

# Los Angeles Lawyer

FEBRUARY 2016 — PART 1 OF 2 / \$5

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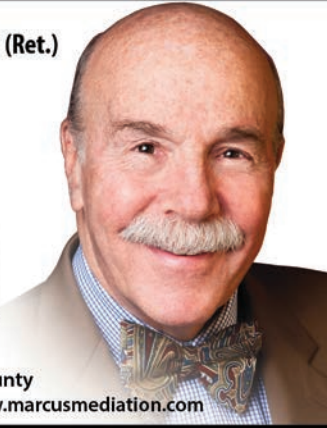
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## FROM THE CHAIR

State Bar dues season is here, and with it comes the important time for every California attorney to step up and contribute to the State Bar's Justice Gap Fund, which helps fund civil legal aid in California. To assist in closing the justice gap for low-income Californians, Line 10

of the 2016 State Bar Fees Statement includes a recommended \$100 donation to legal aid.

Under Section 6033 of the Business and Professions Code, the State Bar is expressly authorized to facilitate the professional responsibilities of its members through the collection of voluntary financial contributions to support nonprofit organizations that provide free legal services to persons of limited means. One hundred percent of the funds donated to the Justice Gap Fund are distributed to qualified legal services organizations throughout California, including rural programs. And the contributions are tax-deductible!

Legal services for the indigent are a critical component of the justice system in California. Indigent Californians have trouble obtaining legal representation or otherwise accessing the civil court system to protect their property, family, housing, and livelihood. After years practicing as a lawyer and hearing about the underfunding of legal services, and especially after year-end giving campaigns, it might seem like a lackluster topic. Unfortunately, the justice gap continues to grow and needs your action.

Contributions to the State Bar Justice Gap Fund supplement funding from Interest on Lawyer Trust Accounts (IOLTA) funds. In 2008, IOLTA was worth \$22 million to California's legal services providers. This year, because of low interest rates, it is worth less than \$6 million. While IOLTA funding has been decreasing by astronomical levels, the need for civil legal services has been increasing. Thus, every donation, of any size, is important.

Many of us do not carefully review the nonmandatory portions of our dues statement and we are quick to process the bill without the recommended voluntary contribution. However, it is not too late. If you missed making a donation on the state bar dues bill, you have two other options for contributing to the State Bar's Justice Gap Fund. You can donate through the Campaign for Justice website at <http://www.caforjustice.org>. Or you can donate by check, made payable to The State Bar of California, c/o the Justice Gap Fund at 180 Howard Street, San Francisco, CA 94105. More information about the Justice Gap Fund is available at <http://www.caforjustice.org>.

Locally, there are also a number of opportunities to support civil legal aid services. We are fortunate in Los Angeles to have a range of excellent legal service providers that are part of the network of programs that receive IOLTA and Justice Gap Fund statewide funding. Those programs could use your financial support to continue to provide services, and expand their programs. The Los Angeles County Bar Association's Counsel for Justice supports important legal aid service projects in five key areas: domestic violence, legal support of veterans, immigration legal assistance, AIDS legal services, and civic mediation. Last year alone, LACBA's legal services projects helped more than 18,000 people and provided over \$4.6 million in pro bono services. These projects also need your support. To donate to LACBA's legal aid service projects, go to <http://www.lacba.org/cfj>. ■

Donna Ford is a retired Assistant United States Attorney.





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## Shawn Trell COO and GC for AEG Live



**SHAWN TRELL** | Shawn Trell is the the chief operating officer and general counsel of AEG Live, the live-entertainment division of Los Angeles-based AEG, one of the world's leading sports and entertainment presenters.

**What is the perfect work day?** The perfect work day involves a morning executive committee meeting. We get together and talk about pertinent things of the day and the future direction of the company.

**What are your three major job duties?** I am responsible for the overall growth of the company. I oversee our venue operations throughout the United States, and I oversee the legal affairs.

**How many employees does AEG Live have?** We have 700 employees, nationally, with 12 regional offices around the country.

**You have new offices Downtown. Why the move?** We moved into a great, unique space that fits our company's culture, and we are close to LA Live and our parent company.

**How was 2015 for AEG Live?** We toured the Rolling Stones, Taylor Swift, the Who, and Kenny Chesney. These are monster tours

with some of the biggest bands in history—and in Taylor's case arguably the biggest artist in the world right now.

**Do you work long hours?** It is not a 9-to-5, day-to-day gig. There's a good bit of travel involved. But I don't look at having access to concerts and festivals as additional work.

**What is the biggest misconception about your job?** It's a business—I'm not hanging out with the band.

**Why did you want to become a lawyer?** I wanted to know a little bit about a lot of different things. I saw law as a means to that end.

**Were you in attendance during the *Jackson v. AEG* trial?** I was there every day as the representative of the company. That case was about protecting the name and the reputation of the company. We could have gotten out of that case on settlement a number of times. It was about principle.

**What did you think of the fuss about the cost to the city of Michael Jackson's funeral?** No good deed goes unpunished. The magnitude of his celebrity required an event like the one at Staples.

**What was your best job?** This is easily my best job—never a dull moment.

**What was your worst job?** I worked for an asbestos removal company.

**Do you have a charity that is close to you?** I am always happy to support children's causes.

**If you were handed \$10 million tomorrow, what would you do with it?** I'd make sure that my family was taken care of, put some away for a rainy day, and give away the rest.

**Who is on your music playlist?** I'm largely an old school guy—the Rolling Stones, Grateful Dead, Lynyrd Skynyrd, and AC/DC.

**What kind of security measures does AEG Live employ at its events?** We take security

very seriously and employ a range of security measures from bag checks to metal detectors.

**Do you anticipate that AEG Live will increase security as a result of the terrorists attack at entertainment venues in Paris?** All of our security measures and procedures are being evaluated.

**In 1969, a ticket to see the Rolling Stones cost \$8, and now it's around \$350. What's an old rock-n-roller to do?** There is this inherent push-pull in the business of artist fees and ticket prices. You can't pay artists more and more to perform and not generate that revenue from somewhere.

**Do you have a favorite AEG venue in Los Angeles?** Yes—the Fonda Theatre.

**Do you have a piece of concert memorabilia that is important to you?** I really don't. I'm not a "things" kind of person. I have a number of great experiences to remember.

**What is your favorite vacation spot?** I like going to the mountains, whether it's summer or winter. I'm a big fan of Beaver Creek and Aspen. The vacation is a dynamic one, not a static one.

**Which television shows do you record?** *Impractical Jokers* and *Deadliest Catch*. My son loves to watch them, and I love to watch them with him.

**Which person in the entertainment business would you like to take out for a beer?** Bill Graham. He forged a path in this industry that had a lot to do with where it is today.

**What are the three most deplorable conditions in the world?** Hunger. Anyplace that is ravaged by a natural disaster. Oppression of women.

**Who are your two favorite U.S. presidents?** The story of JFK is interesting. Ronald Reagan had some connection with people that I really admired.

**What is the one word you would like on your tombstone?** Genuine.

## Avoiding Failure to State a Claim as an Affirmative Defense

**FOR GENERATIONS, SCORES OF LITIGATORS** have asserted “failure to state a claim” as an affirmative defense as a matter of course when answering a complaint. It is even included on the checklist of affirmative defenses provided on the official California Courts website.<sup>1</sup> Thus, new lawyers, typically looking to more seasoned lawyers for guidance and instruction on how to forge ahead in the legal profession, will likely be tempted to include failure to state a claim as an affirmative defense when drafting his or her first answer to a complaint. However, it is important that new lawyers exercise independent judgment and critical thinking rather than blindly following the well-worn path of predecessors.

In short, imitation may be the sincerest form of flattery, but it can also result in a repetition of legal blunders that are best avoided. As evidenced by both case law and common sense, “[f]ailure to state a claim is not a proper affirmative defense but, rather, asserts a defect in [the plaintiff’s] prima facie case.”<sup>2</sup> Such an assertion is properly raised as a simple denial in a defendant’s answer (or as the subject of a demurrer or motion to dismiss). Indeed, state and federal rules of civil procedure specifically distinguish between 1) the mere “denial of the material allegations of the complaint” and 2) an affirmative assertion of “new matter.”<sup>3</sup>

To be clear, an affirmative defense “is a defense that does not negate the elements of the plaintiff’s claim, but instead precludes liability even if all of the elements of the plaintiff’s claim are proven.”<sup>4</sup> For instance, assertions regarding statutes of limitations, unclean hands, or both are proper affirmative defenses, as they may provide a bar to liability notwithstanding that a plaintiff can meet its prima facie burden of proof. On the other hand, “[a] defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense.”<sup>5</sup> Stated otherwise, if a plaintiff cannot satisfy the requirements of its prima facie claim, then there simply is no basis for an affirmative defense to come into play. Rather, the plaintiff’s claim fails on its face, irrespective of whether or not a valid affirmative defense exists. For this reason, an oft-asserted affirmative defense such as failure to perform the contract is not actually an affirmative defense, as it merely negates an element for which the plaintiff already has the burden of proof.<sup>6</sup> Indeed, if a plaintiff failed to perform its own obligations under a contract—and said performance was not excused—the plaintiff cannot maintain a claim for breach of the contract in the first place.<sup>7</sup> By the same token, an assertion of failure to state a claim as an affirmative defense erroneously and illogically implies that a defendant bears the burden of proof with respect to the plaintiff’s prima facie claim.

Faced with the longstanding history of failure to state a claim as a commonplace affirmative defense, new lawyers may reasonably fear that an omission of this allegation from an answer will somehow cause prejudice to their client. More senior lawyers may take issue

(albeit unjustifiably) with a new lawyer’s failure to include this allegation in an answer. However, asserting the improper affirmative defense of failure to state a claim might actually cause detriment to a client’s financial interest, as it will open the door for an aggressive plaintiff to file a motion to strike the affirmative defense, thus costing the client unnecessary legal fees. Such motions are routinely granted.<sup>8</sup> Similarly, the assertion of this affirmative defense will open the door for a plaintiff to propound burdensome discovery (e.g., Judicial Council Form Interrogatory 15.1, which requires a defendant to identify all facts, persons, and documents supporting each affirmative defense)

**As evidenced by both case law and common sense, “[f]ailure to state a claim is not a proper affirmative defense but, rather, asserts a defect in [the plaintiff’s] prima facie case.”**

on an issue for which the plaintiff actually bears the burden of proof.

The mere fact that attorneys have historically raised failure to state a claim as an affirmative defense does not mean that such an assertion is proper or logical. New lawyers should avoid the urge to raise this, and other similarly illusory, affirmative defenses in their answers, lest they ratify—rather than obviate—a widespread blunder of pleading. ■

<sup>1</sup> See <http://www.courts.ca.gov/partners/documents/PLEADING-AffDeflist.doc>.

<sup>2</sup> *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1173 (2010); see also *Vogel v. Huntington Oaks Delaware Partners, LLC*, 291 F.R.D. 438, 442 (2013).

<sup>3</sup> CODE CIV. PROC. §431.30; cf. FED. R. CIV. PROC. 8; see also ROBERT I. WEIL & IRA A. BROWN, JR., *CIVIL PROCEDURE BEFORE TRIAL* §6:437 (2015) (“Facts showing some essential allegation of the complaint is not true are *not* ‘new matter’ but only a traverse. Such matters are in issue under a general denial; i.e., they *need not* be specially pleaded in the answer.”) (emphasis in original).

<sup>4</sup> *Hernandez v. County of Monterey*, 306 F.R.D. 279, 283 (2015); see also *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 385 (1962).

<sup>5</sup> *Zivkovic v. Southern Cal. Edison Co.*, 302 F. 3d 1080, 1088 (2002).

<sup>6</sup> *Walsh v. West Valley Mission Cmty. Coll. Dist.*, 66 Cal. App. 4th 1532, 1545 (1998).

<sup>7</sup> *Consolidated World Investments, Inc. v. Lido Preferred Ltd.*, 9 Cal. App. 4th 373, 380 (1992).

<sup>8</sup> *Vogel v. Huntington Oaks Delaware Partners, LLC*, 291 F.R.D. 438, 442 (2013); *Barnes v. AT&T Pension Benefit Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1174 (2010); *Powell v. Union Pac. R. Co.*, 864 F. Supp. 2d 949, 962 (2012); *Johnson v. Lapidis*, 2007 WL 5878557 (2007).

**David B. Jonelis is an entertainment litigation associate at Lavelly & Singer PC in Century City.**

## Addressing the Uncertainties of Surrogacy and Sperm and Egg Donation

**IN THE LAST 50 YEARS, ADVANCES IN MEDICAL TECHNOLOGY** have spawned a major shift in the legal structure of the family. Through sperm donation, women may have children with no partner, donate eggs, and freeze embryos. Same-sex couples may have children in and outside of marriage, and single fathers may have children with surrogates. Children may be carried by women who are not biologically related to them. The law has not advanced at a similar pace. People who enter into nontraditional reproductive arrangements can find themselves embroiled in litigation and legally separated from a child they parented or brought into the world with the intention of parenting. For this reason, attorneys advising clients on nontraditional parenting arrangements should be aware of the state of the law governing assisted reproduction agreements and similar arrangements.

Historically, the law determined parentage based upon who gave birth to the child. A woman who delivered a child was conclusively presumed to be the child's mother. The father was the man who impregnated her. In early twentieth-century America, some rules were created to temper those basic assumptions to protect the social construct of marriage. For example, under Section 7611(a)-(c) of the Family Code, if a child was born within 300 days of a marriage's end, the husband was presumed to be the father of the child. This was the case whether he had impregnated his wife or not. This law was intended to ensure that the child was born within a legal family unit. Even if the wife had an affair that resulted in a pregnancy, her husband was conclusively presumed to be the father. Similarly, in *Dawn D. v. Superior Court*, the court held that a man who conceived a child as a result of an extramarital affair with a woman who was cohabiting with her fertile husband was statutorily precluded from establishing paternity.<sup>1</sup> It was not until 1992 that the legislature enacted the predecessor statute to Family Code Section 7541, which enabled a husband or a presumed father to seek blood tests to establish the fact of nonpaternity, so long as the husband brought the motion within two years.

Another example of the law's lagging behind technology is what became informally known as the sperm donor rule. It was implemented, in part, so that if a husband was sterile and a couple chose to use donated sperm, there was no risk that the sperm donor could later assert that he was the father of the child, nor was there a risk that the mother of the child could sue the sperm donor for child support. These rules, codified in the Uniform Parentage Act (UPA) and implemented in the majority of states, including California in 1975,<sup>2</sup> gave the first recognition to the fact that children were being created with medical assistance. In an effort to address the situation in which a woman needed donor sperm in order to conceive, the UPA created a class of biological fathers who would never be legal ones.

Pursuant to Section 7613(b) of the Family Code, the man who provided semen to either a physician or sperm bank for use in artificial insemination or in-vitro fertilization was barred from becoming the child's legal father under any circumstances and by requiring that the donation be made through a physician or sperm bank,



medical personnel were deemed to be the appropriate documenters of this fact for legal purposes. People who took artificial insemination into their own hands, so to speak, were not afforded the protection of termination of parental rights of the sperm donor. The operative statute, Family Code Section 7613, provides that the bar to parentage or the conclusive presumption of parentage are only applicable when the married woman conceives "under the supervision of a licensed physician and surgeon" or when the donor provides semen to "a licensed physician and surgeon."<sup>3</sup>

Until recently, courts maintained the sperm donor rule as an absolute bar to a man's being the father of a child conceived by sperm donation, no matter the circumstances.<sup>4</sup> In an effort to protect those parties who were using fertility with the intention not to marry but to co-parent, in 2011 the California Legislature amended Section

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7613(b) to provide that the sperm donor rule would not apply if the “parties otherwise agreed in writing.”<sup>5</sup> Oddly, this amendment did not truly specify what the writing had to consist of. When engaging in fertility treatments, the parties are routinely given consent forms for the procedure. Those forms often refer to the parties as “intended parents.”

### Consent Forms

In a recent case, *Jason P. v. Danielle S.*,<sup>6</sup> while the court did acknowledge the right of the biological father, Jason Patric, to prove his parentage on other grounds, the consent forms were deemed not sufficient to prove his parentage. The court did not accept the argument that the consent forms—which declared both parties to be the “intended parents”—were a sufficient writing to prevent assertion of the sperm donor rule. This seems somewhat at odds with Family Code Section 7606, which defines an “Assisted reproduction agreement” as “a written contract that includes a person who intends to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract.” While not legally binding precedent at this time, in the tentative decision rendered in the highly watched embryo dispute in San Francisco known as *Findley v. Lee*, the court found that both parties were to be held to the consent forms signed prior to creation of the embryos. Under the terms of the forms, if the parties were to divorce the embryos would be thawed and discarded. Thus the former wife did not have the right to take control of the embryos and implant them unilaterally.<sup>7</sup> It will be interesting to see what the court of appeal will do with this finding if the matter goes up on appeal.

Prior to *Jason P.*, California had competing statutes on parentage that could not be legally reconciled. While the sperm donor rule acted as an absolute bar to a man seeking to be declared the father of the child he conceived with his unmarried partner with the intent of raising the child as his own, Family Code Section 7611(d) allowed any man (in typical cases) to be declared the father of a child whom he had held out as his own and received into his home. The lack of reconciliation of these two statutes meant that any man could come forward and seek to be declared the father of a child if he could meet the criteria of Section 7611(d)—except a biological father in cases of sperm donation. In *Jason P.* the court acknowledged the fact that cases did exist in which the biological father established a relationship with the child and in those situations, the biological father should be able to obtain parentage status by meeting the conditions of Section 7611.<sup>8</sup> For this reason, people intending to

conceive and coparent outside of marriage need to properly and carefully document what they are doing before entering into a fertility procedure. That documentation needs to address who is and is not going to be the parent before the child is created. Based upon the ruling in *Jason P.*, the parties must sign a separate and independent agreement from the consent forms in order to ensure that their intent is effectuated in the event of a later dispute.

It is worth noting that while the sperm donor rule prior to *Jason P.* served as an absolute bar to parentage for men, there is apparently a different standard for an egg donor. Prior to *Jason P.*, in *K.M. v. E.G.* the court ruled that the statute is inapplicable to a woman who donates her eggs to her female (unmarried) partner with the intent to conceive.<sup>9</sup> The court reasoned that it was undisputed that the couple lived together and intended to bring the child into their joint home.

### Surrogacy, Egg Donation, and Embryos

Medical technology has not only made it possible to donate sperm and eggs but also for a woman who is not biologically related to a child to carry that child to term. In this regard, the law has evolved to address this reality. California case law has recognized for some time that in situations involving the use of a gestational surrogate, the intentions of the parties should control the question of who is a parent. In *Johnson v. Calvert*,<sup>10</sup> a husband provided his sperm to a fertility clinic for the purpose of fertilizing his wife’s eggs, which were then implanted into the womb of a woman other than his wife. There was never any suggestion that the husband in *Johnson* was not the father, despite the fact that his wife was not the one rendered pregnant by his sperm donation. As the Supreme Court stated in *Johnson*, “the interests of children, particularly at the outset of their lives, are [un]likely to run contrary to those of adults who choose to bring them into being....” Thus, “[h]onoring the plans and expectations of adults who will be responsible for a child’s welfare is likely to correlate significantly to positive outcomes for parents and children alike.”<sup>11</sup> *Marriage of Buzzanca*<sup>12</sup> holds that just as the husband can be deemed the father of the biologically unrelated child carried to term through surrogacy, so can the wife be deemed the mother of the child even if she has no biological relation to the child due to the use of donor eggs and a surrogate. These cases turn on the language of the contracts entered into by the parties. These decisions are, therefore, consistent with Section 7630(f) of the Family Code, which provides that “[a] party to an assisted reproduction agreement may bring

an action at any time to establish a parent and child relationship consistent with the intent expressed in that assisted reproduction agreement.”

Parties contemplating such an arrangement must, however, tread cautiously. California law upholds surrogacy arrangements involving gestational surrogates, who are women carrying children to which they are not biologically related. It does not, however, hold these arrangements as enforceable in a disputed case if the surrogate is also the biological mother, even though the original intent was to give the child to the parents with whom the surrogate contracted. In *Marriage of Moschetta*,<sup>13</sup> the court declined to enforce a surrogacy agreement in which the surrogate was also the biological mother, finding that there was no tie to break between the mother who contracted with the surrogate and the surrogate herself when she was also the biological mother. For this reason, almost all surrogacies that are arranged in California involve gestational surrogates. Parties considering a surrogacy should be aware that California law has some regulation addressing who can arrange a surrogacy and handle the fees paid to the surrogate over the course of the pregnancy when an attorney is not involved, as well as defining what the contract with the surrogate should provide for.<sup>14</sup>

Women who wait until their more mature years to have children often find they do not have viable eggs. Single men with no partner and gay male couples are in a similar situation. In those instances, the parties are in need of donor eggs. This has given rise to a cottage industry, with egg donor agencies facilitating the donation of eggs to third parties for a fee. No court or governmental agency in California has challenged this practice. Typically, the parties to these proceedings sign an ova donation agreement that specifies who is to be the legal parent of the children that may be born of the donor eggs. There are no reported cases that address whether the ova donation agreement qualifies as an assisted reproduction agreement within the parameters of Family Code Section 7606, although a properly drafted agreement should qualify. However, a civil cause of action for breach of contract does lie even when a court may have found that one party to the contract intending to be the parent is not legally declared to be the parent by the family court. *Dunkin v. Boskey*,<sup>15</sup> for example, holds that a determination that one domestic partner was not the legal parent of the child born of the other domestic partner mother using a donor egg was not *res judicata* on the question of damages for breach of contract and infliction of emotional distress.

While the process of egg donation, apart from the medical issues, would seem to be a

straightforward contractual arrangement between consenting adults, particularly in the present day and age when so many people are donating, and others are acquiring eggs through tissue banks, in some instances the old adage that biology trumps all still applies. In *Robert B. v. Susan B.*,<sup>16</sup> the court held that the wife, who had no genetic connection to the donor egg, did not have standing under the Family Code to seek a parentage determination, despite having signed a written contract with her husband to acquire ova from an anonymous donor. That contract stated that it was the intention of both parties to be the parents of the resulting children. In this instance, another woman contracted with the same fertility clinic to purchase ova and semen from two people who would sign away their rights to the child. Thirteen embryos were then produced for the husband and wife. Some of the embryos were implanted in the wife, resulting in the birth of the parties' daughter.

Unbeknown to the parents, however, the same clinic implanted three of their embryos in the other woman, who gave birth to a son only a few days later. The fertility clinic informed the husband and wife of the error, causing them to bring a parentage action against the woman. The court ordered genetic testing over the objections of the single mother, finding that husband had standing to bring the action due to his genetic link. The wife argued that she stood in the shoes of the genetic mother notwithstanding the lack of any genetic connection to the child because she had contracted with the ovum donor and acquired whatever parental rights ovum donor had. The trial court disagreed and dismissed mother from the proceedings, finding that the rights she had acquired were to embryos, but not to the actual child that was born of same. The court of appeal affirmed, finding that the single parent was the mother, and husband was the father, of the child she gestated with eggs from the same donor, thereby forcing the creation of an unusual blended family.

Fertility physicians are actively promoting the concept of cryogenic preservation of eggs as an effort to enable women to defer maternity and parenthood into later adulthood which would otherwise not be possible given the rate at which egg production decreases with age. The theory, of course, being that the eggs can be thawed and fertilized when the woman is ready to have children. Along with cryopreservation of eggs comes cryopreservation of embryos. Some physicians believe that the chances of success are higher if the embryo is created and frozen as opposed to fertilizing the egg after it has been thawed. Additionally, as part of the fertility process multiple embryos are often created and some

will be implanted with additional embryos being reserved for future use. Women are also availing themselves of cryopreservation when given cancer diagnoses as an effort to preserve fertility.

In other situations, embryos are created for future use by the recipients of egg donation. This is not an uncommon practice with gay male couples who may wish to have children with a genetic link to both of them and a sister may be willing to provide the ovum. However, issues can arise when the parties who created the embryos later get into a dispute over whether they can be implanted, remain frozen, or be destroyed—as is the case in several cases now pending before our courts, two of which have received significant amounts of publicity. As previously mentioned, a tentative decision has been issued in the San Francisco case of *Findley* holding the parties to the terms of their consent forms and not allowing the former wife unilateral use of the embryos. The current Los Angeles case involving actress Sofia Vergara has similar facts.<sup>17</sup>

Typically, the parties execute directives that dictate what the disposition of the embryos should be in the event of the death of one or both of the parties and, in the case of a married couple, in the event of their separation or divorce. Section 125315 of the Health and Safety Code provides that physicians are to indicate to fertility clients what their options are so that they can make this decision at the beginning of the process. The question arises, however, as to what happens with the embryos if the parties later get into a dispute about them or the circumstances change. Section 125315 does not address this, as it is intended as a regulation of medical personnel engaged in the practice of fertility treatments. In *Findley*, the wife unsuccessfully contended that she should be permitted to use the embryos to bear children despite having agreed that they would be thawed and discarded in the event of a divorce. In the case of Vergara and Nick Loeb, Loeb contends he should be given the right to use the embryos to have a child notwithstanding the parties' agreement on the disposition forms that any use of the embryos other than cryopreservation would require both parties' consent. There is little authority on the topic, and in fact, in most cases that have been decided in other states, the disposition forms have controlled unless one of the parties was unable to bear children and the frozen embryo created the only possible genetic link between the parent and child.<sup>18</sup> In *Szafranski v. Dunston*,<sup>19</sup> a court of appeal in Illinois affirmed the trial court's decision to award the embryos to the woman, rendered sterile as a result of cancer treatments. However, in that case the evidence

was that the male partner who assisted her in creating the embryos did so specifically so that she could have children knowing that she would likely lose her fertility due to her cancer diagnosis.

In California, Penal Code Section 367g provides that it is a criminal offense to use any genetic material, including ova or embryos, without the consent of the other party who created them.<sup>20</sup> It would appear that in the situation in which the parties agreed that any use of the material required joint consent, that one party could not later override that consent unilaterally regardless of the circumstances. The tentative decision in *Findley* is consistent with the intent of the statute.

Despite the common use of fertility treatments, people needing them have reason to tread very cautiously. While the courts have moved toward a more child-centered approach in resolving these treatment issues, such as was the case in *Jason P.*, the risk of being caught up in a legal dispute when one of the parties has a change of heart (especially in the case of unmarried parents), can result in a situation incurring substantial expense and significant uncertainty as to the outcome. People availing themselves of these treatments need to make sure that all contingencies are properly discussed, addressed, and documented before they start the process, and that they are dealing with reputable lawyers and medical professionals to ensure that their understandings on parentage are clearly resolved at the outset. ■

<sup>1</sup> Dawn D. v. Superior Court, 17 Cal. 4th 932, 937 (1998); FAM. CODE §7540.

<sup>2</sup> See FAM. CODE §§7600-7650.

<sup>3</sup> FAM. CODE §7613(a), (b).

<sup>4</sup> See Steven S. v. Deborah D., 127 Cal. App. 4th 319 (2005).

<sup>5</sup> A.B. 1349 (2011-12 Reg. Sess.) (amending Family Code §§7573, 7576, 7612, and 7613 relating to paternity).

<sup>6</sup> Jason P. v. Danielle S., 226 Cal. App. 4th 167 (2014).

<sup>7</sup> Findley v. Lee, No. FDI-13-780539 (S.F. Super. Ct., filed Nov. 18, 2015), available at <http://www.sfsuperiorcourt.org>.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> K.M. v. E.G., 37 Cal. 4th 130 (2005).

<sup>10</sup> Johnson v. Calvert, 5 Cal. 4th 84 (1993).

<sup>11</sup> *Id.* at 94.

<sup>12</sup> Marriage of Buzzanca, 61 Cal. App. 4th 1410 (1998).

<sup>13</sup> Marriage of Moschetta, 25 Cal. App. 4th 1218 (1994).

<sup>14</sup> See FAM. CODE §§7606, 7962.

<sup>15</sup> Dunkin v. Boskey, 82 Cal. App. 4th 171 (2000).

<sup>16</sup> Robert B. v. Susan B., 109 Cal. App. 4th 1109 (2003).

<sup>17</sup> See, e.g., TV star Sofia Vergara in battle over frozen embryos, BBC News, <http://www.bbc.com/news/entertainment-arts-32547470>.

<sup>18</sup> See Davis v. Davis, 842 S.W. 2d 588 (Tenn. 1992); Reber v. Reiss, 42 A.3d 1131 (Pa. Super. 2012); J.B. v. M.B. and C.C., 783 A. 2d 707 (N.J. 2001).

<sup>19</sup> Szafranski v. Dunston, 993 N.E. 2d 502 (2013).

<sup>20</sup> See PENAL CODE §367g.

## Rules for Workplace Social Media Policies That Work

**EMPLOYEES MAY TURN TO PERSONAL SOCIAL MEDIA** accounts or private chat rooms to vent about the workplace without realizing that these communications may be read by their employers. The law recognizes that employers have legitimate interests in disciplining employees, safeguarding trade secrets, preventing disparagement of their business, and ensuring a work environment free of discrimination, harassment, and abusive conduct. At the same time, federal and state courts, state legislatures, and the National Labor Relations Board (NLRB) have recognized broad protections for employees in their internet communications.<sup>1</sup> Attorneys should advise employers that disciplining an employee for private communications about the workplace on social media may run afoul of federal or state law, including the National Labor Relations Act (NLRA) and the federal Stored Communications Act (SCA).<sup>2</sup>

Although the law on social media use is still developing, there are two principal ways the courts, legislatures, and NLRB have limited an employer's ability to regulate an employee's personal social media communications: 1) by restricting an employer's access to an employee's personal social media account, and 2) by expanding the scope of "concerted protected activity" on social media. Employers should be aware of the restrictions on accessing and regulating the personal social media use of employees and implement clear, narrowly tailored policies that balance the employer and employee rights in social media use. Overly broad social media policies, even if they are not enforced, may be interpreted as chilling or prohibiting protected concerted activity by employees and deemed an unfair labor practice.

### Restricting Access

Years before the advent of social media, the federal government enacted the SCA, aimed at protecting the privacy of Internet communications.<sup>3</sup> The SCA prohibits anyone—not just employers—from accessing electronic communications on a third-party service provider without authorization. In recent years, some states have enacted SCA-like statutes restricting an employer's ability to access an employee's personal social media site.<sup>4</sup> In California, Labor Code Section 980 prohibits employers from requiring or even requesting an employee or applicant to: 1) disclose a username or password for the purpose of accessing personal social media, 2) access personal social media in employer's presence, or 3) divulge any personal social media. The only exception occurs when the employer reasonably believes that the employee's personal social media account is relevant to an investigation of allegations of employee misconduct or violation of law.<sup>5</sup>

There are no reported cases interpreting Labor Code Section 980 or the carve-out for investigations of misconduct. However, a number of courts have found employers liable under the SCA for accessing the personal social media communications of employees. In *Pietrylo v. Hillstone Restaurant Group*, an employee of Hillstone maintained a personal chat group on Myspace during nonwork hours that was accessible only by electronic invitation from the plaintiff, and if

accepted, a personal password to access the group.<sup>6</sup> The site included language that indicated the group was private and a place where Hillstone employees could discuss the "crap/drama/and gossip" related to their workplace. Employees posted sexual and profane comments, jokes about Hillstone's customer service "specs," drug use, and a new wine list given to employees. No Hillstone upper manager was invited to join the group, and members accessed the site only during nonwork hours and on noncompany computers.

An employee member of the chat group showed the communications to her manager, who, in turn, asked the employee for her password to the account. The employee reluctantly provided the password, believing she would be in trouble if she did not. The manager accessed the chat group several times and showed it to other managers. Hillstone then fired the chat group founder and another employee for posting critical comments that it deemed offensive and violating the company's core values. The two terminated employees sued, and the jury found Hillstone liable for violation of the SCA. The plaintiffs won compensatory and punitive damages. The jury found that the employee who reluctantly turned over her password to the manager had not done so voluntarily and had not authorized Hillstone management to access the chat group multiple times without her permission. While the jury found that the employer violated the SCA, it also concluded that the employer was not liable for invasion of privacy, finding that the plaintiffs had no reasonable expectation of privacy in the MySpace group.<sup>7</sup>

Although the SCA and Labor Code Section 980 prohibit unauthorized access to employee social media accounts, they do not bar employers from viewing employee social media communications altogether. So long as the employer has done nothing unlawful to access or view the social media communications, there is no violation of these laws. In *Ebling v. Monmouth-Ocean Hospital Service*, a nurse maintained a private Facebook account on which she friended only other employees, not managers.<sup>8</sup> One of the nurse's supervisors friended her and saw a post by the nurse about a recent shooting at a holocaust museum in Washington, D.C., that stated "I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards...go to target practice." The supervisor turned over the post to a hospital manager, and the nurse sued the hospital for violation of the SCA. The court ruled for the hospital because the manager had not accessed the nurse's account and was shown the post by someone the nurse had authorized to view it.<sup>9</sup>

While it may be tempting to gain consent to access an employee's personal social media site by sending or accepting friend requests, employers should avoid friending, following, or connecting with employees on social media and maintain policies prohibiting, or at

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least discouraging, managers from doing so. Social media sites are filled with a wide range of personal information about employees, such as their sexual orientation, medical issues, religion, age, national origin, or other information protected by antidiscrimination statutes. If an employer later disciplines or terminates an employee who is social media friends with a manager, the employee may claim (and may establish at least a prima facie case) that the employment decision was based on the protected information the manager learned from the social media site, and not on job-related criteria.

For example, in *TerVeer v. Billington*,<sup>10</sup> an employee of the Library of Congress sued the library and his former supervisor, alleging that he was harassed and humiliated by his supervisor and terminated after the supervisor's daughter became Facebook friends with him. TerVeer liked a page that supported a same-sex parent campaign against bullying. The supervisor's daughter commented on the post: "Don't tell me you're weird like that." TerVeer alleged that before the post, he had a great relationship with his supervisor, who had even set him up with his daughter. After his post, however, the supervisor began to harass him, mock diversity, and lecture him on the "sin" of homosexuality. The library filed a motion to dismiss, and the District Court partially denied the motion, ruling that TerVeer stated claims for sex and religious discrimination, retaliation, and hostile work environment.<sup>11</sup> This recently settled case illustrates the potential consequences of learning private information about an employee through their personal social media.

### Social Media as Concerted Activity

The National Labor Relations Act provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>12</sup> The act also makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of these rights.<sup>13</sup>

Many states, including California, have enacted similar laws protecting employees from retaliation by employers for engaging in concerted activity. California Labor Code Sections 232 and 232.5 prohibit employers from requiring employees to refrain from disclosing the amount of their wages or working conditions or discharging, disciplining, or discriminating against employees who disclose the amount of their wages or their working conditions. Section 232.5, however, specifically provides that the statute is not intended to permit an employee to disclose

an employer's proprietary information, trade secret information, or information that is otherwise subject to a legal privilege without the consent of his or her employer.

In recent years, the NLRB has been actively prosecuting employers for violations of the rights of employees to engage in concerted activities, including those of a nonunionized employee on social media. As a recent article in the *New York Times* put it, the NLRB is intervening in social media to "expand its power" and "remain relevant as private-sector unions dwindle in size and power."<sup>14</sup> The NLRB, however, claims that social media sites are the new "virtual water coolers" and that it is "merely adapting the provisions of the National Labor Relations Act, enacted in 1935, to the 21st century workplace."<sup>15</sup> Either way, employers should understand that, under certain circumstances, an employee's expression of dissatisfaction in the workplace on social media may be protected concerted activity under the NLRA, even if the employees are not union members and there is no effort to unionize and no explicit reference to hours, pay, or other working conditions.

For example, in *NLRB v. Karl Knauz Motors, Inc. d/b/a Knauz BMW*, a car salesman posted a sarcastic comment on Facebook criticizing his employer for serving cheap food at a BMW sales event, and posting pictures of colleagues handing out hot dogs and water.<sup>16</sup> Later that day, another dealership owned by the employer let a 13-year-old sit in the driver's seat of a car, and the child accidentally drove the car into a pond. The salesman posted photos of the accident on Facebook, commenting: "This is your car. This is your car on drugs." The salesman was fired one week later for the posts. The NLRB filed a complaint on the salesman's behalf, contending that the Facebook posts were protected activity. The administrative law judge concluded that the first post was protected because the terminated employee and other salespersons shared communications about the cheap food, which could have impacted sales, and thus their commissions.<sup>17</sup> The judge concluded that the second post was not protected concerted activity because it did not discuss terms and conditions of employment and, on that basis, upheld the employer's decision to terminate the salesman.<sup>18</sup>

In *NLRB v. Three D, LLC d/b/a Triple Play Sports Bar and Grille*, a Second Circuit case, two current employees responded to a Facebook post by a former employee regarding the employer's mistakes in withholding taxes, which caused the employees to owe additional state taxes.<sup>19</sup> One employee liked the former employee's initial post. The second employee, whose privacy settings permitted only her friends to view her posts, posted one comment: "I owe too. Such an a\*\*hole."<sup>20</sup>

Both employees were terminated when the employer saw the posts. The administrative law judge recognized there is a balance to be struck between the rights of employees and legitimate employer interests in protecting its reputation but concluded that the employees' posts were protected concerted activity because they were not so disloyal, disparaging, reckless, defamatory, or maliciously untrue so as to lose protection under the NLRA and were not directed at the general public.<sup>21</sup>

In *NLRB v. Design Technology Group, LLC d/b/a Bettie Page Clothing*, a group of employees complained to their supervisor and the owner about working late hours in an unsafe neighborhood. Later that night, the employees engaged in a discussion on Facebook complaining about their employer without explicitly referring to their complaints about working late hours. One employee posted that she would be bringing a "California Worker's Rights" book to work the next day and that her mother worked for a law firm specializing in labor law. Another employee showed the posts to the manager, who terminated the employees. The NLRB ruled against the employer, holding that the posts were conversations for mutual aid and protection and "concerted protected activity."<sup>22</sup>

Although the NLRB has adopted a broad interpretation of "protected concerted activity" in the social media context, mere griping about the workplace is not enough to fall within the protections of the NLRA. In *Tasker Healthcare Group d/b/a Skinsmart Dermatology*, an employee and nine other former and current employees participated in a private group chat on Facebook.<sup>23</sup> After discussing a social event, the employee began venting about a supervisor, used profanity, and wrote: "FIRE ME...Make my day." Later that morning, one of the employees in the chat showed the post to the employer. The employer terminated the employee, stating she obviously was no longer interested in working there. The NLRB concluded that the post was not protected activity as it did not involve shared employee concerns over terms and conditions of employment. Rather, the post was mere griping by an employee who failed to look forward to any action.<sup>24</sup>

While the NLRB has not established a bright line rule for what constitutes protected concerted activity, social media communications among employees concerning any condition or aspect of the workplace and contemplating future action are likely protected activity. If, however, the communications are disloyal, disparaging, reckless, defamatory, or maliciously untrue, they may lose protection under the NLRA, especially if they are directed at the general public. If an employee is merely griping about the employer and not discussing forward-looking group activity among em-



ployees, the comments are not protected.<sup>25</sup> Because each case is different, employers should exercise caution and seek counsel before taking action against an employee for his or her content on personal social media.

### Free Speech

Public employee communications on social media may also be protected by the First Amendment. In *Bland v. Roberts*, the sheriff of Hampton, Virginia ran for re-election. During the campaign, one of the deputy sheriffs liked the Facebook page of the sheriff's electoral opponent. The sheriff won re-election and fired the deputy sheriff and five other employees of the department who had shown support for the sheriff's opponent. The employees sued, claiming that the sheriff retaliated against them because they supported his opponent, and the firings violated their right of free speech. The trial court ruled that a Facebook like did not constitute protected speech, but the Fourth Circuit reversed, holding that the Facebook like was in fact protected by the First Amendment.<sup>26</sup> Although private sector employees have tried to bring claims against their employers for violation of the First Amendment arising out of their social media use, courts have rejected these claims because they do not involve state action and relate to private employment matters.<sup>27</sup>

### Ownership of Social Media Accounts

As social media proliferates, more employers are hiring employees to create and maintain company social media sites. While it may seem clear to the employer that it owns the social media sites established by and operated for the business, employees may not necessarily agree. In *Phone Dog v. Kravitz*, an employee established and operated a Twitter account for his employer under the Twitter handle @phonedog\_noah.<sup>28</sup> Over time, the Twitter account grew to approximately 17,000 followers, and advertisers paid for advertising space on the Twitter account, generating revenue for the employer. When the employee left Phone Dog, he changed the Twitter account name to @noahkravitz. Phone Dog sued, arguing that it owned the Twitter account and login information. The case settled before any ruling on the merits, but the dispute underscores the importance of maintaining a clear policy that the employer owns all company social media sites, along with their usernames and passwords.

In a similar case in England, *Whitmar Publications Ltd v. Gamage*, four senior employees set up a competing business while still employed with the plaintiff.<sup>29</sup> They used their employer's LinkedIn groups to promote their new company and refused to turn over the login information after leaving. The British court issued injunctions against the former

employees, ruling that the LinkedIn account and login information were Whitmar's protected confidential and proprietary information. The ruling in *Whitmar* emphasizes the need for clear policies stating that the employer owns all social media sites, accounts, and login information.

### Recommended Policies

Given the current state of the law, the best way for an employer to avoid disputes with employees over social media use is by drafting clear, narrowly tailored employment policies that balance the employer's and employees' legitimate interests. Among other things, social media policies should prohibit:

- Discrimination, harassment, and abusive conduct on social media.
- Disclosure of the employer's trade secrets and confidential and proprietary information.
- Use of personal social media during work hours.
- Management requests that employees provide access to, or information from, their personal social media accounts.
- Friend requests from managers to employees, along with management's following employees on social media sites or otherwise attempting to insert themselves into employee social media communications without clear, written employee consent.
- Management's acceptance of friend requests or other invitations to follow or link with employees on social media sites.

A social media policy should also clearly state that the employer owns all social media sites established, maintained, accessed, or operated by employees for the company for business purposes during their employment, including all passwords and login information. Employers should avoid any language in a social media policy that could be interpreted as prohibiting or chilling the right of employees to engage in concerted activity and, in particular, discussions over wages, hours, and working conditions. While employers may be permitted to discipline an employee for mere griping about the employer on social media, a social media policy should avoid broadly prohibiting communications by employees on social media that are "inappropriate," "disparaging," "confidential," or "embarrassing" to the company.

Finally, employers should be aware of a recent ruling concerning employee e-mail use. In *Purple Communications*, the NLRB reversed its longstanding position and ruled that an employer may not maintain a policy prohibiting employees who are given company e-mail accounts from using those accounts during nonworking hours to engage in concerted activity and discuss wages and working conditions with other employees.

An employer may only restrict these communications if they substantially disrupt or interfere with production and productivity.<sup>30</sup>

As the cases above indicate, employers face restrictions on accessing and regulating the social media posts of employees. While an employer may guard its trade secrets and business reputation, as well as act to prevent abusive employee conduct, an employer cannot prohibit the legally protected social media activities of employees. Employers that are too heavy-handed in their monitoring of the social media activities of employees may find themselves liable under state and federal law. ■

<sup>1</sup> See, e.g., *NRLB v. Pietrylo v. Hillstone Rest. Group d/b/a Houston's*, No. 06-5754 (D. N.J. Sept. 25, 2009) (unpublished); *NRLB v. Design Tech. Group, LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (Apr. 19, 2013); *NRLB v. Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB No. 31. (Aug. 22, 2014).

<sup>2</sup> Labor and Management Relations Act, 29 U.S.C. §157; Stored Commc'ns Act, 18 U.S.C. §§2701 et seq.

<sup>3</sup> 18 U.S.C. §§2701 et seq.

<sup>4</sup> Many states have enacted statutes regulating access to employee social media sites. See, e.g., ARK. CODE ANN. §11-2-124; COLO. REV. STAT. §8-2-127; 820 ILL. COMP. STAT. 55/10; MD. CODE ANN., LAB. & EMPL. §3-712; MICH. COMP. LAWS SERV. §§37.271 et seq.; NEV. REV. STAT. §613.135; N.J. STAT. ANN. §§34:6b-5 et seq.; N.M. STAT. ANN. §50-4-34; OR. REV. STAT. §659a.330; UTAH CODE ANN. §§34-48-101 et seq.; WASH. REV. CODE §49.44.200.

<sup>5</sup> LAB. CODE §980(c).

<sup>6</sup> *Pietrylo v. Hillstone Res. Group*, 2008 U.S. Dist. LEXIS 108834 (D. N.J. July 24, 2008).

<sup>7</sup> *Id.*

<sup>8</sup> *Ehling v. Monmouth-Ocean Hosp. Serv.*, 872 F. Supp. 2d 369 (D. N.J. 2012).

<sup>9</sup> *Id.*

<sup>10</sup> *TerVeer v. Billington*, No. 12-cv-01290, 2014 WL 1280301 (D. D.C. Mar. 31, 2014).

<sup>11</sup> *Id.*

<sup>12</sup> 29 U.S.C. §157.

<sup>13</sup> 29 U.S.C. §158(a)(1).

<sup>14</sup> Steven Greenhouse, *Even If It Enrages Your Boss, Social Net Speech Is Protected*, N.Y. TIMES (Jan. 21, 2013), available at <http://www.nytimes.com>.

<sup>15</sup> *Id.*

<sup>16</sup> *NLRB v. Karl Knauz Motors, Inc. d/b/a Knauz BMW*, No. 13-CA-46452 (Sept. 28, 2011).

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.*

<sup>19</sup> *NRLB v. Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB No. 31. (Aug. 22, 2014).

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* at 5-6.

<sup>22</sup> *NRLB v. Design Tech. Group, LLC d/b/a Bettie Page Clothing*, 359 NLRB No. 96 (Apr. 19, 2013).

<sup>23</sup> *Tasker Healthcare Group d/b/a/ Skinsmart Dermatology*, No. 04-CA-094222 (May 8, 2013).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Bland v. Roberts*, 730 F. 3d 368 (4th Cir. 2013).

<sup>27</sup> *Pietrylo v. Hillstone Res. Group*, 2008 U.S. Dist. LEXIS 108834 (D. N.J. July 24, 2008).

<sup>28</sup> *Phone Dog v. Kravitz*, Case No. 11-03474 (N.D. Cal. Nov. 8, 2012).

<sup>29</sup> *Whitmar Publ'ns Ltd v. Gamage & Ors* [2013] EWHC 1881 (Ch).

<sup>30</sup> *Purple Commc'ns*, 361 NLRB No. 126 (2014).

by Howard Leslie Hoffenberg and Dorisa Shahmirzai

# Four Fair Factors

Technology has made it easy to reproduce copyrighted work but not simplified the factual analysis that determines fair use

CODIFIED IN THE 1976 COPYRIGHT ACT the fair use exception to copyright infringement provides a list of the purposes for which the reproduction of portions—or even an entire—copyrighted work may be considered fair and not actionable.<sup>1</sup> These purposes are criticism, comment, news reporting, teaching, scholarship, and research. In addition, Section 107 of the act lists four factors to be considered in determining whether or not a particular use is fair.<sup>2</sup> The four factors are: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, 2) the nature of the copyrighted work, 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and 4) the effect of the use upon the potential market for or value of the copyrighted work.

In recent years, technology has made it

simple to reproduce copyrighted work, and courts have struggled to provide guidance on how to stay within the boundaries of fair use. *North Jersey Media Group Inc. v. Pirro*<sup>3</sup> serves to introduce the risks of asserting a fair use defense for using a downloaded photograph. In *Pirro*, Fox News was sued for copyright infringement over its use of a photo by Thomas Franklin. The plaintiff, a publisher, alleged that a Fox News television program had posted on its Facebook page the iconic photograph by Franklin<sup>4</sup> depicting firefighters raising the American flag at the ruins of the World Trade Center site.<sup>5</sup> The photo was juxtaposed with the classic World War II photograph of Marines raising the American flag on Iwo Jima.<sup>6</sup>

Fox News raised the defense of fair use in a summary judgment motion. The court examined the four factors and denied summary judgment based on the last two factors.<sup>7</sup>

As for the second factor, the court found it to favor a finding of fair use because the work “is factual and has been published.”<sup>8</sup> As for factor three, the court was neutral because it was not clear that Fox’s “use of any less of the Work would have ensured its audience’s recognition of the iconic photograph.”<sup>9</sup>

On the first factor, the judge found it not transformative.<sup>10</sup> The court reasoned that the news organization was hardly the first

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Perfect 10  
v.  
Amazon

North Jersey Media  
Group Inc.  
v.  
Pirro

Monge  
v.  
Maya Magazine

Harper  
& Row  
v.  
Nation  
Enterprises

Kelly  
v.  
Arriba Soft  
Corporation

Kienitz  
v.  
Scannie Nation LLC

Fair  
v.  
The

Vanderhye  
v.  
Madigms, LLC

Black  
Entertainment  
Television

Tele  
ney v.  
Pictures  
on, Inc.

Campbell  
v.  
Acuff-Rose  
Music, Inc.

Blanch  
v.  
Koons

Gaylord  
v.  
United States

to have thought of combining two photographs. Furthermore, the court held that it was a question of fact whether Fox News used the photo for the commercial purpose of promoting Pirro's show as opposed to commemorating 9/11.<sup>11</sup> Regarding factor four, the judge observed that the plaintiff had raised more than \$1 million in licensing revenue from the photo from existing licensing programs.<sup>12</sup> The court opined that what Fox News did created a risk that other media organizations would "forego paying licensing fees for the Work and instead opt to use the Combined Image at no cost."<sup>13</sup> The defendants failed to convince the court that reproducing the image juxtaposed to another and adding a social media hashtag was sufficiently transformative.

### News Reporting and Matters of Public Interest

The Ninth Circuit has followed the holding in *Pirro* that merely asserting that using content on a website that has news value or that concerns a matter of public interest does not automatically create a fair use defense. In *Monge v. Maya Magazines*,<sup>14</sup> Maya Magazines illicitly obtained and published six photographs from the secret wedding of pop singer Noelia Lorenzo Monge. In defense against a claim of copyright infringement, Maya Magazines asserted that it was reporting on a matter of public interest.

In rejecting this analysis, the Monge court observed that the preamble of Section 107 includes news reporting as illustrative of fair use. Nonetheless, relying on Supreme Court precedent from *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>15</sup> the Ninth Circuit stated that although news reporting is an example of fair use, it is not sufficient by itself.<sup>16</sup> The Monge court then went on to analyze under what circumstance would the utilization of a photograph in news reporting be transformative, a key term in the context of fair use.<sup>17</sup> Quoting from the U.S. Supreme court decision in *Campbell v. Acuff-Rose Music, Inc.*,<sup>18</sup> the Ninth Circuit observed: "The central purpose of this investigation is to see...whether the new work merely 'superse[d] the objects' of the original creation... or instead adds something new...it asks, in other words, whether and to what extent the new work is 'transformative.'"<sup>19</sup>

The Ninth Circuit held that there was no transformative use of the wedding photos in the mere 1) choosing the most dramatic photographs or seconds of footage, 2) adding captions or headlines, 3) adding a voice-over, 4) performing minor cropping, and 4) making public what had been secret. There was a transformative use, however, in the arrangement of a photograph in a photo montage or its incorporation into other material aiming

at making a comment on the photograph. The Monge court concluded that there was no transformative use in Maya's publishing of the six wedding photographs because, the pictures were "a 'clear, visual recording' of the couple's wedding."<sup>20</sup> The Ninth Circuit continued its analysis by taking into account the commercial nature of the use, finding precedent in the U.S. Supreme Court's decision in *Sony Corporation of America v. Universal City Studios, Inc.*,<sup>21</sup> that "every commercial use of copyrighted material is presumptively an unfair exploitation." The Ninth Circuit concluded: "On balance with transformativeness, the third factor is at best neutral, and does not support Maya's claim of fair use."<sup>22</sup>

Turning to the fourth factor, the Ninth Circuit observed that the effect of the use upon the potential market is the most important.<sup>23</sup> The Monge court noted that the photographs had been unpublished before the defendant used them, depriving the wedding photographer of an opportunity to be the first to market. The court opined that it would be "extraordinary" for the use of an unpublished work to be a fair use.<sup>24</sup> Hence, this factor weighed against fair use.<sup>25</sup>

The final step of fair use analysis is the denouement, in which the court undertakes a balancing. After making findings on the four factors (as well as any other relevant factor), the court balances those factors to reach a conclusion. The Monge court cited with approval an observation in *Nimmer on Copyright* that Section 107 "provides no guidance as to the relative weight to be ascribed to each of the listed factors."<sup>26</sup> In this case, however, the denouement was not difficult in that all of the factors ran against fair use.<sup>27</sup>

### Effect on the Market

In contrast to *Monge*, *Perfect 10 v. Amazon*<sup>28</sup> is a Ninth Circuit decision notable for its downplay of the fourth factor. *Perfect 10* involved a claim that Google infringed the plaintiff's copyrights by displaying on Google's image search thumbnail replicas of infringing third-party copies of images from the plaintiff's adult magazine and website. After it filed its lawsuit, Perfect 10 began marketing thumbnails of its images for download to cell phones. The trial court found this as sufficient to weigh the fourth factor against fair use. It found that users of Google's image search are able to capture the thumbnails that Google displays in response to an image search query and transfer them to cell phones.<sup>29</sup>

The Ninth Circuit rejected the trial court's analysis. It held that because the trial court did not make a finding that Google users had actually downloaded thumbnail images for cell phone use, the potential harm to

Perfect 10's market remained hypothetical, and thus that the fourth factor favored neither party.<sup>30</sup>

The *Perfect 10* court held Google's display of thumbnail images to be fair use because of the use's highly transformative, socially beneficial character, despite possible harm to the plaintiff's potential market for licensing thumbnails.<sup>31</sup> The *Perfect 10* court was heavily influenced by Google's having created something new: search engine results. The Ninth Circuit did not go as far in exempting transformative uses from the analysis of market harm under the fourth factor. But, in refusing to consider Perfect 10's cell phone market as even a potential market that Perfect 10 would reasonably enter—when in fact it was a market that Perfect 10 had already entered—Perfect 10 sharply diminishes the scope and force of the fourth factor.

Four years before the *Perfect 10* decision, in the confines of a less controversial set of facts that did not involve undermining the market for cell phone pictures, the Ninth Circuit held that thumbnail reproductions by a search engine to be a fair use. In *Kelly v. Arriba Soft Corporation*, a commercial photographer sold pictures to various publications from his website. The defendant, Arriba Soft, ran a search engine that indexed images and returned thumbnails. Kelly's pictures appeared as thumbnails on the defendant's search engine, and he sued Arriba for copyright infringement.<sup>32</sup>

The court found that U.S. search engines may use thumbnails of images, although the issue of linking to full-size images instead of going to the original site was not resolved.<sup>33</sup> The Ninth Circuit analyzed the four fair use factors and concluded that Arriba's use of Kelly's images as thumbnails in its search engine was a fair use. As to the nature of the copyrighted work, the pictures were considered to be a published creative work available on the Internet. The court found creative work to favor a finding of infringement.<sup>34</sup> As a published work, the use was more likely to be fair use. As to purpose and character, the use was found to be commercial and transformative, because the images were not being sold as pictures but were to facilitate the identification of the images in the search engine.<sup>35</sup>

The court found the third factor to be neutral. "Copying an entire work militates against a finding of fair use....If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her....This factor neither weighs for nor against either party....It was necessary for Arriba to copy the entire image to allow users to recognize the image and decide whether to pursue more information."<sup>36</sup>

As to the fourth factor, the court took

into account whether such actions were widespread, or solely based on the effect of the particular user. The court indicated that Arriba's use of Kelly's images in its thumbnails did not harm the market for Kelly's images or the value of his images.<sup>37</sup> The court indicated that the thumbnails would guide people to Kelly's work rather than away from it, and the size of the thumbnails makes using them instead of the originals unattractive.<sup>38</sup>

The fourth factor also figures heavily in *Ringgold v. Black Entertainment Television*.<sup>39</sup> Faith Ringgold, a contemporary artist, owned the copyright to a work of art titled Church Picnic Story Quilt. HBO produced an episode of the television show *ROC* in which a poster of Ringgold's artwork was used as part of the set decoration. In 1995, Ringgold happened to watch the episode on BET. She sued the defendants, alleging infringement of her copyright.

The district court upheld the defendants' fair use defense after considering the four nonexclusive factors of Section 107.<sup>40</sup> However, the Second Circuit reversed, finding that HBO and BET's claim to fair use was invalid. As to purpose and character, the court found that HBO and BET's use of the copyrighted work was for decorative purposes, the same purpose for which Ringgold created the work.<sup>41</sup> Further, HBO and BET's use of the work was not transformative; they added nothing new to the original.<sup>42</sup> As to the amount and substantiality of the copyrighted work used, even though the poster was only visible briefly, the whole work could be seen.<sup>43</sup>

The fourth factor was most significant. The court indicated there is a market to license art for use on television sets. In the past, Ringgold had refused to license the poster for use on a television show because of price and accreditation disputes. Ringgold therefore did not have to demonstrate a negative effect on her ability to license the poster.<sup>44</sup> She only had to show that there is a market to license the poster for use as a set decoration. As such, the Second Circuit reversed the trial court's summary judgment in favor of HBO and BET.<sup>45</sup>

In *Kienitz v. Scornie Nation LLC*,<sup>46</sup> the Seventh Circuit addressed a similar matter regarding the reproduction of a copyrighted image. In *Kienitz*, Scornie Nation downloaded a picture of Paul Soglin from the website of Madison, Wisconsin, of which Soglin was the mayor. In addition to adding a political message, Scornie Nation reworked the photograph, removing background and altering facial color, details, and expression before printing the image on T-shirts and tank tops.<sup>47</sup>

The Seventh Circuit analyzed the four fair use factors. On factor one, the political message outweighed any profit from sales. On factor two, the court determined that

the use did not diminish the value of and any potential profit for licensing of the underlying copyrighted photograph. In essence, the court found exploitation to be noncommercial. On factor three, the court held even though the entire face was copied, this was considered fair use. The alleged infringer had removed color, facial expression, and detail. On factor four, the court found that T-shirts and tank tops were not a substitute



for the original photograph, and the photographer had no for-profit licensing plans. The court affirmed summary judgment in favor of the defendants.<sup>48</sup>

In addition to a political message on a T-shirt, courts have viewed with favor a fair use defense to the taking of photographs for a biography. In *Warren Publishing Company et. al. v. Spurlock*, a district court granted summary judgment holding that defendant's reproduction of several graphic works, originally used as monster magazine covers by plaintiff, in a book retrospective of an artist's career was considered a fair use.<sup>49</sup> Regarding the first factor, the court held that the defendant's use of the copyrighted works was transformative.<sup>50</sup> This was because the defendant used the magazine covers to describe and illustrate the artist's body of work over his lifetime.<sup>51</sup> This was different from the plaintiff's use of the images on the magazine covers (namely, to sell magazines).

As to the second factor, the court held that this weighed slightly in favor of the plaintiff. However, the court considered this to be of limited relevance because the defendant's use was transformative and because the copyrighted works were out of print.<sup>52</sup> However, with respect to the third factor, the court agreed with the defendant's argument that the amount he used should be measured against the magazine as a whole.<sup>53</sup> The court rejected the plaintiff's argument that each magazine cover should be considered

an individual work. Accordingly, the portion used by defendant was from 1 to 1.5 percent of each magazine as a whole. The court also rejected the plaintiff's argument that the magazine covers were the heart of each issue, noting that the magazine covers were used to entice readers and advertise the content of the magazines.

Finally, as to the fourth factor, it favored the plaintiff because the plaintiff provided

evidence that he had been interested in publishing a book of magazine covers and that the publication of the defendant's work would harm the market for the plaintiff's book.<sup>54</sup> However, the court noted that the plaintiff had not pursued this interest until the defendant had published his book. The court indicated the plaintiff's "failure to exploit his copyrights in the magazine covers for approximately 22 years substantially detracts from his argument on the fourth factor."<sup>55</sup>

### The Federal Circuit

An insight as to how the Federal Circuit handles fair use is gained from *Gaylord v. United States*.<sup>56</sup> Frank Gaylord appealed the decision of the U.S. Court of Claims that a stamp issued by the U.S. Postal Service made fair use of a copyrighted work, specifically, sculptures of soldiers that constituted part of the Korean War Veterans Memorial. The court determined that Gaylord was the sole author of the sculptures and that they were not exempt from copyright protection under the Architectural Works Copyright Protection Act.<sup>57</sup> The appellate court further indicated that the court of federal claims erred when it determined that the stamp made fair use of Gaylord's work.

As to the first factor, the Federal Circuit disagreed with the Court of Claims, reasoning that the inquiry must focus on the purpose and character of the stamp rather than that of the photograph taken by amateur pho-

tographer John Alli.<sup>58</sup> The stamp, the court held, did not reflect any “further purpose” than the artwork.<sup>59</sup> As the Court of Claims found, the stamp and artwork share a common purpose: to honor veterans of the Korean War.<sup>60</sup> The court went on to observe that works that make fair use of copyrighted material often transform the purpose or character of the work by incorporating it into a larger commentary or criticism. For example, in *Blanch v. Koons*, an artist incorporated a copyrighted photograph of a woman’s feet adorned with glittery Gucci sandals into a collage that could be interpreted as a comment on consumerist culture.<sup>61</sup> The court determined that this was fair use in part because the collage was transformative.<sup>62</sup> It reasoned that the collage and the photo had “sharply different” purposes and that the collage was intended to be a “commentary on the social and aesthetic consequences of mass media.”<sup>63</sup> This type of transformation of a copyrighted work into a larger commentary or criticism falls squarely within the definition of fair use.

The *Gaylord* court concluded that the stamp did not transform the character of the artwork. Although the stamp altered the appearance of the work by adding snow and muting the color, these alterations do not impart a different character to the work. To the extent that the stamp had a surreal character, the original work contributed to that character. A photograph capturing the sculptures on a cold morning after a snowstorm does not transform the artwork’s character, meaning, or message. As the court held, “Nature’s decision to snow cannot deprive Mr. Gaylord of an otherwise valid right to exclude.”<sup>64</sup>

Analysis of the purpose and character of the use also included whether the “use is of a commercial nature or is for nonprofit educational purposes.”<sup>65</sup> The Postal Service acknowledged receiving \$17 million from the sale of the stamps, including to collectors.<sup>66</sup> The court determined that the stamp clearly had a commercial purpose. As to the second factor, the underlying work, the court indicated that although the work is part of a national monument—perhaps the epitome of a published work—given the overall creative and expressive nature of the work, this factor weighed against fair use.<sup>67</sup>

The court considered the third factor to weigh against fair use. The court indicated that although the government’s use of the statues in the stamp weighed against fair use, the court disagreed that the weight was mitigated by the quality of the artwork.<sup>68</sup> The original work constituted the focus—essentially the entire subject matter—of the stamp. Although the snow and muted coloring lessened the features of the soldiers, the stamp

clearly depicted an image of the artwork. Thus, the court concluded that this factor weighed against fair use.

Finally, as to the fourth factor, the court indicated that there was no clear error in the lower court’s determination that the stamp has not and will not adversely impact Gaylord’s efforts to market derivative works. Someone seeking to take a photograph of the artwork or otherwise create a derivative work would not find the stamp to be a suitable substitute. The court agreed that this factor favored fair use. However, on balance, weighing all factors, the court determined that the use by the Postal Service was not a fair use.<sup>69</sup>

### Verbatim Taking in Whole

Although many fair use cases involve images and artwork, text is not forgotten. *A.V. ex rel. Vanderbye v. iParadigms, LLC*<sup>70</sup> is a noteworthy example. The Fourth Circuit held that a defendant’s verbatim copying without alteration of a plaintiff’s copyrighted work, but for a different expressive purpose or function, constitutes a transformative fair use and ultimately enough to tip the balance in favor of fair use. In that case, iParadigms ran the Turnitin plagiarism detection service. Schools that subscribe to the service require their students to upload term papers onto the Turnitin website. Turnitin then electronically compares each student paper against its electronic database of published articles and previously uploaded student papers. Further, if the school has given permission, Turnitin stores each new student paper in its database for use in evaluating the originality of other students’ papers in the future.<sup>71</sup>

Some high school students whose papers had been archived in Turnitin’s database sued iParadigms for copyright infringement. The Fourth Circuit held that iParadigms had engaged in fair use.<sup>72</sup> The court found that the use was transformative because it was undertaken to prevent plagiarism, which is an entirely different purpose than that for which student authors created their papers.<sup>73</sup> The Fourth Circuit cited the Ninth Circuit’s ruling in *Perfect 10* in support of the proposition that a use can be transformative in function or purpose without altering or actually adding to the original work.<sup>74</sup> Moving to the third factor, the court held that the amount of the copyrighted work used must be evaluated in light of the nature of the use.<sup>75</sup> Since it was reasonably necessary for the transformative use to copy the entire work, the third factor was not considered to count against fair use.

### Other Defenses

Although *Vanderbye* and the recent, much-discussed decision in *Lenz v. Universal Music*

*Corporation*<sup>76</sup> (holding that fair use is to be considered on Digital Millennium Copyright Act takedown demand) may be praised for strengthening the shield of fair use, it should be noted that fair use is not the only defense available to an artist who uses a preexisting photograph. In *Fairey et al. v. The Associated Press*,<sup>77</sup> for example, Obey Clothing acquired illustrations of President Barack Obama from artist Shephard Fairey and generated millions of dollars in revenue by selling T-shirts and hoodies with the illustrations. In creating them, Fairey used a copyrighted photograph that was owned by the Associated Press. In the two most well-known examples, Fairey stylized the photographs by removing detail and adding coloring.

Surprisingly, Obey Clothing did not raise fair use as a defense. Rather, Obey Clothing defended on the grounds that the only elements that the Associated Press photograph shared with Fairey’s illustrations were those that are not protected by copyright law because: 1) they are ideas, not expression, 2) they naturally flow from the unprotected idea and therefore are not protected under the scenes a faire doctrine, or 3) they were not chosen, created, or otherwise the original work of the Associated Press’s photographer. In the *Fairey* case, there is no court ruling on the success of this defense strategy because the dispute settled. In other copyright cases, however, this ideas-not-expression defense strategy has had success.

In *Harney v. Sony Pictures Television, Inc.*,<sup>78</sup> freelance photographer Donald Harney took a picture of a young girl on her father’s shoulders holding a palm frond, with a church in the fabled Beacon Hill section of Boston in the background. As fate would have it, the father abducted his daughter. The FBI used Harney’s photograph in a wanted poster, and Sony Pictures Television produced a docudrama on the story. Sony used a simulation of the photograph, using a male adult model holding a young girl model on his shoulder. Harney sued for copyright infringement.

The First Circuit reasoned that copyright protection “extends only to those components of a work that are original to the author,” and that “a work that is sufficiently ‘original’ to be copyrighted may nonetheless contain unoriginal elements.”<sup>79</sup> The court’s analysis initially “dissect[s] the earlier work to ‘separat[e] its original expressive elements from its unprotected content.’”<sup>80</sup> The First Circuit held: “[S]ubject matter that the photographer did not create could be viewed as ‘facts’ that, like ideas, are not entitled to copyright protection.”<sup>81</sup> Quoting from prior decisions, the *Harney* court held: “The Supreme Court has observed that ‘[t]he most fundamental axiom of copyright law is that “[n]o author may

copyright his ideas or the facts he narrates.”<sup>82</sup>

Applying this holding, the *Harney* court found that Sony had only taken factual elements from Harney’s photograph (a daughter on father’s shoulders) and no expressive original content (such as the palm in her hand or the church in the background). In particular, the court held: “Inescapably, however, Harney’s creation consists primarily of subject matter—‘facts’—that he had no role in creating, including the central element of the Photo: the daughter riding piggyback on her father’s shoulders.”<sup>83</sup> Sony was judged nonliable for copyright infringement.

As these cases indicate, transformative purpose is not limited to physically transforming the work. Transformation may include the reason for using the work and is central to fair use. Perfunctory manipulation is likely to be perceived as such and not be weighty enough to establish a transformative use for purposes of asserting a fair use. A new message or utility will likely be very influential in tipping the balance in favor of finding a transformative use. Courts have nevertheless stated that transformative use is not a necessary or sufficient requirement for a finding of fair use. Effect on the market for the original work is a heavily weighed factor. Those who reuse content are advised to avoid perfunctory fair use analysis. ■

<sup>1</sup> See generally 17 U.S.C. §107.

<sup>2</sup> *Id.*

<sup>3</sup> North Jersey Media Group Inc. v. Pirro, No. 13 Civ. 7153 (S.D. N.Y. Feb 10, 2015).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 8.

<sup>8</sup> *Id.* at 10-17.

<sup>9</sup> *Id.* at 18-20.

<sup>10</sup> *Id.* at 11-13.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 6, 22-25.

<sup>13</sup> *Id.* at 24.

<sup>14</sup> *Monge v. Maya Magazines*, 688 F. 3d 1164 (2012).

<sup>15</sup> *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 557 (1985).

<sup>16</sup> *Monge*, 688 F. 3d at 1173.

<sup>17</sup> See generally Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (transformative use) [hereinafter Leval].

<sup>18</sup> *Monge*, 688 F. 3d at 1173-74.

<sup>19</sup> *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); see also *Folsom v. Marsh*, 9 F. Cas., 342, 348 (No. 4,901) (C.C.D. Mass. 1841); *Harper & Row*, 471 U.S. at 562; Leval, *supra* note 17, at 1111).

<sup>20</sup> *Monge*, 688 F. 3d at 1173-74 (quoting *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F. 3d 1119, 1122 (1997)).

<sup>21</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

<sup>22</sup> *Monge*, 688 F. 3d at 1176-77.

<sup>23</sup> *Harper & Row*, 471 U.S. at 566.

<sup>24</sup> *Monge*, 688 F. 3d at 1177-80.

<sup>25</sup> *Id.* at 1180-2.

<sup>26</sup> 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER

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<sup>27</sup> Monge, 688 F. 3d at 1183-84.

<sup>28</sup> Perfect 10 v. Amazon, 508 F. 3d 1146 (9th Cir. 2007).

<sup>29</sup> *Id.* at 1165.

<sup>30</sup> *Id.* at 1168.

<sup>31</sup> *Id.* at 1166.

<sup>32</sup> Kelly v. Arriba Soft Corp., 336 F. 3d 811 (2003).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 942.

<sup>35</sup> *Id.* at 941.

<sup>36</sup> *Id.* at 943.

<sup>37</sup> *Id.* at 944.

<sup>38</sup> *Id.*

<sup>39</sup> Ringgold v. Black Entm't Television, 126 F. 3d 70 (2d Cir. 1997).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 79-80.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 81.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Kienitz v. Sconnie Nation LLC, 766 F. 3d 75 (7th Cir. 2014).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 76.

<sup>49</sup> Warren Publishing Co., et. al. v. Spurlock, 645 F. Supp. 2d 402 (E.D. PA. 2009).

<sup>50</sup> *Id.* at 418.

<sup>51</sup> *Id.* at 419.

<sup>52</sup> *Id.* at 423. (citing Peter Letterese & Assocs., Inc. v. World Inst. of Scientology, 533 F. 3d 1287 (11th Cir. 2008) (out-of-print works are generally accorded less copyright protection)).

<sup>53</sup> *Id.* at 424.

<sup>54</sup> *Id.* at 426.

<sup>55</sup> *Id.* at 427.

<sup>56</sup> Gaylord v. United States, 595 F. 3d 1364 (2010).

<sup>57</sup> *Id.* at 1374.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1375. *See also* Campbell v. Acuff-Rose Music, 510 U.S. 569, 579 (1994).

<sup>60</sup> Gaylord, 595 F. 3d at 1375.

<sup>61</sup> Blanch v. Koons, 467 F. 3d 244, 248 (2d Cir. 2006).

<sup>62</sup> *Id.* at 252-53.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> 17 U.S.C. §107.

<sup>66</sup> Gaylord, 595 F. 3d at 1374.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1375.

<sup>69</sup> *Id.*

<sup>70</sup> A.V. ex rel. Vanderhve v. iParadigms, LLC, 562 F. 3d 630 (4th Cir. 2009).

<sup>71</sup> *Id.* at 634.

<sup>72</sup> *Id.* at 645.

<sup>73</sup> *Id.* at 640.

<sup>74</sup> *Id.* at 639.

<sup>75</sup> *Id.* at 642.

<sup>76</sup> Lenz v. Universal Music Corp., 801 F. 3d 1126 (2015).

<sup>77</sup> Fairey et al. v. The Associated Press, No. 1:09-cv-01123-AKH (S.D. N.Y. 2011).

<sup>78</sup> Harney v. Sony Pictures Television, Inc., 704 F. 3d 173 (1st Cir. 2013).

<sup>79</sup> *Id.* at 178 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991)).

<sup>80</sup> Harney, 704 F. 3d at 179 (quoting Coquico, Inc. v. Rodriguez-Miranda, 562 F. 3d 62, 66 (1st Cir. 2009)).

<sup>81</sup> Harney, 704 F. 3d at 179.

<sup>82</sup> *Id.* at 181 (quoting Feist, 499 U.S. at 344-45 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985))).

<sup>83</sup> Harney, 704 F. 3d at 184.





by Joseph Chora

# Judgment WAY

**Examinations, liens, turnover orders, levies, and investigative techniques are among the tools available to compel judgment debtors to meet their obligations**

**WHILE A COURTROOM VICTORY** is pleasing, any judgment is only as good as its ability to transform the words on the judgment order into money in the pockets of clients. Attorneys should therefore understand the basics of judgment enforcement. Once a judgment is entered, enforcement concerns finding, chasing, and taking the debtor's assets. Through meticulous and diligent pursuit of a judgment, a client may obtain restitution.

The first and most important step in judgment enforcement is the creation of the judgment. Accurately naming the debtor in the judgment is critical.<sup>1</sup> Misspelling the debtor's name or transposing a given and surname can cause unnecessary expense and confusion.<sup>2</sup> Failing to designate a legal entity correctly can also be fatal to a judgment, and is at the least a costly error.<sup>3</sup> Two rules of thumb apply: 1) be as exact and complete as possible with spelling, punctuation, and entity type; include Jr., Sr., and the full business name or full personal name of the debtor and akas,

and 2) be over-inclusive: name all parties, businesses, insurance carriers, individuals, spouses, and others that are legally responsible for the claim.<sup>4</sup>

The content and layout of a judgment are also critical. Findings of fact and conclusions of law are critical to a good judgment.<sup>5</sup> If properly laid out, a trial court's findings can be used to great effect in bankruptcy court, should the debtor decide to file bankruptcy. A special verdict form that satisfies each element of a cause of action can save tens of thousands in legal fees by allowing a creditor to succeed in a motion for summary judgment rather than having to relitigate in bankruptcy court. It should be noted that in some areas the bankruptcy code imposes heightened findings for fraud and other intentional torts. For these reasons, a well-crafted judgment should lay out the gravamen and the dispositive facts of the case.

Default judgments require additional consideration; they are technical and must be

perfected.<sup>6</sup> Normally, default judgments cannot be entered for an amount greater than the amount stated in the complaint.<sup>7</sup> A plaintiff who seeks a default judgment for personal injury or wrongful death must serve a statement of damages and may not state damages in the complaint.<sup>8</sup> A plaintiff seeking a default judgment for punitive damages must serve a statement of punitive damages.<sup>9</sup> Failure to follow these rules can cause headaches for the creditor and needless expenses defending attacks against the judgment.

Another general rule to remember is that judgments in California are valid for 10 years from date of entry; they must be renewed within 10 years, or they cease to exist.<sup>10</sup> Judgments can be renewed after five years from date of entry, and in order to compound

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**Joseph Chora is an attorney who practices judgment enforcement. He is also a private investigator who performs asset and fraud investigations and transactional due diligence.**

interest it makes sense to renew a judgment every five years.<sup>11</sup>

### Locating Assets

Even before trial, assets should be located. While professional investigators are valuable, not every case may justify the use of professionals to obtain the information needed to proceed with an asset investigation. Under Sections 708.10 to 708.30 of the Code of Civil Procedure, interrogatories can be propounded and documents can be demanded of the debtor postjudgment in the same manner as prejudgment discovery. In fact, interrogatories and demand for production are the only available applications of the Civil Discovery Act postjudgment.<sup>12</sup> The interrogatories and demand for production must take place prior to a debtor examination, or at least 120 days after an examination.<sup>13</sup> A debtor's examination—also called an ORAP or OEX—is a powerful method to obtain information.<sup>14</sup>

An ORAP is filed *ex parte* by filing Judicial Council Form AJ-138/EJ-125.<sup>15</sup> Each courthouse in Los Angeles County may follow slightly different rules, so it is best to speak to the clerk regarding specific requirements for an ORAP. Personal service of an ORAP upon the debtor creates a secret lien on all the personal property of the debtor that relates back to the date of issuance of the order, and exists for one year unless extended.<sup>16</sup> A debtor must be personally served at least 10 days prior the date of the examination. In addition, it is good practice to serve a subpoena *duces tecum* with an ORAP to compel the debtor to bring documents, such as a Social Security card, driver's license, bank statements, credit card statements, checkbooks, business records, contracts, and ownership documents of vehicles or businesses. Sections 1985 to 1997 of the Code of Civil Procedure govern subpoenas and apply normally to subpoenas served postjudgment.

A court reporter or videographer is useful to memorialize testimony for future motions or impeachment, just as in depositions. However, an ORAP is not a postjudgment deposition; it is a proceeding before the court, and as such takes place at the courthouse unless otherwise ordered by the court.<sup>17</sup> Debtors are required to answer all questions regarding their assets and finances to aid in enforcement of the money judgment. It is imperative to prepare for an ORAP to identify areas of the debtor's finances that may hold key information about the debtor's assets. If a debtor refuses to answer a question about assets or finances, intervention from the court may be sought, and the judge may compel the debtor to answer or face contempt. Debtors can be asked to empty and inventory a wallet or purse and list the purpose of each

and every key on debtor's key chain.<sup>18</sup>

Debtor examinations can be taken of third parties, as well. Under Section 708.120 of the Code of Civil Procedure, an examination can be taken of anyone who possesses or controls at least \$250 of the debtor's assets, or owes a debt to the debtor for at least \$250. Similar to an examination of the debtor under Section 708.110, a lien is created on the debtor's interest in the property in the possession or control of the third party.<sup>19</sup> Most of the bench officers in the 58 counties in California allow creditors to examine third parties who do not control any assets of the debtor or do not owe any debt to the debtor; rather, they are required to appear as a witness "in the same manner as upon the trial of an issue."<sup>20</sup> However, a small minority of courts read Section 708.130 as not applicable to third-party witnesses but rather as a limitation to the scope of examinations under Sections 708.110 and 708.120. There are currently no published cases on this point.<sup>21</sup> The creditor should keep this in mind when attempting to summon a third party for examination.

In addition to an examination, there are gumshoe techniques to locate assets. These include taking trash that has been deposited curbside; talking to neighbors, landlords, employers, friends and relatives; and searching state and county public records online or in person for corporate interests, trademark and patent registrations, aircraft registrations, SEC filings, and real estate records. Former spouses, business partners, and employees can offer a wealth of information regarding the debtor's finances and assets. Court records—particularly divorces and bankruptcies—can provide valuable information about assets owned or controlled by the debtor. A lifestyle analysis is another way to find a debtor's assets by examining the debtor's residence, spending habits, associations, credit report, expenses and the like.<sup>22</sup>

### Bank Accounts

Federal law prohibits tricking (also known as pretexting) a bank to reveal banking information about a debtor.<sup>23</sup> With a few exceptions<sup>24</sup> that do not apply to private citizens, there are only four ways legally to obtain banking information from a bank: 1) debtor's consent, 2) subpoena, 3) court order, and 4) search warrant.<sup>25</sup> Nevertheless, there are other ways to get banking information, such as a debtor's exam, legal dumpster diving, or speaking to associates or vendors who have received check payments. If a person who has purchased an item from a debtor's business with a check can be found, often the processed check will have valuable banking information about the debtor's bank.

Once the assets are found, the next step is taking them. One of the most efficient

methods of separating a debtor from his or her assets is the turnover order, which takes two statutorily different forms.<sup>26</sup> The first provides that, at the conclusion of a debtor's exam, a debtor can be ordered to turn over property that typically is identified at the examination, but may have been previously identified.<sup>27</sup> This can be jewelry the debtor is wearing, cash in a wallet, a vehicle driven to the examination, a grand piano, or stock shares. The onus is placed on the debtor to turn the property over to the levying officer (typically the sheriff in state court, or the marshal in federal court) for liquidation at an auction. The second type of turnover order requires a writ of execution and a showing of need. This can be brought as a noticed motion or *ex parte*. The court's order must be personally served upon the debtor.<sup>28</sup>

Similar to the turnover order is a levy.<sup>29</sup> A levy is the most common and most versatile remedy.<sup>30</sup> The first step is to obtain a writ of execution by filing Judicial Council form EJ-130. A levy takes place when a judgment creditor, in possession of a valid writ of execution, directs the sheriff to seize the property of the debtor and sell that property at auction.<sup>31</sup> Personal and real property, but not intellectual property, can be reached via a levy. Property can be seized from the debtor, a third party or even from the levying officer.<sup>32</sup> Houses, businesses, cars, boats, helicopters, airplanes, negotiable instruments, documents of title, cash in deposit accounts, safe deposit boxes, accounts receivable, property in a pending action, and final money judgments are some examples of the property that can be levied.<sup>33</sup>

In addition to a levy, another element of judgment enforcement is a keeper, a person who may maintain a presence at the debtor's business and collect all the payments for goods or services made by customers.<sup>34</sup> A similar remedy is a till tap. The levying officer may enter the debtor's business and remove all cash from the debtor's cash register.<sup>35</sup> Wage garnishments are a levy on a debtor's earnings and can be used to take up to 25 percent of a debtor's wages, subject to considerations of the debtor's ability to provide for necessities for the debtor and the debtor's family.<sup>36</sup> If 25 percent is not enough, an assignment order can divert more than 25 percent of the nonwage income streams the debtor receives.<sup>37</sup> The Code of Civil Procedure defines "wages" as earned from "personal services," and gives examples of nonwage income streams.<sup>38</sup> As a practical matter, if there is a question as to the characterization of the income stream, the wage garnishment and assignment order remedies should both be employed.

Another approach is warranted if the assets are to be found in an LLC. The legis-

# MCLE Test No. 254

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. Divorce filings are a not good place to look for a debtor's assets because in a divorce proceeding individuals often misrepresent their assets and liabilities.

True.  
False.

2. Section 708.120 of the Code of Civil Procedure provides for the creation of a lien on real property, not personal property.

True.  
False.

3. Turnover orders can be made immediately after a debtor exam, without meeting ex parte notice requirements, as long as a writ of execution has been filed with the court.

True.  
False.

4. Liens created on personal property can only be effective if they are placed in sequential order, placed after all liens on real property.

True.  
False.

5. Postjudgment, the creditor can use the Civil Discovery Act to propound special and form interrogatories and demands for production to the debtor.

True.  
False.

6. Once a debtor moves funds offshore, they may be collected by applying for a writ of execution and then for a charging order, which can be used to levy on foreign bank accounts in cooperative countries.

True.  
False.

7. An ORAP lien is a powerful lien that attaches to both tangible and intangible personal property of any kind.

True.  
False.

8. Creditors must ask permission from the court after an ORAP is issued if the creditor wants to expand the scope of questions to ask the debtor about the debtor's assets, liabilities, and finances.

True.  
False.

9. Assignment orders affect wages earned by "personal service" and are also known as wage garnishment orders and may divert more than 25 percent of the wages that would normally flow to a debtor.

True.  
False.

10. Creditors must be cognizant of the enforcement actions brought to bear against the debtors, as the litigation privilege does not apply to postjudgment enforcement actions.

True.  
False.

11. Personally serving an ORAP upon a debtor creates a secret lien that relates back to the date on which the order to appear was signed.

True.  
False.

12. There is little benefit to the psychological aspect of judgment enforcement; creditors must focus on simply meeting legal requirements.

True.  
False.

13. Levies can be effectively used to take possession of real or personal property from judgment debtors and third parties in possession or control of real property or personal property that belongs to the judgment debtor.

True.  
False.

14. A keeper and a till tap are remedies at law that allow a creditor to place a lien on and take possession of motor vehicles of all kinds, including boats and airplanes.

True.  
False.

15. If a defendant has not been put on notice of potential liability via the complaint or a statement of damages prior to a default, default may be set aside any time after the entry of default judgment.

True.  
False.

16. Judgments in California are only good for 10 years and cannot be renewed unless the creditor initiates a new suit to extend the judgment another 10 years.

True.  
False.

17. Debtors' banking information is protected under the Graham-Leech-Bliley Act and can only be obtained from a bank by 1) consent, 2) subpoena, 3) court order, 4) a search warrant.

True.  
False.

18. A creditor must show that other remedies have failed before the court will consider the use of a receiver to enforce a judgment.

True.  
False.

19. A lien is considered seasoned if it has been in place for 91 days; a seasoned lien is considered a secure debt in a bankruptcy action, effectively making a previously unsecured creditor a secured creditor.

True.  
False.

20. A judgment for ordinary costs and attorney's fees is automatically stayed when an appeal is filed.

True.  
False.



## JUDGMENT WAY

Name \_\_\_\_\_

Law Firm/Organization \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State/Zip \_\_\_\_\_

E-mail \_\_\_\_\_

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|-----|-------------------------------|--------------------------------|
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| 2.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 3.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 4.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 5.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 6.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 7.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 8.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 9.  | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 10. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 11. | <input type="checkbox"/> True | <input type="checkbox"/> False |
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| 19. | <input type="checkbox"/> True | <input type="checkbox"/> False |
| 20. | <input type="checkbox"/> True | <input type="checkbox"/> False |

lature has deemed the charging order the sole method of diverting income streams originating from a California LLC or partnership.<sup>39</sup> A charging order charges the judgment debtor's membership interest in the LLC or partnership and allows the creditor to receive any distributions due to the member because of that interest in the LLC or partnership. In addition, the court may order the liquidation of the debtor's interest in the LLC or partnership.

Another method of seizing the debtor's assets is to place liens on real and personal property of the debtor. Liens are some of the easiest and most cost-effective forms of passive enforcement.<sup>40</sup> An abstract of judgment creates a lien on all real property in a given county and attaches to any real property interest, whether present or future, vested or contingent, legal or equitable.<sup>41</sup> In addition, if the debtor later acquires a real estate interest, the lien created by an abstract of judgment attaches to the interest when it is acquired.<sup>42</sup> To be perfected, abstracts require a two-step process. They are first filed with the court, then recorded with the county recorder.<sup>43</sup> Liens created by an abstract of judgment are good for 10 years from the date of entry of the judgment; therefore, when a judgment is renewed, the abstract of judgment also needs to be renewed.<sup>44</sup> The JLPP or J1 lien is filed with the secretary of state and attaches to personal property of a business nature.<sup>45</sup>

One of the most powerful liens for a judgment creditor is the ORAP lien.<sup>46</sup> As discussed above, a lien is created when the debtor is served with an ORAP.<sup>47</sup> The ORAP lien is a secret lien, meaning it is perfected without recording or notice to the debtor or anyone else; instead, it is perfected when served upon the judgment debtor or on a third party who possesses or controls property of the debtor.<sup>48</sup> The ORAP lien attaches to both tangible and intangible personal property of the debtor. It remains in effect for one year from the date the ORAP was issued by the court, but can be extended by either serving the debtor with another ORAP or by order of the court.<sup>49</sup>

A receiver is a court-appointed representative empowered by the court to take some measure of control from the debtor over the assets controlled by the debtor, where the appointment of a receiver is a reasonable method to enforce a judgment, considering the interests of both the debtor and creditor.<sup>50</sup> Receivers are appointed by the court as representatives of the court, to insure an efficient and effective satisfaction of a judgment. Typically, a creditor will move for appointment of a receiver and suggest a list of receivers. However, the court may ignore the creditor's suggestions and appoint a receiver of its own choosing or solicit an additional list from the debtor or creditor. Receiverships

are a powerful and flexible remedy which can be tailored to enforce a judgment. While some judicial officers view receivers as a remedy of last resort, there is no support for that thinking within either the Code of Civil Procedure or controlling case law.<sup>51</sup>

Since the adoption of the Enforcement of Judgment Law in July of 1983, a receivership is no longer a remedy of last resort.<sup>52</sup> It should be noted, however, that receivers can be very expensive to the debtor. Because a receivership is intrusive to a business at best and fatal at worst, judicial officers may weigh competing interests before ordering a receiver to be used. A receiver's powers can be limited or wide-ranging. A receiver may be appointed only to determine the income of a recalcitrant debtor who is the sole owner of a closely held corporation, or to take over the legal capacity of a the debtor. Some assets, such as liquor licenses and intellectual property, may require a sale by a receiver.<sup>53</sup> Receivers can be appointed via noticed motion or ex parte if circumstances warrant, and the filing of an application may be enough to motivate a debtor to settle.

Another important aspect of taking assets is psychology. The creditor must make it clear to the debtor that the creditor has the money, the will, and the expertise to collect the judgment. Delay, misdirection, misrepresentation, and noncooperation are the defenses of the debtor who has the money to satisfy a judgment but is unwilling to do so. The creditor must show the debtor that his or her assets have been identified, that the remedies at law will be used, and that any attempt to hinder, delay, or defraud the creditor will not be tolerated.

### Chasing the Assets

Some debtors engage in evasive actions, such as fleeing the jurisdiction, filing bankruptcy, or appealing the judgment and postjudgment rulings. There have been cases of debtors' using bank accounts in the name of dead relatives, liquidating assets into diamonds and fleeing the country, filing and dismissing bankruptcy several times, and allowing defaults to be taken only to argue that their due process rights were violated. Debtors will often transfer assets to friends, family members, long-term employees, or corporate entities. Depending on how the assets are held, an ORAP and turnover order against the third party may be sufficient to put a lien on and recover the transferred assets. However, depending on how the transfer was made, it may be necessary to initiate a fraudulent transfer action.<sup>54</sup> The definitions of "transfer" and "claim" are quite broad, and reviewing the relevant statutes may give a creditor more options when seeking to unwind or obtain a judgment for the value

transferred to the transferee.<sup>55</sup>

Some debtors may seek bankruptcy protection.<sup>56</sup> While many judgments can be discharged in bankruptcy, some can be disputed and rendered nondischargeable.<sup>57</sup> An adversary proceeding in bankruptcy court is a new lawsuit in the bankruptcy court, in this case to determine if the judgment will be discharged or determined to be nondischargeable. A creditor can ask the bankruptcy court to dismiss debtor's bankruptcy altogether if the debtor is found to have engaged in conduct in violation of the Bankruptcy Code.<sup>58</sup> Liens that have been placed on the debtor's property and have remained for 91 days or more are considered seasoned and outside the bankruptcy preference period. As such, the creditors holding those liens are considered secured creditors<sup>59</sup> entitled to full payment up to the equity in the personal or real property above any exemptions.<sup>60</sup>

A debtor may seek relief from enforcement actions by filing an appeal. While a judgment for ordinary costs and attorney's fees is automatically stayed on the appeal,<sup>61</sup> there is no automatic stay of enforcement during an appeal for money judgments, costs under Section 998 of the Code of Civil Procedure, or costs awarded under Section 1141.21. For these judgments, a debtor must post a bond or deposit cash in lieu of a bond to obtain a stay of enforcement.<sup>62</sup> The bond for a stay of enforcement must be 1.5 times the judgment amount from an admitted carrier, or two times the amount from a nonadmitted carrier.<sup>63</sup>

A debtor may attempt to forestall enforcement by suing a creditor for its legitimate enforcement actions, in an attempt to drive up the expense, intimidate the creditor into settlement, or abate collection efforts altogether. Legitimate collection efforts are considered petitioning actions and, as such, an anti-SLAPP special motion to strike is an effective and appropriate response to such frivolous litigation.<sup>64</sup> Successful use of an anti-SLAPP motion to strike will dismiss the debtor's lawsuit against the creditor and add another separate judgment for attorney's fees. In addition, collection actions are also covered under the litigation privilege, which adds another layer of protection for attorneys who enforce judgments.<sup>65</sup>

A debtor may flee the jurisdiction moving to another state or out of the country. However, the location of the assets is more important than the location of the debtor, as assets can still be seized without the debtor's presence in the state.<sup>66</sup> Effective judgment enforcement against an absent debtor is possible if the creditor has been diligent in asset investigation, creating liens and utilizing the remedies at law to seize the debtor's assets. Debtors may also place assets offshore in an attempt to thwart judgment enforcement, yet may

still have access to the assets offshore via debit cards linked to the debtor's accounts. These cards leave a trail of recorded banking information when purchases are made. Once the accounts are identified, a turnover order can issue where the court orders the debtor to repatriate the funds or face contempt.<sup>67</sup>

An accurate, valid judgment, a thorough asset location search, and a clear understanding of the remedies at law to seize and pursue assets will give a judgment creditor the tools needed to convert a paper judgment into real money. With these tools, assets may be found, chased, and taken to satisfy the debtor's obligation to the client. ■

<sup>1</sup> Orr v. Byers, 198 Cal. App. 3d 666 (1988); Meller & Snyder v. R & T Props., 62 Cal. App. 4th 1303 (1998).  
<sup>2</sup> Manson, Iver & York v. Black, 176 Cal. App. 4th 36 (2009).  
<sup>3</sup> L.A., CAL. CODE §198; CODE CIV. PROC. §680.135.  
<sup>4</sup> Tokio Marine & Fire Ins. Corp. v. Western Pacific Roofing Corp., 75 Cal. App. 4th 110 (1999).  
<sup>5</sup> Lange v. Waters, 156 Cal. 142 (1909); FED. R. CIV. P. 52(a).  
<sup>6</sup> CODE CIV. PROC. §§585-587.  
<sup>7</sup> CODE CIV. PROC. §580.  
<sup>8</sup> CODE CIV. PROC. §425.11.  
<sup>9</sup> CODE CIV. PROC. §425.115.  
<sup>10</sup> CODE CIV. PROC. §683.020.  
<sup>11</sup> CODE CIV. PROC. §683.110.  
<sup>12</sup> CODE CIV. PROC. §2016.070.  
<sup>13</sup> CODE CIV. PROC. §§708.020, 708.030.

<sup>14</sup> CODE CIV. PROC. §708.110.  
<sup>15</sup> See <http://www.lacourt.org/division/civil/CI0025.aspx>.  
<sup>16</sup> CODE CIV. PROC. §708.110(d).  
<sup>17</sup> CODE CIV. PROC. §708.110(a).  
<sup>18</sup> CODE CIV. PROC. §708.110; Kyne v. Eustice, 215 Cal. App. 2d 627 (1963); Troy v. Superior Court, 186 Cal. App. 3d 1006 (1986).  
<sup>19</sup> CODE CIV. PROC. §708.120(c).  
<sup>20</sup> CODE CIV. PROC. §708.130.  
<sup>21</sup> 1538 Cahuenga v. Fabe, 2015 Cal. App. Unpub. LEXIS 6259 (unpublished).  
<sup>22</sup> TRACY COENEN, LIFESTYLE ANALYSIS IN DIVORCE CASES: INVESTIGATING SPENDING AND FINDING HIDDEN INCOME AND ASSETS (2014).  
<sup>23</sup> Gramm-Leach-Bliley Act, Pub. L. 106-102, 113 Stat. 1338 (1999).  
<sup>24</sup> 12 U.S.C. §3403(c), (d); 12 U.S.C. §3414.  
<sup>25</sup> Right to Financial Privacy Act, 12 U.S.C. §§3401, 3402.  
<sup>26</sup> CODE CIV. PROC. §708.205; CODE CIV. PROC. §699.040.  
<sup>27</sup> CODE CIV. PROC. §708.205.  
<sup>28</sup> CODE CIV. PROC. §699.040.  
<sup>29</sup> CODE CIV. PROC. §687.010.  
<sup>30</sup> CODE CIV. PROC. §§700.010-700.200.  
<sup>31</sup> CODE CIV. PROC. §699.530.  
<sup>32</sup> CODE CIV. PROC. §§700.015, 700.030.  
<sup>33</sup> CODE CIV. PROC. §§700.010-700.200.  
<sup>34</sup> CODE CIV. PROC. §700.070.  
<sup>35</sup> *Id.*  
<sup>36</sup> CODE CIV. PROC. §706.050.  
<sup>37</sup> CODE CIV. PROC. §708.510.  
<sup>38</sup> CODE CIV. PROC. §§706.011(b), 708.510.  
<sup>39</sup> CODE CIV. PROC. §708.310.  
<sup>40</sup> CODE CIV. PROC. §§697.310, 697.510.  
<sup>41</sup> CODE CIV. PROC. §697.340(a); Judicial Council

Form EJ-001.  
<sup>42</sup> CODE CIV. PROC. §697.340(b).  
<sup>43</sup> CODE CIV. PROC. §697.310(a).  
<sup>44</sup> CODE CIV. PROC. §§697.310(b), 683.180.  
<sup>45</sup> CODE CIV. PROC. §§697.510-697.550; Secretary of State Form JLI.  
<sup>46</sup> Southern Cal. Bank v. Zimmerman (In re Hilde), 120 F. 3d 950 (1997).  
<sup>47</sup> CODE CIV. PROC. §708.110.  
<sup>48</sup> CODE CIV. PROC. §708.110(d); CODE CIV. PROC. §680.290.  
<sup>49</sup> CODE CIV. PROC. §708.110.  
<sup>50</sup> CODE CIV. PROC. §708.620.  
<sup>51</sup> CODE CIV. PROC. §708.620; RN's "Ask the Receiver" Expert Answer Man Peter Davidson Surveys Use of Receiverships in Non Traditional-Settings, RECEIVERSHIP NEWS 4 (Winter 2008).  
<sup>52</sup> CODE CIV. PROC. §§680.010-724.260.  
<sup>53</sup> CODE CIV. PROC. §§708.620, 708.630, 699.720; Office Depot, Inc. v. Zuccarini, 596 F. 3d 696 (2010).  
<sup>54</sup> CIV. CODE §3439.01(b), (i).  
<sup>55</sup> CIV. CODE §3439.01.  
<sup>56</sup> 11 U.S.C. §524.  
<sup>57</sup> 11 U.S.C. §523.  
<sup>58</sup> 11 U.S.C. §727.  
<sup>59</sup> 11 U.S.C. §547.  
<sup>60</sup> CODE CIV. PROC. §704.080.  
<sup>61</sup> Chapala Management Corp. v. Stanton, 186 Cal. App. 4th 1532 (2010).  
<sup>62</sup> CODE CIV. PROC. §917.1.  
<sup>63</sup> CODE CIV. PROC. §917.1(b).  
<sup>64</sup> CODE CIV. PROC. §425.16.  
<sup>65</sup> Rusheen v. Cohen, 37 Cal. 4th 1048 (2006).  
<sup>66</sup> Shaffer v. Heitner, 433 U.S. 186 (1977); 2 WITKIN CAL. PROC. JURIS. §254 (2008).  
<sup>67</sup> FTC v. Affordable Media, LLC, 179 F. 3d 1228 (1999).

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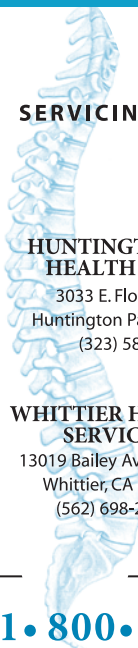
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by DAVID J. COOK

# HOUSE HUNTING

## **As real estate prices rise, equity may bridge the recovery gap between general liability policy limits and total damages in personal injury suits**

COMMENCING IN 2012, Southern California real estate has appreciated in value and even reached its 2008 plateau and made further gains.<sup>1</sup> In a rising market, however, property owners may discover that their home, business, or auto insurance policy limits have failed to keep pace<sup>2</sup> and that real or personal property may become the subject of active enforcement of a large-dollar judgment. Attorneys pondering settlement of a major case necessarily navigate through litigation, settlement negotiations, insurance coverage, and postjudgment enforcement. In personal injury cases, rising real estate values factor into a policy limits offer, which is the settlement offer made by a defendant's insurer to tender the full amount of the policy in exchange for a complete release of liability.<sup>3</sup>

If liability is undisputed and damages exceed the policy limits, the insurer offers policy limits in order to shield the insured from enforcement of judgment in excess of the policy limits.<sup>4</sup> In considering a policy limits offer, a plaintiff's counsel weighs the costs and risks of litigation, the amount of the offer, the potential outcome, and whether a defendant could satisfy a judgment in excess of policy limits.<sup>5</sup> Hence, a defendant's real property equity (which may include rentals and investment property) enters the equation, especially in circumstances involving liability to visitors or invitees.<sup>6</sup>

Given escalating real estate equities, and a paltry policy limits offer, counsel may be motivated to take the case to trial and seek judgment in anticipation that enforcement

would generate a recovery over the policy limits offers.<sup>7</sup> Facing postjudgment enforcement and possibly a losing hand at trial, a defendant may likely consider a settlement.<sup>8</sup> Rising real estate equities drive cases to trial because the equities represent a viable source of recovery.<sup>9</sup> While the minimum for automobile liability insurance is only \$30,000,<sup>10</sup> routine medical expenses, pain and suffering, and wage losses may exceed six, or even seven, figures.<sup>11</sup> As a result, drivers and property owners are chronically underinsured in the face of rising real estate equities. When a policy limits offer is made, a plaintiff's

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counsel typically investigates whether the debtor has sufficient assets to produce a recovery.<sup>12</sup> Real estate equities, including the home, are the primary source of the recovery.<sup>13</sup> In negotiating a policy limits offer, a plaintiff's counsel often demands a sworn financial statement, which when completed may be used as an investigatory tool.

Property held as husband and wife—community property—is subject to enforcement even if only one spouse is the defendant.<sup>14</sup> If property is held in joint tenancy and presumptively separate property, only the defendant's interest is subject to enforcement,<sup>15</sup> and the nondebtor's joint tenancy interest is immune from enforcement.<sup>16</sup> A plaintiff may be able to reach the nonliable party's interest (i.e., separate property) if the underlying obligation was a community obligation or if the parties were acting in an agency capacity.<sup>17</sup> Generally, one spouse bears no liability for injury or death caused by the other spouse.<sup>18</sup> The vesting deed (grant deed) and subsequent deeds of trust disclose title.<sup>19</sup> Separate property from a joint tenancy deed is a rebuttable presumption.<sup>20</sup> Joint tenancy is a common form of ownership given the belief that parties can avoid probate and its inherent delay and expenses.<sup>21</sup>

In this context, it is important to note that a sworn financial statement, even if listing the gross real property equities, is necessarily misleading if properties are held in joint tenancy.<sup>22</sup> To mitigate any misunderstanding, a financial statement compels disclosure of title to the real property, signed under penalty of perjury, and notarized by all title holders.<sup>23</sup>

### **Title Reports**

With the exception of the Los Angeles County Recorder, most county recorders feature a robust online presence.<sup>24</sup> Counsel can search under either grantor or grantee index by typing in the defendant's name. If the name is common, the recordings will list all instruments under that name. If the name is uncommon, there may be difficulties in locating instruments under the abbreviated name and even bona fide recordings may be missed.<sup>25</sup> In negotiating a policy limits offer, a plaintiff's counsel should endeavor to get a copy of the defendant's driver's license or passport to ensure the correct spelling of the name.<sup>26</sup>

Online title information is a snapshot of recorded instruments, and since some online recorder sites are reasonably current while others are less so, counsel should periodically reconfirm title information.<sup>27</sup> Facing a large and underinsured or noninsured claim, tort defendants may fraudulently transfer their home to children, the nonliable spouse, an LLC, or even "trust protectors," although these types of transfers are fraudulent con-

veyances.<sup>28</sup> However, online information has limited value—for example, if the plaintiff is a putatively unsecured creditor of the debtor and not a bona fide purchaser for value. If a plaintiff's counsel concludes that a defendant's real property has significant equity that may justify a sheriff's sale, a plaintiff's counsel commensurately will recognize that a debtor's bona fide and nonfraudulent but unrecorded grant deeds, quitclaim deeds, or deeds of trust may be recorded at a later date.<sup>29</sup> These secret, but valid, instruments may well trump the claim of a prior unsecured creditor yet still be fraudulent conveyances.<sup>30</sup> Thus, while the title snapshot may suggest that the debtor is endowed with significant real equity, counsel should be alert to hidden deeds and encumbrances.

In some cases, a plaintiff's counsel may accept a stipulation for entry of judgment, which would immediately be entered as part of a settlement and have an abstract of judgment recorded.<sup>31</sup> A plaintiff's counsel may even order a title report that evidences the recording of the abstract and a high priority in the chain of title. However, a prior unrecorded instrument—specifically a grant deed, quitclaim deed, or deed of trust—would take precedence over an earlier recorded abstract of judgment because the holder of an abstract of judgment is not a bona fide purchaser for value.<sup>32</sup> A cautious plaintiff's counsel may consider ordering a title report to verify title to the property. A title report, also called a litigation guaranty, starts at \$500 for \$10,000 worth of insurance. A title report is useful in providing information that discloses all recorded instruments, including title discrepancies, grant deeds, real property taxes, a recorded homestead exemption, and subsequent conveyances. The risk, however, in every title report is backdating, which means that the effective date of title is about two to four weeks prior to its issuance. Therefore, the report does not disclose any instruments recorded later. This could be a complete disaster if, within days before the close of any deal, the defendant refinances the real property or even sells the property. In that event, the plaintiff would either obtain a lien upon fully encumbered real property or discover that the real property is gone. The remedy for the risk of late transfers is to cycle the transaction through an escrow company or third party, obtain a dated down title report (which may itself be ineffective, given some last-minute ruse attempted by the defendant), or, better yet, a posttransaction title report.<sup>33</sup>

### **Secret Community Property**

Community property is the property acquired by either spouse during the marriage, which may include appreciation on premarital sep-

arate property and paydown of secured debt from community earnings.<sup>34</sup> After some period of time in some marriages, the real estate equities rise, but the marriage craters. In the ensuing family law proceeding, the court determines whether the postmarital appreciation of the separately owned home and paydown of the mortgage are community assets. Under the *Moore/Marsden* rule, and absent a viable prenuptial agreement, the nonproperty-owning spouse acquires a community interest in the appreciation and equity accrued from the mortgage paydown.<sup>35</sup> *Moore/Marsden* creates additional equity available to a judgment creditor because the judicially created community property is subject to enforcement.<sup>36</sup>

Typically, appraisers value homes based on comparables, apartments, commercial properties based on rents and the return on equity, and raw land (or other "fixer uppers") on costs to build.<sup>37</sup> Agricultural property is *sui generis*.<sup>38</sup> However, in a highly inflated market, irrationality upsets normal pricing. Scarce owner-occupied commercial buildings command an exorbitant premium. Homes in luxury communities also command significant premiums. Unique, storied, or celebrity-touched properties likewise command huge premiums. Tax considerations, zoning entitlements, development potential (i.e., apartments into condominiums), neighboring or abutting properties that share a common driveway can add or subtract big dollars to any price. Owners of such properties may receive weekly or monthly calls from real estate brokers who claim to have offers at hand. To determine the value of such properties, online services such as Blockshopper or Zillow are helpful but are not a substitute for a professional appraisal.

Many homeowners finance or refinance their real property purchases, including both homes and investment properties.<sup>39</sup> The most common loans are from a bank or mortgage lender. The common standard is that a purchase money loan is 80 percent of the purchase price (loan to value ratio) and a 30-year amortization schedule. Most deeds of trust have on their face the due date and amount of the loan. Absent a windfall or financial disaster, the borrower (the defendant) makes timely payments. Amortization schedules are online that enable counsel to calculate the balance of the loan.<sup>40</sup> Property taxes too are in the public record.<sup>41</sup> Counsel can obtain copies of the prior liens—property profiles—through customer service of most title companies, ordering a litigation guaranty, or abstracting this information via search services, public records reports, or the county recorder.

### **Homestead Rights**

Property owners are entitled to the recorded homestead<sup>42</sup> and the automatic homestead



exemptions.<sup>43</sup> The recorded homestead enables the homeowner to protect the equity in the home but requires the homeowner to record a declaration of homestead. The automatic homestead grants various protections in favor of the homeowner in the event of a forced sale initiated by a judgment creditor. While the two remedies differ, the exemptions are as follows: in the case of what is known as the secret and double homestead, a plaintiff can levy on the defendant's interest in the home and seek an order authorizing the sale of the home.<sup>44</sup> The judge will authorize a sheriff's sale assuming that the plaintiff can demonstrate that the property, if sold, would generate sufficient funds to pay off the prior liens, the homestead, and provide some money to the creditor.<sup>45</sup> The judge will set the release price at 90 percent of the appraised value,<sup>46</sup> and the sheriff cannot sell the property for less than 90 percent of the appraised value.<sup>47</sup> The 90 percent rule is a complete bar to a forced sale (hence the secret homestead).<sup>48</sup> However, in a rapidly appreciating market, a sheriff may well be able to sell the home for cash at 90 percent of the appraised value, or even more.<sup>49</sup> Homestead rules only apply to the defendant's residence, and not investment property.<sup>50</sup> If the property is held in joint tenancy, and both joint tenants are judgment debtors, each debtor is entitled to a homestead, which doubles the gross homestead (hence, the double homestead).<sup>51</sup>

After concluding that the defendant has sufficient equity that would lead to a sheriff's sale at 90 percent of the appraised value, the answer is obvious: Reject the policy limits offer, assuming that the plaintiff is willing to go to trial and will prevail, and that someone will finance the enforcement. Tempering this easy answer is the consideration that enforcement against a home is expensive, in light of the 90 percent requirement, title report, appraisal, a contested trial on the value of the home, incidental expenses, much less the attorneys' time and effort.<sup>52</sup>

If a plaintiff rejects a policy limits offer, a defendant has various options. A defendant can go to trial or file bankruptcy, which, in the long run, may be unavailing because the excess equity in the property above the homestead is an asset of the estate and possibly subject to sale by the trustee.<sup>53</sup> The upside of a bankruptcy, of course, is that the debtor may qualify for Chapter 13<sup>54</sup> or Chapter 11,<sup>55</sup> in which the debtor will have the opportunity to pay off the policy limit's excess over a period of time.<sup>56</sup> In some cases in a Chapter 7 bankruptcy the trustee may be willing to accept a cash discount in exchange for surrendering his or her interest in the debtor's nonexempt equity.<sup>57</sup>

In another scenario the debtor agrees to make payments of a stipulated amount that

typically spans years and may pay interest.<sup>58</sup> Each type of long-term settlement of personal injury case bears its own risks including default and postagreement fraudulent transfers. In light of these risks, the basic options are a stipulation for entry of judgment, an entered judgment and recorded abstract, or a deed of trust.

The defendant may offer a stipulation for entry of judgment that can be filed and judgment entered upon default. The risk is that the defendant has already sold or refinanced the home, which makes the property effectively inaccessible.<sup>59</sup> The later judgment and abstract

nonjudicial foreclosure.<sup>64</sup> The plaintiff is free of any homestead claim asserted by the defendant nor is foreclosure a means of enforcement.<sup>65</sup> The plaintiff does not need a court order to foreclose and avoids the risks faced in a forced sale of a joint tenant's interest in the home.<sup>66</sup> The plaintiff will reap the benefits of the continuing rise in the real estate market. However, the plaintiff must insure that the deed of trust is enforceable, which requires all parties on title to execute the deed of trust and underlying debt instrument.<sup>67</sup> The plaintiff should obtain a policy of title insurance, cycle through an escrow, and even obtain an



render nothing of value given that the property is gone or overencumbered.<sup>60</sup>

The plaintiff's counsel should obtain a title report that reflects title before the entry of judgment and recording of the abstract and thereafter an updated title report after the recording to detect any intervening liens. While a recorded abstract is a viable lien and survives any sale,<sup>61</sup> the enforcement of the judgment nonetheless invokes the entire enforcement machinery, compelling the judgment creditor to obtain a court order for a sale of the property with a 90 percent release price.<sup>62</sup> Therefore, the abstract is a lien and not a substitute for active enforcement.

The defendant (and co-owner spouse) may agree to the execution and recording of a deed of trust to secure the payment stream under the settlement agreement.<sup>63</sup> The upside is that the plaintiff can proceed by way of a

appraisal. In short, a deed of trust converts a tort claim into a secured transaction.

The downside is that the plaintiff faces the "one form of action rule" but may proceed with a judicial foreclosure.<sup>68</sup> However, the threat of foreclosure compels the debtor to bring the obligation current or refinance or sell the property.

What happens if the defendant defaults on the settlement? Assuming that the plaintiff secured the settlement agreement with a deed of trust, he or she can proceed with foreclosure.<sup>69</sup> If a plaintiff is a judgment creditor, the plaintiff can proceed with enforcement.<sup>70</sup> Alternatively, a plaintiff can do nothing. Sometimes, inaction can produce a better deal if the settlement agreement imposes a higher rate of interest, penalties, or even compound interest in the event of default.<sup>71</sup> Usury does not apply; upon default, a plaintiff could

accrue interest at any rate.<sup>72</sup> If the property appreciates, so does the plaintiff's secured position. Facing an inordinate rate of interest accruing upon default, the defendant is motivated to refinance or sell the property to exit an onerous transaction or negotiate a workout. Some deeds of trust may die of old age.<sup>73</sup> For example, judgments die at 10 years,<sup>74</sup> and renewal is subject to special recording and notice rules.<sup>75</sup> However, if the settlement (annuities, structured settlements, and lottery winnings sold in a secondary market, but subject to the Structured Settlement Transfer Act) is fully secured and bears an above-market rate of interest, and there is a soaring market, the plaintiff may sell the settlement at a fair discounted price as long as the payment history is seasoned—i.e., the obligor has a history of timely payments. The settlement may be attractive to a buyer even if the defendant is in default, assuming rising equity in the property.<sup>76</sup>

Settlements that are comprised of a long-term obligation secured by real property may fold themselves into continuing proceedings. In some cases, a plaintiff may declare a default that is unjustified or premature. In other cases, a plaintiff may declare a default that a defendant seeks to unwind and reinstate. The parties may battle any number of issues that necessitate the court's continuing jurisdiction.<sup>77</sup> It is more important to maintain the state court's jurisdiction to enforce the settlement agreement.<sup>78</sup> In federal court, once the action is dismissed, the court loses all jurisdiction.<sup>79</sup> A party seeking to enforce a settlement must necessarily incorporate into the settlement agreement continuing and viable federal jurisdiction.<sup>80</sup> If the case is pending in state court, and, as part of the settlement, a plaintiff dismisses the action with prejudice and without a reservation of rights, any dispute by and between the parties must be resolved by a separate action.<sup>81</sup> A cautious plaintiff's counsel always insures that the state court retain continuing jurisdiction to adjudicate any post-settlement disputes.

Policy limits offers compel counsel to rigorously investigate the financial condition of a defendant. If a defendant owns valuable real property, a pushback from a policy limits offer is the correct strategy. Upon initially pushing back from the settlement table, a plaintiff may receive a better offer, albeit predicated upon a long-term payment stream that is secured by the defendant's real property. Complex settlements incorporate lots of moving parts if based on real estate security. Pretransistor, moving parts always wear out and sometimes fail. "Moving parts" means that sometimes complex settlements fail, given the multiplicity of details, and contrary to the movies, failure is an option. Securing a long-term settlement arising from a personal

injury case is a necessity but can be fraught with risks or rewards. ■

<sup>1</sup> California Home Prices & Home Values, <http://www.zillow.com/ca/home-values>.

<sup>2</sup> How much homeowners insurance do I need?, [www.iii.org/article/how-much-homeowners-insurance-do-i-need](http://www.iii.org/article/how-much-homeowners-insurance-do-i-need).

<sup>3</sup> Crisci v. Security Ins. Co. of New Haven, Conn., 66 Cal. 2d 425, 429 (1967).

<sup>4</sup> Johansen v. California State Auto. Assn. Inter-Ins. Bureau, 15 Cal. 3d 9, 15 (1975).

<sup>5</sup> Archdale v. Am. Int'l Specialty Lines Ins. Co., 154 Cal. App. 4th 449, 464 (2007).

<sup>6</sup> Melton v. Boustred, 183 Cal. App. 4th 521, 530 (2010) (landlords bear premises liability).

<sup>7</sup> CODE CIV. PROC. §§695.020, 703.020(a).

<sup>8</sup> CODE CIV. PROC. §§683.010, 918(b).

<sup>9</sup> CODE CIV. PROC. §§697, 697.390(a)-(b).

<sup>10</sup> INS. CODE §11580.1b.

<sup>11</sup> See, e.g., [Verdictsearch.com/state/ca](http://Verdictsearch.com/state/ca).

<sup>12</sup> See, e.g., Westlaw, Lexis Nexis, D&B, among others.

<sup>13</sup> CODE CIV. PROC. §704.730. Unlike Texas and Florida, the defendant is entitled to an exemption of a dollar amount of equity in the home (\$75,000 if single; \$100,000 if married; \$175,000 if over 65, disabled, or low income).

<sup>14</sup> CODE CIV. PROC. §§704.710-704.850, 695.020(a); FAM. CODE §910(a); In re Marriage of Davis, 61 Cal. 4th 846 (2015) (Community property ends upon bona fide separation, i.e., separate residence).

<sup>15</sup> FAM. CODE §913(b)(1); Donlon v. Donlon, 155 Cal. App. 2d 362, 364-365 (1957).

<sup>16</sup> CODE CIV. PROC. §§708.820(a), 704.800(b) (another form of a secret exemption that may render the home almost "judgment proof").

<sup>17</sup> FAM. CODE §914 (necessaries) and FAM. CODE §1000 (liability for death or injury). FAM. CODE §1000(b)(1) might impose liability upon the nonliable spouse, which is recoverable first from community, and thereafter separate, property.

<sup>18</sup> FAM. CODE §1000(a).

<sup>19</sup> The vesting deed is the grant deed by which the parties take title. In nearly all transactions, parties obtain title insurance. Typically, the names of the vesting deed are the parties holding the title insurance.

<sup>20</sup> In re Marriage of Wall, 30 Cal. App. 3d 1042, 1046 (1973).

<sup>21</sup> In re Estate of Dolley, 265 Cal. App. 2d 63, 72 (1968).

<sup>22</sup> CODE CIV. PROC. §§704.820(a), 701.590(b), 701.680(a).

<sup>23</sup> FAM. CODE §852(a).

<sup>24</sup> See <https://www.criis.com>.

<sup>25</sup> Nicknames, abbreviated names, or use of middle names on instruments may lead to inadequate indexing. In re Marriage of Cloney, 91 Cal. App. 4th 429 (2001) (title held in middle name of grantee).

<sup>26</sup> Aside from counsel engaging in investigating, many third parties offer extensive assets searches that would reveal property ownership, prior conveyances, alias names, lists of lawsuits and judgments and other useful information. Obtaining a professional asset search is routine.

<sup>27</sup> See Loan Policy of Title Insurance Issued by Blank Title Insurance Company, <https://www.alta.org/forms/download.cfm?>

<sup>28</sup> See generally CIV. CODE §§3439 *set seq.* Effective January 1, 2016, the Uniform Voidable Transaction Act replaced the Uniform Fraudulent Transfer Act. The bulk of the changes focuses on the burden of proof in litigating the claims.

<sup>29</sup> Mejia v. Reed, 31 Cal. 4th 657, 688, 688 (2003). Facing a large tort claim, with inadequate insurance,

defendants seek the services of attorneys and others who offer asset protection strategies. Fraudulent conveyances are against the public policy of California.

<sup>30</sup> RNT Holdings, LLC v. United Gen. Title Ins. Co., 230 Cal. App. 4th 1289, 1296-1297 (2014). However, any transfer in the face of a large dollar claim bears earmarks of a fraudulent conveyance. CIV. CODE §§3439.04(b)(1)-(11) (badges of fraud).

<sup>31</sup> CODE CIV. PROC. §§674, 697.340 *et seq.*

<sup>32</sup> Casey v. Gray, 13 Cal. App. 4th 611 (1993), as modified on denial of *reh'g* (Mar. 2, 1993) (The holder of an abstract is not a bona fide purchaser, and a prior bona fide unrecorded instrument trumps a subsequently recorded abstract.). Any late or irregular recording of an instrument in the face of enforcement bears badges of fraud. CIV. CODE §3439.04(b)(1)-(11). See also In re Hetzer, 1998 WL 35315852 (Bankr. N.D. Cal. Mar. 31, 1998) (surreptitious deed of trust recorded on September 28, which was six days before judicial enforcement granted deed was recorded).

<sup>33</sup> Absent an escrow and commensurate title insurance or a recorded restraining order, a defendant would have free reign to convey title hours before the plaintiff could record the deed of trust as security for the settlement.

<sup>34</sup> In re Marriage of Nelson, 139 Cal. App. 4th 1546, 1552, (2006); Bono v. Clark 103 Cal. App. 4th 1409, 1426 (2004).

<sup>35</sup> Marriage of Marsden, 130 Cal. App. 3d 426 (Ct. App. 1982); Marriage of Moore, 28 Cal. 3d 366 (1980).

<sup>36</sup> CODE CIV. PROC. §695.020(a).

<sup>37</sup> See generally Appraisal and Valuation, <http://www.dre.ca.gov/files/pdf/refbook/ref15.pdf>.

<sup>38</sup> The value of agricultural property depends on such factors as the crop, water district, acreage, soil conditions, age of orchards, production rates, and viability of ground water.

<sup>39</sup> Refinancing real property in a rising market generates tax-free and unearned capital, which finances additional properties.

<sup>40</sup> Amortization Schedule Calculator, <http://www.amortization-calc.com>.

<sup>41</sup> Property Searches, [http://www.ca.gov/OnlineServices/OS\\_Consumers\\_propsearch.html](http://www.ca.gov/OnlineServices/OS_Consumers_propsearch.html).

<sup>42</sup> CODE CIV. PROC. §§704.910 *et seq.*

<sup>43</sup> CODE CIV. PROC. §704.720.

<sup>44</sup> CODE CIV. PROC. §§704.780(b); 695.020(a) (if community property, the court orders the sale of the entity); 704.820(a) (if separate property—joint tenancy—the court orders the sale of the joint tenant's interest).

<sup>45</sup> CODE CIV. PROC. §704.790.

<sup>46</sup> CODE CIV. PROC. §704.780(b).

<sup>47</sup> Bratcher v. Buckner, 90 Cal. App. 4th 1177, 1190 (2001).

<sup>48</sup> CODE CIV. PROC. §708.800(b).

<sup>49</sup> *Id.*

<sup>50</sup> CODE CIV. PROC. §704.710(a), (c).

<sup>51</sup> CODE CIV. PROC. §704.820(a) (each joint tenant is entitled to a homestead).

<sup>52</sup> GOV'T CODE §§26720 *et seq.* (in the enforcement of a judgment, the judgment creditor must finance the execution for the issuance of writs and other process and payment of charges due the sheriff; most sheriffs post their charges online).

<sup>53</sup> 11 U.S.C. §541.

<sup>54</sup> 11 U.S.C. §1325(a)(4) (A payment plan must guarantee unsecured creditor recovery, which they would receive if the debtor had filed Chapter 7 and reached the value of the nonexempt equity in the property). Chapter 13 is limited to cases in which the unsecured debt must be \$383,175 or less and secured debt of \$1,149,575. 11 U.S.C. §109(e). However, many personal injury cases generate judgments in the middle to high five figures, and even six-figure judgments are also common.

<sup>55</sup> 11 U.S.C. §1129(a)(7)(A)(ii) (guaranty to receive same recovery had the debtor filed Chapter 7).

<sup>56</sup> 11 U.S.C. §1325(b)(4)(A)(ii) (five-year plan).

<sup>57</sup> FED. R. BANKR. P. 9019 (a trustee may sell back to the debtor the debtor's nonexempt equity, which is subject to court confirmation).

<sup>58</sup> CODE CIV. PROC. §664.6.

<sup>59</sup> CIV. CODE §3439.08(a); *Annod Corp. v. Hamilton & Samuels*, 100 Cal. App. 4th 1286 (2002).

<sup>60</sup> CIV. CODE §3439.08(a) (the lender or buyer, if bona fide, is immune from a fraudulent conveyance).

<sup>61</sup> CODE CIV. PROC. §697.390.

<sup>62</sup> CODE CIV. PROC. §704.800(b). If property is held in joint tenancy and only one party is a judgment debtor, the likelihood of a successful sheriff's sale at 90 percent is exceedingly low. If both joint tenants are the judgment debtor, they are both entitled to separate exemptions thus doubling the net exemption. CODE CIV. PROC. §704.820(a).

<sup>63</sup> See *Generally* CIV. CODE §§2924 *et seq.* Deeds of trust are available online. Likewise, the defendant can encumber personal property through a perfected security interest. See COM. CODE §§9101 *et seq.*

<sup>64</sup> CODE CIV. PROC. §726(a) (one form of action rule).

<sup>65</sup> *Spencer v. Lowery*, 235 Cal. App. 3d 1636 (1991) (a deed of trust takes priority over homestead rights).

<sup>66</sup> CIV. CODE §2924 *et seq.* Both parties would execute the deed of trust, which obviates the obstacles imposed in a forced sale under CODE CIV. PROC. §704.820(b).

<sup>67</sup> Upon the foreclosure, the trustee issues a trustee's deed to the buyer at the foreclosure sale. In turn, the buyer sells, refinances, or otherwise disposes of the property in which the buyer seeks "good and marketable title," which means that the buyer has obtained title insurance.

<sup>68</sup> CODE CIV. PROC. §726(b).

<sup>69</sup> CODE CIV. PROC. §726(a); CIV. CODE §§2924 *et seq.*

<sup>70</sup> CODE CIV. PROC. §700.015

<sup>71</sup> Absent an agreement, interest could accrue at 10 percent per annum. CIV. CODE §3289(b). Prudence dictates incorporating a contractual rate of interest, given ambiguities are construed against the drafter and construed against the drafter of a standard form agreement. *Benedek v. PLC Santa Monica, LLC*, 104 Cal. App. 4th 1351, 1357 (2002); *Victoria v. Superior Court*, 40 Cal. 3d 734, 739 (1985).

<sup>72</sup> *Bisno v. Kahn*, 225 Cal. App. 4th 1087 (2014), *as modified on denial of reh'g* (May 23, 2014), *rev. denied* (Aug. 13, 2014) (usury does not apply to transactions in which the judgment creditor offers forbearance to the judgment creditor).

<sup>73</sup> Market Record Title Act, CODE CIV. PROC. §§880.020 *et seq.*

<sup>74</sup> CODE CIV. PROC. §§683.010 *et seq.*

<sup>75</sup> CODE CIV. PROC. §683.180(b).

<sup>76</sup> INS. CODE §10134 *et seq.*; 321 *Henderson Receivables Origination LLC v. Sioteco*, 173 Cal. App. 4th 1059 (2009).

<sup>77</sup> *Viejo Bancorp, Inc. v. Wood*, 217 Cal. App. 3d 200, 206 (1989) (motion to enforce must be filed in a pending action).

<sup>78</sup> *Pietrobon v. Libarle*, 137 Cal. App. 4th 992 (2006); *Wackeen v. Malis*, 97 Cal. App. 4th 429 (2002) (preservation of court's jurisdiction to enforce settlement; statute of frauds applies for judicial settlement from real property transaction). *Nicholson v. Barab*, 233 Cal. App. 3d 1671, 1681-83 (1991).

<sup>79</sup> *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

<sup>80</sup> The parties would incorporate into a federal judgment (or consent decree) the actual terms of the settlement and clear reservation of the court's jurisdiction to enforce the settlement.

<sup>81</sup> *Pietrobon*, 137 Cal. App. 4th 992.

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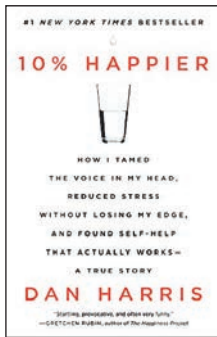
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## 10% Happier



By Dan Harris  
HarperCollins Publishers  
2014  
\$25.99, 256 pages

We lawyers are an unhappy crowd, with an incidence of depression four times the national average, and comparable rates of substance abuse and suicide, as reported in published studies. The pressure and unrelenting scrutiny we work under has much to do with our discontent. So, when a laborer in another high-pressure profession—TV journalism—pulls off a 10% uptick in happiness and reports on how he did it, lawyers may well take heed. Ostensibly a memoir, *10% Happier: How I Tamed the Voice in My Head, Reduced Stress without Losing My Edge, and Found Self-Help That Actually Works—A True Story* also serves as a hitchhiker's guide to what has come to be known as the mindfulness movement. With engaging, self-deprecatory wit, author Dan Harris, an anchor for ABC's *Nightline*, chronicles his rise from part-time scriptwriter at a small-market TV station to member of ABC's national news team by age 28, describes that ascent's toll on his psyche and acquaints the reader with the guides he followed and learned from in what he characterizes as his 10-percent successful quest to achieve serenity without "losing his edge."

When Harris first directly encountered the mindfulness movement in 2009, it was hardly breaking news. Joseph Goldstein—one of Harris's primary sources—founded the Insight Meditation Society in 1975. Jon Kabat-Zinn founded the influential Mindfulness-Based Stress Reduction Program at University of Massachusetts Medical School in 1979, and wrote the bestseller *Full Catastrophe Living* in 1990. Mark Epstein, Harris's earliest mentor in meditation and mindfulness, became a recognized authority with the publication of *Thoughts Without A Thinker* in 1995. *The Power of Now*, by Eckhart Tolle, through whom Harris first encountered the movement, was published in 1997.

But in 2001, when Harris's journey through what he calls "the Hobbesian environment" of TV news was getting under way, he was not focusing on the change that comes from within. Hungrily and skillfully pursuing air time, he landed assignments like being first on the scene after the passengers of United Flight 93 brought it down on 9/11, reporting post-9/11 events for a week, and covering conflicts in Pakistan, Afghanistan, Iraq, and Israel over the next three years. He describes himself during those years as "floating on a wash of adrenaline, besotted with airtime, and blinded to the potential psychological consequences."

In 2003, Harris was diagnosed with depression. Shortly after, he experimented with, and became semidependent on, cocaine and ecstasy. After suffering two panic attacks while reading the news on

TV in 2004 and 2005, he realized he needed to turn himself around. Through an ironic pairing of events, his emotional down-spiral and his turn-around both grew out of a low-adrenaline beat—religion and spirituality—that he was covering on 9/11. When Flight 93 came down, Harris was coincidentally within driving distance, shooting a story on church youth groups. ABC ordered him to the site, and so began his role in post-9/11, on-the-scene war news.

The religion and spirituality assignments continued, and, in 2008, they brought him into contact with Tolle, who was then being described

**All Harris wanted, he says, was to excel in his profession but be less stressed. Well, isn't that what we are all seeking?**

as America's most popular spiritual author. In January of that year, Oprah selected Tolle's third book, *A New Earth*, for her book club. To boot, Cher, Paris Hilton, and Meg Ryan publicly adored Tolle, so Tolle was prime material for TV. Urged by a coworker to consider a story on Tolle, Harris perused *A New Earth*, which struck him at first as "irredeemable poppycock." As he read, though, aspects of Tolle's message persuaded him to book Tolle for an interview. The interview triggered further investigations into meditation and mindfulness.

Harris's account of subsequent on- and off-camera encounters with meditators, meditation teachers, and occasional hawkers of get-rich-quick mind tricks is entertaining and, at moments, enlightening. On the entertaining side are encounters with Deepak Chopra, whom Harris remembers for his rhinestone glasses. On the enlightening side is Harris's interview with the Dalai Lama. Harris's account of his own 10-day sojourn at a meditation retreat is hilarious...and enlightening.

However, the Dalai Lama gets only four pages of coverage in *10% Happier*—a third of the ink devoted to Tolle, whose ideas Harris ultimately finds disappointing. More Dalai Lama and less Tolle might have improved the book. Still, something Tolle says, viewed together with what the Dalai Lama has done, resolves a tension that runs through *10% Happier* and highlights an insight that makes the book particularly useful for achievement-oriented folks like lawyers.

During an interview, Tolle preaches acceptance of what is, "becoming friendly with just the is-ness" of things, and Harris asks if making important social changes requires unfriendliness to things that are wrong. Tolle responds by referencing attorney Mahatma Gandhi, who, Tolle asserts, effected change "from a state of consciousness that was already at peace"—what the Dalai Lama is admired for.

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The change Harris was seeking to effect in the personal quest narrated in the memoir part of *10% Happier* was more modest than those Gandhi and the Dalai Lama have achieved. All Harris wanted, he says, was to excel in his profession but be less stressed. Well, isn't that what we are all seeking?

Harris offers a handful of strategies that helped him. Three of them apply with special force to those of us whose profession is the law. For starters, he recommends a disciplined meditation practice to tame the voices in one's head—for example, opposing counsel, hard-to-please clients, and our own planned or imagined retorts. Secondly, he passes along several helpful meditation-1A-level instructions. For example, when the voices won't shut up, ask "Is this useful?" A slave to obsessive thoughts before he began meditating, Harris reports he found it easy to escape them if he focused on whether they were getting him anywhere. Third, he recommends *metta*—best translated as lovingkindness—and he summarizes neuropsychiatric research tending to show that a compassionate frame of mind benefits brain chemistry.

#### Nonattachment

The most elusive piece of the puzzle Harris had been working on since first encountering Tolle—the quandary of how to reduce stress without becoming ineffectual—emerged out of a mélange of ancient Buddhist teachings, conversations with mentor Epstein, and a comment by David Axelrod. President Barack Obama's campaign manager, Axelrod is nobody's idea of a Buddhist sage, but he is an indisputably effectual person.

Buddhism teaches nonattachment to all the impermanent things of the world—an approach to life that Harris initially equated with passivity. But Epstein explained that nonattachment is more like the capacity, after doing one's utmost to achieve a goal, to let go, tolerate the fact that forces beyond one's control often determine the result of an endeavor, and emotionally regroup for the next challenge. Epstein's explanation reminded Harris of Axelrod's comment, made in a conversation with a group of journalists before the 2012 election. Asked about the challenges of campaigning amidst factors in world affairs that were beyond his control, Axelrod answered with consummate Buddhist nonattachment: "All we can do is everything we can do"—as sound a principle for preparing, with equanimity, for a trial as for managing a campaign or reporting from a combat zone.

*10% Happier* is a quick, easy, and entertaining read. It gives usable hints for decreasing stress and misery. It also points the way to more advanced guidance in the mindful pursuit of happiness. ■

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## Effective Whistleblower Policy Benefits Employers and Employees

**CALIFORNIA HAS A GENERAL** whistleblower statute that applies to all employees reporting violations of state or federal law: Labor Code Section 1102.5. In 2014, California implemented SB 496, an expansion of its whistleblower protections and a legislative effort to strengthen the already robust 1102.5. As revised, the law protects employees who report suspected illegal activity internally, even when the reports are part of the employee's job. The new protections also prohibit anticipatory retaliation that occurs when an employer takes action against an employee because it suspects that the employee is about to blow the whistle on illegal activity. This law is a powerful tool for California whistleblowers that has only been fortified over time. Strong whistleblower protections such as those in California tend to be construed as a policy win for employees and the attorneys who litigate on their behalf. However, employers also benefit from strong whistleblower policy.

Most states have some level of whistleblower protection built into their laws. In many states protective statutes are limited only to government employee whistleblowers, while private-sector employees are limited to more difficult common law causes of action for wrongful discharge. One unintuitive result of California's codified whistleblower statute is the benefit to employers of earlier resolution. In most state common law, an employee can bring a wrongful discharge claim only after termination. It is wrongful discharge, after all, so actual discharge is an essential element of the claim. By allowing claims for retaliation based on other forms of adverse action—for example, demotion, change in pay, and change in schedule, among others—suits under California's law will generally entail smaller damages, allowing for easier settlement and lower litigation costs when cases do arise. A presumably higher quantity of suits may be balanced by smaller, more resolvable suits.

A second potential benefit to employers is procedural. The California general whistleblower statute applies to whistleblowers reporting violations of state or federal law. Some federal law violations include their own whistleblower statutes under which the plaintiff must file with OSHA (and submit to a proceeding before the Department of Labor and the Administrative Review Board) before the employee can be heard by a jury. For example, an employee reporting violations of federal laws governing environmental protection will most often be protected by federal whistleblower retaliation statutes specific to those laws—the Clean Air Act, CERCLA, Solid Waste Disposal Act, Safe Drinking Water Act, etc.

While the administrative exhaustion requirement under the California statute has been something of a point of contention, the important point for employers is that the existence of a California cause of action for alleged violations of federal statutes should bring more litigation closer to home. Litigating in state court means operating in a more familiar forum with more familiar procedures.

Rather than proceeding before an administrative body or a federal district court that might require the knowledge and cost of more filings and billable hours, cases brought before state tribunals should reduce the litigation costs to employers.

A conscientious employer understands the operational benefits of a strong whistleblower policy. Employers certainly do not want to litigate against their employees, but knowing where operations are breaking down or where laws are being violated is critical to any business. Employees who have more whistleblower protections are more comfortable reporting these kinds of problems. Employee

**A conscientious employer understands the operational benefits of a strong whistleblower policy.**

reports may uncover unseen areas of significant liability for the company independent of a potential dispute with the employee. A better protected employee is more likely to report problems up the internal chain and avoid a more costly run-in with external regulators. This allows the company to internally resolve not only the dispute with the employee but also the underlying issue that led the employee to come forward in the first place. Weighed against the alternative of litigation with an aggrieved employee and a regulatory audit, strong whistleblower protections are a double-win for employers.

To obtain this benefit, employer-side litigators and human resource professionals who have not already done so need to review their whistleblower and compliance policies. This may require not only rewriting policies but also making management professionals aware of the new sources of liability for the organization. Indeed, given the trend toward increasingly specific legislative and regulatory guidance on the subject, these reviews and training refreshers are most effective as a regular part of the organizational environment.

There are drawbacks to being an employer under the ever-strengthening regime of California Labor Code Section 1102.5. However, given the trajectory of California's whistleblower regime, fighting against the forward march of whistleblower protections is a futile exercise. A more effective approach may be to ascertain what advantages the law offers and take steps to maximize those advantages—for example, being prepared to settle claims quickly before terminating an employee or doing whatever possible to nudge litigation to a preferred forum. Above all, employers should let employees know they are protected and encourage internal reporting and resolution. With the right approach, this law can benefit everyone. ■

**David L. Scher** a principal in the Los Angeles office of **The Employment Law Group, P.C.**, and **R. Scott Oswald** is the firm's managing principal.



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