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POINTS & Authorities®

FIRM NEWSLETTER

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"Great report. Could you cut it down to one sentence?"

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There Ought To Be A Law: Consider This Alternative To Litigation

Donald P. Wagner

Government is becoming more intrusive. At the state and federal levels, a host of agencies and departments continuously create new rules for us to live by. At the more local levels, our cities and counties have regulations and ordinances that increasingly control how and what we can do with our businesses, our homes, and our private property.

All too often, those intrusive rules and regulations frustrate a client's legitimate business or personal interests. But the old adage that you can't fight city hall is mostly true, and applies also to fighting governments and their bureaucracies at those different levels. So how can a lawyer help a client when faced with a growing body of unhelpful government rules?

Fortunately, not all legal problems require a lawsuit to fix. Litigation is the default way attorneys seek to resolve those problems. Lawyers naturally turn to the courts to deal with them. But sometimes, there is another way. Try to change the law.

Attorneys should think about this alternative, and clients should ask about it.

There is a simple reason why court challenges to a city or county ordinance, or to an administrative regulation, are frequently unsuccessful: The rules are written in such a way as to favor the

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PLEASE NOTE

At the request of many of our clients and friends, Buchalter Nemer will distribute future editions of *Points & Authorities* electronically. If you prefer to continue receiving hard copies of this publication, please contact us via email at marketing@buchalter.com.

Thank you very much for your continued interest in *Points & Authorities*.

ADAM BASS POINTS From the President

We are delighted to bring you the Summer 2016 issue of *Points and Authorities*.

Donald Wagner opens this issue with an interesting alternative to traditional litigation from the oftentimes pervasiveness of local, state and federal regulations and legal requirements that can have a significant impact on a company's business operations or an individual's personal interests.

Turning our attention to the California employment law topic of independent contractors, Robert Cooper addresses the traditional working classification of independent contractor and how the events of the last decade suggest that this classification will be greatly transformed, if it survives at all.

Next, Daniel Slate writes about the factual circumstances that can support a finding of good faith for confirmation of a chapter 11 plan, when the plan is premised upon very modest impairment (known as "artificial impairment"). Recent court opinions have indicated that a finding of "economic justification" for the artificial impairment supports a determination that the plan is in good faith.

Also in this issue, John Hosack and Jason Goldstein address the recent *Jesinoski* opinion which held that a borrower need only exercise a conditional right of rescission under the Truth in Lending Act (TILA) by notifying the lender of the exercise of that right within 3 years of consummation of the loan. Previously, a borrower who sought to exercise a conditional right of rescission under TILA was required to exercise that right within 3 years of the consummation of the loan and file suit within that same 3 year period. You will learn how *Jesinoski* changed this timeframe without altering TILA's statute of limitations provisions.

Finally, Matthew Seror discusses the increase in copyright infringement litigation, particularly in the Central District of California with the apparel industry taking the brunt of this uptick, prompting the Supreme Court to clarify the standard for attorney fee awards in copyright cases.

I am especially pleased to share with you that Buchalter Nemer was recently ranked among the 100 best law firms for minority attorneys (*Law 360*), and earned the honor of being named one of the Best Places to Work in Orange County by the *Orange County Business Journal*. Our Firm also continues to experience prolific growth, and we are thrilled to welcome all of our new attorneys; see New Faces on page 5.

We hope you enjoy this issue of *Points and Authorities*, and as always, we value our relationships with all of you and welcome your questions, comments and feedback.

Adam J Bass

Adam Bass
President and Chief Executive Officer

The Concept Of Independent Contractor Is Under Assault—Especially In California

Robert S. Cooper

The traditional working classification of independent contractor, as we have known it, may soon go the way of the dinosaur, the horseless carriage, and the telegraph. Although perhaps your gardener, pool man or family accountant can still call themselves independent contractors, the recent developments of the last decade suggest that if this classification is to survive at all, it will be greatly transformed or minimized in its use. This is especially true in the new on-demand businesses such as Uber and many others that are being besieged by class action lawsuits as well as attacks from state and federal regulators. Consider the following recent events and trends:

- The state of California recently (in 2012) amended the Labor Code to add stiff penalties for misclassification of workers. Labor Code sect. 226.8 proscribes penalties of not less than $5,000 and not more than $15,000 for each violation in addition to any other penalties or fines permitted by law, and not less than $10,000 and not more than $25,000 for each violation, if the Labor and Workforce Development Agency or a court issues a determination that the violation was deemed a *willful misclassification*; this statute provides no private right of action but can be the basis for an LWDA action;

- California's Employment Development Department (EDD), which is responsible for enforcing employment taxes such as Unemployment Insurance (UI), State Disability Insurance (SDI) and Personal Income Tax (PIT) against employers, conducts thousands of tax audits across the state, often issuing assessments that assume a company's numerous vendors are misclassified employees, and putting the burden on the companies to prove otherwise. These tax assessments have resulted in multi-millions of dollars in assessments for back taxes against California employers.[1]

- The trucking industry, long a haven of owner-operator truckers running their own businesses, has been transformed by the clean truck rules at the ports of Los Angeles and Long Beach, which outlawed all but the newest trucks from entering the ports. This resulted in many truckers leasing newer trucks from employers who still needed them to haul goods for their customers—but the trucking companies and truckers have been besieged by class action lawsuits attempting to claim that they are misclassified employees. Various adverse court decisions have further chilled the independent contractor title for these truckers. (*People ex rel. Harris v. Pan Anchor Transportation* (California Supreme Court 2014) [Unfair Competition case alleging that truck drivers misclassified as independent contractors is not preempted by federal law]; *Garcia v. Seacon Logix,Inc.,* (190 Cal.Rptr. 2015) [Port of Long Beach truck drivers are employees, not independent contractors].

- Just weeks ago (June 16, 2016) FedEx agreed to pay $240 million to settle claims from delivery drivers in 20 states who said they were incorrectly classified as independent contractors. A federal judge awarded $37.2 million in attorneys' fees to class counsel for FedEx drivers in a separate $227 million settlement with drivers in those states, one of a slew of lawsuits in approximately 40 states against FedEx.

- Uber recently was forced to pay nearly $100 million in one of many class action suits against it alleging mis-classification of its driver agents, although it was not required as part of the settlement to re-classify its agents. Similar class actions have been filed in droves against other on-demand service companies across the nation.

One of the problems fueling the independent contractor hotbed of legal activity is that the traditional common law test, the so-called "right- to- control-test" outlined by the California Supreme Court 25 years ago in *S.G. Borello & Sons v. Dept. of Industrial Relations* (1989) 48 cal.3d 341) offers no bright-line answer to classifying workers. The court summarized that "[t]he principal test of an employment relationship is whether the person to whom service is rendered has a right to control the manner and means of accomplishing the result desired…" The Court further stated that the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because [t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities…" However, the Court also recognized a range of some eight (8) other secondary factors taken from other precedents, including whether the principal supplies the tools and instrumentalities, the length of time for which the services are to be performed and others. For its part, when assessing the misclassification issue, the EDD utilizes the control test, but adds its own factors as well, and ultimately their test includes some 23 separate factors to analyze whether workers have been misclassified as independent contractors.

The federal test, called the "suffer or permit to work" test, is far stricter, and in July 2015, the U.S. Dept. of Labor issued Administrator's Interpretation No. 2015-1, which concluded that "[i]n sum, most workers are employees under the FLSA's broad definitions…"

Another problem is that, while companies like utilizing independent contractors to save paying for insurance, expenses, benefits and employment lawsuits, state and federal governments don't want to be denied tax revenues generated by employees, and unions want all workers to be employees, so that they can potentially be unionized, and generate dues.

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Confirmation Of A Chapter 11 Plan: Good Faith In The Context Of "Artificial Impairment"

Daniel H. Slate

In order to confirm a chapter 11 plan, at least one class of creditors whose claims are "impaired" must accept the plan. The concept of "impairment" is very broad. Under the Bankruptcy Code, a class of claims is impaired unless the plan "leaves unaltered the legal, equitable, and contractual rights" to which the holder of the claim is entitled. That alteration can be very modest: payment in full but paid half at confirmation and the other half in 30 days, reduction of the applicable interest rate by one basis point, etc. With such wide latitude in impairment, courts have struggled with whether such "artificial" impairment bumps up against another requirement of confirmation: that the plan is proposed in good faith. The question boils down to whether the Bankruptcy Code draws a distinction between artificial impairment and economically driven impairment.

The 8th Circuit directly addressed the tension between concepts of good faith and artificial impairment in *In re Windsor on the River Associates*, 7 F. 3d 127 (8th Cir. 1993) ("*Windsor*"). The *Windsor* court held that "a claim is not impaired if the alteration of rights in question arises solely from the debtor's exercise of discretion." In *Windsor*, the debtor had no reason to impair several classes of creditors, calling the delay in payment to those classes of creditors "manufactured," and effectively circumventing the purpose of bankruptcy, consensual reorganization. In other words, the *Windsor* court determined that artificial impairment is not "impairment" for confirmation purposes.

The Ninth Circuit, in *Matter of L&J Anaheim Associates*, 995 F. 2d 940 (9th Cir. 1993) held that the Bankruptcy Code did not distinguish between discretionary and economically driven impairment, relying on the "plain language" of the statute. The reasoning undertaken by the *Windsor* court has been criticized by a number of courts. The Fifth Circuit, in the *Matter of Village at Camp Bowie I, LP,* 710 F. 3d 239 (5th Cir. 2013) ("*Camp Bowie*") expressly rejected *Windsor*, and joined the Ninth Circuit in holding that the Bankruptcy Code does not distinguish between discretionary and economically driven impairment. *Camp Bowie* went on, however, to consider the issue under good faith. Over the objection of the secured creditor, the Court determined that the plan was in good faith, even though the only class to vote in favor of the plan was the class of general unsecured creditors, and they were to be paid in full three months after confirmation.

While finding good faith in that instance, the *Camp Bowie* court expressly rejected the concept that artificial impairment should get a "free pass" under the good faith analysis. The facts mentioned in the *Camp Bowie* opinion included the following: (i) the debtor's property was worth several million dollars over and above the debt owed the secured creditor; (ii) the debtor's principals were investing $1.5 million in new money into the property; and (iii) the debtor's unsecured creditors were "independent third parties."

The Sixth Circuit recently followed the lead of *Camp Bowie*, and found that even though the plan artificially impaired several creditors, the debtor's motives are addressed through the lens of good faith issues. The facts in I*n re: Village Green I, GP*, 811 F. 3d 816 (6th Cir. 2016) ("*Village Green*")[1] were different from those mentioned in *Camp Bowie*. For example, in *Village Green*, (i) the real property was worth substantially less than the secured debt; (ii) the debtor's principals were not contributing any new money into the property; and (iii) the only unsecured creditors were the debtor's former lawyer and accountant.

Under those facts, the Court, in affirming the District Court's reversal of a determination of good faith by the Bankruptcy Court, relied upon a number of factors to conclude that the Bankruptcy Court's determination was clearly erroneous. The appellate court determined that the debtor did not have an economic justification for "rationing" every dollar when the total of impaired claims was less than $2,400, and the debtor's projections indicated net operating income of $857,000 during the first year after confirmation. The appellate court also cited the fact that the two impaired creditors were the debtor's former lawyer and accountant compounded the appearance that impairment was undertaken in order to circumvent the purpose of the Bankruptcy Code. The *Village Green* court referenced the District Court's reasoning that in the context of good faith it is useful to consider whether there is an "economic justification" for the artificial impairment. The Sixth Circuit determined that there was no such justification in *Village Green*.

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[1] Buchalter Nemer successfully represented the secured creditor in *Village Green*.

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There Ought To Be A Law: Consider This Alternative To Litigation

Donald P. Wagner

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government when its acts are challenged in court. Only if the challenged ordinance or regulation violates some controlling law—say the federal or state constitution or a governing statute—should the legal challenge succeed. And, frankly, only rarely do careful and competently advised government entities so sloppily draw an ordinance or regulation. If the unhelpful government action is legitimately passed, i.e., with proper notice and a sufficient vote, and the action is within the government's appropriate jurisdiction, then the action probably withstands a court challenge. Indeed it should survive since the courts exist to enforce, not change, the law.

But if the court cannot change the law, why not instead go to the government entity that *can*?

The First Amendment famously protects the freedoms of speech and religion. But it does more. It also protects the right of the people to petition their government for redress of grievances. Thus, when faced with an ordinance or statute that frustrates a client's goals, rather than reflexively filing a lawsuit, a lawyer should consider whether first simply to "petition" the government to change that frustrating law. There is a slightly pejorative word for this—*lobbying*—but it is constitutionally protected as a valuable American right.

A successful lobbying effort unfortunately is not as simple as the textbook civics lessons might suggest. It requires much more than going to a meeting of the government agency, for example, a city council or board of supervisors meeting, and asking for the change during the public comments. Most of those presentations frankly are haphazard and do not effectively engage policy makers. Moreover, California's open meeting law, the Brown Act, actually limits that opportunity for the public officials to engage. Local elected officials in fact are frequently instructed by their own attorneys not to respond to public comments during agendized meetings. And finally, it is difficult in the short time usually available for public comments to adequately raise and thoroughly address the concerns that would actually influence local elected officials to make a change in the law.

Instead, a serious effort to lobby for a change in an ordinance or statute requires not just access to the targeted official or officials, but an understanding of the law, economics, *and politics* that public officials will consider in deciding whether to change the law. That takes time, experience, and much thought to develop. Done correctly, a lobbying job is best approached as one would prepare for a court hearing. Evidence, "witnesses," and policy arguments are required to defend the underlying policy change the client wants to make. But this is a "hearing" with a crucial difference.

Public officials are not judges and react to different pressures than do judges in a court hearing. The effective lobbyist understands this. Because elected officials are charged with making the law, not merely enforcing it, the proposed change must be one that the official believes is in the public's best interest and can be defended to the public, most obviously at election time. An experienced and professional lobbyist will anticipate this and be prepared to explain why the proposed change is in the public good.

In short, a successful lobbying effort will not be the one with the most evidence to win in a court. It will be the one that achieves a public policy goal that the official is willing to stand behind in the court of public opinion.

Finally, an important warning: Many jurisdictions have detailed rules governing lobbyists. Often, a lobbyist must be registered, pay a fee for the privilege of being registered, and make certain financial disclosures. These rules vary from jurisdiction to jurisdiction. Additionally, some activity might be considered lobbying by one government entity and not lobbying by another. It is necessary for any attorney who wants to petition a government to change the law, rather than go to court to force that change, to know those rules of lobbying and stay within them. This will avoid personal liability and improve the chances of success.

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Truth-In-Lending Act Rescission Part I: Why The U.S. Supreme Court's *Jesinoski* Opinion Does Not Defeat The Statute of Limitations

John L. Hosack and Jason E. Goldstein

Before the United States Supreme Court opinion in *Jesinoski v. Countrywide Home Loans, Inc.* (2015) __ U.S. __, 135 S.Ct. 790, the law in the Ninth Circuit was that a borrower who sought to exercise a conditional right of rescission under the Truth-In-Lending Act ("TILA") was required to exercise that right within three (3) years of the consummation of the loan and to file suit within that same three (3) year period to enforce that right if the rescission request was not complied with. See, *McComie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1329 (9th Cir. 2012) ("Because § 1635(f) is a statute of repose, it extinguished McComie Gray's right to rescission on April 14, 2009, three years after the consummation of the loan").

In *Jesinoski*, 135 S.Ct. at 793, the Supreme Court disagreed with cases like *McComie-Gray*, and instead held that a borrower need only exercise a right of rescission under TILA by notifying the lender of the exercise of that right within three (3) years of the consummation of the loan. The borrower did not also have to file a lawsuit within that three (3) year period to enforce the right to rescind under TILA.

Based on *Jesinoski*, borrowers now claim that TILA rescissions happen instantaneously upon the exercise of the right to rescind, regardless of whether a lawsuit is filed or the amount of time which elapses after the *exercise* of the right to rescind with no further action taken by the borrower.

Did *Jesinoski* hold that a borrower never has to file a lawsuit to enforce a contested right of rescission? No, *Jesinoski* did not so hold.

The Supreme Court in *Jesinoski* did not hold that a borrower which makes a timely rescission request never has to file a lawsuit to enforce its contested rescission right. The Supreme Court was not presented with this question in Jesinoski.

If the Supreme Court were presented with such a question in the future, it does not appear that the question could be answered in the affirmative. This is because the express language of TILA provides for a one (1) year statute of limitations for rescission claims.

15 U.S.C. § 1640(a) provides a borrower with remedies under TILA when a lender declines a borrower's request for rescission:

> "[A]**ny creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title**... with respect to any person is liable to such person in an amount equal to the sum of—(1) any actual damage sustained by such person as a result of the failure... **(3) in the case of...any action in which a person is determined to have a right of rescission under section 1635 or 1638(e)(7) of this title, the costs of the action together with a reasonable attorney's fee as determined by the court**..." [Emphasis added]

Moreover, 15 U.S.C. § 1640(e) provides a one (1) year time limit within which actions may be brought when a lender allegedly fails to comply with a request for rescission under TILA.

> "[A]**ny action under this section may be brought** in any United States district court, or in any other court of competent jurisdiction, **within one year from the date of the occurrence of the violation**..." [Emphasis added]

TILA's express language requires that an action to enforce a right to rescission—*or any action under TILA for that matter*—must be filed "...within one year of the date of the occurrence of the violation..." *Jesinoski* did not alter the statutory language of TILA and change its one (1) year statute of limitations. Nevertheless, borrowers now argue that it did.

Fortunately for lenders, it appears that the predominate post-Jesinoski trend in TILA rescission litigation involving the statute of limitations is that the borrower must file a lawsuit within one (1) year of the exercise of the right to rescind and if the borrower does not do so, the rescission claim is time barred. See, e.g., *Macklin v. Deutsche Bank Nt'l Trust Co. (In re Macklin)*, 2015 Bankr. LEXIS 1186, 95-96 and 98, fn. 2 (E.D. Cal. 2015) ("The plaintiff argues that under 15 U.S.C. § 1635, the Plaintiff has an absolute right to rescind for TILA violations. Plaintiff asserts only notice to the lender is required to effect rescission. The court finds the Plaintiff was entitled [to] send a notice of his intent to rescind, however, the court finds the time to litigate the validity of the rescission has passed...The court finds that even if the one year statute of limitations...").

On July 19, 2016, the California Court of Appeal issued an opinion in *U.S. Bank Nat'l Assoc. v. Naifeh* (2016) 2016 Cal. App. LEXIS 599, which is the first published opinion by a California appellate court in which the effect of *Jesinoski* is discussed. In *Naifeh*, the borrower obtained a loan in March of 2007, purported to exercise a conditional right of rescission by sending letters to the lender in July of 2009, December of 2009 and January of 2010, but the lender did not comply with the rescission request. The borrower then began recording fraudulent documents which purported to reflect that the borrower was released from the debt. After the secured property was foreclosed upon, the borrower continued recording fraudulent documents and even purported to convey title to the secured property to a third party. In 2011, the lender was ultimately required to file a lawsuit to cancel the fraudulent recorded documents.

The Superior Court entered judgment in favor of the successor to the lender and against the borrower and others, but the Court of Appeal in *Naifeh*, 2016 Cal.App. LEXIS * 31, vacated the judgment and remanded the case, "for further proceedings with respect to appellant's affirmative defense of rescission." The California Court of Appeal in *Naifeh* did not issue any opinion on the TILA statute of limitations issue which is the subject of this article, but instead stated

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The Supreme Court Clarifies Standard For Attorney Fee Awards In Copyright Cases

Matthew L. Seror

Copyright infringement litigation has been on the rise in recent years, particularly in the Central District of California, with the apparel industry feeling the brunt of this uptick. In a typical case, a plaintiff alleges the infringement of a textile design used to create garments and files suit against everybody in the distribution chain—from fabric suppliers to retailers. Under the Copyright Act of 1976, among the possible damages plaintiffs can seek is an award of its attorney's fees and costs.

Generally speaking, courts in the United States adhere to the "American Rule," which dictates that absent statutory authority or an agreement between the parties, each litigant is responsible for its own attorney's fees, regardless of who prevails in the litigation. The Copyright Act is one of the statutorily recognized exceptions to the "American Rule" which permits the shifting of attorney's fees to the losing party in litigation. See 17 U.S.C. §505.

Section 505 of the Copyright Act provides that a court, "in its discretion may allow the recovery of full costs by or against any party […]" and that reasonable attorney's fees can be awarded as part of those costs. But this provides little guidance to district courts tasked with deciding when to exercise its discretion and award fees, and when not to. In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Supreme Court took a step toward establishing a nationwide standard. In *Fogerty*, the Court identified "frivolousness, motivation, objective unreasonableness[,] and the need in particular circumstances to advance considerations of compensation and deterrence" as nonexclusive factors that should inform a district court's analysis of fee applications under 17 U.S.C. § 505. *Id.* at 534, n. 19. Notwithstanding this precedence, there still existed a disparity among Federal Circuits in the application of 17 U.S.C. § 505. The Second Circuit places significant emphasis on the objective reasonableness factor (and perhaps in some cases to the exclusion of all other factors). In the Fifth Circuit, it is the "rule rather than the exception [that attorney's fees] should be awarded routinely" to the prevailing party in copyright cases. *McGaughey v. Twentieth Century Fox Film Corp.*, 12 F.3d 62, 65 (5th Cir. 1994). In the Ninth Circuit, where Courts routinely consider a variety of factors, their application has at times been inconsistent.

Enter Supap Kirtsaeng, a former Cornell University student from Thailand. The enterprising Kirtsaeng turned global publishing giant John Wiley & Sons' practice of selling the same English language textbooks at different prices internationally and domestically into a business. Kirtsaeng would purchase John Wiley textbooks overseas (where John Wiley sold them at lower prices) and have them shipped to the United States, where he would resell them for a profit. Due to the price discrepancy between the John Wiley's international and domestic pricing structure, Kirtsaeng could sell the textbooks at a profit while still undercutting John Wiley's U.S. prices.

John Wiley sued Kirtsaeng for copyright infringement. In *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. __ (2013), a divided 6-3 Supreme Court held that Kirtsaeng's purchase and reselling of lawfully obtained editions of John Wiley textbooks was protected by the first sale doctrine. Armed with this win, Kirtsaeng returned to the district court and sought two million in attorney's fees pursuant to 17 U.S.C. § 505. The district court denied Kirtsaeng's motion, holding that Kirtsaeng was not entitled to recover his fees because John Wiley's litigation position, while ultimately not successful, was nevertheless objectively reasonable. The Second Circuit Court of Appeal affirmed the district court's denial of Kirtsaeng's fee application. Kirtsaeng appealed to the Supreme Court, providing the Court with the opportunity to clarify the standard under which attorney's fees can be awarded under 17 U.S.C. § 505.

Now, in the case's second trip to the Supreme Court, Kirtsaeng argued that the Second Circuit's standard put too great an emphasis on the objective reasonableness factor, essentially disregarding all other factors and creating a presumption whereby if the losing party's litigation position was reasonable, a denial of a fees motion was all but assured. Kirtsaeng argued that the central focus of a district court's inquiry on a fee application under 17 U.S.C. § 505 should not be the reasonableness, but whether the case advanced the law. If it does (according to Kirtsaeng) the prevailing party should be entitled to recover its attorney's fees, thereby incentivizing and encouraging other litigants to continue litigating important cases so as to clarify and advance copyright jurisprudence.

Conversely, John Wiley argued that the objectively reasonableness is the appropriate standard to use on a Section 505 fee application. John Wiley argued that such a standard provides not only a measure of predictability but also provides a straightforward standard for district courts to employ when ruling on fee applications.

On June 16, 2016, in a unanimous 8-0 ruling, the Court held that the objective reasonableness of the losing party's position in litigation should remain a significant portion of the inquiry, but that, "objective reasonableness can be only an important factor in assessing fee applications—not the controlling one." *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. __ (2016) (slip op., at 10). There is no doubt that while the objectiveness reasonable factor carries "significant weight," district courts presented with fee applications must consider all factors, including those enumerated in *Fogerty*, and "view all the circumstances of a case on their own terms in light of the Copyright Act's essential goals." *Id.*, (slip op. at 11).

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Firm Highlights

Buchalter Nemer is proud to announce its placement on *Law360*'s
"Top 100 Firms for Minority Attorneys"

The survey ranked Buchalter based upon the firm's minority representation at both the partner and non-partner levels, and based upon the firm's total number of minority attorneys. Law360 also ranked Buchalter Nemer as one of the 50 best law firms for minority equity partners, with 15.2 percent of equity partners identified as minority (compared to a reported 7.58 percent for all law firms surveyed).

Buchalter Nemer's 2016 Northern California Super Lawyers

Peter G. Bertrand, Shawn M. Christianson, Richard C. Darwin, Howard N. Ellman
Manuel Fishman, Alicia Guerra, Robert E. Izmirian, Jay L. Paxton, Thomas M. Sherwood
and James B. Wright

Buchalter Nemer's Northern California Super Lawyers 2016 "Rising Stars"

Peter H. Bales and Ivo Keller

Buchalter Nemer's Southern California Super Lawyers 2016 "Rising Stars"

Oren Bitan, Shadi Enos, David Mark, Michael Muse-Fisher
Nicole Sahagen Schiff, Matthew Seror and Joseph Welch

Buchalter Nemer has earned the distinction of being ranked one of the
Orange County Business Journal's Best Places to Work in **Orange County!**

The Supreme Court Clarifies Standard For Attorney Fee Awards In Copyright Cases

Matthew L. Seror

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Notwithstanding this apparent win for John Wiley insofar as the Court appeared to have adopted Wiley's objective reasonableness standard, the Court nevertheless reversed and vacated the Second Circuit's decision. The Court held that the language of the Second Circuit's opinion suggests that a finding of objective reasonableness raises a presumption against granting a fee application—without due consideration of the other relevant factors. As a result, the Court vacated the Second Circuit's ruling and remanded the case for further consideration of Kirtsaeng's fee application in light of the totality of the *Fogerty* factors.

The Court's recent ruling in *Kirtsaeng* provides important guidance to district courts and litigants alike. With the standard for attorney's fees clarified, litigants can conduct their own analysis as to the risks and benefits of a potential Section 505 fee award and tailor their litigation and settlement strategy accordingly.

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The Concept Of Independent Contractor Is Under Assault—Especially In California

Robert S. Cooper

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Obviously, in the current environment, companies that utilize independent contractors need to be extremely careful as to how much control they exercise over these workers. But also, especially in light of the explosive growth of on-demand companies, state legislatures should step up to both clarify the law and protect these burgeoning businesses, which are growing because consumers want them, and because many workers love the freedom to make money on their own schedules and outside of the traditional workplace.

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[1] In 2007, the state of California collected $40.3 million in assessments on employment tax fraud, $18.5 million in Labor Code citations and $11.9 million in payroll tax assessments.

Truth-In-Lending Act Rescission Part I: Why The U.S. Supreme Court's *Jesinoski* Opinion Does Not Defeat The Statute of Limitations

John L. Hosack and Jason E. Goldstein

Continued from page 7

in footnote 9 that, "We need not and do not decide these issues, because the trial court did not decide them, and the parties did not fully brief them in this appeal."

The TILA rescission statute of limitations issue is currently pending before the Ninth Circuit Court of Appeals, but it is unclear if the Ninth Circuit will resolve this issue or decide the pending appeal on other grounds. On July 19, 2016, the California Court of Appeal in *Naifeh* determined not to address the statute of limitations issue at this time. Until such an opinion is issued by the California Court of Appeal, the California Supreme Court, or the Ninth Circuit Court of Appeals, lenders in the Ninth Circuit must continue to assert that TILA "means what it says" and that a TILA rescission claim brought more than one (1) year after the borrower's *exercise* of a purported right to rescind, is time-barred.

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