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Civil Procedure

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Civil Procedure

Civil Procedure; causes of action--immunities; special motions to strike--award of attorney fees and costs

Code of Civil Procedure §§ 425.15, 425.16 (new);
Corporations Code §§ 5047.5, 24001.5 (new).
SB 1264 (Lockyer); 1992 STAT. Ch. 726

Under prior law, no cause of action¹ could be commenced, without order of the court, against any person serving without compensation² as a director³ or an officer⁴ of a nonprofit corporation⁵ as a result of any averred act of negligence⁶ where the

1. See BLACK'S LAW DICTIONARY 221 (6th ed. 1990) (defining cause of action as the facts which give a person a right to judicial redress or relief against another); see also CAL. CIV. PROC. CODE § 422.10 (West 1973) (defining allowable pleadings); *id.* § 422.40 (West 1973) (requiring the naming of parties in the complaint); *id.* § 425.10 (West Supp. 1992) (prescribing the contents of a complaint including a statement of facts constituting the cause of action).

2. See CAL. CIV. PROC. CODE § 425.15(d) (enacted by Chapter 726) (defining compensation as including salary, fee, or other consideration for services rendered, but excluding reimbursement of expenses).

3. See CAL. CORP. CODE § 164 (West 1990) (defining directors generally); *id.* § 5047 (West 1990) (defining directors of nonprofit corporations as natural persons elected or appointed to act as members of the governing body of the corporation).

4. See *id.* § 312 (West 1990) (designating as officers a chairman of the board or president, secretary, chief financial officer, and others as may be necessary to enable the board to sign instruments and share certificates); BLACK'S LAW DICTIONARY 1083 (6th ed. 1990) (defining officer as one charged with important functions of management).

5. See CAL. CIV. CODE § 425.15(e) (enacted by Chapter 726) (limiting the application of Chapter 726 to tax-exempt nonprofit corporations as defined in the California Corporations Code organized to provide charitable, educational, scientific, social, or other forms of public service); see also CAL. CORP. CODE §§ 5110-6910 (West 1990 & Supp. 1992) (promulgating the Nonprofit Public Benefit Corporation Law); *id.* §§ 7110-8910 (West 1990 & Supp. 1992) (promulgating the Nonprofit Mutual Benefit Corporations Law); *id.* §§ 9110-9690 (West 1991 & Supp. 1992) (promulgating the Nonprofit Religious Corporation Law).

6. See CAL. CIV. CODE § 1714 (West 1985) (defining negligence as the failure to exercise ordinary care or skill in the management of property or person which results in injury to another).

person was acting within the scope of the position in which he or she was serving.⁷ Chapter 726 reenacts this limitation.⁸

Under Chapter 726, prior to issuance of an order of the court permitting such a cause of action to be brought against an officer or director, the party seeking to bring the cause of action is required to submit to the court a petition, proposed pleading, and affidavits⁹ as well as any other evidence sufficient to substantiate the claim.¹⁰ Under Chapter 726, the court must then direct that the petition and affidavits be served upon the party against whom the action is proposed and that the party served be provided the opportunity to submit opposing affidavits before the court determines whether the pleading should be filed.¹¹

Chapter 726 further provides that causes of action against officers and directors of nonprofit corporations for monetary damages are precluded, except as specified.¹² Under Chapter 726, these limitations are extended to cover causes of actions against directors or officers of nonprofit medical corporations.¹³

7. 1990 Cal. Stat. ch. 107, sec. 2, at 838 (enacting CAL. CIV. PROC. CODE § 425.15). The previous § 425.15 contained a provision which caused it, absent amendment or deletion of the provision, to be repealed on January 1, 1992 without further action. *Id.* See *infra* note 13 (discussing liability of charitable corporations and their officers).

8. CAL. CIV. PROC. CODE § 425.15 (enacted by Chapter 726); see *id.* § 425.14 (West Supp. 1992) (promulgating limitations for actions against religious corporations similar to those relating to nonprofit corporations, but containing no self-repealing clause).

9. See *id.* § 2009 (West 1983) (describing an affidavit as being used, in addition to other enumerated purposes, to verify a pleading or paper in a proceeding, or examination of a witness).

10. *Id.* § 425.15(a) (enacted by Chapter 726).

11. *Id.*

12. CAL. CORP. CODE § 5047.5(b) (enacted by Chapter 726). Chapter 726 precludes actions for monetary damages where the person serving as director or officer acted: (1) Within the scope of his or her duties as director or officer; (2) in good faith; (3) in a manner believed to be in the best interest of the corporation; and (4) in the exercise of his or her policymaking judgment. *Id.* § 5047.5(b) (enacted by Chapter 726). Chapter 726 does not limit such actions premised on self-dealing transactions, conflicts of interest, intentional, wanton, or reckless acts, gross negligence, fraud, oppression, or malice, or where the action is brought by the Attorney General or, in the case of a charitable trust, by a beneficiary of that trust. *Id.* § 5047.5(c)(1)-(7) (enacted by Chapter 726). Furthermore, Chapter 726 specifically excludes from those immune from civil liability any director or officer of a corporation that unlawfully "restricts membership, services, or benefits conferred on the basis of race, religious creed, color, national origin, ancestry, sex, marital status, disability, political affiliation, or age." *Id.* § 5047.5(h) (enacted by Chapter 726).

13. *Id.* § 24001.5(b) (enacted by Chapter 726). Chapter 726 does not affect any action brought against the nonprofit corporation for any negligent action or omission of the volunteer director or officer. *Id.* § 24001.5(g), (i) (enacted by Chapter 726); see *Malloy v. Fong*, 37 Cal. 2d 356, 367, 232

Under existing law, where an action¹⁴ is brought, and the pleadings¹⁵ contain improper, false, or irrelevant matters or are otherwise not in conformity with state law, upon a motion from the opposing party, the court may strike the nonconforming or improper portion of the pleading.¹⁶ Furthermore, existing law permits the court to order payment of expenses¹⁷ where the court determines that an action is frivolous¹⁸ or intended solely to cause unnecessary delay.¹⁹

Chapter 726 expressly finds that existing laws were insufficient to reduce the number of actions intended solely to chill the legitimate demonstration of a person's right of petition or free speech in

P.2d 241, 247 (1951) (holding charitable corporations liable for their torts); *see also* RESTATEMENT (SECOND) OF TORTS § 895E (1977) (rejecting charitable enterprise as an immunity to tort liability). The Restatement noted that, in 1977, 35 states followed the policy of imposing liability on charitable organizations for tortious conduct, six left the immunity only for religious organizations, four limited the immunity to recipients of the charity, as opposed to paying patients, strangers, invitees, and employees, and eight limited the immunity to the extent that there existed liability insurance. *Id.*; *see* Parker v. Port Huron Hosp., 105 N.W.2d 1, 10 (Mich. 1960) (holding that charitable, nonprofit hospital organizations are not immune from tort liability).

14. *See* CAL. CIV. PROC. CODE § 581(a)(1) (West Supp. 1992) (defining action as a civil action or special proceeding); *id.* § 581(a)(2) (West Supp. 1992) (defining complaints as including cross-complaints); *id.* § 581(a)(4)-(5) (West Supp. 1992) (defining defendants and plaintiffs as including cross-defendants and cross-complainants).

15. *See id.* § 92(d) (West Supp. 1992) (permitting motions to strike only where the damages or relief sought are not supported by allegations of the complaint); *id.* § 435(b)(1) (West Supp. 1992) (permitting any party to serve and file notice of a motion to strike all or a portion of the opposing party's pleadings); *id.* § 435(a)(2) (West Supp. 1992) (defining pleading as a demurrer, answer, complaint, or cross-complaint).

16. *Id.* § 436 (West Supp. 1992); *see id.* § 437 (West Supp. 1992) (requiring that grounds for a motion to strike appear on the face of the challenged pleading or any other matter of which judicial notice is required); CAL. CIV. PROC. CODE § 589(b) (West Supp. 1992) (finding an issue of law to arise where a motion to strike has been filed); CAL. R. CT. 329 (specifying the form of a motion to strike); Porten v. University of San Francisco, 64 Cal. App. 3d 825, 828, 134 Cal. Rptr. 839, 841 (1976) (noting the legal effects of facts alleged in a complaint are a question of law rather than one of fact).

17. *See* CAL. CIV. PROC. CODE § 128.5(a) (West Supp. 1992) (including as expenses attorney's fees).

18. *See id.* § 128.5(b)(2) (West Supp. 1992) (defining frivolous as totally and completely without merit or for the sole purpose of harassing the opposing party).

19. *Id.* § 128.5 (West Supp. 1992). *See generally* Review of Selected 1981 California Legislation, 13 PAC. L.J. 602 (1982) (discussing provisions of the California Code of Civil Procedure intended to reduce the incidence of meritless litigation by permitting the awarding of attorney fees to the wronged party).

connection with a public issue.²⁰ Under Chapter 726, where a plaintiff has failed to establish that there is a probability that the plaintiff will prevail in a claim arising from an act in furtherance of petition or free speech, the cause of action will be subject to a special motion to strike.²¹ A defendant who has prevailed on a special motion to strike shall be entitled to recover attorney's fees and costs.²² Chapter 726 does not impair the right of the plaintiff to recover expenses where it is determined that the defendant's motion to strike was frivolous or solely intended to cause unnecessary delay.²³

SEA

Civil Procedure; civil actions

Civil Code § 47 (amended); § 1646.5 (new); Code of Civil Procedure § 410.40 (new); § 2032 (amended).
SB 1804 (Kopp); 1992 STAT. Ch. 615

Existing case law protects publications in a judicial proceeding¹ as privileged,² and this privilege has been held to extend to the

20. CAL. CIV. PROC. CODE § 425.16(a) (enacted by Chapter 726); *see* ASSEMBLY SUBCOMMITTEE ON THE ADMINISTRATION OF JUSTICE, COMMITTEE ANALYSIS OF SB 1264, at 4 (June 30, 1992) (discussing the nature and effect of SLAPP (Strategic Lawsuits Against Public Participation) suits which arguably are brought by large development and corporate interests to discourage citizens from engaging in the public, political process).

21. CAL. CIV. PROC. CODE § 425.16(b) (enacted by Chapter 726).

22. *Id.* § 425.16(c) (enacted by Chapter 726).

23. *Id.*; *see id.* § 128.5 (West Supp. 1992) (empowering the court to order a party to pay reasonable expenses, including attorneys' fees, of another party incurred as a result of bad-faith, frivolous, or delaying actions or tactics).

1. *See* CAL. CIV. PROC. CODE § 583.110 (West Supp. 1992) (defining action); *see also id.* § 363 (West 1982) (specifying the construction of the word "action"); *Triad Data Serv., Inc. v. Jackson*, 153 Cal. App. 3d Supp. 1, 7, 200 Cal. Rptr. 418, 424 (1984) (holding that an action is not commenced by merely filing a complaint with the Labor Commissioner).

2. *See* CAL. CIV. CODE § 47 (amended by Chapter 615) (specifying privileged publications in a judicial proceeding).

recording³ of a lis pendens affecting real property.⁴ Chapter 615 protects the recording of a lis pendens as privileged only if it identifies an action⁵ previously filed with a court of competent jurisdiction which affects the title or right of possession of real property.⁶

Prior law permitted parties to a contract, agreement, or undertaking of at least \$250,000 to designate the law of this state to govern regardless of whether it bears any relation to this state.⁷ Additionally, prior law authorized the use of courts of this state to litigate an action against a foreign corporation or nonresident involving a contract, agreement or undertaking relating to the transaction of at least \$1,000,000 if the foreign corporation or resident submits to the jurisdiction of this state's courts.⁸ Chapter 615 reenacts these provisions and applies them retroactively.⁹

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3. See CAL. GOV'T CODE § 27201 (West Supp. 1992) (requiring the recorder to accept for recordation any instrument, paper or notice which is authorized by law to be recorded); see also *id.* § 27322 (West Supp. 1992) (authorizing the manner of recordation).

4. *Albertson v. Raboff*, 46 Cal. 2d 375, 381, 295 P.2d 405, 409 (1956); see CAL. CIV. PROC. CODE § 409 (West Supp. 1992) (defining the purpose of lis pendens); see also POWELL ON REAL PROPERTY § 464 n.2 (1992) (discussing the effects of the recordation of lis pendens on purchasers of real property); BLACK'S LAW DICTIONARY 932 (6th ed. 1990) (defining lis pendens as a pending suit which gives prospective purchasers notice that any interest acquired by them in property litigation is subject to decision of the court).

5. See CAL. CIV. PROC. CODE § 1049 (West Supp. 1992) (defining pending action).

6. CAL. CIV. CODE § 47 (amended by Chapter 615); cf. ALA. CODE § 13A-11-161 (1991); OKLA. STAT. tit. 14, § 1443.1 (1991); UTAH CODE ANN. § 45-2-3 (1992) (authorizing privileged communications in judicial proceedings).

7. 1986 Cal. Stat. ch. 968, sec. 1 at 1845. This law was repealed by its own terms on January 1, 1992. *Id.*

8. 1992 Cal. Stat. ch. 968, sec. 5 at 1845. This law was repealed by its own terms on January 1, 1992. *Id.*

9. CAL. CIV. CODE § 1646.5 (enacted by Chapter 615); CAL. CIV. PROC. CODE § 410.40 (enacted by Chapter 615).

Civil Procedure; civil liability, professional negligence

Code of Civil Procedure § 411.36 (new and repealed).
AB 3412 (Eastin); 1992 STAT. Ch. 1278

Under existing law, an attorney filing a professional negligence action¹ against an architect², engineer³, or land surveyor⁴ is required to file a certificate declaring that, based on consultations with an expert⁵ in the same discipline as the defendant, there is reasonable and meritorious cause for the filing of the action.⁶ If the attorney is unable to consult with an expert, the attorney must file a certificate stating one of the following: 1) The consultations could not be achieved before a statute of limitations impaired the action; 2) the consultations were unable to be achieved after at least three good-faith attempts with three separate experts; or 3) the attorney intends to rely solely on the doctrine of *res ipsa loquitur*⁷ and/or on a failure to inform of the consequences of the procedure.⁸

1. See CAL. CIV. PROC. CODE § 411.35(i) (West Supp. 1992) (defining a professional negligence action as including a complaint or cross complaint for indemnity arising out of the rendering of professional services whether or not the complaint specifically asserts or utilizes the term "professional negligence" or "negligence").

2. See CAL. BUS. & PROF. CODE §§ 5500-5610.7 (West 1990 & Supp. 1992) (defining architect and regulating the practice of architecture).

3. See CAL. CIV. PROC. CODE § 411.35(a) (West Supp. 1992) (defining engineer); see also CAL. BUS. & PROF. CODE §§ 6710-6797 (West 1975 & Supp. 1992) (regulating the practice of professional engineers).

4. See CAL. BUS. & PROF. CODE § 8701 (West Supp. 1992) (defining land surveyor); see also *id.* §§ 8700-8806 (West 1975 & Supp. 1992) (regulating the practice of land surveyors).

5. See CAL. CIV. PROC. CODE § 411.35(b)(1) (West Supp. 1992) (setting forth the requirements for an expert). The attorney must reasonably believe that the expert is knowledgeable in the relevant issues. *Id.*

6. *Id.* § 411.35 (West Supp. 1992).

7. See CAL. EVID. CODE § 646 (West Supp. 1992) (defining *res ipsa loquitur*); see *Newing v. Cheatham*, 15 Cal. 3d 351, 360, 540 P.2d 33, 39, 124 Cal. Rptr. 193, 199 (1975) (holding that in order to use the doctrine of *res ipsa loquitur*, negligence need not be the only explanation for the accident, but only the most probable one); *Di Mare v. Cresci*, 58 Cal. 2d 292, 298-99, 373 P.2d 860, 864, 23 Cal. Rptr. 772, 776 (1962) (holding that the doctrine of *res ipsa loquitur* is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it was probably the result of negligence by someone and that the defendant is probably the one responsible).

8. CAL. CIV. PROC. CODE § 411.35(b), (d) (West Supp. 1992).

Chapter 1278 applies similar provisions to every occupational negligence⁹ action brought by a common interest development¹⁰ association against a contractor.¹¹ Under Chapter 1278, an attorney must certify that the attorney has consulted with at least one contractor¹² who the attorney reasonably believes is knowledgeable in the relevant issues and the attorney has concluded that the defendant participated in the allegedly negligent installation, grading, or landscaping at issue in the action.¹³ Certificates under Chapter 1278 are subject to the same provisions regarding disclosure of consultants and disciplinary action against attorneys as for certificates regarding architects, engineers, and land surveyors.¹⁴ Chapter 1278 does not apply to actions for work done on a residential structure containing four or less dwelling units or under construction contract for less than \$20,000.¹⁵ Violations of Chapter 1278 may constitute unprofessional conduct and be grounds for discipline against the attorney.¹⁶

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9. See *id.* § 411.36(a) (enacted by Chapter 1278) (defining occupational negligence as a negligent act or omission in the construction, reconstruction, repair, or improvement of a structure or other work of improvement which is the proximate cause of a construction defect or of damage to property resulting from the defect).

10. See CAL. CIV. CODE § 1351(c) (West Supp. 1992) (defining common interest development as including a common apartment project, condominium project, planned development, or stock cooperative).

11. CAL. CIV. PROC. CODE § 411.36 (enacted by Chapter 1278); see *id.* § 411.36(a) (defining contractor as a person holding a valid contractors license under Chapter 9 of the California Business and Professions Code). Chapter 1278 repeals itself on January 1, 1997. *Id.* § 411.36(i) (enacted by Chapter 1278).

12. The contractor consulted may not be a party to the litigation. *Id.* § 411.36(b)(1) (enacted by Chapter 1278). In addition, the contractor must be licensed and be doing business in California. *Id.*

13. *Id.* § 411.36 (enacted by Chapter 1278). Alternatively, the attorneys must certify that they were unable to conduct a consultation for one of the following reasons: (1) The consultations could not be achieved before a statute of limitations impaired the action; (2) the consultations were unable to be achieved after at least three good-faith attempts with three separate experts; or (3) the attorney intends to rely solely on the doctrine of *res ipsa loquitur* and/or on a failure to inform of the consequences of the procedure. *Id.* § 411.36(b)(2)-(3),(d) (enacted by Chapter 1278).

14. *Id.* § 411.36(e)-(j) (enacted by Chapter 1278); see *id.* § 411.35(e)-(i) (enacted by Chapter 1278) (detailing provisions regarding disclosure of consultations and discipline for noncompliance).

15. *Id.* § 411.36(k) (enacted by Chapter 1278).

16. *Id.* § 411.36(f) (enacted by Chapter 1278). Chapter 1278 was apparently enacted to reduce the number of frivolous lawsuits reportedly filed against contractors. STAFF OF THE SENATE COMMITTEE ON THE JUDICIARY, ANALYSIS OF AB 3412, at 2 (June 23, 1992).

Civil Procedure; comparative fault regarding common interest development associations

Code of Civil Procedure § 374 (amended).
AB 3708 (Bentley); 1992 STAT. Ch. 1283

Under existing law, an association¹ established to manage a common interest development² has standing in actions concerning damage to: (1) Common areas;³ (2) separate interests⁴ covered by the association's maintenance or repair obligations; or (3) separate interests when the damage is related to or arises out of damage to (1) or (2).⁵ Chapter 1283 reduces the association's recovery in proportion to its fault or the fault of its managing agents when comparative fault is affirmatively plead by the defendant.⁶ When the only damage incurred is that of the association or its members, comparative fault shall not apply to cross-actions or separate actions

1. See CAL. CIV. CODE § 1351(a) (West Supp. 1992) (defining association as either a nonprofit corporation or unincorporated association which is created to manage a common interest development).

2. See *id.* § 1351(c)(1)-(4) (West Supp. 1992) (defining common interest development as a community apartment or condominium project, a planned development, or a stock cooperative).

3. See *id.* § 1351(b) (West Supp. 1992) (defining common area as any area in the common interest development except the areas designated as separate interests).

4. See *id.* § 1351(d)(1)-(4) (West Supp. 1992) (defining separate interest as an individual condominium unit, a separately owned area, or the exclusive right to occupy an apartment or area).

5. CAL. CIV. PROC. CODE § 374(a)(2)-(4) (amended by Chapter 1283). See *Lauriedale Assoc., Ltd. v. Wilson*, 7 Cal. App. 4th 1439, 1444, 9 Cal. Rptr. 2d 774, 779 (1992) (stating that a homeowners association which has failed to collect adequate assessments from its members has injured those members, and may not sue them for restitution); *Orange Grove Terrace Owners Ass'n v. Bryant Properties, Inc.*, 176 Cal. App. 3d 1217, 1222, 222 Cal. Rptr. 523, 526 (1986) (allowing a homeowners association to sue for damages to common areas that occurred prior to the association's formation); see also ALASKA STAT. § 34.08.320(a)(4) (1991); COLO. REV. STAT. § 38-33.3-302(a)(4) (1992); CONN. GEN. STAT. § 47-244(a)(4) (1986); NEV. REV. STAT. ANN. § 116.3102(1)(d) (1991) (empowering common interest community associations to institute, defend, or intervene in litigation involving affairs that affect the common interest). In actions concerning these types of damages, Chapter 1283 permits defendants or cross-defendants to use the comparative fault of the association or its managing agents as a setoff to their liability regardless of whether the association is a party to the litigation. CAL. CIV. PROC. CODE § 374(c) (amended by Chapter 1283).

6. CAL. CIV. PROC. CODE § 374(b) (amended by Chapter 1283).

instituted against the association for contribution or implied indemnity.⁷

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Civil Procedure; motions to reconsider orders, judicial holidays

Code of Civil Procedure §§ 134, 135, 1008 (amended);
Government Code §§ 72300, 72306 (repealed).
SB 1805 (Kopp); 1992 STAT. Ch. 460

Under existing law, a motion to reconsider a judge-made order or court order, in whole or in part, must be made within ten days after knowledge of the order, and must be based on new or different facts unknown at the time of the order.¹ Chapter 460 extends the basis for such motions to include new or different circumstances or law, and specifically applies these provisions to all orders whether interim or

7. *Id.* Chapter 1283 is ostensibly in response to case law which may subject a plaintiff association to multiple cross-complaints or new actions arising out of the same factual dispute where the new party is seeking contribution or indemnity. ASSEMBLY SUBCOMMITTEE ON THE ADMINISTRATION OF JUSTICE, STAFF ANALYSIS OF AB 3708, at 2 (Apr. 21, 1992) (hereinafter ANALYSIS OF AB 3708); see *American Motorcycle v. Superior Court*, 20 Cal. 3d 578, 604, 578 P.2d 899, 916, 146 Cal. Rptr. 182, 199 (1978) (holding that a cross-complaint seeking implied indemnity may be valid even though liability had been apportioned in the original action); *Doose Landscape, Inc. v. Superior Court*, 234 Cal. App. 3d 1698, 1701, 286 Cal. Rptr. 321, 322 (1991) (refusing to bar a cross-complaint seeking implied indemnity against a former plaintiff who had already settled); *Daon Corp. v. Place Homeowners' Ass'n*, 207 Cal. App. 3d 1449, 1456, 255 Cal. Rptr. 448, 452 (1989) (stating that the association's ability to sue on both its own and its members' behalf gives it a dual nature and concomitantly may make it a joint tortfeasor liable to its own members). Although Chapter 1283 does not diminish any joint liability as described in Civil Code § 1431, comparative fault principles will reduce the amount of an association's recovery and make unnecessary any subsequent litigation to achieve "fairness." See ANALYSIS OF AB 3708, *supra* at 2; CAL. CIV. PROC. CODE § 374(e) (enacted by Chapter 1283). See ILL. REV. STAT. ch. 30, para. 312.1(c)-(e) (1992) (establishing and authorizing a trust fund to be used to indemnify a common interest community association's financial loss due to legal liability or property damage).

1. CAL. CIV. PROC. CODE § 1008 (a)-(b) (amended by Chapter 460).

final.² In addition, if a court at any time determines that there has been a change of law that warrants the court to reconsider a prior order, the court may do so on its own motion and enter a different order.³

Under existing law, filing a motion to reconsider an order without new facts is punishable as contempt.⁴ Under Chapter 460, filing such a motion without new facts, circumstances, or law is punishable by contempt and sanctions.⁵

Existing law provides that every state holiday⁶ is a judicial holiday.⁷ Under existing law, courts are closed on judicial holidays for all but specified business.⁸ Chapter 460 provides that one or more departments of the court may remain open and in session for the transaction of any business on a judicial holiday or at any hours of the day or night the judges of the court may prescribe.⁹ Any paper

2. *Id.* § 1008 (a)-(b),(d)-(e) (amended by Chapter 460); *see* *Blue Mountain Dev. Co. v. Carville*, 132 Cal. App. 3d 1005, 1013, 183 Cal. Rptr. 594, 598 (1982) (comparing interim and final judgments). Since the enactment of Civil Procedure Code § 1008, some California courts have found that the section does not apply to interim orders. 1992 Cal. Stat. ch. 460, sec. 1, at _____. Chapter 460 was enacted to clarify that § 1008 does indeed apply to interim orders. *Id.*; *see Blue Mountain*, 132 Cal. App. 3d at 1013, 183 Cal. Rptr. at 598; *Greenberg v. Sorrento Grill, Inc.*, 131 Cal. App. 3d 441, 445, 182 Cal. Rptr. 466, 468 (1982); *Magallanes v. E.R. Squibb and Sons, Inc.*, 167 Cal. App. 3d 878, 882, 213 Cal. Rptr. 547, 549 (1985); *Abreu v. Svenhard's Swedish Bakery*, 208 Cal. App. 3d 1446, 1456, 257 Cal. Rptr. 26, 31 (1989) (holding that interim rulings are subject to correction at any time up to final judgement even in the absence of newly discovered evidence and that § 1008 does not divest the court of its inherent power to correct its interim rulings). Inclusion of interim orders within Chapter 460 is an effort to reduce the number of motions to reconsider by California judges. 1992 Cal. Stat. ch. 460, sec. 1, at _____.

3. CAL. CIV. PROC. CODE § 1008(c) (amended by Chapter 460).

4. *Id.* § 1008 (amended by Chapter 460); *see id.* §§ 1209, 1218 (West Supp. 1992) (defining contempt and detailing provisions for determining guilt and punishment).

5. *Id.* § 1008(d) (amended by Chapter 460); *see id.* § 128.5 (West Supp. 1992) (vesting power in the courts to impose sanctions including payment of any reasonable fees incurred by another party as a result of bad-faith actions).

6. CAL. GOV'T CODE § 6700(n) (West Supp. 1992) (listing the state holidays).

7. CAL. CIV. PROC. CODE § 135 (amended by Chapter 460).

8. *Id.* § 134 (amended by Chapter 460). Courts can remain open for jury instructions, verdicts, arraignments, small claims court, and injunctions. *Id.*; *see* CAL. R. CT. 249, 534, 987 (discussing rules for courts that remain open during non-business hours).

9. CAL. CIV. PROC. CODE § 134(c) (amended by Chapter 460).

filed with the court when the court is open on a judicial holiday is deemed filed on the next day that is not a judicial holiday.¹⁰

SRM

Civil Procedure; powers of attorney for health care

Civil Code §§ 2483.5, 2445 (new); § 2432 (amended).
AB 2697 (Polanco); 1992 STAT. Ch. 470
(Effective August 10, 1992)

Under existing law, a durable power of attorney for health care¹ may not be witnessed by a health care provider² or an employee of a health care provider.³ Chapter 470 clarifies existing law so that a durable power of attorney for health care may not be witnessed by the principal's⁴ health care provider or by an employee of the principal's

10. *Id.*

1. See CAL. CIV. CODE § 2430(a) (West Supp. 1992) (defining durable power of attorney for health care as a durable power of attorney to the extent that it authorizes an attorney in fact to make health care decisions for the principal); see also *id.* § 2400 (West Supp. 1992) (defining durable power of attorney as a power of attorney by which a principal designates in writing that another person is his or her attorney in fact).

2. See *id.* § 2430(d) (West Supp. 1992) (defining health care provider as a person who is licensed, certified, or otherwise authorized or permitted by the law of this state to administer health care in the ordinary course of business or practice of a profession).

3. *Id.* § 2432(d) (amended by Chapter 470). Other persons who may not serve as witnesses to a durable power of attorney for health care include the attorney in fact, an operator or employee of a residential care facility for the elderly, or an operator or employee of a community care facility. *Id.* In addition, at least one witness may not be related to the principal by blood, marriage, or adoption or be entitled to any portion of the principal's estate. *Id.* § 2432(e) (amended by Chapter 470); see *id.* § 2410(a) (West Supp. 1992) (defining attorney in fact); *id.* § 2430(f) (West Supp. 1992) (defining community care facility as a community facility as defined in § 1502 of the California Health and Safety Code); *id.* § 2430(g) (West Supp. 1992) (defining residential care facility for the elderly); see also *id.* §§ 2430-2444 (West Supp. 1992) (regulating the use of a durable power of attorney for health care); *Review of Selected 1983 California Legislation* 15 PAC. L.J. 526 (1984) (discussing durable power of attorney for health care). For other state statutes requiring similar witnessing, cf. D.C. CODE ANN. § 21-2205 (1989); IOWA CODE ANN. § 144B.3 (West Supp. 1992); MISS. CODE ANN. § 41-41-159 (1991); N.H. REV. STAT. ANN. § 1337.12 (Anderson 1991); TENN. CODE ANN. § 34-6-203 (1990); TEX. CIV. PRAC. & REM. CODE ANN. § 135.004 (West Supp. 1992); VT. STAT. ANN. tit. 14, § 3456 (1991); WYO. STAT. § 3-5-202 (1991).

4. See CAL. CIV. CODE § 2410(d) (West Supp. 1992) (defining principal as the natural person who has designated another as his or her attorney in fact a power of attorney).

health care provider.⁵ In addition, Chapter 470 provides that a durable power of attorney for health care or similar instrument executed in another state or jurisdiction in compliance with laws of that jurisdiction or in compliance with California law shall be valid and enforceable to the same extent as if it was executed in California.⁶

SRM

Civil Procedure; privileged communications

Civil Code § 3426.11 (new).

AB 1445 (Quackenbush); 1992 STAT. Ch. 165

Under existing law, certain communications made in legislative, judicial, or other official proceeding authorized by law¹ are specified as privileged.² Under existing case law, the privilege is absolute, except for a derivative tort action for malicious prosecution.³ Under existing law, the owner of a trade secret is privileged to refuse to

5. *Id.* § 2432(d) (amended by Chapter 470).

6. *Id.* § 2445 (enacted by Chapter 470); *cf.* IOWA CODE ANN. § 144B.3 (West Supp. 1992); N.H. REV. STAT. ANN. § 137-J:10 (1991); N.D. CENT. CODE § 23-06.5-11 (1992); TENN. CODE ANN. § 34-6-215 (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 135.013 (West Supp. 1992) (stating that a durable power of attorney for health care executed in a foreign state or jurisdiction will be recognized and enforced). Chapter 470 was apparently enacted because under existing law it is unclear as to whether a durable power attorney for health care signed outside of California would be recognized by California health providers. SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF AB 2697, at 3 (June 1992).

1. *See* *Mouchette v. Board of Educ.*, 217 Cal. App. 3d 303, 313, 266 Cal. Rptr. 1, 5-6 (1990) (holding that privileged publications made in legislative, judicial, or other official proceedings did not apply in a school district employee's wrongful termination action); *see also* *Lebbos v. State Bar of California*, 165 Cal. App. 3d 656, 668, 211 Cal. Rptr. 847, 853 (1985) (holding that informal complaints to the State Bar are a part of official proceedings, and are protected by California Civil Code § 47).

2. CAL. CIV. CODE § 47(b) (West Supp. 1992).

3. *Silberg v. Anderson*, 50 Cal. 3d 205, 216, 786 P. 2d 365, 375, 266 Cal. Rptr. 638, 644 (1990); *see* CAL PENAL CODE § 1447 (West Supp. 1992) (defining malicious prosecution).

disclose the secret.⁴ Chapter 165 provides that disclosure of a trade secret to a competitor of the owner of a trade secret in an official proceeding is not a privileged communication.⁵

STL

Civil Procedure; restraining orders

Code of Civil Procedure § 548 (amended).
AB 2634 (Lee); 1992 STAT. Ch. 149

4. CAL. EVID. CODE § 1060 (West 1966). Existing law provides that protective orders and other devices are available to prevent the disclosure of trade secrets in criminal cases. *Id.* §§ 1061-1063 (West Supp. 1992). Existing law also provides that the misappropriation of trade secret information is subject to an action for damages. CAL. CIV. CODE § 3426.3 (West Supp. 1992). Existing law specifies protections that are available for trade secret with regard to depositions, production of documents, and requests for admission. CIV. PRO. CODE §§ 2016-2036 (West Supp. 1992); *see* CAL. PENAL CODE § 499c (West 1988) (providing for the crime of theft of a trade secret).

5. CAL. CIV. CODE § 3426.11 (enacted by Chapter 165). *See also* IIT Telecom Prods. Corp. v. Dooley, 214 Cal. App. 3d 307, 316, 262 Cal. Rptr. 773, 783 (1989) (holding that the privilege conferred by California Civil Code § 47 extended to an unauthorized and tortious disclosure of trade secret information which occurred during or in preparation for litigation). Chapter 165 apparently overturns Dooley by holding that the privilege conferred by California Civil Code § 47(b) does not apply to the voluntary intentional disclosure of trade secret information by a competitor or potential competitor of the owner of trade secret information of the agent or representative of such competitor. SENATE COMMITTEE OF JUDICIARY, ANALYSIS OF AB 1445, at 2 (June 16, 1992).

Existing law mandates that any restraining order¹ granted² pursuant to the Domestic Violence Prevention Act (DVPA)³ and the Family Law Act,⁴ within the discretion of the court, is valid for no more than three years unless otherwise terminated or extended by further order of the court.⁵ With the enactment of Chapter 149, a restraining order that fails to state the expiration date on the face of

1. See CAL. CIV. PROC. CODE § 527.6 (West Supp. 1992) (governing temporary restraining orders and injunctions for harassment); CAL. CIV. CODE § 4359(a) (West Supp. 1992) (stating the situation where a court may issue a temporary restraining order); BLACK'S LAW DICTIONARY 1314 (6th ed. 1990) (defining restraining order); see also ALASKA STAT. § 11.56.740(b) (1991) (setting forth that violating a domestic violence restraining order is a class A misdemeanor); *id.* § 25.35.010(a) (1991) (permitting a person subjected to domestic violence to petition for injunctive relief); Elizabeth Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 273-74 (1971) (discussing the effects of domestic violence restraining orders); *Review of Selected 1979 California Legislation*, 11 PAC. L. J. 465, 470 (1980) (discussing the punishment for a willful and knowing violation of a restraining order under the Domestic Violence Prevention Act, the Family Law Act, or the Uniform Parentage Act); cf. FED. R. CIV. P. 65(b) (governing the federal procedure for granting a temporary restraining order). See generally *Rosenbaum v. Rosenbaum*, 541 N.E.2d 872, 875 (Ill. 1989) (holding valid under the Domestic Violence Act, a restraining order to prevent a mother's harassment of her son).

2. See CAL. CIV. PROC. CODE § 548(a) (amended by Chapter 149) (specifying that the restraining order may be granted after notice and a hearing).

3. See *id.* §§ 540-553 (West Supp. 1992) (setting forth the Domestic Violence Prevention Act); see also *Caldwell v. Coppola*, 219 Cal. App. 3d 859, 863, 268 Cal. Rptr. 453, 455 (1990) (stating that the purpose of the DVPA is to prevent repeat acts of violence and abuse by a spouse or household member, and to provide for a separation of the persons involved in such domestic violence); Micheal J. Malinowski, *Federal Enclaves And Local Law: Carving Out A Domestic Violence Exception To Exclusive Legislative Jurisdiction*, 100 YALE L.J. 189, 208 (1990) (concluding that courts must continue to nudge development of the law toward federal recognition of state court restraining orders for cases of domestic violence by adopting a modified doctrine of noninterference which recognizes the federal interest in protecting all citizens from domestic violence). See generally *Review of Selected 1979 California Legislation*, 11 PAC. L.J. 465 (1980) (discussing the enactment of the Domestic Violence Prevention Act).

4. See CAL. CIV. CODE §§ 4000-5180 (West 1983 & Supp. 1992) (codifying the Family Law Act); see also Truninger, *supra* note 1, at 267-68 (discussing procedures suggested by the Family Law Act, and possible problems related to these procedures).

5. CAL. CIV. PROC. CODE § 548(a) (amended by Chapter 149). The order of the court may be by written stipulation filed with the court or by the motion of any party. *Id.*

Civil Procedure

the form⁶ will have a duration of three years from the date of issuance.⁷

DLR

Civil Procedure; small claims court

Code of Civil Procedure §§ 116.220, 116.610 (amended).
SB 1376 (Lockyer); 1992 STAT. Ch. 142

Existing law permits a small claims court¹ to render money judgments² and equitable relief in the form of rescission,³ restitution,⁴ reformation,⁵ and specific performance,⁶ in lieu of, or

6. See WEST'S CALIFORNIA JUDICIAL COUNCIL FORMS, CH100-150 (1992) (setting forth mandatory and optional forms approved by the Judicial Council for restraining orders pursuant to the Code of Civil Procedure § 548).

7. CAL. CIV. PROC. CODE § 548(b) (amended by Chapter 149). Chapter 149 does not prohibit the issuance, by written stipulation, of domestic violence restraining orders arising under the Family Law Act, with a permanent duration. *Id.* § 548(c) (amended by Chapter 149). According to the author of Chapter 149, the validity of domestic violence restraining orders that are meant to be enforceable, but because of the technical requirement of an expiration date may not be enforced, are ensured by the stated presumption of a three year expiration date. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2634, at 3 (June 23, 1992). By clarifying that parties may obtain permanent restraining orders under the DVPA, Chapter 149 resolves any confusion as to whether permanent restraining orders are enforceable by the police since they are not listed in the DVPA. *Id.*

1. See CAL. CIV. PROC. CODE § 116.210 (West Supp. 1992) (establishing the small claims division); *id.* § 116.220(a)(1)-(3) (amended by Chapter 142) (establishing the jurisdiction of the small claims division). See generally Suzanne E. Elwell & Christopher D. Carlson, *Contemporary Studies Project: The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1990) (reviewing the small claims court system in Iowa).

2. See CAL. CIV. PROC. CODE § 577 (West 1976) (defining judgment).

3. See 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts*, § 885 (9th ed. 1987) (discussing rescission of a contract by an injured party, and conditions for relief).

4. See *id.* § 91 (discussing quasi-contractual relief in the form of restitution).

5. See *id.* §§ 385, 386 (discussing instrument which may be reformed).

6. See 11 *id.*, *Equity* §§ 21, 28 (9th ed. 1990 & Supp. 1992) (discussing specific performance and the grounds for granting and denying specific performance).

in addition to, money damages.⁷ Chapter 142 additionally permits a small claims court to issue a conditional judgment.⁸

STL

Civil Procedure; small claims courts

Code of Civil Procedure § 116.725 (new); §§ 116.370, 116.540 (amended).
AB 3653 (Horcher); 1992 STAT. Ch. 201

Under existing law, the right to appeal a judgment from small claims court is limited to the defendant with respect to a plaintiff's claim and the plaintiff with respect to a defendant's claim.¹ Chapter 201 specifies that no provision of existing law is to preclude a court from correcting a clerical error in the judgment or from setting aside

7. CAL. CIV. PROC. CODE § 116.610(a) (amended by Chapter 142); *see id.* § 116.220(b) (amended by Chapter 142) (authorizing equitable relief).

8. *Id.* § 116.220(3)(b) (amended by Chapter 142); *see id.* § 116.610(b) (amended by Chapter 142) (permitting a court to continue a matter to a later date, and to encourage the parties to attempt resolution through informal or alternative means); 11 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity*, § 77 (9th ed. 1990) (discussing the practice of courts allowing a vendor to correct a default to avoid a forfeiture, and the effect of conditional judgments); *cf.* N.Y. CTRY CIV. CT. ACT § 1805 (Consol. 1992) (authorizing a conditional judgment in small claims court). A conditional judgment is a judgment which is rendered only upon the occurrence of a specific event; for example, return of personal property. CAL. CIV. PROC. CODE § 116.610(b) (amended by Chapter 142).

1. CAL. CIV. PROC. CODE § 116.710 (West Supp 1992); *see* CAL. R. CT. 151-156 (providing rules for the hearing of small court cases on appeal); *Superior Wheeler Cake Corp. v. Superior Court*, 203 Cal. 384, 387, 264 P. 488, 489 (1928) (holding that the distinction between plaintiff and defendant in regard to the right of appeal was not violative of the Due Process Clause of the Constitution); *Smith v. Superior Court*, 93 Cal. App. 3d 977, 979, n.2, 156 Cal. Rptr. 149, 151 n.2 (1979) (stating that since the plaintiff chose to take advantage of the simplified procedures of small claims court, the plaintiff should be bound by the court's judgment, while an involuntary defendant should not be so bound and should be allowed to appeal to a higher court following an adverse judgment); *Davis v. Superior Court*, 102 Cal. App. 3d 164, 170, 162 Cal. Rptr. 167, 171 (1980) (holding that since a defendant presenting a cross-complaint is a voluntary claimant, such a party, like a voluntary plaintiff, loses the right of appeal on the cross-complaint). Either party may move to vacate an adverse judgment if they were absent from the hearing with good cause. CAL. CIV. PROC. CODE §§ 116.720(c), 116.730(c) (West Supp. 1992). Appeals are heard in the superior court in the county in which the action was heard. *Id.* § 116.710(b) (West Supp. 1992).

a judgment on the ground of an incorrect legal basis for the decision.²

Existing law provides that a representative may appear and participate in a small claims action on behalf of a party if the claim can be disputed or proven by the use of a business record,³ so long as there is no other issue of fact in the case, and if the representative is a regular employee or a duly appointed or elected officer or director of the party, is qualified to testify on the subject matter of the action, and is neither employed, elected, or appointed specifically to represent the party in small claims actions.⁴ Chapter 201 limits the ability of an individual doing business as a sole proprietorship to be represented in a small claims action to representation by a regular employee or elected officer or director who is qualified to testify and who is employed for reasons other than to represent the party in small claims actions.⁵

DHT

2. CAL. CIV. PROC. CODE § 116.725 (enacted by Chapter 201); *see* *Parada v. Small Claims Court*, 70 Cal. App. 3d 766, 769, 139 Cal. Rptr. 87, 88 (1977) (holding that a plaintiff may not appeal an adverse judgment based on a mistake of legal theory); B.E. WITKIN, CALIFORNIA PROCEDURE, *Judgement*, §§ 69, 70 (3d ed. 1985) (providing that purely clerical errors and inadvertent errors of the trial court should be corrected).

3. *See* CAL. EVID. CODE § 1271 (West 1966) (describing admissible business records).

4. CAL. CIV. PROC. CODE § 116.540(d) (amended by Chapter 201); *see id.* § 87 (West 1982) (providing that a corporation may appear through a director, officer, or employee in actions before the municipal or justice courts).

5. *Id.* § 116.540(d)(2) (amended by Chapter 201).

Civil Procedure; standards and qualifications for court interpreters

Code of Civil Procedure § 264 (repealed); Government Code § 68562.1 (repealed); §§ 68561, 68562, 68565 (repealed and new); §§ 68560.5, 68566 (new); §§ 68560, 68563, 68564 (amended).
SB 1304 (Lockyer); 1992 STAT. Ch. 770

Under prior law, the State Personnel (Board)¹ was responsible for administering programs governing court interpreters.² Chapter 770 requires the Judicial Council,³ rather than the Board, to establish certification programs for court interpreters and requires courts to use only certified interpreters.⁴ Chapter 770 requires the Judicial Council to designate languages for which certification programs will be established, and to designate and approve entities to test and certify interpreters.⁵ In addition, the Judicial Council must adopt standards for interpreter proficiency, continuing education, certification

1. See CAL. CONST. art. VII, §§ 2-3 (creating the State Personnel Board and setting forth its members and duties); see also CAL. GOV'T CODE §§ 18650-18656, 18700-18716 (West 1980 & Supp. 1992) (providing for the organization, powers, and duties of the State Personnel Board).

2. 1991 Cal. Legis. Serv. ch. 883, sec. 4, at 3436 (West) (enacting CAL. GOV'T CODE § 6856) (repealed by Chapter 770); 1987 Cal. Legis. Serv. ch. 1220, sec. 1, at 250 (West) (enacting CAL. GOV'T CODE § 68565) (repealed by Chapter 770). Interpreter does not include interpreters for deaf or hard-of-hearing persons or interpreters qualified for administrative hearings or noncourt settings. CAL. GOV'T CODE § 68560.5 (enacted by Chapter 770).

3. See CAL. CONST. art. VI, § 6 (requiring the Judicial Council to monitor the state court system and make annual recommendations for improvements to the Governor and Legislature); see also CAL. GOV'T CODE §§ 68500-68553 (West 1976 & Supp. 1992) (providing for the organization, power, and duties of the Judicial Council).

4. CAL. GOV'T CODE §§ 68561-68562 (enacted by Chapter 770); see *id.* § 68561(b)-(d) (enacted by Chapter 770) (permitting courts to use only interpreters certified by the Judicial Council except in specified circumstances). Under Chapter 770, interpreters previously deemed qualified by the State Personnel Board will have until January 1, 1996 to comply with certification requirements established by the Judicial Council. *Id.* § 68561(b) (enacted by Chapter 770). A court may appoint a non-certified interpreter for good cause, and the Judicial Council shall set procedures and guidelines for determining what is sufficient for good cause. *Id.* § 68564(d)-(e) (amended by Chapter 770); see *People v. Roberts*, 162 Cal. App. 3d 350, 356-57 208 Cal. Rptr. 461, 465 (1984) (holding that there was good cause where the district attorney informed the court that the interpreter was the only person he could find with the ability to translate for the victim and eyewitness, and where it was reasonable to conclude that district attorney's statement and lack of objection by defense counsel indicated that the qualified interpreter on the list was unavailable).

5. CAL. GOV'T CODE § 68562(a) (enacted by Chapter 770).

renewal, professional conduct, and recruitment and training programs.⁶

Chapter 770 also permits courts to impose additional testing requirements and standards to satisfy local conditions.⁷

SRM

Civil Procedure; summary adjudication

Code of Civil Procedure §§ 485.230, 708.030, 1802 (new); §§ 437c, 685.040, 685.070, 1019.5, 1800 (amended).
AB 2616 (Peace); 1992 STAT. Ch. 1348

6. *Id.* See generally CAL. R. CT., Standards of Judicial Administration Recommended by the Judicial Council, app. §§ 18-18.3 (West 1992) (setting forth the Judicial Council's standards for determining when a court interpreter is needed, instructions to interpreters on court procedure, interpreters understanding of court terminology, and the Standards of Professional Conduct for Court Interpreters.) Each superior court must establish a procedure for at least biennial review of the performance and skills of each court interpreter currently certified by the Board, and shall remove from the recommended list of interpreters any who do not conform to the Judicial Council's Standards of Professional Conduct. CAL. R. CT. 984. Each superior, municipal, and justice court may still adopt additional local requirements to meet local conditions. CAL. GOV'T CODE § 68562(g) (enacted by Chapter 770).

7. CAL. GOV'T CODE § 68562(g) (enacted by Chapter 770). This chapter results from proposals by the Judicial Council Advisory Committee on Court Interpreters, appointed by the Chief Justice of California in 1990. *Id.* § 68560(d) (enacted by Chapter 770). The proposals are apparently in response to long-term complaints about the lack of competent court interpreters. Telephone interview with Ben Firschein, Consultant, Senator Lockyer's Office (May 22, 1992). One law review article detailed such problems as lack of fluency in both languages, summarizing testimony rather than translating it, and lack of training in courtroom procedures. Charles M. Grabau & David R. Williamson, *Language Barriers in our Trial Courts: The Use of Court Interpreters in Massachusetts*, 70 MASS. L. REV. 108, 110 (1985). See also, e.g., ARK. CODE ANN. § 16-10-127 (Michie 1987); HAW. REV. STAT. § 606-9 (1991); KY. REV. STAT. ANN. § 30A.405 (Michie/Bobbs-Merrill 1991); MASS. GEN. LAWS ANN. ch. 221, § 92 (West Supp. 1992); N.Y. JUD. LAW § 386 (McKinney 1983); TEX. CIV. PRAC. & REM. CODE ANN. § 21.023 (West 1986); WIS. STAT. ANN. § 885.37 (West Supp. 1991) (detailing other states' regulations regarding court interpreters).

Existing law prohibits a party from moving for summary judgment¹ based on issues asserted in a prior motion for summary adjudication denied by the court, unless the party establishes new facts or circumstances supporting the issues reasserted in the summary judgment motion.² Chapter 1348 establishes that the prohibition would not apply where the party establishes a change of law supporting the issues reasserted in the summary judgment motion.³ Additionally, Chapter 1348 expressly provides that a cause of action has no merit if there is a complete defense to the entire cause of action.⁴ Further, Chapter 1348 mandates the proof required to establish that there is no defense to a cause of action or that a cause of action has no merit, for purposes of summary judgment and summary adjudication.⁵

1. See CAL. CIV. PROC. CODE § 437c (amended by Chapter 1348) (establishing the grounds for and effects of summary judgment). See generally *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986); Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 54-56 (1988) (discussing summary judgment generally); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 165 (1988) (discussing summary adjudication and changes in substantive law).

2. CAL. CIV. PROC. CODE § 437c(f) (amended by Chapter 1348); see S. Alexandria Jo, *Review of Selected 1990 California Legislation*, 22 PAC. L.J. 323, 446 (1991) (discussing the 1990 amendments to Code of Civil Procedure § 437c).

3. CAL. CIV. PROC. CODE § 437c(f) (amended by Chapter 1348).

4. *Id.* § 437c(n)(2) (amended by Chapter 1348); see *City of Emeryville v. Superior Court*, 2 Cal. App. 4th 21, 25, 2 Cal. Rptr. 2d 826, 828 (1991) (discussing legislative intent in amending Code of Civil Procedure § 437c, and holding that a cause of action has no merit if a defendant shows that there is a complete defense to that cause of action). The Legislature apparently intends to codify the decision in *City of Emeryville* by amending § 437c. ASSEMBLY SUBCOMMITTEE ON THE ADMINISTRATION OF JUSTICE, ANALYSIS OF A.B. 2616, at 1 (May 5, 1992). Prior to the enactment of Chapter 1348, Code of Civil Procedure § 437c did not specify that a defendant may present an affirmative defense to an entire cause of action. *City of Emeryville*, 2 Cal. App. 4th at 25, 2 Cal. Rptr. 2d at 328.

5. CAL. CIV. PROC. CODE § 437c(n) (amended by Chapter 1348). A plaintiff or cross-complainant has met his or her burden of persuasion by showing that there is no defense to a cause of action if that party has proved each element of a cause of action. *Id.* § 437c(n)(1) (amended by Chapter 1348). Once this burden has been met the burden shifts to the defendant or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action. *Id.* § 437c(n)(2) (amended by Chapter 1348). Once this burden has been met, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action. *Id.*

Existing law establishes various proceedings for the enforcement of judgments, including writs of attachments,⁶ written interrogatories to the judgment debtor,⁷ and provisions regarding assignment for the benefit of creditors.⁸ Chapter 1348 expands the proceedings for enforcement of judgments to include the discovery of the identity, location, and value of property in which the defendant has an interest,⁹ for the recovery of attorney's fees,¹⁰ a demand for production of documents by a judgment creditor,¹¹ written notice of an assignment to the assignor's creditors from the assignee.¹²

STL

6. See *id.* § 485.210 (West 1979) (defining the procedures for application and filing of a writ of attachment); see also THOMPSON ON REAL PROPERTY § 2541 (1979 & Supp. 1992) (discussing writ of attachment).

7. See CAL. CIV. PROC. CODE § 708.020 (West 1987) (authorizing written interrogatories to judgment debtor).

8. *Id.* § 1800 (amended by Chapter 1348).

9. See *id.* § 485.230 (enacted by Chapter 1348) (authorizing discovery of identity, location, and value of property in which the defendant has an interest).

10. See *id.* § 685.040 (amended by Chapter 1348) (authorizing payment of attorney's fees if the underlying judgment includes an award of attorney's fees); see also *id.* § 685.070(a)(6) (amended by Chapter 1348) (allowing for payment of attorney's fees if allowed by Civil Procedure § 685.040). But see *Chelios v. Kaye*, 219 Cal. App. 3d 75, 81, 268 Cal. Rptr. 38, 42 (1990) (holding that a creditor may not obtain attorney's fees). The Legislature apparently intends to overturn the decision in *Chelios*. ASSEMBLY SUBCOMMITTEE ON THE ADMINISTRATION OF JUSTICE, ANALYSIS OF A.B. 2616, at 2 (May 5, 1992).

11. See CAL. CIV. PROC. CODE § 708.030 (amended by Chapter 1348) (authorizing the production of documents).

12. *Id.* § 1802(a) (amended by Chapter 1348).

