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**Stability** — sta’bil’i-ty, noun

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In the fictional work *Historias de cronopios y de famas*, the Argentine writer Julio Cortázar (1914-1984) envisions a parallel universe inhabited by “cronopios”—fuzzy green creatures who are idealistic, creative, and optimistic—and “famas”—other fuzzies who are methodical and well organized but rigid and unimaginative. Upon encountering a new city, for example, a fama will immediately survey its hospitals and hotels for all indicia of conventional sophistication. A cronopio will find the trains already departed, the hotels fully booked, and the taxi drivers indifferent. The cronopio, however, will spend the night dreaming of the beautiful city he has just discovered, confident that its inconveniences are simply day-to-day realities everyone must endure.

As we go to press, I along with a few thousand other lawyers have just returned from the State Bar Annual Meeting in Monterey, an event that more than once has made me think of Cortázar’s imaginary realm. Only a fama would arrive at one of the most stunning jewels of the California coast to spend the days in windowless conference rooms tethered to a Blackberry and the hope for a sprinkling of “rain” (i.e., client development). Only a cronopio would barely notice the countless hours passed indoors, would keep repeating how gorgeous the weather was, and would take inspiration from the humanitarians and scholars who speak for just an hour.

From a distance, the State Bar Annual Meeting looks just as irrelevant to our practices as Cortázar’s fictions. But a closer look at the bar’s recent history reveals the error of this assumption. Thirty years ago, this publication featured a tongue-in-cheek article titled “The Unmaking of a Bar Governor.” Authored by an individual who lost his race for the State Bar Board of Governors, the article advises those aspiring to a similar fate to keep “outside the establishment” and be “a minority of any kind.” The essay further explains that no woman had yet been elected, only one African American had served, and the “perks” of election included events at the Bohemian and California Clubs. Mind you, this was 1978, not 1958.

This year, the five newly elected members of the State Bar board (full disclosure: I am one of them) include three people of color and one woman. Notwithstanding the contrast this presents to the board described in these pages just a few decades ago, the board’s gender and ethnic composition is what I predict most of us will notice last and think about least in evaluating my fellow board members. What is far more striking are the extraordinary levels of professional excellence my board colleagues have attained, their steadfast commitment to the betterment of our profession, and their devotion of countless unbilled hours to the public interest. Indeed, what is remarkable to me in our new president is not so much the message of inclusiveness and diversity in her installation speech but her earlier campaign speech, in which she promised to work very hard to advance all of the bar’s aims and would ask her fellow governors to join her in the rigors of increased commitment.

All of this is consistent with my own conclusion that we are at our best as lawyers when we harness both our cronopio and fama proclivities. Like the fama on holiday, we know instinctively how to keep to a tightly wrought calendar and catch a tiny error buried deep within a dense manuscript. Like the fama on holiday, we know instinctively how to keep to a tightly wrought calendar and catch a tiny error buried deep within a dense manuscript. Like the fama on holiday, we know instinctively how to keep to a tightly wrought calendar and catch a tiny error buried deep within a dense manuscript. But, given the opportunity, many if not most of us relish the opportunity to use our legal abilities for the greater good.

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Distinguishing between Similar Causes of Action

THE DIFFERENCE BETWEEN $12.1 MILLION AND $250,000 can be one word. For example, in medical malpractice actions, plaintiffs often allege professional negligence and battery in the same complaint. In an action for professional negligence due to the defendant’s failure to obtain the patient’s informed consent, the plaintiff’s noneconomic damages are limited to $250,000 by the Medical Injury Compensation Reform Act, commonly referred to as MICRA. On the other hand, a cause of action for medical battery is not subject to the MICRA damage cap and can include punitive damages. Although the amount of damages available greatly differ, these two causes of action are actually closely related and can turn on whether the defendant failed to inform the patient of the nature of the treatment or only the risks of the treatment. Thus, understanding the nuances of these two causes of action is critical.

To demonstrate the point, in a medical malpractice case, the plaintiff alleges both professional negligence and battery. The jury returns a verdict awarding the plaintiff $12.1 million in noneconomic damages and over $600,000 in economic damages. The defense counsel, however, notices an error in the jury instructions. Specifically, the plaintiff did not observe the distinction between medical battery and negligent failure to obtain informed consent. As a result, the jury’s verdict is unclear as to whether a battery occurred. If the verdict is premised on medical battery, the defense counsel cannot cap the damages using MICRA. If the doctor’s conduct constitutes only professional negligence, then MICRA will limit the noneconomic damages.

The above fact pattern is based on Saxena v. Goffney. By failing to distinguish the two causes of action in the verdict form, the jury did not notice a clear finding of fact showing the doctor’s conduct was not merely negligent failure to obtain informed consent but battery. The court of appeal reversed the trial court and granted the defendant’s motion for a judgment notwithstanding the verdict on the battery cause of action. In addition, the court of appeal ordered the lower court to reconsider the motion to apply the MICRA damages cap. The result was that the $12.1 million in noneconomic damages became a target for MICRA’s cap of $250,000.

Attorneys seeking to understand this result may read the major cases on point to help distinguish between the two closely related causes of action. California courts have provided guidance in distinguishing between the risks and nature of a medical procedure. In Bereky v. Anderson, the court of appeal held that the defendant could be liable for battery when the plaintiff was not informed that a spinal puncture was part of a proposed treatment. The issue for medical battery was not whether the defendant should have told the plaintiff of the risk of injury but whether the defendant gave the plaintiff sufficient information as to the nature of the treatment so that the plaintiff could intelligently decide whether to undergo such an invasive procedure. After the ruling in Bereky, a new cause of action emerged: negligent failure to obtain informed consent.

Specifically, Cobbs v. Grant held that this negligent action occurs when an undisclosed complication results, “the occurrence of which was not an integral part of the treatment procedure but merely a known risk.” When an undisclosed complication results from a medical procedure, there is no intentional deviation from consent as in battery. Rather, the defendant has failed to meet the duty of care to disclose pertinent information regarding risks and results. Thus, the action is based in negligence. Because the negligent failure to obtain informed consent was carved out of medical battery, the distinction between the two actions is easily blurred.

Consulting model jury instructions may also be helpful in distinguishing these causes of action. For example, the Judicial Council of California Civil Jury Instructions for medical battery and negligent failure to obtain informed consent both ask whether the defendant performed a procedure without the patient’s informed consent. The difference is that the negligent failure to obtain informed consent instruction goes further and asks if a reasonable person would have consented if the defendant had informed the patient of the treatment’s results and risks. Thus, mirroring case law, the model jury instructions draw a distinction between the two causes of action by focusing on the risks of treatment rather than the nature of the treatment. Admittedly, this distinction in the jury instructions is not clear—as the court of appeal in Saxena points out.

The lesson of Saxena is to understand the elements of similar causes of action. Reading major cases and consulting model jury instructions can help identify elements that are prone to confusion. These steps will help identify the word choices that can mean the difference between $250,000 and $12.1 million.

1 See CIV. CODE §3333.2.
3 Cobbs v. Grant, 8 Cal. 3d 229, 239-40 (1972).
6 Cobbs, 8 Cal. 3d at 241.
7 CACI No. 530A, 533.
8 Saxena, 159 Cal. App. 4th at 325 n.4.

Jonathan Howell is an associate at Kamel and Maxwell in Los Angeles specializing in medical malpractice and civil litigation defense. He would like to thank attorneys Karla Pleitez, Edward Howell, and John Maxwell for providing editorial comments for this article.
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REAL ESTATE DEVELOPMENT in the United States is financed, to a great extent, with borrowed money. When lenders are uncertain about future market conditions, they make fewer loans. When lenders constrict the flow of lending, the resultant lack of liquidity causes a slowdown in transaction volume and drives real estate prices down. The decline in property values makes lenders even more reluctant to lend. As a result, the attention of lenders today is focused less upon making new loans and more upon being repaid for the loans that are presently outstanding.

One hedge against the higher risk of nonpayment created in uncertain times is the guaranty. The most basic and popular form of guaranty is the payment guaranty. If a guarantor in California is not the borrower itself, an alter ego of the borrower, or an entity that has direct personal liability for the obligations of the borrower (such as a general partner of a borrower that is a limited partnership), and if the guaranty is properly drafted to include waivers of suretyship and antideficiency-related defenses, then the lender will be able to obtain a judgment on the guaranty for amounts owed by the borrower and not realized through foreclosure.

If the lender is financing the construction of improvements, an additional guaranty is available: the completion guaranty. In its most rudimentary form, a completion guaranty is a promise by the guarantor that the borrower will perform the obligations it undertakes, pursuant to the loan documents, to complete construction of specified improvements on the real property collateral, and that the completion guarantor will perform the borrower’s obligations if the borrower fails to do so.

Lenders in California whose loans are secured with real estate have special reasons to use payment and performance recovery guaranties. Unlike lenders in most other states, California real estate-secured lenders cannot sue directly upon a promissory note to recover the debt without jeopardizing their rights with respect to the real property collateral. If the lender wants to recover a monetary award directly from the borrower, the lender must run the gauntlet of California’s antideficiency and one-form-of-action rules.

The effect of the one-form-of-action rule is that, when a lender’s loan is secured by a deed of trust on real property, the only action the lender can properly bring is one for recovery of the debt that includes a count for a court-supervised foreclosure of the deed of trust. Judicial foreclosure involves a full-blown lawsuit, complete with complaint, answer, motions, discovery, and trial. Needless to say, it is time-consuming and expensive for a lender to pursue such a lawsuit to completion.

Following the trial, the antideficiency laws govern the ability of the lender to recover a deficiency judgment (i.e., a judgment for recovery of any balance of the defaulted debt that remains owing after application of foreclosure sale proceeds). The deficiency recovery will be limited to the lesser of the actual deficiency or the difference between the foreclosure sale price and the fair market value of the foreclosed property as established through a fair value hearing. A lender who is successful at this stage can obtain a judgment for the deficiency. Next comes the process of actually collecting money, although another problem remains. If a deficiency is established, the borrower will have a statutory right to redeem the property from foreclosure by tendering the foreclosure sale price within one year after the foreclosure sale date. The existence of this right of redemption puts a substantial chill on the ability of the lender to resell the foreclosed real estate.

Thus, the lender who resorts to judicial foreclosure in order to make a full recovery of its defaulted loan must make significant expenditures of time and money that are likely to end with a reduced value of the foreclosed property. As result, California real estate lenders are rarely willing to go through the judicial foreclosure process that is necessary to establish a deficiency judgment against the borrower.

Robert E. Williams is a partner at Sheppard, Mullin, Richter & Hampton LLP in Los Angeles who specializes in real estate finance. He gratefully acknowledges the research assistance of Allison Twist Underwood, an associate at Sheppard Mullin, and Roger Steinbeck, a summer associate in 2007.
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As a result of the difficulties associated with judicial foreclosure, the road to remedies more often traveled by California real estate-secured lenders is exercise of the private power of sale contained in the deed of trust, culminating in a trustee’s sale of the property collateral. This private, nonjudicial foreclosure process is governed by the California Civil Code.9 It can result in a foreclosure sale in as little as three months and 21 days, and it is inexpensive in comparison to a lawsuit for judicial foreclosure. When the trustee’s sale takes place, it is final, and there is no statutory right of redemption. But this efficiency and finality come at a cost: the California antideficiency rules10 provide that the lender has no right, following the trustee’s sale, to obtain a deficiency judgment against the borrower.

In view of the hurdles placed in the path to recovery of money by the one-form-of-action and antideficiency rules, it makes sense for California construction lenders to seek assurance that the improvements that are financed with the proceeds of their loans will actually be built. After all, construction lenders underwrite their loans on the basis of the value of the real property collateral as improved with the buildings and other improvements to be financed with the proceeds of the construction loan. The construction lender sizes its loan in accordance with a loan-to-value ratio that compares the amount of the loan to the projected value of the improved real property, as determined by an appraisal of the prospective value of the property in its fully improved state. To the extent that the borrower fails to complete the improvements, a gap will be revealed between collateral value and the amount of the loan. It makes sense to close this gap by obtaining a guaranty of completion of construction.

In the minds of most construction lenders, a completion guaranty operates in just this way and, for this reason, construction lenders make frequent use of completion guaranties. Many construction lenders believe that, in the unhappy event of a borrower’s failure to complete construction, the lender will be able to force the guarantor to finish the improvements.

However, the seminal case on this issue makes it clear that the remedies provided to a construction lender by a completion guaranty do not work in the manner envisioned by most lenders. In fact, the remedies are quite complex and difficult to implement. In view of the widespread use of completion guaranties, it is, at first impression, surprising that there is very little case law in California with respect to their enforcement. It seems fair to assume that one reason for the dearth of reported cases dealing with completion guaranties is that completion guaranties are not often enforced.

**Marina View**

The leading California case on completion guaranties, Glendale Federal Savings & Loan Association v. Marina View Heights Development Company, Inc.,11 was decided more than 30 years ago, and the law established in that case has never been substantially revised or reconsidered. The case involved two loans—one fully disbursed, and one only partially disbursed, at the time of default—and two completion guaranties. It is important for any practitioner who uses completion guaranties to become familiar with the rules for their enforcement as announced in Marina View.

First (and most significantly, in dealing with the widely held perception of the completion guaranty as a device to ensure that construction of improvements will occur), it should be noted that the issue before the court in Marina View was only the measure of damages that could be awarded for breach of a completion guaranty. The court did not even consider whether the completion guarantors could be compelled to complete the improvements. Thus, the first lesson that emerges from a consideration of Marina View is implicit: A court will not specifically enforce the obligation of a completion guarantor to construct improvements. Courts are, in general, reluctant to become embroiled, through the exercise of equitable powers, in administration of a complex business transaction.

This reluctance certainly makes sense in the context of a construction financing. It is hard to imagine a court supervising the progress of construction. Monitoring the quality and progress of construction of improvements is a task for which construction lenders depend upon specially trained employees or outside contractors. A court that sought to engage in such supervision would probably need to appoint special receivers or other officers and would need to follow the progress of construction through a protracted series of hearings. A California trial court is unlikely to grant such relief in the context of a defaulted private construction financing. Thus, the remedy available to a construction lender under a completion guaranty is not the equitable remedy of specific performance of completion of construction but an action for money damages.

The second lesson of Marina View is how to measure damages available to a construction lender under a defaulted completion guaranty. The Marina View court drew a distinction between damages available to lenders and to owners. Glendale Federal Savings and Loan Association, the lender in Marina View, foreclosed upon the real property collateral by power of sale and sought to recover from the completion guarantors the cost of the unfinished construction work. The court held that recovery was not allowed:

> The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff’s property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed....A different rule applies, however, where improvements are to be made on property not owned by the injured party...Glendale’s interest in the land was solely that of a secured lender....The measure of damages, therefore, is the value which the improvements, had they been completed, would have added to the security because that is the contractual benefit of which Glendale was deprived.12

Glendale argued that its damages should not be limited as a result of the fact that it was a lender with a deed of trust on the property, rather than an owner. It pointed out that it became an owner as a result of foreclosure of its deed of trust. But the Marina View court rejected this argument:

> It is a settled principle that general damages that may be awarded for breach of contract are ordinarily confined to those which would naturally arise from the breach, or which might have been reasonably contemplated or foreseen by the parties at the time they contracted, as the probable result of the breach....At the time the loan transaction was entered into, [the borrower’s agreement to construct the improvements and the guarantors’] guaranty were intended as additional security devices only, not a contract to construct improvements on Glendale’s land.13

Here, the Marina View court’s reasoning is very hard to follow. A limitation of damages to those that are foreseeable at the time of entry into the contract is a solid proposition, but it certainly seems that a completion guarantor should foresee that a deed of trust on real property may be foreclosed upon default in the obligation secured, and that the lender may become the new owner. Why does a construction lender take a deed of trust to secure the loan obligation, if not to obtain either ownership of the property, or the cash paid at foreclosure by a competing bidder? But the holding in Marina View is clear: The measure of damages is the loss of value that results from failure to complete con-
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conclusion, not the lender's cost of completing construction.

A construction lender seeking to enforce a completion guarantee is not home free, however, even with a showing that the completion of improvements that are the subject of the completion guaranty would have made the collateral more valuable. As noted above, the court in Marina View dealt with two loans and two completion guaranties. It came to two different conclusions regarding liability, finding the guarantors liable with respect to one guaranty but not liable with respect to the other. The distinction drawn by the court between the two guaranties focused upon whether the construction lender was fully secured with respect to its loan, irrespective of whether the obligation to construct improvements was performed: “Glendale was entitled to damages only to the extent noncompletion of the improvements impaired its security interest. If Glendale had been fully secured on the date of foreclosure, it would have suffered no injury by reason of the failure to construct the improvements and would not have been entitled to damages.”

As to one of the loans, the court found that the lender did not sustain damage as a result of failure to complete the improvements, because the lender was “fully secured” even without completion of the improvements. The court did not elaborate on the approach to determination of whether the lender is fully secured. Construction lenders typically make loans at less than a 100 percent ratio of amount of loan to value of collateral (loan-to-value ratio). But here, the Marina View court seems content to merge the roles of the lender as lender and as owner, and it seems that the finding of “full security” is based upon a comparison of the lender's outstanding loan amount with the appraised value of the property in the hands of the lender, following foreclosure.

The loan as to which the Marina View court found that the construction lender was fully secured was not fully disbursed. However, because of its finding that the lender was fully secured, the court did not reach the issue of the effect of undisbursed loan proceeds upon the calculation of damages available under the completion guaranty. It seems fair to assume, however, that if a construction lender had not fully disbursed the proceeds of its loan that were allocated for the funding of the guaranteed works of improvement, and if the construction lender is eligible for the recovery of damages because it is held not to be fully secured, then the damages to the lender should be offset by the amount of loan proceeds not disbursed. This offset is a reasonable tradeoff, since the construction lender contracts to fund construction of improvements; hence, the construction lender expects to fully disburse the proceeds of its loan in exchange for completion of the improvements.

In view of the foregoing, the damages available to a construction lender under a completion guaranty can be formulated as follows:

The damages available to a lender under a completion guaranty equal the value of the project with improvements completed minus the sum of (a) the value of the project in its current state plus (b) undisbursed loan proceeds; provided that no damages will be available if the lender's loan is adequately secured irrespective of failure to complete improvements. This damage formula, derived from Marina View, is relatively simple. However, the formula represents the tip of a rather formidable iceberg of judicial procedure. To understand it, a comparison should be made of the judicial procedures required for enforcement of payment guaranties and enforcement of completion guaranties. Enforcement of a payment guaranty is a relatively simple matter. In the typical case of a payment guaranty executed concurrently with execution of the loan documents, the lender probably needs only to prove both the existence of the debt and the existence of the default, and to authenticate the guaranty. In order to establish a right to damages under a completion guaranty in light of the rules established in Marina View, the lender has a lot more work to do. The lender must prove the value of the property in its current state and the value that the property would have had if it were improved. This latter value is speculative and cannot be derived by simple application of a capitalization rate to the results of actual operations of the property. All of this will require appraisal testimony, and a completion guarantor wishing to defend against liability will be free to summon its own appraiser. This is the stuff of a fully contested lawsuit, with qualification of appraisers as expert witnesses, discovery, direct examination, and cross-examination. Conduct of a lawsuit involving this level of evidentiary complexity is likely to take a long time and cost a lot of money.

The Real Benefits of Completion Guaranties

The net results of Marina View are that the remedies available under a completion guaranty are not what they appear to be from the face of the completion guaranty document, and that those remedies are not aligned with the expectations of the construction lender. Does this mean that a completion guaranty is useless? Certainly not, but practitioners should educate themselves as to the limitations on those rights and remedies and, armed with that knowledge, reconsider both the use of completion guaranties and the drafting of completion guaranties when they are used.

It may not be particularly useful to obtain a completion guaranty from a deep-pocket guarantor who is willing to give a full payment guaranty. A payment guaranty, when given by a guarantor who possesses sufficient assets, can cause the lender's loan to be fully repaid. The lender who is lucky enough to find such a guarantor needs only a payment guaranty for full protection. Where the guarantor's assets are not sufficient to pay off the loan, it will still be easier for the lender to obtain a judgment on a payment guaranty than it will to obtain judgment on a completion guaranty.

On the other hand, if the guarantor is unable or unwilling to provide a payment guaranty, a completion guaranty may make sense. The construction lender makes its loan in reliance upon the increase in collateral value that will be provided by the construction of improvements, and a risk for the lender is that this increase in value will not occur because of a failure to complete construction. If the lender cannot address its loan exposure directly by obtaining a payment guaranty, addressing construction risk through a completion guaranty may be the next best thing.

If the construction lender chooses to obtain a completion guaranty, the lender and its counsel need to take into account some practical issues not considered in the Marina View opinion. Specifically, lenders and their counsel should consider what rights the completion guarantor should have in any undisbursed loan proceeds, and what conditions should be imposed on disbursement of those proceeds to the completion guarantor in order to fund completion. Because the construction lender's bargain entails full construction of improvements in exchange for full disbursement of loan proceeds, it is fair for the completion guarantor to require the construction lender to make undisbursed loan proceeds available in the event the guarantor elects to actually construct improvements—and the lender's damage remedy will be offset by the amount of undisbursed loan proceeds in any event. A well-drafted completion guaranty should incorporate the same conditions to disbursement that appear in the construction loan agreement (e.g., periodic requisitions, disbursement in accordance with a preapproved line item budget, an obligation to keep the loan in balance by depositing funds with the lender, retention of some percentage of loan proceeds pending completion, maintenance of payment and performance bonds, and so on).

In addition, the lender should remember
that disbursements of the loan increase the debt of the borrower and the lien upon the borrower’s property. Does the lender have the ability to make such disbursements to the completion guarantor absent a request for the same by the borrower? What if the borrower is bankrupt? In view of these concerns, it is wise to include, among the conditions to the lender’s obligation to disburse, receipt by the lender of a requisition from the borrower or its legal representative.

Because of the gap between likely expectations of the parties and the rule of damages announced in Marina View, it is a good practice for the completion guaranty to explicitly lay out the remedies available to the lender in the event of default. A concise statement of the damage formula would facilitate a meeting of the minds as to the obligations undertaken by the completion guarantor and would enhance certainty of enforcement. Spelling out the remedies available need not be viewed as a concession by the construction lender. After all, a description of the measure of damages will be consistent with applicable law, and will make it clear to even the most recalcitrant completion guarantor that it faces the prospect of a complex lawsuit and damages if it does not complete the improvements.

Another good idea would be to establish a mechanism for the selection of an appraiser who will make the determinations of value that are required in order to implement the damages rule from Marina View and to specify the appraisal methodology that is to be used in making those determinations. In order to address the offset for undischarged loan funds in a precise way, the completion guaranty can specify that only those undisbursed funds that are specifically allocated to funding of the guaranteed improvements—and not those allocated to other improvements, or to funding of construction-period interest or other reserves—should give rise to an offset.

**Specific Amounts**

Although one cannot be sure of its enforceability, a further drafting solution suggests itself. In stating the elements of damages for which the completion guarantor may be liable, it would be a good idea to include amounts expended by the lender or its agents in causing construction to be completed. It is true that the Marina View court disallowed the recovery by the lender of the costs of completion, on the basis of the distinction it drew between owners and lenders. But that distinction is the shakiest part of the holding in Marina View. It is very much in line with the expectations of the parties to a construction financing that the construction lender, when faced with a default, may need to step in and cause construction to be completed in order to minimize its loss. It is fair, therefore, to include reimbursement of the costs of such construction activity of the lender—whether incurred before or after foreclosure—among the obligations of the completion guarantor. Costs for which the completion guarantor could be obligated under this approach would include the full range of items includable as protective advances, including costs of hiring replacement contractors, subcontractors, and design professionals; costs of obtaining payment, performance, and lien release bonds; costs of procuring insurance; and costs of appointment of a receiver.

It would be nice if construction lenders could say that when they use a completion guaranty, it means just what they “choose it to mean—neither more nor less.” The problem is that, in view of the applicable California law, a completion guaranty is both less and more than most construction lenders would choose it to mean. Counsel armed with knowledge of the disparity between appearance and reality may be able to bring more certainty and predictability to the use of this basic construction loan document.

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5. Code Civ. Proc. §726. Strictly speaking, the borrower can compel the lender to style any collection action as a judicial foreclosure upon the real property encumbered by the deed of trust. However, the lender who violates the one-action rule is just as likely not to get a second chance. Bank of Am. v. Dzialy, 152 Cal. App. 3d 767 (1984); Security Pac. Nat’l Bank v. Wozab, 51 Cal. 3d 991 (1990).
12. Id. at 123-24.
13. Id. at 123.
14. Id. at 124.
15. Id. at 128.
16. Id.
17. Id. at 123-25, 127-28. For a thorough analysis of the elements of damages under Marina View and a compelling critique of the court’s distinction between the measure of damages applicable to owners and that applicable to secured lenders, see Timothy O’Brien, *Completion Guarantees: Misnamed and Misunderstood*, 12 Cal. Real Prop. J. 1 (Fall 1994).
Applying Reciprocal Easement Agreements to Retail Projects

**RECIPROCAL EASEMENT AGREEMENTS** (REAs) are commonly used in retail development when neighboring property owners want to develop their respective properties as one integrated shopping center. Often when more than one owner develops a shopping center, one of the owners acts as developer and the other is a major retailer (for example, Target, Wal-Mart, Home Depot, or Kohl’s). Although the developer may lease a portion of the property to the major retailer (in which case an REA will not necessarily be warranted, since the lease will provide for construction, operation, and management), if the retailer desires to purchase a portion of the property, it will be necessary for the developer and the major retailer to enter into an REA. It is used to detail the parties’ contractual agreement on such things as the construction of the shopping center, the architectural compatibility of the buildings, the use of the common area, and restrictions on use.

Many of the parties’ respective rights, as detailed in the REA, are considered easements, since they effectively allow one party nonexclusive use of the property of the other. The REA is usually a recorded document, and the contractual obligations set forth in the REA typically run with the land of the property encumbered by it. Without an REA, the major retailer (or developer) could potentially build whatever it desired whenever it desired; prevent the developer from using any part of the major retailer’s parcel for parking, access, or utility lines; or put its space to an incompatible use.

In this regard, an REA may be viewed as taking the place of a lease and the rights and obligations it typically sets forth between a developer and a major retailer. However, in most cases the major retailer will not view the two as being the same. The major retailer may view its ownership of a portion of the shopping center as giving it greater rights and fewer obligations than a lease. For example, a major retailer may want the unilateral right to lease its property to any other user following its acquisition of a portion of the shopping center, whereas if it leased the property, it would most likely allow the developer landlord the right to consent to certain assignments or sublets. However, without an REA that contains many of the same provisions normally contained in a lease, the operation of a shopping center that many parties own may be chaotic and ineffective.

To avoid the problem of having too many parties running a shared property, a typical retail REA sets forth many issues affecting the developer and retailer. An REA may be a two-party agreement (e.g., between the developer and the major retailer) or involve three or more parties (e.g., between the developer and multiple retailers). In addition, an REA may be between nonretailer property owners that want to jointly develop their respective properties for retail or other purposes (e.g., industrial, warehousing, or office). This type of REA is less common and deals with some but not all of the same issues that are usually covered in an REA between a developer and a major retailer. The typical two-party REA between a developer and a retailer addresses, among other things: 1) easements for parking, access, encroachments, and utilities, 2) construction and architectural compatibility, 3) operation of common areas, 4) taxes, building maintenance, and building insurance, 5) use, recapture rights, and rights of first offer, 6) covenants running with the land, term, and amendments, and 7) mortgagee protection provisions.

**Parking, access, encroachments, and utilities.** The REA should provide both parties with at least the most basic rights for their respective properties, so that they may be operated in harmony. Each party should have the right to access the other party’s property for vehicular parking and pedestrian access. For instance, the customers and employees of the major retailer (and operators on the developer’s property) will need the right to park anywhere they want within the shopping center (subject to an agreement by the parties to provide special areas for employee parking) and to walk anywhere they want within the shopping center. Customers of the occupants of the shopping center should view the property as being owned by one party and operated as a fully integrated shopping center (even though the property is owned by two or more different parties). Each party may also need the right to connect to the other parties’ utility systems (typically the major retailer ties into the developer’s utility systems for the shopping center). This enables utilities to be brought to each occupant’s premises by using another party’s utility mains or conduits and avoiding duplication of facilities and work. The parties may also need certain encroachment rights if their canopies or foundations minimally encroach upon the other party’s property.

**Construction and architectural compatibility.** The REA will typically require that the developer construct all the on- and off-site improvements for the shopping center, as well as the buildings to be located on the developer’s property. Similarly, the REA will commonly require the major retailer to be responsible for the construction of its building. The REA will typically provide rights for a party to review and approve the plans and specifications of the other party’s work, thereby creating a way to ensure architectural compatibility for the construction work. In addition, the REA will often require that each party construct its improvements pursuant to a mutually approved construction schedule. Depending on the nature of the deal, the REA (or a separate development agreement) will require that the major retailer reimburse the developer for an equitable share of the costs incurred by the developer to construct the shopping center’s on- and off-site improvements.

**Operation of common areas.** The REA should require that at least one party operates, insures, and maintains the common areas of the shopping center. The party with this responsibility is usually the developer or a third-party manager appointed by the developer. The manager should be obligated to keep the common areas in a neat, clean, and attractive condition, and then to charge the parties to the REA for their respective prorated shares of common area costs. If the

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developing a poor job operating and maintaining the common area, the major retailer often has the right to take over the operation and maintenance of the common areas located on its property, although sometimes this takeover right may apply to the entire common area in the shopping center. Instead of one party being responsible for the operation of the common areas, sometimes an REA will provide for each party to be responsible for its own portion of the shopping center. Again, in this case, the REA should require that such operation and maintenance meet certain standards of quality, failing which the other party will have certain well-specified remedies.

**Taxes, building maintenance, and building insurance.** REAs usually require each property owner to pay the property taxes that relate to its respective property. In addition, each party is typically required to maintain the appearance of the buildings on its property in an attractive manner. Each party may also be required to maintain first-party insurance on the buildings located on its property (note, however, that in the event of a casualty, each party is usually given the right to raze the building improvements located on its own property or to rebuild them to their former condition). Regardless of a party’s responsibility for buildings on its property, most REAs require that common area improvements located on a party’s property be rebuilt following a casualty. Although this obligation is typically the responsibility of the developer, in some cases it may be the responsibility of each property owner.

**Use, recapture rights, and rights of first offer.** Some REAs may require the major retailer to use its property for a particular use or, in turn, restrict uses on the developer for the benefit of the major retailer. In the event that the major retailer is required to make a particular use of its property and ceases to do so for a specified period (usually six months, but often subject to extension for remodels, casualties, or other events outside the control of the major retailer), the developer may be given the right to purchase the major retailer’s property for its fair market value or other negotiated price. In theory, this gives the developer the right to control its real estate or to lease or sell the major retailer’s property to a user that will use its property for a retail use compatible with the remainder of the shopping center. The REA may also provide that in the event that either party desires to sell its property to an unaffiliated third party, the other party will have, for a short time, a right of first offer to purchase the selling party’s property. In other words, the selling party has an obligation to undergo good faith negotiations with the other party to the REA before selling the property to the unaffiliated third party. If either a right to purchase or a right of first offer is contained in the REA, the buying party should be required to pay a price that is agreeable to both parties. In the event that the parties are unable to reach an agreement on price within a short time, the party desiring to sell its property would have the right to sell it to the unaffiliated third party. However, the REA may require the selling party to again offer the property for sale to the other party if it is unable to sell the property within a specified time for a price equal to or greater than 95 percent of the purchase price offered by the other party.

**Covenants running with the land, term, and amendments.** The REA should specifically provide that the rights and obligations set forth in the REA run with the land of the property subject to the REA. In other words, the entity owning the property that is subject to the REA will be subject to the terms and provisions set forth in the REA. In addition, the REA should specifically provide for the term of the REA and the method by which the REA may be amended. The REA should provide that the easements necessary for a party to access the public streets surrounding the shopping center and to use the shopping center utility systems run in perpetuity. This will most likely be required by the governing body with jurisdiction over the property as a condition to the recordation of the subdivision map creating the parcels that are subject to the REA. In some REAs, the parties agree that the easements for parking will run in perpetuity. Typically, the REA cannot be amended without the approval of the developer and the major retailer. However, the REA should be clear as to which parties have this approval right if one party’s property is subsequently subdivided into multiple properties or owned by multiple parties.

**Mortgagee protection provisions.** The REA should contain provisions for the benefit of the lender of each party to the REA. In the event of a default by one party to the REA, the nondefaulting party should be obligated to notify the defaulting party’s lender (to the extent it has been given notice of the lender) and allow the lender to cure the default. In addition, the REA should provide that a breach of any of the covenants or restrictions contained in the REA will not defeat or render invalid the lien of any lender made in successive owners, the REA must be recorded in the Office of the Recorder of each county in which the land is situated. CIV. CODE §1468(d).

4 Civil Code §1460 defines covenants running with the land as “certain covenants, contained in grants of estates in real property, [that] are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them.”

5 Easements expressly created through an REA should be restricted to the specific, limited, and definable use or activity contemplated by the parties because the extent of the easements are determined by the terms of the grant or the nature of the enjoyment by which it was acquired. CIV. CODE §806.

6 The owner of the property burdened by the easement has no obligation to maintain or repair the easement unless the parties enter into an agreement that alters their legal responsibilities and imposes an obligation of maintenance on the servient tenement owner. Herzog v. Grosso, 41 Cal. 2d 219, 228 (1953). The owner of an easement has the statutory duty to maintain and repair the easement. CIV. CODE §823.

7 Also known as an exclusive use provision, this is essentially a covenant not to permit other occupants of the shopping center to operate a business that would compete with the business of the major retailer. For case law discussing the legality of such limited constraints on trade, see Great Western Distillery Prods., Inc. v. Wuthen Distillery Co., 10 Cal. 2d 442, 448-49 (1937); Martikian v. Hong, 164 Cal. App. 3d 1310, 1314 (1985); Borman, Inc. v. Great Scott Super Markets, Inc., 433 F. Supp. 343, 349-51 (E.D. Mich. 1975); and Optivision, Inc. v. Syracuse Shopping Center Assocs., 472 F. Supp. 665, 674-81 (N.D. N.Y. 1979). See also Jeffrey N. Brown, Use Provisions in Commercial Leases, LOS ANGELES LAWYER, Jan. 2006, at 21.

8 The requirements for the covenants in the REA to run with the land are set forth in Civil Code §1468.

9 As a general rule, restrictions on land may be amended or terminated by the execution of a mutual agreement signed by all the property owners subject to the restrictions. RESTATEMENT (FIRST) OF PROPERTY §557. However, the parties may also agree to an expiration date or modified procedures in the REA.

10 For sample mortgage protection provisions in the analogous area of landlord-tenant retail leasing, see Gary Blick, Estelle Brafl & Tamir Stein, Default and Remedies, in RETAIL LEASING—DRAFTING AND NEGOTIATING THE LEASE §27.55-27.56, 777-79 (CEB 2007).
Two cases pending before the California Supreme Court will address liability insurance coverage for accidental consequences of intentional acts

It may seem like a truism that liability insurance only covers accidents. But it’s not always true. In certain nonaccidental circumstances, including alleged assaults and batteries committed in self-defense, California’s courts have consistently held that insurers are duty bound to defend policyholders. Two cases now before the California Supreme Court, Delgado v. Interinsurance Exchange and Jafari v. EMC Insurance Companies, raise a related issue: When a liability policy covers injury arising from an “occurrence,” which is defined as an “accident,” does the insurer have a duty to defend an action for assault if the complaint alleges the insured was acting under an unreasonable and negligent belief that he or she was acting in self-defense? The outcome may alter decades-old authority concerning coverage for unexpected and unintended damages of intentional acts.

Much litigation over the issue has been and continues to be waged. In fact, after the supreme court granted the insurers’ petitions for review in Delgado and Jafari, the Second District Court of Appeal handed down two decisions addressing insurers’ duty to defend claims for alleged intentional acts. In one, the court of appeal continued to apply a strict standard to intentional acts of a sexual nature and held that the insurer was not obligated to defend the insured against such claims. In the other, more recent decision, the court distinguished an alleged intentional act from its accidental consequences, and held the insurer was obligated to defend a suit for consequential damages.

The standard commercial (formerly comprehensive) general liability (CGL) policy provides coverage for “damages because of bodily injury or property damage... caused by an occurrence.” The term “occurrence” is often defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” The policy

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also typically provides an exclusion of coverage for “bodily injury or property damage neither expected nor intended by the insured.” 15

Additionally, Insurance Code Section 333 provides that “[a]n insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured’s agents or others.” This deceptively simple statute is followed by more than 40 pages of annotations. Indeed, the alleged commission of an intentional act is probably the most common ground for an insurer’s denial of tender or reservation of rights, and policyholders and insurers have been fighting over it for at least 50 years. 6

Gray v. Zurich Insurance Company is the seminal case in which the supreme court recognized that “the carrier must defend a suit which potentially seeks damages within the coverage of the policy.” 7 Dr. Vernon Gray, the insured, tendered to Zurich, his insurer, a lawsuit that had been filed against him for assault arising out of a road-rage altercation between him and another driver. 8 Gray advised Zurich that he had acted in self-defense, after the plaintiff left his vehicle, approached Gray’s car, and jerked open the door. Zurich denied tender on the ground that the complaint alleged an intentional tort.

The court held Zurich was obligated to defend Gray and to pay the judgment awarded against him in the suit Gray tried and lost at his own expense. The opinion rested on a number of legal and factual grounds. Among them were the court’s finding that Zurich’s policy failed clearly to define the application to the duty to defend of the exclusion of coverage “for bodily injury or property damages caused intentionally by or at the direction of the insured,” particularly in view of insurance language promising to “pay on behalf of the insurer all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage.” 9

In support of its legal analysis, the Gray court cited multiple cases for the proposition that an act that may be “intentional” or “willful” in legal terms does not necessarily fall outside insurance coverage. 10 The court observed that Gray “might have been able to show that in physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not commit willful and intended injury, but engaged only in nonintentional tortious conduct.” 11 In the 42 years since Gray was decided, courts have repeatedly cited it for the proposition that CGL coverage may be available for intentional acts committed under circumstances of self-defense. 12

Delgado and Jafari

The Delgado case currently pending before the supreme court arises out of allegations somewhat similar to those in Gray. Delgado is an insurance bad faith action under Insurance Code Section 11580. In the underlying action Delgado sued Reid, who was insured by the Auto Club, for damages allegedly resulting from an assault and battery that, Delgado alleged, Reid had committed, albeit unreasonably, in self-defense. Reid tendered Delgado’s suit to the Auto Club, which rejected it on the grounds that there was no “occurrence” but rather an intentional, unprovoked attack that was not an accident and thus was excluded under the terms of his policy and Section 333. Reid and Delgado stipulated to judgment for Delgado on his claim for negligence, with a covenant not to execute and an assignment of Reid’s claims against the Auto Club for failure to defend. 13

The trial court sustained the Auto Club’s demurrer to Delgado’s subsequent bad faith action, 14 but the Second District Court of Appeal reversed. 15 The court cited no fewer than seven cases to support its conclusion that the facts alleged in the underlying action against Reid presented the possibility of coverage under the policy. 16 Those cases included Gray and Mullen v. Glens Falls Insurance Company. 17 Mullen was a coverage action arising from a suit against Mullen for alleged injuries that resulted from a fight that the court viewed as having been started—for all Mullen’s insurer could have known—by the plaintiff, whom Mullen struck in self-defense. In holding the defend-
produces the damage. Clearly, where the insured acted deliberately with the intent to cause injury, the conduct would not be deemed an accident. Moreover, where the insured intended all of the acts that resulted in the victim’s injury, the event may not be deemed an ‘accident’ merely because the insured did not intend to cause injury. Conversely, an ‘accident’ exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity.”  

The Jafari court also distinguished Quan v. Truck Insurance Exchange, another case involving allegations that the insured committed sexual assault and rape, for the same reasons it found Mendez inapposite: “Because the sexual assault was deliberate, the Quan Court concluded there was no ‘accident’ within the meaning of the policy and thus no coverage.” It quoted language from Quan rejecting the possibility that the insurer might be held liable for physical injuries caused by “accidentally” touching, kissing, embracing, or having sex with the claimant and emphasized a part of that language: “nor is there any additional ‘happening’ to combine with these necessarily deliberate acts so as to produce an ‘accident’ giving rise to bodily injury.”  

Thus the Jafari court found “the definitions provided in [Mendez and Quan] [did] not foreclose the possibility acts in self-defense can be an ‘accident’ and thus fall within the coverage provision of the policy.” Indeed, the court read those opinions to “support the finding [that] acts in self-defense can be an ‘accident’ where the third party’s actions provoking the self-defense response were the unforeseen and unexpected element in the causal chain of events making the insured’s acts in self-defense unplanned and involuntary. Under these courts’ definitions,” the court reasoned, “it is the unexpectedness of the third party’s actions which creates the ‘accident’ within the meaning of the coverage clause.”  

In Jafari, the court understood the Gray decision as a statement that courts must take the broad view of any incident raising the question of self-defense when determining whether there has been an unexpected and unintended force, or happening, in the causal chain of events creating the “accident.” Therefore, according to Jafari, “the third party’s actions prompting an insured to act in self-defense are part of the causal chain of events leading to potential injury. In the usual case the third party’s actions which prompt the need to protect self or others will be the unintended, unexpected, unplanned and unforeseen event constituting the ‘accident.’” Further, the court stated:  

The provoking party’s actions are an integral part of the overall incident. The insured’s response in self-defense often will be intentional when the insured fears serious bodily harm or death. Other times the insured could be acting purely reflexively in responding to the third party’s real or perceived threat. In this sense, the insured’s acts in self-defense are involuntary, not wrongful, and triggered by the unexpected and unforeseen threat presented by the provoking third party.  

The Jafari court concluded that “properly viewed, even deliberate acts of self-defense in response to unexpected, unforeseen and unintended events by the third party are ‘accidents’ and give rise to the potential for liability under the policy, and hence the obligation to provide a defense.”  

On August 3, 2007, the supreme court granted review of Delgado and did the same for Jafari on November 12, 2007, but deferred consideration of the case pending the outcome of Delgado. The parties (and amici) have fully briefed the Delgado case, but as of November 2008, oral argument had not been scheduled.  

The Wright Concerns  
Meanwhile, the courts of appeal continue to consider cases involving allegedly intentional acts and policyholders’ claims that their insurance companies owe duties to defend or indemnify. In March 2008, the court of appeal issued its opinion in Lyons v. Fire Insurance Exchange. The court cited Mendez and Quan in echoing the holdings of those cases that allegations of false imprisonment in the context of sexual assault raised no potential of coverage under the CGL policy the defendant had issued to the plaintiff—a former Major League Baseball player known to his teammates as “Psycho.” The claims therefore triggered no duty to defend.  

Lyons fits into a long line of cases rejecting a defense or indemnity against claims of sexual molestation. But in cases involving less prurient facts, claims for damages that are unintentional and unexpected consequences of an intentional act are held to trigger the insurer’s duty to defend.  

For example, State Farm Fire and Casualty Company v. Superior Court (Wright) arose from the tender of an action against State Farm’s insured for personal injuries the plaintiff suffered when the insured threw him into a swimming pool, and he landed on the pool’s cement step and broke his collarbone. State Farm rejected tender on the grounds that the plaintiff’s injuries were not caused by an “occurrence” or “accident” as the policy defined those terms. The insured settled the underlying action and assigned all rights under his policy to the plaintiff.  

At the trial of the plaintiff’s action against State Farm, the court found the insured did not intend to injure the plaintiff but rather simply wanted to get him wet. As recounted by the appellate court, “the trial court recited the rule that when an injury is an unexpected or unintended consequence of the insured’s conduct, it may be characterized as an accident for which coverage exists.” Because the injury was neither expected nor intended, the trial court ruled State Farm owed a duty to defend its insured against the allegations of the underlying action.  

The Wright court started its analysis by noting the meaning of the term “accident” in insurance law is not settled. The court reviewed a number of cases, including Quan, and arrived at the conclusion that “an accident can exist when either the cause is unintended or the effect is unanticipated.” The court cited with approval the Mendez defin-
vention of “accident” that Jafari, too, had emphasized, requiring an unintended and fortuitous aspect in the causal series of events leading to the injury or damage.49

The court described a series of illustrative paradigms. In one, a batter hits a baseball during a game with the intention of hitting a home run but, because of his stance and the angle of contact between bat and ball, sends it through a window in foul territory instead. In another, an intentionally speeding driver negligently hits another car. Both are accidents, according to Wright. In the baseball paradigm, one of the aspects in the causal series of events—too much force at an inadvertent angle—was unintended by the batter and thus fortuitous. The second paradigm was chosen from the Mendez opinion, in which the court explained that “the act directly responsible for the injury—hitting the other car—was not intended by the driver and was fortuitous. Accordingly, the occurrence resulting in injury would be deemed an accident.”50

The Wright court likened the plaintiff’s claim to the paradigms. State Farm’s insured deliberately picked up Wright and threw him into the pool, but he did not intend or expect the consequence that Wright would land on a step and be injured. “[T]he act directly responsible for [the plaintiff’s] injury, throwing too softly so as to miss the water, was an unforeseen or undesigned happening or consequence and was thus fortuitous,” the court concluded.51 “The event here was an accident because not all of the acts, the manner in which they were done, and the objective accomplished transpired exactly as Lint [the policyholder] intended.”52

The Wright court distinguished many of the cases on which State Farm relied as involving sexual harassment or sexual assault, or claims in which “the insured intended all of the acts in the causal chain, including the injury.”53 And it rejected “`State Farm’s argument that we should apply `fortuity’ solely to the act causing the injury without reference to the injury, [because it] would result in no coverage at all.’”54

The court observed: In State Farm’s analysis, there could never be a covered event because all batters deliberately seek to hit baseballs and therefore engage in intentional acts, regardless of whether the property damage, namely, breaking windows, was intended. Likewise, there would never be a covered occurrence when an injury is occasioned by a negligent driver, who obeys the laws of the road, nevertheless miscalculates a lane change and hits another car. Under State Farm’s analysis all accident-based automobile insurance policies would be illusory.55

The analyses in Wright and Jafari seem intuitively correct. They are also consistent with the test the California Supreme Court applied in Montrose Chemical Corporation v. Superior Court.56 In holding the plaintiff had established facts triggering the insurer’s duty to defend it against claims arising from alleged discharges of toxic chemicals from the plaintiff’s manufacturing plant, the court recited a “test for ‘expected’ damage[,] whether the insured knew or believed its conduct was substantially certain or highly likely to result in that kind of damage.”57

Nobody ever threw someone in a swimming pool, or punched a threatening person in the nose, because he or she had insurance. But insurance ought to cover people for the consequences of things they do that, due to unforeseen factors (including an unprovoked attack), cause damage to others. That is certainly what a policyholder would reasonably expect.58

In line with these expectations, three courts in the state’s largest appellate district have in the last year alone found the potential for coverage in nominally intentional acts. There are plainly good reasons to provide such coverage. The supreme court will have the last word, of course. It could decide to reject some 50 years of precedent, or it could follow the reasoning of Jafari and the concerns expressed in Wright.

4 Compare Bank of the West v. Superior Court, 2 Cal. 4th 1234, 1238 (1992) (construing advertising injury coverage under “[c]omprehensive general liability insurance policies”), with Buss v. Superior Court, 16 Cal. 4th 35, 39 (1997) (resolving “issues relating to standard commercial general liability insurance policies, which were formerly called comprehensive general liability insurance policies”).
6 See Gray v. Zurich Ins. Cos., 65 Cal. 2d 263, 273 n.12 (1966) (string cite of cases “recogniz[ing] that an act which under the traditional terminology of the law of torts is denominated `intentional’ or `wilful’ does not necessarily fall outside insurance coverage,” leading with Fircro, Inc. v. Fireman’s Fund Ins. Co., 173 Cal. App. 2d 524 (1959)).
7 Id. at 275.
8 Id. at 267.
9 Id. at 266-67.
10 Id. at 273 n.12.
11 Id. at 277.
14 Id. at 678-79.
15 Id. at 676.
16 Id. at 681-86.
17 Mullen, 73 Cal. App. 3d at 170.
21 Id. at 889.
22 Id. at 889-91.
23 Id. at 889.
24 Id. at 890, 891.
25 Id. at 891.
26 Id. at 894.
27 Id. at 902.
30 Id. at 44.
33 Jafari, 155 Cal. App. 4th at 899.
34 Id. (citing Quan, 67 Cal. App. 4th at 601) (emphasis in original).
35 Id. at 899.
36 Id. at 900.
37 Id.
38 Id.
40 Id. at 889-90.
43 Id. at 321.
44 Id. at 321-22.
45 Id. at 322.
46 Id. at 323 (citing Interinsurance Exch. v. Flores, 45 Cal. App. 4th 661, 669 (1996)).
47 Id.
48 Id. at 325 (citing Hogan v. Midland Nat’l Ins. Co., 3 Cal. 3d 553, 559 (1970)).
49 Id. at 328 (citing Merced Mut. Ins. Co. v. Mendez, 213 Cal. App. 3d 41, 50 (1989)).
50 Id. (citing Mendez, 213 Cal. App. 3d at 50).
51 Id. at 329 (emphasis in original) (citations omitted).
52 Id. (emphasis in original).
53 Id.
54 Id. at 330.
55 Id.
57 Id. at 304-05.
58 See Bank of the West v. Superior Court, 2 Cal. 4th 1254, 1264-65 (1992) (Ambiguous policy provisions should be interpreted to protect the insured’s objectively reasonable expectations.).
Bankruptcy is often a refuge for individuals or businesses whose assets are threatened by pending litigation or judgments. While access to the bankruptcy court has been severely restricted in recent years by congressional changes to the U.S. Bankruptcy Code, the bankruptcy option remains for those defending civil lawsuits who subsequently require the benefits and protections afforded under bankruptcy law.

But what happens when the debtor is the one prosecuting a civil action, and he or she fails to disclose the pending or even potential civil action in the context of the bankruptcy proceeding? The result of this oversight or deception can be drastic, including the ultimate sanction: dismissal of the civil action.

When an individual or entity files a petition for bankruptcy protection under chapters 7, 11, or 13 of the Bankruptcy Code, a bankruptcy estate is created. Pursuant to Section 541(a)(1) of the code, the bankruptcy estate is composed of “all legal or equitable interests of the debtor in property as of the commencement of the case.”

The scope of Section 541(a)(1) is broad, encompassing both tangible and intangible property. Included within the wide sweep of “intangible property” under the section are prepetition causes of action held by the debtor. The bankruptcy estate encompasses all property of the debtor, even what is needed for a fresh start. As the U.S. Supreme Court has recognized, “[A]n estate in bankruptcy consists of all the interests in property, legal and equitable, possessed by the debtor at the time of filing, as well as those interests recovered or recoverable through transfer and lien avoidance provisions.”

The Bankruptcy Code affords debtors the right to exempt certain property from the

Part of any litigator’s due diligence should be to determine if the plaintiff has a pending bankruptcy action.

by Craig A. Roeb

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bankruptcy estate. Section 522 of the Bankruptcy Code directs what property a debtor may exempt. In chapter 7 proceedings, nonexempt property in a debtor’s bankruptcy estate is subject to administration by the trustee for the benefit of creditors—and this property includes pending lawsuits. As one court has explained, pursuant to Section 541, “a trustee in bankruptcy succeeds to all causes of action held by a debtor at the time a bankruptcy petition is filed.”

On appeal, the Eleventh Circuit held that the doctrine of judicial estoppel precluded a party from “asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.”

Subject to the specific exemption rules, the Bankruptcy Code seeks to ensure that all property of the debtor is included in the debtor’s bankruptcy estate for administration by the bankruptcy trustee. To accomplish that purpose, Bankruptcy Code Section 521(1) requires the debtor to file a schedule of assets and liabilities, a schedule of current income and expenditures, and a statement of financial affairs. A debtor has an “affirmative duty to disclose all of its assets to the bankruptcy court.” The required documents must be executed under penalty of perjury.

In completing the schedules, debtors have an absolute duty to report any and all interest they hold in property, even if they believe their assets are worthless or unavailable to the bankruptcy estate. Schedules must be complete, thorough, and accurate so that creditors are able to judge for themselves the nature of the debtor’s estate. The disclosure obligations of debtors are at the very core of the bankruptcy process. In fact, courts have said that meeting these obligations is part of the price that debtors must pay for receiving a bankruptcy discharge. As one court has noted: The dual purposes of a Chapter 7 bankruptcy case are to grant the honest debtor a discharge of his or her pre-petition debts, and to provide a mechanism for the fair and orderly distribution of the debtor’s assets that are subject to administration by the

Trustee. These purposes are fully realized when a debtor complies with the requirement that he or she submit accurate and complete information concerning the identification of creditors and assets. When an individual files for bankruptcy protection but fails to disclose an existing cause of action in his or her bankruptcy filings, such as the statement of financial affairs, and later receives a discharge, courts have held especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. The Court further noted that the “purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.”

In New Hampshire, the Court set forth several factors for courts to consider in determining whether to apply judicial estoppel.

Equitable Grounds

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position and then later seeking advantage by taking a clearly inconsistent position. In recent years, the doctrine of judicial estoppel has been asserted with increasing frequency as a defense to various claims. In New Hampshire v. Maine, the U.S. Supreme Court applied the doctrine to bar the State of New Hampshire from taking a different position from that taken by the state during litigation in the 1970s. It explained that “under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” The Court further noted that the “purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.”

First, the later position must be clearly inconsistent with the earlier position. Second, if a party succeeds in persuading a court to accept that party’s earlier position, the judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Third, the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped from attempting to assert it. Implying greater application of the doctrine, the Court noted that these factors are not “inflexible prerequisites.”

The doctrine’s specific applicability to bankruptcy proceedings is illuminated in Hay v. First Interstate Bank. The debtor, Hay, filed a chapter 11 bankruptcy petition in 1986. During the course of the proceeding, Hay discovered information leading to potential claims that he ultimately brought against First Interstate and others in a federal civil action in 1989. However, Hay never brought the information to the attention of the bankruptcy court at any time before the bankruptcy proceeding was closed in 1988.

First Interstate moved for summary judgment in the civil action, contending Hay was judicially estopped from asserting any claims against it because the events that led to his claims arose during the course of Hay’s prior bankruptcy proceeding. The trial court granted First Interstate’s summary judgment
MCLE Test No. 175

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. A bankruptcy estate consists of the legal interests of a debtor at the time of the commencement of a bankruptcy case.
   True
   False

2. Under U.S. Bankruptcy Code Section 541(a)(1), a debtor must identify both tangible and intangible property when filing a petition and supplemental documents, including schedules, with the bankruptcy court.
   True
   False

3. Federal law does not include a prebankruptcy petition cause of action as intangible property in the evaluation of the debtor’s property.
   True
   False

4. All property possessed by the debtor at the time of filing a bankruptcy petition must be disclosed under Section 541(a)(1).
   True
   False

5. A trustee in bankruptcy does not have a right of succession to a cause of action held by a debtor at the time a bankruptcy petition is filed.
   True
   False

6. A debtor must file schedules with a bankruptcy petition, except:
   A. A schedule of assets and liabilities.
   B. A schedule of current income and expenditures.
   C. A schedule of pending causes of action.
   True
   False

7. A debtor does not need to disclose assets deemed to be worthless or unavailable when filing a petition for bankruptcy.
   True
   False

8. Under Section 522(b), an exemption is an interest withdrawn from the estate for the benefit of the debtor.
   True
   False

9. Courts have held that debtors who fail to disclose a cause of action at the time of filing their bankruptcy petitions lack standing to subsequently bring a civil claim.
   True
   False

10. A debtor loses the right to pursue a civil claim if he or she either fails to disclose the claim or the trustee fails to ask about the claim.
    True
    False

11. A court’s refusal to allow a party to assert a position and then later seek advantage by taking a clearly inconsistent position is commonly known as:
    A. Equitable estoppel.
    B. Judicial estoppel.
    C. Res judicata.
    D. Statutory estoppel.

12. Which of the following is not a factor that a court will consider when determining whether to apply judicial estoppel?
    A. The subsequent position asserts an unrecognized claim.
    B. The subsequent position is inconsistent with the first.
    C. A party would gain an unfair advantage if the subsequent position is advanced.
    D. A party has convinced a previous court of its position.

13. The Ninth Circuit has held that a debtor need not disclose litigation likely to arise in the nonbankruptcy context.
    True
    False

14. A debtor’s duty to disclose potential claims as assets does not end when the debtor files schedules but continues for the duration of the bankruptcy proceeding.
    True
    False

15. A debtor’s failure to disclose is inadvertent only when the debtor either lacks knowledge of the undisclosed claims or has a fraudulent motive to conceal.
    True
    False

16. A debtor may correct a prior nondisclosure of a pending civil action as long as the bankruptcy proceeding is ongoing.
    True
    False

17. Parties asserting judicial estoppel may raise an inference of bad faith if they show a motive to conceal the claim by the debtor.
    True
    False

18. If a party asserts judicial estoppel against a debtor, courts have held that the same party bears the burden of production indicating that nondisclosure was in good faith.
    True
    False

19. Once a party establishes that the debtor had knowledge of the claim and a motive to conceal it, the inquiry does not end if the debtor comes forward with rebuttal evidence.
    True
    False

20. A debtor who conceals a pending civil action during a bankruptcy proceeding may lose both legal and equitable rights to pursue the action as a consequence.
    True
    False

MCLE Answer Sheet #175

DISCLOSE OR DISMISS

Name ____________________________
Law Firm/Organization ____________________________

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Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. ☐ True ☐ False
2. ☐ True ☐ False
3. ☐ True ☐ False
4. ☐ True ☐ False
5. ☐ True ☐ False
6. ☐ A ☐ B ☐ C
7. ☐ True ☐ False
8. ☐ True ☐ False
9. ☐ True ☐ False
10. ☐ True ☐ False
11. ☐ A ☐ B ☐ C ☐ D
12. ☐ A ☐ B ☐ C ☐ D
13. ☐ True ☐ False
14. ☐ True ☐ False
15. ☐ True ☐ False
16. ☐ True ☐ False
17. ☐ True ☐ False
18. ☐ True ☐ False
19. ☐ True ☐ False
20. ☐ True ☐ False
motion, which was unanimously affirmed on appeal.\textsuperscript{23}

The Ninth Circuit initially recognized that while not all of the facts underlying Hay’s claims against First Interstate were known during the pendency of the bankruptcy proceeding, Hay knew enough information to require him to notify the bankruptcy court of the existence of the potential asset. Citing precedent, the Ninth Circuit noted that a debtor “must disclose any litigation likely to arise in the non-bankruptcy context.” The court held that the failure to give this notice estopped Hay and justified the summary termination of his civil action.\textsuperscript{24}

Similarly illustrative is \textit{Hamilton v. State Farm Fire and Casualty Company},\textsuperscript{25} in which the plaintiff asserted a questionable claim with his insurer, State Farm, for water intrusion at a home Hamilton owned but rented to others. Following an investigation of the claim, State Farm concluded Hamilton intentionally caused the water intrusion, that he vandalized and stole property from the house, and that he violated the antifraud/concealment provisions of the insurance policy at issue. Consequently, State Farm denied the claim.\textsuperscript{26}

Prior to State Farm’s decision, Hamilton hired lawyers to pressure the insurer to pay the claim. In correspondence from the lawyers to the carrier, Hamilton emphasized the importance of promptly settling his claim because he was facing a November 10, 1997, foreclosure deadline on his house due to the unremedied property damage and corollary absence of income generated by a renter. Nevertheless, State Farm denied the claim on November 3, 1997.\textsuperscript{27}

Before receiving State Farm’s denial letter, Hamilton filed for chapter 7 bankruptcy protection on October 31, 1997. In the schedules he filed with the bankruptcy court, Hamilton listed a $160,000 loss against his estate, but he failed to disclose his corresponding claim against State Farm as an asset of the estate. The bankruptcy trustee noticed the large loss Hamilton listed and inquired on several occasions if he was pursuing any insurance claims to recover on the loss. Hamilton’s repeated failure to respond led to a successful motion by the trustee in July 1998 to dismiss the bankruptcy case, which also vacated any impending discharge of Hamilton’s debts.\textsuperscript{28}

Three months later, in October 1998, Hamilton filed a bad faith lawsuit against State Farm based on the denial of his insurance claim. State Farm brought a motion for summary judgment, contending, among other things, that the case was barred by the doctrine of judicial estoppel because Hamilton failed to list his insurance claim (and impending lawsuit) as assets in his chapter 7 bankruptcy schedules. The trial court agreed with State Farm, concluding Hamilton’s contradictory positions in the bankruptcy case and his subsequent civil action estopped him from pursuing his lawsuit against State Farm.\textsuperscript{29}

As the court declared:

\begin{quote}
[\textit{W}e] must invoke judicial estoppel to protect the integrity of the bankruptcy process. The debtor, once he institutes the bankruptcy process, disrupts the flow of commerce and obtains a stay and the benefits derived by listing all his assets. The Bankruptcy Code and Rules “impose upon the bankruptcy debtors an express affirmative duty to disclose all assets, including contingent and unliquidated claims.” The debtor’s duty to disclose potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding.\textsuperscript{30}
\end{quote}

The court of appeal thus concluded that Hamilton’s dishonesty in his bankruptcy case judicially estopped him from asserting claims—which constitute previously undisclosed assets—in his subsequent civil action.

A decision in the same vein is \textit{Burnes v. Pemco Aeroplex, Inc.}\textsuperscript{31} The debtor in \textit{Burnes} filed a chapter 13 bankruptcy petition in July 1997. Six months later, the debtor filed a discrimination charge with the Equal Employ-
ment Opportunity Commission against his employer. Almost a year later, while his bankruptcy proceeding was pending, the debtor filed an employment discrimination suit against his employer in federal district court. The debtor never amended his bankruptcy schedules or the statement of financial affairs to include the lawsuit. In October 2000, the debtor converted his bankruptcy case from chapter 13 to chapter 7. At that time, the debtor filed new, updated schedules but again did not include the discrimination lawsuit. In January 2001, the debtor received a “no asset” discharge of over $38,000 in debt. Neither the chapter 7 trustee nor any of the debtor’s creditors knew about the lawsuit. The defendant employer moved for summary judgment in the district court on the basis of judicial estoppel, and the court granted the motion, concluding that judicial estoppel barred the debtor from pursuing his claims.32

On appeal, the Eleventh Circuit held that the doctrine of judicial estoppel precluded a party from “asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.” Moreover, the doctrine is “an equitable concept intended to prevent the perversion of the judicial process” and “protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.”33 The court concluded that the first part of the two-part analysis had been satisfied because the debtor had signed his bankruptcy schedules and statement of financial affairs under oath.34

Although the court recognized that judicial estoppel should not be applied if the inconsistencies are the result of “a good faith mistake rather than…part of a scheme to mislead the court,” the court determined that a “debtor’s failure to satisfy [his or her] statutory disclosure duty is inadvertent only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment.”35 In so holding, the court rejected the debtor’s contentions that his failure to place the cause of action on his schedules was inadvertent error. The court held that the debtor clearly demonstrated his knowledge of the undisclosed cause of action because he had filed the discrimination lawsuit during the pendency of his chapter 13 bankruptcy proceeding and continued to pursue the claim when he converted the case to a chapter 7 proceeding. The court also determined that the lender had a motive to conceal the cause of action because he probably would not have received a “no asset” discharge of his debts if the trustee, the bankruptcy court, and his creditors had known about the cause of action. Therefore, the court held that the district court did not err in determining that the debtor was judicially estopped from pursuing his discrimination lawsuit against his former employer.36

When to Notify, Correct, or Attack

For defendants, the issue of timing in notifying the court in a civil action of potential bankruptcy fraud committed by a debtor/plaintiff in a bankruptcy proceeding is crucial. If the bankruptcy proceeding is still ongoing, the debtor/plaintiff still has the opportunity to revise or amend the statement of financial affairs that was filed in the bankruptcy court to “correct” a prior nondisclosure of a pending civil action. Once the bankruptcy proceeding is concluded, however, the opportunity to correct the nondisclosure virtually evaporates, and the plaintiff is exposed to critical scrutiny by the civil court to explain away the objective appearance of fraud and deception.

The recent decision of an Indiana appellate court in Morgan County Hospital v. Maria Upham is instructive.37 Maria Upham, the surviving spouse and personal representative of the estate of her decedent husband, claimed that her husband died as a result of malpractice committed by a hospital and its staff physicians. Before instituting the mal-
practice action, Upham first brought an administrative claim in 1998 with the Indiana Department of Insurance against the same defendants. During the course of the pre-litigation administrative claim, Upham responded to interrogatories under oath that she had never filed for bankruptcy.

Following an adverse ruling and dismissal of her pre-litigation administrative claim in 2001, Upham filed for chapter 13 bankruptcy protection in June 2002. Five months later, she initiated the malpractice action. In January 2005, Upham filed an amended declaration in bankruptcy court concerning her financial affairs, in which she did not disclose the ongoing malpractice action.

In September 2006, during her deposition in the malpractice action, Upham testified about the bankruptcy petition she had filed three years earlier in 2002. At the time of her testimony, the bankruptcy proceeding was still open and ongoing. One month later, Upham was successful in a motion to have the bankruptcy court issue an order specifying that any sums recovered in the malpractice action would be reported to the court and trustee for distribution to Upham's creditors.

Subsequently, the defendants in the malpractice action brought summary judgment motions on the grounds that Upham did not possess standing to sue and that she was judicially estopped from pursuing the action based on her failure to disclose it in her filings with the bankruptcy court. The court granted the motions, agreeing with the defense that Upham was judicially estopped from pursuing her malpractice suit based on the nondisclosure issue.

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Subsequently, the defendants in the malpractice action brought summary judgment motions on the grounds that Upham did not possess standing to sue and that she was judicially estopped from pursuing the action based on her failure to disclose it in her filings with the bankruptcy court. The court granted the motions, agreeing with the defense that Upham was judicially estopped from pursuing her malpractice suit based on the nondisclosure issue.

Upham then brought a motion in the trial court for reconsideration and to correct the error. The motion was granted, thereby nullifying the summary judgments in favor of the defendants, and the order was affirmed on appeal. Citing Robson v. Texas Eastern, the court of appeal in Morgan initially noted the applicability of judicial estoppel when a debtor/plaintiff fails to disclose a cause of action as an asset in bankruptcy proceedings and then pursues the omitted cause of action in a subsequent civil lawsuit. The court then noted how an inference of bad faith arises when the party asserting judicial estoppel demonstrates that the plaintiff had knowledge of an unscheduled claim and a motive for concealment, notwithstanding the duty to disclose it.

The court recognized that if the party asserting judicial estoppel establishes knowledge of a claim and motive for concealment by the debtor/plaintiff, the plaintiff then has the “burden of coming forth with evidence indicating that the nondisclosure was made in good faith.” However, the court also empha-
sized that while knowledge and motive are important in establishing judicial estoppel, “the inquiry does not end there if the debtor/plaintiff comes forward with evidence indicating that the non-disclosure was made in good faith.”

Applying these principles to the facts of the case, the appellate court in Morgan concurred with the trial court that Upham sufficiently explained her failure to amend her filings with the bankruptcy court to denote the existence of the malpractice action prior to her deposition in that action. The explanation, concomitant with the fact that her bankruptcy proceeding was still open and ongoing, militated in favor of Upham and against the defendants’ judicial estoppel argument. The trial court’s order reversing the defendants’ summary judgment motions was thus proper and affirmed on appeal.

Whether by mistake or intention, a debtor/plaintiff who conceals a pending civil action in the context of a bankruptcy proceeding may lose any legal or equitable right to pursue the civil action as a consequence of the nondisclosure. While the timing of an attack by the defense can be determinative of success on a dispositive motion brought in the trial court, eventually the issue must be addressed with the court by counsel.

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3 In re Graham Square, Inc., 126 F. 3d 823 (6th Cir. 1997) (“Property of the estate includes the debtor’s interest in a cause of action.”) (citing In re Cotrell, 876 F. 2d 540 (6th Cir. 1989)).
6 11 U.S.C. §522(b); Owen, 500 U.S. at 308 (“An exemption is an interest withdrawn from the estate (and thus, from creditors) for the benefit of the debtor.”).
7 In re Degenaar, 261 B.R. 316 (Bankr. M.D. Fla. 2001).
8 11 U.S.C. §521(1); Browning v. Levy, 283 F. 3d 761 (6th Cir. 2002).
9 Id.
15 Rissetto v. Plumbers & Steamers Local 343, 343 F. 3d 597, 600-01 (9th Cir. 1996); Russell v. Rolfs, 893 F. 2d 1033, 1037 (9th Cir. 1990).
17 Id. at 749.
18 Id. at 750.
19 Id. at 751.
20 Id.
21 Hay v. First Interstate Bank, 978 F. 2d 355 (9th Cir. 1992).
22 Id. at 556.
23 Id. at 557.
24 Id.
25 Id.
26 Hamilton v. State Farm Fire & Cas. Co., 270 F. 3d 778 (9th Cir. 2001).
27 Id. at 780-81.
28 Id. at 781.
29 Id.
30 Id. at 781-82.
31 Id. at 785.
33 Id. at 1284.
34 Id. at 1287.
35 Id. at 1285.
36 Id. at 1287.
37 Id. at 1288.
40 Morgan, 884 N.E. 2d at 280.
THE FIRST STEP in organizing any U.S. corporation is to decide where to incorporate—and with 50 states offering their charters, any systematic search for the best one quickly proves daunting. Lawyers and their clients most often limit their consideration to just a handful of states, and if they do consider a state other than the one in which they are resident, they most commonly choose a Delaware charter.1 More recently, however, Nevada has waged an aggressive and successful campaign to attract corporate charters. By 1999, Nevada was second only to Delaware when ranked by the national percentage of out-of-state, publicly traded corporations.2 For publicly traded corporations located in California, the order of preference for charters has been Delaware, California, and Nevada.3

Much has been written about the preeminence of Delaware as an importer of corporate charters. Much less has been written about Nevada. Practitioners seeking to assist their corporate clients should be aware of the key differences between California and Nevada corporate law.

California’s relationship with the corporate form has been ambivalent at best. The drafters of the original 1849 Constitution imposed personal liability on stockholders by specifying that each stockholder of a corporation “shall be individually and personally liable for his proportion of all its debts and liabilities.”4 The 1879 Constitution substantially expanded the provisions relating to corporations. In addition to continuing to place personal liability on stockholders for corporate debts, the 1879 Constitution made directors jointly and severally liable for all moneys embezzled or misappropriated by the officers of the corporation during the directors’ term of office.6 The 1879 Constitution also prohibited corporations from holding any real estate for a period longer than five years except as necessary for carrying on their business.7

In 1930, voters approved the removal of several of these detailed provisions from the constitution. The following year, California enacted its first modern general corporation law. By that time, attitudes toward corporations had softened. More important, California had awakened to the fact that it was competing with other states for corporate charters. In fact, the draftsmen of the 1931 California General Corporation Law stated that their primary object was to “put California on a...
competitive basis as to all legitimate corporate advantages and facilities with Delaware, Nevada and other incorporating states....”

Nevada has been far friendlier to the corporate form. Nevada’s constitution, adopted in 1864 and still in effect, provides that “corporations in corporations formed under the laws of this State shall not be individually liable for the debts or liabilities of such corporation.” In the last few decades, the Nevada Legislature has been proactive in its efforts to enact statutory provisions that are alluring to those in search of a corporate charter.

Each organizer of a corporation has specific priorities and objectives for the corporation and for its internal structure and governance. In many instances, lawyers may be inclined to go with what they know—the corporation law of the state in which they and their clients happen to be located. Indeed, to do otherwise would require a lawyer to expend time and effort in becoming familiar with the general corporation law of another jurisdiction. Moreover, lawyers are likely to believe that there is less risk of error or surprises due to their greater familiarity with their home state’s law. Lawyers may also be concerned about the cost and inconvenience of litigation in another jurisdiction.

When lawyers do look out of state, they are likely to look for specific provisions such as manager liability, voting rights, and anti-takeover provisions. The extent to which these provisions will be of interest or even available depends upon whether the corporation is publicly traded.

Managerial Conduct

Both California and Nevada establish the standard of care for directors by statute. Beyond that similarity, California and Nevada share very little in their approaches to managerial conduct. In Nevada Revised Statutes Section 78.138(1), Nevada expresses a director’s duty of care simply and succinctly: “Directors shall exercise their powers in good faith and with a view to the interests of the corporation.” In 1999, the Nevada Legislature, at the behest of the Business Law Section of the State Bar of Nevada, amended Section 78.138 so that “directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.”

On its face, Nevada’s statutory standard is subjective—that is, it addresses only a director’s state of mind rather than whether the director measures up against some external standard. The Nevada Supreme Court has not had occasion to explicate the meaning of “good faith” under Section 78.138. Thus, it remains to be seen to what extent an objective standard of conduct will be judicially read into the Nevada statute.

California, on the other hand, requires directors to act with due care in addition to good faith:

A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, and in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

By requiring good faith and imposing an “ordinarily prudent person” standard, California imposes both subjective and objective components to a director’s standard of care that contrasts with Nevada’s overly subjective standard.

California purports to afford directors the protection of the business judgment rule, which immunizes disinterested directors from liability for the decisions that are made by them in their capacity as directors. Nevada, in contrast, has its statutory good faith presumption. While the statute does not indicate whether this presumption can be rebutted, presumably a plaintiff would be permitted to make a contrary evidentiary showing.

Because of the dearth of decisions applying Nevada’s unique statutory standard and presumption, it is not possible to conclude with any degree of certainty that directors in Nevada will be held to a lower standard than directors of California and Delaware corporations. However, Nevada’s statute on its face offers the prospect of a lower standard.

California allows for the inclusion of a provision in a corporation’s articles of incorporation that eliminates or limits the liability of directors. Until 2001, Nevada had also permitted such an exculpatory provision to be included in the articles. Thus, both states had followed the opt-in approach to limiting the liability of directors. Now, in a significant break with California, Nevada automatically relieves corporate directors and officers from liability to the corporation or its stockholders for damages unless it is proven that: 1) the act or failure to act constituted a breach of fiduciary duty; and 2) the breach involved intentional misconduct, fraud, or a knowing violation of the law.

The Nevada law contains a number of very specific exceptions. Thus, liability is not excluded under Nevada Revised Statutes Sections 35.230 (liability for judgment of ouster), 90.660 (civil liability in connection with sales of securities), 91.250 (commodity law), 452.200 (unauthorized use of endowment funds), 452.270 (violation of laws pertaining to mausoleums, vaults, or crypts), 668.045 (receiving deposits of insolvent banks), and 698A.030 (insider trading in an insurer). In 2003, the Nevada Legislature amended Section 78.138(7) to permit a corporation to provide for greater liability in articles of incorporation or an amendment to the articles filed on or after October 1, 2003. Thus, Nevada now takes an opt-out approach, while California and Delaware continue to take an opt-in approach.

In addition to avoiding the necessity of including an exculpatory provision in the articles of incorporation, Nevada’s law offers broader exculpation than does California’s. Perhaps most significantly, Nevada’s law exculpates directors and officers, whereas California and Delaware permit excusal only of directors.

California’s General Corporation Law does not permit liability to be eliminated or limited for acts or omissions that:

• Involve intentional misconduct or a knowing and culpable violation of law.
• A director believes to be contrary to the best interests of the corporation or its shareholders.
• Involve the absence of good faith on the part of the director.
• Show a reckless disregard for the director’s duty to the corporation or its shareholders in circumstances in which the director was aware, or should have been aware, in the ordinary course of performing a director’s duties, of a risk of serious injury to the corporation or its shareholders.
• Constitute an unexcused pattern of inattention that amounts to abdication of the director’s duty to the corporation or its shareholders.

In addition, California’s law prohibits absolving a director from liability for:

• Any transaction in which the director obtained an improper personal benefit.
• Contracts in which the director has a material financial interest.
• Improper distributions to shareholders or improper loans.

Thus, California’s statute permitting excusal of directors includes far more exceptions than Nevada’s statute.

Stockholder Voting Rights

Cumulative voting rights generally operate by giving each stockholder a number of votes equal to the number of shares multiplied by the number of directors to be elected. The stockholder may then distribute these votes among the directors in any manner in which the stockholder sees fit. The debate over the merits of cumulative voting in the election of directors has been longstanding. Proponents of cumulative voting typically argue that cor-
porate performance is enhanced when minority shareholders are able to attain some representation on the board of directors. Opponents, on the other hand, argue that cumulative voting leads to divisiveness and special interest directors.

California has a strong historical bias in favor of cumulative voting in the election of directors. In fact, California's 1879 Constitution enshrined cumulative voting as a constitutional right. The 1931 California General Corporation Law continued mandatory cumulative voting. When the current California General Corporation Law was introduced, it contained a provision allowing a corporation to opt out of cumulative voting, but the bill was amended to include mandatory cumulative voting.

Nevada does not mandate cumulative voting in the election of directors. Instead, it permits a corporation to confer cumulative voting rights by including a provision in the certificate (articles) of incorporation. Because cumulative voting has been strongly disfavored by publicly traded corporations, California relaxed its cumulative voting mandate in 1989 by enacting an exception for “listed corporations.” The Corporations Code defines a “listed corporation” as a corporation with outstanding shares listed on the New York Stock Exchange, the American Stock Exchange, or the National Market System of the Nasdaq Stock Market (or any successor to that entity). These corporations may eliminate cumulative voting by amending their articles of incorporation.

Closely held corporations use supermajority voting power to balance the relative voting powers of investors. Supermajority voting requirements have also enjoyed popularity with publicly traded companies due to their utility as antitakeover devices. For example, a supermajority provision may require the affirmative vote of at least 90 percent of the outstanding shares to approve a merger. Although the individual voting rights of each share remain unchanged under a supermajority voting provision, minority stockholders may have significantly increased power because a higher vote requirement will allow them to block certain corporate transactions.

Nevada allows supermajority voting provisions to be included in either the articles of incorporation or the bylaws. Further, there is seemingly no limitation on these provisions.

California law is much more restrictive. The articles may include a provision requiring a supermajority vote of any class or series of stock for any or all corporation actions. There are several exceptions, however, to this general rule. Thus, a supermajority vote cannot be imposed regarding the removal of directors, the election of directors, and voluntary dissolution.

California imposes additional restrictions for widely held corporations that on or after January 1, 1989, filed or file an amendment to their articles or a certificate of determination containing a supermajority vote provision. If a corporation has outstanding shares held of record by 100 or more persons, the supermajority vote requirement cannot exceed 66⅔ percent of the outstanding shares, or

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which has traded in recent months in a range of $30 to $33. The real impact of the rights is to be found in their “triggering” and “flip-over” features which have led to their being labeled as “poison pills.”

The rights detach and may be exercised only if certain triggering events, referred to as the 20% and 30% events, occur. Prior to the occurrence of any of these events the rights are not transferable apart from the common stock to which they are affixed. Thus if a person (a) acquires 20% of Household’s common shares or (b) achieves the right to purchase 20% or (c) achieves the right to vote 20% or (d) announces the formation of a group of persons holding 20% to act together, the rights are triggered. The 30% triggering event occurs upon the announcement of a tender offer or exchange offer for 30% of Household’s outstanding stock.

Once a triggering event has occurred the rights may be exchanged for the new preferred upon the payment of the exercise price. Moreover, if a merger or consolidation occurs under the terms of which Household’s common shares are exchanged for securities of the acquiror, the right “flips-over” and enables the holder, at the then exercise price of the right, to purchase common stock of the acquiror at a price reflecting a market value of twice the exercise price of the right. Thus the right holder would be entitled to purchase $200 worth of the acquiror’s common for $100. The resultant dilution of the acquiror’s capital is immediate and devastating.

The court’s description makes it clear that shareholder rights plans are effective because they discriminate against specific shareholders. The discriminatory nature of a shareholder rights plan constitutes both its operative mechanism and its legal vulnerability.

Nevada has enacted several statutory provisions that directly address the legal viability of shareholder rights plans. The provisions of Nevada Revised Statutes Section 78.195(5), which apply to the issuance of shares of more than one class or series, “do not restrict the directors of a corporation from taking action to protect the interests of the corporation and its stockholders, including, but not limited to, adopting or signing plans, arrangements or instruments that grant rights to stockholders or that deny rights, privileges, power or authority to a holder of a specified number of shares or percentage of share ownership or voting power.”

A nearly identical statement is also found in Nevada Revised Statutes Section 78.330(4), which governs the voting rights of stockholders. Further, Section 78.378(3) provides that nothing in Nevada’s control share law prohibits signing plans, arrangements, or instruments that deny rights, privileges, power, or authority to a holder of a specified number of shares or percentage of share ownership or voting power. While these provisions provide strong evidence of the Nevada Legislature’s attempt to validate shareholder rights plans, they do not necessarily foreclose challenges to director action in adopting or implementing a plan. Further, Nevada is far from the only state to have statutorily endorsed shareholder rights plans.

The status of shareholder rights plans is far less clear under the California Corporations Code, which is devoid of any analogue to the Nevada statutes that are applicable to the plans. A shareholder rights plan could be challenged on the basis of Corporations Code Section 203, which mandates equality of treatment: “Except as specified in the articles or in any shareholders’ agreement, no distinction shall exist between classes or series of shares or the holders thereof.” Nonetheless, this has not prevented California corporations from implementing shareholder rights plans.

Section 203 as well as the absence of any judicial precedent upholding shareholder rights plans cast a significant shadow upon the enforceability of these plans.

In a very influential decision, the Delaware Supreme Court in 1985 applied a heightened scrutiny standard to board actions taken in response to takeover threats. In Unocal Corporation v. Mesa Petroleum Company, the court held that a board of directors will be afforded the benefit of the business judgment rule if it can show that it had reasonable grounds for believing that a threat existed and that its response was proportional to the threat. The Nevada Supreme Court has not applied the Unocal standard to boards of Nevada corporations. However, in 1997, a U.S. District Court in Nevada applied the Unocal standard to actions taken by the directors of ITT Corporation in response to a hostile tender offer made by Hilton Hotels Corporation.

Shortly after the Hilton decision, the Nevada Legislature enacted S.B. 61, which codified but also limited the Unocal standard. Nevada practitioners had been concerned about the possible broad application of Unocal to change-in-control situations involving Nevada corporations. Under Nevada Revised Statutes Section 78.139, the second prong of the Unocal standard, which requires a proportional response, will be applied if, and only if, the action impedes the exercise of the rights of stockholders to vote for or remove directors. Thus, the proportionality prong of the Unocal standard does not apply to other antitakeover actions of the board of directors. These actions are subject to the general standard of care set forth in Section 78.138(1) and have the benefit of the business-judgment-rule presumption codified in Section 78.138(3).

In 1987, the Nevada Legislature adopted a control share law that was patterned after a similar law adopted the previous year by Indiana. This action closely followed the U.S. Supreme Court’s decision to uphold the constitutionality of the Indiana statute. Nevada’s control share law operates by providing that an “acquiring person” and its associates obtain voting rights in “control shares” only to the extent conferred by a vote of the stockholders. The statute also provides for redemption of control shares in certain circumstances.

Nevada also has had a business combination law on the books since 1991. This law, like the control share law, is patterned after Indiana’s statute. Generally, the law operates to prohibit certain combinations between a corporation and an interested stockholder for a three-year period. After this three-year moratorium, combinations with an interested stockholder are permitted if certain qualitative and quantitative conditions are met. California is among the minority of states that has not adopted either a control share or business combination law.

California’s Extraterritorial Reach

In deciding whether to advise clients to incorporate outside of California, practitioners must consider the California statutes that purport to impose various provisions of the state’s General Corporation Law on foreign corporations. Corporations Code Section 2115, the far-reaching of these statutes, has been a part of California’s General Corporation Law since the law was enacted more than a quarter century ago. The logic behind Section 2115 is straightforward: If a foreign corporation has a majority of its contacts with California, then California has an interest in applying its corporate laws to the corporation even if that corporation has been organized in another state.

The tests that California has established to implement this premise are also straightforward. Essentially there are two. The first test is met when persons having addresses in California hold more than 50 percent of the corporation’s outstanding voting securities. The second test focuses on where a corporation does most of its business. This test is met when the average of the corporation’s payroll, property, and sales factors are more than 50 percent for the latest full income year. These
factors are reported on the corporation’s California franchise tax return.48

If both of these tests are met, then Section 2115 specifies numerous provisions of the General Corporation Law that will apply to the corporation “to the exclusion of the law of the jurisdiction in which it is incorporated.” These include provisions relating to directors (i.e., annual election, removal, filling of vacancies, standard of care, indemnification, and liability for improper distributions to shareholders); limitations on corporate distributions; shareholders (i.e., liability for unlawful distributions, annual meeting requirement, cumulative voting, limitations on supermajority voting); corporate transactions (i.e., limitations on sales of assets, mergers and conversions, requirements for conversions, reorganizations, and dissenters’ rights); records and reports; and rights of inspection. In addition, Section 2115 subjects a foreign corporation to the possibility of suit by the California attorney general for violations of specified provisions of the General Corporation Law.

While Section 2115 is the most expansive of California’s outreach statutes, it is not the only provision of the General Corporation Law that requires the application of California law. Thus, California’s statute governing inspection of the share register is available to shareholders of a foreign corporation that has its principal executive offices in California or that customarily holds meetings of its board of directors in California.49 California extends to directors of the same foreign corporations the absolute right to inspect corporate records.50 In addition, California provides shareholders of a foreign corporation the right to inspect accounting books and records and corporate minutes if the corporation maintains those records or its principal executive offices in California.51 Finally, California’s requirement that a corporation provide an annual report to its shareholders is applicable to a foreign corporation that either maintains its principal executive office in or customarily holds meetings of its board of directors in California.52

To the extent that any of these California outreach statutes applies, a corporation organized in Nevada may be subject to the very California law provisions that it is seeking to escape—including cumulative voting, for example. Recently, the Delaware Supreme Court refused to apply Section 2115 based on the “internal affairs doctrine,”53 which requires that the law of the state of incorporation govern the internal affairs of a corporation. While this decision strongly suggests that the Delaware courts will pay little respect to California’s outreach statutes, it is not the last word. Indeed, at least one legal scholar criticizes the Delaware Supreme Court’s decision and argues that it is intended not so much to persuade but “to deter other states, such as California and New York, from seeking to regulate the affairs of Delaware entities, or, in the alternative, to create the very conditions which might convince federal actors to prevent other states from doing so.”54

California courts are likely to be more deferential to California law. Moreover, it remains to be seen whether the courts will conclude that every California corporate statute imposed on a foreign corporation involves the corporation’s “internal affairs.”55 In the meantime, practitioners should be braced for races to the courthouse.

In most cases, Section 2115 will be a source of concern for privately held corporations, for two reasons. First, a privately held corporation located in California will more likely satisfy the criteria for the application of the statute. Second, Section 2115 does not apply to corporations that either have outstanding securities listed on the New York Stock Exchange or the American Stock Exchange or are designated as qualified for trading on the Nasdaq National Market.56

Proponents of incorporating in Nevada often tout the fact that Nevada has no corporate income tax.57 Accordingly, some business owners may be led to believe that they can avoid paying California franchise tax...
simply by incorporating their California business in Nevada. However, this is pure codswallop. A business that has business income from sources both within and outside California is required to apportion its income and pay California tax. The portion of the corporation’s total income that has its source in California is determined under Revenue and Taxation Code Sections 25120 through 25141. In addition, a corporation with a California “commercial domicile” is subject to California tax on any income that is not subject to apportionment.58 Thus, a corporation that does business in California cannot escape California taxation by incorporating in another state. The California Franchise Tax Board is well aware of the use of Nevada corporations to avoid California tax and has even published a form titled “Don’t Gamble with Your Taxes: Read the Fine Print about Incorporating in Nevada.”59

California remains a popular chartering state for privately held firms located in California. However, it has proven remarkably ineffectual in retaining the charters of publicly traded corporations located in the state. While Delaware continues to attract an overwhelming percentage of these emigrant corporations, Nevada has established itself as a viable second choice. Because the reasons for going out of state will vary from firm to firm, there is no single right answer to the question of where a business should incorporate. For those firms looking for a significantly different approach to California, a Nevada corporate charter is worth considering.

1 Lucian Bebchuk & Alma Cohen, Firms Decisions Where to Incorporate, 46 J. LAW & ECON. 383, 392-93 (2003). The data produced by these two authors show that in the case of California headquartered, publicly traded corporations, Delaware as of the end of 1999 represented over 91 percent of the out-of-state charters.


3 Bebchuk & Cohen, supra note 1, at 392-93.
4 CAL. CONST. of 1849, art. IV, §36.
5 Article XII of the 1879 Constitution devoted 16 sections specifically to corporations in general and another seven to railroad and transportation companies.
6 CAL. CONST. of 1879, art. XII, §3.
7 Id. at art. XII, §9.
8 Henry W. Ballantine, Questions of Policy in Drafting a Modern Corporation Law: California General Corporation Law (1931), 19 CAL. L. REV. 465, 466 (1931).
9 NEV. CONST. art. 8, §3.
10 California’s General Corporation Law prescribes the standard of care for directors but not officers. HAROLD MASH, JR., R. ROY FINKE, & LARRY SONSINI, MASH’S CALIFORNIA CORPORATION LAW §§11.02 (4th ed. 2001) (“The statute does not purport to specify the duties of officers of a corporation...”). However, some statutory standards applicable to officers can be found in statutes governing the relationships between principal and agent. See, e.g., LAB. CODE §2830-66 (governing the obligations of employees to employers).
12 CORP. CODE §309.
13 See Gaillard v. Natomas Co., 208 Cal. App. 3d 1230, 1264 (1989) (incorrectly describing Corporations Code §309 as “codifying California’s business judgment rule”); MARSH, FINKE & SONSINI, supra note 10, at §11.03[A] (“[I]t is highly doubtful that the California courts will hold that [Section 309] was intended to abolish the business judgment rule....”). See also 1975 Assembly Committee Comment to Section 309: “It is intended that a person who performs his duties as a director in accordance with this standard shall have no liability by reason of being or having been a director.”
14 NEV. REV. STAT. §78.138(3).
17 CORP. CODE §§204(a)(10), 309(c).
18 CORP. CODE §204(a)(10).
21 CAL. CONST. of 1879, art. XII, §12 (repealed).
22 Ballantine, supra note 8, at 484.
23 MARSH, FINKE & SONSINI, supra note 10, at §12.02. California’s attachment to cumulative voting is so strong that governmental bodies are statutorily obligated to vote for resolutions authorizing cumulative voting. GOVT. CODE §6900.
24 NEV. REV. STAT. §78.360. Delaware takes a similar opt-in approach to cumulative voting. DEL. CODE ANN., tit. 8, §212.
26 CORP. CODE §301.5(d). On January 13, 2006, the Securities and Exchange Commission issued an order approving the application of the Nasdaq Stock Market, Inc., to register one of its subsidiaries, The Nasdaq Stock Market LLC, as a national securities exchange. SEC Rel. No. 34-53128, 71 FR 3550 (Jan. 13, 2006). As the successor to the Nasdaq Stock Market, NASDAQ Stock Market LLC has operated as a national securities exchange since August 1, 2006. In addition, the Nasdaq National Market was renamed the NASDAQ Global Market effective July 1, 2006. The NASDAQ Global Market now contains two tiers: NASDAQ Global Market and NASDAQ Global Select Market. California has not yet amended the statute to reflect these changes.
27 CORP. CODE §301.5(a).
29 NEV. REV. STAT. §78.320(1). However, there is some question about the effectiveness of placing supermajority voting provisions in the bylaws alone.
30 CORP. CODE §204(a)(15).
31 Id. A supermajority vote requirement (not to exceed 66⅔%) may be imposed for a class or series of preferred

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shares designated as “preferred” or “preference” regarding voluntary dissolution. CORP. CODE §402.5.  
32 CORP. CODE §710. The determination of the number of persons holding shares of record must be made in accordance with Corporations Code §605.  
33 CORP. CODE §710(c). This exception was added at the request of the Business Law Section of the California State Bar for the purpose of allowing supermajority vote provisions in late round venture capital financings. S.B. 497 (Beverly), California Senate Floor Analysis, Apr. 13, 1993, available at http://www.leginfo.ca.gov/pub/93-94/bill/sen/sh_0451-0500/sh_479_cfa_930413.111241_sen_floor.  
34 Martin Lipton fathered the stockholder rights plan in 1982 with the publication of a memorandum titled “Warrant Dividend Plan.” Martin Lipton & Paul K. Rowe, Pills, Polls and Professors: A Reply to Professor Gilson, 27 DEL. J. CORP. L. 1, 9 (2002).  
36 Over the years, the Nevada Legislature has made minor refinements to the wording of the statute. For example, the phrase “or grants rights” was added in 2001 for the apparent purpose of clarifying that discrimination could be either positive or negative. 2001 Nev. Stat. ch. 296, §10. In 2003, the legislature substituted the word “signing” for “executing,” even though directors do not typically execute or sign stockholder rights plans qua directors. 2003 Stat. ch. 485, §27.  
38 The reference in the statute to a “shareholders agreement” is not to any agreement among or with the shareholders. Rather, the term means a written agreement among all the shareholders of a close corporation, or if a close corporation has only one shareholder, between that shareholder and the corporation. CORP. CODE §186.  
40 In 1999 Emeritus Corporation filed an action for injunctive and declaratory relief against ARV Assisted Living, Inc., challenging the validity of its shareholder rights plan. Among other things, the complaint alleged that the rights plan violated Corporations Code §§203 and 400 “in that under the terms of the pill [rights plan] all shares of ARV are not granted the same rights, preferences, privileges and restrictions.” Emeritus Corp. v. ARV Assisted Living, Inc., O.C. Super. Ct. Case No. 787788 (Dec. 9, 1997), filed as an exhibit to Schedule 14d-1 by Emeritus Corporation with the Securities and Exchange Commission, Dec. 19, 1997, available at: http://www.sec.gov/Archives/edgar/data/949322/0000950103-97-000758.txt. The lawsuit did not result in a reported decision addressing the validity of shareholder rights plans.  
44 See Minutes of the Nevada Senate Committee on Judiciary, Feb. 3, 1999 (“Both standards are established under Delaware law. Mr. Fowler [chairman, Business Law Section, State Bar of Nevada] stated they wanted to make sure that the directors did not have this higher duty in a take-over situation unless they take an action

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that might impede the right of stockholders to vote for or against their staying in office as directors. He said he thought the directors should have the benefit of the business judgment rule until they do something that might impede the right of stockholders to vote for directors."


46 See Subramanian, supra note 37, at 1813-14 (listing 27 states with control share laws).

47 California’s General Corporation Law establishes an elaborate taxonomy of corporations. A “domestic corporation” is a corporation formed under the laws of California. CORP. CODE § 162. The term “foreign corporation” generally refers to any corporation other than a domestic corporation. CORP. CODE § 171. The term “corporation” is also frequently used and defined to mean only a corporation organized under the California General Corporation Law (as opposed, for example, to corporations organized under California’s nonprofit corporations law) and certain other domestic corporations. CORP. CODE § 162.

48 The factors are fractions defined in California’s Revenue and Taxation Code that are used to apportion taxes when a corporation has business activities that are taxable in California as well as outside California. See text, infra. Thus, a corporation’s “property factor” is a fraction, the numerator of which is the average value of the corporation’s real and tangible personal property owned or rented and used in California during the taxable year, and the denominator of which is the average value of all the corporation’s real and tangible personal property owned or rented and used during the taxable year. A corporation’s “payroll factor” is a fraction, the numerator of which is the total amount paid in California during the taxable year by the corporation for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year. REV. & TAX CODE § 25132. A corporation’s “sales factor” is a fraction, the numerator of which is the total sales of the corporation in California during the taxable year, and the denominator of which is the total sales of the corporation everywhere during the taxable year. REV. & TAX CODE § 25134.

49 CORP. CODE § 1600(d).

50 CORP. CODE § 1602.

51 CORP. CODE § 1601(a).

52 CORP. CODE § 1501(g).


55 See Keith Paul Bishop, The War between the States— Delaware’s Supreme Court Ignores California’s Corporate Outreach Statute, 19 INSIGHTS 19 (July 2005).

56 CORP. CODE § 2115(c).


58 “Commercial domicile” means the principal place from which the trade or business of the taxpayer is directed or managed. REV. & TAX. CODE § 25120(b).

59 Available at http://www.frb.ca.gov/forms/misc/689.pdf.
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The Center is directed by Gilbert Kliman, MD, a Harvard Medical School Graduate, board certified child psychiatrist and Distinguished Life Fellow of the American Psychiatric Association. Dr. Kliman spends more than half of his time in practice and research and less than half in litigation. International literary prize winner and author of over 50 articles and books, recipient of over 50 grants, he has spent over 33 years founding public health organizations to help children. Diplomate of the American College of Forensic Examiners and four psychiatric specialty boards, Dr. Kliman has served as psychiatric expert in some of the nation’s most important institutional neglect and child psychological trauma cases. Known for appearances on 20/20 and The Today Show, listed in Best Doctors in America™, he can provide attorney references from over 100 trials and 275 depositions. He has been accepted as psychiatric expert by federal and state courts in Alaska, California, Florida, Mississippi, New York, Michigan, Montana, Ohio, Oregon, Texas and Washington. Much of his testimony is for defense of municipalities, schools, corporations, and individuals, in which attorneys references describe remarkable effectiveness. He is one of the nation’s most highly credentialed forensic child psychiatrists and has a team of distinguished associates.

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The Los Angeles County Bar Foundation’s 2007-2008 Fund Drive raised nearly $351,000 from corporations, individuals, law firms and others. Direct contributions from law firms totaled $148,900; individuals contributed $109,292; and corporations and others contributed $20,695. In addition to these direct contributions, $72,223 was contributed to the Foundation by individuals, corporations and law firms by means of the Association’s annual dues statement voluntary contribution.

The Foundation wishes to express sincere thanks to all who contributed during the 2007-2008 campaign. As part of the procedures required in connection with its annual audit, the Foundation hereby lists all individuals who made contributions of $1,000 or more, and all law firms, corporations, and other organizations that contributed $1,000 or more during the period beginning July 1, 2007, and ending June 30, 2008. If you are not listed below, and you made a contribution to the Foundation fitting any of the above criteria, please contact the Foundation’s independent certified public accountants, Green, Hasson & Janks LLP, by calling Tom Barry directly at (310) 873-1647. (Note: The Foundation records gifts made by check on the date of receipt, not the date written on the check.) The Foundation regrets that space limitations prevent the listing of the names of all contributors.

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An ACE for Los Angeles High School Students

FOR YEARS, JOSEPH LANE (the clerk and executive officer of the Second Appellate District) and I discussed the possibility of taking appellate court proceedings to high school students. In some of the other five California appellate districts the appellate bench has taken its show on the road to smaller communities and held proceedings in either the local courthouse or in a high school auditorium. We recognized that such outreach activities were not easily adapted to, or reasonably feasible in, the megalopolis of Los Angeles. However, we came upon a model: Division Six of the Second District, located in Ventura, established a program with two local high schools that we thought could be adapted to Los Angeles. But we needed a way to greatly expand the reach of the program to make it available to the large number of schools in the city.

Fortuitously, in early 2004, Marshall Croddy, vice president of the Constitutional Rights Foundation, asked us if the CRF might assist in developing a curriculum for high school classes that would involve our court. Croddy and Laura Wesley, director of law programs for the CRF, proposed a program with three phases. First, volunteer attorneys would visit high school classrooms and orient the students about the appellate process and a particular appellate case. Then, the students would travel to our courtroom in the Ronald Reagan Building to hear oral arguments and interact with the attorneys and the justices involved with the case. Finally, after the court filed its opinion, the volunteer attorneys would revisit the classrooms to discuss the case outcome.

After our agreement with the CRF, its representatives developed an orientation curriculum to present to the students and to enlist the cooperation of members of the Los Angeles bar to carry out components of the proposed program. The curriculum and program procedures had to be field tested and assessed. When teachers and students who reviewed the proposed program gave it positive marks, we were ready to put it into action.

The CRF and the court enlisted the Appellate Courts Committee of the Los Angeles County Bar Association and the California Academy of Appellate Lawyers to collaborate in the program. The three groups recruited attorneys to act as the instructors for the program to educate the students about the appellate process and the particular case that they would follow. By fall of 2004, we were ready to roll. All we lacked was a catchy acronym with which to title the program. We finally agreed on ACE—the Appellate Courts Experience.

Division Two (my division) was the guinea pig for the inaugural run of the ACE program. We selected a case suitable to the students’ understanding and made the briefs available to the program attorneys who had volunteered to serve as instructors. We scheduled a special morning oral argument session for our courtroom in the Ronald Reagan Building on October 24, 2004. In early October the volunteer attorneys met with the students in their classrooms, gave them copies of the briefs, and prepared them for the oral arguments. On the day of the special session, the students traveled by school bus to the Ronald Reagan Building and were brought to our courtroom on the third floor. The clerk of the court and others gave them an introduction, and the students met the advocates on the appeal. Soon the justices took the bench in the traditional manner, and oral argument ensued in accordance with the normal routine. At the conclusion of the arguments and after the justices had left the bench, the students were addressed again by the clerk and were able to ask the arguing attorneys questions about the case, why they chose to become attorneys, and their backgrounds. That session lasted about a half hour,

Students also gain an awareness that they, too, may find a role in the legal system and that this goal is not beyond their reach.

and then the students were broken into groups, and each group was ushered to one of the participating justice’s chambers. In the informality of the chambers, each justice addressed the students concerning the proceedings—being careful not to comment inappropriately about the case itself—and then entertained questions. The enthusiasm of the students was quite evident.

Since that inaugural run of ACE in 2004, the program has been repeated 11 times. All the Los Angeles-based divisions of the Second District have had an opportunity to host at least one ACE oral argument session. Almost 20 high schools have participated. From the perspective of the justices, it seems clear that a major objective of the ACE program is being met. Students are able to grasp the role of the courts in promoting the rule of law, providing fair resolutions of legal disputes, and administering justice in the criminal law arena. Students also gain an awareness that they, too, may find a role in the legal system and that this goal is not beyond their reach. Every session results in questions about how the judge became a lawyer or a judge and why.

But it is very clear to me that the guts of the ACE program lies in the mentoring provided by the volunteer attorneys who instruct and guide the students through a process with which they are generally quite unfamiliar. Without this tremendous effort by the members of the bar, the ACE program could not be maintained. There may come a day when, through the Internet or closed circuit broadcasting, the ACE program could be further broadened so that the court proceedings could be piped into schools that cannot make the trip to the court. But we are off to a wonderful start, thanks to the Constitutional Rights Foundation, the Los Angeles County Bar Association, and the California Academy of Appellate Lawyers.

Justice Roger Boren is administrative presiding justice of the California Court of Appeal, Second Appellate District.
Ethics, Sub stance Abuse, Diversity: A Humorous Approach

ON THURSDAY, NOVEMBER 13, the Los Angeles County Bar Association, together with the Law Practice Management Section and the Small and Solo Practitioner Division, will host a program titled “Legal Ethics: A Funny Thing Happened on the Way to the Disciplinary Hearing.” It’s often said that laughter is the best medicine. Let lawyer, comedian, and humor columnist Sean Carter show you how to add a daily dose of laughter to your practice. In this presentation, he explores some of the more outrageous disciplinary cases that come before state bar committees and how lawyers can avoid being part of them. After explaining why legal ethics is not an oxymoron, Carter will cover how laughter is the best defense against substance abuse. Additionally, Carter will explore the issues involved in recruiting and retaining minority and women employees and debunks some of the common myths surrounding the issue of diversity. The event will take place at the LACBA Conference Center, 281 South Figueroa Street, Downtown. Figueroa Courtyard reduced parking with LACBA validation costs $10. On-site registration and the meal will begin at 4 P.M., with the program continuing from 4:30 to 8:15 P.M. The registration code number is 010051. The prices below include the meal.

$150—CLE+Plus members
$175—Barristers Section members
$195—Law Practice Management Section and Small and Solo Practitioner Division members
$275—LACBA members
$450—all others

3.5 CLE hours, including 1 hour of ethics, 1 of elimination of bias, 1 of substance abuse, and half an hour of general CLE

Complex Court Symposium

ON WEDNESDAY, NOVEMBER 19, the Litigation Section, together with the Labor and Employment Law Section, the Los Angeles and Orange County Chapters of the Association of Business Trial Lawyers, the Association of Southern California Defense Counsel, and the Consumer Attorneys Association of Los Angeles, will present a program on all aspects of complex court litigation. Many of the 19 judges from the complex courts in California—including all seven Los Angeles Complex Court judges—are scheduled to present their views and take questions. The program will cover procedures for case control, class certification, discovery, attaining and approving settlements, and conduct at trial. The program will take place at the Omni Los Angeles Hotel, 251 South Olive Street, Downtown. Valet parking costs $12. On-site registration will begin at 2:30 P.M., with the program continuing from 3 to 7:30 P.M. The registration code number is 010073. The prices below include the meal.

$80—CLE+Plus members
$160—Litigation and Real Property Section members
$160—ABTL, CAALA, and SCDC members
$180—LACBA members
$225—all others

1.25 CLE hours

Electronic Discovery Faux Pas

ON THURSDAY, NOVEMBER 20, the Los Angeles County Bar Association and the Small Firm and Sole Practitioner Division will host a webinar (an online seminar) on the most common and critical faux pas that attorneys commit when handling electronic data of clients. Solutions and tips on to how to avoid errors will be provided. Please note that registration for this program closes on November 17. Early registration is required because of the special nature of the program. Registrants must provide an e-mail address so that the Association may send information prior to the program. The webinar will take place from 11:30 A.M. to 12:30 P.M. The registration code number is 010156.

$45—CLE+Plus members
$85—LACBA members
$125—all others

1 CLE hour

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/where you will find a full listing of this month’s Association programs.
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