VALLEY LAWYER

OCTOBER 2022 • $5

A Publication of the San Fernando Valley Bar Association

Meet New SFVBA President, Matthew A. Breddan

Data and Equity: Avoiding an Endless "You-Loop"

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A Publication of the San Fernando Valley Bar Association

On the cover: *SFVBA President, Matthew A. Breddan*
Photo by Ron Murray

FEATURES

CORRECTION: On page 28 of the September issue of *Valley Lawyer*, we incorrectly referred to SFVBA Immediate Past President Christopher P. Warne as 'Chris Warne.' We apologize for the oversight.

DEPARTMENTS

VALLEY LAWYER

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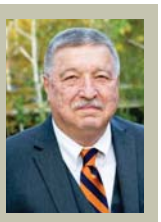

michael@sfvba.org

CIVIL DISCOURSE IS DEFINED as "*the engagement in discourse, or conversation, intended to enhance understanding; civil discourse exists as a function of freedom of speech. It is discourse that supports, rather than undermines the societal good*."

A lofty concept, indeed, but the tragically sad fact is that civil discourse has become a rare commodity in today's heated political and social environment with an Orwellian cancel culture mindset that has rendered the wearing of a hat or an online difference of opinion a perfectly acceptable reason to punish or even destroy someone and render them anathema.

Recently, the mayor of Inglewood, California, kicked of the regular city council meeting with a stern warning to public speakers that if they made "*disparaging remarks*" about the council they would have their mics muted and could face arrest by the police.

Sadly, so many examples, but here's just a couple: some 20 major national retailers have taken a pillow manufacturing company's products off their shelves after the firms's CEO publicly had the audacity to question the electoral results of the 2020 presidential election.

One more…actress Gina Carano, who starred in the first two seasons of *The Mandalorian* television program was fired from the show for daring to post o+n social media an image—deemed "*abhorrent and unacceptable*" by the show's producers—from Nazi Germany and compared it to today's overheated political climate.

It was reported that the producers weren't offended by Carano's opinion about the current state of affairs, but instead were outraged by her display of a photograph that contained a Nazi swastika.

This is nothing new. In fact, it's millennia old. The ancient Mesopotamians originated what has come to be known as *Damnatio Memoriae*—the literal erasing of any memory of a person who has violated the 'norm' or crossed paths with those in power.

Statues or mural images of '*offenders*' had their faces obliterated; official documents had any mention of their names excised; and, in some cases, any mention of their names could mean a death sentence. They were rendered '*unpersons*' a la 1984.

The Romans practiced it; so did the Egyptians, the Greeks, the Venetians, the Nazis, the Fascists, and now, us.

Not to be outdone, the Communists also practiced the art of memory erasure.

There are dozens of examples of the dictator Joseph Stalin ordering the retouching of photographs to remove individuals who he considered his rivals. In one such case, after having Marshal General Grigory Kulik executed, Stalin ordered all images of Kulik's wife erased.

The purge was so successful that, to this day, no one knows what the woman looked like.

There was more. Following the 1953 arrest and execution of Lavrenty Beria, the head of the NKVD—the Soviet secret police—the editor of the 65-volume Great Soviet Encyclopedia mailed subscribers to the second edition a letter instructing them to cut out and destroy the three-page article on Beria and "*paste in its place the enclosed replacement pages*" that expanded expanding the adjacent articles on F. W. Bergholz (an 18th-century courtier), and the Bering Sea.

Actor Rowan Atkinson hit it on the head comparing cancel culture with a "*medieval mob looking for someone to burn*." For what it's worth, I concur.

For the sake of all we hold dear, perhaps those inclined should douse their torches, stow their pitchforks, and learn to live in a world where everyone else doesn't think, act, look, vote, or view the world the way they do.

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Good luck and happy bidding!

CALENDAR

OCTOBER 2022

SUN	MON	TUE	WED	THU	FRI	SAT
NATIONAL HISPANIC HERITAGE MONTH (September 15-October 15)						1
2	VBN 3 Returning Live and in Person Soon!	ZOOM MEETING 4 Editorial Committee 12:00 NOON	5	6	7	8
9	10	WEBINAR 11 Probate and Estate Planning Section *GAL and CAC – the Intersection of Differing Methods to Effect Adequate Representation in the Courthouse* 12:00 NOON Presenters Lawrence M. Lebowsky and Adam Streltzer will discuss GAL and CAC and the relation to courtroom representation. (1 MCLE Hour)	12	ZOOM MEETING 13 Membership and Marketing Committee 6:00 PM	14	15
16	17 ZOOM MEETING Mock Trial Committee 6:30 PM	WEBINAR 18 Taxation Law Section *The Corporate Transparency Act* 12:00 NOON Attorney/CPA Stuart Simon will discuss the compliance and reporting requirements under the Corporate Transparency Act. These onerous reporting requirements which may go into effect in late 2022 or early 2023 will require business entities to report their ownership structures. Once the forms are released and the compliance is implemented, this act will have broad application to small and medium sized business entities. A must attend for the professionals representing business owners. (1 MCLE Hour)	Board of Trustees 6:00 PM	FREE TO MEMBERS! SAN FERNANDO VALLEY BAR ASSOCIATION — All Section WEBINAR Mediation – Why Threats and Power Fall Short! Wednesday, October 19 12:00 NOON Sidney Kanazawa of ARC (Alternative Resolution Centers) will review what we learned during the pandemic and the effects it has had on mediation. Free to all members! (1 MCLE Hour) REGISTER NOW https://members.sfvba.org/calendar/signup/MjQ3MQ== THE SFVBA IS A STATE BAR OF CALIFORNIA APPROVED MCLE PROVIDER.		
23	24	25	WEBINAR 26 Business Law Section *1031 Exchanges* 12:00 NOON Greg Burns will share the latest on 1031 Exchanges. (1 MCLE Hour)	27	28 WEBINAR Bankruptcy Law Section *Dischargeability of Taxes in Bankruptcy* 12:00 NOON Hon. Robert Kwan and attorney David Reeder will outline dischargeability in relation to taxes. (1 MCLE Hour)	29
30		Save the Date SAN FERNANDO VALLEY BAR ASSOCIATION & VALLEY COMMUNITY LEGAL FOUNDATION Installation Gala THURSDAY | NOVEMBER 17 PORTER VALLEY COUNTRY CLUB | NORTHRIDGE See ad on page 17				

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) 227-0495 or events@sfvba.org. Pricing discounted for active SFVBA members and early registration.

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 16.

By Lisa Miller

Data and Equity:

Avoiding an Endless "You-Loop"

The ostensible goal of surveillance capitalism is to fuel the creation of better products, drive better inventory control, and personalize customer service.

OUR SOCIETY PRODUCES 2.5 quintillion bytes of data daily, which doubles every three years.[1]

As a result of this non-stop information tsunami, data is increasingly driving our futures as three of the top four highest-valued companies in the world focus on technology—Apple, $2.36 trillion; Microsoft, $1.2 trillion; and Alphabet/Google, $1.5 trillion are, respectively, ranked Nos. 2, No. 3, and No. 4 globally in market capitalization.

Facebook, No. 8 in market capitalization at $5.72 billion;, Alphabet/Google, and Amazon, No. 8 in market capitalization at $1.13 trillion are all versions of the so-called surveillance capitalism business model.[2]

Surveillance Capitalism

An economic system that commoditizes the mass aggregation of personal data for private sector business profit, the ostensible goal of Surveillance capitalism is to fuel the creation of better products, drive better inventory control, and personalize customer service.

Surveillance capitalism fueled the top seven global tech companies to add a total of $3.4 trillion to their collective valuation in a single year.[3]

Data continues to play the central role in the astronomical rise of the influence of tech companies, most of which have some iteration of the big data business model as they exploit user data for profit.

However, although surveillance capitalists ingest personal user data for profit, this profit doesn't necessarily return to the community from which it is farmed.

When individuals or teams work with large datasets, they make decisions with equity implications that can be utilized to disenfranchise and harm, while data equity displays concern for how the information is gathered, used, protected, and preserved.

Because research drives decisions, data gathering without data equity considerations results in inaccurate information that causes sometimes irreparable damage. This is why the manner in which research is executed,

"Although surveillance capitalists ingest personal user data for profit, this profit doesn't necessarily return to the community from which it is farmed."

and how data sets from the results are created, has far-reaching consequences.

Data is more than just bits of aggregated information. It is a powerful global influencer.

Data Equity

A viable commitment to equity, fairness, and access, data equity considers how data is collected, analyzed, interpreted, and distributed.

It weighs data privacy, big data, and decision-making that results from our culture's increasing trend toward "*datafication*,"encompasse s power and privilege, knowledge equity, and the ways that decisions are justified based on data.

Data equity also analyzes issues of data sovereignty, the democratization of data, and the ways that data reinforce stereotypes, furthers racial bias, and interferes with social justice.

It considers marginalized communities' unequal opportunities to access, use, and benefit from data as well as harm from misuse of data.

Data is not objective and numbers themselves are neutral, but they don't function in a vacuum. It is collected, analyzed, interpreted, and distributed by people with personal biases with project goals, queries, and framing are inevitably informed by these individual perspectives.

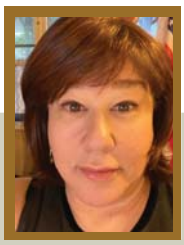
For example, interpretation bias can lead to research results being selectively valued or dismissed as data can create and perpetuate power dynamics.

As a result, knowledge can also create power imbalances, and it is important to remember that statistics aren't inherently biased, but the people involved in compiling them make choices.

Some communities may have less access to data than others and institutions should be sensitive to power dynamics and seek opportunities for equity in their data projects.

Research, thus, must consider whose voice is shaping the narrative.

If these choices are not thoughtful, they can reinforce their own perspective and affect the data and the decisions based on it as institutions could be overlooking insights from affected communities



Lisa Miller is an administrative judge hearing and deciding tax controversies. Based in Seattle, Washington, she lectures throughout the US and EU on administrative law. The ABA recently published her practice guide *Art of Advocacy in Administrative Law and Practice*. She can be reached at Lisa@LMillerConsulting.com.

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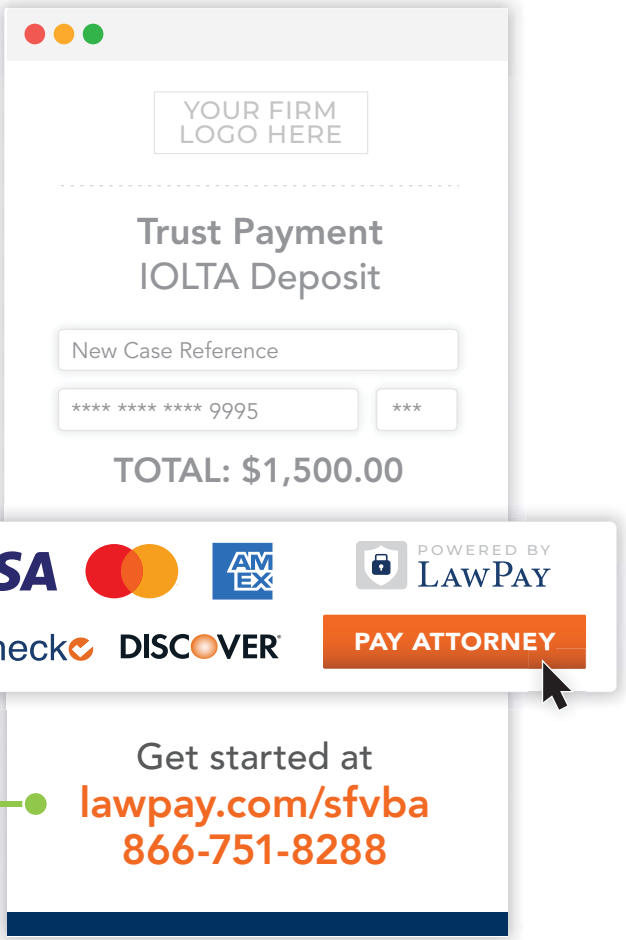

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because the voices of those communities are not at the table where conversations about research occur.

If institutions do not value community voices as reliable experts, institutions could be accepting partial information as the total picture.

To counter this, researchers can seek partnerships to secure information about research options, methods, inputs, costs, benefits, and risks.

Misuse of data can cause harm, especially around racial bias and reinforcing stereotypes.

As a result, organizations should consider what tangible value is generated, for whom, and at what cost.

Data as Decision Driver

Data is creating a knowable future.

The rate at which we can predict the future is accelerating as rapidly as the Internet is expanding.

Researchers need to demonstrate that the data they are producing is reliable and created as part of a process informed by a trio of benchmarks—awareness, intentionality, and equity.

Systems analyze data in the context of stored information to extrapolate a pattern, which can be used to predict outcomes, and data scientists and analysts now make credible predictions and providing detailed scenarios.

For example, Google is a sophisticated prediction engine with 28 percent of its revenue flowing from AdSense, which displays different advertisements for different viewers, keyed to each viewer's past or current searches, which is a predictive function.[4]

Google leverages viewer data to extrapolate trends in human activity to predict future activity. It's data aggregation and resulting predictive power have direct effects such as querying activity around particular companies can predict stock price increases.

Crafting Equity Goals

Issues that researchers should consider when crafting equity goals for data projects include:

- Funding—Sensitivity to the relationship among data, resources, and power. Data is a source of power and a valuable commodity. The authority structures of data projects should be apparent and evaluated, then adjusted to help achieve equity goals.

- Motivations—Define "*equitable*" and how the concept will be applied. Define primary and secondary internal/private objectives and be clear about what the institution hopes to get out of its data projects.

- Project Design—Determine priorities when deciding among methodologies. Craft unbiased queries and implement perspectives beyond an individual's own experience.

- Data Collection and Sourcing—Set equity standards and determine how, when, and where to get data.

- Analysis—Disconnect decisions from a particular worldview. Institutions should make data decisions transparent and intentional.

- Interpretation—Create data interpretation frameworks that are transparent, intentional, equitable processes. Interpretation teases meaning from results. Interpretation frameworks should show how equity, motivation, project design, data quality, and data analysis factor into findings.

- Communication & Distribution—Explain equity standards at each

step. Institutions should design data project approaches that connect content, design, medium, and accessibility to an institution's definition of equity.

Thanks to artificial intelligence and machine learning, an increasing number of decisions are now made by machines.

However, many datasets/databases lack diverse data, so decisions based on them could possibly be biased with the ironic result that whiz-bang AI and machine-learning algorithms limit the value of their own product.

The Future of Data Equity

Our increasing levels of datafication means the future is becoming increasingly knowable. Often, the future as an idea shapes current behavior.

The Internet carries this phenomenon into our daily lives with endless Web personalization has resulted in what users have "*clicked on*" in the past determining what substantive search results and advertising users see next. This is called "*information determinism*."

The future's orientation around data and predictive algorithms means viewers can get stuck in an endless "*you-loop*"—a seemingly endless web browsing *Groundhog Day* that internet users are doomed to repeat over and over again.[5]

It endlessly reinforces a narrow personal viewpoint, especially misleading because we expect the Internet to produce dispassionately sourced search results.

This, in reality, is antithetical to quality data projects because it can influence data interpretation—the future tail is wagging the current dog.

Some suggested best practices:

• Break data projects into manageable parts and apply the data equity process to each discrete decision. Identify places in data projects where humans prioritize personal experiences and make these acts intentional, so they achieve equity goals.

• Request consent to gather data, explain why it is needed, how it will be used, how it benefits communities, and how it will be protected: reinforce confidentiality.

• Be transparent about data's origins, the methods used to collect and analyze it, research and data choices, the reasons behind them, and the motivations and goals of the project. Seek feedback from target communities regarding what data would be helpful.

• Account for intersectionality in race, ethnicity, disability, LGBTQ+, language, nationality, gender, etc.

It is critical to understand that data drives decision-making and resource allocation now and in the future in public policy and private industry both locally and globally.

It predicts the future and influences the present, and, because data is such a pervasive factor, data equity principles should always be put into play when sourcing, aggregating, interpreting, and communicating data.

[1] https://www.lighthouselabs.ca/en/blog/everyday-uses-of-data-you-ve-never-thought-about#:~:text=Currently%2C%20there%20are%202.5%20quintillion,inspiring%20the%20world%20around%20us. (Last visited September 6, 2022).
[2] https://companiesmarketcap.com/ (last visited September 6, 2022).
[3] https://www.cnbc.com/2020/12/31/techs-top-seven-companies-added-3point4-trillion-in-value-in-2020.html. (Last visited September 6, 2022).
[4] https://www.pewresearch.org/internet/2012/07/20/the-future-of-big-data/ (Last visited September 6, 2022).
[5] https://www.pewresearch.org/internet/2012/07/20/the-future-of-big-data/. (Last visited September 6, 2022).

Data and Equity: Avoiding an Endless "You-Loop"

Test No. 168

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. Three of the top four highest-valued companies in the world focus on technology
   ❑ True ❑ False
2. Surveillance capitalism is an economic system that commoditizes the mass aggregation of personal data.
   ❑ True ❑ False
3. One of the goals of surveillance capitalism is private sector profit.
   ❑ True ❑ False
4. Surveillance capitalism can spur better consumer products and personalized customer service.
   ❑ True ❑ False
5. None of the large technology companies have a big data business model.
   ❑ True ❑ False
6. When organizations work with large datasets, they are insulated from the equity implications of data-related decisions.
   ❑ True ❑ False
7. Data equity is caring about how data is gathered, used, protected, and preserved.
   ❑ True ❑ False
8. Because research drives decisions, data gathering without data equity considerations can cause harm.
   ❑ True ❑ False
9. The manner in which research is executed and how data sets from the results are created generally does not have consequences.
   ❑ True ❑ False
10. Data is no more than random bits of information.
    ❑ True ❑ False
11. Data equity is a commitment to equity, fairness, and access.
    ❑ True ❑ False
12. Data equity considers how data is collected, analyzed, interpreted, and distributed.
    ❑ True ❑ False
13. Data project framing is separate and unaffected by individual Perspectives.
    ❑ True ❑ False
14. Data generally cannot perpetuate power dynamics.
    ❑ True ❑ False
15. Knowledge can create power imbalances.
    ❑ True ❑ False
16. Researchers should seek partnerships to secure information about research methods, costs, benefits, and risks.
    ❑ True ❑ False
17. Misuse of data can cause harm around bias and stereotypes.
    ❑ True ❑ False
18. The future is becoming increasingly knowable.
    ❑ True ❑ False
19. Predictive algorithms trap readers in an endless "*you-loop*."
    ❑ True ❑ False
20. Information determinism means that what users clicked on in the past determines what substantive search results and advertising users see next.
    ❑ True ❑ False

Data and Equity: Avoiding an Endless "You-Loop"

MCLE Answer Sheet No. 168

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
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14.	❑ True	❑ False
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18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False

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By Michael D. White

Meet New SFVBA President, Matthew A. Breddan

A native New Yorker, Matthew A. Breddan came to the San Fernando Valley in 1983 and attended El Camino Real High School in Woodland Hills before completing his undergraduate degree in criminal justice and earning his JD from the University of La Verne College of Law.

Photos by Ron Murray

NATIVE NEW YORKER, MATTHEW A. BREDDAN'S family divorced when he was young and several years later his family moved West to settle in the San Fernando Valley in 1983.

"I attended El Camino Real High School in Woodland Hills before completing my Bachelor of Arts in Criminal Justice with a minor in Sociology from California State University Fullerton," says Breddan, who was recently elected to lead the San Fernando Valley Bar Association through the upcoming year.

"My family is very important to me," he says. "I have a younger sister, a Nurse Practitioner in Oregon, who I am very proud of. I am also very devoted to my children and am incredibly proud of their accomplishments."

After earning his Juris Doctorate from the University of La Verne College of Law, he launched his career in the law eventually starting his own practice in the San Fernando Valley, focusing on family law issues including divorce, paternity, establishing parental rights, child custody and visitation, child support, and domestic violence restraining orders.

In December 2013, Breddan joined The Reape-Rickett Law Firm as a Shareholder and became head of the Calabasas office.

Elected to the Association's Board of Trustees in 2016, he was re-elected to a second term and, four years later, was elected Secretary.

In addition to his work in the legal community, he has served as a board member of Haven Hills, a domestic violence organization, and has participated in community outreach and education to support domestic violence survivors.

HOW WOULD YOU SAY YOU'VE GOTTEN WHERE YOU ARE TODAY?

"My faith, my family, and my firm. I have had a tremendous support system throughout my professional career."

WHY DID YOU CHOOSE THE LAW AS A PROFESSION?

"I chose to become a lawyer as a backup plan. Initially my plan was to become a police officer. I chose to become a lawyer because I didn't want to have my family worrying when I went to work.

"Upon entering the legal profession, I initially wanted to be in the district attorney's office but found my way to family law."

WHAT INSPIRED YOU TO BECOME A FAMILY LAW ATTORNEY?

"That's kind of funny. I was not 'inspired' to become a family law attorney, initially I didn't want to practice family law. It's the path that I found while "wandering."

WHAT IS IT ABOUT BEING A LAWYER THAT YOU ENJOY? FIND CHALLENGING?

"I enjoy the problem-solving aspect of being a lawyer. In family law there are often a plethora of complex and competing problems and I like trying to find creative solutions to help families in crisis. "Additionally, although I do attempt to settle every case when possible, I also enjoy the trial and courtroom work."

WOULD YOU TAKE THE SAME CAREER PATH IF YOU HAD TO DO IT ALL OVER AGAIN?

"That's hard to say. There were other career paths that I did entertain undertaking. However, since I didn't go in that/ those directions, I can't really say."

WHAT WOULD YOU BE DOING PROFESSIONALLY IF YOU WEREN'T AN ATTORNEY?

"I would have likely gone into law enforcement. Over the course of my career, I was also an adjunct professor at L.A. Valley College which I thoroughly enjoyed so that could be another option if I wasn't an attorney."

HOW WOULD YOU DEFINE YOUR PHILOSOPHY OF LEADERSHIP?

"My leadership philosophy is essentially "all hands-on deck" so we all work together for the common good.

"A well organized and coordinated team can accomplish more when working toward the same goal than one individual. Additionally, I believe it is important to lead by example."

WHEN YOU JOINED THE SFVBA WAS YOUR GOAL TO BECOME THE PRESIDENT?

"Short answer…no. I joined the SFVBA as a younger attorney to seek mentorship and access many of the

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 40 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.

benefits of being a member such as research tools, CLE events, and networking opportunities.

"As time passed and I became more familiar with the organization, I started thinking about joining the leadership tract and how I can help strengthen the Bar."

WHAT CAN BE DONE TO REPOSITION THE BAR AS A LEADING ORGANIZATION AS WE EMERGE FROM THE PANDEMIC?

"I believe we need to raise and enhance the Bar's presence in our community so that we are viewed as leaders in the legal community. The Bar needs to provide CLE and organize events that excite and inspire our membership.

"Additionally, we need to be far more accessible to our members and our other local bar associations to build relationships and opportunities. We also need to be more involved in the local bench, so that we can provide programs and services that bring the bench and Bar closer together."

WHAT GOALS WOULD YOU LIKE TO SET FOR THE BAR DURING YOUR TENURE?

"In addition to the aforementioned, one of my primary goals is to continue rebuilding to make this Bar as successful as it once was. The pandemic was a devastating period for this bar, not only financially, but also organizationally.

"Our leadership and members have made tremendous efforts to help us weather the storm, so we are coming out of it full steam ahead, including recently organizing some of the most successful and well attended events in the Bar's almost 100 year history.

"I intend to build upon this foundation so that our membership receives the highest quality opportunities for professional development and networking as well as elevate the Bar's presence."

WHAT DO YOU FEEL ARE THE BAR'S STRENGTHS?

"One of the Bar's strengths is, of course, its members. Our membership is comprised of a very diverse group of professionals, both lawyers and non-lawyers, who bring a wealth of information, experience, and ideas that push the Bar forward.

"We also have some amazing sections and section leaders, without whom we would be in serious trouble"

> My faith, my family, and my firm. I have had a tremendous support system throughout my professional career."

WHERE WOULD YOU LIKE TO SEE THE BAR A YEAR FROM NOW WHEN YOU LEAVE OFFICE?

"As our legal community and organization continue to adapt to an evolving environment, I would love to see the bar on a path to prosperity to ensure a strong and stable future.

"Additionally, I would like to see the Bar's profile continue to grow and build upon our strong reputation so that we are well respected by the bench, our membership, and other bar associations."

IN ADDITION TO SERVING THE BAR YOU ARE ALSO INVOLVED WITH OTHER COMMUNITY ORGANIZATIONS, WHAT MOTIVATES YOU TO BE SO INVOLVED WITH VARIOUS COMMUNITY CAUSES?

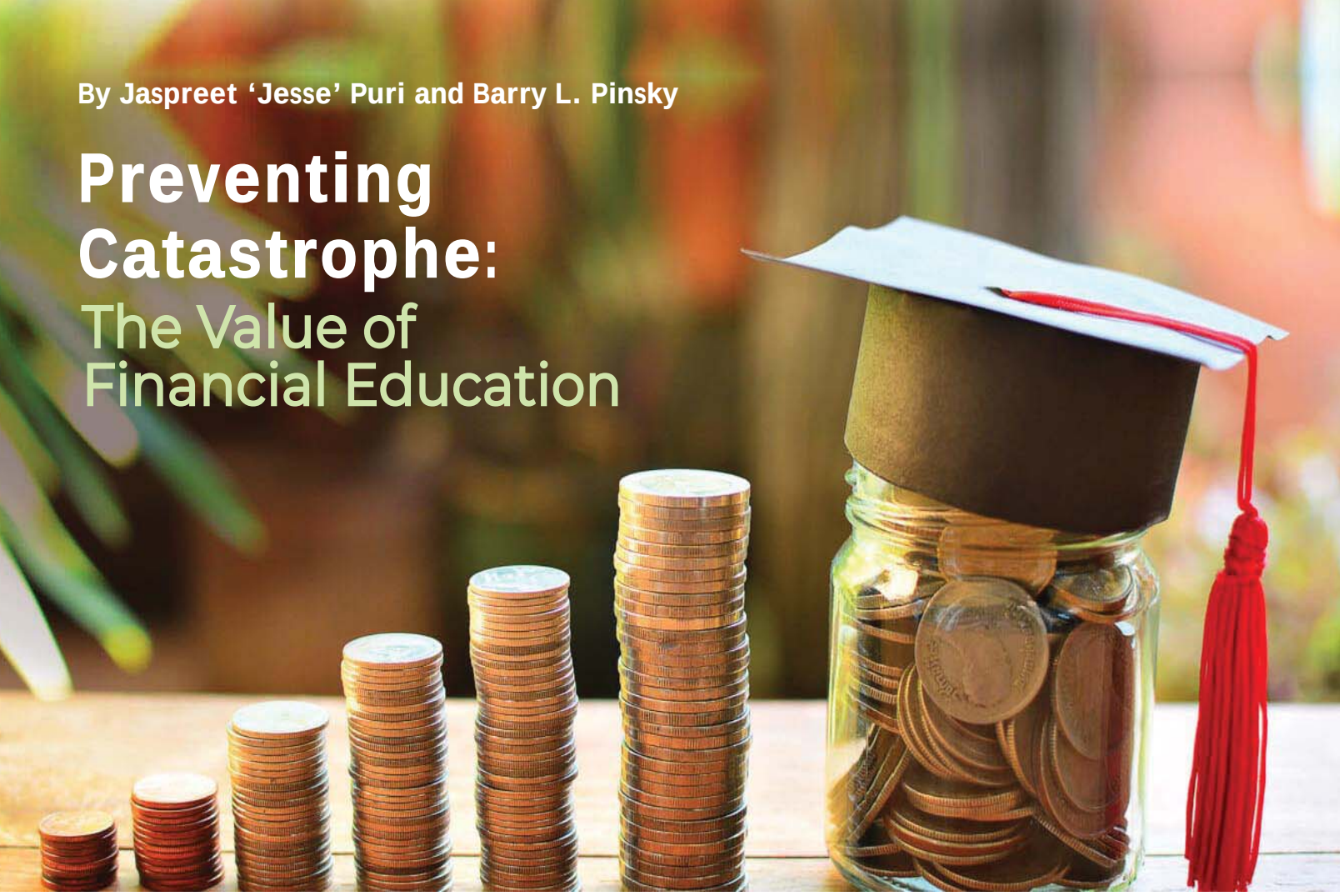
"For the past several years I have served on the executive committee for Haven Hills, a domestic violence agency, and I'm presently serving the organization as their Vice President.

"I have also participated in educational and outreach efforts for domestic violence survivors as well as client advocates to provide critical information to help survivors navigate the legal landscape.

"In addition to dedicating my time to supporting domestic violence survivors I am also very active in my church and with the American Red Cross, often hosting blood donations to support my community. "Giving back to and supporting my community is as important in my personal life as it is in my professional life and all of these entities help me 'fill the tank' if you will."

By Jaspreet 'Jesse' Puri and Barry L. Pinsky

Preventing Catastrophe:
The Value of Financial Education



PROBJOT PURI AND HIS YOUNG WIFE CHANBIR left their home in India in 1986 and journeyed to the United States with the hope of a new life in a new land, a dream shared by so many immigrants.

Originally, they settled in Ventura County, and in 1987, their first child, Jaspree—later nicknamed Jesse—was born.

Shortly thereafter, they moved to the San Fernando Valley to establish roots and build a family, and Jesse's younger sister Leena arrived. Probjot found a position working for Lamps Plus, and Chanbir went to work as a bank teller.

After moving to the Valley, Probjot and Chanbir purchased a modest single-family home, anticipating a stable, American future for their growing family.

Unfortunately, that measure of stability was short-lived.

The Cost of Being Unaware

As recent immigrants, they were unschooled in the intricacies of the U.S. financial system and its services.

In purchasing their home, they had committed to accepting an adjustable-rate mortgage (ARM) without understanding the full implications of potential rate increases.

An ARM may serve the needs of a limited time horizon and flexible financing terms, but, in fact, may be inappropriate for certain circumstances requiring a longer time horizon and a stable payment protocol.

Unfortunately, they found themselves bound to an ever-increasing monthly mortgage payment which quickly far outstripped their combined incomes.

As a result, refinancing their home was not an option in light of their salaries.

With his income limited by his entry-level status, and his mortgage costs spiraling out of control, Probjot soon ran out

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of options. The property was foreclosed, and the home was lost to the finance company.

With the loss of the home, the cherished memories and the dreams of a bright, stable family life were snatched from the household.

The root cause of the disaster? A lack of understanding of the terms of the financing structure and a want of knowledge regarding the rudiments of the U.S. finance system.

The ramifications of the family's loss echoed through many difficult future circumstances, namely the immediate need for the family to find a new residence and relocate all of their possessions.

Fortunately, a family friend helped provide an affordable small apartment, but all equity in the home was lost, their credit status and ratings deteriorated significantly, and years passed before the family could once again afford to purchase another house.

However, the bitter lessons of financial distress did not go unheeded.

Probjot committed himself to learning all he could concerning the intricacies of America's financial institutions.

Studying the available popular literature, asking friends for advice and guidance, faithfully rebuilt his credit status, eventually he was able to purchase a new home for his family after retiring the mortgage in a mere seven years.

> "The root cause of the disaster? A lack of understanding of the terms of the financing structure and a want of knowledge…"

Uncommon Confusion

Unfortunately, the experience of the Puri family is not rare.

Most recently, during the financial crisis of 2007 and 2008, the prevalence of sub-prime and predatory lending led to millions of foreclosures, the impact of which persists to this day.

Many of the home purchases made in the early to mid-2000's were financed under terms which could never have been rationalized with a proper appreciation of basic financial literacy and a modicum of planning.

While many factors contributed to the financial meltdown of 2007 and beyond, much blame can be attributed to a lack of understanding of basic financial principles as initially temporary low interest rates enticed many uninitiated investors to explore real estate purchases and speculation.

The stark fact is that adjustable mortgage rate products build in the risk of rising rates escaped millions of borrowers.

The failure of many predatory lenders to perform legitimate credit checks led many borrowers to assume that credit-worthiness was unnecessary.

The expenses involved in property ownership were not well understood by many purchasers as the requirements for insurance, property tax payments, property upkeep, and potentially rising mortgage carrying costs all weighed on the pocketbooks of the mortgagees.

The truth is that the intricacies and complexities of sophisticated financial instruments managed by major financial institutions are way beyond the scope of those not in the finance profession and few of us are adequately knowledgeable in the minutia of the subject.

Live and Learn

However, within the spheres of our own lives and influence, much can be achieved through basic financial literacy and education.

While Probjot and Chanbir Puri suffered significant hardship as a result of their unfamiliarity with the nation's financial landscape, they were able to recover their bearings and ultimately succeed through careful study, education and application of fundamental principles.

Their son, Jesse, took these lessons to heart in his own career planning—following his own education at California State University at Northridge, financed in part by his employment at a local bank, he entered the retail financial services industry helping individuals and small businesses navigate their way through what is an often overwhelming complex financial planning environment.

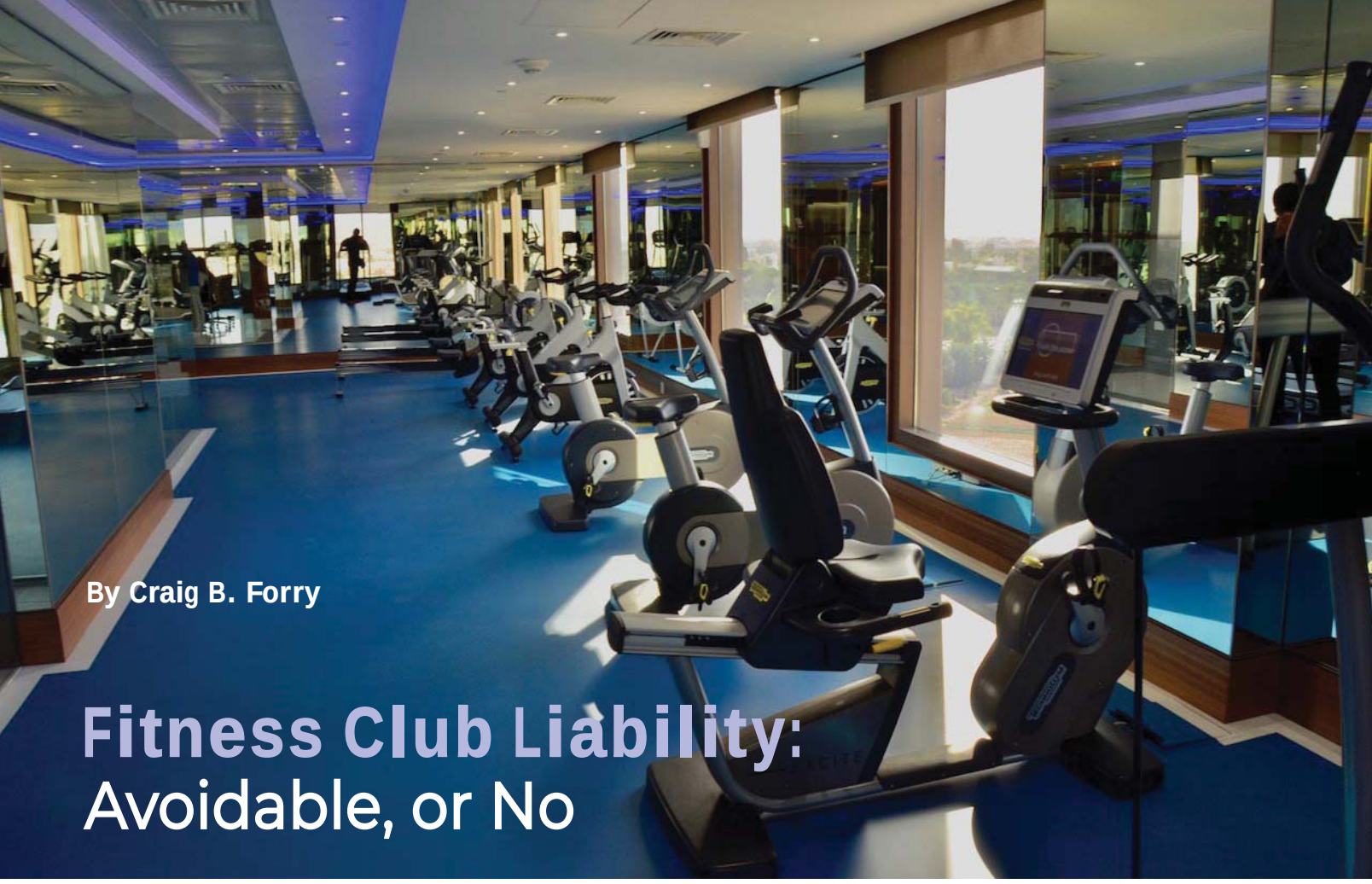
He also has committed substantial time and energy to financial education and mentoring of local high school students in order to help them avoid the potential pitfalls which plagued his family in their early days as immigrants to the U.S.

The former Chairman of the Federal Reserve Board, Alan Greenspan, stated, "*Children and teenagers should begin learning basic financial skills as early as possible. Indeed, improving basic financial education in elementary and secondary schools can help prevent students from making poor decisions later, when they are young adults, that can take years to overcome*."[1]

In our complex modern world, basic financial literacy is not a luxury as all of us, every day, are subject to the currents and challenges of contemporary economic life.

Beginning the process of education and diligent study early, one can better understand what are critical fundamental financial benchmarks and avoid many unfortunate complications along the way.

[1] Alan Greenspan, September 26, 2003, Washington D.C. 33rd Annual Legislative Conference of the Congressional Black Caucus.



By Craig B. Forry

Fitness Club Liability: Avoidable, or No

IN THE RECENT CASE OF *JOSHI V. FITNESS International, Inc.*, the appellate court ruled in favor of the fitness club.[1]

On May 1, 2017, Mansi Joshi was injured while using a locker room sauna at City Sports Club, a San Jose exercise facility owned by Fitness International, LLC.

Joshi, a member of the Club, filed a personal injury suit alleging a claim for premises liability based upon Fitness's failure to maintain the sauna in a safe condition.

In her formal complaint, she alleged that Fitness was negligent and that it failed to guard against or warn against a dangerous condition on the premises.

The specific facility condition she alleged was that an interior light was burned out, and that when she entered the sauna and closed the door, she tripped and fell because the area was dark, resulting in her right arm being severely burned after making contact with the sauna's heating element.

Fitness filed a motion for summary judgment, asserting that any claim for ordinary negligence was barred by a release of liability signed by Joshi in connection with her membership.

Fitness claimed further that Joshi could not establish a claim for gross negligence, and she could not establish a claim for premises liability because Fitness had no actual or constructive knowledge of a dangerous condition at the Club.

The trial court granted the motion, and judgment was entered in favor of Fitness.

A Triable Issue

Joshi argued on appeal that there was a triable issue of material fact to support a claim for gross negligence against Fitness.

She contended further that there was evidence presented below that Fitness had actual or constructive knowledge of the existence of a dangerous condition—the burned out light bulb inside the sauna—at the time of the incident and it failed to take corrective action to eliminate the danger.

The appellate court concluded that in its motion for summary judgment, Fitness negated:

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• A claim for ordinary negligence alleged in the complaint because Joshi signed a membership agreement containing a release of claims for injuries arising from accidents at the Club;

• A claim for gross negligence; and,

• A claim for premises liability.

The ruling was based upon evidence that Fitness had no actual or constructive knowledge at the time of the incident that the sauna light bulb was burned out.

Accordingly, the trial court did not err in granting Fitness's motion for summary judgment, and the judgment entered on that order was affirmed.

Joshi had signed a membership agreement with Fitness, and the membership agreement included a provision—the Release—that read, in relevant part, as follows:

> *"IMPORTANT: RELEASE AND WAIVER OF LIABILITY AND INDEMNITY. You hereby acknowledge and agree that use by Member…,of the facilities, services, equipment or premises offered by CSC...involves risks of injury to persons and property. Member understands, voluntarily accepts and assumes full responsibility for such risks… ,Member agrees that CSC will not be liable for any injury to the person or property of Member…,and Member hereby releases and holds harmless CSC from all liability to Member…for any loss or damage…".*

Joshi checked into the Club, and after her workout, entered the sauna in the women's locker room. She saw two people sitting in the sauna and the door closed behind her; there was a single light fixture in the sauna; and she realized the interior light was off when the door closed behind her and it became completely dark.

After entering the sauna—as she attempted to seat herself on the upper level—she fell on her right side onto the heating unit. Joshi had testified that she fell because it was pitch black inside the sauna.

After the incident, she spoke with the manager telling him that the light was out in the sauna, there was no warning sign, and that he "*should close down the sauna because it's hurting people*."

The manager responded he was unaware of the situation. She testified that she did not know how long before the incident that the light bulb for the sauna had been out, and she had no information that Fitness was aware of a light bulb being burned out prior to the incident.

The district operations manager for Fitness stated that the Club's operations manager performed detailed weekly inspections of the Club and documented any conditions that needed attention, including cleaning and any maintenance issues.

In addition, Club employees performed daily walk-through inspections of the Club, including the women's sauna, to determine whether there were any conditions that needed attention.

The Club cleaned the women's sauna twice per day and Fitness did not have notice that the light bulb for the women's sauna was burned out at the time of the incident.

Generally, all persons are legally responsible "*for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property*."[2]

Valid, Unless Prohibited

However, an exculpatory contract releasing a party from liability for future ordinary negligence is valid unless it is prohibited by statute or impairs the public interest.

Such releases arising out of exercise facilities or recreational sports have generally been held to not impair the public interest.

The same is not true insofar as a release in the context of recreational facilities or programs purports to insulate the service provider or program from liability for gross negligence.

In *City of Santa Barbara v. Superior Court*, the California Supreme Court considered whether a release in favor of a city sponsoring a summer camp for developmentally disabled children was effective to release future liability for acts of gross negligence.[3]

In *Santa Barbara*, the mother of a girl with developmental disabilities had signed a release included in an application form for enrollment in summer camp. The child drowned while attending the camp, and her parents filed a wrongful death action against the City and the child's counselor alleging a claim for negligence.

The defendants, who argued the release offered a complete defense, unsuccessfully moved for summary judgment.

The Court of Appeal denied the defendants' petition for writ of mandate, concluding that, although the release precluded liability for ordinary negligence, it did not preclude liability for future gross negligence.

On review, the Supreme Court affirmed acknowledging that an agreement provided by a participant in recreational programs and services that releases liability for future negligence is enforceable.

It agreed, however, with the appellate court's conclusion that to the extent the release agreement purports to release liability for future gross negligence, it had violated public policy and is unenforceable.

The high court reasoned that, "*The distinction between ordinary and gross negligence reflects a rule of policy that*

harsher legal consequences should flow when negligence is aggravated instead of merely ordinary."

Gross Negligence

A subspecies of negligence, gross negligence is not a separate tort.

As the Supreme Court held, its conclusion that an agreement purporting to release a claim for future gross negligence was expressly not a recognition of a cause of action for gross negligence.

Whether a lack of due care constitutes gross negligence is generally a question of fact.

However, this is not always the case.

Joshi argued that the trial court erred in granting summary judgment, contending that whether a defendant's conduct constitutes gross negligence is generally a question of fact and is thus not subject to summary judgment.

It asserted that there was evidence presented that raised a triable issue of fact that Fitness was grossly negligent citing evidence that on "*the morning of Joshi's accident*", a Club employee performed a walk-through and noted on a checklist that the sauna in the women's locker room needed repair.

Joshi argued that a reasonable inference to be drawn from this evidence is that the Club determined on the morning, that the lightbulb in the women's sauna needed to be replaced.

In view of expert testimony that a sauna is considered a "*high risk*" area to have in a fitness facility, Joshi argued, the Club's failure to replace the light bulb during the day or to take other corrective action—closing down the sauna, for example—created a triable issue of material fact as to the Club's gross negligence.

Further, *Joshi* contended that the trial court erred in rejecting the theory of premises liability, because she raised a triable issue of fact that the Club had actual knowledge of the dangerous condition—the burned out light bulb—before the incident involving Joshi at approximately 7:30 that evening.

An exculpatory contract releasing a party from liability for future ordinary negligence is valid unless it is prohibited by statute or impairs the public interest.

Numerous cases have upheld the validity of such agreements waiving ordinary negligence claims in the context of the use of gymnasiums and fitness facilities.

The Release in this case is clearly the type of exculpatory contract permitted under the law.

The trial court correctly held that under the terms of the Release, Joshi's claim for ordinary negligence arising from her trip-and-fall accident in the sauna was barred.

Notwithstanding the Release's effectiveness in waiving Joshi's claim for negligence against Fitness, to the extent it purports to release liability for future gross negligence, it violates public policy and is unenforceable.

In contrast to ordinary negligence—which involves a breach of the duty of exercising reasonable care to protect others from harm—gross negligence has long been defined as either a want of even scant care or an extreme departure from the ordinary standard of conduct.

Here, Joshi alleged in her form complaint that she entered the women's sauna at the Club, tripped and fell due to the light bulb being burned out, landed on the heating element, and was injured. There were no factual allegations in the complaint supporting gross negligence.

Accordingly, since Fitness, as moving defendant, satisfied his burden of establishing the Release as a complete defense to a claim for ordinary negligence, the burden shifted to Joshi to present evidence of a triable issue of fact to support a finding of gross negligence against Fitness. Joshi did not satisfy that burden.

> "A claim for premises liability must show that the owner knew or reasonably should have known about the claimed dangerous condition."

Even assuming that Fitness, in moving for summary judgment, was required as its initial burden to negate gross negligence, the record shows that its obligation was satisfied.

Fitness, based upon the declaration of its district operations manager, did not have notice that the light bulb for the women's sauna was burned out and needed to be replaced at the time of the incident.

Further, there was evidence presented by Fitness that the Club's operations manager performed detailed weekly inspections of the Club and documented any maintenance issues needing attention. Fitness also presented evidence that Club employees performed daily walk-through inspections, including the women's sauna, to determine whether there were any conditions requiring attention.

The evidence constituted a prima facie showing negating Joshi's assertion that the actions of Fitness showed a want of even scant care, or an extreme departure from the ordinary standard of conduct.

Efforts by fitness facility to ensure equipment was in good order, including daily inspections and preventative maintenance, negated the claim that its conduct demonstrated a want of even scant care or an extreme departure from the ordinary standard of conduct.

There was no evidence presented showing that Fitness's conduct constituted either a want of even scant care or an extreme departure from the ordinary standard of conduct,

and simply no evidence offered by Joshi below that pointed to such extreme conduct.

Accordingly, the trial court properly concluded that there was no triable issue of material fact in support of Joshi's claim of gross negligence.

An Argument on Appeal

Joshi argued on appeal that there was a triable issue of material fact regarding whether the defective condition—such as the burned out light bulb in the women's sauna—existed long enough so that it would have been discovered by an owner who exercised reasonable care.

In support of the claim of premises liability, Joshi argued that the trial court, in holding that there was no triable issue of fact that Fitness had constructive knowledge of the dangerous condition, neglected to consider the evidence supporting an inference of actual knowledge.

She asserted that the evidence—namely, the May 1 checklist—and the inferences reasonably drawn from that evidence, presented more than enough to create a prima facie case of actual knowledge sufficient to survive summary judgment.

A plaintiff asserting a claim for premises liability must show that the owner knew or reasonably should have known about the claimed dangerous condition on the property.

As the California Supreme Court has explained, "*Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability*."

Although the owner's lack of knowledge is not a defense, to impose liability for injuries suffered by an invitee due to a defective condition of the premises, the owner or occupier "*must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him [or her], he [or she] should realize as involving an unreasonable risk to invitees on his [or her] premises*."

The Plaintiff's Burden

Where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it.

The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence.

Knowledge may be shown by circumstantial evidence which is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts.

Here, the basis of Joshi's assertion is that Fitness, as demonstrated by the May 1 checklist, had actual, or at least constructive, knowledge of the burned out sauna light bulb prior to the incident.

Because, Joshi argued in her appellate briefs , the condition was discovered—she claims in her appellate briefs—on the morning of May 1 and the long delay in replacing the lightbulb would be thoroughly unexplainable, the trial court erred in granting summary judgment in favor of Fitness on her premises liability claim.

Joshi's argument has no merit as there was no evidence presented that the May 1 inspection that resulted in the creation of the May 1 checklist indicating that the sauna in the women's locker room needed repair occurred in the morning.

Indeed, there was no evidence at all as to the exact time of day the May 1 checklist was generated; it could have been sometime before 7:30 p.m. when Joshi was injured, or it could have been after 7:30 p.m.

Therefore, even if one were to infer that the indication that the women's sauna needed repair referred to a burned out light bulb, Joshi did not present evidence—through the May 1 checklist or otherwise—that Fitness had actual or constructive knowledge of the dangerous condition prior to the incident.

Her claim for premises liability was therefore properly disposed of through summary judgment and the judgment entered on the order granting summary judgment was affirmed.

Lessons Learned

- Membership agreements routinely include a release from liability clause.

- To the extent the release agreement purports to release liability for future gross negligence, it violates public policy and is unenforceable.

- In contrast to ordinary negligence—which involves a breach of the duty of exercising reasonable care to protect others from harm—gross negligence long has been defined as either a want of even scant care or an extreme departure from the ordinary standard of conduct.

- Efforts by fitness facility to ensure equipment was in good order—including daily inspections and preventative maintenance—negated claim that its conduct demonstrated a want of even scant care or an extreme departure from the ordinary standard of conduct.

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[1] *Joshi v. Fitness Int'l,* No. H048115, 2022 Cal. App. LEXIS 584 (Ct. App. June 14, 2022).
[2] California Civil Code § 1714(a).
[3] *City of Santa Barbara v. Superior Court*, California Supreme Court, 41 Cal. 4th 747 (2007).

By Cynthia Martens

War and Peace: Protecting Trademarks in Russia

YES, WE SHALL LIVE, UNCLE Vanya. Could Anton Chekhov ever have imagined that his literary work would be used to sell hamburgers? In March, a controversial application for an "*Uncle Vanya*" mark in connection with "*snack bars, cafes, cafeterias, restaurants, bar services, canteens, cooking and home delivery services*," incorporated the red-and-yellow golden arches logo of McDonald's.

It was just one in a series of recent applications in Russia that have caused serious pearl-clutching among intellectual property lawyers.

Since Russia invaded Ukraine on February 24, the country has faced numerous financial, trade and travel sanctions. It's also been snubbed by major intellectual property partners.

In a February 28 letter, a group of whistleblowers and staff representatives at the World Intellectual Property Organization (WIPO) called for the entity's public condemnation of Russia's invasion of Ukraine and the rapid closure of its Russia Office.

The European Patent Office severed ties with Russia on March 1, and shortly thereafter the United States Patent and Trademark Office (USPTO) confirmed that it had "*terminated engagement*" with officials from Russia's agency in charge of intellectual property, the Federal Service for Intellectual Property (Rospatent), and with the Eurasian Patent Organization.

In response, Russia has adopted an aggressive posture in the intellectual property realm where it once sought to peacefully engage with the world, an effort that began well before the collapse of the Union of Soviet Socialist Republics. When the USSR joined the Paris Convention in 1965, it eagerly sought to develop Soviet intellectual property.

Yet, in March, Russia issued Decree No. 299, which effectively nullifies the enforcement value of Russian patents owned by entities and individuals in "*unfriendly*" countries including the United States, European Union member states, the United Kingdom, Ukraine, Japan, South Korea, Australia and New Zealand.

Russian Prime Minister Mikhail Mishustin also greenlighted the importation of branded products without the brands' permission, creating gray market headaches.

As Boris Edidin, deputy chairman of the Commission for Legal Support of the Digital Economy of the Moscow

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Branch of the Russian Bar Association, clarified in a recent legal commentary published by Moscow-based RBC Group: "*entrepreneurs have the opportunity to import goods of well-known brands, regardless of the presence or absence of an official representative on the Russian market*."

Russia, like the EU, had traditionally adopted a tougher stance than the United States on parallel imports. Now, however, "*both by 'anti-crisis' measures and by cloak-and-dagger methods*" Russia is sure to do all it can to keep its planes flying and its factories running, said Peter B. Maggs, research professor of law at the University of Illinois at Urbana-Champaign and noted expert on Russian and Soviet law and intellectual property.

The increase in parallel imports makes trademark prosecution and maintenance more important than ever in Russia, but it's not the only cause for concern.

In March, as political tensions reached a crescendo, a Russian court declined to enforce the trademark rights for Peppa Pig, the famous British cartoon character, due to "*unfriendly actions of the United States of America and affiliated foreign countries*."[1]

RBC Group reported in March that it had tracked more than 50 trademark applications by Russian entrepreneurs and businesses for the marks of famous foreign brands, many in the fashion and tech sector. While most trademark applications were explicit copies of existing brands, in other cases applicants were content to imitate well-known trademarks and trade dress.

For example, a Russian entrepreneur from a design studio called Luxorta applied to register an IDEA brand that mimics the style and yellow-and-blue color schemes of famous Swedish brand IKEA.

He told RBC that his business had suffered after IKEA suspended its Russian operations, and that he aspired to develop his own line of furniture and work with IKEA's former suppliers.

Other applicants RBC interviewed indicated they hoped to sell the marks back to foreign companies once those companies return.

On April 1, Rospatent published a press statement clarifying that "*in case an identical or similar trademark has already been registered in the Russian Federation, it would be the ground for refusal in such registration*."

More recently, the head of Rospatent, Yury Zubov, has responded with frustration to news coverage of trademark woes in Russia, noting that intellectual property legislation is unchanged and the "*Uncle Vanya*" hamburger mark had been withdrawn.

Prof. Maggs agreed that those trying to register or use close copies of foreign marks in Russia will likely fail.

He cited a June 2 decision by the Court of Intellectual Property Rights to uphold lower court findings that the mark "*FANT*" for a carbonated orange soft drink violated unfair competition laws, because it was confusingly similar to the "*FANTA*" brand owned and licensed to third parties by Coca-Cola HBC Limited Liability Company. Russia's consumer protection agency had originally brought the case.

The Court reasoned that… "*confusion in relation to two products can lead not only to a reduction in sales of the FANTA drink and a redistribution of consumer demand, but can also harm the business reputation of a third party, since the consumer, having been misled by the confusion between the two products, in the end receives a different product with different quality, taste and other characteristics.*"

In addition, Prof. Maggs said, "*the Putin Regime is and will be promoting Russian products as 'just as good' as foreign products. An example, obviously*

approved at high levels is the adoption of a totally different trademark for the sold McDonald's chain," he said, referring to the June 12 reopening of former McDonald's restaurants in Moscow under the name "*Vkusno & Tochka*"—*"Tasty and That's It."*

Brands should be wary of inadvertently jeopardizing their Russian marks by suspending local operations; a trademark may be cancelled in Russia after three years of uninterrupted non-use. While Article 1486 of the Russian Civil Code states that "*evidence presented by the rightholder of the fact that the trademark was not used due to circumstances beyond his control [emphasis added] may be taken into account*," brands claiming infringement still risk being ineligible for damages or injunctive relief, because technically they are not losing sales while pausing business in Russia.

Moreover, if a company has suspended sales in Russia to show solidarity with Ukraine, but seeks to stop sales in Russia by others, it may be accused of violating the good faith requirement of Article 10 of the Russian Civil Code, which states that exercising "*rights for the purpose of limiting competition and also abuse of a dominant position in a market are not allowed.*"

Russia remains a party to numerous intellectual property treaties, including the Paris Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Hague Agreement. But as the Peppa Pig case illustrates, court decisions on intellectual property are not immune to political heat.

The question looming on the horizon is whether, if the current crisis escalates, the Russian government would outright cancel trademarks from hostile countries. It would not be the first time a state denied intellectual property rights during political conflicts.

In the aftermath of the First World War, for example, the U.S. government advocated for the "*expropriation*" of property, including intellectual property, of German nationals, perceived as responsible for the militarism of their government.[2]

And in the 1930s, the German patent office removed Jewish patent-holders from its roster as part of its notorious "*Aryanization*" process.

However, because Russia is not officially at war with the countries it has deemed "*unfriendly*," these precedents are not directly on point.

Brands that have suspended business operations in Russia should monitor their trademark portfolios closely for infringement and consider how they can prove use of each mark during a prolonged absence from the Russian market. In other words: keep your eyes on Uncle Vanya.

[1] See case No. A28- 11930/2021 in the Arbitration Court of the Kirov Region; an appeals court later overturned this holding, in a win for the porcine star.
[2] Caglioti DL. Property Rights in Time of War: Sequestration and Liquidation of Enemy Aliens' Assets in Western Europe during the First World War. Journal of Modern European History. 2014;12(4):523-545. doi:10.17104/1611-8944_2014_4_523.

By Lisa Sotto and Jenna Rode

Privacy Protection: The Rulemaking Process Begins

ON JULY 8, 2022, THE CALIFORNIA PRIVACY Protection Agency Board began the formal rulemaking process to establish regulations promulgating the amendments made to the California Consumer Privacy Act (CCPA) by the California Privacy Rights Act (CPRA).

The CPPA Board issued a formal Notice of Proposed Rulemaking and Initial Statement of Reasons, and has released the proposed regulations.

The Notice of Proposed Rulemaking notes that the CPPA has taken into consideration privacy laws in other jurisdictions, and that the proposed regulations would allow businesses to implement compliance with the CCPA/CPRA "*in such a way that would not contravene a business's compliance with other privacy laws*," such as the GDPR, and the U.S. state privacy laws of Colorado, Connecticut, Utah, and Virginia.

While the proposed regulations are voluminous—at 66 pages—they do not include all of the approximately two dozen topics required to be addressed under the CCPA/CPRA.

Additional regulations covering topics including cybersecurity audits, risk assessments, and automated decision-making are expected to be released at a later date.

The proposed regulations seek to harmonize the existing CCPA regulations with the CPRA's amendments, operationalize new concepts introduced under the CPRA, and reorganize the text to facilitate understanding.

The proposed regulations, if adopted, would add certain significant new compliance obligations on businesses. Below are key examples of topics the proposed regulations address.

Data Minimization[1]

The proposed regulations expand upon the CCPA/CPRA's data minimization principle, and specify that a business's "*collection, use, retention, and/or sharing [of personal information ("PI")] must be consistent with what an average consumer would expect*."

Businesses may collect, use, retain, or "*share*" (for cross-context behavioral advertising purposes) PI for other disclosed purposes, provided that they are compatible with the average consumer's reasonable expectations.

Explicit consumer consent is required when a business uses PI for secondary purposes unrelated to, or incompatible with, the original purpose(s) at collection.

Attorneys **Lisa J. Sotto** and **Jenna N. Rode** focus on privacy and cybersecurity practice issues at the law firm of Hunton Andrews Kurth LLP in New York City. They can be reached, respectively, at LSotto@HuntonAK.com and JRode@HuntonAK.com.

Additionally, a business may only collect PI categories that are disclosed via notice at the time of collection.

The proposed regulations illustrate several examples of where explicit consumer consent would be required because a business's use of PI would not be consistent with the reasonable expectations of an average consumer.

They include a mobile flashlight app that would need to obtain consent to collect geolocation data because the average consumer would not reasonably expect the collection of such data for the provision of flashlight services; and an ISP may collect geolocation data to track service outages, but may not sell the information to data brokers without consumer consent.

The introduction of the "*average consumer*" concept to the CCPA/CPRA's data minimization principle could mean that a business may no longer be able to rely solely on the disclosures in its privacy policy for its use of PI, and instead may need to obtain consent to use PI in ways that would be incompatible with an average consumer's reasonable expectations.

This could have significant compliance implications for businesses that seek to use PI for a variety of purposes that are unrelated to the initial purpose(s) for which the data was processed.

Requirements for Submitting Requests and Obtaining Consent[2]

The proposed regulations outline a number of requirements with which businesses must comply when designing and implementing consumer rights request methods and obtaining consumer consent:

- *Provide Symmetry in Choice:* A business's opt-out of sale/sharing mechanism must be symmetrical to the business's opt-in process; a business must not require more steps for a consumer to opt out of the sale/sharing of PI, compared to the process to opt in to such sale/sharing—after having previously opted out.

  For instance, the choice between "*Accept All*" and "*More Information*" is asymmetrical, whereas the choice between "*Accept All*" and "*Decline All*" is considered symmetrical.

  Choices must be presented in similar sizes and colors. If the choice to opt in is selected by default, it will not be considered symmetrical to the choice not to participate.

- *Avoid Confusing Language:* A business must avoid using confusing language when obtaining consumer consent or providing consumer rights request methods, such as the use of double negatives—for example, the choice of "*Yes*" or "*No*" next to "*Do Not Sell My Personal*

Information," or toggle options that state, "*On*" or "*Off*," without further clarifying language.

• *Avoid Manipulative Language:* A business must not use manipulative language or architecture that guilts a consumer into making a particular decision, such as choosing between the options of "*Yes*" and "*No, I like paying full price*."

• *No Bundled Consent:* A business cannot obtain bundled consent to incompatible processing activities, which would be manipulative because the consumer would be forced to consent to incompatible uses to obtain an expected product or service.

• *Dark Patterns:* Any method that does not comply with the above requirements may constitute a "*dark pattern*," which the proposed regulations define as "*a user interface that has the effect of substantially subverting or impairing user autonomy, decision-making, or choice, regardless of a business's intent*." Note that this definition adds the language in italics, thereby expanding the CCPA/CPRA's existing definition of the term.

The proposed regulations, like the CCPA/CPRA, specify that agreement obtained through use of dark patterns does not constitute valid consent.

Notice of Third-Party Data Collection[3]

The proposed regulations add an entirely new notice requirement that is not reflected in the text of the CCPA/CPRA.

If a business allows third parties to control the collection of PI, the business must include in its notice of collection either the names of all such third parties or information about the third parties' business practices.

While not explicitly mentioned in the proposed regulations, "*third parties that control the collection of PI*" arguably would include third-party cookie providers operating on a business's site.

This is a significant addition, as the CCPA currently only requires businesses to disclose certain information about the categories of third parties to whom PI is disclosed, but not the actual identity of such third parties.

It is not clear how a business would comply with the alternative option, to disclose information about the third parties' "*business practices*," which is not detailed in the proposed regulations.

Notice of Right to Opt-Out of Sale/Sharing[4]

The proposed regulations specify that the "*Do Not Sell or Share My Personal Information*" link must either immediately effectuate the consumer's choice, or redirect the consumer to a webpage where the consumer can "*learn about and make that choice*."

The proposed regulations also for the first time specify that this link must be included on the header or footer of the business's Internet "*homepage*," which is broadly defined to mean any page that collects PI.

The proposed regulations also allow for a business to forego posting the "*Do Not Sell or Share*" link if it provides an alternative opt-out link (see below) or processes global opt-out preference signals in a frictionless manner (also see below).

Notably, the proposed regulations also state that a business that sells or shares PI it collects through a connected device—smart TV, for example—or via virtual reality must ensure consumers encounter the notice via the same medium.

Right to Limit the Use/Disclosure of Sensitive PI[5]

The proposed regulations set forth a list of purposes for which a business may process sensitive PI without offering the right to limit the use or disclosure of such information—for example, to perform the goods or services requested, to detect security incidents, to prevent fraud.

A business that uses or discloses sensitive PI for purposes other than those listed in the proposed regulations must provide notice of the right to limit the use or disclosure of sensitive PI that complies with the proposed regulations' requirements.

The notice must be disclosed to a consumer in the same manner in which the consumer's sensitive PI is collected—if a business collects sensitive PI by phone, the notice must be provided orally during the call, for example.

In addition to the notice, a business that collects sensitive PI online must allow consumers to submit requests to limit through an interactive form accessible via a link titled, "*Limit the Use of My Sensitive Personal Information*" that is displayed on the header or footer of the business's homepage, which either has the immediate effect of limiting the use and disclosure of the consumer's sensitive PI or leads the consumer to a webpage where the consumer can learn about and make that choice.

The proposed regulations also allow businesses to combine the right to opt out of sale/sharing with the right to limit, in the form of an alternative opt-out link (see below).

Notably, unlike the CCPA/CPRA, the proposed regulations do not specify that the right to limit the use or disclosure of sensitive PI must be provided only where a business uses sensitive PI to infer characteristics about consumers.[6]

Therefore, businesses that process sensitive PI for purposes other than those listed in the proposed regulations, but do not use the data to infer characteristics about consumers, may nonetheless may be required to offer the right to limit the use or disclosure of sensitive PI under the proposed regulations; this inconsistency creates some confusion.

Similar to opt-out requests, the proposed regulations specify that requests to limit do not need to be verifiable. The proposed regulations require businesses to instruct their service providers/contractors and third parties to whom a consumer's sensitive PI has been disclosed to comply with the consumer's request to limit.

Processing Consumer Requests

The proposed regulations would make the following changes to the process for handling consumer rights requests:

- *Deletion Requests:* Upon receipt of a deletion request, a business must flow down such request to any third party to whom the business has sold, or with whom the business has shared, PI, unless doing so is "*impossible or would involve disproportionate effort*." This requirement is in addition to the existing requirement under the CCPA to flow down deletion requests to a business's service providers and contractors.[7]

  Further, a business that denies a consumer's request to delete, in whole or in part, must nonetheless instruct its service providers and contractors to delete the consumer's PI that is not subject to the relevant legal exception, and not use the consumer's PI for any purpose other than the purpose provided by that exception.

  The proposed regulations also for the first time impose direct obligations on service providers and contractors with respect to deletion requests, requiring such entities to:

  - Comply with requests to delete;
  - Notify their own service providers/contractors of such requests; and,
  - Notify any other service providers, contractors, or third parties that may have accessed PI from or through the service provider or contractor of such requests, unless the information was accessed at the direction of the business unless doing so is "*impossible or would involve disproportionate effort.*"

- *Correction Requests:* The proposed regulations specify that, in response to a correction request, a business may consider the totality of the circumstances regarding contested PI when determining whether the PI is accurate.[8]

To do so, a business may consider the nature of the PI, how it was obtained, and documentation related to the accuracy of the PI.

Notably, the proposed regulations state that if the business is not the source if the PI and has no documentation to support the accuracy of the information, the consumer's assertion of inaccuracy "*may be sufficient*" to establish that the PI is inaccurate.

The proposed regulations also require businesses to instruct their service providers and contractors to make the necessary corrections to the PI in their respective systems, and service providers/contractors must comply with such requests.

They also permit businesses to delete PI in response to a correction request if doing so would not negatively impact the consumer, or the consumer consents to the deletion.

If a business denies a request to correct, it must, among other requirements, explain its rationale to the consumer including any applicable legal exceptions and inform the consumer that upon the consumer's request, the business will note, internally and to any person to whom it discloses the PI, that the PI is contested.

In addition, the proposed regulations specify that a consumer's request to confirm that a business has corrected inaccurate information shall not be considered an access request, or count toward the CCPA/CPRA's limitation of two access requests made within a 12-month period.

Access Requests[9]

The proposed regulations specify that a business must provide all the PI it has collected/maintained about the consumer on or after January 1, 2022, including beyond the 12-month period preceding the request, unless doing so proves "*impossible or would involve disproportionate effort*."

Notably, the proposed regulations explicitly require businesses to include in response to an access request any PI that the business's service providers or contractors obtained as a result of providing services to the business.

Opt-Out Preference Signals[10]

The proposed regulations indicate that businesses must be able to comply with universal opt-out of sale/sharing preference signals, provided the signal is in a commonly used and recognizable format and clearly states its purpose to consumers.

If a business processes opt-out preference signals in a frictionless manner, in accordance with Sections 7025(f) and (g) of the proposed regulations, it need not, but may, display the "*Do Not Sell or Share My Personal Information*" link, or alternative opt-out link, on its homepage.

Alternative Opt-Out Link[11]

The proposed regulations specify that a business may

provide consumers with a single, clearly-labeled link that allows consumers to easily exercise both the right to opt-out of sale/sharing and the right to limit the use and disclosure of sensitive PI, instead of posting separate links for each right.

The link must direct the consumer to a webpage that informs the consumer of both their right to opt-out of sale/sharing and the right to limit, and provide the opportunity to exercise both rights.

The webpage must include an interactive form or mechanism by which the consumer can submit their request that is easy to execute, requires minimal steps, and complies with the requirements set forth in the proposed regulations.[12]

The alternative link must be conspicuous and comply with the proposed regulations' requirements for disclosures and communications to consumers as set forth in of the proposed regulations); be titled "*Your Privacy Choices*" or "*Your California Choices*."[13]

It should also include the following opt-out icon to the left or right of the link title: 

Service Providers/Contractors[14]

• *Application to Non-Profits:* The proposed regulations notably indicate that a service provider/contractor rendering services to a non-profit nonetheless would be subject to the CCPA/CPRA, even though the entity provides services to a "*non-business*" under the CCPA/CPRA, which exempts non-profits from application.

• *No Cross-Context Behavioral Ads:* The proposed regulations make clear that a service provider or contractor cannot contract with a business to provide cross-context behavioral ads; any entity providing such services would constitute a "*third party*" under the CCPA/CPRA.

• *Service Provider/Contractor Agreements:* A business's agreement with a service provider/contractor must identify the specific—not generic—business purpose(s) and service(s) for which the service provider/contractor processes PI on behalf of the business, and specify that the business is disclosing the PI to the service provider/contractor only for the limited and specified business purpose(s) set forth within the contract.

The proposed regulations indicate that the description of the business purpose or service cannot merely reference the entire contract generally, but must instead be specific.

A business's agreement with a service provider/contractor must also require, without limitation, that the service provider/contractor:

- Comply with consumer rights requests and flow down certain requests to its own service providers/contractors or third parties that may have accessed the consumer's PI;
- Provide documentation to verify that PI is no longer retained after a request to delete; and,
- Notify the business within five business days if it can no longer meet its obligations under the CCPA/CPRA.

If a business does not include the required content in its agreements with service providers/contractors, the entity to whom the business discloses PI would constitute a "*third party*," to which the business may be deemed to "*sell*" PI.

Third Parties[15]

• *Affirmative Compliance Obligations:* The proposed regulations for the first time impose affirmative obligations on third parties, including but not limited to the requirement to:

- Comply with a consumer's request to delete PI, opt out of the sale/sharing of PI, or limit the use/disclosure of PI that is forwarded to the third party by a business, and no longer retain, use, or disclose the consumer's PI unless the third party becomes a service provider/contractor under the law; and,
- Recognize and comply with opt-out preference signals as valid requests to opt out of the sale/sharing of the consumer's PI.

The proposed regulations specify that contracts with third parties must, among other requirements:

- Identify the limited and specified purposes(s)—not a generic description—for which the PI is sold or disclosed to the third party (note that, unlike service provider/contractor agreements, contracts with third parties do not need to specify the "*business purpose(s)*"—as defined under the CCPA/CPRA—for which the PI is disclosed to the third party;
- If the business authorizes a third party to collect PI through its website either on behalf of the business or for the third party's own purposes, require the third party to check for and comply with a consumer's opt-out preference signal, unless informed by the business that the consumer has consented to the sale/sharing of their PI; and,
- Require that the third party notify the business within five business days if the third party can no longer meet its obligations under the CCPA/CPRA.

Due Diligence[16]

The CCPA/CPRA provides businesses with an affirmative defense to alleged CCPA/CPRA violations committed by service providers, contractors and third parties to whom the business has disclosed PI, if the business "*does not have actual knowledge, or reason to believe*," that the entity intends to commit such violation.

The proposed regulations introduce a new due diligence concept, specifying that a business's due diligence of a service provider, contractor, or third party will factor into whether the business reasonably can rely on this affirmative defense.

For example, the proposed regulations state that a business that never enforces the terms of its contract with a service provider, contractor or third party to whom it discloses PI, nor exercises its rights to audit or test the entity's systems, may not be able to rely on the defense that it did not have reason to believe that the entity intended to use the PI in violation of the CCPA/CPRA at the time the business disclosed the PI to the entity.

While the proposed regulations do not impose an affirmative due diligence obligation on businesses, this language encourages businesses to engage in such due diligence with respect to entities to which it discloses PI.

CPPA Audits[17]

The proposed regulations state that the CPPA may audit possible violations of the CCPA/CPRA, and provides criteria for when such audits may occur.

For instance, the proposed regulations specify that the CPPA may conduct an audit if a business's, service provider's, contractor's, or other person's collection or processing of PI presents significant risk to consumer privacy or security, or if the entity has a history of noncompliance with the CCPA/CPRA or any other privacy protection law.

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[1] Section 7002 of title 11, division 6, chapter 1 of the California Code of Regulations concerning the CCPA.
[2] *Id.* Section 7004.
[3] *Id.* Section 7012.
[4] *Id.* Section 7013.
[5] *Id.* Section 7014.
[6] See Cal. Civ. Code Sect. 1798.121(d)).
[7] Section 7022 of title 11, division 6, chapter 1 of the California Code of Regulations concerning the CCPA.
[8] *Id.* 7023.
[9] *Id.* Section 7024.
[10] *Id.* Section 7025.
[11] *Id.* Section 7015.
[12] *Id.* Section 7004.
[13] *Id.* Section 7003.
[14] *Id.* Section 7050.
[15] *Id.* Section 7052.
[16] *Id.* Sections 7051, 7053.
[17] *Id.* Section 7304.

CARE COURTS: Gov. Gavin Newsom has signed into law the centerpiece of his latest push to address California's escalating homeless crisis, a program to compel residents struggling with mental health and addiction into court-ordered treatment.

Newsom signed legislation to create a new civil court system—the Community Assistance, Recovery and Empowerment Court, or CARE Court—intended to provide treatment and housing for people who are suffering from severe forms of mental illness and are unable to care for themselves. Senate Bill 1338 gives family members, first responders and medical professionals, among others, a new pathway to get treatment for those with mental illness.

The policy will not only require people to participate in treatment programs, but also mandate counties to make services available to them.

Under the new legislation, California's 58 counties must set up mental health courts and provide treatment to those diagnosed with schizophrenia or other psychotic disorders.

For an individual to be referred to CARE Court, family members, first responders, behavioral health providers and others can petition a civil judge who will be tasked with ordering a clinical evaluation to assess whether the person meets the criteria to qualify.

Participants must be age 18 or older, experiencing severe mental illness and either be "*unlikely to survive safely in the community without supervision*" or at risk of causing serious harm to themselves or others if their conditions go untreated.

The governor's office has estimated that 10,000 to 12,000 people would qualify for the program, but county offices believe that number could reach as high as 50,000, according to an Assembly floor analysis.

AMAZON SUIT FILED: The State of California has filed an antitrust lawsuit against ecommerce company Amazon, accusing the company of stifling competition and creating artificial pricing floors.

The 84-page complaint was filed in San Francisco Superior Court and argues that Amazon's anticompetitive practices are in violation of California's Unfair Competition Law and Cartwright Act.

The lawsuit mirrors a complaint filed in 2021 by the District of Columbia. The case was initially dismissed by a trial court judge, but an appeals process is now underway.

Amazon stands as the most dominant online retail store in the United States and reportedly controls around 38 percent of online sales in the US.

The company has more than 160 million Prime members nationwide and around 25 million customers in California.

OFF-DUTY POT USE: Gov. Newsom has also signed legislation that will prohibit California employers from discriminating against applicants or employees due to off-duty marijuana use.

The new measure, which takes effect on January 1, 2024, means that the mere presence of marijuana in an employee's system, or their admission of use away from work, cannot serve as the basis for disciplinary action.

The new law contains a few important exceptions. First, it does not affect employers' ability to use pre-employment testing to identify and exclude persons based on the presence of psychoactive cannabis metabolites.

Most current drug tests identify non-psychoactive metabolites, and the law is unclear on exactly what tests can be used for this purpose. Presumably, these tests would measure impairment at the time of testing.

The law also excludes the construction and building trades industries from the new prohibitions. It does not change limitations on employee drug testing already in place under California law. The law also does not apply to workers subject to federal drug testing or use requirements.

CALIFORNIA PRISONS: A larger panel of the 9th U.S. Circuit Court of Appeals again blocked California's first-in-the-nation ban on for-profit private prisons and immigration detention facilities, finding that it is trumped by the federal government.

A three-judge appellate panel last year rejected the 2019 state law that would have phased out privately run immigration jails in California by 2028. The law would have undermined a key piece of the nation's detention system for immigrants.

California Attorney General Rob Bonta had asked the larger appellate panel to reconsider a ruling.

The law signed by Gov. Gavin Newsom was one of many efforts to limit California's cooperation with the federal government as then-President Donald Trump's policies on immigration enforcement. But the Biden administration continued the U.S. government's opposition to the law on constitutional grounds.

The 11-member appellate panel said the state law "*is preempted by the federal government under the U.S. Constitution's supremacy clause*" and sent the case back to the trial court for a decision on other legal arguments.

ORWELLIAN INSIGHT: "*Every record has been destroyed or falsified, every book rewritten, every picture has been repainted, every statue and street building has been renamed, every date has been altered. And the process is continuing day by day and minute by minute. History has stopped. Nothing exists except an endless present in which the Party is always right.*"

—George Orwell, *1984*.

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AMANDA M. MOGHADDAM
VCLF Board Member
and SFVBA Secretary

amanda.moghaddam@gmail.com

IT WAS A NIGHT TO REMEMBER on September 22, 2022, when the SFVBA's Probate Section dined together all for a good cause.

Probate Section Chair and new SFVBA Trustee, Nancy Reinhardt, arranged for a wonderful evening where Section members dined on delicious Mediterranean fare, enjoyed sparkling water, and auctioned off artwork to benefit the VCLF's scholarship and community work.

Nancy graciously arranged to auction off pieces by the Probate Section's own John Rogers. For those who may not know, John has always enjoyed creating art. However, a very severe accident set him back significantly in those endeavors.

It was with great joy that she was able to bring eight pieces he created to the dinner to be auctioned off, and the Probate Section was tickled pink to have the opportunity to bid on pieces made by their dear friend and colleague.

Nancy also provided for auction a print depicting a gorgeous mountain vista by artist Brad Hundman.

Section members enthusiastically, and perhaps a little competitively, bid on the available pieces with help from Larry Weiner of Flans & Weiner, Inc., professional real estate auctioneers. Larry smoothly ran the auction, which raised $735 to help fund the Foundation's work.

On behalf of the VCLF, a huge thank you to the Probate Section, the donors, and the dinner sponsors—Parsi Group Realtors; Geffen Real Estate; Pinnacle Estate Properties, Inc.; Flans & Weiner, Real Estate Auctioneers, Inc.; Paul Hargraves/ReMax One; Bond Services of California; Banc of California; Manufacturers Bank; and, Lawyers Mutual Insurance Co.

Helping to raise additional funds for the SFVBA was Scott Kunitz of Banc of California, who raffled off two fully hosted tickets to a LAFC soccer match. Members in attendance who renewed their membership on the spot were given two tickets to the raffle, which in turn helped the SFVBA. The Bar is very grateful for Banc of California's support.

> "We hope that you can join us this year and volunteer for some of our most important programs."

The VCLF, the charitable arm of the Bar Association, is so honored that the Probate Section utilized its social time to raise funds for our projects.

This year is going to be an exciting, charitable term as we will continue our support of scholarships to high school and college students interested in pursuing legal careers, connecting the community to the legal system, and exposing students to legal analysis and ways of thinking.

We hope that you can join us this year and volunteer for some of our most important programs, including *Constitution & Me*, an interactive program with local high schools that explores constitutional principles through the pro and con arguments of a student-centered hypothetical fact pattern.

And please do "Save the Date" and join the VCLF and SFVBA Board members for 2022's Annual Installation Gala on November 17, 2022 at the Porter Valley Country Club.

A cocktail reception will start at 5:30 p.m., followed by a ballroom dinner starting at 6:30 p.m. We hope to see you there!

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Valley Retro

What is now Canoga Park High School opened its doors for the first time on October 4, 1914 in the farming community of Owensmouth.

The oldest secondary school in the west San Fernando Valley, the school opened with 14 students and 2 teachers and fielded its first baseball team in 1916.

Playing without a coach in a fallow barley field, the 'Owensmouth Nine' lost every one of its games but one its first year.

The school was renamed in 1931 when Owensmouth officially changed its name to Canoga Park. The Assembly Hall was built by the Federal Emergency Administration of Public Works. Completed in 1939, it survived the 1971 earthquake with minor damage and, still in use today, is identified in the California Register of Historic Resources as "*historically significant*."

Today, more than 1,400 students attend Canoga Park High School with two magnet programs offering classes in communications, arts and media, and engineering, environmental and veterinary sciences.

Interesting note—The coming-of-age movie *Fast Times at Ridgemont High* was partially filmed at Canoga Park High in 1982. (Image courtesy of the L.A. Dept. of Water & Power)

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