



1 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

I. INTRODUCTION

A. Nature and Classification of Judgment.

7 Witkin Cal. Proc. Judgm § 1

[§ 1] Nature and Classification of Judgment.

"A judgment is the final determination of the rights of the parties in an action or proceeding." (*C.C.P.* 577; see *C.C.P.* 1064 [similar definition of judgment in special proceeding]; *C.C.P.* 1235.120 and 1235.130 [special definition in eminent domain statute]; Rest.2d, Judgments, Scope Note, p. 1; C.E.B., 3 Civil Proc. During Trial 3d, §23.3; Cal. Civil Practice, 4 Procedure, §28:1 et seq.; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §1.)

Judgments may be classified according to the manner in which they are reached, e.g., judgment after trial and judgment without trial (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §133 et seq.). But the important consequences of a judgment are dependent on the various meanings of "final." (See *infra*, §7.) And certain kinds of determinations that are not judgments should be distinguished. (See *infra*, §8 et seq.)

The traditional term "decree" is still appropriate to describe the judgment of a court of equity, but the same court now gives legal and equitable relief, and the determination of an equitable action is a judgment. "Decree" survives as an alternative literary usage, with no special legal significance. (See *Coleman v. Los Angeles* (1919) 180 C. 714, 182 P. 440; C.R.C., Rule 8.10(4) ["'Judgment' includes any judgment or order that may be appealed"]; *F.R. Civ. P.*, Rule 54(a) [similar]; 10 Federal Practice & Procedure (Wright, Miller & Kane) §2651; 21A Federal Procedure, L. Ed. §51:1 et seq.; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §3.)

SUPPLEMENT: [This section is current through the latest supplement]



2 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

I. INTRODUCTION

B. Effect of Judgment on Nonparty.

7 *Witkin Cal. Proc. Judgm* § 2

[§ 2] Effect of Judgment on Nonparty.

A judgment cannot be given in favor of or against one who is not a party to the action. (*Fazzi v. Peters* (1968) 68 C.2d 590, 594, 68 C.R. 170, 440 P.2d 242; *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 C.A.3d 699, 717, 262 C.R. 899; see *Hutchinson v. California Trust Co.* (1941) 43 C.A.2d 571, 575, 111 P.2d 401; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §85 et seq.; 2 *Cal. Proc.* (5th), *Jurisdiction*, §315; on judgment against person lacking capacity to be party, see 4 *Cal. Proc.* (5th), *Pleading*, §§70, 83; on invalidity of judgment where court lacks personal jurisdiction of party, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §106 et seq.; on exception for class action, see 2 *Cal. Proc.* (5th), *Jurisdiction*, §183; 4 *Cal. Proc.* (5th), *Pleading*, §270.)

In *Overell v. Overell* (1937) 18 C.A.2d 499, 64 P.2d 483, plaintiff sued to quiet title and defendant cross-complained. Judgment was given that plaintiff take certain property and that defendant receive one parcel. The court also found that defendant had assigned to her attorney a 25% interest in any recovery and decreed that conveyance of an undivided one-fourth interest in that parcel should be made to the attorney. *Held*, the latter part of the judgment was void. (a) The attorney was not originally a party to the action and could become a party only by order of court. The enforceability of his agreement with defendant was not in issue, and a judgment on that issue would not bind either him or her. (b) Former C.C.P. 385 allowed an action to proceed after a transfer *pendente lite* of an interest in the action (see 4 *Cal. Proc.* (5th), *Pleading*, §262), but this did not give the court authority to make an *ex parte* adjudication as between the transferee and the parties to the action. The transferee has no standing in court until he or she has been substituted in place of the transferor, or otherwise made a party. (18 C.A.2d 503.)

This result may be changed by estoppel. In *LeMire v. Queirolo* (1967) 250 C.A.2d 799, 58 C.R. 804, B, the driver of a truck labeled "Louie Queirolo Trucking," negligently caused injuries to plaintiff. Plaintiff sued several parties, including Queirolo as an individual. (250 C.A.2d 804.) The pleadings and pretrial statement set up only the usual defense of contributory negligence. On the second day of trial, Queirolo testified that the business was a corporation. Judgment was rendered against him as an individual. *Held*, affirmed. The court found some evidence to support an inference of personal ownership, but its main reliance was on estoppel. "The facts above show, and we hold, that there was a clear and deliberate plan and design (if indeed a bona fide corporation was a proper defendant to have been sued) to take advantage of a mistake in which Queirolo was a sedulous actor in perpetuating and perhaps in perpetrating." (250 C.A.2d 803.)

SUPPLEMENT: [This section is current through the latest supplement]



3 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

I. INTRODUCTION

C. Effect of Death of Party.

1. Before Action Is Commenced.

7 Witkin Cal. Proc. Judgm § 3

[§ 3] Before Action Is Commenced.

Death before the action is commenced renders the judgment void as to the decedent, who never was a party to the action. The case is simply one of a judgment for or against a person who is not a party (*supra*, §2). (*Conlin v. Blanchard* (1933) 219 C. 632, 635, 28 P.2d 12; see 46 Am.Jur.2d (2006 ed.), *Judgments* §90; 2 Cal. Proc. (5th), *Jurisdiction*, §317.)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

I. INTRODUCTION

C. Effect of Death of Party.

2. Before Verdict or Submission.

7 *Witkin Cal. Proc. Judgm § 4*

[§ 4] Before Verdict or Submission.

Death occurring during the trial, and before verdict or submission for decision, generally results in a voidable, not void, judgment. The executor or administrator should be substituted as a party, but failure to substitute is merely error, not a jurisdictional defect, and the judgment is not subject to collateral attack. (*Collison v. Thomas* (1961) 55 C.2d 490, 496, 11 C.R. 555, 360 P.2d 51; see *Bliss v. Speier* (1961) 193 C.A.2d 125, 13 C.R. 847 [judgment in excess of jurisdiction was reversed, but personal representative was substituted and no new trial was required]; *Johnson v. Simonelli* (1991) 231 C.A.3d 105, 107, footnote 1, 282 C.R. 205 [judgment entered against person who died after commencement was void because it was entered against someone who was no longer party]; *Sacks v. FSR Brokerage* (1992) 7 C.A.4th 950, 959, 9 C.R.2d 306 [judgment in favor of decedent was not void where parties suffered no prejudice as result of his death; following *Collison v. Thomas*]; 4 *Cal. Proc.* (5th), *Pleading*, §259; 2 *Cal. Proc.* (5th), *Jurisdiction*, §317; on power to enter judgment nunc pro tunc, see *Leavitt v. Gibson* (1935) 3 C.2d 90, 100, 43 P.2d 1091; *infra*, §60 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

I. INTRODUCTION

C. Effect of Death of Party.

3. After Verdict or Submission.

7 *Witkin Cal. Proc. Judgm § 5*

[§ 5] After Verdict or Submission.

(1) *After Verdict in Jury Trial.* If a party dies "after a verdict upon any issue of fact, and before judgment, the court may nevertheless render judgment" on that issue. (*C.C.P. 669*; see *46 Am.Jur.2d (2006 ed.), Judgments §89*; cf. *Williamson v. Plant Insulation Co. (1994) 23 C.A.4th 1406, 1408, 28 C.R.2d 751* [in bifurcated action in which plaintiff died during second phase of trial, *C.C.P. 669* did not authorize judgment to be entered on verdict from first phase of trial; issue of liability was to be tried in second phase, and thus at time of plaintiff's death, plaintiff's claim had not yet been established].)

(2) *After Submission in Court Trial.* Similarly, if a party dies after submission of the case in a nonjury trial, the court may render judgment. (*C.C.P. 669*; see *Kellogg v. Asbestos Corp. Ltd. (1996) 41 C.A.4th 1397, 1404, 49 C.R.2d 256* [because plaintiff died after trial and submission of his personal injury action, trial judge could render judgment under *C.C.P. 669*, but, under former *Prob.C. 573(c) (14 Summary (10th), Wills and Probate, §519)*, judgment could not include damages for pain and suffering]; *In re Marriage of Mallory (1997) 55 C.A.4th 1165, 1170, 64 C.R.2d 667, 11 Summary (10th), Husband and Wife, §119* [applying *C.C.P. 669* in marital dissolution action].)

West's Key Number Digest, Abatement and Revival 67; Judgment 12

SUPPLEMENT: [This section is current through the latest supplement]



6 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

I. INTRODUCTION

C. Effect of Death of Party.

4. Effect on Enforcement of Judgment.

7 *Witkin Cal. Proc. Judgm § 6*

[§ 6] Effect on Enforcement of Judgment.

Death after judgment does not affect the judgment, but it does affect the manner in which the judgment is enforced.

(1) *Death of Judgment Creditor.* On death of a judgment creditor, the judgment may be enforced by the executor or administrator or successor in interest. (*C.C.P. 686.010*; see *Darter v. Magnussen (1959) 172 C.A.2d 714, 719, 342 P.2d 528.*)

(2) *Death of Judgment Debtor.* Enforcement of a judgment after the death of the judgment debtor is governed by the Probate Code. (*C.C.P. 686.020*; see 8 *Cal. Proc. (5th), Enforcement of Judgment, §50.*) The judgment, although not enforceable against the judgment debtor's estate, is payable in the due course of administration. (*Prob.C. 9300(a).*) However, if any property of the judgment debtor was levied on under a writ of execution before death, the property may be sold or collected to satisfy the judgment. (See *Prob.C. 9303.*) Furthermore, if estate property is attached in an action and the defendant dies before or after entry of judgment, the attachment lien may be converted into a judgment lien on the property. (*Prob.C. 9304(a)*; see 14 *Summary (10th), Wills and Probate, §628.*)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

II. FINAL JUDGMENT

A. Various Uses of Term.

7 *Witkin Cal. Proc. Judgm* § 7

[§ 7] Various Uses of Term.

(1) "*One Final Judgment*" Rule. There is only one final judgment, the last or ultimate judgment that determines the rights of the parties. This "one final judgment" rule is important when there are different orders or "judgments" in the course of a particular action or proceeding, and it is necessary to determine which, for purposes of appeal, is the final judgment, and which are merely nonappealable, intermediate, or interlocutory determinations. (See *infra*, §12 et seq.; 9 *Cal. Proc.* (5th), *Appeal*, §§95, 96.) But the one final judgment rule is subject to an exception where separate and independent relief is sought by or against different parties. Final judgment can be given for or against one or more parties, and the action may then proceed to final judgment for or against the others. (See *infra*, §38; C.E.B., 3 *Civil Proc. During Trial* 3d, §23.5; 80 *A.L.R.4th* 707 [entry of judgment on multiple claims under state court rules]; cf. *F.R. Civ. P.*, *Rule 54(b)*; 10 *Federal Practice & Procedure* (Wright, Miller & Kane) §2653 et seq.; 89 *A.L.R. Fed.* 514 [*F.R. Civ. P.*, *Rule 54(b)*]; C.J.E.R., *Judges Benchbook*, *Civil Proceedings: Trial*, §16.21.)

(2) *When Judgment Is Final*. Another sense in which the term "final" is used is in reference to the point at which the "final" or last judgment becomes safe from attack or review. Thus, it may be said that a final judgment is appealable, but also that it is not final so long as an appeal or motion for new trial is pending. (See *Southern Public Util. Dist. v. Silva* (1956) 47 *C.2d* 163, 165, 301 *P.2d* 841; *Jennings v. Ward* (1931) 114 *C.A.* 536, 300 *P.* 129.) For example, for purposes of *Ins.C. 11580(b)(2)*, authorizing an action against an insurer on an insurance policy by a judgment creditor after judgment against the insured is final (see 2 *Summary* (10th), *Insurance*, §301 et seq.), a judgment is final only when the appeal has been concluded or the time within which to appeal has passed. (*McKee v. National Union Fire Ins. Co.* (1993) 15 *C.A.4th* 282, 285, 19 *C.R.2d* 286 [following *Jennings*].)

In *Civic Western Corp. v. Zila Industries* (1977) 66 *C.A.3d* 1, 135 *C.R.* 915, the court observed that "the finality of a judgment can only be weighed in terms of the situation as it existed *at the time the judgment is entered*, rather than basing the determination on the occurrence of events after judgment which establish, by hindsight, that the judgment obtained did in fact give to the prevailing party all the relief it found necessary." (66 *C.A.3d* 12.) If, at the time of entry of an injunctive judgment in favor of the plaintiff, other causes of action remained untried, the judgment was not final, i.e., it did not fully dispose of all the issues. Accordingly, defendant was entitled to file a cross-complaint. (66 *C.A.3d* 12, citing the text.)

(3) *Final Although Not Res Judicata*. A judgment may be final in the sense of a final determination of the issues

raised in the particular action, and also may by lapse of time be safe from appeal, but still may not constitute a final determination of the controversy involved in that action. In other words, a final judgment not on the merits will ordinarily not be a bar to a new action on the same cause of action. (See *infra*, §370 et seq.)

(4) *Final Although Subject to Modification.* A judgment may be final in the three senses already discussed, yet, under a statutory or judicially recognized power, the court may modify its terms at some future date. However, unless and until the modification is sought and ordered, the judgment is as final as any other final judgment. (See *infra*, §79 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



8 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

II. FINAL JUDGMENT

B. Distinctions.

1. Order.

7 *Witkin Cal. Proc. Judgm* § 8

[§ 8] Order.

"Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." (*C.C.P. 1003*.) Generally speaking, an order is not a final determination of the cause but an intermediate ruling of some kind, usually a decision on a motion. (See 6 *Cal. Proc. (5th)*, *Proceedings Without Trial*, §§1, 44.)

But this basic distinction does not always hold true. Some determinations, although characterized as "orders," are in effect final judgments for purposes of appeal and res judicata. (See *infra*, §§12 et seq., 363 et seq.) And some orders are not intermediate but are made after final judgment, e.g., orders granting or denying a new trial, orders vacating a judgment, and orders in connection with the enforcement of judgments. (See 8 *Cal. Proc. (5th)*, *Enforcement of Judgment*, §§185, 278, 381; 8 *Cal. Proc. (5th)*, *Attack on Judgment in Trial Court*, §§77 et seq., 142.)

West's Key Number Digest, Judgment 22

SUPPLEMENT: [This section is current through the latest supplement]



9 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

II. FINAL JUDGMENT

B. Distinctions.

2. Announcement of Decision and Proposed Judgment.

7 *Witkin Cal. Proc. Judgm* § 9

[§ 9] Announcement of Decision and Proposed Judgment.

(1) *Order for Judgment.* An "order for judgment," developed in practice without statutory definition, is neither a judgment nor an order in the true sense. It is merely a statement of the judge indicating what his or her decision will be. Although usually entered in the minutes, it is not an appealable judgment but merely the basis for a judgment to be made. (See *Prothero v. Superior Court* (1925) 196 C. 439, 441, 238 P. 357 [minute order: "Argument opened and closed. Judgment of the court that both sides take nothing"]; *Thomas v. Superior Court* (1935) 9 C.A.2d 383, 49 P.2d 898; *Smith v. Smith* (1941) 45 C.A.2d 212, 113 P.2d 892; *Grattan v. Silbaugh* (1953) 121 C.A.2d 684, 264 P.2d 53 [nonappealable]; *Fox v. Fox* (1954) 127 C.A.2d 253, 273 P.2d 585 [same]; *Gideon v. Superior Court* (1956) 141 C.A.2d 640, 297 P.2d 84 [oral decision granting divorce with alimony and attorneys' fees was not judgment enforceable by contempt proceeding]; *Silvagni v. Superior Court* (1958) 157 C.A.2d 287, 290, 321 P.2d 15 [injunction action; oral pronouncement before required findings and conclusions were prepared was not judgment, and there was no contempt for failure to comply]; *Grable v. Citizens Nat. Trust & Savings Bank of Riverside* (1958) 164 C.A.2d 710, 714, 331 P.2d 103 [minute entry stating what judge was prepared to hold on basic legal issue; not res judicata]; *People v. Wilmshurst* (1999) 68 C.A.4th 1332, 1341, 81 C.R.2d 221, citing the text [tentative statement of decision has no relevance on appeal and arguments based on it will be disregarded]; 9 *Cal. Proc.* (5th), *Appeal*, §161.)

(2) *Announcement of Tentative Decision.* C.R.C., Rule 3.1590 establishes a procedure for trials lasting more than 1 day. (See C.R.C., Rule 3.1590(k).) After trying a question of fact, the trial court must "announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk." And unless the announcement is made in open court in the presence of all appearing parties, the clerk must immediately mail to the parties a copy of the minute entry or written tentative decision. (C.R.C., Rule 3.1590(a).) The purpose of this announcement is merely to start the time running on a request for a statement of decision (see *C.C.P.* 632); it is a preliminary order, ineffective by itself. The tentative decision does not constitute a judgment and is not binding on the court. (C.R.C., Rule 3.1590(b).) The tentative decision does not constitute findings of fact and it may not be used to impugn subsequent findings or the judgment. (*United Pac. Ins. Co. v. Hanover Ins. Co.* (1990) 217 C.A.3d 925, 934, 266 C.R. 231.) However, unless either party specifies new controverted issues or makes new proposals, the trial judge may direct that the tentative decision be the statement of decision. (C.R.C., Rule 3.1590(c)(2).) (For full discussion of procedure and substitution of statement of decision for findings of fact and conclusions of law, see 7 *Cal. Proc.* (5th),

Trial, §389 et seq.)

(3) *Mailing Proposed Judgment*. If a statement of decision is requested, the court must mail the proposed statement of decision and a proposed judgment to all appearing parties. (C.R.C., Rule 3.1590(e).) If a statement of decision is not requested or has been waived and a written judgment is required, the court must mail only the proposed judgment. (C.R.C., Rule 3.1590(g).) After a hearing on any objections, the court must sign and file its actual judgment, which is then entered under *C.C.P. 664* (infra, §49). (C.R.C., Rule 3.1590(h); see 7 *Cal. Proc.* (5th), *Trial*, §399.)

West's Key Number Digest, Judgment 23

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Announcement of Tentative Decision*. C.R.C., Rule 3.1590 was extensively amended and relettered in 2009. The procedure for trials completed within 1 day, or in less than 8 hours over more than 1 day, is set forth in C.R.C., Rule 3.1590(n). C.R.C., Rule 3.1590(a) now provides that the clerk must immediately serve, rather than mail, the minute entry or written tentative decision. C.R.C., Rule 3.1590(c)(2) is now C.R.C., Rule 3.1590(c)(4). (3) *Mailing Proposed Judgment*. C.R.C., Rule 3.1590 was extensively amended and relettered in 2009. C.R.C., Rule 3.1590(e) was relettered C.R.C., Rule 3.1590(f) and now provides that the court must serve, rather than mail, a proposed statement of decision and a proposed judgment on all appearing parties, unless the court has ordered a party to prepare the statement. C.R.C., Rule 3.1590(g) was relettered C.R.C., Rule 3.1590(h). C.R.C., Rule 3.1590(h) was relettered C.R.C., Rule 3.1590(l). If no party requests or is ordered to prepare a statement of decision, or if the court deems that a statement of decision has been waived, the court must prepare and serve a proposed judgment or must order a party to do so. (C.R.C., Rule 3.1590(h), as amended in 2009; C.R.C., Rule 3.1590(i), added in 2009.)



10 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

II. FINAL JUDGMENT

B. Distinctions.

3. Opinion of Trial Court.

7 *Witkin Cal. Proc. Judgm § 10*

[§ 10] Opinion of Trial Court.

An oral or written opinion by a trial judge, discussing and purporting to decide the issues in the manner of an appellate court opinion, is merely an informal statement of the judge's views. It may be helpful in framing the judgment, or on appeal in interpreting ambiguous or uncertain portions of the judgment. But it is not itself the decision of the court or a judgment. (See *De Cou v. Howell* (1923) 190 C. 741, 751, 214 P. 444; *Diaz v. Shultz* (1947) 81 C.A.2d 328, 183 P.2d 717; *Lord v. Katz* (1942) 54 C.A.2d 363, 367, 128 P.2d 907; *Bailey v. El Dorado* (1984) 162 C.A.3d 94, 97, 210 C.R. 237, quoting the text; *In re Marriage of Hafferkamp* (1998) 61 C.A.4th 789, 793, 71 C.R.2d 761, citing the text [unsigned ruling that was not entitled "judgment" did not constitute judgment]; *Collins v. Hertz Corp.* (2006) 144 C.A.4th 64, 77, 50 C.R.3d 149, quoting the text [tentative decision at initial hearing finding triable factual issues had no legal effect]; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §7; 9 *Cal. Proc.* (5th), *Appeal*, §350 et seq.)

However, even this well-settled distinction sometimes breaks down where orders are involved. The order is made by the judge and entered in the minutes by the clerk or signed and filed. (See *infra*, §§44 et seq., 49 et seq.) Because no particular language is requisite for an order, a trial judge may, orally or in writing, state his or her views on the law and the proper decision. If the judge makes no other statement, it is possible to treat this "opinion" as the "decision," and therefore the clerk may enter it in the minutes or file the writing as the order. (See *Keller v. Cleaver* (1937) 20 C.A.2d 364, 366, 67 P.2d 131 [opinion stated that judge had "reached the conclusion that a new trial should be granted"]; *Maxwell v. Perkins* (1953) 116 C.A.2d 752, 754, 756, 255 P.2d 10 [caption "Memorandum re Order," closing words "The motions ... are granted"]; *Martino v. Concord Community Hosp. Dist.* (1965) 233 C.A.2d 51, 56, 43 C.R. 255, 9 *Cal. Proc.* (5th), *Appeal*, §161, citing the text; *Estate of Lock* (1981) 122 C.A.3d 892, 896, 176 C.R. 358 [probate "Decision," with declarations that "settlement of the account and petition for distribution are denied" and that "gift tax disbursements in the account are disallowed" was treated as final judgment]; *MHC Financing Ltd. Partnership Two v. Santee* (2005) 125 C.A.4th 1372, 1392, 23 C.R.3d 622 citing *Estate of Lock* [where "final statement of decision and judgment" clearly set forth trial court's final determinations on merits of various issues not challenged on appeal, determinations were part of judgment].)

SUPPLEMENT: [This section is current through the latest supplement]



11 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

II. FINAL JUDGMENT

B. Distinctions.

4. Judgment on Appeal.

7 Witkin Cal. Proc. Judgm § 11

[§ 11] Judgment on Appeal.

When a final judgment is appealed, the appellate court renders a decision affirming, reversing, or modifying the judgment of the trial judge, accompanied by an opinion giving the reasons for the decision. That part of the appellate opinion that constitutes the decision (usually appearing at the end) is the judgment on appeal, and it is copied into the remittitur, which returns the case to the trial court. (See *9 Cal. Proc. (5th), Appeal*, §831.) (On appellate judgment as res judicata, see *infra*, §357; on appellate opinion as law of the case, see *9 Cal. Proc. (5th), Appeal*, §459 et seq.; on appellate opinion as precedent, see *9 Cal. Proc. (5th), Appeal*, §481 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

III. INTERLOCUTORY JUDGMENTS AND ORDERS

A. In General.

1. Nature of Determination.

7 Witkin Cal. Proc. Judgm § 12

[§ 12] Nature of Determination.

An interlocutory judgment or order is a provisional determination of some or all issues in the cause. The term "interlocutory" has been loosely used to cover all orders that are not final judgments, including orders on motions, and sometimes has been misapplied to judgments that are in legal effect final (see *infra*, §14 et seq.). But interlocutory judgment has a narrower, more specific, and more useful meaning. In certain kinds of cases (usually equitable actions), it is desirable to have a preliminary determination of the respective rights of the parties before taking evidence or further steps to settle the controversy. Roughly classified, the principal situations are the following:

(1) *Unresolved issues*. Where the ultimate judgment will be unconditional, but basic issues of law must be determined before evidence is heard and a final judgment rendered; e.g., an interlocutory order determining the right to an accounting, then taking of the account and judgment for the amount found due (see *infra*, §14 et seq.). (See *Yeboah v. Progeny Ventures (2005) 128 C.A.4th 443, 449, 27 C.R.3d 150*, citing the text.)

(2) *Conditional judgment*. Where the interlocutory judgment is conditional, the successful party having the election to comply with the conditions and obtain final judgment; e.g., a conditional decree for specific performance or quiet title (see *infra*, §23 et seq.).

(3) *Statutory decrees*. Statutory types of interlocutory decrees, such as an interlocutory order for partition (see *infra*, §21).

SUPPLEMENT: [This section is current through the latest supplement]



13 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

III. INTERLOCUTORY JUDGMENTS AND ORDERS

A. In General.

2. Characteristic Features.

7 *Witkin Cal. Proc. Judgm* § 13

[§ 13] Characteristic Features.

Two characteristic features of interlocutory orders or judgments should be noted:

(1) *Not final for appeal.* An interlocutory order is not final for purposes of appeal, except where a particular kind is made appealable by statute. But appealability depends on the nature and effect of the judgment rather than its label, and careful analysis is often necessary to determine whether further judicial action, and therefore a later final judgment, is necessary. (See *Belio v. Panorama Optics* (1995) 33 C.A.4th 1096, 1101, 39 C.R.2d 737; 9 Cal. Proc. (5th), *Appeal*, §136 et seq.; cf. *Republic Natural Gas Co. v. Oklahoma* (1948) 334 U.S. 62, 68 S.Ct. 972, 976, 92 L.Ed. 1212, 1220 [finality for purposes of review by U.S. Supreme Court].)

(2) *Not final in trial court.* An interlocutory order, except for a few statutory types, is also not final in the trial court; it may be modified by the court after further evidence or the law has been considered. Thus, in *Solorza v. Park Water Co.* (1949) 94 C.A.2d 818, 211 P.2d 891, the interlocutory decree awarded attorneys' fees to the successful plaintiffs in a representative suit for rescission. But, after plaintiffs' failure to comply with the terms of the decree, a final judgment was rendered against them, and the fee allowance was eliminated. (94 C.A.2d 821.) (See *Travelers Ins. Co. v. Superior Court* (1977) 65 C.A.3d 751, 760, 135 C.R. 579, quoting the text; C.E.B., 3 Civil Proc. During Trial 3d, §23.3; 46 Am.Jur.2d (2006 ed.), *Judgments* §178.)

Pursuant to the same theory, if, after an interlocutory judgment, the rest of the case is tried before a different judge, that judge may make new findings and a different decision in rendering final judgment. "It is obvious that where an issue is referred to a second judge by an interlocutory judgment and all the evidence on that issue is heard by that judge there is no reason why he may not make new findings on that issue, regardless of the findings of the first judge. ... Had the first judge proceeded with the accounting matter, at the time of making the final judgment he could have changed any of his prior findings if he felt that the evidence required it, even including the findings on the main issue. So a second judge in making his final judgment may change such of the prior judge's findings which he feels the evidence requires, provided only that he has heard all of the evidence on that subject and is not merely contrasting the evidence he has heard with the cold record of the testimony before the other judge." (*Lacey v. Bertone* (1952) 109 C.A.2d 107, 110, 240 P.2d 395; see *Tilem v. Los Angeles* (1983) 142 C.A.3d 694, 706, 191 C.R. 229, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



14 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

III. INTERLOCUTORY JUDGMENTS AND ORDERS

B. Order for Accounting.

1. Order Considered Final Judgment.

7 Witkin Cal. Proc. Judgm § 14

[§ 14] Order Considered Final Judgment.

An important question in accounting actions is whether the first judgment or order determining the right to an accounting and ordering it taken is appealable. In *Zappettini v. Buckles* (1914) 167 C. 27, 138 P. 696, plaintiff sued for dissolution of a partnership and an accounting. The court gave its decree that the partnership be dissolved, declared the respective property interests, ordered the business sold by a receiver, ordered the receiver to pay the proceeds into court, and adjudged that they be applied to fees, expenses, and debts to be determined by the court, any remaining funds to be divided in a certain proportion and paid. *Held*, this was a final judgment, and appealable.

(a) The test of finality is whether a judicial act remains to be done after the accounting has been ordered. If any further judicial action is necessary to determine the rights of the parties, the order is merely interlocutory. But if nothing remains but to give effect to the order, it is a final judgment, even though some further order or orders of the court may be necessary for that purpose. (167 C. 33.)

(b) Here, the rights of the parties had been fully determined, and the matters reserved were simply such as were necessary to carry the judgment into effect. (167 C. 33.) (See *Price v. Slawter* (1959) 169 C.A.2d 448, 337 P.2d 914 [following *Zappettini* on substantially similar facts]; *Eldridge v. Burns* (1978) 76 C.A.3d 396, 404, 142 C.R. 845, citing the text.)

In *Brown v. Memorial Nat. Home Foundation* (1958) 158 C.A.2d 448, 322 P.2d 600, the action involved valuable assets of a charitable trust, and resulted in an "Interlocutory Judgment" declaring the property held in trust, removing defendant as trustee and restraining it from using the assets, appointing receivers, and calling for a future accounting and appointment of a new trustee. *Held*, this was a final and appealable judgment. All essential determinations of substantive rights had been made; the appointment of a new trustee would not affect those rights, and the accounting was merely to insure full performance of the surrender of assets by the old trustees. (158 C.A.2d 455.)

SUPPLEMENT: [This section is current through the latest supplement]



15 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

III. INTERLOCUTORY JUDGMENTS AND ORDERS

B. Order for Accounting.

2. Order Considered Interlocutory.

7 *Witkin Cal. Proc. Judgm* § 15

[§ 15] Order Considered Interlocutory.

Despite *Zappettini v. Buckles* (1914) 167 C. 27, 138 P. 696, supra, §14, most of the decisions find the orders in accounting actions to be interlocutory. *Gunder v. Gunder* (1929) 208 C. 559, 282 P. 794, distinguished *Zappettini* on the ground that there the court did not order a reference for an accounting, but directly ordered the sale of the property and specified the distribution to be made of the proceeds. The reference to a master or referee is, under this theory, the factor that makes the first judgment interlocutory only. (See *Doudell v. Shoo* (1911) 159 C. 448, 453, 114 P. 579; *McAllen v. Souza* (1937) 24 C.A.2d 247, 74 P.2d 853; *Brown v. Trophy-Craft Co.* (1948) 85 C.A.2d 246, 192 P.2d 779; *Nesbitt v. Bruce Eells & Associates* (1951) 105 C.A.2d 370, 233 P.2d 183; *Rose v. Boydston* (1981) 122 C.A.3d 92, 97, 175 C.R. 836, citing the text; *Yeboah v. Progeny Ventures* (2005) 128 C.A.4th 443, 448, 27 C.R.3d 150 ["modified judgment" that established procedures to be used in accounting and provided for appointment of special master was interlocutory; citing *Gunder* and the text].)

In *Middleton v. Finney* (1931) 214 C. 523, 6 P.2d 938, the action was for an accounting and dissolution of a partnership. (a) The court made findings and conclusions and gave judgment dissolving the partnership, determining interests of the parties in certain property, and directed an accounting, but provided that on its completion the court would decree the amount of money due from the parties. (b) After the accountant's report, the court adopted it, made findings and conclusions including substantially all of those previously made, and decreed the sums due. *Held*, the first judgment was interlocutory; although only computations remained, they were subject to the approval of the court and were to be incorporated in a further judgment (a judicial act). (214 C. 525, distinguishing *Zappettini* and following *Gunder*.)

Although reference is an important factor, it is not the only one. The judgment may be interlocutory, even though no reference is ordered and the judgment itself does not state that further judicial action is contemplated. The basic test is whether the judgment as it stands is enforceable by ministerial action, or whether judicial action is required before the rights of the parties are finally settled. Thus, in *David v. Goodman* (1948) 89 C.A.2d 162, 200 P.2d 568, the order was for an accounting, and also that defendant receive a share of profits during a certain period, less amounts drawn. "The accounting and determination of profits left to be done are more than a mere execution of what was determined or a ministerial compliance with the terms of the decree." (89 C.A.2d 166.) (See *Most Worshipful Sons of Light Grand Lodge, Ancient Free & Accepted Masons, Jurisdiction of Calif. v. Sons of Light Lodge Number 9* (1949) 91 C.A.2d 582,

588, 205 P.2d 722 [accounting requiring ascertainment of amounts paid as fees, dues, taxes and assessments, during certain periods, and whether certain bank accounts included any disputed amounts]; *Shirley v. Cook* (1953) 119 C.A.2d 220, 259 P.2d 25; *Degnan v. Morrow* (1969) 2 C.A.3d 358, 363, 82 C.R. 557.)

In *Kinoshita v. Horio* (1986) 186 C.A.3d 959, 231 C.R. 241, the court held that *Gunder* and subsequent decisions have nullified the rule of *Zappettini*. Plaintiff sued for dissolution of a partnership and sale of its assets. The trial judge appointed a receiver, and rendered a judgment for dissolution that (a) determined plaintiff's 31.43% interest, (b) ordered the receiver to sell the property, pay partnership debts, and distribute the remaining assets, and (c) retained jurisdiction for all purposes necessary to ensure compliance. The judgment did not specify the percentage interest of the individual defendants or provide a formula for allocating the costs and expenses assessed against them. Defendants appealed. *Held*, appeal dismissed; the judgment was interlocutory.

(a) Partnership dissolutions and similar proceedings tend to require a series of adjudications by the trial judge; e.g., the judge may order one or more provisional or special remedies in a progression of steps culminating in a final decree. (186 C.A.3d 963, citing the text.) In *Gunder*, the Supreme Court noted a conflict of authority over appealability of the decrees in those proceedings, and later cases have established the rule that judgments declaring the rights of the parties and ordering an accounting are not appealable. (186 C.A.3d 964.)

(b) In *Zappettini*, the judgment declared the exact percentage interest of each partner and ordered the proceeds sold; the court held that no further judicial action was required (see supra, §14). But *Middleton* contradicts *Zappettini's* premise that the ascertainment of sums due does not involve an essential judicial act, and other opinions have cast doubt on *Zappettini* as an authority. (186 C.A.3d 965, 966.) "We are satisfied that there is a conflict between *Zappettini* and the *Gunder* line of cases, and we have found no way to reconcile it. It might be suggested that *Gunder* applies when the judgment orders an accounting, but *Zappettini* governs when property is ordered sold by a receiver. This is a distinction, however, unsupported by logic or principle. ... [T]he trial court must in the ordinary course of a sale by a receiver confirm the sale and approve the receiver's final account. ... If anything such a proceeding is likely to require more judicial attention than an accounting." (186 C.A.3d 966.)

(c) Given the policy considerations supporting the one final judgment rule and the necessity for a definite rule "to reduce both the temptation to file dilatory appeals and the compulsion to file protective ones ... [w]e therefore hold that a judgment decreeing the dissolution of a partnership and directing the sale of assets by a receiver is not a final judgment and that in the absence of a statutory exception it is not appealable." (186 C.A.3d 968.)

SUPPLEMENT: [This section is current through the latest supplement]



16 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

III. INTERLOCUTORY JUDGMENTS AND ORDERS

C. Other Nonstatutory Types.

1. Specific Performance.

7 Witkin Cal. Proc. Judgm § 16

[§ 16] Specific Performance.

In *Maxwell v. Superior Court (1934) 1 C.2d 294, 34 P.2d 475*, plaintiff purchasers sued to rescind agreements for the sale of land, and defendant vendors sought reformation and specific performance. The trial court gave an interlocutory decree for defendants, directing that, within specified times, defendants deposit a deed, plaintiffs state any objections to title, defendants clear the title, and, plaintiffs deposit the price. It was further provided that on deposit of the price, a final judgment for specific performance should be entered, but that on failure of plaintiffs to make the deposit, defendants should have judgment against them for the amount. *Held*, this decree, and a further order determining that the deed furnished by defendants did not convey a merchantable title, were purely interlocutory and nonappealable. The decrees declared rights, but these were conditional, and jurisdiction was retained until compliance with the conditions was established. (*1 C.2d 297.*)

In *Olmstead v. West (1960) 177 C.A.2d 652, 2 C.R. 443*, plaintiffs sued to specifically enforce an option to purchase real estate. The judgment was expressly designated as interlocutory, and expressly reserved jurisdiction to make and enter final judgment. *Held*, defendant's appeal dismissed. Among the factors that made the judgment interlocutory, i.e., that called for future judicial determination, were the following: (a) the ability of defendant to furnish title policy as called for by the judgment; (b) the ability or willingness of plaintiffs to pay; and (c) the nature and reasonableness of expenses and costs of escrow. (*177 C.A.2d 653.*) (See *Wesley N. Taylor Co. v. Russell (1961) 194 C.A.2d 816, 820, 15 C.R. 357.*)

SUPPLEMENT: [This section is current through the latest supplement]



17 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

III. INTERLOCUTORY JUDGMENTS AND ORDERS

C. Other Nonstatutory Types.

2. Reformation.

7 *Witkin Cal. Proc. Judgm § 17*

[§ 17] Reformation.

In *Whitacre v. Hall* (1940) 40 C.A.2d 68, 104 P.2d 401, an action on a contract, the issue of reformation was tried first on stipulation, and the court filed findings and an interlocutory judgment in favor of defendants, ordering an accounting. Thereafter the other issues were tried and new findings and judgment, reciting the earlier judgment, were signed and filed. *Held*, the second was the final, appealable judgment. The first "judgment," on the preliminary questions of interpretation and reformation, did not establish any certain indebtedness, and the procedure of recording it "was unnecessarily formal and perhaps irregular." (40 C.A.2d 73.)

In *Hosford v. Henry* (1951) 107 C.A.2d 765, 238 P.2d 91, plaintiff creditor sought reformation of a deed of trust. Defendant debtor was the operator of a public utility, and the court could not directly decree a lien on its property without the consent of the Public Utilities Commission. The appropriate procedure was to enter an interlocutory decree for reformation and then continue the case until an application for consent could be made to the Commission. In the event of its refusal, then (a) if the ground was mistake, the parties would be left where the mistake placed them; (b) if the ground was fraud, the defrauded party would have an action for damages. (107 C.A.2d 775.) (See *Maier Brewing Co. v. Pacific Nat. Fire Ins. Co.* (1961) 194 C.A.2d 494, 500, 15 C.R. 177.)

SUPPLEMENT: [This section is current through the latest supplement]



18 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

III. INTERLOCUTORY JUDGMENTS AND ORDERS

C. Other Nonstatutory Types.

3. Quiet Title.

7 *Witkin Cal. Proc. Judgm § 18*

[§ 18] Quiet Title.

In *Bloom v. Bloom* (1929) 207 C. 70, 276 P. 568, a lender's action to quiet title, defendant borrower alleged that his deed to plaintiff was intended as a mortgage. The court decided in favor of defendant and rendered judgment that plaintiff execute a reconveyance to defendant on payment by defendant of the amount found due. *Held*, this final judgment was erroneous, for it specified no time for payment and allowed defendant to delay indefinitely, speculating on changes in the value of the property. The appropriate procedure would have been an interlocutory judgment, requiring defendant to pay the debt within a specified reasonable time, following which a reconveyance should be made, and further providing that, if default occurred, plaintiff should be entitled to a decree quieting title. (207 C. 72.) (See *Booth v. Taylor* (1933) 135 C.A. 348, 26 P.2d 846; *Scarbery v. Bill Patch Land & Water Co.* (1959) 170 C.A.2d 368, 371, 338 P.2d 916; *infra*, §24.)

Security-First Nat. Bank of Los Angeles v. Superior Court (1933) 132 C.A. 683, 23 P.2d 1055, reviewing earlier conflicting decisions, reaches a debatable result. Plaintiff sued defendant bank to quiet title to land. The court gave an "interlocutory decree" providing that, if defendant paid \$ 14,000 to plaintiff in 3 months, it should have title; if not, title should be quieted in plaintiff. (132 C.A. 686.) The trial was continued for this period for the sole purpose of receiving proof on the fact of payment. No payment was made and, at the subsequent hearing, a "judgment quieting title" was entered for plaintiff. (132 C.A. 686.) Defendant moved for a new trial, which was granted over plaintiff's objection that the first decree was the final judgment and the motion was too late. In this proceeding on certiorari, it was held that the first decree was, as a matter of law, a final judgment under the rule of *Zappettini v. Buckles* (1914) 167 C. 27, 138 P. 696, *supra*, §14. The court nevertheless refused to annul the order, on the ground that all parties and the trial judge had concurred in the mistaken analysis of the effect of the decree, and that fairness to the litigants required a trial on the merits. (132 C.A. 695.) This latter conclusion is, however, unsupportable; the parties cannot confer power on the court to hear an appeal or motion for a new trial after lapse of the jurisdictional time. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §§13, 19, 91.)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

III. INTERLOCUTORY JUDGMENTS AND ORDERS

C. Other Nonstatutory Types.

4. Mortgage Foreclosure.

7 Witkin Cal. Proc. Judgm § 19

[§ 19] Mortgage Foreclosure.

In *Grable v. Damar Production Co.* (1965) 232 C.A.2d 510, 43 C.R. 16, plaintiff, a mortgagee in possession of real property, sued to foreclose. On August 3, 1964, the court entered a judgment fixing the sums due as of October 23, 1963, directing sale, and specifying distribution. Because of the substantial time that had passed and would pass until completion of the sale, jurisdiction was reserved to make adjustments for credits to plaintiff for further expenses, and credits to defendants for profits. The supplemental judgment finally determining these matters and fixing a net balance to plaintiff was entered October 8, 1964. *Held*, the first judgment was a final judgment, and thus, plaintiff's appeal on October 13, 1964, from that judgment, was too late. Plaintiff's appeal from the supplemental judgment, which was a special order after final judgment, was timely. The court, finding no authority on mortgage foreclosure, applied the rule laid down in *Zappettini v. Buckles* (1914) 167 C. 27, 138 P. 696, *supra*, §14, for accounting cases. (232 C.A.2d 512.)

SUPPLEMENT: [This section is current through the latest supplement]



20 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

III. INTERLOCUTORY JUDGMENTS AND ORDERS

C. Other Nonstatutory Types.

5. Miscellaneous Examples.

7 *Witkin Cal. Proc. Judgm* § 20

[§ 20] Miscellaneous Examples.

In various other kinds of actions, the trial court finds it desirable to render judgment in two separate steps, and it is necessary, as in the accounting cases (*supra*, §14 et seq.), to select one as the final, appealable judgment. The following are examples:

(1) *Action for Rescission*. In *Solorza v. Park Water Co.* (1949) 94 C.A.2d 818, 211 P.2d 891, an interlocutory decree of rescission of a sale of assets was rendered on condition that, within 60 days, plaintiff restore the consideration. Subsequently, on plaintiff's failure to restore, final judgment was rendered against him. (94 C.A.2d 821.) Although the equitable action for rescission has been abolished (see 3 *Cal. Proc.* (5th), *Actions*, §130), the same procedure would doubtless be appropriate in an action for restitution after unilateral rescission.

(2) *Action on Mechanic's Lien*. In *Ferelli v. Weaver* (1962) 210 C.A.2d 108, 26 C.R. 439, a building contractor's action against a property owner to recover money on his contract and foreclose a mechanic's lien, the court ordered discharge of subcontractors' liens and claims and presentation of proof of discharge, following which judgment was to be entered for plaintiff in a stated sum. *Held*, citing the text, the order was interlocutory, for it did not adjudicate either the amount or validity of the subcontractors' claims. (210 C.A.2d 114.)

(3) *Action To Dissolve an Organization*. In *re Los Angeles County Pioneer Soc.* (1953) 40 C.2d 852, 257 P.2d 1, was a proceeding by members to dissolve a society, in which the Attorney General intervened to assert that the society was a charity that had abandoned its trust. The trial court upheld this contention, entered an "interlocutory judgment" so stating, and retained jurisdiction to make further orders necessary to a complete determination of the proceeding. (40 C.2d 857.) Later, after a further hearing, the court appointed a trustee and ordered the assets turned over to it. *Held*, the first order was purely interlocutory and nonappealable because the court reserved judicial questions about the rights, duties and liabilities of the society. The appeal was therefore properly taken from the second order. (40 C.2d 858.)

SUPPLEMENT: [This section is current through the latest supplement]



21 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

III. INTERLOCUTORY JUDGMENTS AND ORDERS

D. Statutory Types.

7 *Witkin Cal. Proc. Judgm* § 21

[§ 21] Statutory Types.

A number of statutes expressly provide for interlocutory judgments or decrees. While the statutes differ in nature and purpose, two features are common and distinguish the decrees from the ordinary interlocutory decree in equitable actions (*supra*, §14 et seq.). First, they are usually appealable, and second, they are not subject to later modification by the trial court. The following are the principal types:

(1) *Partition*. In an action for partition (see 12 *Summary* (10th), *Real Property*, §66 et seq.), the court first makes an interlocutory order or decree directing partition and determining the respective interests of the parties. This order is appealable and, if allowed to become final without appeal, cannot be modified by the trial court. (See *C.C.P.* 872.720(a), 904.1(a)(9); *Pista v. Resetar* (1928) 205 C. 197, 270 P. 453; *Raisin Inv. Co. v. Magginetti* (1952) 109 C.A.2d 163, 240 P.2d 349; *Degnan v. Morrow* (1969) 2 C.A.3d 358, 364, 82 C.R. 557; *Richmond v. Dofflemyer* (1980) 105 C.A.3d 745, 753, 164 C.R. 727.)

(2) *Innocent Improver*. C.C. 1013.5, authorizes an action by an innocent improver to remove fixtures from land. Where damages cannot readily be ascertained before removal, an interlocutory judgment may be given, authorizing removal on condition that the plaintiff pay into court the estimated or stipulated total damages. (C.C. 1013.5(c); see 13 *Summary* (10th), *Personal Property*, §98 et seq.)

(3) *Condemnation*. The judgment in a condemnation proceeding, determining the amount of compensation, may be designated "interlocutory," in view of the statutory right of the condemnor to abandon within 30 days thereafter. (See *C.C.P.* 1268.510(a); 8 *Summary* (10th), *Constitutional Law*, §1269.) But it is in fact a final judgment. (*McDaniels v. Dickey* (1933) 219 C. 89, 92, 25 P.2d 404; *Baldwin Park Redevelopment Agency v. Irving* (1984) 156 C.A.3d 428, 432, 202 C.R. 792.)

(4) *Trial of Plea in Abatement*. When a defendant pleads in one action that another action is pending on the same cause of action, a trial may be held under *C.C.P.* 597 to determine that issue. If the defense is sustained, an appealable interlocutory judgment, abating the second action until the first is determined, is rendered in favor of the defendant. (See 7 *Cal. Proc.* (5th), *Trial*, §152.)

SUPPLEMENT: [This section is current through the latest supplement]



22 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IV. ALTERNATIVE AND CONDITIONAL JUDGMENTS

A. Alternative Judgment.

7 *Witkin Cal. Proc. Judgm* § 22

[§ 22] Alternative Judgment.

A court may render judgment in the alternative. In *Chandler v. Hibberd* (1958) 165 C.A.2d 39, 332 P.2d 133, an action to quiet title and establish a boundary, the trial judge made findings and gave judgment (a) that the original surveyed boundary could be relocated, and (b) that it had been superseded by an agreed boundary. *Held*, this was a proper approach, and the judgment was not inconsistent. "The agreed boundary is controlling if the judgment establishing it becomes final, otherwise a determination of the original boundary line is required. The use of the alternative or contingent form of judgment is proper under such circumstances. A judgment in this form has the practical advantage of eliminating subsequent litigation as to the location of the true boundary in the event, as here, the findings relative to an agreed boundary are not sustained." (165 C.A.2d 50.) (See *Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 C.A.4th 28, 45, 8 C.R.3d 614 [homeowner who objected to alternative form of judgment that would have allowed her either to remove illegal fence or to obtain permit for it could not later complain about injunction requiring her to remove fence]; on alternative judgment in action for specific recovery of personal property, see *infra*, §32.)

In an action by a vendor for specific performance of a contract to sell real property, the court may enter a decree that the purchaser take title and pay the price, or, if the purchaser fails, that the property be sold to satisfy the judgment. But the circumstances may justify an unconditional decree. In *Laske v. Lampasona* (1948) 89 C.A.2d 284, 200 P.2d 871, defendant purchasers had deposited the entire price in escrow, and had authorized the escrow holder to pay it on delivery of the deed. *Held*, judgment requiring delivery of the deed to defendants and payment of the price to plaintiff affirmed. There was no reason for an alternative decree. (89 C.A.2d 289.)

SUPPLEMENT: [This section is current through the latest supplement]



23 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IV. ALTERNATIVE AND CONDITIONAL JUDGMENTS

B. Conditional Judgment.

1. Nature.

7 Witkin Cal. Proc. Judgm § 23

[§ 23] Nature.

Another method of settling a controversy in two stages is the conditional judgment, under which the successful party is given relief on compliance with conditions imposed to protect the rights of the losing party. The judgment is usually interlocutory, so that the court renders a final judgment after the conditions are performed or the time for performance has elapsed. It may, however, be final, if compliance with the conditions or rights on default is a matter of enforcement or if, so far as the condition is concerned, the judgment is self-executing and requires no further judicial act. (*Taper v. Long Beach (1982) 129 C.A.3d 590, 605, 181 C.R. 169.*)

An unusual exercise of this power occurred in *Martin v. Hollins (1931) 118 C.A. 561, 5 P.2d 899*. The defaulting buyer under a conditional sale unlawfully sold to a bona fide purchaser. The seller, after demand and refusal, sued to repossess. Although at this point, the seller was entitled to the remedy, the court denied it and gave a conditional judgment for the buyer, subject to payment of the balance due on the price. (*118 C.A. 563.*)

SUPPLEMENT: [This section is current through the latest supplement]



24 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IV. ALTERNATIVE AND CONDITIONAL JUDGMENTS

B. Conditional Judgment.

2. Illustrations.

a. Quiet Title.

7 *Witkin Cal. Proc. Judgm § 24*

[§ 24] Quiet Title.

A typical use of a conditional decree is in an action to quiet title, where the plaintiff is entitled to a decree only on doing equity, e.g., paying a mortgage debt or taxes. (See *Stein v. Simpson (1951) 37 C.2d 79, 87, 230 P.2d 816* [final judgment in favor of debtor was subject to payment of sum due under deed of trust within 30 days from notice of entry of judgment].)

In *Perry v. West Coast Bond & Mortg. Co. (1934) 136 C.A. 557, 29 P.2d 279*, a mortgagee, after the sale and purchase of the property, sued defaulting debtors for a deficiency. On stipulation, an "interlocutory judgment" was entered for the amount of the debt, with a right of the debtors to redeem by December 15; if they failed, judgment for the title was to be entered for the mortgagee. (*136 C.A. 558.*) No redemption was made and on December 15, a "final judgment" was entered giving title to the mortgagee. (*136 C.A. 558.*) The debtors then objected to execution on the theory that the money award was not incorporated into the final judgment. *Held*, execution was proper; the "interlocutory judgment" was a conclusive determination on the issue of money due, and was a final judgment despite the fact that its execution was suspended (for redemption) during a short period. (*136 C.A. 559.*)

Where a vendor sues to quiet title against a defaulting installment purchaser, the vendor is demanding essentially a strict foreclosure amounting to a forfeiture. If the defendant purchaser seeks an opportunity to cure the default, under the present equitable rule the vendor is not entitled to an unqualified judgment. The decree should provide that, if the amount due is not paid on or before a day stated, the defendant's equity will be foreclosed. (*Petersen v. Ridenour (1955) 135 C.A.2d 720, 728, 287 P.2d 848; Bartley v. Karas (1983) 150 C.A.3d 336, 197 C.R. 749* [following *Peterson*].)

The Quiet Title Law permits the court to grant necessary equitable relief. (*C.C.P. 760.040(c)*; see *5 Cal. Proc. (5th), Pleading, §654 et seq.*)

SUPPLEMENT: [This section is current through the latest supplement]



25 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IV. ALTERNATIVE AND CONDITIONAL JUDGMENTS

B. Conditional Judgment.

2. Illustrations.

b. Specific Performance.

7 *Witkin Cal. Proc. Judgm* § 25

[§ 25] Specific Performance.

The types of conditional judgments approved in specific performance actions were discussed in *Goldsworthy v. Dobbins* (1952) 110 C.A.2d 802, 243 P.2d 883. (a) A decree may order conveyance and make delivery conditional on payment by the purchaser of the amount due on the purchase price with interest. (b) If the parties have agreed that a title policy will be furnished, the judgment may provide that the purchaser will pay only on tender to the purchaser of such a policy showing title free and clear. (c) The judgment may direct that the amount of an encumbrance be paid directly to the holder instead of to the vendor even though the holder is not before the court. (110 C.A.2d 809.)

In *Goldworthy*, the court followed the procedure approved in *Moser v. Pearce* (1932) 124 C.A. 478, 12 P.2d 977, *infra*, §28: entry of an interlocutory judgment allowing defendant purchasers a specified time to pay the price and accept a deed and title documents deposited in escrow; if the purchasers fail, final judgment to be entered for the price. On appeal the final judgment was modified, thus eliminating defendants' fear that plaintiffs could levy and collect the price without conveying. If plaintiffs should refuse to convey after receiving the price, judgment could be enforced against them by contempt proceedings. (110 C.A.2d 810.) (See *Adams v. Bell* (1933) 219 C. 503, 505, 27 P.2d 757; *Hercules Glue Co. v. Littooy* (1941) 45 C.A.2d 42, 44, 113 P.2d 490, *infra*, §81; cf. *Alder v. Drudis* (1947) 30 C.2d 372, 384, 182 P.2d 195 [specific restitution].)

SUPPLEMENT: [This section is current through the latest supplement]



26 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IV. ALTERNATIVE AND CONDITIONAL JUDGMENTS

B. Conditional Judgment.

2. Illustrations.

c. Injunction.

7 *Witkin Cal. Proc. Judgm § 26*

[§ 26] Injunction.

In *San Diego v. Southern Calif. Tel. Corp.* (1954) 42 C.2d 110, 266 P.2d 14, plaintiff city sought to enjoin defendant corporation from using streets for its facilities without a franchise from the city, its old franchise having expired. The decision in favor of the city was a judgment enjoining occupation of the streets but providing that if, within 30 days after judgment became final, the company applied for a new franchise and paid for the use of the streets, the injunction would not take effect unless and until the company failed to accept a new franchise or the city refused to grant it. *Held*, this conditional injunction was appropriate. It was clearly in the public interest that the trial court assure continued telephone service pending the outcome of the appeal, and the city was adequately protected by the requirement that the company continue to pay under the old franchise. (42 C.2d 119, 120.)

Pahl v. Ribero (1961) 193 C.A.2d 154, 14 C.R. 174, involved a distinguishable kind of conditional judgment. Plaintiff sued for a mandatory injunction against defendant's encroaching building. The trial judge concluded that an award of the cost of repair would be adequate relief, and entered an "Interlocutory Judgment on Findings," denying the injunction, but reserving jurisdiction to give relief if the overhang of the building increased, or if certain other events occurred. (193 C.A.2d 158.) *Held*, despite the interlocutory label, this order was a final determination of the particular controversy, for the reserved jurisdiction related only to future events that might not happen. Hence, the judgment, although in a sense conditional, was final and appealable. (193 C.A.2d 160, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



27 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IV. ALTERNATIVE AND CONDITIONAL JUDGMENTS

B. Conditional Judgment.

2. Illustrations.

d. Restitution.

7 *Witkin Cal. Proc. Judgm* § 27

[§ 27] Restitution.

Conditional decrees were formerly recognized as appropriate in actions for rescission. (See *Loud v. Luse* (1931) 214 C. 10, 13, 3 P.2d 542; cf. *Alder v. Drudis* (1947) 30 C.2d 372, 384, 182 P.2d 195 [specific restitution].)

The action to have a rescission adjudged was abolished in 1961 (see 3 *Cal. Proc.* (5th), *Actions*, §130), but a conditional decree is equally appropriate in an action based on a completed unilateral rescission. "[T]he court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties." (C.C. 1692.)

SUPPLEMENT: [This section is current through the latest supplement]



28 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IV. ALTERNATIVE AND CONDITIONAL JUDGMENTS

B. Conditional Judgment.

3. Limitations on Power.

7 *Witkin Cal. Proc. Judgm* § 28

[§ 28] Limitations on Power.

(1) *Condition Denying Substantial Right.* The court should not make a conditional order that denies a substantial right of a party. (See *Sketchley v. Lipkin* (1950) 99 C.A.2d 849, 854, 222 P.2d 927 [injunction against infringer of trade secret; improper condition compelling plaintiff to reimburse defendant for machines was wrongfully constructed].) In *Ochoa v. McCush* (1931) 213 C. 426, 2 P.2d 357, plaintiffs (appellants) sued defendant for a reconveyance of land. The court decreed that they should have it if, within 2 months, they reimbursed defendant for expenditures made on the property; otherwise they should take nothing. *Held*, this was wrong, for it would make plaintiffs submit to the conditions despite their appeal. A reasonable procedure in such a case is to order the reconveyance subject to a lien for the payments. (213 C. 431; see *Cohn v. Cohn* (1934) 1 C.2d 313, 315, 34 P.2d 1000.)

(2) *Condition Resulting in Forfeiture.* A condition that may result in a forfeiture is improper. In *Moser v. Pearce* (1932) 124 C.A. 478, 12 P.2d 977, plaintiff vendor sued defendant purchaser for specific performance. The trial court gave an interlocutory decree for the price, conditioned on plaintiff depositing a deed and title insurance policy with the court within 30 days "after this judgment shall become final." (124 C.A. 482.) *Held*, this was erroneous because plaintiff could refuse to perform until after the judgment became final, thus compelling defendant to pay the price without getting a deed or title policy. Accordingly, the decree was corrected on appeal so as to give both parties time to comply with the conditions before entry of final judgment. (124 C.A. 483.)

(3) *Condition Too Strictly Enforced.* Even if the conditional judgment is proper, it may be improper to enforce it too strictly. In *Leslie v. Federal Finance Co.* (1939) 14 C.2d 73, 92 P.2d 906, a conditional interlocutory decree allowed plaintiffs, whose interest in land had been foreclosed, to obtain a reconveyance on payment of a specified sum by a certain date. Their tender, 8 days late, was refused and title was quieted in defendant. *Held*, judgment reversed; the trial court should have exercised its equitable power to relieve plaintiffs from the forfeiture. (14 C.2d 78.) (See *Los Angeles Auto Tractor Co. v. Superior Court* (1928) 94 C.A. 433, 440, 271 P. 363 [upholding trial court's equitable power and discretion to give extensions of time to comply with decree]; *Gibson v. River Farms Co. of Calif.* (1942) 49 C.A.2d 278, 284, 121 P.2d 504.)

SUPPLEMENT: [This section is current through the latest supplement]



29 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 V. FORM AND CONTENT OF JUDGMENT
 A. In General.

7 *Witkin Cal. Proc. Judgm* § 29

[§ 29] In General.

There is no prescribed form for a judgment. Its sufficiency depends on whether it shows distinctly that the issues have been adjudicated. (*Hentig v. Johnson* (1908) 8 C.A. 221, 224, 96 P. 390; *Hoover v. Lester* (1911) 16 C.A. 151, 116 P. 382; *Welch v. Reese* (1927) 82 C.A. 27, 255 P. 250; *Avakian v. Dusenberry* (1936) 15 C.A.2d 55, 58 P.2d 1306; *Berris & Seaton v. Meyers* (1984) 163 C.A.3d Supp. 54, 60, 210 C.R. 444; see C.E.B., 3 Civil Proc. During Trial 3d, §23.13 et seq.; Cal. Civil Practice, 4 Procedure, §28:6 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §16.2 et seq.; 10 Federal Practice & Procedure (Wright, Miller & Kane) §2652; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §64 et seq.; 15 *Am.Jur. P.P. Forms* (2005 ed.), *Judgments*, §2 et seq.)

Judicial Council Form No. JUD-100 [Judgment] has been adopted for optional use. The form provides for entry of judgment by default, on stipulation, or after a court trial, and specifies whether judgment is entered by the clerk or the court and the amount of the judgment.

There are, in addition, a number of statutes dealing with the content of particular judgments. For example, C.C. 1781(g) provides that a judgment in an action under the Consumer's Legal Remedies Act (see 4 *Cal. Proc.* (5th), *Pleading*, §302) must describe all class members who were notified and did not request exclusion. (For other examples, see *infra*, §30 et seq.)

Obviously, a judgment must be within the issues raised by the pleadings or at the trial. A default judgment outside the issues is void and subject to collateral attack. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §313.) A judgment outside the issues rendered after an answer is filed is not void, but is erroneous, and the defect is necessarily reversible error or a basis for modification on appeal. (*Pavlovich v. Pavlovich* (1913) 22 C.A. 500, 507, 135 P. 303; see 2 *Cal. Proc.* (5th), *Jurisdiction*, §291; cf. *Wallace v. Otis* (1941) 47 C.A.2d 814, 817, 119 P.2d 195 [mistakenly describing judgment outside issues as "void"]; *Jew v. Occidental Life Ins. Co.* (1948) 88 C.A.2d 246, 250, 198 P.2d 711 [judgment contrary to admissions].)

SUPPLEMENT: [This section is current through the latest supplement]



30 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

B. Content of Particular Judgments.

1. Money Judgment.

a. In General.

7 *Witkin Cal. Proc. Judgm* § 30

[§ 30] In General.

"A judgment for money must be stated with certainty and should specify the amount." (*Kittle v. Lang* (1951) 107 C.A.2d 604, 612, 237 P.2d 673; see *Imperial Cas. & Indem. Co. v. Sogomonian* (1988) 198 C.A.3d 169, 185, 243 C.R. 639, citing the text [judgment that failed to set forth amount of money damages was defective].) A common form of a money judgment is that "plaintiff recover" a specified sum from defendant. (See *Troy v. Troy* (1932) 127 C.A. 489, 493, 16 P.2d 290 ["plaintiff have and recover"]; cf. *Avakian v. Dusenberry* (1936) 15 C.A.2d 55, 56, 58 P.2d 1306 [judgment that defendants "pay over to plaintiffs" a certain sum was irregular but sufficient]; for forms, see Cal. Civil Practice, 4 Procedure, §28:15; C.E.B., 1 Debt Collection Practice 2d, §§7.16, 7.29, 7.30; 15 Am.Jur. P.P. Forms (2005 ed.), Judgments, §11.)

"In any judgment ... , the amount shall be computed and stated in dollars and cents, rejecting fractions." (*C.C.P.* 577.5.) Furthermore, a California court enforcing a foreign judgment rendered in foreign currency, ""must ordinarily convert the foreign currency to American dollars using the exchange rate that was in effect at the time of the foreign judgment," unless the parties show that they had an agreement that one side alone would bear the risk of postjudgment currency fluctuations. (*Pecaflor Const. v. Landes* (1988) 198 C.A.3d 342, 350, 243 C.R. 605; see 65 *Harv. L. Rev.* 887 [if obligation is payable in foreign currency, judgment converts into dollars]; on judgment or award on foreign money claim, see *C.C.P.* 676.7, 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §473.) If the plaintiff loses an action for money, the judgment should recite that plaintiff "take or recover nothing." (See *Ferrara v. Jordan* (1955) 134 C.A.2d Supp. 917, 286 P.2d 589.)

SUPPLEMENT: [This section is current through the latest supplement]



31 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

B. Content of Particular Judgments.

1. Money Judgment.

b. Installment Payments.

7 *Witkin Cal. Proc. Judgm § 31*

[§ 31] Installment Payments.

(1) *Limited Civil Cases.* If the judgment or order in a limited civil case in which the defendant appears is for the payment of money, the defendant must pay immediately or at any time and "upon terms and conditions, including installment payments, that the court may prescribe." (*C.C.P.* 582.5; on limited civil cases, see 2 *Cal. Proc.* (5th), *Courts*, §241 et seq.) In determining appropriate terms and conditions, the court must consider any factors that would be relevant to the determination of a claim for exemption or the examination of a debtor. (*C.C.P.* 582.5; on claim of exemption, see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §180 et seq.; on examination of debtor, see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §278.) For good cause and on motion by a party and notice to all affected parties, the court may amend the terms and conditions for payment, regardless of (a) the nature of the underlying debt and (b) whether the moving party appeared before entry of the judgment or order. (*C.C.P.* 582.5.)

(2) *Future Damages for Medical Malpractice.* The Medical Compensation Reform Act (MICRA) provides that, at the request of either party, the superior court must order that future damages, if they equal or exceed \$ 50,000, be paid in whole or in part by periodic payments. (*C.C.P.* 667.7(a); see *American Bank & Trust Co. v. Community Hosp.* (1984) 36 *C.3d* 359, 204 *C.R.* 671, 683 *P.2d* 670, 7 *Cal. Proc.* (5th), *Trial*, §344 [in order to avoid potential conflict with right to jury trial, *C.C.P.* 667.7 was interpreted to require jury to designate portion of award attributable to future damages]; on MICRA provisions generally, see 6 *Summary* (10th), *Torts*, §940 et seq.)

In *Craven v. Crout* (1985) 163 *C.A.3d* 779, 209 *C.R.* 649, the court held that a request for periodic payment of damages must be made before entry of judgment, and that once the judgment is entered, the trial judge is without power to modify an original lump sum judgment to order periodic payments. (163 *C.A.3d* 782.) The situations in which the court may change an entered judgment are all explicitly authorized by statute, and nothing in *C.C.P.* 667.7 authorizes such a change. Former *C.C.P.* 85 explicitly authorized the amendment of a municipal court judgment to order periodic payments; *C.C.P.* 667.7 contains no similar language. (163 *C.A.3d* 783.)

(3) *Judgment Based on Structured Settlement.* The structured settlement is an important development in the area of compensatory damages, especially where large sums of money are involved. It replaces the lump sum award to the plaintiff with periodic future payments, usually financed by the purchase of an annuity and designed to meet the needs

of the particular plaintiff. Both parties benefit: the defendant by the relatively lower cost of the annuity and the plaintiff by the steady stream of tax-free payments. (See *Franck v. Polaris E-Z Go Div. of Textron* (1984) 157 C.A.3d 1107, 1116, 1119, 204 C.R. 321 [defendant agreed to pay lump sum of \$ 25,000, plus \$ 190,000 in future periodic payments over 17-year period to be financed by purchase of annuity at cost of \$ 75,000]; 28 *Pepperdine L. Rev.* 787 [effect of anti-assignment clauses on plaintiffs' ability to sell their rights to deferred payments under structured settlements]; 31 *A.L.R.4th* 95 [computation of attorneys' fees under structured settlements]; 31 Am.Jur. Trials 595 [evaluation of structured settlements].)

SUPPLEMENT: [This section is current through the latest supplement]



32 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

B. Content of Particular Judgments.

2. Specific Recovery of Personal Property.

7 Witkin Cal. Proc. Judgm § 32

[§ 32] Specific Recovery of Personal Property.

In an action for specific recovery of personal property (see 5 *Cal. Proc.* (5th), *Pleading*, §692 et seq.), judgment for the plaintiff may be in the alternative, either for return of the property or, if return is not possible, for the property's value and damages for its detention. A similar alternative judgment may be given to the defendant where the plaintiff has obtained possession by ancillary claim and delivery proceedings. (*C.C.P.* 667; see *Nahhas v. Browning* (1919) 181 C. 55, 183 P. 442; *Webster v. Mountain Monarch Gold Mining Co.* (1935) 6 C.A.2d 450, 454, 44 P.2d 646; *Brueckner v. Ferrara* (1961) 196 C.A.2d 398, 401, 16 C.R. 515; *National Diversified Services v. Bernstein* (1985) 168 C.A.3d 410, 418, 419, 214 C.R. 113; C.E.B., 3 Civil Proc. During Trial 3d, §23.16; C.E.B., 1 Debt Collection Practice 2d, §6.111 et seq. [writs of possession]; Cal. Civil Practice, 4 Procedure, §28:17 [form]; 21B Am.Jur. P.P. Forms (2001 ed.), Replevin, §382 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
V. FORM AND CONTENT OF JUDGMENT

B. Content of Particular Judgments.

3. Unlawful Detainer.

7 Witkin Cal. Proc. Judgm § 33

[§ 33] Unlawful Detainer.

In an action for unlawful detainer (see *5 Cal. Proc. (5th), Pleading*, §638 et seq.), the judgment under *C.C.P. 1174* may take several forms:

(1) Ordinarily, the judgment is for restitution of the premises. (See *C.C.P. 1174(a)*; *Cal. Civil Practice*, 3 Real Property, §18:102 et seq. [forms]; 12 Am.Jur. P.P. Forms (1999 ed.), Forcible Entry and Detainer §60; 8 *Cal. Proc. (5th), Enforcement of Judgment*, §332 et seq.)

(2) In addition, if the action is based on failure to pay rent or perform covenants of the lease, and the landlord, in the 3-day notice, elects to declare a forfeiture of the lease, the judgment is for forfeiture. (See *C.C.P. 1174(a)*; *Pfitzer v. Candeias (1921) 53 C.A. 737, 200 P. 839*; C.E.B., 2 Landlord-Tenant Practice 2d §13.17; 12 Am.Jur. P.P. Forms (1999 ed.), Forcible Entry and Detainer §62.)

(3) In a proper case, the judgment may also award actual damages, including rent due, and statutory damages up to \$ 600. (See *C.C.P. 1174(b)*; *Superior Motels v. Rinn Motor Hotels (1987) 195 C.A.3d 1032, 1066, 241 C.R. 487* [measuring rent due]; C.E.B., 2 Landlord-Tenant Practice 2d §§13.18, 13.19; 12 Am.Jur. P.P. Forms (1999 ed.), Forcible Entry and Detainer §61; 12 *Summary (10th), Real Property*, §738 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Restitution:* See 12 Am.Jur. P.P. Forms (2008 ed.), Forcible Entry and Detainer §69.

(2) *Forfeiture:* See 12 Am.Jur. P.P. Forms (2008 ed.), Forcible Entry and Detainer §71.(3) *Damages:* See 12 Am.Jur. P.P. Forms (2008 ed.), Forcible Entry and Detainer §70.



34 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

B. Content of Particular Judgments.

4. Injunction.

7 *Witkin Cal. Proc. Judgm § 34*

[§ 34] Injunction.

The drastic effect of injunctive relief makes it necessary to frame injunction decrees with care, and judgments that are too broad or indefinite are frequently modified by the appellate court. (See *Thompson v. Kraft Cheese Co. of Calif.* (1930) 210 C. 171, 180, 291 P. 204; *Johnson v. Farmer* (1940) 41 C.A.2d 874, 881, 107 P.2d 959 [violation of Unfair Practices Act; injunction was void]; *People v. Robin* (1943) 56 C.A.2d 885, 887, 133 P.2d 436 [nuisance]; *California Intelligence Bureau v. Cunningham* (1948) 83 C.A.2d 197, 204, 188 P.2d 303 [trade secrets]; *Hucke v. Kader* (1952) 109 C.A.2d 224, 228, 240 P.2d 434 [injunction prohibiting interference "in any manner" with use of road was not too broad]; *Morton v. Superior Court* (1954) 124 C.A.2d 577, 582, 586, 269 P.2d 81 [overbroad injunction prohibiting rock quarry operation]; *Smith v. Silvey* (1983) 149 C.A.3d 400, 406, 407, 197 C.R. 15 [overbroad injunction curtailing right to redress grievances]; *Sunrise Country Club Assn. v. Proud* (1987) 190 C.A.3d 377, 382, 383, 235 C.R. 404 [overbroad injunction concerning condominium covenants]; C.E.B., 3 Civil Proc. During Trial 3d, §23.15; Cal. Civil Practice, 2A Procedure, §16:136 [forms]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §277.)

Where the wrongful act is a nuisance, the judgment may consist of an injunction together with damages to the date of trial; i.e., no supplemental pleading is necessary for recovery of damages suffered after commencement of the action. (*Hutcherson v. Alexander* (1968) 264 C.A.2d 126, 136, 70 C.R. 366.) And where damages are sought, they should be awarded at the time of trial. In *Hutcherson*, the action was brought by plaintiff "drive-in" operator to enjoin certain activities of defendant, a competitor located on adjacent property. The trial judge granted an injunction, which was affirmed with modifications. As to damages, the judge thought that plaintiffs had been in business for too short a time to determine the extent of their losses, and consequently retained jurisdiction to fix damages at a later date after the nuisance had been abated and plaintiffs were able to operate without interference. On this point the judgment was held erroneous. If the evidence of actual damages was completely speculative, nominal damages should have been awarded; if there was some basis of calculation, this should have been used. (264 C.A.2d 135.) But no authority supported the relief granted by the trial judge here: abatement of the nuisance and deferment of judgment on past damages to a later date in order to consider evidence accumulated after abatement. This would have given plaintiffs a second chance to prove damages according to profits made in entirely new and different circumstances. (264 C.A.2d 134, 135.)

SUPPLEMENT: [This section is current through the latest supplement]



35 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
V. FORM AND CONTENT OF JUDGMENT
B. Content of Particular Judgments.
5. Condemnation.

7 Witkin Cal. Proc. Judgm § 35

[§ 35] Condemnation.

The judgment in a condemnation proceeding determines the right to condemn and the amount of compensation to be paid by the plaintiff. This judgment is "final" in the sense that it is no longer subject to direct attack. (See *C.C.P. 1235.130*; C.E.B., 2 Condemnation Practice 3d §§10.20, 10.21; 9A Am.Jur. P.P. Forms (2005 ed.), Eminent Domain, §156; 8 *Summary* (10th), *Constitutional Law*, §1171.)

However, the proceeding is not concluded by that "final judgment." A final order of condemnation must be made and recorded to pass title to the property. (See *C.C.P. 1268.030*; C.E.B., 2 Condemnation Practice 3d §10.28; on procedure and content of order, see 8 *Summary* (10th), *Constitutional Law*, §1254.)

SUPPLEMENT: [This section is current through the latest supplement]



36 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

B. Content of Particular Judgments.

6. Marriage: Dissolution, Nullity, and Legal Separation.

7 *Witkin Cal. Proc. Judgm § 36*

[§ 36] Marriage: Dissolution, Nullity, and Legal Separation.

(1) *In General.* Judicial Council Form No. FL-180 is an all-purpose form for nullity of marriage, legal separation, and final judgment of dissolution. The form covers the type of relief to be granted. The form refers to additional orders that may be attached.

(2) *Stipulation for Judgment.* Experience with the original provision for a proposed judgment offered by one party (see *supra*, §9) proved unsatisfactory. C.R.C., Rule 5.116 instead authorizes submission to the court of a "stipulation for judgment," at the time of the hearing on the merits. The stipulation must contain the exact terms of the judgment proposed to be entered. (C.R.C., Rule 5.116(a).) It must include a disposition of all matters subject to the court's jurisdiction on which adjudication is sought, or "an explicit reservation of jurisdiction over any matter not proposed for disposition at that time." (C.R.C., Rule 5.116(b).) It concludes with a statement that "[t]he foregoing is agreed to by," with the petitioner's signature and the signature of the petitioner's counsel (C.R.C., Rule 5.116(a)), and it has the effect of a written agreement between the parties as to all matters it covers (C.R.C., Rule 5.116(b)).

(3) *Dissolution.* The former procedure of interlocutory judgment was eliminated in 1983. (See 11 *Summary* (10th), *Husband and Wife*, §109.) Under the present procedure, if the court determines that no dissolution should be granted, judgment to that effect only is entered. (*Family C. 2338(a)*.) If a dissolution is granted, a judgment of dissolution of marriage is entered. (*Family C. 2338(b)*); see Cal. Civil Practice, 2 Family Law Litigation, §16:13 et seq.) The form of judgment is set forth in Judicial Council Form No. FL-180. (See Cal. Civil Practice, 2 Family Law Litigation, §16:21; 11 *Summary* (10th), *Husband and Wife*, §110 et seq.)

The judgment becomes final 6 months from the earlier of (a) the date of service of the summons and petition, or (b) the date of appearance of the respondent. (*Family C. 2339(a)*.) The judgment must specify the date on which it becomes final. (*Family C. 2340*.) The court may, however, extend the 6-month period for good cause. (*Family C. 2339(b)*.) (On notice of entry, see *infra*, §57 et seq.; on nunc pro tunc entry, see *infra*, §60 et seq.)

(4) *Nullity.* The form of judgment of nullity of marriage is set forth in Judicial Council Form No. FL-180. (See Cal. Civil Practice, 3 Family Law Litigation, §20:88 et seq.; 11 *Summary* (10th), *Husband and Wife*, §170 et seq.)

(5) *Legal Separation.* A judgment of legal separation may not be rendered without the consent of both parties unless one party has not made a general appearance and the petition is one for legal separation. (*Family C. 2345*; see Cal. Civil Practice, 2 Family Law Litigation, §16:13 et seq.; 11 *Summary* (10th), *Husband and Wife*, §147.) The form of judgment is set forth in Judicial Council Form No. FL-180.

SUPPLEMENT: [This section is current through the latest supplement]



37 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

B. Content of Particular Judgments.

7. Dependency and Wardship Proceedings.

7 Witkin Cal. Proc. Judgm § 37

[§ 37] Dependency and Wardship Proceedings.

(1) *Dependency Proceedings.* If the court finds that a minor is dependent within the meaning of Welf.C. 300, a disposition hearing must be held. (Welf.C. 360; see 10 *Summary* (10th), *Parent and Child*, §627 et seq.) The court may appoint a legal guardian and issue letters of guardianship if doing so is in the best interest of the minor, and if the parent informs the court that the parent does not want family maintenance or reunification services. The minor and parent must agree to the guardianship unless the minor is incompetent to give a meaningful response. (Welf.C. 360(a).) Alternatively, the court may do the following:

- (a) Without adjudicating the minor a dependent child of the court, order services designed to keep the family together and place the minor and the minor's parent or guardian under a social worker. (Welf.C. 360(b).)
- (b) Order the minor to be a dependent child of the court. (Welf.C. 360(d).)
- (c) Limit parental control of the minor. (Welf.C. 361(a).)
- (d) Provide for the care, supervision, custody, and support of the minor. (Welf.C. 362(a).) (On modification of judgments and orders, see Welf.C. 385 et seq.; see also 10 *Summary* (10th), *Parent and Child*, §§654 et seq, 905 et seq.)

(2) *Wardship Proceedings.* If the court finds that a minor is within the provisions of Welf.C. 601 or 602 because of delinquent or criminal conduct, a disposition hearing must be held. (See 10 *Summary* (10th), *Parent and Child*, §889 et seq.) The court may then do the following:

- (a) Dismiss the petition. (Welf.C. 782.)
- (b) Place the minor on probation without wardship. (Welf.C. 725(a).)
- (c) Limit or deny parental control or custody. (Welf.C. 726.)
- (d) Provide for the minor's care, custody, control, and conduct, including physical confinement. (Welf.C. 726, 727, 730, 731.) (On modification of judgments and orders, see Welf.C. 777 et seq.; see also 10 *Summary* (10th), *Parent and*

Child, §§654 et seq, 905 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



38 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

C. Joint and Several Judgments.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 38

[§ 38] In General.

The statutes on permissive joinder of parties whose interests are not united recognize the propriety of several judgments. (See *C.C.P.* 378(b), 379(b); 4 *Cal. Proc.* (5th), *Pleading*, §194 et seq.) And the statutes on judgment make express provision for several judgments. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." (*C.C.P.* 578.) In an action against several defendants, the court may, "in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." (*C.C.P.* 579.)

Although *C.C.P.* 579 authorizes judgment "against" one or more defendants, it also allows the trial court to enter judgment in favor of one or more defendants, when all issues between those defendants and the plaintiff have been adjudicated, even though the action remains pending against other defendants. (*Oakland Raiders v. National Football League* (2001) 93 *C.A.4th* 572, 577, 113 *C.R.2d* 255 [all issues between plaintiff and numerous defendants had been resolved by way of summary adjudication orders and thus trial court had discretion to render judgment in favor of those defendants]; for illustrations of several judgments in favor of one or more plaintiffs, see *Curtis v. Nye & Nissen* (1927) 86 *C.A.* 507, 514, 261 *P.* 747; cf. *Rowley v. Davis* (1915) 169 *C.* 678, 147 *P.* 958 [several judgment for plaintiff before trial of conflicting claims of defendants]; for illustrations of several judgments against one or more defendants, see *Huntoon v. Southern Trust & Commerce Bank* (1930) 107 *C.A.* 121, 130, 290 *P.* 86 [equitable action against trustee and purchasers from him; separate judgment for purchasers was proper]; *T&R Painting Const. v. St. Paul Fire & Marine Ins. Co.* (1994) 23 *C.A.4th* 738, 744, 745, 29 *C.R.2d* 199 [appropriate to allow action to proceed against contractor's surety even after judgment had been obtained, through arbitration, against contractor].)

A separate judgment is also proper in an action for damages against a negligent and incompetent driver of an automobile and the owner who negligently entrusted the car to the driver. (See *Rocca v. Steinmetz* (1922) 189 *C.* 426, 428, 208 *P.* 964.)

In some situations, however, there should be only one judgment:

(1) Where interests are joint. (See *infra*, §39.)

(2) Where actions are completely consolidated. (See *Stanton v. Superior Court* (1927) 202 C. 478, 484, 261 P. 1001; *Page v. Bakersfield Uniform & Towel Supply Co.* (1966) 239 C.A.2d 762, 772, 49 C.R. 46; 4 *Cal. Proc.* (5th), *Pleading*, §346.)

(3) Where a number of plaintiffs recover for wrongful death; a single lump sum judgment should be rendered. (See *Plecity v. Keilly* (1941) 44 C.A.2d 649, 112 P.2d 960; *Canavin v. Pacific Southwest Airlines* (1983) 148 C.A.3d 512, 535, footnote 10, 196 C.R. 82 [apportionment of award by court is properly accomplished in "postjudgment, ancillary, special proceeding"]; 6 *Summary* (10th), *Torts*, §1380.)

(4) Where the plaintiff recovers on the complaint and the defendant recovers on a cross-complaint; a single net judgment should be rendered. (See *Moss Const. Co. v. Wulffsohn* (1953) 116 C.A.2d 203, 205, 253 P.2d 483; *American Nat. Bank v. Stanfill* (1988) 205 C.A.3d 1089, 1095, 252 C.R. 861, quoting the text.)

(5) Where the liability of one defendant is limited by statute (e.g., *Veh.C. 17151* [limited liability of owner of car operated by permission]); the verdict must be in a single amount without apportionment (see 7 *Cal. Proc.* (5th), *Trial*, §356), but the judgment will incorporate the limitation. (*Aynes v. Winans* (1948) 33 C.2d 206, 208, 200 P.2d 533.)

SUPPLEMENT: [This section is current through the latest supplement]



39 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

C. Joint and Several Judgments.

2. Defendants: Contract Actions.

7 *Witkin Cal. Proc. Judgm* § 39

[§ 39] Defendants: Contract Actions.

(1) *Joint and Several Obligation.* Several judgments may be rendered against one or more defendants on a joint and several contractual obligation. (*Brooke v. Glide* (1919) 39 C.A. 534, 537, 179 P. 546; *Irvin v. Superior Court* (1934) 140 C.A. 622, 35 P.2d 642; see *Williams v. Reed* (1952) 113 C.A.2d 195, 204, 248 P.2d 147 [defendants may be sued separately]; 1 *Summary* (10th), *Contracts*, §112.)

(2) *Joint Obligation.* If the obligation is joint, all joint obligors must be named as defendants, and ordinarily there will be a joint judgment. Under *Corp.C. 16306(a)* (9 *Summary* (10th), *Partnership*, §39), all partners are liable jointly and severally for all partnership obligations except as "agreed by the claimant or provided by law." In *Mirabile v. Smith* (1953) 119 C.A.2d 685, 689, 260 P.2d 179, S, an assignee for collection, sued three partners in the municipal court for money due on a contract of sale. Two partners filed an answer; partner M was served but did not answer. S had judgment by default entered against M, levied execution on his bank account, and did not go to trial against the answering partner defendants. Thereafter (a) M successfully sued in the superior court to vacate the judgment and recover the money, and (b) the superior court later issued prohibition to restrain further proceedings in the municipal court on the default, pending trial of the issues raised in the answer. *Held*, this was proper; no judgment should be entered against M until a determination of the joint partnership liability on the merits. (119 C.A.2d 689.)

(3) *Effect of Judgment Against Served Defendants.* "In an action against two or more persons who are jointly, jointly and severally, or severally liable on a contract, the court in which the action is pending has jurisdiction to proceed against such of the defendants as are served as if they were the only defendants." (C.C.P. 410.70.) Under this section, the action may be tried against those defendants actually served, and, under C.C.P. 578 and 579, a several judgment may be rendered against those defendants. (See *Melander v. Western Nat. Bank* (1913) 21 C.A. 462, 475, 132 P. 265; *Trans-Pac. Trading Co. v. Patsy Frock & Romper Co.* (1922) 189 C. 509, 511, 209 P. 357; *Merchants Nat. Bank of Los Angeles v. Clark-Parker Co.* (1932) 215 C. 296, 299, 9 P.2d 826.) Afterwards, those not served may be summoned to appear and show cause why they should not be bound by the judgment. (C.C.P. 989; see *Kupfer v. Brawner* (1942) 19 C.2d 562, 122 P.2d 268; *Fried v. Municipal Court* (1949) 94 C.A.2d 376, 210 P.2d 883; *Brenelli Amedeo, S.P.A. v. Bakara Furniture* (1994) 29 C.A.4th 1828, 1840, 35 C.R.2d 348 [C.C.P. 410.70 and 989 apply only when alleged joint debtor is joined as party and cause of action is stated against him or her]; 2 *Cal. Proc.* (5th), *Jurisdiction*, §184; 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §398 et seq.; 15 *Am.Jur. P.P. Forms* (2005 ed.),

Judgments §§221, 222.)

(4) *Alternative Liability*. Where one but not both of two defendants is liable, e.g., where an agent and an undisclosed principal are sued, the plaintiff must elect before judgment which one to hold liable, and a judgment against both is ordinarily improper. (See *Ikerd v. Warren T. Merrill & Sons* (1992) 9 C.A.4th 1833, 1839, footnote 6, 12 C.R.2d 398.) But the right to compel election may be waived by failure to demand it, and a judgment against both will in that event be upheld. (*McEwen v. Taylor* (1951) 106 C.A.2d 25, 33, 234 P.2d 754; see 3 *Summary* (10th), *Agency and Employment*, §160.)

SUPPLEMENT: [This section is current through the latest supplement]



40 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

C. Joint and Several Judgments.

3. Defendants: Tort Actions.

a. Economic Damages.

7 Witkin Cal. Proc. Judgm § 40

[§ 40] Economic Damages.

Joint tortfeasors are jointly and severally liable for economic damages, and several judgments may be rendered in favor of or against one or more alleged joint wrongdoers. (See *Evangelatos v. Superior Court* (1988) 44 C.3d 1188, 1198, 246 C.R. 629, 753 P.2d 585; *Knight v. Gosselin* (1932) 124 C.A. 290, 295, 12 P.2d 454; *Hedlund v. Sutter Med. Service Co.* (1942) 51 C.A.2d 327, 334, 124 P.2d 878; 5 *Summary* (10th), *Torts*, §66; on liability for noneconomic damages, see *infra*, §41.)

SUPPLEMENT: [This section is current through the latest supplement]



41 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

C. Joint and Several Judgments.

3. Defendants: Tort Actions.

b. Noneconomic Damages.

7 *Witkin Cal. Proc. Judgm § 41*

[§ 41] Noneconomic Damages.

(1) *Purpose and Enactment.* To remedy excessive judgments against "governmental and private defendants ... perceived to have substantial financial resources or insurance coverage and ... thus ... included in lawsuits even though there was little or no basis for finding them at fault" (C.C. 1431.1(a)), the electorate approved Proposition 51, the Fair Responsibility Act of 1986 (C.C. 1431.1 et seq.). The Act may be amended only by two-thirds vote of the Legislature or by a vote of the electorate. (C.C. 1431.4.)

(2) *Definitions.* "Economic damages" means "objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities." (C.C. 1431.2(b)(1).)

"Noneconomic damages" means "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." (C.C. 1431.2(b)(2).)

(3) *No Joint Liability for Noneconomic Damage.* In an action for personal injury, property damage, or wrongful death, based on principles of comparative fault, the liability of each defendant for noneconomic damages is several only, never joint. Each defendant is liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment must be rendered against that defendant for that amount. (C.C. 1431.2(a); see 5 *Summary* (10th), *Torts*, §§53, 54.)

SUPPLEMENT: [This section is current through the latest supplement]



42 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

D. Certainty and Construction.

1. Requirement of Certainty.

7 *Witkin Cal. Proc. Judgm* § 42

[§ 42] Requirement of Certainty.

The judgment must be sufficiently certain to permit enforcement, and serious uncertainty may be reversible error. (*Shriver v. Superior Court* (1920) 48 C.A. 576, 585, 192 P. 124 [judgment that does not designate prevailing party is void]; *Seaboard Surety Corp. of America v. Superior Court* (1931) 112 C.A. 248, 249, 296 P. 633 [judgment against "the sureties" on defendants' redelivery bond was void judgment "against a nameless person"]; *People v. Rio Nido Co.* (1938) 29 C.A.2d 486, 489, 85 P.2d 461 ["a judgment purporting to adjudicate the title to real property must be as clear and explicit as a deed which purports to convey real property"]; *Johnson v. Farmer* (1940) 41 C.A.2d 874, 881, 107 P.2d 959 [injunction]; *Colvig v. RKO General* (1965) 232 C.A.2d 56, 65, 42 C.R. 473 [same rules as apply to other writings]; *Casad v. Qualls* (1977) 70 C.A.3d 921, 927, 928, 139 C.R. 243, citing the text; *In re Marriage of Sandy* (1980) 113 C.A.3d 724, 728, 169 C.R. 747 [judgment ordering husband to pay amount of military retirement check was sufficiently certain where amount of check, although not stated in judgment, was definitely ascertainable]; *In re Marriage of Economou* (1990) 224 C.A.3d 1466, 1479, 274 C.R. 473 [judgment in marital dissolution proceeding described assets with sufficient certainty]; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §66; on construction to uphold judgment, see *infra*, §43; on parol evidence rule, see *infra*, §43.)

SUPPLEMENT: [This section is current through the latest supplement]



43 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

V. FORM AND CONTENT OF JUDGMENT

D. Certainty and Construction.

2. Construction To Uphold Judgment.

7 *Witkin Cal. Proc. Judgm* § 43

[§ 43] Construction To Uphold Judgment.

A judgment will be construed to uphold it if this is possible. (*California School Employees Assn. v. King City Union Elementary School Dist.* (1981) 116 C.A.3d 695, 702, 172 C.R. 368.) Thus, uncertainties or irregularities may be eliminated or resolved by reference to the record, including the pleadings. (*Watson v. Lawson* (1913) 166 C. 235, 241, 135 P. 961 [uncertainty as to water rights]; *Minehan v. Silveria* (1933) 131 C.A. 317, 319, 21 P.2d 617 [uncertainty as to which of several defendants was intended]; *Tischhauser v. Tischhauser* (1956) 142 C.A.2d 252, 256, 298 P.2d 551, 2 Cal. Proc. (5th), *Jurisdiction*, §235 [void portion of judgment, which purported to immediately dispose of land, was construed as requiring execution of deed to land]; see 46 *Am.Jur.2d* (2006 ed.), *Judgments* §74.)

In *Verdier v. Verdier* (1953) 121 C.A.2d 190, 263 P.2d 57, a partition action, a typewritten interlocutory decree was presented to the trial judge, calling for the sale of property at public auction. The judge struck out "at public auction" and substituted "at private sale," as he had statutory authority to do. (121 C.A.2d 191, 192.) But he did not strike out the remaining language calling for manner of sale as "on execution." (121 C.A.2d 192.) In this appeal from an order confirming the private sale, the court declared that the failure to strike out the execution provision was inadvertent, and that the repugnant matter should be ignored as if it, too, were deleted. Questions of interpretation of this kind arise more frequently in connection with constitutional provisions, statutes and contracts than judicial orders or decrees. "But they are all 'writings,' to be construed in accordance with substantially the same canons of interpretation," including the rule of contemporaneous construction (here the trial judge who made the decree construed it in confirming the sale). (121 C.A.2d 193.)

Where a description of real property is inadequate or ambiguous, extrinsic evidence may be used to make it certain. (*Sepulveda v. Baugh* (1887) 74 C. 468, 474, 16 P. 223 [judgment was not subject to collateral attack]; *Goatman v. Fuller* (1923) 191 C. 245, 251, 216 P. 35; *Newport v. Hatton* (1924) 195 C. 132, 156, 231 P. 987.) However, a judgment, like an integrated contract, is subject to the parol evidence rule, and its terms cannot be varied by extrinsic evidence. (*Yarus v. Yarus* (1960) 178 C.A.2d 190, 197, 3 C.R. 50 [divorce decree characterized payment provisions as property settlement; parol evidence to show intention to make them alimony was improperly received]; on parol evidence rule generally, see 2 *Cal. Evidence* (4th), *Documentary Evidence*, §59 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VI. RENDITION OF JUDGMENT

A. What Constitutes Rendition.

7 *Witkin Cal. Proc. Judgm* § 44

[§ 44] What Constitutes Rendition.

The rendition or giving of judgment is a judicial act that can only be performed by the judge. It is distinct from entry, which is a ministerial act of the clerk. (See *Gossman v. Gossman* (1942) 52 C.A.2d 184, 197, 126 P.2d 178; *Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 C.A.3d 1182, 1193, 213 C.R. 790, citing the text; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §16.22 et seq.; Cal. Civil Practice, 4 Procedure, §28:26; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §55 et seq.)

Where a statement of decision is not required or is waived, the judgment is rendered as soon as the decision is entered into the minutes of the court. (*Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 C.A.3d 1182, 1193, 213 C.R. 790; on statement of decision, see *infra*, §47 and 7 *Cal. Proc.* (5th), *Trial*, §389 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



45 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VI. RENDITION OF JUDGMENT

B. Decision by Judge Who Tried Case.

7 *Witkin Cal. Proc. Judgm* § 45

[§ 45] Decision by Judge Who Tried Case.

(1) *Rendition by Judge Who Tried Case.* In a trial without a jury, judgment must be rendered by the judge who tried the case. It would be a denial of due process for a new judge to render a decision without having heard all the evidence. (See *Guardianship of Sullivan* (1904) 143 C. 462, 467, 77 P. 153; *Linsk v. Linsk* (1969) 70 C.2d 272, 279, 74 C.R. 544, 449 P.2d 760, 1 Cal. Proc. (5th), Attorneys, §251; *Swift v. Daniels* (1980) 103 C.A.3d 263, 162 C.R. 863; *Rose v. Boydston* (1981) 122 C.A.3d 92, 97, 175 C.R. 836; *In re Marriage of Colombo* (1987) 197 C.A.3d 572, 581, 242 C.R. 100, citing the text; *European Beverage v. Superior Court* (1996) 43 C.A.4th 1211, 1214, 51 C.R.2d 147 [defendants were entitled to have second phase of bifurcated trial heard by same judge who heard first phase or, if that judge was unavailable, to have mistrial declared so that entire action could be heard by one judge]; *Blumenthal v. Superior Court* (2006) 137 C.A.4th 672, 681, 40 C.R.3d 509, citing the text [family law trial should be completed by trial judge who had heard it from beginning]; 84 A.L.R.5th 399 [differing views in other jurisdictions]; 2 Cal. Proc. (5th), Courts, §18.)

(2) *Entry by Another Judge.* Once the judgment has been rendered, however, the ministerial act of entry may be ordered by a successor judge. (See *Hayward Union High School Dist. of Alameda v. Madrid* (1965) 234 C.A.2d 100, 114, 44 C.R. 268 [trial judge granted motion for summary judgment (rendition); successor properly ordered entry of summary judgment]; *infra*, §49 et seq.; 2 Cal. Proc. (5th), Courts, §19.)

(3) *Rendition by Another Judge.* In one situation, judgment may be rendered by another judge: where the decision has been entered in the minutes and the trial judge is unavailable. The formal judgment or order conforming to the minutes may be signed by the presiding judge of the court or by a judge designated by the presiding judge. (C.C.P. 635.)

However, C.C.P. 635 applies only where (a) no statement of decision has been requested or (b) the judge who heard the evidence has already provided the parties with a statement of decision as requested. The statute does not authorize the presiding to render a formal judgment whenever the judge who heard the evidence has orally entered a tentative decision, or tentative findings in the minutes. (*Armstrong v. Picquelle* (1984) 157 C.A.3d 122, 127, 203 C.R. 552; see *Raville v. Singh* (1994) 25 C.A.4th 1127, 1133, 31 C.R.2d 58 [minute order reflecting oral statement of tentative decision entered by judge who died prior to ruling on objections was proposed statement of decision only and not decision for purposes of C.C.P. 635]; cf. *Leiserson v. San Diego* (1986) 184 C.A.3d 41, 48, 229 C.R. 22 [presiding judge properly entered judgment in conformity with "Intended Decision" filed by judge who had subsequently died,

where there was no indication that deceased judge had contemplated any modification and where statement provided complete and adequate basis for appellate review]; on statement of decision generally, see 7 *Cal. Proc.* (5th), *Trial*, §389 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



46 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VI. RENDITION OF JUDGMENT

C. Minute Order on Motion.

7 *Witkin Cal. Proc. Judgm* § 46

[§ 46] Minute Order on Motion.

An oral pronouncement of the judge, followed by a minute entry reciting the nature of the motion and adding "Motion Granted" or "Motion Denied," is a typical method of deciding motions. (See *Simmons v. Superior Court* (1959) 52 C.2d 373, 341 P.2d 13; *Western Greyhound Lines v. Superior Court* (1958) 165 C.A.2d 216, 331 P.2d 793 [order granting motion for change of venue]; *Casa de Valley View Owner's Assn. v. Stevenson* (1985) 167 C.A.3d 1182, 1193, 213 C.R. 790 [granting motion to enter judgment under C.C.P. 664.6 constituted rendition of judgment]; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §44.) However, C.R.C., Rule 3.1312(a) (*infra*, §54) requires the party that prevails on a motion to prepare a proposed written order, unless the parties waive notice or the court orders otherwise. (On notice of grant or denial of motion, see C.C.P. 1019.5, 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §45.)

Motions for dismissal or nonsuit, formerly decided by minute order, now require a written order signed by the court. (See *infra*, §48.)

SUPPLEMENT: [This section is current through the latest supplement]



47 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
 VI. RENDITION OF JUDGMENT
 D. Judgment After Trial or Hearing.

7 *Witkin Cal. Proc. Judgm* § 47

[§ 47] Judgment After Trial or Hearing.

(1) *Former Law on Findings.* *C.C.P. 632* originally required findings in the superior court (unless waived). The signing and filing of the findings constituted the rendition of judgment. Unless this was done there was no judgment. Entry of judgment by the clerk was unauthorized, and even a formal "judgment" signed by the judge was premature and void. (See *Aspegren & Co. v. Sherwood, Swan & Co.* (1926) 199 C. 532, 537, 250 P. 400; *Supple v. Luckenbach* (1938) 12 C.2d 319, 84 P.2d 52; *Easterly v. Cook* (1934) 140 C.A. 115, 123, 35 P.2d 164; *Young v. Briggs* (1936) 17 C.A.2d 338, 343, 61 P.2d 1223; *Petroleum Midway Co. v. Zahn* (1944) 62 C.A.2d 645, 652, 145 P.2d 371; *Engleman v. Green* (1954) 125 C.A.2d Supp. 882, 886, 270 P.2d 127.) The mandatory requirement was abolished by a 1968 amendment and findings were thereafter made only on request. (See 7 *Cal. Proc.* (5th), *Trial*, §389 et seq.)

(2) *Statement of Decision Procedure.* In 1981, *C.C.P. 632* was amended to abolish findings of fact and conclusions of law. Under the present procedure, the court must, on request, issue a statement of decision "explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." (*C.C.P. 632*; see 7 *Cal. Proc.* (5th), *Trial*, §390 et seq.) A proposed statement of decision and proposed judgment are prepared, and a hearing is required on any objections. (C.R.C., Rule 3.1590(e), (i).) Where no statement of decision is requested, the judge, after the hearing, must "sign and file its judgment," which constitutes the decision on which judgment is entered under *C.C.P. 664*. (C.R.C., Rule 3.1590(g), (h).)

(3) *Bifurcated Trial.* In bifurcated trials (see 7 *Cal. Proc.* (5th), *Trial*, §400), a statement of decision is prepared as in other cases, "but the court must not prepare any proposed judgment until the other issues are tried, except when an interlocutory judgment or a separate judgment may otherwise be properly entered at that time." (C.R.C., Rule 3.1591(a).) If the other issues are tried by a different judge, each judge must perform all acts required by C.R.C., Rule 3.1590 as to the issues tried by that judge, and the proposed judgment must be prepared by the judge trying the final issue. (C.R.C., Rule 3.1591(b).) Trial may proceed on subsequent issues before a statement of decision is issued on previously tried issues. (C.R.C., Rule 3.1591(c).)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Statement of Decision Procedure.* C.R.C., Rule 3.1590 was extensively amended and relettered in 2009. C.R.C., Rule 3.1590(e) was relettered C.R.C., Rule 3.1590(f) and C.R.C., Rule 3.1590(i) was relettered C.R.C., Rule 3.1590(k). C.R.C., Rule 3.1590(g) was relettered C.R.C., Rule 3.1590(h) and C.R.C., Rule 3.1590(h) was relettered C.R.C., Rule

3.1590(*l*). The court may order a hearing on objections, but is not required to do so. (C.R.C., Rule 3.1590(*k*), as amended in 2009.)



48 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VI. RENDITION OF JUDGMENT

E. Formal Order of Dismissal or Nonsuit.

7 *Witkin Cal. Proc. Judgm* § 48

[§ 48] Formal Order of Dismissal or Nonsuit.

(1) *Same Procedure Governs Both*. The statutory provision for nonsuit was formerly in the statute on dismissal, and the procedural treatment was accordingly the same for both. The separation of the two in 1947 (dismissal, *C.C.P. 581*; nonsuit, *C.C.P. 581c*) was not intended to change the rule that nonsuit is a form of dismissal ordered by the court. Accordingly, *C.C.P. 581d*, which prescribes the form of "[a]ll dismissals ordered by the court," applies to nonsuits as well as dismissals. (See *Costa v. Regents of Univ. of Calif. (1951) 103 C.A.2d 491, 493, 229 P.2d 867*; *John Norton Farms v. Todagco (1981) 124 C.A.3d 149, 162, 177 C.R. 215*.)

(2) *Requirement of Written Order*. All dismissals ordered by the court must be in the form of a written order signed by the court and filed in the action. (*C.C.P. 581d*; see *Milton Meyer & Co. v. Curro (1966) 239 C.A.2d 480, 483, 48 C.R. 812* [nonsuit]; *Palazzi v. Air Cargo Terminals (1966) 244 C.A.2d 190, 192, 52 C.R. 817* [nonsuit].) The order need not specify the grounds or reasons for granting the dismissal. (*John Norton Farms v. Todagco (1981) 124 C.A.3d 149, 162, 177 C.R. 215*; on nonsuit, see 7 *Cal. Proc. (5th), Trial*, §*419; 8B *Am.Jur. P.P. Forms* (2006 ed.), Dismissal, Discontinuance, and Nonsuit, §§62 et seq., 192 et seq.; on dismissal, see 6 *Cal. Proc. (5th), Proceedings Without Trial*, §280; *Cal. Civil Practice, 3 Procedure*, §§22:20, 22:101; for comparison of nonsuit and other forms of dismissal, see *Cal. Civil Practice, 3 Procedure*, §22:94; 7 *Cal. Proc. (5th), Trial*, §408.)

SUPPLEMENT: [This section is current through the latest supplement]



49 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 49

[§ 49] In General.

(1) *Nature of Entry.* "The judgment is the judicial act of the court; its entry in the judgment-book, which affords the highest record evidence of its existence, is but the ministerial act of the clerk." (*Brown v. Superior Court* (1925) 70 C.A. 732, 735, 234 P. 409.) In other words, the judgment must first be rendered in one of the ways discussed above (supra, §44 et seq.); it is then the clerk's duty to enter it in the judgment book or other proper place, thereby providing record evidence of that judgment. (See *C.C.P.* 664; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §94; *Cal. Civil Practice*, 3 Procedure, §28:27 et seq.; *C.E.B.*, 3 Civil Proc. During Trial 3d, §23.19; *C.J.E.R.*, *Judges Benchbook*, Civil Proceedings: Trial, §16.23; 80 *A.L.R.4th* 707 [entry of judgment on multiple claims]; on alternative methods of entry under *C.C.P.* 668.5, see *infra*, §51.)

(2) *No Alteration by Clerk.* Because the clerk acts ministerially, the clerk must enter the judgment as rendered. (*C.C.P.* 664 [judgment must be entered "in conformity to the verdict," or "in conformity to the decision of the court"].) The clerk cannot modify it in any particular, even to correct an erroneous act of the court. If the clerk does change it, the entry is void and it may be set aside at any time. (*San Francisco v. Brown* (1908) 153 C. 644, 649, 96 P. 281; *Lane v. Pellissier* (1929) 208 C. 590, 283 P. 810 [clerk cannot change date of entry]; *McMahon v. Hetch-Hetchy & Yosemite Valleys Ry. Co.* (1905) 2 C.A. 400, 402, 84 P. 350 [clerk cannot disregard verdict on theory that it is erroneous]; *Aspen Int. Capital Corp. v. Marsch* (1991) 235 C.A.3d 1199, 1205, 286 C.R. 921.)

(3) *Distinction: Notation on Instrument.* An additional notation, not an entry, is required where the plaintiff recovers judgment on a written obligation to pay money. The instrument is no longer valid (being merged in the judgment), and notice of that fact should be brought home to third persons. Accordingly, at the time of entry of judgment, the clerk must, unless otherwise ordered, note over his or her official signature and across the face of the writing the fact that judgment has been rendered, the date of the judgment, and the title of the court and cause. (*C.R.C.*, Rule 3.1806; see *Bill Benson Motors v. Macmorris Sales Corp.* (1965) 238 C.A.2d Supp. 937, 941, 48 C.R. 123.)

West's Key Number Digest, Judgment 270, 271

SUPPLEMENT: [This section is current through the latest supplement]



50 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

2. Judgment Is Ineffectual Until Entry.

7 *Witkin Cal. Proc. Judgm* § 50

[§ 50] Judgment Is Ineffectual Until Entry.

"In no case is a judgment effectual for any purpose until entered." (*C.C.P.* 664; see *Wilson v. Los Angeles County Employees Assn.* (1954) 127 C.A.2d 285, 289, 273 P.2d 824, *infra*, §51; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §§102, 103; cf. *F.R. Civ. P.*, Rule 58; 11 Federal Practice & Procedure (Wright & Miller) §2785.)

The purpose of the rule is clear. It would be manifestly undesirable to allow judgments to be used or enforced without any official evidence of their terms. The rule goes further, however; until entry, the judge can vacate or change a previously rendered judgment as he or she sees fit. (*Consolidated Const. Co. v. Pacific Elec. Ry. Co.* (1920) 184 C. 244, 249, 193 P. 238; *Egan v. McCray* (1934) 220 C. 546, 31 P.2d 1041; *Phillips v. Phillips* (1953) 41 C.2d 869, 874, 264 P.2d 926; *Hume v. Lindholm* (1927) 85 C.A. 80, 84, 258 P. 1003; *Lind v. Baker* (1941) 48 C.A.2d 234, 244, 119 P.2d 806; *In re Anthony H.* (1982) 138 C.A.3d 159, 164, 165, 187 C.R. 820, quoting the text; *In re Marriage of Micalizio* (1988) 199 C.A.3d 662, 672, 245 C.R. 673; *In re Marriage of Drake* (1997) 53 C.A.4th 1139, 1170, 62 C.R.2d 466, *infra*, §54 [trial court did not err in filing written orders that differed from earlier oral rulings].)

In *Miller v. Stein* (1956) 145 C.A.2d 381, 302 P.2d 403, defendants moved for leave to file a cross-complaint after they had answered, and the judge orally granted the motion. Then, the same day, the judge on his own motion signed and filed a written order vacating the oral decision and giving reasons for denying leave to file the pleading. *Held*, this was within his power; the decision was still "in the breast of the court" and subject to his plenary control. "Such a rule, which permits an oral decision to be changed by the judge upon more extended reflection at any time before it has been regularly entered in the court's official minutes, seems one best calculated to promote the more efficient discharge of the judicial process." (145 C.A.2d 385.)

In *Adam v. Los Angeles Transit Lines* (1957) 154 C.A.2d 535, 317 P.2d 642, the judge orally announced a conditional order denying a new trial on reduction of the verdict. (154 C.A.2d 537.) It was never entered in the minutes (154 C.A.2d 537) and accordingly, it was proper for him to supersede it by an order continuing the matter and a later order denying the motion. (154 C.A.2d 545.)

In *Briggs v. Briggs* (1958) 160 C.A.2d 312, 325 P.2d 219, an order was made appointing a guardian ad litem for defendant wife in an annulment action. The guardian ad litem, an attorney, was notified by the clerk and represented the

defendant in stipulating to a default judgment. *Held*, judgment vacated. The order of appointment was neither signed by the court nor entered in the minutes. Hence, it was wholly ineffective, and the purported guardian ad litem was a stranger to the proceedings with no authority to act. (160 C.A.2d 319.)

However, a party should not be deprived of the benefits of entry by the unwarranted refusal of the clerk to act, or the unauthorized order of the judge staying entry. Accordingly, mandamus will lie to compel the entry. (*Woods v. Rechenmacher* (1942) 53 C.A.2d 294, 127 P.2d 614; see 8 Cal. Proc. (5th), *Extraordinary Writs*, §112.)

SUPPLEMENT: [This section is current through the latest supplement]



51 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

3. Place and Form of Entry.

a. Judgments.

7 *Witkin Cal. Proc. Judgm* § 51

[§ 51] Judgments.

(1) *Traditional Method: Judgment Book.* Prior to 1974, all judgments of the superior, municipal, and justice courts were entered in the "judgment book." (*C.C.P.* 668; see *Wood, Curtis & Co. v. Missouri Pac. Ry. Co.* (1907) 152 C. 344, 347, 92 P. 868; *Lane v. Pellissier* (1929) 208 C. 590, 283 P. 810; *Verdier v. Verdier* (1953) 118 C.A.2d 279, 280, 257 P.2d 723; *Los Angeles v. Ranger Ins. Co.* (1994) 26 C.A.4th 61, 63, 31 C.R.2d 257.)

In *Wilson v. Los Angeles County Employees Assn.* (1954) 127 C.A.2d 285, 273 P.2d 824, the court, confronted with the problem of a false date of entry (*infra*, §§55, 56), undertook an extensive examination of the methods of entry of judgments generally and in Los Angeles County. In particular, the court examined the superior court rule that required attorneys to submit an original judgment for the case file and a carbon copy for the judgment book. The carbon copy method was equally valid. "The clerk may use such methods as may become available by invention or the advances of science or such devices as will reduce costs, save time, and increase accuracy, so long as the judgment entered conforms to the decision of the court. Manifestly, if a judgment is signed by a judge and a carbon copy of them is entered in a judgment book the carbon copy must be a true copy of the judgment as signed by the judge. There is no reason why a conformed 'carbon copy' should not import absolute verity." (127 C.A.2d 292.)

(2) *Modern Methods.* Although courts in some counties continue to enter judgments in a judgment book, *C.C.P.* 668 no longer provides the exclusive method of entry. *C.C.P.* 668.5 authorizes alternatives. (See C.E.B., 3 Civil Proc. During Trial 3d, §23.19.) The clerk may place an individual judgment in the case file for that action and do any of the following:

- (a) Make a microfilm copy of the individual judgment.
- (b) Enter the judgment in the register of actions.
- (c) Enter the judgment in the court's electronic data-processing system.

"Today, few if any counties in this state still use the traditional judgment book system for entering judgments. ...

Given the near universal adoption of the newer system, the concept of 'entry,' as distinct from filing, appears to have lost its utility, and its survival has become a frequent source of confusion. ... Its complete removal from our system of civil procedure will, however, require an extensive statutory revision by the Legislature." (*Palmer v. GTE Calif.* (2003) 30 C.4th 1265, 1268, footnote 2, 135 C.R.2d 654, 70 P.3d 1067, 8 Cal. Proc. (5th), *Attack on Judgment in Trial Court*, §59.)

(3) *Judgment on Stipulated Settlement.* Where the parties to pending litigation stipulate for settlement of the case, the court, on motion, may enter judgment under the terms of the settlement. (*C.C.P.* 664.6.)

West's Key Number Digest, Judgment 270, 271, 277, 284

SUPPLEMENT: [This section is current through the latest supplement]



52 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

3. Place and Form of Entry.

b. Dismissals and Nonsuits.

7 *Witkin Cal. Proc. Judgm* § 52

[§ 52] Dismissals and Nonsuits.

(1) *Written Dismissal*. A written dismissal, i.e., a voluntary dismissal by the plaintiff (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §283 et seq.), is entered in the clerk's register. (*C.C.P.* 581d; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §305.)

(2) *Involuntary Dismissal or Nonsuit*. A dismissal by order of the court and a nonsuit were formerly granted by oral order entered in the minutes. The statute now requires a written order signed by the court (see supra, §48), which is filed in the action and noted in the register of actions. (*C.C.P.* 581d.)

SUPPLEMENT: [This section is current through the latest supplement]



53 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

3. Place and Form of Entry.

c. Probate Orders.

7 *Witkin Cal. Proc. Judgm* § 53

[§ 53] Probate Orders.

(1) *Ordinary Orders.* All probate orders, except those for distribution, must be either entered at length in the minute book of the court, or signed by the judge and filed. (*Prob.C. 1048(a)*; see *Carroll v. Carroll (1940) 16 C.2d 761, 768, 108 P.2d 420* [signing and filing ordinary probate decree was sufficient; *C.C.P. 664* and *668* are not applicable in probate]; *29 Cal. L. Rev. 635 [Carroll]*; *14 Summary (10th), Wills and Probate, §379.*)

(2) *Order for Distribution.* An order for distribution must be entered at length in a judgment book or other permanent record of the court. (*Prob.C. 1048(b)*; see *Mears v. Jeffry (1947) 80 C.A.2d 610, 617, 182 P.2d 294* [entry in minute book under former law]; *14 Summary (10th), Wills and Probate, §379.*)

SUPPLEMENT: [This section is current through the latest supplement]



54 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

3. Place and Form of Entry.

d. Other Orders.

7 *Witkin Cal. Proc. Judgm* § 54

[§ 54] Other Orders.

(1) *Minute Orders From Bench.* An order is a direction of a court or judge that is made or entered in writing and that is not included in a judgment. (C.C.P. 1003.) Orders not constituting judgments (supra, §51) or dismissals (supra, §52) may be entered in the minutes. (See *Dempsey v. Market Street Ry. Co. (1943) 23 C.2d 110, 113, 142 P.2d 929*; *Simmons v. Superior Court (1959) 52 C.2d 373, 378, 341 P.2d 13*; *Cox v. Tyrone Power Enterprises (1942) 49 C.A.2d 383, 391, 121 P.2d 829*; *Price v. Superior Court (1986) 186 C.A.3d 156, 171, 230 C.R. 442*; 6 *Cal. Proc. (5th), Proceedings Without Trial*, §44.)

(2) *Formal Written Orders.* The court may, however, elect to make a formal order, or direct that such an order be prepared, and entry then consists of filing the signed order with the clerk. (See *Pacific Home v. Los Angeles (1953) 41 C.2d 855, 857, 264 P.2d 544*; *Badella v. Miller (1955) 44 C.2d 81, 84, 279 P.2d 729*; *Lee v. Cranford (1951) 107 C.A.2d 677, 680, 237 P.2d 986*; *Perez v. Perez (1952) 111 C.A.2d 827, 829, 245 P.2d 344*; *Maxwell v. Perkins (1953) 116 C.A.2d 752, 756, 255 P.2d 10.*) "[P]reparation of a written order is now contemplated in the ordinary course of events." (*Hughey v. Hayward (1994) 24 C.A.4th 206, 209, 30 C.R.2d 678, 9 Cal. Proc. (5th), Appeal*, §610.)

Even if the court does not direct preparation of an order, one must be prepared whenever a party prevails on a motion. Within 5 days of a ruling, a party prevailing on a motion must mail or deliver a proposed order to the other party for approval as conforming to the court's order, unless the parties waive notice or the court orders otherwise. The other party must respond within 5 days of the mailing or delivery, and must state any reasons for disapproval. Failure to respond within 5 days is deemed an approval. (C.R.C., Rule 3.1312(a).) When the 5-day approval period expires, the prevailing party must promptly transmit the proposed order to the court along with a summary of any responses or a statement that no responses were received. (C.R.C., Rule 3.1312(b).) Another party may submit a proposed order if the prevailing party fails to do so as required by C.R.C., Rule 3.1312(a) or 3.1312(b). (C.R.C., Rule 3.1312(c).) Unless otherwise ordered by the court, C.R.C., Rule 3.1312 does not apply if the motion was unopposed and a proposed order was submitted with the moving papers. (C.R.C., Rule 3.1312(d).)

A trial court's oral ruling on a motion does not become effective until it is filed in writing with the clerk or entered in the minutes. Accordingly, the trial court may properly file a written order differing from its oral ruling when the

ruling has not been entered in the minutes. Furthermore, when the trial court's minute order expressly indicates that a written order will be filed, only the written order is the effective order. (*In re Marriage of Drake* (1997) 53 C.A.4th 1139, 1170, 62 C.R.2d 466, citing the text [trial court did not err in filing written orders that differed from its earlier oral rulings where oral rulings were not entered by minute order and other minute orders directed party to prepare written orders].)

(3) *Choice of Methods*. One of these methods must be used if the order is to be effective. (See *Ketscher v. Superior Court* (1970) 9 C.A.3d 601, 604, 88 C.R. 357 [judge's warning from bench was not an order and disobedience was not punishable contempt].) Sometimes the judge takes both steps; i.e., he or she orally announces an order that is entered in the minutes, and then later signs and files a written order. What constitutes entry of the order under these circumstances affects the running of the time for appeal, and the controlling factors are stated in C.R.C., Rule 8.104(d)(2). (See 9 *Cal. Proc.* (5th), *Appeal*, §609 et seq.)

(4) *Special Statutes*. A few special statutes govern entry of particular orders, such as orders granting a new trial (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §77 et seq.) and probate orders (see *supra*, §53).

SUPPLEMENT: [This section is current through the latest supplement]



55 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

4. Time of Entry.

a. Judgments.

7 *Witkin Cal. Proc. Judgm* § 55

[§ 55] Judgments.

(1) *Jury Trial*. Judgment in a jury trial must be entered within 24 hours after rendition of the verdict (see 7 *Cal. Proc.* (5th), *Trial*, §339), unless the court reserves the case for argument or further consideration, or grants a stay. (*C.C.P.* 664.)

(2) *Court Trial*. Judgment in a court trial must be entered immediately on the filing of the court's decision. (*C.C.P.* 664; see *Estate of Crabtree* (1992) 4 *C.A.4th* 1119, 1124, 6 *C.R.2d* 224 ["under section 664, in most instances the time between filing and entry, if it exists, will be very short"]; on rendition of court's decision, see *C.R.C.*, Rule 3.1590(h), *supra*, §47.)

(3) *Entry Under Alternative Methods*. When an alternative method of entry authorized by *C.C.P.* 668.5 is used (see *supra*, §51), the date of filing the judgment with the clerk constitutes the date of its entry, regardless of when the judgment is placed in the court file. (*C.C.P.* 668.5; *Los Angeles v. Ranger Ins. Co.* (1994) 26 *C.A.4th* 61, 65, 31 *C.R.2d* 257.)

(4) *Directory Nature of Time Requirements*. The provisions of *C.C.P.* 664 have been held directory only, and a valid judgment may be entered after expiration of the specified periods. (*Hume v. Lindholm* (1927) 85 *C.A.* 80, 84, 258 *P.* 1003; see 46 *Am.Jur.2d* (2006 ed.), *Judgments* §107 et seq.) Thus, where the case involves both legal and equitable issues, and the legal issues are tried first, it is error to enter judgment on the verdict. One final judgment should be entered after findings are made on the equitable issues. (See *Shapiro v. Equitable Life Assur. Soc. of the United States* (1946) 76 *C.A.2d* 75, 98, 172 *P.2d* 725; *Alton v. Rogers* (1954) 127 *C.A.2d* 667, 677, 274 *P.2d* 487.)

(5) *True Date of Late Entry*. In the larger counties, administrative difficulties often make it impossible to enter the judgment on the day it was rendered. In these cases, it is improper to give the entry the date of rendition. The true (later) date of actual entry must be stated. (*Wilson v. Los Angeles County Employees Assn.* (1954) 127 *C.A.2d* 285, 289, 273 *P.2d* 824 [false date of entry had to be expunged]; see *Verdier v. Verdier* (1953) 118 *C.A.2d* 279, 282, 257 *P.2d* 723, 9 *Cal. Proc.* (5th), *Appeal*, §608.)

(6) *Motion for Judgment Notwithstanding Verdict.* Formerly, the entry of judgment was stayed pending the judge's determination of a motion for judgment notwithstanding the verdict. (See *Reed v. Cortez* (1948) 88 C.A.2d 416, 424, 198 P.2d 911.) The automatic stay was abolished in 1961. C.C.P. 664 now provides that, unless the court orders otherwise, judgment must be entered "whether or not a motion for judgment notwithstanding the verdict be pending." If the court subsequently grants a judgment notwithstanding the verdict with respect to all or some of the causes of action, that judgment vacates the earlier judgment entered by the clerk. (*Beavers v. Allstate Ins. Co.* (1990) 225 C.A.3d 310, 329, 274 C.R. 766.)

West's Key Number Digest, Judgment 272-

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Court Trial.* C.R.C., Rule 3.1590(h) was relettered C.R.C., Rule 3.1590(l) in 2009.



56 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

4. Time of Entry.

b. Minute Orders.

7 *Witkin Cal. Proc. Judgm* § 56

[§ 56] Minute Orders.

A "minute order" is effective when entered in the "minutes" (see *supra*, §54), but there is no statutory definition of the latter term. In practice, a courtroom clerk usually keeps "rough minutes" or notes of the court's orders (often highly abbreviated and somewhat cryptic), which are later transferred to a "minute book," sometimes called "smooth minutes" or "permanent minutes." If there is a discrepancy in the terms of these respective entries, or a difference in the date of entry (due to time lag in transfer), which is controlling as to content and time of entry?

It has long been settled that the "rough minutes" are not an official record, that the notations therein are mere memoranda of the clerk for his or her own use, and that the only entry of a minute order is in the minute book or permanent minutes. (*Brownell v. Superior Court* (1910) 157 C. 703, 706, 109 P. 91; *Van Tiger v. Superior Court* (1936) 7 C.2d 377, 381, 60 P.2d 851; *Wyman v. Municipal Court* (1951) 102 C.A.2d 738, 228 P.2d 89 [rough minutes cannot be used to impeach correctness of entry in permanent minutes]; *Wilson v. Los Angeles County Employees Assn.* (1954) 127 C.A.2d 285, 289, 273 P.2d 824; *Deshero v. Rhodes* (1969) 1 C.A.3d 733, 738, 82 C.R. 138; see 2 *Cal. Proc.* (5th), *Courts*, §365; 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §125.) Even with the implementation of C.R.C., Rule 3.1312 (*supra*, §54), the date of entry of a minute order remains the date the order is entered in the permanent minutes unless the minute order expressly directs the preparation of a written order, in which case the date of entry is the date the signed order is filed. (C.R.C., Rule 8.104(d)(2); see *Hughey v. Hayward* (1994) 24 C.A.4th 206, 209, 30 C.R.2d 678, 9 *Cal. Proc.* (5th), *Appeal*, §610.)

SUPPLEMENT: [This section is current through the latest supplement]



57 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

5. Notice of Entry.

a. Purpose and Entry.

7 *Witkin Cal. Proc. Judgm* § 57

[§ 57] Purpose and Entry.

(1) *Purpose of Notice.* A judgment or order is effective when entered in accordance with statutory requirements (see *supra*, §51 et seq.) without notice to any party. (See *C.C.P. 581d, 664.*) Notice of entry, however, determines the time within which to do the following:

(a) *Move for a new trial.* (*C.C.P. 659*; see 8 *Cal. Proc. (5th), Attack on Judgment in Trial Court*, §58 et seq.)

(b) *Move to vacate and enter a different judgment.* (*C.C.P. 663a*; see 8 *Cal. Proc. (5th), Attack on Judgment in Trial Court*, §141.)

(c) *Appeal.* (C.R.C., Rule 8.104(a); see 9 *Cal. Proc. (5th), Appeal*, §575.)

(2) *Form of Notice.* Notice must be in writing. (See *C.C.P. 659, 660, 663a, 664.5*; C.R.C., Rule 8.104(a).) But no particular form is required. Any notice in writing that conveys to a losing party that the judgment has been entered is sufficient. (*National Advertising Co. v. Rohnert Park (1984) 160 C.A.3d 614, 618, 206 C.R. 696* [endorsed copy of judgment, showing date of entry in judgment book, was sufficient notice of entry]; *Ramirez v. Moran (1988) 201 C.A.3d 431, 437, 247 C.R. 117.*) For purposes of C.R.C., Rule 8.104(a), a file-stamped copy of the judgment may be used in place of a document entitled "Notice of Entry." (C.R.C., Rule 8.104(a); see *Palmer v. GTE Calif. (2003) 30 C.4th 1265, 1268, footnote 2, 135 C.R.2d 654, 70 P.3d 1067, 8 Cal. Proc. (5th), Attack on Judgment in Trial Court*, §59 [in counties using newer systems, judgment's date of filing, as shown on file stamp, is judgment's date of entry, and serving file-stamped copy of judgment gives notice of date of entry; citing *National Advertising Co.*].) (See C.E.B., 3 Civil Proc. During Trial 3d, §23.28; C.E.B., 1 Civil Appellate Practice 3d, §2.15; Cal. Civil Practice, 4 Procedure, §28:34 [form of notice]; 15 Am.Jur. P.P. Forms (2005 ed.), Judgments, §22 et seq.)

(3) *Notice to Attorney General.* Within 10 days after a court has entered judgment in a contested action or special proceeding in which the court has declared unconstitutional a state statute or regulation, the prevailing party, or as otherwise ordered by the court, must mail a copy of the judgment and a notice of entry of judgment to the Attorney General and must file proof of service with the court. (*C.C.P. 664.5(e)*; C.R.C., Rule 2.1100.)

West's Key Number Digest, Judgment 276

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Form of Notice.* Judicial Council Form No. CIV-130 [Notice of Entry of Judgment or Order] has been approved for optional use.



58 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

5. Notice of Entry.

b. Notice by Party.

7 *Witkin Cal. Proc. Judgm* § 58

[§ 58] Notice by Party.

(1) *When Party Must Give Notice.* With a few exceptions, it is the responsibility of the party submitting an order or judgment for entry in a contested action or special proceeding to give notice of entry of judgment. The exceptions are: (a) small claims actions; (b) actions or proceedings in which a prevailing party is not represented by counsel; and (c) specified marital dissolution proceedings. (*C.C.P.* 664.5(a).)

(2) *When Party May Give Notice.* Even in those situations in which the clerk must provide notice of entry (see *infra*, §59), this method of notice is not exclusive; a party may still serve notice to start the time running for a motion for new trial, a motion to vacate, or a notice of appeal. (See *C.C.P.* 659, 663a; *C.R.C.*, Rule 8.104(a); 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §§59, 141; 9 *Cal. Proc.* (5th), *Appeal*, §575.) This allows counsel to begin the time running in situations where the clerk delays or fails to give the statutory notice or where the mailing is ineffective. (See *Valley Vista Land Co. v. Nipomo Water & Sewer Co.* (1967) 255 *C.A.2d* 172, 63 *C.R.* 78 [notice misaddressed by clerk and never received by party did not start time running for appeal]; cf. *F.R. Civ. P.*, *Rule 77(d)* [either clerk or party may give notice, but lack of notice by clerk does not affect time to appeal]; 12 *Federal Practice & Procedure* (Wright & Miller) §3084; 21A *Federal Procedure*, L. Ed. §51:18.)

(3) *Procedure.* The party giving notice must prepare and mail a copy of the notice of entry of judgment to all parties who have appeared and must file the original notice of entry, together with the proof of service by mail, with the court. (*C.C.P.* 664.5(a); but see *National Advertising Co. v. Rohnert Park* (1984) 160 *C.A.3d* 614, 618, 206 *C.R.* 696 [service on opposing counsel of endorsed copy of judgment, showing date of entry in judgment book, was sufficient notice of entry even though mailing procedure provided by *C.C.P.* 664.5 was not followed].)

SUPPLEMENT: [This section is current through the latest supplement]



59 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

A. Ministerial Act of Clerk.

5. Notice of Entry.

c. Notice by Clerk.

7 *Witkin Cal. Proc. Judgm § 59*

[§ 59] Notice by Clerk.

(1) *Duty in Action Involving Unrepresented Party.* In a contested action or special proceeding in which the prevailing party is not represented by counsel, the clerk of the court must give notice of entry of judgment. "Promptly" on entry of judgment, the clerk must mail the notice to all parties who have appeared, certify that the mailing was accomplished, and place the certificate in the court's file. (*C.C.P. 664.5(b)*.) "Judgment" includes any appealable judgment, decree, or signed order. (*C.C.P. 664.5(c)*.)

(2) *Duty in Marital Proceedings.* The clerk must give notice of entry of a final judgment of dissolution, nullity, or legal separation. The notice is given to the attorney of record of each party, or to the party (if the party is self-represented). (*C.R.C., Rule 5.134(a)*.) Judicial Council Form No. FL-190 must be used.

A person submitting the judgment to the court for signature must submit stamped envelopes addressed to the parties and an original and at least two copies of Judicial Council Form No. FL-190. (*C.R.C., Rule 5.136(a)*.) The form must be fully completed with the exception of the date of entry, the date of mailing, and signatures, and it must also specify in the certificate of mailing the place where notices have been given to the other party. (*C.R.C., Rule 5.136(b)*.) If the other party has not appeared, the address stated in the affidavit of mailing of the request for default must be used. (*C.R.C., Rule 5.136(c)*.) The judge may refuse to sign the judgment until completion of the notice of entry form. (*C.R.C., Rule 5.136(d)*.)

(3) *Duty by Court Order.* The court may direct the clerk to mail notice of any ruling "whether or not appealable." (*C.C.P. 664.5(d)*.) (On requirement of notice by clerk of determination of submitted matters, see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §45.)

SUPPLEMENT: [This section is current through the latest supplement]



60 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

B. Nunc Pro Tunc Entry.

1. Nature of Power.

7 *Witkin Cal. Proc. Judgm* § 60

[§ 60] Nature of Power.

A nunc pro tunc order or judgment is one entered as of a time prior to the actual entry, so that it is treated as effective at the earlier date. This retroactive entry is an exercise of the inherent power of the court, the object being to do justice to a litigant whose rights are threatened by a delay that is not the litigant's fault. (See generally *Estate of Pillsbury* (1917) 175 C. 454, 461, 166 P. 11; *Leavitt v. Gibson* (1935) 3 C.2d 90, 103, 43 P.2d 1091; *Norton v. Pomona* (1935) 5 C.2d 54, 62, 53 P.2d 952; *Scoville v. Kegl* (1938) 27 C.A.2d 17, 24, 80 P.2d 162; *Verdier v. Verdier* (1958) 162 C.A.2d 325, 331, 327 P.2d 934, citing the text; *Williamson v. Plant Insulation Co.* (1994) 23 C.A.4th 1406, 1415, 28 C.R.2d 751; *Scalice v. Performance Cleaning Systems* (1996) 50 C.A.4th 221, 238, 57 C.R.2d 711, citing the text [nunc pro tunc entry was proper where delay between date that judgment normally would have been entered and date it was actually rendered was due to court's unavailability]; *National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Nationwide Ins. Co.* (1999) 69 C.A.4th 709, 715, 82 C.R.2d 16 [nunc pro tunc modification of stipulation from one for "arbitration" to one for "reference" was proper where form of proceeding was denominated "arbitration" but it was reference in substance; modification preserved appellate court's power to review proceedings]; C.E.B., 3 Civil Proc. During Trial 3d, §23.30; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §16.26; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §130 et seq.; 15 *Am.Jur. P.P. Forms* (2005 ed.), *Judgments*, §91 et seq.)

The power may also be exercised by an appellate court. (See *McPike v. Heaton* (1900) 131 C. 109, 111, 63 P. 179 [appellant died during appeal; judgment of reversal entered nunc pro tunc as of date prior to death]; *Larson v. Barnett* (1950) 101 C.A.2d 282, 290, 225 P.2d 297 [reversal with directions to trial court to make order nunc pro tunc]; *Dominguez v. Alhambra* (1981) 118 C.A.3d 237, 242, 173 C.R. 345 [ordering trial court to enter judgment of dismissal, nunc pro tunc as of date of order sustaining demurrer, and treating notice of appeal as from that judgment].)

West's Key Number Digest, Judgment 273

SUPPLEMENT: [This section is current through the latest supplement]



61 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

B. Nunc Pro Tunc Entry.

2. Limitations on Power.

7 *Witkin Cal. Proc. Judgm* § 61

[§ 61] Limitations on Power.

There must be a good reason for the exercise of this unusual power, and in the absence of a good reason, the trial court's retroactive order will be reversed. As the court observed in *Mather v. Mather* (1943) 22 C.2d 713, 140 P.2d 808, the only grounds for antedating are "the preservation of the legitimate fruits of the litigation which would otherwise be lost to the prevailing party or the correction of a deficiency in the recordation of a previous decision so as to express the true intention of the court as of the earlier date and thus conform to verity." (22 C.2d 719.)

It is entirely improper, therefore, to order a nunc pro tunc entry where the result would be unconscionable. (See *Phillips v. Phillips* (1953) 41 C.2d 869, 875, 264 P.2d 926 [effect would be to cut off time to appeal]; *Young v. Gardner-Denver Co.* (1966) 244 C.A.2d 915, 53 C.R. 522 [entry would have rendered new trial order granted to defendants void as beyond jurisdictional period, and plaintiff was aware of mistake and remained silent].)

The court can only make the record show that something was actually done at a previous time. A nunc pro tunc order cannot declare that something was done that was not done. Cases illustrating this point include the following:

Johnson & Johnson v. Superior Court (1985) 38 C.3d 243, 256, 211 C.R. 517, 695 P.2d 1058 [trial court erred in permitting nunc pro tunc amendment of returns of service to include signed return receipts more than 3 years after commencement of action, where return receipts had not actually been signed when returns of service were filed].

Los Angeles v. Superior Court (Peters) (1968) 264 C.A.2d 766, 771, 70 C.R. 826 [lower court improperly attempted to amend actual filing date of complaint to avoid bar of statute of limitations].

Hamilton v. Laine (1997) 57 C.A.4th 885, 889, 67 C.R.2d 407 [trial court had no authority, 10 years after entry of judgment establishing medical trust for minor, to establish special needs trust instead; special needs trust was not initially intended and to establish it nunc pro tunc would deprive other party of rights under statutory lien; citing *Estate of Eckstrom* (1960) 54 C.2d 540, 7 C.R. 124, 354 P.2d 652, *infra*, §69].

APRI Ins. Co. v. Superior Court (1999) 76 C.A.4th 176, 185, 90 C.R.2d 171 [trial court could not have used nunc pro tunc order to vacate judgment that correctly reflected court's grant of motion to quash and dismissal of defendant;

citing *Hamilton*].

West Shield Investigations & Sec. Consultants v. Superior Court (2000) 82 C.A.4th 935, 950, 98 C.R.2d 612 [nunc pro tunc order declaring that prior order emancipating minor did not affect minor's ability to sue or be sued was of no effect; there was no indication that court originally intended to order tolling of statute of limitations that began to run on minor's emancipation but was prevented from doing so by clerical error, and court did not have authority to do so in any case].

SUPPLEMENT: [This section is current through the latest supplement]

See *In re Marriage of Padgett* (2009) 172 C.A.4th 830, 851, 91 C.R.3d 475 [order dividing pension plan survivor's benefits between decedent's surviving spouse and decedent's former spouse, entered nunc pro tunc almost 20 years after original dissolution judgment, was improper; at most, original court intended to address pension assets at later date, rather than to classify them as community property at time of dissolution].



62 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

B. Nunc Pro Tunc Entry.

3. Grounds.

a. Death of Party.

7 *Witkin Cal. Proc. Judgm* § 62

[§ 62] Death of Party.

Where a trial is completed but judgment is delayed through no fault of the parties, and thereafter a party dies, the judgment in favor of or against a dead person was formerly invalid. The survival statutes have, to a large extent, eliminated this problem (see 3 *Cal. Proc.* (5th), *Actions*, §§15, 16, 17) but, in a situation in which it arises, invalidity may be avoided by antedating the judgment so as to make it effective before the death. And this will ordinarily be done if, at the time of death, the case is ready for rendition of final judgment. (See *Estate of Pillsbury* (1917) 175 C. 454, 461, 166 P. 11 [trial of malpractice suit was concluded 2 days before death; judgment was entered 2 days after death, in ignorance thereof, and later entered nunc pro tunc as of day of submission]; *Norton v. Pomona* (1935) 5 C.2d 54, 62, 53 P.2d 952 [findings and conclusions, as well as formal judgment, filed nunc pro tunc]; *Bank One Texas v. Pollack* (1994) 24 C.A.4th 973, 980, 981, 29 C.R.2d 510 [death of debtor did not void original judgment entered on sister state judgment; superior court was directed to enter amended abstract of judgment nunc pro tunc as of date of original entry of judgment to preserve priority of plaintiff's lien]; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §91 et seq.; on enforcement of judgment after death, see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §50.)

The test of "ready for the rendition of final judgment" is flexible, and was liberally applied in *Wells v. Coca Cola Bottling Co. of Fresno* (1956) 140 C.A.2d 218, 221, 294 P.2d 955. A personal injury action tried by the court on March 4, 1953 was ordered "submitted on briefs." (140 C.A.2d 219.) No briefs were filed and on December 4, 1953, the judge signed a memorandum decision for plaintiff, directing him to prepare findings. Findings were presented February 24, 1954; plaintiff died February 28, 1954; findings were signed March 2, 1954, and judgment was entered March 8, 1954. Then plaintiff's counsel learned of his client's death, and on March 26, 1954, the trial judge retired. *Held*, his successor had authority to order findings and judgments filed nunc pro tunc as of February 26. Ordinarily, of course, submission on briefs defers submission, either until briefs are in or a later order of submission is made. But the failure of counsel to file briefs for many months could properly be treated as a waiver of the privilege, and the failure of the judge to enter a formal order of submission, if error, was not prejudicial. Hence, the memorandum decision of December 4 was a sufficient submission and put the case in readiness for final judgment. (140 C.A.2d 223.) (See *Leavitt v. Gibson* (1935) 3 C.2d 90, 107, 43 P.2d 1091; but see *Williamson v. Plant Insulation Co.* (1994) 23 C.A.4th 1406, 1415, 1416, 28 C.R.2d 751 [personal injury action, in which plaintiff died during trial, was not ready for rendition where evidentiary stage of

trial had not been completed, jury had not been instructed, attorneys had not presented summations, and there had been no verdict on which judgment could be rendered].)

C.C.P. 669, providing for the rendition of a judgment where death occurs after a verdict or submission (*supra*, §5), does not limit the court's power to enter the judgment as of a date prior to the death of the party. (See *Fox v. Hale & Norcross Silver Mining Co.* (1895) 108 C. 478, 479, 41 P. 328; *Norton v. Pomona*, *supra*; *In re Marriage of Mallory* (1997) 55 C.A.4th 1165, 1176, 64 C.R.2d 667, 11 Summary (10th), *Husband and Wife*, §119 [trial court in marital dissolution action has power to enter a judgment nunc pro tunc as of date preceding death of party].)

SUPPLEMENT: [This section is current through the latest supplement]



63 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VII. ENTRY OF JUDGMENT

B. Nunc Pro Tunc Entry.

3. Grounds.

b. Other Situations.

7 *Witkin Cal. Proc. Judgm* § 63

[§ 63] Other Situations.

(1) *Clerical Error*. Where clerical errors in the judgment or order are corrected by the court under its inherent power, the order of correction may, if necessary, be made nunc pro tunc as of the time of the original entry. (See *Takekawa v. Hole* (1915) 170 C. 323, 149 P. 593; *Carter v. J.W. Silver Trucking Co.* (1935) 4 C.2d 198, 205, 47 P.2d 733; *Estate of Goldberg* (1938) 10 C.2d 709, 76 P.2d 508; *La Mar v. Superior Court* (1948) 87 C.A.2d 126, 129, 196 P.2d 98; *Wilson v. Wilson* (1948) 88 C.A.2d 382, 384, 198 P.2d 916; *Sampson v. Sapoznik* (1954) 124 C.A.2d 709, 269 P.2d 209; *Brashear v. Gerbracht* (1954) 128 C.A.2d 263, 268, 274 P.2d 933; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §139; *infra*, §67 et seq.)

(2) *Failure To Enter*. Where a judgment or order is rendered, but, through negligence or inadvertence of the clerk, is not entered at the proper time, the court may order its entry nunc pro tunc. (*Marshall v. Taylor* (1893) 97 C. 422, 426, 32 P. 515; *Hess v. Gross* (1943) 56 C.A.2d 529, 531, 133 P.2d 1; *Milicevich v. Sacramento Med. Center* (1984) 155 C.A.3d 997, 1000, 202 C.R. 484; see *Bed, Bath & Beyond of La Jolla v. La Jolla Village Square Venture Partners* (1997) 52 C.A.4th 867, 882, 60 C.R.2d 830 [trial judge properly entered formal order granting defendant summary adjudication nunc pro tunc, even though plaintiff had already perfected its appeal; judge had inadvertently failed to enter formal order months before, when it was submitted by defendant]; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §139.)

(3) *Judgment of Dissolution of Marriage*. The Family Code provides for entry of a decree of dissolution nunc pro tunc where failure to make timely entry is a result of mistake, negligence, or inadvertence. (See *Family C. 2346*; *In re Marriage of Tamraz* (1994) 24 C.A.4th 1740, 1748, 30 C.R.2d 233; *Cal. Civil Practice*, 2 Family Law Litigation, §16:19; 19 *A.L.R.3d* 648 [entering judgment or decree of divorce nunc pro tunc]; 24 *Am.Jur.2d* (1998 ed.), *Divorce and Separation* §393; 11 *Summary* (10th), *Husband and Wife*, §116 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Judgment of Dissolution of Marriage*. See 24 *Am.Jur.2d* (2008 ed.), *Divorce and Separation* §366.



64 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VII. ENTRY OF JUDGMENT

C. Abstract of Judgment.

7 *Witkin Cal. Proc. Judgm § 64*

[§ 64] Abstract of Judgment.

(1) *Use of Abstract To Create Judgment Lien.* A judgment lien on real property may be created by recording an abstract of a money judgment with the county recorder. (*C.C.P. 697.310(a)*; see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §69 et seq.)

(2) *Contents of Abstract.* *C.C.P. 674(a)* specifies the required contents of an abstract of a judgment or decree requiring the payment of money as follows:

- (a) The title of the court where the judgment or decree is entered and the number of the action.
- (b) The date the judgment or decree was entered and where it is located in the court's records.
- (c) The judgment debtor's name and last known address (and if known, the last four digits of the debtor's Social Security number and driver's license number) and the address at which the summons was served.
- (d) The name and address of the judgment creditor.
- (e) The amount of the judgment or decree.
- (f) Whether the court has ordered a stay of enforcement and, if so, the date the stay ends.
- (g) The date of issuance of the abstract.

(3) *Mandatory Forms.* The Judicial Council has adopted the following mandatory forms for abstracts of judgment:

- (a) Abstract of Judgment--Civil and Small Claims. (Judicial Council Form No. EJ-001.)
- (b) Abstract of Support Judgment. (Judicial Council Form No. FL-480.)

SUPPLEMENT: [This section is current through the latest supplement]



65 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

A. No Correction of Judicial Error.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 65

[§ 65] In General.

Before entry, the judge may freely alter the judgment rendered. (See *supra*, §50.) But once the judgment is entered, the judge loses this unrestricted power to change it. If the entry conforms to the judgment as rendered, and there is no clerical error in the rendition or entry, there can be no summary amendment by the court itself no matter how wrong in law the decision may be. Judicial error, i.e., an erroneous decision, can only be rectified by the regular procedures for attack on judgment: motion for a new trial, motion to vacate judgment, appeal, or an independent action in equity. (See *Lankton v. Superior Court* (1936) 5 C.2d 694, 696, 55 P.2d 1170; *Stevens v. Superior Court* (1936) 7 C.2d 110, 112, 59 P.2d 988; *Estate of Burnett* (1938) 11 C.2d 259, 262, 79 P.2d 89; *Badella v. Miller* (1955) 44 C.2d 81, 86, 279 P.2d 729; *Epley v. Califro* (1958) 49 C.2d 849, 854, 323 P.2d 91; *Estate of Eckstrom* (1960) 54 C.2d 540, 544, 7 C.R. 124, 354 P.2d 652, *infra*, §69; *Chase v. Superior Court* (1962) 210 C.A.2d 872, 875, 27 C.R. 383, citing the text; *Hunydee v. Superior Court* (1961) 198 C.A.2d 430, 432, 17 C.R. 856; *Estate of Harris* (1962) 200 C.A.2d 578, 590, 19 C.R. 510; *Rogers v. Hirschi* (1983) 141 C.A.3d 847, 850, 851, 190 C.R. 575, citing the text; *Craven v. Crout* (1985) 163 C.A.3d 779, 782, 783, 209 C.R. 649, *supra*, §31; *Ramon v. Aerospace Corp.* (1996) 50 C.A.4th 1233, 1236, 1238, 58 C.R.2d 217 [after entry of judgment, trial court has no power to rule on motion for reconsideration; motion is not acceptable way to correct judicial error]; *Rochin v. Pat Johnson Mfg. Co.* (1998) 67 C.A.4th 1228, 1237, 79 C.R.2d 719 [court, attempting to correct prior perceived judicial error in directing jury to disregard fault of nonparties, amended judgment to reinstate allocations of fault that had been previously stricken; amended judgment was void]; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §16.28; on regular methods of attack, see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §2.)

West's Key Number Digest, Judgment 302 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



66 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

A. No Correction of Judicial Error.

2. What Constitutes Judicial Error.

7 *Witkin Cal. Proc. Judgm* § 66

[§ 66] What Constitutes Judicial Error.

Judicial error, as distinguished from clerical error, is a relatively simple concept, which needs no detailed list of examples. The test is simply whether the challenged judgment was made or entered inadvertently (clerical error) or advertently (judicial error). (*Bowden v. Green* (1982) 128 C.A.3d 65, 70, 180 C.R. 90, quoting the text.) As the court said in *Lankton v. Superior Court* (1936) 5 C.2d 694, 55 P.2d 1170: "The judgment in this case was the identical judgment which the trial court intended to render. There was no mistake in its entry, and it expressed in apt and definite terms the conclusion at which the trial court arrived during the trial of the action. If the court misconstrued the evidence before it, or misapplied the law applicable to the facts disclosed by the evidence, or was even misled by counsel, such an error was in no sense a clerical error which could thereafter be corrected by the court upon its own motion." (5 C.2d 696.) (See *Nacht v. Nacht* (1959) 167 C.A.2d 254, 263, 334 P.2d 275, *infra*, §78; *Estate of Eckstrom* (1960) 54 C.2d 540, 545, 7 C.R. 124, 354 P.2d 652, *infra*, §*69; 50 A.L.R.5th 653 [consideration by state civil courts whether error is judicial or clerical].)

Despite the simplicity of the test, cases holding correction improper are numerous. The following are illustrative:

Stevens v. Superior Court (1936) 7 C.2d 110, 113, 59 P.2d 988 [mistaken interpretation of effect of waiver by counsel].

Owen v. Crocker-Huffman Land & Water Co. (1918) 38 C.A. 649, 652, 177 P. 299 [misapprehension of nature, extent, or effect of testimony].

McKannay v. McKannay (1924) 68 C.A. 709, 713, 230 P. 218 [defective findings revised].

McConville v. Superior Court (1926) 78 C.A. 203, 207, 248 P. 553 [failure to allow lien for full amount that evidence warranted].

Liuzza v. Brinkerhoff (1938) 29 C.A.2d 1, 4, 83 P.2d 976 [erroneous theory of the law].

Felton Chemical Co. v. Superior Court (1939) 33 C.A.2d 622, 627, 92 P.2d 684 [modification enlarging scope of judgment].

Morgan v. State Bd. of Equalization (1949) 89 C.A.2d 674, 682, 201 P.2d 859 [unexplained change of decision].

Wilson v. Wilson (1952) 109 C.A.2d 673, 675, 241 P.2d 281 [modification of divorce decree to require husband to pay taxes due on property, use of which was awarded to wife].

Allen v. Allen (1956) 138 C.A.2d 706, 711, 292 P.2d 581, citing the text [after making order modifying custody and support provisions of divorce decree, court improperly sought to add provision for attorneys' fee].

Uhl v. Johnson (1956) 141 C.A.2d 659, 666, 297 P.2d 493 [attempt to make joint tenancy a tenancy "in trust"].

Blake v. Municipal Court (1956) 144 C.A.2d 131, 134, 300 P.2d 755 [contempt adjudication by minute order; after petitioner sought certiorari, judge attempted to augment recitals by formal written order].

Stevens v. Superior Court (1958) 160 C.A.2d 264, 270, 325 P.2d 204 [amendment of decree in heirship proceeding to add bar of res judicata].

Hunydee v. Superior Court (1961) 198 C.A.2d 430, 432, 17 C.R. 856 [judge, who had granted plaintiff's motion for new trial because he mistakenly thought he could not amend findings, set aside order and directed defendant's counsel to prepare new findings].

Estate of Harris (1962) 200 C.A.2d 578, 590, 19 C.R. 510 [probate judge signed decree of distribution without examining it and later substantially changed it].

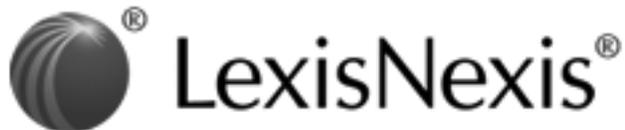
Lake v. Superior Court (1977) 67 C.A.3d 815, 818, 136 C.R. 830 [similar to *Blake v. Municipal Court*; after final contempt order, judge attempted to correct it by adding essential finding of ability of contemnor to comply].

Tokio Marine & Fire Ins. Corp. v. Western Pac. Roofing Corp. (1999) 75 C.A.4th 110, 117, 89 C.R.2d 1 [judgment could not be corrected to include party's insurers as judgment debtors; insurers were not parties at time of judgment, trial court had no jurisdiction over them, and there was no evidence that court intended to include them as debtors at that time].

Bell v. Farmers Ins. Exchange (2006) 135 C.A.4th 1138, 1144, 38 C.R.3d 306 [prejudgment interest rate provided in judgment precisely carried out trial court's intent and could not be considered clerical error].

In *Motores de Mexicali, S.A. v. Superior Court (1958)* 51 C.2d 172, 331 P.2d 1, petitioner obtained a default judgment against E Corp., which then went into bankruptcy. Meanwhile another creditor in a separate action obtained an adjudication that the corporation was the alter ego of three individuals. Petitioner applied for an order to show cause why its judgment should not be corrected to add the names of the individuals. *Held*, the order was properly denied. *Mirabito v. San Francisco Dairy Co. (1935)* 8 C.A.2d 54, 47 P.2d 530, and *Thomson v. L.C. Roney & Co. (1952)* 112 C.A.2d 420, 246 P.2d 1017, involving parent and subsidiary corporations, are distinguishable. In each of those cases, the facts justifying disregard of the separate corporate entity were explored during the trial, and the parent in effect conducted the litigation through its attorney who represented both corporations. Here the individuals did not participate in the basic action against the corporation, their attorneys did not represent the corporation, and no facts of domination were developed (the judgment was by default). Hence, the proposed amendment would constitute a judgment against them without a hearing, a denial of due process. (51 C.2d 174.)

SUPPLEMENT: [This section is current through the latest supplement]



67 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

1. Nature of Power To Correct.

7 *Witkin Cal. Proc. Judgm* § 67

[§ 67] Nature of Power To Correct.

A court of general jurisdiction has the power, after final judgment, and regardless of lapse of time, to correct clerical errors or misprisions in its records, whether made by the clerk, counsel, or the court itself, so that the records will conform to and speak the truth. (*Kaufman v. Shain* (1896) 111 C. 16, 19, 43 P. 393; *San Francisco v. Brown* (1908) 153 C. 644, 650, 96 P. 281; *Takekawa v. Hole* (1915) 170 C. 323, 327, 149 P. 593; *Kohlstedt v. Hauseur* (1937) 24 C.A.2d 60, 61, 74 P.2d 314; *Estate of Goldberg* (1938) 10 C.2d 709, 713, 76 P.2d 508, *infra*, §69; *Benway v. Benway* (1945) 69 C.A.2d 574, 579, 159 P.2d 682; *Estate of Remick* (1946) 75 C.A.2d 24, 27, 170 P.2d 96; *In re Roberts* (1962) 200 C.A.2d 95, 97, 19 C.R. 147, citing the text [power exists in criminal as well as civil cases and is not suspended by pendency of appeal or habeas corpus proceeding]; *Russell v. Superior Court* (1967) 252 C.A.2d 1, 7, 59 C.R. 891, *infra*, §70, citing the text; *Pettigrew v. Grand Rent-A-Car* (1984) 154 C.A.3d 204, 210, 211, 201 C.R. 125, citing the text; *People v. Landon White Bail Bonds* (1991) 234 C.A.3d 66, 77, 285 C.R. 575, citing the text; *Aspen Int. Capital Corp. v. Marsch* (1991) 235 C.A.3d 1199, 1204, 286 C.R. 921, citing the text [amendment of Colorado judgment to conform it to the original Colorado decree]; see C.E.B., 3 Civil Proc. During Trial 3d, §23.29 et seq.; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §139 et seq.)

This inherent power is confirmed by statute. "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed." (*C.C.P.* 473(d); cf. *F.R. Civ. P.*, *Rule 60(a)*); see 11 Federal Practice & Procedure (Wright & Miller) §2854; 21A Federal Procedure, L. Ed. §51:135; 11B *Am.Jur.* P.P. Forms (2007 ed.), Federal Practice and Procedure §§1228, 1231.)

The correction may be made even though an appeal has been taken and is pending. (*Fay v. Stubenrauch* (1904) 141 C. 573, 575, 75 P. 174 ["It is true that the court by the appeal loses jurisdiction of the cause, for the purposes of the appeal, but it does not lose jurisdiction of its records"]; *Boust v. Superior Court* (1912) 162 C. 343, 345, 122 P. 956; *Crawford v. Meadows* (1921) 55 C.A. 4, 10, 203 P. 428.) And it may also be made after affirmance of the judgment on appeal. (*La Mar v. Superior Court* (1948) 87 C.A.2d 126, 129, 196 P.2d 98; *Hennefer v. Butcher* (1986) 182 C.A.3d 492, 506, 227 C.R. 318; on entry of correction order *nunc pro tunc*, see *supra*, §63.)

SUPPLEMENT: [This section is current through the latest supplement]



68 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

2. Illustrations.

a. Purely Clerical Errors.

7 *Witkin Cal. Proc. Judgm* § 68

[§ 68] Purely Clerical Errors.

The most obvious and appropriate exercise of the power to correct is in situations where there is a clerical error in drafting or copying the judgment. Common examples include the following:

(1) *Mistake in the name of a party.* (See *Fay v. Stubenrauch* (1904) 141 C. 573, 574, 75 P. 174; *Thomson v. L.C. Roney & Co.* (1952) 112 C.A.2d 420, 425, 246 P.2d 1017 [amendment to designate true name of judgment debtor]; *Davis v. Rudolph* (1947) 80 C.A.2d 397, 405, 181 P.2d 765; *Jack Farenbaugh & Son v. Belmont Const.* (1987) 194 C.A.3d 1023, 1027, 1029, 240 C.R. 78 [judgment was amended to add defendant corporation's alter ego, who had control of litigation, as additional judgment debtor on ground that omission was "misnomer"].)

(2) *Omission of the name of a party.* (See *Boust v. Superior Court* (1912) 162 C. 343, 345, 122 P. 956; *Estate of Goldberg* (1938) 10 C.2d 709, 713, 76 P.2d 508, *infra*, §74; *Kohlstedt v. Hauseur* (1937) 24 C.A.2d 60, 61, 74 P.2d 314.)

(3) *Mistaken term or phrase.* (See *Chula v. Superior Court* (1962) 57 C.2d 199, 202, 206, 18 C.R. 507, 368 P.2d 107 [judgment holding attorney in contempt incorrectly recited that "Defendant" be taken into custody of sheriff, etc.; judgment was amended nunc pro tunc to read that "George H. Chula" (petitioner) be taken]; *Estate of Remick* (1946) 75 C.A.2d 24, 29, 170 P.2d 96 [decree of distribution referring to property "or the proceeds" instead of "or value thereof," as petition prayed and court ordered]; *Dorland v. Dorland* (1960) 178 C.A.2d 664, 668, 3 C.R. 262 [action by administrator to recover estate property, judgment in favor of "the estate" was corrected to read "the heirs and/or devisees"].)

(4) *Mistake in the description of property.* (See *Meyer v. Porath* (1952) 113 C.A.2d 808, 811, 248 P.2d 984.)

(5) *Mistake in the amount, items, or extent of the judgment entered.* (See *Takekawa v. Hole* (1915) 170 C. 323, 324, 149 P. 593; *Estate of Soboslay* (1935) 4 C.2d 177, 179, 47 P.2d 714; *Hennefer v. Butcher* (1986) 182 C.A.3d 492, 506, 507, 227 C.R. 318, citing the text [subtraction error]; *Aspen Int. Capital Corp. v. Marsch* (1991) 235 C.A.3d 1199, 1204, 1205, 286 C.R. 921 [judgment was missing costs and attorneys' fees incurred in collecting sister state judgment].)

(6) *Omission of date of entry of judgment from abstract.* (See *Commonwealth Land Title Co. v. Kornbluth* (1985) 175 C.A.3d 518, 531, 220 C.R. 774, citing the text.)

The failure of the clerk to perform the ministerial duty of entering judgment in conformity with the court's decision is a typical ground for correction. (See *Kaufman v. Shain* (1896) 111 C. 16, 19, 43 P. 393; *Culligan v. Leider* (1944) 65 C.A.2d 51, 56, 149 P.2d 894; *La Mar v. Superior Court* (1948) 87 C.A.2d 126, 129, 196 P.2d 98; *Aspen Int. Capital Corp. v. Marsch*, *supra*, 235 C.A.3d 1205, citing the text [amendment of entry of sister state judgment to correct clerical error that occurred at time of entry; amendment was necessary to conform entry to decision actually rendered by sister state court].)

Replacement of a lost record is a similar exercise of the power. (See *Wilson v. Nichols* (1942) 55 C.A.2d 678, 681, 131 P.2d 596 [part of appellate court's remittitur was lost; order directing filing of certified copy nunc pro tunc as of date original was filed].)

SUPPLEMENT: [This section is current through the latest supplement]



69 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

2. Illustrations.

b. Inadvertent Error of Trial Judge.

7 *Witkin Cal. Proc. Judgm* § 69

[§ 69] Inadvertent Error of Trial Judge.

(1) *General Rule.* If the trial judge through inadvertence or mistake makes or signs an order or decision different from that which the judge intended, he or she may correct this error as readily as that of the clerk in entering a judgment. (*Bastajian v. Brown* (1941) 19 C.2d 209, 214, 120 P.2d 9, *infra*, §77; *Estate of Costa* (1951) 37 C.2d 154, 157, 231 P.2d 17; *In re Marriage of Sheridan* (1983) 140 C.A.3d 742, 746, 189 C.R. 622, citing the text; *Pettigrew v. Grand Rent-A-Car* (1984) 154 C.A.3d 204, 210, 201 C.R. 125, *infra*, §72, citing the text; *Conservatorship of Tobias* (1989) 208 C.A.3d 1031, 1035, 256 C.R. 525; see *Martin v. Martin* (1970) 2 C.3d 752, 760, 87 C.R. 526, 470 P.2d 662 [nunc pro tunc correction of general discharge in bankruptcy to exclude nondischargeable obligation to pay alimony, by federal referee acting under *F.R. Civ. P., Rule 60(a)*].)

The following are among the cases illustrating this rule:

Martin v. Ray (1946) 74 C.A.2d 922, 928, 170 P.2d 75 [judge signed formal judgment prepared by party and differing from prior memorandum filed by judge].

Raines v. Damon (1949) 89 C.A.2d 812, 815, 201 P.2d 886 [judgment mistakenly covered issues that, by stipulation, were to be governed by decision in another action].

Hansen v. Hansen (1949) 93 C.A.2d 568, 570, 209 P.2d 626 [divorce decree mistakenly omitted condition that alimony should terminate on remarriage].

Nathanson v. Murphy (1957) 147 C.A.2d 462, 468, 305 P.2d 710, citing text [inadvertent award of interest to run from time of wrongful taking of money instead of time of judgment].

Muller v. Municipal Court (1959) 176 C.A.2d 156, 158, 160, 1 C.R. 207 [minute entry, "counsel for defendant" to prepare judgment, corrected to read "Clerk"].

Gravert v. DeLuse (1970) 6 C.A.3d 576, 581, 86 C.R. 93 [juvenile court judge, in order adjudging child dependent, inadvertently described G as father; paternity was not in issue, and was subject of paternity suit by child against

defendant D].

Poole v. Work. Comp. App. Bd. (1989) 211 C.A.3d 694, 697, 259 C.R. 564, citing the text [error stating that workers' compensation case had been "closed" corrected to "suspended"].

On v. Cow Hollow Properties (1990) 222 C.A.3d 1568, 1574, 272 C.R. 535, citing the text [error awarding defendants attorneys' fees as "cross-complainants" for their unsuccessful cross-complaint corrected to "defendants" for their successful defense of case-in-chief].

Ames v. Paley (2001) 89 C.A.4th 668, 672, 107 C.R.2d 515 [trial court had inherent power to correct judgment to conform to terms of settlement agreement that provided for interest on promissory note and for operative date of note; judgment had to be corrected to include date of note and date when interest began to accrue].

(2) *Presumption of Inadvertence.* In *Wilson v. Wilson* (1948) 88 C.A.2d 382, 198 P.2d 916, the appellate court modified an interlocutory divorce decree awarding community property and directed that the property should be assigned in the final decree. Thereafter, a different superior court judge signed a final decree silent on the disposition. *Held*, a nunc pro tunc correction was proper. In answer to the argument that this was merely judicial error--failure to follow the law--the court observed that it was the duty of the superior court judge to carry out the decision of the appellate court, that it could not be assumed that he would deliberately flout that decision, and that, therefore, the erroneous decree must have been inadvertently signed. (88 C.A.2d 383.)

In *Estate of Goldberg* (1938) 10 C.2d 709, 76 P.2d 508, *infra*, §74, the court used language to the effect that where the judgment is not that which the law ought to have pronounced on the facts of record, it may be presumed to be a clerical misprision rather than a judicial blunder. (10 C.2d 716.) In *Estate of Eckstrom* (1960) 54 C.2d 540, 7 C.R. 124, 354 P.2d 652, this language was disapproved. A probate decree of distribution ordered an improper deduction from the distributive share of a trustee, for federal estate tax purposes. Some 20 months later, on motion of the executor, another judge ordered a nunc pro tunc correction to eliminate the deduction as a clerical misprision. *Held*, reversed. If the order was the one intended, even though clearly erroneous, it cannot be corrected under the inherent power after it is final. "It is only when the form of the judgment fails to coincide with the substance thereof, as intended at the time of the rendition of the judgment, that it can be reached by a corrective *nunc pro tunc* order." (54 C.2d 545.)

SUPPLEMENT: [This section is current through the latest supplement]



70 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

2. Illustrations.

c. Mistake of Attorney Draftsman.

7 *Witkin Cal. Proc. Judgm* § 70

[§ 70] Mistake of Attorney Draftsman.

In *Russell v. Superior Court* (1967) 252 C.A.2d 1, 59 C.R. 891, both parties were awarded decrees of divorce, and alimony was covered by agreement, as follows: (a) a written stipulation that, on granting of the final decree, "the Court may re-evaluate the alimony award and make some further order"; (b) the minute order granting interlocutory decrees, which stated that "upon entry of a final decree, both parties request that the matter of alimony be reviewed." The interlocutory decree used the words of the written stipulation. The final decree, prepared by the husband's attorneys, was submitted by them to the judge without reminding him of the agreed plan to review alimony, and he signed it without doing so. More than 6 months later, after time for relief under C.C.P. 473 (see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §175 et seq.) had elapsed, the wife petitioned for reevaluation of the alimony allowance. The judge decided that he had jurisdiction, and the husband sought prohibition. *Held*, writ denied.

(a) The intention of the parties and the judge was to reserve jurisdiction to modify the alimony award. "Inclusion of provision for the time--the making of the final decree--was merely a convenient occasion when the already-agreed-to-and-ordered reevaluation was to occur." (252 C.A.2d 6.)

(b) The language of the interlocutory decree was ambiguous. In view of the minutes of the court ("both parties request"), it should have said "shall" instead of "may." This was not a case of a memorandum or minute recital improperly contradicting a clear order (citing the text), but one of an ambiguity or clerical error in the decree. The judge, acting under mistake as to extrinsic facts on which his action was predicated, had inherent power to vacate a judgment that otherwise would not have been rendered. (252 C.A.2d 6.) "Actually, the mistake was not that of the judge. The mistake was that of the draftsman of the decree--the husband's lawyer. In these times busy judges must of necessity rely heavily upon the attorneys to prepare orders and judgments accurately so that they express that which was done at the trial and that which the judge had called for." (252 C.A.2d 8.) (See *Zisk v. Roseville* (1976) 56 C.A.3d 41, 47, 127 C.R. 896; *In re Marriage of Mercado* (1977) 75 C.A.3d 701, 704, 141 C.R. 423; *Hennefer v. Butcher* (1986) 182 C.A.3d 492, 507, 227 C.R. 318, citing the text [judgment modified to correct subtraction error of attorney draftsman].)

SUPPLEMENT: [This section is current through the latest supplement]



71 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

2. Illustrations.

d. Clarification of Ambiguity.

7 *Witkin Cal. Proc. Judgm* § 71

[§ 71] Clarification of Ambiguity.

An extension of the power of correction was recognized in *Estate of Careaga (1964) 61 C.2d 471, 39 C.R. 215, 393 P.2d 415*. The judge ordered entry of a decree of distribution. On motion, many years later, to amend the decree *nunc pro tunc*, it appeared that the word "such" had been inserted before "issue living," as the latter words appeared in the will. The judge testified, of course, that he intended to follow the will, but had no independent recollection of the decree. Thus, it was a typical judicial error, i.e., the judge had knowingly signed the particular decree without carefully reading it to see that it conformed to the will. *Held*, the error was clerical and could be corrected on the theory that the inserted word was actually superfluous; i.e., the order merely clarified the original decree, which was made ambiguous by the inclusion of the word. "The *nunc pro tunc* decree, therefore, was the decree which the court intended to enter at the time it entered the original decree." (61 C.2d 478.)

SUPPLEMENT: [This section is current through the latest supplement]



72 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

2. Illustrations.

e. Judge's Intention To Rule Correctly.

7 *Witkin Cal. Proc. Judgm* § 72

[§ 72] Judge's Intention To Rule Correctly.

An even more startling departure from the established principles in this field occurred in *Estate of Doane* (1964) 62 C.2d 68, 41 C.R. 165, 396 P.2d 581. A petition for distribution of a trust estate did not follow the terms of the will. The probate judge made an order in exact conformity with the petition. It became final, and the error was not detected until years later. Then, on motion for an order nunc pro tunc to correct the decree, the original probate judge testified that it was his intention to follow the terms of the will and that he would not have signed an order contrary to it; therefore this decree did not express his intended decision. On this evidence, the Supreme Court held that the error was clerical, citing *Estate of Careaga* (1964) 61 C.2d 471, 39 C.R. 215, 393 P.2d 415, supra, §71. (62 C.2d 71.)

The dissenting opinion in *Doane* distinguished *Careaga*. The error here was judicial. The judge followed the petition without comparing it with the will, i.e., he failed to correctly interpret the facts. And, although the decision gives effect to the testator's intent, it threatens the finality of decrees of distribution. "In every case where the provisions of a decree of distribution are different from those of the will, and the original probate judge testifies that he really did not mean to sign the order but erroneously believed the order followed the will, the decree now will be subject to correction by a *nunc pro tunc* order." (62 C.2d 73.) (See *Gill v. Epstein* (1965) 62 C.2d 611, 615, 44 C.R. 45, 401 P.2d 397 [citing *Doane* and stressing judge's declaration of his intention].)

Doane was nevertheless followed in *Pettigrew v. Grand Rent-A-Car* (1984) 154 C.A.3d 204, 201 C.R. 125. Plaintiff sued defendant vehicle owner on its liability for a driver's negligence under *Veh.C. 17150*. Defendant failed to seek an instruction under *Veh.C. 17151* on the limitation of liability to \$ 15,000, and the jury verdict for \$ 150,000 was followed by a judgment in that sum. After denial of its motion for a new trial, defendant moved to vacate or modify under *C.C.P. 473*, and the trial judge modified the judgment by reducing the damage award to \$ 15,000. *Held*, affirmed; the governing statute was overlooked through inadvertence of counsel and the court. "It cannot be presumed that the court intended deliberately to render and enter a judgment which was contrary to law. Thus, there was an error in the judgment which was made inadvertently; it was a clerical error and could be corrected by the court under its statutory and inherent power so to do." (154 C.A.3d 211.)

SUPPLEMENT: [This section is current through the latest supplement]



73 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

2. Illustrations.

f. Judgment Based on Invalid Stipulation.

7 *Witkin Cal. Proc. Judgm* § 73

[§ 73] Judgment Based on Invalid Stipulation.

In *Bowden v. Green* (1982) 128 C.A.3d 65, 180 C.R. 90, plaintiffs sold a business to defendants, receiving a promissory note for the price. The note provided that any state or federal tax refunds obtained by defendants would be paid to plaintiffs, and plaintiffs' complaint on the note alleged breach of this latter provision. Defendants answered with denials of liability, and also cross-complained for damages for fraud in the negotiations for sale of the business. At a court trial, the judge found that plaintiffs were entitled to a state income tax refund with interest and attorneys' fees, and entered judgment accordingly, but with an additional provision that defendants take nothing by their cross-complaint. The judge resigned after the trial, and, 1 year later, defendants moved to correct the judgment, submitting the judge's declaration that the provision dismissing the cross-complaint was not brought to his attention at the time he signed the judgment, and that he did not intend to include it because the parties had informally agreed to a later trial of the issues raised by the cross-complaint. Plaintiffs submitted the declaration of their trial counsel that counsel for both parties had stipulated to dismiss the cross-complaint in consideration of plaintiffs dropping their claim to accelerate the balance due on the note. Defendants countered with the declaration of one of them that defendants had never authorized dismissal of their cross-complaint and were unaware of it. At the hearing, the new judge found that the parties through their counsel had made a valid stipulation to dismiss the cross-complaint, that the judgment was signed without objection from defendants' counsel, and that there was no inadvertence or clerical error. *Held*, reversed.

(a) In determining whether an error is clerical or judicial, the judge's own statement is the best evidence and his or her declaration will be extremely persuasive on appeal. (128 C.A.3d 71, 72, quoting the text.) Here, the record contained no evidence to contradict the first judge's declaration that he signed the judgment dismissing the cross-complaint by inadvertence. (128 C.A.3d 72.)

(b) Nevertheless, if defendants validly stipulated to that judgment they cannot, after their expressed consent, complain on appeal that the trial judge made a clerical error. There was substantial evidence to support the new trial judge's finding of such a stipulation by counsel, and if the stipulation was properly executed (as the evidence showed) and was within the authority of defendants' attorney, it was binding on defendants. (128 C.A.3d 72.)

(c) However, a stipulation to give up a client's cause of action, without consent, ratification, or estoppel, is invalid.

(128 C.A.3d 73; see 1 Cal. Proc. (5th), Attorneys, §247.) And here there was no evidence in the record of authority, actual or ostensible, ratification or estoppel. *(128 C.A.3d 73.)* Thus, the judgment was entered by clerical error, and could not be upheld as a valid judgment by consent. *(128 C.A.3d 74.)*

SUPPLEMENT: [This section is current through the latest supplement]



74 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

3. Procedure.

a. Motion.

7 *Witkin Cal. Proc. Judgm* § 74

[§ 74] Motion.

(1) *Motion or Application of Party.* A party may seek the correction by motion under *C.C.P. 473(d)* (supra, §67). (See *Raines v. Damon* (1949) 89 C.A.2d 812, 816, 201 P.2d 886; Cal. Civil Practice, 4 Procedure, §28:38 [notice of motion for order to correct clerical error], §28:39 [order]; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §153 et seq.; 15 *Am.Jur. P.P. Forms* (2005 ed.), *Judgments*, §37 et seq.; cf. *F.R. Civ. P., Rule 60(a)*; 11 *Federal Practice & Procedure* (Wright & Miller) §2855; 11B *Am.Jur. P.P. Forms* (2007 ed.), *Federal Practice & Procedure*, §1228; 21A *Federal Procedure, L. Ed.* §51:135)

There is some authority for issuance of mandamus to compel the judge to act. (See *La Mar v. Superior Court* (1948) 87 C.A.2d 126, 131, 196 P.2d 98.) But the remedy by appeal from an order denying relief is considered adequate in the absence of unusual circumstances. (*Phelan v. Superior Court* (1950) 35 C.2d 363, 371, 217 P.2d 951 [disapproving reasoning of *La Mar* and similar decisions].)

(2) *Court's Own Motion.* *C.C.P. 473(d)* (supra, §67) recognizes the inherent power of the court to act on its own motion. (See *Estate of Soboslay* (1935) 4 C.2d 177, 179, 47 P.2d 714; *Kohlstedt v. Hauseur* (1937) 24 C.A.2d 60, 62, 74 P.2d 314; *Wilson v. Wilson* (1948) 88 C.A.2d 382, 384, 198 P.2d 916; *F.R. Civ. P., Rule 60(a)*; 11 *Federal Practice & Procedure* (Wright & Miller) §2855; 21A *Federal Procedure, L. Ed.* §51:135.)

(3) *No Time Limit.* A motion under *C.C.P. 473(b)* for relief from a judgment must be made within 6 months of entry of the judgment (see 8 *Cal. Proc. (5th), Attack on Judgment in Trial Court*, §175), but a clerical error may be corrected at any time, whether the correction is sought by motion or is made on the court's own motion. In *Estate of Goldberg* (1938) 10 C.2d 709, 76 P.2d 508, the testator directed that his property be divided among his four children, and the court directed distribution "in accordance with terms of the will," but the decree omitted the name of one child as a distributee. On the hearing of a petition of the executor 35 years later, a new judge of the probate court made a nunc pro tunc order correcting the decree to include that child. *Held*, this was proper, though there was no evidence of the actual intention of the original judge except the language of the minute order and decree. (10 C.2d 717.) (See *Kaufman v. Shain* (1896) 111 C. 16, 23, 43 P. 393; *Peoples Ditch Co. v. Foothill Irr. Dist.* (1932) 123 C.A. 257, 262, 11 P.2d 86; *Pettigrew v. Grand Rent-A-Car* (1984) 154 C.A.3d 204, 209, 201 C.R. 125; cf. *F.R. Civ. P., Rule 60(a)* ["whenever"]);

11 Federal Practice & Procedure (Wright & Miller) §2855; 21A Federal Procedure, L. Ed. §51:135.)

SUPPLEMENT: [This section is current through the latest supplement]



75 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

3. Procedure.

b. Notice.

7 *Witkin Cal. Proc. Judgm* § 75

[§ 75] Notice.

The law is unclear about whether notice is required before a court may correct or amend a judgment. (See C.E.B., 3 Civil Proc. During Trial 3d, §23.29 [recommending that notice be given].) On the one hand, "abundant authority" supports the proposition that "the court has inherent power either on its own motion, or on ex parte application, or on notice, to set aside an order or judgment taken through its own inadvertence or mistake." (*Estate of Costa (1951) 37 C.2d 154, 157, 231 P.2d 17.*)

Nevertheless, some decisions have stated that notice is required, except when the error appears on the face of the record, is within the judge's knowledge, or is clear from undisputed facts. (See *Estate of Hultin (1947) 29 C.2d 825, 830, 178 P.2d 756*; *Badella v. Miller (1955) 44 C.2d 81, 87, 88, 279 P.2d 729* [*Costa* and similar cases were explained as dealing with error appearing on face of record, and *Hultin* was quoted with approval; comments, however, were dicta, because case did not involve "either clerical error or judicial inadvertence"]; *Burnam v. De Long (1947) 81 C.A.2d 559, 562, 184 P.2d 705* [notice is required if amendment affects substantial rights or right to appeal]; cf. *Ukegawa Bros. v. Agricultural Lab. Rel. Bd. (1989) 212 C.A.3d 1314, 1321, 261 C.R. 420* [quoting *Hultin*; Board had no duty to hold evidentiary hearing where clerical nature of error appeared on face of record]; *F.R. Civ. P., Rule 60(a)* ["with or without notice"]; 11 Federal Practice & Procedure (Wright & Miller) §2855; *14 A.L.R.2d 224* [conflicting views of other courts]; *46 Am.Jur.2d (2006 ed.), Judgments* §154 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



76 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

3. Procedure.

c. Proof of Error.

1. Methods of Proof.

7 Witkin Cal. Proc. Judgm § 76

[§ 76] Methods of Proof.

A few early decisions suggested that the error must appear from the record. (See, e.g., *Leonis v. Leffingwell* (1899) 126 C. 369, 371, 58 P. 940.) It has long since been settled, however, that the error may be shown by any competent evidence, including the trial judge's statement based on his or her own recollection. (See *Kaufman v. Shain* (1896) 111 C. 16, 21, 43 P. 393 [affidavit of shorthand reporter]; *In re Roberts* (1962) 200 C.A.2d 95, 97, 19 C.R. 147, citing the text [affidavit of judge and testimony of clerk]; *infra*, §§77, 78.)

SUPPLEMENT: [This section is current through the latest supplement]



77 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

3. Procedure.

c. Proof of Error.

2. Trial Judge's Determination Upheld.

7 *Witkin Cal. Proc. Judgm* § 77

[§ 77] Trial Judge's Determination Upheld.

Where the error is made by the judge, it is seldom clear from the record or other extrinsic evidence whether the error is judicial or clerical; i.e., whether the judge (1) knowingly rendered a judgment without realizing that it was bad in law (judicial error), or (2) inadvertently or by mistake signed findings or a judgment or order that the judge did not intend to constitute his or her decision. The issue is one of the judge's intent, and the best evidence is the judge's own statement, either express or implied from the order of correction. Hence, where the record permits an inference of clerical error, the judge's affidavit or declaration will be extremely persuasive on appeal. (*Dalley v. B. & H. Trans. Co. (1931) 114 C.A. 320, 322, 299 P. 748* [here there was not even a recital of inadvertent mistake, but a mere order to "correct the record"]; *Peoples Ditch Co. v. Foothill Irr. Dist. (1932) 123 C.A. 257, 260, 11 P.2d 86*; *Kohlstedt v. Hauseur (1937) 24 C.A.2d 60, 62, 74 P.2d 314* ["It is for the judge who made the original decision to decide whether the judgment as written expresses his decision"]; *Denton v. Denton (1971) 18 C.A.3d 708, 715, 96 C.R. 136* [order in separate maintenance action to sell property to pay wife's attorney and accountant fees inadvertently failed to cover contingency that property would sell for less than amount needed; correction to make husband pay balance directly]; *Bowden v. Green (1982) 128 C.A.3d 65, 71, 72, 180 C.R. 90*, quoting the text [judge's declaration that he signed judgment dismissing cross-complaint solely by inadvertence]; *Conservatorship of Tobias (1989) 208 C.A.3d 1031, 1035, 256 C.R. 525.*)

The extraordinary freedom that this rule gives a trial judge, and the manner in which it clouds the distinction between clerical and judicial error, are well illustrated in *Bastajian v. Brown (1941) 19 C.2d 209, 120 P.2d 9*. Plaintiff sued to quiet title on the theory that trust deeds, and a conveyance in satisfaction thereof to defendants, were voidable for fraud and undue influence. The court by minute entry ordered judgment for defendants. Defendants' chief attorney became ill and his draft of findings was not submitted. A year later, plaintiff's attorney prepared findings supporting judgment for defendants but with extremely favorable provisions for his own client (the losing party), which he served on defendants' new attorney and filed. Defendants' attorney promptly wrote the judge that proper findings had been drawn a year ago, and that the proposed findings favorable to plaintiff were "pure bunk." A few weeks later, the judge signed plaintiff's proposed findings. Shortly afterwards, on defendants' motion, the judge set them aside and directed new findings for defendants, reciting that the others had been made inadvertently, that they did not express his true

intent, and that he had relied on fraudulent representations of plaintiff's counsel that the proposed findings conformed to the judgment ordered. *Held*, the judge's action was an authorized correction of a clerical error. His declaration that the findings did not conform to his intended judgment "cannot be wholly disregarded nor lightly brushed aside. It was a declaration of a fact that was concealed in the mind of the judge, and no one was in a better position than he to state his true intent." (19 C.2d 214.)

The judgment ultimately rendered by the trial court was, of course, the only appropriate one, and the same result would have been reached by the normal procedure of motion for new trial or appeal. But the decision places in the hands of the trial judge a relatively uncontrolled power, unlimited in time, over many final judgments. Here, the judge had before him a letter from defendants' counsel denouncing the findings as unwarranted. It can scarcely be assumed that he ignored the letter, and it is hard to see how he could have signed the erroneous findings inadvertently after having read it. As the dissent argues, all of the circumstantial evidence points to an advertent judicial error, and the only basis for the conclusion that the error was clerical was the judge's own declaration. Thus, under the holding of the case, the trial judge alone may determine whether such a final judgment shall stand or fall, and the judge's determination will be upheld if it has some evidentiary support in inferences from the record. (19 C.2d 215.) (See *Nathanson v. Murphy* (1957) 147 C.A.2d 462, 469, 470, 305 P.2d 710 [quoting the text and *Morgan v. State Bd. of Equalization* (1949) 89 C.A.2d 674, 201 P.2d 859, *infra*, §78, and characterizing *Bastajian* rule as "extreme"].)

SUPPLEMENT: [This section is current through the latest supplement]



78 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

B. Correction of Clerical Error After Entry.

3. Procedure.

c. Proof of Error.

3. Trial Judge's Determination Rejected.

7 *Witkin Cal. Proc. Judgm* § 78

[§ 78] Trial Judge's Determination Rejected.

The view that the judge's determination is conclusive was expressly repudiated in *Estate of Burnett* (1938) 11 C.2d 259, 79 P.2d 89, and the rule was declared that "where the facts upon which the court acted are undisputed and only one conclusion can be drawn from them, the appellate court is not bound by the order made below." (11 C.2d 262.) *Bastajian v. Brown* (1941) 19 C.2d 209, 120 P.2d 9, supra, §77, is hard to reconcile with *Estate of Burnett* and the line of cases that require something more than the trial judge's own declaration or act of correction. (See *McKannay v. McKannay* (1924) 68 C.A. 709, 715, 230 P. 218; *Felton Chemical Co. v. Superior Court* (1939) 33 C.A.2d 622, 628, 92 P.2d 684.)

Morgan v. State Bd. of Equalization (1949) 89 C.A.2d 674, 201 P.2d 859, after a careful review of the California decisions, suggests the following approach to situations involving substantial changes in the judgment: "In such cases, if the court is purporting to correct a clerical error, it should say so, or there should be something in the record to show it. ... Where there is conflicting evidence as to whether the error was clerical, the reviewing court will probably accept the conclusion of the trial court. ... If the record shows clearly that there was no clerical error, the recital by the trial court will not be conclusive." (89 C.A.2d 682.)

The *Morgan* view was followed, and *Bastajian* and *Nathanson v. Murphy* (1957) 147 C.A.2d 462, 305 P.2d 710, supra, §77, were distinguished as involving evidence independent of the judge's own declaration, in *Nacht v. Nacht* (1959) 167 C.A.2d 254, 334 P.2d 275. At the hearing on a contested motion by the husband for entry of a final decree of divorce, both parties testified to numerous visits and acts of intercourse. The judge thereupon terminated the testimony, stating that the husband's affidavit of no cohabitation was perjury, that there was a reconciliation, and that counsel for the wife should prepare an order denying the final decree. The order so prepared was signed and filed December 17. On December 18, on the hearing of a further motion to set aside the interlocutory decree (which the court had instructed the wife's counsel to file), the court said that the husband should have a decree and refused to allow further argument, whereupon a minute order was entered granting the motion for a final decree. Thereafter, on February 25, the judge made an order setting aside his first order denying that motion, and directing entry of the decree nunc pro tunc, adding the declaration that the order of December 17 had been entered inadvertently. *Held*, reversed.

"Thus the question narrows down to this. A hearing is had. At that hearing the trial judge not only indicates how he has weighed the evidence, but expressly makes a finding on the vital issue and makes his ruling. The formal order reflecting those views is entered. Then, on the next day, the judge enters a contrary order, declaring that the earlier order had been entered inadvertently. There is nothing in the record to support this declaration of inadvertence except the declaration of the court itself. ... Can the judge, by merely declaring that a prior ruling was entered inadvertently, set that ruling aside and enter a different ruling? Will the appellate court, based on such a declaration alone conclusively presume that the change in mind occurred prior to the entry of the first order? We think not. The sanctity of judicial pronouncements cannot be made to depend on such insecure foundations. ... In our opinion, before a formal ruling can be set aside and a contrary ruling made on the ground of inadvertence, there must appear in the record something to support the finding of inadvertence other than the declaration of the court to this effect." (167 C.A.2d 264.) (But see *Estate of Doane* (1964) 62 C.2d 68, 41 C.R. 165, 396 P.2d 581, supra, §72 [probate judge's declaration of intention was accepted]; *Pettigrew v. Grand Rent-A-Car* (1984) 154 C.A.3d 204, 209, 201 C.R. 125, supra, §72 [no declaration of intention by trial judge].)

SUPPLEMENT: [This section is current through the latest supplement]



79 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

C. Final Judgments Subject to Modification.

1. Statutory Authority To Modify Judgment.

7 Witkin Cal. Proc. Judgm § 79

[§ 79] Statutory Authority To Modify Judgment.

Some judgments, although final in all of the important senses (final determination of rights of parties, affirmed on appeal or time for appeal and other attack gone, *res judicata*; see *supra*, §§1, 7), are nevertheless subject to modification by the court after they have become final. In these cases, the court, by statute or under long established equitable principles, has continuing jurisdiction over the subject matter of the cause after judgment. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §§421, 423.)

The principal statutory examples are decrees for the following:

(1) *Support of a spouse or child*. A court may reexamine the circumstances of a spouse or child to whom support was ordered in a dissolution or similar action and modify the award accordingly. (See *Family C. 3651* [modification of child, family, or spousal support]; *Wodicka v. Wodicka* (1976) 17 *C.3d* 181, 188, 130 *C.R.* 515, 550 *P.2d* 1051, *infra*, §364, citing the text; *Klinker v. Klinker* (1955) 132 *C.A.2d* 687, 694, 283 *P.2d* 83 [stipulated judgment for insane wife, that husband was liable but wife was not yet in need; jurisdiction was expressly reserved]; *Allen v. Allen* (1956) 138 *C.A.2d* 706, 708, 292 *P.2d* 581 [support of child]; 10 *Summary* (10th), *Parent and Child*, §439 et seq.; 11 *Summary* (10th), *Husband and Wife*, §273 et seq.)

(2) *Custody of a child*. (See *Family C. 3087* [modification of joint custody]; 10 *Summary* (10th), *Parent and Child*, §§223, 249 et seq., 265.)

(3) *Unlawful detainer*. (*C.C.P. 1179* [trial court may relieve tenant from forfeiture and restore tenant to former tenancy]; see *Gill Petroleum v. Hayer* (2006) 137 *C.A.4th* 826, 832, 40 *C.R.3d* 648 [*C.C.P. 1179* is specific statutory procedure that vests trial court with authority to affect judgment after its entry].)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

C. Final Judgments Subject to Modification.

2. Express Reservation of Jurisdiction.

7 *Witkin Cal. Proc. Judgm* § 80

[§ 80] Express Reservation of Jurisdiction.

Independent of statute, a court that renders an equitable decree may appropriately reserve jurisdiction to take steps to carry it into effect, and, to that end, may make changes in procedural provisions. (See *Allen v. California Water & Tel. Co.* (1946) 29 C.2d 466, 481, 176 P.2d 8; *Lesser & Son v. Seymour* (1950) 35 C.2d 494, 500, 218 P.2d 536; *Gibson v. River Farms Co. of Calif.* (1942) 49 C.A.2d 278, 284, 121 P.2d 504; *Day v. Sharp* (1975) 50 C.A.3d 904, 912, 123 C.R. 918; *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.* (1976) 65 C.A.3d 121, 130, 135 C.R. 192, quoting the text [permanent injunction]; *Estes v. Rowland* (1993) 14 C.A.4th 508, 536, 17 C.R.2d 901, quoting the text; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §399 et seq.; 2 *Cal. Proc.* (5th), *Jurisdiction*, §420.)

The jurisdiction reserved is to modify procedural provisions, not to materially change the adjudication of substantial issues. Thus, in *Orban Lumber Co. v. Fearrien* (1966) 240 C.A.2d 853, 50 C.R. 41, a contract between plaintiff and defendants gave plaintiff the right to cut and remove timber from defendants' land for 10 years from April 4, 1951. A dispute led to litigation, and in June 1959, defendants obtained a preliminary injunction preventing removal of certain kinds of timber. After trial, a judgment was entered in June 1962, dissolving the injunction and extending the contract right of plaintiff to log the area for an additional period (1 year and 10 months) to compensate for the time during which its operations were halted by the injunction. The judgment also provided for continuing jurisdiction. In April 1964, plaintiff sought a modification to give it a further extension of time to log, on a showing of delays caused by efforts to obtain state authorization and right-of-way over adjoining land. The judge denied the order and plaintiff appealed. *Held*, affirmed.

(a) The original extension was given by the judgment to remedy plaintiff's inability to exercise its contract rights during the litigation. This was a judicial modification of the contract based on an adjudication of the issues. (240 C.A.2d 858.)

(b) The subsequent motion did not involve a mere procedural change. "[T]he modification sought by plaintiff was not a request to extend the time for enabling plaintiff to follow the procedure prescribed by the judgment, but an attempt to materially change a substantial adjudicated portion of the judgment consisting of the determination that the vital provision of the contract, providing for its duration, be extended for the specific period therein provided. To hold that such extension could be further extended upon contingencies not related to procedural matters intended to accomplish

the enforcement of the judgment would be to countenance an act in excess of the trial court's jurisdiction." (240 C.A.2d 858.)

A modification that goes beyond the issues raised in the pleadings or pretrial proceedings is of course invalid. (*Orange County Water Dist. v. Colton* (1964) 226 C.A.2d 642, 649, 38 C.R. 286; see supra, §29; *C.J.A. Corp. v. Trans-Action Financial Corp.* (2001) 86 C.A.4th 664, 671, 103 C.R.2d 538 [modification of lienholder's judgment of judicial foreclosure into money judgment against borrower for entire amount of debt was invalid; lienholder's claim that it was sold-out junior lienholder entitled to avoid one-action rule was not raised by pleadings before judgment, not subject of pretrial discovery, not subject of evidence to meet burden of proof, and not tested by borrower's defenses].)

SUPPLEMENT: [This section is current through the latest supplement]



81 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

C. Final Judgments Subject to Modification.

3. Inherent Power.

a. In General.

7 *Witkin Cal. Proc. Judgm § 81*

[§ 81] In General.

A court also has inherent power, without express reservation (*supra*, §80), to take steps to carry its equitable decree into effect and to make changes in procedural provisions. (*Lesser & Son v. Seymour* (1950) 35 C.2d 494, 500, 218 P.2d 536; *Vallelunga v. Gomes* (1951) 102 C.A.2d 374, 381, 227 P.2d 550 [power to order distribution of fund deposited with court]; *Brown v. Brown* (1971) 22 C.A.3d 82, 84, 99 C.R. 311, citing the text; *Vanderstok v. Bank of America* (1972) 29 C.A.3d 731, 734, 105 C.R. 699, citing the text; *In re Marriage of Fithian* (1977) 74 C.A.3d 397, 402, 141 C.R. 506, citing the text [dissolution court had authority to order husband to deposit wife's share of his retirement pay in court].)

In *Hercules Glue Co. v. Littooy* (1941) 45 C.A.2d 42, 113 P.2d 490, defendant agreed to assign a patent. Plaintiff obtained a decree of specific performance of the agreement, conditioned on payment of defendant's expenses. After defendant's unsuccessful appeal and finality of the appellate judgment, he asked for \$ 250 additional expenses incurred in obtaining the patent pending the appeal. *Held*, the trial judge had power to order payment, for the plain purport of the decree was that plaintiff should have clear title to the patent and defendant should be reimbursed for all expenses in securing it. (45 C.A.2d 45.)

In *Barnes v. Chamberlain* (1983) 147 C.A.3d 762, 195 C.R. 417, plaintiff purchasers sued defendant vendor for specific performance of a contract to sell a house. The trial court's judgment stated that plaintiffs were entitled to a conveyance on condition that they pay the purchase price into escrow within 90 days of the entry of judgment. Defendant appealed without seeking a stay under C.C.P. 917.4 (see 9 Cal. Proc. (5th), *Appeal*, §243), and the judgment was affirmed. When plaintiffs sought to amend and supplement the judgment to enforce its terms, defendant contended that the 90-day period for performance of the condition had expired while the appeal was pending. The trial judge concluded that the judgment should have allowed plaintiffs 90 days from the date the judgment became final, and amended and supplemented the judgment accordingly. *Held*, affirmed.

(a) Defendant argued that C.C.P. 917.4 gave unamendable finality to the judgment where no stay was sought. This interpretation is not supported by the language of the section or the general purpose of the statutes governing stay on appeal, and would lead to absurd results. "[T]he successful party in the trial court would have to perform the conditions

of the judgment to fulfill the buyer's duties under the terms of the escrow, while at the same time the losing party, in the process of appealing and seeking to set the judgment aside, would void the very escrow the buyer would be required to complete." (147 C.A.3d 766.)

(b) Cases such as *Lesser & Son* and *Hercules Glue Co.* make it clear that a court of equity has authority, with or without an express reservation of jurisdiction, to make additional orders supervising the details of the decreed performance. Here, "by its very terms and nature, the decree envisioned the performance of complex mutually interrelated escrow terms and conditions. Where an equity court acts to enforce the terms of its sale decree, the effects are procedural directions. Followup orders do not alter the substantive rights of the parties. ... Any delay in the execution of the judgment was a result of [defendant's] actions in appealing the trial court's order. [Defendant] by the appeal process effectively forestalled the fulfillment of the order." (147 C.A.3d 769.)

SUPPLEMENT: [This section is current through the latest supplement]



82 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

VIII. CORRECTION AND AMENDMENT OF JUDGMENT

C. Final Judgments Subject to Modification.

3. Inherent Power.

b. Prohibitory Injunction.

7 *Witkin Cal. Proc. Judgm* § 82

[§ 82] Prohibitory Injunction.

An even greater power, to make modifications in the substantial terms of the decree, necessarily exists where a permanent prohibitory injunction is granted. "This is so because the decree, although purporting on its face to be permanent, is in essence of an executory or continuing nature, creating no right but merely assuming to protect a right from unlawful and injurious interference. Such a decree, it has uniformly been held, is always subject, upon a proper showing, to modification or dissolution by the court which rendered it." (*Sontag Chain Stores Co., Ltd. v. Superior Court* (1941) 18 C.2d 92, 94, 113 P.2d 689; see *Green Trees Enterprises v. Palm Springs Alpine Estates* (1967) 66 C.2d 782, 788, 59 C.R. 141, 427 P.2d 805; *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist.* (1976) 65 C.A.3d 121, 130, 135 C.R. 192; *Bernardi v. City Council of Los Angeles* (1997) 54 C.A.4th 426, 438, 63 C.R.2d 347 [stipulated judgment validating redevelopment plan could not be characterized as continuing prohibitory injunction and was not subject to modification]; Cal. Civil Practice, 2A Procedure, §16:146 [motion to vacate or modify injunction], §16:147 [order vacating or modifying injunction]; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §312; 14A *Am.Jur.* P.P. Forms (2002 ed.), *Injunctions*, §§109, 110; on similar power to modify preliminary injunction, see *Union Interchange v. Savage* (1959) 52 C.2d 601, 606, 342 P.2d 249; *Branker v. Superior Court* (1958) 165 C.A.2d 816, 818, 332 P.2d 711; *New Tech Dev. v. Bank of Nova Scotia* (1987) 191 C.A.3d 1065, 1072, 236 C.R. 746; 42 *Am.Jur.2d* (2000 ed.), *Injunctions* §309; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §399 et seq.)

Usually the application to modify an injunction is based on a change in circumstances, and it has occasionally been assumed that neither an error of law nor a change in the law would justify that action. (See earlier California decisions cited in *Sontag*, *supra*, 18 C.2d 95.) But in *Sontag*, a permanent injunction was granted against peaceful picketing to obtain a closed shop. Subsequently, the California Supreme Court held that kind of picketing lawful, and the unions moved to vacate the decree. *Held*, the trial court had jurisdiction to entertain the motion, reexamine the decree, and grant appropriate relief. The inherent power "may be exercised either where there has been a change in the controlling facts upon which the injunction rested, or the law has been changed, modified or extended, or where the ends of justice would be served by modification." (18 C.2d 95.)

In *Little v. Schwartz* (1960) 182 C.A.2d 594, 6 C.R. 40, plaintiff, owner of 60 unimproved acres that he visited only occasionally and used for grazing cattle, had a mile-long prescriptive right of way across defendant's land as a means of

access. In 1944, defendant locked the entrance gate. Plaintiff sued and obtained a final judgment (a) quieting his title to the right of way and (b) enjoining defendant from interfering with the free use of the easement and maintaining locks on the gate. Ten years later, defendant moved to modify the injunctive portion of the judgment to permit a lock or dial satisfactory to plaintiff on the gate, on the following showing of change in conditions: From a sparsely settled region the area had gained over 300 residents, and members of the public continually trespassed on defendant's 900-acre improved ranch, dumping rubbish, hunting, destroying personal property in the buildings, allowing cattle to escape, etc. *Held*, order denying modification reversed.

The peculiar problem presented by this hybrid judgment was that a final judgment quieting title is not subject to change or modification, but because of the background of defendant's conduct, the trial judge added an injunction. Thus the question was whether the injunction was such an integral part of the quiet title judgment as to be free from modification or was to be governed by the usual rule permitting modification of a permanent injunction. The court reasoned that the prohibition against locking was neither necessary to the judgment quieting title nor essential to that title, and created no right in plaintiff but merely protected the use of the right. Hence, the injunctive order did not become an inseparable part of the quiet title judgment. And, because defendant wanted only to prevent the public from damaging his own property, and his proposal of a lock which would readily admit plaintiff but keep out trespassers would not diminish or interfere with plaintiff's rights, modification was within the lower court's power. (*182 C.A.2d 599.*)

SUPPLEMENT: [This section is current through the latest supplement]



83 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IX. RECOVERY OF COSTS

A. In General.

1. Statutory Right to Costs.

7 *Witkin Cal. Proc. Judgm* § 83

[§ 83] Statutory Right to Costs.

The right to recover costs is wholly dependent upon statute. (*Williams v. Atchison, Topeka & Santa Fe Ry. Co.* (1909) 156 C. 140, 141, 103 P. 885; *Turner v. East Side Canal & Irr. Co.* (1918) 177 C. 570, 573, 171 P. 299; *Estate of Johnson* (1926) 198 C. 469, 471, 245 P. 1089; *Perko's Enterprises v. RRNS Enterprises* (1992) 4 C.A.4th 238, 241, 5 C.R.2d 470; see *Michel v. Williams* (1936) 13 C.A.2d 198, 201, 56 P.2d 546, 2 Cal. Proc. (5th), *Jurisdiction*, §321 [unauthorized award is void].)

Although there are many statutory references to costs, the principal coverage is in the chapter of the Code of Civil Procedure commencing with section 1021. Much of the chapter was revised in 1986. Existing case law was codified and the former statutes were made more specific. The most significant result of the revision was that the allowance of costs now depends on how the prevailing party is determined rather than on the character of the action involved. (See *infra*, §89; for practice and forms, see Cal. Civil Practice, 4 Procedure §33:18 et seq.; C.J.E.R., *Judges Benchbook*, *Civil Proceedings: Trial*, §16.29 et seq.; Rutter Group, 3 *Civil Trials and Evidence* §17:91 et seq.; 20 *Am.Jur.2d* (2005 ed.), *Costs* §§2, 3; 7C *Am.Jur. P.P. Forms* (2002 ed.), *Costs*, §82 et seq.)

West's Key Number Digest, *Costs* 3 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



84 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IX. RECOVERY OF COSTS

A. In General.

2. Award Against Government.

7 *Witkin Cal. Proc. Judgm* § 84

[§ 84] Award Against Government.

(1) *Former Law.* General statutes allowing costs do not authorize an award against the government, and costs may not be awarded against federal or state governmental agencies except as statutes expressly provide for them. (See 72 *A.L.R.2d* 1379 [liability of state, or its agency or board, for costs in civil action to which it is party]; 20 *Am.Jur.2d* (2005 *ed.*), *Costs* §35 et seq.) This rule formerly precluded the recovery of costs against California governmental agencies. (See *Gayer v. Whelan* (1943) 60 *C.A.2d* 616, 619, 141 *P.2d* 514.) Moreover, an award of costs against the State Controller was prohibited by statute. (See *Estate of Compton* (1962) 202 *C.A.2d* 94, 97, 20 *C.R.* 589 [costs on appeal].)

(2) *Present California Law.* The California rule was changed by legislation in 1943 and 1945. When the state is a party, costs are awarded against it on the same basis as against any other party. The costs must be paid out of the appropriation for the agency on whose behalf the state appeared. (*C.C.P.* 1028; see *Department of Industrial Relations v. Lee* (1999) 73 *C.A.4th* 763, 767, 769, 86 *C.R.2d* 710 [although *Lab.C.* 101 provides that no court costs of any nature shall be paid by Department of Industrial Relations, department is still subject to requirement of *C.C.P.* 1028 that state agencies must pay costs of prevailing party in litigation; "only reasonable reading" of *Lab.C.* 101 is that it exempts department from paying filing fees and other fees charged by court in connection with litigation].)

When a county, city, district, or other public agency or entity, or an officer of an entity in his or her official capacity, is a party, costs are awarded against the entity on the same basis as against any other party. The costs must be paid out of the entity's treasury. (*C.C.P.* 1029; see *Boland v. Cecil* (1944) 65 *C.A.2d Supp.* 832, 842, 150 *P.2d* 819 [state officers].)

(3) *Federal Law.* The Federal Rules of Civil Procedure recognize the principle that, in the absence of express statutory authorization, costs cannot be awarded against the government. (*F.R. Civ.P.*, *Rule 54(d)*; see 10 *Federal Practice & Procedure* (Wright, Miller & Kane) §2672; 21A *Federal Procedure*, L. Ed. §51:103.) However, since 1966, federal courts have had statutory authority to exercise the same discretion to award costs against the United States, its agencies or officials, as against a private litigant. But costs allowable against the United States do not include the fees and expenses of attorneys, and must be limited to reimbursing the prevailing party, "in an amount established by statute, court rule, or order," for the costs that party incurred in the litigation. (28 *U.S.C.*, §2412(a)(1).)

SUPPLEMENT: [This section is current through the latest supplement]



85 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IX. RECOVERY OF COSTS

A. In General.

3. No Award Against Absent Class Members.

7 Witkin Cal. Proc. Judgm § 85

[§ 85] No Award Against Absent Class Members.

Absent class members, at least in those cases where class membership is subject to an "opt-out" provision, cannot be held liable for a successful defendant's costs. It would be inequitable to permit a defendant to recover against potential class members who received notice and chose to opt out of the litigation, and it would be no less unfair with regard to those class members who chose not to incur the expense of consulting an attorney and who did not have the foresight to opt out. A plaintiff may not be permitted to use without consent the resources or credit of unnamed class members to finance the action. In addition, a potential liability for defense costs to class members who are required to opt out to avoid class membership would undermine the effectiveness of the group remedy provided by the class action. (*Earley v. Superior Court* (2000) 79 C.A.4th 1420, 1433, 1435, 95 C.R.2d 57 [trial court erred in ordering that absent class members who failed to opt out of class membership in bank employees' class action against bank for recovery of unpaid overtime compensation could be liable for defendant's attorneys' fees and costs].)

SUPPLEMENT: [This section is current through the latest supplement]



86 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IX. RECOVERY OF COSTS

A. In General.

4. Incident to Judgment.

7 *Witkin Cal. Proc. Judgm* § 86

[§ 86] Incident to Judgment.

Costs are an incident of the judgment, and ordinarily cannot be recovered except as part of a final judgment on the issues. Thus, if the court has no jurisdiction to render judgment, an award of costs is improper. (*Gutting v. Globe Indem. Co. (1931) 119 C.A. 288, 289, 6 P.2d 298.*) And an order awarding costs falls with a reversal of the judgment on which it is based. (*Purdy v. Johnson (1929) 100 C.A. 416, 421, 280 P. 181.*)

In *Ferrara v. Jordan (1955) 134 C.A.2d Supp. 917, 286 P.2d 589*, the "judgment" merely stated that defendants "have and recover from the plaintiff ... costs in the sum of \$ 8.25." Plaintiff's appeal was dismissed, for a purported judgment simply awarding costs is not a judgment. Costs are an incident of the judgment but cannot constitute the judgment. "After a trial of an action for money, it should appear either that plaintiff is entitled to an award of money in some amount, or that he take nothing." (*134 C.A.2d Supp. 918.*) The opinion recognizes, of course, that this admittedly sound legal principle had to be followed only because the trial judge, perhaps inadvertently, neglected to add the necessary recital that "plaintiff should recover nothing." (*134 C.A.2d Supp. 919.*) (See *Douglas v. Willis (1994) 27 C.A.4th 287, 290, 32 C.R.2d 408* [trial court costs are incident to judgment and thus are not separately enforceable].)

SUPPLEMENT: [This section is current through the latest supplement]



87 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IX. RECOVERY OF COSTS

A. In General.

5. Distinctions.

7 *Witkin Cal. Proc. Judgm* § 87

[§ 87] Distinctions.

The present topic deals with the award of costs of an action, as an incident to a judgment for the prevailing party in that action. The following other matters are distinguishable and are treated elsewhere:

(1) *Security for costs*. The requirement that the plaintiff in certain kinds of actions furnish security (bond) for costs as a condition to maintenance of the action. (See 3 *Cal. Proc. (5th), Actions*, §350 et seq.)

(2) *Exemption for indigent plaintiff*. The exemption of an indigent plaintiff obtained by application to sue *in forma pauperis*. (See 3 *Cal. Proc. (5th), Actions*, §416 et seq.)

(3) *Costs in family law proceedings*. The allowance of costs during the pendency of a proceeding to determine parentage or in proceedings for dissolution of marriage, adjudication of nullity, legal separation, custody of children, proceedings involving support orders, and proceedings to establish physical or legal custody of a child or for visitation orders. (See *Family C. 270, 2030, 2031, 2255, 7605(a)*; *Carbone v. Superior Court (1941) 18 C.2d 768, 770, 117 P.2d 872*; *Lerner v. Superior Court (1952) 38 C.2d 676, 685, 242 P.2d 321*; 11 *Summary (10th), Husband and Wife*, §§173, 175 et seq.)

(4) *Costs of prior action as damages*. The recovery of the costs of a prior action or proceeding as damages, e.g., where the aggrieved party successfully defends against an unfounded criminal or civil action and then sues for malicious prosecution (see 5 *Summary (10th), Torts*, §§469 et seq., 475 et seq.; 6 *Summary (10th), Torts*, §1699 et seq.), or where a defendant in an action is successful in discharging an attachment or injunction, and sues the surety on his or her bond (see 6 *Cal. Proc. (5th), Provisional Remedies*, §§228 et seq., 417). (See *Stanton v. Pratt (1941) 18 C.2d 599, 602, 116 P.2d 609* [successful plaintiff in accounting action was given costs of receivership as part of principal recovery].)

(5) *Payment of costs as condition for relief*. The award of certain minor costs to the adverse party as a condition for granting procedural relief to an applicant; e.g., a continuance (see 7 *Cal. Proc. (5th), Trial*, §34); leave to amend (see 5 *Cal. Proc. (5th), Pleading*, §1195); vacation of a default judgment (see 8 *Cal. Proc. (5th), Attack on Judgment in Trial Court*, §186); expunging a *lis pendens* (see 3 *Cal. Proc. (5th), Actions*, §391 et seq.).

(6) *Costs of service.* The recovery by the plaintiff of costs of other service or attempted service where the defendant fails to acknowledge receipt of a mailed summons, whether or not the plaintiff is otherwise entitled to recover costs in the action. (*C.C.P. 415.30(d)*; see 3 *Cal. Proc. (5th), Actions*, §1017.)

(7) *Costs in action by innocent improver.* The recovery by a landowner of costs in an action by an innocent improver to remove fixtures (*C.C. 1013.5(b)*) or for other appropriate relief (*C.C.P. 871.5*), notwithstanding that the plaintiff is the prevailing party. (See 13 *Summary (10th), Personal Property*, §98; 12 *Summary (10th), Real Property*, §460.)

(8) *Costs on appeal.* The recovery of costs on appeal. (See 9 *Cal. Proc. (5th), Appeal*, §953 et seq.)

(9) *Costs in writ proceedings.* The recovery of costs in original writ proceedings. (See 8 *Cal. Proc. (5th), Extraordinary Writs*, §213.)

SUPPLEMENT: [This section is current through the latest supplement]



88 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IX. RECOVERY OF COSTS

B. Recovery of Costs as Matter of Right.

1. Significance of Prevailing Party.

a. Statutory Development.

7 *Witkin Cal. Proc. Judgm* § 88

[§ 88] Statutory Development.

(1) *Prevailing Party*. The fundamental principle regarding costs used to be that the successful or prevailing party was entitled to costs as a matter of right in certain classes of actions and as a matter of the court's discretion in others. (Former C.C.P. 1031(a), 1032; see *Bue v. Superior Court* (1928) 93 C.A. 147, 150, 269 P. 553, 2 Cal. Proc. (5th), *Jurisdiction*, §321 [separate actions by two parties, tried together with recovery for neither; each successful defendant was entitled to costs in his own action]; *Merlino v. Fresno Macaroni Mfg. Co.* (1946) 74 C.A.2d 120, 124, 168 P.2d 182, *infra*, §109.)

The statutes did not explain the concept of the "prevailing party." Obviously the plaintiff prevailed when he or she recovered his or her major demand, and the defendant prevailed when the plaintiff recovered nothing. Complications arose, however, from the nature and extent of the recovery and from multiple parties or claims.

(2) *Classes of Action*. The five classes of actions in which costs were allowed "of course" were set forth in former C.C.P. 1032:

(a) Actions for the recovery of real property or involving the title or possession of real estate. (See *Sierra Union Water & Mining Co. v. Wolff* (1904) 144 C. 430, 432, 77 P. 1038 [quiet title action; plaintiff who recovered part of property was entitled to costs]; *Hoyt v. Hart* (1906) 149 C. 722, 731, 87 P. 569 [action to establish easement and enjoin interference with it]; *Coffman v. Bushard* (1913) 164 C. 663, 666, 130 P. 425 [action to rescind exchange of property on ground of fraud]; *Tonini v. Ericcsen* (1933) 218 C. 39, 40, 21 P.2d 565 [action for injunction against escaping waters and for damages, main issue being ownership of easement to have waters flow over lands].)

(b) Actions to recover possession of personal property.

(c) Actions to recover money or damages. (See *Tonini v. Ericcsen* (1933) 218 C. 39, 40, 21 P.2d 565; *Wilkinson & Co. v. McKinley* (1948) 84 C.A.2d 100, 106, 190 P.2d 35.)

(d) Special proceedings. (See *Exchange Nat. Bank of Tulsa v. Ransom* (1942) 52 C.A.2d 544, 546, 126 P.2d 620

[third-party claim for release of property from levy]; *Merlino v. Fresno Macaroni Mfg. Co.* (1946) 74 C.A.2d 120, 124, 168 P.2d 182 [proceeding for dissolution of corporation]; *Maguire v. Corbett* (1953) 119 C.A.2d 244, 252, 259 P.2d 507, *infra*, §137 [third-party claim for release of property from levy; claim denied, costs awarded to judgment creditor]; *Stenzor v. Leon* (1955) 130 C.A.2d 729, 735, 279 P.2d 802 [arbitration proceeding]; *Miles Calif. Co. v. Hawkins* (1959) 175 C.A.2d 162, 163, 345 P.2d 492 [contempt for violation of injunction]; *Williams v. Santa Maria Joint Union High School Dist.* (1967) 252 C.A.2d 1010, 1013, 60 C.R. 911 [administrative mandamus].)

(e) Actions involving the legality of a tax, impost, assessment, toll, or municipal fine.

(3) *1986 Revision: Determination of Prevailing Party.* The statutes governing the recovery of costs were substantially revised in 1986. Former C.C.P. 1031 was amended, former C.C.P. 1032 was repealed, and a new C.C.P. 1032 was added. The fundamental principle of awarding costs to the prevailing party remains the same, but whether those costs are awarded as a matter of right or as matter of the court's discretion now often depends on how the prevailing party is determined. If a party fits one of the definitions of "prevailing" listed in C.C.P. 1032(a)(4) (*infra*, §89), that party is entitled as a matter of right to recover costs. (C.C.P. 1032(a)(4), 1032(b).) In other situations, the prevailing party is determined by the court and the award of costs is discretionary. (C.C.P. 1032(a)(4), *infra*, §97.) (See C.E.B., 3 Civil Proc. During Trial 3d §27.8 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §16.29; 16 California Lawyer 66 (March 1996) [guidelines for determining prevailing party under C.C.P. 1032(a)(4)]; Cal. Civil Practice, 2 Procedure §8:16 et seq.; 4 Procedure §33:2; 20 *Am.Jur.2d* (2005 ed.), *Costs* §14.) The federal rule is similar. (See *F.R. Civ.P.*, *Rule 54(d)(1)* [costs are allowed to prevailing party unless federal statute, rules, or court order provides otherwise]; 10 *Federal Practice & Procedure* (Wright, Miller & Kane) §2667; 21A *Federal Procedure*, L. Ed. §51:91 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



89 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

B. Recovery of Costs as Matter of Right.

1. Significance of Prevailing Party.

b. Determining Who Is Prevailing Party.

7 *Witkin Cal. Proc. Judgm* § 89

[§ 89] Determining Who Is Prevailing Party.

(1) *Statutory Definition of "Prevailing Party."* Each of the following parties qualifies as a "prevailing party" under *C.C.P. 1032(a)(4)*:

- (a) The party with a net monetary recovery (see *infra*, §91).
- (b) A defendant in whose favor a dismissal is entered (see *infra*, §92).
- (c) A defendant where neither the plaintiff nor the defendant obtains any relief (see *infra*, §93).
- (d) A defendant "against those plaintiffs who do not recover any relief against that defendant" (see *infra*, §94).

C.C.P. 1032(a)(4) defines "prevailing party" for its own purposes only; it does not purport to define the term for purposes of other statutes. (*Heather Farms Homeowners Assn. v. Robinson* (1994) 21 *C.A.4th* 1568, 1572, 26 *C.R.2d* 758, *infra*, §221; see *Gilbert v. National Enquirer* (1997) 55 *C.A.4th* 1273, 1276, 64 *C.R.2d* 659 [following *Heather Farms Homeowners Assn.*; declining to use definition in *C.C.P. 1032(a)* when interpreting "prevailing party" for purposes of *C.C. 3344* (commercial misappropriation of name or likeness)]; *Galan v. Wolfriver Holding Corp.* (2000) 80 *C.A.4th* 1124, 1129, 96 *C.R.2d* 112 [following *Heather Farms Homeowners Assn.* and *Gilbert*; declining to read definition in *C.C.P. 1032* into *C.C. 1942.4* for purpose of determining right to attorneys' fees].)

(2) *Type of Action Is Irrelevant.* Except as otherwise provided by statute, the prevailing party is entitled to costs as a matter of right "in any action or proceeding." (*C.C.P. 1032(b)*.) Thus, the relevant question is whether a party qualifies as "prevailing" under *C.C.P. 1032(a)(4)*. The type of action in which the party prevailed is of no consequence, unless another statute expressly governs the award of costs in that type of action. (See *Murillo v. Fleetwood Enterprises* (1998) 17 *C.4th* 985, 991, 73 *C.R.2d* 682, 953 *P.2d* 858, 4 *Summary* (10th), *Sales*, §322 [*C.C. 1794(d)*], authorizing cost recovery by buyer in action to enforce consumer warranty, does not provide express exception to general cost recovery rule of *C.C.P. 1032(b)*); prevailing seller in action by buyer of motor home could recover costs under *C.C.P. 1032(b)*); *Agnew v. State Bd. of Equalization* (2005) 134 *C.A.4th* 899, 911, 36 *C.R.3d* 464 [Rev.C. 7156, authorizing prevailing

taxpayer to recover fees and costs where state's position was not substantially justified, does not provide express exception to general cost recovery rule of *C.C.P. 1032(b)*; prevailing taxpayer in sales tax refund action could recover costs under *C.C.P. 1032(b)*; following *Murillo*; for statutes that govern award of costs in specified actions, see *infra*, §95.)

(3) *Action Must Be Adversarial*. The "action or proceeding" under *C.C.P. 1032(b)* must be adversarial. In *Blue Lagoon Community Assn. v. Mitchell* (1997) 55 C.A.4th 472, 64 C.R.2d 81, a community association petitioned under C.C. 1356 (12 Summary (10th), *Real Property*, §95) for approval of amendments to the association's covenants, conditions, and restrictions. Several members objected, and after the trial judge denied the petition, the objectors requested costs and fees under *C.C.P. 1032(b)*. *Held*, denial of costs affirmed. A petition under C.C. 1356 is not an adversarial proceeding. No defendants are named; no rights are sought to be protected; no wrongs are sought to be redressed. Hence, the objectors were not enforcing the governing documents and were not entitled to fees and costs. (55 C.A.4th 477.)

West's Key Number Digest, Costs 32

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Type of Action Is Irrelevant*. See *Northwest Energetic Services, LLC v. Franchise Tax Bd.* (2008) 159 C.A.4th 841, 869, 71 C.R.3d 642 [prevailing taxpayer in refund action could recover costs, including fees, under *C.C.P. 1032(b)*; Rev.C. 19717 (text, §231), which authorizes fees for prevailing party in franchise tax refund action, does not expressly prohibit application of *C.C.P. 1032(b)*; citing *Agnew v. State Bd. of Equalization* (2005) 134 C.A.4th 899, 36 C.R.3d 464, text, p. 627].



90 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

B. Recovery of Costs as Matter of Right.

1. Significance of Prevailing Party.

c. Effect of Cross-Complaint or Complaint in Intervention.

7 *Witkin Cal. Proc. Judgm* § 90

[§ 90] Effect of Cross-Complaint or Complaint in Intervention.

For purposes of defining "prevailing party" under *C.C.P. 1032*, "unless the context clearly requires otherwise," "plaintiff" includes a cross-complainant or a party filing a complaint in intervention (*C.C.P. 1032(a)(3)*) and "defendant" includes a cross-defendant or a person against whom a complaint is filed (*C.C.P. 1032(a)(2)*). "Complaint" includes a cross-complaint. (*C.C.P. 1032(a)(1)*.) (See *Catello v. I.T.T. General Controls* (1984) 152 C.A.3d 1009, 1015, 200 C.R. 4 [parties in intervention are either entitled to award of costs or may be held liable for costs in same manner as original parties]; *Garcia v. Hyster Co.* (1994) 28 C.A.4th 724, 733, 34 C.R.2d 283 [plaintiff in intervention is liable for costs only from date of filing complaint in intervention]; cf. *McLarand, Vasquez & Partners v. Downey Savings & Loan Assn.* (1991) 231 C.A.3d 1450, 1454, 282 C.R. 828, *infra*, §93 ["defendant" did not include plaintiff as cross-defendant where neither party recovered].)

In *Building Maintenance Service Co. v. AIL Systems* (1997) 55 C.A.4th 1014, 64 C.R.2d 353, an employee who had slipped and fallen on her employer's premises brought a negligence action against the company that provided janitorial services. The company brought the employer into the action by filing a cross-complaint for indemnity against it, and the employer responded by cross-complaining against the company for indemnity and reimbursement of the employee's workers' compensation benefits. Subsequently, the employer also filed a complaint in intervention against the company, again seeking reimbursement of the workers' compensation benefits. A jury determined that the janitorial services company was not negligent, and the judge determined that neither party should recover from the other on their respective indemnity claims. The trial judge awarded substantial costs to the company. *Held*, the company is entitled to a portion of its costs.

(a) The company was the prevailing party under *C.C.P. 1032* as to the complaint in intervention. In the absence of the complaint in intervention, the company would not meet the definition of one of the four categories of parties who are entitled to costs as a matter of right (see *supra*, §89). However, because the company clearly prevailed on the complaint in intervention, it is entitled to costs as a defendant where neither the plaintiff nor the defendant who has filed a cross-complaint obtains any relief. (55 C.A.4th 1026, 1027, following *McLarand*.)

(b) The company is entitled to only those allowable costs incurred after the filing of the complaint in intervention. It

is not entitled to costs going back to the time when the employee's negligence complaint was filed. (55 C.A.4th 1027, citing *Garcia*.)

SUPPLEMENT: [This section is current through the latest supplement]



91 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

B. Recovery of Costs as Matter of Right.

2. Prevailing Party Defined by C.C.P. 1032.

a. Party Who Obtains Net Monetary Recovery.

7 *Witkin Cal. Proc. Judgm* § 91

[§ 91] Party Who Obtains Net Monetary Recovery.

(1) *General Rule.* The party with a "net monetary recovery" is the prevailing party. (*C.C.P. 1032(a)(4)*.) Among the numerous cases discussing this rule are the following:

Ecco-Phoenix Elec. Corp. v. Howard J. White (1969) 1 *C.3d* 266, 272, 81 *C.R.* 849, 461 *P.2d* 33 [prevailing plaintiff with substantial recovery was entitled to costs despite earlier agreement, prepared by defendant, providing that plaintiff would bear all costs in event of litigation to enforce agreement].

Public Employees' Retirement System v. Winston (1989) 209 *C.A.3d* 205, 212, 258 *C.R.* 612 [after amount of security deposit was offset against amount of unpaid rent, lessor owed lessee a refund and thus lessee was prevailing party with net monetary recovery].

Vacco Industries v. Van Den Berg (1992) 5 *C.A.4th* 34, 55, footnote 23, 6 *C.R.2d* 602 [although monetary awards were nearly offset, plaintiffs received "slight" net monetary recovery].

Fundamental Inv. Growth Shelter Realty Fund I-1973 v. Gradow (1994) 28 *C.A.4th* 966, 973, 33 *C.R.2d* 812 [costs on appeal may be included in determining whether party received net monetary recovery under *C.C.P. 1032*].

Foothill Properties v. Lyon/Copley Corona Associates (1996) 46 *C.A.4th* 1542, 1553, 54 *C.R.2d* 488 ["net monetary recovery" does not include discovery sanctions].

Sears v. Baccaglio (1998) 60 *C.A.4th* 1136, 1139, 1155, 70 *C.R.2d* 769, *infra*, §194 [party may fail to recover net monetary judgment and yet prevail for purposes of collecting fees under *C.C. 1717* (*infra*, §170) in action founded in contract].

Bramalea Calif. v. Reliable Interiors (2004) 119 *C.A.4th* 468, 471, 14 *C.R.3d* 302 [residential developer who paid homeowners in exchange for releases of liability was not prevailing party in homeowners' litigation involving construction defects].

(2) *Partial Recovery*. The prevailing party may be awarded costs if he or she receives a substantial, although partial, recovery. (See *Sierra Union Water & Mining Co. v. Wolff* (1904) 144 C. 430, 433, 77 P. 1038 [plaintiff in quiet title action recovered only part of property]; *McCarthy v. Gaston Ridge Mill & Mining Co.* (1904) 144 C. 542, 546, 78 P. 7 [injunction was denied because nuisance abated before decision, but damages were awarded]; *Exchange Nat. Bank of Tulsa v. Ransom* (1942) 52 C.A.2d 544, 546, 126 P.2d 620 [third-party claimant recovered property of \$ 640 value, was unsuccessful as to one item of \$ 225 value]; *Michell v. Olick* (1996) 49 C.A.4th 1194, 1198, 57 C.R.2d 227 [plaintiff who prevailed on only one of several claims was prevailing party, where defendant had dropped his cross-complaint and recovered nothing].) A plaintiff who receives an award of damages may still be the prevailing party despite the fact that total damages are reduced by application of the comparative negligence doctrine. (*Hyatt v. Sierra Boat Co.* (1978) 79 C.A.3d 325, 350, 145 C.R. 47, *infra*, §97.)

(3) *Net Judgment After Cross-Complaint*. If the plaintiff sues for money and the defendant successfully cross-complains for money in a larger amount, a single judgment should be rendered in favor of the defendant for the excess. (*C.C.P.* 666.) Because the net result is favorable to the defendant, the defendant, and not the plaintiff, is entitled to costs. (*Shelley v. Hart* (1931) 112 C.A. 231, 243, 297 P. 82; see *Gerstein v. Smirl* (1945) 70 C.A.2d 238, 240, 160 P.2d 585 [dictum]; 66 A.L.R.3d 1115 [who is prevailing party where both parties prevail on affirmative claims].)

On the same theory, if the cross-complaint is good, but for a lesser amount than the plaintiff recovers, the plaintiff alone is entitled to costs. (*Moss Const. Co. v. Wulffsohn* (1953) 116 C.A.2d 203, 205, 253 P.2d 483 ["the party awarded the net judgment is the prevailing litigant and thus the *successful party*"]; see *Biren v. Equality Emergency Med. Group* (2002) 102 C.A.4th 125, 139, 125 C.R.2d 325 [defendant who was awarded judgment on cross-complaint was not prevailing party; judgment was to be applied as credit against larger amount owed to plaintiff and thus plaintiff obtained net monetary recovery].)

(4) *Effect of Settlement With Other Parties*. "Net monetary recovery" is determined after comparing competing damage claims between the plaintiff and the defendant, without regard to settlements or other contributions from unrelated defendants or other parties. Thus, where a jury verdict results in a damage award for one litigant, that party has obtained a net monetary recovery, even if the judgment is later reduced to zero as a result of offsets for settlements under *C.C.P.* 877 (6 *Summary* (10th), *Torts*, §71). (*Wakefield v. Bohlin* (2006) 145 C.A.4th 963, 982, 983, 52 C.R.3d 400 [plaintiff buyer, who prevailed against defendant seller on claim of negligent misrepresentation and received jury verdict for \$ 33,950, obtained net monetary recovery, even though judgment was reduced to zero because of pretrial settlements with other defendants].)

(5) *Unlawful Detainer Action*. In *Strickland v. Becks* (1979) 95 C.A.3d *Supp.* 18, 157 C.R. 656, plaintiff landlord brought an unlawful detainer action for failure to pay rent, and defendant tenant proved the affirmative defense of breach of warranty of habitability. The judgment reduced the amount of rent due by 50% and denied possession to plaintiff on payment of the amount adjudged due, but awarded costs to plaintiff. *Held*, reversed. If plaintiff had sued to recover rent, and defendant had sought damages by cross-complaint, two competing money claims would have been involved, and plaintiff, with a net judgment in her favor, would have been the prevailing party. In unlawful detainer, however, a judgment for damages or rent is a mere incident of the main object--recovery of possession. Plaintiff was not the prevailing party on that issue, and therefore defendant, not plaintiff, was entitled to costs. (95 C.A.3d *Supp.* 21.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule*. The term "net monetary recovery" does not include settlement proceeds received by a plaintiff in exchange for a dismissal in favor of the defendant. This interpretation ensures that only one party, a defendant who obtains a dismissal (see text, §92), qualifies for a mandatory award of costs under *C.C.P.* 1032(a)(4). (*Chinn v. KMR Property Management* (2008) 166 C.A.4th 175, 188, 82 C.R.3d 586.)

See *Vons Cos. v. Lyle Parks Jr.* (2009) 177 C.A.4th 823, 831, 99 C.R.3d 562 [company that obtained net monetary recovery was prevailing party on claims assigned to it by another party with whom company had settled; trial court could have determined costs attributable to those claims from existing record and did not need to review settlement

agreement to ensure that assignment included recovery of costs].



92 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

B. Recovery of Costs as Matter of Right.

2. Prevailing Party Defined by C.C.P. 1032.

b. Defendant Who Obtains Dismissal.

7 *Witkin Cal. Proc. Judgm* § 92

[§ 92] Defendant Who Obtains Dismissal.

A defendant in whose favor a dismissal is entered is the prevailing party and is entitled to costs. (*C.C.P. 1032(a)(4)*.) This is true where the plaintiff voluntarily dismisses or where the trial court orders an involuntary dismissal. (See *McMahan's of Long Beach v. McMahan Service Corp.* (1956) 145 C.A.2d 607, 609, 302 P.2d 847 [dismissal for lack of prosecution]; *MacLeod v. Tribune Publishing Co.* (1958) 157 C.A.2d 665, 668, 321 P.2d 881; *Santa Barbara v. David R.* (1988) 200 C.A.3d 98, 101, 245 C.R. 836; *Adler v. Vaicius* (1993) 21 C.A.4th 1770, 1777, 27 C.R.2d 32 [plaintiff dismissed with prejudice]; *Crib Retaining Walls v. NBS/Lowry* (1996) 47 C.A.4th 886, 889, 54 C.R.2d 850 [cross-defendant was entitled to recover costs from cross-complainant following dismissal of cross-complaint, even though dismissal resulted from good faith settlement between cross-defendant and plaintiff]; *Great Western Bank v. Converse Consultants* (1997) 58 C.A.4th 609, 614, 68 C.R.2d 224 [same; following *Crib Retaining Walls*]; *Cano v. Glover* (2006) 143 C.A.4th 326, 331, 48 C.R.3d 871 [defendant in action that was dismissed *without prejudice* was entitled to costs under *C.C.P. 1032(a)(4)*]; *66 A.L.R.3d 1087* [dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party"].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Long Beach v. Stevedoring Services of America* (2007) 157 C.A.4th 672, 678, 68 C.R.3d 779 [after cross-complaint for indemnity was dismissed as moot, cross-defendant in whose favor cross-complaint was dismissed was prevailing party entitled to costs; citing *Crib Retaining Walls v. NBS/Lowry* (1996) 47 C.A.4th 886, 54 C.R.2d 850, text, p. 631, and *Great Western Bank v. Converse Consultants* (1997) 58 C.A.4th 609, 68 C.R.2d 224, text, p. 631]; *Chinn v. KMR Property Management* (2008) 166 C.A.4th 175, 183, 82 C.R.3d 586 [settlement offer that required plaintiff to dismiss action but was silent about plaintiff's ability to recover costs did not automatically entitle defendants to recover costs or preclude plaintiff from doing so; however, defendants were prevailing parties, and plaintiff could not recover additional costs].



93 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IX. RECOVERY OF COSTS

B. Recovery of Costs as Matter of Right.

2. Prevailing Party Defined by C.C.P. 1032.

c. Defendant Where Neither Party Recovers.

7 *Witkin Cal. Proc. Judgm* § 93

[§ 93] Defendant Where Neither Party Recovers.

(1) *General Rule.* Where neither the plaintiff nor the defendant obtains any relief, the defendant is the prevailing party. (*C.C.P. 1032(a)(4)*.) This is a codification of earlier case law based on former C.C.P. 1032.

In *Gerstein v. Smirl* (1945) 70 C.A.2d 238, 160 P.2d 585, plaintiff and defendant were in an automobile accident; plaintiff sued and defendant counterclaimed for damages. Both parties were denied relief and a judgment for costs in favor of defendant was upheld. The fact that a defendant is required, on penalty of waiver, to plead a transaction counterclaim (now transaction cross-complaint; see 5 *Cal. Proc.* (5th), *Pleading*, §1158), and fails to sustain that affirmative demand, does not deprive him or her of the right as a successful defendant in the plaintiff's action. "[I]f plaintiff in an action fails to make out his case, the defendant is entitled to judgment and must be regarded as the prevailing party. In other words, a party who defeats an action by a counterclaim is as much entitled to his costs as is a party who defeats it by any other means. In an action such as the instant one for damages, the 'net result' of a judgment requiring defendant to pay nothing to the plaintiff is favorable to the former." (70 C.A.2d 240.) (See *Chaparral Greens v. Chula Vista* (1996) 50 C.A.4th 1134, 1151, 58 C.R.2d 152 [builder and city and county that approved builder's proposed project were entitled to costs in plaintiff's unsuccessful action challenging approval].)

(2) *Distinction: Plaintiff Who Wins in Liability Phase.* Where the plaintiff wins in the liability phase of the trial and receives a verdict in a specific amount, the plaintiff may be, in the court's discretion, designated the prevailing party and entitled to costs, even though the ultimate judgment, after deductions from the verdict based on insurance proceeds and settlement, is zero. (*Pirkig v. Dennis* (1989) 215 C.A.3d 1560, 1566, 264 C.R. 494; see *Ferraro v. Southern Calif. Gas Co.* (1980) 102 C.A.3d 33, 52, 162 C.R. 238 [creating distinction on basis of former C.C.P. 1032; distinguishing *Gerstein* on ground that court held plaintiffs failed to make case]; *Syverson v. Heitmann* (1985) 171 C.A.3d 106, 112, 114, 214 C.R. 581 [following *Ferraro*]; *Elrod v. Oregon Cummins Diesel* (1987) 195 C.A.3d 692, 703, 241 C.R. 108 [following *Syverson*]; *Childers v. Edwards* (1996) 48 C.A.4th 1544, 1550, 56 C.R.2d 328 [defendants were entitled to costs, including attorneys' fees, under *C.C.P. 1032(a)(4)*, despite plaintiffs' victory on liability claim, where plaintiffs failed to prove damages, which is element of cause of action for misrepresentation; distinguishing *Pirkig*]; *Zamora v. Shell Oil Co.* (1997) 55 C.A.4th 204, 214, 63 C.R.2d 762 [plaintiffs were prevailing party where defendant manufacturer was found strictly liable, even though, after settlement amounts with other defendants were credited against jury's

award, net judgment was \$ 0; following *Pirkig*].)

The 1986 revision of *C.C.P. 1032* did not change the rule laid down in *Ferraro* and *Syverson*. "[T]he net monetary recovery grafted in section 1032 by the 1986 amendment ... is far from being the sole instance when a litigant may be declared the prevailing party in the case. This is reaffirmed by the statutory phrase that the prevailing party *includes* the party with a net monetary recovery. The word 'include' is an open-ended term which is expansive in scope and fails to limit the definition of the prevailing party to the enumerated instances. The additional language of the statute makes it even clearer that the listed examples of prevailing parties are not all-inclusive inasmuch as the section explicitly states that parties who do not recover monetary relief or ones who do not come within the enumerated examples, may also be declared prevailing parties and awarded costs in the discretion of the court." (*Pirkig v. Dennis, supra, 215 C.A.3d 1565*; for discussion of prevailing parties determined in court's discretion, see *infra, §97 et seq.*)

(3) *Plaintiff as Cross-Defendant*. The defendant is the prevailing party in a case in which the defendant files a cross-complaint and plaintiff and defendant both fail to recover on their respective claims. As the court noted in *McLarand, Vasquez & Partners v. Downey Savings & Loan Assn. (1991) 231 C.A.3d 1450, 282 C.R. 828*, although *C.C.P. 1032(a)* provides that defendant and plaintiff include a cross-defendant and cross-complainant, respectively, it excepts cross-defendants and cross-complainants unless the context clearly requires otherwise. "Clearly the context requires otherwise here. ... A defendant cannot obtain relief unless it files a cross-complaint against the plaintiff because affirmative relief cannot be claimed in the answer. ... The statute, therefore, already contemplates that when neither the plaintiff nor the defendant who has filed a cross-complaint prevails, the defendant is the prevailing party entitled to costs." (*231 C.A.3d 1454* [following *Schrader v. Neville (1949) 34 C.2d 112, 207 P.2d 1057*].) (See *Building Maintenance Service Co. v. AIL Systems (1997) 55 C.A.4th 1014, 64 C.R.2d 353, supra, §90.*)

SUPPLEMENT: [This section is current through the latest supplement]



94 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

B. Recovery of Costs as Matter of Right.

2. Prevailing Party Defined by C.C.P. 1032.

d. Defendant Against Whom Plaintiff Recovers Nothing.

7 *Witkin Cal. Proc. Judgm* § 94

[§ 94] Defendant Against Whom Plaintiff Recovers Nothing.

(1) *General Rule.* One defendant who prevails may recover costs even though the plaintiff recovers against another defendant. "Prevailing party" includes a defendant "as against those plaintiffs who do not recover any relief against that defendant." (*C.C.P. 1032(a)(4)*); see *Childers v. Edwards* (1996) 48 *C.A.4th* 1544, 1549, 56 *C.R.2d* 328 [defendants were entitled to costs, including attorneys' fees, under *C.C.P. 1032(a)(4)*, despite plaintiffs' victory on liability claim, where plaintiffs were awarded no damages]; for reverse situation in which defendant prevails against one plaintiff but not against another, see *infra*, §96.)

(2) *Distinction: Defendants United in Interest.* In those instances in which several defendants are united in interest or join in making the same defenses in the same answer, the prevailing defendant definition in *C.C.P. 1032(a)(4)* does not apply and the defendant against whom the plaintiff does not recover is not entitled to costs as a matter of right. Instead the allowance or disallowance of costs to the prevailing defendant lies within the sound discretion of the court, as does the apportionment of those costs, if allowed. (*Slavin v. Fink* (1994) 25 *C.A.4th* 722, 726, 30 *C.R.2d* 750 [plaintiff's cases against two defendants were consolidated and tried at same time with defendants sharing same counsel; trial judge's allocation of costs was affirmed]; see *Smith v. Circle P Ranch Co.* (1978) 87 *C.A.3d* 267, 272, 150 *C.R.* 828; on apportionment, see *infra*, §96.)

Other cases discussing the trial's court's discretion to allow costs to a prevailing defendant who was united in interest with a nonprevailing defendant include the following:

Webber v. Inland Empire Inv. (1999) 74 *C.A.4th* 884, 917, 88 *C.R.2d* 594 [trial court did not abuse discretion by awarding fees to prevailing defendants, even though nonprevailing defendant (an individual) "dominated and controlled" prevailing defendants (business entities); trial court could treat defendants separately; citing *Slavin*].

Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburg, Pennsylvania (2004) 118 *C.A.4th* 1061, 1075, 13 *C.R.3d* 586 [trial court properly exercised discretion in determining that defendant against whom plaintiff recovered nothing was prevailing party, even though defendant was represented by same counsel as defendant against whom plaintiff prevailed; citing *Webber* and *Slavin*].

Wakefield v. Bohlin (2006) 145 C.A.4th 963, 983, 52 C.R.3d 400, quoting the text [although jury determined that wife, who sold house she owned jointly with husband, was not liable for negligent misrepresentation whereas husband was so liable, wife did not qualify as prevailing party under C.C.P. 1032(a)(4); husband and wife were represented by same attorney, filed joint answer to buyer's complaint, and joined in same motions and responses].

Benson v. Kwikset Corp. (2007) 152 C.A.4th 1254, 1278, 62 C.R.3d 284 [trial court properly awarded costs to prevailing defendant in action alleging unfair competition and false advertising; although prevailing defendant's defenses were identical to those of its codefendants, there was no indication that prevailing defendant participated in deceptive activity that codefendants committed].

(3) *No Shifting of Prevailing Defendant's Costs.* The plaintiff cannot charge an unsuccessful defendant with the costs of the prevailing defendant. Thus, in *Gibson v. Thrifty Drug Co.* (1959) 173 C.A.2d 554, 343 P.2d 610, plaintiff sued a number of defendants for damages for personal injuries. Defendant B Corp. paid jury fees until a directed verdict was entered in its favor. Plaintiff received a verdict and judgment against defendant L.A. Co. (a) Defendant B Corp. was properly awarded costs of \$ 650, including the jury fees, against plaintiff. (b) Plaintiff was properly awarded costs against defendant L.A. Co., but contended that she should also recover from L.A. Co. the \$ 650 she paid to the successful defendant, B Corp. *Held*, plaintiff was not entitled to include that item. Former C.C.P. 1032(b), containing language substantially similar to C.C.P. 1032(a)(4), did "not give a party any right to recover those amounts which she has become liable for because she has unsuccessfully prosecuted an action against a third person as well as against a defendant as to whom she is successful. To hold otherwise would be to indirectly make the defendant liable for the costs incurred by another defendant." (173 C.A.2d 556.) (See *Davis v. Wilde* (1961) 197 C.A.2d 855, 856, 17 C.R. 925 [following *Gibson* on similar facts]; *Transamerica Title Ins. Co. v. Green* (1970) 11 C.A.3d 693, 704, 89 C.R. 915 [following *Gibson* theory in complicated case involving cross-complainants and cross-defendants].)

SUPPLEMENT: [This section is current through the latest supplement]



95 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

B. Recovery of Costs as Matter of Right.

3. Prevailing Party in Specified Actions.

7 Witkin Cal. Proc. Judgm § 95

[§ 95] Prevailing Party in Specified Actions.

Numerous statutes govern the recovery of costs as a matter of right in the context of specific actions. The following are illustrative. (For other examples, see C.E.B., 3 Civil Proc. During Trial 3d, §27.19 et seq.)

(1) *Unlawful Detainer*. In an unlawful detainer action involving residential property, a tenant who fails to pay rent and raises as an affirmative defense breach of any warranty of habitability or the landlord's obligations to make the premises tenantable under C.C. 1941 (see 12 *Summary* (10th), *Real Property*, §619) is the prevailing party if a substantial breach has occurred and the tenant pays the reasonable rental value of the premises in its untenable condition within 5 days of the court's judgment. The court must award the tenant costs and attorneys' fees "if provided by, and pursuant to, any statute or the contract of the parties." (*C.C.P. 1174.2(a)*.) If there is no substantial breach or the tenant fails to pay accrued rent, the landlord is the prevailing party for purposes of awarding fees and costs. (*C.C.P. 1174.2(b)*); see *Strickland v. Becks* (1979) 95 *C.A.3d Supp. 18*, 157 *C.R. 656*, supra, §91; on landlord's recovery of expenses of eviction, see *C.C.P. 1034.5*, infra, §137.)

(2) *Default Judgment*. The plaintiff is entitled to costs on a judgment by default in an action arising from a contract or a judgment for the recovery of money and damages. (See *C.C.P. 585(a)*; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §166.)

(3) *Partition*. Costs in partition actions are governed by *C.C.P. 874.010* et seq. (See infra, §219.) Except as otherwise provided by those statutes, the court must apportion the costs of partition among the parties in proportion to their interests or must make some other equitable apportionment. (*C.C.P. 874.040*.)

(4) *Eminent Domain*. The defendants in an eminent domain action are entitled to costs, including the costs of apportioning the award among themselves, except that they must bear the costs of determining any issue as to title between themselves. (*C.C.P. 1268.710*.) Moreover, the court must award the defendants their litigation expenses whenever (a) the proceeding is "wholly or partly dismissed for any reason," or (b) final judgment is that "the plaintiff cannot acquire property it sought to acquire in the proceeding." (*C.C.P. 1268.610(a)*, 1235.140 [defining litigation expenses], infra, §124; see 8 *Summary* (10th), *Constitutional Law*, §§1171, 1265, 1267.)

(5) *Inverse Condemnation*. A plaintiff who is awarded compensation or settles an inverse condemnation action must be reimbursed for reasonable costs, disbursements, and expenses. (C.C.P. 1036.)

(6) *Installment Sales*. The prevailing party in any action on a contract or installment account subject to the provisions of the Unruh Act regulating installment sales (see 4 *Summary* (10th), *Sales*, §289) is entitled to reasonable attorneys' fees and costs, regardless of whether the action is instituted by the seller, holder, or buyer. (C.C. 1811.1; see *Morgan v. Reasor Corp.* (1968) 69 C.2d 881, 896, 73 C.R. 398, 447 P.2d 638, 4 *Summary* (10th), *Sales*, §269 [action for declaratory relief was action "on a contract" within meaning of provision giving right to costs].)

(7) *Actions Not in Good Faith*. The defendant in a civil proceeding (a) under the California Government Claims Act, (b) for express or implied indemnity, or (c) for contribution, is entitled to costs if the proceeding was brought in bad faith. If the court determines that the proceeding was not brought "in the good faith belief that there was a justifiable controversy under the facts and law" and with reasonable cause, it must award the "defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding," in addition to those costs normally awarded to the prevailing party. (C.C.P. 1038(a), *infra*, §235.)

(8) *Action for Money in Which Defendant Tenders Full Amount Before Trial*. If the defendant in an action for the recovery of money only (a) tendered the full amount due before the action was commenced, and (b) deposits the tendered amount in court, "plaintiff cannot recover costs, but must pay costs to the defendant." (C.C.P. 1025; see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §81.)

(9) *Civil Enforcement Actions by Attorney General*. Whenever the Attorney General prevails in specified civil enforcement actions, the court must award to the Attorney General the costs of investigating and prosecuting the action, including expert fees, reasonable attorneys' fees, and costs. The awards must be paid to the Public Rights Law Enforcement Special Fund established by *Govt.C. 12530*. (C.C.P. 1021.8(a).) Awards are required in actions to enforce statutes involving the following:

- (a) Immigration consultants. (*B. & P.C. 22445, 22446.5*.)
- (b) Supervision of charitable trusts. (*Govt.C. 12598*.)
- (c) Restrictions on sales and distribution of tobacco products. (*B. & P.C. 17537.3, 22958, 22962, 22963; Health & Saf.C. 118950; P.C. 308.1, 308.3*.)
- (d) Cigarette manufacturer's duty to place funds in escrow for judgment and settlement. (*Health & Saf.C. 104557*.)
- (e) Collection of cigarette tax. (*Rev.C. 30101.7*.)
- (f) Discrimination, denial of civil rights, and interference with the exercise of civil rights. (C.C. 52, 52.1, 55.1.)
- (g) Handicapped access to public buildings and accommodations. (*Govt.C. 4458; Health & Saf.C. 19958.5*.)
- (h) Housing discrimination. (*Govt.C. 12989.3*.)
- (i) Diversion or obstruction of natural flow of river, stream, or lake. (*Fish & Game C. 1615*.)
- (j) Water pollution. (*Fish & Game C. 5650.1; Water C. 13350, 13385*.)
- (k) Waste discharge requirements. (*Water C. 13261, 13262, 13264, 13265, 13268, 13304, 13331*.)
- (l) Pollution or adverse environmental effects; protection of natural resources. (*Govt.C. 12606, 12607*.)
- (m) Enforcement of Forest Practices Act. (*Pub.Res.C. 4601.1, 4603, 4605*.)

- (n) Air pollution. (*Health & Saf.C. 39674, 41513, 42402 et seq., 43016, 43017, 43154.*)
- (o) Orders and penalties issued by San Francisco Bay Conservation and Development Commission. (*Govt.C. 66640, 66641, 66641.7.*)
- (p) Coastal development and compliance with Coastal Commission's orders and local coastal programs. (*Pub.Res.C. 30820, 30821.6, 30822.*)
- (q) Waste or unauthorized diversion of water. (*Water C. 275, 1052, 1845.*)
- (r) Unlawful or negligent taking or destruction of protected bird, mammal, fish, reptile, or amphibian. (*Fish & Game C. 2014.*)
- (s) Underground storage tanks containing hazardous substances. (*Health & Saf.C. 25299.*)
- (t) Surface mine reclamation. (*Pub.Res.C. 2774.1.*)
- (u) Waste tire cleanup. (*Pub.Res.C. 42847.*)
- (v) Solid waste disposal site cleanup. (*Pub.Res.C. 48023.*)
- (w) Fire suppression costs, costs of providing rescue or emergency medical services, and investigation costs incurred in fighting negligently or unlawfully set fire. (*Health & Saf.C. 13009, 13009.1.*)
- (x) Abatement of public nuisance. (*C.C. 3494.*)
- (y) Corporate Securities Law (*Corp.C. 25000 et seq.*) or California Commodity Law (*Corp.C. 29500 et seq.*).
- (z) Enforceable restrictions on open-space land subject to special assessment rules. (*Govt.C. 16147; see Rev.C. 422 [defining enforceable restrictions].*)

SUPPLEMENT: [This section is current through the latest supplement]



96 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

B. Recovery of Costs as Matter of Right.

4. Apportionment of Costs Among Multiple Parties.

7 *Witkin Cal. Proc. Judgm* § 96

[§ 96] Apportionment of Costs Among Multiple Parties.

(1) *Permissive Joinder and Consolidation.* In *Fields v. Napa Milling Co.* (1958) 164 C.A.2d 442, 330 P.2d 459, plaintiff F and her daughters B and K brought a personal injury action arising from the collision of their car and defendant's truck. Defendant cross-complained. Judgment was given (a) for damages and costs in favor of daughter B; (b) no damages to F (contributorily negligent) or K (not injured), and costs to defendants against them. *Held*, affirmed. The rule set forth in *Colla v. Carmichael U-Drive Autos* (1930) 111 C.A. Supp. 784, 787, 294 P. 378, 2 *Cal. Proc.* (5th), *Jurisdiction*, §41, is that each joined cause retains its distinctive identity. "If each party in the instant case had commenced a separate action, it would seem clear that respondents could have recovered their costs against appellants. Since each cause of action retains its distinctive identity where there is a joinder and each plaintiff recovers or fails to recover on his separate demand, there would seem to be no authority, purpose, or reason to deny respondents costs against appellants who failed to establish their causes of action." (164 C.A.2d 449.) (See *Avalos v. Welty* (1965) 237 C.A.2d 545, 547, 47 C.R. 447 [each party should claim costs separately]; *Rappenecker v. Sea-Land Service* (1979) 93 C.A.3d 256, 155 C.R. 516 [following *Fields*]; *Acosta v. SI Corp.* (2005) 129 C.A.4th 1370, 1374, 29 C.R.3d 306 [defendant who fully prevailed against multiple plaintiffs, all of whom were represented by same law firm and pursued single cause of action in joint trial, was not required to apportion costs among plaintiffs or file separate cost memoranda as to each plaintiff, even though plaintiffs' damages were individual; distinguishing *Fields* and *Avalos*]; 68 A.L.R.2d 1058 [award of costs to defendant on causes of action where claims of some, but not all, of coplaintiffs were successful].)

(2) *Prevailing Party Is Entitled Only to Costs Party Actually Incurred.* "[W]here a prevailing party incurs costs jointly with one or more parties who remain in the litigation, during the pendency of the litigation that party may recover only costs actually incurred by the party or in its behalf in prosecuting or defending the case." (*Fennessy v. DeLeuw-Cather Corp.* (1990) 218 C.A.3d 1192, 1196, 267 C.R. 772, *infra*, §146 [award of costs under C.C.P. 1032 to one of six defendants in wrongful discharge action was reversed for failure to ascertain whether apportionment was required]; see *Jonkey v. Carignan Const. Co.* (2006) 139 C.A.4th 20, 26, 42 C.R.3d 399 [two defendants properly filed joint memorandum for costs that they had necessarily incurred; where both defendants shared counsel, split costs, and prevailed at trial, there was no danger of duplicative cost award or award to nonprevailing party; distinguishing *Fennessy*].)

(3) *No Reduction of Costs Based on Number of Parties.* In *Nelson v. Anderson* (1999) 72 C.A.4th 111, 84 C.R.2d 753, plaintiff sued defendant law firm for intentional and negligent interference with prospective economic advantage and for legal malpractice. The trial court granted defendant's motion for nonsuit on the interference claims and the jury found for defendant on the malpractice claim. Defendant claimed costs of nearly \$ 278,000. On plaintiff's motion to tax, the trial court reduced defendant's pretrial costs by two-thirds, reasoning that defendant had settled with two other plaintiffs before trial and had waived its right to collect costs from those plaintiffs, and thus "it would be unfair to [plaintiff], and would constitute an inappropriate windfall to [defendant] to allow it to collect all of its pre-trial costs from [plaintiff]." *Held*, order reducing costs by two-thirds reversed.

(a) Because defendant was a party against whom plaintiff obtained no relief, it was the prevailing party under *C.C.P. 1032(a)(4)* (see *supra*, §94). (72 C.A.4th 128.) As such, it was entitled to all reasonable and necessary costs allowed by *C.C.P. 1033.5* (see *infra*, §117 et seq.). The trial court had no authority to reduce defendant's pretrial costs for the reasons it stated. "[A]n across-the-board reduction based upon the number of plaintiffs, without regard to the reason the costs were incurred, is not a determination of the necessity or reasonableness of the costs." (72 C.A.4th 130, distinguishing *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 C.A.4th 102, 30 C.R.2d 486, *infra*, §114.)

(b) Similarly, although a prevailing party who recovers costs that were neither reasonable nor necessary could be said to enjoy a windfall, plaintiff here did not seek the reduction on those grounds and the court did not analyze the reasonableness or necessity of the costs affected by the two-thirds reduction. Hence, the court's "windfall" determination was not based on a valid statutory restriction. (72 C.A.4th 130.)

SUPPLEMENT: [This section is current through the latest supplement]



97 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

1. Prevailing Party Determined by Court.

7 Witkin Cal. Proc. Judgm § 97

[§ 97] Prevailing Party Determined by Court.

(1) *General Rule.* When a party recovers other than monetary relief and in situations other than those specified in *C.C.P. 1032(a)(4)* (supra, §91 et seq.), the "prevailing party" is determined by the court, which has discretion to allow or deny costs. (*C.C.P. 1032(a)(4)*; see *Nestande v. Watson (2003) 111 C.A.4th 232, 243, 4 C.R.2d 18* [court did not abuse discretion in denying costs to proponents of ballot initiative who prevailed in attempt to place initiative on ballot; proponents were not prevailing party against county officials from whom they sought costs]; cf. *F.R. Civ.P., Rule 54(d)* [costs allowed to prevailing party, unless federal statute, rules, or court order provides otherwise]; see 10 Federal Practice & Procedure (Wright, Miller & Kane) §2665; 21A Federal Procedure, L. Ed. §51:105; *74 Harv. L. Rev. 1464* [discretion of court under Rule 54(d) to deny all costs to prevailing party].)

(2) *Apportionment of Costs.* If the court allows discretionary costs, it may apportion them between the parties on the same or adverse sides pursuant to rules adopted under *C.C.P. 1034* (infra, §139). (*C.C.P. 1032(a)(4)*.) Costs in a negligence action (6 *Summary* (10th), *Torts*, §1327 et seq.), however, should not be apportioned in accordance with the degree of the plaintiff's comparative fault. (*Hyatt v. Sierra Boat Co. (1978) 79 C.A.3d 325, 349, 350, 145 C.R. 47* [defendant's motion to reduce plaintiff's cost bill by 40%, based on jury's special finding that plaintiff was 40% contributorily negligent, was properly denied]; see *Smock v. California (2006) 138 C.A.4th 883, 888, 41 C.R.3d 857* [trial court in personal injury action properly refused to apportion liability for costs between state (10% liable for plaintiff's injuries) and driver (90% liable)]; cf. *Greenberg v. Pacific Tel. & Tel. Co. (1979) 97 C.A.3d 102, 106, 158 C.R. 558*, infra, §100 [trial judge should have apportioned costs in negligence case where plaintiff's judgment was below municipal court maximum and plaintiff was 80% responsible for injury].)

West's Key Number Digest, Costs 32

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.*

Federal rule: See 25 *A.L.R. Fed 2d 471* [liability of indigent litigant for costs under *F.R. Civ. P., Rule 54(d)(1)*].



98 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

a. Where Party Recovers Something Other Than Money.

7 *Witkin Cal. Proc. Judgm* § 98

[§ 98] Where Party Recovers Something Other Than Money.

(1) *Action for Declaratory Relief*. In *Texas Commerce Bank-El Paso v. Garamendi* (1994) 28 C.A.4th 1234, 34 C.R.2d 155, *infra*, §189, plaintiff banks, which had purchased investment contracts from an insolvent insurance company, brought a declaratory relief action against the company's conservator, seeking designation of themselves as policyholders (entitled to priority status in conservatorship proceedings). The trial court ruled in plaintiffs' favor, but ordered that each party bear its own costs. *Held*, award as to costs affirmed. Although the banks were "without question the prevailing parties," they were not among the prevailing parties specified by *C.C.P. 1032(a)(4)* as entitled to costs as a matter of right. Thus, whether to award costs to them was completely within the trial court's discretion. (28 C.A.4th 1248.) Its decision not to do so was not an abuse of discretion. (28 C.A.4th 1249.)

Other actions for declaratory relief include the following:

Lincoln v. Schurgin (1995) 39 C.A.4th 100, 104, 45 C.R.2d 874 [trial judge did not abuse discretion in proclaiming defendants to be prevailing party, but ordering each side to bear its own costs; defendants won declaratory relief, but were required to pay damages on other count; citing *Texas Commerce Bank-El Paso*].

East Bay Mun. Util. Dist. v. Department of Forestry & Fire Protection (1996) 43 C.A.4th 1113, 1133, 51 C.R.2d 299 [plaintiff was not prevailing party, despite court's ruling that defendant's guidelines were illegal, where court declined to enjoin use of guidelines and ruled against plaintiff on all other causes of action].

Olsen v. Breeze (1996) 48 C.A.4th 608, 627, 55 C.R.2d 818 [plaintiff whose lawsuit prompted ski equipment distributors to modify their release of liability forms was not prevailing party, where plaintiff had sought to outlaw use of releases altogether].

Friends of the Trails v. Blasius (2000) 78 C.A.4th 810, 838, 93 C.R.2d 193 [in action to declare public easement for use of road along side of canal, trial court properly assessed costs against defendant irrigation district that already held easement for canal access, even though trial court rejected plaintiffs' request for affirmative relief against district; trial court could find that relief had been granted in favor of plaintiffs against district on quiet title claim].

(2) *Action for Injunctive Relief.* In *Sokolow v. San Mateo* (1989) 213 C.A.3d 231, 261 C.R. 520, a sex discrimination action against a private mounted patrol unit and a county sheriff's department, plaintiffs sought an injunction compelling the patrol to admit women. Instead, the trial court required the sheriff's department to cease its close, intertwined relationship with the patrol. Because it had granted plaintiffs their alternative relief, not their primary relief, the trial court determined that they were not prevailing parties and denied costs. *Held*, reversed. Under *C.C.P. 1032(a)(4)*, the trial court had discretion to award costs to plaintiffs as parties who recovered other than monetary relief. Plaintiffs were the prevailing parties in this litigation. (213 C.A.4th 251.) (See *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 C.A.4th 607, 625, 81 C.R.2d 708 [trial court correctly denied costs to either party in action for misappropriation; plaintiff was awarded permanent injunction and no monetary relief and trial court could determine, under *C.C.P. 1032(a)(4)*, that neither party prevailed]; *Pallco Enterprises v. Beam* (2005) 132 C.A.4th 1482, 1502, 34 C.R.3d 490 [trial court did not abuse discretion in determining that defendant landowners who removed illumination from advertising display on their property were prevailing party in nuisance action; plaintiff's objective had been to obtain removal of display altogether and landowners were able to avoid that result].)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

b. Where Judgment Could Have Been Rendered in Limited Civil Case or Small Claims Action.

1. General Rule in Superior Court.

7 *Witkin Cal. Proc. Judgm* § 99

[§ 99] General Rule in Superior Court.

(1) *Former Rule and Modification.* Originally, *C.C.P. 1032(d)* provided that no costs were allowable in superior court actions in which judgment could have been rendered in an inferior court. (See *Murphy v. Casey (1910) 13 C.A. 781, 783, 110 P. 956* [plaintiff took consent judgment offered by defendant, below jurisdictional amount]; *Poswa v. Jones (1913) 21 C.A. 664, 669, 132 P. 629* [plaintiff's recovery was reduced below jurisdictional amount by defendant's successful counterclaim]; *Hollinger v. Medina (1941) 46 C.A.2d 542, 543, 116 P.2d 166*; *Shotwell v. Bloom (1943) 60 C.A.2d 303, 316, 140 P.2d 728*.) This strict rule was relaxed by a 1953 amendment, providing that the prevailing party could not recover costs, unless the judge, in his or her discretion, allowed costs or partial costs as the judge deemed proper. (See *Miller v. Superior Court (1955) 136 C.A.2d 536, 538, 288 P.2d 902* [plaintiff's superior court judgment for \$ 7,500, reduced by court as condition to denial of new trial, entitled plaintiff to costs]; *Avalos v. Welty (1965) 237 C.A.2d 545, 548, 47 C.R. 447* [no order made; costs denied]; *Young v. General Tel. Co. (1977) 75 C.A.3d 177, 182, 142 C.R. 57*, citing the text.)

(2) *Present Rule.* In a case other than a limited civil case, the court must determine costs in its discretion in accordance with *C.C.P. 1034* (see *infra*, §139) when the prevailing party recovers a judgment that could have been rendered in a limited civil case. (*C.C.P. 1033(a)*; see *Dorman v. DWLC Corp. (1995) 35 C.A.4th 1808, 1816, 1817, 42 C.R.2d 459* [trial court abused its discretion under prior version of *C.C.P. 1033(a)* by prematurely denying costs and fees to either party when it drafted statement of decision, without having cost bill before it and without hearing objections to statement of decision]; *Steele v. Jensen Instrument Co. (1997) 59 C.A.4th 326, 331, 69 C.R.2d 135* [plaintiff's costs were properly denied under *C.C.P. 1033(a)* where she was awarded less than \$ 25,000 in damages; trial judge correctly determined damages amount without adding in potential attorneys' fees]; on limited civil case, see 2 *Cal. Proc.* (5th), *Courts*, §241 et seq.)

(3) *Distinction: Successful Cross-Complaint.* In *Young v. General Tel. Co. (1977) 75 C.A.3d 177, 142 C.R. 57*, plaintiff filed a tort action in the superior court alleging damages of over \$ 400,000 from an automobile collision. Defendant filed a cross-complaint alleging damages of \$ 5,000 arising out of the same transaction. The jury verdict in

the main action was in favor of defendant, and a stipulated judgment for \$ 445 was entered in favor of defendant on the cross-complaint. However, the trial judge refused to order costs under defendant's cost bill for \$ 1,463.74, on the ground that the judgment was in an amount within the jurisdiction of an inferior court. *Held*, reversed. Former C.C.P. 1032(d), providing for costs in the court's discretion, did not apply to a judgment in an "amount" within the jurisdiction of an inferior court, but to a "judgment" that could have been rendered in an inferior court. (75 C.A.3d 180.) Here, defendant had to assert its claim by cross-complaint in the superior court or the claim would have been barred under C.C.P. 426.30(a) (see 5 Cal. Proc. (5th), *Pleading*, §1177); hence, the judgment could not have been rendered in any inferior court available to it. (75 C.A.3d 181.)

SUPPLEMENT: [This section is current through the latest supplement]



100 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

b. Where Judgment Could Have Been Rendered in Limited Civil Case or Small Claims Action.

2. Application of Rule in Personal Injury Actions.

7 *Witkin Cal. Proc. Judgm* § 100

[§ 100] Application of Rule in Personal Injury Actions.

(1) *Action by Spouses.* Application of the rule to personal injury actions by a husband and wife on joined claims has depended on the state of the community property law. Originally, the recovery was community property; hence, the aggregate of verdicts in favor of the husband and wife could be computed to bring the judgment above the jurisdictional minimum and support a cost award. (See *Thomas v. Smith* (1934) 2 C.A.2d 701, 702, 38 P.2d 827.) Then the law was changed to make these damages the separate property of each spouse, with the result that the right to costs could no longer be determined by aggregating the verdicts. (See *Lichtenauer v. Dorstewitz* (1962) 200 C.A.2d 777, 779, 19 C.R. 654.) The 1968 Legislature restored the rule that such damages are community property. (See 11 *Summary* (10th), *Community Property*, §40 et seq.)

(2) *Apportionment in Comparative Negligence Situation.* In *Greenberg v. Pacific Tel. & Tel. Co.* (1979) 97 C.A.3d 102, 158 C.R. 558, plaintiff sued defendant for injuries suffered when a telephone book fell on his foot in one of defendant's public booths. The demand was \$ 5,000. The jury found plaintiff 80% responsible for the injury, and judgment was for \$ 1,000, with costs of \$ 348.50. *Held*, reversed.

(a) Defendant's motion to reduce the cost award in proportion to plaintiff's fault was properly denied because that type of apportionment is unauthorized (see *supra*, §97). (97 C.A.3d 106.)

(b) However, plaintiff's judgment was below the municipal court maximum, and former C.C.P. 1032(d) applied. In exercising his discretion under the statute, the trial judge should have considered, as an appropriate factor, the percentage assessment of fault against a prevailing plaintiff. (97 C.A.3d 108.) Here, in view of the high percentage of fault, it was an abuse of discretion to allow all of plaintiff's costs. (97 C.A.3d 109.)

(c) "[W]e do not mean to imply that a plaintiff's costs must be disallowed to the full extent of the percentage of fault assessed against him. Nor do we hold that every percentage of fault on a plaintiff's part requires some disallowance of such plaintiff's costs. Under all the circumstances of a particular case, a relatively small percentage of fault may well

not require any disallowance of full costs to a plaintiff." (97 C.A.3d 109.)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

b. Where Judgment Could Have Been Rendered in Limited Civil Case or Small Claims Action.

3. Recovery Below Small Claims Maximum.

7 Witkin Cal. Proc. Judgm § 101

[§ 101] Recovery Below Small Claims Maximum.

(1) *When Action Could Have Been Brought in Small Claims Division.* When a prevailing plaintiff in a limited civil case recovers less than the maximum amount available within the jurisdiction of the small claims division, and could have brought the action in the small claims division but did not do so, the court may, in its discretion, allow or deny costs to the prevailing party, or it may allow costs in part in an amount it deems proper. (*C.C.P. 1033(b)(1)*.) The claim could have been prosecuted informally and at slight expense in the small claims division. (See *2 Cal. Proc. (5th), Courts*, §289 et seq.; on limited civil case, see *C.C.P. 85, 2 Cal. Proc. (5th), Courts*, §241 et seq.)

(2) *When Action Could Not Have Been Brought in Small Claims Court.* When a prevailing plaintiff in a limited civil case recovers less than the maximum amount available within the jurisdiction of the small claims division, and could not have brought the action in small claims division, costs and necessary disbursements must be limited to the following: (a) the actual cost of the filing fee; (b) the actual cost of service of process; and (c) reasonable attorneys' fees, if specifically allowed by law. The plaintiff may recover those costs only if, before commencement of the action, the plaintiff gave the defendant written notice of intent to commence an action that could result in a judgment including these costs and disbursements. (*C.C.P. 1033(b)(2)*.)

SUPPLEMENT: [This section is current through the latest supplement]



102 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

c. Equitable Actions.

7 *Witkin Cal. Proc. Judgm* § 102

[§ 102] Equitable Actions.

Before the 1986 revision of *C.C.P. 1032*, it was held that an award of costs in an equitable action was "beyond the pale" of the statute's provisions mandating costs to the prevailing party as a matter of right in certain actions. Costs in equitable actions were instead governed by the discretionary provisions of *C.C.P. 1032*. (*Miller v. American Honda Motor Co. (1986) 184 C.A.3d 1014, 1019, 229 C.R. 523.*) Equitable actions under the revised statute should be evaluated in the same manner as any other action with regard to costs: Is the prevailing party one of the types specified by *C.C.P. 1032(a)(4)* (*supra*, §89) or is the prevailing party determined by the court?

SUPPLEMENT: [This section is current through the latest supplement]



103 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

d. Probate Proceedings.

7 Witkin Cal. Proc. Judgm § 103

[§ 103] Probate Proceedings.

The right to costs in probate proceedings is complicated by many statutes and by the necessity of determining whether payment should be made by a party or out of the assets of the estate.

A number of sections provide for costs in particular proceedings. (See, e.g., *Prob.C. 6544* [proceedings for family allowance], *Prob.C. 9255* [creditor's action on claim], *Prob.C. 9653* [action to recover fraudulently conveyed property], *Prob.C. 11624* [preliminary distribution]; 14 *Summary* (10th), *Wills and Probate*, §400; cf. *Estate of Bevelle (1947) 81 C.A.2d 720, 722, 185 P.2d 90* [attorneys' fees are not included].)

Unless the Probate Code or Judicial Council rules provide otherwise, either the superior court or the appellate court may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. (*Prob.C. 1002*; see *Estate of Johnson (1926) 198 C. 469, 471, 245 P 1089*; *Estate of Erickson (1935) 4 C.A.2d 602, 603, 41 P.2d 939*; *Estate of Selb (1949) 93 C.A.2d 788, 794, 210 P.2d 45*; *Estate of Williams (1952) 110 C.A.2d 50, 55, 242 P.2d 26*; on discretion in manner of awarding costs on appeal, see 9 *Cal. Proc. (5th), Appeal*, §967.)

SUPPLEMENT: [This section is current through the latest supplement]



104 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

e. Marital Litigation.

7 Witkin Cal. Proc. Judgm § 104

[§ 104] Marital Litigation.

During the pendency of a proceeding for dissolution of marriage, for nullity of marriage, for legal separation, to establish physical or legal custody of a child, or for a visitation order, the court may order any nongovernment party to pay the costs of maintaining or defending the proceeding. (*Family C. 2030, 7605*; see *Family C. 2255* [court may grant costs in proceedings to have marriage adjudged void], *Family C. 270* [court must determine that party has ability to pay before awarding costs].)

SUPPLEMENT: [This section is current through the latest supplement]



105 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

f. Interpleader Proceeding.

7 Witkin Cal. Proc. Judgm § 105

[§ 105] Interpleader Proceeding.

A party who follows the interpleader procedure set forth in *C.C.P. 386* or *386.5* may request costs. When the court discharges the party, it may, in its discretion, award costs from the amount in dispute that has been deposited with the court. In the final judgment, the court may provide for assumption of those costs by one or more of the adverse claimants. (*C.C.P. 386.6(a)*; see *4 Cal. Proc. (5th), Pleading, §257.*)

SUPPLEMENT: [This section is current through the latest supplement]



106 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

g. Housing Development Action Against Public Entity.

7 Witkin Cal. Proc. Judgm § 106

[§ 106] Housing Development Action Against Public Entity.

In an action or proceeding to enjoin the approval of a housing development in which the defendant prevails, costs, including attorneys' fees, may be awarded to the prevailing public entity or to a nonprofit housing corporation that is the real party in interest and the permit applicant of the low- and moderate-income housing. The trial judge must find the following:

- (1) The development was for low- and moderate-income housing. (*Govt.C. 65914(a)(1).*)
- (2) The action was frivolous and undertaken primarily to hinder the low- or moderate-income nature of the development. (*Govt.C. 65914(a)(2).*)
- (3) The public entity prevailed on all issues and, if an intervenor, actively took part on a continuous basis in the defense. (*Govt.C. 65914(a)(3).*)
- (4) The plaintiff's demand for a preliminary injunction was denied and not reversed on appeal, or the action was dismissed due to the defendant's motion for summary judgment, and not reversed on appeal. (*Govt.C. 65914(a)(4).*)

Furthermore, an appellate court may award costs, including attorneys' fees, to the prevailing public entity if it upholds the trial judge's findings. (*Govt.C. 65914(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



107 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

h. Action Rendered Moot Before Judgment.

7 Witkin Cal. Proc. Judgm § 107

[§ 107] Action Rendered Moot Before Judgment.

Even though a defendant complies with the plaintiff's demand before judgment and thereby renders the case moot, the plaintiff may be awarded costs. In *Lewin v. Board of Trustees of Pasadena Unified School Dist.* (1976) 62 C.A.3d 977, 133 C.R. 385, probationary teachers were successful in proving wrongful termination of their employment, but defendant school district reemployed them, rendering their petition moot. In affirming an award of costs, the court said: "There appears to be no California authority on point for administrative mandamus proceedings, but ample authority from this and other jurisdictions supports the general proposition that where the litigant who prevails on the law is denied affirmative relief only because belated conduct of the opposing litigant renders moot the need for judicial relief, the prevailing litigant is entitled to its costs." (62 C.A.3d 983.)

SUPPLEMENT: [This section is current through the latest supplement]



108 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

i. Action Under Fair Employment and Housing Act.

7 Witkin Cal. Proc. Judgm § 108

[§ 108] Action Under Fair Employment and Housing Act.

In *Perez v. Santa Clara* (2003) 111 C.A.4th 671, 3 C.R.3d 867, plaintiff sued her employer under the Fair Employment and Housing Act (FEHA) (*Govt.C. 12940 et seq.*), alleging racial discrimination and retaliation. After the trial court entered judgment for defendant, defendant requested its costs, including deposition costs, witness fees, and other amounts, but not including attorneys' fees. The trial court, citing *Cummings v. Benco Bldg. Services* (1992) 11 C.A.4th 1383, 15 C.R.2d 53, *infra*, §217, stated that it did not have authority to grant defendant its costs because plaintiff's action was not frivolous, unreasonable, or groundless. *Held*, reversed and remanded for reexamination of defendant's costs request.

(a) *Cummings* held that an award of attorneys' fees or costs to a prevailing defendant in a FEHA action can be granted only if the action was frivolous, unreasonable, or groundless, a standard that the *Cummings* court adopted from *Christiansburg Garment Co. v. Equal Emp. Opportunity Com.* (1978) 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648. The issue in *Christiansburg*, however, was limited to the recovery of attorneys' fees. Other costs were not at issue. "We find this blending of fees and costs to be unnecessary and inappropriate." (111 C.A.4th 680.)

(b) *C.C.P. 1032(b)* provides for costs "as a matter of right" absent express statutory provision, and *Govt.C. 12965(b)* specifically allows "reasonable attorney's fees and costs" within the court's discretion. "We therefore disagree with the *Cummings* court's extension of the *Christiansburg* standard for attorney fees to ordinary litigation expenses. ... A prevailing defendant should be able to recover these costs even if the plaintiff did not bring a frivolous, groundless, or unreasonable lawsuit." (111 C.A.4th 681.) (See *Knight v. Hayward Unified School Dist.* (2005) 132 C.A.4th 121, 134, 33 C.R.3d 287 [cost award was proper; agreeing with *Perez* that costs are not limited to circumstances in which plaintiff's case is utterly without merit].)

SUPPLEMENT: [This section is current through the latest supplement]



109 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

j. (New) Validating Proceeding.

7 Witkin Cal. Proc. Judgm § 108A

[§ 108A] (New) Validating Proceeding.

Under *C.C.P. 860 et seq. (4 Cal. Proc. (5th), Pleading, §158)*, a public agency may bring an action, in the nature of a proceeding in rem, to determine the validity of certain public acts. The costs of the action may be allowed and apportioned between the parties or taxed to the losing party in the discretion of the court. (*C.C.P. 868*; see *Foothill-De Anza Community College Dist. v. Emerich (2007) 158 C.A.4th 11, 27, 69 C.R.3d 678* [costs were correctly imposed on losing defendants in district's action to validate bond issue, despite prohibition in *C.C.P. 861.1* against subjecting persons who contest validity to punitive action].)

SUPPLEMENT: [This section is current through the latest supplement]



110 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

D. Recovery of Costs Prohibited.

1. Controverted Issue Decided in Defendant's Favor.

7 Witkin Cal. Proc. Judgm § 109

[§ 109] Controverted Issue Decided in Defendant's Favor.

A party who nominally wins but does not receive any substantial recovery or successfully maintain any substantial defense should not receive costs. (*Miller v. American Honda Motor Co. (1986) 184 C.A.3d 1014, 1020, 229 C.R. 523*, quoting the text.) This is so, e.g., where the only controverted issue is decided in favor of the defendant. Thus, in *Weller v. Brown (1914) 25 C.A. 216, 143 P. 251*, plaintiff sued to quiet title to a strip of land in which defendant claimed an easement. The existence of the easement was the only material issue, and defendant was adjudged entitled to it. *Held*, plaintiff was not entitled to costs, though he was adjudged the owner of the fee. (*25 C.A. 222.*) (See *Muzio v. Erickson (1919) 41 C.A. 413, 419, 182 P. 974; Whiting v. Squeglia (1924) 70 C.A. 108, 117, 232 P. 986.*)

In *Merlino v. Fresno Macaroni Mfg. Co. (1946) 74 C.A.2d 120, 168 P.2d 182*, plaintiffs sued for dissolution of a corporation and appointment of a receiver. Defendants opposed this demand, and offered to buy plaintiffs' stock for a price to be fixed by the court. The court denied the relief requested by plaintiffs, appointed appraisers, and gave judgment that plaintiffs sell to defendants at the price fixed. Thus, in form plaintiffs recovered a money judgment against defendants for the price of their shares, but in substance they were unsuccessful, and defendants were properly awarded costs. "Plaintiffs failed to obtain what they sought in their complaint and defendants obtained the affirmative relief prayed for in their answer." (*74 C.A.2d 125.*)

SUPPLEMENT: [This section is current through the latest supplement]



111 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

D. Recovery of Costs Prohibited.

2. Disclaimer or Default in Quiet Title Action.

7 *Witkin Cal. Proc. Judgm* § 110

[§ 110] Disclaimer or Default in Quiet Title Action.

Where a defendant in a quiet title action either disclaims or allows judgment to be taken against him or her by default, costs cannot be awarded against the defendant. (*C.C.P. 761.030(b)*; *Michel v. Williams* (1936) 13 C.A.2d 198, 201, 56 P.2d 546; see *San Mateo Community College Dist. v. Half Moon Bay Ltd. Partnership* (1998) 65 C.A.4th 401, 415, 76 C.R.2d 287 [*C.C.P. 761.030(b)* did not apply where trustees and agents of lessee disclaimed interest in leased property, but also denied lessor's right to quiet title]; *Cal. Civil Practice, 1 Real Property Litigation*, §5:56; 5 *Cal. Proc. (5th), Pleading*, §661.)

However, in *McMorris v. Pagano* (1944) 63 C.A.2d 446, 146 P.2d 944, costs were allowed where defendants, in addition to disclaimers, answered denying all allegations of the complaint. The court declared that if defendants wished to invoke the statutory protection against a cost award, "they should not have raised the issue on plaintiff's possession and other material issues alleged, and put him to his proof." (63 C.A.2d 452.)

SUPPLEMENT: [This section is current through the latest supplement]



112 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

D. Recovery of Costs Prohibited.

3. Unnecessary Additional Trial.

7 *Witkin Cal. Proc. Judgm* § 111

[§ 111] Unnecessary Additional Trial.

(1) *Retrial After Mistrial.* Where a first trial ends in a mistrial because of misconduct of counsel for the successful party, and costs are charged against the party as a penalty, the party cannot recover those costs even though he or she is successful in the retrial. (*Mullin v. Rousseau* (1931) 112 C.A. 719, 731, 297 P. 944.)

(2) *Separate Actions Where Joinder Is Possible.* Where several plaintiffs bring successive actions to recover on a claim for money, and all of the relief could have been obtained in one action, they are only allowed the costs of the first action. (*Longmaid v. Coulter* (1898) 123 C. 208, 216, 55 P. 791.) A statute establishes a similar rule where several defendants who could have been joined are sued successively. The plaintiff may elect the action for which he or she receives costs. (*C.C.P. 1022*; see *Cal. Civil Practice, 2 Procedure*, §8:24.)

(3) *Trial De Novo After Judicial Arbitration.* *C.C.P. 1141.21* denies costs when a judgment in a trial de novo after judicial arbitration is not more favorable to the party who demanded it. (See 6 *Cal. Proc. (5th), Proceedings Without Trial*, §626.)

SUPPLEMENT: [This section is current through the latest supplement]



113 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

IX. RECOVERY OF COSTS

E. Recovery of Costs Following Offer To Compromise.

1. Defendant's Compromise Offer.

a. Plaintiff Fails To Obtain Judgment More Favorable Than Offer.

7 *Witkin Cal. Proc. Judgm* § 112

[§ 112] Plaintiff Fails To Obtain Judgment More Favorable Than Offer.

(1) *Statutory Authorization.* Where the defendant, before trial or arbitration, makes an offer to compromise that the plaintiff does not accept, and the plaintiff fails to obtain a more favorable judgment, the plaintiff may not recover his or her postoffer costs and must pay the defendant's costs from the time of the offer. (*C.C.P. 998(b)*), (c)(1); see *Cirimele v. Shinazy* (1954) 124 C.A.2d 46, 52, 268 P.2d 210 [term "cost" in statute did not include attorneys' fees and hence did not preclude allowance of fees]; *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 C.4th 133, 139, 45 C.R.3d 760, 137 P.3d 939 [uninsured motorist arbitration pursuant to *Ins.C. 11580.2* is "arbitration" within meaning of *C.C.P. 998*]; 57 *Stanf. L. Rev.* 2017 [*F.R. Civ. P.*, Rule 68 "offer to allow judgment" rule]; *Cal. Civil Practice*, 4 Procedure, §27:19 et seq.; *C.J.E.R.*, Judges Benchbook, Civil Proceedings: Trial, §16:49 et seq.; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §110; on method of claiming costs under *C.C.P. 998*, see *infra*, §139.)

In addition, except in an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover the costs of the services of expert witnesses (who are not regular employees of a party) actually incurred and reasonably necessary in preparation for trial or arbitration, or during trial or arbitration, or both, of the case by the defendant. (*C.C.P. 998(c)(1)*); see *Regency Outdoor Advertising v. Los Angeles* (2006) 39 C.4th 507, 531, 46 C.R.3d 742, 139 P.3d 119, 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §84 [award of expert witness fees under *C.C.P. 998(c)(1)* is not limited to those fees incurred *after* offer is extended; defendant was entitled to both preoffer and postoffer expert witness fees.]

C.C.P. 998 does not apply to an enforcement action brought by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor. (*C.C.P. 998(g)(2)*.)

(2) *Illustrations.* In *Scott Co. of Calif. v. Blount* (1999) 20 C.4th 1103, 86 C.R.2d 614, 979 P.2d 974, the subcontract between plaintiff subcontractor and defendant general contractor contained a unilateral attorneys' fees provision that authorized fees for defendant if defendant had to "employ an attorney to enforce any provision [of the subcontract], or to collect damages for breach of the subcontract." Plaintiff sued defendant for breach of contract and negligence and sought damages of over \$ 2 million. Plaintiff rejected defendant's pretrial offer to settle for \$ 900,000. The trial judge found defendant liable, but awarded plaintiff only \$ 442,054 in damages. The judge then awarded

plaintiff its costs, including attorneys' fees, incurred before defendant's settlement offer, and awarded defendant its costs, including attorneys' fees, incurred after the offer. The Court of Appeal agreed with the award to plaintiff but disagreed that defendant was entitled to its postoffer attorneys' fees. *Held*, judgment of trial court affirmed.

(a) *Plaintiff is entitled to its preoffer costs.*

(1) C.C. 1717 (infra, §170 et seq.) renders mutual the unilateral attorneys' fee provision in the subcontract, giving either plaintiff or defendant, if a prevailing party, a right to attorneys' fees on any contract claims. Although plaintiff did not achieve all of its litigation objectives, the trial court acted within its discretion in implicitly concluding that plaintiff prevailed on the contract for purposes of C.C. 1717. Thus, plaintiff would ordinarily be entitled to recover its attorneys' fees and other costs. (20 C.4th 1109.)

(2) C.C.P. 998 does not cut off plaintiff's right to its preoffer costs. The statute as it existed at the time of trial provided that a plaintiff who failed to obtain a judgment that was more favorable than the defendant's settlement offer "shall not recover his or her costs and shall pay the defendant's costs from the time of the offer." (20 C.4th 1110.) This language was interpreted for decades as permitting a plaintiff to recover preoffer costs and the Legislature acquiesced in this interpretation. The Legislature recently reaffirmed the interpretation in 1997 amendments, making clear that the statute cuts off only a prevailing plaintiff's right to *postoffer* costs, not the plaintiff's right to preoffer costs. (20 C.4th 1111.)

(b) *Defendant is entitled to its postoffer costs.*

(1) Under C.C.P. 998, a defendant whose pretrial offer is greater than the judgment received by the plaintiff is treated for purposes of postoffer costs as if it were the prevailing party. The postoffer costs that the statute denies the plaintiff and awards to the defendant are the costs allowed under C.C.P. 1032, which, under C.C.P. 1033.5(a)(10)(A) (infra, §150) include attorneys' fees when authorized by contract. (20 C.4th 1112, 1113.)

(2) The contract provision here authorizes attorneys' fees. (20 C.4th 1113.) The Court of Appeal incorrectly reasoned that because defendant's attorneys had not been used to "enforce" the contract or "to collect damages," defendant could not recover its postoffer attorneys' fees. However, C.C. 1717 applies in favor of the party prevailing on a contract claim whenever that party would have been liable under the contract for attorneys' fees had the other party prevailed. (20 C.4th 1113.) Thus, had defendant here completely defeated plaintiff's contract claims, it would have been entitled to attorneys' fees under the contract provision. More fundamentally, under C.C.P. 998, defendant's entitlement to costs derives not from its status as a prevailing party but from plaintiff's failure to accept a reasonable settlement offer. (20 C.4th 1114.)

(3) There is no sound basis under C.C.P. 998 for distinguishing attorneys' fees from other categories of costs, as the Court of Appeal did here. The statute's language does not do so. (20 C.4th 1114.) Moreover, under the Court of Appeal's holding, a plaintiff rejecting a settlement offer in a case in which there is a contractual attorneys' fee provision would know that, should it prevail with a judgment less than the offer, it would still get its preoffer attorneys' fees but would not be liable for defendant's postoffer attorneys' fees. This asymmetry would substantially lessen the cost to plaintiffs of rejecting reasonable settlement offers. (20 C.4th 1115.)

The following are among the numerous cases that have discussed the availability of postoffer costs or expert witness fees where the plaintiff fails to obtain a judgment more favorable than the defendant's pretrial offer:

Murillo v. Fleetwood Enterprises (1998) 17 C.4th 985, 1000, 73 C.R.2d 682, 953 P.2d 858, 4 Summary (10th), Sales, §322 [C.C. 1794(d), authorizing cost recovery by buyer in action to enforce consumer warranty, does not provide express exception to C.C.P. 998; prevailing seller in action by buyer of motor home could recover expert witness fees under C.C.P. 998].

Jones v. Dumrichob (1998) 63 C.A.4th 1258, 1266, 74 C.R.2d 607 [sufficiency of proof of reasonableness of expert

fees awarded under *C.C.P.* 998].

Carver v. Chevron U.S.A. (2002) 97 C.A.4th 132, 152, 118 C.R.2d 569 [corporation's offer to franchisees of \$ 100 each plus waiver of costs and attorneys' fees was reasonable, in good faith, and not merely nominal, thereby justifying award of expert witness fees to prevailing corporation; hindsight showed that value of proposed waiver was considerable, and franchisees had always known that corporation hired expensive lawyers who could be expected to pursue all avenues of defense].

Biren v. Equality Emergency Med. Group (2002) 102 C.A.4th 125, 140, 125 C.R.2d 325 [defendant was entitled to postoffer costs under *C.C.P.* 998 even though plaintiff was prevailing party; relying on *Scott Co. of Calif. v. Blount*].

Vick v. DaCorsi (2003) 110 C.A.4th 206, 209, 1 C.R.3d 626, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §89 [defendants' offer was valid even though it was not allocated between plaintiffs; plaintiffs were husband and wife whose action arose out of their purchase of community property, they were suing on choses in action that were community property, their recovery would be community property, and each plaintiff had authority to accept offer on community's behalf].

Thompson v. Miller (2003) 112 C.A.4th 327, 338, 4 C.R.3d 905 [trial court abused its discretion under *C.C.P.* 998(c) in denying defendant's expert witness fees; defendant had made reasonable settlement offer, which plaintiffs did not accept, and then defendant had prevailed at trial].

Elite Show Services v. Staffpro (2004) 119 C.A.4th 263, 268, 14 C.R.3d 184 [inclusion in settlement offer of agreement to pay "reasonable" attorneys' fees did not render offer too uncertain to be enforced under *C.C.P.* 998(c)].

Menees v. Andrews (2004) 122 C.A.4th 1540, 1543, 19 C.R.3d 664 [defendant's offer was impliedly conditioned on joint acceptance by both plaintiffs and thus did not support fees award under *C.C.P.* 998; criticizing *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 C.A.4th 102, 30 C.R.2d 486, *infra*, §114].

Skistimas v. Old World Owners Assn. (2005) 127 C.A.4th 948, 951, 952, 26 C.R.3d 319 [individual defendants were entitled to their expert witness fees, even though fees were paid by insurer rather than by defendants themselves; requirement in *C.C.P.* 998(c) that fees be "actually incurred" does not mean that fees must be "personally incurred"].

Agnew v. State Bd. of Equalization (2005) 134 C.A.4th 899, 911, 36 C.R.3d 464 [Rev.C. 7156, authorizing prevailing taxpayer to recover fees and costs where state's position was not substantially justified, does not provide express exception to *C.C.P.* 998; prevailing taxpayer in sales tax refund action could be eligible for expert witness fees under *C.C.P.* 998; following *Murillo*].

Seever v. Copley Press (2006) 141 C.A.4th 1550, 1560, 47 C.R.3d 206 [defendant's offer to compromise was sufficiently certain to be enforceable under *C.C.P.* 998, even though it included provision to pay unspecified amount of attorneys' fees; citing *Elite Show Services*; however, on remand, amount of award may need to be scaled down if plaintiff, who sued under Fair Employment and Housing Act, is found to be of modest means].

Duale v. Mercedes-Benz USA, LLC (2007) 148 C.A.4th 718, 724, 56 C.R.3d 19 [car buyers who prevailed in their warranty action were entitled to costs incurred before settlement offer from car seller, but not those incurred after offer; although buyers were entitled to fees and costs under *C.C.* 1794(d), they were also subject to limitations of *C.C.P.* 998(c)(1); citing *Murillo*].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Authorization. F.R. Civ. P., Rule 68:* See *Kinsey v. Union Pac. R. Co.* (2009) 178 C.A.4th 201, 204, 100 C.R.3d 253 [prevailing defendant in federal Employers' Liability Act action could not recover costs; federal rule allows defendant to recover postoffer costs only when plaintiff/offeree obtains judgment that is less than offer, and not when plaintiff/offeree loses action in its entirety].(3) (*New Limitation on Recoverable Attorneys' Fees Under C.C.P.* 998

Based on Underlying Statute. In *Mangano v. Verity* (2008) 167 C.A.4th 944, 84 C.R.3d 526, plaintiff employee sued defendant employers, claiming discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Govt.C. 12900 et seq.). Defendants offered to settle the action for \$ 2,500, but plaintiff refused. Defendants subsequently were awarded summary judgment and sought their postoffer attorneys' fees under C.C.P. 998(c)(1). The trial court denied the fees request, on the ground that a FEHA defendant cannot obtain its attorneys' fees unless the plaintiff's action was frivolous, unreasonable, or groundless. *Held*, affirmed.

(a) The Supreme Court in *Scott Co. of Calif. v. Blount* (1999) 20 C.4th 1103, 86 C.R.2d 614, 979 P.2d 974, text, p. 650, noted that the "Legislature has in certain limited instances made a policy decision to treat prevailing plaintiffs and prevailing defendants differently for purposes of attorney fees and other costs. Section 998 takes these differences as it finds them . . . Thus, if a case is governed by a statute under which a prevailing plaintiff but not a prevailing defendant is entitled to attorney fees, then a defendant who does not prevail but is nonetheless entitled to its postoffer costs under section 998 is not entitled to its postoffer attorney fees as part of those costs." (167 C.A.4th 950, 951.) In other words, C.C.P. 998 does not grant greater rights to attorneys' fees than those granted by the underlying statute. (167 C.A.4th 951.)

(b) C.C.P. 998 does not eliminate the substantive requirements for awarding attorneys' fees to a prevailing defendant under FEHA. As interpreted by *Cummings v. Benco Bldg. Services* (1992) 11 C.A.4th 1383, 15 C.R.2d 53, text, §217, FEHA authorizes fees to a defendant only when the plaintiff's action was unreasonable, frivolous, groundless, or vexatious. Defendants here, who did not argue that plaintiff's claim suffered from any of those defects, were not entitled to their postoffer attorneys' fees. (167 C.A.4th 951.)



114 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

E. Recovery of Costs Following Offer To Compromise.

1. Defendant's Compromise Offer.

b. Determining Whether Judgment for Plaintiff Is More Favorable Than Offer.

7 Witkin Cal. Proc. Judgm § 113

[§ 113] Determining Whether Judgment for Plaintiff Is More Favorable Than Offer.

(1) *Exclusion of Postoffer Costs.* In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator must exclude the postoffer costs. (*C.C.P. 998(c)(2)(A)*.) This provision is intended to clarify that attorneys' fees awarded to a prevailing party are costs for purposes of *C.C.P. 998* and are not part of the judgment. (*C.C.P. 998(c)(2)(B)*); see *Adam v. DeCharon (1995) 31 C.A.4th 708, 713, 37 C.R.2d 195* [decided under former version of *C.C.P. 998(c)*, which allowed inclusion of fees and costs when determining whether judgment in tort action is more favorable; where plaintiffs prevailed on tort causes of action, trial court had to add to judgment the costs and reasonable attorneys' fees that plaintiffs incurred before compromise offer and if total amount exceeded \$ 15,000, plaintiffs were entitled to costs and attorneys' fees]; *Steele v. Jensen Instrument Co. (1997) 59 C.A.4th 326, 330, 69 C.R.2d 135* [decided under former law]; *Bodell Const. Co. v. Trustees of Calif. State University (1998) 62 C.A.4th 1508, 1516, 73 C.R.2d 450, 6 Cal. Proc. (5th), Proceedings Without Trial, §107*; Cal. Civil Practice, 4 Procedure, §27:27 et seq.)

(2) *Effect of Confidentiality Condition.* A confidentiality condition attached to a settlement offer in a defamation action renders the offer invalid for purposes of shifting costs to the plaintiff under *C.C.P. 998*, because the value to a particular plaintiff of public vindication is so highly subjective and elusive that no court can determine its monetary worth. (*Barella v. Exchange Bank (2000) 84 C.A.4th 793, 801, 101 C.R.2d 167* [defendant was not entitled to recover postoffer costs, even though defendant had offered \$ 25,000 to settle defamation action and jury had awarded only \$ 10,000; settlement offer included provision that terms of settlement remain confidential].)

SUPPLEMENT: [This section is current through the latest supplement]



115 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

E. Recovery of Costs Following Offer To Compromise.

1. Defendant's Compromise Offer.

c. Joint Offer by Multiple Defendants.

7 Witkin Cal. Proc. Judgm § 114

[§ 114] Joint Offer by Multiple Defendants.

In *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 C.A.4th 102, 30 C.R.2d 486, an age discrimination action against multiple defendants, three plaintiffs rejected defendants' joint offer. Following a favorable verdict for one plaintiff, one losing plaintiff declared bankruptcy, and the remaining losing plaintiff was ordered to pay one-third of defendants' costs, including expert witness fees. *Held*, affirmed. The joint offer was valid. All three defendants were sued on a theory of joint and several liability and they filed a joint answer. (25 C.A.4th 115, 116.) The expert witness fees complied with the requirements of *C.C.P. 998(c)* because they were for expert services and were reasonably necessary to defendants' case. (25 C.A.4th 123.) Allocation of one-third of the total costs to the remaining plaintiff was reasonable given the amount of this plaintiff's claim and the intense defense focus to defeat it. (25 C.A.4th 125.)

A lengthy dissent argued that (a) the trial judge erred in shifting any costs because the joint offer was invalid under *C.C.P. 998*, being a conditional offer requiring acceptance by all three plaintiffs, and (b) assuming it was appropriate to shift some costs, the trial judge erred in failing to take account of plaintiff's means in settling the amount of the award. (25 C.A.4th 132, 133.) (See *Austin B. v. Escondido Union School Dist.* (2007) 149 C.A.4th 860, 888, 57 C.R.3d 454 [trial court properly awarded expert witness costs to multiple defendants who, as a group, had served plaintiffs with offer to compromise that exceeded plaintiffs' eventual recovery; because school district defendant was employer of individual defendants, it would have been liable for judgment against defendants, and thus plaintiffs were not prejudiced by offer made collectively by all defendants].)

SUPPLEMENT: [This section is current through the latest supplement]



116 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

E. Recovery of Costs Following Offer To Compromise.

2. Plaintiff's Compromise Offer.

7 *Within Cal. Proc. Judgm § 115*

[§ 115] Plaintiff's Compromise Offer.

(1) *Statutory Authorization.* If the plaintiff's pretrial offer is not accepted and the defendant fails to obtain a more favorable judgment or award in an action or proceeding, the court or arbitrator, in its discretion, may require the defendant to pay, in addition to plaintiff's costs, a reasonable sum to cover postoffer costs of the services of expert witnesses (who are not regular employees of a party) actually incurred and reasonably necessary in preparation for trial or arbitration, or during trial or arbitration, or both, of the case by the plaintiff. (*C.C.P. 998(b)*, (d); see *Pilimai v. Farmers Ins. Exchange Co.* (2006) 39 *C.4th* 133, 148, 45 *C.R.3d* 760, 137 *P.3d* 939 [uninsured motorist arbitration pursuant to *Ins.C. 11580.2* is "arbitration" within meaning of *C.C.P. 998*; arbitration plaintiff was entitled to deposition and exhibit preparation costs, in addition to expert witness fees]; *Cal. Civil Practice, 4 Procedure*, §27:19 et seq.; on method of claiming costs under *C.C.P. 998*, see *infra*, §139.) This provision does not apply to eminent domain actions (*C.C.P. 998(d)*, 998(g)(1)), or to an enforcement action brought by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor (*C.C.P. 998(g)(2)*). (See *Miller v. Union Pac. R. Co.* (2007) 147 *C.A.4th* 451, 455, 53 *C.R.3d* 893 [because federal law does not authorize expert witness fees for prevailing plaintiff in action under Federal Employers' Liability Act, plaintiff who received more than offer to compromise could not obtain fees under *C.C.P. 998*].)

(2) *Illustrations.* Among the cases applying this provision are the following:

Wilson v. Wal-Mart Stores (1999) 72 *C.A.4th* 382, 388, 85 *C.R.2d* 4, 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §96 [plaintiff who received judgment greater than first settlement offer, but less than subsequent offer, both of which defendant rejected before trial, was not entitled to costs].

Burch v. Children's Hosp. of Orange County Thrift Stores (2003) 109 *C.A.4th* 537, 547, 135 *C.R.2d* 404 [although plaintiff received judgment in excess of settlement offer, she was not entitled to costs; unapportioned offer to multiple defendants was invalid because, at time of offer, defendants could not have been found jointly and severally liable for full amount of judgment]; *Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburg, Pennsylvania* (2004) 118 *C.A.4th* 1061, 1076, 13 *C.R.3d* 586 [same].

Jones v. John Crane (2005) 132 *C.A.4th* 990, 1011, 35 *C.R.3d* 144 [trial court did not abuse discretion in denying

plaintiffs' request for expert witness fees as untimely; plaintiffs filed motion for fees more than 1 month after notice of entry of judgment and failed to offer explanation for neglect].

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations.* See *Chinn v. KMR Property Management (2008) 166 C.A.4th 175, 195, 82 C.R.3d 586* [trial court did not abuse discretion by declining to award costs to plaintiff who had offered to dismiss action in exchange for \$ 10,000 from one defendant, \$ 10,000 from second defendant, and \$ 17,000 from third; plaintiff eventually settled for total of \$ 23,000 from first two defendants, which eliminated their liability for indemnification of third and thus was arguably more favorable for them].



117 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

E. Recovery of Costs Following Offer To Compromise.

3. Judgment Between Compromise Offers.

7 Witkin Cal. Proc. Judgm § 116

[§ 116] Judgment Between Compromise Offers.

If the judgment is more favorable than the defendant's compromise offer, but less favorable than the plaintiff's compromise offer, neither party may recover costs under *C.C.P. 998*. (*Rose v. Hertz Corp. (1985) 168 C.A.3d Supp. 6, 11, 214 C.R. 795.*)

SUPPLEMENT: [This section is current through the latest supplement]



118 of 165 DOCUMENTS

Withkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Withkin Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 A. In General.

7 *Withkin Cal. Proc. Judgm § 117*

[§ 117] In General.

(1) *Statutory Authorization.* Any item "required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal" is allowable as a matter of right. (*C.C.P. 1033.5(a)(13)*.) In addition, certain items are specifically allowable as a matter of right under *C.C.P. 1033.5(a)*, while others are prohibited under *C.C.P. 1033.5(b)* (see *infra*, §119 et seq.). Finally, the court has discretion to allow or deny items not mentioned in *C.C.P. 1033.5* and items assessed on application. (*C.C.P. 1033.5(c)(4)*; *Ladas v. California State Auto. Assn. (1993) 19 C.A.4th 761, 774, 23 C.R.2d 810*; see C.E.B., 3 Civil Proc. During Trial 3d, §27.67 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §16.31; Cal. Civil Practice, 2 Procedure §8:30 et seq.; *20 Am.Jur.2d (2005 ed.)*, Costs §44 et seq.; 84 Am.Jur. Trials 367 [using taxation of costs to collect litigation expenses and maximize recovery].)

(2) *Contractual Authorization.* The parties may agree to a contract provision that entitles the prevailing party to recover litigation expenses beyond those prescribed by *C.C.P. 1032* and *C.C.P. 1033*. (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co. (1996) 47 C.A.4th 464, 491, 492, 54 C.R.2d 888* [provision authorizing recovery of all "costs, charges and expenses" could be enforced]; but see *Fairchild v. Park (2001) 90 C.A.4th 919, 109 C.R.2d 442* [litigants cannot adopt definition of costs that differs from statutory definition].) To the extent that a contract may provide for costs beyond those permitted by *C.C.P. 1033.5*, however, those costs must be specifically pleaded and proven at trial. They may not be awarded pursuant to a post-trial motion. (*Hsu v. Semiconductor Systems (2005) 126 C.A.4th 1330, 1341, 25 C.R.3d 82* [striking recovery of expert witness fees and general photocopying costs]; *Jones v. Union Bank of Calif. (2005) 127 C.A.4th 542, 551, 25 C.R.3d 783* [nonstatutory costs must be pleaded and proved at trial rather than included in memorandum of costs]; see *infra*, §139.)

(3) *Costs on All Causes of Action Allowed.* A party entitled to costs as a matter of right is entitled to costs incurred on all causes of action, including those on which the party did not prevail. (*Michell v. Olick (1996) 49 C.A.4th 1194, 1200, 1201, 57 C.R.2d 227* [party was entitled to costs incurred attempting to prove patently unmeritorious claims, as well as those incurred proving single claim on which party prevailed].)

West's Key Number Digest, Costs 146 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



119 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 B. Conditions.

7 *Witkin Cal. Proc. Judgm* § 118

[§ 118] Conditions.

Whether costs are awarded as a matter of right (*Perko's Enterprises v. RRNS Enterprises* (1992) 4 C.A.4th 238, 5 C.R.2d 470) or in the court's discretion (*Ladas v. California State Auto. Assn.* (1993) 19 C.A.4th 761, 23 C.R.2d 810), all costs are subject to the following conditions:

(1) *Costs must be incurred.* Costs are allowable if incurred, whether or not paid. (C.C.P. 1033.5(c)(1); *Ceranski v. Muensch* (1943) 60 C.A.2d 751, 754, 141 P.2d 750.)

(2) *Costs must be necessary.* Allowable costs must be reasonably necessary to the conduct of the litigation, rather than merely convenient or beneficial to its preparation. (C.C.P. 1033.5(c)(2); see *Moss v. Underwriters' Report* (1938) 12 C.2d 266, 274, 83 P.2d 503; *Perko's Enterprises v. RRNS Enterprises*, *supra*, 4 C.A.4th 244; *Ladas v. California State Auto. Assn.*, *supra*, 19 C.A.4th 774 [whether cost item was reasonably necessary presents question of fact for trial court and its decision is reviewed for abuse of discretion]; *Gibson v. Bobroff* (1996) 49 C.A.4th 1202, 1209, 57 C.R.2d 235, *infra*, §125 [court-ordered mediation expenses were reasonably necessary]; *Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 C.A.4th 592, 602, 3 C.R.3d 593 [prevailing defendant was not entitled to recover costs of discovery referee appointed by court, even though payment of referee's fees was necessary to conduct of litigation; court's reference order had provided for fees to be divided equally among plaintiffs and defendant and court did not abuse discretion by allocating fees in this way rather than allowing defendant to recover its share as costs]; *Wagner Farms v. Modesto Irr. Dist.* (2006) 145 C.A.4th 765, 774, 52 C.R.3d 683, 12 *Summary* (10th), *Real Property*, Supp., §857 [prevailing party could recover costs reasonably and necessarily incurred in preparing record of administrative proceedings in action under California Environmental Quality Act; costs of documents that did not reflect agency proceedings had to be excluded]; 30 *A.L.R.2d* 1148 [allowance of fees of guardian ad litem].)

(3) *Amount must be reasonable.* Allowable costs must be reasonable in amount. (C.C.P. 1033.5(c)(3).)

A prevailing party is entitled to *all* reasonable and necessary costs allowed by C.C.P. 1033.5. (*Nelson v. Anderson* (1999) 72 C.A.4th 111, 128, 84 C.R.2d 753, *supra*, §96 [trial court's stated reasons for reducing prevailing defendant's allowable costs (that two-thirds of costs should be allocated to settling plaintiffs and that nonsettling plaintiff had limited resources) were not authorized by statute].)

SUPPLEMENT: [This section is current through the latest supplement]



120 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
X. ITEMS ALLOWABLE AS COSTS
C. General Costs.
1. Attorneys' Fees.

7 Witkin Cal. Proc. Judgm § 119

[§ 119] Attorneys' Fees.

Attorneys' fees are allowable costs when authorized by contract, statute, or law. (*C.C.P. 1033.5(a)(10)(A), (B), (C)*); on recovery of fees generally, see *infra*, §149 et seq.; on procedure for obtaining fees as allowable costs, see *infra*, §139 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



121 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
X. ITEMS ALLOWABLE AS COSTS
C. General Costs.
2. Attorneys' Meals.

7 Witkin Cal. Proc. Judgm § 120

[§ 120] Attorneys' Meals.

In *Ladas v. California State Auto. Assn.* (1993) 19 C.A.4th 761, 23 C.R.2d 810, defendant claimed, as "Deposition Related Travel Expenses," lunches consumed while attending local depositions and other meals simply designated "Business Meal Expenses (Not Deposition Related)." These expenses were not recoverable. The only meal expenses allowed by statute are those for jurors kept together during trial and deliberation (*C.C.P. 1033.5(a)(2)*, *infra*, §136). While *C.C.P. 1033.5(a)(3)* "allows the cost of *taking* and *transcribing* depositions and 'travel expenses to attend depositions,' it does not mention meals eaten while attending local depositions. Nor can meal expenses be justified as 'necessary to conduct the litigation' since attorneys have to eat, whether they are conducting litigation or not. At best, these expenses are 'merely convenient or beneficial' to preparation for litigation, the recovery of which is proscribed" under *C.C.P. 1033.5(c)(2)*. The expenses should have been stricken. (19 C.A.4th 774.)

SUPPLEMENT: [This section is current through the latest supplement]



122 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
X. ITEMS ALLOWABLE AS COSTS
C. General Costs.
3. Travel.

7 *Witkin Cal. Proc. Judgm* § 121

[§ 121] Travel.

(1) *Travel To Attend Depositions.* C.C.P. 1033.5(a)(3) authorizes travel expenses to attend depositions. (See *Hoge v. Lava Cap Gold Mining Corp.* (1942) 55 C.A.2d 176, 187, 130 P.2d 470; *Marocco v. Ford Motor Co.* (1970) 7 C.A.3d 84, 97, 86 C.R. 526.) In *Thon v. Thompson* (1994) 29 C.A.4th 1546, 35 C.R.2d 346, the court held that this authorization is not limited to travel by attorneys practicing locally. The trial court properly awarded costs for out of county travel. (29 C.A.4th 1548.) However, to the extent that the award covered the expenses of chartering an airplane rather than taking commercial flights, it was in error. The charters, although convenient, were not reasonably necessary. (29 C.A.4th 1549.) (See *Seever v. Copley Press* (2006) 141 C.A.4th 1550, 1560, 47 C.R.3d 206 [costs allowed; citing *Thon*].)

(2) *Travel Not Related to Depositions.* Routine expenses for local travel not related to depositions, including parking fees, cab fares, and mileage fees, by attorneys or other firm employees, are not reasonably necessary to the conduct of litigation. (*Ladas v. California State Auto. Assn.* (1993) 19 C.A.4th 761, 775, 776, 23 C.R.2d 810; see *Sime v. Hunter* (1921) 55 C.A. 157, 159, 202 P. 967 [disallowing attorney's travel expenses for hearing on appeal].)

SUPPLEMENT: [This section is current through the latest supplement]



123 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

X. ITEMS ALLOWABLE AS COSTS

C. General Costs.

4. Postage, Telephone, Photocopying, and Fax Charges.

7 Witkin Cal. Proc. Judgm § 122

[§ 122] Postage, Telephone, Photocopying, and Fax Charges.

Postage, telephone, and photocopying charges (other than for exhibits) are not allowable, "except when expressly authorized by law." (*C.C.P. 1033.5(b)(3)*.) Although the statute makes no reference to fax charges, the court in *Ladas v. California State Auto. Assn. (1993) 19 C.A.4th 761, 23 C.R.2d 810*, considered them within this prohibition. "Fax expenses contain elements of all three of the above nonrecoverable items, and it is unlikely that the Legislature intended to allow attorneys to circumvent the statutory bar by using a fax machine instead of the mail, the telephone or a photocopier." (*19 C.A.4th 775.*)

SUPPLEMENT: [This section is current through the latest supplement]



124 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
X. ITEMS ALLOWABLE AS COSTS
C. General Costs.
5. Referee's Fees.

7 Witkin Cal. Proc. Judgm § 123

[§ 123] Referee's Fees.

The reasonable sum fixed by the court as the fee of a referee is allowable, but, if the parties agree on a different rate of compensation, this is awarded. (*C.C.P. 1023*; see *6 Cal. Proc. (5th), Proceedings Without Trial, §77.*)

SUPPLEMENT: [This section is current through the latest supplement]



125 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 C. General Costs.
 6. Condemnation Expert.

7 *Within Cal. Proc. Judgm § 124*

[§ 124] Condemnation Expert.

(1) *On Abandonment.* The court must award the defendant's "litigation expenses" whenever an eminent domain action is dismissed "for any reason." (*C.C.P. 1268.610(a)*.) *C.C.P. 1235.140* defines "litigation expenses" to include, in addition to reasonable and necessary expenses, reasonable attorneys' fees, appraisal fees, and reasonable and necessary fees for the services of other experts incurred in preparation for trial, during trial, and in any subsequent judicial proceedings, whether incurred for services rendered before or after the filing of the complaint.

If the plaintiff files a notice of abandonment as to a particular defendant, or a request for dismissal of a particular defendant, and the court determines that the defendant did not own or have any interest in the property that the plaintiff sought to acquire in the proceeding, the court must award the defendant only those litigation expenses incurred up to the time of filing the notice of abandonment or request for dismissal. (*C.C.P. 1268.610(c)*.)

(2) *After Judgment That Plaintiff Cannot Acquire Property.* The defendant may recover the same costs after judgment as when the action is dismissed. (*C.C.P. 1268.610(a)*.)

(3) *After Partial Dismissal, Dismissal of One or More Plaintiffs, or Judgment That Plaintiff Cannot Acquire Portion of Property.* In these situations, the defendant may recover "only those litigation expenses or portions thereof, that would not have been incurred had the property sought to be acquired following the dismissal or judgment been the property originally sought to be acquired." (*C.C.P. 1268.610(b)*.)

(4) *After Judgment Fixing Sum.* The large cost awards on abandonment are not allowable where the action takes its normal course and a judgment is entered fixing the sum awarded for the taking. In such a case, the property owner defendant is only entitled to ordinary costs. (*People v. Bowman (1959) 173 C.A.2d 416, 418, 343 P.2d 267.*) In *Bowman*, defendant asked for \$ 402.10 as appraisal fees and expenses of preparing expert witnesses. *Held*, reversing the lower court, the only proper sum was for \$ 14.60--ordinary witness fees of the two valuation experts for their court attendance and mileage; awards of \$ 187.50 and \$ 200 for appraisals and preparation for trial were stricken. (*173 C.A.2d 418.*) (See *Los Angeles v. Ortiz (1971) 6 C.3d 141, 144, 98 C.R. 454, 490 P.2d 1142, 8 Summary (10th), Constitutional Law, §1267.*)

SUPPLEMENT: [This section is current through the latest supplement]



126 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 C. General Costs.
 7. Mediation Expenses.

7 Witkin Cal. Proc. Judgm § 125

[§ 125] Mediation Expenses.

In *Gibson v. Bobroff* (1996) 49 C.A.4th 1202, 57 C.R.2d 235, plaintiff, who prevailed in a personal injury action against defendants, sought reimbursement for the costs incurred in court-ordered mediation before trial. *Held*, award of costs to plaintiff affirmed.

(a) Mediation costs are not proscribed by statute. Had the Legislature meant to exclude these costs, it would have done so in *C.C.P. 1033.5(b)*. Instead it left this matter to the trial court's discretion under *C.C.P. 1033.5(c)(4)* (*supra*, §117). (49 C.A.4th 1207, 1208.)

(b) The judicial arbitration system contains disincentives to a trial de novo, one of which is the imposition of costs on a party who requests a trial de novo but fails to obtain a more favorable judgment. Mediation, like arbitration, was created as a trial alternative. Parity of treatment between arbitration and mediation with regard to costs is "strongly indicated." (49 C.A.4th 1209.)

(c) The cost of mediation is reasonably necessary to the conduct of litigation, especially where, as here, the mediation was court-ordered. "[W]e reject defendants' view that only those costs directly related to the preparation or the trial of a case are recoverable as being 'reasonably necessary to the conduct of the litigation.'" (49 C.A.4th 1210.)

SUPPLEMENT: [This section is current through the latest supplement]



127 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

X. ITEMS ALLOWABLE AS COSTS

D. Pretrial Costs.

1. Filing and Motion Fees.

7 *Witkin Cal. Proc. Judgm* § 126

[§ 126] Filing and Motion Fees.

Filing and motion fees are allowable. (*C.C.P. 1033.5(a)(1)*; see *Callaway v. Novotny* (1932) 128 C.A. 166, 169, 16 P.2d 1013; *Fundamental Inv. Growth Shelter Realty Fund I-1973 v. Gradow* (1994) 28 C.A.4th 966, 975, 33 C.R.2d 812 [transfer costs and fees for change of venue were properly treated as filing fees].) Delivery charges incurred for filing documents with the court and complying with another party's document demands are also recoverable, in the court's discretion, if reasonably necessary to the conduct of the litigation. (*Ladas v. California State Auto. Assn.* (1993) 19 C.A.4th 761, 776, 23 C.R.2d 810; see *Nelson v. Anderson* (1999) 72 C.A.4th 111, 132, 84 C.R.2d 753 [defendant failed to prove that messenger filings were reasonable or necessary when compared to probable cost of alternatives such as filing by mail]; *Benach v. Los Angeles* (2007) 149 C.A.4th 836, 857, 57 C.R.3d 363 [costs incurred in filing documents by messenger were reasonable and necessary, given volume of motions and pleadings filed and served in action and heavy workload of attorneys assigned to case; citing *Nelson*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 C.A.4th 11, 30, 69 C.R.3d 678 [same day messenger fees to file plaintiff's supplemental brief and peremptory challenge to assigned trial judge were necessary and reasonable and not merely incurred for convenience].



128 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 D. Pretrial Costs.
 2. Service of Process.

7 *Witkin Cal. Proc. Judgm* § 127

[§ 127] Service of Process.

The cost of service is allowable as follows:

(1) *Service by public officer.* If service is by a public officer, "the recoverable cost is the fee authorized by law at the time of service." (*C.C.P. 1033.5(a)(4)(A).*)

(2) *Service by process server.* If service is by a registered process server, "the recoverable cost is the amount actually incurred in effecting service," including but not limited to the cost of a stakeout or other means used to locate the person served, "unless such charges are successfully challenged by a party to the action." (*C.C.P. 1033.5(a)(4)(B).*)

(3) *Service by publication.* If service is by publication, "the recoverable cost is the sum actually incurred in effecting service." (*C.C.P. 1033.5(a)(4)(C).*)

(4) *Service by other means.* If service is by any other means, the recoverable cost is the lesser of the actual amount incurred or the sum allowed to a public officer for that service, "except that the court may allow the sum actually incurred in effecting service" on application under *C.C.P. 1033.5(c)(4)* (*supra*, §117). (*C.C.P. 1033.5(a)(4)(D).*)

Costs of service, like other costs, must be reasonably necessary. (See *Republic Indem. Co. of America v. Schofield* (1996) 47 C.A.4th 220, 229, 54 C.R.2d 637 [insurer's costs of service in declaratory relief action against insured were "reasonably necessary"; parties were served so that action would have collateral estoppel effect against them]; *Nelson v. Anderson* (1999) 72 C.A.4th 111, 132, 84 C.R.2d 753 [defendant's memorandum of costs did not state how subpoenas were served, making it impossible to determine from face of cost bill whether items were proper; defendant did not meet burden of proving reasonableness of service costs]; *supra*, §118.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Service by process server.* *C.C.P. 1033.5(a)(4)(B)* was amended in 2009. The part quoted in the text now provides for recovery of charges "unless those charges are successfully challenged by a party to the action."



129 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 D. Pretrial Costs.
 3. Provisional Remedies.

7 *Witkin Cal. Proc. Judgm* § 128

[§ 128] Provisional Remedies.

(1) *Attachment*. The expenses of attachment, including keeper's fees and the charges for preserving of perishable property, are recoverable. (*C.C.P. 1033.5(a)(5)*; see *Legg & Shaw Co. v. Worthington* (1910) 157 C. 488, 492, 108 P. 284; *Callahan v. Danziger* (1916) 172 C. 738, 740, 158 P. 760; *Unwin v. Barstow-San Antonio Oil Co.* (1918) 36 C.A. 508, 509, 172 P. 622; *Kellogg v. Honcutt Gold Mines Co., Ltd.* (1938) 25 C.A.2d 109, 111, 76 P.2d 551.) However, obtaining a description of property as the basis for an attachment is merely beneficial and convenient to the litigation, and thus the expense of doing so is not recoverable. (*Murphy v. F.D. Cornell Co.* (1930) 110 C.A. 452, 455, 294 P. 490.)

(2) *Receivership*. The amount allowed a receiver as compensation and expenses may be recoverable (see *Ephraim v. Pacific Bank* (1902) 136 C. 646, 651, 69 P. 436), but is normally payable out of the estate or funds of the receivership. (See 6 *Cal. Proc.* (5th), *Provisional Remedies*, §459.)

(3) *Premium on Surety Bond*. Formerly, premiums on surety bonds, e.g., for attachment or claim and delivery, were not allowable items because a personal bond without premium might be filed. (See *Williams v. Atchison, Topeka & Santa Fe Ry. Co.* (1909) 156 C. 140, 141, 103 P. 885; *Moss v. Underwriters' Report* (1938) 12 C.2d 266, 274, 83 P.2d 503.) This unrealistic view was changed in 1951. Where costs are allowed by statute, they must include the premium on a bond reasonably paid under a statute requiring bond. (*C.C.P. 995.250(a)*.) If the bond is not required by statute, the costs must still include the premium unless the court determines that the bond was unnecessary. (*C.C.P. 995.250(b)*); see *C.C.P. 1033.5(a)(6)* [premiums on necessary surety bonds are allowable].)

SUPPLEMENT: [This section is current through the latest supplement]



130 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
X. ITEMS ALLOWABLE AS COSTS

D. Pretrial Costs.

4. Depositions.

7 *Within Cal. Proc. Judgm § 129*

[§ 129] Depositions.

(1) *Authorized Costs*. The costs of taking, videotaping, and transcribing depositions, including an original and one copy of depositions taken by the claimant and one copy of depositions taken by the party against whom costs are allowed, are allowable. (*C.C.P. 1033.5(a)(3)*; see 2 *Cal. Evidence (4th), Discovery §38*.) Cases discussing this rule include the following:

Kern v. Ginn (1983) 146 C.A.3d 1107, 1113, 194 C.R. 512 [defendant, by merely alleging, in motion to tax costs, that depositions were neither reasonable nor necessary, failed to meet burden of showing that depositions were unnecessary].

M. C. & D. Capital Corp. v. Gilmaker (1988) 204 C.A.3d 671, 679, 251 C.R. 178 [simple reference to costs for "multiple depositions" was proper in absence of evidence that depositions were unnecessary].

Republic Indem. Co. of America v. Schofield (1996) 47 C.A.4th 220, 228, 54 C.R.2d 637 [insurer's deposition costs in declaratory relief action against insureds were "reasonably necessary"; depositions of plaintiffs in underlying action against insureds were not prejudicial to insureds].

Heller v. Pillsbury Madison & Sutro (1996) 50 C.A.4th 1367, 1395, 58 C.R.2d 336 [assessment of both stenographic transcript costs and videotape costs of deposition was proper].

Nelson v. Anderson (1999) 72 C.A.4th 111, 132, 84 C.R.2d 753 [trial court erred in requiring defendant claiming costs to prove reasonableness of cost of expert's deposition and in making its determination based on expert's usefulness at trial; deposition expense is expressly allowed by statute, expert had been designated by plaintiff, and thus plaintiff bore burden of proving that cost was unnecessary or unreasonable].

Hsu v. Semiconductor Systems (2005) 126 C.A.4th 1330, 1342, 25 C.R.3d 82 [trial court erred in awarding costs for expediting preparation of deposition transcripts, where court recognized that costs were not allowed under *C.C.P. 1033.5(a)(3)* and instead awarded them under parties' contract].

These deposition costs are allowable even though the deposition is eventually not used, e.g., where the cause is

decided on demurrer without a trial on the facts. (See *Welch v. Alcott* (1918) 178 C. 530, 532, 174 P. 34; *Simpson v. Gillis* (1934) 1 C.2d 42, 55, 32 P.2d 1071; *Hughes v. Hughes* (1920) 49 C.A. 217, 218, 193 P. 148; *Seever v. Copley Press* (2006) 141 C.A.4th 1550, 1557, 47 C.R.3d 206 [costs for videotaping depositions were allowable, even though depositions were not used at trial]; 76 A.L.R.2d 953 [taxation of costs and expenses in proceedings for discovery or inspection].)

(2) *Unauthorized Costs*. The cost of attorney lunches while attending local depositions is not recoverable. (*Ladas v. California State Auto. Assn.* (1993) 19 C.A.4th 761, 774, 23 C.R.2d 810, *supra*, §120.) The costs for editing videotaped depositions are not allowable. (*Science Applications Int. Corp. v. Superior Court* (1995) 39 C.A.4th 1095, 1105, 46 C.R.2d 332.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Authorized Costs*. C.C.P. 1033.5(a)(3) was amended in 2009 to refer to the costs of "video recording" rather than "videotaping" depositions.



131 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 D. Pretrial Costs.
 5. Investigation.

7 *Witkin Cal. Proc. Judgm* § 130

[§ 130] Investigation.

(1) *General Rule.* Investigation expenses in preparing a case for trial are not allowable "except when expressly authorized by law." (*C.C.P. 1033.5(b)(2)*); see *People v. Feraud (1920) 45 C.A. 765, 767, 188 P. 843* [expenses were merely beneficial].) However, whenever the Attorney General prevails in specified civil enforcement actions, the court must award to the Attorney General all costs of investigating the action. (*C.C.P. 1021.8(a)*); see *supra*, §95.)

(2) *Computer Legal Research.* *C.C.P. 1033.5(b)(2)* precludes recovery of investigation expenses, and *C.C.P. 1021* (*infra*, §149) precludes recovery of attorneys' fees in the absence of an agreement of the parties or statutory authority. Thus, fees for legal research, computer or otherwise, may not be recovered under *C.C.P. 1033.5*. (*Ladas v. California State Auto. Assn. (1993) 19 C.A.4th 761, 776, 23 C.R.2d 810.*)

(3) *Fees Incurred in Assisting Expert.* A party may not recover fees for experts not ordered by the court. (*C.C.P. 1033.5(b)(1)*, *infra*, §133.) And *C.C.P. 1033.5(b)(2)* bars recovery of investigation expenses in preparing the case for trial. Thus, "[a]n award of fees incurred in order to assist an expert prepare his testimony runs contrary to either or both of the foregoing subdivisions." (*Ladas v. California State Auto. Assn., supra* [fees incurred in obtaining Department of Insurance documents containing data relevant to defendant's parity claim].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Computer Legal Research.* See *33 A.L.R.6th 305* [recovery of computer-assisted legal research costs as part of attorneys' fees]; *28 A.L.R. Fed 2d 397* [recovery of computer-assisted legal research costs as part of attorneys' fees under federal statutes].



132 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 E. Trial Costs.
 1. Exhibits.

7 *Witkin Cal. Proc. Judgm* § 131

[§ 131] Exhibits.

(1) *When Expenses Are Allowable.* The cost of models, photocopies, and blowups of exhibits "reasonably helpful to aid the trier of fact" are allowable. (*C.C.P. 1033.5(a)(12).*)

Delivery charges incurred in transporting exhibits to and from the courtroom are also recoverable, in the court's discretion, if reasonably necessary to the conduct of the litigation. (*Ladas v. California State Auto. Assn. (1993) 19 C.A.4th 761, 776, 23 C.R.2d 810.*) Moreover, although postage, telephone, and photocopying charges are generally not allowable, they are recoverable in connection with exhibits. (See *C.C.P. 1033.5(b)(3).*)

The following cases are among those discussing the recovery of exhibit costs:

Science Applications Int. Corp. v. Superior Court (1995) 39 C.A.4th 1095, 1103, 1104, 46 C.R.2d 332 [costs of graphic exhibit boards and video production were allowable as "models and blowups" under *C.C.P. 1033.5(a)(12)*; however, costs for document control of trial exhibits, essentially unallowable "high tech" paralegal fees, and costs for laser discs and graphics communication system, used to store and present trial exhibits, were not recoverable].

Heller v. Pillsbury Madison & Sutro (1996) 50 C.A.4th 1367, 1396, 1397, 58 C.R.2d 336 [costs of photocopying exhibits and of exhibit tabs were recoverable].

Riverside v. Murrieta (1998) 65 C.A.4th 616, 629, 76 C.R.2d 606 [plaintiff was not entitled to costs for blowups and photocopies; trial court expressly determined that items were not reasonably helpful].

Nelson v. Anderson (1999) 72 C.A.4th 111, 133, 84 C.R.2d 753 [trial court did not abuse discretion in disallowing expenses relating to use of videotapes and laser discs for exhibits; court was in best position to determine that use of "cutting edge" technology was not reasonably helpful to jury].

El Dorado Meat Co. v. Yosemite Meat & Locker Service (2007) 150 C.A.4th 612, 616, 58 C.R.2d 590 [trial court did not abuse discretion in allowing expenses for preparation, photocopying, and projection of 37-page document containing charts, graphs, and financial summaries; defendant could not have mounted defense without exhibit summarizing years of both parties' business data].

(2) *Necessity of Using Exhibits at Trial*. Because *C.C.P. 1033.5(a)(12)* requires that the exhibits must "aid the trier of fact," fees are not authorized for exhibits not used at trial. (*Ladas v. California State Auto. Assn.*, *supra*, 19 C.A.4th 775 [costs of trial exhibits, blowups and transparencies, and for binding and tabbing exhibits, were not allowed where case was dismissed before trial]; see *Crabtree v. Houghton* (1923) 191 C. 33, 34, 214 P. 846 [expense of surveys and preparation of maps for use as exhibits were not allowable without order of court]; *Miller v. Highland Ditch Co.* (1891) 91 C. 103, 106, 27 P. 536 [same]; 97 A.L.R.2d 138 [maps, models, wall charts, photographs].)

However, in *Applegate v. St. Francis Lutheran Church* (1994) 23 C.A.4th 361, 28 C.R.2d 436, plaintiff dismissed the action before trial but the trial judge awarded defendants costs for photographs and blueprints prepared for trial. *Held*, affirmed. Although the exhibit costs were not allowable under *C.C.P. 1033.5(a)(12)*, they were allowable under *C.C.P. 1033.5(c)(4)* as reasonably necessary to the conduct of litigation, rather than merely convenient or beneficial to its preparation. (23 C.A.4th 363, 364.)

Other cases discussing whether the exhibits must be used at trial include the following:

Heppler v. J.M. Peters Co. (1999) 73 C.A.4th 1265, 1298, 87 C.R.2d 497 [exhibit costs were properly awarded; trial court was aware of which exhibits were used and could determine if they were reasonably helpful; alternatively, court had discretion to award costs after finding that exhibits were reasonably necessary to conduct of litigation].

Anaheim v. Department of Trans. (2005) 135 C.A.4th 526, 534, 37 C.R.3d 393 [trial court had discretion to award costs of preparing legislative history materials, even though materials were not submitted to court; citing *Applegate*].

Seever v. Copley Press (2006) 141 C.A.4th 1550, 1557, 47 C.R.3d 206 [reversing award of costs for exhibits that were not used at trial; *C.C.P. 1033.5(a)(12)* implies that those costs are not allowable and thus discretionary authority to award costs under *C.C.P. 1033.5(c)(4)* does not apply; disagreeing with *Applegate*].

Benach v. Los Angeles (2007) 149 C.A.4th 836, 855, 57 C.R.3d 363 [award of costs for photocopying exhibits was within trial court's discretion under *C.C.P. 1033.5(c)(4)*, even though majority of exhibits were not used at trial; trial court recognized that prudent counsel would have prepared exhibits in anticipation that they would be used; 15 cents per page charge was reasonable].

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Necessity of Using Exhibits at Trial*. See *Cristler v. Express Messenger Systems* (2009) 171 C.A.4th 72, 90, 89 C.R.3d 34 [whether exhibits were used at trial was factual question that trial court resolved and appellate court would not second-guess].



133 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 E. Trial Costs.

2. Fees of Ordinary Witness.

7 *Witkin Cal. Proc. Judgm* § 132

[§ 132] Fees of Ordinary Witness.

Unless otherwise provided by law, the per diem fee for an ordinary witness who is legally required to attend a civil action or proceeding is \$ 35. (*Govt.C. 68093.*) These fees are allowable as costs. (*C.C.P. 1033.5(a)(7)*); see *Fay v. Fay* (1913) 165 C. 469, 475, 132 P. 1040; *Baker-Hoey v. Lockheed Martin Corp.* (2003) 111 C.A.4th 592, 601, 3 C.R.3d 593 [*C.C.P. 1033.5(a)(7)* does not apply to costs of deposing treating physicians; physicians are experts and recovery of their costs is governed by provisions of *C.C.P. 1033.5* regarding experts (see *infra*, §133), not by those applicable to ordinary witnesses]; *57 A.L.R.2d 1243* [allowance of witness fees of stockholders, directors, officers and employees of corporate litigant]; *2 Cal. Evidence (4th), Witnesses, §15.*)

This is so even under the following circumstances:

(1) The witness is not summoned by subpoena but appears voluntarily. (*Linforth v. San Francisco Gas & Elec. Co.* (1908) 9 C.A. 434, 437, 99 P. 716.)

(2) The witness is outside the 100-mile range of a subpoena and appears voluntarily. (*Naylor v. Adams* (1911) 15 C.A. 353, 357, 114 P. 997.)

(3) Although summoned in good faith, the witness is not sworn and does not testify. (*Prichard v. Southern Pac. Co.* (1935) 9 C.A.2d 704, 706, 51 P.2d 428; see *22 A.L.R.3d 675* [allowance of witness fees with respect to witnesses not called to testify or not permitted to do so when called].)

(4) The witness has not yet been paid. (*Ray v. Clark* (1922) 57 C.A. 467, 469, 207 P. 501.)

(5) The witness is a county employee in an action by a county. (*Kern v. Ginn* (1983) 146 C.A.3d 1107, 1110, 194 C.R. 512 [county's liability for fees and mileage was incurred under plan by which it paid full salaries while employees were serving as witnesses and was entitled to receive back amounts paid for fees and mileage].)

West's Key Number Digest, Costs 183 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

See *Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 C.A.4th 11, 30, 69 C.R.3d 678 [witness fees for employees of plaintiff district were allowable; employees were not parties].



134 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 E. Trial Costs.

3. Fees of Expert Witness.

7 *Witkin Cal. Proc. Judgm § 133*

[§ 133] Fees of Expert Witness.

(1) *Entitlement to Compensation.* The former rule that an expert must testify to opinions without extra compensation was abrogated in 1968 by the enactment of *Govt.C. 68092.5*. (See 2 *Cal. Evidence (4th), Witnesses, §21* et seq.) A party requiring the testimony of an expert must pay the expert's "reasonable and customary hourly or daily fee for the actual time consumed in the examination of that witness by any party." (*Govt.C. 68092.5(a)*; see 34 *San Diego L. Rev. 541* [attorney's personal liability for expert witness fees].) The statute applies to an expert (except a party or the employee of a party) who is one of the following:

(a) An expert described in *C.C.P. 2034.210(b)* (expert trial witness). (See 2 *Cal. Evidence (4th), Discovery, §183*.)

(b) A physician or other treating health care practitioner who is to be asked to express an opinion.

(c) An architect, professional engineer, or licensed land surveyor who was involved with the original project design or survey for which he or she is to be asked to express an opinion within his or her expertise or relevant to the proceeding.

A party designating an expert is responsible for travel expenses and any fee for preparing for the testimony. (*Govt.C. 68092.5(a)*; on order setting compensation where hourly or daily fee is deemed unreasonable, see *Govt.C. 68092.5(c)*.)

(2) *Expert Ordered by Court.* The fees of expert witnesses ordered by the court are allowable. (*C.C.P. 1033.5(a)(8)*; *Ev.C. 731(c)*; see *Dodge v. San Diego Elec. Ry. Co. (1949) 92 C.A.2d 759, 769, 208 P.2d 37*; 39 *A.L.R.2d 1376* [power of court that appoints or employs expert witnesses to tax fees as costs]; 1 *Cal. Evidence (4th), Opinion Evidence, §83*.)

(3) *Expert Not Ordered by Court.* The fees of experts not ordered by the court are not allowable "except when expressly authorized by law." (*C.C.P. 1033.5(b)(1)*; see *Govt.C. 12965(b)* [authorizing expert witness fees in action under Fair Employment and Housing Act (FEHA)]; *Elec.C. 14030* [authorizing expert witness fees in successful action to enforce California Voting Rights Act]; *Davis v. KGO-T.V. (1998) 17 C.4th 436, 439, 71 C.R.2d 452, 950 P.2d 567* [fees for experts in age discrimination action under FEHA were not allowed; decided before *Govt.C. 12965(b)* was

amended to expressly authorize award of expert witness fees]; on express authorization of expert fees following offer to compromise, see *C.C.P. 998* (supra, §112 et seq.); on express authorization of expert fees in Attorney General's action to enforce public rights, see *C.C.P. 1021.8(a)* (supra, §95).

In *Bussey v. Affleck* (1990) 225 C.A.3d 1162, 275 C.R. 646, plaintiffs were allowed, under C.C. 1717 (infra, §170) and *C.C.P. 1021* (infra, §149), to recover their counsel's disbursements, including expert witness fees, made in connection with their action for the balance due on a promissory note, because the note provided for attorneys' fees and costs in the event of litigation. (225 C.A.3d 1166, 1167.)

In *Ripley v. Pappadopoulos* (1994) 23 C.A.4th 1616, 28 C.R.2d 878, the trial judge, citing *Bussey*, awarded plaintiff attorneys' fees and costs including fees for an expert witness not ordered by the court. *Held*, the expert witness fees are not recoverable.

(a) Fees of experts not ordered by the court are expressly not allowable as costs under *C.C.P. 1033.5(c)(1)*. (23 C.A.4th 1623.) Further, the statutory provisions dealing with the compensation of experts in general do not provide for the recovery of the expenses in a cost award. Recovery is, "in the first instance, the responsibility of the party who hires the expert." (23 C.A.4th 1624.)

(b) When the numerous statutory provisions providing for expert witness fees are considered together with express prohibitions against the inclusion of the fees in a cost award, it is clear the legislature has reserved the power to determine selectively the types of actions and circumstances in which the fees are recoverable. (23 C.A.4th 1625.)

Among the numerous cases disallowing fees for expert witnesses who were not ordered by the court are the following:

Robert L. Cloud & Associates v. Mikesell (1999) 69 C.A.4th 1141, 1153, 82 C.R.2d 143 [trial court erred in allowing expert witness fees as costs, despite attorneys' fee provision in agreement between parties; following *Ripley* and rejecting *Bussey*].

Sanchez v. Bay Shores Med. Group (1999) 75 C.A.4th 946, 948, 89 C.R.2d 634 [plaintiff in medical malpractice case could not recover expert witness fees paid to medical experts who were employed by plaintiff and not appointed by court].

First Nationwide Bank v. Mountain Cascade (2000) 77 C.A.4th 871, 875, 878, 92 C.R.2d 145 [cross-complainants were not entitled to recover expert witness fees from subcontractor, despite contract clause providing for recovery of "necessary expenses"; parties who contract for recovery of expert witness fees must specially plead and prove their right to them; following *Ripley* and *Cloud* and rejecting *Bussey*].

Steiny & Co. v. California Elec. Supply Co. (2000) 79 C.A.4th 285, 293, 93 C.R.2d 920 [general contractor who sued subcontractor for indemnity was not entitled to expert witness fees, where fees were not expressly authorized by law; contract did not expressly mention expert witness fees, but even if it did, that would not supply necessary express authorization; following *Ripley* and *Cloud*].

Fairchild v. Park (2001) 90 C.A.4th 919, 928, 109 C.R.2d 442 [scope of term "costs" in C.C. 1717 (infra, §170) cannot be enlarged by contract beyond costs allowable under *C.C.P. 1033.5*; following *Ripley* and *Cloud* and rejecting *Bussey*].

Carwash of America-PO LLC v. Windswept Ventures No. I (2002) 97 C.A.4th 540, 544, 118 C.R.2d 536 [requirement that expert witness fees must be pleaded and proven rather than submitted in cost bill applies to prevailing defendant as well as to prevailing plaintiff, even when prevailing defendant does not seek affirmative relief].

Baker-Hoey v. Lockheed Martin Corp. (2003) 111 C.A.4th 592, 600, 3 C.R.3d 593 [*C.C.P. 1033.5(b)(1)*] prevented

prevailing defendant from recovering costs of deposing plaintiffs' treating physicians, where these experts were not ordered by court; former C.C.P. 2034(i)(2) (now C.C.P. 2034.430), which required defendant to pay physicians' fees, is not statute specifically authorizing recovery of expert fees].

Hsu v. Semiconductor Systems (2005) 126 C.A.4th 1330, 1342, 25 C.R.3d 82 [expert witness fees and photocopying costs could not be awarded as element of attorneys' fees under rationale that expenses were disbursed by attorneys in course of litigation; disapproving *Bussey* and following *Ripley*].

Benson v. Kwikset Corp. (2007) 152 C.A.4th 1254, 1278, 62 C.R.3d 284 [trial court properly denied plaintiff's request for costs of expert witnesses, investigators, telephone calls, copying, and other miscellaneous expenses; C.C.P. 1021.5 (infra, §259) does not authorize expenses other than attorneys' fees; following *Ripley* and disagreeing with *Bussey* and *Beasley v. Wells Fargo Bank* (1991) 235 C.A.3d 1407, 1 C.R.2d 459, infra, §274].

West's Key Number Digest, Costs 187

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Expert Not Ordered by Court.* See *Olson v. Automobile Club of Southern Calif.* (2008) 42 C.4th 1142, 1147, 1149, 74 C.R.3d 81, 179 P.3d 882 [C.C.P. 1021.5 (text, §259 et seq.) does not authorize award of expert witness fees; relying on *Davis v. KGO-T.V.* (1998) 17 C.4th 436, 71 C.R.2d 452, 950 P.2d 567, text, p. 668]; *Amaral v. Cintas Corp. No. 2* (2008) 163 C.A.4th 1157, 1218, 78 C.R.3d 572 [expert witness fees were not authorized as costs under labor statutes or C.C.P. 1021.5; citing *Olson*]; *Anthony v. Los Angeles* (2008) 166 C.A.4th 1011, 1017, 83 C.R.3d 306 [under *Govt. C. 12965(b)*, trial court properly awarded fees for expert witnesses not ordered by court]; *Gorman v. Tassajara Dev. Corp.* (2009) 178 C.A.4th 44, 73, 83, 100 C.R.3d 152 [plaintiffs were not entitled to experts' deposition fees; plaintiffs could be entitled to recover, as tort damages, not as costs, some fees incurred in investigating damage from defective construction; citing *Stearman v. Centex Homes* (2000) 78 C.A.4th 611, 92 C.R.2d 761, 6 *Summary* (10th), *Torts*, §1515].



135 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
X. ITEMS ALLOWABLE AS COSTS
E. Trial Costs.
4. Mileage.

7 Witkin Cal. Proc. Judgm § 134

[§ 134] Mileage.

The travel expense (mileage) of a witness, to and from the place of a civil action or proceeding, is an allowable cost item, to be paid at a rate of 20 cents a mile. (*C.C.P. 1033.5(a)(7)*; *Govt.C. 68093*; *Federoff v. Birks Bros. (1925) 75 C.A. 345, 347, 242 P. 885*; *Richards v. Silveria (1929) 97 C.A. 166, 170, 275 P. 478*; *Prichard v. Southern Pac. Co. (1935) 9 C.A.2d 704, 706, 51 P.2d 428*; see *57 A.L.R.2d 1243* [allowance of mileage of stockholders, directors, officers and employees of corporate litigant]; *22 A.L.R.3d 675* [allowance of mileage with respect to witnesses not called to testify or not permitted to do so when called]; *2 Cal. Evidence (4th), Witnesses, §15.*)

SUPPLEMENT: [This section is current through the latest supplement]



136 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 E. Trial Costs.
 5. Reporter's Fees.

7 *Within Cal. Proc. Judgm § 135*

[§ 135] Reporter's Fees.

(1) *Reporting Fees.* The statutory fees of the official reporter for reporting are paid in equal proportion by the parties, although either may pay the whole. The parties share the cost of making a record where a verbatim record is not made at public expense under *Govt.C. 69952* or other provisions of law. (*Govt.C. 69953.*)

Court reporter fees are recoverable as taxable costs by the prevailing party as otherwise provided by law. (*C.C.P. 1033.5(a)(11)*; *Govt.C. 68086(a)(4)*, 69953; see *Heppler v. J.M. Peters Co. (1999) 73 C.A.4th 1265, 1298, 87 C.R.2d 497* [prevailing plaintiffs were entitled to recover court reporter fees, but sole defendant against whom plaintiffs prevailed should not be charged with entire amount incurred in trying action against numerous defendants]; *Benach v. Los Angeles (2007) 149 C.A.4th 836, 858, 57 C.R.3d 363* [defendant's cost bill for court reporter fees was substantiated and trial court properly order plaintiff to pay substantiated amount, even though it was more than amount plaintiff had paid for court reporter fees].) If an official reporter is not available, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter, with the costs recoverable as provided in *Govt.C. 68086(a)(4)*. (*Govt.C. 68086(a)(5)(B)*; C.R.C., Rule 2.956(c).) If the services of an official pro tempore reporter are utilized under *Govt.C. 68086(a)(5)(B)*, no other charge will be made to the parties. (*Govt.C. 68086(a)(5)(C)*; C.R.C., Rule 2.956(d).)

(2) *Transcribing Fees.* The expense of transcribing is distinct. A transcript used on appeal may be an element of the costs on appeal. (See 9 *Cal. Proc. (5th), Appeal*, §969.) The costs of transcripts ordered by the court are allowable. (*C.C.P. 1033.5(a)(9)*.) The costs of transcripts not ordered by the court are not allowable "except when expressly authorized by law." (*C.C.P. 1033.5(b)(5)*; see *Welch v. Alcott (1918) 178 C. 530, 532, 174 P. 34* [cost of partial transcript ordered by court]; *Sunny Slope Water Co. v. Pasadena (1934) 1 C.2d 87, 99, 33 P.2d 672*; *Walton v. Bank of California (1963) 218 C.A.2d 527, 548, 32 C.R. 856*, citing the text.) The fees for transcripts and copies ordered by the parties must be paid by the ordering party. (*Govt.C. 69953*; *Mt. Shasta Power Corp. v. McArthur (1931) 111 C.A. 640, 641, 295 P. 1049.*)

SUPPLEMENT: [This section is current through the latest supplement]



137 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
X. ITEMS ALLOWABLE AS COSTS
E. Trial Costs.
6. Jury Fees and Expenses.

7 Witkin Cal. Proc. Judgm § 136

[§ 136] Jury Fees and Expenses.

The fee for jurors is \$ 15 a day for each day's attendance as a juror after the first day. (*C.C.P. 215(a)*.) A juror who is employed by a federal, state, or local government entity, or by another public entity defined in *C.C.P. 481.200*, and who receives regular compensation and benefits while performing jury service, may not be paid the fee. (*C.C.P. 215(b)*.) Jurors are reimbursed for mileage at the rate of 34 cents per mile for each mile actually traveled in attending court as a juror after the first day, in going only. (*C.C.P. 215(c)*); on deposit of fees with court by appropriate party, see *C.C.P. 631(c), 631.1, 631.2, 7 Cal. Proc. (5th), Trial, §99*.)

Jury fees and the cost of juror food and lodging while the jury is kept together during trial and deliberation are allowable costs. (*C.C.P. 1033.5(a)(1), (a)(2)*); see *Heppler v. J.M. Peters Co. (1999) 73 C.A.4th 1265, 1298, 87 C.R.2d 497* [prevailing plaintiffs were entitled to recover jury fees, but sole defendant against whom plaintiffs prevailed should not be charged with entire amount incurred in trying action against numerous defendants].) The costs of investigating jurors or preparing for voir dire are not allowable "except when expressly authorized by law." (*C.C.P. 1033.5(b)(4)*); see *C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §16:32*.)

SUPPLEMENT: [This section is current through the latest supplement]



138 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 F. Costs of Enforcing Judgment.
 1. In General.

7 *Witkin Cal. Proc. Judgm* § 137

[§ 137] In General.

(1) *Right to Costs.* A judgment creditor may recover the reasonable and necessary costs of enforcing a judgment. (*C.C.P.* 685.040; see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §46 et seq.)

(2) *Allowable Costs.* The specific costs allowed are stated in *C.C.P.* 685.070. (See 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §47; on costs incurred in supplementary proceedings, see *C.E.B.*, 2 *Debt Collection Practice* 2d §11.47 et seq.) The following are among the enforcement costs allowed:

(a) *Costs incurred during third-party proceeding.* In *Maguire v. Corbett* (1953) 119 *C.A.2d* 244, 259 *P.2d* 507, the judgment creditor levied execution on an automobile as community property of the debtor husband, and appellant wife filed a third-party claim to the car as her own property. The court determined that the transfer from the husband to the wife was fraudulent, denied the third-party claim, and awarded the creditor \$ 90.75 as costs of storage of the car during the 4-month pendency of the third-party claim proceeding. On the wife's appeal, the cost award against her was held proper. Execution would have resulted in sale of the car except for the wife's claim, which made her an adversary, and, although title could have been determined without storage, impounding was within the trial judge's discretion. (119 *C.A.2d* 252.)

(b) *Receiver's compensation.* In *Evans v. Galardi* (1979) 93 *C.A.3d* 291, 155 *C.R.* 505, the trial judge rendered a money judgment for plaintiff, made an order charging defendants' interest in a partnership, and appointed a receiver to enforce the order. *Held*, the receiver's compensation was entirely chargeable to defendants. The charging order serves the same purpose as a writ of execution, and costs of a charging order receivership must be allowed "of course" to the judgment creditor. (93 *C.A.3d* 294.)

(c) *Eviction costs in unlawful detainer proceedings.* A plaintiff who recovers judgment for possession may request as costs the amount advanced to the sheriff or marshal to effect the eviction. (*C.C.P.* 1034.5.)

SUPPLEMENT: [This section is current through the latest supplement]



139 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
 X. ITEMS ALLOWABLE AS COSTS
 F. Costs of Enforcing Judgment.
 2. Attorneys' Fees.

7 *Witkin Cal. Proc. Judgm* § 138

[§ 138] Attorneys' Fees.

(1) *Generally Not Recoverable.* The recoverable costs of enforcing a judgment do not include attorneys' fees unless otherwise provided by law. (*C.C.P.* 685.040; see *infra*, §149.) In *Chelios v. Kaye* (1990) 219 *C.A.3d* 75, 268 *C.R.* 38, plaintiffs moved under *C.C.P.* 685.080 for postjudgment costs, including attorneys' fees incurred in enforcing the judgment in a contract action. Plaintiffs sought to avoid the express prohibition in *C.C.P.* 685.040 against attorneys' fees as costs of enforcement by arguing that they were excepted by *C.C.* 1717 (award of attorneys' fees to prevailing party in contract action; see *infra*, §165 et seq.). *Held*, denial of motion affirmed.

(a) When plaintiffs' underlying contract claim was reduced to a final, nonappealable judgment, their prior contractual rights were merged into and extinguished by the judgment. Thereafter, plaintiffs, as the prevailing party, had only those rights set forth in the judgment itself. (219 *C.A.3d* 80.)

(b) Because plaintiffs' attorneys' fees were incurred to enforce a judgment without an attorneys' fees clause, and the underlying contract had been extinguished by merger before the fees were incurred, there was no attorneys' fees clause upon which to premise the statutory rights of *C.C.* 1717. (219 *C.A.3d* 80.) (See *Hambrose Reserve, Ltd. v. Faitz* (1992) 9 *C.A.4th* 129, 132, 11 *C.R.2d* 638, *infra*, §192 [following *Chelios*].)

(2) *Exception Where Underlying Judgment in Action on Contract Awards Attorneys' Fees.* *C.C.P.* 685.040 permits the collection of attorneys' fees incurred in enforcing a judgment where the underlying judgment includes an award of attorneys' fees to the judgment creditor under *C.C.P.* 1033.5(a)(10)(A) (attorneys' fees authorized by contract). (See *Miller v. Givens* (1994) 30 *C.A.4th* 18, 21, 22, 37 *C.R.2d* 1 [although underlying judgment was obtained before *C.C.P.* 685.040 was amended to allow fees, assignee of judgment creditor could collect attorneys' fees incurred after amendment's effective date; creditor was applying amendment prospectively only].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Exception Where Underlying Judgment in Action on Contract Awards Attorneys' Fees.* See *Jaffe v. Pacelli* (2008) 165 *C.A.4th* 927, 934, 82 *C.R.3d* 423 [judgment creditor was entitled to fees incurred in challenging debtor's attempt to discharge debt in bankruptcy; promissory note that gave rise to judgment included attorneys' fees provision]; *Globalist Internet Technologies v. Reda* (2008) 167 *C.A.4th* 1267, 1273, 84 *C.R.3d* 725 [under *C.C.P.* 685.040, judgment creditor

was entitled to fees incurred in later action by judgment debtor, who was attempting to settle judgment debt at substantial reduction; citing *Jaffe*].



140 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XI. PROCEDURE FOR OBTAINING COSTS

A. Memorandum of Costs.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 139

[§ 139] In General.

(1) *Judicial Council Rules*. Prejudgment costs must be "claimed and contested in accordance with rules adopted by the Judicial Council." (*C.C.P. 1034(a)*.) (On costs on appeal and the procedure for claiming those costs, see *C.C.P. 1034(b)*; *9 Cal. Proc. (5th), Appeal*, §974 et seq.)

(2) *Prevailing Party's Responsibility*. A prevailing party claiming costs must serve and file a verified memorandum of costs. To verify, the party, or the party's attorney or agent, states "that to the best of his or her knowledge the items of costs are correct and were necessarily incurred in the case." (C.R.C., Rule 3.1700(a)(1); see *Hydratec v. Sun Valley 260 Orchard & Vineyard Co. (1990) 223 C.A.3d 924, 926, 272 C.R. 899*, infra, §148 [prevailing defendant waived right to recover costs by failing to file verified memorandum of costs, even though judgment mistakenly failed to award defendant its costs]; *Chaparral Greens v. Chula Vista (1996) 50 C.A.4th 1134, 1153, 1154, 58 C.R.2d 152* [where prevailing parties complied with former C.R.C., Rule 870 (now C.R.C., Rule 3.1700), failure to comply with former C.R.C., Rule 232(c) on preparation of statement of decision (now C.R.C., Rule 3.1590; see *7 Cal. Proc. (5th), Trial*, §396) did not constitute waiver of right to costs]; C.E.B., 3 Civil Proc. During Trial 3d, §27.88 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §§16.34, 16.35; Cal. Civil Practice, 4 Procedure §33:3 et seq.; on necessity of pleading and proving nonstatutory costs, see supra, §117.)

The following statutes and rules are among those containing similar provisions:

(a) C.R.C., Rule 3.1700(a)(2) (costs of party seeking default judgment must be claimed on Judicial Council Form No. CIV-100 [Request for Entry of Default (Application to Enter Default)]).

(b) *C.C.P. 685.070(b)* (memorandum served and filed for costs incurred after judgment; see *8 Cal. Proc. (5th), Enforcement of Judgment*, §47).

(c) *C.C.P. 1268.610(d)* (memorandum filed by defendant on dismissal of condemnation proceeding; see *8 Summary (10th), Constitutional Law*, §1265).

(d) *C.C.P. 386.6(a)* (party discharged in interpleader proceedings must request award in motion or pleading; see *4*

Cal. Proc. (5th), Pleading, §257).

(e) C.R.C., Rule 3.2000 (supplemental memorandum to recover costs of eviction in unlawful detainer proceedings).

(f) *C.C.P. 998* (trial court has discretion to award expert witness fees to qualifying prevailing parties). (See *Jonkey v. Carignan Const. Co. (2006) 139 C.A.4th 20, 27, 42 C.R.3d 399* [use of cost bill by prevailing defendants was permissible; noticed motion is not required].)

(3) *Judicial Council Forms*. The Judicial Council has adopted the following optional forms to assist courts and parties with the procedural requirements necessary to recover costs:

(a) Form No. MC-010 [Memorandum of Costs (Summary)].

(b) Form No. MC-011 [Memorandum of Costs (Worksheet)].

(c) Form No. MC-012 [Memorandum of Costs After Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest].

(d) Form No. MC-013 [Memorandum of Costs on Appeal].

(4) *Amendment of Memorandum*. If an inadvertent mistake is made in the memorandum, relief under *C.C.P. 473* is proper, either by a motion for leave to amend or a motion to strike out the first memorandum and substitute a new one. (See *Ferry v. O'Brien (1923) 63 C.A. 620, 625, 219 P. 467*; Cal. Civil Practice, 4 Procedure §33:4.) Similarly, a verification defective in form can be cured. The court has discretion to allow the filing of a supplemental memorandum with a proper verification. (*Pacific Southwest Airlines v. Dowty-Rotol, Ltd. (1983) 144 C.A.3d 491, 495, 193 C.R. 25.*)

(5) *Alternative Procedure*. Nothing in *C.C.P. 1032* (defining "prevailing party"; supra, §89) prohibits the parties from stipulating to alternative procedures for awarding costs pursuant to rules adopted under *C.C.P. 1034*. (*C.C.P. 1032(c)*; see *Jones v. Union Bank of Calif. (2005) 127 C.A.4th 542, 551, 25 C.R.3d 783* [*C.C.P. 1032(c)* allows parties to agree to procedures for awarding costs, but does not expressly authorize parties to expand by agreement items allowable as costs].)

(6) *Prima Facie Evidence*. If items in the memorandum of costs appear to be proper charges, the verified memorandum is prima facie evidence of their propriety. The burden is on the party challenging costs to show they were not reasonable or necessary. If, however, items are properly objected to, the burden of proof is on the party claiming them as costs. Whether a cost item was reasonably necessary is a question of fact to be decided by the trial court. (*Jones v. Dumrichob (1998) 63 C.A.4th 1258, 1266, 74 C.R.2d 607.*)

(7) *Prejudgment Interest May Not Be Requested in Memorandum of Costs*. Prejudgment interest is not an element of costs, but an element of damages. Hence, a cost bill is not the appropriate vehicle for requesting prejudgment interest under C.C. 3287. Prejudgment interest should be awarded as part of the judgment after a specific request made *before* entry of judgment. (*North Oakland Med. Clinic v. Rogers (1998) 65 C.A.4th 824, 830, 76 C.R.2d 743, 1 Summary (10th), Contracts, §888.*)

West's Key Number Digest, Costs 195 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Alternative Procedure*. See *Gorman v. Tassajara Dev. Corp. (2009) 178 C.A.4th 44, 70, 100 C.R.3d 152* [trial court properly concluded that settling parties had stipulated to alternative procedure for awarding costs; there was no error or prejudice in omission of formal motion to tax costs].



141 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XI. PROCEDURE FOR OBTAINING COSTS

A. Memorandum of Costs.

2. Service and Filing.

a. Time Limits.

7 *Witkin Cal. Proc. Judgm* § 140

[§ 140] Time Limits.

(1) *In General.* Under C.R.C., Rule 3.1700(a)(1), a memorandum of costs must be filed and served within the earliest of the following:

(a) 15 days after notice of entry of judgment or dismissal is mailed by the clerk under *C.C.P. 664.5* (see *supra*, §59).

(b) 15 days after notice of entry of judgment or dismissal is served. (See *Sanabria v. Embrey (2001) 92 C.A.4th 422, 425, 111 C.R.2d 837* [following plaintiff's voluntary dismissal, defendant had 15 days from service of notice of entry of dismissal to file memorandum of costs; memorandum filed over 5 months after service was untimely and trial court erred in awarding costs].)

(c) 180 days after entry of judgment. (See *Haley v. Casa Del Rey Homeowners Assn. (2007) 153 C.A.4th 863, 879, 63 C.R.3d 514* [operative event is entry of judgment, not entry of special verdict; memorandum filed well before entry of judgment, but almost 30 days after entry of special verdict, was timely]; on premature filing before entry of judgment, see *infra*, §142.)

C.R.C., Rule 3.1700(a)(1) contemplates the entry of a dismissal or judgment as a predicate to a costs award. (See *Boonyarit v. Payless Shoesource (2006) 145 C.A.4th 1188, 1192, 52 C.R.3d 241* [award of costs to defendant who failed to secure entry of order or judgment of dismissal after being voluntarily dismissed from action was not authorized; construing prior rule].)

(2) *Default Judgment.* Costs of a party seeking a default judgment must be requested at the time of applying for the judgment. (C.R.C., Rule 3.1700(a)(2).)

(3) *Condemnation Proceeding.* When a condemnation proceeding is dismissed on the plaintiff's motion, the memorandum for costs must be filed within 30 days after notice of entry of judgment. (*C.C.P. 1268.610(d)*); see *Estate of Weber (1952) 113 C.A.2d 160, 173, 247 P.2d 939* [service is required only on parties actually adverse]; 8 *Summary*

(10th), *Constitutional Law*, §1256.)

(4) *Extension of Time*. The parties may extend the time for filing and serving a cost memorandum by a written agreement filed with the clerk. In the absence of an agreement, the court may extend the time up to 30 days. (C.R.C., Rule 3.1700(b)(3); see *Adam v. DeCharon* (1995) 31 C.A.4th 708, 713, 37 C.R.2d 195 [trial court properly heard motion filed 35 days after notice of entry of judgment was mailed].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Fries v. Rite Aid Corp.* (2009) 173 C.A.4th 182, 185, 92 C.R.3d 523 [defendant who filed memorandum of costs within 15 days after service of notice of entry of dismissal was entitled to costs; defendant did not have to file proposed judgment with costs memorandum].

(4) *Extension of Time*. See *Cardinal Health 301 v. Tyco Electronics Corp.* (2008) 169 C.A.4th 116, 154, 87 C.R.3d 5 [by awarding costs to defendant who filed memorandum more than 15 days after nonsuit was granted, trial court implicitly granted extension under C.R.C., Rule 3.1700(b)(3); rule does not require that party expressly request extension or that court specifically state that it granted one].

(5) *(New) Expert Witness Fees Under Fair Employment and Housing Act*. C.R.C., Rule 3.1700(a)(1) applies only to the items listed in *C.C.P. 1033.5(a)* as "allowable as costs." These costs can be immediately entered by the clerk on the judgment, as required by C.R.C., Rule 3.1700(b)(4) (text, §147). C.R.C., Rule 3.1700(a)(1) does not apply to costs, such as fees for expert witnesses not ordered by the court, which require an exercise of discretion by the trial court. "[I]n the absence of a specific rule applicable to the discretionary award of expert witness fees, a motion for the expert witness fees permitted under FEHA is timely if filed within the same time constraints as those applicable to a noticed motion for attorney fees." (*Anthony v. Los Angeles* (2008) 166 C.A.4th 1011, 1014, 1016, 83 C.R.3d 306 [plaintiff was not required to claim expert witness fees, authorized by *Govt.C. 12965(b)*, within 15-day time constraint of C.R.C., Rule 3.1700(a)(1)]; on time requirements for filing noticed motion for attorneys' fees, see text, §301; on fees for expert not ordered by court, see text, §133.)



142 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XI. PROCEDURE FOR OBTAINING COSTS

A. Memorandum of Costs.

2. Service and Filing.

b. Late Filing.

7 *Within Cal. Proc. Judgm § 141*

[§ 141] Late Filing.

(1) *Former Law.* At one time, trial courts had broad discretion in allowing relief from a late filing when the opposing party failed to show prejudice. (*Hoover Community Hotel Dev. Corp. v. Thomson* (1985) 168 C.A.3d 485, 214 C.R. 264; see *Gerard v. Ross* (1988) 204 C.A.3d 968, 983, 251 C.R. 604 ["decision whether a party has waived costs by virtue of a late filing is left to the sound discretion of the trial court"].)

(2) *Scope of Discretion Under Present Law.* C.R.C., Rule 3.1700(b)(3) (supra, §140), which allows a trial court to extend the time for filing a memorandum of costs by 30 days, may limit the court's discretion to consider a memorandum filed after that point. Several cases have recognized such a limitation in the context of a motion for contractual attorneys' fees, formerly required to be served and filed at the same time as the memorandum of costs. (See *Nazemi v. Tseng* (1992) 5 C.A.4th 1633, 1641, 7 C.R.2d 762 [court's discretion to extend time was limited by former C.R.C., Rule 870(b)(3) (now C.R.C., Rule 3.1700(b)(3)); attorneys' fees award reversed where motion was made after 30-day maximum extension]; *Bankes v. Lucas* (1992) 9 C.A.4th 365, 371, 11 C.R.2d 723 [same]; *Russell v. Trans Pac. Group* (1993) 19 C.A.4th 1717, 1726, 24 C.R.2d 274 [cost procedure requirements are mandatory and trial court does not have discretion to disregard noncompliance]; on procedure for claiming attorneys' fees, see *infra*, §295 et seq.)

(3) *Relief Under C.C.P. 473.* Even if a trial court no longer has discretion to disregard a party's failure to file its memorandum of costs in a timely manner, it may grant relief under *C.C.P. 473(b)* (8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §144 et seq.) upon a showing of excusable neglect, mistake, inadvertence, or surprise. (See *Russell v. Trans Pac. Group*, *supra*, 19 C.A.4th 1717, 1729; *Cal. Civil Practice*, 4 Procedure §33:5 [relief from late filing of memorandum of costs], §33:23 [form; notice of motion for order granting relief from failure to file timely memorandum of costs].)

SUPPLEMENT: [This section is current through the latest supplement]



143 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XI. PROCEDURE FOR OBTAINING COSTS

A. Memorandum of Costs.

2. Service and Filing.

c. Premature Service or Filing.

7 *Witkin Cal. Proc. Judgm* § 142

[§ 142] Premature Service or Filing.

(1) *Former Law.* The language of former C.C.P. 1033 made it clear that the cost bill could not be filed before the verdict or decision. Service of the cost bill before the verdict or decision, on the other hand, was valid. (*Lange v. Fisher* (1983) 146 C.A.3d 113, 116, 194 C.R. 517.)

(2) *Present Law.* The premature filing of a cost memorandum under C.R.C., Rule 3.1700(a)(1) should be considered a "mere irregularity at best" and does not require striking the memorandum absent prejudice to other party. (*Pamela W. v. Millsom* (1994) 25 C.A.4th 950, 961, 30 C.R.2d 690; see *Brown v. West Covina Toyota* (1994) 26 C.A.4th 555, 560, 32 C.R.2d 85 [premature cost bill was deemed timely]; *Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 C.A.4th 863, 879, 63 C.R.3d 514 [memorandum filed well before entry of judgment, but after entry of special verdict, was timely].)

SUPPLEMENT: [This section is current through the latest supplement]



144 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XI. PROCEDURE FOR OBTAINING COSTS

A. Memorandum of Costs.

3. Memorandum or Motion After Judgment.

7 Witkin Cal. Proc. Judgm § 143

[§ 143] Memorandum or Motion After Judgment.

A memorandum of costs incurred after judgment in connection with enforcement of the judgment must be served personally or by mail, and filed, at any time not more than 2 years after the item has been incurred, but before the judgment is fully satisfied. (*C.C.P. 685.070(b)*; see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §47; *C.E.B., 2 Debt Collection Practice 2d §11.49*; 7C *Am.Jur. P.P. Forms (2002 ed.)*, Costs, §93.)

Within the same time period, the judgment creditor may make a noticed motion to recover the costs of enforcing the judgment, including costs incurred but not approved by the court or referee in a proceeding supplementary to execution. (*C.C.P. 685.080(a)*.) The notice of motion must be supported by affidavit of a person having knowledge of the facts. (*C.C.P. 685.080(b)*; see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §48; *Cal. Civil Practice, 4 Procedure §30:11 et seq.* [forms: notice of motion, declaration in support, and order].)

SUPPLEMENT: [This section is current through the latest supplement]



145 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XI. PROCEDURE FOR OBTAINING COSTS

B. Challenging Award of Costs.

1. Motion To Strike or Tax Costs.

7 Witkin Cal. Proc. Judgm § 144

[§ 144] Motion To Strike or Tax Costs.

(1) *Motion To Strike*. The adverse party may challenge the entire cost bill for late service or another irregularity, or on the ground that the action or judgment does not call for a cost award, by a motion to strike the cost bill from the files. (See *Markart v. Zeimer* (1925) 74 C.A. 152, 156, 239 P. 856; *Le Cyr v. Dow* (1938) 26 C.A.2d 459, 460, 79 P.2d 777.)

(2) *Motion To Tax*. If the judgment properly carries costs, but objection is made to any of the items or amounts claimed, the adverse party files a motion to tax costs. (See *Ladas v. California State Auto. Assn.* (1993) 19 C.A.4th 761, 23 C.R.2d 810 [motion to tax challenging numerous cost items]; C.E.B., 3 Civil Proc. During Trial 3d, §27.103 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §§16.36, 16.37; see also *C.C.P. 685.070(c)* [similar procedure for motion to tax costs of enforcing judgment]; for federal procedure, see *F.R. Civ.P., Rule 54(d)*; 10 Federal Practice & Procedure (Wright, Miller & Kane) §2679; 21A Federal Procedure, L. Ed. §51:120.)

(3) *Form of Motion*. Unless the motion objects to the entire cost memorandum, a motion to strike or tax costs must "refer to each item objected to by the same number and appear in the same order as the corresponding cost item claimed on the memorandum of costs" and must state why the item is objectionable. (C.R.C., Rule 3.1700(b)(2); see Cal. Civil Practice, 4 Procedure §§33:20, 33:24 [forms: notice of motion for order taxing costs; notice of motion for order striking memorandum of costs]; 7C Am.Jur. P.P. Forms (2002 ed.), Costs, §110 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Motion To Tax*. See *Gorman v. Tassajara Dev. Corp.* (2009) 178 C.A.4th 44, 68, 100 C.R.3d 152 [lack of formal motion to tax costs did not prejudice party seeking costs; trial court properly considered objections to costs].



146 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Within Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XI. PROCEDURE FOR OBTAINING COSTS

B. Challenging Award of Costs.

2. Service and Filing.

7 *Within Cal. Proc. Judgm § 145*

[§ 145] Service and Filing.

(1) *Time Limits.* A notice of motion to strike or tax costs must be served and filed within 15 days after service of the cost memorandum, but, if service was by mail, the period is extended as provided by *C.C.P. 1013* (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §30). (C.R.C., Rule 3.1700(b)(1); see *Brown v. West Covina Toyota* (1994) 26 *C.A.4th* 555, 560, 32 *C.R.2d* 85 [premature motion to strike was deemed timely where premature cost bill was deemed filed on date of judgment].)

(2) *Extension of Time.* The parties may extend the time for filing and serving a motion to strike or tax costs by a written agreement filed with the clerk. In the absence of an agreement, the court may extend the time up to 30 days. (C.R.C., Rule 3.1700(b)(3).)

(3) *Waiver.* Failure to file a motion to tax costs may constitute a waiver of the right to object to the costs awarded. (*Jimenez v. Oxnard* (1982) 134 *C.A.3d* 856, 859, 184 *C.R.* 864; *Santos v. Civil Service Bd.* (1987) 193 *C.A.3d* 1442, 1447, 239 *C.R.* 14, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



147 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XI. PROCEDURE FOR OBTAINING COSTS

B. Challenging Award of Costs.

3. Burden of Proof.

7 *Within Cal. Proc. Judgm* § 146

[§ 146] Burden of Proof.

(1) *Burden on Party Opposing Costs.* If items on their face appear to be proper charges, the verified memorandum of costs is *prima facie* evidence of their propriety, and the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. (*Murphy v. F.D. Cornell Co.* (1930) 110 C.A. 452, 455, 294 P. 490; *Ladas v. California State Auto. Assn.* (1993) 19 C.A.4th 761, 774, 23 C.R.2d 810; see *Nelson v. Anderson* (1999) 72 C.A.4th 111, 131, 84 C.R.2d 753 [burden was on plaintiff to show that defendant's requested costs were unnecessary or unreasonable where defendant's charges appeared on their face to be proper]; *Benach v. Los Angeles* (2007) 149 C.A.4th 836, 856, 57 C.R.3d 363 [same; citing *Nelson*].) And if this showing is not controverted, the trial court's order disallowing costs will be reversed. (*Fay v. Fay* (1913) 165 C. 469, 475, 132 P. 1040.)

(2) *Burden on Party Claiming Costs.* On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs. (*Whitaker v. Moran* (1914) 23 C.A. 758, 761, 139 P. 901 [impropriety raised by affidavit of objector]; *Oak Grove School Dist. of Santa Clara v. City Title Ins. Co.* (1963) 217 C.A.2d 678, 698, 699, 32 C.R. 288; *Melnyk v. Robledo* (1976) 64 C.A.3d 618, 624, 134 C.R. 602; *Ladas v. California State Auto. Assn.*, *supra*.)

(3) *Illustrations.* In *Fennessy v. DeLeuw-Cather Corp.* (1990) 218 C.A.3d 1192, 267 C.R. 772, defendant and five codefendants in a wrongful discharge action were granted summary judgment. Defendant was the sole party awarded costs under *C.C.P. 1032* and he received the entire amount he requested. Plaintiff moved to strike or tax costs, contending that "there is no basis for awarding defendant ... any costs because none ... were incurred by him individually." The trial judge denied the motion, finding that defendant had made a *prima facie* showing of entitlement to the costs, and that plaintiff had failed to meet his burden of proving that they were not legitimate. *Held*, award of costs reversed; plaintiff's motion was adequate.

(a) Under former C.R.C., Rule 870(b)(2) (now C.R.C., Rule 3.1700(b)(2)), the motion to strike or tax costs did not have to specify each objectionable item, so long as it objected to defendant's entire cost memorandum. (218 C.A.3d 1195.)

(b) It was undisputed that all defendants were represented by the same counsel, who took depositions and

performed other tasks that benefited all defendants. Once plaintiff questioned defendant's entitlement to costs incurred by the six defendants "nothing more needed to be or could have been added by additional declarations or affidavits." (218 C.A.3d 1196.) (See *Acosta v. SI Corp.* (2005) 129 C.A.4th 1370, 1379, 1380, 29 C.R.3d 306 [remanded for trial judge to review supporting documents for specific costs disputed by plaintiffs; because trial judge had mentioned his reluctance to undergo "tedious" task of review, appellate court could not assume that he properly fulfilled his obligation].)

SUPPLEMENT: [This section is current through the latest supplement]



148 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XI. PROCEDURE FOR OBTAINING COSTS

C. Judgment.

1. Inclusion of Cost Award.

7 *Witkin Cal. Proc. Judgm* § 147

[§ 147] Inclusion of Cost Award.

(1) *Entry by Clerk After Postjudgment Hearing.* "When a judgment includes an award of costs and fees, often the amount of the award is left blank for future determination. ... After the parties file their memoranda of costs and any motions to tax, a postjudgment hearing is held and the trial court makes its determination of the merits of the competing contentions. When the order setting the final amount is filed, the clerk enters the amounts on the judgment nunc pro tunc." (*Grant v. List & Lathrop* (1992) 2 C.A.4th 993, 996, 997, 3 C.R.2d 654; see *Nazemi v. Tseng* (1992) 5 C.A.4th 1633, 1637, 7 C.R.2d 762.)

(2) *Entry by Clerk Without Postjudgment Hearing.* After the time has passed for a motion to strike or tax costs or for determination of that motion, the clerk must immediately enter the costs on the judgment. (C.R.C., Rule 3.1700(b)(4); see C.E.B., 3 Civil Proc. During Trial 3d, §27.109 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial, §16.42; Cal. Civil Practice, 4 Procedure §33:22 [form; order granting motion for taxing costs and striking or reducing items of costs]; 7C Am.Jur. P.P. Forms (2002 ed.), Costs, §87 et seq.) Unauthorized or premature entry by the clerk is ineffectual. (*Hennessy v. Superior Court* (1924) 194 C. 368, 371, 228 P. 862 [immediate entry before end of period allowed for motion to tax].)

(3) *Appeal From Judgment.* The award of costs, being part of the judgment, is reviewable on appeal from the judgment. But an order on a motion to tax costs, or to strike a cost bill from the files, is separately appealable as an order after final judgment. (*Markart v. Zeimer* (1925) 74 C.A. 152, 155, 239 P. 856; see *Le Cyr v. Dow* (1938) 26 C.A.2d 459, 460, 79 P.2d 777; *Grant v. List & Lathrop* (1992) 2 C.A.4th 993, 996, 997, 3 C.R.2d 654, 9 Cal. Proc. (5th), *Appeal*, §187 [although postjudgment order setting costs was appealable and could have been challenged by separate notice of appeal, separate appeal was not required].) And mandamus will lie to compel the trial court to decide a motion to tax costs even though an appeal is pending from the judgment, for the motion is ancillary and collateral to the action. (*Hennessy v. Superior Court*, supra, 194 C. 373.)

SUPPLEMENT: [This section is current through the latest supplement]



149 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XI. PROCEDURE FOR OBTAINING COSTS

C. Judgment.

2. Failure To Include Costs.

7 *Witkin Cal. Proc. Judgm* § 148

[§ 148] Failure To Include Costs.

(1) *Theory That Judgment Must Include Award.* Several older cases appear to hold that costs are not recoverable unless awarded by the judgment, and that, unless the judgment contains a provision for costs (see *supra*, §147), a memorandum of costs is ineffective, and the right to costs is permanently lost. (*Gould v. Moss* (1910) 158 C. 548, 549, 111 P. 925; *Kaufman v. Pacific Indem. Co.* (1936) 5 C.2d 761, 769, 56 P.2d 504; *Union Trust Co. of San Diego v. Superior Court* (1939) 13 C.2d 541, 543, 90 P.2d 582.)

(2) *Theory of Clerk's Ministerial Duty.* The opposing theory is that where the case is one in which the prevailing party is entitled by statute to costs, the judgment automatically carries a right to costs even though no express provision is made for costs. Justification for this theory is found in the mandatory language of C.R.C., Rule 3.1700(b)(4), directing the clerk to include the award in the judgment. Performance of this duty is a ministerial act, not a judicial act, and failure to perform is a clerical error that the judge can afterwards correct. (See *Miles Calif. Co. v. Hawkins* (1959) 175 C.A.2d 162, 165, 345 P.2d 492, citing the text; *Williams v. Santa Maria Joint Union High School Dist.* (1967) 252 C.A.2d 1010, 1014, 60 C.R. 911, citing the text.)

In *Hydratec v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 C.A.3d 924, 272 C.R. 899, plaintiff sued several defendants to recover its expenses in constructing an irrigation system on a ranch. Judgment was rendered in plaintiff's favor except as to one defendant. Plaintiff prepared proposed judgments providing that all of the parties bear their own costs and attorneys' fees, and the prevailing defendant did not object. *Held*, the prevailing defendant waived its right to recover costs under *C.C.P. 1032* by failing to file a verified memorandum of costs.

(a) A trial court's duty to award costs to a prevailing party under *C.C.P. 1032* is ministerial. To the extent the costs provisions of the judgments violated *C.C.P. 1032*, "the trial court was authorized to correct the judgments to reflect the statutory command in the same manner it was empowered to remedy any other clerical error in the judgments." (223 C.A.3d 928, citing *Miles Calif. Co. v. Hawkins* and *Williams v. Santa Maria Joint Union High School Dist.*)

(b) "However, the fact an incorrect cost allocation may be rectified does not mean the aggrieved party may wait and raise the issue for the first time on appeal. ... The time provisions relating to the filing of a memorandum, while not jurisdictional, are mandatory." (223 C.A.3d 928.)

SUPPLEMENT: [This section is current through the latest supplement]



150 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
 XII. RIGHT TO ATTORNEYS' FEES
 A. In General.

7 *Witkin Cal. Proc. Judgm* § 149

[§ 149] In General.

(1) *Presumption Against Fee Shifting*. "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation ... is left to the agreement, express or implied, of the parties." (*C.C.P. 1021*.) *C.C.P. 1021* is the California version of the "American rule" under which each party must pay its own legal fees. (*Trope v. Katz* (1995) 11 C.4th 274, 278, 279, 45 C.R.2d 241, 902 P.2d 259; *Covenant Mut. Ins. Co. v. Young* (1986) 179 C.A.3d 318, 321, 225 C.R. 861, *infra*, §175; see *Salgado v. Los Angeles* (1998) 19 C.4th 629, 651, 80 C.R.2d 46, 967 P.2d 585, 6 Summary (10th), *Torts*, §964 [Medical Injury Compensation Reform Act (MICRA) does not provide for award of attorneys' fees to prevailing party; ordinary rule that each party bears its own fees applied to medical malpractice action against county hospital]; *Trails Trucking v. Bendix-Westinghouse Automotive Air Brake Co.* (1973) 32 C.A.3d 519, 522, 524, 108 C.R. 30; *Douglas v. Los Angeles Herald-Examiner* (1975) 50 C.A.3d 449, 467, 123 C.R. 683; *UMET Trust v. Santa Monica Med. Inv. Co.* (1983) 140 C.A.3d 864, 872, 189 C.R. 922 [party could not recover attorneys' fees incurred in defending against his own wrongdoing]; *Steele v. Gold* (1984) 150 C.A.3d 928, 931, 198 C.R. 257; *Sam Andrews' Sons v. Agricultural Lab. Rel. Bd.* (1988) 47 C.3d 157, 172, 253 C.R. 30, 763 P.2d 881; *California Fair Plan Assn. v. Politi* (1990) 220 C.A.3d 1612, 1617, 270 C.R. 243 [insurer is limited to contract damages in action against insured for breach of covenant of good faith and fair dealing; hence, insurer is not entitled to fees in absence of contract provision]; *Abbett Elec. Corp. v. California Fed. Savings & Loan Assn.* (1991) 230 C.A.3d 355, 358, 281 C.R. 362; *United Services Auto. Assn. v. Dalrymple* (1991) 232 C.A.3d 182, 187, 283 C.R. 330; *Grasso v. Crow* (1997) 57 C.A.4th 847, 850, 67 C.R.2d 367, 4 Summary (10th), *Negotiable Instruments*, §49 [fees are not "specifically provided for" in U.C.C. 3416 (warranty on transfer of negotiable instrument), and thus statute does not authorize fee shifting]; CACI, No. 3964 [jurors not to consider attorneys' fees and court costs in determining damages].)

(2) *Commentary*. The rule has been the subject of extensive commentary. (See C.E.B., 3 Civil Proc. During Trial 3d, §26.2; Cal. Civil Practice, 2 Procedure, §8:38 et seq.; Cal. Civ Practice, 4 Procedure, §33.25 et seq.; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §16.61 et seq.; C.E.B., Attorney Fee Awards 2d, Chap. 1; 101 *Harv. L. Rev.* 1231 [proposal for fee awards to low-income, prevailing parties]; 23 *Pepperdine L. Rev.* 125 [fee shifting on summary judgment or dismissal as equitable deterrent to frivolous lawsuits; criticizing American rule]; 57 *So. Cal. L. Rev.* 503; 100 *A.L.R.2d* 397 [what constitutes "trial" within meaning of statute allowing attorneys' fees as costs]; 43 *A.L.R.3d* 793 [fees in civil contempt proceedings]; 51 *A.L.R.3d* 1336 [statute allowing fees to out-of-state defendant successfully defending suit brought in state]; 73 *A.L.R.3d* 515 [validity of statute allowing fee to successful claimant but

not to defendant, or vice versa]; 34 *A.L.R.4th* 457 [attorneys' fees in mandamus proceedings]; 49 *A.L.R.4th* 825 [obduracy as basis for award of attorneys' fees in jurisdiction that follows American rule]; 9 *A.L.R.5th* 933 [recovery of attorney' fees and costs for breach of agreement not to sue]; 20 *Am.Jur.2d* (2005 ed.), *Costs* §55 et seq.)

(3) *Exceptions.* *C.C.P. 1021* does not give the whole picture. Attorneys' fees are allowed as costs (see, *infra*, §150) and awarded as part of the judgment in the following cases:

(a) When they are provided for by contract (see *infra*, §165 et seq.).

(b) When they are provided for by statute (see *infra*, §210 et seq.) or ordinance (see *infra*, §230).

(c) When the plaintiff in an equitable action recovers or preserves a common fund, or obtains benefits for the plaintiff and others (see *infra*, §249 et seq.).

(4) *Distinctions.* Fees awarded to a prevailing party as part of the judgment, considered in this topic, must be distinguished from fees that are awarded as damages in certain cases (see *infra*, §151 et seq.), as sanctions for discovery violations (see 2 *Cal. Evidence* (4th), *Discovery*, §249 et seq.) or bad faith actions or tactics (see *infra*, §222; 7 *Cal. Proc.* (5th), *Trial*, §226 et seq.), or under other circumstances (see *infra*, §158).

West's Key Number Digest, *Costs* 194.14, 194.16

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Presumption Against Fee Shifting.* See *Applera Corp. v. MP Biomedicals, LLC* (2009) 173 *C.A.4th* 769, 789, 93 *C.R.3d* 178 [fees were properly awarded where agreement provided for enforcement under laws of Switzerland; Swiss law follows English Rule, rather than American Rule, and grants fees to prevailing party as matter of course].



151 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

B. Nature of Fees.

1. Fees as Costs.

7 *Within Cal. Proc. Judgm § 150*

[§ 150] Fees as Costs.

(1) *General Rule.* Attorneys' fees authorized by contract, statute, or law are an item of allowable costs. (*C.C.P. 1033.5(a)(10)*; see *Nielsen v. Stumbos* (1990) 226 C.A.3d 301, 305, 276 C.R. 272 [contractual attorneys' fees awarded to party who recovers no money damages are treated as any other incidental cost of litigation for purposes of automatic stay provisions of *C.C.P. 916*].) Where a statute refers to an award of "costs and attorney's fees," attorneys' fees are "an item and component of the costs to be awarded and are allowable as costs" under *C.C.P. 1033.5(a)(10)*. (*C.C.P. 1033.5(c)(5)*; see *C.C. 1717(a)*, *infra*, §170 et seq. [attorneys' fees "shall be an element of the costs of suit"]; *California v. Superior Court (Lovelace)* (1995) 11 C.4th 50, 81, 44 C.R.2d 399, 900 P.2d 648 [statute that expressly precluded recovery of "costs" also precluded recovery of "included category of attorney fees"]; *Dorman v. DWLC Corp.* (1995) 35 C.A.4th 1808, 1814, 42 C.R.2d 459; *Elton v. Anheuser-Busch Beverage Group* (1996) 50 C.A.4th 1301, 1307, 58 C.R.2d 303 [fees under *C.C.P. 1021.9* (*infra*, §230) are costs, not damages; thus fee award did not conflict with statutory limitation on types of damages available for fire injury].) Labeling these fees according to whether they are authorized by contract, statute, or law determines, among other things, the procedure for obtaining the fees. (See *Bankes v. Lucas* (1992) 9 C.A.4th 365, 370, 371, 11 C.R.2d 723; *C.E.B., Attorney Fee Awards* 2d, §1.6 et seq.; 64 *A.L.R.2d* 1329 [fees as costs or damages in prohibition proceedings]; *infra*, §295 et seq.)

(2) *Distinction: Where Contract or Statute Does Not Specify Fees.* Where a contract or statute provides for recovery of "costs" alone, without specifying attorneys' fees, fees are not authorized. (See *Royster Const. Co. v. Urban West Communities* (1995) 40 C.A.4th 1158, 1170, 47 C.R.2d 684 [lien claimant was not entitled to recover attorneys' fees in action on mechanic's lien where release bond and statute governing release bonds merely provided for "costs of suit"]; *Department of Forestry & Fire Protection v. LeBrock* (2002) 96 C.A.4th 1137, 1140, 117 C.R.2d 790 [statutes that allow forestry department to collect, from person responsible for fire, costs of suppressing fire, providing rescue or emergency services, investigating, making reports, accounting for fire, and collecting suppression and rescue costs do not authorize attorneys' fees; property owner whom department sued for costs could not collect her fees, even though jury returned verdict in her favor].)

(3) *Fees Authorized by Law.* Before 1993, *C.C.P. 1033.5* allowed for the recovery of fees only as authorized by contract or statute. Many courts nevertheless awarded fees under the common fund and substantial benefit theories (see *infra*, §249 et seq.). The purpose of the 1993 amendment making fees authorized by "law" recoverable was to allow

attorneys' fees based on case law to be recovered as costs. The amendment did not change existing law. It simply codified it. (*Tanner v. Tanner* (1997) 57 C.A.4th 419, 423, 67 C.R.2d 204.)

SUPPLEMENT: [This section is current through the latest supplement]



152 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

B. Nature of Fees.

2. Fees as Damages.

a. "Tort of Another" Doctrine.

1. When Fees Are Recoverable.

7 *Witkin Cal. Proc. Judgm* § 151

[§ 151] When Fees Are Recoverable.

A person who through the tort of another has been required to protect his or her interests by bringing or defending an action against a third person may recover for the reasonably necessary loss of time, attorneys' fees, and other expenditures he or she incurred. (*Prentice v. North Amer. Title Guaranty Corp., Alameda Div. (1963) 59 C.2d 618, 620, 30 C.R. 821, 381 P.2d 645, 6 Summary (10th), Torts, §1656; Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 C.A.3d 104, 112, 128 C.R. 901; see C.E.B., Attorney Fee Awards 2d, §9.4; 66 Cal. L. Rev. 94 [Prentice]; 44 A.L.R.4th 776 [recovery of attorneys' fees in fraud action].)*

The "tort of another" doctrine, rather than being an exception to the rule that parties must bear their own attorneys' fees, is an application of the usual measure of tort damages. "The theory of recovery is that the attorney fees are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action." (*Sooy v. Peter (1990) 220 C.A.3d 1305, 1310, 270 C.R. 151; see C.E.B., Attorney Fee Awards 2d, §9.5.*)

Cases applying the doctrine include the following:

Gray v. Don Miller & Associates (1984) 35 C.3d 498, 507, 198 C.R. 551, 674 P.2d 253 [fees were recoverable as damages in fraud action by prospective buyer of real property against real estate brokerage firm, where broker falsely notified buyer that his offer had been accepted, forcing buyer to protect his interest by bringing action against sellers].

Manning v. Sifford (1980) 111 C.A.3d 7, 12, 168 C.R. 387 [applying *Prentice* to allow fees to brokers who were sued by purchaser of land after adjoining landowner interfered with purchaser's easement].

Bruckman v. Parliament Escrow Corp. (1987) 190 C.A.3d 1051, 1060, 235 C.R. 813 [in vendor's action against escrow agent, fees incurred in purchaser's earlier action were recoverable].

Third Eye Blind v. Near North Entertainment Ins. Services, LLC (2005) 127 C.A.4th 1311, 1324, 26 C.R.3d 452

[insureds who were forced to sue their insurer for coverage could recover attorneys' fees as damages in their negligence action against their business manager and insurance broker, in which insureds claimed that defendants should have advised them to obtain more definite coverage].

SUPPLEMENT: [This section is current through the latest supplement]



153 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

B. Nature of Fees.

2. Fees as Damages.

a. "Tort of Another" Doctrine.

2. Distinctions.

7 *Witkin Cal. Proc. Judgm* § 152

[§ 152] Distinctions.

(1) *Employer-Employee Situation. Golden West Baseball Co. v. Talley* (1991) 232 C.A.3d 1294, 284 C.R. 53, involved an agreement between plaintiff and the city of Anaheim to lease a baseball stadium. Plaintiff sued defendant city manager for fraud, but sought as damages only the attorneys' fees incurred in a prior action against the city necessitated by defendant's alleged misrepresentations concerning plaintiff's leasehold interest in the stadium parking lot. *Held*, summary judgment for defendant affirmed.

(a) Because plaintiff wished to apply the "tort of another" doctrine, the issue is whether the relationship between defendant and the city was such that the city could be considered a "third party." (232 C.A.3d 1302.)

(b) In addition to conceding that defendant acted as a representative of the city during all of the negotiations concerning the lease, plaintiff offered no evidence that defendant exceeded the scope of his employment, and presented no theory as to how defendant's interests could possibly be divergent from those of the city. "Under these circumstances we hold that an employee cannot be sued under the 'tort of another' doctrine to recover attorneys' fees incurred in an action against the employer unless it is shown the employee was not acting on behalf of the employer." (232 C.A.3d 1302.)

(c) This holding is consistent with the California Supreme Court's policy of moving cautiously in expanding the nonstatutory bases on which awards of attorneys' fees may be based. (232 C.A.3d 1302, citing *Bauguess v. Paine* (1978) 22 C.3d 626, 150 C.R. 461, 586 P.2d 942, 7 Cal. Proc. (5th), Trial, §226.) A more important consideration is that allowing plaintiff to maintain this action would result in a second lawsuit against the tortious employee following every successful action against an employer, and the employer would inevitably be required to pay the "damages" of the second action. The trial judge was correct in concluding that plaintiff's invocation of the "tort of another" doctrine was merely an improper attempt to circumvent the American rule that parties bear their own fees (supra, §149). (232 C.A.3d 1303.)

(d) In the prior action against the city, plaintiff also sued another party who was clearly a "third party." However,

this does not change the result. Plaintiff's primary contention in the prior action was that the city could not undertake any commercial development of the leased property, either by itself or through the additional defendant, without plaintiff's consent. Hence, the presence of the additional defendant did not change the basic character of the prior action, which was directed primarily against the city. (232 C.A.3d 1304.)

(2) *No Breach of Duty.* In *Lubner v. Los Angeles* (1996) 45 C.A.4th 525, 53 C.R.2d 24, a truck owned by defendant city crashed into plaintiff's home and destroyed numerous works of art. Plaintiffs sued their homeowners insurance carrier to recover property damages and then sued defendant. In seeking attorneys' fees in their action against defendant, plaintiffs claimed that they had been forced to sue their insurance carrier because defendant unjustifiably denied their claim for damages. *Held*, plaintiffs are not entitled to fees. The "tort of another" doctrine does not apply because defendant's denial of the claim was not a breach of its duty of care to plaintiffs. (45 C.A.4th 534.) (See *Watson v. Department of Trans.* (1998) 68 C.A.4th 885, 893, 80 C.R.2d 594 ["tort of another" doctrine does not entitle exonerated defendants in commonplace, multiparty tort actions to recover attorneys' fees from unrelated codefendants who are held liable; quoting *Davis v. Air Technical Industries* (1978) 22 C.3d 1, 148 C.R. 419, 582 P.2d 1010, *infra*, §153, and refusing to extend *Prentice*]; *David v. Hermann* (2005) 129 C.A.4th 672, 687, 28 C.R.3d 622 [*Prentice* was not applicable to action to invalidate testamentary documents; action was not one for damages on tort theory of liability].)

(3) *Underlying Action Was Not Natural and Probable Consequence of Tort.* In *Electrical Electronic Control v. Los Angeles Unified School Dist.* (2005) 126 C.A.4th 601, 24 C.R.3d 316, plaintiff, a subcontractor that had not been paid for work it had performed for defendant school district, sued the general contractor alleging various causes of action, the district to enforce stop notices, and an undetermined surety to enforce any payment bonds that might exist. Plaintiff subsequently brought the present action against defendant district for negligently failing to require the general contractor to obtain a payment bond. The underlying action was settled, and the present action resulted in a judgment awarding plaintiff damages, including \$ 80,000 for attorneys' fees that plaintiff incurred in the underlying action. *Held*, the damages award must be reduced by \$ 80,000.

(a) The "tort of another" doctrine provides that, when a plaintiff must bring an action against a third party as the natural and probable consequence of the defendant's negligence, the attorneys' fees in that action are recoverable as damages against the defendant. (126 C.A.4th 616.) Conversely, when the action against the third party is not the natural and probable consequence of the defendant's negligence, fees are not recoverable. Here, plaintiff's underlying action was not a natural and probable consequence of defendant's failure to require the general contractor to provide a payment bond. Stop notice and payment bond remedies are cumulative, and the underlying action was independent of the district's negligence. (126 C.A.4th 617.)

(b) Plaintiff argues that it would not have brought the underlying action had a payment bond been in place. "This may be true. However, [plaintiff] was not required to bring the underlying action at all." There are no damages plaintiff recovered in the underlying action that it could not also have recovered directly from defendant in the negligence action. Plaintiff's attorneys' fees were caused by its decision to pursue a joint tortfeasor, rather than simply seek a recovery based on defendant's negligence. (126 C.A.4th 617.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Joint Negligence of Codefendants.* The "tort of another" doctrine does not apply where a plaintiff has been damaged by the joint negligence of multiple codefendants. Plaintiffs may not "pick and choose which one of several joint tortfeasors should absorb the costs of the plaintiffs litigating with the other tortfeasors." (*Gorman v. Tassajara Dev. Corp.* (2009) 178 C.A.4th 44, 78, 81, 100 C.R.3d 152 [doctrine did not apply in negligence action against contractor and numerous subcontractors, where plaintiffs were damaged by combined negligence of all; plaintiffs named subcontractors as defendants because of subcontractors' own negligence, not as result of contractor's negligence].)



154 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
 XII. RIGHT TO ATTORNEYS' FEES
 B. Nature of Fees.
 2. Fees as Damages.
 b. Action Based on Failure To Defend.

7 *Witkin Cal. Proc. Judgm* § 153

[§ 153] Action Based on Failure To Defend.

(1) *Insurer's Failure To Defend Insured.* Where an insurer, in violation of its policy obligation, refuses to defend the insured in an action, and the insured furnishes his or her own defense, the insured may recover from the insurer the attorneys' fees incurred in that action. However, in the action to recover the amount of fees previously incurred, the insured is not entitled to attorneys' fees; i.e., this is an ordinary action for damages against a tortfeasor, in which fees are not allowed. The rule is the same whether the action is based on prior refusal to defend or bad faith refusal to settle. (*Carroll v. Hanover Ins. Co.* (1968) 266 C.A.2d 47, 50, 71 C.R. 868; *Twentieth Century-Fox Film Corp. v. Harbor Ins. Co.* (1978) 85 C.A.3d 105, 114, 115, 149 C.R. 313; see *Otis Elevator Co. v. Toda Const.* (1994) 27 C.A.4th 559, 566, 32 C.R.2d 404 [attorneys' fees in action on indemnity agreement were not allowable where they were not explicitly provided for in that agreement]; *Heppler v. J.M. Peters Co.* (1999) 73 C.A.4th 1265, 1293, 87 C.R.2d 497 [plaintiff homeowners, assignees of general contractor's rights to indemnity from subcontractor, were properly awarded general contractor's attorneys' fees as item of damages for subcontractor's failure to defend general contractor]; *Torres v. San Diego* (2007) 154 C.A.4th 214, 224, 64 C.R.3d 495 [attorneys' fees could be recovered in action to enforce municipal resolution that promised indemnification for members of public boards; fees were not limited to underlying actions that city was required to defend; distinguishing *Otis Elevator Co.*]; 77 A.L.R.2d 1143 [right of indemnitee's insurer defending action against indemnitee to recover from indemnitor]; 2 *Summary* (10th), *Insurance*, §297 et seq.)

(2) *Manufacturer's Failure To Defend Retailer.* In *Davis v. Air Technical Industries* (1978) 22 C.3d 1, 148 C.R. 419, 582 P.2d 1010, the plaintiff was injured when a defective hand-cranked portable freight elevator fell on his foot, and he sued the manufacturer and retailer on theories of negligence, breach of express warranty, and strict liability. The retailer asked the manufacturer to defend him, and on its refusal, cross-complained against it for implied indemnity and any attorneys' fees incurred in the defense. In the trial on the complaint, the manufacturer conducted its own defense without assistance from the retailer, and the retailer's defense was exclusively concerned with contesting the allegations of his negligence and breach of warranty and casting sole responsibility on the manufacturer. The retailer was granted a nonsuit on the breach of warranty issue, and the plaintiff voluntarily dismissed the negligence claim. The jury then found both defendants strictly liable and awarded \$ 7,516 in damages.

In the severed trial on the cross-complaint, the trial court gave the retailer judgment against the manufacturer for

the amount of the damages and attorneys' fees of \$ 19,804.77. *Held*, the award for attorneys' fees was improper.

(a) *No policy exception for products liability case.* The general rule that a tort defendant is responsible for his or her own attorneys' fees (see *supra*, §149) applies to claims for implied indemnity in products liability cases where the retailer indemnitee incurs fees solely in defense of his or her own alleged wrongdoing. (22 *C.3d* 5, 6.)

(b) *Distinctions.* The following situations are distinguishable:

(1) *Defending on behalf of indemnitor.* Because the retailer incurred the attorneys' fees exclusively in his own defense, the issue whether such fees can be recovered by an implied indemnitee who defends on behalf of the indemnitor was not before the court. (22 *C.3d* 4, footnote 3; 22 *C.3d* 6, footnote 7.)

(2) *Insurer who refuses to defend.* Where a liability insurer, in violation of its express contractual obligation, fails to defend its insured, it is liable for attorneys' fees incurred in the defense. No such contract is involved here. (22 *C.3d* 6, footnote 6.)

(3) *Express indemnity contract.* Under C.C. 2778(3), (4), where one party has agreed to indemnify the other against liability, the indemnitor must defend the indemnitee or pay the cost of his defense. No such rule applies to cases of noncontractual implied indemnity. (22 *C.3d* 6, footnote 6.)

(4) *Fees incurred in prior action.* The exception recognized in *Prentice v. North Amer. Title Guaranty Corp., Alameda Div.* (1963) 59 *C.2d* 618, 30 *C.R.* 821, 381 *P.2d* 645, "was not meant to apply in every case in which one party's wrongdoing causes another to be involved in litigation with a third party." Such an expansion "would eventually swallow" the general rule of *C.C.P. 1021* that each party must pay for its own attorney. And the fact that the retailer's attorneys' fees were substantially greater than the damages awarded to the plaintiff does not, given that the retailer was defending against allegations of his own culpability, justify a judicial departure from the statutory rule. (22 *C.3d* 7.)

SUPPLEMENT: [This section is current through the latest supplement]



155 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

B. Nature of Fees.

2. Fees as Damages.

c. Action Based on Insurer's Bad Faith.

1. When Fees Are Recoverable.

7 *Witkin Cal. Proc. Judgm* § 154

[§ 154] When Fees Are Recoverable.

(1) *Brandt Case*. In *Brandt v. Superior Court* (1985) 37 C.3d 813, 210 C.R. 211, 693 P.2d 796, plaintiff B was insured under a group disability income policy issued to his employer by defendant S. His complaint alleged that he became totally disabled and made a timely demand on S for benefits, but S unreasonably refused to pay. Three causes of action were pleaded: (a) breach of contract; (b) breach of the covenant of good faith and fair dealing; and (c) violation of *Ins.C. 790.03* (unfair claims practices). In the second cause, plaintiff listed attorneys' fees incurred in connection with the first cause as part of the resulting damage. S moved to strike that part of the complaint and the motion was granted. *Held*, mandamus granted to compel the trial court to vacate the order.

(a) *Conflicting decisions of Court of Appeal*. *Mustachio v. Ohio Farmers Ins. Co.* (1975) 44 C.A.3d 358, 118 C.R. 581, allowed recovery; *Austero v. Washington Nat. Ins. Co.* (1982) 132 C.A.3d 408, 182 C.R. 919, denied recovery, on the ground that *C.C.P. 1021* (supra, §149) precluded an award. The dissenting opinion in *Austero* is correct and much of it is adopted in the present opinion. (37 C.3d 816, 817.)

(b) *Attorneys' fees as damages*. "When an insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy, it follows that the insurer should be liable in a tort action for that expense. The attorney's fees are an economic loss--damages--proximately caused by the tort. ... These fees must be distinguished from recovery of attorney's fees *qua* attorney's fees, such as those attributable to the bringing of the bad faith action itself. What we consider here is attorney's fees that are recoverable as damages resulting from a tort in the same way that medical fees would be part of the damages in a personal injury action." (37 C.3d 817.)

(c) *Attorneys' fees as compensation*. *C.C.P. 1021* leaves to the agreement of the parties "the measure and mode of compensation;" but here, as in the third-party tort situation, what is involved is not the compensation of attorneys but damages wrongfully caused by defendant's acts. (37 C.3d 817.) This is also true in actions for false arrest and malicious prosecution, in which damages may include attorneys' fees incurred to obtain release from confinement or dismissal of the unjustified charges. (37 C.3d 818.)

(d) *Fees claimed as damages in action in which recovery is sought.* "The fact that--here as well as in *Austero*--the fees claimed as damages are incurred in the very lawsuit in which their recovery is sought, does not in itself violate section 1021's general requirement that parties bear their own costs of legal representation, though it may make the identification of allowable fees more sophisticated. If the insured were to recover benefits under the policy in a separate action before suing on the tort, the distinction between fees incurred in the policy action, recoverable as damages, and those incurred in the tort action, nonrecoverable, would be unmistakable. ... In the usual case, the attorney's fees will have been incurred in connection with a prior action; but there is no reason why recovery of such fees should be denied simply because the two causes ... are tried in the same court at the same time. ... There was no disadvantage to defendant in the fact that the causes, although separate, were concurrently tried." (37 C.3d 818, in part quoting *Prentice v. North Amer. Title Guaranty Corp., Alameda Div.* (1963) 59 C.2d 618, 30 C.R. 821, 381 P.2d 645.)

(e) *Cases distinguished.* *Lowell v. Maryland Cas. Co.* (1966) 65 C.2d 298, 54 C.R. 116, 419 P.2d 180, *Patterson v. Insurance Co. of North America* (1970) 6 C.A.3d 310, 85 C.R. 665, and *Carroll v. Hanover Ins. Co.* (1968) 266 C.A.2d 47, 71 C.R. 868, were not bad faith cases. The plaintiffs' entire actions there were comparable only to the first part of the present action, i.e., for benefits due under insurance policies, and there was no allegation of bad faith--as in the second part of the present action. Thus the plaintiffs in *Lowell*, *Patterson*, and *Carroll* sought attorneys' fees in an action for prosecution of that very action, i.e., attorneys' fees as compensation, not as damages. (37 C.3d 818.) The *Austero* majority, in relying on these three cases, blurred the distinction between bad faith conduct and nontortious but erroneous withholding of benefits. "When no bad faith has been alleged and proved, *Lowell*, *Patterson*, and *Carroll* preclude the award of attorney's fees incurred in obtaining benefits that the insurer erroneously, but in good faith, withheld from the insured. However, when the insurer's conduct is unreasonable, a plaintiff is allowed to recover for all detriment proximately resulting from the insurer's bad faith, which detriment *Mustachio* has correctly held includes those attorney's fees that were incurred to obtain the policy benefits and that would not have been incurred but for the insurer's tortious conduct." (37 C.3d 819.)

(f) *Davis case.* *Davis v. Air Technical Industries* (1978) 22 C.3d 1, 148 C.R. 419, 582 P.2d 1010, supra, §153, relied on by the dissent in the present case, held that the defendant seller in a products liability action could not recover attorneys' fees from the defendant manufacturer, although ultimately the manufacturer was found to be entirely at fault; i.e., the seller could not recover fees he had incurred exclusively to defend against allegations of his own negligence, even though the manufacturer's tort was responsible for the buyer's action against the seller. But *Davis* was given a narrow interpretation in *Gray v. Don Miller & Associates* (1984) 35 C.3d 498, 507, 198 C.R. 551, 674 P.2d 253, which confined the *Davis* limitations to products liability litigation, and allowed a prospective buyer to recover attorneys' fees in an action against a real estate broker for fraud. (37 C.3d 818, footnote 4.) (See also concurring opinion, 37 C.3d 820, arguing that *Davis*, decided by a divided court, should be overruled in light of the unanimous opinion in *Gray v. Don Miller & Associates*: "Why there should be a different rule on attorney fees in products liability cases as distinguished from all other causes has never been adequately explained.")

(g) *Amount of fees.* The fees recoverable may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract; fees attributable to obtaining any portion of the plaintiff's award that exceeds the amount due under the policy are not recoverable. (37 C.3d 819.)

(h) *Determination by court or by jury.* The determination of the recoverable fees (as damages) must be made by the trier of fact unless the parties stipulate otherwise. "A stipulation for a postjudgment allocation and award by the trial court would normally be preferable since the determination then would be made after completion of the legal services ... , and proof that otherwise would have been presented to the jury could be simplified because of the court's expertise in evaluating legal services." (37 C.3d 819.) If, however, the matter is to be presented to the jury, the court should instruct along the following lines: "If you find (1) that the plaintiff is entitled to recover on his cause of action for breach of the implied covenant of good faith and fair dealing, and (2) that because of such breach it was reasonably necessary for the plaintiff to employ the services of an attorney to collect the benefits due under the policy, then and only then is the plaintiff entitled to an award for attorney's fees incurred to obtain the policy benefits, which award must not include attorney's fees incurred to recover any other portion of the verdict." (37 C.3d 820.) (On *Brandt* and its progeny, see

C.E.B., Attorney Fee Awards 2d, §9.6 et seq.)

(2) *Cases Following Brandt*. The following are among the cases applying the *Brandt* analysis:

Essex Ins. Co. v. Five Star Dye House (2006) 38 C.4th 1252, 1263, 45 C.R.3d 362, 137 P.3d 192, 2 Summary (10th), *Insurance*, Supp., §241 [assignee of insured's bad faith cause of action against insurer received right to recover policy benefits in full, including fees authorized by *Brandt*].

Campbell v. Cal-Gard Surety Services (1998) 62 C.A.4th 563, 571, 73 C.R.2d 64 [trial court abused discretion when it denied plaintiff's request for attorneys' fees on ground that defendant had not acted in bad faith; jury found in plaintiff's favor on bad faith claim, defendant did not challenge that finding, and trial court did not have authority to make different factual findings; citing *Brandt*].

Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburg, Pennsylvania (2004) 118 C.A.4th 1061, 1074, 13 C.R.3d 586 [trial court properly limited damages award under *Brandt* to 40% of amount recovered as policy benefits; parties' contingency agreement specified that plaintiff would pay 40% of all amounts recovered in case].

(3) *Fees on Appeal*. There is some disagreement among the appellate courts about the availability of fees on appeal from a judgment for the insured. One court has held that the attorneys' fees the insured has to incur to defend a judgment against an insurer are a "logical extension" of the fees incurred in the trial court action. "[T]o the extent that appellate attorney fees reflect the continuation of services performed to obtain the rejected payment of policy benefits, they should be recoverable" under *Brandt*. (*Baron v. Fire Ins. Exchange* (2007) 154 C.A.4th 1184, 1198, 65 C.R.3d 502 [disagreeing with *Burnaby v. Standard Fire Ins. Co.* (1995) 40 C.A.4th 787, 47 C.R.2d 326, *infra*, §155].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Cases Following Brandt*. See *Major v. Western Home Ins. Co.* (2009) 169 C.A.4th 1197, 1218, 87 C.R.3d 556 [substantial evidence supported award of *Brandt* fees, where attorney carefully segregated time spent on bad faith action from time spent on contract action alone].



156 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

- Within Summary of California Law
 XII. RIGHT TO ATTORNEYS' FEES
 B. Nature of Fees.
 2. Fees as Damages.
 c. Action Based on Insurer's Bad Faith.
 2. Limitations on Recovery.

7 *Witkin Cal. Proc. Judgm* § 155

[§ 155] Limitations on Recovery.

(1) *Necessity of Contractual Relationship and Insurer's Bad Faith.* *Brandt v. Superior Court* (1985) 37 C.3d 813, 210 C.R. 211, 693 P.2d 796, supra, §154, was distinguished in *Fuhrman v. California Satellite Systems* (1986) 179 C.A.3d 408, 231 C.R. 113. Defendant accused plaintiff of illegally receiving its television signals, and made allegedly extortionate demands to settle its claim. Plaintiff sued defendant and, in her cause of action for extortion, sought recovery of attorneys' fees incurred for advice as a result of defendant's demands. *Held*, attorneys' fees were not recoverable. The broad language of *Brandt* should be limited to its factual setting--an action against an insurer by its insured for a bad faith refusal to pay benefits on an underlying contract; the present case involves neither an underlying contractual relationship nor bad faith on the part of an insurer. (179 C.A.3d 426, 427, 428.) A dissenting justice argued that the *Brandt* analysis was based on tort, not contract, principles, that it was not limited to insurance disputes, and that plaintiff should be entitled to recover as damages attorneys' fees reasonably incurred as a result of defendant's tortious conduct. (179 C.A.3d 430, 431.)

(2) *Fees on Appeal.* In *Burnaby v. Standard Fire Ins. Co.* (1995) 40 C.A.4th 787, 47 C.R.2d 326, plaintiff homeowner made a claim on his homeowners policy for landslide damage to his property. Defendant insurer denied the claim. Plaintiff sued for breach of contract and tortious breach of the covenant of good faith and fair dealing. The jury awarded plaintiff over \$ 235,000 in contractual damages, \$ 200,000 in "extracontractual damages," which included attorneys' fees and emotional distress damages, and \$ 500,000 in punitive damages. The judgment was affirmed on appeal, and plaintiff sought attorneys' fees incurred in responding to the appeal. The trial judge awarded those fees. *Held*, reversed. *Brandt* does not support the award of fees on appeal.

(a) The fees attributable to the attorney's efforts in pursuing the breach of contract claim were awarded by the jury as part of the \$ 200,000 in "extracontractual damages," although there is no way to discern how much of that award is for attorneys' fees and how much is for emotional distress. Thus, plaintiff may have already recovered fees sufficient to cover the cost of responding to the appeal. (40 C.A.4th 793.)

(b) "There is *nothing* in *Brandt* to suggest that attorney fees on appeal are recoverable, and certainly nothing to

suggest they are recoverable as costs rather than damages." (40 C.A.4th 793.) Under *Brandt*, a plaintiff is entitled to be made whole for the harm he suffered by reason of the defendant's tortious conduct in denying benefits due under the policy. The prosecution of an appeal from an adverse judgment is not tortious conduct. (40 C.A.4th 795.) Furthermore, there is no authority for awarding fees as an item of *costs* on appeal when they were recovered at trial as *damages* and not pursuant to statute or contract. (40 C.A.4th 795, 796.)

Two of the three justices suggested that "it is time for the Supreme Court to reconsider and reject the exception it adopted in *Brandt*." (40 C.A.4th 797.) (See *Lubner v. Los Angeles* (1996) 45 C.A.4th 525, 535, 53 C.R.2d 24, *supra*, §152 [*Brandt* was distinguishable]; but see *Baron v. Fire Ins. Exchange* (2007) 154 C.A.4th 1184, 1197, 65 C.R.3d 502, *supra*, §154 [disagreeing with *Burnaby*].)

SUPPLEMENT: [This section is current through the latest supplement]



157 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

B. Nature of Fees.

2. Fees as Damages.

c. Action Based on Insurer's Bad Faith.

3. Calculation of Fees in Contingency Fee Case.

7 *Witkin Cal. Proc. Judgm* § 156

[§ 156] Calculation of Fees in Contingency Fee Case.

In *Cassim v. Allstate Ins. Co.* (2004) 33 C.4th 780, 16 C.R.3d 374, 94 P.3d 513, plaintiff insureds sued defendant insurer for bad faith in handling plaintiffs' insurance claim. Plaintiffs agreed to pay their attorney 40% of all sums recovered. The jury awarded plaintiffs \$ 3,594,600 in compensatory damages and \$ 5 million in punitive damages. After the parties stipulated that the court would separately decide the issue of fees under *Brandt v. Superior Court* (1985) 37 C.3d 813, 210 C.R. 211, 693 P.2d 796, supra, §154, the court awarded plaintiffs \$ 1,193,533 in *Brandt* fees. *Held*, the trial court abused its discretion in awarding as much in *Brandt* fees as it did.

(a) *Brandt* established that the fees recoverable may not exceed the amount attributable to the attorney's efforts to obtain the rejected payment due on the insurance contract. Fees attributable to obtaining any portion of the plaintiff's award that exceeds the amount due under the policy are not recoverable. (33 C.4th 807.) *Brandt* did not, however, explain how to calculate *Brandt* fees in a contingent fee case. (33 C.4th 808.)

(b) Plaintiffs argue that the trial court correctly used the total amount of compensatory damages awarded to calculate fees, while defendant contends that the fees should have been 40% of the amount due on the insurance policy, or 40% of \$ 40,856.40. (33 C.4th 807.) "[W]e reject both proffered methods of calculation." (33 C.4th 808.) Defendant's method assumes that when plaintiffs agreed to pay a 40% contingent fee, they were agreeing to pay separately 40% of the contract recovery and 40% of the tort recovery. Actually, however, plaintiffs agreed to pay their attorney an unallocated and undifferentiated 40% of their total recovery, whatever that might be. (33 C.4th 808.) Defendant's method also erroneously assumes that a client who agrees to pay a 40% contingent fee will never pay more than 40% of the contract recovery to obtain that recovery. But a client paying his or her lawyer an hourly fee may choose to pay more than 40% (or even more than 100%) of an anticipated contract recovery in order to obtain that recovery. The same is true for a client operating under a contingent fee agreement. Certainly nothing in *Brandt* limits the amount of fees awarded as damages to a percentage of the contract benefits. (33 C.4th 809.)

(c) On the other hand, permitting plaintiffs to recover the majority of their attorneys' fees attributable to the entire compensatory damages award is inconsistent with the premise of *Brandt* that a plaintiff is entitled to only a portion of

the overall legal fees as damages. To the extent that some overlap in legal work occurs between contract and noncontract claims, the trial court should exercise discretion in apportioning the fees. (33 C.4th 811.)

(d) In a contingent fee case, the trier of fact should determine "the percentage of the legal fees paid to the attorney that reflects the work attributable to obtaining the contract recovery." (33 C.4th 812.) No portion of legal fees attributable to the punitive damage award can be recovered as *Brandt* fees. Moreover, *Brandt* fees can never exceed the legal fees for the combined tort and contract recovery, and in most cases they will be far less. "To determine the percentage of the legal fees attributable to the contract recovery, the trial court should determine the total number of hours an attorney spent on the case and then determine how many hours were spent working exclusively on the contract recovery. Hours spent working on issues jointly related to both the tort and contract should be apportioned, with some hours assigned to the contract and some to the tort. This latter figure, added to the hours spent on the contract alone, when divided by the total number of hours worked, should provide the appropriate percentage." (33 C.4th 812.)

SUPPLEMENT: [This section is current through the latest supplement]



158 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

B. Nature of Fees.

2. Fees as Damages.

d. Defense of Attorney's Action.

7 *Witkin Cal. Proc. Judgm* § 157

[§ 157] Defense of Attorney's Action.

In *Schneider v. Friedman, Collard, Poswall & Virga* (1991) 232 C.A.3d 1276, 283 C.R. 882, the court introduced its discussion as follows: "The issue before us is one of first impression. Can a client recover in a separate lawsuit attorney's fees and costs from a former lawyer which the client has incurred defending against that lawyer's attempt to collect or retain an unreasonable fee?" *Held*, affirming summary judgment for defendant attorneys; no authority supports such a right.

(a) "A very narrow 'second party tort' exception does exist under California law which by analogy could serve as a basis for allowing clients to recover attorney's fees incurred in litigation against unscrupulous lawyers." (232 C.A.3d 1282, discussing *Brandt v. Superior Court* (1985) 37 C.3d 813, 210 C.R. 211, 693 P.2d 796, *supra*, §154.) But *Gray v. Don Miller & Associates* (1984) 35 C.3d 498, 507, 198 C.R. 551, 674 P.2d 253, rejected the contention that attorneys' fees should be recoverable whenever the court finds that a defendant-fiduciary has committed fraud. (232 C.A.3d 1282.)

(b) There may be reasons to conclude that lawyers belong in the same limited category with insurers with respect to disputes over fees. A lawyer who receives the proceeds of a judgment or settlement holds those funds in trust for the client. (232 C.A.3d 1282.) And where the beneficiary of a trust is forced to defend his or her rights through litigation occasioned by the bad faith or unreasonable conduct of the trustee, the trustee may be required to reimburse the beneficiary for attorneys' fees and costs incurred. (232 C.A.3d 1283, citing out-of-state cases.) "It would require but a short extension of this common law rule to hold that where a lawyer forces a client to litigate a fee dispute by adopting a position in bad faith, the client may recover the attorney's fees and costs expended in litigating the fee dispute either in the principal action or in a separate action for breach of fiduciary duty." (232 C.A.3d 1283.)

(c) However, no California case has applied the rule allowing recovery of attorneys' fees by a beneficiary against a trustee (232 C.A.3d 1283), and the Supreme Court has admonished courts to move cautiously in expanding the nonstatutory bases on which awards of fees may be established (232 C.A.3d 1284). "These considerations convince us we should not create a 'lawyer-trustee' exception on our own. If such an expansion of current principles is to take place, it should be announced by the Supreme Court." (232 C.A.3d 1284.)

SUPPLEMENT: [This section is current through the latest supplement]



159 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

B. Nature of Fees.

3. Other Types of Fee Awards.

7 *Witkin Cal. Proc. Judgm* § 158

[§ 158] Other Types of Fee Awards.

In addition to being awarded as costs (supra, §150), damages (supra, §151 et seq.), or sanctions, fees may be awarded in the following situations:

(1) *Family Code actions*. The advance allowance of suit money, including attorneys' fees, in proceedings for nullity of marriage, dissolution of marriage, legal separation (*Family C. 2030, 2255*), enforcement of child or spousal support (*Family C. 3557*), or to establish physical or legal custody of a child or for a visitation order. (*Family C. 7605(a)*.) (See *Family C. 270* [determining ability to pay], *Family C. 272* [payment directly to attorney]; 11 *Summary* (10th), *Husband and Wife*, §§173, 175 et seq.)

(2) *Action by attorney against client*. The recovery in an action by an attorney against a client of an agreed fee or the reasonable value of the attorney's services. (See 1 *Cal. Proc.* (5th), *Attorneys*, §208 et seq.; on client's inability to recover fees in defense of attorney's action, see supra, §157.)

(3) *Ordinary services to estate*. The allowance of statutory percentages of the value of an estate as a fee for ordinary services of the personal representative's attorney. (*Prob.C. 10810*; see 12 *Summary* (10th), *Wills and Probate*, §528 et seq.)

(4) *Extraordinary services to estate*. The allowance of fees for extraordinary services, out of the estate of a decedent, to the personal representative's attorney. (*Prob.C. 10811*; *Estate of Rowe* (1944) 66 C.A.2d 594, 601, 152 P.2d 765; *Estate of Schnell* (1947) 82 C.A.2d 170, 174, 185 P.2d 854; *Estate of Baum* (1989) 209 C.A.3d 744, 750, 257 C.R. 566 [court may award extraordinary fees despite settlement estimating fees at lower amount]; see 12 *Summary* (10th), *Wills and Probate*, §534.)

(5) *Administration of trust*. An allowance out of a trust estate to a trustee, under *Prob.C. 15684*, as reimbursement for expenses (including attorneys' fees) incurred in the administration of the trust and for its benefit. (See *Mitau v. Roddan* (1906) 149 C. 1, 16, 84 P. 145; *Dingwell v. Seymour* (1928) 91 C.A. 483, 513, 267 P. 327; *Conley v. Waite* (1933) 134 C.A. 505, 506, 25 P.2d 496; *Whittlesey v. Aiello* (2002) 104 C.A.4th 1221, 1225, 128 C.R.2d 742 [attorneys' fees were not allowed under *Prob.C. 15684* where attorney unsuccessfully defended trust amendment that had changed

beneficiary; litigation was not challenge to existence of trust, but dispute over who would benefit from it]; *David v. Hermann* (2005) 129 C.A.4th 672, 689, 28 C.R.3d 622 [where effect of petition was to secure decree adjudicating trust to be invalid and void, petitioner did not render service to trust requiring reimbursement]; 24 A.L.R.4th 624 [award out of trust estate in action by trustee against cotrustee]; cf. *Los Angeles Trust & Savings Bank v. Ward* (1925) 197 C. 103, 110, 239 P. 847 [escrow-holder is not a trustee, and is not entitled to attorneys' fees when he interpleads conflicting claimants].)

(6) *Public corporation in receivership*. An award for services rendered to a public corporation in receivership or liquidation. (*Anderson v. Great Republic Life Ins. Co.* (1940) 41 C.A.2d 181, 188, 106 P.2d 75; *Eggert v. Pacific States Savings & Loan Co.* (1942) 53 C.A.2d 554, 557, 127 P.2d 999; *McConnell v. All-Coverage Ins. Exchange Auto. & Fire* (1964) 229 C.A.2d 735, 740, 40 C.R. 587; cf. *Roddis v. All-Coverage Ins. Exchange Auto. & Fire* (1967) 250 C.A.2d 304, 309, 58 C.R. 530 [fees denied; no good faith or reasonable grounds].)

(7) *Workers' compensation*. An allowance in workers' compensation proceedings. (*Lab.C. 4906*; see 2 *Summary* (10th), *Workers' Compensation*, §354.)

(8) *Action by innocent improver*. An allowance to a landowner in an action by an innocent improver to remove fixtures (C.C. 1013.5(b)) or for other appropriate relief (C.C.P. 871.5). (See 13 *Summary* (10th), *Personal Property*, §98; 12 *Summary* (10th), *Real Property*, §460.)

(9) *Security*. A deposit as security for costs and fees. (See 3 *Cal. Proc.* (5th), *Actions*, §350 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



160 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

C. Recipients of Fees.

1. Client.

7 *Witkin Cal. Proc. Judgm* § 159

[§ 159] Client.

Normally, an attorneys' fee award is part of the amount recovered by the successful party, to reimburse or indemnify the party for fees paid out or incurred by the party. An award directly to the attorney, who is not a party to the action, is void. (See *Los Angeles v. Knapp* (1936) 7 C.2d 168, 173, 60 P.2d 127; *Flannery v. Prentice* (2001) 26 C.4th 572, 577, 110 C.R.2d 809, 28 P.3d 860, *infra*, §218 [proceeds of fee award under *Govt.C. 12965* exceeding fees client has paid belong to *attorneys* for whose work they are awarded, absent contractual agreement validly disposing of them]; *Chavez v. Scully* (1923) 62 C.A. 6, 7, 216 P. 46; *Scott v. Staggs* (1954) 129 C.A.2d 54, 57, 276 P.2d 605; *Beard v. Goodrich* (2003) 110 C.A.4th 1031, 1035, 2 C.R.3d 160 [attorney was not entitled to court-ordered attorneys' fees once judgment that included those fees was vacated on appeal; instead, attorney had to recover fees from client pursuant to fee agreement between them; distinguishing *Flannery*]; for exceptions in probate and domestic relations cases, see *supra*, §158; on proper award under private attorney general theory, see *Serrano v. Priest* (1977) 20 C.3d 25, 47, footnote 21, 141 C.R. 315, 569 P.2d 1303, *infra*, §257; on necessity of pleading, see *Oliver v. Schene* (1960) 182 C.A.2d 473, 484, 6 C.R. 461.)

SUPPLEMENT: [This section is current through the latest supplement]



161 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

C. Recipients of Fees.

2. Attorney Representing Himself or Herself.

a. Early Rule Against Recovery of Fees Questioned.

7 *Within Cal. Proc. Judgm § 160*

[§ 160] Early Rule Against Recovery of Fees Questioned.

Several early cases held that an attorney who represents himself or herself cannot be awarded the reasonable value of his or her services as a fee, for the attorney has incurred no liability for the fee. (See *Patterson v. Donner* (1874) 48 C. 369; *Long Beach v. Sten* (1929) 206 C. 473, 474, 274 P. 968; *O'Connell v. Zimmerman* (1958) 157 C.A.2d 330, 337, 321 P.2d 161.) These cases were rejected and distinguished by the Court of Appeal in *Renfrew v. Loysen* (1985) 175 C.A.3d 1105, 222 C.R. 413. Plaintiff attorney represented herself in an action on a contract that provided for an award of attorneys' fees. Judgment was entered for plaintiff, and she moved for an award of attorneys' fees under C.C. 1717 (see *infra*, §170 et seq.). The trial judge denied her motion, relying on the "general rule" that an attorney litigant is not entitled to attorneys' fees, because the attorney has incurred no obligation to pay fees. *Held*, reversed.

(a) The "general rule," as stated in *Sten* and *O'Connell*, is that an attorney representing him or herself may not recover attorneys' fees. In *Sten*, the California Supreme Court refused to decide the desirability of this rule, but felt compelled to follow precedent. However, that court itself "seriously questioned" the soundness of the rule in *Consumers Lobby Against Monopolies v. Public Util. Com.* (1979) 25 C.3d 891, 160 C.R. 124, 603 P.2d 41, and the Ninth Circuit Court of Appeals has rejected the rule. (175 C.A.3d 1108.)

(b) In *Leaf v. San Mateo* (1984) 150 C.A.3d 1184, 198 C.R. 447, 3 Cal. Proc. (5th), *Actions*, §498, another district of the Court of Appeal, reasoning that an attorney who represents him or herself makes a tangible commitment of time and skills that would otherwise be available for gainful application, concluded that the attorney could recover the reasonable value of his or her professional services. The Supreme Court denied a hearing in *Leaf*. The denial, while not constituting approval, "is not without significance as to the views of the members of that court." (175 C.A.3d 1109.)

(c) "We find the reasoning of these cases logical and persuasive. An attorney's livelihood is based on the utilization of time and skill, for which he or she receives compensation. Renfrew's prosecution of her action ... required her to utilize professional time and skill which would otherwise have been available for her regular law practice. This loss of available time represents a loss of income." (175 C.A.3d 1109.) To allow defendant to escape her contractual obligation to pay fees simply because plaintiff relied on her own professional skill would create a windfall for the defendant at the direct expense of the plaintiff. There is no justification for that rule. (175 C.A.3d 1109.)

(d) The trial court must exercise its discretion to determine the reasonable value of plaintiff's services in the litigation of her action against defendant. (175 C.A.3d 1110.) (See 17 Pacific L. J. 1503 [*Renfrew*].)

Renfrew was disapproved by the California Supreme Court in *Trope v. Katz* (1995) 11 C.4th 274, 292, 45 C.R.2d 241, 902 P.2d 259, *infra*, §161.

SUPPLEMENT: [This section is current through the latest supplement]



162 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
 XII. RIGHT TO ATTORNEYS' FEES
 C. Recipients of Fees.

2. Attorney Representing Himself or Herself.
 b. Rule Reaffirmed: Attorney May Not Recover Fees.

7 Witkin Cal. Proc. Judgm § 161

[§ 161] Rule Reaffirmed: Attorney May Not Recover Fees.

(1) *General Rule Prohibiting Recovery.* In *Trope v. Katz* (1995) 11 C.4th 274, 45 C.R.2d 241, 902 P.2d 259, defendant retained plaintiff law firm to represent him in a marital dissolution proceeding. The parties agreed in writing that, if plaintiff sued defendant to recover the fees and costs incurred in the dissolution proceeding, "the Court [could] award reasonable attorneys' fees for the recovery of said fees and costs." Eventually, plaintiff, representing itself, sued defendant for breach of contract to recover unpaid fees. Defendant cross-complained for legal malpractice, and a jury awarded damages to both parties. Plaintiff moved for an award of attorneys' fees under the contract. *Held*, order denying fees affirmed.

(a) *Applicability of C.C. 1717.* Although *C.C.P. 1021* (supra, §149) gives individuals a broad right to contract out of the American rule against fees for the prevailing party, those arrangements are subject to the restrictions of C.C. 1717 (infra, §170 et seq.), which authorizes "reasonable attorney's fees" that are "incurred" enforcing a contract. (11 C.4th 279.) "[A]n attorney litigating in propria persona cannot be said to 'incur' compensation for his time and his lost business opportunities" because he does not become obligated to pay for them. Moreover, "the usual and ordinary meaning of the words 'attorney's fees,' ... is the consideration that a litigant actually pays or becomes liable to pay in exchange for legal representation. An attorney litigating in propria persona pays no such compensation." (11 C.4th 280.)

(b) *Significance of pre-1968 cases.* Several cases decided before 1968, when the Legislature enacted C.C. 1717, support this interpretation of the words "reasonable attorney's fees" and demonstrate that these words had an established legal meaning when the statute was enacted. (11 C.4th 282, citing *Patterson v. Donner* (1874) 48 C. 369; *Long Beach v. Sten* (1929) 206 C. 473, 474, 274 P. 968; *O'Connell v. Zimmerman* (1958) 157 C.A.2d 330, 337, 321 P.2d 161.) The language in *Consumers Lobby Against Monopolies v. Public Util. Com.* (1979) 25 C.3d 891, 160 C.R. 124, 603 P.2d 41, questioning the logic of these decisions is "pure dictum." Moreover, *Consumers Lobby* involved an attorneys' fee award under an equitable exception to the American rule against fees, rather than a contract provision allowing fees subject to C.C. 1717. (11 C.4th 284.)

(c) *Avoiding disparate treatment of attorneys and nonattorneys.* In enacting C.C. 1717, the Legislature clearly "did not intend to allow doctors, architects, painters, or any other nonattorneys to receive compensation for the valuable time

they spend litigating a contract matter on their own behalf." (11 C.4th 285.) Neither the language nor the legislative history of C.C. 1717 supports a holding that the "time and opportunity that an attorney gives up when he chooses to litigate a case in propria persona are somehow qualitatively more important and worthy of compensation than those of other pro se litigants." (11 C.4th 285.)

(d) *Disapproval of Court of Appeal cases.* To the extent that they conflict with the holding here, *Renfrew v. Loysen* (1985) 175 C.A.3d 1105, 222 C.R. 413, supra, §160, and *Dameshghi v. Texaco Refining & Marketing* (1992) 3 C.A.4th 1262, 6 C.R.2d 515, are disapproved. To the extent that they imply that *Patterson* and *Sten* are no longer precedents, the following cases are also disapproved: *Hambrose Reserve, Ltd. v. Faitz* (1992) 9 C.A.4th 129, 11 C.R.2d 638, infra, §192; *Leaf v. San Mateo* (1984) 150 C.A.3d 1184, 198 C.R. 447, 3 Cal. Proc. (5th), Actions, §498; *Garfield Bank v. Folb* (1994) 25 C.A.4th 1804, 31 C.R.2d 239, infra, §164; *Jacobson v. Simmons Real Estate* (1994) 23 C.A.4th 1285, 28 C.R.2d 699, infra, §163. (11 C.4th 292.) (See 78 A.L.R.3d 1119 [right of party who is an attorney and appears for him or herself to award of fees]; 34 *Stanf. L. Rev.* 659 [review of federal and state law and argument in favor of award].)

(2) *Distinction: Attorney Assisted by Others.* A pro se attorney who prevails in an action on a contract with an attorneys' fee provision may recover reasonable attorneys' fees incurred for legal services of other attorneys who assist the pro se attorney in the prosecution or defense of the action, even if the assisting attorneys do not appear as attorneys of record. (*Mix v. Tumanjan Dev. Corp.* (2002) 102 C.A.4th 1318, 1321, 126 C.R.2d 267 [attorney who sued his commercial landlord for breach of lease that contained fees provision could recover fees he paid to another attorney for assistance with action].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule Prohibiting Recovery.* See *Gorman v. Tassajara Dev. Corp.* (2009) 178 C.A.4th 44, 93, 100 C.R.3d 152 [prohibition applied to attorney whose incorporated firm represented attorney and attorney's wife; although corporation may have sent bill, same person was attorney and client; also, interests of attorney and wife were joint and indivisible].



163 of 165 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

C. Recipients of Fees.

3. Attorney Represented by Other Members of Own Firm.

7 *Within Cal. Proc. Judgm § 162*

[§ 162] Attorney Represented by Other Members of Own Firm.

In *Gilbert v. Master Washer & Stamping Co.* (2001) 87 C.A.4th 212, 104 C.R.2d 461, plaintiff tenant sued its landlord for breach of contract and conversion and also named the landlord's attorney as a defendant based on his alleged role in preventing plaintiff from recovering its property from the leased premises. Defendant attorney, who was represented by other members of his law firm, obtained summary judgment and moved for attorneys' fees. Relying on *Trope v. Katz* (1995) 11 C.4th 274, 45 C.R.2d 241, 902 P.2d 259, supra, § 161, the trial court denied the motion for fees. *Held*, reversed and remanded.

(a) *Trope* is distinguishable. Unlike an attorney who represents himself or herself in pro. per., a member of a law firm who is represented by other attorneys in the firm "incurs" fees within the meaning of C.C. 1717. "Either the represented attorney will experience a reduced draw from the partnership (or a reduced salary from the professional corporation) to account for the amount of time his or her partners or colleagues have specifically devoted to his or her representation, or absorb a share of the reduction in other income the firm experiences because of the time spent on the case. This is different from the 'opportunity costs' the attorney loses while he or she is personally involved in the same case, because the economic detriment is caused not by the expenditure of his or her own time, but by other attorneys working on his or her behalf." (87 C.A.4th 221.)

(b) Unlike an attorney who acts in pro. per., an attorney represented by other members of the attorney's firm is party to an attorney-client relationship. Here, the other members of defendant's law firm were representing not their personal interests or even those of the firm, but the separate and distinct interests of defendant. (87 C.A.4th 222.)

(c) Permitting an attorney who is represented by members of his or her own law firm to recover fees does not lead to inequitable application of C.C. 1717. The Supreme Court in *Trope* held that allowing attorneys, but not other litigants, to recover fees when they litigate in pro. per. would conflict with the statute's purpose of establishing mutuality of remedy among the parties to a contract. "[T]his consideration is absent where an attorney litigant is represented by members of his or her firm, because like a corporation represented by in-house counsel, the represented attorney seeks to recover fees for work done by others on his behalf. Indeed, it would be inequitable in the extreme to permit [defendant] to recover fees incurred by outside counsel, but deny him such recovery merely because his counsel are members of the same law firm as he." (87 C.A.4th 223.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Gorman v. Tassajara Dev. Corp.* (2009) 178 C.A.4th 44, 95, 100 C.R.3d 152 [attorney could recover fees for other attorneys and paralegals he hired to represent him, even though they worked in his law firm; citing *Gilbert v. Master Washer & Stamping Co.* (2001) 87 C.A.4th 212, 104 C.R.2d 461, text, p. 703].



164 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
XII. RIGHT TO ATTORNEYS' FEES

C. Recipients of Fees.

4. Nonattorney Representing Himself or Herself.

7 *Witkin Cal. Proc. Judgm § 163*

[§ 163] Nonattorney Representing Himself or Herself.

In *Jacobson v. Simmons Real Estate* (1994) 23 C.A.4th 1285, 28 C.R.2d 699, plaintiff sued for breach of a storage locker agreement, filing the complaint in pro. per. but retaining an attorney when the matter was ordered to judicial arbitration. Plaintiff prevailed and was awarded damages and costs. Plaintiff sought attorneys' fees under C.C.P. 1033.5(a)(10)(A), as provided under the rental agreement, for his counsel and for himself for self-representation. The trial judge awarded fees for plaintiff's attorney, but denied fees for plaintiff's self-representation. *Held*, affirmed.

(a) A nonattorney successful in self-representation in civil litigation is not as a matter of law entitled to attorneys' fees. (23 C.A.4th 1290.) An attorney prosecuting his or her own contractual claim pro se may recover attorneys' fees under C.C. 1717. (23 C.A.4th 1291, citing *Renfrew v. Loysen* (1985) 175 C.A.3d 1105, 222 C.R. 413, supra, §160, which was later disapproved by the Supreme Court.) But it does not follow that awards of contractually based attorneys' fees should be awarded to a nonattorney successful at self-representation. (23 C.A.4th 1291.) "The 'well-reasoned basis' for distinguishing between a licensed attorney who represents himself or herself and a nonattorney who does likewise is that the written contract which provides for the fee award specifies that it is an *attorney fee*." The parties could have specified they would be liable for "legal services fees," but did not. (23 C.A.4th 1291.)

(b) Plaintiff urges that the term "attorney's fees" be considered descriptive not of the person performing the service, but of the service performed. However, viewing the words in their ordinary and popular usage, an "attorney" is a person "legally appointed to act for another." The very use of the term "attorney fees" presupposes the prevailing party has been represented by an attorney. (23 C.A.4th 1292.)

(c) Precluding a prevailing plaintiff from recovering fees for self-representation does not violate the reciprocity provision of C.C. 1717. The statute "ensures reciprocity by providing that *any* successful litigant, not just the one named in the contract, can recover fees that have been paid to an attorney." (23 C.A.4th 1293, citing *Xuereb v. Marcus & Millichap* (1992) 3 C.A.4th 1338, 5 C.R.2d 154, infra, §185.) "Nothing in the statutory language suggests the Legislature intended to establish parity between pro se and represented litigants by entitling the former to legal service fees whenever the contract provides for an award of attorney fees." (23 C.A.4th 1293.)

(d) Plaintiff's contention that the trial judge's interpretation of C.C.P. 1033.5 violated plaintiff's due process and

equal protection rights is meritless. Plaintiff argues that the interpretation permits "recoupment of attorney fees to those successful litigants who could afford to hire an attorney (and as interpreted by California appellate courts, by litigants who are themselves attorneys), but denies said fees as costs to successful and competent litigants who could not afford to hire an attorney and had to prosecute their cases themselves." (23 C.A.4th 1294.) The denial of fees was compelled by the parties' agreement to reimburse attorneys' fees rather than legal services fees, not by the trial judge's statutory interpretation. (23 C.A.4th 1294.)

(e) Plaintiff's equal protection argument fails because attorneys and nonattorneys are not similarly situated. "Of necessity, attorneys are subject to a myriad of expenses related to maintaining a license and a practice which nonattorneys do not bear. The parties could rationally conclude that the greater expenses associated with employment of an attorney ... warrants recoupment of fees from the losing litigant." (23 C.A.4th 1295.) (See 14 A.L.R.5th 947 [recovery of attorneys' fees by pro se litigant under state law].)

SUPPLEMENT: [This section is current through the latest supplement]



165 of 165 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law
 XII. RIGHT TO ATTORNEYS' FEES
 C. Recipients of Fees.
 5. In-House Counsel.

7 *Witkin Cal. Proc. Judgm* § 164

[§ 164] In-House Counsel.

In *Garfield Bank v. Folb* (1994) 25 C.A.4th 1804, 31 C.R.2d 239, plaintiff sued for declaratory relief and breach of contract, and on several tort claims. Defendant prevailed and was granted costs including attorneys' fees for services of its in-house counsel. *Held*, affirmed. In this case of first impression, the purpose of C.C. 1717 (*infra*, §170 et seq.), analogous California cases, and persuasive authority from other states establish that in-house counsel fees are recoverable when counsel is actively engaged in preparing the case for trial. (25 C.A.4th 1807.)

(a) C.C. 1717 does not expressly require the prevailing party to incur legal expenses. "The statute simply provides that a prevailing party is entitled to attorney fees and costs, 'which are incurred to enforce that contract'. ... Thus, a prevailing party may recover attorney fees when represented by nonprofit legal counsel." (25 C.A.4th 1807, citing *Beverly Hills Properties v. Marcolino* (1990) 221 C.A.3d Supp. 7, 270 C.R. 605.) Similarly, a lessor has recovered attorneys' fees even though his defense was paid by his insurance carrier. (25 C.A.4th 1807, citing *Staples v. Hoefke* (1987) 189 C.A.3d 1397, 235 C.R. 165, *infra*, §169.) Further, attorneys who litigate their own claims are entitled to recover attorneys' fees under C.C. 1717. (25 C.A.4th 1807, citing *Renfrew v. Loysen* (1985) 175 C.A.3d 1105, 222 C.R. 413, and *Leaf v. San Mateo* (1984) 150 C.A.3d 1184, 198 C.R. 447, 3, Cal Proc. (5th), Actions, §498, which were later disapproved by the California Supreme Court.)

(b) In awarding attorneys' fees in analogous cases, courts have relied on the purpose of C.C. 1717, which is to establish mutuality of remedy when a "contractual provision makes recovery of attorney's fees available for only one party ... and to prevent oppressive use of one-sided attorney's fees provisions." (25 C.A.4th 1808, citing *Reynolds Metals Co. v. Alperson* (1979) 25 C.3d 124, 158 C.R. 1, 599 P.2d 83, *infra*, §206.)

(c) Reasonable attorneys' fees have been allowed under 42 U.S.C., §1988 (see *infra*, §242) when representation for the prevailing party was by nonprofit counsel. (25 C.A.4th 1809, citing *Blum v. Stenson* (1984) 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891.) Other states wrestling with the issue have allowed fees for in-house counsel, reasoning that to do so compensates the prevailing party for time counsel could have devoted to other corporate matters. Further, fees have been allowed when in-house counsel actively participated in the preparation of the case with private co-counsel. (25 C.A.4th 1809.)

(d) Here, the trial court spent "a great deal of time" in determining the reasonableness of the fees awarded for the time spent by defendant's in-house counsel. "Because disallowing fees for in-house counsel would provide a windfall for appellant, we can see no reason to distinguish the lost opportunities from actual expenditures on outside counsel." Defendant's in-house counsel was actively participating in the underlying litigation, and the trial court did not abuse its discretion in awarding attorneys' fees for his services. (25 C.A.4th 1809, 1810.)

In *PLCM Group v. Drexler* (2000) 22 C.4th 1084, 95 C.R.2d 198, 997 P.2d 511, plaintiff insurer, carrier of a professional malpractice insurance policy purchased by defendant attorney, sued defendant for breach of the insurance contract. Plaintiff, who was represented by in-house counsel, sought to collect \$ 10,319, the deductible that remained unpaid following resolution of a claim that defendant had made under the policy. After a jury verdict and judgment for plaintiffs, the trial judge awarded plaintiff \$ 61,050 in attorneys' fees under a policy provision that allowed recovery of attorneys' fees and costs incurred in bringing an action to recover an unpaid deductible. *Held*, affirmed.

(a) In-house counsel may recover attorneys' fees under C.C. 1717. *Trope v. Katz* (1995) 11 C.4th 274, 45 C.R.2d 241, 902 P.2d 259, supra, §161, held that an attorney who chooses to litigate in pro. per. in an action to enforce a contract containing an attorneys' fee provision cannot recover attorneys' fees under C.C. 1717. However, the considerations that led to that conclusion do not apply in the case of in-house counsel. There is no problem of disparate treatment for attorneys who appear in pro. per. and nonattorney pro se litigants. In-house attorneys, like private counsel but unlike pro se litigants, do not represent their own personal interests and are not seeking remuneration simply for lost opportunity costs that could not be recouped by a nonlawyer. A corporation represented by in-house counsel is in an agency relationship; it has hired an attorney to provide professional legal services on its behalf. There is no impediment to the effective and successful prosecution of meritorious claims because of possible ethical conflict or emotional investment in the outcome. The fact that in-house counsel is employed by the corporation does not alter the fact of representation by an independent third party. Instead, the payment of a salary to in-house attorneys is analogous to hiring a private firm on a retainer. (22 C.4th 1093.)

(b) *Garfield Bank* held that in-house counsel may recover their attorneys' fees under C.C. 1717. *Trope* disapproved *Garfield Bank* only to the extent that it referred, in passing, to authority for awarding attorneys' fees to pro se litigants. (22 C.4th 1093, footnote 2.) The reasoning in *Garfield Bank* and numerous federal cases that have denied fees to pro se litigants while granting them to in-house counsel is persuasive. "We discern no basis for discriminating between counsel working for a corporation in-house and private counsel engaged with respect to a specific matter or on retainer." (22 C.4th 1094.)

(c) The trial court properly calculated the plaintiff's attorneys' fees based on their market value, i.e., the reasonable in-house attorney hours multiplied by the prevailing hourly rate in the community for comparable legal services. The fee setting inquiry in California ordinarily begins with the "lodestar," which is the number of hours reasonably expended multiplied by the reasonable hourly rate. The reasonable hourly rate is that prevailing in the community for similar work. (22 C.4th 1095.) The trial court was not required to use the "so-called cost-plus approach, based on a precise calculation of the actual salary, costs, and overhead of in-house counsel." Nothing in C.C. 1717 "compels such an approach." (22 C.4th 1096, 1097.) "[T]he market value approach has the virtue of being predictable for the parties and easy to administer. By contrast, the cost-plus approach, in addition to being cumbersome, intrusive, and costly to apply, may distort the incentives for settlement and reward inefficiency. For these reasons, we conclude that the lodestar method, as applied to the calculation of attorney fees for in-house counsel, is presumably reasonable, although in exceptional circumstances, the trial court is not precluded from using other methodologies." (22 C.4th 1097.)

(d) Defendant's argument that awarding fees to in-house counsel based on prevailing market rates for attorney services "most likely constitutes an unjustified windfall" is not persuasive. (22 C.4th 1097.) It is not always a cost-per-hour decision that drives a client to prefer the use of an in-house attorney. Defendant presented no evidence that the costs here, in terms of overhead, salary, and other compensation for corporate in-house counsel, were necessarily less than the market rate for a law firm in the same location. Instead, plaintiff's counsel estimated that actual expenses for in-house counsel in this matter would have exceeded the market rate. "Requiring trial courts in all

instances to determine reasonable attorney fees based on actual costs and overhead rather than an objective standard of reasonableness, i.e., the prevailing market value of comparable legal services, is neither appropriate nor practical; it 'would be an unwarranted burden and bad public policy.' " (22 *C.4th 1098*.)

(e) There was sufficient evidence here to support the amount of the award. The trial court has broad authority to determine the amount of a reasonable fee. (22 *C.4th 1095*.) In addition to the detailed documentation submitted by plaintiff, the trial court was familiar with the quality of the services performed and the amount of time devoted to the case. The award was not clearly wrong; the trial court did not abuse its discretion. (22 *C.4th 1096*.)

SUPPLEMENT: [This section is current through the latest supplement]



1 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

A. Contract Provision.

1. Nature and Effect.

7 *Witkin Cal. Proc. Judgm* § 165

[§ 165] Nature and Effect.

(1) *Special Damages*. Certain kinds of contracts often provide that on breach and action, the aggrieved party may recover attorneys' fees. (For illustrations, see *infra*, §§166, 167.) Early cases held that the only legitimate object of this type of provision was reimbursement for sums actually paid or to be paid, and the sums were recoverable not as costs but as special damages, which had to be particularly alleged and demanded in the complaint. (*Brooks v. Forington* (1897) 117 C. 219, 221, 48 P. 1073; *Genis v. Krasne* (1956) 47 C.2d 241, 246, 302 P.2d 289, citing the text; *City Inv. Co. v. Pringle* (1920) 49 C.A. 353, 356, 193 P. 504 [no recovery where no payment or liability to pay]; 79 A.L.R.2d 513 [validity of provision in assignment for benefit of creditors].)

(2) *Costs*. The statute that defines allowable costs provides that attorneys' fees, when authorized by contract, are allowable as costs and recoverable as part of a cost award. (*C.C.P. 1033.5(a)(10)(A)*, *supra*, §119; see *Ripley v. Pappadopoulos* (1994) 23 C.A.4th 1616, 1627, 28 C.R.2d 878; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §16.62; on procedure for obtaining fees as costs, see *infra*, §295 et seq.)

(3) *Parties*. Either a prevailing plaintiff or a prevailing defendant may be awarded fees under a contract provision. (See *Citizens Suburban Co. v. Rosemont Dev. Co.* (1966) 244 C.A.2d 666, 683, 53 C.R. 551; *Hunt v. Smyth* (1972) 25 C.A.3d 807, 832, 101 C.R. 4 [award to defendant creditor in plaintiff debtor's unsuccessful action to enjoin sale under trust deed].) If the contract provides for fees at all, then the prevailing party may recover them, even if the contract purports to specify only one of the parties as eligible. (C.C. 1717, *infra*, §170 et seq.)

(4) *Fees on Appeal*. A contract provision for reasonable fees embraces an allowance for services rendered on appeal as well as during trial. (*Wilson v. Wilson* (1960) 54 C.2d 264, 272, 5 C.R. 317, 352 P.2d 725; *Rabinowitch v. California Western Gas Co.* (1967) 257 C.A.2d 150, 160, 65 C.R. 1.)

West's Key Number Digest, Costs 194.32

SUPPLEMENT: [This section is current through the latest supplement]



2 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

A. Contract Provision.

2. Illustrations.

a. Building Contracts.

7 *Witkin Cal. Proc. Judgm* § 166

[§ 166] Building Contracts.

(1) *In General.* Building contracts often contain an attorneys' fee provision. (See *Moss Const. Co. v. Wulffsohn* (1953) 116 C.A.2d 203, 204, 253 P.2d 483 ["should either party hereto bring suit in court to enforce the terms hereof, any judgment awarded shall include court costs and reasonable attorney's fees to the successful party"]; *Anso Const. Co. v. Ocean View Estates* (1959) 169 C.A.2d 235, 240, 337 P.2d 146; *Bellwood Discount Corp. v. Empire Steel Bldgs. Co.* (1959) 175 C.A.2d 432, 438, 346 P.2d 467; *Heidt v. Miller Heating & Air Conditioning Co.* (1969) 271 C.A.2d 135, 137, 74 C.R. 695, *infra*, §168.)

(2) *Liability of Surety for Fees.* The contractor's surety is bound by the contractor's agreement. In *Boliver v. Surety Co.* (1977) 72 C.A.3d Supp. 22, 140 C.R. 259, the contract between plaintiff home builder and defendant contractor provided for attorneys' fees to the successful party, but the surety contract between the contractor and surety did not contain an express provision to that effect. *Held*, nevertheless, the surety was liable for fees. Under general principles of suretyship law, the surety's liability is commensurate with that of the principal (C.C. 2808). Hence, if the principal contract provides for fees to the owner in a successful action against the contractor, the owner may recover those fees in a successful action against the contractor's surety. (72 C.A.3d Supp. 31, 32.) (See *T&R Painting Const. v. St. Paul Fire & Marine Ins. Co.* (1994) 23 C.A.4th 738, 746, 29 C.R.2d 199 [following *Boliver*; surety for contractor on construction bond was liable to subcontractor for attorneys' fees in arbitration to enforce subcontract where subcontract provided for attorneys' fees, even though payment bond did not]; *National Technical Systems v. Superior Court* (2002) 97 C.A.4th 415, 423, 118 C.R.2d 465 [subcontractor could recover, from surety on bond, attorneys' fees provided for in subcontract, provided that total recovery did not exceed amount of bond; citing *Boliver* and *T&R Painting Const.*].)

(3) *Distinction: Action on Mechanic's Lien.* Attorneys' fees are not recoverable in an action against a landowner to foreclose a mechanic's lien. (*Abbott Elec. Corp. v. California Fed. Savings & Loan Assn.* (1991) 230 C.A.3d 355, 359, 360, 281 C.R. 362; cf. *Korech v. Hornwood* (1997) 58 C.A.4th 1412, 1422, 68 C.R.2d 637 [lien claimants invoked contractual attorneys' fee provision by pursuing breach of contract claim against landowners and could therefore be liable for landowners' fees when breach of contract claim failed].) Because a mechanic's lien foreclosure and an action against the landowner's surety on a mechanic's lien release bond involve the same cause of action, the bar against recovery of attorneys' fees applies to the latter type of action also. (*Royster Const. Co. v. Urban West Communities*

(1995) 40 C.A.4th 1158, 1165, 47 C.R.2d 684.)

SUPPLEMENT: [This section is current through the latest supplement]



3 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

A. Contract Provision.

2. Illustrations.

b. Other Contracts.

7 *Witkin Cal. Proc. Judgm* § 167

[§ 167] Other Contracts.

The following are typical contracts in which attorneys' fees clauses may be found:

(1) *Promissory note*. (See *Mann v. Mann* (1946) 76 C.A.2d 32, 43, 172 P.2d 369; *Wilson v. Wilson* (1960) 54 C.2d 264, 272, 5 C.R. 317, 352 P.2d 725; *American City Bank v. Zetlen* (1969) 272 C.A.2d 65, 67, 76 C.R. 898 [fees on appeal]; *Wiener v. Van Winkle* (1969) 273 C.A.2d 774, 784, 78 C.R. 761, *infra*, §169; *IMO Dev. Corp. v. Dow Corning Corp.* (1982) 135 C.A.3d 451, 461, 185 C.R. 341; *Niederer v. Ferreira* (1987) 189 C.A.3d 1485, 1506, 234 C.R. 779 [note providing for attorneys' fees and guaranty providing for prompt payment of installments were construed together to authorize recovery of attorneys' fees in action on guaranty]; *Neptune Soc. Corp. v. Longanecker* (1987) 194 C.A.3d 1233, 1250, 240 C.R. 117.)

(2) *Deed of trust or mortgage*. (See *C.C.P.* 580c, 726; *Brooks v. Forington* (1897) 117 C. 219, 221, 48 P. 1073 [real mortgage]; *Fell v. Frierson* (1915) 171 C. 351, 352, 153 P. 229 [chattel mortgage]; *Liebenguth v. Priester* (1944) 64 C.A.2d 343, 345, 148 P.2d 893 [trust deed; 5% of unpaid amount]; *Techow v. Pollack* (1952) 111 C.A.2d 556, 558, 244 P.2d 915 [fees were properly allowed to defendant holder of note and trust deed in action by plaintiff maker to determine balance due on note]; *O'Connor v. Richmond Savings & Loan Assn.* (1968) 262 C.A.2d 523, 525, 68 C.R. 882 [provision that on default of trustor, beneficiary could perform acts to protect security, employing counsel and paying reasonable fees]; *Nevin v. Salk* (1975) 45 C.A.3d 331, 339, 119 C.R. 370.)

(3) *Lease*. (See *Genis v. Krasne* (1956) 47 C.2d 241, 244, 302 P.2d 289; *Bank of America v. Moore* (1937) 18 C.A.2d 522, 529, 64 P.2d 460 [general provision was insufficient to authorize award to defendant lessor in action brought against him by plaintiff lessee]; *Linn v. Weinraub* (1948) 85 C.A.2d 109, 111, 193 P.2d 21 [provision authorized fees for services up to judgment; award for services after judgment was improper]; *Kennedy v. Morrison* (1949) 93 C.A.2d 516, 517, 209 P.2d 422; *Pehau v. Stewart* (1952) 112 C.A.2d 90, 97, 245 P.2d 692; *Stubblefield v. Fickle* (1954) 123 C.A.2d 325, 327, 266 P.2d 808 [statutory prohibition against costs in quiet title action where defendant disclaims (*C.C.P.* 761.030(b)) does not preclude award of attorneys' fees under lease provision]; *Wagner v. Shapona* (1954) 123 C.A.2d 451, 463, 267 P.2d 378 ["That in case suit shall be brought ... for declaratory relief to determine the rights of the parties hereunder, the Lessee will pay to the Lessor a reasonable attorney's fee which shall be

fixed by the court as a part of the costs of such suit"]; *Cirimele v. Shinazy* (1954) 124 C.A.2d 46, 52, 268 P.2d 210 [defendant's offer to compromise under C.C.P. 998(c) may prevent plaintiff's recovery of costs but not attorneys' fees provided for in lease; applying former C.C.P. 997]; *Stockton Theatres v. Palermo* (1954) 124 C.A.2d 353, 364, 268 P.2d 799, *infra*, §168; *Richard v. Degen & Brody* (1960) 181 C.A.2d 289, 299, 5 C.R. 263 [broad provision included services on appeal]; *Munier v. Hawkins* (1961) 190 C.A.2d 655, 664, 12 C.R. 274, citing the text; *Rabinowitch v. California Western Gas Co.* (1967) 257 C.A.2d 150, 158, 65 C.R. 1; *Mabee v. Nurseryland Garden Centers* (1979) 88 C.A.3d 420, 424, 152 C.R. 31; *Honey Baked Hams v. Dickens* (1995) 37 C.A.4th 421, 43 C.R.2d 595; *Republic Bank v. Marine Nat. Bank* (1996) 45 C.A.4th 919, 922, 53 C.R.2d 90 [sublessor was entitled to attorneys' fees, even though sublease did not specifically provide for them, where sublease incorporated master lease by reference and master lease provided for fees]; *Circle Star Center Associates, L.P. v. Liberate Technologies* (2007) 147 C.A.4th 1203, 1208, 55 C.R.3d 232 [in its state court action for breach of lease, defamation, and conversion, landlord could recover fees incurred in obtaining dismissal of tenant's federal bankruptcy action; dismissal restored parties to preexisting rights and remedies under lease, which provided for fees in any action arising out of lease].)

(4) *Association bylaws.* (See *Malibou Lake Mountain Club, Ltd. v. Smith* (1971) 18 C.A.3d 31, 35, 95 C.R. 553 [fees to club in event of litigation between it and members, sounding in tort or contract, or by way of action or defense or cross-complaint].)

(5) *Homeowners association covenants, conditions, and restrictions.* (See *Share v. Casiano Bel-Air Homeowners Assn.* (1989) 215 C.A.3d 515, 522, 263 C.R. 753, *infra*, §168.)

(6) *Escrow agreement.* (See *Bruckman v. Parliament Escrow Corp.* (1987) 190 C.A.3d 1051, 1059, 235 C.R. 813 ["All of the parties to this escrow hereby jointly and severally promise and agree to pay ... as well as to indemnify you and to hold you harmless from and against all litigation and interpleader costs, damages, judgments, attorney's fees"].)

(7) *Investment agreement.* (See *Brown v. California Pension Administrators & Consultants* (1996) 45 C.A.4th 333, 348, 52 C.R.2d 788 [fees to administrator in action arising out of agreement governing administrator's duties to individual investors].)

(8) *Indemnity agreement.* (See *Continental Heller Corp. v. Amtech Mechanical Services* (1997) 53 C.A.4th 500, 61 C.R.2d 668 [indemnity agreement between contractor and subcontractor entitled contractor to indemnity for its losses, including attorneys' fees, in defending and settling claims against it and for its attorneys' fees incurred in enforcing the agreement]; cf. *Building Maintenance Service Co. v. ALL Systems* (1997) 55 C.A.4th 1014, 1028, 1030, 64 C.R.2d 353 [indemnification contract provided for recovery of fees incurred in defending third-party claims; it did not address issue of action between parties on the contract itself; distinguishing *Continental Heller Corp.*]; 59 A.L.R.5th 733 [indemnitor's liability for attorneys' fees arising out of defense of action alleging indemnitee's negligence].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Lease.* See *Zagami v. James A. Crone* (2008) 160 C.A.4th 1083, 1095, 74 C.R.3d 235 [agreement for rental of tractor provided for recovery of attorneys' fees, but prevailing party would have to be determined on remand].



4 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

A. Contract Provision.

3. Interpretation of Provision.

a. Proceedings Covered.

7 *Witkin Cal. Proc. Judgm* § 168

[§ 168] Proceedings Covered.

(1) *Scope of Provision Strictly Construed.* In *Stockton Theatres v. Palermo* (1954) 124 C.A.2d 353, 268 P.2d 799, the lease clause authorized fees if "either party shall commence any legal proceedings against the other for relief because of any default by the other because of failure to perform any term, covenant or condition of this lease and shall prevail in said action." *Held*, this did not provide for fees in all legal actions, but only for those within its scope. Hence, no fees were awarded to plaintiff lessee who eventually won (by reversal on appeal) the following: (a) a declaratory relief action brought by defendant lessor to have the lease declared void; (b) an unlawful detainer action brought by defendant lessor ousting plaintiff lessee from possession. Neither of these actions was commenced by plaintiff; the appeals he took were not commencements. (124 C.A.2d 364.)

Other cases in which the attorneys' fee provision in a contract was strictly construed include the following:

Tanner v. Tanner (1997) 57 C.A.4th 419, 424, 67 C.R.2d 204 [provision in marital settlement agreement that required husband to "pay all legal fees associated with this dissolution" did not require husband to pay fees wife incurred in husband's postdissolution challenge to agreement; provision applied only to fees incurred in negotiation and preparation of agreement and in entry of judgment of dissolution].

Kalai v. Gray (2003) 109 C.A.4th 768, 777, 135 C.R.2d 449 [defendant was not entitled to fees in civil action that plaintiff brought prematurely before seeking arbitration; contract clause provided for fees for party that prevailed in arbitration and no arbitration had taken place].

Aozora Bank, Ltd. v. 1333 North Calif. Boulevard (2004) 119 C.A.4th 1291, 1294, 1295, 15 C.R.3d 340 [lender could not recover attorneys' fees in waste action against borrower; nonrecourse loan documents provided that borrower would be liable only "if and to the extent that" borrower committed waste and did not expressly include attorneys' fees as possible exception to borrower's nonliability].

People v. Speedee Oil Change Systems (2007) 147 C.A.4th 424, 429, 430, 54 C.R.3d 225 [provision authorizing fees for party in whose favor "final judgment" was entered did not entitle plaintiffs to fees they incurred on appeal, even

though appellate court had ruled in their favor on postjudgment issue; controlling "final judgment" was one executed by trial court, in defendant's favor, on merits of plaintiffs' contract claim].

Acosta v. Kerrigan (2007) 150 C.A.4th 1124, 1129, 58 C.R.3d 865, 6 Cal. Proc. (5th), *Proceedings Without Trial*, §524 [trial court that was responsible for deciding petition to compel arbitration, in accordance with arbitration clause in occupancy agreement, also was responsible for resolving claim for attorneys' fees made in connection with that petition; party that succeeded in compelling arbitration was entitled to fees incurred in doing so, and did not have to wait until arbitrator decided merits of dispute before collecting fees; distinguishing *Lachkar v. Lachkar* (1986) 182 C.A.3d 641, 227 C.R. 501, *infra*, §196].

Butler-Rupp v. Lourdeaux (2007) 154 C.A.4th 918, 929, 65 C.R.3d 242 [under lease provision that authorized fees to "party who is entitled to recover costs of suit," party was entitled to fees incurred in trial court and on prior appeal, even though appellate court had ordered both parties to bear their own costs for prior appeal; "suit" refers to entire action, so prevailing party had to be determined by looking at action as whole].

(2) *Actions To Enforce Contract*. In *Heidt v. Miller Heating & Air Conditioning Co.* (1969) 271 C.A.2d 135, 74 C.R. 695, the provision was for fees payable in an action "to enforce or interpret" the contract. Plaintiff sued for damages for breach of contract, based on defendant's poor workmanship resulting in injury to plaintiff's building. Thus, plaintiff could have brought a tort action independent of the contract, and an award of fees would have been improper. But the pleading and trial were on the theory of breach of contract. *Held*, reversing the trial court, fees were properly claimed; an action for damages for breach of contract is an action to "enforce" the contract. (271 C.A.2d 138.)

The following are among the numerous cases involving enforcement of a contract:

Walsh v. New West Fed. Savings & Loan Assn. (1991) 234 C.A.3d 1539, 1547, 1 C.R.2d 35 [complaint alleged fraud and breach of contract].

R.P. Richards v. Chartered Const. Corp. (2000) 83 C.A.4th 146, 158, 99 C.R.2d 425 [in subcontractor's action to enforce settlement agreement between subcontractor and contractor, trial court properly awarded attorneys' fees to subcontractor, including fees that subcontractor incurred in renewed prosecution of action against contractor's surety following settlement; settlement agreement expressly provided for fees to prevailing party in litigation, between the two parties and any other parties named in agreement, arising out of settlement].

Blackburn v. Charnley (2004) 117 C.A.4th 758, 767, 11 C.R.3d 885 [home buyers who filed action and recorded lis pendens before pursuing mediation against home builder were entitled to attorneys' fees as prevailing party; purchase agreement required home buyers to mediate dispute arising out of agreement before resorting to court action, except for action to enable recording of notice of pending action].

Frei v. Davey (2004) 124 C.A.4th 1506, 1511, 22 C.R.3d 429 [prevailing sellers in action for specific performance of residential purchase agreement could not recover attorneys' fees; by refusing request to mediate dispute before resorting to court action, sellers failed to comply with agreement's fees provision].

Baugh v. Garl (2006) 137 C.A.4th 737, 742, 40 C.R.3d 539 [plaintiffs' action to enjoin neighbor from taking water from pipeline, in violation of settlement agreement, was action to enforce contract, and plaintiffs were entitled to fees under provision in settlement agreement].

(3) *Contempt Proceedings To Enforce Judgment*. In *Share v. Casiano Bel-Air Homeowners Assn.* (1989) 215 C.A.3d 515, 263 C.R. 753, plaintiff homeowners sued defendant association to enforce provisions of the covenants, conditions, and restrictions requiring the association to repair and maintain hillsides adjacent to their residences. Following a partial trial, the parties entered into a settlement agreement in which defendant agreed to make repairs, and a judgment was entered incorporating the terms of the agreement and retaining jurisdiction of the court over performance. Thereafter plaintiffs sought a contempt order based on defendant's failure to comply with the judgment;

this resulted in a second settlement and stipulated order requiring defendant to perform a maintenance program. Plaintiffs then made a motion for attorneys' fees under the fees clause in the CC&R's. The trial judge denied the motion on the ground that there was no finding in the contempt proceeding and no prevailing party. *Held*, reversed. Plaintiffs instituted the civil contempt proceeding as a means of enforcing defendant's contractual obligations under the CC&R's as determined by the order and judgment; this brought them within the clause in the CC&R's providing for an award to the prevailing party in "any legal or equitable proceeding" to enforce the *CC&R's*. (215 C.A.3d 522, 523.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope of Provision Strictly Construed*. See *CytoDyn of New Mexico v. Amerimmune Pharmaceuticals* (2008) 160 C.A.4th 288, 300, 72 C.R.3d 600 [defendants were not entitled to attorneys' fees in action alleging misappropriation of patents and trademarks; defendants were not parties to various agreements containing fee provisions, and action was not attempt to enforce those agreements].(2) *Actions To Enforce Contract*. See *Amtower v. Photon Dynamics* (2008) 158 C.A.4th 1582, 1602, 1603, 71 C.R.3d 361 [defendants were entitled to fees where plaintiff clearly alleged that defendants had breached duty established by employment agreement; plaintiff was "unquestionably" attempting to enforce rights under employment agreement, rather than alleging fraud or misrepresentation]; *Lange v. Schilling* (2008) 163 C.A.4th 1412, 1416, 78 C.R.3d 356 [home buyer who failed to attempt to mediate with sellers before filing action was not entitled to fees; standard residential purchase agreement requires mediation before action as unambiguous condition precedent to fee award, and doctrine of substantial compliance is not applicable; citing *Frei v. Davey* (2004) 124 C.A.4th 1506, 22 C.R.3d 429, text, p. 714].



5 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

A. Contract Provision.

3. Interpretation of Provision.

b. Fees Not Paid or Incurred.

7 *Witkin Cal. Proc. Judgm* § 169

[§ 169] Fees Not Paid or Incurred.

(1) *Under Contingent Fee Arrangement.* In *Wiener v. Van Winkle* (1969) 273 C.A.2d 774, 78 C.R. 761, the makers of a promissory note agreed that if an action were brought on the note they would pay "such sum as the Court may fix as attorneys' fees." Defendant indorsers assumed the obligation, but in this action by plaintiff holders, challenged their claim to fees. They showed that plaintiffs had agreed with their attorney that his sole compensation for bringing the action would be the amount awarded by the court. *Held*, reversed.

(a) There was nothing illegal in the attorney-client agreement for a contingent fee. (273 C.A.2d 774; see 1 *Cal. Proc.* (5th), *Attorneys*, §176 et seq.)

(b) The fee should have been ascertained by the judge and the award made, notwithstanding the fact that it had neither been paid nor the obligation for it incurred by plaintiffs. "The promissory note does not require that the [plaintiffs] 'incur' attorney's fees; rather, it provides that the [defendants] will pay 'such sum as the Court may fix as attorneys' fees.'" To deny plaintiffs those fees would deprive them of the benefit of their agreement. (273 C.A.2d 789.) (See *Gonzales v. Personal Storage* (1997) 56 C.A.4th 464, 478, 65 C.R.2d 473 [lease provision permitted recovery of fees, even though plaintiff would not have been obligated to pay fees had she not prevailed in action on lease; following *Wiener*]; *Fairchild v. Park* (2001) 90 C.A.4th 919, 924, 109 C.R.2d 442 [contingent arrangement between tenants and their attorney did not foreclose attorneys' fee award under C.C. 1717; following *Gonzales*].)

(2) *Where Party Receives Free Representation.* In *Staples v. Hoefke* (1987) 189 C.A.3d 1397, 235 C.R. 165, defendant was awarded attorneys' fees under a lease that provided that the prevailing party "shall be entitled to his reasonable attorney's fees to be paid by the losing party as fixed by the court." Plaintiffs contended that the award of attorneys' fees was improper because the fees had been paid by defendant's insurer, which had represented him. *Held*, the award was proper. The lease did not require that the prevailing party "incur" attorneys' fees. Even if the fees ultimately go to the insurer, plaintiffs are not entitled to avoid their contractual obligation to pay fees on the fortuitous circumstance that they sued a defendant who obtained insurance coverage providing a defense. (189 C.A.3d 1409.) (See *Beverly Hills Properties v. Marcolino* (1990) 221 C.A.3d Supp. 7, 11, 270 C.R. 605 [attorneys' fees award to tenant in unlawful detainer action under fee provision in lease was proper, even though tenant had been represented by legal

services organization that had not charged for its services].)

(3) *Where Fees Are Paid by Someone Other Than Party.* In *International Billing Services v. Emigh* (2000) 84 C.A.4th 1175, 101 C.R.2d 532, plaintiff corporation sued three former employees, engineers who had left plaintiff, reorganized as another company, and developed and marketed a technology that, according to plaintiff, was a misappropriation of plaintiff's proprietary technology. The legal services agreement that defendants signed with their attorneys made defendants jointly and severally liable for legal services rendered by the attorneys. However, the fee agreement bound the attorneys to look first to defendants' new company for payment, and that company did indeed pay all the fees. After defendants prevailed at trial and requested their attorneys' fees, plaintiff contended that defendants had not incurred any fees. *Held*, trial court award of fees to defendants affirmed. Plaintiff is seeking a windfall. After bringing suit and demanding fees, plaintiff wants to avoid paying the prevailing party fees based on the fortuitous circumstance that defendants had arranged a means of defending themselves from this nonmeritorious lawsuit. The fact remains that if defendants' new company had failed to pay, defendants would have been contractually obligated to step in and fund the defense of the lawsuit. (84 C.A.4th 1193.) "That contractual obligation was a liability. The fact no bills remained unpaid at the time of the award does not change this result." (84 C.A.4th 1194, citing *Staples* and *Beverly Hills Properties*.)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

1. In General.

a. Nature and Purpose of C.C. 1717.

7 *Witkin Cal. Proc. Judgm* § 170

[§ 170] Nature and Purpose of C.C. 1717.

(1) *Need for Reciprocity.* An attorneys' fees provision is usually included by the party that drafts the contract, e.g., the installment seller, the mortgagee, the lessor, or the payee of a note. It may provide for an award to either party to the contract (see *supra*, §§166, 167), but it is sometimes designed for the sole benefit of the party with the greater bargaining power who offers a completed draft for the other party's acceptance. (On contracts of adhesion, see 1 *Summary* (10th), *Contracts*, §323 et seq.) Giving full effect to the contract might mean that a buyer, mortgagor, lessee, or maker of a note, although successful in the litigation, would not be entitled to an award of fees.

The 1968 Legislature prohibited this practice by enacting C.C. 1717. The statute "is a part of an overall legislative policy designed to enable consumers and others who may be in a disadvantageous contractual bargaining position to protect their rights through the judicial process by permitting recovery of attorney's fees incurred in litigation in the event they prevail." (*Coast Bank v. Holmes* (1971) 19 C.A.3d 581, 597, footnote 3, 97 C.R. 30.) (See *Care Const. v. Century Convalescent Centers* (1976) 54 C.A.3d 701, 704, 126 C.R. 761; *Milman v. Shukhat* (1994) 22 C.A.4th 538, 543, 27 C.R.2d 526; C.E.B., *Attorney Fee Awards* 2d, Chap. 6; C.E.B., 3 *Civil Proc. During Trial* 3d, §26.77 et seq.; *Cal. Civil Practice*, 4 *Procedure*, §33:28 et seq; 13 *Pacific L. J.* 233 [critical analysis of C.C. 1717 and decisions].)

C.C. 1717 was not designed exclusively for the benefit of consumers or unsophisticated, weaker parties to a contract. It reflects a fundamental policy to prevent one-sided attorneys' fee provisions and thus to prevent overreaching "both in the negotiation of a contract and in the use of the courts during litigation." (*ABF Capital Corp. v. Grove Properties Co.* (2005) 126 C.A.4th 204, 218, 23 C.R.3d 803.) The litigation concern applies regardless of the parties' relative bargaining strengths in negotiating the contract. (126 C.A.4th 219.)

(2) *Statutory Solution.* C.C. 1717 applies in an action on a contract, where the contract specifically provides that attorneys' fees and costs that are incurred to enforce that contract will be awarded either to one of the parties or to the prevailing party. The party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, is entitled to reasonable attorneys' fees in addition to other costs. (C.C. 1717(a); see *Scott Co. of Calif. v. Blount* (1999) 20 C.4th 1103, 1113, 1114, 86 C.R.2d 614, 979 P.2d 974, *supra*, §112 [had defendant completely defeated plaintiff's contract claims, it would have been entitled to attorneys' fees under contractual

attorneys' fees provision that authorized fees to "enforce" contract or "collect damages," even though defendant was not taking either of those actions; citing *Hsu v. Abbara* (1995) 9 C.4th 863, 39 C.R.2d 824, 891 P.2d 804, infra, §199]; *Peretz v. Legal Aid Foundation of Los Angeles* (2004) 122 C.A.4th Supp. 1, 4, 18 C.R.3d 863 [federal regulation that prohibits legal services attorneys from collecting fees did not preempt application of C.C. 1717; Legal Services Corporation, not private party, is authorized to enforce regulation, and tenant represented by legal services attorney could recover fees where lease provision provided for them].)

(3) *Waiver Prohibited.* Attorneys' fees authorized by C.C. 1717 are not subject to waiver, and a contract that provides for a waiver of attorneys' fees is void. (C.C. 1717(a).)

(4) *Applicability to Contract With Bilateral Attorneys' Fees Provision.* C.C. 1717 applies "where the contract specifically provides that attorney's fees and costs ... shall be awarded either to one of the parties or to the prevailing party." It thus applies to contracts containing reciprocal, as well as unilateral, attorneys' fees provisions. (*Santisas v. Goodin* (1998) 17 C.4th 599, 614, 71 C.R.2d 830, 951 P.2d 399, infra, §201; *Sears v. Baccaglio* (1998) 60 C.A.4th 1136, 1149, 70 C.R.2d 769, infra, §194; see *Johnson v. Siegel* (2000) 84 C.A.4th 1087, 1100, 101 C.R.2d 412 [although plaintiff forfeited his right to attorneys' fees by commencing action without first attempting to resolve dispute through mediation as required by agreement between parties, prevailing defendants could still recover fees; mutuality of remedy was not at issue; defendants would have forfeited their right to fees had they commenced action without prior mediation attempt]; *Van Slyke v. Gibson* (2007) 146 C.A.4th 1296, 1299, 53 C.R.3d 491 [defendants did not have to seek mediation as prerequisite to recovery of fees, as prescribed by unenforceable purchase agreement, because they did not initiate action; citing *Johnson*].)

(5) *Applicability to Costs Other Than Fees.* The reference to "attorney's fees and costs" in C.C. 1717 makes contractual provisions reciprocal as to both fees and costs. (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 C.A.4th 464, 492, 54 C.R.2d 888.)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

1. In General.

b. Retroactive Operation.

7 Witkin Cal. Proc. Judgm § 171

[§ 171] Retroactive Operation.

In *Coast Bank v. Holmes* (1971) 19 C.A.3d 581, 97 C.R. 30, the court held C.C. 1717 applicable to a note executed in 1966, rejecting the contentions that the statute should be construed as prospective and that retroactive interpretation would be an unconstitutional impairment of the obligation of contract. "It is common knowledge that parties with superior bargaining power, especially in 'adhesion' type contracts, customarily include attorney fee clauses for their own benefit. This places the other contracting party at a distinct disadvantage. Should he lose in litigation, he must pay legal expenses of both sides and even if he wins, he must bear his own attorney's fees. One-sided attorney's fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims. ... The application of section 1717 to past contracts does not result in any substantial impairment of the rights of the party who dictated the inclusion of an attorney fee clause for his benefit either to enforce the contract or to recover attorney's fees in accordance with its terms." (19 C.A.3d 596; see *San Luis Obispo Bay Properties v. Pacific Gas & Elec. Co.* (1972) 28 C.A.3d 556, 570, 104 C.R. 733.)

SUPPLEMENT: [This section is current through the latest supplement]



8 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

1. In General.

c. Shareholders' Derivative Action.

7 *Witkin Cal. Proc. Judgm* § 172

[§ 172] Shareholders' Derivative Action.

In *Brusso v. Running Springs Country Club* (1991) 228 C.A.3d 92, 278 C.R. 758, plaintiff minority shareholders brought a derivative action against defendant majority shareholders, officers, and directors of defendant corporation, alleging breach of contract. Defendants cross-complained. The trial court ruled for defendants on the complaint and for plaintiffs on the cross-complaint, but awarded attorneys' fees to defendants under C.C. 1717. Plaintiffs appealed from the fee award, contending that *Corp.C. 800*, which creates the shareholders' derivative right of action (see 9 *Summary* (10th), *Corporations*, §170 et seq.), exclusively governs the award of attorneys' fees, and that under that section, plaintiffs should have received the award. *Held*, award to defendants affirmed; C.C. 1717 was controlling.

(a) *Corp.C. 800* provides for a bond to be supplied by plaintiffs to cover the probable costs of defense, including fees. C.C. 1717 creates a right to fees, which is statutory as well as contractual. (228 C.A.3d 101; see *supra*, §170.) Thus the two statutes must be harmonized. (228 C.A.3d 101.)

(b) C.C. 1717 is mandatory and cannot be waived by either party. In contrast, the decision to require a bond under *Corp.C. 800* is discretionary. C.C. 1717 can fill in the gap left by *Corp.C. 800* because C.C. 1717 is mandatory and the underlying theory of the action is breach of contract. (228 C.A.3d 102.)

(c) Plaintiffs contended that *Corp.C. 800* should control because it presents a comprehensive scheme for awarding fees. The objective of *Corp.C. 317*, the indemnification provision, is to afford officers and directors the freedom to conduct their activities without fear of bearing the financial burden of defending against meritless charges. (228 C.A.3d 103.) But in the present case, defendants moved for posting of security and their motions were denied. Now, after trial on the merits, there is no bond on which to rely, although defendants were vindicated in the action. If *Corp.C. 800* were held to be the exclusive basis for a fee award, defendants would be unable to obtain any award. Hence, their election to invoke C.C. 1717 was both necessary and proper. (228 C.A.3d 105.)

(d) "We have found no authority for denying defendants their fees under *Civil Code section 1717*, and we hold that *section 800 of the Corporations Code* does not prescribe the exclusive statutory ground for granting attorney's fees where the shareholder derivative suit was premised on causes of action for breach of contract, which contracts contain

attorney's fees provisions, and where requests for security under *Corporations Code section 800* had been denied." (228 C.A.3d 107.)

SUPPLEMENT: [This section is current through the latest supplement]



9 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

1. In General.

d. Action Not Related to Fee Provision.

7 Witkin Cal. Proc. Judgm § 173

[§ 173] Action Not Related to Fee Provision.

(1) *Former Judicial Rule.* In *Sciarrotta v. Teaford Custom Remodeling (1980) 110 C.A.3d 444, 167 C.R. 889*, the court confronted a question of first impression: whether C.C. 1717 applies in a case in which "the contract provides for attorney's fees only in favor of one party who is sued successfully by the other to enforce a contractual right *not* the subject of the attorney fee provision." (*110 C.A.3d 447.*)

The contract was a standard form building contract providing for fees to be awarded to the contractor should it be forced to sue the owner for "the contract price." The action was brought by plaintiff owners for breach of the agreement to construct a house "in a substantial and workmanlike manner." Plaintiffs offered the following policy argument in support of their position: If the defendant sues to enforce the only part of the contract benefiting it and prevails, it is entitled to fees; in order to achieve equality, plaintiffs who sue to enforce the only part of the contract benefiting them should be entitled to fees, and C.C. 1717 should be interpreted accordingly to cover any action. (*110 C.A.3d 448, 449.*) The court, construing the statute narrowly, rejected the argument, limiting reciprocity to the specific provisions of the contract in which attorneys' fees are provided. (*110 C.A.3d 450, 451.*)

(2) *Legislative Response.* The 1983 Legislature limited *Sciarrotta* by amending C.C. 1717(a). Where a contract provides for attorneys' fees, as set forth in C.C. 1717(a), the fees provision must be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the contract specifically states that representation. (C.C. 1717(a); see *Paul v. Schoellkopf (2005) 128 C.A.4th 147, 151, 26 C.R.3d 766* [fees provision in escrow instructions did not apply to other disputes between buyer and seller over sale of land; provision indicated parties' intent to limit recovery of fees to conflicts over execution of escrow].)

Harbor View Hills Community Assn. v. Torley (1992) 5 C.A.4th 343, 7 C.R.2d 96, points out that statutes increasing or decreasing allowable litigation costs, even if silent concerning retroactivity, have been consistently applied to cases pending when the statutes became effective. (*5 C.A.4th 347.*) Hence the 1983 amendment, intended to reject the *Sciarrotta* interpretation, should be retroactively applied. (*5 C.A.4th 349*, and footnote 4.)

SUPPLEMENT: [This section is current through the latest supplement]



10 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

1. In General.

e. Contract Action Based on Book Account.

7 Witkin Cal. Proc. Judgm § 174

[§ 174] Contract Action Based on Book Account.

(1) *Determining Reasonable Fees.* "Except as otherwise provided by law," the prevailing party in a contract action based on a book account is entitled to reasonable attorneys' fees as an element of costs. (C.C. 1717.5(a).) The fees are fixed by the court at whichever of the following amounts is lower:

(a) \$ 800, for book accounts that are maintained for consumer purposes (i.e., those based on an obligation owing by a natural person for goods, money, or services that were primarily for personal, family, or household purposes). (C.C. 1717.5(a).)

(b) \$ 1,000 for all other book accounts to which C.C. 1717.5 applies. (C.C. 1717.5(a).)

(c) 25% of the principal obligation owing under the contract. (C.C. 1717.5(a).)

If a party is found to have no obligation owing on a book account, that party is entitled to a reasonable fee not greater than \$ 800 (for consumer book accounts) or \$ 1,000 (for other book accounts). (C.C. 1717.5.)

The attorneys' fees allowed under C.C. 1717.5 must be the lesser of the maximum amount allowed by C.C. 1717.5, the amount provided by a default attorneys' fee schedule adopted by the court applicable to the suit, or an amount otherwise provided by the court. A claim for attorneys' fees under C.C. 1717.5 in excess of the amounts set forth in the default attorneys' fee schedule must be reasonable attorneys' fees, as proved by the party, as actual and necessary for the claim that is subject to C.C. 1717.5. (C.C. 1717.5(b).)

(2) *Exceptions.* C.C. 1717.5 is not applicable in the following circumstances:

(a) The right to fees under C.C. 1717.5 has been waived by agreement. (C.C. 1717.5(a).)

(b) The contract provides for attorneys' fees and costs as provided in C.C. 1717. (C.C. 1717.5(a).)

(c) There is a written agreement between the parties signed by the person to be charged and the agreement does not

state that the prevailing party is entitled to fees under C.C. 1717.5. (C.C. 1717.5(a).)

(d) One of the parties is a bank, savings association, federal association, state or federal credit union; a subsidiary, affiliate or holding company of any of those entities; or an authorized industrial loan company, licensed consumer finance lender, or licensed commercial finance lender. (C.C. 1717.5(c).)

(e) One of the parties is an insurance company. In the absence of a specific contractual provision, an insurance company, surety, or guarantor is not liable under C.C. 1717.5 for attorneys' fees and costs awarded to a prevailing party against its insured. (C.C. 1717.5(c).)

SUPPLEMENT: [This section is current through the latest supplement]



11 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

1. In General.

f. No Judicially Established Bilateral Fee-Shifting.

7 Witkin Cal. Proc. Judgm § 175

[§ 175] No Judicially Established Bilateral Fee-Shifting.

In *Covenant Mut. Ins. Co. v. Young* (1986) 179 C.A.3d 318, 225 C.R. 861, property owners hired two law firms to represent them in a dispute with a contractor. The contractor's bonding company attempted to settle the dispute and believed that an agreement had been reached with the property owners' lawyers, but the property owners refused to sign. The bonding company then brought this action against the law firms for breach of warranty of authority, seeking damages including attorneys' fees under C.C. 3318. Judgment was for defendant law firms, and they filed a cost bill including attorneys' fees. The trial judge, recognizing that C.C. 3318 expressly authorized an award of fees only to a successful plaintiff suing an agent, nevertheless thought that the statute should be construed to give a reciprocal right to an agent successfully defending against the action, and made the award. *Held*, reversed.

(a) C.C. 3318, in the original 1872 Civil Code and unchanged, provides that the detriment caused by breach of warranty of an agent's authority is deemed to be the amount that could have been recovered from the agent's principal if the warranty had been complied with, and the reasonable expenses of legal proceedings taken in good faith to enforce the agent's act against the principal. This section has been construed to permit an award of attorneys' fees to a plaintiff receiving a judgment for damages against the agent (*Beraksa v. Stardust Records* (1963) 215 C.A.2d 708, 716, 30 C.R. 504), but the language cannot be deemed applicable to an agent who successfully defends against the action. (179 C.A.3d 322, 323.)

(b) C.C. 1717 does establish a reciprocal right to fees, but only in cases where a contract authorizes fees only to one party. Although C.C. 1717 has been liberally construed to broaden the class of litigants who could claim to be parties to the contract, no authority exists for extending its application to noncontract cases. There is a salient difference between one-sided attorneys' fee provisions in private contracts (usually favoring the party with the greater bargaining power) and those established by statute to advance a public purpose. "Through enactment of section 1717 the Legislature has evidenced it regards private imposition of unilateral fee-shifting to be *against* the public interest. At the same time, in literally scores of specific areas of the law, it has intentionally imposed one-sided fee-shifting as a means of *advancing* the public interest." (179 C.A.3d 324.)

(c) Policy considerations support this legislative approach. "[W]here the Legislature wants to encourage litigation it

can intervene to alter the decision-making equation by instituting unilateral fee-shifting. ... This makes it economical to seek redress not just in aggravated cases where the potential economic recovery is huge but in modest cases as well. It also means the probability of success does not have to be so high before it makes economic sense to file suit." (179 C.A.3d 325.) To superimpose a judicially declared principle of "reciprocity" on these statutes would frustrate the legislative intent to allow more injured people to seek redress, and it is possible that bilateral fee-shifting would lead to less effective enforcement than is experienced in the absence of any fee-shifting. (179 C.A.3d 325, 326; see footnotes 8, 9, and 10, citing authorities on economics of fee-shifting.)

(d) The economic effect of bilateral fee-shifting is particularly significant where the claimant is represented by a contingent fee lawyer. "Under the American rule, the prospective plaintiff does not risk payment of any legal fee--even his own lawyer's--if he loses. But if he loses under two-way fee-shifting he is faced with the risk he will have to pay his opponent's fees. Thus, claimants--especially 'risk averse' ones--are apt to be scared away from filing even highly promising claims by fears of an economic loss they don't have to worry about under the American rule or one way fee-shifting." (179 C.A.3d 328.)

(e) The argument that bilateral fee-shifting is a proper method of deterring frivolous suits is not persuasive. "[U]nilateral fee-shifting only encourages the filing of cases where there is a reasonable opportunity of winning. Victory is the only way to have one's legal fees paid by the other party. So defeat is still expensive. Moreover, the Legislature already provides a way for the victim of a frivolous lawsuit to shift his legal fees to the offending plaintiff." (179 C.A.3d 328, citing C.C.P. 128.5, 7 Cal. Proc. (5th), Trial, §227.)

Several other decisions are of note. (See *Carver v. Chevron U.S.A.* (2002) 97 C.A.4th 132, 144, 118 C.R.2d 569 [fees provision in lease between corporation and franchisees could not be construed to cover corporation's fees incurred in defending against franchisees' action under Cartwright Act; Act's attorneys' fees provision (B. & P.C. 16750(a)) provides for fees for prevailing plaintiff only; citing *Covenant Mut. Ins. Co.* and distinguishing *Murillo v. Fleetwood Enterprises* (1998) 17 C.4th 985, 73 C.R.2d 682, 953 P.2d 858, supra, §89, which allowed costs, not attorneys' fees, for prevailing defendant in consumer action]; *Carver v. Chevron U.S.A.* (2004) 119 C.A.4th 498, 503, 14 C.R.3d 467 [fees incurred in defending overlapping Cartwright Act and non-Cartwright Act claims could not be recovered]; *Wood v. Santa Monica Escrow Co.* (2007) 151 C.A.4th 1186, 1189, 60 C.R.3d 597 [because defendant was not entitled to fees under elder abuse statute, which allows fees for prevailing plaintiffs only, defendant was not entitled to fees as prevailing party on tort causes of action; all causes of action arose from single transaction and overlapped elder abuse cause of action; citing *Carver*].)

SUPPLEMENT: [This section is current through the latest supplement]



12 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

2. Necessity of Attorneys' Fee Provision.

a. Absence of Provision.

7 *Witkin Cal. Proc. Judgm* § 176

[§ 176] Absence of Provision.

(1) *General Rule Against Recovery of Fees.* In *Meininger v. Larwin-Northern Calif.* (1976) 63 C.A.3d 82, 135 C.R. 1, plaintiff subcontractor agreed to do painting work for defendant contractor, and, after a dispute, sued for damages for breach of contract. A jury verdict for damages was returned, and the trial judge entered judgment accordingly, but refused to allow attorneys' fees. *Held*, affirmed. The contract contained a special provision requiring the subcontractor to indemnify the contractor from liability or loss suffered in any tort action by third parties, including attorneys' fees incurred. This provision did not make C.C. 1717 applicable, for it did not provide for attorneys' fees in an action on the contract. (63 C.A.3d 85.)

Other cases prohibiting the recovery of fees in the absence of an attorneys' fee provision include the following:

California Fair Plan Assn. v. Politi (1990) 220 C.A.3d 1612, 1617, 270 C.R. 243 [insurer was limited to contract damages in action against insured for breach of covenant of good faith and fair dealing; insurer was not entitled to fees in absence of contract provision].

Myers Bldg. Industries, Ltd. v. Interface Technology (1993) 13 C.A.4th 949, 968, 17 C.R.2d 242 [following *Meininger*; fee provisions in indemnity clauses did not trigger application of C.C. 1717; 1983 amendment making fee provision applicable to entire contract was of no import].

Building Maintenance Service Co. v. AIL Systems (1997) 55 C.A.4th 1014, 1028, 1030, 64 C.R.2d 353, *supra*, §90 [indemnification contract provided for recovery of fees incurred in defending third-party claims; it did not address issue of action between parties on the contract itself and thus fees were not recoverable under C.C. 1717 in that action; distinguishing *Continental Heller Corp. v. Amtech Mechanical Services* (1997) 53 C.A.4th 500, 61 C.R.2d 668, *supra*, §167].

Southern Pac. Thrift & Loan Assn. v. Savings Assn. Mortg. Co. (1999) 70 C.A.4th 634, 642, 82 C.R.2d 874 [indemnity provision that contained attorneys' fee clause was not attorneys' fee provision applicable to entire agreement; because indemnity provision was not triggered by plaintiff's conduct, there was no basis for fee award for defendant;

following *Myers Bldg. Industries, Ltd.*].

Campbell v. Scripps Bank (2000) 78 C.A.4th 1328, 1335, 93 C.R.2d 635 [trial court erroneously awarded attorneys' fees to escrow holder under standardized indemnification clause within general escrow instructions; clause did not put principals to escrow on notice that it was attorneys' fee clause providing for award of fees to prevailing party in litigation to enforce escrow instructions; citing *Myers Bldg. Industries, Ltd.*].

(2) *Distinction: Fees Provision Providing for Fees Incurred in Enforcing Indemnity Agreement.* In *Baldwin Builders v. Coast Plastering Corp.* (2005) 125 C.A.4th 1339, 24 C.R.3d 9, plaintiff developer entered into subcontracts with defendants requiring defendants to perform construction work. Although the subcontracts included general indemnity provisions, defendants each executed a stand-alone indemnity agreement with plaintiff, which stated in part: "The undersigned Subcontractor hereby agrees to indemnify [developer] ... against any claim, loss, damage, expense or liability arising out of acts or omissions of Subcontractor in any way connected with the performance of the subcontract ... unless due solely to [developer's] negligence. ... Subcontractor shall, on request of [developer] ... but at Subcontractor's own expense, defend any suit asserting a claim covered by this indemnity. Subcontractor shall pay all costs, including attorney's fees, incurred in enforcing this indemnity agreement." After homeowners filed an action against plaintiff for construction defects, plaintiff cross-complained against defendants on numerous causes of action. At trial, the jury returned special verdicts finding that neither defendant was negligent in performing their work. The trial court subsequently ordered plaintiff to pay defendants' attorneys' fees. *Held*, affirmed and remanded for calculation of amount of fee award.

(a) *M. Perez Co. v. Base Camp Condominiums Assn. No. One* (2003) 111 C.A.4th 456, 3 C.R.3d 563, *infra*, 179, correctly held that an indemnity provision allowing the recovery of attorneys' fees incurred in defending against third-party claims under a construction contract was not within the purview of C.C. 1717(a). "[H]owever, to the extent the opinion can be read as holding that the indemnity provision's authorization of the recovery of attorney fees in a direct action to enforce that provision was also not subject to [C.C. 1717(a)], we simply cannot agree with such an interpretation of the contractual language and the statute." (125 C.A.4th 1346.) The express language of the attorneys' fees clauses here authorizes the recovery of attorneys' fees where one of the parties brings an action to enforce the indemnity. The action is one "on [the] contract" within the meaning of C.C. 1717(a). The fact that the clauses are set forth in the indemnity agreements does not alter this conclusion. (125 C.A.4th 1346.)

(b) The indemnity agreements here do not contain unequivocal language requiring defendants to indemnify plaintiff even in the absence of their fault or negligence. Thus, a showing of fault, or lack of fault, was a necessary component of any claim to enforce the indemnity agreements. (125 C.A.4th 1347.) Because defendants were required to establish that they were not negligent in performing the work under their subcontracts in order to defeat plaintiff's express indemnity claim, the trial court could properly award the fees incurred in making that showing as an element of the fees incurred to enforce the indemnity agreements. The case must be remanded to determine that amount. (125 C.A.4th 1348.)

(c) *Myers Bldg. Industries, Ltd.* is inapposite here and does not support a conclusion that defendants are precluded from recovering fees and costs incurred in establishing their lack of fault for the alleged construction defects. Defendants are not relying on the attorneys' fees provisions as a basis for recovering fees incurred to enforce some other contracts, as the general contractor was attempting to do in *Myers Bldg. Industries, Ltd.* (125 C.A.4th 1348.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule Against Recovery of Fees.* See *Carr Business Enterprises v. Chowchilla* (2008) 166 C.A.4th 14, 18, 82 C.R.3d 128 [indemnity provisions in construction contracts did not authorize fees in action to enforce contracts; relying on *Meininger v. Larwin-Northern Calif.* (1976) 63 C.A.3d 82, 135 C.R. 1, text, p. 724, and *Myers Bldg. Industries, Ltd. v. Interface Technology* (1993) 13 C.A.4th 949, 17 C.R.2d 242, text, p. 725, and distinguishing *Baldwin Builders v. Coast Plastering Corp.* (2005) 125 C.A.4th 1339, 24 C.R.3d 9, text, p. 725].



13 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

2. Necessity of Attorneys' Fee Provision.

b. Provision in Supplementary Document.

7 *Witkin Cal. Proc. Judgm* § 177

[§ 177] Provision in Supplementary Document.

In *Boyd v. Oscar Fisher Co.* (1989) 210 C.A.3d 368, 258 C.R. 473, plaintiff dealer sued defendant manufacturer for wrongful termination of an exclusive dealership agreement, and defendant cross-complained for unpaid invoices. The net recovery was in favor of defendant on its cross-complaint and the trial judge awarded attorneys' fees to it. *Held*, affirmed. Although the dealership agreement did not have an attorneys' fee provision, a provision was contained in the invoices, and therefore was a part of the agreement.

(a) Several documents concerning the same subject and made as part of the same transaction may be construed together, even though they are not executed contemporaneously and do not refer to each other. (210 C.A.3d 378; see 1 *Summary* (10th), *Contracts*, §747.)

(b) U.C.C. 2207 allows terms to be added to a contract by acceptance (see 4 *Summary* (10th), *Sales*, §§38, 39), and the evidence supported the conclusion that the parties were merchants who added the attorneys' fee provision to the dealership agreement by subsequent invoices. (210 C.A.3d 379.) (Cf. *Pilcher v. Wheeler* (1992) 2 C.A.4th 352, 355, 3 C.R.2d 533 [no evidence to show parties' intention that multiple contracts should constitute single transaction]; *Brittalia Ventures v. Stuke Nursery Co.* (2007) 153 C.A.4th 17, 28, 62 C.R.3d 467 [purchaser was not entitled to fees where contract that it sought to enforce by bringing action did not contain fee provision; purchaser could not rely on fee provision in different contract championed by seller, which purchaser had to defeat in order to prevail in action; distinguishing *North Associates v. Bell* (1986) 184 C.A.3d 860, 229 C.R. 305, *infra*, §180].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Pellegrini v. Weiss* (2008) 165 C.A.4th 515, 533, 81 C.R.3d 387 [because agreement on which prevailing party asserted his cause of action and which was incorporated by reference into complaint did not have fees provision, prevailing party could not recover fees; other agreements that did contain fee provisions were peripheral and were not part of integrated agreement; citing *Pilcher v. Wheeler* (1992) 2 C.A.4th 352, 3 C.R.2d 533, text, p. 727]; *Vons Cos. v. Lyle Parks Jr.* (2009) 177 C.A.4th 823, 834, 99 C.R.3d 562 [assignee of warranty that did not contain attorneys' fee provision had no right to recover fees, even though related construction contract, which was not assigned, did contain provision; distinguishing *Dell Merk v. Franzia* (2005) 132 C.A.4th 443, 33 C.R.3d 694].



14 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

2. Necessity of Attorneys' Fee Provision.

c. Ambiguous Provision Construed as Attorneys' Fee Provision.

7 *Witkin Cal. Proc. Judgm* § 178

[§ 178] Ambiguous Provision Construed as Attorneys' Fee Provision.

In *International Billing Services v. Emigh* (2000) 84 C.A.4th 1175, 101 C.R.2d 532, plaintiff corporation sued three former employees, engineers who had left plaintiff, reorganized as another company, and developed and marketed a technology that, according to plaintiff, was a misappropriation of plaintiff's proprietary technology. Plaintiff attached to its complaint a copy of a "Confidential Information and Invention Agreement," which had been signed by defendants while they were employed by plaintiff, and requested attorneys' fees based on a provision in that agreement. The provision stated that the signatories "promise to reimburse Company for any legal fees, liability, or loss which Company incurs as a result of any unauthorized disclosure or use of Confidential Information by" the signatories. Defendants prevailed at trial and requested attorneys' fees, which the trial court awarded, despite plaintiff's claim that the provision was an indemnity clause, not a fees provision. *Held*, affirmed.

(a) The provision covers legal fees incurred in actions by plaintiff against its employees (or former employees) as well as legal fees incurred in actions by plaintiff against third parties to prevent the dissemination of information wrongly disclosed by employees. There is no legislative form language required by C.C. 1717, so long as the agreement authorizes an award of fees incurred to enforce the contract. The language here, which conveys the notion that breach of confidentiality will have serious repercussions, including the need to reimburse plaintiff for its legal fees in the event of an action, does so. (84 C.A.4th 1183.)

(b) The meaning of the provision is at least ambiguous. Because plaintiff drafted the provision, it should be construed against plaintiff. This is so despite the fact that in other cases it would benefit plaintiff to construe the provision as a fees provision. (84 C.A.4th 1184.) At trial, plaintiff conceded that it had asserted that the provision was a fee provision. "Unless [plaintiff] is now taking the position its claim in the trial court was wholly frivolous, we must conclude [plaintiff] concedes the provision is at least ambiguous and susceptible of the meaning [plaintiff] previously asserted." (84 C.A.4th 1186.)

(c) Plaintiff is judicially estopped from denying that the contract contains an attorneys' fees clause. "If a party to a contract can claim a right to recover attorney's fees pursuant to a provision in a contract and then deny the effect and application of that provision if his opponent prevails," the purposes of C.C. 1717 "would be thwarted and attorney's fees

claims could be used as instruments of oppression. Specifically, uncertainty about a party's rights and obligations with respect to ultimate recovery of attorney's fees would create pressure to settle unmeritorious claims." (84 C.A.4th 1188.) Plaintiff's position is unfair. A pleader should not be permitted to threaten a litigant with the prospect of an adverse attorneys' fees award and avoid the same fate if unsuccessful. (84 C.A.4th 1191.)

One justice concurred in the result, but dissented from the portion of the opinion discussing judicial estoppel, which the dissenting justice considered an issue that was not dispositive, in light of the court's conclusion that the contract here authorizes the award of fees to the prevailing party. (84 C.A.4th 1196.)

SUPPLEMENT: [This section is current through the latest supplement]



15 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

2. Necessity of Attorneys' Fee Provision.

d. Necessity of Litigating Existence of Attorneys' Fee Provision.

7 *Witkin Cal. Proc. Judgm* § 179

[§ 179] Necessity of Litigating Existence of Attorneys' Fee Provision.

M. Perez Co. v. Base Camp Condominiums Assn. No. One (2003) 111 C.A.4th 456, 3 C.R.3d 563, declined to follow *International Billing Services v. Emigh* (2000) 84 C.A.4th 1175, 101 C.R.2d 532, supra, §178, and limited its reach. In *M. Perez Co.*, the owner of a condominium complex sued a general contractor for breach of a contract for the construction of improvements at the complex. The owner sought attorneys' fees "as provided under the contract." The jury returned a special verdict for the contractor and the trial court entered judgment accordingly, awarding damages with interest to the contractor. The trial court noted, however, that the special verdict did not contain a finding that a contract permitting an award of attorneys' fees existed between the parties. The court thus rejected the contractor's request for fees. *Held*, the contractor was not entitled to fees.

(a) *International Billing Services* announced in dictum: "Where a party claims a contract allows fees and prevails, it gets fees. Where it claims a contract allows fees and loses, it must pay fees." (111 C.A.4th 464.) Under this dictum, because the owner claimed a contractual right to attorneys' fees and lost its case, the contractor would be entitled to fees. However, *International Billing Services* "sweeps too broadly." (111 C.A.4th 465.) Its conclusion is correct only if the litigation is over the validity of the attorneys' fee provision. "A more precise statement of the rule would be: Where a party claims that a contract allows fees and proves it, that party gets fees. Where a party claims that a contract allows fees and does not prove it, the opponent gets fees. The fallacy of the rule stated in *International Billing Services* is the assumption that if the party who claims that a contract allows fees prevails in the underlying litigation, it gets attorney fees. In truth, the party must still prove that the contract allows attorney fees. The mere allegation is not enough. It is only where the parties litigate the existence of an attorney fee provision and the party claiming such a right prevails that the party should be entitled to attorney fees." (111 C.A.4th 468.)

(b) *International Billing Services* improperly used the doctrine of judicial estoppel to reach the conclusion that a party claiming attorneys' fees is later estopped from denying an attorneys' fee provision. (111 C.A.4th 468.) "Where a litigant is uncertain that a contractual provision allows the recovery of attorney fees, it is not improper to assert a claim based on that provision, just as it is not improper for the opponent to claim the provision does not allow such recovery. But those parties should not be estopped thereafter to assert contrary positions if their interests become reversed. *International Billing Services* asserts that the plaintiff who claims a contractual right to attorney fees is estopped to

claim otherwise after it loses the underlying litigation. However, the same principle should apply to the prevailing defendant. If the defendant denied that the plaintiff had a contractual right to attorney fees, it should be equally estopped to assert otherwise thereafter. There is no reason in law or logic why judicial estoppel should apply to one but not the other. Equity suggests that it apply to neither." (111 C.A.4th 469, discussing reasoning from concurring opinion in *International Billing Services*.)

SUPPLEMENT: [This section is current through the latest supplement]



16 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

a. Action Where No Contract Was Formed.

7 *Witkin Cal. Proc. Judgm* § 180

[§ 180] Action Where No Contract Was Formed.

A party is entitled to attorneys' fees under C.C. 1717 "even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed." (*Hsu v. Abbara* (1995) 9 C.4th 863, 870, 39 C.R.2d 824, 891 P.2d 804, *infra*, §199; see *Bovard v. American Horse Enterprises* (1988) 201 C.A.3d 832, 842, 247 C.R. 340.)

In *Care Const. v. Century Convalescent Centers* (1976) 54 C.A.3d 701, 126 C.R. 761, plaintiff brought an action for alleged breach of a lease. The trial judge found that no binding agreement for a lease had been made, and gave judgment for defendant. Defendant, invoking the attorneys' fees provision of the lease it had successfully challenged, sought an award. The trial judge ruled against it and, without attacking that ruling, defendant sought attorneys' fees on appeal. *Held*, it was entitled to the award (and could also have been awarded fees for the trial).

(a) The "on a contract" language in several statutes (e.g., C.C. 1717; C.C. 1811.1; C.C. 2983.4, *infra*, §224) is used to express an overall legislative policy, and should be given the same construction. The reasoning in *Leaf v. Phil Rauch* (1975) 47 C.A.3d 371, 120 C.R. 749, that attorneys' fees could be awarded in an action for restitution on a rescinded contract, is persuasive. "We can find little to differentiate an 'extinguished' contract from one such as this one which was found not to have been accepted by [defendant]." (54 C.A.3d 706.)

(b) *Geffen v. Moss* (1975) 53 C.A.3d 215, 125 C.R. 687, is distinguishable. There the agreement was illegal and public policy precluded enforcement of the contract, so there was no need for a mutual right to attorneys' fees; here, no public policy against enforcement is involved. (54 C.A.3d 707.)

Care Const. was followed in *Jones v. Drain* (1983) 149 C.A.3d 484, 196 C.R. 827. The court, reviewing many late cases dealing with nonsignatory parties (149 C.A.3d 487; see *infra*, §206 et seq.), concluded that "a prevailing defendant sued for breach of contract containing an attorney's fees provision and having had to defend the contract cause of action, is entitled to recover its own attorney's fees and costs therefor, even though the trial court finds no contract existed." (149 C.A.3d 490.)

In *Leamon v. Krajcikewcz* (2003) 107 C.A.4th 424, 132 C.R.2d 362, a jury found that a contract for the sale of real property was invalid because plaintiff seller had been forced to sign the contract under duress. The contract provided that any party who commenced an action under the contract without first attempting to resolve the matter through mediation would not be entitled to recover attorneys' fees. Because plaintiff had not attempted mediation before filing this quiet title action, the trial court denied her request for attorneys' fees. *Held*, affirmed.

(a) The mutuality of remedy provided by C.C. 1717 does not conflict with enforcement of the condition precedent to the recovery of fees. Although defendant buyers could have collected attorneys' fees if they had successfully enforced the contract, they could not have done so without first seeking mediation, making the imposition of the condition precedent mutual and reciprocal. (107 C.A.4th 433.) Mutuality is served when both parties are subject to the same reasonable restrictions that do not inherently favor one party. (107 C.A.4th 436.)

(b) C.C. 1717 applies to a contract that "specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party." The phrase "specifically provides" permits parties to a contract to set forth with specificity the circumstances in which attorneys' fees are recoverable, as long as those circumstances do not otherwise conflict with the requirements of C.C. 1717. (107 C.A.4th 436.)

(c) Requiring plaintiff to mediate the question of the validity of contract does not force her to concede that the contract is enforceable. She could have clearly stated her position that the contract is voidable or invalid and that she was seeking mediation solely to preserve a claim for attorneys' fees. (107 C.A.4th 433.)

(d) The public policy of promoting mediation as a preferable alternative to judicial proceedings is served by requiring mediation as a condition precedent to recovering attorneys' fees. Had the parties here resorted to mediation, their dispute may have been resolved in a much less expensive and time-consuming manner. (107 C.A.4th 433.)

Other cases discussing the availability of attorneys' fees when no contract was formed include the following:

Manier v. Anaheim Business Center Co. (1984) 161 C.A.3d 503, 506, 508, 207 C.R. 508, *infra*, §206 [following *Care Const.* and *Jones*].

North Associates v. Bell (1986) 184 C.A.3d 860, 865, 229 C.R. 305 [citing *Care Const.* and *Jones*, and applying their reasoning to action on lease that had expired].

Bovard v. American Horse Enterprises (1988) 201 C.A.3d 832, 843, 247 C.R. 340 [following *Geffen*: where neither party can enforce illegal contract, there is no mutual right to attorneys' fees].

Milman v. Shukhat (1994) 22 C.A.4th 538, 545, 27 C.R.2d 526 [defendants in declaratory relief action who successfully proved nonexistence of contract were entitled to attorneys' fees; following *North Associates v. Bell*].

San Francisco v. Union Pac. R. Co. (1996) 50 C.A.4th 987, 1000, 58 C.R.2d 1 [citing *North Associates*; attorneys' fee provision in lease could be enforced even though lease had been cancelled].

Yuba Cypress Housing Partners, Ltd. v. Area Developers (2002) 98 C.A.4th 1077, 1081, 120 C.R.2d 273 [although real estate contract between plaintiff and defendant was unlawful due to defendant's violation of Subdivided Lands Act, plaintiff could enforce contract's fee provision; contract did not have illegal object and thus was not type that neither party could enforce; furthermore, defendant, by violating Act, was estopped from asserting invalidity of contract; distinguishing *Geffen* and *Bovard*].

Cano v. Glover (2006) 143 C.A.4th 326, 331, 48 C.R.3d 871 [defendant was not required to prove existence of contract in order to recover attorneys' fees; plaintiff was estopped by his pleadings, which alleged existence of contract].

Van Slyke v. Gibson (2007) 146 C.A.4th 1296, 1299, 53 C.R.3d 491 [prevailing defendants were entitled to fees in specific performance action by plaintiffs who claimed to have accepted defendants' counteroffer for sale of defendants' property, even though offer was not accepted; plaintiffs would have been entitled to fees had they prevailed; citing *Hsu*].

MBNA America Bank, N.A. v. Gorman (2006) 147 C.A.4th Supp. 1, 7, 54 C.R.3d 724 [credit card holder was entitled to fees after trial court declared arbitration provision in credit card agreement to be unenforceable; card holder won simple, unqualified victory by defeating bank's petition to confirm arbitration award].

PM Group v. Stewart (2007) 154 C.A.4th 55, 68, 64 C.R.3d 227 [plaintiffs who prevailed by proving absence of purported contract between themselves and defendants were entitled to fees].

SUPPLEMENT: [This section is current through the latest supplement]

See *Rael v. Davis* (2008) 166 C.A.4th 1608, 1622, 83 C.R.3d 745 [fees were not recoverable where mediation agreement providing for fees was inadmissible under mediation confidentiality requirements of *Ev.C. 1115 et seq.* (1 *Cal. Evidence* (4th), *Circumstantial Evidence*, §152 et seq.)].



17 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

b. Action Where Contract Was Rescinded.

7 Witkin Cal. Proc. Judgm § 181

[§ 181] Action Where Contract Was Rescinded.

In *Hastings v. Matlock* (1985) 171 C.A.3d 826, 217 C.R. 856, plaintiffs contracted to sell a lot and new home to defendants. When the house was substantially complete, the parties entered a rental agreement to permit defendants to occupy the house until the close of escrow. Both contracts contained a provision for the award of attorneys' fees in the event of legal action. A dispute arose between the parties, escrow never closed, and plaintiffs sued defendants for breach of contract and unlawful detainer. A settlement agreement was reached under which defendants would vacate the house and plaintiffs would repay defendants' money. The trial judge subsequently entered judgment for specific performance of the settlement agreement and awarded attorneys' fees to plaintiffs. *Held*, affirmed.

(a) Enforcement of the settlement agreement was based on rescission of the two earlier agreements that contained the provision for attorneys' fees. Although no prior California case has addressed this issue squarely, both *Leaf v. Phil Rauch* (1975) 47 C.A.3d 371, 120 C.R. 749, and *Star Pac. Inv. v. Oro Hills Ranch* (1981) 121 C.A.3d 447, 176 C.R. 546, permitted awards of attorneys' fees in actions involving rescission of a contract providing for those fees. (171 C.A.3d 840.) And *Care Const. v. Century Convalescent Centers* (1976) 54 C.A.3d 701, 126 C.R. 761, *supra*, §180, concluded that an action is "on a contract" within the meaning of C.C. 1717 so long as the action involves a contract. (171 C.A.3d 841.)

(b) Under these decisions, in "an action to enforce the rescission of a written land sale agreement, containing a clause for attorney's fees which does not limit recovery of such fees to any particular form of action involving the contract, the prevailing party is entitled to an award of such fees." (171 C.A.3d 841.)

SUPPLEMENT: [This section is current through the latest supplement]



18 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

c. Action Involving Fraudulent Inducement To Contract.

7 Witkin Cal. Proc. Judgm § 182

[§ 182] Action Involving Fraudulent Inducement To Contract.

An action for damages for fraudulent inducement to enter into a contract is not an action on the contract and does not bring C.C. 1717 into operation. (*Schlocker v. Schlocker* (1976) 62 C.A.3d 921, 133 C.R. 485.) However, a party contracting in reliance on a fraud may elect the contract remedy of rescission, and in that case, C.C. 1717 is properly invoked. (*Star Pac. Inv. v. Oro Hills Ranch* (1981) 121 C.A.3d 447, 460, 461, 176 C.R. 546; see supra, §181.)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

d. Action To Foreclose Mechanic's Lien.

7 Witkin Cal. Proc. Judgm § 183

[§ 183] Action To Foreclose Mechanic's Lien.

C.C. 1717 provides for attorneys' fees only in contract actions and does not extend to mechanic's lien foreclosures, even where an underlying contract between the lien claimant and the landowner had an attorneys' fee provision. (*Abbett Elec. Corp. v. California Fed. Savings & Loan Assn. (1991) 230 C.A.3d 355, 361, 281 C.R. 362; Royster Const. Co. v. Urban West Communities (1995) 40 C.A.4th 1158, 1170, 47 C.R.2d 684; cf. Korech v. Hornwood (1997) 58 C.A.4th 1412, 1422, 68 C.R.2d 637* [lien claimants invoked contractual attorneys' fee provision by pursuing breach of contract claim against landowners and were therefore liable, under C.C. 1717, for landowners' fees when breach of contract claim failed].)

SUPPLEMENT: [This section is current through the latest supplement]



20 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

e. Tort Action Arising Out of Contract.

1. Uncertainty Whether Action Is Based on Contract or Tort.

7 Witkin Cal. Proc. Judgm § 184

[§ 184] Uncertainty Whether Action Is Based on Contract or Tort.

In *McKenzie v. Kaiser-Aetna* (1976) 55 C.A.3d 84, 127 C.R. 275, plaintiff contractor sued defendant owner to recover for services, labor, and material. The complaint set forth causes of action for breach of contract, breach of implied warranty, fraud, and negligent misrepresentation. The jury brought in a general verdict for plaintiff, and the parties stipulated that the court should determine the issue of attorneys' fees. The court found that plaintiff had failed to establish that the verdict in his favor was based on the written contract containing the attorneys' fees provision, rather than on the distinct theories of implied warranty or negligent misrepresentation. *Held*, affirmed. "The only reasonable interpretation of section 1717 is that it reciprocates the allowance of attorney's fees only when such fees are incurred to enforce the provisions of the contract." (55 C.A.3d 89.) (See *Wong v. Davidian* (1988) 206 C.A.3d 264, 271, 253 C.R. 675 [distinguishing *McKenzie* and holding C.C. 1717 applicable to action for reformation]; *Kangarlou v. Progressive Title Co.* (2005) 128 C.A.4th 1174, 1177, 27 C.R.3d 754 [action alleging that escrow agent breached fiduciary duty to buyer was based on contract; although breach of fiduciary duty may be both breach of contract and tort, here, buyer alleged that escrow agent failed to obtain evidence that real estate broker was regularly licensed, failed to communicate facts learned about broker's license, and failed to comply strictly with escrow instructions, all of which concern duties undertaken in contract].)

SUPPLEMENT: [This section is current through the latest supplement]



21 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

e. Tort Action Arising Out of Contract.

2. Availability of Fees Under C.C.P. 1021.

aa. Recovery Allowed.

7 *Witkin Cal. Proc. Judgm* § 185

[§ 185] Recovery Allowed.

In *Xuereb v. Marcus & Millichap* (1992) 3 C.A.4th 1338, 5 C.R.2d 154, plaintiff purchasers sued defendant real estate agents, alleging various causes of action arising out of a real estate transaction. The jury returned a verdict in favor of defendants, and they filed a motion for attorneys' fees under an attorneys' fees clause in the purchase agreement. The trial court denied the motion on the ground that the case had been tried on tort theories. *Held*, reversed. The effect of C.C. 1717 is to make an otherwise unilateral right to attorneys' fees reciprocally binding on all parties to actions to enforce a contract. Here, the action was not on the contract, and C.C. 1717 was not applicable, but the statute does not supersede or limit the broad right of parties under C.C.P. 1021 to make fee agreements. (3 C.A.4th 1342; on C.C.P. 1021 generally, see *supra*, §149.)

Xuereb was followed in *Lerner v. Ward* (1993) 13 C.A.4th 155, 16 C.R.2d 486. Plaintiffs sued defendants for falsely representing that real property plaintiffs had agreed to purchase could be subdivided. The complaint alleged causes of action for breach of contract, reformation, fraud, breach of fiduciary duty, and negligence. Before trial, plaintiffs dismissed the contract counts and proceeded solely on the fraud cause of action. The jury returned a verdict for defendants, and they moved for attorneys' fees. The trial court denied the motion on the ground that C.C. 1717 does not authorize an award in a fraud action arising out of a contract. *Held*, judgment reversed; recovery was permissible under C.C.P. 1021.

(a) *No recovery under C.C. 1717.* A tort action for fraud arising out of a contract is not an action on a contract within the meaning of C.C. 1717. (13 C.A.4th 159, citing *Schlocker v. Schlocker* (1976) 62 C.A.3d 921, 133 C.R. 485, *McKenzie v. Kaiser-Aetna* (1976) 55 C.A.3d 84, 127 C.R. 275, *supra*, §184, and other cases.)

(b) *Recovery under C.C.P. 1021.* C.C.P. 1021 authorizes attorneys' fees where expressly provided in a contract. The clause in the present contract was similar to that in *Xuereb*. It was not limited to an action on the contract, but covered any action arising out of the contract, and this included any action for fraud. (13 C.A.4th 160.) Hence, although plaintiffs, by proceeding only on a tort theory, gave up their opportunity to obtain fees under C.C. 1717, they still could

have recovered fees under *C.C.P. 1021*. However, defendants, as the prevailing parties, were entitled to their fees. (13 *C.A.4th* 160.)

The following are among the numerous cases allowing the recovery of attorneys' fees under *C.C.P. 1021* in a tort action arising out of a contract:

Santisas v. Goodin (1998) 17 *C.A.4th* 599, 607, 619, 71 *C.R.2d* 830, 951 *P.2d* 399, *infra*, §201 [attorneys' fee provision embraced contract and tort claims; *C.C. 1717* did not bar recovery of fees incurred in defending tort claims].

Palmer v. Shawback (1993) 17 *C.A.4th* 296, 299, 21 *C.R.2d* 575 [following *Lerner* and *Xuereb*].

Adam v. DeCharon (1995) 31 *C.A.4th* 708, 712, 37 *C.R.2d* 195 [citing *Xuereb*; plaintiffs could seek fees under *C.C.P. 1021* as prevailing parties in tort action arising out of real estate contract, even though they did not prevail on contract claim].

Sweat v. Hollister (1995) 37 *C.A.4th* 603, 610, 611, 43 *C.R.2d* 399 [following *Xuereb*; defendant sellers were entitled to fees under *C.C.P. 1021* in tort action arising out of real estate contract, but defendant brokers, who were not parties to contract, were not entitled].

Allstate Ins. Co. v. Loo (1996) 46 *C.A.4th* 1794, 1798, 54 *C.R.2d* 541 [language of attorneys' fee provision in lease encompassed any action that related to leased premises; following *Lerner*].

Childers v. Edwards (1996) 48 *C.A.4th* 1544, 1549, 56 *C.R.2d* 328 [defendants were entitled to costs, including attorneys' fees, in tort action arising out of breach of real estate contract; following *Xuereb*].

Gonzales v. Personal Storage (1997) 56 *C.A.4th* 464, 478, 480, 65 *C.R.2d* 473 [fees were recoverable in tort action for conversion of stored personal property where storage agreement included fee provision applicable to "any legal action"; following *Xuereb*].

Johnson v. Siegel (2000) 84 *C.A.4th* 1087, 1101, 1102, 101 *C.R.2d* 412 [prevailing defendants were entitled to attorneys' fees in plaintiff's action for fraud and misrepresentation arising out of real estate transaction; following *Xuereb* and *Lerner*].

Thompson v. Miller (2003) 112 *C.A.4th* 327, 333, 336, 4 *C.R.3d* 905 [majority shareholder was entitled to attorneys' fees in minority shareholders' unsuccessful action alleging fraud, concealment, and breach of fiduciary duty in defendant's purchase of shares from plaintiffs; broad fees provision in share purchase agreement provided for fees to prevailing party "in any dispute under this Agreement"; distinguishing *Excess Electronix v. Heger Realty Corp.* (1998) 64 *C.A.4th* 698, 75 *C.R.2d* 376, *infra*, §201].

Wakefield v. Bohlin (2006) 145 *C.A.4th* 963, 987, 52 *C.R.3d* 400 [home buyer was entitled to attorneys' fees after prevailing against seller on claim of negligent misrepresentation; real estate purchase agreement provided for fees to prevailing buyer or seller in action arising out of agreement; citing *Santisas*].

SUPPLEMENT: [This section is current through the latest supplement]

See *Chinn v. KMR Property Management* (2008) 166 *C.A.4th* 175, 182, 190, 82 *C.R.3d* 586 [fee provision in lease agreement was "exceptionally broad" and authorized fees in tort action between tenant and lessor; remand was necessary to determine which party most realized its objectives through settlement and thus prevailed].



22 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

- B. Statutory Extension of Contract Right.
 - 3. Necessity of Action "On the Contract."
 - e. Tort Action Arising Out of Contract.
- 2. Availability of Fees Under C.C.P. 1021.
 - bb. Recovery Denied.

7 *Witkin Cal. Proc. Judgm* § 186

[§ 186] Recovery Denied.

In *Moallem v. Coldwell Banker Commercial Group* (1994) 25 C.A.4th 1827, 31 C.R.2d 253, plaintiff, as the assignee of two corporations, received judgment against the corporations' real estate agents for negligence and breach of fiduciary duty, but not on its claim for breach of contract. The attorneys' fees provision named defendant as its only beneficiary. Both sides were denied attorneys' fees under C.C. 1717, the trial judge ruling that neither party had prevailed on the contract. On appeal, plaintiff relied primarily on *Xuereb v. Marcus & Millichap* (1992) 3 C.A.4th 1338, 5 C.R.2d 154, supra, §185. *Held*, affirmed as to attorneys' fees.

(a) Although the present case, like the *Xuereb* line of cases, involved a tort claim arising out of a real estate transaction with a contract provision for attorneys' fees, the critical and dispositive difference was that the provision specifically limited entitlement to attorneys' fees to defendant. On that basis, the plaintiff's request for fees lacked support under the contract and under C.C.P. 1021. (25 C.A.4th 1832.)

(b) The public policy of mutuality of remedy established by C.C. 1717 applies only to attorneys' fees for contract actions, not tort claims. Therefore, C.C. 1717 is limited to contract actions based on breach of contract, and where the contract itself specifically provides for attorneys' fees incurred for its enforcement. (25 C.A.4th 1832.)

In *Loube v. Loube* (1998) 64 C.A.4th 421, 428, 74 C.R.2d 906, plaintiffs brought a legal malpractice action against the attorneys who had represented them in a real estate action. Concluding that plaintiffs suffered no damages from defendants' representation in the underlying action, the trial judge rendered judgment for defendants and awarded them attorneys' fees. *Held*, award of fees reversed.

(a) The action here is not "on the contract" as required by C.C. 1717. Although the retainer agreement between the parties provided for recovery of fees by the prevailing party in a "legal action or arbitration [that] is necessary to enforce the terms of this Agreement," plaintiffs did not bring suit on the agreement. They sued for negligence. (64 C.A.4th 429.) Although the parties had a contractual relationship and the legal action arose from that relationship, the cause of action

sounded in tort and "was no more 'on the contract' than a claim for breach of fiduciary duty or for fraud involving a contract." (64 C.A.4th 430.) *Xuereb* is distinguishable; the attorneys' fee provision here, unlike the one in *Xuereb*, is narrowly drawn and cannot be read as a contractual agreement to award fees in a legal malpractice action. (64 C.A.4th 430.)

(b) Although the majority of attorney time was directed to defending against plaintiffs' legal malpractice claim, at least some of it was devoted to responding to plaintiffs' additional claim that they were charged excessive fees in the underlying action. That time is compensable under C.C. 1717. (64 C.A.4th 430, 431.)

Other cases denying recovery of attorneys' fees include the following:

Jue v. Patton (1995) 33 C.A.4th 456, 459, 460, 39 C.R.2d 364 [distinguishing *Xuereb*; fees were denied where action was voluntarily dismissed before trial].

Excess Electronix v. Heger Realty Corp. (1998) 64 C.A.4th 698, 75 C.R.2d 376, *infra*, §188 [attorneys' fee provision did not encompass tort actions].

Hasler v. Howard (2004) 120 C.A.4th 1023, 1027, 16 C.R.3d 217 [prevailing broker was not entitled to attorneys' fees in client's tort action alleging fraud, breach of fiduciary duty, and breach of duty to disclose; fee provision in listing agreement provided for fees only in action regarding obligation to pay compensation; distinguishing *Xuereb*].

Hasler v. Howard (2005) 130 C.A.4th 1168, 1170, 30 C.R.3d 714 [client who prevailed on appeal when broker attempted to reverse order denying fees was not entitled to fees; contract did not entitle either party to fees, no matter who prevailed, and fact that broker requested them in trial court did not mean that client could obtain them by prevailing on appeal; distinguishing *Hsu v. Abbara* (1995) 9 C.4th 863, 39 C.R.2d 824, 891 P.2d 804, *infra*, §199].

SUPPLEMENT: [This section is current through the latest supplement]

See *Casella v. SouthWest Dealer Services* (2007) 157 C.A.4th 1127, 1160, 69 C.R.3d 445 [employment agreement provided for attorneys' fees incurred in enforcing agreement's provisions only; prevailing employee could recover fees incurred in defending against employer's breach of contract claims, but not those incurred in litigating employee's wrongful termination and other tort claims; relying on *Excess Electronix v. Heger Realty Corp.* (1998) 64 C.A.4th 698, 75 C.R.2d 376, text, p. 738].



23 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

e. Tort Action Arising Out of Contract.

3. Nature of Affirmative Defense.

7 *Witkin Cal. Proc. Judgm* § 187

[§ 187] Nature of Affirmative Defense.

(1) *Tort Defense in Contract Action.* In *Siligo v. Castellucci* (1994) 21 C.A.4th 873, 26 C.R.2d 439, plaintiff seller sued defendant buyer for breach of a contract for the sale of a business. Defendant asserted fraud as an affirmative defense and filed a cross-complaint for fraud. Plaintiff prevailed at trial. In proving the amount of attorneys' fees, plaintiff submitted his attorneys' invoices that separated the fees into two categories: one for services involving the breach of contract action, and one for services in defense of the fraud cross-complaint. The trial judge divided the fees in this same manner and only awarded fees designated in the breach of contract action, reasoning that if the causes of action were separate and the fees could be allocated, then the prevailing party was only entitled to those fees related to the contract. *Held*, reversed and remanded.

(a) C.C. 1717 does not independently bar an award for attorneys' fees in a tort action. Further, under *C.C.P. 1021*, parties may validly contract for an award of attorneys' fees even though the action is based on tort rather than contract. (21 C.A.4th 877.)

(b) "An obligation to pay attorney fees incurred in the enforcement of a contract ' includes attorneys' fees incurred in defending against a challenge to the underlying validity of the obligation.' " (21 C.A.4th 878.) The pivotal point is whether a defense against the noncontractual claim is necessary to succeed on the contractual claim. Because plaintiff was required to defend against fraud in order to succeed on his complaint to enforce the agreements, the trial judge erred in apportioning the award of attorneys' fees between the offensive and defensive aspects of the case. (21 C.A.4th 879, 880.)

(2) *Contract Defense in Tort Action.* In *Plemon v. Nelson* (1983) 148 C.A.3d 720, 196 C.R. 190, the court held that a tort action for negligence did not make the statute applicable, even though defendant by cross-complaint pleaded a contract with an attorneys' fees provision. Defendant alleged the contract defensively, asserting that any tort liability he might incur as a result of plaintiff's negligence action was subject to a limitation of liability clause in the contract. Thus, defendant's cross-complaint would not be regarded as an action to enforce the contract against plaintiff, i.e., to make plaintiff liable under the contract. (148 C.A.3d 724.) (See *Gil v. Mansano* (2004) 121 C.A.4th 739, 742, 17 C.R.3d 420

[provision in release that provided for fees "[i]n the event action is brought to enforce the terms of this [Release]" did not support fees award for defendant who asserted release as affirmative defense in action for fraud; although provision can be drawn broadly enough to apply to defensive use of contract, this one was not].)

SUPPLEMENT: [This section is current through the latest supplement]



24 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

f. Action for Equitable Relief.

7 *Witkin Cal. Proc. Judgm* § 188

[§ 188] Action for Equitable Relief.

As with tort claims (*supra*, §184 et seq.), whether an award of fees on other noncontract claims, such as claims for equitable relief, is appropriate depends on the scope of the contractual attorneys' fee provision; C.C. 1717 does not apply to those claims. (*Excess Electronix v. Heger Realty Corp.* (1998) 64 C.A.4th 698, 713, 75 C.R.2d 376 [lessee's equitable claims for contribution and indemnity did not fall within lease provision authorizing fees in action to enforce terms of lease or to declare rights under lease; equitable claims were created solely by operation of law and principles of equity, not by lease; citing *Santisas v. Goodin* (1998) 17 C.4th 599, 71 C.R.2d 830, 951 P.2d 399, *infra*, §201].)

SUPPLEMENT: [This section is current through the latest supplement]

In determining whether an action is "on the contract" under C.C. 1717(a), "the proper focus is not on the nature of the remedy, but on the basis of the cause of action." Thus, causes of action for declaratory and injunctive relief and to quiet title can be actions on a contract. (*Kachlon v. Markowitz* (2008) 168 C.A.4th 316, 347, 348, 85 C.R.3d 532 [where home buyers' claims were based on promissory note and deed of trust, their action against sellers was "on the contract," even though they sought declaration that note had been paid in full, injunction against foreclosure, and quiet title].)



25 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

g. Action for Declaratory Relief.

7 *Witkin Cal. Proc. Judgm* § 189

[§ 189] Action for Declaratory Relief.

In *Texas Commerce Bank-El Paso v Garamendi* (1994) 28 C.A.4th 1234, 34 C.R.2d 155, plaintiffs, banks that had purchased investment contracts from an insolvent insurance company, sought declaratory relief against defendant insurance commissioner in his capacity as conservator of the insolvent company. The action challenged defendant's failure to designate plaintiffs' priority status in conservatorship proceedings as that of policyholders. The trial judge ruled for plaintiffs, but ordered each party to bear its own costs including attorneys' fees. *Held*, reversed as to attorneys' fees.

(a) Plaintiffs' investment contracts provided for attorneys' fees to the prevailing party in any litigation to enforce rights under those contracts. (28 C.A.4th 1239.) Actions for a declaration of rights based on an agreement are on the contract within the meaning of C.C. 1717. Because the action had to do with the interpretation of the investment contracts, it was on the contract. (28 C.A.4th 1246.)

(b) C.C. 1717(b)(1) provides that "the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." (See *infra*, §194.) Because plaintiffs won both at trial and on appeal, they were the prevailing parties in the declaratory relief action within the meaning of C.C. 1717. (28 C.A.4th 1246, 1247.) (See *San Francisco v. Union Pac. R. Co.* (1996) 50 C.A.4th 987, 999, 58 C.R.2d 1 [action for declaratory relief to determine rights of parties to lease was "on the contract"; citing *Texas Commerce Bank-El Paso*].)

In *Curry v. Moody* (1995) 40 C.A.4th 1547, 48 C.R.2d 627, plaintiffs lent money to a borrower in return for a promissory note and a deed of trust on the borrower's home. The borrower, who never repaid the loan, later reconveyed the deed of trust, containing plaintiffs' forged signatures, to defendant, who eventually foreclosed on the home. In plaintiffs' action for declaratory relief and to quiet title, the trial judge awarded them damages equal to the principal on the note, as well as attorneys' fees. *Held*, attorneys' fees award reversed. Defendant was not sued "on a contract as if [it] were a party to it." (40 C.A.4th 1557.) Plaintiffs' complaint did not plead a cause of action on the note, but rather for declaratory relief and to quiet title. The only significance of the note was to provide the measure of damages suffered by plaintiffs. As plaintiffs acknowledged, defendant was not obligated to plaintiffs on the note. (40 C.A.4th 1557.) (See *Exxess Electronixx v. Heger Realty Corp.* (1998) 64 C.A.4th 698, 708, 75 C.R.2d 376, *supra*, §188.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Turner v. Schultz* (2009) 175 C.A.4th 974, 979, 96 C.R.3d 659 [fees were proper where plaintiff unsuccessfully sought declaratory and injunctive relief to avoid enforcement of agreement's arbitration provision; agreement provided for fees incurred in connection with action to enforce agreement].



26 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

h. Action on Lease for Breach of Implied Warranty of Habitability.

7 Witkin Cal. Proc. Judgm § 190

[§ 190] Action on Lease for Breach of Implied Warranty of Habitability.

In *Fairchild v. Park* (2001) 90 C.A.4th 919, 109 C.R.2d 442, plaintiff tenants leased a residence from defendant landlord, who failed to provide a habitable dwelling. Plaintiffs were behind on their rent by about 1 year. A fire broke out in the residence and destroyed plaintiffs' personal belongings. Plaintiffs sued for breach of contract, breach of the implied warranty of habitability, negligence, and fraud, and defendant cross-complained for back rent. The trial court dismissed plaintiffs' fraud claim and barred all tort relief on the warranty claim, but ultimately found for plaintiffs on their breach of warranty claim and awarded them \$ 89,000. The trial court awarded defendant \$ 12,000 in back rent. Because the lease provided for attorneys' fees for the landlord in an action brought for the breach of any of the covenants contained in the lease, plaintiffs moved for fees under C.C. 1717. The trial court denied the motion. *Held*, reversed.

Plaintiffs prevailed on a contract claim and are entitled to fees under C.C. 1717. Plaintiffs' recovery was not based on a duty independent of the lease. The trial court expressly awarded damages based on defendant's breach of the warranty of habitability, which is implied in every lease. (90 C.A.4th 925.) Even though their complaint included an allegation of negligence, plaintiffs could elect, after the finding of liability, to go forward on a contract theory to recover attorneys' fees. Furthermore, the fact that plaintiffs were awarded the market value of their lost property does not mean that they necessarily prevailed on a tort claim, nor does the fact that the covenant of habitability is imposed by law mean that it sounds in tort. Finally, plaintiffs could recover on a contract cause of action even though they were in breach of the lease by being behind on the rent; the implied covenant of habitability contained in the lease is independent of the covenant to pay rent. (90 C.A.4th 927.)

One justice dissented, arguing that plaintiffs who, without justification, had withheld rent for 1 year could not enforce a contractual attorneys' fee clause against defendant. (90 C.A.4th 931.)

SUPPLEMENT: [This section is current through the latest supplement]



27 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

i. Action by Party With Security Interest in Personal Property.

7 *Witkin Cal. Proc. Judgm § 191*

[§ 191] Action by Party With Security Interest in Personal Property.

In *California Wholesale Material Supply v. Norm Wilson & Sons* (2002) 96 C.A.4th 598, 117 C.R.2d 390, plaintiff, a materials supplier, obtained a security interest in a subcontractor's accounts receivable and filed a financing statement reflecting that interest. After the subcontractor defaulted on its obligation to plaintiff, plaintiff sought to have defendant, a general contractor, pay directly to plaintiff money that defendant owed the subcontractor. Instead, defendant paid the money to another party to whom the subcontractor owed money and who had a prior perfected security interest in the subcontractor's accounts receivable. Plaintiff sued defendant under former U.C.C. 9502 (now U.C.C. 9607), and the trial court found that defendant had properly paid the other party. Defendant moved for attorneys' fees based on a fee provision in the subcontract between it and the subcontractor. The trial court denied the motion, finding that the action arose out of the security agreement between plaintiff and the subcontractor, rather than out of the subcontract. *Held*, reversed.

(a) The action arose out of the subcontract. The subcontractor had given plaintiff a security interest in the subcontract and plaintiff became the assignee of the subcontractor's rights in the subcontract. Even though plaintiff framed its complaint as a U.C.C. collection action for damages, the parties necessarily litigated plaintiff's claim for money allegedly due the subcontractor under the subcontract. (96 C.A.4th 605.)

(b) Plaintiff is liable for attorneys' fees under the subcontract even though plaintiff was not a signatory to the subcontract. Had plaintiff prevailed on its cause of action as the assignee under the subcontract, defendant would have been liable to plaintiff for attorneys' fees under the subcontract's provision. Consequently, defendant is entitled to recover those fees because it prevailed. (96 C.A.4th 608.)

In *Dell Merk v. Franzia* (2005) 132 C.A.4th 443, 33 C.R.3d 694, plaintiff bank entered into a security agreement with a contractor. The agreement and the note that it secured both contained provisions requiring the contractor to pay the bank's attorneys' fees in a collection action or an action to enforce the security agreement. The bank notified defendant, one of the contractor's customers, that all proceeds of the contract between the contractor and defendant were to be paid jointly to the bank and the contractor. When litigation ensued between the contractor and defendant, plaintiff bank intervened, claiming first, that it was entitled to any amounts still due to the contractor from defendant, and

second, that defendant should have made a previous progress payment jointly to plaintiff and the contractor. After judgment for defendant, defendant was awarded attorneys' fees. *Held*, affirmed.

(a) Plaintiff's action to recover any remaining proceeds owed by defendant to the contractor, bank's assignor, was based on the contract between the contractor and defendant, which did not contain a fees provision. Because plaintiff would not have been entitled to collect attorneys' fees from defendant if plaintiff had prevailed on this claim, defendant could not collect fees from plaintiff for defending this claim. (*132 C.A.4th 451*, distinguishing *California Wholesale*.)

(b) Plaintiff's action for repayment of the previous progress payment, however, was an action on the security agreement within the meaning of C.C. 1717. Had plaintiff established that defendant was bound by the agreement, it would have been entitled to attorneys' fees consistent with the agreement's provision. Defendant was therefore entitled to an award of fees for successfully defending plaintiff's contractual claim regarding the progress payment. (*132 C.A.4th 454*.)

SUPPLEMENT: [This section is current through the latest supplement]



28 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

j. Contract Action Reduced to Judgment.

7 *Witkin Cal. Proc. Judgm* § 192

[§ 192] Contract Action Reduced to Judgment.

(1) *Recovery Allowed*. In *Rainier Nat. Bank v. Bodily* (1991) 232 C.A.3d 83, 282 C.R. 926, plaintiff bank sued defendants in the state of Washington on the basis that defendants were guarantors of a promissory note. The Washington court gave judgment for plaintiff together with an award of attorneys' fees and costs, and plaintiff domesticated the judgment in California. The trial court granted defendants' motion to vacate the judgment, on a finding that defendants did not sign the guaranty and that Washington had no jurisdiction over them. The Court of Appeal affirmed, and defendants then moved for attorneys' fees under C.C. 1717. *Held*, they were entitled to fees.

Despite plaintiff's argument that the Washington judgment is not a contract within C.C. 1717, the original contract action instituted by the bank, albeit a contract on which defendants were found to be not liable, controls under C.C. 1717. The purported guaranty provided for attorneys' fees in the event of a legal action to enforce its terms, plaintiff was awarded attorneys' fees by the Washington court, plaintiff attempted to domesticate the entire Washington judgment, and defendants are now the prevailing party. Had plaintiff initiated the litigation in California, defendants would be entitled to an award of attorneys' fees. "It matters little to [defendants'] pocketbook whether their attorney was employed to resist an action initially filed in California or to set aside a sister state judgment. [Plaintiff's] argument also overlooks the fact that it actually received an award of attorney's fees which it tried to enforce. To disallow attorney's fees in this factual situation would reward [plaintiff] for selecting an improper forum and would be contrary to logic and to the spirit" of C.C. 1717. (232 C.A.3d 86.)

(2) *Recovery Denied*. In *Hambrose Reserve, Ltd. v. Faltz* (1992) 9 C.A.4th 129, 11 C.R.2d 638, plaintiff sued on a promissory note in New York and sought to enforce its judgment in California. The judgment did not include attorneys' fees. Defendant successfully resisted enforcement and sought attorneys' fees under C.C. 1717 as the party prevailing on the note. *Held*, defendant was not entitled to fees.

(a) The action was not one on a contract under C.C. 1717, but was a proceeding to enforce a judgment. (9 C.A.4th 131.)

(b) The analysis in *Chelios v. Kaye* (1990) 219 C.A.3d 75, 268 C.R. 38, that the judgment merges and extinguishes

contract rights, is persuasive. Furthermore, *Rainier* is distinguishable because it is based on equities "peculiar to that case" that implicate the mutuality principle underlying C.C. 1717. (9 C.A.4th 132.) The plaintiff in *Rainier* had selected the Washington forum and had received attorneys' fees there as the prevailing party. When the California court ruled that that forum was improper, equity demanded that the defendants recover attorneys' fees. "Equity does not compel the same result here. [Plaintiff here] did not recover attorney fees in New York, so the issue of mutuality does not arise." (9 C.A.4th 133.)

SUPPLEMENT: [This section is current through the latest supplement]



29 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

3. Necessity of Action "On the Contract."

k. Offset for Damages on Other Causes of Action.

7 Witkin Cal. Proc. Judgm § 193

[§ 193] Offset for Damages on Other Causes of Action.

An action may seek relief in addition to that based on a contract. If damages on a noncontract cause of action are awarded against the party prevailing on the contract cause of action, an award of attorneys' fees under C.C. 1717 is deducted from that award of damages. If the award under C.C. 1717 exceeds the damages on the noncontract cause of action, the party prevailing on the contract is entitled to the net amount. (C.C. 1717(c).)

SUPPLEMENT: [This section is current through the latest supplement]



30 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

a. Party Recovering Greater Relief.

7 *Witkin Cal. Proc. Judgm § 194*

[§ 194] Party Recovering Greater Relief.

(1) *In General.* The party prevailing on the contract is the party who recovered a greater relief in the action on the contract. (C.C. 1717(b)(1); see C.E.B., *Attorney Fee Awards* 2d, §6.18 et seq.; Cal. Civil Practice, 4 Procedure, §33:47 [form; notice of motion to determine prevailing party and fix fees as costs in contract action]; on determination that there is no prevailing party, see *infra*, §199.) Cases discussing when a party is the prevailing party under this rule include the following:

Artesia Med. Dev. Co. v. Regency Associates, Ltd. (1989) 214 C.A.3d 957, 965, 966, 266 C.R. 657 [in plaintiff lessor's unlawful detainer action against defendant lessee and defendant assignee, judgment of forfeiture of lease made plaintiff the prevailing party, even though court allowed defendant assignee to remain in possession as lessee subject to conditions].

Mustachio v. Great Western Bank (1996) 48 C.A.4th 1145, 1150, 56 C.R.2d 33 [although plaintiff's claim for punitive damages was rejected on appeal, she was party prevailing on contract because she received damages for breach of contract and conversion].

Wong v. Thrifty Corp. (2002) 97 C.A.4th 261, 263, 265, 118 C.R.2d 276 [lessor who accepted lessee's offer to compromise clearly was prevailing party and was entitled to attorneys' fees, even though lessee had not been "determined" to be in default under lease, as required by attorneys' fee provision in lease; definition of "prevailing party" in fee provision conflicted with definition in C.C. 1717(b)(1) and was therefore void].

Biren v. Equality Emergency Med. Group (2002) 102 C.A.4th 125, 139, 140, 125 C.R.2d 325 [defendant who was awarded judgment on its cross-complaint was not prevailing party; judgment was to be applied as credit against larger amount owed to plaintiff, and defendant obtained only "mixed" result on its various claims].

(2) *Exception: Voluntary Dismissal.* The general definition of prevailing party does not apply where the action has been dismissed voluntarily or pursuant to a settlement, in which case there is no prevailing party. (C.C. 1717(b)(2); see *infra*, §200.)

(3) *Exception: Tender and Deposit.* If the defendant alleges tender and deposits in court the full amount to which the plaintiff is entitled and the allegation of tender is found to be true, the defendant is deemed to be the prevailing party. If a deposit has been made, the court must, on application of any party, order the deposit invested in an interest-bearing account. The interest is allocated between the parties in the same proportion as the original funds are allocated. (C.C. 1717(b)(2).)

(4) *"Greater Relief" Is Not Necessarily Same as "Net Monetary Recovery".* In *Sears v. Baccaglio* (1998) 60 C.A.4th 1136, 1139, 1155, 70 C.R.2d 769, defendant, the lessor of a building, secured a personal guaranty from plaintiff, the principal shareholder of the company to whom the building was leased. The guaranty guaranteed the lessee's performance of the lease and required payment of reasonable attorneys' fees to the prevailing party in any legal action concerning the guaranty. After the lessee company filed for bankruptcy and defaulted on the lease, plaintiff paid defendant \$ 112,000 under protest. Defendant eventually also received payments from the lessee's bankruptcy estate, rent in mitigation, and the security deposit, totaling, with plaintiff's payment under the guaranty, \$ 359,386. Plaintiff sued defendant for breach of contract and other claims, alleging that the guaranty no longer existed, and requested \$ 112,000 in damages. Defendant cross-complained for an additional \$ 5,461. The trial court found plaintiff liable on the guaranty, but awarded plaintiff over \$ 67,000 in damages, representing the amount that defendant had recovered from the various payment sources exceeding what the lessee had owed to defendant on the lease. The trial court awarded defendant nothing on his cross-complaint. The trial court then awarded defendant attorneys' fees, finding that he had prevailed on the contract issue. *Held*, affirmed.

(a) C.C. 1717 applies here. The statute plainly applies to contracts including bilateral fee provisions. (60 C.A.4th 1146.) Thus, it permits fees to be awarded in contract actions where the contract provides for an award to the prevailing party, not just to those where the contract purports to permit fees only to a specified party. (60 C.A.4th 1149.)

(b) C.C. 1717 gives the trial court discretion to determine the prevailing party, regardless of which party received the greater amount of damages. The trial court may apply equitable principles and conclude that the person receiving the greater monetary judgment may not be the party recovering "greater relief" on the contract action. (60 C.A.4th 1151.) "In the event one party received earlier payments, settlements, insurance proceeds, or other recovery, the court has discretion to determine whether the party required to pay a nominal net judgment is nevertheless the prevailing party" entitled to attorneys' fees under C.C. 1717. (60 C.A.4th 1154, 1155.)

(c) The result would not be different under C.C.P. 1032. Even under C.C.P. 1032 (supra, §91), which defines "prevailing party" to include the party who obtains a net monetary recovery, the court is not constrained to award attorneys' fees to the party with the greatest net monetary recovery. (60 C.A.4th 1155.) Where there is evidence of other success, such as here by collection of a portion of the funds at issue, the court may take that recovery into account when determining who prevailed. (60 C.A.4th 1156.) In any case, C.C. 1717 is the applicable statute when determining whether and how attorneys' fees should be awarded under a contract. (60 C.A.4th 1157.)

(d) The trial court here did not abuse its discretion in determining defendant to be the prevailing party. The trial court noted that the "whole thrust" of its decision was to give effect to the guaranty, which plaintiff had hotly disputed, and to award defendant the damages to which he was entitled under that contract. Plaintiff received money not because the court found defendant liable for breach of contract, but because of the fortuitous circumstances of defendant collecting from other sources. (60 C.A.4th 1159.)

One justice concurred and dissented, arguing that C.C. 1717 applies only to unilateral contractual attorneys' fee provisions, and that, because the contract here contained a reciprocal fee provision, C.C. 1717 was not applicable. Nevertheless, according to this justice, defendant's attorneys' fee award was justified under C.C.P. 1032. (60 C.A.4th 1160.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Wood v. Santa Monica Escrow Co.* (2009) 176 C.A.4th 802, 805, 97 C.R.3d 909 [plaintiff was not

entitled to fees, even though he prevailed on appeal of fees issue, where defendant was prevailing party on underlying action in trial court; trial and appeal must be treated as parts of single proceeding, and prevailing party must be determined by who prevails overall; citing *Mustachio v. Great Western Bank* (1996) 48 C.A.4th 1145, 56 C.R.2d 33, text, p. 744, and *Presley of Southern Calif. v. Whelan* (1983) 146 C.A.3d 959, 196 C.R. 1, text, §196].



31 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

b. No Requirement of Final Judgment.

7 *Witkin Cal. Proc. Judgm* § 195

[§ 195] No Requirement of Final Judgment.

(1) *Former Rule.* As originally enacted, C.C. 1717 provided that the "prevailing party" was the party in whose favor final judgment was rendered. (See *National Computer Rental, Ltd. v. Bergen Brunswick Corp.* (1976) 59 C.A.3d 58, 63, 130 C.R. 360 [defendant prevailed on only issue tried, and was therefore prevailing party, even though plaintiff nominally held judgment for amount that was never disputed and never litigated]; *Samuels v. Sabih* (1976) 62 C.A.3d 335, 339, 133 C.R. 74 [dismissal for lack of prosecution was not final judgment within meaning of statute]; *Cole v. BT & G* (1983) 141 C.A.3d 995, 999, 190 C.R. 690 [order vacating judgment on confession was final judgment terminating proceedings and establishing parties' rights].)

(2) *Revised Definition.* The definition of a prevailing party for purposes of C.C. 1717 was revised in 1981. The court, on a party's notice and motion, must determine who is the party prevailing on the contract, whether or not the action proceeds to final judgment. (C.C. 1717(b)(1).) However, final disposition is required. (See *infra*, §196.)

In *Elms v. Builders Disbursements* (1991) 232 C.A.3d 671, 283 C.R. 515, plaintiffs' action was dismissed for failure to bring it to trial within 5 years. *Held*, defendant was the prevailing party and was entitled to fees. *Winick Corp. v. Safeco Ins. Co.* (1986) 187 C.A.3d 1502, 232 C.R. 479, involved a dismissal for failure to serve and return summons within 3 years. There, plaintiff's claim was thrown out completely. "In any practical sense of the word, the defendant 'prevailed.'" (232 C.A.3d 674.) "So it is here. [Defendant] obtained all the relief it requested, and [plaintiffs] were denied all of their demands." (232 C.A.3d 675.)

(3) *Determination on Motion of Losing Party Is Not Required.* The provisions of C.C. 1717 requiring the court to determine the prevailing party and to fix reasonable attorneys' fees on motion of "a party" do not necessarily give the losing party the power to force the court to take that action. In *De La Cuesta v. Superior Court* (1984) 152 C.A.3d 945, 200 C.R. 1, plaintiffs bought property subject to deeds of trust issued by defendant, which contained due-on-sale provisions. When defendant exercised its rights under those provisions, plaintiffs sought to enjoin the resulting nonjudicial foreclosure. After a summary judgment for defendant was entered and affirmed on appeal, plaintiffs filed a motion to require the trial judge to determine the prevailing party and fix reasonable attorneys' fees under C.C. 1717. This was done to ensure judicial scrutiny of the amount of attorneys' fees, incurred in enforcing the right of foreclosure,

that defendant would add to the amount necessary to pay off the loan. The motion was denied, and plaintiffs sought mandamus. *Held*, writ denied.

(a) The amount of fees incurred by defendant in the injunction action would not necessarily be coextensive with the fees incurred in connection with its overall effort to foreclose. Hence, in the absence of a showing of the services performed and their value, it is doubtful that the court could properly make orders for attorneys' fees. (152 C.A.3d 949.)

(b) In any event, plaintiffs have misconceived their remedy. They must allow defendant to set the amount of attorneys' fees, which they can then challenge in a new action for declaratory relief or injunction in which they will be entitled to attorneys' fees if they prevail. (152 C.A.3d 950.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Revised Definition.* See *Profit Concepts Management v. Griffith* (2008) 162 C.A.4th 950, 953, 76 C.R.3d 396 [former employee was prevailing party in employer's action for breach of contract and was entitled to recover reasonable attorneys' fees, where trial court granted employee's motion to quash service for lack of personal jurisdiction; citing *Elms v. Builders Disbursements* (1991) 232 C.A.3d 671, 283 C.R.515, text, p. 747].



32 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

c. Final Disposition Is Required.

7 *Witkin Cal. Proc. Judgm* § 196

[§ 196] Final Disposition Is Required.

In *Presley of Southern Calif. v. Whelan* (1983) 146 C.A.3d 959, 196 C.R. 1, plaintiff sued defendant for breach of contract, and the trial judge granted defendant's motion for summary judgment. Plaintiff appealed, the summary judgment was reversed, and plaintiff claimed his costs on appeal, including \$ 8,699 in attorneys' fees. *Held*, the award was improper.

(a) A party who prevails on appeal is not entitled to invoke C.C. 1717, where the appellate decision does not decide who wins the lawsuit but instead contemplates further proceedings in the trial court. And the reversal of a summary judgment is merely an interim stage of the litigation, much the same as denying a summary judgment motion or overruling of a demurrer. (146 C.A.3d 961.)

(b) In *Bank of Idaho v. Pine Avenue Associates* (1982) 137 C.A.3d 5, 17, 186 C.R. 695, the court said that an award of fees to a plaintiff successful in this interim ruling would be proper after the action is finally decided, even if the defendant prevails. This approach is unsound. It emphasizes procedural victories during the course of trial rather than on the final disposition of the substantive issues. "Apportionment of fees is surely correct where the final result in a case is both victory and loss for both sides, e.g., where plaintiff recovers on his complaint and defendant recovers on a cross-claim. Apportionment, however, should not be based on the fact a party makes successful procedural maneuvers during trial but loses the case. If such apportionment were allowed, a party who wins an unmitigated victory in a case where fees are provided for by contract would have his right to fees offset by the fact his opponent won discovery, evidentiary or other rulings during trial. Under the *Bank of Idaho* approach, a defendant whose motion for summary judgment is denied by the trial court would have to pay the fees plaintiff incurred in opposing the motion even if the defendant goes on to win the case; there is no real distinction between that scenario and a case such as the one at bench where the settlement of an interim issue, such as summary judgment, requires a side trip to the Court of Appeal. It would be both impractical and unfair to ask the trial courts to review all the procedural rulings in a case before deciding who is entitled to what fees. A party who wins an outright victory should recover all his fees without offset for the fees incurred by the other party." (146 C.A.3d 962.)

Other cases discussing the requirement of a final disposition include the following:

Lachkar v. Lachkar (1986) 182 C.A.3d 641, 648, 649, 227 C.R. 501 [because order compelling arbitration was not final determination of substantive rights, there was no prevailing party and no right to attorneys' fees].

Snyder v. Marcus & Millichap (1996) 46 C.A.4th 1099, 1102, 54 C.R.2d 268 [defendant was not entitled to fees, despite successful partial appeal that reduced defendant's damages significantly, because defendant was not overall prevailing party; approving *Presley of Southern Calif.* and criticizing *Bank of Idaho*].

First Sec. Bank of Calif. v. Paquet (2002) 98 C.A.4th 468, 475, 119 C.R.2d 787 [shareholders who sued bank in derivative shareholder action were parties in name only and therefore, after bank's cross-complaint against them was dismissed, action was final as to them in their individual capacities and they were entitled to attorneys' fees, despite possibility that they might be individually liable for fees if derivative action failed].

Estate of Drummond (2007) 149 C.A.4th 46, 50, 56 C.R.3d 691 [will contestants were not prevailing parties following dismissal of contract claims against them by probate court; dismissal was merely interim success, because claimant was directed to, and did, pursue claims in other forum; criticizing *Cole v. BT & G* (1983) 141 C.A.3d 995, 190 C.R. 690, *supra*, §195].

SUPPLEMENT: [This section is current through the latest supplement]

See *Otay River Constructors v. San Diego Expressway* (2008) 158 C.A.4th 796, 805, 70 C.R.3d 434 [party that obtained order denying petition to compel arbitration was prevailing party under C.C. 1717, even though merits of underlying contractual dispute had not yet been resolved; party defeated only contract claim before trial court in discrete proceeding to determine whether arbitration was necessary; distinguishing *Presley of Southern Calif. v. Whelan* (1983) 146 C.A.3d 959, 196 C.R. 1, text, p. 748]; *Turner v. Schultz* (2009) 175 C.A.4th 974, 980, 96 C.R.3d 659 [trial court properly awarded fees to defendants in action to stay arbitration, where only issue before trial court (whether arbitration should proceed) was resolved in defendants' favor; there was no need to wait for results of arbitration or to let arbitrator determine fees; citing *Otay* and *Acosta v. Kerrigan* (2007) 150 C.A.4th 1124, 58 C.R.3d 865, text, §168].



33 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

d. Discretion of Judge.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 197

[§ 197] In General.

A trial judge has wide discretion in determining who is the prevailing party. (*Hunt v. Fahnestock* (1990) 220 C.A.3d 628, 633, 269 C.R. 614, *infra*, §198; see 16 California Lawyer 60 (July 1996) [determining prevailing party for purposes of C.C. 1717].) Hence, where plaintiff guarantors failed to prevail on causes of action for damages, but were exonerated from any further liability on their guaranties, the trial judge did not abuse his discretion in awarding them fees. (*Krueger v. Bank of America* (1983) 145 C.A.3d 204, 217, 193 C.R. 322.)

In *Nasser v. Superior Court* (1984) 156 C.A.3d 52, 202 C.R. 552, plaintiff lessee filed a declaratory judgment action to validate his 3-year option to renew the lease and to set the rent for the option period. The trial judge validated the option but set the rent at an amount higher than that which plaintiff had requested in his declaratory judgment action or previously offered; then the judge ruled that neither party had prevailed and awarded no attorneys' fees. *Held*, there was no abuse of discretion, because the judgment was both "good news and bad news" for each party. (156 C.A.3d 60; on determination of no prevailing party, see *infra*, §199.)

Cases discussing the trial court's discretion to determine the prevailing party include the following:

Foothill Properties v. Lyon/Copley Corona Associates (1996) 46 C.A.4th 1542, 1554, 54 C.R.2d 488 [trial court did not abuse discretion in awarding fees to defendant who obtained "simple, unqualified win," even though plaintiff arguably prevailed on claim for right to certain documents; right was never seriously contested and plaintiff received documents before trial; following *Hsu v. Abbara* (1995) 9 C.4th 863, 39 C.R.2d 824, 891 P.2d 804, *infra*, §199].

Acree v. General Motors Acceptance Corp. (2001) 92 C.A.4th 385, 402, 403, 112 C.R.2d 99 [substantial evidence supported finding that plaintiffs obtained "greater relief" in class action against corporation that provided financing for purchase of automobiles; although defendant prevailed on majority of contract claims, plaintiffs prevailed on most significant claim, defendant took nothing on its cross-complaint, and defendant made "weighty" changes in business practices after action was filed].

Jackson v. Homeowners Assn. Monte Vista Estates-East (2001) 93 C.A.4th 773, 786, 788, 113 C.R.2d 363 [trial court did not abuse discretion in awarding fees to plaintiffs who achieved main litigation objective, which was amendment of covenants, conditions, and restrictions to allow renting of property, even though plaintiffs received only nominal "nuisance value payment" for settling case and did not obtain most of requested relief].

*Ajaxo v. E*Trade Group (2005) 135 C.A.4th 21, 57, 59, 37 C.R.3d 221* [trial court did not abuse discretion in determining that plaintiff, who won "simple, unqualified verdict" on breach of contract claim and established damages over \$ 1 million, was prevailing party, even though plaintiff recovered only fraction of damages it initially sought].

SUPPLEMENT: [This section is current through the latest supplement]

The following are among the numerous cases discussing the trial court's discretion to determine the prevailing party:

Ritter & Ritter, Pension & Profit Plan v. Churchill Condominium Assn. (2008) 166 C.A.4th 103, 125, 82 C.R.3d 389 [homeowners were prevailing parties in action against condominium association and individual directors, where jury awarded damages for association's failure to take remedial action; homeowners also prevailed on request for injunctive relief, forcing association to obtain membership vote on need to perform remediation].

Federal Deposit Ins. Corp. v. Dintino (2008) 167 C.A.4th 333, 355, 84 C.R.3d 38 [borrower was entitled to fees incurred in defending against bank's breach of contract claim; trial court erred in considering bank's success on noncontract causes of action, such as unjust enrichment, when determining which party prevailed on sole contract cause of action; citing *Hsu v. Abbara (1995) 9 C.4th 863, 39 C.R.2d 824, 891 P.2d 804, text, §199*].

Kachlon v. Markowitz (2008) 168 C.A.4th 316, 349, 85 C.R.3d 532 [home buyers were prevailing party in action against company that home sellers substituted in as trustee to conduct nonjudicial foreclosure; substituted trustee consistently allied itself with sellers on essential issues relevant to claims on promissory note and deed of trust, was not neutral in litigation, and did not limit itself to defending against damage claims based in tort; moreover, trustee's immunity from liability under C.C. 47 (5 *Summary* (10th), *Torts*, Supp., §563) did not prevent it from being liable for attorneys' fees under C.C. 1717].



34 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

d. Discretion of Judge.

2. Multiple Prevailing Parties.

7 *Witkin Cal. Proc. Judgm* § 198

[§ 198] Multiple Prevailing Parties.

When an action involves multiple, independent contracts that each provide for attorneys' fees, the prevailing party for purposes of C.C. 1717 must be determined as to each contract, regardless of who prevails in the overall action. (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co. (1996) 47 C.A.4th 464, 491, 54 C.R.2d 888* [defendant could receive fees under two agreements while plaintiff received fees under third agreement, even though plaintiff's net recovery in entire action on all three agreements far exceeded that of defendant]; see *Acree v. General Motors Acceptance Corp. (2001) 92 C.A.4th 385, 401, 112 C.R.2d 99* [although only 14,000 of 116,000 class members were awarded damages in action against corporation that financed plaintiffs' acquisition of automobiles, trial court properly awarded attorneys' fees to class without considering prevailing party status on individual basis; distinguishing *Arntz*, which was not class action, because present action involved standard sales agreement offered to class of borrowers, rather than multiple, independent contracts].)

In *Hunt v. Fahnestock (1990) 220 C.A.3d 628, 269 C.R. 614*, there were three separate awards of attorneys' fees under C.C. 1717. Plaintiff junior lienholder brought an action for judicial foreclosure and receivership against defendant debtors and senior lienholder. The debtors had defaulted on promissory notes owed to plaintiff, which were secured by two properties owned by the debtors, and on a loan to the senior lienholder, which was secured by a trust deed on the second property. The senior lienholder cross-complained for indemnity against the debtors under the terms of the trust deed. As to the first property, the debtors stipulated to judicial foreclosure for the unpaid principal balance of the loan, interest, advances made by plaintiff on senior obligations, and plaintiffs' attorneys' fees. As to the second property, the trial judge denied plaintiff judicial foreclosure and awarded the debtors attorneys' fees for their successful defense; however, the judge found for the senior lienholder on its cross-complaint and awarded it attorneys' fees. The judge then offset the senior lienholder's fees against the unpaid principal balance due plaintiff on the note secured by the second property. *Held*, both the fee award to the debtors and the offset of the senior lienholder's fees were proper.

(a) Plaintiff contended that the fee awards created three prevailing parties, but that C.C. 1717 only permits one party--or no party--to prevail. However, in an action involving several contracts, fees may be awarded to the prevailing party on each contract, regardless of whether that party is the prevailing party in the action. Here, a different party

prevailed on each of three independent, unrelated contracts: (1) In the foreclosure of the first property, plaintiff prevailed on the note securing his loan on that property; (2) in the cross-complaint, the senior lienholder prevailed on the trust deed securing its loan on the second property; (3) in the foreclosure on the second property, the debtors prevailed on their note to plaintiff, secured by that property. (220 C.A.3d 632.)

(b) The decision was also justified on equitable principles. The debtors were awarded fees because they successfully defended foreclosure of the second property and because they were legally obligated to pay the senior lienholder's fees under their trust deed. Thus, it was equitable to offset those fees against the unpaid balance due plaintiff on the note secured by the second property. (220 C.A.3d 633.)

SUPPLEMENT: [This section is current through the latest supplement]



35 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

d. Discretion of Judge.

3. No Prevailing Party.

7 *Witkin Cal. Proc. Judgm* § 199

[§ 199] No Prevailing Party.

(1) *General Rule.* The court may determine that there is no party prevailing on the contract. (C.C. 1717(b)(1).) In *Hilltop Inv. Associates v. Leon* (1994) 28 C.A.4th 462, 33 C.R.2d 552, the trial judge found in favor of defendant on an alter ego claim under a cross-complaint, but also in favor of plaintiffs on other cross-claims, including breach of contract. The original complaint, verified by defendant on behalf of a corporation and limited partnership, had been dismissed. Defendant filed a cost bill along with a motion to determine the prevailing party and fix attorneys' fees as items of costs. The trial judge viewed the case in its entirety and determined that fairness required denying defendant attorneys' fees, that defendant was not the prevailing party, and that there was no prevailing party. *Held*, affirmed. While technically the defendant was a "prevailing party" in that he was not personally liable under an alter ego theory in the cross-complaint, plaintiffs prevailed against the defendant-controlled partnership that caused plaintiffs to cross-complain. "Under the circumstances the result was a draw." C.C. 1717(b)(1) permits the court to exercise discretion and determine that there is no party prevailing on the contract. The trial judge properly did so. (28 C.A.4th 468.)

(2) *Abuse of Discretion.* In *Hsu v. Abbara* (1995) 9 C.4th 863, 39 C.R.2d 824, 891 P.2d 804, plaintiffs, who had attempted to purchase defendants' home, sued for breach of the sales contract when the deal collapsed. The trial judge found that no contract to sell the property had been formed, but denied defendants' motion for attorneys' fees under C.C. 1717, even though the parties' written offers had contained attorneys' fee provisions. *Held*, reversed. "When a defendant obtains a simple, unqualified victory by defeating the only contract claim in the action, section 1717 entitles the successful defendant to recover reasonable attorney fees incurred in defense of that claim if the contract contained a provision for attorney fees. The trial court has no discretion to deny attorney fees to the defendant in this situation by finding that there was no party prevailing on the contract." (9 C.4th 877.)

In *Deane Gardenhome Assn. v. Denktas* (1993) 13 C.A.4th 1394, 16 C.R.2d 816, plaintiff homeowners association sued defendant homeowners, seeking injunctive relief and damages for painting their home in violation of the restrictive covenants. The trial judge gave judgment in favor of defendants, but denied their request for attorneys' fees, observing that "with a micro ounce of cooperation, insight and judgment, this could have been a ten-minute small claims case."

(13 C.A.4th 1397.) *Held*, reversed. "We are not at all unsympathetic to the trial court's concerns. All too often attorney fees become the tail that wags the dog in litigation. Particularly in homeowner disputes such as this where the allegedly offending homeowner, rather than comply with neighborhood demands he or she remove something deemed to be offensive, decides to stand on his or her 'property rights.' Often the economic value of what the homeowner gains is minute compared to the litigation costs. However, holding the homeowner cannot recover reasonable attorney fees because he or she controls whether the homeowners association is required to bring suit in effect renders the attorney fees provision of the CC&R's unilateral. ... Furthermore, such a holding would be tantamount to holding homeowners must always yield to the demands of their homeowners association and then pursue their damage remedy rather than forcing the association to prove a violation of the CC&R's." (13 C.A.4th 1399.)

Other decisions have held that a finding that no party prevailed was an abuse of discretion. (See *RTC Mortg. Trust 1994-S2 v. Shlens* (1998) 62 C.A.4th 304, 326, 327, 72 C.R.2d 581 [trial court erred in denying plaintiff fees where note and trust deed on which plaintiff sued contained attorneys' fees provisions, and plaintiff was unquestionably prevailing party; fact that federal law barred defendant from asserting his state law defenses did not make it inequitable to apply state law principles to issue of attorneys' fees; citing *Hsu*]; *Pacific Custom Pools v. Turner Const. Co.* (2000) 79 C.A.4th 1254, 1267, 1272, 94 C.R.2d 756 [trial court abused discretion in denying fees to general contractor who was granted summary judgment on subcontractor's cross-complaint; even though contract between parties provided for fees in action "brought against" subcontractor, C.C. 1717 made fee provision applicable to action by subcontractor, and general contractor, as party that achieved "simple, unqualified win," was prevailing party under statute; citing *Hsu*].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Abuse of Discretion.* See *Silver Creek, LLC v. BlackRock Realty Advisors* (2009) 173 C.A.4th 1533, 1539, 93 C.R.3d 864 [where property seller prevailed on main litigation objective regarding disposition of property, and buyer merely prevailed on secondary issue regarding disposition of deposit, trial court abused its discretion by finding that neither party prevailed; seller indisputably obtained greater relief; citing *Hsu v. Abbara* (1995) 9 C.4th 863, 39 C.R.2d 824, 891 P.2d 804, text, p. 752].



36 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

e. Voluntary Dismissal.

1. General Rule.

7 *Witkin Cal. Proc. Judgm* § 200

[§ 200] General Rule.

(1) *Rule Established by Case Law.* In *International Industries v. Olen* (1978) 21 C.3d 218, 145 C.R. 691, 577 P.2d 1031, plaintiff sublessor sued defendant sublessee for damages for alleged breach of the lease. Defendant answered on the merits and served interrogatories. Some time thereafter, plaintiff, having relet the premises at an increased rental, filed a dismissal without prejudice. *Held*, defendant was not entitled to fees.

(a) Before the adoption of C.C. 1717, fees could not be recovered by the defendant under a contract provision when the plaintiff voluntarily dismissed. The theory was that fees could not be taxed as costs, and could not be recovered prior to dismissal because the clerk was not authorized to delay dismissal. While this procedural bar may have been removed, public policy and equitable considerations call for adherence to the prior practice. (21 C.3d 224.)

(b) A voluntary dismissal may result from the plaintiff's discovery that his action is without merit, or for other reasons; e.g., the defendant may give the plaintiff substantially all of the relief sought, or the plaintiff may learn that the defendant is insolvent. In those cases, equitable principles preclude recovery of fees by the defendant. And recovery by the defendant in all voluntary dismissal cases would encourage plaintiffs to maintain pointless litigation in moot cases or against insolvent defendants to avoid liability for fees. (21 C.3d 224.)

Three justices dissented, arguing that: (a) When attorneys' fees are recoverable under statute they are deemed an element of costs. (b) C.C. 1717 should be construed to authorize recovery of attorneys' fees whenever costs are recoverable. (c) A voluntary dismissal determines litigation with finality comparable to a judgment on demurrer or on findings or verdict; that there has been no determination of the merits and that a new action may be filed has no bearing on the pragmatic result: termination of the pending litigation. (21 C.3d 225, 226.)

The rule of *International Industries* was applied in *Investors Capital Management v. Reiff* (1979) 96 C.A.3d Supp. 26, 158 C.R. 272, despite a significant factual difference: the voluntary dismissal was entered after a trial, judgment for plaintiff, and reversal of the judgment on appeal. The majority held that the dismissal had the same effect as a dismissal before trial; i.e., no final judgment was ever rendered, and defendant could not therefore be considered the prevailing

party. (96 C.A.3d Supp. 28, 29.) A dissenting judge argued that the factual difference was controlling, and that equitable considerations called for an award of attorneys' fees to a defendant who had been forced to go through a trial, and whose judgment on appeal was on the merits and binding in the event of a retrial. (96 C.A.3d Supp. 31.)

(2) *Codification of Rule.* In 1981, the holding of *International Industries* was codified as follows: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section." (C.C. 1717(b)(2); see *Rosen v. Robert P. Warmington Co.* (1988) 201 C.A.3d 939, 943, 247 C.R. 635.) The definition of prevailing party in C.C. 1717 is mandatory and cannot be altered or avoided by contract. (*Excess Electronix v. Heger Realty Corp.* (1998) 64 C.A.4th 698, 707, 708, 75 C.R.2d 376 [even though lease provided for fees to party that obtains relief by settlement, no attorneys' fees could be awarded with respect to contract claim for declaratory relief, where parties settled action and cross-plaintiff dismissed complaint with prejudice].)

The following are among the cases discussing C.C. 1717(b)(2):

D & J v. Ferro Corp. (1986) 176 C.A.3d 1191, 1193, 222 C.R. 656 [dismissal on plaintiff's request, after commencement of trial, is voluntary; hence, C.C. 1717(b)(2) precludes award of attorneys' fees].

Jue v. Patton (1995) 33 C.A.4th 456, 460, 39 C.R.2d 364 [following *International Industries*; voluntary dismissal before trial precludes attorneys' fees award].

Honey Baked Hams v. Dickens (1995) 37 C.A.4th 421, 426, 43 C.R.2d 595 [after plaintiff's voluntary dismissal of contract action, defendant could recover fees despite bar in C.C. 1717; because contract provision was bilateral, statute did not apply, and fees were independently available under contract].

Ryder v. Peterson (1996) 51 C.A.4th 1056, 1060, 59 C.R.2d 562 [defendants were not entitled to attorneys' fees where plaintiffs dismissed their contract and tort action without prejudice before trial; following *Jue* and disagreeing with *Honey Baked Hams*].

Chase Manhattan Mortg. Corp. v. Lessel (1997) 55 C.A.4th 10, 13, 64 C.R.2d 113 [debtors under deed of trust were not entitled to fees where lender voluntarily dismissed its foreclosure action against them; following *D & J*].

Carver v. Chevron U.S.A. (2002) 97 C.A.4th 132, 150, 118 C.R.2d 569 [C.C. 1717(b)(2) did not apply where plaintiffs dismissed only one cause of action among many, and that cause of action was inextricably intertwined with another cause of action that went to trial; prevailing defendants were entitled to fees without need to apportion between dismissed cause of action and others].

(3) *Distinctions.* The courts have recognized several distinctions from the general rule against designating a prevailing party following a voluntary dismissal. (See *infra*, §201 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Codification of Rule.* See *Mitchell Land & Imp. Co. v. Ristorante Ferrantelli* (2007) 158 C.A.4th 479, 486, 70 C.R.3d 9 [unlawful detainer action that was based on tenant's alleged breach of lease covenants was "on a contract"; C.C. 1717(b)(2) precluded award of attorneys' fees to tenant following voluntary dismissal by landlord]; *Ford Motor Credit Co. v. Hunsberger* (2008) 163 C.A.4th 1526, 1530, 78 C.R.3d 661 [C.C. 1717(b)(2) precluded award of attorneys' fees to defendant after plaintiff voluntarily dismissed its only cause of action against that defendant; dismissal of all other claims being adjudicated in same proceeding is not necessary]; *Marina Glencoe, L.P. v. Neue Sentimental Film AG* (2008) 168 C.A.4th 874, 877, 85 C.R.3d 800 [plaintiff voluntarily dismissed action for breach of lease after trial started and while defendant's motion for judgment was pending; C.C. 1717(b)(2) precluded award of attorneys' fees]. (New) *Rule applies despite offer to compromise:* C.C.P. 998 (text, §112 et seq.), which authorizes costs, including fees, in some circumstances following a rejected offer to compromise, does not override the prohibition of attorneys' fees in C.C. 1717(b)(2). (See *Ford Motor Credit Co.*, *supra*, 163 C.A.4th 1532 [C.C. 1717(b)(2) precluded award of attorneys' fees to defendant, even though plaintiff had rejected his offer to compromise and then failed to obtain more

favorable judgment; because *C.C.P. 998* does not independently create right to fees, defendant's only avenue for fees was *C.C. 1717*, and that avenue was blocked by *C.C. 1717(b)(2)*].)



37 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

e. Voluntary Dismissal.

2. Distinction: Fees Incurred in Defending Noncontract Claims.

7 *Witkin Cal. Proc. Judgm* § 201

[§ 201] Distinction: Fees Incurred in Defending Noncontract Claims.

In *Santisas v. Goodin* (1998) 17 C.4th 599, 71 C.R.2d 830, 951 P.2d 399, the purchasers of a home sued the seller's broker and the broker's attorney, alleging breach of contract, negligence, deceit, negligent misrepresentation, and suppression of fact. After discovery, plaintiffs voluntarily dismissed the action with prejudice. Defendants moved to recover their attorneys' fees, based on a provision in the residential purchase agreement that entitled the prevailing party in a "legal action ... instituted by the Broker, or any party to this agreement, or arising out of the execution of this agreement or the sale" to fees. The trial judge awarded defendants their fees and the Court of Appeal affirmed. *Held*, defendants could recover fees incurred defending the *tort* claims asserted against them.

(a) *Effect of contractual provision.* The express provision for attorneys' fees in the residential purchase agreement permits the prevailing party to recover attorneys' fees incurred for the defense of each of the contract and tort claims alleged in the complaint. On its face, the provision embraces all claims. Furthermore, defendants are the prevailing parties in this action as that term is used in the agreement. (17 C.4th 608.)

(b) *Effect of C.C. 1717 on contract claims.* C.C. 1717 applies to contracts containing reciprocal as well as unilateral attorneys' fee provisions, including those, like the one here, that authorize recovery of attorneys' fees by a "prevailing party." (17 C.4th 614.) When a complaint contains causes of action within the scope of C.C. 1717, meaning those sounding in contract and based on a contract containing an attorneys' fee provision, and the plaintiff voluntarily dismisses the action, C.C. 1717(b)(2) bars the defendant from recovering fees incurred in defending those causes of action, even if contract terms authorize recovery. (17 C.4th 617.) Hence, defendants here may not recover fees incurred in defending plaintiff's contract claim. (17 C.4th 619.)

(c) *Effect of C.C. 1717 on noncontract claims.* The bar in C.C. 1717(b)(2) applies *only* to causes of action that are based on contract and are therefore within the scope of C.C. 1717. If the voluntarily dismissed action also asserts noncontract causes of action, the attorneys' fee provision, depending on its wording, may give the defendant a contractual right, unaffected by C.C. 1717, to recover fees incurred in litigating those causes of action. (17 C.4th 617.) That is the case here; defendants are entitled under the fee provision to recover the fees they incurred in defending the

tort claims and C.C. 1717 does not bar that recovery. (17 C.4th 622.)

(d) *Effect of Olen case. International Industries v. Olen* (1978) 21 C.3d 218, 145 C.R. 691, 577 P.2d 1031, supra, §200, did not involve attorneys' fees under a contractual attorneys' fee provision as applied to tort claims, which are outside the scope of C.C. 1717. Therefore, *Olen* is not authority here. (17 C.4th 620.) *Olen* did not establish an inflexible rule of contract law that operates beyond the scope of C.C. 1717. It merely construed C.C. 1717 and has been effectively superseded by the 1981 amendment that created C.C. 1717(b)(2) and codified its holding (see supra, §200). (17 C.4th 622.)

(e) *Conflicting Court of Appeal cases. Ryder v. Peterson* (1996) 51 C.A.4th 1056, 59 C.R.2d 562, and *Jue v. Patton* (1995) 33 C.A.4th 456, 39 C.R.2d 364, supra, §200, are disapproved to the extent that they are inconsistent with the conclusion that contractual attorneys' fee provisions are generally enforceable in voluntary pretrial dismissal cases except as barred by C.C. 1717. (17 C.4th 622, footnote 9.)

Three justices concurred and dissented, arguing that defendants may recover both the fees incurred in defending the tort claims and those incurred in defending the contract claim; neither are barred by C.C. 1717(b)(2) because that statute "simply has no bearing where, as here, the parties are already contractually bound by a fully reciprocal fee clause." (17 C.4th 631.)

Among the cases discussing this distinction are the following:

Excess Electronix v. Heger Realty Corp. (1998) 64 C.A.4th 698, 75 C.R.2d 376 [lessee's tort claims for constructive fraud and breach of fiduciary duty by broker did not fall within lease provision authorizing fees in action to enforce terms of lease or to declare rights under lease; tort claims do not enforce a contract and claims here were premised on duty that arose without regard to terms of lease; fees for lessee's contract claims were barred by C.C. 1717(b)(2)].

Del Cerro Mobile Estates v. Proffer (2001) 87 C.A.4th 943, 948, 105 C.R.2d 5 [although mobilehome park landlord's voluntary dismissal of action against tenant precluded tenant from recovering fees incurred in defending against breach of contract claim, tenant could recover fees, under C.C. 798.85, incurred in defending against nuisance claim; relying on *Santisas v. Goodin*].

Silver v. Boatwright Home Inspection (2002) 97 C.A.4th 443, 449, 118 C.R.2d 475 [even though home buyers voluntarily dismissed action against home inspection company, C.C. 1717 did not bar recovery of fees company incurred in defending against home buyers' noncontract claims, and fee provision in contract between company and buyers was broad enough to cover those claims; nevertheless, trial court did not abuse its discretion in determining that buyers, who had recovered virtually all their damages through settlement with other defendants, were prevailing party].

Topanga & Victory Partners v. Toghia (2002) 103 C.A.4th 775, 783, 127 C.R.2d 104 [defendant who was sued on contract to which he was not party was barred from recovering attorneys' fees on contract causes of action by C.C. 1717(b)(2) when action was voluntarily dismissed; unlike defendants in *Santisas*, however, who were awarded attorneys' fees incurred to defend noncontract causes, defendant here could not recover fees on noncontract causes because he was not party to underlying contract].

Drybread v. Chipain Chiropractic Corp. (2007) 151 C.A.4th 1063, 1070, 60 C.R.3d 580 [sublessee was prevailing party in action for wrongful possession following termination of lease, even though sublessor voluntarily dismissed action before trial; attorneys' fee provision in sublease was broad enough to encompass noncontract claims, and sublessor's claim that sublessee was unlawfully holding over after lease expiration was noncontract claim; citing *Santisas v. Goodin*].

SUPPLEMENT: [This section is current through the latest supplement]

See *Gogri v. Jack in the Box* (2008) 166 C.A.4th 255, 274, 82 C.R.3d 629 [trial court had no authority to award fees

incurred in defending against contract claims following plaintiff's voluntary dismissal; remand was required to determine availability of fees for defending against tort and statutory claims; citing *Santisas v. Goodin* (1998) 17 C.4th 599, 71 C.R.2d 830, 951 P.2d 399, text, p. 756].



38 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

e. Voluntary Dismissal.

3. Distinction: Voluntary Dismissal of Trial De Novo Following Arbitration.

7 *Witkin Cal. Proc. Judgm* § 202

[§ 202] Distinction: Voluntary Dismissal of Trial De Novo Following Arbitration.

In *Kelley v. Bredelis* (1996) 45 C.A.4th 1819, 53 C.R.2d 536, plaintiffs sued defendant for breach of contract and specific performance of a written lease and option contract concerning defendant's house. The lease contained an attorneys' fee provision. The action was resolved in defendant's favor in judicial arbitration, and the arbitrator awarded defendant her attorneys' fees. The plaintiffs requested a trial de novo, but later requested that the action be dismissed with prejudice. Instead of dismissing, the trial judge vacated the request for trial de novo, entered judgment on the arbitration award, and determined the amount of fees owed to defendant. *Held*, affirmed.

(a) Plaintiffs did not have an absolute right to dismiss their case. The result of that action would have been to avoid paying attorneys' fees to defendant. Instead, plaintiffs' request for dismissal repudiated their request for trial *de novo*. (45 C.A.4th 1826.) Thus, the trial judge properly vacated plaintiffs' dismissal, which made C.C. 1717(b)(2) inapplicable because there was no longer a voluntary dismissal. (45 C.A.4th 1832.)

(b) *International Industries v. Olen* (1978) 21 C.3d 218, 145 C.R. 691, 577 P.2d 1031, *supra*, §200, does not bar recovery of attorneys' fees whenever there is a voluntary dismissal. "It is reading *Olen* far too broadly to suggest that it means that attorney fees authorized by contract may never be awarded in the event of a voluntary dismissal after arbitration but before trial de novo." (45 C.A.4th 1828.)

(c) The substance of the arbitrator's award, including the award of attorneys' fees, is not appealable. Nevertheless, the award was properly made under C.C. 1717 because the lease provided that the prevailing party should receive attorneys' fees and defendant was clearly the prevailing party. (45 C.A.4th 1828.)

(d) Defendant was entitled to fees as costs under C.C.P. 1033.5(a)(10)(A) (*supra*, §150) and C.C.P. 1032(a)(4), (b) (*supra*, §§89, 92). Defendant was a prevailing party in whose favor a dismissal was entered before trial. (45 C.A.4th 1833, citing *Honey Baked Hams v. Dickens* (1995) 37 C.A.4th 421, 43 C.R.2d 595, *supra*, §200.)

SUPPLEMENT: [This section is current through the latest supplement]



39 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

e. Voluntary Dismissal.

4. Distinction: Issue of Entitlement to Costs and Attorneys' Fees Expressly Reserved.

7 *Within Cal. Proc. Judgm* § 203

[§ 203] Distinction: Issue of Entitlement to Costs and Attorneys' Fees Expressly Reserved.

In *Reveles v. Toyota by the Bay* (1997) 57 C.A.4th 1139, 67 C.R.2d 543, plaintiff sued defendant car dealer for breach of contract and under several consumer protection statutes in connection with the sale of a damaged and hazardous used truck. On the day of trial, defendant agreed to settle for an amount that plaintiff had requested a year earlier. Plaintiff refused to settle without expressly reserving his right to move for costs and attorneys' fees, and the parties' stipulation provided for that motion to be made and determined. Despite the stipulation, defendant argued at the hearing on the motion that because plaintiff had not obtained a judgment after trial, the court could not deem plaintiff to be the prevailing party. *Held*, award of costs and fees to plaintiff affirmed.

(a) Defendant could, and did, waive its right to have the merits of the action decided in a trial when it expressly agreed to reservation of the costs issue. (57 C.A.4th 1149.) *International Industries v. Olen* (1978) 21 C.3d 218, 145 C.R. 691, 577 P.2d 1031, supra, §200, and C.C. 1717(b)(2) (supra, §200), are inapplicable because plaintiff here refused to dismiss this action unless defendant promptly paid a costs award. Where there is no dismissal, a settling party may seek fees under C.C. 1717 unless the right to do so was waived in the settlement. (57 C.A.4th 1150.) Here, the right was expressly reserved. (57 C.A.4th 1151.)

(b) Plaintiff was entitled to costs, as the party who obtained a "net monetary recovery," under C.C.P. 1032(a)(4), (b) (supra, §91). The costs awarded were reasonably incurred and appropriate. (57 C.A.4th 1151.) Furthermore, plaintiff recovered a "greater relief" in the action on the sales contract and thus was entitled as a matter of right to costs, including attorneys' fees, under C.C. 1717(b)(1) (supra, §194). (57 C.A.4th 1153.)

(c) Finally, C.C. 1717(b)(2) does not preclude an award of attorneys' fees and costs sought under other statutes. (57 C.A.4th 1150, 1151.) Plaintiff here was entitled to fees under the Consumers Legal Remedies Act (C.C. 1780(d), supra, §224) (57 C.A.4th 1154) and the Song-Beverly Act (C.C. 1794(d), infra, §224) (57 C.A.4th 1158). (See *Jackson v. Homeowners Assn. Monte Vista Estates-East* (2001) 93 C.A.4th 773, 778, 113 C.R.2d 363 [citing *Reveles*; because parties expressly agreed on record and in settlement agreement to have trial court determine attorneys' fees issue before dismissal could be entered, defendant waived right to contend that C.C. 1717 precludes that procedure].)

SUPPLEMENT: [This section is current through the latest supplement]
C.C. 1780(d) was relettered C.C. 1780(e) in 2008.



40 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

e. Voluntary Dismissal.

5. Distinction: Where Prevailing Party's Right to Fees Arises Under Another Statute.

7 Witkin Cal. Proc. Judgm § 204

[§ 204] Distinction: Where Prevailing Party's Right to Fees Arises Under Another Statute.

C.C. 1717(b)(2) does not bar a fee award where the prevailing party's right to recover fees arises under a fee-shifting statute. (*Damian v. Tamondong* (1998) 65 C.A.4th 1115, 1119, 77 C.R.2d 262 [defendant in whose favor dismissal was entered in deficiency action on contract subject to Rees-Levering Automobile Sales Finance Act could be prevailing party for purposes of that Act's attorneys' fee provision (C.C. 2983.4)]; see *Coltrain v. Shewalter* (1998) 66 C.A.4th 94, 107, 77 C.R.2d 600 [defendant could be considered prevailing party following plaintiff's dismissal of alleged SLAPP suit]; *Parrott v. Mooring Townhomes Assn.* (2003) 112 C.A.4th 873, 878, 6 C.R.3d 116 [homeowners association could be prevailing party under former C.C. 1354(f) (now C.C. 1354(c)), despite homeowners' voluntary dismissal of action against association; C.C. 1717(b)(2) did not apply; citing *Damian*]; *Kim v. Euromotors West/The Auto Gallery* (2007) 149 C.A.4th 170, 178, 56 C.R.3d 780 [C.C. 1717(b)(2) did not bar fee award for plaintiff whose claims arose under Consumer Legal Remedies Act; citing *Parrott*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Ford Motor Credit Co. v. Hunsberger* (2008) 163 C.A.4th 1526, 1532, 78 C.R.3d 661, Supp., supra, §200 [C.C.P. 998 (text, §112 et seq.) shifts fees only if there is contractual or other statutory basis for fees; it does not independently create statutory right to fees; defendant's only avenue for fees was C.C. 1717 and that avenue was blocked by C.C. 1717(b)(2)].



41 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

4. Prevailing Party.

f. Settlement Under C.C.P. 998.

7 *Witkin Cal. Proc. Judgm* § 205

[§ 205] Settlement Under C.C.P. 998.

In *Lanyi v. Goldblum* (1986) 177 C.A.3d 181, 223 C.R. 32, plaintiffs sued for breach of a contract that provided for attorneys' fees. Defendants' compromise offer under C.C.P. 998 (supra, §112 et seq.; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §82 et seq.) was accepted, but neither the offer nor the acceptance mentioned costs or attorneys' fees. The trial judge entered judgment awarding costs but specifically disallowing attorneys' fees. *Held*, reversed.

(a) In *Rappenecker v. Sea-Land Service* (1979) 93 C.A.3d 256, 155 C.R. 516, the court concluded that a compromise settlement under C.C.P. 998 did not preclude recovery of costs under former C.C.P. 1032 when the settlement terms were silent as to costs. (177 C.A.3d 184.) The issue here is whether the rationale of *Rappenecker* should be extended to an award of attorneys' fees under C.C. 1717 as an item of costs. (177 C.A.3d 185.)

(b) In *Folsom v. Butte County Assn. of Governments* (1982) 32 C.3d 668, 186 C.R. 589, 652 P.2d 437, the Supreme Court, relying largely on the reasoning of *Rappenecker*, held that a settlement agreement concludes only the matters contemplated by the parties, which ordinarily are those matters that would otherwise have to be resolved at trial. Because costs and attorneys' fees authorized by statute are matters incidental to the judgment, the trial judge may award costs and fees where the settlement agreement is silent as to them. (177 C.A.3d 186, 187.)

(c) "The combined reasoning of *Rappenecker* and *Folsom* compels the conclusion" that attorney fees authorized by C.C. 1717 are available to a party who prevails by a C.C.P. 998 compromise settlement that is silent as to costs and fees. (177 C.A.3d 187.)

(d) Defendants argue that, because the underlying contract that did provide for fees was superseded by the compromise agreement, which did not provide for fees, plaintiffs were not the prevailing parties under C.C. 1717. This "merger and bar" argument must be rejected. First, the argument was rejected by *Folsom*. Second, C.C. 1717(a) by its terms applies to the contract on which the underlying action was brought, not to a subsequent settlement agreement. (177 C.A.3d 188.)

(e) The claim that, under the 1981 amendment to C.C. 1717, plaintiffs were not the prevailing parties, must also be

rejected. C.C. 1717(b)(2) applies to voluntary dismissals or dismissals pursuant to settlement; under *C.C.P. 998*, the settlement results in a judgment, not a dismissal. (*177 C.A.3d 189*.) Although worded more broadly, C.C. 1717(b)(2) appears to endorse the Supreme Court's holding in *International Industries v. Olen* (1978) 21 C.3d 218, 145 C.R. 691, 577 P.2d 1031, supra, §200, that C.C. 1717 fees are not recoverable when the plaintiff voluntarily dismisses without prejudice before trial. (*177 C.A.3d 189, 191*.) As *Folsom* made clear, fees may be awarded when plaintiff dismisses with prejudice. Hence, even if the express application of C.C. 1717(b)(2) only to dismissals were ignored, an award of fees would still be permissible in the case of a *C.C.P. 998* judgment, which, unlike a dismissal without prejudice, does determine the rights between the parties. Under C.C. 1717(b)(1), the court is authorized to determine who is the prevailing party and to award costs and fees accordingly. (*177 C.A.3d 192*.)

(f) Because the settlement here did not encompass the question of C.C. 1717 fees, and because it is undisputed that plaintiffs were the prevailing parties based on equitable considerations, they were entitled to an award of attorneys' fees as an item of costs. (*177 C.A.3d 193*.) (See *Ritzenthaler v. Fireside Thrift Co.* (2001) 93 C.A.4th 986, 989, 113 C.R.2d 579 [compromise agreement that expressly settled "all damages and injunctive claims" did not encompass plaintiff's claim for attorneys' fees under C.C. 1717; trial court properly awarded fees]; *Wong v. Thrifty Corp.* (2002) 97 C.A.4th 261, 264, 118 C.R.2d 276 [compromise offer was silent as to costs; trial court should have awarded fees to prevailing plaintiff].)

SUPPLEMENT: [This section is current through the latest supplement]



42 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

5. Nonsignatory Parties.

a. Fees Sought by Nonsignatory Parties.

1. Fees Allowed.

7 *Witkin Cal. Proc. Judgm* § 206

[§ 206] Fees Allowed.

(1) *In General.* Several earlier Court of Appeal opinions expressed the view that only a party to the contract may claim the statutory award. (See *Arnold v. Browne* (1972) 27 C.A.3d 386, 398, 103 C.R. 775; *Boliver v. Surety Co.* (1977) 72 C.A.3d Supp. 22, 29, 140 C.R. 259; *Sain v. Silvestre* (1978) 78 C.A.3d 461, 476, 144 C.R. 478; *Canal-Randolph Anaheim v. Wilkoski* (1978) 78 C.A.3d 477, 486, 496, 144 C.R. 474.) Later cases have made it clear that in some situations, nonparties are entitled to fees. (See *Jones v. Drain* (1983) 149 C.A.3d 484, 487, 488, 489, 196 C.R. 827; *Loduca v. Polyzos* (2007) 153 C.A.4th 334, 340, 62 C.R.3d 780 [nonsignatory homeowner was intended third-party beneficiary of contract between general contractor and subcontractor and could recover fees under broad provision in that contract; provision authorized fees for prevailing party and did not impose limitations on third-party rights; citing *Real Property Services Corp. v. Pasadena* (1994) 25 C.A.4th 375, 30 C.R.2d 536, *infra*, §209]; C.E.B., Attorney Fee Awards 2d, §§6.11, 6.12; C.E.B., 3 Civil Proc. During Trial 3d, §§26.107, 26.108.)

(2) *Where Signatory Plaintiff Could Have Recovered Fees.* In *Reynolds Metals Co. v. Alperson* (1979) 25 C.3d 124, 158 C.R. 1, 599 P.2d 83, plaintiff held promissory notes of a parent corporation and its subsidiary. The notes had an attorneys' fees provision with a limitation to 15% of the principal. When the corporations went into bankruptcy, plaintiff sued defendant shareholders and directors on the "alter ego" theory. The trial judge, rejecting the theory, gave judgment for defendants, together with attorneys' fees. *Held*, the award was proper but excessive in amount.

(a) Construing C.C. 1717 to carry out its purpose, the statute gives a reciprocal remedy for a nonsignatory defendant sued on a contract as if he or she were a party to it, "when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the defendant." (25 C.3d 128, 129.) Here, had plaintiff prevailed on its cause of action against defendants as the alter egos of the corporation, defendants would have been liable on the notes and the attorneys' fees provision in the notes would call for an award against them. Hence, under the reciprocal theory of C.C. 1717, they, as the prevailing parties, are entitled to attorneys' fees. (25 C.3d 129.)

(b) C.C. 1717 establishes a reciprocal right to attorneys' fees, and the statutory right should be no greater than the contractual right. Hence, the amount awarded here, in excess of the 15% limit in the notes, was improper. (25 C.3d

130.)

In *Manier v. Anaheim Business Center Co.* (1984) 161 C.A.3d 503, 207 C.R. 508, plaintiffs sued for specific performance and breach of a contract for the purchase of real property, claiming that defendants had breached an agreement to assist plaintiffs in obtaining financing. The trial court found no such obligation, and gave judgment for defendants. Defendants then sought an award of attorneys' fees based on a paragraph in the deposit receipt. The trial judge held that, because one defendant had made handwritten changes in the receipt that plaintiffs had never accepted, there was no contract, and hence no right to attorneys' fees. *Held*, reversed.

(a) In *Canal-Randolph*, the court concluded that a nonsignatory to a contract may not recover attorneys' fees under C.C. 1717. (161 C.A.3d 506.) The contrary position was taken in *Pas v. Hill* (1978) 87 C.A.3d 521, 151 C.R. 98, written by the same panel 10 months later. (161 C.A.3d 506, 507.) In *Reynolds Metal*, the Supreme Court relied heavily on *Babcock v. Omansky* (1973) 31 C.A.3d 625, 107 C.R. 512, but did not distinguish or disapprove *Canal-Randolph*. The Supreme Court did, however, specifically disapprove *Arnold v. Browne*, one of the cases relied on by the *Canal-Randolph* court. (161 C.A.3d 507, footnote 4.)

(b) *Pas v. Hill* states the better rule. "The prevailing party in an action based on a contract where the opposing party seeks attorneys fees under the agreement is entitled to recover his own fees pursuant to section 1717 whether the contract is upheld or whether the court determines the prevailing litigant was not a party or signatory to the contract or, as here, the contract is not enforceable." (161 C.A.3d 507.)

(c) The determination whether a party is entitled to attorneys' fees under C.C. 1717 depends not on the evidence at trial but on the pleadings. Because both plaintiffs sought attorneys' fees on the basis of the alleged contract, defendants as the prevailing parties are entitled to fees under C.C. 1717. Nor does it matter that one plaintiff was not a signatory to the deposit receipt, because she alleged entitlement to attorneys' fees under it. (161 C.A.3d 508.)

Other cases allowing the recovery of fees where the signatory plaintiff could have recovered fees include the following:

Lewis v. Alpha Beta Co. (1983) 141 C.A.3d 29, 33, 189 C.R. 840 [lessee who sued landlord and cotenant to enforce restrictive covenant assumed by cotenant for lessee's benefit was entitled to claim benefit of lease provision for attorneys' fees in cotenant's lease].

Montgomery v. Bio-Med Specialties (1986) 183 C.A.3d 1292, 1295, 1296, 228 C.R. 709 [shareholders who intervened to defend action against corporation were entitled to attorneys' fees under C.C. 1717; failure to allege alter ego relationship did not preclude award, because intervenors would have been liable to plaintiff for attorneys' fees had plaintiff prevailed].

Korech v. Hornwood (1997) 58 C.A.4th 1412, 1419, 68 C.R.2d 637 [mechanic's lien claimants invoked contractual attorneys' fee provision by pursuing breach of contract claim against nonsignatory landowners and were therefore liable for landowners' fees when breach of contract claim failed, even though claimants prevailed on their mechanic's lien claim].

Dell Merk v. Franzia (2005) 132 C.A.4th 443, 454, 33 C.R.3d 694, *supra*, §191 [defendant was entitled to fees incurred defending plaintiff's claim that defendant should have made payments jointly to plaintiff and contractor, in accordance with security agreement between plaintiff and contractor; because security agreement contained attorneys' fees provision that would have entitled plaintiff to fees had it prevailed, defendant was entitled to fees even though it was not signatory to security agreement].

(3) *Nonassuming Grantee of Property*. A nonassuming grantee of property encumbered by a deed of trust was at first held not entitled to recover fees, because the grantee was not obligated on the contract. (See *Pas v. Hill*, *supra*, 87 C.A.3d 535.) But in *Saucedo v. Mercury Savings & Loan Assn.* (1980) 111 C.A.3d 309, 168 C.R. 552, the court that

decided *Pas* reexamined its decision in the light of criticism by commentators, and took the opposite position, overruling *Pas*. (111 C.A.3d 315.) "While the nonassuming grantee would not have been personally liable for payment of attorneys fees under the note and deed of trust, the trustee and/or beneficiary would have been entitled to attorney fees under the provisions of the deed of trust had they prevailed, and these fees would have become part of the debt secured by the deed of trust. To prevent foreclosure of his interest, the nonassuming grantee would have had to pay off the secured debt, including the attorneys fees." (111 C.A.3d 315.) (See *Wilhite v. Callihan* (1982) 135 C.A.3d 295, 301, 185 C.R. 215 [following *Saucedo*].)

(4) *Where Nonsignatory Is Employee of Signatory*. If the nonsignatory is an employee of a signatory and is sued for actions taken in his or her official capacity, the nonsignatory may be entitled to recover attorneys' fees. (See *Carver v. Chevron U.S.A.* (2002) 97 C.A.4th 132, 149, 118 C.R.2d 569 [attorneys' fee provision in lease between corporation and franchisees was broad enough to cover fees incurred by corporation in defending its employees against franchisees' claims based on actions taken by employees in official capacities; claims against individual defendants clearly grew out of transactions or relationships contemplated by lease; moreover, even if employees had not been named as defendants, they would have been material witnesses and corporation's defense would have involved same issues].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Where Signatory Plaintiff Could Have Recovered Fees*. See *Pueblo Radiology Med. Group v. Gerlach* (2008) 163 C.A.4th 826, 828, 77 C.R.3d 880 [trial court properly awarded fees to nonsignatory, individual defendants after finding that they were not alter egos of signatory corporate defendant, even though court had not yet determined whether breach of contract occurred; had plaintiff prevailed on alter ego claim, whoever prevailed on breach of contract claim would have been entitled to attorneys' fees; citing *Reynolds Metals Co. v. Alperson* (1979) 25 C.3d 124, 158 C.R. 1, 599 P.2d 83, text, p. 763].



43 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

5. Nonsignatory Parties.

a. Fees Sought by Nonsignatory Parties.

2. Fees Denied.

7 *Witkin Cal. Proc. Judgm* § 207

[§ 207] Fees Denied.

In *Super 7 Motel Associates v. Wang* (1993) 16 C.A.4th 541, 20 C.R.2d 193, plaintiff purchaser of real estate sued the seller and the broker for fraud, seeking rescission of the contract of sale or, alternatively, damages. Plaintiff recovered damages against defendant seller, but defendant broker was exonerated. Defendant broker subsequently was awarded attorneys' fees under the fee provision of the contract. *Held*, the fee award was improper.

(a) *Defendant broker was not a party to the sales contract.*

(1) Although mentioned in the contract, the broker had no contractual obligations to either plaintiff or defendant seller and had no interest in the sale of the property. (16 C.A.4th 545.)

(2) Although defendant broker signed the document containing the sales contract, the document was in two parts: the first was the sales contract to which defendant broker was a stranger; the second was the broker's commission agreement, to which he was a contracting party. Thus, defendant broker's signature merely signified his assent to the terms of the commission aspect of the document. Moreover, if defendant broker were considered a party to the sales contract, the fee clause in the commission agreement would become redundant, because commission disputes would fall within the general attorneys' fees clause in the sales contract. This would violate the rule of construction requiring, where possible, that every part of a contract be given effect. (16 C.A.4th 545, 546.)

(3) Defendant broker was not a party to the contract, despite his claim that entitlement to a commission made him a third-party beneficiary of the sale. That claim is inconsistent with the rule that a party may not be liable for fees unless he agrees to the fee provision, because a third-party beneficiary does not participate in reaching the agreement. (16 C.A.4th 546.) Further, defendant broker's rights derived from the commission portion of the document, and the sales contract contained no promise to pay defendant broker. Thus, he could not be a third-party beneficiary of the sales contract. (16 C.A.4th 547, following *Weber v. Dobyms* (1961) 193 C.A.2d 402, 14 C.R. 103, 1 Summary (10th), *Contracts*, §706.)

(b) *Naming defendant broker as a party defendant in rescission causes was of no import.*

(1) Defendant broker, as a nonsignatory to the contract, could not recover on the theory that plaintiff was estopped from denying his right to fees after suing him as if he were a contracting party; defendant broker could only recover if he could have been liable for fees on the contract. (*16 C.A.4th 548.*)

(2) The claim against defendant broker, however, was not "on the contract," and plaintiff neither sought nor could have obtained rescission against him. Although a broker is a proper party defendant to a fraud claim seeking rescission of the real estate sales contract and can be held jointly and severally liable for consequential damages, liability is not premised on the contract but on fraud, and is ancillary to the contractual claim against the seller. Because a tort claim for damages carries no award of attorneys' fees, defendant broker could not recover his fees under C.C. 1717. (*16 C.A.4th 549.*) (See *Sweat v. Hollister (1995) 37 C.A.4th 603, 615, 43 C.R.2d 399* [defendant real estate brokers were not entitled to fees under clause "similar, if not identical, to" clause in *Super 7 Motel Associates v. Wang*]; *32 San Diego L. Rev. 535* [C.C. 1717 should be amended to clarify that contractual fee shifting applies only to signatories to contract].)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

5. Nonsignatory Parties.

b. Fees Sought From Nonsignatory Parties.

1. Fees Denied.

7 *Within Cal. Proc. Judgm* § 208

[§ 208] Fees Denied.

In *Glynn v. Marquette* (1984) 152 C.A.3d 277, 199 C.R. 306, plaintiff entered into a contract to purchase real property from W. In violation of the contract, W sold the land to defendant M, who had knowledge of the facts and was therefore not a bona fide purchaser. Plaintiff sued W and M for specific performance and other relief, and settled with W for \$ 5,000, reserving his rights against M. The trial judge gave judgment for plaintiff under C.C. 3395 (specific performance against third person to whom property was conveyed). Plaintiff then filed a cost memorandum including a claim for \$ 24,750 in attorneys' fees. *Held*, the trial judge properly struck the item for fees.

(a) C.C. 3395 does not provide that the contract between the seller and buyer is enforceable in like manner against the seller's grantee. It refers only to "an obligation in respect to real property" that would be specifically enforced. (152 C.A.3d 280.)

(b) A contract between a buyer and seller may contain many promises by the seller, including a promise to pay the prevailing party's attorneys' fees in the event of litigation. The latter promise is compensable by a money judgment, and plaintiff's remedy was against W, the other party to the contract. Having settled with W for \$ 5,000, plaintiff was not entitled to look to defendant M for additional attorneys' fees. (152 C.A.3d 281.)

In *Leach v. Home Savings & Loan Assn.* (1986) 185 C.A.3d 1295, 230 C.R. 553, the trustee of a testamentary trust obtained two loans, and each time gave the lender a promissory note secured by a deed of trust against real property of the trust. Plaintiff, a beneficiary of the trust, sued the lenders and others to clear title to the property by having the deeds of trust declared void, and also sought an injunction to halt pending foreclosure proceedings. Defendants' motions for summary judgment were granted, but their request for attorneys' fees, based on provisions in the deeds of trust and promissory notes, was denied because plaintiff was not a signatory to the instruments. *Held*, affirmed.

(a) Under C.C. 1717, if plaintiff could have recovered attorneys' fees had she prevailed, defendants may recover fees from her. (185 C.A.3d 1305.) However, only a few of the cases cited by defendants deal with a nonsignatory's liability for fees under C.C. 1717, and "[n]one of these cases persuade us that [plaintiff] would be entitled to a fee

award." (185 C.A.3d 1305.)

(b) *Reynolds Metals Co. v. Alperson* (1979) 25 C.3d 124, 158 C.R. 1, 599 P.2d 83, and *Babcock v. Omansky* (1973) 31 C.A.3d 625, 107 C.R. 512, "involve a nonsignatory defendant's right to receive attorneys' fees from a signatory plaintiff who would have received fees if the plaintiff had prevailed. In our case, signatory defendants seek fees from ... a nonsignatory plaintiff who would have no contractual or statutory right to receive fees if she had prevailed. The logic of *Reynolds* and *Babcock* does not apply in this different factual context." (185 C.A.3d 1305, 1306.)

(c) The rationale of *Saucedo v. Mercury Savings & Loan Assn.* (1980) 111 C.A.3d 309, 315, 168 C.R. 552, supra, §206, and *Wilhite v. Callihan* (1982) 135 C.A.3d 295, 301, 185 C.R. 215, is also inapplicable here. In those cases, the nonsignatory plaintiff was the successor in interest to the signatory borrower, and the action to prevent foreclosure was a practical alternative to refinancing. Here, plaintiff is a beneficiary of a trust, not a signatory's successor in interest, and her action to prevent foreclosure was not an alternative to refinancing but an attempt to have the underlying debt declared void. (185 C.A.3d 1306.)

(d) The equitable estoppel theory of *Manier v. Anaheim Business Center Co.* (1984) 161 C.A.3d 503, 207 C.R. 508, supra, §206, and *Jones v. Drain* (1983) 149 C.A.3d 484, 487, 488, 489, 196 C.R. 827, is based on the premise that a party who alleges a right to recover attorneys' fees is estopped from claiming that he could not recover them if the other party prevails. This theory was first announced in *Pas v. Hill* (1978) 87 C.A.3d 521, 535, 151 C.R. 98, which was criticized by legal writers and overruled in *Saucedo*. "As such, *Jones* and *Manier* are not well-founded." (185 C.A.3d 1306.)

(e) "*Reynolds* and section 1717 require that the party claiming a right to receive fees establish that the opposing party *actually* would have been entitled to receive them if he or she had been the prevailing party. To the extent that *Jones* and *Manier* are inconsistent with this ruling, we decline to follow their reasoning." (185 C.A.3d 1306, 1307.)

(f) Plaintiff's allegation of entitlement to attorneys' fees would have been insufficient. As a nonsignatory plaintiff, she would have had no right to recover fees under the fee clauses contained in the notes and deeds of trust, and defendants therefore may not recover fees from her. (185 C.A.3d 1307.) (See 32 *San Diego L. Rev.* 535 [proposing that C.C. 1717 should be amended to clarify that fee-shifting applies only to contract signatories].)

The following are among the numerous cases denying fees sought from nonsignatory parties:

Alhambra Redevelopment Agency v. Transamerica Financial Services (1989) 212 C.A.3d 1370, 1381, 261 C.R. 248 [quoting *Leach*: "[A] reciprocal right is only created where the party alleging he or she is entitled to attorney's fees' *actually* would have been entitled to receive them if he or she had been the prevailing party' "].

Brusso v. Running Springs Country Club (1991) 228 C.A.3d 92, 110, 278 C.R. 758, supra, §172 [following *Reynolds* and *Leach*].

Wilson's Heating & Air Conditioning v. Wells Fargo Bank (1988) 202 C.A.3d 1326, 1333, 1335, 249 C.R. 553 [subcontractors were not entitled to fees in action against construction lender, despite stipulated judgment in their favor, because lender was nonsignatory to attorneys' fee clauses in subcontracts with general contractor].

Abbett Elec. Corp. v. California Fed. Savings & Loan Assn. (1991) 230 C.A.3d 355, 359, 281 C.R. 362 [following *Wilson's Heating & Air Conditioning*].

Selma Auto Mall II v. Appellate Dept. (1996) 44 C.A.4th 1672, 1682, 52 C.R.2d 599, 9 *Cal. Proc.* (5th), *Appeal*, §246 [order requiring sublessee to post bond securing attorneys' fees owed by lessees to lessors was abuse of discretion; sublessee was not party to lease containing attorneys' fee provision and did not expressly assume lease's obligations].

Sessions Payroll Management v. Noble Const. Co. (2000) 84 C.A.4th 671, 680, 101 C.R.2d 127 [because

nonsignatory plaintiff, who sued as third-party beneficiary under contract, would not have been entitled to attorneys' fees had plaintiff prevailed, prevailing signatory defendant was not entitled to fees; also, plaintiff was not estopped from contesting fee award for defendant, even though plaintiff had asked for fees in its complaint; following *Leach*].

Whiteside v. Tenet Healthcare Corp. (2002) 101 C.A.4th 693, 706, 124 C.R.2d 580 [patient who unsuccessfully alleged that hospital improperly accepted payment from patient's group insurer after accepting payment from his individual insurer was not liable for attorneys' fees under provision in contract between hospital and individual insurer; because there was insufficient nexus between hospital and patient, patient would not have been able to enforce provision, and contract in no way indicated that signatories intended provision to benefit or obligate subscribers to insurance coverage].

SUPPLEMENT: [This section is current through the latest supplement]

See *Amtower v. Photon Dynamics* (2008) 158 C.A.4th 1582, 1605, 71 C.R.3d 361 [defendant could not recover fees based on provision in agreement to which plaintiff was not party; second agreement to which plaintiff was party did not expressly or impliedly incorporate first agreement or its fee provision]; *Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 C.A.4th 858, 896, 76 C.R.3d 325 [lessor could not recover fees from lessee's realtor based on provision in commission agreement between lessor and lessor's realtor; agreement allowed fees in "litigation between the parties hereto" and lessee's realtor was not party to agreement and would not have been entitled to fees had it prevailed; citing *Leach v. Home Savings & Loan Assn.* (1986) 185 C.A.3d 1295, 230 C.R. 553, text, p. 767, and *Sessions Payroll Management v. Noble Const. Co.* (2000) 84 C.A.4th 671, 101 C.R.2d 127, text, p. 769].



45 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

B. Statutory Extension of Contract Right.

5. Nonsignatory Parties.

b. Fees Sought From Nonsignatory Parties.

2. Fees Allowed.

7 *Witkin Cal. Proc. Judgm* § 209

[§ 209] Fees Allowed.

In *Real Property Services Corp. v. Pasadena* (1994) 25 C.A.4th 375, 30 C.R.2d 536, plaintiff, a nonsignatory sublessee movie theatre operator (RPS) sued defendant, the signatory landlord for breach of contract under a third-party beneficiary theory. Under the original lease, the lessee was to build a parking garage and movie theatre, and RPS was expressly designated as the sublessee who would operate the movie theatre. The lease included an attorneys' fees provision. Defendant prevailed but was denied attorneys' fees. *Held*, reversed.

(a) A number of decisions deal with nonsignatories to contracts with attorneys' fees provisions, including *Leach v. Home Savings & Loan Assn.* (1986) 185 C.A.3d 1295, 230 C.R. 553, supra, §208, *Super 7 Motel Associates v. Wang* (1993) 16 C.A.4th 541, 20 C.R.2d 193, supra, §207, and *Manier v. Anaheim Business Center Co.* (1984) 161 C.A.3d 503, 207 C.R. 508, supra, §206. The rule distilled from these cases is that "[a] party is entitled to recover its attorney fees pursuant to a contractual provision only when the party would have been liable for the fees of the opposing party if the opposing party had prevailed. Where a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed." (25 C.A.4th 382.)

(b) When a lessor has expressly agreed to a sublease, as here, the sublessee is a third-party beneficiary of the implied covenant of quiet enjoyment in the original lease. Further, when there is a sufficient nexus between the lessor and a nonsignatory sublessee, the sublessee is entitled to enforce an attorneys' fee provision in the lease as a third-party beneficiary. Here, the portion of the lease naming RPS as the sublessee establishes that nexus. (25 C.A.4th 383.)

(c) Not only was defendant potentially liable for any breaches it might have committed, including costs and attorneys' fees, but plaintiff was liable for costs and attorneys' fees if it could not prove that defendant breached the contract. Plaintiff had every right to expect that had it prevailed, it would have been entitled to attorneys' fees. Therefore, under the reciprocity concept embodied in C.C. 1717, defendant, as the prevailing party, was entitled to an award of reasonable attorneys' fees against RPS, a nonsignatory plaintiff, who sued to enforce the terms of the contract in which RPS was expressly contemplated as a sublessee. (25 C.A.4th 383, 384.)

(d) Plaintiff's contention that the propriety of denying attorneys' fees is dependent on the reason for the judgment is rejected. "Any resolution ... to enforce the original lease agreement must be accompanied by an award of reasonable attorney fees to the prevailing party. This is so whether the judgment is based upon the merits or lack of standing ... Moreover, any lack of standing by RPS to bring the lawsuit does not alter the fact that RPS sued [defendant] to enforce the contract, thereby entitling the prevailing party to its attorney fees." (25 C.A.4th 384, footnote 7.)

In *Pacific Preferred Properties v. Moss* (1999) 71 C.A.4th 1456, 84 C.R.2d 500, defendants, sellers of a house, received a note secured by a deed of trust as consideration for the sale. They later foreclosed on the deed of trust, causing the buyers to sue plaintiffs, the brokers named in the purchase contract between the buyers and sellers. Plaintiffs in turn sued defendants for wrongfully foreclosing. After defendants prevailed on their motions for summary judgment, they sought an award of attorneys' fees, predicated on a provision in the purchase contract that, in any legal action, proceeding, or arbitration arising out of the contract, "whether instituted by or against the BUYER or SELLER, or the Brokers named herein, the prevailing party(s) shall be entitled to reasonable attorney's fees and costs." The trial court denied fees, reasoning that plaintiffs were not parties to the contract. *Held*, reversed.

(a) "[T]here is no inherent impediment to a broker making a contract to pay attorney's fees, in any action arising from the contract, by means of the same document used to memorialize the real estate purchase contract between buyer and seller," which is exactly what occurred here. (71 C.A.4th 1461.) As the attorneys' fee provision expressly provides, plaintiffs here promised to pay attorneys' fees if they were not the prevailing party in litigation arising out of the real estate purchase contract. The buyers and sellers manifested assent to the reciprocal attorneys' fees right and obligation by executing the contract. This manifestation of mutual assent met the requirements for an agreement and a bargain. (71 C.A.4th 1463.)

(b) *Super 7 Motel Associates v. Wang* (1993) 16 C.A.4th 541, 20 C.R.2d 193, *supra*, §207, is inapposite. The attorneys' fee provision here, unlike the one in *Super 7*, "unambiguously includes the broker within the ambit of its benefit provisions and its performance obligations." The "prevailing party," as used in the provision, is obviously intended to apply to plaintiffs. (71 C.A.4th 1462.)

The following are among the numerous cases allowing fees sought from nonsignatory parties:

Abdallah v. United Savings Bank (1996) 43 C.A.4th 1101, 1111, 51 C.R.2d 286 [citing *Real Property Services Corp.*; because nonsignatory plaintiff would have been entitled to fees if he had prevailed in action for breach of contract, he was liable for fees as losing party].

Heppler v. J.M. Peters Co. (1999) 73 C.A.4th 1265, 1288, 87 C.R.2d 497 [plaintiff homeowners who were assigned general contractor's indemnification rights against defendant subcontractors were liable for fees incurred by prevailing subcontractors, including fees incurred before assignment; plaintiffs would have benefited from fees provisions in subcontracts had they won and were thus obligated to pay fees when they lost; citing *Real Property Services Corp.*].

California Wholesale Material Supply v. Norm Wilson & Sons (2002) 96 C.A.4th 598, 608, 117 C.R.2d 390, *supra*, §191 [materials supplier to whom subcontractor had assigned right to accounts receivable was liable for fees in supplier's action against general contractor who had paid money owed to subcontractor to party other than supplier, even though supplier was not signatory to subcontract containing attorneys' fee provision].

Erickson v. R.E.M. Concepts (2005) 126 C.A.4th 1073, 1086, 25 C.R.3d 39 [assignees of subcontracts incurred subcontractual obligations for attorneys' fees; citing *Heppler*].

SUPPLEMENT: [This section is current through the latest supplement]

See *Exarhos v. Exarhos* (2008) 159 C.A.4th 898, 903, 72 C.R.3d 409 [even though plaintiff was not signatory to deposit agreement between defendant bank and plaintiff's deceased grandmother, plaintiff was liable for bank's attorneys' fees in plaintiff's unsuccessful negligence action against bank; as decedent's successor in interest under Prob.C. 377.11,

plaintiff was even more closely aligned to decedent than contractual assignee is to contracting party; citing *Heppler v. J.M. Peters Co.* (1999) 73 C.A.4th 1265, 87 C.R.2d 497, text, p. 771].



46 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

1. Actions To Review Administrative Determination.

a. Actions Under Govt.C. 800.

1. In General.

7 Witkin Cal. Proc. Judgm § 210

[§ 210] In General.

Reasonable attorneys' fees are recoverable in a civil action to appeal or review an award, finding, or other determination of an administrative proceeding where (1) it is shown that the determination resulted from the "arbitrary or capricious" action or conduct of a "public entity" or its officers, and (2) the complainant prevails in the action. The fees are computed at \$ 100 per hour and may not exceed \$ 7,500. Actions resulting from the conduct of the California Victim Compensation and Government Claims Board are exempted from these provisions. (*Govt.C. 800(a)*; see *In re Nada R.* (2001) 89 C.A.4th 1166, 1181, 108 C.R.2d 493 [*Govt.C. 800* does not apply to appeals from trial court judgments].) The award is mandatory where the prevailing complainant makes the necessary showing. (*Plumbing, Heating & Piping Employers Council v. Quillin* (1976) 64 C.A.3d 215, 224, 134 C.R. 332; see *Zuehlsdorf v. Simi Valley Unified School Dist.* (2007) 148 C.A.4th 249, 256, 55 C.R.3d 467 [parent who obtained preliminary injunction allowing daughter to participate in soccer program was prevailing party under *Govt.C. 800*, even though permanent injunction was later denied as moot; parent succeeded in having daughter reinstated to team, league failed in its attempt to exclude her, and arbitrary or capricious action by league was prohibited].)

SUPPLEMENT: [This section is current through the latest supplement]



47 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

1. Actions To Review Administrative Determination.

a. Actions Under Govt.C. 800.

2. Public Entity.

7 *Witkin Cal. Proc. Judgm* § 211

[§ 211] Public Entity.

The scope and effect of *Govt.C. 800* were considered in *Olson v. Hickman* (1972) 25 C.A.3d 920, 102 C.R. 248. Petitioner, discharged from his civil service position in the Sacramento County Assessor's office, sought mandamus in the superior court to compel reinstatement and the payment of back salary. The superior court denied the writ but the Court of Appeal reversed, directing that it issue. Petitioner then moved for allowance of \$ 1,500 attorneys' fees, on an uncontradicted showing that he had incurred liability for it. The county contended that the statute did not apply to a local public agency, and that it could not be retroactively applied to this proceeding, which was commenced before its effective date. *Held*, the statute applied, and a reasonable fee, determined to be \$ 1,000, should be paid.

(a) The statute refers to an administrative proceeding under the Government Code "or under any other provision of state law." The county is a political subdivision of the state and its charter is a state law, and the reference to conduct of a "public entity" makes it clear that the statute extends to the administrative action of local agencies. (25 C.A.3d 923.)

(b) The award is made where there was "arbitrary or capricious action." Here, the action was found to be "discriminatory and illegal," and hence it was "arbitrary and capricious." (25 C.A.3d 923.)

(c) The statute became effective March 4, 1972. The court's decision ordering issuance of the writ was made on February 28, 1972, but the decision did not become final until the end of the 60-day period for hearing in the Supreme Court. Hence, the proceeding was pending at the time the statute became effective, and a procedural change applies to a pending action. (25 C.A.3d 922.) (See *Fontana Unified School Dist. v. Burman* (1988) 45 C.3d 208, 225, 246 C.R. 733, 753 P.2d 689 [in teacher dismissal hearing, applicable statute is *Educ.C. 44944(e)*, allowing prevailing teacher to recover reasonable attorneys' fees without limitation, rather than *Govt.C. 800*].)

SUPPLEMENT: [This section is current through the latest supplement]



48 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

1. Actions To Review Administrative Determination.

a. Actions Under Govt.C. 800.

3. Action Must Be Arbitrary or Capricious.

7 *Within Cal. Proc. Judgm* § 212

[§ 212] Action Must Be Arbitrary or Capricious.

(1) *Definition.* The phrase "arbitrary or capricious" has been interpreted to mean "conduct not supported by a fair or substantial reason." (*Madonna v. San Luis Obispo* (1974) 39 C.A.3d 57, 62, 113 C.R. 916; see *Midstate Theatres v. Board of Supervisors* (1975) 46 C.A.3d 204, 211, 119 C.R. 894 [question of fact for trial judge]; *A.B.C. Federation of Teachers v A.B.C. Unified School Dist.* (1977) 75 C.A.3d 332, 343, 142 C.R. 111 [following *Madonna* and *Midstate*]; *Campbell v. Residential Rent Stabilization & Arbitration Bd.* (1983) 142 C.A.3d 123, 129, 190 C.R. 829 [following *Madonna* and *Midstate*].)

Other cases interpreting the meaning of "arbitrary or capricious" include the following:

American President Lines, Ltd. v. Zolin (1995) 38 C.A.4th 910, 934, 45 C.R.2d 370 [plaintiff who challenged amount of registration fees charged by Department of Motor Vehicles was not entitled to attorneys' fees; although director's interpretation of registration agreement and department's authority was incorrect, it was not bad faith legal position and was supported by substantial reason].

Gilliland v. Medical Bd. of Calif. (2001) 89 C.A.4th 208, 220, 106 C.R.2d 863 [even though medical board did not have authority to impose statutory penalty, it did not act arbitrarily or in bad faith by arguing that it did].

Loewenstein v. Lafayette (2002) 103 C.A.4th 718, 737, 127 C.R.2d 79 [city's denial of property line adjustment application that presented "close and difficult case" was not arbitrary and capricious].

(2) *Determination by Trial Court.* *Plumbing, Heating & Piping Employers Council v. Quillin* (1976) 64 C.A.3d 215, 134 C.R. 332, holds that the factual issue of capricious conduct must be determined by the trial court in the original proceeding at the time the merits of the case are considered. The issue cannot be raised after a reversal on appeal. (64 C.A.3d 222, 225.) (See *Stirling v. Agricultural Lab. Rel. Bd.* (1987) 189 C.A.3d 1305, 1312, 235 C.R. 56 [trial court's finding that general counsel's action was arbitrary and capricious, made without taking evidence and based on a misconception as to relief sought, was erroneous]; *Reis v. Biggs Unified School Dist.* (2005) 126 C.A.4th 809, 822, 24

C.R.3d 393 [trial court's determination that school district acted arbitrarily and capriciously when it refused to reelect teacher to full-time equivalent permanent position was not abuse of discretion; district offered no rationale and failed to defend its actions in response to teacher's mandamus petition]; *Zuehlsdorf v. Simi Valley Unified School Dist.* (2007) 148 C.A.4th 249, 255, 256, 55 C.R.3d 467 [trial court clearly found that refusal by school district and league to allow transfer student to play soccer was "illogical and capricious"; award of fees under *Govt.C. 800* was within trial court's discretion, where league's rules made it difficult to determine who was eligible to participate].)

(3) *Legislative Conduct.* The statute does not authorize fees where the public agency performed a purely legislative function such as the adoption of a regulatory ordinance, but arbitrary or capricious conduct after its enactment may support the award. (*Reeves v. Burbank* (1979) 94 C.A.3d 770, 777, 778, 156 C.R. 667.)

SUPPLEMENT: [This section is current through the latest supplement]



49 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

1. Actions To Review Administrative Determination.

a. Actions Under Govt.C. 800.

4. Complainant Only.

7 *Witkin Cal. Proc. Judgm* § 213

[§ 213] Complainant Only.

In *Stirling v. Agricultural Lab. Rel. Bd.* (1987) 189 C.A.3d 1305, 235 C.R. 56, a labor union filed unfair labor practice charges against a company. The general counsel for the Agricultural Labor Relations Board issued a complaint. A settlement was reached, which the board rejected, and the general counsel petitioned for a writ requiring the board to adopt standards for reviewing settlements and to consider the proposed settlement in the light of these standards. The superior court summarily denied the petition and awarded attorneys' fees to the labor union, the real party in interest. *Held*, award reversed.

(a) The complainant under *Govt.C. 800* is the party who seeks appellate review of an adverse determination in an administrative hearing, and who successfully asserts that the official conduct in question was arbitrary or capricious. The complainant in the writ proceedings was petitioner general counsel, not the labor union. (189 C.A.3d 1311, 1312.)

(b) When the Legislature intends that the successful side will recover attorneys' fees no matter who brought the legal proceeding, it typically uses the term "prevailing party." If, on the other hand, the Legislature desires to authorize the award only to one or another side, it uses such terms as "plaintiff" or "defendant." This intent appears in *Govt.C. 800*. "[T]he Legislature only intended that the party bringing the appeal or writ proceeding, and not any prevailing party, should be eligible for attorney's fees. It is, after all, only an appellant or petitioner who would seek appellate review of official acts on the grounds they are 'arbitrary or capricious.' Respondents and real parties, in contrast, seek no relief. Instead of seeking review and reversal, they seek denial and affirmance. Since the statute covers both appeals and writ proceedings, it is only sensible that the Legislature would employ a term that describes parties who seek relief in both proceedings, an appellant and a petitioner, alike: the complainant." (189 C.A.3d 1311.)

SUPPLEMENT: [This section is current through the latest supplement]



50 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

1. Actions To Review Administrative Determination.

a. Actions Under Govt.C. 800.

5. Need for Formal Hearing.

7 *Witkin Cal. Proc. Judgm* § 214

[§ 214] Need for Formal Hearing.

Govt.C. 800 has been held to permit an award of attorneys' fees on appeal or review from a determination of any administrative proceeding. It is not limited to the review of determinations at formal administrative hearings. Hence, an award was proper where the challenged government action consisted of a letter summarily rejecting petitioner's request for a grievance hearing. Denial of the grievance was an administrative decision which necessarily occurred at an "administrative proceeding." (*Forrest v. Trustees of Calif. State Universities & Colleges* (1984) 160 C.A.3d 357, 365, 367, 206 C.R. 595.)

Kistler v. Redwoods Community College Dist. (1993) 15 C.A.4th 1326, 19 C.R.2d 417, reached a contrary result, criticizing what it referred to as "broad dicta" in *Forrest*. Plaintiffs, former community college administrators, were awarded attorneys' fees under *Govt.C. 800* after they successfully challenged defendant community college district's actions terminating their annual contracts early and forcing them to use accrued vacation balances in order to be paid for the remainder of their terms. *Held*, award reversed.

(a) *Govt.C. 800* applies only to appeals from a final administrative determination by an administrative law judge, not to every determination by a public agency. Here, no hearing occurred and no hearing was contemplated. (15 C.A.4th 1336, citing *Sullivan v. Calistoga Joint Unified School Dist.* (1991) 228 C.A.3d 1313, 279 C.R. 529.)

(b) "In *Sullivan*, ... we implicitly rejected the view taken in certain dicta of the Second District in *Forrest* ... which suggested any administrative decision might qualify for attorney fees on appeal under section 800. We note that the result in *Forrest*, as opposed to the broad dicta contained therein, was correct. In *Forrest*, the employee sought a grievance hearing to which he was entitled, but the state university refused to convene the hearing. ... Since an administrative hearing would have been held, for the protection of the employee and at his request, if not for the illegal act of the state university, section 800 could apply despite the fact that, technically, no administrative hearing had taken place." (15 C.A.4th 1336.) (See *Traverso v. People* (1996) 46 C.A.4th 1197, 1211, 54 C.R.2d 434 [denial of billboard permit is not "administrative proceeding" within meaning of *Govt.C. 800* because there is no hearing involved]; *Gustafson v. Zolin* (1997) 57 C.A.4th 1361, 1367, 67 C.R.2d 645 [letter from DMV advising driver that his license

suspension could not be set aside without further documentation was not "administrative proceeding" under *Govt.C.* 800, which is limited to administrative hearings or similar proceedings that present issues for hearing and disposition].)

SUPPLEMENT: [This section is current through the latest supplement]



51 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

1. Actions To Review Administrative Determination.

b. Welfare Determinations.

7 *Witkin Cal. Proc. Judgm* § 215

[§ 215] Welfare Determinations.

Within 1 year after receiving notice of a final welfare decision, a welfare applicant or recipient may file a petition for writ of mandamus to review applicable questions of law. An applicant or recipient who prevails is entitled to reasonable attorneys' fees and costs. (Welf.C. 10962.)

In *Trout v. Carleson* (1974) 37 C.A.3d 337, 112 C.R. 282, an award was upheld even though the applicant had been represented by California Rural Legal Assistance, a nonprofit corporation, and was not obligated to pay any fees to it. It was sufficient that the claimant was represented by an attorney who, if acting in a private capacity, would have been entitled to compensation. (37 C.A.3d 343.) (See *Roberts v. Brian* (1973) 30 C.A.3d 427, 429, 106 C.R. 360 [awards for fees in trial court, on appeal from adverse judgment, and on appeal from award of the two earlier sums]; *Horn v. Swoap* (1974) 41 C.A.3d 375, 384, 116 C.R. 113 [following *Trout*, and ordering that fees for appellate services be awarded by trial court on remand]; *Luna v. Carleson* (1975) 45 C.A.3d 670, 673, 119 C.R. 711 [following *Trout* and *Horn*; services rendered by county legal aid society].)

In *Silberman v. Swoap* (1975) 50 C.A.3d 568, 123 C.R. 456, the award was upheld although the petitioner brought a traditional mandamus proceeding to compel the director of the Department of Social Welfare to perform a mandatory duty, rather than an administrative mandamus proceeding to review a decision. (50 C.A.3d 571.) In *Hypolite v. Carleson* (1975) 52 C.A.3d 566, 125 C.R. 221, awards were sustained, although the plaintiffs sued not only on their own behalf but as representatives of a class. (52 C.A.3d 587.)

SUPPLEMENT: [This section is current through the latest supplement]



52 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

1. Actions To Review Administrative Determination.

c. Hospital Disciplinary Decisions.

7 *Witkin Cal. Proc. Judgm* § 216

[§ 216] Hospital Disciplinary Decisions.

B. & P.C. 809.9 authorizes an award of attorneys' fees to the substantially prevailing party in a suit challenging an action taken or restriction imposed that is required to be reported under *B. & P.C. 805* (medical and health care peer review), if the adverse party's prosecution or defense was frivolous, unreasonable, without foundation, or in bad faith. For this purpose, when a plaintiff obtains an award of damages or permanent injunctive or declaratory relief, the plaintiff is considered to have substantially prevailed and the defendant not to have substantially prevailed. (*B. & P.C. 809.9*.)

In *Mir v. Charter Suburban Hosp.* (1994) 27 *C.A.4th* 1471, 33 *C.R.2d* 243, through administrative mandamus proceedings, plaintiff physician successfully overturned a hospital's disciplinary action against him on the ground of insufficient evidence, and was upheld on appeal. The trial judge found that the hospital had opposed mandamus unreasonably and without foundation and granted plaintiff attorneys' fees under *B. & P.C. 809.9*. *Held*, award of attorneys' fees reversed.

(a) Plaintiff was a substantially prevailing party for purposes of *B. & P.C. 809.9*, in that he had "obtained what amounted to declaratory relief from the superior court on administrative mandamus." (27 *C.A.4th* 1479.) A petition for a writ of mandamus to review an administrative decision "in effect seeks declaratory relief as to the rights of the parties." Consequently, a petitioner who prevails on mandamus "is entitled at that juncture to seek attorney fees" under section *B. & P.C. 809.9*. (27 *C.A.4th* 1480.)

(b) However, grant of a petition for writ of mandamus due to a lack of substantial evidence "does not amount to a finding that the defense to the petition was unreasonable or without foundation." (27 *C.A.4th* 1482.)

(c) Based on legislative history, the statute should properly be construed as a sanctions measure specifically applicable to actions challenging medical peer review decisions, and not as creating a broad entitlement to attorneys' fees to the prevailing party in an action challenging a peer review decision. (27 *C.A.4th* 1484, 1485.)

(d) "[A] determination that administrative findings are not supported by 'substantial evidence' ... is not synonymous

with a determination there was *no supporting evidence*." (27 C.A.4th 1486.) Further, "if the mere overturning of a hospital's decision for a lack of substantial evidence gave rise to recovery under section 809.9 on the grounds of 'unreasonable' or 'without foundation,' the statute's provision for recovery of attorney fees where a hospital's action or defense was so lacking in merit as to be 'frivolous' or 'in bad faith' would be rendered surplusage." (27 C.A.4th 1487.)

A lengthy dissent criticized the majority for concluding that *B. & P.C. 809.9* was unclear as to what circumstances allowed recovery of attorneys' fees by a prevailing party, contending that the statute "clearly sets out four *alternative* categories under which such fees may be awarded." (27 C.A.4th 1488.)

SUPPLEMENT: [This section is current through the latest supplement]



53 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

2. Actions Under Fair Employment and Housing Act.

a. Standard for Awarding Fees.

7 *Witkin Cal. Proc. Judgm* § 217

[§ 217] Standard for Awarding Fees.

(1) *In General.* In an action under the California Fair Employment and Housing Act (FEHA) (see 8 *Summary* (10th), *Constitutional Law*, §915 et seq.), the trial court has discretion to award attorneys' fees to the prevailing party. (*Govt.C. 12965(b)*.) "The language, purpose and intent of California and federal antidiscrimination acts are virtually identical. Thus, in interpreting FEHA, California courts have adopted the methods and principles developed by federal courts in employment discrimination claims arising under title VII of the federal Civil Rights Act ... , and under the federal Age Discrimination in Employment Act." (*Cummings v. Benco Bldg. Services* (1992) 11 *C.A.4th* 1383, 1386, 15 *C.R.2d* 53.)

Among the many cases discussing the propriety of a fees award under FEHA are the following:

Tipton-Whittingham v. Los Angeles (2004) 34 *C.4th* 604, 608, 21 *C.R.3d* 371, 101 *P.3d* 174 [companion case to *Graham v. DaimlerChrysler Corp.* (2004) 34 *C.4th* 553, 21 *C.R.3d* 331, 101 *P.3d* 140, *infra*, §265; catalyst theory, which allows attorneys' fee award for plaintiff who has been catalyst in bringing about relief sought by litigation, applies to actions under *Govt.C. 12965(b)*].

Flannery v. California Highway Patrol (1998) 61 *C.A.4th* 629, 637, 71 *C.R.2d* 632, *infra*, §312 [plaintiff who alleged harassment, discrimination, and wrongful termination was entitled to fee award under FEHA, but remand was necessary to reconsider amount of award].

Horsford v. Board of Trustees of Calif. State University (2005) 132 *C.A.4th* 359, 393, 33 *C.R.3d* 644 [trial court abused discretion in calculating amount of plaintiffs' fee award; court did not attempt to fully compensate plaintiffs' attorneys for services provided, failed to use attorneys' time records as starting point for lodestar determination, failed to consider adequately propriety of higher hourly rate for out-of-town counsel, failed to consider relevant factors for awarding enhancement multiplier, and required attorneys to look to plaintiffs to make up for any undercompensation].

Nichols v. Taft (2007) 155 *C.A.4th* 1233, 1240, 66 *C.R.3d* 680 [trial court abused discretion by using fee multiplier to compensate for higher rates of out-of-town counsel; plaintiff failed to show that hiring local counsel was impractical; trial court mistakenly believed that it was required to impose multiplier under *Horsford*].

(2) *Award to Prevailing Defendant.* The standard a trial court must use in exercising its discretion in awarding fees to a prevailing defendant was set forth in *Christiansburg Garment Co. v. Equal Emp. Opportunity Com.* (1978) 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648. Under that standard, such awards should be permitted "not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious." (*Cummings v. Benco Bldg. Services, supra*, 11 C.A.4th 1387.)

In *Hon v. Marshall* (1997) 53 C.A.4th 470, 62 C.R.2d 11, an employee's FEHA action against her former employers ended in summary judgment for defendants as a result of plaintiff's failure to exhaust her administrative remedies. The trial judge awarded defendants their attorneys' fees under *Govt.C. 12965*. *Held*, reversed.

(a) A defendant who is granted summary judgment in a FEHA action because of a jurisdictional defect does not qualify as a "prevailing party" entitled to fees under *Govt.C. 12965*. The federal courts that have considered this issue in actions involving federal statutes, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Civil Rights Attorney's Fees Awards Act of 1976, have concluded that an award should not be made to defendants who prevail as a consequence of a jurisdictional defect. The reasoning in these cases is sound. Furthermore, interpreting *Govt.C. 12965* to include defendants such as these as "prevailing parties" would encourage plaintiffs to file actions in federal courts under the federal civil rights statutes, rather than in state courts under the FEHA. "This would defeat the policy of keeping the California law as an effective remedy against [employment] discrimination and would undermine Congress's intent 'to encourage full use of state remedies.' " (53 C.A.4th 477.)

(b) Defendants may nevertheless be able to recoup their attorneys' fees through an award of sanctions. A plaintiff may not prosecute a FEHA action with impunity. If the circumstances surrounding a plaintiff's failure to exhaust administrative remedies render the decision to sue under FEHA frivolous, vexatious, or otherwise an act of bad faith, the trial court may impose sanctions under *C.C.P. 128.5, 128.6, or 128.7* (see 7 *Cal. Proc. (5th), Trial*, §226 et seq.). (53 C.A.4th 478.)

Hon was distinguished in *Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 C.A.4th 762, 89 C.R.2d 429, in which plaintiff sued his former employers under the FEHA, alleging that he was wrongfully terminated because of his age and a medical disability. Before filing the action, plaintiff had signed a release of all claims in exchange for, among other things, \$ 17,000. The trial court entered judgment against plaintiff based on the release and awarded defendants their attorneys' fees on the ground that plaintiff's unlawful discrimination claims were unreasonable and meritless. *Held*, affirmed.

(a) Plaintiff had no legal basis for pursuing the unlawful discrimination cause of action. Plaintiff was represented by an attorney and knew or should have known that, because they were explicitly the subject of the release, the claims were unreasonable or without foundation. (75 C.A.4th 770.)

(b) Furthermore, *Hon* is not controlling. The issue of failing to exhaust administrative remedies that was raised in *Hon* is not akin to the ground raised here: the execution of a valid release in which plaintiff agreed to settle all claims, including those based on unlawful discrimination. Moreover, *Hon* did not address whether a general release is a mere technicality or could never support an attorneys' fee award. Nor did it address the issue whether the standard of *Christiansburg Garment Co.* is triggered by continuing to pursue litigation in the face of a valid release of unlawful discrimination claims. The trial court here reasonably could have concluded that the action was frivolous, unreasonable, or without foundation given the release. (75 C.A.4th 771.)

The following are among the cases discussing the propriety of a fees award to a prevailing defendant:

Bond v. Pulsar Video Productions (1996) 50 C.A.4th 918, 922, 57 C.R.2d 917 [award to defendant was proper, even though plaintiff's discrimination claim survived defendant's summary judgment motion, where trial judge found claim to be "frivolous, vexatious, and without merit"].

Saret-Cook v. Gilbert, Kelly, Crowley & Jennett (1999) 74 C.A.4th 1211, 1228, 88 C.R.2d 732 [award to defendants was proper where plaintiff's action was intended solely to harass, and was frivolous, without merit, unreasonable, and vexatious].

Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro (2001) 91 C.A.4th 859, 867, 869, 110 C.R.2d 903 [award to defendants in pregnancy discrimination action was abuse of discretion; there was credible evidence that plaintiff was temporarily disabled by her difficult pregnancy and needed accommodation; there was no suggestion of blatant perjury by plaintiff; she presented expert and percipient testimony to support her claim that she was not reasonably accommodated; she survived motions for nonsuit and for summary judgment, and she garnered votes of two jurors].

Jersey v. John Muir Med. Center (2002) 97 C.A.4th 814, 830, 118 C.R.2d 807 [trial court abused discretion in awarding fees to prevailing defendant; court used wrong standard, stating that plaintiff's case lacked merit, and failed to make express written findings to support award; there was no need to remand for findings, because plaintiff's action, while ultimately failing, could not be considered frivolous and trial court clearly did not consider it to be so].

Perez v. Santa Clara (2003) 111 C.A.4th 671, 681, 3 C.R.3d 867, supra, §108 [prevailing defendant in FEHA action should be able to recover ordinary litigation expenses other than attorneys' fees, even if plaintiff's lawsuit was not frivolous, groundless, or unreasonable; disagreeing with *Cummings*].

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.*

(New) Settlement under C.C.P. 998: When an offer to compromise under *C.C.P. 998* (text, §112 et seq.) is silent on costs and fees, the prevailing party is entitled to fees authorized by *Govt.C. 12965(b)*. (*Engle v. Copenbarger & Copenbarger, LLP (2007) 157 C.A.4th 165, 68 C.R.3d 461* [plaintiff who secured recovery on discrimination claim under FEHA was entitled to fees, where defendant failed to include fee waiver in its offer to compromise; citing *Folsom v. Butte County Assn. of Governments (1982) 32 C.3d 668, 186 C.R. 589, 652 P.2d 437, text, §294*].)(2) *Award to Prevailing Defendant.* See *Young v. Exxon Mobil Corp. (2008) 168 C.A.4th 1467, 1474, 86 C.R.3d 507* [trial court had discretion to deny fees to prevailing defendant, plaintiff's supervisor, even though plaintiff's wrongful termination action was frivolous; award simply would have benefited defendant employer, who paid fees for supervisor, was not otherwise entitled to award, and did not incur significant fees on supervisor's behalf that it would not have incurred anyway].

(New) Plaintiff's ability to pay: Because most FEHA actions involve litigants who do not have the financial means to prosecute an action, the public policy behind FEHA is served by eliminating the potential imposition of devastating fees. Thus, a plaintiff's ability to pay must be considered before awarding attorneys' fees in favor of the defendant. (*Villanueva v. Colton (2008) 160 C.A.4th 1188, 1203, 73 C.R.3d 343* [although trial court must consider financial status, plaintiff offered no evidence that he was unable to pay fees; \$ 40,000 award to defendant was not abuse of discretion].)



54 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

2. Actions Under Fair Employment and Housing Act.

b. Fees Are Paid to Attorney, Not to Client.

7 *Witkin Cal. Proc. Judgm* § 218

[§ 218] Fees Are Paid to Attorney, Not to Client.

In *Flannery v. Prentice* (2001) 26 C.4th 572, 110 C.R.2d 809, 28 P.3d 860, plaintiff had been awarded attorneys' fees under *Govt.C. 12965(b)* in an action against her former employer. She sued defendants, her attorneys in that action, seeking a declaration that she was entitled to the entire fee award. Defendants cross-complained, contending that they were entitled to the fee award, to recovery in quantum meruit, or to damages for breach of contract. The parties had no written agreement for dispersal of the fee award, and they disagreed on the terms of an oral agreement. The trial court granted defendants' motions for summary judgment and summary adjudication, declaring that defendants were entitled to the proceeds of the fee award in the FEHA action as a matter of law. The Court of Appeal reversed and remanded. *Held*, remanded; proceeds of a FEHA fee award exceeding fees the client has already paid belong to the attorneys for whose work they are awarded, unless there is a valid contractual agreement otherwise disposing of them.

(a) Although *Govt.C. 12965(b)* authorizes fee awards to the "prevailing party," that language does not unambiguously favor plaintiff. The word "party" can refer to a litigant's attorney of record. (26 C.4th 578.) Thus, the legislative history and underlying purposes of *Govt.C. 12965* must be examined. (26 C.4th 579.) California courts have held that statutory fee awards *may* be paid directly to the prevailing litigant's attorney, and also that fee awards under the private attorney general doctrine (*C.C.P. 1021.5*, *infra*, §259) are properly made to plaintiffs' attorneys rather than to the plaintiffs. "Neither in enacting nor in amending" *Govt.C. 12965*, or the FEHA generally, "has the Legislature repudiated such precedents." (26 C.4th 582.)

(b) The underlying purpose of FEHA is to safeguard the right of Californians to seek, obtain, and hold employment without experiencing unlawful discrimination. (26 C.4th 582, 583.) Interpreting *Govt.C. 12965* to vest ownership of fees awarded under the statute and not disposed of by contract in the litigant, rather than in the litigant's attorney, would diminish the certainty that attorneys who undertake FEHA cases will be fully compensated, and thus would dilute the statute's effectiveness at encouraging attorneys to undertake FEHA litigation. (26 C.4th 583.)

(c) Construing *Govt.C. 12965* as vesting ownership of unassigned, unpaid attorneys' fees in the litigant's attorney will advance important public policies. Specifically, it will encourage representation of legitimate FEHA claimants and discourage nonmeritorious suits, by enhancing the likelihood that attorneys who undertake or defend FEHA cases will

be fully compensated. (26 C.4th 585.) It will avoid unjust enrichment; "in general, where attorney compensation has neither been paid nor forgiven and there is no contract assuring it, allowing a victorious litigant to retain the proceeds of a fee award (in addition to a substantial damages judgment) would confer an unjustified windfall." (26 C.4th 586.) It will ensure fairness; paying an award under *Govt.C. 12965* directly to the party, in the absence of an agreement requiring the party to pay its yet unpaid attorney, would, from the perspective of the payer, transform the award into "a kind of punitive damages." (26 C.4th 586.) Finally, ordering that *Govt.C. 12965* fee awards "be paid directly to plaintiffs whenever there exists no contrary agreement between plaintiffs and their counsel (such that plaintiffs realize a windfall at counsel's expense) could make sense only if the law treated attorneys who fail to secure fee agreements as deserving of such punishment. ... But that is not the case." (26 C.4th 589.) The Legislature has expressly declined to sanction failure to obtain a written fee agreement in such a way. (26 C.4th 589.)

(d) Although the Court of Appeal incorrectly analyzed the question of who owns unassigned *Govt.C. 12965* proceeds, it correctly remanded this matter for a determination whether an agreement between plaintiff and defendants exists and what its terms may be. (26 C.4th 590.)

One justice dissented, arguing that the "clear and unequivocal" language of *Govt.C. 12965(b)* authorizes fees to the prevailing party, not the prevailing lawyer. (26 C.4th 591.)

SUPPLEMENT: [This section is current through the latest supplement]



55 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

3. Partition Actions.

7 *Within Cal. Proc. Judgm § 219*

[§ 219] Partition Actions.

Attorneys' fees are allowed in a partition action where they are incurred "for the common benefit" of parties entitled to share in the lands divided. (*C.C.P. 874.010(a)*); see *Capuccio v. Caire* (1932) 215 C. 518, 528, 11 P.2d 1097; *Riley v. Turpin* (1960) 53 C.2d 598, 603, 2 C.R. 457, 349 P.2d 63; *Williams v. Wells Fargo Bank* (1943) 56 C.A.2d 645, 652, 133 P.2d 73 [award should await final judgment and not be included in interlocutory decree]; *Muller v. Martin* (1953) 116 C.A.2d 431, 436, 253 P.2d 686; 94 A.L.R.2d 575 [allowance and apportionment of attorneys' fees in partition actions]; 12 *Summary* (10th), *Real Property*, §83.) The award must be made to the party, not the attorney. (*Scott v. Staggs* (1954) 129 C.A.2d 54, 57, 276 P.2d 605.)

The fees must be apportioned among the parties in proportion to their interests, unless the court determines that some other apportionment is more equitable. (*C.C.P. 874.040*.) (See *Finney v. Gomez* (2003) 111 C.A.4th 527, 545, 3 C.R.3d 604 [trial court abused discretion in awarding 100% of fees incurred in partition action to plaintiff; fees should have been divided in proportion to parties' ownership interest in property; additional fees that plaintiff incurred in consulting bankruptcy attorney should not have been awarded at all without evidence that they were for common benefit].)

Attorneys' fees are also allowed where they are incurred in related actions involving (1) protecting, confirming, or perfecting title, (2) setting the boundaries, or (3) making a survey of the property. (*C.C.P. 874.020*.)

SUPPLEMENT: [This section is current through the latest supplement]



56 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

4. Actions Against Surety on Government Construction Bond.

7 *Witkin Cal. Proc. Judgm* § 220

[§ 220] Actions Against Surety on Government Construction Bond.

(1) *General Rule.* Government contractors whose contracts involve expenditures of more than \$ 25,000 must file a payment bond. (C.C. 3247.) The prevailing party in an action against the surety on the bond must be awarded reasonable attorneys' fees, taxed as costs. (C.C. 3250; see *Lewis & Queen v. S. Edmondson & Sons* (1952) 113 C.A.2d 705, 708, 248 P.2d 973; *General Elec. Co. v. Central Surety & Ins. Corp.* (1965) 232 C.A.2d 590, 603, 43 C.R. 48; *Winick Corp. v. Safeco Ins. Co.* (1986) 187 C.A.3d 1502, 1506, 232 C.R. 479 [obtaining dismissal with prejudice for plaintiff's failure to timely serve summons qualified defendant as prevailing party under statute]; *Contractors Labor Pool v. Westway Contractors* (1997) 53 C.A.4th 152, 167, 61 C.R.2d 715, *infra*, §311 [trial court erred in applying restrictions of local court rule in awarding fees under C.C. 3250]; *Walt Rankin & Associates v. Murrieta* (2000) 84 C.A.4th 605, 629, 101 C.R.2d 48 [fees under C.C. 3250 were not available in tort action against city for failure to ensure that payment bond surety was sufficient admitted surety under C.C.P. 995.310]; 8 A.L.R.3d 1438 [construction of attorneys' fees provision in contractor's bond].)

The statute does not apply to the surety of a federal Government contractor. (*B.C. Richter Contracting Co. v. Continental Cas. Co.* (1964) 230 C.A.2d 491, 505, 41 C.R. 98 [construing predecessor to C.C. 3250].)

(2) *Arbitration Proceedings.* In *Liton General Engineering Contractor v. United Pac. Ins.* (1993) 16 C.A.4th 577, 20 C.R.2d 200, plaintiff subcontractor filed an action for recovery on a public works payment bond against defendant, the surety for a general contractor whom plaintiff had sued for breach of contract and common counts in a related action. In granting summary judgment for plaintiff, the trial judge ordered defendant to pay plaintiff's attorneys' fees. Most of the fees had been incurred in arbitration proceedings between the general contractor and plaintiff, which were resolved in plaintiff's favor. *Held*, award of attorneys' fees affirmed.

(a) The fact that the bulk of fees were incurred in arbitration of plaintiff's dispute with the general contractor was of no import. Plaintiff originally filed its action against the general contractor on the subcontract, and against defendant on the bond, and the judge compelled plaintiff to complete arbitration before it could establish defendant's liability on the bond. This compulsion, along with the fact that the arbitration agreement did not call for waiver of the statutory right to fees from defendant under C.C. 3250, indicated that plaintiff did not "elect" a remedy foreclosing an action against defendant in which fees could be awarded. Under the circumstances, successful resolution of the arbitration was a

necessary precursor to a successful outcome in plaintiff's action against defendant. Thus, the arbitration fees were incurred as an integral part of the action on the bond, and plaintiff was entitled under the statute to its fees against defendant. (*16 C.A.4th 585.*)

(b) Defendant's obligation to pay attorneys' fees did not violate its due process rights, notwithstanding that defendant was not a party to the arbitration. At the time of the action, there was no California authority holding that defendant could be compelled to arbitrate. Plaintiff did not seek to enforce the arbitration judgment against defendant; plaintiff sought summary judgment against it under C.C. 3250 for the arbitration fees and costs. Defendant had the chance to raise its defenses in opposition to the summary judgment. Further, the right to fees under C.C. 3250 is reciprocal. Had plaintiff lost at arbitration, defendant could have moved for summary judgment as to its own liability and also requested attorneys' fees. The fact that defendant's award would have been less because it incurred no fees at arbitration did not undermine the reciprocity of C.C. 3250. (*16 C.A.4th 587.*)

(c) C.C. 3250 did not require an apportionment of the fees spent by plaintiff in arbitrating with the general contractor and in litigating with defendant. Plaintiff was not permitted to establish defendant's liability on the bond without first completing arbitration, and the liability of the general contractor and defendant were so factually interrelated that it would have been impossible to separate the activities involved in the arbitration into compensable and noncompensable time units. (*16 C.A.4th 588.*)

(d) The award of fees did not contravene C.C. 2855, which provides that an arbitration award against a principal may not be deemed an award against the surety. The arbitration was part of the action on the bond, and plaintiff did not seek to execute the arbitration judgment against defendant; plaintiff sought summary judgment, thereby giving defendant a chance to raise its defenses. (*16 C.A.4th 588.*)

(e) Defendant's statutory liability for attorneys' fees was not derivative of any fee liability of the general contractor. The provision of the subcontract that each party would bear its own attorneys' fees simply reiterated the general rule of *C.C.P. 1021* (supra, §149) that each party bears its own fees except where provided by statute or prior agreement, and it was not designed to relieve defendant of its statutory fee liability as the nonprevailing party in the bond action. The general statutes concerning surety and principals--C.C. 2808 and 2809--do not prevail over C.C. 3250, a more specific statute regarding attorneys' fees in public works bond litigation. C.C. 3250 contemplates that a surety may be liable for amounts owed by the general contractor as well as for fees, as its own direct liability. Thus, in an action on the payment bond, fees must be awarded to the prevailing party regardless of whether the principal would be liable for those fees contractually or pursuant to statute. (*16 C.A.4th 589.*)

(f) Relying on C.C. 2839, which provides that performance of the principal obligation exonerates a surety, defendant claimed that the general contractor's payment of the principal and interest it owed to plaintiff promptly after the arbitration award discharged any obligation to pay attorneys' fees. This claim is without merit. Under C.C. 2807, a surety is liable immediately on its principal's default; here, the general contractor's initial refusal to pay what it owed triggered defendant's obligation. At that point, defendant was liable to plaintiff not only for the amount wrongfully withheld, but also by C.C. 3250 for the fees plaintiff incurred in pursuing its action on the bond. Thus, defendant's liability for fees also was statutorily based and did not depend on any contractual liability. (*16 C.A.4th 590.*)

(g) Plaintiff's right to collect attorneys' fees was not waived by its agreement in the subcontract to arbitrate disputes between itself and the general contractor, and by its agreement that each party would bear its own costs and attorneys' fees in any arbitration. Although plaintiff acknowledged the absence of any right to recover fees against the general contractor in arbitration, it neither expressly nor impliedly waived its rights under C.C. 3250 to recover attorneys' fees from defendant as a prevailing party. The statutory obligation of defendant to pay fees if it does not prevail in an action on the bond is not affected by the terms of the contract between plaintiff and general contractor, be it an agreement to arbitrate, or an agreement to waive attorneys' fees as between those two. (*16 C.A.4th 593.*)

(h) Also unavailing was the dissenting justice's claim that if a contractor and subcontractor settle their dispute

following negotiation or arbitration, a surety could be forced to pay attorneys' fees to a subcontractor who has made an inflated and legitimately disputed claim against the contractor. (16 C.A.4th 602) This is so because a subcontractor is not entitled to fees against a surety merely because the subcontractor prevailed in arbitration or otherwise settled its claim with the general contractor. A subcontractor is entitled to recover fees reasonably incurred in satisfying its claim only when it prevails in its action on the bond. The subcontractor cannot be deprived of its own defenses and those available to the general contractor. Should the general contractor settle a claim the subcontractor considers defensible, the surety can raise its defenses in the action on the bond. If the surety prevails, it can recover its fees from the subcontractor. (16 C.A.4th 594.) (See *Scott Co. of Calif. v. United States Fidelity & Guaranty Ins. Co.* (2003) 107 C.A.4th 197, 216, 132 C.R.2d 89 [because C.C. 3250 imposes independent statutory obligation on sureties to pay successful claimant's attorneys' fees, principal's discharge under C.C.P. 998 (releasing defendant from liability for costs incurred after settlement offer; see supra, §112 et seq.) did not necessarily exonerate sureties; trial court would have to determine whether sureties had consented to be bound by settlement offer; citing *Liton General Engineering Contractor*].)

SUPPLEMENT: [This section is current through the latest supplement]



57 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

5. Actions To Enforce Equitable Servitude.

7 *Witkin Cal. Proc. Judgm § 221*

[§ 221] Actions To Enforce Equitable Servitude.

Covenants, conditions, and restrictions applicable to a common interest development may be enforced as equitable servitudes by an owner, by the association, or by both. (C.C. 1354(a).) The prevailing party in any enforcement action must be awarded reasonable attorneys' fees and costs. (C.C. 1354(c).) (See 12 *Summary* (10th), *Real Property*, §§114, 122 et seq.)

In *Heather Farms Homeowners Assn. v. Robinson* (1994) 21 C.A.4th 1568, 26 C.R.2d 758, defendant homeowner sought recovery of costs from plaintiff homeowners association following the global settlement of a complex series of cross-complaints and subsidiary actions concerning the enforcement of equitable servitudes under C.C. 1354. Defendant expressly declined to participate in the settlement agreement, which required plaintiff to dismiss its action against defendant without prejudice. The settlement judge found that the dismissal without prejudice did not mean that the defendant had prevailed, and that there were no prevailing parties. At the conclusion of the settlement, defendant claimed costs and attorneys' fees as the prevailing party under C.C. 1354. The judge who ruled on the attorneys' fee request found that, although defendant was the prevailing party for purposes of general litigation expenses and entitled to recover those from plaintiff, he was not a prevailing party in the litigation within the meaning of the statute, and thus was not entitled to attorneys' fees under C.C. 1354. *Held*, defendant was not the prevailing party for purposes of recovering attorneys' fees under C.C. 1354.

(a) "The pivotal question here is how does a court determine who is the 'prevailing party' " for purposes of C.C. 1354. The statute neither defines prevailing party nor offers guidance for courts. (21 C.A.4th 1571.)

(b) Under the general cost statute, *C.C.P. 1032(a)(4)*, a "prevailing party" includes a defendant in whose favor a dismissal is entered. Defendant argued that because he was the recipient of a dismissal and was awarded general litigation costs, he must also be deemed the prevailing party for purposes of C.C. 1354. However, the premise for this argument "has been uniformly rejected by the courts of this state." *C.C.P. 1032(a)* defines "prevailing party" for its own purposes only. It does not purport to define the term for purposes of other statutes. (21 C.A.4th 1572.)

(c) Under C.C. 1717(b)(2), when an action has been voluntarily dismissed or dismissed under a settlement, there is no prevailing party for purposes of C.C. 1717 (see *supra*, §200 et seq.). However, C.C. 1717 applies only to actions

where the contract specifically provides for an award of attorneys' fees and costs, and both sides agree there was no contract involved here. (21 C.A.4th 1572.)

(d) Both the settlement judge and the trial judge properly concluded that there was no prevailing party. Plaintiff voluntarily dismissed its complaint as part of a global settlement, not because the defendant succeeded on some procedural issue or otherwise received what he wanted. "While it might be possible to conjure a scenario where a litigant who refuses to participate in a settlement and then receives a voluntary dismissal without prejudice could be deemed the prevailing party, that is certainly not the case here." (21 C.A.4th 1574.)

In *Kaplan v. Fairway Oaks Homeowners Assn.* (2002) 98 C.A.4th 715, 120 C.R.2d 158, members of a homeowners association sued the association, challenging the validity of an election of the board of directors. The trial court found the election valid and awarded defendant its attorneys' fees under former C.C. 1354(f) (now C.C. 1354(c)). Plaintiffs appealed, claiming that their action was filed under *Corp.C. 7616*, which does not authorize an attorneys' fees award. *Held*, fee award affirmed.

(a) *Corp.C. 7616* provides a procedural vehicle for challenging an election, but does not create any substantive rights. (98 C.A.4th 719.) The gist of plaintiffs' action was to enforce the members' proxy and cumulative voting rights under the bylaws. (98 C.A.4th 720.)

(b) Before 1993, C.C. 1354 authorized fees in an action "to enforce the declaration." The statute now authorizes fees in an action specified by C.C. 1354(a) "to enforce the governing documents." (98 C.A.4th 718, 719.) By broadening the attorneys' fee provision in C.C. 1354, the Legislature eliminated any distinction between an action to determine the validity of an election and one brought to enforce "the placement of a fence or the painting of a garage." The legislative policy underlying an award to a prevailing party, either a homeowner or an association, applies equally to both types of enforcement actions. (98 C.A.4th 721.)

Other cases discussing when a party is entitled to an attorneys' fee award under C.C. 1354(c) include the following:

Mt. Olympus Property Owners Assn. v. Shpirt (1997) 59 C.A.4th 885, 893, 69 C.R.2d 521 [trial court erred in awarding fees under C.C. 1354; property was not "common interest development"].

Parrott v. Mooring Townhomes Assn. (2003) 112 C.A.4th 873, 876, 6 C.R.3d 116 [even after homeowners' voluntary dismissal of action against association, trial court had jurisdiction to determine prevailing party under C.C. 1354 for purpose of awarding attorneys' fees; citing *Heather Farms Homeowners Assn.*].

Salawy v. Ocean Towers Housing Corp. (2004) 121 C.A.4th 664, 670, 17 C.R.3d 427 [defendant who successfully invoked governing documents as defense to plaintiffs' action was not entitled to fees under C.C. 1354; gist of plaintiffs' action was not to enforce governing documents but rather to enforce alleged promise unrelated to governing documents].

Chee v. Amanda Goldt Property Management (2006) 143 C.A.4th 1360, 1379, 50 C.R.3d 40 [condominium owner's personal injury action for damages sustained when neighbor's dog jumped on her was action brought to enforce covenants, conditions, and restrictions (CC&Rs), and thus defendant, as prevailing party, was entitled to attorneys' fees under C.C. 1354; plaintiff alleged causes of action for breach of contractual obligation created by CC&Rs and for declaratory relief affirming her interpretation of CC&Rs].

SUPPLEMENT: [This section is current through the latest supplement]

See *Garcia v. Santana* (2009) 174 C.A.4th 464, 476, 478, 94 C.R.3d 299 [to ensure that fee is "reasonable," as required by C.C. 1354(c), trial court must consider financial circumstances of losing party and impact of award on that party].



58 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

6. Actions in Bad Faith.

7 *Within Cal. Proc. Judgm* § 222

[§ 222] Actions in Bad Faith.

Several California statutes provide for an award of attorneys' fees against a party who brings an action in bad faith, delays the prosecution of an action, or uses other bad faith tactics. The following are examples:

(1) *Delay tactics*. A trial court may order a party, the party's attorney, or both to pay reasonable expenses, including attorneys' fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (*C.C.P. 128.5, 128.7*; see *On v. Cow Hollow Properties (1990) 222 C.A.3d 1568, 1575, 272 C.R. 535* ["sanctions can be based either on a finding of a bad faith action or 'tactics that are frivolous or solely intended to cause unnecessary delay' "]; *56 A.L.R.4th 486* [liability for attorneys' fees based on bad faith or misconduct]; *7 Cal. Proc. (5th), Trial, §227 et seq.*)

(2) *Housing development*. A trial court may award attorneys' fees to a prevailing public entity or nonprofit housing corporation in a frivolous action against the public entity or housing corporation to delay or thwart a low or moderate income housing development. (*Govt.C. 65914(a)*.)

(3) *Peace officer*. The trial court may award attorneys' fees in an action for damages against a peace officer or the officer's employer, arising out of performance of the officer's duties, on a finding by the court that the action was not filed or maintained in good faith and with reasonable cause. (*C.C.P. 1021.7*; see *Martin v. Szeto (2004) 32 C.4th 445, 448, 9 C.R.3d 687, 84 P.3d 374* [*C.C.P. 1021.7* authorizes attorneys' fees in actions for libel and slander only when peace officer or officer's public employer is a party and action arises out of performance of officer's duties; statute does not authorize fees in libel and slander actions generally]; *Planned Protective Services v. Gorton (1988) 200 C.A.3d 1, 15, 245 C.R. 790* [despite its general wording, statute allows fees only in actions involving peace officers and their employers]; *Salazar v. Upland Police Dept. (2004) 116 C.A.4th 934, 948, 11 C.R.3d 22* [plaintiff must have both good faith and reasonable cause to bring action against peace officer; absence of either condition is sufficient ground for awarding fees under *C.C.P. 1021.7*].)

(4) *Bad faith appeal of small claims court judgment*. For good cause and where necessary to achieve substantial justice, the court in a small claims case may award a party to an appeal attorneys' fees not exceeding \$ 150. (*C.C.P. 116.780(c)*.) The court may increase the fees awarded up to \$ 1,000 on finding that the appeal lacked substantial merit

and was not based on good faith and was intended to harass or delay the other party or to encourage the other party to abandon the claim. (*C.C.P.* 116.790; see 2 *Cal. Proc.* (5th), *Courts*, §312 et seq.)

(5) *Satisfaction of judgment.* In an action for wrongful refusal to record a satisfaction of judgment, the trial court must award reasonable attorneys' fees to the prevailing party. (*C.C.P.* 724.080.)

(6) *SLAPP suit.* If a cause of action arises from a defendant's act in furtherance of his or her right of petition or free speech in connection with a public issue (a SLAPP suit), the defendant may make a motion to strike the cause of action. (See 5 *Cal. Proc.* (5th), *Pleading*, §1040 et seq.) A prevailing defendant on a special motion to strike is entitled to recover his or her attorneys' fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court must award costs and reasonable attorneys' fees to a plaintiff prevailing on the motion. (*C.C.P.* 425.16(c); on amount of fees, see *Ketchum v. Moses* (2001) 24 *C.4th* 1122, 104 *C.R.2d* 377, 17 *P.3d* 735, *infra*, §312; on timing of motion for fees, see *infra*, §301.)

Attorneys' fees in SLAPP suits have been the subject of numerous cases, including the following:

Coltrain v. Shewalter (1998) 66 *C.A.4th* 94, 107, 77 *C.R.2d* 600 [where plaintiff voluntarily dismisses alleged SLAPP suit while motion to strike is pending, trial court has discretion to declare defendant to be prevailing party for purposes of *C.C.P.* 425.16].

Liu v. Moore (1999) 69 *C.A.4th* 745, 751, 754, 81 *C.R.2d* 807, 5 *Cal. Proc.* (5th), *Pleading*, §1042 [defendant who is voluntarily dismissed from SLAPP suit is entitled to hearing on motion to strike to determine entitlement to attorneys' fees; fees are not recoverable as costs unless defendant prevails on motion to strike].

Kyle v. Carmon (1999) 71 *C.A.4th* 901, 917, 84 *C.R.2d* 303 [trial court properly awarded fees to defendant who was voluntarily dismissed from SLAPP suit; hearing on motion to strike established that requirements of *C.C.P.* 425.16 were met and plaintiff did not propose on appeal any circumstance that would justify denial of fees].

Wilkerson v. Sullivan (2002) 99 *C.A.4th* 443, 446, 121 *C.R.2d* 275 [after defendants successfully moved to strike plaintiffs' complaint as SLAPP suit, trial court erred in denying defendants' motion for attorneys' fees incurred in defending against plaintiffs' appeal, even though plaintiffs dismissed appeal before opening briefs were filed; dismissal of plaintiffs' appeal left intact trial court's ruling that plaintiffs' action was SLAPP suit, which entitled defendants to recover attorneys' fees, including those incurred in defending against unsuccessful appeal].

Pfeiffer Venice Properties v. Bernard (2002) 101 *C.A.4th* 211, 215, 123 *C.R.2d* 647 [defendants were entitled to ruling on merits of their SLAPP motion, and to attorneys' fees if they prevailed on motion, where action against them was dismissed sua sponte by trial court on other grounds before SLAPP motion was heard; following *Liu*].

SUPPLEMENT: [This section is current through the latest supplement]

(6) *SLAPP suit.* *C.C.P.* 425.16(c) was amended and subdivided in 2009. The provisions cited in the text are now in *C.C.P.* 425.16(c)(1). *C.C.P.* 425.16(c)(2), added in 2009, provides that a defendant who prevails on a special motion to strike in an action subject to *C.C.P.* 425.16(c)(1) is not entitled to attorneys' fees and costs if the plaintiff's cause of action was brought under specified provisions of the Public Records Act (see 2 *Cal. Evidence* (4th), *Witnesses*, §278 et seq.), the Open Meeting Act (see 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §10 et seq.), or the Brown Act (see 9 *Cal. Proc.* (5th), *Administrative Proceedings*, §18 et seq.). (See 5 *Cal. Proc.* (5th), *Pleading*, Supp., §1040.)



59 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

7. Civil Rights Actions.

7 *Witkin Cal. Proc. Judgm* § 223

[§ 223] Civil Rights Actions.

The following are among the statutes providing for attorneys' fees in civil rights actions:

(1) *Disability protections*. The prevailing party in an action to enjoin violation of statutes protecting the rights of blind or other physically disabled persons is entitled to attorneys' fees. (C.C. 55.)

(2) *Discrimination by business*. A court must award attorneys' fees in an action by a person denied the rights guaranteed under C.C. 51 (Unruh Civil Rights Act), C.C. 51.5 (prohibiting discrimination by businesses), and C.C. 51.6 (prohibiting discriminatory pricing based on gender). (C.C. 52(a); see *Engel v. Worthington* (1997) 60 C.A.4th 628, 632, 70 C.R.2d 526 [award under C.C. 52(a) is mandatory; trial judge's discretion is limited to determining amount of award]; *Choate v. Orange* (2000) 86 C.A.4th 312, 325, 103 C.R.2d 339, *infra*, §244 [award for prevailing plaintiff under Unruh Civil Rights Act is mandatory, but trial court has discretion not to award fees under 42 U.S.C., §1988 when plaintiff's recovery is de minimis; distinguishing *Engel*]; *Doran v. North State Grocery* (2006) 137 C.A.4th 484, 488, 39 C.R.3d 922 [C.C. 52(a) requires finding that defendant has denied plaintiff rights guaranteed by C.C. 51, 51.5, or 51.6 before plaintiff can recover attorneys' fees; plaintiff who obtained compromise settlement without required finding was not entitled to fees].)

(3) *Harassment*. The prevailing party in an action to enjoin harassment is entitled to attorneys' fees. (C.C.P. 527.6(i); see *Adler v. Vaicius* (1993) 21 C.A.4th 1770, 1777, 27 C.R.2d 32 [following plaintiff's dismissal with prejudice, defendant was awarded attorneys' fees as "prevailing party" under C.C.P. 1032(a)(4) (*supra*, §92), even though temporary restraining order had issued under C.C.P. 527.6]; 6 *Cal. Proc.* (5th), *Provisional Remedies*, §316 et seq.)

(4) *Employment discrimination*. The trial court may award attorneys' fees to the prevailing party in an action for damages for unlawful discrimination in employment. (*Govt.C. 12965(b)*; see *Cummings v. Benco Bldg. Services* (1992) 11 C.A.4th 1383, 1386, 15 C.R.2d 53, *supra*, §217.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Disability protections*. See *Molski v. Arciero Wine Group* (2008) 164 C.A.4th 786, 790, 79 C.R.3d 574 [trial court

properly determined that defendant was prevailing party, where plaintiff obtained none of relief sought, defendant obtained judgment on every cause of action, and action played no role in defendant's remediation of access problems; C.C. 55 does not require that plaintiff's claim be frivolous, unreasonable, or groundless].(3) *Harassment*. See *Krug v. Maschmeier* (2009) 172 C.A.4th 796, 800, 91 C.R.3d 452 [prevailing defendant in action under C.C.P. 527.6(i) may recover attorneys' fees at trial court's discretion].



60 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

8. Consumer Protection Actions.

7 *Witkin Cal. Proc. Judgm* § 224

[§ 224] Consumer Protection Actions.

Statutes authorizing attorneys' fees in actions involving consumer protection include the following:

(1) *Automobile Sales Finance Act*. The prevailing party in an action under the Automobile Sales Finance Act is entitled to reasonable attorneys' fees. (C.C. 2983.4; see *Cobian v. Ordonez* (1980) 103 C.A.3d Supp. 22, 31, 163 C.R. 126; *Brown v. West Covina Toyota* (1994) 26 C.A.4th 555, 566, 32 C.R.2d 85 [defining "action on a contract" for purpose of Act and recovery of fees; fees were denied]; *Damian v. Tamondong* (1998) 65 C.A.4th 1115, 1119, 77 C.R.2d 262 [defendant could be prevailing party for purposes of C.C. 2983.4, even though plaintiff voluntarily dismissed deficiency action]; *Graciano v. Robinson Ford Sales* (2006) 144 C.A.4th 140, 151, 50 C.R.3d 273 [plaintiff who settled with automobile dealer after receiving jury verdicts in her favor was entitled to attorneys' fees under C.C. 2983.4; fact that plaintiff did not obtain public benefit in settling action did not affect her entitlement to fees]; 4 *Summary* (10th), *Sales*, §260.)

(2) *Consumer Legal Remedies Act*. The prevailing plaintiff in an action under the Consumer Legal Remedies Act is entitled to attorneys' fees, and the prevailing defendant may be awarded reasonable attorneys' fees on a finding that the prosecution was not in good faith. (C.C. 1780(d); see *Broughton v. Cigna Healthplans of Calif.* (1999) 21 C.4th 1066, 1086, 90 C.R.2d 334, 988 P.2d 67 [C.C.P. 1284.2, which provides that parties to arbitration must bear their own attorneys' fees unless arbitration agreement provides otherwise, gives way to remedial provisions of Consumer Legal Remedies Act when parties have agreed to arbitrate claims under Act; C.C.P. 1284.2 thus does not bar enforcement of arbitration agreement containing claim under Act]; *Reveles v. Toyota by the Bay* (1997) 57 C.A.4th 1139, 1154, 67 C.R.2d 543, supra, §203; *Hayward v. Ventura Volvo* (2003) 108 C.A.4th 509, 511, 513, 133 C.R.2d 514 [C.C. 1780(d) does not limit fees to those "incurred" by plaintiff under contingency fee agreement, but rather allows trial court to award "reasonable" fees]; *Corbett v. Hayward Dodge* (2004) 119 C.A.4th 915, 920, 14 C.R.3d 741 [C.C. 1780(d) requires finding of subjective bad faith]; *Graciano v. Robinson Ford Sales*, supra, 144 C.A.4th 151 [plaintiff who settled with automobile dealer after receiving jury verdicts in her favor was entitled to attorneys' fees under C.C. 1780(d); fact that plaintiff did not obtain public benefit in settling action did not affect her entitlement to fees]; *Kim v. Euromotors West/The Auto Gallery* (2007) 149 C.A.4th 170, 180, 56 C.R.3d 780 [trial court would have to determine on remand whether plaintiff obtained net monetary recovery or achieved most or all of what he wanted in action; fact that plaintiff and defendants settled before trial did not preclude plaintiff from being prevailing party under C.C. 1780(d)].)

(3) *Consumer Warranty Act*. A prevailing buyer in an action under the Song-Beverly Consumer Warranty Act is entitled to attorneys' fees. (C.C. 1794(d); see *Reveles v. Toyota by the Bay* (1997) 57 C.A.4th 1139, 1154, 67 C.R.2d 543, supra, §203; *Robertson v. Fleetwood Travel Trailers of Calif.* (2006) 144 C.A.4th 785, 817, 50 C.R.3d 731 [plaintiffs could recover fees even though they had contingency fee arrangement with their attorney].)

(4) *Fair Debt Collection Act*. A prevailing debtor in an action under the Rosenthal Fair Debt Collection Practices Act is entitled to reasonable attorneys' fees, and a prevailing creditor may be awarded reasonable attorneys' fees on a finding that the debtor's prosecution or defense of the action was not in good faith. (C.C. 1788.30(c); see *Akins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 C.A.4th 1127, 1132, 94 C.R.2d 448, infra, §311 [fees at trial and on appeal were awarded to prevailing debtor].)

(5) *Installment sales*. The prevailing party in an action under the Unruh Act regulating installment sales is entitled to reasonable attorneys' fees. (C.C. 1811.1; see *Leaf v. Phil Rauch* (1975) 47 C.A.3d 371, 378, 120 C.R. 749 [action for restitution after rescission is action "on a contract" that justifies award to successful plaintiffs]; 4 *Summary* (10th), *Sales*, §289.)

(6) *Injunctions against obscenity, drugs, gambling, and other vices*. Costs, including attorneys' fees, may be awarded to the prevailing party in a government agency action to enjoin the sale or distribution of obscene matter, alcoholic liquor, or controlled substances, or to enjoin illegal gambling, lewdness, assignation, or prostitution. (C.C. 3496; see *People v. Mitchell Bros.' Santa Ana Theater* (1985) 165 C.A.3d 378, 387, 211 C.R. 501 [C.C. 3496 authorizes recovery of attorneys' fees on appeal]; *Oakland v. McCullough* (1996) 46 C.A.4th 1, 4, 53 C.R.2d 531 [costs in drug house abatement action under C.C. 3496 include salaries and overhead expenses of government attorneys and law enforcement personnel attributable to investigation and prosecution of action].)

(7) *Licensing disciplinary proceedings*. A licensee in a disciplinary proceeding before any board within the Department of Consumer Affairs, who is found to have violated the licensing act, may be required to pay a sum not to exceed the reasonable costs of investigating and enforcing the case, including the charges imposed by the Attorney General. (*B. & P.C. 125.3*; see *Schneider v. Medical Bd. of Calif.* (1997) 54 C.A.4th 351, 354, 62 C.R.2d 710 [medical board in administrative proceeding to revoke medical license was entitled to recover costs of investigation and enforcement, including charges imposed by Attorney General up to date of hearing]; *Angelier v. State Bd. of Pharmacy* (1997) 58 C.A.4th 592, 599, 68 C.R.2d 213 [Board of Pharmacy was entitled to fees charged by Attorney General for legal work in connection with license revocation]; *Oranen v. State Bd. of Chiropractic Examiners* (1999) 77 C.A.4th 258, 90 C.R.2d 287 [even though Board of Chiropractic Examiners is not within Department of Consumer Affairs and thus not covered by *B. & P.C. 125.3*, its cost reimbursement regulation is authorized by act that created board; board properly ordered chiropractor to pay costs connected with his revocation hearing].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Consumer Legal Remedies Act*. C.C. 1780(d) was relettered C.C. 1780(e) in 2008.

See *Shisler v. Sanfer Sports Cars* (2008) 167 C.A.4th 1, 83 C.R.3d 771 [defendant was not entitled to fees under C.C. 1780, where trial court did not find subjective bad faith by plaintiffs; however, defendant was entitled to fees under Florida consumer statute].(6) *Injunctions against obscenity, drugs, gambling, and other vices*. See *People v. Bhakta* (2008) 162 C.A.4th 973, 980, 76 C.R.3d 421 [award to state in action to enjoin motel operators from facilitating prostitution was within court's discretion under C.C. 3496].



61 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

9. Actions Involving Government or Corporate Accountability.

7 *Witkin Cal. Proc. Judgm* § 225

[§ 225] Actions Involving Government or Corporate Accountability.

The following statutes provide for an attorneys' fee award in actions involving government or corporate accountability:

(1) *Shareholder's derivative action*. The court in a shareholder's derivative action against a corporation and its officers or directors may require the plaintiff to furnish a bond for reasonable expenses, including attorneys' fees, that may be incurred by the defendants in connection with the action. (See *Corp.C. 800(d)*; *60 Cal. L. Rev. 164* [attorneys' fees in shareholder derivative suits; reexamining substantial benefit rule]; *9 Summary* (10th), *Corporations*, §170 et seq.)

(2) *Regulatory action*. A trial court may award attorneys' fees to a successful small business or licensee in an action against a state regulatory agency for a regulatory action taken without substantial justification. (*C.C.P. 1028.5(a)*, (b); see *Wang v. Division of Labor Standards Enforcement* (1990) *219 C.A.3d 1152, 1160, 268 C.R. 669* [Division of Labor Standards Enforcement was regulatory agency for purposes of *C.C.P. 1028.5*; award of fees against agency was correct].)

(3) *County counsel's failure to represent county or officers*. The county counsel is required to prosecute or defend civil actions involving a county or any of its officers in their official capacities. (*Govt.C. 26529*.) Failure to do so may result in attorneys' fees for a party that has to seek other representation. (See *Anderson v. Superior Court* (1995) *11 C.4th 1152, 1162, 48 C.R.2d 766, 907 P.2d 1312* [county clerk was entitled to fees under *Govt.C. 26529* in action against superior court in which she sought to retain her official duties, where conflict of interest prevented county counsel from representing her].)

(4) *Political Reform Act*. The prevailing party in an action to enforce the Political Reform Act may be awarded reasonable attorneys' fees. (*Govt.C. 91003(a)*, *91012*; see *People v. Roger Hedgecock for Mayor Committee* (1986) *183 C.A.3d 810, 815, 228 C.R. 424* [prevailing defendant is entitled to attorneys' fees only if action "was frivolous, unreasonable or without foundation"]; *Community Cause v. Boatwright* (1987) *195 C.A.3d 562, 573, 240 C.R. 794* [following *Roger Hedgecock for Mayor Committee*]; *Downey Cares v. Downey Community Dev. Com.* (1987) *196 C.A.3d 983, 995, 996, 242 C.R. 272* [California precedents under *C.C.P. 1021.5* (infra, §259) are to be followed in

interpreting and applying *Govt.C. 91003*]; 7 *Summary* (10th), *Constitutional Law*, §271 et seq.)

(5) *Public Records Act*. The trial court must award reasonable attorneys' fees to a prevailing plaintiff in litigation under the Public Records Act. (*Govt.C. 6259(d)*; see *Motorola Communication & Electronics v. Department of General Services* (1997) 55 C.A.4th 1340, 1344, 64 C.R.2d 477 [plaintiff did not "prevail" under *Govt.C. 6259(d)*, where litigation did not motivate defendant to release requested documents]; *Fontana Police Dept. v. Villegas-Banuelos* (1999) 74 C.A.4th 1249, 1251, 1252, 88 C.R.2d 641 [individual who sought police department tape recordings was entitled to attorneys' fees, even though he was not denominated "plaintiff" in litigation that motivated release of recordings; happenstance that police department actually initiated litigation by seeking protective order does not eliminate individual's right to fees]; 2 *Cal. Evidence* (4th), *Witnesses*, §286.)

(6) *Information Practices Act*. An individual who successfully brings an action against a state agency for failure to comply with the Information Practices Act is entitled to reasonable attorneys' fees. (C.C. 1798.48(b); see *Meister v. Regents of Univ. of Calif.* (1998) 67 C.A.4th 437, 446, 78 C.R.2d 913, *infra*, §312.)

(7) *Voting Rights Act*. The trial court must award reasonable attorneys' fees to the successful party in an action to enforce the California Voting Rights Act of 2001, which prohibits political subdivisions from imposing "at-large" methods of election in a manner that impairs the ability of a protected class to elect candidates of its choice (see *Elec.C. 14027*). However, no award may be made to prevailing defendants, unless the plaintiff's action is frivolous, unreasonable, or without foundation. (*Elec.C. 14030*; on Act, see 7 *Summary* (10th), *Constitutional Law*, §233.)

(8) *Open meetings*. A trial court may award reasonable attorneys' fees to the plaintiff in an action for violation of the open meetings statutes. (*Govt.C. 11130.5* [state bodies]; *Govt.C. 54960.5* [local bodies]; see *Boyle v. Redondo Beach* (1999) 70 C.A.4th 1109, 1120, 83 C.R.2d 164, *infra*, §234 [statute authorizes award for defendant when act is frivolous and totally lacking in merit].) Numerous cases have construed these statutes, including the following:

Common Cause v. Stirling (1981) 119 C.A.3d 658, 174 C.R. 200 [fees awarded under *Govt.C. 54960.5* were not limited to cases involving issues of state or federal significance].

Common Cause v. Stirling (1983) 147 C.A.3d 518, 195 C.R. 163 [denial of fees was abuse of discretion].

International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal (1999) 69 C.A.4th 287, 301, 81 C.R.2d 456 [trial court properly awarded attorneys' fees in action against board of directors of private corporation formed to operate coal export facility on city harbor land; board is legislative body subject to *Govt.C. 54960.5* and action benefited public by clarifying that board must comply with open meetings statute].

Bell v. Vista Unified School Dist. (2000) 82 C.A.4th 672, 689, 98 C.R.2d 263 [although plaintiff was entitled to fees attributable to his claim under open meetings statute, he was not entitled to fees incurred in prosecuting claims for damages; trial court's failure to apportion fee award contradicts express scope of *Govt.C. 54960.5*].

Los Angeles Times Communications LLC v. Los Angeles County Bd. of Supervisors (2003) 112 C.A.4th 1313, 1326, 5 C.R.3d 776 [successful plaintiff should get fees unless special circumstances would render award unjust; defendant's alleged good faith is not special circumstance; plaintiff newspaper's exposure of violations of open meetings statute benefited public and clarified scope of act].

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Public Records Act*. See *Galbiso v. Orosi Public Util. Dist.* (2008) 167 C.A.4th 1063, 1085, 84 C.R.3d 788 [plaintiff who asserted violation of Act based on official's denial of access to *all* relevant public records and who obtained preliminary injunction allowing her to inspect and copy records was prevailing party entitled to attorneys' fees under *Govt.C. 6259(d)*].



62 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

10. Insurance or Indemnity Actions.

7 *Witkin Cal. Proc. Judgm* § 226

[§ 226] Insurance or Indemnity Actions.

Statutes providing for attorneys' fees in insurance or indemnity actions include the following:

(1) *Vexatious refusal to pay*. In an action against a foreign insurer, the court may allow the plaintiff to collect reasonable attorneys' fees if it appears to the court that the insurer's refusal to pay was vexatious and without reasonable cause. (*Ins.C. 1619*.)

(2) *Wilful failure to pay*. The plaintiff in an action for payment under a standard fire insurance policy, where the insurer wilfully fails to pay within 30 days of an agreed or settled loss, is entitled to reasonable attorneys' fees. (*Ins.C. 2057*.)

(3) *Implied indemnity*. The trial court may award attorneys' fees to the prevailing party in an action on a claim for implied indemnity. (*C.C.P. 1021.6*.) Cases discussing this statute include the following:

Bear Creek Planning Com. v. Title Ins. & Trust Co. (1985) 164 C.A.3d 1227, 1246, 211 C.R. 172 [*C.C.P. 1021.6* applies to fees incurred in underlying action, not to those incurred in indemnification action].

Uniroyal Chemical Co. v. American Vanguard Corp. (1988) 203 C.A.3d 285, 293, 295, 249 C.R. 787 [conditions for recovery by prevailing indemnitee].

Fidelity Mortg. Trustee Service v. Ridgeway East Homeowners Assn. (1994) 27 C.A.4th 503, 513, 32 C.R.2d 521, 3 Summary (10th), *Agency and Employment*, §123 [*C.C.P. 1021.6* applies only when underlying tort is committed by indemnitor].

John Hancock Mut. Life Ins. Co. v. Setser (1996) 42 C.A.4th 1524, 1528, 50 C.R.2d 413 [defendant's fee award under *C.C.P. 1021.6* was not barred by determination of good faith settlement under *C.C.P. 877.6* (5 Summary (10th), *Torts*, §83 et seq.) between plaintiff and other defendants; summary judgment effectively finding that defendant was not joint tortfeasor had become final before good faith determination was made].

Watson v. Department of Trans. (1998) 68 C.A.4th 885, 890, 80 C.R.2d 594 [trial court erred in ordering, under

C.C.P. 1021.6, that defendant who was found partially liable in automobile accident case must pay attorneys' fees of defendant who was found not liable; no theory of implied indemnity applied].

Wilson, McCall & Daoro v. American Qualified Plans (1999) 70 C.A.4th 1030, 1034, 83 C.R.2d 192 [consulting firm was entitled to attorneys' fees under *C.C.P. 1021.6* from accountant because, due to accountant's negligence, consulting firm was required to defend law firm's cross-complaint when accounting firm refused to do so; it was immaterial that consulting firm had not been sued in underlying professional negligence action against law firm and accountant that gave rise to cross-complaint].

(4) *Employer indemnification*. An employer must indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even unlawful directions, unless the employee, at the time of obeying the directions, believed them to be unlawful. (*Lab.C. 2802(a)*.) "Necessary expenditures or losses" includes attorneys' fees incurred by the employee enforcing the rights granted by *Lab.C. 2802*. (*Lab.C. 2802(c)*); see *Jacobus v. Krambo Corp.* (2000) 78 C.A.4th 1096, 1104, 1105, 93 C.R.2d 425 [stating in dictum provided for guidance of trial court on remand that, although *Lab.C. 2802* "unquestionably" provides for indemnification of attorneys' fees incurred in underlying action, it does not specifically provide for fees incurred in pursuing indemnity claim; following *Bear Creek Planning Com.* and rejecting *O'Hara v. Teamsters Union Local No. 856* (9th Cir. 1998) 151 F.3d 1152].)

(5) *Public agency indemnification*. *Torres v. San Diego* (2007) 154 C.A.4th 214, 64 C.R.3d 495, provides an example of a municipal resolution that promises indemnification for members of public boards of expenses they incur from claims arising out of the performance of their board duties. The court construed the municipal resolution as it would construe a statute imposing a duty to defend, and it determined that the resolution entitled members of a city board to a defense in actions against them *and* to attorneys' fees and costs incurred in a separate action to enforce the city's duty to defend. (154 C.A.4th 226.)

SUPPLEMENT: [This section is current through the latest supplement]



63 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

11. Labor and Employment Actions.

7 *Witkin Cal. Proc. Judgm* § 227

[§ 227] Labor and Employment Actions.

The following are among the statutes providing for attorneys' fees in labor and employment actions:

(1) *Recovery of wages.* The plaintiff or cross-complainant in an action for the recovery of wages for labor performed, not exceeding \$ 300, may recover not more than 20% as attorneys' fees. (*C.C.P. 1031.*)

(2) *Wages lost because of discrimination.* An employee in an action to recover wages lost due to discrimination must be awarded reasonable attorneys' fees. (*Lab.C. 1197.5(g)*; see *Jones v. Tracy School Dist.* (1980) 27 *C.3d* 99, 109, 111, 165 *C.R. 100*, 611 *P.2d* 441 [award under *Lab.C. 1197.5(g)* is mandatory].)

(3) *Nonpayment of wages or benefits.* Reasonable attorneys' fees are mandatory in certain actions for nonpayment of wages, fringe benefits, or health or pension fund contributions. (*Lab.C. 218.5*; see *Kistler v. Redwoods Community College Dist.* (1993) 15 *C.A.4th* 1326, 1336, 1337, 19 *C.R.2d* 417, *supra*, §214 [*Lab.C. 218.5* does not authorize fees against public employers specified in *Lab.C. 220*]; *Californians for Population Stabilization v. Hewlett-Packard Co.* (1997) 58 *C.A.4th* 273, 294, 67 *C.R.2d* 621 [fees under *Lab.C. 218.5* were not available to prevailing defendant in unfair competition action under *B. & P.C. 17200*, where prayer for relief did not include unpaid wages or benefits and plaintiff would not have had standing to bring action, or to request fees, under *Lab.C. 218.5*]; *On-Line Power v. Mazur* (2007) 149 *C.A.4th* 1079, 1085, 57 *C.R.3d* 698 [fees under *Lab.C. 218.5* were available in action for nonpayment of executive's salary, even though executive had employment contract and was not paid hourly wage].) *Lab.C. 218.5* does not apply to an action for which attorneys' fees are recoverable under *Lab.C. 1194.* (*Lab.C. 218.5.*)

(4) *Recovery of minimum wage or overtime compensation.* An employee who is receiving less than the legal minimum wage or legal overtime compensation and who successfully sues to recover the unpaid balance is entitled to reasonable attorneys' fees. (*Lab.C. 1194*; see *Earley v. Superior Court* (2000) 79 *C.A.4th* 1420, 1426, 95 *C.R.2d* 57 [*Lab.C. 1194*, rather than *Lab.C. 218.5*, controls award of attorneys' fees in overtime claim cases]; *Sampson v. Parking Service 2000 Com.* (2004) 117 *C.A.4th* 212, 222, 11 *C.R.3d* 595 [*Lab.C. 1194* applies only to court action, not to administrative proceeding, to recover overtime compensation]; *Eicher v. Advanced Business Integrators* (2007) 151 *C.A.4th* 1363, 1378, 61 *C.R.3d* 114 [*Lab.C. 1194* authorized fees for successful employee who appealed from administrative decision under *Lab.C. 98.2*].)

(5) *Dismissal of school district employee.* An administrative decision that a permanent certificated school district employee may not be dismissed or suspended must include attorneys' fees for the employee. (*Educ.C. 44944(e)(2)*); see *California Teachers Assn. v. California* (1999) 20 C.4th 327, 350, footnote 10, 84 C.R.2d 425, 975 P.2d 622, 7 Summary (10th), *Constitutional Law*, §661 [requirement of *Educ.C. 44944(e)* that dismissed or suspended teachers pay half the cost of dismissal hearing was unconstitutional, but whether statute's attorneys' fee provision survived invalidation of statute's hearing cost provision was not properly before court]; *De Groat v. Newark Unified School Dist.* (1976) 62 C.A.3d 538, 542, 133 C.R. 225 [former *Educ.C. 13413(e)*]; *Board of Education v. Commission on Professional Competence* (1980) 102 C.A.3d 555, 562, 162 C.R. 590 [same]; *Kistler v. Redwoods Community College Dist.* (1993) 15 C.A.4th 1326, 1337, 19 C.R.2d 417, supra, §214 [*Educ.C. 44944* applies to teachers in elementary and secondary schools, not to administrators in college districts].)

(6) *Retirement allowance.* The trial court may award reasonable attorneys' fees to an applicant who successfully appeals a retirement board denial of a retirement allowance under the County Employees Retirement Law. (*Govt.C. 31536*; see *Morcos v. Board of Retirement* (1990) 51 C.3d 924, 927, 275 C.R. 187, 800 P.2d 543 [county employee was entitled to attorneys' fees for services rendered on appeal in successfully defending judgment overturning retirement board decision]; *Van Hook v. Board of Retirement* (1983) 148 C.A.3d 714, 719, 196 C.R. 186 [court has discretion to deny award]; 18 *Pepperdine L. Rev.* 1060 [*Morcos*].)

(7) *Arbitration of collective bargaining agreement.* The trial court must award attorneys' fees to the prevailing party in an action to compel arbitration of a dispute concerning a collective bargaining agreement. (*Lab.C. 1128(a)*); see *Lab.C. 1128(c)* [action to compel compliance with decision of arbitrator of grievance panel]; *Warehouse, Processing, Distribution Workers Union, Local 26 v. Hugo Neu Proler Co.* (1998) 65 C.A.4th 732, 739, 76 C.R.2d 814 [application of *Lab.C. 1128(a)* was preempted by federal law].)

(8) *Uninsured employer.* In an action for damages by an injured employee against an uninsured employer, a judgment against the employer must include reasonable attorneys' fees. (*Lab.C. 3709*; see *Cortez v. Bootsma* (1994) 27 C.A.4th 935, 938, 33 C.R.2d 20.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Recovery of minimum wage or overtime compensation.* See *Harrington v. Payroll Entertainment Services* (2008) 160 C.A.4th 589, 593, 72 C.R.3d 922 [employee who was underpaid by \$ 44.63 for overtime on one day of work was entitled to fees under *Lab.C. 1194*]. (5) *Dismissal of school district employee.* See *Roybal v. Governing Bd. of Salinas City Elementary School Dist.* (2008) 159 C.A.4th 1143, 1152, 72 C.R.3d 146 [school psychologists who were laid off due to revenue shortfalls were not entitled to fees in action for reinstatement; *Educ.C. 44944* applies to dismissal or suspension proceedings initiated under *Educ.C. 44934*, not to layoffs].



64 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

12. Landlord and Tenant Actions.

7 *Witkin Cal. Proc. Judgm* § 228

[§ 228] Landlord and Tenant Actions.

Statutes including the following provide for attorneys' fees in landlord and tenant actions:

(1) *Untenantable dwelling*. Fees are available in an unlawful detainer proceeding in which the tenant asserts as an affirmative defense that the landlord has failed to provide a tenantable dwelling. (C.C. 1942.4(b)(2); see *Galan v. Wolfriver Holding Corp.* (2000) 80 C.A.4th 1124, 1129, 96 C.R.2d 112 [trial court acted within its discretion under C.C. 1942.4 in finding that there was no prevailing party after plaintiffs voluntarily dismissed one defendant as part of settlement with several defendants; settlement did not exonerate dismissed defendant and merely reflected plaintiffs' practical determination about value of pursuing trial].) A landlord who institutes an unlawful detainer proceeding based on a tenant's nonpayment of rent, and who is liable for a violation of C.C. 1942.4, is liable to the tenant or lessee for reasonable attorneys' fees and costs, in an amount to be fixed by the court. (C.C.P. 1174.21.)

(2) *Retention of personal property*. A court may award reasonable attorneys' fees to the prevailing party in a tenant's action against a landlord for retaining personal property in violation of C.C. 1965. (C.C. 1965(e)(3).)

SUPPLEMENT: [This section is current through the latest supplement]



65 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

13. Actions Involving Personal Injury or Intentional Torts.

7 *Witkin Cal. Proc. Judgm* § 229

[§ 229] Actions Involving Personal Injury or Intentional Torts.

Among the statutes providing for fees in personal injury actions or actions involving intentional torts are the following:

(1) *Felonious conduct*. The trial court may award reasonable attorneys' fees to the prevailing party in an action for damages arising from commission of a felony, against the defendant convicted of the felony. (*C.C.P. 1021.4*; see *Wood v. McGovern* (1985) 167 C.A.3d 772, 778, 213 C.R. 498 [statute applied to actions that had not been reduced to final judgment before effective date]; *Sommers v. Erb* (1992) 2 C.A.4th 1644, 1648, 4 C.R.2d 52 [nature and purpose of statute]; *Baker v. Mid-Century Ins. Co.* (1993) 20 C.A.4th 921, 926, 25 C.R.2d 34 [insurer was not obligated to pay attorneys' fees awarded to victim of insured's felonious conduct].)

(2) *Unlicensed goods or services*. In an action for treble damages against an unlicensed person who caused personal injury or damage to another as result of providing goods and services for which a license is required, the court may award attorneys' fees to the prevailing party. (*C.C.P. 1029.8(a)*.)

(3) *Failure to file certificate of merit*. A party who incurs attorneys' fees as a result of another party's failure to file a certificate of merit in a professional malpractice action may recover those fees. (*C.C.P. 411.35(h)*); see *Guinn v. Dotson* (1994) 23 C.A.4th 262, 269, 28 C.R.2d 409 [paralegal fees were allowed as element of attorneys' fees under *C.C.P. 411.35(h)* where prevailing practice was to bill separately for paralegal services at reasonable market value].)

(4) *Commercial misappropriation*. The prevailing party in an action for commercial misappropriation of a person's name and likeness must be awarded attorneys' fees. (C.C. 3344(a); see *Gilbert v. National Enquirer* (1997) 55 C.A.4th 1273, 1276, 64 C.R.2d 659 [interpreting "prevailing party" for purposes of C.C. 3344]; *Kirby v. Sega of America* (2006) 144 C.A.4th 47, 62, 50 C.R.3d 607 [C.C. 3344(a) is mandatory; plaintiff's argument that, to encourage enforcement, defendant should receive fees only if plaintiff's action is frivolous or in bad faith is misdirected].)

SUPPLEMENT: [This section is current through the latest supplement]



66 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

14. Actions Involving Real Property or Environmental Issues.

7 *Witkin Cal. Proc. Judgm* § 230

[§ 230] Actions Involving Real Property or Environmental Issues.

(1) *Illustrations.* The following statutes are among those awarding attorneys' fees in real property or environmental disputes:

(a) *Injunction preventing water diversion.* In an action to modify or dissolve an injunction preventing the diversion of waters, if judgment is rendered for the person in whose behalf the injunction was granted, that person is entitled to reasonable attorneys' fees. (*C.C.P.* 532(b).)

(b) *Contribution to well.* The plaintiff in an action to compel contribution for the expense of a water well may be awarded reasonable attorneys' fees. (*Water C.* 7003.)

(c) *Inverse condemnation.* A successful plaintiff in an inverse condemnation proceeding must be awarded reasonable attorneys' fees. (*C.C.P.* 1036; see 8 *Summary* (10th), *Constitutional Law*, §1168; on fees awarded to defendant in condemnation proceeding, see *infra*, §234.)

(d) *Mobilehome Residency Law.* Reasonable attorneys' fees must be awarded to the prevailing party in an action arising under the Mobilehome Residency Law. (*C.C.* 798.85; see *Del Cerro Mobile Estates v. Proffer* (2001) 87 *C.A.4th* 943, 948, 105 *C.R.2d* 5 [attorneys' fees were available to defendant under *C.C.* 798.85, even though plaintiff voluntarily dismissed statutory nuisance claim before trial]; *SC Manufactured Homes v. Canyon View Estates* (2007) 148 *C.A.4th* 663, 673, 56 *C.R.3d* 79 [mobilehome dealer's action against other dealers and mobilehome park managers and owners, alleging that kickback scheme among defendants prevented plaintiff from selling mobilehomes, did not arise out of Mobilehome Residency Law; dismissed defendants were not entitled to fees].)

(e) *Trespass on agricultural land.* In an action for property damage arising from a trespass on land under cultivation or used for raising livestock, the prevailing party is entitled to reasonable attorneys' fees. (*C.C.P.* 1021.9; see *Haworth v. Lira* (1991) 232 *C.A.3d* 1362, 1367, 284 *C.R.* 62; *Elton v. Anheuser-Busch Beverage Group* (1996) 50 *C.A.4th* 1301, 1304, 58 *C.R.2d* 303 [invasion of fire onto plaintiff's property was "trespass" for purposes of *C.C.P.* 1021.9]; *Quarterman v. Kefauver* (1997) 55 *C.A.4th* 1366, 1375, 64 *C.R.2d* 741 [phrase "lands either under cultivation or intended or used for the raising of livestock" in *C.C.P.* 1021.9 did not encompass urban backyard garden]; *Starrh &*

Starrh Cotton Growers v. Aera Energy LLC (2007) 153 C.A.4th 583, 606, 63 C.R.3d 165 [property owner was entitled to fees under C.C.P. 1021.9 where oil production activities on adjacent land caused contamination of groundwater; statute allows recovery for surface and subsurface trespasses].)

(f) *Housing contract*. The prevailing party in an action to enforce a contract between the California Housing Financing Agency and a housing sponsor is entitled to reasonable attorneys' fees. (*Health & Saf.C. 51205(f)*; see *California Housing Finance Agency v. E.R. Fairway Associates (1995) 37 C.A.4th 1508, 1513, 44 C.R.2d 591* [statute applies to action that was not yet final when statute became effective].)

(g) *Payment of construction claim*. In an action against an owner or construction lender to enforce the payment of a claim stated in a bonded stop notice, the prevailing party is entitled to collect reasonable attorneys' fees from the party held liable for payment of the claim. (C.C. 3176; see *Villinger/Nicholls Dev. Co. v. Meleyco (1995) 31 C.A.4th 321, 329, 37 C.R.2d 36* [petition to confirm arbitration award is not "action" for purpose of C.C. 3176]; *Mechanical Wholesale Corp. v. Fuji Bank, Ltd. (1996) 42 C.A.4th 1647, 1660, 50 C.R.2d 466* [construction lender who successfully defends action on invalid stop notice claim is prevailing party].)

(h) *Home Equity Sales Contracts Act*. The homeowner in an action against an equity purchaser under the Home Equity Sales Contracts Act is entitled to reasonable attorneys' fees. (C.C. 1695.7; see *Boquilon v. Beckwith (1996) 49 C.A.4th 1697, 1721, 57 C.R.2d 503*.)

(i) *Retention of contractor's payments*. In an action by a contractor against an owner or by a subcontractor against a contractor to collect payments wrongfully retained by the owner or contractor, the prevailing party is entitled to attorneys' fees. (C.C. 3260(g); see *McAndrew v. Hazegh (2005) 128 C.A.4th 1563, 1566, 27 C.R.3d 836* [statute did not apply where owner never had retention proceeds or payments in his possession; dispute between owner and contractor arose from contractor's allegedly unauthorized extra work]; *Taylor v. Van-Catlin Const. (2005) 130 C.A.4th 1061, 1068, 30 C.R.3d 690* [arbitrator correctly awarded fees to prevailing owner under C.C. 3260(g)].)

(j) *Unsafe residential building*. The building owner in an action by an enforcement agency to identify and correct unsafe conditions in a residential building must pay the agency's attorneys' fees. (*Health & Saf.C. 17980.7(d)(1)*; see *San Francisco v. Jen (2005) 135 C.A.4th 305, 309, 37 C.R.3d 454* [statute authorized fees incurred as result of abatement efforts against uninhabited building].)

(2) *Distinction: Where Statute Requires Contractual Attorneys' Fee Provision*. C.C.P. 730, which authorizes the trial court to determine the amount of attorneys' fees in a foreclosure action where the security instrument contains an attorneys' fees clause, should be distinguished from the statutes listed above. C.C.P. 730 does not authorize the court to award fees in the absence of an attorneys' fees provision. (*Chase Manhattan Mortg. Corp. v. Lessel (1997) 55 C.A.4th 10, 13, 64 C.R.2d 113*.)

(3) *Ordinance*. A city ordinance may authorize an award of attorneys' fees, just as a state statute does. (*Santa Paula v. Narula (2003) 114 C.A.4th 485, 492, 8 C.R.3d 75* [fees were authorized by ordinance in city's action to foreclose on lien on apartment buildings for unpaid administrative costs and penalties; fees provision furthered ordinance's purpose of building and safety code enforcement]; but see *Monte Sereno v. Padgett (2007) 149 C.A.4th 1530, 1535, 58 C.R.3d 218* [ordinance authorizing fees for city in proceeding to abate public nuisance conflicted with *Govt.C. 38773.5(b)*, which requires ordinances authorizing fees in nuisance abatement proceedings to provide for recovery by prevailing party, rather than limiting recovery of fees to city].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Illustrations*.(i) *Retention of contractor's payments*. See *Brawley v. J.C. Interiors (2008) 161 C.A.4th 1126, 1135, 74 C.R.3d 832* [trial court had discretion to deny award under C.C. 3260(g) to builder; even though jury awarded some damages to builder, it also found that builder breached contract and was negligent, and it awarded some damages to owner].



67 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

15. Taxation Actions.

7 *Within Cal. Proc. Judgm* § 231

[§ 231] Taxation Actions.

Several tax statutes authorize attorneys' fees, including the following:

(1) *Sales and use taxes*. The prevailing party in an action against the State of California in connection with the determination, collection, or refund of sales and use taxes may be awarded reasonable litigation costs, including attorneys' fees. (Rev.C. 7156; see *Tetra Pak v. State Bd. of Equalization* (1991) 234 C.A.3d 1751, 286 C.R. 529; *Pacific Mut. Life Ins. Co. v. State Bd. of Equalization* (1996) 41 C.A.4th 1153, 1165, 49 C.R.2d 99 [Rev.C. 7156 only pertains to actions involving sales and use taxes and is not applicable to insurance companies' action challenging new insurance premiums tax rates]; 9 *Summary* (10th), *Taxation*, §374.)

(2) *Franchise taxes*. The prevailing party in an action against the State of California in connection with the determination, collection, or refund of franchise taxes may be awarded reasonable litigation costs, including attorneys' fees. (Rev. C. 19717; see *McDonnell Douglas Corp. v. Franchise Tax Bd.* (1994) 26 C.A.4th 1789, 1799, 33 C.R.2d 129 [plaintiff prevailed but was denied attorneys' fees because board's position on complex tax matter was arguably justified]; *Lennane v. Franchise Tax Bd.* (1996) 51 C.A.4th 1180, 1188, 59 C.R.2d 602 [even after awarding taxpayers their trial costs under Rev.C. 19717, trial judge may redetermine whether state's position was substantially justified when party later applies for appellate costs]; *Wertin v. Franchise Tax Bd.* (1998) 68 C.A.4th 961, 977, 80 C.R.2d 644 [board was not substantially justified in issuing notice of proposed assessment without reviewing taxpayer's returns; fees were properly awarded]; *Fujitsu IT Holdings v. Franchise Tax Bd.* (2004) 120 C.A.4th 459, 487, 15 C.R.3d 473 [taxpayer was entitled to fees where board adopted untenable position that taxpayer's claim was time-barred].)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Franchise taxes*. See *Northwest Energetic Services, LLC v. Franchise Tax Bd.* (2008) 159 C.A.4th 841, 869, 71 C.R.3d 642 [Rev.C. 19717 is not exclusive means by which party in tax refund action may recover attorneys' fees; taxpayer could seek fees under C.C.P. 1032(b) and C.C.P. 1021.5]; *Ventas Finance I, LLC v. Franchise Tax Bd.* (2008) 165 C.A.4th 1207, 1233, 81 C.R.3d 823 [same; citing *Northwest Energetic Services*].



68 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

16. Probate and Trust Actions.

7 *Witkin Cal. Proc. Judgm* § 232

[§ 232] Probate and Trust Actions.

The following are among the statutes authorizing fees in probate and trust actions:

(1) *Escheat proceeding*. If additional counsel is employed in an escheat proceeding in a decedent's estate on behalf of the State of California, the sheriff must pay the attorneys' fees for that counsel out of the proceeds of the sale. (*C.C.P. 1423*.)

(2) *Transfer of irrevocable trust*. The trial court may award reasonable attorneys' fees to a petitioner in a proceeding to remove a trustee for refusal to transfer administration of an irrevocable trust to a successor trust company on the beneficiaries' request. (*Prob.C. 15645*; see 13 *Summary* (10th), *Trusts*, §52.)

(3) *Recording notice to slander title*. In an action to determine rights in estate real property, where a notice was recorded for the purpose of slandering title to the property, thereby removing a surviving spouse's right under *Prob.C. 13540* to convey it, the person who recorded the notice must pay reasonable attorneys' fees. (*Prob.C. 13541(d)*; see 14 *Summary* (10th), *Wills and Probate*, §821.)

(4) *Claim against property in revocable trust*. In an action on a rejected claim against property in a deceased settlor's revocable trust, the prevailing party is entitled to reasonable litigation expenses, including attorneys' fees, if the prosecution or defense was unreasonable. (*Prob.C. 19255(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]



69 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

17. Other Actions Involving California Statutes.

7 Witkin Cal. Proc. Judgm § 233

[§ 233] Other Actions Involving California Statutes.

Attorneys' fees are authorized in specified civil actions by the Attorney General to enforce various public rights. (*C.C.P. 1021.8(a)*; see *supra*, §95.) Furthermore, a person who fails to pay on a timely basis a liability or penalty imposed in an action prosecuted by the Attorney General must pay, in addition to that liability or penalty, interest, reasonable attorneys' fees, and costs for any collection proceedings to enforce payment. (*Govt.C. 12513.1*.)

Other California statutes provide for an award of attorneys' fees in the judgment. (See *C.E.B., Attorney Fee Awards 2d*, Chap. 5 [discussing numerous fee-shifting statutes]; *C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §16.74*.)

West's Key Number Digest, Costs 194.22

SUPPLEMENT: [This section is current through the latest supplement]



70 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

18. Unsuccessful Actions: Award to Defendant.

a. In General.

7 *Within Cal. Proc. Judgm* § 234

[§ 234] In General.

Numerous statutes, including the following, authorize an award of attorneys' fees and costs to a defendant against whom an unsuccessful action is brought:

(1) *Dismissed condemnation proceeding.* The court must award a defendant's litigation expenses, which include reasonable attorneys' fees (see *C.C.P. 1235.140(b)*), whenever a condemnation proceeding "is wholly or partly dismissed for any reason." (*C.C.P. 1268.610(a)(1)*); see *Temple City Redevelopment Agency v. Bayside Drive Ltd. Partnership* (2007) 146 C.A.4th 1555, 1559, 53 C.R.3d 728 [defendant who sold property while action was pending was entitled to litigation expenses, including fees, when action was later dismissed]; 8 *Summary* (10th), *Constitutional Law*, §1265.)

(2) *Unsuccessful condemnation proceeding.* If the final judgment in a condemnation proceeding is that the public entity cannot acquire the property, the landowner must be awarded attorneys' fees. (*C.C.P. 1268.610(a)(2)*); see 8 *Summary* (10th), *Constitutional Law*, §1265.) There is, however, no legislative provision for an award of these expenses in an ordinary condemnation action in which the condemnor is successful, and the defendant landowner has no constitutional right to the award as an element of just compensation. (*Los Angeles v. Ortiz* (1971) 6 C.3d 141, 98 C.R. 454, 490 P.2d 1142.) Where an attorney is a joint owner of property, and defends in pro. per., the attorney is not entitled to fees. (*Long Beach v. Sten* (1929) 206 C. 473, 474, 274 P. 968.)

(3) *Unsuccessful action to enjoin utility bonds.* The plaintiff is liable for all costs, damages, and necessary expenses that the defendant incurred because the action was filed. (*C.C.P. 526b*; *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.* (1942) 20 C.2d 684, 687, 128 P.2d 529.)

(4) *Unsuccessful action against property owner or public entity allowing public access to land.* An owner of real property who, under an agreement with a public or nonprofit agency, allows the public to use the property for a recreational purpose may recover reasonable attorneys' fees in an action against the owner by someone who was allegedly injured or suffered damages on the property or by someone who seeks to restrict, prevent, or delay public use of the property. (C.C. 846.1(a), (c).) The owner may present a claim for fees to the California Victim Compensation and

Government Claims Board if any of the following occur:

(a) The court dismisses the action on demurrer, on the owner's motion for summary judgment, or on its own motion for lack of prosecution. (C.C. 846.1(a)(1), (c)(1).)

(b) The plaintiff dismisses the action without any payment from the owner. (C.C. 846.1(a)(2), (c)(2).)

(c) The owner prevails in the action. (C.C. 846.1(a)(3), (c)(3).)

A public entity that permits the public to use real property for recreation is eligible to recover fees under the same circumstances. (C.C. 846.1(b), (c).)

A claim under C.C. 846.1(a), (b), or (c) is paid from an appropriation made for that purpose. The fees may not exceed an hourly rate greater than the rate charged by the Attorney General at the time the award is made, and they are limited to \$ 25,000. (C.C. 846.1(d).) Moreover, the annual total of claims allowed by the California Victim Compensation and Government Claims Board may not exceed \$ 200,000. (C.C. 846.1(e).)

(5) *Frivolous action under open meetings statute.* In *Boyle v. Redondo Beach* (1999) 70 C.A.4th 1109, 83 C.R.2d 164, plaintiff sued various city governing bodies and officials for allegedly violating the Brown Act (*Govt.C. 54950 et seq.*) by adding a previously unnoticed item to the agenda of a city council meeting. The trial court sustained demurrers for defendants and awarded them attorneys' fees under *Govt.C. 54960.5*. *Held*, fee award reversed and remanded. *Govt.C. 54960.5* authorizes fees for defendants when the court finds that the action was clearly frivolous and totally lacking in merit. However, "[g]iven the important public purposes underlying the Brown Act, the requirements of due process, and the need to make a record for appellate review, we conclude that pursuant to section 54960.5, a trial court must specify with particularity the basis for awarding costs or attorney fees." (70 C.A.4th 1121.)

SUPPLEMENT: [This section is current through the latest supplement]



71 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

18. Unsuccessful Actions: Award to Defendant.

b. Unwarranted Action for Governmental Tort, Indemnity, or Contribution.

1. Statutory Authorization.

7 Within Cal. Proc. Judgm § 235

[§ 235] Statutory Authorization.

C.C.P. 1038 authorizes recovery of reasonable attorneys' fees, expert witness fees, and other "defense costs" specified in *C.C.P. 1038(b)*, when both of the following occur:

(1) The defendant or cross-defendant obtains a summary judgment, judgment under *C.C.P. 631.8* (motion for judgment in court trial; see *7 Cal. Proc. (5th), Trial, §430 et seq.*), directed verdict, or nonsuit in an action for indemnity or contribution or in a proceeding under the California Tort Claims Act. (*C.C.P. 1038(a)*.)

(2) The court, on motion, finds that the plaintiff, petitioner, cross-complainant or intervenor did not bring the action in good faith and with reasonable cause. (*C.C.P. 1038(a)*.)

The motion must be made before the jury is discharged or the judgment is entered. The motion "waives any right to seek damages for malicious prosecution," but failure to make the motion does not waive the right to pursue an action for malicious prosecution. (*C.C.P. 1038(c)*.) An award of defense costs may be made only on notice and an opportunity to be heard. (*C.C.P. 1038(a)*.) (See *Dudman v. California (1983) 145 C.A.3d 617, 620, 193 C.R. 500* [order denying costs because state did not supply sufficient information was reversed].)

C.C.P. 1038 is ambiguous regarding the time at which a motion for costs must be filed and determined. To give effect to the statute's purpose, which is to discourage frivolous lawsuits against public entities, *C.C.P. 1038(c)* must be construed to mean that a motion for costs should be filed at the earliest practical time before discharge of the jury or entry of judgment. The motion for costs must be heard by the same judge who heard the motion that disposed of the action. (*Gamble v. Los Angeles Dept. of Water & Power (2002) 97 C.A.4th 253, 255, 259, 118 C.R.2d 271* [department's motion, filed 1 month after trial judge granted motion for summary judgment and several months before judgment was entered, was timely].)

Statutory attorneys' fees provisions apply to fees on appeal unless the statute specifically provides otherwise. Hence, *C.C.P. 1038* provides for recovery of attorneys' fees on appeal. (*Gonzales v. ABC Happy Realty (1997) 52*

C.A.4th 391, 395, 60 C.R.2d 566.)

SUPPLEMENT: [This section is current through the latest supplement]



72 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

18. Unsuccessful Actions: Award to Defendant.

b. Unwarranted Action for Governmental Tort, Indemnity, or Contribution.

2. Improper Continuation of Action.

7 *Within Cal. Proc. Judgm* § 236

[§ 236] Improper Continuation of Action.

In *Curtis v. Los Angeles* (1985) 172 C.A.3d 1243, 218 C.R. 772, plaintiff filed a personal injury action against a county and city. He joined the county as a defendant on the ground that the land on which the accident occurred might be county property. Defendant county forwarded declarations to plaintiff's attorney, which disclosed that the county did not own the property, and it requested a dismissal as to the county, but plaintiff refused. The county moved for summary judgment and requested attorneys' fees under *C.C.P. 1038*. The trial judge granted the motion for summary judgment, but denied attorneys' fees on the ground that *C.C.P. 1038* applies only to actions originally filed in bad faith. *Held*, reversed.

(a) The Legislature enacted *C.C.P. 1038* to allow public entities to recover the costs of defending frivolous lawsuits. Because little cost is involved in defending a lawsuit unless it is maintained after it is filed, the Legislature intended the word "brought" in *C.C.P. 1038(a)* "to include *continuing* the action in bad faith and without reasonable cause." (172 C.A.3d 1250.)

(b) Also, *C.C.P. 1038(c)* indicates the Legislature's intent to permit a party to seek relief under either *C.C.P. 1038* or by means of a malicious prosecution action, but not both. Because a malicious prosecution action may be based on improper continuation as well as improper initiation of an action, *C.C.P. 1038* should also be construed to permit an award of attorneys' fees based on continued maintenance of an action in bad faith. (172 C.A.3d 1250, 1252.) (See *Hall v. Regents of Univ. of Calif.* (1996) 43 C.A.4th 1580, 1586, 51 C.R.2d 387 [defendants were entitled to costs in negligence action where, despite plaintiff's expert's deposition testimony that defendants did not breach standard of care, plaintiff made tactical decision to keep defendants in action to avoid possible "empty chair" defense by codefendants].)

SUPPLEMENT: [This section is current through the latest supplement]



73 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

18. Unsuccessful Actions: Award to Defendant.

b. Unwarranted Action for Governmental Tort, Indemnity, or Contribution.

3. What Constitutes "Reasonable Cause."

7 *Witkin Cal. Proc. Judgm* § 237

[§ 237] What Constitutes "Reasonable Cause."

In *Carroll v. California* (1990) 217 C.A.3d 134, 265 C.R. 753, plaintiffs were injured while riding on a motorcycle at a street intersection in Riverside. They sued the city, the county, and the state, alleging that each owned, managed, operated and supervised the intersection. Both the county and the state advised plaintiffs that they had no control over the city street, and requested dismissal of the actions against them, warning that they would seek fees and costs under C.C.P. 1038 if they were required to defend. They later moved for summary judgment, which the court granted, with an award of \$ 6,097.25 to the county and \$ 3,680 to the state. *Held*, affirmed.

(a) "Reasonable cause" means the same as "probable cause," and *Sheldon Appel Co. v. Albert & Olier* (1989) 47 C.3d 863, 254 C.R. 336, 765 P.2d 498, 5 Summary (10th), *Torts*, §471, dealing with the tort of malicious institution of civil proceeding, is persuasive here. (217 C.A.3d 141, 142.)

(b) "At the minimum, this term requires that the Plaintiffs' attorney have some articulable fact or facts to conclude that a particular person or entity should be *initially* included in the lawsuit as a party-defendant. Not only did Plaintiffs fail to present any basis to the trial courts of State or County 'control' in or near the intersection in dispute, but a review of the discovery record indicates that Plaintiffs never raised the question of adjacent property 'owned or controlled' by the County or State during the course of this litigation." (217 C.A.3d 142.)

(c) "The record is replete with valid demands by both defendants at an early stage of the proceedings that they be dismissed as improper parties to the lawsuit. Those demands fell on deaf ears. The County had assured Plaintiffs' counsel before the complaint was filed that it had no control over the intersection. By the time Plaintiffs propounded their interrogatory responses to the County ... nine months had passed since Plaintiffs had been put on notice in the County's rejection of their claim that the County had no jurisdiction over the intersection. The State, through a declaration under penalty of perjury informed Plaintiffs that it did not control or have any other relationship to the intersection." (217 C.A.3d 143.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Laabs v. Victorville* (2008) 163 C.A.4th 1242, 1269, 78 C.R.3d 372 [plaintiff's claim that injuries suffered in automobile accident were caused by dangerous condition of public property was objectively reasonable; summary judgment was not foregone conclusion, and it depended on declaration that defendant submitted later]; *Clark v. Optical Coating Laboratory* (2008) 165 C.A.4th 150, 182, 80 C.R.3d 812 [state was not entitled to fees under C.C.P. 1038 where its original summary judgment motion and similar motion for judgment on pleadings were denied; although state eventually obtained summary judgment, reasonable attorney could have believed that plaintiffs' claims were tenable].



74 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

18. Unsuccessful Actions: Award to Defendant.

b. Unwarranted Action for Governmental Tort, Indemnity, or Contribution.

4. Award Is Proper Where Plaintiffs Lacked Either Reasonable Cause or Good Faith.

7 *Within Cal. Proc. Judgm* § 238

[§ 238] Award Is Proper Where Plaintiffs Lacked Either Reasonable Cause or Good Faith.

In *Kobzoff v. Los Angeles County Harbor/UCLA Med. Center* (1998) 19 C.4th 851, 80 C.R.2d 803, 968 P.2d 514, a man was taken to a medical center after a thwarted suicide attempt. When hospital staff later allowed him to use the bathroom in an unsecured, unsupervised area, he left the hospital and dove in front of a truck, which struck and killed him. Plaintiffs, the decedent's family and estate, filed a medical malpractice action against defendant county, the hospital's operator. Defendant moved for summary judgment under *Govt.C. 856.2(a)(2)*, which provides immunity for the injury or death of an escaping mental patient. Defendant also requested its attorneys' fees and costs under *C.C.P. 1038*. The trial judge granted both motions, ruling that, in light of the county's statutory immunity and cases interpreting that immunity, plaintiffs lacked reasonable cause to maintain the action. Defendant never claimed, and the trial judge never ruled, that plaintiffs filed or maintained the action in bad faith. The Court of Appeal reversed the award of costs, and remanded for a determination whether plaintiffs acted in bad faith. *Held*, award of costs under *C.C.P. 1038* was proper.

(a) A defendant may recover costs under *C.C.P. 1038* if the trial court finds that the plaintiff lacked either reasonable cause or good faith in bringing or maintaining the action. The statute's plain meaning is clear and unambiguous. The Legislature's use of the word "and" shows that it intended courts to construe in the conjunctive the two requirements for pursuing the action in "good faith" and "with reasonable cause." (19 C.4th 861.) Thus, before denying a motion for costs under *C.C.P. 1038*, a court must find the plaintiff satisfied both requirements. (19 C.4th 862.)

(b) Plaintiffs here lacked reasonable cause for pursuing their action. No reasonable plaintiffs, without some additional legal basis for the action, would maintain an action against a defendant protected by conclusive statutory immunity. Plaintiffs' decision to do so was unreasonable as a matter of law. Moreover, there is no support for plaintiffs' claim that allowing defendant to recover costs after proving the absence of only one statutory element effectively chills actions to modify or extend existing law. Plaintiffs' lawsuit was not aimed at modifying existing law; plaintiffs did not challenge the statutory immunity. (19 C.4th 863.) (See *Austin B. v. Escondido Union School Dist.* (2007) 149 C.A.4th 860, 887, 57 C.R.3d 454 [trial court properly awarded fees to school district where plaintiff's claim, that teacher's

alleged battery of students violated civil rights acts, lacked reasonable cause; there was no evidence that alleged abuse was motivated by students' disabilities or was intended to interfere with students' constitutional or statutory rights].)

SUPPLEMENT: [This section is current through the latest supplement]



75 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

19. Actions Under Federal Statutes.

a. In General.

7 *Witkin Cal. Proc. Judgm* § 239

[§ 239] In General.

Over 150 federal statutes authorize mandatory or discretionary awards of attorneys' fees. (*Ruckelshaus v. Sierra Club* (1983) 463 U.S. 680, 103 S.Ct. 3274, 3276, 77 L.Ed.2d 938, 943; see 17 U.S.C., §505, 13 *Summary* (10th), *Personal Property*, §68 [Copyright Act]; *C.C.P. 1021.10* [authorizing fees in successful action brought in name of people of California to enforce Jenkins Act (15 U.S.C., §375 et seq.), which requires cigarette sellers to file specified information with California tobacco tax administrator]; 8 Federal Procedure, L.Ed. §20:443 et seq.; but cf. *Key Tronic Corp. v. United States* (1994) 511 U.S. 809, 114 S.Ct. 1960, 1967, 128 L.Ed.2d 797 [attorneys' fees are not available in cost recovery action by private litigants under §107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C., §9607)].)

Comment on these statutes is extensive. (See 27 California Lawyer 34 (September 2007) [qualifying for interim fees under federal statutes]; 96 *Harv. L. Rev.* 677 [award of fees to unsuccessful environmental litigant]; 57 *So. Cal. L. Rev.* 471 [attorneys' fees to successful tax litigant who proves that government adopted "unreasonable" trial position]; 25 *Southwestern U. L. Rev.* 107 ["evenhanded treatment" for defendant under 17 U.S.C., §505]; 20 *Am.Jur.2d* (2005 ed.), *Costs* §§62, 63; 1 *A.L.R.2d* 222 [Federal Tort Claims Act]; 22 *A.L.R.3d* 1081 [construction and application of attorneys' fee provision in Social Security Act]; 37 *A.L.R.3d* 1125 [fees in action under Interstate Commerce Act against carrier for lost or damaged freight]; 140 *A.L.R. Fed* 557 [award of attorneys' fees under Truth in Lending Act (15 U.S.C., §1640(a))]; 146 *A.L.R. Fed* 531 [award of costs and attorneys' fees in judicial review of administrative proceedings under Clean Air Act (42 U.S.C., §7607(f))]; 171 *A.L.R. Fed* 173 [special circumstances precluding attorneys' fee award under Voting Rights Act (42 U.S.C., §1973l(e))]; 171 *A.L.R. Fed* 419 [attorneys' fees under Endangered Species Act (16 U.S.C., §1540(g)(4))].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Amtower v. Photon Dynamics* (2008) 158 C.A.4th 1582, 1601, 71 C.R.3d 361 [under 15 U.S.C., §77k(e), attorneys' fees were properly awarded to prevailing defendant in securities action that was "without merit"]. *Commentary:* See 49 *Santa Clara L. Rev.* 863 [recovery of fees under Clean Air Act by financially motivated plaintiffs].



76 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

19. Actions Under Federal Statutes.

b. Who May Recover.

7 *Witkin Cal. Proc. Judgm* § 240

[§ 240] Who May Recover.

(1) *Successful Party*. The statutes typically limit recovery to the prevailing party, the substantially prevailing party, or the successful party. (*Ruckelshaus v. Sierra Club* (1983) 463 U.S. 680, 103 S.Ct. 3274, 3277, 77 L.Ed.2d 938, 943; see *Christiansburg Garment Co. v. Equal Emp. Opportunity Com.* (1978) 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 [under §706(a) of Title VII of Civil Rights Act of 1964, giving trial judges discretion to award reasonable attorneys' fees to prevailing party, award to prevailing defendant is proper only if action was frivolous, unreasonable, without foundation, or brought in bad faith]; *Weber v. Langholz* (1995) 39 C.A.4th 1578, 1585, 46 C.R.2d 677 [federal Truth in Lending Act (15 U.S.C., §1640(a)(3)), which provides for fees to successful borrower, but not to successful lender, does not preempt C.C. 1717 (supra, §170 et seq.); lender could recover fees in action under Act where borrower had signed note and deed of trust containing fee provisions].)

Most of the environmental protection statutes authorize an award whenever it is deemed "appropriate" by the court. (See 96 *Harv. L. Rev.* 677.) The scope of the term "appropriate," as used in §307(f) of the Clean Air Act (42 U.S.C., §7607(f)), was considered in *Ruckelshaus*. Plaintiffs challenged certain emission standards set by the Environmental Protection Agency. Despite their being completely unsuccessful on the merits, the trial judge deemed it "appropriate" to award them attorneys' fees, and the awards were affirmed on appeal. *Held*, reversed. Other federal fee-shifting provisions reflect a consistent rule. "A successful party need not pay its unsuccessful adversary's fees." (103 S.Ct. 3277, 77 L.Ed.2d 943.) The legislative history of §307(f) reveals that its purpose was not to reject this rule, but rather to expand it to include partially prevailing parties, i.e., those who achieve some, even if not major, success. (103 S.Ct. 3278, 77 L.Ed.2d 945.) Hence, "absent some degree of success on the merits by the claimant, it is not 'appropriate' for a federal court to award attorney's fees under §307(f)." (103 S.Ct. 3282, 77 L.Ed.2d 949.)

(2) *Rejection of "Catalyst Theory" for Determining Prevailing Party*. In *Buckhannon Bd. & Care Home v. West Virginia Dept. of Health & Human Resources* (2001) 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, the operator of assisted living facilities failed a fire inspection because some of the facilities' residents were incapable of "self-preservation" as defined by state law. After receiving cease and desist orders requiring it to close its facilities within 30 days, the operator brought an action against the state and various agencies and individuals, seeking declaratory and injunctive relief that the "self-preservation" requirement violated the Fair Housing Amendments Act of

1988 (FHAA), 42 U.S.C., §3601 et seq., and the Americans with Disabilities Act (ADA), 42 U.S.C., §12101 et seq. Defendants postponed enforcement of the cease and desist orders pending resolution of the action. Subsequently, the state legislature eliminated the self-preservation requirement and the district court dismissed the action as moot. Plaintiff then requested attorneys' fees as the prevailing party under 42 U.S.C., §3613(c)(2) (FHAA) and 42 U.S.C., §12205 (ADA), contending that it was entitled to fees under the catalyst theory. Under that theory, a plaintiff is a prevailing party if the action brings about a voluntary change in the defendant's conduct. The trial court denied the motion and the Court of Appeals affirmed. *Held*, affirmed. The catalyst theory is not a permissible basis for an award of attorneys' fees under the FHAA or the ADA.

(a) The catalyst theory allows an award where there is no judicially sanctioned change in the legal relationship of the parties. "This is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary." (121 S.Ct. 1840, 149 L.Ed.2d 863.) Those decisions have awarded attorneys' fees where the plaintiff has received a judgment on the merits or obtained a court-ordered consent decree, but not where the plaintiff has secured the reversal of a directed verdict or acquired a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by judicial relief. "Never have we awarded attorney's fees for a nonjudicial 'alteration of actual circumstances.'" (121 S.Ct. 1841, 149 L.Ed.2d 864.)

(b) The legislative history of the Civil Rights Attorney's Fees Awards Act (42 U.S.C., §1988, *infra*, §242) does not support a broad reading of "prevailing party" that includes the catalyst theory. (121 S.Ct. 1841, 149 L.Ed.2d 864.) Plaintiffs cite legislative history stating that "the phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits," and that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." These references are at best ambiguous concerning the availability of the catalyst theory. (121 S.Ct. 1842, 149 L.Ed.2d 865.) "Particularly in view of the 'American Rule' that attorney's fees will not be awarded absent 'explicit statutory authority,' such legislative history is clearly insufficient to alter the accepted meaning of the statutory term." (121 S.Ct. 1842, 149 L.Ed.2d 865.)

(c) Plaintiff asserts that the catalyst theory is necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorneys' fees and that rejecting the catalyst theory will deter plaintiffs with meritorious but expensive cases from bringing suit. These assertions are entirely speculative and unsupported by any empirical evidence. (121 S.Ct. 1842, 149 L.Ed.2d 865.) Plaintiff's fear of mischievous defendants only materializes in claims for equitable relief; if the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case. If a case is not moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorneys' fees. Given this possibility, a defendant has a strong incentive to enter a settlement agreement, in which it can negotiate attorneys' fees and costs. (121 S.Ct. 1843, 149 L.Ed.2d 865.)

(d) An interpretation of the fee-shifting statutes that would spawn a second litigation of significant dimension must be avoided. A catalyst theory hearing "would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that 'will likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct.'" (121 S.Ct. 1843, 149 L.Ed.2d 866.)

Four justices dissented, arguing that the majority's "constricted" definition of prevailing party and rejection of the catalyst theory impede access to court for the "less well-heeled," and shrink the incentive Congress created for the enforcement of federal law by private parties. (121 S.Ct. 1850, 149 L.Ed.2d 874.) (See *Graham v. DaimlerChrysler Corp.* (2004) 34 C.4th 553, 21 C.R.3d 331, 101 P.3d 140, *infra*, §265 [declining to apply holding of *Buckhannon* to actions under C.C.P. 1021.5]; 115 *Harv. L. Rev.* 457 [*Buckhannon*]; 8 U.C. Davis J. Juvenile Law & Policy 1 [effect of *Buckhannon* on federal Individuals with Disabilities Education Act]; 54 *U.C.L.A. L. Rev.* 1087 [empirical results showing negative effect of *Buckhannon* on civil rights enforcement actions].)

SUPPLEMENT: [This section is current through the latest supplement]



77 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

19. Actions Under Federal Statutes.

c. Equal Access to Justice Act.

7 *Witkin Cal. Proc. Judgm* § 241

[§ 241] Equal Access to Justice Act.

(1) *Statutory Authorization.* The Equal Access to Justice Act (EAJA) (28 U.S.C., §2412) authorizes the award of attorneys' fees to a prevailing party in a civil action or adversary adjudication in litigation against the United States unless the position taken by the United States is substantially justified or the award would be unjust. (28 U.S.C., §2412(d)(1)(A); see *Sullivan v. Hudson* (1989) 490 U.S. 877, 109 S.Ct. 2248, 2253, 104 L.Ed.2d 941, 955, 956 [Social Security claimant was entitled to fees for representation in administrative proceedings on remand from federal district court].)

Administrative deportation proceedings are not adversary adjudications and thus do not fall within the category of proceedings in which an award of attorneys' fees is authorized. (*Ardestani v. Immigration & Naturalization Service* (1991) 502 U.S. 129, 112 S.Ct. 515, 116 L.Ed.2d 496.)

(2) *Applicability to Fee Litigation.* In *Commissioner, I.N.C. v. Jean* (1990) 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134, the Court introduced the issue as follows: "In many cases parties are able to resolve by stipulation a claim for fees under the EAJA. In some cases, however, a fee application will prompt the Government to litigate aspects of the fee request or require the court to convene a hearing before deciding if an award of fees and expenses is authorized. The question in this case is whether a prevailing party is ineligible for fees for the services rendered during such a proceeding unless the Government's position in the fee litigation itself is not 'substantially justified.'" (110 S.Ct. 2317, 110 L.Ed.2d 140.) *Held*, no additional justification is required. "The 'substantial justification' requirement ... establishes a clear threshold for determining a prevailing party's eligibility for fees, one that properly focuses on the governmental misconduct giving rise to the litigation. The EAJA further provides district courts discretion to adjust the amount of fees for various portions of the litigation, guided by reason and statutory criteria. The purpose and legislative history of the statute reinforce our conclusion that Congress intended EAJA to cover the cost of all phases of successful civil litigation addressed by the statute." (110 S.Ct. 2322, 110 L.Ed.2d 146, 147.)

(3) *Time Limit.* A party seeking fees must apply for them within 30 days of final judgment in the action. (28 U.S.C., §2412(d)(1)(B); see *Melkonyan v. Sullivan* (1991) 501 U.S. 89, 111 S.Ct. 2157, 2162, 115 L.Ed.2d 78, 91 ["final judgment" means final judgment of district court, not decision rendered by administrative agency]; *Shalala v. Schaefer*

(1993) 509 U.S. 292, 113 S.Ct. 2625, 2629, 125 L.Ed.2d 239, 246 [when a "sentence 4" remand under 42 U.S.C., §405(g) (application for Social Security benefits) occurs, 30-day filing period begins immediately on expiration of period for appeal from remand order; it does not commence on entry of judgment after postremand administrative proceedings have been completed; citing *Melkonyan*, and distinguishing and criticizing *Sullivan*]; *Scarborough v. Principi* (2004) 541 U.S. 401, 124 S.Ct. 1856, 1865, 158 L.Ed.2d 674, 682 [timely fee application may be amended after 30-day period to cure initial failure to allege that government's position was not substantially justified].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Statutory Authorization.* See *Richlin Sec. Service Co. v. Chertoff* (2008) 553 U.S. ___, 128 S.Ct. 2007, 2011, 2012, footnote 3, 170 L.Ed.2d 960, 966 [prevailing party may recover fees for paralegal services at market rate; construing administrative proceedings provision of EAJA, but reasoning "would extend equally" to 28 U.S.C., §2412].



78 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

19. Actions Under Federal Statutes.

d. Civil Rights Attorney's Fees Awards Act.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 242

[§ 242] In General.

(1) *Entitlement to Fees.* In *Alyeska Pipeline Service Co. v. Wilderness Soc.* (1975) 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141, *infra*, §256, the Supreme Court halted a federal court trend toward awarding attorneys' fees to those who successfully bring actions effectuating a strong congressional or national policy. The Court held that the awards must be authorized by statute. (95 S.Ct. 1628, 44 L.Ed.2d 160.) The Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C., §1988) was adopted in response to the *Alyeska Pipeline* decision. It gives the district courts discretion to award reasonable attorneys' fees to the prevailing party (other than the United States) in an action or proceeding to enforce provisions of various statutes, including 42 U.S.C., §§1981, 1981a, 1982, 1983, 1985, and 1986, among others. (42 U.S.C., §1988(b).) It also allows the district courts to include expert fees as part of attorneys' fees in actions under 42 U.S.C., §§1981 or 1981a. (42 U.S.C., §1988(c).) (See 73 *So. Cal. L. Rev.* 1075 [effects of income tax on attorneys' fee awards under 42 U.S.C., §1988]; 10 *Federal Practice & Procedure* (Wright, Miller & Kane) §2675.)

Cases discussing 42 U.S.C., §1988 include the following:

Hutto v. Finney (1978) 437 U.S. 678, 98 S.Ct. 2565, 2575, 57 L.Ed.2d 522, 537 [Act authorizes award of fees on appeal].

Maine v. Thiboutot (1980) 448 U.S. 1, 100 S.Ct. 2502, 2506, 65 L.Ed.2d 555, 562 [Act applies to all 42 U.S.C., §1983 claims, including those based solely on violations of Social Security Act]; *Maher v. Gagne* (1980) 448 U.S. 122, 100 S.Ct. 2570, 2594, 65 L.Ed.2d 653, 660 [same].

Pulliam v. Allen (1984) 466 U.S. 522, 104 S.Ct. 1970, 1981, 80 L.Ed.2d 565, 580 [judicial immunity does not bar award of attorneys' fees under Act].

Webb v. Board of Education of Dyer, Tennessee (1985) 471 U.S. 234, 105 S.Ct. 1923, 85 L.Ed.2d 233 [attorneys' fees are not available under 42 U.S.C., §1988 for time spent pursuing optional state administrative proceedings before filing federal civil rights action].

(2) *Waiver of Fees*. The settlement of a class action may be conditioned on waiver of a claim for attorneys' fees under 42 U.S.C., §1988. (*Evans v. Jeff D.* (1986) 475 U.S. 717, 106 S.Ct. 1531, 1538, 1545, 89 L.Ed.2d 747, 759, 767 [district court's approval of waiver was not abuse of discretion where settlement provided greater relief than could reasonably have been expected at trial]; 102 Harv. L. Rev. 1278 [waivers of fees since *Evans*]; 98 Harv. L. Rev. 828 [conflict between FRCP 68 ("offer of judgment" rule) and 42 U.S.C., §1988]; on prevailing party, see *infra*, §244; on independent action for fees, see *infra*, §247.)

(3) *Denial of Fees To Avoid Prejudice*. A trial court has discretion under 42 U.S.C., §1988 to deny fees where a postjudgment motion unfairly surprises or prejudices the affected party. (*Board of Administration of the Calif. Public Employees' Retirement System v. Wilson* (1997) 57 C.A.4th 967, 974, 67 C.R.2d 477 [fees were properly denied where plaintiff did not mention possible recovery under 42 U.S.C., §1988 until its postjudgment motion for attorneys' fees; defendant thus had no reason to contest plaintiff's standing under 42 U.S.C., §1983 until that time; appropriate time to adjudicate issues affecting entitlement to judgment is before judgment; citing *White v. New Hampshire Dept. of Emp. Sec.* (1982) 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed.2d 325, *infra*, §294]; *Hawaiian Gardens v. Long Beach* (1998) 61 C.A.4th 1100, 1114, 72 C.R.2d 134 [although plaintiff pleaded cause of action under 42 U.S.C., §1983, trial judge had not considered or addressed any civil rights issue in rendering judgment for plaintiff, and 42 U.S.C., §1983 claim was dismissed after plaintiff prevailed on mandamus causes of action; citing *Wilson*].)

(4) *No Preemption of State Action for Malicious Prosecution*. In *Del Rio v. Jetton* (1997) 55 C.A.4th 30, 63 C.R.2d 712, two police officers, who had been previously dismissed as defendants in a federal civil rights action, sued the unsuccessful plaintiffs from that action for malicious prosecution. The trial judge determined that the malicious prosecution action was preempted by 42 U.S.C., §1988. *Held*, reversed.

The attorneys' fee provision of 42 U.S.C., §1988 has a dual purpose: (a) to encourage vigorous enforcement of good faith civil rights claims, and (b) to deter civil rights actions that are clearly frivolous, vexatious, or intended to harass. Simply because Congress provided one form of relief to prevailing defendants in frivolous civil rights actions, however, does not mean that it intended to occupy the entire field of relief for those defendants. (55 C.A.4th 35.) Where a civil rights action is without foundation, 42 U.S.C., §1988 provides a very limited remedy; a greater measure of relief is available where the prevailing defendant later proves that the action was also brought in bad faith. (55 C.A.4th 36.)

SUPPLEMENT: [This section is current through the latest supplement]



79 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

19. Actions Under Federal Statutes.

d. Civil Rights Attorney's Fees Awards Act.

2. Action Involving Both Covered and Not Covered Claims.

7 *Within Cal. Proc. Judgm* § 243

[§ 243] Action Involving Both Covered and Not Covered Claims.

If an action involves both a claim covered by the Act and one that is not, the fact that the decision was based on the claim not covered (thereby rendering it unnecessary to decide the covered claim) does not necessarily preclude an award of fees under the Act. An award is justified if the undecided covered claim was a substantial one arising from the same nucleus of facts as the claim on which the decision was based. (*Smith v. Robinson* (1984) 468 U.S. 992, 104 S.Ct. 3457, 3464, 82 L.Ed.2d 746, 759.) However, "where ... petitioners have presented distinctly different claims for different relief, based on different facts and legal theories, and have prevailed only on a nonfee claim, they are not entitled to a fee award simply because the other claim was a constitutional claim that could be asserted" under 42 U.S.C., §1983. (*Smith v. Robinson*, *supra*, 104 S.Ct. 3471, 82 L.Ed.2d 767 [plaintiffs prevailed under Education of the Handicapped Act before it was amended to provide for fees; undecided claims under 42 U.S.C., §1983 involved different facts and legal theories]; see *McFadden v. Villa* (2001) 93 C.A.4th 235, 237, 113 C.R.2d 80 [plaintiff who prevailed on state battery claim against police, but lost on federal excessive force claim, was not entitled to fees under 42 U.S.C., §1988; claims are not identical causes of action and were treated separately at trial, in pleadings, and in instructions].)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

19. Actions Under Federal Statutes.

d. Civil Rights Attorney's Fees Awards Act.

3. Prevailing Party.

7 *Within Cal. Proc. Judgm* § 244

[§ 244] Prevailing Party.

(1) *Party Who Loses on All Claims Is Not Prevailing Party. Hewitt v. Helms (1987) 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654* "presents the peculiar-sounding question whether a party who litigates to judgment and loses on all of his claims can nonetheless be a 'prevailing party' for purposes of an award of attorney's fees." Plaintiff, while a prisoner in a Pennsylvania state correctional institution, was placed in administrative segregation pending an investigation of his possible involvement in a prison riot. After a hearing, he was found guilty of striking a corrections officer and was sentenced to 6 months of disciplinary restrictive confinement. While incarcerated, he filed a *42 U.S.C., §1983* action against defendant prison officials alleging that his conviction on the basis of uncorroborated hearsay (report of testimony of an undisclosed informant) was a violation of due process. Defendants asserted qualified immunity from suit and also contested the constitutional claims on the merits.

Before the district court reached a decision, plaintiff was released on parole, and 6 months later, that court rendered summary judgment against him on his constitutional claims. The Court of Appeals reversed, the Supreme Court granted certiorari, and after other intermediate steps, the case came back to the district court, which granted summary judgment for defendants on the basis of qualified immunity. Plaintiff appealed, and while the appeal was pending, the Pennsylvania Bureau of Corrections revised its regulations to include procedures for the use of confidential-source information in inmate disciplinary proceedings. After the district court's decision was affirmed by the Court of Appeals, plaintiff sought attorneys' fees, which the district court denied on the ground that he was not a prevailing party. The Court of Appeals reversed, concluding that its prior holding that plaintiff's constitutional rights were violated was a form of judicial relief that served as a standard of conduct to guide prison officials, and directing that the district court reconsider whether plaintiff's suit was a "catalyst" for the amendment of the Bureau of Corrections regulations. *Held*, Court of Appeals judgment reversed.

(a) In order to be eligible for attorney's fees under *42 U.S.C., §1988*, a litigant must be a prevailing party. "Whatever the outer boundaries of that term may be, [plaintiff] does not fit within them. Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." (*107 S.Ct. 2675, 96 L.Ed.2d 661.*) Plaintiff did not obtain a damages award, an injunction or declaratory judgment, or relief

through a consent decree or settlement. "The most that he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made." (107 S.Ct. 2675, 96 L.Ed.2d 661.)

(b) It is not necessary that relief be judicially decreed. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief sought, and he or she is deemed to have prevailed despite the absence of a formal judgment in his or her favor. This "equivalency" doctrine acknowledges the primacy of the redress over the means by which it is obtained. "If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has 'prevailed' in his suit, because he has obtained the substance of what he sought. Likewise in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed. That is the proper equivalent of a judicial judgment which would produce the same effect; a judicial statement that does not affect the relationship between the plaintiff and the defendant is *not* an equivalent." (107 S.Ct. 2676, 96 L.Ed.2d 662.)

(c) The only "relief" plaintiff obtained was "the moral satisfaction of knowing that a federal court concluded that his rights had been violated." The same moral satisfaction "presumably results from any favorable statement of law in an otherwise unfavorable opinion." Here, the Court of Appeals expressed its view on plaintiff's constitutional rights, but that issue became irrelevant in the light of defendants' qualified immunity. (107 S.Ct. 2676, 96 L.Ed.2d 662.)

(d) There is also a "practical objection to equating statements of law (even legal holdings en route to a final judgment) with declaratory judgments: The equation deprives the defendant of valid defenses to a declaratory judgment." (107 S.Ct. 2677, 96 L.Ed.2d 662.) If the district court had entered a declaratory judgment that plaintiff's constitutional rights had been violated, its only effect would have been to provide a basis for a fee award against defendants who might ultimately be found immune; and the court could take that into account in deciding whether to enter such a judgment. (107 S.Ct. 2677, 96 L.Ed.2d 662.)

(e) "[A] favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.'" (107 S.Ct. 2677, 96 L.Ed.2d 663.) (See *Buckhannon Bd. & Care Home v. West Virginia Dept. of Health & Human Resources* (2001) 532 U.S. 598, 121 S.Ct. 1835, 1840, 149 L.Ed.2d 855, 863, supra, §240 [citing *Hewitt v. Helms*; rejecting "catalyst theory"].)

(2) *Significant Issue Test.* In *Texas State Teachers Assn. v. Garland Independent School Dist.* (1989) 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866, the Court said: "If the plaintiff has succeeded on 'any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind. ... The floor in this regard is provided by our decision in *Hewitt v. Helms*. ... Thus, at a minimum, to be considered a prevailing party within the meaning of §1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Beyond this absolute limitation, a technical victory may be so insignificant, and may be so near the situation addressed in *Hewitt* as to be insufficient to support prevailing party status. (109 S.Ct. 1493, 103 L.Ed.2d 877.)

(3) *Award of Nominal Damages.* In *Farrar v. Hobby* (1992) 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494, plaintiff school owner brought an action against six defendants, seeking \$ 17 million in damages for denial of his due process rights when his school was closed. At trial, the jury found that one defendant had deprived plaintiff of a civil right, but plaintiff was awarded only \$ 1 in nominal damages. *Held*, plaintiff was not entitled to attorneys' fees.

(a) "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Under this definition, a plaintiff who wins nominal damages is a prevailing party. (113 S.Ct. 573, 121 L.Ed.2d 503, 504.)

(b) However, the technical nature of a nominal damages award may affect the fees awarded under 42 U.S.C.,

§1988. The most critical factor in determining a fee award is the degree of success obtained. "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, ... the only reasonable fee is usually no fee at all." (113 S.Ct. 574, 575, 121 L.Ed.2d 505, 506.) (See *Choate v. Orange* (2000) 86 C.A.4th 312, 323, 326, 103 C.R.2d 339 [where one plaintiff recovered small award that was far less than he sought and other plaintiff recovered nothing, trial court properly awarded no fees; "exceedingly modest verdict created no new rule of liability, broke no ground, and sent no message"; following *Farrar*].)

(4) *Preliminary Injunction*. A party does not attain prevailing party status by achieving a preliminary injunction that is later reversed, dissolved, or otherwise undone by the final decision in the same case. (*Sole v. Wyner* (2007) 551 U.S. ___, 127 S.Ct. 2188, 2194, 167 L.Ed.2d 1069, 1076 [plaintiff who received preliminary injunction allowing her to create peace symbol on beach using nude bodies was not prevailing party; final decision in action rejected plaintiff's claim that state law banning nudity in parks was unconstitutional as applied to nonerotic, expressive nudity, and thus plaintiff did not gain enduring change in her legal relationship with state officials; citing *Texas State Teachers Assn.*].)

(5) *Different Standard for Prevailing Defendant*. Although the attorneys' fee provision in 42 U.S.C., §1988 makes no distinction between prevailing plaintiffs and prevailing defendants, there is a more stringent standard for defendants than for plaintiffs. Attorneys' fees ordinarily are awarded to prevailing plaintiffs unless special circumstances render an award unjust. Prevailing defendants, however, can recover attorneys' fees only if the court also finds that the civil rights claim was objectively frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. (*Choate v. Orange, supra*, 86 C.A.4th 322 [trial court erred in awarding fees to defendants, where plaintiffs sustained real injuries from encounter with defendants, some of whom were acting under color of law, and all named defendants were directly involved in incident that gave rise to civil rights action]; see *Hughes v. Rowe* (1980) 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163; *Robbins v. Regents of Univ. of Calif.* (2005) 127 C.A.4th 653, 664, 25 C.R.3d 851 [award for defendants was proper; plaintiff club members' claim of violation of their right to free speech, and their continued prosecution of claim after their suspensions from club were lifted, were unreasonable]; *Jones & Matson v. Hall* (2007) 155 C.A.4th 1596, 1610, 66 C.R.3d 872 [award for certain defendants was proper; plaintiffs' counsel admitted that there was no direct evidence tying them to alleged civil rights violations or to knowledge of alleged wrongdoing by other defendants; plaintiffs continued to litigate claims after it should have been obvious that claims were frivolous, groundless, or unreasonable].)

SUPPLEMENT: [This section is current through the latest supplement]



81 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

19. Actions Under Federal Statutes.

d. Civil Rights Attorney's Fees Awards Act.

4. Award Against State.

7 *Within Cal. Proc. Judgm* § 245

[§ 245] Award Against State.

In enacting 42 U.S.C., §1988, Congress exercised its power under the Fourteenth Amendment, §5, to set aside the states' Eleventh Amendment immunity from retroactive relief. (*Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 C.A.3d 1023, 1030, 204 C.R. 913, *infra*, §248.) "[T]he Eleventh Amendment has no application to an award of attorney's fees, ancillary to a grant of prospective relief, against a State. It follows that the same is true for the calculation of the *amount* of the fee. An adjustment for delay in payment is ... an appropriate factor in the determination of what constitutes a reasonable attorney's fee under §1988. An award against a State of a fee that includes such an enhancement for delay is not, therefore, barred by the Eleventh Amendment." (*Missouri v. Jenkins* (1989) 491 U.S. 274, 109 S.Ct. 2463, 2469, 105 L.Ed.2d 229, 240 [reaffirming holding in *Hutto v. Finney* (1978) 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522].)

SUPPLEMENT: [This section is current through the latest supplement]



82 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

19. Actions Under Federal Statutes.

d. Civil Rights Attorney's Fees Awards Act.

5. Attorney Representing Himself or Herself Is Not Entitled to Fee.

7 Witkin Cal. Proc. Judgm § 246

[§ 246] Attorney Representing Himself or Herself Is Not Entitled to Fee.

In *Kay v. Ehrler* (1991) 499 U.S. 432, 111 S.Ct. 1435, 113 L.Ed.2d 486, the Court resolved a conflict among the Circuits on whether a *pro se* litigant who is also a lawyer may be awarded fees. Neither 42 U.S.C., §1988 nor its legislative history provided a clear answer, and the decision was reached on a consideration of policy. "A rule that authorizes awards of counsel fees to *pro se* litigants--even if limited to those who are members of the bar--would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." (111 S.Ct. 1438, 113 L.Ed.2d 493; see 69 So. Cal. L. Rev. 1795 [criticizing *Kay*]; on right of attorney litigant to fees generally, see *supra*, §161.)

SUPPLEMENT: [This section is current through the latest supplement]



83 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

19. Actions Under Federal Statutes.

d. Civil Rights Attorney's Fees Awards Act.

6. No Award in Independent Action.

7 *Within Cal. Proc. Judgm § 247*

[§ 247] No Award in Independent Action.

In *North Carolina Dept. of Trans. v. Crest Street Community Council* (1986) 479 U.S. 6, 107 S.Ct. 336, 93 L.Ed.2d 188, the court held that, under the plain language and legislative history of 42 U.S.C., §1988, attorneys' fees can be recovered only in the action or proceeding to enforce the civil rights laws listed in the statute (see supra, §242). Hence, a separate action, solely to recover attorneys' fees, cannot be maintained. (107 S.Ct. 340, 93 L.Ed.2d 195.)

The court took note of the suggestion that this holding would create an incentive to file protective lawsuits (rather than to pursue administrative remedies) in order to obtain attorneys' fees, but in reply quoted its prior conclusion in *Webb v. Board of Education of Dyer, Tennessee* (1985) 471 U.S. 234, 105 S.Ct. 1923, 85 L.Ed.2d 233: "[C]ompetent counsel will be motivated by the interests of the client to pursue ... administrative remedies when they are available and counsel believes that they may prove successful." (107 S.Ct. 341, 93 L.Ed.2d 197.) "Moreover, our holding creates a legitimate incentive for potential civil rights defendants to resolve disputes expeditiously, rather than risk the attorneys' fees liability connected to civil rights litigation." (107 S.Ct. 341, 93 L.Ed.2d 197.)

Three justices dissented.

SUPPLEMENT: [This section is current through the latest supplement]



84 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

C. Fees Authorized by Statute.

19. Actions Under Federal Statutes.

d. Civil Rights Attorney's Fees Awards Act.

7. Award by California Court.

7 *Within Cal. Proc. Judgm* § 248

[§ 248] Award by California Court.

California courts have concurrent jurisdiction with federal courts in civil rights actions under 42 U.S.C., §1983 (see 8 *Summary* (10th), *Constitutional Law*, §816 et seq.) and may award attorneys' fees under 42 U.S.C., §1988. (*Filipino Accountants' Assn. v. State Bd. of Accountancy* (1984) 155 C.A.3d 1023, 1028, footnote 4, 204 C.R. 913.)

In *Filipino Accountants' Assn.*, plaintiffs brought a mandamus proceeding against defendant board, alleging that, in exercising its statutory authority to grant waivers of examination to persons licensed in another state or country, it discriminated against Filipino certified public accountants. They received a favorable judgment by stipulation, and then moved for attorneys' fees under both C.C.P. 1021.5 and 42 U.S.C., §1988. Having in mind a possible legislative limitation on amounts awarded in the California statute, defendant board conceded its liability under C.C.P. 1021.5, but challenged the trial judge's reliance on 42 U.S.C., §1988 as an alternative ground of decision. *Held*, plaintiffs were entitled to an award under the federal statute.

(a) A plaintiff is a prevailing party if he or she succeeds on any significant issue in litigation that achieves some of the benefit the parties sought in bringing the action. (155 C.A.3d 1031, quoting *Hensley v. Eckerhart* (1983) 461 U.S. 424, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50, *infra*, §314.) Plaintiffs met this test here. They obtained a reevaluation of their applications for licensure and vindicated Filipino accountants' rights to equal protection of the laws. (155 C.A.3d 1031.)

(b) *Maher v. Gagne* (1980) 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653, approved the test set forth in *Hagens v. Lavine* (1974) 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577: The plaintiff must plead a claim that is sufficiently "substantial" to confer jurisdiction on the federal courts. The word is defined in *Hagens* in terms of its opposite--insubstantiality; claims are constitutionally insubstantial only if prior decisions inescapably render them frivolous. (155 C.A.3d 1034.) Plaintiffs met this test as well. A respectable body of law supported their constitutional claims under 42 U.S.C., §1981. (155 C.A.3d 1035.)

California courts have awarded fees under 42 U.S.C., §1988 on numerous occasions, including the following:

Green v. Obledo (1984) 161 C.A.3d 678, 682, 207 C.R. 830 [fee award in 42 U.S.C., §1983 action based on denial of AFDC benefits was proper; state budget restrictions on payment of attorneys' fees was not applicable].

Coalition for Economic Survival v. Deukmejian (1985) 171 C.A.3d 954, 960, 966, 217 C.R. 621 [plaintiffs seeking temporary relief to ensure timely payment of AFDC benefits were prevailing parties and were entitled to fees].

EWAP v. Ontario (1986) 177 C.A.3d 1108, 1114, 223 C.R. 422 [plaintiff was prevailing party within meaning of statute, where defendant conceded on issues on which relief was granted].

Sokolow v. San Mateo (1989) 213 C.A.3d 231, 261 C.R. 520, infra, §273 [plaintiff who successfully challenged county's association with discriminatory private organization was entitled to fees].

California courts have also denied fees under 42 U.S.C., §1988. (See *Board of Administration of the Calif. Public Employees' Retirement System v. Wilson (1997) 57 C.A.4th 967, 974, 67 C.R.2d 477, supra, §242*; *Union Oil Co. of Calif. v. Los Angeles (2000) 79 C.A.4th 383, 392, 94 C.R.2d 81* [trial court improperly awarded attorneys' fees to manufacturer who sued city for refund of unconstitutional tax; because taxpayer had adequate legal remedy (tax refund), trial court could not have awarded either declaratory or injunctive relief under 42 U.S.C., §1983, and thus it could not award fees under 42 U.S.C., §1988].)

SUPPLEMENT: [This section is current through the latest supplement]



85 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

1. Recovery of Common Fund.

a. General Principle.

7 *Witkin Cal. Proc. Judgm* § 249

[§ 249] General Principle.

Under a rule long established in equity courts, where a number of persons are entitled to a common fund, and an action is necessary to create, protect, or compel distribution of it, one who brings the action for the benefit of all is entitled to payment of his or her attorneys' fees out of the fund. "The bases of the equitable rule which permits surcharging a common fund with the expenses of its protection or recovery, including counsel fees, appear to be these: fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful." (*Estate of Stauffer* (1959) 53 C.2d 124, 132, 346 P.2d 748, *infra*, §252.)

Despite the sweeping negative terms of *C.C.P. 1021* (*supra*, §149), this rule was recognized as applicable in California in proper cases. (See *Aleman v. Wensinger* (1870) 40 C. 288, 294 [applied without discussion]; *Tulare v. Dinuba* (1928) 205 C. 111, 117, 127, 270 P. 201 [dictum]; *Winslow v. Harold G. Ferguson Corp.* (1944) 25 C.2d 274, 285, 153 P.2d 714 [upholding attorney's prior claim against fund]; *Estate of Reade* (1948) 31 C.2d 669, 671, 191 P.2d 745; *D'Amico v. Board of Med. Examiners* (1974) 11 C.3d 1, 25, 112 C.R. 786, 520 P.2d 10, citing the text; *Weber v. Marine Cooks' & Stewards' Assn. of Pac. Coast* (1949) 93 C.A.2d 327, 340, 208 P.2d 1009; *Paramount Pictures v. Sparling* (1953) 122 C.A.2d 221, 222, 264 P.2d 648, *infra*, §250; *Melendres v. Los Angeles* (1975) 45 C.A.3d 267, 272, 119 C.R. 713, *infra*, §250 [class action]; *Lee v. State Farm Mut. Ins. Co.* (1976) 57 C.A.3d 458, 467, 129 C.R. 271; *Abouab v. San Francisco* (2006) 141 C.A.4th 643, 668, 46 C.R.3d 206 [catalyst theory of *Graham v. DaimlerChrysler Corp.* (2004) 34 C.4th 553, 21 C.R.3d 331, 101 P.3d 140, *infra*, §265, applies in common fund actions, but so does its requirement of presuit notification; petitioners who did not meet that requirement could not recover fees].)

This subject has received much attention from commentators. (See 87 *Harv. L. Rev.* 1597 [development of doctrine and criticism of abuses]; 88 *Harv. L. Rev.* 849 [attorneys' fees in public interest litigation]; 49 *U.C.L.A. L. Rev.* 991 [payment of fees in coupon-based settlements in class actions; arguing that class counsel should be paid in same currency as members of class, to avoid problem of defendants essentially paying counsel in cash to accept worthless

coupons for class members]; 53 *U.C.L.A. L. Rev.* 1483 [common features of incentive awards and attorneys' fee awards in class actions]; 38 *A.L.R.3d* 1384 [attorneys' fees in class actions]; 89 *A.L.R.2d* 691 [award in *cy pres* litigation]; 9 *A.L.R.2d* 1132 [award in beneficiary's litigation respecting trust]; 2 *A.L.R.3d* 1441 [right of attorney for holder of property insurance to fee out of insurer's recovery from tortfeasor]; 89 *A.L.R.3d* 690 [attorneys' fees in taxpayer's action in state court]; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §16.86; C.E.B., Attorney Fee Awards 2d, §7.4; Cal. Civil Practice, 4 Procedure, §§33:35 [common fund theory]; 33:45 [form; supporting declaration for order awarding attorneys' fees based on common fund theory]; 20 *Am.Jur.2d* (2005 ed.), *Costs* §65 et seq.)

The rule has been invoked in shareholders' derivative suits, because an individual shareholder's recovery is likely to be insignificant compared with the expense of the litigation. (See *California Mut. Bldg. & Loan Assn. of San Jose v. Mortimer* (1945) 68 *C.A.2d* 82, 85, 155 *P.2d* 876; *Fletcher v. A. J. Industries* (1968) 266 *C.A.2d* 313, 320, 72 *C.R.* 146, citing the text; 60 *Cal. L. Rev.* 164 [attorneys' fees in shareholder derivative suits; substantial benefit rule]; 88 *Harv. L. Rev.* 849, 854; 39 *A.L.R.2d* 583 [corporation's liability for attorneys' fees and other expenses incident to controversy respecting internal affairs of corporation]; 19 *Am.Jur.2d* (2004 ed.), *Corporations* §2149 et seq.) However, fees will be denied where the ultimate objective of the action is not to secure or preserve a common fund but to establish the plaintiff's personal adverse interests in the fund. (*Baker v. Pratt* (1986) 176 *C.A.3d* 370, 379, 222 *C.R.* 253 [plaintiff and defendant were the only shareholders]; see *Cziraki v. Thunder Cats* (2003) 111 *C.A.4th* 552, 557, 3 *C.R.3d* 419, *infra*, §254 [distinguishing and declining to extend *Baker*].)

SUPPLEMENT: [This section is current through the latest supplement]



86 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

1. Recovery of Common Fund.

b. Fees Allowed.

7 *Witkin Cal. Proc. Judgm* § 250

[§ 250] Fees Allowed.

In *Paramount Pictures v. Sparling* (1953) 122 C.A.2d 221, 264 P.2d 648, the Alien Property Custodian took over a Japanese bank, and defendant superintendent of banks, under license from the Treasury Department, proceeded to liquidate it. Plaintiff depositors brought an action to establish the right of all depositors to interest as well as principal, while defendant superintendent and the custodian who intervened strongly opposed the claim of interest at trial and on appeal. Motions by plaintiffs' counsel for an award of fees were denied on the authority of *In re Pac. Coast Bldg.-Loan Assn. of Los Angeles* (1940) 15 C.2d 155, 159, 99 P.2d 261, holding that where a statutory officer in charge of a fund fairly presents the issues determinative of its proper disposition, an intervening claimant on the successful side is not entitled to fees. *Held*, order reversed with directions to determine the motions on the merits.

"On the whole case it is clear that counsel for the plaintiffs rendered services which substantially benefitted all the depositors and creditors as a class by establishing their right to receive interest, that they did this over the determined opposition of the superintendent on at least one issue decisive of that right, that left to representation by the superintendent alone that issue would almost certainly have been decided the other way, and that the case is therefore one in which the court has the power to allow counsel fees from the fund available for the payment of interest, and the court should exercise its free discretion in determining that question." (122 C.A.2d 228.)

In *Knoff v. San Francisco* (1969) 1 C.A.3d 184, 81 C.R. 683, a taxpayer brought a successful class action in mandamus to compel county officials to make proper assessments on property that had been underassessed or had escaped assessment. (See 8 Cal. Proc. (5th), *Extraordinary Writs*, §94.) *Held*, it was proper to award attorneys' fees directly to the law firms named in the petition, and to fix the fees on a contingent percentage basis (20% of the first million, 10% of the second, 5% of the third) of tax revenues collected in compliance with the writ. (1 C.A.3d 203.)

In *Melendres v. Los Angeles* (1975) 45 C.A.3d 267, 119 C.R. 713, the court discussed the principles governing the award of fees in class actions and then addressed itself to a novel question presented by unusual facts. Members of the Los Angeles police and fire departments were denied a certain salary increase. A police department employee filed a class action seeking the increase, and shortly afterwards the employees' Protective League filed a similar class action. The league's members included 9,000 of the 10,000 employees. The trial judge found that both actions were proper

class actions, and that the actions should be consolidated. He then entered judgment for retroactive salary increases, which judgment was affirmed on appeal. As to attorneys' fees, the problem was that the league's attorneys had contracted to a limit of 5% of the fund for any award to them, while the attorneys for the individual employee had no contract. The judge awarded the league's attorneys 7.5% of the fund and the employee's attorneys 2.5% of the fund. *Held*, the 7.5% award to the league attorneys was in excess of the equitable powers of the court, for it was bound to honor the contract limitation. (45 C.A.3d 282.) The judgment was accordingly modified to give them only 5% of the total fund received by the league's members, and 7.5% of the total fund received from nonmembers. (45 C.A.3d 284.) (See *Bank of America v. Cory* (1985) 164 C.A.3d 66, 90, 91, 210 C.R. 351 [common fund created from recovery of dormant bank accounts under Unclaimed Property Law].)

SUPPLEMENT: [This section is current through the latest supplement]



87 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

1. Recovery of Common Fund.

c. Fees Denied.

7 *Witkin Cal. Proc. Judgm* § 251

[§ 251] Fees Denied.

In *San Francisco v. Sweet* (1995) 12 C.4th 105, 48 C.R.2d 42, 906 P.2d 1196, defendant pedestrian was struck by an automobile. He was treated at plaintiff county's hospital, but was unable to pay for treatment. He later sued the driver and obtained a settlement. Plaintiff county asserted a lien, under *Govt.C. 23004.1*, in defendant's action against the driver, and defendant's attorney set aside a portion of defendant's net recovery to satisfy the lien, reduced by what he believed to be plaintiff's proportionate share of attorneys' fees. Plaintiff then sued defendant and his attorney to recover the full amount of the lien. The trial judge determined that the common fund doctrine applied and reduced plaintiff's recovery on the lien by a pro rata share of defendant's attorneys' fees. *Held*, reversed.

(a) The common fund doctrine does not apply. The doctrine has no applicability when the relationship of the litigation plaintiff and the hospital lien claimant is that of debtor and creditor. (12 C.4th 118.) A personal injury action is not an action taken for the benefit of the plaintiff's creditor; it is prosecuted for the benefit of the plaintiff. The creditor's right to payment is not contingent on litigation that creates a fund. Thus, no equitable principles justify departure from the rule that each party to litigation pay its own fees. (12 C.4th 116, 117, approving *Lindsey v. Los Angeles* (1980) 109 C.A.3d 933, 167 C.R. 527.)

(b) In enacting *Govt.C. 23004.1*, the Legislature did not intend that the common fund doctrine apply to reduce the county's lien recovery. The Legislature did not provide for apportionment of attorneys' fees in every case but instead gave the county the discretion to compromise its claim in individual cases. The Legislature did not indicate any intention to change the rule that each party pay its own fees. (12 C.4th 120.)

Among the other decisions denying fees are the following:

Tulare v. Dinuba (1928) 205 C. 111, 127, 270 P. 201 [action by private attorney to recover fund belonging to county that had legal department with duty to obtain money].

Gabrielson v. Long Beach (1961) 56 C.2d 224, 229, 14 C.R. 651, 363 P.2d 883 [attorney who represented his own and client's interest in attempting by litigation and otherwise to secure oil interests in tidelands was not entitled to fees;

if ultimate objective is not to secure or preserve common fund but to establish personal adverse interests in fund, fees may not be awarded].

Grady v. Pacific Mut. Life Ins. Co. of Calif. (1964) 61 C.2d 673, 676, 39 C.R. 914, 394 P.2d 730 [attorneys for certain claimants took same position as Insurance Commissioner did; their participation was not necessary to full presentation of issues, and they did not recover fund].

Bank of America v. West End Chemical Co. (1940) 37 C.A.2d 685, 696, 100 P.2d 318 [fees were denied where action was on behalf of only two classes of stock].

Mann v. Superior Court (1942) 53 C.A.2d 272, 280, 127 P.2d 970 [intervenor was denied fees].

Heffernan v. Bennett & Armour (1952) 110 C.A.2d 564, 588, 243 P.2d 846 [action to set aside fraudulent conveyance].

Estate of Phelps (1955) 132 C.A.2d 850, 853, 283 P.2d 293 [services in obtaining partial distribution; "Compensation from estate funds is allowed for necessary services in preserving or enhancing assets of an estate, not for taking money out of it"].

Estate of Bullock (1955) 133 C.A.2d 542, 547, 284 P.2d 960 [although claimant performed legal services of value to estate, his position conflicted with that of other beneficiaries, primary purpose of services was personal benefit, and other beneficiaries or their attorneys rendered substantially same services; "where, as in the instant case, the other interested parties all retained counsel, the equitable rule of paying from the general fund does not apply"].

Estate of Korthe (1970) 9 C.A.3d 572, 576, 88 C.R. 465 [there were many beneficiaries of estate and nearly all were represented by other counsel].

Lovett v. Carrasco (1998) 63 C.A.4th 48, 55, 73 C.R.2d 496 [common fund doctrine does not apply to private, contractual medical lienholders; relationship of lienholder and personal injury plaintiff is one of creditor and debtor; following *Sweet*].

Riverside v. Murrieta (1998) 65 C.A.4th 616, 628, 76 C.R.2d 606 [county was not entitled to fees in action challenging city's approval of redevelopment project; as taxing agency, county should be responsible for fees incurred in preserving its share of tax increment funds].

Day v. Alta Bates Med. Center (2002) 98 C.A.4th 243, 251, 119 C.R.2d 606 [quantum meruit action by attorney for malpractice claimant, in which attorney sought compensation for his services from private hospital that had filed lien in malpractice action, was barred by *Sweet* and *Lovett*; hospital was creditor of malpractice claimant and analysis of *Sweet* applies equally to private hospital asserting claim under C.C. 3045.1].

Jordan v. Department of Motor Vehicles (2002) 100 C.A.4th 431, 446, 123 C.R.2d 122 [common fund doctrine did not support fee award in plaintiffs' action seeking refunds of smog impact fees; because Legislature had established refund account under which those who had paid impact fees would receive refund of entire amount plus interest and penalties, attorneys' fees would not be paid out of recovery and borne by all who benefited, but instead would be paid by state; refund account, although established in response to litigation, was not required by it].

SUPPLEMENT: [This section is current through the latest supplement]

See *Northwest Energetic Services, LLC v. Franchise Tax Bd.* (2008) 159 C.A.4th 841, 878, 71 C.R.3d 642 [common fund doctrine did not apply to taxpayer's action for refund; litigation did not result in creation or preservation of fund from which fees could be paid, and taxpayer was seeking recovery of fees, not from fund, but effectively from other California taxpayers through Franchise Tax Board].



88 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

1. Recovery of Common Fund.

d. Effect of Probate Code.

7 *Witkin Cal. Proc. Judgm* § 252

[§ 252] Effect of Probate Code.

Prob.C. 21400 et seq. follow general law in providing that, in the absence of a different testamentary disposition, resort for payment of claims must first be had to property undisposed of by will. (See 14 *Summary* (10th), *Wills and Probate*, §659.) In the case of services to the estate, this indicates the source from which the fee is to be paid, and renders it both unnecessary and improper to apply the general equitable rule of payment out of the fund (the general assets of the estate). This was the holding in *Estate of Stauffer* (1959) 53 *C.2d* 124, 346 *P.2d* 748.

The testator made a will and then made a gift of his property to P and K. On his death, his heirs instituted a successful will contest establishing undue influence of P and K. A special administrator was then appointed. His attorney sued P and K and recovered property valued at over \$ 173,000. The attorneys were awarded expenses and extraordinary fees of \$ 32,500. The probate judge found that without the attorneys' services there would have been no property in the estate, and that the services were performed for the common benefit of all heirs and beneficiaries under the will. Accordingly, he ordered that the charges be borne ratably by all. *Held*, reversed; payment should be made out of intestate property. (53 *C.2d* 130, 132.)

The heirs contended that their attorneys (who were also the attorneys for the special administrator) were entirely responsible for the restoration of the property because their will contest initiated the proceedings, but, under this decision, the heirs would inherit nothing because the amount of the award equaled the value of one-third of tangible assets held by the special administrator. (53 *C.2d* 133.) The court took a different view. While the heirs created the situation calling for the appointment of a special administrator, it was he, a neutral party, who successfully conducted the litigation to recovery. (53 *C.2d* 134.) A strong dissenting opinion attacks the result in *Stauffer* as "shocking" and "contrary to elementary rules of fairness and justice." (53 *C.2d* 136, 137.) (See *Estate of Harvey* (1964) 224 *C.A.2d* 555, 561, 36 *C.R.* 788.)

SUPPLEMENT: [This section is current through the latest supplement]



89 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

2. Preservation of Common Fund.

7 *Witkin Cal. Proc. Judgm* § 253

[§ 253] Preservation of Common Fund.

In *Estate of Lundell* (1951) 107 C.A.2d 463, 237 P.2d 62, the probate court made an allowance of \$ 12,000 extraordinary fees to attorneys for the executors. Attorneys for the guardian of a minor chief beneficiary objected, appealed, and obtained a reversal, following which the fee was cut to \$ 6,500. *Held*, the objecting attorneys were properly awarded a \$ 2,500 fee out of the assets of the estate. The court relied on *Estate of Reade* (1948) 31 C.2d 669, 191 P.2d 745, notwithstanding the fact that in the present case no fund was recovered or increased; the attorneys merely prevented the executors from depleting an existing fund. The significant fact in both cases was that a fund was preserved, so that "each beneficiary received more than he would otherwise have received because of the services rendered by the attorneys." (107 C.A.2d 465.)

Lundell was followed in *Estate of Swanson* (1959) 171 C.A.2d 437, 340 P.2d 695. "We see no rational distinction between the case of bringing in new property into an estate and the case of protecting the common fund from depletion by excessive claims that the lawful protector of the estate, to wit, the executor or administrator, seeks improperly to have allowed." (171 C.A.2d 441.)

SUPPLEMENT: [This section is current through the latest supplement]



90 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

3. Benefits Without Fund.

a. Fees Allowed.

7 *Witkin Cal. Proc. Judgm* § 254

[§ 254] Fees Allowed.

Most of the early cases awarding fees in the absence of statute or contract refer to the creation or preservation of a fund (see *supra*, §§249, 250), and it has sometimes been assumed that this is a condition to an award. (See *Tanner v. Superior Court* (1941) 43 C.A.2d 732, 736, 111 P.2d 713; *Solorza v. Park Water Co.* (1949) 94 C.A.2d 818, 821, 211 P.2d 891.)

In *Fletcher v. A. J. Industries* (1968) 266 C.A.2d 313, 72 C.R. 146, the court examined the question and approved an award where other benefits were found. Plaintiff shareholders brought a derivative action against defendant corporation and its officer-directors, alleging that the individuals dominated the management and caused damage to the corporation. Defendants president and treasurer moved for security (former Corp.C. 834(b), now Corp.C. 800(c)). After a protracted hearing on the motion, a settlement was negotiated, providing for the addition of new directors, the limitation of defendant president's powers, the resignation of defendant treasurer, and the reference of charges of defendant president's misconduct to a future arbitration proceeding in contemplation of a monetary award to the corporation. The trial judge approved the settlement and ordered that it be performed. Plaintiffs then sought attorneys' fees and costs, which were awarded. *Held*, affirmed.

Defendants (and a dissenting justice) relied on *Solorza* as establishing the California law, and pointed out that no fund was yet in existence, and could only arise from an arbitration proceeding not yet commenced. But the majority characterized the *Solorza* declaration on this point as dictum (266 C.A.2d 323), and then reasoned as follows:

(a) The equitable doctrine was first announced in *Trustees of the Internal Improvement Fund of Florida v. Greenough* (1882) 105 U.S. 527, 26 L.Ed. 1157, a common fund case. It was extended in *Sprague v. Ticonic Nat. Bank* (1939) 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184, where no fund was created, to support an award under the power of equity to do justice as between a party and those benefiting by his litigation. Because California cases have recognized *Greenough* as the source of the basic rule, the *Sprague* extension should also be recognized. (266 C.A.2d 323.)

(b) The same policy reasons favoring policing of corporate management support the extension. (266 C.A.2d 324.) The benefits obtained here were substantial (changes in corporate management, and the economy of an arbitration

proceeding rather than litigation), and it was immaterial that these benefits were achieved by settlement rather than judgment in a contested action. (266 C.A.2d 325.)

The *Sprague* view was later reaffirmed by the United States Supreme Court. (*Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 392, 90 S.Ct. 616, 626, 24 L.Ed.2d 593, 606; see *Hall v. Cole* (1973) 412 U.S. 1, 93 S.Ct. 1943, 1948, 36 L.Ed.2d 702, 710 [award to union member vindicating rights of members in action against union]; *D'Amico v. Board of Med. Examiners* (1974) 11 C.3d 1, 25, 112 C.R. 786, 520 P.2d 10, citing the text; *Young v. Redman* (1976) 55 C.A.3d 827, 836, 128 C.R. 86, citing the text; *Inyo v. Los Angeles* (1978) 78 C.A.3d 82, 87, 144 C.R. 71, infra, §258; 9 A.L.R.3d 1045 [prevailing union member's right to recover attorneys' fees in action against union or union officers]; 7 *Loyola L.A. L. Rev.* 137 [same]; 24 *Santa Clara L. Rev.* 467 [fee awards in consumer class actions].)

The "substantial benefit" theory of *Fletcher* was applied in *Mandel v. Hodges* (1976) 54 C.A.3d 596, 127 C.R. 244. Plaintiff brought an action to enjoin the Governor and other executive officers from ordering the closure of state offices for 3 hours on Good Friday and from granting employees paid time during this period. The appellate court held that the orders and practices violated the freedom of religion provisions of the United States and California Constitutions, and affirmed the trial court's order granting the requested relief. The trial court's order awarding attorneys' fees to counsel for plaintiff was also affirmed. Tax-generated funds were used to pay state employees for the 3-hour period during which they did not work (54 C.A.3d 622), and the saving of those funds was a substantial benefit to the citizens and taxpayers (54 C.A.3d 623). (See *Coalition for Los Angeles County Planning in Public Interest v. Board of Supervisors* (1977) 76 C.A.3d 241, 142 C.R. 766 [action by public interest groups and individuals against county to declare general plan void for violation of governing statutes; class of persons benefited consisted of county residents].)

In *Cziraki v. Thunder Cats* (2003) 111 C.A.4th 552, 3 C.R.3d 419, plaintiff, one of three shareholders in a corporation that was set up to manufacture engine parts, asserted derivative claims against the other two shareholders for breach of fiduciary duty and usurpation of corporate opportunity. Plaintiff alleged that defendants had failed to assign patents to the corporation, which they had agreed to do when the corporation was formed. Plaintiff requested assignment of the patents to the corporation and the imposition of a constructive trust to account for the corporation's lost profits and lost business opportunities. He also asserted individual claims against defendants and requested damages in accordance with those claims. The trial court ordered defendants to assign the patents and to pay the corporation over \$ 250,000, but did not enter a damage award in favor of plaintiff as an individual shareholder. Plaintiff then moved to recover attorneys' fees incurred in successfully prosecuting the derivative action, invoking the common fund and substantial benefits doctrines. The trial court denied the motion. *Held*, reversed and remanded. The trial court erred in concluding that the common fund and substantial benefits doctrines do not apply.

(a) Plaintiff's case created for the corporation both a common fund in the form of the monetary judgment against the majority shareholders and a substantial benefit in the form of the patent assignment, which preserved the corporation's main asset. (111 C.A.4th 558.) The common fund and substantial benefit doctrines apply whenever (1) a shareholder derivative action results in a substantial benefit to the corporation on whose behalf the plaintiff has brought suit, and (2) the judgment does not confer on the plaintiff an individual benefit separate from that received by all of the shareholders. (111 C.A.4th 559.)

(b) *Baker v. Pratt* (1986) 176 C.A.3d 370, 222 C.R. 253, does not prevent application of the doctrines. Like *Baker*, all the shareholders in the corporation here participated in the litigation. Unlike *Baker*, however, the judgment here did not award plaintiff an individual award or benefit, nor did the present case involve the dissolution of the corporate entity. Absent a trial court finding that plaintiff was actually pursuing a personal adverse interest through his derivative claims, there is no reason to apply *Baker*. (111 C.A.4th 561.)

(c) According to defendants' interpretation of the holding in *Baker*, the only time a plaintiff in a derivative action involving a close corporation could properly invoke an equitable doctrine in seeking attorneys' fees would be in a successful action that benefited a shareholder class of a certain, unspecified size or when at least one shareholder had not participated in the litigation. To accept this interpretation would undermine the equitable principles articulated in

Fletcher, namely, encouraging minority shareholders to pursue their rights and thereby promoting corporate governance. Defendants' interpretation would create a negative incentive for a shareholder in a close corporation with few other shareholders to seek a legal remedy or to join an action on behalf of a company in which he or she has any interest. It would have the same effect on an attorney who might otherwise represent such a shareholder in the hope of recovering fees from a better-funded company on whose behalf he or she has litigated. (111 C.A.4th 564.) "Accordingly, we decline to extend *Baker* as a blanket rule disallowing attorney fee awards in any derivative suit merely because the litigation involves the entire class of shareholders in a close corporation." (111 C.A.4th 565.)

SUPPLEMENT: [This section is current through the latest supplement]



91 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

3. Benefits Without Fund.

b. Fees Denied.

7 *Witkin Cal. Proc. Judgm* § 255

[§ 255] Fees Denied.

In *Mandel v. Lackner* (1979) 92 C.A.3d 747, 155 C.R. 269, the court reviewed the award for services in the successful appeal in *Mandel v. Hodges* (1976) 54 C.A.3d 596, 127 C.R. 244, supra, §254, pursuant to the appellate court's vesting of jurisdiction in the trial court to determine the application. The propriety of an award was upheld, but the order was reversed for a proper determination of the amount. The respondent also claimed additional fees on this appeal by the state from the original award. *Held*, no fees could be given. (a) The respondent prevailed in the present appeal only to the extent that she was held entitled to an award. Because this point was conceded by appellant, respondent is not a prevailing party on the appeal "in any real sense." (92 C.A.3d 759, 760.) (b) The "substantial benefit" to the public produced in *Mandel v. Hodges* was fully realized by the decision on that appeal; respondent's attorneys are now representing their own interests. (92 C.A.3d 760.)

The following are among the other cases denying fees:

Baker v. Pratt (1986) 176 C.A.3d 370, 380, 222 C.R. 253 [fees will be denied where action involves dispute of two persons in their individual capacities or corporate entities owned by one or both of the parties; analyzing *Fletcher v. A. J. Industries* (1968) 266 C.A.2d 313, 72 C.R. 146, supra, §254, and holding its rule inapplicable].

Johnson v. Tago (1986) 188 C.A.3d 507, 518, 233 C.R. 503 [substantial benefit exception is limited to "successful" plaintiffs; hence, shareholders involved in proxy fight were not entitled to attorneys' fees prior to determination of winner].

Consumer Cause v. Mrs. Gooch's Natural Food Markets (2005) 127 C.A.4th 387, 398, 25 C.R.3d 514 [unnamed member of putative class who successfully blocked proposed class settlement was not entitled to fees, where objector's efforts did not confer substantial benefit on class of beneficiaries subject to court order; putative class members could have opted out of proposed settlement, claims preserved by rejection of settlement lacked substantial merit, and putative class members (general public) were no longer before court to be assessed for fair share of fees].

Robbins v. Alibrandi (2005) 127 C.A.4th 438, 451, 25 C.R.3d 387, infra, §323 [benefit of avoiding further

litigation, which may be factor supporting settlement of shareholder derivative action, is not benefit supporting award of fees under substantial benefit doctrine].

Abouab v. San Francisco (2006) 141 C.A.4th 643, 668, 46 C.R.3d 206 [catalyst theory of *Graham v. DaimlerChrysler Corp.* (2004) 34 C.4th 553, 21 C.R.3d 331, 101 P.3d 140, *infra*, §265, applies in substantial benefit actions, but so does its requirement of presuit notification; petitioners who did not meet that requirement could not recover fees].

SUPPLEMENT: [This section is current through the latest supplement]



92 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

a. Equitable Theory.

1. Federal Rejection of Theory.

7 *Witkin Cal. Proc. Judgm* § 256

[§ 256] Federal Rejection of Theory.

The "private attorney general" concept "seeks to encourage suits effectuating a strong congressional or national policy by awarding substantial attorney's fees, regardless of defendants' conduct, to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens." (*D'Amico v. Board of Med. Examiners* (1974) 11 C.3d 1, 27, 112 C.R. 786, 520 P.2d 10; see 24 *Hastings L. J.* 733.)

This concept was favorably received in a number of lower federal court decisions, but in *Alyeska Pipeline Service Co. v. Wilderness Soc.* (1975) 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141, the Supreme Court declared that the federal courts lack power to make this type of an award without statutory authorization. "We do not purport to assess the merits or demerits of the 'American rule' with respect to the allowance of attorneys' fees. It has been criticized in recent years, and courts have been urged to find exceptions to it. It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals." (95 S.Ct. 1628, 44 L.Ed.2d 160; see 89 *Harv. L. Rev.* 170 [criticizing *Alyeska* and discussing test proposed by dissenting opinion]; 10 *Loyola L.A. L. Rev.* 329, 346 [attorneys' fees in taxpayers' actions]; 16 *Santa Clara L. Rev.* 267 [advocating national and local legislation in light of *Alyeska*]; on enactment in 1976 of federal legislation to overcome much of effect of *Alyeska*, see *supra*, §242.)

SUPPLEMENT: [This section is current through the latest supplement]



93 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

a. Equitable Theory.

2. California Adoption of Theory.

7 *Witkin Cal. Proc. Judgm* § 257

[§ 257] California Adoption of Theory.

California Court of Appeal decisions subsequent to *D'Amico v. Board of Med. Examiners* (1974) 11 C.3d 1, 112 C.R. 786, 520 P.2d 10, supra, §256, and *Alyeska Pipeline Service Co. v. Wilderness Soc.* (1975) 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141, supra, §256, refused to recognize the private attorney general theory as the basis for an award where no fund was created. (See *Menge v. Farmers Ins. Group* (1975) 50 C.A.3d 143, 148, 123 C.R. 265 ["If California is to adopt the broad rule, it must either be by legislative action or by a decision of the Supreme Court"]; *Mandel v. Hodges* (1976) 54 C.A.3d 596, 620, 127 C.R. 244; *Anthony v. Superior Court* (1976) 59 C.A.3d 760, 770, 130 C.R. 758.)

But in *Serrano v. Priest* (1977) 20 C.3d 25, 141 C.R. 315, 569 P.2d 1303 (*Serrano III*), the theory was adopted in limited form. After entry of judgment in *Serrano v. Priest* (1976) 18 C.3d 728, 135 C.R. 345, 557 P.2d 929, 8 Summary (10th), *Constitutional Law*, §806, holding that the California system of public school financing was unconstitutional, and prior to the filing of defendants' appeals, plaintiffs' attorneys moved for an award of reasonable attorneys' fees against defendants in their official capacities as officers of the state. The trial judge, considering the three theories advanced by plaintiffs, rejected the "common fund" and "substantial benefit" theories, but awarded \$ 400,000 to each on the "private attorney general" theory. After the appeals were taken, the plaintiffs also sought fees in connection with the appeal. *Held*, they were entitled to both.

(a) *No right on common fund theory.* In the cases supporting awards on this theory, the activities of the party resulted in the preservation or recovery of a certain or easily calculable sum of money--the "fund" from which the fees were to be paid. (20 C.3d 35.) Under the findings of the trial court no fund was created; any money made available for public education would flow from legislative implementation of the judgment, not from the judgment itself. (20 C.3d 36.) And even if it were concluded that money made available because of *Serrano* should be considered a "fund," there is no suggestion that payment could be made out of that fund, for this would diminish the amount made available for educational purposes, and would constitute the improper acceptance of a fee from a client. (20 C.3d 37, and footnote 7.) "[W]here plaintiffs' efforts have not effected the creation or preservation of an identifiable 'fund' of money out of which they seek to recover their attorneys fees, the 'common fund' exception is inapplicable." (20 C.3d 37.)

(b) *No right under substantial benefit theory.* This theory has also been recognized in a number of *California cases*. (20 C.3d 38.) But again, benefits in the form of educational opportunities for children or tax savings for taxpayers would not accrue from the decision, but only from legislative implementation in the manner that the Legislature chooses. (20 C.3d 41.) And benefits of a conceptual or doctrinal character that are shared by the state as a whole do not justify application of the common fund rule. "If the effectuation of constitutional or statutory policy, without more, is to serve as a sufficient basis for the award of attorneys fees in this state, the rationale for such awards must be found in a theory more directly concerned with considerations of this nature." (20 C.3d 42.)

(c) *Award under private attorney general theory.* This theory was described in *D'Amico*, but consideration of its application in California was deferred pending the decision of the United States Supreme Court in *Alyeska Pipeline Service Co.*, which rejected the theory. (20 C.3d 43, 44.) Courts that have accepted the theory have stressed the societal importance of the public policy vindicated. (20 C.3d 45.) Critics have pointed to the lack of objective standards and the necessity of a subjective evaluation by the judge, and a subjective evaluation of a statutory policy may be of questionable propriety. (20 C.3d 46.) But in the present case, the trial court found that the public policy advanced by the litigation was constitutional, and that the benefits are to be widely enjoyed among the citizens of this state. In these circumstances, the award is proper. (20 C.3d 46.) However, "we need not, and do not, address the question as to whether courts may award attorney fees under the 'private attorney general' theory, where the litigation at hand has vindicated a public policy having a statutory, as opposed to, a constitutional basis. The resolution of this question must be left for an appropriate case." (20 C.3d 47.)

(d) *Nature of plaintiffs' organizations is immaterial.* The attorneys were Public Advocates, a nonprofit legal corporation supported by tax-exempt charitable funds, and the Western Center on Law and Poverty, a public interest law center funded by the federal Legal Services Corporation, neither of which may accept fees from clients. But the facts that plaintiffs are under no obligation to pay fees to their attorneys and that they receive funding from charitable and public sources does not preclude the award. "Because the basic rationale underlying the 'private attorney general' theory which we here adopt seeks to encourage the presentation of meritorious constitutional claims affecting large numbers of people, and because in many cases the only attorneys equipped to present such claims are those in funded 'public interest' law firms, a denial of the benefits of the rule to such attorneys would be essentially inconsistent with the rule itself." (20 C.3d 48.) The propriety of these awards under statutory provisions is well established in California, and similar considerations are applicable to an award made under the court's equitable powers. (20 C.3d 48, citing *Horn v. Swoap* (1974) 41 C.A.3d 375, 116 C.R. 113, and *Trout v. Carleson* (1974) 37 C.A.3d 337, 339, 112 C.R. 282, supra, §215.)

(e) *Scope of award.* The direct award made by the trial court to plaintiffs' attorneys, rather than to plaintiffs themselves, was proper under federal and *California cases*. (20 C.3d 47, footnote 21.) The lower court properly calculated the amount of work done and awarded an adequate fee. The award of fees for services on appeal should be made on the same theory as that which sustained the award for trial services. (20 C.3d 49.) (See 66 Cal. L. Rev. 138 [private attorney general rule and public interest litigation in California following *Serrano III*]; 106 A.L.R.5th 523 [state cases that have adopted, applied, or rejected private attorney general doctrine]; on calculation of amount of award, see infra, §304; on codification of theory, see infra, §259; on award to legal aid offices, see infra, §287.)

SUPPLEMENT: [This section is current through the latest supplement]



94 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

a. Equitable Theory.

3. Fees Denied.

7 *Witkin Cal. Proc. Judgm* § 258

[§ 258] Fees Denied.

In *Inyo v. Los Angeles* (1978) 78 C.A.3d 82, 144 C.R. 71, plaintiff county brought an action against defendant city, seeking mandamus to compel defendant to prepare an environmental impact report on its use of Owens Valley groundwater. The writ was granted, the report was filed, and the Court of Appeal held that it was inadequate. Later, plaintiff moved in the Court of Appeal for an award of costs and attorneys' fees against defendant. *Held*, motion denied.

(a) *Background law on right to attorneys' fees.*

(1) Four principles are described in *Serrano v. Priest* (1977) 20 C.3d 25, 141 C.R.315, 569 P.2d 1303 (*Serrano III*), *supra*, §257, but, "[i]t is not certain whether *Serrano III* intended to postulate four separate standards whose discrete verbal forms would govern fee applications; or, whether it merely described several stock situations in which American courts, in the exercise of an historic discretionary power, have been habitually receptive to those applications. The verbalization of separate formulae seemingly requires a court to test each fee claim against each formula posed as its justification." (78 C.A.3d 87.)

(2) The "substantial benefit" rule apparently originated as an *ad hominem* justification for a fee award in a stockholder's action with nonmonetary benefits; the phrase was then employed as useful shorthand. (78 C.A.3d 88, footnote 1.)

(3) The "private attorney general" phrase was coined in a decision involving a private citizen's standing to sue for vindication of a public objective; a *per curiam* opinion of the Supreme Court then used the metaphor in connection with attorneys' fees authorized by a federal statute. (78 C.A.3d 88, footnote 1.)

(b) *Serrano III and C.C.P. 1021.5.* The new statute (see *infra*, §259) did not become effective until after the events leading to this claim, and in rejecting plaintiff's demand on substantive grounds (see *infra*, this section), the following collateral matters are not considered: (1) Whether *C.C.P. 1021.5*, a procedural statute in force at the time of this decision, applies; (2) whether there is any reason to follow *Serrano III's* self-imposed confinement to constitutional

vindications; (3) if *C.C.P. 1021.5* governs, whether its arguable prohibition against awards to public entities governs when two public entities are embroiled; (4) whether either decisional or statutory rules impose liability on defendant city to pay for a legal victory assertedly for the benefit of Californians generally. (78 C.A.3d 89, footnote 3.)

(c) *Plaintiff's showing was insufficient under private attorney general theory.* Plaintiff contended that statewide benefits resulted from its lawsuit by forcing defendant to conserve water, but it failed to show that these benefits were disproportionately important in comparison to its own. The litigation was brought to preserve its own local environmental values, and the victory bulked large enough to warrant the cost of winning it. (78 C.A.3d 90.)

(d) *Plaintiff's showing was insufficient under substantial benefit theory.* "The *substantial benefit* phrase would gain increased accuracy if the adjective *common* were inserted after *substantial*. The dominating quest for justice which prompted equity to grant the award is silent when the applicant has waged his lawsuit for an objective adverse to the interest of the party who is now asked to pay for it. The possibility of a fee award under these circumstances would arouse a conflict between the attorney's interest in the fee and the litigational interest of his client." (78 C.A.3d 91.) Here, the main objective of the action was to limit the city's use of its groundwater resources--an objective hostile to the city's interest. (78 C.A.3d 91.)

(e) *Plaintiff's showing was insufficient under vexatious litigant theory.* Assuming power to make an award on this ground (78 C.A.3d 87, 91), bad faith is the central element found in actions leading to the lawsuit or in the conduct of the litigation. (78 C.A.3d 92.) "Bad faith, as an oppressive quality warranting a fee award, occurs when a defendant contumaciously deprives a plaintiff of his clear legal entitlement, forcing the latter into the expense of rescuing himself through legal action." (78 C.A.3d 92.) In the prior opinion of this court, the authors of defendant's environmental impact report were charged with "wishful misinterpretation" of the project, fallacious assumptions, and "calculated selection" of an erroneous project description. (78 C.A.3d 92.) But there was no bad faith "in the sense of a motive or intention to oppress its opponent in litigation. To equate the misconceptions of the city's environmental impact report with bad faith is indulgence in Monday morning quarterbacking." (78 C.A.3d 93.) (For subsequent treatment of issues involved in *Inyo*, see *Woodland Hills Residents Assn. v. City Council of Los Angeles* (1979) 23 C.3d 917, 154 C.R. 503, 593 P.2d 200, *infra*, §261.)

SUPPLEMENT: [This section is current through the latest supplement]



95 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

b. Codification of Theory.

1. Nature and Scope of Statute.

7 *Witkin Cal. Proc. Judgm* § 259

[§ 259] Nature and Scope of Statute.

(1) *Statutory Authority.* Shortly before the opinion in *Serrano v. Priest* (1977) 20 C.3d 25, 141 C.R. 315, 569 P.2d 1303 (*Serrano III*), supra, §257, was filed, the 1977 Legislature enacted C.C.P. 1021.5, authorizing an award of attorneys' fees to a successful party against one or more opposing parties (see infra, §260) in the following circumstances:

(a) *Public interest.* The action has resulted in the enforcement of an important right affecting the public interest. (C.C.P. 1021.5.)

(b) *Significant benefit.* A significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons. (C.C.P. 1021.5.)

(c) *Necessity and financial burden.* The necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, make the award appropriate. (C.C.P. 1021.5.) This factor consists of two tests. First, was private enforcement necessary, and second, does the financial burden of private enforcement warrant subsidizing the private enforcer's attorney? "The private financial burden test does not require a comparison of public benefits achieved to the plaintiff's personal stake in the case. Rather, it mandates a comparison between the estimated value of the plaintiff's individual stake in the action (which may be nonpecuniary) and the cost of the litigation." (*Lyons v. Chinese Hosp. Assn.* (2006) 136 C.A.4th 1331, 1354, 39 C.R.3d 550 [fees were appropriate in asbestos action where public prosecution would not have been undertaken or successful without plaintiff's involvement and where plaintiff's litigation costs far exceeded estimated value of his case]; on application of necessity and financial burden criterion to public entity, see infra, §285.)

(d) *Preservation of recovery.* The fees should not, in the interest of justice, be paid out of the recovery. (C.C.P. 1021.5.) The interest of justice factor permits the recovery of attorneys' fees when a monetary recovery should not in the interest of justice be the source of fees. If the successful party obtained no monetary recovery, this factor is not relevant. Thus, if a party establishes that he or she is entitled to fees under the statutory criteria, the trial court cannot require the

party to "shoulder the *additional* burden, not contemplated by the statute," of showing that the award is in the interests of justice. (*Lyons v. Chinese Hosp. Assn.*, *supra*, 136 C.A.4th 1355, 1356.)

Later cases and commentators have discussed the differences between the requirements of *Serrano III* and *C.C.P. 1021.5*. (See *Inyo v. Los Angeles* (1978) 78 C.A.3d 82, 89, footnote 3, 144 C.R. 71, *supra*, §258; *Woodland Hills Residents Assn. v. City Council of Los Angeles* (1979) 23 C.3d 917, 932, 154 C.R. 503, 593 P.2d 200, *infra*, §261; C.E.B., Attorney Fee Awards 2d §7.14; 18 *San Diego L. Rev.* 843 [early application of *C.C.P. 1021.5*].)

(2) *No Claim Filing Requirement*. In general, an award may be ordered against, but not in favor of, public entities involved in litigation with private entities, and no claim need be filed for an award against a public entity. (*C.C.P. 1021.5*; see Cal. Civil Practice, 4 Procedure, §33:46 [form; notice of motion for order awarding attorneys' fees based on private attorney general theory]; 73 *Cal. L. Rev.* 1929 [private attorney general doctrine as means of enforcing important rights]; on award in favor of public entity in action involving other public entity, see *infra*, §285.)

(3) *Pleading Requirements*. The intent to seek attorneys' fees under *C.C.P. 1021.5* need not be pleaded in the underlying action; the fees are incidents to the cause. (*Washburn v. Berkeley* (1987) 195 C.A.3d 578, 583, 240 C.R. 784 [fees may be awarded after entry of stipulated judgment unless excluded by stipulation]; but cf. *Feminist Women's Health Center v. Blythe* (1995) 32 C.A.4th 1641, 1675, 1676, 39 C.R.2d 189, *infra*, §268 [fees awarded against defaulting defendants were improper where plaintiff failed to request fees in complaint].)

(4) *Effect of Dismissal Statute*. The statute providing for dismissal of an action not brought to trial within 3 years after a reversal on appeal (see 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §432) is not applicable to the ancillary proceeding on a motion for an award of attorneys' fees under *C.C.P. 1021.5*. (*No Oil v. Los Angeles* (1984) 153 C.A.3d 998, 1006, 200 C.R. 768.)

(5) *No Award for "Obdurate Behavior" of Opposition*. *C.C.P. 1021.5* does not allow for an award of fees for vexatious litigation or a party's "obdurate behavior" during the litigation. The private attorney general doctrine for recovering fees is distinct from the sanctions-based doctrine found in *C.C.P. 128.5* (7 *Cal. Proc.* (5th), *Trial*, §227 et seq.) and other statutes. (*People v. Tehama County Bd. of Supervisors* (2007) 149 C.A.4th 422, 447, 450, 56 C.R.3d 558.)

West's Key Number Digest, Costs 194.42

SUPPLEMENT: [This section is current through the latest supplement]



96 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

b. Codification of Theory.

2. Opposing Party.

7 *Within Cal. Proc. Judgm* § 260

[§ 260] Opposing Party.

In *Connerly v. State Personnel Bd.* (2006) 37 *C.4th* 1169, 39 *C.R.3d* 788, 129 *P.3d* 1, plaintiff successfully challenged the validity of five statutory affirmative action programs. The defendants, various state agencies responsible for enforcing the programs, chose either not to defend the programs or to litigate only issues of standing and justiciability. Instead, a group of organizations and associations ("the advocacy groups") who were generally in favor of the programs actively participated in the litigation, first as amici curiae and then as real parties in interest. After entry of a judgment holding most of the statutory basis for the programs unconstitutional, plaintiff moved for an award of attorneys' fees under *C.C.P. 1021.5*. The trial court granted the motion, calculated the amount of the award, and ordered that the advocacy groups pay 1/6 of the total, with the remainder to be paid by the state agencies. The Court of Appeal affirmed the fee award. *Held*, judgment reversed.

(a) The opposing party that is liable for attorneys' fees under *C.C.P. 1021.5* is generally the agency being sued, "which is responsible for initiating and maintaining actions or policies that are deemed harmful to the public interest and that gave rise to the litigation." (37 *C.4th* 1176, 1177.) By this standard, the advocacy groups "clearly" are not opposing parties; they were responsible neither for enacting nor enforcing the statutes that were judged to be unconstitutional in the underlying litigation. (37 *C.4th* 1177.)

(b) Moreover, amici curiae traditionally have not been considered parties liable for attorneys' fees. (37 *C.4th* 1177.) Although "amici curiae almost by definition have a particular ideological or policy focus that motivates them to participate in certain litigation, notwithstanding the lack of a direct interest in the litigation's outcome," the policy interest of the advocacy groups here in maintaining some affirmative action programs "is no different in kind from that of the typical amicus curiae and no different in substance from like-minded members of the general public." (37 *C.4th* 1179.)

(c) Those found liable for fees under *C.C.P. 1021.5* in past cases "were either real parties in interest that had a direct interest in the litigation, the furtherance of which was generally at least partly responsible for the policy or practice that gave rise to the litigation, or were codefendants with a direct interest intertwined with that of the principal

defendant." (37 C.4th 1181.) The advocacy groups here, by contrast, had only an ideological or policy interest typical of an amicus curiae. (37 C.4th 1181.) Although the advocacy groups acted at times as lead counsel in the litigation, they did so only "at plaintiff's invitation and with the encouragement of the trial court, in order to conduct litigation that would otherwise not have been adversarial." (37 C.4th 1182.)

(d) The existence of the state defendants and their uncontroverted liability for fees fulfill the purpose of *C.C.P. 1021.5*, which is to provide substantial attorneys' fees in actions enforcing important public policies. It is not necessary to make the advocacy groups also liable for those fees. (37 C.4th 1182.) Moreover, the policy of encouraging participation by amicus curiae is not compatible with a rule that would place amicus curiae at risk for attorneys' fees. (37 C.4th 1183.)

Several other decisions deal with determining who is the opposing party. (See *Nestande v. Watson* (2003) 111 C.A.4th 232, 239, 4 C.R.2d 18 [proponents of ballot initiative, who prevailed in attempt to place initiative on ballot, could not recover fees from county officials, who never took legal position against proponents and instead defended initiative's title and summary in action by initiative's opponents; litigant who is allied with prevailing party does not become opposing party simply by failing to litigate as aggressively as prevailing party would like]; *Wal-Mart Real Estate Business Trust v. City Council of San Marcos* (2005) 132 C.A.4th 614, 624, 33 C.R.3d 817 [parties who successfully opposed business's attempt to delay referendum vote were not entitled to fees from city; although city did not oppose business's attempt, neither did it argue against opposition's positions; city merely sought judicial determination of procedure to be followed in counting signatures on referendum petition].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Mejia v. Los Angeles* (2007) 156 C.A.4th 151, 159, 67 C.R.3d 228 [developer, real party in interest in action under California Environmental Quality Act, was opposing party, and fee award against it was proper; developer had direct interest in litigation and participated actively in it, and developer's purported lack of fault was immaterial; following *Connerly v. State Personnel Bd.* (2006) 37 C.4th 1169, 39 C.R.3d 788, 129 P.3d 1, text, p. 843]; *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 C.A.4th 1083, 1093, 69 C.R.3d 184 [public agency that determined whether renovation project qualified as public work was opposing party for purposes of fee award under *C.C.P. 1021.5*; agency was responsible for initiating and maintaining relevant policy decision that was subject of litigation; relying on *Connerly*]; *Ramon v. Santa Clara* (2009) 173 C.A.4th 915, 921, 93 C.R.3d 278 [plaintiff could recover fees incurred opposing defendant county's amicus curiae efforts in related case; although county was not opposing party in related case, it advocated same position as in present case and settled present case based on result in related case; distinguishing *Connerly*].



97 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

c. Criteria for Applying Statute.

1. In General.

7 *Within Cal. Proc. Judgm* § 261

[§ 261] In General.

Woodland Hills Residents Assn. v. City Council of Los Angeles (1979) 23 *C.3d* 917, 154 *C.R.* 503, 593 *P.2d* 200, comprehensively covers the case law background and interpretation of *C.C.P.* 1021.5. Plaintiffs, a residents' association and some individual members, brought a mandamus proceeding against three entities of the City of Los Angeles (the city council, the planning commission, and an advisory agency), challenging approval of a subdivision map. The principal grounds were failure to make specific findings, failure to prepare an environmental impact report before approval, and inconsistency of the subdivision with the general plan. The trial judge rejected all attacks, but on plaintiffs' appeal, the Court of Appeal reversed on the ground of failure to make specific findings that the proposed subdivision was consistent with the general plan, as required by *Topanga Assn. for Scenic Community v. Los Angeles* (1974) 11 *C.3d* 506, 113 *C.R.* 836, 522 *P.2d* 12, 8 *Summary* (10th), *Constitutional Law*, §1056. The appellate court directed the trial judge to remand the matter to the city council, and he did so with the admonition that the necessary findings would have to be made before approval of the map. Plaintiffs then moved for an award of attorneys' fees from defendant city, alleging that the association had neither the resources nor a sufficient stake in the litigation to enable it to finance the action, that their counsel had undertaken the cause on a pro bono publico basis with the expectation of an award in the event of the success, and that the action resulted in a public benefit, in that city authorities would thereafter perform their statutory duties in connection with subdivision approvals. The trial judge denied the motion. *Held*, reversed.

(a) *C.C.P.* 1021.5 is applicable to pending cases. Prior to *Serrano v. Priest* (1977) 20 *C.3d* 25, 141 *C.R.* 315, 569 *P.2d* 1303 (*Serrano III*), supra, §257, an award of attorneys' fees under the private attorney general theory was not explicitly sanctioned. *Serrano III* authorized an award where a litigant vindicated a constitutional right, but left open the question whether the courts had inherent power to make an award where the litigation vindicated a statutory right. This issue need not be reached here because, while the present case was pending on appeal, *C.C.P.* 1021.5 was enacted to authorize an award "without regard to whether the public policy vindicated rests upon Constitution or statute." (23 *C.3d* 931.) Federal and California decisions support the policy of applying procedural changes like attorneys' fees provisions to pending cases. (23 *C.3d* 931.) Accordingly, *C.C.P.* 1021.5 applies to cases pending on appeal at its effective date

(January 1, 1978). (23 C.3d 932.)

(b) *Use of federal cases to interpret C.C.P. 1021.5.* C.C.P. 1021.5 was the Legislature's explicit reaction to the United States Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Soc.* (1975) 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141, supra, §256. The statute is a legislative declaration that California courts have the authority exercised in numerous pre-*Alyeska* federal decisions to award attorneys' fees on a private attorney general theory. Those decisions "will often be helpful and reliable guides in interpreting the various provisions of the California statutes." (23 C.3d 934.)

(c) *First criterion: important right.* The right need not be constitutional, but not all statutory rights can be considered "important." The courts must ascertain the "strength" or "societal importance" of the right involved. (23 C.3d 935.) However, federal cases have found proper application of the private attorney general doctrine in litigation involving racial discrimination, the rights of mental patients, legislative reapportionment, and environmental protection. (23 C.3d 936.) And plaintiffs argue that they have vindicated an important right in requiring a municipality to deny approval to a subdivision inconsistent with the general plan. (23 C.3d 936.) Defendants' answer, that no such right was vindicated by a decision merely restating the procedural requirement of findings laid down in *Topanga*, is unacceptable. The fact that a plaintiff is able to win his or her case on a preliminary issue without adjudication of the important right does not necessarily preclude an award. Hence, the trial judge, exercising equitable discretion under C.C.P. 1021.5, must determine from a "practical perspective" whether the action did serve to vindicate an important right. (23 C.3d 938.)

(d) *Second criterion: significant benefit.* The benefit may be pecuniary or nonpecuniary; hence, the absence of a readily ascertainable economic value does not foreclose an award. The benefit need not be a "tangible" asset or "concrete" gain, but may simply be the effectuation of a fundamental policy (see *Serrano III*). However, not every enforcement of statutory obligations results in a "significant" benefit. The trial judge must determine the significance of the benefit and the size of the class receiving it, "from a realistic assessment" of the gains. (23 C.3d 939, 940.) Here, the judge must resolve the issue raised by the contentions of the parties; i.e., defendants' contention that only a small group of homeowners in the vicinity of the subdivision could benefit, and plaintiffs' contention that all residents of the city will benefit from the litigation's success in requiring conformity with the general plan. (23 C.3d 940.)

(e) *Third criterion: necessity and financial burden of private enforcement.* The necessity is clear, because the action is against the only governmental agencies responsible for subdivision approval. (23 C.3d 941.) Whether the financial burden of private enforcement makes an award appropriate depends on whether the cost of plaintiffs' victory transcends their personal interest, i.e., whether the litigation expenses would place a disproportionate burden on them. (23 C.3d 941, citing *Inyo v. Los Angeles* (1978) 78 C.A.3d 82, 144 C.R. 71, supra, §258.) This issue must be resolved by the trial judge. (23 C.3d 942.)

(f) *Apportionment of fees.* Although C.C.P. 1021.5 "does not specifically address the question of the propriety of a partial award of attorney fees, we believe that if the trial court concludes that plaintiffs' potential financial gain in this case is such as to warrant placing upon them a portion of the attorney fee burden, the section's broad language and the theory underlying the private attorney general concept would permit the court to shift only an appropriate portion of the fees to the losing party or parties." (23 C.3d 942.)

(g) *Substantial benefit doctrine is not applicable.* On remand, the trial judge should determine the entitlement to attorneys' fees only under the private attorney general doctrine codified in C.C.P. 1021.5. The substantial benefit doctrine seeks to prevent unjust enrichment, and usually applies where a common fund is created or preserved or a decision is obtained providing substantial pecuniary benefits to other persons; the "involuntary clients" who receive a substantial gain generally have no cause to complain. (23 C.3d 945; see supra, §§249, 254, 255.) When the benefits become less tangible and more ephemeral, the equity in charging involuntary beneficiaries becomes more problematical. (23 C.3d 945.) Establishing a binding legal precedent under the doctrine of stare decisis is not a sufficient basis for an award. (23 C.3d 946.) Although prior decisions have sustained awards under the substantial

benefit theory under circumstances in which the benefits were no more "concrete" or "actual" than those in this case, the private attorney general concept is the more correct basis. And, because the Legislature has explicitly endorsed that concept, "in this state cases of this nature should appropriately be governed by the private attorney general doctrine." (23 C.3d 948.)

SUPPLEMENT: [This section is current through the latest supplement]



98 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

c. Criteria for Applying Statute.

2. Financial Burden of Private Enforcement.

7 *Witkin Cal. Proc. Judgm* § 262

[§ 262] Financial Burden of Private Enforcement.

The "financial burden of private enforcement" criterion of *C.C.P. 1021.5* (supra, §259) and *Woodland Hills Residents Assn. v. City Council of Los Angeles* (1979) 23 C.3d 917, 154 C.R. 503, 593 P.2d 200, supra, §261, was further defined in *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors* (2000) 79 C.A.4th 505, 94 C.R.2d 205, an environmental land use action brought by a city, a nonprofit public interest corporation, and an unincorporated association. Plaintiffs sued defendant county for failure to comply with the California Environmental Quality Act in approving a large residential subdivision. After losing in the trial court, plaintiffs successfully appealed and then returned to the trial court to request their attorneys' fees for the appeal and for the trial. The trial court denied both requests, concluding that plaintiffs had failed to show that their financial burden in bringing the action was out of proportion to their financial interest in the action. *Held*, reversed and remanded.

(a) The trial court's assessment that plaintiffs' financial burden was not out of proportion to their financial interest was an abuse of discretion. Plaintiffs' declarations that they had no financial incentive or economic stake in the outcome of the litigation were supported by the fact that the only relief they sought was defendant's compliance with constitutional and environmental laws. Plaintiffs' claim that some of them would suffer the physical taking of their real property as a consequence of the development did not contradict their position of no financial incentive; any taking would result in compensation at fair market value. (79 C.A.4th 519.) As for plaintiffs' financial burdens, they devoted about 1,200 hours and \$ 240,000 in fees to the trial and nearly 600 hours of attorney time and \$ 120,000 in attorneys' fees to the appeal of the trial court's initial ruling for defendant. (79 C.A.4th 519, 521.)

(b) On remand, the trial court must consider whether the cost of this litigation, including the trial and appeal, is out of proportion to the plaintiffs' nonfinancial interests in the litigation. The court in *Williams v. San Francisco Bd. of Permit App.* (1999) 74 C.A.4th 961, 88 C.R.2d 565, concluded explicitly that a plaintiff's "personal interest" or "individual stake" under the financial burden criterion can be an aesthetic interest. (79 C.A.4th 514.) According to *Williams*, an aesthetic or environmental interest may be considered sufficient to block an award of attorneys' fees under the financial burden criterion if certain conditions are met: "That interest must be specific, concrete and significant, and these attributes must be based on *objective* evidence. In short, for an aesthetic or environmental interest to block an

award of attorney fees under the financial burden criterion, that interest must function essentially in the same way in the comparative analysis as a financial interest, clearly an objective interest. A subjective, vaguely grounded aesthetic interest, even if 'heart-felt,' will not be considered sufficient; nor will a mere abstract interest in aesthetic integrity or environmental preservation suffice to block an award of attorney fees." (79 C.A.4th 516.) A so-called "nimby" ("not in my backyard") personal interest does not automatically disqualify the party asserting it from meeting the financial burden criterion. (79 C.A.4th 516, 517.)

(c) The fact that plaintiffs' lead attorney will personally benefit from the litigation does not preclude a fee award. The requirement of *C.C.P. 1021.5* that an important public right be enforced and a significant public benefit be conferred protects against improprieties that might result from having the attorney profit from litigation in which he is the largest beneficiary. There are many other plaintiffs in the action. (79 C.A.4th 521.) There was no contention that the attorney "set up" the county or the developer; he was not self-dealing, but rather, according to the evidence, he was self-sacrificing. Nor did the fact that plaintiffs were not responsible for the fees incurred by the attorney, who accepted the case on a contingency fee basis, foreclose an award. Because the basic rationale underlying *C.C.P. 1021.5* is to encourage the presentation of meritorious claims affecting large numbers of people, a denial of the benefits of the rule to such attorneys would be essentially inconsistent with the rule itself. In any event, plaintiffs were responsible for costs. (79 C.A.4th 522.) (See *Punsly v. Ho* (2003) 105 C.A.4th 102, 113, 129 C.R.2d 89 [arrangements involving pro bono counsel and contingency fee counsel do not foreclose award under *C.C.P. 1021.5*; citing *Families Unafraid to Uphold Rural El Dorado County*]; *Otto v. Los Angeles Unified School Dist.* (2003) 106 C.A.4th 328, 333, 130 C.R.2d 512 [fact that police association, rather than individual police officer, bore responsibility for fees incurred by officer in vindicating rights did not preclude award]; on application of financial burden criterion to public entities, see *infra*, §285.)

Courts are not required to consider whether requiring a public agency to pay a plaintiff's attorneys' fees under *C.C.P. 1021.5* imposes an undue hardship on the agency. (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 C.A.4th 493, 518, 83 C.R.2d 850 [fees were properly imposed on Coastal Commission in action successfully challenging Commission's approval of local coastal plan].)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

c. Criteria for Applying Statute.

3. Determination of Criteria by Appellate Court.

7 *Within Cal. Proc. Judgm* § 263

[§ 263] Determination of Criteria by Appellate Court.

In *Los Angeles Police Protective League v. Los Angeles* (1986) 188 C.A.3d 1, 232 C.R. 697, the Court of Appeal had previously issued a published opinion and remanded the cause for the trial court to consider whether fees should be awarded. The trial court denied the request for fees, and the prevailing party (plaintiff) appealed. Defendant city contended that the appellate court should defer completely to the trial court's discretionary determination. *Held*, when a successful legal action results in a published appellate opinion, the appellate court owes only limited deference to the trial court's determination.

(a) "We regard it crucial to distinguish between two situations--when the trial court is considering a court-awarded fee where the litigation began *and ended* at the trial level as contrasted with one which resulted in an appellate decision. In the former situation, the trial court may well be in a better position than the appellate court to assess whether what happened in that court enforced an 'important right affecting the public interest' and 'conferred a significant benefit on the general public or a large class of persons.' Accordingly, the appellate court owes the trial court a full measure of deference in deciding whether the trial court abused its discretion. But the second situation is something quite different. An appellate court is in at least as good a position as the trial court to judge whether the legal right enforced through its own opinion is 'important' and 'protects the public interest' and whether the existence of that opinion confers a 'significant benefit on the general public or a large class of persons.'" (188 C.A.3d 7.)

(b) At least two of the four elements of the *C.C.P. 1021.5* test (significant benefit and important right) are more easily evaluated by appellate courts than by trial courts. "It makes little sense to defer to the discretion of a single trial judge who may have had to make this decision in a matter of moments on the basis of a rather cursory review of the legal field involved when the deferring body would be three judges who have already researched the legal aspects of the case in depth in order to produce a full-fledged appellate opinion on the subject." (188 C.A.3d 8.)

(c) On the third and fourth elements of the test (necessity and burden of private enforcement, and fees should not be paid out of the recovery), the trial court's conclusions merit deference. "On the other hand, except for issues such as witness credibility, the Court of Appeal ordinarily is in just as good a position as the trial judge to estimate benefits,

probabilities of success, and the like. Accordingly, when an appellate court spots a questionable estimate or a faulty calculation it need not shrink from the task of correcting this element of the equation and reassessing whether that change alters the ultimate result." (*188 C.A.3d 11.*)

SUPPLEMENT: [This section is current through the latest supplement]



100 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

d. Causal Connection Required.

1. In General.

7 *Within Cal. Proc. Judgm* § 264

[§ 264] In General.

In *Sacramento v. Drew* (1989) 207 C.A.3d 1287, 255 C.R. 704, plaintiff city brought a validation proceeding under C.C.P. 860 to determine the validity of a special tax assessment district to raise funds for the construction of schools. Defendant answered (as an interested person), challenging the constitutional and statutory authority for the district, and the trial court granted his motion for summary judgment. However, the judge refused defendant's request for attorneys' fees on the grounds that (a) the judge would presumably have reached the same result without defendant's participation, and (b) defendant belatedly raised the winning legal theory. *Held*, order denying fees reversed.

(a) The statutory requirement of necessity of private enforcement (*supra*, §259) "addresses the issue of the comparative availability of *public* enforcement, not the causal relationship between the claimant's action and the result." (207 C.A.3d 1298, citing *Woodland Hills Residents Assn. v. City Council of Los Angeles* (1979) 23 C.3d 917, 154 C.R. 503, 593 P.2d 200, *supra*, §261.) Where an action is brought against governmental agencies and officials, the necessity of private enforcement is obvious. (207 C.A.3d 1299.)

(b) The causal requirement is also stated in the statute. The action must result in enforcement of a right affecting the public interest. "The causal relationship must be such that the result would not have occurred but for the *action* in which the claimant was a successful party." (207 C.A.3d 1299.) The suggestion that another party could have made the successful argument is not a basis for denying an award to the party who did carry the argument. (207 C.A.3d 1301.) And the speculation that the unsuccessful party might renounce its effort or rescind its action, or that the trial court might, on its own initiative, produce the correct result without assistance, contravenes the policy underlying C.C.P. 1021.5. "The statute seeks to induce persons to shoulder a burden disproportionate to their personal financial stake in order to ensure the vindication of important public rights that might otherwise be disregarded. It is inconsistent with this policy to defeat the expectations engendered by the statutory inducement with the claim that the advocates are unnecessary in any but obvious circumstances of inevitable failure. A prospective private attorney general should not have to rely on the prospect that the court will do the right thing without opposition." (207 C.A.3d 1301.)

(c) The city argues that a C.C.P. 1021.5 award is inappropriate in a validation action because the public entity is

responsible for the adjudication benefiting the public and should be rewarded for taking the initiative. But in a validation action, the city "comes as an advocate, with an axe to grind, seeking enforcement of its action, doubtless in order to make its bonds saleable." It cannot preempt *C.C.P. 1021.5* "by a first strike when the prospect of litigation looms." (207 C.A.3d 1302.)

(d) The final argument is that the prevailing statutory claim of invalidity of the district was advanced "belatedly," because defendant's conduct of the litigation obfuscated the issue on which the case was decided and thereby prolonged the case and its attendant expense. But "[a] litigant should not be penalized for failure to find the winning line at the outset, unless the unsuccessful forays address discrete unrelated claims, are pursued in bad faith, or are pursued incompetently." (207 C.A.3d 1303.)

By its terms, *C.C.P. 1021.5* authorizes attorneys' fees if the action results in the enforcement of an important public right affecting the public interest. The success of an ancillary part of the action does not determine whether a party is successful for purposes of the statute. (*Consumer Cause v. Mrs. Gooch's Natural Food Markets* (2005) 127 C.A.4th 387, 402, 25 C.R.3d 514 [unnamed member of putative class who successfully objected to class certification and blocked proposed class settlement was not entitled to fees, where objector's efforts did not result in enforcement of important right affecting public interest; distinguishing *Sacramento v. Drew*]; see *Savaglio v. Wal-Mart Stores* (2007) 149 C.A.4th 588, 603, 57 C.R.3d 215 [newspaper's successful motion to unseal court records was ancillary to action's objective, which was challenge to defendant's labor practices; newspaper, which was not party to action, was not entitled to fees]; 27 California Lawyer 34 (September 2007) [possibility of interim fees under *C.C.P. 1021.5*].)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

d. Causal Connection Required.

2. Relief Obtained Without Judgment.

7 *Witkin Cal. Proc. Judgm* § 265

[§ 265] Relief Obtained Without Judgment.

An award may be appropriate where the plaintiff's action "was a *catalyst* motivating defendants to provide the primary relief sought"; i.e., the plaintiff will be considered a successful party where an important right is vindicated "by activating defendants to modify their behavior." (*Westside Community for Independent Living v. Obledo* (1983) 33 C.3d 348, 353, 188 C.R. 873, 657 P.2d 365 [quoting federal case]; see *Californians for Responsible Toxics Management v. Kizer* (1989) 211 C.A.3d 961, 967, 259 C.R. 599 [it is not necessary that plaintiff achieve favorable final judgment, but only that plaintiff's action "spurred defendant to act or was a catalyst speeding defendant's response," i.e., critical fact is impact of action, not manner of its resolution; citing *Maria P. v. Riles* (1987) 43 C.3d 1281, 240 C.R. 872, 743 P.2d 932, *infra*, §272, and *Folsom v. Butte County Assn. of Governments* (1982) 32 C.3d 668, 186 C.R. 589, 652 P.2d 437, *infra*, §294].)

This rule and its limitations were explored in *Westside*, where the court in a 4 to 3 opinion reversed an order awarding fees. *Govt.C. 11135* bars any program or activity funded by the state from unlawfully discriminating against persons on any of the typical bases, and *Govt.C. 11139.5* directs the Secretary of the Health and Welfare Agency to establish regulations providing guidelines for the determination of discriminatory practices. The statutes were enacted in September, 1977, and in November, 1979, plaintiffs sought mandamus in the superior court to compel defendant Secretary to issue final implementing regulations. Defendant's answer showed diligent efforts to comply with the statutory requirement, including the completion of draft regulations 2 months before plaintiffs' petition was filed and prompt steps to obtain the necessary approval of other agencies. At the hearing on the mandamus petition in December, 1979, defendant told the judge that the draft regulations would be released in January, 1980, and they were released at that time. At a later hearing in January, defendant informed the court that public hearings would be completed in May and that the final regulations would be issued in June. One week after the January hearing, plaintiffs filed a motion under *C.C.P. 1021.5*. The trial judge awarded fees of \$ 10,870, and in July awarded additional fees of \$ 1,538. *Held*, orders reversed.

(a) Federal and California decisions support the proposition that attorneys' fees may be awarded where relief is obtained through a "voluntary" change in the defendant's conduct, through settlement or otherwise. (33 C.3d 352; on

settlement, see *infra*, §294.)

(b) To justify the award, however, "there must be a causal connection between the lawsuit and the relief obtained." (33 C.3d 353.) The federal cases declare that the plaintiff's action must be a "material" factor or have "contributed in a significant way." (33 C.3d 353.) Where there is no such causal connection, fees cannot be awarded. Here, the record showed that the lawsuit was "completely superfluous." There was no evidence to indicate that the issuance of final regulations "occurred even a day earlier than it otherwise would have" as a result of the action. (33 C.3d 353.) (See *Suter v. Lafayette* (1997) 57 C.A.4th 1109, 1136, 67 C.R.2d 420 [plaintiffs who failed to show causal connection between action challenging city's firearms ordinance and amendment of ordinance were not entitled to fees]; on rejection of catalyst theory for determining prevailing party entitled to attorneys' fees under federal statutes, see *Buckhannon Bd. & Care Home v. West Virginia Dept. of Health & Human Resources* (2001) 532 U.S. 598, 121 S.Ct. 1835, 1840, 149 L.Ed.2d 855, 863, *supra*, §240.)

Use of the catalyst theory as the basis for fees under C.C.P. 1021.5 was reaffirmed, with limitations, in *Graham v. DaimlerChrysler Corp.* (2004) 34 C.4th 553, 21 C.R.3d 331, 101 P.3d 140. Defendant truck manufacturer incorrectly marketed the 1998 and 1999 models of one of its trucks as having a 6,400-pound towing capacity, when in fact the trucks could tow only 2,000 pounds. In February 1999, defendant established a response team to address the problem, and by June 1999, it had taken steps to replace its marketing materials and owners manuals and had notified existing buyers of the error. By summer of 1999, defendant had authorized its dealers to offer to repurchase or replace the trucks on a case-by-case basis for those customers who demanded that remedy. Also in the summer of 1999, two public agencies began investigating the problem and requested a response from defendant by the end of August. On August 23, 1999, plaintiffs, several buyers of the trucks, filed an action alleging breach of warranty and requesting return of their purchase or lease payments, compensatory damages, and attorneys' fees. On September 10, 1999, defendant sent a letter to all affected buyers, offering to repurchase or replace their trucks, and the trial court subsequently dismissed plaintiffs' action as moot. Although defendant argued that plaintiffs' action was not a catalyst for defendant's decision to repurchase or replace all the trucks, and that plaintiffs' action was unnecessary given the involvement of the public agencies, the trial court awarded \$ 762,830 in attorneys' fees to plaintiffs under C.C.P. 1021.5. The Court of Appeal affirmed, recognizing the continued viability of the "catalyst theory" in California, despite the rejection of that theory by the United States Supreme Court in *Buckhannon*. *Held*, the catalyst theory remains viable in California, but with certain limitations that the trial court must consider on remand.

(a) The catalyst theory is an application of the principle that courts look to the practical impact of public interest litigation in order to determine whether a party was successful, and therefore potentially eligible for attorneys' fees. (34 C.4th 566, citing *Westside Community for Independent Living*.) That principle is fully consistent with the purpose of C.C.P. 1021.5 to reward attorneys who successfully prosecute cases in the public interest and thereby prevent worthy claimants from being stifled by a lack of legal resources. "We therefore reaffirm our endorsement of the catalyst theory." (34 C.4th 568.)

(b) The reasoning of the Court in *Buckhannon* for rejecting the catalyst theory is unpersuasive. The *Buckhannon* majority relied heavily on the definition of "prevailing party," from Black's Law Dictionary (7th ed., 1999), as a party "in whose favor a judgment is rendered" and concluded that a defendant's voluntary change in conduct lacks the necessary judicial imprimatur on the change. However, "we are aware of no judicial construction or legislative usage in California that limits the terms 'prevailing party' or 'successful party' to the meaning found in the most recent edition of Black's Law Dictionary to the exclusion of other meanings." (34 C.4th 570.) Instead, the term "successful party," as ordinarily understood, means the party that achieves its objectives. (34 C.4th 571.)

(c) Defendant's argument that the catalyst theory must be rejected because C.C.P. 1021.5 requires "enforcement" of an important right is also unpersuasive. It would be contrary to the objectives of C.C.P. 1021.5 to hold that a plaintiff who obtains a final judgment has "enforced" a right, while one whose litigation position is so strong that it compels the defendant to change its conduct to avoid a probable judgment has not. (34 C.4th 572.)

(d) The catalyst theory does not necessarily lead to a complex causal determination. Although the theory may require some fact-finding, it may also save judicial resources by encouraging plaintiffs to discontinue litigation after receiving the remedy sought. Moreover, catalyst theory cases may be resolved by relatively economical, straightforward inquiries by trial court judges familiar with the litigation. Finally, although it is impossible to quantify the "magnitude of the potential and actual abuses by plaintiffs under a catalyst rule or by defendants under its absence," abolishing the catalyst theory is likely to deter attorneys from taking meritorious public interest cases, given that defendants could litigate tenaciously and then avoid paying fees by voluntarily providing relief before entry of a court order. (34 C.4th 574.)

(e) Sensible limitations on the catalyst theory will discourage extortionate lawsuits without discouraging those that genuinely benefit the public interest. A plaintiff seeking fees under the catalyst theory must establish (1) a causal connection between the lawsuit and the relief obtained and (2) that the lawsuit is not frivolous, unreasonable, or groundless. (34 C.4th 575.) In addition, the plaintiff must have reasonably attempted to settle the matter without litigation. "Lengthy prelitigation negotiations are not required, ... but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time." (34 C.4th 577.)

(f) Here, the trial court concluded that plaintiffs' action substantially caused defendant's willingness to repurchase or replace the trucks, but it did not consider the merits of the lawsuit or whether plaintiffs attempted to settle this matter before litigating. Hence, the case must be remanded for a determination of these requirements of the catalyst theory. (34 C.4th 577.)

Three justices dissented, arguing that the catalyst theory, having been repudiated by the United States Supreme Court, should not be resurrected in California, and that plaintiffs would not qualify for fees under the theory in any case because the lawsuit was unnecessary when filed, was moot within a few days, and conferred no substantial public benefit. (34 C.4th 585.) (See 42 *San Diego L. Rev.* 1295 [Graham].)

The following are among the subsequent cases discussing the catalyst theory:

Tipton-Whittingham v. Los Angeles (2004) 34 C.4th 604, 609, 21 C.R.3d 371, 101 P.3d 174 [companion case to *Graham*; recognizing viability of catalyst theory, but reiterating holding from *Westside Community* that fees may not be obtained by merely causing acceleration of issuance of governmental regulations or remedial measures that were ongoing when litigation was filed].

Godinez v. Schwarzenegger (2005) 132 C.A.4th 73, 90, 33 C.R.3d 270 [catalyst theory governed availability of fees where plaintiffs never obtained preliminary injunction or other judicial relief in their action challenging manner in which bond money was allocated; although substantial evidence supported finding that action was catalyst for change in allocation methods, remand was necessary to determine whether action had merit and whether plaintiffs engaged in reasonable attempt to settle dispute before litigating; applying *Graham* retroactively].

Colusa v. California Wildlife Conservation Bd. (2006) 145 C.A.4th 637, 657, 52 C.R.3d 1 [catalyst theory did not apply to action in which plaintiff county achieved desired judicial resolution of issues].

SUPPLEMENT: [This section is current through the latest supplement]

See *Hogar Dulce Hogar v. Community Dev. Com. of Escondido* (2007) 157 C.A.4th 1358, 1364, 69 C.R.3d 250 [association's litigation was catalyst for redevelopment agency's decision to amend tax sharing agreement with county, justifying award of attorneys' fees; citing *Graham v. DaimlerChrysler Corp.* (2004) 34 C.4th 553, 21 C.R.3d 331, 101 P.3d 140, text, p. 853]; *Marine Forests Soc. v. California Coastal Com.* (2008) 160 C.A.4th 867, 878, 74 C.R.3d 32 [corporation that unsuccessfully challenged Coastal Commission order requiring it to remove experimental reef was not entitled to attorneys' fees, even though action resulted in amendment of statute governing composition of Commission; corporation did not achieve primary goal of preventing removal of reef and continued to challenge amended statute and

preamendment action].



102 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

1. Environmental Enforcement, Zoning, and Development Actions.

7 *Witkin Cal. Proc. Judgm* § 266

[§ 266] Environmental Enforcement, Zoning, and Development Actions.

Numerous cases, including the following, have awarded fees to the successful party in environmental enforcement, zoning, and development actions:

Rich v. Benicia (1979) 98 C.A.3d 428, 435, 159 C.R. 473 [action against city to compel preparation of environmental impact report in case where there was considerable community interest and controversy; following *Woodland Hills Residents Assn. v. City Council of Los Angeles* (1979) 23 C.3d 917, 154 C.R. 503, 593 P.2d 200, supra, §261].

Save El Toro Assn. v. Days (1979) 98 C.A.3d 544, 159 C.R. 577 [in action challenging subdivision map approval, trial judge properly denied fees under substantial benefits theory, but failed to consider right to fees under C.C.P. 1021.5; following *Woodland Hills*].

San Bernardino Valley Audubon Soc. v. San Bernardino (1984) 155 C.A.3d 738, 753, 202 C.R. 423 [mandamus action attacking board of supervisors' approval of site for cemetery, environmental impact report, and county's general plan].

Kern River Public Access Com. v. Bakersfield (1985) 170 C.A.3d 1205, 1227, 1228, 217 C.R. 125 [action to compel city to require developer to provide public access to navigable river].

Galante Vineyards v. Monterey Peninsula Water Management Dist. (1997) 60 C.A.4th 1109, 1125, 71 C.R.2d 1 [vineyards that successfully challenged certification of water district's environmental impact report were properly awarded 50% of their requested attorneys' fees; reduction recognized that vineyards were pursuing both significant public interest and private interest].

Bolsa Chica Land Trust v. Superior Court (1999) 71 C.A.4th 493, 517, 83 C.R.2d 850 [in plaintiff's action challenging Coastal Commission's approval of local coastal plan, trial court properly divided plaintiff's attorneys' fees

among Commission and two landowners who had vigorously defended Commission's approval; landowners' defense compelled plaintiff to incur substantial attorneys' fees, making imposition of costs equitable].

Friends of the Trails v. Blasius (2000) 78 C.A.4th 810, 832, 93 C.R.2d 193 [plaintiffs' successful action to declare public easement for use of road along side of irrigation canal vindicated important public right to public ownership of public property and conferred significant benefit on public, even though result was only to open 240-foot easement across single lot; measure of benefit of maintaining public access to trail segment is far more than mere segment viewed in isolation].

Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors (2000) 79 C.A.4th 505, 520, 521, 94 C.R.2d 205, supra, §262 [trial court abused discretion in determining that plaintiffs' financial burden in bringing action was not out of proportion to their financial interest in doing so; only relief requested by plaintiffs was defendant's compliance with constitutional and environmental laws, whereas their financial burden totaled over 1,800 hours of attorney time and \$ 360,000 in attorneys' fees for trial and appeal].

Protect Our Water v. Merced (2005) 130 C.A.4th 488, 493, 30 C.R.3d 202 [petitioners, whose mandamus action temporarily set aside county's approval of surface mining project, was prevailing party entitled to fees; appellate opinion that ordered approval set aside, which would not have been required without petitioners' challenge, educated governmental agencies about importance of keeping complete administrative record of decisionmaking process under California Environmental Quality Act].

Bowman v. Berkeley (2005) 131 C.A.4th 173, 176, 31 C.R.3d 447 [neighbors who successfully petitioned on due process grounds to reverse approval of housing development were entitled to fees incurred in connection with due process issue, even though development was ultimately approved; due process problem was significant, proceedings following reversal generated great deal of additional public input on development, and interests of numerous people in approval process were vindicated].

Colusa v. California Wildlife Conservation Bd. (2006) 145 C.A.4th 637, 651, 52 C.R.3d 1 [county's action to force various state agencies to accommodate county's concerns regarding conservation easement in agricultural preserve fostered agencies' present and future compliance with agricultural conservation statute; action resulted in easement being amended to allow perpetual grazing in preserve and would cause agencies to negotiate with counties before imposing additional easements].

Orange v. Barratt Amer. (2007) 150 C.A.4th 420, 441, 58 C.R.3d 542 [developer's action challenging county's use of surplus regulatory fees resulted in reduction of future fees, significantly benefiting those who apply for permits and those who purchase homes in county].

SUPPLEMENT: [This section is current through the latest supplement]

See *Mejia v. Los Angeles* (2007) 156 C.A.4th 151, 157, 67 C.R.3d 228 [homeowner's personal stake in opposing development on adjacent land was substantial, but did not outweigh great financial burden placed on her; award of fees was proper where pursuing litigation required homeowner to deplete her savings and refinance her home]; *Hogar Dulce Hogar v. Community Dev. Com. of Escondido* (2007) 157 C.A.4th 1358, 1364, 69 C.R.3d 250 [association's litigation prompted redevelopment agency to amend tax-sharing agreement with county, and judgment required agency to reimburse low-income housing fund]; *RiverWatch v. San Diego Dept. of Environmental Health* (2009) 175 C.A.4th 768, 776, 96 C.R.3d 362 [environmental organization and Native American tribe were entitled to fees; litigation raised numerous significant environmental and constitutional questions that transcended tribe's personal interest in mitigating impacts to sacred sites and nearby casino; plaintiffs prevailed on three significant environmental compliance issues and were not required to prevail on every issue in order to obtain fees].



103 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

2. Actions Affecting Criminal Justice System.

7 *Witkin Cal. Proc. Judgm* § 267

[§ 267] Actions Affecting Criminal Justice System.

Fees have been awarded under *C.C.P. 1021.5* in actions seeking to improve the criminal justice system. (See *Olney v. Municipal Court* (1982) 133 *C.A.3d* 455, 462, 184 *C.R.* 78 [mandamus proceeding to compel municipal court to allow misdemeanor defendants to appear by counsel, rather than in person; case involved important statutory right and petitioner's personal goal was incidental]; *Daniels v. McKinney* (1983) 146 *C.A.3d* 42, 51, 193 *C.R.* 842 [action on behalf of prisoners in county jail to obtain exercise privileges]; *Gregory v. State Bd. of Control* (1999) 73 *C.A.4th* 584, 598, 86 *C.R.2d* 575 [action by mother of murder victim for reimbursement of funeral and counseling expenses as derivative victim under statutes governing victim compensation fund; plaintiff successfully established that Board of Control (now California Victim Compensation and Government Claims Board) must obtain crime report from police department].)

SUPPLEMENT: [This section is current through the latest supplement]



104 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

3. Abortion Rights.

7 *Witkin Cal. Proc. Judgm* § 268

[§ 268] Abortion Rights.

Fees have been awarded under *C.C.P. 1021.5* in actions to confirm abortion rights. (See *Planned Parenthood Affiliates v. Swoap* (1985) 173 C.A.3d 1187, 1202, 219 C.R. 664 [mandamus proceeding to prevent enforcement of budget act restrictions on appropriations to organizations providing abortion-related services, on ground that restrictions violated single subject rule of Cal. Const., Art. IV, §9]; *Planned Parenthood v. Aakhus* (1993) 14 C.A.4th 162, 169, 17 C.R.2d 510 [upholding award of attorneys' fees under *C.C.P. 1021.5* to abortion clinic that obtained injunctive relief against antiabortion protesters].)

In *Feminist Women's Health Center v. Blythe* (1995) 32 C.A.4th 1641, 39 C.R.2d 189, plaintiff clinic obtained a permanent injunction imposing time, place, and manner restrictions on the confrontational conduct of defendant anti-abortion demonstrators at plaintiff's clinic. The trial judge then awarded plaintiff attorneys' fees under *C.C.P. 1021.5* jointly and severally among all defendants. *Held*, except as to two defendants who failed to answer plaintiff's complaint, the award was proper.

(a) The financial burden of private enforcement made the award appropriate for two reasons. First, defendants overstated the financial benefit to plaintiff from the funds it collects for the medical and abortion services it provides. The cost of litigation exceeded plaintiff's net income for a 3-year period. "Moreover, plaintiff is a nonprofit corporation operating four medical clinics in northern California, and its surpluses are used to subsidize its failing clinics, not to provide dividends for shareholders." (32 C.A.4th 1667.) Second, plaintiff's primary motive in bringing the lawsuit was not to recover lost revenues, but to seek relief in a representative capacity on behalf of women attempting to obtain abortion services at its clinic by ensuring that their access was not restricted unlawfully. (32 C.A.4th 1668, citing *Planned Parenthood v. Aakhus*.)

(b) Defendants' status as private parties did not preclude the award. (32 C.A.4th 1669, citing *Braude v. Automobile Club of Southern Calif.* (1986) 178 C.A.3d 994, 223 C.R. 914, *infra*, §275, and *Planned Parenthood v. Aakhus*.)

(c) The award did not chill defendants' right to free speech. Their conduct "unquestionably exceeded" their free

speech rights and interfered with the exercise by others of the constitutional right to abortion. (32 C.A.4th 1669, citing *Planned Parenthood v. Aakhus* and other cases.) Further, defendants were not prevented from exercising their free speech rights within the lawful limits set forth in the injunction. (32 C.A.4th 1670.)

(d) The judge was not required to apportion the award based on the individual culpability of the defendants and the proportionate impact on plaintiff's litigation costs. This was so because plaintiff was compelled to retain counsel to secure an order enjoining unprotected conduct engaged in by all of the defendants equally. (32 C.A.4th 1671, 1672.)

(e) Defendants' claim that the award was improper based on their belief that they had a constitutional right to demonstrate in plaintiff's parking lot was without merit. A private parking lot is not a public forum that must be made available for the exercise of free speech rights. (32 C.A.4th 1673.) "Moreover, even if they honestly thought the parking lot was a quasi-public forum, defendants had absolutely no basis to believe they had a constitutional right to enter the lot to interfere with the conduct of plaintiff's business and use of the property, to impede the movement of customers or business tenants, to block access, to create noisy disturbances or to harass uninterested patrons." (32 C.A.4th 1674.)

(f) Plaintiff's failure to prevail in attempting to restrict defendants to an area outside the clinic's line of sight did not require reducing the award. Although a reduced award is appropriate when a claimant achieves only limited success (32 C.A.4th 1674, citing *Sokolow v. San Mateo* (1989) 213 C.A.3d 231, 261 C.R. 520, *infra*, §273), here, that attempt was an insignificant part of plaintiff's case, and thus, plaintiff got nearly all it asked for (32 C.A.4th 1674, citing *Sundance v. Municipal Court* (1987) 192 C.A.3d 268, 237 C.R. 269, *infra*, §319).

A dissenting justice argued that the award should have been denied because (a) plaintiff had failed to show that the financial burden of private enforcement was disproportionately greater than its stake in the litigation, and (b) the award unconstitutionally burdened defendants' right to speech. (32 C.A.4th 1677.)

SUPPLEMENT: [This section is current through the latest supplement]



105 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

4. Right To Circulate Petition.

7 *Witkin Cal. Proc. Judgm* § 269

[§ 269] Right To Circulate Petition.

In *Press v. Lucky Stores* (1983) 34 C.3d 311, 193 C.R. 900, 667 P.2d 704, plaintiffs, seeking to qualify an initiative measure for a statewide election, set a goal of at least 500,000 signatures. They circulated petitions on the premises of several privately owned shopping centers, including one location in front of defendant's supermarket. After 5 days of solicitation, plaintiffs were ordered by store officials to stop gathering signatures in front of the store, and were threatened with arrest if they refused to leave. They then sought injunctive relief in the superior court, which issued a preliminary injunction restraining defendant from denying plaintiffs access to the premises. Plaintiffs obtained 3,000 signatures at defendant's store and 556,000 signatures statewide, and the measure qualified but was defeated at the election. After the election, plaintiffs' attorneys (the Center for Law in the Public Interest, a nonprofit corporation) moved for an award of attorneys' fees under C.C.P. 1021.5. *Held*, they were entitled to an award (although the wrong formula was used; *infra*, §316).

(a) Plaintiffs' action resulted in the enforcement of important rights: the fundamental rights of free expression and petition guaranteed by the *California Constitution*. (34 C.3d 318.)

(b) Defendant contended that no "significant benefit" was conferred on the public because the superior court simply applied principles already established in *Robins v. Pruneyard Shopping Center* (1979) 23 C.3d 899, 153 C.R. 854, 592 P.2d 341, 7 *Summary* (10th), *Constitutional Law*, §316. This is unsound. Attorneys' fees have consistently been awarded for the enforcement of well-defined, existing obligations. (34 C.3d 318, citing *Rich v. Benicia* (1979) 98 C.A.3d 428, 435, 159 C.R. 473, and *Friends of "B" Street v. Hayward* (1980) 106 C.A.3d 988, 994, 165 C.R. 514.) Moreover, the declaration of rights in landmark cases would have little meaning if those rights could not be enforced in subsequent litigation. (34 C.3d 318.)

(c) The general public benefited from enforcement of the fundamental constitutional rights of free speech and petition. (34 C.3d 319.) *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 C.3d 158, 166, 188 C.R. 104, 655 P.2d 306, is distinguishable. That litigation protected the plaintiff against an unconstitutional taking of private property; the economic interests involved were not as fundamental as the equal protection rights vindicated in *Serrano*

v. Priest (1976) 18 C.3d 728, 135 C.R. 345, 557 P.2d 929, supra, §257, or the freedom and petition rights involved here. Moreover, the primary effect of the judgment in *Pacific Legal Foundation* was merely to invalidate a condition on land use that affected the value of a single parcel; only the plaintiffs' personal economic interests were advanced by their lawsuit. Here, plaintiffs had no pecuniary interest in the subject of the litigation. (34 C.3d 319, footnote 7.)

(d) Benefits were also conferred on a large class of persons. Plaintiffs were able to use the injunction to gain access to additional shopping centers throughout the state. (34 C.3d 320.) Moreover, even the access gained at the particular store benefited a large class. In addition to the 3,000 signers, countless other persons were educated about a contemporary issue of public importance. (34 C.3d 321.)

(e) The financial burden of private enforcement made the award appropriate, because plaintiffs had no pecuniary interest in the outcome of the litigation. (34 C.3d 321.)

One justice, concurring in the judgment, disagreed with the majority's "apparent assumption" that litigation enforcing fundamental constitutional principles necessarily confers a significant benefit on the general public. In his view, *Serrano III* states separate requirements of (a) an important right and (b) a significant benefit. (34 C.3d 325, citing *Serrano v. Priest* (1977) 20 C.3d 25, 141 C.R. 315, 569 P.2d 1303, supra, §257.) (See *Citizens Against Rent Control v. Berkeley* (1986) 181 C.A.3d 213, 229, 231, 226 C.R. 265 [owners of rental properties who challenged constitutionality of ordinance limiting amount of contributions to campaign committees for or against municipal ballot measures satisfied financial burden of private enforcement criterion; owners' victory in litigation merely gave them opportunity to oppose rent control initiative more vigorously and they continued to defend judgment even after rent control was established].)

SUPPLEMENT: [This section is current through the latest supplement]



106 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

5. Actions Affecting the Electoral Process.

7 *Witkin Cal. Proc. Judgm* § 270

[§ 270] Actions Affecting the Electoral Process.

In *Washburn v. Berkeley* (1987) 195 C.A.3d 578, 240 C.R. 784, plaintiffs sought a writ of mandamus under former Elec.C. 5025 (now Elec.C. 9295), challenging as false and misleading a ballot argument submitted in support of a local initiative measure. Following a settlement and entry of a stipulated judgment, plaintiffs were awarded attorneys' fees under C.C.P. 1021.5 from one of the signatories of the challenged argument. *Held*, award affirmed. The decision resulted in a substantial benefit to the public and no pecuniary benefit to plaintiffs. Although one of the plaintiffs was a member of the city council, which had a competing measure on the ballot, this abstract personal stake or personal interest did not preclude a finding that the cost of plaintiffs' legal victory transcended his personal interest. (195 C.A.3d 584.) The substantial benefit to the public of a successful action under the statute "is obvious, given the significance of ballot arguments in the electoral process." (195 C.A.3d 585.) (For rejection of First Amendment defense, see *infra*, §277.)

In *California Common Cause v. Duffy* (1987) 200 C.A.3d 730, 246 C.R. 285, plaintiffs filed a taxpayers' action for declaratory and injunctive relief against defendant sheriff, to establish the illegality of using his staff and supplies for the distribution of postcards opposing a vote to retain the Chief Justice at the coming election. The trial judge granted summary judgment for plaintiffs on the declaratory relief claim, and denied injunctive relief as unnecessary because the activity had stopped. The judge then awarded attorneys' fees. *Held*, award affirmed. The opinion examines the factors of prevailing party (200 C.A.3d 741), causation (200 C.A.3d 743), important right (200 C.A.3d 744), significant benefit (200 C.A.3d 749), and necessity and financial burden of private enforcement (200 C.A.3d 750).

In *Hull v. Rossi* (1993) 13 C.A.4th 1763, 17 C.R.2d 457, the trial judge refused to award attorneys' fees under C.C.P. 1021.5 to the authors of 2 ballot measures who successfully (a) defeated attempts to strike 14 statements from election pamphlet arguments in support of the measures, and (b) limited to minor word changes challenges to 4 other statements. *Held*, this was error; the authors were entitled to attorneys' fees. Although the judge correctly found the challenges to be minor, he abused his discretion in finding that any judge would have so found without the aid of the authors' attorneys. That finding was clearly speculative. Moreover, denying a fee award would have a chilling effect on citizens' willingness to participate in the preparation of ballot arguments. (13 C.A.4th 1769.)

Other cases awarding fees in actions affecting the electoral process include the following:

Hammond v. Agran (2002) 99 C.A.4th 115, 132, 120 C.R.2d 646 [city council candidate who successfully pursued appeal to determine whether candidates' statements can lawfully include, under *Elec.C. 13307*, statements of candidates' views or positions, was entitled to portion of fees on appeal attributable to that issue; election was over and candidate had already won, so issue was no longer peculiar to candidate but rather affected all voters and candidates].

Santa Monica v. Stewart (2005) 126 C.A.4th 43, 84, 90, 24 C.R.3d 72 [sponsor of initiative who intervened in successful action requiring city officials to certify initiative was entitled to attorneys' fees, despite trial court's assessment that sponsor's intervention did not contribute to outcome; sponsor's action was necessary private enforcement because no public attorney general was available, and trial court erred in weighing relative contributions of private attorneys general; also, sponsor's financial burden in litigating matter "unquestionably" outweighed its ideological interest in implementing voters' will].

Wal-Mart Real Estate Business Trust v. City Council of San Marcos (2005) 132 C.A.4th 614, 621, 33 C.R.3d 817 [parties who successfully opposed plaintiff's attempt to delay referendum vote were entitled to fees; electorate's constitutional right to referendum vote is important and parties protected rights of thousands of registered voters to proceed in accordance with state law].

SUPPLEMENT: [This section is current through the latest supplement]



107 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

6. Civil Rights of Employees.

7 *Within Cal. Proc. Judgm* § 271

[§ 271] Civil Rights of Employees.

In *Baggett v. Gates* (1982) 32 C.3d 128, 185 C.R. 232, 649 P.2d 874, plaintiffs, four Los Angeles police officers, brought an action against defendants Chief of Police, Board of Police Commissioners, and City of Los Angeles, to prevent disciplinary reassignment to lower grade positions without the administrative appeal provided by the Public Safety Officers' Procedural Bill of Rights (*Govt.C. 3300* et seq.; see 8 *Summary* (10th), *Constitutional Law*, §960). The trial judge granted the requested relief but denied attorneys' fees. *Held*, denial of fees was an abuse of discretion. The litigation conferred a significant benefit on the general public--enforcement of the Bill of Rights Act should help to maintain stable relations between peace officers and their employers. (32 C.3d 143.) And the financial burden placed on plaintiffs was out of proportion to their personal stake in the case. The administrative appeal will not necessarily result in reversal of the decision and hence may not result in any pecuniary benefit to plaintiffs. (32 C.3d 143.)

One justice, dissenting on the issue of the award of fees, pointed out that the fees amounted to about \$ 8,400; that each plaintiff challenged disciplinary sanctions threatening to reduce his salary by \$ 5,000 a year, enough to provide plaintiffs with a substantial financial incentive; and that the fees were actually paid by the Los Angeles Police Protection League, not by plaintiffs themselves. (32 C.3d 145, 146.)

The following are among the other cases in which employees who sought to enforce their civil rights were awarded fees:

Schmid v. Lovette (1984) 154 C.A.3d 466, 476, 201 C.R. 424 [action against school district attacking requirement that employees subscribe to statutory oath disavowing membership in Communist Party].

Henneberque v. Culver City (1985) 172 C.A.3d 837, 846, 218 C.R. 704 [action by police officer to compel administrative appeal on demotion; following *Baggett*].

Hanna v. Los Angeles (1989) 212 C.A.3d 363, 378, 260 C.R. 782 [litigation established availability of remedy for violation of Public Safety Officers Procedural Bill of Rights Act].

Edgerton v. State Personnel Bd. (2000) 83 C.A.4th 1350, 1361, 100 C.R.2d 491 [award was proper where labor union and employee of state agency obtained injunction prohibiting agency from conducting off-duty drug testing of employees; action helped to preserve employees' privacy rights and benefited all state employees who might be subject to testing, and neither union nor any of its members received pecuniary benefit].

Otto v. Los Angeles Unified School Dist. (2003) 106 C.A.4th 328, 332, 130 C.R.2d 512 [upholding award to police officer who vindicated rights found in Public Safety Officers Procedural Bill of Rights Act; costs of prevailing transcended officer's interest in removing memorandum from his personnel file; citing *Baggett*].

Riverside Sheriffs' Assn. v. Riverside (2007) 152 C.A.4th 414, 421, 61 C.R.3d 295 [sheriffs' association was entitled to fees in action under Public Safety Officers Procedural Bill of Rights Act; action forced county to follow law regarding employee representation, which was important for its members, and association bore entire financial burden without obtaining economic benefit; citing *Baggett*].

SUPPLEMENT: [This section is current through the latest supplement]



108 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

7. Civil Rights of Students.

7 *Witkin Cal. Proc. Judgm* § 272

[§ 272] Civil Rights of Students.

In *Slayton v. Pomona Unified School Dist.* (1984) 161 C.A.3d 538, 207 C.R. 705, plaintiff public school students and their parents obtained a writ of mandamus prohibiting school officials from engaging in specified conduct that violated plaintiffs' statutory and constitutional rights. The trial court denied a request for attorneys' fees under C.C.P. 1021.5. *Held*, reversed. Denial of fees was an abuse of discretion.

(a) Plaintiffs were "successful parties" even though they did not prevail on every issue litigated. (161 C.A.3d 546.)

(b) The action vindicated "important rights affecting the public interest," including state and federal constitutional rights to free expression and the right to a free education provided by the state Constitution and statutes. (161 C.A.3d 547.)

(c) The action significantly benefited "a large class of persons," including present and future students in the district and their parents. (161 C.A.3d 552.)

(d) Inasmuch as plaintiffs had no pecuniary interest in the outcome of the litigation, "the necessity and financial burden of private enforcement" made the award appropriate. (161 C.A.3d 552.) (See *Phipps v. Saddleback Valley Unified School Dist.* (1988) 204 C.A.3d 1110, 1119, 251 C.R. 720 [action to compel school district to admit student who tested positive for AIDS].)

In *Maria P. v. Riles* (1987) 43 C.3d 1281, 240 C.R. 872, 743 P.2d 932, plaintiffs brought an action challenging a state statute that required school officials to report students' immigration status. The trial judge granted a preliminary injunction directing defendant State Superintendent of Public Instruction not to implement the statute and to instruct local school districts not to disclose noncitizen students' immigration status. After reports that school districts were disclosing immigration status, the trial judge entered a further order requiring defendant to issue a new memorandum to local districts requiring compliance with the injunction. The statute was thereafter amended to delete the reporting requirement, and, as plaintiffs took no further action, their action was dismissed for failure to bring the case to trial

within 5 years (see 6 *Cal. Proc. (5th), Proceedings Without Trial*, §364 et seq.). Subsequently, plaintiffs' counsel sought attorneys' fees under *C.C.P. 1021.5*, and the trial judge made the award. The Court of Appeal reversed, holding that the dismissal divested the trial judge of jurisdiction and that plaintiffs were not successful litigants, having failed to establish that their action served as a catalyst for change or served to vindicate any important right. *Held*, reversed with directions to affirm the trial court's judgment.

(a) A motion under *C.C.P. 1021.5* is a collateral, ancillary matter that may not be properly heard until the benefit is secure, which in some cases may not be until after final judgment. The trial court retains jurisdiction under *C.C.P.1021.5* to hear an application for fees after the judgment in the underlying action has become final. (*43 C.3d 1289.*)

(b) Although it has been held that a dismissal under the mandatory statute is "jurisdictional," this label is not determinative. Persuasive federal precedent has permitted the award of attorneys' fees under *42 U.S.C., §1988*, notwithstanding that the court was deprived of jurisdiction over the underlying action following its dismissal for mootness. (*43 C.3d 1290.*)

(c) Neither the fact that the state had not implemented the statute at the time plaintiffs brought their action nor the fact that the Legislature's amendment of the statute mooted the action precluded the trial judge's finding that plaintiffs were successful parties under *C.C.P. 1021.5*. Plaintiffs were not required to wait until they suffered harm to seek the injunction, and the record supports the trial judge's finding of threatened harm. By obtaining the preliminary injunction and the subsequent order, plaintiffs vindicated important educational rights of children. "This is precisely the type of public interest lawsuit that the private attorney general doctrine ... was intended to foster." (*43 C.3d 1293.*)

SUPPLEMENT: [This section is current through the latest supplement]



109 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

8. Other Civil Rights.

7 *Witkin Cal. Proc. Judgm* § 273

[§ 273] Other Civil Rights.

(1) *Right To Refuse Medical Treatment*. In *Bouvia v. Los Angeles* (1987) 195 C.A.3d 1075, 241 C.R. 239, plaintiff sought an award of attorneys' fees in a mandamus proceeding in which the Court of Appeal recognized the right of a competent adult to refuse medical treatment and directed the trial court to grant an injunction requiring removal of a feeding tube (see 5 *Summary* (10th), *Torts*, §127). The trial judge refused to make the award on the ground that the Court of Appeal opinion merely reiterated principles articulated in earlier opinions. *Held*, reversed.

(a) "It is well established that the enforcement of existing rights, as well as the creation of new rights, may serve as a basis for awarding fees under the private attorney general doctrine." (195 C.A.3d 1084, citing *Press v. Lucky Stores* (1983) 34 C.3d 311, 193 C.R. 900, 667 P.2d 704, *supra*, §269.)

(b) The decision did more than simply apply well-settled legal principles to a particular factual setting. The Court of Appeal opinion made it clear that the right to refuse medical treatment exists independent of the reasons that may motivate the exercise of that right, and "independent research has revealed no other prior decision, either within or without this state, which expresses such a view." (195 C.A.3d 1084, 1085.)

(2) *Equal Protection Rights*. In *Sokolow v. San Mateo* (1989) 213 C.A.3d 231, 261 C.R. 520, the Patrol, a private organization of men formed to promote civil defense, developed a close relationship with the sheriff's department of defendant county, with its members appointed as deputy sheriffs and receiving valuable services from the sheriff's office. For years, plaintiff woman sought membership, and finally brought this action against the county, the sheriff, and the Patrol, seeking either (a) an injunction against the Patrol excluding qualified women from membership, or (b) an injunction against the county maintaining any affiliation with the Patrol. At a hearing on a motion for summary judgment, plaintiff made it clear that the principal remedy she sought was admission to the Patrol, and that she greatly preferred that to the alternative relief. The trial judge granted summary judgment to plaintiff, requiring the Patrol to choose between its males-only policy and its relationship with the sheriff's department, and the Patrol chose to sever its relationship. Accordingly, the judge made an order specifying the methods by which this severance should be accomplished. Plaintiff then moved for an award of attorneys' fees under 42 U.S.C., §1988 (*supra*, §242) and C.C.P.

1021 (supra, §149). The judge denied the motion on the ground that the primary relief sought was not obtained, and that the secondary relief did not enforce any right affecting the public interest, because the Patrol continued to maintain its males-only policy. (213 C.A.3d 242.) *Held*, order reversed.

(a) The United States Supreme Court has said that the parties may be considered prevailing under the federal statute (42 U.S.C., §1988) "if they succeed on *any significant issue* in litigation which achieves *some of the benefit* the parties sought." (213 C.A.3d 243, citing *Hensley v. Eckerhart* (1983) 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40, *infra*, §314, and *Texas State Teachers Assn. v. Garland Independent School Dist.* (1989) 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866, *supra*, §244.) C.C.P. 1021.5 is slightly different in emphasis and applies to state lawsuits seeking to enforce a broader panoply of rights. (213 C.A.3d 243, 244.)

(b) Plaintiff was successful in vindicating the constitutional right of equal protection, and there were no "special circumstances" justifying denial of fees under 42 U.S.C., §1988. (213 C.A.3d 245.)

(c) Plaintiff was successful in vindicating "an important right affecting the public interest" (equal protection and freedom from governmental involvement in invidious discrimination). (213 C.A.3d 245.) "Litigation enforcing these rights necessarily confers a 'significant benefit' on society as a whole, as well as on the direct victims of sexual discrimination. Moreover, it will deter other governmental entities from undertaking similar activities." Hence, she was entitled to fees under C.C.P. 1021.5. (213 C.A.3d 246.)

(d) The trial judge's decision on the merits in favor of plaintiff cannot be reconciled with its order denying attorneys' fees. The permanent injunction severed the "significant involvement of the County in the Patrol's activities, and ended the special benefits enjoyed by the Patrol at the expense of County taxpayers." (213 C.A.3d 247; for holding of *Sokolow* on amount of fee, see *infra*, §319.)

SUPPLEMENT: [This section is current through the latest supplement]



110 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

9. Action Challenging Business Practices.

7 *Within Cal. Proc. Judgm* § 274

[§ 274] Action Challenging Business Practices.

In *Beasley v. Wells Fargo Bank* (1991) 235 C.A.3d 1407, 1 C.R.2d 459, plaintiffs obtained a judgment in a class action that challenged defendant bank's assessment of fees against credit card customers. After judgment, plaintiffs sought attorneys' fees under C.C.P. 1021.5, and received an award of \$ 1,958,509. Defendant bank appealed, contending that in class action litigation that yields a common fund recovery, attorneys' fees may be paid from the common fund and do not impose a financial burden on private enforcement. *Held*, award affirmed.

(a) The following rule may be extrapolated from the opinion in *Los Angeles Police Protective League v. Los Angeles* (1986) 188 C.A.3d 1, 232 C.R. 697, *supra*, §263: "If the estimated value of a class action common fund recovery, determined as of the time the vital litigation decisions were being made, does not exceed actual litigation costs by a substantial margin, the financial burden of private enforcement is such as to make it appropriate to award attorney fees under section 1021.5. In contrast, if estimated value is substantially more than actual litigation costs, there should be no award under section 1021.5 unless public benefits are very significant." (235 C.A.3d 1415.)

(b) In the present case, the issue is close. However, this consumer protection action has directly benefited hundreds of thousands of the bank's customers, and has undoubtedly been closely watched by lending institutions nationwide. Hence, the public benefits from the litigation make the award appropriate. (235 C.A.3d 1417, 1418.)

(c) Defendant bank also challenged the award of counsel's expenses for expert witness fees and other expenses that were not recoverable as ordinary costs. However, in framing C.C.P. 1021.5 the Legislature relied heavily on the federal decisions before *Alyeska Pipeline Service Co. v. Wilderness Soc.* (1975) 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141. Hence, "we must assume the Legislature intended to adopt the pre-*Alyeska* federal practice of awarding expert witness fees and similar expenses when attorney fees were recoverable in private attorney general cases, consistent with the guiding purpose of encouraging public interest litigation." (235 C.A.3d 1421.)

The following are among the cases awarding fees in actions challenging business practices:

Graham v. DaimlerChrysler Corp. (2004) 34 C.4th 553, 578, 21 C.R.3d 331, 101 P.3d 140, supra, §265 [plaintiffs' action, which caused truck manufacturer to replace or repurchase trucks for which it had greatly overstated towing capacity, conferred significant safety benefit on thousands of consumers; citing *Beasley*].

Notrica v. State Comp. Ins. Fund (1999) 70 C.A.4th 911, 954, 83 C.R.2d 89 [plaintiff who obtained injunction affecting defendant's business practices as they related to over 250,000 employers enforced right of sufficient societal importance to merit attorneys' fee award].

Colgan v. Leatherman Tool Group (2006) 135 C.A.4th 663, 702, 38 C.R.3d 36 [plaintiffs' action to enjoin and penalize manufacturer that had falsely advertised its products as being made in United States enforced important consumer protection laws and significantly benefited substantial number of people].

Lyons v. Chinese Hosp. Assn. (2006) 136 C.A.4th 1331, 1345, 39 C.R.3d 550 [building contractor who obtained injunction requiring building owner to undertake training and notification procedures regarding asbestos exposure was entitled to attorneys' fees, even though contractor obtained no damages for his personal asbestos exposure; contractor succeeded in obtaining relief on significant issue in action].

MBNA America Bank, N.A. v. Gorman (2006) 147 C.A.4th Supp. 1, 8, 54 C.R.3d 724 [credit card holder was entitled to fees after trial court declared arbitration provision in credit card agreement to be unenforceable; important public right to jury trial was vindicated and card holder's financial burden from pursuing action exceeded his personal stake in outcome].

Estrada v. FedEx Ground Package System (2007) 154 C.A.4th 1, 16, 64 C.R.3d 327 [three drivers, who successfully sued package delivery company to establish that they were employees and were entitled to reimbursement for some work-related expenses, were entitled to fees; class action ultimately obtained awards for 209 drivers].

SUPPLEMENT: [This section is current through the latest supplement]

See *Olson v. Automobile Club of Southern Calif.* (2008) 42 C.4th 1142, 1151, 74 C.R.3d 81, 179 P.3d 882 [C.C.P. 1021.5 does not authorize award of expert witness fees; disapproving *Beasley v. Wells Fargo Bank* (1991) 235 C.A.3d 1407, 1 C.R.2d 459, text, p. 868, on this point]; *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 C.A.4th 1083, 1096, 69 C.R.3d 184 [action successfully challenging public agency's determination that renovation project was not public work enforced important right and conferred significant benefit to many; enforcement of prevailing wage policy applicable to public works protects community's private sector workers].



111 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

10. Rights of Members of Nonprofit Corporations.

7 *Witkin Cal. Proc. Judgm* § 275

[§ 275] Rights of Members of Nonprofit Corporations.

In *Braude v. Automobile Club of Southern Calif.* (1986) 178 C.A.3d 994, 223 C.R. 914, plaintiffs, members of defendant club, sued to set aside defendant's election of members to the board of directors. After two trials and two appeals, a major revision by the Legislature of the nonprofit corporation law in response to the litigation, and a revision of the club's by-laws in response to the new law, plaintiffs obtained a judgment in the third trial, which prohibited defendant from using general proxies in contested elections. The trial judge, however, refused to award attorneys' fees. *Held*, plaintiffs were entitled to attorneys' fees under *C.C.P. 1021.5*.

(a) The denial of attorneys' fees under the substantial benefit doctrine was proper. As *Save El Toro Assn. v. Days* (1979) 98 C.A.3d 544, 159 C.R. 577, and other cases have made clear, an award under that theory requires that the benefit "be actual and concrete and not conceptual or doctrinal and not merely the effectuation of a constitutional or statutory policy." (178 C.A.3d 1006.) When the benefit is less tangible and more ephemeral, the "case should be considered under the private attorney general doctrine rather than the substantial benefit doctrine." (178 C.A.3d 1008, citing *Woodland Hills Residents Assn. v. City Council of Los Angeles* (1979) 23 C.3d 917, 932, 154 C.R. 503, 593 P.2d 200, *supra*, §261, and *Save El Toro Assn.*) Although cases such as *Coalition for Los Angeles County Planning in Public Interest v. Board of Supervisors* (1977) 76 C.A.3d 241, 142 C.R. 766, *Mills v. Electric Auto-Lite Co.* (1970) 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593, and *Hall v. Cole* (1973) 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702, permitted an award of fees under the substantial benefit doctrine, the Supreme Court in *Woodland Hills* recognized that the situations involved in those cases should now be handled under *C.C.P. 1021.5*. (178 C.A.3d 1009.) The benefit in this case, opening up the opportunity to participate in the election process, is potential and conceptual rather than actual or concrete. (178 C.A.3d 1008.)

(b) "[M]ost of the limitations imposed on the application of the substantial benefit doctrine are not applicable to the private attorney general concept. Thus, the benefit may be conceptual or doctrinal and need not be actual and concrete; further, the effectuation of a statutory or constitutional purpose may be sufficient." (178 C.A.3d 1011.) The litigation here vindicated important rights of defendant's 1.8 million members and resulted in precedential decisions and statutory revisions of benefit to the members of other nonprofit corporations. (178 C.A.3d 1012.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Choi v. Orange County Great Park Corp.* (2009) 175 C.A.4th 524, 529, 96 C.R.3d 90 [directors of nonprofit corporation charged with developing former military property were entitled to fees after forcing disclosure of documents that corporation relied on in its search for chief executive officer, even though disclosure came as part of settlement, rather than final judgment; document disclosure benefited public by maintaining integrity of selection process, and corporation would not have disclosed documents in absence of directors' action against it].



112 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

11. Action Involving Welfare Benefits.

7 *Witkin Cal. Proc. Judgm* § 276

[§ 276] Action Involving Welfare Benefits.

In *San Diego v. Lamb* (1998) 63 C.A.4th 845, 852, 73 C.R.2d 912, plaintiff county sued defendant, the mother of a 15-year-old girl, for reimbursement of Aid to Families with Dependent Children (AFDC) benefits that plaintiff had paid to the girl after she left defendant's home and had a baby of her own. The trial court ordered reimbursement. *Held*, reversed. The AFDC reimbursement statute (former Welf.C. 11350, 11 *Summary* (10th), *Husband and Wife*, §343) provides for recoupment of benefits only from the "noncustodial parent" of the aided child, meaning here, the father of the 15-year-old girl's baby. In addition, defendant is entitled to her attorneys' fees at both the trial and appellate level under *C.C.P. 1021.5*.

Defendant's successful resistance to plaintiff's attempt to recoup benefits has significantly benefited a large class of persons; parents "whose children abandon the family home to raise children of their own will not be forced to bear the financial burden that appropriately lies with the absent parent of the needy child." (63 C.A.4th 853.) Furthermore, because the reimbursement action was brought by a public agency, the need for private rather than public enforcement of the interests of the benefited class is evident. Finally, defendant, whose legal fees probably exceed the amount of the support order, has taken on a financial burden out of proportion to her individual stake in the case. (63 C.A.4th 853.)

SUPPLEMENT: [This section is current through the latest supplement]



113 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

e. Fees Awarded.

12. No First Amendment Defense.

7 *Witkin Cal. Proc. Judgm* § 277

[§ 277] No First Amendment Defense.

In *Washburn v. Berkeley* (1987) 195 C.A.3d 578, 240 C.R. 784, fees were sought in a mandamus proceeding challenging as false and misleading a ballot argument on a local initiative measure (see *supra*, §270). Real party in interest R, one of the signers, contended that the First Amendment precludes an award of money based on speech about public issues in the absence of findings that the offending statements were knowingly false or in reckless disregard of the truth (see *Gertz v. Robert Welch* (1974) 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789, 5 Summary (10th), *Torts*, §613). *Held*, there was no violation of R's First Amendment rights.

(a) *Gertz* is irrelevant. An award of attorneys' fees under C.C.P. 1021.5 is not compensation for damages caused by a false statement, and no finding of fault is required by that statute. (195 C.A.3d 588.)

(b) The mandamus proceeding under former Elec.C. 5025 (now Elec.C. 9295), which restricted speech by preventing false ballot arguments, was justified by the state's compelling interest in the integrity of the electoral process. The added deterrent effect on speech of the possibility of a fee award does not inhibit speech to a significantly greater degree than does the prospect of the action itself. (195 C.A.3d 589.) (See *Feminist Women's Health Center v. Blythe* (1995) 32 C.A.4th 1641, 1670, 39 C.R.2d 189, *supra*, §268 [attorneys' fees awarded to women's health clinic, which obtained permanent injunction restricting confrontational conduct of antiabortion demonstrators, did not violate demonstrators' free speech rights].)

SUPPLEMENT: [This section is current through the latest supplement]



114 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

f. Fees Denied.

1. Defense of Criminal Case.

7 *Witkin Cal. Proc. Judgm* § 278

[§ 278] Defense of Criminal Case.

In *Fogelson v. Municipal Court* (1981) 120 C.A.3d 858, 175 C.R. 64, petitioner, convicted of violating a city ordinance, obtained a reversal on appeal, and the municipal court dismissed the criminal proceeding. Petitioner then filed a motion for attorneys' fees of \$ 35,000. *Held*, the claim was properly denied. "[N]othing so much as winks at the possibility that section 1021.5 might be applied to attorney's fees incurred in the defense of criminal cases." (120 C.A.3d 861.) It is of no consequence that the same result--invalidation of the ordinance--could have been obtained in an action for an injunction or declaratory relief. Petitioner did not seek those forms of civil relief. (120 C.A.3d 863.)

SUPPLEMENT: [This section is current through the latest supplement]



115 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

f. Fees Denied.

1A. (New) Opposing Party Did Nothing To Adversely Affect Public Interest.

7 Witkin Cal. Proc. Judgm § 278A

[§ 278A] (New) Opposing Party Did Nothing To Adversely Affect Public Interest.

C.C.P. 1021.5 does not authorize an award of attorneys' fees against an individual "who has done nothing to adversely affect the rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public." (*Adoption of Joshua S. (2008) 42 C.4th 945, 949, 70 C.R.3d 372, 174 P.3d 192.*) In *Joshua S.*, after obtaining a California Supreme Court opinion validating "second parent" adoption, the same-sex partner of a child's birth mother adopted the child, while the mother remained a coparent. The partner then sought attorneys' fees under *C.C.P. 1021.5* against the birth mother, who had opposed the adoption. The trial court awarded fees, but the Court of Appeal reversed, concluding that the partner's personal stake in the litigation was so large that a private attorney general award was not justified. *Held*, affirmed.

(a) An "unspoken" justification for departing from the American rule that each party must pay his or her own fees is that it is equitable to impose public interest attorneys' fees on parties that have done something to adversely affect the public interest. (*42 C.4th 954.*) *C.C.P. 1021.5* refers to the "enforcement" of an important right affecting the public interest. (*42 C.4th 956.*) This implies that those on whom fees are imposed have acted in a way that violates or compromises an important right, thereby requiring enforcement through litigation. (*42 C.4th 956.*)

(b) In *Connerly v. State Personnel Bd. (2006) 37 C.4th 1169, 39 C.R.3d 788, 129 P.3d 1*, text, §260, the state, rather than amici curiae who had unsuccessfully argued in favor of state affirmative action policies, was liable for fees. *Connerly* acknowledged that "the parties against whom attorney fees should be assessed should be those responsible for the policy or practice adjudged to be harmful to the public interest." (*42 C.4th 957.*)

(c) The birth mother here was a private litigant with no institutional interest in the litigation. She sought a judgment that would have settled her own private rights and those of her children and her former partner. In the course of the litigation, she raised an issue that gave rise to an important appellate precedent. (*42 C.4th 957.*) She did nothing to adversely affect the public interest other than being on the losing side of an important appellate case. *C.C.P. 1021.5* was not intended to impose fees on an individual in that category. (*42 C.4th 958.*)

SUPPLEMENT: [This section is current through the latest supplement]



116 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

f. Fees Denied.

2. No Public Interest Vindicated.

7 *Witkin Cal. Proc. Judgm* § 279

[§ 279] No Public Interest Vindicated.

Orders denying fees have been upheld, and orders granting fees have been reversed, in a number of cases in which the plaintiff's action did not vindicate an important public interest.

In *Bruno v. Bell* (1979) 91 C.A.3d 776, 154 C.R. 435, plaintiff, an attorney, proceeded in pro. per. to successfully challenge the validity of a statute providing for distribution to counties of rental income received by the state as a result of its acquisition of real property for highway purposes. The trial judge awarded plaintiff \$ 30,000 in fees on the theory that the saving of administrative expenses conferred a substantial benefit on California taxpayers. *Held*, reversed. "[T]he strength or societal importance of the public policy vindicated by this decision is de minimis." (91 C.A.3d 786.) Plaintiff purported to be representing himself as a party litigant and at the same time claimed entitlement to attorneys' fees for his services; litigation so motivated does not require the added incentive of an award of fees. (19 C.A.3d 787.)

In *Beach Colony II v. California Coastal Com.* (1985) 166 C.A.3d 106, 212 C.R. 485, the trial court awarded attorneys' fees to the successful plaintiff in an action litigating the avulsion rights of property owners in the coastal zone. *Held*, the award was an abuse of discretion. Although the litigation enforced important property rights affecting the public interest and benefited present and future owners of property within environmentally sensitive areas, there was no showing that plaintiff's financial burden transcended its personal financial interest. (166 C.A.3d 111.) C.C.P. 1021.5 "was not designed as a method of rewarding litigants motivated by their own pecuniary interests who only coincidentally protect the public interest." (166 C.A.3d 114.)

There are numerous examples of cases, including the following, in which private, not public, rights were vindicated and thus fees were not allowed:

Pacific Legal Foundation v. California Coastal Com. (1982) 33 C.3d 158, 166, 188 C.R. 104, 655 P.2d 306 [plaintiff's successful appeal merely vindicated rights of owners of single parcel and did not confer benefit on large class].

Grimsley v. Board of Supervisors (1985) 169 C.A.3d 960, 966, 213 C.R. 108 [no important right affecting public interest was vindicated, where action merely alerted county officials to procedural defect in adoption of general plan].

Leiserson v. San Diego (1988) 202 C.A.3d 725, 738, 249 C.R. 28 [cameraman who was arrested for refusal to leave jetliner crash site was primarily interested in obtaining civil damages for himself in tort action; litigation was not designed to promote media rights, and cameraman's request for fees was properly denied].

Mandicino v. Maggard (1989) 210 C.A.3d 1413, 1419, 1420, 258 C.R. 917 [plaintiff was properly denied award of fees in mandamus proceeding against city clerk seeking deletion of ballot pamphlet arguments; minimal modifications did not confer significant benefit on voters; distinguishing *Washburn v. Berkeley* (1987) 195 C.A.3d 578, 240 C.R. 784, supra, §270].

King v. Lewis (1990) 219 C.A.3d 552, 556, 268 C.R. 277 [small, insignificant changes in impartial analysis prepared for county referendum did not vindicate important public right or benefit; distinguishing *Washburn v. Berkeley*].

Balch Enterprises v. New Haven Unified School Dist. (1990) 219 C.A.3d 783, 795, 268 C.R. 543 [developer, who successfully challenged school district's imposition of school facilities fee on new commercial and industrial construction within district was not entitled to fees; school facilities fee was overturned only because of school district's failure to comply with technical, procedural requirements of authorizing statute, and thus, no important public right or benefit was vindicated].

Wang v. Division of Labor Standards Enforcement (1990) 219 C.A.3d 1152, 1161, 268 C.R. 669 [any public benefit resulting from general contractor's challenge of administrative interpretation of *Lab.C. 1021.5* (imposition of penalty against general contractor for contracting with subcontractor who lacks valid contractor's license) was incidental to general contractor's own pecuniary interest; citing *Beach Colony II* and *Austin v. Board of Retirement of Los Angeles* (1989) 209 C.A.3d 1528, 258 C.R. 106, infra, §280].

Christward Ministry v. San Diego (1993) 13 C.A.4th 31, 49, 16 C.R.2d 435 [fees were properly denied to plaintiff challenging adequacy of environmental impact report for landfill expansion; public benefits were insignificant or achieved apart from lawsuit, and plaintiff's private property interests were real basis for suit].

Kistler v. Redwoods Community College Dist. (1993) 15 C.A.4th 1326, 1336, 1337, 19 C.R.2d 417, supra, §214 [terminated community college administrators who had been unlawfully required to use accrued vacation balances as final wages were not entitled to fees; they were simply seeking wages due them].

Planned Parenthood v. Santa Maria (1993) 16 C.A.4th 685, 691, 20 C.R.2d 391 [fees were properly denied to women's health care organization suing to obtain federal grant to construct new clinic; vindication of privacy rights of public was incidental to organization's attempt to further its own financial interests].

California Licensed Foresters Assn. v. State Bd. of Forestry (1994) 30 C.A.4th 562, 573, 35 C.R.2d 396 [citing *Planned Parenthood v. Santa Maria*; foresters' association was not entitled to fees for successfully challenging state board's emergency regulations where plaintiff's litigation costs were not out of proportion to its stake in the litigation; economic interests of association and its members provided sufficient motivation for challenging regulations].

Family Planning Specialists Med. Group v. Powers (1995) 39 C.A.4th 1561, 1568, 46 C.R.2d 667 [defense of libel action brought after defendant distributed fliers calling plaintiffs "baby killers" did not result in enforcement of free speech rights].

Pacific Mut. Life Ins. Co. v. State Bd. of Equalization (1996) 41 C.A.4th 1153, 1165, 49 C.R.2d 99 [insurance companies' action challenging new insurance premiums tax rate and seeking refunds was for plaintiffs' own strong economic interests; citing *Beach Colony II*].

Olsen v. Breeze (1996) 48 C.A.4th 608, 627, 629, 55 C.R.2d 818 [plaintiff whose lawsuit prompted ski equipment distributors to modify their release of liability forms was not entitled to fees; plaintiff did not vindicate important right inasmuch as skiing is not matter of public interest].

Flannery v. California Highway Patrol (1998) 61 C.A.4th 629, 637, 71 C.R.2d 632 [plaintiff's action under Fair Employment and Housing Act, alleging discrimination and wrongful termination by government agency, primarily vindicated her own personal right and economic interest].

Draeger v. Reed (1999) 69 C.A.4th 1511, 1524, 82 C.R.2d 378 [driver's action challenging suspension of his driver's license did not confer significant public benefit; although action clarified law relating to out-of-state drunk driving convictions, it affected relatively small class of persons with multiple convictions in California and other states].

Ryan v. California Interscholastic Federation (2001) 94 C.A.4th 1033, 1043, 114 C.R.2d 787 [foreign high school student's successful action to require defendant to rescind its ineligibility requirements did not confer significant benefit on large class of people; trial court did not declare rights of all high school student athletes, but merely found that record did not support denial of eligibility to plaintiff].

Punsly v. Ho (2003) 105 C.A.4th 102, 114, 129 C.R.2d 89 [nature and extent of benefit conferred on public by litigation challenging grandparents' visitation rights could not be fully assessed; even though litigation resulted in published appellate opinion finding that visitation statute was unconstitutional as applied, law in area was still evolving].

Baxter v. Salutory Sportsclubs (2004) 122 C.A.4th 941, 944, 19 C.R.3d 317 [plaintiff whose lawsuit prompted health club to make minor changes to its membership contracts was not entitled to fees; no club member, and no member of public, had experienced any harm from wording of former contracts and club probably would have corrected contracts without litigation if given opportunity].

Consumer Cause v. Mrs. Gooch's Natural Food Markets (2005) 127 C.A.4th 387, 400, 25 C.R.3d 514 [unnamed member of putative class who successfully objected to class certification and blocked proposed class settlement was not entitled to fees; objector's efforts did not result in enforcement of important right affecting public interest where putative class members already had right to opt out of both class and settlement and where parties to action continued with it as initially filed].

Concerned Citizens of La Habra v. La Habra (2005) 131 C.A.4th 329, 334, 31 C.R.3d 599 [petitioners who successfully asserted defect in city's compliance with California Environmental Quality Act were not entitled to fees; trial court characterized defect as "minute blemish" that could be repaired, and rejected all of petitioners' other claimed defects, and thus petitioners' action did not confer significant benefit on large class of people].

DiPirro v. Bondo Corp. (2007) 153 C.A.4th 150, 196, 62 C.R.3d 722 [manufacturer of automobile touch-up paint did not confer significant benefit on public by successfully arguing that paint did not require specific warnings; essence of manufacturer's defense was advancement of its own economic interests].

SUPPLEMENT: [This section is current through the latest supplement]

See *Roybal v. Governing Bd. of Salinas City Elementary School Dist.* (2008) 159 C.A.4th 1143, 1148, 72 C.R.3d 146 [laid-off school psychologists who successfully sued for reinstatement were not entitled to fees; at best, their action revealed deficiencies in district's layoff procedure on one occasion; action did not vindicate rights of other state teachers or even other laid-off district employees].



117 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

f. Fees Denied.

3. No Financial Burden of Private Enforcement.

7 *Witkin Cal. Proc. Judgm* § 280

[§ 280] No Financial Burden of Private Enforcement.

In *Ciani v. San Diego Trust & Savings Bank* (1994) 25 C.A.4th 563, 30 C.R.2d 581, plaintiff and the Attorney General filed simultaneous and essentially identical actions to prevent defendant from demolishing buildings plaintiff considered part of San Diego's architectural heritage. Temporary restraining orders were granted in both actions, and demolition was stayed pending appeal of the demolition permit before the Coastal Commission under the Permit Streamlining Act (*Govt.C. 65920 et seq.*). Ultimately, demolition was allowed with some modification. Plaintiff then sought attorneys' fees under *C.C.P. 1021.5*. The trial judge ruled that the private attorney general doctrine rather than the substantial benefit theory applied, that plaintiff's involvement was unnecessary because of the state's active prosecution, and that *C.C.P. 1021.5* was not applicable to fees incurred solely in administrative proceedings. *Held*, affirmed.

(a) *C.C.P. 1021.5* requires that: "(1) the action resulted in the enforcement of an important right affecting the public interest; (2) a significant pecuniary or nonpecuniary benefit was conferred on a large class of persons; and (3) the necessity of private enforcement and the attendant financial burden thereof make the award appropriate." (25 C.A.4th 571, citing *Planned Parenthood v. Aakhus* (1993) 14 C.A.4th 162, 17 C.R.2d 510.) Although plaintiff met the first two criteria, there was no necessity for private enforcement because the state actively prosecuted the dispositive issues. (25 C.A.4th 572.)

(b) Services are necessary and significant when a private party (1) advances significant factual or legal theories not duplicative of those advanced by the state, which are adopted by the court, and (2) produces substantial and significant evidence not duplicative of or cumulative to that produced by the state. (25 C.A.4th 572, citing *Committee To Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 C.A.3d 633, 280 C.R. 329, *infra*, §286.) Here, plaintiff's theory that the Coastal Commission had appellate jurisdiction over the demolition permit under the Permit Streamlining Act was identical to the state's theory. (25 C.A.4th 572.) Further, plaintiff's evidentiary examples of other restored projects rested "on his subjective belief that such evidence caused the judge to issue a T.R.O. in the early stages." The judge, however, refuted plaintiff's role. (25 C.A.4th 573.)

(c) Plaintiff's participation in the postlitigation Coastal Commission proceedings did not entitle him to attorneys'

fees. *C.C.P. 1021.5* requires a substantial benefit. "[T]he mere fact the lawsuit creates the right to commence or pursue collateral administrative proceedings does not automatically allow postlitigation administrative activity to fall under the umbrella of benefits conferred by the lawsuit." (25 *C.A.4th* 574.) The reference to "action" in *C.C.P. 1021.5* means judicial action and does not extend to fees incurred in administrative proceedings. Even if both lawsuit and administrative proceeding share a common factual core, this "commonality does not automatically require the court to treat the 'benefits' from the administrative action as benefits created by the 'action'." (25 *C.A.4th* 574.) The test is whether the activity in the administrative proceedings is useful, necessary, and directly contributes to the lawsuit's resolution. (25 *C.A.4th* 576.)

(d) The substantial benefit doctrine does not apply. The theory permits recovery of attorneys' fees if the litigant's efforts (1) create a substantial, actual and concrete pecuniary or nonpecuniary benefit, (2) the benefit accrues to members of an ascertainable class, and (3) the court's subject matter jurisdiction permits an award apportioning costs proportionately among members of the benefited class. "The doctrine rests on concepts of unjust enrichment: those enriched by an economic windfall should bear their fair share of the costs expended to create the benefits obtained." (25 *C.A.4th* 578.) Plaintiff's participation resulted in intangible and ephemeral benefits; no revenues were increased, expenses were not reduced, and no fund was created to benefit any recognizable group. (25 *C.A.4th* 578.)

In *Satrap v. Pacific Gas & Elec. Co.* (1996) 42 *C.A.4th* 72, 49 *C.R.2d* 348, plaintiff sued defendant utility company for wrongful termination in violation of public policy, breach of contract, and invasion of privacy. The jury found that plaintiff had been terminated without cause in retaliation for his disclosures to the government agency responsible for regulating defendant. Shortly before the jury's verdict, the agency determined that defendant had acted imprudently in procuring gas supplies for its ratepayers, which was essentially what plaintiff had accused defendant of doing before plaintiff was terminated. The jury awarded plaintiff damages totaling over \$ 500,000. The trial judge denied plaintiff's request for attorneys' fees, in the amount of \$ 1.2 million, under *C.C.P. 1021.5*. *Held*, affirmed.

(a) Attorneys' fees are awarded under *C.C.P. 1021.5* when a significant public benefit is conferred through litigation by someone whose personal stake in the litigation would, without the fee award, be insufficient to encourage the litigation. (42 *C.A.4th* 77.) A trial court may deny fees on the ground that the plaintiff's personal stake was not disproportionate to the burden of private enforcement, even if the litigation happens to enforce an important public right or confer a significant public benefit. (42 *C.A.4th* 78.)

(b) Here, the record supports the trial judge's conclusion that plaintiff's personal financial stake was not so disproportionate that he would have declined to bring the lawsuit without the incentive of a fee award. Plaintiff's closing argument and settlement demands indicated that he expected to recover at least \$ 3 million in damages, more than enough to warrant incurring the costs of litigation. Although the jury verdict turned out to be significantly less than plaintiff sought, it was appropriate for the trial judge to rely on evidence of plaintiff's realistic, expected recovery, instead of the amount actually recovered. (42 *C.A.4th* 79.) "Private attorney general fees are not intended to provide insurance for litigants and counsel who misjudge the value of their case, and vigorously pursue the litigation in the expectation of recovering substantial damages, and then find that the jury's actual verdict is not commensurate with their expenditure of time and resources." (42 *C.A.4th* 79, 80.)

(c) The trial judge did not abuse his discretion by considering only the financial burden criterion. Where the judge finds that one criterion is not met, it is unnecessary to make findings concerning the remaining criteria. (42 *C.A.4th* 80, 81.) In any event, plaintiff was not prejudiced by the trial judge's method because plaintiff's showing in support of the other criteria was even less compelling. His privacy claims were directed at vindicating his personal reputation, not any important public right. The utility ratepayers' right not to pay for imprudent practices was enforced by the agency's proceeding, not by plaintiff's lawsuit. (42 *C.A.4th* 81.) Finally, because plaintiff's expected recovery provided adequate incentive for his lawsuit, the lawsuit did not encourage employees to report their employers' violations of the law beyond the encouragement already provided by the "whistleblower" statute (*Lab.C. 1102.5, 3 Summary* (10th), *Agency and Employment*, §284). (42 *C.A.4th* 82.)

A number of decisions have determined that the necessity and financial burden of private enforcement was not sufficient to make an award appropriate:

In re Dormio (1981) 127 C.A.3d 788, 793, 179 C.R. 669 [county jail inmate appeared in pro. per. and was awarded relief potentially of benefit to other inmates; fees were properly denied where there was no financial expenditure for attorney's services].

Austin v. Board of Retirement of Los Angeles (1989) 209 C.A.3d 1528, 1535, 258 C.R. 106 [fees were denied where plaintiff sought to enforce his individual right to interest on award of retroactive retirement benefits and his motive in defending appeal was his economic self-interest; citing *Woodland Hills Residents Assn. v. City Council of Los Angeles* (1979) 23 C.3d 917, 932, 154 C.R. 503, 593 P.2d 200, supra, §261].

Luck v. Southern Pac. Trans. Co. (1990) 218 C.A.3d 1, 30, 267 C.R. 618 [fees were denied where employee sought substantial damages in action for wrongful discharge following her refusal to submit to drug testing; employee demonstrated significant financial incentive for bringing action].

Hawaiian Gardens v. Long Beach (1998) 61 C.A.4th 1100, 1113, 72 C.R.2d 134 [city that successfully sued neighboring city to prevent closure of street on border of both cities was not entitled to fees under C.C.P. 1021.5; because action was tried primarily on administrative record compiled before resolution to close street was adopted, with one brief hearing, burden of litigation did not transcend opposing city's interest in controversy].

Draeger v. Reed (1999) 69 C.A.4th 1511, 1524, 82 C.R.2d 378 [financial burden on driver who challenged suspension of his driver's license, and thereby clarified law relating to out-of-state drunk driving convictions, was not out of proportion to his stake in avoiding 18-month suspension of license].

Williams v. San Francisco Bd. of Permit App. (1999) 74 C.A.4th 961, 966, 88 C.R.2d 565 [plaintiff's need to pursue action to prevent building of large structure next to his personal residence was not out of proportion to his "individual stake" in matter, which was his strong desire to maintain aesthetic integrity of neighborhood and protect his property's privacy and access to light, air, and view; personal stake in litigation need not be purely economic].

Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors (2000) 79 C.A.4th 505, 514, 94 C.R.2d 205, supra, §262 [although trial court abused discretion in determining that plaintiffs' financial burden in bringing action was not out of proportion to their financial interest in doing so, trial court on remand must consider whether that burden is out of proportion to plaintiffs' *nonfinancial* interests; citing *Williams*].

Save Open Space Santa Monica Mountains v. Superior Court (2000) 84 C.A.4th 235, 248, 100 C.R.2d 725, 2 Cal. Evidence (4th), Discovery, Supp., §12 [party opposing motion for fees under C.C.P. 1021.5 should be allowed to conduct discovery to determine whether plaintiff public interest organization was actually litigating primarily for benefit of nonlitigants; if those nonlitigants had prosecuted action in their own names, it is possible that they would have been barred from recovery by cases such as *Williams* and *Hawaiian Gardens*].

Jobe v. Orange (2001) 88 C.A.4th 412, 416, 105 C.R.2d 782 [high school association that successfully defended environmental challenge to its plans to expand school was not entitled to attorneys' fees; although association was nonprofit and probably would not profit financially from increased student enrollment, it had a significant pecuniary interest in physical expansion of school].

Ryan v. California Interscholastic Federation (2001) 94 C.A.4th 1033, 1046, 114 C.R.2d 787 [cost of foreign high school student's successful action to require defendant to rescind its ineligibility requirements was not disproportionate to plaintiff's personal interest in obtaining athletic eligibility].

Hammond v. Agran (2002) 99 C.A.4th 115, 124, 120 C.R.2d 646 [city council candidate who successfully defended his statement in voters pamphlet against allegation that statement was factually misleading was not entitled to attorneys'

fees at trial or on appeal; trial work done by candidate's attorneys was directly and intimately connected to candidate's quest for elective office; pursuing appellate court's ruling that candidate's statement was not misleading, even after candidate had already won election, was directly related to salvaging his reputation].

Caloca v. San Diego (2002) 102 C.A.4th 433, 447, 126 C.R.2d 3 [sheriff's deputies and sheriffs association were not entitled to attorneys' fees for successfully challenging civilian review board's procedures; plaintiffs incurred only \$ 32,500 in fees to bring action in which they had "very concrete personal and pecuniary stake" and for which they had financial incentive].

Punsly v. Ho (2003) 105 C.A.4th 102, 115, 129 C.R.2d 89 [financial burden of mother's litigation challenging grandparents' visitation rights was not out of proportion to mother's individual stake in matter; mother's parental interests in assessing and pursuing her child's best interests formed sufficient incentive to pursue litigation].

Nelson v. Los Angeles (2003) 113 C.A.4th 783, 794, 6 C.R.3d 650 [plaintiff's personal financial stake in wrongful death action against county sheriff was substantial and provided adequate incentive to pursue action; attorneys' fees were not recoverable, despite evidence that sheriff's department changed restraint procedures in response to death of plaintiff's son; citing *Satrap v. Pacific Gas & Elec. Co.*].

Arnold v. California Exposition & State Fair (2004) 125 C.A.4th 498, 509, 22 C.R.3d 790 [plaintiff who challenged bidding and approval process for harness racing contract was not entitled to attorneys' fees; plaintiff's financial interest in obtaining contract for himself was specific, concrete, and significant].

SUPPLEMENT: [This section is current through the latest supplement]

See *Roybal v. Governing Bd. of Salinas City Elementary School Dist. (2008) 159 C.A.4th 1143, 1151, 72 C.R.3d 146* [laid-off school psychologists who successfully sued for reinstatement were not entitled to fees; financial burden of litigation did not transcend their personal interest in obtaining reinstatement and damages].



118 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

f. Fees Denied.

4. Party Was Not Successful.

7 *Witkin Cal. Proc. Judgm* § 281

[§ 281] Party Was Not Successful.

The court may award fees to a "successful" party only. (*C.C.P. 1021.5*.) Cases applying this rule include the following:

Miller v. California Com. on Status of Women (1985) 176 *C.A.3d* 454, 457, 458, 222 *C.R.* 225 [where earlier judgment in plaintiffs' favor was reversed on appeal, plaintiffs were not prevailing parties and were not entitled to attorneys' fees].

Macias v. Municipal Court (1986) 178 *C.A.3d* 568, 579, 580, 223 *C.R.* 756 [although misdemeanor arraignment procedures were modified in response to plaintiff's action, the primary relief sought--assistance of counseling attorney for all misdemeanants--was not achieved because plaintiff lost; award of attorneys' fees was reversed].

Urbaniak v. Newton (1994) 19 *C.A.4th* 1837, 1842, 24 *C.R.2d* 333 [plaintiff suing for wrongful dissemination of positive HIV status was not successful party where multiple defendants were granted summary judgment; citing *Leiserson v. San Diego* (1988) 202 *C.A.3d* 725, 249 *C.R.* 28, *supra*, §279.]

Mapstead v. Anchundo (1998) 63 *C.A.4th* 246, 278, 73 *C.R.2d* 602 [even though opponents of county zoning ordinance persuaded trial judge to overrule county registrar and place referendum challenging ordinance on ballot, they were not successful parties for purposes of *C.C.P. 1021.5*; trial judge should have upheld registrar's decision, and fact that election was held before appellate court could reverse trial court did not make opponents "successful"].

National Parks & Conservation Assn. v. Riverside (2000) 81 *C.A.4th* 234, 238, 96 *C.R.2d* 576 [plaintiff who successfully challenged initial environmental impact report (EIR) and return EIR was not entitled to fees incurred after return EIR was filed; because plaintiff's victory as to return EIR was reversed on appeal, plaintiff was not successful party; however, plaintiff could be entitled to fees incurred during administrative process leading to filing of return EIR].

Schmier v. Supreme Court (2002) 96 *C.A.4th* 873, 878, 117 *C.R.2d* 497 [individual who unsuccessfully sought to

require publication of all appellate court opinions and to enjoin enforcement of rules governing publication of opinions was not entitled to attorneys' fees; plaintiff's action did not realize his objective, because rules governing publication were not deleted or altered, and did not establish new law].

SUPPLEMENT: [This section is current through the latest supplement]

See *Carson Citizens for Reform v. Kawagoe* (2009) 178 C.A.4th 357, 370, 100 C.R.3d 358 [after appellate court reversed judgment for citizens' group, group was no longer successful party entitled to fees; award against city clerk had to be reversed even though clerk had not appealed judgment for group and had not raised any substantive issues].



119 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

f. Fees Denied.

5. Lobbying Efforts.

7 *Witkin Cal. Proc. Judgm* § 282

[§ 282] Lobbying Efforts.

In *Crawford v. Board of Education of Los Angeles* (1988) 200 C.A.3d 1397, 246 C.R. 806, four community groups intervened in a school desegregation action, and the trial court ultimately approved a plan involving voluntary reassignment of students rather than busing. The intervening parties were denied fees on the ground that the approved plan resulted from the passage of an initiative proposition in the November 1979, election, and the political activities of intervenors in supporting the initiative did not meet the criteria for an award. "As we see it, the private attorney general doctrine limits awards of fees to litigants who successfully utilize the *judicial process* to achieve their aims. The doctrine simply does not, nor should it, encompass successful lobbying efforts by those who seek to influence the Legislature or the electorate on any particular issue." (200 C.A.3d 1408.)

SUPPLEMENT: [This section is current through the latest supplement]



120 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

f. Fees Denied.

6. Other Statutory Grounds for Fees Exist.

7 *Within Cal. Proc. Judgm* § 283

[§ 283] Other Statutory Grounds for Fees Exist.

The private attorney general doctrine codified in *C.C.P. 1021.5* is based on the premise that, without some mechanism authorizing a fee award, private actions that effectuate fundamental public policies may be infeasible. Where another statute provides such a mechanism, resort to *C.C.P. 1021.5* is unnecessary. (*Flannery v. California Highway Patrol* (1998) 61 C.A.4th 629, 637, 638, 71 C.R.2d 632 [plaintiff was entitled to fees under *Govt.C. 12965(b)* of Fair Employment and Housing Act (supra, §217); award under *C.C.P. 1021.5* was improper]; see *Weeks v. Baker & McKenzie* (1998) 63 C.A.4th 1128, 1170, 74 C.R.2d 510 [fees were awarded under *Govt.C. 12965(b)*, not *C.C.P. 1021.5*; action vindicated plaintiff's personal rights and economic interest; citing *Flannery*]; *Bell v. Vista Unified School Dist.* (2000) 82 C.A.4th 672, 689, 98 C.R.2d 263 [plaintiff was entitled to fees under *Govt.C. 54960.5* of Brown Act (supra, §225), thus award under *C.C.P. 1021.5* was improper; also, primary focus of action was plaintiff's personal interest in reinstatement at his job and in compensatory damages]; but see *Riverside Sheriffs' Assn. v. Riverside* (2007) 152 C.A.4th 414, 419, 61 C.R.3d 295 [*Govt.C. 3309.5(e)* is not exclusive basis for recovery of fees in action under Public Safety Officers Procedural Bill of Rights Act; sheriffs' association was entitled to fees under *C.C.P. 1021.5*].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Northwest Energetic Services, LLC v. Franchise Tax Bd.* (2008) 159 C.A.4th 841, 873, 875, 71 C.R.3d 642 [prevailing taxpayer in refund action was entitled to fees under *C.C.P. 1021.5*, despite presence of fee provision in *Rev.C. 19717* (text, §231), where ruling for taxpayer could be used by many limited liability companies to seek refunds; *Rev.C. 19717* provides alternative means of recovering fees in limited circumstance in which Franchise Tax Board's position is without substantial justification; distinguishing *Flannery v. California Highway Patrol* (1998) 61 C.A.4th 629, 71 C.R.2d 632, text, p. 882].



121 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

g. Recipients of Fees.

1. In General.

7 Witkin Cal. Proc. Judgm § 284

[§ 284] In General.

C.C.P. 1021.5 provides for a fee award to a "successful" party against an "opposing" party. The statute thus permits awards to defendants as well as plaintiffs. (*San Luis Obispo v. Abalone Alliance (1986) 178 C.A.3d 848, 869, 223 C.R. 846* [affirming award].) A party, for purposes of *C.C.P. 1021.5*, is a litigant by or against whom an action is brought, namely the party plaintiff or defendant. (*Savaglio v. Wal-Mart Stores (2007) 149 C.A.4th 588, 603, 57 C.R.3d 215* [newspaper that successfully moved to unseal court records in action between employees and retailer was not party to action and was not entitled to fees].)

SUPPLEMENT: [This section is current through the latest supplement]



122 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

g. Recipients of Fees.

2. Public Entity.

7 *Witkin Cal. Proc. Judgm* § 285

[§ 285] Public Entity.

(1) *Recovery of Fees Is Possible*. Originally, *C.C.P. 1021.5* did not allow attorneys' fee awards in favor of public entities. In 1993, the statute was amended to authorize an award to a public entity that is the successful party in an action in which one or more opposing parties is also a public entity. A successful public entity is not required to satisfy the presentation of claims requirements of *Govt.C. 900* et seq. (see 3 *Cal. Proc.* (5th), *Actions*, §231 et seq.). A fee award may not be increased or decreased by a multiplier based on extrinsic circumstances as stated in *Serrano v. Priest* (1977) 20 *C.3d* 25, 141 *C.R.* 315, 569 *P.2d* 1303. (*C.C.P. 1021.5*; see *Press v. Lucky Stores* (1983) 34 *C.3d* 311, 193 *C.R.* 900, 667 *P.2d* 704, supra, §269; *California v. Pacific Indem. Co.* (1998) 63 *C.A.4th* 1535, 1552, 75 *C.R.2d* 69 [private attorney general theory is not available when defense counsel is the Attorney General]; *Colusa v. California Wildlife Conservation Bd.* (2006) 145 *C.A.4th* 637, 648, 52 *C.R.3d* 1 [county recovered attorneys' fees in action against various state agencies; county successfully forced agencies to accommodate county's concerns regarding conservation easement in agricultural preserve].)

C.C.P. 1021.5 continues to bar recovery of fees by successful public entities against private parties.

(2) *Application of "Necessity and Financial Burden" Criterion*. The court may award fees if the necessity and financial burden of enforcement by one public entity against another public entity make the award appropriate. (*C.C.P. 1021.5*.) "The question in such a case is not whether *private enforcement* was necessary but whether public enforcement--that is, enforcement by one public entity against another--was necessary. Obviously, in such a case the availability of 'public enforcement' cannot preclude a fee award, or no public entity would ever be able to recover fees under" *C.C.P. 1021.5*. (*People v. Tehama County Bd. of Supervisors* (2007) 149 *C.A.4th* 422, 452, 56 *C.R.3d* 558.) Furthermore, the traditional financial burden criterion (supra, §262) can easily be applied to a public entity that is a political subdivision of the state, by asking whether the public entity deserves a reward for pursuing litigation that was in the interest of a greater spectrum of the public than its own constituents. When, however, the public entity litigant is the state itself, acting through the Attorney General, the action "will always be self-serving, in that the People will always be pursuing their own interests through their chief attorney, whose very *raison d'etre* is to enforce the laws of the state and serve the public interests of the state's population as a whole." (149 *C.A.4th* 456 [fees were not available in

action by People of State of California, through Attorney General, to obtain injunction requiring county supervisors to apply state law].)

SUPPLEMENT: [This section is current through the latest supplement]



123 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

g. Recipients of Fees.

3. Private Party That Cooperates With Public Entity.

7 *Witkin Cal. Proc. Judgm* § 286

[§ 286] Private Party That Cooperates With Public Entity.

In *Committee To Defend Reproductive Rights v. A Free Pregnancy Center (1991) 229 C.A.3d 633, 280 C.R. 329*, plaintiffs filed a complaint seeking injunctive relief based on allegations of false advertising and unfair business practices. The complaint alleged that defendants falsely advertised the center as a medical facility that provided counseling and referral, when in fact it represented an anti-abortion viewpoint, provided no abortion counseling other than to recommend against abortion, and was not a medical facility. Four months after plaintiffs' complaint was filed, the District Attorney filed a similar action on behalf of the People. Despite some differences in the causes of action, the actions were consolidated for trial, and the trial court rendered a judgment restraining defendants from operating the center in such a way as to suggest that abortion services were available there. Plaintiffs' counsel then sought attorneys' fees, and the District Attorney credited them with spurring the involvement of his office in the litigation. The trial court, however, made an order denying fees on the ground that plaintiffs' action was not necessary. *Held*, reversed.

(a) The second criterion of *C.C.P. 1021.5* is the necessity of private enforcement (see *supra*, §259), and the trial court concluded that plaintiffs' action was unnecessary because they filed the action without contacting the District Attorney, and the District Attorney subsequently filed a similar action. (*229 C.A.3d 640.*) This view is incorrect; federal cases have held that private parties who cooperate with governmental officials in litigation are not barred from recovering fees. (*229 C.A.3d 641.*) However, a private party is not eligible for fees in every case of colitigation by way of intervention or consolidation; the award is dependent on a finding that the colitigating private party rendered necessary and significant services of value. (*229 C.A.3d 642.*)

(b) "Important factors the trial court should address in determining if the services of the private party were necessary, so as to support that ultimate finding, are these: (1) Did the private party advance significant factual or legal theories adopted by the court, thereby providing a material non de minimis contribution to its judgment, which were nonduplicative of those advanced by the governmental entity? (2) Did the private party produce substantial evidence significantly contributing to the court's judgment which was not produced by the governmental entity, and which was neither duplicative of nor merely cumulative to the evidence produced by the governmental entity?" (*229 C.A.3d 642.*)

(c) Nothing in the statute or cases suggests that the Legislature intended *C.C.P. 1021.5* to be utilized by private party plaintiffs as a means of obtaining fees from adverse private defendants solely because the plaintiff "beats the district attorney to the courthouse" in filing actions for substantially the same civil relief afforded by the Business and Professions Code. Conversely, the statute does not proscribe payment of fees to private plaintiffs solely because the People have initiated a similar action that is consolidated for trial. (229 C.A.3d 643.) "The trial court ... must carefully walk the line between unreasonably transmuting section 1021.5 into an unwarranted cornucopia of attorney fees for those who intervene in, or initiate litigation against, private parties under the guise of benefiting the public interest while actually performing duplicative, unnecessary, and valueless services; and providing appropriate compensation under that statute in cases where the colitigating private party does render necessary, significant services of value and benefit to the public." (229 C.A.3d 643.)

(d) In determining necessity of services, the trial court is not bound to find them to be such solely because they are explicitly or implicitly characterized as such by the public entity or its attorneys, or solely because the attorney for the public entity elects to consolidate the cases to cooperate with the attorney for the private party. "The court's discretion ... may neither be surrendered to nor dictated by such characterizations or tactical decisions of the lawyers." (229 C.A.3d 644.)

In *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 C.A.4th 499, 63 C.R.2d 118, a private individual, an environmental organization, and a county district attorney sued a ski resort for unfair competition in connection with the resort's cutting of hundreds of trees. Plaintiffs were successful on the merits and the trial judge awarded attorneys' fees to the two private plaintiffs under *C.C.P. 1021.5*. *Held*, award of fees affirmed.

Private enforcement of the action was necessary. The district attorney stated that the scope of the litigation was "too much for his office to handle" and that full-time prosecution of the action would have made prosecution of other offenses impossible. (54 C.A.4th 545.) Primary responsibility for the litigation rested with the individual plaintiff's attorney, and the attorneys for the environmental organization provided expertise in land use and forestry law, as well as historical and factual background knowledge necessary to prosecute the action efficiently. (54 C.A.4th 545, 546.)

SUPPLEMENT: [This section is current through the latest supplement]

In *State Water Resources Control Bd. Cases* (2008) 161 C.A.4th 304, 73 C.R.3d 842, various nonprofit, private organizations and several water agencies sought mandamus relief against the State Water Resources Control Board. The relief was granted, and the private organizations and water agencies requested their attorneys' fees under *C.C.P. 1021.5*. The trial court awarded fees to two of the water agencies, but denied fees for the private organizations, reasoning that the relief the private organizations obtained required the board to do no more than provide the relief that the water agencies had already obtained. *Held*, reversed.

(a) When a public entity, like the Attorney General or a district attorney, whose function it is to represent the general public and ensure proper enforcement, performs its function, there is no need to induce a private attorney general to duplicate the function. The efforts of a colitigating private party should be evaluated on whether they were necessary and significant to the success that was achieved. (161 C.A.4th 316, 317; citing *Committee To Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 C.A.3d 633, 280 C.R. 329, text, p. 884.) If, however, there is no public attorney general available to act, then fees under *C.C.P. 1021.5* must be available to any party, public or private, who takes on the responsibility of enforcement. If more than one party does so, each is eligible for fees, without preference to a particular one. (161 C.A.4th 317, citing *Santa Monica v. Stewart* (2005) 126 C.A.4th 43, 24 C.R.3d 72, text, §270.)

(b) Here, the Attorney General represented the board and thus was not available to pursue enforcement litigation against the board. Other public and private entities had to bring the action instead. The success of the private organizations may not be deemed unnecessary simply because it mirrored the success achieved by the water agencies. (161 C.A.4th 317.) Where a public entity receives fees under *C.C.P. 1021.5* for succeeding in important public interest litigation, "a private party who succeeded alongside the public entity cannot be denied a similar award of fees simply

because the success might have been achieved by the public entity acting alone." (161 C.A.4th 318.)



124 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

g. Recipients of Fees.

4. Legal Services Attorney.

7 *Witkin Cal. Proc. Judgm* § 287

[§ 287] Legal Services Attorney.

In *Folsom v. Butte County Assn. of Governments* (1982) 32 C.3d 668, 186 C.R. 589, 652 P.2d 437, *infra*, §294, plaintiffs were represented by attorneys of several legal service agencies funded primarily with public funds. But the legislative intent in enacting C.C.P. 1021.5, and leading federal cases, make it clear that this circumstance is irrelevant to the determination of a fee award. (32 C.3d 681, 682, 683.) "Thus we rule it no barrier to a section 1021.5 award that the attorneys involved are employed by publicly funded legal services organizations." (32 C.3d 683.) (See *Serrano v. Priest* (1977) 20 C.3d 25, 141 C.R. 315, 569 P.2d 1303, *supra*, §257; *In re Marriage of Ward* (1992) 3 C.A.4th 618, 623, 4 C.R.2d 365 [entitlement to award in child custody proceedings]; 87 *Harv. L. Rev.* 411 [award of attorneys' fees to legal aid offices].)

SUPPLEMENT: [This section is current through the latest supplement]



125 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

g. Recipients of Fees.

5. Pro. Per. Litigant.

7 *Witkin Cal. Proc. Judgm* § 288

[§ 288] Pro. Per. Litigant.

A license to practice law is a prerequisite to an award of attorneys' fees under *C.C.P. 1021.5*; thus, a pro. per. litigant is not entitled to fees. (*Atherton v. Board of Supervisors of Orange* (1986) 176 C.A.3d 433, 437, 438, 222 C.R. 56; on general denial of attorneys' fee awards to pro. per. litigants, see *supra*, §163.)

SUPPLEMENT: [This section is current through the latest supplement]



126 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

g. Recipients of Fees.

6. Attorney Who Personally Benefits From Action.

7 *Within Cal. Proc. Judgm § 289*

[§ 289] Attorney Who Personally Benefits From Action.

In *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors* (2000) 79 C.A.4th 505, 94 C.R.2d 205, supra, §262, a city, a nonprofit public interest corporation, and an unincorporated association of concerned citizens successfully sued defendant county for failure to comply with the California Environmental Quality Act in approving a large residential subdivision. Plaintiffs' lead attorney was one of the members of the unincorporated association and owned property near the proposed project site. The trial court denied plaintiffs' request for fees incurred at trial and on appeal. *Held*, reversed. The appellate court rejected defendant's argument that the attorney should not profit from litigation in which he personally was the largest beneficiary. There were 13 other members of the unincorporated association, and plaintiffs also encompassed the 200-member public interest corporation and the city. The status of the attorney here is distinguishable from that of the attorney in *Bruno v. Bell* (1979) 91 C.A.3d 776, 154 C.R. 435, supra, §279. (79 C.A.4th 521.) In *Bruno*, the only plaintiff was an attorney pursuing a legal technicality of de minimis societal importance. Furthermore, the evidence here showed that, rather than self-dealing, the attorney was self-sacrificing. (79 C.A.4th 522.)

SUPPLEMENT: [This section is current through the latest supplement]



127 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

g. Recipients of Fees.

7. Attorney Whose Client Does Not Request Fee Award.

7 Witkin Cal. Proc. Judgm § 290

[§ 290] Attorney Whose Client Does Not Request Fee Award.

In *Lindelli v. San Anselmo* (2006) 139 C.A.4th 1499, 43 C.R.3d 707, an individual and a waste management company filed a petition for a writ of mandamus, challenging respondent town's award of an interim contract to another waste management company. On appeal in that action, the Court of Appeal concluded that respondent had violated the Elections Code by awarding the interim contract before a referendum election challenging a long-term contract could be held. The action was remanded to the trial court to determine whether petitioners were entitled to attorneys' fees under C.C.P. 1021.5. A few days before petitioners' attorneys intended to file a fee motion, however, both petitioners informed the attorneys that they no longer wished to be moving parties in the fee request. The attorneys filed a motion to intervene under C.C.P. 387(a) to request reasonable attorneys' fees and costs under C.C.P. 1021.5. The waste management company that had received the interim contract and the town opposed the motion, and the trial court denied it, concluding that the attorneys lacked standing to seek an award of fees on their own behalf. *Held*, reversed.

(a) *Flannery v. Prentice* (2001) 26 C.4th 572, 110 C.R.2d 809, 28 P.3d 860, *supra*, §218, established that attorneys' fees awarded under Govt.C. 12965 of the Fair Employment and Housing Act (FEHA) "belong, absent an enforceable agreement to the contrary, to the attorneys who labored to earn them. ... In other words, the fee award belongs to the attorney in the first instance and only belongs to the client if an agreement so specifies." (139 C.A.4th 1506.) Govt.C. 12965 authorizes an attorneys' fee award to a "prevailing party" in an action to enforce FEHA, and C.C.P. 1021.5 authorizes one for a "successful party" in an action to enforce an important right affecting the public interest. The two statutes share similar language and purposes, and there is no reason to distinguish between them in the construction of the word "party." (139 C.A.4th 1508.) Moreover, nothing in the language of C.C.P. 1021.5 or its legislative history clearly indicates that the Legislature intended "party" to refer only to a litigant. This court should not construe "successful party" more narrowly than the *Flannery* court construed "prevailing party" in Govt. C. 12965. (139 C.A.4th 1509.) Attorneys' fees awarded under C.C.P. 1021.5 belong, absent an enforceable agreement to the contrary, to the attorneys. (139 C.A.4th 1509, 1510.)

(b) California cases that have rejected intervention or fee requests from attorneys in marital dissolution proceedings or in actions involving claims for fees arising out of contracts between attorneys and their clients are distinguishable.

"The parties have not cited and we have not found any California court" that has denied intervention to counsel seeking fees under *C.C.P. 1021.5*, or any other provision authorizing fee shifting in cases that vindicate fundamental public policies. (*139 C.A.4th 1511.*) Because the fee provision in the marital dissolution context is intended for the spouses' benefit, the attorney's claim for fees arises from the attorney's employment relationship, and it is the attorney who must enforce a contractual lien on the recovery through an independent action against the client. In contrast, the attorneys' interest in the fee award here arises from *C.C.P. 1021.5* itself. That interest will be directly and adversely affected if a final judgment issues before a motion for fees, and the attorneys will forever lose the right to collect fees under *C.C.P. 1021.5*. Thus, the attorneys have a sufficiently direct and immediate interest to permit intervention and a motion for an award of fees. (*139 C.A.4th 1512.*)

(c) The attorneys here are entitled to an award of fees under *C.C.P. 1021.5*. By obtaining a declaration that the interim contract violated the Elections Code stay provisions, petitioners enforced an important right and conferred a significant benefit on the general public. Furthermore, because petitioners did not seek removal of the winner of the interim contract, their appeal provided little potential individual benefit to them. Thus, the necessity and financial burden of private enforcement make an award appropriate. The amount of fees, however, is a factual issue more properly considered by the trial court on remand. (*139 C.A.4th 1517.*)

SUPPLEMENT: [This section is current through the latest supplement]



128 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

h. Nature of Proceeding to Which Statute Applies.

1. Writ Proceeding in Appellate Court.

7 Witkin Cal. Proc. Judgm § 291

[§ 291] Writ Proceeding in Appellate Court.

C.C.P. 1021.5 allows fees in "any action" that meets the statute's criteria concerning public benefit, private enforcement, and the interests of justice. (See *supra*, §259.)

In *Planned Parenthood Affiliates v. Swoap* (1985) 173 C.A.3d 1187, 219 C.R. 664, plaintiffs were entitled to fees in an original mandamus proceeding in the Court of Appeal. Because the matter could not be remanded to a trial court for determination of the amount, the opinion stated that "unless the parties are able to agree within 30 days as to the appropriate amount of costs and fees, the matter may be submitted to this court on affidavits." (173 C.A.3d 1202.) (See *Saleeby v. State Bar* (1985) 39 C.3d 547, 574, 216 C.R. 367, 702 P.2d 525, 1 Cal. Proc. (5th), Attorneys, §18 [mandamus proceeding to require State Bar to adopt rules governing exercise of discretion in administering Client Security Fund]; *Bowvia v. Los Angeles* (1987) 195 C.A.3d 1075, 241 C.R. 239, *supra*, §273 [mandamus proceeding].)

SUPPLEMENT: [This section is current through the latest supplement]



129 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

h. Nature of Proceeding to Which Statute Applies.

2. Habeas Corpus Proceeding.

7 *Witkin Cal. Proc. Judgm* § 292

[§ 292] Habeas Corpus Proceeding.

In re Head (1986) 42 C.3d 223, 228 C.R. 184, 721 P.2d 65, involved a petition for habeas corpus filed on behalf of three prison inmates by the Prison Law Office, a privately supported group of attorneys who provide direct legal service at no cost to inmates. The petition challenged the procedures under which the Department of Corrections implemented the work furlough program authorized by P.C. 6260 et seq. The superior court found the procedures to be constitutionally inadequate, and ordered individualized consideration of inmates to determine eligibility under procedures affording due process. After affirmance of the order on appeal, the Prison Law Office requested and the superior court awarded attorneys' fees of \$ 3,350. The Director of Corrections appealed, and the Court of Appeal reversed the order, holding that *C.C.P. 1021.5* applies only to civil cases, and that habeas corpus is a special proceeding of a criminal nature. *Held*, judgment of Court of Appeal reversed.

(a) When the form of the proceeding has been mandamus, the fact that the rights of criminal defendants or inmates were vindicated has not been regarded as a bar to recovery of attorneys' fees. (42 C.3d 227, citing *Olney v. Municipal Court* (1982) 133 C.A.3d 455, 184 C.R. 78, and *Daniels v. McKinney* (1983) 146 C.A.3d 42, 193 C.R. 842.)

(b) *Fogelson v. Municipal Court* (1981) 120 C.A.3d 858, 175 C.R. 64, *supra*, §278, observing that *C.C.P. 1021.5* does not deal with criminal actions, involved a claim of fees for defense and appeal in a criminal prosecution. The court there pointed out that the criminal defendant does not initiate the action, and that his self interest provides incentive enough to assert available defenses. (42 C.3d 228.) The reasoning of *Fogelson* is inapplicable to the habeas corpus statutes, which neither define offenses nor establish defenses. "They do create a procedure by which prisoners may vindicate rights related to their confinement and release ... , which may be utilized as an alternative to actions for declaratory or injunctive relief and/or mandamus." (42 C.3d 228.) The critical fact is the impact of the action, not the manner of its resolution. (42 C.3d 228.)

(c) A prisoner has numerous constitutional rights related to the condition of his or her confinement or the lawful execution of his or her sentence, and additional rights by statute and regulation. (42 C.3d 229, 230.) And an action on behalf of a prisoner to enforce rights under the work furlough program bears none of the indicia of a criminal

prosecution. "Rather the purpose is to compel a state or local officer to comply with duties imposed on him by regulation, statute, or constitutional provision." (42 C.3d 230.)

(d) The argument that awarding fees in these proceedings would encourage bringing civil rights actions by petition for habeas corpus and swamp the superior court with petitions is not persuasive. "If attorney fees were not available in habeas corpus proceedings brought to vindicate the rights of prison inmates generally there is no reason to expect that the burden on courts would in any way be lessened. On the contrary, it is likely that a greater number of proceedings would be brought by individual inmates in propria persona, or by attorneys in petitions for writs of mandamus or complaint for declaratory relief in which attorney fees would be available. Without the assistance of counsel, in propria persona inmates would likely file many more petitions, and impose a greater burden on the judicial system, than that imposed by a single, well-researched, attorney-prepared petition. And, mandamus or declaratory relief proceedings are likely to be more complex, with the potential, as a consequence, of higher fee awards than the relatively modest amount of attorney fees sought by the Prison Law Office here." (42 C.3d 231.)

SUPPLEMENT: [This section is current through the latest supplement]



130 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

h. Nature of Proceeding to Which Statute Applies.

3. Administrative Proceeding.

7 *Within Cal. Proc. Judgm* § 293

[§ 293] Administrative Proceeding.

In *Best v. California Apprenticeship Council* (1987) 193 C.A.3d 1448, 240 C.R. 1, plaintiff, a participant in an apprentice program administered by the state-created California Apprenticeship Council (CAC), was denied a religious belief exemption from assignment to a nuclear power plant. Following an administrative appeal that upheld the CAC decision, plaintiff brought a mandamus proceeding in which he prevailed on appeal. Subsequently, the trial judge awarded plaintiff attorneys' fees, but denied recovery for fees incurred during the administrative proceedings. *Held*, the denial of those fees was error.

(a) The holding in *Consumers Lobby Against Monopolies v. Public Util. Com.* (1979) 25 C.3d 891, 160 C.R. 124, 603 P.2d 41, that attorneys' fees may be awarded for quasi-judicial administrative proceedings, applies with equal force to cases involving the "private attorney general" doctrine. (193 C.A.3d 1456, 1457.)

(b) "[T]he appropriate inquiry to determine whether attorney's fees should be awarded by a court for services provided during administrative proceedings is whether they were useful and of a type ordinarily necessary to the vindication of the public interest litigated by the private party." (193 C.A.3d 1459.) This inquiry effectuates the purpose of the private attorney general doctrine, and whether the private enforcement of public policies is achieved through an administrative proceeding or a judicial proceeding is irrelevant. (193 C.A.3d 1459.)

(c) While *C.C.P. 1021.5* uses the term "action," that term does not mean in all contexts the technical definition in the *Code of Civil Procedure*. (193 C.A.3d 1460, citing the text.) The Supreme Court, in holding that fees could be awarded in a habeas corpus proceeding, stated that "the nature of the relief sought, not the label or procedural device by which the action is brought, is determinative of the right to seek fees" under *C.C.P. 1021.5*. (193 C.A.3d 1461, quoting *In re Head* (1986) 42 C.3d 223, 228 C.R. 184, 721 P.2d 65, *supra*, §292.) Hence, the term "action" in *C.C.P. 1021.5* "encompasses administrative proceedings which were useful and necessary to the public interest litigation." (193 C.A.3d 1461.) It does not matter whether the administrative proceedings precede or follow a court action. (193 C.A.3d 1462.)

(d) Here, plaintiff pursued a remedy that ultimately culminated in court proceedings as an adjunct to administrative

proceedings and is seeking fees for that single legal course. Because the administrative proceedings were the first step in litigation leading to the mandamus proceedings, "by their very nature they were useful and of a type ordinarily necessary to the public interest litigation." (193 C.A.3d 1461.)

In *Hospital Systems v. Office of Statewide Health Planning & Dev.* (1994) 25 C.A.4th 1686, 30 C.R.2d 922, plaintiff hospital challenged defendant's building regulation in an administrative hearing and successfully pursued an administrative appeal. In this action under C.C.P. 1021.5 seeking attorneys' fees incurred in the administrative proceedings, the trial judge granted defendant's motion for judgment on the pleadings, holding C.C.P. 1021.5 inapplicable to fees incurred solely and exclusively in an administrative proceeding. *Held*, affirmed.

(a) A motion for attorneys' fees under C.C.P. 1021.5 must relate to an existing action and must be filed in the court in which that action is pending. The motion does not create a new cause of action; it is a collateral matter ancillary to the main cause. (25 C.A.4th 1691, 1692.)

(b) *Best v. California Apprenticeship Council* is distinguishable. There both an administrative proceeding and court litigation were involved. (25 C.A.4th 1693.) The rule enunciated in *Best* "clearly envisioned a court proceeding as one of the steps in resolving a given dispute, either before or after the administrative proceeding. Here, however, there was no court litigation." (25 C.A.4th 1694.)

SUPPLEMENT: [This section is current through the latest supplement]



131 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

i. Award After Settlement.

7 *Witkin Cal. Proc. Judgm* § 294

[§ 294] Award After Settlement.

(1) *Where Settlement Agreement Is Silent on Issue of Fees.* In *Folsom v. Butte County Assn. of Governments* (1982) 32 C.3d 668, 186 C.R. 589, 652 P.2d 437, plaintiffs, resident taxpayers of Butte County, alleged that they were elderly, disabled, of limited means, and hence transit-dependent. They sought declaratory and injunctive relief against county allocations to street and road projects of funds collected under the Transportation Development Act. After some legal proceedings and negotiations, a settlement agreement was made, under which plaintiffs promised to dismiss their action with prejudice on substantial performance of defendants' promise to establish four transit systems. Plaintiffs then sought costs and attorneys' fees under C.C.P. 1021.5. The trial judge, rejecting defendants' challenges, awarded fees and costs as requested. The order declared that the action resulted in enforcement of an important right affecting the public interest, that a significant benefit had been conferred on both a large class of persons and the general public, and that the necessity and financial burden of private enforcement made the award of attorneys' fees appropriate. *Held*, order affirmed.

(a) *Agreement silent on costs and fees does not bar award.*

(1) Defendants contended that the agreement operated as a merger and bar of all issues, leaving the trial court without jurisdiction to award costs or fees. They also pointed out that their attorneys refrained from injecting fee issues into the negotiations in deference to judicial admonitions that such conduct is improper. (32 C.3d 676, footnote 14, citing federal cases.) This contention is unsound. Compromise agreements are favored, and are governed by the principles applicable to contracts generally. They ordinarily conclude all matters put in issue by the pleadings, but do not conclude matters incident to the judgment that were no part of the cause of action. (32 C.3d 677.) Thus, costs are allowed, in the absence of an express agreement to the contrary, following entry of a consent decree. (32 C.3d 677, citing *Rappenecker v. Sea-Land Service* (1979) 93 C.A.3d 256, 155 C.R. 516, *supra*, §205.) The same reasoning applies to attorneys' fees authorized solely by statute. They are incidents to the cause, properly awarded after entry of a stipulated judgment, unless expressly or by necessary implication excluded by the stipulation. (32 C.3d 678; see footnote 16, citing the text, and *Mabee v. Nurseryland Garden Centers* (1979) 88 C.A.3d 420, 152 C.R. 31, on distinction where fees incurred in prior action are part of relief sought.)

(2) "Therefore, absent affirmative agreement of the parties to the contrary, the trial court retains jurisdiction after the filing of a compromise agreement to entertain a cost bill. It also retains jurisdiction to consider a statutory fee motion--at least where the showing required by statute could not have been made prior to judgment." *C.C.P. 1021.5* is such a statute. (32 *C.3d* 679, citing *Marini v. Municipal Court* (1979) 99 *C.A.3d* 829, 835, 160 *C.R.* 465.) The United States Supreme Court, in *White v. New Hampshire Dept. of Emp. Sec.* (1982) 455 *U.S.* 445, 102 *S.Ct.* 1162, 1166, 71 *L.Ed.2d* 325, 331, expressed a similar view as to fee motions under the Civil Rights Attorney's Fees Awards Act (42 *U.S.C.*, §1988). (32 *C.3d* 679, 680.)

(3) Defendants' concern that one settling a lawsuit may want to know his or her total liability in advance was recognized as reasonable in *White*. Hence, "we decline to rule, as plaintiffs urge, that fee matters may never be injected into negotiations on the merits without placing counsel in a position of inherent conflict." (32 *C.3d* 681.) As *White* states, "[a]lthough such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel." (32 *C.3d* 681.)

(b) *Award of fees on settlement of case*. In determining whether plaintiffs were "successful" (or prevailing parties), "[t]he critical fact is the impact of the action, not the manner of its resolution." (32 *C.3d* 685.) Thus, an award is not barred because the case was won on a preliminary issue (*Woodland Hills Residents Assn. v. City Council of Los Angeles* (1979) 23 *C.3d* 917, 154 *C.R.* 503, 593 *P.2d* 200, supra, §261) or because it was settled before trial (*Rich v. Benicia* (1979) 98 *C.A.3d* 428, 159 *C.R.* 473). (32 *C.3d* 685.) Here, plaintiffs were influential in the public agency's decision to institute the transit systems, and therefore were "successful parties" under *C.C.P. 1021.5*. (32 *C.3d* 687.) (See *Washburn v. Berkeley* (1987) 195 *C.A.3d* 578, 583, 240 *C.R.* 784, supra, §270 [citing *Folsom*]; *Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 *C.A.4th* 680, 688, 22 *C.R.2d* 807 [distinguishing *Folsom*; covenant not to execute judgment against insurer included, by implication, agreement not to pursue claim for fees and costs].)

(2) *Consent Decree Provision Does Not Waive Fees*. In *Zambrano v. Oakland Unified School Dist.* (1991) 229 *C.A.3d* 802, 280 *C.R.* 454, plaintiff sued defendant to resolve a dispute over bilingual education. The parties entered into a consent decree, creating a plan to be carried out by an expert auditor and a monitor. The decree also provided that the plan could be enforced by order of the court, and that a party who obtained judicial enforcement would be entitled to attorneys' fees. Plaintiff's attorneys were awarded \$ 350,000 for prosecuting the complaint, defending the cross-complaint, entering the consent decree, and satisfying tort claims against the district. Then plaintiff filed a motion for attorneys' fees for his successful efforts in enforcing the consent decree before the monitor. The trial court ruled that the decree provision authorizing fees for judicial enforcement was a waiver of fees for nonjudicial enforcement. *Held*, reversed.

(a) The decree did not contain an express waiver; it was silent as to fees for postjudgment participation in the enforcement process. And the courts have been hesitant to find implied waivers. (229 *C.A.3d* 805.) The district might have negotiated an express waiver, by stating that fees were available only for judicial enforcement, but it did not do so. (229 *C.A.3d* 807.)

(b) "The District also suggests that fee availability would encourage attorney participation, turning what was meant to be amicable, informal dispute resolution into an adversarial, litigious process. The opposite argument is equally persuasive: limiting attorney fees to judicial enforcement puts a premium on litigation, discouraging alternative dispute resolution." (229 *C.A.3d* 807.)

SUPPLEMENT: [This section is current through the latest supplement]



132 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

A. Motion Procedure.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 295

[§ 295] In General.

(1) *Former Law.* Before 1990, a party's right to attorneys' fees arose either by contract or by statute. When a statute provided for attorneys' fees, the fees were recoverable as costs under the cost bill procedure (*supra*, §139 *et seq.*), and when a contract provided for fees, they were recoverable as special damages, which had to be pleaded and proved. A party prevailing in an action to which C.C. 1717 (*supra*, §170) applied could follow either procedure. (*M. C. & D. Capital Corp. v. Gilmaker* (1988) 204 C.A.3d 671, 680, 251 C.R. 178.)

(2) *Present Law.* Attorneys' fees are allowable as costs regardless of whether authorized by contract, statute, or law. (C.C.P. 1033.5(a)(10); on fees awarded as damages, see *infra*, §299.) However, rather than being recoverable under the cost bill procedure, they are generally recovered by noticed motion filed after judgment in the underlying action. (See C.C.P. 1033.5(c)(5), *infra*, §296 *et seq.*; C.E.B., Attorney Fee Awards 2d, §14.13 *et seq.*)

(3) *Pleading Fees.* Although there is no requirement that statutory attorneys' fees be pleaded in the underlying action, they should be mentioned in the complaint. The right to contractual fees is sufficiently pleaded by pleading the contract itself. (See *Washburn v. Berkeley* (1987) 195 C.A.3d 578, 583, 240 C.R. 784 [statutory fees]; *Ganey v. Doran* (1987) 191 C.A.3d 901, 911, 236 C.R. 787 [contractual fees]; *Curry v. Moody* (1995) 40 C.A.4th 1547, 48 C.R.2d 627 [right to contractual fee was sufficiently pleaded where promissory note containing attorneys' fee provision was attached to complaint and incorporated by reference]; *Allstate Ins. Co. v. Loo* (1996) 46 C.A.4th 1794, 1797, 54 C.R.2d 541 [party seeking fees pursuant to contract no longer pleads entitlement to fees as item of damages]; C.E.B., Attorney Fee Awards 2d, §14.1; C.E.B., 3 Civil Proc. During Trial 3d, §26.151.)

(4) *Uncontested Fees.* If a party is entitled to fees that are fixed without the necessity of a court determination, the fees must be claimed in the memorandum of costs (see *supra*, §139). (C.R.C., Rule 3.1702(e).)

SUPPLEMENT: [This section is current through the latest supplement]



133 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

A. Motion Procedure.

2. Fees Based on Contract.

7 *Witkin Cal. Proc. Judgm* § 296

[§ 296] Fees Based on Contract.

Attorneys' fees authorized by contract, including those awarded under C.C. 1717 (*supra*, §170), are allowable costs under *C.C.P. 1032*. (*C.C.P. 1033.5(a)(10)(A)*.) They must be fixed (1) on a noticed motion, (2) on entry of a default judgment, or (3) as stipulated by the parties. (*C.C.P. 1033.5(c)(5)*); see *Allstate Ins. Co. v. Loo* (1996) 46 *C.A.4th* 1794, 1797, 54 *C.R.2d* 541 [lessor properly sought fees provided for in lease by filing noticed motion]; *Cadle Co. v. World Wide Hospitality Furniture* (2006) 144 *C.A.4th* 504, 515, 50 *C.R.3d* 480 [noticed post-trial motion for fees owed under contracts was proper; plaintiff did not have to request fees in prayer in complaint or specify amount of fees in body of complaint]; *C.E.B., Attorney Fee Awards* 2d, §14.14.)

In *Bankes v. Lucas* (1992) 9 *C.A.4th* 365, 370, 371, 11 *C.R.2d* 723, the court quoted the Legislature's Comment on the purpose of *C.C.P. 1033.5(c)(5)*: "The Legislature finds and declares that there is great uncertainty as to the procedure to be followed in awarding attorney's fees where entitlement thereto is provided by contract to the prevailing party. It is the intent of the Legislature in enacting this act to confirm that these attorney's fees are costs which are to be awarded only upon noticed motion, except where the parties stipulate otherwise or judgment is entered by default. It is further the intent of the Legislature to vest the Judicial Council with the discretion provided in *Section 1034 of the Code of Civil Procedure* to adopt procedural guidelines establishing the time for the hearing of these motions, but the Legislature finds and declares that the criteria set forth in Section 870.2 of the California Rules of Court provide a fair and equitable procedure for the motions." (On former *C.R.C. 870.2* (now *C.R.C.*, Rule 3.1702), see *infra*, §300 et seq.)

There is some uncertainty whether strict compliance with the noticed motion requirement is required. (See *Gunlock Corp. v. Walk on Water* (1993) 15 *C.A.4th* 1301, 1304, 19 *C.R.2d* 197 [trial court has discretion to award fees despite party's failure to comply with statutory requirements of noticed motion]; cf. *Hydratec v. Sun Valley 260 Orchard & Vineyard Co.* (1990) 223 *C.A.3d* 924, 929, 272 *C.R.* 899 [prevailing defendant waived right to recover attorneys' fees under *C.C. 1717* by failing to file notice of motion to claim fees as element of costs]; *Russell v. Trans Pac. Group* (1993) 19 *C.A.4th* 1717, 1725, 24 *C.R.2d* 274 [contractual attorneys' fees must be claimed by noticed motion, not by mere filing of memorandum of costs; trial judge lacked discretion to disregard noncompliance].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Chinn v. KMR Property Management* (2008) 166 *C.A.4th* 175, 194, 82 *C.R.3d* 586 [plaintiff properly requested

determination of entitlement to fees by noticed motion; she did not need to include demand in complaint, nor did she need to request particular amount in motion].



134 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

A. Motion Procedure.

3. Fees Based on Statute.

7 Witkin Cal. Proc. Judgm § 297

[§ 297] Fees Based on Statute.

Fees authorized by statute may be fixed (1) on a noticed motion, (2) at the time a statement of decision is rendered, (3) on an application supported by an affidavit made concurrently with a claim for other costs, or (4) on the entry of a default judgment. (*C.C.P. 1033.5(c)(5)*.) As with contractual attorneys' fees, the motion procedure set forth in C.R.C., Rule 3.1702, governs the recovery of statutory attorneys' fees, "[e]xcept as otherwise provided by statute." (C.R.C., Rule 3.1702(a), *infra*, §300.)

If the party opposing a *C.C.P. 1021.5* attorneys' fee award produces evidence suggesting that a public interest organization is litigating an action primarily for the benefit of nonlitigants, the court should, in order to resolve the issue, allow the opposing party to conduct limited discovery. The permissible kinds of discovery will be decided on a case-by-case basis. However, before a trial court orders the discovery, it must first determine whether the discovery impermissibly infringes on important associational privacy rights of third parties. (*Save Open Space Santa Monica Mountains v. Superior Court* (2000) 84 C.A.4th 235, 250, 100 C.R.2d 725, 2 Cal. Evidence (4th), *Discovery, Supp.*, §12.)

SUPPLEMENT: [This section is current through the latest supplement]



135 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

A. Motion Procedure.

4. Fees Based on Other Grounds.

7 Witkin Cal. Proc. Judgm § 298

[§ 298] Fees Based on Other Grounds.

Attorneys' fees authorized by "law," but not by statute, are obtained in the same way as those authorized by contract (supra, §296): (a) by noticed motion, (b) on entry of default, or (c) as stipulated to by the parties. (*C.C.P. 1033.5(a)(10), 1033.5(c)(5).*)

SUPPLEMENT: [This section is current through the latest supplement]



136 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

A. Motion Procedure.

5. Fees Awarded As Damages.

7 Witkin Cal. Proc. Judgm § 299

[§ 299] Fees Awarded As Damages.

Fees sought as damages (see *supra*, §151 et seq.) may not be asserted by posttrial motion. They must be pleaded and proved to the trier of fact. (See *Brandt v. Superior Court* (1985) 37 C.3d 813, 819, 210 C.R. 211, 693 P.2d 796; *Hsu v. Abbara* (1995) 9 C.4th 863, 869, 39 C.R.2d 824, 891 P.2d 804.)

SUPPLEMENT: [This section is current through the latest supplement]



137 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

A. Motion Procedure.

6. Timing of Motion.

a. In General.

7 Witkin Cal. Proc. Judgm § 300

[§ 300] In General.

C.R.C., Rule 3.1702 governs filing a notice of motion for attorneys' fees authorized by any statute or contract, except as otherwise provided by statute. The rule applies when a court determines entitlement to fees, the amount of fees, or both. This is so whether the court makes that determination (1) because the statute or contract refers to "reasonable" fees, (2) because the statute or contract requires a determination of the prevailing party, or (3) for other reasons. (C.R.C., Rule 3.1702(a); see *Sanabria v. Embrey* (2001) 92 C.A.4th 422, 426, 111 C.R.2d 837 [former C.R.C., Rule 870.2 (now C.R.C., Rule 3.1702) governs motions for attorneys' fees in all civil cases, including those that result in voluntary dismissal; period for filing motion commences on service of notice of entry of dismissal]; on timing of motion in unwarranted action for governmental tort, indemnity, or contribution, see *Gamble v. Los Angeles Dept. of Water & Power* (2002) 97 C.A.4th 253, 255, 259, 118 C.R.2d 271, *supra*, §235.)

SUPPLEMENT: [This section is current through the latest supplement]



138 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

A. Motion Procedure.

6. Timing of Motion.

b. Fees Determined by Trial Court.

7 *Witkin Cal. Proc. Judgm § 301*

[§ 301] Fees Determined by Trial Court.

(1) *In General.* A noticed motion to claim attorneys' fees for services up to and including the rendition of judgment in the trial court, including attorneys' fees on an appeal before the rendition of judgment in the trial court, must be served and filed within the time for filing a notice of appeal under C.R.C., Rule 8.104 (9 *Cal. Proc.* (5th), *Appeal*, §575 et seq.) and C.R.C., Rule 8.108 (9 *Cal. Proc.* (5th), *Appeal*, §586 et seq.). (C.R.C., Rule 3.1702(b)(1).) The parties may, by stipulation, extend that time for an additional 60 days if no notice of appeal is filed, or if one is filed, until the time within which a memorandum of costs must be served and filed under C.R.C., Rule 8.276(d) (see 9 *Cal. Proc.* (5th), *Appeal*, §975 et seq.). (C.R.C., Rule 3.1702(b)(2).) For good cause, the trial judge may extend the time for filing the motion if there is no stipulation, or for a longer period than allowed by stipulation. (C.R.C., Rule 3.1702(d).)

The following are among the numerous cases discussing the time for filing a motion for fees determined by the trial court:

Los Angeles Times v. Alameda Corridor Trans. Authority (2001) 88 *C.A.4th* 1381, 1389, 107 *C.R.2d* 29 [motion for fees, filed 132 days after trial court entered minute order, was timely; because order was not mailed by clerk or served by either party on the other, former C.R.C., Rule 2 (now C.R.C., Rule 8.104) gave 180 days after date of entry of judgment to file motion].

Crespin v. Shewry (2004) 125 *C.A.4th* 259, 265, 22 *C.R.3d* 696 [plaintiffs were entitled to attorneys' fees for successfully defending against defendant's postjudgment motions to modify permanent injunction, even though plaintiffs did not file motion for fees until 3 years after defendant's motions were denied; former C.R.C., Rule 870.2(b)(1) (now C.R.C., Rule 3.1702(b)(1)) does not govern time for bringing motion for fees arising from activities after final judgment, such as litigation over modification to permanent injunction].

Persson v. Smart Inventions (2005) 125 *C.A.4th* 1141, 1176, 23 *C.R.3d* 335 [defendant's motion for attorneys' fees was timely under former C.R.C., Rule 870.2(b)(1) (now C.R.C., Rule 3.1702(b)(1)); because defendant had filed several motions for judgment notwithstanding the verdict, his time to file notice of appeal, and thus his time to file motion for fees, was extended under former C.R.C., Rule 3 (now C.R.C., Rule 8.108)].

Saben, Earlix & Associates v. Fillet (2005) 134 C.A.4th 1024, 1029, 36 C.R.3d 610 [where trial court entered order granting summary judgment, but never entered summary judgment, deadline for filing motion for attorneys' fees under former C.R.C., Rule 870.2(b)(1) (now C.R.C., Rule 3.1702(b)(1)) was never triggered and motion filed by law firm was not untimely].

(2) *Probate Proceedings*. The strict time limit of C.R.C., Rule 3.1702 is not applicable to probate petitions for attorneys' fees. The rule provides for recovery of fees "up to and including the rendition of judgment," and thus "presumes the attorney fees to which it applies were generated in litigation culminating in a *judgment*. ... However, many ... fee petitions in the probate court stem from services not related to litigation, and which therefore involve no judgment." (*Hollaway v. Edwards* (1998) 68 C.A.4th 94, 98, 80 C.R.2d 166 [under former rule, probate court properly awarded attorneys' fees to trustee who successfully defended against cotrustee's attempts to remove her, even though trustee petitioned for fees more than 60 days after her motion resisting removal was granted].)

(3) *Appealable Prejudgment Orders*. In *Carpenter v. Jack in the Box Corp.* (2007) 151 C.A.4th 454, 59 C.R.3d 839, plaintiff employee sued his employer and a fellow employee, alleging wrongful termination, employment discrimination, and related causes of action. Defendants filed a special motion to strike under *C.C.P. 425.16* (4 Cal. Proc. (5th), *Pleading*, §1017 et seq.), claiming that plaintiff's causes of action alleged injury arising from protected First Amendment activities, specifically defendant employer's investigation of allegations that plaintiff had sexually harassed defendant employee. The trial court denied the special motion to strike, defendants appealed the order denying the motion, and the appellate court affirmed the order. Plaintiff then filed a motion for attorneys' fees under *C.C.P. 425.16(c)* (supra, §222). Defendants opposed the motion, claiming that it was untimely under C.R.C., Rules 3.1702(b)(1) and 8.104, because it was filed more than 180 days after the trial court entered its order denying defendants' special motion to strike. The trial court ruled that plaintiff's motion for fees was timely and awarded plaintiff his fees and costs. *Held*, affirmed.

(a) An order granting or denying a special motion to strike is an appealable prejudgment order. A motion for attorneys' fees incurred in connection with an appealable prejudgment order is a claim for services rendered before the rendition of judgment, rather than a claim for services up to and including the rendition of judgment. It does not, therefore, fit within the plain language of C.R.C., Rule 3.1702. (151 C.A.4th 464.)

(b) Interpreting C.R.C., Rule 3.1702 to require litigants to apply for attorneys' fees incurred in connection with an appealable prejudgment order within 60 or 180 days after entry of the order would be inconsistent with the language of C.R.C., Rule 3.1702 and its underlying policy. (151 C.A.4th 466, citing *Crespin v. Shewry*, supra.) The drafters of the rule intended to set an outer time limit after judgment within which statutory attorneys' fee could be claimed. (151 C.A.4th 466.) Neither the drafters nor the parties commenting on the rule contemplated that entry of an appealable prejudgment order might trigger the deadlines for claiming fees. (151 C.A.4th 468.)

(c) The time limits imposed by C.R.C., Rule 3.1702 and 8.104 for filing a motion for attorneys' fees under *C.C.P. 425.16(c)* do not start to run until entry of judgment at the conclusion of the litigation. Here, plaintiff's motion for fees, filed before entry of judgment, was not untimely. (151 C.A.4th 468.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. C.R.C., Rule 3.1702(b)(2) was amended in 2008 to replace the reference to C.R.C., Rule 8.276(d) with a reference to C.R.C., Rule 8.278(c).

See *Doppes v. Bentley Motors* (2009) 174 C.A.4th 967, 1001, 94 C.R.3d 802 [trial court erred in denying motion for fees incurred on initial fee motion and after filing of initial fee motion; there is no rule prohibiting party from bringing second motion to recover fees incurred since initial motion was filed].



139 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

A. Motion Procedure.

6. Timing of Motion.

c. Fees Determined by Appellate Court.

7 Witkin Cal. Proc. Judgm § 302

[§ 302] Fees Determined by Appellate Court.

A noticed motion to claim attorneys' fees on appeal requiring the court to determine entitlement to fees, the amount of fees, or both, must be served and filed within the time for serving and filing the memorandum of costs under C.R.C., Rule 8.278(c)(1). That time limit does not apply to a motion for attorneys' fees on appeal claimed under C.R.C., Rule 3.1702(b). (C.R.C., Rule 3.1702(c)(1); see *In re Marriage of Freeman (2005) 132 C.A.4th 1, 7, 33 C.R.3d 237* [application for attorneys' fees incurred on appeal in family law action was untimely, where it was filed long after 40-day period imposed by former C.R.C., Rule 27(d) (now C.R.C., Rule 8.278(c)(1))]; on attorneys' fees on appeal generally, see 9 *Cal. Proc.* (5th), *Appeal*, §979 et seq.)

The parties may by stipulation extend the time allowed under C.R.C., Rule 3.1702(c)(1) up to an additional 60 days. They must file the stipulation before the expiration of the time allowed under C.R.C., Rule 3.1702(c)(1). (C.R.C., Rule 3.1702(c)(2).) For good cause, the trial judge may extend the time for filing the motion in the absence of a stipulation or may extend the time for a longer period than provided in a stipulation. (C.R.C., Rule 3.1702(d).)

SUPPLEMENT: [This section is current through the latest supplement]



140 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

A. Motion Procedure.

6. Timing of Motion.

d. Fees Awarded Under C.C.P. 1021.5.

7 *Within Cal. Proc. Judgm § 303*

[§ 303] Fees Awarded Under C.C.P. 1021.5.

In *Citizens Against Rent Control v. Berkeley* (1986) 181 C.A.3d 213, 226 C.R. 265, plaintiff first requested attorneys' fees under C.C.P. 1021.5 (see supra, §259 et seq.) on remittitur following appellate review. *Held*, the request was timely.

(a) The showing required for an award of fees under the statute cannot be made until the result of the action is known, sometimes only after final judgment. For this reason, there is no express time limit on making a fee request. (181 C.A.3d 226, 227.)

(b) This does not mean that a party may unfairly delay the request to his opponent's disadvantage. Where the other party is unfairly surprised as a result of unexcused delay in making the motion, the trial court has discretion to deny an award of fees. (181 C.A.3d 227, 228.)

(c) There was no unfair delay or surprise here. Plaintiff had earlier sought fees under a federal statute, the benefits of the litigation were not secure until after the federal Supreme Court's decision, and the request was made within 4 months of that court's mandate and within 30 days of the California Supreme Court's remittitur. (181 C.A.3d 227, 228.)

In *Save Our Forest & Ranchlands v. San Diego* (1996) 50 C.A.4th 1757, 58 C.R.2d 708, plaintiff obtained a favorable judgment in July 1993, and moved for attorneys' fees under C.C.P. 1021.5 on August 4, 1994. The trial judge denied the fee motion as untimely. *Held*, affirmed.

(a) Before January 1, 1994, a motion to recover fees under C.C.P. 1021.5 could be made at any time as long as it did not unfairly prejudice the party being asked to pay the fees. (50 C.A.4th 1763, citing *Citizens Against Rent Control*.) On January 1, 1994, however, former C.R.C., Rule 870.2(b) (now C.R.C., Rule 3.1702(b)), requiring motions for statutory fees claims to be filed within the time for filing a notice of appeal, became effective. This rule applies to motions under C.C.P. 1021.5. (50 C.A.4th 1765.)

(b) Strict application of the new rule to all motions made after January 1, 1994, could have the unintended result of

imposing the time limit during the period before the rule became effective. Here, for instance, where judgment was entered in July 1993, strict application would render untimely a motion made on January 1, 1994. The drafters could not have intended such a harsh result. (50 C.A.4th 1765.) Instead, for judgments entered before January 1, 1994, the time limits imposed by the new rule began running on January 1, 1994. (50 C.A.4th 1766.) Plaintiff thus had 60 days from January 1, 1994, to bring its motion for fees under C.C.P. 1021.5. Hence, the trial judge correctly concluded that plaintiff's motion was untimely. (50 C.A.4th 1768.)

SUPPLEMENT: [This section is current through the latest supplement]



141 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

1. General Formula for Calculation.

7 Witkin Cal. Proc. Judgm § 304

[§ 304] General Formula for Calculation.

In *Serrano v. Priest* (1977) 20 C.3d 25, 141 C.R. 315, 569 P.2d 1303 (*Serrano III*), the court specified guidelines for determining the amount of a fee award. First, the trial judge may multiply the time spent and reasonable hourly compensation of each attorney involved in the presentation of the case. Then, using this figure as a "touchstone," the judge may take into consideration various relevant factors, of which some militate in favor of augmentation and some in favor of diminution. Among these factors are the following:

- (1) The novelty and difficulty of the questions involved, and the skill displayed in presenting them.
- (2) The extent to which the nature of the litigation precluded other employment by the attorneys.
- (3) The contingent nature of the fee award, both from the point of view of eventual victory on the merits and the point of view of establishing eligibility for an award.
- (4) Whether an award against the state would ultimately fall upon the taxpayers.
- (5) Whether the attorneys in question received public and charitable funding for the purpose of bringing law suits of the character involved.
- (6) Whether the monies awarded would inure to the individual benefit of the attorneys involved or to the organizations by which they are employed.
- (7) Whether the attorneys involved, if more than one, had approximately an equal share in the success of the litigation. (20 C.3d 48, 49.)

Methods for determining and adjusting the "touchstone" or "lodestar" amount are discussed in detail elsewhere. (See C.E.B., Attorney Fee Awards 2d, Chaps. 12, 13; *infra*, §306 et seq.) The following are among the cases applying the "touchstone" or "lodestar" calculation method:

Weeks v. Baker & McKenzie (1998) 63 C.A.4th 1128, 1171, 74 C.R.2d 510 [trial court's use of multiplier of 1.7 to

enhance fees awarded in action under Fair Employment and Housing Act was not justified; action did not involve novel or complex issues, attorneys did not have to demonstrate extraordinary skills, and both plaintiff and her attorneys were fully compensated for their efforts].

Meister v. Regents of Univ. of Calif. (1998) 67 C.A.4th 437, 449, 78 C.R.2d 913, *infra*, §312 [if statute does not provide method of calculation for attorneys' fees award, trial court must use lodestar method].

Ramos v. Countrywide Home Loans (2000) 82 C.A.4th 615, 624, 98 C.R.2d 388 [trial court abused discretion in using multiplier of 2.5, where it appeared that court relied on skilled nature of representation and public benefits conferred in determining both lodestar amount and multiplier amount; on remand, court must precisely articulate why enhancement is appropriate].

In re Vitamin Cases (2003) 110 C.A.4th 1041, 1051, 2 C.R.3d 358 [award was reversed in class action alleging price-fixing by vitamin manufacturers; there was possibility of substantial duplication of efforts by numerous attorneys, counsel intended to distribute fees in manner independent of lodestar, risks were not as large as counsel portrayed them, and relationship between time expended and result achieved did not necessarily justify lodestar multiplier of 2; citing *Ramos*].

West's Key Number Digest, Costs 194.18

SUPPLEMENT: [This section is current through the latest supplement]



142 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

2. Use of Percentage of Benefit as Multiplier in Class Action.

7 *Witkin Cal. Proc. Judgm* § 305

[§ 305] Use of Percentage of Benefit as Multiplier in Class Action.

Lealao v. Beneficial Calif. (2000) 82 C.A.4th 19, 97 C.R.2d 797, contains an extensive discussion of the propriety of calculating attorneys' fees in a class action by using a percentage of the class benefit. Plaintiffs, borrowers on loans made by defendant lender, alleged that they had been improperly charged prepayment penalties. The total amount of prepayment penalties imposed on the class was about \$ 19.2 million; the average penalty was \$ 2,867. To settle the action, defendant agreed to pay members of the class who filed claims 77% of the amount they had paid as prepayment penalties, which would total \$ 14,784,000 if every member of the class filed a valid claim. The settlement agreement did not require that plaintiffs' counsel's fees be deducted from the refunds received by members of the class, nor did it specify the amount of the fee the attorneys would receive. Instead, it provided only that respondent would pay "such reasonable attorneys' fees and costs as determined by the Court." Plaintiffs' attorneys initially requested fees in the amount of \$ 3.5 million, arguing that they had succeeded in creating a fund of \$ 14,784,000 for the benefit of the class and were entitled to approximately 24% of that amount or \$ 3.5 million. Alternatively, they maintained that the size of a class recovery may be used as a factor to enhance a lodestar award and thus the \$ 3.5 million was justified under the lodestar method. The trial court rejected both arguments and awarded fees in the amount of \$ 425,000, representing the hourly rates claimed by plaintiffs' attorneys and paralegals multiplied by the time they expended on the case. Plaintiffs' attorneys then moved for a new trial on the issue of attorneys' fees and requested \$ 1.76 million, which is 24% of \$ 7.35 million, the total of the valid claims that had actually been filed as of the time of the request. The trial court denied the motion for a new trial. *Held*, reversed and remanded.

(a) The trial court's refusal to award fees calculated *purely* as a percentage of the class recovery was not an abuse of discretion. (82 C.A.4th 39.) Although the federal courts have indicated a growing willingness to determine fees in common fund cases using a percentage-of-the-benefit approach (82 C.A.4th 30), the California Supreme Court, in *Serrano v. Priest* (1977) 20 C.3d 25, 141 C.R. 315, 569 P.2d 1303 (*Serrano III*), *supra*, §304, has rejected pure percentage fees, at least in cases, like this, in which there is not a conventional common fund (82 C.A.4th 37).

(b) *Serrano III* does not, however, bar California trial courts from using the percentage-of-the-benefit approach to adjust the lodestar. (82 C.A.4th 39.) *Serrano III* requires that the "starting point" of every equitable fee award be a calculation of an attorney's services in terms of the time expended on the case. That lodestar amount may be adjusted by the consideration of relevant factors justifying an increase or decrease, but *Serrano III* did not mandate the use of any

particular factor or prohibit the use of others. Moreover, intermediate appellate courts in California have, in effect, adopted the common federal practice of "cross-checking" the lodestar against the value of the class recovery, because the award is still "anchored" in the time spent by counsel on the case, and the practice is therefore consistent with the mandate of *Serrano III*. Thus, California courts often use "the amount at stake, and the result obtained by counsel" as relevant factors justifying enhancement of a lodestar fee through use of a multiplier, as do their federal counterparts. (82 C.A.4th 45.) "Accordingly, we hold that, in cases in which the value of the class recovery can be monetized with a reasonable degree of certainty and it is not otherwise inappropriate, a trial court has discretion to adjust the basic lodestar through the application of a positive or negative multiplier where necessary to insure that the fee awarded is within the range of fees freely negotiated in the legal marketplace in comparable litigation." (82 C.A.4th 49, 50.)

(c) The record here reveals nothing that would make it inappropriate to evaluate the lodestar as a percentage of the recovery and adjust it accordingly if it is significantly different from the range of percentage fees freely negotiated in comparable litigation. First, although the settlement did not create a common fund out of which fees are to be paid, the monetary value of the benefit to the class is much less speculative than that of some traditional common funds. (82 C.A.4th 50.) The amount of claims actually paid is approximately \$ 7.4 million less than the amount defendant agreed to pay members of the class. Thus, if the lodestar amount were reasonably adjusted upward to reflect an appropriate percentage of the claims paid, the total amount of defendant's out-of-pocket expense arising from this litigation would still be considerably less than the amount to which it was exposed under the settlement agreement. Moreover, the class was notified that the attorneys would seek a fee representing about 24% of the recovery; no member of the class objected and only two members opted out. (82 C.A.4th 51.)

(d) Furthermore, the fact that the action settled quickly was the major reason the lodestar was so low relative to the monetary value of the recovery; "promptness of settlement cannot be used to justify the refusal to apply a multiplier to reflect the size of the class recovery without exacerbating the disincentive to settle promptly inherent in the lodestar methodology." (82 C.A.4th 52.) Finally, "permitting the amount of the recovery to influence the fee is most justified where the amount of the recovery is not due primarily to the size of the class." Here, the individual recoveries of class members were not de minimis. The large recovery here is thus a more authentic indication of the value of the attorneys' contribution than might otherwise be true. (82 C.A.4th 53.) (See 113 Harv. L. Rev. 1827 [market models for determining attorneys' fees in class action litigation]; 50 U.C.L.A. L. Rev. 879 [benefits of awarding fees based on percentage of fund in small claims consumer class actions]; but see *Graciano v. Robinson Ford Sales* (2006) 144 C.A.4th 140, 161, 50 C.R.3d 273 [*Lealao* did not authorize imposition of negative multiplier in action involving individual, nonrepresentative plaintiff suing under consumer protection statutes that mandate fees to prevailing party; plaintiff was entitled to all attorneys' fees reasonably expended, without limitation to proportion of actual recovery].)

Additional cases discussing the use of a percentage of benefit to determine fees in a class action include the following:

Ramos v. Countrywide Home Loans (2000) 82 C.A.4th 615, 628, 98 C.R.2d 388 [cross-checking fee award in class action against amount that would be awarded under common fund approach is not abuse of discretion; citing *Lealao*].

Wershba v. Apple Computer (2001) 91 C.A.4th 224, 254, 110 C.R.2d 145 [recognizing, but not applying, percentage of recovery method in class action].

Thayer v. Wells Fargo Bank (2001) 92 C.A.4th 819, 845, 112 C.R.2d 284 [attorney was not entitled to increase in lodestar under *Lealao*; even if class recovery can be monetized with reasonable degree of certainty, *Lealao* does not mandate that fees be measured by percentage of benefit].

SUPPLEMENT: [This section is current through the latest supplement]

See *Chavez v. Netflix* (2008) 162 C.A.4th 43, 60, 75 C.R.3d 413 [trial court properly estimated amount of class benefit and percentage multiplier, and method used to check fee award against estimate of what market would pay for comparable services under fee agreement was within court's discretion; citing *Lealao v. Beneficial Calif.* (2000) 82

C.A.4th 19, 97 C.R.2d 797, text, p. 902]; *Consumer Privacy Cases (2009) 175 C.A.4th 545, 557, 96 C.R.3d 127*, Supp., infra, §323A [trial court could have cross-checked fee award arrived at through lodestar method against percentage of common fund, but it was not required to do so; citing *Lealao*].



143 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

3. Fees Based on Contract.

a. Where Contract Does Not Specify Amount.

7 *Witkin Cal. Proc. Judgm* § 306

[§ 306] Where Contract Does Not Specify Amount.

Where a contract provides for fees without specifying a particular sum, the amount awarded is within the court's discretion. (See *Pehau v. Stewart* (1952) 112 C.A.2d 90, 97, 245 P.2d 692; *Palm Springs-La Quinta Dev. Co. v. Kieberk Corp.* (1941) 46 C.A.2d 234, 241, 115 P.2d 548; *Iverson v. Spang Industries* (1975) 45 C.A.3d 303, 312, 119 C.R. 399, citing the text; *Melnyk v. Robledo* (1976) 64 C.A.3d 618, 623, 134 C.R. 602; C.E.B., Attorney Fee Awards 2d, Chap. 11.) The court need not follow the guidelines set forth in *Serrano v. Priest* (1977) 20 C.3d 25, 48, 49, 141 C.R. 315, 569 P.2d 1303, supra, §304. (*Montgomery v. Bio-Med Specialties* (1986) 183 C.A.3d 1292, 1296, 1298, 228 C.R. 709.)

In *Hadley v. Krepel* (1985) 167 C.A.3d 677, 214 C.R. 461, defendant sought attorneys' fees of \$ 15,647. Plaintiffs challenged \$ 9,156 of the sum claimed, asserting that much of the fees were due to defendant's two changes of counsel. The trial court, without explanation, awarded attorneys' fees of \$ 3,000. *Held*, reversed. While exclusion of fees for duplicative services was proper, this factor alone cannot justify the low award. The litigation, while not complex, required a certain amount of skill, and the hourly fees for trial preparation and trial by themselves totaled more than \$ 4,000. Thus, the fee award bore no rational relationship to the actual fees incurred; and, at a minimum, defendant should receive the difference between the amount challenged (\$ 9,156) and the amount incurred (\$ 15,647). (167 C.A.3d 686, 687.)

A local rule of court scheduling fees in contract cases is not binding; the judge has discretion to award a larger amount on a proper showing. (*AnSCO Const. Co. v. Ocean View Estates* (1959) 169 C.A.2d 235, 240, 337 P.2d 146; see C.C.P. 1033.5(c)(5) [where claim is not based on court's established schedule of fees for contract actions, burden of proof is on claimant]; *Cruz v. Ayromloo* (2007) 155 C.A.4th 1270, 1275, 66 C.R.3d 725 [trial court did not err in awarding fees that were 39 times higher than amount suggested by local court guidelines and that were higher than overall damages awarded to prevailing party; guidelines allowed for "reasonable" fee award, and award greater than overall damages is not uncommon].)

The following cases have discussed the reasonableness of attorneys' fees awarded under a contract that provides for fees without specifying an amount:

Wilson v. Wilson (1960) 54 C.2d 264, 272, 5 C.R. 317, 352 P.2d 725 [\$ 3,000 note with reasonable attorneys' fee provision; fee of \$ 350, and, after affirmance of judgment on appeal, \$ 750 additional as fees on appeal].

IMO Dev. Corp. v. Dow Corning Corp. (1982) 135 C.A.3d 451, 461, 465, 185 C.R. 341 [where issues cannot be segregated, it is error for judge to do so for purpose of limiting amount awarded].

Stokus v. Marsh (1990) 217 C.A.3d 647, 654, 266 C.R. 90 [award under C.C. 1717 may include fees for services rendered prior to filing of complaint].

Finalco v. Roosevelt (1991) 235 C.A.3d 1301, 1306, 3 C.R.2d 865 [note providing for payment of "all costs of collection" covered not only fees incurred in proving plaintiff's action on note but also those incurred in defending against defendant's cross-complaint].

Carroll v. Import Motors (1995) 33 C.A.4th 1429, 1439, 39 C.R.2d 791 [distinguishing *Stokus*; where defendant's attorney's work in first action was not necessary to victory in similar second action, award of fees for work in first action was not "reasonable" under C.C. 1717].

Weber v. Langholz (1995) 39 C.A.4th 1578, 1586, 46 C.R.2d 677 [although fee request did not include time records and billing statements, trial court could evaluate reasonableness of request and make award].

Abdallah v. United Savings Bank (1996) 43 C.A.4th 1101, 1111, 51 C.R.2d 286 [plaintiffs' contract and tort claims were "inextricably intertwined," making it impossible to separate out those fees incurred on contract action alone; quoting *Finalco*].

Robinson v. Grossman (1997) 57 C.A.4th 634, 648, 67 C.R.2d 380 [court properly awarded two attorneys fees, even though one attorney failed to sign his letter stating amount of fees under penalty of perjury and neither attorney itemized fees, where no objection was raised at trial court].

Korech v. Hornwood (1997) 58 C.A.4th 1412, 1423, 68 C.R.2d 637 [counsel could not defend landowners from breach of contract claim without ascertaining facts relating to issues that were common to mechanic's lien cause of action; trial court properly declined to apportion fees between those incurred with regard to contract cause of action, in which fees are proper, and mechanic's lien cause of action, in which they are not allowed; quoting *Reynolds Metals Co. v. Alperson* (1979) 25 C.3d 124, 158 C.R. 1, 599 P.2d 83].

11382 Beach Partnership v. Libaw (1999) 70 C.A.4th 212, 219, 82 C.R.2d 533 [trial court properly awarded less than amount of attorneys' fees requested, where trial took only 2 days and parties were attempting to make it more complicated than necessary].

Heppler v. J.M. Peters Co. (1999) 73 C.A.4th 1265, 1297, 87 C.R.2d 497 [trial court erred in requiring sole defendant against whom plaintiffs prevailed to pay fees that plaintiffs incurred in preparing for trial against other defendants; some issues could have been isolated for purposes of attorneys' fee award].

Acree v. General Motors Acceptance Corp. (2001) 92 C.A.4th 385, 404, 112 C.R.2d 99 [\$ 3.6 million attorneys' fee award in class action involving 116,000 members was not abuse of discretion; trial was complex and technical and included four interlocutory trips to appellate court; trial court excluded fees for time spent on noncontract claims; apportionment of fees between successful and unsuccessful contract claims was unnecessary because all contract claims involved same contract and same contractual relationship].

Olson v. Cohen (2003) 106 C.A.4th 1209, 1217, 131 C.R.2d 620 [trial court properly awarded over \$ 30,000 in fees to law corporation that prevailed in action by clients seeking private remedies for corporation's failure to register with State Bar; case presented novel legal question in context of class action and involved large amount of potential damages, and award was significantly less than amount requested].

Erickson v. R.E.M. Concepts (2005) 126 C.A.4th 1073, 1082, 25 C.R.3d 39 [trial court properly declined to apportion fees incurred defending tort claims and those incurred defending indemnity claims under subcontract; claims raised common issues requiring virtually identical evidence; citing *Abdallah* and *San Dieguito Partnership, L.P. v. San Dieguito River Valley Regional Open Space Park Joint Powers Authority* (1998) 61 C.A.4th 910, 72 C.R.2d 91, *infra*, §308].

*Ajaxo v. E*Trade Group* (2005) 135 C.A.4th 21, 64, 37 C.R.3d 221 [trial court did not abuse discretion in declining to award any attorneys' fees for plaintiff's prior counsel; trial court had noted that attorneys did not do good job of preparing for trial and plaintiff failed to detail services attorneys provided or their qualifications to support their requested billing rates].

PM Group v. Stewart (2007) 154 C.A.4th 55, 68, 64 C.R.3d 227 [because plaintiffs' tort theories and defendants' contract claims were interrelated and required virtually identical evidence, trial court properly determined amount attributable to defense of contract claims by reducing total amount of attorneys' fees by only 10%; citing *Abdallah* and *Erickson*].

Yield Dynamics v. TEA Systems Corp. (2007) 154 C.A.4th 547, 577, 580, 66 C.R.3d 1 [trial court was not required to apportion fees to allow only those for claims involving breach of asset purchase agreement and disallow those for claims for breach of invention agreement, breach of confidentiality agreement, and fraud; defenses of claims were interrelated and impossible to separate; trial court appropriately reduced fee award by 40% to disallow fees for defense of distinct, unfair business practices claim].

El Escorial Owners' Assn. v. DLC Plastering (2007) 154 C.A.4th 1337, 1365, 65 C.R.3d 524 [reduction in requested amount of fees was appropriate; trial court properly separated attorney time spent on indemnity issues from time spent on tort and toxic mold issue, where provision limited fees to actions to enforce terms of subcontract; also defendants did not meet burden of proving that claimed hours were reasonable and necessary].

Cruz v. Ayromloo, supra, 155 C.A.4th 1276 [trial court did not err in awarding fees that were based on claims beyond breach of contract, where broad fee provision in lease covered all fees in civil action stemming from lease; also, fact that legal work incidentally benefited other tenants, who did not have leases with fee provision, did not eliminate right of plaintiff tenants, who did have leases, to recover fees].

SUPPLEMENT: [This section is current through the latest supplement]

See *Amtower v. Photon Dynamics* (2008) 158 C.A.4th 1582, 1603, 1603, 71 C.R.3d 361 [trial court properly refused to apportion fees incurred defending contract claim and those incurred defending remaining seven causes of action; all causes of action relied on same factual allegations]; *Peak-Las Positas Partners v. Bollag* (2009) 172 C.A.4th 101, 113, 90 C.R.3d 775 [fee award in action to enforce land purchase agreement was not excessive, despite exceeding purchase price of property; value of land to plaintiff was greater than purchase price and defendant had always been aware of that; also, defendant's aggressive litigation posture caused plaintiff to incur higher fees]; *Gorman v. Tassajara Dev. Corp.* (2009) 178 C.A.4th 44, 63, 99, 100 C.R.3d 152 [trial court was not required to explain reasoning on motion for attorneys' fees; however, where there was no reasonable connection between lodestar amount and award, and where parties and appellate court could not explain award, remand was necessary].



144 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

3. Fees Based on Contract.

b. Where Contract Specifies Amount.

7 Witkin Cal. Proc. Judgm § 307

[§ 307] Where Contract Specifies Amount.

If the contractual provision is for a specific sum, or for a percentage of the demand, this amount may be recovered without showing reasonableness. (*Johnson v. Kaeser* (1925) 196 C. 686, 695, 239 P. 324; see *Garabedian v. Los Angeles Cellular Tel. Co.* (2004) 118 C.A.4th 123, 126, 12 C.R.3d 737 [trial court had duty to review and modify amount of attorneys' fees specified in class action settlement].)

SUPPLEMENT: [This section is current through the latest supplement]



145 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

3. Fees Based on Contract.

c. Where Contract Specifies "Amount Incurred."

7 *Witkin Cal. Proc. Judgm* § 308

[§ 308] Where Contract Specifies "Amount Incurred."

In *San Dieguito Partnership, L.P. v. San Dieguito River Valley Regional Open Space Park Joint Powers Authority* (1998) 61 C.A.4th 910, 72 C.R.2d 91, a partnership of property owners sued a public agency alleging violation of the California Environmental Quality Act (CEQA). The parties entered into a settlement agreement in which defendant agreed to conduct an environmental review in accordance with CEQA. The settlement agreement contained an attorneys' fees provision that provided for the prevailing party in an action to enforce the agreement to recover attorneys' fees "in the amount ... incurred in connection" with the suit. After defendant certified a final environmental impact report, plaintiff sued again, alleging CEQA violations and breach of the settlement agreement. Plaintiff's action was consolidated with a related action, brought by a citizens' group, also alleging CEQA violations. The trial judge rendered judgment for defendant agency. Defendant then requested attorneys' fees in the amount of \$ 57,342, although plaintiff alleged that defendant had actually incurred less than \$ 25,000 in fees. Defendant contended that in calculating the lodestar, the trial court was required to use "fair market hourly rates" rather than the "below market rates" actually charged to defendant by its counsel. The trial judge awarded \$ 40,352 in attorneys' fees. *Held*, reversed.

(a) The trial judge had no power to award fees in excess of the amount incurred. Where, as here, the parties specifically agree that the prevailing party is entitled to an award "in the amount of attorneys' fees and costs incurred," the court may not award more than that amount. C.C. 1717 (*supra*, §170) does not change this result. (61 C.A.4th 917.) The object of the provision in C.C. 1717 allowing the recovery of "reasonable attorney's fees" in an action on a contract is to reimburse a party for attorneys' fees the party has paid, or to indemnify the party for fees the party has become liable to pay, provided the fees so paid or incurred are reasonable. (61 C.A.4th 918, citing *Trope v. Katz* (1995) 11 C.4th 274, 45 C.R.2d 241, 902 P.2d 259, *supra*, §161.)

(b) The trial judge was not required to apportion the fee award between the contract and CEQA causes of action. Apportionment of a fee award between fees incurred on a contract cause of action and those incurred on other causes of action is within the trial court's discretion. Attorneys' fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed. (61 C.A.4th 920, quoting *Reynolds Metals Co. v. Alperson* (1979) 25 C.3d 124, 158 C.R. 1, 599 P.2d 83.) Here, the settlement agreement required defendant to conduct an environmental review in accordance with CEQA. Accordingly, plaintiff's

cause of action for breach of the settlement agreement and its cause of action for violation of CEQA were each premised on the same issue: whether defendant complied with CEQA in conducting its environmental review. (61 C.A.4th 920.)

(c) The trial judge was not required to apportion the fee award between plaintiff's action and the related citizens' group action. Defendant would have had to litigate its compliance with CEQA in plaintiff's action for breach of the settlement agreement regardless of the related action. Plaintiff should not be allowed to avoid responsibility for attorneys' fees, for which it otherwise would have been wholly responsible, simply because of the fortuitous existence of another action by another party raising the same issue. This is especially true given that plaintiff first brought the attorneys' fees provision into play by putting the settlement agreement at issue in its action against defendant. (61 C.A.4th 921.) (See *PLCM Group v. Drexler* (2000) 22 C.4th 1084, 1097, footnote 5, 95 C.R.2d 198, 997 P.2d 511, supra, §164 [trial court properly calculated fees owed to in-house counsel under contractual attorneys' fee provision and C.C. 1717 by multiplying reasonable in-house attorney hours by prevailing hourly rate in community for comparable legal services; disapproving *San Dieguito* to extent that it suggests that fees can be recovered only in amount incurred on "fee-for-service" basis].)

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Use of equitable considerations to reduce amount of fees:* In *EnPalm, LLC v. Teitler Family Trust* (2008) 162 C.A.4th 770, 75 C.R.3d 902, defendants prevailed in a real estate fraud and breach of contract action and requested more than \$ 116,000 in fees under the contract. The trial court calculated "reasonable" attorneys' fees to be \$ 50,000, but then applied equitable principles to reduce the fees to \$ 5,000, after finding that one of the defendants had intentionally lied under oath about various material matters. The trial court determined that, had that defendant been more forthcoming, the action would have been resolved earlier, and thus "the vast majority of the time incurred by [defendants' counsel] was not reasonably incurred." *Held*, affirmed.

(a) Defendants contend that the trial court impermissibly "punished" them, but the record does not support this factual contention. The trial court never used that term. The record instead compels the conclusion that one of the defendants engaged in conduct before and during the trial that rendered most of defendants' fees unnecessary. (162 C.A. 4th 775.)

(b) After determining the lodestar figure of \$ 50,000, the trial court was entitled, under *PLCM Group v. Drexler* (2000) 22 C.4th 1084, 95 C.R.2d 198, 997 P.2d 511, text, p. 910, to use equitable principles to reduce that figure to a reasonable amount. (158 C.A.4th 774.) Furthermore, *Graham v. DaimlerChrysler Corp.* (2004) 34 C.4th 553, 21 C.R.3d 331, 101 P.3d 140, text, §321, permits fee enhancements in litigation over the amount of fees when a party has engaged in conduct that has caused the prevailing party to spend more time on a case than was otherwise reasonably necessary. This same rule applies as a ground for *reducing* a prevailing party's fee award. (162 C.A.4th 777.)

One justice dissented, contending that the second reduction of fees, from \$ 50,000 to \$ 5,000, was an abuse of discretion. The trial judge's explanation of the reduction showed that he impermissibly characterized one of the defendants as both the prevailing party and the "culpable party." (162 C.A. 4th 779.)



146 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

3. Fees Based on Contract.

d. Test of Net Recovery.

7 *Witkin Cal. Proc. Judgm* § 309

[§ 309] Test of Net Recovery.

When a note or other contract contains a provision for fees, either for a reasonable sum or a percentage of the amount recovered, no difficulty is encountered if the only issue is liability for the amount claimed. If, however, the defendant files a cross-complaint, should the fee be based on the amount of the plaintiff's claim that is successfully established, or on the net recovery after deducting offsets awarded the defendant? The general rule is that the net recovery is the basis, but some authorities hold it proper to consider the extra work necessitated by the defense of the cross-complaint, and to award an additional amount for this.

In *Independent Iron Works v. Tulare* (1962) 207 C.A.2d 164, 24 C.R. 361, the court discussed the different views but held that the matter was one for the trial judge's discretion: "We do not lay down a general rule that additional fees ... can never be allowed, or, on the contrary, that such services must necessarily enhance the award." (207 C.A.2d 172.)

The problem is simpler where the plaintiff sues for a large sum and recovers a much smaller amount. The rule for both costs (*supra*, §91) and attorneys' fees is that the prevailing party is the one with the net judgment in his or her favor. (*Moss Const. Co. v. Wulffsohn* (1953) 116 C.A.2d 203, 205, 253 P.2d 483; *Distefano v. Hall* (1968) 263 C.A.2d 380, 385, 69 C.R. 691 [prayer for \$ 128,000; judgment after second trial for \$ 12,559.96; \$ 5,000 award of fees to plaintiff].)

SUPPLEMENT: [This section is current through the latest supplement]



147 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

3. Fees Based on Contract.

e. Effect of Contingency Agreement.

7 Witkin Cal. Proc. Judgm § 310

[§ 310] Effect of Contingency Agreement.

Courts are not constrained by contingency agreements in making attorneys' fee awards. A court may consider a contingency fee agreement, but the agreement is just one factor in awarding a "reasonable" fee. (*Heppler v. J.M. Peters Co.* (1999) 73 C.A.4th 1265, 1296, 87 C.R.2d 497 [trial court did not abuse discretion in awarding fees based on billing statements rather than on alleged 30% contingency agreement between plaintiffs and plaintiffs' attorney]; *Persson v. Smart Inventions* (2005) 125 C.A.4th 1141, 1172, 1175, 23 C.R.3d 335 [fee award greater than amount prevailing party owed attorney under their contingency fee agreement was not erroneous; fee clause in parties' stock redemption agreement allowed for "reasonable attorneys' fees to be fixed by the court," nothing indicated that provision should not apply where prevailing party had contingency fee agreement, and provision did not limit fees to those "actually incurred"; citing *PLCM Group v. Drexler* (2000) 22 C.4th 1084, 95 C.R.2d 198, 997 P.2d 511].)

SUPPLEMENT: [This section is current through the latest supplement]



148 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

4. Fees Based on Statute.

a. In General.

7 *Witkin Cal. Proc. Judgm* § 311

[§ 311] In General.

If a statute merely gives a general right to attorneys' fees, or to "reasonable" fees, the amount awarded is within the discretion of the court. (See *Los Angeles v. Los Angeles-Inyo Farms Co.* (1933) 134 C.A. 268, 274, 25 P.2d 224; *People v. Thompson* (1935) 5 C.A.2d 668, 671, 43 P.2d 606; *Riverside v. Brown* (1939) 30 C.A.2d 747, 749, 87 P.2d 60; *Muller v. Martin* (1953) 116 C.A.2d 431, 435, 253 P.2d 686; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §16.76; on use of "lodestar" method to calculate fees awarded under statute, see *infra*, §312.)

In *Cortez v. Bootsma* (1994) 27 C.A.4th 935, 33 C.R.2d 20, the prevailing plaintiff sought attorneys' fees under *Lab.C. 3709*, permitting a judgment to include "reasonable attorneys' fees fixed by the court." A local rule limited an attorneys' fee award to the amount agreed to by plaintiff and plaintiff's attorney. The trial judge followed the local rule. *Held*, reversed. A local rule so limiting attorneys' fees must yield to state law granting discretion to award a reasonable fee. (27 C.A.4th 938.) Not before the court, and thus not decided, was "whether the local rule limiting fee awards is valid when the attorney fees are awarded based on a private contractual clause for 'reasonable attorney's fees,' rather than ... on a positive statutory provision." (27 C.A.4th 938, footnote 3.)

In *Contractors Labor Pool v. Westway Contractors* (1997) 53 C.A.4th 152, 61 C.R.2d 715, plaintiff sought attorneys' fees under C.C. 3250 (*supra*, §220), which mandates an award of "reasonable" attorneys' fees to the prevailing party in an action on a government construction bond. The trial judge awarded fees, but limited them to the amount provided by a local court rule. *Held*, reversed. The local rule provides for fees in excess of the amounts set forth in the rule only where "extraordinary services" are performed. (53 C.A.4th 167, footnote 7.) The rule thus conflicts with C.C. 3250; it purports to limit a court's discretion in setting a fee award, but C.C. 3250 contains no such limitations. (53 C.A.4th 169, citing *Cortez*.)

In *Akins v. Enterprise Rent-A-Car Co. of San Francisco* (2000) 79 C.A.4th 1127, 94 C.R.2d 448, plaintiff sued a rental car company and one of its employees for, among other things, two violations of the Robinson Fair Debt Collection Practices Act (FDCPA) (C.C. 1788 et seq.): wrongful conversion and forceful repossession. Plaintiff prevailed on the conversion claim only. The trial court awarded her attorneys' fees, under C.C. 1788.30(c), which provides that a prevailing debtor in an action to enforce any liability under the FDCPA must be awarded reasonable

attorneys' fees "based on time necessarily expended to enforce the liability." *Held*, affirmed.

(a) The trial court was not required to limit the award to the fees incurred on the successful part of the FDCPA claim only. "If there is a common *legal* issue--in this case, the application and interpretation of a statute on which there was no case law to guide counsel--that links a claim on which an attorney fees motion may properly be based with a claim for which no attorney fees may be recovered, that appears to us to be sufficient to link the legal work to the compensable attorney fees claim. Both FDCPA claims--that based on facts surrounding the actual repossession and that based on the later wrongful withholding of [plaintiff's] property--have the novel statute as their basis." (79 C.A.4th 1133.)

(b) The amount awarded (\$ 85,490) was not an abuse of discretion. "The only proper basis of reversal of the amount of an attorney fees award is if the amount awarded is so large or small that it shocks the conscience and suggests that passion and prejudice influenced the determination." (79 C.A.4th 1134.) Here, the award granted was significantly reduced from the original request as a result of the trial court's indication that it did not look favorably on the full request. Thus, it clearly appears that the trial court exercised its discretion. The award of attorneys' fees does not shock the conscience or suggest that passion and prejudice had a part in it. (79 C.A.4th 1134.)

(c) Plaintiff is also entitled to her attorneys' fees on appeal. Statutory authorization for the recovery of attorneys' fees incurred at trial necessarily includes attorneys' fees incurred on appeal, unless the statute specifically provides otherwise. (79 C.A.4th 1134.)

Other cases discussing the amount of attorneys' fees awarded under a statute include the following:

Trout v. Carleson (1974) 37 C.A.3d 337, 341, 112 C.R. 282 [court need not follow local minimum fee schedule].

Horn v. Swoap (1974) 41 C.A.3d 375, 384, 116 C.R. 113 [use of mechanical formula was rejected].

Levy v. Toyota Motor Sales, U.S.A. (1992) 4 C.A.4th 807, 813, 5 C.R.2d 770 [recovery of fees for breach of warranty under Song-Beverly Act (C.C. 1794(d)) "determined by the court to have been reasonably incurred by the buyer"].

Nightingale v. Hyundai Motor America (1994) 31 C.A.4th 99, 103, 37 C.R.2d 149 [recovery of fees under Song-Beverly Act (C.C. 1794(d)) determined at rate buyer was obligated to pay under fee agreement, rather than at attorney's actual, higher, hourly rate].

Church of Scientology v. Wollersheim (1996) 42 C.A.4th 628, 658, 49 C.R.2d 620 [award was within trial court's discretion where it was based on attorneys' declarations of their experience and expertise, on itemized accountings, and on expert's opinion of value of services].

Boquilon v. Beckwith (1996) 49 C.A.4th 1697, 1721, 57 C.R.2d 503 [trial judge did not abuse discretion in determining that only 50% of fees claimed by plaintiffs were reasonably incurred in establishing cause of action under Home Equity Sales Contracts Act; other half of plaintiffs' counsel's and expert's time was spent in effort to portray defendant as "bad actor," which trial judge rejected].

Wertin v. Franchise Tax Bd. (1998) 68 C.A.4th 961, 979, 80 C.R.2d 644 [trial court properly awarded fees in excess of \$ 75 per hour, the rate set by Rev.C. 19717; defendant failed to rebut plaintiff's showing that enhanced fee was justified].

International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal (1999) 69 C.A.4th 287, 302, 81 C.R.2d 456 [in action to enforce open meetings statute, trial court properly based attorneys' fee award on prevailing market rates, rather than on fees actually incurred by plaintiff; like private attorney general statute (supra, §259 et seq.), which uses prevailing market rates, fee provision in open meetings statute authorizes compensation for

private actions that serve to vindicate important rights affecting public interest].

Bell v. Vista Unified School Dist. (2000) 82 C.A.4th 672, 688, 98 C.R.2d 263 [trial court abused discretion in failing to apportion plaintiff's attorneys' fee award between statutorily authorized fees relating to defendant's Brown Act violation, and those relating to plaintiff's wrongful termination causes of action; although Brown Act violation may have procedurally facilitated wrongful termination, it was substantively distinct].

Del Cerro Mobile Estates v. Proffer (2001) 87 C.A.4th 943, 950, 105 C.R.2d 5 [citing *Akins v. Enterprise Rent-a-Car Co.*, *supra*; remand to allow trial court to apportion attorneys' fee award (to exclude fees for breach of contract claim and allow fees for statutory nuisance claim) was not necessary; two causes of action arose from common core of operative facts].

Consumer Defense Group v. Rental Housing Industry Members (2006) 137 C.A.4th 1185, 1217, 40 C.R.3d 832 [action against apartment building owners and managers alleging violations of Proposition 65 (*Health & Saf.C. 25249.5 et seq.*) was "so absurdly easy" to bring that attorneys' fees of over \$ 500,000, which defendants agreed to in settlement, were "objectively unconscionable"].

Graciano v. Robinson Ford Sales (2006) 144 C.A.4th 140, 157, 50 C.R.3d 273 [trial court should have determined whether plaintiff's causes of action under Consumer Legal Remedies Act and Automobile Sales Finance Act, on one hand, and causes of action for which fees were not available, on other hand, were based on common core of facts or were so inextricably intertwined to preclude apportionment].

Thompson Pac. Const. v. Sunnyvale (2007) 155 C.A.4th 525, 554, 66 C.R.3d 175 [award in action under *Pub.Contr.C. 7107*, regarding funds withheld by public entity from contractor, was reasonable; trial court asked public entity to separate out fees incurred in defending statutory claim from those arising under other claims].

SUPPLEMENT: [This section is current through the latest supplement]

See *Harrington v. Payroll Entertainment Services* (2008) 160 C.A.4th 589, 594, 72 C.R.3d 922 [reasonable fee for dispute over \$ 44.63 in unpaid overtime was no more than \$ 500]; *People v. Bhakta* (2008) 162 C.A.4th 973, 980, 76 C.R.3d 421 [award of \$ 100,000 to state in action to enjoin motel operators from facilitating prostitution was supported by hundreds of pages of documentation]; *Doppes v. Bentley Motors* (2009) 174 C.A.4th 967, 1001, 94 C.R.3d 802 [trial court erred in denying fees incurred in bringing postjudgment motion for fees; where attorneys' fees are recoverable by statute, reasonable fees incurred in preparing motion are also recoverable].



149 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

4. Fees Based on Statute.

b. Use of Lodestar Approach.

7 *Witkin Cal. Proc. Judgm* § 312

[§ 312] Use of Lodestar Approach.

The lodestar adjustment method for calculating attorneys' fees, set forth in *Serrano v. Priest* (1977) 20 C.3d 25, 141 C.R. 315, 569 P.2d 1303 (*Serrano III*), supra, §304, is not necessarily limited to fees awarded under the private attorney general doctrine (infra, §316). (*Flannery v. California Highway Patrol* (1998) 61 C.A.4th 629, 640, 647, 71 C.R.2d 632 [*Serrano* approach was binding in action under Fair Employment and Housing Act; case was remanded for recalculation of amount because trial judge improperly applied multiplier and "double count[ed]" several factors on which it relied to enhance amount of award]; see *Vo v. Las Virgenes Mun. Water Dist.* (2000) 79 C.A.4th 440, 445, 94 C.R.2d 143 [based on inadequate record provided by appellant, trial court's determination, using lodestar method, of amount of fees to be awarded under Fair Employment and Housing Act could not be considered abuse of discretion]; *Graciano v. Robinson Ford Sales* (2006) 144 C.A.4th 140, 154, 50 C.R.3d 273 [trial court abused its discretion by setting lodestar based on rate for generic expert testimony set by local rule; court should have relied on plaintiff's un rebutted evidence establishing prevailing rates for attorneys with comparable skills]; *Robertson v. Fleetwood Travel Trailers of Calif.* (2006) 144 C.A.4th 785, 818, 50 C.R.3d 731 [lodestar method, including use of fee multipliers, is appropriate for determining fees under Song Beverly Consumer Warranty Act (C.C. 1794(d))]; 51 U.C.L.A. L. Rev. 825 [use of lodestar to calculate fees under fee-shifting statutes]; C.E.B., Attorney Fee Awards 2d, Chap. 11.)

In *Meister v. Regents of Univ. of Calif.* (1998) 67 C.A.4th 437, 78 C.R.2d 913, an instructor at defendant university sued the university and one of its employees for damages under the Information Practices Act (C.C. 1798 et seq.), after the employee widely circulated a letter criticizing plaintiff and dismissing him from his position as coordinator of a legal studies program. Plaintiff rejected several settlement offers and the matter proceeded to arbitration. The arbitrator awarded plaintiff \$ 25,000 in noneconomic damages and \$ 2,500 in punitive damages and enjoined defendants from depriving plaintiff of his rights, retaliating against plaintiff, or publishing personal or confidential information about him. After the parties stipulated to entry of judgment on the arbitration award, plaintiff moved to recover his attorneys' fees in the amount of \$ 428,851. He subsequently submitted a supplemental claim for over \$ 90,000 for the fees incurred in litigating the initial fee claim. The trial court awarded only \$ 75,500 in fees, the amount incurred up to the time of defendants' first settlement offer. *Held*, affirmed.

(a) *The trial court properly applied the lodestar method to calculate fees.* "We are persuaded by *Flannery* that the

California Supreme Court intended its lodestar method to apply to a statutory attorney's fee award unless the statutory authorization for the award provided for another method of calculation." (67 C.A.4th 448, 449.) C.C. 1798.48(b) merely provides for "reasonable" fees "as determined by the court." Thus, the trial court was required to use the lodestar method. (67 C.A.4th 449.)

(b) *The trial court properly limited the fees to those incurred up to the time of defendants' first settlement offer.* C.C.P. 998 (supra, §112 et seq.) prevents plaintiffs who reject reasonable settlement offers from recovering their postoffer costs. Even though that statute was not applicable here, the trial court properly allowed the underlying policy concerns addressed by C.C.P. 998 to guide the exercise of its discretion. The trial court had the discretion to determine that attorney time spent after the offer was not "reasonably spent." (67 C.A.4th 450.) Federal cases stating that a trial court may not use an informal settlement offer as a basis for determining the amount of a reasonable attorneys' fee award are not persuasive. (67 C.A.4th 452.) The evidence supports the conclusion that defendants' first settlement offer would have afforded plaintiff as good or better relief, both monetary and injunctive, than the judgment did. (67 C.A.4th 453, 454.) Moreover, the court did not err in concluding that plaintiff's action had not been a catalyst for reform of defendant university's faculty disciplinary process; debate about the process preceded plaintiff's lawsuit. (67 C.A.4th 454, 455.)

(c) *The trial court properly denied plaintiff's request for attorneys' fees incurred in litigating his request for attorneys' fees.* Although prevailing parties may be compensated for hours reasonably spent on fee-related issues, an unreasonably inflated request may be denied. Here, "plaintiff's attorneys attempted to justify more than \$ 500,000 in fees for a case which achieved a modest financial award and stipulated injunctive relief which required defendants to do little, if anything, more than obey the law in the future." The trial court did not abuse its discretion in concluding that the fees incurred in attempting to justify this unreasonable request were not hours "reasonably spent." (67 C.A.4th 455.)

(d) *The trial court properly denied plaintiff's request for attorneys' fees incurred in opposing defendants' postjudgment motions to seal court files and for sanctions.* Fees for postjudgment proceedings are compensable if the work is necessary to secure the litigation's final result. Although plaintiff prevailed in preventing the court from sealing the court files, that achievement was not necessary for him to secure the result obtained in the litigation: recompense for defendants' wrongful disclosure of information about him. (67 C.A.4th 456.)

In *Ketchum v. Moses* (2001) 24 C.4th 1122, 104 C.R.2d 377, 17 P.3d 735, plaintiff landlord sued a tenant who had reported numerous code violations to government agencies. Defendant filed a special motion to strike under C.C.P. 425.16 (5 Cal. Proc. (5th), Pleading, §1017 et seq.), on the ground that the action constituted a strategic lawsuit against public participation (SLAPP suit). The trial court granted the motion and defendant moved for attorneys' fees under C.C.P. 425.16(c) (supra, §222). The trial court awarded fees of \$ 140,212, which included a lodestar amount of \$ 70,106, for costs incurred in the motion to strike and for the fee motion. The trial court applied a fee enhancement of 2.0 based on the contingent risk of nonpayment and the exceptional quality of representation by defendant's counsel. After further litigation prompted by plaintiff's motion for reconsideration and request for a stay, the trial court awarded supplemental attorneys' fees in the amount of \$ 112,160. The Court of Appeal reversed, holding that the trial court lacked authority to apply a fee enhancement to the lodestar figure. *Held*, judgment of Court of Appeal affirmed and case remanded for recalculation of fee.

(a) The lodestar adjustment approach should be applied to fee awards under C.C.P. 425.16. Because the provisions of C.C.P. 425.16 refer to attorneys' fees and costs without indicating any restrictions on how they are to be calculated, the Legislature is presumed to have intended that courts use the prevailing lodestar adjustment method. (24 C.4th 1136.)

(b) The trial court in an anti-SLAPP action has authority to award a fee enhancement. The lodestar approach allows a court awarding attorneys' fees to include an enhancement for the purpose of compensating the attorney who agreed to undertake representation at the risk of nonpayment or delayed payment. (24 C.4th 1136.) Permitting a fee enhancement for contingency cases under C.C.P. 425.16 does not encourage unmeritorious claims. Because a prevailing party will receive attorneys' fees only if the case is successful, there is little or no incentive to pursue nonmeritorious cases.

Similarly, because *C.C.P. 425.16* permits only a prevailing party to recover fees, a fee enhancement does not improperly permit attorneys to "pool" the risk in contingency cases, thus receiving payment for cases involving nonprevailing clients. (24 *C.4th 1137*.) In the absence of any legislative intent to limit attorneys' fees in anti-SLAPP actions, "we decline to impose a per se rule against such fee enhancements." (24 *C.4th 1139*.)

(c) The trial court here arrived at a proper lodestar figure. The lodestar was based on detailed documentation by defendant's attorney, which the trial court reviewed, and there was extensive oral argument with regard to the fee award. "We have no reason to doubt that the [trial] court conducted an independent assessment of the evidence presented." (24 *C.4th 1140*.) Moreover, the trial court properly included not only the fees incurred with respect to the underlying claim, but also the fees incurred in enforcing the right to mandatory fees under *C.C.P. 425.16*. (24 *C.4th 1141*.)

(d) The trial court abused its discretion in determining the amount of the fee enhancement. Although the entitlement to attorneys' fees on the motion to strike was subject to the risk that defendant and his attorney might not prevail on the motion and thus might not be entitled to attorneys' fees, once the motion was successful, attorneys' fees were mandatory under *C.C.P. 425.16(c)*. "An award of fees was, accordingly, no longer contingent" and the trial court erred in applying an enhancement for contingent risk to the fees accrued after the motion to strike was granted. (24 *C.4th 1142*.) Moreover, the substantial enhancement that was purportedly based on the exceptional quality of representation provided by defendant's attorney may have included improper double counting. The qualifications of defendant's attorney were presumably included in the hourly rate used to calculate the lodestar. By using these qualifications to justify both the hourly rate and the multiplier, the court appears to have counted the same factor twice. Finally, the record indicates that the trial court may have improperly permitted its disapproval of plaintiff's litigation strategy to influence its selection of the enhancement amount. An enhancement for contingent risk or quality of representation may not properly be imposed merely for the purpose of punishing plaintiff. (24 *C.4th 1143*.) (See *Mann v. Quality Old Time Service (2006) 139 C.A.4th 328, 341, 42 C.R.3d 607* [defendants whose motion to strike four causes of action under anti-SLAPP statute was successful as to one and unsuccessful as to other three were not entitled to all fees incurred on all claims; even though attorney work on all four claims was overlapping and intertwined, fee award must be reduced to reflect partial success].)

In *Greene v. Dillingham Const., N.A. (2002) 101 C.A.4th 418, 124 C.R.2d 250*, a jury awarded plaintiff damages on his claim that he was subjected to racial harassment in violation of the Fair Employment and Housing Act (FEHA), but rejected his retaliation and punitive damages claims. Using the lodestar method, the trial court awarded plaintiff attorneys' fees under *Govt.C. 12965(b)*, the fee provision of FEHA. *Held*, affirmed and remanded for determination of possible additional fees.

(a) The fee amount did not need to be further reduced to reflect the unsuccessful claims. It is appropriate to reduce a fee award when a plaintiff prevails on only one of several causes of action, and the trial court did so when it awarded fees not for the actual hours billed, but for a reduced number of hours, including reductions for time spent on claims on which plaintiff did not prevail. Further reduction, however, was not required, given that plaintiff's claims were intertwined and based on the same set of facts and courses of conduct. (101 *C.A.4th 423*.)

(b) The trial court did not abuse its discretion in awarding fees for the period of time after plaintiff rejected defendant's informal settlement offer. "We respectfully disagree with the court's reasoning" in *Meister*, which held that a court could reduce the lodestar figure by the amount of fees incurred by a plaintiff after he declined an informal settlement offer, even though *C.C.P. 998* (supra, §112 et seq.) did not apply. The punitive provisions of *C.C.P. 998* have no application to an informal settlement offer, such as the one here, made during the course of a confidential mediation session. The penalties would frustrate the public policy favoring settlement that is served by mediation. Furthermore, the recipients of an informal offer do not receive the procedural protection afforded recipients of offers under *C.C.P. 998*. (101 *C.A.4th 425*.)

(c) In deciding whether to apply a multiplier, the trial court should have considered contingent risk as a factor. Apparently, the trial court concluded that *Weeks v. Baker & McKenzie (1998) 63 C.A.4th 1128, 74 C.R.2d 510*, and *Flannery*, eliminated contingent risk as one of the factors to consider in imposing a multiplier, at least as to *FEHA*

cases. (101 C.A.4th 428.) The trial court reached this conclusion without benefit of the opinion in *Ketchum*, in which the Supreme Court reaffirmed that contingent risk is a valid consideration in determining whether to apply a fee enhancement in cases where attorney fees are authorized by statute. On remand, the trial court must determine whether a fee enhancement for contingent risk is merited. *(101 C.A.4th 429.)*

SUPPLEMENT: [This section is current through the latest supplement]

See *Wysinger v. Automobile Club of Southern Calif. (2007) 157 C.A.4th 413, 430, 69 C.R. 3d 1* [trial court's use of lodestar to calculate fees in employment discrimination action was proper, even though employee did not prevail on all claims; issues, such as retaliation, on which employee did prevail were intertwined with discrimination issues on which he did not]; *Bernardi v. Monterey (2008) 167 C.A.4th 1379, 1394, 1398, 84 C.R.3d 754* [fees awarded to prevailing plaintiff under California Public Records Act (text, §225) were reasonable; lodestar did not have to be proportionate with plaintiff's degree of success, measured by percentage of requested records she obtained; modest enhancement of 1.25 recognized contingent fee arrangement, extended delay before attorney could receive compensation, and presence of unique issues]; *Komarova v. National Credit Acceptance (2009) 175 C.A.4th 324, 347, 350, 95 C.R.3d 880* [although trial court could apply multiplier to fee award under C.C. 1788.30(c) (text, §224), it erred in basing decision to apply multiplier on necessity of private enforcement of statute; citing *Flannery v. California Highway Patrol (1998) 61 C.A.4th 629, 71 C.R.2d 632, text, p. 915*].



150 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

4. Fees Based on Statute.

c. Federal Statutes.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 313

[§ 313] In General.

An award of attorneys' fees under §304(d) of the Clean Air Act (42 U.S.C., §7604(d)) may include an award for time spent in administrative proceedings necessary to vindication of a party's rights under a previous consent decree. (*Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (1986) 478 U.S. 546, 106 S.Ct. 3088, 3096, 92 L.Ed.2d 439, 453, 454.) However, in determining the amount of a reasonable fee, it is improper to increase the lodestar figure on the basis of counsel's "superior quality" of performance, and the lodestar amount is reasonable in the absence of evidence showing that the results obtained were "outstanding" or that the lodestar figure was otherwise not reasonable. (106 S.Ct. 3099, 3100, 92 L.Ed.2d 457, 458.) (See 14 *Ecology L. Q.* 517 [*Delaware Valley Citizens' Council for Clean Air*]; 151 *A.L.R. Fed* 77 [conditions in employment discrimination actions justifying decrease in attorneys' fees awarded under §706(k) of Civil Rights Act of 1964 (42 U.S.C., §2000e-5(k))]; on problem of enhancement of lodestar figure to compensate for attorney's assuming risk of loss and risk of not being paid, see *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (1987) 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (*Delaware Valley II*); *Burlington v. Dague* (1992) 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 [enhancement of award on account of contingency is not permitted]; 24 *Pacific L. J.* 1567 [*Burlington*]; 20 *Pepperdine L. Rev.* 1 [same].)

SUPPLEMENT: [This section is current through the latest supplement]



151 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

4. Fees Based on Statute.

c. Federal Statutes.

2. Fees Under 42 U.S.C., §1988.

7 *Witkin Cal. Proc. Judgm* § 314

[§ 314] Fees Under 42 U.S.C., §1988.

(1) *Reasonable Fee*. The product of reasonable hours times a reasonable rate normally provides "reasonable" attorneys' fees, but this amount can be enhanced in cases of exceptional success. (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40, 50; see *Blum v. Stenson* (1984) 465 U.S. 886, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891, 901 [fees are to be determined by prevailing market rate in relevant community, rather than by cost-based standard, regardless of whether prevailing party is represented by private counsel or nonprofit legal service organization].)

In *Hensley*, the court laid down the following guidelines governing the relationship between success and reasonableness: "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." (103 S.Ct. 1943, 76 L.Ed.2d 54.) (See *Riverside v. Rivera* (1986) 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 [district court correctly applied *Hensley* in awarding over \$ 245,000 in attorneys' fees, even though damages recovered were only \$ 33,350; because damage award may not fully reflect public benefit obtained, fees in excess of amount of damages are not necessarily unreasonable]; *Harman v. San Francisco* (2006) 136 C.A.4th 1279, 1306, 39 C.R.3d 589 [attorneys' fee award of \$ 1.1 million was vacated where plaintiff was awarded compensatory damages of only \$ 30,300; on remand, trial court must exclude hours expended on claims that were unrelated to claim of damages on which plaintiff succeeded at trial and must reduce award to reflect limited nature of plaintiff's relief compared to litigation's scope; citing *Hensley* and *Riverside*]; 89 Cal. L. Rev. 999 [constitutionality of statutory restrictions on amount of fees that prisoners can recover under 42 U.S.C., §1988]; 26 Santa Clara L. Rev. 193 [use of contingency factor in determining reasonable fee under Act].)

(2) *Contingent Fee*. An attorneys' fee award under 42 U.S.C., §1988 is not limited to the amount provided in a contingent fee agreement entered into by the plaintiff and the plaintiff's attorney. (*Blanchard v. Bergeron* (1989) 489

U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67; see 17 Pacific L. J. 1275 [contingent fee awards under 42 U.S.C., §1988].)

However, the statute does not invalidate contingent-fee agreements that require a prevailing plaintiff to pay the attorney more than the statutory award against the defendant. "In sum, §1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer. What a plaintiff may be bound to pay and what an attorney is free to collect under a fee agreement are not necessarily measured by the 'reasonable attorney's fee' that a defendant must pay pursuant to a court order. Section 1988 itself does not interfere with the enforceability of a contingent-fee contract." (*Venegas v. Mitchell* (1990) 495 U.S. 82, 110 S.Ct. 1679, 1684, 109 L.Ed.2d 74, 84.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Reasonable Fee.* See *Harman v. San Francisco* (2007) 158 C.A.4th 407, 419, 421, 69 C.R.3d 750 [strict proportionality between damages awarded (\$ 30,300) and fees awarded (\$ 1.1 million) was not required, and fee award was not subject to reversal on that basis; however, remand was necessary for trial court to reduce award by amount incurred in unsuccessful prior appeal on attorneys' fees issue]; *Donovan v. Poway Unified School Dist.* (2008) 167 C.A.4th 567, 627, 84 C.R.3d 285 [trial court properly applied multiplier of 0.25, after finding that attorneys' hourly rate was in low range of reasonable].



152 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

5. Fees Awarded Out of Common Fund.

7 *Witkin Cal. Proc. Judgm* § 315

[§ 315] Fees Awarded Out of Common Fund.

Rebney v. Wells Fargo Bank (1991) 232 C.A.3d 1344, 284 C.R. 113, involved the settlement of a class action against defendant bank, arising from the assessment of checking account fees. Under the terms of the settlement, \$ 3.4 million was to be divided among attorneys, including counsel for the class representatives and counsel for objectors to the settlement. The court appointed a referee to determine the fees, and, after modifying the referee's award, made its order awarding fees according to the "lodestar" or "touchstone" approach. *Held*, affirmed. Under this approach, the court calculates base amounts from a compilation of time spent and reasonable hourly compensation of each attorney, and then may adjust the base amounts in light of various factors. (232 C.A.3d 1347, citing *Mandel v. Lackner* (1979) 92 C.A.3d 747, 155 C.R. 269, *infra*, §316, and *Maria P. v. Riles* (1987) 43 C.3d 1281, 240 C.R. 872, 743 P.2d 932, *supra*, §272.)

Other cases discussing the amount of fees recovered from a common fund include the following:

Dunk v. Ford Motor Co. (1996) 48 C.A.4th 1794, 1809, 56 C.R.2d 483 [rejecting award based on percentage of common fund recovery; lodestar or touchstone method of determining amount is appropriate].

Lealao v. Beneficial Calif. (2000) 82 C.A.4th 19, 43, 97 C.R.2d 797, *supra*, §305 [even when common fund is not established, trial court has discretion to adjust basic lodestar to reflect amount of class recovery, as long as value of recovery can be monetized with reasonable degree of certainty and it is not otherwise inappropriate to do so; distinguishing *Dunk*].

Wershba v. Apple Computer (2001) 91 C.A.4th 224, 254, 110 C.R.2d 145 [trial court properly used lodestar approach, with multiplier of 1.42, to calculate attorneys' fees in class action in which plaintiffs sued computer company that had rescinded its policy of providing free technical phone support to customers; citing *Rebney* and *Dunk*].

SUPPLEMENT: [This section is current through the latest supplement]

See *Consumer Privacy Cases* (2009) 175 C.A.4th 545, 556, 96 C.R.3d 127, *Supp.*, *infra*, §323A [trial court properly used lodestar method and applied multiplier to calculate fees in consumers' class action against bank; settlement agreement in which bank agreed to pay fees as determined by court, up to \$ 4 million, was proper].



153 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

6. Fees Awarded Under Private Attorney General Doctrine.

a. Touchstone and Multiplier.

7 *Witkin Cal. Proc. Judgm* § 316

[§ 316] Touchstone and Multiplier.

(1) *In General.* The amount of fees awarded under the private attorney general doctrine must be determined by calculating a "touchstone" or "lodestar" figure (hours spent times a reasonable hourly rate) and then adjusting that figure by a multiplier based on other factors. (*Press v. Lucky Stores* (1983) 34 C.3d 311, 322, 193 C.R. 900, 667 P.2d 704, supra, §269; see 73 A.L.R.4th 938 [cost of services provided by paralegals as element of award].)

In *Mandel v. Lackner* (1979) 92 C.A.3d 747, 155 C.R. 269, the court elaborately examined the factors bearing on an award of \$ 75,000 under the substantial benefit theory, following a successful judgment on appeal.

(a) The formulation in *Serrano v. Priest* (1977) 20 C.3d 25, 48, 49, 141 C.R. 315, 569 P.2d 1303 (*Serrano III*), supra, §304, is controlling, and it requires a determination based on time spent and reasonable hourly compensation of each attorney involved in the case. (92 C.A.3d 756, 757.)

(b) The judge did not follow this formulation. The elaborate findings stressed the novel and complex nature of the litigation and the high degree of skill of the attorneys; but the description of time spent lacked specificity ("substantial," etc.). (92 C.A.3d 752.) The findings on the nature of the case and the skill of the attorneys could support augmentation of the amount, but the base figure had to be derived from calculation of the value of the time spent. (92 C.A.3d 758.)

(c) In the retrial on remand, the evidence should commence with clear proof of the crucial factors of time spent and reasonable hourly compensation, to develop the base figure; then evidence to augment or diminish it may be produced. Some of the seven factors approved in *Serrano III* may be applied in the judge's discretion, but do not limit that discretion. (92 C.A.3d 761.) The precept that an experienced trial judge is the best judge of the value of professional services applies to services rendered in his court; in valuing services not personally witnessed, he may require more by way of objective proof, and this may well be provided by expert testimony. (92 C.A.3d 762.) (See *Long Beach City Employees Assn. v. Long Beach* (1981) 120 C.A.3d 950, 961, 172 C.R. 277.)

In *Press v. Lucky Stores*, supra, plaintiffs submitted a lodestar or touchstone figure of \$ 13,960 (hours spent times reasonable hourly rate), with a multiplying factor of 1.5 to reflect the public impact of the results, the high quality of the

work, and the contingencies involved. The total amount requested was \$ 20,940. The trial judge granted the motion on a finding that plaintiffs had satisfied the statutory requisites for an award, but he used a unique formula for determining the amount. He concluded that the only benefit conferred by the litigation was the securing of signatures on a petition at defendant's store; he therefore computed the fee in accordance with the ratio of signatures obtained there (3,000) to those obtained statewide (556,000), and awarded only \$ 112.98. *Held*, reversed.

(a) The touchstone or lodestar figure, increased or reduced by a multiplier based on other factors, must be used. (34 C.3d 322, quoting *Serrano* and citing *Mandel*.) The court's calculation, which ignored the lodestar figure, "improperly intertwined the determination of the litigation's importance with the question--which should arise only after it has been concluded that an award is proper--of the amount to be awarded." And it was an illogical measure: The fact that the total number of signatures greatly exceeded the number gathered at defendant's store did not diminish the importance of the rights secured. (34 C.3d 323.)

(b) The fee must bear some reasonable relationship to the lodestar figure and to the purpose of the private attorney general doctrine. Here, in failing to apply the lodestar adjustment method, the judge awarded an amount "which had no rational relationship to the skill, time and effort expended by plaintiffs' attorneys." (34 C.3d 324.)

The following cases are among those applying the touchstone or lodestar method of calculating fees in private attorney general actions:

Werschkull v. United Calif. Bank (1978) 85 C.A.3d 981, 1007, 149 C.R. 829 [order awarding fees of \$ 400,000 was reversed because it bore no relationship to rate of compensation and number of hours spent by attorneys].

Wallace v. Consumers Cooperative of Berkeley (1985) 170 C.A.3d 836, 847, 849, 216 C.R. 649 [fee award of over \$ 200,000 properly included compensation for services at administrative hearings and civil penalty proceeding closely related to underlying action].

Citizens Against Rent Control v. Berkeley (1986) 181 C.A.3d 213, 232, 235, 226 C.R. 265 [fee award of over \$ 200,000 was justified where it was supported by over 200 pages of documentation and no enhancement of lodestar figure was sought].

California Common Cause v. Duffy (1987) 200 C.A.3d 730, 754, 246 C.R. 285 [trial judge has no duty to make specific factual findings on his own motion explaining his calculation; party dissatisfied should request specific findings].

Californians for Responsible Toxics Management v. Kizer (1989) 211 C.A.3d 961, 970, 971, 259 C.R. 599 [determining touchstone or lodestar amount, and factors applied in adjusting figure up or down].

Galante Vineyards v. Monterey Peninsula Water Management Dist. (1997) 60 C.A.4th 1109, 1125, 71 C.R.2d 1 [trial court properly awarded 50% of plaintiffs' requested attorneys' fees].

Edgerton v. State Personnel Bd. (2000) 83 C.A.4th 1350, 1363, 100 C.R.2d 491 [in successful action to enjoin state agency from performing off-duty drug testing of employees, 1.5 multiplier was justified by novelty and difficulty of issues involved, skill displayed by plaintiffs' counsel in overcoming defendant's intransigent opposition, excellent results plaintiffs achieved, and importance of vindicated privacy rights].

Children's Hosp. & Med. Center v. Bonta' (2002) 97 C.A.4th 740, 777, 118 C.R.2d 629 [trial court properly included, in plaintiffs' fee award, hours spent by plaintiffs' attorneys in earlier federal proceeding, because federal rulings materially contributed to resolution of issues presented to trial court; moreover, hourly rates requested were in line with market rates and reflected expertise and specialization of plaintiffs' attorneys; number of hours compensated was reasonable given complexity of case].

Davis v. San Diego (2003) 106 C.A.4th 893, 902, 131 C.R.2d 266 [award of over \$ 10,000 for about 47 hours of service was proper; police officers association submitted uncontested evidence that its counsel was one of few California attorneys with ample experience in cases involving law enforcement officers acting in scope of their official duties, and that attorney's \$ 225 hourly rate had been determined to be reasonable in other matters].

MBNA America Bank, N.A. v. Gorman (2006) 147 C.A.4th Supp. 1, 11, 54 C.R.3d 724 [adequate billing records supported trial court's finding of time spent on credit card holder's defense of action by bank, and rates charged by attorneys were reasonable].

(2) *No Multiplier for Public Entities.* C.C.P. 1021.5 permits recovery of attorneys' fees under the private attorney general doctrine by a successful public entity against another public entity (see supra, §285). These awards may not be increased or decreased by a multiplier based on extrinsic circumstances. (C.C.P. 1021.5.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Hogar Dulce Hogar v. Community Dev. Com. of Escondido* (2007) 157 C.A.4th 1358, 1370, 1371, 69 C.R.3d 250 [trial court did not abuse discretion in refusing to apply multiplier; trial court effectively limited fees to about 50% of attorney's efforts expended to bring about reallocation of tax revenue; however, court should have awarded fees incurred before plaintiff filed complaint because precomplaint activities prompted defendant to take steps that greatly contributed to success of litigation]; *Northwest Energetic Services, LLC v. Franchise Tax Bd.* (2008) 159 C.A.4th 841, 879, 71 C.R.3d 642 [trial court erred in adjusting lodestar from about \$ 215,000 to \$ 3.5 million; listing of factors, in absence of further explanation, did not justify adjustment; fact that award would come from taxpayers to private attorneys also militated against upward adjustment]; *Ramon v. Santa Clara* (2009) 173 C.A.4th 915, 923, 93 C.R.3d 278 [plaintiff could recover fees incurred opposing defendant county's amicus curiae efforts in related case; citing *Wallace v. Consumers Cooperative of Berkeley* (1985) 170 C.A.3d 836, 216 C.R. 649, text, p. 923, and *Children's Hosp. & Med. Center v. Bonta'* (2002) 97 C.A.4th 740, 118 C.R.2d 629, text, p. 924].



154 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

6. Fees Awarded Under Private Attorney General Doctrine.

b. Class Action.

7 *Within Cal. Proc. Judgm § 317*

[§ 317] Class Action.

When fees are awarded in a class action, they must be based on the time spent and a reasonable hourly rate. (*Mandel v. Lackner* (1979) 92 C.A.3d 747, 757, 155 C.R. 269; see *Lealao v. Beneficial Calif.* (2000) 82 C.A.4th 19, 49, 97 C.R.2d 797, supra, §305 [class action not involving private attorney general doctrine; trial court had discretion to adjust basic lodestar to reflect monetary value of benefit received by class]; *Thayer v. Wells Fargo Bank* (2001) 92 C.A.4th 819, 833, 112 C.R.2d 284 [attorney in one of five coordinated class actions by banking customers to prevent bank from imposing monthly fees was not entitled to fees greater than lodestar amount, but rather should have received *less* than lodestar amount; bank never contested customers' legal claims or their right to reasonable fees under C.C.P. 1021.5 and attempted to settle cases almost immediately; litigation, which mainly involved anticipatory breach of contract claim, was not novel or complicated; attorney's role in coordinating proceedings was not helpful, he had no continuing obligations following settlement, and he duplicated work of other attorneys for customers].)

A multiplier, if used, must be based on facts other than those used to trigger the application of C.C.P. 1021.5. (*Estrada v. FedEx Ground Package System* (2007) 154 C.A.4th 1, 18, 64 C.R.3d 327 [award of over \$ 12 million to three drivers, who successfully sued package delivery company to establish that they were employees and were entitled to reimbursement for some work-related expenses, was excessive; on remand, trial court must consider whether use of multiplier is appropriate].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Amaral v. Cintas Corp. No. 2* (2008) 163 C.A.4th 1157, 1216, 78 C.R.3d 572 [trial court properly applied multiplier of 1.65 in class action involving labor law violations, based on novelty and difficulty of issues involved, importance of action in enforcing right to living wage, and high degree of skill displayed by attorneys; action raised issues of first impression and attorneys took substantial risk that they would not prevail and thus would not recover full fee]; *Consumer Privacy Cases* (2009) 175 C.A.4th 545, 556, 96 C.R.3d 127, Supp., infra, §323A [trial court properly used lodestar method and applied multiplier to calculate fees in consumers' class action against bank; settlement agreement in which bank agreed to pay fees as determined by court, up to \$ 4 million, was proper].



155 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

6. Fees Awarded Under Private Attorney General Doctrine.

c. Representation by Public Interest Law Firm.

7 Witkin Cal. Proc. Judgm § 318

[§ 318] Representation by Public Interest Law Firm.

Services compensable under *C.C.P. 1021.5* are computed from their reasonable market value, without regard to the fact that counsel are employed by a public interest firm or agency. Hence, the trial judge is entitled to use the prevailing billing rates of comparable private attorneys as the "touchstone" for determination of that value. (*Serrano v. Unruh* (1982) 32 C.3d 621, 643, 186 C.R. 754, 652 P.2d 985; see *California Common Cause v. Duffy* (1987) 200 C.A.3d 730, 756, 246 C.R. 285 [salaried institutional lawyer was entitled to same "market value" award as self-employed lawyer; error to reduce hourly rate because of his status].)

In *Margolin v. Regional Planning Com.* (1982) 134 C.A.3d 999, 185 C.R. 145, plaintiffs successfully sued to compel defendant regional planning agency and others to comply with the state Subdivision Map Act. The trial judge awarded \$ 300,000 in attorneys' fees, based on records furnished by the public interest law firm that represented plaintiffs. On appeal, defendants contended that it was error to deny their motion to compel deposition answers on questions concerning the salaries paid to the attorneys. *Held*, neither salaries paid nor other overhead costs are proper elements in determination of the fees, which should be based on the quality of the research done and the benefit produced for the client and the community. (134 C.A.3d 1004.) Moreover, evidence introduced by plaintiffs' attorneys on awards in nine other public interest lawsuits prosecuted by them was properly admitted. "[T]he figures are obviously relevant, particularly in determining the reasonable value of services rendered by a public interest law firm which does not bill its clients. The most analogous evidence to fees charged by a private law firm would be fees sought and deemed reasonable by courts in other cases." (134 C.A.3d 1005.)

SUPPLEMENT: [This section is current through the latest supplement]



156 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

6. Fees Awarded Under Private Attorney General Doctrine.

d. Award After Limited Success.

7 *Witkin Cal. Proc. Judgm* § 319

[§ 319] Award After Limited Success.

In *Sundance v. Municipal Court* (1987) 192 C.A.3d 268, 237 C.R. 269, the issue was whether the successful plaintiffs were entitled to an award based on all hours reasonably spent in pursuit of the litigation, or whether compensation for legal theories on which they did not prevail should be excluded. The court declined to follow the federal precedent supporting exclusion, *Hensley v. Eckerhart* (1983) 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40, supra, §314: "Rather than adopt a rigid holding, we conceive it to be far more beneficial to leave it to the discretion of the trial court to determine whether time spent on an unsuccessful legal theory was reasonably incurred." (192 C.A.3d 274.) (See *Feminist Women's Health Center v. Blythe* (1995) 32 C.A.4th 1641, 1674, 39 C.R.2d 189, supra, §268 [following *Sundance*].)

In *Sokolow v. San Mateo* (1989) 213 C.A.3d 231, 261 C.R. 520, supra, §273, the appellate court pointed out that limited success calls for a smaller award.

(a) Under 42 U.S.C., §1988, the trial court must determine what amount would be "reasonable"; and, under *Hensley v. Eckerhart*, "the degree or extent of appellants' success in obtaining the results which they sought must be taken into consideration in determining the extent of attorney fees which it would be reasonable for them to recover." (213 C.A.3d 248.)

(b) The right to fees under C.C.P. 1021.5 is independent of the federal right, and federal cases, while persuasive, are not controlling. However, "under state law as well as federal law, a reduced fee award is appropriate when a claimant achieves only limited success." (213 C.A.3d 249.) *Sundance* is distinguishable. The plaintiffs in that case were entirely successful on all of their claims for relief, although some of the legal theories used to support those claims were not found meritorious. Here, although plaintiff vindicated important equal protection rights, she was not successful in obtaining of her primary goal. (213 C.A.3d 250.) Hence, the trial judge should take into consideration the limited success achieved by plaintiff. (213 C.A.3d 250.) (See *Krumme v. Mercury Ins. Co.* (2004) 123 C.A.4th 924, 946, 20 C.R.3d 485 [trial court did not abuse discretion in applying multiplier of 1.5 to lodestar amount of plaintiff's attorneys' fees, even though plaintiff obtained only injunctive relief; multiplier was less than plaintiff requested, indicating that trial court may have taken plaintiff's limited success into account]; on award following limited success in action under

Fair Employment and Housing Act, see *Greene v. Dillingham Const., N.A.* (2002) 101 C.A.4th 418, 422, 124 C.R.2d 250, supra, §312.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Hogar Dulce Hogar v. Community Dev. Com. of Escondido* (2007) 157 C.A.4th 1358, 1368, 69 C.R.3d 250 [association achieved excellent results by prompting redevelopment agency to amend tax sharing agreement and by obtaining judgment that required agency to reimburse low-income housing fund, even though reimbursement amount was not as much as association had sought; fee amount did not need to be reduced to reflect association's less than complete success].



157 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

6. Fees Awarded Under Private Attorney General Doctrine.

e. Multiple Defendants.

7 *Witkin Cal. Proc. Judgm* § 320

[§ 320] Multiple Defendants.

(1) *Apportionment Between Defendants*. In *Sokolow v. San Mateo* (1989) 213 C.A.3d 231, 261 C.R. 520, supra, §273, involving sex discrimination in a private organization (the Patrol) affiliated with the sheriff's department, the court held that, under the circumstances of the case, it was appropriate to assess a greater percentage of the fees award against a county, one of two defendants. "Appellants' lawsuit was successful in eliminating the County's participation in invidious discrimination on the basis of sex. Appellants were also successful in obtaining savings to taxpayers, both directly, through the actual reduction in the County's expenditures on Patrol-related activities; and indirectly, through the termination of the County's involvement in invidious discrimination. The County has also been forced, through this litigation, to agree to permit women to engage in equestrian search and rescue under the aegis of the sheriff's department. On the other hand, although the close affiliation between the sheriff's department and the Patrol has been terminated except for search and rescue services, the Patrol was permitted to retain its male-only membership policy. To that extent, it has been less affected by this lawsuit than the County. The trial court, in its own broad discretion, may apportion the attorney fees award between the County and the Patrol in recognition of these differences." (213 C.A.3d 250.) (See *Feminist Women's Health Center v. Blythe* (1995) 32 C.A.4th 1641, 1671, 39 C.R.2d 189, supra, §268; *Friends of the Trails v. Blasius* (2000) 78 C.A.4th 810, 837, 93 C.R.2d 193 [trial court that found public easement for use of road alongside of irrigation canal and awarded attorneys' fees against landowners and irrigation district that already held easement for canal access did not err in failing to apportion award].)

(2) *Effect of Settlement With One Defendant*. In *Californians for Responsible Toxics Management v. Kizer* (1989) 211 C.A.3d 961, 259 C.R. 599, one defendant--the more culpable party--settled with plaintiff, and the nonsettling defendant sought to reduce the amount of plaintiff's fee award. "The public policy which stands behind section 1021.5 is defeated if the trial court looks to the amount of the settlement of the more culpable party and then seeks to reduce the plaintiff's fee award so that a nonsettling defendant is not punished out of proportion to his culpability. Such a rule would permit a settling defendant who is more culpable to effectively place a cap on plaintiff's total fee award. While such a result is perhaps fair as between the defendants, it subverts the very purpose of section 1021.5 which is to recompense plaintiffs who benefit the public by successfully undertaking such litigation." (211 C.A.3d 976.)

SUPPLEMENT: [This section is current through the latest supplement]



158 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

6. Fees Awarded Under Private Attorney General Doctrine.

f. Time Spent In Obtaining Award.

7 *Witkin Cal. Proc. Judgm § 321*

[§ 321] Time Spent In Obtaining Award.

(1) *In General.* In *Serrano v. Unruh* (1982) 32 C.3d 621, 186 C.R. 754, 652 P.2d 985, the question was whether an award of attorneys' fees under C.C.P. 1021.5 could include compensation not only for time reasonably spent on the underlying litigation, but also for time spent in obtaining the award of the fees. Defendants had contended that the efforts of plaintiffs' attorneys in securing their fees vindicated no more than their personal interest, and that this interest was inimical to that of their clients because every fee awarded reduces the fund available for the public use. In an elaborate opinion discussing federal and state authorities, the court came to the following conclusion: "In sum, defendants give us no reason in law or logic why we should not follow the rule of the overwhelming majority of courts that have considered the question. We hold therefore that, absent circumstances rendering the award unjust, fees recoverable under section 1021.5 ordinarily include compensation for all hours reasonably spent, including those necessary to establish and defend the fee claim." (32 C.3d 639.) (See *Hammond v. Agran* (2002) 99 C.A.4th 115, 128, 120 C.R.2d 646 [city council candidate who, on appeal, successfully defended statement in voters pamphlet against allegations that statement was unlawful, was not entitled to attorneys' fees for time spent arguing on appeal that fees should be awarded if candidate prevailed; fee work on appeal was premature request that appellate court determine entitlement to fees, rather than remand for consideration by trial court].)

(2) *Use of Multiplier.* In *Graham v. DaimlerChrysler Corp.* (2004) 34 C.4th 553, 21 C.R.3d 331, 101 P.3d 140, supra, §265, the Supreme Court concluded that fees for fee litigation under C.C.P. 1021.5 may be enhanced under some circumstances, but the enhancement should generally be lower than the enhancement for fees awarded in the underlying litigation.

(a) A rule that fees for fee litigation can never be enhanced is not in harmony with the principle that calculating fees and enhancements is a highly fact specific matter best left to the discretion of the trial court. Moreover, it is not clear that a categorical rule against enhancements would reduce attorneys' fee litigation. (34 C.4th 581.)

(b) Fees for fee litigation should not be enhanced on the basis that the plaintiff obtains exceptional results. Although the underlying litigation may do so, justifying an enhancement for the fees incurred in that litigation, the subsequent fee litigation simply produces fees to compensate the plaintiff's attorneys. (34 C.4th 582.) On the other hand,

fees for fee litigation may be enhanced when a defendant's opposition to the fee motion creates extraordinary difficulties, when the attorney has risked nonpayment by taking the case on a contingency basis, and when there is a significant delay in the payment of the fees. However, the "fact that the risk of fee litigation is generally less than the risk of litigation on the merits of the suit justifies a lower attorney fee multiplier for the former, if one is given at all." (34 C.4th 583.)

Three justices dissented, arguing that a multiplier for litigating fees on fees is excessive and will lead to outrageously inflated awards. (34 C.4th 601.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Hogar Dulce Hogar v. Community Dev. Com. of Escondido* (2007) 157 C.A.4th 1358, 1371, 69 C.R.3d 250 [association should have been awarded all fees incurred in prosecuting its fee motion; citing *Serrano v. Unruh* (1982) 32 C.3d 621, 186 C.R. 754, 652 P.2d 985, text, p. 928].



159 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

6. Fees Awarded Under Private Attorney General Doctrine.

g. Budget Act Restrictions.

7 *Within Cal. Proc. Judgm § 322*

[§ 322] Budget Act Restrictions.

In *California Labor Federation v. Occupational Safety & Health Standards Bd.* (1992) 5 C.A.4th 985, 7 C.R.2d 399, petitioners brought a mandamus proceeding in the Court of Appeal to compel respondent to incorporate in the Cal/OSHA plan certain health and safety provisions adopted in the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65). The requested relief was granted, and petitioner then moved for an award of attorneys' fees and costs. The court awarded \$ 114,266.25 in fees and \$ 2,820.30 in costs, and directed respondent to pay these sums "forthwith." The budget analyst for the Department of Industrial Relations then advised counsel that the state had established a Budget Appropriation with a \$ 125 cap on the hourly fee payable, and that the court's award had to be reduced to \$ 55,522.75 in order for petitioners to receive any payment. Petitioners then moved to enforce the award as originally made, contending that the budget provisions were void because they affected an amendment of existing law in violation of the single subject rule (Cal. Const., Art. IV, §9; see 7 *Summary* (10th), *Constitutional Law*, §§129, 131 et seq.). *Held*, motion granted.

(a) The Legislature has the substantive power to limit or control attorneys' fee awards against the state. As the Supreme Court pointed out in *Mandel v. Myers* (1981) 29 C.3d 531, 174 C.R. 841, 629 P.2d 935, 7 *Summary* (10th), *Constitutional Law*, §141, legislation to establish a fixed or maximum hourly rate of recovery could be valid. The issue here, however, is whether such a "cap" may be enacted as part of the *Budget Act*. (5 C.A.4th 990.) "Despite the fact that some such restrictions have been included in the Budget Act for at least 10 years, no published decision has yet faced the issue whether the restrictions survive scrutiny under the single subject rule." (5 C.A.4th 992.)

(b) *C.C.P. 1021.5* does not contain an express limitation on the size of the award, "but has been universally understood to permit a 'reasonable' award in light of factors derived from the statute's history and purpose. ... The Budget Act provisions in question here, on the other hand, impose what the state itself refers to as a 'cap' on the hourly rate which will be paid. Coupled with the requirement that the recipient waive any amounts exceeding this 'cap,' the provisions impose what amounts to a mandatory numerical ceiling on the fees which may be recovered." (5 C.A.4th 994.)

(c) Respondent contends that the existing limitation to a reasonable fee is not "statutory," but a mere judicial

interpretation of *C.C.P. 1021.5*; hence, the budget provisions do not affect existing statutory law. However, the limitation to a "reasonable" award is as much a matter of "statutory law" as anything explicitly stated in the section, for it is so inherent and essential as to be "necessarily implied." "The statute limits fee awards to a 'reasonable' sum as surely as if it said so. The budget provisions purporting to impose a different limitation seek to effect an outright alteration of section 1021.5 as drawn." (5 *C.A.4th* 995.)

(d) "[T]he Legislature is presumptively free to limit attorney fee awards under section 1021.5. What the Legislature may *not* do is grant a substantive right to fees, as it has done in section 1021.5, and then retract or impair the right thus granted through amendments masquerading as Budget Act provisions." (5 *C.A.4th* 996.)

(e) "Respondent seems to contend that whether or not the budget provisions are void, this court cannot direct payment of the full award because to do so would infringe legislative prerogatives and transgress the separation of powers. While we recognize the delicacy of the problem presented, we are satisfied that we can grant the relief requested by petitioners without impermissibly invading the domain of the Legislature." (5 *C.A.4th* 996.) The separation of powers doctrine prohibits a court from directly ordering the Legislature to enact a specific appropriation; but once funds have been appropriated, a court may order the State Controller or other similar official to make expenditures from such funds. (5 *C.A.4th* 996, citing *Mandel*.)

(f) Respondent is ordered to pay the full amount. "We retain jurisdiction (1) to enforce this order as may be necessary, (2) to determine whether a further award of attorney fees can and should be allowed, and if so in what amount, in connection with work performed by petitioners' counsel in seeking to enforce the original award, and (3) to consider such other matters as may be necessary and proper." (5 *C.A.4th* 997.)

SUPPLEMENT: [This section is current through the latest supplement]



160 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

7. Fees Negotiated in Settlement of Shareholder Derivative Action.

7 Witkin Cal. Proc. Judgm § 323

[§ 323] Fees Negotiated in Settlement of Shareholder Derivative Action.

A trial court must review an agreement to pay attorneys' fees negotiated as part of the settlement of a shareholder derivative action. Unlike the obligation of a court when fashioning a fee award, the court's task in reviewing the negotiated fee is to determine if the fee is fair. The court must review the settlement as a whole, including the fee award, "to ensure that it was fairly and honestly negotiated, is not collusive and adequately protects the interests of the corporation and of the shareholders. The court is entitled to recognize that the corporation may have a legitimate business interest in settling a marginal case, including paying the plaintiff's attorney fees, as a means of avoiding the costs of litigation. Nonetheless, the plaintiffs' attorneys owe an ethical and fiduciary duty to their clients--the shareholders, and through them to the corporation itself--to limit fees to an amount that represents the value of the work done. Therefore, although a negotiated fee may represent a reasoned business decision to settle, a negotiated fee that exceeds a fair and reasonable fee for the attorneys' contribution may not be approved." (*Robbins v. Alibrandi (2005) 127 C.A.4th 438, 444, 452, 25 C.R.3d 387* [reversing fee award that trial court calculated by determining amount that would be available under substantial benefit doctrine; issues involved were not novel or complex, expertise of plaintiffs' attorneys did not justify multiplier, and litigation conferred very little benefit on corporation and shareholders].)

SUPPLEMENT: [This section is current through the latest supplement]



161 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XV. INTEREST

A. Interest on Obligation or as Damages.

7 Witkin Cal. Proc. Judgm § 324

[§ 324] Interest on Obligation or as Damages.

Where a contractual obligation on which an action is brought is one that draws interest, that interest continues to run until the obligation is superseded by a verdict or judgment. And in certain kinds of actions, both in contract and tort, interest may be recoverable as part of the damages. These principles are part of the substantive law of damages and are not relevant to the discussion here. (See generally C.C. 3287, 3288, 3289, 3302; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §16.99; Cal. Civil Practice, 2 Procedure §8:50 et seq.; 1 *Summary* (10th), *Contracts*, §888 et seq.; 6 *Summary* (10th), *Torts*, §1643 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



162 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XV. INTEREST

B. Interest on Verdict or Decision.

7 *Witkin Cal. Proc. Judgm* § 325

[§ 325] Interest on Verdict or Decision.

In cases involving unliquidated contract claims where the court, acting under C.C. 3287(b) (see 1 *Summary* (10th), *Contracts*, §893), has awarded interest from a date before the entry of the judgment, the clerk or judge must include that interest in the judgment. In other cases, the clerk is required to include in the judgment interest awarded by the court and interest accrued since the entry of the verdict. (C.R.C., Rule 3.1802.)

Thus, when a verdict or decision is rendered, regardless of whether any interest is included in the sum awarded, the award bears interest at the legal rate for the interim period following the verdict or decision until the entry of the judgment. (*United States Nat. Bank of Portland v. Waddingham* (1907) 7 C.A. 172, 175, 93 P. 1046; *Dixon Mobile Homes v. Walters* (1975) 48 C.A.3d 964, 974, 122 C.R. 202, citing the text; see C.E.B., 3 Civil Proc. During Trial 3d §27.113; C.J.E.R., Judges Benchbook, Civil Proceedings: Trial §16.116; 5B Am.Jur. P.P. Forms (2004 ed.), Clerks of Court, §3 et seq.) (On legal rate of interest, see *infra*, §327.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Holdgrafer v. Unocal Corp.* (2008) 160 C.A.4th 907, 935, 73 C.R.3d 216 [trial court properly awarded interest from date of jury's verdict].

Pellegrini v. Weiss (2008) 165 C.A.4th 515, 81 C.R.3d 387, disagrees with the rule of *Dixon Mobile Homes v. Walters* (1975) 48 C.A.3d 964, 122 C.R. 202, text, p. 932, that an award must bear interest at the legal rate during the period from rendition of the verdict or decision until entry of judgment. Although the clerk must calculate the continuation of any *prejudgment* interest that may have been awarded from the date of the verdict through the date of the judgment, C.R.C., Rule 3.1802 does not provide for the accrual of *postjudgment* interest between the verdict and the judgment. (165 C.A.4th 532.)



163 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XV. INTEREST

C. Interest on Judgment.

1. From Date of Entry.

a. General Rule.

7 *Witkin Cal. Proc. Judgm* § 326

[§ 326] General Rule.

The judgment as entered will include interest on the total amount awarded from the time of the verdict or decision (supra, §325). Thereafter, the judgment bears interest at the legal rate from its date of entry by force of law, regardless of whether it contains a declaration to that effect. (*Los Angeles v. Salas* (1995) 38 C.A.4th 510, 516, 45 C.R.2d 61 [defaulting parent was required to pay interest on child support arrearages]; see *Pinecrest Productions v. RKO Teleradio Pictures* (1970) 14 C.A.3d 6, 11, 92 C.R. 44 [omission of express provision in judgment does not defeat claim]; on legal rate of interest, see infra, §327.) The judgment bears interest regardless of whether the original claim sued on was liquidated or unliquidated, in contract or in tort. (See *Beeler v. American Trust Co.* (1946) 28 C.2d 435, 438, 170 P.2d 439 [interest continues during appeal]; *Sullivan v. Wellborn* (1948) 32 C.2d 214, 219, 195 P.2d 787 ["it has been intimated generally that interest runs on a money judgment only"]; *Rogers v. Springfield Fire & Marine Ins. Co.* (1928) 92 C.A. 537, 541, 268 P. 679; *Los Angeles Rock & Gravel Co. v. Los Angeles* (1933) 132 C.A. 262, 264, 22 P.2d 541 [municipality was liable]; *Los Angeles v. Aitken* (1939) 32 C.A.2d 524, 531, 94 P.2d 1045 [interest on condemnation award]; *Connecticut General Life Ins. Co. v. California* (1941) 47 C.A.2d 88, 89, 117 P.2d 377 [state was liable]; *California v. Day* (1946) 76 C.A.2d 536, 553, 173 P.2d 399; *Los Angeles v. Lorbeer* (1958) 158 C.A.2d 804, 809, 323 P.2d 542 [interest on condemnation award]; *General Ins. Co. v. Commerce Hyatt House* (1970) 5 C.A.3d 460, 474, 85 C.R. 317; *Wm. R. Clarke Corp. v. Safeco Ins. Co. of America* (2000) 78 C.A.4th 355, 357, 92 C.R.2d 709 [judgment debtor with equitable right to offset improperly calculated amount due under judgment by subtracting offset from principal amount of judgment, then using remainder to calculate postjudgment interest due as of date of payment; postjudgment interest should have been calculated before judgment debtor credited itself with offset]; 15 A.L.R.2d 473 [interest on interpleaded or impleaded disputed funds]; 54 A.L.R.2d 814 [interest on decree of probate court allowing claim against estate or making allowance for services]; 11 A.L.R.4th 1099 [running of interest on judgment where both parties appeal].)

SUPPLEMENT: [This section is current through the latest supplement]



164 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XV. INTEREST

C. Interest on Judgment.

1. From Date of Entry.

b. Rate of Interest.

7 *Witkin Cal. Proc. Judgm* § 327

[§ 327] Rate of Interest.

(1) *In General.* Cal. Const., Art. XV, §1, sets the rate of interest on judgments at 7% per year but provides that a different rate, not to exceed 10% per year, may be set by the Legislature. The Legislature has raised the rate to 10% per year. (*C.C.P. 685.010(a)*.)

C.C.P. 685.010(a) is prospective only. (*Hersch v. Citizens Savings & Loan Assn. (1985) 173 C.A.3d 373, 218 C.R. 646* [for judgment entered before, but paid after, statute's effective date (January 1, 1983), interest was computed at 7% from date of judgment through December 31, 1982, and at 10% thereafter]; see *41 A.L.R.4th 694* [retroactive change of rate].)

(2) *Prejudgment Interest in Personal Injury Action.* Although prejudgment interest in personal injury actions under C.C. 3291 (see 6 *Summary* (10th), *Torts*, §1646) accrues until satisfaction of the judgment, interest between entry of judgment and satisfaction of judgment may not be cumulatively awarded under both C.C. 3291 and *C.C.P. 685.010* in excess of the 10% limit. (*Mendez v. Kurten (1985) 170 C.A.3d 481, 215 C.R. 924.*) Prejudgment interest under C.C. 3291 is not an element of damages to be included in the final judgment when applying the 10% interest rate of *C.C.P. 685.010*. (*Steinfeld v. Foote-Goldman Proctologic Med. Group (1997) 60 C.A.4th 13, 17, 70 C.R.2d 41* [plaintiff was not entitled to postjudgment interest under *C.C.P. 685.010(a)* on *sum* of verdict and prejudgment interest up to entry of judgment; citing *Mendez*].)

(3) *Sister State Judgment.* Interest on a sister state judgment prior to the time the judgment is entered by the clerk of the appropriate California court (see *C.C.P. 1710.20*) accrues at the sister state rate. (*C.C.P. 1710.15(b)(3)*.) After entry, interest accrues at the California rate. (*C.C.P. 1710.25(b)*.) (See 8 *Cal. Proc. (5th), Enforcement of Judgment*, §449 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *311 South Spring Street Co. v. Department of General Services (2009) 178 C.A.4th 1009, 1014, 101 C.R.3d 176* [award of postjudgment interest against State of California at 10% rate was void; 7% rate set by Constitution applied].



165 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XV. INTEREST

C. Interest on Judgment.

1. From Date of Entry.

c. Rate Applicable to Local Public Entities.

7 Witkin Cal. Proc. Judgm § 328

[§ 328] Rate Applicable to Local Public Entities.

The 7% rate mandated by Cal. Const., Art. XV, §1 (*supra*, §327) applies to judgments against local public entities. (*San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 C.A.3d 146, 150, 272 C.R. 38.*)

In *California Fed. Savings & Loan Assn. v. Los Angeles (1995) 11 C.4th 342, 45 C.R.2d 279, 902 P.2d 297*, plaintiff savings and loan association sought a refund of business taxes it had paid to defendant city. The trial judge ordered defendant to refund the taxes and to pay postjudgment interest at a rate of 7% per year. The Court of Appeal modified the order to provide for interest at a rate of 10% under *C.C.P. 685.010(a)* (*supra*, §327). *Held*, reversed; the 7% rate is correct. *Govt.C. 970.1(b)* "plainly and expressly" exempts local public entities from the enforcement of judgments provisions (see 8 *Cal. Proc. (5th), Enforcement of Judgment*, §61), including *C.C.P. 685.010(a)*. (*11 C.4th 347.*) Because the Government Code does not itself set an interest rate applicable to local public entities, the Legislature must have assumed the rate to be constitutionally imposed. (*11 C.4th 348*; approving *San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn.*) (See *Gregory v. State Bd. of Control (1999) 73 C.A.4th 584, 599, 86 C.R.2d 575* [correct rate of interest on judgment against state Board of Control (now California Victim Compensation and Government Claims Board) is 7%, not 10%; citing *California Fed. Savings & Loan Assn.*].)

SUPPLEMENT: [This section is current through the latest supplement]



166 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XV. INTEREST

C. Interest on Judgment.

1. From Date of Entry.

d. No Compounding of Postjudgment Interest.

7 Witkin Cal. Proc. Judgm § 329

[§ 329] No Compounding of Postjudgment Interest.

In *Westbrook v. Fairchild* (1992) 7 C.A.4th 889, 9 C.R.2d 277, plaintiff received a jury award of \$ 500,000 in compensatory damages and \$ 200,000 in punitive damages. The trial judge entered judgment for these amounts, but added "together with compound interest thereon." *Held*, this was error; the judgment bears 10% simple interest from the date of entry until it is satisfied or renewed.

(a) C.C. 3288 (see 6 *Summary* (10th), *Torts*, §§1643, 1644) gives the trial judge discretion to compound prejudgment interest in certain noncontract actions when the judge is the trier of fact. The section is not applicable where, as here, the judge is not the trier of fact. (7 C.A.4th 892, 893.)

(b) The general rule is that there can be no compounding of interest in the absence of specific statutory authority. (7 C.A.4th 894.) And there is no "inherent equitable power" to award compounding interest. "[E]xercise of such a power ... would result in a postjudgment interest award which exceeds the constitutional and statutory provisions for the payment of 10 percent simple interest on a judgment until satisfied or renewed. In addition, exercise of such a power would invade the province of the jury. The jury had to make its factual determinations based on the equitable causes of action pled. In doing so, it awarded the amounts it found proper to compensate plaintiff for breach of the 1968 contract to make a will. If the trial court, or this court, assumes unfettered discretion to award additional compound interest because of defendant's perceived fraud, the effect is to retry issues already determined by the jury." (7 C.A.4th 897.)

SUPPLEMENT: [This section is current through the latest supplement]



167 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XV. INTEREST

C. Interest on Judgment.

2. Judgments to Which Rule Applies.

a. Judgment in Marital Dissolution.

7 *Witkin Cal. Proc. Judgm* § 330

[§ 330] Judgment in Marital Dissolution.

In re Marriage of Teichmann (1984) 157 C.A.3d 302, 203 C.R. 619, held that no interest was due for the 19-month period from entry of the judgment to the sale of the family residence. However, *In re Marriage of Pollard* (1988) 204 C.A.3d 1380, 251 C.R. 751, distinguished *Teichmann* and held that an award of the proceeds from the sale of the family residence was a money judgment on which interest accrued from the date of entry. The judgment of dissolution, which was entered on March 9, 1981, gave the wife exclusive possession of the family residence, and awarded the husband \$ 33,429.50 as his equity share based on the 1981 value of the house. Because the wife was unable to make this payment, and both parties wanted her to remain in the house for the sake of the minor children, it was agreed that the husband would be paid "when" the house was sold. By June 1987, the house remained unsold, and the husband obtained an order requiring payment of the money by May 1, 1988. However, the trial judge refused the husband's request for interest from March 9, 1981. *Held*, reversed.

(a) The court in *Teichmann* "found no money judgment because the trial court ordered the property sold at the time of the interlocutory judgment and the wife to receive \$ 89,000 from the receipts of the sale. The husband did not have the beneficial use of the wife's share during the 19-month interval. Further, at the time of sale the wife shared equally the benefit of the increasing value of the home due to the 19 months' appreciation after the court order and before sale and in the interim had full use and enjoyment of the property." (204 C.A.3d 1384.)

(b) "Here, [the husband] received no similar benefit while [the wife] has. Further, [the wife] has had the beneficial use of [the husband's] interest for seven years while he has been deprived of the use of his money award. In equitable terms, we are addressing *Teichmann's* factual flipside." (204 C.A.3d 1384.)

(c) The husband was entitled to the lesser of postjudgment interest from the date of entry of the judgment or the appreciated value of his share of the house as of the date the wife elects to satisfy the award. (204 C.A.3d 1386.) (See *In re Marriage of Hoffee* (1976) 60 C.A.3d 337, 339, 131 C.R. 637 [postjudgment interest applied to judgment for child support].)

SUPPLEMENT: [This section is current through the latest supplement]



168 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XV. INTEREST

C. Interest on Judgment.

2. Judgments to Which Rule Applies.

b. Qualified Consent Judgment.

7 *Witkin Cal. Proc. Judgm* § 331

[§ 331] Qualified Consent Judgment.

In *John Siebel Associates v. Keele* (1986) 188 C.A.3d 560, 233 C.R. 231, the parties stipulated for entry of an arbitration award providing for 15% interest. The award was entered as a judgment on the condition that plaintiff would not attempt to levy execution unless, after written notice, defendant failed to cure a default. Subsequently, plaintiff sought to enforce the judgment, and defendant moved to quash the writ of execution, and to vacate the judgment as void to the extent that it provided for interest in excess of the constitutional and statutory rate. *Held*, denial of motion to vacate affirmed and denial of motion to quash reversed with directions to recalculate interest.

(a) The judgment, which could not be enforced without compliance with the condition, was "a conditional, qualified judgment." Until it became absolute, the larger contract rate of interest remained in effect. (188 C.A.3d 566.)

(b) When plaintiff employed the judicial process to enforce the stipulated judgment, it lost its qualified nature and became absolute. From that time on, the limited constitutional and statutory rate applied. (188 C.A.3d 566, 567.)

SUPPLEMENT: [This section is current through the latest supplement]



169 of 170 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XV. INTEREST

C. Interest on Judgment.

2. Judgments to Which Rule Applies.

c. Other Judgments.

7 *Witkin Cal. Proc. Judgm* § 332

[§ 332] Other Judgments.

(1) *Judgment Against State*. The general rule awarding interest on a judgment (supra, §326) has been held applicable to judgments against the state or its political subdivisions. (See *Harland v. California* (1979) 99 C.A.3d 839, 843, 160 C.R. 613 [restating settled rule and rejecting number of technical attacks on it]; *Straughter v. California* (1980) 108 C.A.3d 412, 415, 169 C.R. 471 [following *Harland*].)

(2) *Prejudgment Interest Award*. Where a judgment is rendered for money damages, plus prejudgment interest as additional damages to compensate for loss of the use of property, the entire amount bears interest at the legal rate from the date of entry. This is not an impermissible compounding of interest; the aggregate amount of damages and prejudgment interest awarded by the judgment is turned into a new principal. (*Big Bear Properties v. Gherman* (1979) 95 C.A.3d 908, 913, 157 C.R. 443.) (See *Cassinovs v. Union Oil Co.* (1993) 14 C.A.4th 1770, 1789, 18 C.R.2d 574 [prejudgment interest was proper under C.C. 3287(a) (interest on damages that are certain) and C.C. 3288 (interest for breach of noncontractual obligation) on trespass claim from date of filing complaint; although award was based on quasi-contract theory that usually involves uncertain damages, defendant had sufficient information with which to calculate damages]; *Steinfeld v. Foote-Goldman Proctologic Med. Group* (1997) 60 C.A.4th 13, 17, 70 C.R.2d 41, supra, §327 [plaintiff was not entitled to postjudgment interest on sum of verdict and prejudgment interest awarded under C.C. 3291; distinguishing *Big Bear Properties* and contrasting compensatory function of prejudgment interest under C.C. 3291 with that of C.C. 3287 and 3288].)

On the other hand, allowance of a claim against a solvent estate is not a judgment; only after an order of court directing payment does it bear statutory interest. (*Palmer v. Gregg* (1967) 65 C.2d 657, 661, 56 C.R. 97, 422 P.2d 985.) And an award of interest on a judgment prior to its entry, and contrary to a stipulation of the parties, is void and subject to collateral attack. (*Jones v. World Life Research Institute* (1976) 60 C.A.3d 836, 848, 131 C.R. 674, 2 Cal. Proc. (5th), *Jurisdiction*, §318.)

SUPPLEMENT: [This section is current through the latest supplement]



170 of 170 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XV. INTEREST

C. Interest on Judgment.

3. Where Judgment Is Modified or Reversed on Appeal.

7 *Witkin Cal. Proc. Judgm* § 333

[§ 333] Where Judgment Is Modified or Reversed on Appeal.

"A judgment bears legal interest from the date of its entry in the trial court even though it is still subject to direct attack. ... When a judgment is modified upon appeal, whether upward or downward, the new sum draws interest from the date of entry of the original order, not from the date of the new judgment. ... On the other hand, when a judgment is reversed on appeal the new award subsequently entered by the trial court can bear interest only from the date of entry of such new judgment." (*Stockton Theatres v. Palermo* (1961) 55 C.2d 439, 442, 11 C.R. 580, 360 P.2d 76 [applying rule to judgment for costs; prior "reversal" was in effect a modification]; see *Snapp v. State Farm Fire & Cas. Co.* (1964) 60 C.2d 816, 818, 36 C.R. 612, 388 P.2d 884; *Espinoza v. Rossini* (1967) 257 C.A.2d 567, 569, 65 C.R. 110, citing the text; *Ehret v. Congoleum Corp.* (2001) 87 C.A.4th 202, 209, 104 C.R.2d 370 [appellate court's disposition was modification, not reversal; court reinstated original jury verdict and its allocation of fault and merely modified offsets allowed one defendant for settlements reached by other defendants; citing *Stockton Theatres*]; 75 *Harv. L. Rev.* 840 [*Stockton Theatres*]; 4 *A.L.R.3d* 1221 [date from which interest on judgment starts running, as affected by modification of amount of judgment on appeal].)

SUPPLEMENT: [This section is current through the latest supplement]

See *Munoz v. Union City* (2009) 173 C.A.4th 199, 203, 92 C.R.3d 527 [trial court correctly determined that postjudgment interest should run from date of original judgment; plaintiff's entitlement to recovery was established by original judgment, and two appeals simply modified that judgment by increasing amount of defendant's liability; citing *Stockton Theatres v. Palermo* (1961) 55 C.2d 439, 11 C.R. 580, 360 P.2d 76, text, p. 938, and *Snapp v. State Farm Fire & Cas. Co.* (1964) 60 C.2d 816, 36 C.R. 612, 388 P.2d 884, text, p. 938].



1 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

1. Nature of Doctrine.

7 *Witkin Cal. Proc. Judgm* § 334

[§ 334] Nature of Doctrine.

The doctrine of res judicata gives certain conclusive effect to a former judgment in subsequent litigation involving the same controversy. It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration. It is well established in common law and civil law jurisdictions and is frequently declared by statute. (See *C.C.P. 1908, 1908.5, 1911; Commissioner of Internal Revenue v. Sunnen (1948) 333 U.S. 591, 68 S.Ct. 715, 719, 92 L.Ed. 898, 905; United States v. Munsingwear (1950) 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36; Goddard v. Security Title Ins. & Guarantee Co. (1939) 14 C.2d 47, 51, 92 P.2d 804; Sutphin v. Speik (1940) 15 C.2d 195, 201, 101 P.2d 497; Bernhard v. Bank of America (1942) 19 C.2d 807, 810, 122 P.2d 892, infra, §473; Panos v. Great Western Packing Co. (1943) 21 C.2d 636, 637, 134 P.2d 242; French v. Rishell (1953) 40 C.2d 477, 480, 254 P.2d 26; Teitelbaum Furs v. Dominion Ins. Co., Ltd. (1962) 58 C.2d 601, 25 C.R. 559, 375 P.2d 439, infra, §389; Busick v. Work. Comp. App. Bd. (1972) 7 C.3d 967, 972, 104 C.R. 42, 500 P.2d 1386, infra, §403, quoting the text; Estate of Spinosa (1953) 117 C.A.2d 364, 367, 255 P.2d 843; Wood v. Herson (1974) 39 C.A.3d 737, 745, 114 C.R. 365, citing the text; Shuffer v. Board of Trustees of the Calif. State University & Colleges (1977) 67 C.A.3d 208, 216, 136 C.R. 527, quoting the text; De Weese v. Unick (1980) 102 C.A.3d 100, 105, 162 C.R. 259, citing the text; Nakash v. Superior Court (1987) 196 C.A.3d 59, 67, 241 C.R. 578, infra, §408, quoting the text; California Coastal Com. v. Superior Court (1989) 210 C.A.3d 1488, 1498, 1499, 258 C.R. 567.)*

Res judicata gives conclusive effect to a former judgment only when the former judgment was in a different action; an earlier ruling in the same action cannot be res judicata, although it may be "law of the case" if an appellate court has determined the issue. (*Lennane v. Franchise Tax Bd. (1996) 51 C.A.4th 1180, 1185, 1186, 59 C.R.2d 602* [trial court's ruling that taxpayers were entitled to costs was not res judicata as to whether they were later entitled to appellate costs]; see *Griset v. Fair Political Practices Com. (2001) 25 C.4th 688, 701, 107 C.R.2d 149, 23 P.3d 43, 9 Cal. Proc. (5th), Appeal, §853*, citing the text [res judicata applies to later litigation to give conclusive effect to former judgment; where plaintiffs did not commence separate lawsuit, but instead improperly sought to revive original litigation after its final conclusion, there was no pending legal proceeding to which res judicata or its exceptions properly could be applied]; on distinct doctrines of law of the case and stare decisis, see *9 Cal. Proc. (5th), Appeal, §§459 et seq., 481 et seq.*; on election of remedies, see *3 Cal. Proc. (5th), Actions, §179 et seq.*)

A great deal of commentary is available in law reviews and treatises. (See James 5th, Chap. 11; *103 Harv. L. Rev.*

1989 [claim preclusion in modern latent disease cases]; 30 *Hastings L. J.* 191 [standards for evaluating effect of change in law after judgment]; 47 *So. Cal. L. Rev.* 357 [expansion of doctrine in multiparty litigation]; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §463 et seq.)

West's Key Number Digest, Judgment 540

SUPPLEMENT: [This section is current through the latest supplement]



2 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

A. In General.

2. Scope and Effect.

7 *Witkin Cal. Proc. Judgm* § 335

[§ 335] Scope and Effect.

Subject to some exceptions and qualifications, the doctrine applies to the following:

- (1) Judgments of every kind of court, local or foreign. (See *infra*, §350 et seq.)
- (2) All types of final judgments on the merits. (See *infra*, §363 et seq.)
- (3) Parties, persons in privity, and, to a limited extent, strangers. (See *infra*, §452 et seq.)

The doctrine has two essential effects. First, in a new action on the same cause of action, a prior judgment for the defendant is a complete bar (*infra*, §407 et seq.). A prior judgment for the plaintiff likewise precludes the new action because it results in a merger, superseding the plaintiff's claim by a right of action on the judgment (*infra*, §401 et seq.). Second, in a new action on a different cause of action, the former judgment is not a complete merger or bar, but is effective as a collateral estoppel, i.e., it is conclusive on issues actually litigated between the parties in the former action. (See *infra*, §413 et seq.) (On conclusive determination of issues in new action on same claim (direct estoppel), see *infra*, §342.)

Res judicata is not a jurisdictional defense and may be waived by failure to raise it in the trial court. (See *David v. Hermann* (2005) 129 C.A.4th 672, 683, 28 C.R.3d 622, citing the text; 2 *Cal. Proc.* (5th), *Jurisdiction*, §§104, 105; *infra*, §348.)

SUPPLEMENT: [This section is current through the latest supplement]



3 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

3. Restatement Second.

a. Scope and Terminology.

7 *Witkin Cal. Proc. Judgm* § 336

[§ 336] Scope and Terminology.

Chapter 1 (Introduction) of the Second Restatement of Judgments contains a comprehensive analysis of the purposes and effects of the doctrine of res judicata and also discusses the scope, organization, and terminology used.

(1) *In General.* The Second Restatement uses the term "claim preclusion" for the primary aspect of res judicata and "issue preclusion" for collateral estoppel. "Preclusive effects" refers to limitations on the opportunity in a second action to litigate claims or issues that were litigated, or could have been litigated, in a prior action. The rule of claim preclusion is that a party ordinarily may not assert a civil claim arising from a transaction with respect to which the party has already prosecuted a claim, whether or not the two claims wholly correspond to each other. The rule of issue preclusion is that a party ordinarily may not relitigate an issue that the party fully and fairly litigated previously. The concept of "privity" refers to a group of relationships under which the preclusive effects of a judgment extend beyond a party to the original action and apply to persons having specified relationships to that party. (Chapter 1, p. 1.)

(2) *Civil Judgments.* The Restatement deals with the effects of prior adjudications in civil litigation. It thus includes the effect in a civil action of a prior administrative adjudication, an arbitral decision, or a prior criminal adjudication. (Chapter 1, p. 2.) The rules also apply, with certain qualifications, to the effect to be given a judgment when the subsequent proceeding is before an administrative tribunal. (Chapter 1, p. 2.)

(3) *Sister Jurisdiction Judgments.* The rules focus primarily on preclusion questions arising within a single legal system; i.e., the effect in a state court of a prior judgment rendered in a court of that state, and the corresponding situation within the federal judicial system. "This set of problems may be called the intramural law of res judicata, in contrast to the problems arising in connection with recognition of a judgment of a sister jurisdiction." (Chapter 1, p. 2.) Recognition of sister state judgments is dealt with in the Second Restatement of Conflict of Laws, and recognition of foreign country judgments is dealt with in the Second Restatement of Conflict of Laws and the Restatement of Foreign Relations Law of the United States. (Chapter 1, p. 2.)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

A. In General.

3. Restatement Second.

b. Other Rules of Estoppel.

7 *Witkin Cal. Proc. Judgm* § 337

[§ 337] Other Rules of Estoppel.

The terms "res judicata" and "collateral estoppel" have sometimes been used to refer to some other and distinct forms of estoppel.

(1) *Inconsistent Positions*. Where a party attempts to take inconsistent positions with regard to a claim or contention arising in concurrent or successive actions, the party is often estopped to contradict in one action a position taken in other litigation. "Such an estoppel may be imposed under the doctrine of election of remedies, or a rule of evidence or candor toward the court that a party may not assume inconsistent positions, or a rule denominated as estoppel in pais. Estoppel imposed under such rubrics does not rest on the fact that a court has determined the claim or contention in question, for the estoppel is imposed on the basis of events occurring before adjudication actually takes place. Rather, the basis of the estoppel is the unfair advantage that may accrue to a party from the possibility that the claim or contention might be differently resolved in adjudications that are separately conducted." (Chapter 1, p. 4.) (See *infra*, §339.)

(2) *Controverted Admissions*. A related form of estoppel occurs when a party has made a concession or admission in prior litigation and in a subsequent action seeks to controvert it; in some decisions, the admission is treated as conclusive, in others as prima facie evidence or a rebuttable presumption. "Here, too, the results may be justified, but they flow from the conduct of the party and not from a decision of the matter by a court." (Chapter 1, p. 5.)

(3) *Estoppel of Nonparty*. A person who is not a party to litigation, but who indicates that he or she will conform his or her conduct according to a judgment between others, may be estopped from later pursuing an inconsistent claim. "This situation involves a true estoppel and not claim or issue preclusion, for a non-party ordinarily is not bound under res judicata by litigation to which he is not a party. It is dealt with in this Restatement because many courts in applying a rule of estoppel in such situations use the language of res judicata, particularly the term 'privity.' It is hoped that the recognition of the distinctions involved may clarify both the concept of estoppel in pais and the concepts of claim and issue preclusion." (Chapter 1, p. 5; see *Rest.2d, Judgments* §62.)

SUPPLEMENT: [This section is current through the latest supplement]



5 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

3. Restatement Second.

c. Res Judicata and Law of Procedure.

7 *Witkin Cal. Proc. Judgm* § 338

[§ 338] Res Judicata and Law of Procedure.

(1) *Relationship Between Procedure and Res Judicata.* "The complementary relationship between the law of procedure and the law of res judicata is not difficult to explain. The law of res judicata expresses essentially simple principles, even though the implications of those principles are often complex. The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so. A related but narrower principle--that one who has actually litigated an issue should not be allowed to relitigate it--underlies the rule of issue preclusion. The legal and social purposes served by these principles will be referred to presently. The very statement of them, however, shows their dependence on presuppositions about the law of procedure. The 'chance' to litigate is not simply some unspecified opportunity for disputation over legal rights; it is the opportunity to submit a dispute over legal rights to a tribunal legally empowered to decide it according to definite procedural rules. Any less formal process would be regarded as either legally inconclusive--that is, not a serious and genuine 'chance' to litigate--or fundamentally unfair. Indeed, a procedure for ventilating a legal dispute that lacks certain minimal elements of form will be treated as inconclusive for the reason that it is fundamentally unfair. Putting the point differently, it may be a denial of Due Process to treat an undefined procedural mechanism as yielding a conclusive result in determination of legal rights." (Chapter 1, p. 6.)

(2) *Fair Opportunity To Litigate.* "The law of res judicata expresses the terms for assessing whether the procedural system afforded the contending party an adequate opportunity to litigate. In the now accepted phrase, the question is whether that opportunity was 'full and fair.' Modern civil procedure usually does provide full and fair freedom to present substantive contentions and full and fair access to evidence. Accordingly, under that system of procedure there must be compelling reasons to sustain a plea for a second chance. Such is the general tenor of this Restatement." (Chapter 1, p. 9.) Thus, "the policy of the modern law of res judicata is summed up in §26(f) of this Restatement, allowing relitigation of a claim (except on other specific grounds) only if it is 'clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason.'" (Chapter 1, p. 10.) (See *Gouvis Engineering v. Superior Court* (1995) 37 C.A.4th 642, 650, 43 C.R.2d 785, citing the text.)

(3) *Effect of Restrictive Original Procedure.* "[W]hen the rules of original procedure constrain the first opportunity to litigate, the rules of res judicata are adjusted reciprocally. In some types of courts of limited jurisdiction and some

types of administrative agencies, for example, the scope of substantive inquiry and the potential for development of evidence are much more restricted than the corresponding opportunity afforded in a court of general jurisdiction in a comparable case. The rules of res judicata with respect to the judgments of such tribunals are correspondingly less restrictive." (Chapter 1, p. 10.)

(4) *Importance of Finality of Judgment.* "However formulated and applied, the basic principle of res judicata reflects a fundamental paradox. The law of res judicata endows judgments of courts with a peculiar finality: They are immune from examination by other authorities and may be reexamined by the courts themselves only in unusual circumstances. Yet this finality attaches not because the courts are infallible but because they are inevitably fallible. Adjudication is a procedure by which a disinterested agency--the judge or jury--is authorized to impose a binding resolution of a controversy over legal rights. Arriving at such a resolution requires either a determination of the facts or a particularization of the law as it applies to facts, or both. If there were infallible personages who could discern law and facts in a way that engendered universal assent, the process of adjudication would be socially unnecessary. Legal disputes could simply be remanded to the oracles. It is because such personages do not exist that the offices of judge and jury and a system of procedure are created by law, supplying by fiat a practical substitute for perfect intelligence." (Chapter 1, p. 10.)

"Finality, then, is the service rendered by the courts through operation of the law of res judicata. The finality in contemplation includes the immediate finality that is imposed on the litigation itself. It includes also imposition of finality on the dispute that gave rise to the litigation so far as it is within the means of legal process to do so. In a still broader sense, the law of res judicata cumulatively reinforces the authoritativeness of the law itself. It holds that at some point arguable questions of right and wrong for practical purposes simply cannot be argued any more." (Chapter 1, p. 11.)

"The central problem in finality of judgments is how far the principle of finality is to be qualified. The law of res judicata grapples with this central problem. Its specifications endeavor to state the conditions under which the possibility of failure of civil justice is so substantial as to justify remedial action in the form of relitigation. On the one hand, judgments must in general be accorded finality despite flaws in the processes leading to decision and the unavoidable possibility that the results in some instances were wrong. On the other hand, a judgment in a particular case must be subject to reexamination in the name of substantial justice if the initial engagement of the merits was inadequate. Mediation between these opposed considerations cannot be simply ad hoc; if it were, both the finality of judgments and the opportunity for reexamination would be a function of the intuitions of judges. A measure of intuition and discretion, to be sure, is required in administering the law of res judicata, as the rules in this Restatement frankly acknowledge. However, a policy of reasonable finality requires rules that take into account the complex substantive and procedural considerations going into a civil judgment. The law of res judicata is thus a mirror of legal justice itself." (Chapter 1, p. 12.)

SUPPLEMENT: [This section is current through the latest supplement]



6 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

4. Distinction: Judicial Estoppel.

a. Nature of Doctrine.

7 *Witkin Cal. Proc. Judgm* § 339

[§ 339] Nature of Doctrine.

(1) *Purpose of Doctrine.* Judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from "asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process." (*Jackson v. Los Angeles* (1997) 60 C.A.4th 171, 181, 70 C.R.2d 96; see *Prilliman v. United Air Lines* (1997) 53 C.A.4th 935, 960, 62 C.R.2d 142 [discussing, but not applying, judicial estoppel]; *Levin v. Ligon* (2006) 140 C.A.4th 1456, 1468, 45 C.R.3d 560 [doctrine as set forth in *Jackson* remains good law]; 85 A.L.R.5th 353 [judicial estoppel of subsequent action based on statements, positions, or omissions as to claim or interest in bankruptcy proceeding]; 99 A.L.R.5th 65 [judicial estoppel in civil action following administrative proceeding]; 121 A.L.R.5th 403 [judicial estoppel following conduct, other than mere participation, in arbitration proceeding]; 124 A.L.R.5th 575 [application of judicial or equitable estoppel to claim for, or defense to, award of attorneys' fees or other court-ordered fees].)

(2) *When Doctrine Is Applicable.* Under *Jackson v. Los Angeles*, *supra*, 60 C.A.4th 183, the doctrine applies under the following circumstances:

- (a) The same party has taken two positions.
- (b) The positions were taken in judicial or quasi-judicial administrative proceedings.
- (c) The party successfully asserted the first position (i.e., the first tribunal adopted the position or accepted it as true).
- (d) The two positions are totally inconsistent.
- (e) The first position was not taken as a result of ignorance, fraud, or mistake.

In *Thomas v. Gordon* (2000) 85 C.A.4th 113, 102 C.R.2d 28, the doctrine applied despite the absence of the third factor (party successfully asserted the first position). Plaintiff sued the accountant for two corporations for defendant's failure to keep plaintiff apprised of the corporations' financial affairs. In earlier bankruptcy petitions, plaintiff had

repeatedly failed to list any assets in the corporations. The bankruptcy petitions had been dismissed. The trial court in the present action granted defendant's motion for summary judgment, on the grounds that plaintiff's claims were predicated on some interest in the corporations, and the doctrine of judicial estoppel precluded her from alleging that she had such an interest. *Held*, affirmed. This is a situation that warrants application of the doctrine of judicial estoppel even absent proof of success in the earlier bankruptcy litigation. Plaintiff "brazenly admits" that she transferred her income stream to the corporations, which were owned wholly by her paramour, in order to keep it out of the hands of her creditors. She then filed for bankruptcy, expecting to reclaim her funds after all of her lawful debts were discharged. She repeatedly signed documents under oath that failed to report any interest in the corporations. "Assuming that the doctrine of judicial estoppel should be applied to an unsuccessful litigant only in the rare situation where the litigant has made an egregious attempt to manipulate the legal system, we agree with the trial court that 'this is as egregious as it gets.'" (85 C.A.4th 119.) (See *Tuchscher Dev. Enterprises v. San Diego Unified Port Dist.* (2003) 106 C.A.4th 1219, 1244, 132 C.R.2d 57 [doctrine did not apply where defendant's allegedly inconsistent position in first action was unsuccessful and where first position had no meaningful relevance to issues in second action; citing *Jackson* and distinguishing *Thomas*].)

(3) *Collateral Estoppel Distinguished*. "Collateral estoppel bars a party from relitigating an issue of ultimate fact that a court already has adjudicated. It deals with the finality of judgment on factual matters that were fully considered and decided. Judicial estoppel, on the other hand, prevents inconsistent positions whether or not they have been the subject of a final judgment. ... Collateral estoppel deprives a party of the right to relitigate an issue. The rationale is to conserve judicial resources by preventing repetitive litigation. In contrast, judicial estoppel deprives a party only of the right to assert a particular position. ... Judicial estoppel is designed to maintain the purity and integrity of the judicial process by preventing inconsistent positions from being asserted." (*Jackson v. Los Angeles*, *supra*, 60 C.A.4th 182.) (See 30 *Loyola L.A. L. Rev.* 323 [distinguishing judicial estoppel, collateral estoppel, and *res judicata*].)

(4) *Limiting Doctrine to Cases Where Party Misrepresents Facts*. Judicial estoppel is intended to protect the integrity of the judicial process by preventing litigants from playing "fast and loose" with the courts. It should, therefore, be invoked only in egregious cases and is usually limited to cases where a party misrepresents or conceals material facts. Changing legal arguments as a result of taking different positions in two different lawsuits may be a reasonable litigation tactic that does not undermine the integrity of the judicial process. (*California Amplifier v. RLI Ins. Co.* (2001) 94 C.A.4th 102, 117, 118, 113 C.R.2d 915 [corporation and its officers, who had argued in underlying case that violation with which they were charged required making knowingly false statement, were not judicially estopped from arguing, in subsequent case against their liability insurer, that negligent, unintentional conduct could have caused violation]; see *ABF Capital Corp. v. Berglass* (2005) 130 C.A.4th 825, 832, 30 C.A.4th 588 [judicial estoppel did not apply; defendant, after he belatedly discovered applicable law, merely asserted inconsistent legal positions in same action; change in position did not mislead plaintiff or trial court, and trial court had ample opportunity to examine both positions before ruling].)

SUPPLEMENT: [This section is current through the latest supplement]



7 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

A. In General.

4. Distinction: Judicial Estoppel.

b. Doctrine Applicable.

7 *Witkin Cal. Proc. Judgm* § 340

[§ 340] Doctrine Applicable.

The doctrine of judicial estoppel has been applied in numerous cases. The following decisions are illustrative:

New Hampshire v. Maine (2001) 532 U.S. 742, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968, 977 [judicial estoppel prevented New Hampshire from asserting that inland Piscataqua River boundary between New Hampshire and Maine ran along Maine shore; New Hampshire had asserted in earlier litigation that boundary ran along "middle of the river," which was either middle of main channel of navigation or geographic middle of river].

Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics (1998) 61 C.A.4th 672, 679, 71 C.R.2d 771 [judicial estoppel doctrine applied; after defendant orally stipulated in open court that parties could be ordered to arbitration and expressly stated that no written stipulation was required, he could not later claim that because order to arbitrate was based on oral stipulation, order and resulting award for plaintiff were void].

International Engine Parts v. Feddersen & Co. (1998) 64 C.A.4th 345, 349, 75 C.R.2d 178 [judicial estoppel doctrine barred plaintiffs' professional malpractice action against accounting firm because plaintiffs had failed to disclose their negligence claim in their earlier bankruptcy action].

California Coastal Com. v. Tahmassebi (1998) 69 C.A.4th 255, 259, 81 C.R.2d 321 [landowner who waived right to litigate applicability of exclusion from coastal development permit and agreed to obey Coastal Commission orders cannot later assert that exclusion applies and that landowner has no obligation to obey orders; following *Law Offices of Ian Herzog*].

Drain v. Betz Laboratories (1999) 69 C.A.4th 950, 958, 81 C.R.2d 864 [after presenting long-term disability and workers' compensation claims in which he swore he was disabled from performing all of his duties and from "any occupation," employee was judicially estopped from contending that his employer should have accommodated his disability by giving him "light" duty; distinguishing *Prilliman v. United Air Lines* (1997) 53 C.A.4th 935, 62 C.R.2d 142, supra, §339, and *Bell v. Wells Fargo Bank* (1998) 62 C.A.4th 1382, 73 C.R.2d 354, infra, §341].

International Billing Services v. Emigh (2000) 84 C.A.4th 1175, 1186, 101 C.R.2d 532, supra, §169 [judicial estoppel prevented plaintiff from denying that contract provision was attorneys' fees clause where plaintiff's complaint had included request for attorneys' fees based on provision].

People v. Torch Energy Services (2002) 102 C.A.4th 181, 188, 125 C.R.2d 365 [judicial estoppel prevented permit holder from asserting that permit conditions were preempted by federal law; permit holder had agreed to comply with permit conditions in its dealings with administrative agencies that imposed conditions and could not escape this "long-established commitment"].

Scripps Clinic v. Superior Court (2003) 108 C.A.4th 917, 942, 134 C.R.2d 101 [judicial estoppel prevented former patient of medical clinic from asserting that clinic's termination of her medical care was administrative action, rather than one performed in clinic's capacity as health care provider; patient had claimed earlier in same proceeding that termination violated physician's professional duty of care].

Uhrich v. State Farm Fire & Cas. Co. (2003) 109 C.A.4th 598, 611, 135 C.R.2d 131 [patient, who had successfully sued former psychologist alleging that he intentionally conspired against her in effort to seek revenge and retribution, was judicially estopped from claiming, in subsequent action against psychologist's insurers, that psychologist had merely acted negligently and thus was entitled to coverage under insurers' policies].

Furia v. Helm (2003) 111 C.A.4th 945, 957, 4 C.R.3d 357 [judicial estoppel prevented contractor from claiming that alleged fraud of mediator in dispute between contractor and former clients caused him to abandon remodeling project that gave rise to dispute; contractor had successfully argued in previous disciplinary proceedings that he did not abandon project].

Levin v. Ligon (2006) 140 C.A.4th 1456, 1473, 45 C.R.3d 560 [judicial estoppel precluded former husband from asserting claim to former wife's financial assets, where husband had successfully claimed in English action that English attorneys' malpractice had caused him to lose his rights to any interest in those assets; positions were inconsistent, judicial estoppel applied to position taken in foreign court, and English action had been settled favorably for husband].

SUPPLEMENT: [This section is current through the latest supplement]



8 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

4. Distinction: Judicial Estoppel.

c. Doctrine Not Applicable.

7 *Witkin Cal. Proc. Judgm* § 341

[§ 341] Doctrine Not Applicable.

Courts have declined to apply the doctrine of judicial estoppel in numerous cases, including the following:

Cleveland v. Policy Management Systems Corp. (1999) 526 U.S. 795, 119 S.Ct. 1597, 1602, 1603, 143 L.Ed.2d 966, 974, 977 [recipient of Social Security Disability Insurance (SSDI) benefits was not automatically estopped from pursuing claim under Americans with Disabilities Act (ADA); however, recipient must explain how her SSDI contention that she was unable to work is consistent with her ADA claim that she can perform essential functions of job]. (See 32 *Loyola L.A. L. Rev.* 461 [*Cleveland*].)

Aguilar v. Lerner (2004) 32 C.4th 974, 986, 12 C.R.3d 287, 88 P.3d 24, 1 Cal. Proc. (5th), Attorneys, §221 [plaintiff's reliance on protections of statute that makes arbitration of claim for unpaid legal fees voluntary for client was not totally inconsistent with his decision to file malpractice action against his attorney rather than pursue arbitration under statute; judicial estoppel did not apply].

MW Erectors v. Niederhauser Ornamental & Metal Works Co. (2005) 36 C.4th 412, 421, 30 C.R.3d 755, 115 P.3d 41 [contractor was not judicially estopped from claiming that subcontractor was unlicensed, even though, in related litigation against owner of project, contractor may have recovered amounts attributable to subcontractor's work; statutory bar prohibiting unlicensed subcontractor from recovering compensation applied regardless of equities].

Bell v. Wells Fargo Bank (1998) 62 C.A.4th 1382, 1387, 73 C.R.2d 354 [plaintiff's action for disability discrimination was not barred by doctrine of judicial estoppel despite certain statements he made in application for disability benefits; statements were not inherently and totally inconsistent with his litigation position that he could have continued working had his accommodation been left in place; following *Prilliman v. United Air Lines* (1997) 53 C.A.4th 935, 62 C.R.2d 142].

Cloud v. Northrop Grumman Corp. (1998) 67 C.A.4th 995, 1018, 79 C.R.2d 544 [trial court erred in granting defendants' motion for judgment on pleadings in plaintiff's action for wrongful termination and sexual harassment, despite plaintiff's nondisclosure of claim against defendant in earlier bankruptcy proceeding; application of judicial

estoppel requires finding of bad faith intent by plaintiff, which cannot be obtained from mere review of pleadings and bankruptcy filings].

Haley v. Dow Lewis Motors (1999) 72 C.A.4th 497, 511, 85 C.R.2d 352 [trial court incorrectly applied judicial estoppel to grant defendant's motion for judgment on pleadings in plaintiffs' wrongful termination action; plaintiffs claimed that their failure to list cause of action as asset in earlier bankruptcy proceeding was due to ignorance, not bad faith; claim would have to be evaluated before doctrine could be applied].

Kelsey v. Waste Management of Alameda County (1999) 76 C.A.4th 590, 598, 90 C.R.2d 510 [summary judgment based on judicial estoppel was improper in plaintiff's action against former employer for employment discrimination, even though plaintiff had failed to list pending employment claim in prior bankruptcy proceedings; defendant failed to show that plaintiff's failure to list claim was intentional and not result of ignorance].

Hanna v. Los Angeles County Sheriff's Dept. (2002) 102 C.A.4th 887, 896, 125 C.R.2d 686 [judicial estoppel did not apply to deputy sheriff who sought reinstatement to paid status after being denied disability retirement in earlier workers' compensation action; deputy's positions were not inconsistent].

Koo v. Rubio's Restaurants (2003) 109 C.A.4th 719, 735, 135 C.R.2d 415, 1 Cal. Proc. (5th), Attorneys, §109 [attorney for corporate defendant in class action by defendant's managers did not take inconsistent positions when he argued that he represented defendant's managers, but that he did not have attorney-client relationship with managers; assertion was clearly made for purposes of applying rule that would prohibit plaintiffs' lawyers from making ex parte contact with managers and trial judge entered order consistent with that interpretation].

M. Perez Co. v. Base Camp Condominiums Assn. No. One (2003) 111 C.A.4th 456, 469, 3 C.R.3d 563, supra, §179 [declining to follow *International Billing Services v. Emigh* (2000) 84 C.A.4th 1175, 101 C.R.2d 532, supra, §169; judicial estoppel did not prevent plaintiff who had claimed contractual right to attorneys' fees from denying existence of contractual fees provision later when plaintiff lost its case].

Kitty-Anne Music Co. v. Swan (2003) 112 C.A.4th 30, 35, 4 C.R.3d 796 [judicial estoppel did not apply to party who successfully resisted opponent's summary judgment motion and then moved for summary judgment in his favor; evidence presented with regard to first motion convinced party to move for summary judgment and party's positions were not inconsistent].

Daar & Newman v. VRL Int. (2005) 129 C.A.4th 482, 491, 28 C.R.3d 566 [law firm was not judicially estopped from asserting that California court had jurisdiction in action to recover fees from firm's former client, even though firm had established in prior action against client that client had insufficient jurisdictional contacts with California; law firm's argument for specific jurisdiction over former client was not inconsistent with argument it made on client's behalf in prior action].

In re Marriage of Taschen (2005) 134 C.A.4th 681, 689, 36 C.R.3d 286 [wife who filed dissolution petition was not judicially estopped from later claiming, after husband moved to bifurcate dissolution from property settlement issues, that California was inconvenient forum; petitioner could consistently argue that bifurcation would threaten her immigration status and make further proceedings in California inconvenient].

People v. American Contractors Indem. Co. (2006) 136 C.A.4th 245, 251, 38 C.R.3d 603 [judicial estoppel did not preclude bail bond company from asserting that limitation period for enforcing summary judgment on bond had expired, even though bond company had pursued appeal on summary judgment past date on which judgment purportedly became unenforceable; it was not clear during appeal whether enforcement would be stayed by pendency of appeal].

State Water Resources Control Bd. Cases (2006) 136 C.A.4th 674, 826, 39 C.R.3d 189 [judicial estoppel did not apply where board maintained consistent position throughout proceedings regarding legislative intent behind statute that

authorized water districts to merge].

Gottlieb v. Kest (2006) 141 C.A.4th 110, 130, 46 C.R.3d 7 [although plaintiff took inconsistent positions when he asserted in bankruptcy court that his companies did not have any legal claims against anyone and then sought to recover on claim against defendant, judicial estoppel did not apply; plaintiff was not successful in asserting his position in bankruptcy court and bankruptcy action was dismissed without confirmation of reorganization plan].

Jogani v. Jogani (2006) 141 C.A.4th 158, 168, 182, 45 C.R.3d 792 [judicial estoppel did not apply in plaintiff's action to recover his alleged share of partnership assets, even though plaintiff had testified in earlier judgment debtor examinations that he was not involved in any partnerships, because courts in judgment debtor proceedings did not accept testimony as true; also, recovery by plaintiff here could provide source of funds for judgment creditors who may have been defrauded by earlier testimony, which would be consistent with equitable nature of judicial estoppel].

SUPPLEMENT: [This section is current through the latest supplement]

Other cases in which the doctrine was not applicable include the following:

Mercury Interactive Corp. v. Klein (2007) 158 C.A.4th 60, 85, 70 C.R.3d 88 [defendants in shareholder derivative action were not judicially estopped from claiming that sealed records rule did not apply to dispute with media over exhibits attached to complaint; stipulated protective order between defendants and plaintiffs did not state that all court-filed discovery materials other than those relating to discovery motions were governed by rules and thus defendants' position that rules did not apply in subsequent dispute with media was not inconsistent].

Montegani v. Johnson (2008) 162 C.A.4th 1231, 1238, 76 C.R.3d 621 [admission by siblings that daughter of decedent was beneficiary of trust did not estop siblings from arguing otherwise several months later; admission was correct at time it was made, which was before appellate court held that daughter had violated no contest clause].

Safai v. Safai (2008) 164 C.A.4th 233, 246, 78 C.R.3d 759 [minor's written consent to appointment of his mother as guardian ad litem did not preclude conclusion that he was not voluntarily participating in trust contest within meaning of no contest clause].

Applera Corp. v. MP Biomedicals, LLC (2009) 173 C.A.4th 769, 791, 93 C.R.3d 178 [judicial estoppel did not prevent plaintiff from relying on Swiss law to pursue attorneys' fees, after relying on California law with regard to breach of contract claim; defendant demonstrated no prejudice from belated assertion of Swiss law].



9 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

5. Distinction: Direct Estoppel.

7 *Witkin Cal. Proc. Judgm* § 342

[§ 342] Distinction: Direct Estoppel.

"Issue preclusion" generally occurs where an issue that was previously litigated and determined is raised in a subsequent action between the same parties on a different claim. This effect is commonly called "collateral estoppel." (See *supra*, §335, *infra*, §413.)

In some situations, however, the issue previously litigated and determined is raised again in a subsequent proper action between the same parties on the same claim. The Restatement characterizes this effect as direct estoppel. (See *Rest.2d, Judgments, Int. Note, p. 131; §17, Comment c; §20, Comment b.*) Thus, if the defendant successfully raises the objections of lack of jurisdiction, improper venue, or nonjoinder of parties, a resulting judgment of dismissal is not on the merits and is therefore neither a merger nor a bar. Hence, the plaintiff may bring a second action on the same claim. (*Rest.2d, Judgments §20(1).*) But the issue determined in the first action--lack of jurisdiction, improper venue, or nonjoinder of parties--is conclusive on the parties in that second action. (*Rest.2d, Judgments §17, Comment c; §20, Comment b.*)

King v. International Union of Operating Engineers (1952) 114 C.A.2d 159, 164, 250 P.2d 11, illustrates the concept, although it does not utilize the Restatement's terminology. The first action was by a number of members of a local union on behalf of all to obtain a declaration of local freedom from control by the international union. It was dismissed without prejudice for failure to exhaust inter-union remedies. *Held*, the judgment of dismissal was res judicata in this second action by other union members seeking the same relief without exhaustion of those remedies.

MIB v. Superior Court (1980) 106 C.A.3d 228, 164 C.R. 828, citing the first Restatement, California cases, and the text, applied the doctrine to a determination of nonjurisdiction. In three prior actions against a foreign corporation, the trial court quashed the summons on the ground that plaintiff had failed to show sufficient contacts with this state to subject the foreign corporation to the jurisdiction of California courts. *Held*, this prior determination of the jurisdictional issue was res judicata; i.e., a determination of jurisdictional facts is binding, whether it establishes jurisdiction or lack of jurisdiction. (*106 C.A.3d 232, 234.*) (See *Sabek v. Engelhard Corp. (1998) 65 C.A.4th 992, 998, 76 C.R.2d 882* [direct estoppel precluded plaintiff, who had unsuccessfully attempted to assert jurisdiction over defendant on two previous occasions, from raising issue of personal jurisdiction a third time; citing *MIB*]; for full discussion of res judicata effect of jurisdictional determinations, see 2 *Cal. Proc. (5th), Jurisdiction, §344 et seq.*)

In *Smith v. Smith* (1981) 127 C.A.3d 203, 179 C.R. 492, plaintiff wife sued defendant husband for divorce in 1967, but did not plead his military retirement benefits as community property. They were therefore not considered, and the decree divided only the listed items. In 1968, plaintiff moved to amend the divorce judgment on the ground of mistake, etc., of her former attorney and, on denial of the motion for untimeliness, brought an action against defendant seeking either to set aside the decree or an award of one-half of the retirement benefits. Defendant demurred on the grounds that (a) the former attorney's mistake was intrinsic and not a basis for equitable relief, and (b) the divorce decree was res judicata on community property rights. The demurrer was sustained, and the action was dismissed. Plaintiff then sued her former attorney for malpractice and obtained a judgment for \$ 100,000--the value of her lost claim of community property benefits. (See *Smith v. Lewis* (1975) 13 C.3d 349, 118 C.R. 621, 530 P.2d 589, 1 Cal. Proc. (5th), Attorneys, §328.) In 1978, plaintiff brought the present action to recover the same lost benefits. The trial judge concluded that the current complaint was identical to one cause of action of the 1968 complaint and that the judgment on demurrer in the 1968 action was res judicata. *Held*, affirmed.

(a) If the 1968 judgment had been limited to the impropriety of the remedy of equitable relief against a judgment, it would not be a bar to a subsequent action seeking an appropriate remedy. (127 C.A.3d 207, citing the text.) But the judgment also resolved the issue of res judicata tendered by the demurrer; i.e., it determined that failure to tender the issue of retirement benefits in the divorce action barred a later claim for those benefits. (127 C.A.3d 207.)

(b) Plaintiff's contention that the 1968 judgment was not res judicata because it did not correctly decide the merits of her community property claim is unsound. A judgment not passing directly on the substance of a claim may nevertheless operate as a bar to relitigation of the very issue that was litigated in the previous action. (127 C.A.3d 207, 208.) The 1968 judgment determined the issue of the res judicata effect of the divorce decree on the claim of retirement benefits and thus operated as a direct estoppel. (127 C.A.3d 209.)

SUPPLEMENT: [This section is current through the latest supplement]



10 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

6. Where Doctrine Is Not Applicable.

7 *Witkin Cal. Proc. Judgm* § 343

[§ 343] Where Doctrine Is Not Applicable.

(1) *Direct Attack on Judgment Is Not Final.* By its very nature, the doctrine of res judicata does not prevent a timely direct attack, e.g., by a motion for a new trial or by an appeal. It only applies where the judgment is final and safe from direct attack and is collaterally attacked in a subsequent proceeding. (See *Rest.2d, Judgments* §13, Comment a; §17, Comment d; *infra*, §363 et seq.)

(2) *Judgment Is Not on Merits.* The doctrine only protects a final determination of the controversy on the merits of the claims and defenses. If the judgment is on procedural or other grounds unrelated to the merits, it is not res judicata. (See *infra*, §370 et seq.)

(3) *Judgment Is Void.* Obviously a judgment, although final and on the merits, has no binding force and is subject to collateral attack if it is wholly void for lack of jurisdiction of the subject matter or person, and perhaps for excess of jurisdiction, or where it is obtained by extrinsic fraud. (See *Rochin v. Pat Johnson Mfg. Co. (1998) 67 C.A.4th 1228, 1239, 79 C.R.2d 719* [judgment that was improperly amended to correct perceived judicial error is void and has no preclusive effect]; *Pajaro Valley Water Management Agency v. McGrath (2005) 128 C.A.4th 1093, 1100, 27 C.R.3d 741* [judgment in action that was initially filed in municipal court, which lacked jurisdiction, was not void; judgment was actually rendered in superior court, which had jurisdiction, following unification of municipal and superior courts]; *Rest.2d, Judgments* §§12, 17; 2 *Cal. Proc. (5th), Jurisdiction*, §§11, 106, 332; 8 *Cal. Proc. (5th), Attack on Judgment in Trial Court*, §§6 et seq., 225 et seq.)

(4) *Parties Are Not Adversaries.* In *Atherley v. MacDonald, Young & Nelson (1955) 135 C.A.2d 383, 287 P.2d 529*, plaintiff sued M and F for personal injuries. Defendant M cross-complained against defendant F on an agreement to hold M harmless from liability. The trial judge struck out the cross-complaint and M appealed. Pending the appeal, the main action was tried with judgment for plaintiff against M and absolving F. *Held*, M's appeal was not rendered moot. "[I]n no event is a judgment in an action in which the parties were not adversaries, but only joined as codefendants, res judicata as between them in a later proceeding. ... If respondent [F] had permitted appellants' cross-complaint to go to trial then, of course, the parties would have occupied the adversary position necessary to make the judgment res judicata between them." (135 C.A.2d 385.) (See *Truck Ins. Exchange v. Torres (1961) 193 C.A.2d 483, 493, 14 C.R. 408*; *Mabie & Mintz v. B & E Installers (1972) 25 C.A.3d 491, 495, 101 C.R. 919*; *Schultz v. Harney (1994) 27 C.A.4th 1611, 1620*,

33 C.R.2d 276 [res judicata did not bar action by guardians ad litem for minor to recover excessive attorneys' fees awarded by probate court in minor's prior medical malpractice action; attorney and guardians were not adversaries in medical malpractice action]; *Benasra v. Mitchell Silberberg & Knupp, LLP* (2002) 96 C.A.4th 96, 111, 116 C.R.2d 644 [corporation's action against its former attorneys for breaching loyalty to corporation by representing corporation's adversary in arbitration was not barred by res judicata, even though arbitration panel had ruled that there was insufficient evidence to support disqualification of attorneys; attorneys were not parties to arbitration dispute and opposed disqualification motion on their client's behalf, not on their own behalf]; *Rest.2d, Judgments* §38, Comment b.)

(5) *No Adversary Trial of Issue*. In *Estate of Charters* (1956) 46 C.2d 227, 293 P.2d 778, S became guardian of the estate of a minor and also trustee of a testamentary trust for her. S, in violation of the trust terms, sold the minor's residence and had the account approved. In this proceeding for instructions, the court ordered the trustee to purchase a suitable home for the minor or provide her with rent. *Held*, affirmed; the order settling the account was not res judicata. The trustee occupied a dual relationship, the minor had no independent representation and no opportunity to present her claims to the court, and there was therefore no adversary trial or decision of the issue. (46 C.2d 234.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Judgment Is Void*. See *311 South Spring Street Co. v. Department of General Services* (2009) 178 C.A.4th 1009, 1015, 101 C.R.3d 176 [because award of postjudgment interest at rate in excess of 7% constituted grant of relief that Constitution forbids and court has no power to grant, award was void; quoting the text].



11 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

7. Discretionary Rejection of Doctrine.

a. Discretion Approved and Criticisms.

7 Witkin Cal. Proc. Judgm § 344

[§ 344] Discretion Approved and Criticisms.

Greenfield v. Mather (1948) 32 C.2d 23, 194 P.2d 1, an interpleader action, was the culmination of a long series of trial and appellate proceedings over the division of a \$ 12,549.60 fund between a divorced husband and wife. On the fourth appeal in the action between the spouses, the Supreme Court finally decided the issue by a reversal with directions to enter judgment that the sum be paid one-half to the husband and one-half to the wife. (*25 C.2d 587.*) The trial judge entered the judgment, and it was accepted as res judicata by the judge in the interpleader action in which the fund was to be divided. The wife appealed, offering figures in support of her claim to the whole of the fund. In this appeal, the majority opinion declared that the Supreme Court, in its previous decisions, had acted under a misapprehension as to the evidence relating to the proper division of the fund, and that its former holdings on the right to equal division were outside the issues of the actions in which the appeals were taken and were mistakenly made. The judgment was accordingly reversed on the ground that "[a]ll those circumstances together with the facts and history of the litigation heretofore set forth present a situation where the doctrine of res judicata should not be applied." (*32 C.2d 35.*)

The opinion concludes with the following explanation: "We are mindful of the rule that a judgment rendered in an action in personam by a court having jurisdiction over the subject matter and the parties is not void and subject to collateral attack merely because it may erroneously determine some matter not specifically raised in the pleadings, and not covered by the evidence before the trial court, and that such a judgment is res judicata. We adhere to this rule. ... But in rare cases a judgment may not be res judicata, when proper consideration is given to the policy underlying the doctrine, and there are rare instances in which it is not applied. In such cases it will not be applied so rigidly as to defeat the ends of justice or important considerations of policy." (*32 C.2d 35.*)

Three judges dissented. The main dissenting opinion challenges the factual as well as the legal basis of the majority decision, denies the existence of any special considerations of policy or justice, and finds no test for determining when such considerations exist ("how, any more than in hundreds of other cases where the courts have refused to reexamine final judgments to determine whether or not they were erroneous, is never specified"). (*32 C.2d 36.*) The opinion further points to the startling possibility that the decision "precludes any application of the doctrine of res judicata until the courts look behind each judgment to the specific circumstances of each case to determine whether those circumstances

involve such considerations of policy or justice." (32 C.2d 37.) The dangers of the decision are summed up as follows: "So cavalier a departure from res judicata throws into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case. It is an invitation to all unsuccessful litigants to relitigate their cases, for they commonly view judgments against them as erroneous and hereafter can contend with justifiable cause that their cases also present an exceptional combination of circumstances requiring a departure from the doctrine of res judicata." (32 C.2d 36.)

The dissent seems unanswerable; the majority opinion will remain a constant threat to the stability of judgments until expressly overruled or limited. (See 65 *Harv. L. Rev.* 831 [suggesting that statutory provision for reopening earlier judgment for further proceedings is preferable to making loose exceptions to res judicata effect of judgment]; cf. *Kramer v. Superior Court* (1950) 36 C.2d 159, 164, 222 P.2d 874 [concurring opinion: "Petitioners in effect contend that the doctrine of res judicata must be disregarded because of what they consider to be inequities arising out of the erroneous decree of distribution. Such a departure from res judicata throws into question the finality of any judgment and thus is bound to cause infinitely more injustice in the long run than it can conceivably avert in this case"].)

In *Zeppi v. California* (1962) 203 C.A.2d 386, 21 C.R. 534, plaintiffs argued that a change in the law (abrogation of governmental immunity from tort liability) made it "unfair" and "unjust" to hold the former "mistaken" judgment against them a bar. The court said: "Such 'mistakes' or 'injustices' are not ground for equity's intervention. So to hold would be to emasculate, if not wipe out, the doctrine of res judicata because the doctrine is most frequently applied to block relitigation based upon contentions that a law has been changed. Our courts have repeatedly refused to treat the self-evident hardship occasionable by a change in the law as a reason to revive dead actions." (203 C.A.2d 388.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Plumley v. Mockett* (2008) 164 C.A.4th 1031, 1048, 79 C.R.3d 822 [findings in manufacturer's tort action for misappropriation of invention had no collateral estoppel effect in salesperson's later action for malicious prosecution; applying collateral estoppel would violate public policy of permitting parties to pursue nonfrivolous litigation without risk of subsequent liability for malicious prosecution].



12 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

7. Discretionary Rejection of Doctrine.

b. Discretion Rejected.

7 *Witkin Cal. Proc. Judgm* § 345

[§ 345] Discretion Rejected.

The dissent in *Greenfield v. Mather* (1948) 32 C.2d 23, 194 P.2d 1, supra, §344, and the holding in *Zeppi v. California* (1962) 203 C.A.2d 386, 21 C.R. 534, supra, §344, were approved in *Slater v. Blackwood* (1975) 15 C.3d 791, 126 C.R. 225, 543 P.2d 593.

Plaintiff, a minor, filed a action in 1970 against the driver and owner of a car in which she was riding as a guest and suffered injuries. Under the then existing guest law, she could recover only on a showing of intoxication or wilful misconduct, and the lower court entered judgment against her under *C.C.P. 581c*. She appealed, asserting unconstitutionality of the guest law, and the Court of Appeal affirmed the judgment. In 1973, following the decision in *Brown v. Merlo* (1973) 8 C.3d 855, 106 C.R. 388, 506 P.2d 212, holding the guest law unconstitutional (see 6 *Summary* (10th), *Torts*, §1280), she filed a new complaint against the same parties on the same cause of action, but on the new legal theory of negligence. Because she was a minor, the statute of limitations was not a bar, but the lower court rendered judgment on demurrer on the basis of the prior 1970 judgment. On appeal she contended that *Brown v. Merlo* should be given retroactive effect by invoking the *Greenfield* theory of discretionary rejection of the res judicata defense. *Held*, judgment for defendants affirmed.

"There is some authority for the proposition that, in particular circumstances, courts may refuse to apply res judicata when to do so would constitute a manifest injustice. ... We consider the *Greenfield* decision of doubtful validity and it has been severely criticized. ... While we find it is unnecessary for our present purposes to reach the question of whether *Greenfield* itself should be directly overruled, we expressly hold that the rule of that case is inapplicable where, as here, the only possible basis for its implementation is founded on a change in law following the original judgment." (15 C.3d 796, citing the text.) (See *Carroll v. Puritan Leasing Co.* (1978) 77 C.A.3d 481, 488, 143 C.R. 772 [noting criticism in *Slater* and declaring that *Greenfield* exception could not be applied where only injustice asserted was that plaintiff's property would be subjected to execution]; *Smith v. Brovan* (1979) 97 C.A.3d 19, 24, 158 C.R. 515 [following *Slater*]; 30 *Hastings L. J.* 193 [critical examination of *Slater*].)

SUPPLEMENT: [This section is current through the latest supplement]



13 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

7. Discretionary Rejection of Doctrine.

c. Discretion Limited.

7 *Witkin Cal. Proc. Judgm* § 346

[§ 346] Discretion Limited.

(1) *Res Judicata Doctrine Rejected*. Prior to *Slater v. Blackwood* (1975) 15 C.3d 791, 126 C.R. 225, 543 P.2d 593, supra, §345, *Greenfield v. Mather* (1948) 32 C.2d 23, 194 P.2d 1, supra, §344, was followed in *Jackson v. Jackson* (1967) 253 C.A.2d 1026, 62 C.R. 121. Plaintiff wife and defendant husband executed a property agreement providing for monthly payments to the wife, and she was awarded an uncontested decree of divorce. Thereafter, she sought execution and a receiver to collect arrearages of payments, on the theory that the agreement was merged in the decree and could not be modified. Defendant husband contended that it was neither integrated nor merged and should be modified for mistake. In earlier proceedings, the husband had obtained an order from the judge of the domestic relations department that the agreement was not merged and that the divorce court had no jurisdiction to interpret it. This order was in direct conflict with a previous order and with the language of the interlocutory decree and was clearly erroneous. But the wife did not appeal from it, and, under settled law, the later order was controlling and res judicata. (See infra, §367.) Nevertheless, the trial judge refused to give it effect and ordered execution to issue. *Held*, affirmed.

(a) Application of the doctrine would prolong the litigation, cause wasted effort and expense, and subvert the purpose of res judicata. (253 C.A.2d 1037.)

(b) "This case presents appealing circumstances for divergence from the general rule because adherence to that rule would cause more, rather than less, litigation, and would afford an opportunity for the relitigation of matters which have already been fully contested and adjudicated between the parties. The application of the rule under the circumstances of this case would defeat the ends of justice and the policy upon which the rule itself rests." (253 C.A.2d 1040.)

After *Slater*, and despite its near repudiation of *Greenfield*, the *Greenfield* doctrine was revived in a Court of Appeal opinion in which the court noted that *Slater* did not expressly overrule *Greenfield*. In *Hight v. Hight* (1977) 67 C.A.3d 498, 136 C.R. 685, a divorce decree ordered the father to pay child support. The mother, a Colorado resident, brought a California proceeding to enforce the judgment against the father in Humboldt County. The father set up the defense of denial of his visitation rights. The mother was represented by the district attorney of the county and did not appear. The district attorney failed to seek a continuance to obtain evidence from the mother, and the trial court upheld the father's defense and denied relief. The district attorney then obtained a judgment of dismissal. Shortly thereafter, the

mother sought a support order from the same court. The father pleaded res judicata, but the court held a hearing on the merits and made the order. *Held*, affirmed.

(a) The elements of a conclusive judgment were established (final, on merits, parties the same), but the *Greenfield* doctrine should be applied. Although the merits of the issue were determined, the mother was not present and had no fair opportunity to meet the husband's defense. The statute allows the mother to remain in her own state, and contemplates that the prosecuting attorney will seek a continuance and get her evidence by deposition and interrogatories. Here it did not appear that the mother was even aware that the father was contesting her claim, no evidence from her was presented, and there was no meaningful trial on the merits. (67 C.A.3d 504.)

(b) Although nominally a party, the mother had no actual control over the action. Hence, the observation in *Minton v. Cavaney* (1961) 56 C.2d 576, 15 C.R. 641, 364 P.2d 473, *infra*, §466, is relevant: For res judicata to apply against a party, the party should have participated in the control of the action and should have been able to determine whether or not to appeal from an adverse judgment. (67 C.A.3d 504.) Thus, both "the ends of justice" and "important considerations of policy" would be defeated if the prior judgment were considered res judicata. (67 C.A.3d 504.)

(2) *Doctrine Strictly Applied.* The United States Supreme Court took the strict view in *Federated Dept. Stores v. Moitie* (1981) 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103. Seven plaintiffs filed class antitrust actions on behalf of retail purchasers for treble damages against department store owners, alleging illegal fixing of retail prices. The federal district court dismissed the actions on the ground that the plaintiffs had not alleged an injury to their business or property within the meaning of §4 of the Clayton Act. Five plaintiffs appealed, and, pending the appeal, the United States Supreme Court decided in another case that retail purchasers can suffer such an injury. The Court of Appeals accordingly reversed the district court judgment of dismissal. M and B, the two nonappealing plaintiffs, refiled their actions in the state court, but defendants had the actions removed to the federal district court, which ordered them dismissed because they involved the same claims of alleged violation of antitrust laws that had been determined adversely to M and B in the first district court action. The Court of Appeals, recognizing that a "strict" application of the doctrine of res judicata would require dismissal, held that "public policy" and "simple justice" called for an exception. *Held*, reversed; the actions of the nonappealing plaintiffs were properly dismissed.

(a) The res judicata consequences of a final unappealed judgment on the merits is not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. (101 S.Ct. 2427, 69 L.Ed.2d 109.)

(b) No equitable exception can be recognized on the theory that the nonappealing party's rights are "closely interwoven" with those of another party. The two plaintiffs here made a calculated choice to forego their appeals, and then sought to be the windfall beneficiaries of an appellate reversal procured by other independent parties. Neither public policy nor the ends of justice would be served by a departure from the established doctrine of res judicata, which "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." (101 S.Ct. 2429, 69 L.Ed.2d 110.) (See *California Coastal Com. v. Superior Court* (1989) 210 C.A.3d 1488, 1498, 258 C.R. 567 [quoting *Federated Dept. Stores v. Moitie*]; *Littoral Dev. Co. v. San Francisco Bay Conservation & Dev. Com.* (1995) 33 C.A.4th 211, 217, 39 C.R.2d 266 [declining to exercise discretionary power to relax collateral estoppel rules; case was not one in which "inability to raise a constitutional argument would work a serious injustice and harm the public interest"]; *Robert J. v. Leslie M.* (1997) 51 C.A.4th 1642, 1647, 59 C.R.2d 905 [res judicata barred action to establish nonparentage by man who had admitted in previous paternity proceeding to being legal father of child, even though subsequent blood tests excluded him as child's biological father; citing *Slater*]; 35 *Hastings L. J. 1* [*Federated Dept. Stores v. Moitie*].)

SUPPLEMENT: [This section is current through the latest supplement]



14 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

A. In General.

8. Statutory Modification of Doctrine.

7 *Witkin Cal. Proc. Judgm* § 347

[§ 347] Statutory Modification of Doctrine.

The division of military retirement benefits in dissolution proceedings was controlled by the United States Supreme Court decision in *McCarty v. McCarty* (1981) 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589, until Congress enacted the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) in 1983. (See 11 *Summary* (10th), *Community Property*, §80 et seq.) Normally, the *McCarty* decision would be controlling as to judgments that became final during this 18-month hiatus, but in 1984, the California Legislature enacted former C.C. 5124, effective until January 1, 1986, authorizing the trial court to modify a community property settlement in a judgment that became final during the hiatus period. Thus, "by positive act" the Legislature superseded and modified the preclusive effect of the doctrine of res judicata or collateral estoppel as applied to military retirement benefits in decrees and judgments or settlements that became final in the specified time frame. (*Mueller v. Walker* (1985) 167 C.A.3d 600, 607, 213 C.R. 442.)

The retroactive provision in former C.C. 5124 was challenged as a taking of property without due process. The *Mueller* opinion answers this contention as follows:

(a) "Absent an indication of any purpose upon the part of the state authority (whether legislative or judicial) to evade some prior decision of the United States Supreme Court or federal Congress, the principles of finality protecting the parties to this litigation (res judicata or collateral estoppel) are, within the broad limits of fundamental fairness, solely the concern of state law." (167 C.A.3d 607.)

(b) "If it be assumed arguendo there is a 'taking' by the legislative negation of the finality of a judgment, such taking may be constitutional where public policy and fairness considerations are great. Thus, the Legislature may modify the doctrine of res judicata, allow relitigation, for reasonable public policy grounds" or other rational bases. (167 C.A.3d 607.) (See *In re Marriage of Doud* (1986) 181 C.A.3d 510, 519, 522, 226 C.R. 423 [rejecting contentions that former C.C. 5124 violated Contract and Due Process Clause].)

SUPPLEMENT: [This section is current through the latest supplement]



15 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

A. In General.

9. Proof and Waiver of Defense.

a. Waiver and Estoppel.

7 *Witkin Cal. Proc. Judgm* § 348

[§ 348] Waiver and Estoppel.

(1) *Waiver*. Unless properly raised in the trial court by pleading or evidence, the res judicata defense is waived. (See *C.C.P. 1908.5*; *Domestic & Foreign Petroleum Co. v. Long* (1935) 4 C.2d 547, 562, 51 P.2d 73; *Wolfsen v. Hathaway* (1948) 32 C.2d 632, 638, 198 P.2d 1; *Dillard v. McKnight* (1949) 34 C.2d 209, 219, 209 P.2d 387; *Harley v. Superior Court* (1964) 226 C.A.2d 432, 436, 38 C.R. 72, *infra*, §366; *Busick v. Work. Comp. App. Bd.* (1972) 7 C.3d 967, 977, 104 C.R. 42, 500 P.2d 1386, citing the text [waiver was not found]; *Rest.2d, Judgments* §1, Comment a; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §629 et seq.; cf. *Cohn v. Cohn* (1936) 7 C.2d 1, 7, 59 P.2d 969 [waiver of right to object to splitting of cause of action]; *Hulsey v. Koehler* (1990) 218 C.A.3d 1150, 1156, 267 C.R. 523 [*C.C.P.* 426.30, barring claim that was not asserted by cross-complaint in previous action arising from same occurrence (see 5 *Cal. Proc.* (5th), *Pleading*, §1177), is analogous to res judicata rather than to collateral estoppel; hence, statute is waived as defense if not specially pleaded]; on raising defense by motion for summary judgment, see *Dryer v. Dryer* (1964) 231 C.A.2d 441, 446, 41 C.R. 839; 95 *A.L.R.2d* 648 [raising res judicata by motion for summary judgment under federal rule and state statutes]; on raising defense by demurrer, answer, or motion to dismiss, see 5 *Cal. Proc.* (5th), *Pleading*, §§965, 1005, 1127, 1128; on prior trial of issue, see 7 *Cal. Proc.* (5th), *Trial*, §150 et seq.)

The general rule that the defense must be pleaded and proved at the trial is subject to an exception where a prior judgment is not yet final. In such a case, the binding prior judgment may be set up by supplemental answer when it becomes final. (*Johnston, Baker & Palmer v. Record Machine & Tool Co.* (1960) 183 C.A.2d 200, 211, 6 C.R. 847, citing the text.) Or, if not final until after appeal from the second judgment, it may be brought to the attention of the appellate court in that appeal. (*Haines v. Pigott* (1959) 174 C.A.2d 805, 808, 345 P.2d 339, *infra*, §366.)

Moreover, unlike res judicata as a bar, collateral estoppel requires no special pleading. (*Solari v. Atlas-Universal Service* (1963) 215 C.A.2d 587, 592, 30 C.R. 407; *Ponce v. Tractor Supply Co.* (1972) 29 C.A.3d 500, 507, 508, 105 C.R. 628.)

(2) *Estoppel*. The defendant may also be estopped to raise the defense in the second trial by his or her conduct in the first trial, e.g., where the defendant induces his or her adversary to refrain from presenting an issue or objects to its consideration. (*United Bank & Trust Co. of Calif. v. Hunt* (1934) 1 C.2d 340, 345, 34 P.2d 1001; *Comer v. Associated*

Almond Growers of Paso Robles (1929) 101 C.A. 687, 282 P. 532; Davies v. Krasna (1970) 12 C.A.3d 1049, 1056, 91 C.R. 250.)

SUPPLEMENT: [This section is current through the latest supplement]



16 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

A. In General.

9. Proof and Waiver of Defense.

b. Methods of Proof.

7 *Witkin Cal. Proc. Judgm* § 349

[§ 349] Methods of Proof.

(1) *Judgment Alone*. The former judgment may be proved as a public writing in official custody by introducing a certified copy. (See *Ev.C. 1530*; 2 *Cal. Evidence (4th), Documentary Evidence, §41 et seq.*)

(2) *Judgment Roll*. Seldom does the judgment show on its face the identity of causes of action, issues, or parties that may be required by the particular plea. Accordingly, it became customary and proper to introduce the judgment roll and, if necessary, to supplement it by extrinsic evidence. (*Goodman v. Dam (1931) 112 C.A. 244, 246, 296 P. 623.*) (See *Hamilton v. Carpenter (1940) 15 C.2d 130, 98 P.2d 1027* [examination of pleadings, trial, and decision in first action]; *Steiner v. Thomas (1949) 94 C.A.2d 655, 657, 211 P.2d 321* [file in prior action and prior probate proceeding]; *Lynn v. Cable (1950) 95 C.A.2d 696, 698, 213 P.2d 521* [oral testimony of proceedings in prior justice court action; from conflicting evidence, trial court determined effect of justice court judgment].)

(3) *Judicial Notice*. The early decisions refused to take judicial notice of the judgment or records in a prior case, except to avoid unreasonable hardship. These were overruled in *Flores v. Arroyo (1961) 56 C.2d 492, 496, 15 C.R. 87, 364 P.2d 263*, and the Evidence Code now makes it clear that judicial notice may be taken in any case. (*Ev.C. 452(d)*; see *Carroll v. Puritan Leasing Co. (1978) 77 C.A.3d 481, 486, 143 C.R. 772*; *Cal. Civil Practice, 2 Procedure §9:33; 1 Cal. Evidence (4th), Judicial Notice, §23.*)

(4) *No Right to Jury Trial*. The applicability of res judicata is properly tried to the court, not to a jury, even though it is a legal, rather than an equitable, defense. The issues are often mixed fact-law determinations that are better made by the court. (*Windsor Square Homeowners Assn. v. Citation Homes (1997) 54 C.A.4th 547, 557, 558, 62 C.R.2d 818, 7 Cal. Proc. (5th), Trial, §151.*)

SUPPLEMENT: [This section is current through the latest supplement]



17 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

1. In General.

7 Witkin Cal. Proc. Judgm § 350

[§ 350] In General.

The res judicata doctrine in both its major aspects (bar and collateral estoppel) applies to all courts, including inferior courts of limited jurisdiction and courts of special jurisdiction. Thus, *C.C.P. 1908(a)* refers to the judgment of "a court or judge of this state, or of the United States." (See *83 A.L.R.2d 977* [court of limited jurisdiction]; *46 Am.Jur.2d (2006 ed.), Judgments §450*; *47 Am.Jur.2d (2006 ed.), Judgments, §513*; *infra, §§351, 355*; on criminal court, see *infra, §386 et seq.*; on bankruptcy court, see *infra, §355*; for small claims court exception, see *infra, §352.*)

SUPPLEMENT: [This section is current through the latest supplement]



18 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

2. California Trial Courts.

a. Superior Courts.

7 *Witkin Cal. Proc. Judgm* § 351

[§ 351] Superior Courts.

The application of the doctrine to judgments of superior courts and the former municipal courts appears in numerous cases cited throughout this chapter. Judgments of the former justice court also had res judicata effect. "The final adjudication of an inferior court made within its jurisdiction is binding and conclusive upon a higher court in a subsequent action." (*Todhunter v. Smith* (1934) 219 C. 690, 695, 28 P.2d 916; see *Borland v. Borland* (1922) 56 C.A. 638, 641, 206 P. 478; *Pajaro Valley Water Management Agency v. McGrath* (2005) 128 C.A.4th 1093, 1100, 27 C.R.3d 741 [superior court judgment had collateral estoppel effect, even though action was initially filed in municipal court, which lacked jurisdiction; action proceeded to judgment in superior court following unification of municipal and superior courts].)

The doctrine also applies to probate court judgments and orders. (See *Kuchel v. Tolhurst* (1952) 39 C.2d 224, 228, 246 P.2d 41 ["the doctrine of res judicata applies to judgments and orders of the probate court, including an order fixing inheritance taxes, as well as to those of any other court"]; *Burchell v. Strube* (1955) 43 C.2d 828, 835, 279 P.2d 1 [order determining validity of assignment to heir-hunter, cutting down share from 40% to 10%]; *Estate of Radovich* (1957) 48 C.2d 116, 308 P.2d 14; *Estate of Werfel* (1953) 116 C.A.2d 167, 172, 253 P.2d 79 [prior order granting family allowance to widow-executor was binding on United States and State of California with income tax deficiency claims]; *Lazzarone v. Bank of America* (1986) 181 C.A.3d 581, 591, 226 C.R. 855 [order settling trustee's account].)

SUPPLEMENT: [This section is current through the latest supplement]



19 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

2. California Trial Courts.

b. Small Claims Division.

7 *Within Cal. Proc. Judgm* § 352

[§ 352] Small Claims Division.

(1) *Reason for Distinction.* A special problem arises in connection with small claims courts, not because of their inferior jurisdiction (which was formerly paralleled by municipal courts) or the minimizing of rules of evidence (which also is done in Workers' Compensation Appeals Board proceedings), but because of their informal, summary, and nonlegal procedure.

(2) *General Rule: Small Claims Judgment Has No Collateral Estoppel Effect.* In *Sanderson v. Niemann* (1941) 17 C.2d 563, 110 P.2d 1025, a personal injury action in the small claims court resulted in judgment for plaintiffs, husband and wife, for damage to their car and the expense of medical services to the wife. A second action was brought in the superior court for general damages for the wife's personal injuries. *Held*, the small claims court judgment was effective as a merger and bar of the cause of action adjudicated there, but it was not effective as collateral estoppel (on the issues of negligence and contributory negligence) in the new action on the distinct cause. The court described the procedure in the small claims court (see 2 Cal. Proc. (5th), *Courts*, §289 et seq.) and then said: "There are a number of cases which illustrate the application of the doctrine to inferior courts such as justices' and municipal tribunals, where such courts, though with lesser jurisdiction, nevertheless function as courts of law with some form of pleadings, and in accordance with legal rules of evidence and the right of representation by counsel. In such cases issues can be framed and decided and therefore may be given conclusive effect in a subsequent action based on a different cause of action. But a small claims court is not a typical inferior court, and no case has been called to our attention wherein a judgment of a tribunal which operates in the entirely informal manner of a small claims court, as hereinbefore indicated, has been considered to come within the second aspect of the doctrine of *res judicata*." (17 C.2d 574.) (See *Jellinek v. Superior Court* (1991) 228 C.A.3d 652, 659, 279 C.R. 6.)

(3) *Effect of Superior Court Affirmance of Small Claims Judgment.* Formerly, a distinction was made when an appeal was taken from the small claims court and the superior court affirmed the small claims court judgment. In *Perez v. San Bruno* (1980) 27 C.3d 875, 168 C.R. 114, 616 P.2d 1287, the court held that the doctrines of *res judicata* and collateral estoppel applied. "[W]hen a losing defendant in a small claims action invokes his right of appeal to the superior court, and when that court ... conducts a trial de novo and enters judgment against such appealing defendant, the considerations set forth in our *Sanderson* opinion are not applicable." (27 C.3d 885.)

However, *Perez v. San Bruno* was repudiated by *Rosse v. DeSoto Cab Co.* (1995) 34 C.A.4th 1047, 40 C.R.2d 680. In *Rosse*, plaintiff's car collided with a cab owned by defendant company and driven by one of its employees. Plaintiff won a small claims court judgment in an action relating to the repair of his vehicle. Defendant appealed the judgment to the superior court under C.C.P. 116.710(b) (see 2 Cal. Proc. (5th), Courts, §312), and plaintiff again prevailed at the superior court trial de novo. Subsequently, two passengers in the cab at the time of the accident sued both plaintiff and defendant in superior court. Plaintiff and defendant cross-complained against each other for indemnity in that action. The trial court granted summary judgment for plaintiff on both cross-complaints, reasoning that the issue of defendant's negligence had been fully litigated in the small claims de novo proceeding in superior court. *Held*, reversed. Collateral estoppel effect may not be accorded the judgment of a small claims court or a superior court in an action arising under the Small Claims Act (C.C.P. 116.110 et seq.). (34 C.A.4th 1053.)

(a) *Sanderson* established that, because of the informal nature of small claims proceedings, judgments rendered by the small claims court are not effective as collateral estoppel on issues such as negligence and contributory negligence in a later action. (34 C.A.4th 1051, 1052.)

(b) *Perez* distinguished original proceedings in the small claims court from de novo proceedings in the superior court and held that collateral estoppel does apply to judgments rendered in the latter tribunal. *Perez* cited former C.R.C., Rule 155, which provided that de novo proceedings were to be conducted just like other superior court proceedings, with a few minor exceptions. (34 C.A.4th 1052.)

(c) Former C.R.C., Rule 155 was repealed in 1991, and de novo hearings on appeal to the superior court are now conducted informally under C.C.P. 116.770. Except for the fact that attorneys may participate, de novo hearings are now virtually indistinguishable from original proceedings in the small claims court. "As the premise of *Perez* has been undermined, its holding is no longer sound. The rationale of *Sanderson* is now as pertinent to de novo as to original proceedings." (34 C.A.4th 1052.) (See *Foothills Townhome Assn. v. Christiansen* (1998) 65 C.A.4th 688, 692, 76 C.R.2d 516 [homeowner's small claims judgment, affirmed in trial de novo, regarding 1993 assessment did not preclude later action involving 1995 assessment; citing *Rosse*].)

(4) *Distinction: Small Claims Judgment May Be Effective as Merger or Bar.* A small claims judgment, even though it is not effective as collateral estoppel, bars a subsequent proceeding on the same cause of action. (*Sanderson v. Niemann, supra*, 17 C.2d 573; see *Allstate Ins. Co. v. Mel Rapton* (2000) 77 C.A.4th 901, 907, 92 C.R.2d 151 [insured's small claims judgment against tortfeasor barred insurer from pursuing its subrogation action; latter action was precluded by res judicata effect of rule against splitting cause of action].)

(5) *Distinction: Judgment Against Small Claims Plaintiff May Have Collateral Estoppel Effect.* In *Pitzen v. Superior Court* (2004) 120 C.A.4th 1374, 16 C.R.3d 628, the driver and the passenger of a vehicle that was involved in an accident sued the driver of another vehicle in small claims court. The small claims court found that the small claims plaintiffs had failed to meet their burden of proving that the small claims defendant caused the accident, and entered judgment for the small claims defendant. Subsequently, the passenger sued both drivers in superior court and the driver who had been the small claims plaintiff filed a cross-complaint against the small claims defendant. The small claims defendant filed a demurrer, contending that the judgment in the small claims action had collateral estoppel effect. The trial court overruled the demurrer. *Held*, reversed.

(a) *Sanderson*, *Rosse*, and *Perez* all suggest that "a primary factor in determining whether to give collateral estoppel effect to a prior final judgment is whether the record in the former proceeding adequately reflects the issues actually litigated and decided in that proceeding." (120 C.A.4th 1384.) The basis for not giving collateral estoppel effect to small claims judgments is accordingly "attenuated where the record is adequate to reliably determine which issues were litigated and decided in the small claims action." (120 C.A.4th 1385.)

(b) *Sanderson* and its progeny all involved an attempt to apply collateral estoppel against a small claims defendant who had lost in the small claims court. The decisions avoided "the unfairness inherent in a plaintiff being allowed to

force a defendant into small claims court, obtain a favorable determination on an issue, and then preclude the defendant from relitigating the issue in a subsequent action in superior court, where the potential damages may be much greater." (*120 C.A.4th 1385.*) By contrast, a small claims plaintiff, having chosen to litigate in an informal setting by bringing an action in small claims court, should not be allowed to cite the informality of that forum to gain a second chance to litigate a previously decided issue. (*120 C.A.4th 1386.*)

(c) Here, a memorandum of decision from the small claims action expressly addresses the issue whether the small claims defendant caused the accident. The issue in the present action is the same. The parties in both actions are the same. (*120 C.A.4th 1387.*) Thus, collateral estoppel precludes the small claims plaintiff from relitigating whether the small claims defendant caused the accident. (*120 C.A.4th 1388.*)

SUPPLEMENT: [This section is current through the latest supplement]



20 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

3. Sister State Courts.

a. Sister State Judgment in State Action.

7 *Witkin Cal. Proc. Judgm* § 353

[§ 353] Sister State Judgment in State Action.

Under the Full Faith and Credit Clause of the United States Constitution, a judgment rendered by a court of a sister state is entitled to the same res judicata effect in California courts that it would have in the courts of the state of its rendition. (See *C.C.P. 1913(a)* [judicial record of sister state is same in California as in state where it was made]; *Rest.2d, Conflict of Laws* §93 et seq.; *Rest.2d, Judgments* §18, Comment d and §28, Comment e; *32 A.L.R.3d 1330* [res judicata or collateral estoppel effect of sister state decree affecting real property in state where property situated]; *36 A.L.R.5th 527* [full faith and credit "last-in-time" rule as applicable to sister state divorce or custody judgment that is inconsistent with forum state's earlier judgment]; *30 Am.Jur.2d (2005 ed.), Executions and Enforcement of Judgments* §688 et seq.; *7 Summary (10th), Constitutional Law*, §35 et seq.; on effect of other state's custody decree (full faith and credit or comity), see *Rest.2d, Conflict of Laws* §103.)

In *Estate of Hart (1984) 165 C.A.3d 392, 209 C.R. 272*, petitioner's parents divorced. His mother remarried, and her second husband adopted petitioner in an Oklahoma proceeding without the consent of petitioner's natural father. Petitioner's natural father died while domiciled in California, and petitioner (then 43) filed a motion in the Oklahoma court to vacate the adoption on the due process ground that his natural father had not been given notice of the proceeding. The Oklahoma Court of Appeal held that (a) although the adoption decree was void, the Oklahoma statute of limitations (1 year from majority to challenge validity of the decree) barred his action, and (b) the natural father's due process right was personal to him and petitioner lacked standing to challenge the adoption on this ground. Petitioner then filed a petition in California to determine heirship, and the trial court found the Oklahoma adoption decree was void and not entitled to full faith and credit. *Held*, reversed.

(a) California must, regardless of policy objections, recognize the judgment of another state as res judicata, if that state had fundamental jurisdiction in the case. And Oklahoma had that jurisdiction; i.e., subject matter jurisdiction over the adoption, and personal jurisdiction over petitioner, who instituted the proceeding. (*165 C.A.3d 397.*)

(b) The issue of petitioner's standing to assert his natural father's due process right to notice of the adoption was raised and determined in the Oklahoma court. That court agreed that the adoption decree was void, but was nevertheless free from challenge by petitioner. This issue, even though it involved a jurisdictional challenge, was finally determined

in an adversary proceeding in Oklahoma and cannot be collaterally attacked here. (165 C.A.3d 397, 398, citing *Durfee v. Duke* (1963) 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186, 2 Cal. Proc. (5th), *Jurisdiction*, §352.)

The following are among the cases discussing the res judicata effect of a sister state judgment:

Underwriters Nat. Assur. Co. v. North Carolina Life & Acc. & Health Ins. Guaranty Assn. (1982) 455 U.S. 691, 102 S.Ct. 1357, 1366, 71 L.Ed.2d 558, 572 [Indiana decree adjudicating right to insurer's deposit held in trust for policyholders by North Carolina officials was entitled to full faith and credit in North Carolina; jurisdictional questions had been fully litigated in Indiana].

Baker by Thomas v. General Motors Corp. (1998) 522 U.S. 222, 118 S.Ct. 657, 666, 139 L.Ed.2d 580, 594 [Michigan judgment in wrongful discharge action by former employee against car manufacturer, which barred employee from testifying against manufacturer, did not reach beyond controversy between employee and manufacturer; employee could testify in Missouri products liability action brought against manufacturer by someone else].

Hicks v. Corbett (1955) 130 C.A.2d 87, 90, 278 P.2d 77, 2 Cal. Proc. (5th), *Jurisdiction*, §239 [equitable decree to convey land].

Thorley v. Superior Court (1978) 78 C.A.3d 900, 906, 144 C.R. 557 [Utah decree admitting Utah will to probate was entitled to full faith and credit; although appealable, no appeal was pending].

Krofcheck v. Ensign Co. (1980) 112 C.A.3d 558, 568, 169 C.R. 516 [where judgment against limited partnership was, under Utah law, not enforceable against California general partner who was not joined as party, entry of California judgment against that partner in sister state judgment proceeding was improper].

Tyus v. Tyus (1984) 160 C.A.3d 789, 792, 794, 206 C.R. 817 [final Texas judgment was entitled to res judicata effect, even on matters erroneously decided and regardless of California policy objections].

Silbrico Corp. v. Raanan (1985) 170 C.A.3d 202, 207, 216 C.R. 201, 8 Cal. Proc. (5th), *Enforcement of Judgment*, §459 [full faith and credit had to be accorded to Wisconsin judgment for which all interested parties were given notice and reasonable opportunity to be heard].

In re Marriage of Hanley (1988) 199 C.A.3d 1109, 1119, 245 C.R. 441 [Washington dissolution decree superseded California interlocutory judgment].

Brinker v. Superior Court (1991) 235 C.A.3d 1296, 1300, 1 C.R.2d 358 [New Jersey judgment confirming California arbitration award was res judicata under New Jersey law despite pending appeal, and thus was entitled to full faith and credit].

American Continental Ins. Co. v. American Cas. Co. of Reading, Pennsylvania (2001) 86 C.A.4th 929, 942, 103 C.R.2d 632, *infra*, §441 [applicability of collateral estoppel to preclude issue decided by sister state court, where issue is one of first impression in California].

SUPPLEMENT: [This section is current through the latest supplement]



21 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

3. Sister State Courts.

b. State Judgment in Federal Action.

7 *Witkin Cal. Proc. Judgm* § 354

[§ 354] State Judgment in Federal Action.

(1) *General Rule.* A federal statute (28 U.S.C., §1738) provides that state court judgments are entitled to full faith and credit in the federal courts. (See *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S.Ct. 3220, 3224, 92 L.Ed.2d 635, 643, *infra*, §361 [28 U.S.C., §1738 applies to state court judgments, not to unreviewed state administrative decisions]; *Matsushita Elec. Industrial Co., Ltd. v. Epstein* (1996) 516 U.S. 367, 116 S.Ct. 873, 877, 134 L.Ed.2d 6, 16 [federal court must give full faith and credit to state court judgment approving class action settlement, even though settlement released claims within exclusive jurisdiction of federal courts]; 28 West L.A. L. Rev. 317 [criticizing *Matsushita* for failing to adequately address due process issues]; 7 *Summary* (10th), *Constitutional Law*, §30.) This rule is set forth in the Restatement. (*Rest.2d, Judgments* §86.) (See 91 *Harv. L. Rev.* 1281 [collateral estoppel of prior state findings in cases within exclusive federal jurisdiction]; 26 *U.C.L.A. L. Rev.* 177 [effect of state court judgments on subsequent federal rights actions]; 16 *U.C. Davis L. Rev.* 1 [res judicata impact of state judgments in federal environmental litigation].)

In *Migra v. Warren City School Dist. Bd. of Education* (1984) 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56, the United States Supreme Court held that 28 U.S.C., §1738 gives a state court judgment preclusive effect in a federal court civil rights action under 42 U.S.C., §1983, even though the federal issue was not raised in the state court proceeding. (104 S.Ct. 896, 79 L.Ed.2d 62.) 42 U.S.C., §1983 "does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claim." (104 S.Ct. 898, 79 L.Ed.2d 64.)

(2) *Exceptions.* *Rest.2d, Judgments* §86, states the following exceptions to the general rule:

(a) A state court adjudication does not preclude federal court litigation of a related federal claim based on the same transaction "if the federal claim arises under a scheme of federal remedies which contemplates that the federal claim may be asserted notwithstanding the adjudication in state court."

(b) A determination of an issue by a state court does not preclude relitigation of that issue in the federal court "if according preclusive effect to the determination would be incompatible with a scheme of federal remedies which

contemplates that the federal court may make an independent determination of the issue in question."

(3) *Determination of Preclusive Effect of State Court Judgment.* In *Marrese v. American Academy of Orthopaedic Surgeons* (1985) 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274, petitioners filed actions in Illinois courts, alleging that respondent's denial of membership violated their associational rights under state law. After the dismissal of their complaints, petitioners filed an action in the federal district court alleging violation of the federal antitrust law. Ultimately, the Court of Appeals held that, as a matter of federal law, their antitrust action was barred by the earlier state court judgment. *Held*, reversed.

(a) Under 28 U.S.C., §1738, a state court judgment may preclude relitigation of an issue in a subsequent federal action, even though, as here, the federal claim could not have been brought in the state court. However, in determining the preclusive effect of the state judgment, 28 U.S.C., §1738 requires that the federal court look first to state law, not federal law. (105 S.Ct. 1331, 1332, 84 L.Ed.2d 281, 282.)

(b) Reference to state law may make it unnecessary to determine whether the federal court, as an exception to 28 U.S.C., §1738, should refuse to give preclusive effect to the state judgment. Hence, the Court of Appeals here should first have determined whether and to what extent, under Illinois law, the prior state judgment precluded relitigation of the claim or issue in the federal action. (105 S.Ct. 1333, 1335, 84 L.Ed.2d 283, 285.) Because neither the district court nor the Court of Appeals considered Illinois preclusion law, the case should be remanded for resolution in the first instance by the district court. (105 S.Ct. 1335, 84 L.Ed.2d 285.) (See 44 U.C.L.A. L. Rev. 159 [state court judgment as basis for issue preclusion in federal bankruptcy court].)

SUPPLEMENT: [This section is current through the latest supplement]



22 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

4. Federal Courts.

7 *Witkin Cal. Proc. Judgm* § 355

[§ 355] Federal Courts.

(1) *In General*. "A federal court judgment has the same effect in the courts of this state as it would have in a federal court." (*Martin v. Martin* (1970) 2 C.3d 752, 761, 87 C.R. 526, 470 P.2d 662; see C.C.P. 1908; *People v. Rath Packing Co.* (1978) 85 C.A.3d 308, 323, 149 C.R. 431; *Estate of Hilton* (1988) 199 C.A.3d 1145, 1168, 245 C.R. 491; *Gamble v. General Foods Corp.* (1991) 229 C.A.3d 893, 899, 280 C.R. 457, *infra*, §409; 90 *Harv. L. Rev.* 1354 [effect of federal declaratory judgment in subsequent state proceedings]; 30 *Am.Jur.2d* (2005 ed.), *Executions and Enforcement of Judgments* §§683, 701 et seq.)

In *Martin*, plaintiff wife was granted a divorce for extreme cruelty. A property settlement agreement was approved, which provided that defendant husband pay plaintiff \$ 500 per month for the rest of his life as part of the division of community property. After entry of the final decree, defendant ceased payments, filed a voluntary petition in bankruptcy, and was adjudicated a bankrupt. He set up the \$ 500 monthly obligation as a debt. Plaintiff opposed, contending that it was a nondischargeable obligation for alimony. The referee in bankruptcy found the debt to be alimony, but inadvertently issued a general discharge. This was later corrected nunc pro tunc to exclude the alimony payments. The corrected order was affirmed by the district court, and an appeal was taken to the Court of Appeals. Meanwhile defendant moved in the California trial court to cancel the alimony judgment as discharged in bankruptcy. The trial court, under the misapprehension that the discharge was general, granted the motion. *Held*, reversed. The order of discharge, as amended nunc pro tunc, was a final judgment and therefore res judicata on the issue of nondischargeability of the claim. Under the binding federal rule, a judgment or order is final for purposes of res judicata, although an appeal is pending, unless and until it is reversed. (2 C.3d 761.)

Among the other cases discussing the preclusive effect of a federal court judgment are the following:

Levy v. Cohen (1977) 19 C.3d 165, 172, 137 C.R. 162, 561 P.2d 252 [order confirming plan of arrangement was res judicata on liability of general partners for obligations of limited partnership].

Glendale v. Roseglen Const. (1970) 10 C.A.3d 777, 780, 89 C.R. 219 [bankruptcy court judgment that money deposited by bankrupt as security for performance of street work was not an asset of bankrupt estate].

Victa v. Merle Norman Cosmetics (1993) 19 C.A.4th 454, 468, 24 C.R.2d 117, *infra*, §458, citing the text [dismissal with prejudice of EEOC's discrimination action concerning plaintiff was not res judicata bar to plaintiff's state action; no privity existed between plaintiff and EEOC].

Abdallah v. United Savings Bank (1996) 43 C.A.4th 1101, 1110, 51 C.R.2d 286 [federal court's dismissal with prejudice of racketeering counts against defendants precluded state court action on same issue; new allegations in state complaint could have been included in federal complaint].

Conrad v. Bank of America (1996) 45 C.A.4th 133, 149, 53 C.R.2d 336 [debtor's claims against bank in state postbankruptcy action were barred where debtor failed to list those claims in bankruptcy proceedings].

Lumpkin v. Jordan (1996) 49 C.A.4th 1223, 1230, 57 C.R.2d 303 [federal court judgment in employment discrimination action was entitled to collateral estoppel effect in subsequent state court action].

Atascadero v. Merrill Lynch (1998) 68 C.A.4th 445, 477, 80 C.R.2d 329 [bankruptcy court's authorization of settlement agreement between trustee and beneficiaries, under which beneficiaries reserved right to proceed against third parties, was res judicata in beneficiaries' subsequent state action against brokerage firm that had advised trustee].

Butcher v. Truck Ins. Exchange (2000) 77 C.A.4th 1442, 1460, 92 C.R.2d 521, *infra*, §415 [federal court judgment that was based on two grounds and was affirmed on appeal had preclusive effect in subsequent state action only as to second ground; federal appellate court had upheld second ground and declined to address first ground].

Nathanson v. Hecker (2002) 99 C.A.4th 1158, 1162, 121 C.R.2d 773 [bankruptcy court's order allowing landlord's claim for unpaid rent and other damages was final and entitled to preclusive effect in landlord's state action against tenants, even though bankruptcy was dismissed before confirmation of reorganization plan].

Roos v. Red (2005) 130 C.A.4th 870, 878, 30 C.R.3d 446 [bankruptcy court's finding in dischargeability proceeding that defendant acted wilfully and maliciously in causing car accident precluded defendant from relitigating his liability in later state court wrongful death action, even though bankruptcy court finding was made without jury trial].

(2) *Refusal To Exercise Pendent Jurisdiction*. If a federal court dismisses federal claims on the merits by summary judgment, it should refuse to exercise pendent jurisdiction (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §72) over nonfederal claims. Hence, the federal judgment does not bar litigation of nonfederal claims in the state court. (*Merry v. Coast Community College Dist.* (1979) 97 C.A.3d 214, 226, 228, 158 C.R. 603.) If, however, the plaintiff elects to proceed to judgment in the federal court, the plaintiff's entire cause of action is either merged in or barred by the federal court judgment. (*Mattson v. Costa Mesa* (1980) 106 C.A.3d 441, 455, 164 C.R. 913, 4 *Cal. Proc.* (5th), *Pleading*, §48; see *Boccardo v. Safeway Stores* (1982) 134 C.A.3d 1037, 1042, 1054, 184 C.R. 903 [federal dismissal of antitrust cause of action barred same cause of action under state law theory; federal court would not clearly have declined to exercise jurisdiction]; *Craig v. Los Angeles* (1990) 221 C.A.3d 1294, 1299, 271 C.R. 82, citing the text [following *Merry* and distinguishing *Mattson*]; *Koch v. Hankins* (1990) 223 C.A.3d 1599, 1602, 273 C.R. 442 [same]; *Harris v. Grimes* (2002) 104 C.A.4th 180, 187, 127 C.R.2d 791, *infra*, §440 [declining to follow *Mattson*; plaintiff could pursue state negligence claim over which federal court had declined to exercise pendent jurisdiction, even though she had proceeded with federal civil rights claim]; *Rest.2d, Judgments* §25, Comment e.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Burdette v. Carrier Corp.* (2008) 158 C.A.4th 1668, 1681, 71 C.R.3d 185 [res judicata prevented former employee from reasserting, in state action, defamation claim against former employer; employer had obtained favorable final judgment on merits in federal court]; *Hernandez v. Pomona* (2009) 46 C.4th 501, 511, 94 C.R.3d 1, 207 P.3d 506 [judgment for defendants in federal civil rights action collaterally estopped plaintiff from later raising wrongful death claim in state court; both actions involved identical issue (whether police used reasonable care in applying deadly force)].



23 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

5. Foreign Courts.

7 *Witkin Cal. Proc. Judgm* § 356

[§ 356] Foreign Courts.

A foreign judgment will be res judicata in an American court if it has that effect in its country of rendition and if it meets the American standard of fair trial before a court of competent jurisdiction. (See *Rest.2d, Conflict of Laws* §98; *Rest.3d, Foreign Relations of the United States* §481 et seq.; *30 Am.Jur.2d (2005 ed.), Executions and Enforcement of Judgments* §706 et seq.; cf. *Estate of Cleland (1953) 119 C.A.2d 18, 20, 258 P.2d 1097* [Mexican divorce decree was not entitled to recognition where, under Mexican law, it was not final].)

The recognition of foreign money judgments is provided for by the Uniform Foreign-Country Money Judgments Recognition Act (*C.C.P. 1713* et seq.), which sets forth both discretionary and mandatory grounds for withholding recognition. The mandatory grounds are based on failure to meet the Restatement requirement of a fair trial before a court of competent jurisdiction. (See *8 Cal. Proc. (5th), Enforcement of Judgment*, §462.)

SUPPLEMENT: [This section is current through the latest supplement]



24 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

6. Reviewing Courts.

7 *Witkin Cal. Proc. Judgm* § 357

[§ 357] Reviewing Courts.

An opinion of a reviewing court determining a question of law has two common effects: It becomes the law of the case on retrial (see 9 *Cal. Proc.* (5th), *Appeal*, §459 et seq.) and a precedent under the doctrine of stare decisis (see 9 *Cal. Proc.* (5th), *Appeal*, §481 et seq.). It may also be res judicata. (See *Rest.2d, Judgments* §27, Comment o.)

Thus, in *Grable v. Grable* (1960) 180 *C.A.2d* 353, 359, 4 *C.R.* 353, the Court of Appeal in a prior appeal decided that trustees had the power to make sales and conveyances of trust property. *Held*, this was a conclusive determination of the issue, and therefore binding in a later action involving the same trust and trustees but different transferees. (180 *C.A.2d* 359.) (See *Ryerson v. Riverside Cement Co.* (1968) 266 *C.A.2d* 789, 794, 72 *C.R.* 595 [prior appellate decision (that judgment purporting to reform shipping document was in excess of jurisdiction) was binding in later action by carrier against shipper to recover undercharges]; *Beckstead v. International Industries* (1982) 127 *C.A.3d* 927, 934, 179 *C.R.* 767; cf. *Ball v. Rodgers* (1960) 187 *C.A.2d* 442, 448, 9 *C.R.* 666 [binding only on issues decided by appellate judgment, not necessarily on all matters discussed in opinion].)

The res judicata effect of a reviewing court's decision is particularly significant when it is rendered in the exercise of original jurisdiction, i.e., in an extraordinary writ proceeding. (See *Hollywood Circle v. Department of Alcoholic Beverage Control* (1961) 55 *C.2d* 728, 733, 13 *C.R.* 104, 361 *P.2d* 712, *infra*, §359 [determination in mandamus proceeding that dismissal of appeal was proper]; *Overstreet v. Butte* (1962) 57 *C.2d* 504, 506, 20 *C.R.* 631, 370 *P.2d* 335, *infra*, §374 [determination in prohibition proceeding that action must be dismissed because of defense of sovereign immunity].)

SUPPLEMENT: [This section is current through the latest supplement]



25 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

7. Workers' Compensation and Public Utilities Tribunals.

7 *Witkin Cal. Proc. Judgm* § 358

[§ 358] Workers' Compensation and Public Utilities Tribunals.

In California, the Workers' Compensation Appeals Board and the Public Utilities Commission are not mere administrative bodies but constitutional courts. (See 2 *Cal. Proc.* (5th), *Courts*, §161.) Accordingly, their final decisions are given res judicata effect.

Workers' compensation decisions furnish most of the illustrations. (See *French v. Rishell* (1953) 40 C.2d 477, 480, 254 P.2d 26 [Industrial Accident Commission]; *Goodman Bros. v. Superior Court* (1942) 51 C.A.2d 297, 301, 124 P.2d 644; *De Campos v. State Comp. Ins. Fund* (1954) 122 C.A.2d 519, 531, 265 P.2d 617; *Carter v. Superior Court* (1956) 142 C.A.2d 350, 356, 298 P.2d 598; *Solari v. Atlas-Universal Service* (1963) 215 C.A.2d 587, 593, 30 C.R. 407; *Addington v. Industrial Indem. Co.* (1972) 24 C.A.3d 802, 809, 101 C.R. 277 [doctrine may apply, but determination was not binding here because issue presented to W.C.A.B. was different from that before court in later proceeding]; *Greatorex v. Board of Administration of City Employees' Retirement System* (1979) 91 C.A.3d 54, 57, 154 C.R. 37 [parties and issues were same and doctrine applied]; *Dakins v. Board of Pension Commrs.* (1982) 134 C.A.3d 374, 381, 184 C.R. 576, citing the text; *Causey v. Board of Pension Commrs.* (1984) 152 C.A.3d 484, 488, 489, 199 C.R. 535; *Young v. Libbey-Owens Ford Co.* (1985) 168 C.A.3d 1037, 1042, 1043, 214 C.R. 400 [W.C.A.B. award was not res judicata in subsequent tort action for intentional infliction of emotional distress because that tort issue could not be litigated in compensation proceeding]; *Hughes v. Atlantic Pac. Const. Co.* (1987) 194 C.A.3d 987, 1002, 240 C.R. 200, citing the text [doctrine was not applicable where decision was not final, defendant was not party, and issues decided differed from those to be determined by court].)

Public utilities decisions are to the same effect. (See *Sale v. Railroad Com. of Calif.* (1940) 15 C.2d 612, 616, 104 P.2d 38 [noting exception based on continuing jurisdiction of commission to modify its orders]; *People v. Western Air Lines* (1954) 42 C.2d 621, 630, 268 P.2d 723; *Foothill Ditch Co. v. Wallace Ranch Water Co.* (1938) 25 C.A.2d 555, 563, 78 P.2d 215; 8 *Summary* (10th), *Constitutional Law*, §1107.)

In any case, the administrative decision, to have res judicata effect, must be final. Because a decision of the Workers' Compensation Appeals Board is not final until expiration of the 5-year period for rescission or amendment (*Lab.C.* 5803, 5804; see 2 *Summary* (10th), *Workers' Compensation*, §426), the doctrine is inapplicable to its awards during this period. (*De Court v. Beckman Instruments* (1973) 32 C.A.3d 628, 635, 108 C.R. 109, *infra*, §432.)

Also, where the administrative decision is relied on as a collateral estoppel, it must meet the test of similar issue (infra, §415 et seq.). (See *Dakins v. Board of Pension Commrs.*, supra, 134 C.A.3d 385; *Carlson v. Wald* (1984) 151 C.A.3d 598, 601, 199 C.R. 10; infra, §397.)

SUPPLEMENT: [This section is current through the latest supplement]



26 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

8. Administrative Tribunals.

a. Limited Application of Doctrine.

7 *Witkin Cal. Proc. Judgm* § 359

[§ 359] Limited Application of Doctrine.

(1) *In General.* The strict doctrine of res judicata relates to final judgments of courts. An increasing tendency to recognize something analogous to res judicata appears in the decisions dealing with administrative determinations, but the law is in an uncertain state. This is due in part to the different kinds of statutory enactments creating administrative agencies and defining their powers. (See *Williams v. Oakland* (1973) 30 C.A.3d 64, 68, 106 C.R. 101, *infra*, §360; *Bank of America v. Long Beach* (1975) 50 C.A.3d 882, 890, 124 C.R. 256; *Raley v. California Tahoe Regional Planning Agency* (1977) 68 C.A.3d 965, 977, footnote 7, 137 C.R. 699 [criticism of use of term "res judicata" in referring to finality of administrative decision]; *Rest.2d, Judgments* §83; C.E.B., *Administrative Hearing Practice* §1.39 et seq.; 2 *Am.Jur.2d* (2004 ed.), *Administrative Law* §374 et seq.)

"The key to a sound solution of problems of res judicata in administrative law is recognition that the traditional principle of res judicata as developed in the judicial system should be fully applicable to some administrative action, that the principle should not be applicable to other administrative action, and that much administrative action should be subject to a qualified or relaxed set of rules concerning res judicata." (*Hollywood Circle v. Department of Alcoholic Beverage Control* (1961) 55 C.2d 728, 732, 13 C.R. 104, 361 P.2d 712.)

Hence, an order determining facts within its jurisdiction, and relating to individual rights, will often be held binding in a subsequent proceeding before the agency itself, where the statute does not expressly give the agency power to modify its decisions. (*Olive Proration Program Committee for Olive Proration Zone No. 1 v. Agricultural Prorate Com.* (1941) 17 C.2d 204, 209, 109 P.2d 918; *Louis Stores v. Department of Alcoholic Beverage Control* (1962) 57 C.2d 749, 756, 22 C.R. 14, 371 P.2d 758, *infra*, §444 [department's decisions were res judicata, but operation of decision as collateral estoppel was subject to exceptions]; *San Francisco v. Ang* (1979) 97 C.A.3d 673, 678, 159 C.R. 56 [Board of Permit Appeals--quasi-judicial tribunal--decided appeal by property owner from decision of zoning administrator].) (On administrative decision as collateral estoppel, see *People v. Sims* (1982) 32 C.3d 468, 186 C.R. 77, 651 P.2d 321, *infra*, §398; on waiver of doctrine by failure to assert it properly, see *Pacific Coast Med. Enterprises v. Department of Benefit Payments* (1983) 140 C.A.3d 197, 214, 189 C.R. 558.)

In *Hollywood Circle v. Department of Alcoholic Beverage Control*, *supra*, the Alcoholic Beverage Control Appeals

Board dismissed petitioner's appeal from an order revoking its liquor license, on the ground that it was not timely. A subsequent Supreme Court decision in another case determined that the ground of dismissal was erroneous, and petitioner then contended (as did the Court of Appeal and two dissenting Supreme Court justices) that the erroneous dismissal was an attempted divestment of appellate jurisdiction and void, and thus that its appeal was still pending. Accordingly, petitioner sought mandamus to compel the Appeals Board to reinstate it. *Held*, writ denied. The opinion relies on several theories, not too clearly distinguished.

(a) Assuming that dismissal of the appeal may have been an act in excess of jurisdiction, and hence subject to review by an extraordinary writ (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §285), it was not a wholly void act. (55 *C.2d* 731.) The court here appears to be suggesting that an act merely in excess of jurisdiction may nevertheless be safe from collateral attack (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §§332, 336 et seq.).

(b) *Signal Oil & Gas Co. v. Ashland Oil & Refining Co.* (1958) 49 *C.2d* 764, 322 *P.2d* 1, 2 *Cal. Proc.* (5th), *Jurisdiction*, §294, establishes that jurisdiction implies power to decide a question wrong as well as right. "Obviously the board had jurisdiction to determine whether a party followed the procedure prescribed for appearing before it." (55 *C.2d* 731.) Here, the court appears to hold that the act was merely an error of law in determining a matter of procedure, and not an act in excess of jurisdiction. (See 2 *Cal. Proc.* (5th), *Jurisdiction*, §§287, 290.)

(c) Petitioner originally sought mandamus to review the order of dismissal and was denied relief by the Court of Appeal. Although that Court of Appeal opinion was erroneous and was subsequently disapproved, it became final and was res judicata on the issue. "The determination in the first mandate proceeding that the dismissal of petitioner's appeal was proper therefore bars any further inquiry into that question." (55 *C.2d* 733.) This may mean either that (1) the issue was merely one of procedural law, and the final judgment was obviously res judicata, or (2) the issue was one of jurisdiction (of the appeals board), but the final determination even of a jurisdictional issue may be res judicata (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §346).

(2) *Illustrations.* Numerous other cases have given preclusive effect to administrative decisions, including the following:

University of Tennessee v. Elliott (1986) 478 *U.S.* 788, 106 *S.Ct.* 3220, 3225, 3226, 92 *L.Ed.2d* 635, 645, 646, *infra*, §361 [in action under federal civil rights statutes, fact-finding of state administrative agency acting in judicial capacity is entitled to same preclusive effect to which it would be entitled in state's courts].

George Arakelian Farms v. Agricultural Lab. Rel. Bd. (1989) 49 *C.3d* 1279, 1290, 265 *C.R.* 162, 783 *P.2d* 749 [quoting *Hollywood Circle*].

Knickerbocker v. Stockton (1988) 199 *C.A.3d* 235, 243, 244 *C.R.* 764, 3 *Cal. Proc.* (5th), *Actions*, §349 [Civil Service Commission decision was given collateral estoppel effect in subsequent civil action].

Patrick Media Group v. California Coastal Com. (1992) 9 *C.A.4th* 592, 617, 11 *C.R.2d* 824 [where billboard owner failed to petition for mandamus to revoke Coastal Commission permit requiring billboard removal, issue of compensation for removal of billboards was res judicata].

Briggs v. Rolling Hills Estates (1995) 40 *C.A.4th* 637, 644, 47 *C.R.2d* 29 [homeowners' failure to seek judicial review of city's zoning decision precluded them from raising issues in later independent action under federal Civil Rights Act; citing *Knickerbocker*].

Mola Dev. Corp. v. Seal Beach (1997) 57 *C.A.4th* 405, 410, 67 *C.R.2d* 103 [developer's dismissal of mandamus action challenging city's disapproval of tentative tract map precluded developer's action for damages for regulatory taking].

SUPPLEMENT: [This section is current through the latest supplement]



27 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

8. Administrative Tribunals.

b. Exceptions.

7 *Witkin Cal. Proc. Judgm* § 360

[§ 360] Exceptions.

Application of the doctrine to administrative decisions is subject to the following generally recognized exceptions:

(1) *Regulatory Order*. An administrative order that is regulatory in effect, and implements the general powers of the agency, is not binding on it so as to preclude changes in the order. (*Olive Proration Program Committee for Olive Proration Zone No. 1 v. Agricultural Prorate Com. (1941) 17 C.2d 204, 208, 109 P.2d 918; Szabo v. Board of Osteopathic Examiners (1982) 129 C.A.3d 958, 964, 181 C.R. 473* [doctrine was not applicable to rule making power of agency].)

(2) *Order in Excess of Jurisdiction*. An administrative order is not res judicata where the agency acts in excess of its jurisdiction. "Where a board's order is not based upon a determination of fact, but upon an erroneous conclusion of law, and is without the board's authority, the order is clearly void and hence subject to collateral attack, and there is no good reason for holding the order binding on the board. ... While a board may have exhausted its power to act when it has proceeded within its powers, it cannot be said to have exhausted its power by doing an act which it had no power to do or by making a determination without sufficient evidence. In such a case, the power to act legally has not been exercised, the doing of the void act is a nullity, and the board still has unexercised power to proceed within its jurisdiction." (*Aylward v. State Bd. of Chiropractic Examiners (1948) 31 C.2d 833, 839, 192 P.2d 929*; see *California Coastal Com. v. Superior Court (1989) 210 C.A.3d 1488, 1501, 258 C.R. 567* [exception refers to fundamental subject matter jurisdiction; citing *San Francisco v. Ang (1979) 97 C.A.3d 673, 678, 159 C.R. 56*]; *Lodi v. Randtron (2004) 118 C.A.4th 337, 360, 13 C.R.3d 107* [city's administrative order directing corporation to abate environmental nuisance and to reimburse city for cleanup costs was issued in excess of city's jurisdiction and had no preclusive effect].)

(3) *Order in Absence of Subject Matter Jurisdiction*. An administrative order is not res judicata when the agency has no subject matter jurisdiction. The doctrine of jurisdiction to determine jurisdiction is probably inapplicable to determinations of its own jurisdiction by an administrative agency. (See *San Francisco v. Padilla (1972) 23 C.A.3d 388, 400, 100 C.R. 223, 2 Cal. Proc. (5th), Jurisdiction, §348*.)

(4) *Prospective Effect Only*. An administrative order can only have res judicata effect in a later proceeding; it

cannot operate retrospectively to undermine the determination in a prior proceeding. (See *Pathe v. Bakersfield* (1967) 255 C.A.2d 409, 417, 63 C.R. 220, 2 Cal. Proc. (5th), *Jurisdiction*, §438 [prior determination by city commission that firefighter was entitled to service connected disability pension; later decision by Industrial Accident Commission that no compensable injury was sustained was not binding].)

(5) *No Final Determination*. An administrative decision is not res judicata where it was not intended as a final determination on the merits. In *Williams v. Oakland* (1973) 30 C.A.3d 64, 106 C.R. 101, a finding was made that the employee's disability was duty incurred, but his application was denied "without prejudice." *Held*, use of the familiar quoted term meant that there was no decision on the merits and the subject was open to another application with no defense of res judicata available. (30 C.A.3d 69.)

"[F]inality is lacking, and thus the rules of res judicata do not apply, if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination, or if the administrative agency has decided that one party should have relief but the amount of the damages, or the form or scope of other relief, remains to be determined." (*George Arakelian Farms v. Agricultural Lab. Rel. Bd.* (1989) 49 C.3d 1279, 1290, 265 C.R. 162, 783 P.2d 749.) (See *Long Beach Unified School Dist. v. California* (1990) 225 C.A.3d 155, 169, 275 C.R. 449, *infra*, §364.)

(6) *No Determination of Law*. An administrative decision is not res judicata where the agency--a quasi-judicial tribunal--never had an opportunity to determine the controlling question of law. (*Bank of America v. Long Beach* (1975) 50 C.A.3d 882, 894, 124 C.R. 256 [previous licensing of amusement game did not preclude city council from later deciding that it was game of chance and was not entitled to license].)

(7) *No Adjudication*. An administrative decision is not res judicata when the agency is not acting in a quasi-judicial capacity and the decision is not the result of an adjudicatory proceeding. (*Penn-Co. v. Board of Supervisors* (1984) 158 C.A.3d 1072, 1077, 1080, 205 C.R. 298, citing the text; *Hughes v. Board of Architectural Examiners* (1998) 17 C.4th 763, 794, 72 C.R.2d 624, 952 P.2d 641 [board was not precluded, by its prior decision to license architect, from disciplining architect based on wrongful conduct arising before licensure; licensure decision was not final, quasi-judicial determination, within adversary context, of architect's fitness to practice architecture].)

(8) *Decision Contrary to Statute*. An administrative decision is not res judicata when the statute shows a contrary intent. (See *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S.Ct. 3220, 3225, 92 L.Ed.2d 635, 644, *infra*, §361 [Congress did not intend that unreviewed state administrative findings have preclusive effect on federal Title VII claims].)

(9) *Unemployment Insurance Appeals Board Decisions*. Findings, judgments, conclusions, and orders in actions and proceedings before the board are not binding in a separate or subsequent action between an individual and his or her employer, regardless of whether the prior action was between the same or related parties or involved the same facts. (*Unemp.Ins.C.* 1960; see *Mahon v. Safeco Title Ins. Co.* (1988) 199 C.A.3d 616, 621, 623, 245 C.R. 103 [statute clarified previously unsettled law; hence, it properly applied retroactively to pending litigation].)

(10) *Public Interest Exception*. Collateral estoppel may not apply to a prior administrative decision on a question of law where the issue concerns a matter of public interest. (See *Modesto City Schools v. Education Audits App. Panel* (2004) 123 C.A.4th 1365, 1378, 20 C.R.3d 831 [administrative decision that school district complied with state requirements for funding of independent study program did not have collateral estoppel effect; public interest exception applied because issue involved public funding]; *infra*, §§444, 445.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Order in Absence of Subject Matter Jurisdiction*. See *Noble v. Draper* (2008) 160 C.A.4th 1, 10, 73 C.R.3d 3 [prior wage claims proceeding before Labor Commissioner did not have res judicata effect in employees' later action alleging fraud, negligent misrepresentation, false advertising, and unfair employment practices; because commissioner had no jurisdiction to adjudicate those claims, plaintiffs did not raise them and could not have].

(5) *No Final Determination.* See *Smith v. Selma Community Hosp.* (2008) 164 C.A.4th 1478, 1505, 80 C.R.3d 745 [administrative decision of two hospitals to terminate doctor's privileges did not have collateral estoppel effect in later administrative proceeding at third hospital; decision lacked requisite finality because doctor had appealed it to superior court; fact that his appeal was on procedural rather than substantive grounds was immaterial].



28 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

8. Administrative Tribunals.

c. State Administrative Determination in Federal Action.

7 *Witkin Cal. Proc. Judgm* § 361

[§ 361] State Administrative Determination in Federal Action.

(1) *Preclusive Effect.* In *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635, a black employee of the University of Tennessee was discharged for inadequate performance and misconduct. He sought relief under the state Uniform Administrative Procedures Act and by a civil rights action in the federal district court, alleging that the discharge was racially motivated. The court permitted the administrative proceeding to proceed. The administrative law judge (ALJ) found that the discharge was not racially motivated. This finding was approved in an administrative appeal, and the employee did not seek a court review in Tennessee; instead he pursued his civil rights claim in the federal court action. The university contended that the ruling of the ALJ was entitled to preclusive effect and was therefore a bar to the employee's claims under various civil rights laws. *Held*, the ruling was entitled to preclusive effect, except as to claims under Title VII of the Civil Rights Act of 1964.

(a) *Preclusive effect under 28 U.S.C., §1738 and judicially developed rules.* This statute, which governs the preclusive effect of state court judgments in federal courts (see *supra*, §354), "is not applicable to the unreviewed state administrative factfinding at issue in this case." (106 S.Ct. 3224, 92 L.Ed.2d 643.) However, "federal common-law rules of preclusion" have been fashioned by the Supreme Court in absence of a governing statute. (106 S.Ct. 3224, 92 L.Ed.2d 643, citing *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552, *infra*, §481, and *Blonder-Tongue Laboratories v. University of Illinois Foundation* (1971) 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788.) "Although §1738 is a governing statute with regard to the judgments and records of state courts, because §1738 antedates the development of administrative agencies it clearly does not represent a congressional determination that the decisions of state administrative agencies should not be given preclusive effect." (106 S.Ct. 3224, 92 L.Ed.2d 644.)

(b) *No preclusive effect in Title VII actions.* Under 42 U.S.C., §2000e-5(b), the Equal Employment Opportunity Commission (EEOC), in investigating discrimination charges, must give "substantial weight to final findings and orders made by State or local authorities" in state proceedings. "[I]t would make little sense for Congress to write such a provision if state agency findings were entitled to preclusive effect in Title VII actions in federal court." (106 S.Ct. 3225, 92 L.Ed.2d 644, citing *Kremer v. Chemical Const. Corp.* (1982) 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262, and *Chandler v. Roudebush* (1976) 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416.) A common law rule that unreviewed state administrative proceedings have preclusive effect would therefore be inconsistent with Congress' intent in enacting

Title VII. (106 S.Ct. 3225, 92 L.Ed.2d 645.)

(c) *Preclusive effect in 42 U.S.C., §1983 actions.* "[I]t is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity." (106 S.Ct. 3226, 92 L.Ed.2d 645, citing *United States v. Utah Const. & Mining Co. (1966) 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642.*) This preclusive effect serves the value underlying collateral estoppel, and "is equally implicated whether factfinding is done by a federal or state agency." (106 S.Ct. 3226, 92 L.Ed.2d 646.) "Accordingly, we hold that when a state agency 'acting in a judicial capacity ... resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' ... federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." (106 S.Ct. 3227, 92 L.Ed.2d 646, 647.)

(2) *No Preclusive Effect.* An exception to the general rule allowing state administrative agency decisions to have preclusive effect in later federal actions occurs when Congress has indicated a contrary intent.

(a) *Title VII actions.* Congress did not intend unreviewed state administrative proceedings to have preclusive effect in actions under Title VII of the Civil Rights Act. (*University of Tennessee v. Elliott, supra, 106 S.Ct. 3225, 92 L.Ed.2d 645*; see *Johnson v. Loma Linda (2000) 24 C.4th 61, 76, 99 C.R.2d 316, 5 P.3d 874* [although laches prevented terminated city employee from pursuing petition for writ of mandamus challenging personnel board's decision that termination was proper, employee's Title VII claim was not precluded; judgment based on laches was not judgment on merits; citing *Elliott*].)

(b) *Age discrimination actions.* Judicially unreviewed findings of a state administrative agency made with respect to an age discrimination claim under the Age Discrimination in Employment Act have no preclusive effect on federal proceedings. (*Astoria Fed. Savings & Loan Assn. v. Solimino (1991) 501 U.S. 104, 111 S.Ct. 2166, 2168, 115 L.Ed.2d 96, 103.*)

SUPPLEMENT: [This section is current through the latest supplement]



29 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

B. Type of Court or Tribunal.

9. Arbitration Award.

7 *Witkin Cal. Proc. Judgm* § 362

[§ 362] Arbitration Award.

In *Thibodeau v. Crum* (1992) 4 C.A.4th 749, 6 C.R.2d 27, plaintiffs claimed that the home constructed for them by their general contractor had many defects. The matter went to arbitration, and an award was made, but neither party moved to confirm it. In this action against defendant subcontractor who had constructed the driveway, defendant set up the defense of res judicata based on the arbitration award. *Held*, the action was barred.

(a) The doctrine of res judicata applies to arbitration proceedings. (4 C.A.4th 75, citing *Lehto v. Underground Const. Co.* (1977) 69 C.A.3d 933, 939, 138 C.R. 419; see 6 Cal. Proc. (5th), *Proceedings Without Trial*, §562 et seq.) The parties are required to place before the arbitrator all matters within the scope of the arbitration, related to the subject matter, and relevant to the issues, and the award is res judicata on matters that were raised or could have been raised. (4 C.A.4th 755, citing *Sutphin v. Speik* (1940) 15 C.2d 195, 101 P.2d 497, *infra*, §419, and the text.) Here the arbitration, mandated by the construction agreement, was intended to settle all existing claims between the homeowners and their general contractor and subcontractors. (4 C.A.4th 758.)

(b) Plaintiffs contended that res judicata should not apply because the arbitration award had not been confirmed and was subject to a pending petition to correct. But several cases have held that, for purposes of res judicata, an unconfirmed award is the equivalent of a final judgment. (4 C.A.4th 759, citing *Trollope v. Jeffries* (1976) 55 C.A.3d 816, 822, 128 C.R. 115, and *Lehto*.) As the court said in *Trollope*: "[T]aking cognizance that the purpose of arbitration is to settle differences in a summary manner outside of court for the purpose of expediting a decision by the use of an arbitrator, who is a private extraordinary judge chosen by the parties whose decision is called an award, we conclude that the essential adjudication in an arbitration proceeding is the award. The function of the court is limited to confirming the award as made, or to correct and confirm it as corrected, or to vacate it within the limitations and as provided by the statutes." (4 C.A.4th 759.) The pending petition to correct relates to a minor matter, and an eventual decision on the petition will not otherwise affect the substance of the award. (4 C.A.4th 761.)

Numerous decisions, including the following, have discussed the preclusive effect of an arbitration award:

Vandenberg v. Superior Court (1999) 21 C.4th 815, 828, 88 C.R.2d 366, 982 P.2d 229, *infra*, §478 [decision in private arbitration between lessee and lessor that damage to leased land was not sudden and accidental did not have

collateral estoppel effect in favor of lessee's insurers in lessee's subsequent action seeking indemnity; arbitral parties had not agreed that arbitration award would have collateral estoppel effect in favor of third persons].

Lyons v. Security Pac. Nat. Bank (1995) 40 C.A.4th 1001, 1015, 48 C.R.2d 174 [cosignatory on promissory note was estopped from relitigating whether debtors on note had conspired with holder of note to shift payment to cosignatory; issue had been fully litigated and finally resolved by arbitrator].

Truck Ins. Exchange v. Superior Court (1996) 51 C.A.4th 985, 995, 59 C.R.2d 529 [arbitration award was not res judicata on issues of insurer's duties to defend and to provide independent counsel, where, by agreement of insurer and insured, the only issues decided by arbitrator were those relating to attorneys' fees].

Kelly v. Vons Cos. (1998) 67 C.A.4th 1329, 1335, 79 C.R.2d 763 [collateral estoppel applies to findings made during labor arbitration under collective bargaining agreement].

Brinton v. Bankers Pension Services (1999) 76 C.A.4th 550, 557, 90 C.R.2d 469 [plaintiff's action against defendant company was barred, under res judicata, by prior arbitration award in favor of officer of defendant, even though defendant was not party to arbitration; arbitration claim and later action sought recovery for same injury and contained virtually identical allegations, and arbitration resulted in final judgment on merits; because defendant's liability was merely derivative of officer's, defendant could assert claim preclusion defense without having been party to prior action].

Camargo v. California Portland Cement Co. (2001) 86 C.A.4th 995, 1018, 103 C.R.2d 841 [arbitration award resolving employee's discrimination claim under collective bargaining agreement was not entitled to collateral estoppel effect in employee's later action under Fair Employment and Housing Act (FEHA); agreement to finally resolve FEHA claims in collective bargaining agreement was not clear and unmistakable and arbitration procedures may not have allowed for full litigation and fair adjudication of FEHA claim].

Benasra v. Mitchell Silberberg & Knupp, LLP (2002) 96 C.A.4th 96, 108, 116 C.R.2d 644 [corporation's action against its former attorneys for breaching loyalty by representing corporation's adversary in arbitration was not barred by res judicata, even though arbitration panel had ruled that there was insufficient evidence to support disqualification of attorneys; disqualification motion was ancillary issue and lacked "most elemental aspect" of claim, which is attempt to obtain damages or other type of relief].

Grinham v. Fielder (2002) 99 C.A.4th 1049, 1053, 121 C.R.2d 468 [after arbitrator determined that contractor acted outside his actual agency or scope of employment when he entered into contract with client, collateral estoppel precluded contractor from asserting, in later action against his ostensible employers for contribution and indemnity, that they were his employers; even though arbitration was between contractor and client, alleged employers participated in arbitration completely and presented testimony concerning contractor's authority to bind them in contract with client].

Taylor v. Lockheed Martin Corp. (2003) 113 C.A.4th 380, 384, 6 C.R.3d 358 [arbitration decision under collective bargaining agreement that employee was fired for just cause did not have preclusive effect in employee's later action for retaliatory discharge under *Lab.C. 6310*, where there was no evidence that collective bargaining agreement contained clear waiver of employee's right to sue under statute; citing *Camargo v. California Portland Cement Co.* and distinguishing *Kelly v. Vons Cos.*].

Liska v. The Arns Law Firm (2004) 117 C.A.4th 275, 281, 12 C.R.3d 21 [binding arbitration proceedings between client and law firm, under mandatory fee arbitration statute, did not prevent losing client from filing subsequent action against law firm based on same allegations of misconduct and breach of contract that were subject of arbitration; however, client could not seek to recover any portion of fees that law firm won in arbitration].

Richard B. LeVine v. Higashi (2005) 131 C.A.4th 566, 572, 32 C.R.3d 244 [partner's action alleging that accountant for partnership conspired with partnership to deprive plaintiff of profits was barred by earlier arbitration determination

that partnership did not divert profits from plaintiff, even though accountant was not party to arbitration; res judicata applies to arbitration award that eliminates basis for nonarbitrating party's derivative liability; citing *Vandenberg*, *Brinton*, and *Thibodeau*].

Marcario v. Orange (2007) 155 C.A.4th 397, 403, 65 C.R.3d 903 [arbitration conducted as part of employee's grievance procedure did not have preclusive effect in her later action for violation of labor statutes, where memorandum of understanding between employee's labor union and employer did not specify that it would have that effect; citing *Camargo* and *Taylor*].

SUPPLEMENT: [This section is current through the latest supplement]



30 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

1. Final Judgment.

a. What Are Not Final Judgments.

1. Interlocutory Orders.

7 *Witkin Cal. Proc. Judgm* § 363

[§ 363] Interlocutory Orders.

The doctrine of res judicata applies only to judgments and orders that are final in the sense that no further judicial act remains to be done to end the litigation. Intermediate determinations, such as rulings on motions and interlocutory orders, are not conclusive. (See *Greenfield v. Mather* (1939) 14 C.2d 228, 231, 93 P.2d 100 [invalid partial judgments, neither a complete determination, were not res judicata]; *Erlich v. Superior Court* (1965) 63 C.2d 551, 557, 47 C.R. 473, 407 P.2d 649, citing the text [determination of motion, not on merits]; *Tiffany Productions of Calif. v. Superior Court* (1933) 131 C.A. 729, 731, 734, 22 P.2d 275; *McCarthy v. Superior Court* (1946) 73 C.A.2d 943, 946, 167 P.2d 744; *Grable v. Citizens Nat. Trust & Savings Bank of Riverside* (1958) 164 C.A.2d 710, 714, 331 P.2d 103 [trial judge's opinion and intended future ruling were not binding]; *Grable v. Grable* (1960) 180 C.A.2d 353, 358, 4 C.R. 353 [minute order, stating that "the court is now prepared to hold," was not final judgment]; *Weak v. Weak* (1962) 202 C.A.2d 632, 634, 21 C.R. 9; *Rebco Dev. v. Superior Court* (1977) 67 C.A.3d 13, 16, 136 C.R. 351, 3 *Cal. Proc.* (5th), *Actions*, §414 [order expunging lis pendens]; *Service Employees Int. Union v. Hollywood Park* (1983) 149 C.A.3d 745, 756, 197 C.R. 316 [order sustaining demurrer, not followed by judgment of dismissal]; *Casella v. Morgan Hill* (1991) 230 C.A.3d 43, 48, 280 C.R. 876, citing the text [ruling, on validity of ordinance, that was never memorialized in writing; case was not pursued by plaintiffs]; *Third Eye Blind v. Near North Entertainment Ins. Services, LLC* (2005) 127 C.A.4th 1311, 1323, 26 C.R.3d 452 [trial court's ruling that insurer had duty to defend insureds did not preclude insureds' negligence claims against their business manager and insurance broker, alleging that manager and broker should have advised insureds that policy might not guarantee full coverage; ruling was not necessarily final judgment because insurer could seek contrary ruling if it acquired additional conclusive evidence]; *Rest.2d, Judgments* §13; 56 *Am.Jur.2d* (2000 ed.), *Motions, Rules, and Orders* §43; supra, §7 et seq.; on effect of denial of motion for change of venue, see 3 *Cal. Proc.* (5th), *Actions*, §917; on effect of denial of motion for equitable relief against judgment on subsequent action for relief, see 8 *Cal. Proc.* (5th), *Attack on Judgment in Trial Court*, §221; on renewal of motion after denial, see 8 *Cal. Proc.* (5th), *Proceedings Without Trial*, §46 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Ferraro v. Camarlinghi* (2008) 161 C.A.4th 509, 532, 75 C.R.3d 19 [denial of party's motion to intervene in will

contest was not final judgment on merits and had no preclusive effect].



31 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

1. Final Judgment.

a. What Are Not Final Judgments.

2. Judgments Subject to Appeal or Modification.

7 *Witkin Cal. Proc. Judgm* § 364

[§ 364] Judgments Subject to Appeal or Modification.

(1) *Judgments Subject to Appeal*. A judgment or order may be final in nature, but it does not become res judicata until it is final in the other sense of being free from direct attack. Hence, while an appeal is pending or, though no appeal has yet been taken, the time for appeal has not expired, the judgment is not conclusive. The appropriate defense during the interim period is a plea in abatement (other action pending). (See *Pellissier v. Title Guarantee & Trust Co.* (1929) 208 C. 172, 184, 280 P. 947; *Robinson v. El Centro Grain Co.* (1933) 133 C.A. 567, 573, 24 P.2d 554; *People v. Mitchell Bros. Santa Ana Theater* (1980) 101 C.A.3d 296, 306, 161 C.R. 562, citing the text; *National Union Fire Ins. Co. v. Stites Professional Law Corp.* (1991) 235 C.A.3d 1718, 1726, 1 C.R.2d 570; *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 C.A.4th 1168, 1174, 102 C.R.2d 770 [because judgment on settlement in class action was pending on appeal, res judicata did not bar lawyers, who had represented class action plaintiffs earlier in class action, from seeking attorneys' fees from those plaintiffs in separate actions]; *Rest.2d, Judgments* §13, *infra*, §369; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §525; 5 *Cal. Proc.* (5th), *Pleading*, §1138 et seq.)

A technically pending appeal does not preclude application of the doctrine where it is abandoned and subject to dismissal on the appellate court's own motion. (*Wood v. Herson* (1974) 39 C.A.3d 737, 748, 114 C.R. 365.)

In a few situations, a decision characterized as "interlocutory" or a ruling on a motion is in effect a final determination of a substantial right, and res judicata. The chief test is appealability. If the determination is final for purposes of appeal, it may become conclusive after lapse of the time for appeal. (See *supra*, §21.)

(2) *Distinction: Federal Judgments*. The federal rule is contrary to the California rule. (See *Martin v. Martin* (1970) 2 C.3d 752, 761, 87 C.R. 526, 470 P.2d 662, *supra*, §355; *Calhoun v. Franchise Tax Bd.* (1978) 20 C.3d 881, 887, 143 C.R. 692, 574 P.2d 763; *Sandoval v. Superior Court* (1983) 140 C.A.3d 932, 936, footnote 2, 190 C.R. 29; *Abdallah v. United Savings Bank* (1996) 43 C.A.4th 1101, 1110, 51 C.R.2d 286 [federal court judgment was preclusive, even though appeal on judgment was pending]; *Lumpkin v. Jordan* (1996) 49 C.A.4th 1223, 1230, 57 C.R.2d 303 [federal court judgment was considered final, although on appeal, because it had not been reversed or modified; citing *Calhoun*]; *Nathanson v. Hecker* (2002) 99 C.A.4th 1158, 1163, footnote 1, 121 C.R.2d 773 [recognizing difference between

California and federal law].)

(3) *Distinction: Judgments Subject to Modification.* A judgment may be final although subject to future modification. (See *supra*, §79 et seq.) Thus, it is generally held that, although an order for spousal support may be modified on a showing of changed conditions, the right to recover accrued installments is vested. (See *Gough v. Gough* (1950) 101 C.A.2d 262, 264, 225 P.2d 668; 11 *Summary* (10th), *Husband and Wife*, §273.)

In *Wodicka v. Wodicka* (1976) 17 C.3d 181, 130 C.R. 515, 550 P.2d 1051, defendant contended that the lower court, in an order of July 1972, modifying child support, used the term "majority" to mean the new age (18) then in effect (as of March 4, 1972; see 1 *Summary* (10th), *Contracts*, §26); hence, that the obligation to pay ceased when the child reached 18. But this argument was made in the lower court in a prior proceeding in April 1974, on an order to show cause, and in that proceeding the court increased support payments and thereby impliedly determined the meaning of the term as used in its order of July 1972. In the April 1974, proceeding, child support was ordered until the child reached 21, and defendant did not appeal from this order. Hence, the matter became *res judicata*, for the doctrine applies to final adjudications rendered in the course of a divorce proceeding over which the court has continuing jurisdiction. (17 C.3d 188.)

(4) *Judgments Not Final for Collateral Estoppel Purposes.* In *Long Beach Unified School Dist. v. California* (1990) 225 C.A.3d 155, 275 C.R. 449, plaintiff school district complied with state regulations designed to alleviate racial and ethnic segregation in the public schools, and filed a claim with the state Board of Control (now the California Victim Compensation and Government Claims Board) for reimbursement under Cal. Const., Art. XIII B, §6 (see 9 *Summary* (10th), *Taxation*, §119 et seq.). The board approved the claim, but the Legislature deleted the requested funding from an appropriations bill. Plaintiff then filed a petition for mandamus to compel reimbursement by the state and a complaint for declaratory relief. *Held*, the state was not collaterally estopped from litigating the questions whether the Board of Control properly considered the claim and whether the claim was reimbursable. An administrative decision is not final, and hence cannot be given collateral estoppel effect, if an appeal has been taken, or if the time for an appeal has not lapsed. (225 C.A.3d 169, 170, citing *Sandoval*.) The applicable statute of limitations for review of the decisions here was 3 years, and plaintiff's action was filed before this period lapsed. (225 C.A.3d 170, 171.) (See *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA* (2005) 129 C.A.4th 1228, 1247, 29 C.R.3d 521 [fact that plaintiffs had obtained preliminary injunction in harassment action against demonstrators did not conclusively establish plaintiffs' probability of success on merits for purposes of avoiding motion to strike under anti-SLAPP statute (see 5 *Cal. Proc.* (5th), *Pleading*, §1017 et seq.); preliminary injunction is provisional remedy and not decision on ultimate rights in controversy]; on judgments determined to be final for collateral estoppel purposes, see *infra*, §369.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Judgments Subject to Appeal.* See *Ferraro v. Camarlinghi* (2008) 161 C.A.4th 509, 532, 75 C.R.3d 19, citing the text [denial of party's motion to file cross-complaint and order striking cross-complaint were on appeal and had not acquired finality needed to give them preclusive effect].



32 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

1. Final Judgment.

b. Final Intermediate Judgments.

7 *Witkin Cal. Proc. Judgm* § 365

[§ 365] Final Intermediate Judgments.

(1) *Probate Orders*. A number of independent collateral proceedings may be had in connection with the probate and administration of a single estate, and final orders may be made that are appealable and res judicata. (See *Prob.C. 2103* [judgment, order, or decree, including settling of intermediate account under Guardianship-Conservatorship Law (*Prob.C. 1400* et seq.)]; *Estate of Wear (1942) 20 C.2d 124, 124 P.2d 12* [final account of special administrator]; *Kuchel v. Tolhurst (1952) 39 C.2d 224, 228, 246 P.2d 41* [order fixing inheritance taxes]; *Estate of Crane (1946) 73 C.A.2d 93, 165 P.2d 940* [account of testamentary trustee]; *Estate of Werfel (1953) 116 C.A.2d 167, 172, 253 P.2d 79; 14 Summary* (10th), *Wills and Probate*, §§407, 960 et seq.)

(2) *Bankruptcy Orders*. A bankruptcy proceeding is a collection of individual controversies, and each contested matter is a discrete unit. Thus, orders in bankruptcy cases, particularly those finally settling creditors' claims, may be immediately appealable and final for purpose of res judicata. (*Nathanson v. Hecker (2002) 99 C.A.4th 1158, 1165, 121 C.R.2d 773* [bankruptcy court's order allowing landlord's claim for unpaid rent and other damages was final and entitled to preclusive effect in landlord's state action against tenants].)

SUPPLEMENT: [This section is current through the latest supplement]



33 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

1. Final Judgment.

c. First Judgment in Pending Actions.

7 *Witkin Cal. Proc. Judgm* § 366

[§ 366] First Judgment in Pending Actions.

Where two successive actions dealing with the same controversy are filed in courts of concurrent jurisdiction, the first court to take jurisdiction has priority, and various methods of enforcing its prior jurisdiction have been recognized. (See *Robinson v. El Centro Grain Co. (1933) 133 C.A. 567, 573, 24 P.2d 554* [abuse of discretion to refuse to grant continuance of second trial until first is concluded]; *Martin v. Los Angeles (1996) 51 C.A.4th 688, 699, 59 C.R.2d 303*, infra, §455 [jury's determination in wrongful death action that county was 13% at fault was considered final in cross action for equitable indemnity involving county and other tortfeasors, even though appeal process in main action was not complete]; 2 *Cal. Proc. (5th), Jurisdiction*, §441 et seq.)

It sometimes happens, however, that no attempt is made to protect the exclusive jurisdiction of the first court, and both actions proceed to judgment. In that event, the priority of jurisdiction loses its significance. The first final judgment becomes conclusive, even if it is rendered in the action that was filed later in time. "Where two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but the first final judgment, although it may be rendered in the second suit, that renders the issue *res judicata* in the other court. ... Where the judgment in one suit becomes final through lapse of time or affirmance on appeal while an appeal is still pending in another court from judgment in the other action, the first final judgment may be brought to the attention of the court in which an appeal is still pending and relied on as *res judicata*." (*Domestic & Foreign Petroleum Co. v. Long (1935) 4 C.2d 547, 562, 51 P.2d 73*; see *Ruben v. Los Angeles (1959) 51 C.2d 857, 861*, footnote 1, 337 *P.2d 825*, citing the text; *Busick v. Work. Comp. App. Bd. (1972) 7 C.3d 967, 977, 104 C.R. 42, 500 P.2d 1386*, infra, §403, quoting the text; *Palm Springs Paint Co. v. Arenas (1966) 242 C.A.2d 682, 688, 51 C.R. 747*, citing the text; *Baughman v. State Farm Mut. Auto. Ins. Co. (1983) 148 C.A.3d 621, 624, 196 C.R. 35* [first final judgment in Oregon case dealing with same issue--coverage of insurance policy]; *First N.B.S. Corp. v. Gabrielsen (1986) 179 C.A.3d 1189, 1194, 1195, 225 C.R. 254* [judgment in second action became final during pendency of appeal in first action; collateral estoppel effect of judgment in second action could be raised for first time on appeal in first action]; *Rest.2d, Judgments* §14.)

In *Haines v. Pigott (1959) 174 C.A.2d 805, 345 P.2d 339*, Action No. 1 was filed in San Mateo by plaintiffs in March 1957, to quiet title and remove the cloud of a recorded agreement between plaintiffs and defendant. Action No. 2 was filed by plaintiffs in San Francisco in September 1957, on defendant's promissory note arising out of the same

transaction. In both actions, defendant cross-complained on the agreement, alleging breach by plaintiffs and performance by him. Action No. 2, in San Francisco, went to trial first and judgment was given in favor of plaintiffs and against defendant on that issue. Action No. 1, in San Mateo, was also decided in favor of plaintiffs, judgment being rendered 7 days later. *Held*, defendant's appeal from the judgment in Action No. 1 raised no reviewable issue. The first judgment was res judicata and was properly brought to the attention of the appellate court in the pending appeal. (174 C.A.2d 807, citing the text.)

The priority of the first final judgment may be lost if the prevailing party, after an opportunity to raise it as a bar in the other action, fails to do so. (See *Domestic & Foreign Petroleum Co. v. Long*, *supra* [defense was, however, lost by failure to prove prior judgment].) In *Harley v. Superior Court* (1964) 226 C.A.2d 432, 38 C.R. 72, a wife filed a California divorce action, her husband answered and cross-complained, and the wife answered the cross-complaint. Then the husband filed a Nevada divorce action, and the wife answered setting up pendency of the California action. But the Nevada court proceeded and on July 5, 1963, entered a final divorce decree in favor of the husband without alimony for the wife. The California action came to trial on July 2, 1963, with notice to the husband who appeared by counsel and participated in the trial. On that day, the judge announced his decision giving the wife a divorce and alimony, and a judgment entered that day would have been prior. However, the interlocutory decree was not entered until July 17, 1963, after the Nevada decree, so the Nevada decree was prior. In this order to show cause proceeding brought by the wife, the support order was enforceable against the husband, and prohibition was denied. The Nevada decree could have been urged as a complete bar in the California divorce action, but after the action resulted in a final judgment with nothing in the judgment roll to show the existence and priority of the Nevada decree, that judgment was valid and conclusive against the present collateral attack in the new and independent order to show cause proceeding. (226 C.A.2d 438.)

SUPPLEMENT: [This section is current through the latest supplement]

First final judgment is conclusive: See *Consumer Advocacy Group v. ExxonMobil Corp.* (2008) 168 C.A.4th 675, 684, 86 C.R.3d 39 [settlement in one case became final while other action was pending, even though case that settled had been filed later than pending case; judgment approving settlement was conclusive; citing the text].



34 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

1. Final Judgment.

d. Latest Judgment in Successive Actions.

1. In General.

7 Witkin Cal. Proc. Judgm § 367

[§ 367] In General.

It may happen that in a first action a judgment is rendered that is res judicata in a second action, but that, in the second action, its conclusive effect is either not raised or is not established. The second final judgment is then res judicata in later proceedings. (*California Bank v. Traeger* (1932) 215 C. 346, 351, 10 P.2d 51; *Maloney v. Massachusetts Bonding & Ins. Co.* (1942) 20 C.2d 1, 6, 123 P.2d 449; *In re Marriage of Hanley* (1988) 199 C.A.3d 1109, 1117, 1118, 245 C.R. 441; see *Rest.2d, Judgments §15*; 47 *Am.Jur.2d* (2006 ed.), *Judgments §536*.)

SUPPLEMENT: [This section is current through the latest supplement]



35 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

1. Final Judgment.

d. Latest Judgment in Successive Actions.

2. Judgments in Different States.

7 *Witkin Cal. Proc. Judgm* § 368

[§ 368] Judgments in Different States.

The general rule making the second of two judgments res judicata in later proceedings may be inapplicable in the context of conflicting state judgments. (See *Rest.2d, Judgments* §15, Comment e; 82 *Harv. L. Rev.* 798 [last-in-time rule for conflicting judgments]; 30 *Am.Jur.2d* (2005 ed.), *Executions and Enforcement of Judgments* §723.)

In *Stuart v. Lilves* (1989) 210 C.A.3d 1215, 258 C.R. 780, defendant purchased a house in Colorado from plaintiff and executed a note and a second deed of trust for \$ 18,000. A few years later the holder of the first deed of trust foreclosed and the property was sold. Plaintiff then sought, in three separate actions, to recover the unpaid amount on the purchase money note.

(1) In January 1985, plaintiff brought Action No. 1 in Marin County. Defendant's motion for summary judgment was granted without opposition on the ground that a deficiency judgment was barred by *C.C.P. 580b*, and in October 1985, the court entered judgment for defendant.

(2) In August 1985, while the Marin County action was pending, plaintiff brought Action No. 2 in Colorado on the same cause of action. Colorado had no similar antideficiency statute, but defendant, relying on the California judgment, pleaded res judicata. The Colorado court concluded that the California judgment was not on the merits, and entered judgment for plaintiff.

(3) In April 1987, plaintiff filed an application in Marin County for entry of the Colorado judgment under *C.C.P. 1710.10* et seq. Defendant moved to vacate that judgment on the ground that the Colorado court failed to give full faith and credit to the California judgment. The trial court denied the motion. *Held*, reversed.

(a) The California judgment entered after granting a motion for summary judgment was a judgment on the merits and res judicata in California. Hence, plaintiff was barred from maintaining any further action in California on the same cause of action. (210 C.A.3d 1219, citing the text.)

(b) The question whether plaintiff was barred from entering a sister state judgment on the same cause of action calls for analysis of the rules governing inconsistent judgments. Ordinarily a California court would be bound by the Full Faith and Credit Clause to honor the prior Colorado judgment even if it was one that could not have been obtained under this state's own law. But in the present case there are two prior judgments, and the question is whether the California court is required to recognize the Colorado judgment, which conflicts with an earlier California judgment. (210 C.A.3d 1220.)

(c) The general rule governing two inconsistent judgments makes the later judgment conclusive in a third action. (210 C.A.3d 1220, citing *Rest.2d, Judgments §15*.) But a different rule applies where one of the conflicting judgments was entered by the court in which the current action is pending. That decision takes precedence over a decision of the court of a sister state. (210 C.A.3d 1215, citing *Hammell v. Britton (1941) 19 C.2d 72, 84, 119 P.2d 333*, and out-of-state cases.)

(d) "In light of such persuasive authority, we conclude that plaintiff is *not* entitled to enforce the Colorado judgment in a California court. Plaintiff's original choice of the California forum, together with his passive reaction to the summary judgment proceeding, enabled a final determination of the merits of the controversy, which thereafter barred plaintiff from relitigating the same issue. Despite the fact that plaintiff succeeded in relitigating the controversy in Colorado, the California court was not required to honor the Colorado judgment." (210 C.A.3d 1221.)

SUPPLEMENT: [This section is current through the latest supplement]



36 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

1. Final Judgment.

e. Judgment Final for Collateral Estoppel.

7 *Witkin Cal. Proc. Judgm* § 369

[§ 369] Judgment Final for Collateral Estoppel.

The Second Restatement of Judgments (§13), after stating the general rule that res judicata applies only when a final judgment is rendered, adds the following: "However, for purposes of issue preclusion (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."

This concept of finality for collateral estoppel was invoked in *Sandoval v. Superior Court* (1983) 140 C.A.3d 932, 190 C.R. 29. Plaintiff brought a products liability action against a manufacturer for injuries suffered in the use of a cotton picking machine that he alleged was defectively designed. He moved for partial summary judgment on the ground that, in a prior identical action against the manufacturer, by the special administrator of an estate, the jury had found by special verdict that the machine was defectively designed and returned a general verdict for \$ 262,500; that the manufacturer appealed, and, pending the appeal, the parties reached a settlement under which the manufacturer, although disclaiming liability, agreed to pay \$ 218,837, and the special administrator agreed to give a full release and dismiss the action with prejudice. The trial judge denied the motion on the ground that the prior action had not resulted in a final judgment. Plaintiff then sought mandamus. Although the writ was denied for a different reason (see *infra*, §479), the court approved the Restatement view that the requirement of finality of judgment is interpreted less strictly for the purpose of collateral estoppel than for the purposes of merger or bar. (140 C.A.3d 936.)

(a) Although in California a judgment is not final for purposes of res judicata effect while an appeal is pending (see *supra*, §364), when an appeal is settled favorably to the plaintiff and then dismissed, "the Restatement analysis and reason itself dictate that the trial court judgment reemerges with sufficient finality to permit the application of collateral estoppel." (140 C.A.3d 937.) This view is supported by *Louie Queriolo Trucking v. Superior Court* (1967) 252 C.A.2d 194, 200, 60 C.R. 389, *infra*, §481, where a settlement was reached in favor of the plaintiff after a jury trial on the issue of liability and was followed by a dismissal with prejudice. (140 C.A.3d 937.)

(b) The contrary view expressed in *Lea v. Shank* (1970) 5 C.A.3d 964, 86 C.R. 515, that a retraxit and dismissal with prejudice does not constitute a judgment on the merits for the plaintiff but operates as a judgment in favor of the party dismissed, is incorrect. "We see nothing in the dismissal with prejudice concept that forecloses a finding of

finality sufficient to preclude relitigation of the issues decided against the defendant. This is particularly true when the agreement to dismiss with prejudice is part of a substantial settlement in plaintiff's favor after a final judgment in the trial court. Such a settlement and dismissal of the lawsuit can fairly be construed as a judgment favoring plaintiff on the merits." (140 C.A.3d 939.)

(c) "Under no stretch of the imagination in the present case can the payment of \$ 218,837 on the \$ 262,600 judgment (83 percent of the judgment) be considered a judgment on the merits for [the manufacturer]; rather, it reflects a considered decision by [the manufacturer] that pursuing the appeal to its conclusion would result in [the manufacturer] paying the full judgment plus interest. [The manufacturer's] facade of continued nonliability by use of stereotyped language in the settlement agreement does not alter the fact that the plaintiff prevailed in the lawsuit because of the jury's finding of a product defect." It is the nature of the action and the character of the judgment, not recitals in the judgment, that determine whether it is res judicata. (140 C.A.3d 940, citing *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 C.2d 47, 52, 92 P.2d 804, infra, §375.)

Numerous cases, including the following, have discussed when a judgment is final for collateral estoppel purposes:

Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 C.3d 903, 911, 226 C.R. 558, 718 P.2d 920 [following *Sandoval*; settlement after affirmance on appeal and before expiration of time to petition for review was final judgment for collateral estoppel purposes].

McClain v. Rush (1989) 216 C.A.3d 18, 25, 264 C.R. 563 [following *Sandoval*; summary judgment on issue].

Long Beach Unified School Dist. v. California (1990) 225 C.A.3d 155, 169, 275 C.R. 449, supra, §364 [administrative decision could not be given collateral estoppel effect where action to review decision was filed within statute of limitations].

Abelson v. National Union Fire Ins. Co. (1994) 28 C.A.4th 776, 787, 35 C.R.2d 13 [judgment in coordinated litigation was not final where "limited purpose" collateral estoppel was given for test case while test case was on appeal].

Stonewall Ins. Co. v. Palos Verdes Estates (1996) 46 C.A.4th 1810, 1840, 54 C.R.2d 176 [inverse condemnation judgment against city had collateral estoppel effect in later action, even though first action was settled while appeal was pending with stipulation that judgment be vacated; citing *Sandoval*].

Syufy Enterprises v. Oakland (2002) 104 C.A.4th 869, 877, 128 C.R.2d 808 [denial of lessor's request for summary judgment in unlawful detainer action did not have collateral estoppel effect in lessee's subsequent declaratory relief action against lessor; following denial of summary judgment, lessor voluntarily dismissed unlawful detainer action without prejudice, and thus, previous proceeding did not result in final judgment on merits].

Border Business Park v. San Diego (2006) 142 C.A.4th 1538, 1564, 49 C.R.3d 259 [order sustaining city's demurrer to developer's breach of contract claim in prior action was "sufficiently firm" to preclude relitigation of whether Government Claims Act applied to breach of contract claim; citing *Rest.2d, Judgments §13* and *Sandoval*].

SUPPLEMENT: [This section is current through the latest supplement]



37 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

a. In General.

7 *Witkin Cal. Proc. Judgm* § 370

[§ 370] In General.

A final judgment is res judicata only if it was rendered on the merits. This requirement is derived from the fundamental policy of the doctrine, which gives stability to judgments after the parties have had a fair opportunity to litigate their claims and defenses. (See *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 C.2d 47, 51, 92 P.2d 804; *Johnson v. Loma Linda* (2000) 24 C.4th 61, 77, 99 C.R.2d 316, 5 P.3d 874, citing the text [although laches prevented terminated city employee from challenging personnel board's decision that termination was proper, employee's federal Title VII claim was not precluded; judgment based on laches was not judgment on merits]; *Datta v. Staab* (1959) 173 C.A.2d 613, 620, 343 P.2d 977, quoting the text; *In re Anthony H.* (2005) 129 C.A.4th 495, 503, 28 C.R.3d 575 [juvenile court's denials of petitions to disclose juvenile records were not judgments on merits; first petition was summarily denied without hearing, second petition was denied because same matter was pending in federal court, and third petition was transferred to juvenile court by federal court without decision]; *Rest.2d, Judgments* §19, Comment a; James 5th, §11.16; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §540; supra, §334.) (On conclusive effect of determination of issue where judgment is not on merits (direct estoppel), see supra, §342.)

The judgment is on the merits if the substance of the claim is tried and determined, no matter how wrongly it is decided. In other words, a judgment is binding and conclusive against collateral attack even though it is harsh or unjust, contrary to the evidence, or based on errors of law. (See *Beverly Hills Nat. Bank v. Glynn* (1971) 16 C.A.3d 274, 286, 93 C.R. 907, quoting the text; *Smith v. Smith* (1981) 127 C.A.3d 203, 209, 179 C.R. 492, quoting the text [postdivorce ruling that decree was res judicata on status of retirement benefits as community property barred further attempt to recover benefits]; 47 *Am.Jur.2d* (2006 ed.), *Judgment* §§541, 542; 2 *Cal. Proc.* (5th), *Jurisdiction*, §287; on discretionary rejection of doctrine where it would defeat ends of justice, see supra, §344.)

The rule, however, does not produce a fixed classification of judgments that are or are not on the merits. It is often necessary to examine the record of the proceedings to determine whether a particular adjudication is to be considered res judicata. (See supra, §349, infra, §371 et seq.)

West's Key Number Digest, Judgment 562

SUPPLEMENT: [This section is current through the latest supplement]



38 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

b. What Judgments Are on Merits.

1. Judgment After Trial on Facts.

7 Witkin Cal. Proc. Judgm § 371

[§ 371] Judgment After Trial on Facts.

The usual judgment that meets all the tests and carries out the policies of the res judicata doctrine is one rendered after a trial of the issues of fact, by the jury or court. It is on the merits, even when it is rendered on a directed verdict or as a judgment notwithstanding the verdict. (See *Rest.2d, Judgments §19, Comment h; 7 Cal. Proc. (5th), Trial, §§420, 436.*)

SUPPLEMENT: [This section is current through the latest supplement]



39 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

b. What Judgments Are on Merits.

2. Judgment Without Trial on Facts.

7 *Within Cal. Proc. Judgm* § 372

[§ 372] Judgment Without Trial on Facts.

(1) *Summary Judgment.* A judgment entered after granting a motion for summary judgment is as final and conclusive a determination of the merits as a judgment after trial. (See *C.C.P.* 437c; *State Farm Mut. Auto. Ins. Co. v. Salazar* (1957) 155 C.A.2d Supp. 861, 864, 318 P.2d 210, citing the text; *Martens v. Winder* (1961) 191 C.A.2d 143, 151, 12 C.R. 413 [dictum]; *Columbus Line v. Gray Line Sight-Seeing Cos. Associated* (1981) 120 C.A.3d 622, 629, 174 C.R. 527, citing the text; *Castro v. Higaki* (1994) 31 C.A.4th 350, 357, 358, 37 C.R.2d 84 [denial of petition under C.C. 1714.10 (leave to file civil conspiracy action against attorney) is judgment on the merits, analogous to granting of motion for summary judgment]; but cf. *Koch v. Rodlin Enterprises* (1990) 223 C.A.3d 1591, 1595, 1597, 273 C.R. 438 [summary judgment in previous action on ground that statute of limitations had run was not judgment on merits]; *Johnson v. Siegel* (2000) 84 C.A.4th 1087, 1095, 101 C.R.2d 412 [although defendant was entitled to summary judgment when plaintiff filed action without first pursuing arbitration, as required by agreement between parties, res judicata did not bar plaintiff from pursuing arbitration after summary judgment].) But an order denying a motion for summary judgment merely finds that there is an issue to be tried and is not res judicata. Hence, where a first motion by plaintiff was denied, a second one made after filing an amended and supplemental complaint could be granted. (*Schulze v. Schulze* (1953) 121 C.A.2d 75, 83, 262 P.2d 646.)

(2) *Judgment by Default.* A judgment by default is generally given the effect of merger or bar. (*Rest.2d, Judgments* §19, Comment e; see 77 A.L.R.2d 1410 [doctrine of res judicata as applied to default judgments]; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §176.) (On its effect as collateral estoppel, see *infra*, §448 et seq.)

(3) *Judgment by Consent.* A judgment entered without contest, by consent or stipulation, is usually as conclusive a merger or bar as a judgment rendered after trial. (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990) 50 C.3d 658, 664, 667, 268 C.R. 284, 788 P.2d 1156, citing the text; *Nielsen v. Emerson* (1931) 119 C.A. 214, 218, 6 P.2d 281; *Guaranty Liquidating Corp. v. Board of Supervisors of Los Angeles* (1937) 22 C.A.2d 684, 71 P.2d 931; *Klinker v. Klinker* (1955) 132 C.A.2d 687, 695, 283 P.2d 83; *United States Fire Ins. Co. v. Johansen* (1969) 270 C.A.2d 824, 833, 76 C.R. 174, citing the text; *Avery v. Avery* (1970) 10 C.A.3d 525, 529, 89 C.R. 195; *Ellena v. California* (1977) 69 C.A.3d 245, 259, 260, 138 C.R. 110, citing the text; *Greatorex v. Board of Administration of City*

Employees' Retirement System (1979) 91 C.A.3d 54, 58, 154 C.R. 37, citing the text; *De Weese v. Unick* (1980) 102 C.A.3d 100, 105, 162 C.R. 259, quoting the text; *In re Marriage of Buckley* (1982) 133 C.A.3d 927, 935, 184 C.R. 290; 91 A.L.R.3d 1170 [modern view on res judicata effect of consent judgment].) But a judgment entered under C.C.P. 998 pursuant to an accepted offer to compromise is not a collateral estoppel. (See *infra*, §439; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §99.)

The following are among the numerous cases discussing whether a judgment entered by consent is a conclusive judgment on the merits:

Johnson v. American Airlines (1984) 157 C.A.3d 427, 431, 203 C.R. 638, citing the text [court-approved settlement pursuant to final consent decree in federal class action was binding on class members].

Gates v. Superior Court (1986) 178 C.A.3d 301, 308, 311, 223 C.R. 678, citing the text [consent judgment is res judicata of all issues that were or could have been raised].

Victa v. Merle Norman Cosmetics (1993) 19 C.A.4th 454, 458, 24 C.R.2d 117, *infra*, §458, citing the text [judgment by consent and stipulation in EEOC action].

Landeros v. Pankey (1995) 39 C.A.4th 1167, 1171, 46 C.R.2d 165 [stipulated judgment in unlawful detainer action did not expressly preclude tenant from later litigating issue of breach of warranty of habitability; judgment did not contain comprehensive settlement language or release of all tenant's claims; distinguishing *California State Auto. Assn. Inter-Ins. Bureau*].

Citizens for Open Access to Sand & Tide v. Seadrift Assn. (1998) 60 C.A.4th 1053, 1065, 71 C.R.2d 77 [settlement agreement that clearly indicated parties' intent to decisively establish nature and extent of public use of property was final decision on merits; later action by public interest group seeking declaration of implied dedication was barred].

Third Eye Blind v. Near North Entertainment Ins. Services, LLC (2005) 127 C.A.4th 1311, 1324, 26 C.R.3d 452 [trial court's ruling that insurer had duty to defend insureds did not preclude insureds' negligence claims against their business manager and insurance broker, alleging that manager and broker should have advised insureds that policy might not guarantee full coverage; ruling was not necessarily judgment on merits because insurer and insureds settled before trial; citing *Landeros*].

(4) *Judgment After Arbitration.* An arbitration award confirmed by the court is a binding final judgment. (*Goldkette v. Daniel* (1945) 70 C.A.2d 96, 160 P.2d 145.) By express statutory exclusion, however, an award in an uninsured motorist proceeding is not res judicata or a collateral estoppel in an action by the insured against the owner or operator of the uninsured motor vehicle (*Ins.C. 11580.5*), or in an action or proceeding between the insured, the insurer, the insured's legal representatives, or the insured's heirs and the uninsured motorist (*Ins.C. 11580.2(f)*).

(5) *Judgments on Demurrer, Dismissal, or Nonsuit.* These may or may not be on the merits, depending on the circumstances of the particular case. (See *infra*, §375 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Judgment by Consent.* See *Ferraro v. Camarlinghi* (2008) 161 C.A.4th 509, 540, 75 C.R.3d 19 [order extinguishing alleged beneficiary's claims to estate had no preclusive effect; order was based on stipulation to which alleged beneficiary was not party, and order was not final because party to stipulation had not taken steps to voluntarily dismiss complaint]; *Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 C.A.4th 1544, 1553, 101 C.R.3d 441 [consent decree in federal class action was not binding in plaintiff's later state action for damages for violation of California disability law; consent decree determined injunctive and declaratory relief with regard to federal disability law and did not apply to individual damages claims under state law].



40 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

b. What Judgments Are on Merits.

3. Declaratory Judgment.

7 *Witkin Cal. Proc. Judgm* § 373

[§ 373] Declaratory Judgment.

(1) *Binding on "Matters Declared."* The judgment in an action for declaratory relief is appealable and on the merits and should therefore be binding as to the matters declared, even though it is not a merger or bar. (See *Rest.2d, Judgments* §33; *90 Harv. L. Rev.* 1354 [effect of federal declaratory judgments on state proceedings]; *46 So. Cal. L. Rev.* 803 [res judicata effect of declaratory relief in federal courts]; *48 U.C.L.A. L. Rev.* 159 [appropriate level of preclusion for declaratory judgment]; *10 A.L.R.2d* 782 [extent to which principles of res judicata are applicable to judgments in actions for declaratory relief]; *22A Am.Jur.2d* (2003 ed.), *Declaratory Judgments* §246 et seq.; *5 Cal. Proc.* (5th), *Pleading*, §§849, 850; cf. *In re Los Angeles County Pioneer Soc.* (1953) *40 C.2d* 852, 857, *257 P.2d* 1 [judgment was not binding in new action with different parties].)

In *Aerojet-General Corp. v. American Excess Ins. Co.* (2002) *97 C.A.4th* 387, *117 C.R.2d* 427, plaintiff corporation had been sued by neighboring landowners for personal injuries allegedly caused by plaintiff's discharge of ammonium perchlorate on its property. Plaintiff sued defendant insurers, seeking a declaration that it was entitled to insurance coverage for the landowners' claims. Defendants demurred, arguing that res judicata barred the action because defendants had received, in an earlier action by plaintiff, a judgment declaring that they had "no duty or obligation to indemnify [plaintiff] for any liability that [plaintiff] has incurred or may incur arising out of the alleged release of waste materials at or from property occupied at one time or another by [plaintiff] in Eastern Sacramento County" and "no obligation to *defend*, investigate or to pay the costs of the defense or investigation of any claim, *present or potential*, against [plaintiff] arising out of the alleged release of waste materials at or from property occupied *at one time or other* by [plaintiff] in Eastern Sacramento County." Plaintiff argued that ammonium perchlorate was not one of the chemicals at issue in the first action and that the site of the pollution was different. The trial court sustained the demurrer. *Held*, affirmed.

(a) The language of the judgment in the first action clearly covers defendants' obligations arising from the present action because the earlier judgment covers both past and future claims arising from the release of chemicals at or from property occupied at any time by plaintiff in eastern Sacramento County. The earlier judgment limits neither the types of waste materials covered nor the extent of plaintiff's property in eastern *Sacramento County*. (*97 C.A.4th* 397.) It is

"too late in the day" for plaintiff to object to the scope of that judgment. (97 C.A.4th 398.) Moreover, because the judgment unambiguously covers the present action, there is no need to consider the entire record of the prior case to determine what the judgment declared. (97 C.A.4th 399.)

(b) Although a judgment in an action for declaratory relief does not operate as a merger or bar in a later action, it is binding as to the matters declared. (97 C.A.4th 402, citing the text.) The plain language of *Rest.2d, Judgments* §33 confirms that a final declaratory judgment "is conclusive in a subsequent action between [the parties] as to the matters declared, *and*, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action." (97 C.A.4th 404.) Thus, contrary to plaintiff's assertion, the Restatement does not limit a declaratory judgment's conclusive effect to the issues actually litigated and determined, but also gives conclusive effect to the matters stated in the declaratory judgment. (97 C.A.4th 406.) Case law from a number of other states and federal circuits reaffirms this principle. (97 C.A.4th 407.)

(c) Even assuming that the record from the first action had to be examined to determine the scope of the matters actually declared in the earlier judgment, plaintiff's present action for declaratory relief would be barred. Although the first action focused on pollution caused by three chemicals other than ammonium perchlorate, the gravamen of the action was whether defendants had an obligation to provide coverage for all chemical releases at all disposal areas occupied by plaintiff in eastern *Sacramento County*. (97 C.A.4th 410.) Defendants made ammonium perchlorate a part of their case, introducing into evidence numerous documents describing the dangers of perchlorate contamination, and both parties made the question of ammonium perchlorate coverage an important part of their closing arguments. Moreover, nothing at the first trial limited the scope of plaintiff's property that was to be subject to the declaratory judgment. (97 C.A.4th 411.) Plaintiff asked the jury in the first action for a ruling that would be sufficiently broad in scope so that no future lawsuit about insurance coverage for any chemical pollution, including that caused by ammonium perchlorate, would be necessary. (97 C.A.4th 413.) Plaintiff "sought the broad judgment it got, albeit not its substance, and it is thus bound thereby." (97 C.A.4th 414.)

(2) *Later Action for Damages*. If the plaintiff in the declaratory relief action does not seek the additional relief of a damage award, the declaratory judgment is not a bar to a later action for damages. (*Lortz v. Connell* (1969) 273 C.A.2d 286, 301, 78 C.R. 6 [plaintiff should be allowed to obtain prompt declaration of rights without delays of dispute over damages].) This exception does not apply if the party sought coercive as well as declaratory relief in the prior action. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 C.4th 888, 897, 123 C.R.2d 432, 51 P.3d 297.)

SUPPLEMENT: [This section is current through the latest supplement]



41 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

b. What Judgments Are on Merits.

4. Judgment on Extraordinary Writ.

7 *Within Cal. Proc. Judgm* § 374

[§ 374] Judgment on Extraordinary Writ.

(1) *Writ Issued and Opinion Rendered After Hearing.* Original proceedings in an appellate court are generally subject to the doctrine of res judicata (see *supra*, §357). If an alternative writ of mandamus or prohibition, or a writ of certiorari, is issued, and a decision is rendered with a written opinion granting or denying relief, this decision on the merits is res judicata. (See *Dawson v. Superior Court* (1910) 158 C. 73, 110 P. 479; *Price v. Sixth Dist. Agricultural Assn.* (1927) 201 C. 502, 515, 258 P. 387; *Loeb v. Berman* (1933) 217 C. 716, 720, 20 P.2d 685; *Hollywood Circle v. Department of Alcoholic Beverage Control* (1961) 55 C.2d 728, 733, 13 C.R. 104, 361 P.2d 712, *supra*, §359 [prior judgment in mandamus proceeding]; 21 A.L.R.3d 206 [judgment granting or denying writ of mandamus or prohibition as res judicata]; 14 Am.Jur.2d (2000 ed.), *Certiorari* §113; 52 Am.Jur.2d (2000 ed.), *Mandamus* §467 et seq.; 8 Cal. Proc. (5th), *Extraordinary Writs*, §209.)

In *Overstreet v. Butte* (1962) 57 C.2d 504, 20 C.R. 631, 370 P.2d 335, plaintiff sued defendant county in tort, and the county obtained a writ of prohibition from the Court of Appeal on the ground that the action was precluded by sovereign immunity. Hearing was denied, the writ was served and filed, and the trial judge dismissed the action. Plaintiffs appealed from the order of dismissal, relying on a case in which the Supreme Court held that earlier legislation merely suspended the causes of action. (See 5 *Summary* (10th), *Torts*, §216.) *Held*, order affirmed. Where an appellate court in its decision directs that a specific judgment be entered by the trial court, that decision is res judicata, and it is beyond the jurisdiction of the trial court to allow amended pleadings or retry the case. Any appeal from the judgment entered by directions is limited to questions not involved in the prior appeal, e.g., whether the judgment complies with the directions. (57 C.2d 507; see 9 Cal. Proc. (5th), *Appeal*, §879 et seq.) A writ proceeding is analogous. If it is determined on the merits, the judgment is res judicata in later special proceedings involving the same parties and the same set of facts, even if the law changes in the intervening period. (57 C.2d 506.) Hence, the judgment of the Court of Appeal in the prohibition proceeding was a final determination of the immunity question with respect to the rights of plaintiffs, and they were precluded from raising it again. (57 C.2d 506.)

(2) *Distinction: Petition for Writ Denied Without Opinion.* If the appellate court summarily denies the petition, i.e., does not issue an alternative writ or order to show cause and does not hear the matter or render an opinion on the merits,

the order of denial is not res judicata. (See *State Bd. of Equalization v. Superior Court* (1942) 20 C.2d 467, 471, 127 P.2d 4; *Funeral Directors Assn. of Los Angeles & Southern Calif. v. Board of Funeral Directors & Embalmers of Calif.* (1943) 22 C.2d 104, 107, 136 P.2d 785; *People v. Medina* (1972) 6 C.3d 484, footnote 6, 491, 99 C.R. 630, 492 P.2d 686; *McDonough v. Garrison* (1945) 68 C.A.2d 318, 325, 156 P.2d 983; *Donia v. Alcoholic Bev. Control App. Bd.* (1985) 167 C.A.3d 588, 594, 213 C.R. 447; 52 Am.Jur.2d, Mandamus §487; 18 So. Cal. L. Rev. 287; 8 Cal. Proc. (5th), *Extraordinary Writs*, §186.)

However, *Consumers Lobby Against Monopolies v. Public Util. Com.* (1979) 25 C.3d 891, 160 C.R. 124, 603 P.2d 41, points out that in the following situations, the denial of a petition for a writ without an opinion is res judicata:

(a) Where denial of a petition for prohibition or mandamus is on the merits. Because the normal method of review of judgments and orders is appeal, the courts have discretion to summarily deny the petitions on policy grounds unrelated to their procedural or substantive merits (e.g., adequacy of remedy by appeal). But if the sole possible ground of denial was on the merits, or if it affirmatively appears that the denial was intended to be on the merits, it will have res judicata effect. (25 C.3d 901, footnote 3.)

(b) Where a writ of review is the exclusive remedy, as in the statutory method of judicial review of a decision of the Public Utilities Commission (*Pub.Util.C. 1756*; see 8 *Summary* (10th), *Constitutional Law*, §1108). This review is the equivalent of an appeal, and a denial of the petition is a decision on the merits both as to the law and the facts. (25 C.3d 900, 901.) (See *Abraham v. Work. Comp. App. Bd.* (2003) 113 C.A.4th 1082, 1089, 6 C.R.3d 820 [summary denial by Court of Appeal of petition for review of decision of Workers' Compensation Appeals Board was final determination on merits and precluded petitioner's later petition for administrative mandamus in superior court challenging same decision; petition in Court of Appeal was sole means of obtaining review, and thus ruling on petition must be final; citing *Consumers Lobby Against Monopolies*].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Writ Issued and Opinion Rendered After Hearing.* See 14 Am.Jur.2d (2009 ed.), *Certiorari* §106.



42 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

c. Judgment on Demurrer.

1. Rule and Theory.

7 *Within Cal. Proc. Judgm* § 375

[§ 375] Rule and Theory.

From one point of view, the judgment entered after sustaining a demurrer merely determines the insufficiency of the pleading and not the merits of the claim or defense. On the other hand, general demurrers are commonly used to decide cases expeditiously on the fundamental questions of law involved (see 5 *Cal. Proc.* (5th), *Pleading*, §946), and a rule that a judgment on demurrer is never res judicata would be unrealistic and unwise. Hence, counsel must produce and the court must examine the record in the prior action to see whether the judgment determined the merits. (See *supra*, §349.)

"A judgment given after the sustaining of a general demurrer on a ground of substance, for example, that an absolute defense is disclosed by the allegations of the complaint, may be deemed a judgment on the merits, and conclusive in a subsequent suit; and the same is true where the demurrer sets up the failure of the facts alleged to establish a cause of action, and the same facts are pleaded in the second action. ... But even a judgment on general demurrer may not be on the merits, for the defects set up may be technical or formal, and the plaintiff may in such case by a different pleading eliminate them or correct the omissions and allege facts constituting a good cause of action, in proper form. Where such a new and sufficient complaint is filed, the prior judgment on demurrer will not be a bar. ... This result has frequently been reached where the failure of the first complaint was in misconceiving the remedy, or framing the complaint on the wrong form of action." (*Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 *C.2d* 47, 52, 92 *P.2d* 804.) (See *Keidatz v. Albany* (1952) 39 *C.2d* 826, 828, 249 *P.2d* 264, *infra*, §376; *Crowley v. Modern Faucet Mfg. Co.* (1955) 44 *C.2d* 321, 323, 282 *P.2d* 33; *Lunsford v. Kosanke* (1956) 140 *C.A.2d* 623, 295 *P.2d* 432, *infra*, §376; *Sterling v. Galen* (1966) 242 *C.A.2d* 178, 182, 51 *C.R.* 312; *Rest.2d, Judgments* §19, Comment d; *cf. Olds v. Peebler* (1944) 66 *C.A.2d* 76, 151 *P.2d* 901 [court was unable to determine, in absence of judgment roll, whether demurrer went to merits].)

West's Key Number Digest, Judgment 572

SUPPLEMENT: [This section is current through the latest supplement]



43 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

c. Judgment on Demurrer.

2. Judgment Not on Merits.

7 *Witkin Cal. Proc. Judgm* § 376

[§ 376] Judgment Not on Merits.

(1) *Special Demurrer*. No difficulty is encountered with a judgment entered after sustaining a special demurrer for formal defects such as uncertainty, incapacity to sue, misjoinder of parties, etc., or for lack of jurisdiction. It is not *res judicata*. (See *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 C.2d 47, 52, 92 P.2d 804; *Johnston v. Ota* (1941) 43 C.A.2d 94, 97, 110 P.2d 507; *Rest.2d, Judgments* §19, Comment d; §20 and Comment c; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §§556, 562.)

(2) *General Demurrer*. In *Goddard*, a federal district court sustained a general demurrer and the judgment against the plaintiff was affirmed on appeal. In the new action, the record was examined, and it appeared from the minute order of the trial judge and the opinion of the appellate court that the fatal defect was in the form of the action--the complaint was framed on a theory of conversion rather than case. *Held*, "[t]he judgment was based upon formal matters of pleading, and concluded nothing save that the complaint, in the form in which it was then presented, did not entitle plaintiff to go to trial on the merits. Such a judgment is clearly not on the merits, and ... is not *res judicata*." (14 C.2d 53.)

In *Keidatz v. Albany* (1952) 39 C.2d 826, 249 P.2d 264, the first action, to rescind a land contract for fraud, was dismissed after a general demurrer was sustained on the ground of laches. The first complaint did not sufficiently state facts to justify the alternative recovery of damages, and a second action was brought in which this defect was overcome. *Held*, the former judgment was not a bar. (39 C.2d 829.) (See *Kanarek v. Bugliosi* (1980) 108 C.A.3d 327, 334, 166 C.R. 526 [following *Keidatz*]; *Koch v. Rodlin Enterprises* (1990) 223 C.A.3d 1591, 1595, 273 C.R. 438 [summary judgment in previous action on ground that statute of limitations had run was not bar to second action; quoting *Goddard* and citing *Keidatz*]; *Mid-Century Ins. Co. v. Superior Court* (2006) 138 C.A.4th 769, 776, 41 C.R.3d 833 [insured's action against insurer was not barred by earlier action, in which insurer's demurrer to insured's complaint was sustained solely because statute of limitations had run].)

In *Lunsford v. Kosanke* (1956) 140 C.A.2d 623, 295 P.2d 432, a contract action, defendant demurred and objected to all evidence. The trial judge ruled that the pleading was insufficient but also filed findings against plaintiffs on the

merits. Later, plaintiff brought a second action with a good complaint. *Held*, the first judgment was not res judicata. It was not on the merits, for the judge had held the complaint so defective as to preclude the introduction of any evidence under it. Because the case was decided purely on the insufficiency of the pleadings, the purported findings on the merits were improper and void, and could not affect the correct determination of the issue of res judicata. (140 C.A.2d 628.) (See *Newhall v. Hatch* (1901) 134 C. 269, 272, 66 P. 266 [demurrer to original complaint was sustained on ground of limitations; new complaint pleaded facts of renewal of obligation]; *Takekawa v. Hole* (1911) 17 C.A. 653, 121 P. 296 [prior judgment on the pleadings was not bar to new action alleging entirely different facts]; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §555.)

The objection of premature action, whether raised by a general demurrer or by an answer, is a plea in abatement that does not go to the merits. Hence, if sustained, it does not bar a new action after the cause of action accrues. (See *Rest.2d, Judgments* §20, Comment k et seq.; *Mercer Cas. Co. v. Lewis* (1940) 41 C.A.2d 918, 923, 108 P.2d 65; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §563; 5 *Cal. Proc.* (5th), *Pleading*, §1152.)

Similarly, the objection that a plaintiff doing business in a fictitious name has failed to file a certificate under *B. & P.C. 17910* (see 4 *Cal. Proc.* (5th), *Pleading*, §95) may result in dismissal or judgment against the plaintiff, but the determination is obviously not on the merits and is not a bar to another action on the same cause of action. (*Folden v. Lobrovich* (1957) 153 C.A.2d 32, 314 P.2d 56.)

SUPPLEMENT: [This section is current through the latest supplement]



44 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

c. Judgment on Demurrer.

3. Judgment a Bar.

7 *Witkin Cal. Proc. Judgm* § 377

[§ 377] Judgment a Bar.

(1) *Facts Alleged Are Substantially the Same.* A judgment on general demurrer will be a bar under *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 C.2d 47, 52, 92 P.2d 804, supra, §375, if the new complaint states the same facts and the former judgment determined that these facts did not constitute a cause of action. (See *Rest.2d, Judgments* §19, Comment d.)

In *See v. Joughin* (1941) 18 C.2d 603, 607, 116 P.2d 777, plaintiff's first action, to set aside a foreclosure judgment for extrinsic fraud, was dismissed after a general demurrer was sustained, and the appellate court held that no cause of action to set aside the judgment or to declare a trust was stated. The second action alleged the same facts in slightly different language and sought to have a trust declared. *Held*, under the *Goddard* test, the first judgment was res judicata. The pleadings, when compared, alleged substantially the same case in both instances. (18 C.2d 607.) (See *Crowley v. Modern Faucet Mfg. Co.* (1955) 44 C.2d 321, 323, 282 P.2d 33; *Erganian v. Brightman* (1936) 13 C.A.2d 696, 57 P.2d 971; *Morrison v. Willhoit* (1944) 62 C.A.2d 830, 839, 145 P.2d 707; *In re Cole's Check Service* (1963) 215 C.A.2d 332, 337, 30 C.R. 306; *Sterling v. Galen* (1966) 242 C.A.2d 178, 182, 51 C.R. 312; *Berman v. Aetna Cas. & Surety Co.* (1974) 40 C.A.3d 908, 912, 115 C.R. 566; *Ojavan Investors v. California Coastal Com.* (1997) 54 C.A.4th 373, 383, 62 C.R.2d 803, 12 *Summary* (10th), *Real Property*, §867 [judgment on general demurrer in first action was binding in second action that involved challenges to same permits, deed restrictions, and cease-and-desist order involved in first action]; *Pollock v. University of Southern Calif.* (2003) 112 C.A.4th 1416, 1427, 6 C.R.3d 122 [dismissed professor's fraud and breach of contract claims against university were barred by res judicata; professor's complaint in earlier action, demurrer to which had been sustained, had alleged same facts concerning creation of procedure designed to thwart tenure and had sought vindication of same primary right to fairness in tenure and grievance process].)

(2) *Ground Is Equally Applicable.* A judgment on general demurrer will be a bar under *Goddard*, if, although the new complaint states different facts, the demurrer to the first was sustained on a ground equally applicable to the second. (See *Keidatz v. Albany* (1952) 39 C.2d 826, 828, 249 P.2d 264 [dictum]; *Rest.2d, Judgments* §19, Comment d.)

In *Olwell v. Hopkins* (1946) 28 C.2d 147, 168 P.2d 972, the demurrer set up invalidity of the contract on which the

action was brought. "The defense thus interposed went to the merits of plaintiffs' cause of action. ... They raised an issue as to plaintiffs' right to recover under any circumstances upon their alleged cause of action and upon that issue the court rendered judgment against plaintiffs. ... A decision on the merits ... is not necessarily a decision upon the facts." (28 C.2d 150.) (See *Chappelle v. Concord* (1956) 144 C.A.2d 822, 825, 301 P.2d 968 [sovereign immunity]; *McKinney v. Santa Clara* (1980) 110 C.A.3d 787, 795, 168 C.R. 89 [defect of complaint in first action (failure to allege notice of claim in compliance with statutory requirements) also applied to second complaint; demurrer in first action barred second].)

SUPPLEMENT: [This section is current through the latest supplement]



45 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

d. Voluntary Dismissal.

7 *Witkin Cal. Proc. Judgm* § 378

[§ 378] Voluntary Dismissal.

(1) *Exercise of Absolute Right.* If the plaintiff exercises the absolute right to dismiss before commencement of the trial, by a request filed with the clerk, the dismissal is not a bar to a new action. (See *Breznikar v. T.J. Topper Co.* (1937) 23 C.A.2d 298, 303, 72 P.2d 895; *Shuffer v. Board of Trustees of the Calif. State University & Colleges* (1977) 67 C.A.3d 208, 216, 136 C.R. 527 [dismissal without prejudice was obtained by plaintiff before case was at issue]; *Rest.2d, Judgments* §20, Comment f; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §308; cf. *F.R. Civ. P., Rule 41(a)(1)(B)* [notice of dismissal operates as adjudication on merits if plaintiff has previously dismissed action based on or including same claim]; 9 *Federal Practice & Procedure* (Wright & Miller) §2362; 27A *Federal Procedure*, L.Ed. §62:527 et seq.; *Rest.2d, Judgments* §19, Comment b; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §551.)

(2) *Discretionary Dismissal on Motion.* If, however, the circumstances do not allow the exercise of the absolute right, and the plaintiff moves to dismiss, the court has discretion to grant the motion with or without prejudice to the filing of a new action. (See 47 *Am.Jur.2d* (2006 ed.), *Judgments* §§547, 548; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §313.)

(3) *Dismissal by Consent of Both Parties: Retraxit.* Where the dismissal is by consent or stipulation of both parties after a compromise or settlement of the action, it is intended to operate as a retraxit, and the judgment, entered with prejudice, will bar a new action. (See *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 C.2d 47, 55, 92 P.2d 804 [dictum]; *Sears v. De Mota* (1958) 157 C.A.2d 216, 220, 320 P.2d 579; *Datta v. Staab* (1959) 173 C.A.2d 613, 621, 343 P.2d 977; *Louie Queriolo Trucking v. Superior Court* (1967) 252 C.A.2d 194, 200, 60 C.R. 389, *infra*, §481; *Sylvester v. Soulsburg* (1967) 252 C.A.2d 185, 193, 60 C.R. 218; *Kronkright v. Gardner* (1973) 31 C.A.3d 214, 219, 107 C.R. 270, citing the text; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §545; cf. *F.R. Civ. P., Rule 41(a)(1)(B)* [dismissal is without prejudice unless otherwise stated in stipulation]; 9 *Federal Practice & Procedure* (Wright & Miller) §2363; 27A *Federal Procedure*, L.Ed. §62:549 et seq.; *Rest.2d, Judgments* §19, Comment b.)

Numerous cases, including the following, have discussed whether a dismissal by consent of both parties operates as a retraxit barring a new action:

Neil Norman, Ltd. v. William Kasper & Co. (1983) 149 C.A.3d 942, 197 C.R. 198 [dismissal under settlement was not bar where subsequent action involved issue that was not, and could not have been, part of settlement agreement].

Nakash v. Superior Court (1987) 196 C.A.3d 59, 67, 241 C.R. 578, quoting the text [rule stated, but qualification of *Neil Norman* applied].

Torrey Pines Bank v. Superior Court (1989) 216 C.A.3d 813, 820, 265 C.R. 217 [guarantor's affirmative defenses in action by bank were barred under principles of res judicata; guarantor had dismissed separate action against bank with prejudice and defenses asserted same nucleus of operative facts and raised same legal issues as those alleged in separate action].

Arciniega v. Bank of San Bernardino (1997) 52 C.A.4th 213, 228, 60 C.R.2d 495 [settlement and dismissal of legal malpractice action, in which plaintiff alleged that negligent attorney had wrongfully dismissed plaintiff's action against bank, operated as retraxit barring plaintiff's later action against bank on same cause of action].

Walsh v. West Valley Mission Community College Dist. (1998) 66 C.A.4th 1532, 1545, 78 C.R.2d 725 [after defendant dismissed its cross-complaint with prejudice, it could not assert affirmative defenses concerning same nucleus of operative facts that were alleged in dismissed action, but it was not precluded from contesting allegations in plaintiff's complaint; distinguishing *Torrey Pines Bank*].

Rice v. Crow (2000) 81 C.A.4th 725, 737, 97 C.R.2d 110, 6 Cal. Proc. (5th), Proceedings Without Trial, §309 [disagreeing with *Arciniega*; settlement and dismissal with prejudice of legal malpractice case did not operate to bar plaintiff from prosecuting action against original wrongdoers in underlying action out of which malpractice arose].

Morris v. Blank (2001) 94 C.A.4th 823, 828, 114 C.R.2d 672 [neither res judicata nor collateral estoppel barred plaintiff's superior court action against defendant for negligence, even though defendant's earlier municipal court action against plaintiff, arising out of same car accident, had been settled and dismissed by defendant and plaintiff's insurer; cause of action in superior court was defendant's negligence, whereas cause of action in municipal court was plaintiff's negligence; plaintiff never filed answer or raised affirmative defenses in municipal court, so issues raised in superior court had not been litigated in municipal court].

Le Parc Community Assn. v. Work. Comp. App. Bd. (2003) 110 C.A.4th 1161, 1168, 2 C.R.3d 408 [employee's voluntary dismissal, following settlement, of negligence action against uninsured employer under *Lab.C. 3706* did not bar continued litigation of his related workers' compensation claim; claim under *Lab.C. 3706* and workers' compensation claim do not involve same primary right and Legislature expressly authorized cumulative remedies for injured employee whose employer is uninsured].

Alpha Mechanical, Heating & Air Conditioning v. Travelers Cas. & Surety Co. of America (2005) 133 C.A.4th 1319, 1330, 35 C.R.3d 496 [contractor's dismissal with prejudice of its cross-complaint against subcontractor was retraxit barring further litigation of contractor's affirmative defenses to subcontractor's complaint; in both cases, contractor's primary right was right to competent performance by subcontractor, subcontractor's primary duty was to competently perform, and subcontractor's wrong was negligent or wrongful performance].

Aerojet-General Corp. v. Commercial Union Ins. Co. (2007) 155 C.A.4th 132, 146, 65 C.R.3d 803 [retraxit did not apply where actions were not dismissed with prejudice; from trial court's perspective, actions never existed and there would be no legal bar to further litigation].

West's Key Number Digest, Judgment 570(3).

SUPPLEMENT: [This section is current through the latest supplement]



46 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

e. Involuntary Dismissal.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 379

[§ 379] In General.

A judgment of dismissal has res judicata effect only if it is on the merits. (See *Campanella v. Campanella* (1928) 204 C. 515, 520, 269 P. 433 [trial judge struck complaint from files and dismissed action for no stated reason; resulting judgment was not res judicata]; *Rest.2d, Judgments* §20, Comment g; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §540 et seq.; cf. *F.R. Civ. P., Rule 41(b)* [involuntary dismissal operates as adjudication on merits unless court otherwise orders or dismissal is for lack of jurisdiction, improper venue, or failure to join party under *F.R. Civ. P., Rule 19*]; 9 Federal Practice & Procedure (Wright & Miller) §2369; 27A Federal Procedure, L.Ed. §62:576 et seq.; *Rest.2d, Judgments* §19, Comment b.) (On dismissal for refusal to comply with discovery order, see *infra*, §380.)

The following are typical dismissals that are not on the merits and consequently are not res judicata:

(1) Dismissal for lack of jurisdiction. (See *GMS Properties v. Superior Court* (1963) 219 C.A.2d 407, 415, 33 C.R. 163; *Nichols v. Canoga Industries* (1978) 83 C.A.3d 956, 967, 148 C.R. 459, citing the text; *Rest.2d, Judgments* §20(1)(a); 49 A.L.R.2d 1036 [dismissal for lack of jurisdiction or venue].)

(2) Dismissal for lack of prosecution. (See *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 C.2d 47, 52, 92 P.2d 804 [dictum]; *Gonsalves v. Bank of America* (1940) 16 C.2d 169, 172, 105 P.2d 118; *McManus v. Bendlage* (1947) 82 C.A.2d 916, 921, 187 P.2d 854; *Mattern v. Carberry* (1960) 186 C.A.2d 570, 9 C.R. 137; 54 A.L.R.2d 473 [dismissal of civil action for want of prosecution as res judicata]; 6 *Cal. Proc.* (5th), *Proceedings Without Trial*, §357.)

(3) Dismissal for failure to furnish security for costs as required by statute. (See *Ensher v. Ensher, Alexander & Barsoom* (1960) 187 C.A.2d 407, 411, 9 C.R. 732.)

(4) Dismissal for failure to join an indispensable party. (See *Wilson v. Bittick* (1965) 63 C.2d 30, 35, 45 C.R. 31, 403 P.2d 159 [construing former C.C.P. 389]; *Rest.2d, Judgments* §20, Comment c; on discretionary dismissal under revised C.C.P. 389, see 4 *Cal. Proc.* (5th), *Pleading*, §180 et seq.)

A puzzling problem was presented in *Shore v. Shore* (1954) 43 C.2d 677, 277 P.2d 4. An annulment was awarded to the wife because the husband's prior spouse was living. But, finding the parties *in pari delicto*, the trial judge said that he "makes no findings concerning the character of the property," and "declines for lack of jurisdiction to make any award of property alleged to be community in character." In the present action on a different theory, the husband sought to establish a one-half interest in the property based on their dealings independent of the marriage relationship. *Held*, the judgment in the annulment action was *res judicata*. Ordinarily, a judgment of dismissal is not on the merits, as where a court merely decides that it has no jurisdiction. But here the court really decided that the parties were not entitled to the aid of the law with respect to their property interests, being *in pari delicto*. This decision, like a dismissal because a contract sued on was void, is a determination of the merits. (43 C.2d 680, citing *Olwell v. Hopkins* (1946) 28 C.2d 147, 168 P.2d 972, *supra*, §377.) The dissenting opinion challenges this interpretation of the first judgment, and argues that the case is governed by the rule that an issue expressly excluded is not *res judicata* (see *infra*, §430).

West's Key Number Digest, Judgment 570.

SUPPLEMENT: [This section is current through the latest supplement]



47 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

e. Involuntary Dismissal.

2. Refusal To Comply With Discovery Order.

7 *Witkin Cal. Proc. Judgm* § 380

[§ 380] Refusal To Comply With Discovery Order.

In *Kahn v. Kahn* (1977) 68 C.A.3d 372, 137 C.R. 332, plaintiff refused to comply with a discovery order, and the trial judge imposed the sanction of dismissal under former C.C.P. 2034(b)(2) (now C.C.P. 2023.030(d)(3); see 2 *Cal. Evidence* (4th), *Discovery*, §257 et seq.). Plaintiff did not directly attack the order by motion or appeal, but instead filed a new, virtually identical action. *Held*, the judgment of dismissal was on the merits and a bar to the second action.

(a) The question whether a dismissal is on the merits must be determined on a consideration of the pleadings and findings in the light of the applicable law. (68 C.A.3d 379; see *supra*, §379; *infra*, §383.) The important objectives of the civil discovery statutes have been held to justify the severe statutory sanctions of default judgment against a recalcitrant defendant and dismissal against a recalcitrant plaintiff. (68 C.A.3d 381, 382.) The theory behind these decisions appears to be that "a persistent refusal to comply with an order for the production of evidence is tantamount to an admission that the disobedient party really has no meritorious claim or defense to the action." (68 C.A.3d 382.)

(b) The dismissal statutes also support the conclusion that dismissal as a discovery sanction is on the merits. C.C.P. 581, former C.C.P. 581a, and C.C.P. 581c specify the circumstances under which a dismissal is with prejudice, and C.C.P. 582 provides that "in all other cases" judgment will be rendered on the merits. (68 C.A.3d 382.)

(c) Sound policy also leads to this conclusion. "Suppose the conduct of the evasive party were so flagrant as to amount to insubordination and a resolute intent to disobey any further court orders. To permit such a party to suffer no consequences other than the delay of filing a new action after his first has been dismissed would seem to be an absurdity not intended by the Legislature." (68 C.A.3d 383.)

(d) California discovery statutes were derived in great part from the Federal Rules of Civil Procedure, and former C.C.P. 2034 is identical to the former version of *F.R. Civ. P., Rule 37(b)(2)*. Federal cases have held dismissals under the federal rule to be on the merits, and the accepted rules of statutory construction call for a similar holding on the meaning, force, and effect of California's own statute. (68 C.A.3d 384, 385.)

SUPPLEMENT: [This section is current through the latest supplement]



48 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

f. Nonsuit in Jury Trial.

7 *Within Cal. Proc. Judgm § 381*

[§ 381] Nonsuit in Jury Trial.

Under California's early rule, a nonsuit, unlike a directed verdict, did not bar a new action on the same cause. But the present statute provides that if the motion is granted, "unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits." (*C.C.P. 581c(c)*; see *Tevis v. Beigel (1957) 156 C.A.2d 8, 11, 319 P.2d 98*; *Rest.2d, Judgments §20*, Comments f, g; *7 Cal. Proc. (5th), Trial, §419*.)

However, *C.C.P. 581c(c)* has less effect than its language would suggest. Where the nonsuit is granted on a technical ground not involving the merits, the general test of res judicata applies (see *supra*, §370); i.e., the judgment of nonsuit is not res judicata, and if the trial judge phrases it in terms of an adjudication on the merits (i.e., if he or she does not "otherwise" specify), the judge's discretion is abused and the judgment may be modified to make the proper specification. (*American Broadcasting Cos. v. Walter Reade-Sterling (1974) 43 C.A.3d 401, 406, 411, 117 C.R. 617* [nonsuit was granted because of prematurity of cross-complaint seeking indemnity for attorneys' fees and expenses that had not yet been paid; *C.C. 2778* precluded recovery without payment].)

The court in *American Broadcasting* set forth the following two principles applicable to the situation:

(a) "[W]here a judgment is rendered for the defendant on the ground of the nonexistence of some fact essential to the plaintiff's cause of action, the plaintiff is not precluded from maintaining an action after such fact has subsequently come into existence." (*43 C.A.3d 407*, citing *Rest.*, *Judgments §54* (now *Rest.2d, Judgments §20*).)

(b) A judgment is a bar to a subsequent action only where an identical issue was decided in the prior case, and when other facts or conditions intervene before a second action, furnishing a new basis for claims or defenses, the former judgment is not a bar. (*43 C.A.3d 408*; see *infra*, §434.)

The court also quoted §48.1(2) of the Tentative Draft of the Second Restatement of Judgments on the precise point involved. "A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, *unless a second action is precluded by operation of the substantive*

law or the circumstances are such that it would be manifestly unfair to subject the defendant to such an action." (43 C.A.3d 409.) (The quoted provision, with the exception of the final clause relating to manifest unfairness, is now Rest.2d, Judgments §20(2).)

SUPPLEMENT: [This section is current through the latest supplement]



49 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

g. Judgment on Motion in Court Trial.

7 *Witkin Cal. Proc. Judgm* § 382

[§ 382] Judgment on Motion in Court Trial.

The former motion for nonsuit in a trial by the court has been superseded by a motion for judgment (*C.C.P. 631.8*; see *7 Cal. Proc. (5th), Trial*, §430 et seq.), and *C.C.P. 631.8(c)* contains the same provision as *C.C.P. 581c(c)* (*supra*, §381).

The policy problem involved in these legislative enactments is discussed in *Keidatz v. Albany (1952) 39 C.2d 826, 249 P.2d 264*, where the court compared the rules relating to judgment on demurrer (not necessarily *res judicata*) and nonsuit (*res judicata*). "In view of the liberal rules relating to amendments to the pleadings, it has been forcefully advocated that the same policy reflected in section 581c should apply to judgments on demurrer, and that a plaintiff should be required to set forth all the facts relating to his dispute in one action. ... On the other hand less prejudice is suffered by a defendant who has had only to attack the pleadings, than by one who has been forced to go to trial until a nonsuit is granted, and the hardship suffered by being forced to defend against a new action, instead of against an amended complaint, is not materially greater." (*39 C.2d 830.*)

SUPPLEMENT: [This section is current through the latest supplement]



50 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

2. Judgment on Merits.

h. Effect of Recitals in Judgment.

7 *Witkin Cal. Proc. Judgm* § 383

[§ 383] Effect of Recitals in Judgment.

(1) *First Court's Attempt To Make Judgment Conclusive.* Does the court that renders judgment have the power to characterize it as final and on the merits, e.g., by use of the words "with prejudice," and thereby preclude any inquiry by the second court into its conclusive effect? The answer to this question is not easy, and calls for several distinctions:

(a) Apart from statute, the determination of the issue of res judicata is for the second court. The court rendering the judgment cannot by recital make it final if it is only interlocutory in effect. (See *supra*, §7 et seq.) Similarly, the court's expression of its own intent or belief that the merits have been decided is not binding on the court in which the judgment is pleaded. In *Goddard v. Security Title Ins. & Guarantee Co. (1939) 14 C.2d 47, 92 P.2d 804*, *supra*, §376, the federal district court sustained a general demurrer and dismissed the action "with prejudice." The California court, holding that a new action was not barred, said, "[I]f the intention of the court, gathered from its order or other source, were the test of the effect of the judgment on subsequent actions, the doctrine of *res judicata* would disappear as a legal principle, and the bar of a judgment would depend wholly upon the whim of the first judge, or, more probably, on the form of proposed order drafted by successful counsel ... [I]t is the nature of the action and the character of the judgment that determines whether it is *res judicata*. The intention of the court to make a determination *on the merits* may be important, but if the judgment is clearly not on the merits, the court's intention to make it a *bar* is immaterial. The words 'with prejudice' add nothing to the effect of the judgment in such a case, no matter what light they throw on the intention of the court." (14 C.2d 54.) (See *Ensher v. Ensher, Alexander & Barsom (1960) 187 C.A.2d 407, 411, 9 C.R. 732*; cf. *Lunsford v. Kosanke (1956) 140 C.A.2d 623, 295 P.2d 432*, *supra*, §376.)

(b) A statute may expressly provide that a particular kind of judgment may be rendered "with prejudice," i.e., as a bar to a new action on the same cause of action. (See *C.C.P. 581(d)* [discretionary dismissal on motion of plaintiff]; 6 *Cal. Proc. (5th), Proceedings Without Trial*, §313.) In that case, it is no longer relevant to inquire whether the merits were actually considered.

(2) *First Court's Attempt To Prevent Application of Res Judicata.* The converse of the question above is whether the first court can characterize its judgment as not on the merits and thereby prevent the second court from sustaining the plea of res judicata. Again the following distinctions must be made:

(a) In rare instances, a court goes out of its way to inform a confused attorney that it cannot give the attorney relief in the action that he or she has brought, but that the attorney may salvage the cause of action by a new action. This is not an attempt to preclude inquiry into the nature of the judgment; the court is merely giving friendly advice on its legal effect. (See *Tuller v. Superior Court* (1932) 215 C. 352, 356, 10 P.2d 43 [reliable advice by Supreme Court].)

(b) The California statutes that make nonsuit and judgment on a motion ordinarily a bar authorize the court, by express statement, to order the dismissal without prejudice. The statutes in these instances do give the first court power to determine the effect of its own judgment. (See *supra*, §§381, 382.)

(c) The court undoubtedly has the power to avoid the effect of the judgment as collateral estoppel. By expressly stating that it reserves or does not determine a particular issue, it precludes the assertion, in a subsequent action on a different cause of action, that this issue was litigated and determined. (See *Stark v. Coker* (1942) 20 C.2d 839, 843, 129 P.2d 390; *Northrop Corp. v. Chaparral Energy* (1985) 168 C.A.3d 725, 730, 214 C.R. 173, citing *Stark* and the text; *infra*, §430.)

SUPPLEMENT: [This section is current through the latest supplement]



51 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

3. Judgment In Rem or Quasi In Rem.

7 *Witkin Cal. Proc. Judgm § 384*

[§ 384] Judgment In Rem or Quasi In Rem.

(1) *Judgment In Rem*. The doctrine of res judicata applies to judgments determining rights in property, including decrees of distribution in probate proceedings. (See *Rest.2d, Judgments* §§6, 30; *Crall v. Board of Directors of Poso Irr. Dist.* (1890) 87 C. 140, 26 P. 797 [judgment in special proceeding confirming organization of irrigation district]; *Bennett v. Forrest* (1944) 24 C.2d 485, 493, 150 P.2d 416 [final decree of distribution conclusively determined right to take under will]; *Estate of Radovich* (1957) 48 C.2d 116, 308 P.2d 14 [heirship decree precluded state's redetermination of status for inheritance tax purposes]; *Dabney v. Dabney* (1942) 54 C.A.2d 695, 701, 129 P.2d 470 [final decree of distribution was conclusive on creditor's claim]; *Lazzarone v. Bank of America* (1986) 181 C.A.3d 581, 591, 226 C.R. 855, citing the text [order settling trustee's account was entitled to res judicata effect]; *Noggle v. Bank of America* (1999) 70 C.A.4th 853, 862, 82 C.R.2d 829 [res judicata barred trust beneficiaries' claims that were based on breaches that allegedly occurred during years when probate court approved annual trust reports; beneficiaries had been given notice of hearings to settle trust accountings during those years and could have appeared and raised any questions they might have had; following *Lazzarone*]; 14 *Summary* (10th), *Wills and Probate*, §726.)

However, a decree of distribution, while conclusive as to rights under the will and the decree, does not preclude the probate of a different will and the litigation, in equity, of the rights of the conflicting claimants. (See *Estate of Mitchell* (1931) 115 C.A. 348, 1 P.2d 536; 14 *Summary* (10th), *Wills and Probate*, §727.) A decree in rem admitting a will to probate, while conclusive as to the will, is not effective as a collateral estoppel on incidental issues such as mental condition of the testator, relationship of the beneficiaries, or residence of the testator. (*Estate of Bloom* (1931) 213 C. 575, 2 P.2d 753, 14 *Summary* (10th), *Wills and Probate*, §549.)

(2) *Judgment Quasi In Rem*. The doctrine is equally applicable to judgments quasi in rem. (See *Rest.2d, Judgments* §§8, 32; *White v. Lantz* (1932) 126 C.A. 693, 697, 14 P.2d 1041 [judgment against plaintiff in quiet title action was bar to present action for foreclosure of mortgage in existence at time of first action]; 2 *Cal. Proc.* (5th), *Jurisdiction*, §246 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



52 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

4. Judgment Affecting Status.

7 *Witkin Cal. Proc. Judgm* § 385

[§ 385] Judgment Affecting Status.

(1) *In General.* An action or proceeding to determine personal status has the effect of a judgment in rem, i.e., the determination of status is conclusive on all persons. (See *Rest.2d, Judgments* §31; *37 A.L.R.2d* 836 [judgment in illegitimacy proceeding]; *52 A.L.R.2d* 406 [applicability of doctrine to decrees in adoption proceedings]; 11 *Summary* (10th), *Husband and Wife*, §129 et seq.; 2 *Cal. Proc.* (5th), *Jurisdiction*, §270; on judgments of dissolution of marriage and legal separation as collateral estoppel, see *infra*, §§425, 426.)

A generally recognized exception is that a judgment of legal separation (formerly separate maintenance) is not a bar to a proceeding for dissolution. (*Family C. 2347*; see 11 *Summary* (10th), *Husband and Wife*, §147; *90 A.L.R.2d* 745 [decree in action for "separation" as res judicata in subsequent action for divorce or annulment in absence of statute].)

(2) *Distinction: Custody of Child.* Proceedings involving custody of a minor are unique. Change in circumstances and the differences in the proceedings (e.g., dissolution of marriage, guardianship, habeas corpus, juvenile court) greatly restrict the application of the res judicata doctrine in this field. (See 10 *Summary* (10th), *Parent and Child*, §359 et seq.)

(3) *Distinction: Paternity of Child.* A dissolution decree finding nonpaternity is not binding on a child who is not joined in the proceeding and whose interests are not adequately represented. (*Ruddock v. Ohls* (1979) *91 C.A.3d* 271, 279, 284, *154 C.R.* 87, *infra*, §463.)

(4) *Distinction: Ex Parte Order Establishing Date of Marriage.* In *Schmidt v. Retirement Bd. of San Francisco City & County Employees* (1995) *37 C.A.4th* 1204, *44 C.R.2d* 297, a woman obtained an ex parte order under former Health & Saf.C. 10550 et seq., establishing the date of her marriage. In a subsequent action involving her entitlement to her deceased husband's retirement benefits, the trial court gave the order conclusive effect under *C.C.P. 1908(a)(1)*, which provides that an order "in respect to the personal ... or legal condition or relation of a person" is conclusive on that issue. *Held*, reversed. The possibility of inconsistent and conflicting determinations does not warrant giving conclusive weight to orders issued under former Health & Saf.C. 10550 et seq. when to do so threatens the due process rights of third parties. (*37 C.A.4th* 1212.)

SUPPLEMENT: [This section is current through the latest supplement]



53 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

5. Successive Civil and Criminal Judgments.

a. In General.

7 *Within Cal. Proc. Judgm § 386*

[§ 386] In General.

(1) *Theory of Earlier Cases: Doctrine Inapplicable.* The distinct character of civil and criminal proceedings (see 3 *Cal. Proc.* (5th), *Actions*, §68) precludes any general application of the doctrine of res judicata to successive civil and criminal proceedings. Because of the difference in parties and different degrees of proof, it was widely held that a prior criminal proceeding resulting in conviction *or* acquittal was not conclusive of guilt or innocence in a subsequent civil proceeding. (See *Balestreiri v. Arques* (1942) 49 *C.A.2d* 664, 669, 122 *P.2d* 277 [prior conviction]; *In re Anderson* (1951) 107 *C.A.2d* 670, 671, 237 *P.2d* 720 [prior acquittal]; *American Fire Protection Service v. Williams* (1959) 171 *C.A.2d* 397, 401, 402, 340 *P.2d* 644, citing the text [applying rule to "quasi-criminal" contempt proceeding; prior contempt judgment for violation of injunction was not binding in civil action for damages for violation]; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §650 et seq.; 27 *A.L.R.2d* 1137 [conviction or acquittal as bar to action for seizure, condemnation, or forfeiture of property]; 42 *A.L.R.2d* 634 [conviction or acquittal as bar to action for statutory damages or penalty].)

(2) *Modern Rules.* Regarding a prior acquittal, the rule set forth above is sound and still followed. A criminal defendant could have been acquitted despite a preponderance of evidence of wrongdoing, where the evidence did not meet the higher standard of proof beyond a reasonable doubt. (See *infra*, §387.) But if the jury in a criminal case finds the accused guilty of wrongdoing, by proof beyond a reasonable doubt, that finding can properly be considered conclusive on the issue in a later civil action. This is now the rule as to a prior felony conviction. (See *Teitelbaum Furs v. Dominion Ins. Co., Ltd.* (1962) 58 *C.2d* 601, 604, 25 *C.R.* 559, 375 *P.2d* 439, *infra*, §389; *Rest.2d, Judgments* §85; on effect of prior misdemeanor conviction, see *infra*, §390.) (On distinct problem of admissibility in civil action of prior criminal judgment as evidence of facts determined, see 18 *A.L.R.2d* 1287 [conviction or acquittal as evidence of facts on which it was based in civil action]; 29 *Am.Jur.2d* (2008 ed.), *Evidence* §416; 1 *Cal. Evidence* (4th), *Hearsay*, §270 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



54 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

5. Successive Civil and Criminal Judgments.

b. Prior Criminal Proceeding.

1. Prior Acquittal Is Not Res Judicata.

aa. Acquittal in Criminal Trial.

7 *Witkin Cal. Proc. Judgm* § 387

[§ 387] Acquittal in Criminal Trial.

The long-established rule denies res judicata effect in a civil proceeding to a prior acquittal in a criminal proceeding. The principal reason is the difference in the degree of proof required in the two proceedings; acquittal in the prior criminal proceeding merely determines that guilt was not proved beyond a reasonable doubt. Mention has also been made of the differences in objects, issues, results, procedures, elements of proof, weight of the evidence, effect of illegally obtained evidence, and parties. (See *One Lot Emerald Cut Stones & One Ring v. United States* (1972) 409 U.S. 232, 93 S.Ct. 489, 34 L.Ed.2d 438; *In re Coughlin* (1976) 16 C.3d 52, 58, 127 C.R. 337, 545 P.2d 249, quoting the text; *People v. Mitchell Bros. Santa Ana Theater* (1980) 101 C.A.3d 296, 306, 161 C.R. 562, citing the text; *Rest.2d, Judgments* §85, Comment g; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §652.)

Many decisions apply the rule. (See *United States v. National Assn. of Real Estate Bds.* (1950) 339 U.S. 485, 70 S.Ct. 711, 716, 94 L.Ed. 1007, 1015 [acquittal in criminal proceeding charging conspiracy to violate Sherman Act was not res judicata in subsequent civil proceeding to enjoin same conspiracy]; *Zitny v. State Bar* (1966) 64 C.2d 787, 790, 51 C.R. 825, 415 P.2d 521 [acquittal of charge of soliciting bribe did not bar California State Bar disciplinary proceedings based on same transaction]; *In re Anderson* (1951) 107 C.A.2d 670, 671, 237 P.2d 720; *People v. One 1952 Chevrolet Bel Aire* (1954) 128 C.A.2d 414, 421, 275 P.2d 509 [acquittal in prosecution for possession of narcotics was not bar to proceeding to forfeit car used in transporting narcotics]; *People v. One 1950 Cadillac 2-Door Club Coupe Engine No. 506236120* (1955) 133 C.A.2d 311, 318, 284 P.2d 118 [similar facts and same holding].)

In *Beckner v. Sears, Roebuck & Co.* (1970) 4 C.A.3d 504, 84 C.R. 315, an employee, charged with shoplifting and prosecuted for theft, was acquitted. He brought an action for damages for wrongful interference with his employment. The trial judge allowed him to introduce the municipal court file showing acquittal and prevented defendants from showing the actual facts of stealing. *Held*, judgment for plaintiff on jury verdict reversed. "As a result of the court's ruling plaintiff was enabled to present to the jury a completely fictitious case. He was made to appear as an innocent man who was discharged from his employment as a result of false representations to his employer that he had been guilty of criminal conduct; and the defendants were pictured as the perpetrators of this wrong. Upon the facts as thus

misrepresented the jury properly returned a verdict for substantial exemplary damages as for conduct constituting oppression, fraud or malice." (4 C.A.3d 510.)

SUPPLEMENT: [This section is current through the latest supplement]



55 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

5. Successive Civil and Criminal Judgments.

b. Prior Criminal Proceeding.

1. Prior Acquittal Is Not Res Judicata.

bb. Dismissal of Contempt Proceeding.

7 *Witkin Cal. Proc. Judgm* § 388

[§ 388] Dismissal of Contempt Proceeding.

A contempt proceeding is quasi-criminal (see 3 *Cal. Proc. (5th), Actions*, §69), and the criminal case requirement of proof beyond a reasonable doubt applies in a trial for contempt. Hence, the dismissal of a contempt charge after a hearing on the merits cannot be invoked as a collateral estoppel in a later civil proceeding. (*Gibson v. Gibson (1971) 15 C.A.3d 943, 948, 93 C.R. 617.*)

In *Gibson*, a divorce decree gave plaintiff mother custody of two children and authorized the husband to take them 2 days a week. The complaint alleged that defendant, the husband's mother, conspired with the husband to take the children to Mexico and thereby deprive plaintiff of her lawful custody. Defendant set up the special defense that, in a prior contempt hearing, a different trial judge found in her favor and dismissed the charge. The judge in the present civil action sustained a demurrer to the special defense, and the trial resulted in a verdict and judgment of \$ 50,000 compensatory and \$ 40,000 punitive damages. *Held*, affirmed. The "better rule" is that "prior acquittal in a criminal or quasi-criminal proceeding, such as the contempt citation herein, does not collaterally estop subsequent civil litigation on the same issues." (*15 C.A.3d 943.*)

SUPPLEMENT: [This section is current through the latest supplement]



56 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

5. Successive Civil and Criminal Judgments.

b. Prior Criminal Proceeding.

2. Prior Conviction.

aa. Felony Conviction.

7 *Within Cal. Proc. Judgm* § 389

[§ 389] Felony Conviction.

(1) *Teitelbaum Case*. In *Teitelbaum Furs v. Dominion Ins. Co., Ltd.* (1962) 58 C.2d 601, 25 C.R. 559, 375 P.2d 439, the Supreme Court repudiated the older view (see supra, §386) and held the doctrine of collateral estoppel applicable. Plaintiff corporations claimed a loss of \$ 244,510.90 from theft of furs. In the first proceeding, a criminal prosecution, T, president of the corporations, was convicted of conspiracy, grand theft, and filing a false insurance claim. In this second proceeding against the insurers to recover the loss, in which it was conceded that the corporations were alter egos of T, the court held that the issue decided against plaintiffs in the criminal case--whether the robbery occurred as described by them or whether it was actually staged by T--was conclusive in the civil action.

(a) Prior decisions refusing to apply collateral estoppel were either based on the now discredited doctrine of mutuality of estoppel, or involved a prior acquittal or a plea of guilty. Because *Bernhard v. Bank of America* (1942) 19 C.2d 807, 122 P.2d 892, infra, §473, abandoned the mutuality requirement, cases such as *Balestreiri v. Arques* (1942) 49 C.A.2d 664, 669, 122 P.2d 277, supra, §386, and *American Fire Protection Service v. Williams* (1959) 171 C.A.2d 397, 340 P.2d 644, supra, §386, are no longer authoritative. Former acquittal cases are distinguishable because of the difference in the burden of proof. A plea of guilty does not result in litigation of any issue; considerations of fairness allow it as an evidentiary admission, but should not make it conclusive against a person who seeks for the first time to litigate issues in a civil action. (58 C.2d 605, 606.)

(b) The argument that collateral estoppel ought not to be applied against a party who did not have the initiative in the previous argument is unsound. T had a full opportunity to litigate the issue of his guilt, and every motive to make as vigorous a defense as possible. His election not to testify in the criminal case was a strategic choice, and no more defeats the operation of collateral estoppel than the failure of a litigant to introduce relevant evidence in any other situation. (58 C.2d 607.)

(c) "To preclude a civil litigant from relitigating an issue previously found against him in a criminal prosecution is less severe than to preclude him from relitigating such an issue in successive civil trials, for there are rigorous

safeguards against unjust conviction, including the requirements of proof beyond a reasonable doubt ... and of a unanimous verdict ... and a record paid for by the state on appeal. ... Stability of judgments and expeditious trials are served and no injustices done, when criminal defendants are estopped from relitigating issues determined in conformity with these safeguards." (58 C.2d 606.)

(2) *Subsequent Decisions.* The *Teitelbaum* rule was applied in *Newman v. Larsen* (1964) 225 C.A.2d 22, 36 C.R. 883. Defendant was convicted of assault with a dangerous weapon. Plaintiff, the victim, then brought this action for damages for assault and battery. *Held*, judgment for \$ 25,000 affirmed. The issue on which the civil judgment depended was whether defendant acted either intentionally, or with a wanton and wilful disregard for human safety from which the intent to injure would be implied. This was the issue necessarily decided in the criminal proceeding, for specific intent was not an element of the crime (see 1 Cal. Crim. Law (3d), *Defenses*, §42 et seq.). (225 C.A.2d 24.) (See *People v. Drinkhouse* (1970) 4 C.A.3d 931, 935, 84 C.R. 773, *infra*, §461; *Miller v. Superior Court* (1985) 168 C.A.3d 376, 384, 214 C.R. 125, *infra*, §459; *Higginbotham v. King* (1997) 54 C.A.4th 1040, 1044, 63 C.R.2d 114 [plaintiff in civil rights action was collaterally estopped, by prior felony conviction, from claiming that pretrial publicity had violated his right to fair trial; he had full opportunity to litigate pretrial publicity issue in criminal trial].)

(3) *Distinction: No Collateral Estoppel From Guilty Plea.* The distinction made in *Teitelbaum*, where there was no litigation of the issue in the criminal proceeding, was applied in *Pease v. Pease* (1988) 201 C.A.3d 29, 246 C.R. 762, a conviction following a plea bargain. "The issue of appellant's guilt was not fully litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources." (201 C.A.3d 34.) (See *O'Connor v. O'Leary* (1967) 247 C.A.2d 646, 649, 56 C.R. 1, *infra*, §477 [*Teitelbaum* rule did not apply where it would have defeated ends of justice]; *Bank of California v. Pan Amer. Tire Corp.* (1982) 132 C.A.3d 843, 850, 183 C.R. 470 [rule was not applied where issue was not determined]; *20th Century Ins. Co. v. Schurtz* (2001) 92 C.A.4th 1188, 1193, 1196, 112 C.R.2d 547 [reaffirming and discussing distinction in dicta].)

(4) *Distinction: Criminal Judgment Was Not Final.* In *Grain Dealers Mut. Ins. Co. v. Marino* (1988) 200 C.A.3d 1083, 246 C.R. 410, the judge gave collateral estoppel effect to a state criminal conviction that had been nullified in habeas corpus proceedings in the federal Court of Appeals. *Held*, this was improper. The court quoted *Rest.2d, Judgments* §16, as consistent with California law: "If, when the earlier judgment is set aside or reversed, the later judgment is still subject to a post-judgment motion for a new trial or the like, or is still open to appeal, or such motion has actually been made and is pending or an appeal has been taken and remains undecided, a party may inform the trial or appellate court of the nullification of the earlier judgment and the consequent elimination of the basis for the later judgment. The court should then normally set aside the later judgment." (200 C.A.3d 1089.)

SUPPLEMENT: [This section is current through the latest supplement]



57 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

5. Successive Civil and Criminal Judgments.

b. Prior Criminal Proceeding.

2. Prior Conviction.

bb. Misdemeanor Conviction.

7 *Within Cal. Proc. Judgm* § 390

[§ 390] Misdemeanor Conviction.

(1) *General Rule.* The rule of *Teitelbaum Furs v. Dominion Ins. Co, Ltd.* (1962) 58 C.2d 601, 25 C.R. 559, 375 P.2d 439, supra, §389, could logically be applied to misdemeanor as well as felony convictions. However, practical considerations make this undesirable. Frequently defendants do not appear, accepting a fine without contest, so the issue may not have been litigated. Even if the charge is contested, there is grave danger in permitting a conviction for minor misdemeanors to lay an irrefutable foundation for recovery of substantial damages. (See *Manes v. Wiggins* (1967) 247 C.A.2d 756, 758, 56 C.R. 120 [misdemeanor conviction for assault and battery, obtained without defendant's presence at trial, was not res judicata in subsequent civil action for damages].)

(2) *Distinction: Misdemeanor Case Was Thoroughly Litigated.* In *Mueller v. J.C. Penney Co.* (1985) 173 C.A.3d 713, 219 C.R. 272, plaintiff was convicted of misdemeanor assault, battery, and petty theft arising from a shoplifting incident at a department store. In her civil action for damages for assault and battery, brought against the department store and its security guard, the misdemeanor conviction was given collateral estoppel effect. *Held*, affirmed. Although misdemeanor convictions are generally thought to lack the reliability of felony convictions because misdemeanor defendants do not as thoroughly litigate their cases, collateral estoppel may be applied in appropriate cases, and this is such a case. Plaintiff was represented by counsel and offered testimony, and her postconviction direct and collateral attacks were "relentless." (173 C.A.3d 721.)

In *Leader v. California* (1986) 182 C.A.3d 1079, 226 C.R. 207, plaintiff was convicted of the misdemeanors of resisting arrest and battery on a police officer. In his civil action for assault and battery, brought against the state and the arresting officers and based on alleged use of excessive force in making the arrest, the trial judge refused to give collateral estoppel effect to the misdemeanor convictions. *Held*, reversed.

(a) The trend is toward broader use of misdemeanor convictions for purposes of collateral estoppel, and decisions in other jurisdictions as well as *Mueller* have held that the collateral estoppel effect of a misdemeanor conviction should be determined on a case-by-case basis. (182 C.A.3d 1084, 1085, 1086.)

(b) These decisions provide the following safeguard standards: (1) The prior conviction must have been for a serious offense, ensuring that the defendant was motivated to fully litigate the charges. While a traffic offense may not provide such motivation, "any offense punishable by imprisonment should be considered a serious offense." (182 C.A.3d 1087.) (2) There must have been a full and fair misdemeanor trial so that "convictions of doubtful validity" will not be used. (182 C.A.3d 1087.) (3) The issue on which the prior conviction is offered must of necessity have been decided at the trial. (182 C.A.3d 1087.)

(c) All three safeguards were met here. Plaintiff was convicted of serious crimes that could require incarceration. He was represented by counsel and the criminal charges were thoroughly litigated before, during, and after trial. Whether he committed a battery against an officer and resisted arrest were issues that were necessarily determined. The determinations are conclusive on those issues in the civil trial. (182 C.A.3d 1088, 1089.)

(3) *Traffic Offenses*. The rule as to traffic offenses is codified in *Veh.C. 40834*. A judgment of conviction for a traffic offense ("violation of this code or of any local ordinance relating to the operation of a motor vehicle," or a finding of a juvenile violation) "shall not be res judicata or constitute a collateral estoppel of any issue determined therein in any subsequent civil action." (See *Rousseau v. West Coast House Movers (1967) 256 C.A.2d 878, 888, 64 C.R. 655* [misdemeanor drunk driving conviction was not res judicata and was inadmissible in subsequent civil action].)

SUPPLEMENT: [This section is current through the latest supplement]



58 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

5. Successive Civil and Criminal Judgments.

b. Prior Criminal Proceeding.

3. Prior Ruling on Motion To Suppress Evidence.

7 Witkin Cal. Proc. Judgm § 391

[§ 391] Prior Ruling on Motion To Suppress Evidence.

In *McGowan v. San Diego* (1989) 208 C.A.3d 890, 256 C.R. 537, the issue was whether the doctrine can apply in a civil case to issues determined in a prior P.C. 1538.5 ruling (on a motion to suppress evidence). Plaintiff sued for damages for false arrest, false imprisonment, and assault and battery. In the underlying criminal action, he had filed a motion to suppress evidence of the blood sample taken pursuant to P.C. 1538.5 on the grounds that the stop and arrest were unlawful and that excessive force was used in taking the sample. The motion was denied, and in the civil case defendants successfully moved for summary judgment. The Court of Appeal held that the doctrine could apply if the criteria were met, but reversed the summary judgment on the ground that the issues raised in the civil case were not identical to those adjudicated in the P.C. 1538.5 motion. (208 C.A.3d 895, 896.)

SUPPLEMENT: [This section is current through the latest supplement]

An order denying a motion to suppress evidence on the ground that police officers detained the defendant unlawfully may have preclusive effect in a later civil action in which the detainee argues that he was detained unlawfully or without legal cause. To mitigate this preclusive effect, the defendant should confine his or her challenges to "the *legal sufficiency* of a claimed justification for officer conduct, without putting in issue the factual veracity of that justification." (*Schmidlin v. Palo Alto* (2007) 157 C.A.4th 728, 767, 771, 69 C.R.3d 365 [order denying motion to suppress precluded detainee from litigating, in later civil action, whether his detention was lawful; detainee's counsel admitted that he used suppression hearing to get information on officers' version of events, and counsel failed to steer clear of credibility issues at hearing].)



59 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

5. Successive Civil and Criminal Judgments.

b. Prior Criminal Proceeding.

4. Prior Ruling at Preliminary Hearing.

7 *Witkin Cal. Proc. Judgm* § 392

[§ 392] Prior Ruling at Preliminary Hearing.

In *McCutchen v. Montclair* (1999) 73 C.A.4th 1138, 87 C.R.2d 95, plaintiff, an individual who had spent 4 months in jail on a charge of rape with a foreign object, brought an action for false arrest, negligence, defamation, and intentional infliction of emotional distress after the prosecution dismissed the rape charge on its own motion before jury selection. Defendants, the complaining witness, the arresting officer, the city, and the county, moved for judgment on the pleadings, contending that a ruling at the preliminary hearing in the rape case that there was probable cause to try plaintiff collaterally estopped plaintiff's civil action. The trial court denied the motion. *Held*, affirmed.

(a) A judicial determination at a preliminary hearing that there was sufficient evidence to hold the plaintiff over for trial may preclude the plaintiff from relitigating the issue of probable cause to arrest in a subsequent civil case. This is an issue of first impression in California. However, the Ninth Circuit has decided the issue in *Haupt v. Dillard* (9th Cir. 1994) 17 F.3d 285, a well-reasoned decision that is supported by *California law*. (73 C.A.4th 1145.)

(b) All the requirements for application of collateral estoppel may be present in these circumstances: (1) A finding of probable cause to hold an accused over for trial is a final judgment on the merits for purposes of collateral estoppel. (73 C.A.4th 1145, 1146.) (2) A ruling on sufficiency of the evidence at a preliminary hearing would, in most cases, meet the identity of the issues requirement. (73 C.A.4th 1146.) (3) A preliminary hearing gives the accused ample opportunity to litigate the issue of probable cause to arrest. (73 C.A.4th 1147.) (4) The accused can be presumed to have been motivated to litigate the probable cause issue unless the accused demonstrates that he or she chose not to do so for tactical reasons. (73 C.A.4th 1147.) (5) Because a decision to hold an accused over for trial requires a ruling on the sufficiency of the evidence, the issue of probable cause to arrest will ordinarily be actually litigated and necessarily decided at the preliminary hearing. (73 C.A.4th 1147.) (6) At least in cases where the former arrestee himself or herself brings the civil action, the party against whom collateral estoppel is being asserted would be the same as the party at the prior proceeding. (73 C.A.4th 1147.)

(c) The finding of probable cause at the preliminary hearing here, however, does not have collateral estoppel effect. The evidence presented at the preliminary hearing was not the same as the evidence available to the arresting officer at

the time of plaintiff's arrest. (73 C.A.4th 1147.) The preliminary hearing included evidence that the complaining witness had twice identified plaintiff in a live lineup conducted at the jail after plaintiff was arrested. Thus, the issue at the preliminary hearing was different from the issue here, i.e., was there probable cause at the time plaintiff was arrested? (73 C.A.4th 1148.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Schmidlin v. Palo Alto* (2007) 157 C.A.4th 728, 767, 69 C.R.3d 365 [questioning holding in *McCutchen v. Montclair* (1999) 73 C.A.4th 1138, 87 C.R.2d 95, text, p. 1021, that ruling at preliminary hearing finding sufficient cause to hold defendant for trial bars later claim in civil action that officers arrested defendant without probable cause].



60 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

5. Successive Civil and Criminal Judgments.

c. Prior Juvenile Proceeding.

7 *Witkin Cal. Proc. Judgm* § 393

[§ 393] Prior Juvenile Proceeding.

In *Western Mut. Ins. Co. v. Yamamoto* (1994) 29 C.A.4th 1474, 35 C.R.2d 698, plaintiff insurer sought a declaratory judgment that its insured, a minor, had intentionally caused injuries to defendant, thus precluding insurance coverage for those injuries. The trial court granted summary judgment for plaintiff, using a prior juvenile court ruling that the minor had intentionally inflicted the injuries as collateral estoppel. *Held*, affirmed.

(a) The issue decided in the juvenile court is identical to the one in the declaratory relief action: the minor's intent when he shot defendant. (29 C.A.4th 1482.)

(b) The juvenile court's ruling had been affirmed on appeal, and that affirmance establishes a final adjudication on the merits. (29 C.A.4th 1483.)

(c) The minor was a party in the prior juvenile court proceeding and in the present action and should expect to be bound by the determinations made against him in the first proceeding. Moreover, because collateral estoppel applies to the minor, it applies to defendant. Defendant cannot require plaintiff to pay benefits under the policy if the minor (the insured) is not entitled to coverage. (29 C.A.4th 1483, 1484.)

(d) Although jury trials are not permitted in juvenile court, and the focus of juvenile court is different than adult criminal proceedings, "it does not follow that findings and adjudications made in juvenile court are entitled to less deference or suffer a constitutional infirmity." Accordingly, "where a contested matter has been adjudicated in a juvenile court proceeding ... following the same formalities, rights and processes as an adult criminal trial, the findings of the juvenile court are entitled to the same collateral estoppel effect that would be afforded findings made in an adult criminal trial." (29 C.A.4th 1484, 1485.)

SUPPLEMENT: [This section is current through the latest supplement]



61 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

5. Successive Civil and Criminal Judgments.

d. Prior Civil Proceeding Is Not Res Judicata.

7 *Witkin Cal. Proc. Judgm* § 394

[§ 394] Prior Civil Proceeding Is Not Res Judicata.

(1) *General Rule.* A prior civil proceeding adjudging a party a wrongdoer or finding the party's conduct free from wrong is not conclusive in a subsequent criminal prosecution involving the same conduct. (*People v. Kovacevich* (1937) 19 C.A.2d 335, 338, 65 P.2d 807; *People v. Barker* (1938) 29 C.A.2d Supp. 766, 771, 77 P.2d 321; *Patterson v. Municipal Court* (1965) 232 C.A.2d 289, 301, 42 C.R. 769, 5 Cal. Crim. Law (3d), *Criminal Trial*, §529; *People v. Cole* (1970) 10 C.A.3d 332, 336, 89 C.R. 17 [prior discharge in bankruptcy was not collateral estoppel on issue in later grand theft prosecution]; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §654; cf. *Yates v. United States* (1957) 354 U.S. 298, 77 S.Ct. 1064, 1085, 1 L.Ed.2d 1356, 1385 [dictum that civil judgment may be collateral estoppel in subsequent criminal case].) (On administrative determination as collateral estoppel in subsequent criminal case, see *People v. Sims* (1982) 32 C.3d 468, 186 C.R. 77, 651 P.2d 321, *infra*, §398.)

(2) *Distinction: Identical Issues Involved.* In *Lockwood v. Superior Court* (1984) 160 C.A.3d 667, 206 C.R. 785, the same act of alleged child abuse gave rise to a dependency petition and a felony child abuse prosecution. At a hearing on the dependency petition, conflicting evidence on the cause of the child's injuries was resolved in favor of defendant parents, and the petition was dismissed. Defendants' subsequent motion to dismiss the criminal proceeding on the ground of collateral estoppel was denied. *Held*, prohibition issued, directing the superior court to dismiss the criminal prosecution. The dependency petition specifically alleged cruelty, and the narrow issue litigated in the dependency proceeding was whether defendants had cruelly inflicted the child's injuries. The only issue in the criminal proceeding was whether defendants wilfully injured the child. For purposes of collateral estoppel, defendants sufficiently demonstrated the identity of the issues involved in the two proceedings. Although the two proceedings had different purposes, "these differences, while perhaps relevant to res judicata in the broad sense, are not necessarily dispositive of the collateral estoppel question." (160 C.A.3d 672.)

SUPPLEMENT: [This section is current through the latest supplement]



62 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

6. Successive Criminal Proceedings.

7 Witkin Cal. Proc. Judgm § 395

[§ 395] Successive Criminal Proceedings.

Double jeopardy is the basic defense of a person previously tried in a criminal proceeding and charged again with the same offense. Where the new charge is based on a distinct offense arising out of the same act or transaction, the defense of double jeopardy is not available, but the modern law allows the defendant to invoke the doctrine of collateral estoppel in the second trial as to issues determined in the defendant's favor by acquittal in the prior proceeding. This subject is fully explored in another work. (See *1 Cal. Crim. Law (3d), Defenses, §188 et seq.*)

The use of a prior *conviction* as collateral estoppel in a subsequent prosecution is more questionable. Constitutional objections may be raised to this failure to meet the burden of proof on an element of the crime, and the introduction of the record of a prior conviction would itself be highly prejudicial to the defendant. There is little support for the view that the prosecution may invoke the doctrine on issues of guilt, but it does not seem unreasonable to apply the doctrine to the determination of procedural issues that are not directly related to guilt. (See *1 Cal. Crim. Law (3d), Defenses, §207 et seq.*)

SUPPLEMENT: [This section is current through the latest supplement]



63 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

7. Successive Judicial and Administrative Proceedings.

a. Prior Civil Judgment.

7 *Witkin Cal. Proc. Judgm* § 396

[§ 396] Prior Civil Judgment.

(1) *Judgment Against Licensee*. A judgment establishing the liability of a member of a licensed profession is ordinarily not res judicata in a subsequent administrative proceeding to suspend or revoke the member's license. (*Lundborg v. Director of Dept. of Professional & Vocational Standards* (1967) 257 C.A.2d 141, 146, 64 C.R. 650; see *Magee v. State Bar* (1962) 58 C.2d 423, 429, 24 C.R. 839, 374 P.2d 807 [finding in will contest that attorney-beneficiary was guilty of undue influence was not binding in subsequent disciplinary proceeding].)

In *Lundborg*, a licensed private investigator borrowed money from a friend to invest in his detective school business. He became bankrupt. The friend sued on the investigator's note and recovered judgment on findings that the investigator had obtained the money by fraud (a nondischargeable debt). The State Bureau of Private Investigators and Adjusters filed an accusation against the investigator charging dishonesty occurring outside his licensed business. The hearing officer thought the civil judgment was conclusive on the issue of fraud and allowed evidence only on matters in mitigation. *Held*, the judgment was not collateral estoppel, and the proceeding should be reheard on all the pertinent facts. (257 C.A.2d 149.) The court distinguished statutes that make a final judgment in a civil action an express basis for revocation of a license, rather than a collateral estoppel on an issue. (257 C.A.2d 148.) (See *Richards v. Gordon* (1967) 254 C.A.2d 735, 738, 740, 62 C.R. 466 [B. & P.C. 10177.5 authorizes commissioner, after hearing, to revoke or suspend real estate broker's license when final judgment is obtained against licensee in civil action for fraud].)

Collateral estoppel prevents the impeachment of a prior final judgment in a subsequent administrative proceeding. (*Berg v. Davi* (2005) 130 C.A.4th 223, 230, 29 C.R.3d 803 [administrative law judge properly rejected evidence in real estate licensing proceeding that was intended to impeach earlier civil fraud judgment and disbarment order; citing *Richards*].)

(2) *Judgment Against Applicant for Permit*. A prior judgment in favor of a plaintiff city, in an action to abate a use of property as a nuisance, is binding in a subsequent administrative proceeding for mandamus to review the denial of a use permit. (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 C.A.3d 151, 162, 96 C.R. 484.)

SUPPLEMENT: [This section is current through the latest supplement]



64 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

7. Successive Judicial and Administrative Proceedings.

b. Prior Administrative Decision.

1. Collateral Estoppel Applied.

aa. In Subsequent Civil Proceeding.

7 *Witkin Cal. Proc. Judgm* § 397

[§ 397] In Subsequent Civil Proceeding.

In *Rymer v. Hagler* (1989) 211 C.A.3d 1171, 260 C.R. 76, plaintiff employee, exercising his cumulative remedies under *Lab.C. 3706* (2 Summary (10th), *Workers' Compensation*, §52), filed an application in 1981 for adjudication of a claim with the Workers' Compensation Appeals Board (W.C.A.B.) and later filed a tort action in the superior court alleging failure of defendant employer to provide insurance coverage. In 1986, plaintiff made a motion in the W.C.A.B. proceeding to exclude an indemnity company as a party on the ground that it was not the compensation carrier for the defendant at the time of plaintiff's injuries. The W.C.A.B. judge denied the motion, finding that the indemnity company had admitted coverage. Plaintiff did not challenge the order, but, when it became final, he petitioned for voluntary dismissal, the petition was granted, and the claim was dismissed. In 1987, defendant employer moved for judgment on the pleadings in the superior court action. *Held*, order granting affirmed. The W.C.A.B. judge's ruling on plaintiff's motion was a final adjudication on the issue of insurance coverage even though the proceeding was dismissed. (211 C.A.3d 1181.)

In *Imen v. Glassford* (1988) 201 C.A.3d 898, 247 C.R. 514, the Real Estate Commissioner charged defendant, a real estate salesman, with fraud in a transaction involving the purchase of plaintiffs' residence. The administrative law judge found that defendant had acted fraudulently, and the commissioner revoked his license. Plaintiffs brought an action against defendant seeking damages for the same fraudulent conduct, and moved for summary adjudication on the issue of fraud, on the theory that the administrative judgment was a collateral estoppel. *Held*, summary adjudication affirmed. Offensive use of the doctrine (by the plaintiff) was justified under the principles discussed in *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552, *infra*, §481. (201 C.A.3d 906.) In addition, the factors identified as important in *People v. Sims* (1982) 32 C.3d 468, 186 C.R. 77, 651 P.2d 321, *infra*, §398, were all present here. (201 C.A.3d 907, listing the factors and citing the text.)

The following are among the cases discussing the collateral estoppel effect in a civil proceeding of a prior administrative decision:

Carmel Valley Fire Protection Dist. v. California (1987) 190 C.A.3d 521, 534, 234 C.R. 795 [in subsequent civil actions, state was collaterally estopped from raising issues of law decided by State Board of Control (now California Victim Compensation and Government Claims Board)].

Castillo v. Los Angeles (2001) 92 C.A.4th 477, 480, 111 C.R.2d 870 [summary judgment for defendant city in former employee's wrongful discharge action was proper on collateral estoppel grounds; employee had previously appealed his discharge to civil service commission, which decided identical issue raised by employee here: whether city had discharged employee for unauthorized absences or because of his age and race].

Marie Y. v. General Star Indem. Co. (2003) 110 C.A.4th 928, 954, 2 C.R.3d 135 [dental board's decision that dentist acted intentionally and with sexual motivation when he inappropriately touched patient had collateral estoppel effect in later civil action by patient against dentist's insurer; board's decision followed adversary proceeding in which dentist had full opportunity to litigate issue; citing *People v. Sims* (1982) 32 C.3d 468, 186 C.R. 77, 651 P.2d 321, *infra*, §398].

Furia v. Helm (2003) 111 C.A.4th 945, 957, 4 C.R.3d 357 [disciplinary board's decision that contractor did not abandon remodeling project collaterally estopped contractor from claiming in subsequent civil action that he had abandoned project on fraudulent advice of mediator].

SUPPLEMENT: [This section is current through the latest supplement]

See *California Public Employees' Retirement System v. Superior Court* (2008) 160 C.A.4th 174, 180, 72 C.R.3d 561 [findings of State Personnel Board in whistleblower proceeding had preclusive effect in whistleblower's subsequent civil action; plaintiff chose not to challenge adverse findings by petition for mandamus and could not relitigate them in civil action]; *Miller v. Los Angeles* (2008) 169 C.A.4th 1373, 1382, 87 C.R.3d 510 [discharged employee who failed to exhaust administrative remedies was collaterally estopped from arguing in later complaint that termination was wrongful; administrative decision became final and binding when employee failed to seek judicial review; citing *Castillo v. Los Angeles* (2001) 92 C.A.4th 477, 111 C.R.2d 870, text, p. 1026].



65 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

7. Successive Judicial and Administrative Proceedings.

b. Prior Administrative Decision.

1. Collateral Estoppel Applied.

bb. In Subsequent Criminal Proceeding.

7 *Witkin Cal. Proc. Judgm* § 398

[§ 398] In Subsequent Criminal Proceeding.

In *People v. Sims* (1982) 32 C.3d 468, 186 C.R. 77, 651 P.2d 321, the court held that an administrative decision would operate as a collateral estoppel in a subsequent criminal proceeding. Defendant, a welfare recipient and mother of three children, received a letter from the county social services department, notifying her that she had received benefits to which she was not entitled and demanding restitution. The county then prepared a notice of action, and defendant requested a fair hearing under Welf.C. 10950. Prior to that request, a criminal complaint based on the same allegations of fraud was filed, and defendant was charged with the felony of unlawfully obtaining aid for children who were not entitled and with the misdemeanor of fraudulently acquiring food stamps. While the criminal charges were pending, defendant's fair hearing was held before a hearing officer of the county department. The county challenged the jurisdiction of the department and declined to present any evidence, but defendant submitted evidence. The hearing officer concluded that the department had jurisdiction, that the county had failed to prove its case, and that the notice of action should be rescinded. The department director adopted this conclusion and did not seek judicial review. Subsequently, defendant moved to dismiss the criminal charge, and the trial court granted the motion. *Held*, affirmed; the administrative decision exonerating defendant collaterally estopped the prosecutor from pursuing a criminal action for the same alleged misconduct.

(a) *Administrative decision may operate as collateral estoppel.*

(1) Much uncertainty exists in the case law, seemingly because of the varying types of administrative agencies and procedures, and disagreement whether their decisions are judicial, quasi-judicial, or administrative only. (32 C.3d 477.) *Hollywood Circle v. Department of Alcoholic Beverage Control* (1961) 55 C.2d 728, 13 C.R. 104, 361 P.2d 712, *supra*, §359, applied res judicata principles in successive proceedings before the same administrative agency. *San Francisco v. Ang* (1979) 97 C.A.3d 673, 159 C.R. 56, relied on *Hollywood Circle* to bar relitigation in a collateral civil proceeding of an issue previously decided in an administrative proceeding. (32 C.3d 477, 478.) And in *United States v. Utah Const. & Mining Co.* (1966) 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642, the Supreme Court declared that collateral estoppel may be applied when an administrative agency acts in a judicial capacity and resolves disputed issues of fact properly

before it that the parties have had an adequate opportunity to litigate. This standard is sound and comports with the public policy underlying the collateral estoppel doctrine. (32 C.3d 479.)

(2) The hearing conducted by the county department was a judicial-style adversary proceeding, and the hearing officer's decision was adjudicatory in nature. Collateral estoppel is properly given to final decisions of an administrative agency (e.g., Workers' Compensation Appeals Board and Public Utilities Commission), even though the proceedings are not conducted according to judicial rules of evidence. (32 C.3d 479, 480, 481, citing the text.) *Empire Star Mines Co. v. California Emp. Com.* (1946) 28 C.2d 33, 168 P.2d 686, holding that a decision of the California Employment Commission was not binding in a subsequent court proceeding because the commission did not exercise "judicial power" under the Constitution, is inconsistent with the analysis in *Hollywood Circle, Utah Const.*, and the present case, and is overruled on that point. (32 C.3d 479, footnote 8.)

(3) The disputed issue of fact was properly before the county department's hearing officer, the county had an opportunity and the incentive to present evidence, and thus the second prong of the *Utah Const.* test was satisfied by the hearing. (32 C.3d 481, 482.)

(4) Even where successive proceedings are different in nature, the doctrine of collateral estoppel may still apply. An adjudication in a criminal action may operate as a collateral estoppel in a later civil action. (32 C.3d 482, citing *Teitelbaum Furs v. Dominion Ins. Co., Ltd.* (1962) 58 C.2d 601, 25 C.R. 559, 375 P.2d 439, supra, §389.) Also, an adjudication in a criminal trial may collaterally estop the state from pursuing another criminal prosecution based on the same controversy. (32 C.3d 482, citing *People v. Taylor* (1974) 12 C.3d 686, 117 C.R. 70, 527 P.2d 622, 1 Cal. Crim. Law (3d), *Defenses*, §195.) Although this court has not previously given an administrative agency determination binding effect on a subsequent criminal prosecution, it may do so where the traditional requirements and policy reasons for applying the doctrine have been satisfied by the particular circumstances of the case. (32 C.3d 482, 483.)

(b) *Traditional requirements and policy reasons were satisfied.* Collateral estoppel applies under a three-prong test.

(1) *The issue necessarily decided at the previous proceeding is identical to the one sought to be relitigated.* Here, the identical fraud issue was properly raised by the defendant's request for a fair hearing, and was litigated and determined on the merits. A determination may be based on a failure of proof (*Rest.2d, Judgments* §27, Comment d); hence, the county's failure to present evidence did not preclude the submission and determination of the issue. (32 C.3d 484, 485.) The difference in burden of proof was of no significance, for, if the county failed to meet the preponderance of evidence requirement in the administrative proceeding, it could not meet the beyond reasonable doubt standard in the criminal proceeding. (32 C.3d 485.)

(2) *The previous proceeding resulted in a final judgment on the merits.* This is a more difficult question. The county had 1 year to petition for mandamus review, this time had not elapsed when the trial judge dismissed the information, and only judgments which are free from direct attack are final in this sense. (32 C.3d 486, citing the text.) However, it is not necessary to determine whether the fair hearing decision did become final at any point before the end of the period for review: That deadline has since passed, and collateral estoppel would bar a prosecution against defendant on remand of this case. (32 C.3d 486.)

(3) *The party against whom collateral estoppel is asserted was a party to the prior proceeding.* In *People v. La Motte* (1979) 92 C.A.3d 604, 155 C.R. 5, on facts similar to those presented here, the Court of Appeal found that the county and district attorney were not in privity with each other. This is unsound. Both entities are county agencies that represent the state at the respective proceedings; they operate jointly in investigating and controlling welfare fraud; and an attempt by the county to obtain restitution satisfies the statutory requirement that the district attorney seek restitution before commencing criminal proceedings. Hence, they were in privity, and *People v. La Motte* is disapproved. (32 C.3d 486, 487, 488, and footnote 18.)

(c) *Public policy considerations support application of doctrine.* Giving conclusive effect to the administrative

decision will promote judicial economy by minimizing repetitive litigation. The possibility of inconsistent judgments that may undermine the integrity of the judicial system will be prevented. The fair hearing procedure is the sole method the Legislature provided for challenge of the determination of fraudulent receipt of benefits, and its value would be substantially diminished by disregarding the decision. Precluding the district attorney from relitigating the issue would protect defendant from harassment by repeated litigation. The uniqueness of the statutory scheme, with its policy in favor of resolving fraud cases outside the criminal justice system, makes collateral estoppel particularly appropriate. (32 *C.3d* 488, 489.) (See 30 *A.L.R.4th* 856 [doctrine of res judicata or collateral estoppel as barring relitigation in state criminal proceedings of issues previously decided in administrative proceedings]; 40 *Hastings L. J.* 907 [criticism of *Sims*].)

SUPPLEMENT: [This section is current through the latest supplement]



66 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

7. Successive Judicial and Administrative Proceedings.

b. Prior Administrative Decision.

2. Collateral Estoppel Not Applicable.

7 *Witkin Cal. Proc. Judgm* § 399

[§ 399] Collateral Estoppel Not Applicable.

(1) *Privity Lacking*. The rule that a former judgment is not binding on a stranger to that judgment (see *infra*, §468 et seq.) is applicable in the context of a prior administrative decision. (See *People v. Dawkins* (1987) 195 C.A.3d Supp. 1, 7, 241 C.R. 456 [no privity between district attorney in criminal prosecution for theft and public employer in administrative proceeding to terminate employee because of theft; district attorney was not collaterally estopped by finding of arbitrator that employer failed to carry burden of proving theft]; *Gilroy v. State Bd. of Equalization* (1989) 212 C.A.3d 589, 606, 260 C.R. 723; *Geoghegan v. Retirement Bd.* (1990) 222 C.A.3d 1525, 1531, 272 C.R. 419 [no privity between city and county retirement board and Workers' Compensation Appeals Board; retirement board was not collaterally estopped to deny finding that firefighter's heart trouble was due to industrial cause].)

(2) *Issues Not Identical*. In *Bianchi v. San Diego* (1989) 214 C.A.3d 563, 262 C.R. 566, plaintiff city police officer sought workers' compensation, and the Workers' Compensation Appeals Board (W.C.A.B.) determined that he had suffered permanent disability of 123/4 percent from a single work-related incident. Later he applied to the city Retirement Board for industrial disability retirement, claiming permanent incapacity from orthopedic and psychiatric injuries. The board determined that his orthopedic injuries, though work-related, did not permanently incapacitate him, and that his psychiatric injuries, though they did permanently incapacitate him, were not work-related. Accordingly, the board denied industrial disability retirement. The superior court gave collateral estoppel effect to the W.C.A.B. award and issued mandamus to compel granting of his application. *Held*, reversed.

(a) *No identity of issues*.

(1) A W.C.A.B. proceeding decides whether the employee suffers any job-related injury, and if that injury results in some permanent residual loss, the W.C.A.B. awards the employee a permanent disability rating. Retirement boards focus on a different issue: whether the employee has suffered an injury or disease of such magnitude and nature that he or she is incapacitated from substantially performing job responsibilities. Hence, a W.C.A.B. finding of permanent disability, which may be partial for purposes of workers' compensation, does not bind the retirement board. (214 C.A.3d 567.)

(2) Here, the issue decided by the W.C.A.B. award was not identical to that before the board. "(1) The WCAB dealt with work-relatedness of a disorder associated with a *single* incident, whereas the Retirement Board dealt with the work-relatedness of a set of disorders produced by *long-term* stresses; (2) the WCAB dealt with work-relatedness of a disorder which (even when combined with orthopedic injuries) did *not* totally disable [plaintiff], whereas the Retirement Board dealt with the work-relatedness of exclusively psychiatric disorders which *totally* incapacitated [plaintiff]; and (3) the WCAB award found work-relatedness of a disorder denominated as 'depression' (and described as both 'intermittent' and 'minimal'), whereas the Retirement Board addressed a different set of psychiatric disorders, variously described as 'severe,' 'chronic,' or 'extreme.'" (214 C.A.3d 569.)

(b) *No identity of parties or privity.* Plaintiff, citing *Greator v. Board of Administration of City Employees' Retirement System* (1979) 91 C.A.3d 54, 154 C.R. 37, contended that the requisite privity exists between the city and the retirement board. But *Greator* relied solely on *French v. Rishell* (1953) 40 C.2d 477, 254 P.2d 26, *infra*, §452, which was distinguished in *Traub v. Board of Retirement of the Los Angeles County Employees Retirement Assn.* (1983) 34 C.3d 793, 195 C.R. 681, 670 P.2d 335. *Traub* compels the conclusion here that the retirement system is an independent entity, distinct from the city, and while the city's economic interests may have been represented at the W.C.A.B. hearing, the economic interests of the retirement system participants were not represented. (214 C.A.3d 571, 572.)

Numerous cases, including the following, have declined to give an administrative determination collateral estoppel effect where the issue litigated in the administrative proceeding was not identical to that raised in a subsequent action:

People v. Rodriguez (1984) 160 C.A.3d 650, 653, 654, 206 C.R. 79 [administrative proceeding determined father's residency on one date only for purposes of terminating welfare benefits; issue in criminal prosecution was welfare fraud, which could be shown by residency before that date].

People v. Wilson (1985) 169 C.A.3d 1149, 1157, 215 C.R. 694 [administrative proceeding on discontinuation of public assistance determined value on one date only of assets allegedly conveyed without consideration in order to qualify for aid; issues in welfare fraud prosecution were perjury, fraud, and value of assets before that date].

Los Angeles v. Southern Calif. Edison Co. (2003) 112 C.A.4th 1108, 1120, 5 C.R.3d 575 [Public Utilities Commission's decision regarding aggregate market value of three power plants sold by utility did not conclusively establish value in county's later action against utility alleging underpayment of documentary transfer taxes; Commission did not distinguish value of real property from value of personal property and did not make findings on value of individual plants; thus, it did not decide issue identical to issue in county's action].

Smith v. Napa (2004) 120 C.A.4th 194, 207, 14 C.R.3d 908 [workers' compensation ruling is not binding on issue of eligibility for disability retirement because focus of issues and parties is different; citing *Bianchi*].

Kemp Bros. Const. v. Titan Elec. Corp. (2007) 146 C.A.4th 1474, 1481, 53 C.R.3d 673 [determination of school district hearing officer that contractor had statutory grounds to substitute new subcontractor for subcontractor that had "made no reasonable effort to timely complete the work [contractor] could reasonably expect [subcontractor] to perform" did not have collateral estoppel effect in contractor's breach of contract action against subcontractor; issues were not identical and hearing officer did not necessarily decide whether subcontractor was in breach].

(3) *Legislative Determination of No Collateral Estoppel.* In response to *People v. Sims* (1982) 32 C.3d 468, 186 C.R. 77, 651 P.2d 321, *supra*, §398, the 1989 Legislature enacted *Veh.C. 13353.2(e)*, providing that the result of an administrative proceeding before the Department of Motor Vehicles (DMV) has no collateral estoppel effect in a criminal proceeding.

"The Legislature thus made the policy decision that, whatever similarities there may or may not be between this situation and that of *People v. Sims* ... , administrative proceedings before the DMV will *not* have a preclusive effect on related criminal proceedings. If today, a defendant were to argue that a favorable administrative outcome collaterally estopped a criminal prosecution, and cited *Sims* to support the contention, the contrary legislative enactment would

clearly prevail. Absent constitutional constraints, when the Legislature has established policy, it is not for the courts to differ." (*Gikas v. Zolin* (1993) 6 C.4th 841, 851, 25 C.R.2d 500, 863 P.2d 745.)

(4) *Agency Not Acting in Judicial Capacity*. A court may give collateral estoppel effect only to a final decision of an agency acting in a judicial capacity. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 C.A.4th 1165, 1221, 61 C.R.2d 447 [agency's decision that landfill project was exempt from environmental review did not preclude later challenge to another proposed landfill project; decision was issued after public meeting, not adjudicatory proceeding]; see *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 C.4th 921, 943, 38 C.R.3d 220, 126 P.3d 1040, 12 Summary (10th), *Real Property*, §884 [Department of Forestry's determination that water quality monitoring was not necessary did not collaterally estop Water Board from imposing monitoring requirements; interagency review and approval process did not possess judicial character].)

(5) *Civil Remedies Not Available in Administrative Proceeding*. In *People v. Damon* (1996) 51 C.A.4th 958, 59 C.R.2d 504, an automotive repair business and its owner faced a civil action for unfair business practices and false advertising under *B. & P.C. 17200* and *17500*. Defendants argued that res judicata barred the civil action because they had already been assessed investigative costs and the business had been temporarily closed as part of an earlier administrative proceeding under *B. & P.C. 9884.7* and *9884.9*. The trial judge found defendants liable and imposed civil penalties. *Held*, affirmed.

Res judicata is not applicable. The two statutory schemes that governed the administrative proceeding and the civil action contemplate proceedings in different tribunals affording different remedies that are cumulative, not mutually exclusive. (51 C.A.4th 970.) The civil action provides only for monetary civil penalties, injunctive relief, and restitution, whereas the administrative proceeding allows for suspending or revoking a registration. (51 C.A.4th 971.) Because the administrative and civil provisions afford cumulative remedies that cannot all be sought in one proceeding, the statutory scheme plainly envisions that both an administrative proceeding and a civil action may be brought. (51 C.A.4th 972.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Issues Not Identical*. See *Noble v. Draper* (2008) 160 C.A.4th 1, 17, 73 C.R.3d 3 [Labor Commissioner's ruling in wage claim proceeding that employees quit their jobs did not have collateral estoppel effect in employees' later action alleging fraud, negligent misrepresentation, false advertising, and unfair employment practices].



67 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

C. Nature of Judgment or Order.

7. Successive Judicial and Administrative Proceedings.

c. Prior Order Suppressing Evidence.

7 *Witkin Cal. Proc. Judgm* § 400

[§ 400] Prior Order Suppressing Evidence.

In *Buttimer v. Alexis* (1983) 146 C.A.3d 754, 194 C.R. 603, B was arrested for driving under the influence of intoxicating liquor and refused to submit to a sobriety test. In the criminal proceeding in the justice court, B contended that there was no probable cause for his arrest and made a motion under P.C. 1538.5 to suppress the evidence of his refusal to submit to the test. The trial judge ruled that the arrest was without probable cause, and that the evidence should be suppressed as "a fruit" of the unlawful arrest. The district attorney did not contest the ruling and dismissed the criminal proceeding. Thereafter, the Department of Motor Vehicles (DMV) sought to suspend B's driver's license for refusal to submit to the test. At the hearing, B offered evidence of the justice court ruling, but the hearing officer rejected it, concluded that B had been lawfully arrested, and ordered the suspension. On B's petition, the superior court granted mandamus to compel reinstatement of the license. *Held*, affirmed.

(a) The issue of lawfulness of B's arrest was litigated in the justice court and the determination became final when the criminal charges were dismissed. (146 C.A.3d 759.)

(b) The county district attorney and the DMV were in privity. "[T]he district attorney represents the State of California in criminal matters, and DMV represents the interests of the State of California in its hearings. We conclude the State of California is the real party in interest in both proceedings and the requirement of privity as an element of collateral estoppel is satisfied." (146 C.A.3d 760.)

(c) The policy considerations discussed in *People v. Sims* (1982) 32 C.3d 468, 186 C.R. 77, 651 P.2d 321, *supra*, §398, apply to the present case. "The integrity of a prior judicial determination must be accorded at least the same significance as a prior administrative determination." (146 C.A.3d 761.) (See *Dyson v. State Personnel Bd.* (1989) 213 C.A.3d 711, 726, 727, 262 C.R. 112 [discussing *Buttimer* and holding doctrine of collateral estoppel applicable].)

SUPPLEMENT: [This section is current through the latest supplement]



68 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

D. Judgment as Merger or Bar.

1. Judgment for Plaintiff as Merger.

a. In General.

7 *Witkin Cal. Proc. Judgm § 401*

[§ 401] In General.

A valid final judgment in favor of the plaintiff merges the claim in the judgment. The cause of action is extinguished and the only remaining right of action is on the judgment. (See *Passanisi v. Merit McBride Realtors (1987) 190 C.A.3d 1496, 1510, 236 C.R. 59*, *infra*, §424, citing the text; *Tomaselli v. Transamerica Ins. Co. (1994) 25 C.A.4th 1766, 1769, 31 C.R.2d 224* [judgment for insured in action for breach of contract and implied covenant of good faith merged all rights into judgment; any further rights are on judgment, not on original claim]; *Rest.2d, Judgments §§17, 18*; James 5th, §11.8; *46 Am.Jur.2d (2006 ed.), Judgments §451 et seq.*)

The chief application of the merger aspect of the res judicata doctrine is in the situation where the plaintiff obtains a money judgment for a wrong and later, on a showing of additional elements of damage or a different legal theory of wrong, seeks a further recovery. If the cause of action is single, the plaintiff cannot split it and obtain successive judgments for parts of the wrong. The first judgment will merge and extinguish the cause of action for any and all relief properly obtainable in the first action. (See *Rest.2d, Judgments §18, Comment b; infra*, §402.)

The same rule applies where the first judgment required the defendant to do or refrain from doing an act other than the payment of money. (See *Rest.2d, Judgments §18, Comment b.*)

West's Key Number Digest, Judgment 582 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



69 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

D. Judgment as Merger or Bar.

1. Judgment for Plaintiff as Merger.

b. Single Cause of Action.

7 *Within Cal. Proc. Judgm § 402*

[§ 402] Single Cause of Action.

The merger rule assumes that there is only one cause of action, and there is often great difficulty in determining whether the cause of action is single or multiple. (See 4 *Cal. Proc.* (5th), *Pleading*, §34 et seq.) But once it is determined that the second action is on the same cause of action as the first, the plea of res judicata will be sustained. (See *Edmonds v. Glenn-Colusa Irr. Dist.* (1933) 217 C. 436, 445, 19 P.2d 502; *Mycogen Corp. v. Monsanto Co.* (2002) 28 C.4th 888, 904, 123 C.R.2d 432, 51 P.3d 297 [plaintiff's action for damages for breach of contract to license technology was barred by judgment for plaintiff in prior action seeking declaration that defendant had duty to license technology and specific performance; both actions alleged same breach of contract and differed only in requested remedy]; *Slater v. Shell Oil Co.* (1943) 58 C.A.2d 864, 869, 137 P.2d 713; *McCaffrey v. Wiley* (1951) 103 C.A.2d 621, 625, 230 P.2d 152; *Owl Drug Co. v. Bryant* (1953) 115 C.A.2d 296, 303, 252 P.2d 69; *Carter v. Superior Court* (1956) 142 C.A.2d 350, 356, 298 P.2d 598 [prior award by Industrial Accident Commission precluded tort action for damages for same injury]; *McFaddin v. H.S. Crocker Co.* (1963) 219 C.A.2d 585, 589, 33 C.R. 389; *Impac Imported Parts & Accessories Corp. v. Rattray* (1979) 95 C.A.3d 792, 797, 157 C.R. 226, quoting the text; *California Coastal Com. v. Superior Court* (1989) 210 C.A.3d 1488, 1499, 258 C.R. 567; *Tensor Group v. Glendale* (1993) 14 C.A.4th 154, 160, 17 C.R.2d 639; *Allstate Ins. Co. v. Mel Raption* (2000) 77 C.A.4th 901, 907, 92 C.R.2d 151 [insured's small claims judgment against tortfeasor barred insurer from pursuing its subrogation action; latter action was precluded by res judicata effect of rule against splitting cause of action]; 4 *Cal. Proc.* (5th), *Pleading*, §45.)

In *Hatch v. Bank of America* (1960) 182 C.A.2d 206, 5 C.R. 875, plaintiff was the pledgee of a truck. Defendant took possession as the legal owner. Plaintiff brought an action to quiet title and received judgment determining that his claim was superior to that of defendant's bank and pledgor and that he was entitled to immediate possession. Then he brought a second action for damages for loss of use during the period of conversion by defendant bank. *Held*, the first judgment was res judicata. (182 C.A.2d 210.)

In *Wick v. Wick Tool Co.* (1959) 176 C.A.2d 677, 1 C.R. 531, defendant company, in a former action, sought rescission of an agreement with plaintiff engineer, alleging false representations inducing it to enter into the agreement. Judgment was for plaintiff engineer. In this action by plaintiff engineer for royalties due under the agreement, defendant company by answer and cross-complaint set up two distinct false representations by plaintiff engineer and asked for

damages. *Held*, plaintiff engineer was entitled to summary judgment. The cause of action in both actions was the alleged unenforceability of the licensing agreement, not the particular false representations relied on as grounds. And that cause of action gave rise to possible relief either by rescission or damages, but the objection of splitting was good. Defendant company could not, after failing to obtain rescission, seek damages that it could have demanded in the first action. (176 C.A.2d 686, 687.)

In *Sukut Const. v. Cabot, Cabot & Forbes Land Trust* (1979) 95 C.A.3d 527, 157 C.R. 289, plaintiff contractor brought Action No. 1 against defendant landowner's predecessor to foreclose a mechanic's lien on four adjoining tracts of land. Plaintiff recovered judgment for the full amount of its claim but the lien was held to cover only two tracts. Thereafter, plaintiff filed a new mechanic's lien covering the other two tracts and brought Action No. 2 to foreclose it. *Held*, the first judgment was a merger of the claim. Under C.C. 3152, a claimant may bring separate actions to recover the money due from the person liable and to enforce a mechanic's lien. Here, however, the two actions sought foreclosure of liens on the same property (or a portion of it), based on the same debt of the same person. (95 C.A.3d 531.) The lien was the same in both actions. Only the manner of attempting to reduce it to enforceable form was different. To allow plaintiff to proceed by filing the second lien in order to overcome the deficiencies in the first action would be counter to the prime purpose of res judicata--curtailing multiple litigation causing vexation and expense to the parties. (95 C.A.3d 532, quoting the text.)

In *Johnson v. American Airlines* (1984) 157 C.A.3d 427, 203 C.R. 638, a federal court class action was brought against defendant on behalf of women flight attendants, attacking defendant's policy of mandatory maternity leave as discrimination based on sex, in violation of federal civil rights laws. Later plaintiff, a flight attendant, filed a sex discrimination complaint with the California Fair Employment Practice Commission and brought the present action, challenging the same policy as violative of rights under the California Constitution and statutes. *Held*, a court-approved settlement of the federal class action based on a final consent decree was a bar to the California action

(a) In *Kremer v. Chemical Const. Corp.* (1982) 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262, the court held that a state court's decision upholding a state administrative agency's rejection of an employment discrimination claim was a bar to a similar action brought under Title VII of the federal Civil Rights Act of 1964. "The underlying premise of the opinion in *Kremer* is that a cause of action for alleged discrimination is based on a single primary right, whether the cause of action relies on federal or state antidiscrimination law." (157 C.A.3d 432.)

(b) Here the primary right asserted in the earlier federal class action was the same as that allegedly violated in the present case, specifically "the right to be free from employment discrimination based on sex, in the specific area of involuntary maternity leave." (157 C.A.3d 433.)

SUPPLEMENT: [This section is current through the latest supplement]



70 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

D. Judgment as Merger or Bar.

1. Judgment for Plaintiff as Merger.

c. Mutually Exclusive Remedies.

7 *Witkin Cal. Proc. Judgm* § 403

[§ 403] Mutually Exclusive Remedies.

The merger rule also applies where the plaintiff has one of two mutually exclusive remedies for a single cause of action. A judgment in an action pursuing either remedy precludes a later action to enforce the other. (*Busick v. Work. Comp. App. Bd.* (1972) 7 *C.3d* 967, 973, 104 *C.R.* 42, 500 *P.2d* 1386; see *Rest.2d, Judgments* §25, Comment f.)

In *Busick*, petitioner and another individual, employees of a trucking concern, were dissatisfied with conditions. They left and formed their own trucking business, acquiring two of their former employer's drivers and some of his customers. Final payroll checks were due from the former employer, who insisted that the former employees pick them up in person. When they arrived, he shot both of them and killed himself. They filed an application for compensation in September 1968, and commenced a civil action against the former employer's executor in April 1969. In October 1969, the referee made an order denying compensation, on a finding that the injury did not arise out of or occur in the course of the employment. In November 1969, the board granted petitioner's request for reconsideration. In April 1970, the civil action was tried and resulted in a judgment for the plaintiffs for \$ 500,000 general damages and \$ 150,000 punitive damages. No appeal was taken and it became final on June 15, 1970. Meanwhile, on May 6, 1970, the board made its decision on reconsideration, affirming the findings and order of the referee. *Held*, affirmed; the superior court judgment merged petitioner's claim, and it was unnecessary to consider whether the injury was compensable.

(a) The cause of action for personal injury is single, even though mutually exclusive remedies (workers' compensation and a tort action) might be available. (7 *C.3d* 975.)

(b) Petitioner filed her claim with the board first, and she could have obtained an order from the superior court staying the action pending the board's determination of the jurisdictional issue (see 2 *Cal. Proc.* (5th), *Jurisdiction*, §438). Here, however, neither party objected to the superior court trial, and the rule of first final judgment applied. (7 *C.3d* 977.)

(c) There was no waiver of the res judicata defense by failure to set it up in the trial court. It was unavailable until the superior court judgment became final and was thereafter properly raised in the *Court of Appeal*. (7 *C.3d* 977.)

SUPPLEMENT: [This section is current through the latest supplement]



71 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

D. Judgment as Merger or Bar.

1. Judgment for Plaintiff as Merger.

d. Distinction: Different Cause of Action.

7 *Witkin Cal. Proc. Judgm* § 404

[§ 404] Distinction: Different Cause of Action.

(1) *No Merger*. If the second action is on a different cause of action, as where there are successive breaches of an obligation, or separate and distinct torts, or new rights accrued since the rendition of the former judgment, there is no merger. (See *Paladini v. Municipal Markets Co.* (1921) 185 C. 672, 674, 200 P. 415; *Ash v. Mortensen* (1944) 24 C.2d 654, 660, 150 P.2d 876; *Timm v. McCartney* (1935) 9 C.A.2d 230, 235, 49 P.2d 315; *Daugherty v. Board of Trustees of South Bay Union High School Dist.* (1952) 111 C.A.2d 519, 522, 244 P.2d 950; *Roberts v. Redlich* (1952) 111 C.A.2d 566, 570, 244 P.2d 933 [action for damages for lessee's holding over after trial, which were not recoverable in prior unlawful detainer action]; *Downey v. Johnson* (1978) 79 C.A.3d 970, 975, 145 C.R. 298, citing the text [new rights accrued]; *Murphy v. Allstate Ins. Co.* (1978) 83 C.A.3d 38, 53, 147 C.R. 565, citing the text; *Craig v. Los Angeles* (1990) 221 C.A.3d 1294, 1299, 271 C.R. 82, citing the text; *Banning v. Newdow* (2004) 119 C.A.4th 438, 444, 14 C.R.3d 447 [party was not barred from challenging constitutionality of attorneys' fee award by his failure to challenge three prior attorneys' fee awards; fee awards are separate]; *Rest.2d, Judgments* §24 et seq.; 86 A.L.R.2d 1385 [judgment in false imprisonment action as res judicata in later malicious prosecution action or vice versa]; 46 *Am.Jur.2d* (2006 ed.), *Judgments* §453 et seq.; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §478 et seq.; 4 *Cal. Proc.* (5th), *Pleading*, §49 et seq.)

In *Langley v. Schumacker* (1956) 46 C.2d 601, 297 P.2d 977, a woman brought a tort action for fraud in inducing a marriage (an action later abolished by statute). The court characterized the cause of action as a tort to property. Hence, a prior successful annulment action by the wife, based on refusal to consummate and cohabit, was not a bar to her later action for damages for the fraud. The first action was in equity to determine the plaintiff's marital or nonmarital status; the second was at law seeking compensation for injury to a property right. (46 C.2d 603.)

In *Mata v. Los Angeles* (1993) 20 C.A.4th 141, 24 C.R.2d 314, following a disciplinary termination, plaintiff obtained a writ of mandamus directing defendant city to reinstate him as a police officer. In this civil rights action under 42 U.S.C. §1983, defendants obtained summary judgment on the ground that the action was barred by res judicata and collateral estoppel because of the mandamus relief. *Held*, reversed.

(a) Res judicata gives conclusive effect to a former judgment in subsequent litigation involving the same

controversy. To be the same controversy, there must be a nucleus of facts on which only one claim is allowed. "In California, if the second suit is on a different cause of action, as where there are ... separate and distinct torts ... there is no merger." (20 C.A.4th 149, adopting "nucleus of facts" analysis of *Nakash v. Superior Court* (1987) 196 C.A.3d 59, 241 C.R. 578, *infra*, §408.) Here, the "second suit" is the 42 U.S.C., §1983 action, and it is a different cause of action. "In fact, the mandamus proceeding is technically not regarded as an action at all. It is, instead, described as a special proceeding." (20 C.A.4th 149, citing *Best v. California Apprenticeship Council* (1987) 193 C.A.3d 1448, 240 C.R. 1, *supra*, §293.) Therefore, plaintiff's civil rights action is not barred by the doctrine of claim preclusion. (20 C.A.4th 149.)

(b) However, "the judgment in the mandamus proceeding is not to be ignored. ... Pursuant to the doctrine of issue preclusion, the judgment 'operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.'" (20 C.A.4th 149, citing the text.) All the issues determined in the mandamus proceeding were determined in plaintiff's favor. Thus, the doctrine is of no assistance to defendants and does not support summary judgment. (20 C.A.4th 149, 150.) (See *Federation of Hillside & Canyon Assns. v. Los Angeles* (2004) 126 C.A.4th 1180, 1205, 24 C.R.3d 543 [statement in *Mata* that "mandamus proceeding is technically not regarded as action at all" and is "instead, described as a special proceeding" is simply attempt to explain why causes of action were not same, rather than holding that *res judicata* does not apply when prior ruling was in special proceeding].)

(2) *Claim Discovered After Complaint in First Action Is Filed.* In *Allied Fire Protection v. Diede Const.* (2005) 127 C.A.4th 150, 25 C.R.3d 195, defendant, a construction contractor, received "delay damages" from the United States Air Force when the Air Force caused the construction project to be delayed. Defendant agreed to pay plaintiff subcontractor a portion of those damages. Plaintiff subsequently sued defendant in federal court for breach of the subcontract. During discovery, plaintiff discovered a letter disclosing that defendant had received more delay damages from the Air Force than plaintiff had been led to believe. After the federal case ended in a judgment for plaintiff on its breach of contract claim, plaintiff sued defendant in state court, alleging that defendant had misrepresented the amount of delay damages it received from the Air Force, thereby inducing plaintiff to accept a smaller portion of delay damages from defendant. Defendant asserted *res judicata* as an affirmative defense to plaintiff's state action. The trial court granted summary judgment. *Held*, reversed.

(a) *Res judicata* is not a bar to claims that arise after the initial complaint is filed. (127 C.A.4th 155.) The reason for the rule that all claims that could be brought must be brought is "so [a] party cannot by negligence or design withhold issues and litigate them in consecutive actions. ... Where the plaintiff is unaware of the facts giving rise to a claim due to defendant's fraud, there is no question of successive litigation by design; the only concern is negligence." (127 C.A.4th 156.) Hence, a claim must be included in the first action only where with diligence it could be discovered before that action is filed. (127 C.A.4th 157.)

(b) The undisputed facts here were that plaintiff did not discover the alleged misrepresentation until after the federal action was filed. There was no evidence that plaintiff should have known sooner. Therefore, *res judicata* does not bar the state action. (127 C.A.4th 157.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *No Merger.* See *Niles Freeman Equipment v. Joseph* (2008) 161 C.A.4th 765, 791, 74 C.R.3d 690 [administrative proceeding decertifying defendant's business did not bar later administrative proceeding suspending defendant's business; department's duty in first proceeding was to determine whether business met statutory criteria for certification as Disabled Veteran Business Enterprise (DVBE), whereas department's duty in second proceeding was to suspend business if it had fraudulently obtained and sought to retain DVBE status, and defendant's intent was issue in second proceeding only].



72 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

D. Judgment as Merger or Bar.

1. Judgment for Plaintiff as Merger.

e. Exception: Matter Left Open.

7 *Witkin Cal. Proc. Judgm* § 405

[§ 405] Exception: Matter Left Open.

The pleading defect of splitting the cause of action may be waived by failure to demur or otherwise object in the second action. (See 4 *Cal. Proc. (5th), Pleading*, §47.)

The defendant may also, by acquiescing in the procedure in the first action, be estopped to object in the second action. (See *United Bank & Trust Co. of Calif. v. Hunt (1934) 1 C.2d 340, 345, 34 P.2d 1001* ["The course pursued by the court and counsel ... was tantamount to an express determination ... to reserve the issues involved for future adjudication"]; *Allstate Ins. Co. v. Mel Rapton (2000) 77 C.A.4th 901, 909, 92 C.R.2d 151* [insured's small claims judgment against tortfeasor barred insurer from pursuing its later subrogation action against tortfeasor, even though tortfeasor knew of insurer's subrogation claim before judgment in small claims action and did not object or seek insurer's joinder; subrogation claim could not have been maintained in small claims court, and insurer, not tortfeasor, had duty to protect insurer's right to subrogation by not permitting splitting of cause of action]; *Rest.2d, Judgments* §26, Comment a.)

In *Cason v. Glass Bottle Blowers Assn. (1951) 37 C.2d 134, 231 P.2d 6*, the trial judge decided that plaintiff officer's suspension from defendant union was wrongful, and awarded damages, but the question of his right to reinstatement, and further damages in the event of denial of that right, was expressly left open. *Held*, the present action for reinstatement is not subject to the defense of res judicata (merger). It is immaterial whether the trial judge in the first case was justified in thus limiting the issues, for the correctness of that judgment is no longer open to review. "[T]he prior judgment in effect determined that a wrongful refusal by the union to reinstate plaintiff would constitute a new and independent wrong giving rise to a new cause of action." (37 *C.2d 141*.)

SUPPLEMENT: [This section is current through the latest supplement]



73 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

D. Judgment as Merger or Bar.

1. Judgment for Plaintiff as Merger.

f. Exceptions to Rule Against Splitting.

7 *Witkin Cal. Proc. Judgm* § 406

[§ 406] Exceptions to Rule Against Splitting.

A long-established rule prohibits the splitting of a single cause of action so as to permit successive actions on parts of the claim. Hence, the first action on that single cause of action operates as a merger even though the plaintiff is prepared in the second action (a) to present evidence, grounds, or legal theories not presented in the first action, or (b) to seek remedies or forms of relief not demanded in the first action. (*Rest.2d, Judgments* §25; see 4 *Cal. Proc.* (5th), *Pleading*, §45.)

The Second Restatement of Judgments (§26) lists the following exceptions to this general rule:

(1) The parties have agreed to splitting or the defendant has acquiesced in splitting. (*Rest.2d, Judgments* §26(1)(a); see *supra*, §405.)

(2) The court in the first action has expressly reserved the plaintiff's right to maintain the second action. (*Rest.2d, Judgments* §26(1)(b); see *supra*, §405.)

(3) The plaintiff was unable to rely on a certain theory or to seek a certain remedy or form of relief in the first action because of (a) limitations on the subject matter jurisdiction of the courts, or (b) restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief. (*Rest.2d, Judgments* §26(1)(c).)

(4) "The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim." (*Rest.2d, Judgments* §26(1)(d); see *Martinez-Ferrer v. Richardson-Merrell* (1980) 105 C.A.3d 316, 327, 164 C.R. 591, 3 *Cal. Proc.* (5th), *Actions*, §591 [exception applied].)

(5) "For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course." (*Rest.2d, Judgments* §26(1)(e); see *Spaulding v. Cameron* (1952) 38 C.2d 265, 268, 239 P.2d 625; *Martinez-Ferrer v. Richardson-Merrell*, *supra*, 105 C.A.3d 326; 3 *Cal. Proc.* (5th),

Actions, §601.)

(6) "It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy." (*Rest.2d, Judgments* §26(1)(f); see *Martinez-Ferrer v. Richardson-Merrell, supra*, 105 C.A.3d 327 [exception applied].)

SUPPLEMENT: [This section is current through the latest supplement]



74 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

- D. Judgment as Merger or Bar.
- 2. Judgment for Defendant as Bar.
 - a. General Rule.

7 *Witkin Cal. Proc. Judgm* § 407

[§ 407] General Rule.

The same kind of valid final judgment that would merge the plaintiff's cause of action (see *supra*, §401) will, if in favor of the defendant, constitute a bar to any further action by the plaintiff on the same cause of action. (See *Rest.2d, Judgments* §§17, 19; James 5th, §§11.3, 11.8; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §473 et seq.) Numerous cases have applied this rule. (See *Ernsting v. United Stages* (1929) 206 C. 733, 736, 276 P. 103; *Hamilton v. Carpenter* (1940) 15 C.2d 130, 133, 98 P.2d 1027; *Panos v. Great Western Packing Co.* (1943) 21 C.2d 636, 134 P.2d 242; *Ollwell v. Hopkins* (1946) 28 C.2d 147, 152, 168 P.2d 972; *Weil v. Barthel* (1955) 45 C.2d 835, 837, 291 P.2d 30; *Slater v. Blackwood* (1975) 15 C.3d 791, 795, 126 C.R. 225, 543 P.2d 593, citing the text; *Bendlage v. Kohlsaat* (1942) 54 C.A.2d 136, 139, 128 P.2d 691; *Babcock v. Babcock* (1944) 63 C.A.2d 94, 100, 146 P.2d 279; *Stafford v. Yerge* (1954) 129 C.A.2d 165, 170, 276 P.2d 649; *Williams v. Krumsiek* (1955) 131 C.A.2d 411, 414, 280 P.2d 486; *State Farm Mut. Auto. Ins. Co. v. Salazar* (1957) 155 C.A.2d Supp. 861, 864, 318 P.2d 210, citing the text; *Corral v. State Farm Mut. Auto. Ins. Co.* (1979) 92 C.A.3d 1004, 1011, 155 C.R. 342; *Mattson v. Costa Mesa* (1980) 106 C.A.3d 441, 446, 448, 164 C.R. 913, 4 *Cal. Proc.* (5th), *Pleading*, §48; *Eichman v. Fotomat Corp.* (1983) 147 C.A.3d 1170, 1174, 197 C.R. 612; *Duffy v. Long Beach* (1988) 201 C.A.3d 1352, 1357, 247 C.R. 715; *Takahashi v. Board of Education of Livingston Union School Dist.* (1988) 202 C.A.3d 1464, 1473, 1474, 249 C.R. 578; *Gamble v. General Foods Corp.* (1991) 229 C.A.3d 893, 898, 280 C.R. 457; *Castro v. Higaki* (1994) 31 C.A.4th 350, 357, 37 C.R.2d 84 [applying "primary rights" theory to determine that complaint in second action was based on same cause of action as complaint in first action]; *Henry v. Clifford* (1995) 32 C.A.4th 315, 321, 38 C.R.2d 116 [same]; *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 C.A.4th 1011, 1025, 43 C.R.2d 717, 2 *Cal. Proc.* (5th), *Jurisdiction*, §337 [plaintiff's declaratory relief action was barred by order in defendants' favor in prior action, even though prior order was in excess of court's jurisdiction]; *In re Marriage of Sweeney* (1999) 76 C.A.4th 343, 347, 90 C.R.2d 298 [once denial of plaintiff's motion to execute on dormant support judgment became final, plaintiff's claim for child support arrearages was barred; former Family C. 4502, providing that support orders are enforceable until paid in full, did not apply to claims that were already barred]; *Pollock v. University of Southern Calif.* (2003) 112 C.A.4th 1416, 1427, 6 C.R. 3d 122 [dismissed professor's fraud and breach of contract claims against university were barred by res judicata; professor's complaint in earlier, unsuccessful action had alleged same facts concerning creation of procedure designed to thwart tenure and had sought vindication of same primary right to fairness in tenure and grievance process].)

The same distinction based on the cause of action (*supra*, §404) also applies. If the cause of action is different, the first judgment is not a bar. (See *Hall v. Coyle* (1952) 38 C.2d 543, 546, 241 P.2d 236; *Agarwal v. Johnson* (1979) 25 C.3d 932, 954, 160 C.R. 141, 603 P.2d 58 [judgment was not bar where cause of action was different]; *Ball v. Stephens* (1945) 68 C.A.2d 843, 851, 158 P.2d 207; *McNulty v. Copp* (1954) 125 C.A.2d 697, 708, 271 P.2d 90, 4 Cal. Proc. (5th), *Pleading*, §56; on theories for determining whether cause of action is different, see *infra*, §408 et seq.)

A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence, a prior judgment is *res judicata* on matters that "were raised or could have been raised, on matters litigated or litigable." (*Warga v. Cooper* (1996) 44 C.A.4th 371, 378, 51 C.R.2d 684 [res judicata precluded father from challenging stipulated judgment of child support with defense of concealment; father could have raised defense in proceedings leading to stipulated judgment; citing *Sutphin v. Speik* (1940) 15 C.2d 195, 101 P.2d 497, *infra*, §419]; *In re Marriage of Mason* (1996) 46 C.A.4th 1025, 1028, 54 C.R.2d 263 [husband who had unsuccessfully claimed that wife deceived him about value of business involved in property settlement could not later resurrect fraud claim under theory that business goodwill had been omitted as asset].)

West's Key Number Digest, Judgment 540 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

Matters that were raised or could have been raised: See *Mark v. Spencer* (2008) 166 C.A.4th 219, 229, 82 C.R.3d 569 [res judicata barred action by attorney against his former cocounsel in prior class action to enforce fee-splitting agreement; attorney had full and fair opportunity to bring agreement to attention of court in class action and relative entitlement of two attorneys to fees was fully considered and finally determined by that court].



75 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

D. Judgment as Merger or Bar.

2. Judgment for Defendant as Bar.

b. Theories for Determining Whether Cause of Action Is Different.

1. Different Nucleus of Facts.

7 *Witkin Cal. Proc. Judgm* § 408

[§ 408] Different Nucleus of Facts.

In *Nakash v. Superior Court* (1987) 196 C.A.3d 59, 241 C.R. 578, plaintiffs sued defendants in the federal court seeking rescission of an agreement for fraud and failure of consideration, and the action was dismissed pursuant to a settlement. Subsequently, plaintiffs filed a complaint in the state court, also seeking rescission of the agreement, and setting forth many causes of action, including one for breach of fiduciary duty. The trial court denied defendants' motion for summary adjudication of issues, and the Court of Appeal refused to grant mandamus, holding that the scope of the settlement was a question of fact, and that the parties had a continuing fiduciary relationship.

(a) "What constitutes the 'same controversy' is a complex conceptual and practical problem in applying the doctrine. Analysis has shifted from identification of a primary right upon which only one claim is allowed to determination of the existence of a transaction involving a nucleus of facts upon which only one claim is allowed. ... It is generally conceded that the line dividing those situations compelling application of the doctrine from those which do not cannot be precisely drawn." (196 C.A.3d 68, citing *Rest.2d, Judgments* §24.)

(b) In *Costantini v. Trans World Airlines* (9th Cir. 1982) 681 F.2d 1199 (subsequently vacated on rehearing en banc; see 946 F.2d 1489), the court, holding that California law applied to the dispute, nevertheless referred to the following federal standards in reaching the conclusion that a second action was barred: "(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." (196 C.A.3d 68.)

(c) This case differs from *Costantini*; it "concerns litigants who are engaged in a fiduciary and business relationship which has been structured by the parties' agreement to extend beyond any fixed termination point." (196 C.A.3d 69.) And to view it as one transactional set of facts ignores present realities. "Res judicata was never intended to be used as a vehicle for forever 'immunizing' any party in a continuing business relationship from liability for continuous or recurrent tortious misconduct. All have been pleaded here. ... It is fair to say that the first action, in federal court, differed greatly in scope as well as in the specific allegations of petitioners' wrongdoing. If res judicata may be used to

bar future inquiry into such misconduct, no party engaged in a business and fiduciary relationship in this state would attempt settlement negotiations concerning business differences because of the risk of giving too much future leverage to the other side of the dispute." (196 C.A.3d 69.)

(d) The contention that plaintiffs gave up forever that right to rescind when they dropped the federal action is unsound. Rescission is not a cause of action; it is a remedy. (196 C.A.3d 70.) "Just as an agreement may produce more than one primary right, or produce more than one transactional nucleus of facts, the conduct of parties to the agreement may provide the evidentiary basis for obtaining rescission on more than one ground, on more than one occasion. The transactional nucleus of facts which generated the second complaint occurred *after* the first judgment." (196 C.A.3d 70.)

(e) Hence, the trial judge properly denied summary adjudication, correctly determining that, "while some of the *general* circumstances of the successive suits were the same, the specific, pertinent transactional nucleus of facts was not; the second suit would require the production of substantially different proof." (196 C.A.3d 70.)

SUPPLEMENT: [This section is current through the latest supplement]



76 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

D. Judgment as Merger or Bar.

2. Judgment for Defendant as Bar.

b. Theories for Determining Whether Cause of Action Is Different.

2. Different Primary Right.

7 *Witkin Cal. Proc. Judgm* § 409

[§ 409] Different Primary Right.

In *Gamble v. General Foods Corp.* (1991) 229 C.A.3d 893, 280 C.R. 457, plaintiff filed a complaint in the federal district court, alleging that her employment was terminated as a result of racial discrimination in violation of Title VII of the Civil Rights Act. The court concluded that she was terminated for legitimate reasons and rendered judgment for defendant. While the federal action was pending, plaintiff filed a complaint in the superior court, alleging that defendant had breached an implied-in-fact contract as well as the implied covenant of good faith and fair dealing. After the federal case was decided, the trial court granted defendant's motion for summary judgment on the ground that the federal judgment was res judicata. *Held*, affirmed.

(a) The federal courts utilize a transactions analysis in determining whether two actions are based on the same cause of action; California follows the primary right theory. (229 C.A.3d 898, citing the text.) Where an action is filed in a California state court and the defendant sets up a federal judgment as a bar, California law will determine the res judicata effect of the federal court judgment on the basis of whether the federal and state actions involve the same primary right. (229 C.A.3d 898, citing *Agarwal v. Johnson* (1979) 25 C.3d 932, 160 C.R. 141, 603 P.2d 58.)

(b) In the present case, the primary right is the right to employment. Although plaintiff's state claim also alleges tortious breach of the duty of good faith and fair dealing, that claim is unavailable as a result of *Foley v. Interactive Data Corp* (1988) 47 C.3d 654, 254 C.R. 211, 765 P.2d 373, 2 Summary, (10th Agency and Employment, §271. (229 C.A.3d 901.)

In *Frommhagen v. Board of Supervisors of Santa Cruz* (1987) 197 C.A.3d 1292, 243 C.R. 390, the court observed that its research had failed to uncover a California case applying the primary right theory to actions brought to attack taxes or charges levied in different years. However, following federal authority (see *Commissioner of Internal Revenue v. Sunnen* (1948) 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898), the court held that each year's tax is the origin of a new liability and a separate cause of action. Hence, a judgment against the taxpayer in a prior year is not a complete bar to a new action attacking a new tax. The prior judgment acts only as a collateral estoppel as to matters actually determined in the first action. (197 C.A.3d 1300.)

In *Branson v. Sun-Diamond Growers* (1994) 24 C.A.4th 327, 29 C.R.2d 314, plaintiff sought contractual and equitable indemnity from defendant corporation. In a prior action (*Plate v. Sun-Diamond Growers* (1990) 225 C.A.3d 1115, 275 C.R. 667, 9 Summary (10th), *Corporations*, §83), plaintiff was denied indemnification from the corporation under *Corp.C. 317* (indemnification of corporate agent). Here, the trial judge dismissed plaintiff's complaint stating that all of plaintiff's claims were barred by res judicata and collateral estoppel as a result of the prior action. *Held*, reversed.

(a) *Res Judicata*.

(1) "For purposes of identifying a cause of action under the doctrine of res judicata, 'California has consistently applied the primary rights theory under which the invasion of one primary right gives rise to a single cause of action.' " (24 C.A.4th 340; citing *Slater v. Blackwood* (1975) 15 C.3d 791, 126 C.R. 225, 543 P.2d 593, supra, §345, and declining to follow the "nucleus of facts" analysis suggested in *Nakash v. Superior Court* (1987) 196 C.A.3d 59, 241 C.R. 578, supra, §408.) Under the primary rights theory, a cause of action consists of a primary right possessed by the plaintiff, a corresponding primary duty of the defendant, and a wrong done by the defendant which consists in a breach of the primary right and duty. Two actions constitute a single cause of action if they both affect the same primary right. (24 C.A.4th 341.)

(2) Applying the theory here, "the primary right to seek authorization for indemnity under *Corp.C. 317* is not the same cause of action as one for breach of a contract for indemnity ... or one asserted under the doctrine of equitable estoppel." (24 C.A.4th 343.) The statute merely accords agents of corporations the right to seek authorization for indemnity against adverse judgments for their reasonable and good faith acts on behalf of the corporation. In contrast, contractual indemnity accords the contracting party a right to indemnity under the terms of the contract. (24 C.A.4th 343.) And a claim for equitable estoppel arises from the declarations or conduct of the party estopped. Therefore, plaintiff's application for an order under *Corp.C. 317* involved a different primary right than those asserted in these causes of action. (24 C.A.4th 344.)

(3) Moreover, where a plaintiff is unable to rely on certain theories or seek certain remedies or relief in the first action because of limitations on the courts' subject matter jurisdiction or other restrictions on their authority, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or relief, the former case cannot act as a bar. (24 C.A.4th 344, citing *Rest.2d, Judgments* §26(1)(c).) Here, plaintiff's claims for contractual and equitable indemnity were not recoverable on a motion under *Corp.C. 317*, nor had he filed a complaint or cross-complaint against defendant. Hence, the claims were not before the court, and the only findings possible were under the *Corporations Code*. (24 C.A.4th 344.)

(b) *Collateral Estoppel*.

(1) "Although a second action between the parties on a different cause of action is not barred by res judicata, nevertheless 'the first judgment operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action'." (24 C.A.4th 346, citing the text.) Hence, a former judgment is not a collateral estoppel on issues that might have been raised but were not. (24 C.A.4th 346.)

(2) Any issue of defendant's contractual commitment to indemnify plaintiff is entirely separate from plaintiff's statutory rights under the Corporations Code. Issues of contractual indemnity, breach of the covenant of good faith and fair dealing, and equitable estoppel were not and could not have been litigated in the post-trial statutory motion procedure under *Corp.C. 317*. (24 C.A.4th 346.) The only issues decided in *Plate* were whether plaintiff was being sued as an agent of defendants or acted in the good faith interests of defendant. They were relevant only to the elements of the statute, not to plaintiff's contractual and equitable indemnity claims. (24 C.A.4th 347, 348.) Thus, because the two issues actually litigated in *Plate* were not fatal to plaintiff's contractual and equitable indemnity claims, collateral estoppel does not allow dismissal of those claims and a judgment for defendant. (24 C.A.4th 348.)

In *Brenelli Amedeo, S.P.A. v. Bakara Furniture* (1994) 29 C.A.4th 1828, 35 C.R.2d 348, plaintiff corporation had

obtained a judgment against defendant corporation for contract related claims, but it had been unable to satisfy the judgment before defendant filed for bankruptcy. After the bankruptcy case closed, plaintiff sued defendant and its individual shareholders again, alleging alter ego liability, fraudulent conveyance, conspiracy to fraudulently transfer corporate assets, accounting of profits, intentional misrepresentation of fact, suppression of fact, conspiracy to defraud, and conversion. The trial court dismissed the latter four claims on the basis of *res judicata*. *Held*, reversed.

(a) The primary rights test is the proper method of determining the scope of a cause of action. The trial court employed a transactional test, determining that the claims were barred because they arose from the same transaction on which the first case was based. This approach is contrary to established California law. The "firmly settled" rule in California for determining a cause of action is the primary rights theory. (29 C.A.4th 1835, 1836, citing the text.)

(b) The claims in the present action involve a different primary right than the one involved in the first action. The prior action was for breach of contract, whereas the present action seeks to vindicate plaintiff's right to be free from the shareholders' tortious conduct that unfairly deprived plaintiff of the value of its judgment. Moreover, the proof required at trial will differ considerably from that required in the prior action. Instead of establishing breach of the contract provisions, plaintiff will have to show that the individual shareholders fraudulently conveyed corporate assets, conspired to fraudulently transfer those assets, suppressed facts, conspired to defraud, and converted corporate property to their own benefit. Thus, the present action involves a completely separate set of facts. (29 C.A.4th 1837.) (See 35 *San Diego L. Rev.* 559 [criticism of "unpredictable" primary rights theory].)

Numerous cases have discussed the primary rights theory, including the following:

Weikel v. TCW Realty Fund II Holding Co. (1997) 55 C.A.4th 1234, 1248, 65 C.R.2d 25 [landowner's action against neighbor was barred by judgment against landowner in prior action involving same primary right: landowner's interest in constructing building on disputed wedge of land].

Acun a v. Regents of Univ. of Calif. (1997) 56 C.A.4th 639, 648, 65 C.R.2d 388 [plaintiff's state action was barred by prior federal summary judgment against him, where both actions were based on same primary right to be free of invidious employment discrimination; following *Gamble*].

Citizens for Open Access to Sand & Tide v. Seadrift Assn. (1998) 60 C.A.4th 1053, 1067, 71 C.R.2d 77 [settlement agreement between property owners and government agencies that resolved issue of public access to property barred later action by public interest group seeking declaration of implied dedication; actions differed only in procedural context in which they arose, not substantive issues presented].

Balasubramanian v. San Diego Community College Dist. (2000) 80 C.A.4th 977, 990, 95 C.R.2d 837 [federal court judgment against community college teacher in employment discrimination action barred teacher's state court breach of contract action; in both actions, teacher alleged that college district should have included affirmative action representative on selection committee during teacher's interview for position of assistant professor and both actions involved primary right to be employed by district].

Dunkin v. Boskey (2000) 82 C.A.4th 171, 180, 98 C.R.2d 44 [prior judgment dismissing plaintiff's declaratory relief action to establish parental relationship with child conceived by artificial insemination with anonymous donor did not preclude plaintiff's later action for breach of contract against woman who gave birth to child and who had promised plaintiff parentage, custody, and visitation rights; breach of contract action did not assert same primary right as prior action to establish paternity].

Le Parc Community Assn. v. Work. Comp. App. Bd. (2003) 110 C.A.4th 1161, 1168, 2 C.R.3d 408 [employee's voluntary dismissal of negligence action against uninsured employer under *Lab.C. 3706* did not bar continued litigation of his related workers' compensation claim; claim under *Lab.C. 3706* and workers' compensation claim do not involve same primary right and Legislature expressly authorized cumulative remedies for injured employee whose employer is uninsured].

Simi Valley v. Superior Court (2003) 111 C.A.4th 1077, 1082, 4 C.R.3d 468 [res judicata barred decedent's family's action against city, alleging that police officers negligently used tear gas against suicidal decedent and violated family's rights by not allowing them to speak with decedent; federal court in family's prior civil rights action had found that police officers' conduct was objectively reasonable, thus barring state negligence action premised on violation of same primary right; citing *Acun a*].

Nicholson v. Fazeli (2003) 113 C.A.4th 1091, 1100, 6 C.R.3d 881 [wife's malicious prosecution action was not barred by prior ruling in dissolution action denying her attorneys' fees and costs; primary rights intended to be vindicated by Family Code provisions for fees (adequate opportunity for all parties to litigate despite disparity in resources, and duty to cooperate and work toward settlement) were different from primary right involved in malicious prosecution (right to be free from malicious lawsuit)].

Friedman Professional Management Co. v. Norcal Mut. Ins. Co. (2004) 120 C.A.4th 17, 26, 15 C.R.3d 359 [medical malpractice action alleging that surgery center's incompetence caused patient to suffer vaginal bleeding involved different primary right than patient's later action against surgeon alleging sexual battery and invasion of privacy based on steps taken to control bleeding].

Federation of Hillside & Canyon Assns. v. Los Angeles (2004) 126 C.A.4th 1180, 1202, 24 C.R.3d 543 [res judicata barred mandamus proceeding based on city's alleged failure to comply with California Environmental Quality Act; prior proceeding that was based on same project, same environmental impact report, and substantially same findings involved same primary right].

Lincoln Property Co., N.C. v. Travelers Indem. Co. (2006) 137 C.A.4th 905, 911, 41 C.R.3d 39 [insured's action for breach of implied covenant of good faith and fair dealing was barred by judgment for insurer in insured's prior action alleging breach of duty to defend; conduct that constitutes breach of duty to act in good faith is same conduct that gives rise to breach of duty to defend].

SUPPLEMENT: [This section is current through the latest supplement]

See *Consumer Advocacy Group v. ExxonMobil Corp. (2008) 168 C.A.4th 675, 686, 86 C.R.3d 39* [private enforcement action brought by one consumer group involved different primary right than enforcement action brought by second consumer group; although both actions involved cleanup of same polluted sites and covered same time period, settlement in first action involved only two of three pollutants at issue in second action; res judicata did not entitle defendant to full summary judgment in second action].



77 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

- D. Judgment as Merger or Bar.
- 2. Judgment for Defendant as Bar.
- c. Choice of Wrong Remedy.

7 *Witkin Cal. Proc. Judgm* § 410

[§ 410] Choice of Wrong Remedy.

If the plaintiff, with a good cause of action, seeks a remedy to which he or she is not entitled, or frames the complaint on an erroneous theory so that it lacks essential allegations to justify relief on the proper theory, judgment may be rendered against the plaintiff. Nevertheless, the plaintiff may sue again on the same cause of action.

First, the doctrine of election of remedies does not apply where the plaintiff has misconceived his or her remedy. (See 3 *Cal. Proc. (5th), Actions*, §192.) Second, the doctrine of res judicata does not apply because the judgment, although final, is not on the merits. Recovery was denied not for substantive defects in the plaintiff's claim but for procedural reasons. (See *South San Bernardino Land & Imp. Co. v. San Bernardino Nat. Bank* (1899) 127 C. 245, 248, 59 P. 699 [prior quiet title action on erroneous theory that defendant had no title did not bar present action to establish trust on theory that defendant has legal title]; *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 C.2d 47, 52, 92 P.2d 804, supra, §375; *Miller v. Ambassador Park Syndicate* (1932) 121 C.A. 92, 99, 9 P.2d 267; *In re Keck* (1946) 75 C.A.2d 846, 849, 171 P.2d 933; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §§553, 554.) This is true even though the first court that held the form of action wrong was actually in error; its final judgment on that point is binding under the doctrine of "direct estoppel." (*Rest.2d, Judgments* §26, Comment d; on direct estoppel (issue preclusion), see supra, §342.)

As in the merger cases (supra, §401 et seq.), the concept of the cause of action is significant and controlling. (See 47 *Am.Jur.2d* (2006 ed.), *Judgments* §478 et seq.) The plaintiff, despite introduction in a later action of new elements into the complaint, may be barred by a prior judgment for the defendant under the following circumstances:

(1) Where the same right or obligation (cause of action) is asserted, although a different remedy or type of relief is sought. (See *Papineau v. Security-First Nat. Bank of Los Angeles* (1941) 45 C.A.2d 690, 694, 114 P.2d 629; *Ideal Hardware & Supply Co. v. Department of Employment* (1952) 114 C.A.2d 443, 449, 250 P.2d 353; *Evans v. Horton* (1953) 115 C.A.2d 281, 284, 251 P.2d 1013; *Stafford v. Yerge* (1954) 129 C.A.2d 165, 171, 276 P.2d 649; 4 *Cal. Proc. (5th), Pleading*, §40 et seq.)

(2) Where the same cause of action is asserted, although the complaint is framed to present a different legal theory

of recovery. (*Panos v. Great Western Packing Co.* (1943) 21 C.2d 636, 134 P.2d 242; *Nealis v. Guidotti* (1951) 105 C.A.2d 10, 12, 232 P.2d 902; *Dryer v. Dryer* (1964) 231 C.A.2d 441, 447, 41 C.R. 839; 4 Cal. Proc. (5th), Pleading, §36 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



78 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

D. Judgment as Merger or Bar.

3. Judgment on Cross-Complaint.

7 *Witkin Cal. Proc. Judgm* § 411

[§ 411] Judgment on Cross-Complaint.

The case law on cross-claims was established by decisions dealing with the former counterclaim, which has been replaced by the cross-complaint. (See 5 *Cal. Proc.* (5th), *Pleading*, §1158.)

(1) *Judgment for Defendant.* A defendant who has a cause of action against the plaintiff may set it up by a cross-complaint in the plaintiff's action. If it is decided on the merits in favor of the defendant, the cause of action will be merged in the judgment. (See *Lamb v. Wahlenmaier* (1904) 144 C. 91, 94, 77 P. 765; *Rest.2d, Judgments* §21; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §501.)

In *Lynn v. Cable* (1950) 95 C.A.2d 696, 213 P.2d 521, the lessor brought an unlawful detainer action. By agreement, the issue of rent was tried, and the lessee was awarded damages for breach of the lease as an offset. *Held*, this judgment precluded (by merger) the present action by the lessee for damages for breach. (95 C.A.2d 699.) (See *Gaskill v. Wallace* (1939) 32 C.A.2d 354, 357, 89 P.2d 687.)

(2) *Judgment Against Defendant.* A judgment against the defendant on a cross-complaint asserted by the defendant is a bar to assertion of the same cause of action in a subsequent action. (See *Todhunter v. Smith* (1934) 219 C. 690, 695, 28 P.2d 916; *Safeco Ins. Co. of America v. Tholen* (1982) 117 C.A.3d 685, 698, 173 C.R. 23; *Rest.2d, Judgments* §23.)

In *Flickinger v. Swedlow Engineering Co.* (1955) 45 C.2d 388, 289 P.2d 214, a contractor sued a subcontractor for damages for breach of contract. The subcontractor counterclaimed for \$ 11,000 allegedly due on an account stated, based on work done under the contract. The judgment was that neither party take anything. Thereafter, the subcontractor sued the contractor and his surety for the \$ 11,000, this time setting it forth in the form of a claim for work performed instead of an account stated. *Held*, the amount claimed was a proper counterclaim and the final judgment on the merits was a bar. And, although the surety was not a party to the former action, it was entitled to avail itself of all defenses allowed to the principal. (45 C.2d 393.)

The distinguishable situation of a defendant's failure to plead by cross-complaint a cause of action arising out of the same transaction as that set forth in the complaint is fully covered elsewhere. (See 5 *Cal. Proc.* (5th), *Pleading*, §1177.)

SUPPLEMENT: [This section is current through the latest supplement]



79 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

D. Judgment as Merger or Bar.

4. Failure To Plead Equitable Defense.

7 *Witkin Cal. Proc. Judgm* § 412

[§ 412] Failure To Plead Equitable Defense.

It frequently happens that in a plaintiff's action on a contract or deed, the defendant has the traditionally "equitable" defenses of fraud or mistake. These may be both defenses and causes of action; i.e., they may be raised defensively or by cross-complaint in the plaintiff's action, or they may be the basis of independent actions for restitution after rescission or for reformation. (See 5 *Cal. Proc.* (5th), *Pleading*, §1108.) If the defendant fails to raise them in the plaintiff's action, is a judgment for the plaintiff a bar to a later action by the present defendant for affirmative relief?

Before the adoption of the codes, equitable defenses could not even be pleaded in actions at law. Under the code system, because they may be freely pleaded, these defenses should be subject to the rules of res judicata. Accordingly, the better view seems to be that, in jurisdictions that have abolished the law-equity distinction for pleading purposes, equitable causes of action not set up defensively are barred by a judgment against the defendant. (See *Billmeyer v. Plaza Bank of Commerce* (1995) 42 *C.A.4th* 1086, 1091, 50 *C.R.2d* 119 [trustee's postbankruptcy action against bank alleging lender liability was barred where debtor had failed to mention claims against bank in its bankruptcy case; it was immaterial that bankruptcy court had authorized subsequent state action and that trustee had not intended to conceal claims against bank]; *Conrad v. Bank of America* (1996) 45 *C.A.4th* 133, 149, 53 *C.R.2d* 336 [debtor's claims against bank in postbankruptcy fraud action were barred where debtor failed to list those claims in bankruptcy proceedings; following *Billmeyer*]; *Rest.2d, Judgments* §18; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §506; James 5th, §11.15.)

Early California decisions, misconceiving or unwilling to give full effect to the abolition of forms of action, took the position that the defendant need not plead the equitable cause of action defensively and is not barred by his or her failure to do so. (See *Hough v. Waters* (1866) 30 *C.* 309, 311; *Johnson v. Sun Realty Co.* (1934) 138 *C.A.* 296, 302, 32 *P.2d* 393 [citing *Hough*].) There is no reason for the retention of this outmoded rule. (On the problem of equitable defenses in the summary proceeding in unlawful detainer, see *infra*, §431.)

SUPPLEMENT: [This section is current through the latest supplement]



80 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

1. General Principle.

7 Witkin Cal. Proc. Judgm § 413

[§ 413] General Principle.

A second action between the same parties on a different cause of action is not precluded by a former judgment. (See *supra*, §§404, 407.) But the first judgment "operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." (*Todhunter v. Smith* (1934) 219 C. 690, 695, 28 P.2d 916.) This distinct aspect of the doctrine of res judicata was formerly called "estoppel by judgment." The first Restatement of Judgments used the term "collateral estoppel," and this term is now in common use. The Second Restatement refers to collateral estoppel as "issue preclusion." (Rest.2d, Judgments, Chap. 1, p. 1; *Rest.2d, Judgments* §27 et seq.; see *supra*, §336.)

Collateral estoppel is explored and applied in many cases. (See *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552, *infra*, §481; *Montana v. United States* (1979) 440 U.S. 147, 99 S.Ct. 970, 973, 59 L.Ed.2d 210, 216 [application against government]; *Allen v. McCurry* (1980) 449 U.S. 90, 101 S.Ct. 411, 420, 66 L.Ed.2d 308, 319 [where issue was previously decided against plaintiff in state court, he was not entitled to relitigate it in 42 U.S.C., §1983 action in federal court]; *United States v. Stauffer Chemical Co.* (1984) 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388; *Sutphin v. Speik* (1940) 15 C.2d 195, 202, 101 P.2d 497; *Zaragoza v. Craven* (1949) 33 C.2d 315, 321, 202 P.2d 73; *Pacific Mut. Life Ins. Co. of Calif. v. McConnell* (1955) 44 C.2d 715, 724, 285 P.2d 636, 2 Cal. Proc. (5th), *Jurisdiction*, §337; *Clark v. Leshner* (1956) 46 C.2d 874, 880, 299 P.2d 865, citing the text; *Perez v. San Bruno* (1980) 27 C.3d 875, 883, 168 C.R. 114, 616 P.2d 1287; *Griset v. Fair Political Practices Com.* (2001) 25 C.4th 688, 701, 107 C.R.2d 149, 23 P.3d 43, 9 Cal. Proc. (5th), *Appeal*, §853, citing the text; *Saunders v. New Capital for Small Businesses* (1964) 231 C.A.2d 324, 330, 333, 41 C.R. 703, citing the text; *Carey v. Cusack* (1966) 245 C.A.2d 57, 68, 54 C.R. 244, citing the text; *Berry v. Santa Barbara* (1967) 248 C.A.2d 438, 445, 56 C.R. 553; *Estate of Cates* (1971) 16 C.A.3d 1, 20, 93 C.R. 696; *Beverly Hills Nat. Bank v. Glynn* (1971) 16 C.A.3d 274, 283, 93 C.R. 907; *Wood v. Herson* (1974) 39 C.A.3d 737, 745, 114 C.R. 365; *Kingsbury v. Tevco* (1978) 79 C.A.3d 314, 318, 144 C.R. 773, citing the text; *Gurrola v. Los Angeles* (1984) 153 C.A.3d 145, 151, 152, 200 C.R. 157; *Lockwood v. Superior Court* (1984) 160 C.A.3d 667, 672, 206 C.R. 785, citing the text; *Barker v. Hull* (1987) 191 C.A.3d 221, 225, 236 C.R. 285, quoting the text; *Frommshagen v. Board of Supervisors of Santa Cruz* (1987) 197 C.A.3d 1292, 1299, 1301, 243 C.R. 390, citing the text; *Wittman v. Chrysler Corp.* (1988) 199 C.A.3d 586, 591, 245 C.R. 20; *Interinsurance Exchange of the Auto. Club of Southern Calif. v. Superior Court* (1989) 209 C.A.3d 177, 181, 257 C.R. 37, citing the text; *McClain v. Rush* (1989) 216 C.A.3d 18, 29,

264 C.R. 563, quoting the text; *Golden Cheese Co. v. Voss* (1991) 230 C.A.3d 727, 736, 281 C.R. 602, quoting the text; *Bell Gardens v. Los Angeles* (1991) 231 C.A.3d 1563, 1567, 283 C.R. 91; *Stolz v. Bank of America* (1993) 15 C.A.4th 217, 222, 19 C.R.2d 19; *Machado v. Superior Court* (2007) 148 C.A.4th 875, 886, 55 C.R.3d 902 [order disqualifying attorney from representing client precluded relitigation of same issue in subsequent case involving same attorney and same client].)

Application of the doctrine to particular types of cases has been the subject of considerable comment. (See 85 *Cal. L. Rev.* 479 [effect of stipulated reversals on collateral estoppel]; 95 *Harv. L. Rev.* 280 [actions in state and federal court]; 35 *San Diego L. Rev.* 509 [problems encountered in determining whether issue has been "actually litigated and determined"]; 28 *Stanf. L. Rev.* 709 [multiparty disputes]; 8 *U.S.F. L. Rev.* 74 [antitrust cases]; 94 *A.L.R.3d* 676 [judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa]; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §§466, 487 et seq.; on doctrine applied to criminal cases, see 1 *Cal. Crim. Law* (3d), *Defenses*, §188 et seq.; James 5th, §11.17 et seq; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §§466, 487 et seq.)

In limited civil cases governed by the Economical Litigation statutes, the doctrine is limited. (See *C.C.P.* 99 [judgment or final order is conclusive as to matter directly adjudicated between parties and successors in interest, but it does not operate as collateral estoppel in litigation with third parties]; 2 *Cal. Proc.* (5th), *Courts*, §256.)

Collateral estoppel need not be pleaded. (See *Ponce v. Tractor Supply Co.* (1972) 29 C.A.3d 500, 507, 105 C.R. 628.)

West's Key Number Digest, Judgment 634 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



81 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

2. Identity of Issue Litigated.

a. Requirement.

7 *Witkin Cal. Proc. Judgm § 414*

[§ 414] Requirement.

The effect of a judgment as collateral estoppel is confined to issues actually litigated. The defendant, for example, may elect to forego a defense to the demand in the first action rather than go to the effort and expense of producing evidence and witnesses on it. In the second action on a different claim, it may be feasible and desirable to make the defense, and it is reasonable to allow the defendant to do so. (See *Rest.2d, Judgments §27*, Comment e; *infra*, §415 et seq.)

Numerous cases, including the following, have discussed whether the issues to which collateral estoppel is alleged to apply were actually litigated in a prior action:

Powerine Oil Co. v. Superior Court (2005) 37 *C.4th* 377, 387, 33 *C.R.3d* 562, 118 *P.3d* 589 [judgment in prior writ proceeding, determining that primary insurers had no duty to indemnify insured under standard comprehensive general liability policy, did not preclude insured from arguing that other insurer had duty to indemnify under excess/umbrella policy; policy wording and coverage issues differed].

Department of Industrial Relations v. Seaboard Surety Co. (1996) 50 *C.A.4th* 1501, 1512, 58 *C.R.2d* 532 [collateral estoppel was not applicable to statute of limitations issue in second action, where first action was correctly decided on several grounds and thus identical limitations issue was not necessarily litigated].

Kelly v. Vons Cos. (1998) 67 *C.A.4th* 1329, 1335, 79 *C.R.2d* 763 [arbitrator's finding that grocery chain had closed trucking facility for valid economic reasons barred union's claim in subsequent tort action that chain had acted in bad faith; "economic reasons" issue was fully litigated in arbitration and was essential to completely resolve union's claims].

Bame v. Del Mar (2001) 86 *C.A.4th* 1346, 1362, 104 *C.R.2d* 183 [collateral estoppel did not bar plaintiff's action challenging municipal ordinance, even though city had obtained summary judgment in earlier action to declare ordinance constitutional and court had denied plaintiff's motion to intervene in that action; constitutionality of ordinance was decided in earlier action, but plaintiff's entitlement to refund if ordinance was unconstitutional was not; once Court of Appeal determined that ordinance was invalid, plaintiff was entitled to litigate refund claim].

Dawson v. Toledano (2003) 109 C.A.4th 387, 394, 134 C.R.2d 689 [collateral estoppel did not prevent attorney from denying that he committed legal malpractice, even though his client had been sanctioned for filing frivolous appeal; sanctions order was based at least in part on client's own misconduct and issue whether appeal is frivolous is not identical to issue whether attorney who pursues appeal that is ultimately adjudged to be frivolous has committed malpractice].

Le Parc Community Assn. v. Work. Comp. App. Bd. (2003) 110 C.A.4th 1161, 1174, 2 C.R.3d 408 [collateral estoppel did not preclude employee in workers' compensation action from establishing that defendant was his employer, even though employee and defendant had previously settled negligence action involving same accident; issue of employment by defendant was never litigated in negligence action].

Kilroy v. California (2004) 119 C.A.4th 140, 148, 14 C.R.3d 109 [federal court's determination that highway patrol officer's search of business was unconstitutional did not have preclusive effect in later civil rights action by business owner against officer and state; issue decided in federal proceeding (whether evidence must be suppressed because of deliberate and material omissions) was not identical to issue in later action (whether officer is entitled to qualified immunity because his conduct was objectively reasonable)].

David v. Hermann (2005) 129 C.A.4th 672, 683, 28 C.R.3d 622 [stipulated order appointing successor trustee did not collaterally estop trial court in later proceeding from determining whether initial trustee was guilty of wrongdoing; probate court in first proceeding never adjudicated allegations of wrongdoing].

Kemp Bros. Const. v. Titan Elec. Corp. (2007) 146 C.A.4th 1474, 1481, 53 C.R.3d 673 [determination of school district hearing officer that contractor had statutory grounds to substitute new subcontractor for subcontractor that had "made no reasonable effort to timely complete the work [contractor] could reasonably expect [subcontractor] to perform" did not have collateral estoppel effect in contractor's breach of contract action against subcontractor; issues were not identical and hearing officer did not necessarily decide whether subcontractor was in breach].

Yield Dynamics v. TEA Systems Corp. (2007) 154 C.A.4th 547, 582, 66 C.R.3d 1 [availability of attorneys' fees under asset agreement was not issue in prior arbitration concerning employment agreement between same parties].

SUPPLEMENT: [This section is current through the latest supplement]

The following are among the cases that discuss whether the issues to which collateral estoppel is alleged to apply were actually litigated in a prior action:

Hernandez v. Pomona (2009) 46 C.4th 501, 511, 94 C.R.3d 1, 207 P.3d 506 [judgment for defendants in federal civil rights action collaterally estopped plaintiff from later raising wrongful death claim in state court; both actions involved identical issue (whether police used reasonable care in applying deadly force)].

Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore (2008) 162 C.A.4th 1331, 1338, 76 C.R.3d 649 [probate court's order that law firm could not recover from estate fees for services rendered to administrator personally did not preclude firm's later attempt to obtain fees directly from administrator; whether administrator should be held personally liable for fees was never decided by probate court].

Plumley v. Mockett (2008) 164 C.A.4th 1031, 1048, 79 C.R.3d 822 [issue in manufacturer's tort action was whether salesperson misappropriated manufacturer's invention, whereas issue in salesperson's later action for malicious prosecution was whether manufacturer had reasonable cause to believe that salesperson misappropriated invention; therefore, findings from first action had no collateral estoppel effect in later action].

Mills v. U.S. Bank (2008) 166 C.A.4th 871, 895, 83 C.R.3d 146 [collateral estoppel did not prevent plaintiffs from litigating whether defendant bank was liable for plaintiffs' investment losses or for injuries they allegedly sustained when funds were mistakenly deposited into wrong account, even though earlier federal action had determined that plaintiffs were entitled to rescission of securities transaction; investment losses were not issue in earlier action and

federal court's findings did not address specific injuries alleged in second action].

Johnson v. GlaxoSmithKline (2008) 166 C.A.4th 1497, 1512, 83 C.R.3d 607 [federal court's denial of class certification did not have collateral estoppel effect in later state action against same defendant; class certification issue in federal court was materially different from issue of adequacy of representation presented in state court].

Chinese Yellow Pages Co. v. Chinese Overseas Marketing Service Corp. (2008) 170 C.A.4th 868, 886, 88 C.R.3d 250 [statement by bankruptcy court that judgment creditor was attempting to destroy judgment debtor's business did not have collateral estoppel effect in creditor's separate action against debtor; issue in separate action was whether creditor was entitled to collect attorneys' fees incurred in bankruptcy proceeding, which bankruptcy court did not consider].



82 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

2. Identity of Issue Litigated.

b. Determining Whether Issue Has Been Litigated.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 415

[§ 415] In General.

(1) *Meaning of "Issues Litigated."* The meaning of "issues litigated" (supra, §414) is far from clear, and a difficult problem faces the second court where the former judgment does not show on its face whether the particular issue was decided. (See James 5th, §11.18; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §493.) "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." (*C.C.P. 1911.*)

(2) *Burden of Proof on Party Asserting Defense of Collateral Estoppel.* Where, as is usual, more than one issue was involved, the burden of proof is on the party asserting the defense of collateral estoppel to show that this issue was adjudicated. (See *Emerson v. Yosemite Gold Mining & Milling Co.* (1906) 149 C. 50, 57, 85 P. 122; *Horton v. Goodenough* (1920) 184 C. 451, 460, 194 P. 34; *Quinn v. Litten* (1957) 148 C.A.2d 631, 633, 307 P.2d 90 [no collateral estoppel where issue previously litigated was not identical]; *Weak v. Weak* (1962) 202 C.A.2d 632, 634, 21 C.R. 9, citing the text [issues were not same]; *Solari v. Atlas-Universal Service* (1963) 215 C.A.2d 587, 599, 30 C.R. 407; *Saunders v. New Capital for Small Businesses* (1964) 231 C.A.2d 324, 330, 333, 41 C.R. 703, citing the text; *Carey v. Cusack* (1966) 245 C.A.2d 57, 68, 54 C.R. 244, citing the text; *Frazier v. Wasserman* (1968) 263 C.A.2d 120, 125, 69 C.R. 510; *Timmsen v. Forest E. Olson* (1970) 6 C.A.3d 860, 870, 86 C.R. 359; *Eichler Homes v. Anderson* (1970) 9 C.A.3d 224, 234, 87 C.R. 893; *Estate of Spirtos* (1973) 34 C.A.3d 479, 487, 109 C.R. 919, citing the text; *Hone v. Climatrol Industries* (1976) 59 C.A.3d 513, 529, 130 C.R. 770; *Casad v. Qualls* (1977) 70 C.A.3d 921, 927, 139 C.R. 243, citing the text; *Murphy v. Allstate Ins. Co.* (1978) 83 C.A.3d 38, 53, 54, 147 C.R. 565, citing the text; *Mattson v. Costa Mesa* (1980) 106 C.A.3d 441, 445, 164 C.R. 913; *Jackson v. Sacramento* (1981) 117 C.A.3d 596, 602, 172 C.R. 826; *Insurance Co. of North America v. Liberty Mut. Ins. Co.* (1982) 128 C.A.3d 297, 303, 180 C.R. 244, citing the text; *Harman v. Mono General Hosp.* (1982) 131 C.A.3d 607, 614, 182 C.R. 570 [status of hospital as public entity was not issue actually litigated in proceeding seeking relief from public entity claims statute]; *McMillin Dev. v. Home Buyers Warranty* (1998) 68 C.A.4th 896, 906, 80 C.R.2d 611 [trial court properly considered merits of plaintiff's argument that defendant had waived its right to arbitration, despite federal district court's decision to compel arbitration in related action involving same parties; defendant failed to meet burden of demonstrating that federal court had determined

waiver issue]; *Santa Clara Valley Trans. Authority v. Rea* (2006) 140 C.A.4th 1303, 1311, 45 C.R.3d 511 [court could not determine from incomplete record whether issue involving composition of bargaining unit had been litigated; party asserting that it had been previously litigated failed to carry burden of proof, and collateral estoppel did not apply]; *Rest.2d, Judgments* §27, Comment g; James 5th, §11.18; 17 *Loyola L.A. L. Rev.* 1085 [alternative grounds in collateral estoppel]; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §645; *infra*, §§417 et seq., 430 et seq.)

(3) *Effect of Affirmance of Judgment Based on Alternative Grounds.* It has been held that, where the judgment is based on alternative grounds or issues, and is affirmed generally on appeal, the estoppel will result as to all of the issues. (*Bank of America v. McLaughlin Land & Livestock Co.* (1940) 40 C.A.2d 620, 628, 105 P.2d 607; *Wall v. Donovan* (1980) 113 C.A.3d 122, 126, 169 C.R. 644; *Rest.2d, Judgments* §27, Comment o.)

In *Butcher v. Truck Ins. Exchange* (2000) 77 C.A.4th 1442, 92 C.R.2d 521, plaintiff insureds, who were facing an action for malicious prosecution, requested a defense from their insurer. The insurer refused to provide a defense, claiming that malicious prosecution coverage was not in its policy. Plaintiffs sued the insurer and its agent and produced evidence that the agent had misled them into believing that he had delivered a policy duplicating the coverage (including coverage for malicious prosecution) of plaintiffs' previous insurer, whose policy was not being renewed. Defendants moved for summary judgment, on the basis that a prior judgment in an action in federal court between plaintiffs and their previous insurer precluded plaintiffs' claim. The judgment in the federal action was based on two grounds: first, the policy's malicious prosecution provision did not cover the malicious prosecution claim against plaintiffs, and second, the offense occurred outside the plaintiffs' policy period. That federal judgment was affirmed on appeal, when the appellate court upheld the second ground and declined to address the first. The trial court here determined that the federal judgment was nevertheless conclusive against plaintiffs as to the first ground. *Held*, reversed. If a court of first instance makes its judgment on alternative grounds and the reviewing court affirms on only one of those grounds, declining to consider the other, the second ground is no longer conclusively established. (77 C.A.4th 1446, 1447.)

(a) In this situation there are two lines of cases. One line, represented by *Moran Towing & Trans. Co. v. Navigazione Libera Triestina, S.A.* (2d Cir. 1937) 92 F.2d 37, follows the rule that the appellate court in the prior action determines the preclusive effect of its judgment, i.e., the judgment is conclusive on the first ground. The other line, represented by *McLaughlin Land & Livestock Co.* holds that it is the judgment of the trial court, which is affirmed, that governs the preclusive effect, i.e., the judgment is conclusive on both grounds. (77 C.A.4th 1456.) The *Moran Towing* court reasoned that to treat as controlling the findings of a trial court when the appellate court upsets or disregards them and affirms on different grounds "furnishes parties to other litigations affected by the decision a false guide," and it characterized such a result as "the height of unreason." (77 C.A.4th 1457.) The *McLaughlin* court, on the other hand, reached its decision without considering the well-stated arguments of *Moran Towing* and relied in part on a rule stated in *Corpus Juris* that was completely abandoned in *Corpus Juris Secundum*. (77 C.A.4th 1459.)

(b) "We conclude the reasoning of the *McLaughlin* court has not withstood the test of time, and it would be unwise to follow a rule that looks only to the judgments, without taking account of the reasons for those judgments as stated in the appellate courts' opinions. ... We are persuaded that *Moran Towing* announces the better rule." (77 C.A.4th 1460.) (See *Newport Beach Country Club v. Founding Members of the Newport Beach Country Club* (2006) 140 C.A.4th 1120, 1126, 45 C.R.3d 207 [trial court judgment that decides case on two alternate grounds and is affirmed on one ground is binding only on ground addressed by appellate court; following *Butcher* and declining to follow *People v. Skidmore* (1865) 27 C. 287, and *McLaughlin Land & Livestock Co.*].)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Effect of Affirmance of Judgment Based on Alternative Grounds.* See *Zevnik v. Superior Court* (2008) 159 C.A.4th 76, 83, 70 C.R.3d 817 [facts determined by trial court on merits of motion to disqualify attorneys did not have collateral estoppel effect in later malpractice action; appellate court had affirmed trial court's denial of motion to disqualify on laches ground, without reviewing merits; following *Butcher v. Truck Ins. Exchange* (2000) 77 C.A.4th 1442, 92 C.R.2d 521, text, p. 1058, and *Newport Beach Country Club v. Founding Members of the Newport Beach Country Club* (2006)

140 C.A.4th 1120, 45 C.R.3d 207, text, p. 1059].



83 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

2. Identity of Issue Litigated.

b. Determining Whether Issue Has Been Litigated.

2. Nature of First Proceeding.

7 *Witkin Cal. Proc. Judgm* § 416

[§ 416] Nature of First Proceeding.

"When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section. An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for summary judgment ... , a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict. A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof." (*Barker v. Hull* (1987) 191 C.A.3d 221, 226, 236 C.R. 285 [quoting *Rest.2d, Judgments* §27, Comment d].) It is not necessary that "an exhaustive adversarial hearing" be held on a motion to vacate in order to preclude relitigation of an issue. "[W]e think the appropriate principle is that, while the party urging the estoppel must prove that the issue was actually litigated and that evidence was not *restricted*, he need not establish that any particular type of evidence, such as oral testimony, was presented." (*Barker v. Hull, supra*, 191 C.A.3d 226.) (See *Betyar v. Pierce* (1988) 205 C.A.3d 1250, 1254, 252 C.R. 907 [issue was not litigated]; *Briggs v. Lawrence* (1991) 230 C.A.3d 605, 611, 281 C.R. 578, citing the text [same].)

In *Groves v. Peterson* (2002) 100 C.A.4th 659, 123 C.R.2d 164, a judgment debtor brought an independent action in equity to set aside a prior default judgment against him, on the grounds that he had not been properly served in first action, even though trial court in first action had denied his motion to set aside default judgment. *Held*, the second action was not barred by collateral estoppel. The motion procedure in the first action did not involve all aspects of full litigation and was determined on declarations without the presentation of oral testimony. (100 C.A.4th 667 [criticizing *Barker* to extent that it requires party to request opportunity to gather more evidence].)

In *Ruffalo v. Patterson* (1991) 234 C.A.3d 341, 285 C.R. 647, plaintiff had been represented by defendant attorney in her dissolution proceeding. In this malpractice action, she alleged that, in the dissolution proceeding, defendant negligently instructed her to characterize certain real property as community and failed to raise the issue of her separate property interest. The trial judge gave judgment for defendant on the ground that the identical issue--community or separate character of the property--had been adjudicated in the dissolution proceeding. *Held*, reversed; there was no collateral estoppel. Plaintiff was not seeking a redetermination of the character of the property; her claim was that she

was precluded by her attorney's negligence from litigating its character. (234 C.A.3d 344.) "To hold otherwise would be to rule that where an attorney's negligence has caused a court to make an erroneous adjudication of an issue, the fact that the court has made that adjudication absolves the attorney of all accountability and responsibility for his negligence. That cannot be and is not the rule." (234 C.A.3d 344.)

National Union Fire Ins. Co. v. Lynette C. (1994) 27 C.A.4th 1434, 33 C.R.2d 496, involved a declaratory relief action by plaintiff insurer to determine insurance coverage for a foster parent who negligently failed to protect a foster child from sexual molestation by the other foster parent. The issues of liability and damages were decided in an uncontested proceeding agreed to by the insureds and various counsel in exchange for a nondisclosure agreement and a covenant not to execute against any of the insureds' personal assets. The minor's counsel outlined the agreement on the record and stated without objection that the parties would not have to relitigate liability and damages in the declaratory relief action. The trial judge found for the minor and determined damages. In the declaratory action, the judge ruled that specific insurance liability policies were available to satisfy the judgment for negligent supervision and that plaintiff was bound by the judgment in the uncontested proceeding. *Held*, affirmed.

(a) The "actual trial" requirement of a standard "no action" clause (see *Ins.C. 11580(b)(2)*; 2 *Summary* (10th), *Insurance*, §302) does not require an adversarial proceeding. It is satisfied if there has been (1) an independent adjudication of facts based on an evidentiary showing, and (2) a process that does not create the potential for abuse, fraud, or collusion. (27 C.A.4th 1449.) The requirement was satisfied here because the uncontested proceeding was an independent adjudication before the trial judge in which evidence was presented and evaluated. Further, the process leading to agreement for an uncontested proceeding in exchange for the covenant and the nondisclosure agreement involved full and open discussion among counsel. (27 C.A.4th 1450, 1451.)

(b) The "actual trial" test applies to plaintiff's argument that it is not collaterally estopped from relitigating the liability and damages determined in the uncontested proceeding. A party will be collaterally estopped only if the issues in both actions are identical, there was a final judgment on the merits, and the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication. (27 C.A.4th 1452.)

(c) The uncontested proceeding was agreed to in exchange for the covenant and the nondisclosure agreement from which plaintiff stood to gain. The proceeding involved an independent adjudication of facts based on an evidentiary showing that plaintiff never challenged on the basis of fraud or collusion. There was substantial evidence showing that plaintiff participated in a significant way in the agreement encompassing the nondisclosure accord and in the uncontested proceeding. Finally, the minor's counsel noted on the record without objection that the judgment would be binding. Thus, plaintiff was able to further its interests in the uncontested proceeding, "satisfying the requirements of community of interest and adequate representation, and should reasonably have expected to be bound by the judgment in that action." (27 C.A.4th 1453.)

In *Wright v. Ripley* (1998) 65 C.A.4th 1189, 77 C.R.2d 334, plaintiff lawyer sued a former client and her insurer for malicious prosecution following defendants' unsuccessful legal malpractice action against plaintiff. Although plaintiff had been granted summary judgment in the legal malpractice action, his motion for sanctions under *C.C.P. 128.5* had been denied on the ground that bad faith was not established. Subsequently, in the malicious prosecution action, the trial court granted judgment on the pleadings for defendants on the basis of collateral estoppel, reasoning that the issue of malice had been conclusively determined in the legal malpractice action when plaintiff's motion for sanctions in that action was denied. *Held*, reversed.

(a) Issues resolved on a routine sanctions motion are not entitled to preclusive effect in a later action for malicious prosecution. (65 C.A.4th 1191.) This result serves judicial economy; most sanction motions can be resolved summarily and the party seeking sanctions should be encouraged to pursue that option rather than pushed into seeking a full evidentiary hearing. (65 C.A.4th 1194.)

(b) Moreover, if collateral estoppel effect were given to the denial of sanctions, it would also have to be given when

they are granted, which would force lawyers against whom sanctions are sought to exercise their full due process rights in fighting the charges. (65 C.A.4th 1194.)

(c) *C.C.P. 128.5* was not intended to replace actions for malicious prosecution. Rather than compensating the wronged litigant, *C.C.P. 128.5* helps a court to manage its calendar and expedite litigation. "Thus, a court's decision whether to award sanctions may be influenced by factors extrinsic to a malicious prosecution case." (65 C.A.4th 1195.)

(d) Because the sanctions proceeding is of a summary nature, it is not particularly burdensome and the complaining party will still be entitled to only one opportunity to fully litigate the claim that the underlying action against him or her was malicious. (65 C.A.4th 1196.)

SUPPLEMENT: [This section is current through the latest supplement]



84 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

2. Identity of Issue Litigated.

b. Determining Whether Issue Has Been Litigated.

3. Entire Record Is Admissible.

7 *Witkin Cal. Proc. Judgm* § 417

[§ 417] Entire Record Is Admissible.

(1) *In General*. The entire record in the first action may be admitted for the purpose of determining whether the issue was raised by pleadings or otherwise and was decided by the judgment. (See *Rest.2d, Judgments* §27, Comment f; James 5th, §11.18; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §646 et seq.)

(2) *Showing Was Sufficient*. (See *Sutphin v. Speik* (1940) 15 C.2d 195, 205, 101 P.2d 497, *infra*, §419; *Saunders v. New Capital for Small Businesses* (1964) 231 C.A.2d 324, 333, 41 C.R. 703; *Rynsburger v. Dairymen's Fertilizer Cooperative* (1968) 266 C.A.2d 269, 276, 72 C.R. 102; *First N.B.S. Corp. v. Gabrielsen* (1986) 179 C.A.3d 1189, 1194, 1195, 225 C.R. 254, citing the text; *Frommhagen v. Board of Supervisors of Santa Cruz* (1987) 197 C.A.3d 1292, 1301, 243 C.R. 390, and footnote 3, citing the text.)

(3) *Showing Was Insufficient*. (See *United States v. International Bldg. Co.* (1953) 345 U.S. 502, 73 S.Ct. 807, 97 L.Ed. 1182; *Wolcott v. Salyer* (1933) 217 C. 225, 17 P.2d 1000; *Blumenthal v. Maryland Cas. Co.* (1932) 119 C.A. 563, 567, 6 P.2d 965; *Hardy v. Rosenthal* (1934) 2 C.A.2d 442, 445, 38 P.2d 412; *Babcock v. Babcock* (1944) 63 C.A.2d 94, 98, 146 P.2d 279; *Los Angeles v. Continental Corp.* (1952) 113 C.A.2d 207, 218, 248 P.2d 157; *Estate of Spinosa* (1953) 117 C.A.2d 364, 369, 255 P.2d 843; *De Campos v. State Comp. Ins. Fund* (1954) 122 C.A.2d 519, 532, 265 P.2d 617 [transcript of prior Industrial Accident Commission hearing was examined]; *Hone v. Climatrol Industries* (1976) 59 C.A.3d 513, 529, 130 C.R. 770; *Casad v. Qualls* (1977) 70 C.A.3d 921, 139 C.R. 243; *Jackson v. Sacramento* (1981) 117 C.A.3d 596, 172 C.R. 826; *Schaefer/Karpf Productions v. CNA Ins. Cos.* (1998) 64 C.A.4th 1306, 1314, 76 C.R.2d 42.)

SUPPLEMENT: [This section is current through the latest supplement]



85 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

2. Identity of Issue Litigated.

b. Determining Whether Issue Has Been Litigated.

4. Extrinsic Evidence.

7 *Witkin Cal. Proc. Judgm* § 418

[§ 418] Extrinsic Evidence.

(1) *In General*. "For purposes of applying collateral estoppel, evidence extrinsic to the judgment roll may be used to ascertain what issues were determined in the former action." (*Southwell v. Mallery, Stern & Warford* (1987) 194 C.A.3d 140, 144, 239 C.R. 371 [reporter's transcript setting forth findings and rendition of judgment by trial judge in former action].)

(2) *Trial Judge's Opinion*. The opinion of the trial judge in the prior action is relevant extrinsic evidence that may be examined in determining the scope of the judgment. In *Tevis v. Beigel* (1957) 156 C.A.2d 8, 319 P.2d 98, the president and director of a corporation contracted to buy goods from the corporation for a private business at lower prices than those charged other customers. In the first action for declaratory relief by the president and his partner against the corporation, the corporation asserted the defense of invalidity of the contract, and the judge granted a nonsuit. In this second action by the corporation against the president and his partner to recover profits made under the contract, the judgment of nonsuit was res judicata on the invalidity of the contract. Although there were no findings and the judgment entry gave no indication of the ground relied on, the judge's oral opinion was explicit on the point. (156 C.A.2d 14.) (See *Carroll v. Puritan Leasing Co.* (1978) 77 C.A.3d 481, 491, 492, 143 C.R. 772; *McClain v. Rush* (1989) 216 C.A.3d 18, 28, 264 C.R. 563, quoting the text; *Stolz v. Bank of America* (1993) 15 C.A.4th 217, 222, 19 C.R.2d 19, 3 *Cal. Proc.* (5th), *Actions*, §366 [plaintiff was bound by trial judge's determination in unrelated case that six prior cases prosecuted by plaintiff met statutory definition of vexatious litigant]; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §646.)

(3) *Reviewing Court's Opinion*. The opinion of the reviewing court in the prior case is likewise relevant. Thus, in *Abbott v. Western Nat. Indem. Co.* (1958) 165 C.A.2d 302, 331 P.2d 997, the victim of plaintiff's battery obtained compensatory and punitive damages in an action in Hawaii, and the judgment was affirmed by the Hawaii Supreme Court. In this action against his insurer on a comprehensive liability policy, the insurer set up the defense of the exclusion clause for losses intentionally caused. *Held*, the Hawaii judgment conclusively determined against plaintiff that the loss was intentionally caused and the policy did not cover it. (165 C.A.2d 304.) (See *Mayer v. C.W. Driver* (2002) 98 C.A.4th 48, 64, 120 C.R.2d 535 [trial court finding that was expressly disapproved on appeal would not have collateral estoppel effect in later litigation].)

(4) *Other Evidence.* A recital of the trial judge and a declaration of counsel were determinative in *Talman v. Talman* (1964) 229 C.A.2d 39, 39 C.R. 863. In 1952, defendant wife received an interlocutory divorce decree incorporating a property settlement agreement. In 1960, plaintiff husband, on an order to show cause, sought modification of the support provisions. Defendant filed a motion to dismiss for lack of jurisdiction to modify because the agreement was integrated. The court's minute order read "motion for modification is denied." No appeal was taken. In 1963, plaintiff again sought modification on an order to show cause. Defendant again filed a motion to dismiss, on two grounds: integrated nonmodifiable agreement and res judicata. Defendant's attorney filed a declaration showing that the issue of nonmodifiable integrated agreement was argued in chambers at the 1960 hearing, and that the judge decided that it was nonmodifiable; hence that the "denial" was really a "dismissal" on jurisdictional grounds. This time the court filed an order of dismissal on grounds of no jurisdiction to modify an integrated agreement and also recited that the former order to show cause was "dismissed" on that ground. *Held*, affirmed. The same trial judge heard both motions, and the unchallenged declaration of defendant's attorney, coupled with the judge's own recital in the second order, disclosed his intention in deciding the first order. This was proper extrinsic evidence to construe the uncertain order. (229 C.A.2d 43.)

An arbitrator's affidavit is admissible to show what matters were submitted for decision and considered by the arbitrator in making an award. (See *Sartor v. Superior Court* (1982) 136 C.A.3d 322, 327, 187 C.R. 247 [summary judgment was ordered where judgment confirming award determined issue involved in present action].)

SUPPLEMENT: [This section is current through the latest supplement]



86 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

2. Identity of Issue Litigated.

b. Issues Distinguished From Legal Theories.

7 *Witkin Cal. Proc. Judgm* § 419

[§ 419] Issues Distinguished From Legal Theories.

Despite the established principle that collateral estoppel results only as to issues actually litigated (*supra*, §414), it is often said that a judgment is binding as to all matters that were raised or that might have been raised. (See *Price v. Sixth Dist. Agricultural Assn.* (1927) 201 C. 502, 511, 258 P. 387.) Is this latter statement incorrect as applied to subsequent actions on a different cause of action? The conflict appears to be largely one of expression, which may be resolved if "issues" is given a reasonable meaning. Clearly, a former judgment is not a collateral estoppel on issues that might have been raised but were not; just as clearly, it is a collateral estoppel on issues that were raised, even though some factual matters or legal arguments that could have been presented were not. (See *Bleeck v. State Bd. of Optometry* (1971) 18 C.A.3d 415, 429, 95 C.R. 860, quoting the text; *Rest.2d, Judgments* §27, Comment e; James 5th, §11.18; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §493.)

This distinction is made in *Sutphin v. Speik* (1940) 15 C.2d 195, 101 P.2d 497. Defendant had a lease to drill for oil, and was producing from two wells. Plaintiff sued and received judgment determining his right to a 5% royalty interest in the total production of oil from the premises. The present action was later filed to recover royalties accruing after the entry of the judgment. Defendant alleged that one of the wells had in fact been "whipstocked" into state-owned tidelands (trespass by slant drilling), and that since the prior judgment, he had obtained a right to drill there from the state. He contended that plaintiff's rights, determined in the first action, did not include a share in the production of the well to which he had obtained this new title. *Held*, the first judgment was conclusive on plaintiff's right to the 5% royalty interest from that well.

The issue was not the source of the oil but rather plaintiff's right to 5% of the production of two wells, and the first judgment, rightly or wrongly, determined that issue in favor of the plaintiff. Where the one well was bottomed, whether defendant was legally or illegally taking the oil, and what rights he later acquired from the state, were not new issues. "Defendant has simply offered another legal theory by which the *same issue* might be differently decided. If he may have a new trial of the issue of right to the production of the oil from these wells because of the new argument that the source of the oil must be considered, then it would seem that in subsequent actions he can raise a 'new issue' as to the title of A, B, C, or other possible claimants in addition to the state. In short, defendant's contention is that though the prior judgment determined that plaintiff had a right to a specified percentage of the production of oil from any wells on

certain land, plaintiff may be compelled to relitigate that right whenever defendant can discover a new theory upon which to attack it. This proposition is without support in principle or authority." (15 C.2d 205.)

The same idea was expressed in *Price* as follows: "Appellants ... seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated. But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result." (201 C. 511.) (See *Caminetti v. Board of Trustees of Jackson Union High School Dist.* (1934) 1 C.2d 354, 356, 34 P.2d 1021; *Estate of Keet* (1940) 15 C.2d 328, 334, 100 P.2d 1045.)

Later decisions are to the same effect. "[E]ven though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination." (*Pacific Mut. Life Ins. Co. of Calif. v. McConnell* (1955) 44 C.2d 715, 724, 285 P.2d 636, 2 Cal. Proc. (5th), *Jurisdiction*, §337 [following *Sutphin* and *Caminetti* line of cases and disapproving some others]; *Kronkright v. Gardner* (1973) 31 C.A.3d 214, 216, 107 C.R. 270; *Evans v. Celotex Corp.* (1987) 194 C.A.3d 741, 746, 238 C.R. 259, *infra*, §460; *Frommhagen v. Board of Supervisors of Santa Cruz* (1987) 197 C.A.3d 1292, 1301, 243 C.R. 390; *Takahashi v. Board of Education of Livingston Union School Dist.* (1988) 202 C.A.3d 1464, 1481, 249 C.R. 578; *Interinsurance Exchange of the Auto. Club of Southern Calif. v. Superior Court* (1989) 209 C.A.3d 177, 182, 257 C.R. 37, quoting *Sutphin*; *California Coastal Com. v. Superior Court* (1989) 210 C.A.3d 1488, 1499, footnote 8, 258 C.R. 567, citing the text; *Goldberg v. Frye* (1990) 217 C.A.3d 1258, 1264, 266 C.R. 483 [citing *Sutphin* and *Packham*]; *Wimsatt v. Beverly Hills Weight Loss Clinics Int.* (1995) 32 C.A.4th 1511, 1517, 38 C.R.2d 612, *infra*, §440, citing the text; *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 C.A.4th 32, 48, 41 C.R.2d 393 [earlier decision upholding local rent control ordinance against challenge based on taking of property did not have collateral estoppel effect in later action challenging amendment to ordinance on preemption grounds]; *Warga v. Cooper* (1996) 44 C.A.4th 371, 378, 51 C.R.2d 684, *supra*, §407 [citing *Sutphin*]; *In re Marriage of Mason* (1996) 46 C.A.4th 1025, 1028, 54 C.R.2d 263; *Border Business Park v. San Diego* (2006) 142 C.A.4th 1538, 1566, 49 C.R.3d 259, quoting the text [developer's contentions about applicability of Government Claims Act to its breach of contract claim could have been asserted in its opposition to city's demurrer in prior action and thus were precluded in later action].)

In *Clark v. Leshner* (1956) 46 C.2d 874, 299 P.2d 865, where the defense of collateral estoppel was rejected, the court, citing the text and the *Sutphin* and *McConnell* cases, said: "It is not an easy rule to apply, for the term 'issue' as used in this connection is difficult to define, and the pleadings and proof in each case must be carefully scrutinized to determine whether a particular issue was raised even though some legal theory, argument or 'matter' relating to the issue was not expressly mentioned or asserted." (46 C.2d 880.)

SUPPLEMENT: [This section is current through the latest supplement]



87 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

3. Illustrations of Collateral Estoppel.

a. Contract Actions.

7 *Witkin Cal. Proc. Judgm* § 420

[§ 420] Contract Actions.

Where rights or obligations under a contract are severable, and separate causes of action arise thereunder, successive actions can be brought and the prior judgments will not constitute a merger or bar. (See *supra*, §§404, 408.) And a former defendant may, as a plaintiff, set forth a different cause of action in an independent action. But often there will be issues common to all the actions, and the determination of these issues in a prior action will be res judicata in later actions. (See *Rest.2d, Judgments* §27, Comment d; *Bingham v. Kearney* (1902) 136 C. 175, 177, 68 P. 597 [vendor prevailed in first action to forfeit land for nonpayment of installments; validity of contract, as against claim of fraud, was binding in later action by purchaser to rescind]; *Koehler v. Holt Mfg. Co.* (1905) 146 C. 335, 337, 80 P. 73; *Sutphin v. Speik* (1940) 15 C.2d 195, 201, 101 P.2d 497, *supra*, §419; *Long v. West Coast Life Ins. Co.* (1940) 16 C.2d 19, 23, 104 P.2d 646; *Legg v. United Benefit Life Ins. Co. of Omaha* (1960) 182 C.A.2d 573, 580, 6 C.R. 73; *Smith v. Golden Eagle Ins. Co.* (1999) 69 C.A.4th 1371, 82 C.R.2d 300 [plaintiff's claim of breach of settlement agreement was collaterally estopped by trial court's finding in earlier personal injury action that no settlement had been reached between parties]; 35 A.L.R.3d 874 [res judicata effect of judgment in action on express contract for labor or services on subsequent action on implied contract, or vice versa].)

In *Denio v. Huntington Beach* (1946) 74 C.A.2d 424, 168 P.2d 785, the first action by attorneys alleging wrongful discharge was for fees (measured by royalties) due under a contract of employment. They were successful, and later brought this second action for additional fees due from royalties accrued after the first judgment. *Held*, the validity and binding effect of the employment contract was necessarily determined in the former action to recover under it. Hence, defendant could not raise the defenses of ultra vires, failure of consideration, or fraud. (74 C.A.2d 431.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Shopoff & Cavallo LLP v. Hyon* (2008) 167 C.A.4th 1489, 1516, 85 C.R.3d 268 [finding in earlier action, that agreement between provider of attorney referrals and client for whom provider found attorney was illegal and unenforceable, had collateral estoppel effect in provider's later action to recover share of proceeds from litigation in which client was successful; parties and issues were identical and judgment in first action was final; others who sought to recover share of proceeds were not similarly precluded, however, because they were not parties to earlier action or to

illegal agreement].



88 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

3. Illustrations of Collateral Estoppel.

b. Tort Actions.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 421

[§ 421] In General.

An automobile collision gives rise to distinct causes of action for personal injuries or property damage by the respective drivers or owners. (See 4 *Cal. Proc.* (5th), *Pleading*, §50.) After the first action by the plaintiff against the defendant, there may be a second action by the former defendant against the former plaintiff. However, the issues of negligence and comparative negligence are the same, and the judgment in the first action will be conclusive on those issues in the second action. (See *Todhunter v. Smith* (1934) 219 C. 690, 694, 28 *P.2d* 916 [decided on basis of former contributory negligence defense].)

The same is true where the plaintiff first sues for property damages and later files a separate action on a distinct cause of action for personal injuries (see 4 *Cal. Proc.* (5th), *Pleading*, §54). A judgment against the plaintiff in the first action is not a bar (see *supra*, §407), but is a collateral estoppel on the issues of negligence or comparative negligence. (See *Pratt v. Vaughan* (1934) 2 *C.A.2d* 722, 724, 38 *P.2d* 799 [decided on basis of former contributory negligence defense].)

If a husband and wife sue for personal injuries, and judgment goes against them, this is no bar to a subsequent action by one of them for wrongful death if the other dies from the injuries; the causes of action are distinct. However, the former judgment is a conclusive determination against the surviving spouse on the issues that establish liability. (*Secrest v. Pacific Elec. Ry. Co.* (1943) 60 *C.A.2d* 746, 749, 141 *P.2d* 747; see *Zaragosa v. Craven* (1949) 33 *C.2d* 315, 321, 202 *P.2d* 73, *infra*, §456; 6 *Summary* (10th), *Torts*, §1377 et seq.; cf. *Rest.2d, Judgments* §46(1); 26 *A.L.R.4th* 1264 [when judgment in favor of or adverse to injured person bars action for person's death].)

In *Martinez v. De Los Rios* (1960) 187 *C.A.2d* 28, 9 *C.R.* 326, an action was brought against B Co. and D for intentional injury to property, and the trial court gave judgment for the plaintiff for compensatory and punitive damages. B Co. paid in full, and D, the other tortfeasor, then sought by motion to have an entry of satisfaction of judgment. B Co. resisted, contending that it had a right of contribution from D. *Held*, the right of contribution only exists between negligent tortfeasors (see 5 *Summary* (10th), *Torts*, §107), and the judgment awarding punitive damages was a conclusive determination that the parties were wilful wrongdoers. (187 *C.A.2d* 31.)

In *Klinell v. Shirey* (1963) 223 C.A.2d 239, 35 C.R. 901, an original action was brought by defendant contractor against plaintiff owner, plaintiff's land was attached, and plaintiff prevailed in the action. Then: (a) Plaintiff filed an action in the municipal court against the surety on the attachment bond, alleging damages of over \$ 9,000, but praying for the then maximum of municipal court jurisdiction (\$ 3,000) because the bond limit was only \$ 1,390. Judgment was for \$ 949.46 plus costs of \$ 15.55, and was satisfied. (b) While the surety action was pending, plaintiff brought a second action on the distinct cause of action for wrongful attachment, against defendant contractor and his attorneys, and received judgment for damages of \$ 8,879.04. The municipal court judgment was entered during the second action, but the trial judge refused to give it effect as a collateral estoppel. *Held*, reversed. Plaintiff's theory, that the issues were different because the surety action was based on contract and the second action was in tort, was rejected. An action on an attachment bond is not a contract action for breach; the surety's liability was fixed by former C.C.P. 539 (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §224), not by C.C. 3300 (measure of damages for breach of contract; see 1 *Summary* (10th), *Contracts*, §869 et seq.). The measure of damages in both actions was substantially the same. (223 C.A.2d 244.)

In *Vezina v. Continental Cas. Co.* (1977) 66 C.A.3d 665, 136 C.R. 198, the issue whether defendant driver of an automobile was acting in the scope of his employment at the time of the accident was decided adversely to the plaintiff in a first action against the employee and employer. The determination was held binding in a second action against the insurer of the employer. (66 C.A.3d 670.) (See *Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 C.3d 903, 910, 911, 226 C.R. 558, 718 P.2d 920 [following *Vezina*; determination in tort action that driver was not employee of insured precluded relitigation of issue in insured's subsequent declaratory relief action against insurer].)

In *Ponce v. Tractor Supply Co.* (1972) 29 C.A.3d 500, 105 C.R. 628, plaintiff was injured in a collision with a vehicle owned and operated by defendant B, allegedly acting as the employee of defendant T Co. Defendant B defaulted, and, after a hearing, judgment was entered against him in the sum of \$ 150,000. At the trial, judgment on the verdict against T Co. was in the sum of \$ 180,000. T Co. moved under C.C.P. 663 to vacate the judgment and enter judgment of \$ 150,000, on the theory that the prior default judgment against the employee constituted a limit on the amount recoverable against the employer. The trial judge denied the motion. *Held*, judgment modified to reduce it to \$ 150,000. Although no California authority was found, the rule established in other jurisdictions was followed. The damages awarded against the primary tortfeasor in the prior judgment determines the *upper limit* of an award against the employer; the employer, however, may seek to show that the damages suffered were actually less than that. (29 C.A.3d 505, 507.)

A number of additional decisions are illustrative:

Tushinsky v. Arnold (1987) 195 C.A.3d 666, 672, 241 C.R. 103 [determination in malicious prosecution action that wife "was the sole proximate cause" of child molestation charge against husband precluded relitigation of issue in wife's legal malpractice action alleging that she acted on attorney's advice].

Lyons v. Security Pac. Nat. Bank (1995) 40 C.A.4th 1001, 1016, 48 C.R.2d 174 [cosignatory on promissory note was barred, in action for conspiracy against holder of note and debtors on note, from relitigating validity and superiority of holder's liens where that issue had been fully litigated in previous proceedings with respect to third-party claim].

Roos v. Red (2005) 130 C.A.4th 870, 878, 30 C.R.3d 446 [bankruptcy court's finding in dischargeability proceeding that defendant acted wilfully and maliciously in causing car accident precluded defendant from relitigating his liability in later state court wrongful death action, even though defendant had no right to jury trial in bankruptcy proceeding].

SUPPLEMENT: [This section is current through the latest supplement]

See *Burdette v. Carrier Corp.* (2008) 158 C.A.4th 1668, 1687, 71 C.R.3d 185 [former employee was collaterally estopped from asserting in state action that fellow employees defamed him; defamation claim had been decided against employee in prior federal action]; 36 *Pepperdine L. Rev.* 715 [critique of issue preclusion in mass tort litigation].



89 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

3. Illustrations of Collateral Estoppel.

b. Tort Actions.

2. Where Indemnity Is Sought.

7 *Witkin Cal. Proc. Judgm* § 422

[§ 422] Where Indemnity Is Sought.

(1) *In General.* In a number of situations, the plaintiff is entitled to recover from a defendant tortfeasor, but the liability of the latter is regarded as only secondary, and the defendant may be entitled to bring a subsequent action for indemnity against a third person whose liability is regarded as primary. (See 5 *Summary* (10th), *Torts*, §112 et seq.)

These situations may give rise to problems of collateral estoppel because the nature of the wrongful conduct of the defendant tortfeasor (indemnitee) and the third party primarily liable (indemnitor) may be litigated and determined in the first action. (See *Freightliner Corp. v. Rockwell-Standard Corp.* (1969) 2 *C.A.3d* 115, 118, 82 *C.R.* 439, *infra*, §455, citing the text; *Martin v. Los Angeles* (1996) 51 *C.A.4th* 688, 699, 700, 59 *C.R.2d* 303, *infra*, §455 [jury's determination in wrongful death action that county was 13% liable for plaintiffs' injuries was binding in cross action for equitable indemnity involving county and other tortfeasors, even though jury's special verdict was phrased in terms of "causation" instead of "fault"]; *Rest.2d, Judgments* §§57, 58; James 5th, §11.30; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §605 et seq.)

In *King v. Timber Structures of Calif.* (1966) 240 *C.A.2d* 178, 49 *C.R.* 414, a company engaged a general contractor to construct a building, and the general contractor agreed to indemnify the company. The general contractor engaged a subcontractor to produce and erect roof trusses, and the subcontractor agreed to indemnify the general contractor. The roof collapsed, injuring the general contractor's employees who recovered from the company, a third-party tortfeasor. Two indemnity actions followed: (1) The company sued the general contractor for the amount paid out and the costs of defending the action by the employees. (2) The general contractor cross-complained against the subcontractor; his motion for severance was granted and the cross-complaint was tried separately. In the first trial, the company received judgment against the general contractor, with findings that the general contractor had been guilty of negligence in installing trusses of inferior quality without required bracing, in violation of an ordinance, and also in failing to take proper precautions. No finding was made whether the general contractor's negligence was active or passive, because the only issues raised were negligence and contributory negligence, and the findings and judgment expressly reserved the issues raised by the cross-complaint. In the second trial, a new judge held that the first judgment operated as a collateral estoppel, i.e., as a conclusive determination that the general contractor's negligence was *active*, and that, under the limited language of the subcontractor's indemnity agreement, the general contractor could not recover indemnity from

the subcontractor. *Held*, affirmed.

The general contractor argued that by reason of the severance of trials, the issue of the character of his negligence was reserved, and therefore the first judgment could not be a collateral estoppel on that issue. The court found this argument unconvincing. Although the judgment in the first trial did not expressly determine that the general contractor's negligence was active, an examination of the transcript and exhibits showed that active negligence was established. And the general contractor should have realized that the issue was involved in the first trial and called for as strong a defense as he could make. "In a severed trial, one must sometimes be Janus-headed if he would prevent estoppel by adjudication of disputed factual issues." (240 C.A.2d 184.)

King was distinguished in *Ralke Co. v. Esquire Bldg. Maintenance Co.* (1966) 246 C.A.2d 141, 54 C.R. 556, on the ground that inspection of the lower court file did not indicate that the character or kind of negligence of the indemnitee had been determined in the first case. (246 C.A.2d 147, 148.)

(2) *After Voluntary Dismissal With Prejudice.* In *Long Beach Grand Prix Assn. v. Hunt* (1994) 25 C.A.4th 1195, 31 C.R.2d 70, a personal injury action, an injured motorist sued defendant physician for medical malpractice and plaintiff racing association for negligently altering and maintaining the accident site. Plaintiff cross-complained against defendant for equitable indemnity, and contended that any injury it may have caused was aggravated by defendant. The motorist's complaint against defendant was voluntarily dismissed with prejudice, and defendant, asserting that the dismissal was a judgment on the merits of his liability to the motorist, then obtained summary judgment on the cross-complaint. *Held*, reversed.

(a) A dismissal with prejudice is equivalent to a judgment on the merits and acts as res judicata in favor of the dismissed defendant. However, the question here is whether dismissal with prejudice in the principal action bars a cross-complaint for equitable indemnity, which in essence would relitigate defendant's liability. (25 C.A.4th 1197, 1198.)

(b) Using dismissal with prejudice as collateral estoppel against a third party raises constitutional considerations not present where summary judgment is similarly used. (25 C.A.4th 1199, citing *Columbus Line v. Gray Line Sight-Seeing Cos. Associated* (1981) 120 C.A.3d 622, 174 C.R. 527.) Due process forbids asserting res judicata against a party not bound by the earlier litigation. The party to be bound must have had notice and an opportunity for hearing on the issue, must have had an identity or community of interest with the losing party in the first action, and should reasonably have been expected to be bound by the prior adjudication. (25 C.A.4th 1199.) Nor can collateral estoppel be applied where the party against whom estoppel is asserted could have opposed summary judgment but had no incentive to do so. (25 C.A.4th 1200, citing *White Motor Corp. v. Teresinski* (1989) 214 C.A.3d 754, 263 C.R. 26, *infra*, §477.)

(c) When a factual or legal issue is actually litigated, and the determination is essential to the judgment, it is conclusive in a subsequent action between the parties whether on the same or a different claim. (25 C.A.4th 1202, citing *Rest.2d, Judgments* §27.) However, the party sought to be precluded must have had an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. (25 C.A.4th 1202, citing *Rest.2d, Judgments* §28(5).) And parties who are not adversaries in an action involving a third party are entitled to assert collateral estoppel to issues actually litigated fully and fairly as adversaries to each other and which are essential to the judgment. (25 C.A.4th 1203, citing *Rest.2d, Judgments* §38.)

(d) Unlike the notice and hearing requirements for summary judgment, there is no notice or adjudication when a defendant is voluntarily dismissed with prejudice. (25 C.A.4th 1202.) Here, even if plaintiff had known of the motorist's intention to dismiss defendant, plaintiff would have had no grounds to prevent the dismissal or set it aside. Therefore, it would have been "fundamentally unfair" to allow defendant to use the dismissal with prejudice to bar plaintiff from litigating the question of his negligence when plaintiff had never been afforded the opportunity for a full and fair adjudication on that issue. (25 C.A.4th 1203.) (See *Johnson v. Fresno* (2003) 111 C.A.4th 1087, 1095, 4 C.R.3d 475 [county employee was not barred from seeking indemnity against county, even though plaintiff who claimed to have

been sexually harassed by employee had dismissed county with prejudice from her earlier action against employee and county; therefore, plaintiff, who had received employee's rights against county through assignment, was not barred from seeking indemnity from county.)

SUPPLEMENT: [This section is current through the latest supplement]



90 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

3. Illustrations of Collateral Estoppel.

b. Tort Actions.

3. Legal Malpractice Action.

7 *Witkin Cal. Proc. Judgm* § 423

[§ 423] Legal Malpractice Action.

In *Younan v. Caruso* (1996) 51 C.A.4th 401, 59 C.R.2d 103, plaintiff, after serving a sentence for molesting his stepdaughter, sued the attorney who had defended him in the criminal action for legal malpractice. While in prison, plaintiff had unsuccessfully petitioned for a writ of habeas corpus, asserting a claim of ineffective assistance of counsel. The trial judge dismissed the malpractice action on the ground that the earlier denial of habeas corpus relief collaterally estopped plaintiff from relitigating the issue of defendant's competence. *Held*, affirmed.

(a) Plaintiff was a party in the habeas corpus proceeding. Thus, the requirement that the party against whom collateral estoppel is asserted must have been a party, or in privity with a party, to the previous action (see *infra*, §452) is met. (51 C.A.4th 409.)

(b) The legal and factual issues raised in the habeas corpus proceeding were the same as those raised here. In both, plaintiff was required to prove by a preponderance of the evidence that defendant did not perform as a reasonable lawyer would have under prevailing professional standards. (51 C.A.4th 409.) The trial court in the habeas corpus proceeding found, after a full evidentiary hearing, that defendant did not breach prevailing professional norms by failing to call two expert witnesses, thus resolving the same allegation that plaintiff raises here. (51 C.A.4th 410.)

(c) There was a final judgment on the merits in the habeas corpus proceeding. Although an order denying a writ of habeas corpus is not *res judicata*, the right to bring successive habeas corpus petitions has long been restricted by both statute and judicial policy. (51 C.A.4th 410, citing *In re Clark* (1993) 5 C.4th 750, 21 C.R.2d 509, 855 P.2d 729, 6 Cal. Crim. Law (3d), *Criminal Writs*, §59.) Any further habeas corpus petitions by plaintiff on the same factual grounds would have been summarily dismissed. Even if he had alleged new facts, the petitions would have been considered only if plaintiff justified his delay in presenting those facts and demonstrated a fundamental miscarriage of justice. Plaintiff did not seek further habeas corpus relief on new facts and does not advance any new factual grounds here. Hence, the denial of plaintiff's habeas corpus petition was, "for all intents and purposes, final as to the facts adjudicated." (51 C.A.4th 411.)

(d) Public policy supports the application of collateral estoppel here. Although the purposes of a habeas corpus proceeding based on ineffective assistance of counsel and a legal malpractice action differ greatly, the differences actually work in favor of applying collateral estoppel. Plaintiff had at least as great a stake in prosecuting the habeas corpus proceeding as he had here. (51 C.A.4th 413.) Moreover, permitting plaintiff to pursue his malpractice claim after fully adjudicating the same factual issues in the habeas corpus proceeding would put the integrity of the judicial system at stake in two ways. First, doing so would produce inconsistent verdicts should plaintiff prevail, "casting great doubt on the fact-finding process." (51 C.A.4th 413.) Second, it would contradict the important policy prohibiting successive habeas corpus petitions based on previously determined factual allegations. (51 C.A.4th 413.) Finally, applying collateral estoppel here promotes judicial economy by eliminating repetitive litigation. (51 C.A.4th 414.)

SUPPLEMENT: [This section is current through the latest supplement]



91 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

3. Illustrations of Collateral Estoppel.

c. Property Actions.

7 Witkin Cal. Proc. Judgm § 424

[§ 424] Property Actions.

If a title or interest in property was in issue in a former action, the judgment is conclusive in later proceedings involving the same title or interest, as the following cases illustrate:

Quirk v. Rooney (1900) 130 C. 505, 508, 62 P. 825 [existence of trust].

Nielsen v. Emerson (1932) 121 C.A. 415, 418, 9 P.2d 260 [validity of trust].

Stephani v. Abbott (1934) 137 C.A. 510, 515, 30 P.2d 1033 [existence of prescriptive right].

Seidell v. Anglo-Calif. Trust Co. (1942) 55 C.A.2d 913, 918, 132 P.2d 12 [unlawful detainer judgment after foreclosure sale conclusively determined validity of trust deed and regularity of foreclosure sale]; *Freeze v. Salot* (1954) 122 C.A.2d 561, 564, 266 P.2d 140 [following *Seidell*]; *Strickland v. Calancorporation, Ltd.* (1957) 156 C.A.2d 488, 494, 319 P.2d 737 [following *Seidell*].

Smith v. Schuler-Knox Co. (1948) 85 C.A.2d 96, 100, 192 P.2d 34 [prior quiet title judgment against present plaintiffs was conclusive in their action to redeem land from execution sale].

Basore v. Metropolitan Trust Co. of Calif. (1951) 105 C.A.2d 834, 837, 234 P.2d 296 [prior judgment determining that decedent had no interest in trust fund was binding in action by administrator to recover fund].

Blumenthal v. Liebman (1952) 109 C.A.2d 374, 379, 240 P.2d 699 [prior judgment that determined that defendant was owner until plaintiff paid price was binding in later action for rents and profits].

Zaccaria v. Bank of America (1958) 164 C.A.2d 715, 719, 331 P.2d 198 [ejectment judgment in favor of purchaser at trustee's sale was res judicata on title in later action by former owner to set aside the sale].

Wood v. Herson (1974) 39 C.A.3d 737, 745, 114 C.R. 365 [affirmative defense of equitable title was tried without objection in unlawful detainer action; judgment against defendant was binding in his later specific performance action].

Zimmerman v. Stotter (1984) 160 C.A.3d 1067, 1074, 207 C.R. 108, *infra*, §435 [unlawful detainer judgment is conclusive as to right of possession determined in action, but not as to issues arising after entry of judgment].

Littoral Dev. Co. v. San Francisco Bay Conservation & Dev. Com. (1995) 33 C.A.4th 211, 217, 39 C.R.2d 266 [issue whether parcel constituted "marshland" within statutory definition could not be relitigated].

Amin v. Khazindar (2003) 112 C.A.4th 582, 588, 5 C.R.3d 224 [homeowner's assertion of homestead exemption was barred by her failure to assert it during earlier trial for partition and sale of property; citing *Krier v. Krier* (1946) 28 C.2d 841, 172 P.2d 681, *infra*, §426].

In *Passanisi v. Merit McBride Realtors* (1987) 190 C.A.3d 1496, 236 C.R. 59, plaintiffs executed a deed of trust in favor of defendants. Following plaintiffs' default on the underlying obligation, defendants directed the trustee to exercise the power of sale. Plaintiffs brought an action to enjoin the sale, but defendants prevailed at the trial and were awarded a judgment for attorneys' fees and costs. Defendants were the successful bidders at the ensuing trustee's sale with a bid that did not include the judgment. Plaintiffs then moved for an order under *C.C.P. 724.050* (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §389) requiring defendants to acknowledge the satisfaction of the judgment. *Held*, the doctrine of *res judicata* barred defendants' claim that the amount bid at the trustee's sale included an amount for attorneys' fees in a sum greater than the amount awarded in the previous action between the parties for injunctive relief.

(a) Defendants were required "to defend plaintiffs' action and pursuant to the deed of trust was entitled to reasonable attorney's fees incurred in doing so. [Defendants] submitted the question to the court and the court determined that a reasonable attorney's fee for defending the action was \$ 9,500. Judgment was entered in this amount. That determination by the trial court became final and now collaterally estops [defendants] from claiming a greater amount." (190 C.A.3d 1510, citing the text.)

(b) "Further, defendant's claim ... is merged into the judgment and thus superseded." (190 C.A.3d 1510, citing the text.)

West's Key Number Digest, Judgment 747

SUPPLEMENT: [This section is current through the latest supplement]

See *Gombiner v. Swartz* (2008) 167 C.A.4th 1365, 1370, 85 C.R.3d 83 [finding in unlawful detainer action that residence was duplex subject to local rent stabilization ordinance had collateral estoppel effect in later civil action involving nonpayment of rent; in unlawful detainer action, parties fully litigated issue of ordinance's applicability and judgment was final].



92 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

3. Illustrations of Collateral Estoppel.

d. Dissolution and Legal Separation.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 425

[§ 425] In General.

The former action for divorce is now a proceeding for dissolution of marriage, and the former action for separate maintenance is now a proceeding for legal separation. (See 5 *Cal. Proc.* (5th), *Pleading*, §884.)

Determinations of marital fault were formerly bases for collateral estoppel if the issues were the same. Thus, a wife's decree of separate maintenance, although not a complete bar to a later divorce action by the husband (see *supra*, §385), was conclusive on the grounds tried and determined in the first action. (*Comfort v. Comfort* (1941) 17 C.2d 736, 749, 112 P.2d 259; *Glaston v. Glaston* (1945) 69 C.A.2d 787, 793, 160 P.2d 45; *Gough v. Gough* (1950) 101 C.A.2d 262, 268, 225 P.2d 668; see 90 A.L.R.2d 745 [decree in action for separation as res judicata in subsequent action for divorce or annulment].) But where the issues were different, the prior judgment was not conclusive; e.g., a prior judgment denying a divorce on the ground of cruelty did not preclude a later action on the ground of desertion. (*Jordan v. Jordan* (1954) 129 C.A.2d 309, 311, 276 P.2d 818.) (See *Verdier v. Verdier* (1962) 203 C.A.2d 724, 738, 22 C.R. 93.)

Under the Family Law Act, the fault grounds are eliminated (see 11 *Summary* (10th), *Husband and Wife*, §59), but other issues may still be conclusively determined and may be the basis for collateral estoppel (see *infra*, §426).

SUPPLEMENT: [This section is current through the latest supplement]



93 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

3. Illustrations of Collateral Estoppel.

d. Dissolution and Legal Separation.

2. Issues Determined.

7 *Witkin Cal. Proc. Judgm* § 426

[§ 426] Issues Determined.

Most of the cases considered in this section deal with the former law of divorce, separate maintenance, and annulment, but they should apply to proceedings for dissolution of marriage, legal separation, and nullity (see 5 *Cal. Proc.* (5th), *Pleading*, §884).

(1) *Validity of Marriage*. A judgment of divorce or dissolution conclusively determines the fact of valid marriage. (*Petry v. Petry* (1941) 47 C.A.2d 594, 595, 118 P.2d 498.) This rule applies only between the parties. (See *Rediker v. Rediker* (1950) 35 C.2d 796, 803, 221 P.2d 1, 11 Summary (10th), *Husband and Wife*, §120 [judgment was not res judicata against strangers]; 20 A.L.R.2d 1163 [divorce decree as res judicata or estoppel as to previous marital status, against or in favor of third persons].)

(2) *Paternity of Child*. A judgment of divorce or dissolution that adjudicates paternity of a child of the parties is binding on those parties in a later action between them. (*Garcia v. Garcia* (1957) 148 C.A.2d 147, 154, 306 P.2d 80; *Adoption of Bonner* (1968) 260 C.A.2d 17, 20, 66 C.R. 812; *In re Marriage of Guardino* (1979) 95 C.A.3d 77, 87, 156 C.R. 883; *Brown v. Superior Court* (1979) 98 C.A.3d 633, 636, 159 C.R. 604; *San Diego v. Hotz* (1985) 168 C.A.3d 605, 608, 214 C.R. 658 [finding of paternity in dissolution proceeding collaterally estopped father from relitigating paternity in subsequent support action]; 78 A.L.R.3d 846 [estoppel effect of paternity findings or implications in divorce decree, annulment decree, support order, or custody order].)

(3) *Spousal Support or Property Settlement*. A decree of divorce or dissolution may construe a property settlement agreement and conclusively determine that payments are or are not spousal support or that the agreement was integrated. (See *Rasmussen v. Rasmussen* (1969) 275 C.A.2d 443, 448, 79 C.R. 842, citing the text [payments were not alimony]; *Jackson v. Jackson* (1967) 253 C.A.2d 1026, 1033, 62 C.R. 121 [prior determination on motion, that agreement was integrated and nonmodifiable, was binding]; 11 Summary (10th), *Husband and Wife*, §350 et seq.)

(4) *Community Property*. Frequently a decree of divorce or dissolution determines the nature and extent of community property, or the nonexistence of community property, as the following cases illustrate:

Krier v. Krier (1946) 28 C.2d 841, 843, 172 P.2d 681 [wife's separate maintenance decree determined community character of property; she could not, in husband's partition action, claim different interest as homestead]; see *Shore v. Shore* (1954) 43 C.2d 677, 681, 277 P.2d 4, supra, §379 [following *Krier*].

Maxwell v. Maxwell (1944) 66 C.A.2d 549, 553, 152 P.2d 530 [decree was conclusive determination that insurance policies were not part of couple's community property and former spouse was estopped from litigating that issue].

Kelley v. Kelley (1977) 73 C.A.3d 672, 677, 141 C.R. 33, infra, §427 [property settlement incorporated into judgment of dissolution was conclusive determination of community property rights and barred wife's later action to obtain division of former husband's military retirement pay].

(5) *Separate Property*. The decree may also conclusively determine that property is separate, where the parties raise and litigate the issue of its community or separate character. (*Citizens Nat. Trust & Savings Bank of Los Angeles v. Hawkins* (1948) 87 C.A.2d 535, 541, 197 P.2d 385; see *Watkins v. Watkins* (1953) 117 C.A.2d 610, 611, 256 P.2d 339 [decree establishing wife's separate ownership by quitclaim deed from husband was conclusive in action by husband to quiet title on theory that deed was mortgage]; *Estate of Bialy* (1959) 169 C.A.2d 479, 490, 337 P.2d 511 [decree construed property settlement agreement].)

SUPPLEMENT: [This section is current through the latest supplement]



94 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

3. Illustrations of Collateral Estoppel.

d. Dissolution and Legal Separation.

3. Distinction: Issues Not Litigated.

7 *Witkin Cal. Proc. Judgm* § 427

[§ 427] Distinction: Issues Not Litigated.

In *Kelley v. Kelley* (1977) 73 C.A.3d 672, 141 C.R. 33, a property settlement incorporated into a judgment of dissolution was a conclusive determination of community property rights and a bar to the wife's later action to obtain a division of her former husband's military retirement pay. (73 C.A.3d 677.) *Kelley* was criticized in *Gorman v. Gorman* (1979) 90 C.A.3d 454, 463, 153 C.R. 479, and was disapproved in *Henn v. Henn* (1980) 26 C.3d 323, 161 C.R. 502, 605 P.2d 10.

In *Henn*, the parties were divorced in 1971 by a decree incorporating a property settlement dividing the community property. Neither the pleadings nor the judgment mentioned a matured federal military retirement pension that the husband was then receiving. In 1973, the wife moved for an order dividing the pension as community property (under the holding of *In re Marriage of Fithian* (1974) 10 C.3d 592, 111 C.R. 369, 517 P.2d 449; 11 *Summary* (10th), *Community Property*, §78), and her motion was denied. In 1976, she brought this action for the same relief and the trial judge gave judgment for the husband. *Held*, reversed.

(a) *No collateral estoppel from original decree.* The wife's failure to assert her community right in the pension while obtaining a division of other community property does not have a collateral estoppel effect. She is not relying on a specific factual or legal contention that would have been relevant in the original proceeding; hence, the issue is not one that was previously litigated. (26 C.3d 331.)

(b) *No collateral estoppel from denial of motion.* There are no reported decisions holding that a claim to a community asset not mentioned in the decree may be adjudicated in a motion to modify the decree; the claim may only be determined in a separate action. (26 C.3d 332; see 11 *Summary* (10th), *Community Property*, §244.) Also, the record does not indicate why the motion was denied--whether on the merits or on the res judicata defense or on some procedural defect such as lack of jurisdiction. Because the basis of the ruling cannot be determined, denial of the motion cannot bar the present action. (26 C.3d 332.) (See *Giovannoni v. Giovannoni* (1981) 122 C.A.3d 666, 671, 176 C.R. 154 [following *Henn*].)

Other cases in which collateral estoppel did not apply include the following:

Lewis v. Superior Court (1978) 77 C.A.3d 844, 852, 144 C.R. 1 [judgment was not conclusive on issue where it made no award of community asset to wife because it made no award of it to husband].

Bowman v. Bowman (1985) 171 C.A.3d 148, 157, 217 C.R. 174 [following *Henn*; where pension and insurance benefits were not divided in divorce judgment, former wife was not collaterally estopped from seeking partition after husband's death].

Shasta v. Caruthers (1995) 31 C.A.4th 1838, 1843, 38 C.R.2d 18 [action by district attorney on behalf of child to establish child's paternity and obtain child support was not precluded by dismissal with prejudice of earlier paternity action by child's mother, where earlier action had been settled and paternity issue had not been litigated].

SUPPLEMENT: [This section is current through the latest supplement]



95 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

3. Illustrations of Collateral Estoppel.

e. Actions by Employees.

7 *Witkin Cal. Proc. Judgm* § 428

[§ 428] Actions by Employees.

The following cases are among those discussing the applicability of collateral estoppel to actions involving employees:

Caminetti v. Board of Trustees of Jackson Union High School Dist. (1934) 1 C.2d 354, 356, 34 P.2d 1021 [judgment ordering reinstatement of petitioner to teacher's position determined her right to continued employment].

Servente v. Murray (1935) 10 C.A.2d 355, 359, 52 P.2d 270 [judgment determining that petitioner's dismissal from public employment was for cause].

Runyan v. Ellis (1995) 40 C.A.4th 961, 965, 47 C.R.2d 356 [defendant city was collaterally estopped from relitigating adequacy of disciplinary procedures involving city police officers, where earlier action involving different plaintiff, but same defendant and identical issue, had been decided on merits].

Lumpkin v. Jordan (1996) 49 C.A.4th 1223, 1231, 57 C.R.2d 303 [summary judgment against plaintiff in federal civil rights action was entitled to collateral estoppel effect in plaintiff's state court action claiming violation of California Fair Employment and Housing Act].

Townsel v. San Diego Metropolitan Transit Dev. Bd. (1998) 65 C.A.4th 940, 951, 77 C.R.2d 231 [terminated employee was not collaterally estopped from litigating whether he was entitled to posttermination evidentiary hearing by earlier federal court ruling that he was not entitled to postdisciplinary hearing following 3-week suspension; disciplinary suspension does not trigger same due process rights as termination].

Castillo v. Los Angeles (2001) 92 C.A.4th 477, 480, 111 C.R.2d 870 [summary judgment for defendant city in former employee's wrongful discharge action was proper on collateral estoppel grounds; employee had previously appealed his discharge to civil service commission, which decided identical issue raised by employee here: whether city had discharged employee for unauthorized absences or because of his age and race].

Los Angeles Police Protective League v. Los Angeles (2001) 94 C.A.4th 77, 84, 113 C.R.2d 909 [collateral estoppel

applied to police officers union's petition to compel arbitration; issue (whether transfer of officer that results in reduction in pay grade is arbitrable) was already decided in earlier proceeding involving same parties].

SUPPLEMENT: [This section is current through the latest supplement]

See *Miller v. Los Angeles* (2008) 169 C.A.4th 1373, 1382, 87 C.R.3d 510 [discharged employee who failed to exhaust administrative remedies was collaterally estopped from arguing in later complaint that termination was wrongful; administrative decision became final and binding when employee failed to seek judicial review; citing *Castillo v. Los Angeles* (2001) 92 C.A.4th 477, 111 C.R.2d 870, text, p. 1080].



96 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

3. Illustrations of Collateral Estoppel.

f. Other Proceedings.

7 *Within Cal. Proc. Judgm* § 429

[§ 429] Other Proceedings.

Other proceedings applying the doctrine of collateral estoppel include the following:

(1) *Probate Proceedings*. Because there are several distinct proceedings, there is ample opportunity for collateral estoppel from decrees admitting wills to probate, decrees of distribution, and other probate decrees. (See *Estate of Muller* (1969) 2 C.A.3d 259, 274, 82 C.R. 531 [determination of competency of petitioner for letters of administration was collateral estoppel in later proceeding to remove administrator]; *Estate of Hilton* (1996) 44 C.A.4th 890, 910, 52 C.R.2d 491, 14 Summary (10th), *Wills and Probate*, §538 [partial allowances of extraordinary attorneys' fees collaterally estopped probate court from later ordering attorney to disgorge statutory fees]; for other illustrations, see *supra*, §384.)

(2) *Federal Tax Proceedings*. In *Calhoun v. Franchise Tax Bd.* (1978) 20 C.3d 881, 143 C.R. 692, 574 P.2d 763, plaintiffs filed a California action against the Franchise Tax Board seeking a refund of California income taxes paid. They also filed an action in the federal district court seeking a refund of federal taxes paid during the same period. The federal district court rendered judgment against them on a jury's special verdict, finding that plaintiffs had fraudulently understated their income. The board then raised the federal judgment in the California trial as a collateral estoppel, on the ground that the main issue in the California case--the amount of gross income--was already adjudicated in the federal case. *Held*, the doctrine applied, and the federal judgment was conclusive on that issue, because the federal and state definitions of gross income are substantially identical. (20 C.3d 884.) (See *Commissioner of Internal Revenue v. Sunnen* (1948) 333 U.S. 591, 598, 68 S.Ct. 715, 92 L.Ed. 898, 906; *United States v. International Bldg. Co.* (1953) 345 U.S. 502, 505, 73 S.Ct. 807, 97 L.Ed. 1182, 1187; 85 Harv. L. Rev. 1478 [judgment fixing value for customs tariffs].)

(3) *Proceeding To Rehabilitate Insurance Company*. See *Pacific Mut. Life Ins. Co. of Calif. v. McConnell* (1955) 44 C.2d 715, 724, 285 P.2d 636, 2 Cal. Proc. (5th), *Jurisdiction*, §337.

(4) *Dependency Proceedings*. See *In re Joshua J.* (1995) 39 C.A.4th 984, 992, 46 C.R.2d 491 [collateral estoppel prevented father, in proceeding involving younger son, from relitigating finding in earlier proceeding that he had abused older son].

(5) *Declaratory Relief Action Regarding Right to Attorneys' Fees*. A law firm's claim for legal fees incurred in representing a client in a collection action was collaterally estopped by an earlier court order disqualifying the law firm from representing the client in the collection action due to a conflict of interest. An unappealed order disqualifying an attorney has collateral estoppel effect in a subsequent action involving the same issue. (*A.I. Credit Corp. v. Aguilar & Sebastinelli* (2003) 113 C.A.4th 1072, 1078, 6 C.R.3d 813.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Probate Proceedings*. In *Murphy v. Murphy* (2008) 164 C.A.4th 376, 78 C.R.3d 784, a probate court, under the "substituted judgment" procedures of *Prob.C. 2580* et seq. (14 *Summary* (10th), *Wills and Probate*, §1025 et seq.), authorized a conservator to execute a living trust and pour-over will implementing the conservatee's estate plan. The effect of this action was to disinherit the conservatee's son while leaving the entire estate to his daughter. Following the conservatee's death a year later, the son sued the daughter, alleging breach of an oral contract, undue influence, intentional interference with contract, and fraud. The trial court rendered judgment for the son. *Held*, reversed. The action was barred by collateral estoppel.

(a) The issues litigated here are identical to those litigated in the substituted judgment proceeding. The son's complaint seeks to nullify the conservatee's living trust and pour-over will, on the ground that these testamentary dispositions resulted from the conservatee's breach of an oral testamentary agreement between him and his late wife and from the daughter's fraud, undue influence, and interference with the oral testamentary agreement. Similarly, the conservatee's substituted judgment petition alleged that his living trust and pour-over will "were executed by [the conservatee] freely and are not the result of fraud or undue influence by any party," and that those instruments reflected his testamentary estate plan. (164 C.A.4th 400.)

(b) In the substituted judgment proceeding, the son never raised the argument that implementing the conservatee's estate plan would conflict with a prior testamentary agreement. The existence of that agreement was a matter within the scope of the substituted judgment proceeding and should have been raised there. Collateral estoppel bars the son from doing so in this action. (164 C.A.4th 402.) The issues of fraud and undue influence were adjudicated and necessarily decided in the substituted judgment proceeding. The petition in that proceeding tendered the issues by expressly stating that the living trust and pour-over will were not the result of fraud or undue influence. The probate court was required to consider these issues and presumably did so. (164 C.A.4th 402, 403.)

(c) The son's incentive to litigate his allegations in the substituted judgment proceeding was identical to his incentive to do so here. At both times, the son was adverse to his father's attempt to disinherit him. Although he contends that he did not pursue the issues in the earlier proceeding out of concern for his father's health and because it would have been "financially prohibitive," he fails to cite any authority that application of collateral estoppel would be barred for those reasons. (164 C.A.4th 405, 406.)

(d) Although the substituted judgment proceeding was summary, the son had a full and fair opportunity to litigate his claims. It was summary only because he failed to object to it. Had he done so, the court could have conducted an evidentiary hearing. Furthermore, the son fails to explain why reports that the son now relies on were not available to him in the substituted judgment proceeding. (164 C.A.4th 406, 407.)

(e) The son argues that it would violate public policy and the limited purpose of the substituted judgment statute to impose collateral estoppel here. The son "had ample opportunity in the probate court or in an appeal from the substituted judgment order to oppose the probate court's order on the grounds that the living trust was procured by fraud and undue influence or that a binding testamentary agreement existed. We see nothing in the substituted judgment statutory scheme that should protect [him] from being collaterally estopped from raising the identical issues in the instant action." (164 C.A.4th 408.) (6) (*New State Bar Action for Reimbursement*. See *State Bar v. Statile* (2008) 168 C.A.4th 650, 670, 86 C.R.3d 72 [previous decision by Client Security Fund to pay individuals from whom attorney had misappropriated funds determined amount that attorney owed to State Bar in reimbursement; collateral estoppel precluded attorney from arguing that State Bar was not entitled to full reimbursement].



97 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

a. Issue Excluded or Reserved.

1. In General.

7 *Witkin Cal. Proc. Judgm* § 430

[§ 430] In General.

If the parties expressly exclude a particular issue from consideration, or the court expressly refrains from determining it, no collateral estoppel results. (See *Rest.2d, Judgments* §27, Comment e; *Southern Pac. Co. v. Edmunds* (1914) 168 C. 415, 418, 143 P. 597; *Stark v. Coker* (1942) 20 C.2d 839, 843, 129 P.2d 390; *Estate of Hill* (1957) 149 C.A.2d 779, 787, 309 P.2d 39; *Estate of Liddle* (1958) 162 C.A.2d 7, 13, 328 P.2d 35; *Monolith Portland Cement Co. v. Mojave Public Util. Dist.* (1970) 4 C.A.3d 840, 846, 84 C.R. 639 [parties and court agreed that issue was not involved]; *Myers v. Orange* (1970) 6 C.A.3d 626, 633, 86 C.R. 198, citing the text; *Bleech v. State Bd. of Optometry* (1971) 18 C.A.3d 415, 429, 95 C.R. 860; *Clovis Ready Mix Co. v. Aetna Freight Lines* (1972) 25 C.A.3d 276, 284, 101 C.R. 820, quoting the text; *Interstate Marina Dev. Co. v. Los Angeles* (1984) 155 C.A.3d 435, 444, 202 C.R. 377, citing the text; *American Int. Underwriters Agency Corp. v. Superior Court* (1989) 208 C.A.3d 1357, 1363, 256 C.R. 730 [same]; *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 C.A.3d 699, 712, 262 C.R. 899, citing the text [issue was not previously determined]; *Pacific Estates v. Superior Court* (1993) 13 C.A.4th 1561, 1576, 17 C.R.2d 434, *infra*, §446, quoting the text [issue was not previously determined]; James 5th, §11.19; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §495.)

In *Estate of Doyle* (1962) 202 C.A.2d 434, 21 C.R. 123, the superior court in the first action ruled that an issue should be decided by the probate court. *Held*, therefore, the first judgment was not res judicata on that issue; "on the contrary [the] right to litigate it in a separate action is res judicata." (202 C.A.2d 439.)

In *People v. Barenfeld* (1962) 203 C.A.2d 166, 21 C.R. 501, the state filed a condemnation action, and judgment was entered in defendants' favor for an agreed sum by stipulation, without an answer or trial of any issues. The present action was by the state to recover payments made under a contract to buy the property from defendants, and the complaint alleged illegal creation of a fictitious valuation. Defendants contended that the condemnation judgment was a conclusive determination of the value. *Held*, a stipulated judgment is as conclusive as a contested one only if the issues existed at the time of the stipulation; it is not conclusive where issues were withdrawn. (203 C.A.2d 176.)

In *Hurst v. Hurst* (1964) 227 C.A.2d 859, 39 C.R. 162, a prior paternity action was brought by a minor against his father, but was compromised by an agreement by the alleged father to support the child, with no determination of the

issue of paternity. *Held*, the judgment in the paternity action was not res judicata on that issue in a later divorce action. (227 C.A.2d 864.)

SUPPLEMENT: [This section is current through the latest supplement]

See *Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 C.A.4th 1544, 1553, 101 C.R.3d 441 [consent decree in federal class action resolved injunctive and declaratory relief with regard to federal disability law, but reserved individual damages claims under state law].



98 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

a. Issue Excluded or Reserved.

2. Unlawful Detainer.

7 *Witkin Cal. Proc. Judgm* § 431

[§ 431] Unlawful Detainer.

If the defendant in an unlawful detainer action under *C.C.P. 1161a* (against persons holding over after sale of the property) raises equitable defenses and they are tried without objection, the judgment will be binding on the issues raised and determined. (See *supra*, §424.) But where it appears that the defendant did not have an opportunity to present an equitable defense, such as fraud, the unlawful detainer judgment is not *res judicata* on that issue, and the unlawful detainer defendant may raise it in a subsequent action to set aside a sale. (*Gonzales v. Gem Properties (1974) 37 C.A.3d 1029, 1036, 112 C.R. 884, 4 Summary* (10th), *Security Transactions in Real Property*, §174; see *Zimmerman v. Stotter (1984) 160 C.A.3d 1067, 1075, 1078, 207 C.R. 108, infra*, §435 [unlawful detainer judgment is conclusive on issue of landlord's right to possession, but not on issue whether landlord's postjudgment actions constituted abuse of that right]; *Landeros v. Pankey (1995) 39 C.A.4th 1167, 1171, 46 C.R.2d 165* [stipulated judgment in unlawful detainer action did not expressly preclude tenant from later litigating issue of breach of warranty of habitability; issue was not previously litigated and determined, even though it was raised as affirmative defense to unlawful detainer complaint].)

In *Vella v. Hudgins (1977) 20 C.3d 251, 142 C.R. 414, 572 P.2d 28*, the court again applied these principles. The owner of real property worth over \$ 40,000 defaulted in payments on a note secured by a second deed of trust. The holder of the note had the property sold at a trustee's sale and purchased it. The owner immediately filed an equitable action in the superior court to set aside the sale, alleging that the holder, in a confidential relationship with her, had fraudulently induced her to default. While the action was pending, the holder brought an unlawful detainer proceeding in the municipal court. The owner set up as an affirmative defense the same allegations of fraud. The court, by a minute order without findings, rejected the defense and gave judgment for the holder. Then, in the superior court action, the holder set up the unlawful detainer judgment. The trial judge found in favor of the owner and ordered the property restored to her. *Held*, affirmed.

(a) *Summary character of ordinary unlawful detainer proceeding.* In the ordinary proceeding, affirmative defenses are permissible only if they would preclude removal of the tenant. Hence, the judgment has only a limited *res judicata* effect and will not preclude a subsequent action by the dispossessed party to resolve questions of title or to adjudicate other legal and equitable claims. (*20 C.3d 255*; see *4 Summary* (10th), *Security Transactions in Real Property*, §171 et

seq.)

(b) *Summary character of proceeding under C.C.P. 1161a.* This section provides for "a narrow and sharply focused examination of title": the purchaser must show that he or she acquired the property at a regularly conducted sale and thereafter "duly perfected" his title. Hence, fraud or quiet title actions founded on allegations of irregularity in a trustee's sale are barred by a prior unlawful detainer judgment. (20 C.3d 256.)

(c) *Where attack is based on activities not directly connected with sale.*

(1) In the uncommon situation in which the fraud or other affirmative defenses are raised without objection and fully and fairly tried, the determination is binding. Thus, in *Wood v. Herson* (1974) 39 C.A.3d 737, 745, 114 C.R. 365, the hearing took 7 days and the trial judge made precise findings of fact. "[T]he parties apparently chose to waive speedy resolution of the issue of possession in favor of an extensive adjudication of their conflicting claims by a superior court invested with jurisdiction to deal with any issues the disputants agreed to try." (20 C.3d 257.)

(2) Where no such fair adversary hearing took place, matters affecting the primary obligation or other defects in the plaintiff's title are not concluded by the prior unlawful detainer judgment. (20 C.3d 257.) This was the situation here. The municipal court proceedings were not recorded or transcribed; no findings were made; and the record did not disclose the precise nature of the factual issues litigated or the depth of the court's inquiry. "We decline to assume, given the summary character of this type of action, that the mere pleading of a defense without objection by the adverse party necessarily demonstrates adequate opportunity to litigate the defense. The fact that in the unlawful detainer action both parties submitted trial-length estimates of two hours, whereas trial of the second action consumed four days, while not controlling, does create a strong inference that the former proceeding was a conventional unlawful detainer action, unlike the elaborate and highly atypical proceeding considered in *Wood*." (20 C.3d 258.)

(d) *Practical considerations for plaintiff in C.C.P. 1161a proceeding.* This holding will not impose an unwarranted burden on the plaintiff. "In return for speedy determination of his right to possession, plaintiff sacrifices the comprehensive finality that characterizes judgments in nonsummary actions. Moreover, he has adequate protection against multiple litigation, for ordinarily he can prevent the introduction of extrinsic issues by making appropriate objections to the defendant's pleadings or proof; alternatively, he may request preparation of a transcript ... and written findings ... , both of which may subsequently be offered, together with any stipulation by the parties as to the issues to be tried, in support of a plea of res judicata." (20 C.3d 258.)

SUPPLEMENT: [This section is current through the latest supplement]



99 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

b. Determination Was Not Essential.

7 *Witkin Cal. Proc. Judgm* § 432

[§ 432] Determination Was Not Essential.

If a finding or other determination of an issue in the first action was entirely unnecessary to the judgment, it will not have the effect of a collateral estoppel. (See *Chapman v. Hughes* (1901) 134 C. 641, 654, 66 P. 982; *Albertson v. Raboff* (1956) 46 C.2d 375, 385, 295 P.2d 405, citing the text; *In re Lisa R.* (1975) 13 C.3d 636, 646, 119 C.R. 475, 532 P.2d 123; *Stanson v. Mott* (1976) 17 C.3d 206, 212, 130 C.R. 697, 551 P.2d 1, citing the text; *Wilson v. Interlake Steel Co.* (1982) 32 C.3d 229, 234, 185 C.R. 280, 649 P.2d 922, citing the text; *Denning v. Green* (1931) 119 C.A. 102, 105, 6 P.2d 317; *Green v. Green* (1944) 66 C.A.2d 50, 60, 151 P.2d 679; *Natural Soda Products Co. v. Los Angeles* (1952) 109 C.A.2d 440, 445, 240 P.2d 993; *Bleek v. State Bd. of Optometry* (1971) 18 C.A.3d 415, 430, 95 C.R. 860; *Estate of Spirtos* (1973) 34 C.A.3d 479, 487, 109 C.R. 919; *In re Marriage of Rabkin* (1986) 179 C.A.3d 1071, 1082, 1083, 225 C.R. 219 [statement in order temporarily increasing spousal support, that sale of residence would be change of circumstance, was not basis for collateral estoppel; temporary increase was warranted by parties' written agreement, and statement was both unnecessary to decision and directly in conflict with written agreement itself]; *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 C.A.3d 699, 712, 262 C.R. 899, citing the text; *Four Star Elec. v. F & H Const.* (1992) 7 C.A.4th 1375, 1380, 10 C.R.2d 1, citing the text; *Pitts v. Sacramento* (2006) 138 C.A.4th 853, 858, 41 C.R.3d 838 [finding in prior action that employee had voluntarily separated from her employment did not have preclusive effect in employee's later action for reinstatement; finding was mere surplusage and not essential to determination of first action]; *Rest.2d, Judgments* §27, Comment h; James 5th, §11.20; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §498.)

In *People v. Mack* (1971) 19 C.A.3d 1040, 97 C.R. 448, the question of the navigability of Fall River was in issue in the present action to enjoin interference with its use. The defense of collateral estoppel was based on a finding of nonnavigability in a former decision of the Supreme Court. The trial judge examined the briefs in the case, the pleadings and the reported opinion, and thereafter properly concluded that the issue in the former case was whether the defendant had vested riparian rights to the entire flow, and that nonnavigability had no bearing on the issue. (19 C.A.3d 1049.)

In *De Court v. Beckman Instruments* (1973) 32 C.A.3d 628, 108 C.R. 109, decedent, a diver, was employed in California by defendant company to test an "electrolung." He was killed in a dive from a vessel two miles off the shores of an island near Yucatan, Mexico. The vessel was owned and operated by someone under a contract with defendant.

Defendant and its insurer assisted decedent's widow and minor children in obtaining a workers' compensation award, based on a stipulation that California law applied. Later, the widow engaged counsel who filed the present Jones Act complaint, alleging that the vessel was owned or controlled by defendant, that decedent was a seaman, and that defendant was negligent. Defendant pleaded res judicata and the trial judge granted summary judgment on that ground. *Held*, reversed.

(a) Defendant argues that, under *Scott v. Industrial Acc. Com.* (1956) 46 C.2d 76, 293 P.2d 18, 2 Cal. Proc. (5th), *Jurisdiction*, §438, and *Unruh v. Truck Ins. Exchange* (1972) 7 C.3d 616, 102 C.R. 815, 498 P.2d 1063, 2 *Summary* (10th), *Workers' Compensation*, §416, the determination of jurisdiction by either a compensation board or a court is res judicata, and that a determination was made by implication when the Workers' Compensation Appeals Board awarded compensation; i.e., it impliedly found that defendant was not a seaman. (32 C.A.3d 633.) This argument is unsound. In *Unruh* and *Scott*, the only factors of exclusive jurisdiction of the board were the conditions of compensation for an injury. Here, other factors were determinative of jurisdiction under the Jones Act: Was decedent a seaman, was a vessel involved, and was the employer the owner of it? (32 C.A.3d 634; see 2 *Summary* (10th), *Workers' Compensation*, §131 et seq.)

(b) It cannot be assumed that the Appeals Board considered these issues in making its award. The documents were prepared by defendant and its insurance carrier, plaintiffs had no counsel at the time, and the matter was submitted to the referee without adversary proceedings. Hence, the issues of federal Jones Act jurisdiction were not impliedly determined in the state compensation proceeding, and there was no collateral estoppel. (32 C.A.3d 635.) (On alternative ground that workers' compensation award was not yet final, see *supra*, §358.)

SUPPLEMENT: [This section is current through the latest supplement]



100 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

c. Issue Was Not Properly Triable.

7 *Witkin Cal. Proc. Judgm* § 433

[§ 433] Issue Was Not Properly Triable.

(1) *In General.* If the particular issue was not presented or was not within the court's power to decide in the first action, it will not be concluded by the judgment. (See *Strangman v. Duke* (1956) 140 C.A.2d 185, 191, 295 P.2d 12.) In *People v. Birch Sec. Co.* (1948) 86 C.A.2d 703, 196 P.2d 143, a federal court injunction preventing state officers from forfeiting the charter of a foreign corporation was not a conclusive determination of nonliability for franchise taxes. That issue could not have been involved because an injunction against collection of taxes would have violated the California Constitution and statutes. (86 C.A.2d 711.)

Other cases discussing this principle include the following:

Landeros v. Pankey (1995) 39 C.A.4th 1167, 1171, 46 C.R.2d 165 [stipulated judgment in unlawful detainer action did not expressly preclude tenant in subsequent independent action from litigating issue of breach of warranty of habitability; unlawful detainer action did not involve breach over same time period involved in later action so tenant could not have raised issue in prior proceedings].

Gregory v. State Bd. of Control (1999) 73 C.A.4th 584, 591, 86 C.R.2d 575 [issue whether Board of Control (now California Victim Compensation and Government Claims Board) must subpoena crime report was not fully litigated or necessarily decided in earlier writ proceeding; court denied writ because board had indicated, and plaintiff had acknowledged, that plaintiff would see report at definite future time and thus plaintiff could not challenge failure to receive report until that time].

Silver v. Los Angeles County Metropolitan Trans. Authority (2000) 79 C.A.4th 338, 357, 94 C.R.2d 287 [transportation authority was not estopped from litigating whether statute required authority to compel its employees to participate in Social Security; earlier judgment that ordered authority to obtain Social Security coverage for employees, based on fact that authority had thus far failed to provide acceptable alternative to Social Security, did not preclude authority from subsequently making alternative coverage available].

(2) *Statutory Limits.* A number of statutes dealing with furnishing security for costs expressly state that the

determination whether security must be furnished will not be deemed a determination of the merits of any issue in the action. (See *C.C.P.* 391.2 [vexatious litigant in pro. per.]; *C.C.P.* 1029.5(a) [action against architect or engineer]; *C.C.P.* 1029.6(a) [action against doctor or related professionals]; *Corp.C.* 800(c), (d) [shareholder's derivative action]; 3 *Cal. Proc.* (5th), *Actions*, §§358, 359, 363, 369.)

SUPPLEMENT: [This section is current through the latest supplement]



101 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

d. New Property or Other New Facts.

7 *Witkin Cal. Proc. Judgm* § 434

[§ 434] New Property or Other New Facts.

(1) *General Rule.* Even though the issue appears to be the same, the former judgment may not be res judicata if the second action is concerned with a new title, new interests, or changed circumstances. (See *Rest.2d, Judgments* §28 [after-acquired property]; *Hurd v. Albert* (1931) 214 C. 15, 26, 3 *P.2d* 545 [changed conditions justifying refusal to enforce equitable servitude]; *Younger v. Jensen* (1980) 26 *C.3d* 397, 412, 161 *C.R.* 905, 605 *P.2d* 813; *Lunt v. Boris* (1948) 87 *C.A.2d* 694, 695, 197 *P.2d* 568 [new defaults by defendants]; *Estate of Miller* (1951) 104 *C.A.2d* 1, 18, 230 *P.2d* 667 [former judgment based on earlier conditions]; *McGaffey v. Sudowitz* (1960) 189 *C.A.2d* 215, 217, 10 *C.R.* 862; *Lake Merced Golf & Country Club v. Ocean Shore R. Co.* (1962) 206 *C.A.2d* 421, 435, 23 *C.R.* 881; *Day v. Sharp* (1975) 50 *C.A.3d* 904, 916, 123 *C.R.* 918; 71 *A.L.R.2d* 1362 [judgment denying permit for use of premises under zoning regulations as bar to subsequent application].)

In *California Emp. Stabilization Com. v. Matcovich* (1946) 74 *C.A.2d* 398, 168 *P.2d* 702, plaintiff commission brought the first action against defendant operator of a "taxi dance hall" to collect taxes based on employment of "taxi dancers." Judgment went for defendant on the ground that the women were independent contractors. In the present action, plaintiff alleged and proved a different kind of contract and different method of payment. A judgment that the relationship was employment and that taxes were due was upheld. There was, of course, a new cause of action for taxes for the new period, and the former judgment was not conclusive on the issue of employment because of new facts developed in the interval. (74 *C.A.2d* 403.)

A number of decisions illustrate the general rule, including the following:

Oro Fino Gold Mining Corp. v. El Dorado (1990) 225 *C.A.3d* 872, 878, 274 *C.R.* 720 [where mining areas and drilling methods of exploration project were different in prior judgment, county and environmental group were not collaterally estopped from requiring mining company to obtain environmental impact report before commencing subsequent project].

Blanca P. v. Superior Court (1996) 45 *C.A.4th* 1738, 1754, 53 *C.R.2d* 687, 10 *Summary* (10th), *Parent and Child*, §669 [parent was not collaterally estopped from contesting molestation charge at review hearing, where he had denied

charge throughout proceedings and new evidence (psychologist's report) supported his denial].

Pleasant Valley Canal Co. v. Borrer (1998) 61 C.A.4th 742, 770, 72 C.R.2d 1 [in action to determine water users' respective rights to divert water, parties were not bound by 1916 decision that determined rights as between parties' predecessors in interest; because water rights between two appropriators are based on their relative priority in time, change in users can mean change in accrual of rights].

United States Golf Assn. v. Arroyo Software Corp. (1999) 69 C.A.4th 607, 615, 81 C.R.2d 708 [national golf association was not collaterally estopped from litigating whether defendant had misappropriated plaintiff's handicap formulas and service marks, even though plaintiff had lost earlier misappropriation action against different defendant; formulas and service marks at issue here were developed after earlier action and substantive law of misappropriation was different in earlier action].

Apartment Assn. of Greater Los Angeles v. Los Angeles (2001) 90 C.A.4th 1162, 1168, 109 C.R.2d 504 [prior judgment rejecting challenge, under California Environmental Quality Act, to city's interim housing code enforcement program did not preclude subsequent challenge to city's permanent program; programs were adopted under separate ordinances, were separate projects, and differed in scope, and fact that one was temporary and one was permanent was enough to distinguish them for purposes of environmental impact review].

In re Jessica C. (2001) 93 C.A.4th 1027, 1038, 113 C.R.2d 597, 10 Summary (10th), *Parent and Child*, §668 [collateral estoppel did not prevent second dependency proceeding on sexual abuse allegations, even though court in earlier proceeding had rejected different allegations of sexual abuse; new disclosures of child abuse, substantively different from previous disclosures, constitute new evidence].

People v. Carmony (2002) 99 C.A.4th 317, 322, 120 C.R.2d 896 [earlier determination under former Mentally Disordered Sex Offenders Act (MDSO Act), made when defendant was originally sentenced, that defendant was not mentally disordered offender did not preclude determination of defendant's mental health in proceedings under Sexually Violent Predators Act (SVP Act); unlike MDSO Act, SVP Act emphasizes person's *current* mental health and dangerousness immediately before release on parole].

(2) *Distinction: Facts Going to Weight of Evidence.* Newly discovered facts that do not establish a previously undiscovered theory of liability or a change in the parties' legal rights, but instead merely go to the weight of the evidence, do not preclude collateral estoppel. (See *Evans v. Celotex Corp.* (1987) 194 C.A.3d 741, 747, 238 C.R. 259, *infra*, §460 [evidence of lung biopsy from deceased, whose personal injury action resulted in judgment for defendant, was insufficient to preclude application of collateral estoppel to wrongful death action].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule.* See *Huber v. Jackson* (2009) 175 C.A.4th 663, 677, 96 C.R.3d 346 [general church and diocese were not collaterally estopped from litigating ownership of parish property, even though they had lost similar dispute in earlier case; changes to general church's canons, new statutes, and new case law had emerged during more than 25 years since earlier case; citing *United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 C.A.4th 607, 81 C.R.2d 708, text, p. 1088]. *Correction:* Page 1087, first paragraph, line 10, the date for "McGaffey v. Sudowitz" should be "1961".



102 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

e. Acts After Entry of Judgment.

7 *Witkin Cal. Proc. Judgm* § 435

[§ 435] Acts After Entry of Judgment.

In *Zimmerman v. Stotter* (1984) 160 C.A.3d 1067, 207 C.R. 108, a tenant ousted from a rent-controlled unit contended that the landlord had falsely claimed that the unit was desired for use by family members. The landlord brought an unlawful detainer action and received judgment for possession and a writ of possession. One year later, without any occupation by the landlord's family, the property was rented to strangers at a substantially higher rent. The tenant then brought the present action for wrongful eviction, abuse of process, and intentional infliction of emotional distress. *Held*, summary judgment for the landlord reversed.

(a) The issue of right to possession was conclusively determined in favor of the landlord by the unlawful detainer judgment. Hence, the claim that the landlord acted in bad faith in seeking possession cannot be relitigated. (106 C.A.3d 1074, 1075.)

(b) The remaining causes of action, for wrongful eviction, abuse of process, and intentional infliction of emotional distress, relate to defendant's acts pursuant to the writ of possession after entry of judgment. (160 C.A.3d 1074, 1075.) These are not barred. The judgment decided the landlord's good faith up to the entry of judgment, and a rebuttable presumption remained that, in satisfying the judgment, the same good faith was present. But, because a different intent may be evidenced by subsequent happenings, the presumption is rebuttable and has not been conclusively adjudicated. "There is a logical separation between the two time periods and the two actions. The alleged wrong was not done to appellant by entry of the unlawful detainer judgment itself. The wrong allegedly resulted when, by the use of the writ of possession, respondent evicted appellant from her apartment not for the purpose of occupying the premises as declared by her earlier, but for an ulterior purpose in circumvention of the applicable rent control regulations." (160 C.A.3d 1076.)

In *Daar & Newman v. VRL Int.* (2005) 129 C.A.4th 482, 28 C.R.3d 566, a law firm was not collaterally estopped from asserting that a California court had jurisdiction in the firm's action to recover fees from a former client, even though the firm had established in a prior action against the client that the client had insufficient jurisdictional contacts with California. The claim and the facts surrounding the client's nonpayment for services rendered in the prior action arose after that action and were not before the prior court. (129 C.A.4th 490.)

SUPPLEMENT: [This section is current through the latest supplement]



103 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

f. Judgment on General Verdict.

7 *Witkin Cal. Proc. Judgm* § 436

[§ 436] Judgment on General Verdict.

In *Stout v. Pearson* (1960) 180 C.A.2d 211, 4 C.R. 313, plaintiff husband's car collided with defendant's car. Plaintiff husband and plaintiff wife sued, defendant answered and cross-complained against plaintiff husband and his employers, and a verdict and a judgment were rendered against plaintiff husband and his employers for damages. Both plaintiffs moved for a new trial. This was denied as to the complaint, but granted as to the cross-complaint against plaintiff husband. In the new trial, defendant contended that the now final judgment on the complaint was res judicata on liability, leaving only the issue of damages. The trial judge, however, submitted the whole case to the jury, which decided in favor of plaintiff husband and against defendant. *Held*, affirmed. To apply the doctrine of collateral estoppel, it must not only appear that the issue was litigated, but that it was adjudicated. Several issues were involved in the first action--negligence of defendant, contributory negligence of plaintiff husband, and proximate cause, and there was no way to determine what issue was actually decided by the jury in reaching its verdict. "We conclude that a judgment based on a general verdict in an action wherein a determination of any one of several issues may have been the basis for that verdict, does not authorize the application of the doctrine of estoppel by judgment to such issues in a subsequent action under circumstances where, as in the instant case, it is necessary to identify the specific issue determined in the former action." (180 C.A.2d 216.) (See *Brake v. Beech Aircraft Corp.* (1986) 184 C.A.3d 930, 942, 943, 229 C.R. 336, citing the text [following *Stout*].)

SUPPLEMENT: [This section is current through the latest supplement]



104 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

g. Appellate Judgment Without Opinion.

7 *Witkin Cal. Proc. Judgm* § 437

[§ 437] Appellate Judgment Without Opinion.

In *Rutherford v. California* (1987) 188 C.A.3d 1267, 233 C.R. 781, plaintiff was convicted of a misdemeanor violation of a provision of the Fish and Game Code. He appealed, and the only issue briefed by the parties was whether the provision was unconstitutional. The Appellate Department of the Superior Court reversed with the following order: "It is the unanimous opinion of our appellate department that the judgment is reversed." In the present action by plaintiff seeking a declaration of unconstitutionality of the provision, he contended that the Appellate Department judgment was a collateral estoppel in his favor on the issue of unconstitutionality. *Held*, there was no collateral estoppel. The injustice exception applied (see *infra*, §443), and there was no assurance that the Appellate Department actually resolved the issue of constitutionality.

(a) Although an appellate court in affirming a judgment against an appellant without opinion must be presumed to have found adversely to the appellant on all questions raised in the appeal, "the same completeness in resolution is not a logical consequence where a prevailing appellant obtains a reversal on appeal without opinion in a criminal matter where multiple issues are presented to the appellate tribunal." (188 C.A.3d 1285.)

(b) An analogous situation is where a judgment is based on a general verdict. (188 C.A.3d 1285, citing *Stout v. Pearson* (1960) 180 C.A.2d 211, 4 C.R. 313, *supra*, §436.) "[B]ecause the Appellate Department failed to support its decision with an opinion specifically designating its grounds for reversal of the conviction and instead left a silent record leaving to conjecture as to what was necessarily involved and decided, it is not just to apply the doctrine of collateral estoppel. Indeed, it is possible and within the power of the Appellate Department to have based its decision on omissions not addressed by the parties in their appellate briefing." (188 C.A.3d 1285.)

SUPPLEMENT: [This section is current through the latest supplement]



105 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

h. Compromise Verdict in Negligence Action.

7 Witkin Cal. Proc. Judgm § 438

[§ 438] Compromise Verdict in Negligence Action.

In *Taylor v. Hawkinson* (1957) 47 C.2d 893, 306 P.2d 797, plaintiff, her husband, and her friend (the driver) sued for injuries received in a collision with defendant's car. Grossly inadequate verdicts were returned, but plaintiff alone moved for a new trial, which was granted. On the retrial, plaintiff contended that when the judgment in favor of her husband and friend became final it conclusively determined the issue of defendant's negligence. The trial judge rejected the contention, and a verdict and a judgment were given for defendant. *Held*, affirmed; the record supported the trial judge's implied finding that the jury in the first trial gave compromise verdicts and did not determine the issue of liability. "Defendant did not have his day in court during the first trial on the issue of liability, and plaintiff can now justify making that judgment binding upon him in her action only on the ground that he had an opportunity to attack it. Had he done so, more rather than less litigation would have ensued, and plaintiff would have gained nothing. Defendant did not vex her by seeking a redetermination of an issue once decided, but sought and secured only the right to have the issue of liability determined once after plaintiff by securing a new trial on all issues had established the propriety thereof." (47 C.2d 897.) (See *Clovis Ready Mix Co. v. Aetna Freight Lines* (1972) 25 C.A.3d 276, 285, 101 C.R. 820.)

SUPPLEMENT: [This section is current through the latest supplement]



106 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

i. Judgment on Offer To Compromise.

7 Witkin Cal. Proc. Judgm § 439

[§ 439] Judgment on Offer To Compromise.

C.C.P. 998 establishes procedures for an offer to compromise and the entry of judgment pursuant to an accepted offer. (See 6 *Cal. Proc. (5th), Proceedings Without Trial*, §81 et seq.) A judgment entered under *C.C.P. 998* is deemed to be "a compromise settlement." (*C.C.P. 998(f)*.) This language makes it clear that the element of litigated issues (see *supra*, §415 et seq.) is absent, and the judgment cannot be used as a collateral estoppel, or even be admitted in evidence (see *Ev.C. 1152, 1 Cal. Evidence (4th), Circumstantial Evidence*, §140 et seq.). (See *Milicevich v. Sacramento Med. Center (1984) 155 C.A.3d 997, 1004, 202 C.R. 484*, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



107 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

j. Different Standard of Proof.

7 *Witkin Cal. Proc. Judgm* § 440

[§ 440] Different Standard of Proof.

In re Nathaniel P. (1989) 211 C.A.3d 660, 259 C.R. 555, involved a proceeding to terminate the parental rights of a father (see 10 *Summary* (10th), *Parent and Child*, §325) for physical and sexual abuse. The children had previously been placed in the care of the Department of Social Services for out-of-home placement and supervision after a contested dispositional hearing in a dependency proceeding (see 10 *Summary* (10th), *Parent and Child*, §624 et seq.), at which it was found that the father had sexually abused the children. *Held*, the sexual abuse finding in the prior dispositional hearing did not collaterally estop the father from introducing evidence at the termination proceeding that he had not abused the children. The standard of proof by clear and convincing evidence at the termination proceeding was higher than the preponderance of evidence standard applicable to the dependency proceeding. (211 C.A.3d 668.)

In *Wimsatt v. Beverly Hills Weight Loss Clinics Int.* (1995) 32 C.A.4th 1511, 38 C.R.2d 612, franchisees sued their franchisor in federal court, and the case was dismissed based on a forum selection clause in the franchise agreement requiring the action to be brought in Virginia. Plaintiffs then commenced the present action in California state court. The trial court dismissed the action on the ground that the prior federal court decision collaterally estopped plaintiffs from challenging the forum selection clause in state court. *Held*, reversed. "[T]he issue litigated in the federal proceeding is not identical to the one presented in this case. The federal court's ruling was a matter of federal procedural law, in which there is indeed a heavy burden of proof on the party opposing the enforcement of a forum selection provision. This action, by contrast, turns on state substantive law in which the burden is on franchisors to show that enforcement of a forum selection clause will not subvert substantive rights afforded California citizens. Different sovereignties, different rules, different burdens: no collateral estoppel." (32 C.A.4th 1514, 1523, citing *In re Nathaniel P.*)

In *Harris v. Grimes* (2002) 104 C.A.4th 180, 127 C.R.2d 791, plaintiff's son was shot and killed by a police officer. Plaintiff filed wrongful death actions against the officer in both federal and state courts, alleging negligence and civil rights violations. After the police officer demurred to the state court action on the ground that it was duplicative of the federal action, plaintiff dismissed the state action without prejudice. The federal court removed the negligence claim from the jury's consideration, fearing that trying both claims would confuse the jury because they involved "contradictory standards of conduct for imposing liability" (intentional conduct for the civil rights claim, but only

negligence for the other claim). The federal jury rendered a verdict for the police officer on the civil rights claim. After refiling the state negligence action, plaintiff fired her attorney and hired defendant. The first attorney failed to inform either plaintiff or defendant about a pending order to show cause, ultimately causing the state court to dismiss the action. By the time defendant learned about the dismissal, it was too late to move to set it aside. Plaintiff sued defendant for malpractice. The trial court determined that the federal trial had established that the shooting was "reasonable" and that collateral estoppel thus prevented plaintiff from successfully suing the police officer for negligence. The trial court entered judgment for defendant based on plaintiff's consequent inability to prove her "case within a case." *Held*, reversed.

(a) The trial court misapprehended the import of the federal civil rights trial. The federal court expressly removed from the jury any consideration of the police officer's negligence because it feared confusing the jury. The federal court instructed the jury (1) that plaintiff had to prove that the police officer intentionally committed acts that violated her son's constitutional rights, and (2) that "[a]ctions that were only negligent and not intentional do not support a finding that [the police officer] deprived the decedent of his constitutional rights." Plainly, the police officer's alleged negligence was never submitted to the federal jury. (104 C.A.4th 186, 187.)

(b) The federal jury's verdict does not necessarily mean that it found the police officer's use of deadly force to be reasonable. "First, the federal jury rendered a general verdict without any special findings. Thus, the jury could have reached its verdict for any number of reasons other than finding the shooting was a reasonable use of force. Second, and more important, 'reasonable' conduct in civil rights law does not always mean reasonable conduct under negligence law. The two concepts are not the same." (104 C.A.4th 187, citing *Lucas v. Los Angeles* (1996) 47 C.A.4th 277, 54 C.R.2d 655.)

(c) Plaintiff did not impermissibly split her cause of action by suing under civil rights law in federal court and negligence law in state court. (104 C.A.4th 187.) California's prohibition against splitting causes of action does not aid a defendant when the federal court, rather than the plaintiff, made the decision to split causes of action between state and federal court. A federal court's discretionary refusal to exercise pendent jurisdiction over a state claim does not bar further litigation of the state claim in state court. (104 C.A.4th 188, citing *Lucas* and declining to follow *Mattson v. Costa Mesa* (1980) 106 C.A.3d 441, 164 C.R. 913, supra, §355.)

Other cases illustrating that collateral estoppel does not apply when the second action involves a different standard of proof include the following:

Blanca P. v. Superior Court (1996) 45 C.A.4th 1738, 1754, 53 C.R.2d 687, 10 Summary (10th), *Parent and Child*, §669 [parent was not collaterally estopped from contesting molestation charge at review hearing, where antecedent finding of molestation had been made under mere preponderance of evidence standard; citing *In re Nathaniel P.*].

Lucas v. Los Angeles (1996) 47 C.A.4th 277, 287, 54 C.R.2d 655 [ruling against plaintiff in federal civil rights action against police officers for negligently withholding medical attention from inmate was not collateral estoppel in subsequent state action; in federal action plaintiff had to prove "deliberate indifference to, and subjective knowledge of," inmate's condition, whereas in state action, plaintiff would have to show that defendants had "actual or constructive knowledge" that inmate needed medical care].

In re Sylvia R. (1997) 55 C.A.4th 559, 563, 64 C.R.2d 93 [failure to convict parent of spousal abuse, where burden is "beyond a reasonable doubt," does not establish that parent did not commit spousal abuse for purposes of dependency proceeding, where burden is "preponderance of the evidence"; citing *In re Nathaniel P.*].

Lam v. Ngo (2001) 91 C.A.4th 832, 843, 111 C.R.2d 582 [fact that plaintiff had obtained preliminary injunction in tort action against political protestors who had demonstrated outside his business did not preclude protestors' motion to strike tort action as SLAPP action (see 5 Cal. Proc. (5th), *Pleading*, §1017 et seq.); preliminary injunction required court to assess likelihood that plaintiff would prevail at trial and interim harm that plaintiff would likely suffer without

injunction, whereas anti-SLAPP motion required court to determine whether plaintiff had made prima facie showing of facts that, if proven at trial, would support judgment for plaintiff].

Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA (2005) 129 C.A.4th 1228, 1247, 29 C.R.3d 521 [following *Lam*; fact that plaintiffs had obtained preliminary injunction in harassment action against demonstrators did not conclusively establish plaintiffs' probability of success on merits for purposes of SLAPP analysis].

SUPPLEMENT: [This section is current through the latest supplement]



108 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

k. Different Elements of Proof Required by Sister State Court.

7 Witkin Cal. Proc. Judgm § 441

[§ 441] Different Elements of Proof Required by Sister State Court.

In *American Continental Ins. Co. v. American Cas. Co. of Reading, Pennsylvania* (2001) 86 C.A.4th 929, 103 C.R.2d 632, 13 Summary (10th), *Equity*, §182, a patient sued a hospital and several of its employees for medical malpractice. Plaintiff insurer, which had issued two liability policies to the hospital and its employees, defended the action and negotiated a settlement that released the hospital and its employees from liability. Plaintiff then sued defendant insurer, which had issued a liability policy to a nurse who was involved in the incident giving rise to the malpractice claim but who had not been sued, for equitable contribution. Defendant demurred, arguing that because no claim had ever been made against the nurse and because she had never been named or served in the malpractice action, no obligation to provide coverage under its policy had ever arisen and thus there was no basis on which it could be held liable to plaintiff for any part of the sum paid to defend and settle the malpractice action. The trial court agreed and sustained the demurrer. On appeal, plaintiff argued that defendant could not relitigate the issue of its liability for equitable contribution because the Arizona Court of Appeals had already held, under the identical facts presented here and involving the same insurance companies, that defendant was liable for equitable contribution whether or not the nurse was actually named as a defendant in the underlying action. *Held*, judgment on demurrer affirmed.

(a) The decision in the Arizona case is of no use to plaintiff. (86 C.A.4th 943.) That court did not consider the possible requirement that there be a legal obligation to provide coverage before there could be a valid claim for equitable contribution asserted. It did not do so because, under Arizona law, that is not a necessary element. This is, however, contrary to California law. Collateral estoppel cannot be used to bind a California litigant to a principle of law adopted in the prior foreign court litigation that is contrary to the law of California; nor can it preclude a party from litigating a novel issue of law in California, which this is, merely because that party failed to persuade the courts of another state on the legal wisdom of its position. Thus, plaintiff's collateral estoppel argument fails "because it has not established that the 'same issue' was actually litigated and resolved in the prior litigation. The Arizona court reached its decision under Arizona law while we are asked to decide this case under California law." (86 C.A.4th 945.)

(b) Moreover, because this equitable contribution issue is one of first impression, there is no danger that addressing it will create inconsistent decisions, waste judicial resources, or constitute baseless litigation. "In short, none of the policies underlying the doctrine of issue preclusion would be advanced in this case by our application of the doctrine so

as to preclude [defendant's] contest of an issue which we believe was wrongly decided by an Arizona court." (86 C.A.4th 946.)

SUPPLEMENT: [This section is current through the latest supplement]



109 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

k-1. (New) Constitutional Prohibition in Tax Disputes.

7 Witkin Cal. Proc. Judgm § 441A

[§ 441A] (New) Constitutional Prohibition in Tax Disputes.

Collateral estoppel cannot be used as an exception to the "pay first, litigate later" rule (see 9 *Summary* (10th), *Taxation*, §297), which requires a taxpayer to pay a tax before commencing a court action to challenge collection of the tax. In *California Logistics v. California* (2008) 161 C.A.4th 242, 73 C.R.3d 825, a state agency determined that delivery drivers used by plaintiff company were employees, not independent contractors, and that plaintiff's tax liability should be increased accordingly. Without paying the additional tax, plaintiff sought a declaratory judgment and injunctive relief to establish that its drivers were independent contractors. Plaintiff argued that several prior administrative and judicial proceedings had determined the independent contractor status of its drivers and thus the state was collaterally estopped from claiming otherwise. The trial court sustained the state's demurrer, concluding that it lacked jurisdiction under the pay first, litigate later rule. *Held*, affirmed.

(a) A litigant does not have an absolute right to application of the collateral estoppel doctrine. (161 C.A.4th 249.) Even when the prerequisites for applying the doctrine have been met, policy considerations may prevent its application. (161 C.A.4th 249, 250.)

(b) The doctrine of collateral estoppel cannot take precedence over Cal. Const., Art. XIII, §32, which establishes the pay first, litigate later rule. The doctrine does not require courts to provide relief that the Constitution specifically prohibits. (161 C.A.4th 250.)

SUPPLEMENT: [This section is current through the latest supplement]



110 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

I. Question of Law.

1. Determination May Be Conclusive.

7 Witkin Cal. Proc. Judgm § 442

[§ 442] Determination May Be Conclusive.

The determination of a question of law in a prior action between the parties may be given effect as a collateral estoppel in a subsequent action between the same parties. (See *Rest.2d, Judgments* §27; *Pacific Maritime Assn. v. Unemp. Ins. App. Bd.* (1965) 236 C.A.2d 325, 334, 45 C.R. 892 [dictum]; *Los Angeles v. Los Angeles Assessment App. Bd.* (1993) 13 C.A.4th 102, 108, footnote 4, 16 C.R. 479, citing the text [collateral estoppel applies to legal issues, "albeit with more qualifications than in cases of factual issues"]; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §492.)

This rule is inapplicable, however, where the two actions involve substantially unrelated claims, or where a new determination is necessary due to an intervening change in the applicable legal context. (See *Commissioner of Internal Revenue v. Sunnen* (1948) 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 [prior determination was denied collateral effect in subsequent action involving income tax for different tax year]; *Rest.2d, Judgments* §28(2); James 5th, §11.21.)

SUPPLEMENT: [This section is current through the latest supplement]



111 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

1. Question of Law.

2. Injustice Exception.

7 *Witkin Cal. Proc. Judgm* § 443

[§ 443] Injustice Exception.

Application of the doctrine of collateral estoppel to questions of law is largely recognized by dicta. Most of the cases apply the sweeping exception declared in the first Restatement that "in any event it is not conclusive if injustice would result." (See *Louis Stores v. Department of Alcoholic Beverage Control* (1962) 57 C.2d 749, 757, 22 C.R. 14, 371 P.2d 758, *infra*, §444; *Chern v. Bank of America* (1976) 15 C.3d 866, 872, 127 C.R. 110, 544 P.2d 1310, *infra*, §444, citing the text; *Bleeck v. State Bd. of Optometry* (1971) 18 C.A.3d 415, 430, 95 C.R. 860; 9 Cal. Western L. Rev. 115 [avoiding collateral estoppel in multiple party tort litigation]; *infra*, §§444, 445.)

The *Second Restatement of Judgments*, §28(2) states a similar exception: "to avoid inequitable administration of the laws." (See *Rest.2d, Judgments* §28, Comment c; *Rutherford v. California* (1987) 188 C.A.3d 1267, 1282, 233 C.R. 781, *supra*, §437 [citing *Rest.2d, Judgments* §28(2)].)

In *Pacific Maritime Assn. v. Unemp. Ins. App. Bd.* (1965) 236 C.A.2d 325, 45 C.R. 892, plaintiff association, representing maritime employers, entered into collective bargaining agreements with various unions under which, to distribute the work, employees were given limited tenure rights on the basis of seniority. Two employees, after termination of their employment under these provisions, applied for unemployment compensation. Plaintiff opposed the application on the ground that the union agreement made termination a voluntary act and thus precluded an award. The award was made, and plaintiff sought mandamus. *Held*, writ denied; although the ultimate decision on the merits was in favor of the employees (see 3 *Summary* (10th), *Agency and Employment*, §491), the doctrine of collateral estoppel was not applicable.

(a) In a prior action involving plaintiff association and other seamen, the same contention was made by plaintiff, mandamus was denied by the lower court, and no appeal was taken. This would normally have been a determination of the right to an award under these circumstances, binding on the plaintiff, because it was a party to the prior action (see *infra*, §473). (236 C.A.2d 333.)

(b) But the issue decided in the prior action was a question of law, the meaning of "voluntary" in the statute

denying compensation where the employee voluntarily left his work. If collateral estoppel were to operate here, plaintiff would be barred from contesting awards in all similar cases, while other employers under other collective bargaining agreements would challenge them and perhaps establish a different rule, thereby protecting their reserve accounts. This would be most unfair, and accordingly, the injustice exception applies. (236 C.A.2d 334.)

The following are among the cases discussing the injustice exception:

Thain v. Palo Alto (1962) 207 C.A.2d 173, 185, 24 C.R. 515 [prior determination of constitutionality of weed abatement ordinance was not binding on issue; following *Louis Stores*].

Powers v. Floersheim (1967) 256 C.A.2d 223, 230, 63 C.R. 913 [mixed question of fact and law and intervening change in law; prior decision that defendants' collection agency business was not within license requirement was not conclusive on whether it came within amended statute].

United States Fire Ins. Co. v. Johansen (1969) 270 C.A.2d 824, 834, 76 C.R. 174 [interpretation of indemnity agreement was not binding where it would make stipulated judgment for \$ 2,601 conclusive on liability for over \$ 79,284].

Barragan v. Banco BCH (1986) 188 C.A.3d 283, 297, 232 C.R. 758, citing the text [res judicata did not apply; defendant adopted inconsistent positions in opposing plaintiff's motion to file cross-complaint in earlier action and contending in subsequent action that issues that might have been adjudicated in earlier action were res judicata].

Citizens for Open Access to Sand & Tide v. Seadrift Assn. (1998) 60 C.A.4th 1053, 1074, 71 C.R.2d 77 [exception was not applicable; public access to coastal property was thoroughly considered in previous actions involving property owners and government agencies, and precluding public interest group from relitigating issue would not result in manifest injustice].

People v. Union Pac. R. Co. (2006) 141 C.A.4th 1228, 1244, 47 C.R.3d 92 [exception applied; earlier dismissal of criminal counts against one defendant on basis of federal preemption did not have collateral estoppel effect in later civil case involving different defendant; counts were dismissed when first defendant agreed not to raise collateral estoppel in later civil action and it would be unjust to allow second defendant to assert favorable aspects of first case while rejecting unfavorable ones].

SUPPLEMENT: [This section is current through the latest supplement]



112 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

I. Question of Law.

3. Public Interest Exception.

aa. In General.

7 *Witkin Cal. Proc. Judgm* § 444

[§ 444] In General.

(1) *Development of Exception.* In *Louis Stores v. Department of Alcoholic Beverage Control* (1962) 57 C.2d 749, 22 C.R. 14, 371 P.2d 758, plaintiff used its wholesaler's liquor license solely to sell to its retail stores at a competitive advantage, contrary to the regulatory statute. In a first proceeding, involving activities before 1948, the department refused to revoke plaintiff's license. In a second proceeding, involving activities after 1953, the license was revoked. *Held*, the prior decision was not conclusive in plaintiff's favor. Because different periods and activities were involved, the causes of action were different and the first decision was not a bar. The prior decision could be a collateral estoppel on the issue of violation of the statute, but that doctrine is subject to an exception where the question is one of law and application would be unjust. Here, the statute concerns the public interest in a closely supervised industry, and a continuation of plaintiff's practices would give it an unfair advantage over its competitors. These two factors--public interest and effect on third persons--justify rejection of the doctrine. (57 C.2d 757.) (See *Ewing v. Carmel-By-The-Sea* (1991) 234 C.A.3d 1579, 1585, 286 C.R. 382 [discussing *Louis Stores* and other cases].)

In *Chern v. Bank of America* (1976) 15 C.3d 866, 127 C.R. 110, 544 P.2d 1310, plaintiff borrower sued defendant bank in a class action, seeking damages and an injunction for false and misleading advertising. Defendant argued that plaintiff was estopped by a prior summary judgment against her in an action raising identical issues brought against a different bank. *Held*, collateral estoppel did not apply.

(a) Although the two actions involved parallel facts, they were concerned with different historical transactions; i.e., the prior action was based on representations made by a different defendant in a different transaction. (15 C.3d 871.) And rulings of law, divorced from the specific facts to which they are applied, are generally considered not binding. (15 C.3d 872.)

(b) There is a sound judicial policy against applying collateral estoppel in cases which concern matters of important public interest. (15 C.3d 872, citing *Louis Stores*.) And recent legislation discloses a strong interest in protecting the public by comprehensive regulation of banking and financing practices. (15 C.3d 872.)

In *Consumers Lobby Against Monopolies v. Public Util. Com.* (1979) 25 C.3d 891, 160 C.R. 124, 603 P.2d 41, the court declared that, when the question is one of law, the prior determination is not conclusive "either if injustice would result or if the public interest requires that relitigation not be foreclosed." (25 C.3d 902.) (See *Mountain Home Properties v. Pine Mountain Lake Assn.* (1982) 135 C.A.3d 959, 966, 185 C.R. 623.)

(2) *Restatement Provision.* The *Second Restatement of Judgments*, §28(5) states the exception as follows: "There is a clear and convincing need for a new determination of the issue ... because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action."

SUPPLEMENT: [This section is current through the latest supplement]



113 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

I. Question of Law.

3. Public Interest Exception.

bb. Applicability of Exception.

7 *Witkin Cal. Proc. Judgm* § 445

[§ 445] Applicability of Exception.

In *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 C.4th 251, 5 C.R.2d 545, 825 P.2d 438, the issue on the merits was whether *Educ.C. 39807.5*, which authorizes school districts to charge fees for pupil transportation, violates the free school guarantee (Cal. Const., Art. IX, §5) or the Equal Protection Clause (Cal. Const., Art. I, §7(a)) of the California Constitution. (For holding on merits, see 7 *Summary* (10th), *Constitutional Law*, §497.) S (intervenor in the present case) filed a taxpayer's action against the State Department of Education and other school officials, alleging that their implementation of *Educ.C. 39807.5* violated the constitutional guarantees. The superior court ruled that the school districts that assessed the fees were indispensable parties and did not reach the merits. The Court of Appeal, in *Salazar v. Honig*, reversed, holding that the districts were not indispensable parties, and that the statute violated the constitutional guarantees. The Supreme Court denied review, but ordered the Court of Appeal opinion depublished. On remand, the superior court entered judgment against the defendants, and the department issued a legal advisory directing all school districts to cease charging fees for transportation. Some districts ceased, but others did not, prompting 25 districts to file the present action against the department to determine the validity of the statute. S intervened, and moved to dismiss, alleging that the department and the districts were bound by the former judgment. The trial court denied the motion, but ruled that the statute facially violated the free school guarantee. The Court of Appeal reversed, holding first that the districts were not collaterally estopped to maintain the action because the public interest exception applied, and that the statute was not unconstitutional on its face. *Held*, affirmed.

(a) Where the issue is a question of law, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed. (2 C.4th 257.)

(b) It would be detrimental to the public interest to apply collateral estoppel here. Because *Salazar v. Honig* was depublished and therefore cannot be cited as legal authority (see 9 *Cal. Proc.* (5th), *Appeal*, §821), there has been a continuing uncertainty about the validity of *Educ.C. 39807.5*, and school districts have responded to this uncertainty in different ways. "If we were to hold that this action could not go forward, and if *Salazar v. Honig* was wrongly decided, school districts would be unable to charge fees for transportation, and so they would be unable to collect those revenues,

to which they are entitled by statute. Students might also be adversely affected, because those districts that could not afford to fund bus transportation out of their limited revenues might be forced to eliminate the service." (2 C.4th 258.)

(c) The unusual history of *Salazar v. Honig* also suggests that it would be in the public interest for this action to go forward. In the trial of that case, the state defendants relied solely on the contention that the school districts were indispensable parties. "Thus, no one during the *Salazar v. Honig* proceedings contended that the statute could be applied in a manner consistent with the Constitution." (2 C.4th 258.) The practical result of S's position would be that the constitutionality of the statute would never again be litigated; for if all the school districts are bound by the decision, there would be no opportunity for anyone ever to challenge the legal grounds of the unpublished ruling. "Thus, in one fell swoop, by binding all the parties in the state who have any interest in the issue without naming them as parties to the first action, S would have effectively prevented the constitutionality of this legislative enactment from ever being fully tested or defended." (2 C.4th 258.)

(d) "The public interest exception is an extremely narrow one; we emphasize that it is the exception, not the rule, and is only to be applied in exceptional circumstances. However, the unusually compelling facts in this case make it appropriate for us to apply the exception here." (2 C.4th 259.)

The following are among the cases that have discussed the applicability of the public interest exception:

Sacramento v. California (1990) 50 C.3d 51, 64, 266 C.R. 139, 785 P.2d 522 [exception applied; collateral estoppel would bind state and no other person would have occasion to challenge decision].

Kopp v. Fair Political Practices Com. (1995) 11 C.4th 607, 622, 47 C.R.2d 108, 905 P.2d 1248 [exception applied to allow relitigation of question whether campaign financing provisions were constitutional or could be rewritten to be constitutional].

First N.B.S. Corp. v. Gabrielsen (1986) 179 C.A.3d 1189, 1197, 225 C.R. 254, citing the text [exception did not apply; neither third persons nor public interest was involved].

Palmdale Hosp. Med. Center v. Department of Health Services (1992) 8 C.A.4th 1306, 1310, 1311, 10 C.R.2d 926 [exception applied; Department of Health Services could relitigate issue involving Medi-Cal settlements; decision could affect virtually all state health care facilities serving Medi-Cal beneficiaries].

Acun a v. Regents of Univ. of Calif. (1997) 56 C.A.4th 639, 652, 65 C.R.2d 388 [exception did not apply; plaintiff who prevailed on federal age discrimination claim could not seek additional damages in state court].

Connell v. Superior Court (1997) 59 C.A.4th 382, 394, 69 C.R.2d 231 [exception applied where issue presented (whether regulatory amendment constituted reimbursable state-mandated program) was one of law, which, if wrongly decided by administrative agency, would cause taxpayers to suffer unjustly; following *Sacramento v. California*].

Housing Authority of Los Angeles v. Work. Comp. App. Bd. (1998) 60 C.A.4th 1076, 1083, 70 C.R.2d 738 [exception did not apply; housing authority was collaterally estopped from asserting that its police chief was not an employee for purposes of workers' compensation statute; action involved single local agency, rather than administration of statewide program, and did not affect questions of great economic consequence].

Modesto City Schools v. Education Audits App. Panel (2004) 123 C.A.4th 1365, 1378, 20 C.R.3d 831 [administrative decision that school district complied with state requirements for funding of independent study program did not have collateral estoppel effect; public interest exception applied because issue involved public funding; citing *Arcadia Unified School Dist.* and distinguishing *Housing Authority of Los Angeles*].

Roos v. Red (2005) 130 C.A.4th 870, 886, 30 C.R.3d 446 [exception did not apply; application of collateral estoppel maintained integrity of judicial system, promoted judicial economy, and avoided vexatious litigation].

Jenkins v. Riverside (2006) 138 C.A.4th 593, 41 C.R.3d 686 [exception applied; federal court's determination whether plaintiff was temporary or regular employee of county was not binding in state court action; issue was question of law and federal court's construction of county's salary ordinance was wrong].

People v. Union Pac. R. Co. (2006) 141 C.A.4th 1228, 1244, 47 C.R.3d 92 [exception applied; earlier dismissal of criminal counts on basis of federal preemption did not have collateral estoppel effect in later civil case; whether transportation of hazardous materials in commerce is immune from state regulation is matter of tremendous public significance].

SUPPLEMENT: [This section is current through the latest supplement]



114 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

I. Question of Law.

4. Review of Initial Judgment Was Not Available.

7 *Witkin Cal. Proc. Judgm* § 446

[§ 446] Review of Initial Judgment Was Not Available.

(1) *General Rule.* The *Second Restatement of Judgments*, §28(1) recognizes an exception where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." *Rest.2d, Judgments*, §28, Comment a gives the following explanation: An exception is necessary "when the determination of an issue is plainly essential to the judgment but the party who lost on that issue is, for some other reason, disabled as a matter of law from obtaining review by appeal or, where appeal does not lie, by injunction, extraordinary writ, or statutory review procedure. Such cases can arise for example, because the controversy has become moot, or because the law does not allow review of the particular category of judgments."

(2) *Application of Exception.* In *Pacific Estates v. Superior Court* (1993) 13 C.A.4th 1561, 17 C.R.2d 434, plaintiff homeowners association sought damages from defendants--a condominium project developer, the project's general contractor, and related parties--for construction defects in the project. The parties entered into a settlement agreement providing for a cash payment and a stipulated judgment in plaintiff's favor. Plaintiff subsequently moved for a determination under *C.C.P.* 877.6 that the settlement was made in good faith (see 5 *Summary* (10th), *Torts*, §84). The trial judge denied the motion out of concern that defendants' insurers, who were neither parties to the action nor participants in the settlement, would have been conclusively bound by the stipulated judgment by principles of res judicata or collateral estoppel as stated in *Diamond Heights Homeowners Assn. v. National Amer. Ins. Co.* (1991) 227 C.A.3d 563, 277 C.R. 906. Plaintiff then petitioned for mandamus to overturn the judge's ruling. *Held*, petition granted; *Diamond* was wrongly decided.

(a) A fair reading of *C.C.P.* 877.6 indicates that only parties to the underlying litigation may challenge the trial judge's determination of the good faith of a settlement, and defendants' insurers were not parties to plaintiff's action. As such, they were denied adequate procedural protections from a potentially erroneous decision. Consequently, and contrary to the holding in *Diamond*, an unreviewable decision could provide no basis for later imposing on the insurers the preclusive effects of res judicata or collateral estoppel as to issues not fully litigated in any meaningful sense. (13 C.A.4th 1573.)

(b) Also, a hearing under *C.C.P. 877.6* may not be an appropriate setting in all cases to fully litigate all aspects of the good faith of a settlement if that determination could have conclusive and binding effects on the parties' insurers. This is so because full discovery, presentation of evidence, and argument are not guaranteed or routinely allowed in all *C.C.P. 877.6* hearings. (13 *C.A.4th* 1574.) (See *Anderson-Cottonwood Disposal Service v. Work. Comp. App. Bd.* (1982) 135 *C.A.3d* 326, 332, 185 *C.R.* 336 [prevailing party in third-party action, who was thus not aggrieved and could not appeal from judgment, was not collaterally estopped to tender issue in proceeding before Workers' Compensation Appeals Board].)

SUPPLEMENT: [This section is current through the latest supplement]



115 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

5. Admission in Pleadings.

7 *Witkin Cal. Proc. Judgm § 447*

[§ 447] Admission in Pleadings.

The Restatement takes the position that an admission in the pleadings is not litigation of the issue and does not result in an estoppel. (*Rest.2d, Judgments §27, Comment e.*)

The California cases are in conflict on this point; some appear to make no distinction between the conclusive effect of issues contested at the trial and issues admitted by the pleadings. (See *Servente v. Murray (1935) 10 C.A.2d 355, 360, 52 P.2d 270* [where admitted allegations "are necessary to determine the rights of the adverse parties, the admitted allegations become adjudicated and directly so by acquiescence of the litigants"]; *Johnson v. Fontana County Fire Protection Dist. (1940) 15 C.2d 380, 389, 101 P.2d 1092* [similar holding]; cf. *Schumacker v. Industrial Acc. Com. (1941) 46 C.A.2d 95, 99, 115 P.2d 571* [admitted matter was not conclusive].)

SUPPLEMENT: [This section is current through the latest supplement]



116 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

6. Judgment by Default.

a. Nature of Problem.

7 Witkin Cal. Proc. Judgm § 448

[§ 448] Nature of Problem.

Although a judgment by default will bar a new action on the same cause (*supra*, §372), the Restatement position is that it is not effective as a collateral estoppel. No issues are actually litigated and, as a practical matter, the defendant may reasonably elect to allow judgment to go against him or her without contest for a small demand, even though the defendant has a good defense that he or she would assert if the demand were larger. (See *Rest.2d, Judgments* §27, Comment e; 18A Federal Practice & Procedure (Wright, Miller & Kane) §4442; *77 A.L.R.2d 1410* [application of res judicata to default judgments].)

The California cases do not present a clear picture; some apply the collateral estoppel doctrine (see *infra*, §§449, 451), others do not (see *infra*, §450).

SUPPLEMENT: [This section is current through the latest supplement]



117 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

6. Judgment by Default.

b. Ordinary Judgments as Collateral Estoppel.

7 *Within Cal. Proc. Judgm § 449*

[§ 449] Ordinary Judgments as Collateral Estoppel.

In *Fitzgerald v. Herzer* (1947) 78 C.A.2d 127, 177 P.2d 364, the court said: "A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer. ... Such a judgment is res judicata as to all issues aptly pleaded in the complaint and defendant is estopped from denying in a subsequent action any allegations contained in the former complaint." (78 C.A.2d 131.)

In *Freeze v. Salot* (1954) 122 C.A.2d 561, 266 P.2d 140, F's property was sold under a deed of trust, and A, successor to the purchaser, obtained an unlawful detainer judgment by default against F in the municipal court. In the present action, F sued to set aside the trustee's sale. *Held*, all matters concerning the validity of the sale and title of the purchaser were in issue in the municipal court action and concluded by the prior judgment. (122 C.A.2d 566.)

In *O'Brien v. Appling* (1955) 133 C.A.2d 40, 283 P.2d 289, a default judgment in an action to recover money obtained by fraud was held res judicata in a subsequent proceeding by motion to cancel the record of judgment after an adjudication in bankruptcy. The prior judgment conclusively determined that the debt was nondischargeable (see 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §518). (133 C.A.2d 42.)

Later cases are to the same effect. (See *Flood v. Simpson* (1975) 45 C.A.3d 644, 651, footnote 12, 119 C.R. 675 [citing the text, *Fitzgerald*, and *O'Brien*, but leaving open question whether default entered as sanction for failure to comply with discovery statutes comes within scope of doctrines of res judicata and collateral estoppel]; *Gottlieb v. Kest* (2006) 141 C.A.4th 110, 149, 46 C.R.3d 7 [although default judgment may have collateral estoppel effect, especially where, as here, judgment contains express finding on allegations, default judgment on cross-complaint against plaintiff's companies did not collaterally estop plaintiff from litigating issue of plaintiff's personal fraud, because plaintiff and his companies were not in privity with each other]; on res judicata effect of dismissal for refusal to comply with discovery order, see *supra*, §380.)

SUPPLEMENT: [This section is current through the latest supplement]



118 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

6. Judgment by Default.

c. Where Issue Was Not Raised or Determined.

7 *Witkin Cal. Proc. Judgm § 450*

[§ 450] Where Issue Was Not Raised or Determined.

(1) *Issue Was Not Raised.* Where the issue was not raised in the prior proceeding, the basic requirement for collateral estoppel is absent, and a judgment, whether rendered after trial (see supra, §430 et seq.) or by default, is not conclusive on it. (See *47 Am.Jur.2d (2006 ed.), Judgments §493.*)

Thus, in *English v. English (1937) 9 C.2d 358, 70 P.2d 625*, the issue was the validity of a separation agreement calling for monthly payments of \$ 200. In two municipal court actions, the wife recovered overdue installments, but one judgment went by default, and in the other the husband's cross-complaint was dismissed for defective pleading. *Held*, neither judgment was res judicata in the present action by the husband to rescind for fraud and duress. The issues of fraud, coercion, and duress in procuring the execution of the agreement were neither pleaded nor determined in the prior actions. (*9 C.2d 365.*)

In *Mitchell v. Jones (1959) 172 C.A.2d 580, 342 P.2d 503*, J brought an action in 1953 against M for negligently filling the lower portion of M's land, causing mud and debris to flow onto J's land. He received judgment by default for damages and injunctive relief. In 1954, M brought the present action for damages for deprivation of lateral support by J's excavation. The trial judge ruled that the prior default judgment was a complete bar and gave judgment for defendant J without permitting any evidence. *Held*, reversed. "[A] default judgment conclusively establishes, between the parties so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment; but such judgment is not conclusive as to any defense or issue which was not raised and is not necessary to uphold the judgment." (*172 C.A.2d 586.*) Here, the pleadings in the first action did not raise the issue of J's negligence in excavating, and determination of it was not required to uphold the default judgment. (*172 C.A.3d 586.*)

(2) *Issue Was Raised but Not Determined.* In *Groves v. Peterson (2002) 100 C.A.4th 659, 123 C.R.2d 164*, a judgment debtor brought an independent action in equity to set aside a prior default judgment against him, contending that he had not been properly served in the action that resulted in default. The trial court sustained the judgment creditors' demurrer on the ground of collateral estoppel, because the trial court in the first action had denied the judgment debtor's motion to set aside the default judgment, which had raised the invalid service issue. *Held*, reversed.

The trial court in the first action ruled that the judgment debtor's motion was untimely. Because that ruling was limited to a procedural ground, it did not actually determine whether the service was valid. (100 C.A.4th 670.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Issue Was Not Raised.* See *Ferraro v. Camarlinghi* (2008) 161 C.A.4th 509, 534, 75 C.R.3d 19, citing the text [clerk's entry of default lacked preclusive effect; it was not final or on the merits, and it did not result from litigation of any kind].



119 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

6. Judgment by Default.

d. Default Dissolution of Marriage.

7 *Witkin Cal. Proc. Judgm § 451*

[§ 451] Default Dissolution of Marriage.

California's former divorce law prohibited divorce by default. Nevertheless, the "default divorce," tried by stipulation with the defendant absent, was common; the court, under former C.C. 130, took testimony on the essential matters. The revised law (*Family C. 2336*), although different in terminology, is substantially the same in its prohibition of decree by default and its requirement of proof of grounds. (See 11 *Summary* (10th), *Husband and Wife*, §102.) It would seem, therefore, that prior decisions on collateral estoppel resulting from default divorce decrees are still good law on decrees of dissolution rendered without contest.

The decisions make it clear that a decree rendered after stipulation, where the defendant answers or appears but does not offer evidence or otherwise contest the action at the trial, results in a decree that conclusively determines the issues litigated. (See *Newell v. Brawner* (1956) 146 C.A.2d 337, 341, 303 P.2d 850 [determination of community property]; *Garcia v. Garcia* (1957) 148 C.A.2d 147, 150, 306 P.2d 80 [husband's acknowledgement, in property settlement agreement incorporated in interlocutory decree, of parentage of wife's child]; *Spurr v. Daniels* (1957) 152 C.A.2d 867, 870, 313 P.2d 621 [determination of no community property]; 22 A.L.R.2d 724 [default decree in dissolution action as estoppel or res judicata on issue of marital property rights].)

A distinction was made in *Estate of Williams* (1950) 36 C.2d 289, 223 P.2d 248. In a divorce action brought by the husband, the complaint alleged that there was no community property. The wife was served only by publication, the decree was granted by default, and it did not mention property. After the husband's death, the wife objected to his executor's account on the ground that there was community property in the estate in which she was entitled to share. *Held*, the probate court correctly awarded her a share. (a) If the divorce decree did not determine property rights, it was of course appropriate to determine them in the present proceeding. (b) The decree was silent on those rights, but the complaint alleged that there was no community property. Prior decisions have held that a default judgment may conclusively determine that there is none in such a case. (See *Maxwell v. Maxwell* (1944) 66 C.A.2d 549, 553, 152 P.2d 530 [decree conclusively determined that insurance policies were not community property].) But this is true only under certain conditions. "To summarize the holdings of these cases, a defendant may be estopped by a default judgment entered upon a complaint for divorce alleging facts as to property rights when he has been personally served with summons or has actual knowledge of the existence of the litigation. But this rule has been applied only where the record

shows an express finding upon the allegation as to property." (36 C.2d 297.)

SUPPLEMENT: [This section is current through the latest supplement]



120 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

1. Parties.

a. Substantial Identity.

7 *Witkin Cal. Proc. Judgm* § 452

[§ 452] Substantial Identity.

Normally the doctrine of res judicata in both aspects (merger or bar, and collateral estoppel) calls for identity of the parties to the actions. "The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either." (*C.C.P. 1910.*) (See *Rest.2d, Judgments* §34; *56 Cal. L. Rev. 1098* [nonparties and preclusion by judgment]; *21 Hastings L. J. 763* [extent to which workers' compensation decision and pension board decision bind each other]; on exceptional situations in which strangers may invoke doctrine, see *infra*, §471 et seq.)

Substantial identity is all that is required. In *French v. Rishell (1953) 40 C.2d 477, 254 P.2d 26*, a finding was made by the Industrial Accident Commission that a city fireman's death arose out of his employment. This was binding in a subsequent proceeding before defendant municipal pension board. Although the board was not a party to the prior proceeding, the city was, and the pension board was merely the agent of the city. (*40 C.2d 481.*) (See *Servente v. Murray (1935) 10 C.A.2d 355, 360, 52 P.2d 270* [first proceeding was against pension board, second was against various other city officials, and all were part of one single entity]; *Eulenberg v. Torley's (1943) 56 C.A.2d 653, 657, 133 P.2d 15* [parties were substantially identical despite addition of new defendant involved in separate issue]; *Wilson v. Ostly (1959) 173 C.A.2d 78, 82, 343 P.2d 349*, citing the text.)

Where there is no substantial identity, the doctrine is not applicable. In *Summerford v. Board of Retirement of Santa Barbara County Employees' Retirement Assn. (1977) 72 C.A.3d 128, 139 C.R. 814*, the Workers' Compensation Appeals Board (W.C.A.B.) ruled that plaintiff, a deputy sheriff, had sustained a psychiatric injury entitling him to permanent disability compensation. Defendant board of retirement of the county employees' association sought to make its own psychiatric examination, but plaintiff refused to attend, contending that the W.C.A.B. finding was binding on the retirement board. The trial judge, relying on *French*, granted mandamus to compel issuance of a service-connected disability retirement. *Held*, reversed. Defendant association, unlike a municipal pension board, was not an agent of the county, but a totally distinct organization created under a special statute. (*72 C.A.3d 131, 132.*) (See *Traub v. Board of Retirement of the Los Angeles County Employees Retirement Assn. (1983) 34 C.3d 793, 798, 799, 195 C.R. 681, 670 P.2d 335* [citing *Summerford* and other cases that county retirement board is independent entity and is not bound by

adjudication of workers' compensation claim]; *National Technical Systems v. Superior Court* (2002) 97 C.A.4th 415, 421, 118 C.R.2d 465 [surety for general contractor was not bound by subcontractor's prior judgment against general contractor].)

West's Key Number Digest, Judgment 667 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



121 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

1. Parties.

b. Nonadversary Parties.

7 *Witkin Cal. Proc. Judgm* § 453

[§ 453] Nonadversary Parties.

Formal, nominal, or other nonadversary parties are not bound by the determination of an issue. (See *Rest.2d, Judgments* §§37, 38; James 5th, §§11.7, 11.23 et seq.; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §600.) The principal illustration of this rule is where the plaintiff and defendant in the second action were merely codefendants in the original action. Ordinarily they were not on "opposite sides" of the original action and the judgment was not rendered "between them" for purposes of *C.C.P. 1910* (supra, §452). (See *Robson v. Superior Court* (1915) 171 C. 588, 595, 154 P. 8; *Hardy v. Rosenthal* (1934) 2 C.A.2d 442, 38 P.2d 412; *Andrews v. Horton* (1935) 8 C.A.2d 40, 45, 47 P.2d 496; *Truck Ins. Exchange v. Torres* (1961) 193 C.A.2d 483, 493, 14 C.R. 408; *Great Western Furniture Co. of Oakland v. Porter Corp.* (1965) 238 C.A.2d 502, 508, 48 C.R. 76, citing the text; *Ralke Co. v. Esquire Bldg. Maintenance Co.* (1966) 246 C.A.2d 141, 145, 54 C.R. 556; *Knowles v. Tehachapi Valley Hosp. Dist.* (1996) 49 C.A.4th 1083, 1092, 57 C.R.2d 192, 5 *Summary* (10th), *Torts*, §94 [defendant hospital was not party to stipulated judgment between plaintiff and codefendant surgeon, and thus was not bound by it, where hospital had no contractual or statutory right or duty to control surgeon's defense]; *Pleasant Valley Canal Co. v. Borrer* (1998) 61 C.A.4th 742, 770, 72 C.R.2d 1 [in action to determine water users' respective rights to divert water, parties were not bound by 1916 decision that determined rights as between parties' predecessors in interest; predecessors did not actually litigate any issues adversely to one another in earlier action]; *Johnson v. Fresno* (2003) 111 C.A.4th 1087, 1095, 4 C.R.3d 475 [county employee would not be barred from seeking indemnity against county, even though plaintiff who claimed to have been sexually harassed by employee had dismissed county with prejudice from her earlier action against employee and county; county and employee were not adversaries in earlier action]; 24 *A.L.R.3d* 318 [judgment in action against codefendants for injury or death of person, or for damage to property, as res judicata in subsequent action between codefendants]; on codefendants who are adversaries, see *infra*, §455.)

SUPPLEMENT: [This section is current through the latest supplement]



122 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

1. Parties.

c. Parties in Representative Capacity.

7 *Witkin Cal. Proc. Judgm* § 454

[§ 454] Parties in Representative Capacity.

The identity must be of parties "in the same capacity." (*C.C.P. 1908(a)(2)*.) So, if the first judgment is for or against a party in a fiduciary or other representative capacity, it is not conclusive in a subsequent action in which that party appears as an individual. (*Finnerty v. Cummings (1933) 132 C.A. 48, 22 P.2d 37* [first action by mother as guardian ad litem for child's injuries, second action by mother in her own right for loss of earnings and medical expense]; see *Rest.2d, Judgments* §36; *47 Am.Jur.2d (2006 ed.), Judgments* §579.)

However, a formal difference in capacity is immaterial if the same right is litigated. Thus, in *Bernhard v. Bank of America (1942) 19 C.2d 807, 122 P.2d 892*, plaintiff appeared first with other individual legatees to object to an executor's account. *Held*, she was bound by the judgment against her when she sued later as administrator, for in both proceedings she was seeking recovery for the benefit of legatees and creditors of the estate. (*19 C.2d 813*.) (See *Acun a v. Regents of Univ. of Calif. (1997) 56 C.A.4th 639, 651, 65 C.R.2d 388* [state action was barred by prior summary judgment in federal action, even though defendants were sued in their official capacities in federal action and in their individual capacities in state action; primary right to be free of discrimination was at issue in both].)

SUPPLEMENT: [This section is current through the latest supplement]



123 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

1. Parties.

d. Codefendants Who Are Adversaries.

7 *Witkin Cal. Proc. Judgm* § 455

[§ 455] Codefendants Who Are Adversaries.

(1) *In General.* If codefendants are actually opposed and litigate issues adversely to each other, the doctrine of res judicata applies. (See *Stepan v. Garcia* (1974) 43 C.A.3d 497, 500, 117 C.R. 919, citing the text; *Columbus Line v. Gray Line Sight-Seeing Cos. Associated* (1981) 120 C.A.3d 622, 632, 174 C.R. 527; *Rest.2d, Judgments* §38; James 5th, §11.7; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §601.)

In *Pomona College v. Dunn* (1935) 7 C.A.2d 227, 46 P.2d 270, a prior judgment in a condemnation action was held binding against a mortgagor and in favor of a mortgagee. Though they were both defendants in the condemnation action, the court in that kind of action must determine rights as between defendants. (7 C.A.2d 240.)

In *Freightliner Corp. v. Rockwell-Standard Corp.* (1969) 2 C.A.3d 115, 82 C.R. 439, a motorist was injured in a collision between his passenger car and a truck-trailer. He sued the owner and lessee of the truck-trailer, and the manufacturer and installer of the suspension system. Defendants manufacturer and installer filed cross-complaints for indemnity against each other. At the trial on the motorist's complaint, the owner and lessee were found not liable, defendants manufacturer and installer were both found actively negligent, and the judgment was affirmed on appeal. *Held*, in the trial on the cross-complaints for indemnity, the judgment in the main action was a binding determination that both cross-complainants were actively negligent and consequently neither was entitled to indemnity. (2 C.A.3d 118.)

In *Martin v. Los Angeles* (1996) 51 C.A.4th 688, 59 C.R.2d 303, plaintiffs brought a wrongful death action against numerous defendants, two of whom cross-complained against a third (defendant county) for equitable indemnity. The trial court severed the equitable indemnity action for later trial to the court. The cross-complainants settled with plaintiff during trial, and the jury found that defendant county was 13% liable for plaintiffs' injuries. The equitable indemnity action was then tried to the court, which found defendant county to be 50% liable. *Held*, reversed.

(a) The jury's finding in the wrongful death action that defendant county was 13% liable was binding in the equitable indemnity action; there was sufficient privity between plaintiffs and cross-complainants to apply collateral estoppel. Cross-complainants were named defendants in the wrongful death litigation and remained parties by reason of

their cross-complaint against defendant county even after settling with plaintiffs. (51 C.A.4th 700.)

(b) Cross-complainants' counsel fully participated in the wrongful death trial, and at the time of trial, the interests of plaintiffs and cross-complainants were closely aligned. They both sought to portray defendant county as the most culpable party, plaintiffs in order to obtain a damage award in excess of the sums they received in settlement from cross-complainants, and cross-complainants in order to recoup from defendant county as much of the settlement payment as possible. (51 C.A.4th 701.)

(2) *Distinction: Codefendant Without Incentive To Litigate Issue in Prior Action.* In *Sutton v. Golden Gate Bridge, Highway & Trans. Dist.* (1998) 68 C.A.4th 1149, 81 C.R.2d 155, plaintiff motorist sued defendant district after plaintiff sustained serious injuries in an automobile accident on the Golden Gate Bridge. Plaintiff alleged that the lack of a median barrier on the bridge constituted a dangerous condition and that the bridge was a nuisance. Defendant contended that plaintiff was collaterally estopped from litigating this issue because the issue had been litigated and resolved in an earlier action filed by the heirs of another motorist who had been killed in the same accident. Defendant and plaintiff here were codefendants in the earlier action. *Held*, collateral estoppel is not applicable.

Although defendant filed a cross-complaint against plaintiff in the prior action, making them adversaries, plaintiff did not have the incentive to litigate the issue of defendant's liability for lack of a median barrier in the prior action. (68 C.A.4th 1155.) Plaintiff was represented by his insurer in the prior action and not by his present counsel. The insurer had no interest in pursuing any claims against defendant and did not oppose defendant's motion for summary judgment on the median barrier issue. Although plaintiff's present counsel filed a declaration in opposition to the motion, he urged the court to "draw no conclusions" regarding the merits of plaintiff's claim about the barrier from the arguments of the plaintiffs in the prior action. Thus, plaintiff was not afforded the opportunity for a full and fair adjudication of the median issue in the prior action and is not collaterally estopped from litigating the issue here. (68 C.A.4th 1157.)

In *Bostick v. Flex Equipment Co.* (2007) 147 C.A.4th 80, 54 C.R.3d 28, the jury's finding that a manufacturer of gym equipment was 90% at fault for an equipment user's injuries, that the user was 10% at fault, and that "all other entities" were 0% at fault was not binding in a cross-action between a gym and the manufacturer. The manufacturer did not have a meaningful incentive to adjudicate the amount of the gym's comparative fault in the user's action against the gym and the manufacturer, because inculcating the gym would have undermined the manufacturer's defense without providing any benefit to the manufacturer. (147 C.A.4th 98, citing *Sutton*.)

SUPPLEMENT: [This section is current through the latest supplement]



124 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

a. In General.

1. Nature of Privity.

7 Witkin Cal. Proc. Judgm § 456

[§ 456] Nature of Privity.

A former judgment may be binding on persons who, though not parties to the former judgment, were in privity with a party. (See *Armstrong v. Armstrong (1976) 15 C.3d 942, 951, 126 C.R. 805, 544 P.2d 941*, *infra*, §462, citing the text.)

The loose term "privity" refers to some relationship or connection with the party that makes it proper to hold "privies" bound with the actual parties. "Who are privies requires careful examination into the circumstances of each case as it arises. In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right." (*Zaragoza v. Craven (1949) 33 C.2d 315, 318, 202 P.2d 73*; see *Margolis v. Superior Court (1957) 151 C.A.2d 333, 334, 313 P.2d 29*, citing the text: *State Farm Mut. Auto. Ins. Co. v. Salazar (1957) 155 C.A.2d Supp. 861, 865, 318 P.2d 210*, citing the text; *Weir v. Ferreira (1997) 59 C.A.4th 1509, 1521, 70 C.R.2d 33*, citing the text; *59 A.L.R.2d 752* [effect on surety of default or consent judgment against principal]; *81 A.L.R.2d 1323* [judgment in action by or against stockholder or corporate officer as res judicata in action by or against corporation]; *47 Am.Jur.2d (2006 ed.), Judgments §582 et seq.*)

West's Key Number Digest, Judgment 678

SUPPLEMENT: [This section is current through the latest supplement]



125 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

a. In General.

2. Test: Whether Party Is "Sufficiently Close."

7 *Witkin Cal. Proc. Judgm* § 457

[§ 457] Test: Whether Party Is "Sufficiently Close."

(1) *Modern Approach.* Modern courts are concerned with the practical question whether the nonparty is "sufficiently close to the original case to afford application of the principle of preclusion." (*People v. Drinkhouse* (1970) 4 C.A.3d 931, 937, 84 C.R. 773, *infra*, §461.) (See *Montana v. United States* (1979) 440 U.S. 147, 99 S.Ct. 970, 974, footnote 5, 59 L.Ed.2d 210, 217; *Palmer v. Oakland* (1978) 86 C.A.3d 39, 43, 150 C.R. 41; Rest.2d, Judgments, Ch.1, p. 13 [describing privity terminology].)

The concept of privity was explored and the principles were summarized in *Lynch v. Glass* (1975) 44 C.A.3d 943, 119 C.R. 139, rejecting the defense of collateral estoppel.

(a) "Privity is essentially a shorthand statement that collateral estoppel is to be applied in a given case; there is no universally applicable definition of privity." (44 C.A.3d 947.)

(b) Three factors may favor application of collateral estoppel even though there is no identity of parties and issues: to protect against vexatious litigation, to further the finality of litigation in which public interests are involved, or to promote the stability of adjudications in prior criminal actions. (44 C.A.3d 947.) The test is whether a nonparty was "sufficiently close" to an unsuccessful party in a prior action. (44 C.A.3d 948.)

(c) Nevertheless, due process requirements must be met. The nonparty must have had an identity or community of interest with, and adequate representation by, the losing party in the first action, and the circumstances must have been such that the nonparty should reasonably have expected to be bound by the prior adjudication. (44 C.A.3d 948.)

(d) This expectation would be present where the nonparty had a proprietary or financial interest in and control of a prior action, or where the unsuccessful party in the first action acted in a representative capacity for a nonparty. (44 C.A.3d 949; see *infra*, §§462, 465.)

The *Lynch* approach was approved in *Clemmer v. Hartford Ins. Co.* (1978) 22 C.3d 865, 151 C.R. 285, 587 P.2d

1098. A doctor was insured by defendant insurer under a comprehensive liability policy. The doctor killed his employer and was convicted of second degree murder. Plaintiffs, the widow and minor son of the victim, sued the doctor for wrongful death and obtained a default judgment of over \$ 2 million. They then brought the present action against the doctor's insurer to satisfy the judgment, and defendant asserted the statute (*Ins.C. 533*) and the policy provision excluding liability for a wilful act of the insured. At the trial, defendant contended that the doctor's murder conviction operated as a collateral estoppel against plaintiffs, precluding them from contending that the doctor's act was not wilful. *Held*, the requisite privity between plaintiffs and the doctor was not present. After being found guilty, the doctor withdrew his insanity plea. "He may well have done so as a result of a determination on his part that the sentence to be served by him under a second degree murder conviction would be preferable to the possible consequence of his prevailing on his insanity pleas, to wit, commitment to a state mental hospital. ... For this reason, it cannot be said that [the doctor] had the same interests in fully litigating the issue of the willfulness of his act in killing [the victim] as do the plaintiffs herein. We therefore hold that whereas plaintiffs are subject to any defenses that [defendant] would have had against [the doctor], such defenses must be proved by [defendant]." (22 C.3d 877.)

Numerous cases have followed this approach. (See *Miller v. Superior Court* (1985) 168 C.A.3d 376, 383, 384, 214 C.R. 125, *infra*, §459; *Courtney v. Waring* (1987) 191 C.A.3d 1434, 1444, 237 C.R. 233; *Ceresino v. Fire Ins. Exchange* (1989) 215 C.A.3d 814, 820, 821, 264 C.R. 30 [discussing *Clemmer*, *Lynch*, and *Drinkhouse*; privity was established]; *Lewis v. Sacramento* (1990) 218 C.A.3d 214, 217, 266 C.R. 678 [discussing *Clemmer* and *Lynch*; privity was established]; *Zapata v. Department of Motor Vehicles* (1991) 2 C.A.4th 108, 115, 2 C.R.2d 855 [privity was established between Department of Motor Vehicles and district attorney in context of DUI enforcement]; *Victa v. Merle Norman Cosmetics* (1993) 19 C.A.4th 454, 24 C.R.2d 117, *infra*, §458.)

(2) *Illustrations of Sufficient Closeness*. The following are among the cases finding sufficient closeness between the nonparty and the previous party to impose collateral estoppel against the nonparty:

Children's Hosp. of Los Angeles v. Sedgwick (1996) 45 C.A.4th 1780, 1787, 1788, 53 C.R.2d 725 [hospital was collaterally estopped from relitigating whether anesthesiologist negligently caused injuries to patient; hospital and patient had "community of interest" in patient's earlier, unsuccessful action against anesthesiologist; citing *Clemmer*].

Citizens for Open Access to Sand & Tide v. Seadrift Assn. (1998) 60 C.A.4th 1053, 1069, 71 C.R.2d 77 [settlement agreement between property owners and government agencies that resolved issue of public access to property barred later action by public interest group seeking declaration of implied dedication; government agencies were responsible for representing public interest in earlier actions and did so zealously].

Garcia v. Rehrig Int. (2002) 99 C.A.4th 869, 877, 121 C.R.2d 723 [collateral estoppel precluded child's personal injury action against shopping cart manufacturer because manufacturer had already obtained judgment finding no liability in parents' earlier action against it; parents adequately represented child's interests in prior action; citing *Evans v. Celotex Corp.* (1987) 194 C.A.3d 741, 238 C.R. 259, *infra*, §460, and declining to follow *Kaiser Foundation Hosp. v. Superior Court* (1967) 254 C.A.2d 327, 62 C.R. 330, *infra*, §469].

George F. Hillenbrand v. Insurance Co. of North America (2002) 104 C.A.4th 784, 825, 128 C.R.2d 586 [defendant insurer was collaterally estopped from litigating its liability for malicious prosecution of insured following finding of liability against other insurer; defendant had acted as agent for other insurer, had determined whether actions that allegedly constituted malicious prosecution should be filed, and then had participated fully in malicious prosecution trial; citing *Lewis*].

Mooney v. Caspari (2006) 138 C.A.4th 704, 716, 41 C.R.3d 728 [broker's malpractice action against attorneys who failed to timely sue bankruptcy attorney was barred by earlier determination that bankruptcy attorney was not liable for malpractice; plaintiff in earlier action was sufficiently close to broker to allow application of collateral estoppel because interests of both plaintiffs were closely connected, broker was adequately represented in earlier action, and broker should have been aware that earlier action would bind him].

Alvarez v. May Dept. Stores Co. (2006) 143 C.A.4th 1223, 1233, 49 C.R.3d 892 [in action for overtime wages, collateral estoppel barred department store managers from relitigating issue of class certification, where certification had been denied in prior action composed of other named plaintiffs; prior plaintiffs were "virtual representatives" of present plaintiffs, complaint in prior action alleged same general misconduct occurring during same time period, and certification was sought for same class of employees by same attorneys, who provided adequate representation to prior plaintiffs].

(3) *Illustrations of Lack of Sufficient Closeness.* The following cases are among those in which the nonparty and the previous party were not sufficiently close to warrant application of collateral estoppel:

Old Republic Ins. Co. v. Superior Court (1998) 66 C.A.4th 128, 151, 152, 77 C.R.2d 642, infra, §469 [distinguishing *Drinkhouse* and *Ceresino*].

Vega v. Jones, Day, Reavis & Pogue (2004) 121 C.A.4th 282, 298, 17 C.R.3d 26 [shareholder in company that had been acquired by another company was not barred from bringing fraud action against law firm that had represented acquiring company, even though law firm had obtained summary judgment in earlier fraud actions by three other shareholders; only relationship between plaintiff here and previous plaintiffs was that they were shareholders in same company].

Rodgers v. Sargent Controls & Aerospace (2006) 136 C.A.4th 82, 89, 38 C.R.3d 528 [although plaintiff in asbestos action had same attorney as unsuccessful plaintiffs in prior actions involving same defendant, collateral estoppel did not preclude plaintiff from relitigating issue of defendant's successor liability; plaintiff may have been aware of prior litigation but he did not stand in close relationship with other plaintiffs and had no control over prior proceedings; citing *Vega* and *Lynch*].

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Illustrations of Sufficient Closeness.* See *California Physicians' Service v. Aoki Diabetes Research Institute (2008) 163 C.A.4th 1506, 1521, 78 C.R.3d 646* [administrative ruling that medical procedure was not experimental had collateral estoppel effect in health care service plan's later action, even though plan was not party to administrative proceeding; plan was administrator for self-insurer that was party to first proceeding, plan's denial of coverage was disputed in that proceeding, plan had strong motive for asserting its interests in that proceeding, and plan should have expected to be bound by earlier ruling]; *Consumer Advocacy Group v. ExxonMobil Corp. (2008) 168 C.A.4th 675, 689, 86 C.R.3d 39* [consumer group was in privity with other consumer group that had settled private enforcement action with polluter; settling group, which purported to assert claims on behalf of nonparties and secured remedial measures by polluter, adequately represented public interest, including that of other group].(3) *Illustrations of Lack of Sufficient Closeness.* See *Nein v. HostPro (2009) 174 C.A.4th 833, 844, 95 C.R.3d 34* [although plaintiff in present action and plaintiff in previous action against same defendant shared interest in resolving statutory definition, present plaintiff did not have reason to intervene in earlier action or reason to expect that he would be bound by it; there was no evidence that earlier plaintiff acted as present plaintiff's representative or that present plaintiff had any control over earlier litigation; citing *Rodgers v. Sargent Controls & Aerospace (2006) 136 C.A.4th 82, 38 C.R.3d 528, text, p. 1116*].



126 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

a. In General.

3. No Privity With Government Enforcement Agency in Discrimination Action.

7 Within Cal. Proc. Judgm § 458

[§ 458] No Privity With Government Enforcement Agency in Discrimination Action.

In *Victa v. Merle Norman Cosmetics (1993) 19 C.A.4th 454, 24 C.R.2d 117*, plaintiff filed an age discrimination claim with the Equal Employment Opportunity Commission (EEOC) and the California Department of Fair Employment and Housing after her demotion and subsequent termination by defendant. Plaintiff later sued in state court on an implied employment contract and for state age discrimination violations, but withheld service of the complaint. The EEOC investigated plaintiff's charge, engaged in futile settlement discussions with defendant, and ultimately sued defendant in federal court for violation of the Age Discrimination in Employment Act (ADEA). The district court judge found no merit in the EEOC's case, and the EEOC then negotiated a consent judgment with defendant. At the EEOC's prompting, plaintiff proceeded with her private action. The trial judge tried the res judicata question separately, ruling that, although plaintiff was not a party in the EEOC case, in prosecuting and settling the case, the EEOC acted as plaintiff's representative and was therefore in privity with plaintiff, that plaintiff had been aware of the litigation, and that plaintiff's counsel had participated in discovery proceedings by representing plaintiff during depositions. Thus, plaintiff's action was barred by res judicata. *Held*, reversed; there was no privity between plaintiff and the EEOC.

(a) The EEOC prosecuted its case "at least as much, and perhaps more, in the general, public interest" than in plaintiff's interest. "Although the EEOC complaint alleged it was bringing the action both to correct defendant's unlawful employment practices and to make plaintiff whole, by the time it agreed to the judgment, the EEOC had dispensed with plaintiff's particular interest and was content to dismiss the case in exchange for defendant's submission to a general injunction. In obtaining the judgment here urged as res judicata, the EEOC did not act as plaintiff's representative." (*19 C.A.4th 468.*)

(b) Plaintiff's knowledge of the EEOC case, and of her counsel's participation in its discovery proceedings, was not significant. The participation gave neither counsel nor plaintiff an ability to control or shape the judgment. Thus, plaintiff could not reasonably have anticipated to be bound by the judgment. (*19 C.A.4th 468.*)

(c) "We therefore conclude that in this case the element of privity, representative or otherwise, was lacking, and hence the judgment in the EEOC case cannot serve as res judicata. This decision does not stem from or signify a general

disavowal of the EEOC's capacity to stand in privity with a claimant in an ADEA case. Rather, it derives from the particular facts of the case at hand, which ... compel the conclusion reached." (19 C.A.4th 468.)

SUPPLEMENT: [This section is current through the latest supplement]



127 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

a. In General.

4. Privity of City and State in Criminal Case.

7 *Within Cal. Proc. Judgm § 459*

[§ 459] Privity of City and State in Criminal Case.

In *Miller v. Superior Court (1985) 168 C.A.3d 376, 214 C.R. 125*, plaintiff filed an action for damages against a police officer and the city of Los Angeles, alleging that the police officer raped her, and that the city had been negligent in the hiring and continued employment of the police officer. In a prior criminal trial, the police officer was found guilty, and in the present civil action plaintiff moved for summary judgment against the city and the police officer, on the ground that both were collaterally estopped from relitigating the issue of rape. The lower court denied the motion. *Held*, mandamus issued to compel entry of summary judgment against both defendants.

(a) The issues that the city wanted to relitigate were whether the act of intercourse took place, and, if so, whether it was with consent. These issues were decided by the final judgment in the criminal case. (*168 C.A.3d 382.*)

(b) The city was obviously not a party to the criminal case, and it contended that the judgment should not be binding on it because it had no control over the police officer's defense and no opportunity to show that plaintiff had consented to the intercourse. The answer to this contention is that the city, while not in privity with the officer, was in privity with the People as plaintiff in the criminal prosecution. (*168 C.A.3d 382, 383.*) "When their community of interest, substantial identity of interests and City's closeness to the criminal case are considered in the context of its responsibilities to the public, we think it clear that City was in privity with the People of the State of California. The interest of City was identical to that of the People of the State of California in prosecuting [the police officer], and was successfully represented by the People in that case. Try as it may, City cannot divorce itself from the People in this context unless it wishes to deny on the record that it has an interest in obtaining a conviction of rape committed by one of its police officers while in the line of duty. Its interest in prosecuting [the police officer] was every bit as strong as that of the People of the State of California. ... City has the responsibility of maintaining an efficient and law-abiding police force; thus it is as interested as the People of the State of California in concerning itself with a City police officer who took advantage of and breached a substantial public trust." (*168 C.A.3d 384.*)

(c) The modern approach to privity asks whether the nonparty "is sufficiently close to the original case to afford application of the principle of preclusion." (*168 C.A.3d 384.*) In addition, considerations of public policy lead to the

conclusion reached here. If the actions against the police officer and the city were severed, repetitive litigation would result with a waste of judicial time and resources, and plaintiff would be exposed to a retrial of the rape issue with its attendant humiliation. Most important, however, is the necessity for stability in criminal adjudications. "If City is permitted to challenge the critical fact of [the police officer's] rape of petitioner, and if by reason of failure of proof or otherwise on the part of petitioner the fact was not proved, several anomalies unsettling to public confidence in the judicial process would appear. First, there would be presented the repugnancy that a police officer would have been convicted, jailed and removed from office for forcible sexual conduct which in a civil suit would be found not to have occurred. Second, not only would inconsistent judgments threaten public confidence in our judicial system and undermine the integrity of our system of justice but would have a devastating effect on [the police officer's] concept of justice as he serves out his term in state prison, suffers removal from office and possible denial of pension, not to mention loss of reputation." (*168 C.A.3d 386.*)

SUPPLEMENT: [This section is current through the latest supplement]



128 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

b. Interest in Subject Matter.

1. Successor in Interest.

7 *Witkin Cal. Proc. Judgm* § 460

[§ 460] Successor in Interest.

The most common form of privity is succession in interest. One who succeeds to the interests of a party in the property or other subject of the action, after its commencement, is bound by the judgment with respect to those interests in the same manner as if he or she were a party. (*C.C.P. 1908(a)(2)*); see *Rest.2d, Judgments* §§43, 44; *Estate of Clark* (1923) 190 C. 354, 360, 212 P. 622 [judgment against administrator was binding on heirs]; *Walker v. Hansen* (1933) 218 C. 619, 24 P.2d 764 [judgment against administrator was binding on trustee of same estate]; *Luckhardt v. Mooradian* (1949) 92 C.A.2d 501, 519, 207 P.2d 579 [same]; *Basore v. Metropolitan Trust Co. of Calif.* (1951) 105 C.A.2d 834, 234 P.2d 296 [judgment against decedent was binding in action by administrator]; *Estate of Hanson* (1954) 126 C.A.2d 71, 76, 271 P.2d 563; *Frazier v. Richmond* (1986) 184 C.A.3d 1491, 1498, 1499, 228 C.R. 376 [judgment against pension plan members in prior action was binding in later action by surviving spouses of members]; *Weir v. Ferreira* (1997) 59 C.A.4th 1509, 1521, 70 C.R.2d 33 [first child of decedent was barred from challenging second child's status as issue of decedent; prior dissolution decree involving decedent and his former wife and declaring second child to be decedent's issue was binding on those claiming through decedent]; *Marie Y. v. General Star Indem. Co.* (2003) 110 C.A.4th 928, 954, 2 C.R.3d 135 [dental board's decision that dentist acted intentionally and with sexual motivation when he inappropriately touched patient had collateral estoppel effect in later civil action by patient against dentist's insurer; patient, as assignee of dentist in action against insurer, was in privity with dentist]; 20 *Pacific L. J.* 221 [whether adverse judgment in personal injury action bars subsequent wrongful death action].)

In *Kartheiser v. Superior Court* (1959) 174 C.A.2d 617, 345 P.2d 135, the court held that where a mortgagor (or trustor) in a separate action seeks a determination against the mortgagee (or beneficiary under a trust deed) that a default was cured by tender, any judgment in that action will be binding on a purchaser at the trustee's sale, who succeeds to the title of the mortgagee or beneficiary. (174 C.A.2d 620.)

In *Evans v. Celotex Corp.* (1987) 194 C.A.3d 741, 238 C.R. 259, plaintiffs, the widow and children of E, filed a wrongful death complaint, alleging that E's death was caused by exposure to asbestos products made or sold by defendant. The trial judge dismissed the action, ruling that plaintiffs were in privity with E, and that the issues of causation and liability had been determined against E in his earlier personal injury action against defendant. *Held*,

affirmed.

(a) "Under the modern approach, privity denotes that the plaintiffs in the succeeding action have an 'identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.' " (194 C.A.3d 745, quoting *Clemmer v. Hartford Ins. Co.* (1978) 22 C.3d 865, 151 C.R. 285, 587 P.2d 1098, supra, §457.)

(b) The right to recover against defendant in this case depends, as it did in the earlier personal injury action, on the liability of the defendant and the lack of comparative fault of the deceased. "Plaintiffs' interests in the wrongful death action are inextricably linked to the determination of the deceased's rights in the prior action. The loss they suffer arises by virtue of the injury caused to the deceased. ... It would be anomalous to deny recovery to the deceased but to award damages to his heirs based on the same set of facts and legal issues. Further, it can fairly be said that plaintiffs' legal interests were adequately represented in the personal injury action as if they had been parties thereto. As such, they are deemed to be in privity with him." (194 C.A.3d 746.)

(c) The decision in *Kaiser Foundation Hosp. v. Superior Court* (1967) 254 C.A.2d 327, 62 C.R. 330, infra, §469, that a daughter was not in privity with her deceased father and could bring an action against defendant hospital notwithstanding an earlier action by the father that resulted in a judgment for defendant, is wrong and will not be followed. The court in *Kaiser* "erroneously equated the concept of privity with the existence of the same cause of action. Privity is satisfied so long as the plaintiffs' legal interests are adequately represented in the prior action. Privity is not defeated because the parties raise a different theory or cause of action in support of their rights of recovery." (194 C.A.3d 746.) (See *Brown v. Rahman* (1991) 231 C.A.3d 1458, 1463, 282 C.R. 815 [following *Evans*].)

SUPPLEMENT: [This section is current through the latest supplement]



129 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

b. Interest in Subject Matter.

2. Interest Previously Acquired.

7 *Witkin Cal. Proc. Judgm* § 461

[§ 461] Interest Previously Acquired.

The traditional statement of the privity rule confines it to one who acquires an interest after the first action. If the person acquires it before commencement of that action, he or she is not a successor in interest of a party to the action and ordinarily is not bound by the judgment. (*C.C.P. 1908(a)(2)*; see *Bernhard v. Bank of America (1942) 19 C.2d 807, 811, 122 P.2d 892* [dictum]; *Holman v. Toten (1942) 54 C.A.2d 309, 314, 128 P.2d 808*; *Topanga Corp. v. Gentile (1963) 219 C.A.2d 274, 279, 33 C.R. 56*, citing the text; *Rest.2d, Judgments* §43; *47 Am.Jur.2d (2006 ed.), Judgments* §591.)

This narrow view was rejected and the privity concept was given expanded scope in *People v. Drinkhouse (1970) 4 C.A.3d 931, 84 C.R. 773*. A county tax collector held a tax sale and conveyed land to D and R. R granted to H. Then the tax collector and R were charged with violation of *Govt.C. 1090*, the conflict of interest statute (see 1 *Summary* (10th), *Contracts*, §651 et seq.) and convicted. After the conviction, the state brought an action against D, R, and H, to quiet title to the property. *Held*, summary judgment for state affirmed.

(a) *Prior criminal and subsequent civil judgment*. As to R, the prior criminal conviction for aiding and abetting the tax collector was a conclusive determination in the present civil action of the fact of the tax collector's interest, which rendered the sale void. (*4 C.A.3d 935*.)

(b) *Expanded privity rule*. D and H were not parties to the criminal action, and, under the traditional rule, were not in privity with the criminal defendants (tax collector and R) because the conveyances to them took place before the criminal prosecution was commenced. (*4 C.A.3d 937*.) But "[t]he courts and commentators have indicated a dissatisfaction with the analysis in terms of privity and mutuality and have expanded the impact of preclusion far beyond the traditional concepts." (*4 C.A.3d 937*.) Today's approach is a practical one. (*4 C.A.3d 937*; see *supra*, §456.)

(c) *Bernhard statement is not controlling*. In the light of this modern approach, "we regard the reference in the *Bernhard* case to privies as those who take after former judgment as surely including such parties, but not as limiting the class to these exclusively. It does not seem likely that the *Bernhard* court, while it was engaged in the process of

removing the requirement of mutuality of estoppel ... , at the same moment was erecting a barrier to the legitimate process of the meaning of 'privies' to earlier litigation." (4 C.A.3d 937.)

(d) *Reasons for collateral estoppel in present case.* If the state were required to again prove the tax collector's interest in order to invalidate the deeds, and it failed to do so (e.g., because of absence of witnesses), the result would be anomalous. (1) A county officer would have been convicted for conduct in a transaction found lawful in a civil action. (2) Two grantees on the same deed would be treated differently: the deed to R would be void, the deed to D would be valid. (3) A similar incongruity would exist as to the deed to H. (4 C.A.3d 939.) Hence, considerations of public policy, of the orderliness of titles, and of the finality of litigation, impel the conclusion that D and H are precluded from retrying the essential issue in the case. (4 C.A.3d 939.)

SUPPLEMENT: [This section is current through the latest supplement]



130 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

c. Persons Represented by Fiduciary.

1. General Rule.

7 *Witkin Cal. Proc. Judgm* § 462

[§ 462] General Rule.

Where a fiduciary, such as a trustee, agent, executor, or administrator, is a party to an action in a representative capacity, the beneficiary, whose interests are involved, may be bound by the judgment. (See *Rest.2d, Judgments* §41; *Sea-Land Services v. Gaudet* (1974) 414 U.S. 573, 94 S.Ct. 806, 819, 39 L.Ed.2d 9, 25 [decendent's recovery in personal injury action of damages for loss of future wages precluded recovery for loss of support by his dependents in wrongful death action arising out of same tort]; *Murdock v. Eddy* (1940) 38 C.A.2d 551, 101 P.2d 722 [judgment in action by mother and son that father's obligation should continue until son reached age of 21 was conclusive against son in his action after age 21]; James 5th, §11.28; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §615 et seq.)

This principle was applied in *Zaragosa v. Craven* (1949) 33 C.2d 315, 202 P.2d 73, where a husband unsuccessfully sought damages for personal injuries to himself and his wife. The determination of the issues of negligence and contributory negligence against the husband was held conclusive in the wife's subsequent action on the independent cause of action for her own injuries. "It is thus apparent that plaintiff was in privity with her husband, i.e., had a mutual relationship to the same right or property, in the *prior* litigation. The right, or cause of action, involved in such prior litigation was community in nature and the proceeds of any judgment that might have been recovered from defendant would have belonged to both husband and wife, as community property. Therefore ... the husband was representing the community, to which if judgment had gone against defendant the latter would have owed payment ... and consequently the wife was also represented as to her interest in the community and is bound by the judgment." (33 C.2d 321.)

Similarly, in *Nemeth v. Hair* (1956) 146 C.A.2d 405, 304 P.2d 129, plaintiffs' insurance carrier, under a standard subrogation agreement taken from the husband, sued for property damage to the car, and a crucial issue was determined against the insurer. In the present action by the wife to recover for her personal injuries, the determination of that issue was binding on the husband as a party represented, and on the wife as a person in privity. The 1951 amendment to former C.C. 171c, giving the wife control over her personal injury damages, did not change the privity rule because the damages were still community property. (146 C.A.2d 409.)

For a time (1957 to 1968), the *Zaragosa* rule was inapplicable to these actions, because an amended statute made a spouse's personal injury damages separate property. The 1968 Legislature restored the original classification, making them community property, but retaining the wife's management and control and eliminating the rule of imputing contributory (now comparative) negligence of one spouse to the other innocent spouse. (Former C.C. 5110, 5112; see *Family C. 780, 783*; 11 *Summary* (10th), *Community Property*, §40 et seq.) It would seem, therefore, that, except for the repudiated rule of imputed contributory negligence, the determination of issues in an action by one spouse for personal injury damages would be conclusive in a later action by the other spouse.

In *Armstrong v. Armstrong* (1976) 15 C.3d 942, 126 C.R. 805, 544 P.2d 941, a divorce decree rendered in 1960 contained provisions for support of children, which allowed the father credits on income received by the children from a testamentary trust. In 1973, the children sued the father for money damages and misappropriation of trust assets, contending that the divorce judgment was not binding on them because they were not parties to the divorce action. *Held*, the judgment was res judicata; they were persons "in privity" with the parties to the divorce action. "In the present case, plaintiffs' mother was entrusted with their care and custody and was a proper representative of their interests. While in similar situations we can conceive of a commingling of interests of parent and child in the negotiation of a marital dissolution agreement to the degree that the future interests of a child are clearly and deliberately subordinated to the present interests and advantages of a parent, the record before us discloses no such circumstances." (15 C.3d 951.)

SUPPLEMENT: [This section is current through the latest supplement]



131 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

c. Persons Represented by Fiduciary.

2. Exceptions.

7 *Witkin Cal. Proc. Judgm* § 463

[§ 463] Exceptions.

(1) *Where Fiduciary Acts Improperly.* The beneficiary is not bound by a judgment for or against a fiduciary who fails to give required notice concerning the representation, who acts beyond the scope of authority or without due diligence and reasonable prudence, or who was divested of representative authority. (*Rest.2d, Judgments* §42.)

(2) *Partners.* Partners are fiduciaries (see 9 *Summary* (10th), *Partnership*, §30). The relationship is, however, deemed insufficient to justify application of the res judicata doctrine where successive actions in tort are brought against different partners. Practical dangers call for rejection of the privity rule in those cases. (*Dillard v. McKnight (1949) 34 C.2d 209, 214, 209 P.2d 387* ["a partner would be required to discover at his peril any action against his copartner that might conceivably relate to the partnership business and seek to intervene"]; see *11 A.L.R.2d 847* [judgment for or against partner as res judicata in favor of or against copartner who was not party to judgment]; cf. *Rest.2d, Judgments* §60 [nonparty partner is bound if he or she controlled defense of action or was given notice of opportunity to defend].)

(3) *Co-owners.* Co-owners, such as joint tenants and tenants in common, may join as plaintiffs in an action involving the common property. Except where an absent cotenant is an indispensable party, however, one or more may sue without joining the others. (See 4 *Cal. Proc. (5th), Pleading*, §182 et seq.) Accordingly, a judgment rendered in an action brought by one is neither a merger nor a bar in a subsequent action brought by or against another and is not a collateral estoppel on the issues determined. (See *Rest.2d, Judgments* §54; *47 Am.Jur.2d (2006 ed.), Judgments* §618.)

(4) *Child Seeking Paternity Decree.* A decree in a dissolution proceeding cannot make a determination of nonpaternity of a child who is not a party to the proceeding. In *Ruddock v. Ohls (1979) 91 C.A.3d 271, 154 C.R. 87*, the court in a 1971 Oregon divorce proceeding found that the husband was not the father of the wife's child and denied support. In 1977, the child, through a guardian ad litem, brought an action to establish paternity and to recover support. The trial court struck the complaint on the ground that paternity had been adjudicated in the divorce proceeding. *Held*, judgment reversed; the divorce decree was not res judicata. The mother was not acting in a proper representative capacity to actually and efficiently protect the interests of the child, and the child had no control over the divorce litigation, the choice of tactics, or the right to appeal. (*91 C.A.3d 284, 285.*) "The Oregon judgment shows only that the

mother asserted her right to obtain child support based on an allegation of paternity as distinguished from adjudicating the independent rights of the child." (91 C.A.3d 279.)

SUPPLEMENT: [This section is current through the latest supplement]



132 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

d. Persons Represented in Class Action.

7 *Witkin Cal. Proc. Judgm* § 464

[§ 464] Persons Represented in Class Action.

(1) *Judgment as Collateral Estoppel*. The principle of representation by a fiduciary applies in limited form to a class or representative action. The plaintiff in a class action is not a true fiduciary and cannot deprive the other members of the class of their separate causes of action. Hence, the judgment will not be effective against the others as a merger or bar. But in a proper case, where the interests of the absent parties are adequately represented, the judgment may operate as a collateral estoppel on the issues determined. (See *Daar v. Yellow Cab Co.* (1967) 67 C.2d 695, 706, 63 C.R. 724, 433 P.2d 732, quoting the text; *King v. International Union of Operating Engineers* (1952) 114 C.A.2d 159, 250 P.2d 11 [judgment in action by some members of local labor union on behalf of all]; *Johnson v. American Airlines* (1984) 157 C.A.3d 427, 431, 203 C.R. 638; *Frazier v. Richmond* (1986) 184 C.A.3d 1491, 1498, 1499, 228 C.R. 376 [judgment against class consisting of all eligible and retired members of pension fund was res judicata in subsequent action that included surviving spouses of former employees]; James 5th, §11.29; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §597; 4 *Cal. Proc.* (5th), *Pleading*, §270; cf. *Rest.2d, Judgments* §41, Comments a, e [general rule that members of class are treated as parties]; *Rest.2d, Judgments* §42, Comment e [exception where there is substantial divergence of interest between representative and class members].)

In *Rynsburger v. Dairyman's Fertilizer Cooperative* (1968) 266 C.A.2d 269, 72 C.R. 102, defendant nonprofit cooperative corporation operated a fertilizer facility for dairy farmers, taking manure from dairies and processing it at a plant in Los Angeles County under a special use zoning permit. In July 1965, 11 homeowners sued in Orange County for an injunction, demanding abatement of the plant as a nuisance. They obtained a restraining order that was later dissolved. Next they urged the city councils of local municipalities to sue, and the latter filed actions in Orange County and Los Angeles County, which were consolidated and transferred to San Bernardino County. The San Bernardino court found that there was no public nuisance in operations conducted in conformity with rigidly prescribed conditions, but reserved continuing jurisdiction. This court's judgment became final in November 1966, and defendant complied with it. Then, in January 1967, plaintiffs sought to reactivate their pending Orange County action. The San Bernardino court, on defendant's application, enjoined further proceedings in the Orange County action. *Held*, the injunction was properly granted. The issue involved--whether the plant was a nuisance--was identical in both actions and was concluded by the San Bernardino judgment.

(a) Plaintiffs contend that a judgment in an action by a governmental agency to enjoin a public nuisance cannot be res judicata in an action by an individual suing to enjoin a private nuisance. But the condition of which they complained was a public nuisance. This was convincingly shown by their original pleadings and their successful effort to have the cities bring actions. (266 C.A.2d 277.)

(b) Individuals may, in such a situation, be considered in privity with a governmental agency. "Where statutory authority to sue has been given specifically to a public entity ... , a judgment rendered therein is res judicata as to *all* members of the class represented. ... Therefore, citizens and residents, to the extent they are in privity with or represented by the city or state, are bound by judgments against the governmental body. ... Since property owners similarly injured by a nuisance constitute a class ... , and since the class was well represented in the San Bernardino action, the principle of res judicata applies." (266 C.A.2d 277.)

(2) *Distinction: Judgment in Unfair Competition Action Is Not Preclusive.* In *Payne v. National Collection Systems* (2001) 91 C.A.4th 1037, 111 C.R.2d 260, the Attorney General and a district attorney had obtained a judgment against two companies in an unfair competition action under *B. & P.C. 17200* et seq. The judgment had enjoined the companies from engaging in certain fraudulent practices and had ordered them to pay restitution to specified individuals. Subsequently, plaintiffs here, individuals who claimed to have been defrauded by the two companies, but who were not parties to the Attorney General's action and did not receive restitution in that action, sought restitution from the companies under the unfair competition law. The trial court sustained defendants' demurrers on res judicata grounds. *Held*, reversed.

Traditional res judicata principles do not apply to the unfair competition judgment secured by the prosecutors under the present circumstances. A prosecutor's action under *B. & P.C. 17200* et seq. is "fundamentally different" from a class action or other representative action. (91 C.A.4th 1045.) The prosecutor's action is brought for the public benefit and as a law enforcement action. (91 C.A.4th 1046.) Persons who are defrauded can merely await the outcome of the prosecutor's action and then seek restitution in a later action. Thus, plaintiffs here are not barred from seeking restitution from defendants. (91 C.A.4th 1047.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Judgment as Collateral Estoppel.* See *Martorana v. Marlin & Saltzman* (2009) 175 C.A.4th 685, 694, 96 C.R.3d 172 [class member was collaterally estopped from pursuing malpractice claim against class counsel based on theory that counsel should have negotiated different notice procedure in settlement of class action; trial court in class action necessarily found that notice procedure was adequate, and class member had full opportunity to object at that time].



133 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

e. Persons Who Control or Participate.

1. Nature and Scope of Rule.

7 *Witkin Cal. Proc. Judgm* § 465

[§ 465] Nature and Scope of Rule.

"A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound." (*C.C.P. 1908(b)*.) (See *C.C.P. 1912* [principal is bound by judgment against surety from time of notice and opportunity to join in defense]; *Montana v. United States* (1979) 440 U.S. 147, 99 S.Ct. 970, 974, 59 L.Ed.2d 210, 217 [exercise of control by directing that action be brought and paying attorneys' fees and costs]; *Greif v. Dullea* (1944) 66 C.A.2d 986, 995, 153 P.2d 581; *Stafford v. Russell* (1953) 117 C.A.2d 319, 320, 255 P.2d 872, *infra*, §466; *Stafford v. Yerge* (1954) 129 C.A.2d 165, 173, 276 P.2d 649; *Zingheim v. Marshall* (1967) 249 C.A.2d 736, 745, 57 C.R. 809, *infra*, §466; *Palmer v. Oakland* (1978) 86 C.A.3d 39, 43, 150 C.R. 41 [payment of costs of legal representation]; *Rest.2d, Judgments* §39; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §593 et seq.)

Because the nonparty's cause of action is usually distinct, the rule deals not with merger or bar but only with collateral estoppel. This distinction is illustrated by *Vanguard Recording Soc. v. Fantasy Records* (1972) 24 C.A.3d 410, 100 C.R. 826. A singer had an exclusive contract dating from 1960 to make phonograph records for plaintiff recording company. Defendants reproduced and marketed an earlier 1958 recording by the singer of inferior quality. The singer brought a superior court action for an injunction against the defendants and the injunction was granted. Thereafter, plaintiff brought the present action against the defendants for damages for impairment of the value of their exclusive contract and for expenses in seeking an injunction in a Michigan action. *Held*, plaintiff was entitled to recover.

(a) If plaintiff had been a party to the former injunction action, it would have been precluded by that judgment, under the doctrine of merger, from bringing the present action. It was not a party; hence, it could sue on its own cause of action. (24 C.A.3d 416.)

(b) Plaintiff was in privity with the singer and was bound by matters actually litigated in the first action. However, the determination in the first action was favorable to its present claim, and defendants therefore did not urge collateral

estoppel. Instead they contended that it would be inequitable to permit plaintiff to rely on the doctrine. This contention was disposed of in *Bernhard v. Bank of America* (1942) 19 C.2d 807, 122 P.2d 892, *infra*, §473; i.e., it is sufficient that the party against whom the plea is asserted was a party to the prior action. (24 C.A.3d 417.)

SUPPLEMENT: [This section is current through the latest supplement]



134 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

e. Persons Who Control or Participate.

2. Illustrations.

7 *Witkin Cal. Proc. Judgm* § 466

[§ 466] Illustrations.

(1) *Rule Applied.* In *Stafford v. Russell* (1953) 117 C.A.2d 319, 255 P.2d 872, the rule was applied to a case where the first unsuccessful action was brought by a corporation and the second by the principal stockholder who had a proprietary and financial interest in the judgment and controlled the corporation's conduct in the action. (117 C.A.2d 320.)

In *Zingheim v. Marshall* (1967) 249 C.A.2d 736, 57 C.R. 809, plaintiff contracted to sell a radio station and advertising agency to M, an agent acting for R, a disclosed principal. R guaranteed payment of the purchase price. In the first action brought against M for alleged default in payments, M, with counsel furnished by R, answered and cross-complained seeking rescission for fraud and illegality. The court found no default, but gave judgment for plaintiff for payments that became due during pendency of the action and found the allegations of the cross-complaint to be untrue. In the present actions against M and R to recover the unpaid balance of the price, the prior judgment was conclusive against R on the issues of fraud and illegality. R was the principal in the transaction; he furnished counsel for defense of the first action; he appeared as a witness in the trial of that action; he was interested not only as owner of the property but as guarantor of performance of the contract; and the cross-complaint in that action sought recovery of money that R testified that he had paid. R's control of the action in which he had a proprietary and financial interest was therefore clear. (249 C.A.2d 745.)

In *Aronow v. LaCroix* (1990) 219 C.A.3d 1039, 268 C.R. 866, plaintiff attorney sued defendant attorneys for malicious prosecution. Plaintiff, defendants, and a physician had been parties or counsel, and sometimes both, in several previous, interrelated malicious prosecution actions stemming from a 1967 medical malpractice action in which all were involved. Most recently, plaintiff and the physician had individually sued defendants for malicious prosecution, based on the same alleged misconduct of defendants. Those two actions were consolidated for trial. A mistrial was declared as to plaintiff's action, but the physician's action was concluded in defendants' favor. Plaintiff then refiled her action, i.e., the current one. *Held*, judgment for defendants in the physician's action met the privity requirement for application of res judicata and barred the current action.

(a) *Plaintiff had a proprietary interest in the physician's action.* The malicious prosecution actions by plaintiff and the physician both proceeded on a conspiracy theory; thus, both individuals had as strong an interest in proving lack of probable cause and the existence of malice with respect to the other as with respect to herself. Additionally, there was no disparity in the amounts they hoped to recover. (219 C.A.3d 1049, 1050.)

(b) *Plaintiff had a sufficient connection with the physician's action.* While the two actions were consolidated, plaintiff was both coplaintiff with the physician and cocounsel with the physician's attorney. Plaintiff at least could suggest a course of action that she believed was of mutual benefit to both herself and the physician. (219 C.A.3d 1050, 1051.) Further, plaintiff was a witness at the consolidated trial and was cited three times for contempt for refusing to answer questions responsively and for asserting her intent to continue testifying as she wished. The contempt citations demonstrated that "for a time plaintiff exercised virtually complete control over one part of the evidence ...--the testimony which came out of her own mouth--in spite of efforts by court and counsel to limit that control." (219 C.A.3d 1051.) Thus, plaintiff's connection with the action, although falling short of the power to control, "was so close that she should reasonably expect to be bound by the result." (219 C.A.3d 1052.)

(c) *Policy considerations justified binding plaintiff.* "We note the policy considerations which weigh in favor of applying the doctrine of preclusion--the promotion of judicial economy by minimizing repetitive litigation, the prevention of inconsistent judgments which undermine the integrity of the judicial system, and the protection of innocent defendants against the vexation of having repeatedly to defend against the same claim brought by successive plaintiffs." (219 C.A.3d 1052, citing *Clemmer v. Hartford Ins. Co.* (1978) 22 C.3d 865, 151 C.R. 285, 587 P.2d 1098, supra, §457.) "Most important ... is the elimination of inconsistent judgments. ... Such judgments constitute 'the very situation sought to be avoided by the expanded definitions of privity' currently in effect." It was anomalous to deny recovery to the physician but to award damages to plaintiff based on the same set of facts and legal issues. (219 C.A.3d 1053.)

(2) *Rule Not Applied.* The rule is not applicable where there is no sufficient participation. Thus, in *McRae v. Bates* (1961) 196 C.A.2d 510, 16 C.R. 565, plaintiff, treated by B for an injury, lost a leg. He sued and recovered a judgment for damages for malpractice. B then went into bankruptcy, and plaintiff brought an equitable action against C to compel him to pay the judgment, alleging that B was merely an agent to market C's medical products, that C's attorney represented B, and that C controlled the action. *Held*, judgment for defendant on demurrer affirmed; C never had an opportunity to present any defenses he might have had. (196 C.A.2d 513.)

In *Minton v. Cavaney* (1961) 56 C.2d 576, 15 C.R. 641, 364 P.2d 473, plaintiffs recovered judgment for the wrongful death of their daughter who drowned in a corporation's public swimming pool. Unable to satisfy it, they brought this action against defendant, on the theory that the corporation was his alter ego (see 9 *Summary* (10th), *Corporations*, §9 et seq.). *Held*, judgment for plaintiffs reversed.

(a) As a matter of substantive law, the evidence supported plaintiffs' theory of defendant's liability for the corporation's tort. But the tort (negligence) had to be proved, unless the prior judgment against the corporation was res judicata on this issue, and it was not. The defendant merely filed the corporation's answer as its attorney and withdrew before the trial without participation. (56 C.2d 581.)

(b) "In order that the rule ... should apply it is necessary that the one in whose favor or against whom the rules of res judicata operate participate in the control of the action and if judgment is adverse, be able to determine whether or not an appeal should be taken. It is not sufficient that he supplies the funds for the prosecution or defense, that he appears as a witness or cooperates without having control." (56 C.2d 581; quoting the First Restatement.) (See *Gottlieb v. Kest* (2006) 141 C.A.4th 110, 149, 46 C.R.3d 7 [default judgment against plaintiff's companies, which included finding that plaintiff had personally committed fraud against defendant, did not have collateral estoppel effect in action between plaintiff and defendant; because companies had no assets and could not afford counsel, plaintiff had had no motive to defend claims against them and they did not adequately represent his interests]; *Rest.2d, Judgments* §39, Comment c.)

SUPPLEMENT: [This section is current through the latest supplement]



135 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

2. Persons in Privity.

f. Insurer.

7 *Witkin Cal. Proc. Judgm* § 467

[§ 467] Insurer.

A number of cases deal with the effect, in an action against an insurer, of an adverse judgment in an earlier action conducted by an insured defendant after the insurer's refusal to defend. The Supreme Court stated the general principle as follows: "An insurer that has been notified of an action and refuses to defend on the ground that the alleged claim is not within the policy coverage is bound by a judgment in the action, in the absence of fraud or collusion, as to all material findings of fact essential to the judgment of liability of the insured. The insurer is not bound, however, as to issues not necessarily adjudicated in the prior action and can still present any defenses not inconsistent with the judgment against the insured." (*Geddes & Smith v. St. Paul Mercury Indem. Co.* (1959) 51 C.2d 558, 561, 334 P.2d 881.) (See *Schaefer/Karpf Productions v. CNA Ins. Cos.* (1998) 64 C.A.4th 1306, 1313, 1314, 76 C.R.2d 42 [although video producer established in underlying action against video manufacturers that producer had suffered property damage, whether that property damage was covered by manufacturers' general liability policies was not adjudicated; citing *Geddes & Smith*]; *Rest.2d, Judgments* §§57, 58; for effect of judgment in favor of insurer in later action against insurer, see *Helfand v. National Union Fire Ins. Co.* (1992) 10 C.A.4th 869, 901, 13 C.R.2d 295, 2 Summary (10th), *Contracts*, §143 [judgment in favor of bankrupt's insurer in bankruptcy proceeding was not binding on nonparticipating creditors in their later declaratory relief action against insurer].)

In *Bonfils v. Pacific Auto. Ins. Co.* (1958) 165 C.A.2d 152, 331 P.2d 766, plaintiffs sued an insured for injuries resulting from his alleged negligent driving. The insurer refused to defend on the ground that another person was driving. A default judgment was taken against the insured. *Held*, this was conclusive against the insurer on the issue of the insured's driving. (165 C.A.2d 161.)

In *Ford v. Providence Washington Ins. Co.* (1957) 151 C.A.2d 431, 311 P.2d 930, decedent B was killed in an automobile accident in a car driven either by B or A and owned by C. In an action by decedent's mother, judgment on a jury verdict was rendered against A based on wilful misconduct, and a nonsuit was granted to the owner C (not liable for wilful misconduct of one driving with permission). The mother then brought this action against defendant insurer, which had not represented A, and defendant raised the objection that A was not driving (where A had denied driving in pleadings and at the trial). *Held*, defendant was liable on the policy. Conceding the general rule, defendant nevertheless argued that there could be no privity between it and A unless he was the driver. The court pointed out, however, that the

insurer had notice of the action, knew that under its omnibus clause any driver with permission--either A or B--was covered, and, although it was not called to represent A (because he denied driving), it did not offer to do so either.

"Defendant here was content to sit back without taking a position in the personal injury case, as to drivership, without offering to defend either of the persons charged with drivership, and now, regardless of the determination of the jury, to take a position opposite to the jury's implied finding, and relitigate the issue in order to disclaim coverage, and to escape liability; this, in spite of the fact that the policy obligated defendant to be liable whichever of the two persons in question a jury found to be the driver." (*151 C.A.2d 437.*)

SUPPLEMENT: [This section is current through the latest supplement]



136 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

a. Not Bound by Judgment.

1. General Principle.

7 *Witkin Cal. Proc. Judgm* § 468

[§ 468] General Principle.

Apart from special circumstances, a stranger to an action, i.e., a person neither a party nor in privity, is not bound by the judgment. It is immaterial that the person may have been vitally interested in and directly affected by the outcome of the action; due process requires that the person have his or her own day in court. (See *Rest.2d, Judgments* §34; *Dillard v. McKnight* (1949) 34 C.2d 209, 215, 209 P.2d 387; *In re Los Angeles County Pioneer Soc.* (1953) 40 C.2d 852, 857, 257 P.2d 1 [judgment in action by member against society declaring its noncharitable nature was not binding on Attorney General who, in dissolution proceeding, sought appointment of trustee]; *Morris v. Fortier* (1943) 59 C.A.2d 132, 136, 138 P.2d 368, *infra*, §469; *People v. Birch Sec. Co.* (1948) 86 C.A.2d 703, 711, 196 P.2d 143 [former judgment against certain individually named state officers was not binding on state itself]; *Estate of Miller* (1951) 104 C.A.2d 1, 15, 230 P.2d 667; *Los Angeles v. Continental Corp.* (1952) 113 C.A.2d 207, 219, 248 P.2d 157 [flood control district was entity distinct from county, although county supervisors acted as directors of district]; *Embassy Realty Associates v. Southwest Products Co.* (1954) 126 C.A.2d 725, 729, 272 P.2d 899; *Shapiro v. Republic Indem. Co. of America* (1959) 52 C.2d 437, 439, 341 P.2d 289; *Grable v. Grable* (1960) 180 C.A.2d 353, 359, 4 C.R. 353; *Topanga Corp. v. Gentile* (1963) 219 C.A.2d 274, 278, 33 C.R. 56; *Adoption of Stroope* (1965) 232 C.A.2d 581, 584, 43 C.R. 40; *Kaiser Foundation Hosp. v. Superior Court* (1967) 254 C.A.2d 327, 335, 62 C.R. 330, *infra*, §469, quoting the text; *Frazier v. Wasserman* (1968) 263 C.A.2d 120, 125, 69 C.R. 510; 87 *Harv. L. Rev.* 1485 [collateral estoppel of nonparties]; 41 *A.L.R.3d* 536 [effect of judgment against parents in action for loss of minor's services on minor's action for personal injuries]; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §565 et seq.; *infra*, §469; on applicability of general principle in context of prior administrative decision, see *supra*, §397.)

In *Martin v. Wilks* (1989) 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835, the court held that white firefighters, who were not parties to prior civil rights litigation resulting in consent decrees for the hiring of blacks, were not precluded from challenging, as discriminatory, steps taken by defendant city to implement the decrees.

(a) "[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party, or to which he has not been made a party by service of process." (109 S.Ct. 2184, 104 L.Ed.2d 841.)

(b) Failure of a stranger to intervene does not preclude a challenge: "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." (109 S.Ct. 2185, 104 L.Ed.2d 845.) "Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." (109 S.Ct. 2186, 104 L.Ed.2d 846.)

West's Key Number Digest, Judgment 706 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



137 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

a. Not Bound by Judgment.

2. Illustrations.

7 *Witkin Cal. Proc. Judgm* § 469

[§ 469] Illustrations.

In *Morris v. Fortier* (1943) 59 C.A.2d 132, 138 P.2d 368, deaths resulted from a collision between the car driven by M (employed by S) and the truck driven by W (employed by F). In the first action, the W heirs sued employer S and recovered judgment, the verdict determining that W was not negligent and that S's driver was negligent. In the second action, the M heirs sued employer F, and the jury, bringing in a verdict for plaintiffs, impliedly found W negligent, contrary to the first determination. *Held*, this was proper. The first judgment was not res judicata against the M heirs, who were not parties to the first action and did not previously have an opportunity to litigate the issue of W's negligence. (59 C.A.2d 136.)

In *Kaiser Foundation Hosp. v. Superior Court* (1967) 254 C.A.2d 327, 62 C.R. 330, a husband and wife sued defendants for damages for malpractice in medical treatment of the wife; verdict and judgment were for defendants. Then the wife died, and the husband and his daughter, a minor, sued the same defendants for wrongful death, alleging the same acts of negligence and also breach of contract arising out of the medical service plan. Defendants moved for summary judgment as to both plaintiffs; the trial judge granted the motion as to the husband and denied it as to the daughter. *Held*, the ruling was correct.

(a) Collateral estoppel was properly asserted against the husband, a party to the previous action. The issues were the same, despite the claim for breach of contract. This is immaterial since it does not give rise to an action for wrongful death. (254 C.A.2d 335.)

(b) There was no collateral estoppel as to the daughter, who was neither a party nor in privity with a party to the first action. (254 C.A.2d 335, quoting the text.) (See *Evans v. Celotex Corp.* (1987) 194 C.A.3d 741, 746, 238 C.R. 259, supra, §460 [criticizing and declining to follow *Kaiser Foundation Hosp.*]; *Garcia v. Rehrig Int.* (2002) 99 C.A.4th 869, 878, 121 C.R.2d 723, supra, §357 [criticizing and declining to follow *Kaiser Foundation Hosp.*].)

In *Frazier v. Wasserman* (1968) 263 C.A.2d 120, 69 C.R. 510, the income beneficiary of a spendthrift trust was to receive half the corpus free of restrictions on termination of the trust. The trust terminated January 1, 1961. Thereafter,

on February 10, 1961, the probate court distributed his share (\$ 28,671) to the beneficiary, and later directed delivery of it to him. The beneficiary used the money to pay creditors holding notes he gave during the term of the trust. On April 26, 1961, following a petition filed by two creditors on February 9, 1961, the beneficiary was adjudicated a bankrupt. On February 8, 1963, nearly 2 years later, plaintiff trustee in bankruptcy filed the present action against the creditors to recover the money paid to them. *Held*, judgment for plaintiff affirmed. The contention of defendant creditors, that the probate court's decree of distribution was res judicata, was unsound. The probate court had no jurisdiction in the estate proceeding to adjudicate a controversy between the beneficiary and his creditors. Plaintiff trustee was not a party to the probate proceeding, nor was he in privity with creditors who filed claims in that proceeding (these defendants). Moreover, the issue was not the same: the claim of an individual creditor against a debtor's interest in a spendthrift trust after termination but prior to distribution of the corpus by the probate court is not the same as the claim of a trustee in bankruptcy acting under the *Bankruptcy Act*. (263 C.A.2d 125.)

In *Richards v. Jefferson County, Alabama* (1996) 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76, private employees challenged, in state court, the validity of an occupation tax imposed by defendant county. Plaintiffs raised both state and federal constitutional claims. The trial court ruled that an earlier action upholding the tax barred the state constitutional claims, even though plaintiffs were not parties to that action. The trial court refused to bar plaintiffs' federal claims, because they had not been raised or decided in the earlier action, but the Alabama Supreme Court determined that those claims also were precluded by the earlier judgment. *Held*, reversed. The federal constitutional claims are not barred.

(a) The parties to the earlier action did not provide plaintiffs with notice that an action was pending that would conclusively resolve their legal rights. (116 S.Ct. 1766, 135 L.Ed.2d 84.)

(b) Plaintiffs were not adequately represented by the parties in the earlier action. A prior proceeding, to have binding effect, must at least have been "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." (116 S.Ct. 1767, 135 L.Ed.2d 85, 86.) The parties to the earlier action did not sue on behalf of a class, their pleading did not purport to assert any claim on behalf of nonparties, and the judgment they obtained did not purport to bind any nonparties. (116 S.Ct. 1767, 135 L.Ed.2d 86.) Hence, there is no reason to suppose that the court in the earlier action took care to protect the interests of the plaintiffs here. (116 S.Ct. 1768, 135 L.Ed.2d 86.)

(c) The fact that the two actions involve a challenge to a public tax does not give the first action preclusive effect. In some actions, a taxpayer uses his taxpayer status to complain about an alleged misuse of public funds or some other public action that only indirectly affects him. In those cases, states have wide latitude to limit the number of proceedings that must be entertained and to restrict standing. However, by presenting a federal constitutional challenge to a state's attempt to levy personal funds, plaintiffs here have brought a different type of action. The state may not, within the limits of federal due process, deny them their own day in court. (116 S.Ct. 1768, 135 L.Ed.2d 87.) (See 38 *Santa Clara L. Rev.* 691 [Richards].)

The following are among the cases illustrating that strangers to an action are not bound by the judgment in the action:

Shasta v. Caruthers (1995) 31 C.A.4th 1838, 1843, 38 C.R.2d 18 [res judicata did not preclude district attorney's action on behalf of minor child to establish child's paternity and obtain child support, despite dismissal with prejudice of earlier paternity action by child's mother; there was no privity between mother and district attorney and child was not party to earlier action].

Old Republic Ins. Co. v. Superior Court (1998) 66 C.A.4th 128, 151, 77 C.R.2d 642 [three insurers were not bound by prior appellate ruling that fourth insurer's policy provided coverage to insured, even though all four policies were identical; three insurers did not have financial or proprietary interest in prior action between fourth insurer and insured, fourth insurer was not acting as their representative in that action, and three insurers had no reason to anticipate that patently erroneous appellate opinion against fourth insurer would preclude them from litigating coverage issue under

their own policies with their own counsel articulating their arguments].

Dawson v. Toledano (2003) 109 C.A.4th 387, 394, 134 C.R.2d 689 [collateral estoppel did not prevent attorney from denying that he committed legal malpractice, even though his client had been sanctioned for filing frivolous appeal in prior personal injury action; attorney was not party in personal injury action and, although he had interest in avoiding sanctions for his client, he did not have reason or opportunity to defend himself against malpractice claim at that time].

Kilroy v. California (2004) 119 C.A.4th 140, 148, 14 C.R.3d 109 [federal court's determination that highway patrol officer's search of business was unconstitutional did not have preclusive effect in later civil rights action by business owner against officer and state; neither officer nor state was party to federal court proceeding].

SUPPLEMENT: [This section is current through the latest supplement]

(New) *Rejection of doctrine of "virtual representation":* In *Taylor v. Sturgell* (2008) 553 U.S. ___, 128 S.Ct. 2161, 171 L.Ed.2d 155, the United States Supreme Court, applying federal common law, rejected a "virtual representation" exception to the general rule that nonparties are not bound by a prior judgment. Plaintiff, an antique aircraft enthusiast, submitted a request under the Freedom of Information Act to the Federal Aviation Administration (FAA), seeking information about a vintage model airplane. When the FAA failed to respond, plaintiff filed an action in federal district court. The district court concluded that plaintiff's action was barred by claim preclusion, based on an earlier unsuccessful action by another aircraft enthusiast who had sought the same information. Although the district court acknowledged that plaintiff was not a party to the first action, it held that he had been "virtually represented" by the plaintiff in the first action. The court granted summary judgment to the FAA and the aircraft's manufacturer, who had intervened as a defendant. The Court of Appeals for the District of Columbia Circuit affirmed. *Held*, reversed and remanded. The doctrine of preclusion by "virtual representation" is disapproved.

(a) Past Supreme Court decisions, such as *Richards v. Jefferson County, Alabama* (1996) 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76, text, p. 1134, have emphasized the fundamental nature of the rule that a litigant is not bound by a judgment to which the litigant was not a party. Discrete exceptions to this rule apply in limited circumstances. An amorphous balancing test that attempts to decide whether the relationship between a party and a nonparty is close enough to bring the nonparty within a judgment is "at odds with the constrained approach" of past decisions. (128 S.Ct. 2175, 171 L.Ed.2d 172.)

(b) A party's representation of a nonparty is adequate for preclusion only if (1) the interests of the nonparty and the alleged representative are aligned, and (2) either the party understood herself or himself to be acting in a representative capacity or the first court protected the interests of the nonparty. These protections have been incorporated into the procedural requirements for federal class actions. A virtual representation doctrine could circumvent them and effectively create de facto class actions at will. (128 S.Ct. 2176, 171 L.Ed.2d 173.)

(c) "[A] diffuse balancing approach to nonparty preclusion would likely create more headaches than it relieves." (128 S.Ct. 2176, 171 L.Ed.2d 173.) The district courts would be faced with complicated preclusion questions, even though preclusion doctrine is intended to reduce the burden of litigation on courts and parties. (128 S.Ct. 2176, 171 L.Ed.2d 173.)

(d) Although *Richards* acknowledged that, in "public-law" controversies, legislatures have wide latitude to limit the number of judicial proceedings that may be entertained, that does not mean that the courts should limit successive Freedom of Information Act actions by different requesters. (128 S.Ct. 2177, 171 L.Ed.2d 174.) Any risk that several persons could coordinate to mount a series of repetitive lawsuits is countered through the use of stare decisis and by potential litigants' aversion to wasting money. (128 S.Ct. 2178, 171 L.Ed.2d 175.)

(e) The preclusive effect of the first action on plaintiff's action must be determined according to the six established grounds for nonparty preclusion. Four of them have no application here: There is no indication that plaintiff agreed to be bound by the earlier litigation, that plaintiff here and the prior plaintiff have any legal relationship, that plaintiff

exercised any control over the earlier action, or that this action implicates any special statutory scheme limiting relitigation. Moreover, preclusion clearly cannot be justified on the theory that plaintiff was adequately represented in the earlier action. Nothing in the record indicates that the first plaintiff understood himself to be suing on behalf of plaintiff here, that plaintiff even knew of the first action, or that the federal district court in the first action took special care to protect plaintiff's interests. (*128 S.Ct. 2178, 171 L.Ed.2d 175, 176.*)

(f) The only remaining possibility is that plaintiff here has brought this action as a undisclosed representative or agent of the earlier plaintiff. Preclusion would be appropriate if the present action is a collusive attempt to relitigate the earlier action. Remand to determine whether plaintiff is acting in an agency capacity is appropriate, and defendants must bear the burden of proof on that issue. (*128 S.Ct. 2179, 171 L.Ed.2d 176.*)



138 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

a. Not Bound by Judgment.

3. Exceptions: Binding Judgments.

7 *Witkin Cal. Proc. Judgm* § 470

[§ 470] Exceptions: Binding Judgments.

So far as the *bar* of a judgment is concerned, the only important exceptions to the rule that collateral estoppel does not work against a stranger (*supra*, §§468, 469) are the following:

(1) Judgments in rem, which bind the entire world. (See *Rest.2d, Judgments* §30; 2 *Cal. Proc. (5th), Jurisdiction*, §243 et seq.; *supra*, §384.)

(2) Judgments transferring title to property, which are binding on third persons as well as privies. (See *Rest.2d, Judgments* §43; *Swartfager v. Wells (1942) 53 C.A.2d 522, 527, 128 P.2d 128*; 47 *Am.Jur.2d (2006 ed.), Judgments* §499.)

(3) Judgments for or against either an agent or a known undisclosed principal, which preclude further action against the other, liability being alternative. (See *Rest.2d, Agency* §210(1); 47 *Am.Jur.2d (2006 ed.), Judgments* §612; 3 *Summary (10th), Agency and Employment*, §160; cf. *Rest.2d Judgments* §49, Comment c [modern trend is to allow plaintiff to proceed to judgment against both agent and undisclosed principal].)

SUPPLEMENT: [This section is current through the latest supplement]



139 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

1. Former Mutuality Requirement.

7 Witkin Cal. Proc. Judgm § 471

[§ 471] Former Mutuality Requirement.

If a stranger to the former action seeks to invoke the doctrine of res judicata in a new action, the stranger is first met with the objection that the cause of action (involving neither the original parties nor privies) is not the same. This eliminates the use of the former judgment as a bar. (See *supra*, §407 et seq.)

But even if the cause of action is new, issues formerly litigated by a party may be conclusive under the collateral estoppel aspect of the doctrine. May the stranger assert the estoppel against an opponent who was a party to the former judgment? Traditionally, the objection has been that "the estoppels must be mutual," i.e., that the person who asserts the estoppel must be one who would have been bound by the judgment if it had gone the other way. Because the stranger would not have been bound by an unfavorable judgment (see *supra*, §468), he or she cannot gain any benefit from it. Hence, the losing party in the former action may relitigate the matters previously adjudicated against him or her. (See discussion in *Bernhard v. Bank of America (1942) 19 C.2d 807, 811, 122 P.2d 892*, *infra*, §473; *31 A.L.R.3d 1044* [mutuality of estoppel as prerequisite to applying collateral estoppel to stranger]; *47 Am.Jur.2d (2006 ed.), Judgments §569*.)

The mutuality requirement was abandoned in the celebrated *Bernhard* case, and estoppel may now be asserted by a stranger in a proper case. (See *infra*, §473.)

SUPPLEMENT: [This section is current through the latest supplement]



140 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

2. Derivative Liability.

7 *Witkin Cal. Proc. Judgm* § 472

[§ 472] Derivative Liability.

While the mutuality requirement was still the general rule (supra, §471), an exception was recognized in cases involving derivative liability, i.e., the secondary liability of a person who is innocent of a wrong for the harm caused by another, primarily liable person.

The typical example is where the plaintiff first sues an agent or employee for a negligent or other tortious act and loses. The unfavorable judgment is effective as a collateral estoppel against the plaintiff in a later action against the principal or employer. The plaintiff has had his or her day in court and has litigated the issues that determine liability or nonliability; the defendant, although a stranger to the first action, is entitled to the benefit of the judgment exonerating the party primarily liable. (See *Rest.2d, Judgments* §51; *Freeman v. Churchill* (1947) 30 C.2d 453, 461, 183 P.2d 4; *Eistrat v. Irving Lumber & Moulding* (1962) 210 C.A.2d 382, 390, 26 C.R. 520, citing the text; *Los Angeles v. Superior Court* (Levy) (1978) 85 C.A.3d 143, 154, 149 C.R. 320; 47 *Am.Jur.2d* (2006 ed.), *Judgments* §§613, 614.)

In *Charles H. Duell v. Metro-Goldwyn-Mayer Corp.* (1932) 128 C.A. 376, 17 P.2d 781, the first action was against G to enjoin a breach of contract, and the judgment determined that G was not guilty of breach. The second action was against G and strangers, alleging that they, in concert, caused the breach. *Held*, the first judgment determined the essential issue of G's alleged breach of contract, and plaintiff was not entitled to relitigate it against the strangers whose alleged liability necessarily depended on G's acts. (128 C.A. 382.) "[I]n actions of tort, if the defendant's responsibility is necessarily dependent upon the culpability of another who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way." (128 C.A. 383.)

In *Barrabee v. Crescenta Mut. Water Co.* (1948) 88 C.A.2d 192, 198 P.2d 558, plaintiff claimed damages for injuries resulting when water seepage from a well on defendant's land caused his car to skid. The first action was against the landowner and an independent contractor employed by the landowner who had dug the well. In that action, plaintiff dismissed as to the landowner and the verdict and judgment were for the independent contractor. In the second action, plaintiff sued the landowner alone on the same cause. The only basis for holding the innocent landowner liable was the

narrow liability of an employer of an independent contractor (see 6 *Summary* (10th), *Torts*, §1236 et seq.). But, as in the agency cases, the prior judgment in favor of the independent contractor was a conclusive determination of nonliability of the landowner. (88 C.A.2d 196.)

In *Loughran v. Reynolds* (1945) 70 C.A.2d 241, 160 P.2d 904, plaintiff claimed heavy damages for wrongful discharge from employment by a corporation, alleged to be the alter ego of R. In the federal district court, the corporation was adjudged bankrupt and plaintiff's claim was allowed for only \$ 600 on the ground that he himself had been guilty of breach. In the present action against R, the latter's plea of res judicata was upheld. R as an individual could not be personally liable to plaintiff unless the corporation was liable. And, because his liability was dependent or derivative, the prior judgment of the bankruptcy court against plaintiff was properly asserted as an estoppel. (70 C.A.2d 244.)

The derivative liability exception, as restated in *Bernhard v. Bank of America* (1942) 19 C.2d 807, 122 P.2d 892, infra, §473, is available to either an employer or employee in a second action, after a first judgment determining that the employee was not negligent. "In each of these situations the party asserting the plea of res judicata was not a party to the previous action nor in privity with such a party. ... Likewise, the estoppel is not mutual since the party asserting the plea, not having been a party or in privity with a party to the former action, would not have been bound by it had it been decided the other way. The cases justify the exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries." (19 C.2d 813.)

SUPPLEMENT: [This section is current through the latest supplement]



141 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

3. Repudiation of Mutuality Requirement.

7 *Witkin Cal. Proc. Judgm* § 473

[§ 473] Repudiation of Mutuality Requirement.

Bernhard v. Bank of America (1942) 19 C.2d 807, 122 P.2d 892, repudiated the mutuality requirement (supra, §471) and established that estoppel may be asserted *against* one who was a party or privy to the former action, even though the person asserting it was not. Decedent, an elderly woman, allowed C to handle her affairs, and C, allegedly without authority, drew funds from her account in defendant bank and embezzled them. On her death, C became executor, and later filed an account and resignation, to which plaintiff and other beneficiaries under the will objected. In the first proceeding, the probate court settled the account, declaring in its order that decedent had made a gift of the money to C. No appeal was taken. After C's discharge, plaintiff was appointed administrator with the will annexed and sued defendant bank for allowing the improper withdrawal. *Held*, she was estopped by the former determination that the withdrawal was proper.

(a) A departure from the "facile formula" of mutuality is proper. "The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted." (19 C.2d 811, 812.) "There is no compelling reason ... for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation." (19 C.2d 812.)

(b) There are three pertinent questions: "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" (19 C.2d 813.)

The *Bernhard* case had a significant impact. "Many state and federal courts rejected the mutuality requirement, especially where the prior judgment was invoked defensively in a second action against a plaintiff bringing suit on an issue he litigated and lost as plaintiff in a prior action." (*Blonder-Tongue Laboratories v. University of Illinois Foundation* (1971) 402 U.S. 313, 91 S.Ct. 1434, 1440, 28 L.Ed.2d 788, 797.) (See *Rest.2d, Judgments* §29; 44 *So. Cal. L. Rev.* 1036 [impact of *Bernhard*]; 31 *A.L.R.3d* 1044 [mutuality of estoppel as prerequisite to applying collateral estoppel to stranger]; 34 *A.L.R.3d* 518 [judgment in action against seller or supplier of product as res judicata in action against manufacturer for injury from defective product, or vice versa]; *infra*, §474 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



142 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

4. Illustrations.

7 *Witkin Cal. Proc. Judgm* § 474

[§ 474] Illustrations.

The rule and test of *Bernhard v. Bank of America* (1942) 19 C.2d 807, 122 P.2d 892, supra, §473, have been applied in various situations in which the mutuality rule would have been an unreasonable barrier. (See *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 99 S.Ct. 645, 649, 58 L.Ed.2d 552, 561, infra, §481; *Teitelbaum Furs v. Dominion Ins. Co., Ltd.* (1962) 58 C.2d 601, 604, 25 C.R. 559, 375 P.2d 439, supra, §389 [prior conviction as collateral estoppel in later civil action]; *Horn & Barker v. Macco Corp.* (1964) 228 C.A.2d 96, 106, 39 C.R. 320, 5 Summary (10th), Torts, §115; *Zeppi v. Beach* (1964) 229 C.A.2d 152, 161, 40 C.R. 183, 9 Cal. Proc. (5th), Appeal, §442 [*Bernhard* doctrine applied to appeal]; *Miller v. Bakersfield* (1967) 256 C.A.2d 820, 822, 64 C.R. 469; *Vanguard Recording Soc. v. Fantasy Records* (1972) 24 C.A.3d 410, 417, 100 C.R. 826, supra, §465.)

In *Garcia v. Garcia* (1957) 148 C.A.2d 147, 306 P.2d 80, a divorce action was brought and the husband's acknowledgment of parentage of the wife's child was made a part of the interlocutory decree. In a subsequent action by the husband to declare nonpaternity, defendant child, though not a party to the divorce action, was allowed to assert the plea of res judicata against the husband. (148 C.A.2d 155.)

In *Fairchild v. Bank of America* (1958) 165 C.A.2d 477, 332 P.2d 101, defendant bank (special administrator) filed its first and final account, to which plaintiff executor objected, and the account was approved. No appeal was taken. Thereafter, plaintiff brought this action against the bank and its agent for recovery of losses from alleged failure to protect and account for assets of the estate. *Held*, the order approving the account was res judicata. Defendant agent was not a party nor in privity with defendant bank in the prior proceeding, but plaintiff was a party, and the estoppel could therefore be asserted against him. (165 C.A.2d 482.)

In *Campbell v. Scripps Bank* (2000) 78 C.A.4th 1328, 93 C.R.2d 635, collateral estoppel barred the allegation by the sellers of real property that the escrow holder breached its contract with the sellers by closing escrow without obtaining compliance with the terms of the subordination agreement between the sellers and the buyer. The prior action had determined that the primary lender's trust deed had priority over the sellers' trust deed and thus the sellers' cause of action against escrow holder lacked any potential for damages. (28 C.A.4th 1333.)

SUPPLEMENT: [This section is current through the latest supplement]



143 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

5. Asserting Plea Offensively.

aa. Nature of Problem.

7 *Witkin Cal. Proc. Judgm* § 475

[§ 475] Nature of Problem.

When a vehicle or train collision or similar accident causes death, personal injury and property damage to a number of persons, separate causes of action arise, and separate actions may be filed against a single tortfeasor. If one of the plaintiffs loses (e.g., on the theory of no negligence of the defendant), the judgment against the plaintiff has no effect on the separate actions of the other plaintiffs because they were not parties to that first action. But if one of the plaintiffs wins, it may be contended, under the broad language of *Bernhard v. Bank of America (1942) 19 C.2d 807, 122 P.2d 892*, supra, §473, that the determination of negligence of the defendant is res judicata in all of the subsequent actions by the other plaintiffs, because the defendant was a party to that first action.

The problem is not academic. "This action is part of a larger pattern which has developed in personal injury cases in Los Angeles County and probably elsewhere in the state. The attorney who has a difficult case or group of cases on his hands files in the municipal court an action for recovery from a single defendant for property damage or minor personal injuries in the expectation that liability will be easily and speedily established and the question of damages left as the only issue to be decided in the principal action or actions brought in the superior court because res judicata establishes defendant's liability. This strategy (quite legitimate if *Bernhard* ... has universal application) is applied to multiple injuries to different people arising from the same accident. ... As several commentators have pointed out, *Bernhard*, ... if held applicable to such situations, means that a defendant who obtains a favorable judgment, or 10 of them, cannot use those judgments against other claimants because the want of mutuality would spell absence of due process if the judgments were pleadable in bar or estoppel. But the plaintiff in the eleventh case is fortunate enough to establish liability and the defendant is confronted by a conclusive adjudication of its own negligence in the next 10 or 20 cases,—this being due to the fact that mutuality is not necessary and it has had its day in court, in fact 11 of them (none of which resulted adversely except the eleventh)." (*Nevarov v. Caldwell (1958) 161 C.A.2d 762, 768, 327 P.2d 111.*)

The foregoing problem was explored in a law review note, which stressed the practical difference between properly asserting the plea of res judicata defensively (as in *Bernhard*), and improperly asserting it offensively (as in the examples set forth above). (See *9 Stanf. L. Rev. 281* [limits of *Bernhard* doctrine]; *53 Cal. L. Rev. 25* [author of *9 Stanf.*

L. Rev. 281 recanting, in light of *Teitelbaum Furs v. Dominion Ins. Co., Ltd.* (1962) 58 C.2d 601, 25 C.R. 559, 375 P.2d 439, supra, §389, view that res judicata can never be asserted offensively]; 9 Cal. Western L. Rev. 115 [avoiding collateral estoppel in multiple party litigation].)

This approach was followed, and the *Bernhard* rule was limited, in *Nevarov*. An automobile collision caused injuries to a minor son and to his parents. In an action brought by the three, judgment was in favor of the son for \$ 691.65 but against his parents. A new trial was granted to the parents, and, the son's judgment meanwhile having become final and satisfied, the plaintiffs contended that his judgment conclusively established the defendant's negligence. *Held*, the issue was not concluded.

(a) If the *Bernhard* rule were held applicable, the defendant would have been forced to take what might be a frivolous appeal from the son's comparatively insignificant judgment, merely to keep the issue of its own negligence open for the second trial. (161 C.A.2d 767.)

(b) After examining the decisions declaring the underlying policies of the res judicata doctrine, particularly those subsequent to *Bernhard*, it is necessary "to declare the public policy of this state upon the application of the rule of res judicata to multiple claims of different persons for personal injuries or property damage against a single defendant or set of defendants growing out of a single accident. We hold that res judicata does not apply to those situations; that such an extension of the doctrine would be promotive of litigation and in subversion of sound principles of judicial administration looking to equal justice for all." (161 C.A.2d 774.) (See *Price v. Atchison, Topeka & Santa Fe Ry. Co.* (1958) 164 C.A.2d 400, 402, 330 P.2d 933 [railway accident; following *Nevarov*].)

SUPPLEMENT: [This section is current through the latest supplement]



144 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

5. Asserting Plea Offensively.

bb. Theory That Doctrine Is Not Available.

7 *Witkin Cal. Proc. Judgm* § 476

[§ 476] Theory That Doctrine Is Not Available.

The theory that the plea can only be asserted defensively (i.e., by a defendant who was not a party to the previous action against a losing plaintiff who was; see *supra*, §475) was expanded into a rule in *McDougall v. Palo Alto Unified School Dist.* (1963) 212 C.A.2d 422, 28 C.R. 37. A grantor deeded land to school district trustees for school purposes. After some use, the school building was demolished. One of the grantor's heirs obtained a decree quieting title against defendant school district to an undivided three-fourths interest in the land, and the judgment became final without appeal. In the present proceeding by the county to condemn the land, the three-fourths interest of the heir was conceded, but the other one-fourth was claimed by the remaining heirs of the grantor and the district. The trial judge found that the district was the owner and entitled to that part of the award. The issue of law, whether the heirs of the grantor were entitled on the theory of termination of a determinable fee or breach of condition subsequent, was the same in each case, and the remaining heirs contended that the determination of that issue against the district in the first heir's action was conclusive in the present proceeding. But the court, quoting *Nevarov v. Caldwell* (1958) 161 C.A.2d 762, 327 P.2d 111, *supra*, §475, refused to extend *Bernhard v. Bank of America* (1942) 19 C.2d 807, 122 P.2d 892, *supra*, §473, to a case in which the plea is asserted by a plaintiff against an adversary who was the defendant in the former action. (212 C.A.2d 429, 430.)

SUPPLEMENT: [This section is current through the latest supplement]



145 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

6. Offensive Use Denied.

aa. Interests of Justice.

7 *Witkin Cal. Proc. Judgm* § 477

[§ 477] Interests of Justice.

In *O'Connor v. O'Leary* (1967) 247 C.A.2d 646, 56 C.R. 1, decedent, a theater patron, was killed in a fracas by an employee of defendant theater owner. The employee was convicted of involuntary manslaughter. In this action for wrongful death, plaintiffs contended that the judgment of conviction was a collateral estoppel on the issues of negligence and proximate cause of death, relying on *Newman v. Larsen* (1964) 225 C.A.2d 22, 36 C.R. 883, supra, §389. *Held*, the doctrine was not applicable. The distinction between offensive and defensive use is not controlling. The question is whether invoking the doctrine in a particular case would defeat the ends of justice. The present case raises issues of contributory negligence and assumption of risk, not involved in the prior criminal trial. Thus, application of collateral estoppel would place defendant theater owner at a disadvantage, while refusal to apply it would not deprive plaintiffs of any right. (247 C.A.2d 650.)

In *Cochran v. Union Lumber Co.* (1972) 26 C.A.3d 423, 102 C.R. 632, defendant lumber company granted lands, reserving a right to remove merchantable timber "at any time hereafter." One grantee sued, and this language was interpreted by the court as giving defendant only the right to remove timber within a reasonable time. Defendant did not appeal and the judgment became final as to that grantee. In this later action by plaintiff grantees, they sought to use the prior determination in favor of the stranger grantee as a collateral estoppel, to defeat defendant's claim of a permanent right to remove. *Held*, the deed, properly construed, gave the permanent right, and the prior judgment was not conclusive. To give it effect would mean that defendant alone, among lumber companies, would be bound by the erroneous earlier decision, while other companies could freely litigate the issue and would be entitled to a permanent right of removal under the present holding. (26 C.A.3d 428.)

In *Kelly v. Trans Globe Travel Bureau* (1976) 60 C.A.3d 195, 131 C.R. 488, a delivery man deviated from his duties and negligently caused a collision in which both he and plaintiff were injured. In the delivery man's compensation proceeding, the Court of Appeal held that he was acting in the scope of his employment and was entitled to compensation. In the present action by plaintiff against the delivery man's employer, seeking recovery on the respondeat superior doctrine, plaintiff contended that the finding of scope of employment in the prior proceeding was

conclusive on the employer. *Held*, the doctrine of collateral estoppel was not applicable for policy reasons: (a) the dangers of applying it to future litigation with nonparties, and (b) the undesirability of applying it to determinations in workers' compensation proceedings. (60 C.A.3d 202; for full discussion, see 2 *Summary* (10th), *Workers' Compensation*, §417.) (See *Flores v. Transamerica HomeFirst* (2001) 93 C.A.4th 846, 851, 113 C.R.2d 376 [lender was not collaterally estopped from asserting that arbitration clause in loan agreement with plaintiffs was not unconscionable, even though prior action against lender by different plaintiffs had determined that virtually identical language in their loan agreement was unconscionable; agreement in second case was signed by different parties under different circumstances].)

In *White Motor Corp. v. Teresinski* (1989) 214 C.A.3d 754, 263 C.R. 26, a passenger was seriously injured in a collision between the automobile in which she was riding and a garbage truck. An action was filed by plaintiffs (individually and as guardian ad litem for the passenger) against the seller of the truck, the manufacturer of the truck cab and chassis, the fabricator of the truck, and the seller of the automobile. The truck manufacturer cross-complained for equitable indemnity, and moved for summary judgment, which the court granted. Plaintiffs appealed from the order dismissing the truck manufacturer, but their appeal was abandoned as part of a settlement agreement under which the truck manufacturer paid plaintiffs \$ 50,000. Plaintiffs then settled with the seller of the truck, and the case was tried against the seller of the automobile alone. Judgment was entered in favor of plaintiffs for \$ 3.25 million, on a special verdict allocating comparative negligence (40% to plaintiff passenger and 60% to the automobile seller). The court reserved jurisdiction to reduce the award by the amount of plaintiffs' settlements and any amount to be received in her claim against the truck fabricator, which had declared bankruptcy.

Shortly afterwards, plaintiffs and the automobile seller stipulated to set aside the judgment in exchange for a \$ 400,000 settlement, and the automobile seller moved for a determination of good faith under C.C.P. 877 and 877.6 (see 5 *Summary* (10th), *Torts*, §83 et seq.). The court granted the motion, vacated the judgment, and ordered all cross-claims against the automobile seller dismissed. The truck seller and the truck manufacturer appealed, and the order vacating the judgment and dismissing the cross-claims was reversed. (*Southern Calif. White Trucks v. Teresinski* (1987) 190 C.A.3d 1393, 236 C.R. 159.) The truck manufacturer then sought summary judgment or summary adjudication of issues on its cross-complaint against the automobile seller for equitable indemnity, and the trial court granted the motion for summary judgment against the automobile seller for the amount of the truck manufacturer settlement with plaintiffs (\$ 50,000). On appeal, the automobile seller contended that a triable issue of fact existed as to the relative fault of the automobile seller and the truck manufacturer. The truck manufacturer, relying on *Columbus Line v. Gray Line Sight-Seeing Cos. Associated* (1981) 120 C.A.3d 622, 174 C.R. 527, contended that its summary judgment obtained against plaintiffs was binding on the automobile seller. *Held*, summary judgment reversed; the doctrine of collateral estoppel did not apply.

(a) The issue decided in the prior adjudication--that the truck manufacturer was not liable for the passenger's injuries--was identical to that presented in the present case, and the truck manufacturer's summary judgment in that case was on the merits and became final on plaintiffs' abandonment of their appeal. (214 C.A.3d 762.) However, although notice of the truck manufacturer's motion for summary judgment had been given to the automobile seller, the automobile seller was not named as a cross-defendant in the truck manufacturer's cross-complaint for equitable indemnity. Under these circumstances, the automobile seller would have no reason to anticipate that a successful summary judgment motion by the truck manufacturer against plaintiffs (which would dismiss the truck manufacturer from plaintiffs' action) would someday be used as a basis for the truck manufacturer to obtain indemnification from the automobile seller. Instead, if the truck manufacturer were successful in its summary judgment motion, the logical assumption is that the truck manufacturer would not pay any funds to plaintiffs and there would be nothing to indemnify. (214 C.A.3d 763.)

(b) Even if the elements of collateral estoppel were present, its offensive use (see *supra*, §§475, 476) in this case would make it inapplicable. The truck manufacturer "armed with a judgment of nonliability, nevertheless settled with plaintiffs for \$ 50,000 in exchange for abandonment of plaintiffs' appeal from summary judgment." (214 C.A.3d 763.) In this manner, if the automobile seller were collaterally estopped by the summary judgment, the truck manufacturer

would have achieved two goals. First, the judgment finding the truck manufacturer not liable for the passenger's injuries, whether or not erroneously rendered, would become final. Second, the automobile seller, the only defendant with a finding of fault against it, would become liable, as a matter of law, on the truck manufacturer's cross-claim for equitable indemnity. "More importantly, all of this would occur without any participation by (or representation of)" the automobile seller. (214 C.A.3d 763.)

(c) "This court recognizes that had its summary judgment been reversed on appeal, [the truck manufacturer] was potentially liable to plaintiffs. Therefore, its \$ 50,000 settlement should not be deemed a voluntary payment cutting off any right to equitable indemnity. ... However, it is highly illogical, and more importantly, manifestly inequitable to permit [the truck manufacturer] to take the inconsistent positions that, on the one hand, it faced potential liability should its summary judgment have been reversed and therefore it was not a volunteer, but, on the other hand, the same summary judgment was a final determination that it was not at fault and therefore it was entitled to full equitable indemnity as a matter of law. To affirm such a judgment would increase the potential for collusion and other abuses of the system." (214 C.A.3d 764.)

In *Smith v. ExxonMobil Oil Corp.* (2007) 153 C.A.4th 1407, 67 C.R.3d 69, the survivors of a deceased plumber who had been exposed to asbestos at defendant's refinery sued for wrongful death. In a prior personal injury action against defendant by the plumber, the jury found that defendant had failed to warn the plumber of a preexisting dangerous condition at the refinery and that defendant's employees had failed to exercise ordinary care in the performance of their work. In the wrongful death action, plaintiffs sought to preclude defendant from relitigating these issues. Defendant argued that applying collateral estoppel would be unfair because it had been unable to present a full and complete defense in the personal injury action due to the following circumstances: The daughter of defendant's sole expert witness was killed in car accident a few days before the expert was scheduled to testify, defendant could not find another expert on short notice, and the trial could not be delayed because the plumber was near death. The trial court in the wrongful death action disagreed with defendant's contention, applied collateral estoppel, and proceeded directly to the damages phase. *Held*, reversed. The application of collateral estoppel was unfair.

(a) No prior case has addressed "whether the inability of a defendant at a prior trial to obtain the testimony of an assertedly crucial witness so unfairly denied him a full opportunity to litigate his claim that he should not be collaterally estopped from relitigating the matter." (153 C.A.4th 1416.) *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552, *infra*, §481, *Blonder-Tongue Laboratories v. University of Illinois Foundation* (1971) 402 U.S. 313, 91 S.Ct. 1434, 1440, 28 L.Ed.2d 788, 797, *supra*, §473, and *Rest.2d, Judgments* §29, Comment j, however, acknowledge that the unavailability of a crucial witness or evidence at a prior proceeding is a circumstance that may render the offensive use of collateral estoppel inappropriate. (153 C.A.4th 1417.)

(b) *Evans v. Celotex Corp.* (1987) 194 C.A.3d 741, 238 C.R. 259, *supra*, §460, does not require the application of collateral estoppel here. In *Evans*, collateral estoppel precluded plaintiffs from relitigating whether asbestosis was the cause of the decedent's death, even though results of a biopsy that could not be performed until after an earlier trial involving the issue showed that it was. Preclusion was equitable in *Evans* because the post-trial biopsy appeared to be merely cumulative of evidence presented at the first trial. (153 C.A.4th 1419.) Here, on the other hand, when defendant's expert became unavailable in the personal injury action, no other expert could address the issues of causation, standard of care, and apportionment of fault. Defendant's "fortuitous inability, through no fault of its own, to produce evidence on these crucial issues makes it impossible to say that the prior trial provided it a full and fair opportunity to present a defense." (153 C.A.4th 1420.)

SUPPLEMENT: [This section is current through the latest supplement]



146 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

6. Offensive Use Denied.

bb. Following Arbitration.

7 *Witkin Cal. Proc. Judgm* § 478

[§ 478] Following Arbitration.

In *Vandenberg v. Superior Court* (1999) 21 *C.4th* 815, 88 *C.R.2d* 366, 982 *P.2d* 229, plaintiff, the former lessee of a parcel of land that had been contaminated by underground storage tanks, sued defendant insurers for failure to defend or indemnify him in an action against him by his former lessor. The action between plaintiff and the lessor was resolved by private arbitration under *C.C.P. 1280* et seq. The arbitrator found that the contamination had resulted from plaintiff's improper installation and use of the tanks and that the discharge of contaminants was not sudden and accidental. After a superior court judgment confirming the arbitrator's award of over \$ 4 million to the lessor, plaintiff sought indemnification from defendants. Defendants moved for summary adjudication, contending that a pollution exclusion in their policies was triggered by the arbitrator's determination that the contamination was not sudden and accidental. The trial judge granted defendants' motion, ruling that collateral estoppel precluded relitigation of the cause of the contamination. The Court of Appeal reversed. *Held*, collateral estoppel does not apply. A private arbitration award, even if judicially confirmed, has no collateral estoppel effect in favor of third persons unless the arbitral parties agreed that that consequence should apply.

(a) *C.C.P. 1280* et seq. do not specify that, despite the arbitral parties' failure to so agree, a private arbitration award may be binding in favor of nonparties in litigation involving different causes of action. That consequence is not an inherent or expected feature of private arbitration that the arbitral parties implicitly accept. (21 *C.4th* 831.)

(b) Private arbitration is informal and imprecise in nature and is insulated from judicial interference. These are advantages that parties seek in arbitrating their own claims, but they can be "serious, unexpected disadvantages if issues decided by the arbitrator are given leveraged effect in favor of strangers to the arbitration." (21 *C.4th* 832.) By agreeing to arbitrate particular claims, each arbitral party is not necessarily consenting that issues decided against the party by the informal, imprecise method may bind it in "all future disputes, regardless of the stakes, against all adversaries, known and unknown. On the contrary, common sense weighs against" this assumption. (21 *C.4th* 832.)

(c) The primary purposes of collateral estoppel are to preserve the integrity of the judicial system, promote judicial

economy, and protect litigants from harassment by vexatious litigation. "But because a private arbitrator's award is *outside* the judicial system, denying the award collateral estoppel effect has no adverse impact on judicial integrity. Moreover, because private arbitration does not involve the use of a judge and a courtroom, later relitigation does not undermine judicial economy by requiring duplication of judicial resources to decide the same issue. Finally, when collateral estoppel is invoked by a *nonparty* to the private arbitration, the doctrine does not serve the policy against harassment by vexatious litigation. In such cases, the doctrine is asserted not to protect one who has already once prevailed against the same opponent on the same cause of action, but simply to gain vicarious advantage from a litigation victory *won by another*." (21 C.4th 833.)

(d) Although most other courts and some commentators have determined that a judicially confirmed private arbitration award should have collateral estoppel effect, even in favor of nonparties to the arbitration, unless the arbitral parties agreed otherwise, the rationales for this view do not give sufficient consideration to the voluntary, contractual, and informal nature of private arbitration and to the arbitral parties' reasonable expectations. (21 C.4th 835.) Moreover, courts that take this approach must decide on a case-by-case basis whether the particular arbitration proceedings provided a full and fair opportunity to litigate (21 C.4th 834), which has "adverse effects on the choice, use, and effectiveness of private arbitration as a faster, cheaper alternative to litigation in court" (21 C.4th 836). Under this approach, the arbitral parties do not know at the outset of arbitration the scope and effect of the arbitrator's decision. (21 C.4th 836.)

(e) There was no agreement by plaintiff and the lessor here allowing defendants to assert, against plaintiff, the collateral estoppel effect of issues decided in the arbitration. On the contrary, the terms of an earlier settlement among the lessor, plaintiff, and one of defendant insurers strongly suggest that the arbitration was intended to bind the lessor and plaintiff while reserving all questions of ultimate coverage and indemnity obligations between defendants and plaintiff. (21 C.4th 837.)

Nothing in *Vandenberg* "imposes or implies any limitations on the strict res judicata, or 'claim preclusive,' effect of a California law private arbitration award." (*Brinton v. Bankers Pension Services* (1999) 76 C.A.4th 550, 556, 90 C.R.2d 469 [earlier arbitration award between plaintiff and one of defendant's employees did not have collateral estoppel effect in favor of defendant in plaintiff's subsequent action, where defendant had not been party to arbitration; plaintiff's action was, however, barred by res judicata; quoting *Vandenberg*]; see *Benasra v. Mitchell Silberberg & Knupp, LLP* (2002) 96 C.A.4th 96, 105, 107, 116 C.R.2d 644 [recognizing *Vandenberg* prohibition against collateral estoppel, as well as fact that *Vandenberg* does not limit applicability of res judicata; neither res judicata nor collateral estoppel applied]; *Grinham v. Fielder* (2002) 99 C.A.4th 1049, 1054, 121 C.R.2d 468 [collateral estoppel applied where nonparty to arbitration participated in arbitration completely; distinguishing *Vandenberg*].)

SUPPLEMENT: [This section is current through the latest supplement]



147 of 150 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

6. Offensive Use Denied.

cc. Inconsistent Prior Decisions.

7 *Witkin Cal. Proc. Judgm* § 479

[§ 479] Inconsistent Prior Decisions.

The Second Restatement of Judgments (§29(4)) rejects collateral estoppel where "[t]he determination relied on as preclusive was itself inconsistent with another determination of the same issue."

Sandoval v. Superior Court (1983) 140 C.A.3d 932, 190 C.R. 29, supra, §369, applies this rule. Plaintiff sued defendant manufacturer for injuries received from the use of a machine with an alleged design defect, and sought partial summary judgment on the ground that, in a prior action by another plaintiff against defendant manufacturer for wrongful death, the jury had returned a verdict for substantial damages, together with a special verdict finding that the machine was defectively designed. (See supra, §369.) Defendant manufacturer countered with a showing that in a different prior action by a third plaintiff against defendant manufacturer, the jury, apparently accepting the defense theory of proper design, returned a verdict for defendant manufacturer. *Held*, the prior judgment against the manufacturer could not be used by plaintiff as collateral estoppel.

(a) The Restatement points out that collateral estoppel is essentially equitable in nature, and therefore, there must be some limit to the principle of finality to accord basic fairness to the parties. (140 C.A.3d 941, citing Rest.2d, Judgments, Introduction, p. 11; see supra, §369.)

(b) One circumstance to be considered is whether the determination relied on as preclusive was itself inconsistent with another determination of the same issue. "Giving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct. Where a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted. The inference, rather, is that the outcomes may have been based on equally reasonable resolutions of doubt as to the probative strength of the evidence or the appropriate application of a legal rule to the evidence. That such a doubtful determination has been given effect in the action in which it was reached does not require that it be given effect against the party in litigation against another adversary." (140 C.A.3d 941, quoting Rest.2d, Judgments §29, Comment f.)

(c) *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552, *infra*, §481, approved this approach, accepting the Restatement view that the trial judge should not allow the offensive use of collateral estoppel where it would be unfair to a defendant, and citing the example of a railroad collision injuring 50 passengers. (140 C.A.3d 942.)

(d) Most of the cases involved actions arising out of the same transaction (e.g., a single accident in which a number of plaintiffs were injured). The present case--as often happens in products liability--involves actions arising out of different transactions (plaintiffs using the same product at different times and under different circumstances). *Hardy v. Johns-Manville Sales Corp.* (5th Cir. 1982) 681 F.2d 334, a multiple-product transactions case, applied the *Parklane* inconsistent verdict theory and rejected collateral estoppel. The court in *Hardy* said: "Not only does issue preclusion in such cases appear arbitrary to a defendant who has had favorable judgments on the same issue, it also undermines the premise that different juries reach equally valid verdicts. ... One jury's determination should not, merely because it comes later in time, bind another jury's determination of an issue over which there are equally reasonable resolutions of doubt." (140 C.A.3d 943.) And the Oregon Supreme Court expressed a similar view. (140 C.A.3d 944.)

Sandoval was followed in another Court of Appeal case involving an action against the same defendant based on the same alleged design defect in the machine. (See *Bates v. John Deere Co.* (1983) 148 C.A.3d 40, 48, 195 C.R. 637.)

SUPPLEMENT: [This section is current through the latest supplement]



148 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

6. Offensive Use Denied.

dd. Action Against Federal Government.

7 *Witkin Cal. Proc. Judgm* § 480

[§ 480] Action Against Federal Government.

In *United States v. Mendoza* (1984) 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379, plaintiff, a Filipino national, petitioned for naturalization, asserting that the Government had deprived him of due process of law in his naturalization proceeding. In a prior action against the Government brought by different parties, the same due process issue had been adjudicated against the Government, and the Government had not appealed. Plaintiff contended, and the district court and Court of Appeals held, that the Government was collaterally estopped by the prior adjudication. *Held*, reversed.

(a) The scope of the doctrine of collateral estoppel has been broadened in recent years by *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552, *infra*, §481, abandoning the requirement of mutuality of parties and by conditionally approving its offensive use by a nonparty. But *Parklane* involved private litigants, and the Government is not in a position identical to that of a private litigant. It is a party to a far greater number of cases on a nationwide basis than any private entity, and to allow nonmutual collateral estoppel against it would have serious consequences. (1) It would freeze the first final decision rendered on a particular legal issue, depriving this court of the benefit of permitting several courts of appeal to explore a difficult question and develop conflicts before granting certiorari. (2) It would require substantial revision of the Solicitor General's policy for determining when to appeal an adverse decision (consideration of limited resources of government and crowded dockets of courts). (3) It may lead successive administrations of the executive branch to take differing positions with respect to the resolution of a particular issue. (104 S.Ct. 572, 573, 78 L.Ed.2d 383, 384.)

(b) "We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues such as those involved in this case. The conduct of government litigation in the courts of the United States is sufficiently different from the conduct of private civil litigation in those courts so that what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government. We think that our conclusion will better allow thorough development of legal doctrine by allowing litigation in multiple forums. Indeed, a contrary result might disserve the economy interests in whose name estoppel is advanced by requiring the government to abandon virtually

any exercise of discretion in seeking to review judgments unfavorable to it. The doctrine of res judicata, of course, prevents the government from relitigating the same cause of action against the parties to a prior decision, but beyond that point principles of nonmutual collateral estoppel give way to the policies just stated." (104 S.Ct. 574, 78 L.Ed.2d 386.)

(c) Different considerations are present and a different rule applies where mutuality is present; i.e., where the parties are the same, the Government may be collaterally estopped. "The application of an estoppel when the government is litigating the same issue with the same party avoids the problem of freezing the development of the law because the government is still free to litigate that issue in the future with some other party. And, where the parties are the same, estopping the government spares a party that has already prevailed once from having to relitigate--a function it would not serve in the present circumstances." (104 S.Ct. 574, 78 L.Ed.2d 387, citing *Montana v. United States* (1979) 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210, and *United States v. Stauffer Chemical Co.* (1984) 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388.) (See 99 Harv. L. Rev. 847 [criticizing *Mendoza*]; 109 Harv. L. Rev. 792 [use of nonmutual issue preclusion against state governments]; 30 U.C. Davis L. Rev. 889 [argument for limiting *Mendoza* to its policy rationale].)

SUPPLEMENT: [This section is current through the latest supplement]



149 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

7. Offensive Use Upheld.

aa. Offensive Use Within Trial Court's Discretion.

7 *Witkin Cal. Proc. Judgm* § 481

[§ 481] Offensive Use Within Trial Court's Discretion.

Offensive use of the collateral estoppel doctrine (by a plaintiff against a defendant who lost in a previous action) was approved by the United States Supreme Court in *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552. Plaintiff brought a shareholder's class action in federal district court against defendant Parklane and 12 officers, directors, and stockholders, for rescission of a merger and damages, based on a fraudulent proxy statement. Before trial, the SEC sued the same defendants in a federal district court, alleging the same wrongful act and seeking injunctive relief. The district court found that the proxy statement was materially false and gave the SEC a declaratory judgment. Plaintiff thereupon sought partial summary judgment in his action, contending that defendants were collaterally estopped from relitigating the fraud issue. Defendants contended that application of the doctrine would deny them their Seventh Amendment right to a jury trial. *Held*, the doctrine applied.

(a) *Defensive and offensive use of doctrine.* Defensive use occurs when a *defendant* seeks to estop a plaintiff from asserting a claim that the plaintiff had previously litigated and lost against *another defendant*. In the present case, a *plaintiff* seeks to estop a defendant from relitigating an issue that the defendant previously litigated and lost against *another plaintiff*. Lack of mutuality is no longer an objection. The party against whom estoppel is asserted has litigated and lost in the earlier action (see *supra*, §474). And the arguments against offensive use--that it does not promote judicial economy, and that it may be unfair to a defendant--do not call for a rule wholly precluding that use. (99 S.Ct. 650, 651, 58 L.Ed.2d 561.)

(b) *Trial judge's discretion to apply doctrine.* The preferable approach, supported by the *Rest.2d, Judgments* §29, is to give trial courts "broad discretion" to determine when the doctrine should be applied. "The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." (99 S.Ct. 651, 58 L.Ed.2d 562.)

(c) *No reasons for rejecting doctrine in this case.* Application of the doctrine here will not reward a private plaintiff

who could have joined in the previous action; plaintiff probably could not have joined in the SEC's injunction action. Furthermore, there is no unfairness to defendants, who had every incentive to litigate the SEC action fully and vigorously. Finally, there are no significant procedural opportunities available to defendants that were unavailable in the first action. (99 S.Ct. 652, 58 L.Ed.2d 562.)

(d) *No violation of constitutional right to jury trial.* Prior cases have made it clear that litigation of an issue in an equitable action may have a collateral estoppel effect in a subsequent legal action. (99 S.Ct. 653, 58 L.Ed.2d 565.) Defendants nevertheless contend that, because the common law permitted collateral estoppel only where there was mutuality of parties, allowing it in the absence of mutuality denies the common law right to a jury. This contention calls for an unacceptably rigid interpretation of the Constitution; i.e., developments in the law of collateral estoppel, like those in other procedural areas defining the scope of the jury's function, are not repugnant to the Seventh Amendment simply because they did not exist in 1791. (99 S.Ct. 654, 58 L.Ed.2d 566.) (See *Imen v. Glassford* (1988) 201 C.A.3d 898, 902, 247 C.R. 514, supra, §397; *Roos v. Red* (2005) 130 C.A.4th 870, 881, 30 C.R.3d 446 [citing *Parklane Hosiery Co.* for proposition that unavailability of jury trial in first proceeding does not preclude application of collateral estoppel in subsequent proceeding]; 31 *Hastings L. J.* 755 [*Parklane*].)

In *Louie Queriolo Trucking v. Superior Court* (1967) 252 C.A.2d 194, 60 C.R. 389, plaintiff's employee wrecked its truck and suffered personal injuries in a fall into an excavation made by defendant company. The employee sued the company, the trial was bifurcated, the jury found for the employee on the liability issue, and the clerk entered a "judgment" for the employee. The defendant company moved for a new trial, which was denied, took an appeal, which was dismissed, and settled the case. It was then dismissed with prejudice. The present action by plaintiff employer for damages to the truck was commenced before the employee's action was concluded. When the dismissal was entered, plaintiff sought by supplemental complaint to allege the determination of the employee's action as conclusive on the negligence of defendant company and on the absence of contributory negligence of the employee attributable to plaintiff. *Held*, mandamus granted to compel permission to file it.

The main opinion relied on authorities holding that a judgment absolving an employee from liability also absolves his employer whose liability is based on the respondeat superior doctrine. (See 3 *Summary* (10th), *Agency and Employment*, §167.) The present case, however, was one in which the employer sought affirmative recovery on the basis of that type of recovery by the employee. The concurring opinion suggested that collateral estoppel should be applied, not only in employer-employee cases, but in any case of a bifurcated trial where the issues are fully litigated. Otherwise the bifurcated trial would enable a defendant, by the tactics attempted here, to relitigate identical liability in multiple actions arising from the same transaction. (252 C.A.2d 200.) (See *Vanguard Recording Soc. v. Fantasy Records* (1972) 24 C.A.3d 410, 417, 100 C.R. 826, supra, §465; *R. E. Spriggs Co. v. Adolph Coors Co.* (1979) 94 C.A.3d 419, 429, 156 C.R. 738, citing the text ["the offensive-defensive distinction is an anachronism no longer deserving of judicial recognition"]; *Estate of Gump* (1991) 1 C.A.4th 582, 609, 2 C.R.2d 269; 16 *U.C.L.A. L. Rev.* 203 [res judicata and bifurcated negligence trials].)

SUPPLEMENT: [This section is current through the latest supplement]



150 of 150 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

F. Effect on Parties, Privies, and Strangers.

3. Stranger.

b. Collateral Estoppel Asserted by Stranger.

7. Offensive Use Upheld.

bb. Distinction: Single Action.

7 Witkin Cal. Proc. Judgm § 482

[§ 482] Distinction: Single Action.

In *Lytle v. Household Mfg.* (1990) 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504, plaintiff filed an action involving both equitable and legal claims, and the district court erroneously dismissed the legal claims. On appeal, the Court reversed the dismissal and held that the district court's determination of issues raised in the equitable claims did not collaterally estop plaintiff from relitigating those issues in the new jury trial on the legal issues. "Application of collateral estoppel is unnecessary here to prevent multiple lawsuits because this case involves one suit in which the plaintiff properly joined his legal and equitable claims." (110 S.Ct. 1337, 108 L.Ed.2d 516.) "Although our holding requires a new trial in this case, we view such litigation as essential to vindicating [plaintiff's] Seventh Amendment rights." (110 S.Ct. 1337, 108 L.Ed.2d 516.)

SUPPLEMENT: [This section is current through the latest supplement]



1 of 4 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

IX. RECOVERY OF COSTS

C. Recovery of Costs as Matter of Court's Discretion.

2. Illustrations.

j. (New) Validating Proceeding.

7 *Witkin Cal. Proc. Judgment § 108A*

[§ 108A] (New) Validating Proceeding.

Under *C.C.P. 860 et seq. (4 Cal. Proc. (5th), Pleading, §158)*, a public agency may bring an action, in the nature of a proceeding in rem, to determine the validity of certain public acts. The costs of the action may be allowed and apportioned between the parties or taxed to the losing party in the discretion of the court. (*C.C.P. 868*; see *Foothill-De Anza Community College Dist. v. Emerich (2007) 158 C.A.4th 11, 27, 69 C.R.3d 678* [costs were correctly imposed on losing defendants in district's action to validate bond issue, despite prohibition in *C.C.P. 861.1* against subjecting persons who contest validity to punitive action].)

SUPPLEMENT: [This section is current through the latest supplement]



2 of 4 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIII. BASES FOR FEES

D. Benefits Conferred.

4. Private Attorney General Theory.

f. Fees Denied.

1A. (New) Opposing Party Did Nothing To Adversely Affect Public Interest.

7 *Witkin Cal. Proc. Judgment* § 278A

[§ 278A] (New) Opposing Party Did Nothing To Adversely Affect Public Interest.

C.C.P. 1021.5 does not authorize an award of attorneys' fees against an individual "who has done nothing to adversely affect the rights of the public or a substantial class of people other than raise an issue in the course of private litigation that could establish legal precedent adverse to a portion of the public." (*Adoption of Joshua S.* (2008) 42 *C.4th* 945, 949, 70 *C.R.3d* 372, 174 *P.3d* 192.) In *Joshua S.*, after obtaining a California Supreme Court opinion validating "second parent" adoption, the same-sex partner of a child's birth mother adopted the child, while the mother remained a coparent. The partner then sought attorneys' fees under *C.C.P. 1021.5* against the birth mother, who had opposed the adoption. The trial court awarded fees, but the Court of Appeal reversed, concluding that the partner's personal stake in the litigation was so large that a private attorney general award was not justified. *Held*, affirmed.

(a) An "unspoken" justification for departing from the American Rule that each party must pay his or her own fees is that it is equitable to impose public interest attorneys' fees on parties that have done something to adversely affect the public interest. (42 *C.4th* 954.) *C.C.P. 1021.5* refers to the "enforcement" of an important right affecting the public interest. (42 *C.4th* 956.) This implies that those on whom fees are imposed have acted in a way that violates or compromises an important right, thereby requiring enforcement through litigation. (42 *C.4th* 956.)

(b) In *Connerly v. State Personnel Bd.* (2006) 37 *C.4th* 1169, 39 *C.R.3d* 788, 129 *P.3d* 1, text, §260, the state, rather than amici curiae who had unsuccessfully argued in favor of state affirmative action policies, was liable for fees. *Connerly* acknowledged that "the parties against whom attorney fees should be assessed should be those responsible for the policy or practice adjudged to be harmful to the public interest." (42 *C.4th* 957.)

(c) The birth mother here was a private litigant with no institutional interest in the litigation. She sought a judgment that would have settled her own private rights and those of her children and her former partner. In the course of the litigation, she raised an issue that gave rise to an important appellate precedent. (42 *C.4th* 957.) She did nothing to adversely affect the public interest other than being on the losing side of an important appellate case. *C.C.P. 1021.5* was not intended to impose fees on an individual in that category. (42 *C.4th* 958.)

SUPPLEMENT: [This section is current through the latest supplement]



3 of 4 DOCUMENTS

Within California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Within Summary of California Law

XIV. PROCEDURE FOR OBTAINING FEES

B. Amount of Award.

8. (New) Fees Awarded Under "Clear Sailing" Agreement.

7 Witkin Cal. Proc. Judgment § 323A

[§ 323A] (New) Fees Awarded Under "Clear Sailing" Agreement.

In *Consumer Privacy Cases (2009) 175 C.A.4th 545, 96 C.R.3d 127*, a class action, consumers sued defendant bank, alleging that the bank had unlawfully disclosed personal and confidential information about the consumers to third parties for a fee. The parties reached a settlement that contained, in addition to numerous benefits for the class members, a "clear sailing" attorneys' fee provision. Defendant agreed not to oppose the class's application for an award of fees and expenses to be determined by the trial court, as long as the award did not exceed \$ 4 million. After several hearings, the trial court awarded about \$ 2.9 million in fees and over \$ 100,000 in expenses. The fees were awarded alternatively under the common fund doctrine and the private attorney general doctrine. Several objectors appealed from the fees award, contending that the settlement's separate payment provisions were unethical and improper. They also argued that the difference between the amount awarded and the \$ 4 million that defendant agreed to should be considered a surplus and distributed among the class. *Held*, fees award affirmed.

(a) Although the propriety of "clear sailing" agreements has been debated, commentators have agreed that they are proper. (*175 C.A.4th 553*.) No federal or California authority has adopted the objectors' arguments against them or condemned their use. (*175 C.A.4th 553, 554*.)

(b) Having the trial court determine the amount of fees to be carved out of a lump-sum settlement, as the objectors propose, would not remove the potential conflict of interest that concerns the objectors here; any argument by counsel to enhance his or her fees from a common fund would necessarily diminish the amount available to the class. (*175 C.A.4th 554*.) All class action settlements present the potential for fraud, collusion, or unfairness, and thus all require thorough judicial review of fee applications. Trial court judges are well aware of their roles as fiduciaries for absent class members and can be depended on to ensure that fee agreements are fair and proper. (*175 C.A.4th 555*.)

(c) The fee award here contains no error. The trial court conducted several hearings to review the support for the fee requests. The court used a lodestar analysis and applied a multiplier to calculate the final award. (*175 C.A.4th 556*.) Class counsel had to provide detailed support for their fee claims, and the trial court denied those claims that were not supported. (*175 C.A.4th 557*.)

(d) The almost \$ 1 million difference between the amount agreed to by defendant and the amount awarded by the

trial court need not be distributed to the class. There is no authority for the objectors' "rather unique theory." (*175 C.A.4th 558, 559.*) The arguments that failure to distribute the "surplus" will result in a windfall for the bank and discourage class members from raising objections "miss the mark." (*175 C.A.4th 559.*) Under the agreement, the bank merely established the outer limits of its liability for fees, leaving the determination of reasonable fees for the trial court. (*175 C.A.4th 559.*)

SUPPLEMENT: [This section is current through the latest supplement]



4 of 4 DOCUMENTS

Witkin California Procedure, Fifth Edition

Copyright (c) 2010 By B.E. Witkin Article Sixth Testamentary Trust

CHAPTER IX - Judgment

Witkin Summary of California Law

XVI. RES JUDICATA

E. Judgment as Collateral Estoppel.

4. When Judgment Is Not Conclusive.

k-1. (New) Constitutional Prohibition in Tax Disputes.

7 *Witkin Cal. Proc. Judgment § 441A*

[§ 441A] (New) Constitutional Prohibition in Tax Disputes.

Collateral estoppel cannot be used as an exception to the "pay first, litigate later" rule (see 9 *Summary* (10th), *Taxation*, §297), which requires a taxpayer to pay a tax before commencing a court action to challenge collection of the tax. In *California Logistics v. California* (2008) 161 *C.A.4th* 242, 73 *C.R.3d* 825, a state agency determined that delivery drivers used by plaintiff company were employees, not independent contractors, and that plaintiff's tax liability should be increased accordingly. Without paying the additional tax, plaintiff sought a declaratory judgment and injunctive relief to establish that its drivers were independent contractors. Plaintiff argued that several prior administrative and judicial proceedings had determined the independent contractor status of its drivers and thus the state was collaterally estopped from claiming otherwise. The trial court sustained the state's demurrer, concluding that it lacked jurisdiction under the pay first, litigate later rule. *Held*, affirmed.

(a) A litigant does not have an absolute right to application of the collateral estoppel doctrine. (161 *C.A.4th* 249.) Even when the prerequisites for applying the doctrine have been met, policy considerations may prevent its application. (161 *C.A.4th* 249, 250.)

(b) The doctrine of collateral estoppel cannot take precedence over Cal. Const., Art. XIII, §32, which establishes the pay first, litigate later rule. The doctrine does not require courts to provide relief that the Constitution specifically prohibits. (161 *C.A.4th* 250.)

SUPPLEMENT: [This section is current through the latest supplement]