GIBSON DUNN

California Supreme Court Fall 2017 Round-Up

September 2017

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 2016 through August 2017, organized by subject. Each entry contains a description of the case, as well as a substantive analysis of the Court's decision.

Civil Cases Decided

Arbitration

1. ***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?**

   Decided Apr. 6, 2017 (2 Cal.5th 945). Chin, J., for a unanimous Court. The Court reversed and held that the Federal Arbitration Act ("FAA") did not preempt the California rule prohibiting credit card account agreements from waiving the right to seek public injunctive relief. The Court further held that a credit card account agreement that waives the right to public injunctive relief in any forum is contrary to public policy and unenforceable in California. In 2001, plaintiff opened a credit card account and purchased a "credit protector" plan with Citibank, N.A. Citibank later amended the agreement to include arbitration provisions; plaintiff never opted out and continued to use her card. After plaintiff filed a class action against Citibank in 2011 seeking, among other relief, an injunction prohibiting continued illegal and deceptive practices, Citibank moved to compel plaintiff to arbitrate her claims. Citing section 3513 of the Civil Code providing that "a law established for a public reason cannot be contravened by a private agreement[,]" the Court held that the statutory public injunctive relief available to plaintiff was primarily for the benefit of the general public to remedy a public wrong, not to resolve any private dispute, and thus an arbitration clause could not waive a plaintiff's right to seek such relief in any forum. The Court also rejected Citibank's preemption argument, pointing to section 2 of the FAA, which "permits arbitration agreements to be declared unenforceable" if state law exists to revoke any contract, and is not a defense specific to arbitration.


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Attorney Fees

2. ***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)?**

   Decided Jan. 5, 2017 (2 Cal.5th 318). Kruger, J., for a unanimous Court. The Court reversed and held that the trial court may award attorney fees to a defendant who prevails on a special motion to strike under California's anti-SLAPP statute on the ground that the trial court lacks subject matter jurisdiction. In this case, an attorney who had been disciplined by the State Bar challenged the State Bar's disciplinary action in superior court. The superior court granted the State Bar's anti-SLAPP motion on the ground that the court lacked subject matter jurisdiction because only the Supreme Court has jurisdiction over attorney discipline matters and awarded attorney fees to the State Bar. The Court of Appeal reversed. The Supreme Court reversed the Court of Appeal and held that a trial court that lacks subject matter jurisdiction still has the power to grant an anti-SLAPP motion on that ground; to hold otherwise would empower plaintiffs to harass defendants in tribunals that lacked subject matter jurisdiction over the claims. The Court further held that a court with the power to rule on an anti-SLAPP motion also has the "incidental power" to award attorney fees, rejecting the attorney's arguments that a defendant must prevail on the merits in order to be entitled to fees, and held that jurisdictional challenges must be raised in a demurrer rather than in a special motion to strike under the anti-SLAPP statute.

3. ***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?**

   Decided Apr. 6, 2017 (2 Cal.5th 968). Werdegar, J., for a unanimous Court. The Court affirmed and held that the trial court reasonably found neither party had yet achieved its litigation objectives to such an extent as to warrant an award of fees. Defendant, Scoreinc.com, successfully moved to dismiss a breach-of-contract action filed in California on forum non conveniens grounds. Plaintiff promptly refiled the action in Florida. Defendant then moved to recover attorney fees under the contract's attorney fee clause and section 1717 of the Code of Civil Procedure. The Court held that the trial court did not abuse its discretion in finding that the defendant was not a prevailing party because the action had already been refiled in the chosen jurisdiction and the parties' substantive disputes had not been resolved. The Court disapproved of *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950 and *PNEC Corp. v. Meyer* (2010) 190 Cal.App.4th 66, "to the

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Law360 named Gibson Dunn a 2016 **Appellate Practice Group of the Year** and recognized the firm on its 2015 **California Powerhouse** list, noting that with the firm's "deep California roots and penchant for tackling high-stakes matters, Gibson Dunn has helped shape the Golden State economy and legal landscape by notching landmark trial victories, blazing a trail in appellate work and steering multibillion-dollar transactions."

extent they state the prevailing party determination under section 1717 must be made without regard to the contract litigation's continuation in another forum."

4. ***Mountain Air Enterprises, LLC v. Sundowner Towers, LLC, et al.*, S223536 (1st App. Dist., 231 Cal.App.4th 805). This case presents 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 attorney fee provisions encompass the assertion of an affirmative defense?**

Decided July 31, 2017 (3 Cal.5th 744). Chin, J., for a majority of the Court (Kruger, J., dissenting, joined by Corrigan and Liu, JJ.). The Court affirmed and held that the defendant's assertion of an agreement as an affirmative defense triggered the agreement's attorney fee provision, where the agreement was "necessarily implicated" by the parties' dispute. The provision at issue allowed for an award of fees to the prevailing party in "any legal action or any other proceeding . . . brought for the enforcement of this Agreement or because of an alleged dispute . . . in connection with any provision of this Agreement." The Court first reasoned that raising an agreement as an affirmative defense was not the same as bringing an "action" or "proceeding" to enforce that agreement. Although the procedure for raising an affirmative defense is similar to pleading a claim in a complaint or cross-complaint, it is also different in that a defendant raising an affirmative defense cannot be liable for malicious prosecution. However, attorney fees were nonetheless appropriate under the agreement's clause allowing fees where an action is brought "because of an alleged dispute . . . in connection with" the agreement. Even though the action at issue was brought to enforce the parties' *prior* agreement, the suit "necessarily implicated" the instant agreement because of that agreement's integration clause.

Civil Procedure

5. ***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?**

Decided Jan. 19, 2017 (2 Cal.5th 330). Liu, J. for a unanimous Court. The Court affirmed and held that the time constraints in Code of Civil Procedure section 659a are not jurisdictional, permitting a court—on the basis of fundamental jurisdiction—to consider affidavits in support of a motion for new trial even when those affidavits are submitted *after* the statute's 30-day deadline. Thus, a defendant cannot dispute the timeliness of those affidavits for the first time on appeal, but must do so in the first instance in the trial court. Plaintiff's widow had moved for a new trial on the basis of newly discovered evidence, but failed to file two expert affidavits within section 659a's deadline after she neglected to pay the necessary filing fees. Section 659a, at that time, stated the moving party "shall" file any affidavits in support of a motion for new trial within 10, but no later than 30, days of filing the notice of intent. Nevertheless, defendant did not object to the

submission's timeliness, and the court granted the motion for new trial. On appeal, the defendant relied on *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, to argue that section 659a's time constraints were jurisdictional, that the only remedy for filing outside of 10 days was the statute's provision for an extension of up to 20 days, and that the plaintiff's failure to file within those time constraints deprived the court of jurisdiction to rely on the affidavits. Using traditional canons of interpretation and a presumption against depriving courts of jurisdiction in the absence of express legislative intent, the Court disapproved *Erikson*'s holding that section 659a was jurisdictional, concluding the statute was not plainly mandatory despite its use of "shall," placed no clear limits on jurisdiction, contained no consequence or penalty for noncompliance, and had nothing in its legislative history to suggest such an intent. The Court also distinguished *Erikson* on the basis that there, the nonmoving party had objected at the outset to the court's consideration of an untimely-filed affidavit. The trial court was therefore free to consider the untimely submitted affidavit, and defendant therefore forfeited its argument of untimeliness by raising it for the first time on appeal.

6. ***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?**

Decided Feb. 23, 2017 (2 Cal.5th 536). Corrigan, J., for a unanimous Court. The Court affirmed and held that when a court determines an expert opinion is inadmissible because disclosure requirements were not met, the opinion must be excluded from consideration at summary judgment if an objection is raised. Plaintiff, who failed to disclose experts in response to defendant's demand for exchange of expert information, later submitted expert declarations in summary judgment proceedings. The trial court sustained defendant's objection to the introduction of the declarations and granted summary judgment in defendant's favor. The Court of Appeal affirmed. On appeal, the Supreme Court analyzed the applicability of *Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575, in which the Court of Appeal concluded that expert witness disclosure statutes excluded expert testimony offered by noncomplying parties at trial, but not at summary judgment. The Court also examined *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, which noted that because a trial court could grant relief to a party who failed to disclose experts, the court's ruling on summary judgment could not disregard expert declarations. The Supreme Court disapproved *Kennedy* and overruled *Mann* to the extent they were inconsistent with the Court's opinion, concluding that these earlier opinions overlooked the significance of Code of Civil Procedure section 437c, subdivision (d), which requires that affidavits and declarations submitted in summary judgment proceedings "set forth admissible evidence." Unless a court grants relief to a party that has failed to disclose experts, the party's expert declarations contain inadmissible evidence that is excludable upon objection if the failure to disclose was unreasonable.

7. ***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?**

   Decided Apr. 10, 2017 (2 Cal.5th 983). Cantil-Sakauye, C.J., for a unanimous Court. The Court affirmed in part and reversed in part, holding that the Court of Appeal may use a petition for an extraordinary writ to review a trial court's ruling denying a request for a jury trial, but that there was no right to a jury trial when a plaintiff seeks damages for retaliatory termination under Health and Safety Code section 1278.5(g) ("subdivision (g)"). Plaintiff's complaint set forth two causes of action: one under subdivision (g) that authorizes health-care employees who have been terminated in retaliation for certain forms of whistleblowing to obtain remedies in a civil action, and the second for wrongful termination in violation of public policy under *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167. The trial court determined that it, and not a jury, would resolve the subdivision (g) claim, but that the court would hear the matter concurrently with the evidence presented at the jury trial of plaintiff's *Tameny* claim. Plaintiff petitioned for and was granted a writ of mandate in the Court of Appeal challenging the denial of her requested subdivision (g) jury trial. The Supreme Court affirmed, holding that a trial court "has no power or authority to deny a request for a jury" that a party is statutorily or constitutionally entitled to, overruling *Nessbit v. Superior Court* (1931) 214 Cal. 1, which had held that a trial court's denial of a jury trial could be reviewed only after the trial on appeal of the judgment. However, the Court determined that the Legislature intended for subdivision (g) plaintiffs to have their cause of action adjudicated by a court and not a jury, even when the plaintiff seeks damages in that action.

8. ***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?**

   Decided June 15, 2017 (3 Cal.5th 124). Cuéllar, J., for a unanimous Court. The Court vacated and remanded, holding that a statutory appeal from a ruling denying a section 663 motion is distinct from an appeal of a trial court judgment and is thus permissible without regard to whether the issues raised in the appeal from the denial of the section 663 motion overlap with issues that are, or could have been, raised in an appeal of the judgment. Plaintiff sued his former business partner, but the trial court dismissed the action due to abandonment. Shortly after, plaintiff moved to vacate the judgment, which the trial court denied. Plaintiff then appealed the order dismissing the action and the order denying his motion to vacate. The Court focused on its long history of decisions starting with *Bond v. United Railroads* (1911) 159 Cal. 270, which all held that the statute authorizing appeals of postjudgment orders covered denials of section 663 motions. But the Court also took note of its decision in *Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, which deemed a section 663 order "nonappealable" without any

explanation. The Court explained that despite the decision in *Clemmer*, it would now hold that *Clemmer* did not overrule the Court's longstanding precedent, and that any departure from settled law by the Court would come with an explanation of the departure (which the *Clemmer* Court did not provide). In addition, the Court noted that its decision was supported by "decades of legislative inaction": despite making dozens of changes to the statutory scheme since *Bond*, the Legislature has done nothing to question the Court's holding. Accordingly, the Court overruled its decision in *Clemmer*.

9. ***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?**

Decided Aug. 10, 2017 (3 Cal.5th 767). Kruger, J., for a unanimous Court. The Court affirmed and held that the interim adverse judgment rule bars the malicious prosecution suit. In particular, the Court held that there are only two exceptions to the interim adverse judgment rule: when the interim judgment was decided on a technical ground, and when the interim ruling was obtained by fraud or perjury. Neither exception applied here. In this case, the plaintiffs initiated a malicious prosecution claim against the defendants' attorneys after a trial court found that a trade secrets suit against the plaintiffs had been brought in bad faith. The Court explained that an interim ruling subsequently reversed would not affect the probable cause inquiry of a malicious prosecution claim, and that the summary judgment ruling in favor of defendants established that the argument had merit. Indeed, the original trial court's finding of objective bad faith under the California Uniform Trade Secrets Act was *not* a finding that the underlying action lacked merit. Further, the lower court concluded that denial of summary judgment on the basis of the business plan was itself sufficient to invoke the rule. Thus, the decision was based on the merits, and not on a technical ground. Accordingly, the defendants had probable cause to bring the original action, and the malicious prosecution suit was properly barred. Having concluded that the suit was barred by the interim adverse judgment rule, the Court declined to reach the issue of whether the one-year statute of limitations in Code of Civil Procedure section 340.6 applies to malicious prosecution claims.

Employment & Labor

10. ***Williams v. Superior Court*, 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 ("PAGA") 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.)**

    Decided July 13, 2017 (3 Cal.5th 531). Werdegar, J., for a unanimous Court. The Court reversed, holding that plaintiffs in a PAGA action are not required to show good cause in order to obtain discovery of the names and contact information of other "aggrieved employees," and that courts considering the request should not assume employees have a protectable privacy interest. Instead, the court should determine whether a protectable privacy interest exists and balance that interest against competing or countervailing interests. In this PAGA action, employee plaintiff sought the contact information and employment history for all nonexempt California employees during a two-year period from defendant. Defendant refused the discovery request, arguing it was an invasion of third parties' privacy interests protected by the California Constitution. The trial court granted in part plaintiff's motion to compel, limiting discovery to the store at which plaintiff worked and premising any renewed motion for discovery on plaintiff's appearance for at least six hours of deposition. The Court of Appeal denied plaintiff's petition for writ relief. Citing *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, the Court reversed, noting that the contact information of potential class members was generally discoverable, and rejected defendant's attempts to differentiate PAGA from this precedent, finding no basis in PAGA's text or purpose to impose a good cause requirement on plaintiff before allowing such discovery. The Court held that this discovery in PAGA actions, like discovery in class actions, protects the interests of absent class members and gives access to potential percipient witnesses and relevant evidence. The Court also clarified that, under *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, courts should not *de facto* assume an "obvious invasion of an interest fundamental to personal autonomy" is at stake in these discovery requests, but should determine the existence of such an interest before requiring a requesting party to show a compelling interest or compelling need. Where lesser interests are at stake, courts should apply the *Hill* factors to balance the relevant interests.

11. ***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?

Decided Dec. 22, 2016 (2 Cal.5th 257). Cuéllar, J., for a majority of the Court (Kruger, J., concurring in part and dissenting in part, joined by Corrigan, J.). The Court reversed and held that state law requires employers to provide rest periods to employees during which employees must be "free from duties or employer control." Employers thus may not require employees to remain either "on-duty" or "on-call" during such rest periods. Plaintiffs, security guards working for ABM, sued the company, alleging that ABM failed to provide them the rest periods they were entitled to because they allegedly were required to keep their pagers and phone radios on and to remain vigilant and responsive to calls during such rest periods. The Court agreed that this purported arrangement failed to satisfy the employer's duty to provide rest breaks. In arriving at this conclusion, the Court analyzed the text of subdivision 12(A) of Wage Order 4, which provides that "[e]very employer shall authorize and permit all employees to take rest periods." The Court concluded that the term "rest" means the "[c]essation of work, exertion, or activity," and that the plain meaning of the term "rest period" therefore is "an interval of time free from labor, work, or any other employment-related duties." The Court determined that this reading of the wage order was also in harmony with Labor Code section 226.7, which prohibits employers from requiring "any employee to work during any meal or rest period." The Court observed that employers may still recall employees to work during a rest break; if employers do so though, they must reasonably reschedule the interrupted rest period.

12. ***Mendoza v. Nordstrom*, S224611 (9th Cir. No. 12-57130, 778 F.3d 834). This case presents the following questions from the Court of Appeals for the Ninth Circuit: "(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 more than six days in seven: force, coerce, pressure, schedule, encourage, reward, permit, or something else?"**

Decided May 8, 2017 (2 Cal.5th 1074). Werdegar, J., for a unanimous Court. The case involved two employees who brought suit against their employer, alleging that the employer violated sections 551 and 552 of the Labor Code by allowing them to work more than six days straight, sometimes in shifts longer than

six hours. The Ninth Circuit requested that the Supreme Court resolve three unsettled questions of California law. First, the Court analyzed the plain language, legislative history, and "regulatory and statutory context of which the day of rest laws are a part" and concluded that wage and hour laws were designed to guarantee a day of rest "for each *workweek*," not every seven days. Second, the Court analyzed the plain text of the statute and looked to guidance from relevant state agencies and held that an employee need only work six hours or more *once* on any day during the workweek to be entitled to a day of rest. Third, the Court analyzed how an employer can "cause" its employee to go without a day of rest under the statute. Looking to the traditional meaning of "cause," the Court held that an employer "causes" an employee to go without a day of rest by "affirmatively seek[ing] to motivate an employee's forsaking rest," but does not do so by failing to prevent an employee from consciously foregoing guaranteed rest.

Insurance

Gibson Dunn
for Plaintiffs and
Respondents

13. ***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).)**

Decided Jan. 23, 2017 (2 Cal.5th 376). Cuéllar, J., for a unanimous Court. The Court reversed and held that the Insurance Commissioner's enactment of the replacement-cost estimate regulation was a valid exercise of his administrative authority under section 790.10 of the Unfair Insurance Practices Act ("UIPA"). The UIPA allows the Insurance Commissioner to either (1) bring administrative proceedings to enjoin unfair insurance practices "not defined in Section 790.03" but that "nonetheless prove to be unfair or deceptive"; or (2) "as conditions warrant . . . promulgate reasonable rules and regulations, and amendments and additions thereto, as are necessary." (Ins. Code, §§ 790.06, 790.10.) The Insurance Commissioner promulgated a new regulation in 2010 specifying certain factors that insurance companies must take into account before issuing replacement-cost estimates to customers and declaring any non-conforming replacement-cost estimates to be "misleading" under the UIPA. (Cal. Code Regs., § 2695.183.) Both the Superior Court and the Court of Appeal held that the Commissioner's replacement-cost regulation exceeded the authority delegated to him under the UIPA. The Supreme Court reversed, holding that the UIPA gives

the Commissioner power to issue regulations defining conduct as illegal under the UIPA, and deeming the regulation consistent with the text of the UIPA.

Real Estate

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

    Decided Nov. 21, 2016 (1 Cal.5th 1024). Kruger, J., for a unanimous Court. The Court affirmed and held that in a dual agency context, where the buyer and the seller in a residential real estate transaction are independently represented by a different agent from the same firm, an associate agent who represents the seller in a transaction owes the same fiduciary duty to the buyer as the broker owes to the buyer. In *Horiike,* both the buyer and the seller were represented by agents from Coldwell Banker, albeit independently retained and from different offices. The Court rejected the argument that the seller's agent did not owe a duty to the buyer to disclose all facts materially affecting the value or desirability of the property, concluding that, under Civil Code section 2079.13, subdivision (b), "the associate licensee, who functioned on Coldwell Banker's behalf in the real property transaction, owed the buyer an 'equivalent' duty of disclosure and therefore failing to disclose a known disparity in records pertaining to the square footage of the property may have been a breach of this duty." Looking at the legislative history of Civil Code, section 2079.13, the Court determined that the Legislature amended the original draft language of the statute "with the intent of clarifying that 'the fiduciary duties of real estate broker agents to buyers and sellers also apply to real estate salespersons.'" The Court also recognized that a salesperson's authority to represent either party in a transaction flows solely from their affiliation with the retained broker, and therefore the salesperson "stands in the shoes of the brokerage and assumes the broker's duties." Thus, an associate licensee may not claim independence to avoid the fiduciary duty of disclosure, as it is the broker's status, not the agent's status, that determines that duty.

Tax Law

15. ***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?**

    Decided June 29, 2017 (3 Cal.5th 319). Corrigan, J., for a majority of the Court (Kruger, J., dissenting). The Court affirmed and held the documentary transfer tax, which applies to transfers of "realty sold," applied to the transfer of an

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Appellant

ownership interest in an entity that held realty because the transaction involved an "actual transfer of legal beneficial ownership made for consideration." In this case, as part of an estate planning transaction, several family trusts transferred their interests in a partnership (which owned an LLC that held title to the real property at issue) to other family trusts. The LLC contended the documentary transfer tax did not apply because section 11911 references only "realty sold" and thereby permits taxation only of "instruments that directly reference real property." The LLC also argued that the legislative history of section 11911 evinced the Legislature's intent that it would "*not* . . . tax transfers of legal entity interests." The Court rejected these contentions and held that the tax was not limited to transfers of title to realty, and could be imposed on transfers of beneficial ownership in legal entities holding realty, however indirectly. Critical to the Court's holding was section 11925 of the Revenue and Taxation Code, which exempted certain continuing partnerships from the documentary transfer tax. As the Court wrote, "[i]f the Legislature did not intend the tax to apply to any transaction involving the transfer of legal entity interests, section 11925 would serve no purpose. No transfer of an interest would create liability, so no exemption would be needed." The Court also relied on federal authority interpreting the former federal documentary stamp act (on which section 11911 is based).

Tort Law

Gibson Dunn
for Defendant and Respondent

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?**

Decided Dec. 1, 2016 (1 Cal.5th 1132). Liu, J., for a unanimous Court. The Court reversed and remanded (*Haver*) and vacated and remanded (*Kesner*), holding that employers whose businesses involve the use or manufacture of asbestos-containing products (and the owners of premises where asbestos is used) owe a duty of care to members of employees' households who come into contact with asbestos on the employees' clothing or personal effects. The Court explained that California law establishes a general duty to use reasonable care, but that courts may carve out certain types of cases if an exception is supported by public policy. Applying the factors outlined in *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, the Court declined to find an exception to the general duty of care in this case because: (1) science existing at the time of injury in this case had already established the dangers of asbestos exposure, and thus it was foreseeable that people who interacted with employees of asbestos-using employers could be harmed by coming into contact with asbestos on the employees' clothing and personal effects; (2) harm would be reasonably certain and compensable by law; (3) harm would be closely connected to the defendants' conduct of using asbestos;

(4) finding a duty here would serve the purpose of preventing future harm; (5) the degree of moral blame attributable to the defendants, while difficult to assess, supported finding a duty since the defendants had far greater control over the risks at issue than the plaintiffs did; (6) it was not obvious that liability for asbestos exposure was uninsurable; and (7) the overall burden imposed by finding a duty of care was not unwarranted. As to the last factor, however, the Court recognized that the "most forceful" argument against finding a duty in this case was that it could open the door to a large number of potential plaintiffs. Accordingly, the Court strictly limited the scope of the duty to extend "only to members of a worker's household."

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?**
2. ***California Building Industry Assn. v. State Water Resources Control Bd.*, S226753 (1st App. Dist., 235 Cal.App.4th 1430, mod. 236 Cal.App.4th 529a). This case presents the following issues: (1) Does Water Code section 181 permit the State Water Resources Control Board to approve its annual fee under the waste discharge permit program by a majority of the quorum? (2) Does Proposition 26 apply to the waste discharge permit program fee? (3) Does the Board have the initial burden of demonstrating the validity of its fee? (4) Is the fee, which is based on balancing the fees and costs of the waste discharge permit program, an invalid tax unless it separately balances the fees and costs of each of the eight program areas within the program?**
3. ***Chen v. L.A. Truck Centers, LLC*, S240245 (2d App. Dist., 7 Cal.App.5th 757). This case presents the following issue: Must a trial court reconsider its ruling on a motion to establish the applicable law governing questions of liability in a tort action when the party whose presence justified that choice of law settles and is dismissed?**
4. ***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?**

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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.

5. ***De La Torre v. CashCall*, S241434. (9th Cir. No. 14-17571; 854 F.3d 1082). Request under California Rules of Court, rule 8.548, that the 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: Can the interest rate on consumer loans of $2,500 or more governed by California Finance Code section 22303 render the loans unconscionable under section 22302?**

6. ***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?**

7. ***Dr. Leevil, LLC v. Westlake Healthcare Center*, S241324 (2nd App. Dist., 9 Cal.App.5th 450). The court limited review to the following issue: Does Code of Civil Procedure section 1161a require a purchaser of real property at a foreclosure sale to perfect title before serving a three-day notice to quit on the occupant of the property?**

8. ***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?**

9. ***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?**

10. ***Flo & Eddie, Inc. v. Pandora Media, Inc.*, S240649 (9th Cir. No. 15-55287, 851 F.3d 950). Request under California Rules of Court, rule 8.548, that the 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: "1. Under section 980(a)(2) of the California Civil Code, do copyright owners of pre-1972 sound recordings that were sold to the public before 1982 possess an exclusive right of public performance? 2. If not, does California's common law of property or tort otherwise grant copyright owners of pre-1972 sound recordings an exclusive right of public performance?"**

11. ***Gerard v. Orange Coast Memorial Medical Center*, S241655. (4th App. Dist., 9 Cal.App.5th 1204). This case includes the following issues: (1) Did Senate Bill 327 constitute a change in the law or a clarification in the law? (2) Is the Industrial Wage Commission Wage Order No. 5, section 11(D) partially invalid to the extent it authorizes health care workers to waive their second meal periods on shifts exceeding 12 hours? (3) To what extent, if any, does**

the language of Labor Code section 516 regarding the "health and welfare of those workers" affect the analysis?

12. ***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?**

13. ***Goonewardene v. ADP, LLC*, S238941 (2d App. Dist., 5 Cal.App.5th 154). This case presents the following issue: Does the aggrieved employee in a lawsuit based on unpaid overtime have viable claims against the outside vendor that performed payroll services under a contract with the employer?**

14. ***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?**

15. ***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?**

16. ***Heimlich v. Shivji*, S243029 (6th App. Dist., 12 Cal.App.5th 152). This case presents the following issue: When a party to an arbitration proceeding makes an offer of compromise pursuant to Code of Civil Procedure section 998 and obtains a result in the arbitration more favorable to it than that offer, how, when, and from whom does that party request costs as provided under section 998?**

17. ***Heller Ehrman LLP v. Davis Wright Tremaine LLP*, S236208 (9th Cir. Nos. 14-16314, 14-16315, 14-16317, 14-16318; __ F.3d __, 2016 WL 4011194). Request under California Rules of Court, rule 8.548, that the court decide questions 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: "Under California law, what interest, if any, does a dissolved law firm have in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matters on an hourly basis?"**

Gibson Dunn
for *amicus curiae*

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

20. ***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?**

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. ***Liberty Surplus Ins. Corp. v. Ledesma & Meyers Construction Co., Inc.*, S236765 (9th Cir. No. 14-56120; __ F.3d __, 2016 WL 4434589). Request under California Rules of Court, rule 8.548, that the court decide questions of California law presented in a matter pending in the United States Court of Appeals for the Ninth Circuit. The question presented is: "Whether there is an 'occurrence' under an employer's commercial general liability policy when an injured third party brings claims against the employer for the negligent hiring, retention, and supervision of the employee who intentionally injured the third party."**

23. ***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?**

24. ***McMillin Albany LLC v. Superior Court*, S229762 (5th App. Dist., 239 Cal.App.4th 1132). This case presents the following issue: Does the Right to Repair Act (Civ. Code, § 895 et seq.) preclude a homeowner from bringing common law causes of action for defective conditions that resulted in physical damage to the home?**

25. ***National Shooting Sports Foundation, Inc. v. State of California*, S239397 (5th App. Dist., 6 Cal.App.5th 298). This case presents the following issues: (1) Can a statute be challenged on the ground that compliance with it is**

allegedly impossible? (2) If so, how is the trial court to make that determination?

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

27. ***Pitzer College v. Indian Harbor Ins. Co.*, S239510 (9th Cir. No. 14-56017; 845 F.3d 993). 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. As restated by the court, the questions presented are: (1) Is California's common law notice-prejudice rule a fundamental public policy for the purpose of choice-of-law analysis? (2) If the notice-prejudice rule is a fundamental public policy for the purpose of choice-of-law analysis, can the notice-prejudice rule apply to the consent provision in this case?**

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

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

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

Gibson Dunn
for Defendant and Respondent

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

32. ***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?**

33. ***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?**

34. ***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?**

35. ***Troester v. Starbucks Corp.*, S234969 (9th Circ. No. 14-55530, nonpublished order). Request under California Rules of Court, rule 8.548, that the 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 Standards Act's *de minimis* doctrine, as stated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) and *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984), apply to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197?**

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

37. ***Vasilenko v. Grace Family Church*, S235412 (3d 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?**

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

39. ***Wilson v. Cable News Network, Inc.*, S239686 (2d App. Dist., 6 Cal.App.5th 822). This case presents the following issue: In deciding whether an employee's claims for discrimination, retaliation, wrongful termination, and defamation arise from protected activity for purposes of a special motion to strike (Code of Civ. Proc., § 425.16), what is the relevance of an allegation that the employer acted with a discriminatory or retaliatory motive?**

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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