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“In Rem” Relief from Stay *Affords relief from serial bankruptcies for real estate lenders*

by Scott Rogers & Caroline Djang, Partners, Rutan & Tucker, LLP
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Almost nothing frustrates a real estate lender more than being unable to timely enforce its deed of trust through foreclosure. When the borrower files bankruptcy, the “automatic stay” of Section 362 of the Bankruptcy Code, at least temporarily, prevents the lender from completing its foreclosure. Notwithstanding that the borrower’s bankruptcy may have been filed solely for the purpose of hindering or delaying the foreclosure, to complete the foreclosure, the lender needs to make a motion to the court for relief from the automatic stay. Obtaining relief from stay can take months and cost many thousands of dollars for legal fees, appraisal costs and the like as the lender must establish its entitlement to relief from stay. However, even though the lender may be successful in obtaining relief from stay granted by the court in the borrower’s bankruptcy, it still may not be clear sailing through foreclosure. All too often the borrower is unwilling to give up without a further fight. In those situations, the borrower may transfer the property, or an interest in or a lien upon the property, to a related or friendly third party (often formed for just that purpose) which in turn files another bankruptcy to gain the benefit of the automatic stay and forestall the foreclosure.

Bankruptcy courts have also observed another pattern of cases, in which a borrower, who is not a debtor in bankruptcy, attempts to stave off foreclosure by purporting to transfer an interest in his or her property to a debtor in bankruptcy. Usually, the borrower and the debtor have no connection. The original borrower, or someone working on the borrower’s behalf, may have found the Debtor’s name by simply searching public bankruptcy records. The borrower may have falsified and back-dated a grant deed, and the deed may have never been actually recorded. In such cases, the only party who truly benefits from this scheme is the original borrower who obtains the automatic stay in the bankruptcy case of another party without having to file a bankruptcy petition and comply with the requisite duties of a debtor in bankruptcy. (See, e.g., *In re Dorsey*, 476 B.R. 261, 266 (Bankr. C.D. Cal. 2012).

Schemes like the scenarios described above can forestall foreclosure for, in the case of some crafty borrowers, several years. Thus, in either of these scenarios, the lender is back at square one and is now truly frustrated. Fortunately, there is now some relief for lenders.

In recognition of the potential for such “serial bankruptcies,” Section 362(d)(4) was added to the Bankruptcy Code in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act. Section 362(d)(4) was added to combat serial bankruptcy filings by allowing an “in rem” relief from stay order. Such an order, once a certified copy is recorded in the real estate records with regard to a specified property, makes the relief from stay order effective for 2 years in most cases regardless of any subsequent bankruptcy filing within that 2 year period. The “in rem” relief from stay is both prospective and automatic for the 2 year period. Consequently, the “automatic stay” otherwise applicable upon the filing of a bankruptcy does not take effect, and the lender is permitted to continue and complete its foreclosure notwithstanding the subsequent bankruptcy filing. To thereafter circumvent the “in rem” relief, a debtor would be required to seek the bankruptcy court’s reconsideration of the “in rem” relief order and carry the burden of proving a material change in circumstances and/or good faith.

However, as originally enacted, Section 362(d)(4) was of little use to lenders as it required the lender to demonstrate that the bankruptcy filing was part of a scheme to delay, hinder and defraud creditors. Although delay and hinder are fairly obvious and easily demonstrated, fraud is much more difficult to prove often requiring extensive discovery and factual presentation. As all 3 elements were

required to be shown, the “in rem” relief offered by Section 362(d)(4) was infrequently sought and very rarely granted. Consequently, “in rem” relief from stay had fallen off the radar of most real estate lenders and their counsel.

Subsequently, as part of the Bankruptcy Technical Corrections Act of 2010, “and” was replaced by “or” in Section 362(d)(4) thus paving the way for much broader application of the “in rem” relief from stay provision. The burden of proof on the lender seeking “in rem” relief is now substantially reduced. All the lender need show is that there was a scheme to delay, hinder or defraud, and if that scheme involves the transfer of an ownership interest in real property without the secured creditor’s consent, then the secured creditor may obtain relief under § 362(d)(4). The debtor’s involvement in the scheme is not required. This post-2010 interpretation thus covers the second scenario described above in which the actual borrower is not actually the debtor in bankruptcy.

In summary, real estate lenders have a powerful but little known tool for combating actual or potential serial bankruptcy filings. By obtaining “in rem” relief from stay under the appropriate circumstances, the lender can avoid the need for costly and repetitive visits to the bankruptcy court in the process of enforcing its loan through foreclosure.

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Time to Prepare for the New Year: 18 New California Laws with Obligations for Employers

by Stephen L. Berry, Partner, and Blake R. Bertagna, Associate, Paul Hastings

During the legislative session that recently ended, the California Legislature enacted, and Governor Jerry Brown signed, 18 new laws that for the most part impose new burdens on California employers and expose them to more legal risks. Employers with operations in California should prepare now.

California's Fair Pay Act (Senate Bill 358)

None of California's new laws merits more preparation than the Fair Pay Act—now arguably the nation's toughest equal-pay law. California Labor Code section 1197.5 currently prohibits an employer from paying an employee at a wage rate that is less than the rate paid to employees of the opposite sex *in the same establishment for equal work*, unless the employer can demonstrate that the wage differential is based upon (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) any "bona fide factor other than sex."

The Fair Pay Act, Senate Bill 358, amends Section 1197.5 by removing the requirement that the wage differential be within the same establishment and changing the standard for determining equal pay. Under the new law, employees are prohibited from paying *any* of their employees at wage rates less than those paid to employees of the opposite sex for "**substantially similar work**," which is now to be determined based on a "composite of skill, effort, and responsibility, and performed under *similar working conditions*."

The Fair Pay Act also heightens the burden on employers for defending against wage discrimination claims. To demonstrate that the wage differential is based upon a bona fide factor other than sex, the employer must show that it (1) is not based on, or derived from, a sex-based differential in compensation, (2) is related to the job at issue, and (3) is consistent with business necessity, which is defined as an "*overriding legitimate business propose*." In addition, the employer must demonstrate that each factor relied upon is "applied reasonably," and that one or more of the relied-upon factors accounts for the *entire* pay differential.

The new law provides that a defense based on a bona fide factor other than sex can be defeated if the employee shows an available alternative business practice that would not have produced the wage differential.

SB 358 also prohibits employers from discharging or in any way discriminating or retaliating against employees who disclose, discuss, or inquire about their own or their co-workers' wages for the purpose of enforcing their rights under the new law, and authorizes a civil lawsuit for reinstatement and reimbursement for lost wages and work benefits by any employee who has been discriminated or retaliated against in violation of the law.

A Bit of Good News (Assembly Bill 1506)

California employers have been plagued with a variety of technical violation "gotcha" class and representative action lawsuits for such things as leaving "Inc." off the name of the employer on employee paystubs. The Labor Code Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq.* ("PAGA"), allows an "aggrieved employee" to bring a lawsuit against an employer "personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations." With potential penalties of \$100 per employee per pay period for the first violation and \$200 per employee per pay period for subsequent violations, the monetary liability can mount exponentially with a large workforce.

Labor Code section 226(a) requires employers to provide employees with accurate, itemized wage statements that contain specified items of information, including the inclusive dates of the period for which the employee is paid, and the name and address of the legal entity that is the employer. Under PAGA, for certain violations, a plaintiff may commence a civil action after giving written notice to the Labor and Workforce Development Agency ("LWDA") and waiting to see if the LWDA will investigate, while for other violations, the employee must first provide the employer with notice of the alleged violation to give the employer an opportunity to cure the problem. Under current law, a violation of section 226(a) is subject to a PAGA penalty lawsuit without any right to cure.

Assembly Bill 1506 amends PAGA to require a current or former employee to give notice and an opportunity for the employer to fix wage statements that allegedly fail to include the inclusive dates of the period for which the employee is paid, and/or do not show the correct name or address of the legal entity that is the employer. The new law provides that a violation is deemed cured by providing fully compliant, itemized wage statements to each aggrieved employee for the three-year period prior to the date of the notice to the LWDA. Assembly Bill 1506 limits the employer's right to cure these alleged violations, however, to once in a

12-month period and does not permit the employer to cure other wage statement violations.

What Should Employers Do Now?

While Assembly Bill 1506 provides a glimmer of light for employers, the new laws—such as the Fair Pay Act—generally impose more obligations on employers in the coming year. California-based employers and out-of-state-employers with employees in California should immediately review their policies, procedures and practices to ensure compliance with the new laws.¹

¹ The other new laws include: (1) Assembly Bill 987, which provides that the act of requesting a reasonable accommodation on the basis of religion or disability constitutes protected activity for an unlawful retaliation claim; (2) Assembly Bill 1509, which prohibits retaliation against an employee because the employee is a family member of a person who has, or is perceived to have, engaged in protected activity under applicable provisions of the Labor Code; (3) Senate Bill 600, which amends the Unruh Act to expressly prohibit discrimination on the basis of citizenship, primary language, and immigration status; (4) Assembly Bill 304, which clarifies some ambiguities in the new paid sick leave law, the Healthy Workplaces, Healthy Families Act of 2014 (HWHFA); (5) Senate Bill 579, which amends the Family-School Partnership Act to expand the reasons an employee who has custody of a child can take unpaid time off from work and amends the "kin care law" to better coordinate with the HWHFA; (6) Assembly Bill 1513, which requires piece-rate workers to be paid for "rest and recovery periods," and "other nonproductive time" separate and apart from their piece-rate compensation; (7) Senate Bill 588, which establishes procedures for the Labor Commissioner to enforce judgments against employers who fail to satisfy a final judgment against them for nonpayment of wages; (8) Assembly Bill 970, which authorizes the Labor Commissioner to investigate and issue citations for certain wage and hour violations; (9) Assembly Bill 621, which encourages eligible transportation companies to convert owner-operators to employees, by creating the "Motor Carrier Employer Amnesty Program"; (10) Assembly Bill 202, which requires California-based professional sports teams to classify their cheerleaders as "employees"; (11) Assembly Bill 622, which prohibits using E-Verify to check the employment authorization status of an existing employee, or an applicant who has not received an offer of employment, except as required by federal law or as a condition of receiving federal funds; (12) Senate Bill 623, which expressly provides that undocumented injured workers are eligible for benefits from the Uninsured Employers Benefits Trust Fund and the Subsequent Injuries Benefits Trust Fund; (13) Assembly Bill 359, which provides that, upon a change in control of a grocery establishment, the new grocer must give preferential hiring treatment to certain incumbent grocery workers; (14) Senate Bill 501, which reduces the maximum amount of disposable earnings subject to wage garnishment; (15) Assembly Bill 1245, which requires employers to electronically file their reports required under the Unemployment Insurance Code; (16) and Senate Bill 470 and Assembly Bill 1141, which revise sections of the California Civil Procedure Code regarding summary judgment and adjudication procedures.

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Corporate Principles for Thriving and Avoiding Bankruptcy

by Richard H. Golubow, Founding Member and Managing Shareholder, Winthrop Couchot Professional Corp.

The B Word. Bankruptcy. We know what it is but don't like to say it, and we hope we never have to go through it. Despite stagnant US macroeconomic growth, companies are still generally able to take advantage of the liquidity available in the historically low-interest rate market to refinance or renegotiate their debt. While bankruptcies are down and the turbulent times precipitated by the "great recession" seem so long ago, many companies continue to limp along in some degree of financial instability. Financial professionals continue to anticipate an interest rate increase from the Federal Reserve later this year or early next year. If credit markets tighten, and companies cannot refinance their maturing debt obligations, businesses may be faced with the need to consider bankruptcy, or bankruptcy alternatives.

We're always reminded to pursue preventative healthcare for ourselves and maintenance for our prized possessions. Those same principles hold true and should be pursued by business owners, operators and executives. However, many distressed companies could avoid severe losses and often the loss of the business itself by following some simple and elementary business principles. It is surprising how many experienced and qualified business owners and operators do not aggressively follow some guiding principles. By ignoring them, ownership and management puts at risk the very survival of the business.

1. Prepare, Maintain and Update a Business Plan.

A business plan is critical to the governance and success of a well-managed company. A proper plan includes plans for sales, marketing, operations, capital-expense budget, and a cash-flow projection. It is the roadmap that should guide every aspect of the business. It is the primary tool that aids in executive decisions to increase revenues and profitability while minimizing expenses. As markets change, it is critical to adjust the business plan accordingly.

2. Achieve Cash-Flow Stability.

Planning and executing balanced inflow and outflow of cash is critical to the success of a well-run company. When financial conditions deteriorate or fluctuate, owners and operators must actively manage and adjust cash flow.

3. Prepare Accurate and Meaningful Financial Reports.

There are few owners/operators who haven't experienced that uneasy feeling when presenting the company's financials only to have officers, board members or



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investors discover significant errors. Inaccurate financial reporting is considered by many to be a symptom of a much larger problem, such as mismanagement of the business. All financial reports should be as close to error free as possible and meaningful to reflect the information necessary to profitably operate the business.

4. Constantly Evaluate Your Business Revenues and Expenses.

Maximizing corporate efficiencies such as managing expenses, inventory levels, and capital expenditures, while making the hard day-to-day decisions, often determine the difference between success and failure. Resolve to assess and reconsider historical, business-as-usual allegiances to people, products and processes.

5. Be Transparent, Timely, and Precise in Reporting to Creditors.

Financial reporting is not an exact science and is often subject to interpretation. The presentation of reports to senior or secured creditors should be treated with extreme care. Management must emphasize timeliness and transparency. All too often, reports are delayed or redacted of negative information to avoid advising of the inevitable "bad news." This approach is counterproductive. Once the actual results become known, the trust of creditors may be permanently impaired and the debtor company irreparably harmed.

6. Be Honest with Yourself and Others.

The sooner management faces the reality of a challenging situation, the better prepared it will be to obtain a quick solution. If you try to fool yourself and those around you, you'll ultimately experience failure. While painful, recognizing and dealing directly with the problems at hand lead to a better result.

7. Be Open to the Assistance of Independent Professionals.

It is near impossible for businesses to track and understand the increasingly complex factors affecting corporate finances, marketing, and virtually every other aspect of management. Seeking the advice and counsel of knowledgeable, experienced outside "specialists" such as counsel that specializes in financial restructuring can be crucial to a company's survival.

These principles form the foundation of a sound business and help maintain a state of preparedness, so you can adapt more quickly to the unexpected. Business owners and operators should view these fundamentals as a set of guidelines to follow at all times, irrespective of whether or not the company is in trouble.

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IPOs for IPAs: Ballast Point Transaction Illustrates Benefits of a Dual-Track Approach

by Kyle Leingang, Esq., Dorsey & Whitney LLP

The menu for craft breweries raising capital and looking for investor liquidity now includes another viable alternative – public offerings. With the filing of public offering documents by Ballast Point Brewing & Spirits and the positive reception it received, those watching the industry should be on notice that more craft beer IPOs are on the horizon. With the latest announcement of its impending sale to Constellation Brands for about \$1 billion (thus abandoning its IPO), Ballast Point's transaction further illustrates that an IPO process can be pursued on a "dual-track" with a private acquisition and this strategy can be effective to increase the company's valuation.

With a public offering, Ballast Point would have become only the fourth publicly traded craft brewery, joining the ranks of Boston Beer Company, Mendocino Brewing Company and Appalachian Mountain Brewery (although Craft Brewers Alliance, not a "craft brewery" under the Brewers Association's definition, is also publicly traded). Many in and around craft beer were previously unsure about whether IPOs, a traditional exit path in other industries, would be attractive for craft breweries. Setting aside the upfront costs of an IPO and ongoing securities law compliance burdens, would public breweries have less credibility as craft brands? We now have the answer: there will be no revolt against publicly traded craft breweries.

The viability of public offerings changes the landscape surrounding craft beer financings and liquidity transactions in many ways, including:

- ▶ **Continuing Access to Cash.** Private equity funds won't always be knocking on your door and private equity partners often push companies toward another short-to-immediate term liquidity transaction. Being able to consider public markets gives a craft brewery long term access to growth and operating capital.
- ▶ **Dual-Track.** Ballast Point's sale to Constellation Brands illustrates a more nuanced strategy involving the IPO process: the "dual-track" exit approach. Continuing down a path toward a public offering while simultaneously engaging in private sale negotiations signals financial strength to a prospective buyer and, by establishing a minimum price through public filings, can be an effective means to boost valuations. Those seriously considering a sale to a larger brewery should consider pursuing an IPO to boost their leverage and their valuation in those negotiations.
- ▶ **Continuing Founder Involvement.** IPOs provide liquidity for investors without forcing founders to give up their holdings or leadership roles. This can be very attractive for breweries with founders that remain actively engaged management and wish to remain so going forward.
- ▶ **Craft-on-Craft.** As future acquisitions and mergers between craft breweries take place, publicly traded breweries will be able to offer stock as transaction consideration, which gives liquidity to target investors wanting to cash out, while rolling over others and minimizing the transaction's immediate cash burden.
- ▶ **Trickle Down.** Having public offerings as a viable industry alternative does not only impact large breweries considering an IPO in the near future. Public offering potential, a visible path to liquidity, will encourage institutional funds to invest in craft breweries at earlier growth stages.

The prospect of many publicly traded craft breweries was unthinkable less than two years ago. With the public filings by Ballast Point – only the 31st largest craft brewery at the end of 2014 by production, according to the Brewers Association – and its impending private sale for \$1 billion, many others will certainly be testing the waters as well.

Kyle Leingang

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Susan Natland, Partner knobbe.com

Intellectual Property Issues Under the Trans-Pacific Partnership

by Sheila N. Swaroop, Partner, Knobbe Martens

The recently announced Trans-Pacific Partnership (TPP), a multi-national trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States, has been the topic of debate in the current presidential election season for its impact on trade. The TPP also contains several intellectual property provisions of interest to the biopharmaceutical industry.

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1. Minimum Periods of Market Exclusivity for Biologics

The nations participating in the TPP currently provide varying periods of market protection for biologics. The United States currently offers the longest period of exclusivity, providing twelve years for biologics, while Brunei currently offers no protection. The TPP attempts to harmonize these periods of exclusivity in Article 18.52, by requiring member nations to either provide eight years of data exclusivity for biologics, or provide five years of exclusivity, coupled with an additional three years of "other measures" that must "deliver a comparable outcome in the market." The TPP also contemplates transition periods, ranging from five to ten years, to allow nations to put the required protections in place. Some nations, such as Brunei and Malaysia, have also negotiated special provisions to incentivize submission of applications for biologics in those countries.

2. Potential for Inconsistency for Fixed-Combination Dosage Products

Article 18.53 of the TPP proposes a definition of "new pharmaceutical products" that appears to conflict with recent guidance from the U.S. Food and Drug Administration. The TPP defines a new pharmaceutical product as a pharmaceutical product that does not contain a chemical entity that has been previously approved in that country. In contrast, the October 2014 guidance from the FDA indicates that it will award "new product" exclusivity to certain fixed-combination dosage products, even if they contain a previously approved chemical entity, as long as the fixed-combination product also contains at least one new active ingredient.¹ This difference between the TPP and the FDA's October 2014 Guidance creates some uncertainty regarding the exclusivity periods for fixed-combination products.

3. Broader Enforcement of Trade Secret Rights

Article 18.78 defines and sets forth minimum protections for trade secrets. The TPP obligates member nations to provide criminal procedures and penalties for: (1) unauthorized access of trade secrets, (2) unauthorized misappropriation of trade secrets, and (3) unauthorized disclosure of trade secrets. This provision, along with the other IP provisions of the TPP, was intended to ensure a minimum level of protection for IP rights across all member nations.

¹ FDA Guidance for Industry, "New Chemical Entity Exclusivity Determinations for Certain Fixed-Combination Drug Products" at 8; see also 79 F.R. 62163 (Oct. 16, 2014) (announcing adoption of draft Guidance, first published at 79 F.R. 10167 (Feb. 24, 2014)).

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Prevent Profit Drain: Commit To Accountability

The public face of organizational accountability continues to evolve as expanding access to data and governmental reporting requirements have become fodder for regulatory penalties and civil litigation. Exposure to such profit drain spans the entire spectrum of licensure, certification, marketing, compliance, and reputation. The most effective defense is a robust offense. Your engagement of a committed culture of accountability that integrates credible metrics and supports an effective root cause analysis will best sustain organizational improvement and prevent profit drain. Here's the Top 10 Steps to support a root cause analysis.



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1. Select your team. Involve team members, workforce leaders, and area managers who handle tasks being scrutinized and have the ability to implement change;
2. Decide whether an investigation would benefit from outside counsel's direction. Consider the magnitude of the event in scope and severity and any potential for publicity;
3. Keep it confidential! What is said in the Root Cause Analysis War Room stays there. Mark documents "Confidential Quality Improvement";
4. Embrace the root cause analysis as a quality improvement tool, not a "gotcha" flytrap;
5. Describe the event by defining "what" went wrong, not "why" it happened. Be factual as if describing an opening scene in a movie. It's what you see, not what do you think. Avoid jumping to a "fix it" mode;
6. Identify all contributing factors and break down the parts;
7. Allow broader organizational values and practices to be examined for wider spread improvement;
8. Map processes related to all contributing factors to identify opportunities for improvement;
9. As employee performance issues are identified, refer them for appropriate follow-up;
10. Monitor changes over the long term to prove effectiveness.

Commitment to accountability and the engagement of meaningful and sustained change is strongest when the "root" issue is improved. An effective analysis however, can only occur after a thorough and thoughtful fact gathering process. Only then can appropriate action planning move forward.

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A Sensible Proposal for CEQA Reform

by Sean M. Sherlock, Partner, Snell & Wilmer

Reforming the California Environmental Quality Act (CEQA) has become a perennial legislative topic. But little in the way of meaningful reform is ever achieved, primarily because the opponents of CEQA reform assail any proposal as gutting the state's core environmental protection law. The California Supreme Court and intermediate appellate courts have repeatedly held that CEQA must be interpreted in a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. See e.g., *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553. Yet ask anyone in the real estate development, infrastructure, and construction businesses – you know, the folks who actually build things and make things work – and they will tell you that CEQA is often abused by those who want to use this environmental law to delay and kill projects, or by those who have discovered they can use CEQA to shake monetary settlements out of these projects, irrespective of environmental issues.

Most recently, the theme advanced by CEQA reformers has been that CEQA must not be allowed to frustrate “good” projects. In recent years the government has been promoting infill, transit-related, mixed use, and alternative energy projects to implement its vision of climate-friendly, sustainable communities. Yet even these projects, which have the support of the government, politicians, and many environmentalists, get snared by CEQA. So at this point it seems that everyone is in agreement on at least one thing: despite its intended purpose, CEQA can be and is used as a tool for frustrating development projects irrespective of the projects' environmental impacts. The current debate merely focuses on which projects should be immune from this process, rather than how to reform the law to reduce its abusive uses.

Principles for Successful Reform

Californians want a clean, healthy environment, and a sustainable, jobs-creating economy. To succeed, the reform agenda should focus on curbing CEQA abuse, rather than rolling back substantive environmental protection. And it should resist becoming overly ambitious and complex. Many aspects of CEQA can be improved, but two changes to CEQA would make a huge improvement by curbing the most abusive and unjust aspects of the law, without compromising environmental protection.

A Sensible Proposal

The two changes are:

1. Eliminate the “fair argument” standard.

Unless a development project is exempt, CEQA requires review of the project's environmental impacts, either in the form of a Negative Declaration or an Environmental Impact Report (EIR). The Negative Declaration is a simpler, quicker, and cheaper process, and is appropriate when the project will *not* have a significant adverse impact on the environment. If the project *will* have a significant adverse impact on the environment, then a Negative Declaration is not sufficient, and an EIR is required. The EIR process typically adds a year or more, and hundreds of thousands of dollars to the entitlement process.

The problem is that a project opponent can successfully challenge a Negative Declaration merely by making a “fair argument” that the project might have a significant impact on the environment. See e.g., *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602. Moreover, there is no objective standard for what constitutes a “fair argument,” so in many cases the lead agency and the applicant will not know whether a project opponent has a fair argument until the judge tells them. There is no analogy in all of jurisprudence of which I am aware, in which a plaintiff can come into court and win its case with nothing more than an argument that something might be true.

The policy behind this “fair argument” standard is that CEQA encourages full review of a project's environmental impacts. But the result has been to strip the law of clarity and reliability. In this way, even projects that do not have significant impacts on the environment can be subjected to the delay and expense of litigation, and ultimately have their entitlements thrown out merely because the

project opponents had a “fair argument” that the project *might* have a significant impact on the environment.

Considering the substantial investment of time and money put into these projects, as well as the public benefits of the projects, and the determination of a majority of elected officials (in most cases) to permit the projects, it is not asking too much of project opponents to require that they produce at least *substantial evidence* that the projects *will* have a significant impact on the environment. “Substantial evidence” is a reasonable evidentiary threshold, and if a project truly will have a significant impact on the environment it would be no problem for a challenger to produce substantial evidence of that impact.

2. Require meaningful “exhaustion of administrative remedies.”

CEQA currently requires project opponents to “exhaust administrative remedies” by raising their objections to the lead agency during the administrative process. This is supposed to mean that the project opponent has availed itself of every opportunity to persuade the lead agency at the administrative level, and to give the lead agency a fair opportunity to consider and address the objections before being hauled into court to litigate them. But the courts have watered down the requirement so severely that last-moment ambushes have become a common tactic.

Under some courts' interpretation of the law, a project opponent can lie in the weeds while a project moves through the administrative process – from scoping meetings, to notice and comment on the draft EIR, to planning commission hearings, to city council hearings. But so long as the project opponent shows up at the last minute and reads his objections into the record before the public hearing closes, he is deemed to have satisfied the requirement. See e.g., *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1201. This disruptive tactic is obviously calculated to lay the foundation for a lawsuit, rather than persuade the lead agency to improve or change the project. Considering all of the opportunities for public participation afforded by CEQA, last-minute ambush tactics should not be permitted.

The legislature should amend CEQA's exhaustion requirement to permit lawsuits only by parties who participated at all levels of the administrative process (e.g., commenting in writing on the draft EIR, and testifying before the planning commission and city council), and only on those issues that were timely raised in response to the Notice of Intent to Adopt a Negative Declaration, or the Notice of Availability of the draft EIR. This would eliminate the sandbagging and other brinksmanship that is so common under CEQA, and give the lead agency and applicant a fair opportunity to consider and address the challenger's objections.

Conclusion

While CEQA's goals are well intended, it is often used in furtherance of other, less well-intended goals. CEQA reform should focus on curbing CEQA abuse, rather than merely exempting projects favored by the government.

Sean Sherlock

Sean Sherlock is a partner in Snell & Wilmer's Orange County office representing real estate developers in matters arising under the California Environmental Quality Act (CEQA). He advises clients preparing Environmental Impact Reports (EIRs) and other CEQA documents needed to obtain project approvals, and defends clients against CEQA litigation. Reach Sean at ssherlock@swlaw.com or 714.427.7036.




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Immigration and Existing Visa Programs

by James Pack, Partner, Fragomen, Del Rey, Bernsen & Loewy LLP

Recently, immigration has been at the forefront of the news – a Fifth Circuit decision targeting President Obama’s Executive Actions, campaign posturing, Congressional hearings regarding H-1B visas, the mass detention of refugee children, and a proposed bill that would limit the employment visas most commonly used by professionals. Caught amongst these swirling issues are companies that have an ongoing need for new talent. Below, a few practical pointers regarding existing visa programs.

H-1B Visas. The H-1B is the most commonly utilized visa for professionals. For example, foreign students who graduate from U.S. universities often obtain an H-1B in order to work in the U.S. for the long run. The number of new H-1Bs issued each year is limited by Congress, and for the Fiscal 2016 H-1B allocation the Immigration Service received approximately 233,000 H-1B petitions, against about 85,000 available new H-1Bs. Next year the odds are expected to be worse. Employers who have historically relied on H-1Bs to retain talent in the U.S. must: (1) Ensure that an H-1B petition is filed during the first five business days of April (the H-1B filing window); and (2) Have contingency plans in place.

Alternatives to the H-1B. Aside from the H-1B there are limited visa options: (1) L-1 “Transfer” Visas for people employed by a parent, subsidiary, or affiliate of the employer outside the U.S.; (2) O-1 Visas for people of “extraordinary ability;” and (3) Treaty-based visas for citizens of Canada, Mexico, Australia, Chile, and Singapore. Other alternatives may apply depending on the potential employer, the job offered, and the

background of the employee.

EB-5 Green Card Program. Reports of the demise of the EB-5 program have been (somewhat) exaggerated. Under this program, applicants who invest at least \$1 million (or \$500,000 in specific geographic areas) and create at least 10 full-time jobs may receive a Green Card (lawful permanent residence) in the U.S. On September 30, 2015, Congress temporarily extended the program through December 11; additional Congressional action is required to further extend the program. Current proposals call for a tightening of the requirements and an increase in the minimum investment levels.

James Pack

James Pack provides immigration counsel to large, medium, and small companies in a wide range of industries, including developing wireless technologies, animated feature film production, video game development, and pharmaceuticals. Contact him at jpack@fragomen.com or 949.862.9443.



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Protecting Your Family's Legacy: Priceless

By Jeffrey M. Verdon, Managing Partner, Jeffrey M. Verdon Law Group, LLP

For over thirty years, our firm has been combining the fusion of intelligent income tax and estate tax planning and asset protection to make certain our clients pay the least amount of taxes legally allowed while maintaining a level of asset protection against financially ruinous lawsuits. Thirty years later, not much has changed except the increased number of lawsuits and the awards have gotten larger.

Traditional estate planning only works on half the problem, namely, passing wealth on to heirs. But what is often overlooked to the detriment of the client is a catastrophic lawsuit arising during the client's lifetime costing them all or a substantial part of their assets. Affluent families and successful business owners are routinely targets for lawsuits often without legal merit because the plaintiff and their lawyers know that the defendant, at the end of the day, will settle rather than remain embroiled in lengthy litigation. Without this important piece of planning in place, well before any legal claim, all could be lost.

Even those with more moderately sized estates can benefit from this form of planning. Over 90% of lawsuits settle for one of two reasons: Doubt as to liability or doubt as to collectability. Due to the vagaries of our legal system, we were one of the early users of the offshore asset protection trusts (APT) as courts in foreign countries rarely tolerate the nonsense that our legal system permits. The APT "levels the playing field" and discourages opportunistic litigants.

Over the years we have worked with colleagues to create, uncover, and develop unique structures to protect clients. One



Jeffrey M. Verdon
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client, who accrued over \$200 million from his managed care concern, commented, "We've worked with Jeff for over 25 years and have been at the forefront of financial planning. Jeffrey Verdon has an uncanny ability to find rare people who have rare ideas that others simply haven't thought of."

Protecting assets includes integrating tried and true estate planning strategies with legal and effective "firewall" protection against the unforeseen catastrophic lawsuit. We are often asked: Is going offshore legal? The IRS wouldn't print all of the forms one is required to file for their overseas transactions if going offshore were not legal. But you must disclose this to the IRS. The goal of asset protection removes the economic incentive for new creditors to go after assets that are securely in a trust without committing a fraud on creditors.

Attorneys at some of the most sophisticated large firms in the country continue to have confidence in our creative and successful strategies. These firms have come to understand the knack we have to find a continuous stream of novel ways to secure their clients' legacies. It can be difficult for large firms to perform asset protection work because of potential conflicts of interest.

"The ultimate goal is reduction of taxes and protection of assets from future creditors," Daniel J. Callahan, of Callahan & Blaine, said. "Jeff is very bright; he knows a lot of angles."

We look forward to the opportunity to speak with those interested in protecting their assets and family legacy. For over 30 years we have been the fusion of planning and protection.

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Keeping It Together After You Split

by Stephen Jay Kaufman, Founding Partner, Kaufman Steinberg LLP

With very few exceptions, couples marry hoping to spend the rest of their lives together. However, Orange County divorce rates are pegged at between 50% and 75%, so there's a lot of pain and disappointment in store for those whose hopes and dreams of happy-ever-after come crashing down. Pain and disappointment are amplified when children's lives are also disrupted by divorce.

Children learn far more from watching adults than they do from books or television. They learn how to be mommies and daddies – and how to be spouses – from their parents, who, for better or worse, are primary role models. How parents treat each other when they separate has a tremendous effect on their children. Studies conducted over several generations show children of high-conflict divorce have difficulties establishing and maintaining healthy marriages of their own, and the cycle of divorce, anger and bitterness is often self-perpetuating in these families.

However, many couples maintain healthy co-parenting relationships after they separate. They share custody freely, in ways that do not make their children feel guilty or disloyal to one parent or the other. They communicate frequently and effectively regarding important issues involving their children. They participate together in school and extracurricular activities of their children. They attend birthdays and other important milestones in their children's lives together. In essence, they remain **one parental unit** after they cease living under one roof.

How do they do it? How do they set aside their own pain, anger or disappointment with their ex-spouse when dealing with issues regarding their children? How do they tolerate being in the same room with their ex and the new, "significant other?" It may be very difficult, it may be incredibly frustrating, but parents who are able to put the needs of their children before their own feelings know their children's sense of security and positive self-image are more important than their own feelings about the "ex."

Former spouses who effectively co-parent follow some basic rules. They never

use their children as messengers or go-betweens to the other parent. (No sending the support check with Billy.) They speak positively about the other parent to the children. ("Mommy makes the best mac 'n cheese!") They support each other's differences and parenting styles. ("Those are the rules at Daddy's house, and you need to respect them.") They support new relationships. ("Mom's new friend seems really nice!") Most important, they **never** discuss their differences with the kids. ("I love you and Dad loves you. Don't worry, we'll work it out together.")

When possible, parenting plans are best made **before** parties separate. Consultation with family therapists and attorneys can help parents prepare themselves and their children for coming changes. Parenting classes, books, individual and conjoint therapy with trained professionals are widely available to help separating parents become effective co-parents. Children see and hear everything, and children of divorce often hear too much. Before parents separate, they should promise and plan to remain one parental unit in two, separate households.

Stephen Jay Kaufman

Stephen Jay Kaufman is a founding partner of Kaufman Steinberg LLP. A family law attorney for 23 years and named a Super Lawyer in 2015 and 2016, Steve lives in Irvine with his daughter. He is a volunteer counselor to victims of domestic violence at Human Options, and he is involved in community affairs throughout Orange County. Contact him at steve@kaufmansteinberg.com.



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The Flip Side of the Housing Recovery: Resurgence of the NIMBY

by Michael Shonafelt, Partner, Newmeyer & Dillion LLP

If you own a home you've probably been keeping at least one eye on Zillow lately. Housing values have largely crawled back from 2008 lows — and in many cases have surpassed their 2006 high-water marks.

Good news for some. Bad news for many.

A recent report by the Legislative Analyst notes that “[b]etween 1970 and 1980, California home prices went from 30% above U.S. levels to more than 80% higher.” The trend has only worsened. An average California home now costs \$440,000 — about two and a half times the average national price of \$180,000.

Rising prices means a large swath of the population is being closed out of the market. There simply is not enough supply to meet demand, and if that lop-sided calculus persists, we could be witness to a mass migration of Millennials out of the Golden State. Such a blood-letting of next-generation professionals cannot but spell doom for California's long-term economic prospects.

This crisis is not news. In 1982, the State Legislature declared that “[t]he lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California.” At that time, Legislature enacted the Housing Accountability Act, which significantly restricts the ability of local governments either to force the scale down of a housing project or to deny such a project. Indeed, to deny or scale-down a housing project, local governments must make heightened findings that the project would have a “specific adverse impact on public health or safety.” The “specific, adverse impact” means a “significant, quantifiable, direct, and unavoidable impact,” based on objective, pre-existing written standards. The law interposes a very high threshold for denial and, as some courts have suggested, may also give rise to a protected property right.

It is the affluent communities in SoCal, like the coastal cities, that frequently have the most unmet Regional Housing Needs Allocation (RHNA) housing unit quotas mandated by the State. The Legislative Analysis notes that “[o]n top of the 100,000 to 140,000 housing units California is expected to build each year, the state probably would have to build as many as 100,000 additional units annually — almost exclusively in its coastal communities — to seriously mitigate its



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problems with housing affordability.”

Developers approaching such communities with offers of higher density housing to help those cities meet their RHNA counts often face passionate resistance from existing homeowners who see new development as a threat to their lifestyle (the not-in-my-backyard set or “NIMBY”). City councils, whose electoral fate is in the hands of those anxious homeowners, often feel compelled to address the concerns of their constituents by slamming the door on mixed-use or multi-family housing projects. And so it is in places like the beach where the friction between the entrenched property owner and the up-and-coming workforce is most acutely felt.

Everyone loves a beach. But the chance of actually owning a piece of coastal real estate is a privilege of the very few. The person serving your coffee at the beachside coffee house most likely had to drive far from inland realms to serve it to you. Developers should be apprised of their rights to pursue affordable, but well designed, housing projects in those troublesome jurisdictions. Elected officials of such communities should be advised of their constraints in determining whether or not such developments should be built. And as for the NIMBY, well no one has yet found a cure.

Michael Shonafelt

Michael Shonafelt is a partner at Newmeyer & Dillion LLP, where his practice focuses on representation of real estate developers in land use, natural resource and environmental compliance law. His expertise extends to all categories of real estate development and land uses. He can be reached at Michael.shonafelt@ndf.com and 949.854.7000.



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Past and Present Immigration Reform—Trump Card?

by Richard M. Wilner, Partner, Wilner & O'Reilly, APLC

If it were as simple as legalize them all or build a wall then there really would be no debate. But, it's not that simple. From the last Amnesty under President Ronald Reagan, to the most draconian changes to immigration law under President Clinton, to attempts at reformation by the current administration, not to mention the current Syrian refugee crisis, immigration law is a politically charged issue. This short piece attempts to diffuse the politics from the debate and simply inform on what the current status of the law and/or policy is.

Expansion of Deferred Action for Childhood Arrivals

On June 15, 2012, the U.S. Department of Homeland Security ("DHS") announced that certain illegal immigrants who entered the United States before their sixteenth birthday and meet other set criteria may request for "deferred action" for a period of two years, subject to renewal. While deferred action does



not result in lawful status, it defers removal action and allows the alien to apply for a work permit. This policy is known as Deferred Action for Childhood Arrivals ("DACA"). On November 20, 2014, President Obama attempted to expand DACA by extending the deferred action period to three years and eliminating the cap on age (previously, only individuals who were under the age of 31 as of June 15, 2012 may apply for DACA).

On February 16, 2015, the U.S. District Court of Texas granted a preliminary injunction against DACA expansion. On November 9, 2015, the Fifth Circuit Court of Appeals confirmed the District Court's order. As such, DACA will not be expanded unless the executive branch wins on appeal.

Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")

On November 20, 2014, the Obama Administration proposed that qualified undocumented parents of U.S. citizens or legal permanent residents would not be deported. This reform is known as Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). Similarly, the U.S. District Court of Texas granted a preliminary injunction against DAPA and this order was confirmed by the Fifth Circuit on November 9, 2015. Consequently, there is no DAPA.

Prosecutorial Discretion Exercised In Removal Proceedings

"Deport felons, not families" is the clichéd battle cry of the administration and the favorable exercise of prosecutorial discretion has been a successful tool in that cry. Generally speaking, illegal aliens who were placed in removal proceedings for status violations or denied applications, but have strong familial ties in the United States and have no criminal records would not be deported and their case would be put to "sleep." Like the deferred actions mentioned above, prosecutorial discretion does not give illegal aliens legal status. Instead, they are able to remain in the United States with their families, while waiting for opportunities to adjust their status. Some may also apply for a work permit.

Revised Visa Bulletin

There are other important changes made to our immigration system this year.

As of October 1, 2015, a new chart is added to the Visa Bulletin, which allows individuals, with an approved petition (e.g. I-130, I-140, and I-526) through family or employment based applications, to file for legal permanent residency earlier than anticipated. A new chart is added under "Dates for Filing Family-Sponsored Visa Applications" and under "Dates for Filing of Employment-Based Visa Applications." However, the applications will not be adjudicated until the priority date shown on the approved petition is current.

Nonetheless, applicants who are in the United States legally and will file to adjust status may receive secondary benefits, such as a work permit and a travel document (commonly known as advance parole).

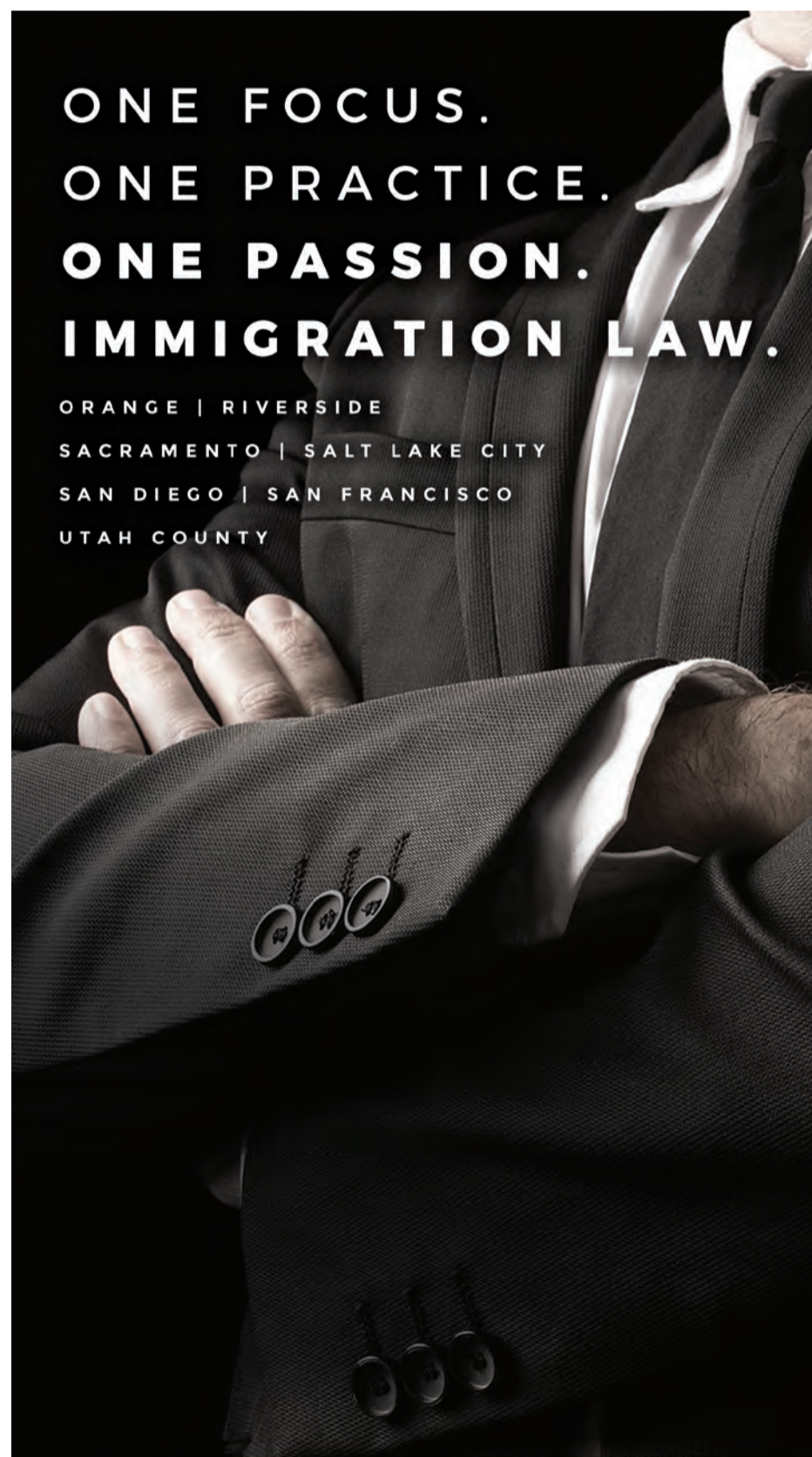
Employment Authorization for H-4 Dependent Spouse

Another significant change to immigration policies occurred on May 26, 2015 - qualified spouse (H-4 visa holder) of an H-1B visa holder may now apply for a work permit.

In order for an H-4 dependent spouse to apply for employment authorization, the H-1B spouse must have an approved I-140 petition or has extended status because a labor certification or I-140 petition was filed at least 365 days prior to the end of the sixth year of H-1B status.

This criteria may be restrictive, but it gives many married couples the opportunity to have a two-income household in the United States while waiting for the approval of their legal permanent residency.

The above merely highlights some of the most significant developments and issues in the recent past and the present time. We are hopeful that when the politicians are done campaigning, practical solutions will be identified that result in fixing, or at the very least improving, our broken system.



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Completing the Trial Court Team: The Role of Appellate Counsel

by Mary-Christine "M.C." Sungaila, Partner, Haynes and Boone LLP

The days of appellate lawyers coming into a case only after an adverse judgment has been entered, or a favorable one appealed, are long gone. Clients and trial lawyers have discovered the value of calling appellate counsel into a case much earlier to assist with dispositive motions, overarching legal strategy, and preserving issues at trial. In this brave new world of hybrid trial and appellate lawyer teams, there are a myriad of "best practices" for maximizing the impact of the appellate lawyer at the trial level, while eliminating duplication of the trial lawyer's role and managing costs. Here are seven key junctures or points of entry for appellate lawyers while a case is in the trial court – it is at these points that savvy clients and trial lawyers most often reach out to appellate lawyers to add value.

The case involves the application or interpretation of a new statute. When a new statute has been enacted, or a party seeks to apply an existing statute in a new or novel way, appellate lawyers are well equipped to fill in the gaps and provide legislative history and policy arguments for why a certain interpretation or application of the statute should prevail. Legal and policy based arguments like these are the bread and butter of appellate law.

Evolving, unstable, or developing areas of law are likely pivotal to the case's

outcome. Some areas of the law are rapidly developing, or are subject to conflicting interpretations by intermediate appellate courts and will ultimately need to be resolved by the U.S. Supreme Court or a state supreme court. Right now, some of these areas include class actions, arbitration, and joint employer determinations. If a case involves developing issues like these, and therefore is likely to end up on appeal, it makes sense to involve an appellate lawyer at the trial court level. Appellate lawyers excel at keeping the "big picture" of the law and legal trends in California and across the country in mind, and can explain those trends and where a particular case fits into them to the trial court.

Complex areas of science, technology, or expert evidence are involved. Most trial judges, like appellate judges, are generalists; they do not specialize in one area of the law. And not all judges are scientifically or technologically savvy. Therefore, if a case involves complex expert testimony involving admissibility issues, or complex science or technology (such as intellectual property cases) which must be "translated" for a legal generalist, an appellate lawyer can help do that.

The case is high stakes, or high profile. Some cases are of institutional importance, involve the potential for a significant monetary judgment, are the subject of media scrutiny, or all three. An appeal is inevitable in these cases, and it makes sense to call an appellate lawyer in early. An appellate lawyer can add to case strategy at the outset by viewing the case through the lens of the law, rigorously scrutinize the complaint and evidence for potential dispositive motions and methods of paring down the legal claims at issue, and preserve issues for appeal throughout the life of the case.

Potentially dispositive legal arguments are about to be made, or an interlocutory appeal or writ may need to be filed. Another sweet spot for appellate lawyer involvement is at the stage of dispositive motions (e.g., motions to dismiss or for summary judgment), which rely on purely legal arguments rather than primarily factual arguments. In addition, whenever a key ruling subject to immediate appeal or writ review is made (this includes key discovery rulings concerning disclosure of information subject to the work product or attorney client privilege), it is appropriate to involve an appellate lawyer to evaluate the propriety and likelihood of success of such a writ or interlocutory appeal, and

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then to prepare the subsequent writ or appeal.

Special jury instructions may be required. In some cases, the pattern jury instructions may not cover all of the claims to be presented to the jury, or the pattern instructions may need to be substantially amended or revised to take into account the

particular circumstances of the case. Whenever special or modified instructions like these are called for, an appellate lawyer can help by crafting these instructions with an eye toward any legal challenges on appeal.

Posttrial motions may be necessary. In order to preserve certain challenges for appeal, such as excessive or insufficient amounts of damages, posttrial motions may be necessary. Since posttrial motions are often the first step toward identifying and arguing likely issues for appeal, it is important to have appellate counsel involved in their preparation and strategy.

When any of the seven junctures above occur in a case, consider calling on appellate counsel to help maximize the presentation of the case.

For more information, contact M.C. Sungaila at 949.202.3062 or mc.sungaila@haynesboone.com.

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Speaking of what WE DID, we proudly announce that the partners and associates of Mavrakakis Law Group LLP, a leading intellectual property law boutique, have joined our firm – resulting in both the expansion of our Silicon Valley presence and establishment of a Chicago office.



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BUSINESS & INVESTMENT IMMIGRATION LAW

EB-5 Regional Centers *Make or Break, Boom or Bust*

by David Hirson, Managing Partner, David Hirson & Partners LLP
Assisted by Law Clerk, Shayda Naeim, Juris Doctor, pending CA Bar results

In 1990, Congress created the direct hire EB-5 program to benefit the U.S. economy by attracting investments from foreign investors. Under the 1990 program, each investor is required to demonstrate that a minimum of 10 new jobs are created as a result of an EB-5 investment of \$500,000 or \$1 million depending on whether the funds were invested in certain high unemployment or rural areas.

In 1992, Congress launched a pilot program, the Immigrant Investor Regional Center Program, which increased the boundaries of the EB-5 program by allowing the designation of Regional Centers (RC's) to pool EB-5 capital from multiple investors into targeted employment areas (TEA's), which include high unemployment or rural areas. Today, the vast majority of all EB-5 capital is raised through the 1992 program. Since its inception, the program has been renewed every few years. The most recent renewal date was until September 30, 2015 when the program would have expired, but Congress extended the expiration to December 11, 2015.

With the regional center program up for renewal this December, a draft bill proposed significant changes to the program. The proposed modifications include: reauthorizing the EB-5 program until September 2019; a more restricted definition of targeted employment areas and additional categories; stricter Regional Center responsibilities and reporting requirements; an increase in the investment amount, and further clarification on necessary documentation for investor's source of funds. The anticipated developments reflect the importance of the Regional Center program, as well as greater transparency among United States Citizenship and Immigration Services (USCIS), the Securities and Exchange Commission (SEC), Regional Centers, Projects, and Investors.

Further discussion and more details of the November 7th draft bill follow:

1. TEA's - Additional Employment Considerations and Categories

The main points in the Draft Bill regarding TEA's reflect that 50% of EB-5 visas will be reserved for immigrants who invest in rural areas, while the remaining 50% of EB-5 visas shall be reserved for immigrants who invest in high unemployment or high poverty areas. In addition, TEA designations will no longer be solely based on state determinations, but rather may also be determined by the Department of Homeland Security (DHS), thus providing the federal government with greater TEA designation power. Further, a TEA designation as a "high unemployment" or "high poverty" area will now be valid for two years instead of one year, starting on the date an application for approval of an investment in a commercial enterprise.

2. Increase in Investment Amount

Whereas a current EB-5 investment in a TEA requires a minimum investment of \$500,000 per investor and \$1 million in a non-TEA designated areas, the proposed bill raises the investment amounts to \$800,000 and \$1.2 million respectively. The bill also extends the TEA investment amount to include infrastructure and manufacturing projects. This change will not affect cases that are filed prior to the enactment of the law.

3. Increased Reporting Requirements and Responsibilities for Regional Center

RC's will be required to comply with stricter requirements, including filing a business plan, offering documents, marketing materials and an economic report for investments. These documents must include significant information such as any material; litigation or bankruptcies in the last 10 years, fees paid to agents or broker dealers, potential conflicts of interest, and certification that all parties participating in the project are also in compliance with relevant federal and applicable state securities laws. RC's will also be required annually to certify that they are in compliance with reporting requirements. If an RC discovers through due diligence that there has been a violation of securities laws in the previous fiscal year, their non-compliance must be reported.

The proposed bill makes prior specifically approved projects by USCIS non-reviewable in subsequent case filings, unless there is fraud, misrepresentation, an omission of a material fact or material mistake in law or fact. Further, DHS may sanction an RC for violations including, knowingly submitting statements of material fact or materially deviating from any approved business plan.

Although DHS no longer holds unfettered discretion for project approval, DHS possesses the authority to suspend or terminate an RC if the RC or any parties associated with the RC either know or reasonably should have known that they are subject to SEC review for fraud or deceit, or for submitting certification that contains an untrue statement of a material fact or omitted a material fact.

The latest draft bill also provides clearer and greater restrictions on parties involved with an RC. The bill proposes that anyone directly or indirectly involved (i.e. officers, board members, managers, general partners, and others with substantive authority) with the RC must be a lawful permanent resident of the US or US citizen. No foreign government may provide capital or directly or indirectly be associated with the ownership or administration of an RC, New Commercial Enterprise (NCE) or Job Creating Enterprise (JCE). Further, DHS must complete background checks on all persons and/or commercial enterprises associated with administration or ownership of an RC, NCE or JCE.

Lastly, each RC must pay an annual fee of \$25,000 (\$10,000 for RC's with 20 or fewer investors) for an EB-5 integrity fund to be used by DHS for audits, site visitations, and conducting investigations inside and outside of the United States. These greater proposed restrictions provide a more streamlined approach as well as greater transparency for investors, RC's and the government.

4. 90% of Job Creation Through Indirect Jobs

While investors will still be required to create 10 jobs as a result of their investment within the two-year period before receiving their conditional green card, the new proposed bill would allow indirect jobs to make up to 90% of the job count, and 10% of jobs to be direct at the JCE level. In addition, construction jobs may also be counted towards job creation, even if they last less than their current requirement of two years. Thus allowing investors to reflect job creation in a less restrictive manner.

5. Further Clarification on Source of Funds Requirements, Changes in Gifts as Source of Investment

The proposed bill continues to allow for a variety of sources to be used as proof of investment funds. However, new restrictions have been placed on requirements for gifts, tax documentation and administration fees. First, gifts as a source of funds will be limited to a gift from a spouse, parent, son or daughter over 21, sibling or grandparent and must be made in good faith. Second, any loans received by investors must be obtained from a bank or lending institution that is properly chartered or licensed in the applicable jurisdiction. And lastly, tax documentation must be provided for the last 7 years prior to filing of the investor's petition. A provision that will be impossible to fulfill for investors in many countries, including China.

It is uncertain on November 12, 2015 what the final legislation will contain resultant from the bi-cameral and bi-partisan draft bill. There will be changes made to the bill and that will be the topic of another article when the information becomes available.

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David has more than 35 years of experience in the practice of immigration law. His focus is on EB-5 investment immigration law. He has been certified as a Specialist in Immigration and Nationality Law by the State Bar of California, Board of Legal Specialization continuously since 1990. David was a practicing attorney in Johannesburg South Africa from 1970 to 1980. He immigrated to the U.S. in 1980 and was admitted to the U.S. California Bar in the same year. Contact him at 949.383.5355 or dhirson@hirsonimmigration.com.





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