ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

LOS ANGELES

WINTER 2020

ABRACADABRA: THE MAGIC IN SPECIAL VERDICTS

Hon. Brian M. Hoffstadt

For decades now, courts have repeatedly proclaimed that asking a civil jury specific questions as part of its verdict was a "risky" and "pitfall"-filled endeavor. (*Jarman v. HCR ManorCare, Inc.* (2017) 9 Cal.App.5th 807, 828-829; *Falls v. Superior Court* (1987) 194 Cal.App.3d 851, 855 (*Falls*).) That is largely because general verdicts are "safer": Courts are required to "impl[y] findings on all issues" necessary to uphold a jury's general verdict (*Falls*, at p. 854), but are *prohibited* from doing so for

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PIRATE'S BOOTY— JOHNNY DEPP'S LAWYERS WALK THE PLANK: A CAUTIONARY TALE FOR ALL ENTERTAINMENT LAWYERS

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Samuel Goldwyn, one of Hollywood's most iconic film producers, supposedly declared that "'[a]n oral contract isn't worth the paper it's written on.'" *Phillippe v. Shapell Industries,* 43 Cal.3d 1247, 1269 (1987). This prophetic adage, simple as it may be, teaches a lesson that entertainment lawyers cannot afford to learn the hard way.

A recent high-profile case from the Los Angeles Superior Court underscores the importance of obtaining signed engagement letters with clients, particularly clients in the entertainment industry.

On October 30, 2019, actor Johnny Depp settled a lawsuit against his former law firm, just weeks before trial was set to begin. Mr. Depp reportedly received an eight-figure payment. *Depp v. Bloom Hergott Diemer Rosenthal La Viollette Feldman Schenkman & Goldman, LLP,* BC680066, 2018 WL 4344241 (Cal. Super. Aug. 28, 2018) should give pause to all entertainment lawyers who rely on

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PRESIDENT'S MESSAGE

Valerie M. Goo

The year 2020—a new decade! Looking back over the past 10 years, it is astonishing how the ABTL Los Angeles Chapter continues to grow. Membership is at an all-time high; we are over 2,200 strong. We are fortunate to have some of the most accomplished trial lawyers, judges and justices on our Board of Governors and Judicial Advisory Committee.

The ABTL's achievements over the past decade can be traced not only to its people, but also to its mission: promoting dialogue between the California bench and bar on business litigation issues. That mission is as critical now, if not more so, than it was when this organization was founded in 1973 here in Los Angeles.

A recent testament to the importance of that mission is the Los Angeles Chapter's Summer 2019 ABTL Report, dedicated entirely to the issue of civility in our profession. Articles from the issue have since been republished by the ALI, discussed in the Daily Journal, used in CLE program materials, and cited in at least two recent court opinions. Kudos to Robin Meadow and John Querio, our dedicated ABTL Report editors, to our Civility Committee, chaired by Michael Mallow, and to all of the authors who contributed articles.

The ABTL dinner and lunch programs are second to none. Our last lunch program, featuring Hon. Dan Buckley, was sold out, and we expect the February 5 Westside dinner program on will also sell out. Be sure to put the upcoming lunch and dinner programs on your calendars now: February 5 (Westside Dinner Program); March 24 (Dinner Program); April 21 (Lunch Program); June 2 (Annual Judicial Reception). And don't forget that the Annual Seminar this year will be at the Mauna Lani on the Big Island, Hawaii October 7-11. You can visit our newly redesigned website www.abtl.org or follow us on our new LinkedIn page www.linkedin.com/company/abtlla for regular updates.

We hope that you will continue to join me and my fellow officers, Susan Leader (Vice President), Manuel Cachán (Treasurer), and Kevin Boyle (Secretary), in our effort to improve our craft and our profession through the promotion of dialogue, diversity, and community. As we embark on the next decade—and soon the sixth decade of the Association of Business Trial Lawyers—we remain committed to ensuring that the ABTL continues to grow and remains a vibrant and vital organization.

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a jury's special findings (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 678 (*D.R. Horton*).) What is more, the price for a defective special finding is typically the re-trial of the entire case (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 124 (*Trejo*); see Code Civ. Proc., § 657, subd. (6)), and there are few things worse than having to re-live the same experience again and again.

So, other than in the sole situation where a special finding is expressly required by statute—namely, to separate "punitive" from "compensatory damages" (Code Civ. Proc., § 625)—the use of such findings is optional. (*Eng v. Brown* (2018) 21 Cal. App.5th 675, 705.)

So why would any sane litigant chance it?

The answer is simple: Asking the jury specific questions—whether it be through a special verdict form or through special interrogatories in conjunction with a general verdict—can work magic.

If you're a plaintiff, why settle for a mundane verdict of actual damages when, by asking the jury the right specific questions, you can double, triple, or potentially even decuple those damages? And if you're a defendant, why be stuck paying the full amount of aggregate damages when, by asking the jury the right specific questions, you can potentially cap or offset certain components of that damages award?

From a plaintiff's perspective, a general verdict for fraud may not by itself be enough to support an award of double damages for misrepresentations that induce someone to "change from one place to another" to accept new employment. (Lab. Code, §§ 970, 972.) Likewise, a general verdict may not by itself be enough to support the award of treble damages and attorneys' fees for receipt of "property that has been stolen or that has been obtained in any manner constituting theft" under California Penal Code section 496. (*Switzer v. Wood* (2019) 35 Cal.App.5th 116, 128.) So a plaintiff seeking this kind of recovery must ask the jury to specially find its statutorily defined predicate. (Indeed, this is why a special finding is statutorily required for punitive damages.) And in those rare cases where a plaintiff bringing legal and equitable claims tries the legal claims first, the more specific the jury's findings on the legal claims, the more effectively those findings will bind the trial court in making its findings on overlapping equitable claims. (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 158-159.)

From a defendant's perspective, special interrogatories are all but necessary to cap, limit or offset certain types of damages. California law caps non-economic damages awards in malpractice cases against health care providers at $250,000 (Civ. Code, § 3333.2), and permits "provider[s] of health care services" to make periodic payments for "future damages" awards equaling or exceeding $50,000 (Code Civ. Proc., § 667.7). However, these caps are enforceable only if the damage award is segregated by type, and the only way to do that is with special interrogatories. (See *Deocampo v. Ahn* (2002) 101 Cal.App.4th 758, 771; *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 377; *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346.) California law also makes liability for non-economic damages among concurrent tortfeasors several, not joint. (Civ. Code, § 1431.2.) However, this limit is enforceable only if the jury imposes a specific amount of non-economic damages against each defendant, and the only way to do that is with special interrogatories that segregate damages by defendant. (*Soto v. BorgWarner Morse TEC, Inc.* (2015) 239 Cal.App.4th 165, 205-206; cf. *Kitzig v. Nordquist* (2000) 81 Cal.App.4th 1384, 1398.) California law empowers defendants to offset economic damages by a prior worker's compensation lien and by the amount recovered against other defendants in a prior good faith settlement. (*Demkowski v. Lee* (1991) 233 Cal. App.3d 1251, 1259-1264; *Poire v. C.L. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal.App.4th 1832, 1841.) As noted above, however, such an offset is enforceable only if damages are segregated by type, which, also as noted above, requires a special interrogatory.

But just like casting a spell or brewing a magic potion, the magic of special findings works only if the sorcerer gets the spell just right. When eye of newt is required, frog's breath

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simply won't do. And woe to the apprentice who trips up the spoken incantation; Professor Dumbledore recognized that "[*w*]*ords* . . . are our most inexhaustible source of magic," and his wisdom applies with even greater force when working *legal* magic. (Harry Potter and the Deathly Hallows-Part 2 (Warner Bros. Pictures 2011), emphasis added.)

Whether a party has wielded the magic of special findings correctly depends largely on the rules governing when those findings will be upheld. Those rules, in turn, depend on the *type* of special finding at issue.

The first type of special finding is a special interrogatory, which is made by a jury along with a general verdict. By and large, special interrogatories are only problematic when they are inconsistent with one another or with the accompanying general verdict. Courts have developed specific rules for how to resolve inconsistencies. When two special interrogatories conflict with each other, the court will give effect to whichever interrogatory answer is more consistent with the general verdict. (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 540-541 (*Hasson*). When a special interrogatory "is inconsistent" with the general verdict, the court will give effect to the interrogatory over the general verdict (Code Civ. Proc., § 625), with one major caveat: If the inconsistency between the two is so fundamental that there is "no possibility of reconciling the general and special verdict under any possible application of the evidence and instructions," the court must vacate the general verdict and set the case for a new trial. (*D.R. Horton, supra, 126 Cal.App.4th at p. 679; Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 302 (*Mendoza*)*; Hasson*, at p. 540.)

The second type of special finding is the bona fide special verdict.

To be valid at all, a special verdict form itself must require the jury to find all necessary "conclusions of fact" or "ultimate facts" underlying a claim, such that "nothing shall remain to the Court but to draw from them conclusions of law." (Code Civ. Proc., § 624; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 959-960 (*Myers Building*).) A special verdict form must not ask the jury to find *evidence or legal conclusions,* and must not set forth the "legal effect" of the conclusions of fact it requires the jury to find. (*Myers Building,* at p. 959; *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 854 [legal conclusions generally inappropriate].) And the form must require findings on "every controverted issue." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285, internal quotation marks omitted; *Trejo, supra,* 13 Cal.App.5th at pp. 136-137.) A special verdict that does not resolve all controverted issues is a "puzzle with pieces missing" and will be disregarded. (*Falls, supra,* 194 Cal.App.3d at p. 855.) Further, a trial court will not generally give any effect to a jury's findings on an incomplete special verdict form. (*Vollaro v. Lispi* (2014) 224 Cal.App.4th 93, 103-104; *Tierney v. Javaid* (2018) 24 Cal. App.5th 99, 112. The sole exception is if the partial findings are sufficient to "eliminate[]" a basis for liability. (E.g., *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1478-1479.)

Even if it calls for a jury to make all necessary findings, a special verdict will be ineffective if there is any inconsistency "between or among [the jury's] answers." (*D.R. Horton, supra,* 126 Cal.App.4th at p. 682.) If the inconsistent answers cannot be reconciled and render the jury's findings "'hopelessly ambiguous,'" the special verdict cannot stand because a court is not permitted to choose which of the contradictory answers to credit. (*Fuller v. Department* (2019) 38 Cal.App.5th 1034, 1038 (*Fuller*); *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 358-359 (*Singh*); *D.R. Horton,* at p. 682; *Trejo, supra,* 13 Cal.App.5th at p. 124.) Applying these standards, courts have invalidated special verdicts in which the jury (1) has assigned different monetary values to the same parcel of property when awarding different types of damages (*D.R. Horton,* at p. 683); (2) has found a defendant liable for negligence but not for strict liability when both claims are based on a single possible defect (*Trejo*, at pp. 127-128; *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 721; cf. *Fuller,* at p. 1040); (3) has found a defendant inconsistently liable and not liable for promissory estoppel, misrepresentations, false

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promises, intentional misrepresentation and concealment when all claims are based on the same underlying misrepresentation (*Singh,* at pp. 359-360); (4) has found a defendant, in a non-insurance context, not liable for breach of contract but liable for breach of the implied covenant of good faith and fair dealing (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344); or (5) has assigned different values to the same object for breach of contract and common count claims (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1093-1094 (*Zagami*).

So what tips should be scribbled in the margins of the spell book for how to properly use the magic of special findings?

Tip No. 1: Ask yourself, "Do I really *need* special findings?" Sometimes, they are required or, as a practical matter, necessary. But when they are not, the risks may outweigh the benefits.

Tip No. 2: If you elect to use a special verdict form, be sure to make sure the form includes *every* element of the claim. And if the form employs a decision-tree model, make sure the instructions about which question to answer next are all correct. Special verdict forms typically go through a lot of negotiation, so you must re-check them after every revision to ensure they work properly. Start with the CACI verdict form if one exists, but carefully examine whether and how it needs to be tailored to your case. And remember that special verdicts, for the reasons explained above, are not for the neophyte. There is a reason the Ministry of Magic didn't allow new Hogwarts students to disapparate.

Tip No. 3: Avoid special interrogatories and special verdict questions that use "and/or" because their inherent ambiguity increases the likelihood of inconsistency (it may be impossible to know whether the jury found both items or just one of them). (See *Myers Buildings, supra*, 13 Cal.App.4th at p. 961.)

Tip No. 4: Run through the possible permutations of answers the jury might give on the special verdict form to flush out (and remove) any possible inconsistencies.

Tip No. 5: Be vigilant for inconsistencies and ambiguities while the jury is still empaneled. Objections matter. If a party perceives that a verdict is "potentially ambiguous or inconsistent," the party should ask the court to obtain clarification from the jury before the jury is discharged; the court is duty-bound to seek such clarification. (*Zagami, supra*, 160 Cal. App.4th at pp. 1091-1092; Code Civ. Proc., § 619; *Mendoza, supra,* 81 Cal.App.4th at p. 303; *Singh, supra,* 186 Cal.App.4th at pp. 357-358.) But if the party fails to seek clarification at that time, the trial court in post-trial motions and the appellate court will do what they can to '"interpret the verdict from its language considered in connection with the pleadings, evidence and instructions"' and will only invalidate the verdict if it is '"hopelessly ambiguous."' (*Zagami,* at p. 1092; *Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 Cal.2d 452, 456-457.) What is more, if the party's failure to ask for clarification appears to have been tactical, the courts may deem the issue waived and let the resulting inconsistent verdict stand. (E.g., *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 529-530; *Woodcock,* at p. 456, fn. 2.)

Tip No. 6: And while the jury is still empaneled, ask that the court poll the jury. You should always do this anyway, but polling is particularly important to ensure that each finding has the necessary votes (and, if you're the losing party, in hopes of learning that a key finding has only the minimal 9-3 vote).

As this complex body of law indicates, making special findings work takes more than being able to utter some magic word like "Abracadabra." It requires parties to "invest the time and attention necessary to ensure" that they are done right; otherwise, they can and do backfire. (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 796.)

And, as Jafar and Voldemort will tell you, there's nothing worse than magic that goes awry.

Hon. Brian M. Hoffstadt is an Associate Justice of the Court of Appeal, Second Appellate District, Division 2.

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oral commission-based agreements with clients.

The protracted litigation began in 2017, when Depp filed a lawsuit against the law firm alleging—among other claims—that the firm committed legal malpractice by mismanaging and misappropriating his finances and collecting millions of dollars in attorneys' fees without a written, signed engagement agreement, in violation of Business and Professions Code section 6147.

Before moving to the substance of Depp's claims, it is important to understand the basics of that statute:

Business and Professions Code section 6147

Business and Professions Code section 6147 sets forth the requirements for enforceable contingency fee agreements. Among other things, all contingency fee retainer agreements must be *in writing* and the client must be provided with a copy of the signed agreement. *See* Cal. Bus. & Prof. Code § 6147(a). Failure to comply with Section 6147 renders the fee agreement voidable at the client's election. *Id.* at § 6147(b). If the client voids the agreement, however, the attorney is "entitled to collect a reasonable fee" based on the value of his or her service. *Id.* With that in mind, back to the facts . . .

The Litigation

When Depp first hired Bloom Hergott in 1999, he entered into an oral agreement under which the firm would provide entertainment-related legal services and, in return, Depp would pay the firm 5% of his earnings. For almost twenty years, the firm represented Depp on multiple matters and spent thousands of hours working on his behalf. In return, Depp paid the firm 5% of his earnings as a commission.

When he sued the firm in October 2017, Depp alleged legal malpractice and asked for a declaration that any purported contingency fee agreement with the firm was unenforceable. Depp sought disgorgement and restitution of all fees he previously paid to the firm. In its cross-complaint, the firm sought a declaration that the 1999 oral agreement was valid and claimed that Depp breached the agreement by refusing to pay for legal services.

Depp filed a motion for judgment on the pleadings as to the firm's breach of contract cross-claim on the ground that the claim was barred by Section 6147 because the oral agreement on which the claim was premised was unenforceable. The central issue in the parties' briefing was whether percentage-based engagements, which have been ubiquitous in the entertainment industry for years, constitute contingency fee arrangements that must satisfy Section 6147's requirements.

Typical contingency fee arrangements, like the kind used in the personal injury context, involve the collection of certain fees only if the case is won. Percentage-based commission engagements, on the other hand, are slightly distinguishable in that the attorney's fees are not contingent on any particular outcome, but rather on the existence of client earnings. This distinction formed the primary basis for the firm's opposition to Depp's motion:

> In the entertainment industry, actors such as Mr. Depp build a reputation off their performances and often have long-term career goals and public relation strategies. [The firm] offers clients a holistic approach that incentivizes both a client and an attorney to develop a mutually beneficial relationship that can last an entire career, instead of just a series of "one shot" transactions. . . . [¶] This goal—advancing a client's career through legal services—is not a clearly defined, limited goal. It is broad and open-ended.

Defendant's Opposition to Plaintiff's Motion for Judgment on the Pleadings at 9:15–23. The firm argued that Depp's legal services could not be reduced to a description of "successful" or "unsuccessful." For example, the firm negotiated a wide variety of different deals for Depp including Depp's approval rights, credits, insurance coverage, etc.

Alternatively, the firm argued that Depp ratified the oral agreement by "continuing to accept legal services and by continuing to pay [the Firm] through July 2017." *Depp,* 2018 WL 4344241, at *3.

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The Ruling

The court was not persuaded, and it granted Depp's motion. It ruled that the firm could not pursue its claim for breach of oral contract because it failed to comply with Section 6147—the agreement was not in a writing containing the required disclosures. 2018 WL 4344241, at *6. The court analyzed the issue using the following framework.

First, the court determined that Depp's oral agreement with the firm was a contingency fee agreement. The court reasoned that a "contingency fee contract" is conditioned upon—or tied to—some measure of the client's success. The court explained:

> [T]he contract as pled is a contingency fee contract. It is tied entirely to [Depp's] success in the entertainment business. As [Depp] put it, when [he] made money, [the firm] made money . . . . That is the very definition of a performance-based incentive. Even if the court employed [the firm's] proposed test, the success of [Depp] in [his] business endeavors was not guaranteed. This is a contingency fee agreement. There is nothing else it can be.

Id. at *4.

Next, the court noted that Depp could not ratify the oral contingency fee agreement because "in order to establish ratification of a contract which is voidable under Section 6147, [the firm] must [] plead and prove the existence of a writing which complies with Section 6147," which the firm could not. *Id.* at *6.

Quantum Meruit Recovery?

Lastly, the trial court acknowledged that "Section 6147(b) does not leave [the firm] without a remedy, even though its contract is unenforceable. When a contract is voided for violation of Section 6147, the claim is converted to one for quantum meruit." *Id.*; *see also* Cal. Bus. & Prof. Code § 6147(b) ("Failure to comply with any provision of this section renders the agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee."); *Arnall v. Superior Court,* 190 Cal. App. 4th 360, 366 (2010) (same); *Mardirossian & Assocs., Inc. v. Ersoff,* 153 Cal. App. 4th 257, 275-76 (2007) (same).

In other words, while the firm was required to return Depp's fees, it was also entitled to offset the reasonable value of the legal services it provided to Depp. Thus, theoretically, if the firm's legal services were more valuable than the fees Depp paid, Depp would be entitled to nothing.

Only a few cases have discussed how to calculate a "reasonable fee" in the context of Section 6147, and the *Depp* court did not reach this issue. Courts that have considered this issue have stated that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Mardirossian & Assocs.*, 153 Cal. App. 4th at 272 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983)). Factors such as the difficulty of the legal questions involved and the experience of the attorney must be considered when determining the rate and number of hours to be used in the calculation. *Id.*

One case has suggested that the "reasonable fee" calculation should also take into account factors such as the likelihood that work on the client's matter would preclude other employment; the results obtained; and the informed consent of the client to the fee. Thus in *Fergus v. Songer*, 150 Cal. App. 4th 552, 567-68 (2007) the jury could conclude that the attorney was entitled to an hourly fee in excess of his normal hourly rate because of his extraordinary services and the fact that he was precluded from accepting other employment. However, in *Chodos v. Borman,* 227 Cal. App. 4th 76, 102-04 (2014), the court criticized *Fergus* and appeared to reject the idea that the amount of benefit conferred should be a consideration when calculating the reasonable value of services.

In the end, the "reasonable fee" question is likely to be an expert-driven inquiry, dependent on the exact facts at issue. But attorneys who can prove, through contemporaneous time records, that they devoted substantial time to the plaintiff's matter are likely to be in the best position.

Takeaways

Oral agreements, even if confirmed by a course of dealing where the arrangement is ratified over a twenty-year period, will not necessarily protect a lawyer from a claim under Section 6147.

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While entertainment lawyers may take solace in the fact that the *Depp* case settled before trial—thus ensuring that the court's ruling on Depp's motion will not become binding precedent—they should assume that handshake deals with clients are ticking timebombs, forever voidable at the client's election. Indeed, since the court's ruling on Depp's motion, other entertainment artists have filed similar suits. E.g., Complaint, *Carter p/k/a/ Lil Wayne v. Sweeney,* No. 151067/2019 (N.Y. Sup. Ct. filed Jan. 30, 2019).

Even if a lawyer has a written contingency fee agreement, it is critical that it comply with Section 6147, which requires that the agreement state (1) the contingency fee rate; (2) how disbursements and costs will be handled; (3) "to what extent, if any, the client could be required to pay any compensation to the attorney" relating to the contingency fee contract; and (4) that the fee is "not set by law but is negotiable between attorney and client." Failure to comply with any single requirement of Section 6147 renders the entire agreement voidable at the option of the client. *Arnall*, 190 Cal. App. 4th at 366 n.6.

Although there may be good arguments that distinguish commission agreements from contingency agreements, Bloom Hergott's experience in the *Depp* case makes clear that entertainment lawyers must understand the serious risk that payment for legal services based on a percentage of a client's earnings will be treated like any other type of contingency fee arrangement and must therefore meet the requirements of Section 6147. As reported by several reputable sources, during oral argument on Depp's Motion, Judge Green echoed this sentiment:

> I don't think there are special rules for show business . . . . I grew up in a show business family. I'm aware that show business people think they live in a separate universe, but they don't. Not a separate legal universe.

Nancy Dillon, *Johnny Depp Wins Major Round in $30 Million Dispute With Entertainment Lawyer that Could Ripple through Hollywood,* The New York Daily News (Aug. 28, 2018), https://www.nydailynews.com/news/ny-news-johnny-depp-wins-round-against-entertainment-lawyer-20180828-story.html; Jenna Greene, *Johnny Depp (and Buckley Sandler) on Top in $30M Malpractice Suit against Hollywood Power Lawyer*, The Recorder (Aug. 29, 2018, 1:12 PM), https://www.law.com/therecorder/sites/therecorder/2018/08/29/daily-dicta-johnny-depp-and-buckley-sandler-on-top-in-30m-malpractice-suit-against-hollywood-power-lawyer-403-20829/?slreturn=20191104134957.

While Judge Green's comments are not precedential, courts routinely remind entertainment litigants that they are subject to the same rules as any other litigant. For example, in *Effects Associates, Inc. v. Cohen,* a "low-budget horror movie mogul" argued that moviemakers should be exempt from copyright law's statute of frauds, which requires a signed writing to transfer ownership of a copyright. 908 F.2d 555, 555-57 (9th Cir. 1990). While acknowledging that "[m]oviemakers do lunch, not contracts," the Ninth Circuit rejected the idea that "moviemakers are too absorbed in developing joint creative endeavors to focus upon the legal niceties of copyright licenses." Id. at 556-57 (internal quotations omitted). Instead, the Ninth Circuit held moviemakers to the same standards as non-movie makers. *See also Weinstein Co. v. Smokewood Entm't Grp., LLC,* 664 F. Supp. 2d 332, 343 (S.D.N.Y. 2009) ("Congress did not exempt parties in the film industry from the requirements of the Copyright Act. Under § 204(a), a transfer of copyright ownership has not occurred unless and until the copyright owner unambiguously embodies its intention to a signed writing.")

Finally, even if a lawyer has a fully compliant written contingency or commission agreement, the best practice is to continue to maintain accurate contemporaneous time records in support of all legal services. This type of evidence can be crucial if a lawyer must defend his or her work in quantum meruit when the former client challenges the validity of the contingency agreement.

Conclusion

While "handshake agreements" and non-binding "deal memos" are routine in the entertainment industry, if lawyers practicing in this industry do not want to walk the plank like Depp's lawyers, it is critical to have signed written agreements that fully comply with the requirements of Section 6147.

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U.S. SUPREME COURT UPDATE: CASES OF INTEREST IN OCTOBER TERM 2019

This article summarizes cases before the United States Supreme Court this Term that involve prominent issues of interest to business litigators.

John F. Querio

EMPLOYMENT/CIVIL RIGHTS

Does discrimination against an employee because of sexual orientation constitute prohibited discrimination "because of . . . sex" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2?

Bostock v. Clayton County, Georgia, No. 17-1618 & Altitude Express, Inc. v. Zarda, No. 17-1623 (cert. granted April 22, 2019; argued Oct. 8, 2019)

These consolidated cases present what is likely to be the biggest employment issue of the Supreme Court's Term: whether Title VII prohibits employers from discriminating against employees based on their sexual orientation on the ground that this is discrimination "because of . . . sex." The circuits are divided on this issue, with the Second and Seventh Circuits holding that it is, and every other circuit holding that it is not. The Supreme Court has granted certiorari in two consolidated cases—one from the en banc Second Circuit that ruled for the employee and the other from the Eleventh Circuit that ruled for the employer—to decide the issue.

The employers and their amici argue that Title VII protections do not extend to sexual orientation because the statute's text does not include sexual orientation among the enumerated grounds on the basis of which employment discrimination is prohibited. They also argue that the original understanding of the statutory term "because of . . . sex" encompassed only practices that treat men differently from women, not practices that discriminate based on sexual orientation. The employees and their amici conversely contend that a plain text analysis of Title VII's phrase "because of . . . sex" includes invidious differential treatment of employees because of the sex of people to whom they are attracted (i.e., disfavoring men who are attracted to other men but not men who are attracted to women).

The question presented implicates whether employees are protected from retaliation for opposing employer discrimination against fellow employees based on their sexual orientation. Protection under Title VII would also extend to discrimination against an employee because of his or her association with a gay or lesbian person. Thus, the ripple effects of the Supreme Court's decision in this case could reach far and wide.

During oral argument in these cases, the justices appeared to be closely divided, with Chief Justice Roberts and Justices Alito and Kavanaugh appearing to favor the employers' side and Justices Ginsburg, Breyer, Sotomayor, and Kagan appearing to favor the employees' side. (Justice Thomas was silent, per his usual practice.) Justice Gorsuch asked tough questions of both sides, pressing the employers' counsel as to why the employees' plain text reading of "because of . . . sex" was not correct, but also interrogating the employees' counsel about the massive social upheaval he posited would occur if the Court rules in the employees' favor, and in particular why this isn't a policy issue better suited for resolution by Congress. While oral argument is at best an uncertain indicator of how a case will be decided, Justice Gorsuch may end up holding the key vote in these cases.

Does Title VII's prohibition on employment discrimination "because of . . . sex" include gender identity and thus prohibit discrimination based on transgender status?

R.G. & G.R. Harris Funeral Homes, Inc v. EEOC, No. 18-107 (cert. granted April 22, 2019; argued Oct. 8, 2019)

Along with the question of whether Title VII's antidiscrimination provisions apply to sexual orientation, the Supreme Court agreed to resolve another circuit split about whether Title VII's prohibition on sex discrimination in employment applies to discrimination based on gender identity.

In this case, a funeral director hired as a man informed her employer that she identified as female and would wear women's

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clothes going forward. Her employer terminated her because of its religious beliefs forbidding gender transitions and its concern about her use of female restrooms and about the discomfort her appearance might cause to grieving families.

The employee argues that the funeral home engaged in sex discrimination because she was treated differently because of the sex she was assigned at birth (i.e., if she had been assigned a female sex at birth, she would not have been terminated for coming to work dressed as a woman). The employee argues that the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), holding that Title VII prohibits discriminating against employees because they do not adhere to gender norms, requires a ruling in her favor. The employer argues that it does not violate Title VII by refusing to treat men as women and vice versa, as long as it treats men and women equally.

The Supreme Court heard oral argument on the same day as *Bostock v. Clayton County* and *Altitude Express v. Zarda.* The justices grappled with issues such as the impact of their ruling on religious institutions who oppose gender transitions, on employers who have sex-specific dress codes for employees, and on the future viability of sex-segregated group bathrooms in workplaces. The argument was of a piece with the argument in *Bostock* and *Altitude Express,* and as in those cases, the outcome may well come down to Justice Gorsuch.

Does a claim of race discrimination under 42 U.S.C. § 1981 fail in the absence of but-for causation?

Comcast Corp. v. National Association of African-American-Owned Media, No. 18-1171 (cert. granted June 10, 2019; argued Nov. 13, 2019)

In recent years, the Supreme Court has decided several cases addressing the substantive causation standard required to establish liability under various federal antidiscrimination statutes. In this case, the Court will decide what causation standard applies to claims of racial discrimination in contracting under 42 U.S.C. § 1981, which guarantees to "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ."

The case arises out of Comcast's refusal to host several television channels operated by Entertainment Studios Network (ESN), which is an African-American-owned media company. ESN alleges that Comcast's refusal was racially motivated, in violation of § 1981. The District Court dismissed the case for failure to state a claim on the ground that race was not a but-for cause of Comcast's refusal to contract. The Ninth Circuit reversed, holding that ESN stated a claim under § 1981 by alleging that discriminatory motive played a role in Comcast's refusal to contract, even if it was not the but-for cause of Comcast's decision. Since this decision exacerbated a circuit split, the Supreme Court granted review.

This case represents the confluence of several strands of Supreme Court precedent. After a Supreme Court plurality decided in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), that but-for causation was required to establish liability for employment discrimination in mixed motive cases under Title VII, Congress abrogated that holding in the Civil Rights Act of 1991. It mandates that plaintiffs in mixed motive cases establish only that discrimination "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). Nevertheless, the Supreme Court more recently held that but-for causation is the default standard, absent textual indication to the contrary in the relevant statute. *See Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167 (2009) (holding but-for causation is a required element of a claim under the Age Discrimination in Employment Act); *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 570 U.S. 338 (2013) (holding but-for causation is a required element of a Title VII retaliation claim). ESN argues that § 1981 does not contain but-for causation language as did the ADEA in *Gross* and Title VII's retaliation provision in *Nassar,* while Comcast argues that § 1981 contains no textual indication that Congress intended to disturb the default but-for causation standard.

At the oral argument, most of the justices indicated they believed the Ninth Circuit got it wrong in holding that but-for causation was not a required element of a § 1981 claim. Where the justices indicated some disagreement was in how to apply that standard at the pleading stage, especially in light of the Court's tightening of notice pleading standards in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). The likeliest outcome may be the course suggested by Justice Kavanaugh: an opinion explaining that but-for (not motivating factor) causation is the required standard and vacating the Ninth Circuit's opinion with instructions to apply the correct standard on remand.

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CONSUMER PROTECTION

Does the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violate the separation of powers, and if so, can the constitutional violation be cured by severing the restrictions on the President's authority to remove the CFPB's director?

Seila Law, LLC v. Consumer Financial Protection Bureau, No. 19-7 (cert. granted Oct. 18, 2019; to be argued Mar. 3, 2020)

This is the marquee separation of powers case on the Court's docket so far this Term. Situated at the intersection of sharp jurisprudential battles over the unitary executive theory and intense political debate over the future of the Consumer Financial Protection Bureau (CFPB), the case is likely to be a landmark in the jurisprudence of presidential power and independent administrative agencies.

Seila Law provides assistance with consumer debt. While investigating whether Seila Law violated federal consumer protection laws, the CFPB issued a civil investigative demand seeking information and documents. Seila Law objected that the CFPB's structure violated the constitutional separation of powers because the President cannot remove its single director except "for cause." The CFPB sought judicial enforcement, and the district court granted the petition, holding that the structure of the CFPB did not violate the separation of powers. The Ninth Circuit affirmed, pointing to Supreme Court and D.C. Circuit decisions that upheld similar statutory restrictions on presidential removal authority.

The outcome of this case may have a significant impact on the long-term project of the Court's conservative majority to rein in the "administrative state" and bolster the power of the President over the executive branch. Starting with *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), the Court has imposed limits on the President's power to remove the heads of certain administrative agencies on the ground that those agencies combine legislative, executive, and judicial powers and were thus intended by Congress to be independent of complete presidential direction and control. The CFPB's director has the most far-reaching protections from presidential removal authority of any agency Congress has so far created, and the constitutional test posed by this case will set the direction of litigation in this area for a long time to come.

Does the "discovery rule" apply to toll the one-year statute of limitations under the Fair Debt Collection Practices Act?

Rotkiske v. Klemm, No. 18-328 (cert. granted Feb. 25, 2019; argued Oct. 16, 2019; decided Dec. 10, 2019)

One tolling doctrine commonly used in personal injury and consumer protection litigation is the discovery rule, under which the statute of limitations does not begin to run until the plaintiff discovers, or should have discovered, his injury and its cause. In this case, the Supreme Court resolved a circuit split about whether the discovery rule applies to toll the statute of limitations for claims arising under the Fair Debt Collection Practices Act (FDCPA).

Defendant collection agency attempted to collect accumulated credit card debt from plaintiff by suing him twice. The first time, defendant attempted service at an address where plaintiff no longer lived. The second time, defendant attempted service at the same incorrect address, where an unrelated addressee accepted service on plaintiff's behalf, and this lawsuit resulted in a judgment against plaintiff. Plaintiff discovered the judgment years later when applying for a mortgage. Plaintiff sued the defendant collection agency for violating the FDCPA, and opposed defendant's dismissal motion by arguing that the discovery rule applied. The district court disagreed and dismissed the action, and the en banc Third Circuit affirmed, creating a circuit split with the Fourth and Ninth Circuits.

The Court issued its opinion in this case on December 10, 2019, holding that the FDCPA's statute of limitations begins to run when a violation occurs, not when the violation is later discovered. The Court's opinion was based largely on the FDCPA's text, but it reserved the question whether an equitable tolling doctrine may apply to fraud-based claims, declining to reach the question in this case because plaintiff failed to preserve it below.

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ENVIRONMENTAL LAW

Does the Clean Water Act require a discharge permit when a pollutant originates from a point source but is conveyed to navigable waters by a nonpoint source, such as groundwater?

County of Maui v. Hawaii Wildlife Fund, No. 18-260 (cert. granted Feb. 19, 2019; argued Nov. 6, 2019)

The Clean Water Act (CWA) requires National Pollutant Discharge Elimination System permits for the discharge of pollutants to navigable waters. The County of Maui operates the Lahaina Wastewater Reclamation Facility, which disposes of treated sewage by releasing it from injection wells into groundwater, which then carries the discharge into the Pacific Ocean. Four nonprofits allege that the County violated the CWA by discharging the treated sewage without a permit. However, the County argues that it did not need a permit for this discharge because it sent the pollutant through groundwater, which it argues is not covered by the CWA. The district court and Ninth Circuit disagreed with the County.

The question presented here is whether a pollutant must be delivered directly to a navigable water in order to trigger the CWA's permit requirement or if indirect delivery through groundwater qualifies as well. In recent years, the Supreme Court has narrowed the scope of the CWA in various ways, including which bodies of water qualify as covered "waters of the United States." *See Rapanos v. United States,* 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs,* 531 U.S. 159 (2001). The oral argument in this case did not lean obviously in favor of one side over the other, with the justices expressing concern to each side about extreme hypotheticals that could result from their opposing interpretations of the CWA.

Are state common-law claims for restoration of property that seek environmental cleanup remedies that conflict with EPA-ordered remedies preempted by the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)?

Atlantic Richfield Co. v. Christian, No. 17-1498 (cert. granted June 10, 2019; argued Dec. 3, 2019)

This case involves the intersection of state environmental cleanup remedies and private property rights, on the one hand, and the federal Superfund Law (known as CERCLA), on the other. It thus represents the latest test of federal preemption to reach the Court.

This case arises out of environmental pollution emitted for over a century by the Anaconda Smelter in Montana. Atlantic Richfield ("Arco") purchased Anaconda shortly before its closure in 1980. In 1983, the EPA prioritized the site under the Superfund program in order to address the contamination, at a cost of approximately $470 million. In 2008, landowners within the Anaconda Superfund site sued Arco in state court, alleging that the smelter operations caused damage to their properties and asserting a common-law claim for "restoration" damages. The Montana Supreme Court allowed the private landowners to proceed with their state-law "restoration" claims. Arco sought U.S. Supreme Court review, arguing that: (1) the restoration claims constitute a challenge to the EPA's remedy and are thus jurisdictionally barred by CERCLA, which deprives courts of jurisdiction to hear challenges to EPA-selected remedies; and (2) CERCLA preempts state common-law claims for restoration.

At the heart of this case is a conflict between federal and state environmental cleanup remedies. Arco seeks to use federal environmental law to shield itself from further, state-mandated cleanup costs. Arco also highlights the fact that the state-law claims and EPA mandates are at odds with each other. For example, the landowners' restoration plan would require removing soil that the EPA determined should not be removed, or digging trenches where the EPA says they should not be dug. If the landowners were to win restoration damages, the result could be a balkanized patchwork of state environmental remediation regimes, contrary to CERCLA's purpose of centralizing environmental cleanup efforts under a federal aegis.

At the oral argument, most of the justices seemed to lean Atlantic Richfield's way, at least regarding the ultimate result. Justices Ginsburg, Sotomayor, and Kagan pushed back against Atlantic Richfield's most expansive preemption arguments, while none of the justices appeared to embrace the landowners' position. The justices voiced interest in coalescing around a compromise whereby the landowners would be deemed potentially responsible parties under CERCLA, meaning that they would need to seek the EPA's permission to conduct any remediation activity on their land.

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ERISA

Is the "more harm than good" pleading standard for ERISA breach of fiduciary duty claims against corporate insiders satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time?

Retirement Plans Committee of IBM v. Jander, No. 18-1165 (cert. granted June 3, 2019; argued Nov. 6, 2019; decided Jan. 14, 2020)

In *Fifth Third Bancorp v. Dudenhoeffer,* 573 U.S. 409 (2014), the Supreme Court recognized the potential that meritless ERISA litigation may be initiated against plan fiduciaries overseeing an employee stock ownership plan (ESOP) whenever there is a drop in the company's stock price. The Court adopted a context-specific pleading standard, under which plaintiffs must "plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." *Id.* at 428.

This case raises the question how *Dudenhoeffer*'s pleading standard should be applied in practice. After the price of IBM's stock dropped, former IBM employees and participants in IBM's ERISA plan sued IBM's 401(k) plan managers, claiming they breached their fiduciary duties in administering IBM's ESOP, which invests primarily in IBM stock. Plaintiffs alleged that defendants knew certain adverse information about the company and failed to disclose that information or otherwise prevent plaintiffs from buying IBM stock. The district court dismissed plaintiffs' claim, the Second Circuit reversed, and the Supreme Court granted review to resolve a circuit split over how *Dudenhoeffer's* pleading standard should be applied.

While sweeping away courts' previous presumption of prudence whenever ESOPs invested in company stock, *Dudenhoeffer* nevertheless set a high bar for plaintiffs asserting fiduciary breach claims regarding management of company stock in ESOPs. In this case, IBM argues that corporate insiders have no ERISA duty to disclose inside information about the company's fiscal health and management in order to use that information for the benefit of the ESOP beneficiaries, and that securities law alone should govern when such disclosures of inside information are required. Plaintiffs conversely argue that generalized allegations that earlier disclosure of adverse inside information is always better than later disclosure satisfy the *Dudenhoeffer* pleading standard.

The Court disposed of this case in a short *per curiam* opinion sending the case back to the Second Circuit to decide whether to consider IBM's and the federal government's new argument that ESOP fiduciaries who are also corporate insiders have no duty to act on corporate inside information when to do so would violate or conflict with the securities laws. Justices Kagan and Gorsuch wrote dueling concurrences debating whether the Second Circuit should take up this issue or deem it waived and what the answer to this question should be. Given the lingering uncertainty over the proper application of *Dudenhoeffer's* pleading standard to corporate insiders, it is likely this issue will return to the Court in short order. This is the latest in a recent string of cases in which the Supreme Court has punted an issue and derailed a case because the petitioner switched horses between its cert. petition and its merits brief, presenting a new issue in the merits brief that the lower courts had not addressed. As the Court said, it is a court of review, not of first view.

May an ERISA plan participant or beneficiary seek injunctive relief against or restoration of plan losses caused by fiduciary misconduct without demonstrating individual financial loss or the imminent risk thereof, and have plaintiffs demonstrated Article III standing?

Thole v. U.S. Bank, NA, No. 17-1712 (cert. granted June 28, 2019; argued Jan. 13, 2020)

Thole presents issues at the intersection of the remedies available under ERISA and Article III standing doctrine. Plaintiffs are beneficiaries of U.S. Bank's pension plan who filed a class action lawsuit alleging that U.S. Bank violated ERISA by breaching its fiduciary duties and causing the plan to engage in prohibited transactions with a subsidiary company, resulting in the plan suffering significant losses and becoming underfunded. At issue is whether plaintiffs must demonstrate, as a matter of ERISA's statutory elements or of Article III standing, individual financial loss or the imminent risk of such loss in order to seek injunctive relief or restoration of plan losses caused by a fiduciary breach.

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The Eighth Circuit dismissed the case, holding that because the bank pension plan's financial position had recovered and was in a healthy condition, there was no financial loss and plaintiffs had no standing to sue. The U.S. Solicitor General is supporting the plaintiff class members, arguing (as his office and the Department of Labor have in other ERISA cases) that an ERISA fiduciary's breach of duty is an injury giving rise to standing, regardless of whether it causes a pension plan to lose money. The circuit courts are deeply split on this issue, with the Second, Third, and Sixth Circuits following the plaintiffs' and the government's approach, while the Fourth, Fifth, and Ninth Circuits have followed the defendant's approach and denied standing to similarly situated plaintiffs. The Court's opinion should thus resolve this important question.

During the oral argument, the justices' positions broke down along predictable lines. Justices Ginsburg, Breyer, Sotomayor, and Kagan asked skeptical questions of U.S. Bank's counsel and seemed to favor the plaintiffs' position, while Chief Justice Roberts and Justices Alito and Gorsuch seemed skeptical that plaintiffs have the requisite standing to pursue their ERISA claims. Justice Kavanaugh asked tough questions of both sides and appeared torn about the outcome, so his vote may be determinative.

Does ERISA's three-year statute of limitations, which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bar suit where all of the relevant information was disclosed to the plaintiff more than three years before the plaintiff filed suit, but the plaintiff did not read it?

Intel Corp. Investment Policy Committee v. Sulyma, No. 18-1116 (cert. granted June 10, 2019; argued Dec. 4, 2019)

This case addresses how ERISA's statute of limitations, and in particular its "actual knowledge" requirement, applies where plaintiff has access to the necessary information but does not read it. Plaintiff, an Intel employee, participated in the company's retirement plan and sued the plan for imprudently investing plan funds in violation of ERISA. ERISA requires plaintiffs asserting such claims to file suit within six years of the fiduciary's breach or within three years of when plaintiff gains actual knowledge of the breach. The district court granted Intel summary judgment on the ground that plaintiff gained actual knowledge of the breach at issue when he received the plan documents from Intel more than three years before filing suit, even though he did not read those documents. Creating a split with the Sixth Circuit, the Ninth Circuit reversed and held that "actual knowledge" requires that the plaintiff actually be aware of the facts constituting the breach, not merely that those facts are available but not known to the plaintiff.

The oral argument in this case appeared to go heavily in plaintiff's favor. Almost all of the justices, from both sides of the ideological spectrum, peppered Intel's lawyer with skeptical questions focused on the text of the ERISA statute of limitations, and in particular its "actual knowledge" language. While predicting the outcome of a case from oral argument is a hazardous endeavor, it seems likely that plaintiff will prevail in this case.

ARBITRATION

Does the Convention on the Recognition and Enforcement of Foreign Arbitral Awards permit a nonsignatory to an international arbitration agreement to compel arbitration based on the doctrine of equitable estoppel?

GE Energy Power Conversion France SAS v. Outokumpu Stainless USA, LLC, No. 18-1048 (cert. granted June 28, 2019; argued Jan. 21, 2020)

The Court's latest foray into arbitration law arises not from its usual fodder of recent years—arbitral class action waivers and preemption of state unconscionability and other public policy doctrines—but rather from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention and incorporated into the Federal Arbitration Act (FAA)). This case asks whether a nonsignatory to an international arbitration agreement can compel a signatory to arbitrate based on equitable estoppel principles.

The dispute arises from international agreements for the provision of cold rolling mills required to operate a steel production plant in Alabama. Outokumpu Stainless USA operated the plant and contracted with Fives St. Corporation, a German company, to supply the cold rolling mills. Fives subcontracted with GE Energy Power Conversion France, a French subsidiary of General Electric, to supply motors for

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the mills. Both contracts contained arbitration agreements requiring arbitration in Germany under German law. When the mills failed, Outokumpu sued GE Energy in Alabama state court, and GE Energy removed the case to federal court and moved to compel arbitration under the New York Convention. Outokumpu moved to remand the case to state court and opposed arbitration, but the district court denied remand and compelled arbitration. The Eleventh Circuit affirmed the denial of remand but reversed the district court's granting of the motion to compel arbitration, holding that the New York Convention requires a written agreement to arbitrate that is "signed by the parties" and that this language means the parties to the litigation rather than the parties to the arbitration agreement. The Eleventh Circuit reasoned that no agreement was signed by the parties before the court because Outokumpu's contract was with Fives, not GE Energy. The Eleventh Circuit acknowledged that Chapter 1 of the FAA empowers nonsignatories to compel arbitration under the doctrine of equitable estoppel, but concluded that the New York Convention (Chapter 2 of the FAA) does not allow this maneuver. In so ruling, the Eleventh Circuit widened a 2-2 circuit split on this issue, prompting the Supreme Court to grant review.

This case will require the Court to focus on interpreting the language of the New York Convention, in particular its "signed by the parties" requirement. The Convention's silence on whether nonsignatories may enforce an international arbitration agreement will impact the construction and stability of such agreements, given that parties to international arbitration agreements, like domestic ones, need to know whether they can be enforced through generally accepted principles of contract law like equitable estoppel.

At the oral argument, the justices appeared split about the outcome of this case, making it difficult to predict. Chief Justice Roberts and Justices Alito and Kagan asked skeptical questions of GE's counsel, emphasizing the general principle that only parties to a written agreement may compel arbitration under it, while Justices Breyer and Gorsuch sounded more favorable to GE's position that equitable estoppel could apply under the New York Convention under these circumstances. Justices Ginsburg and Sotomayor asked challenging questions of both sides, while Justices Thomas and Kavanaugh were completely silent.

CIVIL PROCEDURE

When a plaintiff asserts new claims, can federal preclusion principles bar a defendant from raising defenses that were not actually litigated and resolved in any prior case between the parties?

Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc., No. 18-1086 (cert. granted June 28, 2019; argued Jan. 13, 2020)

This case raises the issue of whether claim or issue preclusion principles can be applied to bar the assertion of a defense in federal court.

Lucky Brand Dungarees and Marcel Fashion Group are competitors in the fashion industry. In 2003, the parties entered into a settlement agreement to resolve a trademark dispute, in which Lucky Brand agreed not to use the "Get Lucky" trademark and Marcel agreed to release future claims regarding its trademarks. In 2005, further litigation ensued involving the scope of the settlement agreement, in which Lucky Brand argued that Marcel's trademark infringement claims were released in the settlement agreement. That litigation resulted in a jury finding that Lucky infringed Marcel's "Get Lucky" mark after May 2003 and an injunction prohibiting Lucky from using the "Get Lucky" trademark.

In 2011, Marcel filed another lawsuit against Lucky Brand alleging infringement of Marcel's "Lucky Brand" trademark. After various procedural twists and turns, Lucky moved to dismiss Marcel's claims on the basis that the release in the 2001 settlement agreement barred Marcel's claims. Marcel opposed on the ground that Lucky Brand's release defense was precluded by res judicata because Lucky Brand could have raised that defense in the 2005 action but failed to do so. The district court granted Lucky Brand's motion and dismissed Marcel's claims, but the Second Circuit vacated the judgment, holding that litigation defenses are subject to federal preclusion principles and that res judicata barred Lucky Brand from invoking its release defense again in this action.

The Supreme Court likely granted review because the Second Circuit's decision to recognize the concept of "defense preclusion" created a circuit split with three other circuits,

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thereby destabilizing the uniformity of preclusion doctrine across the federal court system. The traditional rule is that claim preclusion applies only where the claim at issue in the prior and the current lawsuits is the same. Where the claims are different, only issue preclusion could possibly apply, and then only where the issue was actually litigated and decided in the first proceeding (which all agree did not occur in this case). Thus, the Second Circuit's new rule of "defense preclusion" threatens to conflate the long distinct and well-established concepts of claim preclusion and issue preclusion. Civil practitioners should keep a close eye on how the Supreme Court reacts to this innovation and whether it allows it to survive.

At the oral argument, most of the justices appeared ready to reverse the Second Circuit's decision, although it remained unclear whether the Court would address the existence of defense preclusion vel non. Chief Justice Roberts and Justices Breyer, Sotomayor, and Gorsuch all questioned the concept of defense preclusion to varying degrees, and Justices Ginsburg and Kagan also sounded skeptical of Marcel's position based on the facts of this case. Justice Kagan suggested a narrow disposition that could win the day, under which the Court could recognize that Marcel's claim for the "Lucky Brand" mark is a new claim that was not at issue in the earlier litigation over the "Get Lucky" mark, so that even if defense preclusion does exist, it doesn't apply here.

INTELLECTUAL PROPERTY

Is willful infringement a prerequisite for an award of profits in a trademark infringement action under the Lanham Act?

Romag Fasteners, Inc. v. Fossil, Inc., No. 18-1233 (cert. granted June 28, 2019; argued Jan. 14, 2020)

This case addresses an important and recurring question regarding the remedies available for trademark infringement under the Lanham Act, a question on which the circuits are deeply and evenly divided: whether a plaintiff claiming trademark infringement under the Lanham Act must prove willful infringement in order to recover the defendant's profits.

Plaintiff Romag Fasteners sells magnetic snap fasteners for use in wallets and other leather goods. Defendant Fossil, Inc. designs, markets, and distributes fashion accessories. Fossil and Romag entered into an agreement to use Romag fasteners in Fossil's products. Romag later discovered that certain Fossil handbags sold in the United States contained counterfeit snaps bearing the Romag mark. Romag sued Fossil for patent and trademark infringement based on Fossil's use of the Romag mark on counterfeit goods. A jury found that Fossil infringed Romag's trademarks but did not do so willfully. The jury nevertheless awarded Romag lost profits as well as damages, finding that Fossil acted with "callous disregard" for Romag's trademark rights. The District Court stuck the lost profits award, ruling that "willfulness" is a requirement for an award of profits for trademark infringement. The Federal Circuit affirmed the striking of Romag's lost profits award because Romag had failed to prove that Fossil's infringement was willful.

The Supreme Court's decision here promises to resolve an intractable circuit split on an important and recurring issue of trademark law. Six circuits allow recovery of a trademark infringer's profits under the Lanham Act without requiring a threshold showing of willfulness, considering whether the infringer acted willfully as one factor among many. Six other circuits require proof of willfulness to allow plaintiffs to recover lost profits for trademark infringement under the Lanham Act. Because a Lanham Act plaintiff's actual damages from trademark infringement are often difficult to measure, especially in the modern transnational economy of decentralized supply chains and outsourcing of manufacturing functions abroad, an award of an infringer's profits is often the only way to provide meaningful relief to a trademark holder for infringement.

At the oral argument, most of the justices appeared to be leaning in favor of Romag's position. Justices Ginsburg, Sotomayor, Kagan, Gorsuch, and Kavanaugh all asked skeptical questions of Fossil's counsel, zeroing in on the fact that the Lanham Act uses the phrase "principles of equity" rather than the word "willfulness" in setting the standard for an award of an infringer's profits. The Court seemed to favor a more holistic inquiry, in which willfulness is an important factor but not a threshold requirement for awarding an infringer's profits.

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(1) Does copyright protection extend to a software interface? (2) If so, is a program developer's use of a software interface to create a new computer program protected by fair use?

Google, LLC v. Oracle America, Inc., No. 18-956 (cert. granted Nov. 15, 2019)

This is the marquee intellectual property case on the Supreme Court's docket this Term. It asks whether software interfaces—lines of computer code that allow developers to utilize prewritten libraries of code to perform particular tasks in creating new computer programs—are protected by copyright law and, if so, whether the fair use doctrine provides a defense to copyright infringement claims in this context.

Google and Oracle have been locked in litigation for years over copyright infringement claims related to Sun Microsystems' Java platform (which Oracle purchased in 2010), and in particular Java's software interfaces. Google used Java software interfaces to develop its Android smartphone platform with Sun's blessing, but once Oracle acquired Sun, it sued Google for patent and copyright infringement. Google defended against the copyright claim on the ground that the Java software interfaces were not copyrightable and that, even if they were, Google's incorporation of them into Android was fair use. When the jury hung on the fair use defense after a first trial, the district judge granted Google judgment as a matter of law on the ground that the software interfaces were not copyrightable. The Federal Circuit reversed, holding that they were copyrightable, and the Supreme Court declined to take the case up in that interlocutory posture. On remand, after a second trial, the jury found in Google's favor on its fair use defense, but the Federal Circuit again reversed on that issue and ruled that Google did not engage in fair use as a matter of law.

The Federal Circuit's copyrightability holding deepened an existing circuit split, and that factor, along with the importance of the questions presented to the future of the software industry, likely prompted the Court to grant certiorari. The copyrightability question revolves around two related legal doctrines: section 102(b) of the Copyright Act and the merger doctrine. Section 102(b) embodies copyright law's idea-expression dichotomy by withholding copyright protection from "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such [original] work." 17 U.S.C. § 102(b). Google argues that software interfaces like Java are "methods of operation" that are not copyrightable, and the Supreme Court granted certiorari in a 1996 case to decide that question but ended up affirming by an equally divided Court. The merger doctrine also implements the idea-expression dichotomy by withholding copyright protection where an idea is incapable of being expressed in more than one way, deeming the idea and the expression of the idea to "merge" and thus become unprotectable by copyright law. Google argues that the merger doctrine excludes software interfaces like Java from copyright protection, an issue on which the circuits are also split.

The Federal Circuit's fair use holding is also before the Court, with Google highlighting various aspects of fair use doctrine in need of the Court's guidance, including the role that functionality of the expression plays in applying the fair use factors, how the transformative use test should be applied to software interfaces, and how the market harm analysis should be conducted in this context.

The Court's opinion in this case will have monumental implications for the future of the software industry and computer programming in general, and it will likely be a landmark in policing the boundary between copyright and patent law and in the development of the fair use doctrine.

Does the addition by an online business of a generic top-level domain (".com") to an otherwise generic term create a protectable trademark and avoid the Lanham Act's exclusion of generic terms from trademark protection?

U.S. Patent & Trademark Office v. Booking.com B.V., No. 19-46 (cert. granted Nov. 8, 2019)

The company Booking.com B.V. operates a website allowing customers to book hotel accommodations online. It filed trademark registration applications for the term "BOOKING.COM" with the U.S. Patent and Trademark Office (USPTO) for use of the term in connection with online hotel reservation services. The USPTO examining attorney refused registration on the ground that the term BOOKING.COM is generic and ineligible for trademark protection. Booking.com appealed to the Trademark Trial and Appeal Board (TTAB), which affirmed.

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Booking.com then brought suit in federal district court in the Eastern District of Virginia, which disagreed with the TTAB and held that the term BOOKING.COM is protectable and not impermissibly generic because Booking.com's survey evidence showed that the public associates the term with its particular business and website. The Fourth Circuit affirmed, creating a split with the Ninth and Federal Circuits, and the Supreme Court granted the Solicitor General's petition for certiorari to resolve the split.

The question presented is important for the future of competition in online advertising. If affirmed, the Fourth Circuit's holding would allow early registrants to gain a virtual monopoly over terms in common usage for purposes of online advertising, and thereby crowd out any competitors. As early as 1888, the Supreme Court held that appending the terms "Company" or "Inc." to a generic term does not render the resulting term protectable under trademark law, and the Solicitor General strongly argues that the same principle applies to the online advertising context of the internet. Whether the Court agrees should become apparent once oral argument is held in the spring.

SECURITIES LAW

Can the Securities and Exchange Commission (SEC) seek and obtain disgorgement from a court as equitable relief for a securities law violation even though the Supreme Court has determined that such disgorgement is a penalty?

Liu v. SEC, No. 18-1501 (cert. granted Nov. 1, 2019; to be argued Mar. 3, 2020)

This case puts in peril the most potent weapon in the remedial arsenal of the SEC in pursuing civil enforcement actions in federal court: disgorgement. The federal securities laws permit the SEC to seek three types of remedy in such actions: injunctions, civil monetary penalties (which are limited in amount by statute), and equitable relief (including restitution for unjust enrichment). Two Terms ago, in *Kokesh v. SEC,* __ U.S. __, 137 S. Ct. 1635 (2017), the Supreme Court held that disgorgement is a type of penalty for purposes of the applicable statute of limitations because its primary purpose is to punish violations of the securities laws and deter future violations; defendants frequently have to pay more in disgorgement than they gained from their victims; and disgorged funds are generally paid to the government and not to victims. During the oral argument in *Kokesh*, a majority of the justices expressed doubt as to the existence of any statutory authority for the SEC to seek disgorgement and did not appear to agree that disgorgement was a form of equitable relief, as lower courts have held. In its opinion in *Kokesh*, the Court expressly reserved the question "whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." *Id.* at 1642 n.3.

This case takes up where *Kokesh* left off. The SEC brought a civil enforcement action against Charles Liu and Xin Wang for fraudulently soliciting investments in connection with the EB-5 Immigrant Investor Program, which offers permanent residence to aliens who make a significant investment in a U.S. commercial enterprise. After the district court found that Liu and Wang had violated the securities laws, the SEC sought and was granted an injunction, over $8 million in civil monetary penalties, and over $26 million in disgorgement. Both the district court and the Ninth Circuit rejected Liu and Wang's challenge to the SEC's authority to order disgorgement, concluding that disgorgement is a form of equitable relief authorized by the federal securities laws.

Given this history, it seems probable that the Court will reverse and hold that disgorgement is not an available remedy in SEC civil enforcement actions. If the Court does so, its opinion may have significant implications for other agencies and their enforcement strategies because agencies as diverse as the Federal Trade Commission, the Environmental Protection Agency, the Food and Drug Administration, the Commodity Futures Trading Commission, the Consumer Financial Protection Bureau, and the Federal Energy Regulatory Commission regularly seek and obtain disgorgement as a form of equitable relief in civil enforcement proceedings. If this case sweeps that remedy away, the ripples from its holding may reverberate for some time to come.

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STATEMENTS OF DECISION PART DEUX

Hon. John L. Segal

Robin Meadow

In the Winter 2019 issue of the ABTL Report, we began this two-part primer on statements of decision, explaining what they are, when they're available, why the losing party almost always wants one, and why the winning party rarely does.

In this article, we assume that the trial court is going to issue a statement of decision. We now focus on the strategic decisions and tactical choices counsel will have to make during the surprisingly complicated and lengthy process of preparing the statement of decision.

More About The Doctrine Of Implied Findings

As we discussed in our first article, there is an important doctrine that makes the statement of decision, and what it does and doesn't include, of particular appellate significance: the doctrine of implied findings. In essence, the Court of Appeal presumes that the trial court found all facts against the appellant. As a practical matter, the only way around this presumption is to demonstrate that no substantial evidence supports some necessary factual component of the judgment. That's one of the steepest appellate hills an appellant can have to climb.

Having a statement of decision may allow the appellant to avoid that hill. By nailing down the basis of the trial court's decision, the statement of decision may reveal a dispositive legal error—such as reliance on inadmissible evidence or an inapplicable legal theory. And the Court of Appeal can't imply findings in the face of express contrary trial court findings. (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384 ["When the record clearly demonstrates what the trial court did, we will not presume it did something different"].)

The Statement Of Decision Process

To repeat our advice from Part I: Read rule 3.1590 of the California Rules of Court, and read it again at every step of the statement of decision process. (Trial judges do every time they prepare a statement of decision.) The process can take multiple distinct paths, and you need to be sure you're on the right one.

The process begins with the issuance of a "tentative decision." (Rule 3.1590(a).) Regardless of what label the court uses, that's what this initial announcement of decision is—tentative. (Rule 3.1590(b) ["The tentative decision does not constitute a judgment and is not binding on the court"].) The rules of court do not dictate the content of a tentative decision—it can range from a one-line statement of who wins to many dozens of pages of exposition.

Rule 3.1590(c) allows the court to dictate what procedural path the parties will follow next in working with the court to make the tentative decision become the statement of decision:

> The court in its tentative decision may:
> (1) State that it is the court's proposed statement of decision, subject to a party's objection under (g);
> (2) Indicate that the court will prepare a statement of decision;
> (3) Order a party to prepare a statement of decision; or
> (4) Direct that the tentative decision will become the statement of decision unless, within 10 days after announcement or service of the tentative decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision.

The remainder of rule 3.1590 lays out what's supposed to happen in each of these situations. Unfortunately, the path isn't always clear. Sometimes one of the parties takes off in the wrong direction, or the court uses terminology that obscures which path it intends the parties to follow (for example, it titles its initial document a "tentative statement of decision" but doesn't invoke rule 3.1590(c)(1)). And occasionally a court will use its own preferred procedure, such as requesting both sides to submit proposed statements of decision before it takes the matter under submission.

But there are two steps that counsel seeking a statement of decision must always be prepared to take: Request a statement of decision, and make objections.

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Requesting A Statement Of Decision

A court does not always have to issue a statement of decision. Code of Civil Procedure section 632 requires a statement of decision only "upon the request of any party appearing at the trial." Nor is it enough to just tell the court you want a statement of decision. You have to tell the court what specific issues you want it to address: "The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision." (*Ibid*.; see rule 3.1590(d) [same].) So, to start the process you must make a request and it must be a proper request.

This sounds simple enough, but it isn't. At least, not judging by what many lawyers file: a lengthy set of questions probing every evidentiary detail of the decision, written like a set of interrogatories with multiple conditional subparts. A court is under no obligation to respond to such a document, so long as the final statement of decision "fairly disclose[s] its determination" of the principal controverted issues. (*In re Marriage of Williamson* (2014) 226 Cal.App.4th 1303, 1319; see *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 524 [Appellant "would compel the trial court to make findings with regard to detailed evidentiary facts, to make minute findings as to individual items of evidence. Such a detailed evidentiary analysis is not required by law"].) In short, the request should pose high-level, ultimate-fact questions.

But what if the court's initial document is its "proposed statement of decision" (rule 3.1590(c)(1)), or states that its tentative decision "will become the statement of decision" (rule 3.1590(c)(4))? Do you still need to request a statement of decision? You certainly do if the initial document doesn't address what you consider to be all of the principal controverted issues. Subdivision (c)(4), under which the initial document "will become the statement of decision," expressly contemplates doing this. Subdivision (c)(1), under which the initial document is the "proposed statement of decision," is less clear—it contemplates "objections." But since the court has no obligation to address any principal controverted issue without a request to do so, the proper vehicle would seem to be a request rather than an objection. The path is even less clear if the court issues some kind of hybrid like a "tentative statement of decision."

We believe that regardless of what the initial document says, it's prudent to request a statement of decision that lists all of the principal controverted issues you want the court to address. At worst, it will be redundant; at best it will preserve an issue that might otherwise be lost. This is true even if the court's initial document expressly addresses some of the principal controverted issues you're interested in. Although it seems illogical to ask the court to answer a question it appears to have already answered, prudence dictates that you do so. Much digital ink has been spilled in appellate briefs over whether a request for statement of decision was required or sufficient. Again, redundancy is better than waiver.

Chances are you'll end up filing a hybrid document that objects to any inconsistencies with rule 3.1590; states what you believe the court intended; requests a statement of decision on principal controverted issues, regardless of whether the initial document addresses them; and objects to any omissions or ambiguities.

Objecting To The Tentative Decision

Note we are not saying that your objections will dispute the *correctness* of the court's findings. This is another common mistake attorneys make in the statement of decision process: As we discussed in Part I, lawyers often use the process to re-argue the case, filing what looks much more like a new trial motion (or a statement of disqualification of the trial judge for cause) than a short list of principal controverted issues. Don't reargue the case or criticize the trial judge. Assume the ultimate decision isn't going to change, and focus on ensuring that the reasons for that decision are stated as clearly and completely as possible and in a way that may help you make errors clear for the Court of Appeal. If the trial court changes its mind in light of what you file, great—but don't count on it. Save that for your new trial motion, which the statement of decision process may help you fortify with sufficient details to reveal an obvious error.

So why object? This brings us back to the doctrine of implied findings and Code of Civil Procedure section 634. Section 634 states: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous *and the record shows that the omission or ambiguity was brought to the attention of the trial court* either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue." (Italics added.) Thus, if the trial court fails to address an omission or ambiguity that

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a party calls to its attention, the doctrine of implied findings won't apply to that issue. (Of course, once you identify the omission or ambiguity, the court is likely to address it—at least if it's something that really matters—and thereby eliminate whatever advantage you might have gained. But at the end of the day, it's best to get the trial court's specific reasoning. And recognize that if the process resolves issues in a way that causes the appeal to evaporate, it may well have saved the client a substantial investment in a doomed appeal.)

Your objections must be specific to avoid the doctrine of implied findings. (See *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 498 ["The alleged omission or ambiguity must be identified with sufficient particularity to allow the trial court to correct the defect"].) And your first round of objections may not be enough. If revisions to the statement of decision don't resolve your objections, you need to object again, and continue to object if the problem isn't resolved. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1132.) It's never too late: The court has the power to amend a statement of decision in ruling on a new trial motion (Code Civ. Proc., § 662) or motion to vacate (Code Civ. Proc., § 663).

Preparing The Statement Of Decision

Although trial judges often prepare statements of decision, rule 3.1590(c)(3) allows the court to order one of the parties to prepare it, and under rule 3.1590(e) parties may respond to a request for statement of decision by proposing language. For the non-requesting party—presumably the prevailing party—this is a valuable opportunity to present your client's case to the Court of Appeal through the trial court's eyes.

Some practice pointers:

1. If the trial court has already drafted something or stated its tentative ruling orally on the record in court, use as much of the trial court's language as you can, but don't hesitate to improve and clarify, and of course correct mechanical errors. Add some cases; provide additional reasons the court was right. Don't cheat by including rulings the court did not make, but make the judge look good. Consider providing a redline or using Word's "Track Changes" to show any deviations from the court's language.

2. To the extent you can do so consistently with what the court has already written, tell a compelling story. Make it interesting and readable. Remember, the statement of decision may be the first thing an appellate judge reads.

3. Although you should address all of the principal controverted issues the other side identifies (assuming that they really are principal controverted issues), you don't have to do any more than a judge would have to do. You need not answer every question in a set of interrogatories—you just need to show how the court reached its decision. Less is generally better, because the Court of Appeal must imply all findings in your client's favor. But don't hesitate to lay out key reasoning if it makes the statement of decision more understandable and persuasive. And don't ignore any question unless you're confident it's not appropriate. (That you don't like the answer doesn't make a question inappropriate. Use the opportunity to frame the question as less important and frame the bad answer as favorably as you can, consistent with the evidence and law.)

4. Write like a judge, not an advocate. You should always avoid invective, but particularly in a document you want the court to sign and the Court of Appeal to find persuasive. Be even-handed—be judicial.

5. To avoid any possible confusion, do not include language that sounds like an actual judgment. The judgment should be a separate document. (See *Alan v. American Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 901.) For example, instead of saying that "Plaintiff shall recover $xxx," say "The judgment shall provide that plaintiff shall recover $xxx."

6. If in response to your proposed language the other side identifies an omission or ambiguity, don't fight it—you'll only help preserve the other side's rights under Code of Civil Procedure section 634. Instead, take the opportunity to improve the proposed statement of decision by addressing the point as positively as you can.

7. Even if the court has issued a comprehensive tentative decision, the requesting party will likely pose questions—perhaps many questions—that the tentative decision doesn't directly answer. Unless you feel there is no basis at all for requesting a statement of decision that addresses those questions, it's prudent to provide answers. But rather than rewriting the entire tentative decision to incorporate the answers, consider ending the proposed statement of decision with something like this: "The Court intends the foregoing narrative to explain the factual and legal basis for the Court's decision on all of the principal controverted issues that [the requesting party] has properly identified in its request for statement of decision.

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Nevertheless, to avoid any misunderstanding, the Court further states: [Respond question by question, with page/line references to existing text in the statement of decision or additional text as appropriate]."

Does Any Of This Matter?

You bet it does. Maybe not often—but when it does matter, it matters a lot.

Exhibit A is *Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42 (*Fladeboe*). There, a car dealer sought a declaration that a manufacturer unreasonably withheld consent to transfer a dealership. Following the bifurcated trial on this issue, the trial court found the plaintiffs lacked standing to seek declaratory relief, and (as far as the opinion reveals) made no findings on the consent issue. (*Id*. at pp. 53-54.) But no one requested a statement of decision. (See Cal. Rules of Court, rule 3.1591 [statement of decision in bifurcated trials].)

The Court of Appeal found that some plaintiffs did have standing—but that in the absence of a statement of decision, the doctrine of implied findings nevertheless required affirmance. "Plaintiffs neither requested a statement of decision on their declaratory relief cause of action nor informed the trial court of any ambiguities or omissions in its findings in the minute order. . . . [¶] Given this record, we must infer the trial court, after giving Plaintiffs a full and fair opportunity to try their declaratory relief action, made every factual finding necessary to support its decision. Because the judgment is presumed correct, and because Plaintiffs bore the burden of affirmatively proving error, the doctrine of implied findings instructs us to infer the trial court made every implied factual finding necessary to support the conclusion that [the manufacturer] reasonably withheld consent . . . ." (*Fladeboe, supra*, 150 Cal.App.4th at pp. 61-62.) Finding that this conclusion was "legally sound and supported by substantial evidence" (*id*. at p. 62), the court affirmed.

The takeaway: It's possible, given its no-standing finding, that the *Fladeboe* trial court didn't even think about the consent issue. But the Court of Appeal nevertheless *had to presume* that the trial court not only thought about the issue but decided it for to the manufacturer. That's a big leap, but the failure to request a statement of decision required it.

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Understanding what the statement of decision process is and isn't can be crucial to preserving your client's appellate rights. Our two articles aim to promote that understanding, but it will be worth your while to revisit the details every time you have a bench trial.

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YLD UPDATE

Andrew Holmer

Jonathan Slowik

The YLD kicked off its 2019-20 programming on December 12 with a panel discussion at the Montage Beverly Hills titled "How to Handle High Profile Cases in the Courtroom and with the Press." The star-studded panel included attorneys Robert Shapiro (Glaser Weil Fink Howard Avchen & Shapiro LLP), Shawn Holley (Kinsella Weitzman Iser Kump & Aldisert LLP), and Kevin Boyle (Panish, Shea & Boyle LLP), longtime trial reporter Linda Deutsch (formerly of the Associated Press), and Hon. Deborah Brazil (Los Angeles Superior Court). The panel was moderated by Panish, Shea & Boyle attorney and YLD member Robert Glassman.

The attorneys in attendance were treated to a fascinating discussion about high profile cases lik the O.J. Simpson murder trial, the Michael Jackson child molestation trial, the Christian Brando manslaughter trial, and civil suits stemming from the 2017 Las Vegas shooting at the Route 91 Harvest festival and the Boeing 737 MAX disasters, among other matters. With decades of experience handling such matters, the panelists shared their insights on how to garner—or avoid—publicity, how media coverage can inform settlement posture or trial strategy, and how the ubiquity and immediacy of news reporting online has changed attorneys' approaches to high profile cases in recent years, among other topics.

Stay tuned for much more from the YLD in 2020. We are anticipating a number of exciting programs, including more panel discussions, brown bag lunches with judges, social events (including the annual judicial mixer), and a public service event. There are also opportunities for YLD members to contribute content to the ABTL Report and to assist with the ATBL's judicial profiles podcast. Please contact Andrew Holmer (aholmer@crowell.com) or Jonathan Slowik (jpslowik@akingump.com) if you'd like to hear more about getting involved. We're looking forward to a great 2020!

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