Litigation Section of The State Bar of Califonia

Litigation Update

Litigation Section News

November 2005

A case to read when relying on legislative history in the interpretation of a statute. In *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (Cal. App. Third Dist.; August 30, 2005) [2005 DJDAR 10649], the Court of Appeal provides a detailed syllabus on the use and misuse of "legislative history." The opinion reiterates the oft stated rule that the court may only refer to legislative history if the statute is ambiguous. It then explains in great detail both how a request for juridical notice of legislative history should be presented to the court and then provides an exhaustive list of what documents may and what documents may not be considered by the court in determining the intent of the legislature from the legislative history.

Mandatory provisions of CCP § 473(b) does not authorize setting aside a summary judgment. *California Code of Civil Procedure* § 473(b) mandates relief from a default judgment based on an attorney filing a declaration of fault. But, even though plaintiff's lawyer failed to oppose a motion for summary judgment, it could not be set aside under § 473(b) because the statute is limited to default judgments. This was a summary judgment, not a default judgment, and the general rule charging clients with the negligence of their lawyer remains.

Note: Aside from relief from default judgments, § 473(b) also commands the setting aside of dismissals resulting from lawyers' fault. Before the relief is available, the lawyer must unequivocally acknowledge his or her mistake, inadvertence, surprise, or neglect. And the court must award compensatory attorney fees to the opposing party. (*See*, Weil, Brown & Rylaarsdam, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2005) ¶ ¶ 5:292 ff.)

Filing amended complaint after deadline is not necessarily fatal. Where a demurrer is sustained with leave to amend, *Civ.Proc.* § 581(f)(2) gives the court discretion to dismiss an amended complaint, if it is filed after the deadline set by the court. Contrary to defendant's contention in *Harlan v. Dept. of Transportation* (Cal. App. Fifth Dist.; September 13, 2005) 132 Cal.App.4th 868, [33 Cal.Rptr.3d 912, 2005 DJDAR 11340], a dismissal of the late-filed amended complaint is not mandatory.

Note: The Harlan court relied in part on an important but sometimes overlooked statute. *Civ.Proc.* § 475 requires a court to "disregard any error, improper ruling, instruction, or defect in the pleadings or proceedings which, in the opinion of the court, does not affect the substantial rights of the parties."

The mysteries of DNA evidence revealed. Although not a new case, we recently encountered *U.S. v. Trala* (D.Del. 2001) 162 F.Supp.2d 336, 339-340, as quoted in *People v. Smith* (2003) 107 Cal.App.4th 646, 653-654, [132 Cal.Rptr.2d 230]. In little more than a single page, the District Court in Delaware gives a comprehensive and understandable explanation of DNA evidence and how it may be used, in conjunction with a probability analysis, to identify specific individuals.

Statute of limitations in liability insurance claims. The statute of limitations in a general liability insurance coverage case accrues when the insurer refuses to defend the insured in the underlying litigation. As a result, since the duty to defend is continuing, the statute is tolled until the underlying

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action is terminated by final judgment. *Eaton Hydraulics, Inc. v. Continental Casualty Company* (Cal. App. Second Dist., Div. 8; September 15, 2005) 132 Cal.App.4th 966, [34 Cal.Rptr.3d 91, 2005 DJDAR 11408]. Therefore, although the insured of the insurer frequently brings an action for declaratory relief upon an insurer's denial of a defense under a liability policy, such an action is not necessary to prevent the running of the statute of limitations.

State regulations of non-consensual towing and storage are not preempted by federal law. Three cases filed within a few days of each other held that state restrictions on certain practices by "rogue towing services" are not barred by federal law. The Federal Aviation Administration Authorization Act (FAAAA; 49 USC §§ 14501 ff.) preempts any state law relating to the "price, route, or service" of any motor carrier. This includes tow truck operators, however, the statute provides that states may regulate prices charged by towing companies, if such transportation is performed without the prior written consent of the vehicle owner.

The Ninth Circuit held that a state law (Washington) requiring a signed authorization for the towing of each vehicle did not affect "price, route, or service" and was therefore, not preempted by the FAAAA. *Tillison v. Gregoire* (9th Cir.; September 19, 2005) 424 F.3d 1093 [2005 DJDAR 11487]. In two other cases, the California Court of Appeal held that this State's statutes limiting storage fees for vehicles towed without the consent of the owner are likewise exempted from the federal statute. *CPF Agency Corp. v. R&S Towing Service* (Cal. App. Fourth Dist., Div. 1; September 16, 2005) 132 Cal.App.4th 1014, [34 Cal.Rptr.3d 106, 2005 DJDAR 11481] and *CPF Agency Corp. v. Sevel's 24 Hour Towing Service* (Cal. App. Fourth Dist., Div. 1; September 19, 2005) 132 Cal.App.4th 1034, [34 Cal.Rptr.3d 120, 2005 DJDAR 11507].

Absent a contract to arbitrate, judgment confirming arbitration award must be reversed. Although the superior court granted defendant's motion to compel arbitration, the subsequent judgment confirming the arbitration award was reversed where the contract upon which plaintiff's claim was based did not require arbitration of the dispute. Although courts should indulge every intention to give effect to an arbitration agreement, the petitioner has the burden of establishing the existence of a contractual agreement to submit disputes to arbitration. When defendant failed to do so, the trial court should not have confirmed the arbitration award. *Villacreses v. Molinari* (Cal. App. Fourth Dist., Div. 3; September 26, 2005) 132 Cal.App.4th 1223, [34 Cal.Rptr.3d 281, 2005 DJDAR 11674].

Sanctions must be imposed for frivolous anti-SLAPP motion. The statute providing for a special motion to strike, against plaintiffs who sue in an attempt to punish defendants who exercise their right to free speech and petition, (the so-called anti-SLAPP statute, *Civ.Proc.* § 425.16), provides that a defendant whose motion under the statute is granted *must* be awarded attorney fees. A defendant who is unsuccessful in bringing such a motion is entitled to an award of fees against it, however, if the motion is frivolous. *The Foundation for Taxpayer and Consumer Rights v. Garamendi* (Cal. App. Second Dist., Div. 8; September 27, 2005) 132 Cal.App.4th 1354, [34 Cal.Rptr.3d 354, 2005 DJDAR 11764] (as modified, Oct. 27, 2005).

Note: Because of the right to appeal from an order denying an anti-SLAPP motion and the resulting stay of proceedings, some defendants are tempted to file such motions frivolously. But, if they do so, courts have not been reluctant to award attorney fees.

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