VALLEY LAWYER

FEBRUARY 2023 • $5

A Publication of the San Fernando Valley Bar Association

Taking the Helm:
A New Chief Justice at the California Supreme Court

Survivorship Rules: Simultaneous Death and their Unequal Application

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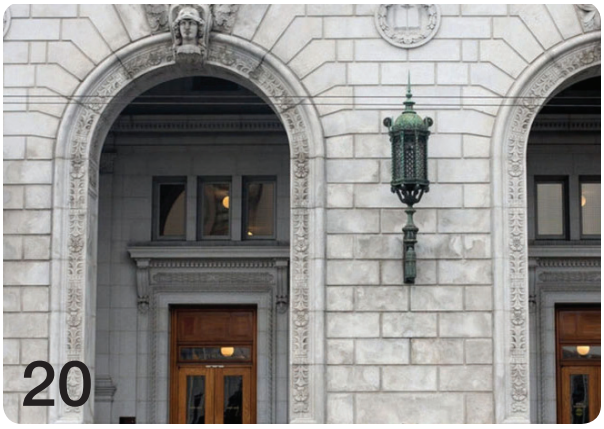

FEATURES

DEPARTMENTS

VALLEY LAWYER

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The Passing of Beloved Lewitt Hackman Shareholder David Gurnick

David Gurnick, a Shareholder in our Franchise & Distribution and Business Litigation Practice Groups, passed away suddenly and unexpectedly on Sunday, January 15, 2023. He was a beloved member of our firm and the community, with an unrivaled work ethic and commitment to our clients.

David accomplished so much during his prolific career. He wrote countless articles for the *Franchise Law Journal*, the scholarly journal of the *ABA Forum on Franchising* as well as *Valley Lawyer*, the publication of the San Fernando Valley Bar association, among others. He authored two treatises – both of which were published by the prestigious Juris Publishing. He spoke frequently at ABA Forum on Franchising and IFA Legal symposium programs, was active with the Valley Community Legal Foundation, and is the only member to serve two separate terms as San Fernando Valley Bar Association President.

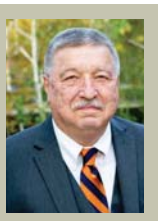
At Lewitt Hackman, David represented clients in all aspects of franchise and distribution law and provided counsel, transactional and litigation services to local, national, and international companies. He was repeatedly recognized by *U.S. News and World Reports' Best Lawyers, Super Lawyers Magazine*, and *the San Fernando Valley Business Journal.*

David will be dearly missed by his co-workers, friends, peers, and clients. He is survived by his wife and three sons.

David's family asks that charitable donations be made in David's honor to either *the Jewish National Fund* or to *The Jewish Federation of Greater Los Angeles*.

The Time Has Come…

MICHAEL D. WHITE
SFVBA Communications Manager



michael@sfvba.org

THIS ISSUE OF *VALLEY LAWYER* IS THE 80TH THAT I've had the privilege of 'putting to bed,' as we say in the business. It is also my last.

It has been my goal since my first issue, and has remained, to have the readers of *Valley Lawyer* 'turn the page' on articles aimed at upping the level of their knowledge and professional acumen by offering opportunities for writers to share of their own professional expertise and insight.

It's been quite a trip and I've been privileged to meet scores of very interesting, and genuinely nice, people, each of whom had a story to tell.

So many, but a few come immediately to mind—Hon. Huey Cotton, Hon. Elizabeth Lippitt, Hon. Firdaus Dordi, Hon. Maureen Tighe, Hon. Eric Taylor, Hon. Virginia Keeny, and Hon. David Gelfound; attorneys Alan Kassan, Mark Shipow, Jonathan Arnold, Ronald Brot, Steven Sepassi, David Habib, Myer Sankary, Karen Karadjian and the late Albert Ghirardelli, to name but a very few.

Since May 2016, when I came on board, I've had the distinct privilege of working closely with some pretty remarkable people whose expertise, support, and encouragement have, in some challenging times, helped in producing what has come to be regarded in legal circles as a pretty good publication.

The legendary Liz Post, for one. The SFVBA's Executive Director back in the day, Liz hired me and was a great boss with high standards. She took care of her staff and made *Valley Lawyer* a priority; Yi Sun Kim was an outstanding President and a good friend who sadly passed away a few months ago. She was a joy to work with and was a constant, unwavering source of support for the magazine; and lastly, the late David Gurnick. A two-time SFVBA President, he served as Chair of the Bar's Editorial Committee and, despite his demanding commitment to his profession, was a devoted friend who always sought out ways to make *Valley Lawyer* better.

I also want to thank Marina Senderov, a genuinely talented graphic artist, who has woven *Valley Lawyer* together month-after-month, year-after-year, with skill and style that has won the magazine several top awards over the years from the likes of the Los Angeles Press Club and the National Association of Bar Executives. I wish I had the ability to say more, but suffice it to say that I will sincerely miss working with my good friend.

So, in closing, I want to thank all those who took the time out of their busy schedules over the past seven years to 'pick up the pen,' hurdle the Great Writer's Block, and share of their expertise and knowledge to inform and educate their fellows.

Sincere gratitude to all and heartfelt thanks for giving this 'old school, ink-stained wretch' the opportunity to ply his trade for a while, and I wish all the best for the San Fernando Valley Bar Association and its membership. It's been an honor and a privilege.

CORRECTION: The writer attribution for the Probate Volunteer Settlement Program article that appeared in the January issue of *Valley Lawyer* contained misinformation. It should have read:

*Attorney Nancy A. Reinhardt focuses on probate, taxation, and business and corporate law issues from her office in **Sherman Oaks**. She can be reached at **nancy@nreinhardtlaw.com**. Kira S. Masteller is a trust and estate planning attorney with the firm of Lewitt Hackman in Encino. She can be reached at KMasteller@lewitthackman.com.*

Our sincere apologies and the Editor regrets any confusion caused by the error.

CALENDAR

FEBRUARY 2023

SUN	MON	TUE	WED	THU	FRI	SAT

BLACK HISTORY MONTH

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1

2
SPECIAL WEBINAR
Probate and Estate Planning Section
Early Evening with Nicholas Van Brunt and Jeff Marvan: THE TOP TEN TRUST AND ESTATE DEVELOPMENTS FOR 2022
5:30 PM
Nick and Jeff will discuss 5 cases from 2022 and 5 legislative developments from 2022 that every trust and estate practitioner should be aware of as we enter the year of the rabbit. (1 MCLE Hour)

3 **4**

5 **6**

7
ZOOM MEETING
Membership and Marketing Committee
6:00 PM

8

10 **11**

12

13
SPECIAL NIGHT
Board of Trustees Meeting
6:00 PM
SFVBA OFFICES

14
WEBINAR
Probate and Estate Planning Section
So You Thought You Could Dance? Increased Estate Tax Exemptions Do Not Mean You Do Not Have to Worry About Taxes
12:00 NOON
With increased exemptions many estates no longer have an estate tax to deal with. Does this mean that there are no tax issues? Even though there is no estate tax due, there are estate and income tax issues to deal with. On top of that, there may be some fiduciary issues for the designated trustee to wrestle with. This program will give you a checklist of some of these issues. Speaker Allan B. Cutrow headlines the discussion. (1 MCLE Hour)

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17 **18**

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SFVBA OFFICES CLOSED

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WEBINAR
Taxation Law Section
Current Trends in IRS Enforcement
12:00 NOON
Former federal prosecutor Vince Farhat, JD, MBA, discusses the latest trends in IRS Criminal Investigation (CI). Vince will touch on the tools IRS CI is using to initiate investigations and the impact the recent $80B IRS budget allocation will have on criminal enforcement.
(1 MCLE Hour)

ZOOM MEETING
Mock Trial Committee
6:30 PM

22
WEBINAR
Business Law Section/All Members
Errors To Avoid When Drafting Stipulated Judgments
Sponsored by
SIGNATURE RESOLUTION
12:00 NOON
More and more, in commercial dispute mediations, settling defendants are using a settlement agreement and stipulated judgment to document extended time and flexible payments terms. Attorneys unfamiliar with the rules may find their documents interpreted as an unenforceable penalty. We will review the recent cases and offer some practical tips so you can draft a stipulation that will stand up in court.
Presented by:
Mark Loeterman, Esq. and Hon. Suzanne Segal (Ret.)
Free to All Members.
(1 MCLE Hour) See ad on page 30

23

24 **25**
WEBINAR
Bankruptcy Law Section
Recent Supreme Court Bankruptcy Opinions
12:00 NOON
Attorney M. Jonathan Hayes and the Hon. Alan M. Ahart, Ret. Bankrutpcy Judge, will review recent Supreme Court Bankruptcy opinions and also discuss recent court opinions impacting the CA homestead exemption.
(1.25 MCLE Hour)

26 **27** **28**

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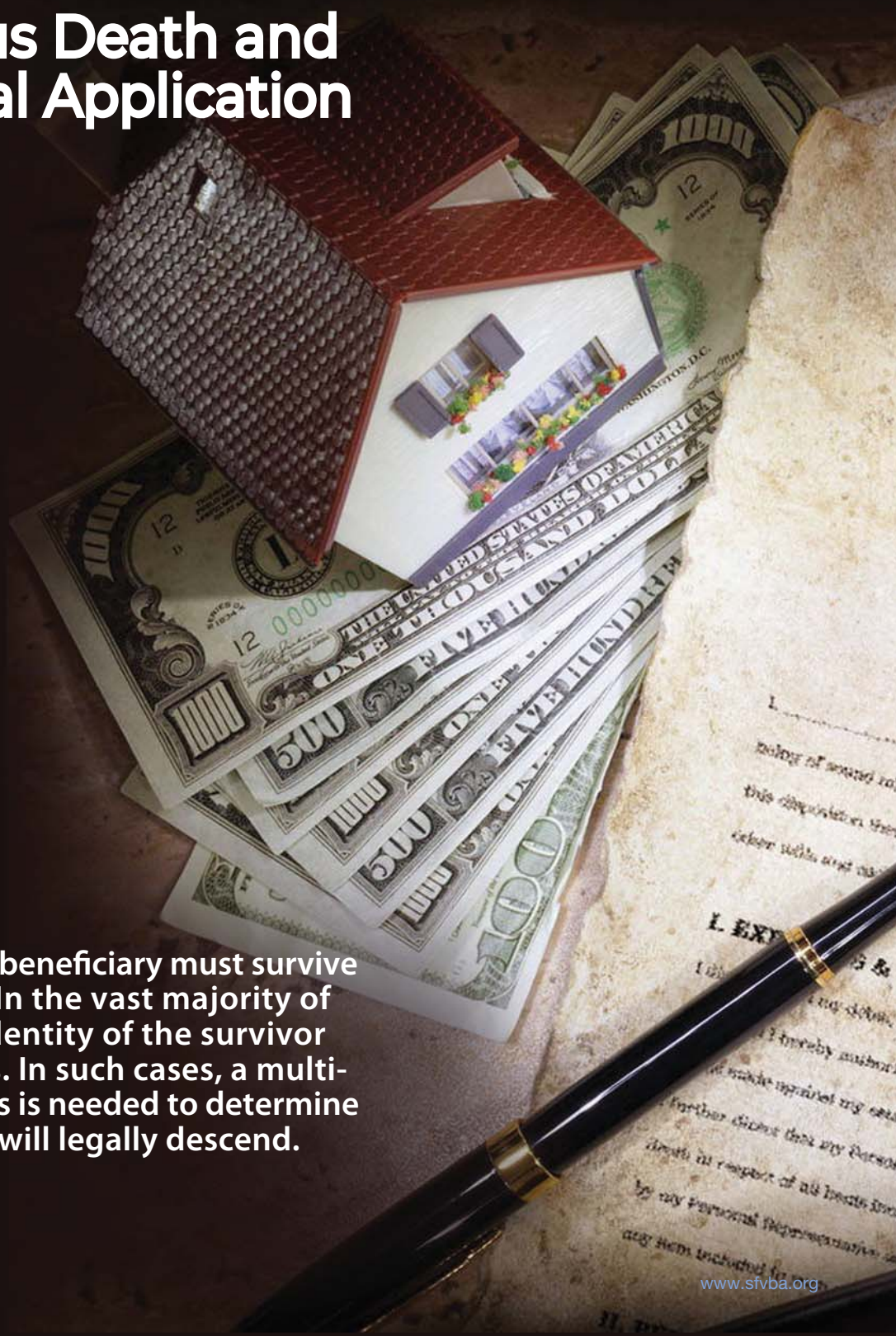
By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 19.

Survivorship Rules:
Simultaneous Death and their Unequal Application

By Mark J. Phillips



Under California law, a beneficiary must survive a decedent to inherit. In the vast majority of cases, of course, the identity of the survivor is clear, but not always. In such cases, a multi-step process of analysis is needed to determine to whom the property will legally descend.


LAST WILL
AND TESTAMENT

UNDER CALIFORNIA LAW, A BENEFICIARY MUST survive a decedent to inherit. Probate Code § 21109, applicable to both wills and trusts, states that "*A transferee who fails to survive the transferor of an at-death transfer...does not take under the instrument*."

In the vast majority of cases, of course, the identity of the survivor is clear, but not always, and when it cannot be determined by clear and convincing evidence that the transferee survived the transferor a multi-step process of analysis is needed to determine to whom the property will descend.

Determination of death is defined under state law, and all states have now enacted in some form the Uniform Determination of Death Act, which California adopted in 1954.

In California, an individual is dead when they have sustained either irreversible cessation of circulation and respiratory functions, or irreversible cessation of all functions of the entire brain, including the brain stem. Health and Safety Code § 7180.

But determining the fact of death is only the first step. When two or more persons die at or near the same time, the right to inherit depends not just on the establishment of death, but on *the order of death*.

Thus, parties may find it necessary to litigate that sequence, and in a surprising and fascinating number of cases the determination of survivorship is no more than speculative at best.

The most famous case is from the courts of Illinois. Newlyweds Stanley and Teresa Janus returned from their honeymoon in September of 1982 to find that Stanley's brother, Adam, had died suddenly of heart failure at age 27.

Assembled to grieve with his family in Adam's home, Stanley professed to a headache, and Teresa agreed that she could also use some aspirin. In Adam's bathroom, they found a recently purchased bottle of Tylenol. They both took some.

Minutes later, Stanley collapsed on the kitchen floor. Teresa was still standing when Diane O'Sullivan, a registered nurse and a neighbor of Adam's, was called to the scene. Stanley's pulse was weak, and Ms. O'Sullivan began CPR.

Within minutes, Teresa also began having seizures and collapsed. Paramedic teams arrived, and both Stanley and Teresa were carried out to ambulances.

Ms. O'Sullivan, the registered nurse, believed that both Stanley and Teresa were dead before they were taken from the home, but she could not tell who died first. They were 25 and 19 years old, respectively.

A 'Riveting' Lawsuit

The lawsuit that followed, *Janus v. Tarasewicz*[1], was a small but riveting episode in the much larger saga of deaths from cyanide-laced Tylenol capsules in Chicago in the fall of 1982, one of the most notorious unsolved crimes in the last generation.

The seven victims, four women, two men and a 12-year old girl, died after taking capsules that had been purchased from drugstores and groceries in the Chicago area.

Someone had opened the capsules and replaced some of the acetaminophen with cyanide, and returned them to the shelves. Stanley, Adam and Teresa were the only related victims. The killer was never identified,[2] but the deaths caused wide-spread panic and led to the implementation of tamper-resistant packaging.

Before they left on their honeymoon, Stanley named Teresa as the primary beneficiary of a $100,000.00 life insurance policy at work, designating his mother as the contingent beneficiary.

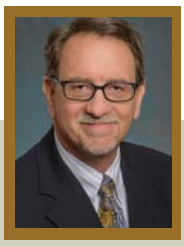
If Teresa survived Stanley that evening in Adam's home, her family was entitled to the proceeds of the policy. If she did not, Stanley's mother was entitled to them.

The case illustrates both the difficulties inherent in establishing an exact moment of death, and the discrepancy in the way state law handles the devolution of assets which variously pass under wills, intestacy, joint tenancy, and life insurance. Whether a beneficiary survives, and how long they survive, determines how these assets are distributed.

Survivorship in cases such as *Janus* simply cannot be determined scientifically. When the paramedics arrived in Adam's home on the evening of September 29, 1982, both Stanley and Teresa were unconscious with non-reactive pupils.

Neither showed any signs of being able to breathe on their own, both had some level of blood pressure, but because Stanley never developed that pressure spontaneously nor recovered pulse or respiration, he was pronounced dead at the hospital at 8:15 p.m.

With Teresa, however, a nurse made an entry in the medical records that she had detected a minimal reaction to light in her right pupil. Teresa was therefore kept in



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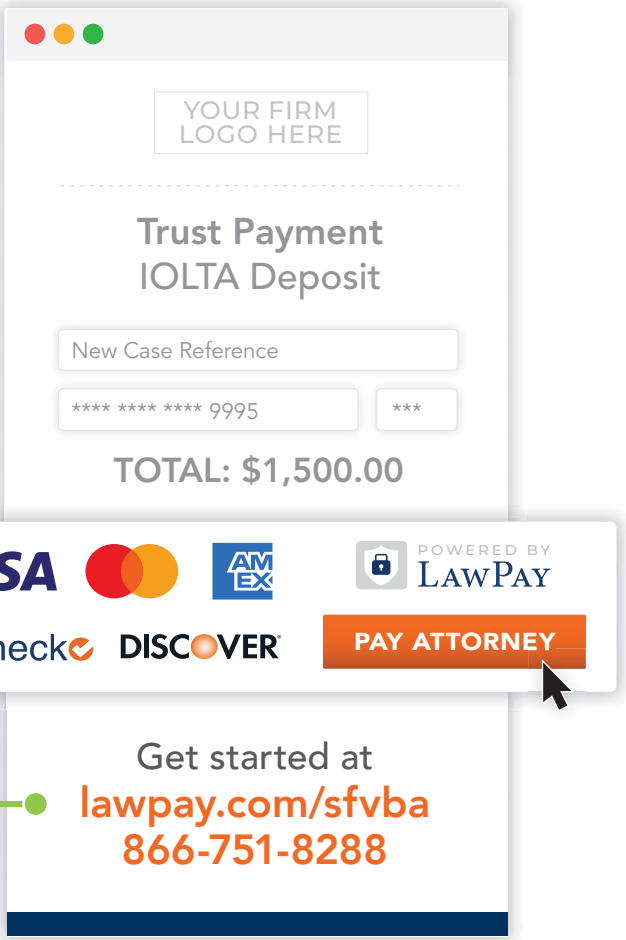

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the hospital for further tests, though she never recovered additional signs of life.

Death certificates issued more than three weeks later listed Stanley's date of death as September 29, 1982 and Teresa's date of death as October 1, 1982.

The Pay-Out

Concluding that Teresa had survived Stanley, the insurance company paid the proceeds of Stanley's life insurance to the administrator of Teresa's estate. Litigation followed from Stanley's mother, contending that they had died simultaneously, and because Teresa had not survived Stanley that she, as contingent beneficiary, was entitled to the insurance proceeds.

When it is impossible to determine the order of death of two individuals, there is a strong presumption that the persons died simultaneously.

This presumption, codified by adoption of the Uniform Simultaneous Death Act, is an attempt "... *to supplant the former arbitrary and complicated presumptions of survivorship with effective, workable, and equitable rules applicable to the ever-increasing number of cases where two or more persons have died under circumstances that there is no sufficient evidence to indicate that they have died otherwise then simultaneously*."[3]

In that circumstance, where it cannot be proven that one individual survived the other, the assets of each decedent are administered and distributed as if each decedent survived the other.

The California Probate Code § 220 provides:

> "... *[I]f the title to property or the devolution of property depends on priority of death and it cannot be established by clear and convincing evidence that one of the persons survived the other, the property of each person shall be administered or distributed, or otherwise dealt with, as if that person had survived the other*."

As the statute makes clear, survivorship must be proven to a standard of clear and convincing evidence. This change in the standard of proof, effective January 1, 1985, was intended to eliminate cases where survivorship appeared to be no more than mere conjecture.

See, for example, *Estate of Rowley* 257 Cal.App.2d 324 (1967), in which two women were killed in a high-speed automobile accident, and the court determined that the victim in the front passenger seat died first on evidence no stronger than the fact that the car was struck from that direction.

The court in *Rowley* took pains to distinguish its opinion form that of *Estate of Wallace*, 64 Cal. App. at p. 113 (1923) in which all of the occupants of an automobile died following impact with a train moving at more than fifty miles an hour, the equivalent of seventy-three feet a second.

The court observed, "*The fact is that the death-dealing impacts occurring between some part or parts of the engine or of the broken automobile and the persons of these unfortunates were so nearly synchronous, in an absolute sense, that for all practical purposes it is impossible to regard them as discrete events separated in time… It is as unbecoming as it is idle for judicial tribunals to speculate or guess whether . . . one or the other may not have ceased to gasp first*." (Id. at 115.)

The Standard of Proof

In raising the standard of proof to the higher level of clear and convincing, the legislature sought to spare courts from this tortuous duty of analyzing spare facts to find survival. *Rowley* ignores many possible scenarios where the driver could have succumbed before the passenger.

This writer has handled numerous estates of individuals dying together in circumstances where it would have been purely conjecture to assume survivorship, including victims of the Jonestown suicide in Guyana, several crashes of private aircraft, and the death of a young couple hiking in Hawaii believed to have stumbled on drug traffickers and whose bodies were not discovered for weeks.

In the early case of *Azvedo v. Benevolent Soc. of Calif.*, 125 Cal.App.2d 894 (1954), payment of insurance proceeds depended upon whether the beneficiary Anthony survived the insured Sylvia. Both were found dead in Anthony's home, the murder victims of Anthony's Aunt Gussie, who subsequently committed suicide.

The court remanded the matter back to the trial court which had earlier ruled the deaths simultaneous. The Appellate Court made clear its inference that Anthony survived Sylvia, because he died after a struggle and she had been killed in her sleep, which the Court believed could not have happened in reverse.

In Illinois at the time of *Janus*, state law did not call for the higher standard of proof. The then provisions of the Illinois version of the Uniform Simultaneous Death Act called for a determination of simultaneous death where "*no sufficient evidence*" existed that one person survived the other.

This extraordinarily low level of proof led to the result of Teresa's family inheriting Stanley's life insurance, against which good sense rebels.

The burden of proof rests sensibly with the party who benefits from survivorship. In *Estate of Lensch* 99 Cal.Rptr.3d 246 (2009), the court ruled that the burden of proof rests with the party who would benefit from survivorship, even when not the petitioning party.

In *Lensch*, 98-year-old Gladys Lensch died in a San Mateo County nursing home, leaving in a handwritten will one-half of her estate to her son, Jay.

His body was discovered later that day, the victim of a self-inflicted gunshot wound, and the death certificates reflect that difference of eleven hours. If Jay survived Gladys,

then her assets would pass to his estate, and his will had disinherited his two sons.

If, however, he had predeceased Gladys, under the anti-lapse statutes of Probate Code § 21109, *et seq.*, Jay would be deemed to have predeceased his mother gifts and the inheritance pass to his surviving sons.

Because otherwise unsupported facts set forth in a death certificate are not conclusive, nor does the presumption of correctness in Health and Safety Code § 103550 shift the burden of proof[4], the court remanded the case back to the trial court to allow the grandsons to present evidence on the order of the deaths.

Still, the reach of the simultaneous death statute is notoriously uneven. Even after proving by clear and convincing the order of the deaths, the next step is to determine *how long the surviving individual lived*.

The concept of inheritance of property based on survivorship for mere minutes or hours is offensive to many, and was the motivation for the Law Review Commission to recommend adoption of provisions similar to those of Uniform Probate Code, which imposes stricter survivorship requirements.[5]

> The Commission stated:
> "[*A]s a matter of general policy, it is unfair to determine the recipients of property based on an instant of survival. The Commission recommends that the policy reflected in the Uniform Simultaneous Death Act, which generally divides property between the estates of the decedents, should be applied to situations of nearly simultaneous death. Most people who consider the question would want the taker to be someone who is likely to survive for more than a few minutes, hours, or even days. They would not want property to pass to one side of the family solely due to an instant of survival*."[6]

The recommendations were not adopted when Probate Code § 220 was amended in 1983 to add the standard of clear and convincing evidence.

The Legislature Acts

In 1989, however, the Legislature adopted the 120 hour (5 day) survivorship requirement, but only for intestate succession, codified in Probate Code § 6403, and for the comparatively rare cases of statutory wills under Probate Code § 6211.

In testate cases, in the absence of express provisions in a will or trust setting forth a required period of survivorship, inheritance rights accrue even when the period of survivorship is mere minutes.

Accordingly, it is prudent and increasingly common for estate planning documents to include survivorship requirements, and practitioners will routinely see provisions for thirty days or more.

Longer periods are acceptable, but more than 120 days is discouraged because such a long period results in a terminable interest and the loss of the federal estate tax marital deduction for transfers between spouses.[7]

Accordingly, the third step is to determine *the type of asset passing from a decedent*, as different types of assets continue to devolve differently based on the timing of death.

In the case, for example, of a married couple with uncommon heirs, such as a second marriage with children from prior marriages, the heirs will find themselves treated differently based on the length of the interval between the two deaths.

The parties will first litigate the issue of survivorship, with each set of heirs attempting to prove by clear and convincing evidence that the person from whom they inherit survived by any measure of time. If they are successful, joint tenancies, pay-on-death multiple party accounts, life insurance, annuities and retirement plans pass to the heirs of the survivor.

But intestate assets and assets passing under statutory wills do not so pass, as Probate Code § 6403 requires survivorship for 120 hours, so those assets will still pass to the heirs of the first to die unless the survivor lived beyond that period.

Finally, assets passing under estate planning documents that incorporate longer survivorship periods, such as thirty days, will also pass assets to the heirs of the predeceased spouse.

Even in the expertly-planned estate, proven survivorship by a few minutes or hours will cause a surviving spouse to be deemed to have predeceased under the provisions of the will or trust requiring survival by thirty days or more, and yet that spouse will continue to inherit under the beneficiary designation of the decedent's retirement plan or life insurance, often the couple's largest assets.

Only a specially crafted beneficiary designation would avoid this result, which most estate planners do not prepare.

Thus, the resulting inequity of application will result in different assets passing to different heirs depending upon the length of survivorship, the existence of a will, and the presence of non-probate property.

---

[1] 482 N.E.2d 418 (Ill. 1985).
[2] One James W. Lewis was convicted and spent twelve years in jail for trying to extort $1,000,000.00 from Tylenol's manufacturer, but was never charged in the killings.
[3] *Azvedo v. Benevolent Soc. of Calif.*, 125 Cal.App.2d 894 (1954).
[4] *Bohrer v. County of San Diego*, 104 Cal.App.3d 155 (1980); *Romero v. Volunteer State Life Ins. Co.*, 10 Cal.App.3d 571 (1970); *Estate of Lensch*, 99 Cal.Rptr.3d 246 (2009).
[5] Uniform Probate Code § 2-104. 17 Cal. Law Rev. Com. Reports, pp. 447, 448. Internal Revenue Code § 2056(b)(7).
[6] 17 Cal. Law Rev. Com. Reports, pp. 447, 448.
[7] Internal Revenue Code § 2056(b)(7).

Survivorship Rules: Simultaneous Death and their Unequal Application

Test No. 172

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. Under California Probate Code § 21109, applicable to both wills and trusts, a beneficiary must survive a decedent to inherit.
❑ True ❑ False

2. Determination of death is defined under state law, yet very few states have adopted the Uniform Determination of Death Act.
❑ True ❑ False

3. Under California Health and Safety Code § 7180 an individual is dead only when they have sustained both (1) irreversible cessation of circulation and respiratory functions, and (2) loss of three or more limbs.
❑ True ❑ False

4. When two or more persons die at or near the same time, the right to inherit depends not just on the establishment of death, but on the order of death.
❑ True ❑ False

5. In 1982, Illinois newlyweds Stanley and Teresa Janus ingested cyanide-laced Tylenol. Stanley died but Teresa survived.
❑ True ❑ False

6. In the fall of 1982, seven victims–four women, two men and a 12-year old girl–died after taking Tylenol capsules that had been purchased from drugstores and groceries in the Chicago area.
❑ True ❑ False

7. In the case of *Janus v. Tarasewicz,* concluding that Teresa had survived Stanley, the insurance company paid the proceeds of Stanley's life insurance to the administrator of Teresa's estate.
❑ True ❑ False

8. Whether a beneficiary survives, and how long they survive, determines how assets are distributed under California law.
❑ True ❑ False

9. Under the Uniform Simultaneous Death Act, when it is impossible to determine the order of death of two individuals, there is a strong presumption that the persons died simultaneously.
❑ True ❑ False

10. Under California Probate Code § 220, where it cannot be proven that one individual survived the other, each decedent is presumed to have predeceased the other.
❑ True ❑ False

11. In California, survivorship must be proven to a standard of clear and convincing evidence.
❑ True ❑ False

12. In *Estate of Rowley* 257 Cal.App.2d 324 (1967), in which two women were killed in a high-speed automobile accident, and the court held that it could not be determined who died first.
❑ True ❑ False

13. In cases involving survivorship, the burden of proof rests with the party who benefits from survivorship.
❑ True ❑ False

14. Under settled California law, the facts set forth in a death certificate are conclusive on the parties in litigation.
❑ True ❑ False

15. Even after proving by clear and convincing evidence the order of the deaths, in many cases it is still necessary to determine how long the surviving individual lived.
❑ True ❑ False

16. In 1989, the California Legislature adopted the 120 hour (5 day) survivorship requirement for intestate succession, codified in Probate Code § 6403.
❑ True ❑ False

17. In testate cases, inheritance rights accrue to beneficiaries only if each beneficiary survives for ten (10) days.
❑ True ❑ False

18. It is prudent and increasingly common for estate planning documents to include survivorship requirements in wills and trusts, and practitioners will routinely see provisions for thirty (30) days or more.
❑ True ❑ False

19. Survivorship periods in estate plans of more than one hundred and eighty (180) days is encouraged because such longer periods assure availability of the federal estate tax marital deduction for transfers between spouses.
❑ True ❑ False

20. The inequity of application of survivorship rules result in different assets passing to different heirs depending upon the length of survivorship, the existence of a will, and the presence of non-probate property.
❑ True ❑ False

Survivorship Rules: Simultaneous Death and their Unequal Application

MCLE Answer Sheet No. 172

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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17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**

By Michael D. White

Taking the Helm:

A New Chief Justice at the California Supreme Court

Hon. Patricia Guerrero, the new Chief Justice of the California Supreme Court and the daughter of Mexican immigrants, was rated as "*exceptionally well qualified for the position [of Chief Justice]*" by the California State Bar Judicial Nominees Evaluation Commission and overwhelmingly approved by voters in last November's general election.


STATE OF CALIFORNIA
THE EARL WARREN BUILDING
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ON TUESDAY, JANUARY 3, 2023, HON. PATRICIA Guerrero raised her right hand to be sworn in as Chief Justice of the California Supreme Court.

"*I am honored and privileged to serve as the 29th Chief Justice of this great state*," she said at the time. "*I look forward to protecting the rights of all Californians and ensuring equal access to justice. Just as I did not get here alone, I do not move forward alone, and I look forward to embarking on this exciting new journey with family, friends, and colleagues*."

Chief Justice Guerrero was nominated to office by Governor Gavin Newsom in August 2022, unanimously confirmed by the Commission on Judicial Appointments the same month, and overwhelmingly approved by voters in the November 2022 general election.

Prior to her public confirmation hearing, the California State Bar Judicial Nominees Evaluation Commission rated Chief Justice Guerrero as "*exceptionally well qualified for the position [of Chief Justice*."

Chief Justice Guerrero first joined the California Supreme Court as an associate justice in March 2022. The following month, she participated in her first oral argument—*Grande (Lynn) v. Eisenhower Medical Center (Flexcare, LLC, Intervener*).

Prior to joining the Court, she served as an associate justice at the Fourth District Court of Appeal, Division One and in San Diego Superior Court from 2013 to 2017, where she served as Supervising Judge of the Family Law Division.

In 2017, she was honored by the American Academy of Matrimonial Lawyers with the award of its Distinguished Jurist Award, and was named Judicial Officer of the Year by the San Diego Family Law Bar Association.

While a justice on the Fourth District Court of Appeal, Chief Justice Guerrero was chair of the State Bar's Blue Ribbon Commission on the Future of the Bar Exam and Chair of the Judicial Council of California Advisory Committee on Criminal Jury Instructions.

Chief Justice Guerrero has also been active participant in the statewide "Judges in the Classroom" civics program.

In July 2022, Chief Justice Guerrero was elected to the American Law Institute, an independent national organization that produces scholarly work to clarify, modernize and otherwise improve the law.

Prior to her appointment to the bench, Chief Justice Guerrero worked as an associate at Latham & Watkins LLP starting in 1997 and was named an equity partner at the firm in 2006. She served as an Assistant U.S. attorney at the U.S. Attorney's Office, Southern District of California from 2002 to 2003.

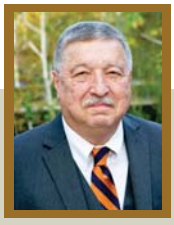

Chief Justice Hon. Patricia Guerrero

A native of the Imperial Valley raised by immigrant parents from Mexico, Chief Justice Guerrero began working in a grocery store at the age of 16 and graduated as co-valedictorian in high school.

She continued working to help pay for her education while attending the University of California, Berkeley, where she was honored with an award given to the top two students in the Legal Studies major upon graduation in 1994.

Three years later, she received her Juris Doctor degree from Stanford Law School, where she was lauded for the quality of her legal writing.

According to her official biography, Chief Justice Guerrero "*has contributed many hours of pro bono work, including as a member of the Advisory Board of the Immigration Justice Project, to promote due process and access to justice at all levels of the immigration and appellate court system. She has assisted clients on a pro bono basis in immigration matters, including asylum applications and protecting vulnerable families by litigating compliance with fair housing laws.*"



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.

Serious Responsibilities

In addition to heading the Court itself, Chief Justice Guerrero also now serves in an administrative capacity as Chair of both the San Francisco-based California Judicial Council (CJC) and the Commission on Judicial Appointments.

Mandated by the state's Constitution, the CJC was created in 1926 to act as the policymaking body for California's state court system, providing policy guidelines to the courts, making recommendations annually to the Governor and Legislature, and adopting and revising the California Rules of Court in the areas of court administration, practice, and procedure.

Directing the Council alone is an enormous undertaking.

Serving a population of more than 39 million people, or about 12 percent of the total U.S. population, the Council oversees the operations of the largest court operation in the entire nation—those of the state's Supreme, Appeals and Superior Courts.

Currently, according to the Council's *2022 Court Statistics Report*, the Council administers the activities of some 2,000

judicial officers and just over 18,000 judicial branch employees statewide at 500 court buildings sited throughout the state.

The judicial branch budget for the 2020–21 fiscal year of $4 billion—excluding infrastructure—represented about 2 percent of the California state budget.

By far and away, the state's Superior Courts handle the vast bulk of the state's judicial case load.

Those courts—one in each of the state's 58 counties—alone handled more than 4.4 million civil, criminal, family, juvenile, probate, mental health, and habeas cases in FY2020-2021, according to the annual report.

On June 2, 1998, California voters approved a constitutional amendment permitting the judges in each county to unify their superior and municipal courts into a single superior court with jurisdiction over all case types. The goal of court unification is to improve services to the public by consolidating court resources, offering greater flexibility in case assignments, and saving taxpayer dollars.

By February 2001, judges in all of the state's 58 counties had voted to unify their trial courts.

The California Legislature determines the number of judges in each court. Superior Court judges serve six-year terms and are elected by county voters on a non-partisan

ballot at a general election. Vacancies are filled through appointment by the Governor.

The state Constitution also gives the Supreme Court the authority to review decisions of the state Courts of Appeal.

Most of the cases that come before the Courts of Appeal involve the review of a superior court decision that is being contested by a party to the case. The Legislature has divided the state geographically into six appellate districts, each containing a Court of Appeal.

Currently, 106 appellate justices preside in nine locations in the state to hear matters brought for review.

This reviewing power enables the Supreme Court to decide important legal questions and to maintain uniformity in the law. The court selects specific issues for review, or it may decide all the issues in a case.

The state Constitution also directs the high court to review all cases in which a judgment of death has been pronounced by the trial court. Under state law, these cases are automatically appealed directly from the trial court to the Supreme Court.

In addition, the Supreme Court reviews the recommendations of the Commission on Judicial Performance and the State Bar of California concerning the discipline of judges and attorneys for misconduct. The only other matters coming directly to the Supreme Court are appeals from decisions of the Public Utilities Commission.

Speaking at Chief Justice Guererro's swearing-in, Fourth Appellate District Administrative Presiding Justice Judith McConnell, said, "*I am confident that whatever new challenges may arise...Chief Justice Guerrero will meet them with grace and skill. She has strength from her family roots in the Imperial Valley, and the strong guidance of her parents and grandparents*."

The Supreme Court: A Brief History

The creation of the state Supreme Court actually predates by a year the admission of California to the Union. Once a backwater of Spain's waning imperial empire, California had morphed into a bustling beehive of business and commerce attracting tens of thousands of people seeking opportunity and fortune.

• **1849**—The Court was established as part of the California Constitution as 48 delegates assembled at Colton Hall in Monterey to draft the state's first Constitution, which was completed in six weeks. Article VI of the new Constitution, covering the judicial branch, provided for a Supreme Court consisting of a Chief Justice and two associate justices.

• **1850**—California was admitted to the Union as its 31st state on September 9. On March 4, 1850, the court convened for the first time in the Graham House, a former hotel on the northeast corner of Kearny Street and Pacific Avenue in San Francisco.

• **1862**—The Court's structure and scope are expanded as the California judiciary was reorganized to meet the needs of a growing state. Article VI of the California Constitution was amended to expand the categories of cases the court could hear and to increase the number of Supreme Court justices from three to five. Terms of office of the Justices were increased from six to 10 years.

• **1879**—The Supreme Court is expanded once more to consist of a Chief Justice and six associate justices, and terms of office were increased from 10 to 12 years. The categories of cases that the Court was mandated to hear were once again augmented, and all opinions were required to be in writing.

• **1904**—The state's Courts of Appeal were established with three being created to handle all appeals in the "*ordinary current of cases*," leaving appeals in the "*great and important*"

cases to the Supreme Court. At the same time, the position of Court Commissioner was eliminated.

• **1926**—The Judicial Council of California was set up by the addition of an amendment to Article VI of the Constitution. Chaired by the Chief Justice, the Council's mandate is to "*improve the administration of justice and to enact rules of court practice and procedure*."

The following year, another constitutional amendment created the California State Bar, a public corporation which licenses and administers all attorneys practicing in California.

• **1934**—Uncontested judicial elections were adopted for the appellate courts, including the Supreme Court. Under this system, the Governor, subject to confirmation by the Commission on Judicial Appointments, fills vacancies in the appellate courts by appointment.

At the next general election, voters decide whether the appointees should be confirmed to fill their predecessors' unexpired terms and whether justices whose terms will expire should be elected to new full terms.

• **1998**—California voters amended the Constitution to allow each county's trial judges to unify their courts into a single countywide Superior Court system. Until then, separate municipal courts in each county had handled the less serious matters, such as misdemeanors, infractions, and minor civil cases.

All 58 counties subsequently consolidated their municipal courts with their respective Superior Courts. Through all this change, the Supreme Court continues to hear cases that make their way from those Superior—or "*trial*"—courts via the state's six Courts of Appeal.

Photos Courtesy of California Supreme Court/ Commission on Judicial Appointments

By Craig B. Forry

Commercial Real Estate:
Do COVID-19 Rent Rules Apply?

IN THE RECENT DECISION IN *SVAP III Poway Crossing, LLC v. Fitness International, LLC*, the appellate court considered Defendant Fitness International, LLC's appeal from a judgment entered in favor of plaintiff SVAP III Poway Crossings, LLC (SVAP) on SVAP's breach of contract claim for Fitness's non-payment of rent under the parties' lease.

Fitness contended that the trial court erred in granting summary judgment because its obligation to pay rent was excused due to the COVID-19 pandemic and resulting government orders prohibiting it from operating its fitness facility for several months.

Specifically, Fitness contended that the court should have found that the obligation to pay rent was excused based on:

- SVAP's own material breach of the lease;
- The force majeure provision in the lease;
- The California Civil Code § 1511;
- The doctrines of impossibility and impracticability; and,
- The doctrine of frustration of purpose.

The appellate court concluded that these contentions lack merit and it affirmed the judgment in favor of SVAP, the owner and landlord of the building commonly known as the Poway Shopping Center.

Fitness is a California limited liability company renting certain space in the shopping center pursuant to a retail lease between the parties.

The lease provides Fitness the right to occupy the premises for a period of fifteen years, subject to three five-year renewals.

The parties later extended the initial term of the lease to October 31, 2025.

Enter COVID-19

In March 2020, California Governor Gavin Newsom proclaimed a State of Emergency in California due to the threat of COVID-19.

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Soon after, he issued an executive order placing limitations on residential and commercial evictions for non-payment of rent. The order also stated, however, that it did not relieve a tenant of the obligation to pay rent, nor restrict a landlord's ability to recover rent due.

Governor Newsom also issued an executive order directing all California residents to follow the State public health directive to stay home or at their place of residence, with certain exceptions, and directing all non-essential businesses to immediately cease operating to prevent further spread of COVID-19.

Gyms and fitness centers were included in the category of non-essential businesses.

Because the government orders made it temporarily illegal for Fitness to operate its health club and fitness center at the premises, it ceased doing so in March 2020.

Fitness was intermittently unable to operate its health club and fitness facility for certain periods from March 2020 through March 2021 due to government closure orders.

In May 2020, SVAP sued Fitness for breach of contract based on the defendant's non-payment of rent.

The complaint alleged that Fitness had defaulted on its obligations pursuant to the lease by failing to pay rent for April and May 2020, Fitness remained in occupancy of the premises, and SVAP had not terminated the lease.

SVAP further alleged that it had performed or was excused from performing all its obligations under the lease.

The complaint sought damages from Fitness for the outstanding rent payments, late payment service charges, interest, and attorneys' fees and costs. SVAP attached the parties' lease and its three amendments to the complaint.

Fitness alleged that the essential purpose of the lease was for Fitness to operate a full-service health club and fitness facility in the premises, but it was impossible for Fitness to do so for several months because of the COVID-19 pandemic and resulting closure of the premises in response to government orders.

A Cross-Complaint is Filed

According to the cross-complaint, Fitness's inability to use the premises as a full-service health club and fitness facility meant it was not required to pay rent during the closure periods.

Fitness also alleged that SVAP breached the contract by failing to provide Fitness a credit for rent paid, failing to comply with the lease's provisions regarding rent abatement, and violating various other representations, warranties, and covenants by SVAP to Fitness in the lease.

The cross-complaint further alleged that SVAP acted in bad faith by demanding payment under the lease and filing its lawsuit against Fitness. Fitness sought a judgment declaring, among other things, that it was not required to pay rent for the closure periods.

It also sought specific performance of the lease's rent abatement provisions and the enforcement of certain promises alleged to have been made by SVAP filed a motion for summary judgment seeking judgment in its favor on its breach of contract claim and dismissing Fitness's cross-complaint.

SVAP contended that it was undisputed that the parties had entered into the retail lease, Fitness had withheld more than eight months' worth of rent, and its failure to pay was not due to lack of funds.

SVAP argued that this failure to pay constituted a breach of the lease, the lease—including its force majeure provision—allocated the risk associated with the pandemic to Fitness and precluded Fitness's asserted defenses, and none of the other statutes or doctrines invoked by Fitness excused the breach.

Fitness opposed summary judgment, arguing that because its business operations were restricted intermittently during the pandemic, its obligation to pay rent was temporarily excused under Civil Code § 1511, the force majeure provision of the lease, and the equitable doctrines of impossibility, impracticability, and frustration of purpose.

Fitness further argued that SVAP had materially breached the lease because during the closure periods—Fitness did not have the right to use the premises as a health club or to quietly enjoy the premises without interruption and disturbance as warranted by SVAP; and SVAP failed to abate rent as required.

The trial court disagreed with Fitness and granted SVAP's summary judgment motion.

There is no dispute SVAP has established the following elements for its breach of contract claim based on Fitness's non-payment of rent:

- The existence of a valid and binding contract between the parties for the lease of retail premises;

- SVAP permitted Fitness to occupy the premises for the term of the lease;

- Beginning in April 2020, after the start of the pandemic and resulting closure orders, Fitness intermittently failed to pay rent to SVAP for several months; and,

- As of October 2021, Fitness owed $520,361.29 to SVAP in unpaid rent.

An Obligation to Pay?

The crux of the parties' dispute on appeal is whether Fitness's obligation to pay rent during the closure periods was excused.

Section 1.9, of the Lease, on which Fitness relied, is titled "*Initial Uses*" and provides that the initial uses of the premises "*shall be for the operation of a health club and fitness facility*."

Section 1.9 also provides that Fitness "*shall have the right throughout the Term and all Option Terms to operate for uses permitted under this Lease*."

Fitness repeatedly asserts that this means SVAP "*guaranteed*" it the right to operate, free from government interference, a fitness facility at the premises throughout the term of the lease.

The parties' inclusion of Section 2.2—which required SVAP to guarantee that, "*as of the Effective Date, Tenant's Initial Uses of the Premises will not violate any applicable rule, regulation, requirement or other law of any governmental agency, body or subdivision thereof applicable as of the date hereof*"—would be rendered meaningless if Section 1.9 were read to require SVAP to make that guarantee throughout the term of the lease.

Instead, the reasonable interpretation of Section 1.9 is that SVAP merely agreed not to restrict Fitness from using the premises in any way permitted under the lease.

Section 8.2 supports this interpretation, as it specifically allows Fitness to "*change the use of the Premises to any alternate lawful retail use*" not otherwise prohibited by the lease or certain other restrictions.

This language further underscores that SVAP's obligation under the contract was not to ensure Fitness's ability to operate a health club and fitness facility for the entire duration of the lease term, but rather to provide Fitness with possession of the premises in exchange for its payment of rent to SVAP.

Fitness did not dispute that SVAP has provided possession of the premises throughout the lease term, nor does Fitness argue that SVAP—as opposed to the government—has restricted its use of the premises in any way. Therefore SVAP fulfilled its obligations and did not breach the lease.

Fitness contended that its performance is excused because the government closure orders resulting from the COVID-19 pandemic constitute a force majeure event under the lease.

The closure orders were "*restrictive laws*," but the laws did not delayed, hindered, or prevented Fitness from performing under the contract.

First, the lease does not require SVAP to guarantee Fitness the unlimited right to use the premises as a health club and fitness facility even when prohibited by law. Rather, the obligation owed by SVAP was the delivery of the premises to Fitness. SVAP fulfilled that obligation.

Second, the trial court properly concluded that the obligation owed by Fitness was the payment of rent. There is no evidence or argument before us that the pandemic and resulting government orders hindered Fitness's ability to pay rent.

Even if they had, the lease explicitly excludes from the definition of force majeure event any "*failures to perform resulting from lack of funds or which can be cured by the payment of money*."

A Failed Argument

Fitness's claims of impossibility and impracticability were similarly unpersuasive. Impossibility is defined as not only strict impossibility but also impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved.

A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost. The defense of impossibility may apply where, as here, a government order makes it unlawful for a party to perform its contractual obligations.

Fitness contended that the defense of impossibility applied here because the government closure orders made it illegal for it to operate its fitness facility.

But, Fitness's obligation under the lease was to pay rent, not to operate a fitness facility. The government closure orders did not make it illegal for Fitness to pay rent. In fact, one of the orders explicitly stated that it did not relieve a tenant of the obligation to pay rent.

Fitness also contended that Civil Code §§ 1511(1) and 1511(2) excuse its obligation to pay rent during the closure periods.

Section 1511(1) provides that a party's performance of its contractual obligation is excused where the operation of law prevents or delays the performance.

The Section does not excuse Fitness's performance because the pandemic and resulting government orders did not prevent Fitness from performing its contractual obligation to pay rent.

Indeed, one of the orders explicitly stated that commercial tenants, such as Fitness, remained obligated to pay their rent despite a moratorium on commercial tenant evictions. Section 1511(1) therefore does not excuse Fitness's payment of rent.

Section 1511(2) similarly was no support to Fitness. It excuses performance only where prevented or delayed by an "irresistible, superhuman cause" and the parties have not "expressly agreed to the contrary."

The irresistible, superhuman cause identified by Fitness here is the COVID-19 pandemic.

Again, however, the pandemic did not prevent Fitness from performing its contractual obligation to pay rent.

Moreover, the parties had "*expressly agreed to the contrary*" by including a force majeure provision in their contract stating that any failure to perform that could be cured by the payment of money would not constitute a force majeure event.

Finally, Fitness contended that its obligation to pay rent was excused under the doctrine of temporary frustration of purpose because the value of the lease was destroyed by the government orders during the closure periods.

The Doctrine of Frustration

The doctrine of frustration excuses contractual obligations where performance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason recognized as such by both parties, for entering into the contract has been destroyed by a supervening and unforeseen event.

A party seeking to escape the obligations of its lease under the doctrine of frustration must show the purpose of the contract that has been frustrated was contemplated by both parties in entering the contract; the risk of the event was not reasonably foreseeable and the party claiming frustration did not assume the risk under the contract; and the value of counter-performance is totally or nearly totally destroyed.

Governmental acts that merely make performance unprofitable or more difficult or expensive do not suffice to excuse a contractual obligation.

The lease only required Fitness to operate a fitness facility for one day and permitted other uses thereafter.

It is also clear from the parties' actions and argument that neither considered the contract to terminate as a result of the orders.

On the contrary, Fitness continued to occupy the premises throughout the closure periods and did not attempt to rescind the lease. It therefore remains obligated to pay rent while in possession of the premises.

Liability under the lease continues as long as the lessee continues in possession.

Lessons Learned

• Impossibility is defined as not only strict impossibility but also impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved.

• A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.

• Civil Code § 1511(1) provides that a party's performance of its contractual obligation is excused where the operation of law prevents or delays the performance. Section 1511(1) does not excuse Fitness's performance because the pandemic and resulting government orders did not prevent Fitness from performing its contractual obligation to pay rent.

• The doctrine of frustration excuses contractual obligations where performance remains entirely possible, but the whole value of the performance to one of the parties at least, and the basic reason recognized as such by both parties, for entering into the contract has been destroyed by a supervening and unforeseen event.

• Governmental acts that merely make performance unprofitable or more difficult or expensive do not suffice to excuse a contractual obligations.

FAST FOOD: The Sacramento Superior Court has ruled that a new law establishing a so-called fast food sector council can't be enforced until officials determine whether the industry challenge to the law can proceed.

The Save Local Restaurants coalition submitted signatures on December 5, 2022 to prevent the fast food council law, AB 257, from taking effect until after California voters decide its fate when the referendum appears on the November 2024 ballot.

The California Department of Industrial Relations tried to put AB 257 into effect temporarily on January 1 of this year despite the pending signature verification process for the referendum, but the coalition sued to stop enforcement of the law.

The Sacramento Superior Court's January 13 ruling found there is "*very little harm*" to the public in delaying enforcement of AB 257 until completion of the signature verification process, which the parties estimate will occur by January 27 or March 13 at the latest.

Once the referendum on AB 257 qualifies for the ballot, it cannot be enforced until voters have their say.

The Secretary of State confirmed on December 9, 2022, that the coalition's referendum petition contained more than the minimum number of required signatures. The counties have 30 working days from that date to perform a full check of signatures and report to the Secretary of State.

The Save Local Restaurants coalition is made up of small business owners, restaurateurs, franchisees, employees, consumers, and community-based organizations.

NON-COMPETE CLAUSES: The Federal Trade Commission has issued a plan to ban non-compete clauses, a proposal that would allow workers to take jobs with rival companies or start competing businesses but raises the prospect of legal opposition from companies that say the practice has a legitimate purpose.

According to the *Wall Street Journal*, the FTC said non-compete clauses constitute an exploitative practice that undermines a 109-year-old law prohibiting unfair methods of competition. Non-compete clauses, which typically bar employees from joining a competitor for a period after they quit, affect nearly one in five American workers, according to the agency.

Long associated with higher-paid managers, the clauses have also been imposed on lower-wage workers who lack access to trade secrets, strategic plans and other reasons that could be cited for hampering job switchers, the agency says.

If the FTC eventually votes to adopt the proposal, companies would have to rescind non-compete requirements they impose on workers and let employees know about the change. FTC officials say non-competes suppress wages, restrain new business formation and hurt the ability of companies to hire workers they need to grow.

The four-member commission voted 3-1 last month to issue the proposal, which is subject to a 60-day period of public comment before it can be adopted as a regulation.

OVERSIGHT SOUGHT: As the California Supreme Court prepares to rule on *Adolph v. Uber*—a case involving claims under the Private Attorneys General Act (PAGA), a law exclusive to California that was recently curbed by the U.S. Supreme Court—a new friend of the court brief asks the state for more oversight to deter PAGA abuse, which they say is simply being used to "*enrich trial lawyers*" at the expense of California employers.

The amicus brief was filed in January as the first act of Stop Small Business Shakedowns (SSBS), a committee of the non-profit Californians for Fair Pay and Employer Accountability group.

"*We ask the California Supreme Court not to broaden PAGA beyond the legislature's intent when it was enacted because a broad ruling would increase shakedown lawsuits against businesses without any benefit to the employees*," Jennifer Barrera, President and CEO of the California Chamber of Commerce and Executive Committee member of the SSBS.

RICO: The Mongol Nation is an unincorporated association whose members include the official, or "*full-patch*," members of the Mongols Motorcycle Gang.

A jury convicted the association of substantive RICO and RICO conspiracy violations; it also found various forms of Mongol Nation property forfeitable. That property included the collective membership marks—a type of intellectual property used to designate membership in an association or other organization. The district court denied forfeiture of those marks, holding that the forfeiture would violate the First and Eighth Amendments.

The Ninth Circuit affirmed the district court's judgment. The court explained that in Mongol Nation's appeal, it argued for the first time that it is not an indictable "*person*" under RICO because the indictment alleges that the association was organized for unlawful purposes only. The panel concluded that this unpreserved argument is non-jurisdictional. The panel did not resolve the Government's contention that Mongol waived it. The panel wrote that regardless of the merits of Mongol Nation's argument, it mischaracterizes the allegations in the indictment.

On the Government's cross-appeal of the order denying its second preliminary order of forfeiture, the panel did not need to decide whether forfeiture of the membership marks would violate the First and Eighth Amendments.

Nor did the panel reach the question of whether the marks may be forfeitable without the transfer of any goodwill associated with the marks. The panel held that the forfeiture was improper for a different reason—the Government effectively sought an order seizing and extinguishing the Mongols' right to exclusive use of its marks without the Government itself ever seizing title to the marks.

By Martin Levy

Benefit Trends for Law Firms for 2023

THERE'S NO DENYING THAT employees' needs have changed over the past few years.

As such, employers need to offer benefits to meet evolving worker needs shaped by lingering effects of the COVID-19 pandemic, a tight labor market and rising inflation.

Many workers are paying more attention to their benefits and wondering how to stretch their dollars further.

Benefits have always been crucial for attracting and retaining top performers.

For 2023, law firms need to offer more than just a health care plan, including more wellness benefits, additional resources and more 'perks' today's workers most need.

Here are three specific strategic laws firms can act on now:

■ Voluntary Benefits: It's no secret that health care costs in the United States have risen sharply over the past two decades and will likely continue to increase. Health care afford-ability is top of mind for employers and employees alike.

As employers search for ways to manage their health care costs, some are considering voluntary benefits as a strategy to round off their offerings—accident insurance; critical illness; hospital indemnity insurance; disability insurance; life insurance; identity theft protection; and pet insurance

Voluntary benefits can provide value to employees without raising an employer's costs, making them powerful tools for attracting and retaining top workers.

■ Financial & Wellness Benefits: Many employees are feeling financially strained due to record-high inflation. Not only will inflation impact employees' decisions about benefits, but it may also result in a need for financial wellness education and guidance.

Resources for financial and wellness must go beyond just offering education to be impactful.

Organizations can boost their attraction to today's workers by offering all sorts of financial and wellness benefits:

- Reviewing retirement plan options and matching contribution.
- Health savings account contributions.
- Flexible spending account contributions.
- Financial planning assistance and coaching.
- Home office subsidies/ reimbursements; and,
- Education reimbursements (e.g., tuition or student loan repayment plans).

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■ **Health Care Premiums:** As health care costs continue to skyrocket, some employers choose to pay 100 percent of employees' and eligible dependents monthly health care premiums.

For reference, the Kaiser Family Foundation reports the monthly average for employee contributions in 2022 was 83 percent.

Fully paid health plans could be a key differentiator for workers weighing their employment options.

Recession-Proofing Benefits

To promote stability during the downturn, HR teams should consider the following tips:

■ **Prioritize employee engagement:** Employee engagement can be vital leading up to and during a recession. During periods of economic uncertainty, employees are likely to feel stressed.

For example, if organizations are forced to lay off employees, the remaining employees could be asked to shoulder additional responsibilities and greater workloads. As a result, these employees may feel overworked and worried about their futures.

By increasing employee engagement during difficult times, HR teams can help maintain staff morale and productivity.

■ **Revisit compensation and benefits strategies:** Many employers have responded to recent labor challenges by increasing workers' salaries, providing substantial bonuses, and expanding employee benefits and perks.

Law firms have been hit especially hard as they sought to gain talent.

HR teams need to rethink how their organizations will address attraction and retention struggles. This may involve curtailing salary increases and even reducing employee benefits.

■ **Automate processes:** The more efficient organizations are, the more resilient they will likely be during a recession.

As such, HR teams can improve organizational productivity by automating processes and implementing new technologies. This may entail implementing a robust hire-to-fire Human Resources Information System, referred to as an HRIS.

■ **Minimize layoffs:** When organizations' financial capabilities become uncertain, their immediate plans may be to reduce costs through layoffs.

However, layoffs should only be considered a last resort, seeing as they can create additional risks—for example, legal liabilities, lower morale, and employee distrust negatively impact business operations by decreasing productivity and proficiency.

Instead, HR teams may be able to minimize the need for layoffs within their organizations by implementing voluntary programs or choosing to slow hire or pause it entirely.

■ **Stay transparent:** Recessions can bring uncertainty. Employees will likely be concerned about their futures, the long-term viability of your company and how their duties may change.

With this in mind, HR teams need to find ways to keep employees informed without fostering their worries. Creating transparent workplace cultures can help organizations limit recession-related ramifications.

Every law firm that offers benefits need to start thinking about balancing benefit packages, employee preferences and thinking about ways to modify offerings or tailor them as business climate changes.

To ensure offerings will resonate with employees, organizations should consider surveying them first.

Benefits will continue to be a challenge for employers and employees alike and the impact of recession on business will continue to challenge HR and company profit and loss statements.

Sanctions Against Russia:
A European Union Perspective

By Danica Šebestová and Lucia Pružinská

THE EU FIRST ADOPTED RESTRICTIVE MEASURES against the Russian Federation back in 2014, in response to Russia's annexation of Crimea and Sevastopol and the destabilization of Ukraine.

Since then, the EU has massively expanded the sanctions, following Russia's military aggression against Ukraine and its decision to recognize the non-government-controlled areas of the Donetsk and Luhansk oblasts as independent entities in 2022.

As of October 19, 2022, the EU has adopted eight so called "*packages*" of sanctions, each of them tightening and strengthening the effectiveness of already existing sanctions by, in particular, adding new restrictive measures, broadening the scope of the existing measures and adding more individuals and entities to the EU sanctions list.

These measures are mainly aimed at weakening Russia's ability to wage a war; therefore, they primarily target areas such as the financial sector, energy and transport sectors or dual-use goods. To that end, the sanctions include individual measures, as well as trade restrictions—in particular export and import bans—or even restrictions on media and other measures.

Individual Sanctions

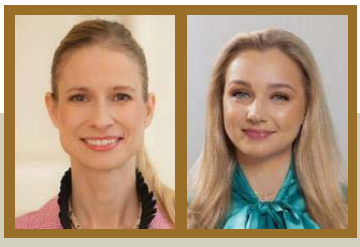
Individual sanctions are directly aimed at persons and entities listed on the EU sanctions list. These persons and entities are subject to an asset-freeze, and it is prohibited for EU persons to make funds available to them.

Among the first individuals to be listed were President Vladimir Putin and Sergey Lavrov, Minister for Foreign Affairs, followed by members of Russian State Duma and other political figures, oligarchs and their family members, prominent businesspeople, mainly those active in the energy, finance, media or defense and arms industries, as well as military persons and entities.

There are currently 1,262 individuals and 118 entities on the EU sanctions list.[1]

Restrictions Targeting the Energy Sector

Further, the sanctions include unprecedented trade



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restrictions. They are, *inter alia*, heavily targeted at essential commodities for the energy sector.

Among the first measures to directly affect the energy sector, was the import ban on Russian coal and other solid fossil fuels, adopted under the 5th package of sanctions in April 2022. It is said to have affected one fourth of all Russian coal exports, amounting to around an 8 billion Euro loss of revenue per year for Russia.

It was followed by a complete import ban on all Russian seaborne crude oil and petroleum products, introduced by the 6th package in June 2022.

The embargo is said to cover 90 percent of the EU's current oil imports from Russia. In 2021 alone, a total of 71 billion Euros worth of crude oil and other petroleum products were imported into the EU.

However, the ban is subject to certain transition periods, and includes a temporary exception for crude oil delivered by pipeline.

Some of the Member States, among which the Czech Republic, are particularly dependent on these supplies and have therefore been granted an indefinite exemption. However, they shall not resell the oil they receive through the pipeline to other Member States or third-party countries, so that they do not gain a competitive price advantage.

The exemption from the ban shall last until the Council decides otherwise. In September 2022, the G-7 first announced its intention to adopt an "*oil price cap*."

If implemented, the provision of services that enable maritime transportation of Russian-origin crude oil and petroleum products would be prohibited, unless these commodities are purchased at or below a determined price.

Following this announcement, President Ursula von der Leyen stated that the European Commission intends to propose a price cap on Russian gas. At the beginning of this year, 40 percent of all gas import into the EU were from Russia, whereas now the EU is down to only 9 percent.

However, some Member States remain heavily dependent on Russian imports and they are worried that the price cap might put their gas supplies from Russia at risk, especially since President Putin warned against this measure and threatened to cut off energy supplies if the price cap is introduced.

Trade Restrictions

The EU's restrictive measures also include export bans on a wide range of goods and services.

It is prohibited to sell, supply, transfer or export so called "*dual-use goods and technology*,"which are items, including software, that can be used for both civil and military purposes. Among these are items that can be used for the design, development, production or use of nuclear, chemical or biological weapons, including a wide range of electronic components.

Moreover, the export ban has also been imposed on goods, which could contribute to the enhancement of Russian industrial capacities, including certain chemicals, packaging materials, wood, various types of machinery, or even roses and other live plants.

Reportedly, the restrictions have caused disruptions in the supply chain and severely affected Russia's access to advanced technology, such as chips.

Due to the shortage, Sberbank, which has mostly worked with European chip producers, has started removing chips from un-activated bankcards to satisfy the demand.

Speaking of the banking sector, major Russian banks have also been heavily hit by the sanctions.

In March, the EU, in cooperation with the U.S. and the UK, has agreed to exclude key Russian banks from SWIFT, the world's dominant financial messaging system.

Sberbank was not among the first ones to be excluded, but, with the adoption of the 6th package of sanctions in early June 2022, Sberbank is now also excluded from SWIFT and is currently listed on the EU sanctions list.

Moreover, as of July 22, 2022, it is also prohibited to purchase, import or transfer gold if it originates in Russia and has been exported from Russia to the EU or to any third-party country after the said date.

Therefore, the prohibition does not apply to gold that was already held by natural persons, companies, investors, banks or other entities across the Member States, if it was exported from Russia before July 22, 2022. The ban applies to gold, including gold in semi-manufactured forms or in powder form, waste and scraps of gold, and gold coins.

Moreover, gold jewelry is also covered by the ban. However, the prohibition shall not apply to gold intended for the personal use of natural persons travelling to the EU, owned by those individuals and not intended for sale.

The Latest Package of Sanctions

The adoption of the 8th package of sanctions was announced on October 6, 2022. The latest restrictive measures include, *inter alia*, additional listings of persons and entities, new export and import restrictions and the legal basis for the anticipated oil price cap.

Additional export restrictions are aimed at further restricting Russia's access to military, industrial and technological items in order to limit its ability to develop its defense and security sector.

The measures include the export ban on coking coal—which is used in Russian industrial plants—specific electronic components found in Russian weapons, and certain chemicals. Moreover, almost 7 billion Euros worth of additional import bans have been adopted.

These include a ban on Russian steel products, machinery and appliances, wood pulp and paper, plastics, vehicles, textiles, footwear, leather, cigarettes, ceramics, certain chemical products and even non-gold jewelry.

Further, the basis for the G-7 oil-price cap was introduced. Its objective is to reduce Russia's revenues while keeping global energy markets stable through continued supplies. This measure is being closely coordinated on the G-7 level and it should be effective as of December 5, 2022 for crude oil, and as of February 5, 2023 for refined petroleum products, both subject to a further decision by the Council.

Further, an additional 30 individuals and 7 entities have been added to the EU sanctions list. Among the designated individuals are those who played a role in the organization of the referenda held in parts of the Donetsk, Kherson, Luhansk, and Zaporizhzhia regions of Ukraine, and their annexation by Russia.

Moreover, representatives of the defense sector, such as Alan Lushnikov, the largest shareholder of arms producer JSC Kalashnikov Concern, or both former and current Deputy Ministers of Defense of the Russian Federation, have been listed.

The sanctioned entities include, for example, defense companies providing weapons or fighter aircraft to the Russian Armed Forces. Moreover, the listing criteria were broadened in order to include the possibility to sanction those who facilitate the circumvention of EU sanctions.

The scope of services that can no longer be provided to the government of Russia or legal persons established in Russia has also been expanded. In addition to accounting, auditing, bookkeeping or tax consulting services, it shall also be prohibited to provide IT consultancy, legal advisory, architecture and engineering services.

These restrictions shall have a significant impact on Russia's industrial capacity, as it is highly dependent on import of these services.

As the President of the European Commission stated, Russia "*should not benefit from European knowledge and expertise*."

Moreover, the existing prohibitions with respect to crypto-assets have been tightened, as a full ban on the provision of the crypto-asset wallet, account or custody services to Russian persons—regardless of the total value of those crypto-assets—has been adopted. Previously, it was allowed to provide such services if the total amount did not exceed 10,000 Euros.

In response to the annexation of certain regions of Ukraine, the geographical scope of the EU's restrictive measures has been extended to cover all the non-government-controlled areas of Ukraine in the oblasts of Donetsk, Luhansk, Zaporizhzhia, and Kherson.

[1] As of 19 October 2022.

Valley Retro

It's 1928 and two women enjoy a panoramic view of Mulholland Drive looking north toward Van Nuys.

Although plotted, the land looks considerably vacant with only a few homes and buildings scattered in the forefront.

Van Nuys is named for Isaac Van Nuys, the son of Dutch immigrant parents, who moved from upstate New York to the Los Angeles area in late 1865.

Four years later, established as a highly successful businessman, farmer and rancher, he founded the San Fernando Homestead Association, which purchased much of the land that now makes up the center of the Valley.

He built the first wood-frame house in the Valley, and on February 22, 1911, lot sales began at this new town, named after its famous founder.

In 1874, Van Nuys and his business partner, Isaac Lankershim, began raising grain and introduced dryland farming to the region.

Two years later, they filled two ships with Valley wheat at San Pedro—the future Port of Los Angeles—in what was the first grain cargo shipped from the harbor, and the first grain shipped to Europe from California.

Before he died in 1912, Van Nuys' amassed land holdings that encompassed the entire southern portion of the San Fernando Valley—an area 15 miles long and 6 miles wide.

Image courtesy of the Security Pacific National Bank Collection/Los Angeles Public Library Collection

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A Lawsuit Brings Food Security

LENA SILVER
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LenaSilver@nlsla.org

MORE THAN A YEAR AFTER community groups filed an urgent lawsuit challenging Los Angeles County's widespread failure to provide timely food assistance to the most vulnerable applicants, the county's Department of Public Social Services has come into full compliance with the law.

It's a major victory for some of Los Angeles' poorest residents, who had previously been left without critical food assistance because the county had failed to process their applications on time.

In the year before the lawsuit was filed, some 54,000 eligible households were forced to wait for days, weeks, and even months for emergency CalFresh benefits, in clear violation of a state law requiring counties to provide these benefits within three days to people with extremely low incomes, and whose housing costs exceed their resources or income for the month.

That widespread violation left more than 100,000 of Los Angeles' poorest residents without access to food—an unconscionable failure that harmed families who were already struggling to survive.

Elizabeth S., a mother of young children who was fleeing domestic violence, was forced to wait 16 days for CalFresh benefits, despite qualifying for expedited relief. She spent those 16 days anxious, waiting in long food distribution lines and skipping meals to ensure there was enough food for her children.

Despite her best efforts, her family was still hungry. Her two lactose-intolerant children had stomach aches because she did not have the money to buy the appropriate milk for them, and the meals she was able to provide were less nutritious. In short order, she also fell behind on rent.

> "Delaying these emergency benefits can have devastating consequences for families living on the margins."

In November of 2021, following months of unsuccessful advocacy efforts to persuade the county to correct its systemic failures, Neighborhood Legal Services of Los Angeles County (NLSLA)—along with co-counsel Western Center on Law and Poverty, Public Interest Law Project, and pro bono firm Sidley Austin—filed a lawsuit.

We represented two organizations—Hunger Action Los Angeles and the Los Angeles Community Action Network—as well as an individual applicant who had been affected by the delays.

And we argued that delaying these emergency benefits—even for a matter of days—can have devastating consequences for families living on the margins.

Seven months later, the county agreed to enter into a permanent injunction requiring its Department of Social Services to come into full compliance with the law by June 1, 2022.

When it fell woefully short of achieving that goal, we filed a motion to enforce.

As a result, the most recent data issued by the County reflects that, as of December 2022, the County has granted benefits in a timely manner to almost 98 percent of eligible households. It's a remarkable turnaround, and a significant victory in the ongoing fight against hunger.

To learn more about NLSLA's work on behalf of people living in poverty, or to get involved, go to nlsla.org.

BLANKET THE HOMELESS

A Project of the San Fernando Valley Bar Association and the Valley Community Legal Foundation of the SFVBA

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