Los Angeles lawyer Don Chomiak cautions real estate developers on adherence to consumer protection laws.

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The 2013-2014 academic year promises to be an exciting one, as we welcome a host of new faculty members who will teach courses in areas such as international trade, healthcare, sports law, patents, mergers and acquisitions, in-house corporate practice, video game law and general practice skills. In addition to four new full time professors, Chapman Law’s newest adjunct faculty members include leaders in practice such as legendary sports agent Leigh Steinberg and general counsel for Blizzard Entertainment, Eric Roeder.

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**Lan Cao, Professor of Law**
Professor Cao currently is the Boyd Fellow and Professor of Law at William & Mary Law School. She earned her J.D. from Yale Law School and clerked for Judge Constance Baker Motley of the U.S. District Court for the Southern District of New York. She practiced with Paul, Weiss, Rifkind, Wharton and Garrison in New York City. She will teach Corporations, International Business Transactions and International Trade Law.

**Samuel F. Ernst, Assistant Professor of Law**
Professor Ernst is an intellectual property and appellate litigation attorney and is a former partner at the national firm of Covington & Burling LLP. He earned his J.D. from Georgetown University Law School and clerked for Judge Timothy B. Dyk at the U.S. Court of Appeals for the Federal Circuit. He will teach Patent Law, Pre-trial Civil Litigation, Contracts and related intellectual property subjects.

**David H. Gibbs, Associate Professor of Practice**
Professor Gibbs is a Practitioner in Residence at Suffolk University Law School and is a former partner at Bowditch & Dewey LLP in Boston. He earned his J.D. from the University of California, Berkeley. He has been listed in Best Lawyers in America in Dispute Resolution and Massachusetts Super Lawyers in Business Litigation. He will teach Practice Foundation Transactions and other practice-oriented topics.

**Julie Greenwald Marzouk, Assistant Clinical Professor (Family Violence Clinic)**
Professor Marzouk is currently a supervising attorney at the Public Law Center in Santa Ana. She earned her J.D. from University Of California, Berkeley School of Law. She will teach Family Violence Clinic and Immigration Law.

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**Eric Roeder, General Counsel, Blizzard Entertainment, Inc.**
Course: Video Game Law

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Serving the L.A. legal community for over 25 years
I had a recent conversation with my neighbor that got me thinking about a topic that is not on my horizon but is important nonetheless—retirement. My neighbor, a non-practicing lawyer working in the corporate world, had just accepted a new position with another large, multinational corporation. He said, “Since I am almost 50, and I know corporations tend to move people out in their 60s, I could not pass up this new opportunity.” My neighbor then mentioned that he will probably consider a consulting practice once he is in his 60s.

At what age should we as lawyers consider retirement? One telling statistic is that the average age at which Americans expect to retire has been steadily creeping up since the mid-1990s. In 1996, people expected to retire at age 60, but according to a new Gallup poll, the expected age of retirement for most Americans is now up to 67. Interestingly, another Gallup survey found that people who are currently under 40 expect to retire at 65 and those of us who are 40 and over, and not yet retired, expect to retire at age 68. The primary reason stated for working longer is money—people did not think they had enough money to live comfortably in retirement.

With the baby boomer bubble advancing in years, approximately one-third of California’s active attorneys are older than 55, and 21 percent are older than 60. As one 65-year old member of the State Bar recently stated, “65 is the new 55, and there is no doubt I intend to continue working.” If that is the case, the ability to “continue working” may depend on where you practice. A recent survey revealed that 37 percent of all law firms surveyed had a mandatory retirement age, and 57 percent of the law firms of 100 or more attorneys had a mandatory retirement age. A relatively small percentage of law firms having fewer than 10 attorneys had a mandatory retirement age. Seventy years was the common mandatory retirement age.

As lawyers approach retirement (or, as some call it, the “next phase”) with financial considerations aside, the possibilities are virtually limitless. A lawyer can choose to continue working, maintaining an active client base and working at the same pace as in prior years. A subtle alternative to this is to maintain an active practice but with a shift in attitude and a commitment to spend more time with family and increase time outside of the office. Alternatively, a lawyer may choose to take on such new interests as volunteering for nonprofits, returning to school, developing new hobbies (or resurrecting old hobbies) and getting involved in any number of outside activities unrelated to the law. There is a certain excitement about thinking of these and many other options as we approach our 60s and 70s.

Since this will wrap up my year as chair of the Los Angeles Lawyer Editorial Board, I want to thank and give credit to all of the other members of the board who gave so generously of their time so that Los Angeles Lawyer could maintain its position as one of the best legal magazines in the country—whether ranked on quality of content, member involvement, or service to its association. Thanks also to Sam Lipsman, our tireless leader, and to Eric Howard, who has stepped up when needed and provided leadership to help us continue to make the magazine so successful. Of course, I owe gratitude to my wife for putting up with me during those late nights in front of the computer doing the magazine’s deadline-driven business. Our new chair, Paul Marks, will no doubt carry on the Los Angeles Lawyer tradition of excellence with the continued hard work and professionalism of the Editorial Board to support him.

Dennis L. Perez is a principal in Hochman, Salkin, Rettig, Toscher & Perez, PC. He is the 2012-13 chair of the Los Angeles Lawyer Editorial Board.
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Steps for Preparing for Appellate Oral Argument

**PREPARING FOR YOUR FIRST** appellate oral argument can be daunting. What if a justice asks a curve ball question, and you do not know the answer? What if the justices do not ask any questions at all? The possible scenarios are almost infinite, and the thought of how to prepare for all of them is enough to send any lawyer into a tizzy. Several months ago, while preparing for my first oral argument in the court of appeal, I asked the experienced oral advocates in my firm what they do to prepare. I learned that everyone has their own way of doing things. Taking into account all of the advice I received, what follows is a suggested plan for preparing for your first appellate argument.

First, start by rereading the briefs. When you receive the notice scheduling oral argument, it probably will have been a long time since you have read them. To refresh your memory, the best place to start is by rereading the briefs and reminding yourself of the arguments made by each side and by any amici curiae. While you are reading the briefs, make sure to flag the cases and the parts of the record that seem most important.

At this point, you may think of new angles to approach the case or new responses to the other side’s arguments that you did not articulate in your brief. Take note of those ideas. During oral argument, the justices do not simply want to hear you recite the arguments that they have already read in your briefs. They want a fresh, distilled oral presentation of the essential reasons why your client should prevail. If you incorporate these new ideas or angles into your presentation, you will make the argument more interesting and potentially more helpful for the court. Do not, however, advance completely new arguments that have not been raised in your briefs. That is not permitted.

**Find the Keys**

Next, gather the key parts of the record and the cases and other authorities that you have flagged. At this stage, it is helpful to assemble only the most crucial documents. Read through these materials and become extremely familiar with them. Next, create an outline of your argument, including all the key facts, issues in the case, summaries of cases, quotations from the record, and anything you think is reasonably likely to come up at oral argument. Nothing is more essential to mastering your argument than creating and studying this outline in the week or two before the argument. This outline may be many pages long.

Next, condense the long outline into one or two pages to take with you to the lectern during oral argument. This shorter outline should include only the most important arguments and facts in the case, stripped to their absolute essentials. Once you have prepared the short outline, practice your argument as much as you can. The short outline is critical because you will not have time to reference your long outline while presenting argument. Brainstorm questions that you think the court may ask and practice your responses.

Oral argument is an exchange of views; it is not a speech. You must expect that the justices will ask you questions about the weakest part of your case in order to test their theories of the case. To prepare for that, you should come up with a list of all the hardest questions that the court could ask you and prepare what your responses will be, being honest with yourself about your opponents’ best points and the weaknesses in your own case. Then ask yourself if your answers to the tough questions you pose would satisfy you if you were sitting as a jurist. Practice your answers aloud.

Sometimes you will encounter a “cold bench.” On occasion an appellate court will not ask you any questions at all. To prepare for that possibility, you should create and practice a two- or three-minute speech that covers the main points that you want to convey to the court. Then ask the court if it has any questions for you. If not, and if you are representing the appellant, be sure to reserve some time for rebuttal. On rebuttal, be ready to respond to any questions asked of your opponent.

Another preparatory step is a moot court. It can be extremely helpful in preparing for oral argument because it gives you practice, in a comfortable environment, with thinking on your feet and talking about the case. The best time to hold a moot court is a few days before the argument, after you have reviewed all the materials and prepared your outline and questions. Recruit other attorneys from your firm to play the role of justices and ask them to read the briefs and think of questions before the moot court. Following the moot court, prepare answers to any difficult questions that arose that you had not already considered.

You will probably be nervous for your first argument. This is normal. If you have followed all the steps outlined here, the odds are that you will be prepared for almost any questions that come your way. However, there is always a possibility that the justices will send a curve ball your way. If you truly do not know the answer to a question, do not guess. Tell the court frankly that you do not know the answer and offer to file a supplemental brief to answer that question.

Finally, remember to breathe deeply and speak—not too quickly—in a loud, clear voice. Rely on your preparation and be flexible. Oral argument is, after all, a verbal exchange with people about a topic about which you and they know a great deal.

Andrea Ambrose Lobato is an appellate attorney at Horvitz & Levy LLP in Encino.
WITH THE RECENT PASSAGE OF PROPOSITION 30, California’s income tax rate will increase to the top rate in the nation. In addition, a 2012 survey on state lawsuit climates ranked California near the bottom among state liability systems, and the Tax Foundation, in its State Business Tax Climate Index for Fiscal Year 2013, ranked California 48th for worst business tax climate. Furthermore, California has not joined the ranks of states offering self-settled trusts, although this state allows a settlor to establish a trust for third-party beneficiaries and protect assets from creditors of the beneficiaries. Nonetheless, if the settlor is a beneficiary, a spendthrift provision pertaining to the settlor’s interest is invalid and will not shield a settlor’s assets from creditors. As a further limitation on California’s asset protection laws, a court can order a trustee to satisfy a judgment against a third-party beneficiary in an amount not exceeding 25 percent of the payments to which the beneficiary is entitled.

In light of these facts, California residents may look to another state for potential protection. Although state statutes for domestic asset-protection trusts (DAPTs) vary, common conditions include 1) the transfer to the trust cannot be fraudulent, 2) trust distributions to the settlor must not be mandatory, 3) the trust must be irrevocable and include a spendthrift provision, and 4) at least one trustee must reside in the jurisdiction where the trust is established. Although many state legislatures have adopted self-settled trust laws, they are not all created equal. Nevada, Alaska, South Dakota, and Delaware have emerged as the leaders for self-settled trust formation because of favorable statutory features and legislatures that are committed to updating self-settled trust laws. When choosing a DAPT jurisdiction, two important variables to consider are the statute of limitations and exception creditors.

In selecting the appropriate DAPT jurisdiction, one factor to pay attention to is the length of the statute of limitations—that is, “seasoning” period before before the trust assets are shielded from the settlor’s creditors. Most DAPT states have a three- or four-year statute of limitations period. On the other hand, until the recent arrival of Ohio’s DAPT legislation and its 18-month statute of limitations, Nevada and South Dakota provided for the shortest seasoning period—two years. Regarding future creditors, Nevada bars suit to recover the transferred assets beginning two years from the date of the transfer to the trust, while pre-existing creditors must commence an action to challenge the transfer within the later of 1) two years from the date of transfer of the assets or 2) six months after the creditor discovers or reasonably should have discovered the transfer. This potential discovery extension is effectively limited because a creditor is deemed to have discovered a transfer at the time a public record is made of the transfer, including the recording of the conveyance of real property or the filing of a financing statement.

The types of exception creditor carve-outs vary from state to state and enable certain creditors to pierce the trust even if the applicable statute of limitations period has expired. The exception creditor provisions generally take the form of carve-outs for property settlements of divorcing spouses, alimony, child support, and preexisting tort creditors. The statutes of the aforementioned leading DAPT jurisdictions (other than Delaware) do not include an exception for preexisting tort creditors.

Potential Challenges to the DAPT

Although the first DAPT statute was enacted almost 15 years ago, no fully adjudicated case law deciding the validity of a DAPT statute yet exists. There are likely tens of thousands of DAPTs, but the few reported cases tend to belong to the bad fact variety. Should a DAPT be contested, however, two of the likely grounds are Section 548(e) of the Bankruptcy Code and the “full faith and credit” clause of the U.S. Constitution.

The recent case of Battley v. Mortensen was the first to apply Bankruptcy Code Section 548(e) and its 10-year clawback provision for DAPTs. Commentators have classified the case, however, as belonging to the bad fact category. The court concluded that the transfer of property from Mortensen to an Alaska DAPT would be avoided under Section 548(e). In light of the egregious facts, the result was not surprising.

Mortensen, who was not an attorney, drafted his own asset protection trust agreement and filed for bankruptcy after the passage of Alaska’s four-year statute of limitations period. He created the trust when he was “under water,” and he assumed more than $250,000 in credit card debt during those four years. In short, Mortensen was not an appropriate candidate for a self-settled trust, and properly coun-
seled clients rarely invoke voluntary bankruptcy. As for the threat of involuntary bankruptcy, those petitions made up a minuscule percentage of all filings from 2006 to 2010. Even if a DAPT settlor lands in bankruptcy court, a creditor must still prove under Section 548(e) that the debtor had an actual intent to hinder, delay, or defraud.

Some commentators also look to full faith and credit and choice-of-law principles as potential weaknesses of DAPTs. Their argument is that a non-DAPT court may cite these public policy principles as grounds for applying its own state’s law rather than that of the DAPT’s home state and enter a judgment for the creditor. However, as one leading commentator has suggested, the “full faith and credit” clause actually “may be more of a benefit than a burden to a domestic APT.”

One reason is that to enter a judgment for the creditor, the non-DAPT court must have appropriate jurisdiction, such as in rem jurisdiction over trust assets or personal jurisdiction over a settlor. This could become an obstacle if trust assets are outside the forum state or the corporate trustee does not have sufficient minimum contacts with the non-DAPT state. Even if the non-DAPT court has jurisdiction and applies its own law, the story is not over. First, a DAPT court may not need to give full faith and credit to the judgment of a non-DAPT-forum court, since the facts of some cases may require the application of another state’s law rather than forum law. Second, should a DAPT court need to give full faith and credit to a judgment, the DAPT jurisdiction still can establish its own enforcement procedures. Further, as more states pass self-settled trust legislation, a non-DAPT court may have more difficulty using public policy arguments as a way to ignore another state’s DAPT laws.

Additionally, lost in the overreaction to Mortensen is the fact that, in creating a 10-year clawback provision for fraudulent transfers to DAPTs, Congress implicitly authorized those transfers that lack such intent.

**Do DAPTs Work?**

In light of the absence of case law addressing DAPTs, a California resident may ask whether a DAPT works. In making this determination, a settlor must consider the appropriate gauge of success. With asset protection planning, “[T]he ultimate goal...is realized if the client weathered a legal storm at least moderately better than he otherwise would have in the absence of any planning.” A DAPT’s protections should encourage an early settlement, a settlement for few cents on the dollar, or no claim at all. The lack of reported cases deciding whether a creditor can pierce a properly created DAPT may well indicate that DAPTs are working.

Nevertheless, creative minds are constantly searching for alternatives, and one alternative to the traditional DAPT is the Hybrid DAPT, in which the settlor is not included as an initial discretionary beneficiary of the trust. Instead, the settlor can be added as a beneficiary later. The Hybrid DAPT trust is established for the benefit of third parties, such as the settlor’s spouse and descendants. Because it is established as a third-party trust, the Hybrid DAPT likely removes some of the uncertainty of a traditional DAPT. If the need should arise, the settlor may access the trust assets via his or her spouse. Should the settlor not have a spouse or descendant who will share the trust assets, the trust instrument may allow for a trust protector or independent trustee to add additional beneficiaries— for example the settlor.

Once the settlor is added as a discretionary beneficiary, the trust resembles a traditional DAPT. Nonetheless, as an added layer of precaution, if a settlor senses that a creditor claim is looming or is contemplating filing for bankruptcy, the settlor may request before either of the foregoing transpires that the trust protector or independent trustee remove him or her as a discretionary beneficiary.

The Hybrid DAPT also addresses the aforementioned potential challenges to traditional DAPTs—Section 548(e) and non-DAPT courts’ not recognizing another state’s DAPT laws. With respect to Section 548(e), the Hybrid DAPT does not appear to come within the purview of the Bankruptcy Code’s 10-year clawback provision. Indeed, Section 548(e) and its clawback apply if, among other conditions, the transfer was made to a self-settled trust or similar device and the debtor is a beneficiary. Since the settlor is not an initial beneficiary of a Hybrid DAPT or, if added, may be removed before filing for bankruptcy, it would likely be harder to argue that the Hybrid DAPT should be subject to the Section 548(e) clawback. For this reason, the Hybrid DAPT may also make it more difficult for a non-DAPT jurisdiction to ignore the laws of another state, since the trust is not self-settled (assuming that the settlor is not a beneficiary at the relevant time).

The Hybrid DAPT also raises the possibility of bifurcation of the trust, for the purpose of extra protection, into two separate trusts: the Clean Hybrid DAPT and the Dirty Hybrid DAPT. This bifurcation will enable the settlor to be added as a beneficiary of the Dirty Hybrid trust while not tainting the assets of the Clean Hybrid DAPT, of which the settlor will not be named as a beneficiary.

**California Income Tax**

As a result of Proposition 30, the previous top California income tax rate of 10.3 percent has been increased to 13.3 percent for all personal income taxpayers with taxable income greater than $1 million. This increase is retroactive to January 1, 2012. In addition, rates have gone up one to three percentage points for California residents earning more than $250,000 a year. The cumulative effect of these taxes over many years will be quite substantial and represent an avoidable depletion of the taxpayer’s wealth.

Unlike California, many of the top asset protection jurisdictions do not impose a state income tax. A California settlor may therefore consider either transferring some income-earning assets into a trust that is located in one of the aforementioned jurisdictions or migrating an established California trust to one of those jurisdictions.

With proper planning, a California settlor could take advantage of one of the enhanced self-settled laws of those jurisdictions, while at the same time recognizing significant tax savings vis-à-vis accumulated nonsource ordinary income and capital gains of a nongrantor trust. As a starting point, the trust should avoid grantor trust status, since settlors generally must report income of these trusts on their personal state income tax returns. California’s criteria for taxing a non-grantor trust is set forth in Revenue and Tax Code Section 17742(a). In addition to the California resident trustee and noncontingent beneficiary bases for taxation, the state also taxes the California-sourced income of a trust.

With respect to the basis of the California source income of a trust, Revenue and Tax Code Section 17742(b) clarifies that the residence of a corporate fiduciary of a trust refers to “the place where the corporation transacts the majority portion of its administration of the trust.” In order to try to avoid resident trustee status, a settlor of a DAPT may look for a non-California trust in a DAPT jurisdiction to administer the trust. If, however, the settlor also desires a California trustee, Section 17743 provides that, when taxability is based on the trustee’s residence and there are two or more trustees (and some are California residents), the taxable income is apportioned according to the number of California trustees.

Regarding the resident beneficiary basis of taxation, the relevant inquiry will be whether one or more California beneficiaries are non-contingent. The California Code of Regulations specifies that a noncontingent beneficiary is “one whose interest is not subject to a condition precedent.” In 2006 Technical Advice Memorandum, the California Franchise Tax Board provided further guidance: “A resident beneficiary whose interest in a trust is subject to the sole and absolute discretion of the trustee holds a contingent interest in the trust. The exercise of the trustee’s discretionary power is a condition precedent that must occur
before the beneficiary obtains a vested interest in the trust. Once the trustee decides to distribute income in a specified amount, the beneficiary has a non-contingent, vested interest in the trust, but only for that amount.39

Accordingly, in order to try to avoid the California tax (until the time when income is actually distributed to a California beneficiary), effort must be made to ensure that the DAPT trustee’s discretionary power over distributions is not compromised.

**Dynasty Trusts and Directed Trusts**

In California and elsewhere, “fiscal cliff” planning saw a rush of settlors looking to create dynasty trusts to leverage the then-current transfer tax exemption amounts for hundreds of years or in perpetuity and thereby lock in benefits in the event of a future re-instatement of lower exemption amounts. The opportunity to “lock in” those benefits still remains, however, since the American Taxpayer Relief Act of 2012 did not alter transfer tax exemption amounts. California, however, has enacted the Uniform Statutory Rule Against Perpetuities, which employs a 90-year wait-and-see period.40 Unlike California, many of the leading trust jurisdictions—including Nevada, South Dakota, Delaware, and Alaska—have either abrogated or modified the rule against perpetuities to allow for dynastic trusts. Accordingly, by establishing a dynasty trust in one of these jurisdictions, the dynasty trust can potentially grow free of state income tax and federal transfer taxes, while providing asset protection for centuries or in perpetuity.

In order to try to effectuate asset protection and income tax minimization goals, a California settlor will need to appoint an out-of-state trustee (most likely a corporate trustee, in order to take advantage of dynastic trust capabilities). While a California settlor may have some reservations about relying on an out-of-state trustee, these concerns may be abated by the fact that many of the jurisdictions that the settlor will be considering have adopted directed trust statutes. The directed trust model allows the settlor to appoint an out-of-state corporate trustee, while having a trusted adviser or protector retain control over many of the traditional duties of the trustee.

Under Nevada law, for example, a settlor can appoint an investment trust adviser to “[d]irect the trustee with respect to…the investment and reinvestment of principal and income.”41 Additionally, Nevada provides that a trust protector may be given powers, including the power to remove and appoint a trustee or trust adviser, modify the terms of any power of appointment, and modify or amend the trust to achieve a more favorable tax status.42 As an added advantage, the directed trust model results in lower trustee fees, since the corporate trustee’s role, especially for investment decisions, is limited. Admittedly, it remains unsettled whether the use of a California investment adviser is a sufficient nexus with California to trigger income taxation.43

California is a community property state. So how can a DAPT work for a married settlor, especially since the community property ownership must be recognized, as a federal constitutional matter, by the other states? The simple answer is that community property rights need to be transmuted into separate property before or contemporaneously with the DAPT planning.44

California residents face the highest top income tax rate in the nation and a state liability system that may leave them vulnerable to frivolous lawsuits, but they may address these concerns by establishing a DAPT in another state. With sufficient planning, Californians may even be able to establish trusts to last for generations (if not forever) potentially free from state income taxes and federal transfer taxes.

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1 See, e.g., Claudia Buck, Prop. 30 to Deliver Hefty Tax Hike to State’s High Earners Next Year, SACRAMENTO BEE (Nov. 19, 2012), available at http://www.sacbee.com/2012/11/19/4996004/prop-30 (Continued on page 20).
To Find Employment as a Lawyer, You Must Market Yourself

I AM APPROACHED WEEKLY by law students and young lawyers seeking advice about finding legal employment in the entertainment industry or growing a practice. When I started out, career guidance was hard to obtain, which is why I take the time to advise those who contact me. Moreover, it enhances goodwill and may lead to referral business for my firm. My most important recommendation, one that applies to virtually any endeavor, is that you are misguided to think the world will beat a path to your doorstep because you are an intelligent person, a hard worker, or did well in school. You must market yourself.

Studies have shown that it takes up to four interactions between two people for recognition to set in and a rapport to be established, which is why it is not just important but necessary for new lawyers to join bar associations and relevant sections and sit on their executive committees. By bar associations, I include county, city, and specialty ones. The Consumer Attorneys Association of Los Angeles, for example, is the best plaintiff’s bar association in the country and has an invaluable listserve. Any association in your field of interest or location is worthwhile. Shaking hands and giving someone a business card, however, will not get you noticed. Being on an executive committee, on the other hand, guarantees that you will regularly rub shoulders with movers, shakers, and go-getters. Constant interaction will provide multiple opportunities to create and maintain social and business relationships with others who have similar interests as you. Therefore, get on a committee and get on its leadership track.

Which Associations?

As your first task, investigate which bar associations will provide the most meaningful value. Joining a county bar association is mandatory, as it will provide an immediate education about who has influence and what are the issues of the day that concern the profession. Family law, for example, is a tightly knit practice area. A practitioner in that arena must be a member of family law sections as a way of keeping up with advancements in the law, networking, and marketing.

Read legal newspapers to keep up on the latest verdicts and opinions so you can see which plaintiff or defense lawyer is clobbering the other and for the profiles and news about attorneys and judges. Being informed about who is who is part of the job of being a lawyer, as is knowledge of the business of law. This knowledge gives you credibility when you discuss current goings-on with others. Doing research enables you to target those you want to know, possibly meet, or at least know about. This kind of research gives you overall awareness of the legal landscape.

Your fellow lawyers (including adversaries and those you view as competitors) are your comrades and colleagues when you work toward common goals that better justice, the profession, and the community. You can assist by putting on programs and interacting with the top lawyers whom you would not ordinarily encounter and get-ciated with their bar associations. Many of those who were on barrister committees when I started practicing law are now superior court and federal judges or extremely successful attorneys and bar leaders.

Referrals

What they do not teach in law school is that referral fees can be extremely lucrative, even into seven figures! An attorney must have extensive knowledge and experience in his or her relevant field of practice and know to whom to refer matters outside of personal areas of expertise. If a good case comes your way, send it to a top attorney and take a referral fee—or, alternately, act as cocounsel with the attorney and further your experience and education. By having relationships with other attorneys, referrals can come to you. A lawyer in your field may have a conflict, be unwilling to work on a contingency basis, or the case may be too small for the counsel making the referral. Be the go-to attorney when that happens by having established a meaningful relationship with your referring friend or business acquaintance.

Distinguish yourself by demonstrating expertise in a specific area that will lead to a better reputation and possibly employment. Develop a niche expertise. Give talks and moderate panels on a current hot legal topic. Nurture and accept opportunities to speak on issues in your area of practice to students, social organizations, and groups that share an interest in those issues. Write articles for law reviews, legal newspapers, and for the public at large. Consider writing an online blog that is relevant to your area of interest or an article that can be on your or another lawyer’s Web page.

Obtain the guidance of a mentor or mentors with expertise in your

Neville L. Johnson is a founding partner at Johnson & Johnson LLP in Beverly Hills. Ashley Hunt, a student at Loyola Law School, and Melanie-Anne Therese Padernal contributed to this article.
area of interest. You will find them by tapping into your alumni pool, family friends, employers past and present, and by forming relationships via the bar associations, or even by cold-calling someone for advice. Many experienced attorneys will help when they are approached in a respectful and professional manner. A relationship built with an adviser may lead to permanent employment or an opportunity to cocounsel on a matter. Also, there is nothing wrong with contacting a potential employer more than once after a reasonable interval of time has passed.

Networking within your field is mandatory. Attend events at which you mingle with those engaged in the business in which your services are of value. For example, female entertainment attorneys in the audio-visual arena should join Women in Film and Independent Film, two organizations that promote education and networking. Join organizations and attend events in and outside of your respective field of interest and the law community. Once you are a member of organizations that are not oriented to lawyers, be active, as the benefits are similar to being on the executive committee of a bar group. Let people get to know you in a nonthreatening, social environment. Everyone you meet is a potential client. At a church, a synagogue, a service organization such as Rotary International, an amateur athletic association, an alumni association or a philanthropic organization, develop relationships with those who can refer business to you or may have an issue or matter for you to resolve. A good job done for a service group shows off good character traits and infers competency and skill as a lawyer.

A relatively new phenomenon is the rise of social networking groups that host weekly or monthly meetings to generate business for their members through regular, structured interaction. For some lawyers, especially those starting their careers, they are excellent sources for business, especially in family law, personal injury, and estate planning. Wherever you are, and at any social gathering, you are on duty. You are always a lawyer, and you must conduct yourself with appropriate grace and dignity. Your next client may be the person with whom you nonchalantly converse at a casual social event or who sits next to you on an airplane. Always have your business cards on you so it is easier for potential clients or business contacts to reach you. Be careful what you say to those who are not intimate friends or family, as you never know how many degrees of separation lie between the object of your reference and the person to whom you are speaking. Even when tempted to do so, do not cause offense or be rude, because doing so may result in a missed opportunity for business.

Jobs are hard to find, so you may have to accept one in a field of practice that is not your ideal. If so, give it your all, learn all you can, and when appropriate move to a more desirable employer. Pro bono work can eventually lead to paying work.

Some of you will work at firms where you are not expected, needed, or desired to bring in business, but you may have an expectation of going out on your own or joining another firm. The suggestions above apply to you who so aspire. As you grow as an attorney, never stop networking, learning, and subtly marketing yourself. You are developing a reputation that you must always be building and burnishing. When you do a good job, others notice—including opposing counsel. When they have a client, friend, or family member who needs services of the type you render, be at the top of their list.

With the exception of those who attend the nation’s elite schools or graduate at the very top of their classes, everyone starts from scratch. Put in the effort, be disciplined and patient, and you will achieve your goals. As you grow in practice, pay it forward. Help those who seek your advice and wisdom as they make their way in our profession.
ATTORNEYS REPRESENTING condominium buyers who are purchasing units in large, yet-to-be-built urban developments in Los Angeles County should familiarize themselves with a little-known federal statute called the Interstate Land Sales Full Disclosure Act (ILSA),¹ which may prove invaluable if the condominium to be purchased turns out to be something other than what was promised.

Enacted in 1968, ILSA is a federal consumer protection law designed to prevent false and deceptive practices in the sale of unimproved tracts of land by requiring developers to disclose information needed by potential buyers.² ILSA accomplishes its goal by imposing rescission rights for up to two years from the date of contract signing for the benefit of buyers if the developer or its agent fails to make certain disclosures.³

ILSA’s reach is not limited to the named developer, which is often little more than an empty shell corporation set up by the real parties developing the property. Other entities and individuals can be liable if they are deemed “indirect sellers” and therefore developers under ILSA.⁴

Although ILSA has been on the books for more than four decades, no California appellate court has issued an opinion on an ILSA claim to date. This is true, in part, because California has its own regulatory scheme governing the marketing and sale of units in developments involving five or more lots or parcels under California’s Subdivided Lands Act (SLA).⁵ The SLA requires that developers provide buyers with a true statement of the terms and conditions for the sale of real property. However, when ILSA and the SLA both apply to a California development, a developer’s failure to make certain federally mandated disclosures may result in the imposition of a two-year rescission right for buyers.⁶

ILSA is based on the full disclosure provisions and philosophy of the Securities Act of 1933, which it resembles in many respects.⁷ The statute also provides for a private right of action that allows consumers to bring lawsuits against developers and their affiliates for ILSA violations.⁸ Courts interpreting ILSA’s language are to read the language broadly to effectuate the statute’s remedial goals.⁹

Don Chomiak is the principal of Talisman Law, P.C., in Santa Monica. He is a commercial litigator and currently represents condominium purchasers in cases involving the Interstate Land Sales Full Disclosure Act and California’s Subdivided Lands Act in Northern and Southern California.
In defending lawsuits brought under ILSA, developers almost always cry “buyer’s remorse,” contending that buyers should be saddled with the consequences of their own actions in choosing to buy real estate at what turned out to be the top of the market. Buyers, on the other hand, claim that the developers were negligent or worse—that they purposefully withheld material information that buyers were entitled to know before agreeing to purchase this real estate to shift the burden of a down market onto buyers. Although it is true that a number of ILSA cases have been brought on grounds that can readily be reduced to buyer’s remorse, plaintiff buyers are prevailing in ILSA cases in jurisdictions around the country because the relevant developers failed to make certain disclosures that are mandated under ILSA.

ILSA and the regulations implementing it require all developers offering nonexempt lots for sale in interstate commerce using a common promotional scheme to submit an extensive statement of record to the Consumer Financial Protection Bureau (CFPB), which is the federal agency that is charged with enforcing ILSA.10 (On July 21, 2011, the CFPB took over enforcement of ILSA from the U.S. Department of Housing and Urban Development (HUD).)11 Developers must also provide prospective purchasers with an ILSA property report prior to the purchaser’s signing of any agreement to purchase.12

As was held in *Burns v. Duplin Land Development, Inc.*:

The statement of record describes the subdivision and must make various disclosures, including persons having an interest in subdivision lots, a legal description of the subdivision, condition of title, range of selling prices of lots, condition of access to the subdivision, unusual noise or safety conditions, availability of sewage disposal and other public utilities, the nature of any improvements to be installed by the developer, consequences of any encumbrances, deed to the subdivision, any liens, and any easements. The property report provided to purchasers must include the information contained in the statement of record, with some exclusions, and any other information that [the CFPB] may require.13

Certain real estate developments are exempt from the registration and disclosure requirements of ILSA. Exempted projects include those in which the proposed project includes less than 25 lots, in which the land being sold is already improved at the time of sale, or for which the developer obligates itself in its form purchase contracts with buyers to complete construction in less than two years.14 Whether or not the land is already improved for purposes of being exempt from ILSA depends on the nature of the improvements and what the developer intends to do with them.

Congress passed ILSA to address the now clichéd plight of retirees who thought they were buying resort properties in Florida and elsewhere only to learn, long after their money was gone, that they had purchased worthless swampland or desert instead.15 The mandated disclosures made in an ILSA property report are intended to prevent these deceptions, much in the way that a prospectus is provided to would-be purchasers of stock in a company to ensure that the investors make an informed decision. ILSA also provides very strong antifraud protections to purchasers of real estate governed by this statutory scheme. ILSA makes it unlawful for a developer to employ a device, scheme, or artifice to defraud a buyer; to obtain money from a buyer by means of omissions of material facts necessary in order to make the statements made not misleading; or to engage in a practice and course of business that operates as a fraud or deceit upon a buyer.16 A provision in a developer’s form purchase contract requiring the buyer to waive the protections of ILSA is rendered void under the statute.17

**Recission Rights**

A developer violates ILSA by failing to include certain information in the form purchase contract that the developer intends to use in selling units in the development, by failing to disclose in its ILSA property report information that is required to be disclosed under this statutory scheme, or if the developer makes affirmative misrepresentations of material fact to, or conceals material facts from, buyers. In certain instances, these failures result in the imposition of a two-year rescission right for the buyer that is imposed from the date of contract.

For example, ILSA requires that the purchase contract provide the buyer with written notice of a 20-day opportunity to remedy default or breach. Where a developer fails to include this 20-day right to cure for the benefit of buyer in the purchase contract, ILSA imposes a two-year right to rescind the agreement from date of signing.18

From a business perspective, a developer’s decision not to give defaulting buyers a 20-day right to cure (and to conceal the resulting two-year rescission right) makes sense in a hot real estate market. If the buyer fails to close escrow and no 20-day right to cure is included in the purchase contract, the developer can immediately cancel the contract, give the next hungry investor in line the opportunity to take advantage of a great real estate investment (potentially for a higher purchase price), and start the process to collect from the escrow company the liquidated damages flowing from the last buyer’s default (if the purchase contract provides for liquidated damages). If a developer decides to omit this 20-day right to cure from a purchase contract and conceals the resulting right to rescind, the risk for the developer is that the real estate market will crash less than two years after the buyer signs the contract and the buyer discovers and exercises this two-year right to rescind in a declining market, leaving the developer with an unsold unit, the value of which has tanked.

If a developer fails to provide a buyer with an ILSA property report concerning the project before the buyer signs a purchase contract, ILSA imposes a two-year right to rescind from date of contract for the benefit of the buyer that the developer must disclose in the purchase contract.19

If a developer fails to make these mandated disclosures, ILSA essentially provides two avenues for rescission.20 First, if the buyer chooses to act within the two-year statutory period, “the buyer may automatically rescind and the courts will enforce that right.”21 This right is referred to in the relevant case law as an automatic rescission right. “[A]n automatic rescission claim must comply with both §1703(d)(7)’s two-year limit for exercising the right of rescission and §1711(b)’s three-year limit for filing suit based on the seller’s refusal to honor said rescission.”22 In other words, to be entitled to automatic rescission, the buyer must first attempt to exercise the rescission right within two years of the contract date and then bring a lawsuit within three years of the contract date if the rescission demand is refused.

In the second avenue, provided for under 15 USC Section 1709(b), the “plaintiff must show a basis for equitable relief—i.e., that §1703(b), (c), or (d) was violated and that the equities demand rescission of the purchase agreement. These two avenues are exclusive of one another, with only the second one continuing to be available where the first avenue is time-barred after two years.”23

**Equitable Relief**

The Sixth Circuit recently held that ILSA “§§1709(a) and (b) both authorize the award of equitable relief for violations of ILSA.”24 Sections “1709(a) and (b) can be read in harmony with §§1703(d)(2)] by construing §§1703(d)(2) as creating an automatic statutory right of rescission, which must be exercised within two years from the date of signing the purchase agreement, and construing §§1709(a) and (b) as creating a right of equitable rescission, available within three years of the date of the signing of the contract,
but only if the buyer can prove entitlement to equitable relief.\textsuperscript{25} “[T]o establish entitlement to equitable rescission, a buyer must show that the seller did not include the required notice of rescission rights and that he would have timely revoked his purchase contract had he been notified of the two-year window within which he could rescind it.”\textsuperscript{26} In pursuing equitable rescission based on a failure of the developer to disclose this two-year rescission right, the buyer “need not show that he would not have entered the contract had he been properly notified of his rights.”\textsuperscript{27}

In \textit{Nabigian v. Juno-Loudoun, LLC},\textsuperscript{28} the Fourth Circuit recently affirmed the district court’s ruling on the plaintiff buyers’ motion for summary judgment that rescission of contract and returning the property to the developer in exchange for the purchase monies plus interest was the proper remedy. The buyers had purchased a lot in a luxury golf course community that was subject to ILSA, and the developer had failed to provide buyers with an ILSA property report, thus resulting in the imposition of a two-year right to rescind from date of contract. The buyers failed to request rescission within the two-year period but brought their lawsuit within three years of contract signing and successfully demonstrated that they would have rescinded their contract within two years had they been made aware of this rescission right and the fact that the Ritz-Carlton Hotel Company, LLC, did not have a 30-year commitment to the development as had been represented to them by the developer’s agent.\textsuperscript{29} The Fourth Circuit held that “[t]he lack of notice of the right to rescission helps establish that equitable rescission is in fact proper in this case. It’s clear that [the plaintiffs] would have exercised their right to rescission within two years of contracting had they known of the right.”\textsuperscript{30}

Rescission is not the only remedy available under ILSA. In order to recover damages under Section 1709(b), buyers “must prove that they were in some way harmed by a violation of §1703(b), (c), or (d) and are therefore entitled to a damage remedy. ’The remedies available to purchasers in such a suit include damages, taking into account the amount the purchasers actually paid, and may also include interest, court costs, reasonable attorneys’ fees and the like.’ In order to recover damages under §1709(a) or (b) where the developer did not give notice of the rescission right, the buyer must prove (1) that the developer did not give notice of the buyer’s right of rescission; (2) that the buyer did not learn about the rescission right until after the two-year period had expired; (3) that the buyer would have exercised the rescission option during the two-year period, if the developer had informed them of the right; and (4) that the buyer has incurred damages as a result.”\textsuperscript{31}

Another way to violate ILSA is by making misrepresentations of material fact in an ILSA property report or by omitting “material facts” from the report. The materiality standard under ILSA is borrowed from federal securities jurisprudence. Under ILSA, a “fact stated or omitted is material if there is a substantial likelihood that a reasonable purchaser or seller of a security (1) would consider the fact important in deciding whether to buy or sell the security or (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the fact.”\textsuperscript{32} In other words, if the objective reasonable buyer would consider the information withheld or misrepresented to be important to the decision about whether to purchase the property, then that information is a material fact under ILSA.

California’s Regulatory Regime

On their face, the disclosure requirements of ILSA are fairly straightforward and a developer can readily avoid being sued by buyers for ILSA violations by making the required disclosures. However, in a number of states, including California, these disclosure requirements are complicated by the existence of a separate, state-level regulatory regime that includes its own registration and disclosure requirements.

In California, developers of residential real estate projects consisting of five or more parcels must comply with the SLA.\textsuperscript{33} The purpose of the SLA is to protect members of the public who purchase lots or houses from developers.\textsuperscript{34} The SLA requires developers to apply for and obtain a Final Subdivision Public Report for the project that includes a true statement of the terms and conditions for the sale of real property governed by the SLA.\textsuperscript{35} The SLA is enforced by the California Department of Real Estate (DRE).
may be under the jurisdiction of HUD’s Office of Consumer and Regulatory Affairs (HUD /OCRA) and states that the developers must contact HUD/OCRA directly to determine if the project is subject to HUD/OCRA laws and regulations. Developers face exposure to civil and administrative actions when, purposefully or not, they fail to include certain language in their purchase contracts and DRE public reports required under ILSA, or where they otherwise violate ILSA.

Attorneys representing condominium buyers purchasing units in urban developments subject to ILSA can better serve their clients by familiarizing themselves with the obligations imposed on developers by ILSA. For these same reasons, developers are best served by erring on the side of caution and including in their form purchase contracts and DRE public reports the language required under ILSA whenever ILSA applies. The alternative is to face litigation as buyers seek redress for perceived wrongs armed with a very consumer-friendly statute. This is especially true when ILSA applies a one-way attorney’s fee provision and other cost-recovery provisions that favor consumers. These provisions may make consumers bolder if the relevant purchase contract does not include a prevailing party attorney’s fees provision.

2 See Kenneally v. Bank of Nova Scotia, 711 F. Supp. 2d 1174, 1184 (S.D. Cal. 2010). Although nothing in the statute limits the application of ILSA to residential real estate, the relevant case law is focused almost exclusively on residential real estate transactions.
4 For example, in Hammar v. Cost Control Marketing and Sales Management of Virginia, Inc., 757 F. Supp. 698 (W.D. Va. 1990), defendant CCM was the parent company of defendant CCM-VA and did not engage in any direct sales activities. CCM-VA was the actual developer of the project and handled marketing and sales. The court nevertheless found CCM to be an indirect seller and a “developer” under ILSA because it had some involvement in the sales effort. The court identified two documents that it deemed sufficient to hold that CCM was an indirect seller. The two documents were a memorandum on CCM stationery that addressed the appointment of a new vice president in charge of sales in Virginia, the state in which the relevant project was located, and another document on CCM stationery that detailed several new sales procedures for each sales site to follow. The documents were sent to CCM-VA’s offices in Virginia. Id., at 704-705.
5 BUS. & PROF CODE §11000 et seq.
6 Although there is no California case law interpreting this statutory scheme, California developers have reason for concern because Congress included a strict liability revocation provision in ILSA to 1) ensure that project registration and disclosure of material information in fact occurs, 2) limit the costly oversight of federal agencies into an activity traditionally regulated by state and local governments, and 3) allow unso- phisticated purchasers to enforce their rights. Bodansky v. Fifth on Park Condo, LLC, 635 F. 3d 75, 86 (2nd Cir. 2011). Where a plaintiff buyer can show the mandatory disclosures were not made, a two-year rescission right is imposed and the balancing of equi-
Evaluating DAPTs for California Residents
(Continued from page 11)

3 PROB. CODE §§15300-15301.
4 PROB. CODE §15304.
5 PROB. CODE §15306.5(a)-(b).

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AN ATTORNEY IN A RUSH to the courthouse rolls past a stop sign and hears the sound of a police siren, only to realize on being pulled over that his or her identification is at home in yesterday’s coat pocket. The police officer arrests the attorney and while searching for weapons finds the attorney’s iPhone, which has a complete record of the attorney’s personal and professional communications. The phone also links to the server of the attorney’s firm, where a wealth of confidential or sensitive information may be accessed.1 Although the attorney is not suspected of any crime other than the traffic offenses, the officer is permitted under current California law to search the phone.2

For attorneys and our business clients, the information that is contained in or available through cell phones is expansive, critical, and potentially compromising. Understanding the law concerning the government’s ability to access this information is imperative. In particular, how the history of the “search incident to arrest” exception applies to cell phones merits examination.

Courts throughout the country disagree on how cell phone searches should be analyzed.3 Despite the differing results, these opinions are all based on fundamental Fourth Amendment principles and landmark cases concerning the search-incident-to-arrest exception to the warrant requirement.

The Fourth Amendment protects individuals from unreasonable search and seizure.4 A warrantless search is “per se unreasonable” subject only to certain “jealously and carefully drawn” exceptions.5 One such exception is a search incident to arrest.6 Under the exception, police may search the body.
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and reaching space of an arrestee, including any containers found on the arrestee’s person. Although the notion of search incident to arrest has been around for nearly a century, its modern incarnation is commonly recognized as being set forth in Chimel v. California. In Chimel, officers searched an arrestee’s home. In finding the search impermissible, the U.S. Supreme Court clearly laid out the two-part rationale underlying this that officers can search containers incident to arrest. Notably, Robinson also shifted focus away from Chimel’s two-pronged rationale for the search-incident-to-arrest exception. The Robinson Court explained that an officer’s ability to search incident to arrest was not dependent on a belief that the arrestee possessed weapons or destructible evidence, noting, “Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed.” The dissent gave an impassioned argument against this change, noting that the “majority’s approach represents a clear and marked departure from our long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment.”

Chimel was originally regarded as requiring the search to occur contemporaneously at the time of arrest. However, five years later, in United States v. Edwards, the Supreme Court allowed for a delayed search (10 hours after arrest) of the arrestee’s clothing for evidence. In doing so, the Court broadly stated that it is “plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention.” Thus, Edwards held that once a suspect is in custody, the items in the suspect’s possession during the arrest may be seized and searched even though a substantial period of time has elapsed.

In addition to timing, objects containing other objects, otherwise known as “containers,” present another significant issue in search-incident-to-arrest jurisprudence. In United States v. Robinson, an officer arrested the defendant for operating a vehicle without a license. The officer then searched the defendant’s person, finding a crumpled cigarette package in his pocket that contained heroin. The Robinson Court held that the officer’s search of the cigarette package did not “offend the limits imposed by the Fourth Amendment.” Although not expressly discussing the search of containers, this opinion has been routinely cited for the proposition applied Chimel in the automobile context, allowing officers to search the “grab area” of an arrestee in a vehicle. Belton was read expansively, and for nearly 30 years, officers were allowed to search a vehicle’s passenger compartment, and any containers found in it, even after the vehicle’s occupants were already in police custody. However, this practice was recently changed in Arizona v. Gant, in which the Supreme Court returned to the rationale set forth in Chimel. In Gant, the Supreme Court broke away from the bright-line rules of Belton and Robinson, expressing concern about the power of police to rummage through an individual’s property. The Supreme Court articulated that an interpretation of Belton that gave the police the right to automatically search a vehicle incident to arrest is “anathema to the Fourth Amendment” and would “untether the rule from the justifications underlying the Chimel exception.”

The Court noted, “If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.” Furthermore, the Court recognized the significance of the change but indicated that “[n]one of the dissenters in Chimel or the cases that preceded it argued that law enforcement reliance interests outweighed the interest in protecting individual constitutional rights so as to warrant fidelity to an unjustifiable rule.”

Last year in People v. Diaz, the California Supreme Court addressed whether officers could conduct a delayed search of the contents of an arrestee’s cell phone under the search-incident-to-arrest exception.

Last year in People v. Diaz, the California Supreme Court addressed whether officers could conduct a delayed search of the contents of an arrestee’s cell phone under the search-incident-to-arrest exception.
1. The Fourth Amendment ensures that individuals receive:
   A. Protection over free speech.
   B. Due process of law.
   C. Protection from unreasonable search or seizure.
   D. A jury trial.

2. Under the “search incident to arrest” exception, police may not contemporaneously search any containers found on the arrestee’s person.
   True.
   False.

3. The purpose of the “search incident to arrest” exception to the warrant requirement is to allow officers to track and gather information on citizens.
   True.
   False.

4. Under the “search incident to arrest” exception, officers may contemporaneously search within the area within the arrestee’s immediate control.
   True.
   False.

5. The U.S. Supreme Court has held that because a cell phone was immediately associated with defendant’s person, officers are entitled to inspect its contents without a warrant.
   True.
   False.

6. One exception to the warrant requirement is a search that is incident to an arrest.
   True.
   False.

7. In United States v. Chadwick, the U.S. Supreme Court upheld the validity of the search of a footlocker in the trunk the arrestee’s car by police officers.
   True.
   False.

8. In California, police are not permitted to search an arrestee’s cellphone incident to an arrest without a search warrant.
   True.
   False.

9. The U.S. Supreme Court did the following with the California Supreme Court’s decision in People v. Diaz.
   A. Affirmed.
   B. Reversed.
   C. Granted certiorari.
   D. Denied certiorari.

10. In People v. Diaz, the California Supreme Court found that cell phones carry with them a heightened privacy interest because of the nature and wealth of information stored within them.
    True
    False.

11. California is the only state to address the issue of whether a warrant is required to search the contents of a cell phone.
    True.
    False.

12. California Supreme Court Justice Kathryn Werdegar wrote that permitting police to search cell phones incident to an arrest allows “police carte blanche, with no showing of exigency, to rummage at leisure through the wealth of personal and business information that can be carried on a mobile phone or handheld computer merely because the device was taken from an arrestee’s person.”
    True.
    False.

13. In a letter to the California State Senate, Governor Brown wrote that the legislature is better suited to resolve the complex and case-specific issues related to constitutional search-and-seizure protections.
    True.
    False.

14. Under New York v. Belton, “[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”
    True.
    False.

15. United States v. Edwards involved a search of defendant’s:
    A. Package of cigarettes.
    B. Luggage.
    C. Cell phone.
    D. Clothing.

16. In 2009, which state supreme court required a package of cigarettes.
    True.
    False.

17. The “search incident to an arrest” exception is recognized as being set forth in Arizona v. Gant.
    True.
    False.

18. In deciding whether a warrant is required to search a phone incident to an arrest, the U.S. Supreme Court could consider:
    A. Whether a phone is a container.
    B. The information stored on a phone.
    C. The risk that evidence of a crime within a phone can be destroyed.
    D. All of the above.

19. In United States v. Finley, the Fifth Circuit decided that cell phones were akin to a container found on an arrestee’s person.
    True.
    False.

20. In New York v. Belton, the defendant was stopped for speeding and the officer observed an envelope marked “Super Fly.”
    True.
    False.
and took him to the police station. Thirty-nine minutes later, officers searched the defendant’s cell phone without a warrant, revealing incriminating messages implicating Diaz in the sale of narcotics.38

In a 5-2 decision, with Justices Kathryn Werdiger and Carlos Moreno dissenting, the Diaz court found that the cell phone was like the clothing taken from the defendant in Edwards and the cigarette package taken from the defendant’s coat pocket in Robinson, but it was unlike the footlocker in Chadwick, “which was separate from the defendants’ persons and was merely within the ‘area of their immediate control.’”40 The court concluded that because the cell phone was immediately associated with defendant’s person, the officer was “entitled to inspect” its contents without a warrant at the police station 90 minutes after arrest, whether or not an exigency existed.41

Thus, the Diaz court considered only whether the delayed search of the cell phone was permissible, without fully considering whether the rationale in Chimel and Gant should apply to cell phones. The majority relied on the bright-line rules set forth in Robinson and Edwards despite the U.S. Supreme Court’s decision in Gant, which scorned the use of a bright-line rule. In fact, the majority opinion is devoid of any discussion of Gant. Instead, the majority asserted that the cell phone search incident to arrest was “reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved.”42 The court also declined to find, as the defendant argued, that cell phones should be treated as having a heightened privacy interest because of the sensitive nature and wealth of information stored on the devices.43

The Diaz court also assumed that everything “stored inside” the cell phone was “on the person” of the arrestee.44 In doing so, the court did not discuss whether items accessible in the cell phone (such as information stored in the “cloud,”45 or remote servers) are actually “on the person.”46 In these instances, the cell phone does not act like a container to “store” that information but rather like a key able to unlock information stored far away from the person being arrested.

The dissent criticized the majority’s holding, noting that it “apparently allow[s] police carte blanche, with no showing of exigency, to rummage at leisure through the wealth of personal and business information that can be carried on a mobile phone or handheld computer merely because the device was taken from an arrestee’s person. The majority thus sanctions a highly intrusive and unjustified type of search, one meeting neither the warrant requirement nor the reasonableness requirement of the Fourth Amendment to the United States Constitution.”47

Californians and their elected officials seemed to agree with the concerns raised by the Diaz dissent. In the aftermath of Diaz, the legislature unanimously voted to require police to obtain a search warrant in order to search an arrestee’s cell phone. The rationale listed for the bill note the prevalence of cell phones today, the propensity to use cell phones to store vast amounts of private data, and that cell phones, once confiscated, no longer pose a threat to officer safety.48 However, Governor Edmund G. Brown vetoed the bill on October 9, 2011, writing, “The courts are better suited to resolve the complex and case-specific issues relating to constitutional search-and-seizure protections.”49

Waiting for the U.S. Supreme Court

The U.S. Supreme Court denied review of Diaz50 and other cell phone search cases that were contrary to Diaz in their outcome or reasoning.51 However, as the defendant in Diaz noted, that the Supreme Court “will rule ultimately and conclusively on this issue is a foregone assumption. The escalated conflict among the various courts appears to have reached a crescendo, impelling this Court to wait no longer.”52

When the U.S. Supreme Court addresses this issue, its disposition may hinge on the primary considerations that have arisen in cases involving cell phone searches, including the underlying purpose of the search-incident-to-arrest exception to the warrant requirement—the need to maintain officer safety and preserve evidence, the determination of whether a cell phone is a container, and the expectations of privacy individuals have in their cell phones. The Court’s decision will also likely depend on each justice’s comprehension of the technology at issue.

As noted above, in Gant, the Supreme Court ostensibly returned to the original justifications underlying a search incident to arrest, holding that a search that did not meet that rationale was unreasonable.53 Since Gant is based on the twin rationales of officer safety and evidence preservation set forth in Chimel, the Court could easily find that reasoning should apply to all searches conducted pursuant to an arrest. Further, in Gant, the Court focused on an individual’s privacy interests, noting that “[a] rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals.”54

Indeed, the Court may find that the same concern is implicated when an officer is able to search an individual’s cell phone and rummage through the contents stored within. It is reasonable to infer that the Supreme Court may echo this concern. This notion had also been proposed by Justice Antonin Scalia, five years before Gant.55 If the Court were to extend Gant to all searches incident to an arrest, then officers would be prohibited from searching items upon arrest, unless the arrestee is unsecured and within reaching distance of the seized item, or the officer believed the item contained evidence of a crime.56 This would likely prohibit most warrantless searches of cell phones that have been secured by officers. To be certain, applying Gant in this manner would represent a significant shift away from how the search-incident-to-arrest exception has been implemented over the last quarter of a century.

Instead of, or in addition to, recognizing the full potential of Gant, the Court could also focus on whether a cell phone should be considered “on the person,” or “an item within the immediate control of the person,” similar to the California Supreme Court’s Diaz analysis. As noted above, this finding would result in the cell phone being treated either like the cigarette package in Robinson (allowing for a contemporaneous search), or the footlocker in Chadwick (not allowing for an asynchronous search). Unlike the California Supreme Court in Diaz, the Supreme Court may consider the modern cell phone’s capability of accessing a significant amount of information that is not “on the person” of the arrestee.

The Court could also decide to focus on whether a cell phone is truly a container.57 Courts across the country have wrestled with the question of whether a cell phone is a container, and this issue dominates a significant amount of cell phone jurisprudence.58 Although several courts have focused on whether a cell phone is a container, the impact of categorizing a cell phone as a container is unclear. The phone, container or not, would still be an item governed by the search-incident-to-arrest exception.

The unique and ubiquitous nature of cell phones postulates whether a new rule needs to be created. The California Supreme Court in Diaz opposed the creation of a rule that considered the nature of the object being searched rather than its location (such as in a home or vehicle).59 However, Justice Anthony Kennedy has previously noted that “cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy.”60 Thus, it is possible that the Court could create a search rule that applies only to cell phones.
Regardless of what route the Court chooses to take in addressing this issue, important considerations for its resolution will depend on how in-depth the individual justices are able to delve into and understand the technological issues involved. The extent to which individual privacy may be exposed to warrantless searches may not be entirely apparent without a full understanding of the underlying technology and its capabilities.

City of Ontario v. Quon

The Supreme Court recently decided two cases concerning new technology. In 2010, the Supreme Court decided City of Ontario v. Quon,61 which addressed whether a police officer had a reasonable expectation of privacy in messages sent by a text-pager, which had been issued by the police department.62 The Court ultimately determined that Quon had a reasonable expectation of privacy in his messages; however, the Court concluded that the search did not violate the Fourth Amendment because it was reasonable under the circumstances.63 The Court’s grasp of the technology involved, however, appeared dubious.64 For example, during the oral argument Chief Justice John Roberts inquired of the text sender and recipient, and even asked whether messages received on a pager could be printed and distributed.65 However, two years after Quon, Justice Sonia Sotomayor’s concurring opinion in United States v. Jones,66 a case discussing GPS tracking, as well as Justice Samuel Alito’s separate concurring opinion,67 may calm some concerns over whether the justices understand that individual privacy is implicated with forms of new technology.

Ultimately, a large responsibility looms over the U.S. Supreme Court to resolve the uncertainty regarding cell phone searches. Resolution is needed not only to provide lower courts with a blueprint of how to analyze cell phone searches—regardless of whether the analysis fits neatly within existing jurisprudence or the Court conjures a new exception specifically for cell phones—but also to provide officers with guidance regarding the scope of their searches. The Court’s decision will also let everyday cell phone users know just how much of their lives they should decide to record on their cell phones, given the risk of having that information searched by police officers.

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1 As Justice Werdegar noted, the California rule subjects “anyone who is the subject of a custodial arrest, even for a traffic violation, to a preapproved foray into a virtual warehouse of their most intimate communications and photographs without probable cause.” People v. Diaz, 51 Cal. 4th 84, 112 (2011) (Werdegar, J. dissenting) (citing Matthew E. Orso, Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence, 50 SANTA CLARA L. REV. 183, 211 (2010)).
2 See EVID. CODE §594; Hickman v. Taylor, 329 U.S. 495 (1947); see also PENAL CODE §1524.
4 U.S. Const. amend. IV.
9 See Chimel, 395 U.S. 752.
10 Id. at 763.
11 Id.
12 Edwards, 415 U.S. 800.
13 Id. at 803-06.
14 Id. at 223.
15 Id. at 224.
17 Robinson, 414 U.S. at 235.
18 Id.
19 Id.
21 Id. at 239.
23 Id. at 4.
24 Id. See also id. at 11.
25 Id. at 5.
26 Id. at 15.
27 Id.
28 Id. at 16, n.10.
29 Id. at 15.
30 See United States v. Curtis, 635 F. 3d 704 (5th Cir. 2011); United States v. Smith, 549 F. 3d 355 (5th Cir. 2008); United States v. Passaro, 624 F. 2d 938 (9th Cir. 1980); United States v. Fontecha, 576 F. 2d 601, 603 (5th Cir. 1978).
35 Gant, 556 U.S. at 345.
39 See United States v. Finley, 477 F. 3d 250 (5th Cir. 2007); State v. Smith, 124 Ohio St. 3d 163, 167-69 (2009) (citing Belton, 453 U.S. at 460).
42 Id. at 2630.
43 Id. at 2624.
44 Id. at 2628-29.
45 Id. at 2629. ("The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.")
47 Id. at 48:57, 51:07.
49 Id. at 958 (Alito, J., concurring).
THE SELF-STORAGE FACILITY ACT (SSFA) regulates aspects of “the relationship between owners and renters of storage units at self-service storage facilities.”1 Enacted in 1981, the SSFA provides self-storage facility owners an “effective remedy against defaulting customers.”2 One significant remedy provides self-storage facilities the ability to vacate nonpaying tenants by holding storage auctions or lien sales.3 To prevent the winning bidder from gaining access to the storage unit after a storage auction, a tenant must move quickly to obtain a temporary restraining order (TRO).

A TRO is a short-term injunction that is issued pending a later determination of whether the moving party is entitled to a preliminary injunction.4 In storage auctions, TROs come into play when a tenant seeks to prevent the winning bidder from accessing the storage space and removing property. Typically, winning bidders have 24 to 48 hours following the storage auction to completely remove all contents from the storage unit. Thus, the tenant must act quickly by moving ex parte to obtain the TRO to prevent the winning bidder from removing the storage space contents.

At an ex parte hearing on a TRO, the court merely reviews the conflicting contentions to determine whether there is a sufficiency of evidence to issue a temporary order to “keep the subject of litigation in status quo pending a full hearing to determine whether the applicant is entitled to a preliminary injunction.”5 All that is determined is whether the TRO is necessary to maintain the status quo pending the noticed hearing on the application for preliminary injunction.6 Thus, the “issuance of a TRO is not a determination of the merits of the controversy.”7 Once a temporary restraining order has been issued, the court will order the storage facility to show cause as to why a preliminary injunction should not be granted. The Order to Show Cause (OSC) hearing must be set no “later than 15 days or, if good cause appears to the court, 22 days from the date the temporary restraining order is issued.”8 In the meantime, defense counsel should prepare a memorandum of points and authorities to oppose the pending application for a preliminary injunction. Counsel should serve the memorandum of points and authorities at least two days before the preliminary injunction hearing to prevent the plaintiff from

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obtaining a continuance.\textsuperscript{9} In contrast to the ex parte hearing regarding the TRO, a “hearing on a preliminary injunction is a full evidentiary hearing giving all parties the opportunity to present arguments and evidence.”\textsuperscript{10} Courts consider two factors in determining whether to issue a preliminary injunction: 1) the likelihood that the plaintiff will prevail on the merits at trial and 2) the interim harm that the plaintiff is likely to sustain if the injunction is denied compared to the harm the defendant is likely to suffer if the court grants the preliminary injunction.\textsuperscript{11} “The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo.”\textsuperscript{12} Irreparable harm “is one for which either…its pecuniary value is not susceptible to monetary valuation, or…the item is so unique its loss deprives the possessor of intrinsic values not replaceable by money or in kind.”\textsuperscript{13} The trial court is the judge of the credibility of the affidavits or declarations filed in support of and in opposition to a preliminary injunction.\textsuperscript{14}

Although a court must consider both factors in making its decision, it may deny a preliminary injunction if either of the two factors alone would support a ruling denying relief.\textsuperscript{15} For example, a court should not issue an injunction if there is no possibility of success, even if issuing the injunction might prevent irreparable harm.\textsuperscript{16} This is because “there is no justification in delaying harm where, although irreparable, it is also inevitable.”\textsuperscript{17} “The burden is on the plaintiff to show that it would be harmed if the preliminary injunction were not granted.”\textsuperscript{18}

Since the plaintiff-tenant would be trying to prevent the winning bidder from gaining access to the storage space and removing property, the tenant must show that the storage facility unlawfully sold the contents of the storage space by violating some aspect of the SSFA.\textsuperscript{19} Review of the entire file from the self-storage facility and immediate analysis of whether the storage unit was sold in accordance with the SSFA is therefore necessary.

If a preliminary injunction is granted, the court must require a bond or undertaking on the part of the moving party.\textsuperscript{20} The amount of the bond is fixed on the basis of the amount of damages the opposing party will likely sustain during litigation if the court subsequently determines that the applicant was not entitled to an injunction.\textsuperscript{21} The undertaking is mandatory, and “a preliminary injunction does not become operative until it is furnished.”\textsuperscript{22} “If the preliminary injunction is valid and regular on its face, requiring the defendant to defend against the main action in order to demonstrate that the injunction was wrongly issued, the prevailing defendant may recover that portion of his attorney fees attributable to defending against those causes of action on which the issuance of the preliminary injunction was based.”\textsuperscript{23}

The SSFA

The SSFA, codified in Business and Professions Code Sections 21700 et seq., has lien and lien sale provisions to help storage facility owners “recover the storage facility…collect the rent and other contractual charges owed; and…sell or otherwise dispose of any personal property remaining after termination.”\textsuperscript{24} As such, the SSFA provides very specific guidelines for the rental contract, late fees, and the attachment liens and sale of a tenant’s property that may occur due to nonpayment of rent and fees. Specifically, if any part of the rent or other charges due from a tenant remains unpaid for 14 consecutive days, a self-storage facility may terminate the tenant’s right to use of the storage space by sending a Preliminary Lien Notice (PLN) to the tenant’s last known address by certified or regular first-class mail if the owner obtains a certificate of mailing indicating the date the notice was mailed.\textsuperscript{25} The contents of the PLN must contain specific notifications, such as a statement that the tenant’s right to use the storage space will terminate on a specified date not less than 14 days after the mailing of the notice unless the tenant pays the amount due prior to that date. The PLN must also provide notice that the tenant may be denied access to the storage space after the termination date if the amount is not paid.\textsuperscript{26} The SSFA provides a sample PLN for reference.\textsuperscript{27} If the PLN has been sent as required and the total amount due has not been paid within 14 days of the termination date specified in the PLN, the lien imposed by the SSFA attaches as of that date, and the self-storage facility owner may 1) deny the tenant access to the space, 2) enter the space, and 3) move any property found in the space to a place of safekeeping.\textsuperscript{28}

Once the lien attaches, the self-storage facility must send the tenant a Notice of Lien Sale (NLS) and a blank declaration in opposition to lien sale form by certified mail or by first-class mail if the owner obtains a certificate of mailing, postage prepaid.\textsuperscript{29} As with the contents of the PLN, a NLS must contain specific notices.\textsuperscript{30} The NLS must indicate the property will be sold to satisfy the lien after a specified date (which must be at least 14 days from the date of mailing the notice) unless the tenant executes and returns by certified mail a declaration in opposition to lien sale, and that the tenant may regain full use of the space by paying the full lien amount before that specified date.\textsuperscript{31} If the tenant completes the declaration and returns it to the self-storage facility before the date set in the NLS, the tenant can prevent the lien sale and force the self-storage facility to proceed instead through a civil action.\textsuperscript{32} If no declaration in opposition to the lien sale is executed, the self-storage facility may sell the property at a storage auction.\textsuperscript{33}

After the expiration of the time given in the NLS, or following the failure of a tenant to pay rent or obtain a court order pursuant to Business and Professions Code Section 21709, “an advertisement of the sale shall be published once a week for two weeks consecutively in a newspaper of general circulation published in the judicial district where the sale is to be held.”\textsuperscript{34} The advertisement must include a description of the property to be sold, the name of the tenant, and the name and location of the storage facility.\textsuperscript{35}

To obtain a preliminary injunction, a plaintiff-tenant must show that the storage facility did not follow the specific lien notice requirements under the SSFA. Defense counsel must therefore provide the court with evidence to show that the self-storage facility complied with the lien notice requirements under the SSFA. Defense counsel should obtain a declaration from an employee of the storage facility, preferably the property manager or the district manager of the facility where the storage unit is located, and set forth all the pertinent facts leading up to the sale of the storage unit. The declaration should identify when the tenant entered into the rental agreement with the facility, the rent amount, and what amount is currently owed. More important, the declaration should identify when the PLN and NLS were mailed and in what manner. Counsel should also obtain copies of the PLN, NLS, and proof of advertisement to attach to the declaration.

In addition to contending that the self-storage facility did not comply with the specific lien notice requirements under the SSFA, a plaintiff-tenant may also challenge the winning bidder’s status. However, Section 21711 of the SSFA provides that—despite noncompliance by the storage facility with the requirements of the SSFA—a bona fide purchaser takes the property free of any rights of persons against whom the lien was claimed.\textsuperscript{36} Thus, the winning bidder’s status is not relevant to the legal battle between the self-storage facility and the tenant. In fact, there is no requirement under the SSFA that a self-storage facility sell the property to a bona fide purchaser. Therefore, to have any chance of obtaining a preliminary injunction, a plaintiff-tenant must show that the storage facility did not follow the specific lien notice requirements under the SSFA, since the sole issue before the court is whether the self-storage facility sold the contents of the storage space in accordance with the SSFA.
To circumvent the protection afforded under Section 21711, a plaintiff-tenant might argue that, since the person against whom the lien is claimed is the tenant, there is third-party property in the storage unit, thereby precluding the winning bidder from taking the property free of the third party’s rights. However, such an argument assumes that Section 21711 was intended to limit the rights of a bona fide purchaser to take property only as to the person the lien was claimed against. This is clearly not the case.

Under well-settled law, a bona fide purchaser takes property free and clear of rights of any persons claiming rights to said property. “A bona fide purchaser for value who acquires his interest in real property without notice of another’s asserted rights in the property takes the property free of such unknown rights.” Thus, Section 21711 is intended to allow a bona fide purchaser to take property free of any rights of persons against whom the lien is claimed even if the self-storage facility sells the property in violation of the SSFA. Section 21711 therefore provides even greater protection for bona fide purchasers.

The third-party argument also assumes that the plaintiff-tenant may assert the rights of the third party or that the third party has standing. “[T]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors,” among which are 1) the extent to which the transaction was intended to affect the plaintiff, 2) the foreseeability of harm to him or her, 3) the degree of certainty that the plaintiff suffered injury, 4) the closeness of the connection between the defendant’s conduct and the injury suffered, 5) the moral blame attached to the defendant’s conduct, and 6) the policy of preventing future harm. The principle underlying this analysis is that “where the ‘end and aim’ of the contractual transaction between a defendant and the contracting party is the achievement or delivery of a benefit to a known third party or the protection of that party’s interests, then liability will be imposed on the defendant for his or her negligent failure to carry out the obligations undertaken in the contract even though the third party is not a party thereto.”

An instructive case on point, although unpublished, is Milwicz v. Public Storage. In Milwicz, Tom Milwicz signed a contract for the rental of a storage space with Public Storage. After he rented the unit, Public Storage failed to notify Milwicz that his property stored at Public Storage’s facility would be sold at auction. Milwicz, along with his wife and daughter, filed a complaint against Public Storage stating claims for negligence and conversion. The complaint sought damages, attorneys’ fees, and punitive damages.

The allegations were based upon the loss of personal property after Public Storage sold it at auction without providing notice. The trial court sustained Public Storage’s demurrer without leave to amend to the plaintiff’s claims for negligence, breach of contract, breach of the covenant of good faith and fair dealing, and conversion based upon a release of liability in the rental contract. The court of appeal, however, reversed and remanded as to Tom Milwicz but affirmed as to his wife, Leslie. The court explained that Leslie “was not in privity of contract with Public Storage and cannot allege a claim of breach” and that this “lack of privity precludes any claim for negligence or other tortious wrongdoing against Public Storage.”

As in Milwicz, counsel should argue that the third-party plaintiff was not in privity of contract with the self-storage facility and, therefore, cannot claim any breach. Further, this lack of privity should preclude any claim for negligence or other tortious wrongdoing against the defendant, as the defendant should not have had any notice or knowledge that third-party property was stored in the rental space prior to the auction sale, and there were therefore no foreseeable plaintiffs to whom it owed a duty. The “end and aim” in such a case between a tenant and self-storage facility is not to deliver “a benefit to a known third party or the protection of that party’s interests.”

Counsel for the facility should argue that as long as it complied with the SSFA, it owned no legal duty to any potential third-party plaintiff. In addition, counsel should argue that once compliance is shown under SSFA, any rights the third party may have had were extinguished. Thus, counsel should argue that Section 1708 is inapplicable, since the facility did not infringe on any legal rights.

Rental Agreement

The SSFA provides that “[n]othing in this chapter shall be construed to impair or affect the right of the parties to create additional rights, duties, and obligations in and by virtue of the rental agreement.” Indeed, “the contract between the operator and renter of a public storage unit defines their legal relationship.” Depending on the terms of the rental agreement, counsel should be able to argue that the tenant understood and agreed
to store personal property in the storage space that belonged only to the tenant. This will help show that a third-party plaintiff cannot prevail on the merits since the storage of third-party property was in clear breach of the rental agreement.

The rental agreement can be further used to show that the tenant is in breach of contract to support the argument that the tenant will not be able to prevail on the merits. For example, counsel should be able to argue that the plaintiff understood and agreed not to store heirlooms or precious, invaluable, or irreplaceable property for which no immediate resale market exists, or objects that the tenant claims have special or emotional value. This is relevant to the discussion regarding suffering irreparable harm with no adequate remedy at law during the temporary restraining order phase if the tenant had in fact claimed that such property was stored in the unit as a basis of obtaining a TRO.

Counsel should further argue that the tenant understood and agreed that all personal property stored in the storage space was at the tenant’s sole risk and that the self-storage facility would not insure the tenant’s personal property. Counsel should also be able to use a provision in the rental agreement to defeat any claims for conversion or negligence with a provision indicating that the self-storage facility would have no responsibility to the tenant or to any other person for any loss from any cause, including, without limitation, the owner’s or owner’s agent’s active or passive acts, omissions, negligence, or conversion, unless the loss is directly caused by the owner’s fraud, willful injury, or willful violation of the law.

Accordingly, counsel should argue that the tenant did not comply with the terms and conditions of the rental agreement and thus, has unclean hands. A party seeking the interposition of a court of equity must come into court with clean hands. Thus, when a plaintiff’s conduct shows that he or she has unclean hands, a preliminary injunction will be denied.55 “No one can take advantage of his own wrong.”56

**Filing a Demurrer**

In addition to preparing points and authorities in opposition to a preliminary injunction, if the temporary restraining order was issued on the basis of a verified complaint, counsel may also consider demurring to or answering the complaint. A preliminary injunction is not warranted if there is not on file a complaint that states facts sufficient to constitute a cause of action for injunctive relief of the character embraced in the preliminary injunction.57 The elements of a cause of action for injunctive relief are 1) a tort or other wrongful act constituting a cause of action and 2) irreparable injury.58 Injunctive relief is not, in itself, a cause of action.59 A cause of action must exist before injunctive relief may be granted.

In the context of storage auctions, a plaintiff-tenant often pleads conversion as the underlying cause of action in the complaint. To state a cause of action for conversion, a plaintiff must sufficiently plead the following elements: 1) The plaintiff’s ownership or right to possession of the property at the time of the alleged conversion, 2) the defendant’s conversion by a wrongful act or disposition of the plaintiff’s property rights, and 3) damages.60 Ownership or right to possession is determined at the time of the alleged conversion.61 A person who neither has title nor any right to possession cannot recover in an action for conversion.62

Under the SSFA, California law provides clear and beneficial lien enforcement rights to self-service storage facilities. One significant right provides self-storage facilities the ability to vacate nonpaying tenants by holding storage auctions or lien sales. Indeed, the primary purpose of the storage auction is to clear an unproductive unit so that it can once again be profitably rented to a different tenant. The popularity of reality shows such as Storage Wars has increased bidding activity, thereby creating an incentive for self-storage facilities to conduct more storage auctions. Self-storage facility operators should nevertheless refrain from acting too quickly in initiating the lien process and, in doing so, make errors that lead to litigation. It is therefore critical for self-storage facilities to understand the lien process under the SSFA to avoid these legal battles. ■

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3 BUS. & PROCEED. CODE §§21700 et seq.
5 Id.
6 Id.
7 Id.
8 CODE CIV. PROC. §§227(d)(1).
9 CODE CIV. PROC. §§227(e).
10 Landmark Holding Group, Inc., 193 Cal. App. 3d at 528-29; see also CODE CIV. PROC. §§227(a)-(f).
14 Voeltz v. Bakery & Confectionery Workers Int’l Union, 40 Cal. 2d 382, 386 (1965) (overruled on other ground by Smyrnios v. Local Joint Executive Bd., 64 Cal. 2d 30 (1966)).
15 Voeltz, 40 Cal. 2d at 386; see also King v. Meese, 43 Cal. 3d 1217, 1227 (1987).
16 Jessen, 142 Cal. App. 3d at 458.
17 Id.
19 BUS. & PROCEED. CODE §§21700 et seq.
20 CODE CIV. PROC. §529(a).
21 Id.
25 BUS. & PROCEED. CODE §21703.
26 BUS. & PROCEED. CODE §21703(d)(1).
27 BUS. & PROCEED. CODE §21704.
28 BUS. & PROCEED. CODE §21705(a).
29 BUS. & PROCEED. CODE §21705(b)(1), (2).
30 BUS. & PROCEED. CODE §21705(b)(1)(A)-(E).
31 BUS. & PROCEED. CODE §21705(b)(1)(C)-(D).
32 BUS. & PROCEED. CODE §21710.
33 BUS. & PROCEED. CODE §21706.
34 BUS. & PROCEED. CODE §21707.
35 Id.
36 BUS. & PROCEED. CODE §21711.
41 Id. at *3.
42 Id. at *4.
43 Id. at *1.
44 Id.
45 Id. at *19-20.
46 Id. at *19-20.
48 CODE CIV. CODE §1708.
49 Sea World, Inc. v. Superior Court, 13 Cal. App. 3d 100, 104 (1970); see also Pacific Tel. & Tel. Co. v. Granite Constr. Co., 225 Cal. App. 2d 765, 768 (1964) ("A cause of action in tort is based on violation of a legally protected right.").
51 BUS. & PROCEED. CODE §21713.
54 CODE CIV. CODE §3317.
58 Id.

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5850 Canoga Avenue, Suite 400, Woodland Hills, CA 91367, (818) 710-7190, fax (818) 710-7191, e-mail: gochmichael@actl.com. Web site: MichaelGoch.com. Contact Michael Goch. Licensing and related disciplinary proceedings with emphasis on healthcare practitioners, as well as Department of Health Services matters and related issues, from investigatory stage through trial and writ proceedings. Degrees/licenses: JD Southwestern University School of Law, cum laude, 1978; admitted in California since 1978. Also admitted in Central, Eastern, Northern, Southern District and Ninth Circuit.

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Thursday, June 27, Dorothy Chandler Pavilion
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Reception: 6:00 PM - Dinner and Program: 7:00 PM
After-Dinner Cocktails, Desserts, & Coffee: 9:00 PM

Judges, Government/Public Interest Attorneys: $180
Individuals: $225
Regular Table of 10: $2,200
Supporter Level Table of 10: $3,300

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Receivers in Restructurings, Liquidations, and Regulatory Actions

ON TUESDAY, JUNE 18, the Remedies Section will host a program that examines restructuring, liquidating, and regulatory receiverships. As the real estate market generally improves, the focus of receivers, counsel, and clients will turn to these non-real-estate forms of receiverships. Speakers Kathy Bazoian Phelps, John W. Berry, Benjamin R. King, Ted Lanes, Richard P. Ormond, Thomas Seaman, and Joel Bruce Weinberg will outline the shift in focus and fresh dose of creative energy that will be needed to reach optimal outcomes for public and private interest-holders. The program will take place at LACBA, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration will begin at 5:30 P.M. and the meal at 6, with the program continuing from 6:30 to 8:30. The prices below include the meal. The registration code number is 011916.

$25—CLE+ member
$60—Remedies, Litigation, or Real Property Section member
$80—LACBA member
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Advanced Mediation Skills Practicum

ON TUESDAY, JUNE 4, the Senior Lawyers Section will host a program featuring Erwin Chemerinsky and Howard Miller, two of California’s premier legal minds, who will discuss historic issues presently before the U.S. Supreme Court, including: 1) Proposition 8 and the Defense of Marriage Act, 2) class actions, arbitration, and intellectual property, 3) civil rights: affirmative action and voting, and 4) other issues raised by the audience. The program will take place at LACBA, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. On-site registration will begin at 5:30 P.M. and the meal at 6, with the program continuing from 6:30 to 9:30. Parking is available at 1055 West 7th and nearby lots. This event is also available as a live Web cast. The registration code number is 011910.

$55—CLE+ member
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3.25 CLE hours
What Business Clients Should Know about Smart Phones

**BYOD**

Attorneys should therefore advise their business clients to examine their policies regarding smart phones and similar devices that employees use for business. The first question a business client may address is whether to allow employees to use their personally owned devices. A “bring your own device” (BYOD) rule saves a company money, but it also creates a large number of complications that are unnecessary if the company creates and enforces a ban on company work on personal devices. Accordingly, many employers simply supply devices to employees and instruct them to use the devices only for business and not to use any personal device for business. However, if BYOD is allowed, each employee needs to sign a detailed agreement acknowledging that while the devices are theirs, the company controls the data and how it is used.

If a BYOD policy is chosen, various questions must be addressed. For example, what kind of devices should be allowed? In order to manage data, synchronizing and backups uniformly, the choice of devices needs to be limited to a handful. Furthermore, whether a client company has a BYOD policy or issues devices, a single wireless supplier should be used to control centralized backups. Another issue is the software and applications that the client may be allowed to install on the device. An endless number of applications are available, and it is unclear how they all integrate or conflict with the business applications that the client’s IT department supports. More critical is whether and how these applications can access data on the device, which may be confidential. Another question is whether business data on the device can be encrypted and kept separate from personal data.

Another issue is data synchronization. In order to effectively preserve, control, and manage business data, employee devices should be synchronized to the company’s server. This minimizes the amount of unique data on the device and is vital to keeping control of company data. Microsoft Exchange is one application that provides synchronization and can give an employer some control over the e-mail and other data that flow to and from employee devices. Synchronization helps an employer manage data but does not prevent the kind of problem described in the example.

To prevent a courtroom scenario like that of the example, which involved preservation of data beyond the date by which it should be deleted, the client should not allow devices used for work to be backed up on an employee’s personal home computer or other devices the client does not control. Backups should be performed automatically and consistently according to the client’s document retention policy. As a general rule, e-mail should be preserved longer than text messages and voice mail, but the exact choices to be made for each type of data will depend on such factors as the regulatory environment in which the client operates and the client’s business needs.

Another factor for an employer client to consider is that devices constantly change. This factor weighs against a BYOD policy. If synchronization and backups are to be handled uniformly, the list of allowed devices needs to be relevant and updated at least every few years. When the list is updated, some devices may no longer be allowed for work. In all such cases, the client’s goal should be to prevent the loss of control over the company data on the devices. Although devices may have their data cleaned, it may be cheaper and more effective to use a hammer and an e-waste bin, even if a departing employee must be paid for a personally owned device. Another policy consideration is whether the departing employee is or may be involved in litigation.

Mobile devices have become ubiquitous so quickly that many employers have not kept pace with their data policies.

**MANY COMPANIES HAVE NOT** fully addressed the issue of how much data smart phones can generate, hold, and access. A typical smart phone can capture location data from cell towers and WiFi networks, among other sources. This information can be correlated with the time stamps of texts, e-mail, and phone calls. For example, it is simple to imagine a courtroom display of a map of Santa Monica that shows the location from which a client’s employee created each e-mail message, text message, and phone call on a crucial day. The time of each message could show that he made communications that he previously denied making.

To continue the example, the data on the smart phone may have been obtained after the employee left the company. The client’s IT department deleted the data from the employee’s phone immediately after the employee left. Without the company’s knowledge, however, the employee had performed backups of the device on his company-issued laptop and to other locations on the company’s network. As a result, multiple versions of the employee’s phone data existed not only on hard drives under the company’s control but also on the user’s personal online backup account.

Tom McCurnin is a partner at Barton, Klugman & Oetting and litigates trade secret and business divorce cases. Greg R. Chan is the senior manager of litigation technology for Bingham McCutchen in Los Angeles.
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February 10, 2013

To whom it may concern,

My name is Alison Triessl. I am a criminal defense attorney specializing in murder, third strike and drug cases. Without a doubt, Jack Trimarco’s polygraphs have been an invaluable asset to my practice.

I recently represented USTA Tennis official Lois Goodman who was accused of murdering her husband. She did not commit the crime and Jack Trimarco’s polygraph was instrumental in negotiations with the District Attorney which resulted in a dismissal of all the charges.

Whenever I consider whether to have a client take a polygraph, there is only one name in the conversation – Jack Trimarco. His level of credibility, professionalism, and experience is unparalleled in the field and garners the respect of prosecutors and defense attorneys alike.

I have worked with Mr. Trimarco for over twelve years and simply put, I adore him. Not only is he the best in the field, he is an absolute pleasure to work with. He is a hardworking, dedicated professional with unquestioned qualifications and integrity.

Warm regards,

Alison Triessl