



# Appellate Reports

## Recent cases of interest to members of the plaintiff's bar

**Personal injury; tobacco; statute of limitations; discovery rule:** *Poosh v. Philip Morris USA, Inc.* (2011) \_\_ Cal.4th \_\_

Plaintiff, a cigarette smoker, was diagnosed with chronic obstructive pulmonary disease (COPD) caused by her smoking habit in 1989. She did not sue. She was diagnosed with smoking-related periodontal disease in 1991, and did not sue. In 2003, she was diagnosed with lung cancer, and filed suit. The Ninth Circuit requested that the Supreme Court decide whether the statute of limitations had run on her claim. The Supreme Court phrased the issue it was deciding this way: "When multiple distinct personal injuries allegedly arise from smoking tobacco, does the earliest injury trigger the statute of limitations for all claims, including those based on the later injury? In a unanimous opinion, the Supreme Court answers the question, "no." Plaintiff's 1989 diagnosis with COPD did not trigger the statute of limitations for a claim based on a different injury, even if it was caused by smoking, and even if it affected the same organ as the original injury.

**Attorney-Client relations; interference with prospective economic advantage; settlements:** *Lemmer v. Charney* (2011) \_\_ Cal.App.4th \_\_, 2d Dist. Div. 8.

Attorney's suit against client for fraud and interference with prospective economic advantage was dismissed without leave to amend on demurrer. Affirmed. Charney hired Lemmer to pursue a lawsuit against his former employer, Teleflora. The retainer was originally hourly, but Charney and Lemmer agreed to change it to a contingency-fee agreement. Lemmer claimed that Charney promised to take the case to trial or settlement, but on the eve of trial made a "walk away" deal with Teleflora, depriving Lemmer of a fee. The court held that any agreement that restricted the client's right to settle the case was void as

against public policy, and that the plaintiff's freedom to walk away from his lawsuit trumped any prospective economic advantage the lawyer might possess.

**Arbitration; disclosures by arbitrators; attorney-client relations:** *Benjamin, Weill & Mazer v. Kors* (2011) \_\_ Cal.App.4th \_\_ (1st Dir. Div. 2.)

Law firm ("BMW") sued former client for fees. Based on the arbitration clause in the fee agreement, which contained an internal inconsistency, the duty to arbitrate was enforceable under the California Arbitration Act ("CAA"), but the mechanism for the arbitration was the Mandatory Fee Arbitration Act ("MFAA"). The arbitration was held, ostensibly under the MFAA, and Sean SeLegue, an attorney whose practice principally involved defending law firms in legal-malpractice cases, was the chief arbitrator. SeLegue did not disclose, as required by the CAA, under Code of Civil Procedure section 1281.9. Kors sought to vacate the arbitration award on that basis, and appealed when the trial court refused to do so. Reversed. In a lengthy analysis, the appellate court held that the CAA applied, and therefore its disclosure obligations did, as well. It found that "a reasonable person [could] doubt whether SeLegue's dependence on business from lawyers and law firms sued by former clients would prevent him from taking the side of a client in a fee dispute with a former law firm, because doing so might — put at risk his ability to secure business from the lawyers and law firms whose business he solicits." Accordingly, he was required to disclose the nature of his practice, and his failure to do so mandated reversal of the arbitration award. The court also held that the trial court should have awarded Kors fees under the arbitration agreement for her successful efforts to compel arbitration under the CAA.

**Attorney's fees; lodestar; multipliers; Code of Civil Proc section 1021.5:** *Rogel v. Lynwood Redevelopment Agency* (2011) \_\_ Cal.App.4th \_\_ (2d Dist. Div. 8.)

Plaintiffs, residents of a mobile-home park sued the Lynwood Redevelopment Agency, claiming that a proposed plan to change the mobile-home park into townhomes would result in the loss of low-income housing units and force plaintiffs out of the City. The parties ultimately settled on terms favorable to the plaintiffs. Plaintiffs made a motion for attorney's fees under Code of Civil Procedure section 1021.5. The trial court granted the motion, but applied a "negative" multiplier (actually a fractional multiplier) to reduce the lodestar fee award, based on the court's determination that it would be "better" for less money to be paid to the prevailing parties in order to leave the Agency with more money to fund its ongoing operations. Reversed; the trial court should have applied the standard lodestar analysis, and could not rely on its subjective determination of the best use of the Agency's funds to reduce the fee award.

**Due Process, DMV License Suspensions:** *Petrus v. Dep't Motor Vehicles* (2011) \_\_ Cal.App.4th \_\_ (Fourth Dist. Div. 1.)

Petrus was arrested in a restaurant parking lot when an off-duty CHP officer observed him driving while intoxicated. He requested a blood test to determine his blood-alcohol level. The results were .18 percent. Petrus requested the results a month before the DMV hearing on his license suspension, but they were faxed to his attorney's office only the morning of the hearing, and the attorney did not see them until moments before the hearing. His attorney objected to the introduction of the test results because they were provided late, and requested a continuance for this reason, which was denied. Petrus's challenge to the suspension in the trial court was denied.



JUNE 2011

Reversed. The requirement in the Government Code that test results be provided prior to the hearing if requested does not equate to discovery minutes before the hearing. Petrus was denied his due-process right to a full and fair opportunity to present a meaningful case.

**Evidence; foundation for expert testimony:** *Bell v. Mason* (2011) \_\_ Cal.App.4th \_\_ (2d Dist. Div. 3.)

Bell recovered a \$700,000 judgment against Mason, as well as \$204,000 in attorney's fees. Bell claimed she sold her house to Mason, who "took advantage of [her] disabilities in gaining her trust and inducing her to enter into the transaction that deprived her of her home." She claimed her disability was mental retardation. At trial, Bell presented expert testimony from Scarf, a psychologist, that she had a 62 IQ and was mentally retarded. The defense psychiatrist, Black, was prevented by the trial court from offering an opinion on the issue of whether Bell was

mentally retarded because he had not examined her personally, even though he had read all three volumes of her deposition testimony and had viewed more than 15 hours of videotaped testimony. The trial court found that because Black had not personally interviewed Bell, his opinion lacked foundation. Reversed. Black's review of the deposition and evaluation of the videotape was an ample foundation. Excluding his testimony was prejudicial.

**Punitive damages; arbitration; judicial review; due process:** *Shahinian v. Cedars-Sinai Medical Center* (2011) \_\_ Cal.App.4th \_\_ (2d Dist. Div. 8.)

Plaintiff, a physician on the medical staff at Cedars-Sinai Medical Center, obtained an arbitration award arising out of the withdrawal of staff privileges. The arbitrator awarded \$2.58 million in punitive damages, an amount 1.2 times the compensatory damages. Cedars-Sinai argued on appeal that the punitive-damages award was unconstitutionally large, and

that applying the ordinary rules that preclude judicial review of arbitration awards operated to deprive it of due process. Affirmed. The arbitrator was within her power to award punitive damages; the amount awarded was not excessive; and the rules of limited judicial review for arbitration awards applies to punitive-damages awards. Since no grounds to disturb the award appeared, given the limited nature of judicial review, it would be affirmed.



Ehrlich

*Jeffrey Isaac Ehrlich is the principal of the Ehrlich Law Firm in Encino. His practice emphasizes insurance bad-faith and appellate litigation. A Harvard Law graduate, he is certified by the State Bar of California as an appellate specialist. He has twice been selected as Appellate Lawyer of the Year by the Consumer Attorneys Association of Los Angeles.*

