

The Judicial Interview: Judge Melissa R. McCormick, Orange County Superior Court

By Richard W. Krebs



[Editorial Note: Before her appointment to the Orange County Superior Court in 2015, Judge McCormick was a litigation partner in the Newport Beach office of Irell & Manella LLP from 2004 to 2015 and an associate there from 1997 to 2003. Before joining Irell & Manella, Judge McCormick served as a law clerk to Judge Emilio M. Garza of the United States Court of Appeals for the Fifth Circuit and to Chief Judge Judith N. Keep of the United States District Court for the Southern District of California. She received her law degree from the UCLA School of Law, where she was an editor of the UCLA Law Review, and her undergraduate degree from Stanford University with Honors and University Distinction. Judge McCormick is a Past President of ABTL-OC.]

Q: When the ABTL Report last interviewed you in 2017, you had a criminal docket. You've since transitioned to a civil docket. What have you found to be most interesting or challenging about that transition?

A: An unlimited civil assignment is a large umbrella that covers a whole range of legal areas. I had exten-

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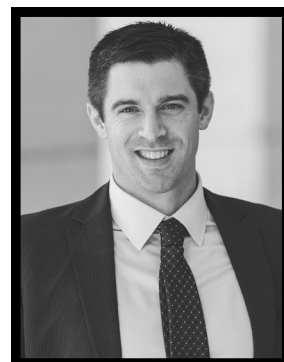
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A Novel Force Majeure Defense: Is Coronavirus an Act of God Preventing Performance of Contracts?

By William O. London, Darrell P. White, and Jonathan Gulsvig

In December of 2019, the first case of COVID-19, commonly referred to as the Coronavirus, was reported in Wuhan, China. *The Illness Now Has a Name, COVID-19*, <https://www.nytimes.com/2020/02/11/world/asia/coronavirus-china.html> (last visited, Feb. 12, 2020). The disease spread rapidly and by January 30, 2020, the World Health Organization (W.H.O.) declared COVID-19 a “public health emergency of international concern.” *2019 Novel Coronavirus (2019-nCoV) Situation Summary*, <https://www.cdc.gov/coronavirus/2019-nCoV/summary.html> (last visited, Feb. 12, 2020). In fact, COVID-19 made the news in Orange County when Costa Mesa obtained a temporary restraining order to block the placement of multiple infected persons at Fairview Health Facility. *‘Why here?’ Costa Mesa, OC officials question feds’ plan for coronavirus quarantine site*, <https://www.ocregister.com/2020/02/22/why-here-costa-mesa-oc-officials-question-feds-plan-for-coronavirus-quarantine-site/> (last visited, Feb. 24, 2020). Due to the W.H.O.’s recent declaration, the extensive preventative



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The President's Message

By Todd G. Friedland



ABTL-OC is the place to be for great networking, interacting with judges, and experiencing next-level programs. ABTL's mission is to "promote competence, ethics, professionalism, and civility in the legal profession and to encourage and facilitate communication between members of the Orange County bar and the County's federal and state judges on matters affecting business litigation and the civil justice system." I cannot think if any organization that does this better.

It is my privilege to serve as the 2020 ABTL-OC President. Our 2019 President, Karla Kraft, has left the organization fiscally sound and thinking about new initiatives to better the member experience. I have always admired Karla's dedication, skill and ability to make everything she touches better. And ABTL-OC is no exception. Karla, thanks for all of your hard work and for everything you have contributed to ABTL-OC over the years. I will do my best to continue these efforts and ensure that ABTL-OC remains one of the preeminent organizations in Orange County.

We've got a new website! Check out www.abtl.org. ABTL's new website has up to date information about our programs and access to the ABTL Report archives. You can also view program information from other chapters.

If you have not been to a dinner program in a while, you have missed a lot. In 2019 our programs included "Ready for Trial, Your Honor" with great feedback from Judge James Di Cesare, Judge John Gastelum, Judge Peter Wilson, and Judge Josephine Staton. The next program was "Business Crimes" presented by District Attorney Todd Spitzer, Deputy District Attorneys Kelly Ernby and Nick Miller, and Assistant USA Vib Mittal. In June, Justice Kathleen O'Leary sat down with California Supreme Court Chief Justice Tani Cantil-Sakauye and Associate Justice Carol Corrigan. This program will go down as one of my favorites, and not just because I saved Justice Corrigan from a spider that had dropped in from the ceiling. ABTL-OC also presented a program on

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ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl

ORANGE COUNTY

8502 E. Chapman Avenue, #443

Orange, CA 92869

Phone: 714.516.8106 Fax: 714.602.2505

E-mail: abtlloc@abtl.org

www.abtl.org

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The Trend Towards Preserving Jury Trials in California

By John Stephens and Tiffany Chukiat



Recently, California lawmakers have taken actions that depart from years of favoring arbitration clauses and forum selection clauses. The enforcement of arbitration and forum selection clauses has historically demonstrated California's deference to the principle of an individual's right to contract and its positive effects on commerce. Enforcing arbitration agreements also has

the benefit of easing California's over-burdened and under-staffed court system. Nevertheless, the California Legislature and courts are increasingly prioritizing its citizens' right to jury trials and swift justice over these other public policy interests. The following statutory and case law developments illustrate this trend:

- Senate Bill 707 ("SB 707"), which, in pertinent part, adds Code of Civil Procedure sections 1281.97, 1281.98, and 1281.99, mandating various sanctions against employers and business entities who do not pay arbitration fees within 30 days of their due date; and
- *Handoush v. Lease Finance Group, LLC* (2019) 41 Cal.App.5th 729, which found a forum selection clause that included a jury trial waiver to be unenforceable.



Under these authorities, while valid arbitration agreements and forum selection clauses are still favored, they will not be enforced if they are being manipulated or abused to deprive California residents of their fundamental, substantive rights.

SB 707:

In October 2019, Governor Gavin Newsom approved SB 707, which mandates various sanctions against parties who do not pay arbitration fees within 30 days of their due date. SB 707 demonstrates the California legislature's intolerance for drafting parties who deny adjudication of their opposing parties' claims by delaying payment of arbitration fees. The ultimate effect of SB 707 is to punish

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AB5: The Gig Economy Killer?

By Andrea W. S. Paris

Law firms, along with other California businesses, received a letter from the EDD in mid-December 2019 advising them that a new law, Assembly Bill 5 (AB5), which makes it more difficult to properly classify a worker as an independent contractor goes into effect on January 1, 2020. For many business owners and freelancers, it was the first time they had heard about this new ABC Test that threatens the way they have been doing business for years. Confusion, some hiring, lots of lost gigs, frustration, and backlash followed.



AB5 codifies and expands a new 3-part test for independent contractor classification (the ABC test) adopted by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* (2018) 4 Cal.5th 903 (*Dynamex*) beyond claims for wages and benefits under the wage orders to those for unemployment benefits and the Labor Code generally (with many, many exceptions). *Dynamex* held that anyone who performs services for a hirer is presumed to be an employee unless they meet the ABC test for independent contractors. To meet the ABC test, the hiring entity has the burden of establishing that the worker meets all of the following requirements: A) is free from the control and direction of the hiring entity in the performance of the work; B) performs work that is outside the usual course of the hiring entity's business; AND C) is customarily engaged in an independently established trade, occupation, or business.

The public policy behind the ABC test, as referenced in *Dynamex* and AB5's policy statement, is the concern that people who should be employees are missing out on the protections afforded to employees. These include wage and hour rules such as meal breaks, rest breaks, and overtime laws, as well as protections against discrimination that protect employees but not independent contractors. The other concern that is evidenced by AB5's intended effect of increasing the number of people who will be classified as employees is the recoup the billions of dollars in lost tax revenue. Businesses pay less taxes when they have less employees and independent contractors are able to take advantage of tax deductions that are unavailable to employees, hence the allure of many to self-

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sive experience with civil procedure, civil law and motion, civil trials, and other aspects of civil litigation from my years in private practice. Despite having had a civil litigation practice, however, the civil docket has presented statutes and legal issues with which I had little or no familiarity from my law practice. Confronting new areas of civil law has been the most interesting aspect of the move to the unlimited civil assignment.

Q: What skills did you develop as a commercial litigator that prepared you for being a judge?

A: The law firm at which I practiced placed a premium on clear, persuasive legal writing and the ability to quickly interpret complex, and at times voluminous, information. As a judge, much of what I learn about cases – certainly pretrial – comes from the parties' briefs. A civil assignment also requires a judge to communicate clearly through written orders. And when you practice law, you need to get along and communicate effectively with different people who have different styles and different goals, from clients to judges to opposing counsel. The same is true for a judge.

Q: What did you find most challenging about your transition from lawyer to judge?

A: The job of a lawyer is very different than the job of a judge. A lawyer's job is to zealously advocate for his or her client within the bounds of the law and ethics. A judge is not an advocate. A judge must to listen to all sides, impartially, and reach conclusions based on the law and facts. The transition from a lawyer's mindset to a judicial mindset, from advocate to neutral, can take some time. I read an article shortly after my appointment to the bench in which the author wrote that judges should work at thinking of themselves as people who used to be lawyers. That concept has stuck with me. Being a judge is not an extension of one's law practice. It is a completely new role.

Q: What is something you've learned as a judge that you wish you had known when you were litigating?

A: Listen to judges when they talk about their observations of juries. When I was in practice, I did not appreciate how much time trial judges spend observing juries. When I attended presentations or otherwise heard judges talk about their observations of, for

example, jury pools or jurors' reactions to particular types of cases or to certain arguments, I did not pay enough attention. When your job involves observing jury trials, you begin over months and years to see patterns and common reactions. So when lawyers go to presentations and judges talk about juries, the judges have much more insight than I gave them credit for when I was practicing law.

The same goes for when judges share their observations about trial practice generally, and what they or juries find persuasive (or not so persuasive). When you've observed dozens or even hundreds of trials, you really do come to observe patterns of presentations, styles, etc. that tend to be more successful than others.

Q: Can you think of something lawyers do that you find persuasive?

A: Lawyers who acknowledge and engage with the other side's best arguments are often very persuasive. I find it helpful and enhancing of a lawyer's credibility when he or she forthrightly identifies the other side's best arguments and explains why, in the lawyer's view, that argument should not succeed. Also, always be candid about the record, warts and all. A lawyer can and should explain why what might seem to be negatives in the record for his or her side should not doom the lawyer's case or argument. It is not helpful to ignore bad facts or pretend they're not there.

Q: What is something lawyers do that you find ineffective?

A: Not following the rules. The rules don't exist to torture lawyers. The rules exist to ensure due process for everyone involved. Not following applicable rules often delays a case or causes other inefficiencies that do not serve anyone's best interests or any lawyer's cause.

Also, lawyers should always answer a judge's questions directly. If I'm asking a lawyer a question, it's because I genuinely want to know the lawyer's perspective on the issue.

Q: Is less always more when it comes to persuasive legal writing?

A: Yes. A page limit is not a goal to be achieved with every filing. Many briefs are much too long and, as a result, end up burying or obscuring key

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concepts. Also, tell the court up front what specifically you are asking the court to do. It makes it more difficult for a court to rule in a party's favor if the relief being sought is unclear.

Q: What's the most rewarding part of your job?

A: One of the most rewarding aspects of working at the court is participating in a positive way in an important public institution.



♦ *Richard Krebs is a senior associate and member of the Complex Litigation and Dispute Resolution practice at Orrick Herrington & Sutcliffe LLP and is an Assistant Editor of the ABTL Report.*

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measures being taken to control and prevent further outbreak are uncertain as the virus continues to claim lives. These uncertainties illuminate the potential domino effect this, or any other, viral "outbreak" can have on international business. With China playing a significant role in the global supply chain, the trending question in business and legal fields is: *does the impact of Coronavirus trigger contractual force majeure clauses?*

WHAT IS FORCE MAJEURE?

Force majeure is a common clause in contracts addressing extreme events beyond the control of the contracting parties that prevents the impacted party from performing the contract. *Force Majeure*, https://www.law.cornell.edu/wex/force_majeure (last visited, Feb. 12, 2020). Elements of the common law force majeure defense are often read into the force majeure provision of a contract but due to the contractual nature of the clause there is variation in the definition of force majeure. *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F.Supp.2d 1099, 1110 (C.D. Cal. 2001). Generally speaking, the event must be unforeseeable, unavoidable, and not the result of the party's actions who is invoking force majeure. Force majeure events are commonly referred to as "an act of god," like natural disasters. Whether by common law or contractual provision, occurrence of the force majeure event, may excuse the impacted party from performance or liability. Practical Law Commercial

Transactions, *Force Majeure Clauses: Key Issues* (West Law, Practical Law).

DOES COVID-19 CONSTITUTE GROUNDS FOR EXERCISING FORCE MAJEURE?

Courts are reluctant to jump to conclusions based on the general definition of force majeure; instead, since it is contractual by nature the courts will look to the contract itself to interpret the clause. In the context of rare international medical emergencies like COVID-19, however, things get interesting because the interpretation turns on the precise wording of the force majeure clause. As such, force majeure clauses and the triggering events are analyzed on a case by case basis.

There are no reported California cases analyzing whether an outbreak of a disease falls within the common understanding of "an act of god" as it would likely be drafted in a standard force majeure clause. Standard contract interpretation principles would apply to the analysis, including narrow interpretation of the clause along with whether it is the kind of thing the parties intended to be included along with the unforeseeability of a potentially global outbreak.

Governmental or regulatory action becomes a closer call depending on the language in a given force majeure clause. In *Watson*, the district court took issue with the boilerplate force majeure language "referring to 'regulatory, governmental ... action'" involving the shutdown of a pharmaceutical plant and compared it to specific language used in a contract between Eastern Airlines and McDonnell Douglas contemplating specific governmental priorities or regulations for materials or equipment (among other things). *Watson Laboratories, Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F.Supp.2d 1099, 1113 (C.D. Cal. 2001). Many force majeure clauses look like the boilerplate in *Watson*, so it could be a closer call whether Chinese-imposed quarantines are tantamount to the governmental action contemplated in a standard contract.

It is important to note there is a significant burden on the party invoking force majeure. Courts are likely to require the invoking party to show that it is "[e]ffectively impossible to perform their contractual duties as a result of the outbreak." "In other words, a company is not excused from an obligation solely because it has become more costly or time-consuming..." Jan Wolfe, *Explainer: Companies consider force majeure as coronavirus spreads*, <https://www.reuters.com/article/us-china-health-legal>

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explainer/explainer-companies-consider-force-majeure-as-coronavirus-spreads-idUSKBN205059 (last visited, Feb. 13, 2020); See also *Butler v. Nepple*, (1960) 54 Cal.2d 589 (“[M]ere increase in expense does not excuse performance unless there exists extreme and unreasonable difficulty, expense, [or] injury.”). In fact, many force majeure clauses require the exercise of reasonable, mitigating efforts by the impacted party. This further complicates the analysis when the impacted party may be dealing with direct, human impact of the coronavirus along with governmental actions involving travel restrictions and quarantines of people and property.

Due to the unique nature of the COVID-19 outbreak, certain measures may have different resulting impacts on local Irvine companies working with Chinese companies across the Pacific rim. For instance, if China completely closed Factory A due to the COVID-19 outbreak (as has been widely reported to already occur), and could not manufacture a product for an indeterminate period of time, but did not have to completely close Factory B, the outcome of a force majeure case would likely result differently for each. A force majeure case invoked by an Irvine business with a manufacturing contract with Factory A *may* have a strong case against being held liable for its nonperformance to its customer or distributor. However, the court’s evaluation is likely to be fact intensive and the court may find differently. Some of the pertinent facts that the court will look into include: a) whether there is a force majeure clause in the contract; b) whether the parties listed an epidemic as a force majeure event; c) whether the COVID-19 outbreak constitutes an epidemic; and d) the degree to which the impacted party had control over the event. Practical Law Commercial Transactions, *Force Majeure Clauses: Key Issues* (West Law, Practical Law).

Can I Invoke Force Majeure?

In order to prevent uncertainty in situations where unforeseeable events occur, parties to a contract often include a force majeure clause, which is commonly considered a “boilerplate” clause. Furthermore, contracts containing this clause may include specific events that are covered and an allocation of risks upon the occurrence of the specified event, such as epidemics. Though explicitly provided for in the contract, a court may still inquire into the foreseeability of the event. Essentially, if parties have negotiated and provided a force majeure clause in the contract, the im-

acted party *can* invoke the clause.

If the parties did not include a force majeure clause, a party *can* still bring a case based on force majeure. Though it is important to note there is significantly more uncertainty as the foreseeability of the event will solely be in the hands of the court. Now, whether the invoking party may prevail upon that clause and not be held liable is extremely fact intensive.

RECENT INVOCATIONS OF FORCE MAJEURE?

As the death toll in China continues to rise, the impact of COVID-19 on Chinese businesses is becoming more prevalent. In China, force majeure clauses “are usually declared in the event of war, natural disaster, or intervention by state authorities.” Yu Sho Cho, *Virus-hit Chinese businesses seek relief with ‘act of God’ clause*, <https://asia.nikkei.com/Spotlight/Coronavirus/Virus-hit-Chinese-businesses-seek-relief-with-act-of-God-clause> (last visited, Feb. 13, 2020). According to recent reports, the China Council for the Promotion of International Trade (CCPIT) determined COVID-19 is a “triggering” event. *Id.* The CCPIT gave permission to certain Chinese businesses allowing them to provide *force majeure certificates* to certain struggling companies. Jan Wolfe, *Explainer: Companies consider force majeure as coronavirus spreads*, <https://www.reuters.com/article/us-china-health-legal-explainer/explainer-companies-consider-force-majeure-as-coronavirus-spreads-idUSKBN205059> (last visited, Feb. 13, 2020). One of the first companies to receive such a certificate is Huida Manufacturing (Huzhou) Co., which supplies steering-system car parts. *China Starts Giving ‘Force Majeure’ Slips to Virus-Hit Companies*, <https://www.bloomberg.com/news/articles/2020-02-11/china-starts-giving-force-majeure-slips-to-virus-hit-companies?fbclid=IwAR1UapEhXxnNIYr3qwcOTwXKy05dEo7SPyrZhOv-M2ySamkHiXa2dUkQJ1c> (last visited, Feb. 24, 2020).

In the United States, Apple Inc., is starting to feel some of the impact COVID-19 is having on one of its largest suppliers, Hon Hai Precision Industry, Co., which is also known as Foxconn Technology Group (“Foxconn”). *Apple supply chain threatened by coronavirus quarantines*, <https://www.latimes.com/business/technology/story/2020-02-07/apple-supply-chain-threatened-by-coronavirus-quarantines> (last vis-

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ited, Feb. 24, 2020). Though Foxconn is located early 490 km outside of Wuhan, it did not permit employees to return for a period of time after the Lunar New Year holiday. *Id.* Considering the upcoming release of new iPhone products, the demand for products, and the uncertainty with the COVID-19-related measures, Apple may experience some trouble after February. *Id.* As leaders in the medical field try to find a treatment for COVID-19, it is likely the reports of companies exercising force majeure will rise and extend throughout the global supply chain. The uncertainty surrounding COVID-19 itself requires fact intensive analysis, which is unique to each case. If you are facing a potential situation whereby you are considering invoking force majeure due to the impact of COVID-19 on your company, the next best step may be to seek the advice of an attorney.

♦ *William O. London. Bill London is a transactional partner at Kimura London & White LLP. Mr. London is fluent in Mandarin and specializes in cross-border disputes involving Chinese and American companies. He can be reached at (949)474-0940.*

♦ *Darrell P. White. Darrell White is a business litigation partner at Kimura London & White LLP and can be reached at dwhite@klw-law.com. He also serves as the ABTL Editor.*

♦ *Jonathan Gulsvig. Jonathan Gulsvig is General Counsel for Professional Plastics, Inc.*

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Looking to Contribute An Article?

**The ABTL Report is always looking
for articles geared toward
business trial lawyers.**

**If you are interested,
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Darrell White at dwhite@klw-law.com**

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Artificial Intelligence with UCI and several companies in the field. We looked in to a virtual courtroom, and saw discovery and an answer drafted in two minutes. In our final 2019 program four general counsel representing Facebook, Oracle, El Pollo Loco and Edwards Lifesciences shared what keeps them up at night. In 2020 we kicked off the year with a program entitled "Sargon the Gatekeeper" discussing issues surrounding expert testimony. Our March program focused on "Opening Statement Techniques from the Masters" and featured highly skilled trial lawyers Jennifer Keller and Bart Williams. The remainder of the year is certain deliver so mark your calendars for May 20, September 9 and November 4.

One of the keys to ABTL-OC's success is the continued involvement of our judiciary. Indeed, this issue you will find a list of ABTL's Judicial Advisory Council and also members of the judiciary sitting on the Board of Governors. These judges and justices help develop and deliver our programs, provide valuable insight on how to advocate for our clients in the courts, conduct meetings with our Young Lawyers Division, and attend our networking socials and programs. ABTL-OC owes each of these judges and justices, and those that have come before them and will come after them, a debt of gratitude for their involvement. Thank you for being there for our members.

Save the date now for ABTL's 47th Annual Seminar on October 7 through 11, 2020 at the Mauna Lani on the big island of Hawaii. The Annual Seminar packs in great networking and amazing programs in a stellar location. It will sell out so watch your emails for registration details coming soon.

This year we have several new members on the Board of Governors:

- Ashley Allyn is Of Counsel at Gibson Dunn & Crutcher practicing labor and employment litigation and a member of the firm's Hiring and Diversity Committees;
- Alejandro Ruiz is a partner at Payne & Fears where he focuses on employment and business litigation matters and has consistently been named a Southern California Rising Star by SuperLawyers;
- Jeff Singletary is a partner at Snell & Wilmer concentrating on business litigation and has been recognized as a Southern California Rising Star by

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SuperLawyers and has served as Board Chair for the Mariposa Women & Family Center;

- Justin Owens is a shareholder in Stradling's business litigation, securities litigation and white collar defense practice groups. Although he has been named a Southern California Rising Star, his true claim to fame was as the multi-year editor of the ABTL Report; and

- Vikki Vander Woude is a partner at Umberg Zipser emphasizing litigation and alternative dispute resolution. Her previous experience includes serving as a Senior Research Attorney in the OCSC complex division.

Of course, ABTL-OC doesn't run itself. It takes countless hours by dedicated volunteers with the guidance and support of the best Executive Director in the business — Linda Sampson. Helping Linda and I this year are the following board members who have stepped up to make ABTL run smoothly: Ken Parker, Programs; Charity Gilbreth and Adam Karr, Annual Seminar; Andrew Gray and Michael McClellan, Membership; Josh Stowell and Peter Villar, Public Service; Ric Fukushima, Sayuri Espinosa and Lauren Blaes, Young Lawyers Division. Darrell White is now the editor of the ABTL Report and will be assisted by Tiffany Chukiat and Richard Krebs. Finally, I look forward to working with our excellent Executive Committee. Joining me are Maria Stearns as Vice President, Matthew Sonne as Treasurer and William O'Neill as Secretary.

We are excited to announce and thank the wonderful organizations that are sponsoring ABTL-OC's 2020 dinner programs. VWM Analytics is our dinner sponsor for each of our five 2020 dinner programs. Our wine sponsors are Signature Resolution (January), Judicate West (March), JAMS (May), JAMS (September) and Judicate West (November).

Thanks for your continued support of ABTL-OC. I look forward to seeing you at our 2020 events.

♦*Todd G. Friedland is a founding partner at the law firm of Stephens Friedland LLP*

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drafting parties through a waiver of the right to arbitration, monetary sanctions, evidentiary sanctions, terminating sanctions, and/or contempt sanctions.

Reasons for Allowing Non-Breaching Party to Bring Claims in Court.

Businesses who impose arbitration provisions on their employees and consumers too frequently abuse their financial leverage by willfully delaying payment of arbitration fees to stall arbitration proceedings. This tactic renders claimants unable to pursue or obtain relief swiftly. SB 707 deems the drafting party's delayed payment a breach of the arbitration agreement and allows claimants to proceed with their claims in civil court.

SB 707 provides the Legislature's reasoning for allowing the non-breaching party to bring its claims in court as a sanction against the breaching party: "It is the intent of the Legislature in enacting this measure to affirm the decisions in *Armendariz v. Foundation Health Psychcare Services, Inc.*, *Brown v. Dillard's, Inc.*, and *Sink v. Aden Enterprises, Inc.* that a company's failure to pay arbitration fees pursuant to a mandatory arbitration provision constitutes a breach of the arbitration agreement and allows the non-breaching party to bring a claim in court." SB 707, Section 1(f). Additionally, "[a] company's failure to pay the fees of an arbitration service provider . . . hinders the efficient resolution of disputes and contravenes public policy." SB 707, Section 1(c). (Emphasis added.) Further, "[a] company's strategic non-payment of fees and costs severely prejudices the ability of employees or consumers to vindicate their rights. *This practice is particularly problematic and unfair when the party failing or refusing to pay those fees and costs is the party that imposed the obligation to arbitrate disputes.*"

Statutes Added by SB 707.

SB 707 adds Code of Civil Procedure sections 1281.97, 1281.98, and 1281.99. Sections 1281.97 and 1281.98 provide that any drafting party that fails to pay the fees necessary to commence or continue arbitration *within 30 days after such fees are due* is held to have materially breached the agreement. Section 1281.99 sets forth sanctions that must be ordered against the drafting party if the action ends up in court due its breach.

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Sanctions for Drafting Party's Failure to Timely Pay Arbitration Fees.

If a drafting party fails to timely pay certain fees and costs before the arbitration can proceed, the employee or consumer may:

- 1) withdraw the claim from arbitration and proceed in court; or
- 2) compel an arbitration in which the drafting party shall pay reasonable attorney's fees and costs related to the arbitration. CCP § 1281.97(b).

If a drafting party fails to timely pay certain fees and costs *during the pendency* of the arbitration, the employee or consumer may:

- 1) withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction;
- 2) continue the arbitration proceeding if the arbitration company agrees to continue administering the proceeding;
- 3) petition the court for an order compelling the drafting party to pay all arbitration fees that the drafting party is obligated to pay; or
- 4) pay the drafting party's fees and, as part of the arbitration award, recover all arbitration fees paid on behalf of the drafting party without regard to any findings on the merits in the underlying arbitration. CCP § 1281.98(b).

If the employee or consumer proceeds with the action in court under Section 1281.98, the employee or consumer may bring a motion, or a separate action, to recover all attorney's fees and all costs associated with the abandoned arbitration proceeding. The court must impose monetary sanctions of the drafting party, and it may impose evidence, terminating, and/or contempt sanctions as well. CCP § 1281.98(c).

Further, if the employee or consumer continues in arbitration under Section 1281.98, the arbitrator shall impose appropriate sanctions on the drafting party, including monetary sanctions, issue sanctions, evidence sanctions, or terminating sanctions. CCP § 1281.98(d).

Section 1281.99 sets forth sanctions a court must order for a drafting party's breach under Sections 1281.97 and 1281.98. The court must order the drafting party to pay the reasonable expenses, including attorney's fees and costs, incurred by the employee or consumer

as a result of the material breach. CCP § 1281.99(a). Additionally, the court may order evidence, terminating, and/or contempt sanctions. CCP § 1281.99(b).

Although the purpose of SB 707 is to deter certain bad behavior by parties who draft and impose employment and/or consumer arbitration agreements, the collateral effect of SB 707 is to preserve employees' and consumers' right to jury trials by allowing claimants to proceed in court despite an otherwise valid arbitration agreement.

Handoush v. Lease (2019) 41 Cal.App.5th 729

The court in *Handoush* held that a forum selection clause containing a jury trial waiver is unenforceable because it substantially diminishes the rights of California residents in a way that violates public policy. In so concluding, the *Handoush* court analyzed 1) the burden-shifting requirements on the parties when one party contests a forum selection clause; 2) the burden of proof for a party seeking to enforce the forum selection clause; and 3) whether a right to a jury trial is a substantive or procedural right.

In *Handoush*, the plaintiff lessee of certain commercial equipment filed a complaint for fraud, rescission, and injunctive relief against the defendant Lease Finance Group, Inc. ("LFG"), the assignee of the original lessor. The lease contained a forum selection clause, selecting New York as the forum with any dispute to be governed by New York law; it also included a jury trial waiver. *Handoush, supra*, 1 Cal.App.5th at 732.

LFG moved to dismiss *Handoush's* complaint based upon the lease agreement's forum selection clause. The trial court granted LFG's motion, finding that *Handoush* did not meet his heavy burden to demonstrate that the forum selection clause, including the jury trial waiver, was unreasonable. The trial court also rejected *Handoush's* argument that the burden shifts to LFG to demonstrate that the forum selection clause will not diminish his substantive rights under California law, finding 1) that such burden shifting only applies where a plaintiff's claim involves unwaivable rights created by California statutes and 2) that "the right to trial by jury is not unwaivable" under Code of Civil Procedure section 631. *Id.* at 733.

The *Handoush* court reversed the trial court's order with instructions to enter a new order denying LFG's motion to dismiss. In doing so, the *Handoush* court recognized that "California favors contractual forum selection clauses so long as they are entered into freely

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and voluntarily, and their enforcement would not be unreasonable” unless such enforcement would “substantially diminish the rights of California residents in a way that violates our state’s public policy [citation omitted].” *Id.* at 734.

Burden Shifting.

The *Handoush* court recognized that the party opposing enforcement of a forum selection clause ordinarily bears the burden of proving why it should not be enforced. However, that burden is “reversed when the claims at issue are based on unwaivable rights created by California statutes [in which case] the party seeking to enforce the forum selection clause bears the burden to show litigating the claims in the contractually designated forum ‘will not diminish in any way the substantive rights afforded ... under California law. [Citations omitted.]” (Emphasis added.) *Id.* at 734.

The *Handoush* court held that a demand for jury trial is unwaivable in predispute contracts under California law. *Id.* at 736. “Our high court held that the waiver methods specified in [Section 631] apply only *after* a lawsuit has been filed. [Citations omitted.] Section 631 does not authorize predispute waivers . . . therefore, the court may not enforce such waivers.” (Emphasis added.) *Id.*

Even though the claims asserted in *Handoush*’s complaint (fraud and other equitable claims) were not statutory claims, the *Handoush* court found that “enforcing the forum selection clause would be contrary to California’s fundamental public policy protecting the jury trial right and prohibiting courts from enforcing predispute jury trial waivers.” *Id.* at 734 – 735. Accordingly, “the [trial] court erred in failing to place the burden on LFG to prove litigating in New York will not result in a diminution of his substantive rights under California law.” *Id.*

Right to Jury Trial: Substantive or Procedural Right?

“While California law holds predispute jury trial waivers are unenforceable, it is undisputed that under New York law there is no similar prohibition. [Citations omitted.]” *Id.* at 737.

The *Handoush* court next analyzed whether the right to a jury trial was a substantive or procedural right and concluded that it is substantive, relying on *In re County of Orange* (9th Cir. 2015) 784 F.3d 520, 527:

A substantive rule is one that creates rights or obligations, or ‘is bound up with [state-created] rights and obligations in such a way that its application in the federal court is required.’ [Citation.] A procedural rule, by contrast, defines ‘a form and mode of enforcing’ the substantive right or obligation. [Citation.].

Under *County of Orange*, “California’s rule on predispute jury trial waivers embodies the state’s substantive interest in preserving the ‘right to a jury trial in the strongest possible terms’ [citation], an interest the California Constitution zealously guards, *see* Cal. Const. art. I, § 16” *Id.* at 529–531.

In short, the *Handoush* court held 1) the trial court erred in enforcing a New York forum selection clause that included a predispute jury trial waiver; and 2) enforcing the forum selection clause would substantially diminish the rights of California residents contrary to California’s public policy. Thus, *Handoush* precludes enforcement of a forum selection clauses when such clause that includes a jury trial waiver.

...

SB 707 and *Handoush* have the simultaneous effects of upholding California’s deference to an individual’s right to freely contract while deterring the drafting parties from abusing contract terms to deprive California residents of their fundamental rights to speedy justice in an appropriate forum. These two examples signal a trend of protecting Californian’s substantive rights when they are threatened by delay tactics or predispute jury trial waivers.

♦ *John Stephens is a partner at Stephens Friedland LLP.*

♦ *Tiffany Chukiat is an associate at Stephens Friedland LLP and is an assistant editor of the ABTL Report.*

employment. However, the legislature may have underestimated businesses’ willingness to end contracts with freelancers rather than converting them to employees, resulting in people losing their livelihoods altogether instead of gaining the benefits of employment.

As of the writing of this article at the end of February 2020, AB5 is under intense fire. The attacks range from efforts for small amendments to the law to

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seeking to repeal it entirely. App-based businesses like Uber and Lyft gathered enough signatures to include an initiative in the November ballot to exempt their industry from AB5's independent contractor test. "In all, 34 separate pieces of legislation related to AB 5 were introduced in the Legislature in the last seven weeks." ("A flood of proposed changes to California's AB 5 awaits state lawmakers," Los Angeles Times, February 28, 2020, <https://www.latimes.com/california/story/2020-02-28/proposals-change-ab5-independent-contractors-labor-law-california> (accessed 2/29/20).)

The legislature undoubtedly anticipated the backlash as evidenced by the explicit contingency written into the law in the event the law is invalidated. The new Section 2750.3 that AB5 added to the Labor Code states that "[i]f a court of law rules that the three-part test in paragraph (1) cannot be applied to a particular context based on grounds other than an express exception to employment status as provided under paragraph (2), then the determination of employee or independent contractor status in that context shall instead be governed by the California Supreme Court's decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*).

Why Should Business Trial Lawyers Care?

As advocates for business clients we are also their advisors. The new Rules of Professional Conduct Rule 2.1 provides that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Comment 1 to the rule clarifies that although "[a] lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest." Due to the high cost of misclassifying workers, if during the course of litigation, we learn that a client's business utilizes a workforce consisting largely of independent contractors, we may have a duty to advise them to discuss independent contractor classification with employment counsel.

The Costs of Misclassification

Many people are surprised to learn that it is a misdemeanor to willfully misclassify employees as independent contractors. Additionally, it exposes both the hirer and worker to unpaid taxes and penalties. An employer bears the responsibility of paying social se-

curity and payroll taxes, unemployment insurance taxes and state employment taxes, providing workers compensation insurance, and of course, complying with the endless labyrinth of state and federal statutes that govern wages, hours and working conditions of employees. The misclassified independent contractor may have underpaid taxes as well.

Additionally, hiring entities invariably treat workers classified as independent contractors differently than they would their employees. This means that they may have inadvertently violated wage and hour laws such as the duty to provide meal breaks with rest breaks, paying overtime, paying for sick leave, reimbursing expenses, providing compliant pay stubs, or the payment of all wages at the time of "termination." These claims could be brought individually, as a class claim, or as a representative action like a Private Attorney General Act ("PAGA") claim.

The other exposure of misclassification is the potential violations of other employment laws such as the Equal Pay Act and the Fair Employment and Housing Act. For example, companies are unlikely to engage in the interactive process with an independent contractor who becomes disabled and would terminate the contract with an "independent contractor" who becomes injured or disabled without second thought.

Additionally, Labor Code Sections 226.8 and 2753 provides for penalties of between \$5,000 and \$15,000 per violation for willful misclassifications. Lastly, Labor Code Section 2753 creates joint and several liability for an individual who is paid, and who knowingly advises on the misclassification of an employee as an independent contractor. Although attorneys and persons who provide advice to their employers, such as Human Resources Managers, are exempt from individual liability, CPAs are undoubtedly worried about this potential liability.

The *Borello* Test

Borello provides a multi-factor test for independent contractor classification, and has been the standard test since its publication and remains the default independent contractor test for the many professions that are exempt from AB5. Thus, any discussion of independent contractor classification must include an understanding of the *Borello* test, which is here to stay regardless of AB5's ultimate fate.

Unlike the elemental ABC test, the *Borello* test is multi-factor and failure to meet many of the factors

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could still leave room for argument that the worker is an independent contractor. The first, and most heavily weighted, factor of the *Borello* test is whether the hiring entity has the right to control and whether the worker has discretion as to the manner the work is performed. If the hiring entity lack control over how the work is performed, whether it is because of the simplicity of the work or because of the worker's superior expertise such that the worker did not require supervision. Assuming there is no control, courts and the DLSE, commonly referred to as the Labor Commissioner, will look at the following factors to determine the proper classification: a) whether the worker is customarily engaged in an independently established business; b) whether the independent contractor status is bona fide and not a subterfuge to avoid employee status; c) whether there is a substantial investment other than personal services in the business; d) whether the worker holds himself/herself out as being in business for oneself; e) whether there is a bargained for contract to complete a specific project for compensation by project rather than by time; f) whether the worker has control over the time and place the work is performed; g) whether the worker supplies tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees; h) whether the purported independent contractor hires employees; i) whether the worker performs work that is not ordinarily in the course of the principal's work; j) whether they performing work that requires a particular skill; or k) whether the worker holds a license pursuant to the Business & Professions Code.

AB5's Exemptions

Dynamex adopted what appeared to be the "simpler" and "clearer" 3-part independent contractor test that tracks Massachusetts' version of the ABC test. I anticipate that courts will look to Massachusetts' interpretation of the nuances of the ABC test as we move forward with litigation in this area. Whereas *Dynamex* limited the ABC analysis to the wage orders that govern wage and hour rules by industry and profession, AB5 expanded the ABC test to the definition of employees for purposes of unemployment insurance and protections under the Labor Code generally. However, the new Labor Code Section 2750.3 provides for so many exemptions from the ABC test that any independent contractor analysis should start with an understanding of the exemptions. Those who are exempt from the ABC test, or who could make small

changes in order to meet the exemption, are not automatically considered independent contractors. They must still be analyzed under the *Borello* test.

Some of the occupations that will be analyzed under the old *Borello* test, include but are not limited to:

1. certain licensed health care professionals (physician and surgeon, dentist, podiatrist, psychologist, veterinarian);
2. Licensed attorney, architect, engineer, private investigator, or accountant;
3. Registered securities broker-dealers or investment advisers;
4. Direct sales salespersons (if they meet certain criteria);
5. Real estate licensees;
6. Workers providing licensed barber or cosmetology services if they meet specific requirements;
7. Others performing work under a contract for professional services such as marketing (if certain requirements are met); administrator of human resources (if certain requirements are met); graphic designer; enrolled agent licensed by the US Department of Treasury; payment processing agent through an independent sales organization; photographer or photojournalist who doesn't license to a putative employer more than 35 times a year; another business entity (if certain very specific requirements are met, one of which is the requirement of a written agreement); or pursuant to a subcontract in the construction industry (if certain requirements are met). In January 2020, Assembly member Lorena Gonzalez, who introduced AB5, introduced AB1850, which would take away the 35 times a year limit to providing services by photographers and writers if certain other new requirements are met. Whether this bill will pass is yet to be seen.

The ABC Test

Should the worker fail to fall under one of the exempt categories provided by Section 2750.3, he/she must pass the ABC test in order to be properly classified as an independent contractor.

- *Prong A - Control*

When analyzing whether a worker is free from the

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control and direction of the hiring entity, the essential question to ask is whether the hiring entity exercises the type and the degree of control that is typically exercised over employees. This type of control will usually be over how people work, procedures workers must adhere to in performing the work, reporting requirements, and training requirements for example.

An example of a working relationship that failed the freedom from control test provided by the *Dynamex* court was a children's wear company that gave their designs, pattern, and yarn to work-at-home knitters and sewers who worked on their own machines, and on their own schedules, but were found to lack freedom from control because they could not decide whether to knit or crochet the product they delivered to the clothing company, which provided the patterns to the knitters, thereby dictating how the product would be knitted.

An example where the court found that the workers were free from the control of the hiring entity was a worker who specialized in historic reconstruction for a construction company who set his own schedule, worked without supervision, purchased his own materials, used his own business cards, and declined the company's offer of employment because he wanted to control his own activities.

- *Prong "B" – Work is Outside the Usual Course and Scope of Business*

This is the prong that trips up most of the independent contractor analysis. Under the ABC test, in order to be an independent contractor, the worker must meet this test in addition to not being subject to the control of the hiring entity. At the heart of this prong is the premise that "individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor" is an employee. *Dynamex*, supra, at 959.

An example that the *Dynamex* court used to demonstrate a worker who meets prong B of the test are plumbers and electricians who service a supermarket, a relationship that would traditionally be viewed as genuine independent contractors. However, a plumber who works for a plumbing company would be providing services within the business's usual course and scope of business and would fail

prong B. This is an obvious example that is not particularly helpful to those grappling with the analysis.

Law firms that use contract lawyers, contract paralegals, or virtual assistants would struggle with this prong if these individuals fail to meet the requirements of one of the exemptions.

- *Prong C - Engaged in an Independent Business*

Prong C asks whether the worker is customarily engaged in an independently established trade, occupation or business. Steps taken to establish and promote his or her own business are indicia of an independent business or trade. For example, incorporating; being licensed; advertising; routinely offering to provide services to the public or to a number of potential customers; and having an opportunity to profit or sustain losses from working with the hiring entity.

It should be noted that the court in *Dynamex* specifically stated that because a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself. Business owners attempting to establish that someone is an independent contractor often cite to the fact that the worker has a full-time job, usually doing something different from what they do for the company. This will not satisfy prong "C."

Advising Clients about AB5

Although AB5's fate is uncertain, failure to comply subjects your clients to significant exposure while they wait for the various challenges to make their way through the courts, the legislature, and to the voters at the end of the year. In the meantime, efforts to enforce AB5 continues and companies are expected to pay unemployment and disability insurance for many more people who used to be properly classified as independent contractors. This is the perfect time for business to make a list of their independent contractors and determine whether they are exempt from the ABC test. If they are, whether they are independent contractors under the *Borello* test. If they are not, whether they could meet all 3 parts of the ABC test. Lastly, clients should consult employment counsel to assist in the analysis and the conversion of independent contractors to employees if necessary.

♦ *Andrea W. S. Paris is an employment and business litigation attorney at Andrea Paris Law, PC with an emphasis on representing small to medium-sized businesses and can be reached at ap@andreaparislaw.com.*

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