

LITIGATION

CALIFORNIA
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2023 Litigation & Appellate Summit

MAY 4-5 | SAN FRANCISCO, CA



Litigation, Appellate, and ADR Update

Thursday, May 4, 2023

Speakers:

Jim Wagstaffe

Jordanna Thigpen

Moderator:

George Wailes

MCLE: 1.5 Hours of MCLE including 1.5 Hours of Legal Specialization in Appellate Law

Conference Reference Materials

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In Search of Hot, New Federal Procedure Cases



CLA Litigation Summit
May 4, 2023

wagstaffe@wvbrlaw.com

 @JWagstaffeLxNx



One Destination GPS, One Litigation Solution:



California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group

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Chapters 1 - 28
James M. Wagstaffe

Co-Authors:
Steven Adamski
Frank Busch

Editorial Consultants:
Hon. Evelio Grillo
Paul Kiesel
Edith Matthai
Hon. Richard Seabolt



Practice Guide: Federal Civil Procedure Before Trial

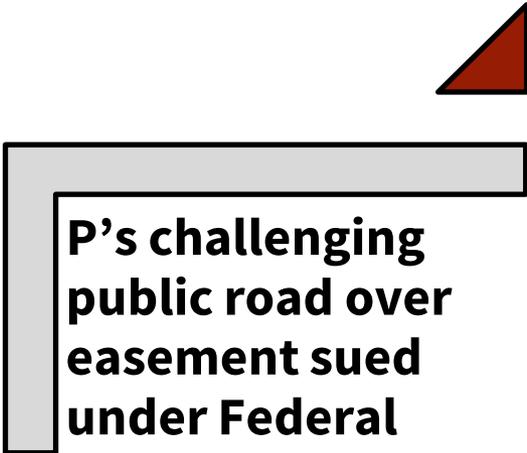
James M. Wagstaffe



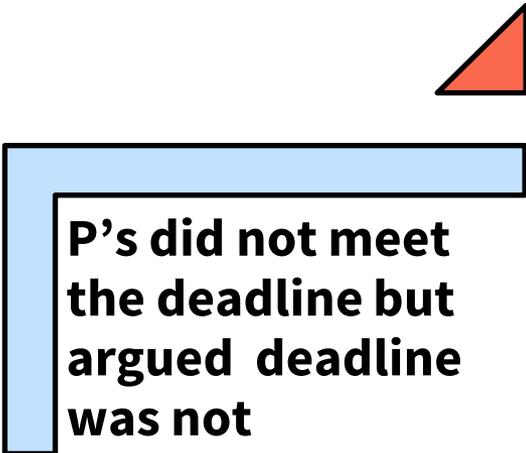


“Jurisdictional”

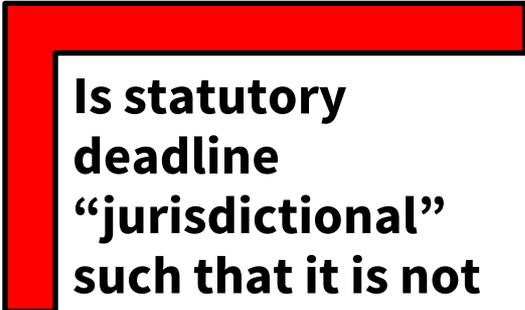
“Jurisdictional”?



P’s challenging public road over easement sued under Federal Quiet Title Act, permitting challenge to government’s intrusion on land -- with 12-year statute of limitations



P’s did not meet the deadline but argued deadline was not jurisdictional so they could argue that equitable doctrines might forgive the late filing



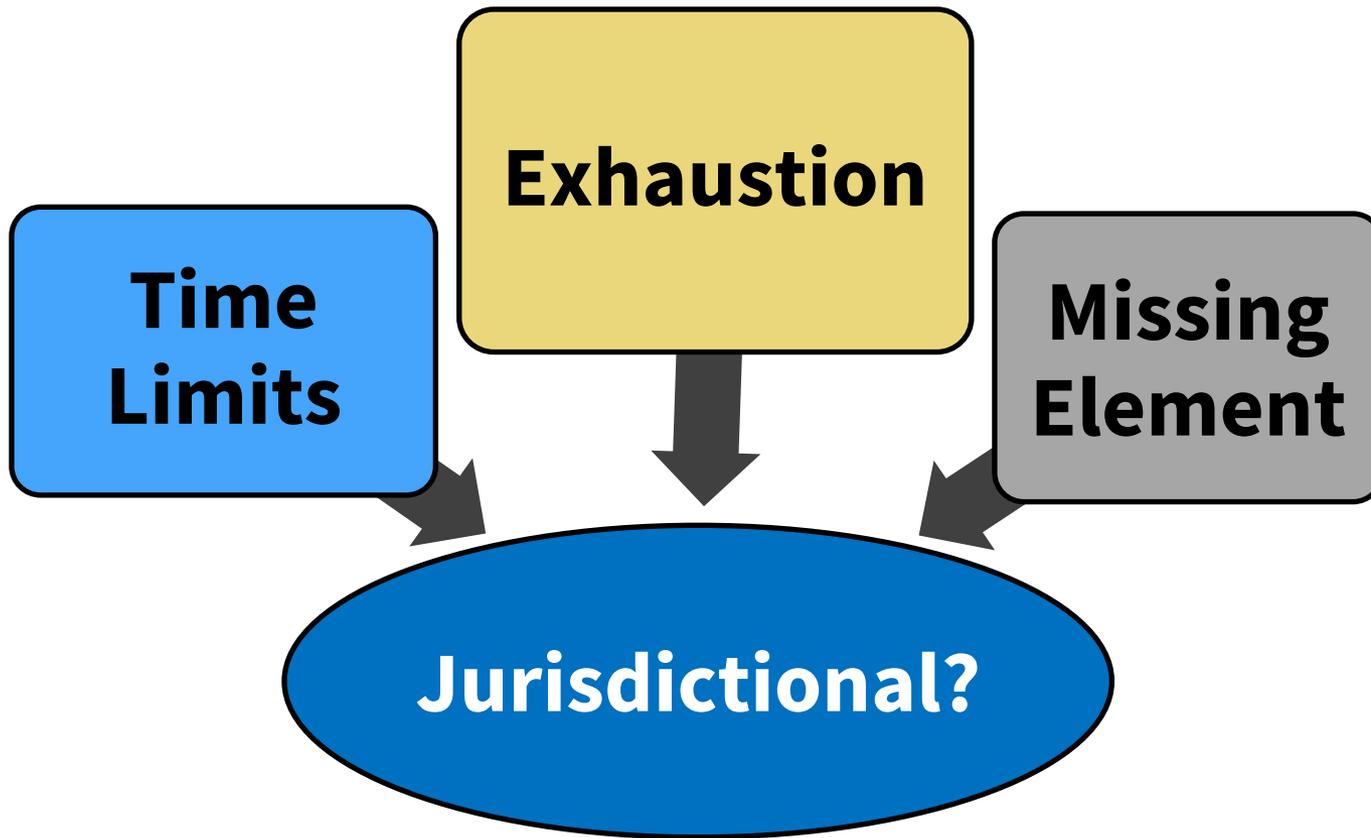
Is statutory deadline “jurisdictional” such that it is not subject to tolling?

Not Jurisdictional

***Wilkins v. U.S.* (2023) 143 S.Ct. 870**

Not all procedural requirements are jurisdictional; only if Congress clearly states they are; here statutory deadline is not “jurisdictional”

Not Jurisdictional: *MOAC Mall Holdings LLC v. Holdco LLC* (U.S. S.Ct. April 19, 2023)—statute authorizing district court review of described bankruptcy determination; *Wiener v. AXA Equitable Life Ins. Co.* (4th Cir. 2023) 58 F.4th 774—choice of law; *Ryder v. Hyles* (7th Cir. 2022) 27 F.4th 1253—RICO injury to business or property requirement; *Operating Eng’s Local 324 Fringe Benefit Funds v. Rieth-Riley Constr. Co.* (6th Cir. 2022) 43 F.4th 617—whether contract is ERISA plan; *Wickfire, L.L.C. v. Woodruff* (5th Cir. 2021) 989 F.3d 343—absence of protectable mark in Lanham Act case; see TWG § 5-IV

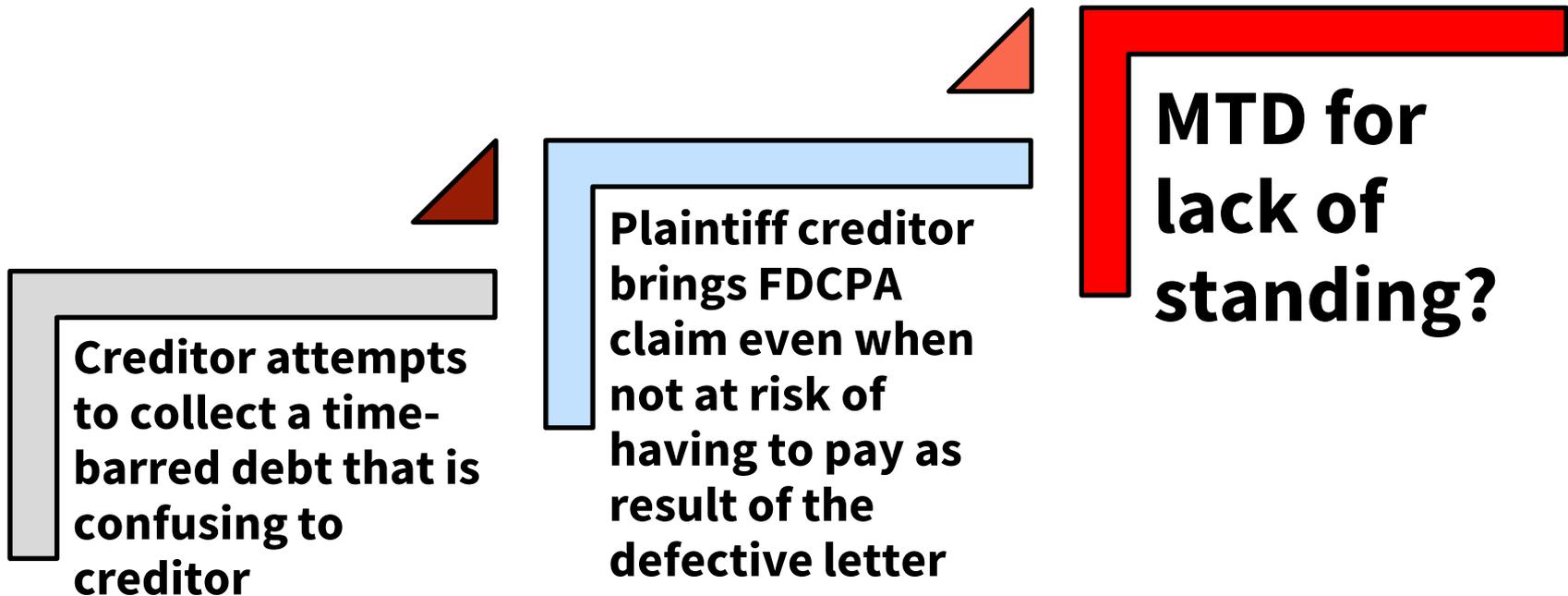


Not Jurisdictional: *Boechler, P.C. v. Comm’r of Internal Revenue* (2022) 142 S.Ct. 2354--time limit to review Tax Court decision; *Fort Bend Cnty., Tex. v. Davis* (2019) 139 S.Ct. 1843—EEOC exhaustion; *Jaludi v. Citigroup & Co.* (3d Cir. 2023) 57 F.4th 148—Sarbane-Oxley’s statute of limitations and exhaustion requirements; *Donnelly v. Controlled Applic. Review* (2d Cir. 2022) 37 F.4th 44—exhaustion for naturalization; *Martz v. Horazdovsky* (9th Cir. 2022) 33 F.4th 1157--statute of limitations for shipowner’s notice



“Spokeo Standing”

Is there *Spokeo* Standing?



GRANT

***Pierre v. Midland Credit Mgt., Inc.* (7th Cir. 2022) 29 F.4th 934**

No concrete injury traceable to “zombie” debt case since mere violation of statute (FDCPA)

See *Spokeo, Inc. v. Robins* (2016) 578 U.S. 330—mere violation of statute without injury; *Earl v. The Boeing Co.* (5th Cir. 2022) 55 F. 4th 897—no class standing if expert testimony on damages is speculative i.e., if Max-8 dangerous plane, FAA not allow flights; *Bassett v. Credit Bureau Servs., Inc.* (8th Cir. 2023) 60 F.4th 1132—no standing for false statement interest accrues when interest not paid; *Flynn v. FCA US LLC* (7th Cir. 2022) 39 F.4th 946—no standing for “overpayment” for recalled and already repaired vehicle; *McGee v. S-L Snacks National* (9th Cir. 2020) 982 F.3d 700—no standing when plaintiff suffered no economic or physical injuries by consuming trans fat from D’s popcorn; TWG § 24-III[A][1], 24.11

O'Leary v. Trustedid, Inc.

(4th Cir. 2023) 60 F.4th 240



Holding: No standing to sue company that violated state statute prohibiting disclosure of six-digits of plaintiffs' social security number (without password protection) since no showing of resulting identity theft.

Remand to state court required

Spokeo:

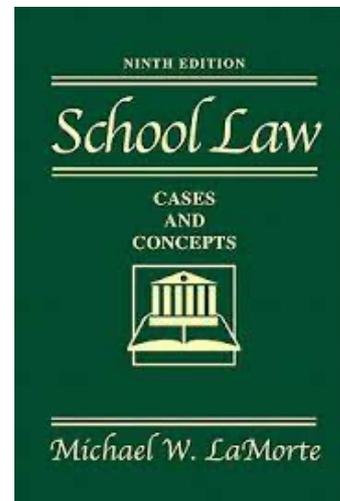


Wadsworth v. Kross, Lieberman & Stone, Inc. (7th Cir. 2021) 12 F.4th 665—no standing under FDCPA just because debt collector fails to inform debtor of statutory rights

Garland v. Orlans, PC (6th Cir. 2021) 999 F.3d 432--mere confusion caused by letter violating FDCPA requirements insufficient for standing

Flecha v. Medicredit, Inc. (5th Cir. 2020) 946 F.3d 762—class members receiving false dunning letter lack FDCPA standing if ignored as junk mail

Spokeo:



E.T. v. Paxton (5th Cir. 2022) 41 F.4th 709—student lacks standing challenging executive order barring school masks mandates since future injury uncertain

Martinez v. Newsom (9th Cir. 2022) 46 F.4th 965—parents lack standing in class action challenging remote class impact on special needs as kids not enrolled there

Soule v. Conn. Ass'n of Sch. (2d Cir. 2022) 57 F.4th 43— cisgender student athlete cannot challenge transgender policy as causing “loss of being champion” graduated and already competed and won state titles

Spokeo:



ADA
Americans with
Disabilities Act

Calcano v. Swarovski N. Am. Ltd. (2d Cir. 2022) 36 F.4th 68—no standing for visually impaired P’s conclusory allegation of intent to buy unavailable braille gift card from store

Harty v. West Point Realty, Inc. (2d Cir. 2022) 28 F.4th 435—no standing for ADA plaintiff who visits travel website with no intention to visit defendant’s hotel

R.K by and Through J.K. v. Lee (6th Cir. 2022) 52 F.4th 625—student with covid risk lacks ADA standing to challenge prohibition by school to require masking

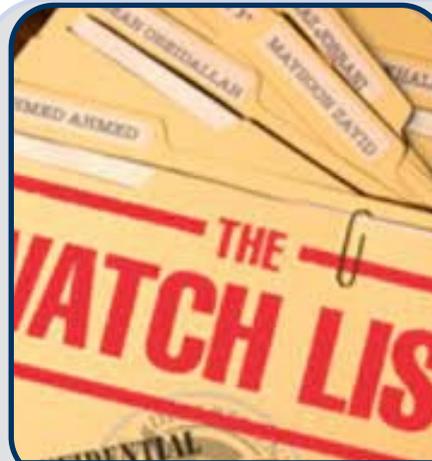
WAGSTAFFE ALERT:

***Acheson Hotels LLC v.
Laufer, cert. granted, No.
22-469:***



Whether disability “tester” who incurs no actual injury has standing to sue hotel for an allegedly non-compliant website?

Standing & Class Actions



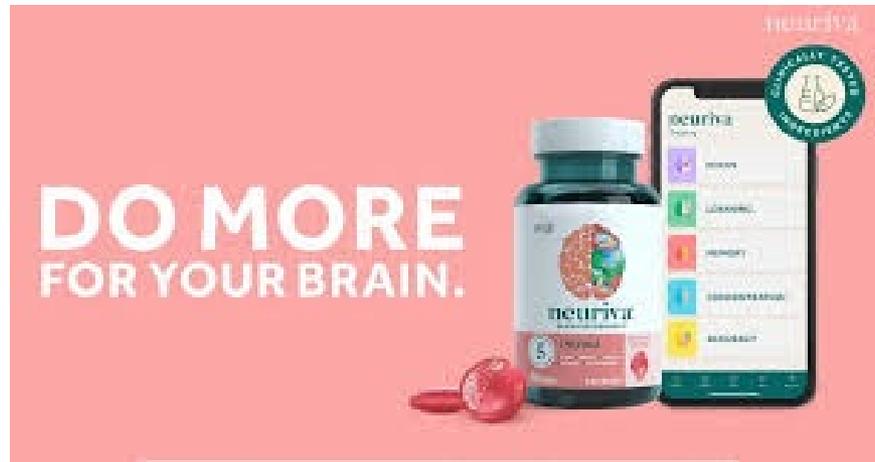
***TransUnion LLC v. Ramirez* (2021)
141 S.Ct. 2190--
even if FCRA
violation in credit
report that falsely
classified
individuals as on
terrorist watch
list, class
members whose
credit records not
accessed lack
standing;
certification can
be reexamined on
remand**



***Johannesson v. Polaris Industries, Inc.* (8th Cir. 2021)
9 F.4th 981—class
based on defective
ATV cannot be
certified when
class as defined
contains members
who lack standing;
see also *Thomley v. Clearview AI, Inc.*
(7th Cir. 2021) 984
F.3d 1241—no
certification if
plaintiffs define
class w/ members
who lack standing**

Williams v. Reckitt Benckiser, LLC

(11th Cir. 4/12/23) 2023 U.S. App. LEXIS 878



Holding: No standing in class action for plaintiffs seeking injunctive relief for misrepresentations by brain performance supplement manufacturer – no plaintiffs plan to buy product in future.

Cf. *Van v. LLR* (9th Cir. 3/13/23) 61 F.4th 1053—even de minimis injury sufficient for class plaintiffs standing

Rule 12(b)(1)

No Waiver

**No
Supplemental
Claims**

**Dismissed
w/o
Prejudice**

Rule 12(b)(6)

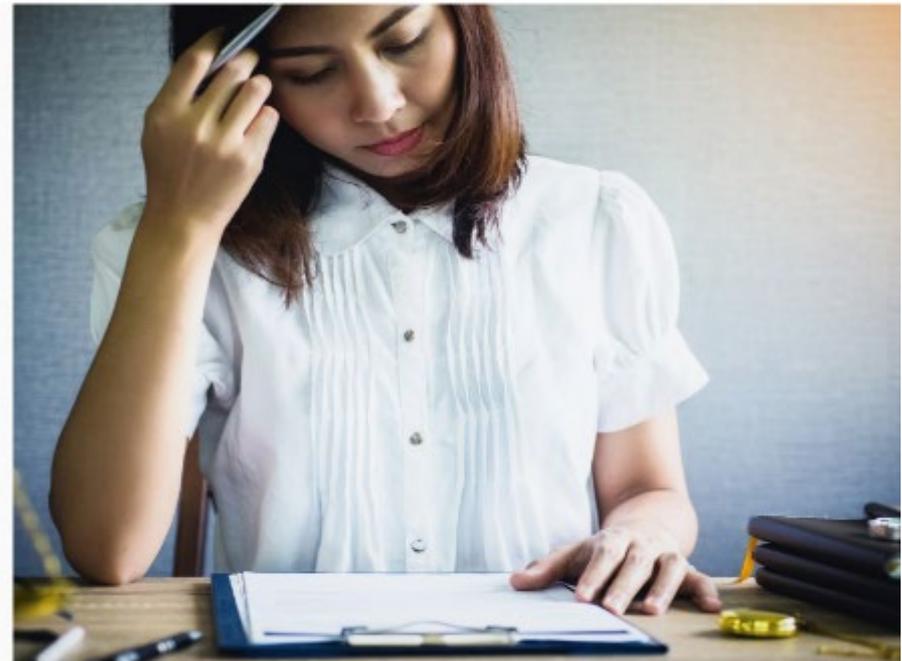
**Can be
Waived
(Aff. Defense)**

**Supplemental
Claims
Discretionary**

**Dismissed
with
Prejudice**

APRIL 2019

Five Essential Tips for Surviving the Supreme Court's Tectonic Changes to the Meaning of "Jurisdiction" and the **Spokeo** Standing Earthquake



When Dorothy reacted to the earthshaking storm by telling Toto they weren't in Kansas anymore, she was expressing what litigators may feel when examining the tectonic changes underway in the U.S. Supreme Court as to what is meant by "subject matter jurisdiction" and Article III standing. And make no mistake about it, surviving these tremblors means more than a quick reading of the hot-off-the-press June 2019 decision in *Fort Bend County* as the latest word on jurisdiction and other recent cases addressing the *Spokeo* juggernaut.

"Jurisdiction" - the Word With Limited Meaning under *Fort Bend County*

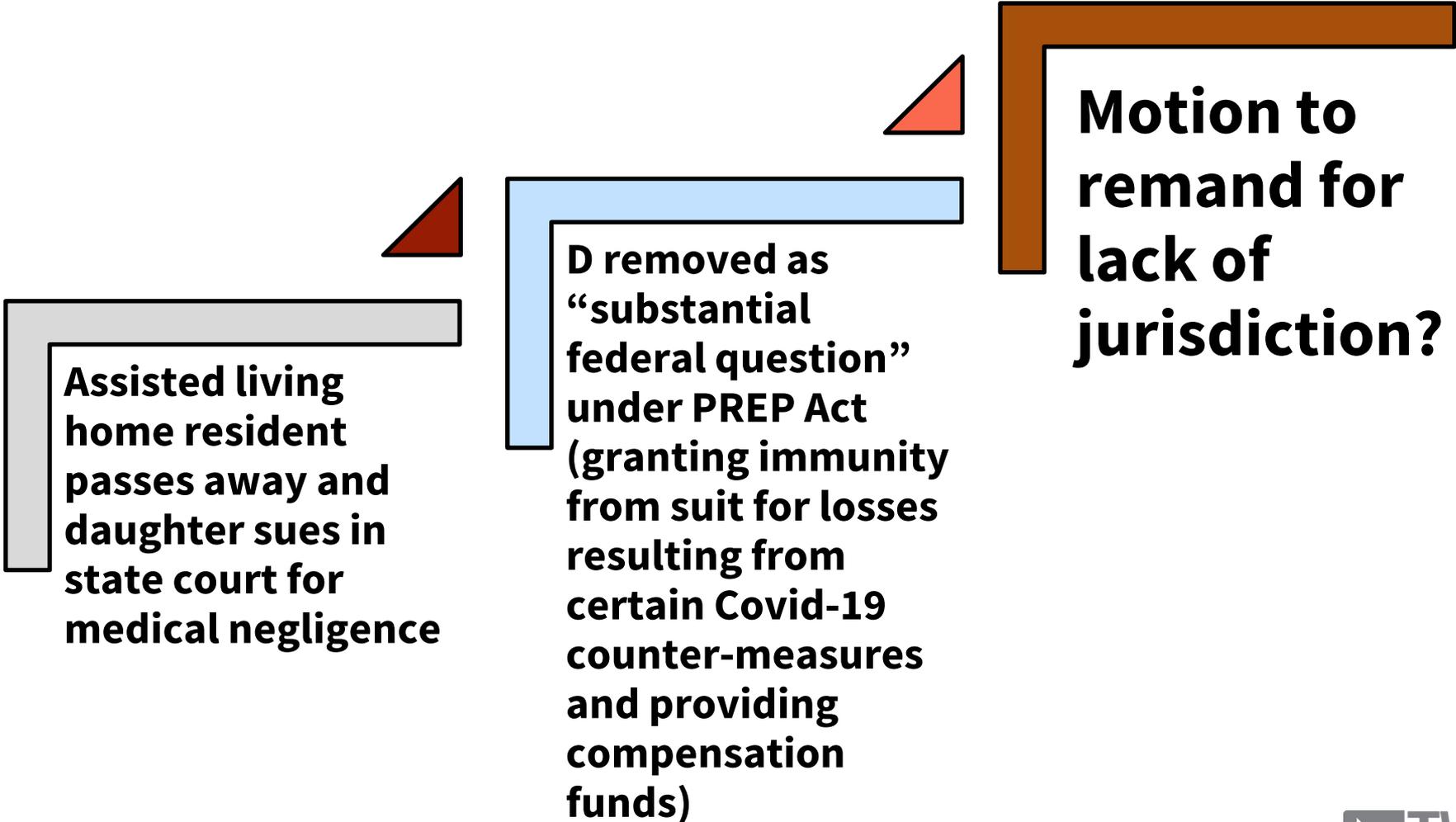
reaffirmed that "the word 'jurisdictional' generally is reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." In contrast, reasoned the Court, an exhaustion requirement—even if mandated by statute—is a claims-processing rule that will be enforced if properly raised, but one that may be forfeited if the party waits too long to raise the point.

Thus, the High Court continued its attack on what it calls the "profligate use" of the term "jurisdiction" in situations where Congress did not expressly and clearly describe the



“The Missing Federal Claim”

Is There Federal Jurisdiction?



Assisted living home resident passes away and daughter sues in state court for medical negligence

D removed as “substantial federal question” under PREP Act (granting immunity from suit for losses resulting from certain Covid-19 counter-measures and providing compensation funds)

Motion to remand for lack of jurisdiction?

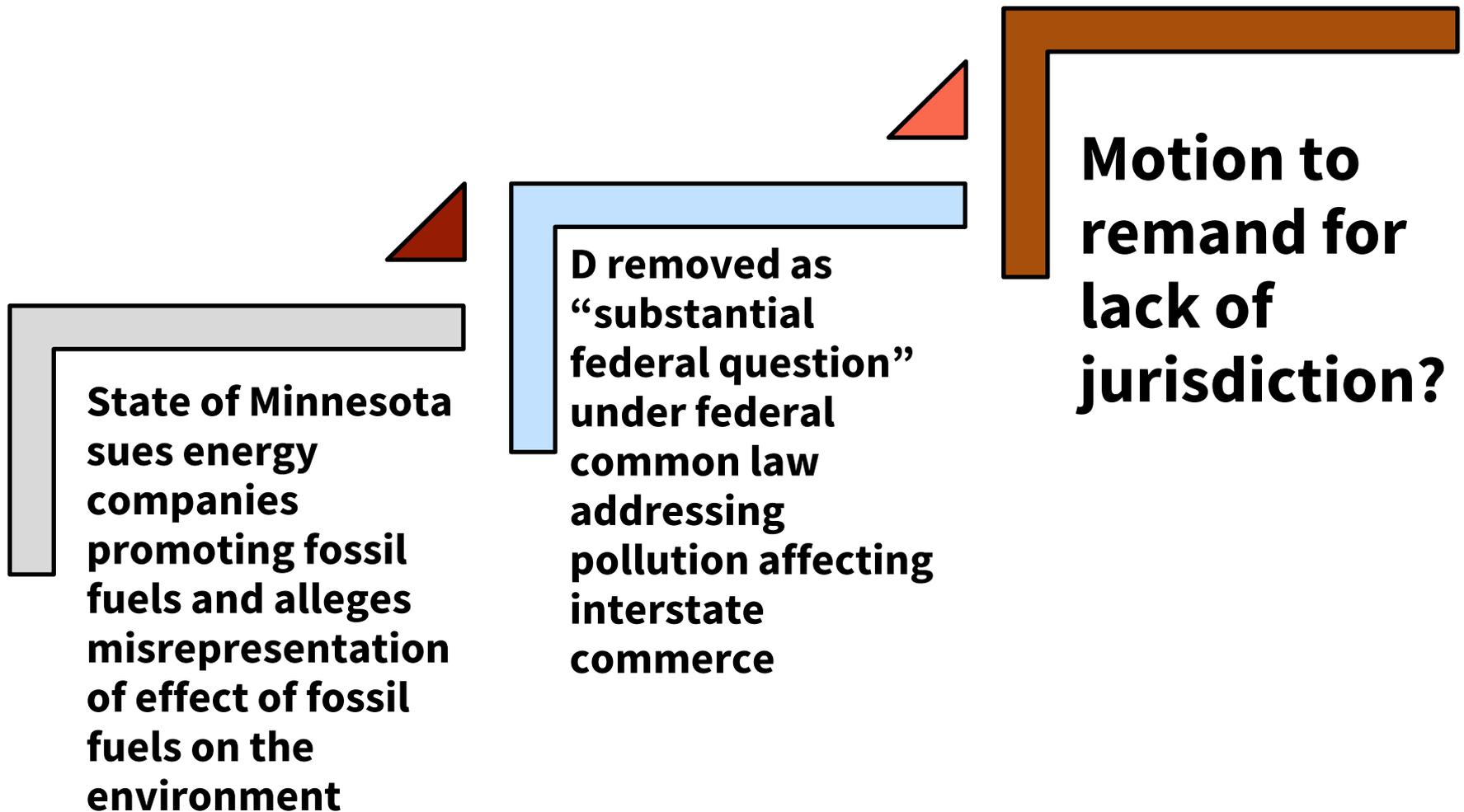
GRANT

***Hudak v. Elmcroft of Sagamore Hills* (6th Cir. 2022) 58 F.4th 845**

Federal immunity not completely preemptive (only a federal defense), and no federal officer removal since rest home not acting under federal officer or agency

See Solomon v. St. Joseph Hosp. (2d Cir. 2023) 62 F.4th 54—same; *Mitchell v. Advanced HCS, L.L.C.* (5th Cir. 2022) 28 F.4th 580--same; *Saldana v. Glenhaven Healthcare LLC* (9th Cir. 2022) 27 F.4th 679--same; *Maglioli v. All. HC Holdings LLC* (3d Cir. 2021) 16 F.4th 393—same; *Vlaming v. West Point Sch. Bd.* (4th Cir. 2021) 10 F.4th 300—no removal of wrongful termination simply because D has Title IX defense; **cf.** *Old Dominion Elec. Coop. v. PJM Interconnection, LLC* (4th Cir. 2022) 24 F.4th 271—claim involving interpretation of federal tariff is substantial federal question; *Banks v. Cotter Corp.* (8th Cir. 2022) 22 F.4th 788--action arising from nuclear incident arises under federal statute; TWG § 6-VI[A][1], § 8-V[E]

Is There Federal Jurisdiction?



GRANT

***Minnesota v. API* (8th Cir. 2023) 563 F.4th 703**

Climate change liability not removable as state claims do not arise under federal law

See also City & Cnty. of Honolulu v. Sunoco LP (9th Cir. 2022) 39 F.4th 1101--state claim arising out of climate change liability not removable; *City of Hoboken v. Chevron* (3d Cir. 2022) 45 F.4th 699—same; *Bd. of Cty. Comm’rs of Boulder Cty. v. Suncor Energy* (10th Cir. 2022) 25 F.4th 238--same; *Mayor and City Council of Baltimore v. BP LLC* (4th Cir. 2022) 31 F.4th 178—same; *Rhode Island v. Shell Oil Prod. Co.* (1st Cir. 2022) 35 F.4th 44--same; **cf.** *City of New York v. Chevron Corp.* (2d Cir. 2021) 993 F.3d 81--issues different if original jurisdiction and raising issues of federal common law for global warming damage claims



Plaintiff is Jedi Master of Claims Alleged

*Port of Corpus Christi
Authority of Neuces Cnty. v.
The Port of Corpus Christi,
L.P. (5th Cir. 2023) 57 F.4th
432; TWG § 8-V[C][3], 8.92*

WAGSTAFFE ALERT:

***Badgerow v. Walters*
(2022) 142 S.Ct. 1310**

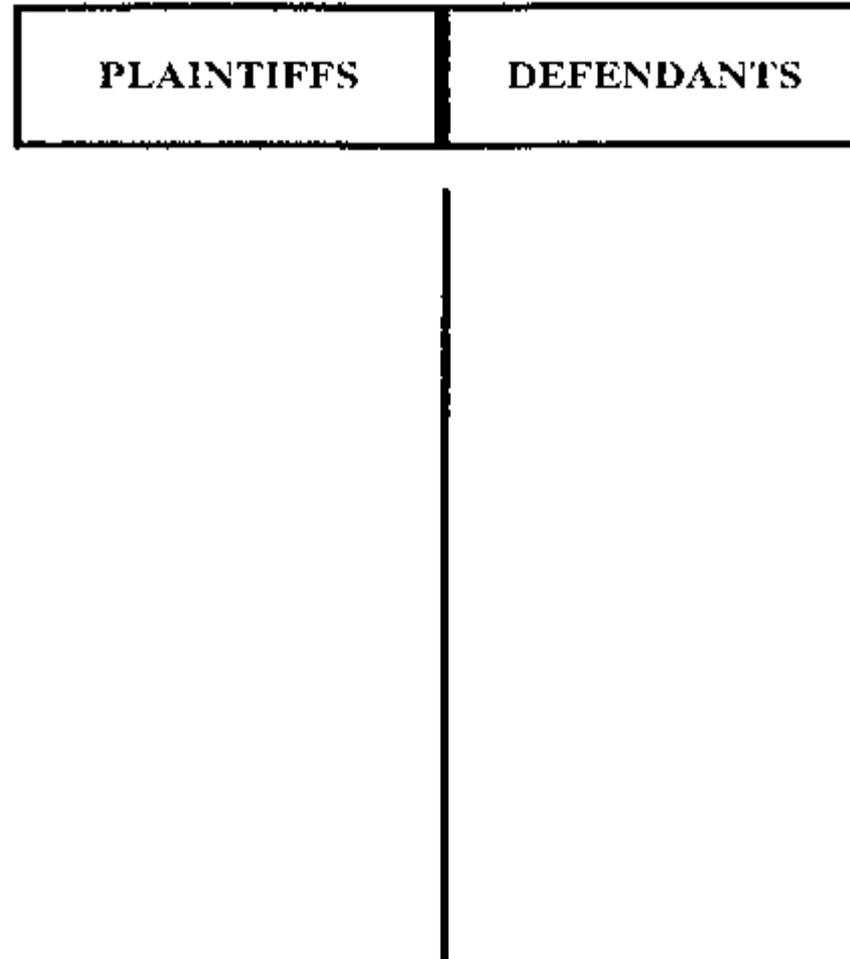


Court holds removal jurisdiction does not exist on petition to vacate arbitration even if underlying claim was federal question (no “pass through” analysis as in petition to compel); see also *Hursh v. DST Systems, Inc.* (8th Cir. 2022) 54 F.4th 561; TWG § 8-V[B], 8.52

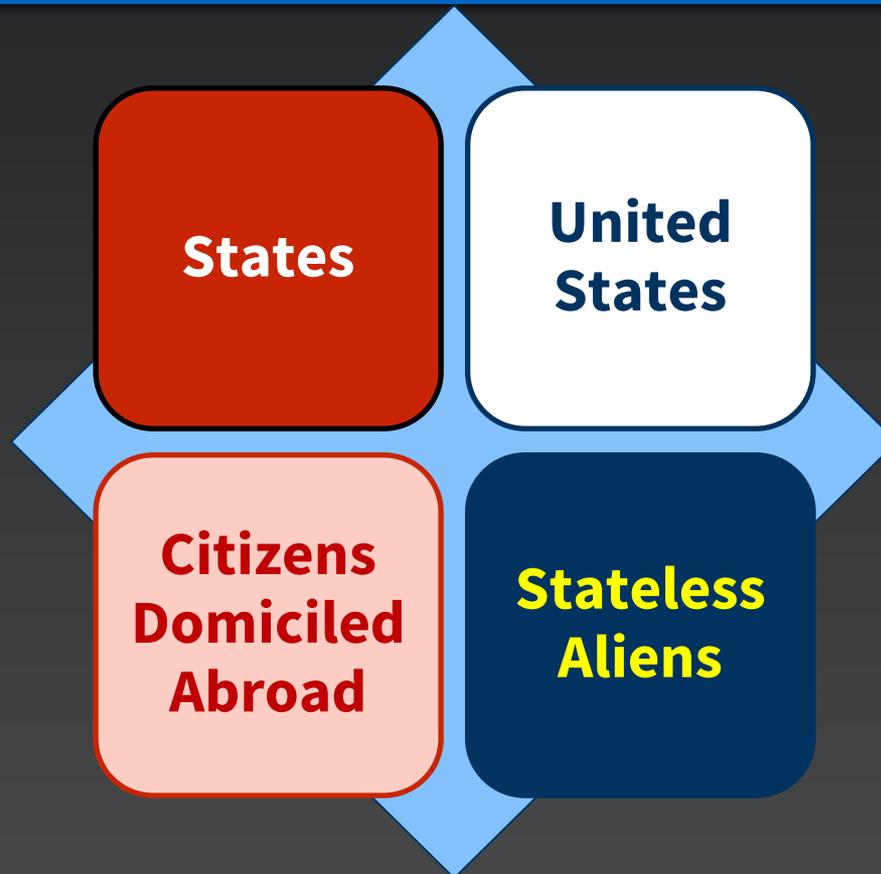


“Complete Diversity”

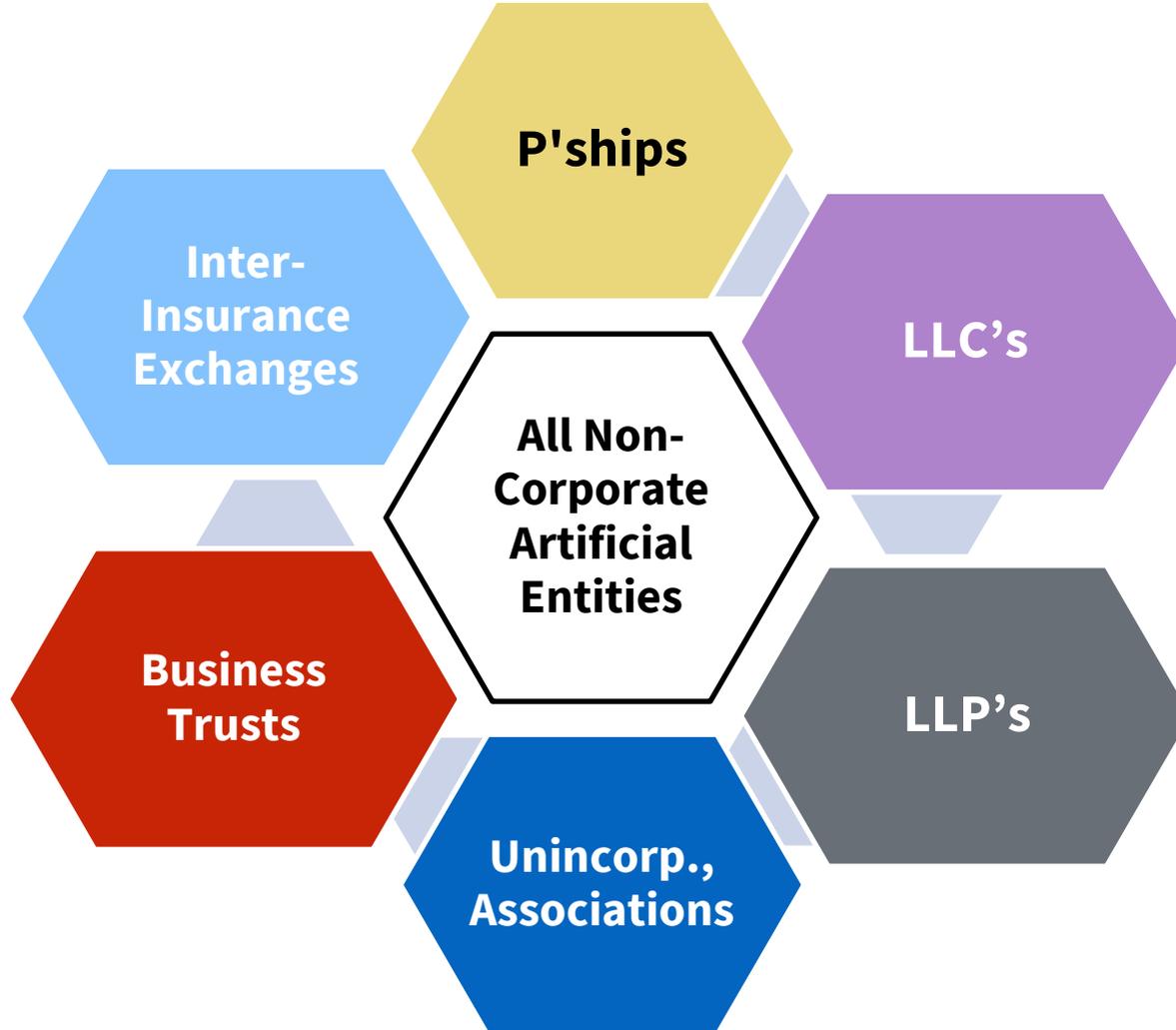
Diversity Algebra



Citizens – Not



Page v. Democratic Nat'l Comm. (7th Cir. 2021) 2 F.4th 630—no diversity if law firm partnership with “stateless” partners domiciled abroad; *Mitchell v. Bailey* (5th Cir. 2020) 982 F.3d 937--Indian Tribe a stateless entity; TWG § 7-III[A][2][a]



Yancheng Shanda v. Kwan (7th Cir. 2023) 59 F.4th 262—must show citizenship of all partners; *Akno 1010 Mkt. St. St. Louis Mo. LLC v. Nahid Pourtaghi* (6th Cir. 2022) 43 F.4th 624—LLC with foreign citizens on both sides; *Cleek v. Ameristar Casino Kan. City, LLC* (8th Cir. 2022) 47 F.4th 629—LLC; *Peace Church Risk Retention Grp. v. Johnson Controls Fire Prot. LP* (3^d Cir. 2022) 49 F.4th 866—inter-insurance exchange subscribers; *Americold Realty Trust v. ConAgra Foods, Inc.* (2016) 136 S.Ct. 1012—REIT's; TWG § 7-III[D][2], 7.167

WAGSTAFFE ALERT:

New FRCP 7.1 (eff. 12/1/22)



All parties in diversity cases must on first appearance file disclosure statement with names and citizenship of every individual or entity whose citizenship is attributed to that party

Qi Qin v. Deslongchamps (7th Cir. 2022) 31 F.4th 576—no “preservation” deposition to determine LLC’s citizenship; *Andersen v. Vagaro, Inc.* (1st Cir. 2023) 57 F.4th 11—P cannot rely on pleadings to show amount in controversy; *Stryker Emp. Co., LLC v. Abbas* (6th Cir. 2023) 60 F.4th 372--post-removal court (with conclusory removal notice) can examine and find satisfied complete diversity and amount-in-controversy



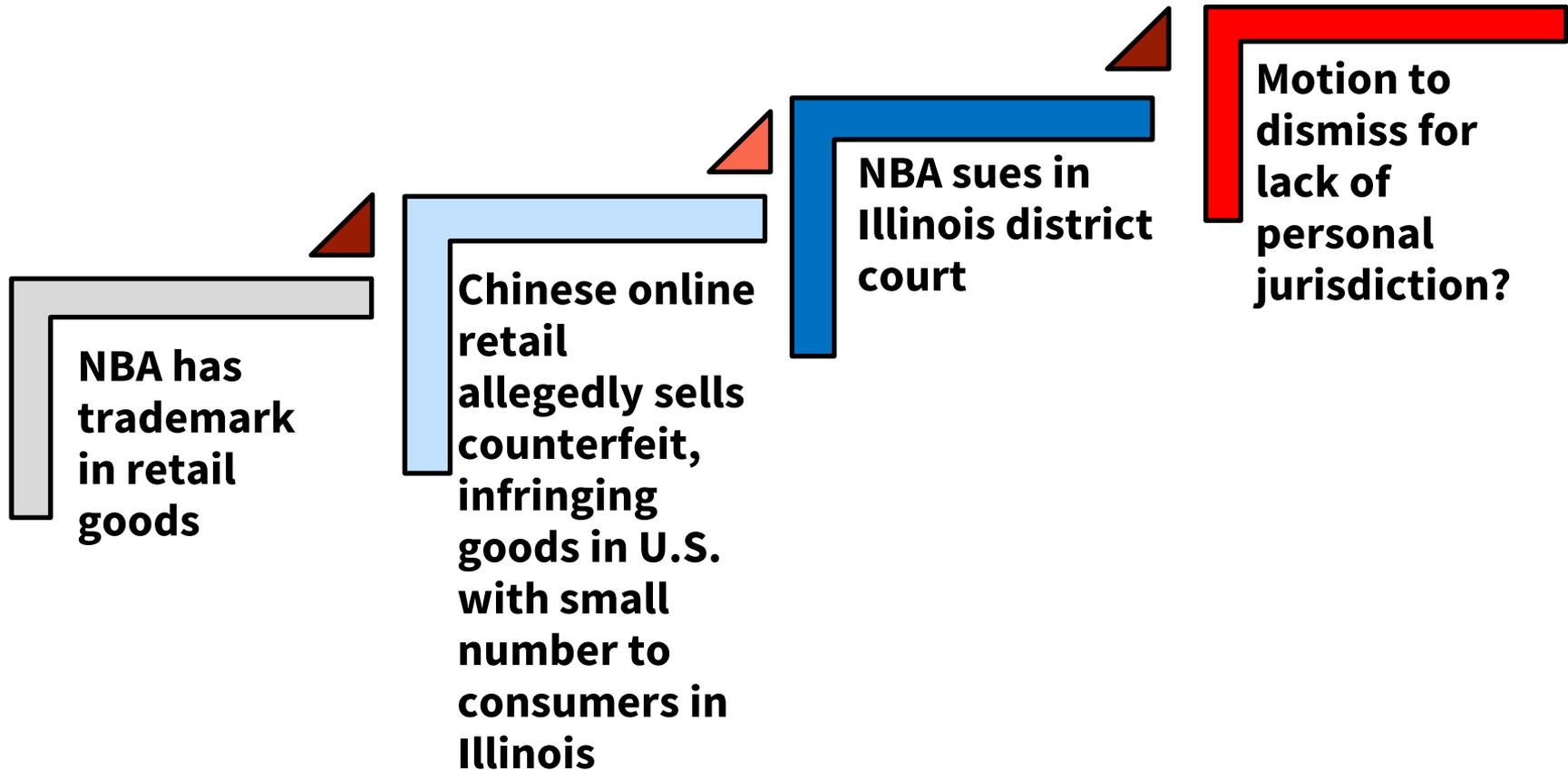
“Whether mutual contentment with the federal forum or genuine obliviousness brought the parties to this unfortunate juncture, this Court will not condone the exercise of jurisdiction where it did not truly exist.”

Capps v. Newmark Southern Region, LLC (4th Cir. 2022) 53 F.4th 299 (appellate court sua sponte per FRAP 28(j) finds no complete diversity due to one limited partner in “great-grandparent” entity owner of LLC); see also *Trump v. U.S.* (11th Cir. 2022) 54 F.4th 689—no equitable or ancillary jurisdiction to block U.S. from using lawfully seized records in criminal investigation



“Personal Jurisdiction”

Personal Jurisdiction B-Ball



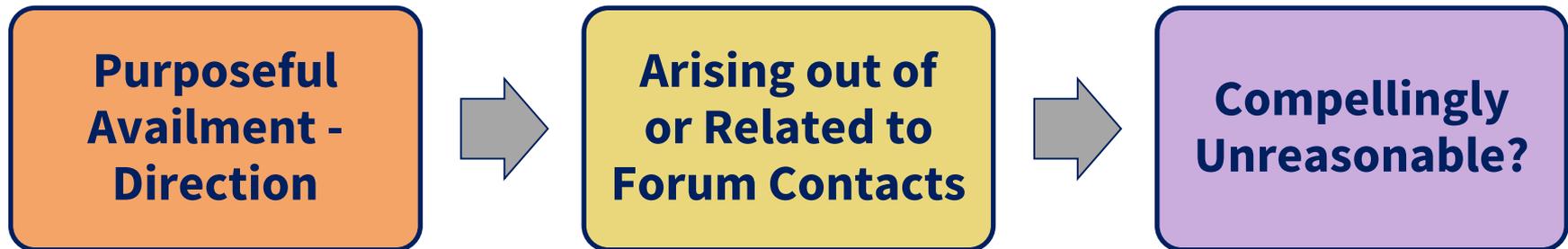
DENY

NBA Props. v. HANWJH (7th Cir. 2022) 46 F.4th 614

Defendant has sufficient minimum contacts with Illinois to support specific personal jurisdiction

Douglass v. Nippon Yusen Kabushiki Kaisha (5th Cir. 2022) 46 F.4th 226, 24-243 -- no general jurisdiction over foreign corporation sued on federal claims arising from injuries and deaths of American naval personnel in collision in foreign waters; *Bilek v. Fed. Ins. Co.* (7th Cir.2021) 8 F.4th 581—agent’s acts in making robocalls to forum can be attributed to out-of-state defendants; *Blessing Chandrasekhar* (6th Cir. 2021) 988 F.3d 889--persons tweeting about forum residents engaged in rally at Lincoln *Memorial* not subject to jurisdiction in Illinois; TWG § 10-V[A], 10.101, § 10-VIII[B][2], 10.357

Specific Jurisdiction 3-Step



Yamashita v. LG Chem Ltd. (9th Cir. 2023) 62 496—no jurisdiction when lithium battery product insufficiently connected to forum activities; *AMA Multimedia, LLC v. Wanat* (9th Cir. 2020) 970 F.3d 1201—no personal jurisdiction for infringement claims despite geotagging ads for forum residents; cf. *Burri Law Pa. v. Skurla* (9th Cir. 2022) 35 F.4th 1207—personal jurisdiction proper over out-of-state D’s who aimed their defamatory remarks at and about forum-based plaintiffs; TWG § 10-VIII[[A][1], 10.350

WAGSTAFFE ALERT:

***Mallory v. Norfolk So.
Railway, No. 21-1168:***

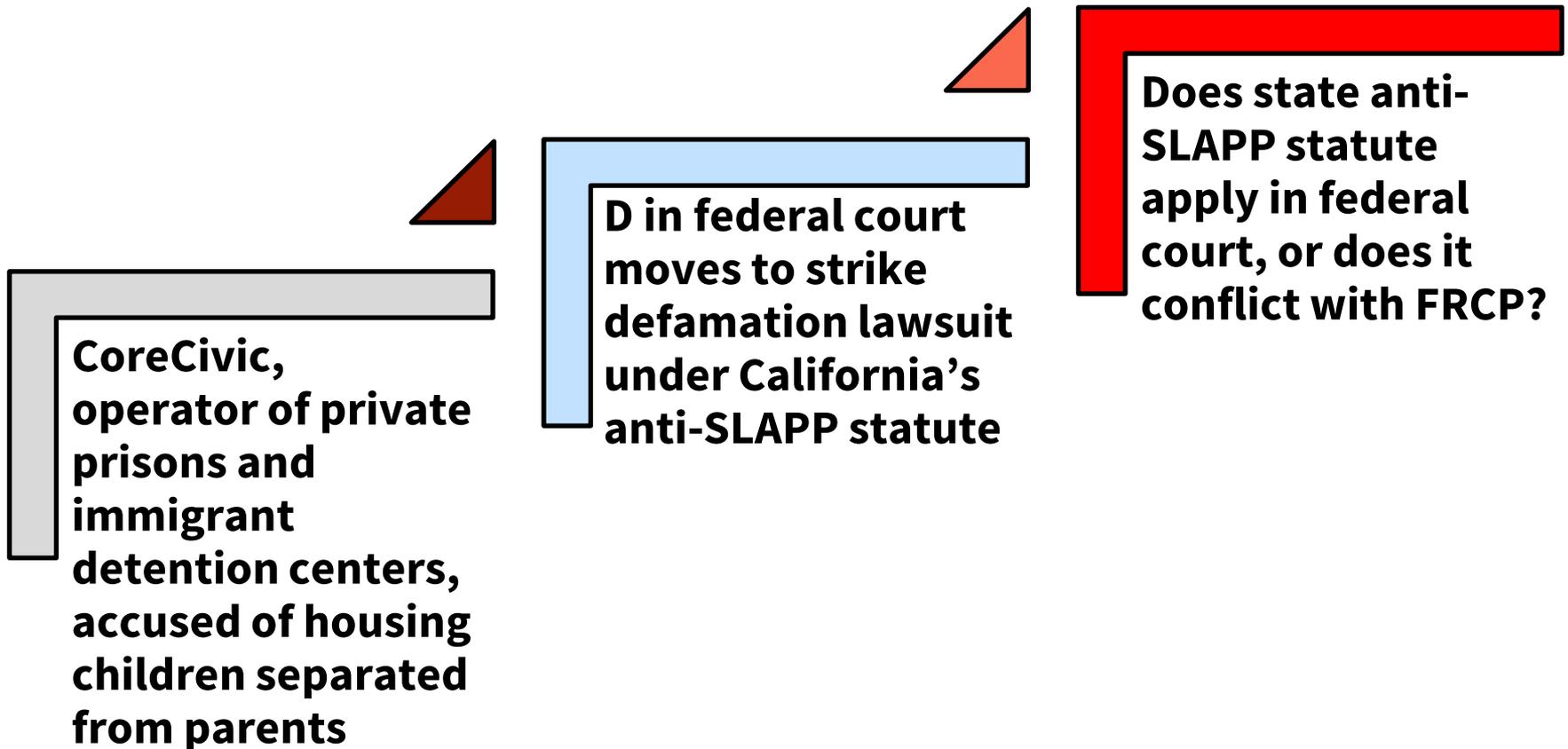


U.S. Supreme Court to resolve split as to whether State may, by statute, require to consent to general personal jurisdiction as prerequisite to registering to do business there



“Erie and State Tort Reform”

State Tort Reform Statute Substantive?

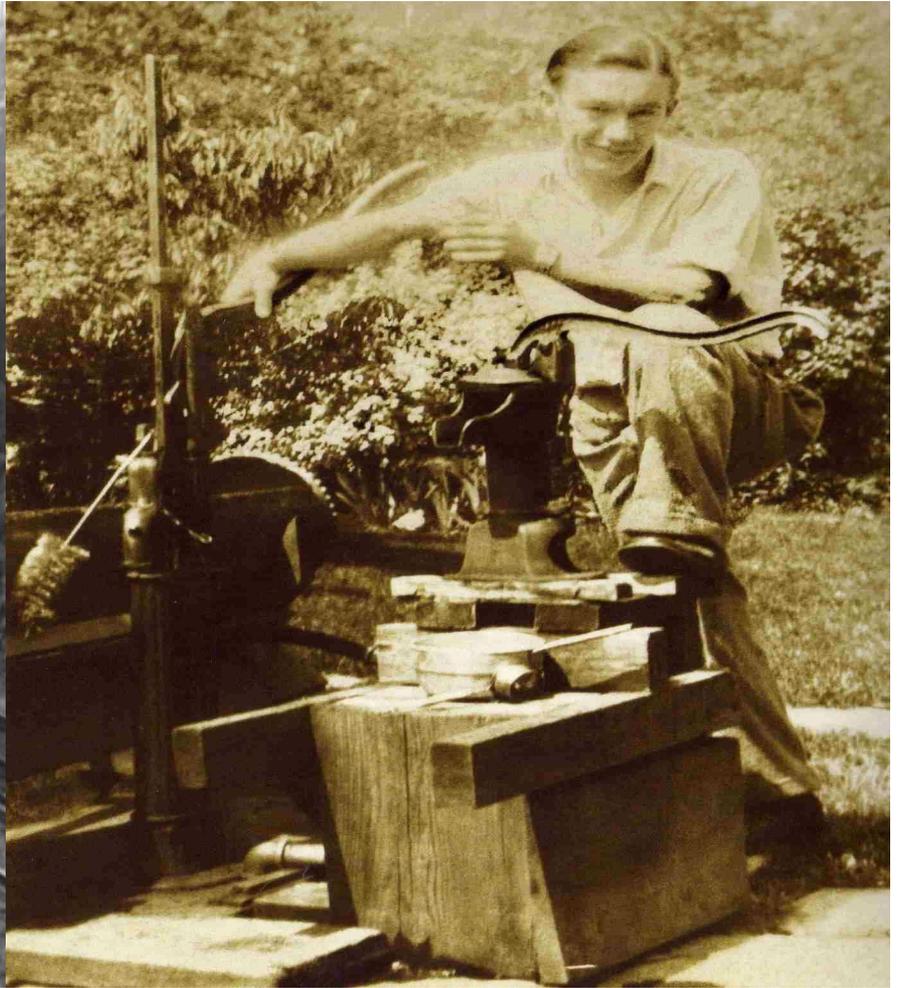


State Anti-SLAPP Statute Applies

CoreCivic, Inc. v. Candide Group, LLC **(9th Cir. 2022) 46 F.4th 1136**

- **State anti-SLAPP statute (entitlement and fee shifting) is “substantive” and thus applies to allow striking state (not federal) claims in federal court**

See also *Ellis v. Salt River Project Agricultural Improvement and Power Dist.* (9th Cir. 2022) 24 F.4th 1262—state notice of claim statute is “substantive” and applies to state claim in federal court; *Miller v. Sawant* (9th Cir. 2021) 18 F.4th 328--court follows Rule 8—not state heightened pleading for defamation; *Sarkees v. E. I. Dupont De Nemours & Co.* (2d Cir. 2021) 15 F.4th 584--federal court must follow state collateral source rule; TWG § 3-II



Erie Railroad & Harry Tompkins

**State
Substance**



**Federal
Procedure**



**Erie
Railroad
v.
Tompkins**

State Tort Reforms in Federal Court?

(TWG § 3-IV[N])

Certificate of Merits

Damage Caps

**Expert
Testimony
Requirements**

**Class Action
Limits**

Anti-SLAPP Statutes

ADR

**Sanctions
Reform**

**Pleading Punitive
Damages**

State Anti-SLAPP Statutes Apply in Federal Court?

YES

***CoreCivic, Inc. v. Candide Group, LLC* (9th Cir. 2022) 46 F.4th 1136; *Godin v. Schencks* (1st Cir. 2010) 629 F.3d 79; *Bongino v. Daily Beast* (S.D. Fla. 2020) 477 F.Supp.3d 1310 (Fl. Stat.); *Caranchini v. Peck* (D. Kan. 2018) 355 F.Supp.3d 1052 (KN statute)**

NO

***La Liberte v. Reid* (2d Cir. 2020) 966 F.3d 79; *Klocke v. Watson* (5th Cir. 2019) 936 F.3d 240; *Abbas v. Foreign Policy Group* (D.C. Cir. 2015) 783 F.3d 1328; *Carbone v. CNN* (11th Cir. 2018) 910 F.3d 1345; *Los Lobos Renewable Power v. Americulture* (10th Cir. 2018) 885 F.3d 659; *Nunes v. Lizza* (N.D. IA 2020) 476 F.Supp.3d 824; *Jiang v. Porter* (ED Mo. 2016) (Jackson, J.)**

Certificates of Merit Required?

YES

***Liggon-Redding v. Estate of Sugarman* (3d Cir. 2011) 659 F.3d 258; *Hahn v. Walsh* (7th Cir. 2014) 762 F.3d 617; see also *HSBC Bank v. Lombardo* (D. Me. 2020) – state statute requiring pre-filing specialized mediation (and stay of action) is substantive)**

NO

***Corley v. U.S.* (2d Cir. 2021) 11 F.4th 79; *Pledger v. Lynch* (4th Cir. 2021) 5 F.4th 511; *Gallivan v. U.S.* (6th Cir. 2019) 943 F.3d 291; see also *Meunier, Carlan and Curfmann v. Skidera* (ND GA 2018) 324 F.Supp.3d 1269 (Story, J.) state heightened pleading rules do not apply**

State Procedure Serving Specific Substantive Goal

Intention to influence substantive outcome manifest



Goal defeated if not applied in federal diversity suit

MARCH 2019

Erie Railroad Rule on Brave New Track



As a civil procedure professor and practice guide author for some thirty years, I do indeed get it that law students and lawyers have trouble applying the tectonic rule enunciated in 1938 by the Supreme Court in *Erie R. Co. v. Tompkins*¹. And certainly it means more than remembering a high profile federal personal injury lawsuit revolving around Harry Tompkins' tragic loss of a limb in a depression-era railroad accident in Hughestown, Pennsylvania.

In the last few years, the *Erie* rule has been on a high speed rail journey as it traverses the 21st Century phenomenon of state tort reform. From state house to state house across this country, local legislators are passing laws imposing seemingly procedural barriers to curb perceived threats of frivolous lawsuits. The question is whether they must be applied in federal court actions.

The *Erie* rule is deceptively simple: if there is a state law claim in federal court (via diversity or supplemental jurisdiction), the court will apply state substantive and federal procedural law. Simple perhaps – but the U.S. Supreme Court itself commented that the classification of a law as substantive or procedural can be “a challenging endeavor.”²

Every law student and lawyer should know that the *Erie* decision is in the Top Ten cases of all time, and for good reason. Disallowing federal courts to intuit general federal common law as part of an otherwise state law claim raised and raises vital issues of separation of powers, federalism, judicial administration, and all to say nothing of questions concerning the tactical manipulation of procedural and jurisdictional rules when initiating or removing actions.

Let's take an important and current example of state legislative tort reform in an area where the federal courts are completely split as to whether it applies in federal court: state anti-SLAPP statutes designed to authorize the prompt striking of unsupported lawsuits arising from a defendant's exercise of free speech or petitioning rights (e.g. defamation

claims).³ Since most of these statutes (enacted in some thirty states) allow for the shifting of attorney's fees and an immediate appeal, they present a powerful shield in the litigator's toolbox.

As stated, the federal circuits are deeply split as to whether the nominally “procedural” anti-SLAPP dismissal statutes nevertheless should be applied in federal court as part of manifest attempts by state legislatures to achieve substantive objectives.⁴ This important debate involves two competing analytic camps: one, reasoning that the state statutes reflect substantive commands, and the other concluding that Fed. R. Civ. P. 12 and 56 answer the same question (i.e., when and how a court dismisses a case before trial) and therefore must be applied notwithstanding contrary state rules.

Defining what is substantive and what is procedural is an illuminating first step. A law is substantive if it is bound up with the rights and obligations of state law (e.g. elements of a claim or defense, burden of proof, statutes of limitations, choice of law, damage caps, etc.). In contrast, a law is treated as procedural if it affects the manner and means of the claim's presentation, i.e., merely a form and mode of enforcing a state law (e.g. pleading standards, class action rules, discovery, dismissal for failure to prosecute, briefing rules, etc.).

But as law students have been telling me for decades, the definitions are easy to state and hard to apply. For example, many facially procedural rules such as the time limits for serving a complaint or requiring out-of-state defendants to post a bond can often be outcome determinative despite the obvious fact they are contained in self-described procedural rules. Comparatively, courts uniformly rule that the right to prejudgment interest is a substantive part of the damages analysis, yet obtaining post-judgment interest has long been held to be a procedural rule governed by the law of the sovereignty (state or federal) in which the judgment was obtained.⁵



Practice Guide: Federal Civil Procedure Before Trial

James M. Wagstaffe

LexisNexis

WAGSTAFFE ALERT:

New Social Security Suppl. Rules 42 U.S.C. § 405(g) (eff. 12/1/22)



Suppl. Rule 2: Streamlined complaint (identify statute, decision to be reviewed and claimant's name, residence and benefits claimed).

Suppl. Rule 3: Simplifies service of process (notify via ECF SSA's Office of General Counsel along with copy to local U.S. Attorney).

Suppl. Rule 4: Streamlines answer (limited to certified copy of administrative record without affirmative defenses and served within 60 days after notice of action).

Suppl. Rules 6-8: Briefing schedule (P's brief 30 days after answer filed, Commissioner's brief 30 days later, reply 14 days thereafter).

See Fed Civ Proc Before Trial: The Wagstaffe Group §11-X; §17-IV; §19-III; §39-II.



“Other Hot, New Cases”

“Hot” New Arbitration Ruling

California Labor Code § 432.6 (employees cannot be required to consent to arbitration) is preempted by the FAA.

Chambers of Com. of U.S. v. Bonta (9th Cir. 2023) 62 F.4th 473



“Hot” New Pre-Judgment Interest Rulings

Pre-judgment interest should have been submitted to *jury* for decision—not post-trial calculation by judge.

Gilliam v. Allen (4th Cir. 2023) 62 F.4th 829—vacating \$36 million award; see also *Walker v. Life Ins. Co. of N. America* (11th Cir. 2023) 59 F.4th 1176—pre-judgment interest governed by state law



“Hot” New Twiqbal Rulings

I & B allegations that D recruited P’s employees to steal trade secrets can be sufficient when proof within exclusive possession of the D’s--
***Ahern Rentals, Inc. v. EquipmentShare.com, Inc.* (8th Cir. 2023) 59 F.4th 948**

Allegations in ADA case against Tesla that it “failed to provide accessible service counters” was conclusory and did not meet Twiqbal pleading standards--
***Whitaker v. Tesla Motors, Inc.* (9th Cir. 2021) 985 F.3d 1173**

Conclusory allegation of “actual malice” in defamation suit insufficient--
***Nelson Auto Ctr. v. Multimedia Holdings Corp.* (8th Cir. 2021) 951 F.3d 952; see also *Walker v. Beaumont Indpt. Sch. Dist.* (5th Cir. 2019) 936 F.3d 72**



“Hot” New Pleading Rulings

Naming a “John Doe” defendant is not a “mistake” under Rule 15(c) and thus amended complaint does not relate back for statute of limitations purposes.

Rodriquez v. McCloughen, 49 F.4th 1120 (7th Cir. 2022); see also *Herrera v. Cleveland* (7th Cir. 2021) 8 F.4th 493



“Hot” New Deposition Ruling

Counsel can be sanctioned for asking irrelevant questions at deposition (questions of teachers about carrying guns on campus and standardized tests).

***Vaughan v. Lewisville Indep. Sch. Dist.*, 62 F.4th 199 (5th Cir. 2023).**



“Hot” New Dismissal Ruling

Court’s “administrative closure” order dismissing case with circuit case pending to be reopened on 14 days notice thereafter not valid exercise of case management since no federal rule allowed.

***Rodriquez v. Hirshberg Acceptance Corp.* (6th Cir. 2023) 62 F.4th 270**



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On Your Schedule

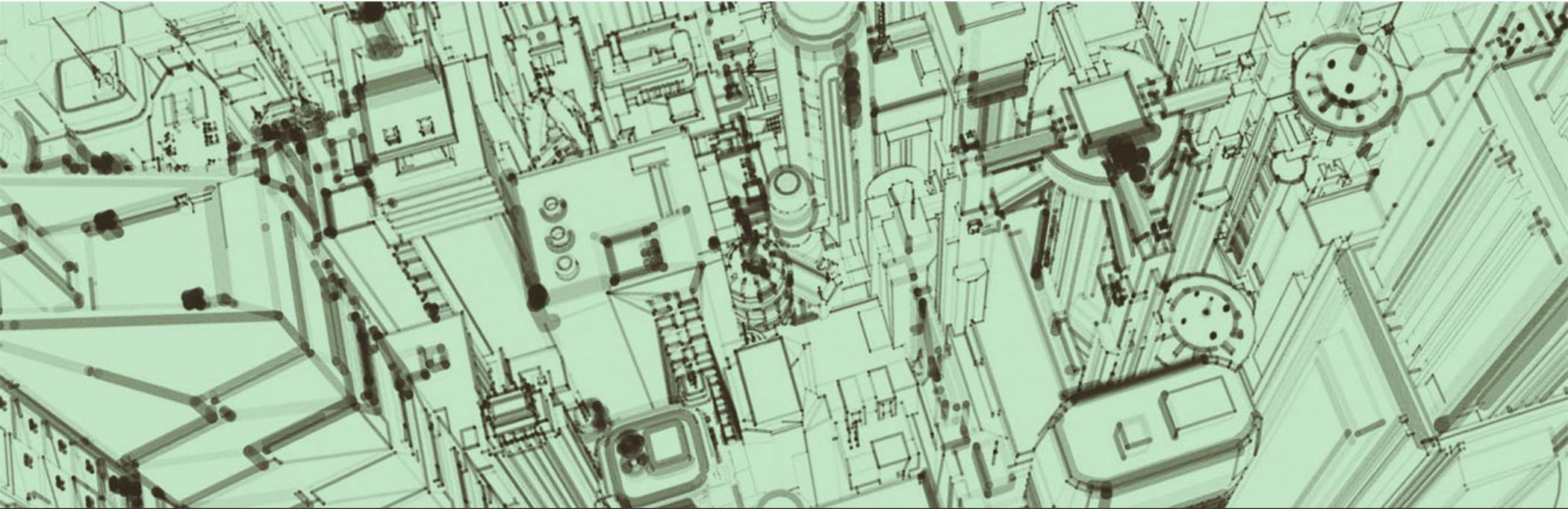
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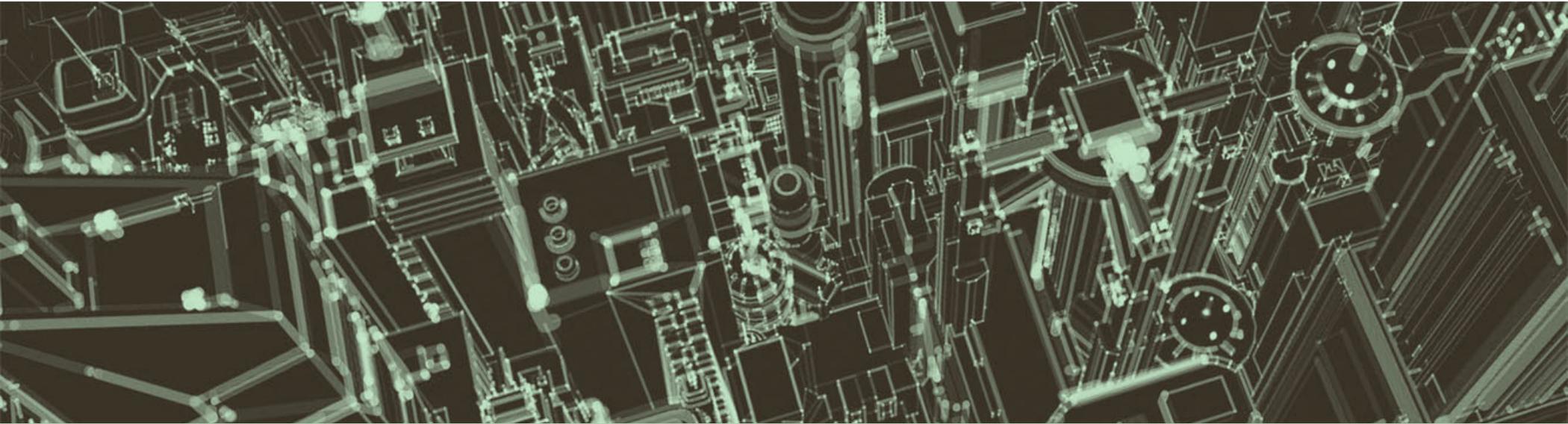
Litigation, Appellate, and ADR Update: CA Legislative Developments and Common Law Developments

CLA Litigation and Appellate Summit – May 4, 2023

Jordanna Thigpen, Esq./Thigpen Legal, P.C.

jt@thigpenlegal.com





California Legislative Developments (2022-current)



California Legislative Developments

- **997 New Laws**
- **More Substantive and Also More Nuanced Changes**
- **Few major practice-related changes**
- **Two new State holidays that are not court holidays**

California Legislative Developments: Civil Rights

- **AB-1576:** Courts required to provide court users with access to lactation rooms that are made available to court employees, which shall meet all requirements of Labor Code § 1031. Takes effect July 1, 2024.
- **SB-53, SB-1210:** Enhances penalties for sending unsolicited images and provides for recovery of attorneys' fees in actions seeking damages or equitable relief against someone that distributes or benefits from distribution of unauthorized obscene materials (new Civ. Code § 52.8)

California Legislative Developments: Code of Civil Procedure

- **AB-1936:** Name change for Hastings: new name is “College of the Law, San Francisco”
- **AB-1981:** Mileage reimbursement for jurors is increased to \$0.34 per mile; requires Judicial Council to study effect of increases on juror compensation to increase diversity
- **AB-2961:** Changes to CCP § 1010.6 re: e-service. Courts are authorized to order e-service on a represented party who has appeared, and a represented party must make e-service if requested. Unrepresented persons must still consent. After July 1, 2024, courts can e-serve parties subject to mandatory e-service.

California Legislative Developments: Code of Civil Procedure (Cont'd)

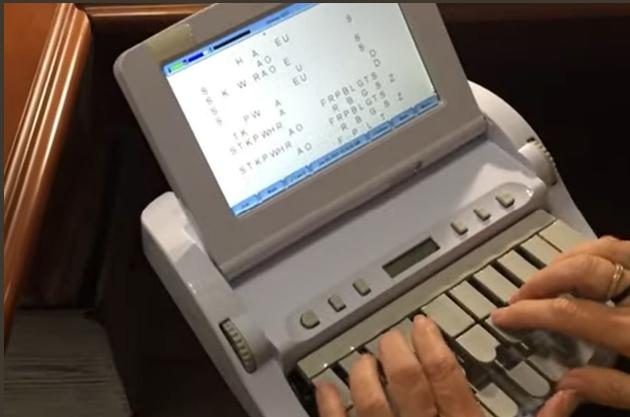
- **SB-688:** Abolishing judgments by confession
- **SB-1155:** Adding new section on time-limited demands for liability claims (Code Civ. Proc. §§ 999 et seq.)
- **SB-1200, SB1477:** New rules relating to certain small judgments (<\$200K for claims relating to medical expenses; <\$50K for claims relating to personal debts): one-time renewal, 5% interest rate, protection for wage garnishment

Civil Practice Emergencies: Remote Hearings

- **Code Civ. Proc. § 367.75** **Remote hearings through July 1, 2023**
- **SB-21, SB-22, AB-1214:** **Remote hearings forever for three more years!**

Civil Practice Emergencies: Court Reporting

- **Code Civ. Proc. § 367.75** Remote hearings are only permissible through July 1, 2023
- **SB-662:** Amending Bus. and Prof. Code § 69957



California Legislative Developments: Corporations

- **AB-769:** Confirming remote meetings are permissible for shareholder/member meetings if reasonable measures are in place to verify participation
- **AB-1780:** Additional changes to Corp. Code § 600 requiring live feed for remote meetings
- **AB-1802:** Amending Corp. Code §§ 17707.06 and 17707.08 to require that omitted assets from an LLC's windup must be used to pay unsatisfied debts before being distributed to members

California Legislative Developments: Criminal Justice

- **SB-731:** Additional rights for automatic expungement of felonies
- **SB-1008:** Free phone calls for incarcerated individuals in county jails/prisons
- **AB-2147:** Permits jaywalking unless a “reasonably careful person” would realize a collision with a human-powered vehicle was imminent

California Legislative Developments: Evidence

- **AB-2799:** Adding Evid. Code § 352.2, to add additional factors for admission of a form of creative expression
- **SB-836:** Adding Evid. Code § 351.3 and 351.4 re: evidence and discovery of immigration status in most civil actions and in open court in criminal actions.

California Legislative Developments: Health and Human Services

- **SB-1137:** Oil and Gas Permitting requiring a 3,200-ft setback between wells and sensitive receptors
- **SB-1138:** CARE Act
- **SB-107:** Transgender protections.
- **Multi-bill:** Protecting reproductive freedom (Proposition 1 also passed in Nov 2022)
- **AB-35:** MICRA changes: increasing the cap over a ten-year period
- **AB-1909:** Cyclist safety – several changes to the Vehicle Code re: cyclists

California Legislative Developments: Housing/Land Use

- **AB-2011:** Zoning changes permitting parking, retail, and office buildings to be used for housing, exempts projects from local approval and CEQA
- **SB-118:** (Slightly) modifies CEQA to remove consideration of student enrollment
- **AB-916** Prevents cities or counties from requiring public hearings as a condition of reconfiguring existing space to increase the bedroom count in existing dwelling units
- **AB-252:** Rent control on berths used for houseboats
- **AB-1410:** Amendments to Davis-Stirling

California Legislative Developments: Labor/Employment

- **Minimum Wage:** Now \$15.50/hour; Ballot Measure on November 5, 2024 Ballot to create an \$18/hour statewide minimum wage by 2026
- **SB-1162:** Pay disparity/transparency requires disclosure for >15 ee
- **SB-951** Increases share of paid family leave from 55% to 60% or 70% depending on income. In 2025, bill will require increase to 70%
- **AB-1051:** Provides for expanded definition of “designated person” for purposes of CFRA leave

California Legislative Developments: Legal Practice

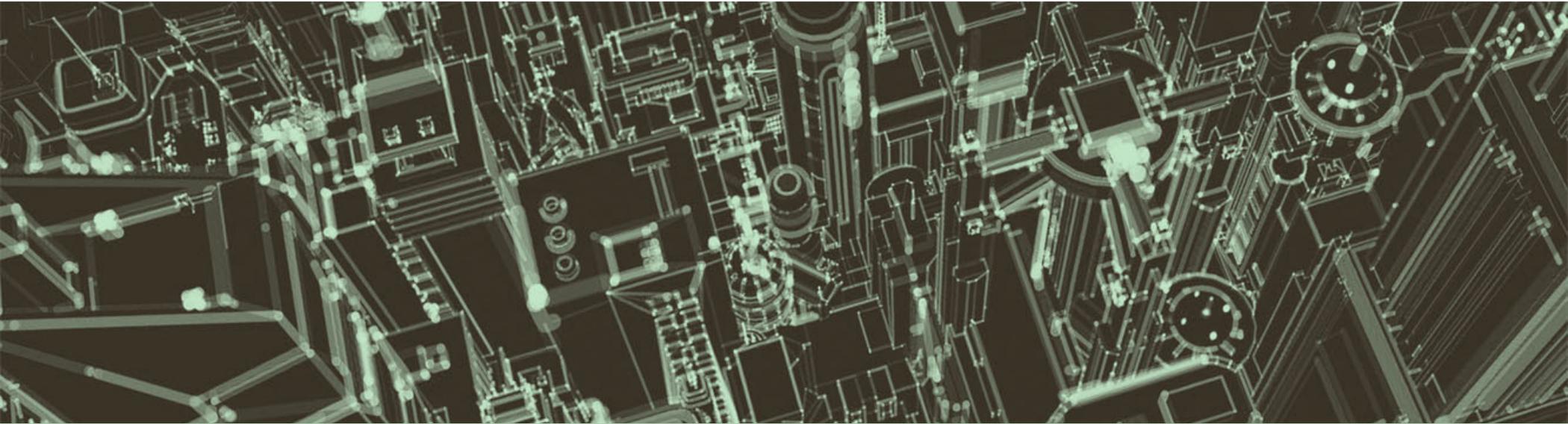
- **AB-2958:** State Bar oversight; prohibiting regulatory sandbox
- **CTAPP:** New trust accounting rules
- **SB-42:** Proposal in the Legislature for reporting lawyer misconduct

2024 California Ballot Measures (so far...)

- **Pandemic Early Detection and Prevention Institute**
- **\$18 Minimum Wage Initiative:** increases minimum wage to \$18 by 2026
- **Employee Civil Action Law and PAGA Repeal Initiative:** Repeals PAGA and replaces it with a new process to address labor violations
- **Two-Thirds Legislative Vote and Voter Approval for New or Increased Taxes Initiative:** requires all new state taxes to be enacted with a 2/3 legislative vote and voter approval; requires all new local taxes to be approved with a 2/3 vote of the local electorate
- **Fast Food Restaurant Minimum Wage and Labor Regulations Referendum:** repeals AB 257 (which establishes a fast-food council to regulate working conditions in the industry)
- **Oil and Gas Well Regulations Referendum:** repeals SB 1137 (described above)

Pending Bills

- **AB-78:** Proposal for new compensation rules for grand jurors
- **AB-615:** Proposal to provide for an interim measure of protection in international commercial arbitrations to be awarded by an arbitral tribunal
- **SB-71:** Proposal to change small claims jurisdictional limit to \$25,000 and changing limited jurisdiction limit to \$100,000
- **SB-235:** Mandatory initial disclosures (amending Code Civ. Proc. §§ 2016.090, 2023.050) except for small claims
- **SB-365:** Prohibits stay on proceedings during the pendency of an appeal of an order dismissing/denying a petition to compel arbitration
- **SB-439:** Proposal for a Code Civ. Proc. § 425.19, permitting defendants to bring motions to strike complaints brought to challenge the approval or permitting of a “priority housing development project” and to otherwise have the benefit of anti-SLAPP elements (attorneys’ fees for prevailing, etc.)
- **SB-554:** Authorizing courts to conduct IDCs and to toll the deadline for filing a discovery motion or making other orders.



California Common Law Developments (2022-current)



Common Law Developments

- Anti-SLAPP, arbitration, CEQA, PAGA, and Water Law
- Several cases involving issues of first impression
- *Siry Inv. Co., L.P. v. Farkhondehpour*, 13 Cal. 5th 333 (2022)

The law itself is on trial in every case as well as the cause before it.

– Justice Harlan F. Stone

Common Law Developments: Alter Ego

- *Lopez v. Escamilla*, 79 Cal. App. 5th 646 (2022): outlines appropriate procedure to use where default is obtained against a shareholder who is later held accountable on an alter ego theory
- *JPV I L.P. Koetting*, 88 Cal. App. 5th 172 (2023): outlines scope of discretion for trial court to use when evaluating the inequitable result factor for alter ego purposes.

Common Law Developments: Anti-SLAPP

- *Serova v. Sony Music Entertainment*, 13 Cal. 5th 859 (2022): significant commercial speech/false advertising case
- *Geiser v. Kuhns*, 13 Cal. 5th 1238 (2022): demonstration outside investor's home protected under CCP § 425.16(e) ("catch-all" provision)
- **"Extortion as a matter of law":** *Falcon Brands, Inc. v. Mousavi & Leep LLP*, 74 Cal. App. 5th 506 (2022); *Flickinger v. Finwall*, 85 Cal. App. 5th 822 (*Flickinger II*); *Geragos v. Abelyan*, 88 Cal. App. 5th 1005 (2023)
- *Jenkins v. Brandt-Hawley*, 86 Cal. App. 5th 1357 (2022) and *White v. Davis, et al.*, 87 Cal. App. 5th 270 (2023): lawyers' conduct can result in liability
- *Mireskandari v. Edwards Wildman Palmer LLP*, 77 Cal. App. 5th 247 (2022): lawyer's professional negligence can result in liability

Common Law Developments: Appellate Procedure

- ***Sarkany v. West*, 82 Cal. App. 5th 801 (2022)**: Trial courts have discretion to waive bonds for indigent litigants (CCP §§ 917.1(a), 995.240)
- ***Garg v. Garg*, 82 Cal. App. 5th 1036 (2022)**: Addressing e-filing problems in connection with timely appeals (Cal. Rules of Court, rules 2.259(c) and 8.77(d))

Common Law Developments: Arbitration

- **Requiring fees in excess of FEHA:** *Ramirez v. Charter Comm., Inc.*, 75 Cal. App. 5th 365 (2022) – compare to *Patterson v. Sup. Ct.*, 70 Cal. App. 5th 473 (2021)
- **Consent:** *Mendoza v. Trans Valley Transport*, 75 Cal. App. 5th 748 (2022) (non-native language, misleading document, no proof of signature); *Nunez v. Cycad Management LLC*, 77 Cal. App. 5th 276 (2022) (non-native language, misleading document); *Nelson v. Dual Diagnosis Treatment Center*, 77 Cal. App. 5th 643 (2022) (e-signature invalid); *Trinity v. Life Ins. Co. of North America*, 78 Cal. App. 5th 1111 (2022) (e-acknowledgment invalid)
 - *But see Iyere v. Wise Auto Group*, 87 Cal. App. 5th 747 (2023) (wet ink signatures)
- **Waiver:** *Aronow and Hang* (indigent party means other must pay); *De Leon v. Juanita's Foods*, 85 Cal. App. 5th 740 (2022) (no showing of prejudice required if fees are paid late)

Common Law Developments: Attorneys' Fees and Costs

- **Unused exhibits:** *Segal v. ASICS American Corp.*, 12 Cal. 5th 651 (2022)
- **Prevailing anti-SLAPP defendants:** *Catlin Ins. Co., Inc. v. Danko Meredith Law Firm, Inc.*, 73 Cal. App. 5th 764 (2022)
- **Section 1021.5:**
 - *Broad Beach Geologic Hazard Abatement Dist. v. 31506 Victoria Point LLC*, 81 Cal. App. 5th 1068 (2022)
 - *Artus v. Gramercy Towers Condo. Ass'n*, 76 Cal. App. 5th 1043 (2022)

Common Law Developments: Claim Preclusion

- **Privity:** *Grande v. Eisenhower Med. Ctr.*, 13 Cal. 5th 313 (2022)
- **“Same cause of action”:** *5th and LA v. Western Waterproofing Co., Inc.*, 87 Cal. App. 5th 781 (2023)

Common Law Developments: Demurrers

- **Documents incorporated by reference:** *Panterra GP, Inc v. Sup. Ct.*, 74 Cal. App. 5th 697 (2022)
- **Liberality of amendments:** *River's Side at Washington Sq. HOA v. Sup. Ct.*, 88 Cal. App. 5th 1209 (2023)

Common Law Developments: Discovery

- **Timing and Authority for Sanctions:** *City of Los Angeles v. PricewaterhouseCoopers, LLC*, 84 Cal. App. 5th 466 (2022) (rev. granted)
- **Cost of Proof Sanctions:** *Pappas v. Chang*, 75 Cal. App. 5th 975 (2022)
- **Timeliness of MTC Interrogatories:** *Golf & Tennis Pro Shop, Inc. v. Sup. Ct.*, 84 Cal. App. 5th 127 (2022)

Common Law Developments: Evidence

- **Prior Testimony:** *Berroteran v. Sup. Ct.*, 12 Cal. 5th 867 (2022)
- **Cross-Examination of Experts on “Reliable” Authority:** *Paige v. Safeway Inc.*, 74 Cal. App. 5th 1108 (2022)
- **Standard of review for MSJ Objections:** *Doe v. SoftwareONE, Inc.*, 85 Cal. App. 5th 98 (2022)

Common Law Developments: Jury Waivers

- **Failure to deposit jury fees:** *TriCoast Builders, Inc. v. Fonnegra*, 74 Cal. App. 5th 239 (2022)
- **Failure to comply with Local Rules:** *Amato v. Downs*, 78 Cal. App. 5th 435 (2022)

Common Law Developments: CCP § 998 Offers

For highest chances of recovering post-offer costs, consider...

- **Accepting before oral grant of MSJ:** *Trujillo v. City of Los Angeles*, 84 Cal. App. 5th 908 (2022)
- **Limiting release to claims in lawsuit:** *Council for Education and Research on Toxics v. Starbucks Corporation*, 84 Cal.App.5th 879 (2022)
- **Attaching the proposed settlement agreement and waiver:** *K.M. v. Grossmont Union High School Dist.*, 84 Cal. App. 5th 717 (2022)

Common Law Developments: SOL/Five Year Rule

- **Tort Claims:** *Andrews v. Metropolitan Transit System*, 74 Cal. App. 5th 597 (2022)
- **COVID-19 Rules (Emergency Rule 10(a)):** *Ables v. A. Ghazale Bros., Inc.*, 74 Cal. App. 5th 823 (2022)
- **Post-mediation/post-settlement agreement conduct:** *Seto v. Szeto*, 86 Cal. App. 5th 76 (2022)

Common Law Developments: Summary Judgment

- **Absolute right to bring:** *Cole v. Sup. Ct.*, 87 Cal. App. 5th 84 (2022)

Common Law Developments: Labor/Employment

- **Ongoing PAGA Issues**
- **Independent Contractors:** *Whitlach v. Premier Valley, Inc.*, 86 Cal. App. 5th 673 (2022)
- **Relationships (Apparently) Matter:** *Atalla v. Rite Aid Corporation*, 89 Cal. App. 5th 294 (2023)

Common Law Developments: Premises Liability

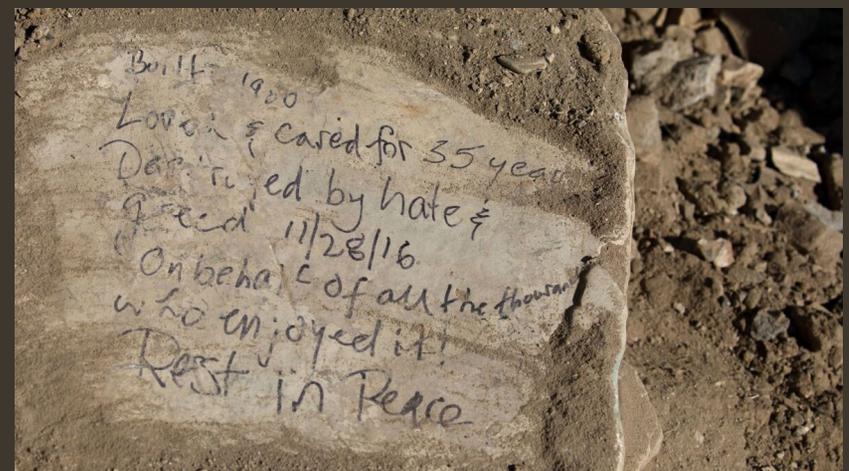
- **Privette v. Sup.Ct., 5 Cal. 4th 689 (1993) Is Still the Law of the Land**
- **But see** *Degala v. John Stewart Company, et al.*, 88 Cal. App. 5th 158 (2023)
- **No memory, no problem:** *Kaney v. Custance*, 74 Cal. App. 5th 201 (2022)
- **Recreational use and known dangerous conditions**

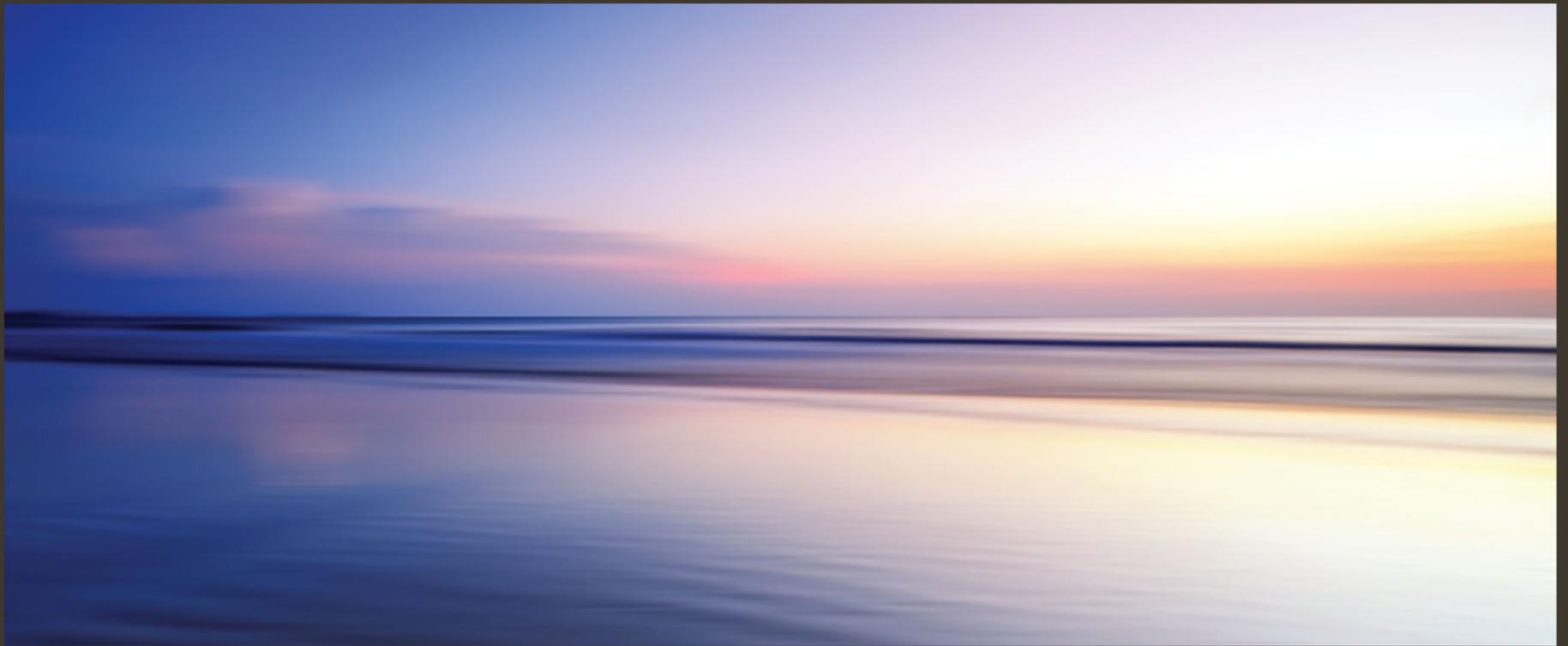
Common Law Developments: Real Property

- **The scope of easement matters:** *Romero v. Shih*, 78 Cal. App. 5th 326 (2022)
- **Lis Pendens claims require individual analysis:** *Shocker v. Sup.Ct. of Alameda County*, 81 Cal. App. 5th 271 (2022)

Common Law Developments: Torts

- **Shine bright:** *M&L Financial v. Sotheby's*, 81 Cal. App. 5th 173 (2022)
- **“Rock forts” as development:** *Spencer v. City of Palos Verdes Estates*, 88 Cal. App. 5th 849 (2023)





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MAY 4, 2023

LITIGATION, APPELLATE, AND ADR UPDATE
2023 AND BEYOND

State Common Law Developments

Jordanna G. Thigpen (SBN 232642)
Thigpen Legal, P.C., Beverly Hills, CA
jt@thigpenlegal.com

Significant Common Law Developments 2022-2023

Alter Ego

- ***Lopez v. Escamilla*, 79 Cal. App. 5th 646 (2022)**: Second District, Division 6. Reversing a grant of summary judgment where the plaintiff filed a subsequent lawsuit against the corporation's shareholder on an alter ego theory, after obtaining a default judgment in her favor. Extensive discussion of appropriate procedure to use in such circumstances.
- ***JPV I L.P. Koetting*, 88 Cal. App. 5th 172 (2023)**: First District, Division 3. Second appeal in underlying dispute involving tribal lending entities and the defendants' breach of fiduciary duties and contract breaches. The dispute was arbitrated and the arbitrator found in favor of the entities. Plaintiff in this action purchased the judgment and moved to add individuals as judgment debtors on alter ego theory, which the trial court denied. Reversed; trial court did not consider all circumstances relevant to the alter ego inquiry, including the arbitrator's factual findings of defendants' wrongful diversion of the entities' customers, and thus "misapplied and proper scope of its discretion" in evaluating the inequitable result element of the alter ego doctrine. Extensive discussion of alter ego authorities as well as collateral estoppel.

Anti-SLAPP

- ***Serova v. Sony Music Entertainment*, 13 Cal. 5th 859 (2022)**: California Supreme Court. False advertising case reversing earlier rulings; finding that allegedly false statements regarding Michael Jackson's participation on nine tracks, made on album and in a promotional video to consumers, were commercial speech subject to the CLRA and the UCL, for which the plaintiff had met the second prong of the anti-SLAPP analysis, and not protected by the First Amendment as defendant claimed. Rejecting "belated" argument that copyright law preempted the plaintiff's consumer deception claims because false advertising and consumer confusion claims can coexist with federal copyright law.
- ***Geiser v. Kuhns*, 13 Cal. 5th 1238 (2022)**: California Supreme Court. Reversing Court of Appeal; finding that demonstration outside a real estate investor's home after eviction of

two long-term residents from their property did constitute speech in connection with a public issue under the “catch-all” provision of Code Civ. Proc. § 425.16(e).

- ***Falcon Brands, Inc. v. Mousavi & Leep LLP*, 74 Cal. App. 5th 506 (2022)**: Fourth District, Division 3. Resolving question of whether email settlement demands crossed over into conduct proscribed by *Flatley v. Mauro*, 39 Cal. 4th 299 (2006), finding statements threatening to reveal illegal conduct (an “escalating series of threats”) were not protected by Section 425.16. However, statements to the plaintiff’s merger partner were not illegal as a matter of law and were made in connection with contemplated litigation, thus protected by Section 425.16.
- ***Mireskandari v. Edwards Wildman Palmer LLP*, 77 Cal. App. 5th 247 (2022)**: Second District, Division 3. Legal malpractice action. In the underlying matter an anti-SLAPP motion was granted, and the Court of Appeal held that summary judgment should be reversed as to the professional negligence, since the defendants allegedly failed to advise the plaintiff of the risks of filing suit against a newspaper publisher.
- ***Flickinger v. Finwall*, 85 Cal. App. 5th 822 (*Flickinger II*)**: Second District, Division 8. Latest evolution of the “extortion as a matter of law” subcategory of anti-SLAPP jurisprudence set forth in *Flatley v. Mauro*, 39 Cal. 4th 299, 320 (2006) and subsequent cases. In what will always be an “entirely fact specific” inquiry, the defendant’s counsel’s letter was held to be not “entirely outside the bounds of ordinary professional conduct” in ongoing dispute between a homeowner and his former contractor.
- ***Jenkins v. Brandt-Hawley*, 86 Cal. App. 5th 1357 (2022)**: First District, Division 2. After a frivolous action and appeal based on appeals of approval of the plaintiffs’ plans for their single family home and ADU, plaintiffs sued the prosecuting attorney and others for malicious prosecution based on an underlying appeal of plans to demolish older structures and build a new home and ADU.
- ***White v. Davis, et al.*, 87 Cal. App. 5th 270 (2023)**: Fourth District, Division 2. The fifth appeal in a long-running estate battle originating in Riverside County, in which the Fourth District has repeatedly affirmed trial court rulings that defendants are asserting

undue influence and committing other bad acts against a nonagenarian with a \$40m estate. In this decision, the Fourth District confirmed the trial court's rulings denying the defendants' anti-SLAPP motions, while also holding that the court abused its discretion in failing to utilize its case management tools and prevent a delay in hearing the merits of the plaintiff's applications for elder abuse restraining orders. This opinion contains multiple references to bad acts committed by attorneys, none of whom have been disciplined by the State Bar.

Appellate Procedure

- ***Sarkany v. West*, 82 Cal. App. 5th 801 (2022)**: First District, Division 2. A trial court, under Code Civ. Proc. § 917.1(a), has discretionary authority pursuant to Code Civ. Proc. § 995.240 to waive the requirement that a bond or undertaking be given to stay enforcement of a money judgment, if the principal litigant is indigent and cannot obtain sufficient sureties for purposes of an appellate undertaking.
- ***Garg v. Garg*, 82 Cal. App. 5th 1036 (2022)**: Fourth District, Division 3. Question of timely appeal where appellant attempted to timely electronically file an appeal; resolving questions of whether Cal. Rules of Court, rules 2.259(c) and 8.77(d) apply to notices of appeal, and which court should determine whether relief is provided to the appellant, and on what burden of proof as follows: (1) both rules potentially apply to a notice of appeal; (2) a motion under 8.77(d) must be filed in the appellate court, and (3) a party seeking relief under rule 8.77(d) must demonstrate “good cause” by a preponderance of the evidence that an attempt to file was made prior to the expiration of the deadline and that diligence was demonstrated in promptly filing the notice of appeal after the failed attempt.

Arbitration

- ***Ramirez v. Charter Comm., Inc.*, 75 Cal. App. 5th 365 (2022)**: Second District, Division 4. Petition to compel arbitration denied where the agreement shortened the FEHA SOL, provided for an attorney fee award for a party compelling arbitration, and

failed to restrict prevailing defendant FEHA attorney fee awards. (*currently before the Supreme Court based on conflict with Patterson v. Sup. Ct., 70 Cal. App. 5th 473 (2021)*).

- ***Mendoza v. Trans Valley Transport, 75 Cal. App. 5th 748 (2022)***: Sixth District. Spanish-speaking employee signed an application but not a handbook, which contained an arbitration policy, but also stated it was not a contract. Defendant's HR representative claimed that it was his practice to provide the handbook. Denial of motion to compel arb affirmed.
- ***Aronow v. Sup.Ct., 76 Cal. App. 5th 865 (2022)***: First District, Division 4. Answering questions certified to it by the trial court; finding that a trial court that granted a defendant's petition to compel arbitration has the ability to lift the stay of proceedings in the trial court where a plaintiff demonstrates financial inability to pay the anticipated arbitration costs, and in such cases, the defendant may either pay the cost of the arbitration or waive the right to arbitration. Trial court must permit the indigent defendant to demonstrate inability to pay and if necessary, conduct an evidentiary hearing.
- ***Nunez v. Cycad Management LLC, 77 Cal. App. 5th 276 (2022)***: Second District, Division 2. arbitration agreement presented in employee's non-native language that he could not read, which was misrepresented and which he was not permitted to review, without copy of referenced AAA rules, was unenforceable.
- ***Nelson v. Dual Diagnosis Treatment Center, 77 Cal. App. 5th 643 (2022)***: Fourth District, Division 3. Decedent's parents could not be compelled to arbitrate their wrongful death suit when the defendant failed to authenticate the electronic signature and the agreement was unconscionable based on facts presented. Extensive discussion of arbitrability and unconscionability authorities.
- ***Trinity v. Life Ins. Co. of North America, 78 Cal. App. 5th 1111 (2022)***: Second District, Division 7. Providing auto-generated acknowledgment indicating the plaintiff has read and agreed to the terms of the arbitration agreement was not a sufficient showing that the plaintiff agreed to it, and could not overcome the plaintiff's claim that she was never presented with the agreement and would not have agreed to it.

- ***Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th 621 (2022)**: Second District, Division 2. Code Civ. Proc. §§ 1281.97, 1281.98 and 1281.99, relating to the consequences of failing to pay arbitration fees on time, are not preempted by the FAA because they further, rather than frustrate, “the parties’ intent to use arbitration as a speedy and effective alternative forum for resolving disputes.”
- ***Espinoza v. Superior Court*, 83 Cal. App. 5th 761 (2022)**: Second District, Division 1. Defendant did not pay requisite arbitration fees by the Code Civ. Proc. § 1281.97 deadline. Court of Appeal overruled trial court’s finding that there was “substantial compliance” as Section 1281.97 is jurisdictional in nature.
- ***De Leon v. Juanita’s Foods*, 85 Cal. App. 5th 740 (2022)**: Second District, Division 3. Court is not required to consider any other factors to determine whether there is any prejudice when a party fails to pay the initiating fees within 30 days as required by Code Civ. Proc. §§ 1281.97, 1281.98 and 1281.99.
- ***DFEH v. Cisco Systems, Inc.*, 82 Cal. App. 5th 93 (2022)**: Sixth District. DFEH pursued discrimination, retaliation, and harassment claims on behalf of plaintiff based on his ancestry as a member of the “lowest caste” in India. Defendant sought to compel DFEH to attend arbitration, but a plaintiff acting independently who was not a signator to the agreement could not be compelled to arbitrate.
- ***Costa v. Road Runner Sports, Inc.*, 84 Cal. App. 5th 224 (2022)**: Fourth District, Division 1. finding out from counsel during the course of litigation that an arbitration provision has been added to the online terms and conditions of a loyalty program, three years after plaintiff enrolled, did not constitute imputed knowledge sufficient to establish an implied-in-fact agreement.
- ***Iyere v. Wise Auto Group*, 87 Cal. App. 5th 747 (2023)**: First District, Division 4. Three employee plaintiffs, filing as a group, denied signing arbitration agreements on their first day of work, denied being given any explanation of the documents, and denied knowing anything about arbitration. The Court held that because the signatures were wet ink vs. electronic, they were more easily authenticated.

- ***Murrey v. Sup. Ct.*, 87 Cal. App. 5th 1223 (2023)**: Fourth District, Division 3. Employee filed her sexual harassment lawsuit in 2021 (thus, was not covered by the 2022 amendment to the FAA). The trial court granted a motion to compel arbitration; reversed based on (1) short time given for electronic signature on large number of documents; (2) arbitration rules were not provided, nor was name of arbitration provider or location; (3) contained numerous other provisions that were substantively unconscionable relating to discovery and costs. Extensive discussion of numerous authorities for procedural and substantive unconscionability.
- ***Algo-Heyres v. Oxnard Manor LP*, 88 Cal. App. 5th 1064 (2023)**: Second District, Division 6. Heirs could not be bound by an arbitration agreement decedent executed upon entering a skilled nursing facility; lacking capacity due to diminished mental functioning means there is no consent to enter into an arbitration agreement.
- ***Geragos v. Abelyan*, 88 Cal. App. 5th 1005 (2023)**: Second District, Division 8. Client sued his former attorney, claiming failure to provide services, and their counsel attempted to engage them in settlement discussions. The communications included the possible filing of a State Bar claim. The defendants filed a cross-complaint for extortion, which became the subject of a properly granted anti-SLAPP motion. Extensive discussion regarding the *Flatley* progeny and the notion of “extortion as a matter of law.”
- ***Gostev v. Skillz Platform, Inc.*, 88 Cal. App. 5th 1035 (2023)**: First District, Division 2. Mobile gaming company’s arbitration agreement, presented as a hyperlink, was procedurally and substantively unconscionable where it limited the forum to San Francisco, a one year statute of limitations, and required the plaintiff to split fees and costs (among other issues).
- ***Hang v. RG Legacy I*, 88 Cal. App. 5th 1243 (2023)**: Fourth District, Division 3. Trial court had authority to order that defendant pay all fees and costs where decedent was indigent at time of his death, and defendant’ failure to do so constituted waiver of the right to arbitration.

Attorneys' Fees and Costs

- ***Segal v. ASICS American Corp.*, 12 Cal. 5th 651 (2022)**: California Supreme Court. Exhibit copies and demonstrative aids copied, but not used during a trial, can be awarded in the discretion of the court if found to be reasonably necessary to the litigation.
- ***Siry Inv. Co., L.P. v. Farkhondehpour*, 13 Cal. 5th 333 (2022)**: California Supreme Court. Penal Code § 496(c)(1) (which provides for treble damages and attorneys' fees) was appropriately applied in case involving fraudulent diversion of partnership assets, even though issue was not "trafficking of stolen goods," as some Courts of Appeal have narrowly interpreted the statute. Also resolved conflict in Courts of Appeal to find that a party in default does have standing to file a motion for a "new trial" claiming legal error with regard to the calculation of damages.
- ***Catlin Ins. Co., Inc. v. Danko Meredith Law Firm, Inc.*, 73 Cal. App. 5th 764 (2022)**: First District, Division 4. A prevailing SLAPP defendant must file a costs memo or fee motion after a voluntary dismissal by plaintiff, in order to preserve the defendant's entitlement to fee recoverability. The underlying facts of this case involve the plaintiff's assertion that there was a clerical overpayment to an attorney's trust account, and he then refused to return the funds, which raises serious questions.
- ***Broad Beach Geologic Hazard Abatement Dist. v. 31506 Victoria Point LLC*, 81 Cal. App. 5th 1068 (2022)**: Second District, Division 4. Malibu homeowners sought to set aside a special assessment against them which would have funded a shoreline fortification project. The homeowners prevailed, but the trial court denied their request to award \$2.4m in fees under Code Civ. Proc. § 1021.5, pursuant to the framework set forth in *Conservatorship of Whitley*, 50 Cal.4th 1206, 1211 (2010), and because the 10-year discounted benefits to homeowners exceeded their litigation costs.
- ***Artus v. Gramercy Towers Condo. Ass'n*, 76 Cal. App. 5th 1043 (2022)**: First District, Division 2. Affirmed San Francisco trial court's ruling that neither side was eligible for attorneys fees' on an extremely contested HOA case. The Court of Appeal noted that the briefing for the attorneys' fees motions totaled 1,867 pages. Extensive discussion of the

standards for abuse of discretion, determining prevailing party, and for award of fees under Code Civ. Proc. § 1021.5.

Claim Preclusion/Collateral Estoppel/Prior Claims

- ***Olson v. Doe*, 12 Cal. 5th 669 (2022)**: California Supreme Court. In context of specific case, civil suit was not properly the subject of a breach of contract and specific performance cross-complaint, where parties had mediated a civil harassment petition under Code Civ. Proc. § 527.6 based on same underlying conduct and agreed to a “non-disparagement” clause.
- ***Grande v. Eisenhower Med. Ctr.*, 13 Cal. 5th 313 (2022)**: California Supreme Court. Finding that second lawsuit was not barred where plaintiff brought claims on behalf of a different class against hospital who used staffing agency defendant who was subject of prior lawsuit. Extensive discussion of claim preclusion (res judicata), issue preclusion (collateral estoppel), and meaning of “privity” within the meaning of those tests.
- ***5th and LA v. Western Waterproofing Co., Inc.*, 87 Cal. App. 5th 781 (2023)**: Second District, Division 8. Finding that second lawsuit involving a leaking roof was barred by claim preclusion. The second suit against the installer should have been brought with the first suit against the company that coated the roof. Extensive discussion regarding the meaning of the “same cause of action” for purposes of the claim preclusion test.

Contracts

- ***City of Oakland v. The Oakland Raiders, et al.*, 83 Cal. App. 5th 458 (2022)**: Second District, Division 7. Oakland did not have standing as a third party beneficiary to the NFL Constitution to object that the Raiders used a nonconforming process to abandon the City for Las Vegas, as third-party enforcement was not consistent with the objectives of the contract. Extensive discussion of applicable three-factor test used to determine third party beneficiary status, as well as unjust enrichment.
- ***Gormley v. Gonzalez*, 84 Cal. App. 5th 72 (2022)**: Third District. Plaintiffs in 20 separate med mal cases resolved underlying lawsuits against two doctors and a medical spa, in which defendants agreed to pay plaintiffs \$575K in two installments. If the

installments were not paid on time, liquidated damages would be assessed at the rate of \$50K per month, up to a cap of \$1.5m. Defendants failed to pay either installment and plaintiffs filed a motion to enforce, which was granted. Court reaffirmed rule that courts are to consider “all” circumstances in determining whether a liquidated damages provision is unreasonable under Civil Code § 1671(d).

Corporations

- **Corporate Records Inspection: *Fowler v. Golden Pacific Bancorp*, 80 Cal. App. 5th 205 (2022):** Third District. A director and a corporation were involved in litigation and he sought inspection under Corp. Code § 1602, which the corporation refused to permit because he could glean information that might help him in the separate suit. Appeal was rendered moot during its pendency, but the Court of Appeal exercised discretion to grant an appeal, finding that there is a “general rule favoring unfettered access” and any exception must be limited to “extreme cases” where there is evidence the director might commit a tort or breach fiduciary duties.
- **Dissolution/Windup: *Friend of Camden v. Brandt*, 81 Cal. App. 5th 1054 (2022):** Second District, Division 8. Plaintiff owned a 1% interest and sought judicial dissolution of an LLC. Defendants together held 50% and filed a motion to avoid the dissolution with the purchase of Plaintiff’s interest. However, Plaintiff voted with the other 49% owners to dissolve the LLC. Held, the vote to dissolve the LLC extinguished any right of the defendants to purchase Plaintiff’s interest and the LLC had to be dissolved.

Creditor’s Rights

- ***Juarez v. Ward*, 88 Cal. App. 5th 730 (2023):** Second District, Division 2. Plaintiff, a judgment creditor, sought delivery of an Oscar statue that belonged to her debtor (David Ward, who received the Oscar in 1974 for *The Sting*). The Oscar was subject to a “winner’s agreement” with the Academy of Motion Picture Arts and Sciences, which provides the Academy with a right of first refusal to purchase the Oscar for \$10. The trial court properly denied plaintiff’s request for delivery of the Oscar since the winner’s agreement controlled. Extensive discussion on equitable servitudes and their impact on

judgment creditors, as well as affirming the rule that the rights of a judgment creditor are derivative of and cannot exceed the debtor's interest.

Demurrers

- ***Panterra GP, Inc v. Sup. Ct., 74 Cal. App. 5th 697 (2022)***: Fifth District. Improper for Court to turn a demurrer hearing into a contested evidentiary hearing where contract mistakenly referred to a different entity than the plaintiff which claimed to have performed the work. References the general rule that documents incorporated into a complaint can be in conflict with a factual allegation and result in dismissal, but that the conflict should be indisputable. If it merely “conveys a legal conclusion (rather than a factual one) or the exhibit statement is ambiguous, it cannot support a demurrer.” *Panterra GP*, fn. 13.
- ***River's Side at Washington Sq. HOA v. Sup. Ct., 88 Cal. App. 5th 1209 (2023)***: Third District. Demurrer to HOA' complaints for construction defects was improperly sustained without leave to amend to cure any standing defects that might present. Extensive discussion of trial court's obligations to exercise liberality with amendment as well as standing for representative actions.

Discovery

- ***City of Los Angeles v. PricewaterhouseCoopers, LLC, 84 Cal. App. 5th 466 (2022)***: Second District, Division 5. Review was granted January 25, 2023. PWC filed a motion for sanctions under Code Civ. Proc. §§ 2023.010 and 2023.030 nine months after the case was dismissed with prejudice, seeking sanctions for egregious misuse of the discovery process. Trial court awarded \$2.5 million in discovery abuse monetary sanctions. However, this had to be reversed given that Sections 2023.010 and 2023.030 do not provide for monetary sanctions and should operate in concert with other provisions that do provide for sanctions. Court also held that (1) if the Discovery Act authorizes sanctions, and if the sanctions are based on a ruling during the action, the court retains jurisdiction after the lawsuit is dismissed to rule on the issue of discovery sanctions as a

collateral matter and (2) the timeliness of a motion for monetary sanctions after a successful discovery motion is a matter of the court's discretion.

- ***Pappas v. Chang*, 75 Cal. App. 5th 975 (2022)**: First District, Division 2. Plaintiff executed an initial settlement agreement with her former plastic surgeon and promised to execute further documents. Plaintiff thereafter refused to execute the further documents unless the settlement was increased by \$425K, on the basis that the settlement agreement unlawfully prohibited her from reporting to the California Medical Board (med mal settlements >\$30K have to be reported to the Medical Board). The Court rejected this argument, but also rejected the physician's cross-appeal for 133.1 hours of attorney time as costs of proof sanctions under Code Civ. Proc. § 2033.420, on the basis that the requests "went 'to the ultimate issue in the case'" and were served "very early in the litigation."
- ***Golf & Tennis Pro Shop, Inc. v. Sup. Ct.*, 84 Cal. App. 5th 127 (2022)**: Fourth District, Division 3. 45-day period (found at Code Civ. Proc. § 2030.300) to file a motion to compel further responses to interrogatories does not begin to run upon service of a combination of unverified responses and objections where the motion challenges only the objections.

Evidence

- ***Berroteran v. Sup. Ct.*, 12 Cal. 5th 867 (2022)**: California Supreme Court. Addressing conflict in the Courts of Appeal; announcing procedure for trial courts to determine whether prior testimony should be excluded under Evidence Code § 1291(a)(2), along with extensive analysis of the reasons for the statute.
- ***Paige v. Safeway Inc.*, 74 Cal. App. 5th 1108 (2022)**: First District, Division 3. Considering issue of first impression under Evid. Code § 721(b)(3), a party may cross-examine an adverse expert about a publication established as reliable authority, regardless of the expert's consideration or reliance on the publication. The "statute provides three means by which a party may establish a publication to be 'reliable authority:' (1) by the

testimony or admission of the witness; (2) by other expert testimony; or (3) by judicial notice.”

- **Summary judgment objections: *Doe v. SoftwareONE, Inc.*, 85 Cal. App. 5th 98 (2022):** Fourth District, Division 3. Affirming new trial order following initial granting of summary judgment. Acknowledges split of authority on whether the abuse of discretion or the de novo standard of review applies to summary judgment objections, noting that the defendant’s evidentiary objections were nearly 100 pages, applying abuse of discretion standard. Extensive discussion regarding the presentation of hearsay statements and whether they constituted authorized admissions.

Forum/Venue

- ***LGCY Power, LLC v. Sup. Ct.*, 75 Cal. App. 5th 844 (2022):** Fifth District. Under Labor Code § 925, employers cannot force employees to litigate claims outside California as a condition of employment. This provision provides an exception to California’s compulsory cross-complaint statute (Code Civ. Proc. § 426.30), such that an employee may file claims in California that are related to claims the employer has filed in a different state. If the related action was filed first and is still pending, California is not compelled to extend credit to the sister state’s compulsory cross-complaint statute.

Jury Waivers/Right to Jury Trials

- ***TriCoast Builders, Inc. v. Fonnegra*, 74 Cal. App. 5th 239 (2022):** Second District, Division 2. Plaintiff did not deposit jury fees and sought to do so on the first day of trial. The trial court denied the request and the parties proceeded to a bench trial at which defendant prevailed. Extensive discussion of Code Civ. Proc. § 631 regarding jury waivers and the procedure for challenging denial of a jury trial: a party who fails to seek writ review of an order denying relief from jury waiver under Section 631 must demonstrate actual prejudice if challenging the order after trial has finished.
- ***Amato v. Downs*, 78 Cal. App. 5th 435 (2022):** Fourth District, Division 2. Plaintiff, an attorney, claimed that his property in Rancho Mirage was sold by the dual agency broker at a much lower price than it could have commanded. Plaintiff contended a number of

procedural problems at the trial court, inter alia, that the trial court improperly denied plaintiff a right to jury trial based on Plaintiff's failure to submit pretrial documents according to Riverside Superior Court Local Rule 3401. The Court of Appeal agreed that the "waiver of jury trial" was a sanction that was not authorized by Code Civ. Proc. §§ 575.2 and 631.

Labor and Employment

- ***Naranjo v. Spectrum Security Services, Inc.*, 13 Cal. 5th 93, 102 (2022) and on remand 88 Cal. App. 5th 937 (2023)**: California Supreme Court and Second District, Division 4. Extra pay for missed meal and rest breaks constitutes "wages" that must be reported, for purposes of fee recovery under Labor Code § 218.5(a). On remand, Court of Appeal was ordered to resolve (1) whether trial court had erred in finding that employer had not acted willfully (pursuant to Cal. Code Regs, tit. 8 § 13520) for purposes of Labor Code § 203 penalties and (2) whether there was a "knowing and intentional" violation for purposes of Labor Code § 226. A petition for review of the decision was filed April 7, 2023.
- ***Rocha v. U-Haul Co. of Cal.*, 88 Cal. App. 5th 65 (2023) (Second District, Division 1) – in conflict with *Gavriiloglou v. Prime Healthcare Mgmt., Inc.*, 83 Cal. App. 5th 595 (2022) (Fourth District, Division 2)**: *Rocha* held that PAGA claims based on FEHA and Labor Code violations were barred by issue preclusion after plaintiffs lost all of their individual FEHA and Labor Code violations in arbitration. Meanwhile, *Gavriiloglou* held that issue preclusion did not apply to a subsequent PAGA action because the plaintiff was in a different capacity.
- ***Whitlach v. Premier Valley, Inc.*, 86 Cal. App. 5th 673 (2022)**: Fifth District. Real estate agents are independent contractors as a matter of law and could not bring PAGA claims.
- ***Espinoza v. Warehouse Demo Servs., Inc.*, 86 Cal. App. 5th 1184 (2022)**: First District, Division 5. Correct inquiry for outside salesperson exemption is the extent to which the employee's hours and working conditions are controlled or supervised by the employer.

- ***Musgrove v. Silver*, 82 Cal.App.5th 694 (2022)**: Second District, Division 2. Employer was not liable for death of employee suffered during work trip even where employer paid for alcohol that contributed to employee’s death – no special relationship, and not vicariously liable for co-employee who was with employee just prior to death. See also *Colonial Van & Storage, Inc. v. Superior Court*, 76 Cal. App. 5th 487 (2022) (no employer liability where employee suffered gunshot wounds while meeting offsite at a coworker’s home)
- ***Atalla v. Rite Aid Corporation*, 89 Cal. App. 5th 294 (2023)**: Fifth District. MSJ was properly granted where plaintiff and alleged sexual harasser, her manager, knew each other and were friends prior to plaintiff starting her work at defendant’s pharmacy.

Mortgage Modifications

- ***Sheen v. Wells Fargo Bank, N.A.*, 12 Cal. 5th 905 (2022)**: California Supreme Court. Mortgage lender (who also served as servicer) did not have any tort duty under general negligence principles to “process, review, and respond carefully and completely” to borrower's loan modification application, and defendant was not responsible for borrower’s economic losses unaccompanied by property damage or personal injury; no special relationship and factors announced in *Biakanja v. Irving*, 49 Cal.2d 647, 650 (1958) did not support finding a duty of care. The Supreme Court noted fraud or promissory estoppel would provide remedies; Justice Liu’s concurrence noted the extreme misrepresentations that had occurred in the lower courts’ opinions where a duty was found.
- Compare to ***Morris v. JPMorgan Chase Bank, N.A.*, 78 Cal. App. 5th 279 (2022)**, First District, Division 4, in which the plaintiff was able to state claims under the California Homeowners Bill of Rights; demurrer order reversed as to statutory claims only.

Premises Liability

- ***Miller v. Roseville Lodge No. 1293*, 83 Cal. App. 5th 825 (2022)**: Third District. Reaffirming *Privette v. Superior Court*, 5 Cal.4th 689 (1993) to find that a hirer delegates

all workplace safety responsibility to an independent contractor and is not responsible for that contractor's workers while they are working.

- ***Kaney v. Custance*, 74 Cal. App. 5th 201 (2022)**: Second District, Division 2. A plaintiff is not barred as a matter of law from proving causation in a slip and fall case where the plaintiff does not remember the fall, but woke up next to a staircase with no handrail, with pain.
- ***Mubanda v. City of Santa Barbara*, 74 Cal. App. 5th 256 (2022)**: Second District, Division 6. Wrongful death plaintiff could not proceed where there was no evidence showing a known dangerous condition of property in the area where her son drowned while stand-up paddleboarding in the Santa Barbara Harbor.
- ***Rucker v. WINCAL, LLC*, 74 Cal. App. 5th 883 (2022)**: Second District, Division 5. Plaintiff was jogging on defendant's property when she swerved not traffic to avoid a homeless encampment, and was hit by a car. No liability given her use of the property was for her own recreational purpose.
- ***Degala v. John Stewart Company, et al.*, 88 Cal. App. 5th 158 (2023)**: First District, Division 2. Plaintiff was attacked and seriously injured while working at a construction site in Hunters Point in San Francisco. Plaintiff was a foreman, employed by a subcontractor, and sued the general. Summary judgment, granted based on *Privette*, was reversed based on triable issues of fact as to a "retained control" theory.

Real Property

- ***Romero v. Shih*, 78 Cal. App. 5th 326 (2022)**: Second District, Division 8. Proper to create an equitable easement in a neighbor dispute, but improper to grant an exclusive implied easement since granting fee title exceeds the scope of a court's equitable powers.
- ***Shocker v. Sup.Ct. of Alameda County*, 81 Cal. App. 5th 271 (2022)**: First District, Division 5. Resolution of question as to whether the plaintiffs' claim for constructive trust was a real property claim (Code Civ. Proc. § 405.31) within the ambit of the *lis pendens* statute (Code Civ. Proc. § 405.4). All constructive trust claims involving real property claims must be decided on a case-by-case basis and there is no categorical rule

that constructive trust claims can never constitute real property claims under Section 405.4.

Section 998 Offers

- ***Trujillo v. City of Los Angeles*, 84 Cal. App. 5th 908 (2022)**: Second District, Division 2. Acceptance of a Code Civ. Proc. § 998 offer after the court orally grant defendant’s summary judgment motion (but before written order) was ineffective.
- ***Council for Education and Research on Toxics v. Starbucks Corporation*, 84 Cal.App.5th 879 (2022)**: Second District, Division 4. Prop 65 case based on acrylamide in coffee. During the pendency of the case, the State Office of Environmental Health Hazard Assessment adopted a new regulation which effectively negated the requirement to provide Prop 65 warnings on coffee. Defendants moved for MSJ, then moved for \$700,000 in costs based on Section 998 offers. The MSJ was affirmed, the costs order was reversed because the release requested in the 998 Offers applied to claims outside the scope of the litigation and thus, were overbroad.
- ***K.M. v. Grossmont Union High School Dist.*, 84 Cal. App. 5th 717 (2022)**: Fourth District, Division 1. A 998 Offer conditioned on a settlement agreement and Civ. Code § 1542 waiver needed to have the settlement agreement attached, so that the offeree can evaluate the agreement’s language.
- ***Smalley v. Subaru of America, Inc.*, 87 Cal. App. 5th 450 (2022)**: Fourth District, Division 3. In a Song-Beverly Act case, Plaintiff rejected 998 Offer and the case went to trial, recovering less than the 998 Offer. The trial court awarded defendant post-offer costs, which the plaintiff appealed. The trial court deferred ruling on the motion for attorneys’ fees considering the pendency of the appeal, and the plaintiff sought to appeal that decision as well. The trial court held that the ruling deferring ruling was not an appealable order. Extensive discussion of 998 Offer authorities.

Settlement Validity

- ***Fettig v. Hilton Garden Inns Mgm’t LLC*, 78 Cal. App. 5th 264 (2022)**: Second District, Division 8. “Duress by a third person”: Plaintiff was allegedly hit by a Hilton

shuttle bus, and mid-trial the parties settled for \$85K. Plaintiff later filed a motion to rescind the agreement, claiming her trial counsel forced her to accept the settlement by stating “he would not be coming back to trial tomorrow” unless she accepted. Denial of her motion was affirmed because Defendant had no idea the settlement was accepted under duress.

Statute of Limitations/Five Year Rule

- ***Andrews v. Metropolitan Transit System*, 74 Cal. App. 5th 597 (2022)**: Fourth District, Division 1. Two-year SOL, vs. 6-month SOL running from date of rejection of tort claim under Gov. Code § 945.6(a)(1) because the rejection notice was defective as a matter of law.
- ***Ables v. A. Ghazale Bros., Inc.*, 74 Cal. App. 5th 823 (2022)**: Fifth District. Dismissal for failure to bring an action to trial within five years (Code Civ. Proc. § 583.310) was justified because Emergency Rule 10(a) is not a statute but an administrative rule, did not extend the plaintiff’s deadline pursuant to statute, and did not trigger section 583.350’s extra six-month period.
- ***Seto v. Szeto*, 86 Cal. App. 5th 76 (2022)**: First District, Division 4. Shareholder derivative suit was improperly dismissed where trial court failed to exclude a period of approximately six months, where court erroneously viewed the failure to satisfy a condition precedent to performance of a settlement agreement as a bar to valid contract formation. Very extensive discussion covering major contract principles and authorities.
- ***Lopez v. American Medical Responses West*, 89 Cal. App. 5th 336 (2023)**: First District, Division 5. One-year statute of limitations under MICRA applies when ambulance passengers are injured during a collision.

Summary Judgment

- ***Cole v. Sup. Ct.*, 87 Cal. App. 5th 84 (2022)**: Fourth District, Division 1. Party had absolute right to have summary judgment heard thirty days before trial pursuant to Code Civ. Proc. § 437c, “despite any calendaring issues in the trial court” and trial court was required to continue the trial date, and regardless of any purported merits of the motion.

Torts

- ***M&L Financial v. Sotheby's*, 81 Cal. App. 5th 173 (2022)**: Second District, Division 8. M&L Financial took 45 “vivid yellow diamonds” worth \$4m to Sotheby’s for auction. M&L told Sotheby’s it was the owner, but Sotheby’s released them to someone else and they “vanished.” Sotheby’s then filed a demurrer, which was granted as to claims for breach of contract and negligence. The Court of Appeal reversed on the breach of contract claim given the circumstances of the contract and oral statements in connection with its making, but affirmed as to the tort claim, on the basis of the economic loss rule.
- ***Spencer v. City of Palos Verdes Estates*, 88 Cal. App. 5th 849 (2023)**: Second District, Division 5. Second appeal in the ongoing Lunada Bay Boys litigation in the City of Palos Verdes. City could be held liable for conspiracy to prevent access under the California Coastal Act, where the City permitted the Lunada Bay Boys to build their “Rock Fort” on public land, and where it remained silent though knowing of the Bay Boy’s activities. Extensive discussion of the Coastal Act, including the effect on landowners who create or tolerate unpermitted structures in violation of the Coastal Act, and whether nonphysical activity can constitute development under the Coastal Act where it negatively impacts coastal access. Confirms that parties can be held liable under the conspiracy doctrine if they agree to engage in conduct that violates a duty imposed by statute.

Unclean Hands

- ***Padideh v. Moradi*, 89 Cal. App. 5th 418 (2023)**: Sixth District. Unclean hands defense was properly applied in a malicious prosecution action where the plaintiff perjured herself at her deposition, as found by the jury. Extensive discussion of the elements of the unclean hands defense.

Utilities

- ***Securus Technologies, LLC v. PUC*, 88 Cal. App. 5th 787 (2023)**: Second District, Division 4. PUC decision to adopt interim rate relief for prison phone providers at a rate of \$0.07 per minute was proper and that the rate did not constitute a confiscatory taking.

CALIFORNIA LAWYERS ASSOCIATION
LITIGATION AND APPELLATE SUMMIT
MAY 4, 2023

LITIGATION, APPELLATE, AND ADR UPDATE
2023 AND BEYOND

**Including Significant New Laws, Changes to the Code of Civil Procedure, and More from
the 2022-23 Legislative Session through current**

Jordanna G. Thigpen (SBN 232642)
Thigpen Legal, P.C., Beverly Hills, CA
jt@thigpenlegal.com

LEGISLATIVE CHANGES

CIVIL RIGHTS

AB-1576: Lactation facilities: Courts are required to provide court users with access to lactation rooms made available to court employees, which shall meet all requirements of Labor Code § 1031. However, this law does not take effect until July 1, 2024.

AB-2448: Civil Rights Pilot Program: requiring FEHA to develop a pilot program before January 1, 2025 to recognize business that create environments free from discrimination and harassment and would require the department to develop criteria to qualify for recognition, including compliance with the Unruh Civil Rights Act. Qualifying businesses will receive a certificate.

SB-53, SB-1210: Unsolicited images: Enhances penalties for sending unsolicited images (“cyber flashing”), as defined, by providing that someone who receives unsolicited obscene material can recover attorneys’ fees and statutory penalties of \$1,500 to \$30,000. SB 1210 adds Civ. Code § 52.8 to provide for an award of attorneys’ fees for civil actions seeking damages or equitable relief against any person that distributes or benefits from the distribution of unauthorized obscene materials.

CODE OF CIVIL PROCEDURE

AB-1936: Name change for Hastings College of the Law: The new name is “College of the Law, San Francisco.”

AB-1981: Jury Duty: Provides for mileage reimbursement for jurors for travel to and from court at .34/mile; requires no-cost public transportation where reasonably available; requires Judicial Council to study the effect of increases on juror compensation and mileage to ascertain whether they might increase juror diversity and participation.

AB-2091: disclosure of reproductive health information: Prohibits compelling a person to provide information that is related to whether an individual has sought or obtained an abortion if the information is being requested based on other states’ laws abrogating reproductive freedom. Insurers may be penalized by the Insurance Commissioner, and health care providers may not respond to subpoenas or law enforcement requests if such subpoenas/requests are based on other states’ laws abrogating reproductive freedom.

AB-2961: E-Service: Changes to Code Civ. Proc. § 1010.6: Authorizes courts to order e-service on a person represented by counsel who has appeared in an action. Requires a party represented by counsel to make e-service if requested. Unrepresented persons must still consent to receive e-service. After July 1, 2024, courts are also permitted to e-serve parties that are subject to mandatory e-service.

SB-688: Judgments by Confession. Judgments by confession, which are used when no action has yet been filed, are barred in California as of January 1, 2023. This does not prohibit a creditor from filing a lawsuit and then obtaining a Stipulation for Entry of Judgment, which means that the debtors will be subjected to additional charges, as well as a public record of a filing against the debtor.

SB-1037: Oral Depositions: Amends Code Civ. Proc. § 2025.310 to provide that all physically present at a deposition must comply with local health and safety ordinances.

SB-1155: Time-Limited Demands for liability claims: Adding Chapter 3.2 Title 14 of Part 2 of the Code of Civil Procedure (new Code Civ. Proc. §§ 999 et seq.)

SB-1200, SB-1477: Enforcement of judgments: Provides for new rules relating to certain small judgments (<\$200K for claims relating to medical expenses; <\$50K for claims relating to personal debts). Such judgments may now be renewed for one-time five year period from the date the application is filed. In addition, the annual rate for interest is 5%. Debtors also now have 60 days to modify or vacate a renewal of judgment. SB 1477 protects a larger amount of a debtor's earnings from wage garnishment.

CORPORATIONS

AB-769: Meetings, State of Emergency: Amendments to Corp. Code §§ 5510, 7510, 9411, and 12460. Authorizes shareholders or members to also conduct a meeting of shareholders or members solely by electronic transmission ("remote meetings") if the meeting is conducted on or before June 30, 2022 (existing law already provides that remote meetings are permitted under certain conditions: (a) the shareholders/members consent or (b) the board determines it is necessary because of an emergency) and there are reasonable measures to verify that each participant is a shareholder/member or proxyholder.

AB-1780: Additional changes re: remote meetings: Amending Corp. Code § 600: Providing that for corporations, remote meetings are permitted as long as there is a live feed for the duration of the meeting, and now requires the corporation to verify that the person who voted is a shareholder or proxyholder.

AB-1802: LLC Dissolution: Amending Corp. Code §§ 17707.06 and 17707.08: Provides that omitted assets from an LLC's wind-up must be used to pay the LLC's unsatisfied debts before being distributed to members.

CRIMINAL JUSTICE

SB-731: Expungement Rights: Provides additional rights for expungement of felonies. Those who have served time on or after January 1, 2005 will have their records automatically expunged as long as they have not been convicted of another felony in the past four years. Violent/serious

felonies will still have to be the subject of court petitions for expungement; sex offenders are not eligible.

SB-1137: Oil and Gas Permitting: Oil and gas drilling in California is under the supervision of the Geologic Energy Management Division in the Department of Conservation, under the direction of the State Oil and Gas Supervisor. This law requires a 3,200 ft. setback between oil and gas wells and “sensitive receptors,” broadly defined to include residences, schools, community resource centers, hospitals, prisons, and any place with a business open to the public. However, they may still be approved and continue under specified circumstances, including where the State is required to “comply with a court order finding that denying approval would amount to a taking of property, or a court order otherwise requiring approval” of the activity.

The law also requires operators to develop a leak detection system for certain chemicals, and detailed response plans.

The law was challenged by the oil and gas industry and is on hold. The industry’s ballot measure to repeal the law will be on the ballot in 2024 as the “California Oil and Gas Well Regulations Referendum,” which they are calling the “Stop the Energy Shutdown” campaign.

SB-1228: Crime victims’ DNA samples: prohibits law enforcement from using DNA from crime victims which they provided from being used in the investigation of an unrelated crime.

SB-1008: Free phone calls for incarcerated individuals: Following the lead of the City of New York (in 2018), the state of Connecticut (in 2021), as well as the City and County of San Francisco and the County of San Diego, all of which were already providing free phone calls from county jails, the entire State of California now mandates free phone calls in all county jails and prisons.

AB-2147: Jaywalking: Permits jaywalking unless a “reasonably careful person” would realize a collision with a human-powered vehicle was imminent.

SB-357: “Loitering” in connection with prostitution offenses: Various changes to the Evidence Code, Penal Code, and others to decriminalize “loitering” related to prostitution, and providing that possession of condoms is not admissible as evidence related to the prosecution of prostitution offenses.

AB-1788: Sex trafficking: Permits claims against hotels for failing to report sexual trafficking within the hotel, or where an employee is benefitting from the sexual trafficking activity. Authorizes the city/county attorney to seek civil penalties and for courts to increase the penalties for repeated violations.

CONSUMER RIGHTS

AB-1287: “Pink tax”: adding Civ. Code § 51.14, prohibiting gender-based pricing on products.

AB-1200:Packaging: bans the sale and distribution of food packaging containing PFAs

AB-2766: Pre-Litigation Subpoenas for UCL Claims: Amending Bus. and Prof. Code § 16759. Authorizes city attorneys and county counsel to issue pre-litigation subpoenas and perform other investigations when they believe there has been a UCL violation.

EDUCATION

AB-2598: Restorative justice practices: requires the State to develop evidence-based best practice implementation on school campuses.

EVIDENCE

AB-2799: Admission of creative expression: Adding Evid. Code § 352.2: Adding additional factors, in addition to Evid. Code § 352, for courts to consider where a party seeks to admit as evidence a form of creative expression.

SB-836: Immigration status: Adding Evid. Code §§ 351.3 and 351.4. Existing law provides that in civil actions for personal injury or wrongful death, evidence and discovery of immigration status is prohibited. This law reenacts certain repealed provisions regarding disclosure of a person's immigration status in civil (other than PI or wrongful death actions) and criminal actions in open court unless a party requests an in camera hearing. However, the sections do not apply when a person's immigration status is necessary to prove some element of the claim or an affirmative defense, or where the person/their attorney voluntarily discloses the status, or under other specified circumstances.

HEALTH AND HUMAN SERVICES

SB-1338: CARE Act: The CARE Act is an effort to address the ongoing deficiencies in the intersection between mental health/substance abuse services, the criminal justice system, and the judiciary. Provides for the CARE act program, a petition-based system for a court to oversee the provision of mental health services and support (including housing and medication). Criminal courts can also refer defendants to the CARE program. By October 1, 2023, seven initial counties will implement the program (Tuolumne, Stanislaus, San Francisco, San Diego, Riverside, Glenn, and Orange) with the remainder to implement by December 1, 2024.

The legislation essentially creates what the State is calling the "CARE court," with the goal of setting up individual respondents (qualifications for whom are defined in the legislation) with individualized care plans that can last up to 24 months. The proceedings will emphasize a non-adversarial approach, confidentiality, and accountability for the parties. The program will empower the judiciary and specified petitioners to refer respondents as an alternative to conservatorships or incarceration, which remain alternatives in the event a respondent fails to complete the program successfully.

SB-107: Transgender Protections: Makes California a sanctuary state for transgender health care, and shields transgender people from legal action from states that target them. Blocks out of state subpoenas and enacts new rules related to disputed involving transgender children.

AB 90, AB 254, AB 352, AB 571, AB 576, AB 598, AB 710, AB 793, AB 1194, AB 1432, AB 1481, AB 1646, AB 1707, SB 36, SB 345, SB 385, SB 487: Fourteen Bills on Reproductive Rights: Multiple new laws to protect reproductive rights for all Californians, including protecting medical records, expanding abortion training options and protection for providers (aimed to close the shortage of providers which is estimated to increase given other states' decisions to deny reproductive freedom), and protecting people from criminal or civil liabilities if a pregnancy is terminated (whether it is done voluntarily or whether it is done outside the medical system). Prohibits private insurance companies from charging for abortions. Also terminates the requirement that coroners investigate stillbirths as "unattended deaths." Many more changes available [here](#).

California voters also passed Proposition 1 in November 2022, which codified reproductive freedom in our State's Constitution.

[AB-32: Telehealth:](#) Making changes allowing audio-only modality for defined "sensitive services" for certain Medi-Cal patients.

[AB-35: Medical Malpractice:](#) removed the \$250,000 MICRA cap to a maximum increase of \$1,000,000 for a death case, and \$750,000 for a non-death case, over a ten-year period, with inflationary adjustments of 2% thereafter. Also provides for three separate categories of defendants (health care providers, health care institutions, and unaffiliated health care providers), and plaintiffs may recover a separate cap for each type. Also adds a new chapter to the Health and Safety Code regarding expressions of sympathy or regret and statements of fault that are made prior to the filing of a lawsuit/demand for arbitration.

HOUSING/LAND USE

[AB-2011](#), the Affordable Housing and High Road Jobs Act: changes to the Government Code. Identifies areas previously zoned for parking, retail, or officer buildings where land could be used for housing, and allows housing on that land. Exempts such projects from local approval and CEQA. This takes effect in July 2023.

[SB-118:](#) one of several pieces of legislation aimed at *Save Berkeley's Neighborhoods v. The Regents of the University of California*, 51 Cal.App.5th 226 (2020), which ordered UC Berkeley to cut its enrollment by 3,050 students. Modifies CEQA to remove consideration of an increase of enrollment as an environmental impact. Schools will still have to conduct CEQA review of long-range development plans, but do not have to do a CEQA review solely due to student increase.

[SB-886:](#) exempts university dorms at public universities from CEQA until January 1, 2023, if the project is LEED platinum or better, subject to certain restrictions as defined.

[AB-916: Dwelling unit bedroom additions:](#) preventing cities or counties from adopting or enforcing any ordinances requiring a public hearing as a condition of reconfiguring existing space to increase the bedroom count within an existing dwelling unit.

AB 252: Rent control for houseboat berths: Amends to the Civil Code to provides for rent control on berths used for houseboats

AB 1410: Amendments to Davis-Stirling: Amendments to the landmark common interest development Act; (1) providing that HOAs cannot prohibit residents from discussing issues with the HOA or the community online, or retaliate against members/residents for doing so; (2) providing that HOAs cannot prevent someone from renting their unit for more than 30 days, even if the governing documents say so; (3) providing that an HOA cannot engage in any enforcement actions for violations of the governing documents, except those actions related to the nonpayment of assessments, during a declared state or local emergency if the nature of the emergency makes it unsafe or impossible for the owner to prevent/fix the violation.

GUNS

AB-1594: “Bounty” law which permits the AG, local prosecutors, or anyone who suffered harm to file lawsuits against firearm manufacturers.

LABOR/EMPLOYMENT

Minimum Wage (next phase of SB 3, passed in 2016)

State minimum wage is now \$15.50 an hour for all California employees. The wage has maxed out, and an inflation-based .50 increase was approved due to a 7.9% CPI increase approved by the California Department of Finance.

Individual jurisdictions have higher minimum wages. For example, Mountain View’s minimum wage, believed to be the highest in the State, is \$18.15/hour. If you want to check your jurisdiction, UC Berkeley’s Labor Center maintains a list [here](#).

There is a ballot measure on the statewide ballot for November 5, 2024 to create an \$18/hr minimum wage by 2026.

SB-1162: Pay Disparity/Transparency: Pay Transparency Act: employers of 15 or more employees must make salary ranges for positions available to applicants and employees, and employers with 100 or more employees must comply with certain reporting requirements based on gender and race.

SB-951: Paid Family Leave: increases share of paid family leave from 55% to 60% to 70% depending on income. In 2025, bill will require increase to 70%.

AB-2183: Farmworker Unionization: Part of an ongoing battle over unionization for farmworkers and a secret ballot process. This bill was signed with multiple conditions and additional work is planned for this legislative cycle.

AB-1041: CFRA Leave: Defines a “designated person” for CFRA purposes to include any individual related by blood or whose association with the employee is the equivalent of a family relationship. Also allows employers to limit the employee to one individual per year for purposes of CFRA leave.

LEGAL PROFESSION

AB-2958: State Bar oversight: Prohibits the State Bar from advancing regulatory sandbox proposals without the Legislature’s approval, requires reporting from the Bar on amounts spent on the regulatory sandbox initiatives since 2018.

PUBLIC SAFETY

AB-1909: Cyclist safety: Several changes to the Vehicle Code, including changing lanes before passing a cyclist (if one is available); lifting a ban on Class 3 e-bikes (except from hiking/recreational trails); prohibiting cities from requiring bicycle licenses; and as of 2024, permitting cyclists to cross at pedestrian signals instead of only at green traffic lights.

SPEECH

AB 2282: Hate Symbols: increases penalties for people who use hate symbols (as defined) as part of hate crimes and expands the existing legislation regarding these symbols to schools.

SB-1100: Open Meetings/Orderly Conduct: Adding Gov. Code § 54957.95: Authorizes the removal of individuals disrupting a meeting and requires removal to be preceded by a warning to the individual that their conduct is disrupting the meeting.

On the Ballot for 2024 (so far)

- **Pandemic Early Detection and Prevention Institute Initiative:** creates a state Pandemic Early Detection and Prevention Institute
- **\$18 Minimum Wage Initiative:** increases minimum wage to \$18 by 2026
- **Employee Civil Action Law and PAGA Repeal Initiative:** Repeals PAGA and replaces it with a new process to address labor violations
- **Two-Thirds Legislative Vote and Voter Approval for New or Increased Taxes Initiative:** requires all new state taxes to be enacted with a 2/3 legislative vote and voter approval; requires all new local taxes to be approved with a 2/3 vote of the local electorate
- **Fast Food Restaurant Minimum Wage and Labor Regulations Referendum:** repeals AB 257 (which establishes a fast-food council to regulate working conditions in the industry)
- **Oil and Gas Well Regulations Referendum:** repeals SB 1137 (described above)

Bills on the Horizon

- AB-78 – Proposal for new compensation rules for grand jurors
- AB-615 – Proposal to provide for an interim measure of protection in international commercial arbitrations to be awarded by an arbitral tribunal
- SB-71: Proposal to change small claims jurisdictional limit to \$25,000 and changing limited jurisdiction limit to \$100,000
- SB-235: Mandatory initial disclosures (amending Code Civ. Proc. §§ 2016.090, 2023.050) except for small claims
- SB-365: Prohibits stay on proceedings during the pendency of an appeal of an order dismissing/denying a petition to compel arbitration
- SB-439: Proposal for a Code Civ. Proc. § 425.19, permitting defendants to bring motions to strike complaints brought to challenge the approval or permitting of a “priority housing development project” and to otherwise have the benefit of anti-SLAPP elements (attorneys’ fees for prevailing, etc.)
- SB-554: Authorizing courts to conduct IDCs and to toll the deadline for filing a discovery motion or making other orders.

JURY INSTRUCTIONS

The Judicial Council approved changes to the Civil Jury Instructions at its August 2022 and December 2022 meetings; a complete list of the changes and the supplement can be found [here](#).

There are other revisions consisting of new authorities, but included below are the revised instructions and the new instructions.

New Jury Instructions

LABOR CODE ACTIONS

- VF-2706. Rest Break Violations (Lab. Code, § 226.7) (new)**
- VF-2707. Meal Break Violations (Lab. Code, §§ 226.7, 512) (new)**
- 2760. Rest Break Violations—Introduction (Lab. Code, § 226.7) (new)**
- 2761. Rest Break Violations—Essential Factual Elements (Lab. Code, § 226.7) (new)**
- 2762. Rest Break Violations—Pay Owed (new)**
- 2765. Meal Break Violations—Introduction (Lab. Code, §§ 226.7, 512) (new)**
- 2766A. Meal Break Violations—Essential Factual Elements (Lab. Code, §§ 226.7, 512) (new)**
- 2766B. Meal Break Violations—Rebuttable Presumption—Employer Records (new)**
- 2767. Meal Break Violations—Pay Owed (new)**
- 2770. Affirmative Defense—Meal Breaks—Waiver by Mutual Consent (new)**
- 2771. Affirmative Defense—Meal Breaks—Written Consent to On-Duty Meal Breaks (new)**
- 2775. Nonpayment of Wages Under Rounding System—Essential Factual Elements (new)**

Revised Instructions

PROFESSIONAL NEGLIGENCE

- 601. Legal Malpractice—Causation (revised)**

MOTOR VEHICLES AND HIGHWAY SAFETY

- 730. Emergency Vehicle Exemption (Veh. Code, § 21055) (revised)**

PREMISES LIABILITY

- 1004. Obviously Unsafe Conditions (revised)**
- 1007. Sidewalk Abutting Property (revised)**

FAIR EMPLOYMENT AND HOUSING ACT

2525. Harassment—“Supervisor” Defined (Gov. Code, § 12926(t)) (revised)

WHISTLEBLOWER PROTECTION

VF-4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Affirmative Defense—Same Decision (Gov. Code, § 8547.8(c)) (revised)

VF-4602. Whistleblower Protection—Affirmative Defense of Same Decision (Lab. Code, §§ 1102.5, 1102.6) (revised)

4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5) (revised)

4604. Affirmative Defense—Same Decision (Lab. Code, § 1102.6) (revised)

CIVIL RIGHTS

3046. Violation of Pretrial Detainee’s Federal Civil Rights—Fourteenth Amendment—Medical Care and Conditions of Confinement (new)

VICARIOUS RESPONSIBILITY

3714. Ostensible Agency—Physician-Hospital Relationship (new)

UNLAWFUL DETAINER

4330. Denial of Requested Accommodation (new)



James M. Wagstaffe

James (Jim) M. Wagstaffe handles a diverse range of litigation matters. His practice focuses on complex litigation, professional and governmental representation, will and trust disputes, legal ethics, and First Amendment matters. Jim is also the author of *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, published by Lexis Nexis. In addition, Jim is recognized as an authority and frequently is consulted by other law firms and clients alike on complicated civil procedure, attorneys' fees and trial practice issues.

Jim currently serves as a member Chair of the Federal Judicial Center Foundation Board, appointed by the Chief Justice of the United States Supreme Court. For more than 30 years, he has been responsible for development and delivery of various annual forums, seminars, webinars, and workshop sessions directed at educating federal judges and their respective clerk staffs on civil procedure and other aspects of federal law. In 2017, he was selected as *California Lawyer* Attorney of the Year for his successful representation of The State Bar of California in a high-profile privacy trial. In addition, Jim has been consistently named one of the Top 100 Super Lawyers in Northern California.

Cutting Edge Litigator

Jim's reputation as litigator is exemplified by his frequent retention in high stakes cases where his strategic and procedural expertise is particularly invaluable. Jim has recently tried multiple jury trials resulting in multi-million dollar verdicts for the firm's clients. These include:

- The successful 2017 federal whistleblower jury trial against Bio-Rad producing a \$14.6 million judgment. This is the largest Dodd-Frank jury verdict in history.
- A 2017 jury trial verdict in a defamation action filed in San Luis Obispo County. It was the largest verdict of this type in the County for several years.
- Obtaining a \$5 million judgment jury verdict in San Francisco for a law firm partner suing for breach of contract.

Jim also has extensive experience trying court trials and arbitrations before retired judges. These include:

- The successful defense of a Trustee sued for over \$100 million by disgruntled beneficiaries.

- An across-the-board trial victory for the State Bar of California in the high-profile *Sandercase* invoking the rights of Bar applicants to maintain privacy as to demographic and racial data.
- Successfully defending the Golden State Warriors in litigation seeking \$55 million arising out of a dispute involving its Arena lease.
- Obtaining success for plaintiffs on an anti-SLAPP motion in case against City of Vallejo brought by couple who were wrongfully accused of having faked their kidnapping.

Jim's practice includes substantial work on virtual world issues, including electronic discovery, related legal ethics questions, and Wi-Fi technology. He was the successful lead attorney in the seminal e-discovery case, *Qualcomm, Inc. v. Bathchelder et al.*, 327 Fed. Appx. 877 (Fed. Cir. 2008). Several years ago he began representing the Australian government in high profile litigation involving the patent for indoor wireless technology. See *Microsoft Corp. v. Commonwealth Scientific and Indus. Research Organisation*, 297 Fed. Appx. 970 (Fed. Cir. 2008).

The State Bar of California has looked to Jim for over 15 years to handle its most challenging cases, including those raising serious constitutional issues. For example, Jim successfully argued the high-profile *in re Garcia* case before the California Supreme Court. In *Warden v. State Bar of California*, 21 Cal.4th 628 (1999), Jim also represented the Bar in a lawsuit in which the plaintiffs alleged the exemptions from the MCLE (continuing education) program were unconstitutional. The matter went up to the California Supreme Court, which ruled in favor of the Bar.

Jim is considered one of the most sought after First Amendment/defamation lawyers in the country. He has represented broadcasters, newspapers, magazines, celebrities and public officials, as well as a host of others – both as plaintiff and defendant. He has been the lawyer on many of the leading anti-SLAPP cases in California and has tried more defamation cases to trial than perhaps any attorney in the state. Jim's First Amendment and media experience is exemplified by his successful defense of *The New Yorker Magazine* in the libel trial *Masson v. New Yorker*, 832 F. Supp. 1350 (N.D. Cal. 1993), aff'd 85 F.3d 1394 (9th Cir. 1996). More recently, Jim obtained an injunction for airline pilots to exercise their free speech rights to commentate at Midway Airport. *Southwest Airlines Pilots' Association v. City of Chicago*, 186 F.Supp.3d 836 (N.D. Ill. 2016).

Appellate Lawyer

In addition to his leadership as a trial lawyer, Jim is highly active in the firm's appellate practice. He handles appeals in both state and federal courts, representing clients seeking to affirm a favorable trial court decision as well as those whose goal it is to obtain a reversal. Jim has established an enviable track record on appeal and has led the way in a number of groundbreaking decisions. For example, Jim has successfully argued many cases in the California Supreme Court including the recent anti-SLAPP statute victory in *Baral v. Schnitt* (2016) and *In re Garcia* (2014).

In addition, Jim has numerous recent appellate victories for governmental parties including achieving a total victory in a multimillion dollar takings case for the City of San Rafael *MHC v. San Rafael*, 714 F.3d 1118 (9th Cir. 2013) obtaining an affirmance of a civil rights dismissal, *Douglas v. Town of Portola Valley*, (9th Cir. 2012) 468 Fed. Appx. 728, and a CEQA victory for the City of Redwood City in *Wilson & Wilson v. City Council of Redwood City*, (2011) 191 Cal. App. 4th 1559.

In *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), Jim secured a sweeping victory from the Ninth Circuit Court of Appeals in a landmark decision with far reaching implications in all areas of domain name registration and Internet infrastructure. Similarly, in *Theofel v. Farey Jones*, 359 F.3d 1066 (9th Cir. 2003), *cert. denied*, 543 U.S. 813 (2004), Jim succeeded in obtaining a reversal of the district court's dismissal of his clients' lawsuit in a published decision that established new boundaries on subpoenas aimed at email communications.

Businesses, individual, and government entities and agencies, and notably, other lawyers, are among the many clients who seek out Jim to represent them at trial and on appeal. *See, e.g., Lintz v. Lintz*, 222 Cal.App.4th 1346 (2014) (leading case in state on testamentary capacity); *In re Apple, Device Address Book Litigation* (2014) (appointed lead attorney in nationwide class action); *In re Cathode Ray Tube Antitrust litigation* (2013) (attorneys for Dell Computer in national class action). In his almost three decades of appellate experience, Jim has represented parties and amici on appeal in matters involving constitutional and civil rights claims, defamation cases, environmental/CEQA, probate disputes, securities fraud, and consumer rights, just to name a few. A listing of Jim's appellate cases is set forth below.

Author, Speaker, Professor

In addition to Jim's courtroom experience, Jim has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, published by Lexis Nexis in 2017. Selected other legal publications are listed below. Jim also authored *Romancing the Room* (Random House) — a spirited step-by-step guide to effective public speaking — and was a contributing author with Arthur Sulzberger Jr., Larry King, and Ira Glass, among others, to *The Expert's Guide to 100 Things Everyone Should Know How to Do* (Clarkson Potter 2004).

Jim is committed to sharing his knowledge and experience with judges, lawyers and students alike. Jim has served as an instructor at the Federal Judicial Center's annual "New Judges Workshop" since 1990, educating newly-appointed federal judges on all aspects of federal procedure. Throughout the year, Jim has been asked to present, moderate and participate in panel discussions and seminars throughout the country with other judges and lawyers on current topics of interest to the legal community. In conjunction with the Practising Law Institute, Jim was the Chair of the 2013 California Trial Evidence program in October, 2013. The program was a day-long legal educational program focusing on the recent case law and statutory developments in the law of trial evidence.

In addition, Jim is an adjunct professor in constitutional law and civil procedure at Hastings College of the Law and in Media Law at San Francisco State University. He has also taught the Practical Speech Communication course at Stanford University for over 35 years.



Jordanna G. Thigpen is Lead Trial Attorney at Thigpen Legal, P.C., which represents clients in complex civil disputes in state and federal court, from inception through appeal. Ms. Thigpen also serves Of Counsel to the Law Office of Joseph L. Alioto and Angela Alioto, practicing employment and civil rights litigation.

Ms. Thigpen has a diverse legal background including service for the government, private, and nonprofit sectors. She has received numerous awards for her work, and in 2021, the *Daily Journal* named her one of California's Top 100 Women Lawyers. As of 2023, she has achieved nearly \$300,000,000 in verdicts and settlements for diverse and deserving clients.

Ms. Thigpen serves as a Member of the California Lawyers Association's Litigation Section Executive Committee, and in September 2022, she was appointed by former California Supreme Court Chief Justice Tani Cantil-Sakauye (Ret.) as an Attorney Member of the Judicial Council's Civil and Small Claims Advisory Committee. She is admitted to practice in California, New York, and the District of Columbia.



George Wailes
San Mateo, California
(650) 638-2343
george@waileslaw.com

As an advocate, George has tried, arbitrated and resolved disputes with multi-million-dollar results in California, and several other states as well as Mexico. He serves as a mediator for the United States District Court for the Northern District of California and as judge-pro-tem and neutral for San Francisco and San Mateo County Superior Courts. From 1989 through 2001, George was co-chair and a faculty member of the Hastings College of Advocacy, Business Litigation Institute, where attorneys from across the country came to hone their trial and courtroom skills.

George was a member of the inaugural Board of Representatives of the California Lawyers Association; is a past Chair of the CLA Litigation Section Executive Committee and continues as an advisor to the committee; and serves on the CLA's Operations and Racial Justice committees. George has been active in other Bar Associations including serving as President of the San Mateo Bar Association in 2010, founding its Labor and Employment Law Section, assisting the Business Litigation Section, and continuing to serve on its Diversity, Bench Bar, and Conference of Delegates Committees and its Race and Social Justice Task Force. He serves as a presider for each week of the Mock Trial program, and regularly assists the Legal Aid Society of San Mateo County handling cases pro bono and serving on its Annual Lunch Committee. He also volunteers for community associations.