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California Supreme Court Round-Up
December 2019 – August 2020

August 2020

Gibson Dunn named Appellate Firm of the Year

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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 December 2019 through August 2020, organized by subject. Each entry contains a description of the case, as well as a substantive analysis of the Court's decision.

Updates From the Court

Justice Ming Chin will be retiring at the end of August 2020, after 24 years of service on the Court. At the June oral argument, his colleagues presented a virtual tribute, and Justice Chin remarked that the current pandemic could provide an opportunity to improve the judicial system. "The future of law and the future of the courts will be virtual and remote," Justice Chin said. Governor Gavin Newsom is expected to announce Justice Chin's successor before the end of the year.

No update would be complete without recognizing the unprecedented COVID-19 pandemic and the decisive actions of the Chief Justice, Supreme Court, and Judicial Council to preserve the health and safety of the courts, judges and staff, and litigants. Since March 2020, the Chief Justice has issued numerous orders announcing emergency measures and implementing emergency Rules of Court approved by the Judicial Council, which suspended court operations and jury trials, tolled civil and criminal case deadlines, and suspended almost all unlawful detainer actions statewide through September 1. The Chief Justice also approved dozens of superior court and Court of Appeal emergency orders, which permitted those courts to implement their own emergency measures and rules. The Court will continue its recent practice of hearing oral argument virtually through at least the end of 2020, and if it does resume in-person hearings in 2021 they will take place only in San Francisco. Finally, the Supreme Court ordered the postponement of the July 2020 Bar examination to October 2020, and ordered the State Bar to make every effort to administer the examination online.

Select Cases Decided

Civil and Appellate Procedure

1. ***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?**

   Decided January 30, 2020 (8 Cal.5th 875). Groban, J. for a unanimous Court. The Court reversed and held that the rule of liberal construction compels that a notice of appeal be construed to include the omitted attorney when it is clear from the record that the omitted attorney intended to participate in the appeal and the respondent was not misled or prejudiced by the omission. Attorney Carrillo, who represented a minor in her suit against the Los Angeles Unified School District ("LAUSD"), was found in contempt of court and subjected to monetary sanctions for violating a discovery order. The trial court subsequently reversed its finding of contempt but maintained the monetary sanctions. Another attorney filed a notice of appeal from the judgment directing payment of monetary sanctions using a standard form on behalf of the minor client. The notice made no reference to Carrillo. The Court of Appeal dismissed the appeal for lack of jurisdiction finding that the right of appeal was vested in Carrillo, not his client, and absent an attempted appeal by the sanctioned party, the ruling was not reviewable. The Supreme Court noted that while the timely filing of a notice of appeal is an absolute jurisdictional prerequisite, technical accuracy in the contents of the notice is not. The Court held that the liberal construction requirement compels a reviewing court to evaluate whether the notice of appeal, despite the technical defect, nonetheless served its basic function of providing notice of who is seeking review of what order or judgment. It acknowledged that a bright-line rule requiring technical accuracy would have the benefit of clarity, but found that benefit insufficient to justify the forfeiture of the right to appeal when the party's intent to participate is reasonably clear from the record and where the omission has caused no confusion or prejudice to the opposing party. It further held that Carrillo's intent to participate was reasonably clear despite its omission from the notice of appeal because (1) the notice of appeal expressly designated the sanctions order as the sole order or judgment at issue in the appeal; (2) the challenged order only imposed sanctions against the attorney and had no effect on the rights of the client; and (3) during the trial court proceedings, Carrillo engaged in substantial litigation regarding the sanctions motions that focused exclusively on whether the superior court had the authority to discipline him. Additionally, LAUSD did not assert that it was misled or prejudiced from the notice's failure to reference the attorney as an appealing party.

Gibson Dunn named 2020 Litigation Department of the Year, an unprecedented fourth win

GIBSON DUNN
Counsel for *amicus curiae*
California Int'l Arbitration
Council in support of
Rockefeller Technological
Investments (Asia) VII

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

Decided April 2, 2020 (9 Cal.5th 125). Corrigan, J. for a unanimous Court. The Court reversed and held that private parties that agreed to arbitration in California can contractually agree to waive formal service of process under California law rendering compliance with the Hague Service Convention inapplicable. Two business entities, Rockefeller Technology Investments (Asia) VII ("Rockefeller") and Changzhou SinoType Technology Co. ("SinoType"), entered into a contract that provided that notice and service of process shall be effectuated by Federal Express mail with copies provided by email or facsimile to the addresses specified within the agreement. In addition, the contract provided that the parties were subject to the jurisdiction of the state and federal courts in California, and that in the event of a dispute, it was to be resolved by binding arbitration in Los Angeles applying California law. After a dispute arose, Rockefeller submitted the case to arbitration. Rockefeller provided notice via Federal Express to Sinotype's address in China and email, but SinoType never responded or appeared. The arbitrator eventually found for Rockefeller, and Rockefeller petitioned to confirm the award in superior court. Rockefeller transmitted the petition and summons via Federal Express to Sinotype's address in China and email, but SinoType never appeared, and the award was confirmed. However, when Rockefeller sought to enforce the award, SinoType moved to quash and to set aside the default judgment for insufficiency of service of process on the ground that Rockefeller had failed to comply with the Hague Service Convention for service of process abroad, and therefore the judgment confirming the arbitration award was void for lack of personal jurisdiction. While the Court agreed that the Hague Service Convention precludes service of process in China via Federal Express, it found that the Hague Service Convention did not apply here because the parties' agreement waived formal service of process under California law. The Court concluded that California Code of Civil Procedure section 1290.4(a) requires that petitions to confirm an arbitration award be served in the manner provided in the arbitration agreement and the agreement here expressly stated that service of process should be effectuated by Federal Express. Therefore, the parties waived and substituted formal service of process in the agreement for an informal method of providing notice, as authorized by section 1290.4(a). The Court reasoned that since the parties agreed to waive formal service of process under California law, the case did "not present an occasion to transmit a judicial document abroad" within the meaning of the Hague Service Convention. Finally, the Court observed that "[r]equiring formal service abroad … where sophisticated business entities have agreed to arbitration and a specified method of notification and document delivery would undermine the benefits arbitration provides" and would be "contrary to the Legislature's attempts to position California as a center for

international commercial arbitration." Gibson Dunn's more detailed client alert on this decision is available at: https://www.gibsondunn.com/california-supreme-court-confirms-that-the-hague-service-convention-does-not-preempt-right-of-parties-to-contract-for-their-preferred-method-of-service/

3. ***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?**

Decided on June 29, 2020 (9 Cal.5th 710). Cuéllar, J. for a unanimous Court. The Court reversed and held that equitable tolling applied to petitions for writs of mandate under Government Code section 11523 and that Saint Francis Memorial Hospital ("the Hospital") had satisfied the first two elements of equitable tolling, timely notice and lack of prejudice. The Court vacated the judgment and remanded to the Court of Appeal to determine whether the Hospital had satisfied the third element of reasonable and good faith conduct. The State Department of Health found the Hospital in violation of a regulation and imposed a fine when its doctors left a surgical sponge inside a patient during surgery. The Hospital appealed and on administrative review, the penalty was upheld "effective immediately." Shortly thereafter, the Hospital filed a request for reconsideration. While it was pending, the Hospital's counsel wrote to the Department's counsel to confirm his understanding that the Department had to decide the request for reconsideration by January 19 and informed the Department that if it was denied, the Hospital would seek to petition the superior court for a writ of mandate. One may petition for a writ under section 11523 "within 30 days after the last day on which reconsideration can be ordered." The Department confirmed the January 19 date. As it turns out, because the decision was "effective immediately" it was not eligible for reconsideration. Thus, the statute of limitations had begun running on the date of the decision, December 16. As a result, when the Hospital filed its petition for a writ of mandate shortly after receiving its denial of the request for reconsideration, the statute of limitations had already run. The Court held that since equitable tolling is a judicially created, nonstatutory doctrine created out of its own equitable powers, the Court presumes that statutory deadlines are subject to equitable tolling unless something in the statute indicates otherwise. The Court held that there was nothing in section 11523's language, structure, or legislative history that demonstrated a legislatively enacted expectation to prohibit equitable tolling. The Court further held that the Hospital had met the first two elements of equitable tolling: timely notice and lack of prejudice to the opposing party. Timely notice was satisfied because the Department had received notice of the Hospital's intentions through the filing of the request of reconsideration and its email regarding its plans to seek a writ. It concluded that lack of prejudice was likewise satisfied because equitable tolling would not prevent the Department from defending its claim on the merits given that it had defended against the claim throughout the administrative proceedings. The third element requires reasonable and good faith conduct by the plaintiff, which the Court explained was an objective and subjective test. However, since the Court of Appeal had not considered that issue, the Court remanded for the appellate court to do so in the first instance.

4. ***Conservatorship of O.B.*, S254938 (2d App. Dist., 32 Cal.App.5th 626). This case presents the following issue: On appellate review in a conservatorship proceeding of a trial court order that must be based on clear and convincing evidence, is the reviewing court simply required to find substantial evidence to support the trial court's order or must it find substantial evidence from which the trial court could have made the necessary findings based on clear and convincing evidence?**

   Decided July 27, 2020 (9 Cal.5th 989). Cantil-Sakauye, C.J. for a unanimous Court. The Court reversed and held that appellate review of the sufficiency of the evidence in support of a finding requiring clear and convincing evidence must account for the higher standard of proof, resolving a split of authority among the Courts of Appeal. The probate court appointed limited co-conservators for O.B., a young woman with autism, applying the requisite standard for such proceedings of clear and convincing evidence. O.B. appealed, arguing insufficient evidence. The Court of Appeal (like many courts) reviewed for sufficiency of the evidence without regard to the clear and convincing standard of proof applicable in the trial court. The Court of Appeal held that the clear and convincing standard of proof "disappears" on appeal. Other Courts of Appeal have looked at whether the record developed before the trial court contains substantial evidence allowing a reasonable factfinder to make the finding with the confidence required by the clear-and-convincing-evidence standard. The Supreme Court agreed with this latter view, holding that the reviewing court must take the higher standard of proof into account in assessing whether there is substantial evidence. It reasoned that substantial evidence must be of "ponderable legal significance" and whether it is cannot be assessed without accounting for the higher standard of proof. In addition, the clear-and-convincing-evidence standard is used when particularly important individual interests are at stake. Appellate review that accounts for the higher burden of proof reaffirms that these individual interests are of special importance and that the judicial system works in a coordinated manner to ensure their protection. It noted that its holding is more consistent with the Court's recent precedent and that of other state supreme courts. The holding also comports with the well-established rule that, in criminal cases, the appellate court reviews for substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt–i.e., considering the heightened standard of proof. The Court further held that nothing in the text or legislative history of the conservatorship statute showed that the Legislature intended that the standard of proof should be ignored when reviewing the record for substantial evidence. Lastly, the Court emphasized that courts nonetheless must not re-weigh the evidence and must view the record in the light most favorable to the prevailing party.

Employment & Labor

5. ***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?

Decided on March 12, 2020 (9 Cal.5th 73). Corrigan, J. for a unanimous Court. The Court reversed and held that settlement of individual claims for Labor Code violations does not deprive an aggrieved employee of standing, as the state's authorized representative, to pursue a claim under the Private Attorneys General Act (PAGA). Kim, a restaurant manager, brought suit against his employer, Reins, a restaurant group, for individual Labor Code violations and for civil penalties under PAGA. Reins moved to compel arbitration of the individual claims based on an agreement signed when Kim was hired and the PAGA litigation was stayed while the arbitration was ongoing. Reins eventually served a statutory offer to settle all of Kim's individual claims. Kim accepted and dismissed his individual claims, leaving only the PAGA claim for resolution. Reins then successfully moved for summary adjudication of the PAGA claim on the ground that Kim lacked standing because his rights had been redressed by the settlement. The Court noted that PAGA standing has two requirements: (1) the plaintiff must be an "aggrieved employee," defined as someone "who was employed by the alleged violator" and (2) "against whom one or more of the alleged violations was committed." It held that since Kim was employed by Reins and alleged that he personally suffered at least one Labor Code violation, he is an "aggrieved employee" with standing to sue on the state's behalf under PAGA. The Court rejected Reins' argument standing is premised on a plaintiff's injury and, therefore, standing is lost when that injury is redressed, noting that the definition of an aggrieved employee does not require an economic injury. Moreover, the PAGA statute allows an employee to bring claims for multiple alleged violations as long as he or she suffered at least one of them. The Court found this to be an indication that standing is not inextricably linked to the plaintiff's own injury. The Court also found Reins' interpretation of standing to be contrary to PAGA's statutory purpose, which is to enforce the Labor Code through a representative action, not to redress employee injury. If settlement deprived an aggrieved employee of standing, then PAGA's purpose would be undermined. The Court also noted that many PAGA claims are brought without an accompanying individual claim, thus militating against linking standing to a claim of individual injury. Moreover, many Labor Code statutes that impose civil penalties and are subject to PAGA do not confer a private right of action. Thus, standing should not be premised on an injury because that would undermine the enforcement of these statutes. The Court also concluded that nothing in the legislative history suggested the Legislature intended to limit standing to only employees with an unredressed injury.

6. ***Ward v. United Airlines, Inc. & Vidrio v. United Airlines, Inc.*, S248702 (9th Cir., 889 F.3d 1068). This case presents the following issues: (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?

Decided June 29, 2020 (9 Cal.5th 732). Kruger, J. for a unanimous Court. Plaintiffs were "pilots and flight attendants who reside in California but perform most of their work in airspace outside of California's jurisdiction." The airline paid them not according to California wage law, but instead according to the terms of a collective bargaining agreement under federal law. Plaintiffs, from three consolidated class actions, sued the airline for failure to provide wage statements that meet the requirements of Labor Code section 226. The Court answered two questions certified from the Ninth Circuit: (1) Whether the Railway Labor Act exemption in Wage Order No. 9 bars an employee covered by a collective bargaining agreement from bringing a wage-statement claim under section 226, and (2) Whether section 226 applies "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 his or her wages, but who does not work principally in California or any other state." The Court answered the first question in the negative, reasoning that there is no evidence the Legislature intended the Wage Order No. 9 exemption to foreclose plaintiffs from bringing section 226 claims. In response to the second question, the Court held that section 226 applies to wage statements if "the employee's principal place of work is in California," which may be satisfied if "the employee works a majority of the time in California" or, for workers "whose work is not primarily performed in any single state, if the worker has his or her base of work operations in California." For example, if, like the plaintiffs here, "a pilot or flight attendant has a designated home-base airport, section 226 would apply if that airport is in California, and not if it is elsewhere." The Court further noted that the other factors offered by the Ninth Circuit (employer location, employee residence, receipt of pay, and payment of taxes) are "not pertinent" to the analysis. The Court limited its holding to section 226, noting this approach "would not necessarily apply to the state's minimum wage, equal pay, or antiharassment laws."

7. ***Oman v. Delta Air Lines, Inc.*, S248726 (9th Cir., 889 F.3d 1075). This case presents the following issues: (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.)**

Decided June 29, 2020 (9 Cal.5th 762). Kruger, J. for a unanimous Court. Plaintiff flight attendants filed a putative class action alleging the airline violated California labor law by failing to pay its flight attendants for all hours worked,

failing to pay all wages in accordance with the semimonthly time frame required by Labor Code section 204, and failing to provide compliant wage statements pursuant to Labor Code section 226. As in *Ward v. United Airlines, Inc.*, 9 Cal.5th 732 (2020), the Court addressed unsettled questions of California law at the request of the Ninth Circuit: (1) Whether "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 episodically and for less than a day at a time;" (2) Whether California minimum wage law applies 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;" and (3) Whether the wage-borrowing prohibition bars 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." Following the reasoning laid out on the same day in *Ward*, and acknowledging that sections 204 and 226 work "hand in hand," the Court answered the first question in the negative: Sections 204 and 226 apply "only to pay periods during which an employee predominantly works inside California." The Court declined to settle the second question (regarding the reach of California's minimum wage laws) because the airline's pay-per-rotation scheme does not violate California law in any event. Thus, with respect to the third question, the Court held that state law allows "compensation schemes that promise to compensate all hours worked at a level at or above the minimum wage, even if particular components of those schemes fail to attribute to each and every compensable hour a specific amount equal to or greater than [the] minimum wage." Justice Liu wrote a concurring opinion to caution that because wage-borrowing centers on the nature of employers' contractual commitments to its employees, courts should be careful not to allow employers to characterize their contractual compensation commitments in ways that would effectively circumvent the wage-borrowing bar.

Evidence

8. ***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?**

Decided May 21, 2020 (9 Cal.5th 442). Corrigan, J. for a unanimous Court. The Court reversed and held that under the facts presented, a witness's observation of a company's name and logo appearing on an invoice constituted circumstantial evidence of identity, not proof of the matter asserted in the invoice, and was therefore not hearsay. In a personal injury action against Keenan Properties, Inc. (Keenan) for selling pipes containing asbestos, the only question as to liability was whether sufficient evidence showed Keenan was the source of the pipes laid by plaintiff. Keenan moved to exclude testimony by plaintiff's supervisor regarding Keenan's invoices linking the pipes to the company, arguing that the company's name and logo on the invoices constituted inadmissible hearsay. The

trial court rejected the argument because the evidence was circumstantial evidence of identity, and even if it were hearsay, it fell under an exception as the statement of a party opponent. The Court of Appeal reversed, holding that the supervisor's descriptions of the invoices were inadmissible hearsay. The Supreme Court agreed with the trial court, reasoning that the "link between Keenan and the pipes does not depend on the word 'Keenan' being a true statement that Keenan supplied the pipes," and as a result, the invoices were not offered for a hearsay purpose. The Court also rejected Keenan's argument that the invoices for the pipes at issue were not authenticated because they were not available, noting that the supervisor's testimony describing the logo (consistently with the exemplar acknowledged by Keenan's representative) was sufficient, in light of the supervisor's duty to review invoices and Keenan's business relationship with plaintiff's employer, because authenticity is only a threshold question.

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Facebook

9. ***Facebook v. Superior Court* ("*Touchstone*"), S245203 (4th App. Dist., 15 Cal.App.5th 729.) In addition to the issues raised in the petition for review, the court directed the parties to address the following issues: (1) If, on remand and in conjunction with continuing pretrial proceedings, the prosecution lists the victim as a witness who will testify at trial (see Pen. Code, §§ 1054.1, subd. (a)), 1054.7) and if the materiality of the sought communications is shown, does the trial court have authority, pursuant to statutory and/or inherent power to control litigation before it and to ensure fair proceedings, to order the victim witness (or any other listed witness), on pain of sanctions, to either (a) comply with a subpoena served on him or her, seeking disclosure of the sought communications subject to in camera review and any appropriate protective or limiting conditions, or (b) consent to disclosure by provider Facebook subject to in camera review and any appropriate protective or limiting conditions? (2) Would a court order under either (1)(a) or (1)(b) be valid under the Stored Communications Act, 18 U.S.C., section 2702(b)(3)? (3) Assuming the orders described in (1) cannot properly be issued and enforced in conjunction with continuing pretrial proceedings, does the trial court have authority, on an appropriate showing during trial, to issue and enforce such orders? (4) Would a court order contemplated under (3) be proper under the Stored Communications Act, 18 U.S.C., section 2702(b)(3)? With regard to questions (1)-(4), see, e.g., *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423; *Juror Number One v. Superior Court* (2012) 206 Cal.App.4th 854; *Negro v. Superior Court* (2014) 230 Cal.App.4th 879; and the Court of Appeal decision below, *Facebook, Inc., v. Superior Court* (*Touchstone*) (2017) 15 Cal.App.5th 729, 745-748. (5) As an alternative to options (1) or (3) set forth above, may the trial court, acting pursuant to statutory and/or inherent authority to control the litigation before it and to insure fair proceedings, and consistently with 18 U.S.C. section 2702(b)(3), order the prosecution to issue a search warrant under 18 U.S.C. section 2703 regarding the sought communications? (Cf. *State v. Bray* (Or.App. 2016) 383 P.3d 883, pets. for rev. accepted June 15, 2017, 397 P.3d 30 [S064843, the state's pet.]; 397 P.3d 37 [S064846, the defendant's pet.].) In this regard, what is the effect, if any, of California Constitution, article I, sections 15 and 24?**

Decided August 13, 2020 (___Cal.5th___). Cantil-Sakauye, C.J. for a unanimous Court. In *Touchstone*, a criminal defendant facing trial for attempted murder sought his alleged victim's records from Facebook—instead of from the victim himself—in an effort to bolster the defendant's self-defense theory and gather witness impeachment material. Facebook moved in the superior court to quash Touchstone's subpoena on the basis of the Stored Communications Act, 18 U.S.C. § 2701 et seq. ("SCA"), which prohibits an electronic communications service from disclosing the contents of people's communications in the absence of certain exemptions, such as consent. The trial court denied Facebook's motion to quash, and the Court of Appeal reversed. The Court vacated and remanded, instructing the superior court to hear argument from Facebook, the prosecution, and the defense as to whether the subpoena was supported by good cause, applying the following seven-factor balancing test: "(1) Has the defendant carried his burden of showing a 'plausible justification' for acquiring documents from a third party; (2) Is the sought material adequately described and not overly broad; (3) Is the material reasonably available to the . . . entity from which it is sought (and not readily available to the defendant from other sources); (4) Would production of the requested materials violate a third party's confidentiality or privacy rights or intrude upon any protected governmental interest; (5) Is defendant's request timely, or, alternatively, is the request premature; (6) Would the time required to produce the requested information . . . necessitate an unreasonable delay of defendant's trial; and (7) Would production of the records containing the requested information . . . place an unreasonable burden on the [third party]?" The Court explained that unless this balancing test is satisfied, a criminal defendant's third-party subpoena must be quashed, regardless of whether the SCA or any other law also independently bars disclosure in a given circumstance. The Court accordingly declined to reach Facebook's argument that the subpoena was barred by the SCA. Gibson Dunn's more detailed client alert on this decision is available at: https://www.gibsondunn.com/california-supreme-court-announces-7-factor-good-cause-test-for-third-party-subpoenas/

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Insurance

10. *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?

Decided April 6, 2020 (9 Cal.5th 215). Kruger, J. for a unanimous Court. The Court reversed and held that "in a case involving continuous injury, where all primary insurance has been exhausted," the language in the policies at issue allows "the insured to access any excess policy for indemnification during a triggered policy period once the directly underlying excess insurance has been exhausted"; the insured need not exhaust excess insurance at lower levels for all periods triggered before obtaining coverage from higher-level excess insurance.

The insured was sued for causing continuous environmental damage between 1947 and 1982, and sought to use both primary and multiple layers of excess liability insurance to cover the amount owed in connection with those claims. The Court addressed the sequence in which the insured may access the excess policies. The insured contended that elective "vertical exhaustion"—in which the insured may access any excess policy once it has exhausted other policies with lower attachment points in the same period—should apply. In contrast, the insurers argued for "horizontal exhaustion," in which the insured may access an excess policy only after it has exhausted other policies with lower attachment points from every policy period in which the damage resulting in liability occurred. The excess insurance policies at issue provided that the insured's "other insurance" must be exhausted before the excess policy could be accessed. The Court read this language "in light of background principles of insurance law" and "reasonable expectations of the parties," and agreed with the insured, holding that because the policy language at issue did not "clearly specify" whether vertical or horizontal exhaustion applied, the policy language allowed the insured to access excess coverage once it had exhausted directly underlying excess policies for the same policy period. The Court emphasized that parties are free to alter this baseline by contract, and that the rule does not alter the usual rules of equitable contribution between insurers. In sum, adopting a rule of vertical exhaustion only serves to place the "administrative task of spreading the loss among insurers" on the insurer, rather than the insured.

Property

11. *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?

Decided July 16, 2020 (9 Cal.5th 840). Groban, J. for a unanimous Court. The Court affirmed and held the trial court erred in allowing Code of Civil Procedure section 1260.040 motions in an inverse condemnation action. Property owners sued the Department of Transportation and the Orange County Transportation Authority ("the Agencies") alleging that sound barriers constructed by the interstate deflected noise, vibrations, dust, and glare onto their properties, and claimed the Agencies were liable for inverse condemnation. Prior to trial, the Agencies brought two motions under section 1260.040—a special procedure of Eminent Domain Law that authorizes a pretrial motion for a ruling on an "evidentiary or other legal issue affecting the determination of compensation"—seeking judgment in their favor on the property owners' claims. The trial court granted the Agencies' motions. After considering the Legislature's intent, the differences in procedures between eminent domain and inverse condemnation actions, as well as the purpose of section 1260.040, the Court ruled that the trial court erred in importing section 1260.040 into an inverse condemnation action. As an initial matter, there was no evidence that the Legislature intended section 1260.040 to apply in the inverse condemnation context. It is part of a procedural

scheme specific to eminent domain actions, in which there is no question as to the public entity's liability, and the focus is on the amount of compensation due. By contrast, an inverse condemnation action proceeds under the procedures governing ordinary civil actions, and the property owner must prove both liability and the amount of damages. Additionally, section 1260.040 was designed to "facilitate resolution of eminent domain cases without the need for trial." Because the public entity's liability is already established at the outset of an eminent domain action, the Legislature would not have contemplated that section 1260.040 motions would be used to dispose of an entire action, but rather only to narrow the range of possible damages to encourage settlement without trial. The Court cautioned that although a trial court "may, in certain circumstances, devise or borrow a procedure appropriate to the specific litigation before it," it "may not do so when an applicable procedure is provided by a statute or rule of court." Here, the Agencies' request to use section 1260.040 for liability determinations in inverse condemnation actions "would not give effect to a property owner's right to compensation and would simply supplant existing [summary judgment and summary adjudication] procedures"; as a result, the Court declined to import the statute into inverse condemnation actions.

Tort Law & Consumer Protection

12. *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?

Decided February 20, 2020 (8 Cal.5th 1094). Cuéllar, J. for a unanimous Court. The Court affirmed and held that the five-year statute of limitations and enhanced damages provisions of Civil Code section 3346 are inapplicable to damage to timber, trees, or underwood from negligently escaping fires. A fire on the property of defendant Lambirth Trucking Company spread to the neighboring property of plaintiff Vincent Scholes, harming some of Scholes's trees. Scholes asserted Lambirth negligently maintained flammable materials on his property, allowed those materials to blow onto Scholes's property, and allowed the fire to escape Lambert's property and enter upon Scholes's property. On his third amended complaint, Scholes claimed damages under Civil Code section 3346, which provides enhanced damages to plaintiffs suffering "wrongful injuries" to timber, trees, or underwood, and a five-year statute of limitations. The statute generally provides for treble damages, but only double damages "where the trespass was casual or involuntary," and actual damages in other circumstances. (*Ibid*.) Lambert demurred on the basis that the complaint was not timely filed within the three-year general statute of limitations for trespass under Civil Code section 338(b) and that section 3346 did not apply to negligently caused fires. The trial court granted Lambert's demurrer, and the Court of Appeal affirmed. The Supreme Court examined the statute's language and structure, and held that section 3346—originally enacted in 1872 by adopting a New York statute—applied only in connection with a "timber trespass," or "timber misappropriation," which is, "essentially, intentionally severing or removing timber from another's

land without the owner's consent." In rejecting a broader application of the word "trespass" in the statute to encompass any intrusion onto property (including a fire), the Court explained that the statute itself contained graduated penalties based on the reasonableness of the trespassor's belief his entry onto the land was permissible, and that accidental entries onto land did not fit neatly into the statute's scheme. The Court construed the statute with Civil Code section 733—providing a cause of action for injury to trees which was codified at the same time as section 3346—to give both consistent effect, and also examined the legislative history, New York precedent on the subject, and fire liability statutes in the Health & Safety Code. All of these authorities supported the narrower construction of section 3346. The Court reserved the question of whether section 3346 would apply to damage to trees caused by intentionally set fires.

13. ***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?**

Decided April 30, 2020 (9 Cal.5th 279). Cantil-Sakauye, C.J. authored the opinion of the Court in which Justices Chin, Corrigan, and Groban joined. Justice Kruger filed a separate opinion concurring in the judgment, in which Justices Liu and Cuéllar joined. All seven Justices agreed that UCL cases must be tried to the court, not a jury, regardless of the relief sought, and that the False Advertising Law ("FAL") claim presented in this case must be tried to the court. The California Department of Business Oversight and several district attorney's offices sued Nationwide Biweekly Administration Inc. and its affiliates under the UCL, FAL, and other state laws, for false and misleading advertising and for operating without a license, and sought civil penalties, restitution, and an injunction. The defendants demanded a jury trial, and the trial court struck the demand on the government's motion. A majority of the Court held that there is no right to a jury trial for causes of action under the UCL or FAL, whether brought by a private party or a public prosecutor, and regardless of the relief sought, and "express[ed] no opinion" on whether the "jury trial right applies to other statutory causes of action that authorize both injunctive relief and civil penalties." First, the majority held the UCL and FAL provide no statutory right to a jury trial because the purpose and legislative history of the UCL (and similarly for the FAL) "convincingly establish that the Legislature intended" UCL claims to be tried to the court, "exercising the traditional flexible discretion and judicial expertise of a court of equity, . . . including when civil penalties as well as injunctive relief and restitution are sought." Nor is there a right under the California Constitution, as the "gist" of an action under the UCL or FAL is equitable in nature, even where a public prosecutor seeks civil penalties. Justice Kruger's separate concurrence reached the same result for the UCL by a "narrower" path, and agreed the "gist" of any UCL action is equitable in nature. Justice Kruger disagreed that all FAL claims are equitable in nature, as determining liability under the FAL does not require weighing the equities, such

as the competing harms and benefits or the parties' and public's interests, and instead requires only findings of fact as to whether the public is likely to be deceived—a task more suited to a jury. However, where UCL and FAL claims are pleaded together and "inherently intertwined," the FAL claim is properly tried to the court. The Court deemed waived the issue of whether the Sixth or Seventh Amendments to the United States Constitution provided a jury trial right. Gibson Dunn's more detailed client alert on this decision is available at: **https://www.gibsondunn.com/california-supreme-court-holds-no-right-to-jury-trial-for-unfair-competition-or-false-advertising-law-claims/**

14. ***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?**

Decided June 25, 2020 (9 Cal.5th 642). Liu, J. for a unanimous Court. The Court affirmed that a district attorney has authority to recover restitution and civil penalties under the Unfair Competition law ("UCL") for violations occurring outside and within her territorial jurisdiction. The Orange County District Attorney sued various brand and generic pharmaceutical manufacturers and distributors under the UCL, alleging an unlawful conspiracy to prevent other generic manufacturers from launching a competing generic drug. The District Attorney sought civil penalties not only for alleged violations that occurred in Orange County, but also for violations that occurred anywhere throughout California. Defendants moved to strike the complaint's claims for monetary relief for violations outside of Orange County; the superior court denied that motion. The Supreme Court noted that the UCL's civil penalty, restitution, and injunctive relief provisions use broad language without any geographic limitation, suggesting no legislative "concern about the geographic scope of relief sought in an enforcement action by a district attorney." Other provisions in the UCL, such as the method for dividing civil penalties between the local jurisdiction and the Attorney General, indicate the statute was not intended to equitably divide penalties among jurisdictions where the violations occur. The Court also rejected the argument that the California Constitution constrained district attorneys' enforcement authority to the limits of their territorial jurisdiction. Finally, the Court addressed the Attorney General's amicus brief—which raised political accountability and "race to the courthouse" concerns of granting district attorneys statewide authority—and stated it was "unable to conclude that the Legislature necessarily believed this concern outweighs the incentive that the scheme provides for district attorneys to bring enforcement actions that might otherwise not be brought at all." Further, the Attorney General's "authority to intervene or take over the case" from a district attorney mitigated, in the Court's view, any concerns about coordinated enforcement of the UCL. The Court expressly reserved the question of whether a district attorney could seek civil penalties and restitution for violations occurring solely outside her territorial jurisdiction. Justice Kruger filed a separate concurrence in which Chief Justice Cantil-Sakauye and Justice Corrigan joined to outline their view that the UCL should be amended

to fill a "gap in the statutory enforcement scheme" and provide notice to the Attorney General for trial proceedings. Gibson Dunn's more detailed client alert on this decision is available at: **https://www.gibsondunn.com/california-supreme-court-holds-that-district-attorneys-may-seek-statewide-civil-penalties-and-restitution-under-unfair-competition-law/**

GIBSON DUNN
Counsel for *amicus curiae* California Chamber of Commerce in support of Biogen, Inc.

15. ***Ixchel Pharma, LLC v. Biogen, Inc.*, No. S256927 (9th Cir., 930 F.3d 1031). This case presents two questions, certified from the Ninth Circuit: (1) Is a plaintiff required to plead an independently wrongful act in order to state a claim for tortious interference with a contract that is terminable at will? (2) What is the proper standard to determine whether Unfair Competition Law section 16600 voids a contract by which a business is restrained from engaging in a lawful trade or business with another business?**

Decided August 3, 2020 (— P.3d —). Liu, J. for a unanimous Court. Plaintiff Ixchel Pharma and Forward Pharma entered into a terminable-at-will agreement to jointly develop a drug, but Forward Pharma terminated the agreement pursuant to a settlement agreement with Defendant Biogen regarding a patent dispute. Plaintiff sued defendant for interference with contractual relations and violation of the prohibition against restraints of trade in section 16600 of California's Unfair Competition Law (UCL). The Eastern District of California dismissed Ixchel's claims on the grounds that section 16600 does not apply outside the employment context. On appeal, the Ninth Circuit certified two questions to the California Supreme Court, which the Court rephrased as: (1) "Is a plaintiff required to plead an independently wrongful act in order to state a claim for tortious interference with a contract that is terminable at will?" and (2) "What is the proper standard to determine whether Unfair Competition Law section 16600 voids a contract by which a business is restrained from engaging in a lawful trade or business with another business?" In response to the first question, the Court held that to state a claim for interference with an at-will contract by a third party, a plaintiff must allege the third party engaged in an independently wrongful act, reasoning that allowing such claims without allegations of independent wrongfulness would risk chilling legitimate competition and "expose routine and legitimate business competition to litigation." In response to the second question, after reviewing statutory history and precedents, the Court ruled that "a rule of reason applies" in evaluating whether a restraint in a business-to-business agreement violates section 16600, and that courts should look to whether the anticompetitive effects of an agreement outweigh the procompetitive effects. The Court emphasized the importance of harmonizing federal antitrust law with section 16600 when evaluating contractual restraints on business operations and commercial dealings under the UCL. Gibson Dunn's more detailed client alert on this decision is available at: **https://www.gibsondunn.com/california-supreme-court-answers-important-questions-about-bounds-of-legitimate-business-competition-under-california-tort-and-antitrust-law/**

State and Local Government

16. ***San Diegans for Open Government v. Public Facilities Financing Authority of the City of San Diego*, S245996 (4th App. Dist., 16 Cal.App.5th 1273). This case presents the following issue: Do non-party taxpayers have direct standing to bring an action to challenge the validity of a public entity transaction for an alleged violation of the conflict of interest provisions of Government Code section 1090?**

Decided December 26, 2019 (8 Cal.5th 733). Corrigan, J. for the Court, in which Chin, Liu, Cuéllar, Kruger, and Groban concurred. The Court reversed and held Government Code section 1092 does not provide for taxpayer standing to seek to invalidate government contracts that allegedly were entered into by government employees and officers with personal financial interests prohibited by Government Code section 1090. Under section 1090, government officials and employees may not be financially interested in any contract made by them in their official capacity or by any body of which they are a member. Section 1092 provides that any contract made in violation of section 1090 "may be avoided at the instance of any party except the officer interested therein." A group of taxpayers who called themselves "San Diegans for Open Government" sued under section 1092 to enjoin the City of San Diego from issuing bonds as part of a transaction to refinance earlier bonds. The organization asserted that at least one member of the refinancing team, which included city officials, had an improper financial interest in the contract for the sale of the bonds. The trial court held that section 1092 only conferred standing on a "party" to the contract, and dismissed the claim on the ground that the taxpayer plaintiffs lacked standing. Relying first on the plain text of the statute, the Court held that section 1092 by its terms was limited to enforcement by the parties to the contract, and that the Legislature did not clearly manifest an intent to create a private right of action. The Court further held that the comprehensive civil, criminal, and administrative scheme for punishing and unwinding interested governmental transactions did not compel the recognition of a private right of action under section 1092. The Court thereafter remanded to the Court of Appeal to determine whether plaintiff nevertheless could proceed under Code of Civil Procedure section 526a, which confers standing on taxpayers in certain circumstances. Chief Justice Cantil-Sakauye filed a dissenting and concurring opinion, in which she stated the phrase "any party" in section 1092 should not be read so narrowly to "create[] a scheme that counts on the foxes to guard the henhouse, and leaves taxpayers helpless to halt even the most egregiously conflicted government bond issuances." The Chief Justice read the statutory phrase as ambiguous as written, but that ambiguity is removed in favor of an expansive reading when the "purpose, policy, and aim" of the statute are considered. The Chief Justice did not dissent from the portion of the majority's opinion remanding the case to the Court of Appeal.

17. ***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?**

Decided May 28, 2020 (9 Cal.5th 488). Kruger, J. for a unanimous Court. The Court reversed and held the City could not charge requesters of government records for the cost of redacting exempt material from otherwise disclosable electronic records. The Public Records Act generally requires a person who requests a copy of a government record to pay the costs of duplicating the record, but not other ancillary costs such as staff time locating responsive material or redacting exempt material from responsive records. Government Code section 6253.9(b)(2) also requires that requesters pay for the costs of producing copies of electronic records if producing them "require[s] data compilation, extraction, or programming." The City charged records requesters approximately $3,200 for time spent editing out exempt material from responsive police body camera footage, contending that the redaction was "data extraction" for purposes of section 6253.9(b)(2). The Court disagreed and required the City to bear its own redaction costs. The Court looked to both the plain and technical meaning of "data extraction," legislative intent, and the constitutional mandate to "broadly construe" statutes that "further[] the people's right of access," and ultimately concluded that the term "data extraction" does not cover redacting digital records, but rather "retrieving responsive data from an unproducible database." Although the Court acknowledged it could not "comprehensively catalog what types of processes will" qualify, it provided "some guideposts": "extraction" would cover pulling data from a database "and producing the relevant data in a spreadsheet," but would not cover "time spent searching for responsive records in an e-mail inbox or a computer's document folder." Justice Cuéllar wrote a concurring opinion to stress that the Court's "interpretation and application of terms such as 'extraction' should avoid, to the extent possible, making pivotal distinctions based on subtle technical details" in light of rapidly changing technologies.

18. ***Alameda County Deputy Sheriff's Association v. Alameda County Employees' Retirement Association*, S247095 (1st App. Dist., 19 Cal.App.5th 61). This case presents the following issues: (1) Do county employees have a contractual right to have their pensions calculated in accordance with a settlement agreement that predates the passage of the California Public Employees' Pension Reform Act of 2013 (PEPRA), despite its conflict with the legislation? (2) Alternatively, are the county retirement boards equitably estopped from implementing the conflicting PEPRA provisions? (3) Do the provisions of PEPRA that alter the definition of "compensation earnable" violate the Contracts Clause of the California Constitution?**

Decided July 30, 2020 (— P.3d —). Cantil-Sakauye, C.J. for a unanimous Court. Cuéllar, J. filed a concurring opinion. The Court reversed and held that 1) county employees have no contractual right to have their pension benefits calculated in a manner inconsistent with the California Public Employees' Pension Reform Act of 2013 (PEPRA); 2) county employees had failed to establish the necessary elements of equitable estoppel to prevent calculation of their pensions in accordance with PEPRA; and 3) the statutory changes to the calculation of pension benefits under PEPRA did not violate the Contracts Clause despite PEPRA's failure to provide offsetting benefits to the detriments it imposed. Here, among other things, PEPRA amended the definition of "compensation earnable" for the calculation of pension benefits for certain county

employees in order to limit pension spiking (the manipulation of compensation to artificially increase a pension benefit). Plaintiffs challenged this provision of PEPRA on contract principles and on a constitutional basis. Prior to the passage of PEPRA, employees in three counties had entered into litigation settlement agreements with their respective retirement boards that specified the types of compensation included in compensation earnable. PEPRA conflicted with these settlement agreements and restricted or excluded certain types of compensation that the settlements allowed. Plaintiffs contended that these settlement agreements conferred a contractual right to continue to include these items in compensation earnable despite the passage of PEPRA, or alternatively, that the counties were equitably estopped from implementing the PEPRA provision in a manner inconsistent with the agreements. The Court held that because retirement boards are required to implement legislation, and because the settlement agreements were silent on the issue of legislative changes, the settlements had to be interpreted to permit modification of retirement board policies due to statutory changes. It also concluded that the county employees had failed to establish the necessary elements of equitable estoppel because there had been no representations regarding the continued enforceability of the settlement agreements in the event of inconsistent legislation. Next, the Court addressed plaintiffs' contention that the PEPRA provision violated the Contracts Clause of the California Constitution because it failed it comply with the "California Rule." The California Rule holds that modifications to pension plans for public employees do not violate the Contracts Clause under the following circumstances (1) the purpose of the modification is to maintain the integrity of the pension system and adjust to changing conditions, (2) the changes are reasonable (which requires the changes bear some material relation to the theory of the pension system and its successful operation), and (3) where the changes disadvantage employees, they "should" be accompanied by comparable new advantages. Alternatively, no Contract Clause violation results when a pension plan modification provides fully compensating new advantages. Here, the Court held that the modifications were for a proper purpose and had a material relation to the pension system because they were implemented to close loopholes in pension calculations. It also held for the first time that under the California Rule, the disadvantages from a pension plan modification do not have to be offset by comparable new advantages if doing so would undermine the constitutionally permissible purpose of the modification. In this case, no comparable advantage was provided because to do so would maintain the loopholes. Significantly, although the Court declined the invitation of some litigants to overrule the California Rule, the high court observed that since it upheld PEPRA's amendment, it had "no jurisprudential reason to undertake a fundamental reexamination of the rule," suggesting that it had not closed the door to doing so in the future in an appropriate case. Justice Cuéllar's concurrence emphasized that the Court's holding was a specific application of the California Rule to the facts of this case and that each case must be assessed based on its particular facts.

Select Pending Civil Cases[1]

1. ***Berroteran v. Superior Court*, S259522. (B296639; 41 Cal.App.5th 518; Los Angeles County Superior Court; BC542525.) Petition for review after the Court of Appeal granted a petition for peremptory writ of mandate. This case presents the following issue: Does a party against whom former deposition testimony in a different case is sought to be admitted at trial under Evidence Code section 1291, subdivision (a)(2), have a similar interest and motive at both hearings to cross-examine a friendly witness?**

2. ***Doe v. Olson*, S258498. (B286105; nonpublished opinion; Los Angeles County Superior Court; SC126806.) Petition for review after the Court of Appeal affirmed and reversed orders in a civil action. This case presents the following issues: (1) Does the litigation privilege of Civil Code section 47, subdivision (b), apply to contract claims, and if so, under what circumstances? (2) Does an agreement following mediation between the parties in an action for a temporary restraining order, in which they agree not to disparage each other, bar a later unlimited civil lawsuit arising from the same alleged sexual violence?**

3. ***Donohue v. AMN Services, LLC*, S253677. (D071865; 29 Cal.App.5th 1968; San Diego County Superior Court; 37-2014-00012605-CU-OE-CTL.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. 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. ***Ferra v. Loews Hollywood Hotel, LLC*, S259172. (B283218; 40 Cal.App.5th 1239; Los Angeles County Superior Court; BC586176.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. The court limited review to the following issue: Did the Legislature intend the term "regular rate of compensation" in Labor Code section 226.7, which requires employers to pay a wage premium if they fail to provide a legally compliant meal period or rest break, to have the same meaning and require the same calculations as the term "regular rate of pay" in Labor Code section 510(a), which requires employers to pay a wage premium for each overtime hour?**

5. ***Geiser v. Kuhns*, S262032. (B279738; nonpublished opinion; Los Angeles County Superior Court; BS161018, BS161019, BS161020.) Petition for review after the Court of Appeal affirmed an order awarding attorney fees in a civil action. The court limited review to the following issue: How should it be determined what public issue or issue of public interest is implicated by speech within the meaning of the anti-SLAPP statute (Code of Civ. Proc.,**

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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.

§ 425.16, subd. (e)(4)) and the first step of the two-part test articulated in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149-150, and should deference be granted to a defendant's framing of the public interest issue at this step?

6. ***Grande v. Eisenhower Medical Center*, S261247. (E068730, E068751; 44 Cal.App.5th 1147; Riverside County Superior Court; RIC1514281.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. The court limited review to the following issue: May a class of workers bring a wage and hour class action against a staffing agency, settle that lawsuit with a stipulated judgment that releases all of the staffing agency's agents, and then bring a second class action premised on the same alleged wage and hour violations against the staffing agency's client?**

7. ***Han v. Hallberg*, S256659. (B268380, B271185; 35 Cal.App.5th 621; Los Angeles County Superior Court; SC114026.) Petition for review after the Court of Appeal reversed the judgment in a civil action. The court limited review to 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?**

8. ***McHugh v. Protective Life Ins.*, S259215. (D072863; 40 Cal.App.5th 1166; San Diego County Superior Court; 37-2014-00019212-CU-IC-CTL.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. This case presents the following issues: (1) Were the provisions of Insurance Code sections 10113.71 and 10113.72 intended by the Legislature to apply, in whole or in part, to life insurance policies in force as of January 1, 2013, regardless of the original date of issuance of those policies? (2) Did the lower courts in this case properly rely upon private opinions of Department of Insurance staff counsel? (See Ins. Code, § 12921.9; Gov. Code, § 11340.5; *Heckart v. A-1 Self Storage, Inc.* (2018) 4 Cal.5th 749.)**

9. ***Naranjo v. Spectrum Security Services, Inc.*, S258966. (B256232; 40 Cal.App.5th 444; Los Angeles County Superior Court; BC372146.) Petition for review after the Court of Appeal affirmed in part and reversed in part the judgment in a civil action. This case presents the following issues: (1) Does a violation of Labor Code section 226.7, which requires payment of premium wages for meal and rest period violations, give rise to claims under Labor Code sections 203 and 226 when the employer does not include the premium wages in the employee's wage statements but does include the wages earned for meal breaks? (2) What is the applicable prejudgment interest rate for unpaid premium wages owed under Labor Code section 226.7?**

10. ***Presbyterian Camp & Conference Centers, Inc. v. Superior Court*, S259850. (B297195; 42 Cal.App.5th 148, mod. 42 Cal.App.5th 1173a; Santa Barbara County Superior Court; 18CV02968.) Petition for review after the Court of Appeal denied a petition for peremptory writ of mandate. This case presents the following issue: Can a corporation be held liable under Health and Safety Code sections 13009 and 13009.1 for the costs of suppressing and**

investigating fires that its agents or employees negligently or illegally set, allowed to be set, or allowed to escape?

11. ***Sandoval v. Qualcomm Inc.*, S252796. (D070431; 28 Cal.App.5th 381; San Diego County Superior Court; 37-2014-00012901-CU-PO-CTL.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. 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?**

12. ***Sass v. Cohen*, S255262. (B283122; 32 Cal.App.5th 1032, mod. 33 Cal.App.5th 942a; Los Angeles County Superior Court; BC554035.) Petition for review after the Court of Appeal reversed the judgment in a civil action. 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?**

13. ***Serova v. Sony Music Entertainment*, S260736. (B280526; 44 Cal.App.5th 103; Los Angeles County Superior Court.) Petition for review after the Court of Appeal affirmed in part and reversed in part an order granting in part and denying in part a special motion to strike in a civil action. This case presents the following issues: (1) Do representations a seller made about a creative product on the product packaging and in advertisements during an ongoing controversy constitute speech in connection with an issue of public interest within the meaning of the anti-SLAPP statute (Code of Civ. Proc., § 425.16)? (2) For purposes of liability under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and the Consumer Legal Remedies Act (Civ. Code, § 1750 et seq.), do the seller's marketing representations constitute commercial speech, and does it matter if the seller lacked personal knowledge that the representations were false? (See *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939.)**

14. ***Shalabi v. City of Fontana*, S256665. (E069671; 35 Cal.App.5th 639; San Bernardino County Superior Court; CIVDS1314694.) Petition for review after the Court of Appeal reversed the judgment in a civil action. 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.)**

15. ***Siry Investment v. Farkhondehpour*, S262081. (B27750, B279009, B285904; 45 Cal.App.5th 1098; Los Angeles County Superior Court; BC372362.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. This case presents the following issues: (1) May a party in default file a motion for new trial raising legal error, including the inapplicability of certain remedies under the allegations as pleaded? (2) May a trial court award treble damages and attorney fees under Penal Code section 496, subdivision (c), in a case involving the fraudulent diversion of business funds rather than trafficking in stolen goods?**

16. ***Smith v. Loanme*, S260391. (E069752; 43 Cal.App.5th 844; Riverside County Superior Court; RIC1612501.) Petition for review after the Court of Appeal affirmed the judgment in a civil action. This case includes the following issue: Does Penal Code section 632.7 prohibit only third-party eavesdroppers from recording calls involving a cellular or cordless telephone, or does it also prohibit participants in calls from recording them without the other participants' consent?**

17. ***Vazquez v. Jan-Pro Franchising International, Inc.*, S258191. (9th Cir. No. 17-16096; 939 F.3d 1045; Northern District of California No. 3:16-cv-05961-WHA.) Request under California Rules of Court rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. The question presented is: Does the decision in *Dynamex Operations West Inc. v. Superior Court* (2018) 4 Cal.5th 903, apply retroactively?**

18. ***Villanueva v. Fidelity National Title Co.*, S252035. (H041870; 26 Cal.App.5th 1092; Santa Clara County Superior Court; CV173356.) Petition for review after the Court of Appeal reversed the judgment in a civil action. 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?**

19. ***Yahoo! Inc. v. National Union Fire Ins. Co.*, S253593. (9th Cir. No. 17-16452; 913 F.3d 923; Northern District of California No. 5:17-cv-00447-NC) Request under California Rules of Court rule 8.548, that this court decide a question of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. 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, assisted by Julian Poon, presenting oral argument at the California Supreme Court. *Photo courtesy of Supreme Court; Credit: Courtesy of Supreme Court*

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the California Supreme Court, or in state or federal appellate courts in California. Please feel free to contact the following lawyers in California, or any member of the Appellate and Constitutional Law Practice Group.

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