Los Angeles lawyer Susan Page White delineates the limitations on discovery protections when attorneys act as insurance claims adjusters.

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In January 2010, Chapman University School of Law's AMVETS Legal Clinic celebrated its one-year anniversary. This pro-bono clinical program offers invaluable experience to students while providing free legal representation to veterans, service members and their families. Through a cooperative effort with the non-profit AMVETS of California, the clinic gives representation in private disputes not covered by the military's JAG Corps.

In its first year of operation, the AMVETS Legal Clinic handled 160 cases while recovering more than $2.2 million for military families. Operating on the campus of Chapman University, the clinic has represented California troops from around the world, from Texas to Japan and Kansas to Germany.

The high volume of cases has lead to the creation of the AMVETS Legal Clinic Pro Bono Legal Network, a case-referral system for local practitioners who can help in the following areas:

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To join the AMVETS Legal Clinic's Pro Bono Network please call (714) 628-2692, or email Director Kyndra Rotunda at krotunda@chapman.edu or Office Coordinator Kiana Boyce at kboyce@chapman.edu. For information about Chapman's Military Personnel Law Center or the AMVETS Legal Clinic, please visit www.chapman.edu/law/programs/clinics/amvets.asp. Your support is greatly appreciated.
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- A child’s inheritance or the income from that inheritance being awarded to the child’s former spouse.

Steven L. Gleitman, Esq.
310-553-5080

Biography available at lawyers.com or by request.

Mr. Gleitman has practiced sophisticated estate planning for 26 years, specializing for more than 14 years in offshore asset protection planning. He has had and continues to receive many referrals from major law firms and the Big Four. He has submitted 52 estate planning issues to the IRS for private letter ruling requests; the IRS has granted him favorable rulings on all 52 requests. Twenty-three of those rulings were on sophisticated asset protection planning strategies.
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When the Los Angeles Galaxy finished Major League Soccer’s 2008 season in last place, it seemed improbable that the team would conclude the 2009 season one goal away from winning the league title. But the Galaxy did just that—and the difference can be ascribed to balance. In 2008 the Galaxy’s star coach, Ruud Gullit, tried to build a team around superstar David Beckham, barely paying attention to the other players. In 2009 the Galaxy’s new coach, Bruce Arena, focused his attention on the entire team, counting on Beckham to simply play his part.

A lack of balance felled one of the most famous teams in the world, Real Madrid. In 2000, the club bought a number of high profile players, forming a team of what the Spaniards called *galácticos*. After some initial success, the team suffered a number of losing seasons. Despite having the best players in the world, Real Madrid failed to give equal attention to the rest of its players or staff. This ultimately led to Real Madrid’s failure on the field.

The concept of balance is just as important to individuals as to professional sports teams. Studies show that achieving work-life balance is critical to individual health and happiness. People in high-stress jobs are much more likely to suffer serious medical conditions than those in less stressful positions. With average working hours continuing to rise in the United States, so too are physical and mental disabilities. Longer work hours and higher stress levels are also causing more rapid turnover among executives.

Lawyers are especially prone to work-life imbalance. Many in private practice are driven to cram in increasing amounts of billable hours. Even lawyers in other types of practices tend to work late and on weekends and take on a great deal of responsibility. I have seen young attorneys in big firms commit their lives to their work, leaving little room for anything else. Most burned out after a few years and left their firms to find other careers. Those who found ways to balance their work with their personal lives generally stayed and excelled.

It’s hard to imagine any lawyer facing death regretful that he or she had not billed more hours. Certainly many of our colleagues lament how little time they spend with their kids. Lawyers and their employers need to be aware that a work-life balance leads to happier, healthier employees and ultimately to greater long-term success for their firms. For an example of the benefits of work-life balance, look no further than Ronald Reagan. Though he is widely considered one of the most successful presidents in recent memory, Reagan took at least 335 days of vacation during his two terms in office—about 6 weeks a year.

I know that more experienced lawyers tend to look on this topic as just so much Generation X whining. An attorney I worked with once scolded me that when he was my age he worked long hours constantly to prove his value and earn his partnership. I probed him as to whether those long hours affected his personal life, and he admitted that they led to a bitter divorce.

Do not fall into the trap of selling out your life for your work. Make time with family a priority. Be prepared to say no when your boss asks you to sacrifice too much of that time. You will barely remember the nights you toiled late to get a brief done, but you will always cherish experiences with loved ones. Maybe you can even find time to attend a Galaxy game together.

David A. Schnider is general counsel for Leg Avenue, Inc., a distributor of costumes and apparel. He is the 2009-10 chair of the Los Angeles Lawyer Editorial Board.
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Preserving an Evidentiary Objection for Appellate Review

IF A LAWYER OBJECTS to the admission of evidence at trial, and the judge neither rules on the objection nor reserves a ruling, and the lawyer does not ask for a ruling, what results if the case is appealed? Many lawyers are surprised to learn that the appellate court will likely consider the evidentiary objection to have been waived. They ask, “Isn’t my objection enough to preserve the issue for appeal?” The simple answer is no.

Courts created this evidentiary waiver rule to prevent the objecting party from gaining an unfair advantage by gambling on a favorable judgment in the trial court while knowing that, in the event of an adverse outcome, the appellate court could reverse based on the trial court’s failure to rule. Some appellate courts treat undecided evidentiary objections as waived without exception, while other appellate courts deem undecided objections as implicitly overruled. It is just not safe to assume appellate courts will regard undecided evidentiary challenges as preserved for appeal.

The best way for a lawyer to avoid this trap is by making an earnest effort to secure a ruling from the trial court. What qualifies as an earnest effort may vary from case to case, but at a minimum the objecting lawyer should expressly ask the trial judge for a ruling on the objection and confirm that the request appears in the trial court record. If the objection occurs at an unreported sidebar, a lawyer can ask the court for the opportunity to later state for the record what occurred while a court reporter is present. The California Court of Appeal has recognized that a trial judge’s failure to rule on evidentiary objections will not result in waiver if the objecting lawyer has requested a ruling and any further request would be fruitless.1

Similarly, the objecting lawyer should respectfully press the trial court to clarify an evidentiary ruling if the meaning of the ruling is uncertain. These same principles apply to pretrial evidentiary objections, such as those raised in—or in opposition to—summary judgment motions.

For example, in Ann M. v. Pacific Plaza Shopping Center,2 the court ruled, “Because counsel failed to obtain rulings” on evidentiary objections in opposition to a summary judgment motion, “the objections are waived and are not preserved for appeal.” As the appellate court observed in Golden West Baseball Company v. Talley,3 “One court has held that the failure to secure a ruling waives the objection, even where the objection was made by the party who eventually prevailed on summary judgment.” While these rulings offer insight on what does not preserve an issue for appeal, trial lawyers should be aware of a recent case that may address more clearly what does.

With Reid v. Google, Inc., the California Supreme Court has taken up the issue of what lawyers must do to preserve undecided evidentiary objections asserted during summary judgment proceedings.4 The court has not yet held oral argument, however, so it may be some time before California attorneys see a definitive ruling.

Federal Courts

Federal appellate courts also enforce the evidentiary-waiver rule. The Ninth Circuit, for example, has considered a lawyer’s pretrial evidentiary objection to be insufficient in preserving the challenge for appeal because the lawyer failed to request a ruling from the trial court.5

The reality is that every trial lawyer should be familiar with the evidentiary-waiver rule because of its potential for affecting future appellate rights. Because the final victory in a case often depends on the appeal, presenting the appellate court with an adequate record is a vital element to achieving a successful outcome. The lesson is straightforward: always ask the trial court for a ruling until the court rules, or until any further request would clearly be useless. Even if the court pressures counsel to drop an issue, or appears to be reluctant to place rulings on the record before a court reporter, counsel’s duty is to take reasonable steps to ensure any claim of error is preserved.

A short checklist can help during trial: 1) Expressly ask the trial judge for a ruling on the objection, 2) Repeat the request for a ruling unless or until it seems clear that any further request would be futile, and 3) Confirm that the request appears in the trial court record.

1See Charnes R. v. Kristina S., 175 Cal. App. 4th 361, 369 (2009) (“Appellate courts sometimes decline to apply [the evidentiary-waiver] rule where the party unsuccessfully pressed for a ruling…”); see also City of Long Beach v. Farmers & Merchants Bank, 81 Cal. App. 4th 780, 784 (2000) (“Frankly…there was nothing further defense counsel could be expected to do in terms of seeking rulings on the previously filed evidentiary objections beyond personally raising the issue on two separate occasions in the presence of the trial court.”).
5See Ramirez v. City of Buena Park, 360 F. 3d 1012, 1026 (9th Cir. 2009) and Marbled Murrelet v. Babbitt, 83 F. 3d 1060, 1067 (9th Cir. 1996).

James Azadian is an appellate attorney with the Enterprise Counsel Group in Irvine.
August 4, 2009

John R. “Jack” Trimarco  
9454 Wilshire Blvd., 6th Floor  
Beverly Hills, CA 90212  

Dear Jack,

I am writing this letter with my deepest thanks for your tremendous efforts in assisting in a murder investigation which focused on my client, Damien Gatewood.

During the early morning hours, shots were fired at a house party in the Southern California area. Tragically, a guest was struck and died. Questionable eye witness identification by one neighbor, identified Damien Gatewood as the shooter.

Mr. Gatewood was arrested days later and had been incarcerated at Wayside Honor Ranch for one year awaiting trial.

I never believed that the authorities had the right man. Your long recognized and unmatched expertise in the polygraph field made you the obvious best choice to perform this critical examination.

You contacted me after you examined Mr. Gatewood. You told me that according to your examination Mr. Gatewood was conclusively not the shooter, a fact which was supported by retired FBI Agent and polygraph examiner Ron Homer, during his quality control.

Armed with the Examination video, polygraph report and your curriculum vitae, I met with the prosecutor assigned to the case. He directed me to the Los Angeles County Sheriff’s Department Polygraph Unit. I met with them to evaluate your test. They all acknowledged your unimpeachable integrity and expertise. They reviewed all charts, documents and video. I was advised by the Unit Chief that you ran a perfect examination and they agreed that Mr. Gatewood was not the shooter. Two days later the case was dismissed and an innocent man was not convicted.

It is a tribute to your reputation that polygraph testing conducted by you is so well received and respected in the legal community.

Warm Regards,

MARKS & BROOKLIER, LLP

ANTHONY P. BROOKLIER
The Benefits to Secured Parties of Real Estate Transactions in Mexico

**MEXICO’S LAW OF TRUSTS AND MORTGAGES** may afford lenders and creditors the opportunity to enter into a loan transaction governed by California law but secured by Mexican real estate under favorable provisions that are not available for Californian real estate collateral.

To understand the benefits of securing credit transactions with real estate in Mexico, lenders and borrowers should consider 1) how to structure a real property secured transaction governed by Mexican law, 2) what remedies would be available in the event of default and how these remedies would be exercised, and 3) how the structure and remedies compare with their counterparts in California.

In California, the preferred form of securing a credit transaction with real property is the deed of trust. Mortgages, while still in existence, have fallen into disuse. By contrast, in Mexico mortgages (hipotecas) and guaranty trusts (fideicomisos de garantía) are equally preferred forms of securing a credit transaction.

The widespread use of mortgages in Mexico is evidenced by Mexico’s production of a third of the total number of mortgages generated in Latin America (with Brazil generating another third) and by Mexico’s recent receipt of $1 billion to promote efficient mortgage markets as part of a $2.5 billion, 10-year conditional credit line for investment projects approved by the Inter-American Development Bank.

A mortgage in Mexico is a contract under which the mortgagor grants to the mortgagee the right to sell, upon breach of a secured obligation, certain real property owned by the mortgagor and to be paid with the proceeds of the sale. The hipoteca requires the same formalities as a grant of real property, which include the signing of the deed or escritura before a notary public and the recording of the deed in the local public registry. A proper mortgage will enjoy priority over a subsequent transfer or conveyance of the mortgaged asset. California law is similar. Under both legal systems, the mortgagee holds a lien on the real property (but not title or possession) that gives the mortgagee the right to sell the property to satisfy the debt upon maturity or default.

There are substantial differences between mortgages in California and Mexico. First, a mortgage in Mexico has no right of redemption, which is one of the major drawbacks for mortgagees under California law. A second difference is the ease with which a creditor in Mexico may obtain a deficiency judgment. In California, provided that a deficiency is not waived or prohibited and a debtor is personally liable for the debt, a creditor must file for a deficiency judgment within three months following the date of the foreclosure sale and after a hearing on the fair value of the real property on the date of sale.

By contrast, a creditor secured by a Mexican mortgage is not required to undertake a separate proceeding to obtain a deficiency judgment. Mexican courts have ruled that the purpose of foreclosing on a mortgaged asset is to cover the indebtedness and, as a result, it would be contrary to judicial efficiency to send the creditor to a new process when the proceeds of the sale fail to cover the debt. Accordingly, when there is a deficiency, mortgagees should be able to execute on other assets of the debtor as part of the same foreclosure procedure.

Obtaining a deficiency judgment in Mexico is thus simpler and faster than in California.

**Fideicomisos de garantía**

Guaranty trusts are used widely in Mexico as an alternative to mortgages. Some of the factors that should be taken into consideration to determine which is the better instrument in a specific transaction are:

1. The fees and costs charged by a trustee in a guaranty trust agreement, which are not applicable in a mortgage.
2. The convenience of a nonjudicial sale of the trust assets versus the need to pursue a judicial sale of the mortgaged assets in case of default.
3. The ability to partially “release” certain trust assets in proportion to the reduction of the debt versus the nondivisibility of the mortgaged assets, which make a partial release unavailable (except when an express agreement as to the portion of the credit applicable to each property applies to individualized properties).
4. The flexibility of the guaranty trust agreement for additional business or commercial purposes, such as the development of a resort project, the subsequent sale of the individual units created within a multiunit or fractional project, and the reinvestment of the sale proceeds.
5. The ability to include personal property, such as rents or sale proceeds, as part of the trust assets.
6. The power of the mortgagor to sell the mortgaged assets or further encumber the mortgaged assets by granting a junior lien on the same which, unless the parties agree otherwise, cannot be achieved if a guaranty trust is used, because the legal owner is the trustee.

The Mexican guaranty trust was created in 2000 with amendments to commercial and tax law that were enhanced, or “polished,” in 2003. Mexico’s Congreso endeavored to reduce transaction costs and interest rates, increase the type of guarantees available under Mexican law, motivate lenders to enter into credit transactions to help boost the economy of Mexico, increase commercial competition among trustees, protect collateral, and lower collection risks. The result is an instrument more favorable than its predecessor to a beneficiary in the event of default.

From a practical standpoint, Mexican courts consider the trustee to be the legal owner of the assets because legal title to the trust assets is transferred to the trustee to secure the performance of contractual obligations. Thus, the trust assets, together with the beneficiary’s right to request a sale in case of default, are not affected if the debtor is the subject of a bankruptcy proceeding, becomes insolvent, or is sued by any creditor. This is a powerful advantage for creditors in comparison to California law.

The transfer of ownership described above also protects trust beneficiaries from debtor’s acts. Once the trust agreement is executed

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and title to the assets has been transferred to the trust, the debtor loses the power and authority to convey or encumber the trust assets (unless the trust agreement expressly provides otherwise).12

Other differences between a California deed of trust and a Mexican fideicomiso relate to the entity that may act as trustee and the scope of the trustee’s responsibilities. Under California law, the trustee under a deed of trust is not a true trustee, is not subject to the general rules governing trusts, and has the limited function of reconveying the property to the settlor if the loan is repaid or to conduct a trustee sale in case of default.13 In Mexico, on the other hand, only entities authorized by law—mainly financial institutions—can act as trustees.14 They generally play a more active role and are highly regulated by the general law of trusts.

Furthermore, beneficiaries under a Mexican guaranty trust have the right to file a claim for any deficiency. By contrast, California law provides, “[N]o judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.”15

With regard to the nonjudicial foreclosure process, Mexican law provides, “[I]n a guaranty trust, the parties may agree on the form in which the trustee shall proceed to the nonjudicial sale of the rights or assets in trust.”16 This ability to regulate the form in which the trustee shall proceed is applicable only if, at the time in which the guaranty trust agreement is entered into, the parties agree to the following terms: 1) the trustee shall initiate the nonjudicial foreclosure upon receiving a written communication requesting that the assets be sold and the events of default of the secured obligations are specified, 2) the trustee shall send a copy of the written communication to the debtor, who may oppose the sale only if any outstanding amount is paid and the debtor shows that no event of default has occurred, 3) in the event that the debtor is not able to prove performance of its obligations, the trustee may proceed to the nonjudicial sale of the trust assets, according to the terms and conditions of the trust agreement, and 4) the time frame in which the above-mentioned activities shall occur.

In the event that the parties to a guaranty trust failed to specify the process for a trustee sale or if the process, as set forth in the trust agreement, failed to meet the requirements of the law, the lender, upon breach of the guaranteed obligation, will have to file a lawsuit (demanda) in the state court having jurisdiction over the assets. If the lawsuit is properly
filed, the court will order full payment of the amounts due and provide that, if full payment is not made, the assets or possession thereof shall be delivered to the lender until they are sold. If the debtor (or whoever is in possession of the assets) refuses to deliver possession of the assets, the court may impose a fine, evict the debtor, or order the debtor’s arrest for up to 36 hours. The lawsuit will then have to be served upon the debtor, who has five days to respond. Upon receipt of the debtor’s response, the parties will be granted a probatory period during which both may offer evidence to support their claims and defenses. At the end of the probatory period, the court will study the case and issue a final judgment.

If the plaintiff prevails, it will be able to proceed to sell the assets or take legal title. If the value of the trust assets is insufficient to cover the amount due, the trust beneficiary may take legal action to collect the deficiency. Any motion or appeal related to the trustee sale will not suspend the nonjudicial foreclosure procedure.17

Although many similarities exist between mortgages and trusts in Mexico and California, Mexican law is in many ways more beneficial to secured parties. Accordingly, borrowers who own or have access to Mexican real estate should seriously consider offering, and lenders should seriously consider accepting, property in Mexico as collateral in properly structured Mexican hipotecas and fideicomisos de garantía as security for loan transactions in California.18
THE USE OF CALIFORNIA CIVIL CODE SECTION 52.1—otherwise known as the Bane Act—has mushroomed in the last few years. A LEXIS search reveals that the vast majority of published cases addressing Section 52.1 date from 2005 to the present. This trend appears to stem in part from the section’s expansive and somewhat undefined nature.

Section 52.1 allows a plaintiff to file a lawsuit against those who interfere or attempt to interfere by “threats, intimidation or coercion” with the plaintiff’s exercise or enjoyment of any state or federal constitutional or legal right. Since the law’s enactment in 1987, the California Supreme Court in Venegas v. County of Los Angeles (Venegas I) has clarified that “Civil Code section 52.1 does not extend to all ordinary tort actions because its provisions are limited to threats, intimidation, or coercion that interferes with a constitutional or statutory right.” In addition to awarding any appropriate damages or providing injunctive or other equitable relief for a violation of Section 52.1(b), a court may also award a plaintiff reasonable attorney’s fees.

Courts originally interpreted Section 52.1 as requiring plaintiffs to be a member of a protected class—for example, a class defined by race or gender. However, in 2000, the California Legislature eliminated this requirement for bringing a claim under Section 52.1.

While Section 52.1 prohibits interference with rights by “threats, intimidation or coercion,” these terms are not defined in the statute. Moreover, the courts and the legislature have made little attempt to more specifically define the scope of these terms.

Some courts have found Section 52.1 to be equivalent to 42 U.S.C. Section 1983, a federal statute enacted in 1871 that provides a cause of action for the redress of violations of the U.S. Constitution committed “under color of law.” Section 1983 is a primary vehicle for bringing constitutional claims for violations of civil rights. In several recent decisions, federal district courts as well as a California appellate court have found that allegations of excessive force and false arrest brought under Section 1983 also support a claim under Section 52.1, suggesting that the reach of Section 52.1 is equivalent to that of Section 1983.

On the other hand, other courts have held that Section 52.1 is distinct from Section 1983. For example, in Barsamian v. City of Kingsburg, the federal district court stated, “Technically, whether a constitutional violation occurred and whether that violation was accompanied by any threats, intimidation or coercion are separate analytical inquiries (albeit with intertwining facts).”

Moreover, a number of courts have held that allegations of excessive force and false arrest—which support a claim under Section 1983—do not state a claim for relief under Section 52.1. For example, in Autry v. City and County of San Francisco (In re M.L.), the plaintiff premised his allegations of a violation of Section 52.1 on claims that he was subject to excessive force. However, the court noted that the “plaintiff’s reliance on the excessive force allegations for proof of a violation under section 52.1 ignores the requirement that [the] plaintiff must demonstrate both the requisite ‘threats, intimidation, or coercion,’ and any interference with constitutional rights. Without proof of the former element—which plaintiff does not even attempt—no liability attaches under this claim.” This latter interpretation of the statute appears to be more in line with the text of Section 52.1.

Expansive and Vague

These conflicting lines of cases demonstrate that courts clearly remain confused regarding the elements and scope of Section 52.1. Section 52.1 contains terms that are not only undefined but also expansive and vague.

Adding to the perplexity is the language of the standard California jury instruction for Section 52.1—Judicial Council of California Civil Jury Instructions 3025. As an element of a violation of Section 52.1, CACI 3025 contains language that the jury must find that a defendant has interfered with a plaintiff’s statutory or constitutional rights by “threatening or committing violent acts.” The statute, however, contains no element requiring violence or the threat of violence.

Blair Schlecter is a partner with Hurrell Cantrall LLP. His practice emphasizes municipal liability, including the defense of civil rights claims against law enforcement officers and officials.
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Thus, the jury instruction appears to be inaccurate, and at least one district court has refused to apply it.17

When the California Supreme Court addressed the reach of Section 52.1 in Venegas I,18 concurring justices stated their concern with the expansive and vaguely defined nature of Section 52.1. Justice Marvin Baxter wrote, “Pragmatically speaking, the limitation in section 52.1 that the right being interfered with under section 52.1 be a right guaranteed by any state or federal law or constitutional provision is hardly a limitation at all.”19 He added that with no requirement for a defendant to act under color of law and because of principles of sovereign immunity applicable to Section 1983 actions, “it is not difficult to envision how the statute will soon come to be abused.” He predicted that “section 52.1 will soon come to be widely viewed as a convenient civil litigation tool through which to reach a garden-variety tort defendant’s deep pocket.”20 He urged the legislature to revisit the language of the statute.21 In a concurring and dissenting opinion, Justice Joyce Kennard stated, “I do…share Justice Baxter’s concerns about the potential breadth of the statute.”22 Given the recent explosion in lawsuits claiming Section 52.1 violations, the concerns of these justices seem appropriate.

With the scope of Section 52.1 still unsettled, neither plaintiffs nor defendants involved in lawsuits alleging violations of Section 52.1 can predict the outcome of their cases with any degree of certainty. This difficulty clouds not only the analysis of a party’s chances of success but also an assessment of the viability of settlement.

Another issue for litigants to consider is qualified immunity. When a suit is filed under Section 1983, government officials are entitled to the defense of qualified immunity if they did not violate a clearly established right of the plaintiff.23 According to the U.S. Supreme Court, “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”24 Qualified immunity is a doctrine acknowledging that government officials can make mistakes regarding the legal constraints on their conduct.25 Thus, qualified immunity essentially provides protection for reasonable mistakes by government officials, particularly police officers acting under stressful situations.26 Moreover, suits filed under Section 1983 allow litigants to try these civil rights matters in federal court since they necessarily involve questions of federal law.27

In contrast to claims under Section 1983, the California Court of Appeal in Venegas v. County of Los Angeles (Venegas II) found no qualified immunity for claims under Section 52.1.28 In Venegas II, the defendants—the County of Los Angeles and a Los Angeles County Sheriff’s Department deputy—argued that the legislative history of Section 52.1 and the similarities between it and Section 1983 established that qualified immunity applies to claims under Section 52.1. The defendants also noted that Section 52.1 was modeled after the Massachusetts Civil Rights Act—and the Massachusetts Supreme Court ruled that the act provides a level of qualified immunity.29 The court acknowledged, “This decision by the Massachusetts high court was, in turn, based on its previous decision that in enacting the Massachusetts Civil Rights Act ‘the Legislature intended to provide remedial…coextensive with 42 U.S.C. [Section] 1983.’”30

However, the Venegas II court refused to follow this decision. It found that the Massachusetts court did not explain why immunity should follow from the fact that Section 52.1 was “coextensive” with Section 1983. Additionally, the court found no evidence that the California Legislature intended to provide immunity. In addition, the court noted that it had long ago “abolished the common law rules of governmental immunity from tort liability.”31

Unaddressed by the court of appeal in Venegas II is the fact that Section 52.1 is not a form of tort liability. Rather, as explained by the supreme court in Venegas I, Section 52.1 requires the violation of a statutory or constitutional right.32 Also, while the court of appeal in Venegas II noted that no evidence exists to support an assertion that the legislature provided for qualified immunity, Section 1983 on its face also provides for no immunity, yet government officials have been granted absolute or qualified immunity under the section by the courts.33

The Venegas II court distinguished Section 1983 from Section 52.1 by finding that a claim under Section 52.1 also had to be supported by the requisite threats, intimidation, or coercion. However, many other courts have not interpreted Section 52.1 in this manner,34 and it is unclear if this added requirement has any substantive impact. Therefore, the reasoning supporting the court’s decision in Venegas II is questionable.

### Troubling Developments

The implications of these recent decisions interpreting Section 52.1 are huge for civil rights cases. In particular, the expansive language of Section 52.1 may prove to be nearly limitless. If Section 52.1 covers all the bases of liability of a federal civil rights action, there will no longer be any need to file suit under 42 U.S.C. Section 1983. Rather, litigants can simply file a Section 52.1 claim instead and keep the matter in state court if they so choose.35 This strategy is especially tempting since Section 52.1, like Section 1983, allows plaintiffs to recover attorney’s fees if they prevail on their claims. Litigants choosing to limit their actions to Section 52.1 claims would render Section 1983 irrelevant and strip federal courts—and litigants—of the ability to try civil rights cases under federal jurisdiction.

Similarly, since Venegas II’s ruling that Section 52.1 does not provide any qualified immunity for government officials, courts are likely to interpret Section 52.1 as a state law version of Section 1983 without the benefit of qualified immunity. The result is that the defense of qualified immunity for government officials may be lost.

The result of these developments is troubling. Without further action by the California Legislature, parties under current law may file expansive and ill-defined civil rights claims without the benefit of the defense of qualified immunity or the potential for resolution in federal court.

Two steps should be considered to address this situation. First, the legislature should provide definitions for the terms of Section 52.1 and decide whether the statute is coextensive with Section 1983. This will resolve confusion among litigants and the courts regarding the reach of Section 52.1. Second, the legislature should amend Section 52.1 to provide qualified immunity for government officials unless they have violated “clearly established” rights about which reasonable officials would know. In this way California state law would mirror the protections provided under federal law.

Any other result would provide an obvious incentive for parties to avoid the use of federal courts or federal law to resolve civil rights issues. The legislature’s failure to act would also deprive government officials of the important and long recognized defense of qualified immunity. These steps will help to clarify the meaning of Section 52.1, provide reasonable protections for government officials being sued, and promote appropriate use of federal and state civil rights laws.
Medora v. City & County of S.F., 2007 U.S. Dist. LEXIS 67471, at *29 (N.D. Cal. 2007) (Allegations of excessive force supported a claim under Civil Code §52.1); Cole v. Doe, 387 F. Supp. 2d 1084, 1103 (N.D. Cal. 2005) (“Use of law enforcement authority to effectuate a stop, detention (including use of handcuffs), and search can constitute interference by ‘threat[,] intimidation, or coercion’ if the officer lacks probable cause to initiate the stop, maintain the detention, and continue a search.”); Gillan v. City of San Marino, 147 Cal. App. 4th 1033, 1050 (2007) (false arrest).

Barsamian v. City of Kingsburg, 597 F. Supp. 2d 1054, 1064 (E.D. Cal. 2009); see also Venegas v. County of Los Angeles, 133 Cal. App. 4th 1230, 1242 (2007) (Venegas I) (“Section 52.1 differs from section 1983 in two important ways. There is no ‘state action’ requirement in section 52.1; the statute applies to private actors as well as government agents. Furthermore, liability is limited to violations of constitutional or statutory rights accomplished by ‘threats, intimidation, or coercion.’”).


Id.; see also Walker v. City of Hayward, 2008 U.S. Dist. LEXIS 44719, at *20 (N.D. Cal. 2008) (“[A] false arrest claim, without more, is not enough” to state a claim under Section 52.1.); Justin v. City & County of S.F., 2008 U.S. Dist. LEXIS 36468, at *26 (N.D. Cal. 2008) (Section 52.1 “does not apply to a plaintiff’s allegation of use of excessive force absent a showing that the act was done to interfere with a separate state or federal constitutional right.”).

2-3000 CACI 3025.

CIV. CODE §52.1.


Id. at 850.

Id. at 851.

Id.


See Kraus v. Pierce County, 793 F. 2d 1105, 1108 (9th Cir. 1986).


Id.; see also Duarte v. Healy, 537 N.E. 2d 1230, 1232 (1989) (“We conclude it to be consistent with the intent of the Legislature in enacting the Civil Rights Act to adopt thereunder the standard of immunity for public officials developed under §1983.”).


Id. at 1245-46.


Since a Section 52.1 claim may be based on violations of the U.S. Constitution, a defendant arguably could remove the case to federal court on this basis. But the California Constitution provides similar protections, and thus plaintiffs could simply limit their allegations to violations of state constitutional or statutory rights to avoid removal of their cases to federal court.
INSURANCE COMPANIES increasingly are turning to their in-house and outside attorneys to perform what is commonly understood to be an ordinary business function of an insurer—the investigation and adjusting of claims received from their insureds. As a result, insureds seeking the production of documents pertinent to their claims are finding that they need to litigate issues regarding the scope of evidentiary privileges and protections.

After an insured sues an insurance company for the improper handling of a claim and for insurance bad faith, the insurance company often will refuse to produce information and documents involving the handling of the claim. Although this evidence goes to the heart of claims against the insurance company, the insurer may argue that the evidence is protected by the attorney-client privilege and the attorney work product doctrine. These assertions, however, are frequently improper.

Insurers should not be permitted to cloak basic claims-handling functions with either the attorney-client privilege or the work product doctrine and then withhold information derived from these actions from insureds. A claims handler’s file often contains key documents that shed light not only on whether insurers have handled a claim properly and in good faith but also, sometimes, on whether the claim is covered. Clearly insureds should seek the production of this information.

Attempting to preclude insureds from receiving claims-handling documents in discovery is the first line of defense for insurers that hire attorneys to investigate and handle the adjustment of a claim. Insurers often do this by claiming that the documents are protected by the attorney-client privilege. The attorney-client privilege attaches to “confidential communication between client and lawyer” during the course of the attorney-client relationship. According to one court, quoting the Evidence Code, “Confidential communications include information transmit-

by Susan Page White

Case law makes it clear that the attorney-client privilege does not attach when an attorney acts as a claims adjuster

Susan Page White is a partner in the Los Angeles office of Dickstein Shapiro LLP. She represents insureds in complex coverage matters.
tions.20 The court of appeal held that the trial court committed reversible error by granting blanket access to the claims file to the insured without first conducting an in camera review of the documents at issue. The appellate court stated that when an attorney is asked to investigate a claim and render legal advice, the trial court likely will need to review each document to determine if it contains mere investigative work or involves the rendering of legal advice.21 Thus, when the line between legal services or advice and claims adjusting becomes blurry, the specific character of each document or communication will determine its proper classification. Still, an insured is entitled to discovery of all information related to the claims adjustment process, notwithstanding an attorney’s involvement.

Insurers invoking the defense of advice of counsel against allegations of bad faith and malice in claims handling will find that they have waived the attorney-client privilege by placing counsel’s advice at issue—even if insurers properly withhold documents from discovery based on the privilege. This defense involves evidence that the insurer relied on the advice of competent counsel. An insurer will argue that it had “proper cause” for its actions even if the advice it received from its counsel was ultimately unsound or erroneous.22 Insurers asserting this defense should be
This court, quoting one of the federal appellate courts, noted that "in anticipation of litigation." However, as the Eighth Circuit recognized in *Diversified Industries, Inc. v. Meredith*, the “rule does not come into play merely because there is a remote prospect of future litigation,” and it does not protect documents prepared in the regular course of business rather than for purposes of the litigation.”

In insurance litigation, the determination of whether attorneys prepared documents in anticipation of litigation or in the ordinary course of business is not always clear. This is because the routine business of insurance companies is not only to investigate and evaluate claims but also to defend their insureds against third-party claims. As the court explained in *Mount Vernon Fire Insurance Company v. Try 3 Building Services, Inc.*, because it is difficult to determine precisely when the possibility of litigation becomes sufficiently definite to be considered “anticipated,” “courts will frequently presume that investigative reports prepared by an insurer prior to a coverage decision are prepared in the ordinary course of the insurer’s business and are not afforded work-product protection.”

Thus, for an insurer to meet the “anticipation of litigation” standard, it must set forth detailed facts. According to the *Mount Vernon* court, quoting one of the federal rules, “[a] party asserting a claim of privilege is obligated to prepare an index of withheld documents, which must provide sufficient information ‘to assess the applicability of the privilege or protection.’” The court further noted that an insurer’s “conclusory claim” that it anticipated litigation at the time of creating a document is “not convincing.”

In addition, documents prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation do not qualify for protection. In *Atlanta Coca-Cola Bottling Company v. Transamerica Insurance Company*, the federal district court ordered the insurer to produce answers to interrogatories that identified the nature and scope of the insurer’s investigation and process of review, consideration, and rejection of the insured’s claim. Despite the insurer’s contention that the requested documents were protected trial preparation materials, the court permitted discovery because the information was limited to what the insurer had compiled prior to its denial of the claim and was relevant to the question of the insurer’s bad faith in denying the claim.

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The evaluation of claims of its policyholders is the regular, ordinary and principal business of defendant insurance company. Most of such claims result in payment by the defendant; it can hardly be said that the evaluation of a routine claim from a policyholder is undertaken in anticipation of litigation, even though litigation often does result from denial of a claim. The obviously incongruous result of the position urged by [the insurer] would be that the major part of the files of an insur-
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1 In California, the attorney-client privilege applies to all confidential communications between attorneys and their clients that are made in the context of an attor-
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ney-client relationship. See Evid. Code §950 et seq. Similarly, the Federal Rules of Evidence define the attorney-client privilege as “the protection that applicable law provides for confidential attorney-client communications.” See Fed. R. Evid. 502(g)(1).

2 Evid. Code §952; Moeller v. Superior Court, 16 Cal. 4th 1124, 1130 (1997).


4 See Green & Shinee v. Superior Court, 88 Cal. App. 4th 532, 537 (2001) (“The attorney-client privilege does not embrace matters otherwise unprivileged merely because the client has communicated those matters to his attorney.”).


6 General Dynamics Corp. v. Superior Court, 7 Cal. 4th 1164, 1190 (1994) (“We reject any suggestion that the scope of the privilege should be dilated in the context of in-house counsel and their corporate clients, Members of corporate legal departments are as fully entitled to the protection of in-house counsel and their corporate clients as any lawyer employed by a company and investigating wrongdoing of that company may rely upon the attorney-client privilege in making a coverage decision are not privileged “because the reports, although prepared by attorneys, are prepared as part of the ‘regular business’ of the insurance company.”).

7 See, e.g., In re Commercial Fin. Servs., Inc., 247 B.R. 828, 852 (Bankr. N.D. Okla. 2000) (An attorney employed by a company and investigating wrongdoing of that company may rely upon the attorney-client privilege and work product doctrine to protect communications and information obtained from company employees for the purpose of providing sound legal advice to the company.).


9 Id. at 1381.

10 Id.

11 Id. at 1398. See also Chicago Title Ins. Co. v. Superior Court, 174 Cal. App. 3d 1142, 1151 (1985) (“It is settled that the attorney-client privilege is inapplicable where the attorney merely acts as a negotiator for the client, gives business advice, or otherwise acts as a business agent.”); Insurance Co. of Pa. v. City of San Diego, No. 02-CV-0693 BEN (CAB), 2007 WL 935712, at *2 (S.D. Cal. Feb. 27, 2007) (“To the extent that the McCormick Barstow law firm acted as a claim handler with respect to the invoices [for defense costs] and their payment, no privilege arose.”).

12 2,022 Ranch, 113 Cal. App. 4th at 1398.

13 Mission Narl’Ins. Co. v. Lilly, 112 F.R.D. 160, 163 (D. Minn. 1986); St. Paul Reinsurance Co. v. Commercial Fin. Corp., 197 F.R.D. 620, 641 (N.D. Iowa 2000); see also National Farmers Union Prop. & Cas. Co. v. Distric Court, 718 P. 2d 1044, 1049-50 (Colo. 1986) (en banc) (insured permitted to discover work conducted by attorneys employed by insurer because attorneys worked more as “investigators” than attorneys, and thus attorney-client privilege was inapplicable); Bertalo’s Rest. Inc. v. Exchange Ins. Co., 658 N.Y.S.2d 656, 659 (N.Y. App. Div. 1997) (Reports prepared by attorneys to advise insurers in making a coverage decision are not privileged “because the reports, although prepared by attorneys, are prepared as part of the ‘regular business’ of the insurance company.”).


15 Lilly, 112 F.R.D. at 163.

16 Id.


18 Id. at 32.


20 Id. at 471.

21 Id.


23 Id. at 727; see also Transamerica Title Ins. Co. v. Superior Court, 188 Cal. App. 3d 1047, 1052 (1987) (“The deliberate injection of the advice of counsel into a case waives the attorney-client privilege as to communications and documents relating to the advice.”).

24 CODE CIV. PROC. §2018.030.


26 Diversified Indus., Inc. v. Meredith, 572 F. 2d 596, 604 (8th Cir. 1977).

27 Id. (The law firm’s investigation was not made and its report was not prepared due to any prospect of litigation involving the client; therefore, attorney work product protection did not apply to the document.); see also Harper v. Auto-Owners Ins. Co., 138 F.R.D. 655, 663 (S.D. Ind. 1991) (Materials generated after litigation is anticipated are not protected if they were part of the insurer’s ordinary and regular course of business.).


29 Id. at *4 (quoting Fed. R. Civ. P. 26(b)(5)); Id. at *7.


31 Id. at 117.

32 Id.

33 Id. at 118.

34 CODE CIV. PROC. §2018.030(b).
FOR YEARS, trade secret plaintiffs have asserted claims under the California Uniform Trade Secrets Act (CUTSA) in tandem with claims for interference with contractual relations and unfair competition. The ability of plaintiffs to assert these sibling claims has gone largely unchallenged in California, until last year. In *K.C. Multimedia, Inc. v. Bank of America Technology and Operations, Inc.* the Sixth District of the California Court of Appeal significantly changed the landscape for trade secret practitioners in what appears to be the first published opinion directly on the subject in California. The *K.C. Multimedia* court ruled that CUTSA preempts all common law claims arising from the “same nucleus of facts.”

The ruling affects every action in California containing an alleged or prospective trade secret claim. Claimants who do not carefully plead interrelated common law claims risk having those claims preempted under CUTSA—a statute that contains serious restrictions for claimants. Among those limitations are a cap on exemplary damages and a provision that those damages can only be awarded by the court.

CUTSA was enacted in 1984 to provide trade secret owners with remedies against misappropriation, including injunctive relief, damages, recovery of amounts of unjust enrichment, and, in some cases, payment of a reasonable royalty and attorney’s fees. While the latter three remedies are not available under common law, damages (including exemplary damages) and injunctive relief are recoverable in common law business interference cases. CUTSA was modeled heavily on the Uniform Trade Secrets Act, which the National Conference of Commissioners on Uniform State Laws approved in

**Weapon of Choice**

The state supreme court may have to decide whether the *California Uniform Trade Secrets Act* preempts common law claims

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1979 to clarify the common law and provide uniformity among the states.6

In K.C. Multimedia,7 the plaintiff-appellant, a supplier of technology services, claimed that banking customers and a former employee misappropriated the source code from K.C. Multimedia’s banking application. Alleging that the source code was a trade secret, K.C. Multimedia asserted claims for violation of CUTSA, breach of confidence, tortious interference with contract, and unfair competition. Shortly before trial, the trial court dismissed the causes of action for breach of confidence, interference with contract, and unfair competition on the grounds that they were preempted by CUTSA.8 The facts do not clearly establish that the parties disputed whether the source code constituted a trade secret. One of the essential, and generally highly contested, elements of a trade secret misappropriation claim is whether a claimed trade secret actually satisfies the statutory criteria for being one.9

On appeal, K.C. Multimedia first challenged the procedural basis for the trial court’s ruling. It argued that the court erred by ruling on the preempting question without first hearing evidence.10 Because K.C. Multimedia had failed to make an objection on the record, the court of appeal ruled that the procedural challenge had been forfeited.11

K.C. Multimedia then attacked the substantive basis of the trial court’s ruling. It did so by relying upon CUTSA Section 3426.7(b). Section 3426.7 addresses preemption, with subsection (b) delineating that “[t]his title does not affect (1) contractual remedies, whether or not based upon misappropriation of a trade secret, (2) other civil remedies that are not based upon misappropriation of a trade secret, or (3) criminal remedies, whether or not based upon misappropriation of a trade secret.” K.C. Multimedia argued that because subsection (b) only addresses what is not affected, the court should interpret any preemption narrowly.12 Not based upon misappropriation of a trade secret” would “appear to be rendered meaningless if, in fact, claims which are based on trade secret misappropriation are not preempted by the state’s statutory scheme.”13 The appellate court affirmed the trial court’s ruling that because CUTSA “pre-empt[s] claims based on the same nucleus of facts as trade secret misappropriation,” the appellant’s alternative civil claims were preempted.14

Difficult to Reconcile
To practitioners who have followed federal law on the issue of preemption, the court of appeal’s holding may not be surprising.15 Furthermore, the California Supreme Court, in Cadence Design Systems, Inc. v. Avant! Corporation, may have signaled the direction the law would take when it noted, in dicta, that if a continuing misappropriation occurred before and after the 1985 effective date of CUTSA, “the claim must be divided in two—one common law claim…and one [CUTSA] claim.”16

Nonetheless, the court of appeal could have interpreted the statute to compel a different rule. As the court in K.C. Multimedia acknowledged, CUTSA does not explicitly address, one way or the other, whether “other civil remedies based upon misappropriation” are preempted.17 By contrast, the corresponding provision of the Uniform Trade Secrets Act unambiguously states that the act “displaces” common law claims: “Except as provided in subsection (b), this Act displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.”18

The court of appeal disagreed, reasoning that “CUTSA’s ‘comprehensive structure and breadth’ suggests a legislative intent to occupy the field.”19 The court further noted that the language in subsection (b)(2) that “[t]his title does not affect…other civil remedies that are to bring common law claims.20 In a state that depends heavily on intellectual property rights, it makes sense to give the broadest possible protections to trade secret owners. On the other hand, if the legislature’s primary goal was to create uniformity with the laws of other states, it follows that courts will read “displacement” language into the statute.

Arguably, K.C. Multimedia conflicts with prior California case law, which would be a principal basis for challenging the decision. Most notably, in Reeves v. Hanlon—decided by the California Supreme Court two years after Cadence Design Systems—a law firm sued former employees for, among other claims, violation of CUTSA and tortious interference with contractual relations. The claims were premised on the defendants’ misappropriation of confidential client information.21 After judgment was entered in favor of the plaintiffs, the court of appeal affirmed, finding that both the CUTSA and interference claims were substantially supported by the record and legally sound.22 At issue before the California Supreme Court was the propriety of the award for violation of CUTSA, and whether the plaintiff could recover under an intentional interference theory. The supreme court affirmed the court of appeal’s judgment in its entirety.23

Similarly, in ReadyLink Healthcare v. Cotton,24 the Fourth District Court of Appeal affirmed the trial court’s issuance of a preliminary injunction in favor of a provider of nursing services against a former agent. The court ruled that there was ample evidence the plaintiff was likely to prevail on its CUTSA and unfair competition claims. Significantly, both claims shared the same nucleus of facts.25 Likewise, in Fleishman v. Superior Court,

The court also enunciated its view that K.C. Multimedia did “not undermine the analytic framework...allowing claims to go forward where the gravamen of the claims does not rest on the misappropriation of trade secrets.” Thus, Phoenix Technologies is the third federal case in a row that seems to place limitations on K.C. Multimedia.
1. The court in K.C. Multimedia, Inc. v. Bank of America Technology and Operations, Inc. ruled that CUTSA pre-empts all common law claims arising from the “same nucleus of facts.”
   A. True
   B. False
2. Remedies under CUTSA include:
   A. Injunctive relief
   B. Exemplary damages
   C. Attorney’s fees
   D. All of the above
3. CUTSA does not define “trade secret.”
   A. True
   B. False
4. CUTSA was modeled after the Uniform Trade Secrets Act.
   A. True
   B. False
5. When did the California Legislature enact CUTSA?
   A. 1979
   B. 1984
   C. 1987
   D. 1994
6. Unjust enrichment is recoverable under CUTSA.
   A. True
   B. False
7. CUTSA displaces contractual remedies based upon misappropriation of a trade secret.
   A. True
   B. False
8. K.C. Multimedia describes CUTSA’s scope as:
   A. Narrow
   B. Comprehensive
9. Which district of the California Court of Appeal decided K.C. Multimedia?
   A. First
   B. Fourth
   C. Sixth
   D. Second
10. All districts of the California Court of Appeal are bound by K.C. Multimedia.
    A. True
    B. False
11. The existence of a trade secret is an essential element of a CUTSA misappropriation claim.
    A. True
    B. False
    A. True
    B. False
13. CUTSA places no cap on the amount of exemplary damages that may be awarded.
    A. True
    B. False
14. Under CUTSA, exemplary damages are assessed by the jury.
    A. True
    B. False
15. Think Village-Kiwi, LLC v. Adobe Systems, Inc. ruled that common law claims arising from alleged acts of misappropriation can proceed as “alternative theories” until it is established whether the information at issue constitutes a trade secret.
    A. True
    B. False
16. In Aversen USA, Inc. v. Jones, the court allowed the plaintiff’s common law claims to proceed because they were independent of the plaintiff’s CUTSA claim.
    A. True
    B. False
17. In K.C. Multimedia, the trial court dismissed the plaintiff’s claims for breach of confidence, interference with contract, and unfair competition on its own motion prior to trial.
    A. True
    B. False
18. In Think Village, the plaintiff challenged CUTSA’s preemptive effect on common law claims.
    A. True
    B. False
19. If a claimant wished to challenge the holding in K.C. Multimedia, which California Supreme Court case would be helpful to cite?
    A. Sheetan v. San Francisco 49ers.
    B. Fleishman v. Superior Court.
    D. Reeves v. Hanlon.
20. Which form of recovery is not available on a claim for interference with contract?
    A. Damages
    B. Unjust enrichment
    C. Injunctive relief
    D. Exemplary damages

ANSWERS

1. True
2. A
3. True
4. True
5. A
6. True
7. True
8. A
9. A
10. True
11. True
12. True
13. True
14. True
15. True
16. True
17. True
18. True
19. A
20. A

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the Second District Court of Appeal held that a preliminary injunction applied to CUTSA and common law claims for misappropriation of trade secrets.27

While none of these opinions directly addresses CUTSA preemption, their holdings seem to implicitly recognize that a party can recover under CUTSA as well as an alternative civil theory—even if both are premised on a misappropriation of trade secrets. Thus it is difficult to reconcile these cases—and most particularly Reeves—with the outcome in K.C. Multimedia.

Federal District Court Rulings

To date, only three cases have addressed K.C. Multimedia, and all of them are federal district court opinions. The first, Think Village-Kiwi, LLC v. Adobe Systems, Inc.,28 recognized that K.C. Multimedia presents somewhat of a Catch-22 for claimants. In Think Village, the plaintiff sought to amend its complaint—which asserted a cause of action under CUTSA—to also include claims for common law misappropriation and breach of confidence. The defendants argued that the amendment would be futile because the proposed claims were preempted. The plaintiff did not challenge CUTSA's preemptive effect but argued that it should be allowed to plead the claims as alternative theories.29

The district court agreed with the plaintiff. It reasoned that because the status of the information was still a matter of allegation, and it had not yet been proven whether the information was entitled to trade secret protection, preemption would be premature. If the information was protectable other than as a trade secret, then CUTSA, pursuant to the express limitation embodied in Section 3426.7(b)(2),30 would not apply.31 This more cautious, wait-and-see attitude comports with the approach taken by several other federal courts.32

In the second case, Aversan USA, Inc. v. Jones,33 plaintiff Aversan, a provider of software engineering services, sued two former employees who had begun contracting directly with one of Aversan’s customers while impermissibly using Aversan’s propriety software. The defendants argued that K.C. Multimedia favored dismissal of Aversan’s claims for interference with contractual relations, interference with prospective economic advantage, breach of duty of loyalty, and unfair competition.

As pled, the allegations underlying the claims did not specifically mention trade secrets. Indeed, two of the claims—interference with prospective economic advantage and unfair competition—focused mainly on alleged false representations by one of the defendants that the defendants continued to work for Aversan. Because the “nuclei of fact” appeared to be different, the district court held that the new claims were independent of the CUTSA claim.34 The court expressly stated that it was not reaching the issue of whether, had the new claims involved similar facts, Aversan could plead them as alternative theories.35

Most recently, in Phoenix Technologies Ltd. v. DeviceVM,36 a systems software developer, Phoenix Technologies, asserted CUTSA, tort, and Unfair Competition Law claims against DeviceVM and a former Phoenix employee arising from alleged trade secret theft. The defendants moved to dismiss the non-CUTSA claims on grounds of preemptive effect. The court acknowledged that “most of the allegations...concern Defendants’ use of information that appears to fall within the definition of a ‘trade secret’ under CUTSA.”37 However the court—as in Think Village—refused to dismiss any of the challenged claims at the pleading stage. Instead, it construed them as not based on the same nucleus of facts as the CUTSA claim but noted that “[i]f, following discovery, there is not sufficient evidence to support these claims based on a distinct nexus of facts, Defendants may move for summary judgment at that time.”38

The court also enunciated its view that K.C. Multimedia did “not undermine the analytic framework...allowing claims to go forward where the gravamen of the claims does not rest on the misappropriation of trade secrets.”39 Thus, Phoenix Technologies is the third federal case in a row that seems to place limitations on K.C. Multimedia.

Practical Effects

Until another court of appeal disagrees or the California Supreme Court addresses the issue, K.C. Multimedia must be viewed as controlling in all trial courts in this state.40 Litigants therefore must assume that all common law claims bearing the “same nucleus of facts” as a claim under CUTSA will be preempted by the statute.

CUTSA preemption has several practical effects. While exemplary damages are available under CUTSA upon a showing that the misappropriation is “willful and malicious,” the court—not the jury—asses the amount of exemplary damages.41 Moreover, these damages are capped at twice the amount of actual damages or unjust enrichment.42 By contrast, claims for intentional interference with contract or prospective economic relations involve no restrictions on the amount of available exemplary damages.43

Another effect, alluded to by the district court in Think Village, may be to foreclose plaintiffs from recovering anything at all in the event that they are unable to demonstrate the existence of a trade secret pursuant to the criteria in CUTSA.44 To avoid the possibility of preemption, plaintiffs could follow the guidance suggested by the district court opinion in Aversan: avoid trade secret allegations entirely, except when pleading direct violations of CUTSA. That approach, however, limits potential remedies and risks sacrificing viable suits involving information that may still be protectable even if it does not quite rise to the level of a trade secret under CUTSA.

Defendants also face a predicament. When a CUTSA claim has not been asserted, defendants must proceed with caution in determining whether to raise the preemption defense. A successful preemption challenge will subject defendants to CUTSA’s unjust enrichment remedy. That added exposure should be measured against the amount of uncapped exemplary damages that could be awarded under the common law claim.

Whether the California Supreme Court will uphold K.C. Multimedia is far from clear. Until the law is clarified further, however, the dilemmas that the case evokes will plague parties on both sides of trade secret litigation.

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1 See, e.g., Reeves v. Hanlon, 33 Cal. 4th 1140, 1147, 1156 (2004) (Plaintiff’s claims under CUTSA and for intentional interference were substantially supported by record.).


8 Id. at 945. The procedural context of the dismissal was somewhat unusual. The defendants first raised the issue of statutory preemption in their trial brief. The trial court dismissed the claims on its own motion. Before ruling, the court gave K.C. Multimedia a chance to respond orally and in writing, and K.C. Multimedia did not object. Id. at 948.

9 Civ. Code §3426.1(d): A plaintiff must establish that the information at issue “(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”


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IN THE TECHNOLOGY SECTOR, many contemplated acquisitions focus on one essential question—build or buy? To answer this question, the proposed acquirer must, by necessity, assess aspects of the target company’s proprietary technology (which in most circumstances is highly confidential), such as scalability, integrity and complexity of software, long-term plans to enhance existing technology, and other important factors that contribute to the value of the intellectual property. This task generally cannot be accomplished without at least one knowledgeable technologist leading the inquiry and asking the right questions.

But what happens when “build” is the conclusion the technologist reaches? If a due diligence process has been carefully planned, a proposed acquirer’s later development of a competing technology may not raise any concerns from either the former target’s or acquirer’s perspective. But if the diligence is not carefully mapped out or the possibility of future litigation has not been adequately considered by either party, the result can be costly to both.

Before diving into the diligence process for a planned acquisition of a technology company—particularly if the proposed acquirer is competing with a similar technology, developing a competing technology, or even just considering developing a competing technology—several fundamental factors should be examined. In particular, the prospective acquirer should look inward at its own development practices and outward at the anticipated due diligence process to educate and position itself for the possibility of litigation.

If the proposed acquirer were sued for alleged misappropriation, how would the company’s existing processes, as well as the actions taken during the due diligence, support or undermine possible defenses that the company could assert? For example, if the potential acquirer

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were required to reconstruct the diligence process, would it be able to mount a credible defense of independent development or reverse engineering based on its own internal documentation and the makeup of its technology team? Or, would the composition of the proposed diligence team and the materials reviewed during the diligence compromise these positions? Also, when the process was over, could the prospective acquirer convincingly maintain that it no longer had access to the target company's materials? Careful planning of in-house development and external diligence processes can go a long way toward answering these questions.

Before entering into diligence with any possible target company, counsel for the proposed acquirer should be sure to understand the rationale for the proposed acquisition. This step not only assists in setting goals for the process but also serves a practical legal purpose. Simply put, legal counsel needs to know from the beginning that the proposed deal is worth the risk. Understanding the motivation for the deal is a central factor to running this calculus, because if a proposed acquirer initiates diligence for anything other than the stated purpose of acquiring the target company, and in the process gains access to the target's trade secrets, this could result in liability. For example, under certain versions of the Uniform Trade Secrets Act, a claim for misappropriation can include the wrongful acquisition of trade secrets even if they are never used. Thus, to steer clear of such an avoidable situation, diligence counsel should ask the company's business and technology executives for samples of e-mail, internal presentations, and similar information that reflect the company's purpose in entering into the transaction.2

After coming to an understanding of the motivation for a proposed deal, the acquiring company's legal team should examine the status of the acquiring company's own development efforts, if any, on similar or competing technology. This means more than simply knowing that development efforts are underway. A substantive inquiry into the scope of the contemplated technology and development efforts—including whether the product or technology is in the concept, design, code-writing, bug-testing, or even beta launch phase—is required. This is an indispensable exercise because, in the event of litigation, evidence of a defendant's parallel development time line can often be key to establishing a defense of independent development.3

On this point, the importance of documentation cannot be overstated. Indeed, because documentation is often vital to establishing a defense of independent development or reverse engineering, it is essential for counsel to understand what documentation the client has to support its own development process, and what efforts, if any, are being taken (or should be undertaken) to preserve these materials.4 For example, does the client have product plans documenting the evolution of certain technology or maintain a software “versioning” system, which allows developers to look back at prior iterations of the software? Should counsel conclude that inadequate efforts are being taken to preserve development documentation, he or she should consider educating the client's product development team about the importance of maintaining the material and implementing a record-keeping requirement. One way to ensure that development information is maintained is to have the company adopt a versioning system for its software development processes. This system keeps archives (e.g., a wiki) of development documents. Employees may also be encouraged to keep lab notebooks documenting their research and experimentation.

Documentation can be helpful in tracking the in-house development process but also can be damaging to a defendant's case. For example, evidence of failed development efforts or documentation suggesting that in-house development proved too difficult, expensive, or time-consuming (or that it simply could not be done) can be particularly damning to a defendant in a trade secret action.5 For this reason, it is crucial for counsel to ask whether the company has had difficulty in developing the product or technology at issue. If development has been difficult, counsel should understand why. Counsel should even consider interviewing management and development team members to understand whether any of them believe in-house development cannot be achieved, and if so why. While the company may not espouse the belief that in-house development cannot be achieved, evidence that any prominent employee involved in the due diligence or development process holds this opinion can sharply undercut a defense of independent development.

Similarly, because evidence of overlap between a due diligence team and competitive product development team can in some states, support an inference of misappropriation or severely undermine the defense of reverse engineering, it is critical from the outset to understand who at the company is working on product development in the relevant area.6 As part of this inquiry, counsel should understand how the client—specifically, the relevant business unit and its in-house technology team—defines “product development” and how it views those who participate in the process. At its broadest parameters, “development” ranges from conceptualizing to quality assurance and everything in between. This information is vital because it informs the entire process, including who should be involved in the diligence and what, if any, competitive sensitivities may arise during its course. Failure to understand these dynamics could result in the inadvertent inclusion of unnecessary personnel in the diligence process, with the further consequence that the company's later competitive development efforts could be delayed or thwarted altogether.7

Beyond examining the contours of the product development team and the status of any parallel development efforts, counsel should understand how the client treats its technology-related materials, and whether the client considers those materials to be trade secrets. The question as to whether a given plaintiff's material actually qualifies as a trade secret ultimately depends on whether it meets the relevant statutory definition of a trade secret. But if the client treats its own similar proprietary material as a trade secret, then it may be hard-pressed later in litigation to argue that it did not understand or expect the target's comparable information to also be a trade secret. This type of evidence could be especially compelling in the context of defending against a claim of willful misappropriation, which in many states could warrant the imposition of exemplary damages.8

Finally, counsel should become familiar with the company's prior track record with trade secret litigation—including whether the company has ever been a plaintiff or defendant in a trade secrets case, and if so, which employees and technology were involved, and whether the company prevailed. If the company did not prevail, counsel should inquire into the reasons why the company's prior litigation position was unsuccessful and explore whether similar factual circumstances that bore on the outcome of the prior case still exist. Once the above factors have been considered, counsel can make more informed decisions about how to properly structure the due diligence process and minimize the risk of future litigation in the event that the deal does not go through.

Structuring Due Diligence

After gathering the information described above, counsel should be in a position to structure the rest of the due diligence in a way that meets the acquiring companies’ needs, while mitigating potential exposure to litigation. In this structural phase of the planning, counsel should examine who, why, what, and how.

The first question to address is: who will be involved in the due diligence? This requires evaluating which employees need access to the potential trade secret information of the target company so that they may properly assess its value. Depending on the status of the acquiring company’s development efforts with similar or competing
technologies, the complexity of the technology at issue, and the contemplated use of the target company’s technology—e.g., as a standalone versus add-on application—the company may need to include several technologists in the evaluation process. In building the team, counsel should make every effort to create a technology due diligence team that is not composed of members of the competing technology development team but does have sufficient understanding of the company’s technology and goals in acquiring the target that it can assist in due diligence. Another alternative is to use a consultant (such as a trusted former employee) who can assess the target company’s technology for purposes of the due diligence.

If such measures are not feasible, counsel should look for ways to reasonably limit the access of technology diligence team members to the alleged trade secrets. This step should be taken in order to demonstrate the acquiring company’s careful handling of this information. For example, counsel may consider whether the legal team can physically monitor the technology due diligence, or whether access to technology documents can be monitored in some other way. Alternatively, if the acquiring company has a reasonable degree of confidence concerning the value of the proposed target and its intellectual property, the parties may consider doing the due diligence in phases. In some cases, it may be feasible to do the preliminary technology diligence before signing a deal and then “deep dive” diligence between the time of signing and closing. This approach should be conditioned on the acquiring company’s ability to get out of the deal in cases in which a material difference exists between what the target company represented in negotiations and what the technology actually is.

Next is the “why” of the process. Here, counsel should consider whether the goal of the diligence has been adequately described to team members. Preferably, this should be done in writing. For example, there should be a due diligence checklist or set of requirements that clearly explains the parameters and purpose of the inquiry—e.g., “we need to know if XYZ exists, and if the technology is compatible with ABC.” If such a directive does not exist in memo format, even an e-mail record can be useful. In litigation, this type of documentation may serve as persuasive evidence against a claim of willful misappropriation, particularly in showing, for example, that the actions of a rogue employee were contrary to the specific directives given as part of the diligence. Similarly, an existing employee handbook or policy that clearly prohibits the use of confidential third-party or competitor information may be useful evidence to rebut a claim of willful misappropriation.

For the “what”—the potential intellectual property and its worth—counsel should determine whether the diligence team understands the governing definition of the term “trade secret.” For most people, the term “trade secret” conjures up thoughts of the recipe for Coca-Cola or a top-secret computer program. Often, the governing law in the relevant jurisdiction extends well beyond these traditional notions of trade secrets to include such things as client lists or compilations of publicly available information. Similarly, the concept of misappropriation can reach beyond conventional notions of the “use” of trade secrets. For example, using another’s trade secrets to figure out “what not to do” can constitute a cognizable claim under the California Uniform Trade Secrets Act. Thus, providing a brief explanation of these governing principles, usually agreed to per a choice-of-law clause in the nondisclosure agreement (NDA), along with a few instructive examples of what the company itself considers to be its own trade secrets, can significantly affect the level of care with which employees approach the diligence process. Moreover, since some companies do not require each diligence team member to individually read and execute the NDA, counsel should consider using a mechanism that requires each employee to acknowledge the company’s obligations under the NDA. E-mail provides a fairly streamlined method for making sure that (at a minimum) every member of the due diligence team is advised by counsel of the company’s obligations.

The “how” is typically the most time-consuming and expensive part of the diligence process. Unlike the who, what, and why, this element requires the cooperation and agreement of the target company. Specifically, because a NDA almost invariably will govern the terms of the diligence process—and can be used defensively later during litigation—it is critical for counsel to examine whether the NDA provides its client with the protection it needs.

Among the key provisions of the NDA that can affect the scope and strength of claims later asserted in an action against the proposed acquiring company are 1) a description of the alleged trade secret and 2) an expiration date regarding confidentiality. In the case of the former, while it is not necessarily dispositive in terms of defining the alleged trade secret in later litigation, a term describing the trade secret may assist in limiting discovery. When a description is included in the NDA, the acquiring company need not agree that the material at issue is in fact a trade secret, and indeed would be well advised to include specific language requiring the target to acknowledge that no such concession is being made. In the case of an expiration date on the NDA, this term can be vital in either prosecuting or defending against a trade secret claim down the road.

From the plaintiff’s perspective, a long expiration term can be evidence of a “reasonable measure” taken to maintain the secrecy of the alleged trade secret. Conversely, from the defendant’s perspective, a shorter term can be probative of the fact that the plaintiff did not intend to maintain the secrecy of the materials past a certain time and that the alleged trade secret information should lose protection after that time.

The NDA also may be used to establish that the companies involved in the proposed transaction are operating on a level playing field in the negotiations. To this end, language to the effect that the contract does not create a fiduciary duty or give rise to an implied confidential relationship under state law can be inserted. Similarly, language confirming that the parties are sophisticated businesses negotiating at arm’s length and that each has conferred with inde-
pended counsel is also useful. These clauses may be effective in opposing a claim that an acquirer somehow owed a heightened duty to the proposed target.  

Likewise, to prevent any later claims that the target was unaware of the acquiring company’s development efforts in the relevant technology—and to possibly guard against a later claim of willful misappropriation—counsel should consider including language that expressly requires the proposed target to acknowledge existing development efforts by the potential acquirer and acknowledge that the potential acquirer may develop a competing technology if the deal falls through. The proposed acquirer should also consider including a term stating that it is not required to explain its reasons for deciding not to pursue the deal. While this seems like a less important term, it can provide the potential acquirer with additional security in knowing that it can simply walk away from the deal if it does not like what it sees.

**Mapping the Paper Trail**

The NDA is one persuasive document to help tell the diligence story, but it is far from dispositive. For this reason, counsel also need to think about the kind of paper trail the due diligence process will create. To this end, it is worthwhile to map out a plan for how the due diligence team will obtain, transmit, and share due diligence information. This plan should include not only materials generated and disseminated by the target company but also any assessments of the target company’s technology or processes that are generated by the acquiring company’s diligence team. Among available options are 1) an online e-data room with password protection, 2) an online sharing program (e.g., NetMeeting) that can be recorded by the host of the program, 3) on-site access or in-person meetings only, or 4) e-mail.

In the case of in-person meetings, counsel should consider whether minutes or recordings of meetings are advisable. In the case of e-mail, counsel should think about how e-mail transmission of due diligence materials would allow either party in a trade secret case to reconstruct the diligence time line to demonstrate who had access to which documents and when. In some cases, such as those in which a diligence team is small, e-mail can be useful to show the limited extent to which the information was shared. In other cases, however—such as those in which the diligence team is large—a client may be better off prohibiting e-mail transmission of diligence documents. When an e-mail ban is not a feasible solution, one practical and inexpensive method for managing (and perhaps minimizing) e-mail communications is to require that diligence counsel be copied on them.

Additionally, if the electronic information that a company receives is not truly restricted internally (e.g., by password protection or levels of access or use), the potential acquiring company could be vulnerable to criticism that it failed to comply with the NDA. Similarly, if there are hard-copy materials circulated during the diligence process, the acquiring company is well advised to store them in a locked or restricted location. Likewise, if diligence team members are permitted to take notes in meetings, these too should be kept restricted, and in an abundance of caution, employees should be advised not to share work product except with members of the team—and within the team, to share on a need-to-know basis only.

If the deal does fall through, the company that sought the acquisition ordinarily will be required to certify that it has returned or destroyed all confidential materials received from the proposed target within a specified time. Depending on the size of the diligence team and scope of materials distributed, this can be a daunting and time-consuming task, but the value of being able to convincingly demonstrate compliance with this term, should litigation occur later, can be incalculable. To this end, counsel should implement a mechanism to ensure that employees return or destroy materials acquired through the diligence. E-mail with built-in response buttons affirming compliance is a useful tool that requires little effort on the part of the employee and that facilitates easy record-keeping for NDA compliance. This measure can later serve as helpful evidence of a company’s good faith efforts to comply with an NDA.

In anticipation of acquiring a company with new and innovative technology, business personnel may not be focused on the possibility of litigation should they decide to walk away from a proposed transaction. This is why the legal team needs to be thinking about these matters. Ideally, after considering the issues, counsel for the potential acquirer will structure the due diligence and the company’s development processes in a manner that enables the company to actively pursue mergers and acquisitions without the fear that walking away will result in litigation.
(2005) (Substantial evidence supported jury verdict finding misappropriation when, “within weeks” of learning of Ajaxo’s trade secrets, “too short a time for independent development, Everypath implemented the same solution.”). 4

See, e.g., Glaxo Inc. v. Novopharm Ltd., 931 F. Supp. 1280, 1304-05 (E.D.N.C. 1996) (independent development defense established by contemporaneous documentation in the form of research notes showing defendant’s development efforts). 5


See, e.g., Den-Tal-Ez, Inc. v. Siemens Capital Corp., 56 A. 2d 1214, 1220, n.3 (Pa. Super. 1989) (affirming three-year injunction barring Siemens from acquiring a business that competed with the plaintiff when there was overlap in the teams conducting diligence into the proposed target and the plaintiff, and when the trial court found that use of the plaintiff’s confidential materials was “inevitable” if the acquisition were to take place). 8


See, e.g., Decision Insights v. Sentia Group, 311 Fed. Appx. 586, 594, 2009 WL 367585, at *7 (4th Cir. Feb. 12, 2009) (District court’s failure to consider whether software compilation could qualify as trade secret required remand); Therapeutic Research Faculty v. NFTY, Inc., 488 F. Supp. 2d 991, 999-1000 (E.D. Cal. 2007) (Plaintiff “adequately alleged that its username and passcode constitute a ‘trade secret’” under Civil Code §3426.1(d)). 10

Generally, the parties negotiating a potential acquisition enter into a nondisclosure agreement (NDA) to specify the terms by which each party discloses confidential information and the scope of the receiving party’s obligations with respect to that information. A typical NDA will provide that the parties may not use any confidential information disclosed by the other except for the purpose of evaluating the possible transaction. 11

See generally, Hoffmann v. Impact Confections, Inc., 544 F. Supp. 2d 1121, 1125-26 (S.D. Cal. 2008) (Plaintiff did not present the court with any evidence that it “designated its ideas as ‘confidential’ under the terms of the Non-Disclosure Agreement” and thus was unable to satisfy the “reasonable efforts to maintain secrecy” prong of the California UTSA.). 12

In California, for example, a trade secret plaintiff is required to “identify the trade secret with reasonable particularity” before “commencing discovery.” Code. Civ. Proc. §2019.210. If an existing document already sets forth these parameters, it can be extremely valuable in defining the scope of the trade secret(s) at issue. 13


See generally Heyman v. A.R. Winaric, Inc., 325 F. 2d 584, 591 (2d. Cir. 1963) (affirming dismissal of misappropriation claim where, among other things, defendant testified that he had discarded plaintiff’s information after his firm had lost interest in purchasing the plaintiff’s business).
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ON FRIDAY, FEBRUARY 12, Trial Advocacy and the Litigation Section will host a basic courtroom skills workshop for civil and criminal cases. The first part of the program consists of lecture and demonstration covering how to call and excuse witnesses, mark exhibits, lay evidentiary foundations, make and respond to evidentiary objections, use demonstrative evidence (including location diagrams), impeach witnesses, and move exhibits into evidence. The second part of the program is a workshop in which participants practice the skills covered in part one and receive constructive feedback on their performance. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at that address for $10 with validation as well as various nearby lots for $5 to $7. On-site registration and a meal and reception will begin at 8 A.M., with the program continuing from 8:30 A.M. to 12:30 P.M. The event registration code number is 010739. The prices below include the meal.

$250—CLE+P LUS member
$350—LACBA member
$500—all others
3.75 CLE hours

TAP: Basic Courtroom Skills Workshop

TAP: California Rules of Evidence

ON FEBRUARY 6 AND MARCH 6, Trial Advocacy and the Litigation Section will host a two-part course on California’s rules of evidence. This course features an innovative and practical seven-step method for analyzing the admissibility of potential evidence. Participants receive a written summary of key rules of evidence, including key definitions and evidentiary presumptions, a user-friendly outline for raising and responding to hearsay objections, and a clear and concise summary of the complex rules regarding the admissibility of character evidence and 1101(b) evidence of specific instances of conduct. This course is taught in two sessions, one on Saturday, February 6, and the second on Saturday, March 6. Written course materials and a course syllabus will be distributed at the first session. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at that address for $10 with validation as well as various nearby lots for $5 to $7. On-site registration with a meal and reception will begin at 8 A.M., with the program continuing from 8:30 A.M. to 12:30 P.M. The event registration code number is 010738. The prices below include the meal.

$60—CLE+P LUS member
$75—Small and Solo Division member
$100—LACBA member
$110—Webcast LACBA member
$140—Webcast all others
3.5 CLE hours

Asset Protection in a Troubled Economy

ON WEDNESDAY, FEBRUARY 3, the Los Angeles County Bar Association and the Small and Solo Division will host a program on asset protection. Speaker Jacob Stein will discuss asset protection from the underlying substantive law to practical aspects of asset protection planning (e.g., what works and what does not). This program will teach attorneys everything they need to know about protecting assets from plaintiffs and creditors. It will cover specific planning strategies and solutions, including planning with community property, business entities, and domestic and foreign trusts. Special emphasis will be placed on protecting assets in a troubled economy, including protection from lenders holding personal guarantees. The seminar will cover how to protect specific common assets, including houses, bank and brokerage accounts, rental real estate, businesses and professional practices, and retirement plans. Course materials will serve as a treatise on asset protection as well as an exhaustive reference source. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at that address for $10 with validation as well as various nearby lots for $5 to $7. On-site registration, along with a meal and reception, will take place starting at 4:30 p.m., with the program continuing from 5:15 to 9 P.M. The registration code number is 010533. The prices below include the meal.

$60—CLE+P LUS member
$75—Small and Solo Division member
$100—LACBA member
$110—Webcast LACBA member
$140—Webcast all others
3.5 CLE hours

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.
**Building Los Angeles’s Landmarks of the Future**

**TO MOST OF THE WORLD,** Los Angeles is still a young city, a view that Steve Martin immortalized in the 1991 movie *L.A. Story.* In his character as a television weatherman, he takes a visiting British journalist on a cultural tour of the city and exclaims, “Some of these buildings are over 20 years old!” It was funny then, but today it’s no laughing matter. As that line nears its own 20-year mark, buildings that still had wet paint when the movie was made may be headed toward burdensome local regulation in a perfect storm of preservation law.

To be sure, buildings do not need to be as old as those in England to be significant to us here. Some buildings, such as Frank Gehry’s Disney Concert Hall, may be important the day the doors open. However, preservation doctrine has long recognized that buildings must generally be at least 50 years old to be designated. Every rule has exceptions, and for the National Register of Historic Places and the California Register of Historical Resources, a more recently built structure must be of “exceptional importance.” At the local level, there is no explicit age requirement for designation as a City Historic-Cultural Monument, nor does it look like there will be one any time soon.

On big round birthdays we laugh that today 50 is the new 30. But with preservation, the reverse is taking place. Los Angeles is in the process of completing a comprehensive citywide historic resource survey, known as Survey L.A. The city anticipates that by the time the survey is completed in 2011, it will have reviewed all 880,000 separate legal parcels within the 469 square miles of the city boundaries and that all buildings 30 years or older will have been surveyed. Not 1880 but 1980! So, for buildings in Los Angeles, 30 is the new 50.

The historic resource survey is not the only cloud on the land use horizon. The city is in the process of the first major overhaul of the Cultural Heritage Ordinance since it was adopted in 1962. In 47 years, there have been fewer than 1,000 Historic-Cultural Monument designations. But with a survey of almost 900,000 parcels, that number could grow by scores of thousands.

The reach of the proposed new regulation would go far beyond the current control. The existing ordinance only imposes a delay on demolition of up to one year. Interestingly, in the almost 50 years of experience with the ordinance, fewer than 3 percent of the locally designated buildings have been demolished. The proposed ordinance would prohibit demolition except when denial of the demolition request would “deprive the owner of reasonable economic return on, or substantially all reasonable use of, the property.” There is also a limited exception for cases in which the purpose and value of an alternative use of the property significantly outweighs the benefit conferred to the community from preservation. However, for both of these, the burden is on the owner to make a detailed factual showing.

The proposed hardship test is intended to approach the Constitutional limit of a taking. In one of the leading regulatory takings cases, *Penn Central Transportation Company v. New York City,* the U.S. Supreme Court upheld a New York City preservation ordinance. The Court upheld the regulation of historic resources as part of the police power to regulate the health and safety of inhabitants, which the Court found includes land use restrictions to enhance the quality of life by preserving aesthetic features of a city.

One of the most hotly debated aspects of the proposed ordinance is the regulation of interiors. While the existing city ordinance is silent on interiors, in practice over the years, the city has reviewed interior alterations. As the draft ordinance was working its way through the system, some property owners argued that interiors had never been explicitly regulated and should be exempt. Others argued that only publicly accessible interiors should be regulated. The debate was joined by neighborhood preservationists who caught the attention of city planning commission with the idea that residential interiors in recently constructed buildings are important to preserve—even where the public does not have access.

The old joke comes to mind: How many preservationists does it take to change a light bulb? None. They won’t let you change even one light bulb. Well, the proposed ordinance does allow routine maintenance, so a homeowner can change the light bulbs. But it could impair a homeowner’s right to change the light fixtures in a bedroom by retaining the existing one-year delay even for private interiors.

As the survey nears completion and the city council has to grapple with the proposed ordinance, there are tough choices to be made. Young or not, our city is fully built out horizontally. Historic or not, our city is still growing. So it’s time we must grow up. Not just in terms of density, but in attitude and outlook.

We can’t have it both ways. At every turn, the city has to make a choice between that which exists today and that which serves a new need now and in the future. Clearly some buildings are historically significant. But it is equally clear that we have not built everything that needs to be built—schools, homes and apartments, transit stations, and classrooms, to name just a few. And what will future generations think if we stop building great buildings? Do we have landmarks from the past but one can only hope there is still room in Los Angeles to build the landmarks of the future.

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William F. Delvac is a partner at Armbruster Goldsmith & Delvac LLP and specializes in land use and historic preservation law.
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