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Los Angeles lawyer Jason R. Parnell assesses the challenge posed by the direct sales model of Tesla, Inc. to traditional U.S. automobile franchise law in light of current economic and technological conditions.

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Henry Thoreau decamped to Walden Pond to live “deliberately.” Sheltering in place during a pandemic would have worked just as well.

On April 3—day 15 of statewide safer-at-home orders—there were 4,566 confirmed cases of COVID-19 in Los Angeles County, including 89 deaths. Three weeks later, there were 19,527 cases countywide, including 913 deaths. There will be more by the time this issue of Los Angeles Lawyer reaches you. Hopefully, the rate of increase will have slowed.

Living with the pandemic has taught us all a lot about some unexpected things. I have learned to make face masks and flourless cookies, use Zoom, and check LACBA’s website for updates from the courts before doing anything related to a court proceeding. I also have learned a ton about living deliberately. These days I deliberate everything—from “Do I really need to rub my eyes?” to “Do I really need to send that snarky e-mail?” When circumstances are shifting, everything gets reevaluated. When that is happening, new approaches to chronic problems, as well as creative approaches to onrushing new problems, can materialize.

Former Chicago Mayor Rahm Emmanuel has taken political flack for applying his 2008 maxim, “Never allow a crisis to go to waste,” to COVID-19’s economic fallout. But the maxim’s point is spot-on. Crises force us to deliberate, or we just plain won’t rise to the immediate occasion. If we do rise to the immediate occasion, and then have the imagination to apply to long-standing problems ideas that started as crisis-focused ones, we may, as individuals, communities, or as a world community, pull ourselves out of some ruts or blaze some new paths.

A good example of this is our bar association, which has been struggling with several chronic problems for several years. When COVID-19 hit, courts closed and chaos reigned in the legal community, LACBA rose to the occasion. Within days of the lockdown orders, LACBA’s website became the wellspring of news for the Los Angeles legal community. I now check the LACBA website daily. I can’t imagine functioning in the current legal environment without it.

LACBA’s practice sections have responded to prohibitions on public gatherings by moving programming—at lightning speed in some cases—to web-based venues. That strategy, in the long haul, promises to solve the chronic problem of bringing LACBA community life to folks in Lancaster and other far-flung parts of the county. Thank you, LACBA leadership and sections for those miracles.

We at Los Angeles Lawyer aspire and intend to continue being a vital part of all that LACBA does to keep this legal community connected during the current crisis and beyond. Thanks for reading. Our mission is to help you, in crisis times and normal times, find creative approaches and solutions to the challenges your practice meets.


Tyna Thall Orren is the 2019–20 chair of the Los Angeles Lawyer Editorial Board. She is an appellate attorney and a partner in the firm of Orren & Orren in Pasadena, California.
My term as president of the Los Angeles County Bar Association ends on June 30, and I am nearly incredulous that my year of stewardship of our beloved bar association will soon be complete. Quite a term it has been. I began with a set of goals formed over years of service in the practice sections, on the board of trustees, and then as president-elect. Among these goals were achieving financial stability, ending the membership decline, and developing a strategic plan for the future. I was also determined to demonstrate that LACBA remains a vital and relevant organization meeting the needs of the lawyers of Los Angeles County, regardless of the nature of practice, size of practice, or location of practice.

As the year began, I was thrilled by the palpable new energy and enthusiasm evident at the installation dinner last June, which set an attendance record. Two task forces were formed and charged with missions to insure our future: the President’s Task Force on Financial Stability and Sustainability and the President’s Task Force on Membership. I also appointed a Strategic Planning Committee charged with developing a strategic plan to help guide LACBA to a thriving future.

We also faced the dilemma of supporting the exemplary work of our pro bono organization, Counsel for Justice (CFJ), while recognizing the need for financial self-sufficiency. I visited each of the projects before my term began. I witnessed firsthand the deep commitment of the directors of our pro bono legal services projects: the Domestic Violence Legal Services Project, Veterans Legal Services Project, Immigration Legal Assistance Project, and AIDS Legal Services Project. The great benefits these pro bono projects provide to our community must be sustained and perhaps even enlarged. This year, our members and law firms throughout the county joined in supporting the projects.

**Practice Groups**

Our practice sections and committees began the year with a robust slate of planned activities and programs. The newly formed Privacy and Cybersecurity Section promptly launched a year of activities and events. Soon after, LACBA was one of the first major bar associations in the country to welcome a Cannabis Section. From the onset, the LACBA Cannabis Section has been active and prominent, gathering rave reviews throughout our community and beyond. Likewise, the revitalized LACBA Small Firm and Sole Practitioner Section continued its remarkable resurgence with strong activities and events fueled by seemingly endless energy and commitment.

We also began a Lawyer Well-Being Project to assist lawyers facing alcohol abuse, substance abuse, or mental and emotional issues. At the same time, in response to the State Bar Task Force on Access Through Innovation of Legal Services (ATILS), LACBA formed a committee that polled our membership and voiced a strong response, giving the individual members of LACBA the strength of a united presence from one of the largest local bar associations in the country. Our Section Leaders Retreat helped launch what I believe can become one of our most significant membership benefits, our Structured Networking Project which will operate networking hubs throughout Los Angeles County at no or low cost to LACBA members.

**COVID-19 Pandemic**

LACBA committees were in full swing. LACBA sections hummed with activity. The task forces and the Strategic Planning Committee were fully engaged, ultimately reporting with substantial recommendations. We were exhilarated by the level of energy and activity. The future seemed more promising than it had in years. Then, COVID-19 arrived.

As the pandemic struck, we restricted public access to our headquarters to protect our staff, then restricted member access, and, then, transferred the entire LACBA staff to remote working status. Seamlessly, our extraordinary staff relocated to their homes and were up and running, ready to serve. But who would they serve? And how? Our members largely left their offices and began working from home. The flow of justice in our court system was reduced to a trickle as our courtrooms were available only to the most urgent matters. What would LACBA do?

True to its long history of serving the lawyers of Los Angeles County, LACBA responded to the pandemic in numerous ways. We began publishing the LACBA Weekly Response Newsletter designed to provide updates from our courts and legal organizations. We reached out to our members to assure them LACBA would be here for them during this critical time. I invited our members to reach out to LACBA, and to me directly, if there was anything we could do to help.

**Partnership with the Court**

The Los Angeles Superior Court has long recognized LACBA as a vital justice partner. Presiding Judge Kevin C. Brazile selected LACBA to communicate the voice of the court to the lawyers of Los Angeles County and to the many affiliate, affinity, and other bar associations throughout the county.

The 2019-20 president of the Los Angeles County Bar Association, Ronald F. Brot is a founding partner and chairman of Brot Gross Fishbein and a noted family law attorney. He is a past chair of LACBA’s Trial Lawyers Section (now the Litigation Section) and Family Law Section, among others.
LACBA was quickly recognized as the place to learn the latest announcements from the LASC presiding judge, the California Judicial Council, and the Chief Justice of the California Supreme Court.

LACBA was also asked for input on how the court would operate with minimal personnel and how the court should resume operations when restrictions are lifted. The presiding judge appointed the LACBA president to the LASC Working Group, and the supervising judge of the Civil Division appointed the LACBA president to the court’s COVID-19 Advisory Council. LACBA is honored and privileged to participate in these groups on behalf of our members.

As our community was largely sent home and gatherings were unsafe, LACBA activities and events came to an abrupt halt. Section executive committee and other committee meetings could not take place. Larger programs and events were postponed indefinitely or outright cancelled. Among the casualties was LACBA’s first Outstanding Service Awards Luncheon where we intended to present well-deserved honors to those individuals and entities who provided exemplary service to LACBA and to our pro bono projects during the past year. Also to be recognized were law firms throughout the county who have supported LACBA by enrolling all of their Los Angeles lawyers as LACBA members.

**Zoom Technology**

LACBA responded to the limitations imposed by local and state government with creativity and determination. Staff was promptly instructed on Zoom videoconferencing technology acquired by LACBA, which hosted the first public appearance by Presiding Judge Brazile, Assistant Presiding Judge Eric C. Taylor, and LASC Executive Officer Sherri R. Carter on the state of the court during COVID-19. More than 1,200 lawyers attended the program on the Zoom platform. Our board of trustees and executive committee meetings also moved to Zoom. Not a single meeting was missed as we learned that we could utilize technology to conduct our regular business. It was not business as usual, but we managed to conduct all of our usual business.

The sections soon followed. Executive committees began to meet using the technology of their choice. Most use Zoom. Some choose Webex. Programming using Zoom technology has expanded and is now offered using online technology, with CLE credit available. While our sections have the autonomy to set pricing, as president I have encouraged LACBA sections to provide free programming to our members while we remain in the throes of the pandemic. Particularly notable is the Structured Networking Program’s remote programming. The networking hub concept was intended to be a face-to-face experience, but the program quickly switched to an online format. The Virtual Networking Program is generating rave reviews.

The operation of our legal services projects was significantly hampered by the distancing limitations required in response to COVID-19, but each of the CFJ projects found a way to continue. The needs of our community did not stop with the onset of the coronavirus and neither has the response from CFJ.

**Membership Response**

One need only look at the way LACBA responded to the pandemic to appreciate the strength of LACBA’s greatest resource—our members. The dedicated response by LACBA members has been resilient, resurgent, and remarkable. I have every confidence that LACBA’s future will be well supported by our members, who will increasingly come from all parts of our county.

Looking Ahead

LACBA embarks upon the new year with a stable membership base, a realistically balanced budget, and a long-term strategic plan. Our sections and committees are thriving. Our pro bono legal services projects are serving the needs of our community. LACBA has regained its position of prominence within the legal community and the community at large.

For more than 140 years, LACBA has stood as an organization of lawyers, by lawyers, and for lawyers. Our most important asset has always been, and always will be, our members who find in LACBA the place where we make important personal relationships, professional relationships, and business relationships. I am pleased to report LACBA’s membership has again become passionate and committed for all that LACBA has been and yet will be.

Passing the gavel to our new president Tamila Jensen will be bittersweet for me. I have truly loved every minute of my presidency. It is comforting to know that LACBA will be led by such an experienced and capable successor. Yet, I will miss the challenges of each new day, and the satisfaction of working with our staff, officers, and trustees to find solutions to each situation as it arises. I am grateful for the opportunity to add my legacy to the contributions of our extraordinary leaders of the past. It has been an experience I will always cherish. In the end, we were interrupted by an unexpected storm of unprecedented magnitude. I am grateful to have faced the storm and held the wheel as we maintained our course and charted a path for a successful future. We will be the better for it.

As I am so fond of saying, it is a great time to be a member of LACBA, and it was a great time to be your president.
ne of the best ways to stand out in a crowded legal marketplace is to find a niche practice. One way a young attorney can carve out a niche is to consider how his or her background can serve a particular market need. Another way is to analyze current market trends and resulting legal gray areas, especially in today’s rapidly changing technological landscape. Exploring my own skills and interests as a former professional dancer exposed me to the growing need for choreographers to seek copyright protection for their choreography.

The popularity of dance has skyrocketed in the last decade. From viral dance challenges dominating social media to such television shows as Dancing with the Stars and So You Think You Can Dance, airing in prime time, dance has taken center stage in popular culture. New technologies, including easily accessible video recording devices and broad digital distribution channels such as Instagram and TikTok, have increased choreographers’ ability to share unique dance routines with people across the world. However, the increased exposure through social media also has made it more difficult for choreographers to receive credit as the originators of everyone’s favorite dance trends. For example, when 14-year-old Jalaiah Harmon created the Renegade dance in her bedroom in Atlanta and posted it online, it quickly went viral. However, Jalaiah struggled to receive credit as the Renegade’s creator while other influencers performing her dance steps benefited from brand deals and media opportunities.1

Unsurprisingly, some dance creators are seeking copyright protection for their moves and taking alleged infringers to court to protect their rights. For example, several complainants have accused Fortnite videogame developer Epic Games of exploiting their dance moves without permission, including Fresh Prince of Bel-Air actor Alfonso Ribeiro (for the use of the Carlton dance), rapper Terrence “2 Milly” Ferguson, (for the use of the Milly Rock), and the mother of Russell “Backpack Kid” Horning, (for the use of the Floss).2 Copyright law grants choreographers exclusive rights to control the use and distribution of a copyrighted work, including, for instance, reproducing the work, performing the work publicly, and authorizing the creation of derivative works.3 While the courts will determine whether Epic Games violated any copyright laws in these pending actions, the U.S. Supreme Court has made it clear that copyright owners must successfully register their work with the U.S. Copyright Office before filing an infringement suit.4 Indeed, original choreography is protected by copyright the moment it is created, but the choreographer cannot fully enforce his or her rights unless it is registered. Thus, choreographers aiming to claim credit for a popular dance routine are well advised to pursue copyright registration.

Although dance has always been a part of the fabric of American culture, the vast majority of choreographic works did not receive copyright protection prior to the Copyright Act of 1976.5 Like all other copyright subject matter, choreography must be an original work of authorship fixed in a tangible medium in order to gain legal protection.6 The Copyright Act does not define an original work, but the U.S. Supreme Court has set the bar for originality in case law.7

Registration also requires the choreographer to memorialize the choreographic work by capturing it on film or by using standard dance notation. The Copyright Office considers several nonexclusive factors typical of copyrightable choreographic works, including the presence of rhythmic movements from a dancer’s body in a defined sequence and space; dance patterns arranged into an integrated, coherent, and expressive compositional whole; dramatic elements such as story or theme; and musical or textual accompaniment.8

Not every dance move qualifies for copyright protection. Choreographic works do not include social dances and simple routines such as the electric slide and other line dances.9 Likewise, individual movements or dance steps by themselves are not copyrightable, such as the basic waltz step, the hustle step, the grapevine, or the second position in classical ballet.10 These movements may, however, serve as the choreographer’s basic material in much the same way that words are the writer’s basic material. Choreographic works are composed of dance-step building blocks which together can create expression that is eligible for copyright protection. Ordinary motor activities, functional physical movements, feats of skill or dexterity, and athletic activities, like a yoga pose, a golf swing, or an exercise routine, also are ineligible for registration as choreography.11 Finally, movement intended to be performed by animals, machines, or other animate or inanimate objects is not copyrightable.12

As dance continues to spread to the masses through popular online platforms, choreographers hoping to reap the financial benefits of its commercialization should obtain a valid copyright registration as a first step. Moreover, new lawyers may find this area of intellectual property practice, or some other area suited to individual habits and preferences, a viable niche for their own career paths.

5 17 U.S.C. §102(a).4
9 Id. at 3
10 Id.
11 Id. at 3-4.
12 Id. at 4.

Harmony Gbe is a law clerk in the United States District Court for the Central District of California in Los Angeles.
Comparing recent annual statistics of criminal investigations and prosecutions by the Internal Revenue Service seems to suggest that the agency may be shifting resources away from criminal tax enforcement. In Fiscal Year 2019, the IRS Criminal Investigation Division initiated 2,485 investigations and recommended 1,893 prosecutions. This continues a trend seen in recent years of declining criminal investigations by the IRS. In 2016, the division initiated 3,395 investigations, and, in 2017, it initiated only 3,019 investigations. In 2018, that number had dropped to 2,886. This trend coincides with a continuing decline in criminal investigation special agents—in 2019, the division had the fewest special agents since the early 1970s.

However, it would be a mistake to conclude that the focus at the IRS is shifting away from criminal tax enforcement. To the contrary, the IRS announced on March 5, 2020, the creation of the Fraud Enforcement Office, to be led by Damon Rowe, a veteran of the IRS Criminal Investigation Division. Prior to appointment as the director of the new Fraud Enforcement Office, Rowe was the executive director of International Operations for the division. Previously, he had served as special agent in charge of the Los Angeles and Dallas field offices and as assistant special agent in charge of the New Orleans field office.

The new Fraud Enforcement Office was created to further efforts by the IRS to detect and deter fraud while strengthening the National Fraud Program. Through additional training, resources, and applied analytics, the IRS aims to thwart emerging threats in the area of fraudulent filings and related activities. The National Fraud Program is a program within the IRS’s Small Business/Self Employed Division (SB/SE) responsible for coordinating the establishment of nationwide fraud strategies, policies, and procedures to increase enforcement.

An important part of the IRS’s strategies to foster voluntary compliance with the tax laws is through the recommendation of criminal prosecutions and/or civil fraud penalties against taxpayers committing tax evasion. This includes the IRS’s Fraud Referral Program under SB/SE, which requires the identification and development of potential criminal fraud and civil fraud penalty cases to be considered in all taxpayer examinations. If an examiner detects possible fraud, the IRS procedure is for the examiner to consult with his or her group manager and then contact a Fraud Referral Program advisor for technical guidance and advice. In Fiscal Year 2001, the IRS had created within the SB/SE fraud technical advisor groups to assist examiners with the...
development of potential fraud cases.\textsuperscript{10}

Despite these procedures under SB/SE for identifying potential fraud cases, referrals from the IRS’s civil side was the source of only 7 percent of criminal cases in 2019.\textsuperscript{11} Of these, fraud referrals from revenue officers handling collections cases accounted for most of the accepted referrals—an extraordinary statistic. The largest source of criminal cases was the U.S. Attorney’s Office (28 percent), other federal agencies (26 percent), and investigations that originated with the criminal investigation division (15 percent).\textsuperscript{12}

However, the IRS’s continued commitment to SB/SE’s role in enforcement is demonstrated by the July 2019 appointment of Eric Hylton as commissioner of SB/SE since he has extensive background and experience in criminal enforcement. Indeed, before being appointed to lead SB/SE, Hylton was the deputy chief of the Criminal Investigation Division as well as executive director of the division’s Office of International Operations.\textsuperscript{13} Regarding his appointment, Hylton stated he is “excited to work with the SB/SE team to bring a laser focus on our enforcement strategies and initiatives.”\textsuperscript{14}

\textbf{Data Analytics}

Although employee numbers in the Criminal Investigation Division have been declining, it is focused on making up for that loss by increasing the use of data analytics, among other strategies.\textsuperscript{15} Don Fort, chief of the Criminal Investigation Division, stated that the division is “working smarter using data analytics to augment good old-fashioned police work and find those cases that have the biggest impact on tax administration.”\textsuperscript{16} He has explained that the “future for CI [criminal investigations] must involve leveraging the vast amount of data we have to help drive case selection and make us more efficient in the critical work that we do.”\textsuperscript{17} Deputy Chief of Criminal Investigation Division Jim Lee stated that in 2019 the division “solidified units designed to better use data to aid [I] in finding and solving the best financial crime cases.”\textsuperscript{18} This process included seizing 1.25 petabytes of digital data in 2019.\textsuperscript{19} As part of its cybercrimes program, the division’s forensic analysis for electronic crimes includes dark web activity, encryption and password recovery, deduplication of large data sets, recovery of hidden and deleted data and damaged disk drives, extraction of data from proprietary financial software (such as tax preparation software), internet activity and history analysis, and website preservation.\textsuperscript{20}

The criminal investigation division has been building its cybercrimes program since 2015.\textsuperscript{21}

\textbf{Noteworthy Trends}

Two recent trends in IRS criminal enforcement are worth noting. The division classifies its investigations into the following program and emphasis areas of fraud: abusive return preparer enforcement, abusive tax schemes, bankruptcy fraud, corporate fraud, employment tax enforcement, financial institution fraud, gaming, general fraud investigations, healthcare fraud, identity theft schemes, international investigations, money laundering and bank secrecy act, narcotics-related investigations, non-filer enforcement, public corruption crimes, and questionable refund.\textsuperscript{22} Although the number of criminal investigations are down overall, the Criminal Investigation Division has been increasing the number of investigations initiated in two of these emphasis areas of fraud: 1) employment tax enforcement and 2) non-filer enforcement.\textsuperscript{23}

Employment tax enforcement includes a variety of employment tax evasion schemes, including pyramiding, in which a business withholds taxes from its employees but intentionally fails to remit them to the IRS; employee leasing, in which a business contracts with outside businesses to handle their staffing needs, but the employee-leasing company fails to pay over to the IRS the collected employment taxes; paying employees in cash, which also has implications for the taxpayer’s entitlement to future social security or Medicare benefits; filing false payroll tax returns and failing to file payroll tax returns.\textsuperscript{24} In 2019, initiated employment tax enforcement investigations increased by over 50 percent to 250 from 162 in 2017.\textsuperscript{25}

Non-filer enforcement is targeted at individuals who refuse to comply with their obligation to file required tax returns and pay any taxes due and owing, generally based on the long-rejected arguments that taxes are voluntary or illegal.\textsuperscript{26} In 2019, investigations initiated of non-filers increased by almost 40 percent to 271 from 206 in 2017.\textsuperscript{27}

\textbf{Enforcement Efforts Go Global}

Beyond the IRS’s local enforcement efforts, criminal tax evasion has been receiving notable global attention in recent years. Two years ago, the Joint Chiefs of Global Tax Enforcement (J5) was formed with leaders of tax enforcement authorities from five countries: Australia, Canada, the Netherlands, the United Kingdom, and the United States. In late 2017, during closing arguments for the Organisation for Economic Co-operation and Development (OECD), a five-point action plan was announced.\textsuperscript{28} Point one of that plan called for a focus on targeted responses to professional enablers of international tax evasion. Recognizing that professional advisors and intermediaries can play an important role in helping the financial system run smoothly (or not), recent big data leak stories, such as the “Panama Papers” of 2016, reflected that a number of professionals were enabling some of the most complex and global forms of tax crime. As a matter of priority, the OECD pledged to increase efforts in this area of international criminal tax enforcement.

The J5 was formed in response to the OECD’s call for action by countries to do more to tackle the enablers of tax crime.\textsuperscript{29} It was created as a platform for the five countries to work together to gather information, share intelligence, conduct operations, and build the capacity of tax crime enforcement officials. The ultimate and greater goal, however, is for the J5 to share its successes, new approaches, and findings from its joint efforts with the broader international tax enforcement community.

To increase the potential for more immediate success, as well as, arguably, to send a clear message that the J5 countries are invested in this venture, each J5 country’s participation is being spearheaded by its respective top criminal tax leaders, viz. the heads of tax crime and senior officials from the Australian Criminal Intelligence Commission (ACIC) and Australian Taxation Office (ATO), the Canada Revenue Agency (CRA), the Dutch Fiscal Intelligence and Investigation Service (FIOD), Her Majesty’s Revenue & Customs (HMRC), and Internal Revenue Service Criminal Investigation (IRS-CI).\textsuperscript{30}

On June 5, 2019, the first anniversary of formation of the J5, these respective criminal tax leaders met in Washington, D.C. After just one year of working together, it was publicly noted that they were all better equipped to conduct joint operations in the fight against those who Continued on page 38.
THE U.S. AUTO INDUSTRY—a nexus of corporate manufacturers, independently owned dealers, suppliers, and workers dominated by Ford, General Motors, and Chrysler (Detroit’s “Big Three” automakers)—has been a staple of the American economy for the last century. For several decades this business model generally had much success; however, the latest financial crisis and worst recession since the Great Depression (the Financial Crisis) necessitated governmental intervention to resuscitate the industry, which had become characterized by saturation, high labor costs, and overexpanded dealer networks.1 Revived U.S. automakers face a unique quandary: to continue the relatively comfortable, century-old business model that nearly led, save governmental action, to the demise of the industry or to seek alternatives to producing cars and selling those cars through local dealerships. The Financial Crisis taught the Big Three lessons leading to profound changes in how they do business. After the Financial Crisis bailout, and now fallout from the recent coronavirus (COVID-19) pandemic, a change to current state laws prohibiting direct sales from U.S. auto manufacturers to consumers could lead to greater long-term financial stability in the U.S. auto industry.

New car sales in the United States traditionally have been conducted via a franchising process in which local dealers act as franchisees under contract with auto manufacturers.2 These manufacturers try to exert control over the ways in which (and the rates at which) their products are sold at the retail level while simultaneously avoiding many of the common-law responsibilities typically associated with a principal-agent relationship.3 In the automobile industry context, dealers receive significant benefits in return for giving up so much control over their business operations. Additionally, the automobile manufacturer’s national marketing efforts and product support assist the local dealer in effectively merchandising (and today, often servicing post-sale) the dealership’s vehicles.4

The long-standing relationship between manufacturer and local dealer is a franchisor/franchisee relationship governed by a “dealer agreement” outlining each party’s rights, duties, and responsibilities.5 The agreements generally govern how a dealer will sell and service the manufacturer’s cars, meet sales targets and customer service objectives, and under what circumstances perform certain warranty services.6 Dealer agreements also carefully outline the manufacturer’s right to terminate a dealer’s franchise.7

Congress has legislated many aspects concerning how dealer agreements are enforced. In particular, federal law permits dealers to sue manufacturers for damages caused by a failure to act in good faith when performing or complying with the express terms of a dealer agreement.8 The

By JASON R. PARNELL

A Model T(esla) for the Future

California, unlike most states that directly prohibit manufacturers from selling vehicles, takes a more balanced approach of addressing manufacturer-dealer potential for competition at the retail level

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“Automobile Dealers’ Day in Court Act” gives dealers the explicit right to sue a manufacturer for arbitrarily terminating or otherwise failing to renew the dealer’s franchise without good cause. By creating a statutory cause of action apart from traditional contract claims, the Day in Court Act permits courts to review franchisor behavior without regard to any dealer agreement provisions that seek, among other concerns, to unfairly expand or contract the common-law rights of contractual waiver or estoppel and generally limit the manufacturer’s liability and how and where cases can be litigated. Through the Day in Court Act, Congress has sought to curtail the heavy economic advantages of manufacturers enabling them to coerce and intimidate dealers. The Day in Court Act also prevents manufacturers from forcing dealers to accept automobiles, parts, accessories, and supplies, which dealers did not need, want, or believe could be absorbed in their specific markets.

State Franchise Laws

State legislatures are involved in dealer franchise law as well. In most states, it is unlawful for manufacturers to cancel or refuse to renew a dealer’s franchise without “good cause,” as is defined by each state’s dealership act. For example, under California law good cause to terminate a franchise can exist in a variety of carefully defined circumstances, including the transfer of a dealer’s equity ownership interests without the manufacturer’s consent, dealer misrepresentations when applying for the franchise, and dealer insolvency, among others. Good cause also may be found when a dealer has breached the material terms of the dealership agreement.

Some state dealership acts provide dealers with the right to protest a franchise termination, allowing the dealer an automatic stay without requiring the dealer to file for injunctive relief. The dealer will then have to make a prima facie case showing the termination was unlawful and, if the dealer meets this requirement, the burden of persuasion will switch to the manufacturer to show the termination was for good cause.

State dealership statutes also govern more detailed aspects of the manufacturer-dealer relationship. In California, in addition to being able to prevent their own terminations, dealers can also block the relocation or addition of another dealer within a certain mile radius of their franchise. Some statutes govern the sale or transfer of the dealer’s franchise, despite express contractual terms within the dealer agreement stating the franchise is non-transferable and solely between the manufacturer and the dealer. Also, some dealership statutes restrict the manufacturer’s right of first refusal that is included in the dealership agreement. In most dealership agreements, a manufacturer has a right of first refusal allowing it to step into the shoes of a willing buyer if the dealer chooses to sell the franchise. Some courts have interpreted the right of first refusal provisions to be in direct contravention of the transfer provisions of a state’s dealership act and, as such, have found them to be void.

With respect to warranty services, in most instances, the manufacturer has specific repair and replacement obligations as warrantor of the vehicles. Some state laws, however, require the manufacturer to use dealers to perform these services, which serves as an additional business advantage for potential franchisees to pursue an auto dealership venture. Some legislatures also require manufacturers to reimburse dealers, dollar for dollar, at whatever rates the dealers charge retail customers. These laws represent a shift from typical manufacturer-dealer practices in which reimbursement obligations for warranty parts and labor would typically be provided in, and governed by, the dealership agreement.

State dealership acts also address how manufacturers may allocate new vehicles to dealers across the state to prevent manufacturers from forcing dealers into purchasing unwanted vehicles and products while ensuring that manufacturers do not discriminate between dealers in allocating more desirable vehicles and products. In these states, manufacturers utilize a predetermined formula for allocating vehicles based on each dealer’s projected and actual sales.

Lastly, state dealership acts sometimes govern the forum in which disputes between manufacturers and dealers may be heard and the laws that may be applied. For example, many states require special administrative boards and agencies to hear and oversee manufacturer-dealer disputes as well as potential violations of the state’s dealership act. Federal and state courts usually have concurrent jurisdiction with these special administrative boards and agencies, allowing the party to choose its forum. In the interest of fairness, the special administrative boards and agencies are usually composed of both manufacturer and dealer representatives. Some state dealership acts also regulate the law that is applied in a manufacturer-dealer dispute, thus rendering the choice of law provisions in a dealership agreement (usually the law of the manufacturer’s home state) illegal or unenforceable and making that state’s dealership act applicable. Even when the choice of law provisions of the dealership agreement are enforceable, the dealer in the dispute will still fall within the auspices of the state dealership act, again allowing the dealer to override any choice of law provisions in the dealership agreement.

Ostensibly, the public policy behind these state laws regulating the relationship between manufacturer and dealers is to prevent manufacturers from abusing, and competing with, their own dealers. Otherwise, manufacturers would take advantage of the information asymmetry between the two parties and create more productive sales locations for themselves. Most states’ franchise laws explicitly prohibit manufacturers from directly selling vehicles to consumers at a physical store in the state, which, at least in theory, would be in direct competition with the manufacturer’s franchisee dealers.

Macro Issues

On a macro level, the Big Three had slowly been losing market share to foreign competitors for years. Rising fuel prices further softened demand for American cars in the United States while the rising legacy costs of the Big Three constrained each company’s ability to increase its competitiveness in the global market. These legacy costs—retiree costs—the automobile companies pay their former employees—include healthcare for life (an extra $16-18 per hour above employees’ hourly wages). Problems in the financial sector precipitating the credit crunch made it more difficult for consumers to get vehicle financing, resulting in lower consumer spending and reduced demand for American cars. By 2008, U.S. automotive sales had fallen to their lowest levels since 1982.

Congress promulgated the Emergency Economic Stabilization Act of 2008, establishing the Troubled Asset Relief Program (TARP, or more popularly known as “the bailout”). The secretary of the U.S. Treasury was authorized under TARP to purchase troubled assets to restore confidence in the economy and stimulate the flow of credit. Congress authorized the Treasury to loan more than $700 billion in funds to aid the ailing financial industry and, according to Henry Paulson, former Secretary of the Treasury, “support financial-market stability” and, more importantly, save jobs, protect the U.S. economy, and prevent the deepening of the Financial
The Tesla Challenge

A new entrant into the U.S. auto industry, Tesla Motors, Inc. combines automotive and energy technology to manufacture electric vehicles. Despite Tesla’s early success, the car company has faced some nearly insurmountable obstacles to its operations in the United States, in that, as a manufacturer, it directly sells to consumers rather than using a third-party franchise dealer. This innovative business model is accomplished through the establishment of manufacturer-owned dealerships in which a customer goes to a Tesla service center or online and chooses a vehicle from Tesla’s online catalogue. Within months, Tesla delivers the vehicle to the service center or the customer’s home or business. While this business model may seem beneficial to consumers, it has faced opposition in the United States from state legislatures, administrative agencies, and dealer associations alike.

As previously discussed, most state franchise laws explicitly prohibit manufacturers and producers from directly selling their vehicles to consumers at a physical store in the state. In 2002, right before Tesla came on the scene, over forty states had this type of prohibitive law in place. For example, Section 320.645 of the Florida Statutes provides: “No licensee, distributor, manufacturer, or agent of a manufacturer or distributor, or any parent, subsidiary, common entity, or officer or representative of the licensee shall own or operate, either directly or indirectly, a motor vehicle dealership in this state for the sale or service of motor vehicles.”

The text of the Florida law is fairly representative of language used by most state legislatures. In those states a company like Tesla may only sell vehicles directly to consumers through an indirect medium, such as by phone or via the Internet. Thus, a prospective buyer can only view and test drive a Tesla vehicle if the prospective buyer travels to one of the few states that allows such a company to “compete with a dealer in the same line-make operating under an agreement or franchise from a manufacturer or distributor in the relevant market area.”

Relevant market area is defined in Vehicle Code Section 507 as “any area within a radius of 10 miles from the site of a potential new dealership.”

Cases arising under laws that challenge Tesla’s ability to operate within a state have been brought to courts and legislatures under several legal theories. In New York, a motor vehicle administrative board issued a permit to Tesla that would have allowed the manufacturer to establish a manufacturer-owned dealership in the state. Dealer interest groups brought suit under a local law banning direct sales in New York, claiming the permit issuance was unlawful. However, the case was dismissed on standing grounds before the merits of the case could be decided.

In Texas, Tesla initially sought a legislative carve-out to the state’s blanket prohibition on direct sales from manufacturers to consumers for high-end electric vehicles. To enhance the likelihood of legislative approval, Tesla sought to completely eliminate the prohibition altogether, allowing manufacturers to sell vehicles of any weight, class, size, or shape directly to consumers. In such proposals, Tesla faced fierce opposition from the Texas Automobile Dealers Association, which argued that the state’s prohibition prevents monopolies and promotes competition in vehicle pricing and service to the consumer, citing state tax and employment benefits for the current law. As a workaround, Tesla opened various service centers or “galleries” throughout Texas where customers could speak with Tesla representatives and view the online catalogue without the ability to actually purchase the vehicle. Each customer was then directed to go online to purchase a vehicle and, when the vehicle was delivered to the Texas customer, it arrived with California registration.

As a greater victory, Tesla successfully fought New Jersey legal reform aimed at shutting down Tesla company stores in the state. The New Jersey Motor Vehicle Commission amended state law such that any party seeking a dealership license in the state was required to “produce evidence that the applicant or licensee is a franchisee to obtain a license—something that Tesla would not be able to produce.” In response, the New Jersey State Assembly’s Consumer Affairs Committee sponsored and unanimously enacted a new bill reversing the commission’s decision and allowing Tesla to sell vehicles directly to consumers.

Connecticut’s Department of Motor Vehicles ruled that Tesla was selling cars out of its Greenwich “gallery” without a new car dealer’s license in violation of state law. The company immediately appealed the ruling, citing that it was an “unfortunate circumstance for Connecticut consumers.” According to the company, the State of Connecticut loses $5 million in tax revenue per year from consumers who go to New York to buy Tesla automobiles. This pro-consumer and pro-state argument was successful for the company in New York, Massachusetts, and Rhode Island, all of which recently approved Tesla’s direct-to-consumer marketing system.

In Utah, Tesla sought to operate under current dealership law and built a $3 million store in Salt Lake City in 2015, but the full-fledged store was demoted to a gallery two weeks before opening when the Utah Attorney General’s Office ruled the gallery was against the state’s no “direct sales” law. Since the ruling, the company obtained a used car dealer license and sued for the right to sell in Utah. However, Tesla lost its direct sales lawsuit in the Utah Supreme Court in 2017. The company then tried to obtain direct sales approval through the Utah legislature, which more recently approved a bill allowing direct sales to consumers.

A Time for Change

Even the Federal Trade Commission (FTC) has expressed its disdain for these so-called “no direct sales” laws on its blog: “[S]tates should allow consumers to choose not only the cars they buy, but also how they buy them.” The FTC described how the marketplace itself is able to police inefficient or unsupported distribution practices, such that the government should not intervene unless extreme circumstances warrant intervention.

Currently, Tesla and its business model are slowly but surely winding their way through courts and legislatures. Although the legal battles and legislative proposals are not yet settled, the company seems to be injecting a new perspective as to how cars can be sold as lawmakers begin to recognize that the advent of the Internet has made the dealer-only system of car sales antiquated. Those involved in the U.S. auto industry and the public have begun to question whether the current franchise dealer system can continue to function as it has and whether dealers should continue their traditional role.

Tesla has introduced a simpler sales process, which appeals to manufacturers
and consumers (assuming that manufacturers, of course, can restructure to account for all costs related to taking on their own local distribution). This simpler sales model could eliminate the saturated, costly, labor-heavy, and overly expanded dealer networks that bogged down the Big Three, pre-Financial Crisis. Empirical data indicate that the franchise dealer system adds 5 to 10 percent to the cost of each vehicle produced, making U.S. vehicles more expensive and the Big Three less competitive in a global market.

For example, the Big Three’s Japanese competitor, Toyota, with its superior automobiles and more efficient manufacturing processes, thrived in all markets during, before, and after the Financial Crisis, including in the United States. In 2008, Toyota replaced General Motors as the world’s largest automobile manufacturer, giving Toyota a reason to oppose the bailout of its largest U.S. competitors. Moreover, Japanese manufacturers do more with less. In terms of shear numbers, U.S. automobile manufacturers have over 20,000 dealerships across the U.S., while their Japanese counterparts have eaten up market share with only a few hundred dealers nationwide.

If the outcome of the Financial Crisis is any indication of things to come, the U.S. auto industry has long been functioning in a financially volatile way. The bailout did not change this fact, as most, if not all, automobile dealerships are still highly leveraged against the vehicles they are selling. Of even greater concern is the fact that the reasons for the bailout in the first place are still present. If anything, subsequent safety scandals and ignition switch fatalities have further diminished the public’s perception. Dealer markets remain oversaturated with studies indicating dealer systems add 5 to 10 percent to the cost of each vehicle produced.

While dealers and their proponents claim they are in place to protect the consumer, consumers tend to appreciate options and freedom of choice. The alternative direct sales model appears to achieve this goal and also eliminates extra franchise dealer costs passed along to consumers. Moreover, recent events related to the COVID-19 pandemic have caused the Big Three and other U.S. auto manufacturers to close plants and shut down production, mounting even more pressure to sell cars in a different way. Dealers also feel the pinch as “shelter-in-place” orders keep people at home and out of crowded showrooms. As customers hold off making large purchases due to market uncertainty, the U.S. auto industry may see the type of numbers that prevailed in the late Financial Crisis.

If the Big Three intend to avoid another bailout, adjust to the Internet age, continue sales during unanticipated market fluctuations—e.g., pandemics—and remain viable and competitive, the current franchise dealer system and its supporting legal framework may need to become a thing of the past, or the U.S. auto industry may become a thing of the past.


1 See, e.g., ALA. CODE §8-20-4(3)(k) (2020); ARIZ. REV. STAT. ANN. §28-4439 (2020); VEHL. CODE §1713.3(2) (2020); DEL. CODE ANN. tit. 6, §5910(c)- (d) (2019); GA. CODE ANN. §10-1-663.1 (2020); IDAHO CODE ANN. §49-1613(6) (2020); 185 ILL. COMP. STAT. ANN. 7107 (2020); IND. CODE ANN. §59.23-3-2(c)(2) (2020); IOWA CODE ANN. §322A.12(2) (2020); KAN. STAT. ANN. §8-2416(e) (2020); LA. REV. STAT. ANN. §31:1267(B) (2020); ME. REV. STAT. ANN. tit. 10, §§1441, 1174(3), 1177 (2020); MISS. GEN. LAWS ch. 93B, §10(a) (2020); MONT. CODE ANN. §80E.13(1) (2020); MISS. CODE ANN. §§63-17-109(1), (2) (2020); MO. REV. STAT. §407.8257(c) (2020); MONT. CODE ANN. §61-4-141(1) (2020); NEV. REV. STAT. §482.36419 (2020); N.H. REV. STAT. ANN. §§337- C(3)(b)(ii) (2020); N.J. STAT. ANN. §§56:10-13.6-, 13.7 (2020); N.M. STAT. §§57-16-5, 57-16-8 (2020); N.Y. VEH. & TRAF. LAW §666.1 (2020); N.C. GEN. STAT. ANN. §520-305(18) (2020); OKEA. STAT. ANN. tit. 47, §56.5(B) (2020); OR. REV. STAT. §§650.1625 (2020); 63 FLA. STAT. ANN. §318.16 (2020); R.I. GEN. LAWS §§31-1.5-17 (2018); S.C. CODE ANN. §§56-15-70 (2020); S.D. COFIFED LAWS §§3-68- 84 (2020); VA. CODE ANN. §§46.2-1569.1, 46.2-1977 (2020); Wis. REV. CODE §§449.80 (2020); W. VA. CODE §§17A-6A-10(2) (2020); Wis. STAT. ANN. §§218.0114(9)(a)(4), (9d), 218.0116(1)(a) (2020); WYO. STAT. ANN. §§31-16-106(g) (2020).

2 McMillian, supra note 22, at 78.


4 Id. at 79. For parts, manufacturers have historically paid a predetermined mark-up over the dealer cost for the parts. For labor, manufacturers will typically reimburse dealers. Id. at 80.

5 Id. at 82; see also FLA. STAT. ANN. §320.64(18)- (19), (22) (2018).

6 McMillian, supra note 22, at 82. There also may be antitrust issues associated with certain requirements.


8 McMillian, supra note 22, at 82. Manufacturers in Florida are required to go a step further and provide each dealer with an “equitable supply” of new vehicles based on model, mix, or colors. Id.; see, e.g., FLA. STAT. §320.64(18) (2018). The term “equitable supply,” however, is not defined in the statute and raises additional questions, including whether a dealer would be compared with only other Florida dealers when deciding what constitutes an “equitable supply,” and whether the size of the dealer should be taken into account when deciding what is “equitable” and what is not.

9 McMillian, supra note 22, at 82-83.

10 McMillian, supra note 22, at 84; FLA. STAT. ANN. §320.64(31) (2018).

11 McMillian, supra note 22, at 83.
31 Forehand & Forehand, supra note 22, at 1066.
32 Id.
33 See, e.g., ALASKA STAT. §45.25.020 (2020); COLO. REV. STAT. §12-122.5 (2020); DEL. CODE ANN. §6, 10417 (2020); FLA. STAT. ANN. §520.64(31) (2020); GA. CODE ANN. §50-1624 (2020); IDAHO CODE ANN. §54-1632 (2020); I.A. REV. STAT. §32.1269 (2020); MASS. ANN. LAWS ch. 93B, §15(e) (2020); MICH. COMP. LAWS ANN. §445.1573(b) (2020); N.Y. VEH. & TRAF. LAW §466(1)(i) (2020); N.C. GEN. STAT. ANN. §20-308.2 (2020); W. VA. CODE §31A-6A-2, 17A-6A-18 (2019); WYO. STAT. ANN. §31-16-124 (2020).
34 McMillian, supra note 22, at 84.
35 Id. at 84-85.
37 Id.
42 Ohnsman & Niquette, supra note 41.
43 See Empie, supra note 40, at 827.
45 See Empie, supra note 40, at n.153.
46 Barmore, supra note 55, at 192.
47 Id. at 194.
53 Id. at 19.
56 Id.
58 See Id. for the fourth year in a row, a bill allowing Tesla to bring its direct-to-consumer business model to Connecticut cleared a General Assembly committee only to be stalled at the legislative level because Tesla has been unable to reach some middle ground with dealers, who have insisted the company abide by existing franchise rules that require sales through dealerships. See also Benjamin Kail, Tesla, Dealers Remain at Odds as Lawmakers Urge Compromise, THE DAY, Mar. 25, 2018, available at https://www.theday.com.
59 Hladky, supra note 76.
62 Lambert, supra note 80.
64 Id.
71 Berk, supra note 87.
72 Id.
76 Id.
On March 5, 2020, the Appeals Chamber of the International Criminal Court (ICC) authorized the opening of an investigation “in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002.” The parties to be investigated include the Taliban, the Afghan National Security Forces, and members of the U.S. armed forces and Central Intelligence Agency (CIA). The decision overturned the controversial April 2019 ruling by a pre-trial chamber of the court, which denied the prosecutor permission to proceed.

The United States is not a member of the ICC, which was set up by treaty in 1998 to prosecute genocide, crimes against humanity, war crimes and—by subsequent amendment—the crime of aggression. The United States did, however, play an active and important role in drafting the foundational Rome Statute and stewarding it to successful conclusion in the summer of 1998. Indeed, President Bill Clinton signed the statute on December 31, 2000, in order to remain influential in the court’s development, leaving open the possibility of later ratification should outstanding U.S. concerns be addressed. Sixteen months later, however, President George W. Bush announced that the United States would not ratify and that the signature had no legal effect, effectively disassociating the United States from the court. How then, seventeen years later, is the prosecutor investigating Americans?

The ICC became operational in 2002, and today has 123 members, or states parties. Canada and almost all Latin American states have joined, along with Australia, all of Western Europe, and most of Africa. Countries which, like the United States, are not parties include Russia, China, India, Pakistan, North Korea, and most Middle Eastern countries—has never become a member.

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BY KATE MACKINTOSH

The USA and ICC: FRIENDS or FOES?

While playing a significant role in founding the International Criminal Court, the United States—like Russia, China, India, Pakistan, North Korea, and most Middle Eastern countries—has never become a member.
Pakistan, North Korea, Iran, and most other countries of the Middle East. A country that becomes party to the Rome Statute is subject to the court’s jurisdiction over genocide, crimes against humanity, and war crimes (and in some circumstances acts of aggression) committed either by its nationals or on its territory. However, this jurisdiction will not be exercised 1) if the crimes alleged are already being investigated by the state concerned, 2) if the state has investigated and decided not to prosecute, or 3) if a trial has already taken place—unless the state is determined to be unwilling or unable to genuinely investigate or prosecute the case.

These last criteria reflect the important principle of complementarity in the Rome Statute. States that created the court, including the United States, had to decide whether it would have primary or complementary jurisdiction. Earlier international criminal courts—such as the post-World War II courts at Nuremberg and Tokyo, as well as the international criminal tribunals for Rwanda and the former Yugoslavia—had primary jurisdiction, giving them authority over any case they selected. In drafting the ICC statute, states went the other way. At the heart of this new system was the idea that courts at the national level would deal with atrocity crimes, with the ICC stepping in only as a last resort.

The statute adds a test of gravity to these complementarity concerns to determine whether a case is admissible. However, even when jurisdiction and admissibility are satisfied, the prosecutor does not have unfettered authority to open an investigation propriae motu. Preliminary examinations may be opened based on information received, but the authorization of a panel of three judges in the pre-trial chamber is needed to proceed to a full investigation. Most cases at the court have started not on the prosecutor’s motion but as a result of referrals by states parties and have been concerned with crimes allegedly committed within a state’s own territory, such as in Uganda, the Democratic Republic of Congo, Central African Republic, and Mali.

The UN Security Council can also refer a situation for investigation if it determines there is a threat to international peace and security and, acting under Chapter VII of the UN Charter, decides that an ICC investigation will avert this threat. In these circumstances, the Security Council is not restricted to nationals or territories of states parties, as having determined to act to maintain or restore international peace and security it is empowered to impose all necessary measures on UN member states, including an ICC investigation. This circumstance has occurred in two situations so far: the 2005 referral of the situation in Darfur, Sudan, following reports of mass crimes including potential genocide there, and the 2011 referral of Libya. As one of the five permanent members of the Security Council wielding veto power, the United States could have blocked either referral. Instead, it abstained on Darfur, and sponsored the Libya referral, which was passed unanimously.

Territorial Jurisdiction

However a situation comes before the ICC, the court’s territorial jurisdiction means that a U.S. national suspected of atrocity crimes committed on a territory being investigated by the court falls under the court’s authority. In response to this, the U.S. State Department took a number of preemptive measures to shield U.S. nationals when the court became operational, most notably through bilateral “non-surrender” agreements and the passage of the American Servicemembers Protection Act of 2002. Under the agreements, also termed “Article 98 agreements” after a provision in the Rome Statute, countries agree not to surrender U.S. nationals to the ICC. Over 100 of these agreements have been signed, including with some states parties to the ICC, although far fewer have been ratified in the foreign jurisdiction, and it is unclear whether those signed with ICC states parties would be valid as a matter of international law.

The American Servicemembers Protection Act of 2002 is primarily intended to exempt U.S. military actors serving overseas from ICC jurisdiction and includes a number of provisions to that effect, including prohibiting cooperation with the court, requiring UN peacekeeping operations to specifically exempt U.S. personnel from ICC jurisdiction and, somewhat notoriously, authorizing the U.S. president to use all means necessary and appropriate to bring about the release of detained U.S. and allied personnel—colloquially known as the “Hague Invasion clause.”

None of these actions alters the basic principle of territorial jurisdiction, whereby a U.S. or other national committing a crime on foreign soil is subject to the authority of that nation’s courts. Moreover, they do not affect the application of universal jurisdiction, whereby any state can prosecute an individual on its territory for war crimes, crimes against humanity, torture, and genocide, regardless of nationality or where the crimes were committed. This principle was the basis for the Miami prosecution of Chuckie Taylor, son of Liberian President Charles Taylor, for crimes committed during the conflict in Liberia, and it would provide authority to prosecute Americans for international crimes before foreign domestic courts.

The Afghanistan situation was not referred to the court by a state or the UN Security Council. In 2007, the ICC prosecutor announced that he was carrying out a preliminary examination to determine whether Rome Statute crimes had been committed in the context of the Afghan conflict since May 2003, when Afghanistan joined the court. By 2012, it was clear that this included examination of possible torture by international military forces. In November 2017, a full 10 years after the preliminary examination was initiated, current ICC Prosecutor Fatou Bensouda asked the judges for authorization to commence an investigation into crimes committed by the Taliban, the Afghan government forces, and members of the U.S. military and CIA, the latter for “acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period.”

Applying a test set out for her in Article 53 of the Statute, and based on her preliminary examination, the prosecutor considered that there was a reasonable basis to believe that crimes within the jurisdiction of the court had been committed and that the requirements of complementarity and gravity were met. She based her complementarity assessment on the apparent lack of domestic investigation or prosecution of the crimes outlined, following President Barack Obama’s decision to block prosecution of the waterboarding, physical beating, mock executions, and other abuses reported by the CIA Inspector-General. Finally, as required by Article 53, she had considered and rejected whether there were nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

The prosecutor’s request led U.S. National Security Adviser John Bolton to threaten the court with sanctions and its officials with prosecution if the investigation were allowed to proceed. On April 5, 2019, Secretary of State Mike Pompeo preemptively revoked Prosecutor Bensouda’s visa, marking a new low in relations between the court and the United States, as well as hampering Bensouda’s regular travel to U.N. headquarters in New York City.

On April 12, 2019, the judges of the pre-trial chamber refused the prosecutor’s
request, finding that, although there was a reasonable basis to believe that crimes under the jurisdiction of the court had been committed and that the requirements of gravity and complementarity had been met, an investigation into the situation in Afghanistan at this stage would not serve the interests of justice.\textsuperscript{27} The decision was widely condemned as legally flawed and potentially politically influenced.\textsuperscript{28}

The legal criticism centered on the test applied by the pre-trial chamber. Two different articles of the statute were potentially applicable—Article 15 and Article 53—each prescribing a different standard. According to the plain wording of these articles, Article 53 prescribes the test for the prosecutor to apply in determining whether to ask for authorization to proceed\textsuperscript{29} and Article 15 the test to be applied by the pre-trial chamber in adjudicating the request.\textsuperscript{30} In this case, the pre-trial chamber applied Article 53,\textsuperscript{31} following the practice of earlier decisions concerning Kenya, Côte d’Ivoire, Georgia, and Burundi,\textsuperscript{32} with the judges in the Kenya case attributing the discrepancy between the tests in articles 15 and 53 to sloppy drafting.\textsuperscript{33} It was, however, the first time that the pre-trial chamber had interpreted the standard to “include a positive determination to the effect that investigations would be in the interest of justice.”\textsuperscript{34} This requirement is not apparent from Article 53, which requires a negative consideration on the part of the prosecutor—whether there are “substantial reasons to believe that an investigation would not serve the interests of justice,” nor from the earlier cases, which found that “[i]t is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber.”\textsuperscript{35} The judges did not address this adverse precedent in their decision.

Coming as it did in the face of the threats from the U.S. administration, this unexplained departure from the language of the Rome Statute and the practice of the court’s was seen with dismay by many observers as the court bowing to political pressure. It was also seen to buttress accusations that the court only prosecutes actors from weak states. This criticism has been most prominently voiced by African nations (and the African Union), remarking on the number of African cases before the court and suggesting that far from contributing to global respect for human rights, the ICC has become a tool the powerful deploy against the powerless.\textsuperscript{36} In September 2019, the prosecutor was granted leave to appeal the pre-trial Chamber decision.\textsuperscript{37}

When the ICC Appeals Chamber handed down its verdict in March, reversing the decision of the pre-trial chamber and authorizing the prosecutor to commence the investigation,\textsuperscript{38} the Appeals Chamber clarified that the test to be applied by a pre-trial chamber in reviewing requests to open investigations is set out in Article 15. This corrects the practice of pre-trial chambers to date and authoritatively dismisses the idea that an investigation can only proceed if the pre-trial chamber determines it to be in the interests of justice.\textsuperscript{39}

The Appeals Chamber decision has been welcomed by scholars and observers of the court as legally robust. Nevertheless, the prosecutor has a difficult path ahead. Investigations into the actions of all parties will be hard. The situation on the ground in Afghanistan is fragile, and cooperation from the U.S. authorities is highly unlikely to be forthcoming. Having earlier cancelled the prosecutor’s U.S. visa, Secretary of State Mike Pompeo went so far as to name and threaten two individual staff members of the court for “helping drive ICC prosecutor Fatou Bensouda’s efforts to use this court to investigate Americans” after the appeals decision came down.\textsuperscript{40} Lacking its own police force or authority over any territory, the court depends on the cooperation of states.

Another sensitive case is looming as the ICC prosecutor squares up to investigate war crimes in the occupied Palestinian territory, also known as Palestine. The situation was referred to her office by the State of Palestine, which acceded to the Rome Statute in 2015,\textsuperscript{41} having been accorded the status of nonmember observer state at the United Nations in 2012. As a referral from a state party, no authorization is required for the investigation to begin.\textsuperscript{42} The prosecutor has indicated that all the requirements of Article 53(1) are met but has asked the pre-trial chamber for a ruling on the court’s territorial jurisdiction in Palestine, in view of the disputed status of that territory.\textsuperscript{43} This decision is likely to be controversial.

Supporters of the court are hoping that it manages to navigate these difficult cases in a way that adds to its credibility as an institution of impartial global justice. Another opportunity is offered by the election of a new prosecutor, for a nine-year term, in June, 2021. The current office has been plagued by questions about the quality of its work—some dating back to the first prosecutor, Moreno-Ocampo—after two high-profile acquittals: the acquittal on appeal in 2018 of military commander Jean-Pierre Bemba, formerly vice-president of the Democratic Republic of the Congo, for the actions of his soldiers in Central African Republic,\textsuperscript{44} and the dismissal of the case against Laurent Gbagbo, former president of Côte d’Ivoire, at the no-case-to-answer stage in January 2019.\textsuperscript{45} Member states have commissioned an independent expert review of the court’s performance which should produce its recommendations in the fall.\textsuperscript{46} The acts of the incoming prosecutor will be critical in determining the success of the institution as it approaches its twentieth anniversary, and the Afghanistan decision has made U.S.-ICC relations central to that project.

Will the United States ever join the ICC? When he spoke at UCLA School of Law in 2019, President Chile Eboe-Osujii of the court quoted chief Nuremberg prosecutor and U.S. Attorney General Robert H. Jackson:\textsuperscript{47}

It is futile to think…that we can have an international law that is always working on our side. And it is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage.\textsuperscript{48} American international lawyers are exploring options for the United States to constructively re-engage with the ICC.\textsuperscript{49} However, the path from Jackson’s vision, and the leadership role the United States has historically played in international justice, to the posture of the current administration seems long indeed.\textsuperscript{50}

\textsuperscript{1} Id.
\textsuperscript{2} Id.
\textsuperscript{3} Rome Statute, supra note 1, art. 17(1).
\textsuperscript{4} Id., art. 12.
\textsuperscript{5} Id., art. 17(1).
\textsuperscript{6} See id., art. 1: “An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.”
The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with article 14; (b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15...

1 U.N. Charter art. 39, ch. VII.
3 Id.
6 supra note 8, art. 13, which provides:

The Court may not proceed with a request for surrender or assistance which would require the receiving State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2 The Court may not proceed with a request for surrender which would require the receiving State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

8 American Service-Members’ Protection Act, supra note 8, §2008. Representatives of the United States acted to restrict all foreign officials over the acts of the United States and other peacekeepers when Darfur and Libya were referred to the ICC. At the insistence of the U.S. mission, a clause was included in the resolutions providing that nationals of non-US States parties (apart from Sudanese and Libyans) would be subject to the exclusive jurisdiction of their state of nationality for any acts committed as part of a UN-authorized force. UN Security Council resolutions 1593 (2005) and 1970 (2011).


13 Rome Statute, supra note 1, art. 15.


20 supra note 15, ¶ 35.
21 supra note 15, ¶ 67.
22 Kenya Decision, supra note 32, ¶ 35.
23 supra note 32, ¶ 65.
24 supra note 27, ¶ 68.
25 supra note 27, ¶ 68.
26 supra note 27, ¶ 68.
27 supra note 27, ¶ 68.
28 supra note 27, ¶ 68.
29 supra note 27, ¶ 68.
30 supra note 27, ¶ 68.
31 supra note 27, ¶ 68.
32 supra note 27, ¶ 68.
33 supra note 27, ¶ 68.
34 supra note 27, ¶ 68.
35 supra note 27, ¶ 68.
36 supra note 27, ¶ 68.
37 supra note 27, ¶ 68.
38 supra note 27, ¶ 68.
39 supra note 27, ¶ 68.
40 supra note 27, ¶ 68.
41 supra note 27, ¶ 68.
42 supra note 27, ¶ 68.
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84 supra note 27, ¶ 68.
85 supra note 27, ¶ 68.
86 supra note 27, ¶ 68.
87 supra note 27, ¶ 68.
88 supra note 27, ¶ 68.
89 supra note 27, ¶ 68.
90 supra note 27, ¶ 68.

39 Id., ¶ 1.

40 Article 15(4) of the Statute requires a pre-trial chamber to determine whether there is a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and that potential case(s) arising from such investigation appear to fall within the Court’s jurisdiction. The pre-trial chamber is not called under article 15(4) of the Statute to review that Prosecutor’s analysis of the factors under article 53(1)(a) to (c) of the Statute


42 Article 15 of the Rome Statute requires authorization of the pre-trial chamber only when the prosecutor acts proprio motu.


44 Judgement on the appeal of Mr. Jean-Pierre Bemba Gombo against Trial chamber III’s “Judgement pursuant to Article 74 of the Statute,” No. ICC-01/05-01/08-3636-Red (June 8, 2018), available at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/05-01/08-3636-Red. Following his acquittal and release, Mr Bemba filed a claim for $77.7 million dollars to compensate him for the time spent in detention and losses arising from what he characterizes as mismanagement of his frozen assets. See Second Public Redacted Version of “Mr. Bemba’s claim for compensation and damages,” No. ICC-01/05-01/08-3673-Red2 (Mar. 19, 2019), available at https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/05-01/08-3673-Red2.


SoCal Pizza may be the most instructive in a growing body of cases regarding EPL policy exclusions for alleged wage-and-hour law violations.

In Southern California Pizza Co., LLC v. Certain Underwriters at Lloyd’s, London Subscribing to Policy Number 11EPL-20208 (SoCal Pizza), the California Court of Appeal recently held that an employment practices liability (EPL) insurer was obligated to defend a California employer in underlying class action litigation alleging violations of the California Labor Code and the Private Attorneys General Act of 2004 (or PAGA). Although SoCal Pizza is the first published decision from the court of appeal on the subject, it follows several pro-insured decisions from state trial courts and federal district courts in recent years confirming that, contrary to what insurers frequently contend, EPL policies often provide coverage for the costs of defending and settling lawsuits alleging violations of the Labor Code and PAGA.

In recent years, class action lawsuits alleging violations of the California Labor Code and PAGA have been among the most frequently filed lawsuits in California. Although the precise allegations and claims asserted vary from claim to claim, employees commonly allege that their employers failed to pay all the minimum or overtime wages owed, failed to provide required meal and rest breaks, failed to provide compliant itemized wage statements, failed to reimburse necessary business expenses, failed to timely pay all wages due upon termination or discharge of employees, and failed to maintain all payroll and employment records required by statute. Employees commonly seek a wide range of relief, including damages, wages, statutory and civil penalties, interest, and attorneys’ fees.

When facing such claims, employers often seek coverage under EPL policies that provide coverage for a wide range of employment-related claims. However, historically, EPL insurers typically denied or contested coverage for claims alleging Labor Code and PAGA violations. In denying or contesting coverage, these insurers relied primarily on policy exclusions, including exclusions for claims alleging violations of so-called “wage and hour” laws. They also relied on the fact that, by and large, EPL insurance policies do not expressly cover violations of the California Labor Code or PAGA.

As confirmed in SoCal Pizza and several trial court decisions that came before it, these commonly asserted defenses to coverage are not always valid. Rather, under the rules of insurance policy interpretation and the principles governing an insurer’s duty to defend, EPL policies can—and frequently do—provide coverage for claims alleging violations of the California Labor Code and PAGA.

Preliminarily, because SoCal Pizza and other relevant case law turn on the rules of insurance policy interpretation and the principles

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governing an insurer’s duty to defend, it is important for practitioners to have a basic understanding of these concepts.

**Governing Insurance Law Principles**

Under California law, the fundamental goal of interpreting insurance policies, as with all contract interpretation, is to ascertain and effectuate the intention of the parties. If the contractual language is clear and explicit, it governs. However, if the policy’s language is ambiguous, its words are to be construed in the insured’s favor, consistent with the insured’s reasonable expectations.

The insured bears the burden of establishing that a claim is within the basic scope of the policy’s coverage, and the insurer bears the burden of establishing that a claim is specifically and clearly excluded. Coverage grants are “interpreted broadly so as to afford the greatest possible protection to” the insured. Policy exclusions and limitations, in contrast, are construed narrowly and are “strictly construed against the insurer and liberally interpreted in favor of the insured.”

Furthermore, exclusions or limitations on coverage must be both conspicuous and “plain and clear in order to be given effect.” In fact, the California Supreme Court has “declared time and again ‘any exception to the performance of the basic underlying obligation must be so stated as clearly to apprise the insured of its effect.’” This means more than the traditional requirement that contract terms be ‘unambiguous.’ Precision is not enough. Understandability is also required. To that end, provisions that constrict coverage otherwise available under the policy are subject to the “closest possible scrutiny.”

One of the most valuable provisions in an EPL policy is the provision obligating an insurer to defend its insured, or to pay its insured’s defense costs, in a lawsuit or claim that is potentially covered. This may be especially true with respect to class action lawsuits alleging violations of the California Labor Code and PAGA, which can cost hundreds of thousands or millions of dollars to defend.

A leading decision regarding the duty to defend is the California Supreme Court’s decision in *Gray v. Zurich Insurance Co.*, in which the court held that an insurer “must defend a suit which potentially seeks damages within the coverage of the policy.” As the California Supreme Court has subsequently explained, “a bare ‘potential’ or ‘possibility’ of coverage [is] the trigger of a defense duty.” Thus, as a practical matter, an insurer cannot escape its duty to defend unless an underlying lawsuit can “by no conceivable theory raise a single issue which could bring it within the policy coverage.”

Furthermore, if there is even one potentially covered allegation or claim in an underlying complaint, an insurer generally will be required to fund a defense to the entire lawsuit—even if most of the allegations and causes of action are uncovered. Indeed, in evaluating the duty to defend, California courts “look not to whether noncovered acts predominate in the third party’s action, but rather to whether there is any potential for liability under the policy.”

Moreover, once triggered, an insurer’s duty to defend continues “until the underlying lawsuit is concluded or until it has been shown that there is no potential for coverage.” “Any doubt as to whether the facts establish the existence of the defense duty must be resolved in the insured’s favor.”

Finally, given the breadth of an insurer’s duty to defend, an insurer cannot rely on a policy exclusion to avoid its defense duty unless the exclusion bars coverage for all claims and allegations in the underlying action. Put differently, “an insurer that wishes to rely on an exclusion has the burden of proving, through conclusive evidence, that the exclusion applies in all possible worlds.”

**SoCal Pizza**

In *SoCal Pizza*, the California Court of Appeal reversed a trial court’s judgment in favor of Certain Underwriters at Lloyd’s, London (Underwriters), holding that Underwriters were obligated to defend their insured in underlying employment class action litigation alleging violations of the California Labor Code and PAGA.

The *SoCal Pizza* court began its analysis by reciting the familiar principles governing an insurer’s duty to defend and the rules governing policy interpretation in California. The court stressed that a “liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity,” adding that exclusions must be clear and ambiguities in the policy must be interpreted “to protect the objectively reasonable expectations of the insured.”

Applying these well-established insurance principles, the *SoCal Pizza* court narrowly construed the policy’s exclusion for claims alleging “violation(s) of any…state…wage and hour…law(s).” The court, relying largely on dictionary definitions, concluded that “using the ordinary meanings of the words, the phrase ‘wage and hour…law(s)’ refers to laws concerning duration worked and/or remuneration received in exchange for work.”

After determining the scope of the “wage and hour law(s)” exclusion, the court turned to the specific California Labor Code violations alleged in the underlying litigation. The court stated that although the exclusion applied to some claims, “many of the disputed underlying lawsuit claims are potentially subject to coverage.”

Specifically, the court held that the underlying claims alleging violations of California Labor Code sections 2800 and 2802—which obligate employers to reimburse certain business-related expenses incurred by their employees—fell outside the scope of the “wage and hour law(s)” exclusion. The court stressed that “[n]either statute mentions wages or hours, nor do they appear in the parts of the Labor Code titled ‘compensation’ or ‘working hours.’” The court held that the purposes of sections 2800 and 2802 were to ensure that employers bear the costs of conducting their businesses and do not pass their operating costs on to their employees by not reimbursing employees for appropriate work-related expenses.

The court also noted that the California Supreme Court previously had characterized expense reimbursement claims as “nonwage” claims. The court specifically referenced *Smith v. Rae-Venter Law Group*, a 2002 California Supreme Court decision in which the Court referred to expense reimbursement claims as “nonwage” claims on nine different occasions throughout the opinion.

The *SoCal Pizza* court further held that the business expense reimbursement claim fell within the policy’s broad coverage for claims alleging “inappropriate Employment Conduct”—which was defined, in pertinent part, to include “any…employment related workplace tort.” The court stressed that, interpreted broadly, the term “tort” encompassed “any wrong, not consisting in mere breach of contract, for which the law undertakes to give to the injured party some appropriate remedy against the wrongdoer.” Because the causes of action alleging violations of sections 2800 and 2802 were not grounded in the breach of a contract, the *SoCal Pizza* court held that they could fairly be construed as alleging employment-related workplace “torts.”

Given its holding in this regard, the court noted that it did not need to reach the insured’s alternative argument that the expense reimbursement claims also alleged a “failure to adopt, implement, or enforce employment related policies or procedures.”
The court also held that Underwriters could not escape their defense duty simply because the expense reimbursements might themselves not be covered. The court stated that “whether the reimbursement amounts are covered losses is neither here nor there,” stressing that Underwriters’ duty to defend is broader than their duty to indemnify. The court also observed that the policy expressly defined “loss” to include defense costs, adding that such expenses are “by their very nature, necessarily...amounts paid ‘on account of a Claim.’”

Underwriters’ petition.

SoCal Pizza is the most recent addition to a growing body of case law confirming that claims alleging violations of the California Labor Code and PAGA can be covered under EPL insurance policies. As these decisions make clear, the broad coverage provided by EPL insurance policies may be triggered by allegations concerning the failure to pay overtime wages, failure to provide meal and rest breaks to employees, failure to provide accurate itemized wage statements, failure to reimburse necessary business expenses, failure to timely pay wages due at termination, and other alleged violations of the California Labor Code and PAGA.

SoCal Pizza is likely to be most instructive with respect to EPL policies containing exclusions for alleged violations of wage and hour law, which in recent years has become one of the more common exclusions in EPL policies issued to California employers. In construing this exclusion narrowly to bar coverage only for alleged violations of laws “concerning duration worked and/or remuneration received in exchange for work,” the SoCal Pizza court provided much-needed guidance to the state’s trial and district courts. The decision also resolved a split in the California state and federal trial courts as to whether “wage and hour law” exclusions bar coverage for claims alleging violations of sections 2800 and 2802.

More broadly, the SoCal Pizza court reiterated the well-established rule that policy exclusions must be construed narrowly. Although the exclusion at issue in SoCal Pizza concerned alleged violations of “wage and hour law,” California courts have applied the same interpretive principles in construing other exclusions in the context of lawsuits alleging violations of the California Labor Code and PAGA. For instance, California courts have held that exclusions for the Fair Labor Standards Act and “similar provisions” of state law do not bar coverage for alleged violations of California Labor Code sections 201-203 (governing the payment of wages upon termination or discharge), 226 (governing itemized wage statements), and 2802 (governing reimbursement of business expenses). Finally, in holding that certain of the claims at issue could be construed as alleging employment-related workplace “torts,” the SoCal Pizza court emphasized and applied the familiar principle that coverage grants be interpreted broadly and in favor of coverage. In this regard, several California courts have applied this interpretive rule and held that lawsuits alleging California Labor Code and PAGA violations can fall within the broad coverage provided by EPL insurance policies. For instance, California courts have held that such alleged violations can trigger coverage in EPL policies for “employment-related misrepresentations,” employment-related “discrimination,” “failure to adopt, implement or enforce employment related policies or procedures,” and “false imprisonment.”

In addition, the SoCal Pizza court confirmed the scope of an EPL insurer’s duty to defend, emphasizing that the duty to defend is broader than the duty to indemnify and will not necessarily turn on whether the amounts sought by the underlying plaintiffs are themselves covered. For this reason, an EPL insurer may owe a duty to defend even if the underlying claimants seek only wages, penalties, or other relief that the insurer contends is uncovered. Indeed, SoCal Pizza makes clear that when an EPL policy covers “Loss” and defines “Loss” to include defense costs (as is usually the case), defense costs will be covered if the underlying lawsuit includes allegations falling within the

Key Takeaways for Insured Employers

SoCal Pizza is the most recent addition to a growing body of case law confirming that claims alleging violations of the California Labor Code and PAGA can be covered under EPL insurance policies. As these decisions make clear, the broad coverage provided by EPL insurance policies may be triggered by allegations concerning the failure to pay overtime wages, failure to provide meal and rest breaks to employees, failure to provide accurate itemized wage statements, failure to reimburse necessary business expenses, failure to timely pay wages due at termination, and other alleged violations of the California Labor Code and PAGA.

Finally, SoCal Pizza provides insureds and insurers alike with a framework for evaluating insurance coverage for so-called “derivative” PAGA claims based on other alleged violations of the California Labor Code. As explained by the SoCal Pizza court, coverage for PAGA claims generally will depend on the nature of the employer’s alleged Labor Code violations. If such alleged violations would themselves fall within the coverage provided under an EPL policy, then so, too, will derivative PAGA claims. Accordingly, when evaluating coverage for PAGA claims in the wake of SoCal Pizza, courts are likely to focus on the nature of the employer’s alleged wrongful conduct and the specific Labor Code provisions that the employer is alleged to have violated.

Thus, SoCal Pizza and other decisions that came before it confirm that EPL policies can afford coverage for lawsuits alleging violations of the California Labor Code and PAGA. As these decisions demonstrate, coverage for such claims turns on the specific facts, allegations, and policy terms at issue.
1. Montrose, 6 Cal. 4th at 295 (emphasis in original).

2. Id. at 299-300.


5. Id.

6. Id. at 148.

7. Id. at 144.

8. Id. at 150.

9. Id. at 150-51.

10. Id. at 151.


12. Southern Cal. Pizza, 40 Cal. App. 5th at 153 (quoting Denning v. State, 123 Cal. 316, 323 (1899)).

13. Id. at 152-53.

14. Id. at 152.

15. Id. at 154.

16. Id.


18. Id.


21. See, e.g., Prof’l Sec. Consultants, 2010 WL 4123786, at *3 (coverage for “any employment-related misrepresentation” triggered by allocation employer “[disseminated false information regarding overtime compensation to employees]”).

22. See, e.g., PHP, 708 F. App’x at 922.


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Our courts, and the justice system generally, are accustomed to having adequate time within which to make thoughtful, deliberate, and carefully planned changes. The coronavirus (COVID-19) pandemic of 2020 eliminated the luxury of time, while still demanding careful, deliberate, and well-thought-out responses. In a court the size of the Los Angeles Superior Court, with 580 judicial officers, 4,600 employees, and 38 courthouses, the intense pressure for rapid adjustment to extraordinary public health concerns placed unprecedented demands on the creativity, commitment, and conscientiousness of judges, court employees, and superior court stakeholders. This is the story of the first 30 days of these efforts. On March 4, 2020, in response to the spread of COVID-19, Governor Gavin Newsom declared a state of emergency in California. On March 13, President Donald J. Trump declared a national emergency. Just days later, on March 16, California counties, including Los Angeles, began issuing shelter-in-place or stay-at-home orders. On March 19, Governor Newsom issued Executive Order N-33-20, requiring all Californians to stay home, subject to certain limited exemptions. Courts are included in this exemption as they provide essential services to the community; therefore, courts are required to remain open during this crisis.

Public Health agencies, including the Centers for Disease Control and Prevention (CDC), the California Department of Public Health (DPH), and local county health departments have recommended increasingly stringent social distancing measures of at least six feet between persons. Further, they have encouraged vulnerable individuals to avoid public gatherings and spaces and recommended the size of social gatherings be...
limited to less than 50, or even 10.

The continuous operation of the courts is an essential element of our constitutional form of government, providing due process and protecting the public. However, courts are clearly public spaces with high risks during this pandemic because they require gatherings of judicial officers, court staff, litigants, attorneys, witnesses, defendants, members of law enforcement, and juries, all of which include numbers well in excess of those allowed for gathering under current executive and health orders.

By early March, the dilemma was clear: whether to remain open to provide access to justice or to shut down to protect the health of the public and find other ways to maintain essential services, using technology and other means to provide access to justice while enforcing social distancing.

Reinventing the largest court in the nation during a pandemic crisis required an extraordinary effort. Full-time working groups in every litigation area, and across the court’s administrative areas, worked tirelessly to create solutions, guided by a common set of principles: 1) preserve essential functions, 2) find ways to support those functions in a manner that supports social distancing of at least six feet, 3) appropriately delay nonessential functions that cannot be safely supported, 4) craft solutions that are supported by key stakeholders and authorized by law, and 5) implement changes rapidly albeit in a way that can be sustained throughout the crisis. Court leadership had to figure out what it means to stay committed to access to justice while also being committed to flattening the curve.

**Laying the Foundations**

As Governor Newsom and Los Angeles Mayor Eric Garcetti issued orders to implement social distancing, Presiding Judge Kevin Brazile took the first of a series of actions designed to implement social distancing in the court. On March 13, relying on the inherent and limited authority the court had at that time, Judge Brazile recommended to all judicial officers that jury trials be continued to a future date. Two days later, the court closed self-help centers while encouraging telephonic appearances and online assistance. Perhaps most significantly, the court also suspended the issuance of juror summons—recognizing that the summoning, selection, seating, and deliberations of juries were inherently incompatible with the mandated level of social distancing since, on an average day, approximately 10,000 jurors may be summoned to appear in one of the 38 courthouses in Los Angeles County. The court also immediately implemented signage in English and Spanish to encourage social distancing, initiated more intensive custodial cleaning, and notified employees of the importance of hand washing and remaining at home if at-risk and when sick.

To provide a foundation for long-term planning, and relying upon authority newly granted by Chief Justice of California Tani Cantil-Sakauye, on March 16, Judge Brazile announced (and made official in his General Order of March 17) that all 38 of Los Angeles County courthouses would be closed to the public March 17 to 19, and that those days would be declared court holidays for purposes of computing filing and other deadlines. The March 17 General Order further stated that when the courthouses reopened, most courtrooms would remain closed through April 16, except for those handling time-sensitive and essential functions, including: protective orders; ex parte matters in civil and family law; emergency writs in family law, probate, mental health, and criminal law; certain criminal and juvenile hearings necessary for the protection of civil and constitutional rights; and a small number of other matters. The March 17 General Order also provided for extensions of statutory time periods across different areas of litigation.

As Judge Brazile stated: The Superior Court of Los Angeles County is committed to providing equal access to justice through the fair, timely and efficient resolution of all cases. However, it is imperative that we continue aligning our Court with the most recent directives and guidelines issued by our national, state and local public health officials.

To put these changes in perspective, in February, nearly 60,000 people went through a weapons screening station at a
Los Angeles County courthouse every day. In addition, nearly 3,000 new non-traffic cases were filed daily. A Los Angeles courthouse was a busy place full of people. In contrast, by mid-March throughout California and the world restaurants and bars were closing, schools were shuttering, businesses of all kinds were closing their doors—all in the interest of social distancing to prevent people from congregating. As an essential service, the court had to instantly reinvent ways to stay open safely.

Online Services
One of the more dramatic ways in which the court changed was the closure of clerks’ offices by court Executive Officer and Clerk of Court Sherri R. Carter, until further notice.5 Intended to support the 4,600 employees and the public in accordance with increasingly strict guidelines for social distancing, the implementation of this measure was far less disruptive than it might have been, given the technological innovations and improvements made by the court over the past several years.

Telephonic services from newly developed local calling centers, staffed with teleworking employees ready to assist, were created to handle essential services, such as restraining orders, without the need for a person to enter the courthouse. Drop boxes were installed outside courthouses for those who needed to file paper documents. Fortuitously, long—and potentially health-threatening—lines of litigants seeking to file papers and retrieve documents had already been reduced by e-filing and online document access and services.

By March 30, those 60,000 daily public entries were reduced by 90 percent, to 6,000. As witnessed in other areas of life during the pandemic—from video streaming to online courses at universities—online services have flourished to fill the gaps created by social distancing. The court is no exception.

In concert with justice system partners, including the district attorney, the public defender, probation department, the department of children and family services, and other agencies, the court immediately launched crash programs in several areas, seeking to replace in-person appearances with telephonic and video appearances. As of this writing, criminal courtrooms are conducting video arraignments. Discussions are in progress to determine if those systems can be extended to felony preliminary proceedings, among other considerations….”8

Criminal Courts
One of the court’s most serious responsibilities is to preserve public safety and individual rights throughout the criminal justice process. The dilemma posed by the COVID-19 pandemic is particularly problematic in the criminal arena in which delay is not just bothersome but may constitute a possible violation of statutory or constitutional rights. In the case of defendants held in custody prior to trial, delay is potentially life-threatening if the virus spreads in the jails. Video appearances are helpful but cannot be done at sufficient scale to avoid this dilemma.

In crisis planning, as in a specific case, the court plays a crucial role in a delicate and important balancing act, bringing together justice system partners to solve shared problems. Court justice partners have agreed upon lists of persons to be released by the court, reflecting their best efforts to balance the public health needs of the jail population and the public safety needs of the community. The prosecutorial agencies and defense bar brought joint motions (10 in all) seeking court orders to release specified inmates on stipulated lists—inmates who will not be brought to court for a hearing until a future date but who will be released upon review and execution of multiple orders by Judge Sam Ohta, who serves as supervising judge of the Criminal Division of the Los Angeles County Superior Court. The lists were vetted and agreed upon by the Los Angeles County District Attorney’s Office, Los Angeles County Public Defender’s Office, Los Angeles County Alternate Public Defender’s Office, Indigent Criminal Defense Appointments (ICDA Bar Panel), and the Los Angeles County Sheriff’s Department, representing an extraordinary consensus and collaboration in response to an extraordinary situation.

In the midst of the crisis, it was reported that “[t]he Los Angeles County Sheriff’s Department is releasing inmates from its jails and cutting down on how many people it books into custody to protect those housed in close quarters from the growing coronavirus pandemic.”6 The court responded with a revised bail schedule on March 27, 2020: The Court’s revised bail schedule, as recommended by the [Chief Justice of California], lowers bail on many misdemeanors and low-level felonies to $0. This means, for those offenses where the bail amount is $0, instead of taking the arrested individual into custody and setting a bail amount, the person would be released with a return date to Court. This will assist in reducing incoming workload on arrests which, in all likelihood, would result in a release at a bail hearing.7

As in other areas, what cannot be handled remotely must be delayed. Over the weekend of March 28-29, the governor, chief justice, and the Judicial Council of California acted in concert to strengthen the ability of the superior courts to delay criminal matters. In the words of the chief justice, such an action followed “careful consideration, balancing the constitutional due process rights of parties in both criminal and civil proceedings with the health and safety of these parties, the public, court staff, judicial officers, attorneys, witnesses, jurors, and others present at these proceedings, among other considerations....”8

Using the authority granted by the chief justice’s March 30 order, Judge Brazile issued an order on April 2 extending the time limits for arraignments, preliminary hearings, and criminal trials, providing much needed relief to those involved in ongoing criminal cases that could not be handled remotely.9

Civil, Family, and Probate
Outside of the tightly scheduled world of the criminal courts, and apart from essential and time-sensitive matters, delay is inescapably more prevalent. Such delays will be addressed as more knowledge and experience are gained about the pandemic and as what is allowable is further identified.

With eviction cases, public policy dictated the response. The initial extension of deadlines for responses in eviction cases (in Judge Brazile’s General Order of March 17) became a moratorium. Judge Brazile’s Order of March 19 explained:

In light of Governor Newsom’s Executive Order urging emergency action to promote housing stability and security, the moratoriums on evictions imposed in both the County of Los Angeles and the City of Los Angeles, and the court’s inability to hold unlawful detainer related hearings throughout
the emergency period, the court finds good cause to continue all unlawful detainer trials without a determination pursuant to Code of Civil Procedure section 1170.5(c).10

Not everyone who provides access to justice does so in a courtroom, or even behind the window at the clerk’s office. Thousands of court employees perform functions that are considered essential. A major challenge is to provide a safe environment within which they can continue to do their work. Here again, recent technological innovations and improvements came to the rescue. For many court employees, essential services plus safe-at-home equals remote telework.

It was 10:00 A.M. on Friday, March 13, when Carter learned that the Los Angeles Unified School District and many other districts across the county would close their schools the following Monday. By 4:00 P.M. that day, Carter had created and offered a new telework program to all employees, especially focusing on those employees with children at home or who were over 65, or otherwise at risk.

Recent efforts at creating a more efficient and electronic environment (e.g., through e-filing, paperless case files, and enhanced online services for court users) have yielded an enormous payback in the current crisis by supporting a telework environment. More and more of the work done by clerical staff and others is computerized. With provisions for secure logins and the recent focus on online security, many court staff can effectively and securely serve the public from home.

Of the court’s 4,600 employees, more than 90 percent are currently able to telework safely from home, thus supporting access to justice. In the court’s administrative units (technology, human resources, budget and finance), managers were able to quickly shift staff to remote work, where they not only continue their normal support activities but also have completed dozens of crash projects that support the court’s pandemic responses. For example, the newly created call center automatically routes calls to the correct clerical employee—currently working at home—who can schedule a courtroom appointment for urgent matters or inform the caller of relevant delays or other provisions that affect his or her matter. A local call center is available for each of the court’s 38 courthouses.

Courthouses have long reflected the community outside, and the quiet streets of Los Angeles County are reflected in depopulated courthouse hallways. In February, during normal court operations, about 568 courtrooms were opened for business. As of this writing, 175 courtrooms are operating, with plans for that number to be reduced even more.

The remaining courtrooms are not empty, but they are safer. Time-sensitive, essential functions that must be done in person are being done in more sparsely populated spaces. The court has arranged increased janitorial services in all courthouses, adding a second daily cleaning and disinfection of public areas, including restrooms, public counters, and high-touch areas—right down to elevator buttons, elevator handrails, escalator handrails, door-knobs, push-pull handles, and visitor benches in the hallways. Weapons screening remains a key feature of courthouse security, so the court and sheriff provide increased disinfecting of the screening stations, and the court provides screening attendants with disinfectant wipes to frequently wipe down high-touch surfaces, such as the bowls used to carry small items through the screening machine.

For those who have a scheduled matter and need to enter a courthouse, and for those inside as well, social distancing is enforced. Sheriff and court public safety staff monitor hallways, lobbies, and courtrooms, as well as direct visitors, to stay at least six feet apart inside and outside the courthouses.

Recent developments are fast-moving and will continue to happen at warp speed. Court leadership is in constant contact with the Judicial Council of California and the chief justice, helping to ensure an effective statewide response and to secure the appropriate authority for the actions needed in Los Angeles County. Court leaders maintain continuing close contact with all county partners, gathering information from the CDC, the DPH, and the county Office of Emergency Management.

As public officials and health experts learn more about effective responses to the pandemic, the court’s strategies will shift as needed. Meanwhile, the court must keep litigants, stakeholders, and the public informed. The court’s Website (lacourt.org) is regularly updated with the latest changes in court services, and frequent news releases help the media keep their readers informed.

The court has created a page dedicated to the latest and most comprehensive information about the court’s responses to the pandemic.

A Threat Like No Other

As the largest trial court system in the nation, one that serves such a diverse, dynamic—and, at times, unique—community, the court has seen its share of challenges. In the 1990s, riots threatened courthouses and swelled criminal courtrooms to the breaking point. Earthquakes have rattled and damaged courthouses. Sudden and severe financial collapses have forced sudden and severe budget contraction twice in the past two decades. Through it all, the court endured and continued to provide access to justice. The doors that were open may have been fewer, but they remained open as decades of court leaders refused to turn people away.

The current pandemic has turned that commitment on its head. Suddenly, open doors are more of a threat to the public than closed ones. There could be no preparation for a threat like this. Rapid, creative, and bold responses have been required, tempered always by respect for the rule of law, the rights of individuals, and the demands of justice. Such responses will continue to be needed in the coming months. Indeed, the “reopening” of the court, whenever it comes and at whatever pace it takes, may prove as challenging as was its sudden reinvention in March. Nonetheless, the court endures and will always remain open to the degree circumstances permit in order to assure access to justice.

Indeed, Presiding Judge Brazile and Executive Officer Carter stand committed to serving the public and providing access to justice in the current environment and to meeting whatever challenges the future may bring.

3 Id.
4 Id.
5 Id.
6 Alex Tchehmedyan et al., L.A. County releasing some inmates from jail to combat coronavirus, L.A. TIMES, Mar. 16, 2020; see also COVID-19 Press Release, supra note 2.
7 Letter from Supervising Criminal Judge Sam Ohata to law enforcement agencies in Los Angeles County re Interim Revised Bail Schedule (Mar. 27, 2020).
9 Press Release, supra note 2.
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commit, promote, and enable international tax crimes and money laundering. The J5 also announced the following collaborative results:

- Collective work on more than 50 investigations involving sophisticated international enablers of tax evasion, including a global financial institution and its intermediaries who facilitate taxpayers to hide their income and assets.
- Cooperation on cases covering crimes from money laundering and the smuggling of illicit commodities to personal tax frauds and evasion.
- Hundreds of data exchanges between J5 partner agencies with more data being exchanged in the past year than the previous 10 years combined.

The first year of the J5 clearly signaled the emphasis on working together to leverage each country’s capabilities and access to information, within existing treaties and laws, so as to enhance the overall effectiveness and success with one goal in mind: to combat cross-border financial tax crimes. Financial crime occurs on a global scale with proceeds of crime transferred among jurisdictions, or, stated another way, tax crime crosses international borders.

In a relatively short amount of time, the J5 leaders have been able to facilitate their respective countries’ abilities not only to share information and open new cases but also to more rapidly develop existing cases. Working to reduce the time it takes to do one’s job is good business. Facilitating international law enforcement’s ability to avoid duplication of efforts and share information in real time to more efficiently and timely disrupt crime on a global level is better business.

To achieve this goal, the J5 partners have focused on building the domestic skillset of like-minded international tax administrations and law enforcement agency partners to collectively develop strategies to combat global tax cheats. The J5 has focused on platforms that enable each country both to share information and to do so in a more organized manner. One such platform is FCInet, which each country has invested in to further that goal.

A decentralized virtual computer network enabling agencies to compare, analyze, and exchange data anonymously, FCInet helps users to obtain the right information in real-time and enables agencies from different jurisdictions to work together while respecting each other’s local autonomy. Organizations can jointly connect information, without needing to surrender data or control to a central database. FCInet does not collect data; it connects data. The J5 made clear it would focus on shared areas of concern and cross-national tax crime threats, including cybercrime and cryptocurrency as well as enablers of global tax evasion while working to share intelligence and data in near real time.

The Web Is Not All That Dark

As criminals continue to find new methods to commit tax fraud and launder illegal proceeds, the J5 also has committed to keep pace with investigating these egregious financial crimes. Tax fraud on any level, including international, is not a new crime. The sophistication with which criminals commit tax fraud has significantly increased through cyber-related activities in recent years. Data breaches, intrusions, takeovers, and compromises are the new tools that criminals use to commit tax crimes.

True to its word, in November 2019, the J5 publicly turned its focus to cryptocurrency as experts from each country gathered in Los Angeles with the mission of optimizing data from a variety of sources available to each country to identify and hold accountable tax cheats and other criminals who attempt to use the dark web and cryptocurrency to commit financial crimes. Specific training was provided on virtual currency, blockchain, and the dark web, as well as advanced training concerning cryptocurrency tracing and open source intelligence.

Using various analytical tools, members of each country were put into teams tasked with generating leads and finding tax offenders using cryptocurrency based on the new data available to them to make connections when current individual efforts would take years to make those same connections, if ever. Cutting through red tape and using the J5 as a force multiplier, this J5 gathering facilitated real investigators, using real data, finding real criminals through leads, trends, methodologies, and investigations that encouraged all the J5 countries to further current and future investigations under the J5 umbrella.

On January 23, 2020, the J5 announced that they had carried out a “day of action” targeting an unnamed

Central American financial institution suspected of facilitating money laundering and tax evasion for customers “across the globe” and collectively executing search warrants, interviews, and subpoenas expected to result in further criminal, civil, and regulatory action being taken by law enforcement in each country.

The investigation began with information obtained by the Netherlands. The coordinated enforcement action garnered leads on hundreds of Australians who were identified as clients of the bank. The amount of tax evasion and money laundering involving the institution’s clients was estimated at more than £200 million in the United Kingdom alone.

Offshore evasion is an international issue that calls for joint international solutions. In just two years, the collective actions of the J5 appear to be a significant and effective step in that direction. Taken together with the IRS’s recent domestic fraud enforcement efforts, the IRS has demonstrated its commitment to combatting criminal tax evasion, both domestically and internationally.

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3 CRIMINAL INVESTIGATION ANNUAL REPORT 2019, supra note 1, at 73.
4 Id.
7 Id.
10 Id.
11 C RIMINAL INVESTIGATION ANNUAL REPORT 2019, supra note 1, at 9.
12 Id.
14 Id.
15 IR-2019-199, supra note 5.
16 Id.
18 C RIMINAL INVESTIGATION ANNUAL REPORT 2019, supra note 1, at 4.
19 Id. at 8.
20 Id. at 14.
21 Id. at 13.
23 C RIMINAL INVESTIGATION ANNUAL REPORT 2019, supra note 1, at 75-74.
25 C RIMINAL INVESTIGATION ANNUAL REPORT 2019, supra note 1, at 73.
27 C RIMINAL INVESTIGATION ANNUAL REPORT 2019, supra note 1, at 74.
30 Id.
32 Id.
33 Id.
35 Id.
37 Id.
The Future of ADR After the Coronavirus

by Jan Frankel Schau

The 1976 Pound Conference offered a revolutionary “big bang” concept of Alternative Dispute Resolution (ADR) and transformed the American legal justice system. Chief Justice of the Supreme Court Warren Burger articulated a vision for a more “informal” justice system that included qualitatively better options and a broader range of substantive remedies. Harvard Law Professor Frank E.A. Sanders envisioned a system in which the parties would be empowered in procedure and would be granted a voice in the decision-making process, democratizing the way justice was attained.

Efficient and Timely
University of California, Irvine Law Professor Carrie Menkel-Meadow saw ADR as a “co-optation” of the more formal and legalistic approach to problem-solving. Mediation offered both qualitative efficiency, by making justice more accessible, cheaper, and faster, and quantitative efficiency, by allowing the parties to redress the legal claims and defenses as well as the underlying interests and needs of the parties.

In 2016, the original Global Pound Conference resumed through a series of meetings worldwide designed to examine and shape the future of ADR. Michael Leathes, who heads the International Mediation Institute at the Hague, called for the pressing need to “overcome the deadly drag of status quoism” and to seek a new paradigm for problem solving.

Enter the coronavirus of 2020 when, in the span of one week, the courts, law offices, and all nonessential businesses were ordered to close. Initially, the only option seemed to be to continue all previously scheduled mediation hearings, but, soon, there was a mad dash to adapt by using ZOOM or other online platforms as a substitute for face-to-face hearings.

Using ZOOM is anything but status quo, and, yet, there are many attributes that suggest this may be the new alternative to conventional ADR. ZOOM is easily accessible on any smart phone and can be used without the need for travel. The platform itself flattens the hierarchy: each participant occupies the same geographic space on the screen. The mediator can control participation by placing the participants on mute or hiding their faces, if desired, and can easily join the parties together or separate them into private breakout rooms.

Intimate Connections
Oddly, there is something intimate about a mediation on ZOOM. One can learn a lot about people when they are observed in their own comfortable surroundings. A client who speaks directly, looking at a camera on his or her own computer screen, can make a clear “connection” that is in some ways better than the one made in a sterile conference room space. There is a safety in communicating through a screen but also an intimacy when the parties are required to be free of distraction and focused on the narrative at hand.

Just as the popularity of videotaped depositions has exploded, the chance to hear the parties’ narrative in the confidential confines of a mediation via the safety of a visual platform can pave the way to better understand the other’s perspective in ways that were essential to the origins of ADR.

Professor Sanders envisioned a “multi-door courthouse” where disputes were resolved in the courts or through arbitration and mediation. With ZOOM, there are no doors or walls. There is no limit to how many cases can be mediated: conference space is unlimited and free. Undoubtedly, once the courts reopen, there will be a considerable backlog. Clients will appreciate the ability to mediate those disputes without waiting for the traditional wheels of justice to churn.

Self-Empowerment
In 1994, Joseph P. Folger and Richard A. Baruch Busch wrote a seminal book, The Promise of Mediation, in which they suggest that people not only have a chance to reach agreements and solve problems but also to transform themselves in the midst of conflict. This would give disputants a greater sense of their own efficacy and an increased openness to others, valuing personal strength and compassion above all.

The hallmark of ADR has always been to promote open-mindedness, exchange perspectives, and solve problems with creativity, flexibility, and efficiency. If online dispute resolution can foster those values, this new paradigm may be here to stay.

Jan Frankel Schau is a mediator with ADR Services, Inc., specializing in mediation of employment, tort, and business disputes.
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