ASSOCIATION OF BUSINESS TRIAL LAWYERS

# abtl REPORT

LOS ANGELES

SPRING 2026

## "DUTY TO DEFEND" DENIALS REQUIRE A SECOND LOOK

*Dominic Nesbitt*

Untold millions of dollars are left on the table by policyholders who fail to challenge wrongful coverage denials. This article aims to remind business litigators of their clients' rights under any liability policy—be it a Directors & Officers, Professional Liability, Employers Practices Liability, or Commercial General Liability policy—which includes a "duty to defend."

### A. The "Potential for Coverage" Standard

The California Supreme Court has made clear that a liability insurer owes a duty to defend unless an underlying lawsuit against its insured can "by no conceivable theory" raise a "single issue" within the policy coverage. *See Montrose Chem.*

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## — INSIDE —



## UNLOCKING THE MYSTERIES OF APPELLATE WRIT PETITIONS

*Hon. Thomas L. Willhite, Jr. (Ret.)*

Seeking writ review by the California Court of Appeal of pre-judgment trial court orders is an important aspect of litigation practice. True, 90 percent or more of writ petitions are summarily denied, with little or no explanation. However, this does not mean that writ review is a waste of time. Rather, it illustrates why attorneys must fully understand the practicalities and technicalities of appellate writ petitions to identify appropriate cases and maximize the chances of success. The potential benefits are worth the challenge: writ relief overturning an adverse lower court ruling can tilt the entire remaining litigation in your client's favor.

### Practicalities of Writ Review

We first need to understand what writ review is and is not. It is not an appeal, in which review of trial court rulings is a matter of right. It is extraordinary relief, discretionary with the court. In this light, perhaps the most important practical consideration is understanding how writ proceedings are processed in the Court of Appeal.

A writ petition is first thoroughly evaluated by a writ attorney who specializes in writ procedure. The writ attorney will prepare a recommended course of action: summary denial, an informal response from the real party in interest, an order to show cause, or other possibilities beyond the scope of this article. The job of a writ attorney is not to be forgiving. It is triage: eliminate the vast majority of cases that do not deserve consideration for extraordinary relief, and isolate the few that do.

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# 2026 PRESIDENT'S MESSAGE

*Amy Lucas*

I am deeply honored to serve as your ABTL President this year, and one of the great joys of this role so far has been the opportunity to get to know so many of you—members of the bar and the judiciary—in a way that would not otherwise be possible. During my first Board meeting as President, and again at our recent Joint Board Retreat, I intentionally incorporated activities designed to facilitate discussion and interaction on a more personal level than one might otherwise expect in a room full of lawyers and judges. These activities highlighted just how wonderfully diverse, yet also unified, we are as members of this organization. We are the products of vastly different upbringings, experiences, and interests. We grew up in different places, followed different paths to a legal career, and carry different passions outside of it. But there are common threads that bind us together: a genuine love of the law; a natural curiosity and drive that keeps us asking harder questions and pursuing the answers; and, for each of us, the privilege of having had someone, somewhere, who believed in us. I hope those of you in attendance came away with similar observations, and look forward to meeting and getting to know as many other ABTL members this year as possible at our events.

During our first event of 2026 in February, we had the pleasure of hosting LA28's Chief Legal Officer and General Counsel Elisabeth Freinberg and Senior Vice President and Deputy General Counsel Aaron Lowenstein for a fireside chat on the legal machinery behind the 2028 Olympic and Paralympic Games. Elisabeth and Aaron described the staggering scale of the operation, which will be the largest peacetime gathering in history, and the complex legal ecosystem they are navigating. What struck me most, however, was the sense of mission that drives them. LA28 is a nonprofit organization pulling off a $7 billion event, and every legal decision they make is in service of something much larger, not just for the partners, the audience, and the athletes, but also our community: Every dollar that LA28 ultimately makes will go to funding local Los Angeles youth sports programs, which are often overlooked but indescribably valuable for young people. It was a special evening, and if you missed it, I hope to see you at one of our upcoming events.

Our April 22 dinner program, titled When Civility Breaks Down: Protecting Judges and The Rule of Law, was one of the most important programs we will host this year. We are living in a time when the independence of the federal judiciary—a cornerstone of our democracy—is under extraordinary pressure, yet continues to hold. Judges are being asked to make difficult, sometimes deeply unpopular decisions, and too often they are met not with respectful disagreement, but with

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## HOGS GET SLAUGHTERED: HOW SHORT-TERM EVIDENTIARY WINS CAN COST THE VERDICT ON APPEAL

*John A. Taylor, Jr.*

A civil verdict is only as strong as the evidentiary rulings that sustain it. The appellate version of the well-known trial maxim—"pigs get fat, hogs get slaughtered"—warns against overreaching during trial for tactical gains that embed reversible error into the record. This principle is illustrated by the recent reversal of a $161 million jury verdict in *Soulliere v. Suzuki Motor Corporation* (Mar. 18, 2026, G063118) 2026 WL 765763 [nonpub. opn.], in which plaintiff's counsel secured an aggressive, favorable evidentiary ruling during trial that looked like an important interim victory—keeping out a key damaging admission by the plaintiff—but that injected error the Court of Appeal could not ignore. The *Soulliere* decision demonstrates a critical practice point: It is almost always better to live with a correct adverse ruling and beat it with facts, experts, and trial craft than to bank a legally erroneous ruling that becomes a wedge for reversal after a hard-won verdict.

### Case Background: What Happened in *Soulliere v. Suzuki*

The dispute began when plaintiff Thomas Soulliere crashed his Suzuki GSX-R600 motorcycle ten days after purchase. He later alleged that a front brake defect caused a complete brake failure just before he collided with the SUV that suddenly pulled out in front of him. The investigating police officer, Officer Shaheen, contemporaneously recorded Soulliere's statement that "he was forced to apply his brakes locking up his wheels." But in the first trial the trial court barred Shaheen from reading that statement into evidence as a past recollection recorded and further barred cross-examination of plaintiff's expert with the officer's deposition testimony.

In a December 2020 decision, the Court of Appeal reversed the jury's verdict, which awarded plaintiff $1.4 million in compensatory damages and $6 million punitive damages. Among other grounds for reversal, the court held that Shaheen's recorded recollection should have been admitted under Evidence Code section 1237 (section 1237). The decision noted that a key issue was whether the motorcycle's front wheel had locked before the collision, and plaintiff's statement to the investigating officer indicated that both his front and rear wheels locked when he applied the brakes, supporting the defense theory that the front brake did not fail.

On remand, both sides' experts agreed that whether the front wheel locked before the collision was the fulcrum of the dispute over whether front brake failure caused the accident. But plaintiff's counsel persuaded the trial court to disregard the Court of Appeal's holding on the admissibility of plaintiff's statement to Shaheen, and to again exclude the testimony as hearsay and untrustworthy. This time, the jury returned a verdict awarding plaintiff $11.4 million in compensatory damages and $150 million in punitive damages (which the trial court conditionally reduced to $30 million in the posttrial motion phase).

In a March 2026 decision, the Court of Appeal reversed again. The court held that the trial court erred by again excluding the officer's recorded recollection. The Court of Appeal also held that plaintiff failed to present competent evidence of Suzuki's overall financial condition to support any punitive damages—because plaintiff's evidence focused only on sales, profits, and income, and disclosed nothing about Suzuki's liabilities, losses, debt load, or long-term obligations. The appellate panel remanded the case for a third trial on liability and compensatory damages, while entirely excluding punitive damages from retrial.

### How Overreach Became Reversal: Law of the Case, Repeat Error, and Appellate Remedies

In the second trial, Suzuki urged the law-of-the-case effect of the first appellate decision regarding the admissibility of Shaheen's recorded recollection testimony. But the trial judge, at the urging of plaintiff's counsel, discounted the doctrine's application to renewed evidentiary issues, observing that after remand "the trial starts all over again." Suzuki's briefs on appeal argued that the first decision squarely held the contents of the report were admissible under section 1237 and that repeating the exclusion violated law of the case, citing authorities that an appellate evidentiary ruling becomes the law of the case and must be adhered to on retrial.

But the Court of Appeal did not have to rely on law of the case to reverse; instead, it simply analyzed de novo the application of Evidence Code section 1237 to hold that plaintiff's statement to Shaheen was admissible as a past recollection recorded and that it had been prejudicially excluded. The court identified

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*Hogs Get Slautered...continued from Page 3*

each foundational element of section 1237—a witness with insufficient present recollection; a statement recorded in writing that would be admissible if given on the stand; and a writing made or adopted when the matter was fresh in memory and affirmed as accurate—and concluded that Shaheen's testimony met every requirement. The appellate court further found that admission of Shaheen's recorded recollection likely would have produced a better outcome for Suzuki—the officer was a neutral witness recounting a near-contemporaneous statement by the plaintiff that tended to show that the brake did not fail. On remand, the court directed that absent materially changed circumstances, the statement should be admitted as a past recollection recorded.

This outcome powerfully illustrates the practical hazard of asking a trial court to revisit an issue that has already been decided adversely to the proponent in a prior appeal. Even if the trial court is persuaded, counsel succeeds only in injecting the record with the same error that previously required reversal, almost guaranteeing a second reversal. That is precisely what occurred here; the new verdict, which swelled from an original $7.4 million to a $161 million total after a massive punitive-damages phase, was entirely set aside because the same core evidentiary misstep remained baked into the record and could not be deemed harmless. Ultimately, persuading the trial judge to exclude the evidence a second time in the face of a contrary analysis by the Court of Appeal was a precarious and ultimately self-defeating way to win the trial day.

The scope of the reversal is also instructive. The Court of Appeal ordered a new trial on liability and compensatory damages but foreclosed punitive damages entirely at retrial, holding that plaintiff had not carried his burden to present meaningful evidence of Suzuki's overall financial condition—net worth or actual wealth—beyond stipulations to annual sales, profits, and net income. This outcome magnified the strategic cost of trial counsel's overreaching. A favorable but erroneous evidentiary ruling may help secure a large verdict in the moment, yet the price on appeal here included not only a retrial on liability, but also the permanent loss of punitive damages.

**Practical Guidance: Building Verdicts that Survive**

For trial and appellate counsel alike, the *Soulliere* decision offers a roadmap for evaluating when to push and when to pivot.

First, recognize the acute appellate risk of persuading a trial court to repeat a ruling that an earlier appeal has already rejected. Law-of-the-case principles are designed to prevent iterative errors on remand; even when a court sidesteps the doctrine and conducts a fresh analysis, a party who secures a reprise of a previously condemned ruling is inviting a second reversal and years of delay. In *Soulliere*, repeating the exclusion of Shaheen's testimony achieved a tactical evidentiary advantage at trial but planted the seed for appellate reversal and a new liability trial, with the added consequence that punitive damages were removed from the case altogether for want of proper proof.

Second, prefer correct adverse rulings you can manage at trial over erroneous favorable ones you cannot defend on appeal. Had plaintiff accepted the admission of Shaheen's statement and addressed it with cross-examination, expert framing, and closing argument, the resulting verdict—if achieved—would have rested on rulings far more likely to withstand appellate scrutiny. By contrast, excluding the statement twice contrary to settled hearsay doctrine and to a prior appellate opinion forced the Court of Appeal to set aside the verdict despite the jury's liability findings, because the exclusion went to a central issue that was reasonably likely to have changed the outcome.

Third, rigorously assess appellate vulnerability before pressing for a favorable ruling. Ask whether there is a clean statutory pathway for the opponent's evidence and whether any contrary authority is distinguishable; if a prior appeal in your case or a closely analogous decision has already spoken, factor law-of-the-case or stare decisis into the calculus. In *Soulliere*, additional case authority sat side-by-side with the 2020 panel's express holding that section 1237 permitted admission of the statement Shaheen recorded; pushing for exclusion again was, in hindsight, a high-risk gambit.

Fourth, consider reputational and professional costs. Appellate courts expect remand proceedings to honor their holdings; disregarding clear guidance invites pointed criticism, undermines credibility, and can complicate future discretionary rulings. Here, the record reflects trial court skepticism about law-of-the-case principles and a willingness to repeat the same evidentiary error, which framed the appeal and narrowed the margin for harmless-error arguments; that dynamic is avoidable with careful adherence to prior appellate instructions.

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**Conclusion: Durable Verdicts Require Restraint at the Right Moments**

*Soulliere* distills a cautionary tale for business litigators and judges about the difference between winning at trial and winning the case. The plaintiff twice secured exclusion of a potent defense admission, but each time the exclusion proved untenable under Evidence Code section 1237 and party-admission principles; the second time, the cost of that overreach was a reversal of a nine-figure judgment and a new trial limited to liability and compensatory damages, with punitive damages eliminated for lack of meaningful financial-condition evidence. The appellate adaptation of "pigs get fat, hogs get slaughtered" is not about timidity; it is about judgment. A correct adverse ruling can often be absorbed and overcome by trial craft; a legally erroneous favorable ruling, particularly one already flagged on a prior appeal, can jeopardize the entire verdict. The durable win is the one built on evidentiary rulings you can defend, not the one you can momentarily win.

***John A. Taylor, Jr.*** *is a partner at Horvitz & Levy LLP.*

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personal attacks and even threats to their own safety and wellbeing. An independent judiciary is a critical part of the foundation on which everything else is built. This program explored what happens when that foundation is tested, and what all of us—lawyers, judges, and citizens—can do to defend it.

On the same topic, I want to say a word about something that has become a central pillar of ABTL's mission and that I hope to carry forward: civility. ABTL and its members have been leaders in changing in the way lawyers interact with one another. From the creation of our Civility Committee, to the work of the California Civility Task Force chaired by our own Justice Brian Currey (Ret.), to the mandatory civility CLE credit and the amendments requiring all attorneys to reaffirm their commitment to practicing with dignity, courtesy, and integrity—these are not minor feats. They are tangible, lasting, contributions that trace directly back to this organization.

Finally, and relatedly, I would be remiss if I did not close with the words of my own beloved mentor, the late Honorable Sandra S. Ikuta of the Ninth Circuit, who modeled an exacting standard of excellence paired with genuine humanity. Following her recent memorial, I was reading through my yellowed copy of the Chambers Guidelines that she distributed to each incoming clerk. Those Guidelines, our Bible for the year, were always to be treated as confidential, and I dutifully kept my copy locked in an office drawer for nearly 20 years. Now, however, I will take the liberty of authorizing a limited waiver for our collective benefit, which I think Judge would have approved. The very first words she wrote to us as we started our legal careers were to remind us of the power of civility: "Welcome to our chambers! This job gives us an incredible opportunity for public service. One way in which we demonstrate our gratitude for this opportunity is in our effort to treat everyone (both inside and outside our chambers) with courtesy and respect." Judge Ikuta lived those words every day. She wrote opinions or dissents on many important and, at times, divisive, legal issues, yet did it with grace, humor, and kindness. Civility, at its core, is about how we choose to show up—for our clients, for the parties before us, for our colleagues, for one another, and for the system of justice we all collectively serve. I carry Judge Ikuta's example with me, and I hope it is one to which we can all aspire as we move through this year together.

Thank you for your support and your commitment to ABTL. I look forward to seeing all of you soon.

# NAVIGATING POST-JUDGMENT MOTIONS: A GUIDE THROUGH THE THICKET

*Alana Rotter*

Disappointing jury verdicts or statements of decision trigger a flurry of questions: Should we challenge this result through post-judgment motions before appealing? If so, which post-judgment motions? When are they due? And how do they interact with an appeal?

This article answers these frequent questions, along with highlighting some potential pitfalls to avoid. Its focus is on California state court practice.

***Overview.*** There are several types of post-judgment motions in California law. The most common are new trial motions; motions for judgment notwithstanding the verdict (JNOV); and motions to vacate. These motions aren't mutually exclusive—a party can pursue them concurrently.

***New trial motions – content and relief.***

New trial motions are available after a jury trial or a bench trial. They must rely on the grounds specified in Code of Civil Procedure section 657, which include attorney or jury misconduct; insufficiency of the evidence; excessive or inadequate damages; and errors of law. [1]

Although new trial motions aren't a prerequisite to pursuing most issues on appeal, there is a significant exception: excessive/inadequate damages. (§ 657, subd. (5).) Purely legal damages issues, such as the applicable measure of damages, do not have to be teed up in a new trial motion. But damages arguments that turn on witness credibility, conflicting evidence, or claims of jury passion or prejudice ordinarily are forfeited if not raised first in a timely new trial motion. (E.g., *Greenwich, S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759.)

New trial motions are also crucial where the existing trial record does not demonstrate the error—for example, evidence demonstrating juror misconduct during deliberations (§ 657, subd. (2)). Affidavits attesting to the misconduct can be submitted with a new trial motion. But tread carefully: There are nuanced rules about what's admissible in a juror declaration. (See, e.g., Evid. Code, § 1150; *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124–1125.)

In other situations, new trial motions can be worthwhile even if not strictly necessary to preserve issues for an appeal.

For example, a trial court has much broader discretion in considering an insufficient-evidence claim than an appellate court does. On a new trial motion, the trial court sits as a "thirteenth juror" with a duty to independently assess the evidence, and with power to disbelieve witnesses, reweigh the evidence, and draw different inferences than the jury. (*Ryan v. Crown Castle NG Networks Inc.* (2016) 6 Cal.App.5th 775, 784–785.) If the court concludes that the clear weight of the evidence is against the verdict, it can grant a new trial even though the evidence would be enough to sustain the jury's verdict on appeal. (*Candido v. Huitt* (1984) 151 Cal.App.3d 918, 923.)

By contrast, an appellate court reviewing an evidence-insufficiency challenge must view the evidence in the light favorable to the judgment and affirm if any substantial evidence supports the judgment. Accordingly, if there's a chance the trial court had a different take than the jury on liability evidence, or thought the damages were too high (or too low), testing the waters with a new trial motion may make sense.

The potential relief on a new trial motion is typically what the name suggests: a partial or full new trial. But there are also other possibilities. For example, after a bench trial, the court can change the statement of decision or modify the judgment, among other things. (§ 662.) And after a jury trial, if the court finds the damages excessive or inadequate, it can offer the non-moving party a remittitur or additur in lieu of a new trial. (§ 662.5.)

***New trial motions – procedure.***

New trial motions involve multiple deadlines and other procedural requirements – some of which are jurisdictional, meaning the court can't grant a new trial absent compliance with them, no matter how meritorious the motion.

*Notice of intent.* The new trial motion journey starts with a notice of intent to move for a new trial that lists the statutory grounds for the intended motion. (§§ 657, 659.) It's common

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[1] All Statutory citations are to the Code of Civil Procedure unless otherwise indicated.

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practice to list all of the statutory grounds, because a new trial order can be affirmed on any grounds listed in the notice even if they weren't developed into arguments.

The notice can be filed (1) after the verdict/statement of decision and before the entry of judgment; or (2) after entry of judgment or service of notice of entry of judgment, within a timeframe specified in section 659. (*Ibid.*) The notice-filing deadline is jurisdictional. It can't be extended by order or stipulation; nor is there an extension for mail service of the triggering document. (*Ibid*.)

*Other filings.* After filing the notice of intent, the moving party has 10 days to file and serve a memorandum of points and authorities and any supporting declarations. (§ 659a.) The non-moving party then has 10 days to file its opposition and any counter-affidavits. (*Ibid.*) The moving party then has 5 days to file a reply. (*Ibid.*) Unlike the notice of intent deadline, these deadlines are not jurisdictional, and can each be extended by up to 10 days by stipulation or by the court for good cause. (*Ibid.*)

*Hearing.* New-trial motion hearing dates are supposed to be set by the court rather than the moving party. (§ 661.) Sometimes an electronic-filing system or the clerk's office conditions filing the notice of intent on having a reserved hearing date. In that case, strategies to consider include calling the clerk before the filing to request a date, or picking the first available date and then applying ex parte to advance it as needed.

*Decision timing.* The court has a short window to decide a new trial motion: Its power to grant a new trial expires on the earliest of (1) 75 days after the clerk mails notice of entry of judgment "pursuant to [Code of Civil Procedure] [s]ection 664.5" or (2) 75 days after a party serves notice of entry of judgment on the moving party. (§ 660.) If no notice is given, the court's power instead expires 75 days after filing of the first notice of intent to move for a new trial. (*Ibid*.) If day 75 falls on a weekend or court holiday, the deadline is the next court day. (§§ 12a, 660.)

A motion not decided within the applicable time is automatically denied by operation of law. (§ 660.) To reduce the risk of that happening, (1) list the decision deadline on the cover page of all related filings, (2) ensure that the hearing date is sufficiently before the deadline, and (3) remind the court of the deadline at the hearing.

*Decision requirements.* An order granting a new trial must "state the ground or grounds relied upon . . . ." (§ 657.) The court also must specify its reasons for granting the motion either in the order itself or in a separate written "specification of reasons" filed within 10 days of the order. (*Ibid*.) The court must prepare the order and specification itself—it can't direct a party to draft it, as courts sometimes do for proposed judgments or statements of decision. (*Ibid.*)

**JNOV motions - substance**

The trial court can grant judgment notwithstanding the verdict "whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made." (§ 629, subd. (a).) That means JNOV is proper if, viewing the evidence in the light most favorable to the verdict, there is no substantial evidence to support the verdict.

JNOV can be granted as to an entire judgment or on specific issues, such as striking a punitive damages award. And the court can grant both JNOV and a new trial on the same issues. (§ 629.)

Indeed, it often makes sense to file both motions, because the court has more leeway to consider evidentiary sufficiency on a new trial motion (where it sits as the thirteenth juror) than on a JNOV motion (where it must view the evidence in the light favorable to the verdict). If the court grants both and the JNOV is affirmed, the JNOV prevails. (§ 629, subd. (d).) If the JNOV is reversed but the new trial order is affirmed (or isn't appealed), it carries the day.

The JNOV deadlines track the new trial deadlines: The JNOV motion is due by the section 659 deadline for filing a notice of intent to move for a new trial and the section 659a deadline governs the subsequent filing deadlines. (§ 629, subd. (b).) The court loses jurisdiction to grant JNOV after "the last date upon which it has the power to rule on a motion for a new trial"—if the court hasn't ruled by then, the motion is denied by operation of law. (*Ibid.*)

**Motion to vacate the judgment**

The court can set aside a judgment after a bench or jury trial on two grounds: (1) "Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts"; or (2) "A judgment or decree not consistent with or not supported by the special verdict." (§ 663.) In either case, the error must have "materially affect[ed] the substantial rights of the

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*Corp. v. Superior Court*, 6 Cal.4th 287, 300 (1993) (quoting *Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 276 n.15 (1966)).

Importantly, the California Supreme Court has emphasized that the duty to defend turns on the potential for coverage raised by the "facts" alleged, and not on the formal causes of action pleaded in the complaint. *See Scottsdale Ins. Co. v. MV Transp.*, 36 Cal.4th 643, 654 (2005); s*ee also Pension Tr. Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 951 (9th Cir. 2002) (explaining "remote facts buried within causes of action that may potentially give rise to coverage are sufficient to invoke the defense duty").

Even facts which are extrinsic to a complaint (e.g., facts in pre-suit communications, interrogatory responses, depositions, and expert reports) can trigger the duty to defend if known to the insurer. *See Montrose*, 36 Cal.4th at 296; *see also Am. Guarantee & Liab. Ins. Co. v. Vista Med. Supply,* 699 F.Supp. 787, 794 (N.D. Cal. 1988) (finding duty to defend premised on a declaration made by plaintiff in underlying action).

**B. Application to Business Litigation**

This broad "potential" for coverage standard is routinely applied by California's courts to hold liability insurers in breach of their duty to defend insureds in business litigation. *See, e.g.*, *CNA Cas. of Cal. v. Seaboard Sur. Co.*, 176 Cal. App.3d 598, 608 (1986) (finding factual allegations in support of uncovered "antitrust" cause of action implicated potential coverage for piracy, unfair competition and idea misappropriation); *Pension Tr. Fund*, 307 F.3d at 954 (concluding facts alleged in support of cause of action for "lender liability" could support a finding of coverage for breach of fiduciary duty); *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1268 (9th Cir. 2010) ("It does not matter that the NFL complaint . . . never listed slogan infringement as a cause of action."); *KM Strategic Mgmt. LLC v. Am. Cas. Co. of Reading PA*, 156 F.Supp.3d 1154, 1160–61 (C.D. Cal. 2015) (finding a "particular paragraph" in the underlying complaint created potential coverage for defamation despite the absence of causes of action for slander or libel).

Evaluating whether the duty to defend is triggered requires a liability insurer to conduct a rigorous investigation, filtering every factual allegation through the policy's myriad coverage grants to identify any potential for covered liability. It is not surprising, particularly in complex business litigation, that insurers often get it wrong.

When a wrongful denial goes unchallenged, the insurer incurs no penalty whatsoever—to the contrary, it profits. Meanwhile, the policyholder is left without the insurance protection it paid for, at times with devastating consequences.

**C. Statute of Limitations**

The limitation period for breach of the duty to defend is four years. *See* Cal. Code Civ. Proc. § 337. Recognizing the importance of the duty to defend, as well as its continuing nature, the California Supreme Court has held that this limitation period is subject to equitable tolling. *See Lambert v. Commonwealth Land Title Ins. Co.*, 53 Cal.3d 1072, 1079–80 (1991). Specifically, even though the action against the insurer accrues upon the refusal to defend, the limitation period is tolled until resolution of the underlying action. *Id*. at 1080.

This tolling rule has also been applied to a claim that the insurer's wrongful denial breached its implied covenant of good faith and fair dealing. *See McGranahan v. Ins. Corp. of N.Y.*, 544 F.Supp.2d 1052, 1063 (E.D. Cal. 2008) (finding "that the two-year statute of limitations for [the insured's] claim for bad faith and fair dealing was equitably tolled until entry of final judgment").

**D. Damages for Breach of the Duty to Defend**

The potential damages recoverable for breach of the duty to defend include the defense fees and costs incurred, "bad faith" damages, and punitive damages. While beyond the scope of this article, the insured may also be able to recover from its insurer the amount of any settlement it reached or judgment it paid.

**1. Defense Fees and Costs**

Where an insurer breaches its duty to defend, "the proper measure of damages is the reasonable attorneys' fees and costs incurred by the insured in defense of the claim." *Marie Y. v. Gen. Star Indem. Co*., 110 Cal.App.4th 928, 960–61 (2003).

An insured should also be able to recover prejudgment interest at the annual rate of 10% from the date of each invoice. *See* Cal. Civ. Code § 3289(b); *Tradewind Prods., Inc. v. Hartford Fire Ins. Co.*, No. 06-5201, 2009 WL 10710831, at *4 (C.D. Cal. Mar. 30, 2009) ("[P]laintiff is entitled to prejudgment interest from the dates it received invoices from

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its attorneys until defendants tendered payment.").

**2. Tort ("Bad Faith") Damages**

If bad faith is established, i.e., if the insurer's position is found to have been unreasonable, then in addition to its defense fees and costs, an insured may also be able to recover any "tort" damages it has suffered as a consequence of the insurer's breach. *See Campbell v. Superior Court*, 44 Cal.App.4th 1308, 1319–20 (1996). Such damages may include the attorney's fees the insured incurred compelling its insurer to pay the benefits due under the policy. *See Brandt v. Superior Court*, 37 Cal.3d 813, 817 (1985).

**3. Punitive Damages**

If it can be proven by clear and convincing evidence that the insurer, in denying a duty to defend, has been guilty of oppression, fraud, or malice, the insured may also be entitled to recover an award of punitive damages. *See* Cal. Civ. Code § 3294(a); *Tibbs v. Great Am. Ins. Co.*, 755 F.2d 1370, 1375 (9th Cir. 1985) ("[T]here is sufficient evidence to support a finding that Great American refused to defend Tibbs in bad faith and is guilty of oppression, fraud, or malice.").

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This article hopefully leaves business litigators with two key takeaways. First, in light of California's broad, policyholder-friendly "potential for coverage" standard, be skeptical of a liability insurer's assessment that it does not owe your client a duty to defend. And second, given the generous statute of limitations in California, your client may still have time—even long after the litigation has concluded—to challenge an insurer's wrongful refusal to defend and recover back the losses it incurred.

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***Navigating Post-Judgment Motions: A Guide Through The Thicket...continued from Page 7***

[moving] party and entitl[e] the party to a different judgment." (*Ibid*.)

A section 663 motion to vacate doesn't allow the court to reweigh the facts—it must be based on uncontroverted evidence. That means that if there's evidence on both sides and the argument is as to weight, the correct vehicle is a new trial motion, not a motion to vacate.

Motion to vacate procedures and deadlines track the new trial motion framework. The process begins with a notice of intent designating the grounds on which the motion will be made and specifying the particular claimed errors. (§ 663a.) The deadlines for the notice of intent, subsequent filings, and decision on the motion are the same as those in the new trial statutes. (*Ibid*; §§ 659a, 660.) And, as with a new trial motion, the court has no power to grant a motion to vacate once its deadline passes, nor can the court extend its time. (§ 663a; see, e.g., *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 476–477.) So, as with new trial and JNOV motions, parties should proactively ensure that their motion is decided before the deadline.

An order vacating a judgment under section 663 cannot simply vacate the judgment and set the matter at large—it must order entry of a specific new judgment. (*20th Century Ins. Co. v. Superior Court* (2001) 90 Cal.App.4th 1247, 1260.)

**Coordinating post-judgment motions with an appeal**

The interaction of post-judgment motions with appeals could fill an entire article itself. But here are a few salient points:

- A valid new trial, JNOV, or vacatur motion generally extends the time for all parties to appeal from the underlying judgment until after the motion is decided. The deadlines are detailed in California Rules of Court, rule 8.108.

- A new trial motion can proceed concurrently with an appeal from the judgment. But an appeal may divest the trial court of jurisdiction to decide a JNOV motion or a section 663 motion to vacate. (*Foggy v. Ralph F. Clark & Associates, Inc.* (1987) 192 Cal.App.3d 1204, 1211–1213 [creating split as to JNOV]; *Copley v. Copley* (1981) 126 Cal.App.3d 248, 298 [vacatur].) Accordingly, if pursuing JNOV or vacatur, it may be prudent to defer appealing from the judgment until after the motion is decided.

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*Unlocking the Mysteries of Appellate Writ Petitions...continued from Page 1*

This is not to say that the justices do not review writ petitions—they do, and conference together before deciding what action to take. It is also not to say that the justices always adopt the writ attorney's recommendation—they don't. But if your writ petition fails to meet the procedural requirements, the writ attorney will call it to the justices' attention, and you will have provided an easy, proper ground to deny the petition outright. The great bulk of the appellate workload is post-judgment appeals. Always remember that a writ petition is "a device . . . to 'cut into line' ahead of those [appellate] litigants." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273.) You have to justify cutting in line, and you better do it right.

***Common Law and Statutory Writs***

The first thing to know is the categories of writs over which the Court of Appeal has original jurisdiction. There are two: "common law writs" and "statutory writs." (Cal. Const., art. VI, § 10.) Common law writs are those that are available at common law to review certain trial court orders. For our purposes, the two major common law writs are the writ of mandate and the writ of prohibition.

The writ of mandate (Code of Civ. Proc., § 1085),[1] the most common, is used to correct an abuse of discretion by the trial court. (See *State Farm Mut. Auto. Ins. Co. v. Superior Court*, *In and For City and County of San Francisco* (1956) 47 Cal.2d 428, 432.) The writ of prohibition (§ 1102), by contrast, is used to prohibit the superior court from carrying out a threatened act that is in excess the court's power to act. (*Abelleira v. District Court of Appeal*, *Third Dist*. (1941) 17 Cal.2d 280, 287–291.) Over time, this distinction has blurred, and writ petitions frequently seek in the alternative the issuance of a writ of mandate or prohibition.

The designation "statutory writ" is not a separate type of writ per se. Rather, it describes writ review (usually by mandate) that is authorized by a specific statute for the specific type of ruling.

The distinction between common law and statutory writs is important, because the filing deadlines are much shorter for statutory writs, and certain statutory writs are the sole method of review for the particular ruling at issue. Thus, knowing the different filing deadlines, and the different types of rulings covered by common law and statutory writs, is essential.

***The Filing Deadline for Common Law Writs***

For common law writs, the court-created "60-day rule" applies: a writ petition may be dismissed as untimely if it is filed later than 60 days after service of notice of entry of the challenged order. The rule is discretionary: the doctrine of laches may justify denying a petition filed within the 60-day period, and a showing justifying the delay and the absence of prejudice to the other party may justify forgiving a violation of the 60-day rule. (See *Labor & Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12, 24.) The best practical advice, however, is don't rely on the 60-day rule. File your writ petition as early as reasonably possible.

***Typical Rulings Challenged by Common Law Writs***

Here is a non-exclusive list of superior court rulings subject to the 60-day rule for common law writs (usually mandate). Some cautionary notes are added.

- Discovery orders. (Caution: discovery orders are generally appropriate for writ review only if they direct the disclosure of privileged material or the issued involved is unsettled and writ relief can provide guidance. (*O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1439.))

- Monetary Sanctions of $5,000 or less. (§ 904.1, subd. (a)(11), (12).)

- Grant or Denial of Disqualification of Counsel. (*Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1263–1264.)

- Rulings on Pleading Motions (Demurrers, Motions for Judgment on the Pleadings, and Motions to Strike). (Caution: Rulings on pleading motions are rarely reviewable (*Curry v. Superior Court* (1993) 20 Cal.App.4th 180, 183, & fn. 4), unless the ruling: (1) involves an issue of great public interest (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1170); or, (2) is clearly erroneous and would necessitate a new trial if review were delayed for the appeal (see *Taylor v. Superior Court* (1979) 24 Cal.3d 890, 894; *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851 (*Babb*)).)

- Compelling Arbitration. (*Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 160–162.)

***Continued on Page 12***

[1] All further section citations are to the Code of Civil Procedure.

*Unlocking the Mysteries of Appellate Writ Petitions...continued from Page 11*

• Denying Writ of Attachment. (*San Diego Wholesale Credit Men's Assn. v. Superior Court* (1973) 35 Cal.App.3d 458, 462.)

• Denying Dismissal for Delay in Prosecution (§ 583.110 et seq.). (*Moran v. Superior Court* (1983) 35 Cal.3d 229, 236.)

• Denial of Priority (§ 36). (*Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 84–85.)

• Granting Relief from Government Tort Claims Act (Gov. Code, § 946.6). (*El Dorado Irrigation Dist. v. Superior Court* (1979) 98 Cal.App.3d 57, 58–59.)

• Grant or Denial of an Undertaking. (*Beaudreau v. Superior Court* (1975) 14 Cal.3d 448, 452.)

***Deadlines for Specific Statutory Writs***

Petitions for statutory writs must be filed within the specified statutory deadline following service of notice of "entry" of the challenged order, or sometimes service of notice of the "order." Regardless, beware that courts have interpreted notice of "entry" of the order to mean that the filing period commences not only by service of a formal notice of entry, but also by the clerk's mailing of a minute order. (*Eldridge v. Superior Court* (1989) 208 Cal.App.3d 1350, 1355; *Schmidt v. Superior Court* (1989) 207 Cal.App.3d 56, 60; *Sturm, Ruger & Co. v. Superior Court* (1985) 164 Cal.App.3d 579, 582.) It is critically important to calculate the filing deadline accurately. Unlike the 60-day rule for common law writs, the deadline for statutory writs is mandatory: the court cannot consider an untimely statutory writ petition.

The following is a non-exhaustive list of important statutory writs and filing deadlines.

• Denial of Summary Judgment/Summary Adjudication (§ 437c, subd. (m)(1)): 20 days after service of a written notice of entry of the order; can be extended by the trial court for 10 days on good cause, and also by the means of service. (*Ibid*.; § 1010.6, subd. (a)(3).)

• Grant or Denial of Motion to Expunge Lis Pendens (§ 405.39): 20 days after service of written notice of the order; can be extended by the trial court for an additional 10 days.

• Grant or Denial of Motion for Change of Venue (§ 400): 20 days after service of a written notice of the order; can be extended by the trial court up to 10 days for good cause.

• Denial of Motion to Quash Service / Denial of Motion to Dismiss or Stay Based on Inconvenient Forum (§ 418.10, subd. (c)): 10 days after service of a written notice of entry of the order, subject to a maximum additional 20-day extension by trial court order for good cause.

• Granting or Denial of Motion to Disqualify a Judge (§ 170.3, subd. (d)): 10 days after service of written notice of entry of the order; can be extended depending on the means of service. (§ 1013, subd. (a).)

• Granting Motion to Coordinate Actions (§ 404.6; Cal. Rules of Court, rule 3.505): 20 days after service of written notice of entry of the order; can be extended by the trial court for 10 days on good cause.

• Grant or Denial of Motion for Good Faith Settlement (§ 877.6): 20 days after service of written notice of the order; can be extended up to 10 days (§ 877.6, subd. (e)), as well as by the means of service. (§ 1013, subd. (a).)

***Parties to an Appellate Writ Proceeding***

Understanding the filing deadlines for writ petitions, let's examine the procedural requirements for initiating a writ proceeding. The procedure is the same for common law and statutory writs.

There are three parties to a writ proceeding. The first is the petitioner, usually the loser in the trial court (but it can be anyone with a beneficial interest in the case (see *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796)). The second is the respondent, the Superior Court of the State of California for the particular county in which the challenged ruling was made. The respondent court is a neutral party.

The third is the real party in interest, usually the party that prevailed in the superior court, but it can be anyone that has an interest that "will be directly affected by writ proceedings." (*Manfredi & Levine v. Superior Court* (1998) 66 Cal.App.4th 1128, 1132.) The real party in interest is the one who must respond to the petition if the appellate court requests a response.

***Commencing a Writ Proceeding***

A writ proceeding is commenced by the filing of a writ petition by the petitioner. The writ petition consists of the petition itself (which must be verified), a memorandum of points and

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*Unlocking the Mysteries of Appellate Writ Petitions...continued from Page 12*

authorities, and an adequate record in support of the petition.

Because writ review is extraordinary relief, the writ petition must establish the necessary justification. It should contain the factual allegations setting forth the relevant procedural and factual history; it should explain how the trial court erred; it should describe why there is no adequate remedy at law and why there will be imminent harm if writ review is not granted; and it should contain a prayer that specifies the relief desired (usually a request that the writ issue to set aside the challenged ruling).

***No Adequate Remedy at Law***

The requirement of no adequate remedy at law means, in substance, that an appeal is not an adequate remedy considering the consequences of the trial court's ruling. General policy considerations may make appeal inadequate based on the importance of the legal issue involved, including that the issue is of widespread importance and should be immediately resolved (*Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816 (*Brandt*); *Phelan v. Superior Court in and for the City and County of San Francisco* (1950) 35 Cal.2d 363, 370–372), that it presents a significant and novel constitutional question (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 851–852), or that it can resolve conflicting trial court interpretations of the law (*Greyhound Corp. v. Superior Court In and For Merced County* (1961) 56 Cal.2d 355, 378).

Also, case-specific circumstances may make an appeal inadequate to address the harm to this specific petitioner in this specific case, such as that the trial court's order is both clearly erroneous as a matter of law and substantially prejudices petitioner's case (*Babb*, *supra*, 3 Cal.3d at p. 851), that the trial court's order deprived petitioner of an opportunity to present a substantial portion of the petitioner's cause of action (*Brandt*, *supra*, 37 Cal.3d at p. 816; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807), or that obtaining a stay pending appeal will require the undue financial burden of posting a bond (*Rondos v. Superior Court, Solano County* (1957) 151 Cal.App.2d 190, 193).

***Irreparable Harm***

The element of irreparable harm frequently blends with a showing of the inadequacy of an appeal. That is, it involves a showing that the appeal cannot adequately correct the harm to the specific petitioner (e.g., the ruling would require the petitioner to undergo two trials). (*Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 324.)

***Memorandum of Points and Authorities***

The memorandum of points and authorities serves the same function as in other procedural contexts. It discusses the applicable law to demonstrate how the trial court erred and why writ relief is necessary. Significantly, the grounds asserted for relief in the petition must have been raised in the trial court; if not, they will generally be deemed forfeited. (See *Sayegh v. Superior Court of Los Angeles County* (1955) 44 Cal.2d 814, 815.) Also, the issue must be ripe (that is, must be of immediate necessity) and must not have become moot by the occurrence of later circumstances. (See *Gridley v. Gridley* (2008) 166 Cal. App.4th 1562, 1588.)

***The Necessary Record***

The most technical requirement of the writ petition, and the one with the most potential pitfalls, is the presentation of an adequate record. In support of the petition, the petitioner must present a record that includes the challenged ruling, all documents and exhibits presented to the trial court, any other trial court submissions necessary for a complete understanding of the issues, and a reporter's transcript of the hearing at which the challenged ruling was made. (See Cal. Rules of Court, rule 8.486(b)(1)(A)–(D).)

If required documents are not available, the petition "must include a declaration that explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance." (Cal. Rules of Court, rule 8.486(b)(2).) If a transcript is not available, "the record must include a declaration: [¶] (A) Explaining why the transcript is unavailable and fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling . . . or [¶] (B) Stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date before any action requested of the reviewing court other than issuance of a temporary stay supported by other parts of the record." (*Id.*, rule 8.486(b)(3)(A)–(B).) Further, there are specific requirements for the form in which the records must be submitted. (See *id.*, rules 8.486(c)(1)(A)–(C), 8.74 [electronic documents format].)

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*Unlocking the Mysteries of Appellate Writ Petitions...continued from Page 13*

Follow all the record requirements to the letter. The failure to provide an adequate record justifies a summary denial of the petition (Cal. Rules of Court, rule 8.486(b)(4)), as does the failure to comply with proper submission form after notice of noncompliance (*id.*, rule 8.486(c)(2)).

***Stay Request***

A writ petition does not stay the trial court's ruling. A stay must be requested by the petition. If a stay is requested, California Rules of Court, rule 8.486(a)(7) requires: "(A) The petition must explain the urgency. [¶] (B) The cover of the petition must prominently display the notice 'STAY REQUESTED' and identify the nature and date of the proceeding or act sought to be stayed. [¶] (C) The trial court and department involved and the name and telephone number of the trial judge whose order the request seeks to stay must appear either on the cover or at the beginning of the text."

As with the requirements for the record, follow these stay-request requirements to the letter, or the court may decline to consider the request. (Cal. Rules of Court, rule 8.486(a)(7).) As a practical matter, understand that evaluation of a stay request will require the writ attorney's and justices' immediate consideration. It will interrupt the work flow not only of post-judgment appeals, but also of other writs. One sure way to make a self-defeating, bad first impression is to request a stay where it is not urgent. Another is to hide the stay request or the nature and date of the proceeding to be stayed in the petition rather than displayed on the cover. And still another is to fail to identify the relevant court on the cover or immediately in the petition text. If you want your request timely considered, treat it like it is urgent enough to do right.

***Conclusion***

Writ practice is technical and full of traps for the unwary. But with consideration of the points highlighted in this article, you can better the chances of obtaining writ review of a challenged ruling, which is the first, and most difficult, step in ultimately obtaining writ relief.

For further guidance, refer to the following authorities.

***California Rules of Court***

Rule 8.486 Petitions for writs of mandate, certiorari, and prohibition in the Supreme Court and Court of Appeal

Rule 8.112 Petition for writ of supersedeas

***Secondary Authorities***

Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2025) ¶¶ 15, 15.1 et seq.

8 Witkin, Cal. Procedure. (6th ed. 2026), Ch. XII, Extraordinary Writs

***General Case Authority***

*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal. App.3d 1266, 1273–1274 [general requirements for granting writ petitions].

*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 [explanation of an alternative writ and issuance of writ in the first instance]

*Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233 ["suggestive" Palma notice]

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# YOUNG LAWYERS DIVISION UPDATE

*Sam Donohue*

*Andrew Figueras*

*Jay Ettinger*

During the second quarter of 2026, the Young Lawyers Division has continued to focus on planning engaging and practical programming for the remainder of the year, while creating opportunities for younger lawyers to connect with the judiciary and the broader legal community.

As part of that effort, the YLD is pleased to announce an upcoming CLE webinar, "Common Pitfalls in Legal Malpractice," to be held virtually on May 28, 2026, from 12:00–1:00 p.m. PST. The program will feature ABTL member Dylan Ruga of Stalwart Law, who will discuss how to identify and avoid common sources of legal malpractice liability. CLE credit will be available, and registration information will be circulated separately.

The YLD is also actively planning a series of social events and brown bag lunches, including opportunities to engage with members of the judiciary and to facilitate informal discussions on practice oriented topics relevant to younger lawyers. More details regarding these events will be shared in the coming months.

As always, we encourage YLD members to keep an eye on the ABTL Report and their email inboxes for updates on upcoming programming. Lawyers interested in helping plan or participate in YLD events please reach out to the YLD co-chairs Andrew Figueras and Sam Donohue, or YLD Vice Chair Jay Ettinger, about getting involved.

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