

## **OUR FIRM**

Nemecek & Cole was established in 1984 by its two founding members, Frank W. Nemecek and Jonathan B. Cole. Since its formation, Nemecek & Cole has evolved from a two attorney boutique to a mid-size law firm that is recognized as one of Southern California's preeminent professional liability and business litigation firms servicing clients nationwide from its Sherman Oaks, California office. Our clients include some of the most prominent and established professionals, businesses, major companies and insurance companies in Southern California and the nation. Our attorneys are seasoned trial lawyers who have tried dozens of cases to defense verdict and handled in excess of 100 appeals before all courts. We have made significant impact in the law through our appellate advocacy and are responsible for numerous published decisions in the areas of professional liability, employment, business litigation, transportation and insurance coverage. Our attorneys have published extensively and have been featured multiple times in The Los Angeles Daily Journal and Verdicts & Settlements. In recognition of our commitment to excellence, our members have been repeatedly recognized as "Super Lawyers" and "Rising Stars" by Southern California's Super Lawyers magazine and have consistently ranked among the top 25 law firms in the San Fernando Valley by the San Fernando Valley Journal.

## **OUR PHILOSOPHY**

Nemecek & Cole is recognized and respected in the legal community for its aggressive advocacy, dedication to excellence and uncompromising work ethic. We are a result-oriented firm focused on offering personalized service to our clients to achieve the best possible outcome. Whether we are called upon to negotiate and resolve disputes pre-litigation or to litigate a case through trial, our focus is always on achieving the client's objectives through the most efficient and economic means possible. Where pre-litigation resolution is not feasible, we believe in taking a proactive approach to litigation. We recognize that litigation can be an emotional and financial drain on our clients and we strive to dispose of claims during the early stages of litigation, leaving little to be tried.

## **OUR PRACTICE AREAS**

Nemecek & Cole's practice areas include the following:

- Professional Liability
- Business and Commercial Litigation
- Insurance Coverage and Bad Faith Litigation
- Real Estate Litigation

- Construction Defect Litigation
- Labor and Employment Litigation
- Technology and Intellectual Property Litigation
- Transportation & Logistics Litigation
- Personal Injury
- Appellate Practice

### **PROFESSIONAL LIABILITY**

Nemecek & Cole is a recognized leader and expert in the professional liability arena. We have successfully represented hundreds of professionals in arbitrations, state and federal trial courts and before the California Court of Appeal and Supreme Court. We have a diverse professional liability practice that includes representation of the following professionals:

- Attorneys and Law Firms
- Accountants and Business Managers
- Directors and Officers
- Brokers and Agents
- Trustees and other Fiduciaries

### **Representation of Attorneys and Law Firms**

Nemecek & Cole devotes a significant part of its professional liability practice to the defense of legal professionals. As the “lawyers for lawyers,” we are called upon daily to advise and represent attorneys from all fields of the legal profession. We represent some of the most prominent and high profile lawyers and law firms in Southern California and the nation in all aspects of litigation, including legal malpractice, conflict of interest, breach of fiduciary duty, fraud, abuse of process, defamation and malicious prosecution litigation. We also advise our clients on risk management issues, ethics issues, partnership disputes, employment compliance, and other matters affecting their practice. Because attorney liability often implicates the “case within a case,” our attorneys are well versed in many areas of the law. We have successfully handled hundreds of claims arising out of underlying family law, tax, estate planning, probate, commercial litigation, bankruptcy, business, entertainment, copyright and transactional matters, among others. We have set significant legal precedent in the attorney malpractice arena and are

responsible for the following published decisions:

- *Leasequip, Inc. v. Dapeer* (2003) 103 Cal.App.4th 394, which held that certain circumstances an attorney may be equitably estopped from asserting the statutes of limitations as a defense.
- *Howard v. Superior Court* (1992) 2 Cal.App.4th 745, which held that a suit against an attorney for "aiding and abetting" a client's fraud is analogous to a suit against an attorney based upon "conspiracy" with a client for purposes of determining applicability of former *California Civil Code* Section 1714.10.
- *Waxman v. Boren, Elperin, Howard & Sloan* (1990) 221 Cal.App.3d 519, which held that an extension to respond to a cross-complaint does not bar discretionary dismissal of a claim pursuant to *California Code of Civil Procedure* Section 583.510.

Our success is attributable not only to our results and legal precedent we set, but to the personalized service we offer our clients. We recognize that our clients find litigation disruptive and an attack on their reputation in the legal community. We work closely with our clients to implement a strategy that serves their needs and disposes of the litigation quickly and efficiently with minimal disruption to their practice. Whenever possible, we negotiate confidential settlements on behalf of our clients in order to protect their privacy interests. We foster close relationships not only with our attorney clients, but also with numerous professional liability carriers. We have panel counsel relationships with the following major professional liability carriers and numerous others across the nation:

- Lawyers Mutual Insurance Company (one of the largest errors and omissions carriers in the State of California)
- Chubb Group of Insurance Companies
- Carolina Casualty Insurance Company
- Great American Insurance Company
- St. Paul Insurance Company
- Admiral Insurance Company
- First Mercury Insurance Company
- James River Insurance Company
- Underwriters at Lloyd's London (various)

- Evanston Insurance Company
- Westport Insurance Company
- Navigators Insurance Company
- Swiss Re Insurance Company
- Farmers Group of Insurance Companies

#### **Representation of Accounting and Business Management Firms**

Nemecek & Cole represents accounting and business management firms in a variety of matters, including malpractice, fraud, unfair business practices, securities violations, conflict of interest, breach of fiduciary duty and other tort litigation. We also counsel our accounting and business manager clients on issues involving standard of practice, ethics, dissolution, employment and business practices. Our expertise in professional liability has proven invaluable in representing our accounting clients during litigation, as well as in advising them on non-litigation matters involving professional liability, accountants' duties, risk management and prevention, and other issues affecting their practice.

#### **Representation of Directors and Officers**

In an ever-changing business environment, directors and officers are often faced with issues and strategic decisions that expose them to personal liability. Nemecek & Cole counsels and represents directors and officers in a wide variety of litigation in both state and federal courts. The firm's representation is vast and includes securities and shareholder litigation, derivative actions, corporate disputes, fraud, indemnity and other matters. The firm also counsels and advises directors and officers regarding their corporate duties and ways to minimize the risk of personal liability.

#### **Representation of Brokers and Agents**

Oftentimes, brokers and agents find themselves at risk of defending against claims of errors and omissions and unprofessional conduct. Nemecek & Cole represents and counsels both brokerage firms and individual brokers and agents in a variety of fields. The firm has served as legal counsel to some of the major agencies and brokerage firms, as well as individual real estate brokers and agents, loan officers, consultants, insurance brokers and agents, financial planners and advisors, among others. Our representation of brokers and agents extends to all types of litigation, including breach of contract, negligence, fraud, breach of fiduciary duty, failure to disclose, misrepresentation and other matters. We also counsel our broker and agent clients on compliance issues, disclosure requirements, fiduciary obligations and disciplinary issues. We

also present seminars on current developments and changes in the laws that assist our clients in avoiding liability.

### **Representation of Trustees and Other Fiduciaries**

Fiduciary litigation is a fast growing area. Fiduciaries entrusted with authority over the management and distribution of a person's wealth are increasingly subjected to claims by beneficiaries and others claiming entitlement to the assets or property of an estate. Nemecek & Cole represents all types of fiduciaries, including guardians, executors, trustees, administrators and other representatives. We handle a myriad of fiduciary litigation involving wills, trusts, guardianships and estates. We represent fiduciaries in multiple types of disputes involving the standard of care, compensation, will contests, fraud, breach of fiduciary duty, negligence, allegations of self-dealing and conflict of interest and litigation over the interpretation and validity of estate planning instruments.

### **LABOR AND EMPLOYMENT**

Virtually every employer will agree that litigation can not only be costly, but can jeopardize an employer's relations with its employees and the community in general. We assist employers in minimizing the risks of litigation by offering educational counseling and advice that is designed to ensure that employers have the appropriate policies and procedures in place. Our services include the following:

- Reviewing policies and procedures to ensure that they are compliant with existing laws and regulations.
- Advising clients on recent developments in the law that impact employment practices.
- Training human resources personnel on how to minimize and properly respond to employee complaints, grievances and claims.
- Ensuring that employers have proper grievance and reporting procedures.
- Presenting seminars that guide employers in understanding compliance with current state and federal laws, wage and hour issues, sexual harassment, discrimination, wrongful discharge, retaliation, employee privacy rights, and leaves of absence, among other issues.

Even with preventative measures in place, employers may not always be able to avoid litigation. When litigation is threatened, employers should be equipped to respond with competent, effective legal representation. Nemecek & Cole has successfully represented hundreds of employers ranging from individuals and small businesses to Fortune 500 companies

in a wide variety of industries. Our attorneys have extensive litigation experience before administrative agencies, state and federal courts and appellate courts. Our representation extends to virtually all areas of labor and employment law, including the following:

- Wrongful Termination and Discharge
- Discrimination
- Sexual Harassment
- Wage and Hour and Employee Benefits Litigation
- Contract Disputes

We have set legal precedent in the employment arena through the following published decisions:

- *Richard Green v. Ralee Engineering Company* (1998) 19 Cal.4th 66, which is the first case under contemporary California law to hold that "public policy" enunciated in administrative regulations (in addition to statutes and constitutional provisions) may support a cause of action for wrongful termination in violation of public policy.
- *Larry Le Bourgeois v. Fireplace Manufacturers, Inc., et al.*, (1998) 68 Cal.App.4th 1049, which is the first case to hold that individual supervisory personnel cannot be held personally liable for (i) disability discrimination under the Americans with Disabilities Act; and (ii) a violation of public policy under the California Fair Employment and Housing Act. The *Le Bourgeois* case also sets forth proper procedures for an employer faced with an employee returning from long term disability leave.

Our attorneys continue to be on the cutting edge of employment litigation and stay informed of the daily decisions handed down by the state and federal courts affecting employers nationwide.

## **BUSINESS AND COMMERCIAL LITIGATION**

Business litigation is an inherent risk in the operation of any establishment. For decades, businesses from all industries have relied on Nemecek & Cole for sound legal advice and effective representation. Our trial lawyers are members of the American Board of Trial Advocates and the Association of Business Trial Lawyers and have tried dozens of business litigation matters to verdict. We represent a broad range of businesses ranging from individual establishments to major companies across the country in all forums, including mediations, arbitrations, state and federal courts and courts of appeal. We specialize in complex business

litigation and handle a broad variety of complex litigation matters involving partnership and shareholder dissolutions, unfair business practices, unfair competition, creditor/debtor disputes, lender liability claims, fraud, breach of contract and class actions.

The firm also represents various corporate, business and financial institutions in commercial litigation, collection of unpaid legal fees and creditor matters. Our attorneys are well versed in California pre and post-judgment attachment laws, having handled in excess of 250 contested attachment proceedings. We not only successfully bring commercial litigation matters to judgment, but successfully implement enforcement of judgment procedures to ensure that our clients are awarded their monetary recovery under the judgment. We have cost effectively collected millions of dollars for our clients.

Our commercial litigation practice also includes litigation of matters involving insurance agents and brokers going "out of trust." We have successfully obtained both state court and non-dischargeable bankruptcy court judgments against agents who have breached their fiduciary obligations to insurance companies by misappropriating trust dollars. We have collected hundreds of thousands of dollars on behalf of our clients through our negotiation and collection efforts.

### **REAL ESTATE LITIGATION**

Real estate litigation is a core component of our practice. Our attorneys handle real estate litigation at every level and in all aspects of the industry. We represent lenders, developers, investors, brokers, landlords, buyers and sellers of real estate, homeowners and other real estate clients in all types of complex real estate litigation. Our skilled attorneys handle disputes arising out of limited partnership syndications, commercial leases, construction litigation, purchase and sale contracts, quiet title actions, unlawful detainers, fraudulent transfers and various other real estate matters. We have successfully represented our clients in mediations, arbitrations and in litigated proceedings before state and federal courts. As a result of our advocacy, we have achieved significant monetary awards and settlements on behalf of our clients.

### **PERSONAL INJURY**

The firm has experience in prosecuting and defending personal injury actions. The firm has successfully handled innumerable contested personal injury actions before juries, courts and arbitrations. Nemecek & Cole has developed a unique approach individually tailored to its clients, which allows these claims to be aggressively defended in a surprisingly cost effective manner. The firm recently succeeded in obtaining a \$6,250,000.00 personal injury settlement against the Los Angeles Police Department. Nemecek & Cole's aggressive and innovative litigation tactics are tailored made for the success of prosecution and defending personal injury actions.



## **TECHNOLOGY AND INTELLECTUAL PROPERTY LITIGATION**

In today's business world, the importance of technology and the Internet cannot be overlooked. Nemecek & Cole recognizes that businesses and employers rely heavily, and oftentimes exclusively, on the Internet and technology to operate their business. Our attorneys are experienced in handling technology and intellectual property matters and are well versed in the intricacies of this area of the law.

We have handled a broad spectrum of computer and intellectual property matters involving, among other things, e-commerce, software and databases, Information Technology and the Internet. We also represent individuals, businesses and employers of all sizes in employment related technology issues. We counsel and advise our clients not only on the issues facing them in today's technological world, but also handle a broad spectrum of technology and intellectual property litigation, including software development, content creation, copyright, trademarks, contracts, employment, licensing, entertainment and video gaming, risk management, and the Internet. We have successfully represented individuals, Internet companies, financial institutions, start-ups, businesses of all sizes and other enterprises in their technology and intellectual property related litigation. We recognize that the goals of each client are different and utilize state-of-the-art computer systems and research capabilities to meet each client's unique needs.

## **INSURANCE COVERAGE AND BAD FAITH LITIGATION**

The direct representation of insurers and policyholders in coverage disputes and litigation comprises a significant part of Nemecek & Cole's practice. Our attorneys have significant experience in litigating claims arising out of all types of insurance policies, including professional liability, directors and officers, homeowners, auto, commercial property and casualty, comprehensive general liability, workers' compensation and EPLI policies.

A substantial portion of our insurance practice is devoted to the defending insurers in "bad faith" litigation. We have successfully defended insurers and their agents in numerous insurance "bad faith" actions involving allegations of improper claims handling, excessive reserving practices and failure to pay earned dividends. We also defend insurers in claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, infliction of emotional distress and unfair business practices.

Our attorneys also have significant experience representing policyholders in insurance coverage matters, both with regard to defense of covered claims as independent or Cumis counsel and in matters involving the failure to defend or indemnify (third party claims). We counsel and advise our clients on issues relating to the unreasonable adjustment of first party



property damage and business interruption claims. In particular, our attorneys have enjoyed great success litigating large scale first party commercial claims involving earthquake, water damage, mold, construction defects, slope failures and other catastrophic losses.

We also assist our clients in policy interpretation by providing insurance policy and coverage analysis. As coverage counsel, we provide coverage opinions and prosecute and defend declaratory relief, subrogation and contribution actions. We take pride in providing a full service insurance practice and achieving the objectives of our insurer and policyholder clients through the most expedient and cost-effective means. Our attorneys provide frank, "no-nonsense" advice that, in the long run, best serves the industry as a whole. Our advocacy has resulted in the following published decisions:

- *Continental Casualty Company v. Robsac Industries*, 947 F.2d 1367 (9<sup>th</sup> Cir. 1992), the leading decision in the area of insurance coverage concerning doctrine of abstention as it relates to parallel state and federal proceedings between an insurer and an insured.
- *Mt. Hawley Insurance Company v. FSLIC*, 695 F.Supp. 469 (9<sup>th</sup> Cir. 1987), insurance coverage case interpreting the "insured versus insured exclusion" in an errors and omissions policy where the FSLIC has stepped into the shoes of the insured for the purposes of bringing litigation.
- *Watts v. Farmers Insurance Exchange*, 98 Cal.App.4th 1246 (2002), analyzing insurance coverage as applied to an "innocent co-insured" under a homeowners policy.
- *Reagen's Vacuum Truck Service v. Beaver Insurance Company*, 31 Cal.App.4th 375 (1994), holding that an insurer need not provide a defense under an employer's liability policy, for a claim of intentional aggravation of injury, nor for a cross-claim for indemnity arising out of such an injury.

## **CONSTRUCTION DEFECT LITIGATION**

Nemecek & Cole has developed substantial expertise in the defense of all phases of construction defect litigation. Nemecek & Cole attorneys have successfully defended general contractors, architects, engineers, subcontractors and materialmen in complex, multi-party litigation involving both residential and commercial construction projects. Nemecek & Cole recognizes that, in this type of litigation, parties with minimal liability are often brought into the claim for the sole purpose of extracting a settlement contribution. The firm prides itself on being able to extract its clients from the litigation in the most expedient and cost-effective manner. We take an aggressive position in enforcing indemnity provisions and additional insured endorsements and have successfully collected on money judgments on behalf of our clients. We

also take an active role in counseling our clients on risk assessment and avoidance.

Since the firm utilizes state-of-the-art computer systems and research capabilities, Nemecek & Cole has the capability of defending general contractors and major sub-contractors in the most document intensive cases from inception through trial, without substantial costs being passed on to the client.

### **APPELLATE PRACTICE**

Nemecek & Cole's appellate department has handled over 100 appeals before the United States Supreme Court, the Ninth and Tenth Circuit Court of Appeals, the United States Tax Court, the California Supreme Court and the California Court of Appeals. Our attorneys are responsible for over 20 published opinions and made headlines and significant impact in the law through their skilled appellate advocacy. Some of the significant reported decisions include the following:

#### **United States Supreme Court**

- *Ulysses Tory v. Johnnie L. Cochran, Jr.*, 544 U.S. 734, 125 S.Ct. 2108 (2005), addressing the question of whether injunctive relief may ever constitutionally be awarded as a remedy for defamation. The case arose out of Nemecek & Cole's successful prosecution of a defamation action on behalf of the famed criminal defense attorney, Johnnie L. Cochran, Esq. The firm obtained an injunctive relief order in the trial court and successfully defeated a challenge to that order in the California Court of Appeal.

#### **Ninth Circuit Court of Appeals**

- *White v. Mayflower Transit, L.L.C.*, 543 F.3d 581, (9<sup>th</sup> Cir.(Cal.) Sep 12, 2008), holding in a matter of first impression, that a shipper's claim for intentional infliction of emotional distress is preempted by the Carmack Amendment to the Interstate Commerce Act.
- *Hall v. North American Van Lines, Inc.*, 476 F.3d 683, (9<sup>th</sup> Cir.(Cal.) Jan 29, 2007), holding that a shipper's claim for damages against a motor carrier are "completely preempted" by the Carmack Amendment for the purposes of determining a federal court's removal jurisdiction.
- *Katzir's Floor and Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143 (9<sup>th</sup> Cir. 2004), reversing an order adding individual and alleged successor corporation as judgment debtors on a default judgment as a violation of due process and otherwise improper.
- *Continental Casualty Company v. Robsac Industries*, 947 F.2d 1367 (9<sup>th</sup> Cir. 1992),

the leading decision in the area of insurance coverage concerning doctrine of abstention as it relates to parallel state and federal proceedings between an insurer and an insured.

- *Mt. Hawley Insurance Company v. FSLIC*, 695 F.Supp. 469 (9<sup>th</sup> Cir. 1987), insurance coverage case interpreting the “insured versus insured exclusion” in an errors and omissions policy where the FSLIC has stepped into the shoes of the insured for the purposes of bringing litigation.
- *Allen v. Crocker National Bank*, 733 F.2d 642 (9<sup>th</sup> Cir. 1984), discussing whether there is a private right of action against banks for paying tax refund checks improperly cashed by taxpayers’ former attorney.

#### **Tenth Circuit Court of Appeals**

- *Cal-Am Corporation v. Spence*, 659 F.2d 1034 (10<sup>th</sup> Cir. 1981), successful defense of sublessor assignor of oil and gas lease against claims for royalties and damages.

#### **United States Tax Court**

- *Naftel v. Commissioner of Internal Revenue*, 85 T.C. No. 30 (1985), establishing jurisdiction of Tax Court to include specific credits in deficiency computation.

#### **California Supreme Court**

- *Green v. Ralee Engineering Company*, 19 Cal.4th 66 (1998), establishing that “public policy” for purposes of a claim for wrongful termination in violation of public policy, may derive from administrative regulations, as well as statutes and constitutional provisions.

#### **California Court of Appeal**

- *Lincoln Place Tenants Ass’n v. City of Los Angeles*, 130 Cal.App.4th 1491, 31 Cal.Rptr.3d 353 (2005), land use case interpreting and applying terms of environmental impact report prepared for redevelopment project.
- *Inline, Inc. v. A.V.L. Holding Co.*, 125 Cal.App.4th 895 (2005) holding that the restitution remedy authorized by the unfair competition law (UCL) in the Business and Professions Code section 17203 does not include the reimbursement of money expended by a plaintiff to recover property from a third party or the fair market value of property wrongfully disposed of by the defendant.

- *Leasequip, Inc. v. Dapeer*, 103 Cal.App.4th 394 (2002), applying principles of estoppel to bar attorney from asserting statute of limitations defense to a legal malpractice claim.
- *Watts v. Farmers Insurance Exchange*, 98 Cal.App.4th 1246 (2002), analyzing insurance coverage as applied to an “innocent co-insured” under a homeowners policy.
- *Reliance Ins. Co. v. Superior Court*, 84 Cal.App.4th 383 (2000), holding that intervention by an insurer is permitted where the insurer remains liable for any default judgment against the insured, and it has no means other than intervention to litigate liability or damage issues.
- *LeBourgeois v. Fireplace Manufacturers, Inc.*, 68 Cal.App.4th 1049 (1998), rejecting efforts to impose personal liability for discrimination on individual supervisory personnel and articulating proper procedures to be followed when an employee returns from long term disability leave.
- *Reagen’s Vacuum Truck Service v. Beaver Insurance Company*, 31 Cal.App.4th 375 (1994), holding that an insurer need not provide a defense under an employer’s liability policy, for a claim of intentional aggravation of injury, nor for a cross-claim for indemnity arising out of such an injury.
- *Kane v. Hurley*, 30 Cal.App.4th 859 (1994), overturning an order of sanctions payable to the court, made pursuant to *Code of Civil Procedure* Section 128.5.
- *Howard v. Superior Court*, 2 Cal.App.4th 745 (1992), applying former *Civil Code* Section 1714.10 (restricting claims of conspiracy against lawyers) to a suit against an attorney for “aiding and abetting” a client’s fraud.
- *Waxman v. Boren, Elperin, Howard & Sloan*, 221 Cal.App.3d 519 (1990), acknowledging a right to a discretionary dismissal of a claim pursuant to *Code of Civil Procedure* Section 583.510, notwithstanding extension of time to respond to cross-complaint.
- *McIntosh v. Bowman*, 151 Cal.App.3d 357 (1984), challenging finding that jury trial had been waived.