiff visits a business's website with the intent of using its services, encounters terms and conditions that deny the plaintiff full and equal access to its services, and then departs without entering into an agreement with the service provider? Alternatively, does the plaintiff have to engage in some further**

interaction with the business and its website before the plaintiff will be deemed to have been denied full and equal treatment by the business?

43. ***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?**

44. ***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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