



# Litigation Update

Litigation Section News

March 2012

**Dispute against credit card company promising to help rebuild credit has to be arbitrated.** Credit card was marketed to be used to “rebuild poor credit.” The company was sued in a class action for misrepresentation. Credit card users signed an arbitration agreement in the application. But the *Credit Repair Organizations Act* [CROA; 15 U.S.C. §1679c(a)] states: “You have a right to sue a credit repair organization that violates the [Act].” The trial court found that Congress intended claims under the CROA to be non-arbitrable, and the Ninth Circuit affirmed. The United States Supreme Court reversed, finding the *Federal Arbitration Act* [FAA; 9 U.S.C. §1] required the matter be arbitrated, and that “had Congress meant to prohibit these very common [arbitration] provisions in the CROA, it would have done so in a manner less obtuse.” *CompuCredit Corp. v. Greenwood* (U.S. Sup. Ct.; January 10, 2012) 132 S.Ct. 665, [181 L.Ed.2d 586].

**Church school did not violate law when it fired teacher with narcolepsy who threatened to file a lawsuit.** The United States Supreme Court ruled a Lutheran Church school did not violate the law when it fired a teacher who claimed she was discriminated against because of a disability, and threatened to sue the church. The Court said the Establishment and Free

Exercise Clauses of the First Amendment bar suits on behalf of ministers against their churches. The Court found the ministerial exception doctrine protects religious groups, and this teacher’s job duties reflected a role in conveying the Church’s message and carrying out its mission. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* (U.S. Sup. Ct.; January 11, 2011) 132 S.Ct. 694, [181 L.Ed.2d 650].

**Non-traditional jew entitled to kosher meals.** A Messianic Jew incarcerated in state prison was denied kosher meals. Prison officials did not dispute the sincerity of the prisoner’s beliefs, but said the prisoner was not eligible to partake in an existing kosher meal program because he was not a traditional Jew and his needs could be satisfied with a vegetarian diet. In prison, kosher food is desired by non-Jewish inmates because it is perceived as better tasting and of higher quality. The Court of Appeal found the prison’s categorization to be an artificial construct and ruled prison officials deprived the prisoner of freely exercising his religion in violation of his statutory rights under the *Religious Land Use and Institutionalized Persons Act of 2000* [42 U.S.C. §2000cc]. *In re: Margarito Jesus Garcia* (Cal. App. Third Dist.; January 11, 2012) 202 Cal.App.4th 892, [136 Cal. Rptr.3d 298].

**California supreme court limits liability of manufacturers.** Defendant manufactured pumps and valves, and was sued for wrongful death caused by asbestos manufactured by third parties and added to the pumps after defendant sold them. The California Supreme Court held that “a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer’s product unless the defendant’s own product contributed substantially to the harm,

or the defendant participated substantially in creating a harmful combined use of the product.” *O’Neil v. Crane Co.* (Cal. Sup. Ct.; January 12, 2012) 53 Cal.4th 335, [266 P.3d 987, 135 Cal.Rptr.3d 288].

**Summary judgment reversed in age discrimination case.** The Ninth Circuit reversed the grant of summary judgment in a case which alleged violation of the Age Discrimination in *Employment Act* [28 U.S.C. §621]. Plaintiff was 54 years old with 29 years of experience. Someone else who was 42 years old and had two years of experience was hired. During the process, there was an inquiry regarding projected retirement dates of applicants, and plaintiff was not given an interview. The circuit court found there is a material dispute as to whether there was age-related bias. *Shelley v. Geren* (Ninth Cir.; January 12, 2012) 666 F.3d 599.

**Class certification reversed.** Federal trial court certified a class involving problems with Honda’s brake system. The Ninth Circuit reversed because the class includes cars in different jurisdictions and California’s consumer protection statutes could not be applied nationwide. *Mazza v. American Honda Motor Co.* (Ninth Cir.; January 12, 2012) 666 F.3d 581.

**No duty of lab to inform patient of lab results.** In their complaint, parents of a child born with cystic fibrosis contend they would not have conceived a child had the hospital informed them of the results of genetic tests. Both the trial and appellate courts found the hospital’s duty ended when it informed the doctor of the results. Summary judgment was granted to the hospital. *Walker v. Sonora Regional Medical Center* (Cal. App. Fifth Dist.; January 12, 2012) 202 Cal. App.4th 948, [135 Cal.Rptr.3d 876].

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**Settlement agreement enforceable under tragic circumstances.** While awaiting a ruling from the superior court on a petition to approve a settlement filed by a guardian *at litem* on behalf of a minor who suffered injuries on an all terrain vehicle, the minor died. The defendant opposed the petition, arguing the settlement was not enforceable because it had not been approved by the court before the minor died, which extinguished damages attributable to pain and suffering. The appellate court found the defendant was bound by the agreement when it was made and that it was enforceable. *Pearson v. Sup. Ct. (Gary Nicholson)* (Cal. App. Second Dist., Div. 6; January 25, 2012) 202 Cal.App.4th 1333, [136 Cal.Rptr.3d 455].

**Terms on back of unsigned invoice unenforceable.** C9 delivered helium-filled tanks to SVC in a “rush order” without having SVC sign the invoice. A boy was injured when one of the tanks fell on him. Both C9 and SVC settled the claim for the boy’s injuries. C9 sued SVC for indemnification because on the reverse side of the invoice there was a provision requiring SVC to indemnify C9 for any loss arising out of the use or possession of the tanks. The appellate court found the indemnity provision unenforceable because SVC had not “manifested assent” to the term. *C9 Ventures v. SVC-West, L.P.* (Cal. App. Fourth Dist., Div. 3; January 27, 2012) 202 Cal.App.4th 1483, [136 Cal.Rptr.3d 550].

**Word to the wise about civil code §998 offers.** Plaintiff does not accept an offer made under *Civ. Code* §998. Defendant takes the deposition of plaintiff’s expert and orders an expensive expedited transcript so it can make a motion to exclude the expert from testifying at trial. The court excludes the expert. Result? The appellate court held: “We therefore hold that section 998, subdivision (c) gives the trial court the discretion to award defendant’s expert fees, regardless of whose witness the expert is, in the event that the plaintiff fails to obtain a more favorable judgment or award.” But that’s not all plaintiff had to pay. She also had to cough up money for defendant’s experts’ preparation time, trial testimony and travel and deposition costs for defendant’s experts who did not testify

at trial. *Chaaban v. Wet Seal, Inc.* (Cal. App. Fourth Dist., Div. 3; January 31, 2012) 203 Cal.App.4th 49, [136 Cal.Rptr.3d 607].

**No liability for supplier of raw materials.** Court of Appeal declined to impose negligence, or strict liability for personal injuries to suppliers of raw materials. The court declined “to extend the holdings of the asbestos cases here because the metal products involved are not inherently dangerous.” *Maxton v. Western States Metals* (Cal. App. Second Dist., Div. 3; February 1, 2012) 203 Cal.App.4th 81, [136 Cal.Rptr.3d 630].

**Presiding Judge should not have cancelled court reporter ordered by another judge.** Presiding Judge of Trinity County Superior Court was publicly admonished for cancelling a court reporter ordered by another Judge “in an effort to ‘prompt Judge Woodward to engage in a dialogue about court expenses.’” *Public Admonishment of Judge Anthony C. Edwards* (February 7, 2012).

**No liability for slip & fall in hotel bathtub.** Plaintiff slipped and fell in a hotel bathtub and sued the hotel and the manufacturer of the bathtub. Against the manufacturer, he alleged the Slip-guard surface was not safe. Even plaintiff admitted industry standards were met. The appellate court stated plaintiff and his expert “were obligated to give a greater factual basis for application of any higher safety standards.” The hotel’s expert opined the coefficient of friction complied with industry standards and the hotel had no notice since prior incidents were not substantially similar. The appellate court said summary judgment should have been granted. *Howard v. Omni Hotels Management Corp. and Kohler Co.* (Cal. App. Fourth Dist., Div. 1; February 8, 2012) 203 Cal.App.4th 403, [136 Cal.Rptr.3d 739].

**Question of fact regarding slip & fall on spill in store.** Plaintiff slipped and fell on jewelry cleaning solution in a jewelry store. The Trial court granted summary judgment because the store did not have actual or constructive notice of the spill. Appellate court reversed, noting “the reasonable inference

to be drawn . . . is that one of defendant’s employees caused the cleaning fluid to be on the floor.” *Getchell v. Rogers Jewelry* (Cal. App. Third Dist.; February 7, 2012) 203 Cal.App.4th 381, [136 Cal.Rptr.3d 641].

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