PARMA CONFERENCE 2017

Roadway to Liability?

Analyzing Dangerous Condition of Public Property Claims After *Cordova, et al. v. City of Los Angeles*

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Dangerous Condition of Public Property Govt. Code § 815(a)

Plaintiff must prove the following elements:

1. The public entity owned or controlled the property at the time of the injury
2. Public property was in a dangerous condition at the time of the injury
3. The injury to plaintiff was legally caused by the dangerous condition
4. The kind of injury that occurred was reasonably foreseeable as a consequence of the dangerous condition
5. Either:
   - The dangerous condition was created by a public employee's negligent or wrongful act or omission within the scope of his/her employment
     OR
   - The public entity had actual or constructive notice of the condition a sufficient time before the injury occurred to have taken reasonable measures to protect against the injury

Ownership or Control of the Property (Govt. Code § 835)

- The Public Entity must be in a position to protect against or warn of the hazard whether or not it owns the property
- Standard: Whether the Public Entity had the power to prevent, remedy, or guard against a dangerous condition.

  Low v. City of Sacramento (1970) 7 Cal.App.3d 826, 833-834

  Tolan v. State of California (1979) 100 Cal.App.3d 980, 984

  Huffman v. City of Poway (2000) 84 Cal.App.4th 975, 990

  Public Utils. Comm'n v. Superior Court (2010) 181 Cal.App.4th 364, 373

Definition of Dangerous Condition Govt. Code § 830(a)

- Statutory definition: "A condition of property that creates a substantial (as distinguished from minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."
- Can include public improvement which has become changed, flawed, damaged or has deteriorated to a state that is potentially dangerous to reasonably foreseeable users
- Potential risks are not sufficient to impose liability.

  Alexander v. State of California (1984) 159 Cal.App.3d 890, 897

Injury Caused by Third Party Conduct

- A public entity is not liable for a dangerous condition of public property based on third party conduct alone
- There must be some concurrent contributing defect in the property itself

  Pekarek v. City of San Diego (1994) 30 Cal.App.4th 909.

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Trivial Risks Excluded Govt. Code § 830(a)

- Public entity is only liable when it creates a substantial risk of injury as opposed to minor, trivial, or insignificant risk
- Whether a defect is too trivial can be decided as a matter of law
  Sambrano v. City of San Diego (2001) 94 Cal.App.4th 225, 234
- A full assessment of all surrounding circumstances is necessary to determine whether the risk is substantial or trivial
  Fielder v. City of Glendale (1977) 71 Cal.App.3d 719, 734;
  see also Calaroso v. Hathaway (2004) 122 Cal.App.4th 922, 927

History of Similar Accidents

- History of similar accidents during the course of normal use of a property can support a finding of a dangerous condition
  Baldwin v. State (1972) 6 Cal.3d 424
- Absence of prior accidents tends to prove no substantial risk of injury
  Sambrano v. City of San Diego (2001) 94 Cal.App.4th 225, 243
  McKray v. State of California (1977) 74 Cal.App.3d 59, 62
  Beuchamp v. Los Gatos Golf Course (1969) 273 Cal.App.2d 20, 36-38

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Use with Due Care

- *Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380
  - Facts: Eight year old injured when attempting to ride his bike down a steep, wet, grassy hill in a park
  - Holding: Court affirmed summary judgment in City's favor because park's condition was not a dangerous condition
  - Reasoning: No reasonable person would conclude the property created a substantial risk of harm to reasonably foreseeable child users who used the property with the due care expected of children
  - *See also Chowdurry v. City of Los Angeles* (1995) 38 Cal.App.4th 1187

Causation

- The condition of the property was a legal cause of the injury
- Definition of legal cause: A cause which is a substantial factor bringing about the injury.

  CACI 1100

  Milligan v. Golden Gate Bridge Highway & Transp. District (2004) 120 Cal.App.4th 1

Notice

- Actual Notice: The Public Entity knew of the condition and "knew or should have known of its dangerous condition" Govt. Code § 835.2(a)
- Constructive Notice: The condition existed for such a period of time and was of such an obvious nature that the Public Entity, in the exercise of due care, should have discovered the condition and its dangerous character. Govt. Code § 835.2(b)

Potential Roadway Affirmative Defenses

- Comparative Negligence
  - The more the Plaintiff argues that the Public Entity had "constructive notice" because the defect was open and obvious, the more comparative negligence there is on Plaintiff's part for similarly failing to observe and avoid it.
- Assumption of Risk
  - *Knight v. Jewett* (1992) 3 Cal.4th 296
  - Primary assumption of risk – Defendant owes no duty to Plaintiff and doctrine operates as a complete bar to recovery
  - Secondary assumption of risk – Defendant owes a duty, but the Plaintiff proceeds to encounter a known risk imposed by the Defendant's breach of duty
  - Part of comparative fault scheme where trier of fact considers the relative responsibility of the parties in apportioning the loss resulting from the injury
  - Critical Issue in determining primary or secondary assumption of risk: Whether the Defendant's conduct is an "inherent risk" of the activity such that liability does not attach as a matter of law
- Third Party Negligence

Potential Affirmative Defenses (Cont'd)

- Reasonable Time to Take Protective Measures
  - If the Public Entity did not create the condition, the Public Entity is not liable if it did not have sufficient time to protect the public from the danger. The jury may consider all the surrounding circumstances including what measures would have been appropriate to remedy the condition and the time necessary to have done so. Govt. Code § 835(b)
- Dangerous Condition Created by Reasonable Act
  - The Public Entity is not liable if the act or omission of its employee creating the condition was reasonable. The jury may weigh the foreseeability of the injury against the practicability and cost to have taken other action. Govt. Code § 835.4(a)
- Reasonable Action to Protect Against Dangerous Condition
  - The Public Entity is not liable if its failure to remedy the condition was reasonable. The jury may weigh the time and opportunity available to the Public Entity to have alleviated the condition, and the cost of doing so, against the foreseeability of the injury. Govt. Code § 835.4(b)

Roadway-related Immunities

- Design Immunity (Govt. Code § 830.6)
- Regulatory Traffic Signs (Govt. Code § 830.4)
- Warning Signs (Govt. Code § 830.8)
- Weather Immunity (Govt. Code § 831)
- Lighting
- Trivial Defect – Qualified Immunity (Govt. Code § 830.2)

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Elements of Design Immunity Govt. Code § 830.6

1. Causal relationship between the plan or design and the accident
2. Discretionary approval of the plan or design before construction or improvement
3. Substantial evidence supporting the reasonableness of the plan or design

   Cornette v. Dept. of Transp. (2001) 26 Cal.4th 63, 66

- First two elements are mixed issues of law and fact
  - Where facts are undisputed, they are properly resolved at summary judgment

    Grenier v. City of Irwindale (1997) 57 Cal.App.4th 931
- Third element is an issue of law
  - Defendant must produce "any substantial evidence" of reasonableness of approval
  - Conflicting evidence produced by plaintiff will not create a triable issue of fact to defeat summary judgment as long as defendant has met this burden

    Wyckoff v. State (2001) 90 Cal.App.4th 45

Causal Relationship Between Plan/Design and Accident

- Must show that the Plaintiff's injuries were caused by a feature inherent in the approved plan or design, as opposed to some other cause
  - There must be a design, but it does not need to be in any particular form

    Thomson v. City of Glendale (1976) 61 Cal.App.3d 378

    Martinez v. County of Ventura (2014) 225 Cal.App.4th 364
- Referred to as "design-caused accident" by Courts
  - Where "lurching" commuter train caused by the plaintiff to fall, and lurching was result of a designed wheel-traction system, design immunity defense available

    BART v. Superior Court (1996) 46 Cal.App.4th 476
  - Omission of median barrier on Golden Gate Bridge also an approved design decision making design immunity defense available

    Sutton v. Golden Gate Bridge Highway & Transp. Dist. (1998) 68 Cal.App.4th 1149
- Does not immunize decisions that were not made
  - Defense not available when no evidence that highway "banking", which caused accident, was not in approved design or plan

    Cameron v. State (1972) 7 Cal.3d 318
  - When environmental conditions – not engineering options or plan or design – result in icy condition on bridge, design immunity not available

    Flournoy v. State (1969) 275 Cal.App.2d 806

Approval by Authorized Public Body or Official

- Requires pre-construction approval by "the legislative body of the public entity or some other body or employee exercising discretionary authority" or a showing that "the plan or design was prepared in conformity with standards previously so approved"
- To determine which board or officer has discretionary approval authority, courts look to both law fixing internal distribution of public entity's powers and applicable administrative arrangements
  - No requirement that plan be prepared by public employees as long as plan is duly approved
    Thomson v. City of Glendale (1976) 61 Cal.App.3d 378
  - If applicable law requires approval by particular board, employee, or licensed professional, such entity must actually approve the design for the defense to be available
    Levin v. State (1983) 146 Cal.App.3d 410
  - No "implied" discretionary approval
    - *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364
- No requirement that the approval be expressed in any particular form
  - Oral approval may also be sufficient
    Bane v. State (1989) 208 Cal.App.3d 860

Any Substantial Evidence Establishing Reasonableness of Approval

- To satisfy court, must show that the plan could have been adopted by a "reasonable" public employee or legislative body
- Courts will look to whether the evidence "reasonably inspires confidence" and "is of solid value"
  Muffett v. Royster (1983) 147 Cal.App.3d 289

Evidence that can Establish Reasonableness of Approval

- Engineering Opinions
  - Opinion of a civil engineer about reasonableness of design
  - BUT not if the opinion is sufficiently flawed so as to destroy its substantiality

    Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal.App.3d 789
- Professional Standards
  - Satisfaction of applicable codes and regulations supports reasonableness of approval

    Moritz v. City of Santa Clara (1970) 8 Cal.App.3d 570
- Accident History
  - Accident rate of 1 in 685,000 vehicles since construction of designed intersection supports reasonableness of approval

    Callahan v. City & County of San Francisco (1971) 15 Cal.App.3d 374

Evidence that can Establish Unreasonableness of Approval

- No fully articulated set of criteria to determine whether approval is "unreasonableness"
- Unreasonable where hazard "obvious" to "any reasonable person"

  Levine v. City of Los Angeles (1977) 68 Cal.App.3d 481
- Court may balance foreseeability of danger against burden of implementing alternative design that reduces or eliminates the danger

  Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal.App.3d 789

Loss of Design Immunity

- A public entity may lose the defense of design immunity if the following three conditions are met:
  1. The plan or design has become dangerous because of a change in physical conditions
  2. The public entity had actual or constructive notice of the dangerous condition
  3. The public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition because of practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings
- Plaintiff must plead and prove the loss of design immunity, and is entitled to a jury trial on the associated issues if there are triable issues of material fact

  Cornette v. Dept. of Transp. (2001) 26 Cal.4th 63

Gonzales v. City of Atwater (2016) 6 Cal.App.5th 929

FACTS

- ACCIDENT
  - 2010: Driver kills pedestrian travelling northbound in crosswalk while making a left turn (Bellevue Road and Linden Street)
- DESIGN HISTORY
  - 2001: Plans to signalize intersection
    - February: Transportation consulting firm Fehr & Peers (F&P) completed a warrants study and designed plans.
    - March: Plans stamped by F&P registered civil and traffic engineer, Robert Rees.
    - F&P plans reviewed and finalized by City Civil Engineer, Frank Lozano, and city staff with F&P through interactive process.
    - May: Lozano approved plans.
    - City Council approved plans and authorized call for bids to build traffic signals.
    - Signals installed according to plans.
  - 2004: Plans to change signalization in response to complaints re congestion
    - February: City retained licensed civil and traffic engineer, Wilbur Elias, to change signals. Elias submitted proposal to City to change signals. Two days later, City issued purchase order to prepare plans.
    - May: Elias forwards first draft of plans and requested payment.
    - June: City paid.
    - August: Elias delivered completed plans and requested final payment.
    - September: City paid.
    - City never implemented plan despite engineering done and funding not an issue

Gonzales v. City of Atwater (2016) 6 Cal.App.5th 929

FACTS CONT'D

- ACCIDENT HISTORY
  - 2002: Bicyclist killed travelling northbound in crosswalk
  - 2008: Pedestrian killed travelling northbound in crosswalk
- PROCEDURAL HISTORY
  - Complaint filed alleging dangerous condition of public property re improper timing/phasing of signals, failure to provide appropriate signage to alert vehicles of presence of pedestrians in crosswalk, and driver was negligent in operation of her vehicle
  - City's MSJ: Entitled to design immunity. Trial court denied. Could not grant design immunity because triable issue of fact as to reasonableness of plan or design
  - Trial:
    - Varying expert testimony re reasonableness of 2001 plans
    - Plaintiff's Counsel concession: Judge asked if there was "a contention by the plaintiff in this case that the 2001 design, when it was adopted and approved, is unreasonable?" Plaintiff's counsel responds "**No, Your Honor.**"

Gonzales v. City of Atwater (2016) 6 Cal.App.5th 929

PROCEDURAL HISTORY CONT'D

- City's Motion for Directed Verdict
  - City's argument: Design immunity established as to the 2001 plans
  - Court: Intersection at the time of the accident didn't conform with 2004 plans so design immunity lost
  - Motion denied
- Jury: Returned special verdict in plaintiff's favor
  - Assigned 100% responsibility to City; found driver not negligent
- City's JNOV and Motion for New Trial
  - Court denies both motions: City approved a different design which it did not implement and therefore, intersection did not confirm with the 2004 design at the time of the accident. City forfeited design immunity because it changed the design of the intersection but did not built it.

Gonzales v. City of Atwater (2016) 6 Cal.App.5th 929

APPELLATE COURT DECISION

- Only addressed issue of design immunity – focuses on second and third elements of design immunity, discretionary approval and reasonableness
- Discretionary Approval
  - Does not required evidence of a deliberative process that resulted in the exercise of judgment
  - Only asks whether a person vested with discretion to approve the plan actually approved
  - The wisdom of approving the plan is judged under the reasonableness element
- Reasonableness
  - Do not reach issue on the merits because Plaintiff's counsel conceded reasonableness at trial
  - Plaintiff's counsel bound by concession and City not required to prove reasonableness
- Holding: City established design immunity; Reverse judgment

Regulatory Traffic Sign Immunity Govt. Code § 830.4

- Applies to regulatory traffic control signals, pedestrian traffic control signals, stop signs, yield right-of-way signs, speed restriction signs and distinctive double line roadway markings

  Frazier v. City of Sonoma (1990) 218 Cal.App.3d 454
- Where the dangerous condition exists for reasons other than, or in addition to, the mere failure to provide such controls, this immunity does not apply

  Washington v. City & County of San Francisco (1990) 219 Cal.App.3d 1531

Warning Signs Immunity
Govt. Code § 830.8

- Applies to detour signs, pedestrian-crossing prohibition signs, railroad warning signs, road work warning sign and school crossing signs
- Does not apply if signs were necessary to warn of a "trap"

  Cameron v. State (1972) 7 Cal.3d 318
- Public entity is not liable for injuries caused by a dangerous condition if it renders an "adequate warning".
- Public entity not liable for failing to warn of a condition of which the plaintiff is fully aware.

  Foremost Dairies Inc. v. State of California (1986) 190 Cal.App.3d 361, 367

Weather Immunity
Govt. Code § 831

- Applies to the effect of fog, wind, rain, flood, ice or snow on the use of streets
- Must show that a reasonably careful person using the public streets and highways would have noticed the weather condition and anticipated its effect on the use of the street or highway

  Allyson v. Dept. of Transp. (1997) 53 Cal.App.4th 1304
- Does not apply to the physical damage to or deterioration of streets and highways resulting from weather conditions
- Does not apply to situations where the weather combines with other factors to make the roadway dangerous

  Erfurt v. State of California (1983) 141 Cal.App.3d 837, 845–846

Lighting

- In general, public entity has no duty to light its streets even though it has the power to do so
  - BUT a duty to light may arise from a "peculiar condition" that "renders lighting necessary in order to make the streets safe for travel"

    Antenor v. City of Los Angeles (1985) 174 Cal.App.3d 477
- Darkness is a naturally occurring condition that a public entity is under no duty to eliminate

    Plattner v. City of Riverside (1999) 69 Cal.App.4th 1441
- There may be liability for failure to light if a Plaintiff relies on the fact that a route is lighted and foregoes other protective action to take that route

    Plattner v. City of Riverside (1999) 69 Cal.App.4th 1441

Trivial Defect

- Specifically excluded from liability per Govt. Code § 830.2
- There is no "magic number" that makes a condition or defect trivial
- Courts use a Totality of the Circumstances test – may consider:
  - The size of the defect or condition
  - Whether view of the condition was obstructed
  - Whether the defect or condition had broken or irregular edges

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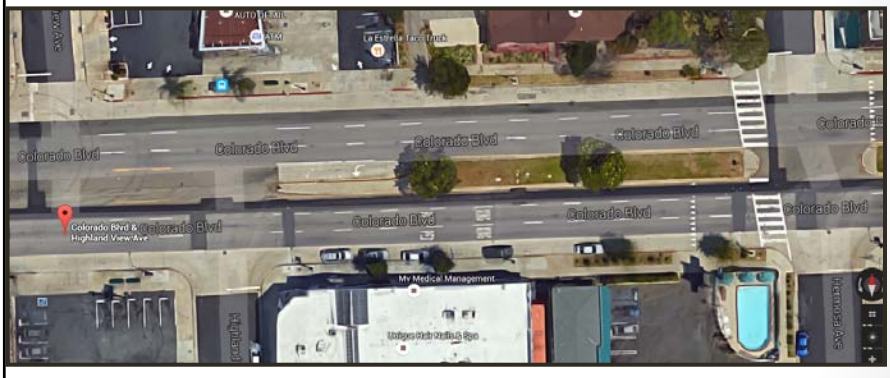
Cordova, et al. v. City of Los Angeles

FACTS:

- Occurred on August 27, 2008 in the Eagle Rock neighborhood of Los Angeles.
- Pregnant driver, Cristyn Cordova, was in car with her sister, brother, friend, and boyfriend and driving down Colorado Boulevard.
- In the next lane was Rostislav Shnayder.
- Shnayder's vehicle moved into Cordova's lane and hit her vehicle.
- Cordova's vehicle veered to the left, climbed onto the center median island, and ultimately collided with a large magnolia tree which was at the end of the center median.
- Cordova, her unborn child, her sister, her brother, and her friend died. Cordova's boyfriend was seriously injured.
- Parents of Cordova brought a wrongful death action alleging Colorado Boulevard was in a dangerous condition because the magnolia trees on the center median were too close to the travel portion of the roadway, posing an unreasonable risk to motorists who might lose control of their vehicles.



Cordova, et al. v. City of Los Angeles

TRIAL COURT

- City filed a motion for summary judgment
  - Center median was not a dangerous condition
  - The accident was caused by third party conduct, not any feature of public property
- Plaintiffs' opposition
  - Submitted declarations from a number of experts who opined that the proximity of the magnolia trees to the travel portion of the roadway presented a significant and foreseeable danger to the public
- Court granted motion for summary judgment
  - The magnolia tree did not constitute a dangerous condition of public property because, among other things, it did not cause the accident that killed the decedents
  - Sustained City's objections to Plaintiffs' experts' conclusions

Cordova, et al. v. City of Los Angeles

COURT OF APPEAL

- Affirmed trial court ruling
- The magnolia tree did not constitute a dangerous condition as a matter of law
- The configuration of the roadway was not a dangerous condition because nothing about Colorado Boulevard would cause a person driving at or near the speed limit to veer into the magnolia trees.
- Did not address Plaintiffs' objections to the trial court's evidentiary rulings

Cordova, et al. v. City of Los Angeles

CALIFORNIA SUPREME COURT

- May a government entity be liable where it is alleged that a dangerous condition of public property existed and caused the injury plaintiffs suffered in an accident, but did not cause the third party conduct that led to the accident?

YES

Cordova, et al. v. City of Los Angeles

CALIFORNIA SUPREME COURT HOLDING

- Nothing in Government Code section 835 required a plaintiff to show that the alleged dangerous condition caused the third party conduct that precipitated the accident in addition to showing that the dangerous condition proximately caused plaintiff's injury
- No prior court had imposed dual causation requirement
- Its "conclusion does not mean . . . that a public entity may be held liable whenever a plaintiff is injured after a third party's conduct causes the plaintiff's vehicle to strike a hard, fixed object on public property close to a road, such as a light post, a telephone pole, a traffic light, a stop sign, or a bridge abutment."
  - **Government Code section 835.4**, which provides that a public entity is not liable for a dangerous condition of public property if the public entity establishes that the act or omission that created the condition was reasonable;
  - **Government Code section 830.2**, which provides that a condition of property is not "dangerous" if it does not create a substantial risk of injury; and
  - **Government Code section 830.6**, which provides public entities with design immunity for those conditions of property which were part of a plan or design for which the entity reasonable gave its discretionary approval

Cordova, et al. v. City of Los Angeles

WHAT THE CALIFORNIA SUPREME COURT DID NOT DECIDE

- Whether Plaintiffs presented sufficient evidence to create a triable issue as to whether the configuration of Colorado Boulevard and the center median constituted a dangerous condition
- Whether there was sufficient evidence to establish that decedents' fatal injuries were proximately caused by that configuration

Cordova, et al. v. City of Los Angeles

IMPLICATIONS

- Difficult for public entities to prevail on motion for summary judgment
  - Focus on reasonableness and due care makes it easier for plaintiffs to create triable issues of fact
- Expert evidence
  - Role of objections to evidence
  - California Code of Civil Procedure section 437c(q): In granting or denying a motion for summary judgment or summary adjudication, **the court need rule only on those objections to evidence that it deems material to its disposition of the motion**. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review.

Risk Management Advice

Document Retention

- Ensure that Public Works/Engineering Department are retaining plans – even if just a sketch
- Ensure that evidence pre-construction approval is retained

Best Practices

- Perform and maintain traffic surveys, traffic counts, and speed surveys
- Review accident history
- Keep roadway conditions fresh, such as signage and striping
- Regularly landscape

Inter-department Communication

- Make sure that Police Department and Public Works/Engineering department are exchanging information regarding accidents/changing traffic conditions
- Ensure that complaints/concerns are shared between departments
- Create an inter-departmental traffic committee to address complaints and concerns from various perspectives

QUESTIONS?

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Mr. Hazelwood was born in San Francisco in 1962 and graduated from University of California, Los Angeles with a B.S. degree in Political Science in 1984. He received his J.D. degree from Loyola Law School-Los Angeles in 1988. Mr. Hazelwood began working with Low, Ball & Lynch as an associate in 1988. He became a partner in 1996. He served as the managing shareholder for Low, Ball & Lynch from 2011-2013.

Mr. Hazelwood is admitted to practice in the State of California, and in the U.S. District Court – Northern and Eastern Districts. He is a member of the Defense Research Institute and the Trucking Industry Defense Association (T.I.D.A.). He has also been active in several public entity defense organizations, including PARMA. Mr. Hazelwood serves as an arbitrator in Santa Clara County. He was named a Northern California Super Lawyer in 2013-2016.

Kimberly Y. Chin

Kimberly Y. Chin's practice focuses on public entities defense. She is admitted to practice in California as well as in the United States District Court for the Central District of California. Ms. Chin is a graduate of Boston College Law School and Wellesley College.

Previously with Low, Ball & Lynch, Ms. Chin was also a litigation associate at Boornazian, Jensen & Garthe in Oakland, California. While in law school, Ms. Chin served as a legal intern in the Middlesex District Attorney's Office in Woburn, Massachusetts, where she authored several successful criminal appellate briefs before the Massachusetts Appeals Court and the Massachusetts Supreme Judicial Court. She was also a summer associate in the San Francisco office of Pillsbury Winthrop Shaw Pittman LLP and a judicial extern to then-federal magistrate judge Edward M. Chen of the United States District Court for the Northern District of California.

Ms. Chin is the author of "Minute and Separate": Considering the Admissibility and Videotaped Forensic Interviews in Child Sexual Abuse Cases after Crawford and Davis, which was published in the Boston College Third World Law Journal in 2010. Her most recent article, "Continuing the White Collar Unionization Movement: Imagining a Private Attorneys Union," was published in 2012 in Pace Law Review.

Ms. Chin is an active member of Asian American Bar Association of the Greater Bay Area and volunteers with the Asian Law Caucus. She also serves as a co-chair of the Northern California Chapter of the Boston College Law School Alumni Association and is a co-representative for the San Francisco Chapter of the Wellesley Lawyers Network.