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SEPTEMBER 2017 • $4

A Publication of the San Fernando Valley Bar Association

Developments in Bankruptcy Law

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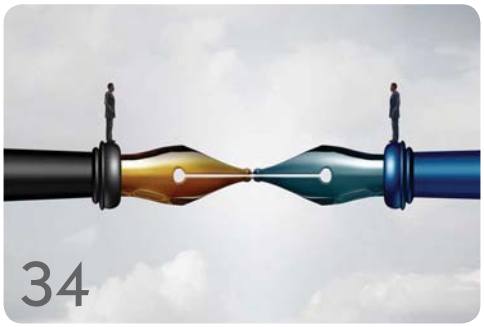

FEATURES

COLUMN

On the cover: *Donna Lynn, Joseph Gualderon and Jacque Vogel*
Photo by Ron Murray

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Mandatory Fee Arbitration Program: A Member Resource

KIRA S. MASTELLER
SFVBA President

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HAVE YOU USED THE SFVBA Mandatory Fee Arbitration (MFA) Program?

We hope you never need to, but in the event you do have a fee dispute with a client, please consider another of your SFVBA member resources to assist you in the fee arbitration process.

The SFVBA is approved by the State Bar to administer the MFA Program in both Los Angeles and Ventura Counties. The Bar has approximately 50 active fee arbitrators, and we are always looking to add volunteers, especially attorneys who practice in the criminal and family law areas, as well as lay arbitrators (non-attorney professionals who have never gone to law school or worked in a law firm).

The SFVBA opens about 45 MFA cases annually, over 90 percent of which are filed by clients. The fee disputes are as small as $1,000, to as large as mid-six figures; the average dispute is $37,000 and is decided by a 3-arbitrator panel.

The SFVBA's MFA Program provides an efficient procedure for clients and attorneys to resolve fee disputes. Most attorneys have an arbitration requirement provision included in their Attorney Client Fee Agreement requiring that arbitration be attempted prior to taking a client to court to collect attorney fees. You can use the SFVBA MFA program even if you have named another program in your fee agreement.

The SFVBA's MFA program is a low-cost and time efficient alternative to a court proceeding. The application process is simple and the fee charged for the MFA is based upon the amount of fees in dispute. Supporting documents are provided by both sides and a hearing is then scheduled.

> "Contact Executive Director Liz Post at epost@sfvba.org with any questions about filing a fee arbitration case or volunteering for the MFA Program."

There is an option for both non-binding and binding awards, with all MFA proceedings using neutral arbitrators. The arbitrator decides the matter based only upon the evidence submitted after considering a number of factors, such as whether there was a written fee agreement and the value of the attorney's services. The arbitration award is public, but the MFA Program's case file and hearing are treated as confidential.

A fillable *Notice of Client's Right to Arbitration* designating the SFVBA as the local fee arbitration program and other pertinent documents are available on the Bar website at www.sfvba.org/fee-arbitration.

The MFA Program is one of many helpful resources the SFVBA provides its members. Please contact Executive Director Liz Post at epost@sfvba.org with any questions about filing a fee arbitration case or volunteering for the MFA Program.

The People Behind the Scenes

MICHAEL D. WHITE
SFVBA Editor

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DURING WORLD WAR II, General Dwight Eisenhower was handed the mammoth task of heading the Western Allies' campaign to wrest Europe away from Nazi Germany's unspeakably evil occupation. After the last shots had been fired and the world took a collective deep breath, Ike set down his personal observations about the day-to-day conduct of the war in a highly-regarded 1948 book, the *Crusade in Europe*. In it, the future president elaborated on the exasperating challenges he often faced in getting his top commanders to agree on the best way to conduct what proved to be a grindingly complicated military operation in a highly charged international political environment.

One thing he wrote, though, expressed in unambiguous fashion what everybody who played a role in the war could honestly agree on. "You will not find it difficult to prove," he observed, "that battles, campaigns, and even wars have been won or lost primarily because of logistics."

It was, he said, a war won by those who got the people and the "beans, bullets and oil" so vital to winning the war where they needed to be, when they needed to be there—namely, the clerks, the truck drivers, the quartermasters, the transportation specialists, the merchant marines, and countless others, who like 98 percent of those in service, never hear a shot fired in anger.

There's a direct corollary here as victory or defeat in courtroom battles is in part determined by the work done by the almost invisible people behind the scenes—the paralegals who research critical information, collect and organize briefs, file motions, interview clients, prepare retainers, and draft document such as pleadings, complaints, subpoenas, interrogatories, deposition notices, pretrial orders, and carry out a myriad of other duties.

> "You have to have a passion for what you're doing…"

I interviewed four paralegals for this issue's cover article and discovered straight away that, despite careers of varied length and experience, a golden thread linked their stories—a shared passion and love for what they do.

One shared how she "moved to California in the '80s and worked with an attorney who is now one of my clients that taught me everything. I just fell in love with the law and progressed from there. You have to have a passion for what you're doing…"

Another shared a love of coming to work every day. "I love learning about the law and enjoy learning about how we got to be where we are… continually learning about where to look for answers."

Dedication, passion and a love for work that garners worthy results. Ike would be proud.

Regards.

CALENDAR

SEPTEMBER

SUN	MON	TUE	WED	THU	FRI	SAT
LATINO HERITAGE MONTH (SEPTEMBER 15 – OCTOBER 15)					1	2
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10	11 VBN VALLEY BAR NETWORK **5:30 PM** **CHABLIS RESTAURANT TARZANA**	12 Probate & Estate Planning Section The Laws of Succession **12:00 NOON** **MONTEREY AT ENCINO RESTAURANT** Mark Phillips will address the group regarding the timing of death for purposes of succession. (1 MCLE Hour) Board of Trustees **6:00 PM**	13	14	15 Bankruptcy Law Section Tentative Opinions of the Woodland Hills' Bankruptcy Judges **12:00 NOON** **SFVBA OFFICES** Lewis Landau leads a distinguished panel in this always popular seminar. (1.25 MCLE Hours; Bankruptcy Law Legal Specialty credit pending)	16
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The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. Visit www.sfvba.org for seminar pricing and to register online, or contact Linda Temkin at (818) 227-0490, ext. 105 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

SUN	MON	TUE	WED	THU	FRI	SAT
LATINO HERITAGE MONTH (SEPTEMBER 15 – OCTOBER 15)						
1	2 VBN VALLEY BAR NETWORK **5:30 PM** **CHABLIS RESTAURANT TARZANA**	3 *Valley Lawyer* Member Bulletin Deadline to submit announcements to editor@sfvba.org for November issue.	4	5 Membership & Marketing Committee **6:00 PM** **SFVBA OFFICES**	6	7
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22	23 Family Law Section **5:30 PM** **MONTEREY AT ENCINO RESTAURANT** Approved for Family Law Legal Specialization (1.5 MCLE Hours)	24 Update on Arbitration **12:00 NOON** **WEBINAR** Susan Barilich, P.C. will lend her expertize on litigation, trials and arbitrations, what is permitted in an arbitration as opposed to a trial. Many attorneys are still not clear on the mechanics of arbitration or the rules that govern arbitration and Barilich will clarify the ins and outs for all. (1 MCLE Hour) --- Editorial Committee **12:00 NOON** **TONY ROMA'S**	25	26 Inclusion & Diversity Committee Dinner at My Place **6:30 PM** **WOODLAND HILLS** A new and fun member benefit to help members get to know each other in an intimate setting, spur referrals, and become more involved with the SFVBA!	27 Inclusion & Diversity Committee **8:15 AM** **SFVBA OFFICES**	28
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Renew Your Membership Today

ELIZABETH POST
Executive Director

epost@sfvba.org

WHILE IT SEEMS THE REST of the world slows down over the summer, the staff of the San Fernando Valley Bar Association stays busy gearing up for a new Bar year that begins October 1. For me, personally, it means preparing a new fiscal year budget, managing our annual Board of Trustees election—don't forget to vote by the September 8 election—and assisting Events Director Linda Temkin and our Programs Committee get ready for our Installation Gala.

The most time-consuming task of the summer, and the year, is supervising our annual membership dues invoicing. This year proved even more time-consuming and frenzied. A month beforehand, the Bar upgraded our association management system, the final piece of technology improvements the SFVBA underwent over the past 12 months, which also included launching a state-of-the-art website, transitioning from paper to online voting, and installing a new cloud phone system.

> "I encourage all members to renew your SFVBA membership."

The upgrade in the membership software affected both the website and our in-house database. Like most technology "improvements"—especially one tailored to our bar association's unique needs—there were glitches to resolve and new procedures to learn. The result was a two week delay in launching the invoicing (as well as some initial embarrassing typos).

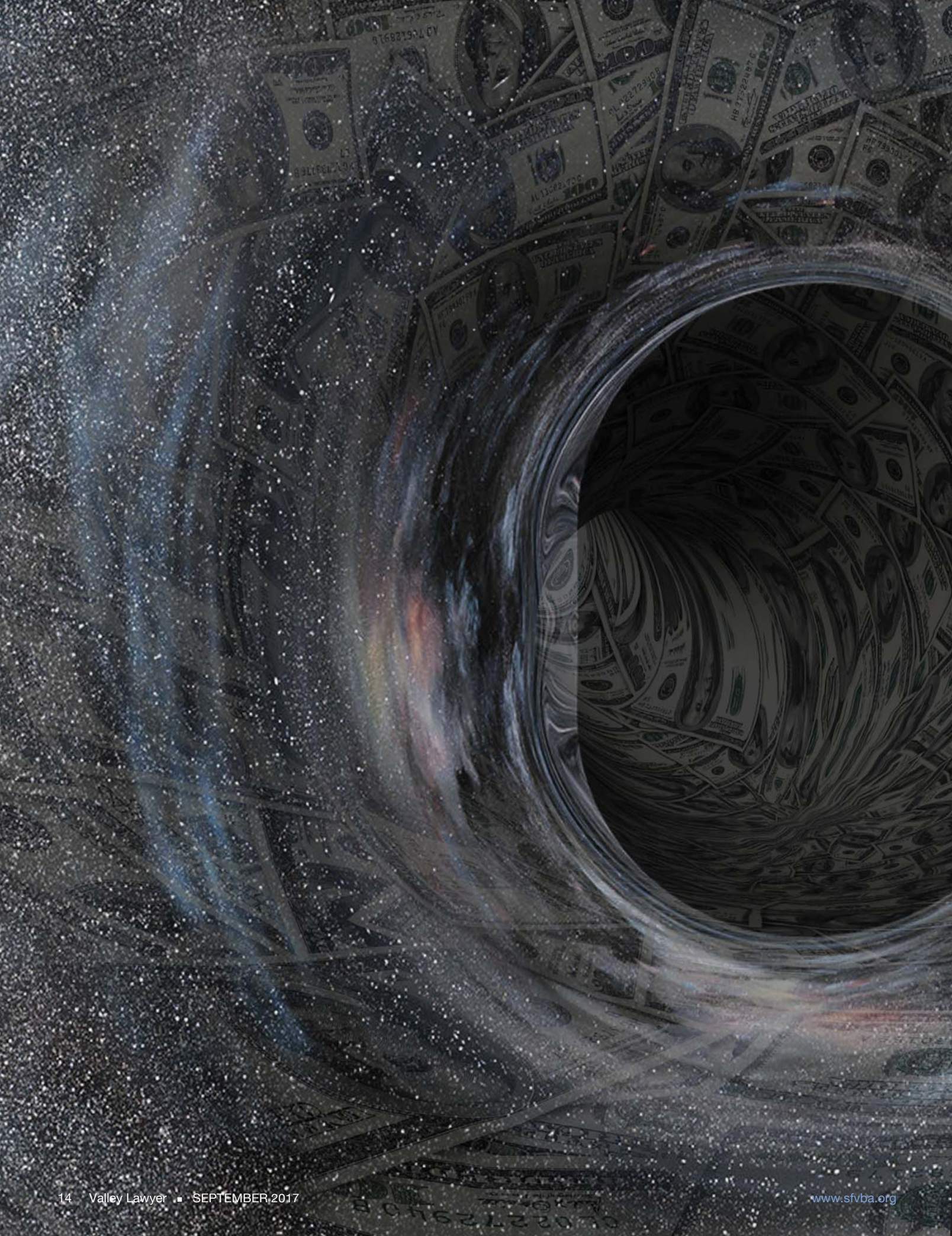
I encourage all members to renew your SFVBA membership by the close of our fiscal year, September 30. Not only does your financial support allow the Bar to invest in this new technology, and consequently upgrade our delivery of services to members, we can continue to provide you with quality programs and benefits, like *Valley Lawyer* magazine, Fastcase online research, and affordable MCLE.

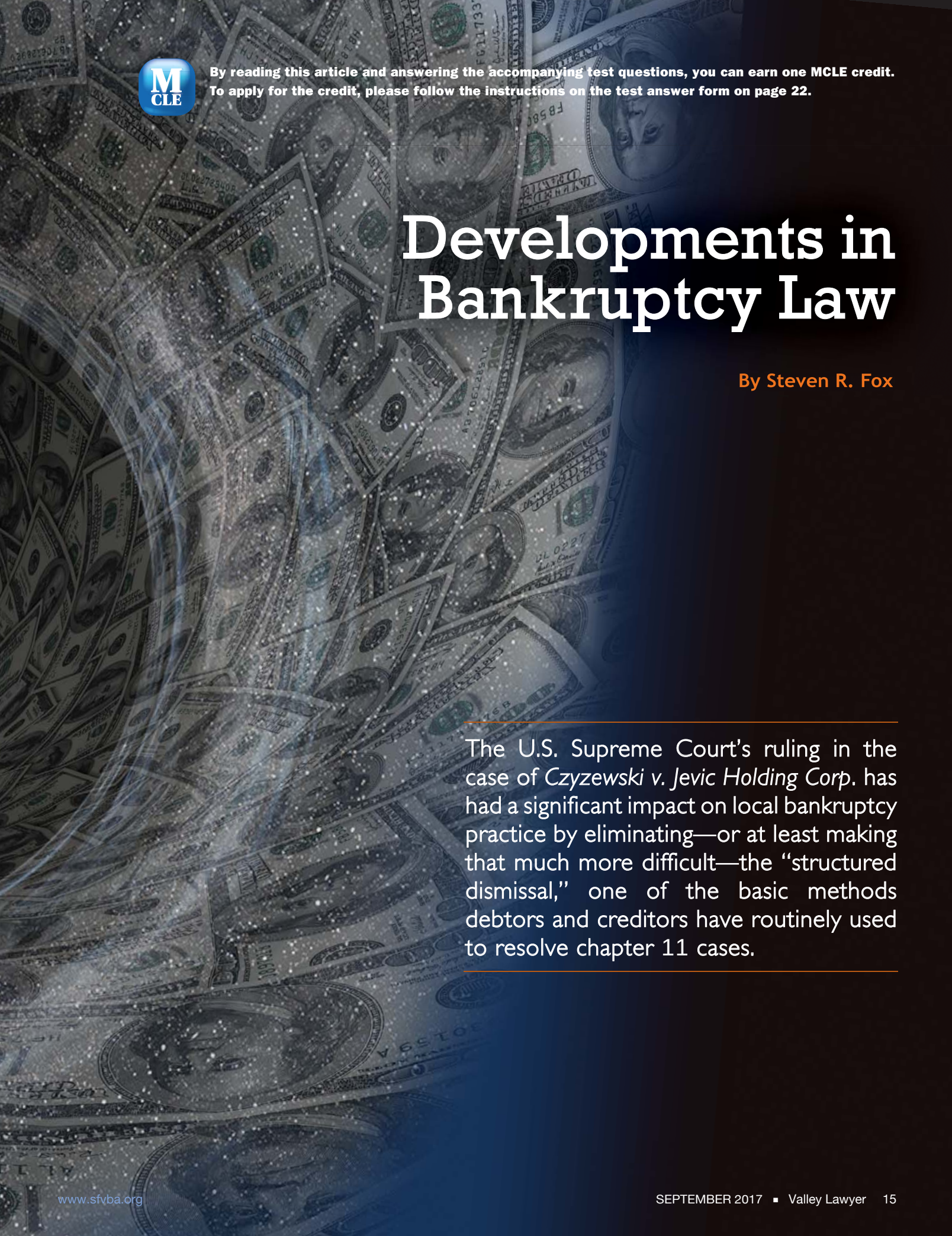
The Cover of *Valley Lawyer*

Coming soon—your chance to be on the cover of *Valley Lawyer* magazine! Once again, the San Fernando Valley Bar Association is auctioning the December cover of this magazine, with the proceeds to be donated to the Valley Community Legal Foundation. This is the opportunity for members or your firm to appear on the cover and be featured in an article on public service.

At the same time, the winner will be helping the VCLF—a 501(c)(3) charitable organization whose mission is to support the legal needs of youth, victims of domestic violence, and veterans of the San Fernando Valley, as well as provide educational grants to qualified students pursuing legal careers.

The email auction will open the first week of October. The winning bidder or firm must be a member in good standing of the San Fernando Valley Bar Association.





By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 22.

Developments in Bankruptcy Law

By Steven R. Fox

The U.S. Supreme Court's ruling in the case of *Czyzewski v. Jevic Holding Corp*. has had a significant impact on local bankruptcy practice by eliminating—or at least making that much more difficult—the "structured dismissal," one of the basic methods debtors and creditors have routinely used to resolve chapter 11 cases.

EACH FALL, THE SAN FERNANDO VALLEY BAR Association's Bankruptcy Section offers case law update programs on opinions from the U.S. Supreme Court, the Ninth Circuit and its Bankruptcy Appellate Panel (BAP), and the local Woodland Hills Bankruptcy Court. Attendees learn about their most recent published and unpublished opinions. Consider attending them. If you have missed any program, consider purchasing a recording.

This article discusses one recent U.S. Supreme Court opinion, *Czyzewski v. Jevic Holding Corp.*[1] It has already impacted local bankruptcy practice by eliminating (or at least making that much more difficult) one method debtors and creditors have used to resolve chapter 11 cases.

How Chapter 11 Cases Conclude[2]

A chapter 11 case typically concludes in one of five ways: (1) a plan is confirmed under §1129; (2) the case is converted under §1112 to a case under chapter 7, where assets may be liquidated and distributed to creditors; (3) the case is dismissed under §1112 with no conditions on dismissal; (4) the case is dismissed but with conditions (the focus of this article); or (5) the debtor's assets are first sold (§363) and then the case is dismissed or converted or a plan is confirmed.

Let's go back over these five possible endings:

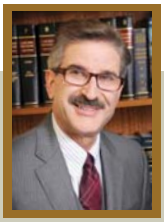
- If a plan is confirmed in the chapter 11 case, this means creditors have been given required disclosures about the debtor and its reorganization, acceptable notice has been provided, creditors have voted for or against the plan, any objections to the plan have been resolved, ruled on or withdrawn and the bankruptcy court has determined that the plan meets the many requirements for plan confirmation.[3] Upon plan confirmation, the debtor and its creditors have a new legal relationship based on the plan's terms.
- If a case is converted to chapter 7 under §1112, creditors will typically receive little or no distribution in the chapter 7 case.
- If a case is dismissed, it is as though, legally, the bankruptcy case was never filed.[4] Generally, a chapter 11 case, when dismissed, is dismissed without conditions, what is called a "straight dismissal."
- The court may dismiss the case but with conditions. This is called a "structured dismissal."[5] Frequently, the terms include the payment of monies to senior or to junior level creditors though without the procedural safeguards of a plan under §1129 and in violation of the absolute priority rule (discussed below).
- A debtor may sell its assets during a chapter 11 case (§363) and then either distribute the monies on hand to creditors through a plan, seek to dismiss its case or convert its case to one under chapter 7.

In *Jevic*, the high Court put a brake on the fourth ending, dismissal with conditions, what is also called a "structured dismissal." This has already impacted how even small chapter 11 cases will proceed. As discussed below, the opinion limits the ability of debtors and creditors to reach resolutions well-grounded in business and financial sense.

Jevic reflects the tension between the power of secured creditors (the highest priority creditors) to be paid first and the power of junior creditors (typically the lowest class of creditors) (and perhaps equity holders) who can control the bankruptcy process. Often these parties, along with the debtor, will reach a settlement which does not follow the payment priority rules for plans[6] and the parties will agree to distribute monies or value of the bankruptcy estate in a manner which skips over or ignores a class of creditors, perhaps a middle level priority class. In doing so, they ignore bankruptcy's "absolute priority rule" which provides that no inferior class of creditors may be provided for in a plan (e.g., paid) unless all superior classes have been fully provided for in the same plan. A structured dismissal arguably avoids the absolute priority rule because dismissal arises under §1112, while the absolute priority rule arises under §1129, but the Supreme Court largely disagreed.

Attorneys have worked creatively to get around the absolute priority rule because this rule, while important in its own right, also restrains good practical financial resolutions to business problems in chapter 11 case.

The absolute priority rule comes up in the context of a chapter 11 plan. Under §1129, a plan must first provide for senior creditors in full (payment) before it can provide for junior classes of creditors. If creditors consent (through the process of voting), then the absolute priority rule can be ignored. Another way to avoid the absolute priority rule is to not do a plan at all; instead, enter into a structured dismissal, meaning the case is dismissed under §1112 and payment is made to creditors but not necessarily according to plan distribution requirements and the absolute priority rule under §1129.



Steven R. Fox is the principal of the Fox Law Corporation in Encino. Fox limits his practice to bankruptcy matters, in particular, Chapter 11 reorganization matters. He can be reached at sfox@foxlaw.com.

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In *Jevic*, the Court held that parties may not deviate from the Code's distribution scheme via a structured dismissal, at least not in a non-consensual structured dismissal.

It is this last way—a case ends, in dismissal, where the court orders otherwise—that gave rise to structured dismissals and ultimately to *Jevic*. There is no specific statutory authority in the Code for structured dismissal but on the other hand, there is no explicit statutory authority forbidding structured dismissals. However, a structured dismissal creates concerns about the process—for example, the lack of an ongoing plan process with its procedural safeguards including disclosure, notice and voting.

With a structured dismissal, there is no chapter 7 liquidation. With a structured dismissal, the parties do not return to their pre-bankruptcy positions because the bankruptcy court has imposed terms on the dismissal, e.g., approved the payment of monies to junior classes without higher priority classes being provided for in full.

Background in *Jevic*

Jevic, a trucking company, filed a reorganization petition under chapter 11. It held fraudulent conveyance claims against its senior secured lenders—the creditors entitled to be provided for in full first in a plan before junior creditors could be provided for there. The claims against the senior lenders were settled. However, by the time a settlement was reached, the estate's attorneys and other professionals had rendered the estate administratively insolvent, in other words, their fees had exceeded the company's ability to pay them. Confirming a plan was an exercise in futility as there would be no monies for anyone other than the senior secured lenders and the professionals. Likewise, conversion to chapter 7 had no merit. There was no money to pay other creditors.

> "Though they are common, the Court noted there is no specific authorization in the Code for structured dismissals."

So the settling parties got creative. As part of settling the fraudulent conveyance claims against them, the senior lenders agreed to pay some monies to junior level unsecured creditors, but remember that the absolute priority rule in a chapter 11 plan would not allow this absent consent. Certain truckers, holding mid-level priority claims (but still out of the money) objected, asserting that their priority claims were entitled to be provided for in full prior to junior unsecured claims being paid a penny.

If this were a plan under §1129 where the absolute priority rule applied, the truckers would be correct. However, there was no plan; this was a structured dismissal. Over the truckers' objection, the bankruptcy court approved the structured dismissal. Both the bankruptcy court and the district court concluded that there was no other good alternative to the structured dismissal the parties had agreed to that got money to the junior level unsecured creditors. Notwithstanding the truckers' objection, the courts concluded that in a plan in chapter 11 and in a liquidation under chapter 7, they would receive nothing. Approving monies to skip over them and to be paid to junior unsecured creditors as part of the structured dismissal did not prejudice the truckers. Though it is possible that in a chapter 7 case, a trustee could pursue the fraudulent conveyance claims that would cost money which the debtor lacked. In effect, the truckers were no worse off than under any other alternative. With a structured dismissal, at least junior unsecured creditors were receiving some monies.

High Court's Ruling

Lacking a direct statutory resolution (e.g., a statute clearly permits or forbids structured dismissals), the Court focused on the concept of priority, the rules in §1129(a), the "basic underpinning of business bankruptcy law" which are "fundamental."[7] Though they are common, the Court noted there is no specific authorization in the Code for structured dismissals.[8]

The Court addressed the argument that under §349(b) (dismiss with conditions for cause), a court may direct distributions to creditors in a manner contrary to §1129's priority payment scheme and the absolute priority rule. While the Court acknowledged that §349 did authorize dismissal with conditions for cause, the Court determined that cause in §349 was meant to protect third parties from events which had occurred in the dismissed bankruptcy case, not to permit parties to distribute monies contrary to the Code's priority scheme.[9]

Despite this, the Court stated that a structured dismissal which violates the absolute priority rule may be permitted if (1) the conditions are consensual and (2) the structured dismissal advances an important bankruptcy objective.[10]

As is common in high Court opinions addressing bankruptcy, many unanswered questions are left.

What about Paying Monies to Critical Vendors and Priority Payroll after *Jevic*?

This was a major problem the Court had to get around. Typically in a chapter 11 business operating case, the debtor seeks to pay priority payroll (payroll earned in the 180 days before case is filed but unpaid as of the date the bankruptcy case began) and to pay pre-bankruptcy claims of other creditors, including those termed "critical vendors," those vendors who are owed monies and whom a debtor cannot replace. An example of a critical vendor might be a

vendor who is the sole source of a needed part for a debtor's manufacturing process. With the proper evidentiary showing, bankruptcy courts typically approve these "first day motions" and these claims are paid in the first weeks of a chapter 11 case. One immediately has to consider the absolute priority rule and §1129's priority payment scheme.

So the *Jevic* court distinguished structured dismissals from first day motions The Court found a policy purpose to justify their payment. If employees are not paid payroll owed to them when a case begins, many, if not all, of the employees will leave for new jobs. That will likely end any reorganization. If critical vendors are not paid, that will likely end any reorganization. (This "doctrine of necessity" arises out of railroad bankruptcy statutes.) The Court distinguished first day motions from structured dismissals as first day motions serve a "significant offsetting bankruptcy-related justification."[11]

Though it can be said that the Court spoke approvingly of first day motions, including articulating its "offsetting bankruptcy-related justification," *Jevic* has already had a different impact on critical vendor motions. In *In re Pioneer Health Services, Inc.*,[12] certain physicians who did work in the debtor's hospitals through a separate medical staffing company, sought to be paid their prepetition claims for monies on the basis they were critical vendors. Relying on *Jevic*, the court refused to grant critical vendor status to the physicians. The court believed that *Jevic* takes a "restrictive view" of critical vendor motions and that the physicians had not demonstrated an important bankruptcy principal, e.g., improving the chances of reorganization would be served by granting their motion.[13]

What about Consensual Structured Dismissals after *Jevic*?

The Court did not strike down structured dismissals where creditor classes are skipped over with respect to payment and the chapter 11 case is dismissed if the skipped over class or classes consents.[14] So *Jevic* gives us the rule and an exception.

At least one court, in *In re William Harry Fryar*,[15] has picked up on the Court's comment that a structured dismissal could be approved if there was consent and approval advanced an important policy consideration.

In *Fryar*, three creditors and the United State Trustee objected to a proposed compromise which included the sale of assets and dismissal of the case. The Tennessee court declined to approve the compromise as it was not consensual, affected parties had objected, and the court could not discern an important Code policy which the structured dismissal advanced.

Consent is not enough on its own to overcome the ban on structured dismissals. There must also be some "significant Code-related objectives" such that varying the

priority of payment serves.[16] These objectives could be approval of first day motions to foster a successful reorganization or maximizing the value of a bankruptcy estate.[17] The *Fryar* court declined to approve a compromise similar to that in *Jevic,* dismissing the chapter 11 case because the court could not find that an important Code principal was being advanced by the structured dismissal.[18]

What if creditors are given appropriate notice of a structured dismissal which violates the absolute priority rule but the creditors do not raise objections, does that constitute consent?

In the Ninth Circuit, *M. Long Arabians* must be considered. There, the Ninth Circuit BAP stated: "However, the failure or inability of a creditor to vote on confirmation of a plan is not equivalent to acceptance of the plan."[19]

M. Long Arabians may be distinguishable. It arose in the context of plan voting where creditors are asked to take an affirmative action—cast a ballot accepting or rejecting a plan. A creditor's failure to cast a ballot arguably should not mean that the creditor has accepted the plan. Section §1129(a)(7) requires that a class of creditors votes to accept the plan (an active step) or receive as much under the plan as they would in a liquidation. In contrast here, with a structured dismissal, creditors are provided notice that their rights may be affected and they are provided an opportunity to object. Silence may equal consent.

Gifting after *Jevic*

There is a related issue, gifting. Gifting has been controversial in bankruptcy circles because it involves senior class gifting monies it is entitled to receive to a junior class of creditors in a plan. A mid-level priority class is skipped over and does not receive that money. It is possible that in a plan where gifting occurs that priority creditors are not paid in full while junior creditors are given monies. This violates the absolute priority rule.

The Court did not directly address this issue but one can wonder if gifting (as opposed to a structured dismissal) is still permissible. *Jevic* places such importance on the Code's distribution statute, §1129, that one can see gifting also being struck down by the Court.

Bankruptcy Sales after *Jevic*

Remember the laundry list at the beginning of this article which lists how chapter 11 cases can conclude with one such ending being a sale of the debtor's assets, e.g., its business. That typically leaves a debtor with money or some value perhaps to distribute to creditors. Typically, a bankruptcy sale is not part of a first day motion. A sale usually occurs during a case and prior to plan confirmation (though a sale can be accomplished through a plan). The impact of a sale in bankruptcy is immense. It dictates the character of the remainder of the case.

Will *Jevic* impact sales? *Jevic* cited multiple cases disapproving bankruptcy sales on the ground that the sales evaded the requirements of plan confirmation and payment priorities.[20] *Jevic* appeared to agree with these opinions but the Court did not directly address the issue. The Court may be suggesting some level of unease with bankruptcy sales prior to plan confirmation.

If a bankruptcy court raises *Jevic* in the context of a sale in bankruptcy, be prepared to articulate the bankruptcy policies which the sale advances, e.g., sales are expressly authorized in the Code, §363, this sale is not a sub rosa plan dressed up as a sale, and the sale advances the reorganization by bringing funds into the estate or by lowering the amount of claims against the estate. There are other policy reasons which may be relevant.

***Jevic's* Impact on Compromises in Chapters 7 and 13**

In both chapters 7 and 13, compromises are reached by which assets may be distributed and cases dismissed. Does *Jevic* apply to these cases?

Jevic arose in a case under chapter 11. One of the two key statutes, §1129 with its priority of payments, is mirrored in large part in chapter 13.[21] Chapter 7's priority scheme

is dictated by §726 which, while somewhat different from §1129, is still a payment priority scheme.

It is not clear that a principled reason exists not to apply *Jevic* to structured dismissals in either chapter 7 or in chapter 13.

Impact on the Practice in the Central District of California

Already judges are questioning creative lawyering where parties in a chapter 11 case reach a settlement in which a chapter 11 case is dismissed but creditors are paid monies, perhaps not in the priority scheme of §1129 of the Code. Judges are expressing concern whether they have the authority to approve structured dismissals.

In at least one case known to the author, the bankruptcy court refused to sanction a structured dismissal which included payment only to the senior secured creditor (no gifting, no skipping over a mid-level creditor to pay junior creditors). The court was concerned about *Jevic's* strong disapproval of structured dismissals even though here the senior creditor in priority was the creditor being paid. Ultimately, the court granted a "straight dismissal," dismissal with no conditions, after the parties committed on the record to honoring their agreement after the case was dismissed.

In another case, the court declined to approve a debtor's motion to pay a claimant prior to plan confirmation relying on *Jevic* and other authority.[22]

Going forward, be aware of the potential issues. Be prepared to address both consent and the relevant bankruptcy principles to support your client's request.

[1] *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017).
[2] All statutory references are to title 11 of the United States Code, the Bankruptcy Code, unless stated otherwise.
[3] 11 U.S.C. §1129(a) and (b).
[4] 11 U.S.C. §349.
[5] 11 U.S.C. §349(b).
[6] 11 U.S.C. §1129(a) and (b).
[7] *Jevic*. at 983 and 984.
[8] *Id.* at 979.
[9] *Id.* at 984-985.
[10] *Id.* at 978 and 985.
[11] *Id.* at 986.
[12] *In re Pioneer Health Services, Inc.*, 17 Bankr. LEXIS 939 (Bankr. S.D. Miss April 4, 2017)(unpublished).
[13] *Id.* at internal page 15. The LEXIS opinion has internal pagination.
[14] *Jevic* at 983.
[15] *In re William Harry Fryar*, 2017 Bankr. LEXIS 1123 (Bankr. E.D. Tenn. April 25, 2017)(unpublished).
[16] *Fryar* at 15.
[17] *Fryar* at 12-13 (citing *Jevic*).
[18] *Fryar* at 16-17.
[19] *See In re Townco Realty, Inc.*, 81 B.R. 707, 708 (Bankr. D. Fla. 1987). *But see In re Campbell*, 89 B.R. 187 (Bankr. N.D. Fla. 1988); *In re M. Long Arabians*, 103 B.R. 211, 215 (9th Cir. BAP 1989).
[20] *Jevic* at 986.
[21] 11 U.S.C. §§1322 and 1325.
[22] *In re Magleby*, 2017 Bankr. LEXIS 2164 (Bankr. C.D. Cal August 2, 2017)(unpublished).

Test No. 107

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. *Jevic* will not impact local bankruptcy practice.
   ❑ True ❑ False

2. Chapter 11 cases typically end with all assets being liquidated by the Chapter 11 debtor.
   ❑ True ❑ False

3. Chapter 11 debtors may not sell assets in a chapter 11 case except through a plan.
   ❑ True ❑ False

4. A "straight dismissal" means a dismissal with conditions.
   ❑ True ❑ False

5. Plan confirmation creates a new legal relationship between a debtor and its creditors.
   ❑ True ❑ False

6. *Jevic* held that debtors in Chapter 11 could no longer sell assets except through a plan.
   ❑ True ❑ False

7. In *Jevic*, the high court approved the structured dismissal in which a middle level creditor group, truckers, were not to be paid monies on account of their claims while junior level creditors would be paid monies.
   ❑ True ❑ False

8. The absolute priority rule means that distributions to creditors in a plan must follow the priority scheme for providing for claims.
   ❑ True ❑ False

9. Under *Jevic*, motions to pay employee payroll earned in the 180 days before the bankruptcy petition was filed but also unpaid cannot be paid after the bankruptcy is filed except through a plan.
   ❑ True ❑ False

10. The Bankruptcy Court in *Jevic* approved the structured dismissal.
    ❑ True ❑ False

11. There is no specific authorization in the Code for structured dismissals.
    ❑ True ❑ False

12. The Supreme Court concluded that the language of §349(b) was not broad enough to permit a bankruptcy court to approve a structured dismissal.
    ❑ True ❑ False

13. The Court concluded that a structured settlement could be approved under two conditions.
    ❑ True ❑ False

14. The holdings in *Jevic* means the end of critical vendor motions.
    ❑ True ❑ False

15. In *Fryar*, the Bankruptcy Court could not find an important bankruptcy goal supporting the critical vendor motion.
    ❑ True ❑ False

16. In the Ninth Circuit, if a creditor fails to vote to accept or to reject a plan, such non-response equals consent.
    ❑ True ❑ False

17. *M. Long Arabians* can be distinguished because it involved silence in the context of a structured settlement.
    ❑ True ❑ False

18. The payment distribution in Chapter 13 is similar to that in Chapter 11.
    ❑ True ❑ False

19. An important bankruptcy objective would be reorganization of a debtor's business.
    ❑ True ❑ False

20. When a Chapter 11 case is converted to one under Chapter 7, a trustee is appointed and he/she liquidates the debtor's assets.
    ❑ True ❑ False

MCLE Answer Sheet No. 107

INSTRUCTIONS:

1. **Accurately complete this form.**
2. **Study the MCLE article in this issue.**
3. **Answer the test questions by marking the appropriate boxes below.**
4. **Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:**

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ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**	❑ **False**
13.	❑ **True**	❑ **False**
14.	❑ **True**	❑ **False**
15.	❑ **True**	❑ **False**
16.	❑ **True**	❑ **False**
17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**

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Paralegals: Behind the Scenes Support

By Michael D. White

In their day-to-day work, paralegals—the "less-glamorized, unsung heroes of the judicial sector"—are called upon to perform a variety of tasks, from preparing discovery documents and drafting briefs, to conducting critical research and providing support to clients. They are the ones who "create the ammunition for attorneys to take to the fight."

THE TERM "BEHIND THE SCENES" ORIGINATES FROM THE THEATRE AS A NOD TO THE WORK OF THE craftsmen—the costumers, set designers, carpenters, stage hands, lighting and sound crews, and others—who labor out of the audience's view doing the jobs so critical to the success of a production.

Some may say the law is, in a sense, a sort of theatre, with the success of the actors (lawyers) on the stage (the courtroom) depending heavily on the skill of those behind the scenes—the paralegals—who provide much of the research and administrative support that can either make or break a case.

Learning What They Don't Teach in School

"Sometimes attorneys become so enmeshed in a case that a lot of our job is to keep them focused," says paralegal Donna Lynn. "They have the difficult, hard work to do and our job is to support them by supplying them with research and information that's precise, organized and exactly what they need when they need it."

Working at the time as an office manager for an advertising agency in Los Angeles, Lynn's path to the paralegal profession began when a lawyer friend showed her some printed information on paralegal programs originally intended for someone else.

> "I like the idea of helping people who want to be responsible." — Donna Lynn

"The list of classes looked very interesting," says Lynn. "And the more that I looked it over, the more I found out that the law itself interested me a lot."

After some time in the paralegal program at Mission College, Lynn found that once she started, she "was in love. I read everything I could and my interest grew and grew," she says. "So, I kept going and eventually graduated with a 4.0. I loved it and that is the thing…you have to have a passion for and a deep interest in it and be willing to learn. I love coming to work every day and love continuing to learn about the law and where to look for the right answers."

She decided on concentrating on estate planning and probate law because she "liked the idea of people who wanted to seek help because they saw a need, rather than people who only got into trouble. I like the idea of helping people who want to be responsible…I like being a responsible citizen and I enjoy working with people who want to be responsible in their personal lives. I like the fact that they're thinking ahead. I love planning and organizing things, so estate planning falls into that."

Lynn, with four years on the job as a paralegal in Tarzana, sees herself as a "legal nurse," helping people who

just got blindsided by something. While more often not in direct communication with clients in anything other than an administrative capacity, she does have occasion to meet with them to request documents for the court to help their case.

"When I do talk with them I love being able to make them feel like it's going to be okay….that there is a light at the end of the tunnel and that they are going to get through this."

That, she says, is something they can't teach in any paralegal program. "Ninety-nine percent of what I've learned about being a paralegal, I didn't learn in school," says Lynn. "It's what I've learned over the years on the job. You learn the terminology so you can navigate your way through things and you get a grand overview, but you really don't learn how things work until you get into an office and see how things actually work," adding that she's been able to apply much of what she learned as an office manager—organization, forethought, and planning—to her current paralegal position.

"In whatever job you may be in, if you develop a passion for the law, you probably have a skillset that you could transfer into being a paralegal," she says.

Cutting Her Teeth on the Law

Lynn's passion for the work she does is shared by paralegal Jacque Vogel.

Vogel, who holds a law degree from the University of West Los Angeles, spent most of the past 25 years as a family law paralegal, but for the past two years has broadened her horizons and put her skills to work in probate and estate planning at Berman & Berman in Encino.

"I cut my teeth on law books and I like the challenge of the law," says Vogel, who credits her late mother, attorney Pearl Franklin Vogel, with inspiring her passion for law. In the 1980s, Pearl was active in the family law community and served as chair of the SFVBA Family Law Section. "I worked in her law office when I was growing up and came to like the camaraderie and realized how much I enjoyed helping clients solve their legal problems, whether it's in family law or probate."

> "I cut my teeth on law books and I like the challenge of the law." — Jacque Vogel

Over the years, Vogel has seen a lot of changes in the law, for example, the detail required in family law for preliminary declarations of disclosure and, in probate law, the adoption of electronic filing.

"Every area of the law morphs," she says. "In probate, the biggest change we've had is mandatory electronic filing . . . making sure the documents are in the correct format and that you get them filed. Paralegals have always had a responsibility to assist the supervising attorney with their knowledge and understanding of the law to research points of authority and prepare court pleadings. But today's paralegals must also possess the skills to handle the technological aspects of the court system."

"I feel good about giving back to the community by helping people when they most need it. I saw my mother do that when I was growing up. Helping people is part of who I am and there is great joy in being able to contribute to a case helping the client at a difficult time," Vogel says.

A Stepping Stone

Joseph Gualderon didn't want to jump right into law school after graduating from the University of Oregon with a degree in liberal arts, so after considering the cost of incurring a huge debt burden, he decided to obtain a paralegal certificate at UCLA Extension.

"It was a way for me to feel out the legal field without incurring the six-figure debt that law school incurs," he says. "I received my certificate and was able to secure a job about a month before I completed the course in June 2011."

Gualderon had an inkling from childhood that he wanted to be a lawyer, but he wanted to be "absolutely sure that that was what I wanted to do before committing so much."

Working as a paralegal at the Sherman Oaks firm of Nemecek & Cole, he says, "is perfect because I get to work with attorneys, see what they do, see how hard they work… from there, I was slowly but surely able to find out that I can do this… this is something I can handle. After my first couple of years, I started working on trials with these diligent individuals and this is what ultimately eliminated any prior apprehension of going to law school and fueled my desire to become on attorney."

Now attending Southwestern School of Law at night while continuing to work as a paralegal during the day, Gualderon credits his work with Nemecek & Cole with giving him a stable foundation for law school—namely, developing maturity and a work ethic, and becoming a better and more efficient time manager. "Working in litigation has provided me with a variety of invaluable knowledge in the legal field, from discovery to trial and everything in between."

What else has he learned along the way that he could pass on to neophyte paralegals?

"Emulate and study the habits of the lawyers you'll be working with; watch and learn how they do what they do," he says. "When I first started, I'd come into work at 9:30 or 10:00. Then I noticed the partner was at his desk at 7:00 every day, so I started to change my hours and found out I'd get a lot more done and could be a lot more efficient that way."

> "Working in litigation has provided me with a variety of invaluable knowledge." — **Joseph Gualderon**

Gualderon also advises the timid not to be daunted because "they aren't expecting the same things from you that they're expecting from a new attorney joining the firm, but nevertheless, be ready to step outside of your comfort zone. Have a positive demeanor and show them you're willing to learn; ask questions; and always say 'yes' when asked to do something. Utilize all the resources at your disposal to learn about the work, be proactive and don't just go through the motions."

Putting a Human Face on the Law

Several years ago, the Colorado-based Center for Legal Studies described paralegals as the "less-glamorized, unsung heroes of the judicial sector."

They are the ones who "create the ammunition for attorneys to take to the fight" and though their work can be repetitive and stressful, have the opportunity to help those they serve "in profound ways."

In their day-to-day work, paralegals are called upon to craft a close-up, personal view of complex, and often emotionally-charged, legal challenges—an experience, and the empathy it generates, that is of undeniably valuable benefit to the lawyers and clients they serve as it can go a long way in providing a more intimate, and less coldly analytical view of the law and its impact on the lives of real people.

They are, truly, the force behind the scenes.

The Virtual Paralegal

FOR MANY SOLO PRACTITIONERS AND SMALL FIRMS, EMPLOYING A TEAM OF—OR EVEN ONE—IN-HOUSE paralegals can be challenging and sometimes cost prohibitive. The ebb and flow of a firm's caseload often doesn't justify retaining a full-time paralegal year-round. In order to meet the needs of Valley lawyers, a local paralegal launched her virtual business in 2014 to provide legal assistance to attorneys when they need it, and within each case's budget.

Valarie Dean is founder and CEO of TechnoTaries, Inc. located in Tarzana, a company that works only with law firms in Southern California, providing virtual paralegal services.

"We're not a staffing agency, so we don't work in-house for attorneys," says Dean. "We're contracted by attorneys who want to outsource their paralegal work rather than hire in-house staff, or who use us to handle overflow projects when their in-house staff is overwhelmed. When attorneys contact me, we first discuss their area of practice and how TechoTaries can become an asset to their law practice, helping to relieve the workload. Many of our attorney-clients are solo practitioners and small law firms, with limited budgets for admin overhead. That's our niche."

Dean founded her company in 2014. Prior to that, she worked as an in-house paralegal, executive legal secretary and managed law firms for more than 30 years.

The company currently has five paralegals and works with attorneys located throughout Los Angeles and neighboring counties. "I like my company being local so that I can personally meet each prospective client, and be more hands-on. It also helps with picking up files and documents if needed. Our attorney-clients like the fact that we have a local presence, and that that we do not farm out any of the projects we handle."

The attorneys who reach out to Dean "are looking for someone who can prepare motions, pleadings, declarations, to free up the attorneys' time so they can go out and get more new clients and grow their law firm," she says. "We relieve them by handling those routine duties that an in-house legal secretary or paralegal would typically do."

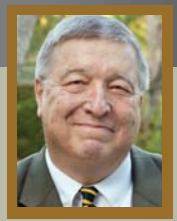
TechnoTaries' attorney-clients "specialize in various areas of law," says Dean. "Basically, attorneys are looking for someone who can draft legal documents, is professional and can work directly with their clients. For example, personal injury attorneys may have us work with their clients to prepare their discovery responses, while family law attorneys will have us handle Request for Orders and work with their clients to prepare supporting declarations."

The attorneys "that come to us for help are looking for a paralegal that is efficient, experienced in their particular area of law, and can work within their required deadlines."

"When I worked in-house for law firms, I was always that person who would take the overtime, and work on weekends," she says. "I developed a passion for the law when I initially moved to California in the '80s and worked for a solo practitioner who taught me everything. This was pre-computer age, when we ordered judicial council forms from the court and used carbon paper. That same attorney is now a TechnoTaries' client."

> "It's wonderful to work with people whose work product you trust." — **Valarie Dean**

Dean "fell in love with the law and progressed from there. You have to love what you do. When I started my company, I reached out to paralegals that I had previously worked with, who I knew had the same passion for the law and work ethics as I do. It's wonderful to work with people whose work product you trust."



Michael D. White is editor of *Valley Lawyer* magazine. He is the author of four published books and has worked in business journalism for more than 35 years. Before joining the staff of the SFVBA, he worked as Web Content Editor for the Los Angeles County Metropolitan Transportation Authority. He can be reached at michael@sfvba.org.

The Thorny Issue of Pre-Trial Bail: Legislative Remedy and Reform

By Christopher T. Armen

THROUGHOUT HISTORY, THE issue of bail has been at the center of discourse and debate of the nation's legal system. Both the U.S. and California Constitutions mandate that bail, pending trial, be both reasonable and not excessive—fundamental rights that trace their roots to the country's beginnings.

The Founding Fathers, weathered by, and weary of, abuses by the British king, were very much aware of the dangers of a criminal justice system that imprisoned its citizens for lengthy periods pending trial, with no recourse for release, absent acquittal at trial. Like all those that have struggled for justice through the centuries, they understood how the system could hurt the most marginalized and vulnerable in a society.

Indeed, since the founding of the United States, bail has been a topic of great legal contention, with key moments in the modern era providing insights into these debates. In 1791, the eighth amendment was adopted as part of the Bill of Rights, prohibiting, among other things, the imposition of excessive bail—a foundational legal moment, adhered to by our current court system for more than two centuries.

Current Bail System

The County of Los Angeles, like most others, currently has a bail schedule which sets the dollar amount the accused is required to pay, based on the specific crime, to be released from custody. This payment allows the individual to remain free while assembling a defense against the criminal charges against them.

The bail amount is a fixed dollar amount, which can be either increased or decreased by judicial authority based on individual circumstances. Only in rare occasions will a judicial officer deviate from the County's scheduled bail amount.

Typically, a bail bondsman charges 10 percent of the bail amount as his fee and guarantees to pay the whole bail if the defendant fails to appear in court. The fee is the cost to the defendant to obtain his release from custody. For example, where the Los Angeles County bail schedule calls for $100,000 bail for the crime the defendant is charged with, the fee that would have to be paid to the bail bondsman would be $10,000 to gain release pending trial. Persons with the financial means to do so can post the entire $100,000 bail amount and would not be required to pay a fee.

It's those characteristics that mark current bail practice and are among those that critics seek to contest and transform.

Justice for Whom?

Recent efforts to reform the bail system aim at promoting fairness and equity in our criminal justice system as bail schedules that are excessive and fairly rigid are seen to discriminate against the poor and people of color.

The right to a speedy trial in both felony and misdemeanor matters is

Christopher T. Armen has been a criminal trial lawyer for 36 years, representing persons accused of misdemeanor and felony offenses. Mr. Armen is co-author of a book on driving under the influence defense. He can be contected at ctarmen@aol.com.

set by law, but often persons charged with misdemeanors or minor crimes, who can't afford bail, will plead guilty so that they can avoid being jailed. Negotiated sentences can sometimes include reduced or waived jail time for some individuals, as opposed to others who, while waiting in custody for a trial, simply grow frustrated and plead guilty. This is especially true in misdemeanor cases, with some persons pleading out to a charge brought with weak evidence or in a case in which they may well be factually innocent.

All this is nothing new. In 1964, U.S. Attorney General Robert Kennedy testified before Congress that, "Every year in this country, thousands of persons are kept in jail for weeks and even months following arrest they are not yet proven guilty...they may be no more likely to flee than you or I."

The Attorney General's testimony spurred Congress to pass the Criminal Justice Act of 1964 and the Bail Reform Act of 1966, both pieces of landmark legislation that significantly shifted the nation's legal terrain. This created a presumption of release before trial for most federal defendants, and substantially reformed the money-bail system in federal proceedings. Only the United States and the Philippines currently use this money-bail system.[1]

Problems Associated with Current Bail System

Being incarcerated while awaiting trial can have significant detrimental impacts on the individual involved, even though under our criminal justice system innocence is presumed until guilt is determined in a court of law. For example, definitive research shows that pre-trial incarceration can exert undue pressure on an individual to plead guilty and be released from custody on bond.[2]

In addition, individuals are more likely to commit new crimes after their release based on the possible loss of parental rights, employment, vehicles, and housing, with pre-trial incarceration increasing the odds that the defendant will receive a comparatively longer sentence.[3]

Research shows there is a systematic disparity in how black and white accused persons are treated under the current bail system. The chances of bail being denied can be up to 25 percent higher for blacks and Latinos than whites.[4]

California has one of the highest bail amounts in the country, resulting in blacks and Latinos being half as likely to afford bail when compared to other groups.[5] Nationally, approximately 90 percent of individuals in jail awaiting trial cannot afford bail.[6]

Proponents of bail reform have long argued that the requirement that persons accused of crime and jailed be paid a large dollar amount to win their freedom pending trial has created a two-tiered system of justice—one for those who can afford bail and get released, and another for those that can't and remain incarcerated.

Current proposed legislation aims at lessening this disparity and creating a more equitable system for incarcerated individuals. Many members of the law enforcement community, including district attorneys and city attorneys, and the bail bond industry, among others, oppose such legislation, citing, among other concerns, the costs to the state and an increased risk to public safety.

Pending Legislative Reform

Earlier this year, two California state legislators—Senator Robert Hertzberg and Assemblyman Rob Bonta—introduced identical pieces of legislation, Senate Bill 10 and Assembly Bill 42, the California Money Bail Reform Act of 2017, that would "phase out excessive money-bail systems statewide for most misdemeanors and some nonviolent felonies."

The Legislative Counsel's Digest laid-out a summary of existing law, the intent of the legislature, and the legislation's requirements and mandates. According to the *Digest*:

- "Existing law requires that bail be set in a fixed amount, as specified, and requires, in setting reducing or denying bail, a judge or magistrate to take into consideration the protection of probability of his or her appearing at trial or at a hearing of the case."
- "This bill would state the intent of the Legislature to enact legislation to safely reduce the number of people detained pre-trial, while addressing racial and economic disparities in the pretrial system, to insure that people are not held in pretrial detention simply because of their inability to afford money-bail."
- "This bill would implement a revised pretrial release procedure. The bill would require, except when a person is arrested for certain felonies, that a pretrial services agency conduct a pretrial risk assessment on an arrested person and prepare a report that includes the results of the assessment and recommendations on conditions of release immediately upon the person being booked."
- "The bill would further require, if a person is in custody at the time of his arraignment, the judge to consider the report and any relevant information provided by the prosecuting attorney and the defendant, and to order the pretrial release of the person, with or without conditions, and requiring the person to sign a release agreement. If the judge determines that pretrial release will not reasonably ensure the appearance of the person in court, the bill would require the judge to set money-bail at the least restrictive level necessary, to ensure that the defendant appears in court."
- "Additionally, the bill would require each county to establish a pretrial services agency that would gather information on arrested persons, conduct risk assessments, prepare individually tailored recommendations regarding release options and conditions, and providing pretrial services and supervision to persons on pretrial release."[7]

Benefits of Bail Reform and Public Support

The proposed legislative reform of California's bail mechanism would reduce the likelihood that individuals are jailed pending trial simply because they cannot afford bail. It would also minimize racial and economic inequalities and deal with defendants using a more case specific approach.[8]

A recent survey found that over 72 percent of Californians polled strongly favored reforming both how and why people are held in jail awaiting trial,

including through money bail, as part of statewide efforts to reform California's criminal justice system.[9]

In addition, 92 percent polled support assessing each case individually, making release decisions based on the specific circumstances of each case, with almost eight out of every ten Californians polled believing in ensuring that bail is not set at a level that keeps individuals in jail based on their inability to pay.

The move to reform California's bail system runs parallel with the bipartisan efforts in Congress to reach the same goal on a national level, with Democratic Senator Kamala Harris of California and Rand Paul, Republican Senator from Kentucky, reaching across the aisle to co-author legislation to encourage states to consider alternatives to cash bail.

"Whether someone stays in jail or not is far too often determined by wealth or social connections, even though just a few days behind bars can cost people their job, home, custody of their children, or their life," the two senators wrote in a *New York Times* July 20, 2017 Op-Ed.

"This isn't just unjust. It also wastes taxpayer dollars," Harris and Paul concluded. "People awaiting trial account for 95 percent of the growth in the jail population from 2000 to 2014, and it costs roughly $38 million every day to imprison these largely non-violent defendants. That adds up to $14 billion a year."

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[1] ACLU of Northern California, Bail Reform Act of 2017.
[2] Shawn D Bushway and Jonah B. Belbach, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model*, 2011.
[3] Mary T. Phillips, New York City Criminal Justice Agency Research Brief No. 18, *Bail, Detention, and Felony Case Outcomes*, 7, 2008, www.nycja.org/library.php.
[4] Steven Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 CRIMINOLOGY 873, 2003.
[5] *Id.*
[6] Brian A. Reaves, U.S. Dept. of Justice, Bureau of Justice Statistics, Felony Defendants in Large Urban Counties, 2009—Statistical Tables, 2013.
[7] California Legislatures Council Digest for Senate Bill 10 and Assembly Bill 42, Analysis of the California Money Bail Reform Act of 2017.
[8] Jim Crogan, *A Defining Moment: Will California end its money-bail system*, www.salon.com, April 21, 2017.
[9] Ben Tulchin, Corey O'Neil and Kiel Brunner, Tulchin Research Polling and Strategic Consulting, Statewide Survey, May 30, 2017.

Acquiring a Business: Ins-and-Outs

By Kyla A. Parrino

DURING THE ACQUISITION of a business, either the assets of a company or the stock of a company are purchased. In an asset acquisition, the tangible and intangible property of the business are purchased and could include assets such as inventory, intellectual property, goodwill of the business, vehicles, and the business facilities. The particular assets being purchased and the assets which are being excluded from the sale are outlined in an asset purchase agreement, along with the particular liabilities the buyer will assume as a result of the purchase.

The asset purchase agreement also contains the representations and warranties of the seller. The representations and warranties are statements of fact by the seller—as of the date when the statements are made—the buyer may rely on those statements to be true.

Accompanying the seller's representations and warranties are the disclosure schedules, the legal documents which provide specific disclosures or exceptions to specific disclosures about those representations and warranties to the buyer. For example, one schedule may disclose a seller's pending litigation while another may disclose the seller's material contracts.

> "In an asset acquisition, the tangible and intangible property of the business are purchased and could include assets such as inventory, and the goodwill of the business..."

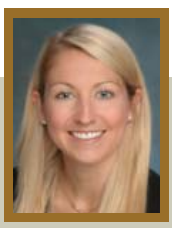
If a seller misrepresents representations and warranties to the buyer, the buyer will have an opportunity for recourse against the seller. In California, the asset purchase agreement, representations and warranties and disclosure schedules serve as unique legal documents which, if not negotiated and completed correctly, could well result in a variety of noisome legal consequences.

Survival Clause

The representations and warranties by the seller to the buyer in an asset deal provide a unique opportunity for the seller to disclose to the buyer both the positive and negative aspects of the business. The representations and warranties "serve as a safety net for the seller and buyer," and if discovered prior to closing, give the parties involved grounds to back out of the asset deal.[1]

Further, if a survival clause is included in the agreement, the representations and warranties contained in the asset purchase agreement can survive post-closing as well.[2] A survival clause exerts additional pressure on the seller to ensure that their representations and warranties are in fact truthful because it gives the buyer additional time to discover if there has been a breach.

If no survival clause is included in the asset purchase agreement, or if the clause is not properly drafted to conform to California law,



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the representations and warranties expire at closing.[3] In *Western Filter v. Argan, Inc.*, the court established the importance of properly drafting a survival clause to ensure that it is enforceable post-closing.[4] In that case, the court ruled that for a survival clause to be enforceable in California, the clause must explicitly state that the intent of the survival clause is to contractually reduce the statute of limitations period.[5]

If the survival clause does not state such intent, the survival clause is void and the buyer only has until closing to bring action for breach of the representations and warranties.[6] The survival clause helps the buyer by giving them more time to discover a breach of the representations and warranties post-closing, while it may also help the seller because it can shorten a statute of limitations period. Given that the representations and warranties are of such value to the buyer and seller in an asset deal and given that the courts have decided that a survival clause must be precisely drafted to conform with specific requirements in order to be enforceable, it is imperative to ensure that a well-drafted survival clause is included in an asset purchase agreement.

Non-Compete Agreements

In the context of an asset sale, another critical legal tool the buyer and seller may utilize is entering into a non-compete agreement—a contract between the buyer and employee, where the employee agrees not to compete with the business of the buyer for a period of time post-sale and upon termination of employment with the buyer, or if the employee quits.

Although in a majority of states reasonable non-compete agreements are enforceable, in California—subject to several narrow exceptions—non-compete agreements are generally unenforceable. California Business and Professions Code §16600 codifies that a contract which restrains an individual from "engaging in a lawful profession, trade, or business of any kind is to that extent void."[7]

One of the exceptions to this general unenforceability of a non-compete agreement is codified in Bus. & Prof. Code §16601, which refers to the sale of the goodwill of the business. It provides that a non-compete agreement is enforceable in the connection to the sale of a business if it is "limited to the area where the sold company carried on business" and if it is "to prevent the seller from depriving the buyer of the full value of its acquisition, including the sold company's goodwill."[8]

Often what makes a contribution to the profitability of a business are its key employees. If a business is sold and previous employees of that business

leave and begin competing with the seller, the seller loses part of the initial bargain.

For this very reason, California courts have upheld that non-compete agreements between the buyer and an employee were part of the asset sale that included purchase of the business' goodwill when it limits the employee to a specific geographic area.[9]

Real Property Lease Restrictions

Often, a business does not own all of the real property that it needs to operate, but instead rents its property and space from a third party. For this reason, the parties to an asset deal must review the seller's lease agreements to determine the restrictions, if any, of the contract.

If the buyer desires to assume the rental contract, it must examine and analyze the terms to determine if it can even be assigned to the buyer. Generally, the courts desire free alienability of property.[10] For this reason, California has codified many of the rules relating to the assignment of commercial leases. California Civil Code §1995.250 provides that a tenant's interest in a lease may be restricted by requiring the landlord's consent, so long as the landlord's consent is not unreasonably withheld and subject to express standards or conditions.[11]

One commercially reasonable restriction on a California commercial lease agreement is the inclusion of a rent recapture clause.[12] The purpose of a rent recapture clause is often utilized by the landlord in the context of an asset deal to reclaim the fair market value of a rental property when it is being rented to the seller for under fair market value. In an asset deal, the buyer desires to purchase the assets of the seller, often including an assumption of the seller's rental agreements. Without a rent recapture clause, the seller would be able to assign the lease to the buyer with the same rental terms, including the same under fair market value rental price.

The rent recapture clause effectively acts as an anti-assignment clause where, if the tenant assigns the initial lease to a third party, the landlord has the right to terminate and recapture the lease.[13] Although the landlord may choose to rent the property to the buyer, the rent recapture clause gives the landlord the ability to prevent the assignment if they so choose.

When analyzing the rental terms in an acquisition, it is critical to look for a valid rent recapture clause to determine if the seller will even be able to assign the lease.

Additional Considerations

Conducting an asset sale in California has many unique legal considerations. The concerns listed above have not even begun to scratch the surface of the issue. For example, regulatory matters related to Internal Revenue Service audits and a plethora of employment law matters predominate negotiations and affect many aspects of an asset deal. Pending litigation and Uniform Commercial Code liens may affect how an asset deal is negotiated.

Further, both California statutory and case law provide interesting obstacles that can affect how a deal is handled. The asset purchase agreement and disclosure schedules provide the basis of an asset deal; however, the content that can be found in these documents and the analysis that follows is what is truly important.

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[1] *W. Filter Corp. v. Argan, Inc.*, 540 F.3d 947 (9th Cir. 2008).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at 949.
[6] *Id.* at 952.
[7] CAL. BUS. & PROF. CODE §16600.
[8] *NewLife Scis. v. Weinstock*, 197 Cal. App. 4th 676, 689, 128 Cal. Rptr. 3d 538, 549 (2011).
[9] *Fillpoint, LLC v. Maas*, 208 Cal. App. 4th 1170, 1177, 146 Cal. Rptr. 3d 194, 199 (2012).
[10] *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 494, 709 P.2d 837, 840 (1985).
[11] CAL. CIV. CODE §1995.250.
[12] *Carma Developers (Cal.), Inc. v. Marathon Dev. California, Inc.*, 2 Cal. 4th 342, 376 (1992).
[13] *Id.*

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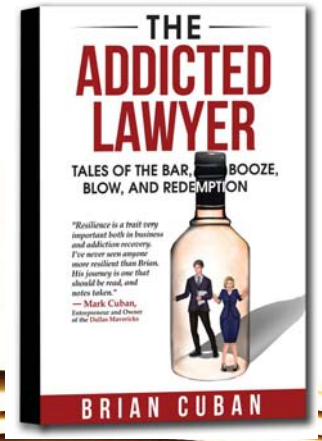

Addicted to More than Just Work

By Mark S. Shipow

WE KNOW THAT LAWYERS—and many other professionals—are often "addicted" to their work. Many of us also probably have the sense that some lawyers and other professionals are addicted to much more than just their work, relying on alcohol and drugs to get them through life.

Brian Cuban—the younger brother of Dallas Mavericks owner Mark Cuban and a graduate of the University of Pittsburgh Law School—confirms this, based on his own experiences, in-depth research studies, and anecdotes. His book, *The Addicted Lawyer*, is frankly stark reading and does a highly commendable job bringing what has developed into a very significant problem into focus.

Cuban certainly provides plenty to contemplate about the underlying reasons, effects and "cures" for substance abuse. Is substance abuse a choice gone wrong, or is it genetic, or the result of one's environment and societal pressures? Or some combination? What does it take to overcome the problem? Is there any permanent cure? Cuban offers insight into all of these issues.

In particular, while recognizing that taking the first drink and doing the first round of drugs might be seen as choices, he makes a pretty strong case that even early choices are influenced by underlying psychological issues.

Cuban expresses concern that society does not recognize that, even if the first step was a choice, the "disease and psychological process of addiction that took hold afterward were not choices." Society's notion that addiction is a choice all along the way, he writes, is stigmatizing and interferes with helping addicts overcome their addiction through medical and psychological help, rather than simply by "pulling themselves up" or "making better choices."

Similarly, he debunks the notion that recovery is "like bouncing back from sobriety after hitting some mythical 'rock bottom.'" Rather, recovery and repairing relationships are an ongoing journey.

Cuban's book is geared to attorneys, and the special demands of the profession that can lead to substance abuse—business travel, with its pressures and contrasting periods of loneliness and comradery (leading to hanging out with fellow addicts); the necessity of keeping client secrets and masking feelings and motives that can spill over into one's own personal life; the pressure to get positive results for clients; internalizing the traumas that clients experience; the culture of collegiality that causes lawyers to turn

Mark Shipow has been a member of the SFVBA Board of Trustees and is President-Elect of the Valley Community Legal Foundation. A 1979 graduate of UCLA Law School, he has his own practice handling commercial litigation, including disputes involving shareholders and partners, real estate and contracts. He can be reached at mshipow@socal.rr.com.

a blind eye when they see another lawyer displaying signs of emotional trouble or addiction; and the training that teaches we can "out-think, out-argue, and out-reason any problem," including addiction.

Of course, many of those in other professions face similar issues and addiction problems, and, as such, Cuban's book should not be limited just to lawyers alone. But his unique approach and language will resonate particularly with the legal community.

Cuban is rather brave to write an autobiography of this sort as autobiographies typically serve as an uplifting review of the high points of a person's life melded in with an occasional self-deprecating remark or anecdote to keep the subject seemingly real.

Cuban's book, though, is an eye-opening exception offering a brutally harsh review of decades of self-abuse and rash behavior, albeit with a couple of chapters of his quite monumental—and so far successful but continuing—efforts to pull himself out of the depths of depression and substance abuse. It can't be easy to so clearly and graphically display one's weaknesses, particularly when you have a famously successful older brother who Cuban refers to frequently in the book.

Cuban's stark and unvarnished self-revelation is a valiant effort to help others who are in the same position he was. I hope he succeeds, both in keeping himself clean and helping others change their lives.

At the least, everyone should read the book. It can serve as a lifeline either for those who are trying to come to grips with their addictive behavior, or as a guide for those who want to help floundering family members or friends. After all, as Cuban says, the critical turning point to recovery is getting the individual to recognize and admit there's a problem and that often requires an outsider's perspective.

The Addicted Lawyer certainly can help in that process.

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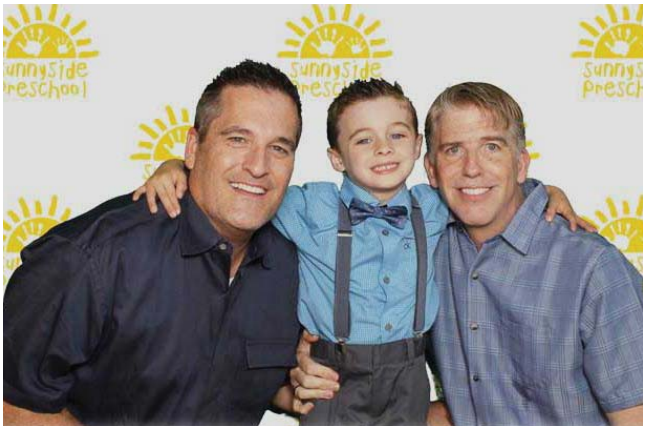
RYAN'S MOTOR SKILLS AND OVERALL development began regressing shortly after his second birthday. "We thought he might be slow and give it time," says Ryan's father Patrick Bromark. "He was speaking one to two words, no eye contact, tantrums, full care, a baby in an invisible bubble."

Overwhelmed and unable to find guidance, Patrick and Bob Prindiville, Ryan's parents, were advised to seek a professional speech and psychological evaluation, which confirmed their worst fear—Ryan was autistic with a severe speech developmental delay. He needed help, but this was only the tip of the iceberg for them.



They immediately began a desperate search for help and resources. "We knew very little, if nothing about autism, besides what we have seen on television and read in the newspaper," says Patrick.

After hours of research and questioning, they turned to The K.E.N. Project, a non-profit, organization based in Calabasas, which assists families with exceptional needs children.

"At The K.E.N. Project we found the light," Bob exclaimed. "I will never forget how welcoming and supportive Dina and Andrea were when we walked in to our first meeting."

Dina Kaplan is Executive Director of The K.E.N. Project, mother of a well-adjusted and remarkable teenager with multiple disabilities of unknown etiology, and a litigation attorney. Dina is an exceptional advocate for her son and has trained hundreds of families to be effective advocates for their disabled children. Dina also has seventeen years of experience representing families in due process hearings, mediation, resolution conferences and other administrative hearings.

Andrea Lorant, K.E.N. Assistant Director, serves as an advocate and educational consultant. She is the mother of three adult children, two of whom have special needs. Andrea has a Master's Degree in Educational Psychology and was a teacher with Los Angeles Unified School District for 13 years prior to starting her work with special needs families. Bob and Patrick were able to find assistance and advocates through The K.E.N. Project for Ryan to ensure that he receives the help and services he needs. Patrick remembered the relief he felt when he sat and listened to others in the group discussions as they went around the circle. "I thought, 'oh my God,' we are not alone."

Patrick and Bob enrolled Ryan in the Early Start Program. Patrick added, "When Ryan was four, and needed due process, Dina's outstanding knowledge and expertise advocated and successfully secured his services and supports as recommended by his doctors."

Patrick summed up the experience by expressing his and Bob's gratitude "to Dina and Andrea for their hard work, compassion, and dedication because without The K.E.N. Project, and their guidance and support, Ryan would not have made the amazing progress he has made and continues to make along his journey."

The K.E.N. Project, with the full support of the Valley Community Legal Foundation, "teaches parents the skills they need to deal with difficult situations that arise almost daily and provide functional, practical tips on being an effective advocate," says VCLF President, Laurence Kaldor.

ABOUT THE VCLF OF THE SFVBA

The Valley Community Legal Foundation—the charitable arm of the San Fernando Valley Bar Association—helps meet the legal needs of San Fernando Valley youth, victims of domestic violence, and veterans. The VCLF also provides educational grants to qualified students pursuing legal careers. The Foundation relies on donations to fund its work. To donate to the VCLF of the SFVBA or to learn more, visit *www.thevclf.org*. To reach The K.E.N. Project, contact (818) 222-8118 or specialkidslaw@gmail.com.

A New Face at the ARS

ROSIE SOTO COHEN
Director of Public Services

rosie@sfvba.org

PLEASE WELCOME OUR NEW SFVBA ATTORNEY Referral Service consultant, Miguel Villatoro.

A first generation Hispanic-American and Los Angeles native, Miguel was raised in North Hills, and graduated from the Northridge Academy. He later enrolled in a two-year program at Los Angeles City College, receiving an Associate degree in Paralegal Studies, as well as his paralegal certification, in 2015.

Bringing a wealth of knowledge to his new position with the SFVBA Attorney Referral Service, he has ten-plus years working in both the health insurance and legal fields, with a strong background in assisting potential clients in need at difficult times in their lives.

"With my legal background and customer service experience, I'll be able to effectively direct potential clients to the best attorneys on our panel," Miguel says. "Being able to help people in a time of need is my goal and priority. With the tremendous resources and opportunities that the Bar offers, I know I'll be able to accomplish that."

With a passion for helping others in need, Miguel enjoys investing some of his spare time volunteering at local food drives and animal shelters. Earlier this year, Miguel and several friends filled more than 100 bags with food and personal hygiene products for distribution to the homeless in the San Fernando Valley and Venice Beach areas.

"It feels great to help out people in need because there were times I was on the receiving end of some sort of help when I was a child," says Miguel. "I know that every little help you can get goes a long way."

In addition to his duties as a referral consultant, Miguel will also take on the role of Case Manager, with responsibility for insurance renewals and case status updates.

In the short time Miguel has been at the San Fernando Valley Bar Association, Miguel has been able to assist a number of clients. "We do a great public service by being able to direct clients to our attorneys where they can received the help they need," he says. "I've received return calls from clients thanking us for the services we provided, as well as compliments about the attorneys they were referred to."

Miguel's goal is to continue his education and, eventually, enroll in law school to "help out people in need."

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