

PAUL W. WINDUST

PRINCIPAL | BERDING & WEIL LLP

pwindust@berdingweil.com



AREAS OF PRACTICE

Mr. Windust is a Principal in Berding Weil's litigation practice group and co-chairs the firm's Director and Officers Litigation Group. He has over 20 years of experience in both commercial and residential real estate law, commercial and contract law, creditor's rights and bankruptcy. He has advised community associations on foreclosure issues, landlord-tenant issues, CC&R enforcement matters, and re-construction contracts. He has litigated and tried to verdict numerous complex business, real estate, and construction defect matters. He has successfully defended Associations and directors and officers against breach of fiduciary duty, negligence, and failure to enforce claims.

PROFESSIONAL HISTORY

DIRECTORS AND OFFICERS

- Achieved summary judgment on behalf of a community association, its directors and its management company on judicial deference grounds. Condo owners claimed common area work adversely impacted their views and diminished their property values. Argued that no breach of duty could be legally stated and that plaintiffs could not second guess board decisions regarding common area maintenance under the judicial deference rule. Obtained prevailing party attorney fee award in excess of \$90,000 on association's behalf.
- Obtained a unanimous 12-0 Jury defense verdict in favor of a 64 unit condominium community association board of directors in a flooring and nuisance dispute. The Jury returned a complete defense victory after a three week trial during which the association faced breach of fiduciary duty and breach of governing document claims. The Plaintiff claimed that the association failed and refused to enforce a flooring restriction contained in the governing documents against an upstairs neighbor. Obtained and collected an attorney fee award of \$165,000 in the association's favor plus interest.
- Successfully defeated anti-SLAPP motion where owners contended that their objection to association's installation of drought tolerant landscaping infringed their right to free speech.

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COMMUNITY ASSOCIATIONS

- Tried to successful verdict a five day bench trial on behalf of condominium association in Huntington Beach, California. Prevented unit owner from making structural modifications to the common areas that would have compromised structural integrity of the building. Obtained an award of attorneys' fees and collected 80% of the fee award.
- Litigated through a five day bench trial CC&R enforcement action arising from owner's intention to modify residence to accommodate multi-family living. Obtained requested injunctive relief and an award of over \$80,000 in attorneys' fees. Successfully litigated the matter through appeal and review request to the California Supreme Court.
- Tried to successful verdict a 20 day bench trial on behalf of owner's association where an owner challenged corporate practices, collection practices, and management practices, with allegations of fraud, conspiracy and embezzlement. Obtained damages judgment on behalf of association via cross complaint which included costs and attorneys' fees exceeding \$200,000. Collected over half of damages and attorneys' fees awarded through judgment enforcement litigation.
- Litigated corporate governance dispute between developer and homeowner's association. Obtained writ relief in superior court declaring developer the "Declarant" under the governing documents.
- Handled two insurance appraisals/arbitrations with homeowner's association insurance carriers arising from damages sustained by the associations as a result of the Northridge Earthquake.
- Represented owner's association in dispute with developer concerning access and use of sewer septic system. Blocked developer's attempt to have the system service a neighboring development controlled by the developer. Obtained dismissal by way of an anti-SLAPP motion of developer's lawsuit for anticipatory breach of the governing documents and other contracts. Assisted with the appeal of the matter.
- Mediated to successful resolution numerous disputes between homeowners' associations and owners concerning architectural violations, governing document violations, and disputes over responsibility for damage to common areas and separate interests.
- Successfully mediated bitter dispute between owners and homeowner's association concerning use and location of private access easements.
- Counseled homeowners' associations on numerous transactions involving easements, licenses, use agreements, lot line adjustments, and architectural applications.
- Defend and prosecute litigation on behalf of homeowner's associations on claims arising from breaches of contract, failure to maintain common areas, director and officer liability, personal injury claims, and construction disputes.

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COMMERCIAL LITIGATION

- Successfully confirmed a \$1.72 million dollar appraisal award on behalf of ousted general partners of a winery located in the Howell Mountain region in the Napa Valley. Overcame challenges to venue and confirmation and persuaded the Court to award attorneys' fees and costs to the former general partners.
- After a three-week jury trial in Santa Clara County, obtained a \$2.5 million dollar jury verdict against a major developer and well known commercial real estate brokerage firm arising from their failure to disclose significant plumbing defects in the sale of a 200+ unit apartment building. A twelve member jury agreed that the defendants intentionally misrepresented the physical condition of the apartment project during the sale, and rendered a unanimous 12-0 verdict.
- Litigated and settled on behalf of an apartment owner/operator a failure to disclose lawsuit arising from the sale of a 50+ unit apartment building in El Dorado Hills, California. The seller failed to disclose systemic water intrusion at the project arising from known roof deficiencies, foundation defects, and inadequate site drainage. Settlement: Confidential.
- Represented Texas based financial services company in numerous creditors' rights actions. Took one matter to trial with a missing key element. Persuaded a key witness to step forward and testify. Secured and collected a \$100,000 judgment for the client.
- Defended a large insurance company in a bad faith action arising from an alleged failure to settle underlying litigation. Obtained settlement of action on terms favorable to the client.
- Defended a health insurance company in United States District Court in a bad faith action arising from alleged failure to cover cosmetic surgery expenses. Received summary judgment on the bad faith claim under the "genuine dispute" doctrine and settled what remained of the case on favorable terms.
- Obtained dismissal at the pleading stage of a bad faith action against a large life insurance company. Briefed the matter on appeal to the Ninth Circuit Court of Appeal which affirmed the dismissal.
- Defended two dietary supplement distributors in Unfair Competition litigation arising from allegedly fraudulent effectiveness claims respecting their products. Interviewed and prepared expert witnesses for deposition. Obtained dismissal of one action at the pleading stage under the "conflict preemption" doctrine.
- Represented numerous banks, leasing companies and other creditor grantors in creditor's rights matters. Used pre-judgment remedies such as writs of attachment and writs of possession as leverage for early settlement. Conducted extensive judgment enforcement proceedings including orders for examination, bank levies, third party claims, and execution sales of real property.
- Prosecuting fraud and fiduciary duty claims on behalf of two high net worth clients against former and current members of LLC entities.
- Successfully settled on behalf of injured client a claim against the United States Government concerning the client's right to over \$2 million in funds seized by the government relating to illegal importation of unapproved cosmetic products.

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COMMERCIAL REAL ESTATE

- Negotiated buy-out of significant commercial lease on behalf of a Fortune 500 client, saving the client hundreds of thousands of dollars on continuing lease obligations while meeting client's long term business plan objectives.
- Litigated to successful trial conclusion commercial lease dispute concerning sublease and assignment rights. Disposed of the majority of the case on demurrer. Obtained legal fees award of over \$300,000.
- Advised major utility company in a dispute with San Francisco landlord concerning unapproved alterations to structure. Negotiated rental increase and extended lease term.
- Successfully unwound apartment building purchaser from sales transaction where seller failed to disclose significant restrictions on conversion of hotel units into residential units. Obtained return of deposit funds.
- Litigated through trial constructive eviction under a commercial lease based on failure to comply with toxic emission disclosures set forth in the Health & Safety Code. Completed trial brief, special jury instructions, and opposition to motion for summary judgment.
- Litigated and settled agricultural unlawful detainer action involving largest strawberry producer in the world and large local grower. Obtained judgment of possession and negotiated new long term lease with local grower with terms favorable to client to accommodate future potential investment objectives.

REAL ESTATE

- Handled execution sale of real property valued at over \$1.5 million to collect personal injury judgment. Convinced judge that third party claiming ownership interest was junior to judgment debtor, prompting full payment of judgment.
- Litigated through judgment at least 5 judicial foreclosure proceedings arising from defaults in mortgage and assessment payments.
- Advised real property private equity fund on residential lease provisions so as to comply with current law and to maximize current market conditions.

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EDUCATIONAL HISTORY

1990 – Bachelor of Science. Marshall School of Business, University of Southern California (Los Angeles, California); advanced coursework in International Relations.

1993 – Juris Doctor. Gould School of Law, University of Southern California (Los Angeles, California).

1993 – Admitted to the California State Bar (California Bar No. 167338). Ninth Circuit Court of Appeal. Northern, Eastern, Central and Southern Federal District Courts.

1999 – California Real Estate Broker License (License Number 01264742).

PUBLICATIONS

“Small Claims Court: The Assessment Collection Alternative” (January, 2006) – Executive Counsel of Homeowners.”

“Assessment Collection in an Economic Crisis” (October, 2008) – Executive Counsel of Homeowners.

“Upstairs Downstairs – Strategies in Dealing with Noise Disputes” (January, 2011) – Executive Counsel of Homeowners.

“Killer Weed in the Common Area – Marijuana and Common Interest Developments” (November, 2011) – Executive Counsel of Homeowners.

“A Guide to Transition – The Keys to Successful Transition from a Developer-Controlled Board to a Member-Controlled Board” (December, 2012) – Berding | Weil LLP.

“Money Found at the End of the Rainbow” (May 2013) – Berding | Weil LLP.

SPEAKING ENGAGEMENTS

Speaker: “Foreclosure of Assessment Liens” (February 2005) – Berding | Weil Annual Legal Seminar.

Speaker: “Case Law Update” (February 2006) – Berding | Weil Annual Legal Seminar.

Speaker: “SB137: Assessment Collection Legislation” (2006) Executive Counsel of Homeowners Central Bay Legal Seminar.

Speaker: “The Politics and Psychology of Amendments to Governing Documents” (2007) Executive Counsel of Homeowners Central Bay Legal Seminar.

Speaker: “Dealing with Noise Disputes” (February, 2010) – Executive Counsel of Homeowners Peninsula Legal Seminar.

BAR MEMBERSHIPS/EXTRACURRICULAR

Contra Costa Bar Association

Commercial Law League of America