Los Angeles lawyers Larry C. Russ (right) and Nathan D. Meyer explain the findings and consequences of the landmark decision in Star Athletica v. Varsity Brands on page 20.
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Here are two facts about the California bar exam that most would think are related but that appear to have no actual causal connection: 1) passage rates have been on the decline, with the results for the July 2016 and February 2017 bar exams the lowest in years for their respective administrations of the exam; and 2) beginning in July 2017, the exam will be shortened from three days to two.

In an article for legal news website Above the Law entitled “California’s Bar Exam Results Are Absolutely Abysmal,” Staci Zaretsky posits that perhaps things will improve with the change to a two-day format. This may be true, but it was not the ostensible motivation for the change. According to information from the State Bar’s Committee of Bar Examiners Office of Admissions, the committee began considering the change several years ago, and the board of trustees approved it two years ago (with final implementation subject to consideration by the California Supreme Court). Moreover, while California had been one of a handful of states with three-day bar exams, analysis of the proposed change indicated that while a two-day exam would be more efficient, it would yield essentially the same results as a three-day exam. What caused the decline in bar exam passage rates is too complex a question to address here, and is one the State Bar itself is now studying.

What seems clearer is that California’s bar admission requirements limit the mobility of its attorneys. As Patrick Sisson writes for online magazine Curbed in “America’s Declining Mobility Has Millennials Feeling Stuck,” mobility in America has been declining for decades, and this decline “creates a domino effect on the economy” and “has many worried about the housing market, household formation, and economic vitality.” According to Sisson, one culprit is “the growth in occupational licensing fees and requirements,” which now “impact anywhere from a quarter to a third of Americans” and are “an indirect tax for moving across state lines.” Sisson posits that it would still be worth it for a lawyer to move from Mississippi to San Francisco for the prospect of better pay. However, he does not address the situation of a California attorney moving out of state (whether to attain a lower cost of living, follow a spouse or partner, or pursue a better opportunity). Licensing obstacles to resuming practice in another state reduce mobility and disproportionately impact attorneys not employed by large firms.

These obstacles are higher for California attorneys than most others. Use of the Uniform Bar Exam (UBE) has increased in recent years, with roughly half of all states having adopted it for present or near-future use. For some period after passing the UBE (generally two to five years), an attorney can take that result to any of these jurisdictions and start practicing. California has not adopted the UBE. California also does not admit out-of-state attorneys on motion, although most states do. Because admission on motion in most of those states is based on reciprocity between the two jurisdictions, California attorneys cannot take advantage of this process in most cases.

There seems little risk that adopting the UBE or allowing admission on motion will prejudice California legal services consumers by inundating the state with unqualified out-of-state attorneys. Other large states (e.g., New York, Texas, Illinois) have done one or both of those things. While switching to a two-day bar exam is a step in the right direction, more needs to be done to bring California’s bar admission requirements in line with those of other states and increase mobility for California attorneys.

John Keith is the 2017-18 chair of the Los Angeles Lawyer Editorial Board. He practices business litigation with the law firm of Fenigstein & Kaufman in Century City.
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Understanding the “Eggshell Plaintiff” Doctrine and Rule

WHAT IS THE PROPER PROCEDURE to follow in this scenario: A client is involved in a low-impact, rear-end automobile collision and suffers from severe neck pain. The property damage is minor, but the client has received physical therapy and several epidural injections, with medical specials totaling $175,000. After filing a complaint and determining the available policy limits, a settlement demand of $1 million is made. However, it is learned during discovery that the client sustained a neck injury at the gym four years ago and underwent three weeks of physical therapy. The defense subpoenas physical therapy records, and the discharge report mentions residual pain, while X-rays reveal degenerative changes in the cervical spine.

The defense counsel learns about this prior injury and counters the million-dollar demand with a $50,000 offer, arguing preexisting condition and that neck surgery was inevitable. He or she also provides a reminder of the property damage photographs that show cosmetic bumper damage. You counter that the client is an eggshell plaintiff entitled to full compensation for damages, but the defense counsel stands firm on his offer.

The “eggshell plaintiff” rule states that a tortfeasor is responsible for all of the damages that his or her negligence causes another and that the tortfeasor will not be exonerated from liability simply because a preexisting condition makes the plaintiff more susceptible to injury. However, courts have been equally clear that defendants are not responsible for compensating the eggshell plaintiff for a preexisting condition, except when the subject incident causes new pain or aggravates the preexisting condition.

An attorney should address several matters when litigating a case with a client who has a preexisting condition. First, the attorney should discuss the client’s medical history at the outset of representation. Clients sometimes fail to reveal a prior gym accident, a fall at a restaurant, or even having received chiropractic care for a stiff back. It may be intentional or a lapse in memory. The attorney should make it clear to the client that prior medical issues should not hurt the case, and may even bolster it. When prior medical issues are completely unrelated to the plaintiff’s claims and do not factor into the damages sought, the attorney should bar discovery or admission of the protected information in the interests of the client’s privacy.

Second, the attorney should obtain all of the relevant medical records and ensure that the client’s treating doctors are aware of the preexisting condition. While it is bad for the attorneys to be unaware of the client’s medical history, it is even worse for doctors to be unaware. Treating doctors, especially surgeons, must have all relevant medical records so they can quantify the aggravation of the preexisting injury while drafting reports or progress notes, and eventually testify to those opinions in a deposition or at trial. Expert medical testimony is necessary to demonstrate the degree to which the prior injury was aggravated by the subject incident and to address the effects on the eggshell plaintiff’s overall health.

Cases involving unresolved preexisting conditions become complex since the insurance adjuster will try to argue that all of the client’s injuries and pain are attributable to the earlier incident. Insurance adjusters are also suspicious of low-impact cases in which the injuries claimed are beyond soft-tissue. The only way for the plaintiff to be able to resist this defense, and to obtain full compensation for injuries currently sustained, is to have all the relevant medical information in possession when the claim is being prosecuted. Thus, all the medical records and diagnostic studies should be obtained as soon as possible.

Finally, if the case goes to trial and the judge decides that the plaintiff is an “eggshell plaintiff,” the judge may request, and the plaintiff’s attorney should ensure, that Judicial Council of California Civil Jury Instructions (CACI) 3928 (eggshell plaintiff doctrine) and 3927 (aggravation of preexisting condition) are read to the jury, as these jury instructions work in tandem.

The latter instruction, CACI 3927, holds defendants responsible for aggravating preexisting injuries of a plaintiff, and for any physical or emotional condition that was made worse by the defendant’s wrongful conduct. The former, CACI 3928, states that a plaintiff must be compensated for all damages caused by the wrongful conduct of the defendant, even if the plaintiff was more susceptible to injury than a normally healthy person would have been. It is important to ensure that both instructions are read so that the jury is forced to consider the plaintiff’s susceptibility.

It is important for attorneys to understand how to litigate a case involving a preexisting condition, as well as how the eggshell plaintiff doctrine and rule on preexisting condition work together during settlement negotiations and at trial. Damages should not be sacrificed because of a preexisting condition when there is competent evidence that the condition was aggravated from the subject incident. Thus, it is essential to secure the client’s past medical records and relevant diagnostic studies as soon as possible so the attorney can properly litigate the case and provide the treating doctors and consultants with all relevant evidence. Being forewarned is being forearmed.

The attorney should make it clear to the client that prior medical issues should not hurt the case, and may even bolster it.

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Guidance on When to File a New Trial Motion

**The New Trial Motion** is a powerful tool for the losing litigant at almost every stage, including after judgment on demurrer, summary judgment, judgment on nonsuit, or judgment after the jury’s verdict. Yet many experienced lawyers never consider this tool or consider it only after trial. Practitioners should assess the advantages and avoid the pitfalls of the new trial motion.

A new trial motion is proper even when there has been no trial on the merits, including judgment on demurrer, summary judgment, and judgment on nonsuit.1 There are three reasons to file a new trial motion after a pretrial judgment.

First, the new trial motion may result in a favorable ruling for the litigant. If that happens, the process will take place more rapidly than the two-plus years it could take to get the same result from pursuing an appeal. Particularly in a complex case or when an attorney develops a new idea on how to frame or support the arguments, a new trial motion offers the opportunity to present that idea, as well as to document it for reference on appeal. For example, a new trial motion was granted after summary judgment in *Doe v. United Airlines, Inc.*2 In *Doe*, the trial court granted summary judgment on the ground that there was no triable issue that the plaintiff had suffered any “bodily injury.”3 Based on the plaintiff’s submission of a new clinical psychologist’s declaration that the passenger was suffering posttraumatic stress disorder, the court granted a new trial. Ultimately, the court of appeal reversed the new trial order in *Doe*, holding that the opinion was not newly discovered and was not produced with reasonable diligence.

**New Evidence**

However, as the court in *Doe* acknowledged, “a party claiming the discovery of new evidence following summary judgment is held to a less demanding standard of reasonable diligence than a party asserting this claim after trial.”4 This point was illustrated in *Scott v. Farrar*,5 in which the “party opposing summary judgment deposed a witness for the first time after the hearing on the summary judgment motion, and sought a new trial on the ground that the witness’s testimony constituted newly discovered evidence.”6 When the trial court denied a new trial, the appellate court reversed, reasoning that the testimony was unknown to the moving party prior to the deposition, and the date of the deposition had been set shortly after the inception of the action in the regular course of discovery, which had been pursued “with reasonable diligence.”7 Thus, even after pretrial judgments, trial courts do grant, and appellate courts uphold the right to, a new trial.

Second, even if the new trial motion is not granted, it allows an opportunity to make the record as complete as possible. For example, in the case of judgment on demurrer, a new trial motion may include an amended complaint that was not previously presented in opposition to the demurrer. Similarly, after summary judgment a new trial motion may include newly discovered evidence or a newly amended complaint.8

Third, it is possible, especially in a complex case, that litigants may conceive of improved strategies after a failed first attempt. A new trial motion is a good place to articulate a new strategy or theory because it can still have an impact on the trial judge and, if nothing else, it can provide a roadmap for appeal.

After trial, the most important reason to file a new trial motion is to complete the record. Any adverse rulings that were issued off the record should be documented in a declaration submitted in support of the new trial motion. If important evidence was erroneously excluded, it should be either attached to (if documentary) or described in (if testimonial) a declaration accompanying the new trial motion. Also, newly discovered evidence may be grounds for a new trial if the evidence could not have been discovered and produced at trial, and the moving party acted with reasonable diligence.9 If the newly discovered evidence was concealed by the opposing party, sanctions should be requested in addition to a new trial.10

Another reason to file a new trial motion after trial is simply that the trial court may grant the motion. For example, a new trial motion was granted when the trial court concluded “it had given the jury an inappropriate instruction on the workers’ compensation exclusivity rule” in *Lee v. West Kern Water District*.11 In *Lee*, the appellate court ultimately reversed this order, holding that the instruction was proper.12

However, an appellate court upheld a new trial on damages in *Licudine v. Cedars-Sinai Medical Center*.13 In *Licudine*, the trial court granted a new trial on damages on the ground of insufficient evidence to support the jury’s award for lost earnings.14 The court of appeal agreed, holding that the plaintiff “did not adduce any evidence to establish that it was ‘reasonably probable’ she could have obtained employment as an attorney or any evidence on the earnings of lawyers,” thus warranting a new trial on damages.15

A new trial motion also may be a prerequisite to preserving an argument for appeal. For example, the failure to seek a new trial on the grounds of inadequate or excessive damages bars the assertion of such grounds on appeal.16

Finally, a new trial motion should be filed posttrial to document

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and correct juror misconduct, juror bias, and the prejudicial effect of any erroneous instructional ruling.

**Timeliness and Sufficiency**

Because the right to a new trial is “purely statutory,” the procedural requirements must be strictly followed. Specifically, two of these deadlines are jurisdictional—failure to comply with them is fatal and cannot be cured.

First, the notice of intention to move for new trial must be timely and sufficient. The notice has to be filed within 15 days of service of the judgment. Because the judgment is often served more than once—either by the clerk or by parties or both—the most conservative approach is to calendar the deadline from the date judgment was entered rather than when it was served.

To ensure that the notice is sufficient requires that all statutory grounds be included in the notice. The statute lists seven grounds for granting a new trial motion: 1) irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial; 2) misconduct of the jury, and whenever any one or more of the jurors has been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors; 3) accident or surprise, against which ordinary prudence could not have guarded; 4) newly discovered evidence, material for the party making the application, which he or she could not, with reasonable diligence, have discovered and produced at the trial; 5) excessive or inadequate damages; 6) insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law; and 7) error in law, occurring at the trial and excepted to by the party making the application. Listing all seven grounds in the notice is important since an order granting a new trial may not be affirmed on any ground that is not stated in the notice.

Second, within 10 days after service of the notice, the points and authorities and all declarations in support of the motion must be filed. The deadline for this filing, however, may be extended up to 20 days for good cause.

Third, it is important to obtain a ruling before the court’s jurisdiction expires, viz. within 60 days of service of the judgment. After the 60-day period has expired, a court no longer has jurisdiction to grant the motion, and it is denied by operation of law. To ensure that an order has been timely filed it is helpful to insert the date of the deadline in the caption of the notice, supporting papers, and reply. Also, raising the deadline at oral argument can serve to keep attention focused on it.

Fourth, the order must comply with the requirements of Section 660 in the Code of Civil Procedure. Again, as with the deadline date, inserting the requirements in the notice and raising them again at oral argument will serve as a reminder. The statute requires that the court prepare the order and that it must include a statement of grounds and reasons in support of the order. An order granting new trial must recite and analyze the evidence that shows why a new trial was proper. Conclusory statements of grounds and reasons may lead to reversal, but an order that fails to state grounds may be affirmed on any grounds stated in the motion.

**Supporting Papers**

Juror declarations must be submitted to show juror bias, juror misconduct, or prejudice from instructional error. Although statements on the jurors’ “mental processes” are inadmissible, juror declarations may report “statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly.”
rations proving juror misconduct have been produced, for example, that show that jurors improperly added plaintiff’s attorney’s fees to the verdict,\textsuperscript{29} that a juror in a medical malpractice case concealed that he was a doctor,\textsuperscript{30} or that one juror contradicted the plaintiff’s testimony with a report of his own low back pain.\textsuperscript{31}

In addition, for claims of juror misconduct, the attorney and client should submit declarations demonstrating that neither had knowledge of the asserted misconduct before the jury’s verdict.\textsuperscript{32} These declarations dispel any inference that the moving party was guilty of waiver or gambled on the verdict.

Jury declarations proving juror bias may show that jurors improperly considered the race of the plaintiff and the financial consequence of rendering a verdict against the defendant.\textsuperscript{33} From a strictly procedural standpoint, juror declarations proving prejudice from instructional error may report statements about the instructions to show that jurors were confused or misled by an instruction.

The drafting of juror declarations must comply with Section 1150(a) of the Evidence Code, which provides:

Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

Opposing a New Trial Motion
When opposing a new trial motion supported by juror declarations, the first step is to obtain counter declarations when possible. For example, one declaration in support of a new trial was effectively countered by eight juror declarations in \textit{Barboni v. Tuomi}.\textsuperscript{34} Moreover, “[g]iven that neither party attacks the admissibility of any of the declarations,” “we find no abuse of discretion in deeming the declarations admissible.” \textsuperscript{35}

If the moving declarations contain hearsay or other inadmissible material, opposing counsel should object and request that those portions of the declarations be stricken. Moreover, opposing counsel should look for the waiver of any arguments in the new trial motion. For example, a claim that evidence was improperly admitted is waived when the party failed to object to their introduction at trial.\textsuperscript{36} Also, a claim that jury voting was defective is waived by a failure to request further deliberations.\textsuperscript{37}

Opposing counsel should show that the moving party has failed to demonstrate any “miscarriage of justice,” which is synonymous with prejudice.\textsuperscript{38}

Finally, opposing counsel should carefully examine the timeliness and sufficiency of the notice of intent to move for a new trial and seek denial of the motion for any failure to comply with the statutory requirements.


\textsuperscript{4} \textit{Doe}, 160 Cal. App. 4th at 1504-05.

\textsuperscript{5} \textit{Id.} at 1504.

\textsuperscript{6} \textit{Id.} at 1509.


\textsuperscript{8} \textit{Doe}, 160 Cal. App. 4th at 1505 (citing \textit{Scott}, 139 Cal. App. 3d at 467-69).

\textsuperscript{9} \textit{Doe}, 160 Cal. App. 4th at 1305.

\textsuperscript{10} \textit{Id.}, 139 Cal. App. 3d 142.


\textsuperscript{12} \textit{Sherman v. Kinetic Concepts, Inc.}, 67 Cal. App. 4th 1152 (1998); (reversing the denial of a new trial motion because additional reports of incidents involving the product that defendant withheld were material).

\textsuperscript{13} \textit{Lee v. West Kern Water Dist.}, 5 Cal. App. 5th 606, 610 (2016).

\textsuperscript{14} \textit{Id.}

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Campbell v. McClure}, 182 Cal. App. 3d 806 (1986) (failure on a new trial to challenge a punitive damage award on new trial as unsupported bars an appellate review).

\textsuperscript{17} \textit{In re Marriage of Herr}, 174 Cal. App. 4th 1463 (2009).


\textsuperscript{19} \textit{CIV. PROC. CODE} §657.

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} \textit{CIV. PROC. CODE} §659a.

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{CIV. PROC. CODE} §660.

\textsuperscript{24} \textit{Id.; Sanchez-Corea v. Bank of Am.}, 38 Cal. 3d 892 (1985).


\textsuperscript{28} \textit{Evid. CODE} §1150.

\textsuperscript{29} \textit{Krouse v. Graham}, 19 Cal. 3d 59 (1977).


\textsuperscript{31} \textit{Smith v. Covell}, 100 Cal. App. 3d 947 (1980).


\textsuperscript{34} \textit{Barboni v. Tuomi}, 210 Cal. App. 4th 340 (2012).

\textsuperscript{35} \textit{Id.} at 349.


\textsuperscript{37} \textit{Sanchez-Corea v. Bank of Am.}, 38 Cal. 3d 892 (1985).

A PREJUDGMENT WRIT OF ATTACHMENT operates as a strategic vise: It both secures assets for a final judgment and exerts pressure on the defendant early in the case. California attachment law, more than that of other states, favors plaintiffs and creditors and can be used in a wide array of cases. Once obtained, an attachment can tip the balance in favor of the creditor from the outset. Attachments may encourage early settlement, assist in obtaining jurisdiction over the defendant, protect against a late-filed bankruptcy, and ensure that the plaintiff can collect on an eventual judgment.

Attachment is most helpful when the defendant might otherwise abscond with the money. In addition to real property, creditors may attach personal property, such as bank accounts. With digital bank accounts, the money might be here today, gone tomorrow—particularly if the defendant learns that a lawsuit has been filed. California law, however, provides several procedural safeguards—including the filing of secret complaints and ex parte application rules—that allow the plaintiff to seek an attachment without notifying the defendant until the assets are safely secured.

Despite all their benefits, prejudgment writs of attachment remain uncommon. Perhaps one reason is practical intimidation. There are few areas of the law more byzantine and susceptible to error than the minutiae of prejudgment writs of attachment. A single attachment application typically involves half a dozen arcane court forms, more than one memorandum of points and authorities, a certified bond, evidentiary declarations, and attorney declarations. Moreover, convincing the judge to sign the right-to-attach order is only half the battle. Navigating the bureaucracy of the court clerk and sheriff’s offices to enforce the writ can prove as formidable as litigating the merits. The reward is often worth the effort, however. Following a few simple steps will increase the likelihood of obtaining a prejudgment writ of attachment and ensure a relatively painless enforcement process. A successful outcome, resulting in a secured lien, may actually save money by encouraging early settlement, as opposed to pushing forward immediately into discovery.

Qualifying for an Attachment

The first consideration facing lawyers considering prejudgment attachment is whether the claims alleged qualify for attachment. A writ of attachment may only issue when the plaintiff asserts a claim for money that is based on a contract (express or implied), and the amount demanded is “readily ascertainable” from the contract.1 If the defendant is a natural person, as opposed to a corporation, the claim must arise out of the defendant’s trade, business, or professional conduct.2 The claim must also be at least partially unsecured by real property.3 A complaint alleging breach of contract is thus an obvious candidate for an attachment remedy. Even if the complaint also alleges other causes of action, the plaintiff can still apply for an attachment based on the contract claim.4 Other forms of implied or quasi contracts may also serve as the basis for an attachment. For example, the plaintiff may obtain an attachment in an action to enforce a foreign or domestic judgment.5 Actions to evict a person illegally occupying property or to obtain funds owed by the defendant, but held by a third person, also qualify for attachment.6

To receive an attachment, the plaintiff must show that “the total amount of the claim or claims is a fixed or readily ascertainable amount” by reference to the contract.7 However, this standard is relatively flexible. The contract need not have a liquidated damages clause or state the exact amount due.8 Rather, so long as the contract furnishes a standard or loose formula for determining damages, the claim is “readily ascertainable.”9 According to case law, the exact amount of damages at this stage may still be “uncertain,” so long as it can be proven at trial.10

Given this low standard, no published California case has denied a writ of attachment on the basis that the claim amount was unascertainable or could not be determined by proof. The amount of the plaintiff’s damages claim, however, does make a practical difference. The plaintiff must file a $10,000 bond regardless of the size of the attachment sought, thus very small claims likely do not warrant an attachment.11

In addition to showing that its claim generally qualifies for attachment, the plaintiff must also defend the merits of the claim by 1) establishing the probable validity of the claim and 2) confirming that it is not seeking attachment for an improper purpose.12 A claim has “probable validity” when it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.13
Courts often issue prejudgment writs of attachment at the outset of the case, prior to formal discovery. At this early stage, the plaintiff is neither expected nor required to comprehensively prove the case. The California Law Review Commission has even warned that courts “should avoid converting the hearing on a preliminary matter into a full-dress trial of the merits of the action.” However, the plaintiff should ensure sufficient evidence to establish a prima facie case. This evidence must be presented through a sworn affidavit or a verified complaint. If the court seems inclined to deny relief, the plaintiff need not lose hope. Pursuant to statute, the plaintiff can request that the court continue the hearing and order the production of additional evidence rather than denying the request outright.

At the same time that the plaintiff applies for a writ of attachment, he or she should seek a temporary protective order (TPO) on the same basis. The attachment code envisions that a plaintiff may seek an attachment and a TPO at the same time. The requirements for a TPO are similar to those for an ex parte application for a writ of attachment, including a showing of great or irreparable injury. However, TPOs sound in equity provide a more flexible remedy than the statutorily based writ of attachment. Thus, even if the plaintiff's request may not meet the formal requirements for an ex parte writ of attachment, the court may still grant TPO relief “in the interest of justice and equity to the parties.”

To facilitate the attachment application process, the Judicial Council of California has prepared various forms conforming to the statutory requirements. These judicial forms should be used with careful attention to detail. There are 17 separate Judicial Council forms related to attachment with different forms used for residents versus nonresidents and for ex parte applications versus after-hearing orders. The key categories are: the plaintiff's application (AT-105, AT-115), the judge's right to attach order (AT-120, AT-125, AT-130), and the court clerk's writ of attachment (AT-135). In addition to these forms, the attorney should prepare a separate memorandum of points and authorities, declaration supporting the factual averments, and any additional filings needed for an ex parte application.

**Securing the Defendant’s Assets**

The most obvious benefit of a prejudgment writ of attachment is securing the defendant’s assets. An attachment creates a judicial lien on the defendant’s property. Assuming the plaintiff succeeds at trial, the plaintiff gains priority against unsecured creditors in collecting on the defendant’s assets. An attachment also ensures that the defendant’s assets do not disappear once the lawsuit is filed, effectively making the defendant judgment-proof. Particularly for a defendant with shaky financial records or significant foreign ties, attachment provides comfort to the plaintiff that money to satisfy claims will be available, and in the United States, should he or she prevail.

Prejudgment attachment serves broader strategic goals than securing assets. For several reasons, attachment can encourage early settlement. Obtaining an attachment lien requires the plaintiff to present evidence supporting the claims. This helps both sides evaluate the likely durability of the plaintiff’s allegations. The court’s reaction to the plaintiff’s application will provide even more insight. If the court believes it is “more likely than not” that the plaintiff will prevail on its claims at trial, and other procedural requirements are met, the court will grant the writ. The plaintiff can also use this early opportunity to present the best facts to the judge who will be overseeing the parties’ future discovery disputes and eventual trial.

If the writ is granted, the pressure then falls on the defendant. Freezing the defendant’s assets imposes an immediate financial constraint on the defendant that can facilitate settlement. If the defendant is a nonresident,
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attaching the defendant’s property may lure the defendant back within the court’s jurisdiction to challenge the attachment. In addition, because the plaintiff becomes a secured creditor after obtaining an attachment, it is more difficult for the defendant to shake off the plaintiff’s claims by filing for bankruptcy as a means of avoiding trial.

There are drawbacks to pursuing an early writ of attachment as well. First, it costs the client legal fees upfront. At a minimum, lawyers should expect to spend time gathering evidence supporting a prima facie case on the merits, searching for assets, completing court forms, drafting legal motions, and pursuing enforcement of the right-to-attach order. If the defendant decides to challenge the attachment application, costs can escalate quickly. A defendant is entitled to oppose an attachment application with his or her own evidence and may wage battles over exempt property. Obtaining an attachment may also put the defendant to immediately file for bankruptcy, and if the defendant does so within 90 days, courts will set aside the lien. Finally, if the plaintiff ultimately fails to obtain a judgment in its favor, the defendant may sue for wrongful attachment and win damages. Because each case is different, the risk-benefit calculation for seeking a prejudgment writ will be different as well.

**Tips for Stealth Attachment**

Of course, attachment only works if the defendant has assets to attach. Filing a public lawsuit, however, may backfire by provoking the defendant into hiding his or her assets under the proverbial mattress. When it comes to dissipating assets, the defendant has various options. While selling real property located in California may take time and raise alarms, at the press of a button the defendant can instantaneously send electronic assets held in bank accounts anywhere in the world. Thus, if there is any concern the defendant may take money and run, the plaintiff should seek full use of the code’s provisions for preserving confidentiality until the assets are secured.

First, before filing the complaint, the plaintiff should quietly identify the specific property he or she intends to attach. Here, a private investigator, a public records search, and even a scan of the defendant’s social media accounts can come in handy. If the defendant is a corporation, the plaintiff may attach any property belonging to the defendant. If the defendant is a natural person, however, the defendant may claim certain exemptions, such as a homestead exemption and wages needed to support the defendant’s family. Although in some cases it may be necessary, the plaintiff should avoid waiting until the discovery phase to identify property to attach. By then, the assets may be long gone.

For jurisdictional reasons, the assets must be located in California. In *Pacific Decision Sciences Corporation v. Superior Court*, the California Court of Appeals vacated a writ of attachment on the basis that the plaintiff had attempted to attach bank funds located outside of California. Pacific Decision, however, does not mean that a plaintiff must now scurry across the country quixotically searching for the physical location of intangible electronic funds. Rather, *Pacific Decision* cautions that the asset holder—in this case the financial institution—must be subject to personal jurisdiction in California so the California county sheriff can appropriately serve the writ. If the bank only has offices outside of California, as was the case in *Pacific Decision*, the plaintiff may need to look elsewhere for attachable assets.

Once the plaintiff has identified assets, the plaintiff should prepare all attachment documents and the complaint at the same time. The Plaintiff should file the complaint shortly (ideally, one day) before filing the attachment application, to get a judge and case number. To avoid tipping off the defendant, and potentially triggering an asset-purge, California attachment law specifically allows the plaintiff to file a complaint in secret. Under Civil Procedure Code Section 482.050, the court clerk will wait until the plaintiff has served the writ of attachment on the defendant—or up to 30 days—before listing the complaint in the court’s public records. Note, however, that some clerks are less familiar with this provision, so the plaintiff should stay in contact with the clerk to prevent an accidental public filing.

After filing a secret complaint, the plaintiff may then submit an ex parte application for a right-to-attach order. As with other ex parte applications, the plaintiff must show that “great or irreparable injury would result” if the defendant were given notice of the attachment hearing. If the plaintiff wishes to avoid providing any notice, it must also provide a declaration explaining the “exceptional circumstances” warranting delayed notice. In the context of attachments, the great or irreparable injury requirement is satisfied when there is a risk the property will be concealed, substantially impaired in value, or otherwise made unavailable to levy. Alternatively, the plaintiff may show that the defendant both failed to pay the debt and is insolvent (but not yet in bankruptcy proceedings). Generally, the fact that the defendant has failed to pay the debt underlying the attachment, without other evidence, is not sufficient to show a risk of “great or irreparable injury.” The plaintiff should point to some additional fact beyond the debt, such as the defendant’s past dishonesty, failure to meet obligations, or concealment of assets, to support an ex parte request.

Assuming the plaintiff qualifies for an ex parte hearing, the judge may sign the right-to-attach order on the same day the plaintiff applies for the attachment. The path is still long, however, from the right-to-attach order to actually seizing the defendant’s assets. Without supervision, this enforcement process can take weeks, by which time the defendant may have gotten wind of the plaintiff’s plans and dissipated the assets. Attorneys are best advised to personally navigate the right-to-attach order through each step of the enforcement process, rather than simply letting the order float through the bureaucracy’s tide.

Once the plaintiff has received a right-to-attach order signed by the judge (form AT-120, AT-125, or AT-130), the next step is to obtain the writ of attachment, signed by the court clerk (form AT-135). The clerk will need multiple copies of the right-to-attach order and a copy of the bond. In order not to lose another day, the plaintiff should obtain the bond beforehand while preparing the attachment applications. (Most bond companies will allow this.) If the defendant’s property is located in more than one county, the plaintiff will need a separate, signed writ of attachment for each county.

**Expediting Writs**

Some court clerks in Los Angeles and San Diego have no procedure for expediting writs of attachment. This is true even if the judge granted the right-to-attach order on an ex parte basis, due to the risk of great and irreparable injury from delay. In those cases, court clerks will typically wait one to two days before signing the writ, after attending to matters received earlier. If the plaintiff needs to attach the assets sooner, the best practice is to draft a special instruction in the judge’s proposed order, directing the court clerk to issue the writ immediately.

After receiving a signed writ of attachment, the plaintiff must then deliver the original to the county sheriff as the levying officer. The sheriff will personally serve the writ on the defendant or the financial institution, or leave a copy at the real property to be attached. As with the court clerks’ offices, many sheriff’s offices in southern California have no procedure for expediting writs of attachment, even those obtained on an emergency, ex parte basis. The emergency writ will go to the end of the line, like any other process-serving request. This process typically takes seven to 10 business days. Meanwhile, however, the defendant’s bank account might be wiped clean. Thus, the ideal solution is to include in the judge’s proposed order a direction that the sheriff’s office prioritize service.

Although the process can be cumbersome, the rewards for obtaining a prejudgment writ...
of attachment are significant. Attachment helps protect a plaintiff from a defendant who might otherwise cut and run. With the defendant’s assets secured, the plaintiff can rest assured that they will still be there, even after the costs of litigation and trial.

1 Code Civ. Proc. §483.010(a).
2 Code Civ. Proc. §483.010(c).
3 Code Civ. Proc. §483.010(b).
9 Id.
10 Id. at 541 (“[U]ncertainty as to the specific amount of ultimate damages is not a basis to deny attachment.”).
12 Code Civ. Proc. §484.090.
15 Code Civ. Proc. §482.040.
16 Code Civ. Proc. §484.090(d).
17 Code Civ. Proc. §486.010(a).
20 As The Rutter Group wisely warns, “While the forms help make this complicated procedural law ‘bearable,’ they should not be used under the impression that attachment law practice is a mere matter of box-checking. Do not turn the forms over to an inexperienced assistant without careful supervision; and in all cases READ THE CODE FIRST!” WEIL & BROWN, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL, Ch. 9(B)-D (1983).
21 Browse all Forms, Judicial Branch Home, California Courts, all attachment forms are available at http://www.courts.ca.gov/forms.htm?filter=AT.
24 The standard for obtaining a nonresident writ of attachment is easier to meet. See Code Civ. Proc. §492.030. If the nonresident makes a general appearance, however, the plaintiff must meet the higher standard for residents. See Code Civ. Proc. §§492.040, 492.050(c).
30 Id.
31 Id. at 1110.
33 Id.
34 Id.
36 Cal. R. of Ct. 3.1203, 3.1204.
40 Id.
There is a saying in copyright law that you “can’t copyright fashion.” As a “useful article,” clothing has generally been considered ineligible for copyright protection. In other words, the cut of a dress, the look of a shoe, or the body-hugging properties of a pair of jeans are beyond the domain of copyright law. The Supreme Court’s ruling this spring in Star Athletica, L.L.C. v. Varsity Brands, Inc. may have shaken—although not destroyed—that core principle, leaving considerable questions for copyright holders and potential “inspired” clothing makers going forward.

The Copyright Act provides that “the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.” Therefore, even though a pictorial, graphic, or sculptural work may be copyrighted, useful articles such as clothing may not. On the other hand, expressive works that appear on a useful article are copyrightable. Justice Stephen Breyer put it best during oral argument in Star Athletica when he commented that “the clothes on the hanger do nothing. The clothes on the woman do everything. And that is, I think, what fashion is about.” In this case, a T-shirt imprinted with the image of Vincent Van Gogh’s painting “The Starry Night” would not be copyrightable, but the image presumptively would be subject to copyright if it were not in the public domain due to its age. Indeed, copyright litigation over fabric prints (images on clothing) is a major industry in Los Angeles.

In most cases, drawing the line between a useful article and a piece of copyrightable material separate from the useful article is easy. For example, most fabric print copyrights are submitted to the copyright office as a JPEG of a piece of artwork that could be applied to clothing, canvas, or anything else and are not even offered as clothing-related. Star Athletica is the Supreme Court’s first decision focused on copyright protection for fashion, but the Court had addressed the line between useful articles and copyright once before, in 1954, in Mazer v. Stein, which concerned a set of dancing figure statuettes.

Although standing alone, the statuettes were clearly works of art designed to be sold, and were in fact sold, as lamp bases. Thus, they were useful objects. The plaintiff company sued several defendants who created identical knockoffs. The issue before the Supreme Court was whether the otherwise copyrightable sculpture was rendered ineligible for copyright protection due to the fact that it was only sold as a useful object. The Supreme Court held that the fact that the otherwise clearly copyrightable work was used as a useful object did not render it ineligible for copyright. Thus, the Mazer decision stands for the proposition that making a work of art into a useful article does not render it uncopyrightable per se. But in Mazer, the Supreme Court offered little guidance on how to draw the line between the useful article and the copyright.

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In the more than 60 years since Mazer, the circuit courts, academia, and the U.S. Copyright Office have struggled to come up with practical guidance on how to apply the principles of Mazer to real-world copyrightability issues. Over the decades, the courts, the Copyright Office, and academia have come up with nine separate tests to determine whether a copyright registration relating to a useful article is sufficiently distinct from the useful article to make it copyrightable: 1) The Copyright Office approach, 2) the Primary-Subsidiary approach, 3) the Objectively Necessary approach, 4) the Ordinary Observer approach, 5) the Design-Process approach, 6) the Stand-Alone approach, 7) the Likelihood-of-Marketability approach, 8) Patry's approach, and 9) the Subjective-Objective approach.7

Although there is no need to address each test, the Copyright Office's approach is worth noting since a copyright registration is a prerequisite to litigation. The Copyright Office, in its Compendium of U.S. Copyright Office Practices (Compendium),8 requires that the copyrightable element be either 1) physically separable from the useful article “without altering the useful aspects of the article” or 2) “capable of being visualized” as existing separately, but only if “the artistic feature and the useful article could both exist side by side and be perceived as fully realized, separate works—one an artistic work and the other a useful article."9 The Copyright Office's criteria generally controlled, but the various circuit courts employed slightly different tests (sometimes narrower and sometimes broader) in the context of infringement litigation.

It is worth stepping back to consider fashion protection before the U.S. Supreme Court decided the Star Athletica case and the law more generally. Prior to 2000, clothing companies tried to protect their design through trademark by arguing that their clothing was “inherently distinctive.” For example, when Wal-Mart knocked off Samara Brothers’ line of children’s clothing in the 1990s, Samara sued for copyright infringement (of specific decorative items) and trademark infringement (of the layout of the dresses themselves).10 After Samara won at trial and before the Second Circuit, the Supreme Court reviewed the trademark ruling.11

In Wal-Mart Stores, Inc. v. Samara Brothers, Inc., Justice Antonin Scalia wrote the majority opinion rejecting Samara’s attempt to protect its designs through trade dress, holding that a useful object (e.g., clothing) could never be “inherently distinctive.” In Wal-Mart Stores the majority argued that in order to obtain trademark protection, the designs must have “secondary meaning.” Secondary meaning basically requires that consumers would recognize the design due to its ubiquity, something very hard for a brand to achieve.13 The Adidas “three stripe” design is an example of secondary meaning. There is currently a bitter fight being litigated over whether Converse Chuck Taylor All Stars sneakers have secondary meaning. However, secondary meaning is rare to find in clothing outside of accessories (e.g., shoes, belts) or true “marks” like the pocket designs on jeans.

Within the last decade, attempts to protect fashion designs through intellectual property have shifted to Congress.15 Bills to protect designs were introduced through the late 2000s and recently in 2012. The most notable bill was the Innovative Design Protection and Piracy Act (IDPPA) (S. 3728), introduced by Senator Charles Schumer of New York in 2010, and was nearly passed by the lame duck Congress after the 2010 elections.16 The IDPPA would have amended the Copyright Act to give creators of new fashion designs (broadly defined) a three-year monopoly over their original designs and the right to sue for infringement.17 The legislation did not reach the Senate floor before the new Congress was seated in 2011, and after 2011, fashion legislation ceased to be a priority.18 Thus, as the fashion industry entered the second decade of the 21st century with the rise of “fast fashion” like Forever 21, the legal environment and the business environment seemed to favor either “inspiration” or knockoffs—depending upon whom you ask.

Enter the rivalry between cheerleader uniform suppliers, Star Athletica and Varsity Brands. Varsity Brands is a major manufacturer of cheerleader uniforms, and over the years, it has submitted images of more than 200 of its uniforms to the Copyright Office for registration, and received registrations.

Star Athletica began selling cheerleader uniforms that Varsity Brands contended were substantially similar to theirs. Varsity Brands sued Star Athletica for copyright infringement in Ohio. Star Athletica successfully obtained summary judgment, with the district court finding that the cheerleader chevron designs and the uniforms themselves were not capable of existing independently.

**Law on Separability**

The Sixth Circuit reversed, finding the uniforms to be copyrightable, and in doing so, laid out its view of the current law on separability.

First, the court examined “physical separability,” or whether the decorative item could be physically removed from the useful article without destroying it (e.g., the hood ornament on a car). It concluded that the chevron designs were not physically separable from the uniform. Upon finding the chevrons were not physically separable, the district court turned to a “conceptual separability” test—basically whether the pictorial, graphic, or sculptural feature can be separated from the useful article in concept. The Sixth Circuit, possibly setting up the case for certiorari, identified the nine separate variants on the conceptual test.

The bulk of the separability approaches discussed by the Sixth Circuit,19 and particularly the approach of the Copyright Office, require that when an artistic element is conceptually removed from the useful article, the useful article remains “useful.” Several of the remaining approaches20 look only at whether the object as a whole is artistic and not dictated by function. In other words, the nine competing tests regarding separability essentially amount to two competing types of tests: 1) whether the artistic work and the useful article could be conceptually separated with one part surviving (conceptually) as a useful article and the element as an artistic work,21 or 2) whether there were aspects of the design of the useful article that were not dictated by function.22

The first set of tests requires the useful article to survive removal of the artistic elements while the second set does not. The Sixth Circuit adopted a hybrid mix of these tests, involving a five-step process.23 Applying the new test to the uniforms, it found the chevron combinations to be conceptually separable from the uniforms themselves, and reversed, in favor of Varsity Brands.24 Star Athletica petitioned for certiorari.25

In May 2016, the Supreme Court granted the petition for certiorari and agreed to hear the case.26 The Supreme Court heard oral arguments in the case on November 6, 2016.27 On June 29, 2017, the Supreme Court decided the case in favor of Varsity Brands.28 The Court held that the Ninth Circuit erred in its conceptual separability test by applying an incorrect legal standard for determining whether the element in question was separable from the useful article.29 For the case at hand, the Supreme Court found that a useful object (e.g., clothing) could be “inherently distinctive,” and thus separable from the useful article, in the context of copyright.30

certiorari on the issue of the appropriate test to determine when a feature of a useful article is protectable under Section 101 of the Copyright Act. Varsity Brands and the U.S. government argued that the chevron designs could be envisioned separately from the uniform. Varsity Brands argued that its designs are not “designs of useful articles.” Rather, they are “two-dimensional graphic designs that appear on useful articles.”26 The government, offering an amicus position, offered a similar argument, stating that removal of the chevrons would leave the uniforms “similarly” useful.27 Star Athletica proffered the same basic tests as the others28 but argued for a different result, viz. that removal of the chevrons would not leave the uniforms equally useful.

The Supreme Court, in a 6-2 opinion written by Justice Clarence Thomas, rejected all of these approaches to copyrightability and set forth a new test for determining whether an expressive element of a useful article was copyrightable under Section 101:

A feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—even on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.29

In this context, the Court held that it does not matter if removing the decorative element would render the useful article useless. In other words, it did not matter that without the chevrons, the garment would no longer be a cheerleader uniform. The Court determined that “[t]he statute does not require the decision maker to imagine a fully functioning useful article without the artistic feature.”30 The only question is whether the claimed feature can exist independently. Applying this test, the Court held that the claimed elements (the chevrons) could exist independently and therefore were copyrightable.

The Court’s decision did not resolve all the pending issues regarding the ongoing dispute between Star Athletica and Varsity Brands. The Supreme Court granted certiorari on the question of whether the uniforms were copyrightable, assuming they were original and sufficiently creative to be copyrighted. This was the issue on which Star Athletica obtained summary judgment in the district court. However, there were other issues in the case, on which the Supreme Court expressly declined to rule. For example, Star Athletica claimed that Varsity Brands was registering designs that it did not create in an effort to create a monopoly on cheerleader uniforms.31 That question has yet to be resolved.

Going Forward

The test adopted by the Supreme Court is a major substantive change, rejecting and overturning Copyright Office practices going back a half century. As noted, some of the competing tests,32 including and most important, that of the Copyright Office, required that the useful object remain similarly useful after removal of the decorative item, at least in concept. This was the theory unsuccessfully advanced by the government, and that requirement has now been unequivocally removed from copyright jurisprudence. Therefore, it is now easier to copyright an artistic aspect of a useful article like a piece of clothing, although the exact nature of the change is still in flux. While the Court’s decision replaces various tests with one two-prong test, the standard in Star Athletica is basically two sentences with no further guidance. As a result, litigants and intellectual property holders, at least for the moment, have no concrete guidance on how the test will be implemented within the fashion industry. As such, in the short period since the case came down, potential copyright holders have taken a “shoot first and ask questions later” approach to copyrightability, in the hope that any type of fashion feature could be protectable.

For example, less than two weeks after the Star Athletica opinion was released, Puma sued Forever 21 for allegedly knocking off its shoes. The core case was based on previously issued design patents and allegations of trade dress. But Puma also took photographs of the shoes, sent them into the Copyright Office as copyright applications, and asserted the knockoffs were infringing on their copyrights under Star Athletica. Puma’s claim is likely pushing the envelope.33 However, practitioners also are likely to see similar actions until the Copyright Office issues meaningful guidance.

However, it is unlikely this will remain the case for long. The initial gatekeeper for copyrights is the Copyright Office, and that office provides detailed guidance on copyrightability in its Compendium. For example, prior to Star Athletica, the guidance on the issues decided in Star Athletica comprised eight single-spaced pages with multiple examples. In most cases, the information provided was sufficiently clear to provide guidance for litigants.

On June 1, 2017, the Copyright Office deleted this section of the Compendium and replaced it with three short paragraphs, quoting the standard from Star Athletica,34 and stating “[t]he U.S. Copyright Office is developing updated guidance on the registration of pictorial, graphic, and sculptural features incorporated into the design of useful articles.”35 In all likelihood, the Copyright Office will be the first federal office to provide real guidance on the impact of Star Athletica and...
probably before meaningful court decisions come down.

Although plaintiffs may try, *Star Athletica* does not mean the IDPPA has now become law through judicial fiat. The decision moves the standard in that direction, but it almost certainly did not move it that far. For example, the Diane Von Furstenberg wrap dress, often offered as a key example of potentially protectable fashion in discussions of the IDPPA,20 probably does not qualify as having artistic elements that could be applied to another medium. However, certain types of clothing that were earlier refused by the Copyright Office, and therefore would have been deemed uncopyrightable by the courts, now would likely pass muster under the Court’s test. In other words, combinations of simple shapes that are integral to a piece of clothing probably would qualify as conceptually separable from the garment now, whereas they would not have before.

As an example, since the line has moved for borderline cases, it is worth looking at the clothing from *Wal-Mart Stores* again. There is an arrangement of seersucker and pocket patches that are no less separable from the dresses than the chevrons from the cheerleader uniforms in *Star Athletica*. In 2001, it was reasonably clear that the layout of the Samara dresses were not protectable under copyright law. Indeed, Samara only sought copyright for some of the individual items on the dresses. Today, the outcome would be less clear. Until guidance from the Copyright Office comes down, or a few motions to dismiss are granted in pending litigation, the sky will be the limit.

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1 They may be subject to trademark or patent law, but obtaining this type of protection requires additional elements not always present and at higher costs.


3 Supreme Court copyright case law generally addresses two successive Copyright Acts, one passed in 1909 and one passed in 1976. For purposes of the issues addressed in *Star Athletica*, the two acts are functionally the same. (Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (Mar. 4, 1909; repealed Jan. 1, 1978); the same. (Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (Mar. 4, 1909; repealed Jan. 1, 1978).

4 The government supported this approach in the Supreme Court case, and argued that the plain white uniform that would remain after the cheerleader chevrons were removed would still be a useful article. The government supported this approach in the Supreme Court case, and argued that the plain white uniform that would remain after the cheerleader chevrons were removed would still be a useful article.

5 Diane Von Furstenberg’s iconic wrap dress, and the Supreme Court did not grant certiorari on the copyright claims. See Samara Bros. v. Wal-Mart Stores, Inc., 165 F. 3d 120, rev’d, 529 U.S. 205 (2000). Wal-Mart Stores, 529 U.S. at 216 (“[A] product’s design is distinctive, and therefore protectable, only upon a showing of secondary meaning.”).

6 Id. at 211.

7 Id. at 216.

8 Ninth Cir. Model Civ. Jury Instruction 15.11 (“[W]hen it has been used in such a way that its primary significance in the minds of the prospective consumers is not the product itself, but the identification of the product with a single source, regardless of whether consumers know who or what that source is.”)

9 These attempts, plus earlier legislative attempts in the 20th century, were discussed briefly in Star Athletica’s Supreme Court brief. Star Athletica, L.L.C. v. Varsity Brands, Inc., case no. 15-855, 2016 WL 3929232 at *22 (U.S. 2016).

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17 The Copyright Act has two other “interest group” amendments, one for vessel hulls and one for architectural design.

18 After 2010, the primary intellectual property legislation was in the patent field.

19 The Copyright Office approach, Objectively Necessary approach, Ordinary Observer approach, and Stand-Alone approach.


21 The government supported this approach in the Supreme Court case, and argued that the plain white uniform that would remain after the cheerleader chevrons were removed would still be a useful article.

22 These standards are somewhat similar to those governing design patents.

23 Briefly, whether the design is of useful article, identifying the utilitarian aspects of the article, and whether the graphic or sculptural features can exist independently. Varsity Brands, Inc. v. Star Athletica, LLC, 799 F. 3d 468, 477-93 (6th Cir. 2015).

24 See id. at 29.

25 Ninth Cir. Model Civ. Jury Instruction 15.11 (“[W]hen it has been used in such a way that its primary significance in the minds of the prospective consumers is not the product itself, but the identification of the product with a single source, regardless of whether consumers know who or what that source is.”)

26 Ninth Cir. Model Civ. Jury Instruction 15.11 (“[W]hen it has been used in such a way that its primary significance in the minds of the prospective consumers is not the product itself, but the identification of the product with a single source, regardless of whether consumers know who or what that source is.”)

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33 Ninth Cir. Model Civ. Jury Instruction 15.11 (“[W]hen it has been used in such a way that its primary significance in the minds of the prospective consumers is not the product itself, but the identification of the product with a single source, regardless of whether consumers know who or what that source is.”)

34 Ninth Cir. Model Civ. Jury Instruction 15.11 (“[W]hen it has been used in such a way that its primary significance in the minds of the prospective consumers is not the product itself, but the identification of the product with a single source, regardless of whether consumers know who or what that source is.”)

35 Ninth Cir. Model Civ. Jury Instruction 15.11 (“[W]hen it has been used in such a way that its primary significance in the minds of the prospective consumers is not the product itself, but the identification of the product with a single source, regardless of whether consumers know who or what that source is.”)

36 Ninth Cir. Model Civ. Jury Instruction 15.11 (“[W]hen it has been used in such a way that its primary significance in the minds of the prospective consumers is not the product itself, but the identification of the product with a single source, regardless of whether consumers know who or what that source is.”)
California’s financial responsibility laws, every owner and operator of a vehicle must be able to establish at all times financial responsibility through liability insurance or its functional equivalent. Any owner or operator who fails to comply with these laws is generally barred by Proposition 213 (Prop. 213) from recovering noneconomic damages in a personal injury action arising from a motor vehicle accident.

One functional equivalent of liability insurance is a cash deposit with the California Department of Motor Vehicles (DMV) made prior to the operation of a motor vehicle. It is clear from the financial responsibility laws that in order for a cash deposit to establish financial responsibility, the deposit must be made before the motorist operates a vehicle in California. Nonetheless, in recent years, some uninsured plaintiffs have attempted to establish their financial responsibility by making a cash deposit with the DMV after an accident in which they have sustained injuries. These plaintiffs have argued that making a post-accident deposit entitles them to recover noneconomic damages just as though, prior to the accident, they had purchased an automobile liability policy or made a cash deposit with the DMV. However, a post-accident deposit is contrary to the purpose, terms, and history of California’s financial responsibility laws and is subject to challenge in litigation arising from motor vehicle accidents. Accordingly, recovery of noneconomic damages by these plaintiffs is barred by Prop. 213.

Proposition 213

California motorists must comply with the state’s financial responsibility laws, which in essence require that they have a source of funds available to compensate others for injury arising from a vehicle’s operation or use. Vehicle owners and operators typically comply with the financial responsibility laws by purchasing insurance, but there are alternative ways for motorists to do so, such as by depositing $35,000 cash with the DMV before operating a vehicle.

In an attempt to encourage compliance with the financial responsibility laws, voters in 1996 approved Prop. 213, known as The Personal Responsibility Act of 1996. The act “was intended to punish and deter scofflaws, i.e., drivers who do not obey the financial responsibility laws,” by precluding their recovery of noneconomic damages arising out of a motor vehicle accident.

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by Karen M. Bray and Stephen E. Norris

Figueroa v. United States holds that a post-accident cash deposit in lieu of insurance does not establish legal financial responsibility at the time of an accident in which injury occurs.
olatile. Motorists who make post-accident deposits as a basis for claiming they have financial responsibility as required by the financial responsibility laws, specifically those plaintiffs argue that they are entitled to recover noneconomic damages because “at the time of the accident,” they had no form of financial responsibility in effect to compensate those who might have been injured as a result of the accident. Therefore, they argue that they are entitled to recover noneconomic damages under subdivision (a)(3) of Civil Code Section 3333.4 as a vehicle “operator” who can “establish his or her financial responsibility as required by the financial responsibility laws.” In relying on Section 16054.2, plaintiffs contrast its language with that of Vehicle Code Section 16034, which states that compliance with the financial responsibility laws may be shown with an automobile liability policy or bond that was “in effect at the time of the accident.”

Plaintiffs who have made post-accident deposits also attempt to support their reading of Vehicle Code Section 16054.2 with a legislative history argument, noting that Section 16054.2 was derived from former Vehicle Code Section 420—the “security following accident” law. Former Section 420 required that those involved in an accident must deposit funds in an amount determined by the DMV based upon the post-accident report and other post-accident evidence. These arguments should be rejected because post-accident deposits do not fulfill the requirements of the financial responsibility laws. The court reasoned that Vehicle Code Section 16020 requires that both drivers and owners of motor vehicles “shall at all times be able to establish financial responsibility” and “shall at all times carry in the vehicle evidence of the form of financial responsibility in effect for the vehicle.” Based on this statute, the court concluded that a post-accident cash deposit cannot establish the plaintiff’s financial responsibility at the time of the accident giving rise to the injury.

The court’s conclusion that financial responsibility must be concurrent with vehicle operation is supported by express provisions in the financial responsibility law statutes, the DMV’s interpretation of those statutes, the legislative history of the financial responsibility laws, and the policies underlying Prop. 213.

Numerous Vehicle Code provisions expressly require that financial responsibility be in place at all times. The statutes comprising the financial responsibility laws clearly indicate that a form of financial responsibility must be in place as a precondition to driving in California. For example, Vehicle Code Section 16000.7 defines an “uninsured motor vehicle” as one “for which financial responsibility...was not in effect at the time of the accident.”

Proposition 213 was intended to punish and deter scofflaws, i.e., drivers who do not obey the financial responsibility laws.
1. One of the purposes of the Personal Responsibility Act of 1996 was to bar drivers who have not complied with the financial responsibility laws from recovering noneconomic damages in an action arising from a motor vehicle accident.
   True.  
   False.  

2. Vehicle owners must comply with the financial responsibility laws to recover noneconomic damages in an action arising from a motor vehicle accident, but nonowner vehicle operators are exempted from the financial responsibility laws.
   True.  
   False.  

3. One way to comply with the financial responsibility laws is to maintain vehicle liability insurance.
   True.  
   False.  

4. The Vehicle Code defines an “uninsured motor vehicle” as one for which financial responsibility was not in effect at the time an accident occurs.
   True.  
   False.  

5. Under former Vehicle Code Section 420—the “security following accident” law—an uninsured driver could avoid license suspension by depositing cash with the Department of Motor Vehicles in an amount the DMV considers cash deposits with the DMV under the financial responsibility laws would satisfy any potential judgment against him or her.
   True.  
   False.  

6. California appellate courts have held that maintaining financial responsibility is an obligation that is concurrent with owning or operating a vehicle.
   True.  
   False.  

7. In Figueroa v. United States, a federal district court concluded that an uninsured plaintiff who made a cash deposit with the DMV after an accident was not in compliance with the financial responsibility laws at the time of the accident.
   True.  
   False.  

8. A vehicle owner involved in an accident can comply with the financial responsibility laws by signing a document assuring the other driver that he or she will subsequently post a cash deposit with the DMV.
   True.  
   False.  

9. California Vehicle Code Section 16054.2, which governs cash deposits with the DMV under the financial responsibility laws, does not expressly state that such deposits must be in place as a precondition to owning or operating a vehicle.
   True.  
   False.  

10. A vehicle operator must at all times carry in the vehicle proof of some form of financial responsibility.
    True.  
    False.

11. Vehicle owners must show compliance with the financial responsibility laws in order to renew their vehicle registration.
    True.  
    False.  

12. To use the cash deposit option as a means of complying with the financial responsibility laws, a vehicle owner or operator must deposit $75,000 with the DMV.
    True.  
    False.  

13. Under California rules of statutory construction, the statutes addressing cash deposits should be read and interpreted separately from the remaining statutes comprising the financial responsibility laws.
    True.  
    False.  

14. According to the California Driver Handbook published by the DMV, one way to comply with the financial responsibility laws is to allow the DMV to secure a lien against a registered vehicle.
    True.  
    False.  

15. The DMV must notify drivers concerning the penalties for failing to comply with the financial responsibility laws.
    True.  
    False.  

16. A defendant in an action arising from a motor vehicle accident may file a motion for summary adjudication on the question whether plaintiff failed to comply with the financial responsibility laws and therefore is not entitled to recover noneconomic damages.
    True.  
    False.  

17. A defendant in an action arising from a motor vehicle accident may file a motion in limine to exclude evidence of noneconomic damages based on Proposition 213 if the plaintiff failed to comply with the financial responsibility laws.
    True.  
    False.  

18. The question whether a plaintiff was in compliance with the financial responsibility laws is a preliminary fact on which the admissibility of noneconomic damages hinges and may therefore be resolved by the trial court.
    True.  
    False.  

19. One way to demonstrate compliance with the financial responsibility laws is to carry a certificate acknowledging that cash has been deposited with the DMV.
    True.  
    False.  

20. The DMV may suspend, cancel, or revoke a vehicle’s registration if the owner fails to provide proof of financial responsibility.
    True.  
    False.
Like­wise, Vehicle Code Sec­tion 16025 requires that “[e]​very driver” in­vol­ved in a de­nar­ri­ve­ment or in­ves­tig­a­tion of an ac­ci­dent pro­vide “[e]vi­dence of fi­nan­cial re­sponsi­bil­ity,” as spec­i­fied in Sec­tion 16020” to “an­y other driver or prop­erty own­er in­vol­ved…and pre­sent at the scene.”18 Also, Ve­hi­cle Code Sec­tion 16028 states that ev­ery driver must pro­vide a peace of­fi­cer who is is­suing a cita­tion or in­ves­ti­gat­ing an ac­ci­dent with “e­vi­dence of fi­nan­cial re­sponsi­bil­ity for the ve­hi­cle that is in ef­fect at the time the de­mand is made.”19

Fin­ally, Ve­hi­cle Code Sec­tion 1656.2 re­quires that the DMV no­tify driv­ers con­cern­ing pe­na­lities for noncom­pliance with the fi­nan­cial re­sponsi­bil­i­ties laws, not­ing that driv­ers must “carr­y writ­ten e­vi­dence of val­id au­to­mo­bile li­ab­i­li­ty in­sur­ance…[or] a $35,000 cash de­pos­i­t” and “must pro­vide e­vi­dence of fi­nan­cial re­sponsi­bil­i­ty” whenever they re­new their ve­hi­cle reg­is­tra­tion and after they “are cit­ed by a peace of­fi­cer for a traf­fic vio­la­tion or are in­vol­ved in any traf­fic ac­ci­dent.”20

Read col­lect­ively, these stat­u­tes leave no dou­t that some form of fi­nan­cial re­sponsi­bil­i­ty must ex­ist from the time a driv­er first op­er­ates a ve­hi­cle.21 A driv­er cannot retro­ac­tively es­tab­lish fi­nan­cial re­sponsi­bil­i­ty any more than that driv­er could retro­ac­tively avoid a cita­tion for fail­ing to com­ply with the fi­nan­cial re­sponsi­bil­i­ties laws.22

Un­insured plaintiffs point to the fact that ne­ither Ve­hi­cle Code Sec­tion 16054.2 nor Civil Code Sec­tion 3333.4 ex­press­ly states that a cash de­pos­i­t must be in place when an ac­ci­dent oc­curs. The ab­sence of an ex­press de­clara­tion in these two stat­u­tes is ir­re­levant, how­ever, be­cause Ve­hi­cle Code Sec­tion 16020 and the other stat­u­tes codify­ing the fi­nan­cial re­sponsi­bil­i­ties laws un­qui­vi­co­ly re­quire fi­nan­cial re­sponsi­bil­i­ty be in ef­fect at the time of the ac­ci­dent. Noth­ing in the lan­guage of Sec­tion 16054.2 sug­gests that a cash de­pos­i­t—un­like all oth­er forms of fi­nan­cial re­sponsi­bil­i­ty—may be se­cured af­ter an ac­ci­dent to retro­ac­tively cre­ate com­pliance with the law.

The DMV in­ter­prets the stat­u­tes to re­quire fi­nan­cial re­sponsi­bil­i­ty at all times. The ar­gu­ment that Ve­hi­cle Code Sec­tion 16054.2 al­lows for a post-ac­ci­dent de­pos­i­t also con­flicts with the DMV’s in­ter­preta­tion of the fi­nan­cial re­sponsi­bil­i­ties laws. Mul­ti­ple DMV pub­li­ca­tions re­flect the de­par­t­ment’s un­der­stand­ing that, whether a driv­er opts for in­sur­ance or a cash de­pos­i­t, ei­ther must be in place at all times to com­ply with the fi­nan­cial re­sponsi­bil­i­ties laws.23

For ex­am­ple, the Cal­i­for­nia Driv­er Hand­book ad­vises driv­ers that “[t]he Cal­i­for­nia Com­pul­sory Fi­nan­cial Re­sponsi­bil­i­ty Law re­quires ev­ery driv­er and ev­ery own­er of a ve­hi­cle to main­tain fi­nan­cial re­sponsi­bil­i­ty (li­ab­i­lity cov­er­age) at all times.”24 The hand­book lists “4 forms of fi­nan­cial re­sponsi­bil­i­ties”: li­ab­i­lity in­sur­ance, a “de­pos­i­t of $35,000 with DMV, a surety bond, or a “DMV-issued self-insur­ance cer­ti­fi­cate.”25 The hand­book also states that a driv­er “must possess e­vi­dence of fi­nan­cial re­sponsi­bil­i­ty when­ever you drive, and show it to a peace of­fi­cer af­ter a traf­fic stop or col­li­sion when asked to do so.”26

Doc­u­ments issued by the DMV when a per­son pro­vides a cash de­pos­i­t re­flect the fact that the de­pos­i­t is ef­fective only to es­tab­lish fi­nan­cial re­sponsi­bil­i­ties pros­pec­tively. These doc­u­ments typ­i­cal­ly in­clude a re­ceipt for the de­pos­i­t and an “Acknowl­edg­ment of Cash De­pos­i­t” form. The doc­u­ments 1) state that the form must be car­ried at all times as e­vi­dence of com­pliance with the fi­nan­cial re­sponsi­bil­i­ties laws un­der Ve­hi­cle Code Sec­tion 16020, 2) ex­plain that the de­pos­i­t num­ber as­signed by the DMV may be used in lieu of in­sur­ance pol­icy in­for­ma­tion on any ac­ci­dent re­port, and 3) direct that the form must be pro­vided to a peace of­fi­cer in the event of an ac­ci­dent or cit­a­tion as proof of fi­nan­cial re­sponsi­bil­i­ty. This lan­guage is pros­pec­tive and does not indi­cate that a cash de­pos­i­t can cur­e a past fail­ure to be fi­nan­cially re­sponsi­ble.

The “se­cur­ity fol­low­ing ac­ci­dent” law was ex­press­ly re­pealed in 1974. Plai­niffs’ post-ac­ci­dent de­pos­i­t ar­gu­ments are based lar­gly on a stat­u­te that was ex­press­ly re­pealed by the legis­la­ture in 1974. Specif­i­cally, for­mer Ve­hi­cle Code Sec­tion 420 per­mit­ted un­insured driv­ers to make a cash de­pos­i­t in an am­ount cal­cu­lat­ed by the DMV af­ter an ac­ci­dent oc­curred. Un­der that law, the DMV was au­tho­rized to sus­pend the li­cense of an un­insured driv­er who was in­vol­ved in an ac­ci­dent un­less the driv­er de­pos­i­t ed se­cur­ity “suf­ficient in the opin­ion of the de­par­t­ment to sat­is­fy any final judg­ment against him.”27 The legis­la­tive his­tory re­lating to the re­peal of the law in­di­cates that these post-ac­ci­dent pro­ce­dur­es im­posed costs­ly ad­min­is­tra­tive bur­dens on the DMV. More­­over, al­low­ing this loop­hole in the fi­nan­cial re­sponsi­bil­i­ties laws re­sulted in driv­ers’ oper­at­ing their ve­hi­cles with­out in­sur­ance while opt­ing to av­oid the ex­pense of pro­cur­ing in­sur­ance in fa­vor of risk­ing have­ing to post a de­pos­i­t af­ter an ac­ci­dent. This tac­tic con­flict­ed with a key pur­pose of the fi­nan­cial re­sponsi­bil­i­ties laws—i.e., to af­ford mo­na­to­ry pro­tec­tion to those injured by virtue of the ac­tions of fi­nan­cially ir­re­sponsi­ble driv­ers.

The legis­la­tive his­tory there­fore re­pealed Sec­tion 420 and en­acted pro­vi­sions list­ing al­ter­na­tive forms of fi­nan­cial re­sponsi­bil­i­ties and re­quir­ing that one be in place at all times as a pre­con­di­tion to oper­at­ing a ve­hi­cle.28 The legis­la­tive his­tory is re­plete with state­ments that the legis­la­tur­es goal was to make fi­nan­cial re­sponsi­bil­i­ty an ob­li­ga­tion that is con­cur­rent with the oper­a­tion of a motor ve­hi­cle in Cal­i­for­nia.

Post-ac­ci­dent de­pos­i­ts run coun­ter to the Sec­tion 16020, dis­cussed by the court in Figueroa, man­dates that all own­ers and oper­a­tors “shall at all times be able to es­tab­lish fi­nan­cial re­sponsi­bil­i­ty…and shall at all times carry in the ve­hi­cle ev­i­dence of the form of fi­nan­cial re­sponsi­bil­i­ty in ef­fect for the ve­hi­cle.”

Pursue a mo­tion for summary ad­
judication based on Prop. 213. The summary adjudication statute—Code of Civil Procedure Section 437c—provides that a party cannot obtain summary adjudication on a damages claim that does not dispose of at least one cause of action. A party may move for summary adjudication “as to...one or more claims for damages...if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty” to plaintiff.

Section 437c therefore “does not permit summary adjudication of a single item of compensatory damage which does not dispose of an entire cause of action.” The statute allows only for summary adjudication of a punitive damages claim, not a component of compensatory damages. As one court observed: “The reference to ‘one or more claims for damages’ in the first part of the sentence is thus still qualified by, and limited to, punitive damages” and “there is no other reasonable interpretation of the sentence which gives effect to all of its words.” The reason for the distinction is that “it is a waste of court time to attempt to resolve issues if the resolution of those issues will not result in summary adjudication of a cause of action.”

“Since the cause of action must still be tried, much of the same evidence will be considered by the court at the time of trial.”

File a motion in limine. Defense counsel should file a motion in limine to exclude evidence of noneconomic losses based on Prop. 213, explaining why a post-accident deposit does not comply with the financial responsibility laws. The motion should be supported by plaintiff’s discovery responses and other evidence needed to establish that, at the time of the accident, plaintiff was not insured and did not have any other form of financial responsibility in place and that plaintiff instead belatedly deposited cash with the DMV.

If the trial court denies the motion in limine on the ground that Prop. 213 does not bar plaintiff’s noneconomic damages claim, defense counsel should make an offer of proof during trial concerning all evidence supporting the Prop. 213 defense. The offer should include admissions from the plaintiff’s discovery responses that he did not have insurance at the time of the accident as well as copies of the DMV documents acknowledging that cash was deposited after the accident. The offer of proof is necessary to preserve the issue of the propriety of the cash deposit for appeal.

File a motion to bifurcate. Because there is a chance that the trial court may deny the motion in limine (either as a matter of law or on the grounds that there are factual disputes pertaining to the Prop. 213 defense), counsel should also file a timely motion to bifurcate the trial requesting that the trial court separately resolve the Prop. 213 issues first. The question whether plaintiff was in compliance with the financial responsibility laws at the time of the accident is a “preliminary fact” upon which the admissibility of evidence of pain and suffering hinges. The determination of that preliminary fact is properly submitted to the court in accordance with Evidence Code Section 405.

Thus, the motion should argue that bifurcation is necessary because, if the defense is correct about the application of Prop. 213, none of the plaintiff’s noneconomic damages evidence, which will invariably be used to play to the jury’s sympathies, should be presented to the jury. If Prop. 213 applies, admission of such evidence will serve only to taint the jury’s evaluation of liability, fault allocation, and other damages claims. Moreover, resolving the Prop. 213 defense in advance will streamline the trial by avoiding potentially unnecessary discussions concerning the admissibility of noneconomic damages evidence, the propriety of noneconomic damages jury instructions, whether noneconomic damages may be included on the verdict form, and whether the plaintiff’s counsel may argue noneconomic damages to the jury.

If the plaintiff opposes bifurcation or the court is reluctant to grant it, defense counsel should argue that, absent bifurcation, the defense should be entitled to offer during the trial before the jury all of the evidence necessary for the jury to determine whether plaintiff was not insured or otherwise financially responsible at the time of the accident. If the jury finds against the plaintiff on that issue, then the verdict form should instruct the jury not to award noneconomic damages.

Oppose any effort to defer a Prop. 213 issue to a second trial phase of post-trial motion. In opposition to a motion in limine or motion to bifurcate, plaintiff may argue that the court should deny the motions and allow the jury to award noneconomic damages. The plaintiffs likely will argue that the court should resolve the Prop. 213 issue by means of a second phase of trial before entering judgment or even by way of a post-trial motion for partial judgment notwithstanding verdict. The plaintiff may contend that proceeding in such a manner would promote judicial economy because, if the court rules that noneconomic damages should be stricken, a court of appeal can simply reinstate the award in the event of reversal rather than having to order a new trial on the noneconomic damages claim. These arguments should be rejected for two reasons.

First, trying the Prop. 213 issue in a second phase of the trial after the admission of evidence of pain and suffering is contrary to the public policy underlying Prop. 213, which dictates that a jury should never hear evidence regarding a plaintiff’s noneconomic damages if the plaintiff was uninsured and cannot otherwise establish financial responsibility at the time of the accident. Moreover, the prejudice from admitting irrelevant evidence that could potentially color the jury’s deliberations on other issues cannot simply be undone on appeal by striking an award that the plaintiff should not have received in the first place based on evidence that should not have been introduced.

Second, there is no procedural basis for deferring submission of the evidence in support of a motion in limine until the filing of a motion for judgment notwithstanding verdict. This motion must be based on evidence presented during trial; it cannot be based on evidence submitted with a motion for judgment notwithstanding verdict—and the plaintiff presumably will not want the jury to hear evidence that he or she failed to have insurance in place at the time of the accident.

Until a California appellate court issues a decision rejecting post-accident deposits as a basis for establishing financial responsibility, uninsured plaintiffs will continue to employ this tactic in their effort to recover noneconomic damages—often one of the largest components of a personal injury plaintiff’s verdict. Defense counsel should therefore be prepared to challenge these noneconomic damages claims by employing the appropriate arguments and procedures.

1 Enacted as Civ. Code §3333.4.
2 Civ. Code §§16000 et seq.
3 See Civ. Code §16021, which provides that “financial responsibility” is established if the driver or owner of the vehicle involved in an accident is:
(a) A self-insurer under the provisions of this division.
(b) An insured or obligee under a form of insurance or bond that complies with the requirements of this division and that covers the driver for the vehicle involved in the accident.
(c) The United States of America, this state, any municipality or subdivision thereof, or the lawful agent thereof.
(d) A [cash] depositor in compliance with subdivision (a) of Section 16054.2.
(e) An obligee under a policy issued by a charitable risk pool that complies with subdivision (b) of Section 16054.2.
(f) In compliance with the requirements authorized by the department by any other manner which effectuates the purposes of this chapter.

See also Civ. Code §16000.7, which provides that a vehicle is deemed uninsured if the owner cannot establish that some form of “financial responsibility” for the vehicle was “in effect at the time of the accident.”

6 Day v. City of Fontana, 25 Cal. 4th 268, 275 (2001); accord Allen, 28 Cal. 4th at 229; see Hodges, 21 Cal. 4th at 116.
7 Hodges, 21 Cal. 4th at 115.
9 CIV. CODE §§3333.4(a)(1)-(3). This article does not address other provisions of Civ. Code §3333.4 precluding recovery of noneconomic damages by drivers convicted of operating a motor vehicle while intoxicated.
10 See VEH. CODE §16056.
15 Id. (emphasis in original).
16 VEH. CODE §16020(a).
17 VEH. CODE §16020(b)(1), (b)(2), (d).
18 VEH. CODE §16025(a)(2).
19 VEH. CODE §16028(a)-(c).
20 See also VEH. CODE §§4750(e) (DMV must refuse vehicle registration, renewal, or transfer absent evidence of financial responsibility), 4000.37 (registration renewal requires evidence of insurance or cash deposit), and 4000.38 (vehicle registration suspended, canceled, or revoked absent proof of financial responsibility).
23 See Yamaha Corp. of Am. v. State Bd. of Equalization, 19 Cal. 4th 1, 7 (1998).
25 Id.
27 Rios v. Cozens, 7 Cal. 3d 792, 794 (1972).
28 See, e.g., VEH. CODE §§16020, 16021, 16054, 16054.2, 16056.
30 CODE CIV. PROC. §437c(f)(1).
31 Id.
33 DeCastro, 47 Cal. App. 4th at 419-23.
34 Id.
35 Id. at 419 (internal quotation marks omitted).
36 Id. (internal quotation marks omitted). There is one exception to this rule, but it is of limited utility because it requires a joint request and declarations from both sides explaining how the motion will promote judicial economy by decreasing trial time or increasing the likelihood of settlement. (See CODE CIV. PROC. §437c(f).)
38 See EVID. CODE §400.
39 EVID. CODE §405(a); see People v. Chapman, 50 Cal. App. 3d 872, 879 (1975).
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Although *Jevic* does not address structured dismissals generally, concern exists that expansion of the ruling may undermine future bankruptcy court discretion.

**THE THREE conventional ways for exiting a chapter 11 bankruptcy case are: 1) confirmation of a plan of reorganization under which the debtor's prebankruptcy obligations are replaced and superseded by the terms of the plan, 2) dismissal of the case, which results in the parties' return to the status quo of their pre-bankruptcy positions, and 3) conversion to a chapter 7 case in which the trustee takes over control and liquidates the assets of the debtor.**¹ In recent years, a fourth alternative known as a “structured dismissal” has received increasing acceptance.² In *Czyzewski v. Jevic Holding Corporation*, on appeal from the Third Circuit, the U.S. Supreme Court recently addressed a situation in which the structure of the dismissal provided for payments skipping a class of objecting creditors in favor of more junior creditors.

The Court in *Jevic* examined whether bankruptcy courts have the power to approve the structured dismissal of a chapter 11 bankruptcy case “that provides for distributions that do not follow ordinary priority rules without the affected creditors' consent?”³ It held that “[o]ur simple answer to this complicated question is ‘no.’”⁴ The Court explained that “the question...[in *Jevic*] concerns the interplay between the priority rules of the Bankruptcy Code (‘Code’) and dismissal of a Chapter 11 case.”⁵ The Court, however, declined to express an explicit view on structured dismissals in general, situations in which no creditor opposition is present, and/or cases in which priority skipping is not at issue.⁶

In a structured dismissal, the chapter 11 case is wound up with certain conditions attached, rather than simply dismissing the case and restoring the status quo ante. The Third Circuit’s opinion in *Jevic,* which was reversed, recognized that while the Bankruptcy Code does not expressly authorize this procedure, “structured dismissals are simply dismissals that are preceded by other orders of the bankruptcy court (e.g., orders approving settlements, granting releases, and so forth) that remain in effect after dismissal.”⁷ Moreover, under Section 349 of the Bankruptcy Code, dismissal ordinarily reinstates the prebankruptcy state of affairs, revesting property in the debtor and vacating orders of the bankruptcy court, unless “for cause” the

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court orders otherwise. The Third Circuit, accordingly, found that “the [Bankruptcy] Code does not strictly require dismissal of a Chapter 11 case to be a hard reset.”

In contrast, the Supreme Court took a more restrictive view of the scope of Section 349. It viewed a court’s discretion under Section 349 to be limited, finding that it only “appears designed to give courts the flexibility to make the appropriate orders to protect rights acquired in reliance on the bankruptcy case.” It found no other authority in the Bankruptcy Code for priority skipping dismissals, stating:

Nothing else in the Code authorizes a court ordering a dismissal to make general end-of-case distributions of estate assets to creditors of the kind that normally take place in a chapter 7 liquidation or chapter 11 plan—let alone final distributions that do not help to restore the status quo ante or protect reliance interests acquired in the bankruptcy, and that would be flatly impermissible in a chapter 7 liquidation or a chapter 11 plan because they violate priority without the impaired creditors’ consent. That being so, the word “cause” is too weak a reed upon which to rest so weighty a power. Accordingly, the Court found the priority-skipping aspect of the structured dismissal in Jevic to be highly problematic.

By way of background, “[a] business may file for bankruptcy under either Chapter 7 or Chapter 11…. In Chapter 7, a trustee liquidates the debtor’s assets and distributes them to creditors. In Chapter 11, the debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor’s estate and often keep the business operating as a going concern.”

The Bankruptcy Code’s statutory priority scheme “ordinarily determines the order in which the bankruptcy court will distribute assets of the estate.” Secured creditors hold the highest priority and are entitled to receive the proceeds of the collateral that secures their debt. Special classes of creditors, such as administrative, wage, and tax claimants, come next in the priority waterfall. Below them are general unsecured creditors. Equity holders are at the bottom of the priority list.

The Supreme Court emphasized that the Bankruptcy Code’s priority system is a fundamental underpinning of business bankruptcy law:

Distributions of estate assets at the termination of a business bankruptcy normally take place through a Chapter 7 liquidation or a Chapter 11 plan, and both are governed by priority. In Chapter 7 liquidations, priority is an absolute command—lower priority creditors cannot receive anything until higher priority creditors have been paid in full. Chapter 11 plans provide somewhat more flexibility, but a priority-violating plan still cannot be confirmed over the objection of an impaired class of creditors.

In chapter 7 liquidation cases, distributions must be made in the statutorily prescribed order. The Court stressed that chapter 11 “provides somewhat more flexibility for distributions pursuant to Chapter 11 plans, which may impose a different ordering with the consent of the affected parties. But a bankruptcy court cannot confirm a plan that contains priority-violating distributions over the objection of an impaired creditor class.”

Chapter 11 Cases

In recent decades, an increasing percentage of chapter 11 cases have involved sales in which the debtor’s business is sold as a going concern or where all or substantially all of the assets of the estate are sold. This is accomplished frequently through a streamlined sale process that commonly involves a stalking horse bidder identified by the debtor, overbid opportunity, and an auction if overbids are received. The sale procedures and the ultimate sale are presented to the court for approval through a motion based on Section 363 of the Bankruptcy Code.

The use of Section 363 to sell substantially all assets of a bankruptcy estate evolved over the years from a disfavored approach to one that is essentially routine—so long as some financial or business justification exists. Nonetheless, despite the significant development in the law of Section 363 sales, the Court, in Jevic, cited the leading early appeals court cases rejecting Section 363 sales as sub rosa plans as apparent examples of improper attempts to “circumvent the Bankruptcy Code’s procedural safeguards.”

In the context of a Section 363 sale, in which sufficient net proceeds are generated to pay all claims in full, a structured dismissal conditioning dismissal of the case on distribution of the sale proceeds to pay creditor claims may be more cost effective and efficient than distributing the proceeds through a liquidating chapter 11 plan. A structured dismissal may provide the same benefits when following the sale little, if any, proceeds are available to pay unsecured creditors. Confirming a chapter 11 plan generally involves a more complicated procedure.

Jevic, a trucking company, was acquired by a private equity firm, Sun, in a leveraged buyout financed by secured lenders, CIT. Two years after Sun’s buyout, Jevic commenced its chapter 11 bankruptcy case. Jevic owed more than $53 million to its first-priority senior secured creditors and over $20 million to its tax and general unsecured claimants. Moreover, two significant lawsuits were brought in Jevic’s bankruptcy case.

One lawsuit was brought by a group of Jevic’s terminated truck drivers based on alleged violations of federal and state Worker Adjustment and Retraining Notification (WARN) acts. The second lawsuit, a fraudulent transfer action, was brought by the official unsecured creditors committee. It alleged that Sun, facilitated by CIT, “acquired Jevic with virtually none of its own money based on baseless projections of almost immediate growth and increasing profitability.” The committee alleged that the leveraged buyout had saddled Jevic with debt and led to Jevic’s bankruptcy as “the foreseeable end of a reckless course of action in which Sun and CIT bore no risk but all other constituents did.”

Three years after the fraudulent transfer lawsuit was initiated, all the major players in the case met to attempt to negotiate a settlement. By then, the only remaining assets in the bankruptcy estate were $1.7 million in cash (subject to Sun’s lien) and the fraudulent transfer lawsuit. Jevic’s tangible assets had been liquidated. The lack of estate funds to finance litigation, the risks, uncertainty, and anticipated length of the litigation led the committee to conclude that a settlement resulting in a modest distribution to unsecured creditors would be desirable.

A settlement agreement was entered into by the committee, Jevic, Sun, and CIT that provided for: 1) the dismissal of the fraudulent transfer action and the release of claims between the parties, 2) CIT’s payment of $2 million into an account earmarked for payment of Jevic’s and the committee’s legal fees and other administrative expenses, 3) Sun’s assignment of its lien on Jevic’s remaining cash to a trust, which would pay tax and administrative creditors first and then general unsecured creditors on a pro rata basis, and 4) the dismissal of the chapter 11 case in accordance with this structure.

There was a problem, however, since the settlement left out the drivers. Further, the drivers’ claim was estimated at $12.4 million, with $8.3 million entitled to treatment as a priority wage claim. The drivers and the U.S. Trustee objected to the settlement and dismissal primarily on the basis that it distributed property of the estate to creditors of lower priority than the drivers. The U.S. Trustee also contended that the Bankruptcy Code does not permit structured dismissals.

Court Decisions

In approving the structured dismissal, the bankruptcy court found that there was no prospect of a confirmable chapter 11 plan in the case and that conversion to chapter 7 was not a feasible alternative. Accordingly,
either continuing in chapter 11 or converting to chapter 7 would be a bridge to nowhere.28

The drivers appealed the bankruptcy court’s ruling to the district court, which explained the standard of review to be applied: “In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court’s findings of fact and a plenary standard to that court’s conclusions [of law].”29 The district court further stated that it “must accept the bankruptcy court’s finding of historical or narrative facts unless clearly erroneous,” and that

with the priorities of the Bankruptcy Code will “usually be dispositive of whether a proposed settlement is fair and equitable.”30 It recognized that “[s]ettlements that skip objecting creditors in distributing estate assets raise justifiable concerns about collusion among debtors, creditors, and their attorneys and other professionals.”31

The Third Circuit explained that structured dismissals devised by certain creditors to increase their recovery at the expense of other creditors are not fair and equitable.32 Accordingly, it held that bankruptcy courts can only approve structured dismissals that deviate from the priority scheme of the Bankruptcy Code when specific and credible grounds justify the deviation.33 As such, “it suffices to say that absent a showing that a structured dismissal has been contrived to evade the procedural protections and safeguards of the plan confirmation or conversion processes, a bankruptcy court has discretion to order such a disposition.”34

Concluding that bankruptcy courts have the power to approve structured dismissals, the Third Circuit next considered whether the structure can skip a class of objecting creditors in favor of more junior creditors. It held that the structure of the dismissal must be fair and equitable and stated that compliance with the priorities of the Bankruptcy Code will usually be dispositive of whether a proposed settlement is fair and equitable.35 The Third Circuit found the case to be a “close call” and the structured dismissal, under the circumstances, to be “the least bad alternative.”36 While regrettable that the drivers were excluded, it explained that if settlements were required to be perfect, they would seldom be approved.37

Based on the record, the Third Circuit found Jevic to be a rare case in which a priority-skipping structured dismissal settlement under Bankruptcy Rule 9019 should be upheld.38 It recognized that settlements are favored in bankruptcy and found that bankruptcy courts have more discretion in approving settlements than chapter 11 plans.39 Importantly, the Third Circuit found that this was a case of “no harm, no foul” in that “[t]he Bankruptcy Court, in Solomonic fashion, reluctantly approved the only course that resulted in some payment to creditors other than CIT and Sun.”40

In reversing, the Supreme Court declined to express any view regarding the legality of structured dismissals in general.41 It implicitly acknowledged them to be appropriate when creditors consent. It also acknowledged that it is standard practice to violate ordinary priority rules during the course of chapter 11 cases with, for example, “first-day” wage orders, “critical vendor” orders, and “roll-ups” in debtor-in-possession financing.42 Yet these types of out-of-priority distributions are found necessary to enable successful reorganization and benefit even disfavored creditors.43 Moreover, the Court emphasized the interim nature of such relief and distinguished the Second Circuit’s decision in In re Iridium Operating LLC44 as approving “an interim distribution of settlement proceeds to fund a litigation trust that would press claims on the estate’s behalf.”45 In contrast, the priority-violating distribution under the Jevic structured dismissal was a final disposition that did not benefit the drivers.

The Supreme Court found fatal flaws in the Third Circuit’s analysis: In a structured dismissal like the one ordered below, the priority-violating distribution is attached to a final disposition; it does not preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmable plan; it does not help to restore the status quo ante; and it does not protect reliance interests. In short, we cannot find in the violation of ordinary priority rules that occurred here any significant offsetting bankruptcy-related justification.46

The Court also rejected the findings of the bankruptcy court that: 1) without the driver-skipping settlement, there would be no settlement, 2) the settlement was the only means for any recovery by any unsecured creditors, and 3) the drivers were not harmed since they would receive nothing under any scenario.

Reasonable Possibility

Instead, the Court found that a settlement arrangement with the drivers respecting ordinary priorities remained a reasonable possibility.47 It also found that the fraudulent transfer litigation against CIT and Sun might be viably pursued, that is, either the case could be converted and a chapter 7 trustee could pursue the litigation using contingency counsel or the case could be dismissed without strings attached and unsecured creditors, including the drivers, could pursue the claims in state court.48 “Consequently, the Bankruptcy Court’s approval of the structured dismissal

There was a problem, however, since the settlement left out the drivers. The drivers and the U.S. Trustee objected to the settlement and dismissal primarily on the basis that it distributed property of the estate to creditors of lower priority than the drivers.

“[a]ppellants largely do not contest the bankruptcy court’s factual findings.”30 The findings regarding the WARN litigation were that it was in its early stages, would be lengthy and expensive, with no certainty of success, and that the bankruptcy estate had insufficient funds to support any litigation.31 Moreover, the bankruptcy court had found that the drivers’ claims were effectively worthless since the estate lacked unencumbered funds to pay and that, in contrast, the settlement offered the prospect of a meaningful distribution to unsecured creditors, recognizing that nothing was provided for the drivers whom the bankruptcy court found had “opted out” of the settlement.32 The bankruptcy court also found that the settlement funds were indisputably CIT’s collateral, and while recognizing the fraudulent transfer litigation existed, found the committee lacked resources to pursue it.33 The district court did not conclude that any of the bankruptcy court’s findings were clearly erroneous.

The district court determined that the priority skipping structure of the dismissal did not constitute an insurmountable impediment, stating that “[a]s discussed by the bankruptcy court, the settlement does not follow the absolute priority rule. However, this is not a bar to the approval of the settlement as it is not a reorganization plan.”34 Instead, the district court found that the structured dismissal satisfied the criteria for approval of a compromise under Bankruptcy Rule 9019 and was properly found to be fair and equitable.35

On appeal, the Third Circuit found that the structure of the dismissal must be fair and equitable and stated that compliance

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cost [the drivers] something. They lost a chance to obtain a settlement that respected their priority. Or, if not that, they lost the power to bring their own lawsuit....”55

In addition to rejecting the underlying findings of the bankruptcy court, the Court found that the Third Circuit’s rare case limitation would prove to be illusory and threatened to warp into a more general rule.16 Moreover, the Court found the consequences of allowing priority-skipping structured dismissals to stand would depart from protections Congress granted to particular classes of creditors (e.g., employee wage priority) and create risks of collusion and uncertainty making settlements more difficult to accomplish.57 As a result, the Court struck down the Third Circuit’s limited approval of non-consensual priority-violating structured dismissals in “rare cases.”

Focusing on the importance of the Bankruptcy Code’s priority system and its perceived silence regarding structured dismissals, the Court stated “we would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Bankruptcy Code prohibits in Chapter 7 liquidations and Chapter 11 plans.”58 Finding no such indication and the lack of “any significant offsetting bankruptcy-related justification,” the Court rejected the violation of ordinary priority rules through a structured dismissal.59

Minority Opinion
The dissent authored by Justice Thomas and joined by Justice Alito characterized Jevic as involving a “novel and important question of bankruptcy law.”60 The dissent lamented, however, as follows:

Unfortunately, it [the majority] does so without the benefit of any reasoned opinions on the dispositive issue from the courts of appeals (apart from the Court of Appeals’ opinion in this case) and with briefing on that issue from only one of the parties. That is because, having persuaded us to grant certiorari on one question, petitioners chose to argue a different question on the merits. In light of that switch, I would dismiss the writ of certiorari as improvidently granted.61

Certiorari had been entered to decide “[w]hether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme.”62 After certiorari was granted, the drivers recast and narrowed the question presented to “[w]hether a Chapter 11 case may be terminated by a ‘structured dismissal’ that distributes estate property in violation of the Bankruptcy Code’s priority scheme.”63

The dissent was offended by this “bait-and-switch” tactic.64 While both questions involved priority-skipping distributions, the recast, narrower question was cited by the dissent as being different from the issue for which certiorari was granted and not the subject of a circuit conflict.65 Accordingly, the dissent would have avoided ruling on the merits and dismissed the appeal.

Consequences
Shortly following the Court’s decision in Jevic, a bankruptcy court in Tennessee, in In re Fryar,66 considered the ramifications of Jevic in addressing a proposed settlement that included a sale in the course of a chapter 11 case. The Fryar court characterized the Jevic ruling as follows:

The United States Supreme Court recently accepted certiorari on this issue [the employment of settlements to avoid the distribution priority requirements of the Code], but opined on a more specific question involving the approval of a structured dismissal which did not follow the Code’s priority distribution.... The Supreme Court held that bankruptcy courts may not approve structured dismissals that provide for distributions that do not follow ordinary priority rules without the consent of affected creditors.67

The Fryar court quoted the Court’s dicta that “acknowledged that there are instances where interim distributions that violate the ordinary priority rules have been approved.”68 Next, it found that the proposed settlement provided for a distribution that violated the ordinary priority rules.69 Nevertheless, the court stated that “[t]his might be acceptable if all of the creditors were consenting....”70 They were not.71 Accordingly, the court, applying Jevic, turned to considering “whether there are Code-related objectives being served that are so significant that deviation [from ordinary priority rules] is justified.”72

The Fryar court put the circumstances of the proposed settlement into context that led it to conclude the reorganization case was doomed,73 and stated:

The court’s review of the facts in this case leads it to conclude that this settlement is more of a preamble to a conversion or structured dismissal than it is to the situation in Iridium, where there was a reorganization anticipated. The Debtor has failed to prove that disregard of the priority scheme will promote “a significant Code-related objective.” Jevic, 137 S. Ct. at 983. As with the situation in Jevic, this case more closely resembles the proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code’s procedural safeguards. Id. at 986.74

Expanding the ruling in Jevic beyond structured dismissals to settlements in general, the Fryar court explained that, in light of Jevic, settlements that provide for distribution different from the Bankruptcy Code’s priority scheme must not only be fair and equitable, but must also be supported by a significant Bankruptcy Code-related objective justifying the deviation, stating that “[t]he proposed settlement should state that objective, such as enabling a successful reorganization or permitting a business debtor to reorganize and restructure its debt in order to revive the business and maximize the value of the estate. The proposed settlement should state how it furthers that objective and should demonstrate that it makes even the disfavored creditors better off.”75 It found no such significant objective to be present and denied the debtor’s motion to approve the settlement.

Prior to the Supreme Court’s decision in Jevic, bankruptcy practitioners and commentators were concerned that the Court might address more than priority-skipping structured dismissals. But the Court’s relatively narrow ruling may alleviate some of these concerns. Jevic can be viewed as limited to structured dismissals involving priority-skipping in which creditor consent is lacking. As the Court recognized, bankruptcy courts frequently authorize payments that do not follow the ordinary priority scheme in order to: 1) avoid potentially devastating disruption in the reorganization effort, 2) advance the goal of successful reorganization, and/or 3) maximize the value of the estate for the benefit of all creditors.

Even though the Court did not explicitly venture beyond the interplay between priority rules and dismissal of a chapter 11 case, concerns persist that the scope of the Court’s ruling may be expanded. Such an expansion could undermine necessary bankruptcy court discretion with regard to settlements in general, unopposed structured dismissals that include priority-skipping, structured dismissals with no priority-skipping involved, and/or interim distributions authorized during chapter 11 cases to avoid harm to the reorganization process and advance the goal of reorganization and/or maximization of the value of the estate.

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2 Id.
3 Id. at 983.
4 Id.
5 Id. at 979.
6 Id. at 985.
7 Official Committee of Unsecured Creditors v. CIT
Group/Business Credit Inc., et al. (In re Jevic Holding Corp.), 787 F. 3d 173 (3rd Cir. 2015).

9 Id. at 181.
10 Id. at 181.
11 In re Jevic Holding Corp., 787 F. 3d at 181.
12 Jevic, 137 S. Ct. at 984 (citing H. R. Rep. No. 95-959, at 338 (1977) and Wiese v. Community Bank of Central Wis., 552 F. 3d 584, 590 (7th Cir. 2009)).
13 Jevic, 137 S. Ct. at 984-85 (citing United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988); Kelly v. Robinson, 479 U.S. 36, 43 (1986); and In re Sadler, 935 F. 2d 918, 921 (7th Cir. 1991)).
14 Jevic, 137 S. Ct. at 978.
15 Id. at 979.
16 Id.
17 Id. at 983.
18 Id.
20 Jevic, 137 S. Ct. at 986 (citing In re Braniff Airways, Inc., 700 F. 2d 915, 940 (5th Cir. 1983); In re Lionel Corp., 722 F. 2d 1063, 1069 (2nd Cir. 1983); In re Boiotech, Inc., 528 B. R. 261, 269 (Bankr. N.J. 2014); cf. In re Chrysler LLC, 576 F. 3d 108, 118 (2nd Cir. 2009), vacated as moot, 592 F. 3d 370 (2nd Cir. 2010) (per curiam)).
21 Jevic, 137 S. Ct. at 980. The Court, at some length, explains the typical structure of a leveraged buyout and the risk that the deal may sour, descend into bankruptcy, and subsequently be attacked as a fraudulent transfer enriching equity holders and lenders at the expense of unsecured creditors. It states that this is what happened in Jevic.
22 Id.
23 Id.
24 In re Jevic Holding Corp., 787 F. 3d 173, 176 (3rd Cir. 2015).
25 Id.
26 Jevic, 137 S. Ct. at 981.
27 In re Jevic, 787 F. 3d at 177-78.
28 On appeal from the bankruptcy court, the district court in Jevic, stated that “[t]he factual background is largely undisputed and is taken from the United States Bankruptcy Court for the District of Delaware’s...oral order dated November 28, 2012 and supplemented by the parties’ briefing.”
30 Id. at *8.
31 Id. at *8-9 (internal quotations and citations omitted).
32 Id. at *10.
33 Id. at *10-11.
34 Id. at *11-12.
35 Id. at *12 (footnote and citations omitted). The district court held that it had no reason to question the bankruptcy court’s conclusion that there was no prospect of a confirmable plan. Id. at *13.
37 In re Jevic Holding Corp., 787 F. 3d 173, 184 (3rd Cir. 2015). (citing In re Iridium Operating LLC, 478 F. 3d 452, 455 (2nd Cir. 2007)).
38 In re Jevic, 787 F. 3d at 184.
39 Id.
40 Id. (citing In re Iridium Operating LLC, 478 F. 3d at 466).
41 In re Jevic, 787 F. 3d at 182.
42 Id. at 184.
43 Id. at 184-85.
44 Id. at 185.
45 Id. at 186.
46 Id. at 185.
48 Id.
49 Id.
50 In re Iridium Operating LLC, 478 F. 3d 452 (2nd Cir. 2007).
51 Jevic, 137 S. Ct. at 985 (emphasis in original).
52 Id. at 985-86.
53 Id. at 983 (“the record...makes clear...that Sun insisted on a settlement that gave petitioners [drivers] nothing only because it did not want to help fund petitioner’s WARN lawsuit against it....But, Sun has now won that lawsuit...If Sun’s given reason for opposing distributions to petitioners has disappeared, why would Sun not settle while permitting some of the settlement money to go to petitioners?”).
54 Id.
55 Id.
56 Id. at 986.
57 Id. at 986-87.
58 Id. at 984.
59 Id. at 986-87.
60 Id. at 987.
61 Id.
62 Id. There was an identified circuit split on this issue. See In re AWECO, Inc., 725 F. 2d 293, 298 (5th Cir. 1984) and In re Iridium Operating LLC, 478 F. 3d 452, 464 (2nd Cir. 2007).
63 Jevic, 137 S. Ct. at 987.
64 Id. at 988.
65 Id.
67 Id. at *12.
68 Id.
69 Among other things, the proposed settlement involved a sale free and clear of an Internal Revenue Service lien, without the lien attached to the sale proceeds, and the payment of one unsecured creditor ahead of other parties with priority and other unsecured creditors. Id. at *1-2, 8-9, and 13-14.
70 Id. at *14.
71 Three creditors and the U.S. Trustee objected. Id.
72 Id.
73 The court explained:
74 This settlement is not part of a “first day” order to ensure the Debtor’s survival to get to a plan. This case has been here for eight months and was filed on the heels of prior chapter 11 which was dismissed for failure to propose a plan. At the initial hearing on the motion, the court asked counsel whether there were other properties which would provide an income stream to fund a plan and pay unsecured creditors, but the Debtor and the U.S. Trustee both contended there was very little income in the case and that funding would have to come from the liquidation of assets. The court is hard pressed to determine what business remains to be revived or reorganized. This is an individual chapter 11 in which the Debtor sought settlement approval on the basis that he believes he can provide the same 53% dividend to all unsecured creditors. Under the law in the Sixth Circuit, an individual may not retain anything in a chapter 11 unless each class of creditors consent or are paid 100%.... The Debtor has not provided any proof that the objecting creditors would support a plan if they were paid 53%. Id. at *14-15.
75 Id. at *15.
76 Id. at *16-17.

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Trials of the Century: A Decade-by-Decade Look at Ten of America’s Most Sensational Crimes

AN ENDURING INCONGRUITY of Americans—and perhaps all humanity—is the simultaneous desire to harshly punish criminals coupled with the absolute, unwavering fascination to hear, read, and discuss every lurid detail of the most heinous of criminal acts. In Trials of the Century: A Decade-by-Decade Look at Ten of America’s Most Sensational Crimes, authors Mark J. Phillips and Aryn Z. Phillips analyze “trials of the century” throughout the twentieth century, juxtaposing the consistent collective public sentiment that a criminal defendant is—without doubt!—guilty and should be swiftly and severely punished against that same public’s voracious consumption of every tidbit of news about the crime: the participants, witnesses, victims, law enforcement, jurors, judges, and advocates.

There is no real definition of a “trial of the century.” It is a label the media proclaims over a high-profile court case. The Phillipses describe a trial of the century as “an overblown, overused bit of media hype so frequently used to label high-profile murder trials, the frequency and selection of which are limited only by the prurient taste of Americans, and the imagination of the editors.” (p. 15.) They note that we have a trial of the century in America at a rate of about one per decade.

Thus, each chapter of the book focuses on a trial of the century for every decade of the twentieth century, from the trial of Henry K. Thaw that commenced January 23, 1907, to the trial in People v. O.J. Simpson that commenced January 23, 1995. There is even an epilogue covering the first trial of the century of the twenty-first century: the Casey Anthony trial. The authors note that each case is different in crime, character, and context, but “alike in telling ways.” (p. 16.)

Each chapter of the book provides a detailed background on the time period, a description of the crime narrative, events of the trial, and a description of the aftermath of the case. The chapters also feature in-depth discussion of the media’s activity and involvement as well as public reaction. A wonderful feature of the book is that the authors do a very good job of identifying the connection between the themes and personalities of the case with the themes of the time period in which the case occurred. Additionally, each chapter highlights quite clearly the involvement of the press in the case, including providing the number of articles that a particular paper wrote, the circulation of the newspapers—The Los Angeles Times, for example, wrote nearly 1,000 articles on the Simpson case, including 398 on the front page—TV viewership numbers, and the like.

The strand of similarity among these 10 cases is three-fold: the significance of the crime at hand, the inquisitive press that fuels the public’s interest in the case, and the public’s consistent reaction to prejudge the defendant’s guilt and concomitant demand for swift justice (in the form of punishment, of course). The thesis of the book is a little hard to tease out, though, because the authors devote a great deal of space to setting up the background of the time period, describing the people involved in the crime, laying out the crime narrative, and chronicling the trial, leaving little room to develop their argument.

Despite that challenge, the book appears to have two theses. The more dominant one is identified right in the introduction—the press plays an important role in ensuring that the court system operates in “a fair, even-handed manner,” but an unrestrained press needing to sell newspapers and advertisements will “so inflame a community that the environment becomes toxic, inhospitable to a fair judicial process.” (p. 14.) Regarding the media frenzies that always accompany these high-profile trials, the secondary thesis addresses whether the press manufactures the deep, abiding interest among the public through its hype machine or whether the press is merely delivering what the public demands. While not perfectly clear, it seems that the authors argue that the public’s passion for these cases is fueled by the press.

There is somewhat of an irony about this book in that while it is critical of the media hype of these trials of the century, it is a very product of, and benefits from, that hype. There is no Trials of the Century book without decades of media-fueled trials of the century.

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Looking at the criticisms of Trials of the Century, there are three. First, for a book about trials of the century, the chronicles of the trials are rather sparse; instead the background and narrative of the crime receive more attention. To focus more on the trials, the same narrative might have been drawn out by reliance on the events in the trial. On the other hand, the authors do a superb job of focusing on the elements in each trial that were of greatest impact to the outcome of the case.

Second, each chapter focuses on the facts, circumstances, results, and aftermath of the trial under consideration, but does not do much to develop the authors’ theses. The chapters are rich with detail but provide less in the way of an argument as to whether the trial-of-the-century concept is harmful, helpful, or a combination of the two. Neither does it make any argument as to whether the trial-of-the-century media frenzy should be changed or whether it even could be changed.

Finally, without a deeper tie-in to the authors’ theses, the book is just another account of 10 trials that have already received a great deal of commentary. There is little additional insight into the trials, the media, or human nature that adds a deeper level of understanding into the relationship and interplay among the public, the press, the court system, the (alleged) criminals, and the victims.

These criticisms speak to the extras that Phillips and Phillips could have done with Trials of the Century to make it really stand out among the true-crime literature; however, the criticisms do not diminish what is still a good book. Each of the 10 chapters is a concise synthesis of a massive body of work that surrounds the particular case under consideration. In but a few pages the authors are able to consolidate a remarkable amount of information while presenting the key issues, questions, and concepts at issue in each case. Anybody reading this book will be thoroughly fluent in each of the cases that are described in its pages.

The authors are deft in drawing the narratives. Each chronicle is well placed, suspenseful (which is saying a lot for a reader who knew most of these cases), and enjoyable to read. The O.J. Simpson chapter is particularly impressive in how it condenses one of the most written-about trials of all time into one concise chapter.

While there are a few criticisms of the Trials of the Century, it is still a good, enjoyable read. With engaging narratives, colorful characters, and great information on the involvement of the media and the public, Los Angeles Lawyer readers will likely enjoy this book.
The Mandate for Certified Court Interpreters

DUE TO THE MULTICULTURAL NATURE OF CALIFORNIA, chances are pretty high that most lawyers who practice in the Golden State have worked with a court interpreter at some point during their careers—or sooner or later will work with one. In spite of this, in almost daily interactions with attorneys, my colleagues and I find that there are misconceptions and misinformation about the court interpreting profession.

One of the most important things to be aware of when working with an interpreter is that California law mandates the use of certified court interpreters for court proceedings, including depositions.1 State court certification from the Judicial Council of California is attained by passing an examination that tests bilingual proficiency, the three modes of interpretation,2 and specialized terminology, legal terms obviously being of paramount importance.

California currently has certified court interpreters in the following languages: American Sign Language, Arabic, Armenian (Eastern and Western), Cantonese, Farsi, Japanese, Khmer, Korean, Mandarin, Portuguese, Punjabi, Russian, Spanish, Tagalog and Vietnamese. Spanish is by far the language with the greatest number of certified court interpreters while Mandarin is next.3

Court interpreters for all other languages are registered since, unlike their certified peers, they were not required to pass an examination that tests the areas covered in the certification examination. Some court interpreters currently deemed registered have never even been tested on their alleged bilingual proficiency. The issue, however troubling, does not seem to be something California officials are trying to address.

Creating examinations to certify interpreters for languages that currently require only registration and hiring qualified professionals to grade them would be an expensive endeavor, particularly when there may not be enough applicants to cover the costs. One possible solution may be to explore partnering with other states to offer a nationwide examination to certify languages that currently have no court certification, but for now the status quo remains with one major exception: Farsi, which had for years been a registered language and has recently been changed to require certification. However, not all registered court interpreters for Farsi have passed the new examination, which has resulted in both certified and registered court interpreters for Farsi statewide, at least for a while.4

Two other types of certification for interpreters also exist in California. One is administrative, from the State Personnel Board, which qualifies an interpreter to interpret for administrative proceedings, for example a workers compensation hearing. The other type of certification is medical, which is exclusively for medical evaluations. The examination for administrative certification is no longer offered in California, and medical certification is obtained by passing the examination offered by the National Board for Certification of Medical Interpreters or the Certification Commission for Healthcare Interpreters.

A certified court interpreter in California is deemed qualified to interpret in the administrative and medical fields in addition to the judicial arena. However, administrative and/or medical interpreting credentials do not qualify an interpreter to interpret for court proceedings, including depositions for a case filed in superior court. Yet it happens all too often. Even interpreters with no credentials whatsoever are found to be interpreting in court, as well as in administrative or medical settings—an unfortunate reality akin to an individual’s practicing law without a license. As long as the legal requirements regarding interpretation remain a nebulous concept, this situation will remain unchanged and could even backfire on unsuspecting attorneys by being used as grounds for an appeal.

Federal court certification—deemed the highest level of certification due to the difficulty of the examination—is offered by the Administrative Office of the U.S. Courts and is currently available only in Spanish, Haitian Creole, and Navajo.5 The Administrative Office does not publish a list of its certified interpreters, but its recently released list of such interpreters can be found on the National Association of Judiciary Interpreters and Translators website.5

Verification of federal court certification credentials, unlike those for the state, is not available online to the public unless the interpreters in question contract with the local district court. Petitions to the Administrative Office of the U.S. Courts to remedy this have so far been unsuccessful.

Raising the matter of interpreted proceedings in law schools would be an exceptionally good way to introduce future lawyers to the statutes that apply to this field and adequately prepare them by creating awareness of the rules of the court that should be followed whenever an interpreter is used for a court proceeding. For example, is it appropriate for an interpreter not to interpret if the person testifying answers anyway after his attorney or the judge instructed him not to? Are interpreters bound by attorney-client privilege? Is it a conflict of interest if the interpreter works for the defense for the preparation of the case and later interprets for the prosecution’s witnesses? Should an interpreter interpret something that a witness says in English? Should an interpreter, like all other parties in a case, avoid interacting with jurors? The answers to these and other questions might surprise you.

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1 GOV’T CODE §§68560.5, 68561. Court certification or registration can be verified online at Search for an Interpreter, California Courts, available at http://www.courts.ca.gov/3796.htm (last viewed July 24, 2017).
2 Simultaneous, Consecutive, and Sight Translation.

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