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Memorandum 2006-36

New Topics and Priorities

BACKGROUND

Each fall, the Commission reviews its Calendar of Topics and determines (1) whether to request authority to add or delete any topic, and (2) what its priorities will be for the next year.

To that end, this memorandum summarizes the status of the studies that the Legislature has authorized the Commission to undertake. The memorandum also presents and analyzes suggestions made throughout the past year regarding new topics for the Commission to study. The memorandum concludes with staff recommendations for allocation of the Commission's resources during the coming year.

At the Commission meeting, the staff does not plan to discuss each of the many ongoing and suggested new topics described in this memorandum. A Commissioner or other interested person who believes a topic warrants discussion should be prepared to raise it at the meeting.

The following letters, email communications, and other materials are attached to and discussed in this memorandum:

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

In addition to these suggestions, the Commission has numerous ongoing and pending projects, and suggestions carried over from previous years. The Legislature also assigned two new projects to the Commission, with relatively short deadlines.

As in other recent years, the Commission must be careful not to spread its resources too thin. The impending retirement of the Executive Secretary is likely to reduce productivity. He will be replaced by a less experienced attorney, probably at the entry level. His departure will leave the Commission with only two attorneys who have taken a Commission proposal through the legislative process. Due to this staffing situation and the existing overload of projects, the staff remains generally negative about undertaking any new projects. **The Commission should be highly selective in deciding how to spend its resources.**

Review of Last Year's Decisions

At its last annual review of new topics and priorities, the Commission decided to undertake three of the suggested new projects:

(1) A study of procedural concerns relating to Code of Civil Procedure Section 1260.040, an eminent domain provision recently enacted on Commission recommendation.

(2) As a low priority matter, a variety of technical issues that the Commission could investigate pursuant to its statutory authority to correct technical and minor substantive defects (Gov't Code § 8298).

(3) As a low priority matter, a narrow issue relating to interest on a pecuniary gift in a trust, which involves a provision drafted by the Commission (Prob. Code § 16340).

Aside from these new projects, the Commission decided to follow its traditional scheme of priorities: (1) matters for the next legislative session, (2) matters directed by the Legislature, (3) matters for which the Commission has engaged an expert consultant, and (4) other matters that have been previously activated but not completed.

Action on Last Year's Decisions

During 2006, the Commission took the following action in response to last year's decisions:

Procedural Concerns Relating to Code of Civil Procedure Section 1260.040

The Commission deferred work on this topic because a bill to have the Commission conduct a broader study of eminent domain law was pending in the Legislature (AB 1162 (Mullin)). The bill was not enacted. Consequently, it is now appropriate for the Commission to commence work on this topic as a separate item. The staff will work it into the schedule as time permits.

Technical Issues

The Commission recently finalized a recommendation on *Technical and Minor Substantive Statutory Corrections.* The staff will seek an author to introduce the proposal in the Legislature in early 2007.

Interest on a Pecuniary Gift in a Trust

The Commission has not yet begun work on this topic. Unless the Commission otherwise directs, the staff will continue to treat it as a low priority matter and work it into the schedule as time permits.

TOPICS LISTED IN THE COMMISSION'S CALENDAR OF TOPICS

The Commission's enabling statute recognizes two types of study topics: (1) those that the Commission identifies for study and lists in the Calendar of Topics that it reports to the Legislature, and (2) those that the Legislature assigns to the Commission directly. Gov't Code § 8293.

The bulk of the Commission's study topics have come through the first route — matters identified by the Commission and approved by the Legislature. If the Commission identifies a topic for study, it cannot begin to work on the topic until the Legislature, by concurrent resolution, authorizes the Commission to conduct the study.

Direct legislative assignments used to be relatively rare but have become more common in recent years. Some of the major topics the Commission recently addressed (including financial privacy and repeal of statutes made obsolete by trial court restructuring) were directly assigned by the Legislature, not requested by the Commission.

This section of the memorandum reviews the status of matters currently listed in the Commission's Calendar of Topics. The next section discusses matters that the Legislature assigned to the Commission directly.

The Commission's Calendar of Topics currently includes 22 topics. See 2006 Cal. Stat. res. ch. 1. A precise description of each topic is appended as Exhibit pages 1-3. The Commission has completed work on a number of the topics listed in the calendar — the authority is retained in case corrective legislation is needed.

Below is a discussion of each topic in the calendar. The discussion indicates the status of the topic and the need for future work.

1. Creditor's Remedies

Beginning in 1971, the Commission made a series of recommendations covering specific aspects of creditors' remedies and in 1982 obtained enactment of a comprehensive statute governing enforcement of judgments. Since enactment of the Enforcement of Judgments Law, the Commission has submitted a number of narrower recommendations to the Legislature.

Enforcement of Judgments and Exemptions

Specific statutes direct the Commission to study enforcement and exemptions. These directives are discussed below under "Topics Referred by the Legislature."

Judicial and Nonjudicial Foreclosure of Real Property Liens

Foreclosure is a matter that the Commission has recognized in the past is in need of work, but has always deferred due to the magnitude, complexity, and controversy involved in that area of law. The National Conference of Commissioners on Uniform State Laws ("NCCUSL") completed work on a Uniform Non-Judicial Foreclosure Act in 2002. That may be a useful product for Commission consideration, although it has not yet been enacted in any jurisdiction. In recent years, the Commission received suggestions from Michael Hertz, John Jones, and the Los Angeles County Superior Court regarding foreclosure procedure. See CLRC Memorandum 2005-29, p. 20; CLRC Memorandum 2002-17, p. 5 & Exhibit p. 47; CLRC Memorandum 2001-4, Exhibit pp. 1-2. These suggestions may also be worth investigating if the Commission undertakes a study of foreclosure. This year, Commissioner Ed Regalia

submitted a few more suggestions regarding foreclosure, underscoring that the area deserves attention. See discussion under "Suggested New Topics" below.

Pursuant to a Commission directive, the staff is monitoring developments relating to the bad faith waste exception to the antideficiency laws. See CLRC Minutes (Nov. 7-8, 2002), pp. 3-4; *Nippon Credit Bank v. 1333 No. Calif. Blvd.*, 86 Cal. App. 4th 486, 103 Cal. Rptr. 2d 421 (2001); see also Miller, Starr & Regalia, California Real Estate *Deeds of Trust* § 10:217, at 720-22 (2003 update). There do not appear to have been any significant new developments in this area in the past year.

Assignments for the Benefit of Creditors

In late 1996, the Commission decided to study whether to codify, clarify, or change the law governing general assignments for the benefit of creditors, including but not limited to changes that might make general assignments useful for purposes of reorganization as well as liquidation. The Commission later hired David Gould of McDermott, Will & Emery in Los Angeles to prepare a background study on this topic. Mr. Gould has done extensive work on this project, but has not yet submitted a final report to the Commission.

2. Probate Code

The Commission drafted the Probate Code and continues to monitor experience under it and make occasional recommendations on it.

Creditors' Rights Against Nonprobate Assets

A nonprobate transfer passes property outside the probate system. As the use of nonprobate transfers in estate planning has increased, the proper treatment of a decedent's creditors has emerged as a major concern. The Commission recently examined such issues in the context of a revocable transfer on death deed. The Commission did not address other types of nonprobate transfers, such as a revocable trust. The Uniform Probate Code now has a procedure for dealing with this matter. This is an important topic that the Commission should take up when resources permit. See Hartog & Schenone, *Alice in Tulsa-land: The* Dobler *Effect on Creditors of Revocable Trusts*, Cal. Trusts & Estates Q. 4 (Summer 2004); CLRC Memorandum 2004-35, p. 5.

Application of Family Protection Provisions to Nonprobate Transfers

Should the various probate family protections, such as the share of an omitted spouse or the probate homestead, be applied to nonprobate assets? This is

another important area that the Commission is well-suited to study. Again, the Commission recently examined such issues in the context of a revocable transfer on death deed, but it did not address similar questions relating to other types of nonprobate transfers. If the Commission undertakes a study of these issues, the Uniform Probate Code may be a useful reference, because it deals with nonprobate statutory allowances to a decedent's spouse and children.

Uniform Trust Code

NCCUSL promulgated a Uniform Trust Code in 2000. The Reporter for the Uniform Trust Code, Prof. David English of the University of Missouri Law School, is preparing a report on how California law compares with the Uniform Trust Code. The Commission originally funded his work, but had to cancel the contract due to budget cuts. Fortunately, the State Bar Trusts and Estates Section agreed to fund the research instead. Prof. English has not yet completed his report.

Uniform Custodial Trust Act

In late 2000, the Commission decided to study the Uniform Custodial Trust Act on a low priority basis. That act provides a simple procedure for holding assets for the benefit of an adult (perhaps elderly or disabled), similar to that available for a minor under the Uniform Transfers to Minors Act. The Commission has not had sufficient resources to take any action on this matter.

Interest on a Pecuniary Gift in a Trust

See discussion under "Action on Last Year's Decisions" above.

3. Real and Personal Property

The study of property law was authorized in 1983, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic.

Mechanics Lien Law

The Commission is actively working on a general overhaul of mechanics lien law. The Commission expects to finalize a proposal for introduction in the Legislature in 2007. For further information on the status of this project, see CLRC Memorandum 2006-39.

Inverse Condemnation

The Commission has dropped inverse condemnation as a separate study topic. However, the Commission has agreed to consider the impact of exhaustion of administrative remedies on inverse condemnation, as part of the administrative procedure study. Prof. Emeritus Gideon Kanner of Loyola Law School is preparing a report for the Commission on this matter. The study has been deferred pending resolution of several cases currently in the courts. The Commission's contract with Prof. Kanner has expired and funding has lapsed, but Prof. Kanner has indicated his intention to perform nonetheless.

Adverse Possession of Personal Property

The Commission has withdrawn its recommendation on adverse possession of personal property pending consideration of issues that have been raised by the State Bar Committee on Administration of Justice. The Commission has made this a low priority matter.

Severance of Personal Property Joint Tenancy

Another low priority project is statutory authorization of unilateral severance of a personal property joint tenancy (e.g., securities). This would parallel the authorization for unilateral severance of a real property joint tenancy.

Environmental Covenants and Restrictions

Several years ago, the Commission decided, as a low priority matter, to study an issue relating to environmental covenants and restrictions. Public agencies often settle concerns over contaminated property, environmental, and land use matters by requiring that certain covenants and restrictions on land use be placed in an agreement and recorded, assuming that because the covenants and restrictions are recorded they will be binding on successors in interest in the property. When the Commission decided a study was needed, however, nothing in case law or statutes permitted enforcement of these covenants against successive owners of the land — they did not fall under the language of Civil Code Section 1468 (governing covenants that run with the land), nor were they enforceable as equitable servitudes. The staff is not certain whether this is still the case. We will check on this when time permits.

Procedural Concerns Relating to Code of Civil Procedure Section 1260.040

See discussion under "Action on Last Year's Decisions" above.

4. Family Law

The Family Code was drafted by the Commission and the general topic of family law has been continued on the Commission's agenda for ongoing review.

Marital Agreements Made During Marriage

California has enacted the Uniform Premarital Agreements Act as well as detailed provisions concerning agreements relating to rights on death of one of the spouses. However, there is no general statute governing marital agreements during marriage. Such a statute would be useful, but the development of the statute would involve controversial issues. The Commission has indicated its interest in pursuing this topic.

When the Commission undertakes such work, it should also consider clarifying certain issues relating to premarital agreements. See CLRC Memorandum 2005-29, p. 25 & Exhibit pp. 21-36. In particular, the Commission should study whether the right to support can be waived; there are recent cases on this point.

5. Offers of Compromise

Offers of compromise was added to the Commission's Calendar of Topics in 1975, at the request of the Commission. The Commission was concerned with Code of Civil Procedure Section 998, which calls for adjustment of costs following rejection of a compromise offer. The Commission noted several ambiguities in the language of Section 998 and suggested that the section did not deal adequately with the problem of a joint offer to several plaintiffs. Since then, Section 3291 of the Civil Code has been enacted to allow recovery of interest where the plaintiff makes an offer pursuant to Section 998.

The Commission has never given this topic priority, but it is one that might be considered by the Commission sometime in the future on a nonpriority basis, when staff and Commission time permit work on the topic.

6. Discovery in Civil Cases

The Commission is actively studying civil discovery, with the benefit of a background study prepared by Prof. Gregory Weber of McGeorge School of Law. Several reforms have been enacted; other proposals are in progress.

The Commission has received numerous suggestions from interested persons, and has also identified other topics to address. We are working through these matters as time permits. Thus far, the focus has been on relatively

noncontroversial issues of clarification. This approach has been successful so far and may be more productive than investigating a major reform that might not be politically viable.

The Commission in 1995 decided to investigate discovery of computer records. This matter is not under active consideration, but the staff is following developments in this area. The topic is being extensively studied in the federal court system and by national organizations such as the American Bar Association. NCCUSL has formed a committee to draft a uniform act on the topic. We will continue to monitor developments in this area.

7. Special Assessments for Public Improvements

There are a great many statutes that provide for special assessments for public improvements of different types. The statutes overlap and duplicate each other and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's calendar in 1980 with the objective that the Commission might be able to develop one or more unified acts to replace the variety of acts that now exist. The Commission has decided to prioritize this matter somewhat, subject to current overriding priorities such as studies with a deadline set by the Legislature.

8. Rights and Disabilities of Minor and Incompetent Persons

The Commission has submitted a number of recommendations relating to rights and disabilities of minor and incompetent persons since authorization of this study in 1979. It is anticipated that more recommendations will be submitted as the need becomes apparent.

9. Evidence

The California Evidence Code was enacted in 1965 on recommendation of the Commission, and the study has been continued on the Commission's agenda for ongoing review.

Review of the California Evidence Code

Since the enactment of the Evidence Code, the Federal Rules of Evidence have been adopted and the Uniform Rules of Evidence have been comprehensively revised. The Commission engaged Prof. Miguel Méndez of Stanford Law School to prepare a comprehensive comparison of the California Evidence Code with the Federal Rules and the Uniform Rules. Prof. Méndez has delivered Parts 1-6 of an eight- or nine-part study. The Commission began active consideration of the

hearsay issues and role of judge and jury, but suspended its work in 2005 due to concern expressed by the Chair of the Senate Judiciary Committee.

Regardless of whether it may become appropriate to consider the concept of conforming the Evidence Code to the Federal Rules of Evidence at some time in the future, there are specific issues that the Commission could productively study now. The staff recommends that the Commission address these issues, subject to the following guidelines:

- **Avoid topics of intense controversy.** The Commission should steer clear of topics that appear to be controversial and politicized (e.g., admissibility of expert testimony). Such topics should be left to the Legislature, unless the Legislature seeks the Commission's help with respect to a specific topic.
- **Stay in close contact with the Judiciary Committees.** The Commission should keep the Judiciary Committees informed about any evidentiary issues it plans to study, and should be attentive to any guidance it receives from those committees. For example, the staff has compiled a list of specific ideas from a variety of sources, for improvement of the Evidence Code (see Exhibit pp. 70-71). If the Commission is interested in studying those ideas, it could submit the detailed list to the Judiciary Committees for consideration and input.

10. Alternative Dispute Resolution

The present California arbitration statute was enacted in 1961 on Commission recommendation. The topic was expanded in 2001 to include mediation and other alternative dispute resolution techniques.

Contractual Arbitration Improvements From Other Jurisdictions

Prof. Roger Alford of Pepperdine Law School prepared a background study for the Commission on contractual arbitration statutes in other jurisdictions. Comments on the background study made clear that the topic was highly controversial. In early 2006 at the Commission's direction, the staff convened a stakeholder meeting to assess whether there were issues relating to contractual arbitration that the Commission could productively study. The consensus was that the Commission should devote its resources to other matters. The Commission subsequently decided to drop its study of contractual arbitration.

No further work on arbitration or other aspects of alternative dispute resolution is currently contemplated. It might be appropriate to drop this topic from the Commission's Calendar of Topics.

11. Administrative Law

This topic was authorized for Commission study in 1987 both by legislative initiative and at the request of the Commission. After extensive studies, a number of bills dealing with administrative adjudication and administrative rulemaking were enacted.

In 2004, the Commission approved a recommendation on *Emergency Rulemaking Under the Administrative Procedure Act*. Legislation to implement that recommendation was enacted this year. For further detail, see CLRC Memorandum 2006-37, p. 2.

12. Attorney's Fees

The Commission requested authority to study attorney's fees in 1988 pursuant to a suggestion of the California Judges Association. The staff did a substantial amount of preliminary work on the topic in 1990.

Award of Costs and Contractual Attorney's Fees to Prevailing Party

The Commission has commenced work on one aspect of this topic — award of costs and contractual attorney's fees to the prevailing party. The Commission has considered a number of issues and drafts, but has not yet approved a tentative recommendation on the matter. Some time ago, we put the matter on the back burner due to its complexity and other demands on staff and Commission time.

Standardization of Attorney's Fee Statutes

The Commission has decided, on a low priority basis, to study the possibility of standardizing language in attorney's fee statutes. For example, many provisions allowing recovery of a "reasonable attorney's fee," are qualified by somewhat different standards. An effort would be made to provide some uniformity in the law, with a comprehensive statute and uniform definitions. If it proves to be too difficult to conform existing statutes, an effort would be made to create a statutory scheme and definitions that future legislation could incorporate.

13. Uniform Unincorporated Nonprofit Association Act

The Commission's recommendations on *Unincorporated Associations*, *Nonprofit Association Tort Liability*, and *Unincorporated Association Governance* have been enacted. Although the Commission has no plans to do further work in this area,

it should retain authority to study the area in case issues arise relating to the provisions enacted on its recommendation.

14. Trial Court Unification

Trial court unification was assigned by the Legislature in 1993. Constitutional amendments and legislation recommended by the Commission have been enacted.

Two related projects have been assigned by the Legislature. They are discussed below under "Topics Referred by the Legislature."

15. Contract Law

The Commission's Calendar of Topics includes a study of the law of contracts, including the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters. In this regard, we have been monitoring developments relating to the Uniform Electronic Transactions Act ("UETA"). California enacted a version of UETA in 1999 (Civ. Code §§ 1633.1-1633.17), but that version differs from the final version approved by NCCUSL. As a result, the California version appears to be preempted to some extent by the Electronic Signatures in Global and National Commerce Act ("E-SIGN"). As yet, the courts have not determined the scope of preemption. We will continue to monitor this situation.

16. Common Interest Developments

CID law was added to the Commission's Calendar of Topics in 1999 at the request of the Commission. The Commission is actively engaged in this study, and has divided it into three phases:

Nonjudicial Dispute Resolution

The effort here is to provide some simple and expeditious means of avoiding or resolving disputes within common interest communities before they escalate into full-blown litigation.

The Commission made this a high priority matter and issued several recommendations. Three of these were enacted with some revisions — (1) *Common Interest Developments: Procedural Fairness in Association Rulemaking and Decisionmaking*; (2) *Common Interest Development Law: Architectural Review and Decisionmaking*; and (3) *Alternative Dispute Resolution in Common Interest Developments*.

In 2005, the Commission issued a recommendation on *Common Interest Development Ombudsperson Pilot Project*. Two bills to implement that recommendation were introduced. One of the bills was vetoed and the other died in the Legislature. For detail on the Governor's veto, see CLRC Memorandum 2006-37, p. 1. It is possible that legislation to implement the Commission's recommendation will be reintroduced.

Uniform Common Interest Ownership Act

In late 2003, the Commission considered whether the Uniform Common Interest Ownership Act ("UCIOA") should be adopted in California in place of the Davis-Stirling Common Interest Development Act. The Commission decided to recommend against adoption of UCIOA at that time. The Commission is using UCIOA as a source of ideas as it studies issues relating to common interest developments. The Commission may at some point reevaluate whether to recommend adoption of UCIOA. CLRC Minutes (Nov. 2003), p. 8.

General Revision of Common Interest Development Law

Numerous issues with existing California law have been brought to the Commission's attention. The staff has compiled and cataloged the issues. See CLRC Memorandum 2005-3. New suggestions continue to arrive. Two proposals have been enacted on Commission recommendation: *Organization of Davis-Stirling Common Interest Development Act* and *Preemption of CID Architectural Restrictions*. The Commission is now working on reorganization and simplification of CID law.

17. Legal Malpractice Statutes of Limitations

The statute of limitations for legal malpractice was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission examined a number of issues, including the limitations period for estate planning malpractice. In 2004, the Commission put its work on the limitations period for estate planning malpractice on hold, referring that aspect of this study to the State Bar for further consideration. The Commission continued to work on other issues relating to the limitations period for legal malpractice. Earlier this year, the Commission decided to discontinue that work but retain the topic on its Calendar of Topics.

18. Coordination of Public Records Statutes

A study of the laws governing public records was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The objectives are to coordinate the public records law with laws protecting personal privacy, and to update the public records law in light of electronic communications and databases.

While this is an important and topical study, we have not given it priority. The staff will work it into the Commission's agenda as staff and Commission resources permit.

19. Criminal Sentencing

Review of the criminal sentencing statutes was added to the Commission's Calendar of Topics in 1999, at the request of the Commission. The Commission began work on this matter, but received extensive negative input.

In 2002, the scope of the Commission's authority with regard to criminal sentencing was narrowed. The Commission is currently authorized to study only "[w]hether the law governing criminal sentences for enhancements relating to weapons or injuries should be revised to simplify and clarify the law and eliminate unnecessary and obsolete provisions."

In 2004, the Commission decided to entirely drop criminal sentencing from the Commission's Calendar of Topics. Perhaps fortuitously, however, the Commission was unable to implement that decision in the resolution of authority that the Legislature passed in January of this year.

Since then, the Legislature has directed the Commission to study and report on nonsubstantive reorganization of the statutes governing deadly weapons. This development is discussed below under "Nonsubstantive Reorganization of Weapon Statutes." In light of this new study, it appears advisable to retain the existing authority to study criminal sentences for enhancements. See CLRC Memorandum 2006-35.

20. Subdivision Map Act and Mitigation Fee Act

Study of the Subdivision Map Act and Mitigation Fee Act was added to the Commission's Calendar of Topics in 2001, at the request of the Commission. The objective of the study is a revision to improve organization, resolve inconsistencies, and clarify and rationalize provisions of these complex statutes. The Commission has not commenced work on this study.

21. Uniform Statute and Rule Construction Act

Study of the Uniform Statute and Rule Construction Act (1995) was added to the Commission's Calendar of Topics in 2003, at the request of the Commission. The Commission has indicated its intention to give this study a low priority.

22. Oral Argument in Civil Procedure

The Commission conducted a comprehensive study to determine whether to clarify the circumstances in which parties are entitled to oral argument. In a report approved earlier this year, the Commission concluded that legislation on this topic is unnecessary. Because the Commission has completed its study and no legislation was enacted, it would be appropriate to drop this topic from the Commission's Calendar of Topics.

TOPICS REFERRED BY THE LEGISLATURE

Technical and Minor Substantive Defects

The Commission is authorized to recommend revisions to correct technical and minor substantive defects in the statutes generally, without specific direction by the Legislature. Gov't Code § 8298. The Commission exercises this authority from time to time. In 2007, the Commission will seek enactment of its most recent recommendation in this area. See the discussion of "Technical Issues" under "Action on Last Year's Decisions" above.

Statutes Repealed by Implication or Held Unconstitutional

The Commission is directed by statute to recommend the express repeal of any statute repealed by implication or held by the Supreme Court of California or the United States to be unconstitutional. Gov't Code § 8290. The Commission obeys this directive annually in its Annual Report. However, the Commission does not ordinarily sponsor legislation to effectuate the recommendation, for a number of reasons. The Commission has requested staff research on the subsequent history of statutes held unconstitutional or repealed by implication. The staff is gathering the requested information on a low priority basis.

Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(b) authorizes the Law Revision Commission to maintain a continuing review of the statutes governing enforcement of judgments. The Commission submits recommendations from

time to time under this authority. Debtor-creditor technical revisions were enacted on Commission recommendation in 2002.

Exemptions from Enforcement of Money Judgments

Code of Civil Procedure Section 703.120(a) requires the Law Revision Commission, decennially, to review the exemptions from execution and recommend any changes in exempt amounts that appear proper. The Commission completed its second decennial review in 2003. Legislation recommended by the Commission was enacted by 2003 Cal. Stat. ch. 379.

Trial Court Unification Procedural Reform

Government Code Section 70219 directs the Commission to study issues in judicial administration growing out of trial court unification. The Commission put considerable effort into this endeavor, and has obtained enactment of a number of recommendations on these issues.

The major project remaining under Section 70219 is a review of basic court procedures under unification to determine what, if any, changes should be made. The Commission has been studying four different matters:

(1) **Appellate and writ review under trial court unification.** The Commission circulated a tentative recommendation to create a limited jurisdiction division within each court of appeal district, replacing the individual superior court appellate divisions. The Commission has discontinued further work on this project due to state budgetary constraints on court operations. The Commission may reactivate this study in the future, as circumstances warrant.

(2) **Criminal procedure under trial court unification.** Prof. Gerald Uelmen prepared a background study for the Commission. After considering the background study, the Commission issued a tentative recommendation proposing changes to the procedure for conducting a preliminary examination in a felony case. Public reaction to the proposal was negative and the Commission decided against making a final recommendation on the subject.

(3) **Jurisdictional limits of small claims cases and limited civil cases.** This is a joint study with the Judicial Council. The Commission put the study on hold in 2004. The following year, the Legislature increased the small claims limit to $7,500 for a claim brought by a natural person. Due to the enactment of this legislation, the Commission decided to end its study of the jurisdictional limits of small claims and limited civil cases.

(4) **Equitable relief in a limited civil case.** The Commission issued a tentative recommendation on this topic in 2005. In light of the comments on the tentative recommendation, the Commission

decided to take a broader view of the role of the limited civil case in the unified court system, before determining whether to proceed with the proposal. Matters to be reviewed include the number of limited civil cases filed, the cost of economic litigation procedures compared with the cost of unlimited civil case litigation, the satisfaction level of the courts with the limited civil case system, and the approach taken in other jurisdictions that have a unified court system. The staff is arranging for a consultant to prepare a background study.

Trial Court Restructuring

The Legislature has directed the Commission to recommend revision of statutes that have become obsolete due to trial court restructuring (unification, state funding, and employment reform). See Gov't Code § 71674. In response to this directive, two substantial bills have been enacted on Commission recommendation. See 2002 Cal. Stat. ch. 784; 2003 Cal. Stat. ch. 149.

More work remains to be done. In 2003, the Commission decided to deprioritize this work, because many issues were still unripe for statutory reform and the Commission's resources were depleted due to budget cuts.

The Commission reactivated the study this year and a tentative recommendation is circulating for comment. The Commission probably will be able to finalize a recommendation addressing some issues in time to seek enactment in 2007.

Other issues still require study; some are not yet ripe for consideration. For detail on the work that remains to be done, see CLRC Memorandum 2006-9.

Revocable Transfer on Death (TOD) Deed

The Commission's report on the revocable transfer on death (TOD) deed is due on January 1, 2007. The Commission is on track to meet this deadline and seek introduction of legislation in early 2007.

No Contest Clause

SCR 42 (Campbell) directs the Commission, in consultation with the Senate and Assembly Judiciary Committees, to conduct a comprehensive study and prepare a report concerning the advantages and disadvantages of the provisions of the Probate Code relating to no contest clauses. The measure also requires the Commission to "[r]eview the various approaches in this area of the law taken by other states and proposed in the Uniform Probate Code, and present to the Legislature an evaluation of the broad range of options, including possible

modification or repeal of existing statutes, attorney fee shifting, and other reform proposals, as well as the potential benefits of maintaining current law." The measure does not set a deadline for completion of the Commission's report. Work is in progress. For further discussion of this study, see CLRC Memorandum 2006-42.

NEW STUDIES ASSIGNED TO THE COMMISSION BY THE LEGISLATURE

The Legislature assigned two new studies to the Commission this year. Both of these studies are subject to a relatively short deadline and will require substantial work.

Nonsubstantive Reorganization of Weapon Statutes

ACR 73 (McCarthy) directs the Commission to study the statutes relating to control of deadly weapons with the objective of proposing legislation that would clean up and clarify the statutes nonsubstantively. The Commission's report on this matter is due by July 1, 2009.

Donative Transfer Restrictions

AB 2034 (Spitzer) directs the Commission to study the operation and effectiveness of the Probate Code provisions that restrict donative transfers to certain classes of individuals. The Commission's report on this matter is due by January 1, 2009.

CARRYOVER SUGGESTIONS FROM LAST YEAR

Of the many suggested topics the Commission considered a year ago, three were added to the Commission's agenda, several related to studies already contemplated, and some were premature, more suited for others to pursue, or otherwise inappropriate for the Commission to undertake. A few of last year's suggestions warrant reconsideration at this time, as the Commission directed last fall.

Duties Where Settlor of Revocable Trust is Incompetent

A number of years ago, the Commission began investigating issues that arise when the settlor of a revocable trust allegedly becomes incompetent. The Commission tabled its work in 2000, in view of an "ongoing project to address these issues by the State Bar Estate Planning, Trust and Probate Law Section Executive Committee." CLRC Minutes (June 2000), p. 12.

Last year, the Commission received a request from John Beauclair to study certain points in this area. See CLRC Memorandum 2005-29, pp. 20-21 & Exhibit pp. 6-9. We attempted to refer Mr. Beauclair's comments to the Trusts and Estates Section for consideration, but discovered that the Trusts and Estates Section was no longer studying the area. No legislation has been enacted and the area remains unsettled. This matter would fall within the Commission's authority to study the Probate Code. **It deserves attention at some point.**

Renewal of Judgment

In connection with the Commission's study of *Enforcement of a Money Judgment Under the Family Code*, John Jones raised issues relating to the procedure for renewal of a judgment. See Second Supplement to CLRC Memorandum 2005-37, Exhibit pp. 2-3. The Commission treated his comments as a new topic suggestion. Although the Commission did not pursue the suggestion last year, it specifically decided that the matter should be reconsidered this year. The points raised by Mr. Jones are specific, concrete suggestions based on practical experience. **They may be worth pursuing when resources are available.** It would not be necessary to request new authority to undertake such work. The issues raised by Mr. Jones fall within the Commission's existing authority to study creditor's remedies.

Venue Statutes

Last year, the Office of Legislative Counsel alerted the Commission to a recent unpublished decision concerning venue issues, in which the Second District Court of Appeal noted that Code of Civil Procedure Section 394 (a venue statute) is a "mass of cumbersome phraseology" and there is a "need for revision and clarification of the venue statutes." See CLRC Memorandum 2005-29, Exhibit p. 59. The Court of Appeal was sufficiently concerned about this matter to direct its clerk to send a copy of the decision to the Office of Legislative Counsel. *Id*. In alerting the Commission to the matter, the Office of Legislative Counsel said it would defer to the Commission's expertise "in determining whether a broader review of venue statutes is in order; however, a review of the present case and the prior reported cases does seem to indicate that Section 394 of the Code of Civil Procedure needs to be restructured." *Id*.

The Court of Appeal is correct in characterizing the venue statutes as cumbersome and confusing. Attempting to clean them up would be difficult but potentially worthwhile, because the statutes are so widely used. The

Commission would need to seek authority from the Legislature to undertake such a study. In light of the appellate court's plea for reform, **the Commission should consider whether to request such authority, so that it could undertake the work when resources permit.**

SUGGESTED NEW TOPICS

During the past year, the Commission received a variety of suggestions for new topics and priorities. These are analyzed below.

Creditor's Remedies

Several of the suggestions relate to creditor's remedies, an area in which the Commission has previously done much work. Because the Commission is already authorized to study this area, it would not need to request new authority to undertake any of these suggested projects.

Foreclosure of Real Property Liens

Commissioner Ed Regalia has written an article entitled *Trustee Sales: The "Terminator" of Debtors' Equities* (2005), which is attached as Exhibit pages 44-60. In this article, Mr. Regalia explains that existing law governing a nonjudicial foreclosure fails to adequately protect the debtor's equity interest in property:

> While it is true that the law contains multiple protections for the debtor, such as notices of default and sale, and time intervals for reinstatement of the loan and other requirements mentioned above, it is also true that a persistent "gap" remains in this web of debtor protection, i.e., protection for the debtor's equity in a rising real estate marketplace. Most often, it will be the less sophisticated and more impoverished debtor who will be adversely affected.

Exhibit p. 55.

He suggests two possible means of addressing this problem: (1) enactment of a short period of redemption following a trustee sale, or (2) "modernizing trustee sales by adoption of electronic age procedures." Exhibit pp. 55-58. The latter approach is already in use for a tax default sale (see Rev. & Tax Code §§ 3692.1, 3692.2), and the Commission previously received suggestions along these lines from attorney Michael Hertz (see CLRC Memorandum 2005-29, p. 20 & Exhibit pp. 56-58). Mr. Regalia writes that either reform

> would put trustee sale debtors in greater "parity" with judicial foreclosure debtors who have the right to at least a three month redemption period, even where they have no actual liability

> beyond the losses of their properties. The "parity" thus created would complement the "parity" for creditors recognized 42 years ago in the context of deficiency judgments, and would fill the gap in existing law which protects the debtor from further liability on the debt, but does not provide him or her with the ability to salvage the equity value of the property.

Exhibit p. 58.

Mr. Regalia's article is yet another indication that foreclosure is an area warranting attention. However, the topic is likely to be both controversial and time-consuming. The Commission should bear this in mind in determining whether to undertake such work.

Homestead Exemption

Brian Parks writes that he is "in the midst of a personal financial disaster and would like to take advantage of bankruptcy protection." Exhibit p. 43. He has found, however, that "since the real-estate values in California have doubled or more my homeowner's exemption would leave me without a home or enough money to get a new one within my budget." *Id*. He would like the Commission to study the homestead exemption again, because "a lot has happened since 1996 when this was last done." *Id*.

Mr. Parks is correct that the Commission approved a recommendation on the homestead exemption in 1996. See *Homestead Exemption*, 26 Cal. L. Revision Comm'n Reports 37 (1996). In that recommendation, the Commission proposed to repeal the declared homestead exemption, and to amend the automatic homestead exemption to protect proceeds of a voluntary sale on the same basis as other homestead proceeds are protected. The recommendation was not enacted. A subsequent study of the same topic ended in 1999, when the Commission decided to drop the topic "[i]n view of the difficulty in finding any consensus on the proper extent of the voluntary sale proceeds exemption ...." CLRC Minutes (Oct. 1999), p. 5.

In 2002, the Commission completed its second decennial review of exemptions from enforcement of money judgments. The Commission did not propose any revisions relating to the homestead exemption. It explained:

> The homestead exemption receives frequent legislative attention, because of the obvious importance of the home, the high level of the exemption, and the role played by interest groups that can effectively sponsor legislation. For that reason, the Commission has not reviewed the current homestead exemption amount and

> makes no recommendation on whether that amount should be changed.

Exemptions from Enforcement of Money Judgments: Second Decennial Review, 33 Cal. L. Revision Comm'n Reports 113, 121 (2003) (footnote omitted). Consistent with the Commission's observations, the homestead exemption amount in Code of Civil Procedure Section 704.730(a)(3) was recently increased from $125,000 to $150,000. 2003 Cal. Stat. ch. 64, § 1.

There appears to be no need for the Commission to review the homestead exemption amounts and its previous efforts to improve homestead exemption procedures proved unsuccessful. **The Commission should devote its resources to other matters, not to the homestead exemption.**

Accord and Satisfaction

Commissioner Bill Weinberger has alerted the Commission to a conflict between two statutes relating to accord and satisfaction. Exhibit pp. 63-64. Civil Code Section 1526(a), enacted in 1987, provides:

> Where a claim is disputed or unliquidated and a check or draft is tendered by the debtor in settlement thereof in full discharge of the claim, and the words "payment in full" or other words of similar meaning are notated on the check or draft, the acceptance of the check or draft *does not constitute an accord and satisfaction if the creditor protests against accepting the tender in full payment by striking out or otherwise deleting that notation* or if the acceptance of the check or draft was inadvertent or without knowledge of the notation.

(Emphasis added.) But Commercial Code Section 3311, enacted in 1992, provides:

> (a) If a person against whom a claim is asserted proves that (1) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (2) the amount of the claim was unliquidated or subject to a bona fide dispute, and (3) the claimant obtained payment of the instrument, the following subdivisions apply.
>
> (b) Unless subdivision (c) applies, *the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.*
>
> ....

(Emphasis added.) "The statutes conflict ... because under Civil Code section 1526 the creditor can 'opt out' of an accord and satisfaction while still accepting the check as partial payment but California Uniform Commercial Code section

3311 offers no such choice." *Woolridge v. J.F.L. Electric, Inc.*, 96 Cal. App. 4th Supp. 52, 59, 117 Cal. Rptr. 2d 771 (2002) (copy attached as Exhibit pp. 65-69).

In *Woolridge*, the court concluded that "the two statutes cannot be harmonized, and therefore, California Uniform Commercial Code section 3311, having been enacted most recently, controls." *Id*. at 60. In reaching that conclusion, the court noted that several commentators had taken that position, as did a federal court in *Directors Guild of America v. Harmony Pictures*, 32 F. Supp. 2d 1184 (C.D. Cal. 1998).

This statutory conflict is an obvious candidate for clean-up legislation. Although *Woolridge* provides guidance on which statute controls, it would be better to prevent confusion by eliminating the conflict in the codes. A Westlaw search found three recent unpublished cases that cite *Woolridge* for the point in question. The issue appears to come up frequently enough to warrant prompt clarification. This would be a narrow project that probably would not take too much work. **The Commission should either undertake the project in the near future, or, preferably, refer the matter to someone else who can handle it.**

Procedure for Repossession of a Vehicle

Kimberly Bushem requests help in "making it the law that you must get a certified letter" with a written warning before your vehicle can be repossessed. Exhibit p. 5. She and her husband tell a touching story about having their car unexpectedly repossessed in the middle of the night due to late payments, after they had paid over $14,000 over a period of several years on a loan that started at about $28,000. *Id*. at 5-8. Apparently, the lender had left some phone messages, but these had not reached the Bushems, who could have taken steps to prevent the embarrassment and inconvenience of repossession had they known the lender was contemplating that step. *Id*. at 6.

Under California law, prior notice is generally not required to repossess a car when there has been a loan default. However, with some exceptions, the debtor must be notified of the seizure within 48 hours. Bus. & Prof. Code § 7507.10. Further, the debtor must be given at least 15 days written notice of intent to dispose of the vehicle, and the notice must inform the borrower of the right to redeem the vehicle by paying all amounts due. Fin. Code § 22328.

Presumably, prior notice of repossession is not required because such notice might cause some debtors to hide their vehicle to avoid repossession. While this may be appropriate in many cases, it seems inappropriate in the circumstances that the Bushems describe, where some payments have been late but large

amounts have been paid over an extended period and there is "definite effort put into trying to make" the payments. Exhibit p. 6. Perhaps it would be possible to concretely define circumstances in which a prior notice of repossession should be required. This probably would be a controversial project, however, and perhaps better-suited to a consumer group than to the Commission. **Unless the Commission otherwise directs, the staff will refer the Bushems' suggestion to one or more consumer groups for consideration.**

Employment Agency, Employment Counseling, and Job Listing Services Act

Civil Code Sections 1812.500-1812.502 comprise the Employment Agency, Employment Counseling, and Job Listing Services Act. Bryan Sanders, a "citizen and consumer of services provided by temporary employment agencies," is "concerned that the Attorney General is not aggressively enforcing provisions of the Act." Exhibit p. 61.

Mr. Sander also writes that "key phrases in the Act ... are unnecessarily vague, almost to the point of nullify[ing] its provisions." *Id*. He refers in particular to the phrase "paid indirectly by a jobseeker," which appears twice in Civil Code Section 1812.501:

> 1812.501. (a) The term "employment agency" or "agency" means:
>
> (1) Any person who, for a fee or other valuable consideration to be *paid,* directly or *indirectly by a jobseeker*, performs, offers to perform or represents it can or will perform any of the following services:
>
> (A) Procures, offers, promises, or attempts to procure employment or engagements for others or employees for employers.
>
> (B) Registers persons seeking to procure or retain employment or engagement.
>
> (C) Gives information as to where and from whom this help, employment, or engagement may be procured.
>
> (D) Provides employment or engagements.
>
> The term "employment agency" or "agency" shall not mean or include any employment counseling service or any job listing service.
>
> ....
>
> (c) The term "job listing service" means any person who provides, offers, or represents it can or will provide any of the following services, for a fee or other valuable consideration to be *paid,* directly or *indirectly, by the jobseeker* in advance of, or contemporaneously with, performance of these services: matches jobseekers with employment opportunities, providing or offering to provide jobseekers lists of employers or lists of job openings or

like publications, or preparing resumes or lists of jobseekers for distribution to potential employers.

....

(Emphasis added.) He also refers to the phrase "charges fees exclusively to employers," which appears in Civil Code Section 1812.502:

> 1812.502. (a) This title does not apply to any person who provides any of the services described in subdivision (a) of Section 1812.501 and who *charges fees exclusively to employers* for those services. The exemption from regulation provided by this subdivision does not apply to any person who provides babysitting or domestic employment for others. This subdivision does not apply to an employment counseling service as defined in subdivision (b) of Section 1812.501.

(Emphasis added.) Mr. Sanders notes that "case law and secondary sources such as Witkins provide little direction on how these phrases should be interpreted." Exhibit p. 61.

The lack of case law interpreting the phrases is not too surprising, as Section 1812.501 was enacted in 1995 and Section 1812.502 was enacted in 1989. Guidance on the proper interpretation is likely to be provided as the statute is applied over time, particularly if it is properly enforced. While the matter could also be addressed by legislation, it may be better to allow the law to develop as concrete examples arise in disputes. **Unless the Commission otherwise directs, the staff will forward Mr. Sanders' comments to the Attorney General's office for consideration**, because that office can adjust the level of enforcement if needed**.**

Review of Articles of Incorporation by Secretary of State

Corporations Code Section 110 provides:

> 110. (a) Upon receipt of any instrument by the Secretary of State for filing pursuant to this division, *if it conforms to law,* it shall be filed by, and in the office of, the Secretary of State and the date of filing endorsed thereon. ....
>
> (b) If the Secretary of State determines that an instrument submitted for filing or otherwise submitted does not conform to law and returns it to the person submitting it, the instrument may be resubmitted accompanied by a written opinion of the member of the State Bar of California submitting the instrument, or representing the person submitting it, to the effect that the specific provision of the instrument objected to by the Secretary of State does conform to law and stating the points and authorities upon which the opinion is based. The Secretary of State shall rely, with

> respect to any disputed point of law (other than the application of Sections 201, 2101, and 2106), upon that written opinion in determining whether the instrument conforms to law. The date of filing in that case shall be the date the instrument is received on resubmission.
>
> ....

(Emphasis added.) Attorney Nelson Crandall says that the Secretary of State's office "has always (as long as I have been practicing) interpreted this to mean that the SoS must review the substance of articles of incorporation before filing them." Exhibit p. 9. According to Mr. Crandall, "[i]n every other state, the SoS office merely reviews the form of the document, not the substance." *Id*.

Mr. Crandall reports that the Secretary of State's office is "incredibly picky." *Id*. He gives a number of specific examples. He also explains that the Secretary of State's office "is so difficult to work with in this regard that most corporate lawyers advise their clients to incorporate in Delaware," where they will not risk the embarrassment of having the Secretary of State's office "rejec[t] their filing over some truly trivial issue." *Id*.

Mr. Crandall believes the system should be changed, such that the Secretary of State does not review the substance of articles of incorporation:

> There is no public policy that can justify substantive review of Articles of Incorporation by the SoS. The SoS has proved, by its current policy of rejecting language that its own staff previously approved, that is goal of substantive purity is unattainable. Substantive review is expensive, both to the state and to the public that has to deal with the SoS. The nitpicking doesn't protect anyone. If a provision of the articles is contrary to law and it is important, the shareholders can straighten it out in court.

Exhibit pp. 9-10.

The staff lacks expertise in this area but suspects that the Secretary of State's office would dispute Mr. Crandall's assertion that there "is no public policy that can justify substantive review of Articles of Incorporation by the SoS." This matter may be more appropriate for the Business Law Section of the State Bar to investigate than for the Commission to study. **Unless the Commission otherwise directs, the staff will bring this matter to the attention of the Business Law Section.**

Statute of Limitations for Selling a Security That Is Not Qualified for Sale

Corporations Code Section 25507(a) prescribes the statute of limitations for selling a security that is not qualified for sale. Under this provision, a lawsuit

alleging such a sale must be "brought before the expiration of two years after the violation upon which it is based or the expiration of one year after the discovery by the plaintiff of the facts constituting such violation, whichever shall first expire."

Attorney William McGrane reports that California "has one of the most restrictive and limited statutory windows of opportunity for purchasers of unqualified securities to file for rescission in the entire country." Exhibit p. 21. He has provided extensive information regarding the comparable limitations period in other states. *Id.* at 23-41. The data are neatly summarized in a chart, which shows that ten states have a limitation period shorter than or the same as in California, ten states have a flat two-year limitation period (the same as in California but no one-year-from-discovery rule), twenty-six states have a longer limitation period, and three states (Colorado, New York, and Rhode Island) appear to have no statute or case law specifying the limitation period. *Id*. at 26.

Mr. McGrane says that California's relatively short limitations period is not good policy:

> When you think about it, where is the public policy for such a short statute of limitations for the not uncommon situation where some reckless high-binder ... stumbles into a Blue Sky problem as part of a larger fraud. Usually the deal doesn't go south and lawyers don't get involved until Section 25507(a) has run. It is a toothless tiger, and it shouldn't be.

Id. at 21. Mr. McGrane is forthright, however, in acknowledging that the drafters of the California provision thought it represented sound policy. They reportedly explained the provision as follows: "'An absolute one-year period, regardless of any knowledge of the plaintiff, is perhaps too short; but if the plaintiff is aware of the violation, then he should be required to sue within one year and not speculate at the expense of the defendant on the market price of the stock. On the other hand, a reasonably short outside period of limitations is essential for this action, which does not require any fault whatever on the part of the defendant and may impose liability for an entirely excusable mistake. Therefore, the two year outside period of limitations was chosen.'" *Id*. at 19-20, *quoting Draftsman's Commentary*, to 1968 Law (author unknown).

Any limitations period represents a balancing of competing interests: the interest in resolving a claim on the merits and the interest in repose. As the Commission knows from its recent unsuccessful efforts to improve the statute of limitations for legal malpractice, striking a sound balance in a politically

acceptable manner is difficult. Absent circumstances that scream out for attention, the staff is not eager to do further work along these lines. Here, California's limitations period is shorter than in many states, but it is not out of the ballpark. The staff recommends that the Commission **conserve its resources for other matters.** Perhaps, however, the Commission should send Mr. McGrane's suggestion to the Business Law Section of the State Bar for further consideration.

Scheduling of an Administrative Hearing

Tom Lasken is an attorney "who retired from the California Department of Real Estate in 2001 and ha[s] been representing respondents in administrative hearings, primarily against DRE, since then." Exhibit p. 11. He is concerned about the manner in which administrative hearings are scheduled.

While he was at the Department of Real Estate, he "always maintained that it was inefficient for the agency to set a hearing date with the Office of Administrative Hearings without consulting with the respondent, since it was always a matter of pure chance whether the respondent would be available on the date selected." *Id*. After he raised this issue, an informal survey showed that "close to half the Statement of Issues were continued because the respondent was unavailable." *Id*. Nonetheless, he says that "the matter was ignored by management under its ironclad policy against constructive suggestions." *Id.*

He thinks it "may be a denial of due process for the agency to communicate *ex parte* with OAH about hearing dates." *Id*. He points out that some offices of OAH "take a very narrow view of what constitutes good cause for a continuance ...." Further, it is time-consuming and expensive for a respondent to seek a continuance. *Id*. If a continuance is granted, Mr. Lasken says it "counts as 'one strike' against the respondent should another continuance be necessary for some other reason, such as unexpected unavailability of a crucial witness, which may result in a continuance request for such a reason being denied." *Id*.

He says this problem is particularly acute in the context of accusation cases, in which the licensee has a vested right. *Id*. at 12. He explains that an agency may spend years investigating a matter and preparing it for a hearing, while the respondent may be given little time between the filing of an accusation and the hearing date. *Id*. He considers this unfair. *Id.*

He also considers it unfair to base the time allotted for a hearing solely on the agency's estimate, without consulting the respondent. *Id*. at 14. He explains that

if the agency's estimate is too low, "it becomes the respondent's burden to either move for a continuance, or notify the agency and OAH that the case will have to be set for further hearing" after the allotted time expires. *Id*. He says "[n]one of that should be necessary, and in all fairness, the respondent should have been consulted as to time estimate and available dates in the first place." *Id*.

Mr. Lasken sought input on his concerns from Michael Asimow, a UCLA law professor who served as the Commission's consultant in its study of administrative law. Mr. Asimow pointed out that under Government Code Section 11430.20 and the accompanying Commission Comment, "ex parte discussions about calendaring and continuances are OK but only if the matter appears to be noncontroversial in the context of the specific case." *Id.* Mr. Asimow also noted that Section 1018(a)(6) of Title 1 of the California Code of Regulations "seems to require the agency to confer with the parties about acceptable hearing dates." *Id*. That appears to be true, however, only if the agency makes a request for "preferred hearing dates." Section 1018(a) provides:

> (a) An agency's request to OAH to set a Hearing date shall be in writing and contain the following information:
>
> ....
>
> (4) The time estimate for Hearing, taking into account the time for respondent's presentation of evidence;
>
> (5) The dates the agency and its counsel are unavailable for Hearing over the next six months; and the unavailable dates of all other parties for Hearing, if known;
>
> (6) Preferred Hearing dates, *but only if* the agency includes at least three alternative preferred Hearing dates and the agency confirms in the request either that all parties have agreed to the specific dates or that it has made reasonable efforts to confer with all other parties for mutually acceptable Hearing dates, and includes the reasonable efforts the agency has made;
>
> (7) A reference to any statute or regulation (if other than section 11517(c)) which specifies the time within which the Hearing shall be held or the proposed decision issued ....

(Emphasis added.)

Mr. Lasken's suggestion that the respondent be consulted before scheduling an administrative hearing seems fair, reasonable, and a matter of commonsense. One would hope, however, that it would not be necessary to address the matter by statute. Mr. Lasken "intend[s] to bring this up with the Director of OAH," but he "expect[s] resistance due to decades of embedded practice." Exhibit p. 14. The staff recommends **awaiting the outcome of Mr. Lasken's effort to address the**

problem with OAH. If the problem persists, it may be appropriate to investigate the possibility of providing statutory guidance.

Litigation

The remaining suggestions all relate to litigation procedure.

Briefing Schedule for a Summary Judgment Motion

In 2005, Code of Civil Procedure Section 1005 was amended to extend the filing deadlines for opposition and reply briefs for many types of motions. The provision does not apply to a summary judgment motion. Joanna Mittman, Court General Counsel for Napa Superior Court, notes that this has created "the anomalous situation whereby the court receives oppositions and replies on the simplest motions long before it receives them on the most complicated motions." Exhibit p. 42. She explains that a "reply due 5 CALENDAR days before hearing means that court staff often has only a couple of court days to review the reply on a summary judgment ..., whereas it has 5 COURT days to review replies on other types of motions ...." *Id*. (Emphasis in original.) She suggests revising the provision governing summary judgment motions (Code of Civil Procedure Section 437c) "so as to make the time for filing oppositions and replies either consistent with section 1005, or to allow for slightly more time." Exhibit p. 42.

With regard to reply briefs, Ms. Mittman is correct that the situation can only be described as anomalous. It does not make any sense that a court would have less time to review a summary judgment reply than to review a reply relating to a less consequential motion. Five calendar days may often be too short to properly review a summary judgment reply, particularly if a courtesy copy of the papers is not delivered to chambers and there is a delay in transmitting the papers from the clerk's office to chambers.

With regard to opposition briefs, the situation is different. Under Section 1005, an opposition brief is to be filed at least nine court days before the hearing on a motion governed by that section. Under Section 437c, a summary judgment opposition is to be filed at least fourteen days before the hearing on a summary judgment motion. Taking into account the difference between court days and calendar days, these time periods are roughly equal. The need for reform is less apparent than with a reply brief.

On initial consideration, it might seem a simple matter to adjust the due date for a summary judgment reply. However, the briefing schedule for a summary judgment motion has recently been the subject of intense political debate. In

2002, the notice period for a summary judgment motion was extended from 28 days to 75 days, to allow more time for preparation of an opposition brief. This reform was controversial, pitting the plaintiffs' bar against defense counsel. See Senate Committee on Judiciary Analysis of SB 688 (Aug. 29, 2002). Although the reform Ms. Mittman proposes is intended to facilitate review by court personnel, rather than favoring plaintiffs over defendants or vice versa, **the Commission should be cautious about getting into this contentious area.** Any legislation along these lines probably should come from the Judicial Council and Administrative Office of the Courts, rather than the Commission, and should be based on a survey of the courts showing a solid consensus that the reform is needed. The staff suggests **forwarding Ms. Mittman's comments to the Administrative Office of the Courts for consideration.**

Litigation Deadlines

Richard Best, former discovery commissioner for San Francisco County Superior Court, urges the Commission to consider "an issue that troubles some in the litigation field: calendar days vs. court days vs. [unknown] days ...." Exhibit p. 4. He says that "the first two are reasonably clear though some will have a preference and 'court' days could be confusing; but, the third is troublesome." *Id*. He asks whether there is "a global solution such as "When not otherwise specified, 'days' means ...." *Id*.

It is not clear from Mr. Best's comments whether he is referring to civil litigation, criminal cases, or both. The problem to which he refers clearly exists in both types of cases, but probably should be examined separately in each context.

The staff has previously looked to some extent at some of the general provisions in the Code of Civil Procedure governing computation of time (e.g., Code Civ. Proc. §§ 10, 12-13b). In addition to Mr. Best's issue, there appeared to be other issues warranting clarification. Attempting codewide clean-up of the rules governing computation of time would be an ambitious and difficult project. Well-crafted legislation would be tremendously useful, however, assisting numerous people calendaring deadlines on a daily basis. **This might be an appropriate project for the Commission when it has sufficient resources for such an undertaking.**

Punitive Damages

Code of Civil Procedure Section 3294(a) allows for imposition of punitive damages in tort cases:

> In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Procedural rules for obtaining such damages are specified in Code of Civil Procedure Section 3295:

> 3295. (a) The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294, prior to the introduction of evidence of:
>
> (1) The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence.
>
> (2) The financial condition of the defendant.
>
> (b) Nothing in this section shall prohibit the introduction of prima facie evidence to establish a case for damages pursuant to Section 3294.
>
> (c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. However, the plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the profits or financial condition referred to in subdivision (a), and the defendant may be required to identify documents in the defendant's possession which are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts. Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. Such order shall not be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial.
>
> (d) The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact

that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.

(e) No claim for exemplary damages shall state an amount or amounts.

(f) The amendments to this section made by Senate Bill No. 241 of the 1987-88 Regular Session apply to all actions in which the initial trial has not commenced prior to January 1, 1988.

Prof. William Slomanson of Thomas Jefferson School of Law writes that he has "yet to see any statute that has been more poorly drafted" than Section 3295. Exhibit p. 62. He has not provided a detailed explanation of his concerns, but he has informed the staff that he considers the discovery aspects of the provision "really obtuse." Email from William Slomanson to Barbara Gaal (March 9, 2006).

Section 3295 was enacted in 1979 and most recently amended in 1987. The staff is not familiar with the politics surrounding the provision, but suspects it was controversial and may not readily be susceptible to clean-up. We suggest that the Commission **hold onto Prof. Slomanson's comments for future consideration when and if the Commission receives additional comments expressing concern about the operation of Section 3295.**

SUGGESTED PRIORITIES

The Commission needs to determine its priorities for work during the remainder of 2006 and for 2007. Completion of prospective recommendations for the next legislative session becomes the highest priority at this time of year. That is followed by matters that the Legislature has indicated should receive a priority and other matters that the Commission has concluded deserve immediate attention. The Commission has also tended to give priority to projects for which a consultant has delivered a background study, because it is desirable to take up the matter before the research goes stale and while the consultant is still available. Finally, once a study has been activated, the Commission has felt it important to make steady progress so as not to lose continuity on it.

Legislative Program for 2007

Active topics on which the Commission might be able to finalize a recommendation in time for introduction in 2007 include:

- Civil discovery improvements (deposition in out-of-state litigation; time limits for discovery in an unlawful detainer case).
- Mechanics lien law comprehensive revision.

- Technical and minor substantive corrections.
- Transfer on death deeds.
- Trial court restructuring.

The Legislature's Priorities

The study of mechanics liens, culminating in the comprehensive revision now under consideration, was requested by the Assembly Judiciary Committee in 1999. The Legislature has also indicated several other priority matters for the Commission:

Nonsubstantive Reorganization of Weapon Statutes

The Commission's report on nonsubstantive reorganization of the deadly weapons statutes is due by July 1, 2009. The Commission obviously will need to give this matter priority to be able to meet that deadline.

Donative Transfer Restrictions

The Commission's report on donative transfer restrictions is due by January 1, 2009. Again, the Commission will need to give this matter priority to be able to meet that deadline.

Trial Court Restructuring

The original deadline for the Commission's report on trial court restructuring was January 1, 2002. That deadline was removed after the Commission submitted a major legislative proposal on the topic and requested authority to continue to do cleanup work in the area.

Although the statute directing the Commission's study no longer includes a deadline, we can infer from the original deadline that the Legislature expects the Commission to promptly address issues relating to trial court restructuring once they are ripe for action. Since removal of the deadline, a second bill implementing a Commission recommendation was enacted, and a third such bill probably will be introduced in 2007. But other issues remain to be addressed. The Commission's work on this topic should continue to receive high priority.

No Contest Clause

Although SCR 42 (Campbell) does not set a statutory deadline for the Commission's work on no contest clauses, it is safe to presume that the Legislature expects the Commission to complete this study without delay. The Commission should treat it as a priority matter.

Consultant Studies

For some ongoing studies, the Commission has the benefit of a consultant's assistance:

Common Interest Development Law

This is a very large project. Prof. Susan French of UCLA Law School prepared a background study for the Commission. The Commission has barely begun to tackle the hundreds of problems that have been identified with the Davis-Stirling Act.

Discovery Improvements From Other Jurisdictions

The Commission has made progress on civil discovery, but it has gotten many suggestions from interested persons that it has not yet considered. Prof. Weber's background study covers numerous issues. Although the Commission made preliminary decisions regarding which issues to pursue, it has not yet addressed most of the ones it selected.

Review of the California Evidence Code

In the above discussion on "Review of the California Evidence Code," the staff recommended that the Commission study the ideas listed at Exhibit pages 70-71, as long as there is no objection from the Judiciary Committees. Prof. Méndez of Stanford Law School is available to assist the Commission in studying those ideas. To be able to take advantage of this opportunity, the Commission should send the list of ideas to the Judiciary Committees for consideration.

Other Activated Topics

Apart from the 2007 legislative program, legislatively set priorities, and projects for which the Commission has assistance of a consultant, the Commission has also commenced work on attorney's fees, which it had to interrupt when other projects became more pressing. The Commission should turn back to that work if time permits.

CONCLUSION

The Commission's agenda continues to be very full. If it just sticks with already activated projects and legislative priorities, it will have more than enough to do in the coming year, particularly given the upcoming retirement of its Executive Secretary.

The staff simply recommends following the traditional scheme of Commission priorities: (1) matters for the next Legislative session, (2) matters directed by the Legislature, (3) matters for which the Commission has an expert consultant, and (4) other matters that have been previously activated but not completed. Projects falling within each of these categories are identified above and are already included in the Commission's Calendar of Topics.

In the next resolution regarding the Calendar of Topics, the Commission should drop the project on oral argument in civil procedure, and perhaps also the topic of alternative dispute resolution. If the Commission is interested in studying the venue statutes as suggested by the Second District Court of Appeal, it will need to request authority to do so.

The suggestions relating to the following topics also deserve serious consideration in the future:

- Duties where settlor of revocable trust is incompetent.
- Renewal of judgment.
- Foreclosure.
- Accord and satisfaction.
- Litigation deadlines.

The Commission should reconsider these suggestions next fall.

Respectfully submitted,

Barbara Gaal
Staff Counsel

Exhibit

NEW TOPICS AND PRIORITIES

Calendar of Topics Authorized for Study

The Commission's calendar of topics authorized for study includes the subjects listed below. Each of these topics has been authorized for Commission study by the Legislature. For the current authorizing resolution, see SCR 15 (Morrow), enacted as 2006 Cal. Stat. res. ch. 1.

1. Creditors' remedies. Whether the law should be revised that relates to creditors' remedies, including, but not limited to, attachment, garnishment, execution, repossession of property (including the claim and delivery statute, self-help repossession of property, and the Commercial Code provisions on repossession of property), confession of judgment procedures, default judgment procedures, enforcement of judgments, the right of redemption, procedures under private power of sale in a trust deed or mortgage, possessory and nonpossessory liens, insolvency, and related matters.

2. Probate Code. Whether the California Probate Code should be revised, including, but not limited to, the issue of whether California should adopt, in whole or in part, the Uniform Probate Code, and related matters.

3. Real and personal property. Whether the law should be revised that relates to real and personal property including, but not limited to, a marketable title act, covenants, servitudes, conditions, and restriction on land use or relating to land, powers of termination, escheat of property and the disposition of unclaimed or abandoned property, eminent domain, quiet title actions, abandonment or vacation of public streets and highways, partition, rights and duties attendant upon assignment, subletting, termination, or abandonment of a lease, and related matters.

4. Family law. Whether the law should be revised that relates to family law, including, but not limited to, community property, the adjudication of child and family civil proceedings, child custody, adoption, guardianship, freedom from parental custody and control, and related matters, including other subjects covered by the Family Code.

5. Offers of compromise. Whether the law relating to offers of compromise should be revised.

6. Discovery in civil cases. Whether the law relating to discovery in civil cases should be revised.

7. Special assessments for public improvements. Whether the acts governing special assessments for public improvement should be simplified and unified.

8. Rights and disabilities of minors and incompetent persons. Whether the law relating to the rights and disabilities of minors and incompetent persons should be revised.

9. Evidence. Whether the Evidence Code should be revised.

10. Alternative dispute resolution. Whether the law relating to arbitration, mediation, and other alternative dispute resolution techniques should be revised.

11. Administrative law. Whether there should be changes to administrative law.

12. Attorney's fees. Whether the law relating to the payment and the shifting of attorney's fees between litigant should be revised.

13. Uniform Unincorporated Nonprofit Association Act. Whether the Uniform Unincorporated Nonprofit Association Act, or parts of that uniform act, and related provisions should be adopted in California.

14. Trial court unification. Recommendations to be reported pertaining to statutory changes that may be necessitated by court unification.

15. Contract law. Whether the law of contracts should be revised, including the law relating to the effect of electronic communications on the law governing contract formation, the statute of frauds, the parol evidence rule, and related matters.

16. Common interest developments. Whether the law governing common interest housing developments should be revised to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, establish a clear, consistent, and unified policy with regard to formation and management of these developments and transaction of real property interests located within them, and to determine to what extent they should be subject to regulation.

17. Legal malpractice statutes of limitation. Whether the statutes of limitation for legal malpractice actions should be revised to recognize equitable

tolling or other adjustment for the circumstances of simultaneous litigation, and related matters.

18. Coordination of public records statutes. Whether the law governing disclosure of public records and the law governing protection of privacy in public records should be revised to better coordinate them, including consolidation and clarification of the scope of required disclosure and creation of a single set of disclosure procedures, to provide appropriate enforcement mechanisms, and to ensure that the law governing disclosure of public records adequately treats electronic information, and related matters.

19. Criminal sentencing. Whether the law governing criminal sentences for enhancements relating to weapons or injuries should be revised to simplify and clarify the law and eliminate unnecessary or obsolete provisions.

20. Subdivision Map Act and Mitigation Fee Act. Whether the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code), and the Mitigation Fee Act (Chapter 5 (commencing with Section 66000), Chapter 6 (commencing with Section 66010), Chapter 7 (commencing with Section 66012), Chapter 8 (commencing with Section 66016), and Chapter 9 (commencing with Section 66020) of Division 1 of Title 7 of the Government Code) should be revised to improve their organization, resolve inconsistencies, clarify and rationalize provisions, and related matters.

21. Uniform Statute and Rule Construction Act. Whether the Uniform Statute and Rule Construction Act (1995) should be adopted in California in whole or part, and related matters.

22. Oral Argument in Civil Procedure. A comprehensive review of the Code of Civil Procedure and applicable case law in order to clarify the circumstances in which parties are entitled to oral argument, and related matters.

COMMENTS OF RICHARD BEST

From: rebest@comcast.net
Subject: general civil procedure issue
Date: August 26, 2006
To: bgaal@clrc.ca.gov

Just wanted to pass on an issue that troubles some in the litigation field: calendar days vs. court days vs. [unknown] days; the first two are reasonably clear though some will have a preference and "court" days could be confusing; but, the third is troublesome. Is there a global solution such as "When not otherwise specified, "days" means...."

Richard E. Best
Best@Justice.com
http://CaliforniaDiscovery.findlaw.com

I don't know how to do this, and I hoping that what I write makes sense to you and is a legitimate reason to be contacting you. Long story short, my husband and I have been hard working people for most of our lives. We had a child born in 2001 with some medical problems, and has caused me to put my life on hold. He's sick a lot and has had 5 major surgeries. I have four other children as well. We have had a lot of financial difficulties due to me not working. I'm writing to you because we purchased a 2004 Honda, back in December 2003. I have had some difficult times financially making payments on time because the payments are due on the 12th and my husband gets paid on the 20th. He gets paid once on the 5th, and that all goes to rent and then on the 20th he gets paid and that's when I'd make the car payment. I have missed a few here and there, and made double payments the following month. August 9, 2006 my husband woke up at his usual time of 5 in the morning and went outside to find our Honda was gone. He came back in and woke me up and was wondering where the car was. I thought for sure it was stolen from us because as far as I knew we were ok on the car payments. It was late, but it had been late for two and half years and we had paid over $14,000, and why would they decide to get upset now? Plus, I never received a letter or warning and there was no indication of any problems on the statements. I want help on making it the law that you must get a certified letter before they can repossess you vehicle. A written warning something. Is this possible? Can you help me? I'm enclosing the letter that was written to Honda. It just seems so unfair that having a late payment once in awhile due to financial difficulties is reason enough for them to take the car without any written letter or warning. I wish they would have given us some kind of chance to do things differently. Thank you from the bottom of my heart for reading this and If you can give me any advise let me know If I'm wasting my time, or is this something that I can change I'd appreciate it.

Kimberly Bushem

Kimberly Bushem

To whom it may concern:

I just wanted to write a letter to you, HFC, about a few things. I Keith Bushem, having my car repossessed am absolutely astonished at the way this all happened. I work a lot more than most, and have hours that aren't easy to deal with most business hours. I'm a construction worker and work outside. I make the payments on the 20th of each month because that's when I get paid. Being late never seemed to be an issue over the last two and half years, but now here we are starting at a $27,865.99 loan and were down to 13,320.56 (this is what's on my statement I just received. With the date on July 23, 2006) we've paid according to my records: $14,545.43. If I made all my payments of 445.15 a month, wouldn't I only owe you 13,799.05? I know there is late fee's, ok I can deal with that and it's our fault, I'm sorry. If you look at the payment history yes, it's not the best, but boy, I see there is definite effort put into trying to make this payment. The actual monthly payment is $445.15 a month and I sure seen a lot of $500.00 a month payments on there. If one was missed I do see an effort the following month of two payments. Like I said, yes, it's not the best. What bothers me is why no letter? I got," we don't send out letters," Why? Why? Why? I heard you called twice and left messages, Ok, well I have two teenagers in the house. You leave messages with just anyone and assume that we get the message? Last, Why, why, why no certified letter to give me a chance to save my car. Why are you now bothered after two and a half years, after I've put over 14,000 of my hard earned money into this car? Could you possibly sell it now for less than I own, and make me pay the difference? Wow, you wouldn't do that would you? I was wondering is there anyone working there that's ever had financial difficulties? I'm just so sad at the way this was handled, were not bad people were hard working Americans trying to survive. Now, I have to cash in my retirement to get a couple thousand dollars, and get the car back so my wife can take the kids to school, go to the grocery store, take our son to the doctors, and

maybe now find another job since she lost her job. She has no way to get there right now. What devastation this has put on our family. You might think this is funny, or were trying to make you feel sorry for us, but that's not what this is about. I just hope one person hears this and can totally understand what HFC has done. This is bad really bad business practice. If I would have got just sent me ONE letter to know you were going to do this, I could have saved my family from this hardship and embarrassment. Look at our payment history and tell me we weren't trying to keep this car. I don't see three payments in a row missing I just see a person who's trying. Well thank you for the reinstatement I'm so happy that you'll let me have my car back for a couple thousand, so kind of you. We also received a letter from the guy that repossessed our car and we need to drive really far, drive in what I don't know, to get our stuff, and pay him a lot of money to get the babies car seat, my wife's glasses, a bible, stroller, loose change of pennies, and according to them cheap sunglasses (generic) when they are my wife's prescription sun glasses. We can have this back of a minimum fee of 30.00. Did you know about this? I will do everything in my power to get your policy of, "NO LETTER WARNING," to end for every hard working person out there, so they to will not go through the humiliation and financial difficulties that you chose to put on some people. I apologize that my payments haven't been the best and maybe I didn't understand your policy to get upset 2 years into the contract about my late payments (but made payments) from the bottom of my heart. I hope you, HFC, will consider sending to your other contracted people out there driving Honda's a letter. If the cost of a letter is an issue, put it on the contract, and charge people on their statements. I would have preferred to pay a $5.00, $50.00 or even a $100.00 dollar fee instead of over two thousand in fee's which I ended up with. Just one simple warning in writing seems fair. However, if you don't like that idea how about what might have worked, is when we got our bill to pay the payment, there was some kind of hint like, red writing with a warning really big to give us some

kind of indication we were in trouble. My last statement gave my wife NO indication she was doing so bad the car was going to get taken in the middle of the night. My apologies, for our sincere efforts. Just to let you know most of the people working there have been very kind, but a couple were very rude and disrespectful. I will be sending this letter to you and several other places to get your, NO LETTER POLICY to end. I was never given a warning or a change to save my car before you came onto my property and took it the middle of the night.

Keith J. Bushem
Honda owner since 2004

COMMENTS OF NELSON CRANDALL

From: Nelson Crandall <NCrandall@EnterpriseLaw.com>
Date: November 9, 2005
To: <scohen@clrc.ca.gov>
Subject: Re: statutes

.... Corporations Code Section 110 requires the Secretary of State (SoS) to file an instrument if the instrument "conforms to law." The SoS has always (as long as I have been practicing) interpreted this to mean that the SoS must review the substance of articles of incorporation before filing them. In every other state, the SoS office merely reviews the form of the document, not the substance of it.

The SoS is incredibly picky. The SoS is so difficult to work with in this regard that most corporate lawyers advise their clients to incorporate in Delaware. The attorneys say its to avoid filing delays, but it is also so that the attorney will not be embarrassed when the SoS rejects their filing over some truly trivial issue.

Example: I had restated articles rejected because it referred to approval by the shareholders at a meeting but did not include the phrase "at which a quorum is present." Mind you, this was not new language. Where there were certain personnel changes in the SoS legal staff, the SoS decided to refuse to file restated articles of incorporation if the reviewing attorney disagree with ANY provision of the restatement, even language that another attorney in the SoS office previously approved. I had to file a certificate of amendment and could not restate the articles until the shareholders had approved the new language.

Example: I once had articles rejected because I set the articles up to include "subseries" of stock. The SoS said the code doesn't authorize subseries, but neither does it define "series" to exclude a subseries, which after all is still a series. I had to rewrite the language in a much more cumbersome fashion to accomplish the same substantive end. The SoS objection was not to what we were doing, but only to how we said it.

Example: One time the SoS rejected a filing because the reviewing attorney couldn't understand that a previous issuance of shares could have been rescinded. So, pursuant to Section 110(b), I wrote an opinion that the instrument conformed to law. Result? The staff attorney ignored the opinion AND refused to return my phone calls. After a month of this nonsense, I finally had to hire a Sacramento attorney to walk over the SoS office to get the articles filed.

There is no public policy that can justify substantive review of Articles of Incorporation by the SoS. The SoS has proved, by its current policy of rejecting language that its own staff previously approved, that its goal of substantive purity is unattainable. Substantive review is expensive, both to the state and to the public that has to deal with the SoS. The

nitpicking doesn't protect anyone. If a provision of the articles is contrary to law and it is important, the shareholders can straighten it out in court.

Regards,

Nelson

Nelson D. Crandall
Enterprise Law Group, Inc.
4400 Bohannon Dr., Suite 280
Menlo Park, CA 94025-1041
650-462-4747 (FAX)
650-462-4700 (Phone)
ncrandall@enterpriselaw.com
www.enterpriselaw.com

COMMENTS OF TOM LASKEN

From: tlasken@caladminlaw.com [mailto:tlasken@caladminlaw.com]
Sent: Monday, December 19, 2005
To: Asimow, Michael
Subject: APA-Ex Parte Communications

Dear Professor Asimow:

I am attorney who retired from the California Department of Real Estate in 2001 and have been representing respondents in administrative hearings, primarily against DRE, since then. I am a fellow Boalt graduate, and during my employment at DRE was assigned to analyze the amendments proposed by the Law Revision Commission pursuant to the study you led to reform that body of law. I was also assigned to train the other DRE attorneys on the resulting changes made.

While at DRE I had always maintained that it was inefficient for the agency to set a hearing date with the Office of Administrative Hearings without consulting with the respondent, since it was always a matter of pure chance whether the respondent would be available on the date selected. When I raised the issue within DRE the secretaries did a quick survey of their workload and determined that close to half the Statement of Issues were continued because the respondent was unavailable. However, the matter was ignored by management under its ironclad policy against constructive suggestions.

I was also always concerned about whether it may be a denial of due process for the agency to communicate *ex parte* with OAH about hearing dates. The agency is able to pre-select dates which are convenient for its in-house counsel or the Attorney General's office. According to the way I read the APA as it now stands, especially under Regulation 1018, there is no requirement for a respondent to be consulted about the hearing date (or the time estimate for the hearing), even if the respondent is represented by counsel. Some offices of OAH, most notably the Sacramento office in my experience, take a very narrow view of what constitutes good cause for a continuance, and some agencies, such as DRE, have institutional policies to oppose continuance requests even in Statement of Issues cases, where there is no possibility of prejudice to the public by the granting of a continuance since the respondent is not yet licensed.

Even if a respondent can show good cause for a continuance, such as respondent's counsel already having been scheduled for a court appearance elsewhere, it is presently incumbent upon the respondent to move for a continuance, at greater cost of time and possibly attorney's fees. Moreover, that then counts as "one strike" against the respondent should another continuance be necessary for some other reason, such as the unexpected unavailability of a crucial witness, which may result in a continuance request for such a reason being denied.

I am particularly concerned about possible due process issues in Accusation cases, where the licensee has a vested right. Taking DRE as an example, DRE has essentially a three-year statute of limitations within which to file a case. It is common for the agency to spend a year or more in investigation, questioning witnesses, taking depositions, subpenaing records, and the like. When the investigation is complete, the file is sent to DRE's Legal Section. There a staff attorney can take weeks or months to review the case and familiarize himself or herself with the facts and the law, and sometimes send the case back for further investigation. When the staff attorney is satisfied that the case is ready for filing (which means everything necessary to go to hearing is available), the Accusation is filed. The respondent has 15 days to file a Notice of Defense. After that 15 days, the staff attorney can send a Request for Setting to OAH, taking into account the preparation time he or she needs, the proximity to other commitments, the availability of witnesses, etc. The matter can then be set for hearing with only 10 days notice to the respondent.

In my experience, most respondents are unsophisticated in legal matters, the Statement to Respondent goes right over their heads, and they don't even start looking for counsel until they get a Notice of Hearing. I recently had a Statement of Issues case where the respondent, atypically, contacted me and retained me within the first 15 days, and a few days later we received a Notice of Hearing for approximately 28 days later. It could have been shorter. During that time, I had to request discovery, get a response from DRE counsel, arrange to have the file copied, digest the material in the file, arrange for witnesses, explore settlement, and prepare for hearing. Counsel for DRE, of course, was set to go when the Statement of Issues was originally filed. In that particular case, I asked counsel for DRE what her position would be on a continuance so I could have time to exercise discovery and prepare, and noted that 28 days wasn't much time to prepare. She responded rather haughtily that she was only required to give 10 days notice, but did agree to a "short continuance". That particular case was a simple application case involving a criminal conviction, but it could just as well have been a records-intensive trust account-related Accusation requiring days of hearing.

I have taken to requesting that I be consulted on potential hearing dates when I first notify DRE and OAH that I represent a respondent, but DRE and OAH routinely ignore those requests.

Does it not seem to you that communications between an agency and OAH on hearing dates and time estimates are important matters about which opposing counsel (or unrepresented respondents) ought to have notice and an opportunity to be heard? If that is not presently required by the APA and OAH's regulations, is it not mandated by the requirements of Due Process? I am basically looking for a reality check here, since agency counsel and administrative law judges I have spoken to seem to think the issue is totally inconsequential. If you agree with me at all, do you think this is a matter which perhaps the Law Revision Commission should take a look at?

Thank you for any consideration you may give this matter. I look forward to getting your perspective.

Thomas C. Lasken
Attorney at Law

RESPONSE OF MICHAEL ASIMOW

On Dec 20, 2005, Asimow, Michael wrote:

Dear Mr. Lasken, thanks for your interesting communication. It's not a problem I've really thought about. I can see some good arguments on both sides of the issue. Your arguments are pretty persuasive; but requests for continuances are often abused.

I don't really have an opinion on whether a due process violation occurs by reason of ex parte contacts about scheduling, but I can imagine a good argument for a due process violation in a very complex case where there is insufficient time to engage in discovery. Whether ex parte communications by an agency to an ALJ are a due process violation is itself a pretty underdeveloped issue.

Reg sec 1018(a)(6) seems to require the agency to confer with the parties about acceptable hearing dates. Can't you make use of that to get an acceptable date? You say that OAH and DRE ignore your requests but that seems a violation of the regulation and you ought to be able to get some relief by communicating with the Director of OAH. Also the text and the comment to APA sec 10430.20 says that ex parte discussions about calendaring and continuances are OK but only if the matter appears to be noncontroversial in the context of the specific case. If you've told OAH and DRE that scheduling is controversial, ex parte communications would be improper.

I'm forwarding this communication to the Law Revision Commission and you'll hear from them if the staff feels that this is a matter that calls for legislative revision.

Let me know if there are any further developments as I'd like to cover this issue in my forthcoming treatise on CA Administrative Law. Thanks for writing to me. — Michael Asimow

REPLY OF TOM LASKEN

Date: Tuesday, December 20, 2005
To: Asimow, Michael <asimow@law.ucla.edu>
From: Tom Lasken <tlasken@lasken.com>
Subject: RE: APA-Ex Parte Communications

Dear Dr. Asimow:

Thank you for your immediate response.

Reg. 1018(a)(6) appears to require specification of any statute or regulation which specifies the time within which the hearing must be held, etc. I assume that would apply to the 90 days within which application hearings must be held, or some other agency-specific statute which may be controlling. However, that falls under the general provisions of 1018(a), which simply specifies what the agency's request for a hearing to OAH must contain, without any reference, as far as I can tell, to whether the respondent must involved in the communication. In fact, my guess is that the regulation simply restates unwritten practice predating the reform of the APA in what the agencies' "Request for Setting" had always contained, and which, in my experience, has never been sent to respondents.

Note that Regulation 1018 (a) requires the agency to give a time estimate for the hearing. No input from the respondent is required or, in my experience, solicited or obtained. If the agency requests 2 hours, OAH sets it for 2 hours, and if respondent's counsel, once he or she gets the Notice of Hearing, determines one or two days are needed, it becomes the respondent's burden to either move for a continuance, or notify the agency and OAH that the case will have to be set for further hearing after the first two hours. None of that should be necessary, and in all fairness, the respondent should have been consulted as to time estimate and available dates in the first place. At least that's my view, and it was my view when I was an agency attorney.

I do intend to bring this up with the Director of OAH. I expect resistance due to decades of embedded practice. Also, the objection may be raised that consulting the respondent will be too time-consuming. As I suggested before, I think that may be penny wise and pound foolish, because avoidable continuance motions are also a waste of time and resources. I also think that time-consumption does not outweigh fundamental fairness and due process.

Your point about APA Section 10430.20 is well taken, and I intend to include a reference to it in my future communications to agencies.

Thank you for sharing your views on this. If there are any significant developments I will let you know.

Tom Lasken

McGRANE GREENFIELD LLP

Attorneys at Law

Please reply to:
William McGrane
San Francisco Office

Direct E-mail:
wmcgrane@mcgranegreenfield.com

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SAN FRANCISCO OFFICE
One Ferry Building
Suite 220
San Francisco, CA 94111
Phone: (415) 283-1776
Fax: (415) 283-1777

SAN JOSE OFFICE
40 South Market Street
Seventh Floor
San Jose, CA 95113
Phone: (408) 995-5600
Fax: (408) 995-0308

May 19, 2006

(By Fed X and E-mail)
Edmund Regalia
Chairman
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303

RE: Corporations Code section 25507(a)

Dear Ed:

Congratulations on your appointment to the commission. I can't think of anybody better qualified to make a practical difference.

I wonder if I can interest you and your staff in an anomaly in the Corporations Code I recently encountered in a case? "Soft notes", i.e., obligations to pay money on a highly contingent basis depending on the success of what became a failed Santa Rosa real estate project were given to landowners contributing their real property to a developer. The "soft notes" were later identified by my expert (a partner of our mutual friend Jack Provine) as securities under a W.J. Howey analysis, but recovery against the issuer and its principals and attorneys was barred by the absolute two year statute of limitations set forth in Corporations Code section 25507(a).

As this Santa Rosa matter was not otherwise a common law fraud case, that meant no recovery for creditors, who were otherwise shut out in bankruptcy. I got curious about why the statute of limitations for the reckless, indefensible act of issuing unregistered non-exempt securities was so short, and what follows is what I've developed here in my office with the help of David Stuckey, Esq., in that regard.

LEGISLATIVE HISTORY OF CORPORATIONS CODE SECTION 25507(a)

Corporations Code section 25507(a) provides the statute of limitations for all actions brought by the purchaser of securities not qualified for sale pursuant to the requirements of the Corporations Code. It reads as follows:

> No action shall be maintained to enforce any liability created under Section 25503[i] (or Section 25504[ii] or Section 25504.1 insofar as they relate to that section) unless brought before the expiration of two years after the violation upon which it is based or the expiration of one year after the discovery by the plaintiff of the facts constituting such violation, whichever shall first expire.

Until 1968 the applicable Act regarding the sale of securities was the Corporate Securities Law of 1917 (the "1917 Law"). The 1917 Law contained no statute of limitations imposed on an action to void securities, so courts invoked equitable principles amounting to laches in connection with actions for rescission as a bar to action to void the securities where substantial delay occurred after the discovery of the violation (this

doctrine was generally applied only in cases where the purchaser was *in pari delicto* with the issuer).[iii]

In 1939, the Court in *Mary Pickford Co. v. Bayly Bros., Inc.*, found in effect that every sale of a security contained an implied representation to the purchaser that a permit had been obtained by the issuer.[iv] If no permit had, in fact, been obtained, this implied representation was false and constituted a misrepresentation actionable under a fraud theory—thus the purchaser was bound by the four-year fraud statute of limitations, which began to run upon the purchaser's discovery of the falsity. However, if the seller reasonably believed no permit was required at the time he sold the security – particularly after being so informed by counsel—the cause of action was for breach of warranty, and the statute of limitations began at the time of the sale (although it was unclear whether this was the four-year statute of limitations under Cal. Civ. Proc. §337(1) or the two-year statute of limitations under Cal. Civ. Proc. § 339(1) for breach of warranty).

As a result, for decades it remained unclear until a court made a final determination regarding the seller's state of mind at the time of sale whether the statute of limitations began to run upon the discovery by the purchaser of the facts supporting a cause of action, or had in fact begun at the date of sale—and therefore whether or not the purchaser's right to sue for rescission was, in fact, time-barred. This situation, naturally, caused much frustration. Commentators were vocal in their scorn: "A more glaring failure to provide legislative guidance for the courts is difficult to find, and it is no

wonder that the result has been irremediable chaos for the honest issuer and frustrating ineffectiveness for the practitioner seeking proper redress for his injured client."[v] Another commentator, writing forty years earlier, noted that:

> It is to be regretted that the court, when the opportunity was presented, did not more accurately state and limit the rule as to the limitation of actions. Because of the fact that a long period may intervene before the question is again presented to the court, it would seem highly desirable that ameliorating legislation be enacted. It is accordingly suggested that either the Act itself or the Code of Civil Procedure should be amended to provide that any action to enforce a civil liability created by the Act must be brought within one year after discovery of the violation and in any event within three years after the bona fide issuance of the security.[vi].

Despite this call for reform, the controlling law regarding corporations remained essentially unchanged until the late 1960's. Then, to address the many inefficiencies of the 1917 Law, including the absence of any clear statute of limitations as noted above, Corporate Commissioner Robert H. Volk met with experts all over the state and country before preparing the Corporate Security Law of 1968 (the "1968 Law"), which was introduced to the Legislature by Assembly member John T. Knox and enacted that year. Section 25507(a) was an original part of the 1968 Law, and was based on the absolute one-year statute of limitations contained in Section 13 of the Federal Securities Act of

1933 and the absolute two-year statute of limitations contained in Section 410(e) of the Uniform Securities Act of the time (neither of which contains a discovery rule).[vii]

Although the 1968 Law itself was amended several times prior to enactment, Section 25507(a) appears not to be among the provisions so amended—indeed, the legislative history of the 1968 Law prepared for this law firm contains only one writing prepared prior to the passage of the 1968 Law that addresses Section 25507(a) at all: on page 18 of a document titled "Summary of the Corporate Securities Law of 1968", which was found in the Legislative bill file of Assembly member Knox, the anonymous author writes of the proposed law that "[s]pecific statutes of limitations are provided. By the substitution of the civil liabilities for the void concept of the prior law substantial rights are given to California investors and areas of continuing doubt and uncertainty are eliminated." These "areas of continuing doubt and uncertainty" presumably refer to the confusing and ambiguous status of the law after the *Mary Pickford, Co.* case.

Two of the drafters of the 1968 Law explained the purpose of the two-year statute of limitations (and the one year discovery rule) thus: "This [two year or one-year discovery rule] period of limitation should be compared with the one year period under Section 12(1) of the Securities Act of 1933 for an action for violation of the Federal registration requirements. An absolute one-year period, regardless of any knowledge of the plaintiff, is perhaps too short; but if the plaintiff is aware of the violation, then he should be required to sue within one year and not speculate at the expense of the

defendant on the market price of the stock. On the other hand, a reasonably short outside period of limitations is essential for this action, which does not require any fault whatever on the part of the defendant and may impose liability for an entirely excusable mistake. Therefore, the two year outside period of limitations was chosen. As in the case of the period of limitations prescribed in Section 25506, presumably this period is subject to being tolled by the general provisions of the Code of Civil Procedure relating to disability or other basis for suspending the running of a statute of limitations."[viii]

Section 25507(a) has not been revised or amended in any way since its passage in 1968. and it has generated little commentary or refinement by the judiciary. Instead, the few California and Federal courts that have interpreted and applied §25507(a) have done so in conclusory terms and without significant comment.[ix]

SURVEY OF LIMITATION OF ACTIONS APPLICABLE IN OTHER STATES

A survey of all state law codes has revealed 47 statutes of limitations[x] analogous to § 25507(a)—many of them based on the current version of the Uniform Securities Act.[xi] Only ten states have limitations periods that expire as quickly as or quicker than California's. By way of contrast, twenty-one states have a maximum deadline for filing that is longer than the two years in California, and another five states have no maximum at all, instead basing their statutes of limitations only on the time when purchasers learn of the illegality. The remaining ten states all provide the same two-year maximum as

California—but do not provide an earlier deadline for those who discover the illegality of the purchased securities within the first year, as California does.

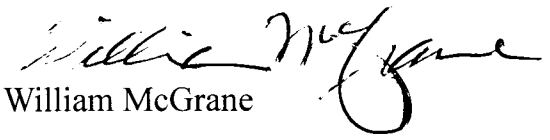
In other words, whereas California is one of only eight states in which a cause of action can expire as soon as one year after sale of an unregistered security, there are at least 37 states in which the statutes of limitations can not—even with actual knowledge on the part of the purchaser of the illegality—expire for at least two—17 of which do not expire for at least three. California thus has one of the most restrictive and limited statutory windows of opportunity for purchasers of unqualified securities to file for rescission in the entire country.

CONCLUSION

When you think about it, where is the public policy for such a short statute of limitations for the not uncommon situation where some reckless high-binder (a phrase I think I first heard from you when we worked against Boise Cascade together while I was still at Boalt) stumbles into a Blue Sky problem as part of a larger fraud. Usually the deal doesn't go south and lawyers don't get involved until Section 25507(a) has run. It is a toothless tiger, and it shouldn't be. Get it out to one year from discovery, no more than a four year period from inception and I'll buy you dinner—assuming that is not bribing a government official. Best.

Very truly yours,

McGRANE GREENFIELD LLP



William McGrane

cc: John MacConaghy (via e-mail)
Clayton Clement (via e-mail)
Michael Senneff (via e-mail)

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[i] Cal. Corp. Code § 25503 is titled "Sale of securities in violation of specified sections," and provides for liability for those who sell unqualified securities.

[ii] Cal. Corp. Code §§ 25504 and 25504.1 provide for joint and several liability for those who directly or indirectly control or assist with intend to defraud a person violating, *inter alia,* Cal. Corp. Code § 25503.

[iii] Harold Marsh, Jr., and Robert H. Volk, *Practice Under the California Corporate Securities Law of 1968,* 1969 (the "Marsh and Volk Practice Guide"), at page 17. The Marsh and Volk Practice Guide apparently remains the definitive explanatory text regarding current California securities law, and is listed on the California Department of Corporations website. Both of the authors were heavily involved in the drafting of the 1968 Act.

[iv] 12 Cal. 2d 501 (1939).

[v] Walter G. Olson, *The California Securities Law of 1968,* 9 Santa Clara Law Review 75, 96 (1968).

[vi] T.W. Dahlquist, *Regulation and Civil Liability Under the California Corporate Security Act: IV*, 34 Cal. L. Rev. 695, 708-709 (1946).

[vii] *Draftsman's Commentary*, to 1968 Law (author unknown). Although the great majority of states adopted some form of the Uniform Securities Act, California legislators twice (in 1959 and again in 1961) rejected proposals that it do so. *See* Olson, *supra* page 2, at 76. Of California's ultimate enactment of a statutory system unrelated to the Uniform Securities Act, Olson wrote that "while there may have been several reasons for this decision, the fact that the Uniform Act was a two-time loser in this state undoubtedly played an important role." *Id.* at 77.

[viii] Marsh and Volk Practice Guide, at pp. 487-488. The authors appear to be referring to tolling provisions such as those found in sections of the California Code of Civil Procedure which toll the running of the statute of limitations for, *inter alia*: (1) time periods during which potential defendants are out-of-state (§ 351); (2) potential plaintiffs who are minors, insane, or imprisoned on a criminal charge (§ 352); and (3) potential plaintiffs who are disabled by reason of the existence of a state of war (§ 354).

[ix] *See, e.g., Eisenbaum v. Western Energy Resources, Inc.*, 218 Cal. App. 3d 314, 325, 326 (1990) (holding that the one-year "discovery rule" requires actual knowledge of illegality, not just "inquiry notice"); *also Sherman v. Lloyd,* 181 Cal. App. 3d 693, 698 (1986) (holding that the "burden of discovery" of a purchaser of securities in a fiduciary relationship with the seller is reduced, "and he is entitled to rely on the statements and advice provided by the fiduciary"); *Toombs v. Leone,* 777 F.2d 465, 470 (1985); *Lubin v. Sybedon Corp.*, 688 F. Supp. 1425, 1426 (S.D. Cal. 1988) ("Section 25503 is the California equivalent of section 12(1) of the 1933 Act, and, like its federal counterpart (section 13), section 25507's two-year statute of limitations has been found to be absolute and not subject to equitable tolling").

[x] Research revealed only 47 statutes of limitations expressly applicable to violations of state statutes prohibiting the sale of unregistered securities. Colorado (C.R.S. 11-15-301) and New York (NY Gen Bus § 359-e) both have statutes prohibiting the sale of unregistered securities, but neither appears to have a statute of limitations expressly applicable to it, nor case law setting our what statute of limitations should be applied. Also, Rhode Island appears to have neither a statute prohibiting the sale of unregistered securities, nor – obviously -- an applicable statute of limitations. The complete table of statute of limitations is as follows:

State	Provision	Statute of Limitations	Discovery Rule
Alabama	Ala. Code §8-6-19(f)	Two years	None
Alaska	Alaska Stat. §45.55.930(f)	Three years	None
Arizona	A.R.S. § 44-2004(A)	One year	None
Arkansas	A.C.A. §23-42-106(f)	Three years	None
California	Cal. Corp. Code §25507(a)	Two years	One year
Connecticut	Conn. Gen. Stat. § 36b-29(f)	Two years	None
Delaware	6 Del. C. §7323(e)	Three years	None
Florida	Fla. Stat. § 95.11(4)(e)	Five years	Two years
Georgia	O.C.G.A. §10-5-14(d)	Two years	None
Hawaii	HRS 485.20	Seven year	Two years
Idaho	Idaho Code §30-14-509(j)	One year	None
Illinois	815 ILCS 5/13(D)	Three years	None

Indiana	Burns Ind. Code Ann §23-2-1-19(g)	None	Three years
Iowa	Iowa Code § 502.509(10)	One year	None
Kansas	K.S.A. 2005 Supp. 17-12a509 (j))	One year	None
Kentucky	KRS § 292.480	Three years	None
Louisiana	La. R.S. 51:714(c)	None	Two years
Maine	32 M.R.S. § 16509(10)	Two years	None
Maryland	Md. Corporations and Associations Code Ann. §11-703(f)	One years	None
Massachusetts	ALM GL ch. 110A, § 410(e)	None	Four years
Michigan	MCLS §451.810(e)	Two years	None
Minnesota	Minn. Stat. § 80A.23 subd.7	Three Years	None
Mississippi	Miss. Code Ann. § 75-71-725	Two years	None
Missouri	§ 409.5-509(j) R.S. Mo.	One year	None
Montana	Mont Code Anno., § 30-10-307	Two years	None
Nebraska	R.R.S. Neb. §8-1118(4)	Three years	None
Nevada	Nev. Rev. Stat. Ann. § 90.670	Five years	Two years
New Hampshire	RSA § 421-B:25(VII)	Six years	None
New Jersey	N.J. Stat. § 49:3-71(g)	None	Two years
New Mexico	N.M. Stat. Ann. § 58-13B-41	Five years	Two years
North Carolina	N.C. Gen. Stat. §78A-56(f)	Two years	None
North Dakota	N.D. Cent. Code §10-04-17(5)	None	Five years
Ohio	ORC Ann. §1707.43(B)	Five years	Two years
Oklahoma	71 Okl. St. § 1-509(J)	One year	None
Oregon	ORS §59.115(6)	Three years	None
Pennsylvania	70 P.S. §1-504(b)	Two years	One year
South Carolina	S.C. Code Ann. § 35-1-509(j)	Three years	None
South Dakota	S.D. Codified Laws § 47-31B-509	Five years	Two years
Tennessee	Tenn. Code Ann. §48-2-122(h)	Five years	Two years
Texas	Tex. Rev. Civ. Stat. art. 581-33(H)	Three years	None
Utah	Utah Code Ann. § 61-1-22	Four years	Two years
Vermont	9 V.S.A. § 5509(j)	One year	None
Virginia	Va. Code Ann. §13.1-522(D)	Two years	None
Washington	Rev. Code Wash. (ARCW) §21.20.430(4)	Three years	None

West Virginia	W. Va. Code § 32-4-410	Three years	None
Wisconsin	Wis. Stat. §551.59(5)	Three years	None
Wyoming	Wyo. Stat. 17-4-122(e)	Two years	None

The breakdown of states and statutes of limitations is as follows:

One Year Max, No Discovery Rule	Two Year Max, One Year Discovery Rule	Two Year Max, No Discovery Rule
Arizona	California	Alabama
Idaho	Pennsylvania	Connecticut
Iowa		Georgia
Kansas		Maine
Maryland		Michigan
Missouri		Mississippi
Oklahoma		Montana
South Dakota		North Carolina
Vermont		Virginia
		Wyoming

Three Year Max, No Discovery Rule	Four Year Max, Two Year Discovery Rule	Five Year Max, Two Year Discovery Rule
Alaska	Utah	Florida
Arkansas		Nevada
Delaware		Ohio
Illinois		Tennessee
Kentucky		New Mexico
Minnesota		
Nebraska		
Oregon		
South Carolina		
Texas		
Washington		
West Virginia		
Wisconsin		

Seven Year Max, Two Year Discovery Rule	Six Year Max, No Discovery Rule	No Max (Discovery Rule)
Hawaii	New Hampshire	Louisiana (2)
		New Jersey (2)
		Indiana (3)

		Massachusetts (4)
		North Dakota (5)

Relevant Portions of Statutes of Limitations Applicable to State Blue Sky Laws

Alabama: Ala. Code §8-6-19(f): *Civil Liability*: **No person may obtain relief under this section in an action involving the failure to register unless suit is brought within two years from the date of sale.** All other actions for relief under this section must be brought within the earlier of two years after discovery of the violation or two years after discovery should have been made by the exercise of reasonable care. No person may bring an action under subsection (a) of this section: (1) If the buyer received a written offer, before the action and at a time when he owned the security, to refund the consideration paid together with interest at six percent per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within 30 days of its receipt, or (2) If the buyer received such an offer before the action and at a time when he did not own the security, unless he rejected the offer in writing with 30 days of its receipt.

Alaska: Alaska Stat. § 45.55.930(f): *Civil liability to buyers:* **A person may not sue under this section more than three years after the contract of sale, except as otherwise provided in this subsection.** For a violation of (a)(2) of this section or AS 45.55.010, an action under this section may be brought within three years after the sale or two years after the person bringing the action discovered or should have discovered the facts on which the action is based, whichever is later. Failure to bring an action on a timely basis is an affirmative defense. A person may not sure under this section if the buyer received (1) a written offer, before suit and at a time when the buyer owned the security, to refund the consideration paid together with interest at eight percent a year or the stated rate of the security if the security has a stated, fixed rate less than eight percent, from the date of payment, less the amount of income received on the security, and the buyer failed to accept the offer within 30 days of its receipt; or (2) the offer before suit and at a time when the buyer did not own the security unless the buyer rejected the offer in writing within 30 days of its receipt.

Arizona: A.R.S. § 44-2004(A): *Limitation of civil actions:* **No civil action shall be maintained under this article to enforce any liability based on a violation of section 44-1841 or 44-1482 unless brought within one year after the violation occurs.**

Arkansas: A.C.A. § 23-42-106(f): *Civil liability:* **No person may sue under this section after three (3) years from the effective date of the contract of sale.** No person may sue under this section: (1) If the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at six percent (6%) per year from the date of payment less the amount of any income received on the security, and he failed to accept the offer within thirty (30) days of its receipt; or (2) If the buyer received such an offer before suit and at a time when he did not own the security unless he rejected the offer in writing within thirty (30) days of its receipt.

California: Cal. Corp. Code § 25507(a): *Limitation of actions for sale or security no qualified for sale; Offer to repurchase security or pay damages prior to action:* **No action shall be maintained to enforce any liability created under Section 25503 (or Section 25504 or Section 25504.1 insofar as they relate to that section) unless brought before the expiration of two years after the violation upon which it is based or the expiration of one year after the discovery by the plaintiff of the facts constituting such violation, whichever shall first expire.**

Colorado: **No statute of limitations was found in state code or case law.**

Connecticut: Conn. Gen. Stat. §36b-29(f): *Buyer's remedies:* **No person may bring an action under this section more than two years after the date of the contract of sale or of the contract for investment advisory services**, except that with respect to actions arising out of intentional misrepresentation or fraud in the purchase or sale of securities, no person may bring an action more than two years from the date when the misrepresentation or fraud is discovered or in the exercise of reasonable case should have been discovered, except that no such action may be brought more than five years from the date of such misrepresentation or fraud.

Delaware: 6 Del. C. § 7323(e): *Civil liabilities:* **No person may sue under this section more than 3 years after the contract of sale.** No person may sue under this section if the buyer received a written offer, before suit and at a time when the buyer owned the security, or if a seller received a written offer before suit, to refund the consideration paid together with interest at the legal rate from the date of payment, less the amount of any income received on the security, and the seller failed to accept the offer within 30 days of its receipt, or if the buyer received such an offer before suit and at a time when the buyer did not own the security, unless the buyer rejected the offer in writing within 30 days of its receipt.

Florida: Fla. Stat. § 95.11(4)(e): *Limitations other than for the recovery of real property;* WITHIN TWO YEARS. **An action founded upon a violation of any provision of chapter 517, with the period running from the time the facts giving rise to the cause of action ere discovered or should have been discovered with the exercise of due diligence, but not more than 5 years from the date such violation occurred.**

Georgia: O.C.G.A. §10-5-14(d): *Civil liability from sales of securities:* **With respect to the purchase, sale, or offer to purchase or sell a security, no person may sue under this Code section more than two years from the date of the contract for sale or sale, if there is no contract for sale.** With respect to the purchase, sale, or offer to purchase or sell a security, no person may sue under this Code section: (1) If the buyer received a written offer, before suit and at a time when he owned the security, to repay in cash or by certified or official bank check, within 30 days from the date of acceptance of such offer in exchange for the securities, the fair value of the consideration paid (determined as of the date such payment was originally paid by the buyer), together with interest on such amount for the period from the date of payment down to the date of repayment, such interest to be computed in case the security consists of an interest-bearing obligation at the same rate as provided in the security or, in case the security consists of other than an interest-bearing obligation, at the rate of 6 percent per annum, less, in every case, the amount of any income received on the security, and: (A) Such offeree does not accept the offer within 30 days of its receipt; or (B) If such offer was accepted, the terms thereof were complied with by the offeror; or (2) If the buyer received a written offer before suit and at a time when he did not own the security to repay in cash or by certified or official bank check, within 30 days from the date of acceptance of such offer, an amount equal to the difference between the fair value of the consideration the buyer gave for the security and the fair value of the security at the time the buyer disposed of it, together with interest on such amount for the period from the date of payment down to the date of repayment, such interest to be computed in case the security consists of an interest-bearing obligation at the same rate as provided in the security or, in case the security consists of other than an interest-bearing obligation, at the rate of 6 percent per annum, less, in every case, the amount of any income received on the security, and: (A) Such offeree does not accept the offer within 30 days of its receipt; or (B) If such offer was accepted, the terms thereof were complied with by the offeror, provided no written offer shall be effective within the meaning of this subsection unless it would be exempt under Code Section 10-5-9 or, if registration would have been required, then unless such rescission offer has been registered and effected under a subsection of Code Section 10-5-5. Any person who is paid for his security in the amount provided by this subsection shall be foreclosed from

asserting any remedies under this chapter regardless of whether the other requirements of this subsection have been complied with.

Hawaii: HRS 485.20(a): *Remedies:* Sales voidable when and by whom. Every sale made in violation of this chapter shall be voidable at the election of the purchaser; and the person making the sale and every director, officer, or agent of or for the seller, if the director, officer, or agent has personally participated or aided in any way in making the sale, shall be jointly and severally liable to the purchaser in an action at law in any court of competent jurisdiction upon tender of the securities sold or of the contract made for the full amount paid by the purchaser, with interest, together with all taxable court costs (and reasonable attorney's fees); provided that notwithstanding any law to the contrary, **no action shall be brought for the recovery of the purchase price after five years from the date of the sale or after two years from the discovery of facts constituting the violations, but in any event after seven years from the date of the sale;** and provided further that no purchaser otherwise entitled shall claim or have the benefit of this section who has refused or failed within thirty days from the date thereof to accept an offer in writing of the seller to take back the security in question and to refund the full amount paid by the purchaser, together with interest on the amount for the period from the date of payment by the purchaser down to the date of repayment, such interest to be computed: (1) In case the securities consist of interest-bearing obligations, at the same rate as provided in the obligations; and (2) In case the securities consist of other than interest-bearing obligations, at the rate of ten per cent a year; less, in every case, the amount of any income from the securities that may have been received by the purchaser.

Idaho: Idaho Code § 30-14-509(j): *Civil liability:* Statute of limitations. **A person may not obtain relief: (1) Under subsection (b) of this section for violation of section 30-14-301, Idaho Code, or under subsection (d) or (e) of this section, unless the action is instituted within one (1) year after the violation occurred**; or (2) Under subsection (b) of this section, other than for violation of section 30-14-301, Idaho Code, or under subsection (c) or (f) of this section, unless the action is instituted within the earlier of two (2) years after discovery of the facts constituting the violation or five (5) years after the violation.

Illinois: 815 ILCS 5/13(D): *Private and other civil remedies; securities:* **No action shall be brought for relief under this Section or upon or because of any of the matters for which relief is granted by this Section after 3 years from the date of sale**; provided, that if the party bringing the action neither knew nor in the exercise of reasonable diligence should have known of any alleged violation of subsection E, F, G, H, I or J of

Section 12 of this Act [815 ILCS 5/12] which is the basis for the action, the 3 year period provided herein shall begin to run upon the earlier of: (1) the date upon which the party bringing the action has actual knowledge of the alleged violation of this Act; or (2) the date upon which the party bringing the action has notice of facts which in the exercise of reasonable diligence would lead to actual knowledge of the alleged violation of this Act; but in no event shall the period of limitation so extended be more than 2 years beyond the expiration of the 3 year period otherwise applicable.

Indiana: Burns Ind. Code Ann §23-2-1-19(g): *Civil penalty*: **Action under this section shall be commenced within three (3) years after discovery by the person bringing the action of a violation of this chapter, and not afterwards**, but in no event may an action, unless the period is extended by operation of I 34-11-5-1, be commenced more than six (6) years after the purchase or sale of a viatical settlement contract or fractional or pooled interest in a viatical settlement contract that occurred before March 17, 2000, and is the subject of the action. This subsection does not affect a remedy that is available to a person bringing a cause of action under IC 27 or IC 34 or based on common law fraud. No person may sue under this section: (1) if that person received a written offer, before suit and at a time when the person owned the security, to refund the consideration paid together with interest on that amount from the date of payment to the date of repayment, with interest on:(A) interest-bearing obligations to be computed at the same rate as provided on the security; and (B) all other securities at the rate of eight percent (8%) per year; less the amount of any income received on the security, and the person failed to accept the offer within thirty (30) days of its receipt; or (2) if the person received an offer before suit and at a time when the person did not own the security, unless the person rejected the offer in writing within thirty (30) days of its receipt.

Iowa: Iowa Code § 502.509(10): *Civil liability: Statute of limitations.* **A person shall not obtain relief under any of the following: *a.* Under subsection 2 for violation of section 502.301, or under subsection 4 or 5, unless the action is instituted within one year after the violation occurred**. *b.* Under subsection 2, other than for violation of section 502.301, or under subsection 3 or 6, unless the action is instituted within the earlier of two years after discovery of the facts constituting the violation or five years after the violation.

Kansas: K.S.A. 2005 Supp. 17-12a509 (j) (§ 38(j)): *Civil Liabilities*: STATUTE OF LIMITATIONS. A person may not obtain relief: **(1) Under subsection (b) for violation of section 11, and amendments thereto, or under subsection (d) or (e), unless the action is instituted within one year after the violation occurred;** or (2) under

subsection (b), other than for violation of section 11, and amendments thereto, or under subsection (c) or (f), unless the action is instituted within the earlier of two years after discovery of the facts constituting the violation or five years after the violation.

Kentucky: KRS § 292.480(5): *Civil liabilities:* Any tender specified in this section may be made at any time before entry of judgment. Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant. **No person may sue under this section more than three (3) years after the date the occurrence of the act, omission, or transaction constituting a violation of this chapter was discovered, or in the exercise of reasonable care should have been discovered.** No person may sue under this section: (a) If the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at the legal rate from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within thirty (30) days of its receipt; (b) If the buyer received an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within thirty (30) days of its receipt; or (c) If paragraph (b) of subsection (2) of this section applies, and if the seller received a written offer before suit equal to the difference between the greater of the highest intermediate value of the security or the consideration received by the purchaser upon disposal of the security and the consideration received by the seller for the security, together with interest on the difference at the legal rate from the date of the transaction; or if paragraph (a) of subsection (2) of this section applies, and if the seller received a written offer to return the security together with any income received by the purchaser on the security; and in either case he failed to accept the offer within thirty (30) days of its receipt. *(Although it is possible to read KRS § 292.480 as providing for an extended discovery rule, this interpretation is apparently incorrect. See* Hutto v. Bockweg, *579 S.W.2d 382, 385 (Ky. App. 1979) (rejecting in conclusory terms an argument that the statute of limitations should have been tolled, on the ground that "KRS 292.480(3) provides that 'no person may sue under that section more than 3 years' after contract of sale).*

Louisiana: La. R.S. 51.714(c): *Civil liability from sales of securities:* **(1) No person may sue under this Section more than two years from the date of the contract for sale or sale, if there is no contract for sale.** No person may sue under this Section: (a) If the buyer received a written offer, before suit and at a time when he owned the security, to repay in cash or by certified or official bank check, within thirty days from the date of acceptance of such offer in exchange for the securities, the fair value of the consideration paid, determined as of the date such payment was originally paid by the buyer, together

with interest on such amount for the period from the date of payment to the date of repayment, such interest to be computed in case the security consists of an interest-bearing obligation, at the same rate as provided in the security or, in case the security consists of other than an interest-bearing obligation, at the applicable rate of legal interest, less, in every case, the amount of any income received on the security, and: (i) Such offeree does not accept the offer within thirty days of its receipt or (ii) If such offer was accepted, the terms thereof were complied with by the offeror; (b) If the buyer received a written offer before suit and at a time when he did not own the security to repay in cash or by certified or official bank check, within thirty days from the date of acceptance of such offer, an amount equal to the difference between the fair value of the consideration the buyer gave for the security and the fair value of the security at the time the buyer disposed of it, together with interest on such amount for the period from the date of payment down to the date of repayment, such interest to be computed in case the security consists of an interest-bearing obligation at the same rate as provided in the security, or, in case the security consists of other than an interest-bearing obligation, at the applicable rate of legal interest, less, in every case, the amount of any income received on the security, and: (i) Such offeree does not accept the offer within thirty days of its receipt or (ii) If such offer was accepted, the terms thereof were complied with by the offeror; (2) Provided, that no written offer shall be effective within the meaning of this Subsection unless, if it were an offer to sell securities, it would be exempt under R.S. 51:709 or, if registration would have been required, then unless such rescission offer has been registered and effected under R.S. 51:705. Any person who is paid for his security in the amount provided by this Subsection shall be foreclosed from asserting any remedies under this Part, regardless of whether the other requirements of this Subsection have been complied with. *(Although La. R.S. 51:714 does not state that two-year statute of limitations in Louisiana is tolled until the purchaser has actual or constructive knowledge of the illegality, Louisiana courts have applied it under those terms. See* Beckstrom v. Parnell, *730 So. 2d 942, 947 (La. App. 1998)).*

Maine: 32 M.R.S. § 16509(10): *Civil liability:* STATUTE OF LIMITATIONS. **A person may not obtain relief: A. Under subsection 2 for violation of section 16301 or under subsection 4 or 5, unless the action is instituted within 2 years after the violation occurred;** or B. Under subsection2, other than for violation of section 16301, or under subsection 3 or 6, unless the action is instituted within the earlier of 2 years after discovery of the facts constituting the violation or 5 years after the violation.

Maryland: Md. Corporations and Associations Code Ann. §11-703(f): *Civil liabilities:* Limitation of actions; effect of offer of refund. (1) A person may not sue under

subsections (a) (1) and (2) of this section after the earlier to occur of 3 years after the contract of sale or purchase or the time specified in paragraph (2) of this subsection. (2) **An action may not be maintained: (i) To enforce any liability created under subsection (a) (1) (i) of this section, unless brought within one year after the violation on which it is based;** or (ii) To enforce any liability created under subsection (a) (1) (ii) or (2) of this section, unless brought within one year after the discovery of the untrue statement or omission, or after the discovery should have been made by the exercise of reasonable diligence. (3) A person may not sue under subsection (a) (3) of this section more than 3 years after the date of the advisory contract or the rendering of investment advice, or the expiration of 2 years after the discovery of the facts constituting the violation, whichever first occurs. (4) A person may not sue under this section: (i) If the buyer received a written offer, before suit and at a time when he owned the security or asset, to refund the consideration paid together with interest at the rate provided for in §11-107(a) of the Courts and Judicial Proceedings Article, as amended, from the date of payment, less the amount of any income received on the security or asset, and he failed to accept the offer within 30 days of its receipt; (ii) If the buyer received the offer before suit and at a time when he did not own the security or asset, unless he rejected the offer in writing within 30 days of its receipt; or (iii) If the seller received a written offer from the buyer, before suit, to return the security or asset, together with the amount of any income received on the security, less interest at the rate provided for in § 11-107(a) of the Courts and Judicial Proceedings Article, as amended, from the date of payment, and he failed to accept the offer within 30 days of its receipt.

Massachusetts: ALM GL ch. 110A, § 410(e): *Civil Liabilities:* **No person may sue under this section more than four years after the discovery by the person bringing the action of a violation of this chapter or any rule promulgated or order issued thereunder**. No person may sue under this section (1) if the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at six percent per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within thirty days of its receipt, or (2) if the buyer received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within thirty days of its receipt.

Michigan: MCLS §451.810(e): *Offer or sale of security; liability; recovery; contribution; tender; survival of action; limitations; rescission offer; disclosure; suit based on contract; rights and remedies cumulative.* **A person may not bring an action under subsection (a)(1) more than 2 years after the contract of sale.** A person may not bring an action

under subsection (a)(2) more than 2 years after the person, in the exercise of reasonable care, knew or should have known of the untruth or omission, but in no event more than 4 years after the contract of sale. A person may not bring an action under this section if the buyer received a written rescission offer, before the action and at a time when he or she owned the security , to refund the consideration paid together with interest at 6% per year from the date of payment, less the amount of any income received on the security, and he or she failed to accept the offer within 30 days of its receipt, or if the buyer received the offer before the action and at a time when he or she did not own the security , unless he or she rejected the offer in writing within 30 days of its receipt. The documents making full written disclosure about the financial and business condition of the issuer and the financial and business risks associated with the retention of the securities shall be provided to the offeree concurrently with the written rescission offer. Such an offer shall not be made until 45 days after the date of sale of the securities and acceptance or rejection of the offer shall not be binding until 48 hours after receipt by the offeree. The rescission offer shall recite the provisions of this section. A rescission offer under this subsection shall not be valid unless the offeror substantiates that it has the ability to fund the offering and this information is set forth in the disclosure documents.

Minnesota: Minn. Stat. § 80A.23 subd.7: *Civil liabilities:* Limitation on actions. **No person may commence an action under subdivision 1 more than three years after the sale upon which such an action is based.** No person may commence an action under subdivision 2 more than three years after the occurrence of the act or transaction constituting the violation.

Mississippi: Miss. Code Ann. § 75-71-725: *Limitation of actions:* No action shall be maintained to enforce any liability created under Section 75-71-717(a) (2) unless brought with two (2) years after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence**, or, if the action is to enforce a liability created under Section 75-71-717(a)(1) unless brought within two (2) years after the violation upon which it is based.**

Missouri: § 409.5-509(j) R.S. Mo: *Civil liability;* **A person may not obtain relief: (1) Under subsection (b) for violation of section 409.3-301, or under subsection (d) or (e), unless the action is instituted within one year after the violation occurred**; or (2) Under subsection (b), other than for violation of section 409.3-301, or under subsection (c) or (f), unless the action is instituted within the earlier of two years after discovery of the facts constituting the violation of five years after the violation.

Montana: Mont. Code Anno., § 30-10-307(5): *Civil liabilities – limitations on actions:* **(a) No action may be maintained under this section to enforce any liability founded on a violation of 30-10-202 unless it is brought within 2 years after the violation occurs.** (b) No action may be maintained under this section to enforce any liability founded on fraud or misrepresentation unless it is brought within 2 years after discovery of the fraud or misrepresentation on which the liability is founded or after such discovery should have been made by the exercise of reasonable diligence. (c) In no event may an action be maintained under this section to enforce any liability founded on fraud or misrepresentation unless it is brought within 5 years after the transaction on which the action is based

Nebraska: R.R.S. Neb. §8-1118(4): *Violations; damages; statute of limitations:* Any tender specified in this section may be made at any time before entry of judgment. Every cause of action under the Securities Act of Nebraska shall survive the death of any person who might have been a plaintiff or defendant. **No person may sue under this section more than three years after the contract of sale or the rendering of investment advice.** No person may sue under this section (a) if the buyer received a written offer, before suit and at a time when he or she owned the security, to refund the consideration paid together with interest at six percent per annum from the date of payment, less the amount of any income received on the security, and the buyer failed to accept the offer within thirty days of its receipt, or (b) if the buyer received such an offer before suit and at a time when he or she did not own the security, unless the buyer rejected the offer in writing within thirty days of its receipt.

Nevada: Nev. Rev. Stat. Ann. § 90.670: *Statute of limitations:* **A person may not sue under NRS 90.660 unless suit is brought within the earliest of 2 years after the discovery of the violation, 2 years after discovery should have been made by the exercise of reasonable care, or 5 years after the act, omission or transaction constituting the violation.**

New Hampshire: RSA § 421-B:25(VII): *Civil Liabilities:* **A person may not recover under this section in actions commenced more than 6 years after his first payment of money to the broker-dealer or issuer in the contested transaction.**

New Jersey: N.J. Stat. § 49:3-71(g): *Action for deceit; liability:* **No person may bring an action under this section more than two years after the contract of sale or the rendering of the investment advice, or more than two years after the time when the person aggrieved knew or should have known of the existence of his cause of action,**

whichever is later. No person may bring an action under this section (1) if the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid, together with interest at the rate established for interest on judgments for the same period by the Rules Governing the Courts of the State of New Jersey at the time the offer was made, from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within 30 days of its receipt, or (2) if the buyer received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within 30 days of its receipt.

New Mexico: N.M. Stat. Ann. §58-13B-41: *Civil statute of limitations:* **No person may sue under Section 40 [58-13B-40 NMSA 1978] of the New Mexico Securities Act of 1986 unless suit is brought: A. within two years after the discovery of the violation or after discovery should have been made by the exercise of reasonable diligence; and B. within five years after the act or transaction constituting the violation.**

New York: **No statute of limitations was found in state code or case law.**

North Carolina: N.C. Gen. Stat. §78A-56(f): *Civil liabilities:* **No person may sue under this section for a violation of G.S. 78A-24 or G.S. 78A-36 more than two years after the sale or contract of sale.** No person may sue under this section for any other violation of this Chapter more than three years after the person discovers facts constituting the violation, but in any case no later than five years after the sale or contract of sale, except that if a person who may be liable under this section engages in any fraudulent or deceitful act that conceals the violation or induces the person to forgo or postpone commencing an action based upon the violation, the suit may be commenced not later than three years after the person discovers or should have discovered that the act was fraudulent or deceitful.

North Dakota: N.D. Cent. Code §10-04-17(5): *Remedies:* **No action may be taken under this section after five years from the date that the aggrieved party knew or reasonably should have known about the facts that are the basis for the alleged violation.**

Ohio: ORC Ann. §1707.43(B): *Remedies of purchaser in unlawful sale*: **No action for the recovery of the purchase price as provided for in this section, and no other action for any recovery based upon or arising out of a sale or contract for sale made in violation of Chapter 1707 of the Revised Code, shall be brought more than two years after the plaintiff knew, or had reason to know, of the facts by reason of which the**

actions of the person or director were unlawful, or more than five years from the date of such sale or contract for sale, whichever is the shorter period.

Oklahoma: 71 Okl. St. § 1-509(J): *Civil liability:* **A person may not obtain relief: 1. Under subsection B of this section for violation of Section 10 of this act, or under subsection D or E of this section, unless the action is commenced within one year after the violation occurred;** or 2. Under subsection B of this section, other than for violation of Section 10 of this act, or under subsection C or F of this section, unless the action is instituted within the earlier of two (2) years after discovery of the facts constituting the violation of five (5) years after such violation.

Oregon: ORS §59.115(6): *Liability in connection with sale or successful solicitation of sale of securities; recovery by purchaser; limitations on proceeding; attorney fees:* **Except as otherwise provided in this subsection, no action or suit may be commenced under this section more than three years after the sale.** An action under this section for a violation of subsection (1)(b) of this section or ORS 59.135 may be commenced within three years after the sale or two years after the person bringing the action discovered or should have discovered the facts on which the action is based, whichever is later. Failure to commence an action on a timely basis is an affirmative defense.

Pennsylvania: 70 P.S. §1-504(b): *Time limitations on rights of action:* **No action shall be maintained to enforce any liability created under section 502 (or section 503 in so far as it relates to that section) unless brought before the expiration of two years after the violation upon which it is based or the expiration of one year after the plaintiff receives actual notice or upon the exercise of reasonable diligence should have known of the facts constituting such violation, whichever shall first expire.**

Rhode Island: **No Statute Discovered**

South Carolina: S.C. Code Ann. § 35-1-509(j): *Civil liability:* **A person may not obtain relief: (1) Under subsection (b) for violation of Section 35-1-301, or under subsection (d) or (e), unless the action is instituted within three years after the violation occurred;** or (2) under subsection (b), other than for violation of Section 35-1-301, or under subsection (c) or (f), unless the action is instituted within the earlier of three years after discovery of the facts constituting the violation or five years after the violation.

South Dakota: S.D. Codified Laws § 47-31B-509(j): *Civil liability:* **A person may not obtain relief: (1) Under subsection (b) for violation of § 47-31B-301, or under**

subsection (d) or (e), unless the action is instituted within one year after the violation occurred; or (2) under subsection (b), other than for violation of § 47-31B-301, or under subsection (c) or (f), unless the action is instituted within the earlier of two years after discovery of the facts constituting the violation or five years after the violation.

Tennessee: Tenn. Code Ann. §48-2-122(h): *Civil liabilities:* **No action shall be maintained under this section unless commenced before the expiration of five (5) years after the act or transaction constituting the violation or the expiration of two (2) years after the discovery of the facts constituting the violation, or after such discovery should have been made by the exercise of reasonable diligence, whichever first expires.**

Texas: Tex. Rev. Civ. Stat. art. 581-33(H): *Civil Liability with Respect to Issuance or Sale of a Security:* Statute of Limitations. **(1) No person may sue under Section 33A(1) or 33F so far as it relates to Section 33A(1): (a) more than three years after the sale;** or (b) if he received a rescission offer (meeting the requirements of Section 33I) before suit unless he (i) rejected the offer in writing within 30 days of its receipt and (ii) expressly reserved in the rejection his right to sue; or (c) more than one year after he so rejected a rescission offer meeting the requirements of Section 33I. (2) No person may sue under Section 33A(2), 33C, or 33F so far as it relates to 33A(2) or 33C: (a) more than three years after discovery of the untruth or omission, or after discovery should have been made by the exercise of reasonable diligence; or (b) more than five years after the sale; or (c) if he received a rescission offer (meeting the requirements of Section 33I) before suit, unless he (i) rejected the offer in writing within 30 days of its receipt, and (ii) expressly reserved in the rejection his right to sue; or (d) more than one year after he so rejected a rescission offer meeting the requirements of Section 33I. (3) No person may sue under Section 33B or 33F so far as it relates to Section 33B: (a) more than three years after discovery of the untruth or omission, or after discovery should have been made by the exercise of reasonable diligence; or (b) more than five years after the purchase; or (c) if he received a rescission offer (meeting the requirements of Section 33J) before suit unless he (i) rejected the offer in writing within 30 days of its receipt, and (ii) expressly reserved in the rejection his right to sue; or (d) more than one year after he so rejected a rescission offer meeting the requirements of Section 33J.

Utah: Utah Code Ann. § 61-1-22(7)(a): *Sales and purchases in violation – Remedies – Limitation of actions:* **No action shall be maintained to enforce any liability under this section unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of two years after the discovery by the**

plaintiff of the facts constituting the violation, whichever expires first. (b) No person may sue under this section if: (i) the buyer or seller received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at 12% per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within 30 days of its receipt; or (ii) the buyer or seller received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within 30 days of its receipt.

Vermont: *Civil liability*: 9 V.S.A. § 5509(j): *Civil liability:* **A person may not obtain relief: (1) Under subsection (b) for violation of section 5301 of this chapter, or under subsection (d) or (e) of this section, unless the action is instituted within one year after the violation occurred;** or (2) under subsection (b) of this section, other than for violation of section 5301, or under subsection (c) or (f) of this section, unless the action is instituted within the earlier of two years after discovery of the facts constituting the violation or five years after the violation.

Virginia: Va. Code Ann. §13.1-522(D): *Civil liabilities:* **No suit shall be maintained to enforce any liability created under this section unless brought within two years after the transaction upon which it is based;** provided, that, if any person liable by reason of subsection A, B or C of this section makes a written offer, before suit is brought, to refund the consideration paid and any loss due to any investment advice provided by such person, together with interest thereon at the annual rate of six percent, less the amount of any income received on the security or resulting from such advice, or to pay damages if the purchaser no longer owns the security, no purchaser or user of the investment advisory service shall maintain a suit under this section who has refused or failed to accept such offer within thirty days of its receipt.

Washington: Rev. Code Wash. (ARCW) §21.20.430(4): *Civil liabilities – Survival, limitation of actions – Waiver of chapter void – Scienter:* (a) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant. **(b) No person may sue under this section more than three years after the contract of sale for any violation of the provisions of RCW 21.20.140(1) or (2) or 21.20.180 through 21.20.230,** or more than three years after a violation of the provisions of RCW 21.20.010, either was discovered by such person or would have been discovered by him or her in the exercise of reasonable care. No person may sue under this section if the buyer or seller receives a written rescission offer, which has been passed upon by the director before suit and at a time when he or she owned the security, to refund the consideration paid together with interest at eight percent per annum from the date of

payment, less the amount of any income received on the security in the case of a buyer, or plus the amount of income received on the security in the case of a seller.

West Virginia: W. Va. Code § 32-4-410(e): *Civil liabilities:* **No person may sue under this section more than three years after the sale.**

Wisconsin: Wis. Stat. §551.59(5): *Civil liabilities:* **No action shall be maintained under this section unless commenced before the expiration of 3 years after the act or transaction constituting the violation**, but the time specified for commencing such action shall be extended by reason of any fact and for the time specified in ss. 893.13 and 893.16 to 893.23. *(These sections provide for tolling during periods of disability, when the defendant is out-of-state, for soldiers during times of war, and so on).*

Wyoming: Wyo. Stat. 17-4-122(e): *Civil liability of sellers violating provisions:* **No person may sue under this section more than two (2) years after the contract of sale.** No person may sue under this section: (i) If the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at six percent (6%) per year from the date of payment, less the amount of any income received on the security, and he failed to accept the offer within thirty (30) days of its receipt; or (ii) If the buyer received such an offer before suit and at a time when he did not own the security, unless he rejected the offer in writing within thirty (30) days of its receipt.

[xi] As of May, 2006, nine states plus the U.S. Virgin Islands have statute of limitations based on the model Uniform Securities Act ("USA") (although both Maine and South Carolina have extended the deadline for filing actiosn beyond the one-year proposed in the USA to two and three years, respectively).

COMMENTS OF JOANNA MITTMAN

Feedback form submitted by Joanna Mittman on February 9, 2006:

emailaddress: joanna.mittman@napa.courts.ca.gov

Message: In 2005 CCP § 1005 was amended to change filing deadlines for oppositions and replies. This section does not apply to summary judgment/summary adjudication motions, which are governed by CCP § 437c. This creates the anamolous situation whereby the court receives oppositions and replies on the simplest motions long before it receives them on the most complicated motions. A reply due 5 CALENDAR days before hearing means that court staff often has only a couple of court days to review the reply on a summary judgment (CCP § 437c(b)(4), whereas it has 5 COURT days to review replies on other types of motions (CCP § 1005(b)).

I would like to suggest a revision to the provision governing the time for filing oppositions and replies to summary judgment/summary adjudication motions, so as to make the time for filing oppositions and replies either consistent with section 1005, or to allow for slightly more time.

Thank you,

Joanna Mittman
Court General Counsel
Napa Superior Court
825 Brown Street
Napa, CA 94559
(707) 299-1271
joanna.mittman@napa.courts.ca.gov

COMMENTS OF BRIAN PARKS

Feedback form submitted by Brian Parks on January 3, 2006:

emailaddress: brianpar@gmail.com

Message: I am in the midst of a personal financial disaster and would like to take advantage of bankruptcy protection. However I find that since the real-estate values in California have doubled or more my homeowner's exemption would leave me without a home or enough money to get a new one within my budget.

I would like for your office to study the Homestead Exemption again. a lot has happened since 1996 when this was last done. What is the procedure for getting this a project going?

TRUSTEE SALES: THE 'TERMINATOR' OF DEBTORS' EQUITIES

Edmund L. Regalia*

I. INTRODUCTION

For the homeowner who loses his job and cannot pay the installments due on his home loan, the ultimate result may be a trustee's sale of the home. While the law provides certain statutory *debt-relief* protections for the debtor homeowner, a case decided this year, *Melendrez v. D&I Investments, Inc.*,[1] demonstrates the harsh result of sale in individual cases. As so often occurs, the successful (and experienced) foreclosure bidder acquired the property at significantly less than its fair market value, with the debtor divested of his home, and unable to benefit from any of the *equity* that had accrued.

Both *Melendrez*, and another case decided in 2005, *Bank of America N.A. v. La Jolla*,[2] dealt with the validity of a foreclosure sale, illustrating the two sides of the void/voidable foreclosure sale coin. The different sides of the "coin" are examined in this article. The article also explores issues masked by the idea, long espoused by the courts, that California's anti-deficiency legislation creates a parity between creditor's remedies and protects the debtor. While the debtor may be protected against further liability on the indebtedness, under current law he or she is not protected against loss of accumulated equity at trustees' sales.

* Shareholder, Miller, Starr & Regalia

II. THE SOURCE OF, AND THE LIMITATIONS ON, THE POWER OF THE TRUSTEE TO SELL THE SECURITY PROPERTY

Preliminarily, it is appropriate to address some basic principles of law relating to the power of the trustees under deeds of trust to sell the security property after an event of default.

The trustee under a deed of trust is not a true trustee of an express trust, but, rather, a common agent of borrower and lender for a single purpose: To take steps related to sale, and to sell the property after default.[3] Typically, the deed of trust will contain provisions identifying the trustee and describing his powers.[4] It is important to note that this power to sell the property, at the lender's direction, has no original statutory basis, but is *contractually* created in the provisions of the deed of trust.[5] However, there are several applicable statutes which comprehensively govern the manner in which trustees exercise their power of sale and limit the exercise of that contractual power under specific standards, for the benefit of the borrower trustor.[6]

If the borrower cures his the default before the trustee's sale, that power of sale is terminated,[7] although it would again be triggered by a new default.

The leading older case dealing with the issue of the trustee's power to sell the property is the 1959 decision in *Bisno v. Sax*.[8] In that case, the court held that the debtor's tender and the lender's acceptance of a slightly late payment sufficient to cure a default resulted in reinstatement of the loan and deprived the trustee of any power to foreclose. The secured creditor had rejected the borrower's tender of reinstatement money, and held the borrower's check uncashed while a trial proceeded on the borrower's action to enjoin the foreclosure sale.

At trial, the debtor lost and the creditor returned the tendered payment and quickly had the trustee sell the property to a third party who successfully bid at the sale.

On the debtor's appeal from the trial court's judgment sustaining the sale, the Court of Appeal reversed on the grounds that the debtor's payment was timely and the creditor's holding of the check during the trial constituted acceptance. Thus, the default was cured. The court said:[9]

> ... The acceptance of payment of a delinquent installment of principal or interest cures the particular default and precludes a foreclosure sale based upon such pre-existing delinquency. ... In the instant case all installments of principal and interest payable before the trial (absent acceleration) had been paid and accepted by respondent beneficiary. At the time of that hearing the only basis left for a foreclosure sale was the bare fact of notice of acceleration, for all installments otherwise in default had been paid. To sustain a foreclosure at that time, based upon defaults which had been cured, would amount to enforcement of a penalty, or a forfeiture, a thing which equity abhors.

The provisions of the deed of trust relating to the trustee and the power of sale are usually not negotiated with the borrower but, rather, are presented by the creditor on a take-it or leave-it basis in a pre-printed form and, are thus, adhesion contracts. This fact, however, has not had any impact on the court decisions which have addressed cases involving exercise of the power of sale. Nevertheless, the courts carefully review sale procedures in each case to assure that the statutory requirements are strictly met.[10]

III. STATUTORY PROTECTIONS FOR THE BORROWER TRUSTOR

The statutory procedures and requirements for exercise of the power of sale provide a comprehensive framework for the regulation of non-judicial foreclosure sales; they are found in Civil Code sections 2924 through 2929.5. These sections prescribe in detail the rules

governing non-judicial foreclosures all the way from declaration of default through conduct of the sale. Summarizing only the most important provisions applicable after default by the debtor, we note the following: The creditor must cause to be recorded a notice of default, part of the contents of which is specifically provided by statute.[11] The notice of default must set forth at least one significant default of the debtor in order to activate the power of sale in the trustee.[12] In addition to recordation, the notice of default must be posted on the property, and served upon or mailed to the trustor and to parties who have requested notice. This commences a three-month period during which no further steps in foreclosure can be taken by the creditor and in which the debtor is given the opportunity to reinstate the loan and cure the default by paying what is then due on the obligation, disregarding any acceleration of the debt by the creditor.[13]

Following the three-month period, the trustee must record a notice of sale which, similarly, must also be posted on the property and mailed to the trustor and other designated parties.[14] In addition, the notice of sale must be published in a newspaper of general circulation once a week for three consecutive weeks, with the first publication being at least 20 days before the date of sale.[15] The trustor has the right to cure the default any time prior to five days preceding the date of sale. This is only a general description of the most important provisions in the statutes, which also require other and additional steps in regulation and implementation of default and sale under deeds of trust.[16]

All of these notice and substantive provisions must be followed carefully, to validate the trustee's sale.[17]

IV. INVALID SALE: VOID OR VOIDABLE?

A. Void Sale

The two 2005 cases mentioned in the introduction to this article – both of which involved winning bids for less than the market value of the properties – illustrate the two sides of the void/voidable sale coin, where infirmities in the sale process have contaminated the sale. In *Bank of America v. La Jolla Group*,[18] the debtor homeowner had entered into an agreement with the lender to cure the default and to reinstate the loan. The agreement was made less than five days before the scheduled sale date, and the debtor performed his part of the agreement. The bank, unfortunately, failed to advise the trustee of the agreement and its effect in curing the loan. The trustee proceeded with the sale, and La Jolla Group II became the successful bidder. The price bid and paid at the sale was $15,500, whereas the value of the property was estimated at $115,000. The trial court entered judgment for the debtor setting aside the trustee's deed, because the sale was "invalid", i.e., void.[19]

The Court of Appeal, relying on *Bisno v. Sax*, *supra*, affirmed the judgment holding that the sale was invalid. It reasoned that the power of sale in the deed of trust was a creature of contract and exists by being expressly granted by the trustor in the deed of trust, citing the text of Miller & Starr, *Cal. Real Estate*.[20] Since the agreement between the debtor trustor and the creditor beneficiary for reinstatement of the loan terminated the default prior to the trustee's exercise of his sale power, there was no longer a contractual basis for the trustee to exercise that power and, therefor, there was no legal right to sell the property.

La Jolla argued that the reinstatement agreement was made during the final five days prior to the scheduled sale date and therefore was not allowed by Section 2924(c) of the

Civil Code. The court dispensed with this argument by pointing out that lender and borrower can voluntarily agree to reinstate a loan at any time before the sale; the five-day rule simply marks the terminal date for the borrower's statutory *right* to reinstate, even where the lender does not voluntarily agree.

In response to La Jolla's argument that it was an innocent third party purchaser with bona fide purchaser (BFP) rights, the court noted that the BFP doctrine gives the purchaser priority over earlier arising unrecorded interests of which the bona fide purchaser had no notice, but it does not serve to validate an invalid (*void*) sale or delivery of the trustee's deed. The court's opinion contains an extended discussion of the lack of conclusiveness in the recitals in the trustee's deed concerning compliance with notice provisions, because La Jolla's argument that it was a BFP rested on the presumptions created by language in the trustee's deed related to the compliance with statutory notice provisions. These recitals are presumptive only and the debtor's right to introduce evidence rebutting the recitals seems clear. The court might have simplified its decision by relying more definitively on the proposition that the trustee had *no power* to sell the property after the default was cured; accordingly, the sale was *void*, not voidable, and even a purported bona fide purchaser cannot acquire any right in the property if there was no legal basis for the sale.[21] In other words, the recitals in the trustee's deed do not rescue a completely void sale for the benefit of an alleged bona fide purchaser. Because the sale was set aside, the debtor trustors were thus able to save their $100,000 equity in the property.

B. **Voidable Sale**

In contrast to the decision of the court in *Bank of America* which upheld the attack on the sale, the court in *Melendrez v. D&I Investment, Inc.*[22] upheld the validity of a trustee's

sale, despite some rather harsh facts which impacted the debtor. In *Melendrez*, the sale was *voidable*, not void, based on the trial court's evaluation of the evidence.

Miguel and Maria Melendrez ("borrowers") executed a note a deed of trust in favor of Great Western Savings to finance their acquisition of a home in 1987. After they defaulted on the loan, Washington Mutual, Great Western's successor in interest, initiated non-judicial foreclosure proceedings. During the default period, the parties entered into a repayment agreement, which provided, *inter alia*, that if timely payments were not received, the creditor reserved the right to proceed with the scheduled trustee's sale with no further notification. After an initial payment by the debtors, pursuant to the repayment agreement, they failed to make other payments on time and the trustee proceeded with the sale. Royal Realty, the highest bidder at the trustee's sale, bought the property for $197,100, whereas it had a fair market value of approximately $300,000. Royal's principal, a licensed real estate broker, had no knowledge of the repayment agreement between the borrowers and lender when he acquired the property. Over the previous five years, he had bought approximately 15 properties at foreclosure sales. The record does not disclose the number of times he participated in trustee sales, without being the successful bidder.

The borrowers' filed suit seeking, *inter alia*, to set aside the trustee's sale and cancel the deed. They contended that the sale was invalid because it was conducted in violation of the repayment agreement. At trial, on *conflicting* evidence, the court concluded that the borrower-trustors had breached the repayment agreement and the trustee's sale was valid. Borrowers appealed, claiming that the court used an incorrect legal standard in holding that the buyer was a bona fide purchaser ("BFP"). The Court of Appeal affirmed, holding that the buyer

qualified as a BFP, and therefore was entitled to the conclusive presumption that the sale was unassailable in the absence of fraud.

The court explained that Civ. Code, § 2924 provides a conclusive presumption of validity in favor of a bona fide purchaser at a nonjudicial foreclosure sale who receives a trustee's deed that contains a recital that the trustee has fulfilled its statutory *notice* requirements for the sale. The court noted that while the buyer received the deed with the recitals, section 2924 does *not* contain a definition of a bona fide purchaser (BFP). The definition of a BFP in the context of section 2924 is consonant with decisions defining the term under California's recording statutes; accordingly, a BFP for value who pays value for his interest, without notice of another's asserted rights in the property, takes the property free from the unknown rights.

The *Melendrez* court rejected the argument that the "professional bidder" status of the buyer at the sale, combined with a substantial underbid, could preclude BFP status for the buyer. It disagreed with the statement in the Miller & Starr text[23] that the 1994 case of *Estate of Yates*[24] supported that proposition, even though the court in *Yates* did refer to the fact that the buyer had purchased between 300 and 500 properties in foreclosure.[25] The net equity of the borrower in the *Yates* security property was about $98,000, and the successful buyer's bid was just over $5,000.[26] Rather, said the *Melendrez* court, the *Yates* decision setting aside the sale was based on the fact that the public administrator for the deceased debtor did not receive proper notice of the sale and *that* was the basis for the holding.

The court is correct in this analysis and in its criticism of the Miller & Starr text, although it failed to acknowledge that *dictum* in the *Yates* opinion does tend to support the proposition that gross disparity between the sale price and the property's value, combined with

the extensive experience of the buyer in purchasing distressed sale properties, could preclude bona fide purchaser status on the part of that buyer. This is what the *Yates* court actually said on that subject:

> There is sufficient evidence in the record to support the probate court's implied conclusion that West End was not a bona fide purchaser. Norman Diamond, the owner of West End, testified that for the past 16 years he has been in the business of purchasing properties in foreclosure and frequently attends foreclosure sales. Diamond has purchased between 300 and 500 properties in foreclosure. Diamond attended the foreclosure sale at which Werdowatz purchased the Ringwood property. Diamond discussed the property with Werdowatz, who was also in the business of buying properties in foreclosure. Werdowatz told Diamond 'there was a lot of juice [equity] in the property.' Diamond drove to the Ringwood property. Diamond then called a title company representative to find out about the liens on the house.[27]

Perhaps this language is surplusage, as opposed to an alternative basis for the *Yates* decision, but it is at least dictum, and as such appears at odds with the *Melendrez* court's conclusion that gross disparity of the sale price compared with the property's value and professional status of the bidder cannot ever defeat BFP status.

Part of the analysis made by the *Melendrez* court relied on the proposition that public auction sales are an important market tool which encourages bidders to appear and bid on the property, thus actually benefiting debtors. This proposition is correct but may be overstated in the real world. For example, if such noticed public auction sales actually attracted sufficient competitive bidding to come close to market conditions, the sale price usually would be more closely aligned with the actual value of the property rather than a far lesser fraction of its value. The effect of the decision of the *Melendrez* court was to cause an approximate $100,000 loss of equity to the defaulting trustors. As demonstrated in *Melendrez*, *Bank of America* and *Yates*, sales in each case were auctioned off to bidders who paid far less than the market value of the

property and the debtors in those cases lost or could have lost significant equities which became, or could have become, windfalls to the successful bidding purchasers. We must ask, therefore, whether, in spite of the substantial debtor protections built into the non-judicial foreclosure statutes, should the Legislature amend the statutory scheme to provide further protection for debtors' equities?

V. POLICY ISSUES; "PARITY" CHALLENGED; SUGGESTIONS FOR REFORM

Over many years, the California courts have reasoned that California's anti-deficiency legislation creates a "parity" between the creditor's remedies and protects the debtor. The courts have compared the finality of the trustee's sale with no right of redemption by the debtor with the potentially more lengthy judicial foreclosure and sale, with its right of redemption by the debtor.[28] The courts tell us that this is a "parity" of remedies. The "parity" analysis was first articulated in the 1963 California Supreme Court decision in *Roseleaf Corp. v. Chierighino,*[29] where the court said:

> It seems clear, as Professor Hetland, amicus curiae herein, contends, that section 580d was enacted to put judicial enforcement on a parity with private enforcement. This result could be accomplished by giving the debtor a right to redeem after a sale under the power. The right to redeem, like proscription of a deficiency judgment, has the effect of making the security satisfy a realistic share of the debt. (See *Salsbery v. Ritter*, 48 Cal.2d 1, 11 [306 P.2d 897].) By choosing instead to bar a deficiency judgment after private sale, the Legislature achieved its purpose without denying the creditor his election of remedies. If the creditor wishes a deficiency judgment, his sale is subject to statutory redemption rights. If he wishes a sale resulting in nonredeemable title, he must forego the right to a deficiency judgment. In either case the debtor is protected.

Although one can question whether this comparison should be called "parity" or "balance," the theme has been repeated, in one form or another, in several subsequent decisions.[30]

But, what of "parity" for the debtor? He or she unfortunately has not achieved parity, in terms of being able *to protect equity appreciation*, as distinguished from *debt relief.* In this respect, the law protects the debtor in a judicial foreclosure more adequately than it does the debtor in a non-judicial foreclosure. Consider that under provisions of the Code of Civil Procedure dealing with judicial foreclosure, the court determines whether a deficiency judgment may be ordered against the debtor.[31] If so, and if thereafter, the sheriff's sale results in proceeds which are sufficient to satisfy the debt and costs, the debtor has a right to redeem for *three months* after the sale.[32] On the other hand, if the sale proceeds are not sufficient to satisfy the debt and costs, the period of redemption is *one year.*[33] It follows that, under judicial foreclosure, a debtor with no exposure to liability beyond the loss of his or her property has a *three month* period in which to redeem, whereas a debtor in a non-judicial trustee's sale foreclosure, also with no exposure to liability beyond loss of his or her property, has no legal right of redemption whatsoever.[34] In short, the law provides the debtor foreclosed in a judicial proceeding with the right to recover all or a part of his or her equity in the property, but gives no such protection to the debtor in non-judicial foreclosure.

The fiction that trustee sales are a true test of market value is belied by cases such as *Melendrez*, *Bank of America*, and *Yates*. That fiction and the 42-year-old mantra of "parity" (for the creditor) may require re-examination of this area of law. Trustee sales are typically accomplished by title companies and/or foreclosure companies who subcontract for the work. They take place at a specific given day and hour on a week day, thus limiting the number and interest of people who might otherwise consider bidding. The 'publicity' of publication three

times over a twenty day period is minimal. Anecdotal evidence suggest that such sales are dominated by a largely professional group of mostly the same repeat bidders in the sale area. It is no wonder, then, that significant disparities occur between the level of the successful bid and the true value of the property.

While it is true that the law contains multiple protections for the debtor, such as notices of default and sale, and time intervals for reinstatement of the loan and other requirements mentioned above, it is also true that a persistent "gap" remains in this web of debtor protection, i.e., lack of protection for the debtor's equity in a rising real estate marketplace. Most often, it will be the less sophisticated and more impoverished debtor who will be adversely affected.

A. **A redemption period**?

One suggestion for reform is to plug the gap by enactment of a short period of redemption following a trustee sale. This would enable the improvident debtor not only to avoid further liability on the loan, but also to recover a least a part of his or her equity where the sale is struck off to a gross under-bidder.

To those who will argue that a redemption period would destabilize an established market place for distress sales and might actually harm debtors, one might reply that a 30-day redemption period is short and can easily be effected by requiring the trustee to withhold delivery of the trustee's deed for that period of time, pending receipt, if any, of a redemption notice and funds. The calculation of the redemption amount can be the same as that applicable to judicial sales.[35] It is doubtful that a short 30-day delay would, to any significant extent, stifle the enthusiasm of the bidders at distress sales, and if the properties are redeemed, the successful

bidder would receive the return of the money paid, together with interest, and other adjustments, within that 30-day period. Whatever minor negative effect a short redemption period would have on the operation of the distress marketplace would be more than offset by the benefit of permitting the debtor to reclaim his or her equity.

Opponents of such a reform might argue that the short redemption period is simply a device to extend the debtor's period for relief from default from approximately 4 months to 5 months. Not quite: the initial period for *reinstatement* runs from date of recording of notice of default to 5 days before the scheduled sale date;[36] during that 5 days, the debtor can payoff the loan (equity of redemption).[37] With a new 30-day post-sale period for redemption, the debtor would have to pay what was paid at the sale, together with interest and costs, to effect a redemption. In other words, there are differences in the scope of payments required in the various steps throughout the procedure. Redemption would be truly the last gasp step, and could also result in fewer last-minute bankruptcy filings, because some debtors would prefer the protection of a short redemption period to the onerous impact of bankruptcy on their credit standings.

B. **Modernize the sale process**?

An alternative suggestion for reform that might accomplish some equity-savings for the debtor involves borrowing concepts from the new 2004 Legislation concerning *tax default sales* in order to provide an expanded market place for the sale. Under the new tax-sale law, effective January 1, 2005, a "public auction" of tax defaulted property "means any venue or medium to sell the property under this chapter that provides reasonable access to the public to bid on and purchase this property."[38] 'Date of sale' means the date upon which a public auction

begins,[39] and 'close of auction' means "the date and time for which the tax collector, or his or her designee, provides public notice... That bidding for that public auction will end."[40]

The new law permits tax default public auction sales to be conducted over the internet, with sale components that (1) allow bids to be submitted by computer, and (2) authorize the tax collector to accept bids for as long as he or she deems necessary.[41]

Admittedly, tax default sales are in a context of their own, with additional provisions permitting disposition of some defaulted properties without a public auction sale,[42] but the concept of expanding the bidders' market in private trustee auction sales by engaging in electronic age techniques is intriguing and could more adequately create 'parity' for debtors in terms of saving their built-up equities. This suggestion would have to be studied carefully, to determine what discretionary powers over the sale process should be given to trustees under deeds of trust. It is doubtful that such trustees should or would be given the extent of discretion the new tax default sale law gives to tax collectors, who have governmental immunities not available to trustees.

VI. CONCLUSION

The ability to attack the finality of a trustee sale in cases of fraud and non-compliance with statutory and contractual requirements is valuable and gives some measure of protection to the debtor whose property has been sold. Void sales and even voidable sales must be carefully scrutinized to assure that creditors have complied with strict legal requirements.

But the three cases highlighted in this article also demonstrate clearly that trustee public auction sales do not always adequately test the fair market value for the property. While bidders at distress sales are entitled to more than the usual market place return because of the

greater risks they take, debtors should be able to "rescue" their built-up equities in extreme underbid sales, and this can be accomplished by enactment of a short redemption period following trustee sales or by modernizing trustee sales by adoption of electronic age procedures such as are contained in the new tax sales laws. Either reform would put trustee sale debtors in greater "parity" with judicial foreclosure debtors who have the right to at least a three month redemption period, even where they have no actual liability beyond the losses of their properties. The "parity" thus created would complement the "parity" for creditors recognized 42 years ago in the context of deficiency judgments, and would fill the gap in existing law which protects the debtor from further liability on the debt, but does not provide him or her with the ability to salvage the equity value of the property.

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[1] *Melendrez v. D&I Investments, Inc.*, 127 Cal.App.4th 1238 (2005).

[2] *Bank of America v. La Jolla Group II*, 129 Cal.App.4th 706 (2005).

[3] *Monterey S.P. Partnership v. W.L. Bangham, Inc.*, 49 Cal.3d 454, 462 (1989); *Vournas v. Fidelity Nat. Title Ins. Co.*, 73 Cal.App.4th 668, 677 (1999); *Stephens, Partain & Cunningham v. Hollis*, 196 Cal.App.3d 948, 955 (1987).

[4] The following is a typical such provision:

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold. Trustee shall cause this notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to,

reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

[5] *I.E. Associates v. Safeco Title Ins. Co.*, 39 Cal.3d 281, 287 (1985); *Garfinkle v. Superior Court*, 21 Cal.3d 268 (1978); *Bank of America v. La Jolla Group II*, 129 Cal.App.4th 706, 712 (2005).

[6] *I.E. Associates v. Safeco Title Ins. Co.*, 39 Cal.3d 281, 287 (1985); Civ. Code § 2924 through § 2929.5; Code Civ. Proc. §§ 580a, 580b and 580d.

[7] *Bisno v. Sax,* 175 Cal.App.2d 714 (1959).

[8] *Bisno v. Sax,* 175 Cal.App.2d 714 (1959).

[9] *Bisno v. Sax,* 175 Cal.App.2d at pp. 724, 725.

[10] *Bank of America N.A. v. La Jolla Group II*, 29 Cal.App.4th 706 (2005).

[11] Civ. Code, §§ 2924, 2924b, 2924c.

[12] *Anderson v. Heart Federal Sav. & Loan Ass'n*, 208 Cal.App.3d 202 (1989).

[13] Civ. Code, § 2924, 2924b; 2924c.

[14] Civ. Code, § 2429b.

[15] Civ. Code, § 2924f.

[16] Civ. Code, § 2924c, subd. (c).

[17] *Garfinkle v. Superior Court*, 21 Cal.3d 268 (1978).

[18] *Bank of America v. La Jolla Group II*, 129 Cal.App.4th 706 (2005).

[19] *Bank of America v. La Jolla Group II*, 129 Cal.App.4th at 710.

[20] Miller & Starr, *California Real Estate*, 3d Ed., § 10:123 (3d ed. 2003).

[21] See, e.g., *Scott v. Security Title Ins. & Guar. Co.*, 9 Cal.2d 606 (1937); *Little v. CFS Service Corp.*, 188 Cal.App.3d 1354, 1360-1362 (1987). (This case also points out the confusion existing in some California decisions, with respect to the meaning of the words "invalid", "void", and "voidable".)

[22] *Melendrez v. D&I Investments, Inc.*, 127 Cal.App.4th 1238 (2005).

[23] Miller & Starr, California Real Estate, Ch. 10, § 10:210 at p. 673.

[24] *Estate of Yates*, 25 Cal.App.4th 511 (4th Dist. 1994).

[25] *Estate of Yates*, 25 Cal.App.4th at 523.

[26] *Estate of Yates*, 25 Cal.App.4th at 515, 517.

[27] *Estate of Yates*, 25 Cal.App.4th at 523.

[28] *Corneleson v. Kornbluth*, 15 Cal.3d 590 (1975); *Roseleaf Corp. v. Cherighino*, 59 Cal.2d 35 (1963); *Simon v. Superior Court*, 4 Cal.App.4th 63 (1992).

[29] *Roseleaf Corp. v. Chierighino*, 59 Cal.2d 35, 43-44 (1963).

[30] See, e.g., *Corneleson v. Kornbluth*, 15 Cal.3d 590 (1975); *Simon v. Superior Court*, 4 Cal.App.4th 63 (1992).

[31] Code Civ. Proc., § 726, 729.010.

[32] Code Civ. Proc., § 729.030, subd. (a).

[33] Code Civ. Proc., § 729.030, subd. (b).

[34] *Moeller v. Lien*, 25 Cal.App.4th 822, 831 (1994).

[35] See Code Civ. Proc., § 729.060.

[36] Civ. Code, § 2924c.

[37] Civ. Code, § 2924c.

[38] Rev. & Tax. Code, § 3692.1, subd. (c).

[39] Rev. & Tax. Code, § 3692.1, subd. (b).

[40] Rev. & Tax Code, § 3692.1, subd. (a)(2).

[41] Rev. & Tax. Code, § 3692.2.

[42] See, e.g., Rev. & Tax. Code, § 3692.

COMMENTS OF BRYAN SANDERS

Feedback form submitted by Bryan Sanders on March 24, 2006:

emailaddress: salinger1981@worldnet.att.net

Message: Based on information I received from the California Secretary of State's Office, several well-established Southern California employment agencies are not in compliance with Section 1812.503 of the "Employment Agency, Employment Counseling, and Job Listing Services Act" (CA Civil Code, Title 2.91), which requires every agency subject to the Act to file a Proof of Surety Bond with the Secretary of State.

Evidence of each company's non-compliance can be obtained from the Secretary of State, Special Filings Unit at (916) 657-5448. As a citizen and consumer of services provided by temporary employment agencies, I am concerned that the Attorney General is not aggressively enforcing provisions of the Act.

Currently, key phrases in the Act regarding fees "indirectly paid by a job seeker" (Section 1812.501) and fees charged "exclusively to employers" (Section 1812.502) are unnecessarily vague, almost to the point of nullify its provisions. Furthermore, case law and secondary sources such as Witkins provide little direction on how these phrases should be interpreted.

The elimination of the Department of Personnel Services has frustrated enforcement of the Act, and though the Attorney General, district attorneys, and city attorneys are charged with the responsibility of prosecuting misdemeanor violations of the Act, few if any of them are aware of its existence. As matter of public policy, perhaps a formal opinion issued by the State Attorney General is warranted.

COMMENTS OF PROF. WILLIAM SLOMANSON

From: slomansonb@worldnet.att.net
Subject: CAL CIV CODE 3295
Date: March 6, 2006
To: bgaal@clrc.ca.gov
Cc: janet.grove@jud.ca.gov

Hi y'all:

I hope that I am not stepping on any toes, but part of my task — at least as I see it — is to point out statutory problems. I have yet to see any statute that has been more poorly drafted than Cal Civil Code Sec. 3295 (punitive damages limitations). If you disagree, then I sense that I would not be able to explain why I feel this way, aka "res ipsa."

Best (or is that worst :-).

Bill

COMMENTS OF WILLIAM WEINBERGER

On Jun 15, 2006, William Weinberger wrote:

Brian,

Has the CLRC ever tried to reconcile or resolve the conflict b/n Commercial Code section 3311 with Civil Code section 1526? (See Woolridge v J.F.L. Electric, Inc. (2002, App 4th Dist) 96 Cal App 4th Supp 52, 117 Cal Rptr 2d 771.)

Just curious.

— Bill

RESPONSE OF BRIAN HEBERT

Bill,

Neither one of those sections was added or amended on Commission recommendation.

I've searched the titles of all prior staff memos and Commission recommendations for the term "accord" and come up empty. There are a couple of references to "satisfaction," but they are in the context of the satisfaction of a judgment.

The only study of contract law that's indicated in our records is a study on electronic contracting.

So I'm pretty confident that the Commission hasn't studied accord and satisfaction as a separate study item.

It's possible that the subject may have come up in the course of some other related study. I'll cc this response to Nat and he can let you know if he recalls any consideration of that particular issue.

Brian Hebert
California Law Revision Commission
916-739-7071
www.clrc.ca.gov

REPLY OF WILLIAM WEINBERGER

On Jun 15, 2006, William Weinberger wrote:

Thanks Brian. Would this be w/in the Comm'n's jurisdiction? One or the other provision would be superseded by the other, unless there are some circumstances in which the Civil Code provision would apply but the Commercial Code would not, but even in such circumstances, it does not seem to be a wise policy choice to have a different rule depending upon what parties are involved.

— Bill

JERRELL E. WOOLRIDGE, Plaintiff and Appellant,
v.
J.F.L. ELECTRIC, INC., et al., Defendants and Respondents.
No. CIV. A.1051.

Appellate Department, Superior Court, San Bernardino County, California.

Jan 28, 2002.

SUMMARY

In an action arising from an automobile accident, defendant moved for summary judgment on the ground that all claims had been resolved through an accord and satisfaction. Defendant's insurer had issued plaintiff checks for both bodily injury and property damage. Plaintiff cashed the bodily injury check without reservation, but in endorsing the property damage check, he wrote "partial payment," without crossing out the "full and final settlement" language on the face of the check. The law and motion judge granted summary adjudication for defendant on accord and satisfaction grounds as to the bodily injury claim but denied it as to the property damage claim. The action then went to trial on the property damage claim. The trial court granted judgment for defendant, finding that the parties had reached an accord and satisfaction on the property damage claim as well. (Superior Court of San Bernardino County, No. SCI54783, Carl E. Davis, Judge.)

The appellate division of the superior court affirmed. It held that the trial court did not err in considering the accord and satisfaction defense, despite the ruling by the law and motion judge. The court held that whether an accord and satisfaction has been reached is a question of fact. In denying the summary judgment motion, the law and motion judge could do no more than find that defendant failed to meet its burden of showing as a matter of law that an accord and satisfaction had been reached. Thus, that factual question was unresolved when the case went to trial. The court further held that the two potentially applicable statutes were in conflict, since under Civ. Code, § 1526, subd. (a), a creditor may accept a check that the debtor sends as a full settlement offer without agreeing that the check represents a full payment, while Cal. U. Com. Code, § 3311, does not give a creditor this option. The court held that Cal. U. Com. Code, § 3311, as the later enacted statute, superseded Civ. Code, § 1526. The requirements of Cal. U. Com. Code, § 3311, were satisfied in this case. (Opinion by The Court.) ***53**

HEADNOTES

Classified to California Digest of Official Reports

(1) Summary Judgment § 24--Hearing and Determination--Partial Judgment-- Effect.
In an action arising from an automobile accident, in which defendant moved for summary judgment on the ground that there had been an accord and satisfaction, and in which the law and motion judge granted summary adjudication for defendant on this ground as to plaintiff's bodily injury claim but denied it as to the property damage claim, the trial court did not err in considering the accord and satisfaction defense. The purpose of summary judgment is to determine whether triable issues of fact exist, not to resolve any issues that remain. Under Code Civ. Proc., § 437c, subd. (m)(2), the fact that summary adjudication is granted as to a cause of action, claim, or affirmative defense does not bar any cause of action, claim, or defense as to which summary adjudication was either not sought or was denied. Whether an accord and satisfaction was reached is a question of fact. In denying the summary judgment motion, the law and motion judge could do no more than find that defendant failed to meet its burden of showing as a matter of law that an accord and satisfaction had been reached. Thus, that factual question was unresolved when the case went to trial.

(2a, 2b) Compromise, Settlement, and Release § 3--Accord and Satisfaction--Part Performance or Payment--Cashing of Check Intended to Satisfy Claim.
In an action arising from an automobile accident, the trial court did not err in granting judgment for defendant on the basis of an accord and satisfaction. Defendant's insurer had sent plaintiff a check indicating that it was payment in full for his property loss. Plaintiff cashed the check, but wrote on it that it was partial payment, without crossing out the "full and final settlement" language. The requirements of Cal. U. Com. Code, § 3311, for an accord and satisfaction were satisfied. There was a bona fide dispute as to the amount defendant owed plaintiff, the insurer's check, issued after telephone discussions with plaintiff, was offered in good faith, plaintiff cashed the check, and the check bore conspicuous statements indicating that it was tendered in full and final satisfaction of the claim.

[See 3 Witkin, Summary of Cal. Law (9th ed. 1987) Negotiable Instruments, § 196; West's Key Number Digest, Accord and Satisfaction 11(2).] ***54**

(3) Compromise, Settlement, and Release § 3--Accord and Satisfaction--Part Performance or Payment--Cashing of Check Intended to Satisfy Claim--Statutory Conflict.
Under Civ. Code, § 1526, subd. (a), a creditor may accept a check that the debtor sends as a full settlement offer without agreeing that the check represents a full payment. To do so, the creditor need only strike out or otherwise delete the "payment in full" language on the check. Civ. Code, § 1526, subd. (a), however, conflicts with Cal. U. Com. Code, § 3311, which does not allow the creditor to opt out of an accord and satisfaction while still accepting the check as partial payment. Since the statutes cannot be harmonized, Cal. U. Com. Code, § 3311, as the later enacted statute, must be deemed to have superseded Civ. Code, § 1526, subd. (a).

(4) Appellate Review § 138--Scope of Review--Presumptions--Evidence.
On appeal, the reviewing court reads the record in the light most favorable to the judgment below. That is, the court views the evidence in a light most favorable to the respondent and presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.

(5) Appellate Review § 160--Determination and Disposition of Cause-- Affirmance--Correct Decision Based on Wrong Reason.
A ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations that may have moved the trial court to its conclusion.

(6) Statutes § 30--Construction--Language--Plain Meaning Rule.
Where statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it.

COUNSEL

Jerrell E. Woolridge, in pro. per., for Plaintiff and Appellant.

Cuff, Robinson & Jones and Kenneth L. Qualls for Defendant and Respondent. ***55**

THE COURT. [FN*]

FN* Before Fuller, P. J., Davis, J., and Wade, J.

Procedural Summary

On February 8, 1999, appellant, Jerrell E. Woolridge, sued respondents, J.F.L. Electric, Inc. (J.F.L.) and its chief executive officer, [FN1] for injuries suffered in an automobile accident. On October 7, 1999, J.F.L. moved for summary judgment on the grounds that all claims had been resolved through an accord and satisfaction. After a hearing held December 27, 1999, the court granted summary adjudication on the bodily injury claim but denied it on property damage. In making his ruling, the motion judge said, "[T]he defendant's notation on the one check, that it was partial payment, is sufficient to signify that he did not agree to accord and satisfaction on that check, [and] while an accord and satisfaction has been reached to the [bodily] injury claim and storage fees, the lawsuit should go forward to the proper amount the plaintiff is allowed for loss of the vehicle."

FN1 During trial, counsel for defendants moved for dismissal. The court granted the dismissal as to the chief executive officer. Appellant did not challenge that dismissal in his opening brief and therefore the propriety of the ruling is not before us on this appeal.

The case was tried to the court on December 7, 2000. The court took the matter under submission and on December 8, 2000, awarded judgment to J.F.L., finding the parties had reached an accord and satisfaction as to the remaining claims.

Timely notice of appeal was filed.

Facts

Mr. Woolridge's 1986 BMW was damaged in October of 1998, when a J.F.L. employee rear-ended it. J.F.L.'s insurance carrier, Fireman's Fund, tried to settle the claim by issuing three checks: The first, in the amount of $780.00, was payable to Savage BMW and bore the notation "For storage on vehicle for JFL re: Woolridge Invoice #10018." Two more checks were issued, payable to Woolridge. A $3,000 check bore the notation "For full and final settlement for your injury." A $6,545 check bore the notation "For the total loss of your vehicle and advance car rental for 27 [FN2] per day for 44 days."

FN2 The record shows that the "27" refers to $27.

Accompanying the checks was a release form which Woolridge was instructed to sign and return. He did not sign the release, but he cashed both ***56** checks. The $3,000 check was cashed without reservation.

Before cashing the $6,545 check, he wrote "partial payment" next to his endorsement, but he did not cross out the "full and final settlement" language on the face of the check.

After cashing the checks, Woolridge sued J.F.L. for additional sums he alleged J.F.L. still owed him. As noted above, J.F.L. succeeded in obtaining summary adjudication as to Woolridge's claim for bodily injury damages, based upon evidence that he had cashed the $3,000 check without reservation. Because summary judgment was denied on the property damage and loss of use claims, these claims went to trial.

At the outset, the trial court told the parties it planned to accept evidence not only on the amount of damages but also on the asserted defense that an accord and satisfaction had been reached on the remaining claims, stating "[the law and motion judge] did not grant summary judgment only as to the issue of property damage … [a]nd that's the only issue that we have before us. I'm not sure that that gets us by the question of the [accord] and satisfaction. That also is a live issue in this trial." Mr. Woolridge responded, "I can understand that. Thank you."

Mr. Woodridge testified that, in his opinion, his car was worth $15,000 before the accident, and the cost to repair would be $11,840.72. He alluded to an estimate from Arrow Glenn Appraisal, but a hearsay objection to that evidence was sustained. He also contended he was entitled to loss of use damages of $27 per day for 487 days.

Mr. Clark, the Fireman's Fund adjuster, disagreed with Mr. Woolridge's evaluation. He testified he had obtained a professional appraisal showing the cost to repair exceeded the car's market value and therefore the company considered the car a "total loss." He then explained how he had computed salvage value and arrived at the $6,545 settlement amount that Woolridge had received.

On the accord and satisfaction issue, while Mr. Woolridge admitted he cashed the check sent to him for property damage and loss of use, he contended he had rejected it as an accord and satisfaction. He attempted to place into evidence a letter to Mr. Clark in which he said he was not accepting the check as a full payment. Clark testified he never received the letter, possibly because it was addressed to a nonexistent post office box. The court sustained J.F.L.'s hearsay objection and excluded the letter from evidence.

Mr. Clark testified he had discussed settlement with Mr. Woolridge. Although at certain times during their discussions, Mr. Woolridge had ***57** disagreed with the value Clark was placing on his car, Clark said the check ultimately issued by the insurance company represented his understanding of the amounts for which Woolridge had agreed to settle. Mr. Woolridge denied having agreed to accept these amounts.

At the conclusion of testimony, the court took the matter under submission. Thereafter, the court gave judgment to defendant on the ground that the parties had reached accord and satisfaction on remaining claims. This appeal followed.

Discussion

(1) Appellant first contends the trial judge erred in considering respondent's accord and satisfaction defense because the judge was bound by the law and motion judge's finding that there was no accord and satisfaction on the property damage and loss of use claims. We disagree.

The purpose of summary judgment is to determine whether triable issues of fact exist, not to resolve any issues that remain. "[T]he fact that a motion for summary adjudication is granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action shall not operate to bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication was either not sought or denied." (Code Civ. Proc., § 437c, subd. (m)(2).) Whether an accord and satisfaction has been reached is a question of fact. (*In re Marriage of Thompson* (1996) 41 Cal.App.4th 1049, 1059 [48 Cal.Rptr.2d 882].) In denying J.F.L.'s motion for summary judgment, the law and motion judge could do no more than find the company had failed to meet its burden of showing as a matter of law that an accord and satisfaction had been reached. Therefore, that factual question was still unresolved when the case went to trial.

(2a) Having concluded the trial court properly considered whether the parties had reached an accord and satisfaction, we move to the question of whether the trial court was correct in concluding that they had done so. The court's judgment is contained in a December 8, 2000, minute order that reads in pertinent part: "Judgment will be for the defendant. It is found that acceptance of the check with the notation 'for the total loss of your vehicle and advance car rental for 27 per day for 44 days' constitutes an accord and satisfaction." Two California statutes relate to a debtor's attempt to reach an accord and satisfaction on a disputed claim by tendering the creditor a check. The first, Civil Code section 1526, was enacted in 1987. It reads in pertinent part: "(a) Where a claim is disputed or unliquidated and a check or draft is ***58** tendered by the debtor in settlement thereof in full discharge of the claim, and the words 'payment in full' or other words of similar meaning are notated on the check or draft, the acceptance of the check or draft does not constitute an accord and satisfaction if the creditor protests against accepting the tender in full payment *by striking out or otherwise deleting* that notation or if the acceptance of the check or draft was inadvertent or

without knowledge of the notation." (Italics added.) (Civ. Code, § 1526, subd. (a).) (3) Under this statute, a creditor may accept a check that the debtor sends as a full settlement offer without agreeing that the check represents a full payment. To do so, the creditor need only strike out or otherwise delete the "payment in full" language on the check. This statute changed the common law rule requiring the creditor to "take it or leave it" when offered a check bearing conspicuous "payment in full" language. (Cf. *Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal.2d 592, 597 [234 P.2d 16] and *In re Van Buren Plaza* (Bankr. C.D.Cal. 1996) 200 B.R. 384, 386.)

In 1992, however, the Legislature enacted California Uniform Commercial Code section 3311, which provides in pertinent part:

"(a) If a person against whom a claim is asserted proves that (1) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (2) the amount of the claim was unliquidated or subject to a bona fide dispute, and (3) the claimant obtained payment of the instrument, the following subdivisions apply.

"(b) Unless subdivision (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim."

In comment 3 to this section, the drafters acknowledge that the statute purposely codifies the common law rule "based on a belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged." (U. Com. Code com., 23A pt. 2 West's Ann. Cal. U. Com. Code (2002 ed.) foll. § 3311, p. 385.)

Appellant's opening brief referred to neither of the above statutes, arguing instead that reversal is compelled by California Uniform Commercial Code section 1207. This argument is meritless because section 1207, by its terms, "does not apply to an accord and satisfaction." [FN3] ***59**

> FN3 California Uniform Commercial Code section 1207, which deals with performance or acceptance under reservation of rights, reads in full:
> "(a) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient.
> "(b) Subdivision (a) *does not apply to an accord and satisfaction*." (Italics added.)

Respondent's brief does not mention California Uniform Commercial Code section 3311, but does cite to Civil Code section 1526. Respondent argues appellant cannot take advantage of section 1526's election to treat a "full payment" check as partial payment only, because appellant's "partial payment" notation on the reverse of the check does not constitute "otherwise deleting" the "full and final payment" language on the front of that check as required by the statute.

Independently, this court identified the potential applicability of California Uniform Commercial Code section 3311 to this case. Therefore, we offered the parties an opportunity to provide supplemental briefing on the question of which statute governs. (Gov. Code, § 68081.) In particular, we invited comment on the reasoning of *Directors Guild of America v. Harmony Pictures* (C.D.Cal. 1998) 32 F.Supp.2d 1184, which held California Uniform Commercial Code section 3311 superseded Civil Code section 1526 because the two were irreconcilable and the Commercial Code section was enacted later. (*Directors Guild, supra*, 32 F.Supp.2d at p. 1192, citing *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 179 [32 Cal.Rptr.2d 574].)

Both parties accepted our invitation to submit supplemental briefs. Appellant argued we should reject *Directors Guild* because it is not binding precedent, and the California Uniform Commercial Code should not be applied because this is a noncommercial transaction. Respondent offered no analysis of either statute, contending the judgment must be affirmed regardless of which statute applies.

Contrary to appellant's assertion, we find California Uniform Commercial Code section 3311 is applicable here, because article 3 of the California Uniform Commercial Code "applies to negotiable instruments." (Cal. U. Com. Code, § 3102, subd. (a).) Checks are negotiable instruments (Cal. U. Com. Code, § 3104), and respondent paid with a check. Civil Code section 1526 is also applicable, because it governs transactions, such as the transaction here, in which a debtor tenders a check in full payment of a disputed claim. The statutes conflict, however, because under Civil Code section 1526 the creditor can "opt out" of an accord and satisfaction while still accepting the check as partial payment but California Uniform Commercial Code section 3311 offers no such choice.

This statutory conflict has been noted by a number of commentators. (See 3 Witkin, Summary of Cal. Law (2001 supp.) Negotiable Instruments, § 196, ***60** p. 231; Hull & Sharma, *Satisfaction Not Guaranteed: California's Conflicting Law on the Use of Accord and Satisfaction Checks* (1999) 33

Loyola L.A. L.Rev. 1; Casey, *Full Payment Condition Checks-California Statutory Conflict* (1998) 20 T. Jefferson L.Rev. 97.) The weight of the commentary reaches the same conclusion as the court in *Directors Guild*, namely, that the two statutes cannot be harmonized, and therefore, California Uniform Commercial Code section 3311, having been enacted most recently, controls.

We agree, and therefore we apply California Uniform Commercial Code section 3311 to evaluate whether the court correctly gave judgment to respondent. (4) In undertaking this analysis, we read the record in the light most favorable to the judgment below. (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591 [159 Cal.Rptr. 1].) That is, we " ' "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*People v. Rayford* (1994) 9 Cal.4th 1, 23 [36 Cal.Rptr.2d 317, 884 P.2d 1369].)

(5, 6)**(See fn. 4.)**, (2b) Viewed in this light, the record contains substantial evidence of an accord and satisfaction under California Uniform Commercial Code section 3311. [FN4] It was undisputed that a bona fide dispute existed as to the amount respondent owed appellant for property damage and loss of use (Cal. U. Com. Code, § 3311, subd. (a)(2)). Respondent's witness, insurance adjuster Clark, testified that during telephone discussions with appellant, he obtained appellant's agreement to a settlement figure and, in reliance upon that agreement, mailed him the check for the settlement amount. Thus, the check was tendered in good faith. (*Id.*, § 3311, subd. (a)(1).) Appellant cashed the check. (*Id.*, § 3311 subd. (a)(3).) The check bore conspicuous statements indicating it was tendered in full and final satisfaction of the ***61** claim. (*Id.*, § 3311, subd. (b).) The statute was therefore satisfied and the court correctly found an accord and satisfaction had been reached. [FN5]

> FN4 Although the record does not indicate that the court considered California Uniform Commercial Code section 3311 in making its finding that the parties had reached an accord and satisfaction, we review results, not reasoning. " '[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' " (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 [112 Cal.Rptr. 786, 520 P.2d 10].) Moreover, even if Civil Code section 1526 had not been superseded, so that it controlled here, we would affirm the trial court's judgment. When statutory language is clear and unambiguous there is no need for construction and courts should not indulge in it. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 348 [158 Cal.Rptr. 350, 599 P.2d 656].) The plain statutory language of Civil Code section 1526 requires "striking out" or "otherwise deleting" the full and final payment language in order to opt out of an accord and satisfaction. Appellant did neither. Rather, he added language. Therefore, he did not satisfy the statute's requirements.
>
> FN5 Subdivision (c) of California Uniform Commercial Code section 3311 provides exceptions to an accord and satisfaction being created by mere acceptance of a check (e.g., if a check is cashed inadvertently) but nothing in the record suggests that the exceptions apply.

Disposition

The judgment is affirmed. ***62**

EVIDENCE CODE: POSSIBLE MINOR IMPROVEMENTS TO INVESTIGATE (10/3/06)

The Commission could propose to study the following ideas, which might result in minor improvements of the Evidence Code:

(1) Whether to amend Evidence Code Section 240 to codify case law holding that a witness who refuses to testify is unavailable.

(2) Whether to amend Evidence Code Section 240 to codify case law holding that a witness who credibly testifies to a total lack of memory concerning the subject matter of an out-of-court statement is unavailable to testify on that subject.

(3) Whether to amend Evidence Code Section 402 to require that the admissibility of an admission or confession of the defendant in a criminal case be heard and determined out of the presence and hearing of the jury.

(4) Whether to add a new presumption to the Evidence Code chapter on presumptions and inferences (Evid. Code §§ 600-670), under which it would be presumed that a trademark or similar business label correctly indicates the source of an item.

(5) Whether to amend Evidence Code Section 768 or another provision such that if an examiner asks a witness about a prior inconsistent statement, upon request the examiner must show the prior inconsistent statement to opposing counsel.

(6) Whether to amend Evidence Code Section 765 or 775 to expressly state that a judge may interrogate a witness called by a party. (Section 775 currently says a judge "may call witnesses and interrogate them the same as if they had been produced by a party to the action." No provision expressly says a judge may interrogate a witness called by someone else.)

(7) Whether to amend Evidence Code Section 775 to make clear that when a judge examines a witness in a jury trial, a party need not raise an objection in the presence of the jury but can instead object at the next opportunity outside the jury's presence.

(8) Whether to amend Evidence Code Sections 912 and 917 to refer to the human trafficking caseworker-victim privilege.

(9) Whether to amend Evidence Code Section 1038.2(a) to refer to Penal Code Section 236.1 instead of Evidence Code Section 236.1, which does not exist.

(10) Whether to amend Evidence Code Section 1400 to expressly require authentication of any tangible item offered in evidence, not just a writing.

(11) Whether the provisions on proving the content of a writing (Evid. Code §§ 1520-1523) should be revised to expressly state that if a party offers a written or oral summary of a voluminous

writing or collection of writings, and an opposing party contends that the summary is unfair, the court may order that the original be produced for inspection in court.

(12) Whether to amend Evidence Code Section 1562 to make clear that an affidavit of a custodian or other qualified witness under Evidence Code Section 1561 may be used to prove the absence of a business record or entry in a business record, not just the existence or content of a business record.