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Jack Trimarco & Associates
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Beverly Hills, CA 90212

Dear Mr. Trimarco:

In the winter of 2010, an environmental disaster occurred off the west coast of the island of Oahu in the State of Hawaii. Heavy rainfall caused millions of gallons of contaminated water—including toxic soil, trash and human medical waste—to pour from the Waimanalo Gulch Sanitary Landfill into the ocean waters. Federal officials launched an investigation into the landfill’s operator, Waste Management of Hawaii (“WMH”). The U.S. Attorney’s Office alleged there was a conspiracy between members of the WMH and its environmental consulting firm to submit false information to regulators about the adequacy of the landfill’s storm water management system.

I represented an employee of the environmental consulting firm hired by WMH to perform construction quality assurance. During the investigation, all evidence pointed to the fact that my client was innocent of any wrongdoing. Nevertheless, the Assistant U.S. Attorney insisted that my client pass a polygraph, or else risk being indicted as a participant in the criminal conspiracy.

In 2012, you conducted a polygraph examination of my client, unequivocally establishing that no deception was indicated. The Assistant U.S. Attorney then demanded that my client pass a polygraph examination administered by FBI agents in Honolulu. The FBI alleged my client failed their polygraph examination, but you responded with a thorough and compelling critique demonstrating how the FBI’s polygraph examination was deficient and should be disregarded.

Last year, I was notified by the U.S. Attorney’s Office of the District of Hawaii that their office would not seek an indictment of my client, nor would any charges against him be pursued. I believe your carefully and competently constructed polygraph examination and critique of the FBI’s polygraph results played a central role in our advocacy that prosecution should be declined in my client’s case.

Sincerely,

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CALIFORNIA has the highest poverty rate in the United States, according to the Census Bureau’s 2013 Supplemental Poverty Measure (see Dan Walters, “Census Bureau: California still has highest U.S. poverty rate,” Sacramento Bee, October 16, 2014). Almost 25 percent of Californians live in poverty, and Los Angeles County has the greatest number of the state’s poor residents, according to the Public Policy Institute of California. These numbers shock the conscience. Potential legal remedies to achieve such basic human needs as food, security, and shelter remain out of reach for many. Supreme Court Justice Goodwin Liu recently noted that the lack of affordable legal representation is so staggering that only one legal aid lawyer exists for every 8,000 indigent Californians (see Amy Yarbrough, “Incubator workshop shines spotlight on need for affordable legal aid,” California Bar Journal, May 2014). Even those living at twice the poverty level cannot afford legal representation. Meanwhile, the legal profession is inundated with law graduates who are burdened by law school debt. The New York Times recently noted the obvious paradox presented by these “two acute—and seemingly contradictory—problems.”

Nationwide, law schools, legal aid organizations, and bar associations—many of them in California—are developing postgraduate law practice incubators and other initiatives that pair postgraduate training programs with people of modest means who do not qualify for legal aid. These initiatives combine practical training for new lawyers with affordable legal assistance to low- and moderate-income clients. The American Bar Association’s Standing Committee on the Delivery of Legal Services maintains a list of these initiatives on its Web site.

In California, the California Commission on Access to Justice leads the effort with the Modest Means Incubator Task Force, which works to encourage, support, monitor, and evaluate incubator and modest means initiatives. In 2014, the commission convened conferences that brought together key stakeholders to develop action plans for addressing the modest-means justice gap. With the assistance of grants from the Ford Foundation, the Public Welfare Foundation, and the California Bar Foundation, the commission provided seed grants to jump start or expand incubator programs through regional partnerships of law schools, legal aid organizations, bar associations, law firms, and court-based self-help centers.

The commission examined several existing law school initiatives, including the placement program at University of California Hastings College of the Law, Lawyers for America, and skill-building programs for beginning solo practitioners offered by the law schools of California Western, Thomas Jefferson, Whittier, and more recently, Loyola. The commission also explored the law school-based nonprofit law firm model at Arizona State and Rutgers law schools. The commission’s goal is to “move us toward a society where access to a lawyer is regarded, both inside and outside the profession, as something within the reach of ordinary people.” (See California Commission on Access to Justice, Overview: Modest Means/Incubator Task Force, October 24, 2013.)

The pro bono projects of the LACBA Counsel for Justice and the commission’s modest means incubator task force project provide a roadmap for Los Angeles lawyers to join the crucial endeavor of providing access to justice not only for the 8.9 million living in poverty in California but also those who lack the means to fully access the state’s justice system. Please consider sharing your experience.

Mary E. Kelly is a nurse attorney and an administrative law judge II with the California Unemployment Insurance Appeals Board. She is cochair of the California Access to Justice Commission’s Administrative Agency Committee.
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Jackie Lacey Los Angeles County District Attorney

In your run for District Attorney, you and Alan Jackson beat out purported front-runner, City Attorney Carmen Trutanich. Were you surprised? I was surprised that I came in first in the primary.

What was your best job? This is my best job.

What was your worst job? I worked for a Sears department store. I felt like I was folding the same clothes over and over again.

What characteristic do you most admire in your mother? She carries herself like a queen.

You lost your father in 2008. What would he say to you today about being the district attorney? I hope he would say, “I knew it.”

You are still happily married to your high school sweetheart from Dorsey, what is your secret? I trust him.

Who is on your music playlist? Upbeat gospel music.

What book is on your nightstand? The Fast Metabolism Diet because I am always trying to lose weight.

Which fictional hero or heroine would you like to be? Yoda, from Star Wars.

What scared you the most about your first job? That we’re heartless, win-at-all-costs prosecutors.

What was your worst job? I worked for a Sears department store. I felt like I was folding the same clothes over and over again.

What was your best job? This is my best job.

What was your best job? This is my best job.

What was your best job? This is my best job.

What was your best job? This is my best job.

What was your best job? This is my best job.

Are celebrity cases harder to prosecute? They are more of an irritant.

What is the biggest misconception about being a district attorney? That we’re heartless, win-at-all-costs prosecutors.

You prosecuted the first race-motivated hate crime. What was that like? It probably was the only time in my career as a prosecutor when I worried about the safety of my family and myself.

What is the perfect day? It starts off with a good walk to clear my head, a healthy breakfast, very little traffic, and when I arrive at work, we go through the schedule exactly as planned. It ends with me going home and having dinner with my husband.

What is underrated in the legal profession? What you can do with a law degree.

What is the biggest misconception about being a district attorney? That we’re heartless, win-at-all-costs prosecutors.

How did you feel when you heard the guilty verdicts? I felt like the community was saying, in Los Angeles county, we will not go back to the 50s and 60s when people were murdered because of the color of their skin.

Where is the biggest misconception about being a district attorney? That we’re heartless, win-at-all-costs prosecutors.

What are the three most deplorable conditions in the world? I am particularly disturbed by how women are treated in countries like Afghanistan for just exercising some basic freedoms. In the United States, it’s our education system. With all of our resources, why aren’t our public schools better? Whenever I look at the infomercials of children starving, I just don’t understand it. We should be able to get food and clean water to everybody.

Who are your two favorite U.S. presidents? Barack Obama and Abraham Lincoln.

What is the one word you would like on your tombstone? Perseverance.
Rules Governing Defense Coverage in an Insurance Policy

When an Insurance Company Refuses to defend a policyholder in a lawsuit, the policyholder should act quickly to secure defense coverage. Although California courts have developed a number of rules designed to resolve defense coverage disputes in favor of general liability policyholders, a dilatory approach rarely benefits the policyholder in cases in which litigation over the insurer's duty to defend is warranted. Once informal avenues of relief are exhausted, there should be no delay in pursuing litigation against the insurer if the policyholder believes that he or she is entitled to defense coverage and if the defense costs are large enough to justify the litigation costs.

The foundational rule of defense coverage is that insurers must defend any lawsuit that even “potentially seeks damages within the coverage of the policy.” The plaintiff's factual allegations against the policyholder are taken as true, and if those allegations can be construed to fall within the scope of the insurance policy’s coverage, the insurer must defend the lawsuit. Coverage is available even if the plaintiff in the underlying lawsuit does not plead all the elements of a covered cause of action, as long as the factual allegations potentially fall within the scope of the policy. “[I]t is not the form or title of a cause of action that determines the carrier's duty to defend, but the potential liability suggested by the facts alleged....”

When there is a factual gap in the allegations, the policyholder may be aware of evidence outside the pleadings that potentially brings the claim within the scope of the policy. In this case, the policyholder should submit the evidence to the insurer at the earliest possible time because the insurer must consider it when deciding whether to provide coverage. It does not matter if the insurer does not believe the policyholder, since the insurer still needs to provide defense coverage. As the court of appeal has explained, “[A]n insurer who simply denies coverage based upon the insurer's attention should be focused on defending against potential liability rather than fighting to secure insurance coverage. Generally, the plaintiff’s allegations against the policyholder should provide enough information to create a potential for coverage. If the allegations are insufficient, the policyholder often has access to additional evidence that can establish defense coverage. Given that defense coverage often can be established at the outset of the lawsuit, there is little reason for the policyholder to wait before securing insurance coverage. The longer a policyholder waits, the greater the opportunity for the insurer to develop facts and arguments that ultimately may bar coverage. An additional benefit of an early coverage decision is that the court will not be biased by later developments in the underlying lawsuit. Although courts are technically required to review the allegations and evidence known to the insurer at the time when the policyholder first requested defense coverage, in practice, a judge's hindsight can be 20/20. Because there are rarely any downsides to pursuing an early coverage decision, policyholders would be wise not to wait.

In consideration of these rules, policyholders typically should submit the evidence to the insurer at the earliest possible time because the insurer must consider it when deciding whether to provide coverage. It does not matter if the insurer does not believe the policyholder, since the insurer still needs to provide defense coverage. As the court of appeal has explained, “[A]n insurer who simply denies coverage based upon the insurer's attention should be focused on defending against potential liability rather than fighting to secure insurance coverage.

The insurer's defense obligations continue until the insurer identifies evidence conclusively showing that there is no possibility that the claim will be covered, at which time the insurer can seek a judicial decision authorizing it to stop paying the policyholder's defense costs. An insurer also may try to justify a failure to defend by relying on evidence developed in the underlying case that the insurer believes shows the claim is not covered. The insurer then argues that there was never a potential for coverage. However, when an insurer identifies new evidence that was not previously available, the duty to defend is “extinguished only prospectively and not retroactively.” There is a real risk, however, that the subsequently developed evidence will color the court's views on the merits, and, if a claim is ultimately not covered, a court may be more inclined to conclude that the claim was never even potentially covered.

In consideration of these rules, policyholders typically should seek an early decision on defense coverage, and insurers should be prepared to defend a lawsuit at its inception or face bad faith claims.
DISCOVERY ALLOWS PARTIES to focus on the issues in dispute, facilitates dispositive pretrial motions, permits meaningful settlement negotiations, and prepares the parties for trial. Under Code of Civil Procedure Section 2017.010, material that falls within the broad definition of “relevant to the subject matter” is discoverable if it relates to any claim or defense of a party. Admissibility is not the sole criterion, and even “fishing expeditions” are allowed. If discovery becomes unreasonable, however, the responding party has several remedies, including a request for an immediate protective order. Courts have the authority to limit the scope and exchange of discovery—written and deposed—if “the burden, expense, and intrusiveness involved in the discovery clearly outweigh the likelihood that the information sought will lead to the discovery of admissible evidence.” A party can (and should) consider filing a protective order when requests for discovery become unreasonably cumulative, burdensome, or oppressive.

A party seeking a protective order must first show there is good cause for the court to bar or limit the discovery propounded. Therefore, an initial analysis is required to determine whether discovery propounded by a party is unreasonably cumulative and duplicative of discovery already responded to, or whether the discovery is largely related to undisputed or stipulated issues. When cases involve multiple parties and multiple claims, some attorneys may attempt to relitigate claims or issues that have already been dismissed or addressed by the parties through other discovery. This creates an undue burden and expense to the party, and a protective order may be appropriate. A protective order may be granted to restrict any discovery method that is “unreasonably cumulative or duplicative.” Regardless of relevance, the statute allows courts to bar discovery that is too expensive or inconvenient, or simply unnecessary. For example, interrogatories that request a party to identify every individual who ever interacted with an employee, without any limitation on the time period requested, would likely be considered unreasonably cumulative.

The standard for an objection to discovery requests based on burdensome and oppressive grounds is distinct from that of being cumulative. The showing required to sustain these types of objections is that the intent of the party was to create an unreasonable burden, or that the burden created does not weigh equally with the stated purpose for trying to obtain it. For example, in Mead Reinsurance Company v. Superior Court, the objecting party showed that responding to the interrogatories would require the review of over 13,000 claims files by five claims adjusters working full time for six weeks. The Mead court, citing West Pico Furniture Company v. Superior Court, held that “[o]ppression] must not be equated with burden, [all discovery imposes some burden on the opposition] to support an objection of oppression there must be some showing...that the ultimate effect of the burden is incommensurate with the result sought.” In West Pico, the trial court had denied a motion to compel the production of documentary information that would have required a search of the records in 78 branch offices of Pacific Finance. The writ petitioned for by West Pico Furniture Company was granted because Pacific Finance had not made a factual showing to the trial court of the nature and extent of the trouble and expense that would have been entailed in responding to the request for discovery. The trial court was directed to vacate its order denying the discovery sought and to reconsider the matter in light of the court’s power under Section 2019(b)(1) of the Code of Civil Procedure, conditioning discovery on just and reasonable terms, including the allocation of expenses. Applying the West Pico rationale, and in view of the specific details facing Mead in its efforts to comply with the order, the Mead court found there was no question that the order by the trial court was oppressive. Mead had made a showing to the trial court of the massive extent of the burden that the request entailed, and the order made no provision at all to mitigate that burden. Therefore, any request for a protective order should include a detailed description of the extent of the burden on the party requesting protection.

A court is authorized to fashion a unique protective order that addresses issues of oppression as well as privilege. The court in Mead found that compliance with the requirements of an order would require Mead “to engage in only a limited evaluation of what names

Jennifer Weidinger is an associate at the Los Angeles office of Pettit Kohn Inggrassia & Lutz whose practice focuses on employment and retail litigation.
to disclose... At the end of one year from the date the letters are sent, Mead will be authorized to open the files of those claimants who have consented to it.16 The appellate court specifically found that the disposition prescribed a procedure that first addressed the privilege problem and then resolved the oppression issue. The trial court is vested with wide discretion to prevent oppression, which is not disturbed on appeal unless it can be established that the trial court has abused its authority.17

A party may also request a protective order under the burdensome or oppressive standard to prevent a party's serving voluminous, unfocused discovery on the eve of trial.18 In Day v. Rosenthal, the court issued a protective order barring both the noticed depositions and written discovery as well. The court found that the boiler plate questions referred to a “whole series of lawsuits,” many of which remained unchanged from the original pleadings. Also, the information sought related to documents generated by Rosenthal that were still in his possession, and it would have required more than 1,600 hours of preparation time in order to answer the first of the nine sets of interrogatories. The court observed that the interrogatories came very late in the proceedings, were voluminous and unfocused, and required so much time to answer that the trial would inevitably have to be postponed. Moreover, the interrogatories were largely inquiries concerning allegations that had been in the pleadings for as long as five years. Upholding the trial court’s ruling, the court of appeal found it difficult to imagine “a scenario in which a court would be more justified in saying, ‘Enough!’” Therefore, the trial court’s exercise of discretion was found to be reasonable.19

Privacy Rights

There are certain types of information and documents that are private and in some circumstances will be protected under the law from disclosure. Distinguished from information or documents protected by a privilege, such as the attorney-client privilege, privacy rights cover such matters as personal finances,20 employee personnel files,21 medical records,22 and sexual relations.23 California’s state constitution affirms that all people have “an inalienable right” to pursue and obtain privacy.24 A party should begin to plan for a written stipulation limiting the disclosure of this information, or a formal protective order, as soon as there is an indication that an adversary intends to procure protected information or documents. For example, employers have a duty to protect non-party employee information (addresses, telephone numbers, etc.) from disclosure, and a well-crafted protective order can maintain privacy rights for these employees. Courts have frequently recognized that individuals have a substantial interest in the privacy of their homes.25 If a party agrees to represent and produce an individual for deposition, there is no need to disclose a witness’s home address and contact information, as the opposing side should not contact a represented party. The court has authority to craft a specific protective order, pursuant to Code of Civil Procedure Section 2031.060(b), in the interests of justice, including to maintain an individual’s safety. In the recent case of Ibarra v. Superior Court, the appellate court found that the trial court had abused its discretion when it compelled the disclosure of the service photographs of guards who allegedly beat a former inmate.26 The photographs should not have been produced to counsel but rather, in order to protect the guards from an unreasonable risk of harm from display to inmates, they should have been produced to a neutral third party under the court’s supervision and made available only at a secure location to identified potential witnesses.

For matters falling within the right to privacy, a court must grant a protective order unless disclosure is found to further a compelling state purpose and that the purpose could not be achieved through less intrusive means.27 As with other privacy considerations, the court will balance the need to obtain the discovery with the party’s privacy rights.28 If the party is seeking to limit the scope of discovery, the burden or intrusiveness of that discovery must clearly be shown to outweigh the likelihood that the information sought will lead to the discovery of admissible evidence.29 In Schnabel v. Superior Court, for example, the appellate court allowed disclosure of the appellant’s personal financial and payroll records and general corporate documents because the appellee was entitled to ascertain the value of shares, but the court prohibited the disclosure of payroll and tax records of corporate employees because the employees’ financial data contained information that infringed their privacy rights.30

The balancing test applies to records sought from third parties as well. In weighing the privacy interests of the third party, the court should consider the nature of the information sought, its inherent intrusiveness, and any specific showing of a need for privacy, including any specific harm that disclosure of the information might cause. For example, the third party may demonstrate that public disclosure of confidential information would damage its competitive position or embarrass persons not involved in the litigation. On the other hand, an overbroad protective order, or an order granted without good cause, is vulnerable upon appeal. In a recent action by tenants who were displaced following foreclosure, the appellate court found that it was an abuse of discretion to issue a sweeping order protecting the documents of a home mortgage servicing company from dissemination. The company made no factual showing that the documents that it had been ordered to produce contained confidential commercial information or information in which it had any protetable interest or that dissemination of the documents to the public would result in injury.31

Upon request, the court can review the information in camera before production to assess its value to the requesting party and the harm that disclosure might cause to the third party. Any discovery order should be carefully tailored to protect the interests of the requesting party in obtaining a fair resolution of the issues while not unnecessarily invading the privacy of the third party.32

Preparing the Motion

Prior to producing sensitive documents, the parties can enter into a written stipulation— not filed with the court, but still binding—or a stipulation for a protective order, which can then be submitted to the court for entry. A written stipulation can effectively define the procedure and terms of a document production, including the 1) designation, 2) access, 3) use, and 4) disposal of the confidential documents. The stipulation and order should comply with the California Rules of Court 2.550 and 2.551, and include a provision for challenges to claims of confidentiality.33

If a party contends that any documents or information designated as confidential by another party are not entitled to protection, a motion to change the designation may be filed, providing adequate notice and an opportunity for the proponent of confidentiality to respond.34 The burden is on the proponent of confidentiality to demonstrate good cause, usually via a formal protective order. Notably, in Stadish v. Superior Court, the court found that the trade secret privilege could be waived if not timely asserted in response to document requests.35 The court also found that upon a proper showing a party may seek a protective order restricting dissemination of the documents, even after it has waived its right to object to the production of documents and produced most of the documents requested.36

If a written stipulation cannot be reached, or opposing counsel has requested protected documents that should not be produced even with a stipulation, a protective order is required. Motions for protective order, like many discovery motions, require a good faith meet-and-confer attempt that is also timely. Failure to bring the motion within 30 days could result in a waiver. Attorneys can extend the timeline with a written stipulation from the
other side, but they must be prepared to file the motion rather than rely on opposing counsel’s verbal promise.37 While the motion and supporting documents need not be lengthy, they should be sufficiently detailed to demonstrate to the court why a protective order is warranted and that all meet-and-confer efforts between the parties have failed.38

The meet-and-confer requirement is paramount. Parties are required to “confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery.”39 The request for a protective order must include a declaration stating “facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion.”40 The court carefully reviews the motion papers to ensure that this requirement has been met. The court will discern whether there was more than a cursory attempt to persuade the other side that protection is warranted.41

If the venue of a case is in the personal injury departments in Los Angeles County, a moving party should be prepared to request an informal discovery conference with the department judge. The informal conference can force an objecting party to face the discovery issues that were glossed over during meet-and-confer attempts. The conference also provides a neutral’s opinion on the dispute, which can prompt more compromise between opposing counsel prior to a formal order or ruling, and is an effective way to avoid sanctions.

Discovery requests propounded long after discovery has closed are untimely and improper. Also, discovery of unreasonably duplicative requests are usually an outright attempt to unnecessarily burden a party with additional discovery. Such conduct constitutes misuse of the discovery process and may merit an award of sanctions pursuant to Section 2030.090 of the Code of Civil Procedure. Following settlement of a class action, the appellate court recently found that the trial court had properly awarded a defendant $165,000 in sanctions, pursuant to Section 2023.010 of the Code of Civil Procedure, from the plaintiffs’ lawyer on the basis that the lawyer 1) disobeyed a court order to allow forensic computer inspections as part of the manufacturer’s discovery relating to the lawyer’s request for attorney fees, and 2) failed to meet and confer in good faith regarding the court-ordered inspections.42 The plaintiffs’ lawyer claimed the lack of a “detailed protocol” constituted “substantial justification” for the failure to obey the discovery order.43 However the court found there could be no reliance on the absence of a protocol when the attorney’s
own conduct in failing to meet and confer had
led to the failure to produce a protocol.44
An attorney should respectfully request via the
motion (or waive the request) that sanctions
be issued against the propounding party and
its attorney, jointly and severally, for the time
spent preparing the motion for protective
order and attending the hearing.

When defending a request for sanctions,
a party must demonstrate that sanctions
would be inappropriate because he or she
has acted, and continues to act, with sub-
stantial justification.45 A party must demon-
strate participation in discovery, including
good faith meet-and-confers efforts. If the
court has imposed monetary sanctions and the
offending party again abuses discovery, the
court may consider imposing “evidence sanc-
tions” (barring a party from introducing evi-
dence at trial) or “issue sanctions” (deeming
facts established adverse to the offending
party). The court also can cite a party for con-
tempt of court and even impose “terminating san-
cctions” (dismissing the plaintiff’s case
with prejudice or striking the defendant’s
answer and entering a default).46

Civil discovery rules are generally applied
liberally in favor of granting discovery; how-
ever, a protective order is an important device
that provides a shield to oppressive requests
and a safeguard for important privacy rights.
A successful protective order will 1) clearly
show good cause exists for the court to bar or
limit the demanded discovery, 2) be narrowly
tailored (not a sweeping order), and 3) outline
extensive meet-and-confere efforts and a good
faith attempt to reach an agreement.

1 CODE CIV. PROC. §§2017.010 et seq.
2 People v. Gonzalez, 53 Cal. App. 4th 1539, 1545
3 Davies v. Superior Court, 56 Cal. 3d 291, 305 (1984)
(citing Greyhound Corp. v. Superior Court, 56 Cal. 2d
355, 391 (1961)).
4 Greyhound Corp. v. Superior Court, 56 Cal. 2d 355,
5 Emerson Elec. Co. v. Superior Court, 16 Cal. 4th
1101, 1110 (1997).
6 See CODE CIV. PROC. §§2030.090(b), 2031.060(b).
7 Emerson Elec. Co., 16 Cal. 4th at 1108.
8 CODE CIV. PROC. §2019.010(a)(1).
9 Rawnsley v. Superior Court, 183 Cal. App. 3d 86, 91
(1986); Doak v. Superior Court, 257 Cal. App. 2d
825, 827-28 (1968).
10 Emerson Elec. Co., 16 Cal. 4th at 1120.
11 Mead Reinsurance Co. v. Superior Court, 188 Cal.
App. 3d 313, 319 (1986).
12 Id. at 318.
13 Id. at 320-21 (quoting West Pico Furniture Co. v.
Superior Court, 56 Cal. 2d 407, 417 (1961)).
14 Mead, 188 Cal. App. 3d at 321.
15 Id.
16 Id. at 322.
17 Cembrook v. Superior Court, 56 Cal. 2d 423, 427
(1961).
(1985).
19 Id.
20 Valley Bank of Nevada v. Superior Court, 15 Cal.
3d 652, 657 (1975).
21 Eldorado Savings & Loan Ass’n v. Superior Court,
22 Heda v. Superior Court, 225 Cal. App. 3d 525,
24 CAL. CONST. art. I, §1.
25 Planned Parenthood Golden Gate v. Superior Court,
26 Borrero v. Superior Court, 217 Cal. App. 4th 695, 706
(2013).
27 Id.
28 Schnabel v. Superior Court, 5 Cal. App. 4th 704, 712
(1993).
29 CODE CIV. PROC. §2017.020.
32 Id. (citing CODE CIV. PROC. §2025(i)); Harris v.
33 Stadish v. Superior Court, 71 Cal. App. 4th 1130,
1144 (1999).
34 Id.
35 Id.
36 Id.
37 WEL & BROWN, CALIFORNIA PRACTICE GUIDE: CIVIL
PROCEDURE BEFORE TRIAL 8:1013 (2010).
38 CAL. R. CT. 3.1110.
39 CODE CIV. PROC. §2023.010(i).
40 CODE CIV. PROC. §2016.040.
41 Clement v. Alegre, 177 Cal. App. 4th 1277, 1285
(2009).
43 Id. at 880.
44 Id.
45 CODE CIV. PROC. §2030.300(d).
46 CODE CIV. PROC. §2023.030(a)-(c).
What Determines Change in Ownership of Real Property in California?

TWO RECENT CASES, Ocean Avenue LLC v. County of Los Angeles and 926 N. Ardmore Ave., LLC v. County of Los Angeles have added both clarity and confusion to planning real property transfers. California property taxes are governed by Proposition 13, which was enacted by the voters in 1978. Under Proposition 13, property owners retain a base year value on their property that can only be increased each year by the lesser of the consumer price index or 2 percent unless there is a reassessable event. Assessors can only assess real property to its fair market value upon a change in ownership or new construction. Therefore, property owners almost always prefer to avoid a change in ownership in order to preserve a property’s below-market base year value.

Proposition 13 did not define the term “change in ownership.” The California Supreme Court held that the definition was left to the legislature. One area that has confused tax planners since the inception of Proposition 13 is planning transfers involving real property owned by a legal entity (such as a corporation, limited liability company, or partnership). Until Ocean Avenue, courts tended to rule that in any issue concerning a change in ownership by legal entities, taxpayers lost. That trend ended with Ocean Avenue.

In Ocean Avenue, a Santa Monica hotel was owned by Ocean Avenue LLC. The sole owner of Ocean Avenue LLC decided it wanted to sell the hotel business, including the real property, and listed the hotel for sale. 101 Wilshire LLC, an entity owned by Michael Dell, entered into a purchase and sale agreement for the hotel in July 2006. However, this agreement was canceled, and three new agreements were made.

The new agreements, unlike the original, were not for the hotel but instead purchases of the LLC interests in Ocean Avenue LLC. Through various entities, Susan Lieberman Dell purchased approximately 49 percent of Ocean Avenue LLC, Michael Dell purchased approximately 48 percent, and other investors purchased about 3 percent. After learning of the transaction through a newspaper article and before gaining any other information, the Los Angeles County Assessor reassessed the hotel.

Section 64
The general rule regarding transfers of interests in entities that own real property is found in Revenue and Taxation Code Section 64(a), which states that the transfer of legal entity interests is not a transfer of the real property of the entity. There are two main exceptions to this general rule: 1) if a person acquires over 50 percent, directly or indirectly, of the entity interests in a legal entity; and 2) if a prior proportional interest transfer occurred that was exempt from reassessment under Section 62(a)(2), then the cumulative transfer of over 50 percent of the original coowners’ interests in the legal entity would cause a change in ownership. Only the first exception, the acquisition of over 50 percent of the interests found in Section 64(c), could apply to Ocean Avenue LLC. For legal entities such as partnerships and LLCs, a person must acquire over 50 percent of both the capital and profits interests in the entity for a Section 64(c) change in ownership to occur.

The assessor, in arguing for a change in ownership, contended that 1) the acquisition of 100 percent of an LLC by new owners is a change in ownership under Proposition 13 and the California Constitution, 2) that Michael Dell acquired over 50 percent of the capital and profits interests in Ocean Avenue LLC, 3) Michael Dell controlled over 50 percent of the capital and profits interests in Ocean Avenue LLC, 4) an equitable conversion occurred upon the signing of the original purchase and sale agreement, and 5) substance over form should apply.

The court of appeal rejected all of the assessor’s arguments and reversed the change in ownership. The court first noted that the assessor’s argument that a Section 64(c) change in ownership occurred failed because the assessor never did the math. The court applied a straightforward “multiply through” test to determine the ownership interests in Ocean Avenue LLC. When multiplying ownership interests through entities to determine indirect ownership in Ocean Avenue LLC, the court concluded that Susan Dell acquired approximately 49 percent of Ocean Avenue LLC, Michael Dell acquired slightly over 48 percent, and others acquired approximately 3 percent. The court, as provided for in the underlying property tax regulations, did not attribute ownership interests between individuals.

The court then determined that an equitable conversion did not occur when the original purchase and sale agreement was signed because the contract was still contingent. The court further determined that even if an equitable conversion did occur, the equitable conversion would not trigger a change in ownership because the general change in ownership test under Section 60 would not have been satisfied.

Next, the court rejected the assessor’s argument concerning substance over form. The court stated that the case was a California property tax case, not a federal income tax case, which meant that the federal concept of substance over form was not controlling. The court continued by stating that the assessor and the Assessment Appeals Board (AAB) were bound by the property tax rules, one of which is specifically on point, and therefore the AAB and the assessor could not assess a property in violation of the rule by relying on an equiv.
table federal tax concept.

The specific rule to which the court was presumably referring to is Rule 462.180. Example 7 of this rule states: “Spouses H and W acquire as community property from the current owners, who are not original co-owners, 100% of the capital and profits interests in an LLC which owns Blackacre. Each of H and W is treated as acquiring 50 percent of the ownership interests as defined in subdivision (c) and Revenue and Taxation Code Section 64(a). No change in control of the LLC; no change in ownership of Blackacre.”

The factual scenario in Example 7 is almost exactly the same as the facts in *Ocean Avenue LLC* and thus was controlling.

Finally, the court addressed the assessor’s constitutional argument and made three findings. First, the court noted that the assessor was bound by the property tax rules and it erred when it did not follow them (presumably Example 7 of Rule 462.180). Second, the court noted that Section 64(a) could not unconstitutionally define “change in ownership” because Proposition 13 left it to the legislature to define the term. Third, the court held that the assessor was not permitted to reassess the hotel on the theory that the legislation or regulation in question is unconstitutional without first following the procedures of filing a declaratory relief action as outlined in Section 538.

The decision in *Ocean Avenue LLC* clarified numerous issues common in real estate transactions. First, the court’s rejection of the assessor’s equitable conversion theory led to a huge sigh of relief in the real estate industry. The AAB determined that a change in ownership occurred upon the signing of a purchase and sale agreement because there was an equitable conversion at that time. If that decision held as the rule of law, taxpayers that entered escrow risked losing their property tax base year value even if the property did not sell, because under the AAB’s decision, every signing of a purchase and sale agreement, whether or not it closed, would trigger a reassessment. Thus, taxpayers would have had to take great care in selecting potential buyers because the would-be seller would be saddled with increased property taxes if the deal fell through.

Second, in the property tax area, there had been some debate as to how to properly calculate indirect ownership interests in an asset-owning entity when the ownership structure includes multiple tiers of legal entities. Before *Ocean Avenue*, tax planners often worried that ownership interests would somehow be attributed to a person, as the assessor argued for in *Ocean Avenue*, in order to trigger a Section 64(c) change in ownership. The court’s application of a straightforward multiply-through method of determining ownership interests with no attribution can now be relied upon by taxpayers when planning transactions in order to avoid triggering a Section 64(c) change in ownership.

Further, the court’s rejection of the assessor’s constitutional argument will create more confidence among tax planners when structuring a transaction that follows a statute or regulation. Finally, the court’s determination that the assessor was not permitted to raise the constitutional theory without complying with Section 538 makes clear that taxpayers will not have to front litigation costs when assessors do not follow the law.

**Ardmore Leads to Confusion**

Unfortunately, the clarity gained in *Ocean Avenue LLC* was taken away in the case of *Ardmore*. In that case, BA Realty, LLP, owned 926 North Ardmore Avenue, LLC, which owned real property in the county of Los Angeles. In 2008, the owners of BA Realty sold 90 percent of their partnership interests, causing a Section 64(d) change in ownership for property tax purposes. The county of Los Angeles argued that a property tax change in ownership constituted realty sold for the documentary transfer tax and imposed a documentary transfer tax on the transaction.

The state documentary transfer tax scheme
allows local governments to impose on “each deed, instrument, or writing by which land, tenements, or other realty sold within the county shall be granted, assigned, transferred, or otherwise conveyed to, or vested in” another. 

“A transfer tax attaches to the privilege of exercising one of the incidents of property ownership, its conveyance.” It is an excise tax rather than a property tax and “cannot have the effect of imposing an increasing burden on property ownership, as do escalating ad valorem property tax rates and inflationary increases in assessed valuation.”

A transfer tax is a one-time burden imposed solely on the privilege of disposing of property and realizing its actual (rather than paper) value. It comes from the old federal stamp tax, which was imposed for the privilege of recording documents.

Generally, the documentary transfer tax is thought of as an excise tax for the privilege of recording a document that transfers realty. The only penalty for failing to pay the tax is the inability to record the transfer document. The court in Ardmore focused on 1) recent amendments to reporting statutes that permit county assessors to share change-in-ownership statements with county recorders, and 2) two cases: Thrifty Corporation v. County of Los Angeles and McDonald’s Corporation v. Board of Supervisors.

Because the court never seemed to grasp or discuss the difference between a property tax and an excise tax, the court misinterpreted both Thrifty and McDonald’s. In Thrifty and McDonald’s, the taxpayers actually recorded leases. The issue was whether the recorded documents transferred realty. Only after a document was actually recorded did the court look to rules from the property tax change in ownership area to determine if the recorded documents transferred realty.

The Ardmore case also brings confusion to the application of Section 11925, which states that the documentary transfer tax does not apply to transfers of partnership interests, or interests in legal entities that are taxed as partnerships, unless there is a technical termination of the partnership under the IRC. In Ardmore, a single member LLC (which is disregarded for federal income tax purposes) owned real property. A transfer of partnership interests at the level above the single-member LLC triggered a change in ownership of the underlying property. The county asserted that the transfer also triggered the imposition of the documentary transfer tax.

The court stated, in summary, that the documentary transfer tax applies to transfers of interests in legal entities pursuant to Section 11911 if the transfer results in a “change of ownership” under Section 64 (c) or (d). However, if title to realty is held by a partnership entity, a transfer of interest in the partnership entity is taxable only if the transfer results in termination within the meaning of 26 USC Section 708, which generally applies when more than 50 percent of the partnership entity’s interests are transferred within a 12-month period.

First, the court failed to fully explain how a single-member LLC, which is disregarded for federal income tax purposes, and thus is treated as a division of the partnership, did not meet the partnership exemption. Second, the court limited Section 11925 in such a way to cause absurd outcomes. For example, assume an LLC owns real property. Individual A owns 50 percent of the LLC and Individual B owns 50 percent. If A acquires a 1 percent interest in the LLC from B (so the ownership of the LLC is now 51 percent A and 49 percent B), there is a property tax change in ownership pursuant to Section 64(c) because A acquired over 50 percent of the ownership of the LLC. But there is no documentary transfer tax due because the transfer of LLC interests (in which the LLC is taxed like a partnership) is not subject to the documentary transfer tax under Section 11925.

Alternatively, assume a partnership owns 100 percent of the LLC (which owns real property). A owns 50 percent of the partnership, and B owns 50 percent. If A acquires a
1 percent interest in the partnership from B, there is a Section 64(c) property tax change in ownership because A indirectly acquired over 50 percent of the LLC. However, under Ardmore, because the LLC is a disregarded entity, there is a documentary transfer tax due on this transaction.

This outcome does not make sense and evidences a major flaw in the Ardmore court’s reasoning. How can a transfer of a legal entity (taxed like a partnership) interest, which is exempt under Section 11925, not trigger a change in ownership in the first example and yet the transfer of a partnership interest in the second example (which is another step removed from the real property) trigger a documentary transfer tax? The additional fact that in neither example did the real property transfer (the LLC continues to own the property in both instances) leads to further confusion regarding how an excise tax for the privilege of selling property could apply to such entity interest transfers. Therefore, under Ardmore, not all Section 64(c) and Section 64(d) property tax change in ownerships will result in transfer tax. The Ardmore decision is the perfect recipe for confusion.

The Ocean Avenue case provided clarity into the muddled property tax legal entity change in ownership law. Unfortunately, just months later, the court in Ardmore created confusion in the legal entity documentary transfer tax area that may take a long time to sort out. The Ardmore court’s insistence on relying upon Section 64(c) and (d) change in ownership rules in regards to the application of the documentary transfer tax while still applying Section 11925 leads to absurd results and a mess for tax practitioners.

2 In some instances in which the property has declined in value, triggering a change in ownership could be a planning opportunity to lock in a new lower base year value.
4 See generally Title Ins. & Trust Co. v. County of Riverside, 48 Cal. 3d 84 (1989); Twentieth Century Fox Corp. v. County of Los Angeles, 223 Cal. App. 3d 1158 (1990); Kraft, Inc. v. County of Orange, 219 Cal. App. 3d 1104 (1990).
5 Rev. & Tax Code §64(a).
6 Rev. & Tax Code §64(c).
7 Rev. & Tax Code §64(d).
10 Id.
12 Under Section 60, a change in ownership occurs when there is a transfer of 1) a present interest, 2) including the beneficial use thereof, 3) which is substantially equivalent to the fee. As of the signing of the original purchase and sale agreement between Ocean Avenue LLC and 101 Wilshire LLC, Ocean Avenue LLC retained the present interest in the hotel, retained all income from the hotel, and still remained fee owner.
13 Ocean Avenue LLC, 227 Cal. App. 4th at 352.
14 Id. at 354.
15 Id.
16 Section 538 states that if an assessor believes a statute or regulation is unconstitutional then it must not assess a property in violation of the statute or regulation but must instead file a declaratory relief action against the State Board of Equalization.
18 At the time of writing this article, counsel for Ardmore filed a petition for review with the California Supreme Court.
19 REV. & TAX CODE §11911(a).
21 Id. (citations omitted).
24 REV. & TAX CODE §11933.
26 For federal tax purposes, there is a deemed transfer of the partnership’s real property when a technical termination occurs under the I.R.C.
28 Id.
California’s Sustainable Groundwater Management Act provides a comprehensive set of tools for local agencies to implement groundwater management plans

California has one of the largest and most complex water systems in the nation. Five hundred and fifteen groundwater basins and subbasins contribute close to 40 percent of the state’s annual water supply in an average year, and during extensive dry or drought years can provide close to 60 percent. Eighty percent of Californians live in areas overlying alluvial groundwater basins, and some communities are entirely reliant on groundwater. Yet, for many years, California and Texas were the only states in the country without groundwater regulation. Texas recently enacted groundwater legislation, and in 2014 the California Legislature approved three bills establishing a framework for the Sustainable Groundwater Management Act (SGMA), which Governor Jerry Brown signed into law. For the first time in its history, California will regulate the extraction of groundwater. Various factors, including the state’s current parched conditions as well as concerns for agriculture, the environment, infrastructure, conservation, and consumer prices, have made statewide regulation politically possible.

California is experiencing a record-breaking drought, with 2013 being the driest year on record. According to a recent study by the University of California at Davis, the California drought is causing the “greatest absolute reduction in water availability for California agriculture ever seen” and will deprive the state’s farmers of 6.6 million acre-feet of surface water or 2.2 trillion gallons, enough to fill 60 million average-sized swimming pools. Although apprehension over California’s prolonged drought and dropping water levels assisted passage of the groundwater legislation, there was strong opposition from elected officials and other agricultural interests representing the Central Valley farm belt, including the California Farm Bureau Federation. This is not surprising since farmers in California consume approximately 80 percent of the state’s water.

Central Valley agricultural production is among the highest in the nation, and the new legislation raised concerns about the costs of producing water and consequently consumer prices and whether the new regulation will force some growers to abandon farming. Paul Wenger, president of the California Farm Bureau Federation, said the bills “may come to be seen as ‘historic’ for all the wrong reasons” by drastically harming food production.

Conversely, the bill was supported by a wide array of interests, from environmentalists to urban water suppliers. These interests applaud the legislation, predicting it will encourage farmers to take steps to be as efficient as possible by adopting drip irrigation.

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organic management methods, and other water-saving practices. These interests hope to correct the existing system, which even during a time of drought, allowed the unregulated production of the state’s most water-intensive crops.

The unregulated system incentivized a “race to the pumping house” in which farmers drill new groundwater wells to maximize their water rights. One observer in the Central Valley was stunned by the large number of well rigs he would see on his daily commute to work. In his Central Valley community, there is a one- to two-year wait for a water well crew. Supporters of the groundwater legislation argue that in these instances, when self-regulation is not working and the incentive to pump more controls, it is precisely the role of government to regulate groundwater production.

For over a century, California water law has largely provided for the management of groundwater through the judicial system. While the State Water Resources Control Board (State Water Board) regulates surface water appropriations initiated after 1914, there is no comprehensive statewide management system for groundwater. As a result, since there has been only scattered tracking of groundwater production, many overlying landowners have been free to pump as much water from their land as they can extract.

Consequently, groundwater pumping is causing land in the Central Valley to sink as emptied aquifers collapse. A 1,200 square-mile area in the western San Joaquin Valley sank by as much as 21 inches between 2008 and 2010, according to a recent study by the U.S. Geological Survey. According to the same study, subsidence is threatening critical water transportation canals. The groundwater level in the San Bernardino area is at its lowest point in recorded history. The reduction of groundwater levels in this area is an issue not only for the City of San Bernardino but also for many other cities that depend on this basin for much of their water supply, including Redlands, Highland, Loma Linda, Rialto, Colton, and Riverside. Imported water supplies also are at extremely low levels due to the drought and environmental constraints in the Bay-Delta—i.e., restrictions afforded under the Endangered Species Act for the Delta Smelt, Chinook Salmon, and other protected species.

The Sustainable Groundwater Management Act

The SGMA is set forth in three bills: SB 1168 instructs local agencies to create management plans, AB 1739 establishes when the state can intervene if the local authorities do not satisfactorily comply with the legislative directives, and SB 1319 works together with AB 1739 to establish new authority for the State Water Board.

Prior to the SGMA, groundwater rights disputes within the state, particularly in Southern California, were adjudicated by a court. In most adjudications, the court quantifies the water rights of the parties by awarding water users an annual base groundwater production right or a percentage of the basin’s safe yield. The court then retains continuing jurisdiction and appoints a watermaster to manage the basin and implement a “physical solution,” which entails the use of supplemental imported surface water supplies, typically from the California State Water Project or the Colorado River, to offset the effects of cutbacks under the judgment and replenish the groundwater basin. Parties who exceed their annual allotment under the court’s judgment are assessed a fee to cover the cost of importing supplemental water to replenish the groundwater basin.

With the availability of supplemental water from the State Water Project, this regime proved to be quite successful in managing groundwater in Southern California. However, California’s water crisis has reduced water supply levels to record lows, creating the stage for new groundwater legislation in unadjudicated basins.

Department of Water Resources

Under the new legislation, the Department of Water Resources (DWR) must designate each groundwater basin within the state as high, medium, low, or very low priority no later than January 31, 2015. In prioritizing the basins and subbasins, the DWR must consider 1) the population overlying the basin or subbasin, 2) the rate of current and projected growth of the population overlying the basin or subbasin, 3) the number of public supply wells that draw from the basin or subbasin, 4) the total number of wells that draw from the basin or subbasin, 5) the irrigated acreage overlying the basin or subbasin, 6) the degree to which persons overlying the basin or subbasin rely on groundwater as their primary source of water, 7) any documented impacts on the groundwater within the basin or subbasin—including overdraft, subsidence, saline intrusion, and other water quality degradation, and 8) any other information determined to be relevant by the department, including adverse impacts on local habitat and local streamflows.

The DWR must also release a report by December 31, 2016, setting forth the DWR’s best estimate of water available for the replenishment of groundwater in the state. Additionally, the DWR must publish best management practices for sustainable management of groundwater by January 1, 2017. Only high- and medium-priority basins will be subject to sustainable groundwater management mandates. If the DWR later elevates a low- or very-low-priority basin to medium or high priority, that basin will have to establish a groundwater sustainability agency within two years and adopt a groundwater sustainability plan within five.

Next, the DWR must develop two sets of emergency regulations to govern how the DWR and local groundwater agencies interact. Since the legislation allows local agencies to request basin-boundary revisions, it tasks the DWR with adopting regulations that detail the substance and process of boundary review by January 1, 2016. Additionally, by June 1, 2016, the DWR must adopt regulations for evaluating groundwater sustainability plans, their implementation, and coordination agreements among local agencies for groundwater sustainability planning. By December 31, 2016, the DWR must publish its best estimate of how much water is available for groundwater replenishment in the state. By January 1, 2017, the DWR has to request basin-boundary revisions, it tasks the DWR with adopting regulations that detail the substance and process of boundary review by January 1, 2016. Additionally, by June 1, 2016, the DWR must adopt regulations for evaluating groundwater sustainability plans, their implementation, and coordination agreements among local agencies for groundwater sustainability planning. By December 31, 2016, the DWR must publish its best estimate of how much water is available for groundwater replenishment in the state. By January 1, 2017, the DWR has to publish best management practices for sustainable groundwater management. These deadlines are all front-loaded, with the actions of the DWR occurring before local agency action deadlines come due; however, the legislation imposes other deadlines on the DWR that are keyed to specific local agency actions instead of to absolute dates. For example, the DWR must evaluate and issue an assessment of each groundwater sustainability plan within two years of the date a local agency submits it, then review plans and plan alternatives at least every five years.

Groundwater Sustainability Agencies

The SGMA calls for the creation of new agencies that will have vast authority to evaluate the condition of their water basins, create sustainability plans consistent with the act’s goals, regulate groundwater extractions, and impose fees for groundwater management. Specifically, SB 1168 allows a local agency, defined as “a local public agency that has water supply, water management, or land use responsibilities within a groundwater basin,” to elect to be a Groundwater Sustainability Agency (GSA). A single agency may serve as a GSA, or a combination of local agencies may form a GSA using a joint powers agreement or memorandum of agreement. Local agencies have until January 1, 2017, to elect to become or form a GSA.

Thereafter, each GSA has until either 2020 or 2022 to establish and adopt a groundwater sustainability plan consistent with the requirements of SB 1168. All plans must provide a roadmap to groundwater sustainability by 2040. GSAs that have established sustainability plans in compliance with SB
1168 will have broad groundwater management powers. Among other things, GSAs are empowered to:

- Require groundwater well registration, measurement of groundwater extractions, and the filing of annual extraction reports.
- Regulate groundwater extractions by imposing well spacing requirements, limiting extractions, and establishing extraction allocations.
- Investigate and determine the sustainable yield of a groundwater basin.
- Require wells to be separated by sufficient distance to prevent well interference.
- Impose fees for groundwater management.
- Enforce the terms of a groundwater sustainability plan.

Groundwater Sustainability Plans

The SGMA is aimed at providing local agencies with the tools to manage groundwater basins in a manner that is sustainable over the long term. Indeed, as the bills moved through the legislature, there was much discussion defining the term “sustainable.” Previously, a landowner could essentially withdraw a safe yield or “the maximum quantity of water that can be withdrawn annually from a groundwater basin without causing an undesirable result.” 37 The approach developed by the legislation requires local agencies to maintain “safe yield” of the basin as defined by existing case law, in addition to considering the economic, social, and environmental effects of limiting groundwater extractions to the safe yield of the basin.

The legislation requires each GSA to develop groundwater sustainability plans, and each plan must meet statewide standards in addition to being adapted for local characteristics. Groundwater basins that are already in a state of overdraft are required to develop groundwater sustainability plans by 2020 that would enable the basins to reach a state of sustainable yield by 2040. Most of the remaining non-overdrafted basins will need to develop plans by 2022.

The groundwater sustainability plan of each GSA must include measurable objectives to achieve the sustainability goal in the basin within 20 years of implementation. SB 1168 defines this “sustainability goal” as the implementation of one or more groundwater sustainability plans that will ensure the applicable basin is operated within the sustainable yield.

SB 1168 defines “sustainable yield” as the maximum quantity of water that can be withdrawn over a period of years without causing an undesirable result. An “undesirable result” under the legislation means one or more of the following effects caused by groundwater conditions occurring throughout the basin: 1) chronic lowering of groundwater levels, 2) significant and unreasonable reduction of groundwater storage, 3) significant and unreasonable seawater intrusion, 4) significant and unreasonable degraded water quality, 5) significant and unreasonable land subsidence that substantially interferes with surface land uses, or 6) depletions of interconnected surface waters that have significant and unreasonable adverse impacts on beneficial uses of the surface water. Undesirable results include chronic lowering of groundwater levels, land subsidence, groundwater storage reduction, and other groundwater conditions adversely impacting the beneficial use of water.

Each sustainability plan must:
- Include monitoring and management for the basin over a 50-year planning horizon.
- Articulate measurable objectives to be achieved every five years.
- Establish incremental milestones every five years in order to achieve the sustainability goals identified in the plan within 20 years.

The DWR will review the plans and have the power to request changes to a submitted plan. The DWR may grant GSAs extensions to achieve sustainability for up to 10 years upon a request and a showing of good cause. Within 20 years of the date a groundwater sustainability plan is implemented, a basin is supposed to achieve sustainability by operating within the basin’s sustainable yield. 39 However, the DWR can give up to two five-year extensions to meet this goal.

Notably, the development of groundwater sustainability plans is exempt from the requirements of the California Environmental Quality Act (CEQA), which requires state and local government agencies to inform decision makers and the public about the potential environmental effects of proposed projects and to reduce those environmental impacts to the extent feasible. For example, under CEQA, if a project may cause adverse environmental impacts, the public agency must prepare a detailed Environmental Impact Report that contains in-depth studies of potential impacts, measures to reduce or avoid those impacts, and an analysis of alternatives to the project. The SGMA’s exemption from CEQA will likely save many months in

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out it, groundwater sustainability plans would likely be tied up in court for years. However, others argue this deferential standard will encourage litigation, as water users seek to protect their water rights in court instead of relying on the discretion and deferential standard afforded GSAs.

**Intervention by the State**

While the SGMA provides local agencies with broad authority to implement the goals of the act, if local agencies fail to act, the State Water Board has the authority to do so.

Governor Brown insisted that the State Water Board must be able to intervene when 1) no local agency is willing to serve as a groundwater sustainability agency, 2) the groundwater sustainability agency does not complete a groundwater sustainability plan in a timely fashion, 3) the groundwater sustainability plan is inadequate, and remains so after a review by the DWR and efforts to cure the deficiencies are unsuccessful, or 4) the groundwater sustainability plan is being implemented and simply does not work.46

Although there has been general agreement to this set of conditions, the objections asserted on the house floor were mostly to the standards that the State Water Board will use to intervene in what the legislation terms a “probationary basin” and that the State Water Board may adopt its own interim plan for regulating groundwater extractions. A late amendment to the act addresses these concerns by preventing state intervention in areas that are engaged in sustainable groundwater management.47 In other words, it limits the State Water Board’s authority to those areas that have taken deliberate actions (or inaction) to thwart groundwater management.

**State Water Board**

AB 1739 and SB 1319 establish new regulatory authority for the State Water Board. Specifically, these bills allow the State Water Board to designate groundwater basins as probationary basins under certain circumstances. Once designated probationary, the State Water Board may adopt its own interim plan for regulating groundwater extractions. The bills allow the State Water Board to designate a basin as probationary if 1) after June 30, 2017, no local agency has elected to be a GSA, 2) after January 31, 2020, any high- or medium-priority basin in a critical condition of overdraft has not adopted a GSA for the entire basin, 3) after January 31, 2020, for any high- or medium-priority basin in a critical condition of overdraft, the DWR and the State Water Board determine that a sustainability plan is inadequate or a groundwater sustainability program is not being implemented in a manner that is likely to achieve the sustainability goal, 4) after January 31, 2022, any high- or medium-priority basin that is not subject to critical conditions of overdraft, has not adopted a GSA for the entire basin, 5) after January 31, 2022, for any high- or medium-priority basin that is not subject to critical conditions of overdraft, the DWR and the State Water Board have determined that a sustainability plan is inadequate and the State Water Board determines that a basin is in a condition of long-term overdraft, or 6) after January 31, 2025, the DWR and the State Water Board determine that a GSA is inadequate and the State Water Board determines that the basin is in a condition in which groundwater extractions result in significant depletions of interconnected surface waters.

If the State Water Board establishes an interim plan for a probationary basin, the interim plan must identify actions necessary to correct conditions of long-term overdraft or a condition in which extractions result in significant depletions of interconnected surface waters. The interim plan must also set a time schedule for the actions to be taken, as well as a description of the necessary monitoring. In addition, the plan may include restrictions on groundwater extraction, a physical solution, and principles for the administration of rights to surface water connected to the basin.

The legislation exempts basins deemed by the DWR to be low priority.48 The legislation further exempts adjudicated groundwater basins that are managed by the courts. Some groundwater basins, mostly in Southern California, have gone through the courts to adjudicate water rights and set pumping limits. Those basins are also exempted from the bill. As a general matter, groundwater basins that have already been adjudicated (chiefly in Southern California) or those agencies that have ongoing and successful groundwater management programs will only need to provide annual reports to the DWR demonstrating that the groundwater basin is being managed in a manner that is consistent with the long-term sustainable yield.

**Implementation and Its Future Challenges**

Even assuming every condition is satisfied and every deadline is met, obtaining sustainable groundwater management in California under the SGMA will be a complex and lengthy process. Because it will take years to craft and implement the management plans, the full effect of the regulations and the recovery of severely overpumped basins will not be felt for many years to come.

The SGMA makes clear that nothing in the legislation “determines or alters surface water rights or groundwater rights under common law or any provision of law that determines or grants surface water rights.”49 Consequently, the new legislation confirms the legislature’s intent to respect existing water rights and its unwillingness to change the current water right priority system. Still, GSAs are vested with broad power to implement water right cutbacks, limit extractions, and establish extraction allocations. Under existing law, senior priority water rights holders are generally not required to reduce extractions or incur significant expense for the benefit of lower-priority water rights holders. It is therefore unclear how GSAs will exercise their water right allocation authority or how groundwater sustainability plans will be developed in areas in which water rights priorities are contested or the equities of a proposed management plan are in conflict. It is also unclear how the burden of water right cutbacks will be allocated or how the cost of pumping assessments to fund necessary basin replenishment and other management objectives will be achieved.

There are decades of court cases that have developed common laws governing groundwater rights in the absence of regulation, and it will be difficult to implement the new law in a way that is consistent with those groundwater rights. Landowners overlying groundwater basins have a right to pump water beneath their lands. Appropriators, prescriptive right holders, and others may also possess senior rights to utilize the groundwater basin for reasonable and beneficial use. The courts have developed a system for allocating groundwater supplies among users when water is scarce. If one party feels that the new groundwater sustainability plans do not appropriately respect the priority system recognized by the courts, that party could bring suit. This action in turn could trigger a court adjudication of all the rights to groundwater in a particular basin.

Optimistically, the planning process, which is participatory and broad-based, will reduce litigation, but, realistically, when some pumpers are faced with either reducing pumping or paying substantially more for what they pump, litigation will likely ensue. While litigation is costly and time-consuming, landowners and other water right holders appreciate that the adjudication process provides clarity regarding their water rights. Similarly situated water right holders may accordingly pool together to share litigation costs, preferring to have a court judgment protect their water rights instead of leaving their fate to the discretion of a GSA and the substantial deference standard provided GSA determinations under the new legislation.

Indeed, with the protection afforded water rights by a court judgment, water right holders may potentially assert that any action by the GSA undermining their water rights con-
stitutes a taking of private property requiring compensation. Courts have held that water rights are rights in real property and, as such, cannot be infringed by others or taken by government action without due process and just compensation.\(^{50}\)

On the other hand, preventing the State Water Board from stepping in and imposing its own plan is a strong incentive to motivate parties to cooperate with a GSA. While the threat of state involvement may provide local interests with incentives to develop a local solution to avoid state regulation, areas unable to reach an agreement on a local level may choose litigation, preferring the courts to protect their water rights as opposed to subjecting themselves to the ongoing fees, regulation, and management plans from the state or a GSA.\(^{51}\)

In addition, the bills contemplate the creation of new GSAs and the sharing of basin management pursuant to a joint powers agreement, memorandum of agreement, or other legal agreement. However, there initially may be disputes over which local agencies should serve as the designated GSA. Indeed, many of the potential agencies likely to serve as GSAs may very well have water rights in dispute.

The Future

Although historic and comprehensive, passing the SGMA may prove relatively easy compared with the hard work of managing California’s groundwater in a sustainable fashion. It is a daunting task to create new local management agencies that must develop sustainability plans addressing competing claims to water while also protecting vested rights, limiting rights, and equally balancing competing social, economic, and environmental interests.

A one-size-fits-all approach will not work, and for that reason, a uniform sustainability plan will not work throughout the state. Plans will differ depending on whether a basin is in overdraft or not, whether the basin is located in an urban or agricultural area, or inland or coastal, as well as various other factors.

The effect of these bills may lead to an increase in groundwater adjudications, which historically have provided valuable water right certainty to stakeholders as well as a comprehensive and effective means for managing basins. Nevertheless, groundwater adjudications involve complex technical and legal issues, requiring substantial resources and a significant number of years to complete.

Cognizant of the SGMA’s potential to increase litigation over water rights, there are efforts underway by the legislature to develop a streamlined adjudication procedure to expedite the water rights litigation process.\(^{52}\) In addition, the Senate Committee on Natural Resources and Water is sponsoring informational hearings on potential adjudication reforms.\(^{53}\)

GSAs will be afforded vast powers under the new legislation. To minimize conflicts and litigation, these GSAs must exercise their new authority in a manner that balances the environmental and economic consequences of overutilizing groundwater while still respecting vested water rights. The new GSAs must also consider how to protect the agriculturally rich Central Valley without significantly adverse consequences to farming operations and food prices, and, at the same time, promote the development of new water supplies, reduce drought vulnerability, and improve water quality and water supply reliability.

Hopefully, funds from Proposition 1, the $7.5 billion water bond approved by voters in November 2014, will assist in achieving these goals. The bond water is expected to provide technical and financial assistance to local agencies, many of which are challenged to meet the ongoing demands of providing water service during a time of drought, together with the cost of developing and implementing a comprehensive sustainability plan.\(^{54}\) Many provisions in Proposition 1 are designed to increase the availability of water. The bond calls for building new reservoirs, investing in conservation measures, groundwater recharge, and groundwater cleanup.\(^{55}\) Proposition 1 also includes $100 million to fund planning in medium- and high-priority groundwater basins.\(^{56}\)

Although many challenges lie ahead, particularly if the record-breaking drought continues, it is hoped that the substantial funding from the water bond, together with the requirements set forth in the SGMA, will place California on track for ensuring a long-term reliable water supply for the more than 50,000,000 acres of prime farmland and over 38 million people that rely on California’s complex and interconnected water system.\(^{57}\)

2. See Groundwater, supra note 1.
4. A “groundwater basin” is defined as an area underlain by permeable materials capable of furnishing a significant supply of groundwater to wells or storing a significant amount of water. A groundwater basin is three-dimensional and includes both the surface extent and all of the subsurface fresh water yielding material. See generally http://www.mojawater.org/groundwater-basins.html
6. Id.
12. Id.
13. Id.
17. Id.
18. See Freeman, supra note 7. (According to the recent study by the University of California at Davis, which concludes that the total statewide cost of the 2014 drought will be $2.2 billion, farmers are making up for some of this lost water by pumping as much groundwater as they can tap into, which will diminish the state’s ability to withstand future droughts. HOWITT, supra note 8, at 2-3.)
19. WATER CODE §1200.
22. Id.
24. Id.
27. "Safe yield" is defined as “The annual amount of water that can be taken from a source of supply over a period of years without depleting that source beyond its ability to be replenished naturally in ‘wet years.'” See http://www.ecomill.com/dictionary/safe-yield.

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The DWR defines “overdraft” as “the condition of a ground water basin in which the amount of water withdrawn by pumping over the long term exceeds the amount of water that recharges the basin. Overdraft is characterized by groundwater levels that decline over a period of years and never fully recover, even in wet years.” DWR, BULLETIN 118, CALIFORNIA’S GROUND-WATER 29 (Oct. 2003), available at http://www.water.ca.gov/pubs/groundwater/bulletin_118/california’s_groundwater_bulletin_118_update_2003_bulletin118_entire.pdf.

WATER CODE §10933 (SB 1168).

WATER CODE §10722.4.

WATER CODE §10722.2.

WATER CODE §10733.2.

WATER CODE §§10733.4(d), 10733.8.

If an area overlying a groundwater basin that is not within the management area of a GSA, the county within which the unmanaged area lies will be presumed to be the GSA for that area, unless the county opts out.

WATER CODE §10727.2 (SB 1168).

City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199 (1975); City of Los Angeles v. City of Glendale, 23 Cal. 2d 68 (1943).

City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199 (1975).

WATER CODE §10727.2(b).

WATER CODE §10727.2(b)(3).

PUBL. RES. CODE §§21000 et seq.

WATER CODE §10723.2.

Id.

WATER CODE §10726.6(e) (SB 1168); CODE CIV. PROC. §1085.

Id.

Brown, supra note 5.

WATER CODE §10735.2(e).

WATER CODE §§10720.7(b), 10730.1(b).

WATER CODE §10720.5 (SB 1168).


Assembly member Jim Patterson said the legislation did not adequately protect local interests because the state can step in to enforce regulation. “There’s really going to be a wrestling match over who’s going to get the water.” See http://www.latimes.com/local/political/la-me-pc-groundwater-regulation-bills-20140916-story.html.


Id.


Id.


IN RECENT YEARS, virtually every aspect of food product labeling—from representations about “all natural” ingredients, to health benefit claims, to the content of nutrient and calorie listings—has come under scrutiny. Food manufacturers are facing heightened scrutiny from government regulators, who are initiating increasing numbers of enforcement actions. At the same time, consumer groups and plaintiffs’ attorneys are filing new food labeling lawsuits (primarily class actions) at unprecedented rates. In some jurisdictions—particularly in California—barely a day goes by without a new filing or a new ruling in a case based upon allegedly false or misleading food marketing claims.

Food companies trying to navigate this new wave of litigation face several challenges. First, food labeling cases are being decided against a backdrop of an unsettled regulatory framework. Litigation often tends to focus on areas in which little or no statutory or regulatory guidance exists about what types of advertising and marketing claims may be made. For example, no FDA regulations specifically define “natural” or “all natural” as those terms are used in food product marketing. The FDA has consistently declined to engage in formal rule making to define the terms, citing “resource limitations and other agency priorities.”\(^1\) Plaintiffs and consumer groups have stampeded into this regulatory void, filing food labeling lawsuits involving the terms “natural” and “all natural” as applied to products ranging from yogurt to pasta.\(^2\) These cases are based upon allegations that, notwithstanding labels using those terms, the products contain ingredients that are synthetic or not naturally occurring in organic foods. In the absence of clear statutory or regulatory definitions, many courts have concluded that lawsuits concerning the terms “natural” and “all natural” are not preempted and have allowed the suits to move forward, provided that plaintiffs meet the normal requirements of pleading and proof.

Second, food labeling lawsuits are increasingly based upon false advertising theories of liability and are no longer confined to claims involving actual product defects or health and safety risks to consumers. Recent lawsuits based upon foods developed through the use of genetically modified organisms (GMOs) are a prime example. The FDA does not require

by Paul Chan

LIABLE Labels

Consumer groups and regulators are continuing to test new theories against manufacturers over food labels

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a separate labeling regime for food developed using biotechnology, nor does the FDA require that manufacturers make any special disclosures for foods that are the product of genetic engineering. The FDA and the preponderance of scientific studies have concluded that GMO foods do not pose any “different or greater safety concern than foods developed by traditional plant breeding.”

Nevertheless, in recent years many lawsuits have been filed based upon the inclusion of GMOs in food products. Plaintiffs in these cases do not necessarily contend that GMO ingredients raise safety or health risks for consumers. Instead, anti-GMO plaintiffs have contended that product labels touting foods as natural are false because the labels either ignore or do not announce the presence of GMOs. According to the plaintiffs in these suits, safety or health risks are irrelevant; consumers allege they have been harmed because they paid for a product labeled as natural, when they would not have paid the same (or any) price had they known the products contain GMOs. These food labeling lawsuits therefore resemble traditional consumer class actions involving wholly economic false or misleading advertising claims.

Another recent development is that false advertising plaintiffs are no longer necessarily consumers or consumer rights groups. In the recent *POM Wonderful v. Coca-Cola* case, the U.S. Supreme Court held that in certain circumstances, food companies have standing to sue competitors for engaging in false or misleading product labeling under the Lanham Act. Specifically, the Supreme Court held that a business allegedly injured by a competitor’s false or misleading advertising (including through product labeling) can sue under the Lanham Act, even if the competitor’s labels were authorized by the FDA or otherwise complied with the Food, Drug, and Cosmetic Act (FDCA). The Court effectively held that regulatory approval provided the floor, but not the ceiling, with respect to food product marketing claims. It is still uncertain whether this ruling will materially increase the volume of new false labeling lawsuits. What is clear is that food companies launching new marketing campaigns must now be prepared for potential labeling litigation initiated by their corporate competitors, not just consumers or consumer groups.

The types of food consumers have also increased to include not just vegetarians but also vegans, paleos, locavores, raw foodies, and others. These conscientious consumers expect full disclosure, or at least something close to precision, from their food product labels. Meanwhile, in law schools, food law is one of the most popular new areas of legal teaching and scholarship, with a primary focus on the need for increased regulation and the limitations of the existing food labeling regime. This increased attention to food labeling lawsuits has only been amplified by new media.

Numerous Web sites and blogs are now devoted to food safety, ingredients, and labeling. These new media serve as vehicles for communication and coordination among the plaintiffs’ bar, public interest groups, and consumers, creating fertile ground for potential new cases and plaintiffs. It is therefore unlikely that the number or frequency of food labeling lawsuits will relent in the near future. However, a number of strategies and defenses are available to companies attempting to mitigate the risks of or defend against these lawsuits.

Food companies still possess a number of potentially viable defenses to labeling lawsuits, at the pleading stage and in opposing class certification. Defendants have had particular success challenging theories of damages.

**Implausible Pleadings**

The first line of defense for a company responding to a food labeling lawsuit is to challenge the reasonableness, or the plausibility, of the theory of liability set forth in the complaint. Food companies have had measured success at the pleading stage based upon failure to satisfy the plausibility standard. In federal court, plaintiffs pursuing false or misleading food labeling claims must set forth factual allegations sufficient to give rise to at least a plausible entitlement to relief. Complaints must set forth “enough facts to state a claim for relief that is plausible on its face,” meaning factual content sufficient to allow “the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”

Some food labeling complaints have been dismissed because they did not set forth facts that supported an objectively reasonable theory of recovery. For example, courts dismissed lawsuits alleging that Froot Loops and Cap’n Crunch Berries cereals were mislabeled because the products did not, in fact, contain fruit or berries. But most cases do not turn on whether it is plausible to believe that Froot Loops contain fruit. Theories of recovery have become more sophisticated, obtaining mixed results on recent pleading challenges.

A series of decisions by California federal district courts involving “all natural” labeling claims issued in late 2013 and early 2014 illustrate significant disparities (and inconsistency) in outcomes. In two cases, courts ruled the pleadings failed to satisfy the plausibility threshold. In *Kane v. Chobani*, a federal judge in the Northern District of California dismissed an action based upon yogurt labels bearing the words “all natural.” The plaintiff alleged the labels were misleading, because the product was artificially colored with fruit and juice concentrate. The court rejected the allegations because the plaintiff failed to plausibly allege how Chobani’s processing of the juices rendered them unnatural. Similarly, in *Pelayo v. Nestle*, a federal court in the Central District of California dismissed a lawsuit based upon “all natural” marketing claims for a pasta product, in part because the product’s ingredient list clearly set forth its ingredients, leading to the conclusion that no reasonable consumer could be confused.

On the other hand, in labeling cases involving similar theories of liability, different California federal courts rejected motions to dismiss based upon the same implausibility arguments. In *Surzyn v. Diamond Foods, Inc.*, a court in the Central District of California rejected Diamond’s argument that “All Natural” on the label of its tortilla chips would not deceive consumers because other information on the product’s packaging would eliminate any customer confusion. Declining to follow *Pelayo*, the court found that it was not “implausible” that consumers would be misled or confused by the “All Natural” label on the packaging of food containing synthetic ingredients, notwithstanding that the synthetic ingredients were disclosed on the ingredient list. A court in the Northern District of California also refused to dismiss three separate class actions involving the labeling of General Mills granola bars that contained GMOs as “100% natural.” The court found that the plaintiffs had plausibly alleged that the labeling was false and misleading because it could lead consumers to believe the products contained only natural ingredients and not GMOs, and
The FDA sets forth regulations defining the terms “natural” or “all natural” as used in food product marketing.

1. True.
   False.

2. In the POM Wonderful case, the class was not ascertainable since there was no way to distinguish between purchasers who bought the product based upon the challenged health claims and those who bought the products for other reasons.

3. True.
   False.

4. The U.S. Supreme Court held that a business allegedly injured by a commercial rival’s false or misleading advertisements (including product labeling) can file a claim under the Lanham Act, even if the competitor’s labels were authorized by the FDA.

5. True.
   False.

6. Food law is a popular new area of legal teaching.

7. Courts dismissed litigation alleging that Froot Loops and Cap’n Crunch Berries cereals were mislabeled because these cereals did contain fruit and berries.

8. True.
   False.

9. Under federal court pleading requirements, plaintiffs claiming false or misleading food labeling must set forth factual allegations sufficient to give rise to at least a plausible entitlement to relief.

10. True.
    False.

The federal preemption defense may be successful in subject areas in which the FDA is actively engaged in drafting definitions and regulations.

11. True.
    False.

Food companies have had little success in defeating class certification in the majority of cases involving food labeling.

12. True.
    False.

One of the most effective means to defeat a food labeling class certification is to attack the causal link between the alleged misconduct and the alleged damages.

13. True.
    False.

Some class certification cases have been defeated because plaintiffs cannot calculate damages since the consumer has received some benefit from the product.

14. True.
    False.

One possible hurdle in certifying a food labeling class is that the class is not readily ascertainable.

15. True.
    False.

The FDA regulates food based upon the objective characteristics and intended use of the food, as well as the method by which the food is developed.

16. True.
    False.

17. True.
    False.

The FDA and the weight of scientific studies have concluded that genetically engineered food poses a greater safety risk than foods developed by traditional plant breeding.

18. True.
    False.

Because of no clear statutes or regulations on food labeling containing the words “natural” or “all natural,” a large number of lawsuits emerged, claiming that product ingredients were synthetic or not naturally found in organic foods.

19. True.
    False.

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

20. True.
    False.
therefore went beyond mere puffery. And in In Re: Hain Celestial Seasonings Products Consumer Litigation, yet another court in the Central District of California denied a motion to dismiss a complaint based upon the “100 percent natural” labeling of a tea product that contained traces of pesticides, also finding that the label was not mere puffery. These disparate results illustrate the limitations (and uncertainty) of pleading challenges based upon the implausibility standard. The defense should certainly be asserted if it is available, but early dismissals of these cases are by no means assured.

Depending on the advertising claim and food product at issue, defendants may also be able to obtain dismissal (or stay) of false labeling lawsuits by asserting a federal preemption defense. In the food labeling context, the preemption defense has largely focused on the 1990 Nutrition Labeling and Education Act (NLEA), which amended the FDCA and which “prohibit[s] the misbranding of foods.” The NLEA prohibits state regulations that are not identical with its or the FDCA’s requirements. The NLEA, however, specifically regulates only certain aspects of food product labeling. Thus, whether the preemption doctrine provides a viable defense depends entirely on the specifics of the labeling claim alleged to be false and misleading and, in some cases, where on the packaging the challenged claim is located.

For example, food labeling regulations distinguish between what are called principal display panels—where photographs, logos, and marketing terms such as “all-natural” tend to appear, typically on the front of food packaging—and the nutritional labeling, or nutrient content claims that tend to appear on the back. As a general matter, the nutritional content claims that occur on the back of the label are more closely regulated than information that appears on the front. Thus, whether a preemption defense will succeed depends entirely on whether the challenged marketing statement appears on the front of the label, making it less likely to be preempted, or in the nutrient content area, making it more likely to be preempted.

The federal preemption defense may also succeed in subject areas in which the FDA is engaging in rule making. In the first half of 2014, for example, a number of cases targeting the use of the term “evaporated cane juice” instead of “sugar” on product labels were stayed or dismissed because the FDA was engaged in active rule making about that term. However, a food labeling lawsuit will not be found to be preempted simply because it involves a product or an ingredient that is or has been the general subject of a federal regulation or statute. The particular federal statute or regulation at issue must be analyzed to determine whether enforcement of state law claims or regulations would be inconsistent with the federal regulatory scheme or whether preemption applies for another reason.

Class Certification

The primary battle in food labeling litigation is often class certification. Although some classes have been certified, food companies have still been successful in the majority of cases in defeating class certification. One of the most effective means to defeat class certification is to attack the viability of the plaintiffs’ theory of damages. A number of courts have refused to certify classes or have decertified classes because plaintiffs have failed to prove a causal link between the alleged misconduct and the alleged damages. For example, a federal district judge in the Central District of California decertified a class action suit based upon the U.S. Supreme Court’s reasoning in Comcast Corporation v. Behrend, which requires that in determining whether class certification is appropriate, “plaintiffs must be able to show that the damages stem from the defendants’ actions that created the legal liability.” The court discussed the factors that may affect a consumer’s decision to buy a food product—price, taste, nutritional information, or advertising—and concluded it was impossible to determine whether or to what extent a health claim that did not appear on the label was the cause of the purchase. Accordingly, the Court found that the plaintiffs had not established that the claims of the class representatives would be typical of other class members, or that the “defendants’ action that created the legal liability” would be common to the class. Certification was therefore not warranted under the class action requirements set forth in Rule 23 of the Federal Rules of Civil Procedure.

Class certification motions have also been defeated in cases in which plaintiffs are unable to calculate damages because the consumer has received at least some benefit from the product. In a class action filed against the J. M. Smucker Company, based upon its labeling claims touting its product as healthy (although it contained hydrogenated oils and corn syrup), a different federal judge in the Central District of California denied class certification because damages could not be accurately determined for the class. The Court ruled that because class members likely received some benefits from their food purchases, they were not entitled to full refunds of their purchase price. And because plaintiffs failed to present evidence on the difference between the true value of Smucker’s products and the market price, damages could not be accurately determined.

Similar reasoning was applied in the POM Wonderful case, in which the motion to decertify the class was granted in part because the plaintiffs could not articulate a viable theory of damages. One model sought recovery of the full purchase price paid for the products. However, the court noted that that model did not take into account the nutritional benefits that the plaintiffs received from purchasing the product, even if it were the case that the claimed health benefit representations were not true. The plaintiffs alternatively alleged a price premium model of damages, comparing the price of similar products and seeking the difference. The court also rejected that model, determining that unlike other markets, the fruit juice market was not necessarily an efficient market, meaning that price differentials between products were attributable to factors other than challenged health benefit claims, and it was impossible to determine how much, if any, of the price premium was related to the benefit claims. As the court put it, “rather than draw any link between [POM’s] actions and the price difference between the four juice average benchmark price and the average [POM] prices, the [price premium model] simply calculates what the price difference was.”

Finally, courts may refuse to certify food labeling classes because the class is not readily ascertainable. In the POM Wonderful case, millions of consumers purchased the product at issue, but none of them were likely to have kept records of their purchases, and there was no way to distinguish between purchasers who bought the product based upon the challenged health claims and those who bought the products for other reasons. Accordingly, because the class was not “ascertainable,” the motion for decertification was granted.

These recent decisions illustrate the considerable hurdles that still confront plaintiffs seeking to certify classes in food labeling litigation. In seeking to avoid class certification, food companies should focus on whether plaintiffs have truly satisfied their requirements to articulate a viable damages theory, and identify an ascertainable class. There is no indication that food labeling lawsuits will be waning any time soon. Food companies will always have an incentive to make marketing and advertising claims—they move products off shelves. And so long as labeling regulations and statutory definitions fail to keep pace with the expectations of consumers and competitors about what should be disclosed on food labels, food labeling law will continue to be made through the courts. Food companies still possess a number of potentially viable defenses to labeling lawsuits, at the pleading stage and in opposing class certification. Defendants have had particular success challenging theories of dam-
ages. However, until courts develop a sufficient and consistent body of case law delineating what types of food marketing claims are and are not actionable, food companies should expect a steady diet of food labeling litigation.

1 See Letter from Leslie Kux, Assistant Commissioner for Policy, Department of Health and Human Services, FDA (Jan. 6, 2014), doc. 70 in Cox v. Gruma Corp., No. 4:12-cv-06302-VGR (N.D. Cal. Jan. 7, 2014); Hitt v. Arizona Beverage Co., LLC, 2009 WL 449190, at *4 (S. D. Cal. Feb. 4, 2009). The FDA’s informal guidance on the term “natural” is that it means “nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected in the food.”


3 The FDA has chosen to regulate food based upon the “objective characteristics of the food and the intended use of the food,” regardless of “the method by which [the food] is developed.” Statement of Policy: Foods Derived From New Plant Varieties, 57 Fed. Reg. 22,984 (May 29, 1992).

4 57 Fed. Reg. at 22,991. The FDA has expressly declined “to make a determination...regarding whether and under what circumstances food products containing ingredients produced using genetically engineered ingredients may or may not be labeled ‘natural.’”


14 21 U.S.C. §§301 et seq.


26 Id. at *4.


In POM Wonderful LLC v. Coca-Cola Company, the U.S. Supreme Court ruled that one food manufacturer may sue another over FDCA compliant food labels.

In June 2014, in POM Wonderful LLC v. Coca-Cola Company, the U.S. Supreme Court unanimously held that the Federal Food, Drug, and Cosmetic Act (FDCA) does not preclude Lanham Act liability for food and beverage labeling practices that “mislead and trick consumers, all to the injury of competitors....”\(^1\) Compared to previous decisions in which the FDA was found to set the bar for food label requirements and supersede false advertising claims, this decision will provide support for packaging and labeling claims, at least in competitive challenges under the Lanham Act. POM Wonderful serves as a warning to manufacturers and their attorneys that a rise in Lanham Act lawsuits may be expected against food and beverage manufacturers that do not modify their labels as necessary to avoid similar actions. Further, while the Supreme Court’s decision arguably adds some weight to arguments raised by the plaintiffs’ class action bar that the FDCA does not impede their private enforcement actions, defense counsel representing food and beverage manufacturers may be able to rely on the higher bar for certifying class actions to challenge class membership.

POM Wonderful markets a juice labeled Pomegranate Blueberry 100% Juice, which consists entirely of pomegranate and blueberry juices. POM competes in the pomegranate-blueberry juice market with the Coca-Cola Company, which created under its Minute Maid brand a juice blend containing 99.4 percent apple and grape juices, with pomegranate, blueberry, and raspberry juices only accounting for the remaining .6 percent. Despite this minuscule amount of pomegranate and blueberry, which amounts to a teaspoon in a half gallon, Coca-Cola labeled its product “POMEGRANATE BLUEBERRY FLAVORED BLEND OF 5 JUICES,” with the words “Pomegranate Blueberry” in all capital letters on two separate lines above the phrase “Flavored Blend of 5 Juices” all in one line in a much smaller font. The product’s front label also displays a picture of blueberries, grapes, and raspberries in front of a halved pomegranate and a halved apple.

In September 2008, POM sued Coca-Cola, claiming that in violation of the Lanham Act’s false advertising provision, Coca-Cola’s product name and label mislead consumers and caused POM to lose sales. On the eve of trial, the district court granted summary judgment in favor of Coca-Cola, holding that the Lanham Act claim is precluded by FDA

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regulations for labels on flavored-juice blends (with which the Minute Maid label technically complies). The U.S. Court of Appeals for the Ninth Circuit affirmed, holding that “the FDCA and its regulations bar pursuit of both the name and labeling aspect” of that claim because allowing the claim would undermine the FDA’s regulations and expert judgments about how juices may and should be labeled. The U.S. Supreme Court, however, granted certiorari to review the Ninth Circuit’s decision.

The Court unanimously reversed the Ninth Circuit’s decision in a succinct opinion by Justice Anthony Kennedy, who during oral arguments commented to counsel for Coca-Cola: “Don’t make me feel bad because I thought that this was pomegranate juice.” The Court began by discussing the two federal statutes at issue. The first statute, the Lanham Act, enacted by Congress in 1946, permits one competitor to sue another for using “false or misleading” advertising that “misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities.” The second statute, the FDCA, prohibits the misbranding of food and beverages and imposes comprehensive food labeling regulations. The provision of those regulations that was critical in Coca-Cola’s defense against POM provides that if a juice blend does not name all the juices it contains and mentions only juices that are predominant in the blend, then it must either declare the percentage content of the name juice or indicate that that the named juice is present as a “flavor or flavoring.” Unlike the Lanham Act, which is enforced by private suits brought by injured competitors, the FDCA provides the United States with nearly exclusive enforcement authority. And, unlike the Lanham Act, the FDCA preempts state law food labeling requirements that are not identical to those in the FDCA.

The Court, in finding that a private party may bring a claim against a competitor under the Lanham Act that challenges a food label that is regulated by the FDCA, focused on two key factors. First, the Court reasoned that “this is not a pre-emption case” in which state law is preempted by federal statute. In 1990, Congress added to the FDCA a preemption provision as part of the Nutrition Labeling and Education Act. This preemption provision forbids a “State or political subdivision of a State” from imposing requirements that are of the type but “not identical to” corresponding FDCA requirements for food and beverage labeling. The provision does not refer to requirements imposed by other sources of law, such as federal statutes. Rather, this case involves the alleged preclusion by one federal statute of a cause of action available under another federal statute.

Second, the Court determined that there was no conflict between the statutes and “[n]o textual provision in either statute discloses a purpose to bar unfair competition claims like POM’s.” In fact, the two statutes have coexisted for almost 70 years, and Congress has yet to enact a provision addressing the preclusion of other federal laws that might bear on food and beverage labeling, and would have done so if it so intended. And, the two statutes actually complement each other: the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety.

While the Court did not conclude that Congress intended the Lanham Act and the FDCA to actually complement each other, it did conclude that the statutes have separate scopes and purposes. The Court also rejected Coca-Cola’s argument that the FDCA precludes POM’s Lanham Act claim because Congress intended national uniformity in food and beverage labeling. First, the delegation of FDCA enforcement authority to the U.S. Government does not indicate that Congress intended to foreclose private rights of action under other federal statutes. Second, the preemption provision applies only to certain state-law requirements, not to federal law. Third, Lanham Act actions are a means to implement a uniform policy to prohibit unfair competition in all covered markets. Finally, even though the FDCA and its FDA regulations address food and beverage labeling with more specificity than the provisions of the Lanham Act, this is irrelevant because there is no evidence to indicate that both statutes cannot be fully enforced as they are complementary and have separate scopes and purposes.

On a similar basis, the Court found the government’s intermediation position to POM and Coca-Cola—that a Lanham Act claim is precluded to the extent that the FDCA or FDA regulations specifically require or authorize the challenged aspect of the label—to be flawed because the government was operating under the assumption that the FDCA and its regulations are a ceiling on the regulation of food and beverage labeling, when Congress intended the Lanham Act and the FDCA to actually complement each other with respect to food and beverage labeling. In short, the Court reasoned that the FDCA and the FDA regulations are a floor, not a ceiling, on the regulation of food and beverage labeling, and concluded that the FDCA cannot be flawed because the government was operating under the assumption that the FDCA and its regulations are a ceiling on the regulation of food and beverage labeling.

The decision allows POM to pursue its Lanham Act action against Coca-Cola at trial in the Central District of California. Whether POM ultimately prevails will depend on whether it can prove damages—lost sales—were caused by Coca-Cola’s alleged false advertising. While this decision is obviously important to POM, it is also significant for food and beverage manufacturers (and their defense counsel) because it allows for private claims by competitors under the Lanham Act to challenge product labels that are otherwise compliant under the FDA but still mislead consumers. Food and beverage manufacturers should evaluate the broader implications of their labels and modify their labels as necessary to avoid similar competitor actions under the Lanham Act. Otherwise, attorneys can expect a rise in Lanham Act lawsuits and more vigorous litigation between competitors for deceptive labeling.

However, it is important to note that the Supreme Court decision, while articulating a broad vision of the statutes as compatible and complementary, did in passing preserve the possibility that some Lanham Act suits might be precluded by the FDA (i.e., if there is positive regulatory action in the matter by the FDA): “Unlike other types of labels regulated by the FDA, such as drug labels, it would appear the FDA does not preapprove food and beverage labels under its regulations and instead relies on enforcement actions, warning letters, and other measures.” The area of drug labeling was specifically singled out. For example, the Central District of California, in a recent decision involving the content of drug labels, some of which were preapproved by the FDA, noted that this “passage suggests that, at a minimum, the Court might find a Lanham Act claim precluded by the FDA where it turns on the content of a drug label, especially if that drug label were pre-approved by the FDA.”

The Central District still noted, however, that the Supreme Court’s decision established a “general presumption” in favor of “Lanham Act claims [and against preclusion] with regard to FDA-regulated products.”

The POM Wonderful decision may also potentially affect the number and success of class actions arising from consumer product labeling issues. For example, just weeks after the Supreme Court gave POM Wonderful its blessing to pursue the Lanham Act action against Coca Cola, a putative consumer class action lawsuit was filed against Walmart in the Northern District of Florida accusing Walmart of deceiving and misleading consumers by labeling and marketing a juice under its Great
Value brand, comprised predominantly of apple and white grape juice concentrate as “100% Cranberry Pomegranate” with the phrase “Flavored Juice Blend” underneath in much smaller type.24

According to the complaint, Walmart’s Great Value brand juice blend, despite featuring pictures of pomegranates and cranberries on its label and despite being labeled as “100% Pomegranate Juice” actually contains a minuscule amount of pomegranate and cranberry juice.25 Apparently, consumers paid almost a dollar more for this juice—as opposed to just buying Walmart’s “virtually identical” and cheaper Great Value apple juice product—due to the allegedly deceptive label and the nutritional benefits associated with a product that primarily contains pomegranate juice.26

The complaint stresses that the label’s compliance with the letter of the law governing juice labeling in the FDCA is not at issue: “Instead, Plaintiffs’ claims are predicated on the fact that the naming and labeling are misleading and deceptive even if they comply with the minimum requirements set forth by the FDA regulations, as the FDA regulations simply set a ‘floor,’ or ‘minimum’ requirements. Indeed, compliance with the minimum requirements is necessary, but is not sufficient to determine if a product’s label is false and misleading, and simply does not provide a shield from liability.”27

Surprisingly, the complaint against Walmart cites Wyeth v. Levine,28 a case cited favorably by the U.S. Supreme Court in the POM Wonderful decision, yet does not cite the Supreme Court’s POM Wonderful decision itself. Rather, it refers to POM Wonderful’s pending state law class action claims against Coca-Cola, which in February 2009 Judge James Otero permitted to go forward to the extent that they are identical to the FDCA and its implementing regulations.29 The complaint adds that the plaintiffs’ state law claims are aimed at features of the naming and labeling that are voluntary and not required by the FDA regulations, which Walmart allegedly selected in order to maximize the label’s deceptive impact upon consumers.30 For example, FDA regulations did not require Walmart to name its product “Cranberry Pomegranate,” as opposed to “Apple Grape,” or to display an image of a pomegranate on its label in conjunction with the name “Cranberry Pomegranate.” This was all, according to the plaintiffs, a “marketing strategy.”31

The Walmart suit asks the court to certify a nationwide class of consumers who purchased the cranberry pomegranate juice and cites violations of Florida consumer protection law and Deceptive and Unfair Trade Practices Act, in addition to breach of express warranty and unjust enrichment. The complaint’s failure to reference the Supreme Court’s decision in the POM Wonderful case may be explained by the fact that the Walmart case is a state law consumer class action, and therefore not a competitor suit arising under the Lanham Act.

However, while the U.S. Supreme Court’s POM Wonderful decision involved two federal statutes—rather than a state and a federal statute as is the case in the state consumer class action context (i.e., in the Walmart example, in May 2014, the Third U.S. Circuit Court of Appeals denied, by a 9-to-4 vote, a petition for rehearing en banc of Carrera v. Bayer, a case that raised the bar for certifying class actions and that has already been cited and relied upon by district courts throughout the nation in denying class certification based on the failure of plaintiffs to affirmatively prove, based on objective criteria, an administratively feasible and reliable method of determining class membership (i.e., lack of ascertainability).
Similarly, in June 2014, a federal district court in New Jersey rejected a class certification attempt by plaintiffs complaining about the marketing of Skinnygirl Margaritas, ruling that purchasers of Skinnygirl Margarita—allegedly deceived because the drink contained preservatives when it was marketed as “all natural”—cannot seek relief by way of a consumer fraud class action. The court observed there is no practical way to identify people who purchased Skinnygirl Margarita and thus to determine class membership, since people do not typically keep receipts for such purchases. In reaching its conclusion, the court joined a growing list of courts around the country that have ruled consumers cannot bring class action claims on behalf of all purchasers of a particular low-cost product when there are no objective records of those purchases, including purchasers of food and beverage. These cases and many others indicate the trend among federal courts of requiring more ascertainability.

On the flip side, if food and beverage manufacturers—especially big pockets like Walmart—“behave well” and actually modify their labels to be less deceiving as a result of the Supreme Court’s recent opinion, consumers may have a harder time finding instances in which they have been “cheated.” This could result in a decrease in state consumer class actions arising from product labeling issues as well as a decrease in competitors’ suits for false advertising under the Lanham Act.

In sum, the POM Wonderful decision confirms that “[c]ompetitors who manufacture or distribute products have detailed knowledge regarding how consumers rely upon certain sales and marketing strategies” and that their “awareness of unfair competition practices may be far more immediate and accurate than that of agency rule makers and regulators.” The Supreme Court’s decision is significant because it broadens the legal remedies available to competitors to protect their interests in Lanham Act suits, at least in the context of food and beverage labels. Although the Supreme Court’s reasoning that the FDCA’s regulations are not a ceiling may in theory have an impact on the number and success of future state consumer class action lawsuits, defense practitioners should not be too alarmed because not only is the Supreme Court’s holding specifically limited to Lanham Act suits in the food and beverage context but also there is a higher burden on the plaintiffs’ class action bar to demonstrate ascertainability in support of class certification.

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2 POM Wonderful LLC v. Coca-Cola Co., 679 F. 3d 1170, 1176-77 (9th Cir. 2012).

4 Justice Stephen Breyer took no part in the consideration or decision of the case.


7 21 U.S.C. §§301 et seq.


12 Id.

13 POM Wonderful, 134 S. Ct. 2228, 2231, 2236.

14 Id. at 2237.

15 Id.

16 Id. at 2238.

17 Id. at 2238-39.

18 21 U.S.C. §343-1. See, e.g., Carreia v. Dreyer’s Grand Ice Cream, Inc., 473 F. App’x 113, 113 (2012) (Holding that the plaintiff was expressly preempted from imposing labeling requirements that do not exist under federal law.); Perez v. Nidek Co., 711 F. 3d 1109, 1118-19 (2013) (Finding that a claim was expressly preempted because the plaintiff effectively sought to “write in a new provision to the FDCA.”).

19 POM Wonderful, 134 S. Ct. at 2239-40.

20 Id. at 2240-41.

21 Id. at 2239.


23 Id. at 10.


25 See Docket Entry 1 (Complaint, ¶¶ 8, 42).

26 Id. at ¶ 44.

27 Id. at ¶ 32.


31 Id.


33 Carrera v. Bayer, 727 F. 3d 3000 (3rd Cir. 2013).


39 Id. at 2238.

40 See id. at 2240.

41 See also id. at 2239-40 (Noting the “disuniformity that would arise” from the judicial application of the “multitude of state laws” that are partially forbidden by the FDCA’s preemption provision.).
How It Is Possible to Collect a 72 Percent Interest Penalty

IN THESE DAYS OF LOW INTEREST RATES on savings accounts, 10 percent—which is the rate of simple, annual interest that applies to any unsatisfied judgment, or any portion of an unsatisfied judgment—sounds very appealing.1 So if 10 percent interest sounds good, how about 72 percent? While one may ask if it is too good to be true or if is there a catch, that high rate is permitted by law under specified circumstances for unpaid judgments or orders for child support. While actually obtaining and enforcing a 72 percent interest penalty may be the catch, there is no legal one other than the technical requirements.

The penalty is found in Sections 4722-33 of the Family Code, which provide as a penalty for nonpayment that a judgment or order for child support can accrue interest at the rate of 6 percent per month up to a maximum of 72 percent of the original amount of the unpaid support. A number of technical and practical issues must be considered, however. The legal requirements are that 1) the obligor has to be more than 30 days in arrears;2 2) the attorney must file and serve a notice of delinquency;3 3) the notice of delinquency must be signed under penalty of perjury;4 4) the notice must state the amount that the child support obligor is in arrears;5 5) the notice must list the installments of support due and the amounts, if any, that have been paid and the balance due;6 6) the notice must state that the arrearage must be paid within 30 days of the date of the service of the notice of delinquency and that any unpaid installment of child support will incur a penalty of 6 percent of the unpaid support per month, and 7) the notice must include the current address of the children, unless a protective order is in place to keep the support obligor from knowing their whereabouts.7

The notice of delinquency form has to be served either personally or by certified mail or in a manner provided for service of summons.8 If, after 30 days from service of the notice of delinquency the arrearages, the interest or penalty remains unpaid, the creditor may file a request to obtain an order for the amount owed, which can then be enforced in the same manner as any other order or judgment.9

To properly object to the penalty, the debtor will need to file and serve a motion to determine arrearages and to show cause why the penalties should not be imposed.10 At the hearing to show cause, the court must find that the debtor has proved any of the following: First, the debtor must prove that the child support payments were not 30 days in arrears on the date of service of the notice of delinquency and are not in arrears on the date of the hearing. Second, the debtor will need to show that he or she suffered serious illness, disability, or unemployment that substantially impaired the ability of the debtor to comply fully with the support order, and the debtor has made every possible effort to comply with the support order. Third, if the debtor is a public employee, he or she may show that the fiscal difficulties of the debtor’s employer have resulted in the employer’s failure to pay the debtor for 30 or more days. Finally, another option for the debtor is to convince the court that it would not be in the interest of justice to impose the penalty.11

While the enforcement of a 72 percent penalty faces these hurdles, as many child support debtors are aware, the Child Support Services Department has broad enforcement powers that surpass those of private attorneys. And while the Child Support Services Department cannot impose the 72 percent interest penalty, it can, for example, garnish a tax refund.12 It is also permissible to have both the Child Support Services Department and a private attorney working to collect past due child support from the same person. Should a party opt to hire a private attorney in conjunction with Child Support Services, however, the party must serve a notice to the local child support agency of the party’s intent to take independent action to enforce the support order.13

The threat of a 72 percent interest penalty for past due child support can be used as a tool to induce a recalcitrant debtor to become compliant or simply to increase the amount owed. Further, the penalty only applies to child support, not spousal support. Ultimately, the question for the attorney and client to ask is if the additional procedural hurdles are worth the trouble. If it is impossible to collect the child support itself, one may need a compelling reason to increase an uncollectible amount and possibly cause the client to develop unrealistic expectations. Nevertheless, the 72 percent interest penalty on child support arrearage is available as a tool that may strike fear into the heart of a delinquent parent—and obtain relief for one’s client.14

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1 CODE CIV. PROC. § 685.010.
2 FAM. CODE § 4722(a).
3 Judicial Council Form FL-485.
4 FAM. CODE § 4723(b)(1).
5 FAM. CODE § 4723(b)(2).
6 FAM. CODE § 4723(b)(3).
7 FAM. CODE § 4724.
8 FAM. CODE § 4725.
9 FAM. CODE § 4726.
10 FAM. CODE § 4727.
11 FAM. CODE § 4728.
12 FAM. CODE § 4729.
13 Judicial Council Form FL-645.

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