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GIBSON DUNN
California Supreme Court
Fall 2016 Round Up

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 April through November 2016, organized by subject. Each entry contains a description of the case, as well as a substantive analysis of the Court's decision.

2016 Term Civil Cases Decided

Arbitration

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

   Decided July 28, 2016 (1 Cal.5th 233). Werdegar, J., for a majority of the Court (Kruger, J., dissenting, joined by Chin and Corrigan, JJ.). The Court affirmed and held that, in analyzing who decides whether an arbitration agreement provides for class arbitration, "no universal rule allocates this decision in all cases to either arbitrators or courts. Rather, who decides is in the first instance a matter of agreement subject to interpretation under state contract law." The majority thus agreed with the United States Supreme Court's plurality opinion in *Green Tree Financial Corp. v. Bazzle* (2003) 539 U.S. 444, 453, which explained that an analysis of the "who decides" question should begin with the parties' agreement, and that "this matter of contract interpretation should be for the arbitrator, not the courts, to decide." In this case, because the issue of class arbitration presented a disputed matter of contract interpretation, state law applied. Because the parties' agreement was ambiguous, the Court used traditional canons of interpretation to conclude that the parties allocated the decision to the arbitrator. The Court held there is "nothing in the FAA or its underlying policies to support the contrary presumption, that this question should be submitted to a court rather than an arbitrator unless the parties have unmistakably provided otherwise."


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Attorney's Fees

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

   Decided Aug. 11, 2016 (1 Cal.5th 480). Werdegar, J. for a majority of the Court (Liu, J., dissenting). The Court affirmed and held that *Serrano* permits a trial court to anchor its calculation of a reasonable attorney's fee award in a class action on a percentage of the common fund recovered. In 2012, a class action employment lawsuit settled before trial for $19 million and the parties agreed that no more than a third of the recovery would go to class counsel as attorney's fees. Over the objection of one class member, the trial court approved the settlement and awarded counsel the maximum fees, as requested. The objecting class member contended that the trial court's award of attorney's fees calculated as a percentage of the settlement amount (the "percentage of fund method") violated the holding of *Serrano v. Priest* (1977) 20 Cal.3d 25, to the effect that every fee award must be calculated on the basis of time spent by the attorneys on the case (the "lodestar" method). The Court rejected this argument. First, the Court reviewed the advantages of the percentage of fund method and its endorsement by several jurisdictions. Second, the Court explained that it did not consider this specific issue in *Serrano* because the award in that case was made under the "private attorney general" doctrine, and not from a common fund. Third, the Court determined that California decisions since *Serrano* have not established any rule prohibiting a percentage of common fund calculation. As such, the Court held that when a class action litigation establishes a monetary fund for the benefit of the class members, the trial court may determine the fee award by choosing an appropriate percentage of the fund.

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

   Decided June 9, 2016 (63 Cal.4th 363). Kruger, J., for a unanimous Court. The Court reversed and held that attorney's fees under *Brandt* may be included as compensatory damages for purposes of calculating the ratio between punitive and compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered. After plaintiff won compensatory and punitive damages from the jury, and subsequently was awarded attorney's fees by the trial court, defendant moved for a new trial seeking a reduction in the punitive damages award for violating the due process clause of the Fourteenth Amendment. The trial court agreed and granted defendant a new trial unless plaintiff consented to a reduction

The National Law Journal named Gibson Dunn to its 2015 **Appellate Hot List** featuring 20 firms that "represent appellate advocacy at its strongest – winning the big cases and changing the law."

U.S. News – Best Lawyers® "Best Law Firms" recognized Gibson Dunn as the 2016 **Law Firm of the Year** for its Appellate Practice.

Chambers USA: America's Leading Lawyers for Business 2016 ranked Gibson Dunn in Tier 1 for **Nationwide and California Appellate Law**.

Daily Journal

The Daily Journal recognized a Gibson Dunn case among its **Top Appellate Reversals** in its 2015 Top Verdicts in California; Gibson Dunn obtained a reversal of what would have been one of the largest punitive damage awards in California history.

of the punitive damages award at a 10-to-1 ratio to compensatory damages, taking into consideration only the jury's award, but not attorney's fees. Defendant argued that under *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, which provides substantive guideposts that courts must consider in evaluating the size of punitive damages awards, courts may not consider evidence not presented to the jury in calculating the punitive-compensatory ratio. The Court disagreed, reasoning that *Gore* looks not to whether a jury's award of punitive damages is unreasonable based on the facts, but rather whether the jury's award exceeds the state's power to punish. Although appellate courts must obviously defer to evidentiary findings made by the trier of fact, an appellate court need not be limited to considering only the facts considered by juries under *Gore*. Thus, the Court found no reason that attorney's fees awarded after the jury's verdict by the trial court under *Brandt* should not be included for purposes of calculating the punitive-compensatory ratio.

Civil Procedure

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

   Decided Aug. 1, 2016 (1 Cal.5th 376). Corrigan, J., for a unanimous Court. The Court reversed and held that a cause of action is subject to an anti-SLAPP motion if it relies on mixed allegations of protected and unprotected conduct. A minority stakeholder in a corporation accused his fellow minority stakeholder of constructive fraud, negligent misrepresentation, and breach of fiduciary duty in relation to the sale of a controlling interest in the company. Some allegations, but not whole causes of action, pertained to the defendant's conduct during a prelitigation fraud investigation, which was protected activity under Code of Civil Procedure section 425.16. The trial court denied defendant's anti-SLAPP motion on the ground that section 425.16 only applies where an entire cause of action relates to protected activity, and the Court of Appeal affirmed. The Supreme Court reversed, rejecting the "primary right" analysis of anti-SLAPP motions. The Court held that an anti-SLAPP motion may properly target "mixed causes of action," which rely on allegations of both protected and unprotected conduct. Thus, where a defendant establishes that a particular cause of action relies "at least in part" on allegations of protected activity, the plaintiff must demonstrate a probability of prevailing or else the claim is stricken.

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

Decided Aug. 29, 2016 (1 Cal.5th 783). Cantil-Sakauye, C.J., for a majority of the Court (Werdegar, J., dissenting). The Court affirmed and held that although the drug manufacturer was not "at home" in California for purposes of general jurisdiction, the manufacturer's extensive activities in California were sufficiently related to the non-resident plaintiffs' suits to support the exercise of specific jurisdiction. The fact that the manufacturer (which was incorporated in Delaware and had its principal business centers in New York and New Jersey) sold large volumes of products in California, had employees in California, was registered to do business in California, and maintained an agent for service of process in California was not sufficient to make it "at home" in the State. However, the non-resident plaintiffs' claims that the manufacturer sold an allegedly defective drug to California and non-resident plaintiffs as part of a "common nationwide course of distribution" bore a substantial relation to the company's contacts in California, which included maintaining research and laboratory facilities in California, marketing and distributing the drug at issue in California, contracting with a California distributor, and employing hundreds of California employees, including sales representatives for the drug. Additionally, the manufacturer failed to show that asserting jurisdiction over it was unreasonable. The exercise of specific personal jurisdiction therefore was consistent with due process requirements. Dissenting from the decision, Justice Werdegar stated that she could find in the record no evidence of contacts in California that bore a substantial connection to the non-residents' claims, noting that the drug at issue was not developed or manufactured in California and that the non-resident plaintiffs did not obtain the drug through California physicians or from a California source.

6. ***Flores v. Presbyterian Intercommunity Hospital*, S209836 (2d App. Dist., 213 Cal.App.4th 1386). This case presents the following issues: (1) Does the one-year statute of limitations for claims under the Medical Injury Compensation Act (Code Civ. Proc., § 340.5) or the two-year statute of limitations for ordinary negligence (Code Civ. Proc., § 335.1) govern an action for premises liability against a hospital based on negligent maintenance of hospital equipment? (2) Did the injury in this case arise out of "professional negligence," as that term is used in section 340.5, or ordinary negligence?**

   Decided May 5, 2016 (63 Cal.4th 75). Kruger, J., for a unanimous Court. The Court reversed and held that the one-year statute of limitations for claims under the Medical Injury Compensation Act (Code Civ. Proc., § 340.5) governs an action for premises liability against a hospital based on negligent maintenance of hospital equipment and the injury in the case arose out of "professional negligence," as that term is used in section 340.5, rather than ordinary negligence. The Court concluded that the key inquiry in determining whether or not plaintiff's action sounded in professional negligence or ordinary negligence was determining the meaning of the phrase "professional services" as it appears in section 340.5. Plaintiff argued that the Court should define professional services as those involving a particularized degree of medical skill. The Court rejected this argument, applying instead the test laid out in *Murillo v. Good Samaritan Hospital* (1979) 99 Cal.App.3d 50, under which professional services are not determined based on the level of skill involved in or employed to complete the task in

question. The Court further clarified, relying on its previous decision in *Lee v. Hanley* (2015) 61 Cal.4th 1225, that the statute of limitations set forth in section 340.5 does not apply to obligations to maintain equipment and premises, but only to claims of injury that resulted from provision of medical care.

Tort Law

Gibson Dunn
for Defendant and Respondent

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

   Decided Nov. 14, 2016 (___). Cantil-Sakauye, C.J., for a unanimous Court. The Court affirmed and held that health care service plans owe a common law tort duty to noncontracting emergency service providers to act reasonably in initially delegating their financial responsibility to an independent physicians association ("IPA") or other risk bearing organization ("RBO") under Health and Safety Code section 1371.4(e). The Court held that the health care service plans had no statutory liability, but that a common law tort duty to protect the plaintiff's financial interests exists under the test set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647. A health care service plan may be liable to noncontracting emergency service providers for negligently delegating its financial responsibility to an IPA or other contracting medical provider group that it knew or should have known would not be able to pay for emergency service and care provided to the health plan's enrollees. Further, the Court held that a health care service plan has a narrow continuing common law tort duty to protect noncontracting emergency service providers once it makes an initial delegation of its financial responsibility. Specifically, a health care service plan's duty to reassume the financial responsibility it has delegated to a contracting medical provider group is triggered by the plan's receipt of information through which the plan becomes aware or should become aware that there can be no reasonable expectation that its delegate will be able to reimburse covered claims from noncontracting emergency service providers.

Select Pending Civil Cases[1]

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

Gibson Dunn
for Plaintiffs and Respondents

2. ***Association of California Ins. Companies v. Jones*, S226529 (2d App. Dist., 235 Cal.App.4th 1009). This case presents the following issues: (1) Does the Unfair Insurance Practices Act (Ins. Code, § 790, et seq.) give the Insurance Commissioner authority to promulgate a regulation that sets forth requirements for communicating replacement value and states that noncompliance with the regulation constitutes a misleading statement, and therefore an unfair trade practice, for purposes of the act? (2) Does the Insurance Commissioner have the statutory authority to promulgate a regulation specifying that the communication of a replacement cost estimate that omits one or more of the components in subdivisions (a)-(e) of section 2695.183 of title 10 of the California Code of Regulations is a "misleading" statement with respect to the business of insurance? (Cal. Code Regs., tit. 10, § 2695.183, subd. (j).)**

Gibson Dunn
for Defendant and Appellant

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

4. ***Barry v. State Bar of California*, S214058 (2d App. Dist., 218 Cal.App.4th 1435). This case presents the following issue: If the trial court grants a special motion to strike under Code of Civil Procedure section 425.16 on the ground that the plaintiff has no probability of prevailing on the merits because the court lacks subject matter jurisdiction over the underlying dispute, does the court have the authority to award the prevailing party the attorney fees mandated by section 425.16, subdivision (c)?**

5. ***California Cannabis Coalition v. City of Upland*, S234148 (4th App. Dist., 245 Cal.App.4th 970). This case includes the following issue: Is a proposed initiative measure that would impose a tax subject to the requirement of California Constitution, article XIII C, section 2 that taxes "imposed by local government" be placed on the ballot at a general election?**

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

6. ***City of San Jose v. Super. Ct.*, S218066 (6th App. Dist., 225 Cal.App.4th 75, mod. 225 Cal.App.4th 568c). This case presents the following issue: Are written communications pertaining to city business, including email and text messages, which (a) are sent or received by public officials and employees on their private electronic devices using their private accounts, (b) are not stored on city servers, and (c) are not directly accessible by the city, "public records" within the meaning of the California Public Records Act?**

7. ***Connor v. First Student, Inc.*, S229428 (2d App. Dist., 239 Cal.App.4th 526). This case presents the following issue: Is the Investigative Consumer Reporting Agencies Act (Civ. Code, § 1786 et seq.) unconstitutionally vague as applied to background checks conducted on a company's employees, because persons and entities subject to both that Act and the Consumer Credit Reporting Agencies Act (Civ. Code, § 1785.1 et seq.) cannot determine which statute applies?**

8. ***Delano Farms Co. v. California Table Grape Com.*, S226538 (5th App. Dist., 235 Cal.App.4th 967). This case presents the following issue: Under Article 1, section 2, subdivision (a), of the California Constitution, can the California Table Grape Commission compel unwilling produce growers to contribute for generic commercial advertising?**

9. ***DisputeSuite.com, LLC v. Scoreinc.com*, S226652 (2d App. Dist., 235 Cal.App.4th 1261, mod. 236 Cal.App.4th 529e). This case presents the following issue: Were defendants entitled to an award of attorney fees under Civil Code section 1717 as the prevailing parties in an action on a contract when they obtained the dismissal of the action on procedural grounds pursuant to a Florida forum selection clause?**

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

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

12. ***Friends of the Eel River v. North Coast Railroad Authority*, S222472 (1st App. Dist., 230 Cal.App.4th 85). This case presents the following issues: (1) Does the Interstate Commerce Commission Termination Act [ICCTA] (49 U.S.C. § 10101 et seq.) preempt the application of the California Environmental Quality Act [CEQA] (Pub. Res. Code, § 21050 et seq.) to a state agency's proprietary acts with respect to a state-owned and funded rail line or is CEQA not preempted in such circumstances under the market participant doctrine (see *Town of Atherton v. California High Speed Rail Authority* (2014) 228 Cal.App.4th 314)? (2) Does the ICCTA preempt a state agency's**

voluntary commitments to comply with CEQA as a condition of receiving state funds for a state-owned rail line and/or leasing state-owned property?

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

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

15. ***Hassell v. Bird*, S235968 (1st App. Dist., 247 Cal.App.4th 1336). This case presents the following issues: (1) Does an on-line publisher have a right to notice and an opportunity to be heard before a trial court orders removal of on-line content? (2) Does the statutory immunity provided by 47 U.S.C. 230(c)(1) and (e)(3) bar a trial court from enjoining a website publisher's actions and potentially enforcing the court's order by way of contempt or other sanctions?**

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

17. ***Heckart v. A-1 Self Storage, Inc.*, S232322 (4th App. Dist., 243 Cal.App.4th 525). This case presents the following issue: Was a self-storage facility's storage rental agreement, which included provisions arguably meeting the definition of "insurance" (see Ins. Code, §§ 22, 1758.75), subject to regulation under the Insurance Code when the principal purpose of the agreement between the parties was the rental of storage space rather than the shifting and distribution of risk?**

18. ***Hernandez v. Restoration Hardware, Inc.*, S233983 (4th App. Dist., 245 Cal.App.4th 651). This case presents the following issue: Must an unnamed class member intervene in the litigation in order to have standing to appeal? (See *Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199.)**

19. ***Horiike v. Coldwell Banker Residential Brokerage Co.*, S218734 (2d App. Dist., 225 Cal.App.4th 427). This case presents the following issue: When the**

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buyer and the seller in a residential real estate transaction are each independently represented by a different salesperson from the same brokerage firm, does Civil Code section 2079.13, subdivision (b), make each salesperson the fiduciary to both the buyer and the seller with the duty to provide undivided loyalty, confidentiality and counseling to both?

20. ***Kabran v. Sharp Memorial Hospital*, S227393 (4th App. Dist., 236 Cal.App.4th 1294). This case presents the following issue: Are the time constraints in California Code of Civil Procedure section 659a jurisdictional such that a court cannot consider late-filed documents?**

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

22. ***Lopez v. Sony Electronics, Inc.* S235357 (2d App. Dist., 247 Cal.App.4th 444). This case presents the following issue: Does the six-year limitations period in Code of Civil Procedure section 340.4, which governs actions based on birth and pre-birth injuries and is not subject to tolling for minority, or the two-year limitations period in Code of Civil Procedure section 340.8, which applies to actions for injury based upon exposure to a toxic substance and is subject to tolling for minority, govern an action alleging pre-birth injuries due to exposure to a toxic substance?**

23. ***McGill v. Citibank, N.A.*, S224086 (4th App. Dist., 232 Cal.App.4th 753). This case presents the following issue: Does the Federal Arbitration Act (9 U.S.C. § 1 et seq.), as interpreted in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 321, preempt the California rule (*Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066; *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303) that statutory claims for public injunctive relief are not subject to compulsory private arbitration?**

24. ***Mendoza v. Nordstrom*, S224611 (9th Cir. No. 12-57130, 778 F.3d 834). Request under California Rules of Court, rule 8.548, that this court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. The questions presented are: "(A) California Labor Code section 551 provides that '[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven.' Is the required day of rest calculated by the workweek, or is it calculated on a rolling basis for any consecutive seven-day period? (B) California Labor Code section 556 exempts employers from providing such a day of rest 'when the total hours of employment do not exceed 30 hours in any week *or six hours in any one day thereof*.' (Emphasis added.) Does that exemption apply when an employee works less than six hours in any one day of the applicable week, or does it apply only when an employee works less than six hours in each day of the week? (C) California Labor Code section 552 provides that an employer may not 'cause his employees to work more than six days in seven.' What does it mean for an employer to 'cause' an employee to work**

Gibson Dunn
for Plaintiff and
Appellant

more than six days in seven: force, coerce, pressure, schedule, encourage, reward, permit, or something else?"

25. ***Mountain Air Enterprises, LLC v. Sundowner Towers, LLC*, S223536 (1st App. Dist., 231 Cal.App.4th 805). This case includes the following issues: (1) Does the assertion of an agreement as an affirmative defense implicate the attorney fee provision in that agreement? (2) Does the term "action" or "proceeding" in Civil Code section 1717 and in attorney fee provisions encompass the assertion of an affirmative defense?**

26. ***926 North Ardmore Avenue v. County of Los Angeles*, S222329 (2d App. Dist., 229 Cal.App.4th 1335). This case presents the following issue: Does Revenue and Taxation Code section 11911 authorize a county to impose a documentary transfer tax based on a change in ownership or control of a legal entity that directly or indirectly holds title to real property?**

27. ***Parrish v. Latham & Watkins*, S228277 (2d App. Dist., 238 Cal.App.4th 81). This case presents the following issue: Does the denial of former employees' motion for summary judgment in an action for misappropriation of trade secrets conclusively establish that their former employer had probable cause to bring the action and thus preclude their subsequent action for malicious prosecution, even if the trial court in the prior action later found that it had been brought in bad faith?**

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

29. ***Perry v. Bakewell Hawthorne, LLC*, S233096 (2d App. Dist., 244 Cal.App.4th 712). The court limited review to the following issue: Does Code of Civil Procedure section 2034.300, which requires a trial court to exclude the expert opinion of any witness offered by a party who has unreasonably failed to comply with the rules for exchange of expert witness information, apply to a motion for summary judgment?**

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

31. ***Roy Allen Slurry Seal, Inc. v. American Asphalt South, Inc.*, S225398 (2d App. Dist., 234 Cal.App.4th 748). This case presents the following issues: (1) In the**

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Respondent

context of competitive bidding on a public works contract, may the second lowest bidder state a claim for intentional interference with prospective economic advantage against the winning bidder based on an allegation that the winning bidder did not fully comply with California's prevailing wage law after the contract was awarded? (2) To state a cause of action for intentional interference with prospective economic advantage, must the plaintiff allege that it had a preexisting economic relationship with a third party with probable future benefit that preceded or existed separately from defendant's interference, or is it sufficient for the plaintiff to allege that its economic expectancy arose at the time the public agency awarded the contract to the low bidder?

32. ***Ryan v. Rosenfeld*, S232582 (1st App. Dist., nonpublished order). The court limited review to the following issue: Is the denial of a motion to vacate the judgment under Code of Civil Procedure section 663 separately appealable?**

33. ***Shaw v. Superior Court*, S221530 (2nd App. Dist., 229 Cal.App.4th 12). This case presents the following issues: (1) Did the Court of Appeal err by reviewing plaintiff's right to a jury by writ of mandate rather than appeal? (See *Nessbit v. Superior Court* (1931) 214 Cal. 1.) (2) Is there a right to jury trial on a retaliation cause of action under Health and Safety Code section 1278.5?**

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

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

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

37. ***Tri-Fanucchi Farms v. Agricultural Labor Relations Bd.*, S227270 (5th App. Dist., 236 Cal.App.4th 1079). This case presents the following issues: (1) May an employer assert as a defense to a request for collective bargaining under the Agricultural Labor Relations Act (Lab. Code, § 1140, et seq.) that the**

certified union has "abandoned" the bargaining unit? (2) Did the Board err in granting "make whole" relief (Lab. Code, § 1160.3) as a remedy for the employer's refusal to bargain with the union?

38. ***Troester v. Starbucks Corp.*, S234969 (9th Circ. No. 14-55530, nonpublished order). 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 federal Fair Labor Standard Act's *de minimis* doctrine, as stated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) and *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984), apply to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197?**

39. ***Vasilenko v. Grace Family Church*, S235412 (3rd App. Dist., 248 Cal.App.4th 146). This case presents the following issue: Does one who owns, possesses, or controls premises abutting a public street have a duty to an invitee to provide safe passage across that public street if that entity directs its invitees to park in its overflow parking lot across the street?**

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

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

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