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Litigating California Contracts

By CURTIS E.A. KARNOW*

I. INTRODUCTION

> "Contract interpretation remains the most important source of commercial litigation and the most contentious area of contemporary contract doctrine and scholarship."[1]

The centuries have produced a lot of cases on contracts; and even more commentary, found in law review articles, casebooks, and the like. But there isn't much on how to apply that material to the trial of a contract action. Trial judges and lawyers are pragmatic souls: We just want to know what to do.

This article was sparked by a couple of cases – one of them mine, the other before a colleague with a courtroom down the hall. Lawyers showed up for the first day of trial, ready to pick the jury. There were contract causes of action, and the usual collection of associated claims and defenses: quantum meruit, accounting, unconscionability, failure of consideration, duress, and on. But none of the people in the courtrooms, including the judges, knew exactly which issues were for the jury, and which for the judge. So jury instructions were incomplete; the need for pretrial hearings was unclear; the trial briefs were, to put it kindly, insufficient. As I came to appreciate more fully after I drafted the note that follows here, the time to figure these issues was long past; but having been handed the cases on the appointed day of trial, I on my case, and my colleague on his, dug in.

It would be a very long time before we were able to start picking a jury.

Most contracts cases look simple: assemble a jury, tell it to decide if there's a breach, and assess damages. Some cases *are* simple, at least legally, because for example there's no disagreement on what the

* Judge of the California Superior Court (County of San Francisco).

1. Ronald J. Gilson et al., *Text and Context: Contract Interpretation As Contract Design*, 100 CORNELL L. REV. 23 (2014).

contract is or what it means. But high complexity can lurk behind everything from an unlawful detainer case to a multi-billion-dollar commercial dispute. This complexity is often a function of problems of scope—what constitutes the deal?—and meaning. This note is designed to walk through the practical application of law to the determination of those two core issues. This implicates the respective provinces of the judge and jury, and it turns out that many contract cases require an analysis of those provinces across a wide variety of claims and defenses. If the trial is not carefully planned, chaos will erupt as issues about to go to the jury need a judge to decide some preliminary matter, or as a judge is about to decide something, she realizes at the last moment that, first, the jury has to hear evidence, be instructed, and deliberate. In worst-case scenarios this happens repeatedly. So, this note also includes sections on jury rights generally, waiver, and short discussions of the right as it might apply to a series of claims and defenses often encountered in cases with a contract cause of action.

Section 1 of this Note begins with a short historical view of contract. While this is a relatively academic review, the point is to provide background to allow for a critical assessment of the disparate appellate authorities which are lobbed at the trial judge, usually out of context. Section 1 also helps with an assessment of the historical test used in California to decide if a claim has a right to a jury determination. The test is arbitrary, at least in the sense that the considerations one might have for wanting a jury versus a judge, or vice versa (such as relief from oppression and partisan judges, trusting in Jacksonian democracy, ability to appeal to the common person or stir indignation, the injection of equitable fairness, management of complex legal and factual issues, whether policy issues are in play, a felt need for objective rules which function well as precedent, and so on and so forth), don't distinguish between claims which are, and which are not, subject to a jury trial under the classic historical test.[2] A variant of the test, as we'll see, may indeed attend to these considerations.) But trial judges and lawyers might not care much: we just want to know what the rules are, and how to implement them. That's the subject of Section 2 of this Note.

II. HISTORICAL NOTES ON CONTRACT LAW

2. *E.g.*, Fleming James, Jr., *Right to A Jury Trial in Civil Actions*, 72 YALE L.J. 655, 661 (1963).

> "But before you have crossed the range you have seen rock of such varied type, age, and provenance that time itself becomes nervous—Pliocene, Miocene, Eocene nonmarine, Jurassic here, Triassic there, Ypresian, Lutetian, Tithonian, Rhaetian, Messinian, Maastrichtian, Valanginian, Kimmeridgian, upper Paleozoic . . . a collection of relics from varied ages and many ancestral landscapes, transported from afar or near, set beside or upon one another. . .."[3]

Providing a history of contract is, to put it as mildly as I can, beyond my powers, and it would be gratuitous in light of the work of others who have spent their professional careers on it. But it is useful to provide a rough timeline of events, to inform the discussions that follow on how to handle contract cases, including how to decide which claims, such as contract, have a right to a jury, and which claims do not, and what evidence to admit for which purposes. The timeline also helps to understand appellate opinions which seem to rest on their views of the history of contract. These opinions often present contract law as a set of consistent principles, perhaps mutating through time, but arriving now at our doorstep as an integrated whole. But the sources of law include current case law, statutes, and earlier opinions and commentators. Their substances are wildly disparate, but all are cited with equal authority in latter day opinions.

Actually, what counts as a 'contract' has shifted over time: it's bit like tracing back the human species- how far do we go? To Homo habilis? Homo erectus? Chimpanzees? One goes back until one finds the essential indicia of contract. People have differed on what those essential indicia are. If it's consideration, that's one thing; if it's the recognition of the executory agreement, that's another. If it's mutual intent, that's a different moment in time.[4] Grant Gilmore tells us contract law didn't erupt until the last decades of the nineteenth century when Harvard's Professor Langdell devised casebooks to

3. JOHN MCPHEE, ASSEMBLING CALIFORNIA, 21-22 (1993) (describing California's Sierra Nevada including Franciscan mélange).

4. *See generally* D. J. Boorstin, *Tradition and Method in Legal History*, 54 HARV. L. REV. 424, 431 (1941).

teach law,[5] with an assist from Oliver Wendell Holmes Jr.[6] Others go back to assumpsit; actually, Holmes does, which is a *lot* further back.[7]

As judges invoke the past to support their opinions today, they resort to different pasts. The law today seems more like the Franciscan *mélange*, a jumble of rocks and soils from many different periods. So much to choose from. The truth is that that contract cases involve many competing interests and principles from disparate pasts. Indeed, we laud greats like Benjamin Cardozo for "harmonizing the many contending concerns of contract law, including commercial certainty, freedom of contract, good faith, protecting the reasonable expectations of parties, and forfending interparty exploitation."[8]

But for those of us—trial judges and lawyers—reading opinions to figure out what to do in the present case, this can be nerve-wracking. We read to extract a guiding thread, to apply it to our new facts. Speaking for myself, I need to know when and if to admit evidence, and the tectonic shifts in contract doctrine have had very different answers to that elemental question. A little history might help extract a guiding thread from opinions which present all threads as equally operative.

My core sources are three items by Morton J. Horwitz, his "The Historical Foundations Of Modern Contract Law," 87 HARV. L. REV. 917 (1974) which he developed and included in his book, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) (abbreviated to "T1" here) and THE TRANSFORMATION OF AMERICAN LAW 1870-1960 (1992) (abbreviated to "T2" here). Even where I don't expressly note Professor Horwitz, the discussion is usually based on his work. Horwitz has his critics,[9] but generally I won't rely on the contested bits of his analyses.

5. GRANT GILMORE, THE DEATH OF CONTRACT (1974). Langdell's casebook first came out in 1871. *See generally* Todd Rakoff, *Case Method*, Campus & Community (Oct. 12, 2011), https://news.harvard.edu/gazette/story/2011/10/case-method/. *See* Morton J. Horwitz, *Review of Gilmore's Death of Contract*, 42 UNIV CHI. L. REV. 787 (1975).

6. O. W. HOLMES, JR., THE COMMON LAW (1881).

7. Holmes tell us that the whole "modern law of contract has grown up through the medium of the action of Assumpsit," which dates to the "reign of Edward III," *Id*. at 275, which is to say 1312-1377.

8. Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1381 (1995).

9. *E.g.*, A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 UNIV. CHI. L. REV. 533, 535 (1979). Horwitz, Gilmore, and others are taken to taken to task by *e.g.*, Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*,

2.1 BROAD STROKES

There are two major movements over the last few centuries in contract law featured in this review. They are connected, but not always in the same way. The first has to do with the essential nature of a contract, the second relates to what we are allowed to look at as we decide a contract's meaning; i.e., admissibility. The first movement is the shift from an equitable view of contract—enforcing what's fair—to the "will" theory in which the parties' intent is the essence of the deal, to the "objective" theory which says the contract is the words (usually written) adopted by the parties, sometimes also including other 'objective' indicia. The second movement is from textualism—admitting only the words as evidence of what the deal requires, "the plain meaning of the language contained within the four corners of the contract"[10]—to contextualism, in which smaller or greater segments of the real-world context of the agreement are admitted to explain its meaning.

These movements are not one-way; they continue to shift, back and forth, to this day. We're in the midst of the objective era, but with doctrines of unconscionability and others, old equity remains firmly in play.[11] We're also—somewhat—in the midst of a contextualist era, where sometimes the context of the agreement matters to its interpretation. Today, at some points in contract analysis, we care about parties' expressions of intent; and at other points, we don't, at all.

Well-known names associated with these movements are Samuel Williston, a textualist, plain meaning fellow, and Arthur Corbin, who "sharply criticized" Williston's approach[12] and argued for a broader review of the circumstances of the contract. In addition

69 FORDHAM L. REV. 427, 428 (2000). *See also* Robert W. Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 TULSA L. REV. 915, 918 (2002).

10. Shahar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519, 520 (2017).

11. *E.g.*, Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into A Fuller Understanding of Modern Contract Law It Is by Or Actions in Dealings That We Become Either Just or Unjust*, 60 U. PITT. L. REV. 839, 897–98 (1999).

12. Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 196–97 (1998).

to Holmes, we will also meet Benjamin Cardozo, allied with Corbin, and a "dedicated contextualist."[13]

2.2 TIMELINE

Holmes' THE COMMON LAW takes us back to the twelfth century, the reign of King Henry II [1133-1189]. You may recall Henry married Eleanor, Duchess of Aquitaine, both portrayed in James Goldman's 1966 play *The Lion in Winter*, and made into a terrific film. Holmes tell us that "great changes were beginning in the reign of Henry II. More various and complex contracts soon came to be enforced."[14] There was no trial by jury at this point,[15] so the problem of allocation of issues among judge and jury had not yet been raised. The "most simple contracts and debts for which there was not the evidence of deed or witness were left to be enforced by the ecclesiastical courts." Holmes then says "the whole modern law of contract has grown up through the medium of the action of Assumpsit," to the "reign of Edward III [1312-1377]."[16] (Assumpsit is an old form of contract: translated as "he undertook" or "he promised," and abolished in England in the nineteenth century.[17])

Leaping ahead, we come to the 1700s and the equitable approach (or doctrine). Damages for breach were set as what was fair; not necessarily what the parties had bargained for. If a defendant had paid little in the bargain, the plaintiff's damages would be reduced to be 'fair' approximation of what had been paid. Deals were by definition 'fair' exchanges. Plaintiffs suing for damages had to confront the notion of a customary price, and a bargain in excess of that was unlikely to be enforced; it wasn't fair and equitable. Specific performance was available; perhaps made the more attractive because, in the absence of sophisticated markets, goods were not fungible. Contracts were seen as transferring title: I agreed to give you one pig and you agreed to give me a peck of wheat. The court might order enforcement of the contract and tell you to give me the wheat, but only because you were holding my property.

13. Meredith R. Miller, *One Judge's Legacy and the New York Court of Appeals: Mr. Justice Cardozo and the Law of Contracts*, 34 TOURO L. REV. 263 (2018).

14. O. W. HOLMES, *supra* note 6, at 261.

15. *Id*. at 255.

16. *Id*. at 274-75.

17. BRYAN GARNER, GARNER DICTIONARY OF LEGAL USAGE, 87 (2011).

By the late 1700s, contract law moved away from its reliance on property law, and some understood a contract as creating an expectation of a future benefit. No longer did an agreement only create an immediate transfer of title. Now contracts could be used to protect against fluctuations in market prices and market availability of products. It is this ability to contract for future benefit—and the related recognition of executory contracts, with performance due in the future—that may be seen as the hallmark of the modern contract.[18]

In 1790, John Joseph Powell published in London his ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS. Earlier enforcement of 'fair' and customary bargains had been seen as providing stability in the sense of an enforcement of prevailing and discernable, objective, values. But Powell denounced the equitable doctrine as *destabilizing*, undermining the rule of law. He wrote, as Horwitz notes:

> "[I]t is absolutely necessary for the advantage of the public at large," Powell wrote, "that the rights of the subject should . . . depend upon certain and fixed principles of law, and not upon rules and constructions of equity, which when applied . . ., must be arbitrary and uncertain, depending, in the extent of their application, upon the will and caprice of the judge." The reason why equity "must be arbitrary and uncertain," Powell maintained, was that there could be no principles of substantive justice. A court of equity, for example, should not be permitted to refuse to enforce an agreement for simple "exorbitancy of price" because "it is the consent of parties alone, that fixes the just price of any thing, without reference to the nature of things themselves, or to their intrinsic value . . .. [T]herefore," he concluded, "a man is

18. Judge Posner writes, "Were exchange simultaneous and limited to goods the quality of which was obvious on inspection, so that there was no danger of unwanted surprises, there would be little need either for contracts or for legal remedies for breach of contract. The main purpose of contracts is to enable performance to unfold over time without either party being at the mercy of the other, as would be the case if, for example, a buyer could refuse to pay for a custom-built house for which there were no alternative buyers at or above the agreed price." R. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1582 (2004), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2893&context=journal_articles.

> obliged in conscience to perform a contract which he has entered into, although it be a hard one . . .."[19]

After the American Revolution, more sophisticated markets had been formed, goods seen increasingly as fungible, executory contracts (with performance in the future) were more routinely made, and the "value" of consideration was increasingly not a function of ascertainable, customary, objective value, but instead the function of the parties' desires and intentions. Whether or not a peck of wheat was "worth" one pig, if you and I agreed that a peck of wheat *was* worth a pig, the courts should enforce our deal. Powell announced the "will" theory of contract: courts should carry out the intentions of the parties—even if it resulted in a "hard" bargain.

In 1791, a year after Powell's ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS, the Seventh Amendment was enacted. It is as of this moment that federal courts decide whether a cause of action is entitled to a jury: if it did in 1791, it does now.[20] California's historical cutoff date wouldn't be for another 59 years.

The presumption of a stable customary measure of contract value continued to erode as the eighteenth century came to a close. In lawsuits complaining that stock was not delivered, expectation damages were awarded—the value of the stock as it turned out to be, or as expected to be, not its value when it had been promised. This allowance of expectation damages continued into the early 1800s, recognizing the bases of these commercial deals.[21] Courts identified and enforced the mutual "subjective meaning which parties actually attributed to contractual language."[22] By 1824, the New York case of *Seymour v. Delancy*[23] shows the courts refusing to consider whether consideration for an exchange is "fair" or not. The earlier role of the

19. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 917–18 (1974) (notes omitted).

20. *E.g.*, Goar v. Compania Peruana de Vapores, 688 F.2d 417, 424 (5th Cir. 1982); Havlish v. 650 Fifth Ave. Co., 934 F.3d 174, 184 n.11 (2d Cir. 2019).

21. Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"-A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 388 (1995) (noting Gulian Verplanck's 1825 work, *An Essay on the Doctrine of Contracts*, as an important moment in "adapting contract law to the realities of a market economy").

22. Jiri Janko, *Linguistically Integrated Contractual Interpretation: Incorporating Semiotic Theory of Meaning-Making into Legal Interpretation*, 38 RUTGERS L.J. 601 (2007). "Modern contract law arose early in the nineteenth century to combat existing 'just price' theories of value." Horwitz, *Review of Gilmore's Death of Contract, supra* note 5, at 794). By 'modern contract law' Horwitz means the will theory. Id. at 795.

23. Seymour v. Delancy, 1824 WL 2270 (N.Y. 1824).

courts in regulating agreements through equity continued to be eviscerated through the nineteenth century. The intent—the will—of the parties defined the agreement.

In 1828, the emerging will theory of contractual obligation was not yet complete. But it was by 1844. Horwitz points to Story's *Treatise on the Law of Contract* ("Every contract," he wrote, "is founded upon the mutual agreement of the parties . . . Both express and implied contracts were "equally founded upon the actual agreement of the parties, and the only distinction between them is in regard to the mode of proof, and belongs to the law of evidence.").[24] This is where we get our "meeting of the minds" test. Under will theory, "the extent of contractual obligation depends upon the convergence of individual desires."[25]

But it became increasingly clear that the commercial interests in stability and predictability of contract were not well-served by the will theory, with the concomitant ability of the parties at trial to plead, for example, different meanings of the contract depending on usage and custom. Joseph Story himself in 1837, before his 1844 Treatise came out, sounded an alarm.[26]

In 1850, California joins the Union. It had, the year before, enacted a Constitution, which went into effect on the date of admission, September 9, 1850.[27] California preserves the right to a jury as it existed in 1850. But coincidentally, it is a pivotal moment in the history of contract. So, it is not clear what is being preserved.

In 1855, 11 years after Story's Treatise, and five years *after* the magical date of 1850, Theophilus Parsons in his LAW OF CONTRACTS echoes Joseph Story's alarm, expressing great dismay at the impact of will theory: it too cannot ensure predictability, a sine qua non for commercial interests. Perhaps more importantly, he says that the construction and interpretation of contracts is not a matter of fact of juries. It is for judges.[28] The development of the objective doctrine, overtaking the will doctrine, took place in "the second half of the [nineteenth] century . . . converting questions of "fact" into questions

24. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 185 (1979).

25. Horwitz, *supra* note 19, at 927.

26. HORWITZ, *supra* note 24, at 196.

27. *1849 California Constitution Fact Sheet*, https://www.sos.ca.gov/archives/collections/constitutions/1849-constitution-facts/.

28. HORWITZ, *supra* note 24, at 197.

of "law" [and so] effected a shift of power from juries to courts."[29] In 1857, the U.S. Supreme Court rejected parol evidence in light of a written contract, although it conceded the plaintiff was illiterate.[30]

This objective theory and its reliance on juries came to dominate American law,[31] but only *after* California became a state. Holmes recited the doctrine in 1881, in THE COMMON LAW: "The law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct." It was stated by Learned Hand this way:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.[32]

In 1872, just under 20 years after Parsons' LAW OF CONTRACTS, the California legislature enacts most of the current set of statutes on contract. This was a momentous year: California passed a variant of New York's Field Code, including the "new Civil, Criminal, and Political Codes."[33] Most of the California statutes on contracts were enacted in 1872. The provisions are heavy on the intent of the parties, i.e., will theory, e.g. CC §§ 1636, 1639, 1640, 1643, 1648, 1649, 1653; CCP §§ 1859, 1860. (But not every one: a couple target the words of

29. Morton J. Horwitz, "*Review" of Gilmore's Death of Contract*, 42 UNIV CHI. L. REV. 787, 795 (1975). One of Horwitz's critics too notes the "progressive dethronement of the jury" during the nineteenth century. A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 UNIV. CHI. L. REV. 533, 600 (1979).

30. Selden v. Myers, 61 U.S. 506, 510–11 (1857).

31. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 48-49 (1994).

32. Hotchkiss v. National City Bank of N.Y, 200 F. 287, 293 (S.D.N.Y. 1911), discussed in Daniel P. O'Gorman, *Learned Hand and the Objective Theory of Contract Interpretation*, 18 U.N.H. L. REV. 63 (2019). *See generally* Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1123–24 (2008).

33. Lewis Grossman, *Codification and the California Mentality*, 45 HASTINGS L.J. 617 (1994).

the agreement, such as CC §§ 1638, some of 1639; 1641,[34] perhaps a reflection of the shifting sands favoring objectivism.

Chronologically, this is where we come across Holmes' assault on the will theory, in his 1881 THE COMMON LAW. Eight years later he comes out with "The Theory of Legal Interpretation,"[35] which pursues this assault, pressing the objective theory: "For each party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances, and therefore cannot complain if his words are taken in that sense."[36]

By 1920, objectivist Samuel Williston is looking back, maybe re-writing history a bit. "It was long ago settled," he says, that "secret intent was immaterial, only overt acts being considered" to understand the meaning of a contract.[37] His followers say the will theory, the examination of intent, was an "alien" theory.[38] It was nonsense to talk about the "meeting of the minds." But it wasn't nonsense and it wasn't alien in the first half of the nineteenth century, as Williston's treatise noted:[39] It had been very much a domestic product, brought about by the ancestors of the same commercial interests which now had delivered the "revolution"[40] of objective theory.[41] Williston did not want to see extrinsic evidence admitted to change the meaning of the agreement's words. His brand of objectivism, unlike that others we'll see next, severely limited parol evidence.[42]

34. Also, in 1872 the Legislature enacted the "Maximums of Jurisprudence" which some contract opinions have cited. Cal. Civ. Code §§ 3509 *ff.* (four maxims were added later). Among these of possible interest for contract interpretation: clean hands, § 3517; a form of *in pari delicto*, § 3524; laches § 3527; specific term controls the general, § 3534; preferred interpretations (not to read provision as void), § 3541; and interpretation, § 3542.

35. O. W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).

36. *Id*. at 419.

37. HORWITZ, *supra* note 24, at 200; SAMUEL WILLISTON, TREATISE ON THE LAW OF CONTRACTS (1920).

38. *See* Williston, *supra* note 37.

39. "During the first half of the nineteenth century, however, there were many expressions which seemed to indicate a contrary rule. Chief among these was the familiar statement, still invoked by many courts today, that a contract requires a 'meeting of the minds' of the parties." 1 Williston on Contracts § 4:1 (4th ed.) (notes omitted).

40. Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 199–200 (1998).

41. HORWITZ, *supra* note 24, at 201.

42. *E.g.*, Michael L. Boyer, *Contract as Text: Interpretive Overlap in Law and Literature*, 12 S. CAL. INTERDISC. L.J. 167, 168 n.3 (2003).

During this same period, i.e., after the turn of the century, another debate was afoot, this one focusing on what evidence might be considered in the integration of a contract, closely related to the battle between the will and objective doctrines. This other contest was between the contextualists and the textualists (adherents of 'plain meaning'). The textualism plain meaning approach is associated with the "late nineteenth and early twentieth centuries," and the "modern" contextualist approach with the mid-twentieth century.[43]

Cardozo is the great expounder of contextualism, denigrating the textualist reliance on the words, and only the words, of the contract: "[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal."[44] Note, though, that this generous consideration of surrounding circumstances was still an objectivist reading, still declining to rely on actual intent of the parties; it was just that the objective facts from which one would glean contract meaning included more than words.[45]

The contextualist approach however did not necessarily lead to a more predicable outcome or, thus, more stability in economic relations. In pursuit of outcomes which accorded with the practicalities of the situation—at least as seen by a judge such as Cardozo—the law was perhaps more "wavering and blurred."[46] Indeed, opting for the practicality of contextualism was in a way a shift—a shift back, we might say—to "equity and fairness."[47] That is, the pragmatic insistence on courts doing what seems economically reasonable, and finding that the parties' true agreement was one based on economic practicality, ironically would reduce certainty in economic life, and, it seems to me, reinvigorate the equitable theories

43. Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917). *See*, Joshua M. Silverstein, *Contract Interpretation Enforcement Costs: An Empirical Study of Textualism Versus Contextualism Conducted Via the West Key Number System*, 47 HOFSTRA L. REV. 1011, 1058 (2019), noting Justice Traynor's decision *Pacific Gas v. G.W. Thomas Drayage Co.,* as the paradigmatic example of contextualism. I mention this case below in the text.

44. Meredith R. Miller, *One Judge's Legacy and the New York Court of Appeals: Mr. Justice Cardozo and the Law of Contracts*, 34 TOURO L. REV. 263 (2018) ("Cardozo was a dedicated contextualist").

45. Larry A. DiMatteo, *Cardozo, Anti-Formalism, and the Fiction of Noninterventionism*, 28 PACE L. REV. 315, 340–41 (2008). Holmes, a founding father of objectivism, too of course is closely associated with the pragmatic approach. Morton J. Horwitz, *Review of Gilmore's Death of Contract*, 42 UNIV CHI. L. REV. 787, 796 (1975).

46. Jacob & Youngs v. Kent, 230 N.Y. 239, 243, 129 N.E. 889, 891 (1921) (Cardozo majority opinion).

47. *Id.*; *see also*, *Jacob & Youngs*, *discussed in*, RICHARD POSNER, A STUDY IN REPUTATION 92, 105-06 (1990).

which predated the will doctrine. Cardozo bent law to the realities of the marketplace and the real-life customs of the parties (into line with "commercial necessity"[48]). But this reinvigorated reliance on the unique conditions of every deal, perhaps reduced predictability.[49]

Cardozo's objectivism was not the objectivism of a plain meaning reliance on the written words. For Justice's McLaughlin's dissent in *Jacob & Youngs*, the issue was clear: the literal words of the contract were *concededly* breached, and the "trial court was right in directing a verdict for the defendant."[50] This was the plain meaning of the deal. But this was endorsed by only three of the seven members of the court.

In 1925, Karl Llewellyn amplified the pragmatic, contextualist approach,[51] to be followed by his writings in the early 1930s which continued to press for changes in contract law and in particular in the Uniform Commercial Code ("UCC") which accorded with changing economic realities.[52] The 1940s saw an increasing shift toward contextualism in the UCC, where for Llewellyn the words were only a piece of the spectrum of objective fact to be considered. This tended to displace Williston's static "plain meaning" model of interpretation.[53] But an important underlying rationale for

48. Posner, *supra* note 47, at 97.

49. "Although much academic commentary suggests otherwise, both the available evidence and prevailing judicial practice support the claim that sophisticated parties prefer textualist interpretation. Sophisticated commercial parties incur costs to cast obligations expressly in written and unconditional forms to permit a party to stand on its rights under the written contract, to improve party incentives to invest in the deal, and to reduce litigation costs. Contextualist courts and commentators prefer to withdraw from parties the ability to use these instruments for contract design. The contextualists, however, cannot justify rules that so significantly restrict contractual freedom in the name of contractual freedom." Alan Schwartz, Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926 (2010). However, not all parties are sophisticated, and especially in the context of one-to-many consumer contracts (discussed in Section 3), most contracts of employment, and other contracts of adhesion, there may be little or no costs incurred in negotiating or drafting form agreements.

50. *Jacob & Youngs*, 230 N.Y. 239, 246, 129 N.E. 889, 892.

51. Karl Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 665 (1925), *discussed in* N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to The Llewellyn-Pound Exchange over Legal Realism*, 1989 DUKE L.J. 1302, 1311 (1989).

52. Karl N. Llewellyn, *What Price Contract? - An Essay in Perspective*, 40 YALE L.J. 704 (1931). *See also* KARL N. LLEWLLYN, CASES AND MATERIALS ON THE LAW OF SALES (1930), *discussed in* John B. Clutterbuck, *Karl Llewellyn and the Intellectual Foundations of Enterprise Liability Theory*, 97 YALE L.J. 1131, 1134–35 (1988).

53. *E.g.*, Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 187 (1989). *See generally* John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 294 (2000).

contextualism was still that the greater span of admissible *objective* facts, such as "trade usage, custom, and commercial practice in contract interpretation provided external and objective measures of meaning."[54]

During this period, one of Llewellyn's teachers, Arthur Corbin, too was aiming at the heart of Willistonian emphasis on the branch of objectivism that excluded much extrinsic evidence. Horwitz places Corbin's impact starting with influential articles in 1912 and 1918.[55] "Corbin's view that extrinsic evidence *reduces* the influence of a judge's personal biases, and thus results in a more accurate interpretation of the words written by the drafters, has been widely accepted in contract law. Both the UCC and the Restatement (Second) of Contracts reflect that view."[56] The "battle between the titans of contract, Samuel Williston and Arthur Corbin . . . [continue] to the present . . . In a textualist regime, generalist courts cannot choose to consider context; in a contextualist regime, these courts must consider it. Thus, text or context."[57]

The march towards contextualism in California culminated in what we might see as a founding document of California's law on contracts, Justice Traynor's decision in *Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*,[58] a rejection of the plain meaning rule.[59] The contract's meaning "can only be found by interpretation of all the circumstances that reveal the sense in which the writer used the

54. Larry A. DiMatteo, *A Theory of Interpretation in the Realm of Idealism*, 5 DEPAUL BUS. & COM. L.J. 17, 29 (2006).

55. HORWITZ, *supra* note 31, at 49.

56. Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 197–98 (1998) (note omitted); *see* Arthur L. Corbin, *The Interpretation of Words and the Parole Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965); ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 555 at 239 (1960) ("[s]eldom should the court hold that the written words exclude evidence of the custom, since even what are often called 'plain' meanings are shown to be incorrect when all the circumstances of the transaction are known ...."), *discussed at e.g.*, Craig A. Naird, *A Theory of Claim Interpretation*, 14 HARV. J.L. & TECH. 1, 82 (2000). *See also e.g.*, Lawrence A. Cunningham, *Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-for-the-Job*, 85 GEO. WASH. L. REV. 1625, 1628–29 (2017).

57. Ronald J. Gilson, et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 25–26 (2014).

58. Pacific Gas & E. Co. v. G. W Thomas Drayage etc. Co., 69 Cal. 2d 33 (1968). *See* Lawrence A. Cunningham, *Contract Interpretation 2.0: Not Winner-Take-All but Best-Tool-for-the-Job*, 85 GEO. WASH. L. REV. 1625, 1628–29 (2017).

59. *E.g.*, Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397, 470 (2004); Carlton J. Snow, *Contract Interpretation: The Plain Meaning Rule in Labor Arbitration*, 55 FORDHAM L. REV. 681, 690 (1987); Robert W. Emerson, *Franchising and the Parol Evidence Rule*, 50 AM. BUS. L.J. 659, 675 (2013).

words."[60] The impact of this case, and its distance from the plain meaning rule, can be seen in Justice Baxter's concurrence a generation later:

> However, I cannot join the majority's general endorsement of *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. . . . Pacific Gas* essentially abrogated the traditional rule that parol evidence is not admissible to contradict the plain meaning of an integrated agreement by concluding that, even if the agreement "appears to the court to be plain and unambiguous on its face," extrinsic evidence is admissible to expose a latent ambiguity, i.e., the possibility that the parties actually intended the language to mean something different. (*Id*. at p. 37, 69 Cal.Rptr. 561, 442 P.2d 641.) [¶] Read in its broadest sense, *Pacific Gas* thus stretched the unremarkable principle that extrinsic evidence is admissible to resolve a contractual ambiguity into a rule that parol evidence is always admissible to demonstrate ambiguity despite facial clarity. The effect is that, despite their best efforts to produce a clear written agreement, parties can never confidently conduct their affairs on the basis of the language they have drafted.

Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384, 395 (2006) (Baxter, J., concurring).[61] But *Pacific Gas* lives on.[62]

2.3 EXTRACTIONS

60. 69 Cal. 2d at 38.

61. Justice Baxter recalls Judge Kozinski's classic attack on *Pacific Gas*: "Under *Pacific Gas*, it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol evidence. If one side is willing to claim that the parties intended one thing but the agreement provides for another, the court must consider extrinsic evidence of possible ambiguity. If that evidence raises the specter of ambiguity where there was none before, the contract language is displaced and the intention of the parties must be divined from self-serving testimony offered by partisan witnesses whose recollection is hazy from passage of time and colored by their conflicting interests." Trident Ctr. v. Connecticut Gen. Life Ins. Co., 847 F.2d 564, 569 (9th Cir. 1988).

62. *E.g.*, Aerotek, Inc. v. Johnson Grp. Staffing Co., Inc., 54 Cal. App. 5th 670, 2020 WL 5525180, at *8 (Sept. 15, 2020).

There are a few notions we can extract from this brief history.

First, some humility. It is difficult, if not impossible, to know what the law "is" at any moment in history. Law changes over time, and most of the shifts outlined above took decades. Yet both federal and California law depends on that conceit to decide which causes of actions are entitled to a jury, an issue explored in detail in Section 2 of this note. Reporting Cardozo's views, Corbin noted, "All 'rules of law' are aggregations of words, with fringes of uncertainty and variable content."[63] Our backward view, back to 1791 or 1850 for example, cannot be more precise.[64]

As of the magic dates of 1791 or 1850, the same issue might be treated as equitable and as legal, for the judge *and* for the jury.[65] Sometimes, the historical approach—the effort to determine what was then for the judge and what was for the jury—simply misses entire chapters of history.[66]

And doctrines fold and unfold through time: they mutate and return through the back door. For example, recall the assortment of issues thought of as 'equitable' in the 1700s—the notion that unfair contracts will not be enforced, or, more perhaps accurately, that they will be enforced only to the extent they are fair. This has been resurrected in the form of unconscionability and other doctrines. Current defenses like misrepresentation, duress, undue influence, mistake, frustration, and others focus on "substantive fairness in exchange."[67] Referring to this quiet reinvigoration of equitable theories, professor DiMatteo writes "This covert operation was made

63. Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 199 (1961).

64. There is also the more abstract problem that appellate opinions on contract, the prime source for determining the progress and shifts in the law, don't necessarily corelate to contract *practice* among people and businesses; they only corelate to the contracts that end up in court. Our view of what contract "is" is like that of an emergency room doctor who thinks the practice of medicine is just trauma work: for that doctor, medicine is taking care of the crises. The "common kinds of appellate cases are: atypical or freak business transactions; economically marginal deals both in terms of the type of transaction and amounts involved; high-stake, zero-sum speculations; deals where there is an outsider interest that does not allow compromise; and family economic transactions." Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present and Future*, 1967 WIS. L. REV. 805, 817 (1967).

65. Fleming James, Jr., *Right to A Jury Trial in Civil Actions*, 72 YALE L.J. 655, 664 (1963).

66. Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83 U. CHI. L. REV. 1893, 1902 (2016).

67. P.S. Atiyah, *Contract and Fair Exchange*, 35 U. TORONTO L.J. 1, 2 (1985).

necessary by the triumph of the "will theory" over the substantive fairness or equitable contract theory of the eighteenth century . . ."[68]

We recall Powell's 1790 pronouncement that under the now eclipsed "will" theory of contract, courts must enforce the intentions of the parties—even if it resulted in a "hard" bargain; today it is still true that "unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain.'"[69]

Secondly, the labels we use to fix the law—as we might say, 'the objectivist theory was in force'—mean different things to different people. And there are entirely legitimate debates about the statement of law attributed to those we use to mark the law's instantiation: we say "Willistonian," for example, meaning a formalistic four-corners analysis, but there's disagreement about what Williston was stating,[70] and so perhaps what the law was when he stated it, or where the law went under his influence. Sometimes, cases and commentators may take a look at a doctrine, and wrongly summarize it, and then we are misled into thinking a related doctrine was in play. For example, a current commentator writes "The objective approach to contract interpretation is known as the 'plain meaning' rule, also the 'four corners' rule, which expects courts to eschew extrinsic evidence of meaning if they find contract language to be plain, clear and unambiguous."[71] But our historical review has shown that objectivism means setting aside an investigation of intent, or "meeting of the minds," and that some—but not all—adherents would also fall into the "plain meaning" textualist camp.

Related to this is the fact that when we say, for example, that contract was a jury issue in 1791, or 1850, we mingle aspects of the cause of action which were probably subject to different treatment at different times. Breach and (within limits) damages may well have generally been issues for the jury, but over time there were differing approaches to meaning and interpretation, with less of a role for the jury as objectivism took hold, and as a function of textualism; and

68. Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 897–98 (1999). *See also e.g.*, Charles Fried, *The Rise and Fall of Freedom of Contract*, 93 Harv. L. Rev. 1858, 1862 (1980) (Reviewing P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT, Oxford University Press (1985).

69. OTO, L.L.C. v. Kho, 8 Cal.5th 111, 130 (2019) (internal quotation omitted).

70. *E.g.*, Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 275 (2005).

71. 1A PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR CONSTRUCTION LAW § 3:34 (as of January 2020 update).

more of a role as contextualism came into vogue. And it is in just those areas- integration, meaning and the use of extrinsic evidence—that current law is the most complex, reflecting the persistence, like Jurassic, Ypresian, and Lutetian rock in the today's Sierra Nevada mountain range, of overlapping and incongruous doctrines.

One reasonable overview of the shifts mapped out above posits little jury input into contract resolution during the 'equitable' era, relatively far more during the 'will' era, a consolidation of more control by judges during the textualist period, and an expansion of the jury's role during the contextualist period. The 1850 marker in California law, the moment by which we decide what is for the jury and what for the judge, comes in the midst of one such evolution, from will to objectivism.

Another version of this problem is posed by California's 1872 statutes, which, at least in great part, embodied the will theory.[72] The difficulty is of course is that while the will theory disappeared, the statutes didn't, and it is elementary that courts have to follow statute law. So it is today that we have a plethora of opinions which pay nominal obeisance to the "meeting of the minds" language.[73] There is a way to deal with this, which is to obliterate the statutes. Here's how you do it: quote the statutes; say that mutual assent or intent is required for a contract and allude to the 'meeting of the minds' test; then qualify that to *objectively perceptible* evidence of intent, i.e. the words of the parties, then focus on the words to deduce the meaning of the contract.[74] As I have suggested elsewhere, "intent" becomes a disposable legal fiction.[75] This tactic has a most venerable history: it's just one the ways in which the objective theory, as opposed to the will

72. *E.g.*, Cal. Civ. Code §§ 1636–37, 1639–40, 1643–44, 1648–49, 1653.

73. *E.g.*, "Every contract requires mutual assent or consent (Civ. Code, §§ 1550, 1565) …." Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc., 89 Cal. App.4th 1042, 1049 (2001). The phrase "meeting of the minds" appears in 628 published and unpublished cases from 1990 to 2020, albeit in a wide variety of contexts, and in the relatively recent unpublished case *Polycomp Tr. Co. v. Agbede,* 2020 WL 3168537, at *5 (June 15, 2020). Deliciously, *Polycomp* cites in support a 1919 case, *California Packing Corp. v. Emirzian*, 45 Cal. App. 236, 240 (1919), obviously decided before the will theory had been demoted.

74. *E.g.*, Rodriguez v. Oto, 212 Cal. App. 4th 1020, 1027 (2013).

75. Curtis E.A. Karnow, *Dangerous Fictions*, THE DAILY JOURNAL (May 22, 2020), https://works.bepress.com/curtis_karnow/44/. As befits a doctrine with a twisted history, the actual test is more complex, as we will see in Section 2 of this note: the objective meaning of words controls, unless a judge thinks there's ambiguity *and* there is extrinsic evidence which generates a meaning to which the words are reasonably susceptible, in which case the meaning is *other* than might appear via the words, but even then the only extrinsic evidence which is considered is "objective" like words, actions and usage.

theory, is articulated.[76] It co-opts the language of will theory, falsely suggesting no more than elaboration; it is the installation of a Quisling.

Third, a rhetorical issue. Judges—and I am one of them—dearly love to invoke the old names: Holmes Maitland, Cardozo . . . We do it for the authority of time and precedent it vests in us. It suggests that the views of these people, by sheer force of their intelligence and authority, are the views of today. Here's a nice example of an invocation that goes from 1951 back to 1936 to 1857:

> Cf. the oft-quoted language of Lord Wensleydale, in *Grey v. Pearson*, 6 H.L.C. 61, [1857] quoted in 3 WILLISTON ON CONTRACTS, Rev.Ed. (1936), sec. 618, p. 1777, reading as follows: 'The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further [sic: farther].'

Achen v. Pepsi-Cola Bottling Co. of Los Angeles, 105 Cal.App.2d 113, 121 (1951). At this point *Achen* was not endorsing the "plain meaning" rule, which is what Lord Wensleydale was discussing, if one reads his next two sentences.[77] Instead, *Achen* only held here that if there's an ambiguity, extrinsic evidence relating to that ambiguity can be considered, but not in connection with other language. The funny thing is that when Lord Wensleydale made his remarks in England in 1857, seven years after California was admitted to the Union, the will theory—the reliance on the intent of the parties—was dominant in the United States, even if some were sounding the alarm on behalf of

76. Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1153 (2008). The Restatement (Second) of Contracts (1981) uses the formulation. Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 746 (2016).

77. "The expression that the rule of construction is to be the intention of the testator is apt to lead into error, because that word is capable of being understood in two senses, viz., as descriptive of that which the testator intended to do, and of that which is the meaning of the words he has used. The will must be in writing, and the only question is, what is the meaning of the words used in that writing." *Grey v. Pearson* (1857) 6 HLC 61, 106.

the commercial classes. It would not be until closer to the turn of the century that plain meaning doctrine would ascend in this country,[78] only to see it under savage attack by Cardozo and others by the time the cited Williston 1936 tome came out, and definitely on its way out by the time of the 1951 *Achen* opinion. Those twists and turns, even if not of great moment here, are obscured by the citations to the past. But judges like quoting past masters, even if we might muddy the waters a bit when we do it.

III. TRIAL OF CONTRACT ACTIONS

> "Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully."[79]

3.1 INTRODUCTION

The central problem in trying a contract action is the number of times the trial shifts between the judge and the jury. If it shifts once, there are no problems. If more, there are problems. If the case shifts from to judge to jury to judge, the problems are not difficult and usually involve at worst some repeated testimony. But if the case includes a shift from jury to judge to jury, the problems will also include the issue of bringing the jury back after a hiatus (during which e.g., the judge is writing a decision). In one of the worst-case scenarios outlined below, the trial shifts from judge (integration issue) to jury (an issue, on which meaning depends, depends on disputed facts) to judge (who decides the meaning of the contract) to the jury (breach, damages). The problems are aggravated further when there are *different* contract-like claims, and related defenses, which seem to require a series of different shifts. We can think of these as trial management issues.

3.1.1 *Conflicting Contract Doctrines*

78. Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 13 (2006) (noting that in "the mid-nineteenth century…The task of federal and state courts alike was to search for "the true exposition of the contract or instrument…").

79. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 25 (1921) (Dover ed. 2005).

These management problems are aggravated by the risk of confusion as we read appellate opinions. Similar sounding phrases are used at different stages of contract interpretation (what the contract means) and implication (whether there is a contract), and so it is easy to quote phrases out of context; and some opinions seem to make equivalences of different tests, or of different stages of contract interpretation and implication. Exacerbating these problems is the fact that current contract law is the result of centuries of development – centuries which have seen radical shifts in thought on what contracts are, how to understand and enforce them, and so on. For example, some have urged that contract is what the parties say it is, whatever seems to have been their intent;[80] others have held an objective view, that the words of the contract are the sole measure of its import and effect;[81] and there have been other positions, too. Today, court opinions invoke all these strands, sometimes all at once in an introductory section, and sometimes just at different stages of the process of contract implication and interpretation. Often, courts introduce their analyses by rote recitation of principles without any sense of irony or noting that the principles seem to point in different directions, e.g., subjective intent and objective meaning. E.g.,

> The goal of contractual interpretation is to determine and give effect to the mutual intention of the parties . . . a "court's paramount consideration in construing [a] stipulation is the parties' objective intent . . . inferred, if possible, solely from the written provisions of the contract . . . the rules of interpretation of written contracts are for the purpose of ascertaining

80. *E.g.*, "the overriding goal of interpretation is to give effect to the parties' mutual intentions as of the time of contracting..." Amtower v. Photon Dynamics, Inc., 158 Cal. App.4th 1582, 1605 (2008) (internal quotations omitted). *See also e.g.*, "Mutual intent is determinative of contract formation because there is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense...." Am. Emp'r Grp, Inc. v. Emp't Dev. Dept., 154 Cal. App. 4th 836, 846 (2007), quoting Banner Entm't, Inc. v. Superior Court (*Alchemy Filmworks, Inc.*), 62 Cal. App. 4th 348, 358 (1998).

81. *E.g.*, "Contracts must mean what they say, or the entire exercise of negotiating and executing them defeats the purpose of contract law—predictability and stability…" Hot Rods, LLC v. Northrop Grumman Sys. Corp., 242 Cal. App. 4th 1166, 1176 (2015); Iqbal v. Ziadeh, 10 Cal. App. 5th 1, 8 (2017) ("California recognizes the objective theory of contracts (Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 948 [65 Cal.Rptr.2d 777]), under which '[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation'"). So for example under the objective approach, it is irrelevant that a party didn't read a contract or didn't know there was particular term in it. *E.g.*, Mission Viejo Emergency Med. Ass'n v. Beta Healthcare Grp., 197 Cal. App. 4th 1146, 1155 (2011).

> the meaning of the *words used* therein . . . [a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting . . . The language of a contract is to govern its interpretation, if the language is clear and explicit . . .

People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 107 Cal.App.4th 516, 525 (2003) (citations and internal quotations omitted) (emphasis in original). All these positions have been true at different times and in different contexts, but run together they don't help much.

3.1.2 *Brief Historical Note*

While I have discussed the history of contract in Section 1, I provide here in context an example of the conflation of principles from different periods, focusing on the critically important moment when contract interpretation statutes were enacted.

Most of the California statutes on contracts were enacted in 1872; and one or another, or many, of these provisions are cited in most modern appellate opinions on contract. These provisions are heavy on the intent of the parties.[82] This was consistent with William W. Story's TREATISE ON THE LAW OF CONTRACTS (1844) where he firmly endorsed the device of focusing on "the mutual agreement of the parties" as the defining feature of contract,[83] what has been called the "will" theory of contract.

But contract law changed after California's 1872 enactments. Examples include the works of Holmes and Williston. Holmes, who wrote THE COMMON LAW in 1881, "explicitly banished from his description of the elements of contract any reference to the subjective wills or intentions of the parties."[84] And Samuel Williston's TREATISE ON THE LAW OF CONTRACTS in 1920 announced the ascendancy of the objective theory of contract, rejecting language that sought to discern

82. *E.g.*, Cal. Civ. Code §§ 1636, 1639–40, 1643, 1648, 1649, 1653; Cal. Civ. Proc. Code §§ 1859–60.

83. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 952 (1974); HORWITZ, *supra* note 24, at 185 (1977).

84. Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Contract*, 75 NOTRE DAME L. REV. 1681, 1728 (2000). *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881), also available at https://www.gutenberg.org/ebooks/2449.

the "meeting of the minds" in agreements and looking to the 'plain meaning' of words.[85] This shift is on display in e.g., *Brant v. California Dairies*, 4 Cal. 2d 128, 132–33 (1935), which expressly rejected evidence on the meeting of the minds in favor of implementing Williston's views.

Now, perhaps we have sort of assemblage of the two notions.[86] But the point remains that opinions tend to invoke clashing principles of contract from across the centuries, including statutes of dubious currency, as if there were one consistent set of doctrines.

3.2 THE PARTIES' POSITIONS

The trial management issues must of course be mapped out in advance of trial. The parties' agreement can solve most of the problems, but (i) many parties won't agree, refusing to commit to any legal position; and (ii) many parties do not *have* a position on the core issues, such as whether they have a right to a jury on a claim. Sorting all this out takes a lot of time, and many cases are far from being ready for jury selection on the assigned trial date.

We need to know the parties' positions on issues such as whether they contend they have a right to a jury on an issue, whether there is an ambiguity in the contract, what kind of ambiguity it is (extrinsic or intrinsic), and so on. As noted, parties frequently at first refuse to commit: they contend the contract is unambiguous, and that no extrinsic evidence is needed, but that if for any reason anyone thinks there is an ambiguity, they want to reserve the right to use extrinsic evidence; and so on. This is unsatisfactory.

Perhaps the trial brief states the party's position, but it's unclear if this can be treated as a preclusive admission. A party may have answered contention interrogatories on the issues (usually not) but it is not clear if those are preclusive in the sense that having taken a position (i.e., the contract is not ambiguous) a party is powerless to

85. *See, e.g.*, HORWITZ, *supra* note 24, at 200; Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 275 n.13 (2005) (noting these: "THOMAS D. CRANDALL & DOUGLAS J. WHALEY, CASES, PROBLEMS, AND MATERIALS ON CONTRACTS 451 (4th ed. 2004) (discussing Williston's objective approach); LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 362 (6th ed. 1996) (discussing the "strict objectivism of classical contract law" as evidenced by Williston); RICHARD E. SPEIDEL & IAN AYRES, STUDIES IN CONTRACT LAW 239 (6th ed. 2003) (discussing the objective theory of contracts)").

86. Jiri Janko, *Linguistically Integrated Contractual Interpretation: Incorporating Semiotic Theory of Meaning-Making into Legal Interpretation*, 38 RUTGERS L.J. 601 (2007).

change it. Typically, interrogatory responses are *admissible* against the responding party, but they are not *preclusive*. At trial, the party can introduce contrary evidence, subject perhaps to the impeachment of the interrogatory responses. Positions taken in summary judgment and adjudication motions are unlikely to be useful: They either resulted in a motion's grant, in which case the issue is moot, or they did not, in which case the matter cannot be used at trial.[87] Responses to requests for admissions are preclusive,[88] and they can go to legal conclusions based on facts,[89] but that may not extend to purely legal issues such as whether there is a right to a jury for a certain claim. It is possible that a position successfully pressed at an earlier time, such as in the context of a motion for summary adjudication, might bind the party under the doctrine of judicial estoppel.[90] It's not entirely clear if under state law the doctrine applies to assertions of law,[91] but it probably does.[92] The motions in limine may or may not map out the problem; typically, they don't because parties are not concerned with trial management, or at least, not as concerned as the judge, who is greatly concerned about it.

Thus, the judge must conduct pretrial proceedings designed to have the parties commit to positions, make agreements where they can, and to allow the judge to inform the parties which issues will be tried to the court or to the jury, and in which order. This can take weeks of briefing, or more.

Next, I discuss some of the basic contract rules in order to explain the steps. I, thereafter, suggest to manage the trial.

3.3 BASIC RULES

Contract cases usually have four parts: determinations of the scope of the agreement, the meaning of the agreement, whether it was breached, and damages. The discussion here looks to the first two parts.

87. *See generally* Cal. Civ. Proc. Code § 437c (n)(2)–(3).

88. WEIL & BROWN, ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 8:1387 (Rutter: 2020) (hereinafter "Rutter").

89. Rutter ¶ 8:1299.

90. Kerley v. Weber, 27 Cal. App. 5th 1187, 1195 (2018).

91. Jackson v. Cty. of Los Angeles, 60 Cal. App. 4th 171, 188 (1997).

92. Nist v. Hall, 24 Cal. App. 5th 40, 48 (2018) (explaining the position on whether a statute applied).

3.3.1. *Scope*

The parties may not disagree where there written agreement. But often there are disagreements based on the existence of (i) oral statements; (ii) sub agreements such as work orders, supplemental writings, and invoices, all issued pursuant to an earlier agreement (such as a "master agreement") but with other terms, or where it unclear if these were issued pursuant to a "master" agreement; (iii) multiple roughly simultaneous written agreements such as employment agreements, employment manuals, and a separate arbitration agreement, or other terms and conditions from various sources that seem to relate to a transaction;[93] (iv) different written agreements over time apparently relating to the same subject matter and with—or without—identical sets of parties.

There are some issues lurking here. First, did the parties intend to put their agreement into writings? Second, if so, which are the writings that the parties intended to reflect their agreement? And third, did the parties intend to put their entire agreement in writing—i.e., is the agreement fully integrated?

3.3.1.1*Integration*

93. It is interesting to note the "Agreement" which governs a consumer's use of Amazon's Alexa device. *Alexa Terms of Use*, AMAZON (Dec. 12, 2020), https://www.amazon.com/gp/help/customer/display.html?nodeId=201809740 ("please read these Alexa Terms of Use, including the Alexa Communication Schedule, the Amazon.com Privacy Notice, the Amazon.com Conditions of Use, and the other applicable rules, policies, and terms posted on the Amazon.com website, available through your Alexa App, or provided with Alexa Enabled Products (collectively, this "Agreement"). By using Alexa, you agree to be bound by the terms of this Agreement."). Four other agreements are expressly called here, but others are referred to ("the other applicable rules") which can be found in three other and different places. *Alexa and Alexa Device Terms*, AMAZON https://www.amazon.com/gp/help/customer/display.html?nodeId=201566380. If one uses Alexa with other parties, more agreements apparently come into force. *Alexa Voice Service Agreement*, SUTTER HEALTH (Jan. 20, 2017), https://www.sutterhealth.org/alexa-voice-service-agreement. In related situations, "if you are a vigilant consumer and you install a Nest thermostat in your bedroom, you should review a minimum of 1,000 privacy contracts, because everything is flowing to third parties which is flowing to third parties, which is flowing to third parties." Noah Kulwin, *Shoshana Zuboff on Surveillance Capitalism's Threat to Democracy* (Feb. 24, 2019) https://nymag.com/intelligencer/2019/02/shoshana-zuboff-q-and-a-the-age-of-surveillance-capital.html. Related issues are discussed in detail in my *The Internet and Contract Formation*, 18 BERKELEY BUS. L. J. (2021).

This scope issue is often thought of as whether the contract is "integrated." It can be integrated in one, or more, documents. This issue is for the judge, even if it depends on the resolution of disputed facts.

> (1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.
> (2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.
> (3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

RESTATEMENT (SECOND) OF CONTRACTS § 209 (1981).

> *c. Proof of integration.* Whether a writing has been adopted as an integrated agreement is a question of fact to be determined in accordance with all relevant evidence. The issue is distinct from the issues whether an agreement was made and whether the document is genuine, and also from the issue whether it was intended as a complete and exclusive statement of the agreement. See § 210; compare Uniform Commercial Code § 2-202. Ordinarily the issue whether there is an integrated agreement is determined by the trial judge in the first instance as a question preliminary to an interpretative ruling or to the application of the parol evidence rule. See §§ 212, 213 . . .

RESTATEMENT (SECOND) OF CONTRACTS § 209 (1981), comment c.

As the Restatement warns us, the integration issue is separate from and prior to the application of the parol evidence rule, which may come into play *after* the integration analysis is complete.[94]

In California, there are said to be two "levels" of integration. (1) Is the identified writing (or writings) the final agreement? And (2) is the writing the "complete and exclusive statement" of the agreement?[95] If only (1) is true, additional *consistent* terms may be introduced.[96] If (2) is true, then nothing can be introduced to *vary* or *add* to the terms.[97] Many opinions use the term "integration" to refer to this second, more complete version of integration.[98]

We're familiar with a so-called integration clause, which is usually evidence of a level 2 (full) integration. But even without such a clause, a review of the agreement itself might manifest the parties' intent to have full level 2 integration.[99]

Once the integration analysis is done,[100] the court has fixed the scope of the agreement. So "[w]hen the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be

94. *See also e.g.*, Morey v. Vannucci, 64 Cal. App. 4th 904, 912–13 n.4 (1998).

95. Kanno v. Marwit Capital Partners II, L.P., 18 Cal. App. 5th 987, 999 (2017).

96. *E.g.*, Malmstrom v. Kaiser Aluminum & Chemical Corp., 187 Cal. App.3d 299, 314 (1986) ("Parol evidence is admissible to establish the terms of the complete agreement of the parties only if the written agreement is not the complete and final embodiment of that agreement").

97. On the parol evidence rule, *see* Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Assn., 55 Cal. 4th 1169, 1174 (2013) ("when the parties put all the terms of their agreement in writing, the writing itself becomes the agreement. The written terms supersede statements made during the negotiations. Extrinsic evidence of the agreement's terms is thus irrelevant"); Archer v. Coinbase, Inc., 53 Cal. App. 5th 266 (2020) (barring extrinsic evidence is e.g., custom and usage); Casa Herrera, Inc. v. Beydoun, 32 Cal. 4th 336, 343, 83 P.3d 497, 501–02 (2004) (the "parol evidence rule …generally prohibits the introduction of any extrinsic evidence, whether oral or written, to *vary, alter or add* to the terms of an integrated written instrument. …The rule does not, however, prohibit the introduction of extrinsic evidence "to *explain* the meaning of a written contract ... [if] the meaning urged is one to which the written contract terms are reasonably susceptible") (emphasis supplied, internal quotations removed); Masterson v. Sine, 68 Cal. 2d 222, 225 (1968) ("When only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing").

98. *E.g.*, Archer v. Coinbase, Inc., 53 Cal. App. 5th 266 (2020).

99. *Kanno*, 18 Cal. App. 5th at 1000.

100. *See*, *e.g.*, Kanno v. Marwit Capital Partners II, L.P., 18 Cal. App. 5th 987, 999–1000 (2017); Hayter Trucking, Inc. v. Shell W. E&P, Inc., 18 Cal. App. 4th 1, 14 (1993).

used to add to or vary its terms."[101] Most importantly for our purposes, the integration issue is only for the judge.[102]

This issue is handled as a Ev. C. § 405 hearing; not under §§ 402, 403.[103] That is, the judge decides integration. One should not be misled by cases which could be read as suggesting there might be issues of fact—perhaps for the jury. The issue is usually one of law,[104] and even where there are factual issues,[105] the matter is still for the trial judge.[106]

The court tells the parties who has the burden of (i) producing evidence and of (ii) proof (two different things); the judge may take evidence, and then determines the preliminary fact (i.e. here, what constitutes the agreement). The jury is not informed of the procedure: it either sees the disputed document or it does not; it either hears the parol evidence or it does not.[107] It may not be obvious which party has the burdens just mentioned: thus, even for this first step, it is conceivable that the court will require briefing.

3.3.1.2 *Impact Of Integration Clause*

The classic integration clause reads something like this: the document "constitutes the entire contract" and "exclusively determines the rights and obligations of these parties thereunder, notwithstanding any prior course of dealings, custom or usage of trade, or course of performance."[108] The *R.W.L. Enterprises* court did not think the clause barred it from looking at for example other "contemporaneously executed writings" although in the end it rejected the impact of those items.[109] Generally, these sorts of clauses

101. *Kanno*, 18 Cal. App. 5th at 999–1000.

102. Brawthen v. H & R Block, Inc., 52 Cal. App. 3d 139, 145 (1975); Esbensen v. Userware Internat., Inc., 11 Cal. App. 4th 631, 638 n.4 (1992) ("it is a question for the trial court rather than the jury"); Alling v. Universal Mfg. Corp., 5 Cal. App. 4th 1412, 1434 (1992).

103. Brawthen v. H & R Block, Inc., 52 Cal. App. 3d 139, 146 (1975).

104. Williams v. Atria Las Posas, 24 Cal. App. 5th 1048, 1051 (2018).

105. Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944, 954 (2003) ("Whether a contract is integrated is a question of law *when the evidence of integration is not in dispute*") (emphasis supplied).

106. Esbensen v. Userware Internat., Inc., 11 Cal. App. 4th 631, 638 n.4 (1992).

107. *See generally* M. SIMONS, CALIFORNIA EVIDENCE MANUAL § 1:42 (2020) (Fed. R. Evid. § 405 discussion).

108. R.W.L. Enterprises v. Oldcastle, Inc., 17 Cal. App. 5th 1019, 1031 (2017).

109. Colaco v. Cavotec SA, 25 Cal. App. 5th 1172, 1203 (2018) (integration clause does not bar review of contemporaneous agreements).

are very good evidence that the identified writings are the final and complete agreement; but the clauses are not preclusive.[110]

3.3.1.3 *Subject Of Agreement*

But an agreement is of necessity regarding a certain *subject*, and the clauses often say this expressly, in words to the effect that the writing is the complete agreement on the 'subject thereof'. So, an integrated agreement on my selling a car just relates to the car sale; not to some other deal we might have on, say, oranges. This apparently simple notion can quickly erupt into a full-blown disagreement over what the "subject matter" of the agreement is. For example, we might have an integrated employment agreement with an arbitration clause and then later termination agreement which is silent on arbitration (in which case that is not the 'subject' of the termination agreement), or has a narrower arbitration clause than the employment agreement (in which case we may say arbitration is a 'subject'). This produces different results on the extent to which arbitration is prescribed.[111]

3.3.1.4 *Effect of Order of Agreements*

As suggested in *Oxford Preparatory Academy*, with agreements signed at different times, the later agreement may well be in force despite an integration clause in the earlier agreement.[112] The point is made here:

> However, "[t]he parol evidence rule precludes extrinsic evidence of *prior or contemporaneous* agreements that contradict, vary, or add to an integrated writing—it does not relate to *future* agreements and does not bar extrinsic evidence that proves that the parties *subsequently* modified their integrated writing.[113]

110. Kanno v. Marwit Capital Partners II, L.P., 18 Cal. App. 5th 987, 1007 (2017).

111. *Compare* Oxford Preparatory Acad. v. Edlighten Learning Sol., 34 Cal. App. 5th 605, 612 (2019); Jenks v. DLA Piper Rudnick Gray Cary US LLP, 243 Cal. App. 4th 1, 15 (2015); *with* Jarboe v. Hanlees Auto Grp., 53 Cal. App. 5th 539 (2020).

112. Williams v. Atria Las Posas, 24 Cal. App. 5th 1048, 1052 (2018).

113. In re Ins. Installment Fee Cases, 211 Cal. App. 4th 1395, 1413 (2012).

3.3.2 *Meaning*

Next, the meaning of the agreement must be decided.

The notion of "meaning" of a contract usually refers to one or both of these:

> (A) The internal structure and logic of the contract: what entails what; what event is a condition precedent to what performance; whether clause X is an obligation, a condition, a remedy, background, etc., or none of these. For example, whether "Jon builds the house by April, and I give him my Bugatti in June" creates a condition precedent to the delivery of the Bugatti or two independent performances.
>
> (B) External mapping: the problems of translation to, or mapping of, events in real world, usually whether a certain event was a breach, or created a triggering condition, and so on; whether specific words refer to a given real world event (or lack of event). For example, whether insurance coverage for a "spill" refers to a slow leaching over many years; or if a promise to deliver a ton of "fruit" incudes fruit juice, etc.

The determination of meaning may require many steps, and resort to both the judge and the jury, perhaps in more than two phases.

First the parties must state whether the contract is ambiguous; they may logically disagree on its meaning and still each contend the contract is not ambiguous. If they agree it is not ambiguous, but disagree on the meaning, the judge decides the meaning.[114]

3.3.2.1 *Isolating Ambiguity*

Just asking the parties if the contract is ambiguous is not likely to produce results. Contracts have many clauses and the parties will surely disagree on some of them. The trick is to identify the material disputes. One approach is work backwards from the breach allegations. Thus (a) if there is a breach, do the parties agree on the consequences as cited in the complaint? If not, the parties should be able to identify the dispute in the remedies section. (b) Reviewing the

114. Fed. R. Evid. 310(a); Wolf v. Walt Disney Pictures & Television, 162 Cal. App. 4th 1107, 1125 (2008).

allegations of breach, do the parties agree that the complaint's allegation, if true, is a breach? If not, the parties should be able to identify an obligation as to which (i) the parties disagree on its requirements or (ii) one side claims is not an obligation at all. Other material disputes must be winkled out in other ways. For example, some disputes depend on the contract's structure of conditions, with plaintiff claiming defendant's performance was due, and defendant arguing it was not due. It may be that a meet-and-confer on jury instructions will precipitate the parties' disagreements.

But the parties must identify exactly what contract language is ambiguous, and if it's rendered ambiguous by extrinsic evidence, the parties must specify the evidence.[115] If they don't present that extrinsic evidence, or if they don't identify an ambiguity, the court will construe the contract as a matter of law.[116]

Again, it is worth emphasizing that this use of extrinsic evidence (EE) has nothing to do with, and is not barred by, the parol evidence rule.[117]

3.3.2.2 *Intrinsic v. Extrinsic*

If one party contends there is an ambiguity, it must explain whether the ambiguity is intrinsic (one sees the ambiguity without looking at extrinsic evidence [EE]), or extrinsic (only EE will reveal the ambiguity). So perhaps we agree I will sell you my house, which seems quite clear on its face. But EE shows I have two houses, so I may wish to argue for an ambiguity based on the EE (and then later also use EE to prove which house you and I had agreed to).[118]

115. Alameda City Flood Control & Water Conservation Dist. v. Dep't of Water Res., 213 Cal. App. 4th 1163, 1190 (2013).

116. City of Fresno v. Fresno Deputy Sheriff's Ass'n, 51 Cal. App. 5th 282, 292, 296 (2020).

117. Oakland-Alameda City. Coliseum Auth. v. Golden State Warriors, LLC, 53 Cal. App. 5th 807 at *6 (2020).

118. We should not confuse this with a very different issue, which is that sometimes because of the words used it's pretty clear there's no agreement at all. That was the consensus on the venerable *Peerless* case. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 418 (1899). The delivery was contracted from the ship Peerless, but EE showed that there were two such named ships. *See*, *e.g.*, Robert L. Birmingham, *Holmes on 'Peerless': Raffles v. Wichelhaus and the Objective Theory of Contract*, 47 U. PITT. L. REV. 183 (1985). The parties didn't agree to the same thing, so there was no agreement. For a fun item on this classic case—it won't take you long to read it—*see* Jeremy A. Blumenthal, *The Problem of the Two Ships Peerless*, 35 SETON HALL L. REV. 1097 (2005).

If the ambiguity is intrinsic, the judge decides the meaning.

3.3.2.3 *Juries and Extrinsic Evidence*

If the ambiguity is extrinsic, based on EE, there are two alternative paths. First, if there are material issues of credibility (conflicting EE), then there is usually a right to a jury to determine the facts.[119] Second, if there are no such issues (e.g., just as there are not when a motion for summary judgment or adjudication is properly granted), the judge resolves the impact of the EE and then the meaning of the contract.[120]

The reader will also be familiar with the notion that the EE, at this stage, is received in some provisional way, that it is not "admitted" but rather 'preliminarily received.'[121] It doesn't matter that the judge thinks the written contract is clear and unambiguous; she *must* provisionally receive the EE to determine if it shows there is indeed an ambiguity. It's not clear what this special evidentiary status really is, because of course the judge considers the EE and it becomes part of the record. This probably just means the jury may not get to see it. The special evidentiary status may reflect the fact that while EE cannot "add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose."[122]

3.3.2.4 *Reasonably Susceptible*

Whether the first or second path is taken, whether the issue goes to the jury or the judge, the parties are limited in what they can argue. They can only argue that the EE shows a meaning to which the writing is "reasonably susceptible."[123] This can be tricky, because there may be a conflict: from whose point of view do we determine that the language could plausibly mean something? The issue is a

119. De Guere v. Universal City Studios, Inc., 56 Cal. App. 4th 482, 505–06 (1997).

120. *Id.*; *see generally* Morey v. Vannucci, 64 Cal. App. 4th 904, 912–13 (1998).

121. Wolf v. Superior Court, 114 Cal. App. 4th 1343, 1350–51 (2004); Brown v. Goldstein, 34 Cal. App. 5th 418, 432 (2019), citing the case routinely thought to have originated this test in this state, Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging, 69 Cal.2d 33, 39-40 (1968).

122. Pac. Gas & Elec. Co, 69 Cal. 2d at 39.

123. Aerotek, Inc. v. Johnson Grp. Staffing Co., Inc., 54 Cal.App.5th 670, 675-6 (Cal. Ct. App., 2020); Oakland-Alameda City Coliseum Auth., 53 Cal. Appat *6 (looking for a "plausible" reading).

legal, not factual one,[124] strongly suggesting that the test is an objective one, not dependent on an idiosyncratic party view.[125]

3.3.2.4.1 *Standards for Deciding Words are Reasonably Susceptible of a Meaning*

There are at least two difficulties here. First, let us recall that it doesn't matter if the judge thinks language is ambiguous or not when deciding whether to admit EE to discern ambiguity: The judge may think he understands the plain meaning of the words, but EE might prove him wrong. Let's call that the Agnostic Rule. At the same time, we say judges decide whether the words are "susceptible" of a meaning or not; if not, the proffered EE is not further considered. Let's call that the Objective Rule.[126] It is not easy to discern the difference between these two Rules and how they prescribe different approaches to discerning meaning. In many situations it may be

124. Brown v. Goldstein, 34 Cal. App. 5th 418, 433 (2019); Winet v. Price, 4 Cal. App. 4th 1159, 1165 (1992).

125. This means of course that a trial court's objective view may be displaced by the appellate court's objective view, done on de novo review. *E.g.*, Moore v. Wells Fargo Bank, N.A., 39 Cal. App. 5th 280, 287, 296-97 (2019). It also means that courts of appeal may disagree among themselves on whether a word is "reasonably susceptible" to a meaning, Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384, 389 (2006). Unfortunately, these sorts of divergences tend to undermine the implicit claim of the test to be an objective one.

126. Some opinions may confuse the issue, with language suggesting that the provisional EE is used to decide not just if there's an ambiguity but also if the words are susceptible of a proffered meaning. See the use of "i.e." in the next quote which seems to make an equivalence between (1) determining ambiguity and (2) reasonable susceptibility: "The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. (Blumenfeld v. R.H. Macy & Co. (1979) 92 Cal.App.3d 38, 45, 154 Cal. Rptr. 652.)" Winet v. Price, 4 Cal. App. 4th 1159, 1165 (1992). The same ambiguous reading could be given to this: "The question whether proffered extrinsic evidence renders a contract reasonably susceptible to ambiguity is a judicial function to be decided initially by the trial court, and independently by the appellate court." Abers v. Rounsavell, 189 Cal.App.4th 348, 357 (2010). Contrast this with the Supreme Court's phraseology, which makes it fairly clear that reasonable susceptibility is *not* proved one way or the other by the EE: "Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible," Parsons v. Bristol Dev. Co., 62 Cal. 2d 861, 865 (1965); Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 37, 442 P.2d 641, 644 (1968) ("The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible").

perfectly obvious that a term can't possibly mean what a party says it means: perhaps "car" doesn't mean "tiger" (although we'll look more closely at that below); "Insurer shall pay $10" cannot possibly mean "insurer shall pay $20" or "Insurer shall never pay." In these situations, applying the Objective Rule, the judge is deciding, without the EE, that the words do or don't mean something. If he decides the words cannot mean something, he won't look at the EE presented in support of the proffered interpretation. He just figures this out on his own.[127] But the Agnostic Rule tells the judge he may *not* decide the meaning of the words on his own. Justice Baxter has noted the ambiguity of holding potential interpretations to just what the words will bear vs. allowing EE to create an ambiguity regardless of the apparent plain meaning of the words.[128]

3.3.2.4.2 *Private Language*

The second difficulty is presented by the notion of private language. The parties may use words in a way that only they mean. So they may indeed intend that "car" means "tiger." There are many rules of interpretation which focus this way on what the parties meant, such as rules which look to what one party thought the other party believed, or rules which consider the acts of the parties at the time (e.g., in our case, buying a tiger cage and hiring a tiger trainer), and so on.[129] But from the perspective of the Objective Rule, 'car' can't possibly mean 'tiger' so the judge will refuse to accept EE offered to support this reading.[130] This Objective Rule is thus at odds with a more general principle that we seek to understand contract language as the parties intended. And there is language in some opinions which, apparently in support of that more general principle, seem to require the judge to attend to private, idiosyncratic meaning:

127. Alameda City Flood Control & Water Conservation Dist. v. Dep't of Water Res., 213 Cal. App. 4th 1163, 1189 (2013) ("Therefore, if the language of the instrument cannot carry the meaning ascribed to it by the party claiming an ambiguity, the case is over") (multiple internal quotes removed).

128. Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384, 395–96 (2006) (Baxter, J., concurring).

129. E.g., *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc.*, 176 Cal. App. 4th 697, 712–13 (2009).

130. 11 WILLISTON ON CONTRACTS, "Ambiguity as a prerequisite—'Private language' and abbreviations," § 33:44 (4th ed.)

> Written words may have special meanings to the contracting parties that are not apparent on the face of the document itself. (*ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.*(1993) 17 Cal.App.4th 1773, 1793, 22 Cal.Rptr.2d 206 [". . . courts should allow parol evidence to explain *special* meanings which the individual parties to a contract may have given certain words"].)

Abers v. Rounsavell, 189 Cal. App. 4th 348, 356 (2010). *ACL Technologies* can be very easily read to endorse a private language interpretation.[131] Neither of these cases, however, actually allows private language to govern interpretation. So for example we have *Abers'* reference to Justice Baxter's concurrence, endorsing the Objective Rule:

> An agreement is not ambiguous merely because the parties (or judges) disagree about its meaning. Taken in context, words still matter. As Justice Baxter has pointed out, "written agreements whose language appears clear in the context of the parties' dispute are not open to claims of 'latent' ambiguity." (*Dore, supra,* 39 Cal.4th at p. 396, 46 Cal.Rptr.3d 668, 139 P.3d 56, conc. opn. of Baxter, J.)

Abers, op cit. So what I have referred to a second problem or difficulty relating to the Objective Rule might be better thought of as only a point of potential confusion.

3.3.2.4.3 ***Technical Language; Usage***

There is one more point to be made, which is that we should distinguish private or idiosyncratic language from technical references understood by more than just the parties, even if not understood generally and not understood by the judge. C.C. §§ 1645,[132] 1644.[133] This is a very different kettle of fish, and EE designed

131. ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co., 17 Cal. App. 4th 1773, 1793–1794 (1993).

132. "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

133. "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a

to support such a reading *should* be accepted by the judge. That is, it is true that a judge should be open to a "special meaning" of terms, but only if that meaning is given "by usage."[134] And by "usage" we mean trade usage, not just that of the parties, but of a larger group to which the parties belong. Thus "'usage' is a uniform practice or course of conduct followed in certain lines of business or professions, or in some procedure or phase of a business or profession."[135] In this sense, 'usage' parallels 'custom'.[136]

3.3.2.5 *Role Of Experts*

It might be thought that expert testimony is not admissible at this stage, because after all the decision whether to accept EE, and specifically what meaning the written words are susceptible of, is based on the Objective Rule and the court, not the jury, must interpret the contract (Ev. C. § 310). And indeed we have opinions like this: "'[e]xpert testimony is not generally admissible on the question of the meaning of particular policy language' because 'it is the *court's* function to interpret policy language.'"[137] But, as should be obvious, experts are often needed to explain industry customs and usage, and their testimony is indeed admissible.[138]

technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

134. MacKinnon v. Truck Ins. Exchange, 31 Cal. 4th 635, 648 (2003); Cal. Civ. Code § 1644.

135. Hayter Trucking, Inc. v. Shell Western E&P, Inc., 18 Cal. App. 4th 1, 15–16 (1993); Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc., 59 Cal. App. 3d 948, 955 (1976) (established trade usage and custom under the U.C.C.); Howard Entm't, Inc. v. Kudrow 208 Cal. App. 4th 1102, 1114 (2012) (industry usage and custom); Southern Pac. Transp. Co. v. Santa Fe Pac. Pipelines, Inc., 74 Cal. App. 4th 1232, 1244 (1999) (same); Ermolieff v. R.K.O. Radio Pictures, 19 Cal. 2d 543, 549, 500 (1942) ("general custom and usage" in the industry, citing CC § 1644); Varni Bros. Corp. v. Wine World, Inc., 35 Cal. App. 4th 880, 890 (1995) (custom and usage is admissible).

136. *E.g.*, Miller v. Stults, 143 Cal. App. 2d 592, 601 (1956). There is yet another source of confusion here as we discuss custom and usage. Regarding the wholly distinct question of whether the actions of the parties have in effect created an agreement, their own actions—their own custom and usage, if you will—may evidence that sort of agreement, known as an implied contract. So, we might say that the parties' "course of conduct implies they had a distribution agreement," Varni Bros. Corp. v. Wine World, Inc., 35 Cal. App .4th 880, 889 (1995). *See* Cal. Civ. Code § 1621.

137. Tustin Field Gas & Food, Inc. v. Mid-Century Ins. Co., 13 Cal. App. 5th 220, 231 (2017).

138. Howard Entm't, Inc. v. Kudrow, 208 Cal. App. 4th 1102, 1114 (2012); Wolf v. Superior Court, 114 Cal. App. 4th 1343, 1355 (2004); Scoville v. De Bretteville, 50 Cal. App. 2d 622, 629 (1942); Law v. Northern Assurance Co. of London, 165 Cal. 394, 407 (1913).

3.3.2.6 *Whether Credibility is an Issue*

Let us say the judge has reviewed the parties' positions on ambiguity, has decided that that the wording of the contract is reasonably susceptible to a meaning offered by a party. The next step is to decide if the acceptance of the EE depends on credibility: is there a conflict in the EE that needs a fact finder to resolve? If not, the judge proceeds alone to the next and final step of resolving the ambiguity. If there is a credibility dispute, the parties have the right to have a jury decide the matter. Note that if there is no conflict in the EE, but only a disagreement about what *inferences* could be drawn from the EE, there is no role for the jury.[139]

3.3.2.6.1 *When Jury Required*

This discussion so far obscures an important distinction: do we need a conflict in the evidence to invoke a jury, such as two opposed witnesses? Or do we need a jury if one side says the other side's evidence is false, or wants the opportunity to cross-examine witnesses to show they are fibbing? In the summary judgment context, facts are not properly disputed unless there is opposed evidence (such as a witness): one will not survive the motion by telling the judge that she wants the opportunity to cross-examine the moving party's witnesses because they aren't telling the truth.[140] At trial, the rule is the contrary: one may well win the trial by convincing the jury that the other side's witnesses are liars, even if one does not have any witnesses on an issue.

Which is it in the present context? When courts write that it is a matter of "conflicting extrinsic evidence,"[141] or say there was a "conflict in the extrinsic evidence," *id*. at 1128, it seems to be the summary judgment model.[142] When they ask whether the issue

139. Wolf v. Walt Disney Pictures & Television, 162 Cal. App. 4th 1107, 1126 (2008).

140. Cal. Civ. Proc. Code § 437c(e); Saldana v. Globe-Weis Systems Co., 233 Cal. App. 3d 1505, 1513 n.3 (1991).

141. Wolf, 162 Cal. App. 4th at 1127.

142. *Cf.*, Brown v. Goldstein (2019) 34 Cal. App. 5th 418, 437 (decided on summary judgment).

"turns upon the credibility of extrinsic evidence," it might be either model, but suggestive of the trial model.[143]

It appears the summary judgment model is used:

> it is jury's responsibility to resolve any conflict in the extrinsic evidence properly admitted to interpret the language of a contract. (*Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 891–892 & fn. 4, 222 Cal.Rptr. 455 [where conflicting extrinsic evidence is admitted to interpret language of agreement, the proper procedure is "for the trial court to require the jury to make special findings on the disputed issues and then base its interpretation of the contract on those findings"].)

Morey v. Vannucci, 64 Cal.App.4th 904, 913 (1998).[144]

3.3.2.7 *Entire Meaning Issue For Jury v. Special Findings*

Thus, the judge proceeds directly to the interpretation of the contract or, having conducted a trial and asked the jury for "special findings,"[145] the judge uses those findings to interpret the contract.[146]

If the judge has decided that the EE presents jury issues, the judge may also simply submit the interpretation issue to the jury.

Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence.

143. Tin Tin Corp. v. Pac. Rim Park, LLC, 170 Cal. App. 4th 1220, 1225 (2009); GGIS Ins. Servs., Inc. v. Superior Court, 168 Cal. App. 4th 1493, 1507 (2008).

144. *See*, *e.g.*, Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., 109 Cal. App. 4th 944, 956 (2003) ("When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues…"); Lonely Maiden Prod., LLC v. GoldenTree Asset Mgmt., LP, 201 Cal. App. 4th 368, 377 (2011) (addressing "material conflict in the extrinsic evidence"); ASP Prop. Group, L.P. v. Fard, Inc., 133 Cal. App. 4th 1257, 1267 (2005) ("evidence is in conflict").

145. Morey, 64 Cal. App. 4th at 912–13.

146. *See* Dillingham-Ray Wilson v. City of Los Angeles, 182 Cal. App. 4th 1396, 1405 (2010); De Guere v. Universal City Studios, Inc., 56 Cal. App. 4th 482, 505–506 (1997).

City of Hope National Medical Center v. Genentech, Inc. (2008) 43 Cal.4th 375, 395. From this, it isn't clear when the judge should follow this option of direct submission to the jury under *City of Hope*, or instead obtain special findings and do the final meaning analysis on her own, under *Morey*. The answer is provided in *City of Hope*: the judge can choose either option.[147] I suggest that when the sole difference between the parties on meaning depends on the resolution of only the EE credibility issues, the jury decides the meaning.

When the fact finder decides the meaning, it often considers extrinsic evidence such as the "parties' conduct before the controversy arose, including their communications."[148] The net effect here is that even where the parties have expressed an intent to have the written words of their agreement be binding, where an ambiguity is located, including an ambiguity solely discernable as a result of the consideration of EE, EE may then, in resolving ambiguity, in effect create the meaning of the written contract.

When the resolution of the credibility issue is only part of the meaning analysis, the judge should accept special findings and decide the contract's meaning. I provide examples and discuss this further below under "Special findings and Interrogatories."

When the jury has completed its work on meaning and EE, the trial either resumes as a jury trial if the claims have such a right, or continues as a bench trial if no such right exists or the parties have waived a jury. That is, the case proceeds to the next steps, breach and damages. Practically, the trial management problem is more difficult, because often there are both claims and defenses that do have a jury right and some that don't. Threading that needle is discussed below.

3.4 SUMMARY

The steps noted above are summarized here.

3.4.1 *Integration*

For the judge in an Ev. C. § 405 hearing:

- Decide which writings constitute the contract (if any).
- Decide if there is any integration; level 1; or level 2 integration. Consider any integration clause.

147. *City of Hope National Medical Center*, 43 Cal. 4th at 396.

148. Moore v. Wells Fargo Bank, N.A., 39 Cal. App. 5th 280, 300 (2019).

- This produces a result which is used to decide if parol evidence will be admitted and if so for which purpose.

3.4.2 *Meaning*

- Do the parties identify a material dispute on meaning?
  - If not, there is no further work to be done.
- Do all parties agree the contract is unambiguous (even if they dispute meaning)?
  - If so, the judge decides the meaning.
  - If not, the parties citing ambiguity must identify the specific words or terms which are ambiguous; then
    - Each party must specify the meaning it attributes to the ambiguous words.
    - Each party specifies if the ambiguity is intrinsic or is shown by extrinsic evidence [EE].
      - If the parties agree is it intrinsic, the judge decides the meaning.
      - If a party contends the ambiguity is revealed by EE, then
        - the judge decides if the words are reasonably susceptible to the meaning attributed;
        - If the words are not reasonably susceptible, then the judge rejects the attempt to use EE and decides the meaning
        - If the words are reasonably susceptible, then the judge accepts the EE; all sides are permitted to identify relevant EE.
          - The judge decides if there is a conflict in the EE which must be resolved by credibility determinations,
            - If not, the judge reviews the EE and decides the meaning.
            - If so, a jury is

empaneled (unless waived).
- The jury either (A) returns special findings, which are used by the judge to decide the meaning, or (B) decides the meaning.

3.5 JURY TRIAL RIGHT

Many cases involve more than a claim of contract breach. And evidence may be relevant to more than one cause of action, with some evidence unique to one claim or defense, and other evidence relevant to more than one of those. Therefore, trial management, and specifically when to empanel a jury, requires not only the analysis discussed above but an evaluation of all claims and defenses.

3.5.1 *California's 'Equity First' Rule*

As opposed to federal practice,[149] in state courts where there are claims triable to both a judge and a jury, usually the judge goes first, and the judge's findings are binding on the jury. If the jury goes first, its findings are binding on the judge. The judge's ruling on what for

149. Hoopes v. Dolan, 168 Cal. App .4th 146, 158 (2008), citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). This means that state cases which rely on federal caselaw are suspect, such as the intermediate appellate opinion which was reversed in Nationwide Biweekly and perhaps cases such as Mendoza v. Ruesga, 169 Cal. App. 4th 270, 284–285 (2008).

convenience we will call 'equitable claims' may have the effect of determining the so-called 'legal claims' (those decided by a jury), so that there is no need for a jury trial, or only for a very limited one.[150]

3.5.2 *Basic Approach To Jury Right*

First, one decides if the legislature has created a right to a jury. If so, that governs. If not, one turns to the state constitutional test in *Nationwide Biweekly Administration*,[151] to which the balance of this discussion is devoted.

3.5.2.1 *Some False Starts*

First, an aside: some lawyers have argued that all issues of "fact" are for the jury, in contrast to issues of "law" which are for the judge. That is a terrible argument; no court has adopted it, despite its superficial charm (and apparent invocation of Ev. C. § 312).[152]

At the simplest level, we may, as suggested above, say that legal actions (or "actions at law") are entitled to a jury, and equitable actions are not.[153] But this distinction is useless. Equity principles are alive in claims both for the jury and claims which go to the judge.[154] The terminology can however be helpful as shorthand for a *conclusion* that a claim goes to the jury or the judge.

Sometimes courts look to what *relief* is sought: is it money—in which case the claim is legal, and for the jury—or is it equitable, such as an injunction, or declaratory relief—in which case it is for the judge. But this isn't determinative either.[155]

150. Nwosu v. Uba, 122 Cal. App .4th 1229, 1242 (2004); Nationwide Biweekly Admin., Inc. v. Super. Ct. of Alameda Cty., 9 Cal. 5th 279, 317 (2020) ("This general 'equity first preference' is a long-standing feature of California law"). *See* Hoopes v. Dolan, 168 Cal. App. at 157; *see also* Rincon EV Realty LLC v CP III Rincon Towers, Inc., 43 Cal. App. 5th 988, 993 (2019).

151. Nationwide Biweekly Admin. Inc., 9 Cal. 5th 279 (2020).

152. Kim v. Yi, 139 Cal. App. 4th 543, 548 (2006); Hodge v. Super. Ct., 145 Cal. App. 4th 278, 287 (2006).

153. Van de Kamp v. Bank of Am., 204 Cal. App. 3d 819, 863 (1988), citing e.g., C & K Eng'g Contractors v. Amber Steel Co., 23 Cal. 3d 1, 9 (1978) (action at law or an action in equity); Nmsbpcsldhb v. Cty of Fresno, 152 Cal. App. 4th 954, 960 (2007) (issue is whether the claim is an "action at law or an action in equity").

154. Jogani v. Sup. Ct., 165 Cal. App. 4th 901, 909 (2008).

155. Walton v. Walton, 31 Cal. App. 4th 277, 287 (1995); C & K Eng'g Contractors, 23 Cal. 3d at10 (request for money damages doesn't make the claim legal); Entin v. Super. Ct., 208 Cal. App. 4th 770, 774 (2012) (request for declaratory relief doesn't necessarily

3.5.2.2 *Historical Test*

The test is an historical one: if the claim had a right to a jury in 1850 when the state's constitution went in to effect, it has one now; if not, then not. This is sometimes phrased a bit differently, which is whether there was a right at "common law;" it is supposed to mean the same thing.[156] This seems like a simple historical quest, but it is not because often one must make analogies between claims and defenses in use today and those in effect in 1850, and decide if the "gist" of the two sets of claims are the same or not.[157] This is a review of whether the two sets are in the same "class" or have the same "nature."[158] So if the "gist" is legal, there's a right to a jury.[159] But no, just because the "gist" is legal, as it happens, is *not* enough to conclude that there is a right to a jury.[160]

3.5.2.3 *Subsumed Legal Claims*

Here is a nice twist. In a case with which I have some familiarity, the trial and appellate courts decided that an interpleader action (where the court decides among claims of multiple parties to some asset lodged with the court, apportioning the asset to the parties) there is no jury entitlement. This is so even though the claims of the parties, such as contract rights, which are subsumed by the interpleader action, are otherwise entitled to a jury.[161] Similarly B&P § 17200 claims, which are tried to the judge, will enable all the

make the claim equitable for the judge); Caira v. Offner, 126 Cal. App. 4th 12, 39 (2005) ("request for punitive damages did not convert her equitable shareholder derivative claim into a legal claim on which Laurens would be entitled to a jury trial").

156. DiPirro v. Bondo Corp., 153 Cal. App. 4th 150, 178 (2007); Wisden v. Super Ct., 124 Cal. App. 4th 750, 760 (2004). It is vague when courts say that they look to how claims were handled at "common law" as opposed to the more precise test, which is how they were handled as of 1850. The "common law" as a body of law goes back to something like the fourteenth century, *e.g.*, David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L. J. 539, 592 n. 26 (1986), and the term 'common law' has seven different senses. BRYAN GARNER, GARNER'S DICTIONARY OF LEGAL USAGE, 179 (3d ed. 2011). This is discussed in Section 1 of this note.

157. *DiPirro*, 153 Cal. App. 4th at 179.

158. *Id*. at 179-180.

159. Brown v. Mortensen, 30 Cal. App. 5th 931, 942 (2019).

160. Franchise Tax Bd. v. Super. Ct., 51 Cal. 4th 1006, 1011 (2011) ("However, it is a general proposition, not an absolute rule, that the right to a jury trial attaches when the "gist" of the action is legal," citing C & K Eng'g Contractors.)

161. Shopoff & Cavallo LLP v. Hyon, 167 Cal. App. 4th 1489, 1514 (2008).

predicate causes of action on which the § 17200 claim is founded, such as fraud, Labor Code violations, etc., tried to the judge even if, separately when not a predicate for § 17200 liability, they would be entitled to a jury.[162] Thus when a plaintiff loses on a § 17200 claim because the judge decides none of the legal claims (such as e.g., breaches of contract, fraud, and slander of title) has merit, this finally disposes of those legal claims and they are not tried to a jury.[163]

Suffice it to say that every single test proposed to decide if there is a constitutional right to a jury has its exceptions. This is worrying, because we're talking about the fundamental right to a jury, and getting this issue wrong (denying a jury when there is a right to one) is reversible error, without regard to any showing of "prejudice."[164]

3.5.3 *Current Law*

3.5.3.1 *Majority Opinion*

Our Supreme Court recently decided *Nationwide Biweekly*.[165] This decides that certain statutes did not have a statutory right to a jury; it reversed an appellate opinion which had relied on federal authority including the federal Seventh Amendment; and most importantly for our purposes it outlined how to decide if a claim has a constitutional right to a jury determination. Three of the seven justices concurred in the opinion—Justices Kruger, Liu and Cuéllar. (Below, I will return to that concurrence.)

The Court confirmed the historical approach based on how things were in 1850.[166] It confirmed the "like nature" and "the same class" approach in figuring out if an 1850 claim is sufficiently similar

162. Hodge v. Superior Court, 145 Cal. App. 4th 278, 284 (2006).

163. Rincon EV Realty LLC v. CP III Rincon Towers, Inc., 43 Cal. App. 5th 988, 995 (2019). So it is that plaintiffs may be put to the hard choice of keeping their § 17200 claim to obtain an injunction or attorney's fees under CAL. CIV. CODE § 1021.5 (Deering 2021), Walker v. Countrywide Home Loans, Inc., 98 Cal. App. 4th 1158, 1179 (2002), but losing the jury; or dismissing the §17200 claim in order to retain the jury right.

164. *E.g.*, Guttman v. Chiazor, 15 Cal. App. 5th Supp. 57, 66 (2017); Mackovska v. Viewcrest Road Prop. LLC, 40 Cal. App. 5th 1, 15 (2019).

165. Nationwide Biweekly Admin., Inc. v. Superior Court of Alameda County, 9 Cal. 5th 279 (2020).

166. *Id*. at 315.

to the one at issue now.[167] It confirmed the "gist" test.[168] We can extract these factors for that test:

- Do prior cases suggest the claims are equitable;[169]
- Is the bulk of relief equitable;[170]
- In deciding remedies, does the court have broad discretion over many factors, the sort of work judges and not juries do;[171] and, closely related,
- Are there expansive and broadly worded substantive standards which call for the exercise of the flexibility and judicial expertise and experience that was traditionally applied by a court of equity. [172]

I would add another practical factor, a function of the last two factors. The fact that model jury instructions exist doesn't always mean the issue is tried to a jury.[173] But one should consider whether one can fashion adequate jury instructions, or whether, on the other hand, the issues to be decided "depend upon skills and wisdom acquired through years of study, training and experience which are not susceptible of adequate transmission through instructions to a lay jury."[174] This seems an excellent way to test the proposition that the jury can decide the matter: if proposed instructions are so vague that many sets of conflicting facts can all permit a verdict for either the plaintiff or the defendant, the issue is probably not for the jury.

So there it is, a "gist" test based on 4 or 5 factors, extracted from the classic California's "historical" approach to whether there's a right to a jury. Only future cases will tell if *Nationwide Biweekly* provides more practical guidance than earlier decisions.[175]

Of course, if it's clear that the claim today *is* the same as one in 1850 which was entitled to a jury, one need not deal with the

167. *Id*. at 316
168. *Id*. at 322.
169. *Id*. at 324.
170. *Id*. at 326.
171. *Id*.
172. *Id*. at 327.
173. Cent. Laborers' Pension Fund v. McAfee, Inc., 17 Cal. App. 5th 292, 350 (2017).
174. Hoopes v. Dolan, 168 Cal. App. 4th 146, 155–156 (2008) (internal citations omitted).
175. We can expect courts to disagree on the applications of these factors, just as the U.S. Supreme Court, engaged in a similar historical quest, has split on whether a cause of action today is more similar to an old common law legal claim or equitable claim. Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990), discussed in *e.g.*, Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L. J. 852, 880 (2013).

Nationwide Biweekly list of factors. The historical inquiry alone may be enough to show that the claim was entitled to a jury as of 1850, as it is with contract and quantum meruit.[176]

The test, then, can be seen as having two branches, either sufficient: the simple one is to see if the claim was tried to the jury in 1850 (like a contract claim). If that doesn't work, e.g., because the current claim seems to have both equitable and legal aspects, or it's not clear how to analogize the current claim to claims extant in 1850, we shift to the gist test. The first, simple, test is arbitrary, in the sense that it simply sorts claims without regard to whether juries or judges are best suited to handling them. For example, it seems arbitrary that promissory estoppel is for a judge and quasi-contract is for the jury. And the allocation is made, for example, of equitable and implied indemnity, and quasi-contract, to juries, although the cases are clear that equitable principles are in play.[177] The gist test, on the other hand, does attend to the respective strengths of the judge and jury.

3.5.3.2 *The Concurrence*

As mentioned, Justice Kruger joined by two other justices filed a concurrence in the judgment.[178] She agreed that one of the statutes at issue had no right to a jury. But regarding the second one, the False Advertising Law ("FAL," B&P 17500), she both agreed with the majority that in *this* case there was no right to a jury, but, in disagreeing with the majority, wrote there might be a right to a jury in other cases because the FAL claim is not "inherently equitable."[179]

176. Jogani v. Super. Ct., 165 Cal. App. 4th 901, 906–907 (2008). It's clear today that contract claims are 'legal' and in that sense entitled to a jury. *E.g.*, Note, *The Right to A Jury Trial in A Stockholder's Derivative Action*, 74 YALE L. J. 725, 727 (165); Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83U. CHI. L. REV. 1893, 1941 n.28 (2016). I discuss the history of contract claims in section 1, but here we should recall that the nature of contract has shifted radically over the centuries, and that early on it was the courts of Chancery (whence our *equity* jurisdiction) that handled contract claims, deciding for example to "enforce unsealed written promises and oral promises." Note, *The Right to A Nonjury Trial*, 74 HARV. L. J. REV. 1176, 1182 (1961). And the period right around the key date we use in this state to decide what sorts of claims have a right to a jury--1850, the mid-nineteenth century--saw profound changes in contract law. *See generally*, Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917 (1974); Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 765–766 (1981), reviewing P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979).

177. *E.g.*, Jogani, 165 Cal. App. at 909.

178. Nationwide Biweekly Admin. Inc. v. Super. Ct. of Alameda Cty., 9 Cal. 5th 279, .334 *ff*.

179. *Id*. at 341.

This sort of parsing presents difficult issues for trial judges and lawyers, because they would have to entertain a new set of criteria to decide what to do in each succeeding FAL case. The distinction between "inherently" equitable claims and what we might call *potentially* equitable claims does not seem to be found in precedent. The new set of criteria the minority opinion cites are these: in this specific case, "trying liability under the FAL to the jury, while the rest of the action was decided by the court, would create procedural complications without significant benefit to the defendant demanding jury trial,"[180] and in this case if the other equitable claims were tried first, the final result "would be determined by the trial court on the basis of equitable principles, allowing the court to all but nullify any jury finding of an FAL violation. What is more, the court could effectively override any jury decision against FAL liability by imposing liability for the same conduct under the UCL before the FAL issue is ever tried . . ."[181]

This is odd. We can understand Justice Kruger's view that the FAL claim was for the jury—she makes a good argument on that, although the majority obviously disagreed. But she concludes that the FAL claim is not for the jury if, under California's 'equity first' rule, the FAL claim is in effect decided by the judge's ruling on e.g., the concededly equitable UCL claim. But I have seen no other case where the fact that a legal claim might be obviated by an earlier ruling on an equitable claim means the legal claim is transmuted into an equitable claim; rather, it's just a legal claim that need not be tried.[182]

Practically it's difficult to know where to go with the minority's approach. When deciding whether to handle legal and equitable claims one after the other, or together, the judge usually first figures out which ones are legal (and get a jury) and which are equitable (and don't get a jury), and tries to muddle along from there; but under Justice Kruger's reasoning, the judge could decide the order of trial first, thereby changing a legal claim into an equitable one, and so justifying a decision to have the judge trial first, and then expressly deciding what had been a legal (jury) claim.

3.6 WAIVER OF JURY RIGHT

180. *Id*. at 342.

181. *Id*.

182. *E.g.*, Rincon EV Realty LLC v. CP III Rincon Towers, Inc., 43 Cal. App. 5th 988, 995 (2019).

No matter how bad or sloppy a party's behavior, there are exactly 6 ways a right to a jury can be waived, and they are listed in CCP § 631 (f):

> (1) By failing to appear at the trial.
> (2) By written consent filed with the clerk or judge.
> (3) By oral consent, in open court, entered in the minutes.
> (4) By failing to announce that a jury is required, at the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation.
> (5) By failing to timely pay the fee described in subdivision (b), unless another party on the same side of the case has paid that fee.
> (6) By failing to deposit with the clerk or judge, at the beginning of the second and each succeeding day's session, the sum provided in subdivision (e).

CCP § 631(f). No other action or inaction waives a jury.[183] A concession in an opposition to a motion regarding the right to a jury doesn't squarely fit in one of these categories, so it doesn't waive a jury.[184] A "failure to submit jury instructions within the specified time" cannot be a waiver of a jury.[185] And so for example, a "pre-dispute" agreement, say in an employment agreement that purports to waive a jury, is ineffective.[186] But all this is within the context of court proceedings; in what could be seen as a loophole, agreements to arbitrate—which of course imply a waiver of a jury, and are most often pre-dispute agreements—are usually valid.[187]

3.7 RELIEF FROM WAIVER OF A JURY

183. Rincon EV Realty LLC v. CP III Rincon Towers, Inc., 8 Cal. App. 5th 1, 12–13 (2017).

184. DiPirro v. Bondo Corp., 153 Cal. App. 4th 150, 177 (2007).

185. Chen v. Lin, 42 Cal. App. 5th Supp. 12, 17 (2019).

186. Handoush v. Lease Fin. Grp., LLC, 41 Cal. App. 5th 729, 736 (2019).

187. O'Donoghue v. Super. Ct., 219 Cal. App. 4th 245, 256–257 (2013); Lange v. Monster Energy Co., 46 Cal. App. 5th 436, 452 (2020) (distinguishing waiver of jury in court setting from waiver of jury inherent in arbitration agreement).

Not only are there strict requirements for waiver of a jury trial, but when there are such waivers, trial courts are encouraged to set the waiver aside on request of the party seeking the jury. The only basis to resist such a request is a demonstration that granting the relief will prejudice the other side.[188] A showing that the jury trial, as such, will "prejudice" the other side (e.g. that the party expects to do better with a judge than a jury, or that a jury trial takes longer) doesn't count.[189] What counts is something like a showing that the other side had prepared for a court trial and was demonstrably unprepared for a jury trial; or had undertaken discovery in contemplation of a court trial that differed markedly from what one would do for a jury trial. Perhaps a party might be prejudiced if it had to develop complex and time-consuming motions in limine, or exhibits which were exceedingly time-consuming to prepare (and useful for a jury and not a judge).[190] Older cases stating that "relief will be denied where the only reason for the [new jury] demand appears to be the party's change of mind,"[191]

may not be good law where there is no prejudice. Also, old law held that denial of jury had to be shown on appeal to have "prejudiced" the party entitled to a jury in order to secure a reversal. That is no longer true: an erroneous denial of a jury alone results in reversal.[192]

3.8 CLAIMS AND DEFENSES WITH A RIGHT TO A JURY

Managing a trial with contract claims requires an investigation into the other claims and defenses at issue, and arranging the trial with the appropriate and efficient submissions to the jury. Absent agreement among the parties, the trial judge may have to decide which claims have a right to a jury and which do not. When some

188. Mackovska v. Viewcrest Rd. Props. LLC, 40 Cal. App. 5th 1, 10 (2019).

189. Gann v. Williams Bros. Realty, Inc., 231 Cal. App. 3d 1698, 1704 (1991); Winston v. Super. Ct., 196 Cal. App. 3d 600, 603 (1987).

190. Johnson-Stovall v. Super. Ct., 17 Cal. App. 4th 808, 811 (1993). *See also* Gonzales v. Nork, 20 Cal.3d 500, 508 (1978); McIntosh v. Bowman, 151 Cal. App. 3d 357, 363 (1984) (prejudice where calling a jury would lead to "continuance … entailing more costs and inconvenience of witnesses," a threat of dismissal for the delay, and delay would cause financial distress).

191. O'Donoghue, 219 Cal. App. 4th at 256–257; Lange v. Monster Energy Co., 46 Cal. App. 5th 436, 452 (2020) (distinguishing waiver of jury in court setting from waiver of jury inherent in arbitration agreement).

192. Mackovska v. Viewcrest Rd. Props. LLC, 40 Cal. App. 5th 1, 16 (2019).

issues are entitled to a jury (e.g. contract) and others are not, the trial judge must consider how to stagger the presentations of evidence. This is discussed below under "Sorting the trial."

Trial judges are of course bound by appellate decisions, and if a case says a claim had a right to a jury in 1850, then that's the way it is. But for many claims, the historical record is in truth more fluid.[193] Some of the case authority listed below is dated, and some may have used analyses which are not strictly speaking the same as used by our Supreme Court in *Nationwide Biweekly*. So in the future, not all these rulings may hold up.

Below, 'equitable' denotes claims triable to the judge, and 'legal' a claim where there is a right to a jury.[194]

3.8.1 *Claims*

- Declaratory Relief: Depends.[195] While these actions are often equitable, if they are "in effect used as a substitute for an action at law for breach of contract," they are legal and a jury is warranted.[196] This can be a "difficult" inquiry.[197]
- Restitution: Depends. Thought of as a type or measure of recovery, and not a cause of action, restitution may call for either jury or not. So, restitution under the False Advertising Law (FAL) and the Unfair Competition Law (UCL) doesn't require a jury, but sought as a remedy for a legal claim would entitle the plaintiff to a jury.[198]

193. *E.g.*, Fleming James, Jr., *Right to A Jury Trial in Civil Actions*, 72 YALE L.J. 655, 658 *ff*. (1963); Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83 U. CHI. L. REV. 1893, 1899-1941 & n.26 (2016) (referring to "the fluidity of jury trial practices in eighteenth-century England").

194. The reader should also consult the lists found at WILLIAM E. WEGNER, ET AL., CALIFORNIA PRACTICE GUIDE—CIVIL TRIALS AND EVIDENCE § 2:78.1 *ff*. (2019); CALIFORNIA JUDGES BENCHBOOK: CIVIL PROCEEDINGS, TRIAL §§ 3.3, 3.4 (2017).

195. Hoopes v. Dolan, 168 Cal. App. 4th 146, 159 n.1 (2008).

196. Entin v. Superior Court, 208 Cal. App. 4th 770, 779 (2012) (internal quotes omitted).

197. Nwosu v. Uba, 122 Cal. App. 4th 1229, 1241. *See* Aerotek, Inc. v. Johnson Grp. Staffing Co., Inc., 54 Cal. App. 5th 670 2020 WL 5525180 at *12 (Sept. 15, 2020) (declaratory relief for ownership of certain property, similar to replevin, may be legal, but where ownership but not *possession* is at issue, action is equitable).

198. Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 699 n.24 (2006); Jogani v. Superior Court, 165 Cal. App. 4th 901, 910 (2008); Am. Master Lease LLC v. Idanta Partners, Ltd., 225 Cal.App.4th 1451, 1484 (2014).

- Equitable or implied indemnity: Legal.[199]
- Promissory Estoppel: Equitable.[200]
- Money had and received, common count: Legal.[201]
- Specific performance: Equitable.[202]
- Quiet Title: Equitable.[203]
- Quasi Contract: Legal;[204] even though based on equitable principles.[205] The court's logic in *Franchise Tax Bd*[206] strongly suggests a jury trial. See unjust enrichment.
- Unjust Enrichment: Likely legal. The doctrine may not really be a cause of action; it is a type of remedy, or perhaps better put, "it is a general principle underlying various doctrines and remedies, including quasi-contract,"[207] strongly suggesting there is a jury right. Quasi contract can be a claim for unjust enrichment,[208] and there is a right to jury trial on unjust enrichment claims.[209]
- Constructive Trust: Equitable.[210]
- Rescission: Depends. "[I]f a rescission action seeking to recover something other than the consideration paid was an equitable action prior to the 1961 amendments, then it is an equitable action today."[211]
- Accounting: Equitable.[212]

199. Martin v. Cty. of L.A., 51 Cal. App. 4th 688, 698 (1996) (legal, even though equitable principles involved) (case perhaps inappropriately seems to rely on federal authority under the Seventh Amendment, but the case was cited with approval in Nationwide Biweekly Admin., Inc. v. Super. Ct. of Alameda Cty., 9 Cal.5th 279, 318 (2020)).

200. Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc., 211 Cal. App. 4th 230, 243–244 (2012); C & K Eng'g Contractors v. Amber Steel Co., 23 Cal. 3d 1, 11 (1978).

201. Nwosu v. Uba, 122 Cal. App. 4th 1229, 1241 (2004).

202. Caira v. Offner, 126 Cal. App. 4th 12, 27 (2005); Nwosu, 122 Cal. App. 4th at 1240.

203. *Nwosu*, 122 Cal. App. at1241.

204. *Id*. at 1241.

205. Welborne v. Ryman-Carroll Found., 22 Cal. App. 5th 719, 728 n.8 (2018).

206. Franchise Tax Bd. v. Super. Ct., 51 Cal. 4th 1006, 1017 (2011).

207. Jogani v. Super. Ct., 165 Cal. App. 4th 901, 911 (2008).

208. Davies v. Krasna, 245 Cal. App. 2d 535, 548 (1966).

209. Lectrodryer v. SeoulBank, 77 Cal. App. 4th 723 (2000).

210. Getty v. Getty, 187 Cal. App. 3d 1159, 1177 (1986).

211. Nmsbpcsldhb v. Cty. of Fresno, 152 Cal. App. 4th 954, 963 (2007). "We conclude that the action is equitable because it seeks something other than a return of the consideration given by NMS." *Id*. at 966.

212. De Guere v. Universal City Studios, Inc., 56 Cal. App. 4th 482 (1997); Van de Kamp v. Bank of Am., 204 Cal. App. 3d 819, 865 (1988).

- Quantum Meruit: Legal.[213]
- Assumpsit: Legal. This is an old form of quantum meruit,[214] similar to a common counts for money had and received.[215] The court's logic in *Franchise Tax Bd*[216] strongly suggests a jury trial.
- Covenant of good faith and fair dealing: Probably legal. The "covenant is a contract term,"[217] so it is likely for the jury. The issue is commonly given to the jury, but in the cases cited here the issue of a right to a jury is not decided.[218] But compare *Benach* where the issue was for the judge.[219]
- Breach Fiduciary Duty: This may depend. There are various sorts of fiduciary duties,[220]and some might be triable to a jury; but at least those that attend to the duties dependent on corporate ownership are triable to the court. It doesn't matter if money damages are sought,[221] and two cases that so hold (*Central Laborers' Pension* and *Interactive Multimedia)* were cited with approval by the Supreme Court in *Nationwide Biweekly*.[222] Compare, *City of Hope* and other cases.[223]
- Alter ego: Equitable.[224] This isn't a cause of action, but, like conspiracy or other theories of vicarious liability, a means to hold one party liable for the wrongs of another.

213. Jogani v. Super. Ct., 165 Cal. App. 4th 901 (2008) [as an example of quasi contract]; Nwosu v. Uba, 122 Cal. App. 4th 1229, 1241 (2004); Chodos v. Borman, 227 Cal. App. 4th 76, 97 (2014); *see* Maglica v. Maglica, 66 Cal. App. 4th 442, 448 (1998) (jury assumed).

214. *Jogani*, 165 Cal. App. 4th at 905.

215. Philpott v. Super. Ct. in & for L.A. Cty., 1 Cal. 2d 512, 517 (1934).

216. Franchise Tax Bd. v. Super. Ct., 51 Cal. 4th 1006, 1017 (2011).

217. Kransco v. Am. Empire Surplus Lines Ins. Co., 23 Cal. 4th 390, 400 (2000).

218. *E.g.*, Thompson Pac. Constr., Inc. v. City of Sunnyvale, 155 Cal. App. 4th 525, 534 (2007); Kransco, 23 Cal. 4th at 398.

219. Benach v. Cty. of L.A., 149 Cal. App. 4th 836, 846–47 (2007) (no jury right because the "gist" of the claim was for specific performance).

220. Hodges v. Cty. of Placer, 41 Cal. App. 5th 537, 547 (2019).

221. Cent. Laborers' Pension Fund v. McAfee, Inc., 17 Cal. App. 5th 292, 347 (2017); Interactive Multimedia Artists, Inc. v. Super. Ct., 62 Cal. App. 4th 1546, 1556 (1998); Nelson v. Anderson, 72 Cal. App. 4th 111, 122 (1999).

222. *See also, e.g.*, Nelson v. Anderson, 72 Cal. App. 4th 111, 122 (1999).

223. City of Hope Nat'l Med. Ctr. v. Genentech, Inc., 43 Cal.4th 375, 394 (2008) (breach of fiduciary duty tried to jury, but issue not raised on appeal); Pellegrini v. Weiss, 165 Cal. App. 4th 515, 531 (2008) (same); Eng v. Brown, 21 Cal. App. 5th 675, 691 n.4 (2018) (same); Middlesex Ins. Co. v. Mann, 124 Cal. App. 3d 558, 566 (1981) (breach of fiduciary duty goes to jury).

224. Dow Jones Co. v. Avenel, 151 Cal. App. 3d 144, 147 (1984).

- Shareholder derivative claims: Equitable.[225]
- Fraudulent transfer: Equitable.[226]

3.8.2 *Defenses*

3.8.2.1*In General*

Most authorities divide defenses into those which are legal and those which are equitable, with the concomitant right of trial for the legal ones. "Equitable defenses are tried to the judge alone; the judge's findings may well obviate a jury trial on remaining legal issues, without abridging the right to a jury trial."[227] "Generally, equitable defenses are tried by the judge alone even though other issues in the action are 'legal' in nature and hence determined by the jury."[228]

The Code of Civil Procedure expressly allows the bifurcation and earlier trial of many defenses such as those which might bar a claim.[229]

There is one troublesome case in this area, *Unilogic*,[230] which reads,

> The gist of Unilogic's action for conversion was legal. Burroughs simply asserted an affirmative defense of unclean hands. As the court observed in *Ford v. Superior Court* (1959) 176 Cal.App.2d 754, 1 Cal.Rptr. 559, in which defendants asserted seven affirmative equitable defenses, including unclean hands, to an action at law for breach of contract: "The assertion of such defenses in a law action will not change it to an action in equity or warrant separate and prior trial by the court." (*Id.*at p. 759, 1 Cal.Rptr. 559.)"

This of course suggests that equitable defenses (here, unclean hands) to legal claims go to the jury. I discuss this case below under

225. Caira v. Offner, 126 Cal. App. 4th 12, 38–39 (2005).

226. Moofly Prods., LLC v. Favila, 46 Cal. App. 5th 1, 10 (2020).

227. Stephen Slesinger, Inc. v. Walt Disney Co., 155 Cal. App. 4th 736, 763 (2007); De Guere v. Universal City Studios, Inc., 56 Cal. App. 4th 482, 506 (1997).

228. WILLIAM E. WEGNER, ET AL., CALIFORNIA PRACTICE GUIDE--CIVIL TRIALS AND EVIDENCE § 2:254 *ff.* (2019).

229. Cal. Civ. Proc. Code § 597.

230. Unilogic, Inc. v. Burroughs Corp., 10 Cal. App. 4th 612, 622 (1992).

"Sorting the Trial," where I suggest that the issue is of trial management, not a rule that actually mandates the submission of equitable defenses to a jury.

3.8.2.2 *Specific Defenses*

For a general list of defenses to contract claims, most of which are legal, see e.g., 5 B. Witkin, CALIFORNIA PROCEDURE, *Pleadings* § 1088 (2020); and many others are cited in e.g. 1 B. Witkin, SUMMARY OF CALIFORNIA LAW, *Contracts, passim* (2020) such as accord and satisfaction, novation, impossibility and so on.

- Equitable Estoppel: Equitable. [231]
- Unconscionability: Probably equitable. The statute commits the issue to the court:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

CC § 1670.5 (a). This is a good example of words used in different ways which can lead to confusion: the issue is "legal" in the sense that it is "a matter of law,"[232] but that does not mean it's "legal" as opposed to "equitable" and so for the jury. Many cases hold the matter is for the judge.[233] But often, this is in the context of petitions or motions to arbitrate which, because these are actually suits in equity for specific performance, would be committed to the judge, and never the jury, anyway.[234] Note, however, e.g., *U.S. Roofing*[235] which was not decided in the arbitration context.

231. Hoopes v. Dolan, 168 Cal. App. 4th 146, 155 (2008); Judicial Council of California v. Jacobs Facilities, Inc., 239 Cal. App. 4th 882, 897 (2015).

232. Carbajal v. CWPSC, Inc., 245 Cal. App. 4th 227, 236 (2016); Jones v. Wells Fargo Bank, 112 Cal. App. 4th 1527, 1539 (2003).

233. Flores v. Transamerica HomeFirst, Inc., 93 Cal. App. 4th 846, 851 (2001); Vance v. Villa Park Mobilehome Estates, 36 Cal. App. 4th 698, 709 (1995); Patterson v. ITT Consumer Financial Corp., 14 Cal.App.4th 1659, 1663 (1993); De Guere v. Universal City Studios, Inc., 56 Cal. App. 4th 482, 504 n.5 (1997).

234. Metis Development LLC v. Bohacek, 200 Cal. App. 4th 679, 688 (2011).

235. U.S. Roofing, Inc. v. Credit All. Corp., 228 Cal. App. 3d 1431, 1448 (1991).

Unconscionability issues seem difficult or impossible to reduce to jury instructions.[236] "The question of unconscionability is expressly one of law for the court and not for the jury. It has been held that there is no violation of the Seventh Amendment right to a jury trial by leaving the question of unconscionability to the court because the doctrine has its origins in equity, despite its use in various common-law decisions."[237]

- Substantial Compliance:[238] Equitable.[239]
- Unclean Hands: Equitable.[240] But the issue has been sent to the jury in some cases.[241] Some cases note that the "defense is available in legal as well as equitable actions,"[242] but this doesn't directly answer the question whether the matter is for a judge or a jury.
- Illegal penalty: Equitable.[243]
- Equitable tolling: Equitable.[244]
- *In pari delicto*: Equitable. [245]

236. *E.g.*, De La Torre v. CashCall, Inc., 5 Cal. 5th 966, 976 (2018) ("Unconscionability is a flexible standard in which the court looks not only at the complained-of term but also at the process by which the contractual parties arrived at the agreement and the larger context surrounding the contract, including its 'commercial setting, purpose, and effect.'); Lona v. Citibank, N.A., 202 Cal. App. 4th 89, 108 (2011) (court looks to "factors … which, under established legal rules—legislative or judicial—operate to render it [unenforceable].').

237. HOWARD HUNTER, MODERN LAW OF CONTRACTS, § 19:40 (2020) (note omitted).

238. Judicial Council of California v. Jacobs Facilities, Inc., 239 Cal. App. 4th 882, 913 (2015) ("To demonstrate substantial compliance, a contractor must show it was licensed prior to performing, acted reasonably and in good faith to maintain its license, was unaware of any failure of licensure upon commencement of performance, and acted promptly and in good faith to reinstate its license upon learning it was invalid."); *see* C. W. Johnson & Sons, Inc. v. Carpenter, 53 Cal. App. 5th 165 at *2 (2020).

239. *Judicial Council of California*, 239 Cal. App. 4th at 914.

240. Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, 133 Cal. App. 4th 658, 679 (2005).

241. *E.g.*, Unilogic, Inc. v. Burroughs Corp., 10 Cal. App. 4th 612 (1992); Mattco Forge, Inc. v. Arthur Young & Co., 52 Cal. App. 4th 820, 846 (1997); *see* Liberty Mut. Fire Ins. Co. v. McKenzie, 88 Cal. App. 4th 681, 688 n.3 (2001).

242. Kendall-Jackson Winery, Ltd. v. Superior Court, 76 Cal. App. 4th 970, 978 (2000); CrossTalk Prods., Inc. v. Jacobson, 65 Cal. App. 4th 631, 647 (1998).

243. Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 232 Cal. App. 4th 1332, 1354 (2015).

244. Hopkins v. Kedzierski, 225 Cal. App. 4th 736, 745–746 (2014).

245. Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP, 133 Cal. App. 4th 658, 677 (2005).

- Forfeiture: Equitable.[246]
- Statute of frauds: Unclear; may depend. I have found no case that directly decides the issue. A Supreme court opinion, *C & K*, can be read to suggest the issue is equitable, as it recites a list of equitable issues this way: "*Ford v. Palisades Corp*. (1950) 101 Cal.App.2d 491, 498-499, 225 P.2d 545 (statute of frauds). . ." but this is better read as noting cases relating to estoppel, including estoppel to plead the statute of frauds, as triable to the judge.[247] The cases on which *C & K* relies do not say the statute of frauds is for the judge; they do say it for estoppel.[248] As we have seen, promissory estoppel (which is a way to *avoid* the statute of frauds) is an equitable issue for the judge.[249] These are not holdings that all statute of frauds issues are for the judge.

There are many issues which may arise under the statute of frauds: whether an agreement is performable within a year, the extent to which it is in writing, whether it's for real property, the sum of money involved, whether a "qualified financial contract" exists, and so on. It may be that some of these involve jury issues and others do not. For example, with respect to the issue of whether we have an "agreement that by its terms is not to be performed within a year from the making thereof,"[250] the issue may depend, first, on ascertaining the meaning of the agreement: what, exactly, are its terms? The identity of the fact finder charged with the eventual resolution of the statute of frauds (when CC § 1624 (a)(1) is in play) may thus depend on the resolution of whether the judge or the jury decides the meaning of the oral contract.

246. Judicial Council of California v. Jacobs Facilities, Inc., 239 Cal. App. 4th 882, 897 (2015).

247. C & K Eng'g Contractors v. Amber Steel Co., 23 Cal. 3d 1, 9–10 (1978).

248. Ford v. Palisades Corp., 101 Cal. App. 2d 491, 499 (1950), relying on Sellers v. Solway Land Co., 31 Cal. App. 259 (1916); Halsey v. Robinson, 19 Cal. 2d 476, 482 (1942). *See also* Jaffe v. Albertson Co., 243 Cal. App. 2d 592, 608 (1966); Price v. McConnell, 184 Cal. App. 2d 660, 667 (1960); 101 A.L.R. 185 (issue of "part performance which will take a contract out of the Statute of Frauds is cognizable only in equity").

249. *E.g.*, Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc., 211 Cal. App. 4th 230, 243–244 (2012); C & K Eng'g Contractors, 23 Cal. 3d 1 at 11.

250. Cal. Civ. Code § 1624 (a)(1).

In oral agreements, there is no question of construing a writing, nor thus of the respective roles of judge and jury in determining written meaning.[251]

3.9 SORTING THE TRIAL

Once the issues discussed above are mapped out and the judge finds out what is disputed, the judge can decide how to arrange the trial. I suggest the judge will consider bifurcation, phasing, and other techniques so as to minimize:

- the total days of trial,
- the number of times the same evidence has to be presented,
- the number of times a non-party witness must make a personal appearance (separate reading from deposition transcripts don't count),
- the number of days the jury will be in court,
- gaps in the days of jury service, and
- risk of inconsistent findings—the judge must consider the impact of findings by one fact finder (jury or judge) on the other (judge or jury) when there are both legal and equitable claims or defenses.

I also suggest that the arrangement should favor, as far as is reasonably convenient, the determination of legal issues by the jury and equitable issues by the judge, that is, to avoid a situation where one fact finder in effect obviates the role of the other.

The parties may have some very good ideas on how to sort the trial with these interests in mind. But left to their own devices, lawyers will not brief the issues this way. Each side has an abiding interest in a jury, or judge, trial; so each will arrange his or her argument to generate that result. So a lawyer who hopes for a jury will explain how the equitable issues either must, or in the court's discretion can, be submitted to the jury, or how after the jury has

251. *Compare* Brawthen v. H & R Block, Inc., 28 Cal. App. 3d 131, 137 (1972) (jury hears evidence of what the oral contact was); Treadwell v. Nickel, 194 Cal. 243, 259 (1924) (same); San Francisco Brewing Corp. v. Bowman, 52 Cal. 2d 607, 613 (1959) (same); Smyth v. Tennison, 24 Cal. App. 519, 521 (1914) ("since the contract was oral, its interpretation in the first instance was a question of fact to be determined by the jury; but, since such interpretation was clearly erroneous, it became the duty of the trial court, upon application therefor, to set the verdict aside"); *with* Fed. R. Evid. § 310 (judge decides meaning of *writings*).

ruled, the judge's task will be so much easier and simpler, perhaps because the judge is then bound by a jury verdict. The side that hopes for a judge trial will discuss the benefits of a quick, streamlined bench trial, the difficult legal issues only a wise judge can handle, and the likelihood that the time and costs of a jury trial, and the concomitant impositions on the public, will be avoided after the judge has ruled in that side's favor, in effect obliterating the legal (jury) claims. The fact is that a trial *can* often be arranged one way *or* the other, jury or judge first, with at least the possibility that the second phase will be truncated or eliminated. But while these sorts of arguments from counsel will be interesting, they may not address the factors to be decided: the most practical approach, retaining as much to the judge, or jury, as appropriate. Those are, I suggest, the bullet-point factors listed just above.

3.9.1 *The Unilogic Problem*

As noted, *Unilogic*[252] can be read to block the judge's consideration of some equitable defenses when the case is in the main legal and thus submitted to the jury.

Now, other authority makes it clear that having submitted an issue to one fact finder (say, the jury), the next fact finder (say, the judge) is bound by the first findings. So, for example, it is routine to note that the judge—having decided equitable issues—may have decided the material legal issues too, leaving nothing for the jury. So a judge could decide an issue; then empanel a jury; or the judge could hear the evidence at the same time as the jury and decide before the jury does; or allow the jury to decide legal issues and then decide the equitable issues, either independently (because the verdict is independent of the equitable issues) or as bound by the verdict (because the verdict tied the judge's hands on a decisive issue). In *Unilogic*, it seems, the jury's decision on the legal issues would bind the consideration of the equitable defenses.[253] So far so good.

What is troubling, though, is the suggestion that the trial judge did not have the *power* to decide the equitable defenses first. *Unilogic* quotes another case to the effect that the "assertion of such defenses in a law action will not . . . warrant separate and prior trial by the

252. Unilogic, Inc. v. Burroughs Corp., 10 Cal. App. 4th 612, 622 (1992).
253. *Id*. at 623.

court."[254] The quote is accurate, but unexplained and unsupported, and may conflict with CCP § 597 and the usual power of the trial judge to order proceedings.[255]

Breaking with my rule to cite only published cases, I note that others read *Unilogic* to suggest, at most, only that the trial judge had *discretion* to send the defenses to the jury:

> Notwithstanding this dicta, *Unilogic* cannot be read to stand for the proposition that Burroughs had a *right* to a jury trial on its equitable defense. The *Unilogic* court stated that," the trial court has *discretion* whether to submit an equitable defense to the jury," and that the trial court had not abused its discretion in submitting the matter to the jury.

La Jolla Cove Motel and Hotel Apartments, Inc. v. Jackman, 2006 WL 401268, at *6 (Feb 21, 2006).

But a published case's remark only increases one's anxiety level on the matter:

> As defendants note, it has been held that courts have the discretion to submit an equitable defense to the jury when the defense " 'is so intertwined with legal claims that it cannot be separately tried to the judge.' " (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 623, 12 Cal.Rptr.2d 741.)

Judicial Council of California v. Jacobs Facilities, Inc., 239 Cal.App.4th 882, 916 (2015). This seems both to confirm the *discretion* noted by *La Jolla Cove Motel*, but also suggests that jury consideration of the equitable issues may be *essential* if the equitable defense cannot be separately tried to the judge. The key here, perhaps, is to regard the phrase "so intertwined with legal claims that it cannot be separately tried to the judge" as a conclusion, and not an analysis; and to see the issue more as one of trial management.

254. *Id*. at 622, quoting Ford v. Super. Ct. In and For Sacramento Cty., 176 Cal. App. 2d 754, 759 (1959).

255. *See generally* Stephen Slesinger, Inc. v. Walt Disney Co., 155 Cal.App.4th 736, 758 (2007) ("inherent power to control litigation"); Bate v. Marsteller, 232 Cal. App. 2d 605, 617 (1965) ("trial court has power over the order of proof"); Fed. R. Evid. § 320.

3.9.2 *Special Findings and Interrogatories*

I have noted that a judge may ask the jury for special findings which resolve credibility disputes arising from conflicting evidence, all in the context of determining the meaning of a contract. Of course, a jury may decide if a contract has been breached, other related claims, many classic defenses, and contract damages.[256] Here, I focus on the jury's role in providing special findings[257] on (i) meaning and (ii) in connection with their verdict on legal claims and legal defenses. I discuss these after an aside on general issues with special findings.

3.9.2.1*An Aside on General Verdicts, Special Verdicts, and Special Findings or Interrogatories*

To provide context, I note that a *general verdict* form simply declares who wins on a cause of action: the jury simply finds for plaintiff or defendant. A *special verdict* form leads the jury through a series of (usually) 'yes/no' questions, with instructions after each as to which question to answer next. The questions resolve each material disputed fact issue necessary to generate a judgment in favor of a party, including damages,[258] and sometimes including the specific type of damages (although as we'll see next, the question which allocates damages can be thought of as a special interrogatory). *Special findings,* also called *special interrogatories*, are added to one of these other verdict forms in order to resolve additional questions, which perhaps are not, strictly speaking, needed to generate a judgment in the case. Special findings can be used to assess whether fault is really that of a master or servant, agency, comparative fault, facts which will help resolve (or indeed dispose of) alter ego, coverage and indemnity issues, and so on.[259] They might, for example, state expressly which of many breaches of fiduciary duty the jury found to be true.[260] Categories or types of damages can be distinguished by special findings,[261] and sorting damages as among claims can be

256. *E.g.*, Monster, LLC v. Super. Ct. 12 Cal. App. 5th 1214, 1228 (2017).

257. The parties should propose language. Thompson Pacific Construction, Inc. v. City of Sunnyvale, 155 Cal. App. 4th 525, 550–551 (2007).

258. Saxena v. Goffney, 159 Cal. App. 4th 316, 325 (2008).

259. *E.g.*, Serian Brothers, Inc. v. Agri-Sun Nursery, 25 Cal. App. 4th 306, 310 n.3 (1994) (findings on agency).

260. Kangarlou v. Progressive Title Co., Inc., 128 Cal. App. 4th 1174, 1179 (2005) (apparently unhappy that special findings were not sought on the issue).

261. Pressler v. Irvine Drugs, Inc., 169 Cal. App. 3d 1244, 1249 (1985).

handled this way too.[262] So too, findings needed to implement MICRA related adjustments.[263] (In practice, this sort of work is also handled in what many call the special verdict form.)

3.9.2.1.1 *Cautions*

There are risks in the use of special verdict forms and special findings that do not exist with general verdict forms. The appellate courts will make "all reasonable inferences" in favor of a general verdict form.[264] The jury will be deemed to have found whatever is necessary to support that verdict,[265] which is a difficult standard of review for the appellant.

With special findings, the appellate courts are more cautious: if the jury issued inconsistent findings, the appellate court will reverse.[266]

With a conflict between a general verdict form and special findings, the appellate court will reverse for a new trial when "the special finding when taken by itself would authorize a judgment different from that which the general verdict will permit."[267]

The trial judge may be able to avert a crisis by intervening before the jury is discharged. It is worth the time to very, very, very carefully review a special verdict form, or form including special interrogatories, to see if there are any inconsistencies, and if there are, the court can have the jury further deliberate and fix "a potentially ambiguous or inconsistent verdict."[268]

3.9.2.2 *Special Findings on Meaning*

262. Tavaglione v. Billings, 4 Cal. 4th 1150, 1152 (1993); Plut v. Fireman's Fund Ins. Co. 85 Cal. App. 4th 98, 103 (2000).

263. Fein v. Permanente Med. Grp., 38 Cal. 3d 137, 157 (1985); *see also, e.g.*, Am. Bank & Tr. Co. v. Cmty. Hosp., 36 Cal. 3d 359, 377 (1984).

264. Fuller v. Dep't. of Transp., 38 Cal. App. 5th 1034, 1039 (2019).

265. Tierney v. Javaid, 24 Cal. App. 5th 99, 113 (2018).

266. Singh v. Southland Stone, U.S.A., Inc., 186 Cal. App. 4th 338, 359 (2010); *see generally* Saxena v. Goffney, 159 Cal. App. 4th 316, 325 (2008); City of San Diego v. D.R. Horton San Diego Holding Co., 126 Cal. App. 4th 668, 679 (2005) (contrasting deference given to general verdict form to scrutiny of special verdict form).

267. Bate v. Marsteller, 232 Cal. App. 2d 605, 614–615 (1965); Wyler v. Feuer 85 Cal. App. 3d 392, 404 (1978); *see also* City of San Diego v. D.R. Horton San Diego Holding Co., Inc. 126 Cal. App. 4th 668, 679 (2005) (the "general verdict will not be set aside unless there is no possibility of reconciling the general and special verdicts under any possible application of the evidence and instructions").

268. Zagami, Inc. v. James A. Crone, Inc., 160 Cal. App. 4th 1083, 1091 (2008).

Let us return to the jury's role in providing special findings on (i) meaning and (ii) in connection with their verdict on legal claims and legal defenses. As to (i), the judge and parties can draft up straightforward questions, answered with a 'Yes/No' response; or whether a fact is true; or selecting which of two meanings it finds to be true. So if the issue of meaning is to return to the judge, the jury will be asked to state whether something is true. If the jury is to have the final say on meaning, it will pick the correct one from offered alternatives.

For example, suppose we agree you will tend my "vegetables." The judge has been convinced that "vegetable" is reasonably susceptible to meanings that include, or not, tomatoes. The EE is expert testimony that a tomato is not in fact a vegetable; and EE to the effect that you and I have previously said that tomatoes are vegetables. If the alleged breach is just that you didn't tend to the tomatoes, the jury should be asked to resolve the meaning. But if it also includes disputes about the meaning of "tend" as to which the judge has not agreed there is useful EE, or the agreement is that you will tend "all the stuff in my backyard including the vegetables" and there is disagreement on what's included in the "backyard," the judge may well ask the jury for special findings and conclude the meaning analysis on her own. Or perhaps the parties disagree whether contracted work was subject to one of many payment provisions in a contract, a determination of which is needed before other interpretation issues can be addressed, and which depends on a contested fact. Then too the judge would ask the jury for special findings.[269]

3.9.2.3 *Special Findings in Connection With Verdict on Legal Claims and Legal Defenses*

As to (ii) above (findings on claims and defenses), we are assuming the jury has first decided a legal issue, and the judge will then decide an equitable issue, e.g. the jury decides an unjust enrichment claim and the judge is to decide *in pari delicto*.[270]

One must be careful. The point here is, I suggest, only to make express what is implicit in the verdict, but not ask the jury to make

269. Dillingham-Ray Wilson v. City of L.A., 182 Cal. App. 4th 1396, 1405 (2010).

270. "In equal fault, equally culpable." BRYAN GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 460 (3d ed. 2011).

findings on facts not properly before them. This is all in aid of ensuring the judge later clearly understands what the jury has decided, what binds the judge, as the judge proceeds to decide equitable issues. These special findings, perhaps in the form of special interrogatories, are meant to make express what may be implicit, but not to interfere with the subsequent judicial task any more than is necessary.

An example might help.

The judge has decided to have the evidence presented once, the jury to return a verdict on unjust enrichment, followed by a judicial determination of *in pari delicto*. What are the special findings to be sought from the jury? Perhaps none. If the jury can make all the factual findings it needs to decide the unjust enrichment issue without attending to whether the parties are equally at fault in, say, entering into the transaction, then the jury should do so, make no special findings, and so leave the judge free to decide the *in pari delicto* issue. But if the jury must decide, for some reason, something concerning the parties' relative fault in entering into an illegal transaction, and a question entrusted to the jury depends on that finding, then special findings should be used to ensure the finding is expressly memorialized. The point is to ensure the judge does not make inconsistent findings.

3.9.3 *Staggering The Trial: A Worst-Case Scenario*

I will assume a worst-case scenario—although this is not too far-fetched. We assume:

- An integration issue: decided by the judge
- EE conflict on a fact related to meaning: decided by the jury
- Final meaning: decided by the judge
- Contract claims, breach and damages: decided by jury
- Fraud: decided by jury
- Alter ego: decided by judge
- *In pari delicto* defense: decided by judge
- Accounting claim: decided by judge

(We can make this even worse if we add a statute of frauds issue, arguably for the jury, and an issue that a party is equitably estopped from *relying* on the statute of frauds—which is for the court. But the point can be made without that.)

Some evidence of bad behavior is common to the *in pari delicto* defense, the fraud claim and alter ego; evidence is common to the fraud and contract claims, as well as to the accounting claim; perhaps some of the EE pertaining to the meaning of the contract also is relevant to the fraud claim. We might suppose some of the alter ego evidence, such as the use of company funds for personal use, is both irrelevant to the jury issues and prejudicial to an individual defendant; but some of the fraud evidence to be heard by the jury also relates to alter ego; and the same witnesses are needed for the fraud and alter ego allegations. Let's say findings on accounting - depending on what they are - might be binding on the contract claims; and vice versa. And findings on *in pari delicto* might determine the fraud claim; and vice versa.

The conundrum cannot be solved without a careful review of which witnesses are needed for each piece of the trial, and what the testimony will be in each case. The parties must provide claim-by-claim and defense-by-defense witness lists, with short descriptions of the testimony (and whether it will be presented solely by deposition). The parties also should provide the judge with their views on the extent to which a decision on one issue must (to any extent) control the result on other issues to avoid inconsistency. For example, they should state, and if they disagree then brief, whether an element of the fraud claim (or an ultimate fact on which it relies) will decide the *in pari delicto* defense, or vice versa; or e.g., whether the decision on the accounting claim must decide some element of the contract claim (or an ultimate fact on which it relies); or vice versa. We might call this an issue dependency analysis. The witness lists will help decide if a witness is needed for more than one issue and the cost (in time and witnesses testifying more than once) of phasing or bifurcation. The issue dependency analysis will help determine the order of decision-making.

The parties should be asked to confer and propose an approach: they have the power of stipulation, which can do much to reduce complexity. This is a good opportunity to see if stipulations can obviate the need for some witnesses; and perhaps to seek agreement on waiving a jury for at least some purposes after the parties contemplate the potential series of shifts of the trial from jury to judge and back again. The parties should confer and if they cannot agree, propose to the judge phases showing the total number of trial days required, when each step (scope, meaning, trial of issues etc.) will be

done, who will testify at each step, and identifying issue dependencies.

Without agreement, the judge will have to impose. There are two core types of decisions: (1) when evidence is heard: jury's evidence before judge's evidence, vice versa, or simultaneously; (2) when decisions are made: judge before jury, or vice versa. The answers may be different for different sets of issues.

In our hypothetical, given the major jury issues (e.g. contract and fraud) during which the background of the deal and the parties' interactions will be discussed, the trial will likely predominate as a jury proceeding. There will be evidence unique to accounting and alter ego and so of interest only to the judge. There are three options. (A) If there are no Ev. C. § 352 issues (it won't waste too much of the jury's time and it doesn't risk confusing the jury), the evidence for the judge can simply come in during the jury trial, with an appropriate instruction to the jury to ignore it. (B) The jury can take (say) a half day off, and the judge can hear the accounting evidence then. (C) After the jury has returned a verdict, the judge hears the unique accounting and alter ego evidence; but this will inconvenience witnesses who also testified to the jury: the witness list should suffice to determine the amount of inconvenience involved.

The real problem here is (2) above, the extent to which the jury's decision could be affected by the judge's decision, and vice versa. Under (A) and (B), the judge could actually decide the issue first, and perhaps issue a ruling that binds the jury (say, on the contract claim[271]); if (C) is used, the judge might be bound by a jury finding on contract. Deciding the timing of decisions, I suggest may be a function of two considerations: (i) the practical: when exactly will the judge write up or issue her decision on accounting? Is there time for this while the jury is empaneled? If a statement of decision is required, how will that work, given the roughly 50-day timetable that could be required?[272] Will the parties waive that timetable? And (ii) which fact finder has the better claim to predominance? Is this predominantly a contract claim, where the jury should be as free as possible to decide; or at heart an accounting case, where the judge should have as much flexibility as possible? This recommendation is a play off the "gist" approach (but not an example of it), and it's

271. The fraud claim could also be impacted. *Cf.*, Union Bank v. Super. Ct., 31 Cal. App. 4th 573, 593 (1995).

272. Cal. Rules of Court 3.1590 *ff*.

interesting to note *De Guere* [273] in which the contract claim there was said to be, in effect, one for accounting.

Most if not all of the evidence relevant to the *in pari delicto* defense is likely to be adduced during the jury trial, perhaps especially as the fraud case is presented. Here again, the difficult issue may be (2) above, the timing of decision making. Are there jury findings in connection with the fraud claim which are decisive with respect to *in pari delicto*? If the judge finds for or against the *in pari delicto* defense, must that determine the outcome of the fraud case, or an element of it? If either of these is true, then the judge must direct the order of decisions, as outlined above.

We still have to consider the postulated need for a jury to decide the credibility of EE. The problem with this is that until the parties are told what the contract means, they might have a difficult time preparing for the rest of the trial; in some cases, they may find it difficult to prepare the witnesses lists and what I have termed the issue dependency analysis. There may well be situations in which the jury can easily decide this issue, perhaps in a phased trial, with a decision on this followed by a brief hiatus before the rest of the trial starts. If not, and if the parties just won't waive a jury for this purpose, judges might consider offering bifurcation and a separate mini-trial with a small jury, an expedited jury trial with 8 members, 6 votes needed for a verdict. Jury selection is usually quick.[274] This will be useful when the review of the EE will be brief, even if some of the evidence might also be presented to the next (main) jury. While using two juries is a major cost, this approach may be worth the candle if, for example, the meaning problem is decisive, and its resolution could lead to settlement.

IV. CONCLUSION

"Step by step, the longest march . . ." [275]

The process of trying what appears to be a simple contract case is sometimes beset with time-consuming complexity, and multiple rounds of pretrial briefing, from the initial decision on determining

273. De Guere v. Universal City Studios, Inc., 56 Cal. App. 4th 482, 508 (1997).

274. Cal. Civ. Code §§ 630.01 *ff*; *see* Curtis E.A. Karnow, Expedited Jury Trials: Materials & Strategies (2019) (unpublished paper) (on file with Be Press).

275. Song popularized by Pete Seeger.

the burden of the parties in an Ev. C. § 405 hearing on integration through to the assessment whether a jury or the judge should make decisions first at trial.

Few cases will involve every step outlined here. But the lawyers generally will not have a good understanding of the pretrial considerations needed, and the judge will have to lead the discussion. Much of this work can be done pretrial in single assignment cases—indeed, months in advance of trial. But in master calendar courts where the judge gets the case on the day set for trial, the parties—and the court—may have to radically adjust their expectations on when the case will be ready for jury selection.

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