

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

LOS ANGELES

WINTER 2019

SHOULD YOU SEEK WRIT REVIEW? CALIFORNIA AND FEDERAL STANDARDS FOR GRANTING MANDAMUS RELIEF



Alana Rotter

It’s a common conversation, and one you’ve probably had.

A client reeling from an adverse ruling wants to go straight to the appellate court for relief. You explain that most interlocutory rulings aren’t immediately appealable, and that review will have to wait until the end of the case. The client asks if there’s some other option—and suddenly, you’re in the position of assessing whether this might be the rare case where the Court of Appeal or Ninth Circuit would grant a writ petition allowing discretionary review.

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FROM THE TRENCHES: THE SPONTANEOUS STATEMENT EXCEPTION TO THE HEARSAY RULE



Robert Glassman

“Objection, hearsay” is probably the single most uttered objection in trials as attorneys on both sides of the aisle attempt to use this rule of evidence to gut the other side’s case. Because the hearsay rule can ultimately prevent the jury from hearing critical evidence that may make or break your case, understanding its exceptions is crucial.



Nathan Werksman

In a recent jury trial, we faced a hearsay objection that sought to exclude a key statement made by an eyewitness to a police officer. We represented a young man whose vehicle was struck by a 22,000-pound dump truck driving through an intersection. The defense’s position

was that the dump truck driver had entered the intersection on a yellow light and that our client had sped into the intersection just as his light turned green. An eyewitness to the crash testified at her deposition that she told the police officer at the scene that she saw “the white work truck run the red light and hit the blue Nissan Versa.” But because the witness now lived in Texas, she was unavailable to testify at trial. Moreover, at her deposition, she was only asked what she told the police officer, rather than simply “What did you see?” And since we inherited the case after her deposition, we did not have the ability to ask that question. So, her statement to the police officer was all we had.

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PRESIDENT'S MESSAGE



Sabrina H. Strong

As I reflect on the previous year, I am filled with gratitude for the hard work and collegiality of my fellow ABTL members. This organization continues to flourish thanks to the tremendous commitment of our members.

I would also like to recognize our Executive Director Linda Sampson. Linda has been committed to this organization for the last decade and she is a critical component of our success. Thank you, Linda, for everything that you do. We are extremely grateful.

As we look ahead to another exciting year filled with top-notch programming, public service outreach events, and bench-meets-bar activities, I encourage you to renew your ABTL membership. We have increased our membership year over year for the past decade. Please help us do it once again! In case you need a little motivation, let's look at a few highlights from our memorable 2018 programs:

- In February, Jeffrey Kessler and David Greenspan offered an inside look at litigation strategies behind the high-profile NFL discipline cases, including Deflate-gate, Bounty-gate, and the Adrian Peterson controversy.
- In April, Steven Clymer and Terry White—the lead federal and state prosecutors in the Rodney King trials—treated us to a riveting look back at critical aspects of the Rodney King events, which remain salient even after 25 years.
- In September, Professor Adam Winkler and Plaintiff-Attorney Josh Koskoff took on the often emotional and controversial topic of gun ownership, mass shootings, and the Constitution.
- In October, we traveled to Maui for our 45th Annual Seminar at the Wailea Beach Resort. Surrounded by the tranquility and beauty of the islands, our attendees listened to distinguished judges, lawyers and other experts engage in thought-provoking discussions and role-play demonstrations reflecting on “when #metoo becomes a business dispute.”
- In November, we were honored to host a conversation between the Honorable Ken Starr and the Honorable Chuck Rosenberg, who captivated our audience with their timely conversation on impeachment, removal, and the rule of law.

I am also honored to report that we have launched our first-ever “Civility” committee. We look forward to working collaboratively to increase awareness, identify best practices, and develop mechanisms to help improve collegiality throughout our legal community.

What a year!

Our tireless Committee Chairs and Vice Chairs are hard at work shaping extraordinary programming and activities for the year ahead. Please join us, participate in the dialogue, and invite your colleagues and clients to attend as well!

We look forward to seeing all of you in 2019!

Sincerely,
Sabrina H. Strong
ABTL President, 2018-2019

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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Spontaneous Statement Exception to the Hearsay Rule ...continued from Page 1

Because the defense was disputing liability and because there were no other disinterested eyewitness statements regarding the defendant's fault, we knew that getting this deposition testimony admitted was critical for our case. We expected the defense to raise a hearsay objection to our showing the deposition clip of her statement to the police officer as part of our opening statement, and, sure enough, they did. The judge issued a tentative ruling sustaining the objection and excluding the evidence, subject to further briefing.

Thankfully, we were prepared to address this in short order and turned to one of the most well-known exceptions to the hearsay rule: the "Spontaneous Declaration" exception codified in Evidence Code section 1240. This exception has been the subject of scholarly debate in California for almost a century. (E.g., *McWilliams, The Admissibility of Spontaneous Declarations* (1933) 21 Cal. L.Rev. 460 [complaining that "(t)he cases on this subject are in almost hopeless confusion"].)

If an out-of-court hearsay statement "(a) [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception," it is admissible under the "Spontaneous Declaration" exception. (Evid. Code, § 1240.) Ultimately, by drawing on the circumstances of the witness's statement and applying it to longstanding and well-settled California case law, we successfully argued that the statement fell under this exception, and her statement to the police officer was admitted. It played a key role in helping us prove the defendant's negligence and prevail at trial.

Here's how we did it:

First, we showed the judge that the statement met section 1240's first criterion—that the statement "(a) purports to narrate, describe, or explain an act, condition, or event perceived by the declarant." This was the easy part. In the statement, the eyewitness is doing just that. She is describing to a police officer the collision she had just perceived.

Second, we tackled the much more complicated criterion of the exception—that the statement "(b) was

made spontaneously while the declarant was under the stress of excitement caused by such perception." Proving this criterion required proving its sub-criteria, namely 1) that the statement was "made spontaneously," 2) that the perception caused the declarant to experience the "stress of excitement," and 3) that the statement was made while the declarant was experiencing that stress. Because the witness did not testify at her deposition that she made the statement "under the stress of excitement," we had to demonstrate that what she did say met the criteria under California law.

As for the spontaneity of the statement, California case law takes an expansive view. In *People v. Washington* (1969) 71 Cal.2d 1170, the California Supreme Court held that "[n]either lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity." (*Id.* at p. 1176.) Rather, the critical component in assessing spontaneity is whether the declaration was "made under the stress of excitement and while the reflective powers were still in abeyance." (*Ibid.*)

Based on this case law, we showed that the statement was not inadmissible simply because the eyewitness made the statement in response to police questioning or because time had lapsed between her perception of the collision and when she made the statement.

Third, we showed that the perception of the collision caused the declarant to experience the "stress of excitement." Stress of excitement results from the perception of an event "startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting." (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) Such a determination is inherently subjective and fact-based—what startles some may not startle others. (*Ibid.*) Therefore, in order to show this, we dug into the facts, drawing heavily on how the eyewitness described the event she perceived. Her deposition provided important information. We noted that she described the collision as "shocking" to her. The white truck "slammed" into the blue Nissan Versa, which then "spun pretty violently." There was a "zoom, bang" and everything happened "really fast." We used these statements of the eyewitness

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to show that the event she perceived—the car crash—was “startling enough” to have caused her the “stress of excitement.”

Lastly, we showed the judge not only that the event caused stress to the witness, but also that she made the statement while under that stress. As discussed above, authorities are clear that lapse of time alone does not preclude admissibility under the spontaneous declaration exception. (See *People v. Washington*, *supra*, 71 Cal. 2d at p.1176; Simons, Cal. Evidence Manual (2018) Spontaneous Statements, § 2:46.) Proving that the statement was made while under the stress of excitement is also a factual enterprise, in which the court must consider “all of the surrounding circumstances.” (*People v. Jones* (1984) 155 Cal.App.3d 653, 661; see *People v. Gutierrez* (2009) 45 Cal.4th 789 [“The amount of time that passes between a startling event and subsequent declaration is not dispositive, but will be scrutinized, along with other factors, to determine if the speaker’s mental state remains excited”]). Because of the fact-based nature of such a determination, courts set no rigid time limit after which a statement can no longer be made while under the stress of excitement. In fact, courts have found admissible spontaneous statements made anywhere from 30 minutes to several hours after the perceived event. (See *In re Damon H.* (1985) 165 Cal.App.3d 471, 475-476; *People v. Clark* (2011) 52 Cal.4th 856, 925-926.) All that matters is that

the declarant was under the stress of excitement when the statement was made.

Here, we showed that the witness’s statement was made shortly after perceiving the event. The witness testified at deposition that after the incident, she and our client “exchanged a few words, the other driver came up, and then I—I believe I got my attention turned towards the police or somebody.” The witness may have had a conversation with a fire captain before giving her statement to the police, but this whole sequence (including giving her statement to the police) occurred within roughly 15 minutes. Considering the startling nature of the event, as previously discussed, we argued to the court that the witness was very likely still under the stress of excitement when she made her statement to the police.

Ultimately, the judge agreed with us, reversed his tentative ruling and determined that the evidence was admissible. It ended up playing a key role in our victory at trial.

So the next time your opposing counsel makes a hearsay objection, don’t relent. Have your list of hearsay exceptions—and the supporting evidence—handy, and be ready to argue. Knowing the exceptions and understanding how they apply may just make all the difference between winning and losing your case.

Robert Glassman and Nathan Werksman are attorneys at Panish Shea & Boyle LLP.

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STATEMENTS OF DECISION: YOUR CHANCE TO TELL AND PRESERVE THE STORY

PART I: THE BASICS



Hon. John L. Segal

Business litigators in California state court are increasingly waiving a jury, often in complex cases. Sometimes it's because of the subject matter of trial, sometimes it's because a court trial allows for more flexibility in scheduling. When, for whatever reason, your fact-finder is a judge, one of the final things he or she does before judgment is to issue a statement of decision that will be the basis of any appellate review of the judgment. Indeed, the trial court's statement of decision is often the first document an appellate judge reads, even before your brief.



Robin Meadow

Too often, the preparation of the statement of decision goes through multiple rounds of objections, proposals, and revisions, as the losing party essentially tries to present a motion for a new trial, rather than focusing on the more limited purpose of a statement of decision.

But what is that purpose? What is a statement of decision, and do you want one?

The "what" seems simple enough. Under Code of Civil Procedure section 632, "[t]he court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." It's probably obvious that the reason the trial court issues a statement of decision is to explain its decision to the Court of Appeal. But in practice it's not that simple.

This article explains the basics of the statement of decision process. Part II, in a later issue of the Report, will discuss strategy.

It's all about the appeal.

Statements of decision matter because of a core

principle of appellate law: the doctrine of implied findings. "[I]n the absence of a statement of decision, an appellate court will presume that the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 267.) In practical terms, this means that the appellate court must presume that the trial court resolved all factual disputes in favor of the prevailing party unless the statement of decision says otherwise. (There is an exception where the statement of decision fails to decide an issue or resolve an ambiguity, if the appellant brought the problem to the trial court's attention. (Code Civ. Proc., § 634.) We will discuss that in Part II.)

Consider this hypothetical: The trial court finds for the plaintiff, whose case depended on proving Fact X. Items A and B in evidence each independently establishes Fact X, and the trial court admitted both. But the court erred in admitting Item B because it was hearsay to which the defendant timely objected. On appeal, can the defendant obtain a reversal based on the erroneous admission of Item B? If there is no statement of decision, the Court of Appeal must presume that the trial court relied on the admissible Item A—so, judgment affirmed. But if in a statement of decision the court explains that it found Item A not credible and relied only on Item B, then its erroneous admission of Item B was prejudicial—judgment reversed. In short: Without a statement of decision, the plaintiff wins on appeal; with one, the defendant wins.

The real world is, of course, a lot more complicated. But before we start in on those complications, we want to stress what a statement of decision is not.

For something that can occur in every bench trial, many lawyers (and even some judges) do not fully understand the statement of decision process. That's not surprising; the procedures governing the preparation of statements of decision are a little complicated. Indeed, trial judges take classes about those procedures.

A request for a statement of decision often looks like a lengthy set of interrogatories. Both sides make objections and submit lengthy briefs on the merits, as the losing party reargues the case and the winning party responds in kind. Occasionally, even the judge doesn't precisely follow

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California Rules of Court, rule 3.1590, which sets out the detailed procedures governing requests for and preparation of statements of decision. None of this activity furthers the goal of explaining the basis for the court's decision or helps the losing party avoid application of the doctrine of implied findings.

So our first recommendation is: Study rule 3.1590 closely at every step of the process—it contemplates multiple pathways—and appreciate the limited (but important) purpose of a statement of decision. The trial court will appreciate your focus, and so will the Court of Appeal.

Do you want a statement of decision?

From the discussion so far, it should be clear that, as a general proposition, the losing party always wants a statement of decision, and the winning party never does. But, as with all generalities, there are exceptions.

For one thing, the winning party can't control whether there is a statement of decision. Rarely does a judge issue something as simple as "plaintiff wins and shall recover \$X." Particularly in business cases, the court will almost always provide an explanation of its ruling. Many judges use the procedure in rule 3.1590(c)(4), which authorizes the court to announce its tentative decision (which it can do orally, see rule 3.1590(a)), and then "[d]irect that the tentative decision will become the statement of decision unless, within 10 days after announcement or service of the tentative decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision."

For another, there can be situations where, rather than risk leaving the matter to an appellate presumption, the winning party wants a statement of decision to make clear that the trial court actually considered and decided a particular issue.

Yet another reason the winning party may want a statement of decision is to take advantage of the fact that the statement of decision may be the only document in which the trial court has an opportunity to speak directly to the appellate court, and it is often the first document that

an appellate judge reads. If there's going to be some statement of decision, the winning party should want to help the trial court make it as comprehensive and persuasive as possible. Participating in drafting the statement of decision is a way to make the trial court's decision stronger and more unassailable on appeal.

If you want it, can you get it?

Section 632 provides for statements of decision "upon the trial of a question of fact." (Code Civ. Proc., § 632.) This does not mean "upon the decision of a question of fact," because plenty of factual decisions don't trigger the right to a statement of decision. "The requirement of a written statement of decision generally does not apply to an order on a motion, even if the motion involves an evidentiary hearing and even if the order is appealable." (*Lien v. Lucky United Properties Investment, Inc.* (2008) 163 Cal.App.4th 620, 623-624.) The phrase "generally does not apply" covers a lot of ground, including rulings under Code of Civil Procedure section 425.16 (the "anti-SLAPP" law) (*Lien, supra*, 163 Cal.App.4th 620), preliminary injunctions (*People v. Landlords Professional Services, Inc.* (1986) 178 Cal.App.3d 68), and CEQA proceedings (*Consolidated Irr. Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 196, fn. 5).

But again, this general rule has exceptions. In *Gruendl v. Oewel Partnership, Inc.* (1997) 55 Cal.App.4th 654, the Court of Appeal reversed the judgment because the trial court failed to issue a statement of decision when making an alter ego finding under Code of Civil Procedure section 187. The decision provides useful guidance on whether a particular procedural setting requires a statement of decision (*id.* at pp. 659-662), although the court was careful to note that its "conclusion is not intended to have application beyond the facts of this particular case" (*id.* at p. 662). A number of other statutes give the parties a right to a statement of decision. (*See* Fam. Code, §§ 2127, 2338, 3022.3; Prob. Code, §§ 1000 [civil rules apply in probate proceedings unless Probate Code states others], 1962.)

A particularly important exception—and one that most lawyers don't know about—is for certain kinds of arbitration orders. Under Code of Civil Procedure section

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1291, “[a] statement of decision shall be made by the court, if requested pursuant to Section 632, whenever an order or judgment, except a special order after final judgment, is made that is appealable under this title [the Arbitration Act].” This includes a judgment following confirmation of an arbitration award, but not an order vacating an award. (See Code Civ. Proc., § 1294.) While most confirmation/vacatur proceedings involve purely legal questions, there can be significant factual disputes when a party raises questions of arbitrator disqualification or misconduct. (See, e.g., *Honeycutt v. JPMorgan Chase, N.A.* (2018) 25 Cal.App.5th 909.) Warning: In this setting, where the “trial” is less than a day, you must request a statement of decision before the matter is submitted (Code Civ. Proc., § 632)—in other words, before the conclusion of the trial court hearing. More on this in Part II.

Despite the limitations on when a party has the right to a statement of decision, the trial court certainly has discretion to issue one. (See *Khan v. Superior Court* (1988) 204 Cal.App.3d 1168, 1173, fn. 4 [although the trial court had no obligation to issue a statement of decision on a motion to quash, it was not “powerless” to do so because “Section 632 and California Rules of Court, rule 232 [now rule 3.1590], are directed to situations where a statement of decision is required; they do not limit situations where a statement of decision can be permitted”].) Most trial judges write orders on contested motions that in many respects resemble statements of decision. So if a statement of decision seems appropriate in a situation where it is not

required, there’s no reason not to request one—although it would be prudent to let the court know that you’re invoking its discretion and that you recognize that you have no right to one.

What if the court refuses to issue a statement of decision?

While a conscientious judge will rarely refuse to issue a statement of decision when one is required and properly requested, there isn’t much of an appellate remedy. “[A] trial court’s error in failing to issue a requested statement of decision is not reversible per se, but is subject to harmless error review.” (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108.) This is a bit of a Catch-22 because it may be impossible to show prejudice without knowing what the trial court found and why. In any case, the usual remedy for the trial court’s failure to provide a statement of decision has not been merits reversal of the judgment, but rather a remand with directions to issue one. (E.g., *Gruendl v. Oewel Partnership, Inc.*, *supra*, 55 Cal.App.4th at p. 662.)

So much for the basics. In Part II, we’ll focus on strategic issues and practical suggestions.

Hon. John L. Segal is an associate justice of the California Court of Appeal, Second District, Division 7.

Robin Meadow is a partner at Greines, Martin, Stein & Richland LLP.

ENFORCEMENT AND INTERPRETATION OF THE CALIFORNIA AUTOMATIC RENEWAL LAW



Dale Giali



Grant Miller

As traditional retail business moves online, many online retailers have turned to a well-tested sales strategy—subscription plans. The concept is simple. The consumer receives ongoing services or recurring shipments of goods, and businesses charge the consumer’s credit card or bank account on a recurring basis until the consumer cancels. The relationship is mutually beneficial. Consumers receive their essential goods and services without hassle, and businesses receive dependable revenue. Consumers enjoy subscriptions for such things as television and internet services, meal, wine, and craft coffee delivery,

clothing, grooming products, dating apps, on-demand video and music, and countless other products and services. But the relationship also carries the potential for problems. Specifically, consumers at times have complained that they are charged without their knowledge and consent after agreeing to what they thought were one-time purchases or free trials. Consumers also complain that such subscriptions can be difficult to cancel. Recognizing these potential problems, many state legislatures passed laws to ensure that consumers enter subscription programs with full knowledge and affirmative consent.

California is one of those states. In 2009, the California legislature passed the Automatic Renewal Law, Business and Profession Code §§ 17600, et seq. (“ARL”), with the stated intent to “end the practice of ongoing charging of consumer credit or debit cards . . . without the consumers’ explicit consent for ongoing shipments of a product or ongoing deliveries of service.” The law became operative in December 2010. Though it has garnered attention from legal commentators, private plaintiffs, and public

prosecutors, the courts have not had many opportunities to interpret its provisions. This article discusses the state of the law and an enforcement trend to watch.

A. Basic Protections Under the ARL

Under the ARL, any business making an automatic renewal or continuous service offer to a California consumer must disclose the terms of the offer, obtain the consumer’s affirmative consent, provide the consumer an acknowledgement of the order, and provide simple cancellation mechanisms, along with other miscellaneous requirements. *See* Cal. Bus. & Prof. Code §§ 17600 *et seq.* Whether offered orally or in writing, the offer terms must be disclosed in temporal or visual proximity to “the request for consent to the offer.” *Id.* § 17602(a)(1). Furthermore, the disclosures must be “clear and conspicuous.” *Id.* A visual disclosure is considered to be clear and conspicuous if it is “in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size . . . in a manner that clearly calls attention to the language.” *Id.* § 17601(c). An audio disclosure is clear and conspicuous if it is “in a volume and cadence sufficient to be readily audible and understandable.” *Id.*

Goods sent without affirmative consent are deemed to be an “unconditional gift” to the consumer. *Id.* § 17603. A business is liable for “all civil remedies that apply to a violation,” but only if the business fails to comply in good faith. *Id.* § 17604. Courts have interpreted the “unconditional gift” provision to entitle customers to the full restitution of any amounts paid for goods delivered under continuous service or automatic renewal subscriptions that were not properly disclosed or for which the seller did not properly obtain affirmative consent. However, the statute has not been litigated extensively, so many of its contours—including its safe harbor provision—remain unclear. *See Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058, 1073 (S.D. Cal. 2018) (interpreting the good faith “safe harbor provision” as “an absolute bar to Plaintiff’s recovery”).

There is no private right of action under the ARL, but a private plaintiff may bring an action under the state’s Unfair Competition Law, Business & Professions Code §§ 17200 *et seq.* (“UCL”), for restitution and injunctive relief,

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California Automatic Renewal Law...continued from Page 8

so long as the plaintiff has suffered injury in fact and lost money or property. *Lopez*, 307 F. Supp. 3d at 1070; Cal. Bus. & Prof. Code § 17204. In addition, public prosecutors—the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor—may bring actions under the UCL to enforce the ARL. In addition to restitution and injunctive relief, public prosecutors can also obtain civil penalties of up to \$2,500 per violation. *Id.* § 17206.

In September 2017, the California legislature passed, and Governor Brown signed into law, SB 313, which amended the ARL. The original draft of SB 313 contained strict new requirements, including that businesses: (a) obtain a consumer’s consent to the automatic renewal offer by means of a consent mechanism, such as a checkbox, separate from the consent mechanism for any other terms and conditions; (b) provide an additional notice three-to-seven days before the consumer’s first automatic renewal; and (c) allow consumers to cancel their plans “as easily as” the consumer accepted the offer. Those requirements were dropped from later drafts and, as enacted, the amendment adds only the following incremental requirements: (1) businesses must provide an online cancellation method when the consumer registered for the subscription online; and (2) businesses must clearly and conspicuously disclose (a) the price that will be charged when a free trial expires, and (b) how to cancel before being charged. *Id.* § 17602. The amendment took effect in July 2018.

B. Enforcement

Since its enactment, the ARL has spawned a steady stream of litigation from private plaintiffs, including class action lawsuits against, among others, Blue Apron, Dropbox, Blizzard Entertainment, Spotify, Google, Hulu, and Apple. The complaints tend to turn on whether the required disclosures were “clear and conspicuous” or provided in “visual proximity” to the “request for consent to the offer,” such that the business obtained the consumer’s “affirmative consent.” Yet the litigation so far has resulted in minimal written orders and opinions (whether published or unpublished). These cases tend to settle, and some of them are ordered into arbitration.

Aside from private class actions, in recent years, district attorneys and other local prosecutors from multiple jurisdictions have worked together to pursue stipulated judgments with various businesses. These local prosecutors recover restitution, civil penalties, investigative costs, and injunctive relief on behalf of the “People of the State of California.” The cases typically involve no active litigation—the dockets comprise pre-packaged complaints with stipulated judgments, often filed on the same day, which are typically signed by the court within days or weeks of filing. Litigants have commented that the pre-packaged settlements are the result of years of negotiation.

While these judgments are not binding on other businesses in California, they reflect the prosecutors’ expansive interpretation of the ARL. Significantly, the terms of the stipulated injunctions we have reviewed regularly exceed the ARL’s requirements. For example, past injunctions have required that:

- businesses obtain their consumers’ assent to the automatic renewal offer using a checkbox (or other consent mechanism) that is separate from the checkbox used for any other terms and conditions (the “separate” or “double” checkbox requirement). An early draft of SB 313 included a similar requirement, but the legislature expressed workability concerns, and it was stricken from the final version.
- the automatic renewal offer terms be presented “immediately adjacent” to the checkbox, where the statute requires only “visual proximity.”
- the post-sale acknowledgement conform to specific, extra-statutory restrictions—for example, that the acknowledgement include a “clear and conspicuous” disclosure (where the statute requires only a disclosure in a manner capable of retention by the consumer) or that the acknowledgment take the form of an email sent immediately after the order with a subject line indicating that it is a confirmation.
- the business must provide a cancellation mechanism that is “as easy and simple as” the mechanism by which the consumer initiated the

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recurring charge. An early draft of SB 313 included a similar requirement, but, like the double checkbox, it was omitted from the final version.

- the cancellation must be effective within a certain time following the consumer’s request—for example, within one business day.
- the business must send an additional notice to the consumer before the first recurring charge. A similar term was included in an early draft of SB 313, but not in the enacted version.

Aside from the terms themselves, these settlements push the boundaries of the ARL by purporting to seek restitution for consumers across the state, even though the prosecutors’ authority ends at the geographical boundaries of their respective jurisdictions (e.g., city, county, etc.). Recently, the California Court of Appeal clarified, in *Abbott Laboratories v. Superior Court*, 233 Cal.Rptr.3d 730 (Cal. Ct. App. May 31, 2018), that district attorneys may not seek or obtain “monetary recovery” under the UCL, except for “violations occurring within the county he [or she] serves.” *Id.* at 734. District attorneys can expand their reach on one condition only: with “written consent by the Attorney General and other [affected] county district attorneys.” The California Supreme Court has agreed to hear the case, and briefing is scheduled to be complete in early 2019. In the meantime, prosecutors have continued to recover restitution on behalf of consumers across the state.

Finally, these settlements have pushed the boundaries of the law by indirectly enforcing a federal law—the

Restore Online Shopper Confidence Act, 15 U.S.C. §§ 8401-8405 (“ROSCA”). ROSCA requires that a business charging a customer for goods sold over the Internet through a negative option feature—an offer in which the consumer’s silence is interpreted by the seller as an acceptance of the offer—(a) clearly and conspicuously disclose all material terms of the transaction before obtaining the customer’s billing information; (b) obtain the customer’s express informed consent to the feature before charging the customer; and (c) provide a simple mechanism for a consumer to stop recurring charges. 15 U.S.C. § 8403. Local prosecutors indirectly enforce ROSCA in their ARL settlements in two ways: first, by pleading a violation of ROSCA, but declining to expressly state it as a cause of action; and, second, by including its terms (or terms modeled on the FTC’s stipulation injunctions under ROSCA) in their stipulated injunctions. Unlike the ARL, the authority to enforce ROSCA rests with the FTC and the attorneys general of the states—not with local prosecutors. *Id.* §§ 8404(a), 8405. Accordingly, it is notable that these stipulated judgments invoke the federal statute.



It remains to be seen precisely how courts will interpret the provisions of the California’s Automatic Renewal Law, but we expect courts will continue to see an increasing number of private and public actions arising under the ARL.

Dale Giali is a partner and Grant Miller is an associate at Mayer Brown.

Should You Seek Writ Review? ...continued from Page 1

Most practitioners know that writ petitions are an uphill battle in both federal and state court, but they may not know exactly what it takes to get a petition granted. This article provides an overview of the standards in the Ninth Circuit and the California Court of Appeal, to help inform the decision about whether pursuing writ relief is worthwhile.

Writ review generally

The general rule is that an appeal lies only from a state court “judgment” that is “final” (Code Civ. Proc., § 904.1, subd. (a)(1)) or from a federal district court’s “final decision” (28 U.S.C. § 1291). As a result, most interlocutory rulings are not immediately appealable. For example, there is no appeal from an order compelling discovery or dismissing some causes of action but not others. Instead, such rulings may be reviewed as part of an appeal from an eventual final judgment at the end of the case.

Writ review provides a safety valve from this final judgment rule. It gives appellate courts discretion to immediately review a non-appealable ruling, rather than forcing the aggrieved party to wait until entry of a final judgment. But such review is disruptive—a writ petition is effectively a request to skip ahead of the long queue of appeals from final judgments, requiring the appellate panel to put aside its regular work for a matter that the petitioner contends is too urgent to wait. As one court put it, writ review raises the specter of “appellate gridlock.” (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 127 (*Omaha Indemnity*)). In most cases, the appellate courts conclude that they need not jump in to provide immediate review because “the case is still with the trial court and there is a good likelihood purported error will be either mooted or cured by the time of judgment.” (*Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1100.)

To minimize the disruption, and to restrict discretionary review to truly deserving cases, the Ninth Circuit and the California Court of Appeal have each developed standards for granting writ relief. Under either set of standards, the

odds of obtaining writ relief are exceedingly low: On average, the California Court of Appeal grants fewer than 10 percent of the writ petitions it receives in civil cases (the percentage varies by district and division); the percentage is even lower in the Ninth Circuit.

Standards for granting mandamus in the Ninth Circuit

The Ninth Circuit considers mandamus relief “ ‘a “drastic and extraordinary” remedy.’ ” (*In re Bozic* (9th Cir. 2018) 888 F.3d 1048, 1052 (*Bozic*)). To determine whether this “drastic” remedy is warranted, the Ninth Circuit adheres to a five-factor test first developed in *Bauman v. U.S. Dist. Court* (9th Cir. 1977) 557 F.2d 650. The “*Bauman* factors” are:

- (1) Does the petitioner have “other adequate means, such as a direct appeal, to attain the relief he or she desires”?
- (2) Absent immediate relief, will the petitioner be “damaged or prejudiced in a way not correctable on appeal”?
- (3) Is the district court’s order “clearly erroneous as a matter of law”?
- (4) Did the district court’s order make “an ‘oft-repeated error,’ or ‘manifest[] a persistent disregard of the federal rules’”?
- (5) Does the district court’s order “raise[] new and important problems, or legal issues of first impression”?

(*Bozic* at p. 1052.)

There are a few situations that may warrant writ relief under these standards, such as discovery orders that raise “particularly important questions of first impression, especially when [the court is] called upon to define the scope of an important privilege.” (*Perry v. Schwarzenegger* (9th Cir. 2010) 591 F.3d 1147, 1157.) And where the district court has erroneously denied a jury trial, the Ninth Circuit may grant writ relief regardless of the *Bauman* factors. (*In re County of Orange* (9th Cir. 2015) 784 F.3d 520, 526.)

But writ relief in the Ninth Circuit is exceedingly rare. The much more common outcome is for the Ninth Circuit

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to deny writ relief under the *Bauman* factors. The recent decision in *Bozic, supra*, 888 F.3d 1048, drives this home. In *Bozic*, the plaintiff petitioned for writ relief after the district court transferred her putative class action from one federal district to another; she requested that the case be transferred back to the originating district. The Ninth Circuit denied writ relief even though it agreed that the district court had clearly erred and even though it acknowledged that the petition presented a matter of first impression. (*Id.* at p. 1052.)

Bozic reasoned that “if clear legal error were sufficient for mandamus relief, every erroneous interlocutory order would warrant issuance of the writ.” (*Bozic, supra*, 888 F.3d at pp. 1054-1055.) The remaining *Bauman* factors avoid opening that floodgate. The petitioner in *Bozic* did not face a sufficiently “imminent injury” from the erroneous transfer order because (1) regardless of what district her case was in, it likely would be stayed pending resolution of an earlier-filed class action, and (2) if the potential stay were lifted, the petitioner could move in the district court to have her case transferred back to the originating district “in reliance on” the Ninth Circuit’s explanation that the transfer order was erroneous—or seek writ relief if the transfer were then denied, when “any potential injury from her case remaining in the Eastern District would be far less speculative.” (*Id.* at p. 1056.)

The *Bauman* factors’ focus on the nature of the harm also generally precludes writ relief from the erroneous denial of summary judgment because the Ninth Circuit does not consider the burden and expense of an unnecessary trial to be irreparable harm. (See, e.g., *In re Cement Antitrust Litigation (MDL No. 296)* (9th Cir. 1982) 688 F.2d 1297, 1303.) Indeed, one treatise cautions that seeking writ review from an order denying summary judgment might even be “considered frivolous and risk sanctions.” (Goelz & Batalden, *Federal Ninth Circuit Civil Appellate Practice* (The Rutter Group 2018) ¶ 13:155, p. 13-30; see also *In re Nordstrom, Inc.* (9th Cir. 2013) 719 F.3d 1128, 1129.)

The Ninth Circuit’s high bar for writ relief does not mean, however, that interlocutory review is wholly off the

table. To obtain review of a significant adverse ruling in circumstances not meeting the *Bauman* factors, consider whether certification for an immediate appeal might be available under (1) 28 U.S.C. § 1292(b), which allows the district court to certify for immediate appeal an order involving “a controlling question of law as to which there is substantial ground for difference of opinion,” if “an immediate appeal from the order may materially advance the ultimate termination of the litigation,” or (2) Federal Rule of Civil Procedure 54(b), which allows the district court to enter a “final judgment” as to fewer than all claims or parties where there is “no just reason for delay.”

Standards for granting writ review in the California Court of Appeal

There is no uniformly-applied equivalent of the *Bauman* factors in California’s state courts. Instead, the Courts of Appeal use an array of criteria in determining whether a case warrants writ relief.

California appellate courts most commonly grant writ review where the petitioner has no other adequate remedy at law (usually meaning no right to immediate appeal) and will suffer “irreparable injury” if the writ is not granted. (E.g., *Omaha Indemnity, supra*, 209 Cal.App.3d at pp. 1274-1275.)

Other factors favoring writ relief are that

- (1) the petition presents a significant, novel issue;
- (2) there is a conflict in the law requiring resolution;
- (3) the trial court’s ruling was clearly erroneous; and
- (4) the challenged order “deprived petitioner of an opportunity to present a substantial portion of his cause of action.”

(*Id.* at pp. 1273-1274.)

Applying these considerations, California appellate courts have granted writ relief as to a broad range of rulings, including discovery orders requiring disclosure of privileged information and attorney disqualification rulings. Unlike the Ninth Circuit, California courts also will sometimes grant writ relief to avoid an unnecessary trial or retrial—for example, reversing an order that erroneously overruled a demurrer or dismissed a plaintiff’s key claims on the eve of trial. (E.g., *Knowles v. Superior*

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A LACK OF CLOSURE ON BOT DISCLOSURE



Richard A. Schwartz

On September 28, 2018, California enacted a first-of-its-kind law that will regulate the activity of automated social media accounts, commonly referred to as “bots.” Starting on July 1, 2019, SB-1001 mandates that automated social media accounts disclose that they are bots to the extent they are used to influence commercial transactions or elections. However, SB-1001 does not specify what penalties a bot-operator might face for noncompliance, nor is it clear how SB-1001 will fit into the landscape of civil or criminal litigation. That ambiguity will require that practitioners navigate some uncertainty in order to advise clients about the risks or litigation options when faced with the ever-increasing influence of automated online activity.

What Bots Are Within Reach of SB-1001?

SB-1001’s reach is limited to “bots,” which it defines as “an automated online account where all or substantially all of the actions or posts of that account are not the result of a person.” Cal. Bus. & Prof. Code § 17940(a). But what constitutes “substantially all” or “the result of a person” remains to be determined. For example, a semi-automated customer-service account, where a human employee takes over the interaction after a few information-gathering exchanges, might not fall within the definition of a bot, even though many of its interactions are automated. Moreover, the statute addresses only bots on social media platforms with 10 million or more users, leaving bots on retail websites unaffected.

In enacting SB-1001, the Legislature was explicitly and primarily concerned with the kinds of bots that could be used to influence elections or commercial activity through deception. A Senate Floor Analysis specifically noted that organizations used bots and fake social media accounts to make contentious opinions appear more popular or widespread in the run-up to the 2016 election, and that

“Russian agents published more than 131,000 messages on Twitter, uploaded over 1,000 videos to YouTube, and disseminated inflammatory posts that reached 126 million users on Facebook.” S. Rules Comm. Office of S. Floor Analyses, S. Floor Analyses, SB 1001, at 4 (Cal. Aug. 30, 2018) (http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB1001, last visited Dec. 19, 2018) (“Floor Analysis”). Similarly, the Floor Analysis took note of the potential for commercial abuses that bots enable, especially when used to amplify the perceived popularity of people, products and services online. *Id.* For example, bots sold in bulk allow users to pad their follower-counts and bolster their online presence. *Id.* Likewise, bots can be programmed to leave online reviews, and bots have been found posting links that are designed to game search engine results rankings.

Of course, not all bots are used for nefarious ends. Some businesses use fully- or semi-automated online accounts to assist in customer service or sales. Other bots are programmed to distribute generally-useful information, like automated alerts about California Highway Patrol activity (@chp_la) or about earthquakes occurring in Los Angeles (@earthquakesLA). Others are the experiments of creatives tinkering around with the medium, such as @GreatArtBot, a bot that generates images based on an algorithm and poses the tacit question of whether bot-generated (*i.e.*, fully-automated) images can be art. While these public-service-oriented bots may be within the definitional purview of SB-1001, they are unlikely to run afoul of SB-1001’s prohibition on influencing commercial or electoral decision-making and therefore are largely unaffected.

What Does SB-1001 Do, Exactly?

SB-1001 makes it illegal for anyone to use a bot to communicate with another person “with the intent to mislead the other person about its artificial identity for the purpose of knowingly deceiving the person about the content of the communication in order to incentivize a purchase or sale of goods or services in a commercial transaction or to influence a vote in an election” unless the bot comes with a clear and conspicuous disclosure

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reasonably designed to give notice that it is a bot. Cal. Bus. & Prof. Code § 17941.

Practitioners quickly will recognize that there are a number of significant limitations built into SB-1001's prohibition. Perhaps most importantly, SB-1001 offers a safe harbor for any bot-operators who identify the bot as such in a clear and conspicuous manner. That's yet another unclear description, but it likely will be enough to label the social media account as a "bot" in its name, biography, or similarly visible description.

As for bot operators who do not disclose the bot's true identity, there are still more obstacles to the imposition of liability. There are two intent requirements a bot operator must meet in order to be liable under SB-1001. First, the operator must intend to mislead message recipients about the identity of the bot, *i.e.*, to try to convince ordinary users that the bot is not actually a bot. Second, the purpose of the identity deception must be to knowingly deceive the person in order to "incentivize" some behavior in connection with a commercial transaction or to influence an election. So, hypothetically, even if @chp_la was not labeled as a bot, and its operator intended to mislead users about @chp_la's true identity, the operator would not violate SB-1001 without the additional intent to induce a user into a commercial transaction or to affect a vote in an election.

***Is This Blade Runner A Private Investigator
Or Government Detective?***

Conspicuously absent from SB-1001's own self-description is any indication of precisely who can enforce SB-1001's prohibition. Most troublingly for practitioners, SB-1001 does not state whether private persons can sue for being misled by a bot, nor does it state any particular measure of relief, let alone whether compensatory or punitive damages are recoverable. Instead, SB-1001 merely recites that it is intended to have a cumulative effect with other applicable laws and duties.

When some lawsuit raises the question of whether SB-1001 provides a private right of action, a reviewing court likely would apply the same analysis the California

Supreme Court applied in *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592, 596 (2010). There, the Court analyzed a provision of the Labor Code that set forth a prohibition, but no particular method of enforcement. *Id.* at 597-601. The Court noted that the existence of a private right of action to redress a statutory violation depends on "whether the Legislature has 'manifested an intent to create such a private cause of action' under the statute." *Id.* at 596 (quoting *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 305 (1988)). Finding no express instruction in the statute, the Court moved on to consider the legislative history and held that "the fact that neither the Legislative Analyst nor the Legislative Counsel acknowledged that a private right of action existed . . . 'is a strong indication the Legislature never intended to create such a right of action.'" *Id.* at 601.

Such an analysis of SB-1001 would likely reach the same result. Nowhere in the legislative history is there any indication that the Legislature contemplated a private right of action. The only indication about who would enforce SB-1001 came from the Assembly Appropriations Committee, which estimated that SB-1001 "will result in costs in the tens of thousands of dollars to the Department of Justice to investigate and prosecute violations." Floor Analysis, at 5. That estimate seems to assume that the state would spend less than one full-time attorney's worth of resources per year to enforce the prohibition, but it still says nothing about what the penalties might be for a violation, let alone whether private enforcement is an option.

Previous versions of SB-1001 would have imposed an obligation on social media platforms to implement a reporting scheme involving investigation and removal of malicious bots following users' reports, but the final version of SB-1001 omitted that more onerous regime. *See SB 1001*, 2017-2018 Sess. (as amended in Senate May 25, 2018). Without some indication in the legislative history that private parties can bring a SB-1001 claim on their own, it is unlikely a court would hold that SB-1001 confers a private right of action under *Lu*.

That being said, consumers are not left without remedy

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if they are misled by a bot in a commercial context. Given the intent requirements imposed by SB-1001, any fact pattern presenting an actionable violation of the act likely would meet the requirements for a common law action based on fraud or negligent misrepresentation, as the only additional element required under those claims is justifiable reliance on the misrepresentation. *See, e.g., Serv. by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807 (1996) (setting forth the elements of a cause of action for fraud); *Shamsian v. Atl. Richfield Co.*, 107 Cal. App. 4th 967 (2003) (setting forth the elements of a cause of action for negligent misrepresentation).

Likewise, consumers can avail themselves of other consumer-protection statutes, such as the False Advertising Law (Cal. Bus. & Prof. Code § 17500), the Consumer Legal Remedies Act (Cal. Civ. Code § 1770(a)), or the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200). Indeed, consumers' claims may even be enhanced by SB-1001, as it provides an independent standard of wrongful conduct on which a consumer might, for example, base an Unfair Competition Law claim. On the other hand, voters conceivably could have a tougher time proving either justifiable reliance or damages that might result from being influenced by a bot in an election. Despite SB-1001's efforts, there may not be an adequate remedy at law for that kind of injury.

Conclusion

While SB-1001 may be lauded as an effort to combat a cutting-edge problem, it remains to be seen whether or not the bill will have any substantive effect apart from being a cumulative obligation not to defraud.

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Court (2004) 118 Cal.App.4th 1290, 1294-1295; *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 988-989.)

In some procedural settings, writ petitions are authorized by statute. For example, California's summary judgment statute expressly authorizes writ petitions challenging summary judgment and summary adjudication rulings. (Code Civ. Proc., § 437c, subd. (m)(1); see generally Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 15:97 et seq., p. 15-53 et seq.) Indeed, sometimes the statutorily-authorized writ petition is the only possible appellate remedy. (Eisenberg, *supra*, at ¶ 15:96.2, pp. 15-50 to 15-51.) Although writ procedure is beyond the scope of this article, practitioners should be aware that courts generally consider the short deadlines for statutory writ petitions to be jurisdictional. (*Id.*, ¶ 15:90, p. 15-48.) This means that even if an adverse ruling is a reasonable candidate for writ relief, timing constraints may affect the feasibility of a petition.



Appellate specialists sometimes say that most of their writ practice is telling clients not to waste their money on writ petitions that have no realistic chance of success. But deserving cases do exist in the California courts, and occasionally even in the Ninth Circuit. Being able to discern these is half the battle.

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POLICIES BEHIND THE HEIGHTENED PLEADING STANDARD UNDER FRCP 9(B)



Maximillian W. Hirsch

Under Federal Rule of Civil Procedure 9(b), in “alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” But many attorneys are unfamiliar with the reasons behind this requirement. This article briefly reviews the history of the heightened pleading standard for fraud, examines several policy reasons behind it, and compares the federal rule with the California rule. In short, while courts have put forward several different rationales for the heightened pleading standard, the rule appears to be an artifact of history—and one which perhaps should be revisited.

English Common Law

The requirement that fraud be pled with particularity is traceable to English common law, which “allowed the defense of fraud to be raised under a general denial or by special pleading.” 5a Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1296 (4th ed. 2017) (quoting 1 Chitty, *Pleading & Parties to Actions*, 12th Amer. Ed. 1855, 476, 479, 536, 581-82.). This heightened pleading standard reflected “the reluctance of English courts to reopen settled transactions” or disrupt established relationships. *Id.* History suggests that it probably came to courts of law from equity courts after the two were merged. See William M. Richman et. al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. Cal. L. Rev. 959, 967 (1987). The Advisory Committee, along with numerous federal courts, have acknowledged the influence that the English common law has had on the federal pleading standard for fraud, which explains why the heightened pleading standard exists, while similar causes of action do not have a similar heightened pleading standard.

Federal Policy Rationales for the Heightened Pleading Standard of Rule 9(b)

Aside from a reliance on English common law, federal courts have given a wide variety of policy explanations for why a plaintiff must plead fraud with particularity. First, courts have acknowledged that fraud claims are generally disfavored, thus the heightened pleading standard. See *Mallozzi v. Zoll Med. Corp.*, 94-11579-NG, 1996 WL 392146, at *3 (D. Mass. Mar. 5, 1996) (“the history of Rule 9(b) suggests that it was added to the rules to deal with the historically disfavored claims of common law fraud”). Second, one of the reasons that fraud claims are generally disfavored is that courts have identified a “concern that potential defendants be shielded from lightly made public claims or accusations charging the commission of acts or neglect of duty which may be said to involve moral turpitude.” *McFarland v. Memorex Corp.*, 493 F. Supp. 631, 638 (N.D. Cal. 1980). This is especially true when the “potential defendants are professionals whose reputations in their field of expertise are most sensitive to slander.” *Id.* at 638; see also, e.g., *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 (9th Cir. 1996) (Rule 9(b) serves to “protect professionals from the harm that comes from being subject to fraud charges.”); *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 663 (2d Cir. 1997) (“Rule 9(b) is designed [to] . . . safeguard a defendant’s reputation from improvident charges of wrongdoing.”). Of course, it is worth noting that other claims that could “involve moral turpitude”—including allegations persons might find far more troubling than fraud—are not assigned the same heightened pleading standard.

Third, courts have acknowledged that the heightened pleading standard is necessary to protect against a “plaintiff with a largely groundless claim . . . simply tak[ing] up the time of a number of people by extensive discovery” in an attempt to “increase the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence.” *In re Leslie Fay Cos., Inc. Sec. Litig.*, 918 F. Supp. 749, 767 (S.D.N.Y. 1996). Similarly, the heightened pleading standard also serves to thwart baseless complaints and fishing expeditions.” *Gutierrez v.*

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Givens, 989 F. Supp. 1033, 1044 (S.D. Cal. 1997); *see also In re Stac Elecs. Sec. Litig.*, 89 F.3d at 1405 (Rule 9(b) serves to “deter the filing of complaints as a pretext for the discovery of unknown wrongs.”). Of course, fraud causes of action are not the only “largely groundless claims” that are brought by plaintiffs, so this too does not offer an adequate explanation for the heightened pleading standard.

Finally, courts have stated that Rule 9(b) “serves to give defendants adequate notice to allow them to defend against the charge.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d at 1405; *Gutierrez*, 989 F. Supp. at 1044 (same). Again, it is unclear why defendants facing fraud claims need more notice than defendants defending other kinds of claims.

California Law and Policy

California, which has a slightly different pleading standard for fraud claims, shares many of these policy rationales. In California, unlike under federal law, courts have set the standard for pleading fraud through case law. Under their precedent, fraud must be pled in the complaint specifically, and general and conclusory allegations are not sufficient. Specifically, a plaintiff must plead “facts which show how, when, where, to whom, and by what means the representations were tendered.” *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 73 (1990). When a plaintiff fails to meet that standard, demurrers are routinely sustained.

California state courts have given several policy rationales for this heightened pleading standard, all of which have also been expressed by the federal courts. First, California state courts have explained that a rationale for their heightened pleading standard is to “allow [a] defendant to understand fully the nature of the charge made.” *Stansfield*, 220 Cal. App. 3d at 73 (quoting *Roberts*

v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 109 (1976)). Second, California state courts have stated that the pleading standard for fraud should be heightened in accordance with the seriousness of the offense and to adequately prepare defendants. *See Stansfield*, 220 Cal. App. 3d at 73 (“The idea seems to be that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense.”). Finally, California courts have also characterized fraud actions as “disfavored,” which leads to the “strict requirements of particularity in pleading.” *Vaughn v. Certified Life Ins. Co. of Cal.*, 238 Cal. App. 2d 177, 181 (1965). Again, just as in federal court, none of these justifications seem unique to fraud causes of action.

In sum, although California’s pleading standard for fraud is derived from case law, while the federal pleading standard is a rule of civil procedure, both require more from a plaintiff to proceed with a case to protect defendants, and both of these heightened pleading standards are based on English common law. And, while both California and federal courts have offered justifications for the heightened pleading standard in addition to legal history, because those justifications also would apply to other causes of action, it seems that fraud owes its heightened pleading standard to history. As a result, it might be time to reexamine the heightened pleading standard for fraud, either to see if other serious causes of action also merit a heightened pleading standard, or alternatively to treat fraud like any other cause of action.

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YLD UPDATE



Jen Cardelús



Andrew J. Holmer

The ABTL's Young Lawyers Division kicked off its activities in October with a community-impact project with the Los Angeles Regional Food Bank. Looking ahead through 2019, the YLD will continue its focus on providing opportunities for younger lawyers to find opportunities to interact with the judiciary, network with fellow young lawyers, and deepen connections with the broader legal community represented throughout the

ABTL. Be sure to keep an eye on the ABTL Report and your email inboxes for updates about upcoming YLD events, which will include brown-bag lunches with members of the judiciary and a YLD-hosted happy hour. And if you or someone you know is interested in helping plan YLD events, please reach out to YLD chair Jen Cardelús, YLD vice-chair Andy Holmer, or Linda Sampson about getting involved.

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CALLING YOUNG LAWYERS

The ABTL Young Lawyers Division (YLD) is looking for

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