Los Angeles lawyer Kevin Rehwald explains wage-and-hour provisions of the Domestic Workers Bill of Rights affecting in-home personal attendants.

Caregiver Care

Los Angeles lawyer Kevin Rehwald explains wage-and-hour provisions of the Domestic Workers Bill of Rights affecting in-home personal attendants.

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Shereef Moharram, Partner (top left); Mark S. Manion, Partner (top right); Craig A. Parton, Partner (seated left); Melissa J. Fassett, Partner (seated right)
20 Caregiver Care
BY KEVIN REHWALD
Supplementing wage order 15, the 2014 Domestic Workers Bill of Rights expands the class of caregivers eligible to receive overtime wages

27 Lemon Law
BY JUDGE RONALD F. FRANK
The reach and application of the Song-Beverly Consumer Warranty Act extend far beyond automobile liability with which it is so closely associated

Plus: Earn MCLE credit. MCLE Test No. 262 appears on page 29.

34 Judicious Selection
BY JUDGE GEORGE F. BIRD AND KIMBERLY A. KNILL
The path to judicial appointment begins with an application that is intended to attract candidates throughout the legal system, thereby resulting in a diverse judiciary

40 Special Section
Semiannual Guide to Expert Witnesses
This month, a not-so-beloved curse may finally be broken and a long-standing glass ceiling may be shattered. The beleaguered Chicago Cubs and Chicago native Hillary Rodham Clinton stand on the precipice of making history and placing the Windy City at the forefront of national attention.

On October 14, 1908, the Cubs won their second straight World Series over the Detroit Tigers. Their return to the series was noteworthy due to how they won the National League. In a classic baseball moment known as “Merkle’s Blunder,” the Cubs and New York Giants were tied 1-1 in the bottom of the ninth at New York’s Polo Grounds III late in the season. With a runner at third and Fred Merkle at first, the next batter hit a single, and the runner on third scored. Or so it seemed.

In something that would be unheard of in today’s security-conscious world, the Giants’ ushers let the fans onto the field, so Merkle immediately headed to the clubhouse without touching second base. Johnny Evers, a Cubs infielder and astute follower of baseball’s rules, got the ball, stepped on second, and asked the umpires to rule that Merkle was out; however, they did not see the play. Since replays and television had yet to be invented, the chief umpire retired to his hotel, reviewed the rules, and agreed Merkle was out. When the two teams were tied at season’s end, the Cubs won the rematch.

In 1945, the Cubs returned to the World Series. The owner of Chicago’s Billy Goat Tavern bought tickets for himself and “Murphy,” his good luck goat, to Game Four. When Murphy was barred from the ballpark, the owner supposedly said, “The Cubs will never win a World Series so long as the goat is not allowed in Wrigley Field.” The Cubs lost the game and the series, and so began the curse that has plagued the team for 71 years.

In 1920, women were finally granted suffrage when the Nineteenth Amendment was ratified. From its launch at the Seneca Falls Convention in 1848, that campaign took 72 years to accomplish. Since then, beginning with Republican Senator Margaret Chase Smith of Maine in 1964, 11 women, including Secretary Clinton, have sought the presidential nomination in the Republican and Democratic parties. Until Clinton became the first female to lead a major party ticket, the campaigns of women like Democratic Congresswomen Shirley Chisolm and Pat Schroeder, Republican Senator Elizabeth Dole, and, most recently, Republican business executive Carly Fiorina failed to gain traction for their campaigns. In addition, two women have been named vice-presidential candidates.

If Clinton is elected on November 8, the United States would be a relative latecomer to a world in which women have served or are serving as heads of their countries. Since 1960, when Sirimavo Bandaranaike was appointed Sri Lanka’s prime minister, women have been appointed or elected to run governments in over 60 countries. According to the Los Angeles Times, “there are currently 18 female world leaders, including 12 heads of government and 11 elected heads of state... (some leaders are both...monarchs are not included).”

Enduring patience. Being persistent and tenacious to overcome obstacles. Forging the right team. Right about now, we will learn if these qualities will be enough for the Cubs or Clinton or both to accomplish what many have dreamed of but thought could not be achieved in their lifetimes.
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Joel Reynolds  Western Director and Senior Attorney, Natural Resources Defense Council

What is the perfect day? Winning—my favorite thing is winning.

As the western director and senior attorney for NRDC, what are your three major duties? Institutional representation of NRDC in the west, fundraising, and programmatic work.

What is your most recent big win? Stopping the Pebble Mine, a massive open-pit gold and copper mine proposed to be built in the headwaters of the Bristol Bay wild salmon fisheries in Alaska, which generates 30-50 million fish every year, $1.5 billion in revenue, and tens of thousands of jobs. We are on the verge of success.

Why are mining companies so powerful? Mining has special status due to passage of the General Mining Act of 1872.

What changed? We used to mine with a pick and shovel. We now have earth-moving machines that gouge holes more reminiscent of the Grand Canyon.

You graduated from Columbia Law School in 1978. Do you need a science background for your work? No, but environmental law lies at the intersection of law and science. Good science is at the heart of every matter in which we’re involved.

Why did you want to become a lawyer? To accomplish things that are important to me.

Were you frightened the first time you appeared in front of a judge? Absolutely. It was over a proposal by the Redevelopment Agency in Pasadena to double the height limit in downtown Pasadena and build 14 skyscrapers up to 20 stories high. The court reporter told me to "slow down."

The "D" in NRDC stands for defense. Who are you defending? People and the natural world, including wild species.

Who are you suing? We are an equal opportunity litigator. We sue the U.S. government, regardless of who is in charge; we sue corporate and individual polluters.

Which opponent has been the toughest? The U.S. Navy. They operate in a part of the globe that gives them total autonomy. As the military, they have special status. When they say something is necessary, judges, Congress, and even the president listen.

Are you a vegetarian? I’m an omnivore, but mostly vegetarian or vegan.

How should we eat? We need to be aware of the resource impact of how we produce what we eat. A plant-based diet has enormous health, environmental, and other benefits.

NRDC has 2.4 million members and activists. What do they contribute? They are the conscience of our organization, giving us standing to litigate in court, financial support, and guidance.

What is the most significant environmental problem we face? Climate change.

Fossil fuels are the main source of climate crisis in the United States. Why do we still use them? We have become addicted to dirty energy and we need to kick the habit.

What about those who scoff at the idea of climate change? They are divorced from reality.

What is the one best thing the world could do? Promote clean energy.

What can the average person do? Support an environmental group, vote for environmental candidates, and act like the environment matters.

Will that make a difference? If individuals don’t take responsibility, we can’t succeed. Individual action is the heart of collective action, which is how we make progress.

Will our children inherit a planet that will sustain them? It depends on what we do today to ensure clean air and water, a stable planet, a healthy ocean, and robust biodiversity.

We have a clean air act. Is it enforced? U.S. environmental law is the most effective structure of its kind anywhere in the world, but the planet is getting smaller. What happens in China affects the air we breathe, the beaches where we recreate, the fish we eat.

Eighty percent of Americans live in cities and suburbs. Why does that concern the NRDC? We need to elevate, promote, and develop sustainable cities. As more people congregate in urban areas, we need to ensure the livability of those communities.

Legal aid groups insist the environment is worse in poorer communities. Is that true? Yes. Low-income communities of color have long borne the brunt of dirty projects that “have to go somewhere”—freeways, incinerators, and dumps. They also have less access to benefits like parks and open space. This has given rise to the environmental justice movement.

Does NRDC recommend disposable diapers or washable cloth diapers? It’s been a debate for...
decades, and I don’t think there is a clear answer to it.

What did you use with your children? Disposable.

Pesticides are used to grow the foods we eat. Is one more harmful than others? We have litigation against the EPA over “roundup” pesticides that are often used on corn and soy. The laws dealing with chemicals are notoriously inadequate. The EPA doesn’t have all the tools it needs, and the tools it has are sometimes not adequately enforced.

Flint, Michigan, changed its water supply, which resulted in lead contamination. Was this behavior criminal? The people making decisions knew of the problem and refused to admit it to the people being victimized. It’s a complete abdication of government responsibility at the most basic level.

What is the greenest country? Countries have different environmental strengths and challenges. Scandinavian countries and Iceland are more advanced in transitioning to 100 percent renewable energy, but they still support commercial whaling.

Which countries are the most polluted? China, India, and the United States lead the list in terms of volume of their contribution.

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

What was your worst job? I was a dishwasher at 16, and my boss yelled at me all the time.

What is the characteristic you most admired in your mother? She was exceptionally thoughtful, nonjudgmental, warm, encouraging, and interested.

What would you do if you were handed $10 million? I’d pay off a few debts, take my entire extended family on a trip to see whales in Baja, and become a philanthropist.

Who is on your music play list? Mainly classical music. My father was a conductor.


Which magazines do you pick up in the doctor’s office? Time and People.

How do you get your news? The evening news for the highlights, NPR in the car, The Daily Show, and, obviously, the Internet.

What is the characteristic you most admired in your mother? She was exceptionally thoughtful, nonjudgmental, warm, encouraging, and interested.

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What is your favorite vacation spot? Paris.

What do you do on a three-day weekend? I go with my wife and kids to our ranch in the Sierras. It’s so quiet time slows down.

What are your hobbies? I love to play tennis, swim in the ocean, and play the violin.

Do you have a favorite hobby? Doing anything with my wife Jenny.

What television show do you watch? The Americans.

Which feature do you wish would work on your smartphone? The keyboard on my Samsung—I have to type everything three times.

Who would you like to take out for a beer? Robert F. Kennedy.

What is your philosophy about environmental work? We have the capacity to leave the world better than we inherited it. I believe that we can prevail, because there are so many people working to make it happen.

What are the world’s three biggest challenges? Fossil fuel dependence, social and income inequality, and unsustainable consumption of essential natural resources.

Who are your two favorite world leaders? Obama and Pope Francis.

What is the one word you would like on your tombstone? Kind.
Summary Analysis of the Defend Trade Secrets Act of 2016

THE DEFEND TRADE SECRETS ACT OF 2016 (DTSA) creates a new civil cause of action under federal law for the misappropriation of trade secrets. Although federal courts have long exercised diversity jurisdiction and supplemental jurisdiction over trade secret claims based on state law, the DTSA, which was enacted in May, grants federal courts original jurisdiction to hear similar claims. The DTSA was enacted to “provide a single, national standard for trade secret misappropriation with clear rules and predictability for everyone involved.”

The DTSA is modeled in large part on the Uniform Trade Secrets Act (UTSA).2 The trade secret statutes of 48 states, including the California Uniform Trade Secrets Act (CUTSA),3 also track the UTSA. But despite both being patterned after UTSA, there are differences between DTSA and CUTSA. Thus, there will be some practical differences when litigating under the two statutes. The extent of the practical differences when litigating under the two statutes will be seen as federal courts adjudicate claims brought under DTSA.

One key difference concerns the scope of protectable information. Each act defines the term “trade secret” slightly differently. At least one federal court has commented that the federal law “defines trade secrets similarly to but even more broadly than the UTSA.”4 In particular, the definition used by DTSA—which was enacted as part of the Economic Espionage Act of 19965—articulates many more examples of categories of information that are protectable. Additionally, while CUTSA requires that the information not be “generally known to the public or to other persons who can obtain economic value from its disclosure or use,”6 DTSA drops the “public” from this formulation.

The CUTSA definition, however, is broad and has been construed to include many different types of information as trade secrets. It is therefore unlikely in practice that the DTSA’s longer list of examples and other semantic variations will serve to expand trade secret protection to information that would not otherwise be protectable under CUTSA.

Although the potential monetary damages are the same in both statutes, the DTSA creates a new procedure for ex parte injunctive relief. Under the new statute, the court may, “only in extraordinary circumstances,” issue an order “providing for the seizure of property from its disclosure or use,”6 regarding a secret that is the subject of the action.”7 To order an ex parte seizure, the court must find, in addition to other requirements, that the plaintiff is likely to succeed on the merits and that, if notice were provided to the defendant, the defendant “would destroy, move, hide, or otherwise make such matter inaccessible.”8 The court must also find that the likely harm to the applicant of denying the ex parte petition outweighs “the harm to the legitimate interests of the person against whom seizure would be ordered” and “substantially outweighs the harm to any third parties who may be harmed by such seizure.”9 At the time of writing, this new power had yet to be exercised by a court.

Since DTSA’s enactment, however, federal courts have not hesitated to grant other injunctive relief under the new law. For example, a district court in Washington recently issued a temporary restraining order requiring defendants to surrender their flash drives, cell phones, secure digital cards, external drives, and cloud storage passwords to a third-party neutral for expedited imaging and preservation.10 Also, a district court in California recently granted the plaintiffs’ ex parte petition for a temporary restraining order preventing the defendant from accessing, using, or destroying any customer and pricing information that allegedly had been misappropriated.11

Another difference between the two statutes is that California’s statute includes an additional pleading requirement not codified in the DTSA. Under CUTSA, a plaintiff must identify its trade secrets with “reasonable particularity” at the outset of the case.12 Plaintiffs usually do so in a separate pleading document, and failure to describe the trade secrets with adequate specificity can result in dismissal. The DTSA has no such explicit requirement.

It is nonetheless likely that federal courts will require a similarly specific description of the trade secret in the pleadings. The Ninth Circuit has made clear that “[a] plaintiff seeking relief for misappropriation of trade secrets must identify the trade secrets and carry the burden of showing that they exist.”13 In federal court, debate between the parties about whether the trade secret has been sufficiently identified likely will be streamlined into a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), rather than back-and-forth motion practice regarding the adequacy of a plaintiff’s Section 2019.210 pleading under CUTSA.

Unlike CUTSA, which preempts state tort claims based on the same nucleus of facts, DTSA does not preempt other claims—including trade secret claims based on state law. A plaintiff who alleges misappropriation of trade secrets only under DTSA, for example, would also be allowed to pleading a breach of California’s implied covenants of good faith and fair dealing based on the same facts.

2 Unif. L. Comm’n available at uniformlaws.org.
3 Civ. Code §§3426.03.426.11
7 Id. at 1.
9 Id.
13 Imax Corp. v. Cinema Techs., Inc., 152 F. 3d 1161, 1164 (9th Cir. 1998) (internal quotation marks omitted).

Zachary T. Elsea is an attorney at Hueston Hennigan LLP and a member of the LACBA Barristers Executive Committee.
February 5, 2016

Jack Trimarco
Jack Trimarco & Associates
9454 Wilshire Blvd., 6th Floor
Beverly Hills, CA 90212

Dear Jack:

We have known each other a long time, but it never ceases to amaze me how you can singlehandedly turn a case around.

Most recently, I contacted you because I was representing a Department of Defense ("DOD") contractor who had failed two polygraph examinations and was in jeopardy of losing his top secret security clearance. I asked you to polygraph him, and when you did, you told me he failed; not exactly the answer I was hoping for. But, being you, you didn’t stop there.

You kept reviewing the videotape of the examination; over and over, for the simple reason that you believed in the truth of the client, as did I. What you discovered was that the client involuntarily held his breath, often for up to 9 seconds at a time. You suspected that this involuntary behavior might impact the test. You contacted no less than four of your colleagues to confirm your suspicions. I simultaneously had the client medically examined, and we confirmed that the client suffered from apnea. This condition essentially made the test results unreliable.

I presented this evidence to the ("DOD"). Solely as a result of this evidence, the DOD dropped the concern relating to the failed polygraph tests. With these concerns dismissed, I defended the client in a hearing before an Administrative Law Judge at the Defense Office of Hearings and Appeals. We just got the decision. It reads:

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Thanks Jack!!

Sincerely,

KAPLAN MARINO, P.C.

NINA MARINO
The Effect of the Anti-*Davis* Legislation on Separating Couples

**WITHOUT PROPER PLANNING** prior to marriage, as well as later in the event of impending dissolution, newly enacted Family Code Section 70, while abrogating *Marriage of Davis,* nevertheless leaves determination of the date of separation to the discretion of the trial court.

The historical approach in California, when determining date of separation for purposes of terminating community property, was evidence that the conduct of the parties indicated “a complete and final break in the marital relationship.” In *Marriage of Baragry,* the court of appeal found that the absence of an active sexual relationship between the parties and the husband’s cohabitation elsewhere with a girlfriend was not sufficient to establish legal separation.

Seventeen years later, *Marriage of von der Nuell* changed the landscape when it construed *Baragry* to hold that two conditions were necessary to establish the actual date of separation: 1) a “parting of the ways with no present intention of resuming marital relations,” and 2) “conduit evidencing a complete and final break in the marital relationship,” emphasizing the second element as the more important. The appellant wife prevailed because, while the first condition was present, the second did not occur until almost four years later. Because of the “ongoing economic, emotional, sexual and social ties between the parties and their attempts at reconciliation, regardless of the parties’ present intention” on the earlier date, “a complete and final break in the marriage did not occur at that time.”

During the 21 years following the *von der Nuell* decision, at least 25 cases wrestled with the issue until the California Supreme Court chose *Marriage of Davis* to clarify the situation in 2015. In *Davis,* the high court was faced with various elements that might normally be considered in determining whether the parties had separated. These included the wife’s declaration on June 1, 2006, that she was “through” with the marriage even though she continued to live in the marital home with the husband until July 2011, and the husband’s contrary assertion that the date of separation was July 1, 2011, because, although the wife alleged that the parties had been “living entirely separate lives” prior to that date, they nevertheless had remained under the same roof until then.

At stake was the husband’s community property interest in his wife’s income for the prior five years, during which her income was higher than his. The court was faced with the clash between the husband’s argument for the necessity of “a bright-line rule...that spouses cannot be living ‘separate and apart’...when they continue to share a residence,” and the wife’s assertion that “no particular fact, including place of residence, is determinative.” The result pitted the benefits of “clear guidance to judges and a measure of predictability to attorneys and litigants” against consideration of “the totality of the circumstances” in deciding the date of separation.

While acknowledging that the phrase “living separate and apart” “is not without at least some ambiguity,” the court focused on the occupation of the marital home by the parties, holding that “living in separate residences is an indispensable threshold requirement...for a finding that spouses are...living separate and apart...for purposes of section 771(a)” of the Family Code. This established a “bright-line rule” that would make it much easier for trial courts to decide whether the parties were living separate and apart. This holding discarded the historical approach of considering the many facets of the marital relationship in favor of simplicity.

The court noted that interpretation of Section 771(a), which defines separate property as “earnings and accumulations of a spouse while living separate and apart from the other spouse,” has always focused on whether separate residences “sufficed” to establish living separate and apart, but did not address whether separate residences were a “prerequisite for application of the law.” With the exception of *Marriage of Norviel,* the prior opinions construing this 1870 statute contemplated situations in which the spouses already “had
In *Norviel*, on June 28, 1998, the husband declared to the wife that “[t]his was the end of the marriage.” However, the parties continued to live as “roommates” until August 15, 1998, when he moved to a separate residence. The parties maintained investment, financial, nonsexual, personal, and family involvement. The husband filed the action for dissolution of marriage on September 15, 1998, identifying June 28, 1998, as the date of separation. The wife contended that the date of separation was September 15, 1998. The trial court found that June 28, 1998, was the date of separation. In a split decision, the appellate court reversed and remanded for further proceedings on the ground that establishment of separate residences is “a predicate to separation.” Since the parties “continued to occupy the family home together until August 15, 1998...separation could not occur before that date.” The parties’ “other conduct may be considered only to the extent that it is contemporaneous with the intent to separate.”

According to supreme court records, no petition for review of the *Norviel* majority decision was filed. This is especially significant in view of the strong dissent filed in that case by then Acting Presiding Justice Bamattre-Manoukian, who noted that prior decisions finding no separation had occurred generally involved situations in which the parties had continuing involvement with each other, notwithstanding the fact that they had separate residences. She suggested that “the parties should be allowed a transition period to take the necessary steps to untangle the financial, legal and social ties incident to their decision to change their marital status.” Further, the trial court should not be unduly restricted “in its ability to weigh all of the evidence of the parties’ conduct.” The dissent did not, however, indicate any specific guidelines for future separating couples.

Because the “issue of whether spouses must be residing in separate places in order to support a finding that they are ‘living separate and apart’ under the statute was finally expressly considered” in *Norviel*, the *Davis* decision adopted the *Norviel* majority view that “sufficiently leading separate lives” was not a satisfactory substitute for the physical separation necessary to establish a separation date. “Living separate and apart” required that spouses live in “separate residences” with “at least one of them” having the “subjective intent to end the marital relationship...objectively evidenced by words or conduct reflecting...a complete and final break in the marriage relationship.”

The *Davis* court noted that historically, nothing suggested the legislature had ever physically separated."
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16. **Filing Date:** September 29, 2016
17. **Date:** 9/29/16

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including multiple damages and civil penalties).

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**Norviel Majority**

The *Davis* court noted that the *Norviel* majority had stated that its holding did “not necessarily rule out the possibility of some spouses living apart physically while still occupying the same dwelling...[so long as] the evidence would...demonstrate unambiguous, objectively ascertainable conduct amounting to a physical separation under the same roof.” However, the *Norviel* majority did not elaborate on how future couples might demonstrate unambiguous, objectively ascertainable conduct amounting to a physical separation under the same roof. While acknowledging the potential exception set forth in the *Norviel* majority opinion, the *Davis* opinion once again was silent as to what might constitute a physical separation while under the same roof.

Citing their historical survey of “section 771(a) and its predecessor statutes as judicially construed,” the *Davis* court was “convinced” of the legislative intent that the statutory phrase “living separate and apart” requires “both separate residences and accompanying demonstrated intent to end the marital relationship,” not withstanding “that such a living arrangement “occurred within a single dwelling.” Nothing less would qualify as an exception under *Davis*, which might be capable of convincing a trial court to decide in that direction.

In this connection, it is important to note that in neither *Norviel* nor *Davis* was there any compelling need for the spouses to remain under the same roof after a declaration that one or the other was “through with the marriage.” In both cases, the ultimate bottom line reason seemed to be “for the sake of the children.” The nonsexual personal, financial, and other interactions appeared to be maintained for purposes of convenience. A qualifying exception under *Davis* would not appear possible under these circumstances.

A subsequent sampling of bench and bar...
has put forth possible suggestions, some more detailed than others, for what might qualify as an appropriate exception to the Davis bright-line rule. Los Angeles Superior Court Judge Thomas Trent Lewis suggested “an exceptional circumstances exception.” First, he noted the following facts from Davis were not considered by the court to qualify as “exceptional circumstances”: no longer sexually intimate, not continuing to share the same bedroom, the continued relationship was kept solely for the sake of the couple’s children, separate finances were maintained and family expenses were shared; vacations were taken separately, child-related birthdays and holidays were celebrated, the parties cooperated only to the extent necessary to carry on the household, and otherwise there was abandonment of the marital relationship in every meaningful way.

Although there are any number of possibilities, the list of potential situations that Judge Lewis said he thought should qualify for such an exception “when a couple is under one roof but still separated,” would be: economic circumstances relating to cost of alternate housing, qualification for rent control or government subsidies, or financial hardship causing impaired credit; health reasons requiring a specially equipped home or close proximity to required medical care; homeschooling of children; operation of a family business; access to the internet or availability of the family computer; absence during the week but present for weekend care of the couple’s children; restricted transportation availability because of limited number of vehicles, or the need to be close to public transportation or employment; social stigma of no longer living together; faith-based convictions and fear of adverse religious reactions; financial dependency; necessary transitional requirements to accommodate needs of a couple’s children; and victims of domestic violence who may feel trapped to remain in an unsafe relationship.

**SB 1255**

The outcry over Davis (adopting the Norviel reasoning) motivated California State Senator John M.W. Moorlach to take the reins and introduce SB 1255 in February 2016. Considering the case was decided in July 2015, Moorlach’s action seven months later underscored the extent of the concern over the fallout from Davis. The bill passed the state assembly and senate in June 2016, and was signed by the governor in July 2016, scheduled to become effective in 2017, providing for among other things a new Section 70 to the Family Code. Those searching for hidden meanings in the new legislation will discover none, because the section makes it clear that the intent is to abrogate the holdings in Davis and Norviel, something rarely seen. A question has been raised concerning potential retroactivity of the new Section 70 that may be unconstitutional as applied. The underlying question is whether the legislative intent in subsection (c) of the new section was to make it apply retroactively or simply to clarify that the Davis and Norviel holdings were not to be applied after 2016. Generally, statutes are presumed to operate only prospectively unless there is some legislative expression to the contrary that clearly appears.

The new Section 70 in effect codifies von der Nuell, by providing:

(a) “Date of separation” means the date that a complete and final break in the marital relationship has occurred, as evidenced by both of the following:

1. The spouse has expressed to the other spouse his or her intent to end the marriage.
2. The conduct of the spouse is consistent with his or her intent to end the marriage.

(b) In determining the date of separation, the court shall take into consideration all relevant evidence.

(c) It is the intent of the Legislature in enacting this section to abrogate the decisions in In re Marriage of Davis... and In re Marriage of Norviel.

Long before any possibility of “living separately and apart” may arise, and as uncomfortable as it may be, Certified Family Law Specialist Thurman W. Arnold III encourages post-Davis couples planning to wed to make it a point to obtain legal advice prior to tying the knot. For those already engaged in marital warfare, he stresses the advisability of turning to “mediation, divorce peacemaking, and the importance of finding inspired mediators.”

His expressed concerns surrounding the reliability of our family law system, which he said needs to be fixed “to meet expectations,” would not appear to be alleviated completely by the new legislation, although his stated views predated its adoption.

When considering the revised landscape initially painted by Davis as altered by the soon-to-be-operative Family Code Section 70, couples may consider advance planning for the worst (even in the best of marriages), because the ultimate determination of the date of separation will still be left to the discretion of the trial court, even under Section 70. Premarital mediation could result in an agreement concerning what evidence will later determine the date of separation if necessary, such as the sampling advanced by Judge Lewis. In addition, such an agreement could provide for later enforceability under Section 664.6 of the Code of Civil Procedure and the collaborative law process pursuant to section 2013(b) of the Family Code. Further, since the parties would not be agreeing on a specific date of separation but rather concerning how that date will be determined, the agreement will not encounter the prohibition set forth in Marriage of Umphrey, cited in Davis for the proposition that a stipulation as to a separation date is not conclusive.

One of the main reasons to use mediation in the first place is that it allows the parties themselves rather than the court to decide their fate, thereby retaining control of their own destiny. Utilization of the mediation process at all stages through the exercise of self-determination by the parties would seem to be a prudent approach, not unlike taking out insurance motivated by the old adage, “better to be safe than sorry.” Therefore, notwithstanding the relief provided by the new Section 70, couples would be wise to seek independent legal advice prior to marriage as well as later in the event of impending separation. Each party should retain a lawyer who is skilled in mediation advocacy before filing papers to end the union.

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4. Id. at 736.
5. Id. at 737.
7. Id. at 849-850.
8. Id. at 851.
9. Id. at 853.
10. Id. at 865.
11. Id.
12. Id. at 843.
16. Id. at 1164-65.
17. Id. at 1167.
18. Davis, 61 Cal. 4th at 864.
19. Id. at 856.
20. Id. at 857.
21. Id. at 863.
24. Id. at 865.
25. Id. at 866.
26. Id. at 870.
27. Honorable Thomas Trent Lewis, Marriage of Davis, 37 FAMILY LAW NEWS, No. 3 (2), (2015) at 12.
28. Id. at 13.
29. Id.
Recovering Statutory Penalties for Violations of the Bane Act

THE BANE ACT authorizes individual civil actions for damages and injunctive relief by individuals whose federal or state rights have been interfered with by threats, intimidation, or coercion. While state appeal courts have been consistent in their interpretation of what is required to state a cognizable Bane Act claim, there is a definitive split among the federal district courts of California on this issue. Until very recently there has been a dearth of case authority on whether the statutory penalties provided under Civil Code Section 52(b), enacted prior to the Bane Act are available for a Bane Act violation.

The original leading case analyzing the necessary elements for a Section 52.1 claim is Venegas v. County of Los Angeles. More recently, the Second District Court of Appeal addressed the issue again in Shoyoye v. County of Los Angeles. Both cases held that the Bane Act’s provisions are limited to threats, intimidation, or coercion that interfere with a constitutional or statutory right separate from the initial constitutional violation.

Since then, however, a few state court opinions have wavered from this position. In Bender v. County of Los Angeles, the appellate court rejected the defendant’s argument that “a defendant cannot ‘interfere by threats, intimidation, or coercion’ with a plaintiff’s Fourth Amendment right to be free from an unreasonable seizure, because ‘coercion is inherent’ in any unlawful seizure.” The Bender court explained that nothing in Shoyoye or any other California authority provides that a Bane Act violation can never be premised upon an unlawful arrest simply because coercion is inherent in the violation. The California Court of Appeals concluded in Allen v. City of Sacramento, however, that when there is an “allegedly unlawful arrest but no alleged coercion beyond the coercion inherent in any arrest...[the] wrongful arrest or detention, without more, does not satisfy both elements of section 52.1.”

The federal district courts are even more divided when trying to answer the question of whether a plaintiff must introduce independent evidence showing threats, intimidation, or coercion that are not inherent in the constitutional violation. The Central District of California in Schaeffer v. County of Orange held consistent with Shoyoye that “alleging excessive force is not tantamount to alleging threats, intimidation, or coercion.” The court said, “[I]t is not enough to simply state certain constitutional rights were violated (e.g., equal protection). Plaintiff must allege facts demonstrating violation of a constitutional right through threats, intimidation or coercion, keeping in mind that alleging excessive force is not a substitute for alleging threats, intimidation or coercion.”

Similarly, in McKibben v. McMabon, the Central District distinguished Allan v. City of Sacramento to hold that when a plaintiff alleges he or she was treated differently and that conduct was purposely directed at the plaintiff for the purpose of interfering with his or her constitutional rights, a Bane Act will lie. In McKibben, although the issue was disparate treatment in a prison facility, the Central District found the “something more” required by Venegas to be disparate treatment that forced those targeted inmates to choose between identifying as gay, bisexual or transgender or be subjected to worse conditions than non-GBT inmates. The Northern District of California concluded otherwise, interpreting the opinion in Shoyoye more broadly. By distinguishing the opinions in Venegas and Shoyoye, the Northern District has held that “Section 52.1 does not necessarily require threats, intimidation, or coercion independent of the violation of the constitutional right.”

In Holland v. City of San Francisco, the federal district court declared: “[t]he Shoyoye court…acknowledged that a Bane Act claim could be based on an arrest without probable cause, even if no ‘threat, intimidation, or coercion’ were shown separate and apart from that inherent to the underlying constitutional violation.” Likewise, in Davis v. City of San Jose, the Northern District concluded intentional conduct or excessive use of force claims suffice without showing additional evidence of threats, intimidation, or coercion separate and distinct from the constitutional violation when there is “deliberate and spiteful harm when the allegations, taken as true, demonstrate physical beating and injury in support of a claim for deprivation of one’s constitutional right to be free from excessive force.”

The Eastern District of California, on the other hand, is more in line with the state courts’ view that something more than an inherently coercive violation, even if deliberate or spiteful, is required to state a claim under the Bane Act. In Rodriguez v. City of Fresno, the court held that “in order to maintain a claim under the Bane Act, the coercive force applied against a plaintiff must result in an interference with a separate constitutional or statutory right. It is not sufficient that the right interfered with is the right to be free of the force or threat of force that was applied.” However, there is some disagreement even within the Eastern District. In Rodriguez v. City of Modesto, the Eastern District held that a “plaintiff bringing a Bane Act [for] excessive force need not allege a showing of coercion independent from the coercion inherent in the use of force” when the arrest was lawful but it is alleged an excessive use of force was used “during the course of the arrest.”

The lack of cohesion concerning proof of a Bane Act also exists concerning whether statutory penalties provided under the statutory scheme are available for violation of the Bane Act. The Bane Act was enacted to supplement Civil Code Section 51.7, the Ralph Civil Rights Act. The Ralph Act addresses the right to be free from violence and intimidation as a result of discrimination, while the Bane Act, enacted later, addresses threats, intimidation or coercion resulting in abandonment of a constitutional right. The Ralph and Bane acts incorporate damages and other remedies set forth in Civil Code Section 52(b): “Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person

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denied that right and, in addition, the following:
(1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
(2) A civil penalty of twenty-five thousand dollars ($25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney. An action for that penalty brought pursuant to Section 51.7 shall be commenced within three years of the alleged practice.16

The federal courts have concluded that statutory penalties provided under section 52(b) are available for violation of the Bane Act. In Davis v. City of San Jose, the only reported opinion that addresses recovery of civil penalties for a Bane Act violation, the Northern District of California addressed the issue squarely:

This Court notes that the Bane Act itself permits recovery under section 52 but does not limit recovery to any subsection, of which there are several. See Cal. Civ.Code § 52.1(b); see generally id. § 52. There are, however, also no cases in which a court has awarded penalties under section 52(b) for Bane Act violations. This ambiguity is noted in the Judicial Council of California Civil Jury Instruction for the Bane Act, which nevertheless concludes that “the reference to section 52 in subsection (b) of the Bane Act would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52.” CACI 3066 (Directions for Use). Given that the Bane Act was enacted after sections 51.7 and 52, see Stamps v. Superior Court, 136 Cal.App.4th 1441, 1446–48, 39 Cal.Rptr.3d 706 (2006) (discussing history of the Bane and Ralph Acts), and the lack of any case law or legislative intent suggesting that recovery for violations of the Bane Act should be limited to any subsection of section 52, the Court concludes that a plain reading of an unambiguous statute (section 52.1) allows Plaintiff to pursue damages under section 52(b).17

No reported state law opinions have addressed the recovery of statutory damages for a Bane Act violation and, until the recent opinion in Davis, attorneys have had to extrapolate from the existing case law discussing and analyzing the remedies set forth in Section 52 for Ralph Act violations under Civil Code Section 51.7. In Los Angeles County Metropolitan Transportation Authority v. Superior Court, the court of appeal examined the legislative history and intent behind the statutory penalty available for violation of the Ralph Act:

It is apparent from this legislative history that section 52 has at least two important non-punitive purposes. The first is simply to provide increased compensation to the plaintiff. The second purpose, and perhaps the more important one, is to encourage private parties to seek redress through the civil justice system by making it more economically attractive for them to sue. A concern had been raised repeatedly that the civil penalties were insufficient and that hate crime victims were not taking advantage of them, very likely owing to the fact that some victims suffered little actual damages. If not for the civil penalty, many such litigants would neither have the economic incentive, nor the means to retain counsel to pursue perpetrators under the statute. Under the current wording of section 52, subdivision (b)(2), the civil penalty clearly provides a minimum compensatory recovery even in those cases where the plaintiff can show little or no actual damages.18

Because the court's opinion in Los Angeles County Metropolitan Transportation Authority does not specifically address the Bane Act, it could be argued that its holding may only be considered a policy argument and nothing more. But the Bane Act does not contain language that would preclude application of the court's rationale in Los Angeles County Metropolitan Transportation Authority. The same is true for any argument that case authority analyzing the Ralph Act is inapplicable to the Bane Act because the Ralph Act and Bane Act address different wrongs. The Ralph Act was enacted before the Bane Act existed so there is no compelling reason to distinguish the remedy provided in Section 52 simply because the two statutes identify two types of wrongs. After all, the two acts incorporate the same Civil Code section for purposes of damages.

Any reasoning related to the Ralph Act would be equally applicable to the Bane Act because the latter was expressly intended by the legislature “to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence.”19 Like the Ralph Act, the Bane Act seeks to ensure vindication for acts of aggression and coercion, and both are costly to pursue in court. Thus, without adequate financial incentive attorneys would not be able to take on such important representation. The mandatory civil penalty is in place for exactly that reason. The stated purpose of the Bane Act is to “fill in the gaps left by the Ralph Act” by allowing an individual to seek relief to prevent the violence from occurring.20 Thus, it would make no sense to limit recovery under the Bane Act to actual damages that exclude civil penalties when a violation of the Ralph Act would entitle a litigant to civil penalties in addition to damages. This is especially true given that the Bane Act incorporates by reference all remedies provided under Civil Code Section 52.

In addition, since Davis, attorneys can now look to earlier state court opinions that alluded to the propriety of the conclusion reached in Davis. For example, in Gatto v. County of Sonoma, the court of appeal upheld a Bane Act violation wherein the plaintiff was solely awarded $1,000 as a civil penalty.21 The Gatto court acknowledged that the civil penalty of $1000 awarded “was the minimum amount then specified for violations of the statutes Gatto invoked” and constituted an award of damages included in both Sections 52.1 and 51.7.22 The Gatto court's classification of the penalty as damages places in serious doubt the argument that the penalties available in Section 52(b) are not included in the damages referenced in Section 52.1.

Additionally, in Venegas v. County of Los Angeles, Justice Marvin R. Baxter, in a concurring opinion noted the remedies available to a plaintiff under the Bane Act:

Under section 52.1 as now amended, whenever any person, whether or not acting under color of law, interferes by threats, intimidation, or coercion with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, a civil action may be brought under its provisions for greatly expanded compensatory damages, substantial fines ($25,000), injunctive and other appropriate equitable relief, as well as attorney fees.23

Moreover, Davis acknowledged that “a plain reading of an unambiguous statute (section 52.1) allows Plaintiff to pursue damages under section 52(b)”.24 The court in Davis explained that because the Bane Act’s language does not limit recovery to any particular subsection of Civil Code Section 52, the Bane Act was enacted after Section 52 and there is no “case law or legislative intent suggesting that recovery for violations of the Bane Act should be limited to any subsection of section 52” there is simply no basis to conclude that the civil penalty provided for in Section 52(b) is not available to a private plaintiff who has prevailed on a Bane Act claim.

The California Civil Code and its provisions “are to be liberally construed with a view to effect its objects and to promote justice.”25 To fail to incorporate the civil penalty
described in Section 52(b)(2) as part of the remedy for the violation of Section 52.1 would render as surplusage the language in Section 52.1 for a “civil action for damages,” including, but not limited to, damages under Section 52.2.

Finally, the express language of the Bane Act does not preclude the award of a civil penalty in private rights of action. Section 52.1 provides:

Any individual whose exercise or enjoyment of rights...as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages...under Section 52.2.

Because Section 52.1 was enacted after Civil Code Section 52, Section 52.1 is not expressly referred to in Section 52. Section 52.1 expressly incorporates the “damages” provided in Section 52, and the plain language of Section 52(b) establishes that the recovery provided for in Section 52 includes “actual damages,” “exemplary damages,” and a “civil penalty.” Moreover, the language of Section 52(b) that provides for recovery of “actual damages suffered by any person denied that right and, in addition, the following...” indicates that actual damages, exemplary damages, and a civil penalty are all recoverable.

Until the California Supreme Court resolves the disagreement among the various state courts about whether additional conduct of threats, coercion, or intimidation is required for a Bane Act claim, it is likely the elements of proof for a Bane Act claim will depend upon which state or federal court is addressing the matter. But even assuming a litigant gets past the pleading and proof for such a claim, the state law authority remains unclear whether the statutory penalty provided for in Civil Code Section 52(b) is recoverable for a violation of the Bane Act. While there is no California reported case that has held civil penalties provided under Civil Code Section 52(b) are recoverable for a violation of the Bane Act, the analyses provided in cases addressing the Ralph Act and Bane Act, the recent federal opinion in Davis, and the legislative history and intent behind the enactment of the Bane Act provide a platform for counsel to make the argument that such penalties are recoverable.

1 Civ. Code §52.1
6 See Davis v. City of San Jose, 69 F. Supp. 3d 1001 (N.D. Cal. 2014).
9 Id.
16 Civ. Code §52(b).
17 Davis v. City of San Jose, 69 F. Supp. 3d 1001, 1010 (N.D. Cal. 2014). The recent unreported Second District of California opinion in Harrington-Wisely v. State contains a blanket statement that penalties are recover- able for a Bane Act violation without elaboration: “The government defendants’ argument Wisely cannot state a Bane Act claim because state prisons are not business establishments is without merit. Civil Code §52.1, subdivision (b), permits any person whose exercise of rights has been interfered with, or attempted to have been interfered with, by the specified improper means to bring an action for compensatory damages against any individual or entity. That section also permits an aggrieved party to seek treble damages, civil penalties and attorney fees under Civil Code §52.” Harrington-Wisely v. State, No. B248565, 2015 WL 1915483 at 7.
18 See CACI No. 3066. The Judicial Council’s “Dir ec -
22 The $1,000 awarded was the minimum civil penalty prescribed at that time under Civ. Code §52; Gatto 98 Cal. App. 4th at 752, n.4.
24 Davis v. City of San Jose, 69 F. Supp. 3d 1001, 1010 (N.D. Cal. 2014).
27 Civ. Code §52.1.
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Many private households employ caregivers to supervise, feed, and care for elderly relatives and disabled family members. The assistive services these caregivers provide allow many incapacitated individuals to remain in their homes and avoid being placed in a facility. Despite the critical value of their services, until very recently, most in-home caregivers were not entitled to overtime compensation. This circumstance changed with the enactment of the Domestic Workers Bill of Rights (DWBR), which became law in 2014.

The DWBR substantially limits the overtime exemption for in-home personal attendants, which had prevented many caregivers from receiving overtime wages. Typically, California employees are entitled by statute to receive overtime compensation for all hours worked in excess of eight hours in a day or 40 hours in a week. An employer is relieved of its obligation to pay overtime wages if it can affirmatively establish that all of the requirements for an exemption have been met. Therefore, the DWBR’s limitations on the personal attendant exemption expanded the class of caregivers who are now eligible to receive overtime wages.

Wage Order 15 Considerations

Prior to the enactment of the DWBR, wage order 15, promulgated by the Industrial Welfare Commission (IWC), governed the wages, hours, and working conditions of persons employed in “household occupations.” The IWC was defunded in 2004, but its wage orders are still in effect, and courts continue to treat wage orders as quasilegislative regulations. Under wage order 15, the term “household occupations” means “all services related to the care of persons or maintenance of a private household or its premises by an employee of a private householdholder.” The wage order also contains a nonexclusive list of covered workers, which includes companions, cooks, graduate and practical nurses, house cleaners, housekeepers, and maids.

Because the primary work of in-home caregivers is to feed, supervise, and care for incapacitated individuals, they fall squarely within the ambit of wage order 15. The pre-DWBR personal attendant exemption for in-home caregivers provides that except for the rules governing minimum wages, the limitations on meal and lodging

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There is further explained, “the word ‘supervision’ with respect to an elderly client refers to assisting the person with daily tasks to allow the individual to remain living in the home.” These tasks include “assistance with bathing, showering, accessing medicines, money management, and housework limited to the direct personal space of the supervised person.”

While housework related to the direct personal space of the incapacitated individual was exempt, general housekeeping unrelated to caregiving was not. Another important distinction was that the provision of medical services, such as taking a temperature or pulse or assisting with an over-the-counter blood sugar test, was counted as nonexempt work. However, the vast majority of caregivers, especially those caring for the elderly, will be required to perform some health tasks related to care. Therefore, under wage order 15, a caregiver would not lose the exemption merely because he or she provided some health care aid. Nevertheless, an employee would be considered a nonexempt practical nurse if medical services occupied more than 20 percent of the caregiver’s work time.

The policy behind wage order 15’s personal attendant exemption was to protect private households with access to affordable assistance with daily living tasks so that incapacitated individuals can remain living in their homes. One way that private households typically arrange for affordable care is to hire a single, live-in caregiver who is responsible for 24-hour supervision. Wage order 15 has special provisions protecting live-in workers. The short rule is that live-in employees are entitled to premium pay for all hours worked in excess of nine in a day or 45 in a week. They must also be paid overtime and double time on any sixth and seventh day of work if they do not receive one day off each week of 24 consecutive hours.

While these special provisions would seem to have permitted some measure of protection to live-in personal attendants, they did not. The live-in rules are contained in part 3 of wage order 15, and personal attendants are exempted from the entirety of part 3, including the live-in provisions. This highlights the disparity between personal attendants and all other domestic employees under wage order 15. It was expected that personal attendants would lose the exemption if they provided 24-hour, live-in care, seven days a week. Personal attendants did not have to receive any duty-free meal or rest breaks. Furthermore, unlike many other exemptions, such as the executive, administrative, and professional exemptions, personal attendants did not have to be paid a salary equal to two times the applicable minimum wage for full-time work. In other words, an employer could lawfully require a personal attendant to work 24 hours a day, six days a week and only pay that employee the minimum wage. Many in-home caregivers have limited education and employment opportunities. Therefore, wage order 15’s personal attendant exemption created a situation in which some of the most vulnerable employees were also some of the least protected and most exposed to unfair employment arrangements.

The DWBR closes the wage gap between personal attendants and other domestic workers. The DWBR applies to any “domestic work employee.” A domestic work employee is defined as “an individual who performs domestic work and includes live-in domestic work employees and personal attendants.” The definition of “domestic work” in the DWBR incorporates much of wage order 15’s definition of household occupations. This makes the coverage of the DWBR coextensive with that of wage order 15. Domestic work under the DWBR means “services related to the care of persons in private households or maintenance of private households or their premises.” The definition also includes a nonexclusive list of covered employees that focuses on caregivers. It expressly covers child care providers and caregivers for the disabled, sick, convalescing, and elderly. Thus, the DWBR is designed to protect caregivers.

The main feature of the DWBR is that it substantially limits wage order 15’s personal attendant exemption. It states that any domestic work employee who qualifies as a personal attendant must be paid “one and one-half the employee’s regular rate of pay for all hours worked over nine in any workday and for all hours worked more than 45 hours in any workweek.” While the DWBR mandates overtime pay for personal attendants, it does not require that they receive meal and rest periods. And, unlike wage order 15’s live-in provisions, the DWBR does not require the payment of double time on the sixth or seventh workdays if the employee does not receive a day off. Otherwise, the DWBR’s overtime rules are very similar to wage order 15’s live-in provisions.

The DWBR expressly excludes certain employees from its reach. These employees include any person providing services through in-home supportive services, close family members, certain babysitters, any person employed by a licensed health facility, and individuals who are compensated through various state programs to care for the developmentally disabled. With the exception of employees working in licensed health facilities, who are covered by wage order 5, the excluded employees remain subject to the personal attendant exemption of wage order 15.

The definitions also described in wage order 15 have two requirements. First, the employee in question must work in a private household supervising, feeding, and dressing an incapacitated individual. Second, the employee must have no other substantial duties. Wage order 15 does not further define the parameters of the exemption. Therefore, it fell to the courts to clarify these requirements.

Regarding the second element, the pre-DWBR cases held that the phrase “no significant amount of [other] work” limited the total work time that an employee could spend on tasks other than dressing, feeding, and supervising. Specifically, a personal attendant would lose the exemption if he or she spent more than 20 percent of the work time performing tasks other than dressing, feeding, and supervising. There is no explicit basis for the 20 percent rule in the language of wage order 15. The cases that adopted the rule relied on various external authorities, the most important of which were publications of the Division of Labor Standards Enforcement (DLSE). The DLSE is the state agency tasked with enforcing the IWC wage orders. While its publications, such as opinion letters, enforcement manuals, and interpretive bulletins, are not binding on courts, they may be considered for their persuasive value.

The first element of the personal attendant exemption looked at which duties would be counted as exempt versus nonexempt when determining if the 20 percent threshold had been met. Here, the language of the wage order is relatively clear. A personal attendant is one who works in a private home supervising, feeding, and dressing an incapacitated individual. As discussed in Cash v. Winn, “under the plain language of this provision, an employee is a personal attendant if the work is directed primarily at supervising, feeding, or dressing the client.” The court
The DWBR’s definition of “personal attendant” also tracks the language of wage order 15. Under the DWBR, a personal attendant is any person employed in a private household “to supervise, feed or dress a child, or a person who by reason of advanced age, physical disability, or mental deficiency needs supervision.” Again, the definition applies with “no significant amount of work other than the foregoing is required.” Unlike the wage order, the DWBR explicitly defines the phrase “no significant amount of [other] work” to mean that the total time a personal attendant spends on tasks other than feeding, dressing, and supervising cannot exceed 20 percent. As such, there is no need to resort to external DLSE materials to support the 20 percent rule.

The DWBR’s definition of a personal attendant also helps clarify who qualifies as an employer. A personal attendant includes “any person employed by a private householder” as well as any person employed by “any third-party employer recognized in the health care industry to work in a private household.”

This new language dovetails with the DWBR’s definition of a “domestic work employer.” Here, the DWBR takes the wage order’s definition of an employer and builds upon it. Under the wage order, an employer is “any person...who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions.” As recently discussed by the California Supreme Court in Martinez v. Combs, this is a far-reaching definition that is broader than the common-law test that distinguishes between employees and independent contractors.

The DWBR expands this definition even further. First, it expressly includes corporate officers and executives within the definition of a domestic work employer. In Reynolds v. Bement, the California Supreme Court held that individual corporate officers and executives are not individually liable for wage and hour violations because they are not employers under the wage orders. Under the DWBR, Reynolds v. Bement is inapplicable. Corporate officers and executives are subject to liability. And, the failure to properly compensate a caregiver as required by the DWBR can result in substantial liability for unpaid overtime, penalties, and even attorneys’ fees.

The DWBR’s definition of a domestic work employer also includes those who procure caregiving services through any third party, such as a temporary service, staffing agency, or other similar agency. This clarifies that private householders cannot evade liability under the DWBR simply by utilizing an employment agency. A private householder is liable to the extent that he or she exercises control over wages, hours, or working conditions. Most employment agencies will also fall under the DWBR’s definition of a “domestic work employer.” This is because the DWBR explicitly labels employment agencies as “third party employers.” More importantly, the DWBR exempts some, but not all, employment agencies from its grasp. This implies that all nonexcluded employment agencies constitute domestic work employers.

Regarding the exclusion, the DWBR provides that employment agencies that comply with all of the terms of Civil Code Section 1812.5095 do not qualify as domestic work employers. The requirements of this section are exacting and only the largest employment agencies are likely to be compliant. Among several other conditions, the employment agency must have a signed contract with the domestic worker that states how the agency referral fee is to be paid and that informs the domestic worker that he or she is free to perform work for persons not referred by the agency. The domestic worker must remain free to renegotiate the rate of pay with the private householder. The agency also cannot exercise control over how the worker performs his or her duties nor provide tools, supplies, or equipment. Further, the agency cannot retain power to terminate the relationship between the worker and the person who receives the services.

Accordingly, in most domestic caregiver cases involving an employment agency, both the agency and the private householder will likely qualify as employers. This is in keeping with prior case law, which recognized that employment agencies and private householders might constitute joint-employers, making both liable for any wage and hour violations. For instance, in Guerrero v. Superior Court, the court considered whether Sonoma County’s In-Home Support Services Public Authority could constitute a joint-employer with the private householder under IWC wage order 15. The trial court sustained the public authority’s demurrer on the ground that it was not an employer under wage order 15 as a matter of law. After carefully examining the wage order’s definition of an employer, the control the public authority exercised over the wages, hours, and working conditions of the domestic employee, the court concluded that the trial court erred in finding that the public authority could not be a joint-employer as a matter of law. Thus, under Guerrero, placement agencies and private householders can qualify as joint-employers depending on the facts of the particular case.

While the DWBR now exempts those employed through in-home support services from its scope, the reasoning of Guerrero is still applicable to private employment agencies. Thus, unless they comply with Section 1812.5095, employment agencies and their
individual corporate agents will likely be held responsible for violations of the DWBR as joint-employers. At a minimum, they will almost certainly be named as defendants in any action brought to enforce the DWBR.

Compensation

Another important issue to consider under the DWBR is how to structure a personal attendant’s compensation. Many private householders compensate domestic employees according to fixed daily rates, weekly rates, or monthly salaries. Because the DWBR requires that a personal attendant receive one and one-half the employee’s regular rate of pay for all hours worked in excess of nine in a day or 45 in a week, these fixed rates are not permissible. Personal attendants must be paid on an hourly basis. In fact, any form of fixed-rate pay constitutes a salary. Paying a personal attendant on a salary basis, even one equivalent to the minimum required under the DWBR, will likely result in substantial liability for unpaid overtime.

Under Labor Code section 115, subdivision (d)(2), “payment of a fixed salary to a nonexempt employee shall be deemed to provide compensation for the employee’s regular, nonovertime hours, notwithstanding any private agreement to the contrary.” This means that if an employer and employee agree that a fixed rate will compensate a personal attendant for both regular and overtime hours, the Labor Code will invalidate this agreement and require that the entire fixed rate be applied to the employee’s regular hours only. In this situation, the employer will have paid the employee nothing for any overtime hours worked.

This not only creates overtime liability for the employer, it also gives rise to the related issue of how to calculate the employee’s regular rate for the purposes of determining the overtime rate. An employer and employee who have agreed on a fixed rate of pay will typically have a specified hourly rate in mind on which the fixed salary is based. However, it is not this agreed-upon rate that will be multiplied by one and a half for all hours worked in excess of nine or 45 hours. According to the statute, “[f]or the purpose of computing the overtime rate of compensation required to be paid to a nonexempt full-time salaried employee, the employee’s regular hourly rate shall be 1/40th of the employee’s weekly salary.”

For example, if the employer and employee agree to a fixed day rate of $240 based on 24 hours of care at $10 per hour for six days, the overtime rate is not $15. Instead, $240 must be multiplied by six, giving that employee a weekly salary of $1,440. Then, $1,440 must be divided by 40, which gives the caregiver a regular rate of $36. It is this figure, not the agreed-upon $10 per hour, that will be multiplied by one and one-half. This makes the employee’s overtime rate $54 an hour instead of the contemplated $15.

Conversely, if an employer pays a 24-hour caregiver on a true hourly basis, the minimum wage of $10 per hour can set the floor for compensation. The DWBR requires payment of nine regular hours, which at $10 per hour equals $90. The DWBR also requires payment of 15 hours at one and one-half times the regular rate of pay, which requires a payment of $225 each day. Thus, provided it is on an hourly basis, the minimum daily amount a caregiver must receive for providing 24-hour care is $315. This rate would only apply to the first five 24-hour days worked by the caregiver each week because after that he or she will have exceeded the weekly maximum of 45 regular hours of work. The minimum day rate for the remaining days in the week is $360. However, nothing in the DWBR prevents a household from hiring multiple caregivers and staggering their shifts such that no one caregiver works more than nine hours in one day or 45 hours in one week. This is a viable cost-saving strategy that reduces the daily cost for 24-hour care to $240 and eliminates the payout of any overtime compensation. In this regard, the DWBR embodies the dual policy behind California’s overtime laws, which encourages the employment of additional workers while adequately compensating employees who are forced to work longer hours.

Independent Contractor Classification

One unsuccessful cost-saving strategy that some households and agencies employ is to classify caregivers as independent contractors. As discussed above, the test for who constitutes an employee versus an independent contractor is more expansive in the wage and hour context than it is under the common-law control test. Anyone who controls the wages, hours, or working conditions is an employer. Moreover, the DWBR explicitly lists in-home caregivers for the disabled, sick, elderly, and convalescing as workers who perform domestic work, meeting the DWBR’s definition of a domestic work employee and therefore cannot be classified as independent contractors.

This reflects the reality that most incapacitated individuals have a litany of unique needs, like special diets, precise food preparation instructions, and medicine or tests that must be given on a set schedule. Requiring a worker to perform a regimented set of time-sensitive duties is antithetical to a true independent contractor relationship, where the principal relinquishes control over the details of the work. It is also difficult to conceive of any greater degree of control that one could exercise over a servant than to require that individual to provide 24-hour, live-in care.

Instead of saving the private household money, classifying a caregiver as an independent contractor will likely subject that employer to penalties under Labor Code Section 226.8 and tax consequences for failing to pay the employer portion of the employee’s payroll taxes. Because some who classify caregivers as independent contractors do so to pay less than the legally required minimum wage, this tactic might suggest a willful artifice to evade California’s wage and hour laws. This could provide a plaintiff’s lawyer with fodder when arguing in favor of penalties that require a showing of willfulness, such as penalties under Labor Code Section 203 and liquidated damages under Labor Code Section 1194.2, among others.

Some domestic work employers may also wish to exclude eight hours of sleep time from the compensable hours worked of a 24-hour caregiver. The DWBR has no provision governing sleep time. Therefore, caregivers are still covered by wage order 15 on this subject. With the exception of wage order 5, which has a unique definition of hours worked, California cases have consistently held that the time an employee spends sleeping at an employer’s premises must be counted as hours worked. Notwithstanding, in 2011, the First District Court of Appeal in Seymour v. Metson Marine held that wage order 9 was modeled after the federal regulations defining hours worked under the Fair Labor Standards Act. It therefore read an implied sleep time exclusion into the wage order that was based on federal regulations, which allowed written, verbal, and implied agreements to exclude up to eight hours of sleep time from 24-hour shifts, provided adequate sleeping facilities were made available and the employee had the opportunity to get five hours of uninterrupted sleep. Because wage order 9’s definition of hours worked was identical to that of the other wage orders, the sleep time exclusion in Seymour v. Metson Marine arguably applied to all other industries, including household occupations.

This was in fact the conclusion reached by the court of appeal in Mendiola v. CPS Security. However, on review, the California Supreme Court rejected this conclusion and disapproved of the sleep time exclusion in Seymour v. Metson Marine. Mendiola was a case involving security guards brought under wage order 4. The court reasoned that there was no indication from the language of the wage order that the IWC intended to incorporate the federal sleep time exclusion. The court, under wage order 4, held that employers cannot exclude sleep time from 24-hour shifts. While the court explicitly limited its holding to wage order 4, the reasoning
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it employed has broader implications.\textsuperscript{57} Because courts are not permitted to incorporate federal regulations into the wage orders absent convincing evidence of the IWC’s intent to do so,\textsuperscript{58} after Mendiola, courts cannot impliedly incorporate the federal sleep time exclusion into wage orders with language identical to wage order 4’s definition of hours worked. Wage order 15 contains the same definition of hours worked as the one under wage order 4. While no court has yet held that the sleep time exclusion is inapplicable to wage order 15, the rationale in Mendiola makes that conclusion virtually inescapable. Therefore, anyone employing an in-home caregiver should not deduct sleep time from the hours worked.

In Labor Code Section 1453, the DWBR contains an express sunset provision that will repeal the law unless the legislature acts to extend it. Currently, SB 1015 is making its way through the California legislature. This bill would repeal Section 1453, making the DWBR a permanent feature of California wage and hour law. Even if SB 1015 fails, and the DWBR is repealed pursuant to Section 1453, it will not eliminate any past liability for unpaid overtime that accrued between January 1, 2014, and December 31, 2016. Because the statute of limitations for overtime that accrued between January 1, 2014, and December 31, 2016, for unpaid overtime that accrued between 1453, it will not eliminate any past liability for unpaid wages were due, tail liability will persist through December 31, 2020. Therefore, there could be many cases in which the DWBR applies to part of a claim and wage order 13 applies to the remainder. In fact, this is already happening with cases in which caregivers worked before January 1, 2014, and continued working thereafter. Because of this, it is important to have a working understanding of both the DWBR and wage order 15’s differing rules.\textsuperscript{59}

\textsuperscript{1} LAB. CODE §1450 et seq.
\textsuperscript{2} LAB. CODE §§510(a), 515; In re United Parcel Service Wage and Hour Cases, 190 Cal. App. 4th 1081, 1010 (2010).
\textsuperscript{3} In re United Parcel Service Wage and Hour Cases, 190 Cal. App. 4th 1010.
\textsuperscript{4} Wage order 15 has been codified at 8 CAL. CODE REGS. §11050.
\textsuperscript{5} Johnson v. Arvin-Edison Water Storage Dist., 174 Cal. App. 4th 729, 735 (2009) (“Although the IWC was defunded effective July 1, 2004, its wage orders remain in effect.”).
\textsuperscript{7} 8 CAL. CODE REGS. §11150, subdiv. 2(J).
\textsuperscript{8} Id.
\textsuperscript{9} Id. §11150, subdiv. 1(B).
\textsuperscript{10} Id. §11150, subdiv. 2(J).
\textsuperscript{11} Id.
\textsuperscript{13} Mendiola v. CPS Sec. Solutions, Inc., 60 Cal. 4th 833, 846 (2015).
\textsuperscript{14} Id.
\textsuperscript{17} 8 CAL. CODE REGS. §11150, subdiv. 2(J).
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 1294.
\textsuperscript{23} Id. at 1302-1303.
\textsuperscript{24} Id. at 1299.
\textsuperscript{25} 8 CAL. CODE REGS. §11150, subdiv. 3(A).
\textsuperscript{26} LAB. CODE §§551-52.
\textsuperscript{27} Id. §1454.
\textsuperscript{28} Id. §1451(b)(1).
\textsuperscript{29} Id. §1451a(1).
\textsuperscript{30} Id.
\textsuperscript{31} Id. §1454.
\textsuperscript{32} Id. §1451(b)(2).
\textsuperscript{33} Id. §1451(d).
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} 8 CAL. CODE REGS. §11150, subdiv. 2(G).
\textsuperscript{37} Martínez v. Combs, 49 Cal. 4th 35, 64-66 (2010).
\textsuperscript{38} LAB. CODE §1451(c)(1).
\textsuperscript{39} Reynolds v. Bement, 36 Cal. 4th 1075 (2005), affirmed by Martínez v. Combs, 49 Cal. 4th at 66 (“The opinion in Reynolds [citation omitted] properly holds that the IWC’s definition of ‘employer’ does not impose liability on individual corporate agents acting within the course of their agency.”).
\textsuperscript{40} LAB. CODE §558.1 (As of January 1, 2016, owners, directors, officers, and managing agents of an employer may be liable for violations of the minimum wage and hours and days of work provisions of the wage orders, as well as for violations of LAB. CODE §§203, 226, 226.7, 1193.6, 1194, 2802.).
\textsuperscript{41} Id. §1451(c)(1).
\textsuperscript{42} Id.
\textsuperscript{43} Id. §1451(c)(2)(B).
\textsuperscript{44} Id.
\textsuperscript{45} CIV. CODE §1812.509(b)(1)-(9).
\textsuperscript{47} Id.
\textsuperscript{48} LAB. CODE §1451(b)(2)(A).
\textsuperscript{50} LAB. CODE §515(d)(2).
\textsuperscript{51} Id. §515(d)(1).
\textsuperscript{54} 29 C.F.R. §785.22
\textsuperscript{55} Mendiola v. CPS Sec. Solutions, Inc., 60 Cal. 4th at 843-44 (the court of appeal concluded “that all industry-specific wage orders implicitly incorporate a federal regulation that permits the exclusion of eight hours of sleep time[,]” emphasis in original).
\textsuperscript{56} Id. at 846, 848-49.
\textsuperscript{57} Id. at 848-49.
\textsuperscript{58} Id. at 843, citing Morillion v. Royal Packing Co., 22 Cal. 4th 575, 592 (2000).
enacted more than 45 years ago, the Song-Beverly Consumer Warranty Act (SBA) contains a wide array of provisions regarding the content and enforceability of warranties for consumer goods. The consumer goods include, but are not limited to, motor vehicles, although most of the litigation and published decisions arise from so-called lemon law actions brought pursuant to the SBA. Thus, while many lawyers and judges may know of the SBA, its reach and application extend well beyond the lemon vehicle, making it important to understand its broader consumer warranty protections, remedies, and defenses.

The SBA is manifestly a consumer protection law liberally interpreted to broaden consumer rights and ease the consumer’s proof of a warranty or statutory liability claim. Many traditional defenses once available to retailers and manufacturers in warranty litigation brought under the Uniform Commercial Code (UCC) over the years have been abrogated or minimized in an action brought under the SBA. For example, long-standing warranty defenses, including notice of breach to the warrantor, rejection or revocation within a reasonable time, set-off for continuing use after discovery of a defect, lack of reliance on the warranty, and mitigation of damages, have been all but eliminated by appellate decisions decided under the pro-consumer SBA.

Further, the SBA regulates the terms of written warranties, imposes obligations on the warrantor to make available facilities for the service and repair of its consumer goods, requires that manufacturers provide adequate replacement parts for repair, and requires certain content in work orders and repair records, as well as reimbursement of costs incurred by a repairing dealer performing warranty work. The law also imposes specific

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**BY JUDGE RONALD F. FRANK**

**LEMON LAW**

Many UCC defenses once available in California have been abrogated or minimized as causes of action under prevailing warranty law

**ORIGINALLY**

The Honorable Ronald F. Frank is a Los Angeles Superior Court judge currently assigned to a misdemeanor trial court at the Metropolitan Courthouse. He practiced civil litigation, including the defense and trial of Song-Beverly Act cases, over a 33-year career.
remedies in litigation including mandatory reimbursement of costs, expert expenses, and attorney’s fees in addition to discretionary civil penalties for a successful plaintiff.10

While the SBA supplements rather than supercedes the provisions of the UCC, the same four-year statute of limitations applies to claims brought under either statute.11

**Essential Elements of a SBA Claim**

In a suit brought under the SBA, the essential elements of the plaintiff’s prima facie case with respect to a consumer good that is not a motor vehicle are 1) plaintiff’s purchase of a consumer good from or warranted by the defendant, 2) defendant’s giving an express warranty covering the goods and its essential terms, 3) failure of the consumer good to perform as warranted, 4) plaintiff’s delivery or tender of the defective or malfunctioning goods to the defendant’s authorized service or repair facility, 5) defendant’s failure to remedy the warranty-covered problem within a reasonable number of repair attempts, and 6) defendant’s failure to replace the unrepaired goods or refund the purchase price less the value of its use by the consumer prior to discovering the defect.12 The appellate courts have reviewed a number of cases involving consumer goods that are not vehicles, including, among others, pianos,13 boats, and expensive audio and video components.

When the consumer good is a new motor vehicle—a passenger car, light truck, or SUV—vehicle-specific provisions of the SBA come into play and affect the plaintiff’s prima facie elements. As set out in CACI jury instruction 3201 and Civil Code Section 1793.2(d)(2), these elements are 1) plaintiff’s purchase or lease14 of a new motor vehicle from or warranted by the defendant, 2) defendant’s giving an express warranty covering the vehicle, and essential terms of the warranty, 3) a defect (or defects) in the vehicle covered by the warranty that substantially impaired its use, value, or safety to a reasonable person in the plaintiff’s situation, 4) plaintiff’s delivery or tender of the vehicle to the defendant or its authorized repair facility, 5) a failure by the defendant or its authorized repair facility to repair the vehicle to match the warranty after a reasonable number of opportunities to do so, and 6) defendant’s failure promptly to replace or buy back the vehicle.15

The term “new motor vehicle” includes not only brand new vehicles first sold at retail but also used vehicles sold or leased with any of the original manufacturer’s new motor vehicle warranty remaining.16 Vehicles excluded from the reach of the SBA are vehicles purchased in private sales and vehicles purchased and serviced outside of California.18 On the other hand, while motorcycles and the portion of a motor home intended for human habitation are specifically excluded from the statutory definition of “new motor vehicle,”19 if sold with an express warranty, these consumer goods are still within the ambit of the SBA.

While the SBA requires that the vehicle be purchased or leased primarily for consumer purposes—personal, family, or household use—amendments to the law provide that even a commercial vehicle sold to an entity with five or less vehicles registered to it still qualifies as consumer use.20 This and other amendments to the statute demonstrate the legislature’s commitment to expand remedies available to purchasers of consumer products and reduce defenses available to manufacturers who offer warranties for those products. Another example of the pro-consumer commitment to expand remedies is the addition of an implied warranty cause of action (i.e., that the consumer goods are merchantable) under the SBA.21

Some of the elements specific to new motor vehicle warranty claims under the SBA include the requirement that the repair problem must be a material one (one that substantially impairs the vehicle’s use, value, or safety)22 and the “lemon presumption”—a vehicle-specific way to prove that an SBA plaintiff has met the requirement to prove that a reasonable number of repair attempts or opportunities have been given to the defendant without a successful fix. Most lemon law cases brought to trial are ones in which one or both of these elements are in dispute or in which there is a dispute as to whether the defect is covered by the warranty’s terms or is expressly excluded.

Other provisions of the SBA applicable only to new motor vehicles claims include those providing details for the remedy of replacement,23 the requirement that a vehicle reacquired under the lemon law have its title “branded” so that the fact of and reasons for the buyback are disclosed to a future purchaser,24 and detailed provisions for calculating a restitution offset for the motor vehicle owner or lessee’s use of the vehicle prior to presenting the defect for repair.25

**Substantiality Element**

In SBA cases involving a new motor vehicle, the most commonly disputed issue of fact is whether the alleged repair issue meets the requirement of substantial impairment. The substantiality element26 derives from Section 1793.22, subdivision (e), and its somewhat circular definition of the term “nonconformity” as “a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee.”27 The term “nonconformity” is “similar to what the average person would understand to be a ‘defect,’”28 which explains why the CACI committee used the simpler word in the burden of proof instruction, CACI 3201. In Lundy v. Ford Motor Co., the Second District clarified that the substantiality requirement “injects an element of degree; not every impairment is sufficient to satisfy the statute.”29 “Whether the impairment is substantial is determined by an objective test, based on what a reasonable person would understand to be a defect… [but] applied, however, within the specific circumstances of the buyer.”30 The Lundy court, and then the CACI committee, borrowed factors from the UCC for the jury to consider in evaluating substantiality: the nature of the defects, the cost and length of time required for repair, whether past repair attempts have been successful, the degree to which the goods can be used while repairs are attempted, inconvenience to the buyer, and the availability and cost of alternative goods (i.e., loaner cars) pending repair.31

Whether an impairment is substantial or not is a question of fact for the jury.32 Appellate decisions from other states under analogous lemon laws have made it clear that some repair problems are not sufficiently significant or material to justify the all-or-nothing remedy for a statutory violation—for example, a slight variation in paint color, a few millimeters’ difference in gaps between body panels on different sides of the car, or squeaks or rattles.

Cases have gone to trial that involved operational noises from properly functioning components, odors the buyer found objectionable (one of the complaints in Lundy was an air conditioner odor), and a difference between the speed of the left front window versus the right front window when being raised or lowered at the same time. Some jurors found these complaints to meet the substantiality element, while others did not. Thus, even though the test is an objective one, it is evaluated from the standpoint of a reasonable buyer in the position and circumstances of the plaintiff. This makes summary judgment an unlikely tool in most cases. The practitioner needs to approach trial with a view toward placing the effect or impact of the malfunctioning component in context, with plaintiff’s counsel focusing on any particular circumstances of the buyer or lessee that may make the defect more important or material, and with defense counsel seeking to diminish its significance in light of all other properly functioning components or systems.

**Presentation and Repair Opportunity**

Another frequently litigated element of the plaintiff’s burden of proof is the obligation of the buyer or lessee to give the manufacturer or dealer a fair chance to fix the customer’s complaint. Oregel v. American Isuzu Motors, Inc. refers to this as the “presentation” require-
1. The Song-Beverly Act as construed by appellate courts restricts or eliminates many UCC common law and statutory defenses previously asserted by defendants in consumer warranty cases.
   True.  False.

2. When a consumer good that is a subject of a SBA case is not a new motor vehicle, a civil penalty is available for a willful violation of the law.
   True.  False.

3. In a SBA case involving consumer goods other than a new motor vehicle, the plaintiff must prove that the defendant has an office in California.
   True.  False.

4. In a SBA case involving a new motor vehicle, the added requirement of proof that the defect substantially impairs use, value, or safety can be proven without expert testimony.
   True.  False.

5. In a SBA case involving a new motor vehicle, the requirement of proof that the plaintiff presented the vehicle for repair of the substantially impairing defect cannot be proven unless a component part has been replaced.
   True.  False.

6. The effect of a defect on driveability does not have to be considered as evidence bearing on whether a reasonable number of repair opportunities has been established in a new motor vehicle SBA case.
   True.  False.

7. The lemon presumption can be used by a plaintiff in support of the pursuit of a nonwillful civil penalty.
   True.  False.

8. In a SBA trial, the cause of a consumer good defect must be proven as an essential element of the prima facie case.
   True.  False.

9. A breach of the implied warranty of merchantability in a SBA action can be proven even in the absence of two repair attempts.
   True.  False.

10. In a SBA new motor vehicle case, the buyer can recover for the emotional distress an objective, reasonable new car buyer would be expected to have when the new car turns out to be a lemon.
    True.  False.

11. Insurance premium fees are recoverable as incidental damages under controlling appellate authority.
    True.  False.

12. Recoverable damages in either a generic consumer goods case or in a new motor vehicle case are not limited to the purchase or lease price paid (less applicable offset), but also can include both incidental and consequential damages.
    True.  False.

13. Unreasonable or unauthorized use of the consumer goods or new motor vehicle is no longer a valid affirmative defense under the SBA.
    True.  False.

14. Either the 4 times or 30 downtime days in the first 18,000 miles options of the lemon presumption are raised in almost every trial of a new motor vehicle lemon law case.
    True.  False.

15. The implied warranty of merchantability allows a purchaser who proves the consumer goods or new motor vehicle were not fit for the ordinary purpose for which such goods are used, even if the purchaser did not give the defendant even one opportunity to repair.
    True.  False.

16. Attorney's fees are available to a successful plaintiff in a SBA case, even if the sales or lease contract had no attorney fee provision.
    True.  False.

17. The existence of a manufacturer protocol for diagnosing that type of complaint is inadmissible on the issue of whether a new car buyer plaintiff has met the presentation element of the prima facie case.
    True.  False.

18. In a certified lemon arbitration program proceeding, a plaintiff at his or her election may attempt to satisfy the presentation element by proof of one or more of the three lemon presumption parameters during the first 18 months or 18,000 miles.
    True.  False.

19. Since civil penalties may only be awarded for willful violations in SBA cases in which the lemon presumption does not apply, the defendant is subject to that quasi-punitive sanction in an amount up to the constitutional limit permissible in true punitive damages cases.
    True.  False.

20. Lack of notice of breach of warranty directly to the manufacturer, not merely to the authorized service and repair facility, remains a viable common law defense in an action under the SBA.
    True.  False
ment, i.e., the number of times the plaintiff presented the vehicle to the manufacturer or dealer for repair.33 Section 1793.2(c) imposes a duty on the buyer to deliver defective or otherwise nonconforming goods to the manufacturer’s authorized service or repair facility or to give written notice of nonconformity if delivery to the repair facility is not practicable. Appellate decisions instruct that “the only affirmative step the Act imposes on consumers is to ‘permit the manufacturer a reasonable opportunity to repair the vehicle.’”34

**MOTOR VEHICLE manufacturers would be well advised to train their field personnel, dealer body, and customer complaint personnel about the lemon presumption.**

What constitutes a reasonable opportunity? This again is an issue for the trier of fact in most instances. CACI 3202 directs juries to consider that “each time” the consumer good or new motor vehicle “was given to” the manufacturer or its authorized repair facility “for repair counts as an opportunity to repair, even if [it/they] did not do any repair work.” The jury is also instructed to consider “all the circumstances surrounding each repair visit.” Circumstances may include how easy or difficult it is for the repair facility to duplicate the complaint, how much detail the plaintiff gives in assisting the diagnostic process, whether the repair facility has a protocol for gathering information needed to locate or replicate the complaint, whether plaintiff (intentionally or unintentionally) omits important information bearing on diagnosis or duplicating the problem, whether the symptom is a generic one with dozens of potential causes (e.g., rough idle quality or rattle noises when driving over bumps), and whether the manufacturer has published technical service bulletins on diagnosis and repair, among others. Only opportunities to address substantially impairing defects count towards a new motor vehicle’s presentation element.35 Expert witnesses in lemon law trials will often create a repair chronology that includes a column in which the number of repair visits or days is tabulated that may qualify for repair of substantially impairing defects. A minimum of two opportunities must be given to qualify as satisfying the presentation element,36 unless only a single attempt at repair was possible because of a subsequent malfunction and destruction of the vehicle, or when the manufacturer refuses to attempt to repair the vehicle.37

The lemon presumption is a shortcut for plaintiff to satisfy the presentation element. It specifies that the reasonable-number-of-repair-attempts element has been established by plaintiff’s proof of any of three different for repair.19 Motor vehicle manufacturers would be well advised to train their field personnel, dealer body, and customer complaint personnel about the lemon presumption, and to include language concerning the direct notification requirement in the warranty and/or owner’s manual.40

When the facts giving rise to the lemon presumption exist, a plaintiff cannot only argue that a presumption case is a “slam dunk” case of liability but a plaintiff also will be able to argue for a double-damages civil penalty without proof of a willful violation of the law pursuant to Civil Code Section 1794(e).41 Note that a plaintiff who declines to use an available lemon arbitration program established for use by California buyers and lessees is barred from relying on the lemon presumption.42 Since most manufacturers now maintain qualified alternative dispute resolution (ADR) programs to deal with lemon law situations, the lemon presumption is only relevant in civil court in those rare cases in which the litigant initially resorted to the lemon ADR program but was dissatisfied with the outcome, or in cases against the handful of manufacturers who have not established a qualifying ADR program.

**Covered by Warranty and Implied Warranty of Merchantability Claims**

Part of the prima facie case is proof that the repair complaint, symptom, or problem is one covered by the applicable warranty. While it is not necessary for a plaintiff to prove the cause of the defect,43 the usual obligation of a tort plaintiff to prove causation—a causal connection between the symptom or repair complaint and the damage claimed by the plaintiff—is contained in the element of a plaintiff’s burden to prove the existence of a defect covered by the warranty. Unlike in a product liability case, a lemon law plaintiff need not prove how the defect occurred or of a paint layer or production line rework that the warranty covers. In addition, CACI 3220 describes the affirmative defense of unreasonable use, which essentially means the repair problem was caused by the plaintiff rather than by a warranty-covered defect.

The SBA expressly includes claims that the consumer good, including a motor vehicle, failed to meet UCC-like tests of fitness for the ordinary or particular purpose.44 To the consumer or his or her counsel, an implied warranty of merchantability claim often provides an easier path to a successful trial verdict than a claim for breach of express warranty because there is no need to prove substantiality or reasonable number of repair opportunities.45 The implied warranty of merchantability provides a minimum level of quality that essentially means the product is in a safe condition substantially free of defects.46 The elements of a prima facie case under an implied warranty of merchantability claim are contained in CACI 3210. This type of warranty cannot be waived by the buyer except in an as-is sale that is highlighted in a “conspicuous writing attached to the goods.”47

**Remedies for SBA Violations**

The usual remedy sought for an SBA violation is replacement of the consumer good or a refund of the purchase price in addition to incidental and consequential damages and attorney’s fees.48 Attorney fees are awardable based on actual time expended and reasonably incurred by counsel.49 When the product is a motor vehicle, the SBA specifies that the refund amount includes finance charges, transportation costs for which the consumer was charged at the point of sale or lease, plus tax, license, registration, and other official fees.50 Incidental damages may be covered if actually charged, are reasonable in amount, and caused by the breach of the SBA applicable to the case (CACI 3242), including repair.
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expenses paid by the consumer, as well as towing and rental costs. It is still an open question as to whether insurance premiums actually paid by the consumer are recoverable as incidental damages. If the buyer elects a replacement remedy, the manufacturer cannot be required to offer a replacement (for example, when the model is no longer made). However, if a replacement vehicle is sought it must be substantially the same as the subject vehicle, carrying the same warranties as the original product. The only amount the consumer is required to contribute to a refund or replacement is the dollar amount attributable to the use of the consumer good before it was first delivered for repair, and in the case of a new motor vehicle delivered for repair, the problem that gave rise to the substantially impairing defect warranting the remedy. The law contains a formula for calculating the amount or offset. Loss of use damages typically are not recoverable, although loss of use factors into whether the defect is a substantially impairing one. Emotional distress damages are not recoverable.

In a significant expansion from a common law UCC claim, the SBA also permits the successful plaintiff in breach of express warranty claims to recover a quasipunitive double-damages civil penalty for willful violations of the law. However, no civil penalty is available for a claim based solely on breach of an implied warranty. Regarding new motor vehicles, a civil penalty is also available for a violation that is not willful when the circumstances of the lemon presumption are met and the manufacturer fails to promptly pay restitution or offer a replacement after written notice of the need for repair. In this context, “willful” means the defendant acted intentionally, akin to the Penal Code definition. "A decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision." No willful civil penalty can be awarded if the defendant reasonably and in good faith believed that it had complied with its statutory obligations. Among other factors the jury may consider in making a willful finding are whether the manufacturer had a written policy on the requirements of repair or replace or the parameters of the law were met, whether the defendant honestly and reasonably believed the warranty did not cover the repair claim, that it was not a substantially impairing problem, that the plaintiff did not permit a reasonable number of repair opportunities, or whether the defendant’s offer of a replace or refund remedy was prompt.

Although the Song-Beverly Consumer Warranty Act has long been on the books, it has been amended numerous times to broaden its consumer protection policy, expand the classes of vehicles to which the lemon law applies, lessen the types of defenses that can asserted, and change the statutory text in response to appellate decisions. Appellate decisions have helped to clarify many of the issues developed during the course of hundreds of trials under the law applying the statute to specific facts.
parameters concerning notice made directly to the manufacturer are applicable only if “the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner’s manual,” the terms of the lemon presumption including the requirement that the buyer must notify the manufacturer, not merely its dealership, directly. See Civ. Code §1793.22(b)(3).

The lemon presumption is a rebuttable one, such as by proof that one more repair attempt would have resulted in the vehicle being fixed, or that some of the repair visits should not be counted as reasonable opportunities such as where the plaintiff is contriving repair visits by visiting different dealerships without mentioning previous visits where the problem could not be replicated in the shop. The lemon presumption is spelled out in CACI 3203; it should not be given if the plaintiff objects to it because the presumption is for the plaintiff’s benefit. See Jiagbogu v. Mercedes-Benz USA, LLC, 118 Cal. App. 4th 1235, 1245 (2004).

Civ. Code §1793.22(c).


Civ. Code §1791.1 gives four nonexclusive definitions of “merchantable,” any or all of which may be relied upon by the plaintiff depending on the facts of a particular case. The implied warranty of fitness for a particular purpose is outlined in Civ. Code §1792.1.


Civ. Code §1792.4(a); see id. §1792.2.

Id. §§1793.2(d)(2)(A) and (B). §1794(b) states that the measure of damages shall include the rights of replacement or reimbursement, plus the UCC measures of damages in Com. Code §§2711 to 2713 applicable to goods as to which the buyer has justifiably revoked acceptance, and where the buyer has accepted the goods, the buyer may recover the cost of repair as well as the measures of damages in Com. Code §§2714 and 2715. Reasonable attorney’s fees are determined by the court pursuant to §1794(d), in a posttrial motion.


See CACI No. 3241.

Civ. Code §1793.2(d)(2)(C) details the mileage usage offset, a formula predicated on an assumed 120,000 mile useful life of a motor vehicle as the denominator and the numerator is the miles driven before the plaintiff first presented the vehicle to an authorized service and repair facility for repair of the substantially-impairing defect or collection of defects that gave rise to the claim. The resulting fraction is multiplied by the recoverable purchase price of the vehicle. In cases involving a leased vehicle, some trial courts have instructed the jury on a smaller denominator based on the contractual maximum miles under the lease, which would increase the size of the offset and reduce the recoverable net damages; other trial courts use the statutory formula.


Civ. Code §1794(c).


See CACI No. 3244, which is based in large part on Kwan supra note 33.


Kwan, 23 Cal. App. 4th at 185.

JUDICIOUS SELECTION

An investigation and interview by the State Bar Judicial Nominees and Evaluation Commission is an important part of the process for prospective judicial candidates.

The Honorable George F. Bird is a judge of the Los Angeles Superior Court. Prior to his appointment, he practiced law for nearly 30 years and was a certified criminal law specialist. He is a former member of the Commission on Judicial Nominees Evaluation of the State Bar of California (JNE). Kimberly A. Knill is a senior appellate attorney with the California Court of Appeal, Fourth Appellate District, Division Three, and past chair of JNE.
slightly in the kinds of professional experience relevant for the requested office. Although attorneys can apply for an appointment to an appellate court, generally trial judges apply for appellate positions. For sitting judges, the application requests details about cases over which the applicant has presided and appellate court decisions reviewing the applicant's rulings.

For attorneys, starting an application might be likened to reviewing jury instructions before filing a complaint—it provides a road map and sets forth the necessary elements for a successful outcome. Familiarity with the information the governor requests and finds important will assist the applicant in preparing for the task of submitting a comprehensive application. Applicants should consider establishing a relationship with a sitting judge who can act as a mentor throughout the process. A mentor judge who has successfully navigated the process can be an invaluable resource to a judicial candidate. In addition to appearing in court on client cases, serving as a temporary judge, attending bar functions, and volunteering in the legal community are excellent ways to begin relationships.

Recognizing that most candidates presumably know the law, what then are the qualities that set one applicant apart from another? Most judges and lawyers agree impeccable judicial temperament is a paramount quality of a great judge. Thus, the applicant should demonstrate his or her patience, appropriate demeanor, ability to maintain decorum in difficult circumstances, and similar attributes indicative of fitness to manage a heavy courtroom calendar with ease and finesse. The applicant should describe life experiences that demonstrate good judgment and temperament and highlight these experiences in the application.

The application asks for a description of past legal and nonlegal experiences, education, training, practice areas, community service and involvement, teaching and writing history, bar association involvement, family life, hardships, leadership roles, and similar life experiences. A candidate must also provide thoughtful insights as to why he or she wants to become a judge, what the candidate has contributed to society, what role judges and attorneys serve in society, and similarly themed topics. Furthermore, applicants must submit detailed explanations about past cases in which they have been involved, including case names and numbers, names of opposing counsel, and the judges who presided over those matters. Additionally, a candidate must provide a writing sample. Letters of reference from carefully selected individuals who have worked closely with the candidate, and who can comment on the candidate's character, judicial temperament, and other qualifications can provide valuable information for the governor's review.

Senior members of the bench familiar with the judicial selection process advise that the governor is looking for candidates who will perform the judicial function with distinction. The applicant should be prepared to demonstrate in the application and interviews what that individual has done to make this a better world. For example, has he or she served as a temporary judge or performed pro bono work? What has the applicant overcome in life? Does he or she have a compelling or incredible story that has taught life lessons that give

Once a judicial application is received, the governor decides whether or not to send the candidate to the JNE Commission for vetting; not every applicant will undergo a JNE review. The governor's office may seek additional peer review and evaluation from local bar associations by releasing the application for a secondary vetting in the local jurisdiction. Locally, Governor Brown regularly requests input directly from the Los Angeles County Bar Association. In addition, JNE often seeks input from members of other local bar associations. The multiple layers of vetting are designed to provide the governor with as much information as possible before making a decision on who should be a judicial officer.

The JNE Commission began as a pilot program in 1979. A year later, the commission's authority was formalized and it became the designated agency of the State Bar responsible for evaluation of judicial candidates. The commission consists of up to 38 members, primarily attorneys and retired judges but also nonattorney public members. The commission convenes for a two-day meeting six times each year to evaluate candidates at the governor’s request.

The JNE Commission must adhere to strict rules of confidentiality to ensure its investigations of judicial candidates are undertaken with integrity, to encourage the free flow of information, and to promote the gathering of facts and opinions from members of the bench and bar without fear of recrimination by those who submit feedback. In addition, the State Bar has promulgated rules governing the commission’s evaluation process.

When the governor submits a judicial candidate to JNE for evaluation, JNE assigns two to four commissioners to each candidate investigation. In the lead commissioner’s first contact with the candidate, the commissioner asks the individual to provide a list of all persons referenced in the judicial application and another list of up to 75 personal references. Over the next 60 days, the investigating commissioners solicit input and feedback from members of the bench and bar familiar with the candidate’s legal work and reputation through the use of a Confidential Comment Form (CCF), usually sent through e-mail. In addition to sending CCFs to those on the candidate’s two lists, the commissioners send CCFs to randomly selected members of the bar and to members of the bench in the county in which the candidate has applied.

During the investigation, the commissioners follow up on comments they receive and make other inquiries to arrive at a recommended rating. The commission evaluates numerous qualities during this process, including impartiality, freedom from bias, industry, integrity, honesty, legal experience broadly, professional skills, intellectual capacity, judgment, community respect, commitment to equal justice, judicial temperament, communication skills, and job-related health. In addition, superior court candidates are expected to have the qualities of decisiveness and patience as well as the ability to communicate well orally. Candidates for the court of appeal are expected to have the qualities of collegiality, writing ability, and scholarship, while supreme court candidates are expected to have these qualities as well as distinction in the profession and breadth and depth of experience.

The candidate’s final step in the JNE investigative process is an interview with the investigating commissioners. At least four days before the interview, the commissioners must disclose to the candidate as detailed as possible without breaching confidentiality any substantial, credible, and corroborated adverse allegations or negative findings related to temperament, industry, integrity, ability, experience, health, physical or mental condition, or moral turpitude that would
be determinative of unsuitability for judicial office unless rebutted. The candidate is given ample time to address any concerns at the interview.

At the full commission meeting, each candidate is discussed and the commission assigns one of the following ratings: exceptionally well qualified, well qualified, qualified, or not qualified. Once the investigation is concluded, the commission’s findings and rating are memorialized in a confidential report to the governor. Only a candidate rated not qualified is permitted to request a reconsideration of the JNE rating. The JNE Commission’s rating of trial court candidates is confidential. Unless a trial court candidate is rated not qualified, the candidate is never notified of his or her rating.

Appellate justices must be confirmed by the CJA, a three-member commission consisting of the chief justice of the California Supreme Court, the state attorney general, and the senior justice from the appellate district of the affected district. When a supreme court appointee is being considered, the third member of the CJA is the state’s senior presiding justice of the courts of appeal. When an appellate court candidate is nominated by the governor, the CJA schedules a public hearing in which the candidate and his or her supporters are given an opportunity to testify as to the candidate’s suitability for appointment. Members of the public also are invited to comment. The chair of the JNE Commission testifies by disclosing the JNE Commission’s rating of the candidate and offering a summary of the basis for its rating. The appellate appointment becomes effective upon confirmation by the CJA.

After the JNE report reaches the governor’s office, the JNE Commission has no further input or involvement with the candidate. The governor’s decision to interview, appoint, or nominate is made at the governor’s discretion and on the governor’s timetable, up to 11:59 p.m. on the last day of the governor’s term in office.

Attorneys who aspire to become a judge should begin assembling materials and carefully considering the judicial application at the earliest possible opportunity. Governor Brown’s history of considering legal experience broadly in evaluating a candidate’s suitability for judicial office and appointing attorneys from all walks of legal life has led to a richer and more diverse California judiciary. Many attorneys no doubt have valuable life experiences, background, and training to make a positive impact on this community and to provide meaningful access to justice in our courts. Those whose legal careers and personal character demonstrate the hallmarks of a good judge and who have a desire to serve the public should consider applying for a judicial appointment.

The authority to appoint and nominate judges vested in the governor of California can translate to far-reaching change within the judiciary. For example, Governor Edmund G. Brown, Jr. has had a profound impact at all levels of the judiciary through his selection of judicial officers. Since he began his second tenure as governor in 2011, Brown has appointed a larger share of women, Latinos, and African-Americans to the state bench than any governor in history, including his own first tenure as governor decades ago. Specifically, nearly 40 percent of Brown’s appointees identify themselves as nonwhite. Also, over the last five years he has appointed 15 judges from the lesbian, gay, bisexual, and transgender communities.

When Governor Brown made his most recent appointments to the California Supreme Court a few years ago, he stated, “I was looking for people who you could say were ‘learned in the law’...I put the word out: Are there people who are scholars or of unusual ability?” Brown’s last three supreme court appointees—Goodwin H. Liu, Mariano-Florentino Cuéllar, and Leondra R. Kruger—among other accomplishments, had been law professors who had never served on the bench before appointment. They also represent diverse ethnic and cultural backgrounds: Justice Liu’s parents are Taiwanese, Justice Kruger is African-American, and Justice Cuéllar was born in Mexico.

Departing from tradition, Governor Brown has deemphasized prior service as a federal or state prosecutor. For example, in addition to appointing criminal defense attorneys, Brown has appointed attorneys whose practices include plaintiff’s tort litigation, insurance defense, and transactional, civil rights, employment, and administrative law. He has selected in-house corporate and government attorneys, as well as those with appellate experience as a practitioner or working for a judicial officer.

Below, several of Governor Brown’s recent appointees to the Los Angeles Superior Court reflect on their experiences with the judicial selection process.

**Judge Michelle Ahnn, former deputy alternate public defender currently assigned to a misdemeanor courtroom:**

Q: What advice would you give to someone wanting to become a judge?
A: Persevere, make sure you maintain a good reputation among the bench and opposing counsel, and be yourself. Also, be prepared for it to take some time for your appointment. Make friends with others going through the process. I found that going to numerous networking events was much more enjoyable with someone who could introduce me to new people and vice-versa. Keep in mind this is not a competition and just because someone gets appointed does not mean you won’t. I found it helpful to view others going through the appointment process as a support network rather than a competition.

Q: How did you prepare for the JNE interview and how long did it last?
A: My interview lasted about 45 minutes. To prepare, I did a mock interview with a recent appointee, which was extremely helpful in helping me formulate my answers and to anticipate questions. I also spoke with five other people who had been recently interviewed by JNE and found out what questions were asked. I was asked which judge I admired. The judge had been a former prosecutor and I admired her for setting aside her “D.A.
which is something I am thinking about to this day. They really made me prepared and spent a lot of time talking about my judicial philosophy, went on forever, but my sense was they wanted to know. They were well given them the documents prior to the interview, I believe less time would trying to explain the lawsuit during the interview whereas if I had had them the documents prior to the interview, I believe less time would have been spent trying to explain the lawsuit. I gave the LACBA interviewers the documents prior to the interview and, fortunately, I did not have to spend the interview explaining the lawsuit with them.

Q: What was the most enjoyable part of the process?
A: Getting the call from Josh Groban!!!

Q: What advice would you give to someone wanting to become a judge?
A: I would advise people to treat everyone with dignity and respect and use the saying from the great coach John Wooden, “The time to make friends is before you need them.”

Judge Rupert Byrdsong, former partner at Ivie McNeill, currently assigned to a civil calendar:

Q: What was the one thing you learned going through the JNE vetting process that you never considered before applying for a judicial appointment?
A: I learned that every interaction you have with opposing counsel can be the game-changing information for a positive application. Even though litigation is by its nature an adversarial process, you must remain professional and reasonable at all times. If you have negative interactions with opposing counsel, you demonstrate the ability to work well with people with different views and objectives.

Q: How has becoming a judge changed your life?
A: I have a greater sense of pride knowing that I am making a difference in the community. My position enables me to influence lives for the better. Finally, the bench is less stressful than the rigors of the business and practice of law. I am proud to serve on the greatest court system in the world!

Judge Rob Villeza, former assistant United States attorney, currently assigned to a misdemeanor courtroom:

Q: How did you prepare for the JNE interview and how long did it last?
A: I submitted my application without asking others to review it. At the very least, you’ll catch more typos if others read it first.

Q: What was the one thing you might do differently if given the chance?
A: Probably relaxed a bit more.

Q: What was the most enjoyable part of the process?
A: Receiving very nice notes from friends and colleagues who said that they said good things to JNE about me in their evaluations.

Q: What advice would you give to someone wanting to become a judge?
A: Go for it! It’s a great job.

Q: How has a judge changed your life?
A: I was very fortunate to have had a very interesting career as a lawyer and law professor before I became a judge. I loved my prior life in the law. But I love judging even more. I am honored to have this job.
vetting process that you never considered before applying for a judicial appointment?
A: Talking about myself and asking others for help made me feel uncomfortable. I learned that there are many people out there who are willing to help and are generous with their time.
Q: What was the most enjoyable part of the process?
A: The humbling feeling of receiving support from so many people.
Q: What advice would you give to someone wanting to become a judge?
A: Really understand what a judge does and determine if this is what you really want to do.
Q: How has being a judge changed your life?
A: I am much more mindful of each facet of courtroom operations. I am more appreciative of professionalism by attorneys.

Judge Frank J. Menetrez, former appellate judicial attorney at the Court of Appeal, Second Appellate District, currently assigned to a juvenile dependency courtroom:
Q: What was the one thing you learned going through the JNE process that you never considered before applying for a judicial appointment?
A: That the process can consist of long periods of completely uneventful waiting, punctuated by brief periods of intense activity. When you hear from JNE, you are given a short deadline to submit names and addresses of persons to whom JNE should send review and comment forms. Shortly after that comes the JNE interview, followed by more waiting for an interview with the governor’s appointment secretary.
Q: What was the most enjoyable part of the process?
A: The interview with the governor’s liaison from the Appointments Office, Josh Groban. It was a long and comprehensive interview, and a bit unnerving, because Josh is very good at not giving any signs of how well or how poorly the interviewee is doing. He really gives nothing away. But it was just an interesting and challenging conversation, and in the end I really enjoyed it.
Q: What advice would you give to someone wanting to become a judge?
A: Before applying, be a good lawyer and be good to your colleagues, both friends and adversaries. JNE sends out lots of review and comment forms, and they are taken very seriously. After applying, be patient. Some applicants sail through quickly, but others take much longer. The vetting of judicial candidates is a long, multilevel administrative process, and can slow down or break down at any number of points for any number of reasons.
Q: How has being a judge changed your life?
A: An easier question would be: How has it not changed your life? As we learn at new judge orientation, we’re not just judges when we are on the bench. We’re judges 24/7, and we need to conduct ourselves at all times in a manner that will reflect well on the courts. That’s an enormous responsibility. And when you take it seriously, as I do, it ramifies in all sorts of directions. It affects everything you do.

3 Id.
4 Nagourney, supra note 1.
5 Joshua Groban is a senior advisor for Policy and Appointments in the Office of the Governor.
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1600 Rosecrans Avenue, Media Center 4th Floor, Manhattan Beach, CA 90266, (310) 745-8887, e-mail: rjdyho@gmail.com. Website: www.rjdyho.com. Dr. Ho provides forensic and neuropsychological evaluations used in legal settings to document a wide variety of psychologically relevant information, including neuropsychological, IME, and forensic evaluations for civil & criminal cases including personal injury, fitness for duty, discrimination, sexual assault and trauma, professional licensing disputes, & assessment of psychological state/functioning at time of criminal offense. List of cases worked on available upon request. She provides expert testimony regarding psychological testing methods, results, and conclusions. List of cases worked on is available upon request. Dr. Ho is a diplomate of two specialty boards, a two-time recipient of the National Institute of Mental Health National Services Research Award, and the current chair of the Institutional Review Board at Pepperdine University. She conducts clinical and community research on mental health, publishes empirical studies and book chapters, and is a frequent invited speaker at various national and local conferences and media outlets.

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Oil Drilling in Los Angeles’s Urban Neighborhoods

THE MASSIVE ALISO CANYON gas well blowout in the San Fernando Valley community of Porter Ranch last year made national headlines over legal claims and concerns about health problems for residents, but other Los Angeles communities also sit next door to dangerous neighbors.

There are at least 2,000 active oil wells in Los Angeles, and drilling most often occurs in areas near low-income or minority neighborhoods. While the Southern California Gas Company methane leak occurred in affluent Porter Ranch, the residents of these urban communities in Los Angeles deserve to have their voices heard as well.

Residents living near oil wells report health problems including asthma, low birth weights, nosebleeds, eye irritation, and neurological issues, as well as exposure to constant noise and foul odors. Many of these residents do not speak English and may be hesitant to lodge official complaints or unsure of how to do so.

Oil production in Los Angeles is not a new phenomenon. In 1892, oil was discovered near what is now Dodger Stadium. In 1903, California became the leading oil producer in the country—though that title would go back and forth among a few other states throughout the years. Drilling companies jumped at the opportunity, and hundreds of wells appeared in the Los Angeles Basin. The citizens of Los Angeles learned to adapt to their surroundings and lived next to these oil fields. By 2012, California was the third highest oil-producing state in the country.

The problem with oil drilling is the waste production—in the air, in the water, and in the ground. None of these contaminants are without direct consequence to the local residents. For every barrel of crude oil extracted, it is estimated that 280 to 400 gallons of waste water is produced. This waste water is contaminated with metals and chemicals. In a time of horrible drought, the usable water is now unusable. Oil drilling also sends toxic chemicals into the air that come into contact with, or are potentially inhaled by, residents of local communities. Common oil field and fracking chemicals include methanol, formaldehyde, carbon disulfide, and hydrogen sulfide, as well as volatile organic compounds, nitrogen oxides, benzene, and toluene. Further, there are reports of increased ground movement, a concern of any Los Angeles resident.

The Los Angeles Oil Field is located south of Dodger Stadium and extends west to Vermont Avenue. The oil basin spreads across, among other locations, Koreatown, Westlake, Echo Park, Chinatown, and Elysian Park. Drilling operations also are located in West Adams and Wilmington. The Inglewood Oil Field in Baldwin Hills is the largest urban oil field in the United States. A community of more than 300,000 directly surrounds it. Belmont High School and the Roybal Learning Center were built directly on areas formerly housing oil operations. It is reported that 70 percent of active wells in Los Angeles are located within 1,500 feet of a home or other sensitive land uses, including schools and hospitals. Petroleum air toxins create a substantial risk to residents within 1,000 feet of emissions. Air quality rules fail to adequately protect against these risks.

The situation is reminiscent of the early 1980s when social justice advocates coined the term “environmental racism” to refer to the placement of low-income or minority communities near environmental hazards, or vice versa. The disproportionate exposure of environmental disasters to low-income and minority neighborhoods (for example, Flint, Michigan, and New Orleans after Hurricane Katrina) is alive and well in Los Angeles with urban oil drilling.

A lawsuit filed in Los Angeles Superior Court by the Youth for Environmental Justice, the South Central Youth Leadership Coalition, and the Center for Biological Diversity claims the City of Los Angeles illegally allowed oil companies to drill wells in residential neighborhoods without assessing health and environmental threats. The lawsuit also charges that conditions, including taller walls and better sound protection, were more strictly enforced at drilling sites in West Los Angeles, a more affluent area.

Reportedly, over 90 percent of the residents in the South Los Angeles and Wilmington site neighborhoods are minorities, while the West Los Angeles and Wilshire sites are located in neighborhoods that are 69 percent white. In addition to oil drilling, new fracking techniques are being employed. The lawsuit argues that fracking is a less regulated industry.

The Los Angeles Times reported that an audit by the California Department of Conservation’s Division of Oil, Gas, and Geothermal Resources found that its own office gave “inconsistent permitting, monitoring and enforcement of well construction and operation.” To summarize the results, the testing was found to be inadequate and not always independently verified. In addition, the City of Los Angeles has sued energy firms to prevent them from further drilling, arguing it created a public nuisance.

Residents and their communities deserve to have their voices heard as well. The problem with oil drilling is the waste production—in the air, in the water, and in the ground.

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Citizens of these areas need to be recognized as having undue risks regardless of their socioeconomic status, race, or location.

Brian S. Kabateck is founder and managing partner of Kabateck Brown Kellner LLP in Los Angeles where he practices in the areas of personal injury, insurance bad faith, pharmaceutical litigation, wrongful death, class action, mass torts and disaster litigation. Laura Kelly St. Martin is a Los Angeles trial attorney who focuses on insurance defense.
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