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Super Powers

Los Angeles lawyers Justin M. Goldstein (left) and Noah Pérez-Silverman discuss the inherent powers of courts to address litigation abuse page 18

by JUSTIN M. GOLDSTEIN and NOAH PÉREZ-SILVERMAN

SUPER POWERS

California courts have broad inherent powers to redress litigation misconduct

CIVIL LITIGATION is not always civil. Nevertheless, there is a line between fighting hard and cheating.

Imagine a party materially altering or fabricating evidence and presenting it as authentic, or surreptitiously reviewing and copying documents from the opposing party's briefcase, or threatening witnesses. These scenarios may seem far-fetched, but each was raised and addressed in a published decision.[1]

Litigation abuses undermine the fairness of the judicial system for the participants, and more broadly, do the same for the public's perception of the courts as a fair venue for resolving disputes. It is therefore no surprise that legislatures have empowered courts to redress misconduct.

Remedies for misconduct are often found in procedural discovery rules. California is no exception. Chapter 7 of the Civil Discovery Act identifies categories of conduct that can justify sanctions and sets forth specific measures a court can impose against "any party engaging in the misuse of the discovery process."[2]

But what of litigation misconduct that cannot be categorized as a "misuse of the discovery process"? As one court has observed, "[I]t is impossible to establish a rule of law for every conceivable situation which could arise in the course of a trial…[or] in the discovery process."[3] It seems inconceivable that there would be no remedy for a party issuing death threats to witnesses, wiretapping the opposition's attorneys, or the like.

The U.S. Supreme Court has affirmed that courts possess certain inherent powers that "necessarily result…from the nature of their institution, powers that cannot be dispensed with…because they are necessary to the exercise of all others."[4] These powers are "not confined by or dependent on statute"[5] and include the power to "fashion[] procedures and remedies as necessary to protect litigants' rights."[6]

California courts agree and have found occasion to flex their inherent powers when confronted with litigation abuses. The inherent powers of California courts include not only precluding evidence and issues but also, as confirmed recently, the power to terminate

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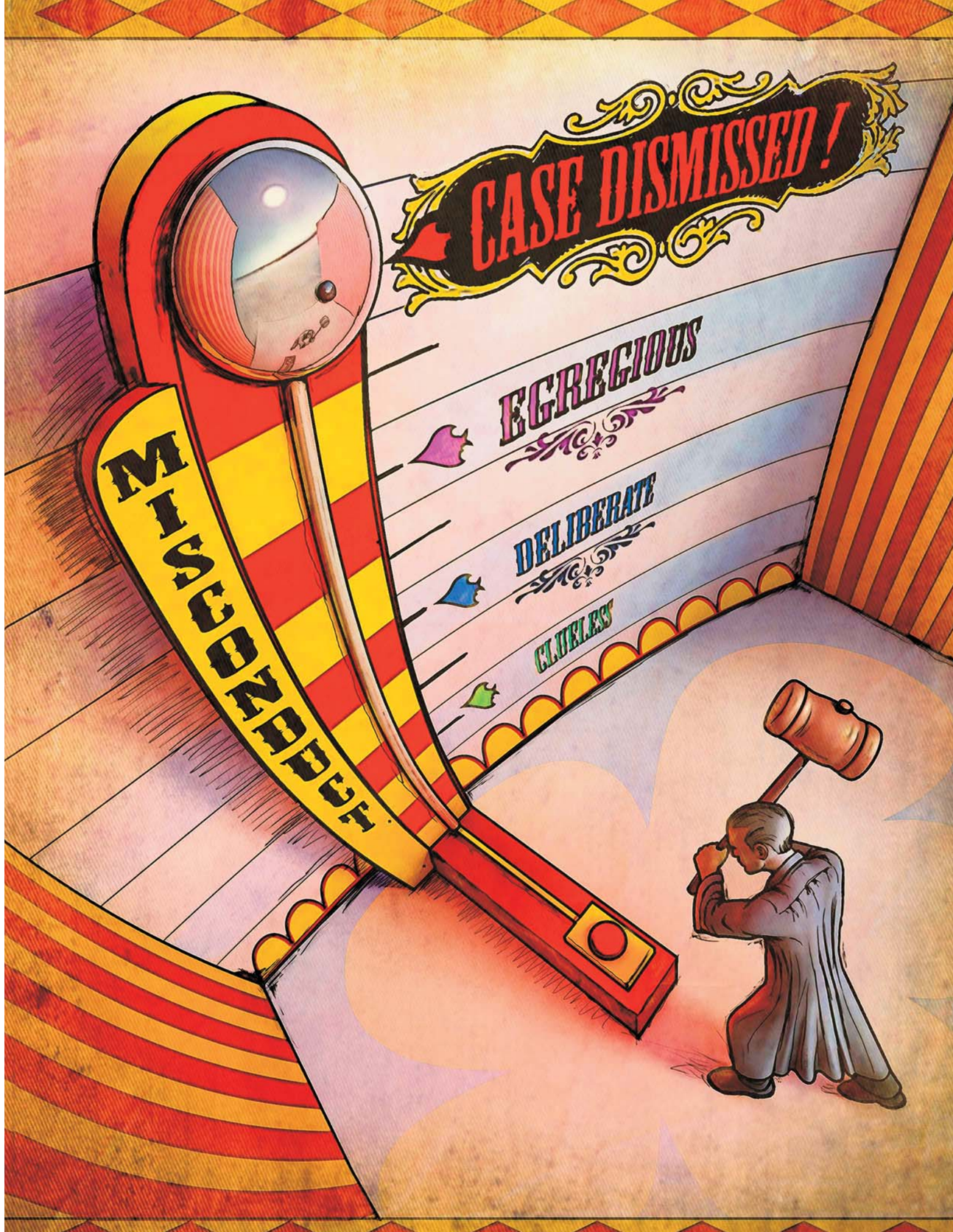


cases to redress litigation misconduct when justice requires.

The notion that courts possess inherent powers—powers separate and apart from those specifically granted to courts by legislatures—is rooted in English tradition.[7] Norman monarchs possessed absolute sovereignty, which they used to assign administrative and judicial tasks to personal ministers and advisers: "Through these councils, the king exercised his vast prerogative authority, which included guaranteeing justice and preserving the peace."[8] As these councilors evolved into more formal judges and courts, they were entrusted with judicial duties and given certain powers essential to the efficient functioning of the courts. However, these early English judges were merely the king's representatives; all their powers stemmed from the king's absolute authority.

The Magna Carta affirmed for the first time that there existed laws even the king must obey. Over the next several centuries the notion of a constrained monarch became more potent. As judges gradually became more independent, a shift took place from allegiance to a particular king to allegiance to the impersonal concept of "the Crown" and, ultimately, to "the law."[9] As a result, judicial powers once merely derivative of the monarch's supreme power became viewed as the "inherent powers" of the court.[10]

The U.S. Constitution established the American judiciary as a separate branch of government with even greater autonomy. As early as 1812, the U.S. Supreme Court acknowledged that Article III federal courts possessed inherent powers: "Certain implied powers must necessarily result to our Courts of justice from the nature of their institution.…[O]ur Courts no doubt possess powers not immediately derived from statute." The Court described those powers as ones that "cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[11]

The same is true of California courts. They were created by the California Constitution[12] and are deemed to have inherent powers "not confined by or dependent on statute."[13] Moreover, the California Legislature has expressly recognized these powers. For example, in addressing the issue of dismissing cases for failure to prosecute, the legislature stated its clear intention not to interfere with the courts' inherent powers: "This chapter does not limit or affect the authority of a court to dismiss an action or impose other sanctions…under inherent authority of the court."[14] The legislature was similarly cautious in its general guidelines for handling the dismissal of cases: "The provisions of this section shall not be deemed to be an exclusive enumeration of the court's power to dismiss an action or dismiss a complaint as to a defendant."[15]

The California Supreme Court has recognized two types of inherent powers: 1) "courts' equitable power derived from the historic power of equity courts," and 2) "supervisory or administrative powers which all courts possess to enable them to carry out their duties."[16] The latter powers, in particular, enable a court to "control litigation before it, to prevent abuse of its process, and to create a remedy for a wrong even in the absence of specific statutory authority."[17]

Redressing Litigation Misconduct

Over the last century, there has been no shortage of reported decisions describing a court's exercise of inherent powers to redress litigation misconduct. For approximately the last 20 of those 100 years, arguably the most important decision in California on the inherent authority of courts was *Peat, Marwick, Mitchell & Co. v. Superior Court*.[18] In *Peat, Marwick*, the state of California sued accounting firm Peat, Marwick for having negligently performed an audit. The state retained the accounting firm Main Hurdman as an expert. Shortly after its retention, however, Main Hurdman began secretly negotiating with Peat, Marwick over a potential merger. Neither Main Hurdman nor Peat, Marwick informed the state of the intended merger. In fact, when news of the merger prematurely leaked to the press, Main Hurdman assured the state that there was no truth to the "rumors." Formal announcement of the merger came almost a year later.

The court exercised its inherent power to sanction Peat, Marwick for having interfered with the state's expert relationship—conduct that the court deemed an "abuse of the litigation process."[19] To "prevent the compromise of confidential information and to preserve the integrity of the judicial process," the court precluded Peat, Marwick from presenting any evidence controverting certain elements of the plaintiff's case.[20] Beyond its core holding, what made the *Peat, Marwick* decision so influential was its thorough treatment of the reach of courts' inherent powers.

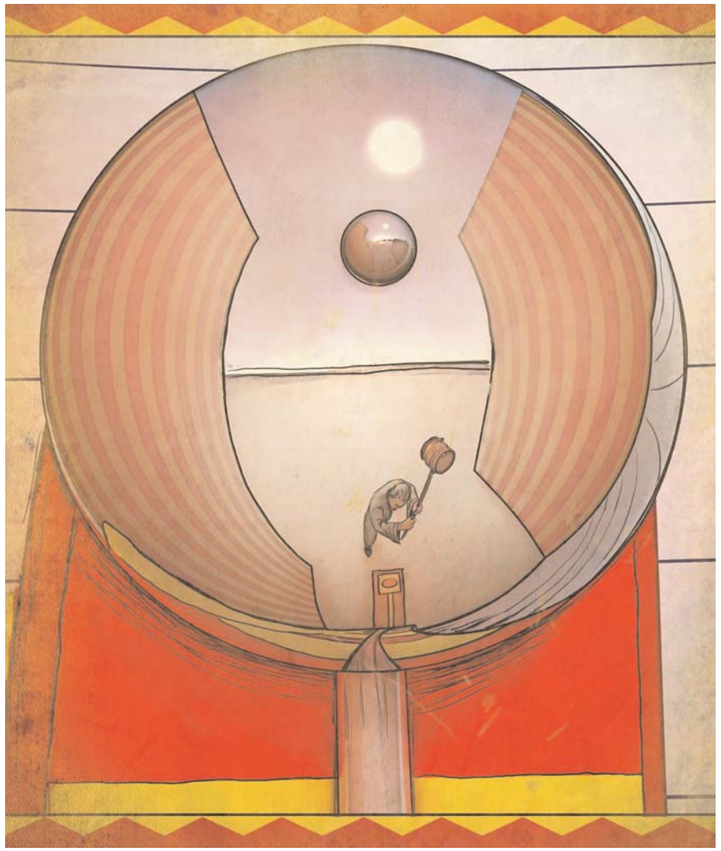
The *Peat, Marwick* court recognized that inherent powers "have been flexibly applied in response to the many vagaries of the litigation process" and reasoned that there is no "intrinsic limitation" that would justify restricting their application to redressing only specific types of litigation abuse.[21] Invading or damaging a party's unique relationship with its expert, the court found, is fundamentally no different from disadvantaging a party by destroying evidence.[22] Nor did the court find due process considerations to be an insurmountable obstacle to the exercise of inherent powers: "We cannot accept the notion that due process of law entitles a litigant to present certain evidence after it has compromised its opponent's ability to counter that evidence with the sort of litigation abuse found in this case."[23] When a party seeks to take unfair advantage or "the integrity of the judicial system" is at risk, the *Peat, Marwick* court affirmed that judges are empowered to act.[24]

The *Peat, Marwick* decision drew heavily from prior California decisions addressing California courts' inherent powers to respond to "the many vagaries of the litigation process." These include *Conn v. Superior Court*, in which a court exercised its inherent powers to require the return of documents wrongfully taken by an employee from his former employer's office.[25] The *Peat, Marwick* decision has been cited on numerous occasions by courts assessing whether and how to apply their inherent powers to redress litigation abuses.[26] However, until recently, no published decision had directly tackled the question of whether the arsenal of inherent powers includes the authority to terminate a case for litigation misconduct. Enter the long-standing *Stephen Slesinger, Inc. v. Walt Disney Company* royalty dispute concerning the Winnie the Pooh children's stories.[27]

In 2004, the trial court imposed a terminating sanction against Stephen Slesinger, Inc., based on its finding that SSI engaged in severe and irremediable litigation misconduct.[28] Among its findings, the court concluded that SSI had 1) hired an investigator who wrongfully obtained Disney documents, 2) reviewed privileged and confidential Disney papers, and 3) materially altered evidence in an effort to conceal its possession of confidential Disney documents.[29] In granting the terminating sanction, the trial court made clear that it was "[e]xercising its inherent powers to preserve and protect the integrity of the judicial process."[30] This gave the court of appeal an opportunity to address whether trial courts have the inherent power to dismiss litigation based on misconduct—a question the court described as one of "first impression."[31]

Although no published California decision had affirmed a court's exercise of inherent power to grant a terminating sanction to redress litigation abuses, California courts have long-recognized inherent powers to terminate cases for other reasons. If a litigant unreasonably delays in prosecuting its case, or pursues a "sham, frivolous or wholly vexatious" claim or defense, California courts have the inherent power to dismiss the entire action.[32]

California courts also have given strong indications that the inherent power to dismiss should be extended to redressing litigation misconduct. For example, one court of appeal upheld the exercise of inherent authority by a peer review panel to terminate an administrative proceeding based on findings of discovery delays, violations of orders, and disruptive behavior.[33] The court likened the inherent powers of administrative officers to those of judges, and found that "hearing officers must have the power to control the parties and prevent deliberately disruptive and delaying tactics. The power to dismiss an action and terminate the proceeding is an important tool that should not be denied them."[34] During the pendency of the *Slesinger* appeal, another division of the California Court of Appeal affirmed that trial courts "have inherent authority to dismiss an action," even though the dismissal in that case was based on statutory authority.[35]



Courts from other jurisdictions have also found that their inherent powers extend to termination. Federal courts have regularly exercised inherent powers to terminate cases for all manner of litigation misconduct, including the manufacturing of evidence,[36] perjury in discovery responses,[37] and bad faith delay.[38] The same is true of state courts around the country.[39]

Three-Part Standard

In the end, the *Slesinger* court concluded that California courts necessarily must have the power to dismiss cases for pervasive litigation abuse. The court established a three-part standard for determining when a court may exercise its inherent power to terminate. A party's misconduct during the course of litigation must:

1) Be "deliberate."
2) Be "egregious."
3) Render "any remedy short of dismissal inadequate to preserve the fairness of the trial."[40]

In *Slesinger*, the court found that SSI's abuses were sufficiently deliberate and egregious, and no remedy short of dismissal could preserve the fairness of trial. Thus, the court concluded that dismissal was warranted under its new standard.

The standard is notable for several reasons. First, it sets the bar. No prior court in California had articulated what conditions would justify exercising the court's inherent power to dismiss a case for misconduct. Until *Slesinger*, no appellate court had reason to do so.

Second, the *Slesinger* court did not expressly adopt a standard articulated by courts from other jurisdictions. For example, Florida courts have ruled that dismissal is appropriate when the conduct of the litigant shows "[a] deliberate and contumacious disregard of the court's authority,…bad faith, willful disregard or gross indifference to an order of the court, or conduct which evinces deliberate callousness."[41] In Maryland, a dismissal for litigation misconduct is "warranted only in cases of egregious misconduct such as willful or contemptuous behavior, a deliberate attempt to hinder or prevent effective presentation of defenses or counterclaims, or stalling in revealing one's own weak claim or defense."[42] The Ninth Circuit has stated that federal courts "have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice."[43] Had the court explicitly adopted another jurisdiction's standard, decisions from that jurisdiction would have become more relevant.

Finally, the *Slesinger* court explicitly made dismissal an appropriate remedy only when no lesser remedy would guarantee fairness. This criterion sets California apart from many jurisdictions—including federal courts—which seem to allow room for courts to exercise the inherent power to dismiss even when it is not absolutely necessary to do so. Dismissals for misconduct in other jurisdictions may explicitly serve as a form of punishment or deterrence. According to the U.S. Supreme Court, for example, "The most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."[44] A number of state courts have concluded likewise.[45]

Slesinger is the only published California state court appellate decision upholding the invocation of inherent powers to dismiss a case based on litigation abuses. Still, California courts have recognized and applied the three-part standard.[46]

One court even intimated that the standard may apply to any exercise of inherent power to sanction based on litigation misconduct.[47] In *New Albertsons, Inc. v. Superior Court*, the trial court imposed an evidentiary sanction after finding the defendant destroyed security camera footage despite having received a request for its production. The court of appeal reversed because the destruction of video footage was deemed not to constitute "egregious misconduct."[48] The court

also did not consider the sanctions to be "necessary to ensure a fair trial."[49] Based on those findings, and relying on *Slesinger*, the court reversed the lower court's use of inherent powers to sanction.[50] Only time will tell whether the three-part standard will emerge as the yardstick for California courts to assess all nonmonetary sanctions for litigation abuse.

Limitations on Inherent Judicial Powers

Although broad, courts' inherent powers are not limitless. They can, for example, be circumscribed by legislation. In *McMahon v. Superior Court*, the court of appeal reversed a trial court's exercise of inherent authority to shorten the statutory notice period for a summary judgment motion.[51] The court held that even when legislative acts bear directly on inherent judicial powers, lawmakers may exercise "a reasonable degree of regulation" of the judiciary—so long as the statutes do not "materially impair the constitutional functions of the courts."[52] This ruling is consistent with the California Supreme Court's general caution that "inherent powers should never be exercised in such a manner as to nullify existing legislation or frustrate legitimate legislative policy."[53]

The inherent power of federal courts are subject to even greater legislative control. That is because the U.S. Supreme Court is the only constitutionally created federal court. All other federal courts are "ordained and established" by Congress.[54] Thus, for example, even though the power of contempt is considered "inherent in all courts [and] essential to the preservation of order in judicial proceedings," the Supreme Court held that Congress could nevertheless regulate that power's application in circuit and district courts because those courts' "powers and duties depend upon [Congress] calling them into existence."[55]

The judiciary itself also can set limits on its inherent powers. California courts have imposed one important doctrinal limitation with implications for parties confronted with litigation misconduct. In *Bauguess v. Paine*, the California Supreme Court ruled that trial courts lack the inherent power to award attorneys' fees based on misconduct.[56] The supreme court recognized the American Rule, which makes each party responsible for its own fees, absent an agreement or statutory basis.[57] But that point did not prove dispositive. The court observed that even when no agreement or statute exists, a trial judge has inherent supervisory power to "take appropriate action to secure compliance with its orders, to punish contempt, and to control its proceedings." However, the court concluded, "It would be both unnecessary and unwise to permit trial courts to use fee awards as sanctions apart from those situations authorized by statute."[58]

Driving this determination were due process concerns about fee awards without statutory safeguards, as well as the prospect of a chilling effect on attorneys' zealous advocacy. According to the court, "The use of courts' inherent power to punish misconduct by awarding attorneys' fees may imperil the independence of the bar and thereby undermine the adversary system." Tempered by procedural safeguards, courts already have "ample power to punish the misconduct by contempt."[59]

That the *Bauguess* court spoke of monetary awards as a way to "punish" misconduct helps reconcile this decision with other decisions giving trial courts broad inherent powers to dismiss and impose evidentiary sanctions to redress litigation abuse.[60] In California, courts have the inherent power to impose nonmonetary sanctions to remedy threats to the judicial system and rebalance the process when one party takes unfair advantage. It makes sense to exclude monetary sanctions from the court's inherent powers to the extent they are viewed solely as a form of punishment. This analysis helps explain why California courts do not have the inherent power to impose monetary sanctions to redress misconduct but federal courts do.[61] Federal courts are permitted to use their inherent power to impose sanctions to punish or deter.[62]

Nevertheless, this analysis is not entirely satisfying because courts could conceivably award nonpunitive monetary sanctions—for example, if the sanction were designed merely to compensate a party for fees incurred as a direct consequence of misconduct by the opposing party. California courts have not carved out an exception to permit the exercise of inherent powers to grant purely restorative monetary sanctions.

At least three explanations for this inaction seem to emerge from California decisions. The first is a concern about abuse, absent statutory safeguards. The *Bauguess* court commented that if it "were to hold that trial courts have the inherent power to impose sanctions in the form of attorneys' fees for alleged misconduct, trial courts would be given a power without procedural limits and potentially subject to abuse."[63] Second, courts seem to view the inherent power to impose nonmonetary sanctions to redress misconduct as more "necessary." The *Slesinger* court observed that the *Bauguess* decision described the inherent power to impose monetary sanctions as "unnecessary" in light of courts' contempt power.[64] In contrast, the court described the inherent power to terminate litigation when deliberate and egregious misconduct renders any lesser sanction inadequate to be "essential for the court to preserve the integrity of its proceedings." This power, according to the court, "restores balance to the adversary system when the misconduct of one party has destroyed it."[65] Finally, the California Legislature has "expressly acknowledged the inherent power of courts to dismiss," but has not done so with respect to monetary sanctions.[66]

In fact, since the *Bauguess* decision, the legislature took a number of steps to ensure that trial courts have statutory authority to impose monetary sanctions for different forms of misconduct. For example, the legislature enacted Code of Civil Procedure Section 128.5, giving courts broad authority to impose monetary sanctions for "bad faith actions or tactics." The legislature specifically observed that this power was "now not presently authorized by the interpretation of the law in *Baug[u]ess v. Paine*."[67] Section 128.5 was later superseded by Section 128.7, which was modeled after Rule 11 of the Federal Rules of Civil Procedure and remains in place today. Section 128.7 grants more limited authority to impose monetary sanctions than Section 128.5 and also provides greater procedural safeguards by allowing an offending filing to be withdrawn without consequence. This and other authorities like Section 177.5 and Rule 2.30 of the California Rules of Court (formerly Rule 227), which authorize imposition of monetary sanctions for certain forms of litigation impropriety, further underscore "the Legislature's acceptance of [the *Bauguess* court's] core holding that trial courts may not award attorney fees as a sanction for misconduct absent statutory authority (or an agreement of the parties)."[68]

The inherent powers of California courts provide an important check on litigation abuses. Recent decisions underscore this fundamental fact, even as the contours of the courts' inherent powers continue to evolve. ■

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[1] *See*, *e.g.*, Aoude v. Mobil Oil Corp., 892 F. 2d 1115 (1st Cir. 1989); R.S. Creative, Inc. v. Creative Cotton, Ltd., 75 Cal. App. 4th 486 (1999); Perna v. Electronic Data Sys. Corp., 916 F. Supp. 388 (D. N.J. 1995); Cummings v. Wayne County, 533 N.W. 2d 13 (Mich. Ct. App. 1995).

[2] Civil Discovery Act, ch. 7, CODE CIV. PROC. §§2023.010-2023.040. *See* CODE CIV. PROC. §2023.010 (listing specific discovery abuses potentially justifying sanctions); CODE CIV. PROC. §2023.030 (catalogue of remedies).

[3] Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983).

[4] Stephen Slesinger, Inc. v. Walt Disney Co., 155 Cal. App. 4th 736, 758 (2007) (quoting United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812) (internal quotations omitted)).

[5] Walker v. Superior Court, 53 Cal. 3d 257, 267 (1991).

[6] Slesinger, 155 Cal. App. 4th at 762.

[7] *See* Robert J. Pushaw Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) (providing historical overview

of courts' inherent powers).
[8] *Id*. at 800.
[9] *Id*. at 806.
[10] *Id*. at 810.
[11] United States v. Hudson & Goodwin, 11 U.S. 32, 34 (1812).
[12] CAL. CONST. art. VI, §1.
[13] Walker v. Superior Court, 53 Cal. 3d 257, 267 (1991).
[14] CODE CIV. PROC. §583.150.
[15] CODE CIV. PROC. §581(m).
[16] Peat, Marwick, Mitchell & Co. v. Superior Court, 200 Cal. App. 3d 272, 287 (1988) (internal quotations omitted).
[17] Western Steel & Ship Repair, Inc. v. RMI, Inc., 176 Cal. App. 3d 1108, 1116-17 (1986).
[18] Peat, Marwick, 200 Cal. App. 3d 272. For the factual background of the case, *see generally id*. at 276-83.
[19] *Id*. at 289.
[20] *Id*. at 275.
[21] *Id*. at 287-89.
[22] *Id*. at 289.
[23] *Id*. at 290.
[24] *Id*. at 289.
[25] Conn v. Superior Court, 196 Cal. App. 3d 774 (1987).
[26] *See*, *e.g*., Silvestro v. Bondex Int'l, Inc., 2005 WL 2435833, at *2-4 (Cal. App. 2d Dist. 2005); Hilton v. Bressler, 2008 WL 2526241, at *4 (Cal. App. 2d Dist. 2008).
[27] Stephen Slesinger, Inc. v. Walt Disney Co., 155 Cal. App. 4th 736 (2007).
[28] *Id*. at 755-56.
[29] *Id*. at 741-56.
[30] *Id*. at 756.
[31] *Id*. at 740.
[32] *See*, *e.g*., Estate of King, 121 Cal. App. 2d 765, 774 (1953); Karras v. Western Title Ins. Co., 270 Cal. App. 2d 753, 757 (1969).
[33] Mileikowsky v. Tenet Health Sys., 128 Cal. App. 4th 531 (2005).
[34] *Id*. at 561.
[35] Del Junco v. Hufnagel, 150 Cal. App. 4th 789, 799 (2007).
[36] Aoude v. Mobil Oil Corp., 892 F. 2d 1115, 1118-22 (1st Cir. 1999).
[37] Martin v. DaimlerChrysler Corp., 251 F. 3d 691, 694-95 (8th Cir. 2001).
[38] Woodson v. Surgitek, Inc., 57 F. 3d 1406, 1417-18 (5th Cir. 1995).
[39] See, *e.g*., Schultz v. Sykes, 638 N.W. 2d 604, 610 (Wis. Ct. App. 2001); Tramel v. Bass, 672 So. 2d 78 (Fla. Dist. Ct. App. 1996); Rockdale Mgmt. Co. v. Shawmut Bank, N.A., 418 Mass. 596 (1994); Cummings v. Wayne County, 210 Mich. App. 249 (1995).
[40] Stephen Slesinger, Inc. v. Walt Disney Co., 155 Cal. App. 4th 736, 764 (2007).
[41] Tramel, 672 So. 2d at 83.
[42] Klupt v. Krongard, 126 Md. App. 179, 202 (1999).
[43] Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F. 3d 337, 348 (9th Cir. 1995).
[44] NHL v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976).
[45] *See*, *e.g*., Tramel, 672 So. 2d at 84 (Florida); Abtrax Pharms. v. Elkins-Sinn, 139 N.J. 499, 517-18 (1995) (New Jersey).
[46] In re Sepuya, 2009 Cal. App. Unpub. LEXIS 6173, at *13-14 (July 30, 2009) (unpublished); In re Marriage of Jayraj & Bindu Nair, 2010 Cal. App. Unpub. LEXIS 1658, at *12-13 (Mar. 9, 2010) (unpublished); Union Carbide Corp. v. Superior Court, 2010 Cal. App. Unpub. LEXIS 326, at *16-17 (Jan. 15, 2010) (unpublished).
[47] *See* New Albertsons, Inc. v. Superior Court, 168 Cal. App. 4th 1403 (2008).
[48] *Id*. at 1434.
[49] *Id*.
[50] *Id*. The court also concluded that a court order violation was required to impose evidentiary sanctions under the relevant statute. *Id*. at 1431-34.
[51] McMahon v. Superior Court, 106 Cal. App. 4th 112, 118 (2003).
[52] *Id*. at 117.
[53] Ferguson v. Keays, 4 Cal. 3d 649, 654 (1971) (citing Martin v. Superior Court, 176 Cal. 289 (1917)).
[54] U.S. CONST. art. III.
[55] Ex Parte Robinson, 86 U.S. 505, 510-11 (1873).
[56] Bauguess v. Paine, 22 Cal. 3d 626, 637-39 (1978).
[57] *Id*. at 634; CODE CIV. PROC. §1021.
[58] Bauguess, 22 Cal. 3d at 637.
[59] *Id*. at 638.
[60] *See also* Andrews v. Superior Court, 82 Cal. App. 4th 779, 782 (2000) (observing that the *Baugess* court "made it clear that a punitive monetary sanction" is not authorized under inherent powers of the court).
[61] Chambers v. NASCO, Inc., 501 U.S. 32, 45-46 (1991).
[62] NHL v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976).
[63] Bauguess, 22 Cal. 3d at 638.
[64] Stephen Slesinger, Inc. v. Walt Disney Co., 155 Cal. App. 4th 736, 760-61 (2007).
[65] *Id*. at 761.
[66] Clark v. Optical Coating Labs., Inc., 165 Cal. App. 4th 150, 165 (2008).
[67] Trans-Action Commercial Investors, Ltd. v. Jelinek, 60 Cal. App. 4th 352, 367 (1997) (quoting 1981 Cal. Stat. ch. 762, §2, at 2968).
[68] Clark, 165 Cal. App. 4th at 164.