

# COLEMAN & HOROWITT

SPRING 2021 NEWSLETTER

## MEET OUR NEW ATTORNEY STEVEN C. CLARK



Steven C. Clark has 25 years of trial experience, trying to verdict numerous court and jury trials, including catastrophic injury claims and property damage claims filed against trucking companies, commercial enterprises, farming operations, multinational corporations, and individuals.

He also has significant experience litigating agricultural, crop loss, and negligent farm management cases, as well as business litigation and creditor rights matters.

Steven works in the Firm's litigation department in its Fresno office representing clients in complex business and real estate litigation, construction litigation, casualty and professional liability defense, and creditor rights matters. Steven can be reached at [sclark@ch-law.com](mailto:sclark@ch-law.com) or (559) 248-4820.

## DYNAMEX RETROACTIVE? YES, BUT...



On April 30, 2018, the California Supreme Court handed down a key decision in *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903. This ruling, a landmark in the state's labor law, set out the requirements for companies to classify workers as independent contractors. It was later made into law in 2019 by AB5.

Nearly three years later, in January of 2021, the Supreme Court in *Vasquez v. Jan-Pro Franchising International, Inc.* (2021) \_\_\_ Cal.5th \_\_\_ went even further, confirming in a unanimous ruling that the *Dynamex* holding applies retroactively. This has significant implications for all companies doing business in California. Essentially, the decision and the follow-up legislation are backed by organized labor, have their eye on the so-called "gig economy," and make it much, much harder for workers to be classified as independent contractors rather than employees. A little background. In 2018, the *Dynamex* holding replaced the so-called *Borello* standard, which established a multi-factor test for determining

whether a worker was an employee or an independent contractor, largely based on the company's control over the worker. *Dynamex* adopted a new "ABC test" which, rather than requiring a worker to prove they're an employee, assumes they are unless the employer can demonstrate that the worker is: (cont. pg 2)

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(A) not under the company's control;  
 (B) doing work that's outside the  
 company's usual course of business;  
 and (C) customarily engaged in an  
 independently established trade,  
 occupation or business.

Following this decision and the  
 enactment of AB5, a key question  
 remained unanswered – would the  
 new ruling and test be applicable  
 retroactively? In other words, could  
 the test be applied (and lawsuits be  
 filed) against companies for activities  
 prior to the issuance of the *Dynamex*  
 decision in 2018? In *Vasquez*, the  
 court responded with a firm "Yes."  
 Actually, however, it's more of a "Yes,  
 but ..."

*Dynamex* will now apply to cases that  
 were filed, but not decided, in April,  
 2018, as well as claims involving  
 events prior to April. There are,  
 however, a number of factors that  
 limit its impact. First, under  
 Proposition 22, which voters  
 approved in November of last year,  
 app-based drivers (Uber, Lyft, etc.)  
 are exempt. Second, for a variety of  
 reasons, whether *Dynamex* and  
*Vasquez* apply to a given work or

workers is very fact-based – many jobs  
 are not affected, depending on the job  
 that's being done and the nature of  
 the case.

And finally, there's the limitations  
 period. In California, the statute of  
 limitations for labor-related lawsuits is,  
 in general, three years. So, even if  
*Dynamex* is applicable, because the  
 decision was handed down on the last  
 day of April, 2018, the retroactive  
 window closed at the end of April,  
 2021.

It was thought there might be a flurry  
 of last-minute filings prior to the end  
 of April. The numbers are not yet in. If  
 you suspect the employee/  
 independent contractor issue may  
 impact you, consult with counsel.

In fact, before deciding to categorize  
 someone working for your  
 organization, you should consult with  
 counsel to make sure the person  
 qualifies as an independent contractor  
 either under the ABC test or an  
 exception to the rule.

If you have questions, contact the  
 head of our labor and employment  
 practices group, **Gregory J. Norys**, at  
 (559) 248-4820 or [gnorys@ch-law.com](mailto:gnorys@ch-law.com).

## RECENT DEVELOPMENTS

[Darryl J. Horowitt and Gregory J. Norys](#) resolved an employment/  
 unfair competition action. In the  
 action, after our client left the  
 employ of his employer, the  
 employer claimed our client  
 misappropriated the employer's  
 trade secrets. When it was clear no  
 trade secrets were misappropriated,  
 our client pursued unpaid monies  
 due to him, including the ownership  
 of the business developed by him. A  
 lawsuit was filed and mediation held.  
 Though mediation did not settle the  
 case, it brought the parties close  
 enough that a favorable settlement  
 was reached, one that was  
 significantly more than the employer  
 ever offered prior to litigation.

[David J. Weiland, Gregory J. Norys,](#)  
[and Craig A. Tristao](#) obtained a  
 favorable arbitration award. In the  
 action, our client, a construction  
 contractor, entered into a single  
 contract that required work at four  
 separate sites. After work was started,  
 the owner attempted to terminate  
 work on just one of the sites and work  
 was then shut down. Our client  
 pursued damages for work performed  
 plus lost profits. The parties mediated  
 first on the issue of damages suffered  
 and agreed that if an arbitrator  
 decided the owner breached the  
 contract, the contractor would receive  
 an agreed-upon amount. An  
 arbitration was then held and, after  
 significant briefing, the arbitrator held  
 in favor of our client.

## RECENT DEVELOPMENTS CONTINUED

[Gregory J. Norys](#) obtained a favorable settlement of an employment class action, claiming PAGA violations. In the action, our client was alleged to have incorrectly calculated the amounts owed on each payroll and provided inaccurate wage statements. An early mediation was scheduled and, after an all-day mediation that lasted into the evening hours, a settlement was reached for the entire class that was a fraction of the amount sought by the Plaintiffs.

[Darryl J. Horowitz](#) was able to obtain a favorable settlement in two real estate matters. In both, our client, a real estate agent and broker, was alleged to have failed to provide information on real property that was sold. In separate matters, the buyer sued, claiming significant damages. In each matter, a pre-lawsuit mediation was held and a settlement reached for less than defense costs. Because the mediation was held before suit was filed, the client was not required to pay a deductible.

[Jennifer T. Poochigian and Darryl J. Horowitz](#) obtained a favorable settlement in a construction dispute. In the action, our client was hired to provide some improvements to a storefront. The owner refused to pay, claiming work outside the scope of the contract was required. When the landlord did not pay, we filed a complaint. The owner then contacted us for a settlement that paid our client the principal balance due plus attorney's fees and costs.

[Darryl J. Horowitz](#) has been named a Significant Sig by the Sigma Chi Fraternity. The award is given to a limited number of distinguished alumni who have demonstrated the best attributes of a member of Sigma Chi, including contributions to the fraternity, the recipient's profession, and the community.

[C. Fredrick Meine III](#) assisted a construction contractor with renewing a judgment and then collecting it in full. After obtaining the judgment in 2010, Fred placed a lien on the debtor's real property. Just before the ten-year expiration of the lien, the debtor sought to refinance his property. Coleman & Horowitz's team renewed the lien and submitted a claim in escrow. The debtor filed papers challenging the renewal, but was defeated. When the escrow company closed the refinance without paying the client's claim, Fred was able to get the client paid through the refinancing lender's title insurance policy.

[C. Fredrick Meine III](#) assisted a client by overturning a judgment based on an erroneous worker's compensation audit. All employers are required to carry worker's compensation insurance and the insurance carriers will periodically audit the employers to confirm that the premium paid was adequate. Where the audit shows underpayment, the carrier will sue to collect any deficiency. When the client came to Coleman & Horowitz, a judgment based on an erroneous audit had already been entered. Fred convinced the carrier's attorney to set aside the default judgment on the basis the audit was erroneous and not only did the client not owe any money, but the client had overpaid and was entitled to a refund of more than \$8,000 in worker's compensation premiums. The judgment was vacated and the client recovered its overpayment.

[Craig A. Tristao](#) resolved a landlord-tenant action. In the action, our client, the owner of a property in the Bay Area, sued to evict a delinquent tenant and collect the unpaid rent. After being able to remove the tenant, Craig was able to successfully recover the overdue rent.

## FIRM AWARDS

- [The Firm has been designated one of the Top Probate Law Firms in Fresno by Expertise.com.](#) The designation was given to the top 24 of 124 probate lawyers and law firms in the Fresno area. More information can be found at [www.expertise.com/ca/fresno/ca/probate-lawyers](http://www.expertise.com/ca/fresno/ca/probate-lawyers).
- [The Firm has been named "Class Action Defense Law Firm of the Year in California" by Global Law Experts,](#) a leading publication with over 300,000 business recipients. The award highlights the firm's defense of class action matters in California.



# FRESNO COUNTY BAR ASSOCIATION PRO BONO ATTORNEY OF THE YEAR 4



Every year the Fresno County Bar Association, with the help of Central California Legal Services, gives an award to the pro bono attorney of the year. "Pro bono" is the term used to describe legal services provided free of charge.

This year, the Fresno County Bar Association will recognize our own C. Fredrick Meine III with the pro bono attorney of the year award! We congratulate Fred for the work he has done, especially for those who cannot afford it.

Fred is being recognized for his work with an elderly WWII veteran who had been fleeced by someone he thought was a friend. Fred picked up the case after

discovering that the veteran had obtained a judgment but was having trouble collecting. Fred worked to collect the judgment, but soon realized that the debtor was a lost cause with no property, no job, and a growing criminal record. Fred worked together with Janet Sheen, a paralegal at Coleman & Horowitz, to organize a GoFundMe drive and publicize the story. In the end, hundreds of people from several states contributed enough to cover the entire judgment and more.

Coleman & Horowitz attorneys often provide pro bono legal services in special cases where the need is great, but the client has no ability to pay. Fred's award is not the first for the firm. Indeed, Coleman & Horowitz has been named the pro bono law firm of the year twice.

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THIS NEWSLETTER IS INTENDED TO PROVIDE THE READER WITH GENERAL INFORMATION REGARDING CURRENT LEGAL ISSUES. IT IS NOT TO BE CONSTRUED AS SPECIFIC LEGAL ADVICE OR AS A SUBSTITUTE FOR THE NEED TO SEEK COMPETENT LEGAL ADVICE ON SPECIFIC LEGAL MATTERS. THIS PUBLICATION IS NOT MEANT TO SERVE AS A SOLICITATION OF BUSINESS. TO THE EXTENT THAT THIS MAY BE CONSIDERED ADVERTISING, THEN IT IS HEREWITH IDENTIFIED AS SUCH.

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