

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 ***Bufil v. Dollar Financial Group, Inc.*** (2008) 162 Cal.App.4th 1193 [76 Cal.Rptr.3d 804], the First District found that denial of class certification in an action against an employer for alleged meal-break violations did not result in issue preclusion (i.e., collateral estoppel) in a subsequent action against the same employer filed on behalf of a more limited class of employees. It cited *Alvarez v. May Department Stores Co.* (2006) 143 Cal.App.4th 1223 for its discussion of collateral estoppel principles.

In ***Cadle II, Inc. v. Fiscus*** (2008) 163 Cal.App.4th 1232 [78 Cal.Rptr.3d 238], the Fourth District cited *Goldman v. Simpson* (2008) 160 Cal.App.4th 255, which held that a California court has continuing jurisdiction over a judgment debtor in connection with a motion to renew a judgment, because it is a proceeding supplemental to the action in which the judgment was rendered. In this case, the court said that an entry of a judgment in California results in an implied contract made in California that obligates the debtor to pay it. Therefore, the California court has jurisdiction over the debtor in an action on the judgment.

In ***Farwell v. Sunset Mesa Property Owners Assn., Inc.*** (2008) 163 Cal.App.4th 1545 [78 Cal.Rptr.3d 666], the Second District cited *Daar v. Yellow Cab* (1967) 67 Cal.2d 695, in which the California Supreme Court created the "death knell" doctrine. That case held that an order denying class certification is appealable, although not on the list of appealable orders at Code of Civil Procedure section 1294. But the Second District said that was because such an order effectually dismissed the action brought on behalf of unnamed class members. On the other hand, an order determining that certain individuals could not be sued as representatives of a defendant class and sustaining a demurrer with leave to amend in the action brought against them in that capacity does not have that effect and is not appealable.

In ***Sharp v. Next Entertainment, Inc.*** (2008) 163 Cal.App.4th 410 [78 Cal.Rptr.3d 37], the Second District held that in a putative class action against an employer, where the named plaintiffs were represented by an attorney also representing the union paying the representation fees for the individual plaintiffs, the conflict waivers signed by the named plaintiffs and the union were sufficient to defeat defendant's motion to disqualify the attorney. The court cited *Jessen v. Hartford Cas. Ins. Co.* (2003) 111 Cal.App.4th 698.

In ***Pueblo Radiology Medical Group, Inc. v. Gerlach*** (2008) 163 Cal.App.4th 826 [77 Cal.Rptr.3d 880], the Second District held that in an action for breach of a contract calling for attorney fees to the prevailing party, a finding that individual defendants sued as alter egos of the defendant corporation were not liable as such, resulting in their dismissal from the action, makes them prevailing parties entitled to a fee award. The court cited *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124; and *Profit Concepts Management, Inc. v. Griffith* (2008) 162 Cal.App.4th 950. It added that bifurcation for judicial economy did not turn the alter ego phase of the trial into a non-contract claim, since the action against them depended on determination of that issue.

In ***In Re BCBG Overtime Cases*** (2008) 163 Cal.App.4th 1293 [78 Cal.Rptr.3d 257], the Fourth District noted that a motion to strike class allegations from a complaint is not a traditional motion to strike, but a request to determine whether the proposed class should be certified. Citing *Carabini v. Superior Court*

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(1994) 26 Cal.App.4th 239, it found that deciding the motion on the basis of a hearing and extrinsic evidence is a proper exercise of a trial court's discretion.

In ***Lien v. Lucky United Properties Inv., Inc.*** (2008) 163 Cal.App.4th 620 [77 Cal.Rptr.3d 707], the First District cited *In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032 as authority for its conclusion that a statement of decision under Code of Civil Procedure section 632 is not required in connection with a decision to grant a SLAPP motion, because although the court considers evidentiary submissions, it does not try issues of fact. The court disagreed with a contrary dictum contained in *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562.

In ***Premier Medical Management Systems, Inc. v. Ciga*** (2008) 163 Cal.App.4th 550 [77 Cal.Rptr.3d 695], the trial court granted a SLAPP motion and awarded attorney's fees to the successful moving party. On appeal, the plaintiff asserted that *Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242 established a 50-hour limit for compensable attorney services in the prosecution of SLAPP motions. However, the Second District held that this would violate the case-by-case Lodestar approach required by *Ketchum v. Moses* (2001) 24 Cal.4th 1122 and rejected the contention.

In ***Ford Motor Credit Co. v. Hunsberger*** (2008) 163 Cal.App.4th 1526 [78 Cal.Rptr.3d 661], the Fourth District noted that Code of Civil Procedure section 998 is not an independent ground for recovering attorney fees, and that under Civil Code section 1717, there is no prevailing party in an action that is voluntarily dismissed. Citing *Santisas v. Goodin* (1998) 17 Cal.4th 599, the court concluded that a defendant in a voluntarily dismissed contract action awarding fees to the prevailing party in litigation is therefore not entitled to recover fees, even if the prevailing party is entitled to enhanced costs under Code of Civil Procedure section 998.

In ***Guerrero v. Rodan Termite Control, Inc.*** (2008) 163 Cal.App.4th 1435 [78 Cal.Rptr.3d 344] the First District held that in deciding whether a plaintiff who rejected defendant's offer of compromise received a more favorable judgment, comparison should be made between the rejected offer and the jury's award prior to reduction for settlements plaintiff received from other defendants after the nonsettling defendant's offer was rejected. The court cited several cases in accord, including *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 963.

In ***Campagnone v. Enjoyable Pools & Spa Service & Repairs, Inc.*** (2008) 163 Cal.App.4th 566 [77 Cal.Rptr.3d 551], the Third District resolved a conflict between the mediation privilege protected by Evidence Code section 1119 and the Third District Court of Appeal Local Rule 1g, which permits the court to direct compulsory appellate mediation. The court said a party, but not the mediator, may inform the court about conduct committed by other parties, including insurers, during appellate mediation that might warrant sanctions. The court added that parties and their attorneys may be sanctioned for failing to appear at compulsory appellate mediation or failing to notify their insurers, which also may be sanctioned for failure to appear.

In ***Liberty Mutual Fire Ins. Co. v. LcL Admins., Inc.*** (2008) 163 Cal.App.4th 1093 [78 Cal.Rptr.3d 200], the Third District held that a party's discovery abuse consisting of the repeated submission of vacuous, meaningless interrogatory responses after three court orders directing proper responses, and ignoring a series of meet and confer letters, justified the court imposing a terminating sanction striking the party's answer and cross claim, thereby enabling the other party to obtain a default judgment.

In ***Guardado v. Superior Court*** (2008) 163 Cal.App.4th 91 [77 Cal.Rptr.3d 149], the Second District held that a trial court's finding that a plaintiff has a substantial probability of prevailing on a punitive damages claim and is entitled to conduct discovery regarding defendant's finances for discovery purposes, is not a determination of contested facts and does not cut off defendant's right to file a peremptory challenge to the judge. Although the writ petitioner cited *Jabro v. Superior Court* (2002) 95 Cal.App.4th 754, the court found it irrelevant.

In ***California Physicians v. Aoki Diabetes Research Institute*** (2008) 163 Cal.App.4th 1506 [78 Cal.Rptr.3d 646], the First District found that in a proceeding between a health-care provider and managed-care organizations administered by Blue Shield, an administrative law judge's finding that a certain treatment was not experimental resulted in issue preclusion (i.e., collateral estoppel) in subsequent litigation between Blue Shield and the same provider regarding the same treatment.

In ***Bowen v. Ryan*** (2008) 163 Cal.App.4th 916 [78 Cal.Rptr.3d 128], the Third District held that in a tort action by a child against a dentist, where the child

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alleged that the defendant dentist choked the child by putting his arm across his throat and shoving him against a wall during the course of treatment, that the testimony of nine of the defendant dentist's 45,000 former patients stating that defendant dentist had restrained them, hit them or held his hand over their mouths, was not admissible as evidence of a common plan or habit. Citing *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, the court said the evidence was solely relevant to a character trait and therefore inadmissible under Evidence Code section 1101.

In ***Los Angeles Unified School District v. Great American Ins. Co.*** (2008) 163 Cal.App.4th 944 [78 Cal.Rptr.3d 99], the Second District noted that according to *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, if contract language is not clear enough to be unambiguous on its face, a trial court is required to provisionally consider proffered extrinsic evidence in determining whether the contract is ambiguous. In this case, since the trial court did not say whether it had done so in ruling the contract was not ambiguous, the court remanded the matter for reconsideration.

In ***Amaral v. Cintas Corp. No. 2*** (2008) 163 Cal.App.4th 1157 [78 Cal.Rptr.3d 572], the First District noted it has long been the law that opinion evidence about the meaning of a statute is inadmissible. The court cited several cases in support of this statement, including *People v. Torres* (1995) 33 Cal.App.4th 37.



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