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10 Barristers Tips
Limiting the liability of design professionals in public contracts
BY THOMAS F. QUILLING

11 Practice Tips
New requirements for home improvement contracts
BY MARION T. HACK

18 Practice Tips
Items to negotiate in the AIE Standard Lease form
BY NADAV RAVID

22 Map Quest
BY LISA M. DITTMAN
Most major real estate developments must navigate the complexities of the Subdivision Map Act

29 Wake-Up Call
BY LESLIE STEVEN MARKS AND NICHOLAS A. MERKIN
The control exception to the construction defect statutes of repose can have a dramatic effect on litigation involving contractors and developers

Plus: Earn MCLE credit. MCLE Test No. 155 appears on page 31.

36 Intelligent Design
BY MEHRDAD FARIVAR
Whether an implied license for architectural and engineering plans has been granted to a third party depends on the intent of the designer

44 By the Book
Anonymous Lawyer
REVIEWED BY MICHAEL A. GEIBELSON

48 Closing Argument
Plain language for civility in discovery
BY MARTIN L. GRAYSON

45 Classifieds

46 Index to Advertisers

47 CLE Preview
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From the Chair

BY R.J. COMER, GORDON ENG, AND TED M. HANDEL

In the movie Field of Dreams, Kevin Costner’s character, farmer Ray Kinsella, hears a voice saying, “If you build it, they will come.” Inspired by this message, he immediately proceeds to convert a portion of his Iowa cornfield into a baseball field that becomes, with its stands and concessions, a commercial development.

Suppose, however, Kinsella tried to develop this project in California. Long before the ballplayers could emerge from the cornfields, who would Kinsella have had to deal with in order to build and operate his shrine? After all, he had no entitlements, plans, construction contract, or leases. If Kinsella thought James Earl Jones’s character and his banker-brother-in-law were a hard sell, he would have faced tougher negotiations with local officials and his architect, contractor, and concessionaires.

While Los Angeles Lawyer’s Real Estate Law issue may not quite attain the near mythical status of Field of Dreams, it does offer real estate attorneys an informative discussion on a variety of matters of current interest. And this may explain why a special issue on real estate law has endured as an annual feature of LAL beginning several years before Field of Dreams was released.

Ray Kinsella’s gamble paid off, both in the movie and in reality. The field has become a tourist attraction in Dyersville, Iowa. This year’s Real Estate Law issue analyzes certain legal risks that property owners, contractors, and design professionals may have to overcome to develop, build, and create dream projects of their own.

Securing local approval to subdivide land and create legal lots amenable to development is marked by complex requirements and political land mines. The Subdivision Map Act is broad in scope not only because it covers unimproved and improved land but also because it encompasses lots on, above, or below the surface of the land. The act also vest localities with considerable discretion in approving maps—and they are quite willing to use it to regulate development in their communities.

A similar level of complexity exists as to who can assert the statutes of repose in construction defect actions. Rather than expose contractors to open-ended liability for alleged construction defects, clear statutory deadlines have been set for the filing of actions. However, the state legislature attempted to mitigate the punitive aspects of this time bar by creating a “control exception” to prevent certain persons from asserting this defense. Still, the convoluted language used in drafting this exception has required California courts to ensure that the policy objective of setting limits on liability exposure is being met.

The relevancy of federal copyright law to the development process is becoming an issue with significant financial consequences for developers. While reluctant in past years to assert their intellectual property rights, design professionals now use American Institute of Architects form contracts to set limits on the use by clients and others of their work product. Nevertheless, situations still occur in which parties have not explicitly addressed these limitations in their agreements. When design professionals subsequently allege infringement of their plans, the federal appellate courts have defined certain conduct as evidence of the professionals’ intent to grant an implied license to use that work product.

We thank the authors who volunteered their time and energies to contribute to these and the other articles in this issue. We hope you will find them not only of interest but of benefit to your practice.

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Limiting the Liability of Design Professionals in Public Contracts

TO ALLOCATE RISK, INDEMNITY AGREEMENTS in public construction contracts have long been negotiated between design professionals and public agencies. The term “negotiated” is used loosely; a public agency typically holds enough power to make indemnity coverage a condition of contract. Assembly Bill 573, signed into law on September 25, 2006, prohibits public agencies from requiring design professionals to contract to indemnity clauses that hold them responsible for defects that are not the result of the designers’ negligence or willful misconduct. As a result of passage of the bill, design professionals can hope to do business with city hall without having to provide a remedy for problems that the professionals did not create.

The bill, codified at Civil Code Section 2782.8, mandates public agencies to require only what is known as Type III indemnity from design professionals for any contract or amendment to contract entered into after January 1, 2007. All contracts and amendments with a public agency for design professional services that purport to indemnify, including the cost to defend, the public agency by a design professional against liability for claims against the public agency are unenforceable except for claims that arise solely out of negligence, recklessness, or willful misconduct of the design professional. A number of public agencies opposed this statutory change, but this opposition may be described as an attempt to maintain an illusion. Most insurance policies for design professionals did not and do not provide coverage for liability beyond the design professional’s own negligence or willful misconduct. Thus, many design professionals could not meet what is called a Type I indemnity requirement through their insurance.

The three types of indemnity agreements are categorized in MacDonald & Kruse, Inc. v. San Jose Steel Co.1 Type I indemnity shifts the burden of mistake away from the public agency. For example, a Type I indemnity clause may read: “The design professional will expressly and unequivocally indemnify the public agency, regardless of whether design professional is solely negligent or concurrently negligent with the public agency.” In another form, a Type I clause may read: “The design professional shall indemnify and hold the public agency harmless as to any and all claims arising out of this Agreement, whether caused in whole or in part by the design professional, and regardless of whether or not caused by the passive or active negligence of the public agency, except for the sole negligence or willful misconduct of the public agency.”

Type II indemnity, in turn, is less strict. A typical Type II indemnity clause reads: “The design professional shall indemnify and hold the public agency harmless as to any and all claims arising out of this Agreement.” An indemnity clause that does not expressly and unequivocally address the issue as to the indemnitee’s negligence is typically considered a Type II indemnity clause, also referred to as a general indemnity clause.

The general authority allowing for indemnity clauses in construction contracts in California can be found in California Civil Code Section 2782(a). The language in this section provided public agencies with grounds to attempt to push onto the design professional as favorable an indemnity clause as possible. Essentially, Section 2782 stated that a public agency could seek indemnity from a design professional so long as the public agency did not try to obtain indemnity for damages arising from the “sole negligence or willful misconduct” of the public agency. Indemnity clauses that purport to indemnify for liability arising from the “sole negligence or willful misconduct” of a public agency or its agents, servants, or independent design professionals directly responsible to a public agency were void and unenforceable. Design professionals preferred to enter into contracts with Type III indemnity agreements, which limit the requirement for design professionals to indemnify only to claims arising out of or from the negligence or intentional act of the design professional. However, a design professional was unlikely to have the clout to negotiate a Type III indemnity agreement with a public agency.

Now, with Civil Code Section 2782.8, there will be no need for the design professionals or their attorneys to negotiate to get what they want. Civil Code Section 2782.8 reads as follows:

(a) For all contracts, and amendments thereto, entered into on or after January 1, 2007, with a public agency for design professional services, all provisions, clauses, covenants, and agreements contained in, collateral to, or affecting any such contract, and amendments thereto, that purport to indemnify, including the cost to defend, the public agency by a design professional against liability for claims against the public agency, are unenforceable, except for claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the design professional. This section shall not be waived or modified by contractual agreement, act, or omission of the parties. This statutory change appears to eliminate the obstacle of Type I and Type II indemnity for design professionals desiring to enter into contracts with public agencies. As a result, design professionals may shed their reluctance to bid on public works projects.

This statutory change appears to eliminate the obstacle of Type I and Type II indemnity for design professionals.


Thomas F. Quilling is an associate with Holland & Knight LLP and serves as the assistant vice president for the Barristers.
New Requirements for Home Improvement Contracts

IF ASKED TO NAME the most highly regulated profession in the State of California, few people would correctly place home improvement contractors at the top of the list. The great degree of regulation stems from the large number of complaints to the state legislature and the state’s consumer protection agency, the Contractors State License Board (CSLB), regarding the failings of home improvement contractors. Mounting complaints to the CSLB over the years prompted intensive legislation designed to prevent abuses by contractors. For example, contractors who do not maintain a proper contractor’s license cannot sue for monies owed on a contract—and they can also be required to disgorge all the money previously paid to them.1 A contractor can even go to jail for being unlicensed.2 And, as added protection for consumers, contractors are required to carry bonds for themselves and their “managing employees.”3

In recent years the enforcement environment has become even more restrictive and treacherous for contractors. This is because in 2005 the legislature passed an all-encompassing law—an expansion of previous legislation—that strictly regulates the contracts between homeowners and home improvement contractors.

The year before, in 2004, the legislature dramatically rewrote the laws regulating home improvement contracts (HICs). Senate Bill 30 was intended “to make home improvement contracts easier to draft and understand.”4 Unfortunately, the new changes were difficult to follow and prompted the construction industry to complain bitterly to the CSLB. In response to those complaints, the CSLB took the remarkable position that it would not enforce the new home improvement law during 2005. The legislature went back to the drawing board and in late 2005 passed Assembly Bill 316, which was enacted into law.5 Unfortunately, AB 316 is strikingly similar to SB 30, despite a sincere desire by the legislature to eliminate the complexities of the former law. The new requirements for home improvement contractors remain confusing. Indeed, AB 316 represents little improvement over SB 30 for home improvement contractors.

AB 316 methodically amends Business and Professions Code Section 7159, adding 11 pages of new requirements for HICs. Section 7159 is long, confusing, redundant, and ultimately makes compliance difficult for even those contractors acting in good faith. Moreover, the new requirements do not reflect the realities of home improvement work. For example, the new requirements fail to account for the different pricing methods used in the industry, such as “cost plus” contracts.6 In addition, the new provisions create traps for the practitioner and contractor. A home improvement contract should be easy to draft and understand. But the new law effectively precludes a simple, one-page construction contract even for minor home improvement work.

For starters, HICs are now regulated right down to the way they look. The contract must be printed in at least 10-point type with each heading in at least 10-point boldface type.7 The words “Home Improvement,” in at least 10-point boldface type, must appear at the top of the document.8 The first page of the contract must contain the date upon which the owner signed the contract and the name and address of the contractor, along with the contractor’s license number, preceded by a statement advising the homeowner that a Notice of Cancellation can be sent to the address noted.9 Almost all the requirements mentioned in the new law must be a part of the contract itself and not merely incorporated by reference to an attachment. This is especially difficult for contractors who use preprinted forms for their work. It is safe to say that the vast majority of preprinted forms currently in use by contractors do not comply with the new rules.

Contract Price and Payment Provisions

Of course, in addition to formatting requirements, HICs must comply with numerous substantive provisions. It would seem that giving a customer a signed copy of the contract would not need explicit reg-

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ulation, and yet the contractor must include the following statement in at least 12-point boldface type: “You are entitled to a completely filled in copy of this agreement signed by both you and the contractor before any work may be started.”10 The homeowner’s receipt of the contract marks the commencement of the time in which the right to cancel may be exercised (either three days or seven days, depending upon the type of project), so a copy of a fully executed contract must be given to the homeowner prior to commencement of the work.11

Arguably, the most problematic change in the new rules applies to the contract price. The new law states that, under the heading Contract Price, the amount of the total cost of the contract—including profit, labor, and materials and excluding finance charges—must be listed.12 This requirement does not contemplate contracts priced on a “cost plus” or “time and materials” basis, both of which are common in the home improvement industry. A failure to list the total contract amount can subject the contractor to a misdemeanor.13 “Cost plus” and “time and material” contracts are preferred by some contractors, so the best practice for complying with the total cost requirement and protecting contractors in these types of contracts is the inclusion of a “not to exceed” amount as part of the maximum price of the contract. In this way the homeowner has been effectively informed of the total cost of the contract as required under the code.

Most arguments between owners and contractors concern what each party claims to be included in the price of the contract. Thus, a detailed description of the work to be performed is always extremely important in construction project contracts. This information is now a required element of an HIC and must be placed under a specific heading: Description of the Project and Description of the Significant Materials to be Used and Equipment to be Installed. With this provision, however, the focus of disputes is likely to shift toward whether the project description is adequate or whether particular materials are “significant” and should have been described. While these disagreements may nominally reduce the amount at issue in construction disputes, they are unlikely to reduce the number of disputes.

In effect, the statute requires a complete description of the project and materials to be installed. For swimming pool contracts, for instance, this description must include an aerial drawing showing the shape, size, dimensions of the construction, equipment, and specifications.14 If a contractor is providing a specific brand of plumbing fixture, appliance, lighting, floor material, alarm, paint, siding or other wall surface, insulation, roofing, or HVAC unit, the contract or specifications must include a complete description of the goods or materials, including any brand name, model number, or similar designation.15 This required specificity is meant to prevent the unscrupulous practice of some contractors who use lesser-quality material but charge the price of higher-quality material.

Down payments used to be an important part of the negotiation between a contractor and owner, especially when custom items were involved. Not anymore. If a down payment is to be charged, the actual amount of the down payment must be listed under the heading Down Payment and followed by a statement in 12-point boldface type: “THE DOWN PAYMENT MAY NOT EXCEED $1,000 OR EXCEED 10% OF THE CONTRACT PRICE, WHICHEVER IS LESS.”16 This is probably the most infuriating requirement for contractors, as it prevents them from collecting money up front for materials. These costs can be significant for custom items. The new law forces contractors to finance the project and possibly be left with unusable materials if the owner fails to pay for them. Alternatively, and to avoid this result, the contractor could have the homeowner purchase the materials directly from the supplier and have the contract apply only to the installation of the materials. This is the best way for contractors to avoid having to finance custom materials, but it deprives contractors of a source of profit. Contractors usually mark up materials that are specially ordered. Many contractors are loathe to give up this source of revenue, but in order to continue this practice, contractors will have to accept the risk of not receiving payment until after the materials are installed.

If the parties contract for progress payments, the details of these payments must be set forth under the heading Schedule of Progress Payments. Each progress payment must be specified in dollars and with reference to what will trigger the payment, including the amount of work or services to be performed as well as any materials to be supplied. This description must be preceded by the following statement in 12-point boldface type: “The schedule of progress payments must specifically describe each phase of work, including the type and amount of work or services scheduled to be supplied in each phase, along with the amount of each proposed progress payment. IT IS AGAINST THE LAW FOR A CONTRACTOR TO COLLECT PAYMENT FOR WORK NOT YET COMPLETED, OR FOR MATERIALS NOT YET DELIVERED. HOWEVER, A CONTRACTOR MAY REQUIRE A DOWN PAYMENT.”17

Thus, except for the down payment, contractors may neither request nor accept payment that exceeds the value of the work performed or the materials delivered.18 This warning advises the homeowner not to overpay the contractor—a common mistake homeowners make on remodeling projects. Homeowners can be left with an unfinished project if the contractor has been overpaid for work performed. Some unscrupulous contractors will neglect projects in which they have a positive cash position to the detriment of projects on which there is money still to be made. The best way for homeowners to manage a project is to keep tight control of disbursements to the contractor and never pay for work not actually completed.

Also, prior to making progress payments, it is extremely important for the homeowner to obtain an unconditional release on any previous payment from the contractor and each of the subcontractors that served 20-day preliminary notices to the owner regarding their lien rights. To aid the homeowner in understanding this remedy, the contractor must place in the contract a statement to the effect that once payment has been made for any portion of the work, the contractor must, prior to any further payment being made, furnish to the owner a full and unconditional release for any claim for mechanic’s lien for the portion of work for which payment has already been made.19 Releases are the only effective way for homeowners to prevent the successful imposition of mechanic’s liens on their homes. Failing to obtain lien releases from all contractors on the project, especially those that have served 20-day preliminary notices, could subject homeowners to paying twice for the work if the general contractor fails to pay its subcontractors.

The contract must include an Approximate Start Date and a definition of what constitutes substantial commencement of the work. The Approximate Completion Date must also be stated in the contract with an equal degree of specificity.20 However, without some form of liquidated damages provision in the contract, the required statement of a completion date is likely meaningless. The contractor suffers no penalty for late completion, and a homeowner usually is not damaged enough by the late completion to warrant a breach of contract suit. If timely completion is especially important, the homeowner should include a liquidated damages provision in the contract and a bonus for early completion.

The contract must also provide notice, in close proximity to the signatures of the contracting parties, that the owner has the right to require the contractor to secure a performance or payment bond. However, unless the project is very expensive, the cost of the bond may not be worth the protection. Even
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though an owner can require the bond, the contractor is not required to pay for the extra cost of the bond.21

**Change Orders**

Probably the greatest points of contention on remodeling projects arise from change orders, which are changes or additions to the scope of work not originally contemplated by the parties or covered by the contract. A blank change order form must be included as part of the contract or as an attachment.22 Because of the problems associated with change orders, the new law requires HICs to contain several notices regarding them. The following statement must be included under the heading Note About Extra Work and Change Orders: “Extra Work and Change Orders become part of the contract once the order is prepared in writing and signed by the parties prior to the commencement of any work covered by the new change order. The order must describe the scope of the extra work or change, the cost to be added or subtracted from the contract, and the effect the order will have on the schedule of progress payments.”23

The contract must also include a statement that the owner may not require a contractor to perform extra work without written authorization. Another required statement will inform the owner that the cost of extra work or change order work is not enforceable against the owner unless a change order identifies all of the following in writing: 1) The scope of the work encompassed by the change order. 2) The amount to be added or subtracted from the contract. 3) The effect the change order will have on the progress payments or completion date.

The contract also must contain language informing the owner that the contractor’s failure to comply with the requirements of the paragraph on change orders does not preclude the recovery of compensation for work performed based on legal or equitable remedies designed to prevent unjust enrichment.24 This is the only portion of the statute that specifically allows a contractor to recover even if he or she is not in compliance with the law.

The requirement for change orders to be in writing and signed by all parties prior to commencement of the covered work25 actually is not beneficial to the homeowner. It allows the contractor an opportunity to demand an unreasonable price for the extra work, since no work can be performed prior to an agreement by the parties. Homeowners would be better served by a provision in the law allowing changes with an agreed-upon price to be determined at a later date and by a formula. This could be accomplished by including in the original contract an agreement to price changes that constitute the actual cost of a change plus an agreed-upon contractor’s fee. The provision would allow the continuation of work that will be paid for once the contractor shows evidence of the actual costs of the work. However, without this provision and according to the law as it is currently written, a contractor can just request a lump sum and refuse to perform if the homeowner fails to agree to the price for changes in the middle of construction. Under these circumstances, a significant portion of the project will either remain unfinished or be placed on hold pending a change order negotiation or dispute. Homeowners will find themselves in the weaker negotiating position, because they need to get their projects completed.

**Statutory Notices**

There are six statutory notices that may either be included as part of the main contract or in an attachment to the contract. Because they are lengthy, it is better to include them as attachments.

**Insurance.** Under the heading Commercial General Liability Insurance (CGL), the contractor must disclose whether or not he or she has insurance. Business and Professions Code Section 7159(e)(1) contains the full wording of the notice. Homeowners should make sure the contractor has adequate liability coverage on all projects and request to be added as an additional insured under the contractor’s policy.

**Workers’ compensation.** Contractors must disclose whether they have workers’ compensation insurance or whether they are exempt. Contractors are only exempt from workers’ compensation requirements if they have no employees. Homeowners should be wary of contractors who claim they are exempt but appear on site with employees. These workers may be considered to be homeowners’ employees, and the homeowners’ insurers may be forced to cover the workers for any injuries sustained on the project. Further, the homeowner could be sued in tort for any injuries sustained by uncovered workers.26

**Mechanic's liens.** HICs are required to include a notice, under the heading MECHANIC’S LIEN WARNING,27 that liens for nonpayment may be placed on the homeowner’s home. Section 7159(e)(4) contains the full text of the notice.

**CSLB notice.** HICs must contain a notice informing homeowners that they may file complaints with the CSLB and warning against using unlicensed contractors. Section 7159(e)(5) contains the full text of this notice. Nevertheless, the required information and warning are all but meaningless, because unlicensed contractors are unlikely to comply with this part of the statute. By doing so they will be warning homeowners of the illegality of their conduct and essentially the unenforceability of the contract.

**Three-day right to cancel.** A contractor must provide a Three-Day Right to Cancel Notice to the homeowner unless a contract is 1) negotiated at the contractor’s place of business, 2) subject to the Seven-Day Right to Cancel Notice, or 3) the contractor is subject to licensure under the Alarm Company Act. The notice must be in 12-point boldface type and in immediate proximity to the contract signatures. The owner must also acknowledge receipt of the notice by signing and dating the notice form on the signature page. Most important, this notice must be written in the same language that was principally used in the oral sales presentation for the contract. Section 7159(6)(B) contains the full text of the notice.

The notice must be accompanied by a blank Notice of Cancellation form in duplicate, also in the same language in which the contract was negotiated.28 Section 7159(6)(c)(vi) contains the full text of this form.

**Seven-day right to cancel.** The contractor must provide a Seven-Day Right to Cancel Notice if the contract is for the repair or restoration of a residential premises damaged by “any sudden or catastrophic event for which a state of emergency has been declared by the President of the United States or the governor.” The seven-day right to cancel has the form requirements as the three-day right to cancel.29

AB 316 also created a new type of contract, a Service and Repair Contract. This is an agreement by an owner and a contractor characterized by several factors: 1) the home improvement work costs $750 or less, 2) the owner initiated the contact with the contractor and requested the work, 3) the contractor does not sell to the owner goods or service beyond those reasonably necessary to take care of the agreed-upon work, and 4) no payment is due or accepted by the contractor until the work is completed. The requirements for service and repair contracts—as detailed as those for more extensive home improvement work30—should be reviewed by counsel with clients who consistently perform minor home improvement work.

**Impact of Noncompliance**

Failing to include the required provisions and notices in HICs exposes the contractor to discipline by the CSLB.31 Once a consumer’s complaint is received by the CSLB, it will generally ask to review the contract between the parties. If the contract is not in compliance, the contractor can be subject to discipline even before the complaint is investigated further. Moreover, a violation for failing to state the contract amount, overcharging on the down payment, or accepting payment
that exceeds the value of the work performed subjects the licensee to a misdemeanor punishable by a fine of not less than $100 nor more than $5,000, or by imprisonment in county jail not exceeding one year, or both. Although the two-year statute of limitations on claims for violations of these sections runs from the date that the homeowner signs the contract, the limitations period is not applicable to any administrative disciplinary action.

These penalties can be enhanced when a contractor’s violation of Section 7159.5 is part of a plan or scheme to defraud owners or tenants in connection with damage caused by a natural disaster. A court can order the contractor to make full restitution to the victim subject only to the contractor’s ability to pay. In addition to full restitution and imprisonment, the court can impose a fine of not less than $500 or more than $25,000.

In addition to discipline for failing to provide the information, notices, and disclosures required by Section 7159, violations of the new HIC rules can have other serious, unintended consequences. Two cases have suggested that contracts failing to comply with Section 7159 could be considered void, thus preventing a contractor from collecting sums otherwise indisputably owed. This suggestion is clear even though the cases found that the noncomplying contracts at issue were enforceable.

In Asdourian v. Araj, the contractor sought compensation from two sophisticated property owners for remodeling work performed pursuant to oral contracts. The owners contended that since the agreements between the parties were oral, they violated Section 7159 and thus were void. Although the California Supreme Court acknowledged that “generally speaking” a contract made in violation of a regulatory statute is void, it stressed that “the rule is not an inflexible one to be applied in its full rigor under any and all circumstances,” and “exceptions have been recognized.” In addition, the court stated that “in compelling cases, illegal contracts were being enforced in order to avoid unjust enrichment to a defendant in a disproportionately harsh penalty upon [the] plaintiff.”

In Arya Group, Inc. v. Cher, a contractor negotiated an oral agreement with Cher to design and construct her Malibu home for the sum of $4,217,529. The parties’ oral agreement was subsequently memorialized in a written contract that was never signed by Cher. The narrow issue was whether the contractor was precluded under Section 7164 from pursuing a breach of contract claim as a result of its failure to secure a signed written contract as required by that section. (Section 7164 contains almost identical provisions to Section 7159 for the construction of a single-family dwelling and is intended to
afford consumers who contract for the construction of a single-family dwelling the same safeguards available under Section 7159.) Following the *Asdourian* decision, the court in *Arya* held that the contractor may seek to enforce his oral contract claim against Cher to the extent that Cher would be otherwise unjustly enriched as a result of her failure to pay the contractor for the reasonable value of its work on the project. The contract was not necessarily void simply due to the failure of the contractor to abide by the requirements of Section 7164.

In reviewing the evolution of Section 7159, the *Arya* court determined that the legislature did not intend that all contracts made in violation of the statute would be void. The legislature thus opened the door to enforcement of noncomplying contracts in appropriate cases to avoid injustice. The court applied this reasoning to the case, noting that 1) the defendant in *Arya* was not a member of the group primarily in need of the statute’s protection—that is, unsophisticated consumers, 2) contracts made in violation of Section 7159 are not “intrinsically illegal,” and 3) if the defendant were allowed to retain the value of the benefits bestowed by the plaintiff without compensation, she would be unjustly enriched. 37

Following *Asdourian* and *Arya*, it appears that an HIC that violates the provisions of Section 7159 would not necessarily be void and unenforceable if the contract were with an owner who was sophisticated (and thus not a member of the class that the statute was intended to protect) and if unjust enrichment would result if the contract were held to be void. This analysis, however, should not provide any comfort for the contractor that does not abide by the provisions of the new law. Contractors should always take special care with unsophisticated owners, especially the elderly, in providing construction services. The best practice is for contractors to draft contracts in compliance with Section 7159 rather than rely on the hope that a court may in the future find that the failure to comply with the requirements of Section 7159 does not render the contract void.

With its passage of numerous substantive and procedural requirements, the legislature has made compliance with the law substantially more difficult for home improvement contractors while simultaneously creating opportunities for homeowners to rely upon technicalities to evade payment for services that were requested and properly performed. Moreover, the legislature has not made much progress in making home improvement contracts easier to understand or draft. In fairness, the legislature was responding to myriad complaints by homeowners that they were being unfairly treated.
by contractors. Unfortunately, the new law is not a fair compromise, because it places a heavy burden on contractors to notify homeowners of their rights and fails to make the provisions easy for homeowners to understand. Nevertheless, because AB 316 is now the law of the state, contractors should update their contracts to conform to its requirements. The consequences of failing to properly comply are too drastic to ignore.

1 BUS. & PROF. CODE §7031(b).
2 BUS. & PROF. CODE §7028.
3 BUS. & PROF. CODE §§7071.5, 7071.9.
4 California Licensed Contractor, CSLB NEWSLETTER, Spring 2005.
5 It should be noted that these new provisions only apply to the remodeling of existing residences. “Home improvement” means the repairing, remodeling, altering, converting, or modernizing of, or adding to, residential property. BUS. & PROF. CODE §7151. Contracts for new construction of single-family residences are covered by Business and Professions Code §7164.
6 A “cost plus” contract fixes the price as the actual cost of the work plus a fee to the contractor.
7 BUS. & PROF. CODE §7159(c)(1) & (2).
8 BUS. & PROF. CODE §7159(d)(3).
9 The first page must also bear the name and registration number of the home improvement salesperson, if applicable. BUS. & PROF. CODE §§7159(c)(3)(B), 7159(d)(1) & (2).
10 BUS. & PROF. CODE §7159(d)(4).
11 BUS. & PROF. CODE §7159(c)(3)(A).
12 BUS. & PROF. CODE §7159.5(a)(1).
13 BUS. & PROF. CODE §7159.5(b).
14 BUS. & PROF. CODE §7159(d)(7). Swimming pool contracts have even more rigid requirements than HICs.
15 BUS. & PROF. CODE §7162.
16 BUS. & PROF. CODE §7159(d)(8).
17 BUS. & PROF. CODE §7159(d)(9).
18 BUS. & PROF. CODE §7159.5(a)(5).
19 Business and Professions Code §7159.5 only requires the contractor to furnish an unconditional release regarding the portion of the work for which payment has been made upon the “request” by the owner for the release. This is in contrast to the requirement that the contractor provide the owner with an unconditional release under §7159. The better practice for contractors is to provide the release irrespective of whether the owner makes a specific request for one. BUS. & PROF. CODE §7159(c)(4).
20 BUS. & PROF. CODE §7159(d)(10) & (11).
21 BUS. & PROF. CODE §7159(c)(6).
22 Id.
23 BUS. & PROF. CODE §7159(d)(13).
24 BUS. & PROF. CODE §7159(c)(3).
25 BUS. & PROF. CODE §7159(c)(5).
27 AB 316 does not require this section to be in any particular font or boldface type, but drafters should nevertheless seriously consider placing this provision in bold in the contract.
28 BUS. & PROF. CODE §7159(c)(6).
29 BUS. & PROF. CODE §7159(c)(7).
30 BUS. & PROF. CODE §7159.10.
31 BUS. & PROF. CODE §7159(a)(3).
32 BUS. & PROF. CODE §7159.5(b).
33 BUS. & PROF. CODE §7159.5(c).
35 Id. at 291-92.
37 Id. at 615.
Items to Negotiate in the AIR Standard Lease Form

THE AMERICAN INDUSTRIAL REAL ESTATE ASSOCIATION provides some of the most widely used commercial real estate lease forms in California. Many landlords and tenants—and more important their brokers—favor using these forms because they help get the deal done fast and cheap—concepts that deal makers may perceive to be anathema to attorneys. Often, the parties simply fill in the blanks on the front cover of the lease form, draft a short addendum to address issues specific to their deal, perhaps scoff at the notion of needing attorneys, and then sign the last page. The parties rarely revise the language in the lease. After all, it is the standard form.

Over the years, however, landlords and tenants faced with lease disputes have discovered that what is one landlord’s standard is not necessarily another’s, and more important, what is one landlord’s standard is not the tenant’s. Moreover, landlords and tenants have discovered that the lease form does not address all the issues that they should be concerned about, and in some cases, even when it does, it does so in ambiguous ways. For these reasons, parties to a lease should specifically discuss certain issues before using the AIR Standard Lease form.1

One issue on this standard form is the commencement date. Parties should look beyond Paragraph 1.3, Term, which provides a blank to be filled in for the commencement date of the term of the lease. Elsewhere in the lease, Paragraph 3.3, Delay in Possession, provides that if the landlord fails to deliver the premises to the tenant by the scheduled commencement date, there is no penalty, unless the landlord delays delivery of the premises by 60 days. If that happens, the only recourse a tenant has is to terminate the lease. This section further provides that if the premises are not delivered within 120 days of the commencement date, the lease will automatically terminate. These two paragraphs can become problems when a dispute arises about construction delays for the tenant improvements to the premises, especially when the landlord is responsible for the work.

In many cases, tenants must move into their new premises by a certain date because they are moving out of existing locations and must do so by a certain date or risk paying holdover rent and other damages. Even if the tenants do not have expiring leases, timing is still critical, since the tenants have already ordered furniture and hired employees. The tenant cannot afford to wait 60 days after the scheduled commencement before looking elsewhere for a new location (which, itself, often takes several months). Tenants therefore have reason to negotiate for the standard 60 days to be reduced. In some cases, the tenant may insist on zero, but most landlords will require some delay time, if not even 60 days.

Discussions of the 60-day period do more than diminish the tenant’s timing risk. It motivates the landlord to commit its resources to making sure that the tenant will have access on time. The landlord will not want to risk losing the tenant after spending time and money constructing the premises to suit the tenant’s needs. Since delay will likely cause damages to the tenant, if possible it should also require the landlord to agree to pay the tenant’s damages in the event the landlord delays delivery of the premises. For example, the landlord can agree to pay for the tenant’s holdover damages for its existing location and give the tenant free rent for each day of the landlord’s delay.

In many leases, the commencement date is defined as the date that the landlord achieves “substantial completion” of the tenant improvement work. Substantial completion means that the landlord has completed enough work that the tenant is able to conduct its business from the premises. What remains are “punch-list” correction items (e.g., fixing a doorknob, doing touch-up paint, etc.). When the parties use “substantial completion” to define the commencement date, the language in Paragraph 3.3 must be modified, since it only gives the tenant the right to terminate if the landlord fails to deliver possession of the premises within 60 days of the commencement date, as determined by substantial completion. This circular language is not helpful to a tenant because the landlord will only be in danger of violating Paragraph 3.3 if the landlord substantially completes the work to the premises and then refuses to hand over the keys. This is highly unlikely.

A more common problem arises when the landlord, for a variety of reasons (such as construction delays), fails to substantially complete the work to the premises on the date that the parties intended. In this more likely scenario, the landlord will be permitted to delay completing its work without penalty since the tenant’s 60-day right to terminate is only triggered after the landlord substantially completes the premises, not before. To protect itself, a tenant should demand a fixed date by which the landlord must deliver the premises or give the tenant the right to terminate or collect damages or both.

From the landlord’s perspective, some of these same issues will arise if the tenant is responsible for the work and the commencement date is tied to substantial completion. To avoid the circuitous language, most landlords will want to shift the construction delay risks to the tenant and provide that the commencement date shall occur upon either a fixed date or the date the tenant opens for business, whichever is earlier, regardless of when the tenant completes its construction.

The AIR lease form should be carefully reviewed to address missing provisions and to clarify existing terms to avoid costly disputes.
To figure out which party bears responsibility to comply with applicable laws (“requirements” in the most current AIR lease forms), one must first read through a maze of paragraphs in the lease form that contain confounding “subject to,” “except as otherwise provided,” and “notwithstanding” disclaimers. Even if parties or attorneys successfully navigate the lease form, they must consider the two cases decided by the California Supreme Court on the same day in 1994: *Brown v. Green* and *Hadian v. Schwartz*, in which the court analyzes two virtually identical provisions in a prior version of the AIR lease form concerning compliance with applicable requirements and reaches opposite conclusions.

Paragraphs 2.2, Condition; 2.3, Compliance; 6.3, Lessee’s Compliance with Applicable Requirements; 7.1(a)-(d), Lessee’s Obligations; 7.2, Lessor’s Obligations, and 49, Americans with Disabilities Act; all address the various rights and responsibilities of the landlord and tenant.

Read together, these paragraphs provide that the tenant is responsible to comply with all laws affecting the premises resulting from 1) the tenant’s use of the premises, or 2) any cause (even unrelated to the tenant’s use of the premises) if those laws affect the premises following the expiration of a landlord’s six-month warranty, unless compliance is required during the last two years of the lease term, in which case the tenant will only be responsible for the amortized portion of the cost to comply with laws, amortized over 12 years.

In *Brown* and *Hadian*, the California Supreme Court held that despite the fact the tenant expressly agreed to comply with applicable laws, that agreement alone did not encompass the repairs at issue if the repairs qualified as substantial. Therefore, despite contrary language in the lease, a landlord may still be responsible for repair costs. In both cases, the court disregarded the clear and unambiguous language in the AIR lease form. Instead, the court applied a six-factor test for the tenant’s obligation to repair: 1) the relationship of the cost of the curative action to the rent reserved, 2) the length of the term and the time for the cost to be amortized, 3) the relationship of the benefit to the tenant to that of the lessor (i.e., the landlord), 4) whether the curative action is structural or nonstructural, 5) the degree to which the tenant’s enjoyment of the premises will be interfered with while the curative action is being undertaken, and 6) the likelihood that the parties contemplated the application of the particular law or order involved.

In *Hadian*, the landlord incurred costs in seismic reconstruction of a building ordered by the city as part of an earthquake hazard reduction program. The court held that the landlord alone was responsible for such costs, notwithstanding a provision in the lease requiring the tenant to, in part, comply with all applicable requirements regulating the use by the tenant of the premises. The court held that the term of the lease and the extent to which the incidents of full ownership of the property are transferred to the tenant are among the most important provisions of the lease to consider in determining whether it is truly a “net” lease. This reasoning suggests that if the lease is a net lease, then it may be held that the parties intended for the tenant to share in such costs. In this case, the term of the lease was only three years, which the court determined was a very short term and would have provided the tenant a limited amount of time in which to amortize the costs of repairs over the life of the lease. The cost of the repairs represented a substantial percentage of the aggregate rent over the term and would amount to capital improvements to the property that would primarily benefit the landlord.

In *Brown*, the landlord incurred costs in connection with removing asbestos-laden material from a building pursuant to a county order. The court held that the tenant was responsible to reimburse the landlord for the costs. The court found that the term of the lease was long enough to permit the tenant to amortize the costs. The amount necessary to remove the asbestos-laden material was less than 5 percent of the total rent reserved over the 15-year term of the lease. In addition, the lease expressly provided that the landlord had to have no obligation and the tenant all obligation to repair and maintain the premises, whether structural or nonstructural.

What this suggests is that neither landlords nor tenants should assume that merely allocating the risk to one party or the other (even unambiguously) in the lease will be determinative of which party will ultimately bear the risk. The final outcome depends on the court’s six-factor test, but the language in the lease will play a relevant factor in determining the outcome, and the parties should make sure the terms meet their expectations.

In addressing the specific language in the relevant paragraphs, a tenant should resist the requirement that it bear the cost to repair or comply with laws if the compliance is triggered after the landlord’s six-month warranty period expires, especially in a short-term lease in which the substantial benefit of the compliance will inure to the landlord. Also, a tenant should object to the language that gives the landlord the right to terminate the lease if the compliance is caused by reasons outside the tenant’s use. The tenant should not lose its lease for something that the landlord will be required to remedy even after the tenant moves out. A tenant should consider revising the amortization period to apply to the “useful life” of the item rather than the form’s 12-year period. Further, tenants should attempt to delete Paragraph 49 or modify it to state that the landlord must warrant that, at least, the premises complies with disability laws or will by the commencement date.

**Audit Rights**

Another part of the standard lease that bears examination is Paragraph 4.2 of the AIR office lease forms. It provides a nonexclusive list of operating expenses that the landlord may charge the tenant and lays out a few exclusions. Since the list is nonexclusive, it is assumed that unless excluded, additional items may be charged to the tenant. It has become common practice for tenant attorneys to provide a list of exclusions from operating expenses to ensure that the tenant is only paying for its fair share. Most lists contain reasonable exclusions (e.g., charitable donations made by the landlord, lease expenses with other tenant prospects, entertainment or travel expenses, etc.), but in some cases aggressive tenant attorneys try to include a few substantive exclusions that are not part of the negotiated deal (Proposition 13 protection, preclusion of earthquake insurance, or exclusions of all capital expenditures). In the end, the tenant should ensure that the landlord does not treat the collection of operating expenses as a source of profit. The landlord, in turn, often seeks to make sure that it keeps a consistent list of permitted inclusions in its leases to avoid the accounting nightmare of having items excluded under some leases and included in others.

The AIR lease form does not contain a right for the tenant to audit the landlord’s books and records concerning operating expenses. No case law in California gives a tenant an implied audit right, but it is widely believed that a tenant may compel an audit through discovery following commencement of a lawsuit. At least one case in Maryland holds that a tenant had an implied common law right to audit the landlord’s books when the lease was silent.7 With this in mind, it is best for both parties to address the tenant’s audit rights in the lease. At a minimum, the audit provision should address 1) the time and manner for requesting and conducting the audit, 2) the qualifications of the person performing the audit, 3) who pays for the audit and whether the tenant is entitled to reimbursement of audit costs if an error is discovered, and 4) confidentiality.

**Assignments and Subletting**

Paragraph 12, Assignment and Subletting, and Paragraph 36, Consent, address the var-
ious rights and obligations of the parties with respect to assignment and subletting. In essence, the tenant is afforded the right to assign or sublet the premises to a third party, subject to the landlord’s reasonable consent. These paragraphs are fairly balanced, but landlords and tenants often seek something other than balance. From a tenant’s perspective, the AIR lease form notably does not allow a transfer to an affiliate without the landlord’s consent. From a landlord’s perspective, the form fails to address recapture rights that give the landlord the right to terminate the lease if the tenant seeks to assign or sublet (especially if the tenant stands to profit from the transfer). The AIR lease does contain a separate addendum that covers limited recapture rights that most landlords like to revise to make unlimited. At first glance it would appear that an unlimited recapture provision and Paragraph 36, Consent-Reasonable, are inconsistent provisions. The California Supreme Court in Carma Developers (California), Inc. v. Marathon Development California, Inc., held, however, that a recapture clause in a commercial lease is enforceable and is not subject to a reasonableness requirement. Assuming that the landlord does not add the recapture addendum, the AIR lease form does not address what happens in the context of a transfer by the tenant for a profit and how the profit will be treated by the parties. Most landlords require at least 50 percent of the profit generated from a transfer. Regardless of how it is split, the profit must be defined. Tenants will want to exclude transfer costs (such as broker commissions, improvement allowances, downtime, legal fees, and so on). Landlords will want to ensure that the tenant is not defining “profit” in a way that avoids having to pay landlords their fair share.

Landlords also prefer to provide in the lease that if the tenant accues the landlord of improperly withholding consent to a proposed transfer, then the tenant must seek a court injunction to require the landlord to issue its consent rather than sue for damages. Paragraph 12.1(e) provides that the tenant may recover compensatory damages from the landlord in addition to obtaining injunctive relief. Therefore, landlords often want to modify the paragraph to delete that remedy.

Other Issues
The AIR lease form was drafted and paid for by brokers. Therefore, it is no surprise that there are several provisions in the lease form that reward or protect brokers. Some of these provisions include Paragraphs 2.4, Acknowledgments; 15.1-15.2, Broker Fees; and 25, Disclosures Regarding the Nature of a Real Estate Agency Relationship. It is customary for most attorneys, much to the chagrin of brokers, to delete these provisions as superfluous at best and possibly harmful.

For example, Paragraph 15.1 provides that a landlord must pay the broker an additional commission if the tenant exercises its option to extend the term of the lease. If the parties agree to pay the broker this additional commission, then they should say so in a separate commission agreement between the landlord and the broker. This clause has nothing to do with the relationship of the landlord and tenant and should not be part of the lease. Another example is the statute of limitation of one year for either party to bring a claim against the broker arising out of the lease transaction. This has nothing to do with the landlord-tenant relationship and should be deleted.

Security deposit. Paragraph 5 of the lease provides, in part, the terms upon which the security deposit may be used by the landlord. Landlords must revise this section to allow themselves the ability to apply security deposits against a defaulting tenant’s future rent obligations. In 250 L.L.C. v. PhoPoint Corporation, the court ruled that under Civil Code Section 1950.7, upon the termination of a lease, the landlord may not retain the security deposit to cover its damages for future rent owed under the lease (as opposed to past rent). The court explained, however, that a tenant can waive Section 1950.7 in commercial leases, thereby allowing landlords to apply the security deposits toward future rent. Therefore, attorneys for landlords should add a waiver of the protection of Section 1950.7 or any similar, related, or successor provision of law. While the 2006 form has been updated to allow for future rent, the parties should take the extra step of expressly waiving the statute.

Removal and surrender. Paragraph 7.4(b) of the lease provides, in part, that the landlord can require the tenant to remove its alterations and utility installations provided that the landlord delivers notice not earlier than 90 days after the end of the lease. Tenants may seek language that the landlord must give tenants notice of the necessity of removal of alterations and utility installations before the tenant makes them. This way, the tenant can determine—before undertaking the anticipated work—whether the improvements make economic sense, after factoring in the cost of removal at the expiration of the lease. In some cases, these costs may be substantial.

Paragraph 9, Damage or Destruction, provides a landlord with the right to terminate the lease if the damage to the premises exceeds six months’ rent. This is an arbitrary figure and not customary in other leases. Depending on the terms of the lease and rent, the parties may review this threshold to suit their deal.

Limitation of liability. Paragraph 20 of the lease provides, in part, that the tenant will look solely to the project for satisfaction of any liability of the landlord with respect to the lease. When an attorney representing the tenant is faced with a landlord that is not willing to eliminate this provision, the attorney may seek to expressly clarify that the tenant may also look to the rents, issues, profits, proceeds, and other income arising from the project regardless of who the receiver is (e.g., the landlord or its lender), and that the provisions of Paragraph 20 shall have no effect on the tenant’s rights to withhold or offset rents.

Nondisturbance and Attornment. Paragraph 30.3 of the lease provides, in part, that the tenant’s subordination of the lease will be subject to the receipt of a nondisturbance agreement regarding security devices (i.e., ground leases, mortgages, deeds of trust, or other hypothecations or security devices) that the landlord becomes a party to after the execution of the lease. The lease does not address security devices entered into by the landlord before the execution of the lease. The landlord may find it difficult to obtain a nondisturbance agreement from a current lender, but an attorney representing the tenant should request one anyway. Without one, the lease could be terminated upon foreclosure.

Paragraph 30.2 of the lease provides, in part, that if another party succeeds to the interest of the landlord upon a foreclosure, that party will not be liable to the tenant for the prior landlord’s acts or omissions or be subject to any offsets or defenses which the tenant might have against the prior landlord. Although this is a standard provision in most leases, what is the tenant to do if the landlord fails to pay the tenant improvement allowance, if any, or construct the tenant improvements? An attorney who represents the tenant will want the lease to provide that the tenant may deduct from rent the applicable amounts upon such failure by the landlord.

Waiver of jury trial. Paragraph 47 of the lease requires the landlord and the tenant to waive their rights to a trial by jury in any action or proceeding involving the property or arising out of the lease. However, in Grafton Partners, L.P. v. Superior Court, the California Supreme Court held that predispute contractual jury trial waivers are not enforceable in California. Consequently, landlords and tenants must resort to alternative methods to handling future disputes. A party (whether a landlord or a tenant) that wishes to avoid a jury trial should add a separate provision in the lease requiring either judicial reference (a process similar to a court trial, which may be appealed) or arbitration (a
process that in virtually all cases is nonappealable).

The AIR lease form, while commonly used and favored by brokers, should be carefully reviewed by the parties before they sign the lease to address missing provisions and to clarify existing terms to avoid costly disputes. As much as parties may want to close a lease deal quickly and cheaply, the less costly method may be to involve lawyers at the beginning of a landlord-tenant relationship rather than at the end.

3 Hadian v. Schwartz, 8 Cal. 4th 836 (1994).
4 Paragraph 2.2 first addresses the issue by providing that the landlord warrants to the tenant that the condition of the building systems and the structure of the building are in good operating condition for 30 days (except for HVAC, for which the landlord warrants for six months), subject to various conditions.

Paragraph 2.3 provides that the landlord warrants to the tenant that the improvements were constructed in compliance with laws for six months. (From a tenant’s perspective, this language also raises a separate issue: The warranty should apply to the condition of the improvements as of the commencement date, not the date the improvements were constructed.) The landlord’s warranty does not apply to compliance of laws (including ADA laws) triggered by the tenant’s use of the premises. If compliance is required because of the tenant’s specific use, then the tenant must pay for it, unless the compliance is required during the last two years of the term and will exceed six months of rent, in which case the tenant has the option to terminate. If the compliance is not required by the tenant’s specific use, and as such is the landlord’s responsibility, the landlord must pay for the cost to comply but may charge the tenant an amortized portion of the cost amortized over 12 years; provided further, that the landlord may terminate the lease if the compliance is triggered during the last two years of the term.

Paragraph 6.3 provides that except as provided elsewhere, the tenant is responsible for complying with all laws.

Paragraph 7.1 provides in essence—subject to Paragraphs 2.2, 2.3, 6.3, 7.2 (among others)—that the tenant is responsible to pay for all costs to repair and maintain the premises unless the item requires replacement, in which case the cost will be paid for by the landlord, and the tenant will be required to pay the amortized portion of the expense over 12 years.

Paragraph 7.2 provides that, subject to Paragraphs 2.2 and 2.3 (among other paragraphs) the landlord is not required to repair or maintain any part of the premises.

Paragraph 49 provides that the tenant is responsible for all ADA compliance, and that the landlord’s warranties do not extend to ADA issues.

5 Hadian, 8 Cal. 4th 836.
6 Brown, 8 Cal. 4th 812.
A subdivision is a necessary entitlement for most, if not all, major development projects in California. Because many of these projects are targeted for legal challenge by their opponents, the state Subdivision Map Act\(^1\) is one of the most heavily litigated statutes in land use law. An understanding of the complicated and highly technical web of regulations that comprise the Map Act is therefore essential for developers, land use counsel, and for city and county attorneys. In addition, real estate lawyers, corporate counsel, and lending counsel all need a working understanding of the Map Act to effectively assist their clients.

The Map Act’s history traces back to 1893, when California first began requiring preparation and recordation of accurate descriptions of land parcels shown on maps. Eventually, the Map Act became a tool for regulating the professions of land surveyors and engineers. In 1943, the Map Act was codified in the Business and Professions Code alongside laws regulating the sale of subdivided lands\(^2\) and laws regulating the surveying profession and the preparation of records of survey.\(^3\)

In 1974, the Map Act was consolidated and recodified in the Government Code, signaling the expanding role of cities and counties in regulating land use. The Map Act today is part land use control, part consumer protection, and part health and safety regulation. By establishing procedures and minimum standards for subdividing parcels of land, the Map Act has developed into an essential tool for cities and counties to regulate development.

The Map Act also plays an extremely important role in allowing cities and counties to protect the public health and safety. Tens of thousands of substandard lots created decades ago, before modern subdivision regulations, exist throughout the state. These substandard lots were generally created by maps that were drawn without regard to

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topography or necessary services such as water, streets, or sewers. Substandard lots remain legal lots, but would not be approved today because they do not meet modern regulatory requirements.

Existing substandard lots can be legitimized with certificates of compliance, but substandard lots often present significant health and safety concerns for cities and counties. One local community in the Chatsworth area, for example, has faced numerous health and safety challenges due to the incomplete and substandard construction of its water service, waste disposal, and streets as a result of the lack of subdivision review. No public sewers service the community, and fire trucks cannot traverse the community’s substandard roads, a situation made worse because the community has inadequate fire buffers and water supply for fire protection. Today, cities and counties are able to use the Map Act to ensure that such problems do not occur.

**What the Map Act Regulates**

Generally speaking, the Map Act prohibits a property owner from selling, leasing, or obtaining financing for his or her property unless it comprises a legal parcel, and city or county approval of a map depicting the subdivided parcel and prepared in compliance with the Map Act is required to create a new legal parcel. The Map Act is not a toothless tiger. Indeed, violations of the Map Act are criminal acts.

Buyer’s and lender’s counsel should carefully review title reports that use legal descriptions expressed by metes and bounds, by reference to surveyed parcels, or in any manner other than by lots or parcels on a subdivision map. These types of legal descriptions should alert counsel that the parcel may have been created in violation of the Map Act. The legality of such a parcel can typically be resolved by researching title to determine when the parcel was created and whether the subdivision complied with regulations then in effect. It is also prudent to obtain a certificate of compliance from the city or county to legitimize the parcel under current law.

In the development context, a project proponent proposing to sell or lease a portion or portions of the property will usually require a subdivision map. Most single-family residential and condominium developments, for example, will require approval of a subdivision map to create the parcels that will eventually be sold to homebuyers. It is important for counsel to always keep in mind that subdivision maps are three-dimensional. Subdivision maps can create lots on the surface of the land, below the surface, and above the surface. For example, a subdivision map is needed to create air-space lots in condominium developments.

Because approval of a subdivision map is discretionary, a requirement for a subdivision map can pose a significant hurdle for development, especially if no other discretionary land use approvals, such as a conditional use permit or variance, are required as well. With a subdivision map comes requirements for public hearings, notice to neighbors, and review of environmental impact under the California Environmental Quality Act (CEQA).

The Map Act regulates only the subdivision of land. It does not regulate the use of land. Other tools are available to cities and counties to regulate the use of land, such as planning, zoning, and requirements for conditional use permits, site plan approvals, and variances.

The Map Act defines a subdivision as “the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease, or financing, whether immediate or future.” Obvious examples of subdivisions include divisions made by deed, lease, or deed of trust. In some cases, an easement, if it grants exclusive occupancy rights may be a subdivision, because it gives the right of exclusive occupancy similar to a fee interest. Condominium developments, including condominium conversions involving no new construction, community apartment projects, and the conversion of five or more existing dwelling units to a stock cooperative are also subdivisions.

Not all subdivisions require compliance with the Map Act, however. The Map Act includes numerous and varied exclusions. The most common and useful exclusions include: financing and leasing of existing or proposed commercial or industrial buildings on a single parcel; financing or leasing of apartments, offices, stores, or similar space within apartment buildings, industrial buildings or commercial buildings; mineral, oil, or gas leases; leases of agricultural land for agricultural purposes; conveyances to a public entity; and lot line adjustments.

A property owner may request that a city or county determine whether his or her property complies with the Map Act and the local subdivision ordinance. When such a request is made the city or county is required to issue either an unconditional or a conditional certificate of compliance, which legitimizes the parcel. A conditional certificate of compliance indicates what remedial acts are necessary to bring the property into compliance with the Map Act. Certificates of compliance determine only whether the lot conforms to the requirements of the Map Act and the local subdivision ordinance. No development rights are granted by a certificate of compliance.

**The Subdivision Process**

The subdivision process varies somewhat by jurisdiction because cities and counties, acting under their police power, may regulate subdivisions and land use within their jurisdiction. While some local Map Act regulations are preempted by state law, the Map Act expressly authorizes cities and counties to modify some of its requirements. It is therefore, important for developer’s counsel to consult not only the Map Act, but also the subdivision ordinance of the city or county before assisting a client with processing a subdivision.

Once the determination is made that a proposed development project requires a subdivision, the next step is to decide whether a “tentative and final map” is required or a “parcel map.” Generally, a tentative and final map is required for all subdivisions creating five or more parcels. A parcel map is prepared when four or fewer parcels are being created. There are exceptions to this general rule, however, including industrial and commercial developments with approved access to a maintained public street and divisions of less than five acres in which each parcel abuts a maintained public street and no dedications or improvements are required. When a final map is required, a tentative map is always required. But it would be wrong to assume that a tentative map is not needed just because a project requires a parcel map. While the Map Act does not require a tentative map for parcel maps, many local jurisdictions do have tentative parcel map requirements.

For parcel maps, the Map Act allows the city or county to adopt procedures for filing, processing, conditioning, approving, and disapproving parcel maps. Nevertheless, city attorneys and county counsels should ensure that due process requirements are met, because constitutional notice and hearing requirements still apply to parcel map approvals. Accordingly, noticed public hearings should always be required prior to approval of a parcel map.

For tentative and final maps, the subdivision process begins with submittal of an application to the city or county. The applicant’s engineer will prepare a map depicting the lots proposed to be subdivided in accordance with the requirements of the Map Act. Notably, a subdivision map for a condominium project need only depict the air lot that is intended to be divided into individual condominium air space lots. A separate condominium plan process through the California Department of Real Estate (DRE) identifies and approves the individual con-
The subdivision map will, however, establish the number of condominium units that may be developed on the property. 31

After submittal, the map is often reviewed first for completeness—whether all of the required information is provided in the map submittal. The map is next reviewed for technical feasibility by a committee comprised of the various city or county departments, such as public works, fire, parks and recreation, and health. Other agencies are also consulted, such as school districts and CalTrans. In addition, an appropriate analysis of the environmental impact of the project pursuant to CEQA is performed.

Generally, a public hearing is scheduled and conducted only after city and county staff have deemed the map complete, approved the technical feasibility of the map, and prepared an appropriate environmental analysis. The public hearing may be before an advisory agency that is authorized to approve, conditionally approve, or disapprove tentative maps, 33 typically a planning commission, or before an advisory agency that can only make recommendations to the local legislative body on tentative maps 34 or directly to the local legislative body. 35 After the required public hearing or hearings, the tentative map can be approved.

While approval of a tentative map is a very significant step in the entitlement process, individual lots cannot be sold, leased, or financed until a final map is approved and recorded. To obtain approval of a final map, the developer generally must satisfy the conditions of the approved tentative map before the tentative map expires. Conditions on a tentative map are typically lengthy and can take years and substantial investment to satisfy. Conditions of approval may be satisfied by performance and completion, performance bond, or written agreement between the subdivider and the city or county. 36

Developers have a limited time to satisfy the conditions of approval of an approved tentative map because the conditions must be satisfied before the tentative map expires. A tentative map has a limited life, ranging from two to fifteen years depending on the number of extensions applied for and granted, and perhaps longer depending on the applicability of tolling provisions triggered by litigation or development moratoria. 37 A tentative map on property subject to a development agreement may also be extended for the period of time provided for in the development agreement, but not beyond the duration of the agreement. 38

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Once the city or county engineer certifies to certify that the proposed changes are specifically permitted by the Map Act. 43 If he or she can so certify, the amending map or certificate of correction is recorded. On recordation, the original map is deemed to have been conclusively corrected. 44

If the requested changes to the final map would pose an additional burden on the present fee owners or affect existing property rights, the city or county cannot approve the changes by an amending map or certificate of correction. 45 A new subdivision map must be approved unless the developer can utilize the lot line adjustment procedure, which is excluded from the Map Act, to achieve the amendment.

Vested Rights

Approval of a final map or a parcel map does not guarantee the right to develop. Planning and zoning categories can be changed, conditional use permits can be denied, and development moratoria can still occur that would limit or prohibit development of the property. The general rule in California is that there is no vested right to develop until a building permit has been issued and substantial work and financing have been invested in good-faith reliance on a validly issued building permit.

The Map Act does provide a protective mechanism to alleviate the harsh effects of California’s late vesting rule. 46 Any time a tentative map is required, the Map Act allows the developer to request a vesting tentative map. 37 The approval of a vesting tentative map confers a vested right to proceed with a development in substantial compliance with the ordinances, policies, and standards in effect at the time the city or county deems the application complete. 48 Accordingly, if the city or county adopts a new policy or ordinance after the vesting tentative map application is deemed complete, the new policy or ordinance cannot apply to the development unless the public health and safety is threatened or the new policy or ordinance is needed to comply with state or federal law.

The Map Act includes one very important exception to the useful rules for vesting tentative maps. If the city or county has initiated proceedings by way of ordinance, resolution or motion and published notice as required by the Government Code prior to the date the vesting tentative tract map application is deemed complete, the city or county may apply to a vesting tract map any ordinances, policies, or standards enacted or instituted as a result of those proceedings. 49 Consequently, the date a vesting tentative map is deemed complete is extremely important. In order to avoid any ambiguity as to that date, developers’ counsel should request written confirmation from the city or county that a vest-
ing tentative map is complete.

It is also important to note that an approved final subdivision map approving condominium units may still be subject to a subsequent conditional use permit requirement for condominium conversions if the developer has not completed the necessary DRE process before the conditional use permit requirement for condominium conversions is imposed. For example, in City of West Hollywood v. Beverly Towers Inc., various apartment owners obtained a final map from Los Angeles County and approval of a DRE report to sell condominium units before West Hollywood incorporated as a city in 1984. All they had left to complete the conversion was to sell a single condominium unit. However, the newly incorporated city of West Hollywood very quickly adopted a conditional use permit requirement to convert apartments to condominiums and sought to apply the new requirement to the owners based solely on the fact that none of the units had been sold.

The California Supreme Court disagreed with the city, and found that sale of a unit is not relevant because the owners had obtained “all necessary approvals” to proceed with the conversion. As such, the city could not impose its conditional use permit requirement. However, “all necessary approvals,” as stated by the court, included both the final map recordation and DRE approval. Accordingly, final map recordation alone would not have been sufficient to defeat the city’s conditional use permit requirement.

A subsequent California Court of Appeal case, City of West Hollywood v. 1112 Investment Co., arising from the same facts as the first West Hollywood case, addressed whether West Hollywood could impose on two apartment buildings a rent control ordinance enacted after the owners of the two buildings obtained all necessary approvals—including a final map and DRE report—to convert the buildings to condominiums. Unfortunately for these property owners, they had allowed the DRE reports, which are valid for only five years, to lapse at various times. Despite the fact that the owners had, in the meantime, obtained renewed valid DRE reports, the court of appeal determined that the city could impose the rent control ordinance because the owners lost whatever rights they had accrued when they permitted the DRE reports to expire.

The court also suggested that something short of vested rights precluded the city from imposing its conditional use permit requirement against property owners with recorded final maps and approved DRE reports. The court found that the Beverly Towers court was driven by principles of fairness—and not a theory of vested rights—when it decided that the city could not impose its conditional use permit requirement for condominium conversion. As such, whatever rights gained under Beverly Towers by obtaining all necessary approvals to proceed with the conversion could expire or lapse if a required approval (in this case, the DRE report) expires or lapses.

When undertaking a condominium conversion, developer attorneys should closely examine the proposed converter’s documents to determine whether the converter has obtained approval of both a final map for condominium purposes and a DRE report and that the approvals have not expired or lapsed for any period of time. If the proposed project has all required documents and no documents have expired, the city or county may not apply any subsequently enacted ordinances regarding condominium conversions to that project.

If, however, a DRE approval has lapsed, triggering the city or county’s ability to impose subsequently enacted ordinances regarding condominium conversions, developer attorneys should closely examine the city’s or county’s codes and ordinances to identify any potential hurdles that could either: 1) preclude the conversion process, 2) provide the local agency with discretionary review, or 3) condition the project in such a manner as to make it economically unfeasible (i.e., mandatory inclusionary housing). If such hurdles exist, developer attorneys should advise their clients that the city or county could defensively apply an ordinance to the project enacted after the project obtained approval for conversion to condominiums.

A Few Uncertainties

As with practically any law, there are many uncertain regulations contained in the Map Act. Two examples are whether a newly incorporated city has added discretion to disapprove a final map and whether a series of lot line adjustments can be requested and approved when the combined effect of the multiple lot line adjustments would affect more than four existing, adjoining lots.

In the first situation, the general rule is that approval of a final map is ministerial if it substantially conforms to the approved tentative map and all conditions of the tentative map have been satisfied. At this time, it is unknown whether a newly incorporated city has greater discretion to disapprove a final map than the county would have for the same map if the city had not incorporated. In City of Goleta v. Superior Court, a developer acquired property in a county area just before the area became part of the proposed city of Goleta. The developer submitted its application for a vesting tentative map after the first signatures on the incorporation petition. The county planning commission approved the vesting tentative map and the city subsequently incorporated. When a city incorporates after the county has approved a tentative map, but before a final map has been recorded, all procedures and regulations of the annexing or newly incorporated city apply to the subdivision.

The city assumed review of the project and ultimately denied approval of the final map. The trial court ruled that the city had no discretion to deny approval of the final map. The appellate court reversed, holding that the Map Act gives newly incorporated cities discretion to disapprove a final map if the vesting tentative map was submitted to the county after the first signature on the incorporation petition. The California Supreme Court has granted review of the Goleta decision. Until the court decides the issue, an incorporation action concurrent with the entitlement process may threaten a developer’s ability to record a final map.

A second uncertainty in the Map Act concerns lot line adjustments in light of changes made to the Map Act to eliminate perceived abuses of previous certificate of compliance and lot line adjustment procedures. The Map Act is inapplicable to a lot line adjustment between four or fewer existing, adjoining parcels when the land taken from one parcel is added to an adjoining parcel and a greater number of parcels than originally existed is not thereby created. Previously, the Map Act exempted lot line adjustments between two or more existing, adjacent parcels. This change in the law became effective in 2002.

Supporters of the changes to the lot line adjustment exclusion were attempting to thwart developer’s attempts to record certificates of compliance in order to legalize unbuildable substandard lots and then, using a series of lot line adjustments, shift the existing lots to more appropriate, nearby areas, thereby effectively creating a new subdivision with limited discretionary review by the city or county. Specifically, the amendment was proposed to prevent the owners of the Hearst Ranch from obtaining certificates of compliance for portions of their land and moving those inland portions to the coastal areas through a series of lot line adjustments. The bill’s proponents argued that land speculators were exploiting the certificate of compliance and lot line adjustment procedures to drive up the cost of property that would otherwise be unbuildable and to avoid modern planning and infrastructure requirements contained in the Map Act.

However, lot line adjustments are also regularly processed for lots created by the modern subdivision process. Minor problems usually related to surveying errors, geology, and grading-related issues are often dis-
covered during construction. It is not uncommon for developers to shift lot lines in a modern subdivision after grading or to accommodate other engineering constraints once construction begins. To correct a problem on one lot may require minor boundary adjustments on many adjoining lots. In addition, homeowners may also want to shift property lines with their neighbors after development.

Since 2002, property owners have attempted to file requests for lot line adjustments affecting four or fewer existing, adjoining parcels with lots that either may be the subject of further lot line adjustment requests in the future or that were the subject of previous lot line adjustments. Approval of a series of lot line adjustments may ultimately affect five or more adjoining parcels, something that could not be accomplished in one application under the current lot line adjustment exclusion.

Cities and counties throughout California do not have consistent policies regarding these multiple lot line adjustment requests. Some cities and counties have no limits on the number of applications for adjustments to lot lines. They give effect to the plain meaning of the words in the amended exclusion and allow these lot line adjustments to be processed and approved, so long as separate applications are filed. Each application must stand alone, but there is no theoretical limit to the number of applications. Other cities and counties will simply not process a lot line adjustment request for a lot that was previously adjusted or that adjoins a previously adjusted lot if those adjustments together would affect five or more existing, adjoining lots. Still others allow subsequent lot line adjustment applications only after a prescribed period of time has passed. Is it appropriate, after all, to prohibit a friendly neighbor lot line adjustment simply because an affected lot is located next to property that adjusted its lot line one year ago, five years ago, or even twenty years ago?

Another pragmatic approach taken by some cities and counties is to treat modern subdivisions differently from antiquated lots that have been legitimized by certificates of compliance. Presumably, these cities and counties reason that the changes to the law meant to target deed-created lots that were never the subject of a formal subdivision review process. Accordingly, if the affected lot was created as part of the modern subdivision process, provides modern and adequate infrastructure, and was appropriately reviewed by the city or county, these jurisdictions allow the filing of more than one lot line adjustment application as long as each filing is limited to four lots. But lot line adjustment applications are still limited to a maximum of four

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lots for all deed-created lots that were not subject to city or county review when they were created.

1 GOV'T CODE §§66410-66499.37.
2 Subdivided Lands Act (codified at BUS. & PROF. CODE §§11000-11200).
3 Professional Land Surveyor's Act (codified at BUS. & PROF. CODE §§8700-8806).
4 See GOV'T CODE §66499.35.
5 See GOV'T CODE §§66424, 66442, and 66499.30.
6 See id.
7 See GOV'T CODE §66499.31.
8 See GOV'T CODE §66441.3; Horn v. County of Ventura, 24 Cal. 3d 605 (1979).
9 See PUB. RES. CODE §21080; 14 C AL. CODE REGS. §15357.
10 See GOV'T CODE §§66200 et seq., 65800 et seq., 65901, and 65906.
11 GOV'T CODE §§66424.
13 GOV'T CODE §66424.
14 See GOV'T CODE §§66412, 66412.1, 66412.2, and 66412.5.
15 GOV'T CODE §66412.1.
16 GOV'T CODE §66412(a).
17 GOV'T CODE §66412(b).
18 GOV'T CODE §66412(k).
19 GOV'T CODE §66426.5.
20 GOV'T CODE §66412(d).
21 GOV'T CODE §66452.6.
22 See, e.g., GOV'T CODE §66452.6(a)(1) (allowing a city or county to extend the initial term that is granted for an approved tentative map from 24 months to 36 months).
23 GOV'T CODE §66426.
24 GOV'T CODE §66428.
25 See id.
26 See id.
27 GOV'T CODE §66428(a).
28 GOV'T CODE §66463.
29 See Horn v. County of Ventura, 24 Cal. 3d 605 (1979).
30 See GOV'T CODE §66427(a).
31 See GOV'T CODE §66427(e).
32 See id.
33 GOV'T CODE §66452.1(b).
34 GOV'T CODE §66452.1(a).
35 GOV'T CODE §66452.2(b).
36 GOV'T CODE §66462.
37 See GOV'T CODE §66452.6.
38 GOV'T CODE §66452.6(a).
39 GOV'T CODE §§66442 and 66474.1.
40 Youngblood v. Board of Supervisors, 22 Cal. 3d 644 (1978); GOV'T CODE §66474.1.
41 GOV'T CODE §66469.
42 GOV'T CODE §66470.
43 See id.
44 GOV'T CODE §66472.
45 See GOV'T CODE §§66469(f) and 66472.1.
46 See Avco Cmty. Developers, Inc. v. South Central Coast Reg'l Comm'n, 17 Cal. 3d 785 (1976).
47 GOV'T CODE §66498.1(a).
48 See id.
49 See Gov. §§66474.2 and 66498.1(b).
51 See Beverly Towers Inc., 52 Cal. 3d 1184.
52 See 112 Investment Co., 103 Cal. App. 4th 1134.
54 See GOV'T CODE §66413(b).
55 GOV'T CODE §66412(d).
In recent years consumer demand for housing in California has intensified and led to a marked increase in housing construction. To meet this growing demand, and in an attempt to maximize profits, many developers chose an assembly line form of home manufacturing, even with the potential sacrifice in quality. As a result, much of California’s new housing inventory was defectively constructed, igniting myriad construction defect lawsuits against developers and contractors.

Many of these cases have been resolved. Others will be brought in the near future. Those contemplating future litigation, however, do not have the luxury of unlimited time to initiate their claims. Construction defect actions, as with virtually all civil litigation claims, must be brought within a specific time period mandated by the California Legislature. Consequently, a viable cause of action for construction defects often turns not only on the merits of the claim but also on whether the lawsuit is brought within the statutory time limits. If a lawsuit is brought

Construction defect statutes of repose should be interpreted broadly, despite the seeming restrictions of the statutory language

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merely one day late, the defendant developer will have an absolute defense to the claim, and the plaintiff—even one with an otherwise factually and legally strong case against the developer—may be left without a remedy.

Understanding the various time limitations for bringing construction defect actions is crucial to plaintiffs and defendants. Unfortunately, several aspects of these time limitations are confusing and require clarification because of ambiguities contained in what is commonly known as the “control exception.”

The California Legislature has imposed different statutes of repose on construction defect cases depending on whether the defects in question are considered “patent”—those that are apparent upon reasonable inspection—or “latent”—those that do not present themselves until after the completion of construction. Code of Civil Procedure Section 337.1 applies to actions for patent construction defects and limits such lawsuits to four years after substantial completion of the construction. Code of Civil Procedure Section 337.15, in contrast, provides for a 10-year statute of repose from the time of substantial completion of construction for lawsuits arising out of latent construction defects.

Both Sections 337.1 and 337.15, however, carve out identical exceptions to their respective time limitations. Each is referred to as the control exception. According to the exception, the time-related defense to liability prescribed in the statutes cannot be asserted by “any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.” The control exception, in other words, bars certain parties under certain conditions from using the statutes of repose of Sections 337.1 and 337.15 as a defense in a construction defect lawsuit.

Even a cursory reading of the control exception reveals the difficulties in comprehending its scope and application. What exactly constitutes “actual possession or the control”? Is control over certain aspects—but not all aspects—of a development enough to fall under the control exception? At what point does “possession or the control” have to be assumed by a developer? What if an entity had “possession or the control” of a development during construction but relinquished it after completion of the construction?

What persons or entities fall into the categories of “owner, tenant or otherwise”? What about a governmental body, property management company, or a condominium homeowners’ association? Does being in “possession or the control” toll the applicable time limitations on actions? If a contractor builds and owns a development for more than 10 years before selling it, does the applicable 10-year or 4-year time limitation begin to run at the time of the plaintiff’s purchase of the development or has the time limitation already run?

**Legislative Intent**

One approach to answering these questions is to ask why the legislature thought the control exception was necessary. It is important to discern for whom the control exception was designed to benefit or protect.

In *Eden v. Van Tyne*, the court of appeal neatly summarizes the statutory intent of Section 337.15 (and, by extension, Section 337.1) and describes the legislative rationale for providing this type of defense to those in the construction industry:

There is a reason for treating persons in possession differently from the contractor and architect. In footnote 2 of the above case [Regents of the University of California v. Hartford Accident and Indemnity Company], the court states: “A contractor is in the business of constructing improvements and must devote his capital to that end; the need to provide reserves against an uncertain liability extending indefinitely into the future could seriously impinge upon the conduct of his enterprise.” On the other hand, one who owns the property or controls it at the time of the accident (i.e., at the time the defect constitutes the proximate cause of the damage or injury) is likely to have insurance.

According to the *Eden* court, indefinite prospective liability for construction defects would make the construction business financially untenable. It is for this reason that the legislature enacted the various time limitations on actions against contractors and builders.

But why did the legislature also take away the protections of Section 337.1 and Section 337.15 from those in “possession or the control”? By passing the control exception, the legislature limited the scope of the Section 337.1 and Section 337.15 time limitation defenses. To this question, *Eden* also provides an answer. Entities that are in “possession or the control” of developed real property most probably have insurance. Consequently, there is no need to protect these entities from indefinite prospective liability, because this liability presumably will be borne by an insurance company. Aggrieved property owners will be able to get their relief from a member of the insurance industry, which apparently—at least in the legislature’s conception—is better suited to carry the costs of this type of liability. From the *Eden* perspective, the statutory scheme might even be viewed as favoring consumers by making sure that potential defendants have deep enough pockets to pay a judgment entered against them. This reasoning became an important guide for California courts considering the proper application of Sections 337.1 and 337.15.

The time limitations on most tort claims run from the time the injury in question is discovered by the potential plaintiff. Sections 337.15 and 337.1, however, operate differently in that their applicable time limitations run from “substantial completion” of the construction rather than from the time the injured party knew, or should have known, of the injury. This difference distinguishes a statute of repose from the more typical statute of limitation.

In *Inco Development Corporation v. Superior Court*, the court of appeal further delineated the hallmarks of these two types of statutes setting forth time periods within which an action can be brought:

Cal. Code Civ. Proc. §337.15 has characteristics of a statute of repose. It is not dependent upon traditional concepts of accrual of a claim, but is tied to an independent, objectively determined and verifiable event, i.e., the date of substantial completion of the improvement. That date may very well predate the time when a potential plaintiff purchases the property. A suit to recover for a construction defect generally is subject to limitations periods of three or four years, depending on whether the theory is breach of warranty or tortious injury to property. Unlike these statutes of limitation which begin to run only when the defect was or should have reasonably been discovered, the 10-year period in Cal. Code Civ. Proc. §337.15 imposes an absolute requirement that a lawsuit to recover damages for latent defects be brought within 10 years of substantial completion of the construction, whether or not the defect was or even could have been discovered within that period.

Therefore, under California law, Section 337.15 is a statute of repose rather than a statute of limitation. Consequently, the 10-year time limitation is an absolute bar that is not dependent on when a latent construction defect is discovered or when the property in question is sold by the developer. Furthermore, it follows that the fact that a developer is in “possession or the control” of a development does not toll Section 337.15 during the time the developer possesses or controls the property.

Similar case law in connection with Section 337.1 provides that this statute is
### MCLE Test No. 155

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. The time limitation on actions involving patent construction defects is:
   - A. Three years after substantial completion of the construction.
   - B. Four years after substantial completion of the construction.
   - C. One year after discovery of the defect.
   - D. 10 years after substantial completion of the construction.

2. The time limitation on actions involving latent construction defects is:
   - A. Three years after substantial completion of the construction.
   - B. Four years after substantial completion of the construction.
   - C. One year after discovery of the defect.
   - D. 10 years after substantial completion of the construction.

3. The time-related defenses to liability prescribed in the construction defect statutes cannot be asserted by “any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.”
   - True.
   - False.

4. The court in *Eden v. Van Tyne* held that “persons in possession” should be treated differently from contractors regarding the ability to invoke a time-related defense to construction defect liability.
   - True.
   - False.

5. The applicable time limitations on construction defect actions run from the time the defect in question was discovered.
   - True.
   - False.

6. Code of Civil Procedure Section 337.15 is a statute of repose rather than a statute of limitation.
   - True.
   - False.

7. A statute of repose is dependent upon the accrual of a claim and is not tied to an independent, objectively determined, and verifiable event.
   - True.
   - False.

8. Code of Civil Procedure Section 337.1 is a statute of limitation rather than a statute of repose.
   - True.
   - False.

9. A defendant who was in “possession or the control” during the time a construction defect was created is barred permanently from pleading the statute of repose defense to a construction defect claim.
   - True.
   - False.

10. *Magnuson-Hoyt v. County of Contra Costa* addresses the question of what classes of parties may employ the statute of repose defense.
    - True.
    - False.

11. In *Eden*, the plaintiffs argued that Section 337.15(e) barred the contractor and named others from using the statute of repose defense because they were in possession or control of the premises at the time the defective latent condition was designed, installed, or built into the improvement.
    - True.
    - False.

12. The plaintiffs in *Magnuson-Hoyt* argued that time limitations for construction defect actions should not be applied against government agencies.
    - True.
    - False.

13. According to *Magnuson-Hoyt*, Section 337.15 clearly and unambiguously expresses a legislative intent to place a 10-year limit on latent deficiency liability exposure for “any person” performing certain activities in making improvements to real property.
    - True.
    - False.

14. Assembly Bill 2631 was proposed in spring 1998 to specifically limit the applicability of the Section 337.15(e) exclusion to:
    - A. Licensed contractors.
    - B. Government entities.
    - C. Nonprofit organizations.
    - D. “Persons” in control.

15. In *Gaggero v. County of San Diego*, the court concluded that the defendant’s methane monitoring activity brought it within the rationale of the “control exception.”
    - True.
    - False.

16. *Leaf v. City of San Mateo* found that the city’s responsibility for storm and sanitary sewer easements constituted enough possession or control for the plaintiff to invoke the control exception and exclude the city from asserting a defense based on the statute of repose.
    - True.
    - False.

17. The *Leaf* court found that the city was not liable for construction defects as a result of sovereign immunity.
    - True.
    - False.

18. A “patent” construction defect, as defined by statute, is:
    - A. Apparent upon reasonable inspection.
    - B. Apparent to a construction expert.
    - C. Provable in court.
    - D. Caused by normal wear and tear on the construction.

19. A “latent” construction defect, as defined by statute, is:
    - A. Apparent upon reasonable inspection.
    - B. Apparent to a construction expert.
    - C. Not provable in court.
    - D. Not found until after the completion of construction.

20. Section 337.15 imposes an absolute requirement that a lawsuit seeking the recovery of damages for latent defects must be brought within 10 years of substantial completion of the construction, whether or not the defect was or even could have been discovered within that period.
    - True.
    - False.
also deemed a statute of repose rather than one of limitation.9 As such, the date of discovery of a patent construction defect is likewise irrelevant to the operation of the statute. As with Section 337.15, the fact that a developer is in “possession or the control” of a development does not toll this provision during the time the developer possesses or controls the property.

**Interpreting the Control Exception**

For the control exception to apply, the “possession” and “control” must occur “at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action.” Reading this portion of the statute certainly seems to indicate that if a party is in possession or control when it caused the defect, it cannot plead the statute of repose defense for construction defect actions. One can even imagine a valid public policy basis for this interpretation: It will create a greater incentive for developers to monitor builders and ensure that the work they perform is free from defect. According to this approach, once a party in possession or control—presumably the party with the best chance at detecting and preventing a construction defect—allows a construction defect to go unrepaired under its supervision, it is forever liable for the consequences.

This interpretation of the control exception, however, defies logic. Such an interpretation would eviscerate the statutes, as almost all parties involved in the creation of a development are to be said to have been at one time in possession or control of the development.

This issue was at the heart of the court’s decision in the *Eden*10 case. The plaintiffs—purchasers of a residential property—filed a complaint for rescission and damages against the sellers of the property and for damages against the builder and a soils engineer. According to the plaintiffs, the sellers had concealed the fact that a substantial section of a patio wall had failed and toppled down a slope. After investigating the wall failure, the plaintiffs discovered that the land was unsta-

defective latent condition was designed, installed, or built into the improvement. Under the plaintiffs’ reading of Section 337.15(e), if a party was ever in possession or control of an improvement, it could never plead a Section 337.15 defense, no matter how much time had elapsed between the discovery of the defect and the party’s relinquishment of possession or control.

The court of appeal, however, rejected the plaintiffs’ argument, concluding that such an interpretation “would defeat the intent of the statute.” All contractors, developers, and the like are in control of an improvement at some stage of its development. Thus the plaintiffs’ interpretation of subdivision (e) would wholly deny the intent of the statute. Indeed, the court found that the argument by the plaintiffs stretches the language of the subdivision beyond the point at which it can be validly applied.12

Therefore, despite the language of the statute, the *Eden* court found that in order to determine whether the control exception applies to a certain party, it is not only relevant who was in control at the time the defect was created but also who was in control at the time it was discovered. Furthermore, although the *Eden* court never mentions this specifically, it is reasonable for parties in possession or control at the time a lawsuit is filed to be excepted from the time limitations defenses by the control exception. This principle can be inferred from the *Eden* court’s reasoning because the party in possession or control is not only best situated to identify a construction defect and remedy it before the filing of a lawsuit but also most likely to cover up the defect. To put it even more starkly, without the control exception a party in “possession or the control” of a development that is aware of a major construction defect could simply elect to withhold this information and run out the clock by failing to relinquish control over the development until the statutory time limit had expired.

The more recent case of *Magnuson-Hoyt v. County of Contra Costa*13 deals with the question of what classes of parties may employ the statute of repose defense. The plaintiff-property owner alleged that landslide damage to her property in 1986 was caused by the manner in which an adjoining public street was constructed in 1968. The complaint alleged that the county substantially participated in the design and construction of the street. The county had no responsibility for maintenance of the street after June 1977, and the action was filed in August 1987. Thus the county pled a defense based on Section 337.15.14

In an attempt to make use of Section 337.15’s legislative rationale in order to defeat its application in the lawsuit, the plaintiff offered two arguments in response. First, the statute does not mention public agencies but refers only to a “person” developing real property. Second, the legislative rationale of the law was to protect “contractors and other professionals and tradespeople in the construction industry,” not government entities.15

The court of appeal rejected the plaintiffs’ contentions in full, finding the language of the statute to be broad enough to encompass government entities:

Section 337.15 clearly and unambiguously expresses a legislative intent to put a 10-year limit on latent deficiency liability exposure for “any person” performing certain activities in making improvements to real property. Among the activities covered by
the statute are performing or furnishing the design or specifications of the improvement. There is nothing in the words of the statute that suggests a public or governmental entity which has engaged in one of the specified activities is precluded from asserting the statute as a defense. Consequently, resort to the legislative history of section 337.15 is unnecessary. We therefore hold that the provisions of section 337.15 can apply to claims against governmental and public entities.16

The Magnuson-Hoyt court never directly addressed the issue of why the legislature would have sought to protect a party from outside the construction industry that would not share a builder's burden to maintain large capital reserves. Nevertheless, the court makes clear that the statutes of repose regarding construction defects should be read broadly to shield “any person” from liability who might otherwise be excluded from the defense if considering solely the legislative purpose expressed by Eden—namely, the protection of members of the building industry. Courts analyzing the appropriateness of applying the control exception to a given situation must keep in mind Magnuson-Hoyt's broad reading of the applicable statute of repose to include nondeveloper parties—a result the legislature may never have intended.

Interestingly, in the spring of 1998, Assembly Bill 2631 (Baugh) was proposed to limit the applicability of the Section 337.15(e) exclusion to government entities. In accordance with this proposal, the possession/control exclusion of subdivision (e) would be made applicable only to government entities that had actual knowledge of the latent deficiency in question and unreasonably failed to take action to cure it. Under this bill, a government agency, even one in possession or control of an improvement, could plead the numeric exclusion of subdivision (e) to give rise to the subsection (e) exception. The court reiterated a policy principle:

First, the class of persons to whom builders may be liable is larger than the class to which owners may be liable…. Second, a builder may be liable for construction defects under various legal theories—contract, warranty, negligence, and perhaps strict liability in tort. Landowner liability for such defects, on the other hand, typically lies only in tort, unless the landowner is a lessor, in which case he is liable only for events occurring while the tenant is in possession…. Third, landowners can ordinarily avoid liability by taking adequate care of their land and structures…. The builder has no such control over his product after relinquishing it to the landowner.19

The court concluded by noting that “[t]he county's monitoring activity did not bring it within the rationale of the exception. The monitoring did not narrow the scope of potential claimants nor the theories upon which the county might be held liable. Rather, quite to the contrary, the monitoring arguably expanded the scope of the county's potential liability.”20 In accordance with this reasoning, which paid special attention to the legislative intent behind the statute of repose, the court found that the county's mere monitoring of methane on the site did not constitute enough “possession” or “control” to give rise to the subsection (e) exclusion.

The decision in Gaggero is narrowly written, addressing only the issue of whether monitoring methane meets the requisite level of “possession or the control” rather than the broader issue of the elements constituting possession or control. Thus it is difficult to derive a broad lesson from Gaggero. Clearly future courts faced with analyzing whether a party has the minimal level of possession or control will have to consider at least some precedent for the idea that, in some cases,
mere supervision over one aspect of a development by an entity is not enough to deem the entity in control of the development for other matters.

In contrast to Gaggero, the court in Leaf v. City of San Mateo found that responsibility for storm and sanitary sewer easements constituted enough possession or control to permit the invocation of the control exception and exclude the City of San Mateo from asserting a defense based on the statute of repose. In Leaf, the owners of a duplex brought an action for inverse condemnation against the city arising from subsidence damage alleged to be the result of the city’s defective sewage and drainage systems. The plaintiffs filed the action against the city on January 28, 1977. The trial court granted summary judgment in favor of the city on the ground that the action was brought more than 10 years after the date of completion of the duplex and thus fell under the ambit of Section 337.15. The court of appeal reversed: The purpose of the ten-year statute is to protect developers of real estate against liability extending indefinitely into the future. [Citations omitted.] Section 337.15 does not protect persons in actual possession or control, as owner or otherwise, of the offending property at the time of the proximate cause of the injury. [Citations omitted.] Defendant City was in possession and control of the storm and sanitary sewer easements on and near plaintiffs’ property. Therefore, City of San Mateo was not within the protected class, specifically developers, which was intended by this statute.

According to the Leaf decision, it was not even necessary for a party to be in control of the damaged property. Mere possession or control over the cause of the defect was enough to bar the protections of Section 337.15 and invoke the control exception.

Although Leaf is as narrowly drawn as Gaggero, a consideration of the decisions in tandem suggests the proper parameters for addressing the question of how much control is enough to qualify for the control exception. In Gaggero, the defendant’s supervisory responsibilities did not give it the information necessary or the authority to identify or remedy the construction defect that was the subject of the underlying litigation. No matter how diligently the County of San Diego monitored the methane at the site, it would not have discovered or been in a position to fix the alleged soil subsidence problem. As a result, excepting the County of San Diego from employing the statutory time limitations defense would seem unfair.

Unlike the Gaggero court’s analysis regarding the County of San Diego, the Leaf court
found that the responsibility of the defendant, the City of San Mateo, was to maintain the city’s sewage and drainage systems—the very subject of the lawsuit. The city, therefore, was uniquely positioned to have discovered the purportedly defective sewage and drainage systems during the years leading up to the lawsuit and would have been best able to remedy any defects. Thus the City of San Mateo should be barred from using the applicable statute of repose as a complete defense to the action.

Although the case law and legislative history pertaining to Section 337.1 and Section 337.15 are scant, the information available allows for the extraction of several principles that can guide the judiciary’s interpretation of these statutes. First, the applicable statutes of repose are designed to avoid the indefinite prospective liability for construction defects that would make the construction business financially untenable. The control exception is designed to except entities that are in “possession or the control” of a development from the protections of the statutory time limitations because these types of entities most probably have insurance to provide for their liabilities. Thus the statutory rationale should not apply to them.

Second, despite the statutory language that the relevant period for possession and control to determine the applicability of the control exception is “at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action,” the proper question is who is in possession or control at the time the suit is filed. Any contrary interpretation would eviscerate the purpose of the statute, as all developer parties were in possession or control at some point during the construction. The party in possession or control at the time the defect is discovered is best situated to identify a construction defect and remedy it before the filing of a lawsuit—and is most likely to conceal the defect.

Third, the construction defect-related statutes of repose should be read broadly to shield “any person” from liability, not just developer parties—despite contrary rationales for the statutory language.

Fourth, a party that was well-positioned to discover and remedy a construction defect as a result of its degree of control or supervision over a development should be barred by the control exception from using the statutory time limitations as a defense.

Last, when interpreting the control exception and the statutory time limitations on construction defect actions, it is important to bear in mind that Sections 337.1 and 337.15 are statutes of repose under California law. As such, these statutes are not tolled during the period that a developer is in possession or control of a development.

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1 See text, infra.
2 CODE CIV. PROC. §§337.1(d), 337.15(e). See text, infra.
3 See CODE CIV. PROC. §337.1(c).
5 CODE CIV. PROC. §§337.1(d), 337.15(e).
7 Id. at 886 (quoting Regents of the Univ. of Cal. v. Hartford Accident & Indem. Co., 21 Cal. 3d 624 (1978)).
10 Eden, 83 Cal. App. 3d 879.
11 Id. at 885-86.
12 Id.
14 Id. at 144.
15 Id. at 142.
16 Id. at 144.
18 Id. at 618-19 (citing Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 182-83 (1982)).
19 Id. at 619.
21 Id. at 714.
The recognition of copyright protection for ARCHITECTURAL DESIGNS has resulted in high-stakes litigation.

Unlike writers, musicians, computer software companies, and others who rely heavily on copyright laws to protect their intellectual property, architects and engineers historically have been less mindful of the powerful protections available to them under the federal copyright statutes. This may be partly due to the fact that buildings generally are not mass produced and sold like books, compact discs, videos, or software and do not readily present opportunities for generating royalties or licensing fees. Increasingly, however, architects and engineers are becoming more aware of the value of their work and are prepared to devote the necessary resources to enforce their intellectual property rights and preserve that value. Consequently, owners and other users are also devoting more attention to copyright laws when retaining architects and engineers.

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Copyright issues arise when design professionals, their clients, or sometimes third parties disagree as to who owns or controls the rights to project designs and drawings. This may occur in various situations. For example, upon sale or transfer of ownership of unimproved real property that has received permits or approvals for improvement based on a particular architectural plan or design, the architect who designed the improvements may challenge the owner's right to sell or transfer, and the buyer's right to acquire and use, the architect's design and plans without the architect's consent or further involvement in the project or payment of additional compensation. If the owner and buyer have the permits needed to proceed with construction, do they still need the architect's consent to use the designs or plans based on which the approvals were granted? Similarly, when an owner terminates an architect before the architect's services are completed and engages other professionals to complete the design and the drawings, can the successor architect copy, use, or alter the designs and drawings of its predecessor without infringing the first architect's copyright?

Building owners and other clients of architects and engineers often make two erroneous assumptions regarding ownership of the designs. The first is that payment of fees to the design professional automatically conveys ownership of the design to the client and the right to use the design as the client sees fit. The other is that ownership of the physical object embodying the copyrighted work (such as the architect's plans whether in paper or electronic form) also includes ownership of the copyrights in that work. A client of an architect does not automatically become the exclusive owner of any of the architect's rights in copyright by paying the architect's fees unless the parties specifically agree to this result in writing. The sale or transfer of any or all of the exclusive rights in a copyrighted work requires a signed writing by the copyright holder that identifies the transferee and includes an explicit reference to the term "copyright."

What happens if there is no written contract between the parties? Even if one exists, what if it does not address the limits to which the copyrightable work may be used? The answer may be found through the application of the doctrine of implied license. If an architect manifests an intent through its conduct that its copyrighted work may be copied, distributed, and used without the architect's involvement, then an implied license could be deemed granted.

Over the past 16 years, courts have defined the type of conduct that may constitute the grant of an implied license in these circumstances. The existence of a license—implied or express—is a complete defense to an infringement action.

Copyrights are "vested" in the "author" of the copyrighted work upon the creation of the work and as soon as it is "fixed" in a tangible medium of expression now known or later developed. While registration of the copyright with the U.S. Copyright Office is not mandatory, it is a prerequisite to filing an infringement action.

Prior to 1990, architectural drawings were entitled to copyright protection as a subcategory of pictorial or graphic works known as Technical Drawings. When the United States signed the Treaty of Berne to conform U.S. copyright laws to the requirements of that treaty, "architectural works" as defined in Title 17 of the U.S. Code became entitled to copyright protection. The scope of this protection applies regardless of the medium in which the works are embodied, including architectural drawings (also protected separately as Technical Drawings), sketches, architectural models, photographs, and finished buildings constructed after 1990. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design but excludes individual standard features.

The commercial value of copyrights lies in an author's ability to control certain uses of, or "exclusive rights" in, the copyrighted work, including the right to copy, display, and distribute the work as well as alter it or create derivative works. Anyone exercising these rights over a work without the copyright holder's consent may be subject to a claim of copyright infringement, and the holder may be able to obtain injunctive relief or recover statutory damages. The infringer may also be required to pay actual damages and disgorge any profits earned from improper use of the copyrighted work. A copyright holder may also recover attorney's fees if the work was properly registered before the inception of any infringing activity.

In the real estate and construction industries the amount of profits at stake can be substantial. A Los Angeles jury recently awarded $5.9 million in damages to William Hablinski Architecture (now Hablinski & Manion Architecture (HMA)) in an infringement action. HMA specializes in the design of "high end," single-family homes. The architectural firm sued Amir Construction and others after the firm discovered the defendants had hired a former HMA employee to illicitly copy and modify the design and drawings of a custom house that HMA had designed in Bel-Air for a home in Beverly Hills. The damages awarded by the jury were largely attributed to the projected profit the defendants anticipated receiving from the sale of the infringing home. A retrial on the issue of the apportionment of the defendants' projected profit from the sale attributable to the use of the copyrighted design was scheduled to begin in December 2006. This local verdict is by no means unique. In 2001, a jury in Norfolk, Virginia, awarded $5.2 million to a Texas architecture firm whose designs were used by Virginia builders to construct more than 300 houses.

Copyright protection extends solely to those aspects or elements of the copyrighted work that constitute original expression. “Original,” however, does not mean "unique." The only requirement for originality is that the work be created by the author alone. Conversely, facts, ideas, concepts, discoveries, and other intellectual activities lacking "expression" are excluded from protection. Under the doctrine of merger, if an idea and the expression of the idea are so close as to be one and the same, no protection is afforded to the expression.

Effects and its Progeny

A lawsuit challenging a producer's right to use special effects footage in a horror film illustrates the type of fact pattern that supports a finding of an implied license. In Effects Associates Inc. v. Cohen, the parties did not enter into a written contract concerning ownership and use of the footage, but a letter acknowledged that the footage had been created for the defendant. The defendant producer refused to pay Effects in full for the footage because he considered it unsatisfactory, but the footage was nevertheless used in the film. The Ninth Circuit rejected the plaintiff's claim of copyright infringement based on mere effects in full for the footage because he considered it unsatisfactory, but the footage was nevertheless used in the film. The Ninth Circuit rejected the plaintiff's claim of copyright infringement based on mere use in full for the footage because he considered it unsatisfactory, but the footage was nevertheless used in the film. The Ninth Circuit rejected the plaintiff's claim of copyright infringement based on mere failure to pay the agreed-upon fees in full. The court held that the producer had been granted an implied license to use the footage because it was created specifically for the film at issue and was intended to be used in it. The grant of this license did not constitute a transfer of the plaintiff's copyright in the footage; rather, it signified that the producer's use of the footage did not constitute copyright infringement.

The copyright holder has the right to set conditions on the grant of a license. For example, the Effects decision implied that if the parties had expressed an intent to condition the grant of a license upon full payment, then the producer's failure to make the payment could have been grounds for an infringement claim. In Aalto v. Ries—decision relied upon by the court in Effects—the court acknowledged there was an implied license but also upheld a copyright infringement claim because the scope of the implied license had been exceeded.

Effects has been applied in numerous copyright disputes involving architectural and engineering plans. I.A.E., Inc. v. Shaver was the first case to do so. Shaver, an architect, was hired by I.A.E. to prepare schematic designs for an airport hangar/cargo facility for the Gary, Indiana, Regional Airport. Shaver's letter agreement required only that
he prepare schematic design drawings. He delivered copies of his drawings to I.A.E., the airport, and other involved parties and participated in a presentation to the airport, which approved the design. I.A.E. paid Shaver half of his design fee and then hired another architect to perform the remaining architectural services required to construct the building.

When Shaver learned of this, he notified the airport that his firm was no longer involved in the project. He also enclosed copies of his schematic design drawings and wrote in a cover letter, “We trust that our ideas and knowledge exhibited in our work will assist the Airport in realizing a credible and flexible use Cargo/Hangar facility.” The Seventh Circuit took note of this statement as an objective manifestation of Shaver’s intent that his designs could be used by others in the future development of the air cargo facility. Shaver also wrote I.A.E. requesting the balance of his fee and reimbursable expenses and demanded a $7,000 fee for the “assignment” of his copyright in the schematic design documents. I.A.E. paid the contract balance and then filed a declaratory relief action seeking a judgment that it had the right to use the drawings. Shaver counterclaimed, sought damages for copyright infringement and breach of contract, and filed third-party complaints against I.A.E.’s joint venture partner and the architecture firm that succeeded the Shaver firm.

The district court concluded Shaver had conveyed an implied nonexclusive license allowing I.A.E. the airport, and others to use his drawings in connection with the construction of the air cargo building. The court rejected Shaver’s argument that he had revoked any nonexclusive licenses he may have granted and held that when consideration is paid for a license, it is irrevocable.

Shaver argued on appeal that he never intended to grant the airport a license to use his copyrighted drawings and asserted the district court’s finding of an implied nonexclusive license was error as a matter of law. He also claimed that even if his firm had granted a license to the joint venture, its scope was exceeded when they hired the second architect and authorized him to use Shaver’s drawings.

The Seventh Circuit analyzed this case in light of Effects and held that while the “transfer of copyright ownership” or any of the exclusive rights vested in a copyright owner must be made in writing, this requirement is inapplicable to the grant of a nonexclusive license. Using Effects as a guide, the court established a three-part test for determining whether an implied nonexclusive license has been granted:

(1) a person (the licensee) requests the creation of a work,
(2) the creator (the licensor) makes that particular work and delivers it to the licensee who requested it, and
(3) the licensor intends that the licensee-requestor copy and distribute his work.

The court applied this test to Shaver’s conduct and found Shaver had manifested an objective intent that his work would be used to further the development of the design of the airport facility.

A year later, the Sixth Circuit reached a contrary conclusion in Johnson v. Jones in a lawsuit involving the design of a client’s “dream home” in Detroit. Jones, the client, and Johnson, the architect, engaged in protracted contract negotiations, including a proposal by Johnson to use the then-standard American Institute of Architects (AIA) contract. This contract included a provision stating that the architect’s drawings “shall not be used by the owner or others on other projects, for additions to this project or for the completion of this project by others, unless the architect is adjudged to be in default under this agreement, except by agreement in writing with appropriate compensation to the Architect.”

While negotiations proceeded, Johnson developed designs for the project. Jones then asked Johnson to be the project contractor, but eventually the two were unable to come to terms on a contract, and the relationship was terminated. Jones retained a new architect and a separate contractor to complete the project. The new architect copied Johnson’s drawings for the project (which had received city approvals) and placed his own seal upon them to expedite obtaining a permit. Johnson saw the project drawings during a casual visit to the site and discovered the architectural drawings being used for construction were identical to those he had created. He promptly filed suit for copyright infringement and false designation of origin under the Lanham Act.

The district court entered judgment in Johnson’s favor. There was no signed contract between the parties, but the court considered whether Johnson had granted an implied license to Jones to use Johnson’s copyrighted work in connection with the project without his involvement—and determined that Johnson had not done so. Unlike Effects and Shaver, the court found Johnson had not manifested any objective intent to allow Jones, her other architect, and the contractor to use Johnson’s designs.

In affirming the district court’s decision, the Sixth Circuit applied a similar analysis. Like Effects and Shaver, the copyrighted work in Johnson was created for the project on which it was ultimately used. However, Johnson presented Jones with two AIA contracts setting specific requirements regarding his ownership of the drawings. Although these contracts were never executed, they “speak to Johnson’s intent.” While Shaver’s schematics were prepared for the first phase of the project and used consistent with that purpose, the court found that Johnson’s drawings were used in a way he never intended—i.e., a rival architect claimed them as his own work and completed the Jones house without Johnson’s involvement. The Sixth Circuit concluded, “Most importantly, the facts in those cases [Effects and Shaver] amply demonstrate that the copyright owners intended that their copyrighted works be used in a manner that they were eventually used. There is no such demonstration of intent in this case. Without intent, there can be no implied license.”

Four years later, the Ninth Circuit considered the issue of whether a license could be implied from the absence of certain terms in a con-
contract rather than the conduct of the parties. In Foad Consulting Inc. v. Musil Govan Azzalino,24 Foad was hired by Gen Com, Inc., to create a “preliminary Concept Development Plan” for a 45.5 acre shopping center in Arroyo Grande, California. Foad proceeded based on an initial contract to create a preliminary plot plan that included the location of proposed buildings, parking areas, and landscaping. Gen Com entered into a second contract with Foad for the preparation of final engineering drawings. Neither contract apparently addressed the ownership of documents and copyright matters. The revised plan was submitted to the city and was approved. Gen Com then transferred its rights to another developer, which hired a development manager. The development manager retained Musil Govan Azzalino (MGA) to perform the remaining architectural and engineering services in connection with the design and construction of the project.

MGA copied much of Foad’s revised plot plan in developing and finalizing the project plans. After writing MGA a letter admonishing it for infringing on its copyrights in the revised plot plan, Foad sued MGA for copyright infringement. The district court granted the defendant’s summary judgment motion under the doctrine of merger.

The Ninth Circuit affirmed the judgment based solely on a de novo review of legal issues. The court first considered “whether federal or state law determines whether a copyright holder has granted an implied nonexclusive copyright license to another.”25 The court concluded that “so long as it does not conflict with the Copyright Act, state law determines whether a copyright holder has granted such a license.”26 Noting California’s broad rule permitting parol evidence in interpreting even nonambiguous provisions of a written contract, the court set out to determine if Foad had granted Gen Com an implied copyright license.27 The court analyzed Foad’s written contract for the preparation of final engineering drawings to determine “whether Foad’s extrinsic evidence discloses any ambiguity in the contract” supporting the grant of such a license and concluded that “the contract gives Gen Com an implied license to use the revised plot plan to build the project.”28 Unlike the courts in Effects, Shaver, and Johnson, the Foad court did not consider whether an implied license was granted based on the conduct of the plaintiff. Rather, the court resolved the question by implications drawn from the language of the contract and based on the notion that if something is not prohibited in a contract, it may be permitted.

Although Judge Alex Kozinski concurred in the result, he criticized the majority’s approach and noted the questions addressed by the court were not presented by the parties. After describing the key facts in Shaver and Johnson, he offered his own analysis and concluded:

Looking at the relationship between Foad and Gen Com, I conclude that this case is cut from the cloth of Shaver, not Johnson. Like Shaver, Foad drafted letter contracts that define a specific scope of work and mentioned no expectation of a continued role in the project…Nowhere does the contract contain a clause like those Johnson proposed, forbidding any additions to the project or completion of it by others.29

A year after the Ninth Circuit decided Foad, the developer defendants in Nelson Salabes Inc. v. Morningside Development LLC,30 appealed a judgment against them awarding more than $736,000 to the plaintiff, an architectural firm, arising from the design and construction of an assisted living facility in Baltimore County, Maryland. The Fourth Circuit affirmed the judgment except as to joint and several liability between the two defendants.

In the case, The Strutt Group, a Maryland real estate developer, retained Nelson Salabes Incorporated (NSI) to prepare a schematic site plan for an assisted living facility. NSI submitted a series of letter agreements to Strutt to perform different services related to the development of the facility. Although Strutt never signed any of these agreements, the parties performed according to their terms. When NSI presented its last agreement, it proposed that the parties enter into a standard AIA contract containing a copyright clause. The parties proceeded as before without signing the AIA contract. Strutt later instructed NSI to stop work and indicated it was going to sell the project.

Morningside Development Holdings bought the project and notified NSI that it intended to use the services of another architect for further development of the project. NSI responded by informing Morningside it had no authority to use the NSI drawings, including the footprint and exterior elevations approved by the county.

Morningside hired a design-build firm to design and construct the project and retained another architect for the project. This architect was instructed to avoid making any modifications to the county-approved plans in order to preserve the approvals. The zoning board approved the successor architect’s plans, and the project was constructed. NSI then filed a complaint for copyright infringement against the defendants.

NSI granted Strutt an implied nonexclusive license, according to the defendants. They argued that this license was transferred.
from Strutt to them. They relied on NSI's failure to prohibit Strutt from using NSI drawings despite the knowledge that Strutt could have sold the project before NSI completed its work.

The Fourth Circuit considered the holdings reached in \textit{Effects, Shaver, Johnson, and Foad} and concluded:

\begin{quote}
[L]ike the architect in \textit{Johnson}, NSI and Strutt plainly contemplated NSI's long-term involvement in [the project], and they engaged in ongoing discussions for more than nine months…. And during those discussions, NSI submitted contracts to Strutt that, similar to those in \textit{Johnson}, contained a standard AIA prohibition against use of the NSI drawings without NSI's future involvement or its express consent….In these circumstances we agree that NSI did not intend for Strutt to utilize the NSI drawings in the construction of [the project] without NSI's future involvement in the Project or its express consent. Therefore, like the district court, we are “satisfied that these facts do not support a finding that [NSI] granted Strutt [an implied] non-exclusive license.”
\end{quote}

\textbf{Determining Intent}

This rationale was followed a year later by the First Circuit in \textit{John G. Danielson Inc. v. Winchester-Conant Properties Inc.}, a case in which the defendants were ordered by the trial court to pay $1.3 million in damages to the architect. \textit{Danielson} involved the development of a 70-unit condominium project in Winchester, Massachusetts. Danielson, the architect, signed a modified AIA contract with the owner of the condominium site. The contract specified that the design and plans were the property of the architect and were not to be used by other parties or on other sites without the architect's permission. The site was not initially zoned for residential development. The Winchester Planning Board voted to allow residential development on the site and entered into a restrictive covenant with the owner that was intended to run with the land for 30 years. The covenant was based on site plans and other drawings developed by Danielson.

Soon after construction began, the owner encountered serious financial difficulties that caused the project to be abandoned. Several years later defendant Winchester-Conant Properties (WCP) acquired the site in a foreclosure sale. When WCP was unsuccessful in obtaining permission to modify the development guidelines under the covenant, WCP provided its architects and agents with Danielson's drawings. They removed the Danielson logo and produced very similar
drawings that were used to obtain a permit and construct the project. Danielson filed suit for copyright infringement, and the defendants responded they had an implied license to use Danielson’s plans. After analyzing the facts in light of the decisions of the other four circuits, the court resolved the question of whether an implied license had been granted in the plaintiff’s favor, and stated in its decision:

The touchstone of finding an implied license, according to this framework [developed by the Effects, Shaver, Johnson, Foad, and NSI decisions], is intent. Two of the cases begin their analysis with a three-part test originally derived from [Effects] which requires that the licensee request the creation of the work, and the licensor create and deliver the work, and the licensor intend that the licensee distribute the work. But they quickly pass over the “request” and “delivery” issues to focus on the manifestations of the architect’s intent that plans may be used on a project without their involvement. We will do the same here.

These decisions make clear that the existence of an implied nonexclusive license turns on the question of intent as exhibited in the conduct of the architect as licensor. In the words of the Shaver court, quoting an Indiana decision, “[I]ntent relevant in contract matters is not the parties’ subjective intent, but their outward manifestation of it.”

In NSI and Danielson, an additional three-prong test has been developed to determine the intent of the licensor. Courts must discern: 1) Whether the parties are engaged in a short-term discrete transaction similar to those in Shaver or Foad or contemplating a longer transaction like those in Johnson, Danielson, and NSI. 2) Whether the architect used a written contract, such as the AIA standard form, providing that the copyrighted material could only be used in the project for which it was created and subject to the architect’s ongoing involvement, like architects Johnson and Danielson. 3) Whether the architect’s conduct during the creation and delivery of the copyrighted material indicates that the use of the copyrighted material without the architect’s involvement or consent was permissible, as it was in the Shaver case.

Architects and engineers and their counsel should give careful consideration to intellectual property issues at the inception of each project. They should analyze and identify the limits to the use of their copyrighted material for the project at hand and beyond. They should also consider whether in any
given case the use of their copyrighted material should be conditioned on their continued involvement in the project. After these issues are analyzed and decisions are made with respect to intellectual property concerns, the intent of the copyright holder should be clearly articulated in written contracts with clients. If a license is to be granted, the parties should define the scope of the license either in their professional services contracts or in a separate agreement. After designs are developed, they should be registered with the U.S. Copyright Office as appropriate.

Developers and their lawyers need to respect the intellectual property rights of design professionals when negotiating agreements with them or using permits and approvals based on copyrighted designs not specifically prepared for use by the developers. Finally, design professionals must be mindful that their intent regarding the use of their copyrighted material is not undermined by their conduct.

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6 17 U.S.C.A. §504(a), (b).
8 William Hablinski Architecture v. Amir Constr., Inc., CV03-6365 CAS (PJWx) (C.D. Cal., filed Sept. 3, 2003). There was a verdict in this case, but no judgment has yet been issued.
11 Id.
14 Effects Assocs., Inc. v. Cohen, 908 F. 2d 555 (9th Cir. 1990).
15 Oddo v. Ries, 743 F. 2d 630 (9th Cir. 1984).
16 L.A.E., Inc. v. Shaver, 74 F. 3d 768 (7th Cir. 1996).
17 Id. at 771.
18 Id. at 772.
19 Id. at 776.
20 Johnson v. Jones, 149 F. 3d 494 (6th Cir. 1997).
21 Id. at 500.
22 Id. at 501.
23 Id. at 502.
24 Foad Consulting Inc., v. Musil Govan Azzalino, 270 F. 3d 821 (9th Cir. 2001).
25 Id. at 826.
26 Id. at 827.
27 Id. at 828.
28 Id. at 829.
29 Id. at 836.
30 Nelson Salabes Inc. v. Morningside Dev. LLC, 284 F. 3d 505 (4th Cir. 2002).
31 Id. at 516.
33 Id. at 40-41.
Anonymous Lawyer

Anonymous Lawyer
By Jeremy Blachman
Henry Holt, 2005
$16.50, 288 pages

Writing a review about this satire is like giving the Academy Award for Best Picture to a comedy. In either case, one feels obliged to find a message among the laughs. Jeremy Blachman’s Anonymous Lawyer is hilariously funny but also casts a bright light on the materialism and pettiness behind what law firms call the pursuit of justice. The book is a collection of Blachman’s popular blog posts at http://anonymouslawyer.blogspot.com. While nonlawyers are likely to find laughter in how a lost soul plays office politics, attorneys are likely to get the message about how (or possibly, how not) to climb to professional heights while sinking to moral depths.

The fictional lawyer of the book’s title lives close to home. He is a hiring partner in a large Los Angeles law firm. This lawyer uses an anonymous blog to reveal his honest musings about the insignificance of everyone but him. These people include the firm’s management (whom he seeks to overthrow), the summer associates he sends on pointless business trips, and the wife and children who leech his money. It is easy to forget that the book is fiction, because Blachman never drops his mask. The e-mail exchanges, in turn, illuminate the trauma that partners inflict on associates. Sometimes the commentary gives voice to an associate seeking revenge, other times to a mother praying for better treatment of her hard-working overachiever. Another narrative strand involves an e-mail dialogue between the Anonymous Lawyer and his niece. He urges her to forget her idealism and follow his path to a top tier law school.

Despite Blachman’s youth in the profession (and his early departure from it), his perception of nuances in all that is bad about the law firm environment is laughably accurate. The book’s archetypal lawyer is wildly self-centered, sexist, and generally malicious. Perhaps all of these should be expected from the suited silhouette on the book’s cover, who sports bright red devil’s horns. Using anonymity for thematic purposes, the author describes others in the firm as “The One Who Missed Her Kid’s Funeral” and “The Word Processor Guy Who Used to Be Under House Arrest.” The facelessness of Anonymous Wife makes it easy to hate her and pity her. The Anonymous Lawyer cannot be expected to remember much about her, given the long hours he has spent kissing up to “The Chairman” and “The Tax Guy” rather than kissing her. The Anonymous Lawyer notes that his office is seven square feet larger than that of another candidate for managing partner. He revels in the exclusivity and length of his moments with the firm’s management, assuming that advancement decisions are made upon a tally of total time spent with members of the executive board.

Some of Blachman’s vignettes are, presumably, recognizable in other business contexts, such as the awkwardness of dealing with office caste systems. The Anonymous Lawyer fails in his attempt to avoid eye contact with one of the firm’s secretaries at a baseball game. His failure is made more awkward still by his inability to come up with a compliment “worth saying in front of her family” any nicer than that she “seems to have very good balance carrying two cups of coffee and a Danish down the halls.” His mental register of demerits for other attorneys who take candy from his secretary’s desk are likely a part of other professions as well.

Lawyers, however, may be the only professionals who, the book points out, dedicate hours to the review of piles of documents for the purpose of reordering Bates numbers. In one instance, Anonymous Lawyer tells an associate to perform a county-by-county analysis of an obscure insurance law, only to be told that the associate had been given that assignment by someone else the week before. Another “summer” is dejected upon learning at the end of an intercontinental flight that a case settled while he was traveling. Anonymous Lawyer also must resolve the dilemma of how soon after a partner’s heart attack to visit the partner at the hospital.

So little humanity is left in the Anonymous Lawyer’s soul that only a short passage reflects on time spent with his son—looking for snakes in trees. Anonymous Lawyer’s interactions with his family show how he sees them as disobedient parasites he suffers only because doing so is more economical and politically expedient than the alternative. His wife seems convinced that a new kitchen will make their marriage stronger.

Anonymous Lawyer is laugh-out-loud funny to those who have been mired in law firm life for even a short while. It also can serve as a primer for those about to take the plunge. On mentoring, the book’s antihero writes: “I don’t want the responsibility of making sure that what I ask him to do is actually helping him. It’s helping the firm.” On significant others, he opines: “The firm just wants to buy the affection of the significant other...[maybe send them home with a] little stress ball they can squeeze.”

If you are a lawyer climbing the ladder at a large law firm, you will commiserate with Anonymous Lawyer’s internal struggle. If you are a lawyer in a small- or medium-sized firm and think that office politics must be even worse elsewhere, you will find solace in this book’s confirmation of your opinion. If you are a solo liberated from the backbiting of law firm life, this book will make the difficulties of going it alone seem worthwhile.

These commendations for Anonymous Lawyer must be accompanied by caution. Do not read the book around others. You will laugh out loud and embarrass yourself. And if you recognize yourself in the Anonymous Lawyer, find a new career path.

Michael A. Geibelson is a partner in the Business Trial and Litigation Group at Robins, Kaplan, Miller & Ciresi L.L.P. in Los Angeles.

REVIEWED BY MICHAEL A. GEIBELSON

By the Book
Classifieds

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$460—CLE+Plus members
$510—LACBA Barristers
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Leveraging Discovery Review Technologies
ON TUESDAY, FEBRUARY 6, the Association will host a session highlighting the best practices for corporate counsel and large law firm litigators who find themselves drowning in paper and electronic discovery. Alexander H. Lubarsky and John Patzakis will explore the legal, technical, and ethical issues that face the corporate litigator who must produce and review electronic data, paper records, transcripts, and instant messaging. This session will highlight the technologies and strategies that have been adopted by the large law firm and corporate legal communities. Those who attend will learn of local data hosts that are as simple to use as e-mail yet as robust as a SQL database. The speakers will also discuss the case law, statutes, and court rules that are changing discovery review, and the metadata embedded in electronic discovery that is creating new rules for privilege and authenticity. Experts in the field of complex discovery will show how to come out a winner. The program will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9. On-site registration and the meal will begin at 5 P.M., with the program continuing from 5:30 to 9:15. The registration code number is 009382. The prices below include the meal.

$50—CLE+Plus members
$95—LACBA members
$125—all others
$80—Corporate Law Section members
3.5 CLE hours, including 1 hour in ethics

PERSUASIVE LEGAL WRITING
ON WEDNESDAY, JANUARY 24, the Los Angeles County Bar Association will host a course led by appellate attorney Daniel U. Smith on how to write with brevity, simplicity, and clarity—or the opposite of what lawyers learn in law school. The course shows how to persuade a skeptical judge by creating headings, paragraphs, and sentences that embody brevity, simplicity, and clarity. The course offers key steps for easy drafting and effective editing. Attorneys of all experience levels will benefit from this program, which provides 3.5 hours of specialization credit in appellate practice. The program will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Reduced parking is available with validation for $9.

On-site registration and the meal will begin at 5 P.M., with the program continuing from 5:30 to 9:15. The registration code number is 009381. The prices below include the meal.

$120—CLE+Plus members
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The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://calendar.lacba.org/. For a full listing of this month’s Association programs, please consult the County Bar Update.
Plain Language for Civility in Discovery

IN THE MAY 2006 California Bar Journal, California State Bar President Jim Heiting proposed a four-hour School of Ethics in Advocacy. The article urges “ethical practice with competence” and “renewed ideals of professionalism.” While both goals are laudable, is a four-hour course in being nice and competent going to make a significant difference in a culture based on ruthless competition? Our society, rightly or wrongly, has gone far beyond the day when integrity, dignity, and a reputation for honesty have currency.

In many quarters today, including the legal profession, giving up a tactical advantage because of an ethical concern simply brands the ethical actor as a fool or an incompetent. This was not always the case. The attorney for the merchants of Boston who brought suit against the English Crown on the eve of the American Revolution was James Otis. At the time, he was a judge of the Admiralty Court in Boston. These judges derived income from the sale of seized contraband, so Judge Otis did quite well. But Otis was a man of integrity. While in practice, Otis once nonsuited his client, during trial, when he noticed in the man’s possession a receipt for a repaid debt about which Otis’s client had lied, stating the debt was never paid and the receipt never issued. What lawyer today could do the same without suffering admonition from the bench and a malpractice suit? Will any four-hour course in civility bring James Otis back?

Two Proposals

My proposals: First, discovery should be automatic and complete. Not even the required early meetings and joint reports are sufficient to create a discovery system that serves the interests of justice before serving the interests of a party. The burden for obstructing discovery should be placed on the objecting party. The rule should be:

Parties must produce all documents in their possession, or reasonably obtainable, which arise from or relate to the subject matter of the captioned lawsuit except privileged documents properly logged.

This rule would not permit any objections to discovery except for privilege. Produce everything, or a privilege log, or move to quash. If you do not want to respond, the burden should be on you to show why response would be antithetical to the interests of justice. You should pay the filing fee and file the papers necessary for a hearing so that a judge can tell you that the request seems pretty clear, that you should produce the documents, pay the sanctions, and have a nice day. This rule, if implemented, would go a long way toward eliminating the acrimonious discovery disputes behind much unethical, obstructionist behavior.

The rule suggested here may give a boost to counsel so incompetent they cannot request a survey report without confusing a noun and a verb, but it does further the purpose of our system of justice—resolving disputes as efficiently, fairly, and nonviolently as possible. Then too, even if an attorney is semiliterate and has drafted requests that are truly incomprehensible (usually not the case) eventually the request will be made with the correct noun and verb in the correct places. So let us just share the information and get on with it. No one intentionally serves dumb discovery requests. A phone call should settle any legitimate confusion.

Second, civility should start with the courts and the public administrators of the justice system all the way from police officers to counter clerks in the courthouse. A courtroom should not be a hos-

What lawyer today could do the same without suffering admonition from the bench and a malpractice suit?

tile environment because that does not further the administration of justice. Third, sanctions should be real. Judges, while remaining courteous, should not be afraid to issue harsh penalties for deception, hiding evidence, and otherwise undermining justice. I once heard a superior court judge state, on the record in court, “I can’t order a party not to lie.” My immediate thought was, Why not? If it is so obvious the party was obstructing the discovery process, why not strike defense if, for example, the computer is not made accessible to an expert or the storage boxes are not fully reviewed by counsel and so certified to the court?

I expect that until ethics and civility have some obvious value to counsel, they will be employed selectively. Civility will not be seen as a profitable enterprise until significant value can be shown. Even the most contentious, unethical, and ignorant lawyer might understand that, if the penalty is severe and the reward enticing, professional courtesy is the way to go. So, the issue becomes, how do we ensure the scorched earth style of litigation is made unprofitable?

Even if certain rulings are modified on appeal, with some changes such as I propose, the bar will soon learn that the risk of having causes of action or defenses stricken (not to mention the cost of appeal) is too high to take chances. Clients should be made to understand an attorney does not make the facts of the case, does not create the documents at issue, and should not be expected to hide them.

It is time for attorneys to remember they are descendants of James Otis, not a long line of robber barons. It is time for civility and honor to be reintroduced into today’s real-world American system of justice. If it takes some new, firm discovery rules for that to be accomplished, so be it.

Martin L. Grayson, a former editor of Litigation, practices maritime and insurance law in Long Beach.
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