

# Daily Journal

C O R P O R A T I O N

DAILY JOURNAL NEWSWIRE ARTICLE

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January 09, 2009

GETTING BACK IN BUSINESS

**FORUM COLUMN**

By John H. Sullivan

State leaders reconciling California's public finances should be doing all they can to promote California's economic recovery. A start would be to send a powerful message that we genuinely welcome private investment in California employees and the production of goods and services.

California's recovery will come sooner and will be stronger if we secure increased investment and protect investment already here.

We must act soon: The UCLA Anderson Forecast released in December predicts higher unemployment in California in 2009, and then weak job growth throughout 2010 as California experiences a "jobless recovery."

At the same time, a Small Business & Entrepreneurship Council survey lists California as the second-toughest state in the nation for small businesses. A number of business group surveys this past year ranked California near the bottom in the way it promotes fair resolution of civil disputes.

Tangible legislation that will make California a more attractive place to do business is bound to result in more jobs sooner. Investors everywhere would take serious note of the following changes to improve the legal climate for business owners, bring balance to the state's class action law, and help California to become a less-litigious state.

These proposals are not new - in fact, most have been proposed in recent years, but have died in the Legislature's judiciary committees. They do not cost taxpayer dollars, nor do they reduce public health or safety. They will, however, be recognized nationally by business decision-makers, who will decide how much personnel or facilities to add or retain in California - if any - and how much to develop in another state.

Past opponents to the proposals - largely the organized plaintiffs' bar - have successfully blocked them. I hope opponents of any of these suggestions will explain their reasoning in the context of our current economic situation. Or, that opponents propose other amendments to help put people back to work by making California a more attractive place for business investment.

Consider these:

Bring more fairness to the state's class action law. A simple change would allow plaintiffs and defendants equal ability to appeal a judge's decision to "certify" a class filing. Defense and plaintiffs' lawyers have acknowledged that the situation puts defendants at a disadvantage, forcing them to undergo a costly legal challenge, regardless of whether the lawsuit has merit and even if the certification decision deserves a second look.

Courts have also recognized the problem. In a recent opinion, the 4th District Court of Appeal noted that: "Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere. ... This interaction of procedure with the merits justifies an earlier appellate look. By the end of the case it will be too late." *Starbucks Corp. v. Superior Court*, 2008 DJDAR 18131. This imbalance is known nationally. It is one of the reasons that business lawyers rank California among the worst states in class action law fairness. Correcting this disparity would send a resonating economic recovery message.

Encourage settlement of lawsuits. Taxpayers, businesses and the judicial branch benefit when a dispute can be settled short of going to court. California trial court settlement procedures and judicial rulings have encouraged and upheld mediation and arbitration. A California Supreme Court decision upholding the award of attorney fees to private lawyers whose legal action was a "catalyst" for public good conditioned that award on the lawyer's pre-litigation attempt to resolve the issue before going to court. *Graham v. DaimlerChrysler Corp.*, 34 Cal.4th 553 (2004). In a recent lawsuit against the state of California, the Supreme Court held that the *Graham* requirement to try resolving a matter before resorting to litigation only applies to "catalyst theory" cases, not categorically to all private enforcement cases. *Vasquez v. State of California*, 2008 DJDAR 17191.

The Legislature could amend the private attorney general statute to require that private lawyers should engage in reasonable attempts to settle before resorting to litigation. Doing so would send a message that California is taking a positive step toward becoming a less-litigious state.

Establish a floating post-judgment interest rate. Defendants found liable for money in a court case have a right to appeal the decision. During the time the case is on appeal, interest accrues on the amount owed, to compensate the plaintiff for lost use of the money if the lower court ruling is later upheld. California law sets this interest rate at a fixed 10 percent - a far better return than the plaintiff could expect from a traditional investment. For the defendant, this locked-in interest rate is an excessive penalty on the right to seek judicial review.

It is not just the private sector that pays California's unjustified 10 percent rate. Our public entities - the state of California, cities, counties, school districts - pay this interest too. This is money that does not go into classrooms or public services of any kind. At least 15 states have established a floating post-judgment interest rate, usually set a few points above the Prime Rate. California should adopt this fair solution.

Clarify California's employee meal and rest break rules. Every California employer is required by law to make sure his employees have time to eat and rest. Does this mean a manager must stand over each employee and make sure breaks are taken - not too soon, not too late, and not too short? The answer to this question should be a common sense one. That is in fact the case - everywhere except California. Our state's class action lawsuit industry has been thriving on the argument that to "provide" a break means to "ensure" it is taken. The result has been multimillion-dollar confrontations, confusion and lost time for owners, managers and employees. State leaders should act now to enact a crisp clarification. This will change an unfortunately strong national perception about California employment law and could prove beneficial as hiring decisions are made in the early stages of economic recovery.

These legislative changes will help put the state back on track toward economic recovery.

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