# California Appellate Splits of Authority to Watch in 2026

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The California Courts of Appeal issue nearly 8,000 written opinions a year, so disagreements are inevitable. And California has no rule of horizontal stare decisis—its intermediate appellate courts are free to disagree when they have good reason. *See Sarti v. Salt Creek Ltd.*, 167 Cal. App. 4th 1187, 1193 & n.4 (2008). Important legal questions can turn on geography or luck of the draw until the Supreme Court steps in. *See* Cal. R. Ct. 8.500(b)(1). This article, the first in a series, canvasses splits in California law. Here are three civil splits of authority worth watching in 2026, spanning entertainment, free speech, consumer protection, and fee recovery.

## 1. Anti-SLAPP Applicability to Idea Theft (*Desny*) Claims

When creatives submit an idea with the expectation of compensation if used, California law allows them to enforce that implied contract when their idea is stolen. *Desny v. Wilder*, 46 Cal. 2d 715 (1956). But do such claims "arise from" protected speech activity for purposes of the anti-SLAPP statute, Cal. Code Civ. Proc. Section 425.16, enacted decades after *Desny?* California courts are divided.

The Ninth Circuit and several divisions of California's Second District Court of Appeal have held that the anti-SLAPP law does not apply to *Desny* claims. *See Jordan-Benel v. Universal City Studios,* 859 F.3d 1184 (9th Cir. 2017); *Kaplan v. NBCUniversal Media*, No. B313911, 2023 WL 4858526, at *9 (Cal. Ct. App. July 31, 2023); *Oldman v. Bates*, No. B296539, 2020 WL 1482343, at *3 (Cal. Ct. App. Mar. 27, 2020); *Shame on You Prods., v. Lakeshore Ent. Grp.,* No. B279896, 2018 WL 4690884, at *9 (Cal. Ct. App. Oct. 1, 2018). Under this line of authority, the wrong complained of is the defendant's failure to pay, not the creative act of executing the idea, e.g., making the film or show. The filmmaking is just evidence of liability or a step in the causal chain leading to nonpayment.

By contrast, two divisions of the Second District hold that *Desny* claims do arise from protected speech because the defendant's creative work is inseparable from the claim. *See Norman v. Ross*, 101 Cal. App. 5th 617 (2024); *Musero v. Creative Artists Agency,* 72 Cal. App. 5th 802, 816, 820 (2021).

This split creates significant uncertainty for California's creative industries and anyone who pitches ideas, from Hollywood to Silicon Valley.

## 2. Definition of "Unfair" Business Practices Post-Cel-Tech

California's Unfair Competition Law (UCL) prohibits "unfair" business practices, Cal. Bus. & Prof. Code Section 17200, but courts are divided on what "unfair" means in consumer cases—a question with enormous practical implications for consumer class actions statewide.

In *Cel-Tech Communications v. Los Angeles Cellular Telephone,* 20 Cal. 4th 163 (1999), the Court adopted a test for "unfair" conduct in UCL cases between competitors: conduct that threatens an antitrust violation, violates the policy or spirit of antitrust laws, or otherwise significantly threatens or harms competition. The court limited this holding to competitor cases, leaving unresolved what test applies in consumer cases.

Before *Cel-Tech*, courts applied a balancing test weighing the utility of the defendant's conduct against the harm to the plaintiff. The *Cel-Tech* Court criticized this test as "too amorphous" and providing "too little guidance," but declined to address whether these criticisms extend to consumer cases. This has produced a three-way split among the Courts of Appeal.

The first line of authority extends *Cel-Tech's* tethering requirement to consumer cases, requiring that unfairness claims connect to constitutional, statutory, or regulatory provisions. *See, e.g.*, *Gregory v. Albertson's,* 104 Cal. App. 4th 845 (2002).

The second line of authority maintains that the pre-*Cel-Tech* balancing test, weighing the utility of conduct against consumer harm, still applies. *See, e.g.*, *Progressive West Ins. v. Superior Court*, 135 Cal. App. 4th 263 (2005).

A third line adopts a three-part test derived from FTC jurisprudence, asking whether the practice causes substantial injury that consumers cannot reasonably avoid and that is not outweighed by countervailing benefits. *See, e.g.*, *Camacho v. Automobile Club of Southern California*, 142 Cal. App. 4th 1394 (2006).

The Court in *Capito v. San Jose HealthCare System, LP*, 17 Cal.5th 273, 284–288 (2024) seemed poised to answer the question these authorities left open but stopped short of resolving the split.

The lingering uncertainty forces both plaintiffs' and defense counsel to argue in the alternative, complicates settlement negotiations, and leaves businesses guessing at compliance standards. As *Bardin v. DaimlerChrysler*, 136 Cal. App. 4th 1255 (2006) observed twenty years ago, California Supreme Court guidance is long overdue.

## 3. Prevailing-Party Fee Awards to Attorneys Who Represent a Spouse

In *Trope v. Katz*, 11 Cal. 4th 274 (1995), the Court held that self-represented attorneys cannot recover fees as a matter of public policy—including treating pro se attorneys on equal footing as other pro se litigants—and because they have not literally "incurred" any such fees. The lower courts have split on whether and when *Trope* should apply to attorneys who successfully represent spouses in litigation.

One line of authority holds that where spouses' interests are "joint and indivisible," the attorney-spouse cannot recover fees for either party. *See Gorman v. Tassajara Development*, 178 Cal. App. 4th 44 (6th Dist. 2009); *Gillotti v. Stewart*, 11 Cal. App. 5th 875 (3d Dist. 2017); *Honchariw v. PMF CA REIT,* 117 Cal. App. 5th 827 (2d Dist. 2025).

A competing line holds that a fact-based inquiry is required: if a genuine attorney-client relationship exists between the spouses, fees may be available—analogous to how pro bono counsel and in-house counsel may recover fees despite not "incurring" out-of-pocket expenses. *See Rickley v. Goodfriend*, 207 Cal. App. 4th 1528 (2d Dist. 2012); *Gogal v. Deng*, 112 Cal. App. 5th 1161 (4th Dist. 2025); *see also PLCM Group v. Drexler*, 22 Cal. 4th 1084 (2000) (in-house counsel); *Lolley v. Campbell*, 28 Cal. 4th 367 (2002) (pro bono).

In a third, overlapping line, *Rickley* and *Gillotti* recognize that fees may be appropriate when attorney-spouses pursue litigation vindicating the public interest.

The inconsistency in appellate decisions means that spousal fee recovery depends on geography rather than a uniform standard. Until the California Supreme Court resolves the split, litigants should argue each line of authority in the alternative to maximize their chances of prevailing.

Disclosure: I am counsel for the petitioners in *Honchariw v. PMF CA REIT*, No. S295127, which is pending before the California Supreme Court and contributes to this split.

## Conclusion

Splits in authority create uncertainty, but they also create opportunities to shape the law and seek clarity from the state's highest court. Stay tuned.

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