



# The Public Lawyer

## Public Lawyers Section

December 2008

Edited by  
Justin.Tully@lvvwd.com

### At Christmas, Lawyer's Holiday Greeting Is a Cease-and-Desist Letter

Around the country, several local communities are abandoning planned holiday displays, reports *Forbes*. But the cancellations aren't the result of budget cuts, or

even First Amendment-based claims of improper commingling of church and state activity. Instead, threats of copyright infringement actions are shutting down the

displays. The town of Louisville, Ky., canceled a display based on the book "[How the Grinch Stole Christmas](#)" when it received a cease-and-desist

*(Continued on page 13)*

#### Inside this issue:

*The Best Argument for Telecommuting* 4

*Ninth Circuit Cases* 5

*Author of Famed Law Review Note Dies* 19



### NEVADA SUPREME COURT CASES

*Valdez v. State* No. 49541 (November 26, 2008) "A jury convicted appellant James Valdez of first-degree murder with the use of a deadly weapon and attempted murder with the use of a deadly weapon. Contrary to constitutional and statutory procedures requiring

a separate penalty trial, when the jury returned the guilty verdict, it also announced that it had decided the sentence. Valdez subsequently agreed to waive his right to a penalty hearing. He stipulated to a sentence of life without the possibility of parole for first-degree murder

and an equal and consecutive term for the use of a deadly weapon. In this stipulation, he reserved his right to appeal the judgment of conviction. The district court then sentenced him to life in prison without the possibility of parole for first-degree murder, plus an equal



*Seasons Greetings*

## NEVADA SUPREME COURT CASES

and consecutive term for the use of a deadly weapon, and 96 to 240 months for attempted murder, plus an equal and consecutive term for the use of a deadly weapon, to run consecutively with the first-degree murder sentence. In this appeal from the judgment of conviction, we address four issues raised by Valdez.

First, we consider whether the district court must explicitly instruct the jury, immediately prior to deliberations in a first-degree murder case, that it is to determine only the question of guilt and not deliberate on the sentence until the separate penalty phase of the proceedings. Here, the district court only instructed the jury regarding bifurcation orally, immediately after jury selection. We conclude that the district court erred by failing to instruct the jury in writing, after the close of argument, that it was not to deliberate as to Valdez's possible penalty until after the sentencing hearing.

Second, we consider whether the jury acted improperly by deliberating the penalty while deciding the issue of guilt and, if so, whether the district court abused its discretion in denying a motion for a mistrial based on

this jury misconduct. We hold that the jury disobeyed the district court's oral instruction and therefore committed misconduct. We further conclude that this misconduct deprived Valdez of his constitutional rights, and the district court, therefore, abused its discretion in denying a mistrial based on this misconduct.

Third, we consider whether numerous alleged acts of prosecutorial misconduct require reversal. In doing so, we clarify the proper harmless-error analyses for prosecutorial misconduct of a constitutional and nonconstitutional dimension. We conclude that the prosecutors engaged in several instances of misconduct throughout the trial but that the individual instances of prosecutorial misconduct do not require reversal.

Finally, we consider whether cumulative error warrants reversal in this case. Although the evidence of guilt was substantial, it was not overwhelming. Considering the jury instruction error, the juror misconduct, and the prosecutorial misconduct, we conclude that these errors denied Valdez a fair trial. Therefore, we reverse and remand."

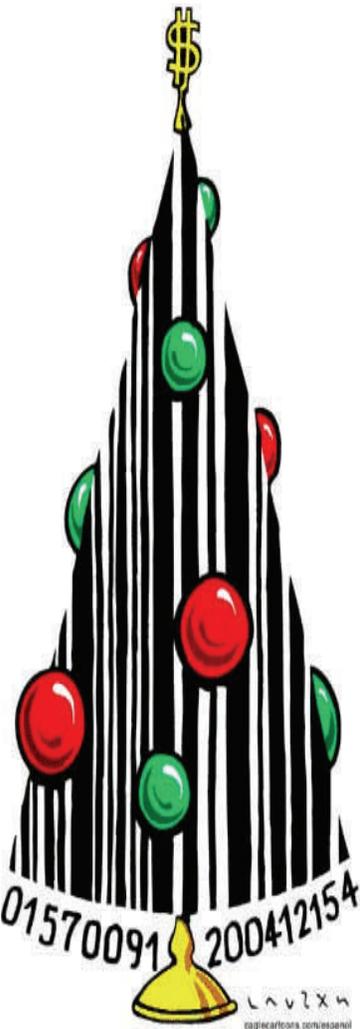
*Boucher v. Shaw* No. 49254 (November 26, 2008) "The United States Court of Appeals for the Ninth Circuit has certified, under NRAP 5, the following question to this court: '[c]an individual managers be held liable as employers for unpaid wages under Chapter 608 of the Nevada Revised Statutes?' We answer the question in the negative and conclude that individual managers cannot be held personally liable for unpaid wages under NRS Chapter 608."

"The definition of 'employer' under NRS 608.011 is ambiguous. Interpreting this provision, we conclude that NRS 608.011 was not designed to extend personal liability to individual managers of corporations in derogation of existing Nevada corporate law. Accordingly, since individual managers cannot be held liable as employers for unpaid wages under NRS Chapter 608, we answer the Ninth Circuit's question in the negative."

*In Re William M.* No. 48649 (November 26, 2008) "These appeals center on Nevada's presumptive certification statute, which consists of NRS 62B.390(2) and (3). These provisions create a rebuttable presumption that juveniles who are

## NEVADA SUPREME COURT CASES

over 13 years of age and charged with certain enumerated offenses fall outside of the jurisdiction of the juvenile court and must therefore be transferred to the district court for adult criminal proceedings. In particular, we examine NRS



62B.390(3)(b)'s rebuttal re-

quirements in light of the right against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution. Under NRS 62B.390(3)(b), to rebut the presumption of certification, the juvenile court must find clear and convincing evidence that the juvenile's criminal actions were substantially influenced by substance abuse or emotional or behavioral problems that may be appropriately treated within the jurisdiction of the juvenile court. Appellants argue that NRS 62B.390(3)(b) requires juveniles to admit to the charged, but unproven, criminal actions, which implicates the Fifth Amendment right against self-incrimination and the constitutionality of the presumptive certification provisions.

Thus in resolving these appeals, we initially determine whether the Fifth Amendment right against self-incrimination is available to juveniles in certification proceedings. We conclude that the Fifth Amendment right against self-incrimination is available to juveniles in certification proceedings under the United States Supreme Court's decision in *In re Gault*. Necessarily, we overrule that part of this court's decision in *Marvin v. State* that improperly con-

cluded that the Fifth Amendment right against self-incrimination did not apply to juveniles in waiver proceedings.

Given the Fifth Amendment's applicability to juvenile certification proceedings, we next address whether NRS 62B.390(3)(b)'s rebuttal terms impinge on the right against self-incrimination by requiring the juvenile to either accede to the criminal court's jurisdiction despite having a substance abuse or emotional or behavioral problem, or to admit guilt, even though that admission could later be used against him in juvenile or adult court proceedings. We hold that, by requiring a juvenile to admit to the charged criminal conduct in order to overcome the presumption of adult certification, the presumptive certification statute, NRS 62B.390(2) and (3), violates the juvenile's Fifth Amendment right against self-incrimination.

We therefore reverse the district court's orders certifying appellants as adults and remand these matters for further proceedings consistent with this opinion. Our disposition of these issues renders the remaining issues in these consolidated appeals moot."

## NEVADA SUPREME COURT CASES

*Olivares v. State* No. 46920 (November 20, 2008) “Reyes Olivares was convicted of first-degree murder with the use of a deadly weapon. He now appeals that conviction on the basis that the district court erred when it refused to hold a hearing to consider doubts about Olivares’ competency, instead proceeding to trial. Olivares argues that there was reasonable doubt regarding his competency and, as such, the district court abused its discretion when it did not hold a hearing after defense counsel raised serious doubts regarding Olivares’ competency. We conclude that the district court abused its discretion and denied Olivares his due process rights by failing to hold a hearing to address the doubts raised as to Olivares’ competency.”



### Justice John Paul Stevens: The Best Argument for Telecommuting

Over at [Chuck Newton Rides the Third Wave](#), Chuck Newton offers the most effective argument for allowing lawyers to telecommute that I’ve ever seen: [Supreme Court Justice Stevens is doing it](#). Referencing a recent article on the Justice, Newton notes that: Justice Stevens does not work much at the Supreme Court at all. He works from his home in Florida except when the Court is hearing oral arguments. In the words of the article, Justice Stevens “telecommutes”.

Newton posits that this kind of work arrangement is necessary for Justices, who spend many years on the court and would likely burn out if tethered to a desk every day. Still, despite the logical reasons for allowing telecommuting, many lawyers and firms still resist this option. But as Newton puts it, if it works for an 88-year-old Supreme Court justice, why won’t it work for you?



## NINTH CIRCUIT CASES

*United States v. Community Home* 07-56060 (December 16, 2008) “Facing a question of first impression, we conclude that an order granting summary judgment is final and appealable under 28 U.S.C. § 1291 even though the district court retained jurisdiction over a pending claim by a qui tam relator for a share of the award under the False Claims Act (‘FCA’), 31 U.S.C. § 3730(d).

Relator Jody Shutt originated this FCA action against Nida Campanilla (‘Campanilla’), the sole owner and president of Community Home and Health Care Services (‘Community Home’), an agency that provided nursing and home health services and received at least \$2.77 million in Medicare reimbursements from May 2003 to August 2004.

Subsequently, the United States pursued criminal charges against Campanilla who entered a guilty plea to one count of health care fraud, in violation of 18 U.S.C. § 1347. In the agreement, she stipulated to making illegal payments to physicians, patients, and marketers, forging physician signatures on Medicare forms documenting the medical necessity of claimed services, submitting reimburse-

ment claims to Medicare for home health services she knew were not medically necessary, and submitting reimbursement claims for services that were not performed as represented. Campanilla also admitted that the scheme had caused Medicare a loss of at least \$608,558.49 and agreed to make full restitution of that amount.

Several months later, the United States intervened in this FCA suit against Campanilla and Community Home, raising both FCA claims and separate common law claims and seeking a civil penalty of \$5,500 and treble damages. The district court granted partial summary judgment to the government, awarding a civil penalty of \$5,500 and treble the damages Campanilla had admitted in her plea agreement. The district court dismissed the government’s remaining common law claims without prejudice while retaining jurisdiction over the relator’s claim for a share of the judgment pursuant to 31 U.S.C. § 3730(d).

“In concluding that a relator’s pending claim against the United States for a share in the judgment does not interfere with the finality of the district court order, we are guided by White

v. New Hampshire Dep’t of Employment Sec., 455 U.S. 445 (1982). There the Supreme Court addressed a related issue: whether a request for attorney’s fees raises legal issues collateral to the main action prompting an inquiry separate and apart from the decision on the merits. *Id.* at 451-52. Following *White*, we held that a district court retains the power to award attorney’s fees after a notice of appeal from the decision on the merits has been filed, *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 957 (9th Cir. 1983), and adopted the ‘bright-line rule’ that ‘all attorney’s fees requests are collateral to the main action,’ rendering a ‘judgment on the merits . . . final and appealable even though a request for attorney’s fees is unresolved,’ *Int’l Assoc. of Bridge Local Union 75 v. Madison Indus., Inc.*, 733 F.2d 656, 659 (9th Cir. 1984).

“The important purpose of promoting efficient judicial administration, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974), is also better served by treating the relator’s claim as collateral to the merits. Although such a rule creates some risk of occasional ‘piecemeal’ appeals, in many instances a court of appeals ruling on the

## NINTH CIRCUIT CASES

merits of a dispositive motion might make an allocation of the award between the government and the relator unnecessary or duplicative. For example, where a district court incorrectly grants a plaintiff's summary judgment motion, an opportunity to review that judgment avoids the need for the district court to determine the relator's share when the claims should have been dismissed or when an ensuing trial would require a new allocation of the award to reflect the relator's participation.

For these reasons, we hold a judgment on the merits of an FCA claim is a separate, final, and appealable decision even where the district court has retained jurisdiction over the collateral issue of allocating the FCA award between the United States and the relator. We therefore reach the merits of this appeal and affirm the district court's grant of summary judgment for the reasons stated in an unpublished memorandum disposition filed herewith. AFFIRMED."

*ABC Inc. v. Miller* 07-15227 (December 12, 2008) "Six media corporations ('Media Corporations') filed a civil rights suit against the Nevada Secretary of State pursuant to 42 U.S.C. §

1983, seeking declaratory and injunctive relief allowing them to conduct exit polling in the November 2006 general election. Specifically, the Media Corporations argued that section 293.740 of the Nevada Revised Statutes impermissibly restricted their free speech rights in violation of the First and Fourteenth Amendments, respectively, by making it unlawful for any person to speak to a voter on the subject of marking his or her ballot within 100 feet of a polling place's entrance. In a thorough opinion consistent with circuit precedent, see *Daily Herald Co. v. Munro*, 838 F.2d 380, 384 (9<sup>th</sup> Cir. 1988), the district court granted the Media Corporations' motion for a preliminary injunction and enjoined the Nevada Secretary of State from prohibiting the Media Corporations' exit polling activities. The district court subsequently granted the Media Corporations a permanent injunction. Thereafter, the Media Corporations sought attorneys' fees pursuant to 42 U.S.C. § 1988(b). The district court denied the request for fees. Its findings of fact and conclusions of law consisted of a single sentence: Having read and considered the foregoing, the Court finds that as argued by Defendant Heller in its Opposition

(#27), special circumstances exist in this case similar to those presented in *Thorsted v. Munro*, 75 F.3d 454 (9<sup>th</sup> Cir. 1996), which warrant the exercise of this Court's discretion to deny Plaintiffs' Motion.

In most situations, a prevailing party under § 1983 should be awarded attorneys' fees. '[A] court's discretion to deny fees under § 1988 is very narrow and . . . 'fee awards should be the rule rather than the exception.' ' *Herrington v. County of Sonoma*, 883 F.2d 739, 743 (9<sup>th</sup> Cir. 1989) (quoting *Ackerley Commc'ns, Inc. v. City of Salem*, 752 F.2d 1394, 1396 (9<sup>th</sup> Cir. 1985)). The Supreme Court has held that 'fees should be awarded as costs unless special circumstances would render such an award unjust.' *Kentucky v. Graham*, 473 U.S. 159, 164 (1985) (internal quotations and citations omitted). When a district court departs from that general rule, it 'must issue findings of fact and conclusions of law identifying the 'special circumstances' and explaining why they render an award unjust.' *Sethy v. Alameda County Water Dist.*, 602 F.2d 894, 897 (9<sup>th</sup> Cir. 1979) (per curiam); see also *Herrington*, 883 F.2d at 744. A district court must adequately explain its decision-making

## NINTH CIRCUIT CASES

process so an appellate court can engage in meaningful review. See *McGrath v. County of Nevada*, 67 F.3d 248, 254 (9th Cir. 1995).

Here, the district court's ruling does not identify the special circumstances rendering the award unjust. The Secretary of State argues that the district court must have adopted the arguments advanced by the Secretary in opposition to the fee request. However, the district court had already rejected most, if not all, of those arguments in its detailed opinion granting the preliminary injunction. Further, the district court erred in its reliance on *Thorsted*, a decision we already confined as based on factors 'largely unique to that case.' *Democratic Party v. Reed*, 388 F.3d 1281, 1285 (9th Cir. 2004).

Rather than apply the *Thorsted* factors, we have employed a two-pronged test to determine whether special circumstances exist to justify denying attorneys' fees, namely whether: (1) awarding the attorneys' fees would further the purposes of § 1988; and (2) the balance of equities favors or disfavors the denial of fees. *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1126 (9th Cir. 2008);

*Bauer v. Sampson*, 261 F.3d 775, 785-86 (9th Cir. 2001); *Gilbrook v. City of Westminster*, 177 F.3d 839, 878 (9th Cir. 1999). When employing this test, we have stressed that attorneys' fees should be denied 'only in unusual cases, . . . such as when there is 'both a strong likelihood of success on the merits and a strong likelihood of a substantial judgment at the outset of litigation.' ' *Mendez*, 540 F.3d at 1126 (quoting *Herrington*, 883 F.2d at 745).

We therefore vacate the judgment of the district court and its order denying the motion for attorneys' fees, and remand to the district court for its analysis pursuant to *Mendez*, and for the entry of findings consistent with *Sethy*. REVERSED and REMANDED."

*Seattle Affiliate v. City of Seattle* 06-35597 (December 12, 2008) "We are presented with a conflict between those who wish to conduct a parade on Seattle's city streets — a forum historically preferred by people who want to demonstrate their messages of honor, celebration or, as in this case, protest — and the city's interests in traffic safety. The City of Seattle by ordinance gives its police chief, when issuing a parade permit,

the discretion to require marchers to use the sidewalks instead of the city streets. The issue is whether the ordinance violates the free speech guarantees of the First Amendment because on its face it impermissibly grants 'the licensing official . . . unduly broad discretion.' *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 323 (2002). We conclude that the ordinance by its terms gives the Chief of Police unbridled discretion to force marchers off the streets and onto the sidewalks, unchecked by any requirement to explain the reasons for doing so or to provide some forum for appealing the chief's decision. We therefore hold that the parade ordinance is facially unconstitutional."

"The Parade Ordinance's open-ended standard, combined with the absence of a requirement that officials articulate their reasons or an administrative-judicial review process, vests the Seattle Chief of Police with sweeping authority to determine whether or not a parade may utilize the forum of the streets to broadcast its message. The First Amendment prohibits placing such unfettered discretion in the hands of licensing officials and renders the Parade Ordinance constitutionally defective on its face. See, e.g., *Thomas*, 534

## NINTH CIRCUIT CASES

U.S. at 324. We therefore need not resolve the other questions presented by the Coalition, such as whether the Ordinance otherwise satisfies the requirements of a valid time, place and manner restriction and whether it is also invalid under the Washington state constitution. We reverse the grant of summary judgment to Seattle. REVERSED.”

*Avista Corp., Inc. v. Sanders County* 07-35321 (December 11, 2008) “This appeal presents the question of whether a court may retroactively declare a railroad right of way abandoned under the Abandoned Railway Right of Way Act. We conclude that the Act does not permit a nunc pro tunc abandonment declaration.”

“In sum, we affirm the district court’s finding that the railroad’s use and occupancy of the right of way ceased as of October 1958 and that the County did not establish a public road within one year of that date. We therefore hold that the Hamptons’ inchoate non-vested reversionary interests in the right of way were not extinguished by the subsequent establishment of a public road. We affirm the district court’s declaration of aban-

donment, but reverse the district court’s retroactive application of the abandonment declaration. We hold that the declaration of abandonment became final when judgment was entered by the district court. On that date, the Hamptons’ inchoate interests became vested, but were divested as to the portion of the right of way already embraced in a public highway. As to any additional portions of the right of way that the County might desire to use for that purpose, we leave it to the district court on remand to determine whether the one-year period to establish



a public highway, commencing with its declaration of abandonment, was tolled during the appeal. We also leave it to the district court to determine the application of § 912 or § 1248 to any portion of the former right of way not embraced in a public highway within the one-year period. We need not, and do

not, reach any other issue presented by this case. AFFIRMED IN PART; REVERSED IN PART; REMANDED. Each side will bear their own costs.”

*League of Wilderness Defenders v. United States Forest Service* 06-35780 (December 11, 2008) “In their suit filed pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 706, the League of Wilderness Defenders — Blue Mountains Biodiversity Project and Cascadia Wildlands Project (collectively, LOWD) sought declaratory and injunctive relief to halt the Deep Creek Vegetation Management Project (the Project), which called for the selective logging of 12.8 million board feet of timber in the Ochoco National Forest. LOWD claims in its suit that the United States Forest Service (Forest Service) failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4231 *et seq.*, and the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, in developing and implementing the Project. The district court denied LOWD’s motion for summary judgment and granted the Forest Service’s cross-motion for summary judgment. Because the Final Supplemental Environ-

## NINTH CIRCUIT CASES

mental Impact Statement (FSEIS) may not tier to a non-NEPA watershed analysis to consider adequately the aggregate cumulative effects of past timber sales, we reverse the district court's grant of summary judgment in favor of the Forest Service, and we remand this case so the Forest Service can reissue its NEPA documentation to include the omitted information regarding past timber sales contained in the watershed analysis."

*Transwestern Pipeline Co, LLC v. 17.19 Acres of Property* 08-15991 (December 11, 2008) "Transwestern Pipeline Co. (Transwestern) appeals the district court's denial of its preliminary injunction motion seeking immediate possession of appellee landowners' parcels of land. As a holder of a valid Federal Energy Regulatory Commission (FERC) certificate, Transwestern claims it is entitled to condemn appellees' land pursuant to § 717f(h) of the Natural Gas Act (NGA). The district court denied the injunction, holding that, until condemnation proceedings are completed, Transwestern maintains no substantive right of possession and therefore the district court lacked authority to grant preliminary equitable relief. The

district court had jurisdiction pursuant to 15 U.S.C. § 717f(h) and 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). We affirm and hold that, until an order of condemnation issues pursuant to the requirements of 15 U.S.C. § 717f(h), Transwestern has no substantive right of possession."

*Oregon Natural Desert Association v. United States Forest Service* 08-35205 (December 11, 2008) "Plaintiffs-Appellants, Oregon Natural Desert Association, Western Watersheds Project, Northwest Environmental Defense Center, Oregon Wild, Center for Biological Diversity, and Friends of Oregon's Living Waters (collectively ONDA), sued Defendant-Appellee, the United States Forest Service (Forest Service), for allegedly failing to comply with § 401 of the Clean Water Act (CWA, or Act) in its issuance of grazing permits on Forest Service lands. 33 U.S.C. § 1341.1 ONDA specifically argued that the outcome and reasoning of *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006), are clearly irreconcilable with our reasoning in *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998), and that Dombeck is, therefore, no longer

controlling law.

The Forest Service moved for judgment on the pleadings pursuant to Federal Rules of Civil Procedure 12(c). The matter was referred to a magistrate judge, who made Findings and Recommendations suggesting that the district court grant the motion for judgment on the pleadings on the ground that ONDA's claim was barred by the doctrine of collateral estoppel. The district court adopted the Findings and Recommendations and granted the motion for judgment on the pleadings. This appeal followed. We have jurisdiction to review this decision under 28 U.S.C. § 1291, and we affirm."

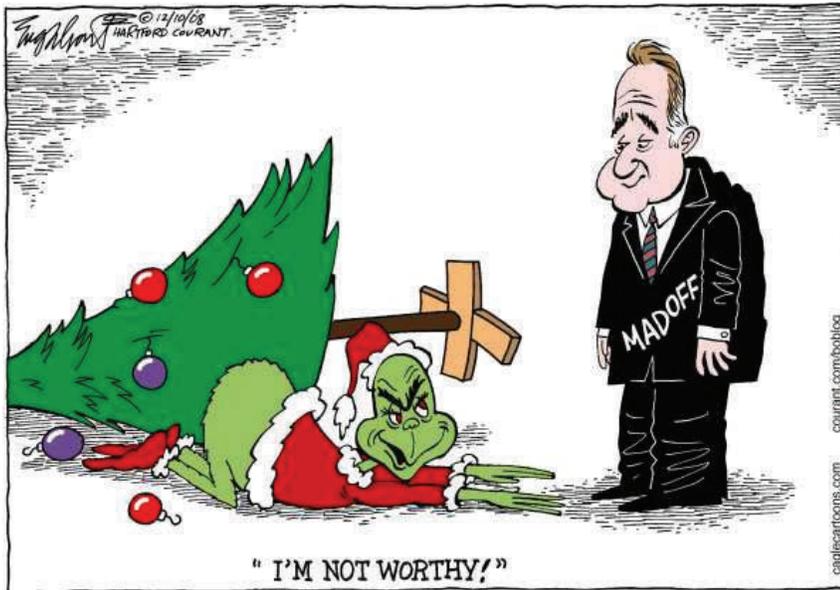
*Societe Civile Succession Richard Guino v. Renoir* 07-15582 (December 9, 2008) "Beseder, Inc., Dror Darel, Tracy Penwell, and CSTPGU LLC (collectively 'Beseder') and Jean-Emmanuel Renoir ('Renoir') appeal the district court's grant of summary judgment in favor of Societe Civile ('Societe') on Societe's copyright infringement claim. Societe and Renoir appeal other issues unrelated to the finding of copyright infringement which are discussed in an accompanying memorandum disposition.

## NINTH CIRCUIT CASES

French artist Pierre-Auguste Renoir and one of his assistants, Richard Guino, created the eleven sculptures at issue between 1913 and 1917 ('the sculptures'). The sculptures

In 1974, the sculptures were exhibited as Renoir-Guino works for sale at the Hotel Bristol in Paris. In 1982, the Guino family and certain members of the Renoir family (not including ap-

Copyright Office registrations for the sculptures, and in the registrations represented that the sculptures were either first published in England in 1983 or unpublished. In 2003, Renoir sold some of the sculptures, or molds or castings thereof, to Beseder, who advertised and sold the sculptures and castings at its gallery in Scottsdale, Arizona. On July 10, 2003, Societe filed its complaint against Beseder and Renoir (Renoir's mother, Hernandez, was added later as a defendant), alleging federal copyright infringement under 17 U.S.C. § 501 et seq. and false designation and false description of sponsorship in violation of the Lanham Act.



were first published in France no later than 1917 under Pierre-Auguste Renoir's name. There was no pre-1978 publication containing an American-style copyright notice.

In 1973, Guino obtained a determination by the French Supreme Court that he was a co-author to certain works of sculpture by Pierre-Auguste Renoir, including the sculptures at issue, and he was awarded a one-half interest in the Renoir-Guino sculptures.

pellant, Pierre-Auguste Renoir's great grandson, Renoir) entered into an agreement, providing that the Guino family would thereafter control production and reproduction of the sculptures using plaster casts from the originals. Under this agreement, the Guino family received exclusive rights to create subsequent editions. A trust (hereinafter 'Societe') was formed to implement the Guino family's rights under the agreement.

In 1984, Societe obtained U.S.

Societe alleged that Renoir and Beseder (collectively, the 'Defendants') engaged in sales, marketing, and reproduction activities in 2003 that infringed upon Societe's copyrights in the sculptures. Although Defendants disagree with some of Societe's characterizations, they generally admit that 'if Societe had legitimate, existing copyright interests under American law in the sculptures, then some of Renoir's and the Beseder Defendants' actions would constitute infringing acts.'

In late 2003, both Beseder and

## NINTH CIRCUIT CASES

Renoir answered the complaint, alleging that the sculptures were in the public domain. In late 2004, Societe moved for partial summary judgment on liability of its copyright claims, but leaving open for trial the question of damages. Societe contended that if the sculptures had fallen into the public domain, they were nonetheless subject to restoration under 17 U.S.C. § 104A. Defendants opposed the motion and asserted cross-motions for partial summary judgment on Societe's copyright claims."

"The issues of copyright infringement damages, among other claims, were tried to a jury in October 2006. On November 2, 2006, a jury awarded \$125,000 in damages to Societe on its copyright infringement claims against Defendants for ten of the eleven sculptures (the district court directed a verdict in favor of Defendants concerning one sculpture, Venus Victrix).

The court reviews 'a district court's grant of summary judgment de novo.' *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir. 2003). Questions of law are reviewed de novo. *Beeman v. TDI Managed Care Servs.*, 449 F.3d 1035, 1038 (9th Cir. 2006).

'Whether a particular work is subject to copyright protection is a mixed question of fact and law subject to de novo review.' *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)."

Beseder argues, citing *Nimmer on Copyright*, that under the *Twin Books* rationale, a newly discovered ancient Greek work, 'published obviously without notice a millennia ago,' would not be in the public domain and would still be eligible for copyright protection, thus creating a limitless copyright term. See 1-4 *Nimmer on Copyright* § 4.01[C][1], at 4-10.1. While an ancient work may be protected today under the ruling of *Twin Books*, the term is not limitless. Instead, the copyright term for a newly discovered ancient work that is not in the public domain or copyrighted would be limited to a finite term of seventy years after the death of the last author, §§ 303(a), 302(a), (b), or December 31, 2047, whichever is later, § 303(a); see also 1-4 *Nimmer on Copyright* § 4.01[C][1], at 4-10.1 n.35.23; 3-9 *Nimmer on Copyright* § 9.09[A], at 9-133. Thus, *Twin Books* does not conflict with either the Copyright and Patent Clause of the Constitution or *Eldred*.

For the foregoing reasons, we find that Defendants infringed Societe's copyrights in the sculptures. We therefore AFFIRM the district court's grant of summary judgment in favor of Societe on its copyright infringement claim. AFFIRMED."

*United States v. AMC, Inc.* 06-55390 (December 5, 2008) "In this action the United States Department of Justice seeks to enforce Title III of the Americans with Disabilities Act ('ADA'), 48 U.S.C. §§ 12181-89, so as to require AMC Entertainment, Inc. and American Multi-Cinema, Inc. (collectively, 'AMC') to provide 'full and equal enjoyment' to disabled moviegoers in ninety-six stadium-style multiplexes located across the nation. Liability is settled, as our circuit has definitively determined that the pertinent guideline drafted by the Architectural and Transportation Barriers Board (the 'Access Board') and adopted by the Attorney General as part of the 'Standards for Accessible Design,' 28 C.F.R. pt. 36, app. A, § 4.33.3 ('§ 4.33.3'), requires that theaters provide 'a viewing angle for wheelchair seating within the range of angles offered to the general public in the

## NINTH CIRCUIT CASES

stadium-style seats.’ Or. *Paralyzed Veterans of Am. v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1133 (9th Cir. 2003), cert. denied, 542 U.S. 937 (2004). Correctly anticipating our holding in *Oregon Paralyzed Veterans*, the district court held that AMC’s existing facilities violate § 4.33.3’s light of sight requirement, awarded summary judgment to the government, and subsequently issued a comprehensive remedial order. *Entm’t, Inc.*, 232 F. Supp. 2d 1092 (C.D. Cal. 2002). The ‘Order Re: Line of Sight Remedies’ sets forth a series of detailed injunctive orders specifying compliance with § 4.33.3 for the ninety-six affected AMC multiplexes containing 1,993 auditoria throughout the nation. AMC timely appeals.

Because the injunction requires modifications to multiplexes that were designed or built before the government gave fair notice of its interpretation of § 4.33.3, the injunction violates due process—and to that extent, its issuance was an abuse of discretion. A two-judge majority of this panel also holds that the district court abused its discretion in neglecting comity concerns pertaining to the Fifth Circuit’s existing, less stringent interpretation of § 4.33.3, while

the dissenting judge would affirm the scope of the nationwide injunction. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse and remand for further proceedings.”

*Love Koren Church v. Chertoff* 07-55093 (December 5, 2008) “Love Korean Church (the ‘Church’) appeals an order of the district court affirming the Bureau of Citizenship and Immigration Services’ (‘CIS’) revocation of a visa petition filed by the Church on behalf its choir director. The Church had sought to have its choir director, a Korean citizen, classified as a ‘special immigrant’ religious worker within the meaning of 8 U.S.C. § 1101(a)(27)(C). Because the revocation of the visa petition was predicated on legal error and findings of fact unsupported by substantial evidence, we vacate the judgment of the district court and remand this case for further consideration by the agency.”

“The AAO’s dismissal of the Church’s appeal rests on an interpretation of 8 C.F.R. § 204.5(m)(2) that is inconsistent with the regulation and on factual findings that are unsupported by substantial evidence. Reconsideration of the AAO’s regulatory interpretation also

requires reconsideration of its application of the two-year experience requirement set forth in 8 U.S.C. § 1101(a)(27)(C)(iii). Accordingly, we reverse the judgment of the district court, and vacate the AAO’s decision. We remand the matter to the district court with instructions to remand it to the agency for further proceedings consistent with this opinion.”

*United States v. Eghbal* 07-55372 (December 5, 2008) “This is civil action brought under the False Claims Act (FCA), 31 U.S.C. § 3729, et seq., against Morteza Eghbal and Marilyn Trujillo to recover treble damages and civil penalties for making false statements to procure home mortgage insurance from the Department of Housing and Urban Development (HUD). Defendants Eghbal and Trujillo appeal from the February 23, 2007 order of the District Court of the Central District of California granting the United States’ motion for summary judgment.

The district court had jurisdiction pursuant to 28 U.S.C. § 1345 and 31 U.S.C. § 3730(a) and this court has jurisdiction under 28 U.S.C. § 1291. Reviewing the district court’s grant of summary judgment de novo,

## NINTH CIRCUIT CASES

*United States v. Johnson Controls Inc.*, 457 F.3d 1009, 1012-13 (9th Cir. 2006), we affirm.

Throughout the 1990s, Eghbal and Trujillo purchased HUD-foreclosed homes and resold them for profit to buyers with mortgage secured loans insured by HUD. Eghbal and Trujillo sold to buyers who lacked sufficient assets to cover the down payment on the properties, and provided the down payment for the buyers by depositing their own personal funds into escrow via cashiers' checks.

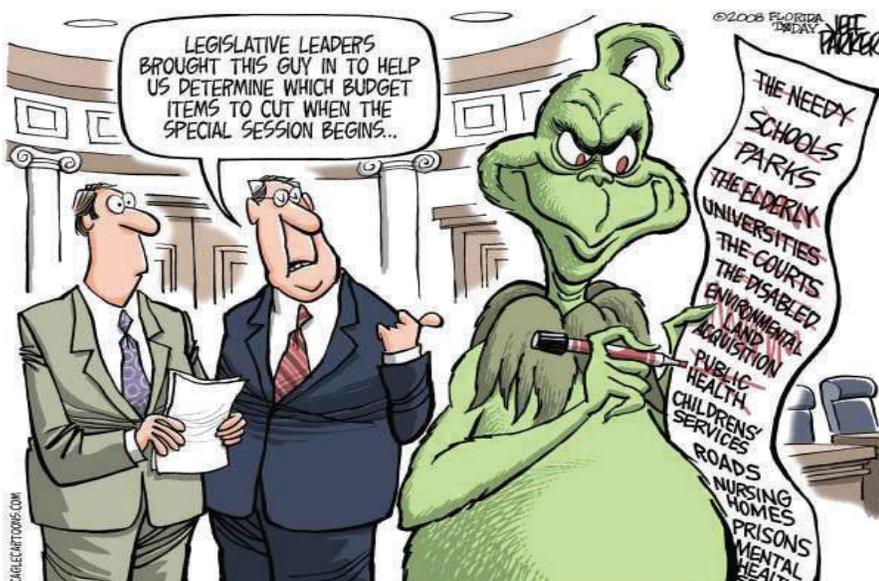
HUD would not insure a loan for a home for which the down

*(Continued from page 1)*

letter from the estate of children's author Dr. Seuss, threatening to sue for copyright violations. The irony wasn't lost on Louisville's mayor, Jerry Abramson, who remarked (paraphrasing the book) that "It appears these lawyers' hearts are two sizes too small." Meanwhile, the town of Medford, Mass., was able to stick with plans for its Christmas celebration, but only by agreeing to call it something other than "The Jingle Bells Festival." These aren't isolated incidents, either. Apparently, when Christmas comes around, many copyright lawyers find that cease-and-desist letters are more of a holiday tradition than sending Christmas cards, as owners of various names and activities associated with holiday traditions seek to protect their rights. So yes, Virginia, there is a Santa Claus -- and [his name is trademarked](#). If that doesn't make him real,

payment was paid by the seller. To that end, HUD required a seller of a home to sign a document called an Addendum to the HUD-1 Settlement Statement (Addendum). By signing the Addendum, the seller certified that he had not, and would not, pay the buyer for any part of the down payment, nor did the seller have knowledge of any loans made to the buyer for purposes of financing the transaction other than those described in the sales contract. HUD would also not insure a loan without a validly signed Addendum. For each instance in which they provided the down payment via cashier's check, Eghbal and Trujillo fraudulently signed the Addendum, falsely stating that they provided no funds towards the down payment.

In total, Eghbal and Trujillo sold 200 properties, at least 62 of which defaulted on their HUD insured mortgages. The pair were criminally charged with making false statements concerning these 62 properties, to which they pled guilty via written plea agreements. A smaller subset of 27 properties were the subject of the FCA action. HUD paid out about \$2.8 million, representing the balances owing on the 27 defaulted



## NINTH CIRCUIT CASES

mortgages.”

“The FCA provides for damages of ‘3 times the amount of damages which the Government sustains’ and civil penalties of \$5,000 to \$10,000 per claim. 31 U.S.C. § 3729(a), 28 U.S.C. § 2461. The Supreme Court has observed that the FCA speaks of multiplying damages, not ‘net damages’ or ‘uncompensated damages.’ *United States v. Bornstein*, 423 U.S. 303, 314 n.10 (1976). In computing the treble damages, the Court specifically directed that ‘the Government’s actual damages are to be [multiplied] before any subtractions are made for compensatory payments previously received by the Government from any source.’ *Id.* at 316.

Eghbal and Trujillo concede the amount of the judgment against them was correctly calculated pursuant to *Bornstein*. Their contention that this correctly-calculated award violated the Eighth Amendment’s prohibition on excessive fines has no merit. The district court made specific findings according to the factors outlined in *United States v. 3814 NW Thurman Street*, 164 F.3d 1191, 1197-98 (9th Cir. 1999), to analyze whether the amount of damages was grossly disproportional to

the gravity of the offense. The district court noted that the 27 false claims were related to other illegal activities, additional and greater penalties could have been (but were not) imposed, and the harm caused by the scheme was farreaching. We agree that the amount of the forfeiture was not so grossly disproportionate to the gravity of the offense as to violate the Eighth Amendment, especially because a systematic and ongoing scheme like Eghbal’s and Trujillo’s undermines the integrity of the programs and erodes the public confidence in the Government’s ability to manage and fund such programs. The judgment of the district court is AFFIRMED.

*International Brotherhood of Electrical Workers v. Citizens Telecommunications* 06-16189 (December 5, 2008) “Appellant Citizens Telecommunications Co. (Citizens) and Appellee International Brotherhood of Electrical Workers, AFL-CIO Local 1245 (IBEW) are parties to a Collective Bargaining Agreement (CBA) in effect from October 2004 through September 2008. IBEW sought an order compelling Citizens to arbitrate IBEW’s claim that Citizens had violated the CBA by reducing employee retirement benefits.

The district court granted the motion to compel arbitration and Citizens appealed, arguing that IBEW cannot arbitrate its grievance without first obtaining consent from the retirees currently eligible for benefits under the CBA. We affirm.”

*Andrzejewski v. Federal Aviation Administration* 06-75730 (December 3, 2008) “Melissa Andrzejewski, a 22-year-old pilot, petitions for review of an order by the National Transportation Safety Board (‘NTSB’) reversing the decision of an Administrative Law Judge (‘ALJ’). After a hearing, the ALJ had found in Andrzejewski’s favor and had reversed a Federal Aviation Administration (‘FAA’) Emergency Order of Revocation (‘Revocation Order’), handed down without a hearing, which revoked Andrzejewski’s commercial pilot’s license on the ground that Andrzejewski performed aerobatic maneuvers too close to the ground—indeed during take-off—in violation of 14 C.F.R. § 91.303(e).

We have jurisdiction pursuant to 49 U.S.C. § 46110 and 5 U.S.C. § 706. We grant Andrzejewski’s petition and remand to the NTSB.”

## NINTH CIRCUIT CASES

“Where an ALJ chooses to credit one set of witnesses’ version of events over another, he has made an implicit credibility determination to which the NTSB must defer ‘in the absence of any arbitrariness, capriciousness or other compelling reasons.’ Dutton, 7 N.T.S.B. 521, 523 (1990). The NTSB must leave undisturbed an ALJ’s credibility finding ‘unless there is a compelling reason or the finding was clearly erroneous.’ *Chirino v. NTSB*, 849 F.2d 1525, 1529-30 (D.C. Cir. 1988).

Here, the ALJ made an implicit credibility finding when he determined that Andrzejewski’s witnesses gave a more accurate version of events than the version given by the FAA’s witnesses. While the ALJ admitted he was not denying the FAA’s witnesses saw what they said they saw, the ALJ noted the FAA’s witnesses did not have experience with the Edge aircraft and its flight characteristics—compared with Andrzejewski’s witnesses—and they may have misunderstood the flight maneuvers they witnessed.

The ALJ simply gave more weight to Andrzejewski’s witnesses than to those of the FAA because of Andrzejewski’s

witnesses’ greater experience and familiarity with the flight characteristics of an Edge aircraft. This is precisely what triers-of-fact should and must do when confronted with expert witnesses whose testimony conflicts on such basic issues as whether the pilot operated the particular plane in an ‘aerobatic flight’ or in a ‘careless or reckless’ manner. After all, what may look like derring-do to a Sunday driver may be a routine cut to a NASCAR driver. The weight of evidence, measured by the witness’ knowledge, experience, and other qualifications, is every bit as much a component of ‘credibility’ as whether the witness has contradicted himself or given the trier-of-fact other reasons to find him not credible. Therefore, in this case, the NTSB erroneously concluded the ALJ did not make a credibility determination to which the NTSB was required to defer.

The NTSB’s failure to give the ALJ’s implicit credibility determination the requisite level of deference was contrary to NTSB precedent and, therefore, arbitrary and capricious.<sup>4</sup> See *Atchison*, 412 U.S. at 807-08. Because the NTSB incorrectly concluded the ALJ’s decision was not based on an implicit

credibility determination, however, the NTSB has not yet addressed whether there is a ‘compelling reason’ to reverse the ALJ’s credibility finding or whether the finding was ‘clearly erroneous.’ See *Chirino*, 849 F.2d at 1529-30. Thus, we remand to the NTSB to make these determinations in the first instance. See *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (holding that where an agency has not yet considered an issue, the ‘proper course’ ‘is to remand the matter to allow the agency to consider the issue in the first instance’) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 726, 744 (1985)). Accordingly, we grant Andrzejewski’s petition and remand to the NTSB for reconsideration.”

*Dietrich v. Cardella* 06-17135 (December 1, 2008) “Every year, thousands of people attend the ‘Best in the West Nugget Rib Cook-Off,’ a multi-day event in downtown Sparks, Nevada. In 2002, Plaintiff Janelle Dietrich attended the event and attempted to register voters and to gather signatures for a political petition. Her activities prompted two incidents that resulted in the filing of this action.

On the first day, a police officer ordered Plaintiff to move to an-

## NINTH CIRCUIT CASES

other location, under threat of arrest if she refused to do so. After 30 minutes at the new location she left, but quickly contacted the American Civil Liberties Union and one of the event's organizers. She was allowed by the event's organizer to return the next morning and to conduct her political activities for the remaining days of the event at the original location and a second satisfactory location. On the third day, however, a second police officer cited her for a traffic violation, allegedly in retaliation for publicity about her first-day activities in a local newspaper.

Plaintiff filed suit under 42 U.S.C. § 1983, alleging violations of her First Amendment right to free speech and naming as defendants the police officers, the event's organizers, the Sparks Police Department, and the City of Sparks. The district court held that no constitutional violations had occurred and granted summary judgment to all Defendants. We affirm in part, reverse in part, and remand for further proceedings.

*United States v. Weyhrauch* 07-30339 (November 26, 2008)

"This is an interlocutory appeal by the government of the district court's pretrial order excluding

evidence from a mail fraud prosecution. It presents a matter of first impression in this circuit — whether a federal honest services mail fraud prosecution under 18 U.S.C. §§ 1341 and 1346 requires proof that the conduct at issue also violated an applicable state law. Preliminarily, we must also address the government's repeated failures to certify this appeal properly according to the jurisdictional requirements of 18 U.S.C. § 3731. We accept the government's fourth attempt to certify, and thus have jurisdiction under § 3731. On the merits, we disagree with district court that a state law violation is required, and thus reverse the court's order excluding certain evidence from trial."

"We hold that 18 U.S.C. § 1346 establishes a uniform standard for 'honest services' that governs every public official and that the government does not need to prove an independent violation of state law to sustain an honest services fraud conviction. Because the district court excluded the evidence based, in part, on its conclusion that the government had to prove that state law imposed an affirmative duty on Weyhrauch to disclose a conflict of interest, we reverse. The government did not

appeal the district court's ruling that the proffered evidence relates only to state law, and we express no opinion whether the proffered evidence is relevant to proving the government's case under the standard we have announced and leave that determination to the district court's sound judgment. REVERSED and REMANDED."

*Alaska Wilderness League v. Kempthorne* 07-71457

(November 20, 2008)

"Petitioners are six organizations that support environmental conservation, indigenous communities, and wildlife populations of Northern Alaska. They challenge the Minerals Management Service's ('MMS') approval of an exploration plan submitted by Shell Offshore Inc. ('Shell'). Shell seeks to drill multiple offshore exploratory oil wells over a three-year period in the Alaskan Beaufort Sea.

Petitioners challenge the agency's action under the National Environmental Policy Act ('NEPA'), 42 U.S.C. §§ 4321-4347, and the Outer Continental Shelf Lands Act ('OCSLA'), 43 U.S.C. §§ 1331-56. Petitioners allege that MMS failed to take the requisite 'hard look' at the impact of drilling on the people and wildlife of the Beaufort Sea

## NINTH CIRCUIT CASES

region in violation of the standards set forth by NEPA, OCSLA, and their implementing regulations. Petitioners also argue that MMS erred by failing to prepare an environmental impact statement ('EIS') for the proposed exploration activities, because of the potential for significant harmful effects on the environment.

We have jurisdiction over all parties' claims as each petition for review was timely filed. We vacate the agency's approval of Shell's exploration plan, and remand so that MMS can conduct the 'hard look' analysis required by NEPA."

*Doody v. Schriro* 06-17161  
(November 20, 2008)

"Seventeen-year-old Johnathan Doody was interrogated overnight for twelve hours straight. When, after several hours, he fell silent and refused to answer the officers' questions, the officers persisted, asking dozens of questions, many over and over again, and telling him he had to answer them. The resulting confession was used in Arizona state court to convict him of multiple counts of murder and robbery. He now petitions for a writ of habeas corpus on the grounds that (1) the warnings he received pursuant to *Miranda v.*

*Arizona*, 384 U.S. 436 (1966), were insufficient; (2) the officers' words and conduct during the interrogation effectively 'de-Mirandized' him; and (3) his confession was involuntary. We affirm the district court's denial of the writ on Doody's *Miranda* claims, but reverse on his voluntariness claim."

"The state here relied heavily on Doody's confession, playing all seventeen tapes of the interrogation for the jury. See *Moore v. Czerniak*, 534 F.3d 1128, 1147 (9th Cir. 2008) (noting the particularly prejudicial impact of 'a taped recording of a defendant's confession taken with all the requisite formalities by police officers and played to a jury that hears the defendant's confession in the defendant's own words from his own lips'). Moreover, the prosecutor's opening and closing statements reviewed and recounted the confession in great detail. As the confession did not align with the state's theory of Doody's role, the prosecutor carefully analyzed which portions proved Doody's involvement in the murders, and which portions the state believed were lies.

The strongest additional evidence against Doody was Garcia's testimony. But the jury

plainly did not credit that testimony. Garcia testified that Doody contemplated the murders while planning the robbery, and, with premeditation, shot the monks himself. The special verdict form, however, indicated that Doody was convicted on felony-murder grounds, not for premeditated murder. Significantly, the state, in its closing statement, told the jurors that, if they believed only the version of events set forth in Doody's confession, they should convict him of felony-murder. Doody thus could well have been convicted on the basis of his confession alone.

Other than his confession and Garcia's testimony, the evidence against Doody was weak. Doody's supposedly incriminating statements to friends were, according to the witnesses' own testimony, understood as jokes. The evidence linking him to items stolen from the temple depended almost entirely on the testimony of friends of Caratachea's who testified with immunity and not without self-interest, as the stolen items had been linked to them. Stolen items found in Garcia's bedroom — which Doody shared at the time it was searched — were not connected specifically to Doody.

## NINTH CIRCUIT CASES

There was some circumstantial evidence that was somewhat more persuasive: One non-self-interested witness testified that Doody claimed ownership of one item stolen from the temple. Also, an acquaintance of Doody's testified that Doody paid the witness \$1,000 that he owed for a car shortly after the murders, although before the murders he had been unable to pay. But the defense impeached this testimony with the witness's prior statement that Doody had paid for the car before the murders.

In sum, discounting Garcia's testimony, as the jury did, the state's case relied almost entirely on his confession and some peripheral, circumstantial evidence. We have no difficulty in concluding that the erroneous admission of Doody's confession had a 'substantial and injurious effect or influence' on the jury's verdict. *Brecht*, 507 U.S. at 623. IV. For the foregoing reasons, we AFFIRM in part, REVERSE in part, and RE-MAND with directions to grant the petition."

*Romoland School District v. Inland* 06-56632 (November 18, 2008) "The Romoland School District and several individuals

and environmental groups, (collectively, 'Plaintiffs') appeal the denial of their motion for a preliminary injunction and the dismissal with prejudice of their two claims against Inland Empire Energy Center ('IEEC'), a wholly-owned subsidiary of General Electric Company. Plaintiffs brought suit against IEEC under the citizen suit provision of the Clean Air Act ('CAA' or 'Act'), 42 U.S.C. § 7604, in connection with IEEC's plans to construct an 810-megawatt power plant approximately 1,100 feet from the Romoland Elementary School in Riverside County, California. IEEC's motion to dismiss contended, among other things, that the district court lacked jurisdiction over the suit because IEEC had been granted a permit under Title V of the CAA, 42 U.S.C. §§ 7661-7661f, and such permits may not be challenged in civil or criminal enforcement proceedings in federal district court under 42 U.S.C. § 7604.

Plaintiffs also included as a defendant in their CAA action the South Coast Air Quality Management District ('the air district' or 'SCAQMD'), the local air pollution control agency that issued the relevant permit and authorized IEEC to begin construction of the power plant. Af-

ter the district court denied Plaintiffs' motion for a preliminary injunction and dismissed their claims against IEEC under Federal Rule of Civil Procedure 12(b)(6), Plaintiffs sought voluntarily to dismiss their claims against the air district under Federal Rule of Civil Procedure 41(a)(2) to gain 'final judgment for purposes of an appeal.' The district court granted Plaintiffs' motion, but the accompanying order did not state that the dismissal of the claims against the air district was with prejudice.

We must resolve two threshold issues of jurisdiction before we may consider the merits of Plaintiffs' claims: (1) whether the district court's dismissals of the claims in this case present us with a final decision pursuant to 28 U.S.C. § 1291; and (2) whether the Central District of California was an appropriate forum, and 42 U.S.C. § 7604 an appropriate statutory basis, for Plaintiffs' challenge such that the district court had jurisdiction over it pursuant to 28 U.S.C. § 1331. We conclude that the orders appealed from are part of a final judgment and thus that we have jurisdiction over this case, but that the district court did not. Accordingly, we affirm the district court's dismissal of the claims against IEEC with preju-

## NINTH CIRCUIT CASES

dice, hold that the claims against the air district should also be deemed to be dismissed with prejudice notwithstanding the voluntary dismissal order's silence on this point, and further hold that all proceedings on Plaintiffs' motion for a preliminary injunction are void because the district court was without jurisdiction to entertain that motion."



## LAW.COM

### **Author of Famed Law Review Note Dies**

William S. Stevens, a Pennsylvania lawyer who died last week at the age of 60, will forever be remembered for the anonymous law review note he published as a law student at the [University of Pennsylvania](#) in 1975. Published as an "Aside," "The Common Law Origins of the Infield Fly Rule" was a slightly tongue-in-cheek inquiry into whether the rule of baseball was shaped by the same influences that shaped the common law.

The Infield Fly Rule is obviously not a core principle of baseball. Unlike the diamond itself or the concepts of "out" and "safe," the Infield Fly Rule is not necessary to the game. Without the Infield Fly Rule, baseball does not degenerate into bladderball the way the collective bargaining process degenerates into economic warfare when good faith is absent. It is a technical rule, a legislative response to actions that were previously permissible, though contrary to the spirit of the sport.

Stevens' obituary in [The New York Times](#) called the note "one of the most celebrated and imitated analyses in American legal history," and [Wikipedia](#) lists it as one of the most significant articles ever published in the [University of Pennsylvania Law Review](#). The note quickly achieved legal fame, the *Times* said, in part because nothing like it had appeared before in a major law review and in part because its reasoning was so elegant and concise.