# GIBSON DUNN

# California Supreme Court Round-Up
# January 2019 – November 2019

November 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 January through November 2019, 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

### SLAPP & Anti-SLAPP Litigation

1. ***Sweetwater Union High 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?**

   **Decided February 28, 2019 (6 Cal.5th 931).** Corrigan, J., for a unanimous Court. The Court affirmed and held that statements on plea forms and in grand jury testimony transcripts are admissible in anti-SLAPP proceedings if it is "reasonably possible" that the evidence contained therein will be admissible at trial. Defendants secured building contracts for facilities improvements for Sweetwater Union High School District. A criminal indictment was then handed down relating to the awarding of the contracts. The District sued to void the contracts, alleging a bribery scheme, and relying in part on Defendants' guilty and no contest pleas, and on grand jury testimony. Defendants brought a motion to strike under Code of Civil Procedure section 425.16 (the SLAPP Act) on the grounds that the District was trying to interfere with their constitutionally protected free speech rights. In turn, the District filed an anti-SLAPP motion under the SLAPP Act. Defendants argued that the content of the plea forms and the grand jury testimony transcripts were hearsay and therefore inadmissible. The Court of Appeal held that because the plea forms were signed under penalty of perjury, they were admissible as declarations in pretrial anti-SLAPP proceedings under Code of Civil Procedure section 2015.5. The Court of Appeal further held that the grand jury testimony was admissible under the same exemption because "the transcriptions are of the same nature as a declaration in that the testimony [transcribed] is given under penalty of perjury." The Supreme Court affirmed, holding that excluding such testimony—which is "at least as reliable as an affidavit or declaration"—would contravene the purposes of the SLAPP Act. The



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Court explained that because discovery is stayed during SLAPP proceedings, normal evidentiary hurdles should be lessened. Defendants also objected to the substance of the evidence, arguing that it should have been admissible at trial to be used in the anti-SLAPP proceeding. The Court disagreed, holding that such evidence may be considered in anti-SLAPP proceedings "if it is reasonably possible" that the evidence will be admissible at trial.

2. ***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?**

**Decided May 6, 2019 (7 Cal.5th 133).** Cuéllar, J., for a unanimous Court. The Court reversed and held that the context of speech is relevant to whether the speech furthers the exercise of constitutional free speech rights on matters of public interest under a catchall provision of Code of Civil Procedure Section 425.16, subdivision (e)(4) (the SLAPP Act). FilmOn.com, a business that distributes internet entertainment programming, sued DoubleVerify, a business that provides online tracking, verification, and brand-safety services to internet advertisers, alleging that DoubleVerify disparaged FilmOn in confidential reports to DoubleVerify's customers by falsely classifying FilmOn websites as containing adult content and copyrighted material. In response, DoubleVerify filed an anti-SLAPP motion based on a catchall provision of the SLAPP Act, which protects "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." The trial court granted the motion, and the Court of Appeal affirmed on the grounds that DoubleVerify's reports "concerned issues of interest to the public," including knowing which internet content is inappropriate for children or copyrighted, irrespective of the context in which DoubleVerify made the statements. The Supreme Court reversed, holding that the context of the speech is relevant to whether a "functional relationship exists between the speech and the public conversation about some matter of public interest" under the catchall provision. The Court explained that "DoubleVerify's reports—generated for profit, exchanged confidentially, without being part of any attempt to participate in a larger public discussion—do not qualify for anti-SLAPP protection under the catchall provision, even where the topic discussed is, broadly speaking, one of public interest." The Court was careful to note that commercial speech is not categorically excluded from anti-SLAPP protection, but in this case DoubleVerify's reports were "too tenuously tethered to the issues of public interest they implicate, and too remotely connected to the public conversation about those issues, to merit protection under the catchall provision." In so holding, the Court approved of *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, reasoning that "it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate."


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3. ***Monster Energy Co. v. Schecter*, 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?**

**Decided July 11, 2019 (7 Cal.5th 781).** Corrigan, J., for a unanimous Court. The Court reversed and held that, in the context of defeating an anti-SLAPP motion, Monster Energy had met its burden in showing that its suit against an attorney for breach of a confidentiality agreement had sufficient "minimal merit" where counsel had signed the agreement under a notation that it was "approved as to form and content." A settlement agreement included several provisions purporting to impose confidentiality on the parties and their counsel. Counsel signed the agreement, noting that he approved the agreement "as to form and content." Counsel allegedly violated the agreement by making public statements about the settlement. Monster Energy sued for breach, prompting counsel to file an anti-SLAPP motion on the grounds that he was not bound by the confidentiality provisions, and thus the suit did not have "minimal merit." The trial court denied counsel's motion, but the Court of Appeal reversed, holding that counsel's signature, indicating approval of the agreement only as to "form and content" precluded a finding that counsel also intended to be bound by the substantive provisions of the agreement. The Supreme Court reversed, reasoning that an attorney's signature on a document containing substantive provisions, even if attached to a "form and content" notation, may reflect a dual intent to both approve the contract for his client's signature, and to be personally bound by the contents of the contract. The Court further held that a reasonable factfinder could conclude that counsel had agreed to be bound given the repeated contractual references to the obligations of both "parties and their counsel," and in light of statements by counsel to a reporter that "he could not reveal the amount of the settlement because '[the client] wants the amount to be sealed.'" The Court also reasoned that public policy favored the enforcement of confidentiality provisions as a means of encouraging settlements.

## Arbitration

4. ***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?**

   **Decided May 30, 2019 (7 Cal.5th 350).** Corrigan, J., for a unanimous Court. The Court reversed and held that trial courts lack authority to vacate an arbitration award when the arbitrator fails to award costs due under Code of Civil Procedure section 998. A dispute over attorney fees was resolved in arbitration. The client made a section 998 offer to settle the case for $30,001, which the attorney rejected. Under section 998, if the refusing party obtains a lesser result than the offer at trial or in arbitration, the refusing party must pay the offering party's costs incurred after the offer. The arbitrator heard the dispute and offered an award of $0 to both parties and directed each party to pay its own costs. Six days after the judgment, the client advised the arbitrator of the section 998 offer, but the arbitrator refused to award costs. The client then filed a motion in the superior court seeking section 998 costs, but that court ruled that only the arbitrator could award costs. The Court of Appeal reversed, holding that the client timely submitted the section 998 offer to the arbitrator, and that the trial court could vacate the arbitrator's award because the arbitrator had ignored material evidence. The Supreme Court agreed that submission of the section 998 offer was timely, but held that the arbitrator's failure to award section 998 costs could not be remedied by the trial court. The Court explained that an arbitration award can be vacated only for fraud, corruption, misconduct, a conflict of interest, or some other issue that questions the fairness of the arbitration process. If such concerns are not present, only minor changes that do not impact the merits of the judgment can be made to an arbitrator's award. Therefore, the arbitrator's error in failing to award costs to the client under section 998 does not give the trial court authority to vacate the arbitrator's judgment.

5. ***OTO, LLC v. Kho (Su)*, 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?**

   **Decided August 29, 2019 (8 Cal.5th 111).** Corrigan, J. for a majority of the Court (Chin, J., dissenting). The Court reversed an order compelling arbitration of an employee's administrative wage claim, holding that an agreement signed under circumstances of "extraordinarily high" procedural unconscionability is

unenforceable, even with a low degree of substantive unconscionability. Kho worked as a technician for One Toyota of Oakland ("OTO"). After signing an arbitration agreement, he later filed a wage claim against OTO with the Department of Labor Standards Enforcement ("DLSE"). OTO petitioned in state court to compel arbitration of the claim. The DLSE proceeded with a hearing, and found in favor of Kho. OTO then sought to vacate the DLSE's award. The trial court vacated the award, but denied OTO's petition to compel arbitration. OTO appealed, and the Court of Appeal ruled that the arbitration agreement was enforceable because, even though it was procedurally unconscionable, it was not substantively unconscionable. Kho petitioned for review by the Supreme Court. The Court reversed, holding that the agreement was unenforceable under California's "sliding scale" approach to unconscionability because, although there was no substantive unconscionability, the agreement involved an "extraordinarily high" degree of procedural unconscionability. Specifically, the Court concluded that the "circumstances here demonstrate significant oppression" because the company conveyed an expectation that the document be signed immediately without question. Furthermore, the agreement was written in "extremely small font" and was so densely worded and "filled with statutory references and legal jargon" that it was a "paragon of prolixity," inaccessible to laypeople. In a vigorous dissent, Justice Chin found the majority's analysis of unconscionability to be inconsistent with established law, explaining that the arbitration clause's terms provided more than enough procedural rights to be enforceable. Justice Chin also argued that the majority's holding was preempted by the Federal Arbitration Act because "judges may not declare an arbitration agreement to be unenforceable based on their subjective view that the arbitration procedure would not provide 'effective vindication' of a statutory right."

6. ***ZB N.A., v. Superior Court (Lawson)*, S246711 (4th App. Dist., 18 Cal.App.5th 175). 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.)?**

   **Decided September 12, 2019 (8 Cal.5th 175).** Cuéllar, J., for a unanimous Court. The Court affirmed and held that employees' pre-dispute agreements to individually arbitrate their claims against employers do not bar their right to bring claims under the Private Attorneys General Act of 2004 (PAGA), but that the employees cannot seek underpaid wages under PAGA. An employee who had signed an arbitration agreement requiring her to forego class arbitration sued her employer and its parent company under PAGA (Labor Code § 2698 et seq.), which grants employees the right to bring representative actions seeking civil penalties on behalf of the state for Labor Code violations. The Supreme Court previously held in *Iskanian v. CLS Transp. L.A., LLC* (2014) 59 Cal.4th 348, that employers may not enforce pre-dispute waivers of PAGA rights, and that the Federal Arbitration Act (FAA) is not preemptive of this rule. The employee sued for alleged violations of Labor Code section 558, which, before PAGA, granted the Labor

Commissioner the right to fine employers for first and subsequent violations "a civil penalty as follows: [a certain number of dollars] . . . in addition to an amount sufficient to recover underpaid wages." The employer's parent company asserted that the employee could not seek "underpaid wages" under PAGA, and sought to force arbitration of that part of the employee's claim. The Court of Appeal sided with the employee, concluding that the civil penalty available under section 558 included underpaid wages, and further held the employee's claim need not be subject to arbitration under *Iskanian*. The Supreme Court reversed in part, holding that the "underpaid wages" recoverable under section 558 were not meant to be recoverable by private citizens under PAGA. Nonetheless, it affirmed the Court of Appeal's holding that the employee's claims could not be subject to arbitration.

## Choice of Law

7. ***Chen v. L.A. Truck Centers*, 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?**

   **Decided July 22, 2019 (7 Cal.5th 727).** Chin, J., for a unanimous Court. The Court reversed and held that trial courts are not required to revisit choice-of-law determinations except under exceptional circumstances. In this case, passengers injured in a tour bus accident sued the distributor and manufacturer of the bus, California and Indiana companies, respectively. Under the governmental interest test formulated in *Reich v. Purcell* (1967) 67 Cal.2d 551, the trial court determined that Indiana law applied. The manufacturer then settled all outstanding claims, and the distributor argued that the trial court should revisit its choice-of-law determination because the Indiana company was no longer involved in the litigation. The trial court declined to revisit the choice-of-law determination. The Court of Appeal reversed, holding that the trial court should have reconsidered the application of Indiana law because Indiana no longer had an interest in the litigation. The Supreme Court reversed, holding that the trial court was not required to revisit the choice-of-law determination, and emphasized both the impracticality of changing a choice-of-law determination that had governed the conduct of discovery and the impediment that doing so would have on the efficient resolution of the case. The Court explained that the "circumstances in which trial courts are required to revisit a choice of law determination, if any, should be the exception and not the rule."

8. ***Pitzer College v. Indian Harbor Insurance Company*, 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?**

**Decided August 29, 2019 (8 Cal.5th 93).** Chin, J., for a unanimous Court. In response to the questions certified by the Ninth Circuit, as restated by the Supreme Court, the Court held that California's notice-prejudice rule is a fundamental public policy for purposes of choice-of-law analysis, and that the notice-prejudice rule is applicable to a consent provision in an insurance policy where coverage does not depend on the existence of a third-party claim or potential claim. Indian Harbor Insurance Company's policy covering Pitzer College for expenses resulting from pollution conditions contained a notice provision, a consent provision, and a choice-of-law provision stating that New York law was to govern all matters arising under the policy. Pitzer remediated pollution discovered during construction of a new dormitory, but failed to obtain Indian Harbor's consent before commencing remediation or paying remediation costs. Pitzer also failed to inform Indian Harbor of the remediation until after it was completed. Indian Harbor denied coverage. Under New York insurance law, policies issued and delivered outside New York are subject to a strict no-prejudice rule, which denies coverage where timely notice is not provided. In contrast, California's notice-prejudice rule requires an insurer to prove that late notice has substantially prejudiced its ability to investigate and negotiate payment for the insured's claim. California applies the principles set forth in section 187 of the Restatement Second of Conflict of Laws in determining the enforceability of contractual choice-of-law provisions. Under section 187, the parties' choice of law generally governs unless it conflicts with a state's fundamental public policy and that state has a materially greater interest in the determination of the issue than the contractually chosen state. The Ninth Circuit requested that the Supreme Court resolve whether California's common law notice-prejudice rule is such a fundamental public policy, and, if so, whether the notice-prejudice rule applies to the consent provision of the insurance policy in this case. The Supreme Court concluded that California's notice-prejudice rule is a fundamental public policy because it cannot be contractually waived, protects insureds against inequitable results generated by insurers' superior bargaining power, and protects the public from bearing the costs of harm that an insurance policy purports to cover. The Court further held that the notice-prejudice rule is applicable to a consent provision in a first-party policy where coverage does not depend on the existence of a third-party claim or potential claim. But the Court left for the Ninth Circuit the determination of whether the policy at issue should be considered first party or third party for purposes of the rule.

## Civil Procedure

9. ***Meza v. Portfolio Recovery Associates*, S242799 (9th Cir., 800 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?**

**Decided February 15, 2019 (6 Cal.5th 844).** Cantil-Sakauye, C.J., for a unanimous Court. In response to a question certified by the Ninth Circuit, the

Court held that the affiant of a Code of Civil Procedure section 98 affidavit must be physically present at the address listed in the affidavit if, under California process rules, the affiant must be personally served in order to be required to appear at trial. In limited civil cases, Code of Civil Procedure section 98, subdivision (a) provides that an affidavit or declaration filed in lieu of live testimony is not hearsay if it lists the current address of the affiant within 150 miles of the place of trial, and if the affiant is available for service of process at that place for a reasonable period of time during the 20 days immediately prior to trial. A consumer sued debt collectors under the Fair Debt Collection Practices Act. The debt collectors introduced a section 98 declaration at trial from a records custodian that explained that the consumer owed a debt. The consumer argued that the declaration violated section 98 because the records custodian was not physically available at the address provided in the declaration. The Court held that, generally, in order for a party to compel a person to appear at a civil trial, the person must be personally served, and explained that if an affiant could be summoned to appear at trial only through personal service of process, "availability for personal service would be necessary—meaning that the affiant would need to be personally present within 150 miles of the place of trial—unless an exception to the personal service requirement were to apply." When there is an exception and service other than personal service is acceptable, the affiant need not be physically present at the listed address. But when service may lawfully be completed by a notice to attend served on an attorney, a local address where the person will be physically present, or their attorney's local address, is required.

10. ***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?**

**Decided July 29, 2019 (7 Cal.5th 955).** Cantil-Sakauye, C.J., for a unanimous Court. The Court reversed and held that, for the purposes of fulfilling the ascertainability requirement for class certification under section 382 of the Code of Civil Procedure, a plaintiff need only propose a defined class "in terms of objective characteristics and common transactional facts" that make the "ultimate identification of class members possible when that identification becomes necessary." Accordingly, the ascertainability requirement does not mandate plaintiffs to supply evidence showing how class members might be individually identified without unreasonable expense. In this case, plaintiff sued Rite Aid drugstore, claiming false advertising and unfair business practices, because an inflatable pool he purchased appeared larger on the packaging. Plaintiff also sought to certify a class of "[a]ll persons who purchased the Ready Set Pool at a Rite Aid store located in California within the four years preceding the date of the filing of this action." Plaintiff did not provide evidence of whether Rite Aid kept records of pool purchase transactions or the contact information of purchasers. The trial court declined to certify a class. The Court of Appeal affirmed, holding that plaintiff had not conducted sufficient discovery to meet his burden of

demonstrating that there were mechanisms for identifying members of the putative class so that they could be notified of the litigation. The Supreme Court reversed, holding that the Court of Appeal imposed too great a burden on plaintiffs at the class certification stage. The Court reasoned that a more generous ascertainability standard would ensure class actions remain a viable means of recovery in cases involving modest individual damages. The Court further explained that a class definition framed in sufficiently objective terms so as to make the identification of class members "possible" when it became necessary to identify them was consistent with due process.

## Employment & Labor

11. ***Goonewardene v. ADP*, 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?**

    **Decided February 7, 2019 (6 Cal.5th 817).** Cantil-Sakauye, C.J., for a unanimous Court. The Court reversed and held that where an employer hires an independent payroll service provider to take over all the tasks that would otherwise be performed by an internal payroll department, an employee who believes he or she was not paid the wages due under the applicable labor statutes and wage orders may not bring a civil action against the payroll service provider. An employee sued her former employer alleging that the employer had failed to pay her wages due, and then wrongfully terminated her when she brought the failure to her employer's attention. The employee sought to join ADP, LLC, a payroll company that provided services to the employer. The trial court sustained ADP's demurrer and entered judgment dismissing the employee's action against ADP. The Court of Appeal reversed, finding that the employee qualified as a third-party beneficiary to the contract between the employer and ADP, and thus the employee's allegations were sufficient to support causes of action against ADP. The Supreme Court reversed, holding that the employee was not a creditor beneficiary of the contract, as there was nothing to suggest ADP agreed to pay wages owed to the employee out of its own funds. The Court further held that the employee could not bring a breach of contract action under California's third-party beneficiary doctrine, as she could not satisfy two of its three elements: (1) the benefit provided to the employee was not a motivating purpose of the contracting parties, and (2) permitting such a third-party action would not be consistent with the objectives of the contract and the reasonable expectations of the contracting parties. The Court also held that, for policy reasons, ADP did not owe the employee a common law duty of care, and thus the employee's negligence cause of action was barred. And, for similar policy reasons and because the employee was not an intended beneficiary of ADP's services, the Court held that the employee's cause of action for negligent misrepresentation could not proceed.

12. ***Melendez v. San Francisco Baseball Assoc.*, S245607 (1st App. Dist., 16 Cal.App.5th 339). The Court limited review to the following issue: Does plaintiff's statutory wage claim under Labor Code section 201 require the interpretation of a collective bargaining agreement, and is it therefore preempted by section 301 of the Labor Management Relations Act?**

**Decided April 25, 2019 (7 Cal.5th 1).** Chin, J., for a unanimous Court. The Court reversed and held that because the dispute ultimately turned on an interpretation of state law, and not on the contents of the parties' collective bargaining agreement ("CBA"), the suit was not preempted under the Labor Management Relations Act of 1947 ("LMRA"). A guards' union that provided security at a baseball stadium sued the San Francisco Giants baseball team for allegedly violating Labor Code section 201, which requires that discharged employees receive "wages earned and unpaid at the time of discharge . . . immediately." The Giants argued that the lawsuit required interpretation of the parties' CBA, which would make the lawsuit subject to federal law and require that it be submitted to arbitration under the LMRA. Accordingly, the Giants moved to compel arbitration. The trial court denied the Giants' motion, holding that "resolution of the controversy does not require interpretation of the CBA, but simply a determination of whether the security guards are discharged within the meaning of Labor Code section 201." The Court of Appeal reversed, citing numerous provisions of the CBA that had to be interpreted to resolve the dispute. The Supreme Court reversed in turn, holding that although the CBA was relevant to the dispute and may have needed "to be consulted," the dispute ultimately turned not on the CBA, but on the meaning of "discharge" under Labor Code section 201. In reaching this conclusion, the Court relied heavily on *Balcorta v. Twentieth Century-Fox Film Corp.* (9th Cir. 2000) 208 F.3d 1102, in which the Ninth Circuit held that state-law claims to enforce collective bargaining agreements are preempted by the LMRA, but that "not every claim which requires a court to refer to the language of a [collective bargaining] agreement is necessarily preempted." *Balcorta* established a two-part test for resolving this issue: First, if the claim arises from the CBA rather than from state law, it is necessarily preempted. Second, if the claim arises from state law, the Court must question whether the claim requires interpretation of a mere reference to the CBA. In this case, the Court held that the union's claim plainly arose out of state law, and that although portions of the CBA were relevant to the parties' dispute, none were in need of interpretation themselves nor could they answer the question of whether the guards were discharged within the meaning of Labor Code section 201.

13. ***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?**

**Decided August 15, 2019 (7 Cal.5th 1141).** Kruger, J., for a majority of the Court (Cuéllar, J., dissenting, joined by Liu, J.). The Court affirmed and held that a claim for earned but unpaid wages is not a cognizable cause of action. Brett

Voris worked for Greg Lampert to launch three start-up ventures, partly in exchange for a promise of later payment of wages. Voris was fired and never paid. He successfully sued the start-up companies for nonpayment of wages, and then sought to hold Lampert personally responsible for the unpaid wages on a theory of common law conversion. Voris argued that by failing to pay his wages, the companies converted his personal property to the companies' use, and that Lampert was individually liable for the alleged misconduct. The trial court and Court of Appeal rejected that argument and the Supreme Court affirmed, holding that Voris did not have a cognizable conversion claim. The Court explained that the tort of conversion is understood as "the wrongful exercise of dominion over personal property of another," and a conversion claim for money will not lie unless "a specific sum capable of identification is involved." The Court further reasoned that "where the money or fund is not identified as a specific thing," the action should be one for contract or debt, rather than conversion. Accordingly, cases recognizing claims for conversion of money usually involve misappropriated, commingled, or otherwise misapplied specific funds held for the benefit of others. Thus, unlike claims for conversion of commissions, gratuities, proceeds from a particular sale, or attorney fees, which are cognizable, Voris's claim for conversion of wages failed. The Court further explained that there are already extensive remedies to ensure employees are paid in full. In dissent, Justice Cuéllar argued that wages are an employee's property once they are earned; "[t]hat the unpaid wages may be commingled with the employer's general funds does not disqualify them as property that may be converted, so long as the sum owed is specific and definite."

## Insurance

**14. *Wishnev v. Northwestern Mutual Life Insurance*, 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?**

**Decided November 14, 2019 (____).** Corrigan, J. for a unanimous Court. In response to a question certified by the Ninth Circuit, the Court held that lenders exempt from restrictions imposed by California's usury laws, as codified in Article XV of the California Constitution, are not required to obtain a borrower's signed consent to charge compound interest on a loan. Plaintiff Wishnev filed a class action lawsuit alleging that Northwestern Mutual was barred by California's usury laws from assessing compound interest on loans taken out against life insurance policies because borrowers never agreed to the loan terms in writing. The U.S. District Court denied Northwestern Mutual's motion to dismiss, holding that Northwestern Mutual was required to secure a borrower's signed consent before charging compound interest, and failed to do so. The Supreme Court held that such signed agreement is not required, relying principally on rules of statutory construction to hold that the compound interest limitation in California's usury laws was impliedly repealed as to exempt lenders like Northwestern Mutual. The Court held that Article XV of the California Constitution, enacted in 1934, conferred upon the Legislature the power to "regulate an exempt lender's compensation 'in any manner,'" and this "broad legislative authority necessarily conflicts with the more narrow compound interest limitation" put in place in 1918 to prohibit charging compound interest in the absence of written notice and signed agreement. Because the 1918 compound interest limitation "necessarily restricts legislative authority to specify when compounding is permitted" under Article XV, the Court held that the 1934 amendment impliedly repealed the 1918 compound interest limitation as to exempt lenders. The Court was careful to explain, however, that its holding "does not mean exempt lenders may charge compound interest without a contractual or legal basis to do so"; it "simply means they are not subject to statutory liability and penalties otherwise imposed by the 1918 initiative on nonexempt lenders."

## Property

15. ***Black Sky Capital 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?**

**Decided May 6, 2019 (7 Cal.5th 156).** Liu, J. for a unanimous Court. The Court affirmed and held that Code of Civil Procedure section 580d does not preclude a creditor holding two deeds of trust on the same property from recovering a deficiency judgment on the junior lien extinguished by a nonjudicial foreclosure sale on the senior lien. When a creditor recovers a debt secured by a deed of trust on real property through a nonjudicial foreclosure sale, section 580d provides that the creditor cannot collect a deficiency judgment if the property is sold for less than the amount of the outstanding debt. A couple borrowed money from a bank by executing a promissory note secured by a deed of trust on a parcel of commercial property. Two years later, they borrowed additional funds from the

same bank by executing a second promissory note secured by a separate deed of trust on the same property. The couple eventually defaulted on the loans, and plaintiff Black Sky Capital, which owned the loans by then, foreclosed on the senior lien and filed a lawsuit to recover the amount still owed on the junior lien that was extinguished. The trial court held that section 580d barred recovery by Black Sky because it was both the senior and junior lienholder. The Court of Appeal reversed. In affirming, the Supreme Court noted that the plain language of section 580d "makes clear that the statute applies where sale of the property has occurred under *the deed of trust securing the note sued upon*, and not some other deed of trust." Since no sale had occurred under the trust deed securing the junior lien, section 580d did not apply to bar Black Sky's recovery, even though it is the same creditor that foreclosed on the senior lien on the same property. The Court noted that it had no occasion to decide the applicability of section 580d in a scenario where a creditor structured a functionally single loan as two separate notes in order to recover under the junior note what it could not recover had it issued a single note on the same property because there was no suggestion of such gamesmanship by Black Sky in this case.

## Tort Law & Consumer Protection

16. ***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?**

**Decided May 30, 2019 (7 Cal.5th 391).** Cuéllar, J., for a unanimous Court. The Court affirmed and held that a gas company had no tort duty to guard against purely economic losses suffered by local businesses as a result of proximity to a gas leak. In October 2015, a Southern California Gas Company ("SoCalGas") storage facility experienced a substantial natural gas leak. A group of local businesses brought negligence claims on behalf of all businesses within five miles of the leak, alleging that the mass departure of residents deprived them of customers and devastated the local economy. The businesses did not allege any accompanying personal injury or property damage. SoCalGas demurred, arguing that the businesses' negligence claims failed as a matter of law because they were seeking to recover solely for economic losses. The trial court overruled the demurrer, and SoCalGas petitioned for a writ of mandate. The Court of Appeal granted the petition and reversed the trial court. In affirming, the Supreme Court explained that the general rule in California is that there is no recovery for negligently inflicted stand-alone economic loss, citing the need to "safeguard the efficacy of tort law by setting meaningful limits on liability." The Court held that this rule applies to cases arising from proximity to an industrial accident because, even though the amount of economic loss is quantifiable, imposing a duty to guard against such losses would present spatial and temporal line-drawing problems. Here, the Court found no meaningful way to spatially limit the claims because people near and far were economically harmed, even though the plaintiffs limited

the putative class to within a five-mile radius of the leak. The Court also found no viable way to temporally limit the claims because the businesses alleged that the harm will continue into the future as long as the SoCalGas facility is still in operation. The Court concluded that dismissal of the claims was necessary to prevent indeterminate liability.

17. ***White v. Square*, 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?**

**Decided August 12, 2019 (7 Cal.5th 1019).** Liu, J. for a unanimous Court. In response to the question certified by the Ninth Circuit, the Court held that a plaintiff has standing to bring an action under the Unruh Civil Rights Act when he visits a website with the intent of using its services, encounters terms and conditions that allegedly deny him equal access to the services, and then leaves the website without entering into an agreement with the service provider. The Unruh Act provides that all people are entitled to equal services from all businesses regardless of their sex, race, religion, and several other protected characteristics. Square provides an internet service that enables merchants to accept payments from customers in exchange for a flat fee and a percentage from every sale. Square's terms of service require that users not use its services in connection with certain businesses, including bankruptcy attorneys. White is a bankruptcy attorney who alleges that he went to the website with the intent of creating an account, read the terms of service, and declined to continue with account creation because he intended to use the services for his business. White brought an action against Square in federal court. The district court dismissed his suit for lack of standing. On appeal, the Ninth Circuit certified the question to the California Supreme Court. In concluding that White has standing to bring his Unruh Act claims, the Court analogized to the situation of a customer who approaches an unattended physical establishment with intent to use its services and encounters a discriminatory sign, such as a segregated water fountain, explaining that the customer would have standing even if she did not make use of the establishment in contravention of the sign, or make a demand that services be provided. The Court further explained that the Unruh Act's purpose of eradicating discrimination would be undermined if plaintiffs were required to transact with a business to have standing, when the business is refusing its services. Accordingly, the Court held that mere awareness of a business's discriminatory policy is not enough for standing, but that visiting a website with intent to use its services is sufficient without entering into an agreement with the business.

## 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. ***Donohue v. AMN Services, LLC*, S253677 (4th App. Dist., 29 Cal.App.5th 1968). This case includes the following issue: Can employers utilize practices upheld in the overtime pay context to round employees' time to shorten or delay meal periods?**
4. ***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?**
5. ***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?**
6. ***Han v. Hallberg*, S256659 (2d App. Dist., 35 Cal.App.5th 621). This case presents the following issues: (1) Can a trust be a partner in a partnership? (2) Does the death of a partner who has transferred his partnership interest to a trust trigger the buyout-on-death term in the partnership agreement?**
7. ***Hart v. Keenan Properties, Inc.*, S253295 (1st App. Dist., 29 Cal.App.5th 203). This case presents the following issues: (1) Was a witness's testimony about his recollection of seeing invoices regarding the supply of products containing asbestos to plaintiff's worksite inadmissible hearsay? (2) Could secondary evidence of the invoices be authenticated by the witness's statements and other circumstantial evidence?**

**Gibson Dunn**
for Defendant and
Respondent

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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.

8. ***Ixchel Pharma v. Biogen*, S256927 (9th Cir., 930 F.3d 1031). The questions presented are: (1) Does section 16600 of the California Business and Professions Code void a contract by which a business is restrained from engaging in a lawful trade or business with another business? (2) Is a plaintiff required to plead an independently wrongful act in order to state a claim for intentional interference with a contract that can be terminated by a party at any time, or does that requirement apply only to at-will employment contracts?**
9. ***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?**
10. ***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?**
11. ***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?**
12. ***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)?**
13. ***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**
14. ***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?**

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

15. ***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?**

16. ***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.)**

17. ***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?**

18. ***Saint Francis Memorial Hospital v. State Dept. of Public Health*, S249132 (1st App. Dist., 24 Cal.App.5th 617). This case presents the following issues: (1) Does equitable tolling apply to a petition for writ of mandate to challenge an action by a state regulatory agency that is filed outside the specified period? (2) Is equitable tolling justified on the facts of this case?**

19. ***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?**

20. ***Sass v. Cohen*, S255262 (2d App. Dist., 32 Cal.App.5th 1032, mod. 33 Cal.App.5th 942a). The Court limited review to the following issues: (1) In a complaint that seeks an accounting of specified assets, is the plaintiff required to plead a specific amount of damages to support a default judgment, or is it sufficient for purposes of Code of Civil Procedure section 580 to identify the assets that are in defendant's possession and request half of their value? (2) Should the comparison of whether a default judgment exceeds the amount**

**of compensatory damages demanded in the operative pleadings examine the aggregate amount of non-duplicative damages or instead proceed on a claim-by-claim or item-by-item basis?**

21. ***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?**

22. ***Shalabi v. City of Fontana*, S256665 (4th App. Dist., 35 Cal.App.5th 639). The Court limited review to the following issue: Code of Civil Procedure section 12 provides: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." In cases where the statute of limitations is tolled, is the first day after tolling ends included or excluded in calculating whether an action is timely filed? (See *Ganahl v. Soher* (1884) 2 Cal.Unrep. 415.)**

23. ***Stancil v. Superior Court*, S253783 (1st App. Dist., nonpublished opinion). The Court issued an order to show cause and limited review to the following issue: Is a motion to quash service of summons the proper remedy to test whether a complaint states a cause of action for unlawful detainer?**

24. ***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?**

25. ***Ward v. United Airlines, Inc. & Vidrio v. United Airlines, Inc.*, S248702 (9th Cir., 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?**

26. ***Weiss v. People ex rel. Dept. of Transportation*, S248141 (4th App. Dist., 20 Cal.App.5th 1156). This case presents the following issue: Can the procedure permitted by Code of Civil Procedure section 1260.040 be used in an inverse condemnation action to determine in advance of a bench trial whether a taking or damaging of private property has occurred?**

27. ***Yahoo! Inc. v. National Union Fire Ins. Co.*, S253593 (9th Cir., 913 F.3d 923). As restated by the Court, the question presented is: Does a commercial general liability insurance policy that provides coverage for 'personal injury,' defined as 'injury . . . arising out of . . . [o]ral or written publication, in any manner, of material that violates a person's right of privacy,' and that has been modified by endorsement with regard to advertising injuries, trigger the insurer's duty to defend the insured against a claim that the insured violated the Telephone Consumer Protection Act by sending unsolicited text message advertisements that did not reveal any private information?**

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.

*Photo courtesy of Supreme Court; Credit: Courtesy of Supreme Court*

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