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DAN SIMON, MA, J.D. twincitiesmediation.com
Will Rogers once said, “The income tax has made more liars out of the American people than golf has. Even when you make a tax form out on the level, you don’t know when it’s through if you are a crook or a martyr.” This is the time of year that most accountants are gearing up for yet another tax filing season. Although it may be early February, April 15th is just over two months away.

How do we lawyers handle our tax filing responsibilities? According to a 1988 IRS Market Segment Specialization Program audit guide on attorneys, a study of lawyers in San Diego revealed more than 10 percent of practicing San Diego attorneys were non-filers! The issuance of this audit guide preceded many audits in Southern California of personal injury lawyers, criminal defense lawyers, real estate lawyers, and others. Since my practice is in this area, I can tell you that the IRS hit a relative mother lode in its audit of attorneys. Some of these audits were even referred to the Department of Justice for criminal prosecution.

Can persons charged with tax evasion go to jail? You betcha! For example, under the advisory federal sentencing guidelines, a person who evades $500,000 in tax could go to jail for over three years, and if the evaded tax is over $1 million, a jail sentence of over four years may be in order.

Do you think these sanctions fit the crime? Let’s compare the criminal sanctions for tax evasion in other countries.

Fortunately for the tax-challenged segment of the population in China, in early 2011 China eliminated the death penalty for forging invoices to avoid taxes. However, those involved in political corruption may still be put to death because “the revulsion for that offense is so strong.” If you are rumored to be living in another country after engaging in activities that substantially and criminally understated your taxes in the United Kingdom, you could not only be facing a heavy jail sentence but also see yourself on the 20 Most Wanted Tax Fugitives list, published by Her Majesty’s Revenue and Customs. This FBI-style list includes the crime, the sentence, and the mug shots of the tax fugitives. One person on that list has been sentenced to an 11-year sentence for conspiracy to defraud the public purse. Compare this to a case in Germany involving 1.1 million Euros in evaded taxes for which the defendant was given a suspended two-year prison sentence. A higher court determined, however, that the sentence warrants review for not being strict enough.

In Russia, recent changes were implemented to laws relating to criminal tax liability and prosecution that provided relief from criminal liability in the case of voluntary payment of outstanding taxes. In effect, if the evaded tax is paid during a criminal tax investigation, the criminal investigation is terminated, and no criminal liability is found. In France, however, in serious cases of “manifest and blatant fraud,” the wrongdoer could be imprisoned for up to five years and fined up to 10,000 Euros. In Singapore, tax evasion may result in a penalty of four times the amount of the tax, a criminal fine not to exceed $50,000 or imprisonment of up to five years, or both.

As we gather our tax records and flip on the Turbo Tax or deliver the records to our accountants, we all should be mindful of the civil and criminal sanctions that exist for failing to pay our fair share of taxes.

Dennis L. Perez is a principal in Hochman, Salikin, Retig, Toscher & Perez, PC. He is the 2012-13 chair of the Los Angeles Lawyer Editorial Board.
Waiting to Become an Attorney after Passing the Bar

MOST WOULD-BE LAWYERS assume that once they have graduated from law school and passed the bar exam, no hurdle remains between them and the practice of law. Most of the time, they are right. Sergio Garcia and a handful of others, however, have accomplished those two goals but still have their applications to practice in the state of California pending. In Garcia’s case, it is his status as undocumented in the United States that is preventing him from being admitted to the bar.

For each candidate who passes the California bar exam, the California Supreme Court must approve his or her application to be admitted formally as a licensed practitioner. When Garcia’s application slid across the antique wood desks in those hollowed halls, the court had to consider for the first time whether it would approve the bar membership of someone who is undocumented. That decision, known as In Re Garcia, is currently pending. The case encapsulates a number of the hot-button immigration issues that are part of the national discourse. It has the potential to affect who your peers are, what it means to practice law in California, and what rights belong to someone who has lived his or her life in this country but does not have legal status.

Garcia’s parents brought him to the United States from Mexico when he was 17 months old and then took him back to Mexico when he was nine years old. Garcia’s family moved him back to the United States when he was 17 years old. Once back in the United States, he applied to adjust his undocumented status. He learned English and graduated from high school and college. Garcia went to law school, taking night classes and paying his entire tuition out of pocket. After graduating, he took and passed the bar exam on his first attempt.

During this time Garcia’s father had become a citizen and his mother a permanent resident. But his citizenship application is still pending after 17 years. When Garcia received approval from the State Bar of his good moral character, there was a comment notifying the supreme court that he lacks legal status.

How to treat individuals like Garcia, undocumented persons who have lived in the United States most of their lives, is a key issue in the political discourse today. Indeed, most people have heard of the DREAM Act, legislation that proposes to provide some status to individuals between the age of 15 and 30 who have lived in the United States for the last seven years. Because such immigration reform has not been enacted, President Barack Obama created a stopgap policy called the Deferred Action for Childhood Arrivals, which allows undocumented youths the opportunity to receive a temporary deferred status, protecting them from deportation and providing them with a work permit. Garcia, however, is not eligible for deferred action because his age of 35 years places him beyond the window of eligibility. It is unknown how many other undocumented immigrants have passed the bar and seek to practice law in California. Indeed, Garcia may be one-of-a-kind given that this is the first time the supreme court has faced this issue.

The court ordered briefing from Garcia and the Committee of Bar Examiners and invited amici briefs as well. The court outlined five questions to be briefed: 1) Does the federal statute that provides that people without legal status are ineligible for benefits preclude the admission of undocumented immigrants to the state bar? 2) Is there any state legislation that provides that undocumented immigrants are eligible for professional licenses and, if not, what is the significance of its absence? 3) Does the issuance of a law license imply that the licensee may legally be employed as an attorney? 4) What are the legal and policy implications of granting a law license to an undocumented immigrant? and 5) What, if any, other concerns arise from granting an undocumented immigrant a law license? All the briefing is complete, and the court is considering the issue.

The U.S. Department of Justice submitted an amicus brief arguing against admission. It reasoned that that federal law prohibits issuing a law license to an “unlawfully present alien,” and that federal law, which fully regulates all areas of immigration, is the only binding and applicable law for the court to consider. In contrast, the State Bar examiners argued that the federal law that prohibits provision of benefits—including professional licenses—to undocumented individuals does not preempt California laws that regulate bar admission, because California laws do not regulate immigration.

The facts of Garcia’s life in the United States provide a unique gloss to the issues. He would, if he were five years younger, be eligible for deferred action. The question would still remain whether someone who could be eligible for a work permit based on deferred action could be eligible for a law license. Depending on how the court decides, this could become a case for the U.S. Supreme Court, given not only that federal preemption and regulation of immigration is a federal consideration but also that a number of states have recently created regulations in a number of areas that contradict federal laws.

Young attorneys who are interested in these issues can become involved. One way is to become trained to help applicants to apply for deferred action so that they may obtain some interim status in the United States. The option of writing one’s congressional representative also exists. For now, the California Supreme Court holds the careers of many future attorneys in its hands.

Devon Myers is an associate at Scheper Kim & Harris LLP and is the assistant vice president for the Barristers. Sergio Garcia, the attorney-in-waiting in In Re Garcia, is a published author and a business owner.
DURING THE FINANCIAL CRISIS, investor confidence plummeted, the financial markets crumbled, and politicians scrambled to find a solution. But as much as the crisis propelled America’s economy toward a recession, it also cleared the path towards financial reform.¹ The Dodd-Frank Wall Street Reform and Consumer Protection Act was passed by Congress and signed into law by President Barack Obama in 2010. The act gave the U.S. Securities and Exchange Commission (SEC) authority to create a uniform fiduciary standard for financial professionals.² If the SEC creates a uniform standard as expected, it will likely have a significant effect on a key aspect of securities litigation: the determination of whether a plaintiff investor’s reliance on affirmative misrepresentations concerning a securities investment was justifiable. The creation of a uniform fiduciary standard will likely provide a rebuttable presumption of reliance.

At present, investment advisers and broker-dealers are subjected to different standards of care regarding the duty they owe to clients.³ Under Section 211 of the Investment Advisers Act (IAA), investment advisers are subjected to a fiduciary duty standard.⁴ Broker-dealers, however, are regulated under the Securities Exchange Act of 1934 (1934 act) and are not held to a fiduciary standard of care in most states.⁵ Rather, broker-dealers are subject to a “suitability”⁶ standard of care and a “know your customer”⁷ requirement. That appears to be about to change.

Section 913(g)(1) of the Dodd-Frank Act amended the 1934 act to allow the SEC to adopt rules providing that when giving personalized investment advice to retail customers, a broker or dealer must follow the same standard of conduct that advisers follow under the IAA. To exercise this authority, the SEC was required under Section 913 to conduct a study regarding the effectiveness of existing standards of care for broker-dealers and investment advisers.⁸ The SEC study recommended a uniform fiduciary standard for broker-dealers that would be no less stringent than the fiduciary duty standard currently applied to investment advisers under the IAA.⁹ Under this standard, broker-dealers would be required to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.¹⁰

As it stands now, a target date for adopting a uniform fiduciary standard has not yet been determined under the Dodd-Frank Act’s implementation timetable.¹¹ However, with President Obama winning re-election and the Democrats retaining control of the Senate, it is virtually impossible for the Dodd-Frank Act to be repealed. Thus, it should be only a matter of time before the SEC adopts a uniform fiduciary standard. When it does, the impact it will have in the financial marketplace will be significant. One immediate effect will involve claims of affirmative misrepresentations under Rule 10b-5 of the 1934 act.

Rule 10b-5 and Justifiable Reliance

Congress enacted the Securities Act of 1933 (1933 act) and the 1934 act following the stock market crash of 1929.¹² Their goal was to protect investors by preventing fraud and creating full disclosure in the markets.¹³ Rule 10b-5, which was promulgated under Section 10-b of the Securities Exchange Act, was designed to protect investors from manipulative and deceptive practices “in connection with the sale or purchase of any security.”¹⁴ Federal courts then defined the elements of an implied, private cause of action for violation of Rule 10b-5, deriving its elements partly from the common law tort of fraud.¹⁵ To recover on this theory, a plaintiff must show 1) a material misrepresentation, 2) scienter, 3) a connection with the purchase or sale of a security, 4) justifiable reliance, 5) economic loss, and 6) loss causation.¹⁶

The role of the justifiable-reliance element is to “provide the requisite causal connection between a defendant’s misrepresentation and a plaintiff’s injury.”¹⁷ This casual connection, however, can be demonstrated in more than one way. A key issue currently controlling the plaintiff’s burden is whether the claim alleges fraudulent representations or fraudulent omissions.¹⁸ If fraudulent omissions are central, the presumption derived from Affiliated Ute Citizens v. United States reduces the burden of proving justifiable reliance. Similarly, the fraud-on-the-market theory provides a rebuttable presumption of reliance when investors trade in an efficient, open market.

Affiliated Ute Presumption

A duty to disclose arises under the securities laws when one party has information that the other party is entitled to know because of a fidu-
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Howard Grobstein, Partner
cation or other, similar relation of trust and confidence between them.19 In Affiliated Ute Citizens, the Supreme Court created a presumption of reliance when the defendant withholds material information from the plaintiff.20 More specifically, when the alleged fraud in a Rule 10b-5 case arises from material omissions, as opposed to material misrepresentations, “positive proof of reliance is not a prerequisite to recovery.”21 “All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision.”22 This duty to disclose serves as the backbone of the presumption in Affiliated Ute Citizens that “if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance.”23

The obligation to disclose and the withholding of a material fact establish the requisite element of causation in fact.24 Once the plaintiff establishes that an omission was material, the burden shifts to the defendant to establish that the plaintiff did not rely on the omission in making the investment decision.25 The defendant may prove an absence of reliance by showing that the plaintiff would have made the same decision even if the withheld information had been disclosed.26

The Fraud-on-the-Market Presumption
The fraud-on-the-market presumption applies in cases with a mix of material misrepresentations and material omissions. The theory underlying the presumption first arose in Blackie v. Barrack, in which the Ninth Circuit extended the Affiliated Ute Citizens presumption to situations in which material misrepresentations adversely affect the price of stock traded in an efficient open market.27 The basis of the court’s reasoning was that the price of a security in an open and developed market is determined by all available, material information, misinformation, and omissions.28 Under this theory, investors can rely on the fact that—in such a market—the price of any security has been set without manipulation or artificial inflation.29 Investors can therefore trade in implicit reliance on the stock price to incorporate all public information.30

The Supreme Court subsequently adopted the Ninth Circuit’s reasoning in Basic Inc. v. Levinson.31 In doing so, the Supreme Court officially created a rebuttable presumption of reliance based on the theory. A defendant, however, can still defeat the presumption by showing positive proof of nonreliance.32

Fiduciary Duty Presumption
Justifiable reliance is presumed when there are material omissions. In cases involving only material misrepresentations, however, there is no such general presumption. If the SEC creates a uniform fiduciary standard, a new presumption arises: fiduciary duty. This presumption is already being applied informally in appropriate cases. The imposition of a uniform fiduciary standard will significantly broaden its application.

Currently, when neither of the existing presumptions apply, the courts use an eight-factor balancing test to determine whether a plaintiff-investor’s reliance on affirmative misrepresentations concerning a securities investment was justifiable.33

This balancing test, which first appeared in Zobrist v. Coal-X Inc., focuses on the following eight factors: 1) the plaintiff’s sophistication and expertise in financial and security matters, 2) whether a longstanding business or personal relationships exist between the plaintiff and the defendant, 3) the plaintiff’s access to relevant information, 4) whether the defendant owed a fiduciary relationship to the plaintiff, 5) whether the defendant concealed the fraud, 6) the plaintiff’s opportunity to detect the fraud, 7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction, and 8) the generality or specificity of the misrepresentations.34

In theory, “[n]o single factor is determinative; all relevant factors must be considered and balanced to determine whether reliance was justified.”35 The truth is somewhat at variance with this theory, however. For example, when the investor is a large financial institution such as a bank, the first factor—the sophistication and expertise of the plaintiff in financial and securities matters—has been argued to be “highly significant, and sometimes dispositive.”36 As such, some commentators have argued that there should be a presumption of sophistication—a rebuttable presumption that reliance was not justified.37

Conversely, a finding on the fourth factor that the defendant owed a fiduciary duty to the plaintiff is nearly always dispositive in favor of finding justifiable reliance. More than 100 circuit court decisions involving either Rule 10b-5 or fraud claims (which use the same test for justifiable reliance) were surveyed.38 Sixteen published cases applied the eight-factor balancing test explicitly. In four out of the five cases in which a fiduciary duty was present, an investor’s reliance was found to be justified.39 Only one case—Ashland Inc. v. Morgan Stanley & Company—held that the plaintiff-investor’s reliance was unjustified as a matter of law despite the existence of a fiduciary duty.40

That case involved the sale of Auction Rate Securities (ARS), which the plaintiff alleged were falsely represented to individual and institutional investors as a safe way to earn a better return than money market funds, without risking a loss of principal.41 Despite overwhelming evidence that brokerage firms made intentional material misrepresentations in selling ARS, investors have fared poorly in litigation because of unwillingness of courts to find that investor reliance on such misrepresentations was justifiable.42 In the remaining cases in which a fiduciary duty was not present, only in four was an investor’s reliance found to be justified.43 The remaining cases found an investor’s reliance unjustified.44

In addition to circuit decisions, more than 100 district court decisions with the same criteria were reviewed, and in the 17 published cases that applied the eight-factor test, courts denied the motion for summary judgment in 7 because they found that genuine issues of material fact still remained as to whether the defendant owed the plaintiff a fiduciary duty.45 If that duty were statutory, the outcomes of those cases would likely have been different. Only two cases held that an investor’s reliance was unjustified despite the existence of a fiduciary duty.46 One of those two decisions was an ARS case in which, as in Ashland, the defendant had already entered into a settlement with the SEC to buy back about $7 billion in ARS.47

Among the remaining cases in which no fiduciary duty was present, one court denied the defendant’s motion for summary judgment.48 In the other cases, the court granted the defendants’ motions for summary judgment or motions to dismiss, finding that the investors’ reliance was unjustified as a matter of law.49

Examination of case law applying the eight-factor test indicates that the existence of a fiduciary duty already plays a significant, if not dispositive, role in determining whether a court will find justifiable reliance. The existence of a fiduciary duty makes it highly probable that the court will find that an investor’s reliance was justifiable. When the SEC adopts the uniform fiduciary standard pursuant to its authority under the Dodd-Frank Act, the question of whether fiduciary duty exists will no longer be at issue. At that point, the justifiable reliance element in Rule 10b-5 cases involving affirmative misrepresentations will almost always be found to be satisfied, and, therefore, a new presumption will likely develop.

“Most presumptions have come into existence primarily because judges have believed that proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it.”50 Since the existence of a fiduciary duty renders justifiable reliance probable, it makes sense to presume reliance until the defendant proves otherwise. A presumption of fiduciary duty will therefore
Justifiable reliance is already presumed in other contexts involving fiduciary duty because such reliance on the fiduciary is simply expected. “The existence of a fiduciary relationship [places] a heightened duty on the fiduciary to disclose information and reduce the degree of reliance expected of the other party.”52 Indeed, “where a fiduciary relationship exists, the [plaintiff’s] usual duty of diligence to discover facts does not exist.”53 For example, in assessing reasonableness of a plaintiff stockholder’s failure to investigate, reliance on the officers and directors of a corporation who occupy a fiduciary relationship, although not absolute, “is to be expected.”54 The same is true with other fiduciary duties imposed as a matter of law, such as between physicians and patients, wherein “facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required” of the injured person.55 When considering that a breach of fiduciary duty cause of action does not require reliance as an element, the proposition makes sense.56 As one author has explained in discussing the essence of a fiduciary relationship, “the law entitles the entrustor to rely on the fiduciary’s trustworthiness. The entrustor is therefore not required to show that he actually relied on the fiduciary and the fiduciary has the burden of justifying self-dealing transactions.”57

Presuming reliance when a fiduciary duty exists will also bring Rule 10b-5 closer to providing the protections afforded to investors under Section 12(a)(2) the Securities Act of 1933, which—unlike Rule 10b-5—does not require investors to prove justifiable reliance on alleged misrepresentations.58 The blue-sky statutes of most states already do not require investors to prove reliance.59 For example, California’s blue-sky act “conspicuously avoids the requirement of actual reliance” since the “legislature is again expressing its intention to afford the victims of securities fraud with a remedy without the formidable task of proving common law fraud [which requires reliance].”60 The fiduciary duty presumption will, therefore, provide investors with a useful device to prove reliance and causation and bridge the gap between the 1933 act (which lacks a reliance requirement) and the 1934 act, which requires a showing of reliance.

Finally, the fiduciary duty presumption will carry out the purpose of the 1933 and 1934 acts “to reverse the age-old concept of caveat emptor and replace it with the concept of caveat venditor or seller beware.”61 One of the principal motivations behind those acts was to protect investors against fraud and promote ethical standards of honesty and fair dealing.62 “Congress’ objectives were “to insure honest securities markets and thereby promote investor confidence.”63 Consequently, courts have explained that the acts should be “construed not technically and restrictively, but flexibly to effectuate its remedial purpose”64 as the “policy of deterring intentional misconduct in securities dealings outweighs the policy of deterring negligent behavior by investors.”65

Once a the fiduciary duty presumption is put into place, courts can look to the burden shifting model used under Affiliated Ute Citizens for guidance. As with the presumption under Affiliated Ute Citizens, a plaintiff would still need to sustain the burden of showing materiality. The plaintiff would need to prove that the misrepresentations (as opposed to the withheld information) would be important to a reasonable investor in making the investment decision. The burden would then shift to the defendant to prove that the plaintiff would have made the same decision even if there had been no misrepresentation.

Even if the SEC does not adopt a uniform fiduciary duty standard, a modified presumption of fiduciary duty will likely still come into existence. Under this scenario, courts would first determine whether a fiduciary relationship exists. If it does, then reliance would be presumed. If it does not, the court would proceed to examine the remaining seven factors to determine justifiable reliance. The eight-factor test would become a seven-factor test applied only after a threshold determination that there was no fiduciary duty.

Although the eight-factor balancing test has remained intact for almost 30 years, it looks likely to be adjusted to take into account the undeniable impact that the presence of a fiduciary duty—whether arising as a matter of law or of fact—has on an investor’s ability to show justifiable reliance. This will, collaterally, bring Rule 10b-5 (which has been referred to as a “judicial oak which has grown from little more than a legislative acorn”66) one step closer to the protections afforded to investors under federal and state securities laws by serving as an evidentiary construct to facilitate a plaintiff’s effort to prove reliance and causation.

5 Independent Order of Foresters v. Donald, Lufkin & Jenrette, Inc., 157 F. 3d 933, 940 (2d Cir. 1998) (generally no fiduciary duty inherent in an ordinary broker-

customer relationship); 15 U.S.C. §§78a et seq.

6 See FINANCIAL INDUSTRY REGULATORY AUTHORITY (FINRA) R. 2310, Recommendations to Customers (Suitability).

7 See NEW YORK STOCK EXCHANGE (NYSE) R. 405, Diligence as to Accounts.


9 Id. at 101.


16 Dura Pharm., 544 U.S. at 341-42.

17 Basic, 485 U.S. at 243-44.

18 Id.


21 Id.

22 Id.; Titan Group, Inc. v. Faggen, 513 F. 2d 234, 239 (2d Cir. 1975) (“in instances of total non-disclosure…it is of course impossible to demonstrate reliance.”).


24 Id. at 153-54.

25 DuPont v. Brady, 828 F. 2d 75, 76 (2d Cir. 1987); see also Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc., 967 F. 2d 742, 748 (2d Cir. 1992).

26 Gower v. Cohn, 643 F. 2d 1146, 1157 (5th Cir. 1981).

27 Blackie v. Barrack, 524 F. 2d 891, 906-07 (9th Cir. 1975).


29 Blackie, 524 F. 2d at 906-07.

30 Id.

31 Basic, 485 U.S. 224.

32 Id. at 248; see also Kirtman v. Homeland, Inc., 611 F. 2d 785, 788-89 (9th Cir. 1980).

33 See Kennedy v. Josephthal & Co., 814 F. 2d 798, 804-05 (1st Cir. 1987); Brown v. E.F. Hutton Group, Inc., 991 F. 2d 1020, 1032 (2d Cir. 1993); Myers v. Finkle, 950 F. 2d 165, 168 (4th Cir. 1991); Molecular Tech. Corp. v. Valentine, 925 F. 2d 910, 918 (6th Cir. 1991); Davidson v. Wilson, 973 F. 2d 1391, 1400 (8th Cir. 1992); Atari Corp. v. Ernst & Whinney, 981 F. 2d 1025, 1029 (9th Cir. 1992); Zobrist v. Coal-X Inc., 708 F. 2d 1511, 1516 (10th Cir. 1983); Bruschi v. Brown, 876 F. 2d 1526, 1529 (11th Cir. 1989).

34 Zobrist, 708 F. 2d. at 1516.

35 Id.


38 See Austin v. Lofts gaarden, 675 F. 2d 168, 176 n.15 (8th Cir. 1982).

41 Id.
42 See http://www.sec.gov/investor/ars.htm. Many investment banks entered into settlement agreements with the SEC to buy back ARS from investors—including Morgan Stanley, which agreed to repurchase approximately $4.5 billion in ARS.
43 Grubb v. Federal Deposit Ins. Corp., 868 F. 2d 1151 (10th Cir. 1989); Kline v. First W. Gov’t’s Sec., 24 F. 3d 480 (3d Cir. 1994); Rubin v. Schottenstein, Zox & Dunn, 143 F. 3d 263 (6th Cir. 1998); Molecular Tech. Corp. v. Valentine, 925 F. 2d 910 (6th Cir. 1991).
59 Dupuy v. Dupuy, 551 F. 2d 1005, 1019 (5th Cir. 1977).
NEWS HEADLINES IN RECENT YEARS recount the tragic stories of overdoses from prescription pain medications and of the prosecutions of the doctors who prescribe them. While it is clear that overdose deaths more often than not involve alcohol, street drugs, and prescription drugs obtained from sources other than a single prescribing physician, it is not surprising, particularly in cases involving overdose deaths, that the public would wish to hold someone accountable. At the same time, however, the science of pain management has been rapidly evolving to recognize the legitimacy and importance of the effective use of medications to treat pain. These competing realities have led to a debate over the prosecution of doctors for prescribing drugs to pain patients.

Traditionally, our system of federalism has reserved most police powers to the states, including the regulation of doctors and the practice of medicine. The California Medical Board, for example, states that its mission is “to protect health care consumers through the proper licensing and regulation of physicians and surgeons...through the vigorous, objective enforcement of the Medical Practice Act.” State medical boards regulate most aspects of the practice of medicine, including licensure and continuing education requirements for physicians, maintenance of standards of professional conduct and medical practice, and disciplinary actions against doctors found to have engaged in unprofessional or dishonorable conduct.

The Ninth Circuit and the U.S. Supreme Court have been quite clear about respecting the tradition that the regulation of medical practices is primarily the province of the states. At the same time, the federal courts have also recognized that “[d]espite the prominence of the States in matters of public health and safety, in recent decades the Federal Government has played an increasingly significant role in the protection of the health of our people.”

by Becky Walker James and Kathryn Lohmeyer

A workable legal standard for doctors who prescribe pain medication has yet to be established

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Over the course of the last two decades, the Drug Enforcement Agency (DEA) has aggressively increased its federal enforcement efforts against doctors prescribing pain medications. Critics characterize these federal enforcement efforts as politically motivated intrusions into the doctor-patient relationship, often made without regard to established guidelines for patient care. Supporters, on the other hand, view federal enforcement actions as a necessary response to growing public health concerns. Federal criminal prosecutions of medical professionals engaged in the treatment of patients who report pain are part of the expansion of federal jurisdiction of the last several decades. While cases in state courts involve violations of a state’s health and safety code or medical practice act, medical professionals that are the subjects of the federal investigations are often tried under the Federal Controlled Substances Act (CSA), which is generally associated with the prosecution of traffickers in illegal drugs. In most of the federal cases against doctors and other medical professionals, the charge is the delivery of a prescription for a prescription pain medication without a legitimate medical purpose.

The consequences of federal drug charges against doctors are severe. Because doctors prosecuted under the CSA are subject to mandatory minimum sentences that are designed to address street dealers of illegal drugs, doctors who write hundreds or thousands of prescriptions as part of their full-time practice have been sentenced to 25 years or more. Although some may say that such sentences are proper when doctors are not acting as doctors but as pill pushers, such dire consequences raise concerns about a chilling effect upon doctors who fear prosecution based on the exercise of their medical judgment. The federal courts have not reached consensus in these cases, but recent pronouncements from the Supreme Court suggest that the federal role in these cases may be more limited than previously believed.

Medical Judgment or Criminal Conduct?

Doctors can be convicted for the knowing or intentional distribution of a controlled substance when their activities fall outside the usual course of professional practice. At the same time, the Supreme Court has cautioned that “[i]t is quite a different matter… to say that the Attorney General can define the substantive standards of medical practice as part of his authority.” So, where do the federal courts draw the line? In enacting the CSA, Congress recognized that “[m]any of the drugs” regulated under the act “have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.” When Congress amended the CSA with the enactment of the Psychotropic Substances Act in 1978, it stated its intention that “control of psychotropic substances in the United States should be accomplished within the existing statutory framework of the procedures and criteria for classification of substances,” and explained that this approach “will insure that…nothing in the Convention will interfere with ethical medical practice in this country as determined by the Secretary of Health and Human Services on the basis of a consensus of the views of the American medical and scientific community.”

The medical and scientific communities are clear that the treatment of pain is unquestionably recognized as a legitimate medical use of opiate analgesics, including oxycodone. This recognition is reflected in the Business and Professions Code in California, which provides that “[a] physician and surgeon may prescribe for, or dispense or administer to, a person under his or her treatment for a medical condition dangerous drugs or prescription controlled substances for the treatment of pain or a condition causing pain, including, but not limited to, intractable pain.” The same state law also states that “[n]o physician and surgeon shall be subject to disciplinary action for prescribing, dispensing, or administering dangerous drugs or prescription controlled substances in accordance with this section.” Additionally, even when a doctor could or should suspect that a particular patient is addicted, prescribing medication to treat that patient’s pain does not constitute an automatic violation of medical ethics or professional guidelines. Generally accepted medical practices include the use of opioid analgesics for the treatment of pain even in addicts.

Federal Prosecution

Over 35 years ago, in United States v. Moore, the Supreme Court addressed the narrow question of whether a physician’s status as a registrant under the CSA was sufficient to exempt him or her from prosecution for dispensing or distributing controlled substances. Dr. Moore was engaged in the controversial “maintenance method” of treatment of heroin addicts, which involved the indefinite use of methadone. After his authorization to conduct a methadone maintenance program was revoked by the FDA, Moore continued to dispense large quantities of methadone in a way that was so “inconsistent with all accepted methods of treating addicts, that, in fact, he operated as a ‘pusher.’” In his briefing to the Supreme Court, Moore conceded that he did not observe generally accepted medical practices in treating his patients.

The Court reversed the D.C. Circuit’s ruling that, as a DEA-registered physician, Moore could not be prosecuted under the CSA. The Court recognized that there are circumstances under which a registered, licensed medical doctor can prescribe or provide drugs to patients in a manner that rises to the level of drug trafficking. In reaching that conclusion, the Court examined numerous provisions within the CSA and explained that physician registration under the act “authorizes transactions within the legitimate distribution chain and makes all others illegal” and that the authorization extended to registered physicians “is limited to the dispensing and use of drugs in the course of professional practice or research.”

On the facts before it in Moore, the Supreme Court concluded that the evidence was sufficient to support a verdict that Moore “exceeded the bounds of ‘professional practice’” when “[i]n practical effect, he acted as a large-scale ‘pusher’ not as a physician.” The Court did not, however, further identify circumstances under which licensed doctors prescribing controlled substances to their patients may be found to have acted outside the “course of professional practice or research.”

Limitations on the Executive Branch’s Authority

Several years ago, in Gonzales v. Oregon, the Supreme Court revisited the CSA and checked the federal government’s attempt to criminalize the writing of prescriptions for controlled substances for use in physician-assisted suicide based on the Department of Justice’s determination of what constitutes a “legitimate medical purpose.” In Gonzales, the Court carefully analyzed the provisions of the CSA and the implementing regulations, which require that prescriptions for controlled substances “be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”

Regarding the language of the regulation, the Court observed that, although it “uses the terms ‘legitimate medical purpose’ and ‘the course of professional practice’…[i]t gives little or no instruction on a central issue in this case: Who decides whether a particular activity is in ‘the course of professional practice’ or done for a ‘legitimate medical purpose.’” The Court noted that “[t]he CSA gives the Attorney General limited powers, to be exercised in specific ways.” The Court explained that the statutory provisions “make clear that the Attorney General can establish controls ‘against diversion,’ e.g., §828(a)(1), but do not give him authority to define diversion based on his view of legitimate medical practice.”

The Court also noted that the CSA circumscribes the attorney general’s authority...
vis-à-vis the authority of other governmental entities. First, “The CSA explicitly contemplates a role for the States in regulating controlled substances, as evidenced by its pre-emption provision.” Second, the attorney general shares the delegated authority under the CSA with the secretary of the U.S. Department of Health and Human Services: “The CSA allocates decision making powers among statutory actors so that medical judgments, if they are to be decided at the federal level and for the limited objects of the statute, are placed in the hands of the Secretary.” The Court concluded that “[t]he structure of the CSA, then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise.”

In Gonzales, the Court reviewed its decision in Moore. The Court did not, however, expand upon what, if anything, beyond the type of conduct at issue in Moore rises to the level of criminal conduct by a physician who writes prescriptions for controlled substances. In fact, the Court recognized that the phrase “legitimate medical purpose” was inadequate to describe with particularity the type of conduct that is subject to criminal prosecution: “All would agree, we should think, that the statutory phrase ‘legitimate medical purpose’ is a generality, susceptible to more precise definition and open to varying constructions, and thus ambiguous in the relevant sense.”

The American Medical Association (AMA) has highlighted the problem for the medical profession in having no precise definition of “legitimate medical purpose.” The AMA has advocated for a distinction to be drawn between cases involving an exercise of medical judgment and those in which no doctor-patient relationship can reasonably be said to exist, stating that “[t]hese are often cast in terms that are so broad as to be meaningless.” Without more specific guidance from the federal courts, the DEA’s increased enforcement efforts arguably are overreaching and impermissibly allow the Attorney General to “define diversion based on his view of legitimate medical practice.”

**Legitimate Medical Purpose**

Inasmuch as the CSA “conveys an unwillingness to cede medical judgments to an executive official who lacks medical expertise,” it follows that Congress cannot have intended to cede to juries medical judgments about the legitimacy of prescribing pain medications to patients who report pain to their physician. Yet this is precisely what jurors are asked to do in cases involving doctors accused of prescribing medications without a legitimate medical purpose. Jurors are asked to find the line between practicing medicine and pushing pills.

In the early years after Moore was decided, “[a] majority of cases [in which physicians were alleged to have dispensed controlled substances without a legitimate medical purpose] dealt with facts which were so blatant that a statement of clear-cut criteria in a form useful in other cases would have been superfluous to the decision.” However, since that time, with the DEA’s increasingly aggressive pursuit of doctors, the lower courts have been left to engage in a case-by-case analysis of evidence to determine whether a reasonable inference of guilt may be drawn from the grey areas of medical practice. Less obvious cases, in which doctors have prescribed pain medication in therapeutic doses to patients who report pain, present the real risk that criminal prosecution vitiates a doctor’s medical judgment.

Not surprisingly, opinions in the lower federal courts reflect a lack of uniformity regarding the requirements for conviction under 21 USC Section 841. The Fourth Circuit, for example, has concluded that the standard for imposing criminal liability on a physician charged under Section 841 requires that the government prove that the doctor’s actions either 1) “were not for legitimate medical purposes in the usual course of his professional practice” or 2) were “beyond the bounds of medical practice.” On the other hand, the Fifth and Seventh Circuits have interpreted Moore to mean that criminal liability may only be imposed when the government has proven both that the prescription did not have a legitimate purpose and that it was dispensed outside the usual course of medical practice. Moreover, the circuit courts’ rulings reflect confusion regarding even the most basic question of whether subjective intent to act outside the scope of professional practice is required to support a doctor’s convictions under Section 841. While the Ninth Circuit has recognized that subjective intent is required, the Fourth and Eleventh Circuits have held that a physician’s conduct is measured only by an objective standard. In United States v. Hurwitz, and United States v. Williams, the Fourth and Eleventh Circuits, respectively, rejected the defendant physicians’ proposed “good faith” jury instructions that would have provided that a doctor is not guilty if he or she acted “in the honest exercise of best professional judgment as to a patient’s needs.” Both courts explained, according to their reading of Moore, the intent requirement in these cases is judged solely by an objective, rather than a subjective, standard.

The fact that several circuits could read Moore to mean that a doctor can be found guilty based solely on violating some objective standard highlights the need for clarification. To allow for conviction when a doctor honestly believes he or she is appropriately treating his or her patients improperly cedes medical judgment to the federal government and to juries, in contravention of congressional intent, as recognized by in Gonzales.

Rather than moving toward resolution, the problem of defining a workable standard for the prosecution of doctors for prescribing medication has continued to grow. As federal interest and involvement in this area expands, litigators continue to work without sufficient guidance to clearly distinguish cases involving drug dealers disguised as doctors from those that boil down to a dispute over the legitimacy of a doctor’s decision to trust a patient’s reports of pain and to prescribe therapeutic doses of opioid analgesics. Although the Supreme Court has declined to take up the question so far, at some point, the federal courts will need to define the limits on the government’s authority to use the CSA to inquire into the legitimacy of medical practices.

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CLASS CONTROL

After a recent Ninth Circuit decision, plaintiffs may elect to pursue more single-state class actions

IN MAZZA v. AMERICAN HONDA MOTOR COMPANY, the U.S. Court of Appeals for the Ninth Circuit held, for the first time, that the application of California’s consumer protection laws to all class members in a nationwide class was inappropriate under California’s choice-of-law rules and that the law of the state where the transaction took place should govern. This holding drew criticism from dissenting Judge Dorothy Nelson, who predicted the majority’s decision would prove “devastating to consumers.” Some practitioners have opined that Mazza makes it nearly impossible to certify a nationwide class that would apply California’s consumer protection laws nationwide. Others have predicted an end to nationwide class actions. Mazza is already having a profound effect on the certification and pleading stages of federal class actions in California.

The plaintiffs in Mazza filed a class action against Honda alleging that Honda had misrepresented the capabilities of an optional safety feature and concealed material information regarding the feature in advertisements. The plaintiffs brought claims under California’s consumer protection statutes, alleging unjust enrichment and violations of the California Unfair Competition Law, the False Advertising Law, and the Consumers Legal Remedies Act.

The district court certified a nationwide state-law class under Rule 23(b)(3) of the

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Federal Rules of Civil Procedure (FRCP). Subsequently, the Ninth Circuit granted Honda’s request to review the district court’s order under FRCP 23(f). In a 2-1 decision, the Ninth Circuit panel vacated the district court’s class certification because the district court “erroneously concluded that California law could be applied to the entire nationwide class.” In the process, the court provided an in-depth choice-of-law analysis of all three steps of California’s governmental-interest test and, for the first time, articulated pro-business considerations and policies that should be considered when applying this choice-of-law test.

At the outset, the Ninth Circuit noted the basic principle that a federal court sitting in diversity must look to the forum state’s choice-of-law rules to determine the controlling substantive law. Under California’s choice-of-law rules, the plaintiff bears the burden of showing that California has significant contacts or aggregation of contacts to the claims of each class member. The court found that the plaintiff met this burden because Honda’s corporate headquarters, the advertising agency that produced the alleged misrepresentations, and a fifth of the proposed class were located in California.

However, writing for the majority, Judge Ronald Gould found that the district court misapplied California’s choice-of-law rules by allowing California’s substantive laws to apply to the entirety of a class that hailed from 44 different states. According to the court, California law may be applied nationwide only if the interests of other states are not found to outweigh California’s interest in having its law applied. To determine what law applies to non-California plaintiffs suing in California courts, the courts use the three-step governmental-interest test.

First, the court determines whether the relevant laws of the potentially affected states are different. Second, if there is a difference, the court determines if there is a “true conflict” by examining each state’s interest in applying its own law to the case. Third, if a true conflict exists, the court determines which state would be more impaired if its law was not applied, and the law of the state whose interest and policies would be most impaired is applied.

The Ninth Circuit Applies a New Standard

The Ninth Circuit articulated a new standard to evaluate whether state laws are materially different. The court stated that a material difference in state laws is outcome-determinative. Applying this standard, the court found that there are outcome-determinative differences between California’s consumer protection laws and the laws of other states with respect to scienter, reliance, and remedies. The court also held that state unjust enrichment laws vary in material respects.

As for the second step, the Ninth Circuit found that each of the 44 states has a strong interest in applying its consumer protection law to the transactions that took place within each state. The court explained that each state has the prerogative to set the “optimal balance between protecting consumers and attracting foreign businesses,” and this may mean less “protection for consumers [in order] to create a more favorable business climate for the companies that the state seeks to attract to do business in the state.” The court stated that the district court overlooked that “each state has an interest in setting the appropriate level of liability for companies conducting business within its territory,” including limiting “excessive litigation.”

Judge Ronald Gould found that the district court misapplied California’s choice-of-law rules by allowing California’s substantive laws to apply to the entirety of a class that hailed from 44 different states.

Regarding the third step of the test, the court stated that each state “has an interest in applying its law to transactions within its borders and that, if California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce.” The court noted that the district court ignored each state’s interest in promoting business and that the Class Action Fairness Act (CAFA) was aimed at stopping courts from ignoring pro-business laws. Because California has little interest in applying its law to residents of foreign states, the court held that each class member’s claims should be governed by the consumer protection laws of the state in which the transaction took place.

The court, therefore, vacated the class certification order because variances in state law overwhelmed common issues and precluded predominance for a single nationwide class. The court did not, however, express any opinion concerning whether the district court still may be able to certify a California class or any subclasses of states that have essentially the same laws.

The plaintiffs, in their petition for en banc review (which was denied), made the dire prediction that the panel opinion “does not merely torpedo this particular nationwide class action against Honda, it also threatens to sink the nationwide class action device itself.” While Mazza has affected class action litigation at the certification and pleadings stages, the concern of significant consumer impact has not yet come to fruition.

Mazza’s significance at the class certification stage—the “main event”—in class action litigation—is unmistakable. Certification of a nationwide or multistate class under a single state’s law often implicates choice-of-law issues. Mazza has proven to be powerful authority for defendants seeking to defeat efforts to certify nationwide or multistate classes, particularly under California law.

Most commentators recognize that federal courts have long been reluctant to extend a single state’s law nationwide. According to the Senate report accompanying CAFA, from 1995 to 2005, no federal court certified a nationwide class using the law of a single state. Most often, it was state courts that certified a nationwide class under a single state’s law. This phenomenon was apparent in California courts and in other states. Not surprisingly, one objective of CAFA was to reduce the number of large-scale interstate class actions in state courts.

In this respect, Mazza carries forward a trend away from nationwide state-law class actions. Federal courts have long construed state choice-of-law principles to require that each putative class member’s claims be governed by the laws of the member’s home state. A minority of federal courts have gone the other way, extending a single state’s law nationwide. Mazza, however, has provided binding legal authority requiring California district courts to take a close look at whether a nationwide class under California’s consumer protection laws should be certified.

Mazza is the first Ninth Circuit decision to apply a choice-of-law analysis comparing California’s consumer protection laws to consumer protection laws across the country and finding that the material differences between the states’ laws counsel against using California’s laws for transactions that occurred across the country. Mazza is also the first Ninth Circuit decision to emphasize the significant interests of states in which the transaction occurred.

Since Mazza, the majority of district courts have relied on Mazza’s choice-of-law holding.
to deny requests to certify nationwide state-law class actions.18 Citing Mazza, the courts are finding that the laws of every state in which transactions took place apply. As Central District Judge Cormac Carney noted, a potential trial with so many different laws to apply would “devolve quickly into an unmanageable morass of divergent legal issues.”19

The few post-Mazza courts that have certified multistate classes are easily distinguishable from Mazza. These cases, for example, include certified classes that consisted only of single-state subclasses,20 defendants that failed to meet their burden of proving material differences in state laws,21 and plaintiffs who did not seek to certify a class under FRCP 23(b)(3).22 In one case, the court warned that Mazza precludes certification in the future.23 In another, the classes were certified under federal law.24

**Subclassing after Mazza**

Because no contested nationwide state-law class actions have been certified after Mazza in the Ninth Circuit, effective and manageable subclassing will play an increasingly important role in efforts to certify multistate class actions. Class action proponents will likely cite the Ninth Circuit’s statement that courts may, in appropriate circumstances, be able to certify subclasses grouped around “materi- ally different bodies of state law.”25 Not surprisingly, plaintiffs’ attorneys have already stated that if a nationwide class is not viable, multiple subclasses of the largest states may be certified.26 The theory is that a class of 10 to 12 subclasses may appear more manageable. This will nevertheless require greater expenditure of time and effort, and thus cost.27

**Keegan v. American Honda Motor Company**28 is a recent example of how subclassing may, in the appropriate case, achieve certification of smaller but multistate subclasses. The plaintiffs in Keegan sought to assert a nationwide state-law class action, but in the alternative proposed a multistate subclassing scheme. The district court completed a detailed state-specific analysis of the various proposed subclasses, and, in light of Mazza, refused to certify a nationwide class under California law. The named plaintiffs hailed from different states, so the Keegan court certified several subclasses under the laws of each named plaintiff’s home state. Keegan is thus one example of why Mazza does not necessarily signal the end of multistate class actions.

The same forces at work at the certification stage are at work when defendants attempt to decertify a previously certified class. There have been two reported decisions on decertification applying Mazza, and the motion was denied in both.29 Nevertheless, it appears that courts will decertify a class if the defendant meets its choice-of-law burden under Mazza.

**Choice-of-Law Issues at the Pleading Stage**

Courts usually will not conduct a detailed choice-of-law analysis during the pleading stage in class actions,30 and in ruling on a motion to dismiss a class action complaint prior to class certification, courts generally consider only the claims of the named plaintiffs.31 Thus, class allegations typically are tested on a motion for class certification, not at the pleading stage.32 Since Mazza, however, a surprising number of district courts have considered the effect of state law variations and have undertaken a choice-of-law analysis at the pleading stage. Courts do remain split as to whether such an analysis is premature. This divergence among courts presents the biggest change in class actions after Mazza.

Mazza does not change the basic premise that courts may properly determine choice-of-law issues at the pleading stage.33 Courts have long recognized that some choice-of-law issues may not require a full factual record and may be amenable to resolution on a motion to dismiss when the necessary facts appear in the complaint.34 Thus, some courts have struck class allegations if it is clear from the pleadings that class claims cannot be maintained.35 The decision concerning whether a choice-of-law issue is ripe or premature is made on a case-by-case basis.36 Mazza has reignited the debate concerning whether a choice-of-law analysis requires a fully developed factual record beyond what is pleaded in a complaint.37 Relying on Mazza, courts have declined to dismiss California law-based claims if the courts need more facts to make a decision. These courts note that Mazza may influence the decision whether to certify a proposed class or subclass, but a determination is premature or unripe at the pleading stage.38

The reasoning is that until the parties have explored the facts through discovery, it would be premature to speculate about whether the differences in consumer protection laws among states are material in the particular case. One court has offered additional reasons for delaying its decision, stating, “[O]nce the relevant facts of the case have been explored during discovery, it is possible that Plaintiff could narrow or define the class in such a way at the class certification stage to make any differences between applicable laws immaterial. Moreover, should choice-of-law analysis appear to pose problems at the class certification stage, Plaintiff could seek to certify subclasses of putative class members from individual states or subclasses of class members from groups of states with consumer protection laws that are not materially different.”39

Other courts have declined to dismiss or strike class claims when the defendant has not properly maintained the burden of showing that foreign law should apply to the class claims.40 These district court decisions note that Mazza was influenced by the briefing of the defendant in that case who “exhaustively detailed the ways in which California law differs from the laws of the 43 other jurisdictions.”41 If the defendant fails to meet its burden at this pleading stage to explain how differences in the various states’ laws would materially affect the adjudication of plaintiffs’ claims or otherwise explain why foreign laws should apply, courts should not dismiss or strike plaintiffs’ state law class claims.42

However, if sufficient facts are pleaded, and the defendant has provided adequate analysis explaining why foreign law should apply, Mazza provides authority for courts to dismiss class allegations early. Indeed, one court summarily dismissed a plaintiff’s nationwide class allegations based entirely on Mazza and without any detailed choice-of-law analysis.43

In one of the most interesting post-Mazza cases outside California, a district court in Ohio granted a motion to strike the nationwide class allegations after conducting a choice-of-law analysis and relying on Mazza.44 The court noted that Mazza determined “without conducting a factual analysis that variations in the elements required to satisfy a cause of action constituted material differences among the statutes.”45 It also noted that “no discovery will change the simple fact that different states have different elements” and that these variations were material.46 After applying steps two and three of California’s choice-of-law analysis, the court determined that a nationwide class could not be certified.

Courts may be likely to do a conflict-of-law analysis and dismiss the claims in a case in which a non-California named plaintiff brings California claims in a California court. For example, in Horvath v. LG Electronics,47 four named plaintiffs brought a class action in the Southern District of California, but only one named plaintiff was from California. The defendants filed a motion to dismiss. Applying the Mazza choice-of-law analysis, the court decided to apply California law only to the California named plaintiff. The court then dismissed the non-California named plaintiffs because the court would not apply California law to them. Other courts have followed this approach as well,48 some noting that a non-California plaintiff who makes the purchases outside of Cal-
MCLE Test No. 222

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


2. Under California’s choice-of-law rules, the defendant bears the initial burden of showing that California has significant contact or aggregation of contacts to the claims of each class member. True. False.

3. Courts using the three-step governmental-interest test first examine whether the relevant laws of the potentially affected states are different. True. False.

4. Second, courts determine which state’s interest would be more impaired if its law were not applied. True. False.

5. Third, if there is a difference in the laws between states, the court determines if there is a true conflict by examining each state’s interest in applying its own law to the case. True. False.


7. Mazza found no outcome-determinative differences between California’s consumer protection laws and the laws in other states. True. False.

8. Mazza holds that each class member’s claims should be governed by the consumer protection laws of the state in which the transaction took place. True. False.

9. The pleading stage in class action litigation is often described as the “main event.” True. False.

10. District courts have the power to certify a California class and/or subclasses of states that have essentially the same laws. True. False.

11. Courts have long recognized that some choice-of-law issues may not require a full factual record and may be amenable to resolution on a motion to dismiss or strike when the necessary facts are pleaded in the complaint. True. False.

12. Standing requires that 1) the plaintiff suffered an injury in fact 2) the injury is fairly traceable to the challenged conduct, and 3) the injury is likely to be redressed by a favorable decision. True. False.


14. There was no dissent in Mazza. True. False.

15. One objective of CAFA was to reduce the number of large-scale interstate class actions in state courts. True. False.

16. A litigant who is unhappy with a district court’s certification decision can petition the court of appeals to review the decision. True. False.

17. California state courts have certified nationwide class actions under California law. True. False.

18. No other state courts besides California have certified nationwide state law class actions. True. False.

19. The court in Mazza noted that CAFA was aimed at stopping courts from ignoring pro-business laws. True. False.


ANSWERS

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

1. ☐ True ☐ False
2. ☐ True ☐ False
3. ☐ True ☐ False
4. ☐ True ☐ False
5. ☐ True ☐ False
6. ☐ True ☐ False
7. ☐ True ☐ False
8. ☐ True ☐ False
9. ☐ True ☐ False
10. ☐ True ☐ False
11. ☐ True ☐ False
12. ☐ True ☐ False
13. ☐ A ☐ B ☐ C ☐ D
14. ☐ True ☐ False
15. ☐ True ☐ False
16. ☐ True ☐ False
17. ☐ True ☐ False
18. ☐ True ☐ False
19. ☐ True ☐ False
20. ☐ A ☐ B ☐ C ☐ D
ifornia does not have standing to assert California state law claims.49 Similarly, other courts reject California law claims in nationwide class actions in which the plaintiffs neither reside in California nor purchased their product in California, and the lawsuit is not brought in a California court.50 This reasoning rests on the presumption against extraterritorial applicability of California statutes when a claim is brought based on conduct that occurred outside of California.51 Other courts reject this approach to using choice-of-law in the standing analysis, noting that “choice of law is not the same thing as standing.”52 Standing requires that 1) the plaintiff suffered an injury in fact, 2) the injury is fairly traceable to the challenged conduct, and 3) the injury is likely to be redressed by a favorable decision. Notably, the Mazza court rejected the defendant’s standing argument despite the court’s conclusion that the application of multiple jurisdictions’ consumer protection laws precluded class treatment.

The courts following this approach have found allegations in the complaint sufficient to confer standing. For example, an out-of-state class member may allege an injury that is attributable to the defendant’s conduct and that is likely to be redressed by a favorable decision.53 Courts have rejected the defense argument that based on choice-of-law principles, the plaintiffs lack standing to assert California consumer protection claims because they are not California citizens and their alleged injuries occurred out of state.54 Some courts are simply reserving their judgment on choice-of-law issues and affording parties the chance to develop a sufficient record.55 Recent decisions show that Mazza’s choice-of-law principles have had a profound impact on how class actions are litigated at the pleading stage. While there currently is no clear major authority on whether Mazza should bar multistate class actions as early as the pleading stage, the significant number of cases in which the issue has already been presented make clear that Mazza’s greatest impact may be in how it shapes the class definition long before a class certification motion is ever filed. Certifying a nationwide class under California law has become significantly more difficult since Mazza.56 Some courts have certified multistate classes through subclasses, but Mazza appears to have erected a significant hurdle. Although Mazza is a class certification decision, its greatest impact appears to be in the pleading stage. Defendants have relied on Mazza to renew efforts to dispose of class claims at the pleading stage. Ultimately, Mazza’s choice-of-law hurdles are not insurmountable, but they present challenges. Plaintiffs likely will force defendants to carry their burden in showing that the other states have a greater interest in having their law applied.57 Other plaintiffs may elect to avoid the choice-of-law issue altogether by pursuing smaller, single-state class actions. Whether Mazza will forever end the practice of certifying nationwide classes under California law remains an open issue.

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1 Mazza v. American Honda Motor Co., 666 F.3d 581 (9th Cir. 2012).
2 Id. at 598-99 (Nelson, J., dissenting).
3 Id. at 592.
4 Id. at 593.

50 This reasoning rests on the presumption against extraterritorial applicability of California statutes when a claim is brought based on conduct that occurred outside of California.

51 Other courts reject this approach to using choice-of-law in the standing analysis, noting that “choice of law is not the same thing as standing.” Standing requires that 1) the plaintiff suffered an injury in fact, 2) the injury is fairly traceable to the challenged conduct, and 3) the injury is likely to be redressed by a favorable decision. Notably, the Mazza court rejected the defendant’s standing argument despite the court’s conclusion that the application of multiple jurisdictions’ consumer protection laws precluded class treatment.

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Painful Prescriptions
(Continued from page 17)

- Jackson-malpractice lawsuit
- Ansley Cook, Criminal Medicine: When Malpractice Turns to Manslaughter (Feb. 9, 2010), http://crime.suite101.com/article.cfm/criminal-medicine;
- See http://www.mbc.ca.gov.
- Jon H. Sutton et al., What Surgeons Should Know about...Medical Licensure and State Regulation of Doctors, 92:3 B ULL. OF THE AM. C OLL. OF SURGEONS 10, 10-12 (Mar. 2007).
- See http://www.mbc.ca.gov.
- Jon H. Sutton et al., What Surgeons Should Know about...Medical Licensure and State Regulation of Doctors, 92:3 B ULL. OF THE AM. C OLL. OF SURGEONS 10, 10-12 (Mar. 2007).
- Conant v. Walters, 309 F. 3d 629, 639 (9th Cir. 2002).
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- Conant v. Walters, 309 F. 3d 629, 639 (9th Cir. 2002).
- See, e.g., DEA Fact Sheet, Action Plan to Prevent the Diversion and Abuse of Oxygen, http://www.deadiversion.usdoj.gov/drugs_concern/oxycodone/abuse_oxy.htm; DEA, DEA, Office of Diversion Control, Cases Against Doctors (2012), http://www.deadiversion.usdoj.gov/crim_admin_actions/doctors_criminal_cases.pdf; Tina Rosenberg, When Is a Pain Doctor a Drug Pusher, N.Y. TIMES MAG. (June 17, 2007), available at http://www.nytimes.com/2007/06/17/magazine/17pain.html?pagewanted=all ("According to the DEA, 71 doctors were arrested last year for crimes related to diversion—the leakage of prescription medicine into illegal drug markets..., arrests and investigations...have risen steadily over the last few years.").
The demise of California’s redevelopment agencies obliges local governments and developers to explore new financing methods.

STAPLES CENTER, L.A. Live, Bunker Hill, Hollywood, and Koreatown are but a few of the places in Los Angeles that benefitted from California’s community redevelopment law. The Community Redevelopment Agency of the City of Los Angeles rebuilt communities from Canoga Park to San Pedro and helped foster the LA River Revitalization Corporation and the Los Angeles CleanTech Incubator. Elsewhere in the state, it would be nearly impossible to find a publicly assisted urban development, infrastructure, or affordable housing project that was not supported by development resources granted under redevelopment law. Nevertheless, on February 1, 2012, redevelopment agencies (RDAs) were eliminated statewide and are going through a multiyear wind-down process.

For more than 60 years, local governments used RDAs for planning and financing projects. To fund themselves, RDAs received a large percentage of the increase in property taxes (known as the tax increment) that was attributable to the rise in land values in redeveloped areas. RDAs also could exercise the power of eminent domain and brownfield cleanup authority to support projects. Redevelopment financing provided local governments with the funds for developments that otherwise might have been infeasible.

The loss of tax increment financing comes at a time when local economies need a capital infusion. With reductions in state and federal grants and programs, local governments are struggling to provide basic services. Cities are struggling to develop new projects and gain the additional jobs and the increase in the tax base that accrue from these projects. Without tax increment financing, cities have to reexamine their economic resources and incentives. Local officials, developers, and urban planners must collaborate and use all available resources to make projects feasible. In this post-RDA era, the financial sources and uses for each project must be analyzed to create the most cost-effective financing plan using public and private resources.

For example, a general law city may provide public money for a private development project only if the city has constitutional or statutory authority. In contrast, a charter city may do so unless expressly forbidden by its charter or the California Constitution. Moreover, municipal funds may only be spent when the welfare of the community and its inhabitants is affected and the public receives actual benefit. Two constitutional provisions—one prohibiting gifts of public funds and another limiting public debt—may con-
strain public assistance to economic development projects. The ban on gifts of public funds prohibits any appropriation benefiting a private party if the public agency received no consideration and the expenditure does not fulfill a public purpose. The debt limitation prohibits a city from incurring any indebtedness or liability that exceeds in any year the income and revenue provided for the year without the approval of two-thirds of the qualified voters of the city. However, many projects have been developed that avoid these prohibitions.

These are not the only prohibitions that must be considered before public assistance is provided to private development. Another is the preapproval process of the California Environmental Quality Act (CEQA), and yet another is the need to pay prevailing wages for a project that receives public funds. Enforcement of the latter has become increasingly costly to private projects that receive public funds. Furthermore, other statutes limit a local agency’s ability to provide financial assistance to vehicle dealers and big box retailers that relocate from another jurisdiction.

Although the demise of RDAs and these legal hurdles create great challenges for development projects, California cities have statutory authority to assist various types of development. Cities can do so directly or through the lease of real property.

Cities may lease property for up to 55 years for commercial development for business purposes or for 55 to 99 years if procedures regarding public hearings and competitive bidding are complied with. Cities may also lease property for up to 99 years for stadium, park, recreational, fair, exposition, exhibition, or sport purposes, subject to certain limitations. Charter cities are not constrained by these limitations.

Cities can also use statutorily authorized incentive programs to fund urban development. This includes the California Infrastructure and Economic Development Bank, the establishment of economic development corporations, capital investment incentives to attract large manufacturing facilities, formation of business improvement districts, and the approval of development agreements.

The state has also created special bodies, such as industrial development authorities and community facilities districts, as a means of accessing financing, including through lease revenue bonds, industrial development bonds, private activity bonds, special tax bonds, and certificates of participation.

Potential Tools

A frequently discussed but rarely employed financing tool is the infrastructure financing district (IFD). This uses a form of tax increment financing but has limitations. It requires the approval of voters and affected taxing entities, and it cannot be used in a redevelopment project area. A few IFDs have been formed, but none have issued public bonds. San Francisco used IFDs for the Rincon Towers project to generate $16 million for new streets, sidewalks, lighting and parks. Other IFDs are being used to create waterfront improvements related to the 2013 America’s Cup venues and Pier 27. The legislature approved amendments to the IFD law last year, but Governor Jerry Brown vetoed all the bills except the one related to the America’s Cup. A few federal financing tools are also gaining acceptance in California, including the New Market Tax Credit Program and the EB-5 program.

The Rise and Fall of Redevelopment in California

In 1952, California led the nation by creating tax increment financing as an innovative way of raising local capital for needed public facilities. Initially, this financing was used for affordable housing as a match to federal urban renewal programs. With the stated goal of eliminating blighted areas, California extended redevelopment law to assist public infrastructure and private development.

In recent years, however, as the state’s fiscal crisis worsened, Governor Jerry Brown acted to eliminate California’s redevelopment agencies (RDAs) in order to reduce California’s debt. Tax increment financing that would otherwise have gone to redevelopment is to be reallocated to schools. Prior to the governor’s elimination of RDAs, the California Redevelopment Association (CRA) sued the state for shifting the tax increment in order to reduce the state’s widening budget gap. The CRA prevailed in one case and lost the other.

In November 2010, California voters passed Proposition 22, which severely limited the state’s ability to take or transfer local funds—including the redevelopment tax increment—to cover budget deficits. Rather than try to circumvent Proposition 22 and other similar proscriptions in the California Constitution, Governor Brown advocated eliminating RDAs altogether and setting aside a portion of their revenues to cover shortfalls in the state’s budget. The legislature initially rejected his proposal. Many legislators were receptive to using RDA funds to help cover California’s debt gap but did not favor the complete elimination of RDAs.

In 2011, the legislature attempted to accommodate both objectives by passing Assembly Bills 1X 26 and 1X 27. Under AB 1X 26, all redevelopment agencies were to be abolished and a process created to provide for their orderly dissolution. AB 1X 27, however, allowed agencies to remain in existence if their governing boards agreed to make certain “voluntary” payments to help reduce gaps in the state’s budget.

The League of California Cities (LOCC) and the CRA sued the state, arguing that both bills violated Proposition 22 and state constitutional protections. The CRA also had two appeals pending in cases involving previous state budgets. Rather than continue this litigation cycle, the LOCC and CRA requested that the California Supreme Court hear their claims, and the request was accepted.

On December 29, 2011, the Supreme Court issued its decision in California Redevelopment Association v. Matusantos. The court agreed that AB 1X 27 violated Proposition 22 and invalidated the law. AB 1X 26, however, did not suffer from the same legal infirmity. As the court explained, the state created redevelopment agencies through legislation. What the legislature had the power to create, it also had the authority to terminate.

All parties were unprepared for this outcome. While a handful of agencies planned to dissolve if both laws were upheld, most intended to make voluntary payments rather than cease to exist. Similarly, the state’s Department of Finance—which was charged with overseeing much of the dissolution process—anticipated that it would only have to administer the dissolution of a small number of agencies, not the entire 400 that were then in existence. AB 1X 26 did, however, create “successor agencies” with responsibility for handling the dissolution process. In most cases, the city or county that established the redevelopment agency assumed this role. Los Angeles and a few other jurisdictions, however, refused to accept this responsibility. Los Angeles officials were concerned with the costs of dissolution and the exposure to potential liability associated with some CRALA assets, including contaminated properties.

Each successor agency is accountable to an oversight board. The board includes representatives from public and other taxing authorities within the RDA’s jurisdiction. A successor agency must submit a payment schedule every six months that includes all the enforceable obligations that must be paid as part of the wind-down process. The agency is allocated property tax revenues sufficient to make these payments if the schedule is approved by both the oversight board and the department of finance. The successor agencies and Department of Finance have widely divergent views of what obligations are enforceable. The agencies are generally committed to honoring contracts and completing existing or pending projects. In contrast, the department has an interest in accelerating dissolution to free up tax increment funds for other purposes.

In an effort to reconcile these disputes, the legislature passed AB 1484. While the legislation provided some clarification, it exacerbated the disagreements between the state and successor agencies. Under this new law, a
Additionally, local governments can provide nonmonetary assistance to potential investors in order to demonstrate public support for a project. For example, cities can offer defined plans and remove procedural hurdles to reduce surprises; expedite processing and pre-entitlement of land; and, for the most desired projects, lend their credit. Local officials, developers, and investors all benefit when projects have an element of certainty attached to them.

Other states have successfully promoted urban development and job creation through sales tax sharing, sales tax revenue bonds, isolated project revenues (sales tax, sewer, and water fees) reinvested in projects, and other locally approved incentive programs. For example, Illinois and New Mexico have revised the tax increment model to finance smaller project areas or require proof of economic feasibility and benefit before district approval.

Private Financing of Public Projects

The recession has depleted public resources for private projects, but private capital for public projects—in the form of public-private partnerships—is still available. Public-private partnerships are already in use for capital projects or services, asset monetization, joint use, concession agreements, and leasing. Private entities such as investment banks and equity funds are emerging to finance public infrastructure improvements as authorized by the Infrastructure Finance Act (IFA).26

Under the IFA, local agencies can use private investment capital in designing, constructing, maintaining, rebuilding, repairing, and operating fee-producing infrastructure facilities. The city of Santa Paula’s water recycling facility is a prominent example. The $60 million need to build the new wastewater treatment facility was obtained under the IFA.27

Redevelopment agencies used public-private partnerships for decades. The challenge now for local governments is to build on these partnerships without the benefit of tax increment financing. Ideally, private investors would provide public agencies with the needed capital and expertise. As governments transition away from RDAs, public-private partnerships will become critical to funding public infrastructure, development, and commercial and industrial projects. The proper alignment of public and private interests and allocation of risk is critical for success.

Affordable Housing

Affordable housing is an example of how this alignment may work. According to the Southern California Association of Non-Profit Housing, the city of Los Angeles needs to produce about 4,000 affordable housing units annually to keep up with demand.28

The need for affordable housing is also acute in rural California. RDAs reportedly had more than $2 billion in low and moderate income housing set-aside funds,29 but the bulk of these funds will no longer be available for affordable housing. Housing authorities have retained some RDA money, but most of what was set aside for housing development will be distributed to other public agencies.

The legislature has acted to reverse this loss to affordable housing. Assembly Bill 1484, approved in 2012, authorizes repayments of loans from the low and moderate income housing funds to a new low and moderate income housing asset fund and approves the expenditure of excess housing bond proceeds for affordable housing purposes.

Due diligence review was incorporated into the process. Specifically, each successor agency is subject to an independent audit to determine the amount of unencumbered cash that the former redevelopment agency held for future development that could be distributed to schools and other taxing authorities. Once the Department of Finance reviews these audits, it sets a dollar amount that each agency must remit to the county auditor, with the first portion paid in November and the second in April. If the agency fails to pay, the amount can be taken out of sales or property tax that would otherwise go to the local government that formed the redevelopment agency.

Resulting Litigation

On September 24, 2012, the LOCC and the city of Vallejo filed a lawsuit challenging several provisions of AB 1484, including the forced appropriation of local sales and property tax. In total, over two dozen lawsuits involving more than 50 jurisdictions have been filed challenging AB 1X 26, AB 1484, and the implementation of those bills by the Department of Finance.

Of these cases, one has garnered significant attention: Syncora Guarantee Inc. v. State of California.30 A bond insurer of redevelopment tax allocation bonds in the Inland Empire filed suit challenging the reallocation of existing redevelopment funds and the process of distributing property taxes to successor agencies. The lawsuit contends that this new distribution scheme and potential revenue loss compromise the bond insurer’s security. Under the dissolution process, a successor agency must divest itself of any RDA money that it holds. However, that money could have been used to pay debt service on outstanding bonds. Further, an agency does not directly receive the tax increment funds under the dissolution process; rather, the county auditor controls those funds and only disburses them biannually after the agency submits justification for the amounts needed. The bond insurer argues these changes fundamentally alter the nature and the quality of the security that it relied upon in insuring the bonds at issue. According to the complaint, these alterations to the security constitute an impairment of the bond insurer’s contracts and an unconstitutional taking. If the bond insurer prevails, Syncora could overturn the current process by which dissolution debts are paid and will add another layer of uncertainty onto an already confusing process.

Disposition of RDA Assets

Under AB 1484, a successor agency may prepare a long-range property management plan for the disposition of real property assets. The plan includes an inventory of the properties owned by the agency and must indicate if a property will be retained or sold and the purpose for which retained properties will be used. If the agency anticipates that a property will be used for a project identified in an approved redevelopment plan, that property can be transferred to its city or county for development.

While property sales and dissolutions bring an end to the era of RDAs, such outstanding legal claims as Syncora will continue to be a major focus of local governments in California for years to come. The demise of RDAs, however, may also affect other state objectives.

For example, the state has set goals for local agencies to reduce greenhouse gas emissions and develop more sustainable communities. Because of these laws, cities are now focusing on transit-oriented developments, improving aging commercial corridors, fostering infill projects, and promoting the adaptive reuse of obsolete or underutilized urban facilities. Without access to the financing and other resources provided by the RDAs, it will be more costly to develop these projects, and there will be less revenue to cover costs.—S.M.&E.W.

3. Matosantos, 53 Cal. 4th 231.
4. Id. at 270.
5. The majority of the amendments enacted through A.B. 1484 are contained in HEALTH & SAFETY CODE §§34171-34191.5.
poses. These changes provide a limited, but ongoing source of funds for low and moderate income housing.

The ability of local agencies to meet the demand for affordable housing without RDAs will require innovation. Governments will need to learn to modify the approval process, identify nontraditional sources of funding, and promote entrepreneurship. Governments must find ways to reduce costs at all development stages. These include permitting, design, construction, operation, and maintenance. Amenities and services may also have to be reduced or eliminated to enhance efficiency.

Affordable housing finance has always involved an amalgam of sources, but now the public financing sources are in question, and new, nontraditional sources will need to be found. These sources will have to replace local, state, and federal programs, contracting budgets, and tax-credit allocations. For example, government programs targeting energy retrofit or greater efficiency may become a catalyst for changes in project design. Community foundations and religious institutions may also fill the gap.

Communities that seek new affordable housing projects have existing authority to them in many ways, such as impact fee waivers and streamlined processing and approval methods. In addition, as the economy rebounds and market-rate housing projects reemerge, inclusionary zoning and density bonus laws can help generate new affordable units. Another approach is monetizing surplus property held by a local government, school districts, or other special districts through the use of joint use agreements or other arrangements to create new revenue. The Los Angeles Unified School District (LAUSD) has used this approach extensively to promote parks, youth services, workforce housing, child care, and healthcare through public-private partnerships. More than 60 partners are currently collaborating with LAUSD under the Joint Use/Innovation Fund Program.

Replacing RDAs

In 2012, the legislature passed three bills (AB 2144, SB 214, and SB 1156) to help local governments establish districts to use tax increments to finance urban development, infrastructure, and infill projects that were previously supported by RDAs. Governor Brown vetoed these bills as “premature,” indicating that local governments should remain focused on winding down redevelopment agencies. Although most experts expect innovation to come at the local level, opportunities for the state exist to provide replacement tools for local economic development.

Public investment in local infrastructure will promote private investment. In many communities, existing roads, water, and sewage systems are inadequate to serve new developments. Updating local infrastructure would help with the higher costs of operation and maintenance in urban areas. If the state is serious about infill development, it should invest in local infrastructure and foster community-based financing, not project-based funding.

While many recognize the importance of large, regional, and statewide projects (such as stadiums, major roads, bridges, and high-speed rail), a need also exists to support local development efforts. At the project level, legislation should clarify that builders and local agencies may share revenues (sales tax, property tax, transient occupancy tax) from new projects that will help stimulate economic development. These incentives will reward those who take risks and generate new tax revenue.

Regulatory reform is also critical. Revisions to CEQA in 2011 were made with the intent of streamlining infill and urban development. However, the implementation of these revisions has demonstrated that “streamlining is inevitably complex.” Further revisions to CEQA may be worthwhile.

Eminent Domain and Brownfield Cleanup

With the demise of RDAs, local government lost two valuable tools: eminent domain for private projects and brownfield cleanup. Cities must regain the authority to employ eminent domain for local economic development and community revitalization. The Polanco Redevelopment Act provided a solution to brownfield properties by immunizing subsequent buyers from liability for sites cleaned up under a state-approved plan. With the end of redevelopment agencies, however, this act no longer applies to new projects.

RDAs may have been eliminated in 2012, but their legacy will endure. Time will prove that the job generation, local economic benefits, and affordable housing produced by RDAs far outweighed their shortcomings. Redevelopment in California will need more than a cosmetic change to be revived. Now that RDAs are gone, those promoting any new public development financing tool must build a constituency to promote economic development, job creation, infrastructure investment, catalyst projects, and affordable housing. Regardless of what transpires, future urban development will require the increased use of public-private partnerships, emerging statutory tools, the revision of existing laws, and establishment of new funding sources to make urban development work.

1 HEALTH & SAFETY CODE §§33000 et seq.
3 Albright v. City of South San Francisco, 44 Cal. App. 3d 866 (1975); see also CAL. CONST. art. XVI, §7.
4 CAL. CONST. art. XVI, §6
5 Consideration must be “adequate” so as to evidence a bona fide contract. City of Los Angeles v. Superior Court (Los Angeles Dodgers, Inc.), 51 Cal. 2d 423 (1959). What constitutes a “public purpose” is primarily a matter for legislative discretion. County of Alameda v. Janssen, 16 Cal. 2d 276 (1940).
6 See CAL. CONST. art. XVI, §18. The debt limitation prohibition requires careful structuring of public assistance efforts. There are exceptions for service contracts and leases. See City of Redondo Beach v. Taxpayers, Property Owners, Citizens and Electors, 54 Cal. 2d 126 (1960).
7 PUB. RES. CODE §§21000 et seq.
8 See LAB. CODE §§1720 et seq.
9 GOV. CODE §§33084, 33084.5.
10 GOV. CODE §37395.
11 GOV. CODE §37380(b).
12 GOV. CODE §37396.
13 GOV. CODE §37380.
14 GOV. CODE §37380.
15 GOV. CODE §§63000 et seq.
16 GOV. CODE §13997.6.
17 GOV. CODE §51298.
18 STS. & HIGH. CODE §§36500, §§36600 et seq.
19 GOV. CODE §§65864 et seq.
20 GOV. CODE §§91500 et seq.
21 GOV. CODE §§33311 et seq. See Arza Land Partners v. Department of Indus. Relations, 2010 WL 518551 (Cal. App. 2d Dist. 2010) (The proceeds from a Mello-Roos bond to finance a portion of the public infrastructure for a planned community are “public funds” and therefore cause the entire project to become a “public work” as defined by Labor Code §1720.).
22 GOV. CODE §§53395 et seq; see also A.B. 2259, 2011-12 sess.
24 The EB-5 Immigrant Investor Program was created to stimulate the U.S. economy through job creation and capital investment by foreign investors. See http://www.uscis.gov.
25 A public-private partnership is an agreement between a federal, state, or local agency and a private entity.
26 GOV. CODE §§5956 et seq.
29 Under the low and moderate income housing set-aside fund requirement that was added in 1976, RDAs had to contribute 20% of the tax increment generated from the redevelopment project area to “increase, improve and preserve the communities’ supply of affordable housing for persons and families of low and moderate income.” See HEALTH & SAFETY CODE §§33342(a).
30 GOV. CODE §§65915 et seq.
31 See http://mo.laschools.org/fis/planning.
35 HEALTH & SAFETY CODE §§33459 et seq.
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**Summary**

This opinion addresses whether, and if so how, an attorney may respond to a former client’s adverse public comments about the attorney when the former client has not disclosed any confidential information and there is no litigation or arbitration pending between the attorney and the former client. The committee concludes that the attorney may publicly respond to such comments as long as the rebuttal 1) does not disclose any confidential information, 2) does not injure the former client in any matter involving the prior representation, and 3) is proportionate and restrained.

**Table of Authorities**


**Statutes:** California Business and Professions Code §6068(e); California Evidence Code §921; California Evidence Code §§950 et seq.

**Opinions:** Los Angeles County Bar Ass’n Form. Opn. No. 396 (1982); Los Angeles County Bar Ass’n Form. Opn. No. 452 (1982); Los Angeles County Bar Ass’n Form. Opn. No. 498 (1999); Los Angeles County Bar Ass’n Form. Opn. No. 519 (2007); Cal. State Bar Form. Opn. 1853-71 (1983). Rules: California Rules of Professional Conduct, Rule 3-100(A); ABA Model Rules of Professional Conduct, Rule 1.6(b)(5); Other Authorities: Restatement (Third) of the Law Governing Lawyers §64, comment e.

**Facts**

Attorney previously represented former client in a civil proceeding. Attorney no longer represents former client in any respect. Subsequent to the conclusion of the representation, former client posts a message on a Web site discussing lawyers, stating that attorney was incompetent and overcharged him, and others should refrain from using attorney. This opinion assumes that no confidential information is disclosed in the message and former client’s conduct does not constitute a waiver of confidentiality or the attorney-client privilege. There is no litigation or arbitration pending between attorney and former client.

**Issues**

In what manner, if any, may attorney publicly respond to disparaging public comments by former client, whether of malpractice or otherwise?

**Discussion**

An attorney “may not do anything which will injuriously affect [a] former client in any matter in which [the attorney] formerly represented [the client]....” Wutchumna Water Company v. Bailey, 216 Cal. 564, 573-74 (1932). See also Oasis West Realty v. Goldman 51 Cal. 4th 811, 812 (2011); Styles v. Mumbert, 164 Cal. App. 4th 1163, 1167 (2008) (“an attorney is forever forbidden from...acting in a way which will injure the former client in matters involving such former representation”).

An attorney also owes a duty of confidentiality to former clients as well as to current clients. California Business & Professions Code Section 6068(e)(1) (it is the duty of an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of, his or her client.”); see also CRPC, Rule 3-100(A); Oasis West Realty v. Goldman, supra, 51 Cal. 4th at 821; Styles v. Mumbert, supra, 164 Cal. App. 4th at 167.

The attorney-client privilege under California Evidence Code Sections 950 et seq. is not subject to the creation of exceptions other than as specified by statute. See, e.g., Costco Wholesale Corporation v. Superior Court, 47 Cal. 4th 725, 732 (2009); OXY Res. California LLC v. Superior Court, 115 Cal. App. 4th 874, 889 (2004) (courts may not “imply unwritten exceptions to existing statutory privileges.”) [internal citations omitted.] “The area of privilege “is one of

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the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme.”” [Citation omitted.]

In the absence of waiver of confidentiality and the attorney-client privilege by former client (see, e.g., Evid. Code §912), there is no statutory exception to the duty of confidentiality under Business & Professions Code Section 6068(e)(1) or the attorney-client privilege under Evidence Code Sections 950 et seq. that would permit an attorney to defend himself or herself by disclosing confidences or privileged information. See General Dynamics Corporation v. Superior Court, 7 Cal. 4th 1164, 1190 (1994) (“Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client”); see also Los Angeles County Bar Ass’n Form. Opn. No. 519 (There is no self-defense exception to the lawyer’s duty of confidentiality under Business & Professions Code Section 6068(e) that would allow an attorney to disclose confidential client information to defend against a lawsuit brought by a nonclient against the attorney.).

This opinion assumes there has been no waiver of any confidential information former client provided to attorney while attorney represented former client. Thus, absent a statutory exception allowing attorney to reveal confidential communications in response to former client’s public statement, attorney remains obligated to preserve former client’s confidential information, and attorney cannot disclose such information in response to that public statement unless authorized to do so by a court’s ruling in a judicial proceeding.

The bar on attorney revealing confidential information in responding to former client’s Internet posting does not mean attorney cannot respond at all. If attorney does not disclose confidential or attorney-client privileged information, and does not act in a way that will injure former client in a matter involving the prior representation, he or she may respond.

However, the attorney’s response also must be proportionate and restrained. See Restatement (Third) of Law Governing Lawyers, section 64, comment e (referencing a “proportionate and restrained” public response). In other words, not only must attorney refrain from revealing any confidential information (because it is assumed that there has been no waiver by former client), and avoid saying anything that would injure former client in a matter related to the prior representation, he or she may say no more than is necessary to rebut the public statement made by former client. This rule has been recognized in other contexts where the extent of an attorney’s ability to respond to
A statement made by a former client has been considered. See, e.g., Los Angeles County Bar Ass’n Form. Opinion. No. 498 (1999) (lawyer may disclose confidential information in a fee dispute with a former client only if relevant to the dispute, if reasonably necessary due to an issue raised by the former client, and if the lawyer avoids unnecessary disclosure); Los Angeles County Bar Ass’n. Form. Opinion No. 452 (1988) (lawyer may file a creditor’s claim in former client’s bankruptcy proceeding but may not prosecute objections to discharge); In the Matter of Dixon, 4 Cal. State Bar Ct. Rptr. 23 (Review Dept. 1999) (former client’s malpractice suit against lawyer does not wholly waive lawyer’s duties under the lawyer-client privilege but constitutes waiver only to the extent necessary to resolve the suit; attorney may not disclose more than is essential to preserve the attorney’s rights).

Therefore, under these circumstances, attorney may respond to former client’s internet posting, so long as 1) attorney’s response does not disclose confidential information, 2) attorney does not respond in a manner that will injure former client in a matter involving the former representation, and 3) attorney’s response is proportionate and restrained.

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinion is based on the facts set forth in the inquiry submitted.

1 For purposes of this opinion, “confidential information” is defined to include both privileged information and information that, while not privileged, is nevertheless considered to be confidential under California Business and Professions Code §6068(e)(1).

2 This opinion also assumes that the person making the Web site posting is a former client. The opinion does not address those situations in which the disparaging comment is posted by an unknown author.

3 It should be noted that, while instructive concerning the duties owed to a former client, none of the holdings of these three cases was based on facts involving an attorney’s response to a former client’s adverse public comments about the lawyer.

4 This committee’s opinion in Los Angeles County Bar Ass’n Form. Opn. No. 396 (1982) is not to the contrary. In that opinion, the committee opined that a lawyer, in a formal legal proceeding involving alleged malpractice by him, could provide a declaration disclosing certain privileged communications in order to rebut claims being made by a former client against the attorney. Unlike the factual scenario underpinning Opn. No. 396, this opinion does not involve a judicial proceeding based upon a claim of malpractice or otherwise.

5 There are some authorities from outside California that suggest an exemption to an attorney’s duties of loyalty and confidentiality may exist in certain circumstances when necessary in “self-defense.” See, e.g., Rule 1.6(b)(5) of the ABA Model Rules of Professional Conduct. It is important to bear in mind, however, that California has not adopted the ABA Model Rules, and they may be consulted for guidance only when there is no California rule directly applicable. See, e.g., County of San Francisco v. Cobra Solutions, Inc., 38 Cal.4th 839, 852-53 (2006); Cal. State Bar Formal Opn. 1983-71.
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Reclaim the Civil Right, Duty, and Power of Jury Service

GROUCHO MARX QUIPPED that he was married by a judge but should have asked for a jury. While juries have no place in wedding chapels, we should trust and rely upon them in litigation more than we currently do. We have all heard that jury trials and trial lawyers are headed toward extinction. Perhaps we did not pay much attention to this prediction. It is time we do, however, or we may witness the end of a critical function of government.

As the Founders of this country recognized, all juries, whether civil or criminal, serve as a check on government power. The Founders wanted courtroom decisions made by impartial citizens who possessed a fresh, collective wisdom, and not by a governmental agent who possessed allegiances and agendas different from those of citizens who were not employed by the state. They also wanted citizens to retain the power to send a message to the government.

Statistics reveal, however, that civil jury trials are drastically diminishing. In its 1991 annual report, the Judicial Branch for the state of California revealed that of 670,024 civil cases filed, 4,170 were tried before a jury. In 2010, it reported that 1,132,926 civil cases were filed but only 1,590 were tried before a jury. In its 1997 annual report, the Administrative Office of the U.S. courts revealed that 249,336 civil cases were pending in the U.S. district courts, with 4,557 tried to a jury. In 2011, with 270,839 cases pending, only 2,254 were tried to a jury. Only 1.1 percent of all civil cases terminated that year were by bench or jury trial.

Although it is difficult to pinpoint the reasons behind this disturbing trend, many trial lawyers cite some explanations. For example, the legal process has become increasingly laborious and expensive, especially due to the surge of statutes and rules relating to civil procedure. This tends to slow cases down, making them expensive and rendering courts inaccessible to the average citizen.

Additionally, misperceptions and prejudices about lawyers, jury trials, and our system of justice remain unchecked. Media reports include examples of miscarriages of justice (real or not) and omit the large number of good decisions that juries make daily. For example, we have allowed the McDonald’s hot coffee case to dominate our minds as an example of a flawed system, yet we seem to ignore the thousands of trials that have never been reported in the media because they were not sufficiently sensational, sexy, or aberrant.

Lobbying efforts by special interests are also part of the problem. It is widely known that big business has paid millions of dollars to attack our esteemed system of justice. They propagate unfounded fiscal fears but do not point to the public benefit that lawsuits have brought to such important matters as civil rights and product safety. Corporate interests routinely include arbitration clauses in their contracts and enforce them with the blessing of our busy courts.

While affording parties an opportunity to settle is important, many cases are pushed into settlement far too aggressively. Many cases are settled through scare tactics and antitrial sentiments made by settlement officers, mediators, and even lawyers. An unreasonable misconception persists that a jury trial is a failure of the system rather than the fulfillment of a constitutional promise.

Judges and lawyers have also fallen short in keeping jurors interested, particularly in this quickly evolving society. The legal profession is so steeped in tradition that even the most respected judges insist upon trial conduct that tends to distance jurors from the process, such as requiring attorneys to remain standing at the lectern during trial, reducing attorney involvement in voir dire, and disallowing juror questions to witnesses. Also, lawyers frequently come to trial unprepared, consuming time by deposing witnesses aimlessly on the stand and fumbling through trial exhibits.

It also appears that people have forgotten their basic civics lessons taught in school, prompting Justice Sandra Day O’Connor to spearhead an effort to teach children civics through several online games (see www.icivics.org). The slow process of neglect and indifference is lethal to jury trials, and our system of justice is withering from lack of interest and attention.

There are several ways we, in our capacities as lawyers and citizens, can protect and strengthen our right to jury trial. For example, we should not perform work that is not necessary to either further the client’s cause or protect the client’s rights. Clients should not run out of resources before they have their day in court. We should keep them well informed so that they are able to make decisions that are best for them, unfettered by unreasonable fears and misperceptions.

If, after doing that, a client decides not to settle, we should respect and support the decision and not attempt to force a settlement.

When trial comes, we should always try to keep jurors interested. We should encourage judges to allow juror questions during trial and use technology as much as possible to keep the jury engaged. We can be creative, be prepared, and waste as little time as possible.

Most important, we can encourage everyone—especially those who have been summoned to serve on a jury and who complain about it—to serve on a jury, and explain the importance of jury service. We can also steadfastly refuse to advise anyone about how to get out of jury service. In short, we can encourage our citizens to reclaim the government by serving on a jury.

William L. Buus is a principal at Schiffer Buus APC and a business litigator. He is a member of LACBA and the American Board of Trial Advocates.
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