

## President's Message

By Todd G. Friedland



In the Winter edition I commented that ABTL-OC is the place to be for great networking, interacting with judges, and experiencing next-level programs. I looked forward to seeing you all at our events, raising money for Public Law Center, and putting on some great programs. Then, right after our last in-person program on "Opening Statement

Techniques from the Masters," COVID-19 reared its ugly head.

Everything shut down as you know. Toilet paper became a commodity traded on the markets. Traffic disappeared. A new face-mask industry was born. Restaurants were allowed to sell alcohol to go – its about time! New phrases entered our vernacular: "social distancing," "safer at home," "quarantini" (yes, I know, two alcohol references in the same paragraph), "six feet please," "distance

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## The California Consumer Privacy Act's Private Right of Action—A Litigator's Guide to Upcoming Battles

By Stephen Tensmeyer

Data privacy is a big deal—even during a global pandemic. In April, the Small Business Administration revealed a potential data breach affecting thousands of small businesses who had applied for loans under the Coronavirus Aid, Relief, and Economic Security Act. *See ABC News, SBA Reports Data Breach in Disaster Loan Application Website*, Apr. 21, 2020.

The same month, privacy advocates raised questions about a joint effort between Google and Apple to use location-tracking software to warn those who may have been exposed to COVID-19. *See CNN, Apple and Google are Working Together to Help Track the Coronavirus*, Apr. 10, 2020. And in late February, as officials in Seattle struggled to understand the extent of the outbreak, the Centers for Disease Control ordered one lab to stop testing because the patients had given permission to test their samples only for influenza—not for coronavirus. *New York Times, 'It's Just Everywhere Already': How Delays in Testing Set Back the U.S. Coronavirus Response*, Mar. 10, 2020.



Even with so much else on their minds, Americans are still thinking deeply about the trade-off between important social goals and the security of their personal information. The California Consumer Privacy Act of 2018, which took effect on January 1, 2020, is the first comprehensive data-protection statute in the country. It reflects an effort to strike a balance between privacy and convenience that may become a model for the nation.

The long gap between enactment and enforcement—approximately a year and a half—was largely a result of

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## Lawyers Beware: The *Masellis* Court Put an End to the “Legal Certainty” Burden in Settle and Sue Legal Malpractice Cases

By Mark B. Wilson



For years, attorneys have been practically immune from legal malpractice actions arising from an underlying case that settled (*e.g.*, a claim by an unhappy client that says the case settled for too little money). That’s because plaintiffs (*i.e.*, former clients) in such “settle and sue” legal malpractice cases have been required to prove their case to a “legal certainty,”

an undefined burden of proof that has no corresponding Judicial Council of California Civil Jury Instruction (CACI). Many legal malpractice attorneys simply won’t touch these claims, fearing there is no way to win them.

All this changed when the Court of Appeal, Fifth District published *Masellis v. Law Office of Leslie F. Jensen*, 2020 WL 3406336 on June 19, 2020, which held, “[f]or ‘settle and sue’ legal malpractice actions, we conclude the applicable burden of proof is a preponderance of the evidence.” If the California Supreme Court does not reverse *Masellis*, then lawyers face a potential wave of new claims.

### What Do the Applicable CACIs Say?

The *fundamental* CACI for legal malpractice says,

“To recover damages from [name of defendant], [name of plaintiff] must prove that [he/she/it] would have obtained a better result if [name of defendant] had acted as a reasonably careful attorney. [Name of plaintiff] was not harmed by [name of defendant]’s conduct if the same harm would have occurred anyway without that conduct.” CACI 601.

There are two CACIs addressing a plaintiff’s burden of proof in civil cases: CACI 200 (the “more likely than not true” instruction); and CACI 201 (the “clear and convincing proof” instruction). *Evidence Code* sections 115 and 502 provide the three potential burdens of proof in California (*i.e.*, the two just men-

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## On the Docket: A Case for Diversity in the Courtroom

By Warrington S. Parker, Khai LeQuang, Krystal Anderson, and Lynda K. Bui



Recent events in our country have caused people of all walks of life to take a closer look at issues of race and diversity. It is the right thing to do.

Yet, when it comes to the courtroom and trials, diversity is not merely the right and just thing to do. If fairness and legal precedent prohibiting discrimination

are not motive enough, there is a more practical reason for it: Our clients are better served by diversity in the courtroom.

### Diverse Juries Make Better Decisions



Every trial lawyer knows jury composition matters. Jury consultants make a living on their professed ability to identify the “right” juror and the “right” mix of attributes for the jury as a whole.

But since the day this country moved away from all male, white jurors, race and gender

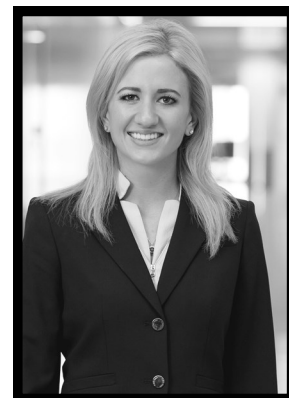
have often been considered in deciding whether a juror is “not right.” While one can argue that, over time, these attributes have become less decisive, the fact remains that lawyers and consultants (consciously or subconsciously) strike women and persons of color from juries because they are women or persons of color. Indeed, verdicts are still being reversed for this reason. *See Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

Yet, as is so often true when someone makes decisions based on negative assumptions about race or gender, striking persons of color and women from a jury usually does not serve a client. It more often than not works against the client’s best interest.

Studies show that diverse juries make better decisions. Diverse juries deliberate longer, discuss a wider range of facts, and make fewer factual errors than non-diverse juries. For example, one study found that the presence of black jurors caused white jurors to engage in more thorough deliberations as opposed to hasty, bias-driven deliberations. *See Samuel R. Sommers,*

*On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCH. 597 (2006). The study consisted of 29 mock juries who watched a video trial, in which a defendant of color faced charges of sexual assault, and were asked to make a decision. The study showed that panels of white and black jurors deliberated longer, discussed more facts, made fewer mistakes about the facts, made fewer uncorrected inaccurate statements, identified more “missing” evidence, and mentioned racism more frequently while they objected to the topic less frequently. *Id.*; *see also* Joshua Wilkenfeld, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 COLUM. L. REV. 2291, 2307-08 (2004); *cf. Ballard v. U.S.*, 329 U.S. 187, 193-94 (1946) (“[A] distinct quality is lost if either sex is excluded.”); *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (“When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience . . .”).

Not only do longstanding studies suggest that a diverse jury is important, they demonstrate that the more diverse the jury is, the better. In other words, having a small number of a minority race on a jury may not give you the “diversity effect” you want because small numbers or a number of one can be muted. As the minority presence within a group becomes less marginal, however, minority members became more extroverted and take on more leadership roles within the group. Wilkenfeld, *supra*, 104 COLUM. L. REV. at 2312 (citing Ji Li et al., *The Effects of Proportional Representation on Intragroup Behavior in Mixed-Race Decision-Making Groups*, 30 SMALL GROUP RES. 259, 265



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## Potential Perils and Pitfalls of Construction Indemnification

By David Grant



Freedom of contract is broad. Parties have many options when divvying up rights and duties pursuant to a written contract. Remedies can be limited; damages can be liquidated. One option is an indemnity provision. Everyone knows what that entails, right?

Indemnity is a contractual obligation of one party to compensate the loss occurred to the other party (the “Indemnatee”) due to the act of the indemnifying party (the “Indemnitor”) or any third party. The parties can agree to indemnify each other for third-party claims arising out of the transaction. But that is far from the end of the matter. The issue is more nuanced and fraught with potential peril. (A court may also impose an indemnity obligation based on equitable principles, but that is outside the scope of this article which identifies potential consequences and pitfalls of contractual indemnification.)

### I. Be Aware of Direct Indemnity

When most people think of indemnity, they think of it in the traditional sense: one party indemnifying the other party on a third-party claim. *See, e.g., Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 555, 21 Cal. Rptr. 3d 322 (2004). A typical example is an insurance contract, whereby one party (the insurer or the indemnitor) agrees to compensate the other (the insured or the indemnitee) for any damages or losses, in return for premiums paid by the insured to the insurer.

But indemnity can mean so much more and occur in virtually any commercial contract. Civil Code section 2772 defines indemnity as “a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.” Where indicated by the express terms of the contract, indemnity can mean direct indemnity (i.e., claims between the two parties), turning any action between the parties into a potential claim for indemnity. *See, e.g., Zalkind v. Ceradyne, Inc.*, 194 Cal. App. 4th 1010, 1025, 124 Cal. Rptr. 3d 105 (2011). Where it is not explicitly stated whether “indemnity” means

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learning” (don’t get me started on that one), “self-isolating,” “covidiot,” and “zoombombing.” We have not had so many new words come out of a crisis since WWII gave us “fubar” and “snafu” (look them up, I’m not printing their meanings here).

Unfortunately, the “Rona” took its toll on ABTL as well. One by one ABTL chapters around the state began cancelling programs. Perhaps worst of all, we cancelled our Annual Seminar that was to take place in Hawaii.

But hey, we are business trial lawyers; we adapt. We found ways to assist our bench, and to make virtual programs available that would assist our members in navigating the new legal landscape. Those have included webinars by presiding judges in Orange County (thank you Judge Nakamura), Los Angeles County, San Diego County and the Central District. In the case of Orange County, Judge Nakamura participated on several occasions.

These webinars filled the bar in on the challenges the Courts were facing, but also answered our questions about when and how filings would be processed, motions would be heard, and trials would be handled. The strong working relationship between the bench and bar has always been a hallmark of ABTL, and that has absolutely been true during this crisis.

What’s next you ask?

Help us help those who are less fortunate. Every year ABTL-OC raises much needed funds to support Public Law Center and its representation of indigent members of our community in need of legal assistance. Our June PLC fundraiser was COVID-cancelled. But that cannot stop ABTL-OC. I have issued our annual “President’s Challenge” to the ABTL-OC Board asking them to support PLC and I ask the same of our members.

I recognize the financial strain the pandemic has had on many of us, but for some less fortunate than us, this pandemic has been catastrophic. You can help. Email [abtloc@abt.org](mailto:abtloc@abt.org) with your pledge for PLC. Please give as generously as possible so that we may continue our chapter’s long and proud tradition of working alongside PLC. When we support PLC, we support access to justice for the poor. Any amount will do. PLC needs us now more than ever. Let’s show PLC that ABTL-OC is here to help.

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Next, mark your calendars for our re-scheduled Annual Seminar. The 2021 Annual Seminar will take place from October 20-24, 2021 at the Mauna Lani hotel on the "Big Island" of Hawaii. Don't let any of your trials get continued to this period of time. Based on the planning that was already done this year before COVID, I expect the Annual Seminar to be amazing.

Finally, watch for announcements on our Fall programs. While we expect they will remain virtual events, we have some outstanding programs in the works including Supreme Court updates, managing virtual trials, and more.

We at ABTL look forward to seeing you in person as soon as possible, and virtually until then. Stay safe, be well, mask up, watch out for murder hornets and Saharan sandstorms, and don't let this COVID "snafu" get you down.

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

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the Act's unique origin and history. The Act was a response to a proposed ballot measure of the same name that gained steam in 2018 and would have enshrined data privacy protections directly into the California Constitution. Proponents of the measure claimed that it would be "one of the most meaningful checks in the United States on the growing power of internet behemoths," *New York Times, Silicon Valley Faces Regulatory Fight on Its Home Turf*, May 13, 2018. But industry representatives and their allies claimed that the ballot measure was "filled with flaws" and expressed concern about its "sledgehammer approach to regulating data." *Id.* When the ballot measure reached the required number of signatures to make it on the November 2018 ballot as a proposed constitutional amendment, the legislature acted quickly to head it off with a statutory fix, pushing the California Consumer Privacy Act through the legislative process and onto the governor's desk in a week's time. Governor Jerry Brown signed the bill into law on June 28, 2018.

Legislators knew that the speed with which the law was drafted made future tweaks inevitable, and partly for that reason, enforcement was delayed until the beginning of 2020. Since that time, significant re-

visions have been made in September 2018 and October 2019. Even with a year and a half to evaluate the law, there are still kinks to be worked out.

Although regulatory enforcement does not begin until July 1, the law itself has been in effect since January 1, 2020, and plaintiffs have already taken advantage of one the statute's most important provisions—the private right of action—to file the first lawsuits under the new law. *See, e.g., Cullen v. Zoom Video Communications, Inc.*, 20-cv-02155-SVK (N.D. Cal. 2020). As these lawsuits move forward, both state and federal courts will be tasked with evaluating the scope and impact of the private right of action as well as the substantive obligations imposed by the law. This article addresses some of the most important questions that these courts will face.

### ***Private Right of Action***

The Consumer Privacy Act's private right of action has been controversial from the moment the law was drafted, with some legislators and commentators characterizing it as a signal victory for privacy, and others calling it "merely another giveaway to trial lawyers in a bill already riddled with them." *San Francisco Chronicle, New Data Privacy Law Gives Californians New Way to Sue Over Breaches*, June 29, 2018. This provision, now codified at Section 1798.150 of the California Civil Code, allows consumers to sue businesses if their "personal information" is "subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business's violation of the duty to implement and maintain reasonable security procedures."

This language is meant to allow plaintiffs to sue when a company experiences a data breach—that is, when a bad actor penetrates the company's security and steals consumers' personal information. A September 2018 amendment the law made explicit that the private right of action "shall not be based on violations of any other section" of the law, such as a company's duty to delete data on request or provide notice of what data the company collects. Senate Bill No. 1121 (Sept. 24, 2018); Cal. Civ. Code § 1798.150. In an apparent effort to prevent circumvention of this limitation by piggybacking on the Unfair Competition Law, the amendment also clarified that a violation of the Consumer Privacy Act cannot "serve as the basis for a private right of action under any other law." *Id.*

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Whether conduct falls within the scope of the private right of action is no small matter. If it does, the law authorizes statutory damages ranging from \$100 to \$750 “per consumer per incident.” *Id.* But “incident” is an undefined term in the statute. If a hacker accesses a company’s database several times in the course of a day, it is unclear whether there has been one “incident” or several. Similarly, if a hacker exposes several items of personal information for a consumer over a period of time, it is unclear how many “incidents” this may include.

The drafters of the Act have been more precise in defining what personal information is subject to the private right of action. For the most part, the Consumer Privacy Act uses a very broad definition of “personal information” that includes nearly all information that “could reasonably be linked, directly or indirectly, with a particular consumer or household.” *Id.* § 1798.140(o)(1). For purposes of the private right of action, however, there is a crucial limitation: the law specifically excludes “a username . . . in combination with a password” from the definition of “personal information.” Cal. Civ. Code §§ 1798.150(a), 1798.81.5. This appears to mean that if a data breach exposes only a username and password for an online account, without more, a plaintiff cannot sue under the Consumer Privacy Act. This likely reflects a legislative judgment that a user account alone is not sufficiently sensitive to justify a lawsuit—it is only if the user account contains sensitive personal information, such as financial or medical data, that the breach becomes actionable. Tech giants can count their blessings for this limitation. If the law were otherwise, an incident like Yahoo’s 2013 data breach, which revealed user names and passwords for *all* of its more than three billion accounts, could have subjected the company to statutory damages of more than two and a quarter *trillion* dollars—more than the Gross Domestic Product of Italy. *See New York Times, All 3 Billion Yahoo Accounts Were Affected by 2013 Attack*, Oct. 3, 2017.

### ***Standing***

Even before courts have determined what the new law’s private right action means and how far it extends, they will also be faced with the question of whether the private right of action is effective in opening the courthouse doors. The answer depends on the application of the notoriously complex and unpredictable doctrine of standing.

For years, data breaches have been a problem in search of a cause of action. Enterprising plaintiffs’ counsel have brought dozens of different common-law and statutory claims in data breach cases, with varying degrees of success. Simple actions for negligence are common, although such torts often face difficulty with the economic loss doctrine. For that reason, negligence actions are often brought along with, or in the alternative to, actions sounding in contract, including breach of implied contract or implied warranty.

California is an attractive jurisdiction for data breach plaintiffs because of the state’s complex and interconnected set of statutes—including the Consumer Legal Remedies Act, the False Advertising Law, and the Unfair Competition Law—that broadly forbid misrepresentations or deceptive practices by businesses. Because of plaintiffs’ efforts to bring their claims within the reach of these causes of action, data breach cases often take on strange flavors—sometimes appearing more like consumer fraud or products liability cases than like cases focused on technological threats.

Choosing a cause of action is only the first step. Litigants often face an even bigger hurdle in articulating a compensable legal harm. Alleging a concrete harm specific to the individual plaintiff is crucial to establishing Article III standing to pursue a claim in federal court. A similar requirement also applies to any California claim under the Unfair Competition Law—a 2004 ballot measure, which proponents argued was necessary to curb frivolous lawsuits, established that plaintiffs can sue under the law only if they can prove that they have “lost money or property as a result of the unfair competition.” California Business & Professions Code § 17204. And of course, even if these threshold standing requirements did not exist, plaintiffs need to articulate such a harm to establish liability and damages.

Many data breach cases have foundered on plaintiffs’ inability to articulate an “immediate” and “concrete” harm from the breach, particularly a harm that applies on a class-wide basis. For example, although some plaintiffs may experience identity theft that is traceable to a particular data breach, others may experience identity theft without knowing how the bad actors came by the information, and many consumers whose data is exposed in a breach may never experience identity theft at all. Most of the important developments in data breach caselaw over the past decade have been a result of plaintiffs seeking to articulate

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theories of harm that apply widely to most or all consumers whose data is exposed in a particular breach. Among other theories, plaintiffs have alleged that consumers lost money and time monitoring for identity theft, that their personal information had monetary value and its exposure deprived it of such value, that they paid less for a certain product or service than they would have if they had known that it was vulnerable to a data breach, that the increased risk of identity theft constitutes an independent harm, and that they have directly suffered by having their privacy violated. *See, e.g. In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 968 (N.D. Cal. 2016). These theories have met with mixed success for purposes of Article III standing, and the results often depend on fact-intensive analyses of the likelihood of harm from the breach in question.

In short, up till now data breach litigation has been a complex knot of statutory schemes, standing requirements, remedies, and damages theories. The Consumer Privacy Act's private right of action represents an attempt to cut this Gordian knot by creating one claim with a clearly defined monetary entitlement for each consumer. But there is no guarantee that this will succeed in simplifying data breach litigation, particularly in federal court. This is because the requirement of standing is a matter of federal constitutional law. And since the United States Supreme Court's decision in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), courts have been more strict in policing this requirement. As the Supreme Court recently reaffirmed in *Spokeo v. Robins*, a legislature "cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo, Inc v. Robins*, 136 S. Ct. 1540, 1548 (2016). The Ninth Circuit has confirmed that this is true even where a statute provides for statutory damages. *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 781 (9th Cir. 2018).

Nevertheless, in the *Spokeo* opinion, the Supreme Court reiterated that Congress has the "power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Spokeo*, 136 S. Ct. at 1549. Since the *Spokeo* decision, courts and litigants have struggled to distinguish permissible exercises of legislative authority to "define injuries and articulate chains of causation" from impermissible attempts to "grant[] the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 1548-49. Unfortunately, few helpful princi-

ples have emerged from these efforts. And although the *Spokeo* Court stated that this power to "define injuries" resides in Congress, it is still unclear whether state legislatures can share this power—and if they can, whether the Consumer Privacy Act's articulation of harm falls within the limits of that power.

For these reasons, it is difficult to predict whether the Consumer Privacy Act will resolve data breach law's perennial standing issues or deepen them. To some observers, the Consumer Privacy Act's private right of action represents a laudable effort to "articulate chains of causation" and ensure that legal protections keep up with changing technological threats. To others, it may be nothing more than a gift to trial lawyers and an attempt to grant a right to sue to those who lack any cognizable injury. Those supporting the latter view may point to the fact that the amount of statutory "damages" depends in large part on factors that are extraneous to traditional damages analysis, such as "the defendant's assets, liabilities, and net worth." Section 1798.150(a)(2). This could suggest that the statutory damages are not meant to compensate the consumer for a discrete harm, but instead simply to punish a company for wrongdoing, regardless of what effect that wrongdoing had on the plaintiff.

Ultimately, these battles over standing doctrine will determine whether the Consumer Privacy Act is a huge step forward in allowing data breach plaintiffs to vindicate their claims in federal court, or whether it is dead on arrival in federal court and pushes claimants into state court. If courts find that any plaintiff entitled to statutory damages under the Consumer Privacy Act has standing to sue, then many of the difficulties and inconsistencies that plague data breach law could drop away. Such a finding would also likely improve plaintiffs' chances of obtaining class certification, because the right to statutory damages would be a factor common to most or all victims of a data breach. But if courts find that the statutory damages do nothing to help a plaintiff establish standing, then these difficulties will remain, and data breach law in federal courts will continue to proceed by fact-intensive fits and starts.

## ***Impacts on Discovery***

For trial lawyers, the private right of action is the most headline-grabbing feature of the Consumer Privacy Act, and litigants and commentators will debate

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its meaning and impact for years to come. But the Consumer Privacy Act may also have consequences for litigators who never become involved in a data breach case. Specifically, the new law may add yet another layer of obligations and considerations to the already complex process of civil discovery. Even before the Consumer Privacy Act went into effect, litigators navigating the discovery process needed to consider the implications of various statutes, including the Electronic Communications Privacy Act, the Stored Communications Act, the Federal Wiretap Act, the Health Insurance Portability and Accountability Act, the Computer Fraud and Abuse Act, the Digital Millennium Copyright Act, and the European Union's General Data Protection Regulation. The Consumer Privacy Act is yet another item for all lawyers involved in civil discovery to add to their mental checklist.

For example, the Consumer Privacy Act requires notice to consumers in many circumstances before personal information can be disclosed to a third party. Similarly, the Act requires companies to delete any of a consumer's personal information upon request. Lawyers need to carefully consider these requirements when responding to discovery requests and ensure that they handle sensitive data in accordance with them. The Act allows exceptions for some of these requirements when necessary to "comply with a legal obligation." Cal. Civ. Code § 1798.105(d)(8). However, at the very least, the risk that a miscalculation about what must be disclosed could result in a statutory violation could add a new level of anxiety when dealing with discovery that may implicate data covered by the Act.

♦ *Stephen Tensmeyer is a litigation associate at Hueston Hennigan LLP in Newport Beach.*

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tioned) and the "reasonable doubt" standard. Section 115 says, "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

The "reasonable doubt" burden is reserved for criminal cases. *Penal Code* section 1096. "Generally, facts are subject to a higher burden of proof [*i.e.*, clear and convincing standard] only where particularly important individual interests or rights are at stake." *In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1490. Examples include "termination of parental rights, involuntary commitment, and deportation." *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.

That leaves only the "more likely than true" burden of proof for legal malpractice cases. And it is well established that "[t]o prevail in a negligence action, the plaintiff must establish every essential element of her case by a preponderance of the evidence." *Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 482. If this is so well-established CACI 200 is the law, why is *Masellis* so important?

**The Unusual "Legal Certainty" Burden Historically Applied to Settle and Sue Cases**

Notwithstanding the common complaint by clients that their attorneys did not achieve an acceptable settlement, there are only a handful of California cases addressing "settle and sue" cases. It's likely the lack of published opinions is largely due to the defense bar's Captain America shield: *Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154.

In *Filbin*, former clients sued their attorney, alleging his negligence caused them to settle their case for less money than they would otherwise have received. At trial, plaintiffs prevailed. Defendant appealed, alleging plaintiff did not prove proximate cause. The appellate court reversed and penned the following reasoning that virtually ended all future settle and sue cases:

***"Damage to be subject to a proper award must be such as follows the act complained of as a legal certainty"*** [citation omitted] . . . '[A] plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would certainly have received more money in settlement or at tri-

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al.’ [Citation omitted.] . . . ***The requirement that a plaintiff need prove damages to ‘a legal certainty’ is difficult to meet in any case. It is particularly so in ‘settle and sue’ cases.***” (Emphasis added.) *Filbin v. Fitzgerald, supra*, 211 Cal.App.4th 154, 166.

The *Filbin* court even tipped its hat to Pennsylvania, which prohibits “settle and sue” cases. *Filbin v. Fitzgerald, supra*, 211 Cal.App.4th 154, 168 fn. 10. With the “legal certainty” lens, it was not hard for the *Filbin* court to conclude that the “Filbins presented no evidence showing to a legal certainty that [defendant’s] acts or omissions proximately caused any injury.” *Filbin v. Fitzgerald, supra*, 211 Cal.App.4th 154, 172.

**The Impact of Masellis  
on the Legal Community**

Like all the other published “settle and sue” cases, the *Masellis* plaintiff alleged her lawyer made mistakes that caused her to receive an inadequate settlement. The jury found the attorney liable for legal malpractice. After the trial, the attorney argued plaintiff failed to meet the *Filbin* “legal certainty” standard of proof as a matter of law, so the trial court should grant a motion for judgment notwithstanding the verdict. The trial court denied the motion, and the attorney appealed.

The *Masellis* court reviewed all “settle and sue” published opinions and concluded,

“[N]one of the cases (1) recognized the general rule and exception in Evidence Code section 115 and (2) explicitly undertook the analysis usually employed when considering whether to alter the burden of proof from the preponderance of the evidence standard. As a result, none of the cases explicitly state the appropriate burden of proof is the ‘legal certainty’ standard and explain how that standard fits within the framework of the three common standards of proof listed in Evidence Code sections 115 and 502. These omissions lead us to conclude the cases using the term ‘legal certainty’ are not authority applying a heightened burden of proof to the elements of causation and damages in a legal mal-

practice action. [Citation omitted.] ***Consequently, we conclude the ambiguous term ‘legal certainty’ simply means the level of certainty required by law, which is established by the applicable standard of proof.***” (Emphasis added.)

The *Masellis* court concluded that the “preponderance of the evidence standard” applies to “settle and sue” cases for three reasons. First, the “preponderance of the evidence standard” is the default standard in civil cases, and higher standards of proof only apply when something more than money is at issue. Second, in *Viner v. Sweet* (2003) 30 Cal.4th 1232, the California Supreme Court stated, “[i]n a litigation malpractice action, the plaintiff must establish that but for the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred.” (Emphasis added.) *Viner v. Sweet, supra*, 30 Cal.4th 1232, 1241. “This statement’s reference to a more favorable judgment or settlement is broad enough to include the ‘settle and sue’ malpractice action.” *Masellis v. Law Office of Leslie F. Jensen, supra*, 2020 WL 3406336 at 15. Third, the *Masellis* court relied on a law review article that concluded the phrase “legal certainty” is ambiguous.

There are a significant number of plaintiffs who have “settlement regret.” *Masellis* just gave those unhappy clients something to celebrate.

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## ***-Diversity: Continued from page 3-***

(1999)).

And while this article is less focused on issues of fairness and related societal normative imperatives, it still needs to be mentioned that diversity in the courtroom serves a fundamental societal value. The lack of diversity in juries undermines the legitimacy of the legal system. *E.g.*, Leslie Ellis & Shari S. Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033 (2003). One need look no further than the reactions to the acquittals of the sheriffs who beat Rodney King, the acquittals of various police officers for violence against African Americans, and the June protests over the killing of George Floyd to know this is so.

### **Diverse Trial Teams Are Better Advocates, Particularly Before Diverse Juries**

Studies also show diverse trial teams perform better.

Women, men, black, brown, white, straight and LGBTQ+ lawyers bring unique perspectives and experiences to the courtroom. According to studies, a team consisting of diverse lawyers may take more time to reach consensus, and it is that very effort and process, research shows, that results in a better-prepared, client-responsive team. A diverse team can not only present the case the client wants, it can also anticipate and address the alternative point of view the other side will present. *See* David Rock, Heidi Grant & Jacqui Grey, *Diverse Teams Feel Less Comfortable—and That's Why They Perform Better*, Harv. Bus. Rev., Sept. 22, 2016; Scott Page, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (Princeton Univ. Press rev. ed. 2008).

A diverse team also offers opportunities for pairing counsel and witnesses in ways that are more engaging, tactically advantageous and balanced to the jury. A diverse team provides more flexibility (and ability) to avoid matching a lawyer with a witness whom the lawyer has no business asking any questions of due to subject matter, demeanor, or any of the thousands of other reasons witness/lawyer matchups are carefully considered before and during trial. Karen L. Hirschman & Ann T. Greeley, *Trial Teams and The Power of Diversity*, 35 LITIGATION, no. 3, 2009, at 23.

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## **Where Do We Start?**

The first step in fostering diversity in the courtroom is to show up with a diverse trial team. And notwithstanding the arguments above for diversity, this is easier said than done. It requires “allies.” An ally is more than just someone who is on board with the cause because it helps others. Allyship comes from the heart as much as the mind. In the words of the Co-Leader of Orrick’s Complex Litigation Practice and Co-chair of Diversity & Inclusion, Darren Teshima, an “ally” isn’t just someone who wants to help a diverse colleague, it’s something you do for yourself: “An ally is a litigator who says, ‘I don’t want to be part of homogenous teams anymore, so I’m going to use my own power and resources to make sure our teams are more diverse.’ It’s a client who says, ‘I want a diverse trial team not only because they are more likely to win but because it’s who we want representing our company.’”

Clients are key allies because they must approve who appears for them in court. But law firms are essential players in this alliance as well. It is the law firm that can suggest who else might represent the client’s interest. It is the law firm that can suggest that perhaps the client overlooked a talent that may bring distinctive assets to the particular matter. And it is the law firm that can show diverse lawyers they have a career path that leads to first-chairing trials.


Judges also can be allies and encourage diversity. For example, in a recent case, a judge congratulated the two law firms for having diverse litigation teams. The judge’s statement impacted everyone in the courtroom that day—clients, partners, associates, and paralegals. That a judge would take notice is significant as other litigants will strive to please.

### **Making a Difference**

In the end, diversity in all its forms makes a difference at trial. Trial lawyers have every incentive—and we submit, the ethical duty as officers of the court—to advocate for it.

Should race or gender be the sole or defining basis of a decision to keep a person on the jury or hire an attorney? No. But nor should they be disqualifying, which is largely how they have historically been considered. Rather than fear old stereotypes, consider the advantages a diverse viewpoint may offer. Rather than

***-Continued on page 12-***



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## **-Diversity: Continued from page 10-**

turn to the same trial team, consider what a more diverse team of advocates might bring to the table.

Does everyone have an obligation to be an ally? That's an individual choice. The question is what kind of a justice system, what kind of a society, do you want to be part of? If it's different from what we have today, what simple everyday choices can you make, as a trial lawyer, in-house counsel or judge, to advance that change?

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## **-Indemnification: Continued from page 4-**

"third-party" and/or "direct" indemnity, a court will apply traditional canons of interpretation in an attempt to discern the parties' intended meaning. Cal. Civ. Code § 2778 (setting forth certain rules "unless a contrary intention appears[.]") A broadly worded indemnity provision that does not expressly limit itself to third-party claims can be interpreted to apply to all claims, including claims between the parties. *Hot Rods, LLC v. Northrop Grumman Systems Corp.* 242 Cal. App. 4th 1166, 1181, 196 Cal. Rptr. 3d 53 (2015) ("[The] parties expressly adopted a broad definition of 'claim' and 'person' that encompasses 'any alleged liabilities,' and covers both first and third party claims."); see also *Zalkind v. Ceradyne, Inc.*, 194 Cal. App. 4th 1010, 1027, 124 Cal. Rptr. 3d 105, 116 (2011) ("This language does not limit indemnification to third party claims and extends indemnification to 'any and all' damages incurred by the [parties] . . . ."—concluding that "'Indemnify' Includes Direct Claims Between the Parties").

## **II. Indemnity May Go So Far as Exculpation**

In rather extreme circumstances, an indemnity clause can even act as an exculpatory clause. For instance, Party A (the Indemnitor) might be obligated to indemnify Party B (the Indemnitee) as to Party B's own harms inflicted upon Party A. Party A sues Party B for breach of contract or in tort. But Party A also owes a broad indemnification obligation to Party B. Accordingly, any recovery against Party B in favor of Party A would trigger Party A's indemnification obligation and functionally absolve Party B of any liability. This result is counterintuitive. But courts will enforce agreements that way, provided the parties clearly "go out of their way and say 'we really, really mean it,' . . . ." *City of Bell v. Superior Court*, 220 Cal. App. 4th 236, 250, 163 Cal. Rptr. 3d 90 (2013) ("Cases which have interpreted an indemnification agreement to act as an exculpatory clause between the parties to the agreement have involved agreements which contain language clearly providing that the indemnification clause applied to such claims.") Moreover, "[a]n indemnity agreement may provide for indemnification against an indemnitee's own negligence, but such an agreement must be clear and explicit and is strictly construed against the indemnitee." *Rooz v. Kimmel*, 55 Cal. App. 4th 573, 583, 64 Cal. Rptr. 2d 177 (1997). Exculpation

**-Continued on page 13-**

### ***-Indemnification: Continued from page 12-***

does have a limit beyond the plain language of the agreement. In construction contracts, the Legislature intervened and has made exculpatory indemnity agreements in construction contracts unenforceable to the extent they seek indemnity for the indemnitee's active negligence. CAL. CIV. CODE §§ 2782, 2782.05, & 2782.9.

### **III. A Party Cannot Be Indemnified for Its Own Misrepresentations**

This broad right of contract has its limits in California. California Civil Code section 1668 states: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Thus, even the broadest indemnity obligation cannot extend to cover an indemnitee's own intentional and/or negligent misrepresentations to an indemnitor. See, e.g., *McClain v. Octagon Plaza, LLC*, 159 Cal. App. 4th 784, 794, 71 Cal. Rptr. 3d 885 (2008) (Section 1668 "encompasses intentional and negligent misrepresentation."); see also *Blankenheim v. E. F. Hutton & Co.*, 217 Cal. App. 3d 1463, 1473, 266 Cal. Rptr. 593 (1990) (same).


### **IV. Indemnity as an Exclusive Remedy**

Finally, attorneys need to be careful that, in creating certain indemnification rights, other remedies are not waived. Parties may be inclined to contract for certain procedures for indemnification claims—e.g., a notice provision, alternative dispute resolution, or a cap on liability. Unless the intent is otherwise, it should be specified that the indemnification provision is a new, contractually-created remedy, and not the exclusive remedy in the event of a dispute between the parties. See, e.g., *Nelson v. Spence*, 182 Cal. App. 2d 493, 497, 6 Cal. Rptr. 312 (1960) ("Where a contract expressly provides a remedy for a breach thereof, the language used in the contract must clearly indicate an intent to make the remedy exclusive."); *McDonald v. Stockton Met. Transit Dist.*, 36 Cal. App. 3d 436, 442, 111 Cal. Rptr. 637 (1973) ("When a contract describes a remedy for breach without an express or implied limitation making that remedy exclusive, the injured party may seek any other remedy provided by law.").




### **V. Conclusion**

Indemnity provisions can be an effective way to manage risk, but attorneys and their clients, must be aware of the potential consequences discussed above and carefully scrutinize any indemnification agreement to ensure that the plain language clearly defines the scope of the indemnity as understood by the attorney and client. Parties seeking contractual indemnification should also give thought to the ability of the proposed indemnitor to perform the obligations (e.g. creditworthiness and available insurance).

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