

Civil Procedure Update

A review of recent decisions on civil procedure, discovery and evidence of interest to the plaintiff's bar



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In ***Heritage Marketing and Insurance Services, Inc. v. Chrustawka*** (2008) 160 Cal.App.4th 754 [73 Cal.Rptr.3d 126] the Fourth District extended the rule of *Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th 1276 to hold that Code of Civil Procedure section 351, which purports to toll the statute of limitations on a cause of action against a party who leaves the state, is unconstitutional and unenforceable, regardless of whether the out-of-state travel was connected with commerce.

In ***California Logistics Inc. v. State of California*** (2008) 161 Cal.App.4th 242 [73 Cal.Rptr.3d 825] the First District held that under the "pay now, litigate later" rule established by Article XIII, section 32 of the California Constitution, a taxpayer who has paid an improperly collected tax may sue to recover it, but a court cannot issue an injunction that would have the effect of preventing the state from collecting a tax. Citing *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, the court noted that a civil litigant does not have an absolute right to application of collateral estoppel.

In ***Brawley v. JC Interiors, Inc.*** (2008) 161 Cal.App.4th 1126 [74 Cal.Rptr.3d 832] the plaintiff had settled a contract dispute with one defendant and proceeded to trial against another. The jury found that plaintiff and defendant had both breached the contract and awarded damages to each against the other. The Fifth District held that the trial court should offset the damages awards against each other as if there had been no settlement. Then if defendant was liable for anything, the court should have set off against that liability any amounts plaintiff received in good faith settlements with other defendants. [*See, Reed v. Wilson* (1999) 73 Cal.App.4th 439.]

In ***Neville v. Chudacoff*** (2008) 160 Cal.App.4th 1255 [73 Cal.Rptr.3d 383] the Second District cited *Flatley v. Mauro* (2006) 39 Cal.4th 299 and noted that while possible application of the litigation privilege (Civ. Code section 47) might inform a court's analysis regarding application of the SLAPP statute (Code Civil Proc., § 425.16), it does not control the analysis. The court found that the SLAPP statute applies to an action for defamation arising from statements made by an attorney in a letter to customers of the attorney's client, informing them that the client was considering litigation against the party now attempting to sue for defamation, so long as the allegedly defamatory statement was made in connection with litigation contemplated in good faith when the letter was sent.

In ***California Back Specialists Medical Group v. Rand*** (2008) 160 Cal.App.4th 1032 [73 Cal.Rptr.3d 268] the Second District held that the SLAPP statute did not apply an in action by medical providers against an attorney for disbursing funds to clients without satisfying the providers' liens because it was based on a controversy between private parties and not under consideration in any court or official proceedings until it was filed. Among other cases, the court cited *Navellier v. Sletten* (2002) 29 Cal.4th 82 as authority for its conclusion. In addition, it found the SLAPP motion made by defendant to be frivolous and affirmed the trial court's order awarding attorney fees to the party successfully opposing it.

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In ***Taheri Law Group v. Evans*** (2008) 160 Cal.App.4th 482 [72 Cal.Rptr.3d 847] the Second District noted that Code of Civil Procedure section 425.17, which amended the SLAPP statute to prevent its application to a cause of action against a seller of goods or services arising from representations about a competitor made for the purpose of soliciting business, could apply to an attorney who allegedly made statements to another attorney's client for the purpose of soliciting the client's business. The court added, however, that if those statements were made while giving legal advice to the client about a pending lawsuit, the amendment would not apply, and the statement would be protected by the original SLAPP statute. Citing *Trope v. Katz* (1995) 11 Cal.4th 274, the court said that an attorney appearing in pro per could not recover attorney fees.

In ***Russell v. Foglio*** (2008) 160 Cal.App.4th 653 [73 Cal.Rptr.3d 87] the Second District noted that an order granting a motion to strike a cause of action under the SLAPP statute (Code Civ. Proc., § 425.16) is separately appealable, so a notice of appeal from an award of attorney fees to the successful moving party does not institute an appeal from the order striking the cause of action. The court added that even if such a notice of appeal were liberally construed to include an appeal from the SLAPP order itself, it would not be timely unless filed within the period for appealing that order.

In ***Marine Forests Society v. California Coastal Comm.*** (2008) 160 Cal.App.4th 867 [74 Cal.Rptr.3d 32] plaintiff successfully sued to lift an injunction obtained by a state agency on the ground that its activities were void because its members were appointed in a manner that violated the state Constitution. The California Supreme Court reversed, holding that although the Constitution had been violated, the method by which the members were selected did not affect the validity of the injunction. The Legislature subsequently amended the statutes to require that agency members be chosen in a different way. Sacramento Superior Court then awarded fees to plaintiff as a private attorney general. On appeal, the Third District reversed the fee award. It said plaintiff's suit was not successful because the favorable judgment was reversed on appeal. The suit was not a catalyst for change in the agency's behavior because the agency acted in response to the statutory amendment rather than to the lawsuit and the suit did not seek to change the way members were selected but to lift the injunction.

In ***Harrington v. Payroll Entertainment Services, Inc.*** (2008) 160 Cal.App.4th 589 [72 Cal.Rptr.3d 922] the Second District noted that Labor Code sections 226, 1194, and 2699 require an award of attorney fees to an employee who successfully sues for underpaid overtime compensation, citing *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754. It found a trial court's denial of the request for approximately $46,000 in attorney fees by an employee who successfully litigated such a claim was error, but concluded that $500 was the maximum that should be awarded as fees in this case.

In ***County of Santa Clara v. Superior Court*** (2008) 161 Cal.App.4th 1140 [74 Cal.Rptr.3d 842] the Sixth District held that in a case in which private counsel, explicitly serving in a subordinate role without any decision-making authority or control, merely assisted government attorneys in litigation of an action for abatement of a public nuisance, the public agency's agreement to pay the private attorneys a contingent fee was valid and enforceable. *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 held that a contingent fee should not be paid to a private attorney representing a public agency in an action to abate a nuisance, because such an action requires absolute neutrality, which could be compromised by a contingent fee. But the court distinguished this case since the attorneys assisting the agency did not have authority that would require absolute neutrality.

In ***Best Interiors, Inc. v. Millie & Severson*** (2008) 161 Cal.App.4th 1320 [75 Cal.Rptr.3d 1] the Second District held that a subcontract that incorporated dispute resolution provisions of the prime contract, which stated that the law of the place where it was to be performed would govern, also incorporated the choice of law provision. Citing *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University* (1989) 489 U.S. 468 and *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, the court concluded the Federal Arbitration Act does not deprive a California court of discretion to deny a motion to compel arbitration on the ground that one of the parties is in litigation regarding the same transaction with a nonsignatory to the arbitration agreement. The trial court's order denying a motion to compel arbitration on that ground was affirmed.

In ***Bruni v. Didion*** (2008) 160 Cal.App.4th 1272 [73 Cal.Rptr.3d 395] the Fourth District held that arbitration provisions in a new home warranty application presented to buyers at or shortly before the close of escrow and containing language broadly referring to construction defects, but worded in a way that ap-

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peared to apply only to the warranty itself, was unenforceable by the builder in construction defect litigation filed by the homebuyers. The same conclusion had been reached in *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, a case arising from the same facts but brought by different plaintiffs. The court decided this case independently to avoid having its decision become uncitable in the event review is granted in *Baker*. However, after publication of this decision, review was denied in *Baker*.

In ***Advantage Medical Services, LLC v. Hoffman*** (2008) 160 Cal.App.4th 806 [72 Cal.Rptr.3d 935] the Fourth District held that even when it is too late to disqualify a neutral arbitrator for failing to disclose his relationship with insurers associated with a party, the arbitration award properly can be vacated.

In ***Jakks Pacific, Inc. v. Superior Court*** (2008) 160 Cal.App.4th 596 [72 Cal.Rptr.3d 914] the Second District held that arbitrators nominated by the court are not required to make disclosures in compliance with Code of Civil Procedure section 1281.6 until they are actually chosen by the parties and appointed.

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Readers are cautioned that cases discussed here may have subsequently become uncitable, and that they should always update citations (e.g., Shepardize) before citing any case.

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