

# LITIGATION



*presents*

## **2024 Litigation and Appellate Summit**

Litigation, Appellate, and ADR Update

Thursday, April 25, 2024  
9:15am - 10:45am

Speakers: Jim Wigstaffe, Jordanna Thigpen, and George Wailes

### **Conference Reference Materials**

*Points of view or opinions expressed in these pages are those of the speaker(s) and/or author(s). They have not been adopted or endorsed by the California Lawyers Association and do not constitute the official position or policy of the California Lawyers Association. Nothing contained herein is intended to address any specific legal inquiry, nor is it a substitute for independent legal research to original sources or obtaining separate legal advice regarding specific legal situations.*

© 2020 California Lawyers Association  
All Rights Reserved

*The California Lawyers Association is an approved State Bar of California MCLE provider.*

LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION

**Finding Your Ripcords**  
**Hot New**  
**Federal Practice Cases**

Jim Wagstaffe    April 25, 2024

# CLA Litigation Summit

---

**April 25, 2024**

[wagstaffe@ammcglaw.com](mailto:wagstaffe@ammcglaw.com)

 @JWagstaffeLxNx





# Rip Cords . . . Not Loose Threads



## California Pretrial Civil Procedure Practice Guide: The Wagstaffe Group

1  
Chapters 1 - 28

James M. Wagstaffe

Co-Authors:  
Steven Adamski  
Frank Busch

Editorial Consultants:  
Hon. Evelio Grillo  
Paul Kiesel  
Edith Matthai  
Hon. Richard Seabolt



## Practice Guide: Federal Civil Procedure Before Trial

James M. Wagstaffe



# Avoiding Crash Landings

LITIGATION

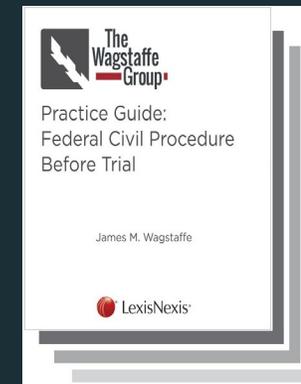
CALIFORNIA  
LAWYERS  
ASSOCIATION

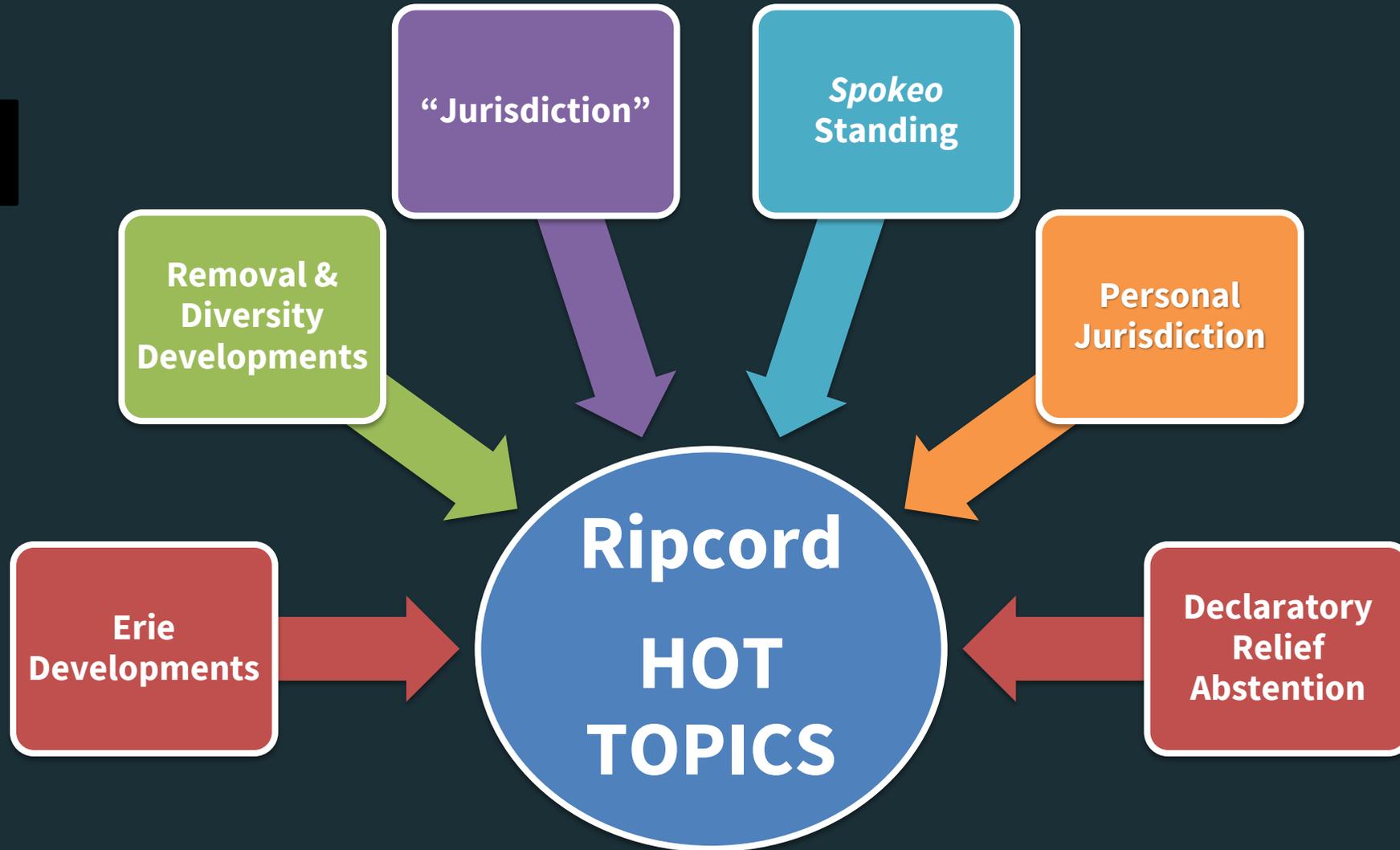
**FRCP &  
Title 28**

**CLA**

**The Wagstaffe Group  
Practice Guide: Fed. Civ.  
Pro. Before Trial & Current  
Awareness**

**PowerPoint  
Slides**





LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION



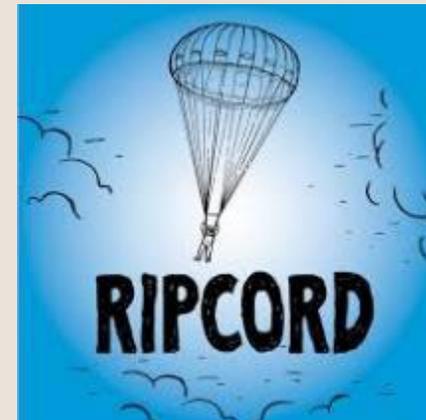
**Safe Landing:**  
**“Jurisdictional”**

# “Jurisdictional”?

Ps challenging public road over easement sued under Federal Quiet Title Act, (12-year statute of limitations)

Ps did not meet the deadline but argued it was not *jurisdictional* so they could argue that equitable doctrines might forgive the late filing

Is statutory deadline “jurisdictional” such that it is not subject to tolling?



# Not Jurisdictional

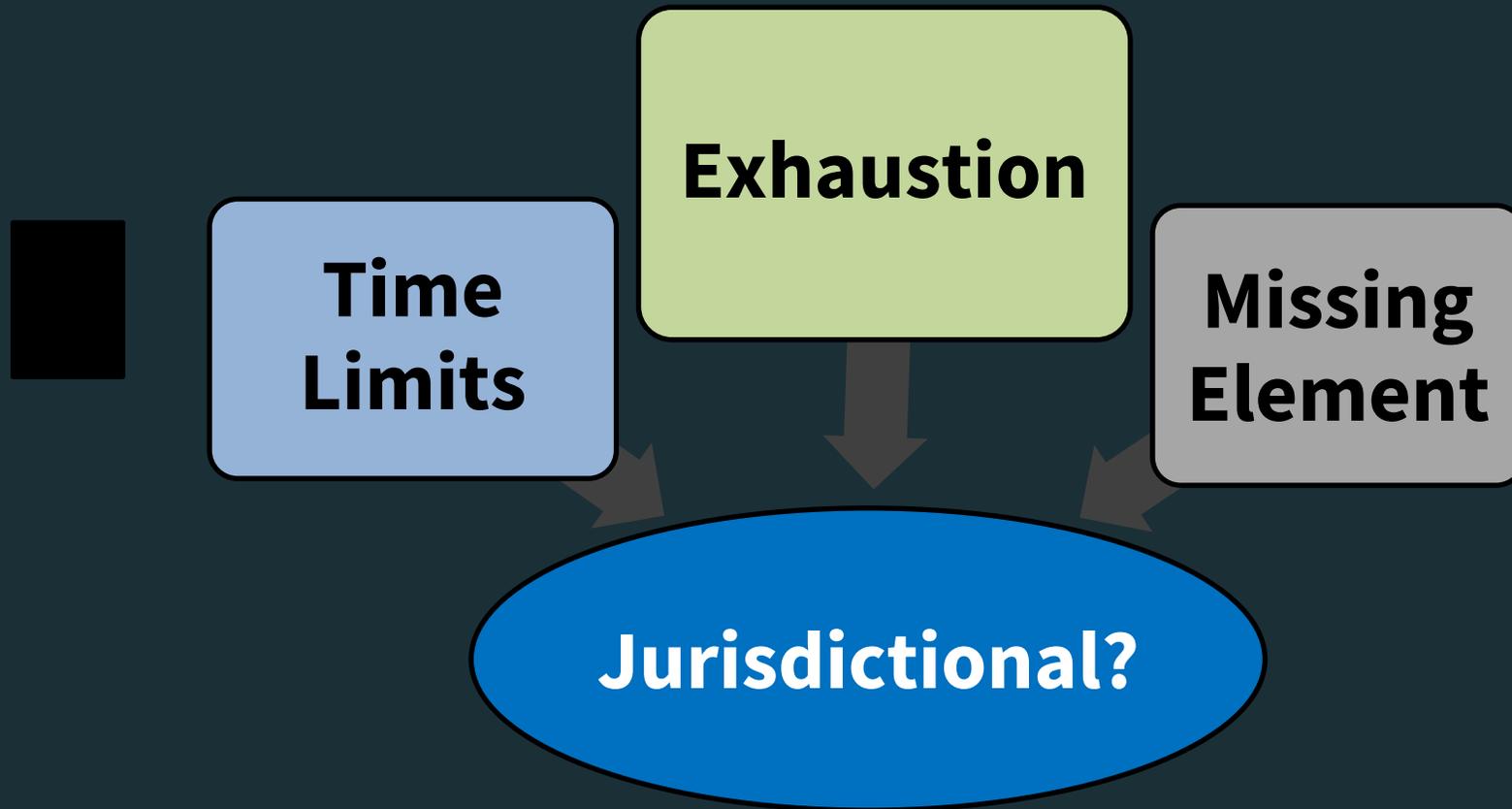
LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION

## *Wilkins v. U.S.* (2023) 143 S.Ct. 870

**Holding: Not all procedural requirements are jurisdictional; only if Congress clearly states they are; here statutory deadline is not “jurisdictional”**

**Not Jurisdictional:** *MOAC Mall Holdings LLC v. Holdco LLC* (2023) 598 U.S. 288—statute authorizing district court review of described bankruptcy determination; *Estate of Van Emburgh v. United States* (4<sup>th</sup> Cir. March 12, 2024) 2024 U.S. App. LEXIS 5867--FTCA requirements of 28 U.S.C. § 2672 (but not § 2675 ); *Wiener v. AXA Equitable Life Ins. Co.* (4<sup>th</sup> Cir. 2023) 58 F.4<sup>th</sup> 774—choice of law; *Carroll v. Trump* (2d Cir. 2023) 88 F.4<sup>th</sup> 418--presidential immunity; *ECC Int’l Constructors, LLC v. Secty. of the Army* (Fed. Cir. 2023) 79 F.4<sup>th</sup> 1364—“sum certain” requirement for Contract Disputes Act submission, 41 U.S.C. §§ 7101-7109; *Rabinowitz v. Kelman* (2d Cir. 2023) 75 F.4<sup>th</sup> 73—forum selection clause; see TWG § 5-IV



**Not Jurisdictional:** *Santos-Zacaria v. Garland* (2023) 143 S.Ct. 1103, 1110—BIA exhaustion requirement; *Donnelly v. Controlled Applic. Review* (2d Cir. 2022) 37 F.4th 44—exhaustion for naturalization; *Fort Bend Cnty., Tex. v. Davis* (2019) 139 S.Ct. 1843—EEOC exhaustion; *Culp v. Comm’r of Internal Revenue* (3d Cir. 2023) 75 F.4th 196—time limit to file with Tax Court; *Jaludi v. Citigroup & Co.* (3d Cir. 2023) 57 F.4th 148—Sarbane-Oxley’s statute of limitations and exhaustion requirements; *Martz v. Horazdovsky* (9th Cir. 2022) 33 F.4th 1157—statute of limitations for shipowner’s notice

# Rule 12(b)(1)

**No Waiver**

**No  
Supplemental  
Claims**

**Dismissed  
w/o  
Prejudice**

# Rule 12(b)(6)

**Can be  
Waived  
(Aff. Defense)**

**Supplemental  
Claims  
Discretionary**

**Dismissed  
with  
Prejudice**

LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION



**Safe Landing:**  
**Spokeo Standing**

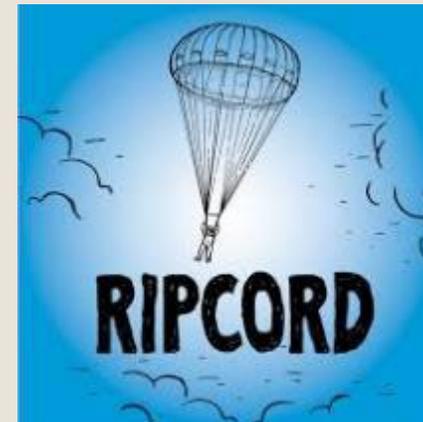
# Is there *Spokeo* Standing?

TrustedID  
hired to notify  
customers of  
data breach  
and allowed  
access to  
informational  
website using  
6 digits of SSN

Plaintiff  
accesses  
website,  
provides SSN  
numbers, and  
alleges SSN  
shared with  
credit  
company in  
violation of  
state privacy  
law

No evidence of  
identify theft  
but statute  
otherwise  
violated

MTD for  
lack of  
standing?

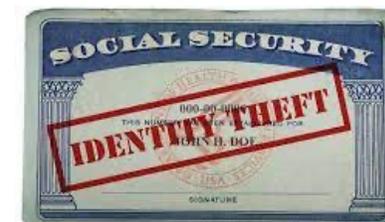


# *O'Leary v. Trustedid, Inc.*

(4<sup>th</sup> Cir. 2023) 60 F.4<sup>th</sup> 240

**Holding: No standing to sue company that violated state statute prohibiting disclosure of six-digits of plaintiffs' social security number (without password protection) since no showing of resulting identity theft, and remand required**

See *Spokeo, Inc. v. Robins* (2016) 578 U.S. 330—no standing when mere violation of statute without injury; *Phillips v. U.S. Customs & Border Prot.* (9<sup>th</sup> Cir. 2023) 74 F.4<sup>th</sup> 986—no standing for government's mere retention of illegally obtained records; *Jones v. L.A. Central Plaza LLC* (9<sup>th</sup> Cir. 2023) 74 F.4<sup>th</sup> 1053—improper to raise standing on MSJ when not challenged on MTD



# Case Alert:

## ***Acheson Hotels LLC v. Laufer*** **(2023) 144 S.Ct. 1859**

Case raises issue whether disability “tester” who incurs no actual injury has standing to sue hotel for allegedly non-compliant website? Despite split in Circuits, SCOTUS dismisses as moot since P dismissed suit (see Thomas, J., conc. – no standing)

See also *Fernandez v. 23676-23726 Malibu Road, LLC* (9<sup>th</sup> Cir. 2023) 74 F.4<sup>th</sup> 1061—no ADA standing, no jurisdiction to award defendant’s attorney fees; *Jones v. L.A. Central Plaza LLC* (9<sup>th</sup> Cir. 2023) 74 F.4<sup>th</sup> 1053—if standing not challenged on MTD, improper for court to raise issue on later summary judgment



# Standing & Class Actions



*TransUnion LLC v. Ramirez* (2021) 141 S.Ct. 2190-- even if FCRA violation in credit report that falsely classified individuals as on terrorist watch list, class members whose credit records not accessed lack standing; certification can be reexamined on remand



*Johannesson v. Polaris Industries, Inc.* (8th Cir. 2021) 9 F.4th 981—class based on defective ATV cannot be certified when class as defined contains members who lack standing; see also *Thomley v. Clearview AI, Inc.* (7th Cir. 2021) 984 F.3d 1241—no certification if plaintiffs define class w/ members who lack standing

# *Williams v. Reckitt Benckiser, LLC*

(11th Cir. 2023) 65 F.4th 1243

**Holding: No standing in class action for plaintiffs seeking injunctive relief per misrepresentations by brain performance supplement manufacturer – no plaintiffs plan to buy product in future.**



*Lake v. Fontes* (9<sup>th</sup> Cir. 2023) 83 F.4<sup>th</sup> 1189—no standing for candidates seeking to bar electronic voting tabulation systems in future elections since allegation “hackable” voting machines speculative; **cf.** *Webb v. Injured Workers Pharmacy LLC* (1st Cir. 2023) 72 F.4th 365—standing for data breach class action plaintiffs since some stolen personal info misused; *Bohanak v. Marsh & McLennan Companies, Inc.* (2d Cir. 2023) 79 F.4<sup>th</sup> 276—same - plaintiff’s identifying information actually accessed by a third party leading to identity theft; *Iten v. County of Los Angeles* (9<sup>th</sup> Cir. 2023) 81 F.4<sup>th</sup> 979—landlord has standing to bring claim under Contracts clause challenging county’s moratorium on evictions; *Van v. LLR* (9<sup>th</sup> Cir. 2023) 61 F.4<sup>th</sup> 1053—even de minimis injury sufficient for class plaintiffs standing

APRIL 2019

## Five Essential Tips for Surviving the Supreme Court's Tectonic Changes to the Meaning of "Jurisdiction" and the **Spokeo** Standing Earthquake



When Dorothy reacted to the earthshaking storm by telling Toto they weren't in Kansas anymore, she was expressing what litigators may feel when examining the tectonic changes underway in the U.S. Supreme Court as to what is meant by "subject matter jurisdiction" and Article III standing. And make no mistake about it, surviving these tremblors means more than a quick reading of the hot-off-the-press June 2019 decision in *Fort Bend County* as the latest word on jurisdiction and other recent cases addressing the *Spokeo* juggernaut.

**"Jurisdiction" – the Word With Limited Meaning under *Fort Bend County***

reaffirmed that "the word 'jurisdictional' generally is reserved for prescriptions delineating the classes of cases a court may entertain (subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction)." In contrast, reasoned the Court, an exhaustion requirement—even if mandated by statute—is a claims-processing rule that will be enforced if properly raised, but one that may be forfeited if the party waits too long to raise the point.

Thus, the High Court continued its attack on what it calls the "profligate use" of the term "jurisdiction" in situations where Congress did not expressly and clearly describe the

LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION



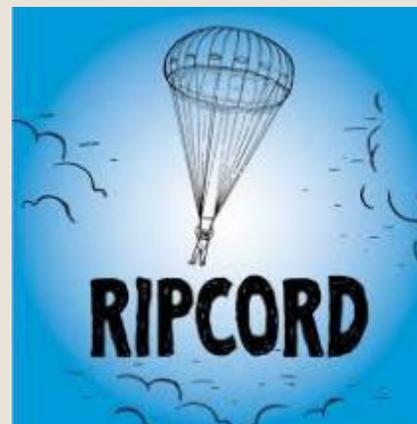
**Safe Landing:  
Big Changes in  
Removal**

# Is There Federal Jurisdiction?

Assisted living home resident passes away and daughter sues in state court for medical negligence for not protecting against risks of exposure to the coronavirus

D removed as “substantial federal question” under PREP Act (granting immunity from suit for losses resulting from certain Covid-19 counter-measures and providing compensation funds)

**Motion to remand for lack of jurisdiction?**



# GRANT

LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION

## ***Martin v. Baj Management* (C.D. Cal. March 20, 2024) (Kronstadt, J.) 2024 U.S. Dist. 49518**

**Holding: Federal immunity not completely preemptive (only a federal defense), and no federal officer removal since rest home not acting under federal officer or agency**

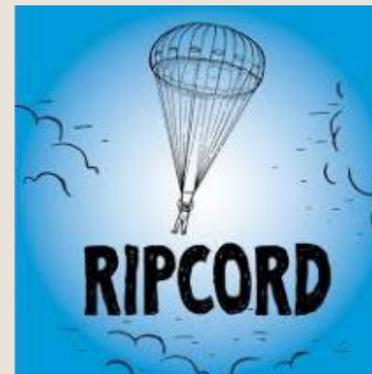
See *Le Carre v. Alliance HC II LLC* (3d Cir. Feb. 16, 2024) 2024 U.S. App. LEXIS 3692--same; *Solomon v. St. Joseph Hosp.* (2d Cir. 2023) 62 F.4<sup>th</sup> 54—same; *Mitchell v. Advanced HCS, L.L.C.* (5th Cir. 2022) 28 F.4<sup>th</sup> 580--same; *Cagle v. NHC Healthcare-Maryland Heights LLC* (8th Cir. 2023) 78 F.4<sup>th</sup> 1071—same; *Hudak v. Elmcroft of Sagamore Hills* (6<sup>th</sup> Cir. 2022) 58 F.4<sup>th</sup> 845—same; *Saldana v. Glenhaven Healthcare LLC* (9th Cir. 2022) 27 F.4<sup>th</sup> 679—same; see also *Maney v. Brown* (9<sup>th</sup> Cir. 2024) 91 F.4<sup>th</sup> 1296--PREP Act does provide immunity and thus dismissal of **§1983** claims brought by Oregon state inmates for damages for assignment of lower COVID-19 § vaccination tier than to correctional officers; *Vlaming v. West Point Sch. Bd.* (4th Cir. 2021) 10 F.4<sup>th</sup> 300—no removal of wrongful termination simply because D has Title IX defense; TWG § 6-VI[A][1], § 8-V[E]

# Is There Federal Jurisdiction?

Local government  
sued oil  
companies in  
state court in tort  
for their  
promotion of  
fossil fuel  
products  
“knowing their  
connection to  
climate change”

Defendants removed  
asserting “federal  
officer” removal  
and as “substantial  
federal question”  
saying suit  
interfered with  
their First  
Amendment right  
to advertise

**Motion to  
remand for  
lack of  
jurisdiction?**



# GRANT

LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION

## ***Anne Arundel Cty. v. B.P., P.L.C.* (4<sup>th</sup> Cir. 2024) 94 F.4<sup>th</sup> 343**

**Holding: Climate change liability not removable as state claims do not arise under federal law; no federal officer removal as government does not direct action**

*See also Minnesota v. API* (8<sup>th</sup> Cir. 2023) 63 F.4<sup>th</sup> 703--(same; *Dist. of Columbia v. Exxon Mobil Corp.* (D.C. Cir. 2023) 89 F.4<sup>th</sup> 144– same; *State of Conn. v. Exxon Mobil Corp.* (2d Cir. 2023) 83 F.4<sup>th</sup> 122—same; *City & Cnty. of Honolulu v. Sunoco LP* (9<sup>th</sup> Cir. 2022) 39 F.4<sup>th</sup> 1101--same; *City of Hoboken v. Chevron* (3d Cir. 2022) 45 F.4<sup>th</sup> 699—same; *Spivey v. Chitimacha Tribe* (5<sup>th</sup> Cir. 2023) 79 F.4<sup>th</sup> 444—*sua sponte dismissal* of removed action not allowed if no jurisdiction due to tribe’s sovereign immunity; remand required

# Case Alert:

## ***Badgerow v. Walters* (2022) 142 S.Ct. 1310**

**Court holds removal jurisdiction does not exist on petition to vacate arbitration even if underlying claim was federal question (no “pass through” analysis as in petition to confirm); see also *Hursh v. DST Systems, Inc.* (8<sup>th</sup> Cir. 2022) 54 F.4<sup>th</sup> 561; *Conti 11. Container Schiffart-GmbH & Co. v. MSC Mediterranean Shipping Co.* (5<sup>th</sup> Cir. 2024) 91 F.4<sup>th</sup> 789-- *Badgerow* does not apply to personal jurisdiction; TWG § 8-V[B], 8.52**



# Why Issue an Order to Show Cause?

LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION



*See, e.g. Caribe Chem Dist. Corp. v. So. Agric. Insecticides, Inc.* (1st Cir. March 13, 2024) 2024 U.S. App. 6178--court applies voluntary-involuntary rule; *Protopapas v. Travelers Cas. and Surety Co.* (4<sup>th</sup> Cir. 2024) 94 F.4<sup>th</sup> 351 -- clause giving opponent of one insurer defendant choice of state court precluded removal

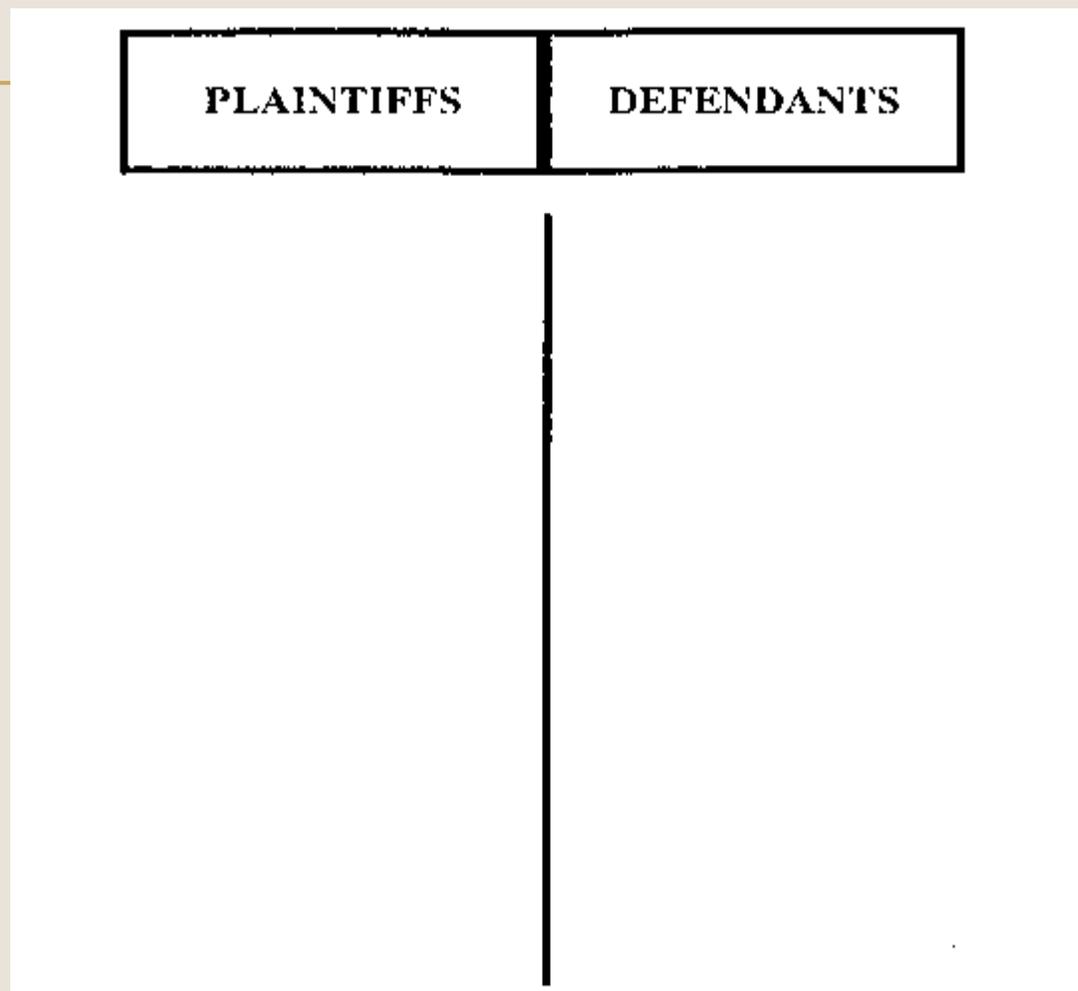
LITIGATION

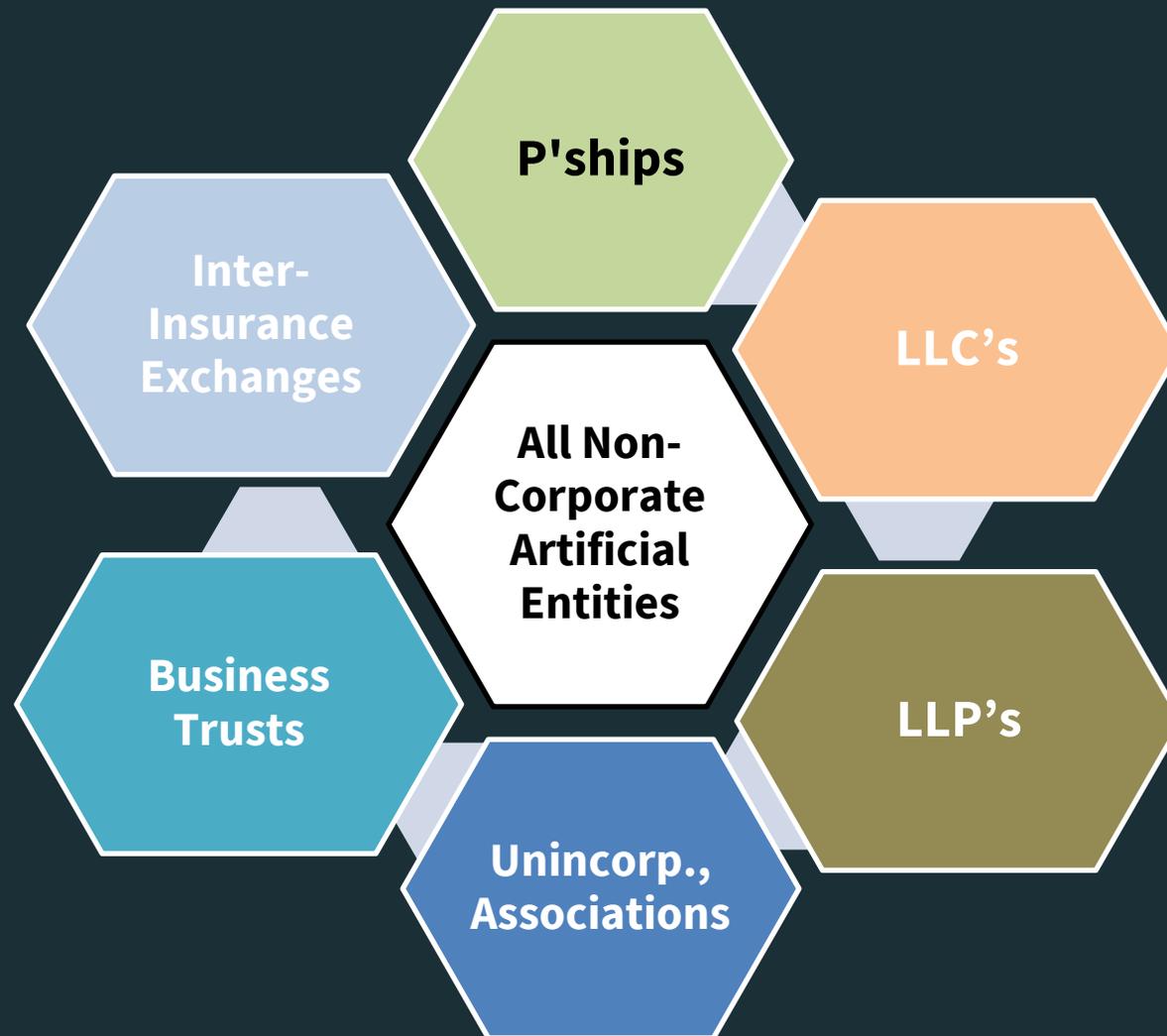
CALIFORNIA  
LAWYERS  
ASSOCIATION



**Safe Landing:**  
**Complete**  
**Diversity**  
**Requirement**

# Diversity Algebra





***Yancheng Shanda v. Wan* (7<sup>th</sup> Cir. 2023) 59 F.4th 262—must show citizenship of all partners, members of LLC's and corporations; *Prospect Holdings (NY), LLC v. Ronald J. Palagi, P.C., L.L.C.* (8<sup>th</sup> Cir. 2023) 76 F.4th 785—dismissal since petition to vacate arbitration did not plead parties' citizenship**

# Rule Alert:

## Fed. R. Civ. P. 7.1 (eff. 12/1/22)

**All parties in diversity cases must on first appearance file disclosure statement with names and citizenship of every individual/entity whose citizenship attributed to party**

*Ashford v. Aeroframe Servs., L.L.C.* (5<sup>th</sup> Cir. March 19, 2024) 2024 U.S. App. LEXIS 6733--court aligns parties in deciding complete diversity; *Qi Qin v. Deslongchamps* (7<sup>th</sup> Cir. 2022) 31 F.4<sup>th</sup> 576—no “preservation” deposition to determine LLC’s citizenship; *Stryker Emp. Co., LLC v. Abbas* (6<sup>th</sup> Cir. 2023) 60 F.4<sup>th</sup> 372--post-removal court (with conclusory removal notice) can examine and find satisfied complete diversity and amount-in-controversy; **cf.** *Pace v. Cirrus Design Corp.* (5<sup>th</sup> Cir. 2024) 93 F.4<sup>th</sup> 879--sham parties ignored in diversity removal calculation when fraud not specifically alleged



LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION



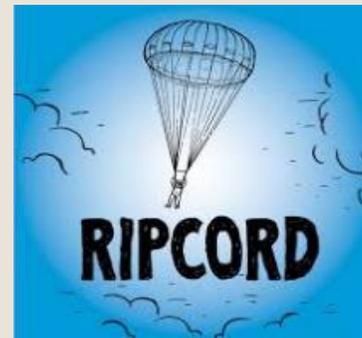
**Safe Landing:**  
**Declaratory**  
**Relief Abstention**

# Can Court Decline Dec. Relief?

Opioid distributor, named in multiple suits, sues its insurer in Ohio state court seeking a declaration as to D's duty to defend

Insurance company removes action to federal court on diversity grounds, and P files motion to remand asserting court should decline to hear declaratory judgment case

Motion to remand asking court to decline jurisdiction?



# GRANT

LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION

## ***Cardinal Health, Inc. v. Nat'l Union Fire Ins. Co* (6<sup>th</sup> Cir. 2022) 29 F.4<sup>th</sup> 792**

### **Discretion to Decline and abstain from deciding declaratory judgment case**

*See Wilton v. Seven Falls Co.* (1995) 515 U.S. 277; *Brillhart v. Excess Ins. Co. of America* (1947) 316 U.S. 491; *Protective Life Ins. Co. v. Kallel* (S.D. Cal. Jan. 18, 2024) 2024 U.S. Dist. LEXIS 9468 (Lopez, J.)—order staying action; *Medical Mut. Ins. Co. of North Carolina v. Littaua* (4<sup>th</sup> Cir. 2022) 35 F.4<sup>th</sup> 205—discretion to decline parallel declaratory relief coverage case; *Admiral Ins. Co. v. Niagra Transformer Corp.* (2d Cir. 2023) 57 F.4<sup>th</sup> 85; *Nat'l Trust Ins. v. So. Heating & Cooling* (11<sup>th</sup> Cir. 2021) 12 F.4<sup>th</sup> 1278; *Argonaut Ins. Co. v. St. Francis Med. Ctr.* (9<sup>th</sup> Cir. 2021) 17 F.4<sup>th</sup> 1276

# ***Case Alert:***

***Great Lakes Insurance SE v. Raiders  
Retreat Realty Co. (2024) 144 S.Ct.  
637***

---

**Choice-of-law provisions in maritime contracts are presumptively enforceable under federal admiralty law, and not rendered unenforceable as contrary to even a strong state law public policy**



LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION



**Safe  
Landing:  
Personal Jx**

# “Relating to” ?

LG Chem  
(So. Korea)  
sold 18650  
lithium-ion  
batteries in  
Michigan to  
distributor  
for  
bundling in  
other  
products

Sullivan buys  
standalone  
18650  
batteries  
from Michigan  
vape shop for  
use in e-cigs  
and they  
“explode”  
causing  
serious  
injuries – &  
not sure these  
are same

LG Chem  
asserts its  
Michigan  
*resale*  
market  
sales are  
unrelated  
to  
Sullivan’s  
standalone  
*consumer*  
market  
purchase

Motion to  
dismiss for  
lack of  
personal  
juris.?



# DENY

LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION

## ***Sullivan v. LG Chem, Ltd.* (6<sup>th</sup> Cir. 2023) 79 F.4<sup>th</sup> 651**

**Holding: LG Chem's servicing of market with the same type of product sufficiently *related* to injury in question**

***Contrast: Yamashita v. LG Chem, Ltd.* (9<sup>th</sup> Cir. 2023) 62 F.4<sup>th</sup> 496, 506—no jurisdiction when defendant battery manufacturer does not sell stand alone products in forum; *LG Chem, Ltd. v. Superior Court* (2022) 80 Cal. App. 5<sup>th</sup> 348, 365—no jurisdiction when forum-based battery sales not related to battery causing injury in question; *B.D. v. Samsung SDI & Co., Ltd.* (7<sup>th</sup> Cir. 2024) 91 F.4<sup>th</sup> 856--sales of batteries to third party retailer may be insufficient contact calling for discovery**

# International Shoe & Modern Formulation



**Due Process requires  
Defendant have certain  
minimum contacts with forum  
state such that maintenance  
of suit does not offend  
traditional notions of fair play  
and substantial justice**

See, e.g., *Davis v. Cranfield Aerospace Solutions, Limited* (9<sup>th</sup> Cir. 2023) 71 F.4<sup>th</sup> 1154, 1158 (federal court in Idaho may not exercise jurisdiction over an English corporation in action by plaintiffs from Louisiana and Indiana for plane accident in Indiana)

# ***Ford Motor Co. v. Montana 8th Judicial Dist. (2021) 141 S.Ct. 1017***



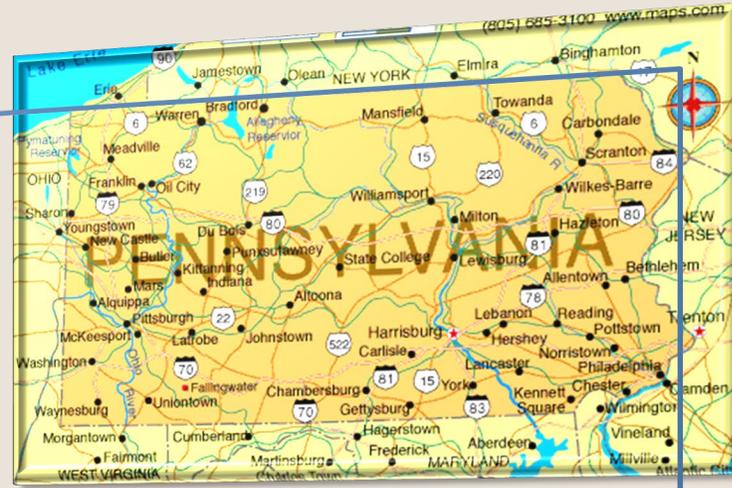
- **Specific jurisdiction if P’s claims arise out of or relate to the D’s forum contacts (“case-linked”). Ford “systematically served” the market, creating “strong relationship” among the defendant, the forum and the litigation.**

**See also *Shambaugh & Son, L.P. v. Steadfast Ins. Co.* (5<sup>th</sup> Cir. 2024) 91 F.4th 364 – no jurisdiction over out-of-state insurer where procurement and enforcement of policies not in forum; *Impossible Foods Inc. v. Impossible X LLC* (9<sup>th</sup> Cir. 2023) 80 F.4th 1079—personal jurisdiction upheld in trademark declaratory relief suit since prior (pre-infringement) brand building occurred in forum; *Johnson v. Griffin* (6<sup>th</sup> Cir. 2023) 85 F.4th 429—personal jurisdiction upheld when out-of-state defendant making defamatory posts about forum resident with intent to get him fired; *AMA Multimedia, LLC v. Wanat* (9<sup>th</sup> Cir. 2020) 970 F.3d 1201—no personal jurisdiction for infringement claims despite geotagging ads for forum residents; cf. *Doe v. Webgroup Czech Repub.* (9<sup>th</sup> Cir. 2024) 89 F.4th 1188 --jurisdiction upheld when Ds targeted website at U.S. market; TWG § 10-VIII[[A][1], 10.350**



Mallory

v.



Norfolk So. Ry. Co.



Injury in Virginia . . .  
Suit in Pennsylvania

**Consent by Registration?**

## Corporate Registration Statutes

“Consent” Can Also Include Subjecting  
registered corporation to General  
Jurisdiction in Forum State

*Mallory v. Norfolk Southern Railway Co.*  
(2023) 143 S.Ct. 2028

# **For Limited Personal Jurisdiction, Count the Minimum Contact “Rocks” Related to the Cause of Action Itself**



LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION



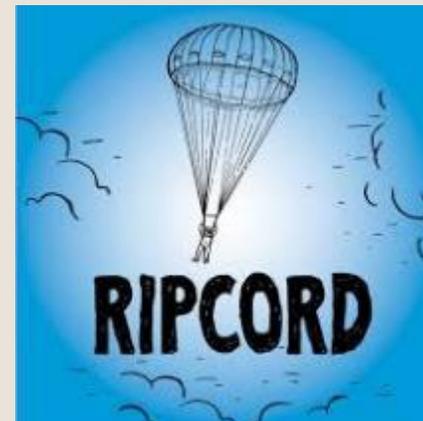
**Safe  
Landing:  
Erie Doctrine**

# State Tort Reform Statute Substantive?

**CoreCivic,  
operator of private  
prisons and  
immigrant  
detention centers,  
accused of housing  
children separated  
from parents**

**D in federal court  
moves to strike  
defamation lawsuit  
under California's  
anti-SLAPP statute**

**Does state anti-  
SLAPP statute  
apply in federal  
court, or does it  
conflict with FRCP?**



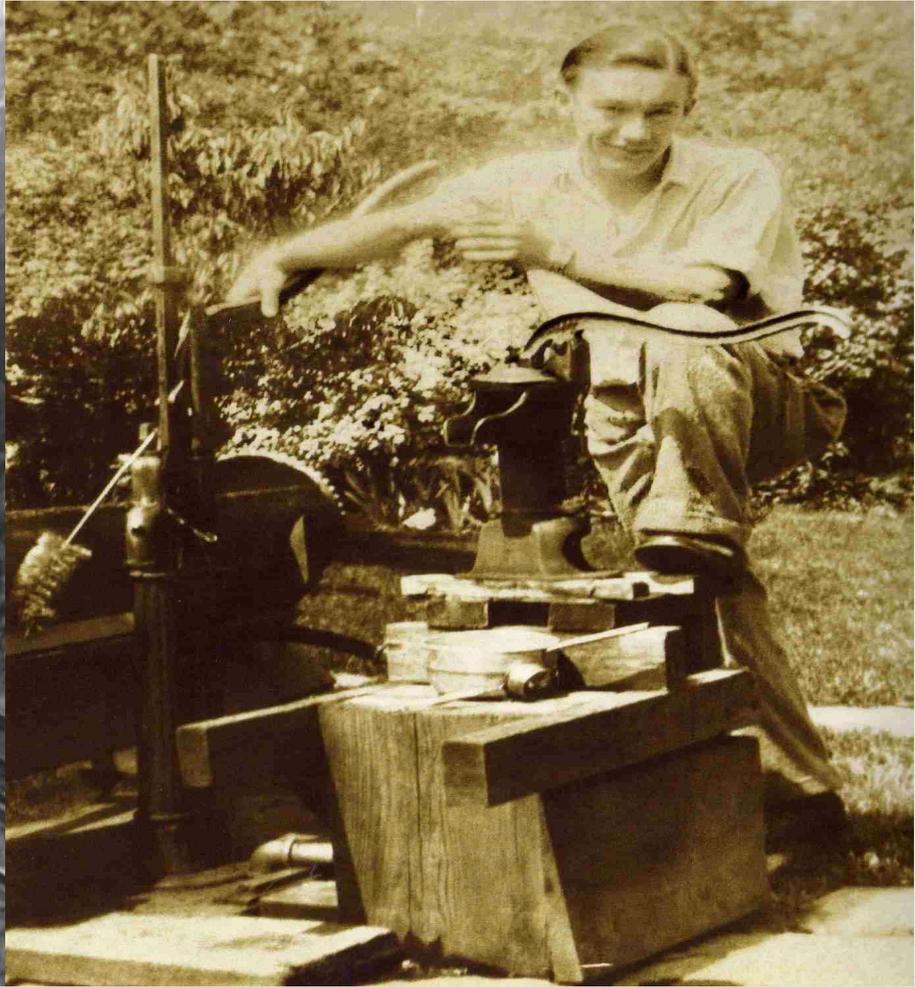
# State Anti-SLAPP Statute Applies

***CoreCivic, Inc. v. Candide Group, LLC* (9<sup>th</sup> Cir. 2022) 46 F.4<sup>th</sup> 1136**

**Holding: State anti-SLAPP statute (entitlement and fee shifting) is “substantive” and thus applies to allow striking state (not federal) claims in federal court**

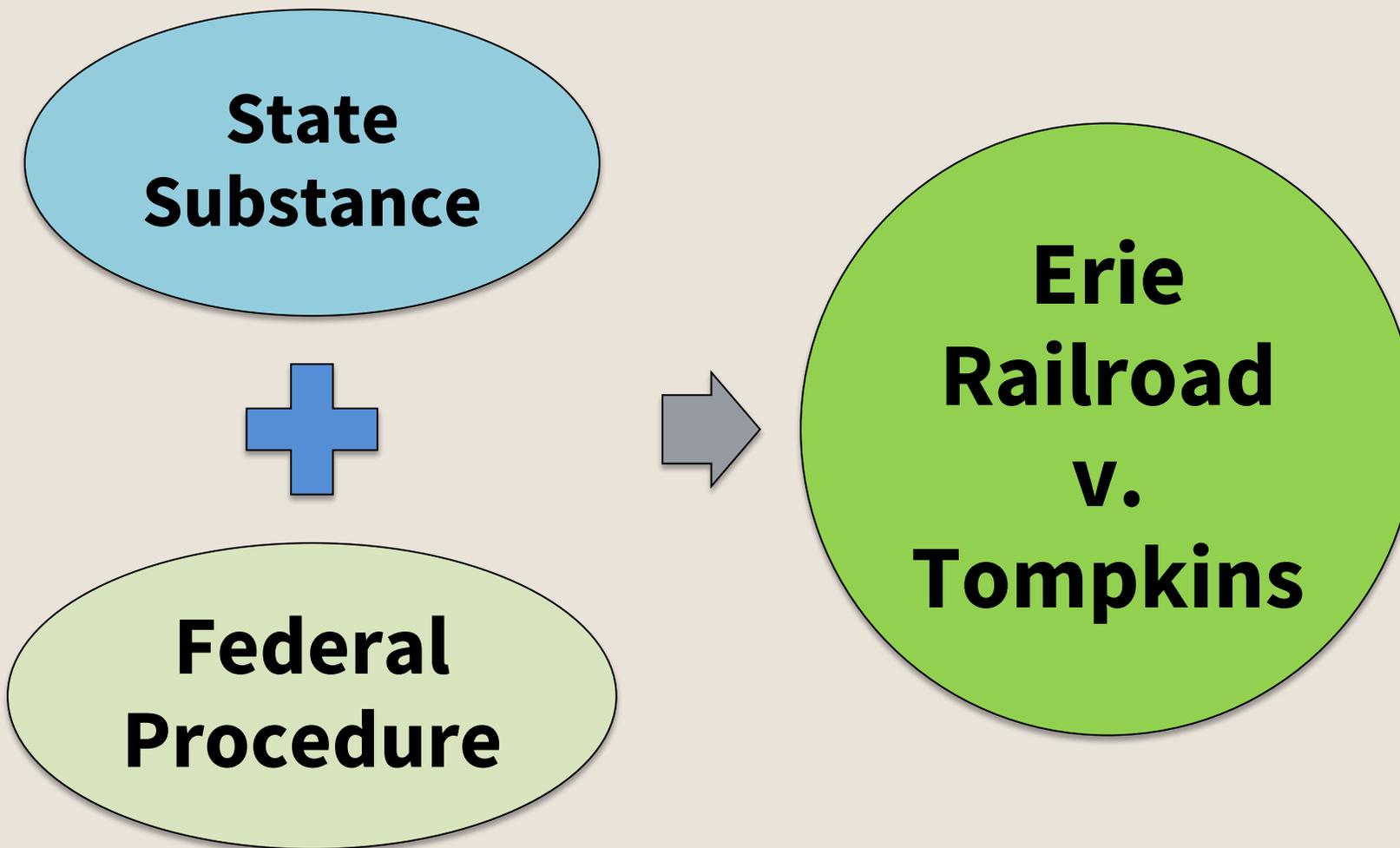
**Note: Split of Authority in Circuits; TWG § 2-III[J], 2.131**

E.g., *Carbone v. Cable News Network, Inc.* (11<sup>th</sup> Cir. 2018) 910 F.3d 1345—state anti-SLAPP statute is “procedural” and does not apply in federal court since Fed. R. Civ. P. 8, 12 and 56 are on point and cover the disposition procedure; state anti-SLAPP statute does not apply in federal court



**Erie Railroad & Harry Tompkins**





*Chicken Ranch Rancheria v. State of California* (9<sup>th</sup> Cir. 2023) 65 F.4<sup>th</sup> 1145—prevailing parties on federal claim in federal court not entitled to attorney fees under state law; *Royalty Network v. Harris*, 756 F.3d 1351 (11<sup>th</sup> Cir. 2014)—in diversity case federal court does not apply state statute requiring complaint be verified; TWG § 3-II

Location - Hughestown



## ERIE RAILROAD CO. v. TOMPKINS

In a landmark decision, the U.S. Supreme Court ruled in 1938 that, in cases between citizens of different states, federal courts must apply state common law, not federal "general common law." Under Pennsylvania common law, Harry Tompkins of Hughestown lost his case against the Erie Railroad, a New York State company. Tompkins had been struck by an unsecured door of a passing train and severely injured near this spot on July 27, 1934.

PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION 1999

# State Tort Reforms in Federal Court?

(TWG § 3-IV[N])

**Certificate of Merits**

**Damage Caps**

**Expert  
Testimony  
Requirements**

**Class Action  
Limits**

**Anti-SLAPP Statutes**

**ADR**

**Sanctions  
Reform**

**Pleading Punitive  
Damages**

# State Anti-SLAPP Statutes Apply in Federal Court?

**YES**

*CoreCivic, Inc. v. Candide Group, LLC* (9<sup>th</sup> Cir. 2022) 46 F.4<sup>th</sup> 1136; *Godin v. Schencks* (1<sup>st</sup> Cir. 2010) 629 F.3d 79; *Bongino v. Daily Beast* (S.D. Fla. 2020) 477 F.Supp.3d 1310 (Fl. Stat.); *Caranchini v. Peck* (D. Kan. 2018) 355 F.Supp.3d 1052 (KN statute); *Moreau v. U.S. Olymp. & Paralympic Comm.* (D. Colo. 2022) (Colo. Statute)

**NO**

*La Liberte v. Reid* (2d Cir. 2020) 966 F.3d 79; *Klocke v. Watson* (5<sup>th</sup> Cir. 2019) 936 F.3d 240; *Abbas v. Foreign Policy Group* (D.C. Cir. 2015) 783 F.3d 1328; *Carbone v. CNN* (11<sup>th</sup> Cir. 2018) 910 F.3d 1345; *Los Lobos Renewable Power v. Americulture* (10<sup>th</sup> Cir. 2018) 885 F.3d 659; *Nunes v. Lizza* (N.D. IA 2020) 476 F.Supp.3d 824; *Jiang v. Porter* (ED Mo. 2016) (Jackson, J.)

# Certificates of Merit Required?

**YES**

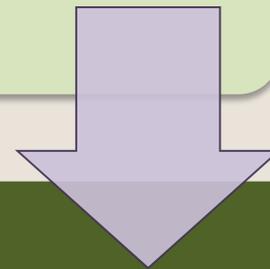
***Liggon-Redding v. Estate of Sugarman* (3d Cir. 2011) 659 F.3d 258; *Hahn v. Walsh* (7<sup>th</sup> Cir. 2014) 762 F.3d 617; see also *HSBC Bank v. Lombardo* (D. Me. 2020) – state statute requiring pre-filing specialized mediation (and stay of action) is substantive)**

**NO**

***Corley v. U.S.* (2d Cir. 2021) 11 F.4<sup>th</sup> 79; *Pledger v. Lynch* (4<sup>th</sup> Cir. 2021) 5 F.4<sup>th</sup> 511; *Gallivan v. U.S.* (6<sup>th</sup> Cir. 2019) 943 F.3d 291; see also *Meunier, Carlan and Curfmann v. Skidera* (ND GA 2018) 324 F.Supp.3d 1269 (Story, J.) state heightened pleading rules do not apply**

# State Procedure Serving Specific Substantive Goal

**Intention to influence substantive outcome manifest**



**Goal defeated if not applied in federal diversity suit**

MARCH 2019

## Erie Railroad Rule on Brave New Track



As a civil procedure professor and practice guide author for some thirty years, I do indeed get it that law students and lawyers have trouble applying the tectonic rule enunciated in 1938 by the Supreme Court in *Erie R. Co. v. Tompkins*<sup>1</sup>. And certainly it means more than remembering a high profile federal personal injury lawsuit revolving around Harry Tompkins' tragic loss of a limb in a depression-era railroad accident in Hughestown, Pennsylvania.

In the last few years, the *Erie* rule has been on a high speed rail journey as it traverses the 21st Century phenomenon of state tort reform. From state house to state house across this country, local legislators are passing laws imposing seemingly procedural barriers to curb perceived threats of frivolous lawsuits. The question is whether they must be applied in federal court actions.

The *Erie* rule is deceptively simple: if there is a state law claim in federal court (via diversity or supplemental jurisdiction), the court will apply state substantive and federal procedural law. Simple perhaps – but the U.S. Supreme Court itself commented that the classification of a law as substantive or procedural can be “a challenging endeavor.”<sup>2</sup>

Every law student and lawyer should know that the *Erie* decision is in the Top Ten cases of all time, and for good reason. Disallowing federal courts to intuit general federal common law as part of an otherwise state law claim raised and raises vital issues of separation of powers, federalism, judicial administration, and all to say nothing of questions concerning the tactical manipulation of procedural and jurisdictional rules when initiating or removing actions.

Let's take an important and current example of state legislative tort reform in an area where the federal courts are completely split as to whether it applies in federal court: state anti-SLAPP statutes designed to authorize the prompt striking of unsupported lawsuits arising from a defendant's exercise of free speech or petitioning rights (e.g. defamation

claims).<sup>3</sup> Since most of these statutes (enacted in some thirty states) allow for the shifting of attorney's fees and an immediate appeal, they present a powerful shield in the litigator's toolbox.

As stated, the federal circuits are deeply split as to whether the nominally “procedural” anti-SLAPP dismissal statutes nevertheless should be applied in federal court as part of manifest attempts by state legislatures to achieve substantive objectives.<sup>4</sup> This important debate involves two competing analytic camps: one, reasoning that the state statutes reflect substantive commands, and the other concluding that Fed. R. Civ. P. 12 and 56 answer the same question (i.e., when and how a court dismisses a case before trial) and therefore must be applied notwithstanding contrary state rules.

Defining what is substantive and what is procedural is an illuminating first step. A law is substantive if it is bound up with the rights and obligations of state law (e.g. elements of a claim or defense, burden of proof, statutes of limitations, choice of law, damage caps, etc.). In contrast, a law is treated as procedural if it affects the manner and means of the claim's presentation, i.e., merely a form and mode of enforcing a state law (e.g. pleading standards, class action rules, discovery, dismissal for failure to prosecute, briefing rules, etc.).

But as law students have been telling me for decades, the definitions are easy to state and hard to apply. For example, many facially procedural rules such as the time limits for serving a complaint or requiring out-of-state defendants to post a bond can often be outcome determinative despite the obvious fact they are contained in self-described procedural rules. Comparatively, courts uniformly rule that the right to prejudgment interest is a substantive part of the damages analysis, yet obtaining post-judgment interest has long been held to be a procedural rule governed by the law of the sovereignty (state or federal) in which the judgment was obtained.<sup>5</sup>



## Practice Guide: Federal Civil Procedure Before Trial

James M. Wagstaffe

# Result of Ripcord

**Online Platform**



**LexisNexis®**



**TWG Current Awareness – updated every 2 weeks**

**Daily Tweets**  @JWagstaffeLxNx



**2024 Jurisdictional Update**

**Monthly Articles – new trends, new cases**

**CALIFORNIA LAWYERS ASSOCIATION**  
**LITIGATION AND APPELLATE SUMMIT**  
**APRIL 25, 2024**

**LITIGATION, APPELLATE, AND ADR UPDATE**  
**2024 AND BEYOND**

**State Common Law Developments**

**Jordanna G. Thigpen (SBN 232642)**  
**Thigpen Legal, P.C., Beverly Hills, CA**  
**[jt@thigpenlegal.com](mailto:jt@thigpenlegal.com)**

## **Significant Common Law Developments 2023-3024**

### **Administrative Procedure**

- *Asiryan v. Medical Staff of Glendale Adventist Medical Center*, \_\_\_\_ Cal.Rptr.3d \_\_\_\_, 2024 WL 1171035 (Feb. 29, 2024)(2DCA/1): Peer review statute replaces any common law rights that a physician has in the context of peer review proceedings. Extensive discussion on the administrative process that is peer review proceedings.
- *Jackson v. Bd. of Civ. Serv. Commissioners of City of Los Angeles*, 99 Cal. App. 5th 648 (2024), review filed (Mar. 20, 2024) (2DCA.7): Where trial court granted in part the writ-of-mandate petition filed by suspended detention officer, set aside the suspension, and remanded the matter to the civil service commission for reconsideration of its findings, there was no “appealable final judgment”
- *Mojave Pistachios, LLC v. Superior Ct. of Orange Cnty.*, 99 Cal.App.5th 605, review filed (2024)(4DCA/3): Where an LLC challenged a groundwater basin replenishment fee, it had to actually pay the fees before filing a suit for a refund or challenge the exempted pumping allotments.
- *Balakrishnan v. Regents of Univ. of Cal.*, 99 Cal.App.5th 513 (2024)(1DCA/5): addressing authority of public university to dismiss plaintiff, a tenured faculty member, and deny him emeritus status for off-campus conduct (sexually abusing a fellow academic and a student), and concluding that university does have such authority.
- *Boermeester v. Carry*, 15 Cal.5th 72 (2023): The fair procedure doctrine does not require a private university to provide a student the opportunity to cross-examine accuser witnesses at a live hearing.

### **Anti-SLAPP**

- *Gazal v. Echeverry*, \_\_\_\_ Cal.Rptr.3d \_\_\_\_, 2024 WL 1340844 (Mar. 29, 2024) (2DCA/8), Parishioner's fraud and elder abuse claims against church deacon for deceiving him into making a \$1m donation that was used to buy a car and a house for a nonprofit led by the deacon's wife, did not arise from protected activity as required for anti-SLAPP strike. Brief discussion of the denial of sanctions for frivolous appeals.

- ***Medallion Film LLC v. Loeb & Loeb LLP***, \_\_\_ Cal.Rptr.3d \_\_\_, 2024 WL 1325975 (Mar. 28, 2024) (2DCA/8): attorneys' prelitigation communications were not protected under the anti-SLAPP statute, nor the litigation privilege, in case where plaintiffs sued for attorney's misrepresentations about his client's involvement when plaintiffs sought payment. Extensive discussion of what will constitute prelitigation communications to be protected in this category.
- ***Williams v. Doctors Medical Center of Modesto, Inc.***, \_\_\_ Cal.Rptr.3d \_\_\_, 2024 WL 1298913 (Mar. 27, 2024) (5DCA): Considering whether a doctor's second lawsuit and an attorneys' fees award against him was subject to issue preclusion. Extensive discussion of anti-SLAPP analysis and the primary rights theory, and how to determine issue preclusion in the context of anti-SLAPP cases.
- ***BioCorRx, Inc. v. VDM Biochemicals, Inc.***, 99 Cal.App.5th 727, 743 (2024), review filed (2024) (4DCA/3): company could invoke the commercial speech exception for its commercial speech in press releases promoting its addiction treatment medicines. Extensive discussion of the commercial speech exception in anti-SLAPP context.
- ***Miszkwycz v. County of Placer***, 99 Cal.App.5th 67 (2024) (3DCA): Defendants filing an anti-SLAPP motion do not have to follow Cal. Rule of Court 3.1322 that applies to conventional motions to strike.
- ***Paglia & Associates Constr., Inc. v. Hamilton***, 98 Cal.App.5th 318 (2023) (2DCA/8): homeowner accused contractor of fraud on Yelp; claims were not protected by litigation privilege because they were not taken in connection with steps in litigation process. Good discussion of distinction between statements made in furtherance of litigation vs. statements made about litigation, which is key.
- ***Green Tree Headlands LLC v. Crawford***, 97 Cal.App.5th 1242 (2023) (1DCA/4): Reversing denial of anti-SLAPP motions in malicious prosecution action. Defendant had probable cause to bring underlying litigation for breach of contract and breach of agreement to quitclaim; good discussion of probable cause in malicious prosecution claims.

- ***Moten v. Transworld Systems, Inc.***, 98 Cal.App.5th 691 (2023) (4DCA/2): Claims against loan servicer based on allegedly false documents attached to debt collection suit, including Rosenthal Act claim, would not be automatically barred by judicial-communications privilege and anti-SLAPP statute, even though plaintiff did not “conclusively establish” that the conduct was unlawful. Trial court directed to determine applicability of public interest exception of Section 425.17 and whether plaintiff demonstrated a probability of prevailing.
- ***Doe v. Ledor***, 97 Cal.App.5th 731 (2023) (1DCA/4): Plaintiff alleged that his classmates (his ex-girlfriend and her friends) embarked on a bizarre, rageful campaign to destroy his life, suing for defamation, harassment, and more, for conduct including contacting the college to which plaintiff was admitted and persuading the college to revoke plaintiff’s acceptance. The trial court denied the anti-SLAPP; order affirmed on basis that the statements were not related to an “issue of public interest,” and even if they were there was no showing that they “contribute[d] to or further[ed] the public conversation on an issue of public interest.” Excellent discussion of the “public interest” protection.
- ***Mary’s Kitchen v. City of Orange***, 96 Cal.App.5th 1009 (2023) (4DCA/3): Homeless service provider filed complaint/petition for writ of mandate after city council terminated plaintiff’s license. Anti-SLAPP motion from the City was rejected: “The action of ratifying the termination of the licensing agreement, assuming it occurred, is not conduct in furtherance of free speech; it is ordinary business. [citation].”
- ***Li v. Jenkins***, 95 Cal.App.5th 493 (2023) (2DCA/8): Denial of anti-SLAPP was proper where allegations concerned defendants’ breach of agreements relating to producer’s participation in a television program, not a public issue.
- ***Iloh v. Regents of University of California***, 94 Cal.App.5th 947 (2023): professor filed petition for writ of mandate to prevent university from complying with the CPRA in response to a request made by an organization that reported on academic accountability, then added the organization as a defendant. Denial of organization’s anti-SLAPP motion was reversed – records were newsgathering and concerned an issue of public interest.

- ***Park v. Nazari***, 93 Cal.App.5th 1099 (2023) (DCA/5): anti-SLAPP suit was properly denied where it was directed at entire complaint, instead of individual claims, because some claims did not arise from protected activity. Trial court is not required to guess what a defendant wants in their motion, though it may parse the claims if it chooses to do so.
- ***Cvejic v. Skyview Capital, LLC***, 92 Cal.App.5th 1073 (2023) (2DCA/8): Employer’s failure to pay arbitration fees was a material breach of arbitration agreement which permitted employee to proceed in Superior Court.
- ***Hastings College Conservation Committee v. Faigman***, 92 Cal.App. 5th 323 (2023) (1DCA/4): claims that sound to prevent law school’s name change pursuant to an allegedly unconstitutional law could not be stricken under the anti-SLAPP statute.
- ***Collins v. Waters***, 91 Cal.App.5th 411 (2023) (2DCA/8): Unsuccessful candidate who challenged Maxine Waters for Congressional seat brought defamation claim against incumbent for her statement that he had been dishonorably discharged in the Navy. Reversing trial court’s denial of anti-SLAPP motion since defendant made at least minimal showing of actual malice.
- ***Nirschl v. Schiller***, 91 Cal.App.5th 385 (2023)(2DCA/4): nanny brought action against former employer in wage and hour action, and a defamation claim made during negotiations over severance. Held, employer had no basis under the law to challenge the complaint under the anti-SLAPP law, the motion to strike non-defamation claims was frivolous and required award of attorneys’ fees to employee.

## **Animals**

- ***Fraser v. Farvid***, 99 Cal.App.5th 760 (2024) (2DCA/8): Discussion of “actual knowledge” rule for purposes of determining landlord’s liability for dangerous dog on the premises.

- ***Dua v. Stillwater Ins. Co.***, 91 Cal.App.5th 127 (2023) (2DCA/2): insurer had duty to defend homeowner under her policy when, in underlying action, third-parties' dogs were bitten by two pit bulls owned by insured's boyfriend. Granting of MSJ reversed.

## **Arbitration**

- ***Vazquez v. Sanisure, Inc.***, \_\_\_\_ Cal.Rptr.3d \_\_\_\_, 2024 WL 1430507 (Apr. 3, 2024) (2DCA/6): arbitration agreements employee executed during her first stint of at-will employment did not apply during her second stint of employment.
- ***Lew-Williams v. Petrosian***, \_\_\_\_ Cal.Rptr.3d \_\_\_\_, 2024 WL 1404151 (Apr. 2, 2024) (2DCA/7): Court did not have jurisdiction to dismiss plaintiff's claims for failure to prosecute after granting a motion to compel arbitration – if a party fails to diligently prosecute an arbitration, the appropriate remedy is for the opposing party to seek relief in the arbitration proceeding
- ***Harrod v. Country Oaks Partners, LLC***, --- P.3d ----, 2024 WL 1319134 (Mar. 28, 2024): Resident's health care agent and nephew signed arbitration agreement under power of attorney but it was ineffective as to resident because signing an arb agreement is not a "health care decision" and there was no express grant of power to agree to arbitration. Affirmed at trial court, Court of Appeal, and CASC.
- ***Weeks v. Interactive Life Forms, LLC***, \_\_\_\_ Cal.Rptr.3d \_\_\_\_, 2024 WL 1250215 (Mar. 25, 2024): customer did not have adequate notice of browsewrap arbitration agreement based on company's website's design and interface. In addition, as a matter of first impression, the FAA does not preempt California law on browsewrap agreements.
- ***Hohenshelt v. Sup. Ct. of Los Angeles County***, 99 Cal.App.5th 1319 (2024) (2DCA/8): Employee was entitled to proceed in Superior Court where employer did not pay arbitration fee by deadline specified in Code Civ Proc. section 1281.98 and employee did not agree to an extension. Arbitration service provider's extension of time for payment did not make payment timely.

- ***Jones v. Solgen Construction, LLC***, 99 Cal.App.5th 1178 (2024) (5DCA): Solar company offered DocuSign (viewing-time and signing-time) information contained in electronic signature to arbitration agreement was admissible under the business-record exception with authenticating declaration from chief revenue officer/custodian of records; document demonstrated that purported agreement was executed after 38 seconds. Defendants motion to compel properly denied given circumstances of plaintiff’s signing and lack of technological prowess.
- ***Kaer v. Southern California Med. Center, Inc.***, 99 Cal.App.5th 214, 685 (2024) (2DCA/5): Federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act applied to prohibit arbitration where “dispute” arose after the date of the arbitration agreement and the effective date of the Act. “For a dispute to arise, a party must first assert a right, claim, or demand.”
- ***Suarez v. Sup. Ct. of San Diego County***, 99 Cal.App.5th 32 (2024) (4DCA/1): Defendant did not pay arbitration fee within 30 days of due date, as required by Code Civ. Proc. 1281.97 et seq. and thus waived right to arbitrate; statute providing for two-day extension of time for electronic service (Code Civ. Proc. section 1010.6) does not apply to employer’s transmission of arbitration fee.
- ***J.R. v. Electronic Arts Inc.***, 98 Cal.App.5th 1107, 1116 (2024) (4DCA/2): Where minor plaintiff disaffirmed, under Family Code section 6710, the “entirety of any [user agreement], contract, or agreement that was accepted through [his] EA account,” he unequivocally disaffirmed “any...contract or agreement” that he entered into, and trial court had authority to decide questions of arbitrability.
- ***Ramsey v. Comcast Cable Comms., LLC***, 99 Cal.App.5th 197 (2023) (6DCA): where subscriber sought public injunctive relief, arbitration agreement in subscriber agreement was unenforceable.
- ***Hasty v. American Automobile Ass’n. etc.***, 98 Cal.App.5th 1041 (2023) (3DCA): Former employee’s arbitration agreement was permeated with unconscionability given

prohibition of representative proceedings and right to compensation and relief in administrative context, and a contract of adhesion and product of surprise.

- ***Haydon v. Elegance at Dublin***, 97 Cal.App.5th 1280 (2023) (1DCA/3): Arbitration agreement was unconscionable where plaintiffs given contract of adhesion under duress, and where agreement prevented plaintiffs from disclosing “the existence, content, or results of the arbitration,” i.e., to be “kept secret,” JAMS rules provided inadequate discovery for the elder abuse claims, and costs provision was make arbitration unaffordable for plaintiffs.
- ***DeMarinis v. Heritage Bank of Commerce***, 98 Cal.App.5th 776 (2023) (1DCA/3): Arbitration agreement containing requirement that employees abandon their right to bring both individual and nonindividual PAGA claims in any forum was unconscionable and entire agreement was void.
- ***Baglione v. Health Net of California, Inc.***, 97 Cal.App.5th 882 (2023) (2DCA/8): county employee health insurance enrollment forms did not comply with statute (H&S section 1363.1) requiring clarify of disclosure with respect to arbitration, nor with signature line requirements, which county employee had standing to enforce.
- ***State ex rel. Cisneros v. Alco Harvest, Inc.***, 97 Cal.App.5th 456 (2023) (2DCA/6): Failure to disclose arbitration agreement during H-2A visa certification made arbitration agreement unenforceable as a matter of law, given that the arbitration agreement was a “material term and condition” of employment required to be disclosed in the certification process.
- ***Mattson Technology, Inc. v. Applied Materials, Inc.***, 96 Cal.App.5th 1149 (2023) (1DCA/5): Where former employer sued former employee and competitor (new employer) with UTSA claims, competitor could not use arbitration clause in contract between employer and employee, because employer did not rely on the contract to state claims against competitor; but claim would be stayed until resolution of the employer and employee’s arbitration.

- ***FCM Investments, LLC v. Grove Pham, LLC***, 96 Cal.App.5th 545 (2023) (4DCA/1): Arbitrator’s focus on claimant’s main witness not credible where he used an interpreter demonstrated “an impression of possible bias” as it was “based on misconceptions about English proficiency and language acquisition.” Excellent discussion of standards for demonstrating bias and the cases in which it has been found.
- ***Doe v. Superior Court***, 95 Cal.App.5th 346 (2023) (1DCA/3): payment of arbitration fees and costs did not occur under Code Civ. Proc. section 1281.98(a) until the arbitration provider received the mailed check.
- ***Yeh v. Superior Court of Contra Costa County***, 95 Cal.App.5th 264 (2023) (1DCA/4): manufacturer could not use the theory of equitable estoppel to force the plaintiffs to arbitrate claims related to express warranties under Song-Beverly Act.
- ***Kielar v. Sup. Ct.***, 94 Cal.App.5th 614 (2023) (3DCA): purchaser’s claims were not intertwined with sales contract with dealer, and manufacturer could not compel arbitration based on equitable estoppel.
- ***Montemayor v. Ford Motor Co.***, 92 Cal.App.5th 958 (2023) (2DCA/7): purchaser’s claims were not intertwined with sales contract with dealer, and manufacturer could not compel arbitration based on equitable estoppel.
- ***Law Finance Group, LLC v. Key***, 14 Cal.5th 932 (2023): 100-day deadline for filing petition to vacate arbitration award is not jurisdictional, and does not preclude equitable tolling or estoppel.

### **Attorneys’ Fees and Costs**

- ***Gramajo v. Joe's Pizza on Sunset, Inc.***, -- Cal.Rptr.3d ----, 2024 WL 1250214 (Mar. 25, 2024) (2DCA/8): trial court had no discretion under Labor Code section 1194 to refuse to award fees and costs on action for minimum wage and overtime, where employee prevailed, notwithstanding Code Civ. Proc. section 1033 which provides for a court to decline to award costs if the case could have been brought in limited jurisdiction.

- ***G.F. Galaxy Corp. v. Johnson***, --- Cal.Rptr.3d ----, 2024 WL 1005623 (Feb. 26, 2024) (4DCA/1): Attorneys’ fees and costs incurred in enforcing judgment, where based on contract containing attorneys’ fees clause, should have been awarded, and corporation was not required to be a “prevailing party” to recover.
- ***Andrade v. Western Riverside Council of Governments***, 98 Cal.App.5th 1020 (2024) (4DCA/1): Reversing for consideration the trial court’s determination that a homeowner in an HOA had not prevailed under attorneys’ fees statute providing for fees for “actions on a contract” under Civil Code section 1717 and reaffirming that even where a party claims a contract is inapplicable, invalid, or nonexistent, fees must be awarded if the contract so provides and the party is determined to have prevailed under Section 1717.
- ***Neeble-Diamond v. Hotel California By the Sea, LLC***, 99 Cal.App.5th 551 (2024) (4DCA/3): After plaintiff failed to establish FEHA and related claims, the defendant filed a cost memorandum seeking statutory award of costs (\$180,369.41) as prevailing party, which was awarded by the court. Reversed – court should have proceeded by noticed motion for discretionary costs given Government Code section 12965(c)(6).
- ***Garcia v. Tempur-Pedic North America, LLC***, 98 Cal.App.5th 819 (2024) (4DCA/2): In determining whether award of costs for late cancellations of depositions is warranted, a court must look as to whether the party actually incurred the costs, not whether the depositions actually took place.
- ***Grossmont Union HSD v. Diego Plus Education Corp.***, 98 Cal.App.5th 552 (2023) (4DCA/1): Dispute between public charter schools; second round at COA. Held, trial court did not properly evaluate “whether “the ... financial burden of private enforcement ... [is] such as to make the award appropriate” under Code Civ. Proc. section 1021.5(b). Extensive discussion of Section 1021.5 factors.
- ***Zarate v. McDaniel***, 97 Cal.App.5th 484 (2023) (2DCA/3): Serving tenants with a notice of attorneys’ fees motion after tenants had already filed motions with the court violated the 21-day safe harbor provision of Code Civ. Proc. section 128.5. Attorneys’ fees award reversed.

- ***Nash v. Aprea***, 96 Cal.App.5th 21 (2023) (2DCA/7): Post-judgment attorneys' fees were not included in a cap of \$1,000 contained in a lease; plaintiff was entitled to \$1,000 in default judgment, and \$27,721 in postjudgment enforcement attorneys' fees.
- ***Snoeck v. ExakTime Innovations, Inc.***, 96 Cal.App.5th 908 (2023) (2DCA/3): Trial court had full discretion to award a negative multiplier for attorneys' incivility when calculating attorneys' fees award, and appropriately reduced the lodestar by 40%.
- ***Ross v. Seyfarth Shaw LLP***, 96 Cal.App.5th 722 (2023) (2DCA/8): Defendants prevailed on an anti-SLAPP motion but were awarded around 80% of what they requested; COA held they were entirely prevailing, not partially prevailing, and thus entitled to 100% of their fees. Good analysis of court's discretion to deny fees.
- ***In re Marriage of Rangell***, 95 Cal.App.5th 1206 (2023) (2DCA/8): Trial court was justified in imposing \$22,000 in attorneys' fees and costs, and \$48,000 in sanctions at the rate of \$1,000/day until party complied, based on extensive failures to comply with court's orders; good discussion of what justifies sanctions particularly where parties are recalcitrant.
- ***Lee v. Cardiff***, 94 Cal.App.5th 398 (2023) (1DCA/1): homeowner alleged claims against landscaping company based on home improvement project, seeking attorneys' fees under statute providing for attorneys' fees in connection with construction of swimming pools. Trial court properly granted fees related to the swimming pool construction claims, but not other claims.
- ***Briggs v. Elliott***, 92 Cal.App.5th 683 (2023) (4DCA/1): where judgment debtor did not file a motion to tax costs, he was prohibited from challenging the claimed costs and postjudgment interest thereto.
- ***Aresh v. Marin-Morales***, 92 Cal.App.5th 296 (2023) (4DCA/3): trial court lacked jurisdiction to enter judgment against a successor attorney, in action brought by discharged attorney against former clients and successor attorney to enforce his attorney-fee liens, where former attorney dismissed successor after successor demurred, and trial court went on to enter judgment against clients without participation of successor.

## **Civil Procedure**

- ***Fix the City, Inc. v. City of Los Angeles***, 100 Cal. App. 5th 363 (2024) (2DCA/5): Thorough discussion of the “relation back” doctrine and whether it applies where original filing was premature. Additional excellent discussion regarding “continuing harm” doctrine.
- ***Estrada v. Royalty Carpet Mills, Inc.***, 15 Cal.5th 582 (2024): Trial courts do not have inherent authority to dismiss cases, and can only do so in highly specific, “tightly circumscribed” situations, which were not present in the case. Court could not strike PAGA claims based on manageability concerns.
- ***Doe v. Marysville JUSD***, 98 Cal.App.5th 95 (2023) (3DCA): Plaintiffs filed and voluntarily dismissed two federal court actions, then later brought state court action, alleging sexual abuse by former counselor. Held, claims barred by res judicata based on FRCP 41(a)(1)(B); heavily criticizing *Gray v. La Salle Bank, N.A.*, 95 Cal.App.5th 932 (2023). Dissent pointed out that no case, and certainly not the US Supreme Court, had ever decided the issue here: two federal dismissals and a subsequent state court action alleging only state law claims.
- ***Gray v. La Salle Bank, N.A.***, 95 Cal.App.5th 932 (2023) (6DCA): FRCP Rule 41, governing voluntary dismissals, did not require state trial court to give a dismissal preclusive effect to a state court action unless state claim preclusion law was incompatible with federal interests. Plaintiffs’ voluntary dismissal of the second federal lawsuit was not a final adjudication on the merits barring the third case; though plaintiffs’ claims still failed and were properly dismissed on demurrer and MSJ. Notes that objections on MSJ must be renewed and argued in appellate briefs in order to be validly stated as a basis for error.
- ***Dollase v. Wanu Water, Inc.***, 93 Cal.App.5th 1315 (2023) (2DCA/8): A corporation that submitted a motion to quash service along with its motion to vacate default (which requires submission of a pleading accompany such motion) constituted compliance with the statute.

- ***Braugh v. Dow***, 93 Cal.App.5th 76 (2023) (2DCA/8): Default judgment was void on its face where service was improper, even where co-owner moved to set aside default one year and nine months later, and thus, could be overturned at any time.

## **Consumers**

- ***Niedermeier v. FCA US LLC***, 15 Cal.5th 792 (2024): A trade-in credit, or sales proceeds, that are received by a buyer do not reduce the statutory restitution remedy available to plaintiffs under the Song-Beverly Act.
- ***California Medical Ass’n v. Aetna Health of California, Inc.***, 14 Cal.5th 1075 (2023): Diversion of staff time could qualify, for UCL purposes, as “injury in fact” and loss of “money or property” for purposes of standing.

## **Contracts and Commercial Transactions**

- ***Trident Society, Inc. v. Cemetery and Funeral Bureau***, \_\_\_\_ Cal.Rptr. \_\_\_\_, 2024 WL 1207714 (Mar. 21, 2024) (3DCA); ***Neptune Management Corp. v. Cemetery and Funeral Bureau***, \_\_\_\_ Cal.Rptr. \_\_\_\_, 2024 WL 1207360, (Mar. 21, 2024) (3DCA): The Short Act, which covers preneed agreements with funeral homes, requires a crematory to hold funds for merchandise in trust where retail agreement for merchandise was collateral to preneed agreement.
- ***VFLA Eventco, LLC v. William Morris Entertainment***, 100 Cal.App.5th 287 (2024) (2DCA/8): Exception to force majeure clause permitted artists to retain deposits for music festival performance, where they were otherwise ready, able, and willing to perform, and artists did not breach the implied covenant when they kept deposits under circumstances of pandemic and force majeure exception.
- ***Berlanga v. University of San Francisco***, 100 Cal.App.5th 75 (2024) (1DCA/3): no breach of the implied covenant, nor frustration of purpose, for switching to online learning at inception of pandemic. Students “could not reasonably have believed” they would have in-person instruction in the wake of the pandemic.

- ***Tiffany Builders, LLC v. Delrahim***, 97 Cal.App.5th 536 (2023) (2DCA/8): Plaintiff had enforceable deal with prospective purchaser of 13 gas stations even though it was handwritten at a coffee shop in Calabasas, given that deal was definite enough. Extensive discussion of enforceability and “sham declarations” on MSJ.
- ***Davis Boat Manufacturing-Nordic, Inc. v. Smith***, 95 Cal.App.5th 660 (2023) (5DCA): Plaintiff was not entitled to force the sale of debtor’s primary residence because debt for a racing boat is a “consumer debt” under relevant statutory scheme.
- ***People ex rel. Allstate Ins. Co. v. Discovery Radiology Physicians, P.C.***, 94 Cal.App.5th 521 (2023) (2DCA/3): Trial court improperly dismissed on demurrer an insurance company’s claims based on defendants’ business models in which non-physicians owned medical corporations. Reversing the order, COA found that the allegations stated the unlicensed practice of medicine, which could be the basis of a qui tam suit.
- ***Esplanade Productions, Inc. v. The Walt Disney Co.***, 93 Cal.App.5th 793 (2023) (2DCA/7): MSJ properly granted on breach of the implied covenant claims where plaintiff screenwriter could not prove that defendant had access to his screenplay after they created Zootopia. Extensive discussion of case law relating to theft of idea cases.

## **Corporations**

- ***Hee Shen Cemetery and Benevolent Ass’n v. Yee Weong Ass’n***. 100 Cal.App.5th 231 (2004) (1DCA/2): request for judicial intervention in election affairs of voluntary association concerning Chinese burial sites were not supported by substantial evidence. Extensive discussion of the standards for when a court will intervene in such disputes.
- ***EpicentRx, Inc. v. Superior Court***, 95 Cal.App.5th 890 (2023) (4DCA/1): Forum selection clauses in bylaws and certificate of incorporation were unenforceable and motion to dismiss based on forum non conveniens was properly denied.
- ***Turner v. Victoria***, 15 Cal.5th 99 (2023): Where plaintiff was not reelected as director of nonprofit after start of lawsuit for director enforcement statutes, they did not lose standing for action.

- ***Kanter v. Reed***, 92 Cal.App.5th 191 (2023) (2DCA/5): Shareholders failed to properly allege presuit demand futility based on substantial likelihood of director oversight liability; good discussion of issues related to demand futility.

### **Damages**

- ***Shah v. Skillz, Inc.***, \_\_\_\_ Cal.Rptr. \_\_\_\_, 2024 WL 1507427, at \*2 (Apr. 8, 2024) (DCA/8): Damages for breach of contract based on wrongful termination resulting in failure to pay stock options were properly measured “after the date of breach, following the IPO;” and stock options are not wages under the Labor Code. Extensive discussion of proper determination of date to measure damages in stock options cases, given that date will often be different than the date of traditional “breach.”

### **Discovery**

- ***Tedesco v. White***, 96 Cal.App.5th 1090 (2023) (4DCA/3): 2nd rodeo for the litigants in this case – the Court’s previous note that “[w]e do not confuse aggressive argument with persuasive advocacy” apparently had no effect. Appeal of \$6,000 sanctions order was improperly used as a platform to attack various other aspects of the litigation; initial subpoena for which the sanctions were issued was impermissibly broad and objectionable, and “oppressive and a misuse of discovery” justifying the \$6,000 sanctions order.
- ***Vargas v. Gallizzi***, 96 Cal.App.5th 362 (2023) (2DCA/7): Trial court abused its discretion in denying the plaintiffs’ request for cost of proof sanctions (Code Civ. Proc. section 2033.420) incurred to prove that certain medical records constituted business records, after driver denied RFAs. However, where the plaintiffs asked the defendant to admit crash had caused “some injury,” fees were properly denied as plaintiffs would have had to introduce the same evidence. Good discussion on cost of proof sanctions.
- ***Pollock v. Superior Court of Los Angeles County***, 93 Cal.App.5th 1348 (2023) (2DCA/1): A statement of compliance made in response to document requests did not

specify which documents related to which requests, which was acceptable under the facts, but also noting: “(1) There is no requirement that a response identify a document with the specific request to which the document applies; (2) There is no requirement that a document production be verified, nor that documents be Bates labeled.”

- ***Victor Valley Union HSD v. Sup. Ct. of San Bernadino County***, 91 Cal.App.5th 1121 (2023) (4DCA/2): school district had duty to preserve video featuring events around sexual assault of student. Extensive discussion of safe-harbor provision governing discovery sanctions when ESI is inadvertently destroyed, and litigation hold for evidence.

### **Evidence/Privileges**

- ***In re Marriage of Lietz***, 99 Cal.App.5th 664 (2024)(4DCA/3): *People v. Sanchez*, 63 Cal.4th 665 (2016) properly applied to exclude testimony of expert regarding size of lot because it was based on “case-specific hearsay.” Instead of using geometry and “basic math,” the party should have hired a surveyor.
- ***People v. Potter Handy, LLP***, 97 Cal.App.5th 938 (2023) (1DCA/3): Where AG’s office filed a complaint for UCL violations against a law firm that was alleged to have asserted false standing allegations when filing federal ADA complaints to extort small businesses, litigation privilege would apply and demurrer was properly sustained without leave to amend.
- ***Inzunza v. Naranjo***, 94 Cal.App.5th 736 (2023) (2DCA/4): Motorist was killed after his pickup truck collided with a tractor-trailer driven by employee. Plaintiffs prevailed at jury trial, but judgment was reversed. Trial court prejudicially excluded entity defendant from introducing evidence contrary to employee’s deemed admissions, but deemed admissions can only be used against the party making the admission (“an agent’s deemed admissions do not bind the principal codefendant”).

## **Insurance**

- *Molinar v. 21st Century Ins. Co.*, 99 Cal.App.5th 1228 (2024)(4DCA/1): Where daughter was listed as a named insured on an insurance policy, she was a “named insured” for purposes of statute requiring insurer to send notice of cancellation of policy for nonpayment.
- *Myasnyankin v. Nationwide Mutual Ins. Co.*, 99 Cal.App.5th 283 (2024) (1DCA/5): statute permitting an insured to record “examination under oath” proceedings entitled insured to record the insurer’s representatives as well.
- *City of Whittier v. Everest Nat’l Ins. Co.*, 97 Cal.App.5th 895, 902 (2023) (2DCA/1): Considering whether Ins. Code section 533, “under which ‘[a]n insurer is not liable for a loss caused by the willful act of the insured,’ bars indemnification for claims under Labor Code section 1102.5. Labor Code section 1102.5 prohibits, inter alia, retaliation against employees for reporting activity they have reasonable cause to believe is unlawful, or for refusing to participate in activity that actually is unlawful” and concluding that because not all Labor Code section 1102.5 claims necessarily involve willful conduct, but some involve something more like negligence, then insurers are not entitled to automatic indemnification. Extensive discussion of retaliation claims and the history of Ins. Code section 533.

## **Jury Instructions**

- *Garrabrants v. Erhart*, 98 Cal. App. 5th 486, 500 (2023)(4DCA/1): Special jury instructions, including modified form of CACI 1800, on invasion of privacy were erroneous and prejudiced the defendant; emphasizing that jury instructions cannot just be picked out of language court opinions as isolated extracts; lengthy discussion of standard for determining error on jury instructions.

## **Labor and Employment**

- ***Huerta v. CSI Elec. Contractors***, --- P.3d ----, 2024 WL 1245291 (Mar. 25, 2024): time spent by employees waiting in line for security procedure was subject to employer's control and compensable as "hours worked" even where employees were sitting in own vehicles given that the security was for employer's own benefit; but drive time did not as no evidence of sufficient control.
- ***Applied Medical Dist. Corp. v. Jarrells***, --- Cal.Rptr.3d ----, 2024 WL 1007523 (Mar. 2024) (4DCA/3): UTSA action in which employer was awarded injunction to stop further misappropriation. Attorneys' fees could be awarded to employee, and trial court had discretion to limit fees to those incurred in obtaining the injunction, but trial court could not just make blanket denials of categories of fees, such as for discover, and blanket, across the board percentage cuts without proper analysis of the interplay between the claims. Nor could expert fees be awarded, but expert fees paid to forensic analyst could "properly be recovered as damages on a claim of misappropriation under the California UTSA, the costs of stopping or mitigating the misappropriation, but not the costs of investigating to determine whether and how any misappropriation occurred." Thorough and extensive discussion of recovery of costs in UTSA action.
- ***Vann v. City and County of San Francisco***, 97 Cal.App.5th 1013 (2023) (1DCA/2): Firefighter's injuries resulting an SFMTA-operated bus driving over an accident scene were exclusively remedied through worker's compensation system.
- ***Beltran v. Hard Rock Hotel Licensing, Inc.***, 97 Cal.App.5th 865 (2023) (4DCA/3): Applying newly amended Gov. Code section 12923 regarding sexual harassment and affirming that even one incident can suffice to establish a claim under the FEHA. Discussion of history of statute, new jury instruction, and case law involving severe and pervasive harassment. Reversing MSJ and MSA in part.
- ***Martin v. Board of Trustees of California State University***, 97 Cal.App.5th 149 (2023) (2DCA/8): Plaintiff failed to state discrimination and harassment claims based on race

and gender; lengthy opinion discussing appropriate standards for FEHA MSJ and various forms of evidence that will suffice to overcome MSJ.

- ***Argueta v. Worldwide Flight Services, Inc.***, 97 Cal.App.5th 822 (2023) (2DCA/8): Reversing for new trial under Code Civ. Proc. section 657(1) where trial court included substance of complaints against the plaintiff and such inclusion was prejudicial error, given that the substance of the claims had nothing to do with the elements of the hostile work environment claim, and any relevant value was far exceeded by the prejudicial effect; limiting instruction held insufficient given high prejudice.
- ***Cruz v. City of Merced***, 95 Cal.App.5th 453 (2023)(5DCA): Reversing denial of police officer's writ of administrative mandamus; officer was not barred by collateral estoppel from litigating the issue of a backpack search he conducted, and trial court's conclusion to the contrary was prejudicial.
- ***Raines v. U.S. Healthworks Medical Group***, 15 Cal.5th 268 (2023): Upon certification from the 9th Circuit: a business-entity agent of an employer may fall within the FEHA definition of employer and thus may be directly liable for FEHA violations, when it performs FEHA-regulated activities on behalf of the employer.
- ***Woodworth v. Loma Linda Univ. Med. Ctr.***, 93 Cal.App.5th 1038 (2023) (4DCA/2): Triable issues of fact existed as to whether employer was accurately capturing employees' time worked with a rounding policy; noting that trial court cannot strike PAGA allegations for lack of manageability.
- ***Adolph v. Uber Technologies, Inc.***, 14 Cal.5th 1104 (2023): a plaintiff does not lose standing to pursue non-individual PAGA claims in court when ordered to arbitrate individual claims.
- ***Thai v. IBM Corp.***, 93 Cal.App.5th 364 (2023)(1DCA/5): Employer was required to reimburse employees for work-from-home expenses incurred during COVID-19 pandemic.
- ***O'Brien v. Regents of University of California***, 92 Cal.App.5th 1099 (2023) (1DCA/3): professor who received a one-year suspension for sexually harassing a colleague at a

conference, along with written censure, was not unfairly disciplined; good analysis of elements of procedural fairness for public university employees.

- ***Zirpel v. Alki David Productions, Inc.***, 93 Cal.App.5th 563 (2023) (2DCA/4): Employer was liable for terminating employee based on whistleblowing activities; employer's conduct supported punitive damages. Excellent discussion of constitutional ratio was punitive damages (here, 6:1).
- ***Brown v. City of Inglewood***, 92 Cal.App.5th 1256 (2023) (2DCA/1): elected city treasurer was not an employee protected by Labor Code section 1102.5.
- ***People ex rel Garcis-Brower v. Kolla's, Inc.***, 14 Cal.5th 719 (2023): bartender's complaint to employer about unpaid wages was protected by retaliation statutes even if owner already knew about the violations.
- ***Kourounian v. California Dep't of Tax & Fee Admin.***, 91 Cal. App. 5th 1100, 1113 (2023) (2DCA/8): jury verdict reversed where trial judge was held to have erroneously admitted certain complaints (including two EEO complaints) pre-dating the protected activity, where plaintiff's claims were only for retaliation ("acts of retaliation must occur after the protected activity") and importantly where the plaintiff had waived those claims in a prior settlement agreement. Discusses hearsay with respect to EEO complaints and their substance.

### **Professional Responsibility**

- ***Sundholm v. Hollywood Foreign Press Ass'n***, 99 Cal.App.5th 1330 (2024): counsel accessed "at least two" privileged documents and defendant moved to disqualify him from representing plaintiff – reversed. "The drastic remedy of disqualification of counsel is appropriate only where the attorney improperly or inadvertently received information protected by the opposing party's attorney-client privilege, the information is material to the proceeding, and its use would prejudice the opposing party in the proceeding." Proper remedy was sanctions and a report to the State Bar.

- ***Engel v. Pech***, 95 Cal.App.5th 1227 (2023) (2DCA/2): LLP partner’s claims for professional negligence, breach of contract, and breach of fiduciary duty, did not relate back to claims asserted by the defendant and were time-barred under the one-year SOL.
- ***Hansen v. Yolkov***, 96 Cal.App.5th 94 (2023) (2DCA/7): Reversing grant of restraining order issued in favor of attorney against opposing counsel, on basis of litigation privilege and for failure to meet the statutory definition of a course of conduct of harassment.

### **Public Records**

- ***First Amendment Coalition v. Sup.Ct.***, 98 Cal.App.5th 593 (2023) (1DCA/3): Refusing to order disclosure of certain law enforcement-related records associated with defendant’s response to the AG’s pattern-or-practice investigation of the Bakersfield Police Department; finding that the CPRA conflicts with Penal Code section 832.7 (which has subsequently been amended) and law enforcement-related records should be protected.
- ***Castañares v. Sup.Ct.***, 98 Cal.App.5th 295 (2023) (4DCA/1): On case of first impression: (1) video footage taken by a drone-mounted camera is exempt from CPRA disclosure if the footage is in an investigatory file: (2) if drone was used to investigate whether a violation of law was occurring or had occurred but agency did not create a corresponding investigatory file; (3) where drone was dispatched in response to a 911 call. City has to classify each video in relation to the 911 call, instead of treating all footage as one event (“a monolith”).
- ***City of Gilroy v. Sup.Ct.***, 96 Cal.App.5th 818 (2023) (6DCA): nonprofit legal services organization was not entitled to CPRA relief, nor declaratory relief based on City’s conduct of failing to turn over records. Prior conduct was moot and declaratory relief is only available for current and justiciable controversies.
- ***County of San Benito v. Sup. Ct.***, 96 Cal.App.5th 243 (2023) (6DCA): as matter of first impression, a party may not reframe a CPRS request as discovery, which would take it outside the narrow CPRA issue of whether disclosure is required.

- ***BondGraham v. Superior Court***, 95 Cal.App.5th 1006 (2023) (1DCA/2): portions of internal affairs investigation report into police officers’ criminal conduct could not be withheld where requested for CPRA disclosure.

## **Real Property**

- ***Temple of 1001 Buddhas v. City of Fremont***, 100 Cal.App.5th 456 (2024) (1DCA/4): issuance of traditional writ of mandate was warranted where City’s appeals process violated the State Housing Law and the State Building Code.
- ***Riddick v. City of Malibu***, 99 Cal.App.5th 956 (2024) (2DCA/5): Pursuant to state law, ADUs directly attached to SFRs are exempt from local coastal development permit requirements, and may be constructed pursuant to the standards set forth in Gov. Code section 65852.2.
- ***Romero v. Shih***, 15 Cal.5th 680 (2024): Recognizing that “effectively exclusive implied easements” excluding a servient owner from making most practical uses of the easement’s surface area are not impermissible as a matter of law. Extensive discussion of various types of easements (express, implied, prescriptive); circumstances of case involved prior division of the parcels, not new construction or trespass.
- ***De Martini v. Sup. Ct.***, 98 Cal.App.5th 1269 (2024) (1DCA/3): Party was required to obtain leave of court to file second lis pendens notice as to same property and defendant, after first notice was expunged. Extensive discussion of lis pendens standards and history of case law interpreting the lis pendens statutes.
- ***Epochal Enterprises, Inc. v. LF Encinitas Properties, LLC***, 99 Cal.App.5th 44 (2024) (4DCA/1): Commercial tenant asserted claims against landlord for failure to disclose asbestos under Asbestos Notification Law, which was properly found to be gross negligence. Landlord knew asbestos was present and even had repairs done on other parts of the property without informing the tenant of the presence of asbestos and lead, which . contaminated plaintiff’s orchids and caused lost profits damages that were supported with

substantial evidence and expert testimony. *Tunkl* factors held inapplicable since they apply only to ordinary negligence.

- ***Yes In My Back Yard v. City of Culver City***, 96 Cal.App.5th 1103 (2023) (2DCA/4): Culver City ordinance violated state law when it reduced allowable sf ratio for SFRs below what was previously permitted before adoption of Housing Crisis Act of 2019; awarding fees multiplier of 1.25 based on low hourly rates and success in achieving litigation objectives.
- ***Visitacion Investment, LLC v. 424 Jessie Historic Properties, LLC***, 92 Cal.App.5th 1081 (2023) (1DCA/2): MSJ was improperly granted where the original owner of both parties' parcels had reserved an easement for railroad activities and other uses when it granted the servient tenement.
- ***South Lake Tahoe Property Owners Group v. City of South Lake Tahoe***, 92 Cal.App.5th 735 (2023) (3DCA): ordinance was discriminatory against interstate commerce where it disallowed vacation rentals but permitted city residents to rent out their homes for less than 30 days.

### **Section 998 Offers**

- ***Kinney v. City of Corona***, 99 Cal.App.5th 1 (2023)(4DCA/2): Plaintiff prevailed in a CPRA action demanding disclosure of a name, and ordinarily, would have been entitled to recover fees and costs. However, the City had served a 998 Offer proposing to disclose the name and pay \$2,500 in attorneys' fees and costs. Plaintiff's \$43K award reversed and trial court was ordered to enter a new judgment awarding \$2,475. Portions of the case are unpublished relating to the "catalyst theory" in the context of CPRA petitions, but extensive discussion on 998 Offers and ambiguity.

### **Settlements**

- ***BTHHM Berkeley, LLC v. Johnston***, \_\_\_\_ Cal.Rptr. \_\_\_\_, 2024 WL 1336433 (Mar. 28, 2024) (1DCA/4): trial court did not have authority to enter prejudgment interest that

was not part of the settlement agreement being enforced by the court, affirming older authority on the same point.

- ***W. Bradley Electric v. Mitchell Engineering***, 100 Cal.App.5th 1 (2024) (1DCA/5): settlement could be enforced where attorney ratified settlement agreement.
- ***Castelo v. Xceed Financial Credit Union***, 91 Cal.App.5th 777 (2023) (2DCA/7): extensive discussion of scope of a release in an employment context, and applicability of Civil Code section 1668, where plaintiff was terminated after signing a settlement agreement.

### **Social Media:**

- ***Wozniak v. YouTube, LLC***, --- Cal.Rptr.3d ---- 2024 WL 1151750 (Mar. 25, 2024) (6DCA); claims against social media company were dismissed on demurrer; but Court of Appeal held leave to amend should have been granted even where most of the claims were dismissed due to CDA immunity.

### **Statute of Limitations/Five Year Rule**

- ***Escamilla v. Vannucci***, 97 Cal.App.5th 175 (2023) (1DCA/1) (review granted Jan. 31, 2024): plaintiff filed a malicious prosecution action against defendant attorney who had represented the opposing parties in the underlying litigation. Held, one-year statute of limitations in Code Civ. Proc. section 340.6 (“arising in the performance of professional services”) applied, vs. the two-year statute in Code Civ. Proc. section 335.1 (“An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another”) for malicious prosecution claim against the attorney representing that plaintiff.
- ***Piedmont Capital Mgt, LLC v. McElfish***, 94 Cal.App.5th 961 (2023) (2DCA/2): limitations period for breach of contract action on HELOC was triggered when the lender exercised the HELOC’s acceleration clause and not upon the borrower’s first missed payment.

## **Torts**

- ***Gutierrez v. Tostado***, 97 Cal.App.5th 586 (2023) – review has been granted by CASC. Plaintiff brought claim for car accident where he was rear-ended by an ambulance on Hwy 280. Plaintiff’s claims were held to be time-barred under MICRA as court found the case was one “arising out of professional negligence.”
- ***Jackson v. Lara***, 100 Cal.App.5th 237 (2024) (4DCA/1): Plaintiff went to a hotel bar and the bartender eventually deemed him too intoxicated for further service. Plaintiff asked to speak with the manager, then became involved in an altercation and was arrested and later tried for battery. During his trial, the criminal court denied his motion for acquittal; the jury later found him not guilty. MSJ properly granted on subsequent suit for malicious prosecution given that lack of probable cause is a required element.
- ***City of Norwalk v. City of Cerritos***, 99 Cal.App.5th 977 (2024) (2DCA/2): Defendant immune from public nuisance claim for diversion of “heavy truck traffic” and its “severe adverse effects” pursuant to Civil Code section 3482 where it limited through-traffic by commercial vehicles and vehicles exceeding a certain weight limit to designated arteries in the city.
- ***Whitehead v. City of Oakland***, 99 Cal.App.5th 775 (2024 ) (1DCA/3): Plaintiff was injured after striking a pothole on his bicycle, during a training exercise for a charity fundraiser in which he signed a release. Release was held to be valid and enforceable given the *Tunkl v. Regents of University of Cal.*, 60 Cal.2d 92 (1963) factors; City was not grossly negligent in failing to repair or prioritize repairs of the pothole.
- ***Olson v. Saville***, 98 Cal.App.5th 1066 (2024) (2DCA/6): Defendant surfer entered plaintiff’s wave, causing plaintiff to exit the wave, but defendant’s surfboard came back through the wave and hit plaintiff. Court rejected plaintiff’s claims on MSJ. Good discussion on the doctrine of primary assumption of the risk.
- ***Leahy v. Peterson***, 98 Cal.App.5th 239 (2023) (4DCA/1): Petitioner may not make a second five-year renewal of civil harassment restraining order without showing of new conduct constituting harassment.

- ***Thomas v. Regents of Univ. of California***, 97 Cal.App.5th 587 (2023) (1DCA/2): Plaintiff properly stated sexual harassment claims under Civ. Code section 51.9; extensive discussion of sexual harassment claims generally and development of case law under both Section 51.9 and FEHA: “Even with no express reference to sex or gender, harassment creating a hostile environment may constitute sexual harassment if the plaintiff can prove ‘she would not have been treated in the same manner’ if she were a man.”
- ***Stufkosky v. Caltrans***, 97 Cal.App.5th 492 (2023) (2DCA/6): Caltrans entitled to design immunity for negligence claim after decedent struck a deer; MSJ properly granted where there was substantial evidence of highway designs’ reasonableness.
- ***Summerfield v. City of Inglewood***, 96 Cal.App.5th 983 (2023) (2DCA/8): On demurrer, no dangerous condition of public property where public park did not have security guards, regardless of two prior shootings that had occurred on premises; no liability from failure to warn about criminal activity in the parking lot, and plaintiffs did not allege with particularity that the failure to provide surveillance cameras in the parking lot was a defective condition.
- ***Brinsmead v. Elk Grove USD***, 95 Cal.App.5th 583 (2023) (3DCA): Reversing dismissal (on demurrer) of claims brought by parents of deceased student, where student’s friend picked her up at the bus stop after bus did not show up for over 40 minutes, and student was instead died in a car accident. Parents stated claims that school district failed in its duty to supervise student and provide her with transportation to school.
- ***Miller v. PG&E***, 97 Cal.App.5th 1161 (2023) (1DCA/3): Misalignment of utility vault cover and property adjacent to sidewalk was trivial as a matter of law, even though it was subsequently repaired, given surrounding circumstances of the accident; MSJ properly granted.
- ***Irvine Company LLC v. Sup. Ct. of Orange County***, 96 Cal.App.5th 858 (2023) (4DCA/3): No liability against shopping center based on negligent undertaking theory when plaintiff engaging in “nonsensical horseplay” (as vividly described in the opinion)

and ultimately sat on and fell from a 43” perimeter wall on the roof the parking garage. Plaintiffs did not plead premises liability and were prohibited from raising those claims on appeal.

- ***Acosta v. MAS Realty, LLC***, 96 Cal.App.5th 635 (2023) (2DCA/3): Following trial of plaintiff’s claims that he fell through a hatch in the roof, the COA reversed the judgment on the basis that there was not substantial evidence to support the jury’s verdict that “the roof hatch’s hazardous condition could not reasonably have been discovered” by the plaintiff, and noting that the doctrines of negligence and peculiar risk, among other issues, had been confused in the underlying proceedings. Noting at Footnote 7 that the CACI instructions are severely deficient and need to be amended. ***See also Blaylock v. DMP 250 Newport Center, LLC***, 92 Cal.App.5th 863 (2023) (4DCA/3)(hazardous nature of plywood panel in floor of crawl space was not concealed from contractor, no duty to warn).
- ***Martin v. Thi E-Commerce, LLC***, 95 Cal.App.5th 521 (2023) (4DCA/3): Extensive opinion on viability of “testers” claims to withstand demurrer for ADA and Unruh Civil Rights Act claims based on stand-alone websites, and confirming that such claims are insufficient to withstand demurrer.
- ***Glynn v. Orange Circle Lounge, Inc.***, 95 Cal.App.5th 1289 (2023) (4DCA/3): Parents of bar patron who died after getting into fights at two separate bars filed a wrongful death claim; under established negligence law, a bar’s duty to patrons ends when patrons safely and peaceably leave the bar.
- ***Law Firm of Fox and Fox v. Chase Bank, N.A.***, 95 Cal.App.5th 182 (2023) (2DCA/7): reversing grant of MSJ to find that bank owed duty of care to Plaintiff after bank disbursed funds from a blocked account, and triable issues of fact remained as to whether they breached the duty.
- ***Carr v. City of Newport Beach***, 94 Cal.App.5th 1199 (2023) (4DCA/3): MSJ properly granted where swimmer dove headfirst into 20”-deep water at a City beach, based on hazardous recreational activity and lack of exceptions to City’s immunity.

- *Altizer v. Coachella Valley Conservation Comm.*, 94 Cal.App.5th 749 (2023) (4DCA/2): motorcyclist was engaged in hazardous recreational activity when he ran into a suspended cable fence while operating his vehicle off-road in an unoccupied area of the desert, no duty on part of Commission.
- *Safechuck v. MJJ Prods., Inc.*, 94 Cal.App.5th 675 (2023) (2DCA/8): after multiple prior actions were dismissed and appealed, in latest stage of this case, musician’s corporations had special relationship with victims of childhood sexual assault, such that claims for negligence and breach of fiduciary duty could survive. Justice Wiley’s concurrence noted: “This is not an alter ego case. This is a same ego case... What is the tort duty? Where the expected benefit of investments in harm avoidance outweighs the burden, courts impose tort duties on defendants, but courts refrain when the burdens outweigh the expected benefits. These corporations could have taken cost-effective steps to reduce the risk of harm. They owed the children that duty in tort.” Justice Wiley also notes that there are no tort duty precedents involving corporations wholly owned by one person.

### **Trial Procedure**

- *TriCoast Builders, Inc. v. Fonnegra*, 15 Cal.5th 766 (2024): Concerns standard for establishing error where a court declines to conduct a jury trial after an express waiver. Clarifies existing law – a trial court is not always required to grant relief from an express jury trial waiver, and a party must establish prejudice in order to prevail.
- *In re Marriage of Tara & Robert D.*, 99 Cal.App.5th 871, 883 (2024) (4DCA/1): Emphasizes factors for determining whether a trial court properly denied a trial continuance, but also, that the party must show prejudice resulting from the denial, in order to demonstrate structural and/or reversible error.
- *Adams v. Dept. of Corrections & Rehabilitation*, 98 Cal.App.5th 951 (2024) (4DCA/3): MSJ improperly granted where there were triable issues of fact as to whether officer was

acting in course and scope of his duty when forced off the freeway during a high-speed chase; discussion of respondeat superior.

- ***Perez v. Oakdale Irrigation Dist.***, 98 Cal.App.5th 793 (2023) (5DCA): Statutory “canal immunity” for irrigation district applying “if at the time of the injury the person injured was using the property for any purpose other than that for which the district or state intended it to be used” prohibited wife’s action following death of her family after their car overturned in irrigation canal.
- ***Rattary v. Favro***, 97 Cal.App.5th 578 (2023) (1DCA/4): reversing jury verdict after defendant’s counsel misstated the law during his closing argument, finding that admonition to jury “compounded” the error. Noting that standard is not merely whether there have been such statements – appellant must also show a reasonable probability that they would have achieved a more favorable result.
- ***People v. Simmons***, 96 Cal.App.5th 323 (2023) (2DCA/6): prosecutor violated Racial Justice Act when she commented on defendant’s skin tone and “ethnic presentation”; cause remanded given that defendant’s counsel did not bring the comments to the attention of the trial court.
- ***Geringer v. Blue Rider Finance***, 94 Cal.App.5th 813 (2023) (2DCA/7): Reversing grant of disqualification of defendant’s counsel under the advocate witness rule (RPC 3.7) even where counsel testified.
- ***North American Title Co., Inc. v. Superior Court***, 91 Cal.App.5th 948 (2023) (5DCA): For purposes of statement of disqualification, employer sufficiently alleged appearance of trial judge’s bias and lack of impartiality in wage and hour class action. Judge acted improperly in striking party’s statement of disqualification. Extensive discussion of procedure for disqualifying a judge for cause.

## **Trusts, Estates, and Probate**

- ***Haggerty v. Thornton***, 15 Cal.5th 729 (2024): Unless a trust instrument provides for a method of modification and makes that method exclusive, then statutory procedures can be used for revocation of trust.
- ***Hamilton v. Green***, 98 Cal.App.5th 417 (2023) (2DCA/4): Heirs' actions to contest a forged amendment to a trust were governed by a 120-day statute of limitations found at Probate Code section 16061.8, and they could not state a claim that was filed after one year, given that they were challenging the existence of the trust, and even where based on alleged forgery.
- ***Robinson v. Gutierrez***, 98 Cal.App.5th 278 (2023) (3DCA): Free room and board for care services will constitute "remuneration" or purposes of statutes relating to donative transfers to "care custodians," including for purposes of determining if there has been undue influence. Determination of undue influence cannot be based on a mere preponderance of the evidence standard because there is a presumption of fraud or undue influence under Probate Code section 21380 for care custodians who receive donative gifts.
- ***Estate of Martino***, 96 Cal.App.5th 596 (2023) (4DCA/1): Stepson did not lack standing to assert claim of "natural parentage" for heirship purposes, under relevant statutes Probate Code sections 6450-6455, when seeking to be designated an heir of his stepfather. Neither his failure to establish a biological connection, nor statute addressing intestate succession through a foster parent or stepparent, are exclusive.
- ***Jo Redland Trust, U.A.D. 4-6-05 v. CIT Bank, N.A.***, 92 Cal.App.5th 142 (2023) (1DCA/4): Where plaintiff filed in name of trust, rather than the trustee, the action was not void ab initio.

## **Miscellaneous**

- *Wood v. San Francisco County Sup. Ct.*, --- Cal.Rptr.3d ---- 2024 WL 1110085 (Mar. 14, 2024) (1DCA/2): trial court abused discretion in refusing to grant, on rounds of offensiveness, applicant’s name change petition where applicant sought name of “Candi Bimbo Doll.” Extensive discussion of relatively small number of name change cases and the few times name changes have been denied.
- *M.A. v. B.F.*, 99 Cal.App.5th 559, 576, 578 (2024) (4DCA/3): Where defendant fractured plaintiff’s neck during sexual encounter, court could determine “as a matter of law” based on its interpretation of the facts that parties were not in a “serious dating relationship” within the meaning of Family Code section 6210 for purposes of sexual battery claim, but merely a “friends with benefits” “casual relationship marked by brief, sporadic sexual ‘hook ups,’ lacking the “emotional and privacy aspects” [citation] or the “emotional and affectional involvement” [citation] that mark frequent, intimate associations.” Dissent notes that the majority “disregards the Legislature’s intent to broaden the definition of domestic violence in order to protect victims, who are made particularly vulnerable because of their intimate, albeit nontraditional, relationships with their perpetrators.”
- *H.B. v. Sup.Ct.*, 97 Cal.App.5th 341 (2023) (1DCA/4): Defendant pled no contest to human trafficking after forcing plaintiff to perform prostitution. As a matter of first impression, finding that amount of money that victim received, but had taken from her, as a result of her acts of prostitution that defendant forced her to commit, fell within restitution statute for human trafficking crimes.

## **Utilities**

- *Gantner v. PG&E Corp.*, 15 Cal.5th 396 (2023): utility customer’s suit for damages arising out of emergency public safety power shutoffs was preempted under Public Utilities Code sections which deprive Superior Court of jurisdiction to review PUC orders; answering question certified to it by the 9th Circuit.

**CALIFORNIA LAWYERS ASSOCIATION**  
**LITIGATION AND APPELLATE SUMMIT**  
**APRIL 25, 2024**

**LITIGATION, APPELLATE, AND ADR UPDATE**  
**2024 AND BEYOND**

**Including Significant New Laws, Changes to the Code of Civil Procedure, and More from  
the 2023-24 Legislative Session through current**

**Jordanna G. Thigpen (SBN 232642)**

**Thigpen Legal, P.C., Beverly Hills, CA**

**[jt@thigpenlegal.com](mailto:jt@thigpenlegal.com)**

## **LEGISLATIVE CHANGES: 2023-2024 (SO FAR)**

### **CIVIL RIGHTS**

**AB-1576:** **Previously passed: Lactation facilities:** Courts are required to provide court users with access to lactation rooms made available to court employees, which shall meet all requirements of Labor Code § 1031. This was amended this year, and this law now does not take effect until July 1, 2026.

**SB-140:** Early childcare and education. Enhancing access to early childcare and education, providing for resources to encourage people to join the business.

### **COURTS AND CIVIL PROCEDURE**

**AB-1032:** Amending various Government Code sections related to the appointment of court interpreters; providing that court employees may provide work under a new classification of “court interpreter pro tempore”

**AB-1119:** Amending portions of the CCP related to debtor’s exams, financial statements, and other rules regarding enforcement of judgments, providing for additional notice period (30 days) and prohibiting courts from issuing an arrest warrant where consumer debt is involved.

**AB-1414:** Excluding consumer debt from the definition of “book account”; prohibiting use of common counts (as defined) to recover consumer debt.

**AB-1253:** Adding Evidence Code section 1285 to provide that:

Within an official written report or record of a law enforcement officer regarding a sexual offense that resulted in a person’s conviction, the following statements are not made inadmissible by the hearsay rule at the civil hearing described in Section 6602 of the Welfare and Institutions Code when offered to prove the truth of the matter stated:

- (a) A statement from a victim of the sexual offense.
- (b) A statement from an eyewitness to the sexual offense.
- (c) A statement from a sexual assault medical examiner who examined a victim of the sexual offense.

**SB-71:** Jurisdiction: small claims and limited civil cases – the limit is now \$35,000.

**SB-75:** Authorizing 26 additional judgeships even though 98 are needed – 52 in San Bernadino and Riverside alone, along with 15 other counties.

**SB-133:** Creating the Access to Justice Commission; extending the \$1,000 complex litigation fee indefinitely, extending remote technology until January 1, 2026.

**SB-235:** FRCP Rule 26 initial disclosures procedures now in effect in CA if a demand is made by the opposing party. Code Civ. Proc. sections 2016.090; 2023.050.

**SB-439:** Adding Code Civ. Proc. section 425.19 and permitting anti-SLAPP lawsuits for lawsuits brought to challenge a “priority housing development” (“a development in which 100 percent of the units, exclusive of any manager’s unit or units, will be reserved for lower income households, as defined in Section 50079.5 of the Health and Safety Code, for at least 55 years.”).

**SB-564:** allowing for increase in sheriff’s and marshal’s fees for service

**SB-696:** Certain amendments to the Civil Code and the Government Code relating to notaries, including on-line notarizations and out-of-state notarizations

## **ADR**

**SB-365:** Amending Code Civ. Proc. section 1294 to provide that trial court proceedings would not be automatically stayed during the pendency of an appeal of an order dismissing or denying a petition to compel arbitration.

## **CONSUMER RIGHTS**

**AB-39:** Digital Financial Assets Law: provides for enhanced regulation of “digital financial assets,” as defined, by the Department of Financial Protection and Innovation including with increased enforcement measures.

**AB-1084:** requires retailers of toys to establish a gender-neutral toy section.

**AB-1262:** Various Business and Profession Code amendments relating to the regulation of professional fiduciaries.

**AB-1366:** Unfair competition and false advertising: permitting the remedy of disgorgement in actions brought by the Attorney General only.

**SB-244:** Right to Repair Act: requires manufacturers of devices costing more than \$50 to provide consumers and repair shops with instructions, parts, and tools for repair.

**SB-478:** CLRA Amendments: Requires websites to show the cost of a service or item upfront, including hotel and STR stays, tickets, and food delivery.

## **COMMERCIAL TRANSACTIONS**

**SB-95:** Various updates to reflect amendments to the Commercial Code to conform to UCC amendments.

**SB-505:** Amending Ins. Code section 10095 to provide for a fair access to insurance requirements clearinghouse program for commercial policies.

## **CORPORATIONS**

**AB-769: Meetings, State of Emergency:** Amendments to Corp. Code §§ 5510, 7510, 9411, and 12460. Authorizes shareholders or members to also conduct a meeting of shareholders or members solely by electronic transmission (“remote meetings”) if the meeting is conducted on or before June 30, 2022 (existing law already provides that remote meetings are permitted under certain conditions: (a) the shareholders/members consent or (b) the board determines it is necessary because of an emergency) and there are reasonable measures to verify that each participant is a shareholder/member or proxyholder.

**AB-1780: Additional changes re: remote meetings:** Amending Corp. Code § 600: Providing that for corporations, remote meetings are permitted as long as there is a live feed for the duration of the meeting, and now requires the corporation to verify that the person who voted is a shareholder or proxyholder.

**SB-446:** Amending the Nonprofit Corporation Law and the Cooperative Corporation Law to conform to changes to the General Corporation Law regarding ratification of corporate actions.

## **CRIMINAL JUSTICE**

**SB-14:** defines human trafficking of minors in California for purposes of a commercial sex act as a serious felony.

**SB-673:** establishes the “Ebony Alert” for missing young Black women and children.

**AB-360:** prohibits “excited delirium” from being considered a medical diagnosis or valid cause of death.

**AB-452:** eliminates the SOL for victims of childhood sexual assault where it occurs on or after January 1, 2024.

## **ELECTIONS/VOTING**

**AB-545:** Permits voters with a disability to complete a regular ballot outside of a polling place and removes requirement for a voter to declare under oath that they are unable to mark their ballot in order to receive assistance doing so.

**SB-329:** permits general law cities to raise the salaries of city councilmembers, since the compensation schedule has not been adjusted since 1984.

## **ENERGY, OIL/GAS**

**SBX1-2:** Grants the California Energy Commission authority to issue penalties to refineries and set a maximum gross gasoline refining margin where necessary; creates new, independent state agency to investigate market or price manipulation.

**AB-3:** Requires the State Energy Resources Conservation and Development Commission, in consultation with the Coastal Commission and specified state entities, to develop a second-phase plan and strategy for seaport readiness before December 31, 2026 for offshore wind energy projects, along with other reports due by December 31, 2027.

**SB-1137:** Oil and Gas Permitting: This was from 2023, but it is still on hold and relates to the November 2024 ballot, so it is being included again. Oil and gas drilling in California is under the supervision of the Geologic Energy Management Division in the Department of Conservation, under the direction of the State Oil and Gas Supervisor. This law requires a 3,200 ft. setback between oil and gas wells and “sensitive receptors,” broadly defined to include residences, schools, community resource centers, hospitals, prisons, and any place with a business open to the public. However, they may still be approved and continue under specified circumstances, including where the State is required to “comply with a court order finding that denying approval would amount to a taking of property, or a court order otherwise requiring approval” of the activity.

The law also requires operators to develop a leak detection system for certain chemicals, and detailed response plans.

The law was challenged by the oil and gas industry and is on hold. The industry’s ballot measure to repeal the law will be on the ballot in 2024 as the “California Oil and Gas Well Regulations Referendum,” which they are calling the “Stop the Energy Shutdown” campaign.

## **EVIDENCE**

**SB-135:** Provides that Evidence Code section 801.1 (covering testimony about medical causation) will only apply in civil actions. Also added Gov. Code section 71651.1 to prevent (until January 1, 2025) a court from retaliating against a reporter who informs the court that technology or audibility issues are preventing the creation of a verbatim record, but retaliation in juvenile court proceedings is prohibited until January 1, 2026 under SB-133.

**SB-652:** With SB-135, adding Evidence Code section 801.1 which now reads as follows:

- (a) In a general civil case, as defined in Rule 1.6 of the California Rules of Court, where the party bearing the burden of proof proffers expert testimony regarding medical causation and where that party’s expert is required as a condition of testifying to opine that causation exists to a reasonable medical probability, the party not bearing the burden of proof may offer a contrary expert only if its expert is able to opine that the proffered alternative cause or causes each exists to a reasonable medical probability, except as provided in subdivision (b).

(b) Subdivision (a) does not preclude a witness testifying as an expert from testifying that a matter cannot meet a reasonable degree of probability in the applicable field, and providing the basis for that opinion.

## **GUNS/WEAPONS**

Extensive gun regulations – examples include AB-724, AB-725, AB-732, AB-455, AB-301, AB-303, AB-732, AB-1089, AB-1406, AB-1420, AB-1483, AB-1587

## **HEALTH AND HUMAN SERVICES**

**AB-40:** Requires “ambulance offload time” for emergency room facilities to be no more than 30 minutes and reporting of the actual times

**AB-352:** Requires companies managing electronic health records to protect records related to exercise of reproductive rights, gender-affirming care, and other sensitive services.

**AB-1029:** Relating to the use of advance health care directive forms; providing that a ‘health care decision’ does not include consent does not include consent by a patient’s agent, conservator, or surrogate to convulsive treatment, psychosurgery, sterilization, or abortion” or “convulsive treatment, psychosurgery, sterilization, or abortion for the individual.” An individual may still execute a “voluntary standalone psychiatric advance directive, as defined.”

**AB-1203:** Provides for an exemption from sales and use taxes for breast pumps and related supplies.

**SB-43:** expands counties’ abilities to put severely mentally ill individuals into medical treatment and/or involuntary psychiatric holds, including serious addicts and those unable to keep themselves safe.

**SB-345:** Protects providers and persons from enforcement actions in California of other states’ laws that criminalize or limit the exercise of reproductive rights and/or gender-affirming care, including the mailing of related medications out of state.

**SB-385:** Permits physician’s assistants to perform specified procedures relating to reproductive freedom without direct supervision of a doctor.

**Multiple Fentanyl-related Statutes:** SB-234 (opioid antagonists required to be available at stadiums, concert venues, and amusement parks); **AB-663:** Permits the creation of additional mobile pharmacies to be created and enables them to dispense treatment for opioid use disorder; **AB-33:** and **SB-19:** establishes the Fentanyl Misuse and Overdose Prevention Task Force to address fentanyl misuse; **AB-701:** enhances penalties (additional jail time) for anyone trafficking more than a kilo of fentanyl.

March 2024 PROPOSITION 1/**SB-326/AB-531:** “Reform” of the Mental Health Services Act, now known as the Behavioral Health Services Act; providing for issuance of \$6.38b in bonds to fund 11,150 new behavioral health beds and 26,700 outpatient treatment slots.

## **EDUCATION**

**AB-5:** Safe and Supportive Schools Act: Requires State DOE to finalize an online training delivery platform and curriculum to support LGBTQ cultural competency training for teachers and other certificated employees, as specified in the legislation, by July 1, 2025.

**AB-10:** Requires State DOE to develop and post on its website a model policy and resources about body shaming (build on existing law, the California Healthy Youth Act).

## **ENVIRONMENT**

**AB-30:** Directs Department of Water Resources to research, develop and implement solutions regarding atmospheric rivers.

**SB-605:** requiring study of wave and tidal energy.

## **HOUSING/LAND USE**

**AB-12:** Prohibits landlords from charging more than one month's rent for a security deposit, as of July 1, 2024.

**AB-42:** Exempts “temporary sleeping cabins,” as defined, from the requirement to add sprinklers if they are new construction, until January 1, 2027.

**AB-968:** Requiring disclosure, within 18 months of title transfer to a buyer, to disclose any repairs, modifications, or other alterations that were performed by a contractor, and the contractor's contact information. Takes effect July 1, 2024.

**AB-1218:** Expands the prohibition of city or county from approving any housing development project that requires the demolition of occupied or vacant protected units, unless specified conditions are met.

**AB-1280:** Requiring disclosures in a natural hazard statement with the sale of residential property of whether the property is located in a high or very fire hazard zone, and if so, what type (state vs. local responsibility).

**AB-1287:** Enhancing incentives and concessions for developers who build according to the “maximum allowable residential density”.

**AB-1308:** Prohibiting a public agency from increasing the minimum parking requirements that apply to an SFR as a condition of approval for remodel and renovation to add to an SFR.

**AB-1317:** Requiring landlords to “unbundle” parking from the price of rent for purposes of increasing the rental rate.

**AB-1449:** Continuing to exempt affordable housing from the California Environmental Quality Act as long as certain requirements are met.

**SB-4:** Permitting development of housing on church-owned properties “by right”.

**SB-267:** Prohibits landlords from using a person’s credit history as part of an application for rental housing without offering the applicant the option of providing verifiable alternative evidence of the applicant’s ability to pay.

**SB 272:** requires local governments to develop a sea level rise plan by 2034; requires Coastal Commission to establish guidelines for preparation of the sea level rise plan.

**SB-423:** Land use: streamlined housing approvals: multifamily housing developments: modifies objective planning standard that prohibits a development subject to the streamlined, ministerial approval process from being located in a high fire severity zone.

**SB-676:** no city can enforce or adopt any regulation prohibiting the installation of drought-tolerant landscaping

**SB-684:** Requires local agencies to ministerially consider, without discretionary review or a hearing, parcel maps for housing development projects that meet specified requirements.

**SB-745:** requiring study of building standards to reduce potable water use in new residential buildings.

**Multiple laws related to HOAs:** **AB-1458** and **AB-1764:** HOA association governance (member elections); **AB-648** (teleconference meetings of HOAs); **AB-572** (prohibiting an HOA that records its original declaration after January 1, 2025 from imposing an increase of a regular assessment on the owner of a deed-restricted affordable housing unit of more than 5% plus CPI, not to exceed 10%)

**Multiple laws related to ADUs:** **AB-976:** Accessory dwelling units: preempting local governments regarding rental terms and owner-occupancy requirements for ADUs as specified; **AB-1033:** Accessory dwelling units: local ordinances: separate sale or conveyance. **AB-1332:** Accessory dwelling units: preapproved plans. **SB-477:** prohibiting covenants that prohibit ADUs and JADUs on SFR zoned-properties.

## **LABOR/EMPLOYMENT**

### **Minimum Wage (next phase of SB 3, passed in 2016)**

State minimum wage is now \$16.00 an hour for all California employees. The wage has maxed out, and an inflation-based .50 increase was approved by the California Department of Finance.

Individual jurisdictions have higher minimum wages. For example, West Hollywood’s minimum wage, believed to be the highest in the State, is \$19.08/hour. If you want to check your jurisdiction, UC Berkeley’s Labor Center maintains a list [here](#).

There is a ballot measure on the statewide ballot for November 5, 2024 to create an \$18/hr minimum wage by 2026.

**[AB-1](#)**: Legislature Employer-Employee Relations Act: Prescribes “rights, duties, and prohibitions” for collective bargaining in the context of legislative employees that “parallel those in the Dills Act.” The Dills Act is existing law relating to collective bargaining between the state and recognized state public employee organizations. Grants exclusive jurisdiction to PERB to determine if a charge of unfair practices is justified, with certain exceptions.

**[AB-1076](#), [SB-699](#)**: Contracts in restraint of trade: noncompete agreements: Non-compete agreements in California are void, and an employer is prohibited from enforcing one, even where employment was maintained outside of California, and even where the employee signed the noncompete while living outside of California and working for a non-California employer. A prevailing employee in an action to enforce the law is entitled to attorneys’ fees and costs.

**[AB-1228](#)**: Fast-food (as defined) workers’ wages increased to \$20/hour beginning April 1, 2024

**[AB-1355](#)**: Employment: benefits: electronic notice and documents.

**[SB-700](#)**: Workers/Applicants cannot be discriminated against based on cannabis use off the job and away from workplace (except as to building and construction trades, and federal workers)

**[SB-41](#)** (airline cabin crew employees) and **[SB-332](#)** (minor league baseball employees) not entitled to rest periods under CA law

**[SB-497](#)**: Amending Labor Code sections 98.6 and 1102.5 to provide a rebuttable presumption in favor of retaliation if the employer’s alleged conduct occurs within 90 days of the protected activity.

**[SB 525](#)**: certain health care workers beginning June 1, 2024 will receive a “health care worker minimum wage” of \$21/hour for covered health care employment, as defined performing “health care services” as defined. Salaried employees must make no less than 150% of the health care worker’s minimum wage for FTE in order to qualify as exempt from minimum wage and overtime.

**[SB-616](#)**: Number of sick days expanded from 3 to 5.

**[SB-700](#)**: Requesting information about an applicant’s prior cannabis use is prohibited

**[SB-848](#)**: requires employers to provide up to five days off for reproductive-related losses (miscarriage, stillbirth, unsuccessful reproductive assistance such as IVF, or adoption)

## **LEGAL PROFESSION**

**AB-2958: State Bar oversight:** Prohibits the State Bar from advancing regulatory sandbox proposals without the Legislature’s approval, requires reporting from the Bar on amounts spent on the regulatory sandbox initiatives since 2018.

**SB-40:** Provides for enhanced measures for State Bar accountability, including fingerprinting of employees, public disciplinary proceedings following a notice of disciplinary charges, a procedure for disclosure of disciplinary investigations, access to answers for applicants failing the exam, eliminating ability of State Bar to dismiss certain proceedings, and many more regulations of the State Bar’s operations.

## **PUBLIC SAFETY**

**AB-413:** “Daylighting” crosswalks – prohibits stopped/parked vehicles within 20 feet of an intersection or crosswalk clear of parked vehicles

**AB-436:** prohibits cities and counties from imposing cruising bans on City streets

**AB-925:** amending rules related to removing vehicles with expired registrations

**AB-1909:** This was passed in 2022, but as of January 1, 2024, bicycles may now use pedestrian signals to enter the crosswalk

**SB-55:** catalytic converters must be marked with VINs

## **SOCIAL MEDIA**

**AB-443:** Requires POST to develop guidance for local law enforcement to evaluate bias through social media screenings of officer applicants.

**AB-1027:** Requiring social media platforms to submit drug safety policies.

**AB-1394:** Prohibits social media platforms from “knowingly facilitating, aiding, or abetting commercial sexual exploitation, as specified”

**SB-60:** Authorizes a person to seek an order requiring a social media platform to remove content that includes offers to “transport, import into this state, sell, furnish, administer, or give away a controlled substance in violation of specified law, as prescribed.”

**SB-678:** A person who is paid by a committee to support or oppose a candidate or ballot measure would have to include a disclaimer that they were paid to make the post.

## MISCELLANEOUS

[SB-732](#): State bat is now the “pallid bat”

### On the Ballot for 2024 (so far)

- **Amendment to the Constitution to provide for marriage equality**
- **Repeal of California Constitutional provision** (Article XXXIV) which prohibits the development, construction, or acquisition of a low-rent housing project, as defined, in any manner by any state public body until a majority of the qualified electors of the jurisdiction approve at an election
- **Amendment to the Constitution** to make changes to the way we approve new taxes and housing bonds – to lower to a 55% majority (instead of 66%).
- **Amendment to the Constitution** to require that any initiative seeking to increase a threshold vote has to pass with the same threshold. According to the sponsor’s website, “The Protect and Retain the Majority Vote Act will also preserve the right of local government to place advisory questions on the ballot to ask voters their opinions on various issues.”
- **Pandemic Early Detection and Prevention Institute Initiative:** creates a state Institute for Pandemic Prevention by taxing people making over \$5m by .75% for 10 years.
- **\$18 Minimum Wage Initiative:** increases minimum wage to \$18 by 2026
- **Employee Civil Action Law and PAGA Repeal Initiative:** Repeals PAGA and replaces it with a new process to address labor violations
- **Two-Thirds Legislative Vote and Voter Approval for New or Increased Taxes Initiative:** requires all new state taxes to be enacted with a 2/3 legislative vote and voter approval; requires all new local taxes to be approved with a 2/3 vote of the local electorate
- **Repeals Costa-Hawkins Rental Housing Act of 1995** and prohibits state from limiting the right of cities and counties to maintain, enact, or expand rent-control ordinances.
- **Oil and Gas Well Regulations Referendum:** repeals SB 1137 (described above)

**Pending qualification** – an initiative to require a one-semester personal finance course for graduating high school seniors as of the 2030 class.

## **JURY INSTRUCTIONS**

The Judicial Council approved changes to the Civil Jury Instructions for the 2024 edition, which can be found [here](#). There are several revisions consisting of new authorities, but included below are the revised instructions and the new instructions.

### **New Jury Instructions**

#### **FAIR EMPLOYMENT AND HOUSING ACT**

2580. Pregnancy Discrimination—Failure to Accommodate—Essential Factual Elements (Gov. Code, § 12945(a)(3)(A)) (new)

2581. Pregnancy Discrimination—“Reasonable Accommodation” Explained (new)

#### **CONCLUDING INSTRUCTIONS**

5030. Implicit or Unconscious Bias (new)

### **Revised Instructions or Updates to Sources and Authorities**

#### **PRETRIAL**

113. Bias (revised)

#### **PREMISES LIABILITY**

1001. Basic Duty of Care (sources and authorities)

1003. Unsafe Conditions (sources and authorities)

1004. Obviously Unsafe Conditions (sources and authorities)

1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control (sources and authorities)

#### **DANGEROUS CONDITION OF PUBLIC PROPERTY**

1100. Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835) (sources and authorities)

1123. Affirmative Defense—Design Immunity (Gov. Code, § 830.6) (sources and authorities)

#### **MALICIOUS PROSECUTION**

1501. Wrongful Use of Civil Proceedings (sources and authorities)

#### **FAIR EMPLOYMENT AND HOUSING ACT**

2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j)) (sources and authorities)

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m)) (sources and authorities)

2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n)) (sources and authorities)

2547. Disability-Based Associational Discrimination—Essential Factual Elements (revised)  
2549. Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit (Gov. Code, § 12927(c)(1)) (revised)

### **LABOR CODE ACTIONS**

- VF-2700. Nonpayment of Wages (Lab. Code, §§ 201, 202, 218)(revised)  
VF-2701. Nonpayment of Minimum Wage (Lab. Code, § 1194) (revised)  
VF-2702. Nonpayment of Overtime Compensation (Lab. Code, § 1194) (revised)  
VF-2706. Rest Break Violations (Lab. Code, § 226.7) (revised)  
VF-2707. Meal Break Violations (Lab. Code, §§ 226.7, 512) (revised)  
VF-2708. Meal Break Violations—Employer Records Showing Noncompliance (Lab. Code, §§ 226.7, 512) (revised)  
VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records (Lab. Code, §§ 226.7, 512) (revised)

### **CIVIL RIGHTS**

3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52) (sources and authorities)  
3070. Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements (Civ. Code, §§ 54.3, 55.56) (revised)

### **VICARIOUS RESPONSIBILITY**

3709. Ostensible Agent (sources and authority)  
3713. Nondelegable Duty (sources and authorities)  
3720. Scope of Employment (sources and authorities)

### **DAMAGES**

- 3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage) (revised)

### **UNLAWFUL DETAINER**

4329. Affirmative Defense—Failure to Provide Reasonable Accommodation (sources and authorities)

### **WHISTLE BLOWER PROTECTION**

4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5) (revised)

### **CONSUMER LEGAL REMEDIES ACT**

4702. Consumers Legal Remedies Act—Statutory Damages—Senior or Disabled Plaintiff Person With a Disability (Civ. Code, § 1780(b)) (revised)