SAN FRANCISCO
Daily Journal
Established in 1888

VOL. 130 NO. 109 WEDNESDAY, JUNE 5, 2024

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DAR
Daily Appellate Report

Administrative Agencies: A farming operation that is a fractional partner in a storefront selling farming goods was not a qualifying person under an FCIC insurance policy. *M&T Farms v. Federal Crop Insurance Corp.*, 9th U.S. Circuit Court of Appeals, DAR p. 4806

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State Senator Tom Umberg in 2022.

Assembly votes to extend remote criminal proceedings

By Malcolm Maclachlan
Daily Journal Staff Writer

An Assembly committee advanced a bill that would extend rules allowing remote criminal proceedings over the objections of labor groups and public defenders.

The bill's author, Sen. Tom Umberg, D-Santa Ana, told the members of the Assembly Public Safety Committee on Tuesday that SB 92 merely seeks to extend a type of proceeding that has become routine.

"Remote proceedings have been taking place regularly in our criminal courts since the COVID-19 pandemic," said Tracy Kenny, deputy director of the office of public affairs with the Judicial Council. "We have four years of experience with this authority. The courts and public have seen great benefits from providing this access."

She said courts have held more than 1.5 million remote criminal proceedings over that time, avoiding "millions of trips to the courthouse" for participants. As she has in other hearings about remote proceedings bills, Kenny touted a 2022 council survey which found over 95% of participants were satisfied with remote proceedings. Kenny added that SB 92 would continue current rules that condition remote hearings on the consent of both sides and bar their use in felony trials.

"The criminal remote statute has clear protections which require the court to convene in person if there's any kind of audibility issue or technological glitches, or if for some reason the court reporter cannot contain the record or the court interpreter cannot provide language access," Kenny said. "The statute has lots of built in protections to ensure a verbatim record as well as language access."

The Assembly passed SB 92 by a 6-0 vote despite opposition from labor groups and defense counsel. SEIU California lobbyist Sandra Barreiro told lawmakers the remote proceedings can be more efficient and convenient but had "limitations." She urged them to vote no.

"We aren't opposed to remote specifically," Barreiro said. "However, we still think that trial courts need to reconcile the impacts on

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Sutter Health's antitrust victory overturned by 9th Circuit panel

By Craig Anderson
Daily Journal Staff Writer

A divided 9th U.S. Circuit Court of Appeals panel on Tuesday reversed a major defense win for health care giant Sutter Health in an antitrust class action because of the trial judge's "prejudicial" jury instructions and exclusion of key evidence.

9th Circuit Judge Lucy H. Koh, an appointee of President Joe Biden, granted a new trial after ruling that U.S. Magistrate Judge Laurel D. Beeler of San Francisco failed to instruct the jury to determine whether Sutter's policies were motivated by an anticompetitive purpose and incorrectly excluded any evidence before 2006.

She agreed with arguments by Constantine Cannon LLP partner Matthew L. Cantor that U.S. Magistrate Judge Laurel D. Beeler's errors prevented the jury, which ruled for Sutter Health following a 2022 trial, from hearing all the evidence. *Sidibe v. Sutter Health*, 2024 DJDAR 4812 (9th Circ., filed April 28, 2022).

Plaintiffs sued Sutter Health in 2012, alleging the company used its market power to pressure health insurance companies into "all-or-nothing" contracts, engaging in unlawful tying in violation of the state Cartwright Act and causing families and businesses, the plaintiffs in the class action, to overpay by $411 million for health care services.

The two key issues were Beeler's decision to exclude evidence prior

'The jury was not instructed that it could consider anticompetitive purpose. This was error.'

— Judge Lucy H. Koh
9th U.S. Circuit Court of Appeals

"As a means of determining anticompetitive effect, however, anticompetitive purpose is one of several relevant factors that a trier of fact may consider," Koh wrote. "Here, the jury was not instructed that it could consider anticompetitive purpose. This was error."

to Jan. 1, 2006 and a jury instruction striking the word "purpose" from "anticompetitive purpose."

Koh wrote that Beeler "excluded documents all based on the same fundamental error: failing to appreciate that pre-2006 evidence was

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Biden's asylum order likely to meet resistance from courts

By Skyler Romero
Daily Journal Staff Writer

President Joe Biden's executive order limiting asylum claims is already drawing ire from progressives for its resemblance to policies proposed by former President Donald Trump, which were dealt a legal blow by the courts during his administration. Experts predict the new order will likely meet the same fate.

"I think there's a clear legal issue about whether denying people the ability to apply for asylum who may be fleeing persecution is legal under U.S. law, and also under international law," Kevin R. Johnson, dean and professor of public interest law and Chicana/o studies at UC Davis School of Law, said in a phone call on Tuesday. "So, I think that the issues raised are serious, and certainly will end up in litigation very shortly -- and in some ways are less justifiable than Donald Trump's."

The present lack of a public health emergency such as the COVID-19 pandemic meant Biden's order may be even less likely to stand up to legal scrutiny than Trump's order, Johnson said.

"In fact, President Trump was able to close the border based on Title 42 for public health reasons," he said. "It's not really available to the Biden administration."

Any challenge to the order is likely to be filed through the federal district court, Johnson said – although the location and venue remains uncertain.

"I could imagine, D.C., could imagine L.A.," he said. "Various Democratic administrations have had good luck in Los Angeles ... so I wouldn't be surprised if it gets filed there, but D.C. is a place it could be filed too."

The executive order would ban migrants caught crossing the border illegally from seeking asylum, according to a fact sheet released by the White House Tuesday morning, subject to the seven-day average for daily illegal border crossings hitting 2,500. The policy would be suspended once the average number of crossings reached 1500 or less.

Within hours of the announce-

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GUEST COLUMN

CA Supreme Court upholds dismissal of strict liability municipal code violations against landlord

By Dmitry Gorin, Alan Eisner and Robert Hill

In *Emily Wheeler v. Superior Court* (Supreme Court No. S272850), the California Supreme Court reversed the appellate division of the Superior Court, which in turn had reversed a Los Angeles County trial court's dismissal of municipal code violations against a landlord under Penal Code § 1385. Section 1385 empowers trial courts to dismiss criminal charges "in furtherance of justice." The Supreme Court held that the trial court was permitted to consider, among other things, Wheeler's innocent state of mind in dismissing what the parties agreed were strict liability offenses which did not require a culpable mental state as an element.

Wheeler and her son, the property owners, were charged with multiple counts alleging that they operated an unlicensed marijuana business specifically, and an unlawful establishment more generally, on property in the Los Angeles city limits. They were additionally charged with maintaining a structure without applying for all necessary permits. Essentially, all of the charges alleged the same conduct: the Wheelers leased the property they owned to a marijuana business which was not properly permitted. The tenant was also named in the municipal code counts but was additionally charged with unlawfully selling cannabis under the California Health and Safety Code.

Wheeler filed a motion to dismiss the charges, arguing that the municipal code provisions were vague and overbroad. She cited to the trial court's Section 1385 authority to dismiss an action on its own motion

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The current state of independent film financing

By Schuyler M. Moore

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The film financing landscape morphs every few years, with losers heading for the exits and new sources lured in by the sexiness of the industry. Beyond death and taxes, the only certainty is that there will always be money chasing Hollywood dreams, and this article summarizes the current state of affairs.

1. **Equity financing**. The starting point for all film financing is the need for equity, starting with funds needed to acquire underlying rights or hire a writer. If a film isn't presold, as discussed below, the need for equity can include 100% of the production cost of a film. Equity investors are often attracted by various goodies other than the hope for profits, including some type of credit with the word "producer" in it, the right to visit the set, and invitations to the premiere and after-party. Producers are well advised to focus on these issues rather than boring financial projections.

Whenever a producer is raising equity, they need to be cognizant of the securities laws, since almost every equity offering is a security. It is critical to comply with various procedural rules and investor limitations in order to qualify for an exemption from the extraordinary cost of federal and state registration of the securities. Failure to comply with the requirements can result in personal liability to the producer for any losses and, in the worst case, jail. One of the tricky securities issues is the use of money "finders," since the SEC takes a dim view of paying people to raise money if they aren't registered broker-dealers.

2. **Cash-flow pre-sale**. In a cash-flow pre-sale, a producer assembles a film package, typically comprised of a script, director, and key-cast, and the film is then pre-sold to a distributor prior to production, and the distributor directly funds production costs. If the distributor is a streamer, the payments generally include a built-in profit to the producer ranging from 10% to 20% of the budget, often referred to as a "premium" or "buyout," although recent rumblings suggest that streamers are going to move to the studio model of paying less up front with additional potential contingent payments based on success of the film.

3. **Loan-backed pre-sale**. In a loan-backed pre-sale, a producer assembles a film package and engages a sales agent to pre-sell the film throughout the world, with distributors agreeing to pay a certain amount upon completion and delivery of the film. The producer then requests a lender to loan funds for production secured by the pre-sale contracts. In some cases, the loan includes a "gap" element (for a higher fee) based on a sales agent's estimates of what the film will hopefully sell for. The lender then requests a completion guarantor to issue a completion bond guaranteeing completion and delivery of the film to the distributors, thus triggering the payments owed under the pre-sale contracts.

4. **Bridge loans**. Loans backed by completion bonds typically don't close until commencement of principal photography, so some lenders make "bridge" loans to cover costs prior to that time in the hope that the magic day will arrive. These loans are riskier and thus bear much higher fees and interest than loans backed by completion bonds.

5. **Production subsidies**. State and foreign subsidies for local production are another great source of financing and can provide up to about 25% of the budget. California has joined the state tax credit fray with a film production tax credit of its own, but it has a number of limits that make it generally unworkable for independent producers. The IRS has put a damper on the state tax credit party by ruling that the receipt of the proceeds from the sale of state tax credits is immediately taxable, but so far everyone has ignored it.

6. **Equity from advertisers**. Advertisers can be another source of equity financing for films, although the more they invest, the more they are inclined to insist on turning the film into one long commercial, even though that hurts the film.

7. **Section 181**. Many people fantasize that federal tax code Section 181 can be used to raise film financing. In theory, Section 181 permits a deduction of the first $15 million for the cost of producing a film in the U.S. However, the deduction is only deductible against a limited type of income that most individuals don't have, and at best the benefit is a one-year deferral of tax. So it doesn't work to raise financing.

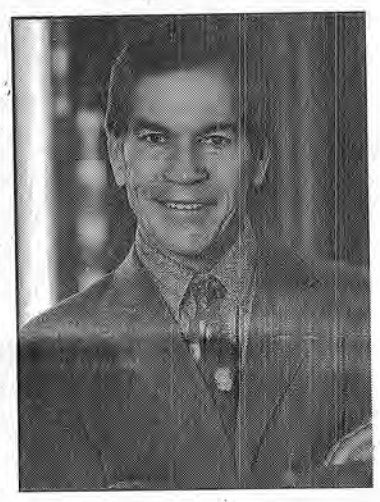
8. **Equity from distributors**. In an effort to acquire studio films for their home markets, a consortium of foreign distributors sometimes invests equity in a film in exchange for distribution rights in their home territories plus a share of worldwide profits. An advantage to the foreign distributor is that its risk is spread over the film's worldwide revenues, instead of the distributor being subject only to the risk of the film's success or failure in its home market. These transactions go by a variety of names, including "split-rights," "co-production," "joint venture," and seemingly almost any other title that comes to mind.

9. **Schemers and dreamers**. A particularly bad way to look for financing is to listen to schemers and dreamers – and there are lots of them. Let's start with the dreamers — the unrealistic individuals who honest-to-God believe that, through some scheme or another, they can raise all the financing in the world. These individuals are *far more prevalent* than the schemers (the frauds) and are much harder to spot, since they do not ask for money up front, so there is no obvious motivation for their actions. They are always, however, driven by less-obvious desires: being "players," being treated like big-shots, the feeling of power, hobnobbing with stars, and being taken to lunch.

The schemers (the frauds), though less prevalent, are far more dangerous, because they are con artists out to steal your money. You can usually spot schemers because sooner or later their plans always boil down to this: Give them money now, and they will give you much more money later.

The best lesson I have learned from my clients that are successful in raising film financing is that they clearly follow Churchill's refrain of "Never give in. Never give in. Never, never, never."

Schuyler M. Moore *is a partner at Greenberg Glusker LLP.*



Some like it hot, some like it historical

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By Zachary D. Schorr

Historic designations for real property are more than just honorary titles; they are a powerful mix of prestige, protection, and potential pitfalls. These designations, while celebrating the architectural and cultural gems of our past, come with a complex web of legal implications that can transform the landscape of property ownership and development. Whether you are a property owner, a developer, a preservation enthusiast, or just a fan of someone like Marilyn Monroe, understanding the legal significance of these designations is crucial.

The ongoing legal battle over Marilyn Monroe's Brentwood property has reignited discussions about historic designations in Los Angeles. At the heart of the issue is the Los Angeles Cultural Heritage Commission's decision to block the new owners' demolition permit for Monroe's former home, citing its cultural significance. This house, where Monroe spent the last six months of her life before passing away in her bedroom in the house at age 36, remains the subject of a dispute concerning its historic value and significance. The new owners are seeking to demolish the house, but the Commission has, so far, prevented them from doing so.

Historic designations are generally not controversial because they are most typically sought by the owner of the property at issue. But the Marilyn Monroe case is certainly not the first instance where a non-owner of a property seeks to use the Historic Designation Statute to prevent redevelopment and/or demolition. This brings to light what has become a hot topic in real estate, which is the voluntary and involuntary historic designation of properties.

As background, in 1962, Los Angeles became one of the first major American cities to adopt historic preservation laws. The idea behind historic designations is to ensure the cultural preservation of sites, buildings, and structures that reflect the history and culture of the City. Historical designations are bolstered by the 2018 amended Ordinance Number 183472, which outlines the process for obtaining a historic designation of real property. Interestingly, the process does not mandate that the current owner of the property apply for or agree to the historic designation of their own property. In fact, the owner does not have to consent to the designation. Instead, it gives the Cultural Heritage Commission authority to initiate the historic designation process by delaying a demolition permit and thereby delaying the owner's ability to demolish their property for two 180-day periods, to allow time to help preserve the potentially historic property.

Certainly some people do not agree with the involuntary portion of the law. But, that disagreement must be balanced against the City of Los Angeles' broader need to protect historic properties without some enforcement mechanisms because the high economic value of real property (and its redevelopment) often weighs against historic conservation efforts. In other words, there must be some balance against redevelopment where our shared cultural history is at stake.

As the battle over this historic property continues, it highlights the complexities and passions involved in preserving our cultural landmarks. Whether Monroe's home will stand or fall remains uncertain, but its story is a testament to the enduring impact of historic preservation.

While historic designations bring prestige and protection to properties, they also involve navigating a complex web of regulations and responsibilities. In California, for instance, Government Code sections 50280 et seq. authorize contracts with owners of qualified historic properties, offering benefits such as reduced property taxes and the ability to use the State Historic Building Code set forth in Health and Safety Code section 18912 to 18961 as opposed to the modern building code. These perks can be substantial, but they come with significant responsibilities.

Beyond the accolades and potential tax breaks, historic designations also impact real property rights. For example, California Civil Code section 1102 mandates that sellers disclose known material facts that could affect a property's desirability. If a property's historic status is not widely known or if it clashes with a buyer's redevelopment plans, this disclosure can become a significant issue. Sellers might find themselves revealing uncertain but potentially devaluing information, though, from a positive perspective, the historic designation could also enhance the property's value.

While most involuntary historic designations are fought through writs of mandate, there is no reason to think that a writ of mandate is the exclusive remedy. In fact, the property owner faced with an involuntary historic designation may consider other potential real estate claims. Although there is a dearth of published decisions on point, unhappy owners may consider bringing an inverse condemnation claim for having their property "damaged" for public use without the government providing the property owner just compensation. This is based on the Constitutional premise that private property may not be taken for public use without just compensation. There is no reason to think that this type of claim could not be brought to seek damages for an involuntary historic designation.

Additionally, historic designations can touch on equitable servitudes—restrictions that do not necessarily run with the land in the traditional sense like a recorded covenant, but still require enforcement based on principles of equity. (Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn. (2001) 92 Cal.App.4th 1247, 1269.) Equitable servitudes still generally require notice of the issue or covenant, which may be applicable to widely known historic properties that simply have not gone through the historic designation process.

In essence, the debate over historic designations is a balancing act between preserving our cultural heritage and respecting individual property rights. As the legal landscape evolves, these discussions will continue to quite literally shape the landscape of our City.

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