WAGNER KIRKMAN BLAINE
KLOMPARENS & YOUMANS LLP
ATTORNEYS AT LAW


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### ▪ General Information

Douglas E. Kirkman is a Partner in the firm's General Civil Litigation department. Mr. Kirkman has extensive experience handling some of the toughest complex business cases that have been litigated in this region.

Complex business cases can be some of the most difficult types of litigation to handle. These cases often involve thousands of documents, require hundreds of hours of depositions, require weeks in trial before juries, and have millions of dollars at stake.

While no one who actually tries these complex cases to verdict can say they've won them all, Mr. Kirkman has a track record in complex business litigation that demonstrates hard-nose tenacity, and a very high success rate.

### ▪ Practice Areas

**Construction Defect/Construction Product Litigation**

Shipping Port Case: The installer of pavers for one of the largest shipping ports on the west coast blamed his inability to complete the machine installation of pavers on alleged manufacturing defects in the product. The installer hired a Florida attorney who had recovered multimillion dollar judgments from nationally known product manufactures, and had published several books on product and construction litigation. The exposure to the client was estimated at $8 to 10 million. Over 60 days of depositions were taken, including plaintiff's experts who were reportedly among the world's top "paver" experts. The client had significant exposure because of difficult ambiguities contained in the contract documents and because of the way the national "paver" institute technical manufacturing specifications had historically been written to determine whether pavers were within tolerance for "bellies" or "settling" during the manufacturing process. This litigation was watched closely by the entire industry, and it ultimately changed the way the national paver instituted wrote their specification for ASTM tolerances for pavers which are mass produced. Mr. Kirkman filed a motion on the eve of trial asking the case be dismissed because the plaintiff had failed to comply with his person-most-knowledgeable duties by claiming "I don't know" or "I don't recall", or words to that effect, several thousand times in two days of deposition testimony after he got caught in a lie. The case settled after the court announced an intention to grant the motion. The plaintiff received nothing on his multi-million dollar claim against the firm's client. Instead, the plaintiff had to pay money to the firm's client on its cross complaint. The defense was considered to be a tremendous success for this important firm client, whose products and reputation were totally vindicated.

Sewer Pipe Installation Case: A Northern California City needed to reconfigure its entire city sewer system. It specified clay pipe, the big ones, which are manufactured by one of the firm's clients. Immediately after installation of several miles of this pipe it was found to be leaking severely. The city filed suit against everyone involved, including the firm's client which had manufactured and supplied the clay pipe. Mr. Kirkman asserted that the clay pipe was not defective, and that the leakage was due to improper installation. While clay pipe can be compromised (cracked) if not properly installed, (if not imbedded and supported properly) it will last forever and always outlasts concrete pipe, if installed properly. Mr. Kirkman's investigation led him to believe that tremendous amounts of water intrusion at several locations, including those which were proximate to several manholes, would prove that the large cracks in the "bell" end of the pipe had been caused by improper installation. Mr. Kirkman recommended that his client spend the money to have several of the manhole installations forensically exhumed. This expenditure proved that the cracking had been caused by improper installation of the manhole, which had allowed the entire manhole to tilt, which caused the failure. This totally vindicated the pipe manufacturer, and demonstrated that the installer was totally responsible, and that the pipe was free of defects.

Mr. Kirkman has successfully defended numerous other similar construction product defect claims. His clients have never been successfully prosecuted for construction product defect claims when Kirkman supervised the litigation.

Mr. Kirkman has successfully defended, or obtained his clients insurance coverage or defense at the expense of the clients' insurers in cases involving numerous construction defect claims. These have involved claims asserting liability as high as $100 million in exposure, all of which have been resolved in a fashion that was favorable to the client.

**Insurance Coverage**

Any time you're named as a defendant in a case someone should determine whether your primary or excess liability insurer may be obligated to provide a defense or indemnity. The firm has extensive experience on this issue. One of Mr. Kirkman's most notable cases involved the pollution exclusion clause. The firm's client purchased land from a company that had operated a motor oil reclamation facility on the site for over 25 years. The client leveled the site, and began operating its own facility on the site. The client eventually sold this property to a local developer who purchased it without conducting soils testing. After such testing was conducted, it was determined that the client's predecessor-in-interest had dumped vast quantities of used motor oil by-product into the dredger tailings, which contaminated the aquifer. The estimated cost of clean-up was in the tens of millions. The purchaser immediately sued the firm's client for rescission of the deal. Mr. Kirkman filed suit for indemnity against the client's insurer, which defended on the "pollution exclusion" clause, which excluded from coverage any "release" of pollutants into the environment which was not "sudden" or "accidental". The insurer claimed that because the predecessor had deliberately dumped the pollutants into the aquifer the exclusionary clause applied. The insurer won summary judgment at the trial court level. Mr. Kirkman recommended that an appeal be filed. Mr. Kirkman's appeal claimed that the words "sudden" and "accidental" were ambiguous, that the word "sudden" could have more than temporal significance, (that it could simply mean "unexpected" or "surprise", which it was to the firm's client) and that Mr. Kirkman's client was entitled to coverage. Mr. Kirkman asserted that the insurer couldn't afford to let this case go to decision by the court of appeal, as there was a claim by a notorious polluter right behind it who would have loved to have Mr. Kirkman's case open the door to this potentially landmark interpretation of the pollution exclusion clause. The insurer had such great concern about the probable success of the appeal that the day before the hearing on the appeal the insurer paid sufficient money on the policy that the client was

able to get the purchaser to drop his rescission action, and agree to defend and indemnify the firm's client from all responsibility for the pollution. This saved the client potentially tens of millions in exposure for clean up costs. This case served as the roadmap which allowed one of the area's largest polluters to obtain a defense at its insurer's expense based upon similar arguments. Using the strategy employed by Mr. Kirkman in defense of the firm's client, this case significantly changed the landscape of insurance law in the pollution exclusion area.

The firm normally has several insurance related cases in progress. Currently for example Mr. Kirkman is prosecuting major litigation against an insurance agency and a major insurer for failing to meet a contractual commitment to provide an insured with fire loss coverage which was "equivalent" the coverage which another insurer had provided, for less money.

**Arbitration**

One of the firm's clients suffered a very adverse binding arbitration award of nearly $4 million. Such awards are much more difficult to avoid than superior court verdicts (which are only successfully appealed about 5% of the time) because arbitrators generally can't be reversed by appellate courts for failure to follow the law as is the case with lower court decisions. Usually the only ground for avoiding a binding arbitration award is proof that the arbitrator failed to disclose some conflict. The client came to Mr. Kirkman to see whether there was anything that could be done. Mr. Kirkman determined that the litigant who prosecuted the case didn't have the requisite contractor's license which was required under the circumstances. This defense was more difficult to present at this stage than it would have been had it been asserted at the arbitration. Mr. Kirkman filed a motion to set aside the arbitration award the same time that the previously victorious side filed its motion to confirm the award. Mr. Kirkman argued that the strong public policy against allowing persons who should be licensed to prosecute claims overshadowed the strong public policy favoring the finality and lack of appeal ability for error of law for final arbitration awards. Mr. Kirkman was able to settle the case for a small fraction of the amount of the award. The opposing attorney in that case was a respected professor of law who is considered to be a top expert in his field. The result is highly unusual because under the circumstances it's considered to be nearly impossible to get such an award overturned. While this case never resulted in a published opinion which resolved this conflict because it was resolved prior to the time the trial court reached a decision on the confirmation requests, it was of landmark significance because of the intersection of two very strong public policies—that which the California Supreme Court had made clear that if favored the finality of binding arbitration awards, and the strong public policy against allowing contractors without licenses to pursue breach of construction contract claims.

**Contract Litigation**

One of the firm's clients made a "paper napkin" deal with its neighbor to trade some legal rights to use of the other's property in exchange for some parking rights on the client's property. The adverse party hired renowned real estate counsel to formalize the agreement. That counsel put provisions in the formal agreement which had not been discussed or agreed upon, so the clients managing partner refused to sign the agreement which included these terms. The other party's attorney wouldn't budge. Months later, the managing partner, who was a practicing lawyer, noted at the last minute that he had to sign this contract or the major loan the business had been seeking would be denied. So he signed, allegedly under "duress". Worse yet, he went and got the signatures of numerous of his co-owners. This same lawyer later came to Mr. Kirkman and wanted him to pull off a miracle and have the now-fully executed contract declared to be "void" because he had been forced to agree to the other party's terms through "economic coercion". The trial judge was extremely skeptical of our chances at the outset, but we asked him to keep an open mind. Mr. Kirkman's

cross examination of the renowned lawyer who had represented the other side turned the tide. The client ultimately received a favorable jury verdict, the contract was set aside, and substantial damages were recovered. This case was remarkable precisely because it was a lawyer who executed the contract after sitting on it for months, nevertheless we were able to get him out of the contract on the ground that he had had an "economic" gun to his head. In other words, this case was viewed as nearly impossible to win. The lawyer continues to use the firm for all his litigation needs.

Mr. Kirkman recently defended sellers of a large business who were accused by the buyers of fraudulently misrepresenting material facts concerning the business, including its historical income, and the use of undocumented immigrants as workers. Although a settlement conference judge had predicted a verdict in favor of the buyers in the multimillion dollar range, after an eight week jury trial the purchasers received nothing on their complaint, and the firm's client received a very large award on its cross-complaint. This case was remarkable because the lawyer for the purchaser had previously obtained a large award against these clients in another case years earlier, when they were represented by different counsel.

**Legal Malpractice**

Mr. Kirkman obtained a large settlement against a California lawyer who tried to dupe his cable television company client out of millions of dollars in recoveries obtained in successful lawsuits against governmental entities. That happy client referred one of the Cayman Islands largest private landowners who had been subjected to a similar scheme by its lawyer. These two suits alone resulted in the settlements valued at in excess of $20 million. On the eve trial in the second matter, Mr. Kirkman obtained signed acknowledgments by the lawyer that he had tried to defraud the clients.

**Real Estate Litigation**

Mr. Kirkman has been involved in some of the largest real estate litigation cases in the Northern California area. He helped bring an extremely rapid and successful conclusion to a dispute involving one of Sacramento's largest home builders, and two of Sacramento's largest companies by forcing the matter into binding arbitration over the developer's objection. This caused a "class III" case (rated very complicated by the courts) which would otherwise have taken years to get to trial, to be successfully concluded within a few months, at a costs savings of hundreds of thousands to the client. The firm was able to maximize the expertise from its transactional side by using the tax experts to counter the adverse party's in-house genius CPA who had helped his client dupe the firm's clients out of large sums of money based on hidden ambiguities which were contained in the parties governing agreements which had been drafted by another law firm. This is just one of many examples of how the firm's dual capability, that is a strong "transactional" and strong "litigation" section complement one another.

**Real Estate Broker Liability**

Recently a prominent real estate broker was hit with a multimillion dollar judgment due to poor representation by another law firm, who failed to even answer requests for admission on time. As a result the court announced an intention to award punitive damages against the broker for most likely in excess of $3 million. Mr. Kirkman was asked to come in just weeks before the trial on the punitive damages phase. He kept the award down to $100,000. This was a major victory because Mr. Kirkman had to fight hard to convince the judge to depart from his mindset to award $3 million in $3 million in punitive damages.

Mr. Kirkman has extensive experience in representing brokers both as plaintiffs and as defendants. Mr. Kirkman has successfully recovered commissions for brokers when their clients try to avoid just obligations to the brokers, and Mr. Kirkman has successfully defended brokers from liability claims.

**Lender Liability/Debtor-Creditor**
The firm frequently gets retained to assist its clients in litigation against its lenders, both as defendants and as plaintiff or cross-complainant.

Due to the recent economic downturn Mr. Kirkman been engaged to prosecute or defend large numbers of cases involving real estate foreclosure, guarantor liability, receiverships, and related claims against banks. The firm has extensive experience defending against receivership actions, as well as guarantor liability claims, in both state and federal courts. The firm has substantial experience litigating the "sham" guaranty defense, which may call into question the validity of a guaranty where the lender seeks to hold the true obligor liable for greater amounts on a guarantee than would be attainable directly against the primary borrower, who is entitled to the benefits of anti-deficiency legislation. In one recent case Mr. Kirkman tested the very foundation of the industries' so-called "mezzanine" lending practice. In this matter the lender decided that the real property which was to serve as security wasn't adequate for the size of the loan requested by the borrower, so it suggested that a "mezzanine" lender should be brought in to make up the difference between what the borrower wanted and what the bank was willing to loan. Right up until the time the loan was to be funded the bank and the mezzanine lender led the borrower to believe that it would be the principle obligor. Then at the last minute the lenders instructed the borrower to create some new entities, one to own the land, another to own the new entity that would own the land, with the original landowner and original "borrower" to now be relegated to the role of "guarantor". Mr. Kirkman alleged that this was nothing other than a scheme by the lenders to avoid the anti-deficiency protections that the borrower would have enjoyed. The mezzanine lender claimed that this structure was the one always used by the mezzanine lending industry. Mr. Kirkman said that may be the case, but he emphasized that critical evidence suggested that this so-called mezzanine lender was actually the senior lender in disguise, as they shared the same headquarters address, had common employees, and other factors. While the issues never reached the stage of a published opinion, so they were not finally resolved, the mezzanine lender agreed to take a $400,000 payment as a settlement in lieu of its $4.475 million unpaid loan balance claim. Mr. Kirkman has received requests from several local law firms for copies of the briefing he filed in this case. He has received numerous referrals from local lawyers based on his activities in pursuing claims of this type against lending institutions.

Mr. Kirkman has had as many as 30 cases going at one time representing debtors who were resisting efforts by banks to foreclose or collect upwards of $750 million in total. Mr. Kirkman has successfully resisted lender's efforts to obtain court appointment of receivers, or at least he has resisted bank efforts to obtain excessive and overbroad receiver powers in about half of the cases where banks have applied for receiverships. Banks frequently seek appointments of receivers on what's called an "ex parte" basis, meaning that they notify you only 24 hours in advance they're going into court the next morning, and the afternoon before they serve you with 30 pounds of paper, and you have to have your opposition ready by 8 am the next morning. Even though this gives banks a tremendous advantage, Mr. Kirkman has managed to keep banks from overreaching in a high percentage of the cases.

Mr. Kirkman has successfully prosecuted many suits either by way of original complaint or by way of cross-complaint against banks or other lending institutions.

In one remarkable case a lender demanded that its borrower sign a "pre-negotiation" agreement before it would even look at allowing the supposedly "assumable" loan to be assumed by the shopping center's prospective purchaser. This pre-negotiating agreement purported to release the bank from any liability for any future act it might commit in connection with reviewing the application. Following the advice of one of

our transactional lawyers (Wagner) our client refused to sign the pre negotiation agreement, and the prospective purchaser was lost. We sued the bank. The bank hired a renowned professor of law who teaches lender liability at one of California's top law schools to testify as an expert. He offered expert testimony that the bank's pre negotiation agreement was a standard document employed by all banks. The bank filed a motion for summary judgment in the federal court action claiming that it was entitled to win as a matter of law. To the bank's surprise we filed our own motion for summary judgment on the same day, wherein we asked the court to declare that the bank's pre negotiation agreement was illegal as a matter of law because it violated a California statute which declares any document which purports to release the beneficiary of the release in advance for any and all conduct, including intentional actions, such as fraud. Neither the bank's attorneys nor their sophisticated lender-liability expert had thought of that one. The bank paid a very substantial sum of money to settle the case immediately thereafter.

**Dissolution of Law Firm**

Because of Mr. Kirkman's substantial complex business litigation experience as well as the transactional expertise of the other members, the firm is frequently retained to represent members of law firms who are forming or dissolving law firms. Because law firm dissolution can be difficult, Mr. Kirkman is retained to assist members of prominent law firms who are going through the difficulties that are associated with any business break up.

**Personal Injury**

While complex business disputes are the firm's area of concentration, Mr. Kirkman's extensive trial experience makes the handling of difficult personal injury cases somewhat of a cakewalk. For example, Mr. Kirkman obtained what was for a time the largest settlement ever obtained against a city, in a swimming pool accident case. Mr. Kirkman's client was seriously injured when he hit his head on the side of a city swimming pool as he was jumping off the side doing "can openers". Mr. Kirkman turned down a settlement that would have paid several million dollars to the injured party. The Superior Court judge who supervised that settlement conference accused Mr. Kirkman of improperly advising his client, and predicted that if the case went to trial the child would receive nothing because that judge thought there was no potential for the city to be found liable for acting negligently. After Mr. Kirkman cross examination of the city's swimming pool expert, the tone changed. The parties hired a retired court of appeal justice to conduct another settlement conference which lasted for several days. On the eve of trial the case settled for a structure which would pay the child over $45 million over his expected lifetime.

Another of Mr. Kirkman's personal injury cases was remarkable due to the fact that he obtained a settlement out of the negligent party's insurance carrier which was 15 times the actual policy limits.

Mr. Kirkman has prosecuted a wide variety of personal injury lawsuits to successful conclusions, however due to the press of other business he will only consider cases involving serious injuries.

**Franchise Disputes**

Mr. Kirkman presently is conducting the defense of large scale disputes between a product licensee and it's licensed manufacturer. This federal court litigation is noteworthy because Mr. Kirkman is contending that the license arrangement constitutes a franchise arrangement under California law as well as under the laws of the state of Minnesota where the action will be tried. This case is being watched closely by the entire industry, because the industry's licensors don't want their licensees to have the protections that they'll have if the courts determine that the arrangements are subject to state franchise laws.

## ▪ Education

University of California, Davis, Bachelors of Science, 1968
University of California, Davis, J.D., 1972

## ▪ Academic Activities

Mediator
Settlement Conference Judge

## ▪ Affiliations

California State Bar
Sacramento County Bar
Consumer Attorneys of California

## ▪ Admissions

California Bar, 1972
United States District Court, 1974
United States Tax Court, 1998