

# The Public Lawyer



STATE BAR OF NEVADA

## Nevada Supreme Court Cases

*Moseley v. Dist. Ct.* 124 Nev. Adv. Op. No. 61 (July 31, 2008)  
“In this original petition we consider two primary issues with regard to petitioner’s NRCP 25 motion to dismiss a deceased plaintiff’s loss of consortium claim. First, we address whether a defendant party who files a suggestion of death on the record is required to name a successor or personal representative for the deceased plaintiff to trigger NRCP 25’s 90-day limitation period. We clarify that a suggestion of a plaintiff’s death filed by a defendant is generally sufficient to trigger the 90-day limitation period within which the remaining plaintiffs or the deceased party’s successor or personal representative are required to move for substitution. Here, petitioner, a defendant in the underlying proceeding, filed the suggestion of death for a plaintiff who died during the proceeding’s pendency. Because petitioner is the defendant and it is a plaintiff who died, petitioner was not required to locate or wait for the designation of a successor for the deceased plaintiff to successfully

trigger the 90-day limitation period. Accordingly, petitioner’s suggestion of death triggered NRCP 25’s 90-day limitation period.

Second, we address whether, after NRCP 25’s 90-day limitation period expires, a motion for an extension of time to substitute a party under NRCP 6(b)(2) may be used to obtain relief when excusable neglect is established. We conclude that after the expiration of NRCP 25’s 90-day limitation period, a party may move the district court for relief under NRCP 6(b)(2) and obtain an extension of time to substitute a proper party so long as excusable neglect is shown. In this case, it is unclear what factual findings the district court made concerning the plaintiffs’ establishment of excusable neglect, which would make denying the motion to dismiss proper.

Thus, we grant the petition in part and direct the clerk of this court to issue a writ of mandamus directing the district court

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to vacate its order denying petitioner's motion to dismiss and to reconsider this issue in light of the principles set forth in this opinion."

*Hernandez v. State* 124 Nev. Adv. Op. No. 60 (July 31, 2008) "The State charged appellant Emmanuel Hernandez with first-degree murder with the use of a deadly weapon for shooting and killing Jose Gonzalez in front of the Palm Hills Apartments in Las Vegas. At the State's request, the district court admitted at trial the preliminary hearing testimony of a witness who did not arrive to testify as scheduled. In this appeal, we address the burden placed on the proponent of an absent witness's preliminary hearing testimony to show that reasonable diligence was used to acquire the presence of the witness.

In general, before preliminary hearing testimony may be entered into evidence in a criminal trial, the proponent must demonstrate that the witness is absent despite the proponent's reasonable efforts to procure the witness's attendance. We conclude first that if a motion to admit preliminary hearing testimony is untimely, the proponent of the testimony must support the motion with an affidavit or sworn testimony demonstrating good cause for the untimely motion. Good cause to allow an untimely motion exists only when the proponent has exercised reasonable diligence to procure the attendance of the witness before the expiration of the motion deadline. We conclude second that in this case, although the State may have exercised reasonable diligence before the expiration of the motion deadline, it did not demonstrate that it exercised reasonable diligence to secure the presence of the witness when it became aware of her absence after the expiration of the deadline, and therefore, the district court erred when it granted the State's motion to admit the witness's preliminary hearing testimony."

*Truck Ins. Exch. v. Palmer J. Swanson, Inc.* 124 Nev. Adv. Op. No. 59 (July 31, 2008)

"Generally, nonsignatories to arbitration agreements have been required to arbitrate under theories of incorporation by reference, assumption, agency, alter ego, and estoppel. In this appeal, we consider whether a nonsignatory to an arbitration agreement can, nevertheless, be required to submit an oral contract dispute to arbitration. We also briefly address whether the doctrine of unclean hands should apply to bind respondent Palmer J. Swanson, Inc. (Nevada firm), to the arbitration provisions contained in the written agreements between appellant Farmers Insurance Exchange and the California-based law firm of Swanson & Antognini, d/b/a Palmer J. Swanson, P.C. (California firm).

Farmers and the California firm entered into several written agreements for the performance of legal services in California, all containing mandatory arbitration provisions. Subsequently, Farmers and the Nevada firm entered into an oral agreement for the performance of legal services in Nevada. Substantial billing disputes arose between Palmer J. Swanson, a 50-percent shareholder and director of the California firm, and Farmers regarding the performance of these services in both California and Nevada. Based on the written arbitration agreements between Farmers and the California firm, Farmers moved to compel the Nevada firm to participate in mandatory arbitration. The Nevada firm argued that it could not be compelled to participate in mandatory arbitration because it was not a party to the agreements entered into between Farmers and the California firm. The district court denied Farmers' motion to compel arbitration, and this appeal followed.

Having reviewed the record and considered the parties' arguments, we conclude that the Ne-

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vada firm was not the alter ego of the California firm and, thus, cannot be bound to those agreements entered into by the California firm. We also conclude that the Nevada firm was not equitably estopped from refusing to comply with the arbitration agreement because it did not receive a direct benefit from the California firm's contracts with Farmers. Finally, under the facts presented, the doctrine of unclean hands does not operate to preclude the Nevada firm from seeking judicial relief. Accordingly, we perceive no error in the district court's order denying Farmers' motion to compel arbitration."

*State v. Barta* 124 Nev. Adv. Op. No. 58 (July 25, 2008) "These consolidated appeals arise from the same central conflict over property tax valuation that we addressed in *State, Board of Equalization v. Bakst*. In *Bakst*, several taxpayers challenged the Washoe County Assessor's use of certain appraisal methods to establish the taxable values of their properties for the 2003-2004 tax year. The district court, and later this court, determined that the Assessor's methods were unconstitutional and ordered the taxpayers' properties' taxable values rolled back to the 2002-2003 tax year levels.

Meanwhile, several Incline Village and Crystal Bay area property owners in Washoe County, including many of the taxpayers involved in the *Bakst* litigation, administratively challenged the Washoe County Assessor's assessments for the subsequent tax year, 2004-2005. Both the Washoe County and State Boards of Equalization denied the Taxpayers relief, and the Taxpayers petitioned the district court for judicial review. The district court determined that the Taxpayers' petitions for judicial review presented issues that were factually iden-

tical to the issues in *Bakst*, which at that point had been decided at the district court level and was pending appellate review. As a consequence, the district court granted their petitions and rolled back their properties' 2004-2005 taxable values to the 2002-2003 rates, as was done to the prior year's values in *Bakst*. These consolidated appeals from the district court's orders regarding the 2004-2005 tax year followed.

In resolving these appeals we, like the district court, conclude that nothing significant distinguishes these cases, factually or legally, from *Bakst*. The State and County appellants nevertheless contend that, even if unconstitutional methods were used to determine the respondent Taxpayers' properties taxable values, we should reverse the district court orders granting the petitions for judicial review because the Taxpayers failed to prove that their properties' 2004-2005 taxable values exceeded their full cash values. That position, however, disregards a taxpayer's right to a uniform and equal rate of assessment and taxation, which is guaranteed by Article 10, Section 1 of the Nevada Constitution. We conclude, as we stated in *Bakst*, that a property value determined using unconstitutional, nonuniform methods is necessarily unjust and inequitable. Thus, because the methods used to value a taxpayer's property are a material consideration in determining whether the property was justly and equitably valued, a taxpayer may challenge an assessment based on the use of unconstitutional methods even if the assessment does not exceed full cash value. Since the Taxpayers here properly challenged their assessments and demonstrated that those assessments were based on unconstitutional methods, we affirm the district court's orders."

*Child v. Lomax* 124 Nev. Adv. Op. No. 57 (July

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25, 2008) “In this original petition for a writ of mandamus, we examine a Nevada constitutional amendment that precludes State Assembly members from serving more than 12 years in office. In examining that amendment, we first address two issues: whether a petition for a writ of mandamus is the appropriate means for challenging a State Assembly member’s qualifications to run for office and whether the constitutional amendment setting term limits for the State Assembly Office is valid and enforceable. With regard to the first issue, under the circumstances presented in this original proceeding involving a matter of statewide importance, a petition for mandamus relief is an appropriate way in which to challenge a candidate’s qualifications on term-limit grounds. As regards the second issue, we conclude that the Nevada Constitution’s term-limit amendment is valid and enforceable in light of our precedent approving the method in which the amendment was enacted.

Because we conclude that a petition for mandamus relief is appropriate for our consideration and that the term-limit amendment is valid, we next address the substance of the petition: whether a member of the State Assembly seeking reelection should be disqualified as a candidate on the ground that, under the term-limit amendment, she will have exceeded the 12-year limit on serving in that office when her current term expires following the 2008 general election. As the constitution provides that a State Assembly member’s term of office begins on the day after the member’s election and the State Assembly member who petitioner asserts has exceeded the 12-year term limitation began serving in that office on November 6, 1996—before the term-limit provision became effective on November 27, 1996—her term that began in 1996 does not count toward the 12-year limitation period.

Thus, as calculated from the amendment’s effective date, the candidate whose qualifications petitioner challenges on term-limit grounds will not have served in the State Assembly for 12 years or more by the time her current term expires. Accordingly, because she is eligible for reelection under the term-limit amendment, we deny this petition.”

*Secretary of State v. Burk* 124 Nev. Adv. Op. No. 56 (July 25, 2008) “Petitioners challenge real parties in interest’s candidacies for state offices or positions on local governing bodies based on the Nevada Constitution’s Article 15, Section 3(2) term-limit amendment. That amendment, which became effective in late November 1996, provides that a person may not serve more than 12 years in any state office or as a member of any local governing body. The primary question presented here is whether that amendment applies to an individual who was elected to a term of office before the amendment’s effective date but commenced serving in that office thereafter. In addressing that question, we reaffirm precedent concluding that the amendment was validly enacted.

As viewed prospectively from its November 1996 effective date, the term-limit amendment applies to all years served in office after that date, even though the office may have been filled by virtue of the 1996 election before the amendment became effective. Thus, any candidate for a state office or position on a local governing body, who, like real parties in interest, has served 12 years or more after the November 1996 effective date is barred by the term-limit amendment from further service in that position. Although the amendment was presented to the voters in a slightly varied format during two successive general elections, the amendment’s lan-

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guage was identical in both, clear in its content, and twice approved by the voters. As we have already recognized in *Nevada Judges Ass'n v. Lau* and *Rogers v. Heller*, and without compelling reasons for overturning that precedent, we reaffirm that the amendment was validly enacted, and we conclude that, under its plain terms, real parties in interest are barred from seeking reelection.”

*Attorney General v. Montero* 124 Nev. Adv. Op. No. 55 (July 24, 2008) “ In this appeal, we address the residency requirements for district court judicial candidates and, in particular, whether a candidate for district judge must reside within the judicial district in which he or she is seeking office. Because district judges are recognized as ‘state officers’ under NRS 293.109, we conclude that a candidate who satisfies NRS 3.060’s mandate that a district court judicial candidate must be a Nevada state resident for at least two years preceding the election is eligible for election within any judicial district within the state under NRS 293.1755(1)’s ‘state’ residency requirement. Accordingly, here, the district court properly denied the challenge to respondent’s candidacy because respondent met the statutory residency requirements for a judicial district court candidate.”

*State v. Pullin* 124 Nev. Adv. Op. No. 54 (July 24, 2008) “ In this original petition for a writ of mandamus, we decide whether ameliorative amendments to the deadly weapon enhancement statute (NRS 193.165) apply to offenders who committed their crimes prior to the effective date of the amendments but were sentenced after that date. We conclude that they do not. We further reaffirm the general rule that crimes are punishable in accord with the law in force at the time a defendant commits his crime unless the

Legislature clearly expresses its intent to the contrary. We conclude that legislative intent, this court’s jurisprudence, and sound public policy reasons mitigate in favor of such a result. Moreover, we conclude that this rule should apply even in the absence of a savings clause. Further, we reject Pullin’s contention that the retroactive application of the amendments to NRS 193.165 is appropriate here because NRS 193.165 is a procedural or remedial statute. Finally, we conclude that the general rule concerning the retroactive application of changes in criminal law applies equally to both primary offenses and sentence enhancements. Accordingly, we grant the petition and direct the district court to enter an amended judgment of conviction that comports with this decision.”

*Vrendenburg v. Sedgwick CMS* 124 Nev. Adv. Op. No. 53 (July 24, 2008) “ In this appeal, we address a single issue of first impression: whether and under what circumstances surviving family members may recover workers’ compensation death benefits if an injured employee commits suicide as the result of an industrial injury. While workers’ compensation benefits are generally available for accidental employee deaths, under NRS 616C.230(1), Nevada’s willful self-injury exclusion, the employee’s surviving family members are precluded from recovering benefits if the employee’s death results from a ‘willful intention to injure himself.’ Although we have not previously addressed the scope of this exclusion, we now conclude that suicides are not willful for purposes of NRS 616C.230(1) if a sufficient chain of causation has been established. Under this construct, a claimant must demonstrate that (1) the employee suffered an industrial injury, (2) the industrial injury caused some psychological condition severe enough to override the employee’s rational judgment, and (3) the psychological con-

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dition caused the employee to commit suicide. In light of this newly announced standard, we reverse the district court's order denying judicial review and remand this matter so that the appeals officer may conduct further proceedings."

*Hill v. State* 124 Nev. Adv. Op. No. 52 (July 24, 2008) "In this case, we consider the district court's role in evaluating potential juror bias in grand jury proceedings. We conclude that it is the domain of the district court judge, not the prosecuting attorney, to determine whether grand juror bias exists as such claims arise. However, when a defendant has been found guilty by a petit jury following a fair trial of the crime for which he was indicted by a grand jury, we conclude that any error that may have occurred as a result of grand juror bias is harmless."

*City of Las Vegas v. Meunier* 124 Nev. Adv. Op. No. 51 (July 24, 2008) "This matter comes to us by way of an original petition for a writ of mandamus. In resolving this petition, we consider the scope of NRS 33.018, which defines acts that constitute domestic violence. Under NRS 33.018, a person convicted of battery commits an act that constitutes domestic violence when the victim is, among other things, the defendant's spouse, 'any other person to whom [the defendant] is related by blood or marriage,' or a person with whom the defendant resides. The issue raised here is whether a battery committed by a sister-in-law upon the person of her brother-in-law is an act of domestic violence under NRS 33.018. We conclude that it is.

*Moldon v. County of Clark* 124 Nev. Adv. Op. No. 49 (July 24, 2008) "In this appeal, we consider whether the placement of interest earned on condemnation funds, which were deposited with the court in an eminent domain action, into a local government's general fund for public benefit, pur-

suant to statute, constituted a taking under the Fifth and Fourteenth Amendments to the United States Constitution.

We conclude that, because condemnation deposits constitute private property to the extent that a party is entitled to the condemnation deposit, the party is likewise entitled to the interest earned on that deposit. Thus, if interest earned from the condemnation deposit is placed into a local government's general fund for public benefit, that act constitutes a taking under the Fifth and Fourteenth Amendments. Accordingly, any statute allowing local governments to keep interest earned on funds deposited with the court is unconstitutional, as applied to condemnation deposits that are ultimately awarded to a private party.

Accordingly, because the condemnees in this appeal were entitled to the deposited amount, we reverse the district court's order determining that the condemnees were not entitled to the interest earned on the condemnation deposit, and we remand this matter to the district court so that the district court may determine the amount of interest owed to the condemnees on the condemnation deposit."

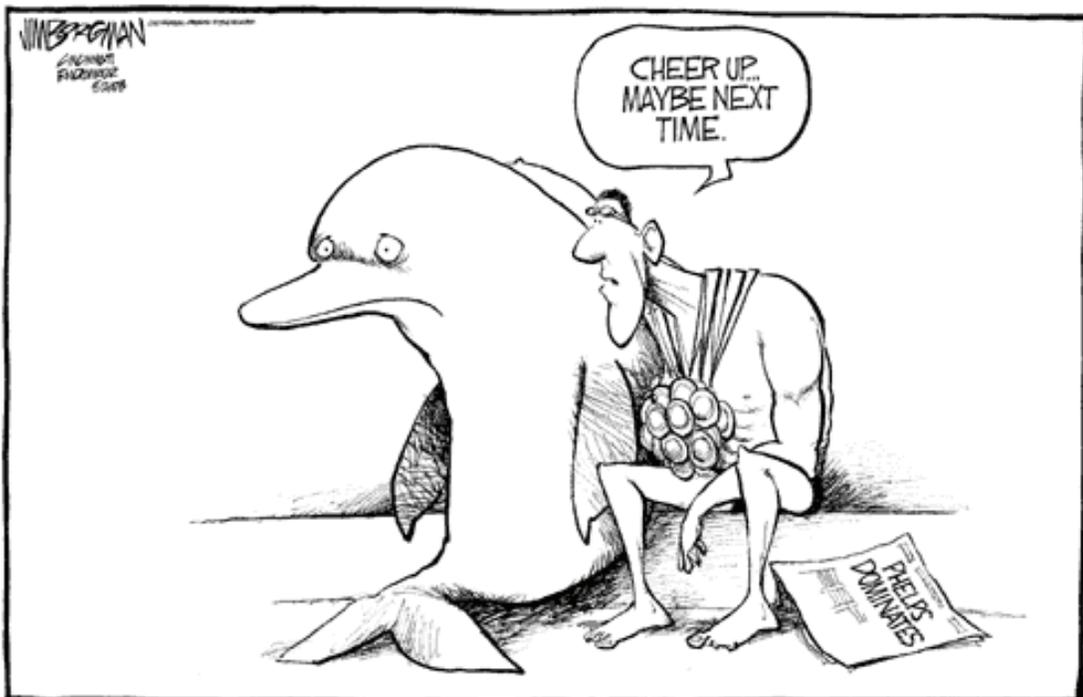
*Hallmark v. Eldridge* 124 Nev. Adv. Op. No. 48 (July 24, 2008) "In this appeal, we consider the extent to which biomechanical engineers may testify concerning damage claims in personal injury matters and clarify the standards for appellate review concerning the adequacy of damage awards based upon the erroneous admission of evidence.

We conclude that (1) the district court below abused its discretion when it allowed a physician with an engineering background to testify

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as a biomechanical expert against a personal injury plaintiff because, among other reasons, the testimony did not assist the jury in understanding the evidence as the testimony was not based on a reliable methodology; (2) prejudice stemming from errors in the admission of evidence bearing upon a damage claim requires reversal when the error substantially affects the rights of the complaining party on appeal; and (3) such an error substantially affects those rights when the appellant establishes, based upon a sufficient appellate record, the reasonable probability of a different result in the absence of the error. We further conclude that the record on appeal sufficiently demonstrates that, but for the error, appellant Carrie Hallmark, plaintiff in the action below, would probably have obtained a more favorable damage award in the matter below. Accordingly, we reverse and remand the case to the district court with instructions that it grant Hallmark a new trial limited to the issue of her damages without the contested evidence.”

### *Phelps Makes History with Eight Gold Medals at the 2008 Beijing Olympics.*



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*Bertelsen v. Harris* No. 06-36020 (August 11, 2008) “We are called on to decide whether attorney misconduct towards clients, involving violations of rules of professional conduct binding on the attorney, requires forfeiture of the attorneys’ fees paid to them when, after all righteous furor is vented, the fees were eminently reasonable for the result produced.

Jeffrey and Amy Bertelsen, their now-defunct company Bertelsen Food & Gas, Inc., and Jeffrey Bertelsen’s parents Dr. Richard and Janice Jo Bertelsen (‘Appellants’), appeal the district court’s judgment after a bench trial in favor of Appellants’ former attorney Roger Harris and his law firm (‘Appellees’) on Appellants’ breach of fiduciary duty claims. Appellants claimed Harris and his firm (1) violated Washington Rule of Professional Conduct (‘RPC’) § 5.4(a) by agreeing to share legal fees with a nonlawyer; (2) failed to comply with Washington law when they modified their legal fee agreements during the course of representation; (3) overcharged Appellants by miscalculating their contingency fee and failed to comply with RPC § 1.5(c)(3)’s requirement that at the conclusion of a contingency fee matter, the attorney provide his client with a written statement showing the method of contingency fee calculation; and (4) failed fully to inform Appellants of conflicts of interest in their joint representation and obtain written waivers of the conflicts.

Appellants sought disgorgement of \$167,500 in fees they paid Harris, his firm, and Harris’s non-attorney consultant. The district court determined that, even assuming Harris and his firm breached the fiduciary duties to their clients imposed by the rules of professional conduct for attorneys, the circumstances of this case did not warrant an equitable award of disgorgement of fees.

This case does not call upon us to determine whether Appellees breached their fiduciary duty to their clients as a matter of Washington state law. Nor is this occasion to express opprobrium at an attorney’s failure to abide by the rules of professional responsibility in representing his clients. Rather, our task is a limited one: we must decide whether the district court abused its discretion when it declined to award disgorgement of fees. We hold there was no abuse of discretion.”

*United States v. Park* No. 06-35886 (August 11, 2008) “Ron and Mary Park own and operate a dog kennel, Wild River Kennels, on property along the Clearwater River in Idaho. Their property is subject to a scenic easement that was granted to the United States, which prohibits commercial activity but permits livestock farming. In this appeal, we are asked to determine the unusual question whether dogs are ‘livestock.’ Despite a gut inclination that the answer might be ‘no,’ resolution of the issue is not so clear, thus precluding summary judgment at this stage of the proceeding. As it turns out, the term ‘livestock’ is ambiguous at best and much broader than the traditional categories of horses, cattle, sheep, and pigs.”

“Because the term ‘livestock farming’ is ambiguous as it is used in the easement, interpretation of the easement cannot be resolved on summary judgment. The judgment of the district court is reversed and we remand for further proceedings.”

*Preminger v. Peake* No. 08-15714 (August 8, 2008) “Plaintiffs Steven R. Preminger and the Santa Clara County Democratic Central Committee appeal the district court’s dismissal, for lack of standing, of their First Amendment

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challenge to the Department of Veterans Affairs' ('VA') denial of entry to one of their facilities for the purpose of registering voters. We now hold that Preminger has standing. Nonetheless, we affirm the judgment in favor of the VA because Plaintiffs failed to demonstrate that the VA's application of 38 C.F.R. § 1.218(a)(14) ('the Regulation') to them violated the First Amendment.

*Miller v. The California Speedway Corp.* No. 06-56468 (August 8, 2008) "Appellant Robert Miller is a big fan of NASCAR, attending from three to six events a year at the California Speedway in Fontana. He also happens to be a quadriplegic who uses an electric wheelchair. When the fans immediately in front of Miller stand during the most exciting parts of the race, they block his view of the action. Appellee California Speedway Corporation ('Speedway') opened the California Speedway in 1997. The track and stadium, which sponsors NASCAR events, has two areas for wheelchairs in the grandstands; the cheaper seats are located at the bottom of the stadium, and the more expensive seats are located near the top. Miller always purchases tickets for the top row.

Miller brought this suit, claiming that Speedway has violated Title III of the Americans with Disabilities Act ('ADA'), 42 U.S.C. § 12181 et seq., and a Department of Justice regulation requiring that wheelchair areas 'provide people with physical disabilities . . . lines of sight comparable to those for members of the general public.' 28 C.F.R. pt. 36, App. A, § 4.33.3 (italics omitted). The district court granted Speedway's motion for summary judgment on the ground that the DOJ regulation does not address the question of lines of sight over standing spectators. *Miller v. California Speedway Corp.*, 453 F. Supp. 2d 1193, 1204 (C.D. Cal. 2006).

As the district court noted, two federal courts of appeals and two federal district courts have addressed this precise question and have reached opposite conclusions. The Third Circuit and the District of Oregon concluded that the DOJ's regulation does not require lines of sight over standing spectators. *Caruso v. Blockbuster-Sony Music Entm't Centre at the Waterfront*, 193 F.3d 730, 736-37 (3rd Cir. 1999); *Indep. Living Res. v. Oregon Arena Corp.*, 982 F. Supp. 698, 742-43 (D. Oregon 1997). By contrast, the D.C. Circuit and the District of Minnesota found that the DOJ's regulation does require lines of sight over standing spectators. *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 587 (D.C. Cir. 1997); *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1269 (D. Minn. 1997). We agree with the D.C. Circuit and reverse the judgment of the district court."

*Navajo Nation v. USFS* No. 06-36027 (August 8, 2008) "In this case, American Indians ask us to prohibit the federal government from allowing the use of artificial snow for skiing on a portion of a public mountain sacred in their religion. At the heart of their claim is the planned use of recycled wastewater, which contains 0.0001% human waste, to make artificial snow. The Plaintiffs claim the use of such snow on a sacred mountain desecrates the entire mountain, deprecates their religious ceremonies, and injures their religious sensibilities. We are called upon to decide whether this government-approved use of artificial snow on government-owned park land violates the Religious Freedom Restoration Act of 1993 ('RFRA'), 42 U.S.C. §§ 2000bb et seq., the National Environmental Policy Act of 1969 ('NEPA'), 42 U.S.C. §§ 4321 et seq., and the National Historic Preservation Act ('NHPA'), 16 U.S.C. §§ 470 et seq. We hold that it does not, and affirm the district

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court's denial of relief on all grounds.”

*Zolotarev v. San Francisco* No. 06-16665 (August 7, 2008) “These consolidated appeals involve suits against the City and County of San Francisco, San Francisco Municipal Transportation Agency (‘MUNI’), and various individual defendants (collectively, ‘Defendants’) for race and national origin discrimination in violation of 42 U.S.C. §§

*Mike Keefe THE DENVER POST 8-16-08*



1981, 1983, 1985 & 1986. Plaintiffs allege that Defendants discriminated against them by giving preferential hiring treatment to Asian and Filipino workers. We do not consider the merits of the plaintiffs' allegations, however, as the only issue before us is whether their claims are barred by the statute of limitations, as the district court found. We agree with the district court that (1) the cause of action accrued and the statute of limitations began to run when the plaintiffs received notice they would not be hired, and (2) equitable estoppel does not prevent the Defendants from asserting a statute

of limitations defense. Accordingly, we affirm the district court in all respects.”

*Center for Biological Diversity v. Mariana Point Development Co.* No. 06-56193 (August 6, 2008) “Marina Point Development Associates, Okon Development Co., Oko Investments, Inc., Northshore Development Associates, L.P., Irving Okovita, Site Design Associates, Inc.,

Ken Discenza, VDLP Marina Point L.P. and Venwest Marina Point, Inc. (collectively ‘Marina Point’) appeal the district court’s judgment on the merits in favor of Center for Biological Diversity and Friends of Fawnskin (collectively ‘the Center’) on their claims under the

Clean Water Act (CWA), and under the Endangered Species Act (ESA). Marina Point also appeals the district court’s order awarding attorney fees to the Center and the district court’s contempt order. We vacate the district court’s judgment on the merits and instruct it to dismiss for lack of jurisdiction. We reverse the order awarding attorney fees and the contempt order.”

“The district court determined that Marina Point had violated the CWA and had either violated or would violate the ESA. *See Center I*, 434 F.

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Supp. at 795-98. However, because it lacked jurisdiction over the CWA claims and because the ESA claims have become moot, we vacate its judgment and remand with directions to dismiss for lack of jurisdiction. Concomitantly, we reverse the award of attorney fees and the contempt order.

Judgment After Trial on the merits (No. 06-56193) VACATED and REMANDED with instructions to DISMISS for mootness (ESA) and lack of jurisdiction (CWA). Order Awarding Attorney Fees (No. 07-55243) and Order of Contempt (No. 07-56574) REVERSED.”

*United States v. Ruff* No. 07-30213 (August 1, 2008) “Kevin Lee Ruff (‘Ruff’) pled guilty to several counts of health care fraud, embezzlement and money laundering. The district court originally sentenced Ruff to a prison term of 12 months and one day and three years supervised release, recommending that he serve his sentence at Geiger Corrections Center (‘Geiger’) to allow him to work, pay restitution and visit with his then 11-year-old son. Discovering that Geiger would not house prisoners, the district court amended Ruff’s sentence to one day of imprisonment and three years of supervised release, with the condition that he serve 12 months and one day of his supervised release at Geiger. The government insists that this modification overstepped the bounds of the district court’s sentencing authority. We disagree. Applying the requisite deferential standard of review, we conclude that the district court did not abuse its discretion and that the sentence it imposed is reasonable. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

*Ortiz v. Ortiz* No. 07-55308 (August 1, 2008) “This case involves an interpleader action over

the life insurance proceeds for an officer killed in the line of duty. Although Luis Gerardo Ortiz’s ex-wife, Gloria Ortiz, was designated as beneficiary, Graciela Ortiz argues that divorce extinguished Gloria Ortiz’s expectancy interest. The district court awarded the life insurance proceeds to the estate for intestate division among Graciela Ortiz and the decedent’s two sons. We reverse and remand.”

“We find that the language of the divorce judgment between Jerry and Gloria Ortiz did not extinguish Gloria’s expectancy interest in Jerry’s life insurance proceeds. The text of the relevant Judgment on Reserved Issues did not contain a single direct reference to life insurance policies. Although one could read the provision awarding ‘[a]ll right, title and interest in any and all of Petitioner’s retirement/pension, 457(b) plans, 401(k) plans or other deferred benefits’ to encompass life insurance policies, it was not clearly apparent that the provision encompassed beneficiary status. Unlike in *Thorp*, the judgment did not ‘clearly indicate[ ] that the parties’ attention had been directed to the expectancy of the insurance proceeds, and that it was intended that plaintiff waive all interest therein, present and future.’ 264 P.2d at 41. Thus the divorce judgment was insufficient to waive beneficiary status because it is not clear from the text of the agreement that such status was contemplated and intentionally waived.”

“In this case, both insurance companies required written notification of change of beneficiary and Jerry took no steps toward providing such notification. Jerry’s lawyer stressed the necessity of changing the designation in both her exit letter and an informal meeting. Jerry indicated that he understood and intended to change the designation; however, he took no action in the four months between the finalization of the divorce and his death. At any point following the finaliza-

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tion of his divorce, Jerry could have named Graciela, his two sons, or anyone else as the beneficiary of his policies. Jerry's inaction does not amount to substantial steps to change his beneficiary; therefore we find that the original designation of Gloria Ortiz remained valid. Thus the district court erred by relying on intent to circumvent a valid beneficiary designation."

"We REVERSE and REMAND for the district court to award 93.55% of the disputed life insurance proceeds to Gloria Ortiz and 6.45% to Graciela Ortiz."

*Twardowski v. American Airlines* No. 06-16726 (July 30, 2008) "In these consolidated appeals, airline passengers or their survivors appeal from summary judgment in favor of Continental Airlines and a number of other air carriers on their claim for damages for failure to warn of the risk of Deep Vein Thrombosis (DVT) on international flights. They argue that the airlines' refusal of requests to warn was an unexpected event and thus, an 'accident' under Article 17 of the Warsaw Convention, because before their flights, the airlines' trade organization, the English House of Lords, and airline medical officers had urged airlines to warn of DVT risks, and the airlines themselves had publicly represented that preventing passenger injury was a priority. However, we have already held that *developing* DVT in-flight is not an 'accident,' *Rodriquez v. Ansett Australia, Ltd.*, 383 F.3d 914, 917 (9th Cir. 2004), and that *failing to warn* about its risk is not an 'event' for purpose of liability for an 'accident' under Article 17, *Caman v. Continental Airlines, Inc.*, 455 F.3d 1087, 1092 (9th Cir. 2006). Neither requests by public agencies, nor the airlines' public commitment to safety, converts the failure to warn about DVT into an event or accident; the gravamen remains, at its core, a

failure to warn. If there is no liability for failure to warn, there is none for failure to warn effectively. Accordingly, we affirm."

*Parra v. Bashas' Inc.* No. 06-16038 (July 29, 2008) "Plaintiffs, current and former Hispanic employees of Bashas', Inc., filed this class action alleging that they had been discriminated against based upon their national origin in violation of Title VII of the 1964 Civil Rights Act as amended ('Title VII'), 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. Plaintiffs allege that defendant discriminated against them in pay and working conditions based on their national origin. The district court certified the proposed class as to the working conditions claim, but denied certification of the proposed class regarding the pay discrimination claim based upon a finding of lack of commonality within the class. Plaintiffs filed a motion for the district court to reconsider its motion and, in the alternative, they offered to redefine the pay discrimination class. Those motions were denied. The Plaintiffs appeal the court's decision to deny certification of the class alleging pay discrimination. We have jurisdiction over this appeal under 28 U.S.C. § 1292 because we granted Plaintiffs' request to file this appeal pursuant to Fed. R. Civ. P. 23(f). We reverse the district court concluding that it abused its discretion in failing to find commonality in the Plaintiffs' original class definition for the discriminatory pay claim."

"In this case, the Plaintiffs presented the district court with extensive evidence showing Bashas', Inc.'s discriminatory pay practices commonly affected all members of the proposed class. We conclude the district court abused its discretion in failing to find commonality existed in the original class definition. Accordingly, we REVERSE the district court's finding that Plain-

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tiffs' originally proposed class lacked commonality under Rule 23(a)(2) and REMAND for consideration of the remaining class certification factors in accordance with this opinion.”

*Moore v. Czerniak* No. 04-15713 (July 25, 2008) “Randy Moore’s taped confession was obtained by the police at the station house by means that even the state concedes were unconstitutional. It does not contest on this appeal the district court’s finding that Moore’s confession was involuntary. As the Supreme Court has declared emphatically, ‘[a] confession is like no other evidence. Indeed, ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.’ ‘*Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139 (1968) (White, J., dissenting)). Inexplicably, Moore’s lawyer failed to recognize that the confession to the police was inadmissible, even though it was unconstitutional for not one but two separate reasons.”

“It is likely that, but for counsel’s failure to file a suppression motion, Moore would have not entered into the plea agreement that required him to plead no contest to a felony murder charge with a mandatory twenty-five-year sentence. As a result, our confidence in the outcome is undermined. Accordingly, Moore is entitled to a writ of habeas corpus directing the state to permit him to withdraw his plea or to release him from custody. Accordingly, we reverse the district court and remand for the issuance of the writ. REVERSED AND REMANDED.”

*Bodine v. Graco, Inc.* No. 06-16271 (July 24, 2008) “Does the Motor Vehicle Information

and Cost Savings Act (‘the Odometer Act’ or ‘the Act’), 49 U.S.C. §§ 32701-32711, and its implementing regulations, 49 C.F.R. pt. 580, allow a private right of action where the fraud relates to something other than the vehicle’s mileage—in this case, its accident history?

Two of our sister circuits have split on this issue. *Owens v. Samkle Auto. Inc.*, 425 F.3d 1318, 1320 (11<sup>th</sup> Cir. 2005) (per curiam) (holding that ‘an allegation of intent to defraud in connection with an Odometer Act violation sufficiently states a claim,’ even when the intent to defraud does not relate to mileage); *Ioffe v. Skokie Motor Sales, Inc.*, 414 F.3d 708, 709 (7<sup>th</sup> Cir. 2005) (‘[A]n Odometer Act claim that is brought by a private party and is based on a violation of [the implementing regulations] requires proof that the vehicle’s transferor intended to defraud a transferee with respect to mileage.’), *cert. denied*, 546 U.S. 1214 (2006).

Finding the reasoning in *Ioffe* persuasive, we conclude that the private right of action under the Odometer Act is limited to allegations of fraud relating to a vehicle’s mileage.”

“At the end of the day, we find the Seventh Circuit’s reasoning more consistent with the language and purpose of what is, after all, commonly referred to as the Odometer Act. If Congress had intended the Act to cover a wide range of activities related to the transfer of vehicle titles, it could have easily said so. We do not for a moment condone activities such as those Bodine alleges here. The doors of the Arizona courts are open to pursue her claims. *See, e.g.*, *Ariz. Rev. Stat. § 44-1522; Madisons Chevrolet, Inc. v. Donald*, 505 P.2d 1039, 1041-43 (Ariz. 1973) (holding that defendant car dealer was liable for both fraudulent concealment and fraudulent misrepresentation when it represented that car was ‘new’ when it had actu-

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ally been in a prior accident, and upholding punitive damages award because defendant's failure 'to inform the plaintiff that the automobile had been previously wrecked was a 'reckless indifference' to the rights and safety of' the plaintiff). Our doors are open only as wide as Congress permits and they are open here only wide enough for claims that directly relate to odometer fraud. AFFIRMED."

*Northwest Environmental Advocates v. United States Environmental Protection Agency* No. 03-74795 (July 23, 2008) "Plaintiffs in this case are Northwest Environmental Advocates, San Francisco Baykeeper, and The Ocean Conservancy. Plaintiffs-intervenors are the States of Illinois, Michigan, Minnesota, New York, Pennsylvania, and Wisconsin. Plaintiffs and plaintiffs-intervenors challenge a regulation originally promulgated by the Environmental Protection Agency ('EPA') in 1973 exempting certain marine discharges from the permitting scheme of sections 301(a) and 402 of the Clean Water Act ('CWA'). That regulation, 40 C.F.R. § 122.3(a), provides that the following vessel discharges into the navigable waters of the United States do not require permits: discharge of effluent from properly functioning marine engines; discharge of laundry, shower, and galley sink wastes from vessels; and any other discharge incidental to the normal operation of a vessel, including the discharge of ballast water.

The district court concluded that the EPA had exceeded its authority under the CWA in exempting these discharges from permitting requirements. The district court vacated § 122.3(a), effective September 30, 2008. We affirm the decision of the district court."

*Cox v. Ocean View Hotel Corp.* No. 06-15903

"Ocean View Hotel Corporation ('Ocean View') and Thomas Cox executed an employment agreement containing a mandatory arbitration clause. When a dispute arose during the course of employment, Cox wrote a letter to Ocean View requesting arbitration, but Ocean View responded by telling Cox that it did not consider his claim ripe for arbitration. Following termination of his employment, Cox filed a complaint in the Circuit Court of Hawai'i. At that point, Ocean View decided that it wanted to arbitrate Cox's claim. After removing the action to federal court, Ocean View moved to compel arbitration. The district court denied its motion to compel arbitration and granted Cox's motion for partial summary judgment on the ground that Ocean View previously breached its agreement and waived its right to arbitrate disputes with Cox. *Cox v. Ocean View Hotel Corp.*, 433 F. Supp. 2d 1171 (D. Haw. 2006) ('*Cox I*'). We have jurisdiction over the district court's denial of a motion to compel arbitration under 9 U.S.C. § 16(a)(1)(B). See *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005).

We hold that the district court erred in granting partial summary judgment in favor of Cox based on his breach-of-agreement theory, because Cox did not properly initiate arbitration under the terms of his employment agreement. We also hold that the district court improperly granted summary judgment in Cox's favor on the issue of waiver." *Houston v. Schomig* No. 06-15523 (July 22, 2008) "Steve Houston, a Nevada state prisoner, appeals from the district court's judgment denying his petition for habeas corpus pursuant to 28 U.S.C. § 2254. Houston's habeas petition challenges his 2000 jury trial conviction for conspiracy to commit murder, three counts of attempted murder with the use of a deadly weapon, and three counts of discharging a firearm out of a motor vehicle.

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Houston contends that his Sixth Amendment rights were violated when the state trial court denied his motion to continue the trial so he could be represented by retained counsel, and denied his appointed counsel's motion to withdraw based on a conflict of interest arising from the Clark County Public Defender's prior representation of the prosecution's star witness. We hold that the trial court's denial of Houston's motion to continue the trial did not violate the Sixth Amendment and that the Nevada Supreme Court's rejection of this claim was neither contrary to, nor an unreasonable application of, federal law. We vacate and remand for an evidentiary hearing to determine whether Houston's right to conflict-free counsel was violated."

*California Department of Water Resources v. Powerex Corp.* No.06-15285 (July 22, 2008) "In this second look, we re-examine whether Powerex, a Canadian corporation that markets and distributes electric power, is a 'foreign state' within the meaning of the Foreign Sovereign Immunities Act of 1976 ('FSIA'). 28 U.S.C. § 1603(a), (b). Four years ago, we held that it was not, but the Supreme Court vacated that decision without resolving the issue. *California v. NRG Energy Inc.*, 391 F.3d 1011, 1026 (9th Cir. 2004), vacated sub nom. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 127 S. Ct. 2411 (2007). To reach that question, we must first consider whether 28 U.S.C. § 1447(d) deprives us of the authority to review a district court's decision to decline an exercise of supplemental jurisdiction and remand to state court. Holding that it does not, we also must decide whether a writ of mandamus is the only means of obtaining review of a 28 U.S.C. § 1367© remand, or whether an appeal under 28 U.S.C. § 1291 will suffice.

This is one of many cases arising out of the

2000-2001 California energy crisis. By February 2001, the state's deregulated energy markets had experienced 'a rapid, unforeseen shortage of electric power and energy available in the state and rapid and substantial increases in wholesale energy costs and retail energy rates.' Cal. Water Code § 80000(a). This caused rolling blackouts throughout California and 'constitute[ d] an immediate peril to the health, safety, life, and property' of Californians. *Id.*

In response, the California Legislature turned to the state's Department of Water Resources ('DWR'), giving it a mandate: 'do those things necessary and authorized' under the Water Code 'to make power available directly or indirectly to electric consumers in California.' Cal. Water Code § 80012. To fulfill this responsibility, DWR was empowered to contract with any person or entity for the purchase of power. *Id.* § 80100. According to DWR's Amended Complaint, between January 17, 2001, and December 31, 2001, DWR and Powerex transacted thousands of 'out of market' purchases and 'numerous exchange transactions.'

In February 2005, DWR filed suit against Powerex in California state court, alleging Powerex had 'manipulated the California energy markets through Enron-style gaming and trading strategies.'"

"Alleging various violations of state contract law, the complaint sought a declaration that all these transactions were void, rescission of all transactions, restoration of all money and benefits that unjustly enriched Powerex, and compensatory damages. In response, Powerex removed the case to federal court, citing the Federal Power Act, 16 U.S.C. § 825p, and FSIA, 28 U.S.C. § 1441(d). DWR moved to remand the case back to state

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court, and Powerex moved to dismiss. The district court denied the motion to remand, finding that DWR's complaint was artfully plead and that it presented a substantial federal question. Turning to the merits, the court then dismissed the case because the 'Plaintiff's claims require the determination of the fair price of the electricity that was delivered under the contracts,' which placed the action squarely within the Federal Energy Regulatory Commission's exclusive jurisdiction.

DWR responded with an amended complaint requesting only declaratory relief stating that the transactions between the parties were void. No longer seeking rescission, restitution, or damages, DWR moved to remand anew under 28 U.S.C. § 1447(c) and 28 U.S.C. § 1367(c). This time, the district court found that the Amended Complaint presented only state law contract issues. The district court also found Powerex's FSIA argument squarely foreclosed by our decision in *California v. NRG Energy Inc.*, 391 F.3d 1011 (9th Cir. 2004), in which we determined Powerex was not a 'foreign state.'"

"On appeal, Powerex argues that the district court erred by finding that the corporation is not

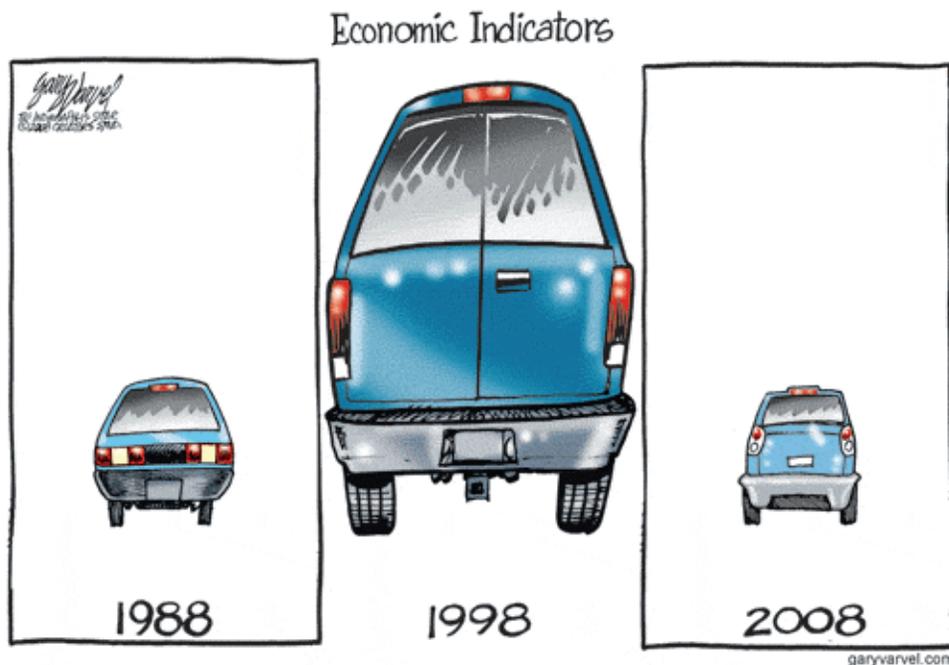
a 'foreign state,' and that DWR's Amended Complaint in fact presents claims that 'arise under' the Federal Power Act."

"Taking a holistic view of Powerex, one sees a corporation that is a wholly-owned, second-tier subsidiary of British Columbia, created pursuant to an order of the Province. A majority of its directors are indirectly selected by the Lieutenant Governor in Council, and its remaining directors are subject to government approval. It is immune

from taxation. By statute, the government's comptroller oversees its financial operations. It implements international agreements at the direction of the government, and it carries out domestic policy goals. Its profits re-

bound to the benefit of the Province's citizens. For these reasons, we agree with Justice Breyer that 'Powerex is the kind of government entity that Congress had in mind when it wrote the FSIA's 'commercial activit[y]' provisions.' *Powerex*, 127 S. Ct. at 2426 (Breyer, J., dissenting) (alteration in original) (quoting 28 U.S.C. § 1602).

Because we hold that Powerex is an organ of British Columbia, it falls within the definition of 'foreign state' and is entitled to a federal bench trial. *See* 28 U.S.C. §§ 1441(d), 1603. We ex-



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press no opinion on the Federal Power Act issue. REVERSED and REMANDED.”

*Green v. LaMarque* No. 06-16254 (July 17, 2008) “While selecting a jury for a criminal trial in Alameda County, California, the prosecutor used peremptory challenges to exclude from the jury all six African-Americans on the jury panel. The African-American defendant claimed the prosecutor based such challenges on race. The prosecutor then offered race-neutral reasons which, we now conclude, also applied to unchallenged white jurors. This disparity in treatment convinces us the non-racial reasons claimed by the prosecutor were pretexts. Because the elimination of even a single juror due to race taints the trial, we reverse the district court’s denial of the writ of habeas corpus.

Eric Warren Green, a California state prisoner, appeals the denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Green was on trial for assault of his mother, with a deadly weapon (a knife), causing great bodily harm, in violation of California Penal Code §§ 245(a)(1), 12022.7(a). During jury selection, Green made a motion to dismiss the empaneled jurors after the prosecutor used six of twelve peremptory challenges to strike all six African-American venire members who were called to the jury box. Green, an African-American, asserted the prosecutor had stricken these venire members based on race. The trial court denied Green’s motion, and a majority of the California Court of Appeal affirmed Green’s conviction.”

“The ‘circumstantial and direct evidence’ needed for this inquiry may include a comparative analysis of the jury voir dire and the jury questionnaires of all venire members, not just those venire members stricken. ‘If a prosecutor’s prof-

fered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.’ *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).”

“Additional evidence of racial discrimination includes the fact that the prosecutor used peremptory challenges to eliminate all six African-Americans from the seated jury pool. Further, the prosecutor had noted the race of each venire member he struck from the jury pool; when the trial judge asked him who he struck and why, the prosecutor was able to read off a list, and he had noted the race of each venire member next to the member’s name. *See Miller-El*, 545 U.S. at 249 n.7.

We hold that, on balance, the direct and circumstantial evidence in the record demonstrates the prosecutor’s strike of Deborah P. was racially motivated. We further hold the California Court of Appeal’s contrary conclusion was based on an unreasonable determination of the facts in light of the evidence presented.

Because ‘just one racial strike calls for a retrial,’ *Kesser*, 465 F.3d at 369, and because the evidence shows the prosecutor’s stated reasons for striking Deborah P. were not genuine, we reverse and remand to the district court with instructions that the court remand this case to the California state court for a new trial. REVERSED and REMANDED.”

*United States v. Miranda-Lopez* No. 07-50123 (July 17, 2008) “Today we join the D.C. Circuit in holding that the crime of aggravated identity theft, 18 U.S.C. § 1028A(a)(1), requires proof that, among other things, the defendant knew

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that the means of identification belonged to another person. It is not enough to prove only that the defendant knew he was using a false document. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008).”

“In holding that the language of § 1028A(a)(1) is ambiguous, we follow the D.C. Circuit’s reasoning in *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008). There, Villanueva-Sotelo, a previously deported Mexican national, presented a police officer with a permanent resident card displaying his own name and photograph and an alien registration number. *Id.* at 1236. Villanueva-Sotelo knew the card was a fake, but, as the government concedes, there was no evidence that he knew that the alien registration number actually belonged to another person. *Id.* Villanueva-Sotelo pleaded guilty to unlawful reentry and possession of a fraudulent immigration document and moved to dismiss the aggravated identity theft charge, arguing that the government could not prove that he knew the alien registration number belonged to another person. *Id.*”

“In ruling on Miranda-Lopez’s post-verdict motion for a judgment of acquittal, the district judge operated on the premise that the statute did not require proof of the defendant’s knowledge that the identification belonged to someone else. We have explained why this premise was incorrect. The district court should now go back and reconsider Miranda-Lopez’s final Rule 29 motion, giving both sides the opportunity to argue whether the evidence sufficiently proved that Miranda-Lopez knew that the identification belonged to another person. REVERSED and REMANDED.”

*Luther v. Countrywide Home Loans* No. 08-

55865 (July 16, 2008) “Section 22(a) of the Securities Act of 1933 creates concurrent jurisdiction in state and federal courts over claims arising under the Act. It also specifically provides that such claims brought in state court are not subject to removal to federal court. We hold today that the Class Action Fairness Act of 2005, which permits in general the removal to federal court of high-dollar class actions involving diverse parties, does not supersede § 22(a)’s *specific* bar against removal of cases arising under the ’33 Act.”

“Luther alleges that the defendants violated sections 11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l(a)(2) and 77o, by issuing false and misleading registration statements and prospectus supplements for the mortgage pass-through certificates. In particular, Luther alleges that the risk of the investments was much greater than represented by the registration statements and prospectus supplements, which omitted and misstated the credit worthiness of the underlying mortgage borrowers. Luther alleges that the value of the certificates has substantially declined since many of the underlying mortgage loans became uncollectible and he now seeks compensatory damages. The complaint expressly ‘excludes and disclaims’ allegations of fraud or intentional or reckless misconduct. The Countrywide defendants removed the action to federal court under the Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 4(a) & 5(a), 119 Stat. 4, 9-13 (codified at 28 U.S.C. §§ 1332(d) & 1453(b)). Once in federal court, Luther brought a motion to remand the case back to state court under § 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a), which prohibits removal of claims filed in state court and arising under the Act. In opposition to that motion, the Countrywide defendants argued that the § 22(a)

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removal bar does not prevent removal under CAFA and that none of CAFA's exceptions applies. The district court granted Luther's motion to remand the case to state court, holding that CAFA and § 22(a) cannot mutually coexist and that the specific bar against removal in the Securities Act of 1933 trumps CAFA's general grant of diversity and removal jurisdiction.

Generally, a district court's order remanding a removed case back to state court is not appealable. *See* 28 U.S.C. § 1447(d). However, permission to appeal can be sought and granted in certain class action cases. *See* 28 U.S.C. § 1453(c)(2). We granted the Countrywide defendants' petition to appeal the district court's order remanding the case to state court, and we review de novo. *See Lowdermilk v. U.S. Bank Nat'l Ass'n*, 479 F.3d 994, 997 n.3 (9th Cir. 2007).

"In general, removal statutes are strictly construed against removal. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). A defendant seeking removal has the burden to establish that removal is proper and any doubt is resolved against removability. *Gaus*, 980 F.2d at 566. However, a plaintiff seeking remand has the burden to prove that an express exception to removal exists. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1023-24 (9th Cir. 2007).

Section 22(a) of the Securities Act of 1933 provides such an express exception to removal: 'Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent juris-

diction shall be removed to any court of the United States.' 15 U.S.C. § 77v(a). CAFA's general grant of the right of removal of high-dollar class actions does not trump § 22(a)'s specific bar to removal of cases arising under the Securities Act of 1933. 'It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.' *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Here, the Securities Act of 1933 is the more specific statute; it applies to the narrow subject of securities cases and § 22(a) more precisely applies only to claims arising under the Securities Act of 1933. CAFA, on the other hand, applies to a 'generalized spectrum' of class actions. *Id.*

The defendants put much reliance on *Estate of Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008), which held that 28 U.S.C. § 1332(d)(9)(C)'s exception to original diversity jurisdiction under CAFA did not cover an action alleging violations of a state consumer-fraud statute. We do not find the case to be controlling. The *Pew* court did not address the interplay between CAFA and § 22(a). Because the claim proceeded under state law rather than the 1933 Act, § 22(a) did not apply on its terms.

In summary, by virtue of § 22(a) of the Securities Act of 1933, Luther's state court class action alleging only violations of the Securities Act of 1933 was not removable. The motion to remand was properly granted AFFIRMED."

*Harper v. City of Los Angeles* No. 06-55519 (July 14, 2008) "This case arises from the Los Angeles Police Department's ('LAPD') investigation and prosecution of three former police officers, Paul Harper, Brian Liddy, and Edward Ortiz. These

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officers were implicated in wrongdoing by former LAPD officer Rafael Perez in an event that came to be known as the ‘Rampart Scandal’—an event that, based on Perez’s own unlawful conduct and his allegations of corruption at the Rampart Division, launched an internal investigation that ultimately implicated scores of police officers, overturned dozens of convictions, and generated intense media scrutiny. The criminal charges against these officers resulted in acquittals. Harper, Liddy, and Ortiz (the ‘Officers’)

subsequently brought suit against a number of actors, including Perez, the district attorneys, the City of Los Angeles, and former Chief of Police Bernard Parks for violations of their constitutional civil rights under 42 U.S.C. § 1983, contending among other claims that the defendants had conducted an improper and negligent investigation, and that they had been arrested without probable cause for falsifying a police report and conspiring to file such a report.

The Officers’ claims against the County of Los Angeles, District Attorney Gil Garcetti, Rafael Perez, and Deputy District Attorneys Laesecke

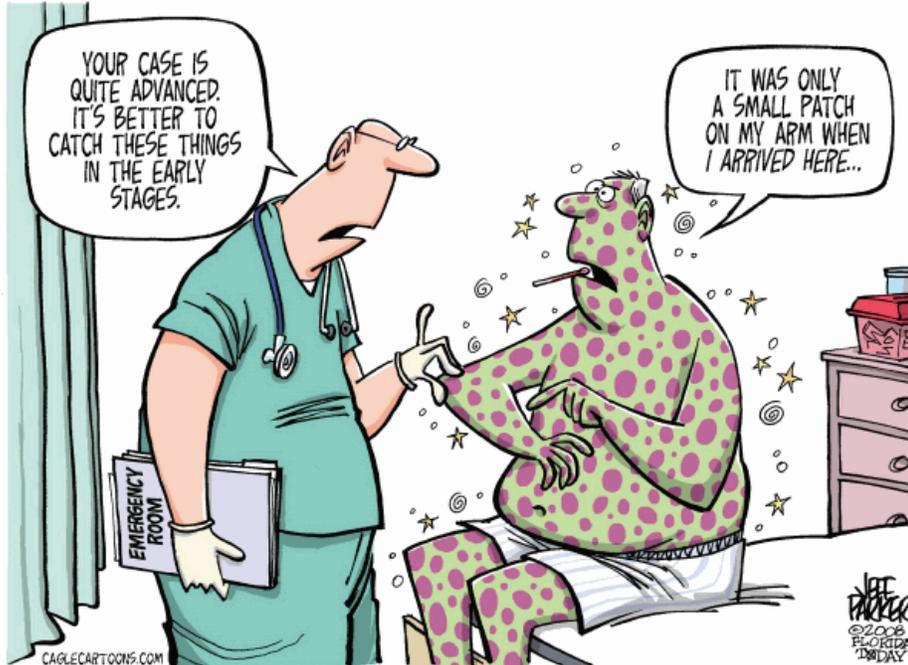
and Ingalls were dismissed on Federal Rule of Civil Procedure 12(b)(6) motions or motions for summary judgment, and the case proceeded to trial against the City of Los Angeles and Chief Parks (‘the City’). After an eleven-day trial, the jury returned a special verdict in favor of the Officers, finding that the Officers’ constitutional rights were violated by the City and by Chief Parks in his official capacity.<sup>1</sup> The jury awarded each officer compensatory damages in the amount of \$5,000,001. The City thereupon

filed a number of post-judgment motions, including a renewed motion under Rule 50(b) for judgment as a matter of law. The district court denied the motions, and the City appealed. We affirm. ‘[W]e do not lightly cast aside the solemnity of the jury’s verdict.’ *Graves v. City of Coeur D’Alene*, 339 F.3d 828,

844 (9th Cir. 2003). Both the jury’s verdict and the jury’s damages award are supported by substantial evidence. We also affirm the district court’s challenged evidentiary rulings. Because we affirm both the verdict and the district court’s determination on the post-judgment motions, we also affirm the district court’s award for attorney’s fees under 42 U.S.C. § 1988.

*United States v. Bourseau* No. 06-56741 (July

### NEWS ITEM: AVERAGE EMERGENCY ROOM WAIT NEARS ONE HOUR, C.D.C. SAYS.



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14, 2008) “Robert I. Bourseau (‘Bourseau’), RIB Medical Management Services, Inc. (‘RIB’), Dr. Rudra Sabaratnam (‘Sabaratnam’) and Navatkuda, Inc. (‘Navatkuda’) (collectively, ‘Appellants’), appeal the district court’s judgment holding them jointly and severally liable to the United States (‘government’) for violations of the False Claims Act (‘FCA’), 31 U.S.C. §§ 3729-3733. We affirm.”

“In 1996, CPMS filed for Chapter 11 bankruptcy. In 1998, the United States Bankruptcy Court for the Central District of California approved a reorganization plan for CPMS which, among other things, gave National Century Financial Enterprises, Inc. (‘NCFE’) a 49.9% limited partnership interested in CPMS. This made NCFE and CPMS ‘related parties’ as that term is defined in the Medicare regulations. Between 1997 and 1999, CPMS retained Paul Fayollat (‘Fayollat’) and Loretta Masi (‘Masi’) of Pacific Hospital Management to prepare and submit Bayview’s 1997, 1998 and 1999 cost reports to its intermediary, Mutual of Omaha Insurance Company (‘Mutual of Omaha’).

In preparing the 1997 cost report, Bourseau and Sabaratnam met with Fayollat, Masi and CPMS’ Director of Finance, Seth Morriss (‘Morriss’). Fayollat advised Bourseau that Medicare would not reimburse Bayview for interest and bankruptcy legal fees unrelated to Bayview’s Medicare patient services, and that it would be improper to include such amounts in the cost report. Notwithstanding Fayollat’s advice, Bourseau directed Fayollat to include in the 1997 report (1) the total amount of interest charged by NCFE for earlier loans and (2) all of CPMS’ bankruptcy legal fees. Only a portion of the interest and bankruptcy legal fees related to the operation of Bayview. CPMS never paid

the interest to NCFE.

In preparing the 1998 cost report, Bourseau and Sabaratnam again met with Fayollat, Masi and Morriss. Fayollat advised Bourseau that Medicare would not reimburse Bayview for interest and bankruptcy legal fees unrelated to Bayview’s Medicare patient services, and that it would be improper to include such amounts in the cost report. Notwithstanding Fayollat’s advice, Bourseau directed Fayollat to include in the 1998 cost report (1) the total amount of interest charged by NCFE, (2) all of CPMS’ bankruptcy legal fees, (3) a rental expense for a lease that never existed, (4) 16,965 additional square feet of space for a partial hospitalization program, although little of the additional space was actually used for Medicare patient care or operation support and (5) management fees for NCFE. Only a portion of the interest and bankruptcy legal fees related to the operation of Bayview. CPMS never paid the interest to NCFE.

In preparing the 1999 cost report, Bourseau again ignored Fayollat’s advice and directed that Fayollat include in the 1999 cost report (1) all of CPMS’ bankruptcy legal fees, (2) 16,965 additional square feet of space for the partial hospitalization program, although little of the additional space was actually used for patient care, (3) management fees for NCFE and (4) ‘program costs,’ representing additional interest payable to NCFE. CPMS never paid the interest to NCFE.

Mutual of Omaha never made adjustments to Bayview’s cost reports, never audited the cost reports and never collected overpayments or paid underpayments. Between July of 1997 and October 2000, Bayview’s Medicare reimbursement rates did not change. And in 2000, CPMS filed for bankruptcy again.”

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“Appellants are liable under the reverse false claims provision of the FCA for the submission of false statements in their 1997, 1998 and 1999 cost reports. The government sustained actual damages and is entitled to a treble damages award of \$15,657,585 and a civil penalties award of \$31,000. AFFIRMED.”

*United States v. Whitehead* No. 05-50458 (July 14, 2008) “Thomas Michael Whitehead sold over \$1 million worth of counterfeit ‘access cards’ that allowed his customers to access DirecTV’s digital satellite feed without paying for it. The jury convicted him of breaking various federal laws, including the Digital Millennium Copyright Act, which forbids the sale of devices that are designed to ‘circumvent[ ] a technological measure’ that protects copyrighted works. 17 U.S.C. § 1201(a)(2)(A). The district court calculated a Guidelines range of 41 to 51 months, but imposed a more lenient sentence of probation, community service and restitution.

The government appeals, arguing that this below-Guidelines sentence was unreasonable, and Whitehead crossappeals, claiming that the indictment and jury instructions omitted an element of the crime. Neither party disputes the district court’s Guidelines calculation. We deferred submission pending our en banc decision in *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008), and now affirm.”

“We find no abuse of discretion in the district court’s conclusion that a substantial amount of community service (1000 hours), a hefty restitution order (\$50,000) and five years of supervised release were more appropriate than prison. At the sentencing hearing, the court heard from Whitehead and his father, who told the court how

Whitehead repented his crime; how he had, since his conviction, devoted himself to his house-painting business and to building an honorable life; how his eight-year-old daughter depended on him; and how he doted on her. In addition, the court took into account its finding that Whitehead’s crime ‘[di]d not pose the same danger to the community as many other crimes.’ These are all considerations that the district court may properly take into account. *See* 18 U.S.C. § 3553(a)(1)-(2). The district court was intimately familiar with the nature of the crime and defendant’s role in it, as we are not. The district court could appraise Whitehead’s and his father’s sincerity first-hand, as we cannot. In short, the district court was ‘in a superior position’ to find the relevant facts and to ‘judge their import.’ *Gall*, 128 S. Ct. at 597. The district court didn’t abuse its discretion in so doing.

*Redding v. Sanford Unified School District* No. 05-15759 (July 11, 2008) “On the basis of an uncorroborated tip from the culpable eighth grader, public middle school officials searched futilely for prescription-strength ibuprofen by strip-searching thirteen-year-old honor student Savana Redding. We conclude that the school officials violated Savana’s Fourth Amendment right to be free from unreasonable search and seizure. The strip search of Savana was neither ‘justified at its inception,’ *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985), nor, as a grossly intrusive search of a middle school girl to locate pills with the potency of two over-the-counter Advil capsules, ‘reasonably related in scope to the circumstances’ giving rise to its initiation. *Id.* Because these constitutional principles were clearly established at the time that middle school officials directed and conducted the search, the school official in charge is not enti-

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tled to qualified immunity from suit for the unconstitutional strip search of Savana.

*Rick-Mik Enterprises Inc. v. Equilon Enterprises, LLC* No. 06-55937 (July 11, 2008) “Equilon Enterprises, LLC (‘Equilon’) does business as Shell Oil Products. Equilon’s standard franchise agreement requires its franchisees, Shell and Texaco gasoline stations, to use Equilon to process credit-card transactions. In addition to payment for sales of petroleum products, Equilon allegedly gets (1) transaction fees associated with the processing, or (2) some kind of unspecified ‘kickback’ from unidentified banks that process the transactions, or both. Rick-Mik Enterprises, Inc., Mike M. Madani, and Alfred Buczkowski (collectively ‘Rick-Mik’) are Equilon franchisees who — on behalf of themselves and other, similarly-situated Equilon franchisees — allege that Equilon violated antitrust laws by illegally tying two distinct products (the franchises and the credit-card processing services). Rick-Mik contends franchisees could pay lower transaction fees from others for credit-card processing. Rick-Mik also alleges that Equilon illegally agreed with banks to price-fix processing fees. The district court dismissed the antitrust and related statelaw counts from Rick-Mik’s complaint. We affirm because: (1) Rick-Mik’s complaint failed to allege market power in the relevant market; (2) in the alleged franchising context, creditcard processing services are not a product distinct from the franchise itself; (3) the price-fixing allegations were impermissibly vague; and (4) Rick-Mik waived the opportunity to attempt to cure these deficiencies.”

“Rick-Mik’s complaint was fundamentally flawed. The complaint failed to allege market power in the relevant tying market (gasoline

franchises, not retail gasoline). The franchises are not separate products, for tying purposes, from credit-card processing services; instead, such processing is an inherent part of the franchises. The price-fixing allegations were impermissibly vague. And questions about further amendment of the complaint were waived. AFFIRMED.”

*Classic Media, Inc. v. Mewborn* No. 06-55385 (July 11, 2008) “Winifred Knight Mewborn (‘Mewborn’), daughter of Eric Knight, the author of the world-famous children’s story and novel, *Lassie Come Home* (collectively, the ‘Lassie Works’), appeals the district court’s grant of summary judgment in favor of Classic Media, Inc. (‘Classic’) and denial of Mewborn’s partial summary judgment motion. Each party sought declaratory relief as to their respective copyright interests in the Lassie Works, works that were in their renewal copyright terms on January 1, 1978 when the Copyright Act of 1976 (the ‘Act’ or the ‘1976 Act’) took effect. This appeal requires us to determine whether the Act’s termination of transfer right, 17 U.S.C. § 304(c), can be extinguished by a post-1978 re-grant of the very rights previously assigned before 1978. Because we conclude that such a result would circumvent the plain statutory language of the 1976 Act, as well as the congressional intent to give the benefit of the additional renewal term to the author and his heirs, we hold that the post-1978 assignment did not extinguish Mewborn’s statutory termination rights.

