Costa Mesa lawyer Juan C. Basombrio discusses the 2016 Justice Against Sponsors of Terrorism Act and its impact on foreign sovereign immunity theory as well as U.S. foreign relations.

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The Evolution of Sports Business

April 14, 2017 • 9:30 am - 4:45 pm
Kennedy Hall, Room 237

Registration: Continental breakfast and beverages
(9:30 - 10 am)

Panel I: Sports Law 2.0: Broadening the Scope of Sports Law
(10 - 11:30 am)

Keynote Luncheon: Featuring Los Angeles Dodgers President & CEO Stan Kasten (11:30 am - 1:15 pm)

(1:30 - 3 pm)

Panel III: Keys to Success: Thriving as a Sports Agent in a Highly Competitive Market (3:15 - 4:45 pm)

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Is California becoming the next Texas? When I posed that rhetorical question to my Los Angeles Lawyer Editorial Board colleagues in December, some looked at me quizically. Was I predicting that a conservative movement harking back to the days of Ronald Reagan, George Deukmejian, and Pete Wilson was about to overtake California’s more recent tradition of being a steadfast blue state? No. My question was about whether our state was poised to assume the activist role that Texas has taken in recent years in using the federal courts as a vehicle to challenge the legality of certain executive orders.

During President Barack Obama’s term, Texas sued the federal government 48 times, according to a Texas Tribune analysis. As Texas Governor Greg Abbott famously said when he was attorney general, “I go into the office, I sue the federal government, and then I go home.”

Take an issue deep to the heart of Texas and a lawsuit will ensue. Immigration: Texas and 24 other states prevailed when a Fifth Circuit decision blocking Obama’s immigration plan was upheld because of a U.S. Supreme Court deadlock. A woman’s right to choose: Texas sued the U.S. Health and Human Services Department when HHS stopped funding the state’s Women’s Health Program because it prohibited money going to affiliates of abortion providers. A judge denied Texas’ request for an injunction preventing HHS from taking this action. The environment: Texas has filed numerous actions related to climate change and air and water quality with mixed results in some while others are pending. Syrian refugees: A federal judge dismissed Texas’ suit seeking to prevent refugees from settling in the state. According to California Sunday Magazine, Texas’ scorecard stands at eight wins, 12 losses, 20 pending decisions, and nine cases withdrawn. University of Texas Law Professor Tom McGarity explained “the state often failed because...it was fighting to weaken new laws or throw out new regulations.” McGarity predicts California will follow the opposite course. As he said, “It’s tough to persuade a court to make an agency do more.... It’s not as hard to overturn a decision by an agency...trying to do less than it has been doing.”

California attorneys general have been successful in suing the federal government. In Massachusetts v. Environmental Protection Agency, they prevailed in suing the agency to curb greenhouse gases under the Clean Air Act. Similar results were achieved in enforcing home appliance energy efficiency standards and protecting endangered species.

Before Donald Trump’s inauguration, California was already arranging the legal resources to challenge the new president through Xavier Becerra’s appointment as attorney general and Eric Holder’s hiring as the legislature’s outside counsel.

The issues that Texas has sued on are ones California could litigate, too. The state’s waiver allowing it to impose tougher emission standards and rollbacks in other environmental regulations will likely be at the forefront. Immigration and health care are others.

A certain irony cannot be overlooked in this state versus federal government litigation. Conservatives traditionally have been perceived as advocates of state’s rights but now apparently will use federal authority to restrain them. In contrast, as a state senate aide said in California Sunday Magazine, blue states like ours will “be pushing the envelope on state legislative authority.”

Ted M. Handel is the 2016-17 chair of the Los Angeles Lawyer Editorial Board and chief executive officer of a nonprofit organization that develops and manages affordable multifamily projects for low-income families and seniors.
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Suggestions for Critical Thinking Skills in Advocacy

AFTER READING “BARRISTERS TIPS” FOR OVER A DECADE, I want to share a generic tip for newly admitted lawyers that I hope will help in all areas of practice. With case files piled high and hours needing to be billed, it can be easy to follow standard office protocols without giving them much thought. But amid the pressures of your day and the demands of your clients and colleagues, I urge you to take a step back and critically think about what you are doing. Think back to your childhood.

Remember when you were a kid and you were incessantly questioning your mom with, “But why not, Mom?” Even back then your mom might have suspected you would be a great attorney. In each phase of your life, as you grew and perceived the circumstances around you differently, asking these questions helped you come to understand the way things worked.

However, somewhere along the way we stopped asking, “But why?” That is too bad because now you are an actual attorney. That means you’ve had years of higher education and passed one of the most difficult professional exams in the country. Some of you are even licensed in other states and countries. Yet for some reason now that you pay the State of California dues each year, many of you kind of just go through the motions and follow what everyone else is doing.

Maybe you’ve heard something along these lines in your legal experience: “That’s the way we do things” or “we have always done it that way.” I know I have. Most of the time there is no problem with that. But for those times when you aren’t sure or think there may be a better way, I hope you will of the time there is no problem with that. But for those times when you aren’t sure or think there may be a better way, I hope you will take the time to look into the issue at hand. Here are a few times this has happened in my practice:

**Signing the Proof of Service.** Does your firm have a policy of blindly signing every Proof of Service (POS) form, including the copy that is sent to the addresser? Or have you asked opposing counsel via a meet-and-confer letter why their POS attached to the served document is not signed? This is a common practice copied by everyone, especially at large law firms. The statute is cited right on the POS form, but I don’t think people ever read it.¹ If they did, they would see that they would be committing perjury by signing a POS attached to the document being served. It is clearly not accurate to state that you have served a document prior to serving it.

**Requesting Traffic Collision Report.** Do you always have the client sign an authorization to request the Traffic Collision Report? Have you ever had your request rejected if you did not enclose an authorization from your client? I encountered this issue a few years ago with the Los Angeles Police Department, one of the largest records divisions in the state. I was told that my request was not valid because I did not include an executed authorization from my client. I took a deep breath and respectfully told the clerk and the supervisor that the California Vehicle Code says I may request it without an authorization from my client.² The supervisor told me, “We have always done it that way” and that in her 27 years she had never seen it my way so it could not be right. Nevertheless, she said she would have LAPD legal counsel get in touch with me to explain “the way we do things.” Shortly thereafter, I received both a verbal and written apology and was advised that going forward staff would handle these issues in accordance with the California Vehicle Code.

Now you might be thinking, “What is the point of this article? Who cares if the POS is done wrong? What does it matter if I have...” to have my client sign an authorization?” Well, you are probably right. Those examples are not very consequential, but I wanted to share with you common examples that you might see or have probably come across as a new attorney.

My point is that this is going on for the big stuff, too, the issues that have huge consequences for your clients. I see it happening all the time where my opposing counsel just wants me to go along with something to my client’s detriment. I am talking about major issues that affect people’s lives and families. I am talking about the hundreds of thousands of dollars my clients have been able to hold onto when someone wanted to take that money away; the license that was suspended and then reinstated; the house that was taken and then returned; the ability to recover money for the death of a loved one after being told it was impossible; the serious felony charges that were dismissed because no crime was committed under the law.

I challenge you to think critically about what you are doing and about what others are asking you to do. It might add a few minutes to your work day, but it might have a significant benefit for your client one day. I hope it will also have a positive impact on how you view yourself as an attorney. You are an advocate. Not just for your client, but for yourself. So take a second, reflect on your work, and be proud of your accomplishments. After all, “Why not?”

¹ **CIV. CODE §1013.**
² **VEH. CODE §20012**

Christopher Montes de Oca is the government relations subcommittee chair of the Los Angeles County Bar Association Barristers. He has been hanging his shingle since 2006, practicing criminal defense and plaintiffs’ personal injury law in downtown Los Angeles.
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Patent Infringement as Applied in Samsung v. Apple

THE U. S. SUPREME COURT’S recent decision in Samsung v. Apple\(^1\) creates a quandary for patent practitioners and clients alike. Most design patents are drafted to provide clients with the broadest protection possible by limiting the number of elements in the patented design. The fewer elements in the design, the easier it is to prove that accused products have substantially the same design as required for infringement.\(^2\) For example, in Samsung v. Apple, one of Apple’s design patents at issue claimed the top “surface” of the iPhone design rather than seeking patent protection for the design of the entire electronic device.\(^3\) That way, to show infringement, Apple only had to prove that the “surface” of Samsung’s accused Galaxy phones had the same design as Apple’s patent.

Previously, in cases like this, the patent owner was able to recover the infringer’s profits on the entire device, despite the fact that the design patent was limited to a portion of the device, (e.g., the top surface of a smartphone). This provided an apparent windfall to patent owners. As an example, the U.S. Court of Appeals for the Federal Circuit awarded Apple $399 million in damages prior to the Supreme Court appeal. This damage award covered Samsung’s entire profits for its sale of infringing smartphones.\(^4\) However, the Supreme Court seemingly has ended this type of award, ruling that damages must now be apportioned so that the patent owner only recovers those profits attributable to the patented design. The Court noted that such apportionment would apply to cases involving multicomponent devices in which the patented design covers only a portion, such as the accused Samsung smartphones.\(^5\) As such, the Supreme Court reversed the finding of damages in Samsung v. Apple and remanded the case to the district court for a factual determination of what portion of Samsung’s profits are attributable to the designs covered by Apple’s patents.\(^6\)

In light of this decision, for multicomponent devices, patent practitioners and their clients must now balance the competing interests of crafting their design patents broadly enough to be able to enforce them against would-be infringers while at the same time making sure not to limit the claimed design to too narrow a portion of a product, which may severely limit recoverable damages. This fine line must be walked to insure that the potential recovery from any design patent litigation is sufficient to warrant institution of a lawsuit in the first place. Otherwise, the cost of seeking a design patent may not be worth the now lower reward.

**Infringement Standard**

A design patent is infringed if the following test is met:

Iff, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.\(^7\)

In applying this test, all ornamental features as illustrated in the figures of the design patent must be considered.\(^8\) Thus, patent practitioners typically limit the ornamental features they include as part of the claimed design. This is particularly true in light of the Federal Circuit’s decision in Contessa Food Products, Inc. v. Conagra, Inc.\(^9\)

Contessa Food Products involved a case of design patent infringement for a serving tray having an arrangement of shrimp. The design patent owned by Contessa included five drawings, with the top and side views showing the tray and shrimp arranged on the tray and a bottom view showing the underside of the tray.\(^10\) The allegedly infringing products were shrimp trays sold by Conagra having a similar design to the patented one. Contessa sought summary judgment of infringement, which was granted.

In its analysis, the district court analyzed the top and side features of the tray including the shrimp arrangement; however, the district court discounted the importance of the underside, finding that, in the accused products, the grooves and features of the underside were covered by packaging at the point of sale and would not be visible to the ordinary observer (i.e., the purchaser).\(^11\) On appeal, the Federal Circuit disagreed. It reversed the finding of infringement, holding that the design of the underside of the tray was not sufficiently considered.\(^12\)

The Federal Circuit found that “the ‘ordinary observer’ analysis is not limited to those features visible at the point of sale, but instead must encompass all ornamental features visible at any time during normal use of the product,” where “normal use” includes “a period in the article’s life, beginning after completion of manufacture or assembly and ending with the ultimate destruction, loss, or disappearance of the article.”\(^13\)

The Court explained that this holding was in line with its prior decision in Keystone Retaining Wall Systems, Inc. v. Westrock, Inc. Keystone involved a case of design patent infringement of a construction block intended to be combined with other blocks to form a wall.\(^14\) The Federal Circuit held that even though only the front face of the block was visible during its use in a retaining wall, the patented block comprised the entire retaining wall block, not just the front, and thus an accused product must include ornamental features from all faces of the block.\(^15\) In total, these cases led to the holding that “the ‘ordinary observer’ analysis is not limited to those features visible during only one phase or portion of the normal use lifetime of an accused product…. Instead, the comparison must extend to all ornamental features visible during normal use of the product.”\(^16\)

The Keystone and Contessa Food Products cases have motivated practitioners to be very careful about what is included in their design
patents, lest they narrow the scope of the design in a way that exculpates potential infringers. To this end, for multicomponent devices, practitioners either depict only the portion of a product they are claiming or use dashed lines to designate the portion of the product, which is provided for context but not included in the claimed design. Apple followed the latter of these practices by depicting everything in dashed lines save the top “surface” of its smartphone in U.S. Design Patent No. 618,677 (the “D’677 Patent”), one of the three Apple patents at issue in the Samsung v. Apple case.

The other two Apple patents at issue were likewise limited to a top portion of an electronic device, with U.S. Design Patent No. 593,087 (the “D’087 Patent”) covering “a rectangular front face with rounded corners and a raised rim,” and U.S. Design Patent No. 604,305 (the “D’305 Patent”) covering “a grid of 16 colorful icons on a black screen.”

At trial, a jury found that Samsung’s accused smartphones infringed all three of these design patents and Apple was awarded $399 million for the entire profits of Samsung’s smartphone sales. On appeal to the Federal Circuit, Samsung argued that these damages should be limited because, pursuant to Section 289 of the Patent Act, damages for design patent infringement are limited to the “total profits” for the “article of manufacture to which [a patented] design or colorable imitation has been applied.” Samsung argued that the relevant “article[s] of manufacture” were the front face or screen of the smartphone rather than the entire smartphone, and thus the damages must be limited to the profits attributable to those portions. The Federal Circuit, however, rejected this argument and affirmed the large damages award.

The Supreme Court overruled the Federal Circuit on this point. The Court focused on the term “article of manufacture,” criticizing the Federal Circuit’s decision as limiting an “article of manufacture” to include only distinct products sold to consumers. The Court held that the term is not so narrow:

“Article of manufacture” has a broad meaning. An “article” is just “a particular thing.” J. Stormonth, A Dictionary of the English Language 53 (1885) (Stormonth); see also American Heritage Dictionary, at 101 (“[a]n individual thing or element of a class; a particular object or item”). And “manufacture” means “the conversion of raw materials by hand, or by machinery, into articles suitable for the use of man” and “the articles so made.” Stormonth 589; see also American Heritage Dictionary, at 1070 (“[t]he act, craft, or process of manufacturing products, especially on a large scale” or “[a] product that is manufactured”). An article of manufacture, then, is simply a thing made by hand or machine.

So understood, the term “article of manufacture” is broad enough to encompass both a product sold to a consumer as well as a component of that product.

The Court found this broad meaning to be consistent with both the legislative history and other statutory interpretations of the term. For example, Section 171(a) of the Patent Act, which makes “new, original and ornamental design[s] for an ‘article of manufacture’ eligible for design patent protection, has been understood by the Patent Office and courts to extend to components of a multicomponent product.

The Supreme Court also pointed out that an “article of manufacture” in Section 171 includes what would be considered a “manufacture” within the meaning of Section 101, which allows a person to obtain a utility patent on a “process, machine, manufacture, or composition of matter.” The term “manufacture” in Section 101 has likewise been construed broadly to include “parts of a machine.”

While the Supreme Court answered the question of what qualifies as an article of manufacture, it declined to set forth a new test to determine what portion of a product (or if the entire product itself) is considered to be the “article of manufacture.” The Court simply remanded the Samsung v. Apple case to the lower courts and stated that the Federal Circuit could address this and any other remaining issues if needed. However, the Court noted that the United States had proposed a test in its amicus brief. The proposal suggests a case-specific, factual determination that takes into account which characterization of “article of manufacture” would “appropriately compensate (rather than over-compensate) the patentee for the contribution of the patented design to the value of the infringer’s finished product.” The United States suggested several factors that should be considered, including:

1) the scope of the design claimed in the patent;
2) the prominence of the design within the product to determine if the design affects the appearance of the product as a whole;
3) whether the design is conceptually distinct from the product as a whole; and
4) the physical relationship between the patented design and the rest of the product, which may reveal if the design adheres only to a component of the product.

The United States cites Federal Circuit
precedents in support of the factors, and the Federal Circuit may look to include some of these factors in a test for “article of manufacture” should it choose to enumerate one. However, the question still remains as to what the exact standard is that patent practitioners must meet in order to make sure any design they patent is able to recover profits on a significant enough portion of a product to make enforcement of the patent worthwhile.

Practice Pointers
While a more specific damages standard hopefully is forthcoming, there are strategies patent practitioners can suggest in the meantime so that clients can best protect their designs. As a starting point, practitioners should first determine whether the design patent seeks to cover the design of a single-component product (such as a dinner plate) or the design of a portion of a multicomponent product (such as a kitchen oven).

If the design covers even a portion of a single-component product, apportionment should not apply, according to Samsung v. Apple, and the client can seek design patent protection without the worry of a reduced damages standard. However, if the design only covers a portion or component of a multicomponent product, Samsung v. Apple could apply and the practitioner may want to consider filing multiple design patents.

Since design patents are reasonably affordable, especially when compared to utility patents, practitioners should consider obtaining both design patents on certain components, and at the same time obtaining design patents directed to the entire product. While it may be harder to show infringement of the latter comprehensive design patent, if infringement is found, the degree of apportionment of the profit damages, if any, should be much less. In addition, having both types of patents available at trial may help further settlement because, even if the defendant believes he or she can avoid the comprehensive design patent, the threat of liability based on the more narrow design patent will still exist.

2 Gorham Co. v. White, 81 U.S. 511, 528 (1871).
3 U.S. D618, 677 (“The claimed surface of the electronic device is illustrated...”).
4 Samsung, 196 L. Ed. 2d at 368.
5 Id. at 366.
6 Id. at 371.
7 Gorham, 81 U.S. at 528.
9 Contessa Food Products, Inc. v. Conagra, Inc., 282 F. 3d 1370 (Fed. Cir. 2002).
10 U.S. Design Patent No. 404,612 titled “Serving Tray with Shrimp.”
11 Contessa, 282 F. 3d at 1379.
12 Id.
13 Id. at 1379-80 (citing In re Webb, 916 F. 2d 1553, 1557-58 (Fed. Cir. 1990).
14 Contessa, 282 F. 3d at 1380 (citing KeyStone Retaining Wall Sys., Inc. v. Westrock, Inc., 997 F. 2d 1444, 1450 (Fed. Cir. 1993)).
15 Contessa, 282 F. 3d at 1380.
16 Id.
18 Id.
20 Apple, 786 F. 3d at 1002.
21 Id.
22 Samsung, 196 L. Ed. 2d at 369.
23 Id. at 369-70.
24 Id. at 370 (citing, Es parte Adams, 84 Off. Gaz. Pat. Office 310, 311 (1898); Application of Zahn, 617 F. 2d 261, 268 (C.C.P.A. 1980)).
27 Id.
29 Id. at 27-29.
30 Id.
31 Samsung, 196 L. Ed. 2d at 366.
The Effect of *Luis v. United States* on Penal Code Section 186.11

**BEFORE CERTAIN WHITE COLLAR** criminal defendants in California are even aware that they have been charged with a crime, prosecutors can proceed ex parte to secure an order freezing any and all bank, investment, and retirement accounts and locking down real property. By the time the defendant is arrested, in custody, and brought into court for arraignment and bail, he or she is likely to be cut off from access to the assets required to hire a lawyer or post bond. The pretrial asset restraint provisions of Penal Code Section 186.11 represent one of the most crippling weapons in the prosecution's arsenal. However, the government's virtually unfettered power to freeze innocent as well as tainted assets is constitutionally questionable in light of the U.S. Supreme Court's recent decision in *Luis v. United States*. Specifically, *Luis* held that under the Sixth Amendment a criminal defendant has an absolute right to untainted assets needed to hire counsel of choice; Section 186.11 fails to guarantee this constitutional protection.

Known as the “freeze and seize” statute, Section 186.11 was “intended ‘to establish a process in which the assets of those alleged to have committed white collar crime could be frozen at the time of their arrest to secure the assets in order to pay restitution for the crime victims....’” A proper petition under this statute “allows the trial court to enjoin the defendant against transferring or disposing of his or her assets.”

When Section 186.11’s predecessor statute was first introduced in 1995, the bill’s stated purpose was to “set up a procedure for the freezing and forfeiture of the financial assets of persons alleged to have committed white collar crimes in order to obtain restitution for the crime victims, pay the costs of investigation and prosecution of those persons, and obtain fines and penalties payable to the counties which have undertaken the prosecution of those criminal defendants.” The proposed bill contemplated that the assets would be subject to forfeiture if the defendant was convicted and provided a process for the prosecuting agency to move the superior court for “pendente lite orders to preserve the status quo of the property alleged in the petition of forfeiture.” Subsequently, the bill was amended, removing any reference to forfeiture, and now, rather than being a forfeiture statute, it solely permits a pretrial “freeze” of assets and a postconviction liquidation to pay restitution and fines. Indeed, the California Supreme Court has observed that the “principal focus of section 186.11....is to facilitate the payment of restitution by ’prevent[ing] dissipation or secreting of assets or property’.”

Section 186.11’s provision for the pretrial restraint of a defendant’s untainted assets permits the seizure of up to three times the amount of the alleged loss. It reads, in relevant part: “any asset or property that is in the control of [the defendant], and any asset or property that has been transferred by [the defendant] to a third party, subsequent to the commission of any criminal act alleged pursuant to subdivision (a), other than a bona fide purchase, whether found within or outside the state, may be preserved by the superior court in order to pay restitution and fines.” The statute thus allows the potential seizure of all of a defendant’s property, inside or outside California, without regard to whether the property has any nexus to criminal activity, and it does not require the release of untainted funds needed to hire counsel.

**Luis v. United States**

In *Luis*, the defendant was charged with federal healthcare fraud offenses. The government alleged that the defendant had obtained up to $45 million illegally but had spent almost all of it, leaving just $2 million in assets. Hoping to ensure that the defendant’s assets would be available to pay fines and restitution if she were convicted, the government requested a pretrial injunction under Section 1345(a)(2) of the U.S. Code. This section allows the government to seek a restraint on property equivalent in value to the proceeds of specified healthcare-related offenses and permits the court to freeze three categories of assets: 1) assets “obtained as a result of the crime,” 2) property “traceable” to the crime, and 3) other “property of equivalent value.” The statute, therefore, implicates assets that are both derived from or traceable to criminal violations and assets that are untainted and have not been shown to be connected with criminal activity. Notably, Section 1345 only allows assets to be restrained up to the “equivalent value” of the assets obtained from or traceable to the purported criminal conduct.

The government asked the federal district court in *Luis* to freeze all of the defendant’s assets, which the government agreed were unconnected with the alleged criminal conduct. The defendant argued that an order that prevented her from using untainted funds to hire counsel of her choice was a violation of the Sixth Amendment. Relying on earlier precedent, the district court found that the defendant did not have a Sixth Amendment right to use untainted assets to hire counsel, and the Eleventh Circuit agreed. Reversing the judgment of the Eleventh Circuit, the U.S. Supreme Court held that “the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.” The Court based its holding on “the nature and importance of the constitutional right to counsel taken together with the nature of the assets” at issue.

The Court in *Luis* first discussed the “fundamental” nature of the Sixth Amendment right to counsel. The Court noted that the right to counsel has been described “as a ‘great engine by which an innocent man can make the truth of his innocence visible,’” that the right has been understood to require that the government provide counsel for indigent defendants in all but the least serious cases, and that the Supreme Court has considered the wrongful deprivation of the right to counsel as a “‘structural’ error that so ‘affect[s] the framework within which the trial proceeds’ that courts may not even ask whether the error harmed the defendant.” The Court then reasoned that the fundamental Sixth Amendment right to assistance of counsel outweighs the interests of the government and victims in securing restitution. As the Court observed, while the

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interests in obtaining payment of criminal forfeiture or a restitution order are important, “compared to the right to counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal justice system.”

The Court next focused on the import of the property’s status as either tainted assets (proceeds of a crime or property used to facilitate a criminal activity) or untainted assets (property that is not a result of or derived from the crime). The Court indicated that the status of the property is crucial because it determines to whom the property belongs at the time of the freeze. When property is “tainted,” the government’s right to the property is said to vest upon commission of the crime, even if title is not perfected until judgment. Under this so-called “rela-
tion-back” doctrine, a pretrial freeze of tainted assets is permissible because the tainted property is said to belong to the government or the victim rather than the defendant at the time of the freeze. Conversely, untainted assets belong to the defendant “pure and simple.” The distinction is “an important one, not a technicality.” Thus, the government, even before trial, has a substantial interest in tainted property, which is sufficient to justify a pretrial restraint, but with respect to untainted property, a defendant can reasonably claim that the property is still his or hers, “free and clear.”

Ultimately, the Supreme Court answered the only question in front of it, and limited the portion of the federal statute that allowed for a pretrial freeze order on untainted assets needed to obtain counsel. However, the Court seriously called into question the practice of freezing any of a defendant’s untainted assets pretrial.

Penal Code Section 186.11 After Luis

Since Section 186.11 allows the pretrial restraint of all of a defendant’s innocent assets, up to three times the amount of alleged loss, it is broader than Section 1345—the federal statute at issue in Luis—in two important ways. It allows the government to seize any assets up to three times the amount of loss. On the other hand, unlike Section 1345, Section 186.11 permits the court, upon application of the defendant, to consider release of funds for attorney’s fees as follows:

The court…may consider a defendant’s request for the release of a portion of the property affecting by this section in order to pay reasonable legal fees in connection with the criminal proceeding,… The court shall weigh the needs of the public to retain the property against the needs of the defendant to a portion of the property. The court shall consider the factors listed in para-

graph (3) prior to making any order releasing property for these purposes.

Although this provision allows the release of attorney’s fees, it does not require the release of untainted funds when necessary to hire counsel, and therefore cannot satisfy the standard set forth in Luis. To begin with, the release of funds for attorneys can only occur after the court has conducted a balancing test and, separately has considered a list of enumerated factors. After the court has under-
taken these required analyses, the release of funds remains wholly discretionary. Finally, the release of funds can only occur after a defendant has been charged and presumably arrested, and, furthermore, is at a critical stage in the proceedings when he or she needs the assistance of counsel. It places the onus on the defendant to file the motion for release of funds, which is not practically accomplished without hiring an attorney. Thus, the very process set forth in Section 186.11 makes it effectively impossible for a defendant to seek release of attorney’s fees because he is without funds to hire counsel to seek the release of funds he needs to hire counsel.

The attorney’s fees provision requires the court to make two discrete balancing analyses prior to releasing any funds for counsel. First, the court shall weigh the needs of the public to retain the property against the needs of the defendant to a portion of the property. Second, the court shall consider the list of five factors set forth in paragraph (f)(3) of the statute. These factors significantly overlap with the considerations of the first bal-
ancing test. For example, the first factor—in subsection (A)—is the public interest in preserving the property or assets, and the last factor—in subsection (E)—is the public interest in compensating victims and paying court-imposed restitution and fines. In short, these two conditions require the court to bal-
ance concerns related to the government and victims with a defendant’s right to counsel prior to releasing any funds for counsel.

These are the same concerns that the Supreme Court held were subsidiary to a defendant’s right to counsel. The Court in Luis recognized that on one side is the “Sixth Amendment right to assistance of counsel that is a fundamental constituent of due process of law” and on the other side are “interests that include the Government’s con-
tingent interest in securing its punishment of choice (namely, criminal forfeiture) as well as the victims’ interest in securing restitution.” After examining these conflicting considerations, the Supreme Court clearly held that the fundamental Sixth Amendment right to assistance of counsel is more impor-
tant than the government’s and victims’ interest in securing forfeiture and restitution. The court found that “compared to the right to counsel of choice, these interests would seem to lie somewhat further from the heart of a fair, effective criminal justice system.”

Thus, the mandate in Section 186.11(f)(4) that requires the court to weigh the needs of the public against the needs of the defendant was explicitly rejected by the Supreme Court. Moreover, the release of attorneys’ fees under Section 186.11 is permissive; it states that the court may consider a defendant’s request for attorney’s fees. This language invests the trial court with unfettered discretion to decide whether to hold a hearing to release funds in the first instance. Under Luis, however, a defendant has an absolute right to use untainted assets for attorney’s fees. “[T]he pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.” Thus, the attorney’s fees provision, which makes the release of fees discretionary, fails for this reason as well. Critically, the process for release of funds under Section 186.11 also conflicts with Luis. Pursuant to Section 186.11, the prosecution can apply for a temporary restraining order (TRO) or other protective relief “to preserve the [defendant’s] property or assets” concurrent with filing a charging document specifying felonies. The statute allows the prosecutor to seek such orders without prior notice to the defendant. Thus, a defendant may be arrested and in custody, facing serious felony charges, and scheduled for arraignment and bail before he or she even receives the docu-
ments relevant to the restraint of his or her assets.

To challenge an asset freeze, a defendant must request a hearing. The hearing must be held within 10 days of serving the request on the prosecuting agency or within two days upon a showing of good cause. At the hearing, the court must consider a whole list of factors prior to making any order releasing property for the purpose of hiring counsel.

Thus, the release of funds for attorney’s fees may occur only after a complaint has been filed—and the defendant, presumably, has been arrested—and likely after the defen-
dant has been arraigned. Further, unless the defendant is going to make the motion for release of funds pro per, the requirement that the defendant “request” the hearing and “request” fees presupposes that the defendant will have counsel in order to request the funds necessary to hire counsel. The Supreme Court was concerned with this very scenario in Luis: “As far as Luis’ Sixth Amendment right to counsel of choice is concerned, a restraining order might as well be a forfeiture; that is, the restraint itself suffices to completely deny this constitutional right.”

Indeed, only with great difficulty could a criminal defendant who has not yet had funds released under Section 186.11(f)(4)
convince private counsel to work, presumably pro bono, to identify the complex legal and factual issues involved in challenging a Section 186.11 freeze. Counsel would further be required to move for and appear at the requisite hearing all in the hope of eventually receiving what the court concludes are reasonable fees. Moreover, the attorney would be required to enter a general appearance before he or she even knew whether funds for attorney’s fees would be released.

Because the potential release of attorney’s fees under Section 186.11(f)(4) occurs only after the defendant has been charged and the assets have been frozen, the process set forth in the statute appears to unlawfully hinder criminal defendants from obtaining funds to challenge the TRO, which results in the inability to hire counsel of choice. In practical respect, it also means that a defendant will be unable to retain counsel of choice at the critical time of arraignment and bail proceedings.44

Obstacles to Statutory Challenge

The Supreme Court’s decision in Luis seriously calls into question the constitutionality of the pretrial restraint provisions in Section 186.11. However, significant strategic and legal concerns remain. Initially, mounting an as-applied constitutional challenge may be difficult if not impossible. First, if counsel has been retained, the asset restraint presumably has not interfered with the defendant’s ability to hire counsel of his or her choice. Second, if defense counsel secures the release of sufficient funds for legal representation, the defendant’s as-applied challenge to the asset restraint is further weakened. Third, a defendant may not authorize the expenditure of the limited funds released for his or her defense on bringing a further challenge to the pretrial restraint.

Although a facial challenge would avoid these issues, courts are less inclined to find statutes unconstitutional when no individual right has been infringed. Moreover, if the challenge is defeated at the trial court level, additional questions regarding the appropriate method of appealing a final ruling from what is statutorily defined as a “pendant” proceeding remain unresolved. Thus, while the holding in Luis calls into question the constitutionality of Section 186.11’s pretrial asset restraint provisions, defense counsel continue to face difficulty getting the issue before the California courts.

1 Luis v. United States, 136 S. Ct. 1083 (2016).
2 Although the powers that are mandated in Penal Code §186.11 are frequently referred to as “freeze and seize” provisions, they are more accurately described as freeze provisions, because the prosecution does not commonly take custody of the assets but simply prevents them from being accessed and distributed.
3 People v. Green 125 Cal. App. 4th 360, 367 (2004), citing S. Rules Comm., Off. of S. Floor Analysis, S. Code §186.11 are frequently referred to as “freeze and seize” provisions, because the prosecution does not commonly take custody of the assets but simply prevents them from being accessed and distributed.
6 Id. at 1088; see also 18 U.S.C. §1345(a)(2).
9 Luis, 136 S. Ct. at 1088.
10 Id. at 1087.
11 Id. at 1088.
12 Id.
13 Id.
14 Id. at 1088-89.
15 Id. at 1089 (internal citations omitted).
16 Id. at 1093.
17 Id.
18 Id. at 1090-92.
21 Luis, 136 S. Ct. at 1090.
22 Id. at 1091.
23 Id. at 1092.
24 Penal Code §186.11(f)(4).
25 The factors that are delineated in Penal Code §186.11(f)(3) consist of: “(A) The public interest in preserving the property or assets pendente lite. (B) The difficulty of preserving the property or assets pendente lite where the underlying alleged crimes involve issues of fraud and moral turpitude. (C) The fact that the requested relief is being sought by a public prose- cutor on behalf of alleged victims of white collar crimes. (D) The likelihood that substantial public harm has occurred where aggravated white collar crime is alleged to have been committed. (E) The significant public interest involved in compensating the victims of white collar crime and paying court-imposed restitution and fines.”
26 Luis, 136 S. Ct. at 1093.
27 Id.
28 Id.
29 Id.
30 Penal Code §186.11(d)(2).
31 Penal Code §186.11(d)(3).
32 Penal Code §186.11(f)(2).
33 Penal Code §186.11(f)(4).
35 It is well settled that a defendant in criminal proceedings has a “fundamental constitutional right to the assistance of counsel at all stages of the proceedings...” (In re Lopez, 2 Cal. 3d 141, 145 (1970), citing Cal. Const. art. I, §13; see also People v. Carasi, 44 Cal. 4th 1263, 1299 (2008); U.S. Const. Amend. XI.) As the U.S. Supreme Court has observed, “[P]erhaps the most critical period of the proceedings” occurs from the time of “arraignment until the begin- ning of...trial.” (Powell v. State of Alabama, 287 U.S. 45, 57 (1932).)
 AGAINST SPONSORS OF TERRORISM ACT (JASTA)\(^1\) became law on September 28, 2016, after the Senate and House of Representatives overwhelmingly overrode President Barack Obama’s veto—the only veto override of the Obama presidency. JASTA was motivated by congressional interest in affording legal redress to the families and victims of the 9/11 terrorist attacks. JASTA’s congressional findings recognize that:

> The United States has a vital interest in providing persons and entities injured as a result of terrorist attacks committed within the United States with full access to the court system in order to pursue civil claims against persons, entities or countries that have knowingly or recklessly provided material support or resources, directly or indirectly, to the persons or organizations responsible for their injuries.\(^2\)

Nonetheless, the Obama administration and others expressed concerns about potential negative effects that JASTA may have on international relations of the United States. However, Congress overrode the veto because JASTA seeks to ameliorate such concerns by strictly focusing its application on acts of international terrorism occurring solely within the United States, and thus is consistent with current United States law on foreign sovereign immunity. As a result, JASTA should not be a significant cause for concern to the extent that a foreign state is not engaged in tortious acts connected to international terrorism occurring within the United States. The scope of conduct that comes within JASTA is limited geographically.

Yet, there is a degree of ambiguity in JASTA that leaves room for judicial construction that may result in judgments having varied views on the exact reach and application of JASTA, and could thereby cause unintended stress on international relations. Therefore, while affording the right of access to courts envisioned by Congress, courts will need to be vigilant and apply JASTA in a manner that is consistent with the limiting principles in existing foreign sovereign immunity law.

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JASTA is an amendment to the Foreign Sovereign Immunities Act (FSIA),3 which was enacted in 1976 to codify international law on foreign sovereign immunity. Originally, international law considered sovereign states to enjoy absolute immunity from the jurisdiction of foreign courts. This view rested on the principle that sovereign states are considered to be equals, and thus their actions cannot be judged by the courts of another sovereign state. However, this view began to erode as sovereign states delved into commercial endeavors with citizens of other sovereign states. For example, in the 1812 case of Schooner Exchange v. McFaddon,4 Chief Justice John Marshall noted a distinction between the public and commercial acts of a foreign state:

A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern.5

This evolution in international law resulted in the so-called restrictive theory of foreign sovereign immunity, first recognized by the United States in the 1952 Tate Letter.6 Under the restrictive theory, as articulated in the Tate Letter, foreign sovereign “immunity is confined to suits involving the foreign sovereign’s public acts, and does not extend to cases arising out of a foreign state’s strictly commercial acts.”7 The restrictive theory has evolved since the Tate Letter, as is now reflected in the FSIA.

Prior to the enactment of the FSIA—when a foreign state was sued in the United States—the State Department filed with the court a recommendation regarding whether the foreign state enjoyed sovereign immunity in the particular case. Indeed, the two expressed purposes of the FSIA were to endorse and codify the restrictive theory of sovereign immunity, and to transfer primary responsibility for deciding “claims of foreign states to immunity” from the State Department to the courts.8 But the State Department retained the ability to submit “statements of interest” to the court, expressing its views on the availability of foreign sovereign immunity in a particular case. Although courts usually follow the government’s views as expressed in the statements of interest, the courts are not bound to do so.

Thus, the FSIA establishes the subject-matter jurisdiction of federal courts in civil actions against foreign states.9 In fact, the Supreme Court has held that the FSIA “provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country” and renders a foreign state “presumptively immune from the jurisdiction of United States courts unless one of the Act’s express exceptions to sovereign immunity applies.”10 Thus, courts should not endeavor to craft exceptions to foreign sovereign immunity that are not expressly set forth in the FSIA or attempt to expand the reach of the enumerated exceptions. The comprehensive nature of the FSIA provides foreign states with a level of predictability regarding what conduct may open the gates of litigation against them in the United States.

The FSIA begins with a general grant of foreign sovereign immunity to foreign states, except as specifically excepted therein: Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.11 The plaintiff must overcome this starting point that foreign states are immune. Sections 1605 to 1607 set forth the FSIA’s exceptions to foreign sovereign immunity. FSIA exceptions commonly invoked against foreign states include the express or implicit waiver by a foreign state of sovereign immunity in the United States,12 commercial activities carried on by a foreign state in the United States or outside of the United States and having a direct effect in this country,13 non-commercial torts committed by a foreign state in the United States,14 and where a foreign state participates in certain international arbitrations.15

Terrorism Exception

Prior to the enactment of JASTA, the FSIA already contained a more limited terrorism exception to foreign sovereign immunity.16 This terrorism exception, added in 1996 and which remains in effect, allows civil actions seeking money damages for personal injury or death “caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act,” against foreign states that are designated by the State Department to be “state sponsors of terrorism.”17 Thus, the FSIA “stripped immunity from a foreign state for claims arising from particular acts, if those acts were taken at a time when the state was designated as a sponsor of terrorism.”18 However, application of this original terrorism exception is extremely limited because the State Department currently has designated only three countries as state sponsors of terrorism: Iran, Sudan and Syria.19 This original terrorism exception cannot be invoked against any other foreign states. It has limited application, and the executive branch has absolute authority to specify which foreign states are subject to it.

To broaden the scope of the terrorism exception, Congress enacted JASTA, which takes a different approach. In enacting JASTA, Congress recognized that “international terrorism is a serious and deadly problem that threatens the vital interests of the United States.”20 Rather than amending the original terrorism exception (Section 1605A) in the FSIA, JASTA introduced a new and separate terrorism exception (Section 1605B). The grounds for application of the new JASTA international terrorism exception differ from the grounds for application of the original terrorism exception.

The White House and others expressed concerns relating to the potential negative effects that JASTA could have on international relations of the United States; mainly, that JASTA allegedly signaled a radical departure from existing law. Although there is some justification for those concerns in that JASTA has broader application than Section 1605A (which was limited to state sponsors of terrorism), JASTA is expressly limited to acts of international terrorism occurring within the United States. To the extent that a foreign state is not involved in such acts, international relations between that foreign state and the United States should not be negatively impacted. JASTA also has been drafted consistently with the general principles set forth in the FSIA.

No Liability Provision

JASTA, like the other exceptions in the FSIA, is not a liability provision. It deprives a foreign state of sovereign immunity and permits the court to exercise subject-matter jurisdiction over claims against it. Under the FSIA, “the foreign state [is] liable in the same manner and to the same extent as a private individual under like circumstances.”21 As a result, it is state law that provides the substantive law of liability on the claim against the non-immune foreign state.22

Specifically, JASTA states that a foreign state shall not have foreign sovereign immunity:

[1] In any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—(1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his
or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred. JASTA clearly limits the exception to acts of international terrorism occurring within the United States. This substantial limitation significantly decreases the potential for negative effects on foreign relations, because foreign states could not be sued in the United States on the basis of alleged acts of international terrorism occurring outside of the United States.

Acts of International Terrorism

Courts also will not be writing on a blank slate with respect to what constitutes an act of international terrorism. JASTA defines the term “international terrorism” as in Section 2331 of Title 18 of the United States Code and excludes from that definition any act of war. For its part, Section 2331 defines international terrorism to be 1) “violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States,” (2) that “appear intended” to “intimidate or coerce a civilian population,” “influence the policy of a government by intimidation or coercion,” or “affect the conduct of a government by mass destruction, assassination, or kidnapping,” and 3) that “occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.”

This detailed definition of international terrorism imposes a heavy burden of proof on plaintiffs (who under the FSIA normally carry the ultimate burden of proof), and limits the scope of the qualifying terrorist act.

In making such determinations, and to decrease the potential for friction in international relations while giving effect to the stated congressional intent, courts should focus on the intended geographical limitation of JASTA, which would be consistent with the general manner in which the Supreme Court has held that the FSIA must be interpreted. For example, the Supreme Court has emphasized that “any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA’s] text. Or it must fall.”

Such construction is in line with the focus of cases interpreting other exceptions in the FSIA. For example, the Supreme Court has held that in tort actions, the FSIA’s commercial activity exception to foreign sovereign immunity does not apply where the gravamen of the action (that is, the facts upon which the action is based) arises outside of the United States. The FSIA already contains a built-in geographic approach that permeates many of its provisions.

A further limitation in JASTA is that the act of international terrorism must have a nexus to a “tortious act” of the foreign state, or of a governmental official acting within the course and scope of his/her authority, because JASTA requires that the physical injury or death be caused both by the act of international terrorism and such tortious conduct. However, JASTA is silent on what standard should be applied to satisfy that apparent nexus requirement. This may be cause for international concern in that courts are left with discretion to decide whether the particular facts connecting the acts of international terrorism to the alleged tortious conduct of the foreign state are sufficiently close or too attenuated. In exercising such discretion, courts should keep in mind the doctrine of international comity, given that the Supreme Court has recognized that foreign sovereign immunity is “a matter of grace and comity.” In other words, the terrorism exception must be read narrowly, which is consistent with the narrow construction generally provided to other FSIA exceptions.

JASTA also makes the substantive burden more difficult for the plaintiff by specifying that the subject tortious conduct must be more than mere negligence: “A foreign state shall not be subject to the jurisdiction of the courts of the United States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence.”

While JASTA, like the FSIA more generally, does not create a cause of action per se, it excludes from the available menu of state tort law causes of action those based merely on negligent conduct. This reflects the intent of Congress to deny foreign sovereign immunity only in cases where the wrongful acts of the foreign state were intentional.

Further consideration must be given to the term “foreign state.” Under the FSIA, a foreign state does not include only the sovereign state itself, but also “a political subdivision of a foreign state or an agency or instrumentality of a foreign state.” In turn, “agency or instrumentality” is also defined.

Under the FSIA, “political subdivision” includes all governmental units beneath the central government. An ‘agency or instrumentality’ of a foreign state, on the other hand, is defined as any political subdivision of a foreign state which is a separate legal person or entity. For example, based on existing case law, the tortious acts of a country’s armed forces, ministries of internal security, finance ministries, embassies, state-owned airlines, state-owned petroleum companies, or nationalized banks, could be considered acts of their respective sovereigns. Thus, foreign states may raise concern that the tortious conduct required by JASTA could be that of an agency or instrumentality, which expands the reach of the international terrorism exception beyond the acts of the sovereign itself. In other words, the sovereign can be brought into court on the basis of actions of its agencies and instrumentalities, if such actions can be attributed to the sovereign. However, that should not be cause for added concern because it reflects existing FSIA law; rather, JASTA limits subject-matter jurisdiction by requiring intent.

Presumption of Separateness

FSIA jurisprudence is rich in the area of the attribution of acts of government officials to foreign states. It generally holds that there is a “presumption of separateness” between the sovereign and its agencies or instrumentalities. This means that the actions of the agency or instrumentality are not imputed to the sovereign unless the sovereign treats the agency or instrumentality as its alter ego or exercises a significant degree of control over it consistent with general corporate law principles found in U. S. law. Hence, the foreign state is not left helpless in this regard. If the foreign state respects the separate juridical personality of the subject agency or instrumentality, their actions cannot be imputed to the foreign state for purposes of application of the FSIA exception. Similarly, if a government official acts outside of the course or scope of his or her authority, then the actions of that official would not be considered to be acts of the foreign state for purposes of the FSIA determination.

A further concern may be the extent to which JASTA could be applied to private (nongovernmental) parties, like financial institutions or other businesses providing services to foreign states. Could a nongovernmental business entity or individual be held liable under JASTA? The answer is yes, because JASTA provides for aiding and abetting liability under certain circumstances.

In this respect, JASTA is different from the rest of the FSIA which mainly concerns itself with jurisdiction and not substantive law. However, although the extent of aider and abettor liability under JASTA will be subject to judicial construction, if the foreign state is immune under the FSIA, the action may also be dismissed as to the private party. In Republic of the Philippines v. Pimentel, the Supreme Court held that, under principles of international comity, an action could not proceed against private parties after dismissal on foreign sovereign immunity grounds of the foreign state, because the interests of the foreign state may be injured if the action proceeds without it. Pimentel has been applied in a variety of cases including disputes regarding government procurement bid-
The FSIA also contains a shifting burden of proof, which further serves to protect foreign states. “Although a party claiming FSIA immunity retains the ultimate burden of persuasion on immunity, it need only present a prima facie case that it is a foreign state; and, if it does, the burden shifts to the party opposing immunity to present evidence that one of the exceptions to immunity applies.” Hence, in a FSIA-based motion to dismiss that challenges the plaintiff’s factual allegations, “Rule 12(b)(6)’s presumption of truthfulness does not attach to [the plaintiff’s] allegations” in his or her complaint. For the case to proceed beyond the pleading stage, the plaintiff must support its allegations against the foreign state with evidence when facing a motion to dismiss. Although some discovery is permitted to establish jurisdiction under the FSIA, the plaintiff seeking discovery bears the burden of establishing the specific need of such discovery. The principles of international comity underlying the FSIA require the court, when deciding whether or not to allow jurisdictional discovery from a foreign state, to balance the plaintiff’s need for “discovery to substantiate exceptions to statutory foreign sovereign immunity” against the need to “protect a sovereign’s or sovereign agency’s legitimate claim to immunity from discovery.” Discovery is the exception rather than the rule.

In this regard, if a district court denies a motion to dismiss a complaint under the FSIA, the defendant foreign state also has the right to pursue an interlocutory appeal. This is so because the FSIA provides “immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits.” The right to an interlocutory appeal provides added protection to the foreign state, because it allows review of the district court’s FSIA determination before trial. In addition, where a court of appeals may exercise interlocutory jurisdiction over the denial of an FSIA motion to dismiss, the court of appeal also may exercise pendent jurisdiction over related jurisdictional issues, such as whether dismissal was appropriate based on forum non conveniens, international comity, and other jurisdictional doctrines.

Default Judgment

The FSIA permits the entry of a default judgment against a foreign sovereign, but stipulates that “[n]o judgment by default shall be entered... against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.” Thus, a foreign state will be forced to hire an attorney to represent it in court and assert the sovereign immunity defense. Nonetheless, when a defendant is a foreign state, a default is especially disfavored because “[i]ntolerant adherence to default judgments against foreign states could adversely affect [the United States’] relations with other nations and undermine the State Department’s continuing efforts to encourage foreign sovereigns generally to resolve disputes within the United States’ legal framework.” Some courts have held that even if a foreign state defaults, the court has an independent duty to perform the required sovereign immunity analysis under the FSIA, and ensure itself that it has subject-matter jurisdiction.

Further, JASTA contains a provision which allows courts to “stay a proceedings against a foreign state if the Secretary of State certifies that the United States is engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims against the foreign state, or any other parties as to whom a stay of claims is sought.” Accordingly, this provision provides the executive branch with significant power to affect the outcome of particular JASTA litigation. Similarly, the Supreme Court has recognized that, by enacting the FSIA, Congress did not divest the president of the authority to settle claims against foreign states. Thus, even after JASTA, the executive branch retains the ability to attempt to negotiate a resolution with the foreign state.

Retroactive Application

Finally, although the Supreme Court has held that the FSIA has retroactive application, Congress limited the retroactive application of JASTA to actions “arising out of an injury to a person, property, or business on or after September 11, 2001.”

In sum, courts recognize that “[a] primary purpose of the FSIA is to make it difficult for private litigants to bring foreign governments into court, thereby avoiding affronting them.” While JASTA has broader subject-matter jurisdiction in claims against foreign states involving acts of international terrorism occurring in the United States, the “presumption under FSIA [remains true] that actions taken by foreign states or their instrumentalities are sovereign acts and thus protected from the exercise of our jurisdiction, unless one of the enumerated exceptions of FSIA applies.” JASTA does not change this presumption of sovereign immunity or the narrow reading imposed by FSIA jurisprudence on the application of its enumerated exceptions, but it does provide access to United States courts to seek redress under a new exception to the FSIA which is broader than the existing terrorism exception. As JASTA’s congressional intent declares, its “purpose” is: [T]o provide civil litigants with the broadest possible basis, consistent with the Constitution of the United States, to seek relief against persons, entities and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist acts against the United States.

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2 Id. §2(a)(7).
5 Id. at 145.
6 Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Acting Attorney General Philip B. Perlman (May 19, 1952) (reprinted in 26 Dep’t of State Bull. 984-85 (1952), at 1a, 4a-5a).
9 Id. §1330(a).
12 Id. §1605(a)(1).
13 Id. §1605(a)(2).
14 Id. §1605(a)(5).
15 Id. §1605(a)(6).
16 Id. §1605(a).
17 Id.
21 28 U.S.C. §1606; see also H.R. Rep. No. 94-1487, at 22 (1976) (the legislative history shows that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances.).
22 See, e.g., Bank of New York v. Yugoimport, 745 F. 3d 599, 609 n.8 (2d Cir. 2014) (“The FSIA operates as a pass-through, granting federal courts jurisdiction over otherwise ordinary actions brought against foreign states. It provides foreign states and their instrumentalities access to federal courts only to ensure uniform application of the doctrine of sovereign immunity.”). 23 28 U.S.C. §1605(b).
24 Id. at §1605(b).
25 Id. §1605(a).
30 Alcon v. Islamic Rep. of Iran, 672 F. 3d 1066, 1075 (D.C. Cir. 2012) (“The FSIA established a broad grant of immunity for foreign sovereigns that can only be abrogated by United States courts to seek redress under a new exception to the FSIA which is broader than the existing terrorism exception.”)
by one of the statute’s narrowly drawn exceptions.”).
32 28 U.S.C. §1603(b); see also Int’l Ins. Co. v. Caja Nacional de Ahorro y Seguro, 293 F. 3d 392, 397
(7th Cir. 2002) (“A foreign instrumentality is defined by
the FSIA as an entity which is a separate legal
person, exhausts the comity interests that have contributed
to its parent government when government exercises
extensive control over the instrumentality’s daily oper-
ations and abuses the corporate form.”).
33 Estates and abuses the corporate form.”).
34 Magness v. Russian Fed’n, 247 F. 3d 609, 613 n.7
(5th Cir. 2001).
(D.D.C. 2011); Bodnjakju v. Fed. Rep. of Yugoslavia,
No. 01 C 4608, 2002 WL 1575067, at *1 (N.D. Ill. July 18, 2002).
36 Bennett v. Islamic Rep. of Iran, 507 F. Supp. 2d 117,
130 (D.D.C. 2007).
37 Blieer v. Bundesrepublik Deutschland, No. 08 C 06254, 2011 WL 4621614, at *5 (N.D. Ill. Sept. 30,
2011).
38 Gomes v. ANGOP, Angola Press Agency, No. 11-
CV-0580 DLJJO, 2012 WL 3637453, at *11 (E.D.N.Y.
39 Darby v. Compagnie Nationale Air France, 769 F.
40 Kensington Intern. Ltd. v. Rep. of Congo, No. 03
CIV. 4578 LAP, 2007 WL 1032269, at *6 (S.D.N.Y.
41 Callejo v. Bancomer, S.A., 764 F. 2d 1101, 1106
(5th Cir. 1985).
42 See, e.g., First Nat’l City Bank v. Banco Para El
Comercio Exterior De Cuba, 462 U.S. 611, 620-29
(1983) (discussing presumption of separateness
and exception to the same); Doe v. Holy See, 557 F. 3d
1066, 1077-79 (9th Cir. 2009) (“We join the D.C.
Circuit and the Fifth Circuit in extending Bancec’s
analysis to the question whether the actions of a cor-
porate entity are the acts of the sovereign state.”).
43 JASTA requires that the tortious act “of any official,
employee, or agent of that foreign state” must be com-
mitted “while acting within the scope of his or her
This is also consistent with existing FSIA case law,
which generally holds that if the government official
acts without actual authority, that activity cannot con-
stitute an act by the foreign state. See, e.g., Phaneuf v.
Republic of Indonesia, 106 F. 3d 302, 307-08 (9th
Cir. 1997).
44 28 U.S.C. §233(d) (“liability may be asserted as
to any person who aids and abets, by knowingly pro-
viding substantial assistance, or who conspires with
the person who committed such an act of international
terrorism.”).
45 Republic of the Philippines v. Pimentel, 553 U.S.
851, 865-66 (2008) (holding that the lower courts
“failed to give full effect to sovereign immunity when
they held the action could proceed [against the private
parties alone] without the Republic and the Com-
mission. Giving full effect to sovereign immunity pro-
motes the comity interests that have contributed to
the development of the immunity doctrine.”).
46 T&JGEM LLC v. Republic of Ghana, 26 F. Supp. 3d
1, 12-13 (D.D.C. 2013).
47 GML LLC v. Asociacion del Futbol Argentino, No.
13-21494-CIV, 2014 WL 2818663, at *7 (S.D. Fla.
June 23, 2014).
48 EduMoz, LLC v. Republic of Mozambique, 968 F.
49 Kelly v. Syria Shell Petroleum Dev. B.V., 213 F. 3d
841, 847 (5th Cir. 2000).
50 Odyssey Marine Exploration, Inc. v. Unidentified,
Shipwrecked Vessel, 675 F. Supp. 2d 1126, 1131 (S.D.
Fla. 2009); aff’d 657 F. 3d 1159 (11th Cir. 2011).
51 First City, Texas-Houston, N.A. v. Rafidain Bank,
150 F. 3d 172, 176 (2d Cir. 1998).
52 See, e.g., Abelesz v. OTP Bank, 692 F. 3d 638, 645
(7th Cir. 2012) (“it is well established that an order
denying sovereign immunity under the FSIA is a col-
nal order subject to interlocutory appeal.”).
53 Foremost-McKesson, Inc., et al. v. Islamic Republic
of Iran, 905 F. 2d 438, 443 (D.C. Cir. 1990); accord
EM, Ltd. v. Republic of Argentina, 685 F. 3d 201,
210 (2nd Cir. 2012) (“sovereign immunity protects a
sovereign from the expense, intrusiveness, and hassle
of litigation”).
54 See, e.g., S & Davis Intern., Inc. v. The Republic of
Yemen, 218 F. 3d 1292, 1297-98 (11th Cir. 2000).
56 Practical Concepts, Inc. v. Republic of Bolivia, 811
F. 2d 1543, 1551 n.19 (D.C. Cir. 1987).
57 See, e.g., Weininger v. Castro, 462 F. Supp. 2d 457,
477 (S.D.N.Y. 2006).
59 Dames & Moore v. Regan, 453 U.S. 654, 684-89
60 Republic of Austria v. Altmann, 541 U.S. 677, 697-
62 Gregorovian v. Investsa, 871 F. 2d 1515, 1528 n.11
(9th Cir. 1989).
63 JASTA, §2(b), 130 Stat. 853.
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IN 2016, respect for the rule of law and the civic virtues of duty, honesty, and civility embodied in the California Rules of Professional Conduct never seemed more important. Traveling in Colombia, Los Angeles Superior Court Judge Benny Osorio was rescued from kidnappers demanding a $33,000 ransom.\(^1\) At home, the State Bar of California was rescued by the California Supreme Court, which assessed bar members to fund the State Bar’s disciplinary system after the legislature adjourned without authorizing 2017 dues.\(^2\) A state audit report found that the state bar’s client security fund, which reimburses victims of attorney dishonesty, was underfunded at the beginning of the year by $16 million and experiencing long delays.\(^3\)

**Attorney-Client Privilege**

The California Supreme Court twice addressed the attorney-client privilege of government agencies under the Public Records Act (PRA).\(^4\) In *Ardon v. City of Los Angeles*,\(^5\) it held that the city’s inadvertent disclosure of documents in response to a PRA request did not waive the protection of the attorney-client privilege and work product doctrine. After conclusion of class litigation challenging the validity of certain city taxes, one of the plaintiffs’ lawyers served a PRA request. An administrative officer released 53 documents, among them three documents that had been listed on a privilege log during the litigation, and the city moved to recover them. Reversing the lower courts, the Supreme Court held that, like the Evidence Code, the PRA protects attorney-client privileged communications absent an intentional and knowing waiver.

In December, a sharply divided Supreme Court again addressed the attorney-client privilege of a government agency, resulting in a controversial new approach to privilege analysis. In *Los Angeles County Board of Supervisors v. Superior Court*,\(^6\) the American

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**2016 Ethics Roundup**

**Last year attorneys in the state found relief from malpractice claims under statutes regarding one-year tolling limitations and anti-SLAPP provisions**

John W. Amberg is a partner in the Los Angeles office of Bryan Cave LLP, and Jon L. Rewinski is a partner in the Los Angeles office of Locke Lord LLP. They are former chairs, and Amberg is a current member, of LACBA’s Professional Responsibility and Ethics Committee. Amberg is also a former chair, and Rewinski a former member, of the California State Bar’s Committee on Professional Responsibility and Conduct.
Civil Liberties Union served a PRA request seeking invoices from law firms defending the county in nine lawsuits alleging police brutality. The county produced invoices for three closed cases with attorney-client and work product information redacted, and, citing the attorney-client privilege and work product doctrine, declined to produce invoices for six pending cases. On the ACLU’s petition for writ of mandate, the superior court ordered the county to produce redacted invoices for all nine cases. The court of appeal reversed, concluding the invoices were entirely privileged. By a 4-3 vote, the supreme court reversed.

The majority opinion, written by Justice Mariano-Florentino Cuéllar and joined by Justices Ming W. Chin (who wrote the Ardon opinion), Goodwin Liu, and Leondra Kruger, declined to follow the seminal modern case on the attorney-client privilege, Costco Wholesale v. Superior Court, which held the privilege attaches to the transmission of information during the attorney-client relationship, and does not depend on the content of the communication. Instead, the majority focused on the content and purpose of the communication and concluded: “In order for a communication to be privileged, it must be made for the purpose of legal consultation, rather than some unrelated or ancillary purpose.” Relying on dictum in Concepcion v. Amscan Holdings, Inc. and federal authority, the court found that lawyers’ invoices generally are not privileged, but “the information contained within certain invoices may be within the scope of the privilege...” to the extent it is conveyed “for the purpose of legal representation”—perhaps to inform the client of the nature or amount of work occurring in connection with a pending legal issue.”9 The court added, “[T]here may come a point when this very same information no longer communicates anything privileged, because it no longer provides any insight into litigation strategy or legal consultation.” Therefore, invoices for pending cases may be privileged, but invoices for closed cases were no longer privileged and should be produced.

In a vigorous dissent, Justice Kathryn M. Werdegar, joined by Chief Justice Tani Cantil-Sakauye and Justice Carol Corrigan, criticized the majority’s reasoning. Evidence Code Section 952 defines a “confidential communication between a client and lawyer” as “information transmitted between a client and his or her lawyer in the course of the relationship and in confidence ... and includes a legal opinion and the advice given by the lawyer in the course of the relationship.” The word “includes” means privileged communications are not limited to legal opinions and advice. “The majority’s decision to add consideration of a communication’s purpose as an additional, nonstatutory element to the Legislature’s definition of a ‘confidential communication’ is unsupported in law.” The dissent criticized the majority’s “unconvincing attempt to distinguish” Costco and, “even more pernicious, ... its suggestion that the protective scope of the privilege somehow wanes with the termination of the subject litigation.”

The opinion may be limited by its facts, but its broad language belies such limitation. Focusing on the content of the communication is a new approach to privilege analysis in California and will be particularly challenging for state court judges, who are preceded by Evidence Code Section 915(a) from ordering an in camera inspection of the material claimed to be privileged.15 How will a court determine whether information is properly redacted? It remains to be seen.

**Conflicts of Interests**

Courts did not hesitate to enforce the duty of loyalty by disqualifying lawyers with conflicts of interest. Three years into a complex racketeering case against dozens of defendants who allegedly paid kickbacks for referrals, engaged in illegal fee sharing, and submitted fraudulent bills for reimbursement, District Judge Andrew J. Guilford disqualified Hueston Hennigan LLP from representing the plaintiff in State Compensation Insurance Fund v. Drobot. Concurrently with the firm’s representation of SCIF, its partner Brian Hennigan represented one of the alleged co-conspirators, Paul Randall, who pleaded guilty to mail fraud. Hueston Hennigan had amended SCIF’s complaint and filed a second civil suit naming more defendants, but, significantly, did not sue Randall. A defendant moved to disqualify Hueston Hennigan on the ground it represented both the victim, SCIF, and one of the perpetrators of the fraud, Randall. Judge Guilford granted the motion, holding Hueston Hennigan had “an actual adverse, concurrent representation conflict.”

The movant was not a current or former client, but had standing because the ethical breach was so severe that it obstructed the orderly administration of justice. The court rejected conflict waivers obtained from SCIF and Randall, finding them factually and legally inadequate, and explained: “[T]he duty of loyalty is improperly and impermissibly compromised when one firm represents—at the same time, in the same litigation, in the same courthouse—a criminal and his victim. That’s what happened here, and if the Court had allowed it to continue, loyalty would have been lost in ways that the client would not—and could not—understand until after harm had been done.”

Eighty-five years ago, the California Supreme Court established that an attorney may not use information acquired during a previous engagement against a former client. Refined in Rule 3-310(E) of the California Rules of Professional Conduct, this principle led to a lawyer’s disqualification in Costello v. Buckley. A woman hired her boyfriend’s brother, a lawyer, to represent her in an easement dispute. After the case ended and the couple broke up, the woman sued her ex-boyfriend to collect a $92,000 debt. When her ex-lawyer appeared as counsel for his brother and served requests for admission demanding she admit the money had been a gift, she disqualified the lawyer because he had obtained confidential information about her romantic relationship during the easement dispute. In vain, the defendant argued there could be no conflict because there was no substantial relationship between the two representations and the information was unnecessary to prove plaintiff’s case. The plaintiff did not need to rely on the presumption of Rule 3-310(E) that information is material if there is a substantial relationship between the two engagements because she proved that her former lawyer possessed confidential information about her romantic relationship that could be used against her. She did not need to show that her ex-lawyer actually used material confidential information, only that he could do so.

In Ontiveros v. Constable, Ontiveros, a minority shareholder in a closely held company, Omega Electric, Inc., brought direct and derivative claims of mismanagement against the majority shareholder and Omega. He moved to disqualify the counsel jointly representing the defendants because their interests were rendered adverse by the derivative claims. The defendants contended they had waived any conflicts and consented to joint representation, but the trial court ruled disqualification was automatic. The Fourth District Court of Appeal affirmed the disqualification order as to the company’s lawyers. Though Omega was nominally a defendant, it was in substance the plaintiff in the derivative suit. Also, under Rule 3-600(E), an organization’s consent to dual representation must be given by a constituent other than an individual who also is to be represented, thus the majority shareholder could not consent for Omega. However, the appellate court partially reversed the disqualification order, thereby permitting the lawyers to continue to represent the majority shareholder because the only confidential company information they possessed came from him, so the representation posed no threat to their duty of confidentiality to Omega.

**Attorney Discipline**

A Woodland Hills attorney, Marilyn S. Scheer, was retained to obtain a modification of her client’s mortgage and accepted $5,500 before
1. Release of documents pursuant to a Public Records Act request does not waive the attorney-client privilege, absent an intentional and knowing waiver.
   - True
   - False

2. For a communication between a lawyer and client to be privileged, it must be made for the purpose of legal consultation.
   - True
   - False

3. Unless waived, attorney-client privileged information never loses the protection of the privilege.
   - True
   - False

4. A California court generally cannot conduct an in camera inspection of a document claimed to be privileged.
   - True
   - False

5. After a lawyer has represented a client in a lawsuit for three years, he cannot be disqualified for a conflict of interest.
   - True
   - False

6. A lawyer has a duty to use information obtained from a former client to aid a current client, so long as the former engagement is concluded.
   - True
   - False

7. In a derivative suit against the corporation and its officers, the defendants' interests are aligned for purposes of conflict of interest analysis.
   - True
   - False

8. Under the Rules of Professional Conduct, an entity's consent to joint representation must be given by a representative who is not also a joint client.
   - True
   - False

9. The state bar’s disciplinary system is unconstitutional because judicial review by the California Supreme Court is discretionary.
   - True
   - False

10. An attorneys’ fee arbitration award in favor of the client is nondischargeable in bankruptcy.
    - True
    - False

11. An opposing attorney may communicate with a public official, even if the official is represented by counsel.
    - True
    - False

12. When a class action establishes a monetary fund for the benefit of class members, an award of attorney’s fees can be based on a percentage of the fund.
    - True
    - False

13. Though it is the prevailing party, a suspended corporation forfeits the right to recover its attorneys’ fees.
    - True
    - False

14. A lawyer’s sexist remarks to opposing counsel can result in sanctions by the court.
    - True
    - False

15. When a lawyer forms a business with a client, an arbitration clause in the operating agreement does not automatically govern a malpractice claim arising out of their attorney-client relationship.
    - True
    - False

16. Trial of a malpractice claim in federal court does not violate the federal policy favoring arbitration if the claimant could not afford the arbitration.
    - True
    - False

17. The statute of limitations for legal malpractice is tolled while the attorney continues to represent the client regarding the specific subject matter in which the wrongful act or omission occurred.
    - True
    - False

18. When a lawyer resigns from an engagement, the attorney-client relationship does not end until he or she returns the client’s files.
    - True
    - False

19. E-mail from a lawyer promising to help an investor recover losses from the lawyer’s client constitutes protected petitioning activity under the anti-SLAPP statute.
    - True
    - False

20. A law firm sued for defamation cannot raise the “fair report” privilege as a defense unless its press release is completely true and accurate.
    - True
    - False
In her bankruptcy, Scheer demanded reinstatement of her law license on the ground that the system violated her First and Fourteenth Amendment rights. The court dismissed her case, and she appealed. Meanwhile, Scheer also filed for Chapter 7 bankruptcy, naming both the former client and the state bar as creditors. After the bankruptcy and district courts ruled against her, she appealed. The result was two Ninth Circuit decisions.

In Scheer v. Kelly, Scheer argued her rights were violated because she was not provided a meaningful judicial review in the dispute with her client and the state bar’s disciplinary procedures were unconstitutional. The Ninth Circuit rejected her arguments. The Rooker-Feldman doctrine barred Scheer’s de facto appeal of the California Supreme Court’s denial of her petition for review. Her claims, based on the California Constitution, had been rejected by the California Supreme Court in In re Rose. The First Amendment protects the right of access to courts for bona fide claims, but no case creates a freestanding right to have a state court hear a dispute in the absence of some asserted cause of action. Scheer’s due process claim failed because she was afforded notice, a hearing, a written decision, and an opportunity for judicial review. That the supreme court’s review is discretionary does not violate due process. California’s regulation of lawyers does not violate equal protection because the “historically unique role of lawyers” allows the state to treat them differentially from other professions. “California’s decision to regulate lawyers principally via a judicially supervised administrative body attached to the State Bar of California, the organization of all state-licensed lawyers, is rational and so constitutional.”

Alas, the Ninth Circuit’s endorsement of the constitutionality of the disciplinary system did not translate into justice for the client. In her bankruptcy, Scheer demanded reinstatement of her law license on the ground that her debt was dischargeable. In In re Marilyn S. Scheer, the Ninth Circuit considered 11 USC Section 523(a) (7), which states a debt is excepted from discharge “to the extent such debt is for a fine, penalty, or forfeiture payable to any for the benefit of a governmental unit, and is not compensation for actual pecuniary loss” and concluded Scheer’s debt was purely compensatory—a fee arbitration award between the lawyer and her former client. Therefore, the court held “our moral take on Scheer’s conduct does not control,” and the debt was dischargeable.

**Communicating with Represented Party**

Not often do courts have occasion to analyze Rule 2-210, which precludes a lawyer from communicating directly or indirectly about the subject of the representation with a party the lawyer knows to be represented, but District Court Judge Dean Pregerson did in United States v. County of Los Angeles. A lawyer representing disabled, mentally ill inmates challenging a proposed settlement between the Department of Justice and the County of Los Angeles over inmate discharge procedures was invited to a social gathering at the home of the director of the Los Angeles County Health Agency. The lawyer disclosed his representation to the host, who started talking about the case and expressed support for the disabled inmates. The lawyer noticed the host’s deposition. Denying the county’s disqualification motion, Judge Pregerson concluded that the lawyer did not breach Rule 2-100 because the host was a “public officer” within the meaning of Rule 2-100(c)(1). Rule 2-100 does not prohibit a lawyer from communicating with a public officer, even if the officer is represented by counsel.

**Getting Paid**

How to calculate fee awards for prevailing plaintiffs in class actions has been a source of confusion since the California Supreme Court’s 1977 decision in Serrano v. Priest, which recognized a court’s equitable authority to award attorneys’ fees under a private attorney general theory. In dicta, Serrano remarked that “[t]he starting point in every fee award, once it is recognized that the court’s role in equity is to provide just compensation for the attorney, must be a calculation of the attorney’s services in terms of the time he has expended on the case” and “[a]nchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.”

Some courts thereafter concluded that all attorneys’ fees awards in class actions had to be based on a lodestar approach—i.e., hours reasonably spent on a matter multiplied by reasonable hourly rates (the lodestar)—adjusted up or down for quality of work, and complexity of issues, results obtained, and risk, as opposed to a simple percentage of recovery. In 2016, the California Supreme Court addressed the confusion.

In Laffitte v. Robert Half International Inc., the court affirmed the trial court’s order awarding the plaintiffs’ counsel one-third of a $19 million common fund settlement in three related wage and hour class actions. In a scholarly opinion by Justice Werdegar analyzing 50 years of fee awards in class actions, the court joined the overwhelming majority of federal and state courts in holding that when a class action establishes a monetary fund for the benefit of class members and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The calculation is reasonably easy to perform. Incentives between counsel and the class are aligned. Also, the percentage better accounts for the contingency risk involved, and it may encourage early settlement. One may test the reasonableness of a percentage award by comparing it to a hypothetical lodestar award. If there is no common fund and the counsel for prevailing plaintiffs have a statutory or contractual right to recover fees from the defendant, the court must still use the lodestar approach. The Laffitte court left for another day whether a percentage fee can be applied when there is no conventional common fund to pay class member claims and class counsel a reasonable fee as determined by a court, or when a settlement fund allows unclaimed money to revert to the defendant or a third party.

In Stetson v. Grissom and Stanger v. China Electric Motor, Inc., the Ninth Circuit also addressed fee awards following common fund settlements of class actions. In Stetson, the providers of bar review courses agreed to pay $9.5 million to members of the plaintiff class. Class counsel sought $1.9 million in fees (20 percent), but District Court Judge Manuel L. Real awarded $85,000 based on a lodestar approach. In Stanger, defendants globally settled investors’ claims for violations of the Securities Act of 1933 for $3.78 million. Class counsel sought $944,583 (25 percent), but Judge Real awarded $466,038 based on a lodestar approach. As noted in Laffitte, under federal common law, in the absence of statutory or contractual fee-shifting provision, the district court has equitable authority to award reasonable fees when class counsel has recovered a common fund. A district court can use a lodestar approach or a percentage approach. The Ninth Circuit vacated both awards, however, holding that Judge Real did not adequately explain his reasons for reducing the lodestar. The large disparity between the requested fees and awarded fees required a specific articulation of the court’s reasoning, which was missing.

When fees are authorized by statute, the
trial court should rigorously comply with statutory requirements. In Ramos v. Garcia, the Fourth District Court of Appeal reversed an attorneys’ fees award to a defendant who prevailed at trial against the plaintiff’s claims for unpaid overtime, minimum wages, and other employment compensation. Labor Code Section 218.5 permits a prevailing plaintiff “employee” or a prevailing defendant “employer” to recover fees on an action brought for nonpayment of wages. The statute did not apply to one defendant because, although he prevailed, he was not a defendant employer but merely a coworker. In Sagonowsky v. Kekoa, the First District Court of Appeal affirmed an award under Family Code Section 271 of almost $90,000 to an ex-husband for fees incurred because his ex-wife’s “unscrupulous,” “re lentless[,] and culpable” conduct frustrated the parties’ settlement. An additional $680,000 sought by the ex-husband was rejected because it was unethered to his fees, and not authorized by Section 271. Finally, in City of San Diego v. San Diegans for Open Government, the Fourth District Court of Appeal reversed the trial court’s award of fees to the prevailing defendant, a nonprofit corporation, because when it filed its answer, the corporation was suspended for having failed to pay past due corporate taxes, and therefore lacked capacity to appear in the lawsuit.

Mistakes and Bad Acts

Lawyers who misrepresent facts to a court or opposing party can face monetary sanctions, disqualification, civil liability, and discipline. In Arroyo v. TP-Link USA Corp., an out-of-state plaintiffs’ lawyer filed a pro hac vice application to represent a putative class in federal court in Los Angeles supported by an affidavit swearing that one of his firm’s associates, a lawyer licensed in California, maintained an office in the Central District and would serve as local counsel. In fact, it was a “virtual law office” and the “local counsel” lived in Chicago and had no plans to move to the Central District. Judge Percy Anderson denied the pro hac vice application, disqualified the firm from serving as class counsel, and ordered it to pay $5,260 to defense counsel.

In Garmon v. County of Los Angeles, the Ninth Circuit held that a Los Angeles deputy district attorney, who discredited a mother’s testimony during her son’s murder trial by using the mother’s confidential medical records, was not entitled to absolute prosecutorial immunity in the mother’s subsequent lawsuit for civil rights violations. The deputy district attorney had obtained the subpoena duces tecum for the medical records by falsely swearing that the mother was the murder victim.

In the Matter of Hubbard, the California Supreme Court approved a two-year suspension for a plaintiffs’ lawyer who, in one client matter, sent the opposing counsel a settlement agreement purportedly signed by his mother when she had already died. In another client matter, an Americans with Disabilities Act case, the lawyer told the opposing counsel and represented in summary judgment papers that his client had visited the defendant’s restaurant when, in fact, it was the lawyer who had done so.

“The lawyer who had done so.” A defense lawyer making this sexist comment to opposing counsel during a deposition drew the wrath of U.S. Magistrate Judge Paul Grewal. The court granted the plaintiffs’ discovery motion, awarded fees and costs, and ordered the offending lawyer to make a monetary donation to the Women’s Lawyers Association of Los Angeles. Quoting a report from the American Bar Association, Magistrate Judge Grewal noted that such comments signify discrimination that “contributes to [women’s] underrepresentation in the legal field . . . tarnishes the image of the entire legal profession and disgraces our system of justice.”

In a suit against JPMorgan Chase Bank, attorney James Crawford brought a stun gun and pepper spray to a deposition and threatened to use them if opposing counsel “got out of hand.” He also made contemptuous comments to the trial judge, who responded with terminating sanctions. Crawford called the appellate justices who affirmed “corrupt . . . Granddads of Anarchy” for their “focal stained opinion.” The appellate court fined Crawford $1,000 and the state bar stripped him of his law license.

Arbitration

Courts declined to compel arbitration of malpractice claims in two cases. In Rice v. Downs, an arbitration clause was construed against the lawyer who drafted it. In 2003, William Rice and his lawyer Gary P. Downs formed a limited liability company and went into the subsidized housing business. Downs acted as lawyer for the company and its members, drafting the operating agreement, which provided: “[A]ny controversy between the parties arising out of this Agreement shall be submitted to the American Arbitration Association for arbitration in Los Angeles, California.” The lawyer allegedly never advised his clients regarding conflicts of interest and did not comply with Rule 3-300 governing business transactions between lawyers and their clients. Although prohibited by the operating agreement, Downs paid by the company for legal services. In 2013, Rice sued Downs and his firm Nixon Peabody for malpractice, breach of fiduciary duty, and breach of contract. Downs moved to compel arbitration under the operating agreement. The superior court ordered the parties to arbitrate and entered judgment on the subsequent award in the lawyer’s favor. The Second District Court of Appeal held the trial court had erred by compelling arbitration. In a thorough analysis, Justice Elwood Lui compared language from arbitration clauses in other cases—all available to Downs when drafting the operating agreement—and concluded from the language used that the parties had intended their arbitration clause to apply to a very limited range of controversies. Rice’s claims for malpractice, breach of fiduciary duty, and rescission did not “arise out of” the operating agreement because they were based on violations of duties created by the attorney-client relationship that pre-dated the parties’ decision to go into business together. They were not subject to arbitration, and the appellate court reversed the judgment and order compelling arbitration.

In Tillman v. Tillman, widow Renee Tillman won $8 million in a wrongful death suit after her husband was killed but ran out of money during the court-ordered arbitration of her malpractice claim against her former lawyers, who failed to join all heirs in the suit. District Judge Virginia A. Phillips stayed Tillman’s malpractice suit and enforced the arbitration clause in the retainer agreement. When the plaintiff could not pay, the arbitrator terminated the arbitration, and the lawyers moved to dismiss her suit. Tillman proved the dissipation of her funds through legal fees, debts, educational expenses, payments to family members, vehicle purchases, home improvements, and investment and gambling losses, but the court dismissed, believing the Federal Arbitration Act deprived it of authority to hear claims subject to the arbitration agreement. The Ninth Circuit reversed and remanded. It concluded that the arbitration, though terminated without any award, “has been had in accordance with the terms of the [arbitration] agreement.” Tillman’s failure to comply with the court’s order compelling arbitration was “not culpable” and did not merit the harsh penalty of dismissal. The court reasoned that remand did not violate federal policy favoring arbitration because Tillman was unable to pay rather than choosing not to pay. A district court has a duty to decide cases before it, and allowing Tillman’s case to proceed was the only way her claims would be adjudicated.

Statutes of Limitation

Legal malpractice claims are subject to a one-year statute of limitations under Business and Professions Code Section 340.6. Subsection (a)(2) provides the limitations period is tolled during the time “[t]he attorney con-
continues to represent the plaintiff regarding the specific subject matter in the alleged wrongful act or omission occurred. In Kelly v. Orr, a daughter seized control of the assets of a family trust, displacing the designated successor trustee, and—advised by lawyers at DLA Piper LLP—refused to relinquish control despite repeated demands from January 2012 to March 2013, when she resigned. In February 2014, the new trustee sued the predecessor trustee’s lawyers for malpractice. The lawyers’ demurrer was sustained on the grounds there was no privity between them and the new trustee, and the suit was time-barred because the new trustee discovered the lawyers’ professional negligence in 2012 and could have sued then. The Fourth District Court of Appeal reversed. As a matter of public policy, a trustee steps into the shoes of his predecessor and succeeds to all of his powers, including the power to bring malpractice claims against the predecessor’s attorneys. The lawyers continued to represent the predecessor trustee until she resigned in 2013, and therefore, the limitations period was tolled. The lawsuit, filed within one year, was timely.

Time ran out on a malpractice action in Gotek Energy, Inc. v. SoCal IP Law Group, LLP. After patent lawyers at SoCal IP Law Group admitted to their client Gotek Energy, Inc. that they negligently had failed to file foreign patent applications, Gotek announced it was making a malpractice claim. SoCal responded by e-mail on November 7, 2012, stating the firm’s attorney-client relationship with Gotek was “terminated forthwith, and we no longer represent [it] with regard to any matters.” The firm asked where the client’s files should be sent. In a letter on November 8, Gotek instructed the lawyers to transfer its files to a new firm. The letter concluded: “[Client] sincerely appreciates the services provided by [firm].” SoCal sent the files to the new counsel on November 15. Three hundred sixty-four days later, on November 14, 2013, Gotek filed suit against SoCal for malpractice. The Superior Court granted summary judgment for the lawyers and dismissed the lawsuit, based on the one-year statute. The Second District Court of Appeal affirmed, rejecting Gotek’s argument that SoCal continued to provide legal services until its files were transferred to the new lawyers, tolling the statute. Transfer of the files was a ministerial act, not evidence of an ongoing mutual relationship. Gotek’s belief that the lawyers were providing legal services by transferring the files was unreasonable as a matter of law. The representation ended when the client consented to SoCal’s express withdrawal and requested delivery of its files to new counsel. Therefore, the one-year statute began to run no later than November 8, 2012, dooming the malpractice suit filed on November 14, 2013, six days too late.

SLAPP Suits

The anti-SLAPP statute, Code of Civil Procedure Section 425.16, and the litigation privilege, Civil Code Section 47, can provide a means to prevail for lawyers sued by non-clients with respect to litigation matters. In Karnazes v. Ares, an attorney was sued for misrepresenting in a series of prelitigation e-mails that he would assist the plaintiff to recover losses on investments the plain-tiff had placed through the attorney’s client. The trial court granted the attorney’s motion to strike under the anti-SLAPP statute because the claims were based on protected petitioning activity—which includes assisting a client in adjudicating disputes in the courts—and the plaintiff could not demonstrate a probability of prevailing on the merits because the e-mail correspondence was inadmissible under the litigation privilege.

By the skin of its teeth, the defendant law firm in J-M Manufacturing Co., Inc. v. Phillips & Cohen, LLP also successfully invoked the anti-SLAPP statute to defeat a claim by its client’s litigation adversary, which sued the law firm for defamation and trade libel after the firm issued a celebratory press release about a phase-one jury verdict against the company. The headline proclaimed that J-M Manufacturing “faces billions in damages after jury finds J-M liable for making and selling faulty water system pipes,” which was not technically true. The jury found that J-M Manufacturing falsely certified that all of its pipes met certain strength and durability standards, not that the pipes were faulty. The litigation privilege protects “fair and true” reports of official proceedings. Rejecting the fair report privilege, the trial court denied the law firm’s motion to strike. A divided panel of the Second District Court of Appeal reversed, concluding that the law firm “may be guilty of self-promotion and puffery,” but its press release “falls comfortably within the permissible degree of flexibility and license afforded communications to the media concerning judicial proceedings”—even though this typically is a question of fact for the jury. Given the ubiquity of sensational, exaggerated press releases, perhaps it is fair, albeit sad, to say that a reasonable reader would not take away from the press release that J-M Manufacturing had sold defective pipes. In dissent, Judge Stanley Blumenfeld, sitting by designation, said that a jury should decide whether the press release was fair and true. Regardless, lawyers should be more careful with press releases.

The anti-SLAPP statute did not shield JAMS and retired Justice Sheila Prell Sonenshine from a lawsuit by a venture capitalist alleging that he stipulated to hire Justice Sonenshine as a private judge in his marital dissolution case based on false representations in her website biography concerning her business experience in two ventures and her founding of an equity fund supporting women-owned and -led businesses. The website neglected to explain that the two ventures faced unfavorable accusations—including class action litigation alleging fraud—and that the equity fund had never raised any equity capital. The alleged omissions constituted commercial speech exempted from an anti-SLAPP motion under Code of Civil Procedure Section 425.17(c).

Rules of Professional Conduct

The second Commission for the Revision of the Rules of Professional Conduct, chaired by Justice Lee Edmon, held public meetings and published draft rules for public comment on a pace to meet its March 31, 2017 deadline for submission of the proposed rules to the California Supreme Court.
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The 15-percent capital contribution rule, so challenging to banks, is a key element in discussion of regulatory reform.
guarantee, repo-style transaction, financial assets according to risk. The initial Capital intended to force riskier institutions to maintain a minimum ratio of capital to risk-weighted assets of 8 percent. Over time—and as subsequent financial crises revealed the shortcomings of these regulations—this framework has been revised. In 2010, the most recent iteration (Basel III) was adopted and the Agencies responded by promulgating regulations which significantly altered the risk weighting and classification of certain real estate loans.

Current U.S. capital adequacy requirements adopted by the Agencies impose four—and in some cases five—ratios quantifying credit risks. Three ratios require a bank to assign risk weights to its assets based on different categories of exposure. For example, cash and gold bullion have a risk weight of zero percent; investments in government-sponsored enterprises such as Fannie Mae and Freddie Mac have a risk weight of 20 percent; first lien residential mortgages have a risk weight of 50 percent; and high volatility commercial real estate (HVCRE) loans have a risk weight of 150 percent. In calculating its total risk-weighted assets, a bank must include not only various classes of equity, but its on-balance sheet exposures, over-the-counter derivative contracts and each off-balance sheet commitment, trade and transaction-related contingency guarantee, repo-style transaction, financial standby letter of credit, forward agreement, and other similar transactions.

The first ratio requires the ratio of common equity tier 1 capital to the risk-weighted assets to be at least 4.5 percent. Common equity tier 1 capital includes paid-in common stock and related surplus, retained earnings, unrealized gains and losses on available-for-sale securities, and common equity minority interests (common equity issued by a consolidated subsidiary of a bank that is not owned by the bank). The second ratio requires the ratio of tier 1 capital to risk-weighted assets to be more than 6 percent. The numerator of this ratio may include noncumulative perpetual preferred stock and qualifying minority interests, in addition to the common equity.

The third ratio is the bank’s total capital to risk-weighted assets, which must exceed 8 percent. The numerator includes tier 2 capital (i.e., cumulative, perpetual preferred stock, trust preferred securities, subordinated debt and qualifying minority interests).

The fourth ratio is the leverage ratio, which is the bank’s tier 1 capital divided by its average total consolidated assets. This ratio does not require weighting of assets for risks and must equal or exceed 4 percent. A fifth ratio, which only applies to institutions with consolidated assets greater than $250 billion or balance sheet foreign exposures greater than $10 billion, requires the ratio of tier 1 capital to its total leverage exposure to exceed 3 percent.

**HVCRE Loans**

One of the highest categories of risk weight is given to high volatility commercial real estate, or loans. All loans financing the acquisition, development or construction of commercial real estate that are not permanent loans are considered HVCRE unless the project meets one of four exemptions. The first three exemptions apply to loans secured by one-to-four family residential properties, loans for projects that qualify as investments in community development, and loans secured by agricultural land. The final exemption applies to projects that meet certain loan-to-value (LTV) requirements.

Specifically, this exemption requires borrowers to contribute cash to the project equaling at least 15 percent of the real estate’s appraised “as completed” value. The 15-percent capital contribution rule is intended to ensure that developers have “skin in the game.” At the same time, this exemption is the most challenging for banks to interpret. Projects falling under this exemption must meet LTV ratios determined by property type. LTV is a lending risk assessment that represents the amount of the loan as a percentage of the total appraised value of the property. For example, a loan of $75,000,000 secured by a property with an appraised value of $100,000,000 has an LTV of 75 percent. Under the HVCRE requirements, the LTV ratio must be 65 percent for raw land, 75 percent for land development, 80 percent for commercial, multifamily and other nonresidential property, and 85 percent for one-to-four family dwellings and improved land. A property’s “as completed” value is the projected market value when the development is expected to be completed; however, that value excludes income generated by the property. The “as stabilized” value is the expected value once the property achieves stabilized occupancy—a value that includes projected cash flow from leases based on a comparison of similar properties. Finally, borrowers are contractually obligated to keep this capital contribution in that entity over the life of the project. The “life of the project” ends when the project is sold, the loan is converted to permanent financing, or the loan is paid off in full. Although the term of a construction loan often extends past issuance of a certificate of occupancy—either in the initial loan term or due to the exercise of extension options—the issuance of that certificate may not mark the end of the HVCRE categorization, even when it signals a significant reduction in risk to the lender.

**Fifteen Percent Capital Rule**

Banks struggle to determine what may be counted toward the developer’s 15-percent capital contribution. The Agencies have been clear that proceeds of a loan from the bank that is financing the project do not count toward the 15 percent contributed capital threshold. Also, unrelated real estate may not be pledged as collateral and counted toward the 15-percent capital contribution, even if that collateral is unencumbered. The capital must be cash or unencumbered readily marketable assets. Purchasers’ deposits on units in a condominium project are also excluded. The purchase price for the land constituting the project may be included, but any appreciation in land value due to the passage of time or land use entitlements are excluded.

For example, if a property purchased for $100,000 has a value of $250,000 at the time of the loan, the borrower may only include $100,000 in its capital contribution. In contrast, a borrower who purchases the property for $250,000 may include the whole amount. This seems an unfair result, particularly since the appreciated value of the land is included in the “as completed” appraised value of the land, as used in the required LTV ratios.

Initially, some lenders allowed borrowers to contribute additional capital as necessary to maintain the 15-percent capital requirement. This was especially important because the rule governing classification of HVCRE loans was not prospective. It applied to all outstanding loans, even if they were already closed on the date that the rule went into effect. However, the rule was subsequently clarified to prohibit post-closing contributions. Any contribution of cash or land must be contributed to the project prior to the
The Agency's have stated that funding from a second bank for a project may not be considered as a capital contribution. For example, if Bank A has a first mortgage secured by the real estate of the project and Bank B has a second mortgage on the same real estate collateral, Bank B's funding must not be considered cash contributed by the borrower.

Cash in the form of grants from nonprofit organizations, municipalities, state agencies and federal agencies also may not be considered as a capital contribution from the borrower. While these third-party grants increase the capital invested in the project, they do not affect the borrower's level of investment and, therefore, do not reflect the borrower's economic interest in the project.

Out-of-pocket development expenses that are paid by the borrower may be included in the contributed capital, including "soft costs" that contribute to the completion and value of the project. These soft costs may include interest, developer fees, leasing expenses, brokerage commissions, management fees, engineering costs, architectural fees, and permit fees if the costs are reasonable in comparison with the cost of similar services from third parties and are related directly to the project.

One category that remains unclear is whether mezzanine debt or preferred equity may be counted toward the borrower's capital contribution. A mezzanine loan is not made to the borrower; rather, it is made to an entity that owns the borrower, directly or indirectly. The collateral for the mezzanine loan is an ownership interest in the borrower, and the borrower receives the funds as an equity contribution. A mezzanine loan is not considered as a capital contribution from the borrower.21

Effect on the Market

The cost to borrowers of construction financing has increased since the implementation of these regulations. That increase in cost may reflect a number of factors in addition to the increased cost of higher reserves for HVCRE loans. Higher risks in a maturing real estate cycle may also be constraining the availability of construction lending. These increased costs may in some instances require borrowers to bring in more equity, thus lowering returns.

The different ways in which banks interpret the HVCRE rules may also be skewing the cost of construction lending and placing some borrowers at a competitive disadvantage in regional markets where high quality commercial real estate development may be economically beneficial to communities. Some banks have interpreted the contributed capital rule to permit distribution of internally generated cash so long as the borrower maintains the 15-percent equity contributed before the loan was made. This is inconsistent with the rule and the available supervisory guidance and contributes to misconceptions about the contributed capital rule. Other banks report most or all of their construction loans as HVCRE whether or not the exemptions to HVCRE are met, which is a conservative approach adopted by highly capitalized, large institutions.

Banks that interpret the exemption requirements more loosely may have a competitive advantage. These banks may also steer their commercial real estate lending toward only prime developments in top-tier markets at a favorable cost in order to capture or maintain a valued relationship with more valued customers. Strong sponsors with quality projects in top-tier markets can still access construction financing on favorable terms. If the construction lending is less profitable, or even unprofitable, the bank may be driven by the desire to maintain a lending relationship with borrowers who bring other business to the bank.

Any competitive advantage comes at the cost of maintaining higher reserves for a nonexempt loan, even if the additional cost is difficult to quantify. The bank may benefit from internalizing the cost of the higher capital reserves rather than passing them along to the borrower in the rates and fees. Other banks—often regional banks—rely more heavily on compliance with the exemptions to escape classification as HVCRE and thus the higher reserve requirements. This can mean that sponsors of high quality developments in more regional markets—even when just as credit-worthy—bear the increased costs. Some projects may not be viable at higher interest rates and with the added burden of the HVCRE requirements, limiting the supply of construction lending and, therefore, new construction projects. This may be hindering economic development in smaller, regional markets where a boost to the economy may be most beneficial and steering the best prices and terms to already highly capitalized borrowers who do not need any assistance to compete. While the HVCRE rules were intended to encourage financial institutions to manage risk responsibly, they may be acting as a brake on development in markets where such development could be most beneficial to the economy.

Nonbank Construction Lending

Another unintended consequence of the Basel III guidelines is the flight to nonbank lenders. To avoid HVCRE exemption requirements, borrowers may pursue construction financing with lenders who fall outside these regulations and avoid the increased capital requirements, such as insurance companies and debt funds. Debt fund financing is expensive but may offer more favorable terms, including lower equity contribution requirements. This unintended consequence potentially may create economic instability that the capital requirements strive to avoid. Banks do not want to
own properties and so they have an incentive to work with borrowers if problems arise in order to avoid foreclosure. Some nonbank lenders have the capacity and expertise to own and manage property, including construction projects, which increases the risk of foreclosure and creates instability in the real estate markets.

**Regulatory Reform Efforts**

The MBA and Commercial Real Estate Finance Council (CREFC) are two industry groups at the forefront of advocating the clarification and improvement of the Basel III requirements. In their communications with the Agencies, both groups have argued for changes to the HVCRE rules. Among those recommendations are that borrowers be permitted to distribute capital generated by the project in excess of the 15-percent capital contribution. The MBA argues that while keeping “skin in the game” may be useful, the current regulations are too blunt an instrument, creating unnecessary operational obstacles during construction of a project. They argue that a borrower should at least be permitted to make interest payments, principal payments, and payments for development fees and other development expenses. The MBA also advocates for the recognition of the appreciated land value, rather than only the purchase price, in the calculation of the 15-percent capital contribution. They note that the appreciated land value is included in the “as-completed” value in an appraisal. To rely on it for one part of the calculation but not another is inconsistent.28 CREFC has echoed these concerns and expressed frustration that the Agencies have not yet clarified these points.29

**Regulatory Uncertainty**

The future regulatory environment is uncertain. The Basel Committee’s proposals to improve the current regulations (known as Basel IV) reject the risk-sensitive approach in favor of prescriptive mandates.30 Others advocate for increased capital reserves, including Neel Kashkari, president of the Federal Reserve Bank of Minneapolis and former Republican Treasury Department official. Kashkari’s proposal would require banks with more than $250 billion in assets to hold common equity to 23.5 percent of risk-weighted assets, a far higher ratio than the 4.5 percent currently required.31

While the new administration has voiced an aversion to regulation in general, no consistent, detailed policy has been presented. President Donald Trump’s statements on bank regulations have been contradictory. As a candidate, he supported reinstating the Glass-Steagall Act (enacted as part of the New Deal to separate deposit banks from investment
banks) as a part of the official Republican Party platform, which could lead to the break-up of the big banks. Remarks by Steve Bannon, White House chief strategist under President Trump, are consistent with the philosophy of Glass-Steagall, and Bannon has repeatedly criticized the government’s response to the 2008 financial crisis as inadequate. However, candidate Trump also advocated eliminating regulations he claimed are holding banks back from lending, though the specifics were never clear.

On February 3, 2017, President Trump signed an executive order directing the Treasury Secretary to examine existing financial regulations. Though it never mentions the Dodd-Frank Act, this order directs the Treasury Secretary to submit a report to the president within 120 days identifying laws and regulations that inhibit federal regulation of the financial system in ways that are inconsistent with the administration’s principles. The principles identified in the order are to prevent taxpayer-funded bailouts, foster economic growth and vibrant financial markets by addressing systemic risk and market failures, make regulation more efficient, and rationalize the federal financial regulatory framework, among others.

Sweeping regulatory change that would upend current capital requirements may not come quickly. Repeal of the Dodd-Frank Act requires congressional action, and no current legislative proposals have sufficient support. Once new federal legislation is enacted, the Agencies must then formally propose new rules and seek public comment. A new Comptroller of the Currency will be appointed by President Trump and confirmed by the Senate this spring, and the president will also fill a vacancy for the Federal Reserve Governor of Supervision and Regulation. Though these appointees must enforce existing laws and regulations, they may bring a lighter hand to the task.

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1 Patricia A. McCoy, Banking Law Manual, §6.03 [hereinafter McCoy].
2 The G10 countries are Belgium, Canada, France, Italy, Japan, the Netherlands, the United Kingdom, the United States, Germany, Sweden and Switzerland.
7 McCoy, supra note 1, at §6.03.
8 Brief History, supra note 3, at 3.
9 McCoy, supra note 1, at §6.03[2][a].
10 Id.
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February 5, 2016

Jack Trimarco
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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,

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The Constitutionality of Withholding Federal Funds from Sanctuary Cities

PRESIDENT DONALD TRUMP’S THREAT to withhold federal funds from “sanctuary cities” is unwise and unconstitutional. Ironically, this type of coercion of local governments violates principles of federalism long advocated by the conservative justices on the Supreme Court. San Francisco and other cities have brought lawsuits to challenge this executive order and should succeed in having it declared unconstitutional.

A great deal of confusion exists over what it means for a city to declare itself to be a “sanctuary.” It does not mean that a city will conceal or shelter undocumented immigrants from detection. Thus, it is not the same as when churches and synagogues have claimed to be sanctuaries and attempted to physically protect people from law enforcement.

Instead, when a city says that it is being a “sanctuary,” it means that the city will not be an arm of federal immigration authorities. For example, a sanctuary city will not investigate, arrest, or detain individuals on the basis of immigration status. The city will provide services to all, regardless of immigration status and generally not turn over undocumented individuals to federal immigration authorities.

There are compelling reasons for cities to adopt such policies. Victims of crime and witnesses to crime will not come forward to the police if they fear deportation. Indeed, it was for exactly this reason that in 1979 the Los Angeles Police Department adopted Special Order 40, which provides that “Officers shall not initiate police action with the objective of discovering the alien status of a person. Officers shall not arrest nor book persons for [violating] the United States Immigration Code.”

Public health officials fear that sick people, including those with communicable diseases, will not seek treatment if they fear that it could lead to their deportation. Of course, their untreated communicable diseases can spread to all of us. Education officials worry that parents will not send their children to school if they think it might lead to deportation. Educating children, whether documented or undocumented, is a moral obligation and obviously essential for society.

Nonetheless, President Donald Trump issued an executive order on January 25, 2017, which threatens sanctuary cities with loss of federal funds. The executive order is titled, “Enhancing Public Safety in the Interior of the United States.” It declares: “Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.”

The key provision says: “In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with Section 1373 of Title 8 of the U.S. Code (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.” Section 1373 says that no law can prevent “any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”

It is unclear whether and when a sanctuary city is violating Section 1373. But assuming that the executive order accomplishes what President Trump wants, this violates the Tenth Amendment. The Supreme Court has held that it is unconstitutional for Congress to commandeer state and local governments and force them to administer federal mandates.

For example, in United States v. Printz,1 in 1997, the Supreme Court declared unconstitutional a provision of the federal Brady Handgun Control Act that required that state and local governments do background checks before issuing permits for firearms. The Court, in an opinion by Justice Antonin Scalia, said that such coercion violated principles of federalism and the Tenth Amendment.

Congress also may not place similar constraints by putting strings on grants to state and local governments. The Supreme Court has said that these types of strings are constitutional only if the conditions are clearly stated, relate to the purpose of the program, and are not unduly coercive. None of the requirements mentioned by the Court are met by the Trump executive order. No federal law conditions federal funds on cities not being able to have sanctuary status. Most federal grants to local governments have nothing to do with immigration.

But most of all, the Trump executive order is impermissibly coercive. In 2013, in National Federation of Independent Businesses v. Sebelius,2 the Supreme Court, in a 7-2 decision, declared unconstitutional the Medicaid provisions of the Patient Protection and Affordable Care Act. These provided that if a state accepted federal Medicaid funds, it had to provide coverage for those within 133 percent of the federal poverty level. The federal government will pay 100 percent of these costs until 2019 and 90 percent thereafter. The Court, in an opinion by Chief Justice John Roberts, declared this unconstitutional as impermissibly coercing state governments in violation of the Tenth Amendment. The Court referred to this as like “a gun to the head” of the states and as “dragooning” them. The Trump executive order does exactly the same thing.

The federal government can use its agencies and agents to enforce federal immigration law however it chooses. But it cannot turn local governments into enforcement arms of the federal government. This is exactly what the Trump executive order does. It is misguided as a matter of policy and unconstitutional coercion in violation of the Tenth Amendment.


Erwin Chemerinsky is the dean and Raymond Pryke Professor of First Amendment Law at the University of California at Irvine School of Law.
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