RIVERSIDE LAWYER

June 2019 • Volume 69 Number 6

MAGAZINE

In This Issue

RIVERSIDE COUNTY BAR ASSOCIATION
RCBA
EST. 1894

The Official Publication of the Riverside County Bar Association

Riverside County Bar Association
4129 Main Street, Suite 100
Riverside, California 92501

Telephone
951-682-1015

Facsimile
951-682-0106

Internet
www.riversidecountybar.com

E-mail
rcba@riversidecountybar.com

RIVERSIDE LAWYER MAGAZINE

C O N T E N T S

Columns:

COVER STORIES:

Features:

Departments:

Mission Statement

Established in 1894

The Riverside County Bar Association, established in 1894 to foster social interaction between the bench and bar, is a professional organization that provides continuing education and offers an arena to resolve various problems that face the justice system and attorneys practicing in Riverside County.

RCBA Mission Statement

The mission of the Riverside County Bar Association is:

To serve our members, our communities, and our legal system.

Membership Benefits

Involvement in a variety of legal entities: Lawyer Referral Service (LRS), Riverside Legal Aid, Fee Arbitration, Client Relations, Dispute Resolution Service (DRS), Barristers, Leo A. Deegan Inn of Court, Mock Trial, State Bar Conference of Delegates, Bridging the Gap, and the RCBA - Riverside Superior Court New Attorney Academy.

Membership meetings monthly (except July and August) with keynote speakers, and participation in the many committees and sections.

Eleven issues of *Riverside Lawyer* published each year to update you on State Bar matters, ABA issues, local court rules, open forum for communication, and timely business matters.

Social gatherings throughout the year: Installation of RCBA and Barristers Officers dinner, Law Day activities, Good Citizenship Award ceremony for Riverside County high schools, and other special activities, Continuing Legal Education brown bag lunches and section workshops. RCBA is a certified provider for MCLE programs.

The Riverside Lawyer *is published 11 times per year by the Riverside County Bar Association (RCBA) and is distributed to RCBA members, Riverside County judges and administrative officers of the court, community leaders and others interested in the advancement of law and justice. Advertising and announcements are due by the 6th day of the month preceding publications (e.g., October 6 for the November issue). Articles are due no later than 45 days preceding publication. All articles are subject to editing. RCBA members receive a subscription automatically. Annual subscriptions are $25.00 and single copies are $3.50.*

Submission of articles and photographs to Riverside Lawyer *will be deemed to be authorization and license by the author to publish the material in the* Riverside Lawyer.

The material printed in the Riverside Lawyer *does not necessarily reflect the opinions of the RCBA, the editorial staff, the Publication Committee, or other columnists. Legal issues are not discussed for the purpose of answering specific questions. Independent research of all issues is strongly encouraged.*

Calendar

June

11 **Civil Litigation Section Meeting**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Hon. Craig Riemer
MCLE – 1 hour General

12 **Criminal Law Section Meeting**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Virginia Blumenthal
Topic: "Handling Difficult Witnesses"
MCLE – 1 hour General

14 **General Membership Meeting**
Noon – 1:15 p.m.
RCBA Gabbert Gallery
Speaker: Justice Michael Raphael
Topic: "Tips on Writing a Good Brief"
MCLE - .75 hour General

21 **Appellate Law Section**
Noon – 1:15 p.m.
Court of Appeal
3389 12th Street, Riverside
Speakers: Hon. Kira Klatchko & Honey Amado, Esq.
Topic: "The Ins and Outs of Mediating in the Court of Appeal"
MCLE – 1 hour General
Due to seating, attendance will be limited to 30 people.

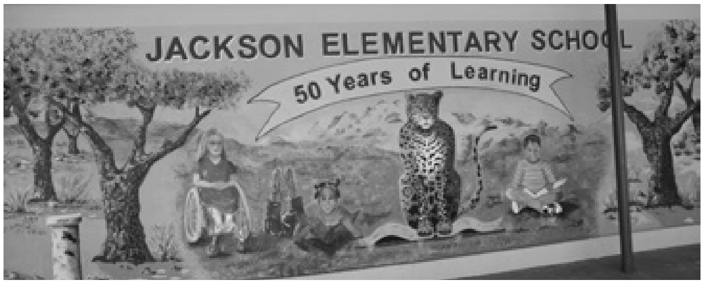
July

1 **Civil Litigation Roundtable**
The Honorable Craig Riemer
Noon – 1:15 p.m.
RCBA Boardroom
MCLE - .75 hour General

EVENTS SUBJECT TO CHANGE.
For the latest calendar information please visit the RCBA's website at riversidecountybar.com.

The 2019 RCBA Reading Day was a Huge Success

by Jacqueline Carey-Wilson



On May 20, members of the RCBA participated in reading to students from kindergarten to fifth grade at Jackson Elementary School in Riverside. The attorneys were assigned classrooms and could either read their favorite children's book or a book chosen by the students. After the books were read, the attorneys took questions from the students about the legal profession. Soon after the reading session concluded, a $500 check from the Riverside County Bar Foundation was presented to the school's interim administrator, Rick Davis, for the school's library. The students, faculty, and staff at Jackson Elementary were excited for the visit and grateful to all who volunteered their time to read and/or who donated books/funds for the school's library. The RCBA wishes to thank the following who participated:

Erica Alfaro
Alexandra Baca
Jacqueline Carey-Wilson
Chris Johnson
Krystal Lyons
Honorable Sheri Pym
Diana Renteria
Theresa Savage
Matt Strickroth
Shumika T. R. Sookdeo

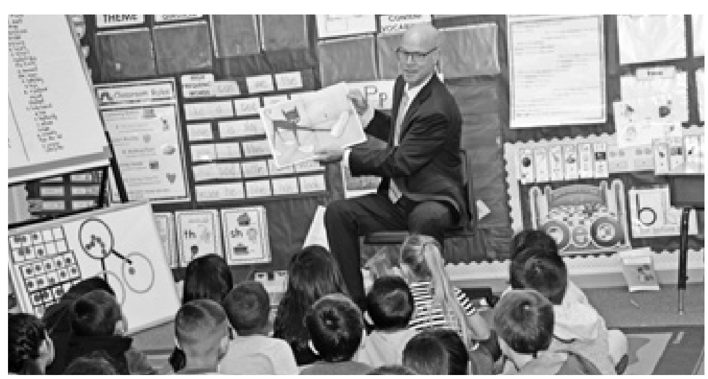
Photos courtesy of Jacqueline Carey-Wilson.

Jacqueline Carey-Wilson presents Rick Davis, Jackson Elementary School Interim Administrator, with a $500.00 check from the RCBA Foundation for the school's library.

Volunteers: Theresa Savage, Erica Alfaro, Matt Strickroth, Krystal Lyons, Judge Sheri Pym, Jacqueline Carey-Wilson, Diana Renteria, and Alexandra Baca.

Diana Renteria

Shumika T. R. Sookdeo



Chris Johnson

Barristers President's Message

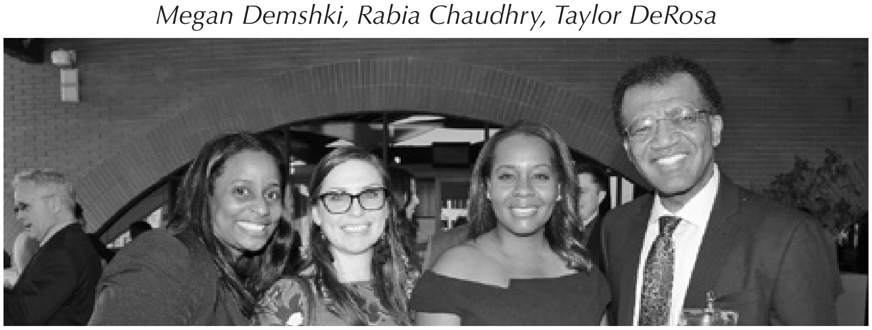
by Megan G. Demshki

Judicial Reception

On May 2, 2019, the Barristers were proud to host the Third Annual Judicial Reception in the Grier Pavilion. We enjoyed a beautiful Riverside evening while taking in views of the skyline and wonderful appetizers and refreshments by The Salted Pig. We are so thankful for the wonderful turnout of judicial officers and members of the legal community. It was truly an honor for the Barristers to present the 2019 Barristers Judicial Officer of the Year Award to the Honorable Jackson Lucky and the 2019 Barristers Attorney Advocate of the Year Award to Robyn Lewis. The Judicial Reception was such a wonderful reminder of what makes Riverside a special and unique community to practice.

(l-r) Taylor DeRosa, Patricia Mejia, Rabia Chaudhry, Goushia Farook, Shumika Sookdeo, Megan Demshki, Robyn Lewis, Judge Jack Lucky, Paul Lin, Braden Holly

(l-r) Braden Holly, Shumika Sookdeo, Goushia Farook, Paul Lin, Megan Demshki, Rabia Chaudhry, Taylor DeRosa



(l-r) Kamola Gray, Samantha Armijo, Shauna Albright, Justice Richard Fields

Megan Demshki and Goushia Farook with award recipients Robyn Lewis and Judge Jack Lucky

David Rivera and Shumika Sookdeo

Marcia Gilman, Jim Heiting, Dan Hantman

A special thank you to our sponsors who made this event possible:

Melissa Baldwin Settlements
Rizio Liberty Lipinsky
Aitken Aitken Cohn
Reid & Hellyer
Law Offices of Shauna M. Albright
Varner & Brandt, LLP
Blumenthal Law Offices
Emanate Appearance Attorneys
First Legal

Turoci Bankruptcy Firm
University of La Verne College of Law
JAMS
Law Offices of Darryl L. Exum
Advanced Depositions

2019-2020 Barristers Board Elections

On Wednesday, June 12, at 5:30 p.m., the Barristers will hold elections for the 2019-2020 Barristers board of directions. The meeting will take place at the Brickwood, which is located at 3653 Main Street in Riverside. Only Barristers members who have attended at least two Barristers' events during this board year may vote. The candidates are as follows:

President: Paul Lin
President-Elect: Goushia Farook
Treasurer:
Taylor DeRosa   Mike Ortiz
David Rivera   Stuart Smith
Secretary:
Taylor DeRosa   Mike Ortiz
David Rivera
Members at Large:
Alex Barraza   Ankit Bhakta
Taylor DeRosa   Braden Holly
Diana Lopez   Patricia Mejia
Mike Ortiz   David Rivera
Stuart Smith   Lauren Vogt

We hope you will join us at the Brickwood to elect and celebrate the new board!

Megan G. Demshki is an attorney at Aitken Aitken Cohn in Riverside where she specializes in traumatic personal injury, wrongful death, and insurance bad faith matters. Megan can be reached at megan@aitkenlaw.com or (951) 534-4006.

THE RCBA WISHES
A VERY HAPPY
50TH WEDDING ANNIVERSARY TO
PRESIDING JUSTICE MANUEL
& ROSEMARY RAMIREZ
ON JUNE 7, 2019

Arbitration Clauses in Consumer Contracts: Is the consumer class action on the brink of extinction?

by Christopher J. Morosoff

Unless you have been living on Walden Pond or off-the-grid in a cabin in the woods, Kaczynski-style, you are a consumer. We are all consumers. All day, every day, we engage in consumer transactions – from the food we eat, to the phones, internet service, and cable tv we watch. From baby products (bottles, formula, baby clothes, toys, cribs, diapers, etc.) to burial and funeral services – we live our lives consuming. But when we engage in a consumer transaction, some of those transactions don't turn out the way we expect.

What do we do when a consumer transaction does not meet our expectations? When, for example, we notice a $3.73 charge on our cable bill that we did not expect. We might call customer service and try to get the charge reversed. If that doesn't work and we're feeling particularly ornery, we might even post a negative review on Yelp. Most of us, however, just brush it off.

Those who feel a bit more combative may even be inclined to sue. So they contact that friend of a distant relative who happens to be a lawyer. Then reality sets in. John Q. Esquire says that it really isn't worth it for him to take on a big cable company for $180 (4-year statute of limitations x $3.73/month). But he'd be happy to take the case for $350 an hour, with a $10,000 retainer.

Consumer claims are, as a general rule, too small to litigate on an individual basis. Consumers are hard pressed to find an attorney willing to litigate against a company with only the prospect of getting 40% of a $180 damages award after years of litigation. Unless . . . that cable company overcharged each of its million-plus customers that same $3.73. In that case, there is no shortage of attorneys here in California (where the benchmark attorneys' fee is 25% of any amount recovered) willing to bring the consumer's claim as a class action on behalf of a million customers.[1] Indeed, the only realistic way to litigate "low value consumer claims," where the potential recoveries are "too small to incentivize individual litigation," is by way of a class action.[2]

Over the past decade, however, it has become more and more difficult to litigate a consumer class action. Most consumer transactions are subject to arbitration agreements. Those that are not have become the exception. Any consumer transaction that requires a contract (e.g., car sales, cell phone, cable, internet service, banking, virtually anything that involves financing) likely by now contains an arbitration clause. In addition, as online shopping increasingly replaces brick and mortar stores, many transactions that traditionally have not been subject to a written agreement (clothing, groceries, anything and everything sold on Amazon, etc.) are now subject to an online retailer's "terms of service" or "terms and conditions." Those "terms" that consumers must accept to complete the online purchase now contain arbitration clauses.

Since at least 2011, following the landmark decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), nearly all businesses have included an arbitration clause in their written or digital contracts. These arbitration clauses universally contain "class waivers" which require consumers to bring any claim they may have on an individual basis and not as the representative of a class.

Prior to 2005, it was unclear whether a class waiver was permissible in California. In 2005, the California Supreme Court announced what became known as the "*Discover Bank* Rule." In *Discover Bank v. Superior Court*, 36 Cal.4th 148 (2005), the Court held that, in California, class action waivers in consumer contracts were generally unenforceable.

In 2011, the US Supreme Court effectively overruled *Discover Bank*, finding that the Rule was preempted by the Federal Arbitration Act.[3] The arbitration clause at issue in *Concepcion* required customers to resolve all disputes through binding arbitration rather than in court. It also contained language, which has not surprisingly become the universal standard in consumer and employment contracts, that required consumers to bring their claims in their "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[4] The Court upheld the enforceability of the arbitration clause and the class waiver. The result is that not only are consumers required to arbitrate their claims, they can only arbitrate their individual claims (think $3.73) and are not permitted to bring their claims as a class action.

Since *Concepcion,* the Supreme Court has methodically strengthened the enforceability of class waivers. In *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1632 (2018), the Court officially extended the reach of class waivers to employment contracts. In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, slip op. at 1-2 (Jan. 8, 2019), the Court held that an arbitrator, not a court, will resolve not only the dispute, but even the question of whether the arbitration agreement at issue applies to the particular dispute.

1 *Laffitte v. Robert Half Int'l, Inc*., 1 Cal.5th 480, 495 (2016).

2 *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1129 (9th Cir. 2017).

3 *Concepcion*, 131 S.Ct. at 1753.

4 *Id.* at 1744.

Most recently, in *Lamps Plus, Inc. v. Varela*, slip op. at 12-13 (April 24, 2019), the Court held that even when the arbitration clause is ambiguous as to the availability of classwide arbitration, the consumer must still arbitrate his or her claim on an individual basis and not as a class action.

The moral of this story is, the next time a client comes to you with a "slam dunk" case because some large company cheated him or her out of $3.73, you would be well advised to check to see if your client signed any contract or agreed, knowingly or not, to "terms and conditions." If so, chances are those "terms" contain an arbitration clause with a class waiver. You might want to just give the client $3.73 and move on to the next case.

Chris Morosoff is an attorney based in Palm Desert. He is a graduate of UC Hastings College of the Law and has specialized in consumer and employment class action litigation for over 20 years. A former director of the General Assistance Advocacy Project in San Francisco, Mr. Morosoff has also dedicated a significant amount of pro bono time over the past 10 years representing low income clients at the Riverside Legal Aid office in Indio.

"California CAN-SPAM" – $1,000 for Each Spam Email

by Boyd Jensen

When I last used the Microsoft based Windows operating system and the Outlook program for emails, images were "automatically loaded." (Of course at the time, I knew nothing about what that meant.) Several years ago, when I chose to start using Apple products, Apple's mail program images were not automatically loaded. One needed to affirmatively indicate auto-loading as a preference. An email was an email and like a posted letter, it had text and images, why worry about downloading images?

That would change when a good friend came to my office because he had been inundated with unsolicited emails. Frankly, I believe that has happened to almost all of us. He told me about the U.S. Federal CAN-SPAM[1] Act (15 U.S.C. chapter 103), but had heard that California laws were stricter. He was right and representing him led me down the pathway of discovery into the labyrinth of digital email communication and the California version of protections for consumers.

The California "CAN-SPAM" statute is found in Business and Professions Code section 17529, et seq. The code provisions have been massaged by several key appellate court opinions,[2] but essentially California law prohibits activity to "initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address."[3] Violative emails are unsolicited in that recipients did nothing to invite or correspond with the identified senders or cohorts behind and associated with the identified senders. The emails must be commercial in that they advertise claimed products or service; were advertisements for the claimed product or service senders; or facilitators sponsoring or associating with senders.

Normally, spam emails are part of an advertising campaign, NOT JUST FOR THE ostensible goods or services. The emails are sent to allure recipients into clicking on external links, which transmit the desire of the recipient to learn more or satisfy curiosity. However, by clicking on the link, the recipient has confirmed his/her existence. The email address will now be amassed with others for solicitation purposes. This is referred to as "harvesting."

Business and Professions Code section 17529.4 attempts to reduce email harvesting. The code section provides that it is unlawful to collect electronic mail addresses if the purpose is to send unsolicited commercial emails. This includes using an automated method to divine email addresses for solicitation purposes, scripts, or automated means to register multiple email accounts from which to send unsolicited commercial emails.

The increased sophistication level of harvesting emails using spamming disguised as "advertising campaigns," often is based upon innocuous email subjects or domain references like "vacations," "education," "vocations," or "weight loss." For instance, in a weight loss advertisement, that seemingly depicts a displayed image, the image file would actually not be part of the original email text or embedded email, but rather a disguised hyperlink or web beacon e.g. "web bug" which upon clicking, would link the spam recipient to a server belonging to the advertising company, and not a weight loss organization. When a recipient/user clicks on the image (hidden hyperlink or web beacon), the user's computer will request to download the image/advertisement information from the advertiser's server, and the request will require the user's computer to supply identifying information about itself to the advertiser.

1 CAN-SPAM acronym for "Controlling the Assault of Non-Solicited Pornography and Marketing."

2 *Hypertouch, Inc. v. ValueClick, Inc.* (2011) 192 Cal.App.4th 805, dispute between service provider and advertiser, upheld CAN-SPAM. *Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal.App.4th 1235, elements of common law fraud are unnecessary to state cause of action. *Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429,434, applies to senders and advertisers. *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, applies to class actions. *Rosolowski v. Guthy-Renker LLC* (2014) 230 Cal.App.4th 1403, email subjects not misleading if context of body of the email clarifies. *Balsam v. Trancos, Inc.* (2012) 203 Cal.App.4th 1083, CAN-SPAM does not prevent recovery under California law.

3 Bus. & Prof. § 17529.2.

Thus, a third-party site, such as an advertiser, can gather information about spam recipient/users, even if users are not purposely clicking on the advertisement. Beacons are not just embedded in visible advertisements but can be embedded in completely invisible elements, a third party can gather such information even if the user is completely unaware of the third party's existence.

Framing is another versatility technique using web beacons. Framing allows web pages to refer to content located on a totally different server. As part of that request, the user's computer has to supply identifying information to the referred server. Thus advertisers can embed beacons to servers, that they do not directly own or operate, and then use those links for tracking purposes.

Business and Professions Code section 17529.5 makes it unlawful to advertise in a commercial email sent to a California email address when it includes a domain name used without permission; has falsified, misrepresented, or forged header information; or has a misleading subject line. Such emails normally contain misrepresented header information, as the header in the context of the email normally misrepresents the source and capability of the sender, because the senders are normally untraceable and not lawfully authorized by the advertiser to use the information contained in the email or its linked information. Simply put the email was using falsified information and the domain without permission, because the email was not intended to advertise, but rather to seduce recipients into "clicking" revealing their authenticity, as prohibited by Section 17529.4 of the Business and Professional Code.

Thus, if the spam email is traced or the header reveals the sponsoring organization of the email, was not an actual weight loss company, the spam would be actionable because of the falsified or misrepresented header.

The good news is that a successful plaintiff can obtain a thousand dollars for each email! In my case for my friend, we were able to identify thousands of spam emails connected to "various advertisers." Business and Professions Code section 17529.8 provides that the recipient of an email in violation of Business and Professions Code section 17529.2, may collect liquidated damages of $1,000 "for each unsolicited commercial email." Business and Professions Code section 17529.5 authorizes collection of $1,000 "for each unsolicited commercial email" sent in violation of its requirements. Both sections authorize actual damages, but such are not as enticing to parties and their counsel, as a thousand dollars for each improper email. Knowledgeable consumers have a powerful tool to respond to spamming.

Boyd Jensen, a member of the RCBA Bar Publications Committee, is with the firm of Jensen & Garrett in Riverside.

Lemon Aid for Attorneys

by Michael Geller

Everybody thinks they know what a "lemon" is when referring to motor vehicles. If you were to look up the phrase "Lemon Law" in the California Annotated Codes you will not find such a law. That being said, while California has among the strongest lemon laws in the country, the statutory basis for this law is not named as "Lemon Law."

The concept of lemon law arose in federal law under the Magnusson-Moss Warranty Act [15 USCS §§ 2301 et seq.], which is national in scope and took effect around 1975.

The California warranty statute that includes what is commonly referred to as the "lemon law" is the Song-Beverly Consumer Warranty Act, Civil Code section 1790 et seq., which was passed around 1970.

The core of each statute is similar. However, there are a number of differences between Magnusson-Moss and Song-Beverly which are beyond the scope of this article. The rest of this article will be based solely on the Song-Beverly Act.

Song-Beverly covers all new consumer goods, which are used, bought, or leased for use, primarily for personal family or household purposes, and this includes clothing and consumables. This means that if you purchase a computer or a camera that the manufacturer cannot, or simply refuses to repair, you have similar remedies under Song-Beverly as you do with lemon automobiles, including the one-way plaintiff's attorney's fees clause. Case law requires that in order for a motor vehicle to be subject to Song-Beverly it had to have been purchased in California.

The Act does not cover goods used primarily for business purposes although, for motor vehicles, there is an exemption for small business that have less than 5 vehicles registered in the name of the business.

Under Song-Beverly coverage is based on the use of the product, not the type of product. If you purchase a Boeing Jet for personal purposes, it could be covered by Song-Beverly.

For Song-Beverly to apply generally, the good must come with a written warranty. Goods sold as-is, or with all faults, are exempt from Song-Beverly.

The sections of Song-Beverly that cover motor vehicles is located in Civil Code section 1793.2 (d)(2), which is the generic lemon law, and the Tanner Consumer Protection Act, Civil Code section 1793.22.

All of the warranty act is also tied in with the Uniform Commercial Code (UCC) as it applies to the acceptance of the goods, rejection of goods, and revocation of acceptance. In addition, if a vehicle is covered by an express warranty, generally two implied warranties also, apply, the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Merchantability generally applies only to motor vehicle sales.

A vehicle is considered a "lemon" if, while covered by the manufacturers written warranty, the manufacturer is unable to conform the vehicle to the written warranty after a reasonable number of attempts and the issue(s) of the repair substantially impairs the use, value, or safety of the vehicle.

All of these elements are generally up to the finder of fact to determine. There is no hard and fast reasonable number of attempts, although there must be at least one attempt to bring a cause of action for breach of the written warranty.

The Tanner Act sets some objective criteria for the presumption of a lemon although to invoke the Tanner Act, there are additional pre-filing requirements. Tanner says a vehicle is presumptively a lemon if it is in the shop for the same items or system over 4 times in the first 18 months or 18,000 miles for most things and for safety concerns, over 2 times. While everyone wants to claim their issue is a safety factor, the lemon law issue would needs to be a clear safety system of the car, such as brake or steering failure. In addition to the 2 or 4 times for a repair, the Tanner Presumption can also be invoked if the vehicle is at a repair facility more than 30 days total in the first 18 months or 18,000 miles, whichever comes first. Even if Tanner is invoked, it is a rebuttable presumption that the vehicle is a lemon. There is case law involving what is a repair attempt, what constitutes a "day" for repairs, or if parts are not available immediately.

For a breach of the implied warranty of merchantability, no repair attempts are necessarily required. In simplistic terms, merchantability is whether the good is of fair and average quality and fit for the ordinary purpose for which such goods are used. Consequently, if you purchase a car that never starts, you may have a breach of the implied warranty of merchantability if you aren't able to use the car as intended.

If a vehicle is believed to be a lemon, a buy-back demand must be made to the manufacturer. Every new vehicle comes with a lemon law book detailing how to notify the manufacturer. Failure to notify the manufacturer is a fatal defect in a lemon law case. Taking it to the dealer for repairs is not deemed notice to the manufacturer.

The manufacturer may offer a repurchase or deny it from the demand letter. If there is a denial, a suit may be filed. Remedies under the lemon law are a repurchase or replacement with an offset for use, computed under the statute, any incidental and consequential damages that flow from the breach, such as rental cars, towing, etc., and attorney's fees and costs. While attorney's fees are available for the prevailing plaintiff, they are not available for the prevailing defendant. Furthermore, if the refusal to repurchase is willful, which is up to the jury, in addition to the repurchase, the jury can award up to double damages. Therefore, if the jury award is repurchase, with an offset for use, totaling $25,000, the jury can choose to award anywhere from $25,000 to $75,000.

The replacement formula is based on MSRP to MSRP, less the allowance for use, because in most cases, you could not get an exact duplicate of the vehicle you possess.

For a breach of the implied warranty of merchantability, the willful damages of up to twice the award is not available, however the other remedies are.

Michael Geller is a sole practitioner in Riverside dealing in all aspects of consumer law and consumer protection, including the lemon law. He has been practicing since 1995.

The Consumer Financial Protection Bureau: A Constitutional Progress Report

by David P. Rivera

Even among lawyers, the Consumer Financial Protection Bureau ("CFPB") is not universally known, much less understood. It is an independent government agency formed in 2011 to protect consumers of financial products and services. This article examines why it was created, what it does, and whether or not its structure is constitutional.

I. The 2008 Financial Crisis

The impact of the 2008 financial crisis was staggering. An autopsy commissioned by Congress reported that two and a half years after the crisis, the job market remained severely impaired: 26 million Americans were unemployed, could not secure full-time employment, or had wholly abandoned their job search. Roughly eight and a half million Americans lost their homes to foreclosure, were in the foreclosure process, or were dangerously overdue on their mortgage payments. Household wealth decreased by nearly $11 trillion. Businesses small and large were affected, as were communities and neighborhoods across the nation.[1]

Risky mortgages, which banks securitized and sold to investors, claim a prime role in the financial crisis. Steady demand for these repackaged mortgages (i.e., mortgage-backed securities) existed among investors whose outlook was buoyed by the traditional strength of the housing market. Mortgage-backed securities became entwined within our financial system. As interest rates rose, borrowers began to default on their mortgages. The housing bubble burst and a domino effect ensued, placing our nation's economy on the brink of collapse.[2]

But risky mortgages were merely an instrument that helped trigger the crisis. The true cause lay in failed system controls. Financial regulation and supervision were inadequate. For example, the Federal Reserve had the power to curb preponderant risky mortgages, yet failed to do so. Financial institutions acted recklessly, assumed too much risk, and shirked their responsibility for corporate governance. They used off-balance sheet financing and misleading financial reports to inhibit transparency. They were not mindful of ethical dealing or accountability.[3]

1 The Fin. Crisis Inquiry Comm., *Fin. Crisis. Inquiry Rpt.*, at xv–xvi (Jan. 2011).

2 Sen. Comm. on Banking, Hous. & Urb. Affairs, *The Restoring Am. Fin. Stability Act of 2010*, 111th Cong., 2nd Sess. 11 (Apr. 30, 2010).

3 The Fin. Crisis Inquiry Comm., *Fin. Crisis. Inquiry Rpt.*, at xviii–xxii (Jan. 2011).

Ultimately, failed system controls paved the way for the CFPB.

II. The CFPB's Mandate

Congress responded to the 2008 financial crisis by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which *inter aliia*, created the CFPB.[4]

The CFPB is empowered to implement and enforce consumer laws codified in 18 different Acts of Congress that were previously administered by seven separate federal agencies.[5] These laws cover bank accounts, money transfers, mortgages, consumer loans, payday loans, student loans, prepaid cards, credit cards, debt collection, credit reporting, and other financial services and products.[6] The CFPB also maintains an office specifically dedicated to protecting the elderly, many of whom have accumulated wealth and suffer cognitive impairments, or are sometimes unaware of modern fraudulent practices.[7]

Consolidation under the CFPB helps harmonize regulatory efforts on several fronts, improving accountability and prioritizing consumer interests. This enables the CFPB to carry out its mandate: to stabilize our financial system by protecting consumers of financial products and services from "unfair, deceptive, or abusive acts and practices" that contributed to the financial crisis.[8]

To date, the CFPB has returned $12.4 billion to over 31 million consumers as a direct result of enforcement actions.[9]

III. Independent Structure

The CFPB is an independent agency within the Federal Reserve System.[10] Congress engineered the CFPB's independence both through its leadership structure and through its funding.[11]

4 12 U.S.C. §§ 5301–5641; *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 80 (D.C. Cir. 2018) (en banc).

5 *Id.* at §§ 5481(12), 5493(c)(2)(A); *PHH Corp.*, 881 F.3d at 80–81 (Kavanaugh, J., dissenting).

6 *Id.* at §§ 5481(12), (15)–(29), 5511(c)(4).

7 *Id.* at §§ 5511(c)(1), 5593(b)(2); *The Conversation*, "Why We Need to Save the Consumer Fin. Prot. Bureau" <https://theconversation.com/why-we-need-to-save-the-consumer-financial-protection-bureau-86379> (last updated Jul. 10, 2017).

8 12 U.S.C. § 5511(b)(2); S. REP. NO. 111-176, at 11-12 (2010).

9 Consumer Fin. Prot. Bureau, *Standing Up for You* <https://www.consumerfinance.gov> (last updated Jun. 4, 2018).

10 12 U.S.C. §§ 5491(a), 5497(a)(2)(c).

11 *Id.* at §§ 5491(c), 5497(a)(1), (c)(2).

The CFPB is led by a single director appointed by the president, subject to confirmation by the Senate. The director serves a five-year term and may be removed by the president only for good cause (i.e., "inefficiency, neglect of duty, or malfeasance in office"), a restriction known as "for cause" removal.[12]

The CFPB does not usually receive funding appropriated by Congress.[13] Instead, its income is derived from periodic budget requests made by the CFPB director to the Federal Reserve.[14] The requested amount is fulfilled by the Federal Reserve so that the CFPB may discharge its duties.[15] However, budget requests are subject to annual caps calculated as a percentage of the Federal Reserve's operating expenses for the year ended 2009.[16] The cap is adjusted upward on an annual basis.[17] Any portion of a request that is unfulfilled (because it exceeds the cap) may be funded through the congressional appropriations process.[18] The practical effect of this funding design is that Congress cannot influence or control the CFPB by threatening its funding.

The CFPB is not funded by the U.S. Treasury, even indirectly.[19] The Federal Reserve does not receive funding appropriated by Congress.[20] Instead, its income is derived from interest on U.S. government securities, interest on foreign securities investments, and service fees received from depository institutions.[21]

IV. Constitutional Challenges

Constitutional challenges to the CFPB have essentially taken form in one overarching issue: is the CFPB's independence constitutional?[22] Expressed more fully, the issue emerges as: is the CFPB's independence created by a *means* appropriate to its *type of agency,* such that it does not impede the president's constitutional ability to "take care that the laws be faithfully executed"?[23]

The constitutional independence analysis concerns both the CFPB's leadership structure and its funding design, but the former has received the brunt of the courts' attention.[24]

Thus far, the U.S. Supreme Court has not reviewed the CFPB's autonomy. However, the United States Courts of Appeals have decided two cases on the matter. In January 2018, the D.C. Circuit Court issued a 7-3 ruling in *PHH Corp. v. Consumer Fin. Prot. Bureau* that preserved the CFPB's independence. In May 2019, a unanimous Ninth Circuit Court panel in *Consumer Fin. Prot. Bureau v. Seila Law, LLC* did the same, adopting in large part the *PHH* court's analysis.[25]

The analyses of both courts, more fully examined below, rest on Supreme Court precedent for other independent government agencies.

A. Independent Leadership Structure: "For Cause" Removal

The Constitution vests the executive power in the president.[26] While the Constitution does not explicitly address presidential removal of executive officers, the Supreme Court recognizes that the executive power encompasses presidential oversight of those officers to ensure that the laws are faithfully executed.[27] The ability to hold officers to account comes part-and-parcel with oversight, and includes the president's power to remove officers when appropriate.[28]

The Court has resolved that this power is not unlimited.[29] Executive officers are not always terminable at will by the president.[30] Court decisions have persistently sustained ordinary "for cause" removal restrictions identical to the one protecting the CFPB's director—i.e., restrictions that authorize removal only for "inefficiency, neglect of duty, or malfeasance in office."[31] This type of removal restriction is in accord with the president's Article II duty to take care that the laws are faithfully executed.[32] In other words, if the CFPB

12 *Id.* at § 5491(c)(1); *Consumer Fin. Prot. Bureau v. Seila Law, LLC,* No. 8:17-cv-01081-JLS-JEM, 2019 WL 1983530 ¶ 4 (9th Cir. May 6, 2019).
13 12 U.S.C. §§ 5497(a)(2)(c), (c)(2), (e).
14 *Id.* at (a)(1).
15 *Id.*
16 *Id.* at (a)(1)-(2)(A).
17 *Id.* at (a)(2)(A)–(B).
18 *Id.* at (e).
19 The CFPB is entirely funded by the Federal Reserve, provided that the CFPB director's budget requests do not exceed the annual caps. In the event that they do, the shortfall would be funded by the U.S. Treasury though the Congressional appropriations process.
20 Fed. Reserve Bank of Richmond, *Fed. Reserve Sys., How Is the Fed. Reserve Funded?* <https://www.richmondfed.org/faqs/frs> (retrieved May 19, 2019).
21 *Id.*
22 *Seila Law,* 2019 WL 1983530 ¶ 2; *PHH Corp.*, 881 F.3d at 78–79.
23 *Id.*
24 *Seila Law*, 2019 WL 1983530; *PHH Corp.*, 881 F.3d 75.

25 *Id.*
26 U.S. Const. art. II, § 1, cl. 1.
27 *PHH Corp.*, 881 F.3d at 84–85, *generally interpreting Myers v. United States*, 272 U.S. 52, 106 (1926).
28 *Id.* at 90, *citing Free Enter. Fund v. Pub. Co. Acctg. Bd.*, 561 U.S. 477, 483, 493 (2010), *quoting Myers*, 272 U.S. at 117.
29 *Free Enter. Fund,* 561 U.S. at 479, *citing Humphrey's Executor v. United States,* 295 U.S. 602, 620 (1935) (holding Congress may create independent agencies headed by officers whom are removable by the President only for good cause); *Seila Law,* 2019 WL 1983530 ¶¶ 6¬–7; *PHH Corp.*, 881 F.3d at 90, *citing Free Enter. Fund,* 561 U.S. at 495–96; *id. citing Morrison v. Olson*, 487 U.S. 654, 691–692 (1988).
30 *Free Enter. Fund,* 561 U.S. at 479, *citing Humphrey's Executor,* 295 U.S. at 620 (holding Congress may create independent agencies headed by officers whom are removable by the President only for good cause); *Seila Law*, 2019 WL 1983530 ¶¶ 6–7; *PHH Corp.*, 881 F.3d at 90, *citing Free Enter. Fund*, 561 U.S. at 495-96; *id. citing Morrison*, 487 U.S. at 691–692.
31 12 U.S.C. § 5491(c)(3); *PHH Corp.*, 881 F.3d at 79, 85, 93 (holding that the President retains sufficient tools to ensure that laws are faithfully executed, notwithstanding a Congressional good-cause restriction on removal power for "inefficiency, neglect of duty, or malfeasance in office"); *Humphrey's Executor*, 295 U.S. 602 (upholding "for cause" removal restriction identical to the CFPB, but in the context of FTC Commissioners); *Wiener v. United States*, 357 U.S. 349 (1958) (explicitly reaffirming *Humphrey's Executor*).
32 *Seila Law*, 2019 WL 1983530 ¶¶ 5, 11; *PHH Corp.*, 881 F.3d at 95.

director is doing a bad job, then allowing the president to fire him is fully consistent with a good faith effort to enforce consumer financial protection laws.

The court has invalidated only those protections that aggrandize presidential removal power in Congress, or which make presidential oversight of an executive officer unusually problematic.[33] Examples include removal power that requires Congressional approval, and removal power existing exclusively in Congressional hands.[34] The CFPB's independent structure isn't jeopardized in this fashion because "Congress has not given itself authority to participate in the president's removal decision."[35]

The Court also considers the type of agency (i.e., the agency's function and purview) involved when analyzing whether Congress has lawfully employed "for cause" protection.[36] The CFPB is a "financial regulator," a descriptor that is not without effect.[37]

Financial regulators have historically been granted more independence from Congressional and Presidential influence than some other agencies.[38] A greater degree of independence helps shield them from shortsighted political pressures and partisan motivations, fostering confidence in a system that is free from tampering.[39] Congress formed the CFPB around an independent structure based, in part, on the agency's function and purview.[40] This comports with a "longstanding tradition of independence for financial regulators."[41]

B. Independent Leadership Structure: Single Director vs. Multi-Member

The courts weighed an argument that the constitutionality of "for cause" removal turns on an independent agency's leadership structure: Multi-member boards promote liberty. Liberty is endangered by agencies that are led by a single director. Therefore, the single-director leadership structure of independent agencies is unconstitutional.[42]

Examined in more detail, the argument posits that individual members of a board serve as a check, a restraint, on one another. That restraint is a substitute for Presidential oversight that should be constitutionally necessary, but has been negated by "for cause" removal. As a consequence of restraint, agency action is slowed or even stopped altogether. This promotes liberty in the populace, freedom from government regulation.[43]

The argument continues. Since the CFPB is led by a single director, it lacks the restraint that would exist if it were led by a multi-member board. Unrestrained, the CFPB is more likely to act, more likely to regulate, more likely to enforce consumer financial protection laws. While this sounds desirable, it can become problematic if regulation is arbitrary, rash, or ill-conceived. Thus, a CFPB led by a single director is more likely to quash liberty.[44]

The courts began their analysis by noting that the leadership form of independent agencies is not constitutionally mandated, nor "has [it] played any role in the [Supreme] Court's removal power doctrine."[45] Therefore, there is nothing unconstitutional about the CFPB's single-director leadership design. Consistent with this finding, the Court has upheld "for cause" removal without consideration to the number of people leading an agency.[46]

Furthermore, the courts noted that as a matter of history some of our nation's earliest independent financial regulators were directed by individual heads.[47] One of them, the Office of the Comptroller of the Currency, which was established in 1863, has always been headed by a single officer who is statutorily protected from removal.[48]

Finally, the courts found that the president exerts no less control over a single-director agency than one led by a multi-member board.[49] The line of accountability is clearest in a single-director leadership structure because there is only one person responsible for the agency.[50] If the president finds that the agency's regulatory efforts are insufficient or contrary to the agency's mandate, there can be only one person responsible for the failing, and only that person needs to be removed "for cause."[51] The opposite is true for agencies led by multi-member boards.[52] Thus, if "for cause" removal is constitutional for agencies with multi-member boards,

33 *PHH Corp.*, 881 F.3d at 79, 85.
34 *Id.*
35 *Id.* at 93; *but cf. Bowsher v. Synar,* 478 U.S. 714 (1986) (holding removal power unconstitutional when conferred solely upon Congress over the Comptroller General, an executive officer appointed by the President, subject to Senate approval); *and cf. Myers,* 272 U.S. 52 (holding legislation unconstitutional when it requires the President to obtain the advice and consent of the Senate prior to removing first-class postmasters from office).
36 *Seila Law*, 2019 WL 1983530 ¶ 7; *PHH Corp.*, 881 F.3d at 94.
37 *Id.*
38 *Seila Law,* 2019 WL 1983530 ¶ 7; *PHH Corp.*, 881 F.3d at 78, 92.
39 *PHH Corp.*, 881 F.3d at 91.
40 *Seila Law*, 2019 WL 1983530 ¶ 7; *PHH Corp.*, 881 F.3d at 78, 81
41 *PHH Corp.*, 881 F.3d at 93.
42 *Seila Law*, 2019 WL 1983530 ¶ 10, *citing PHH Corp.*, 881 F.3d at 165–166 (Kavanaugh, J., dissenting); *PHH Corp.*, 881 F.3d at 188.
43 *PHH Corp.*, 881 F.3d at 108.
44 *Id.* at 105, 110, 166–167; *id.* at 183–184 (Kavanaugh, J., dissenting).
45 P*HH Corp.,* 881 F.3d at 97, 108.
46 *See generally Humphrey's Executor*, 295 U.S. 602 (holding a dual layer of "for cause" protection unconstitutional because it prevented the President from deciding that good cause for removal existed, not because the Public Company Accounting Oversight Board was a multi-member agency, and upholding as constitutional a single layer of "for cause" protection identical to that of the CFPB); Wiener, 357 U.S. 349, *aff'g id.* (holding "for cause" protection constitutional when the President attempted to remove a Commissioner from the War Claims Commission because he did so without good cause, not because the Commission was a multi-member board).
47 *Id.* at 97.
48 12 U.S.C. § 38; *PHH Corp.*, 881 F.3d at 97.
49 *Seila Law*, 2019 WL 1983530 ¶ 10; *PHH Corp.*, 881 F.3d at 98.
50 *PHH Corp.*, 881 F.3d at 97–98.
51 *Id.* at 98.
52 *Id.*

it should be no less constitutional for those led by single directors.[53]

In summary, the president's duties are just as compatible with the "for cause" protection given to the CFPB's single director, as they would be had the CFPB been headed by a multi-member board.

C. Budgetary Independence

The "ultimate [constitutional] inquiry" examined by the courts was "whether [the CFPB's] independence, [*including budgetary independence,*] impedes the president's ability under Article II of the Constitution to 'take Care that the Laws be faithfully executed.' "[54] The *PHH* court, mindful of this issue and because there was no genuine argument otherwise, held in fairly conclusory fashion that the president's "take care" duty was not so impeded.[55]

Having resolved the issue, the court addressed, in dicta, general concerns about the separation of powers and the lack of Congressional and presidential oversight in funding the CFPB.[56]

In the standard agency funding process, agencies' budget requests must be approved by Congress through the appropriations process.[57] Presidential oversight is also required since appropriations begin with the president's annual budget proposal and end with the president signing appropriations bills into law.[58] The CFPB's statutorily-prescribed funding procedures require it to draw money directly from the Federal Reserve, a process that requires neither congressional nor presidential approval.[59]

The *PHH* court noted that the CFPB's budgetary independence isn't unique. Congress may "create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process…" and it has done so with several agencies, including: the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Housing Finance Agency, all of which have uncapped, complete budgetary independence.[60] It follows that Congress lawfully granted budgetary autonomy to the CFPB. Additionally, there is no constitutional requirement that the CFPB be subject to continued Congressional oversight through the appropriations process.[61]

On the matter of presidential powers and oversight, the PHH court could glean no "constitutionally salient effect on the president's power," or any violation of the separation of powers doctrine, that results from the CFPB's independent funding.[62] After all, presidents need not be an agency's proxy in negotiating funding from Congress.[63] Moreover, financial regulators are usually independent from presidential budgetary oversight in the same way that they are independent from the Congressional appropriations process.[64] The PHH court explained that budgetary dependence on the president would weaken the very safeguard that "for cause" protection is meant to provide against him.[65]

V. Pending Courts of Appeals Cases

Two cases involving the constitutionality of the CFPB are pending in the circuit courts: *Consumer Fin. Prot. Bureau v. All American Check Cashing, Inc.* in the Fifth Circuit Court, and *Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC* in the Second Circuit Court.[66]

On March 12, the Fifth Circuit Court heard oral argument from appellant All American Check Cashing in their interlocutory appeal from the district court's finding that the CFPB's independent structure is constitutional.[67]

Briefing is still underway in RD Legal Funding for the CFPB's appeal from the district court's ruling that the CFPB be stricken in its entirety from Dodd-Frank because it is unconstitutional (as opposed to one that strikes only the "for cause" removal provision).[68]

Each case will help shape the constitutional landscape upon which the CFPB sits and could pave the way for review by the Supreme Court.

VI. Conclusion

The CFPB's independence is constitutional per the holding of two of the highest federal courts in the land, the D.C. Circuit Court of Appeals and the Ninth Circuit Court of Appeals. With both courts having ruled in kind, there is currently no split in the Federal Circuit. This might soon change, with two cases pending in the Second Circuit Court and the Fifth Circuit Court. The Supreme Court has not yet reviewed a case on the CFPB's independence, but it is most likely a matter of time, particularly if either of the pending cases results in a Federal Circuit split. Stay tuned.

David P. Rivera is a solo practitioner of business law in Highland and a member of the RCBA publications committee.

53 *Id.* at 100–101.
54 *Id.* at 79, citing U.S. Const. art. II, § 3.
55 *Id.* at 95–96.
56 *Id.*
57 U.S. Fed. Govt., *How the Fed. Govt. Creates and Manages Its Budget* <https://www.usa.gov/budget#item-213654> (last updated Mar. 26, 2019).
58 *Id.*
59 12 U.S.C. § 5497(a)(1).
60 *PHH Corp.*, 881 F.3d at 95.
61 *Id.*
62 *Id.*
63 *Id.* at 96.
64 *Id.*
65 *Id.*
66 Ballard Spahr, *Ninth Cir. Rules CFPB's Structure is Constitutional* <https://www.consumerfinancemonitor.com/2019/05/06/ninth-circuit-rules-cfpbs-structure-is-constitutional/> (May 6, 2019).
67 *Id.*
68 *Id.*

Spotting and Addressing Abusive Debtor's Attorneys and Petition Preparers

by Charity J. Manee

The topic of bankruptcy abuse often evokes images of opportunistic individuals evading debts and hiding assets. In the experience of the author, this type of abuse is relatively uncommon. Arguably more insidious are the abuses perpetrated by small subgroups of those who make their living in the business of bankruptcy. Two such categories– abusive debtor's attorneys and petition preparers (as defined by 11 U.S.C. section 110(a)(1))– are the focus of this article. Most debtors' attorneys and petition preparers do not fall within these categories and are well-meaning individuals who do good work. This article discusses the characteristics of abuses perpetrated by these subsets of debtors' attorneys and petition preparers and the legal framework that seeks to curtail such misconduct.

A. When Abusive Debtor's Attorneys Delegate their Duties

Most financially beleaguered individuals who seek bankruptcy protection are unable to afford attorneys who charge prevailing rates. Unfortunately, the demand for pro bono legal resources exceeds supply and for this reason, are usually not an available substitute for a private attorney. The limited resources of debtors has incentivized some debtor's counsel to file as many cases as possible without regard to the quality of their work or a client's individual needs. The sheer volume of cases filed by these practitioners, coupled often with an overextended support staff, enables these practitioners to maximize profits at the expense of their clients. In many such cases, clients never speak with their attorney and deal exclusively with support staff from the initial client interview and throughout the case. Only a licensed attorney is legally permitted and qualified to give legal advice. This critical function is described in *In re Thao Tran*, 427 B.R. 805, 810, (Bankr. N.D. Cal 2010) as follows,

> [t]he primary duty of a debtor's counsel is to make sure the schedules are accurate and complete. The attorney must use all of his or her training and experience to make sure that an asset or a debt is not inadvertently omitted. When an attorney knows that a debtor is not being completely truthful, the attorney's responsibility is to insist on truthfulness and refuse to represent a debtor who does not comply.

In *Tran*, harsh but warranted sanctions were meted out to an attorney who committed several egregious errors, including not investigating his client's assets, resulting in material omissions from the debtors' schedules. This attorney's "lack of competency and shoddy office practices" cost the debtors their discharge, undermining the very purpose of their chapter 7 petition.[1] In addition to monetary sanctions, the bankruptcy court issued a permanent injunction against the attorney, requiring that he or another licensed attorney (1) conduct the initial client interview in all bankruptcy cases, (2) spend at least one hour counseling his debtor clients, making sure that all assets and debts are discovered and scheduled, and (3) not permit his wife or any other non-attorney in his employ to give any legal advice.[2] This case is but one illustration of a bankruptcy court appropriately exercising its authority to curtail abuse.

B. Abuses Related to Attorney Compensation

Federal courts possess the inherent power to control admission to its bar and to discipline attorneys who appear before it.[3] Bankruptcy courts have inherent authority and responsibility to regulate the conduct of attorneys who practice before them, independent of formal disciplinary proceedings.[4] While these broad powers apply to all attorneys, heightened scrutiny is placed upon compensation arrangements of debtors' counsel given the "'the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure and to protect the creditors of the estate'" and to "protect the debtor against overreaching by an officer of the court who is in a peculiarly advantageous position to impose on both the creditors and his client."[5]

Bankruptcy courts may examine transactions between debtors and their counsel pursuant to the provisions of 11 United States Code section 105(a), 329, and Bankruptcy

1 *Tran*, 427 B.R. at 809.
2 *Id.* at 810.
3 *See e.g., Ex parte Burr,* 22 U.S. 529, 531 (1824).
4 *Paul E. Iacono Structural Engineer, Inc. v. Humphrey,* 722 F.2d 435, 439 (9th Cir. 1983).
5 1983 Advisory Committee Notes on Bankruptcy Procedure 2017 (citations omitted).

Rules 2016(b) and 2017. Additionally, the United States Trustee supervises the administration of bankruptcy cases and may raise issues relating to fees paid to the debtor's attorney.[6] For example, the United States Trustee will file motions to disgorge excessive fees pursuant to section 329.

Nevertheless, some debtor's attorneys misrepresent their compensation arrangements. Fortunately, the United States Trustee and other stakeholders tend to swiftly root out such perpetrators when their conduct is reported or discovered.

C. Abusive Bankruptcy Petition Preparers

As noted above, bankruptcy petition preparers are non-attorneys who assist debtors with filing bankruptcy documents. Like debtors' attorneys, bankruptcy petition preparers are closely regulated by the Bankruptcy Code and bankruptcy courts. A small percentage of them abuse debtors, usually by taking fees greater than the cap set by 11 United States Code section 110(h) or engaging in the unauthorized practice of law. A number of statutory penalties are available if they (1) fail to furnish to the debtor a copy of any document they present to the debtor for signature, (2) execute any document on behalf of the debtor, (3) offer legal advice to the debtor, (4) advertises using (or under) the term "legal", or (5) collect or receive any payment from or on behalf of the debtor for court filing fees. See generally 11 U.S.C. § 110. Like debtors' attorneys, petition preparers are required to report the compensation they receive from debtors.[7]

Based on these rigorous requirements and strict penalties for noncompliance, redress is available for debtors victimized by abusive petition preparers.

D. Conclusion

Abuses by debtor's counsel and petition preparers can have devastating impacts on an already vulnerable population. However, these types of abuses are rare in part due to the statutes and rules which are robustly enforced.

Charity Manee is a partner at Reid & Manee, LLP, representing debtors and creditors in chapter 7, 11 and 13 bankruptcy cases and all parties in bankruptcy litigation. She has extensive experience representing individual and business debtors, creditors, trustees in bankruptcy cases and adversary proceedings.

6 11 U.S.C. § 307.

7 *See* Official Form 2800 (Disclosure of Compensation of Bankruptcy Petition Preparer.

Debt Collection Developments

by Gregory T. Armstrong

In February 2019, the California Supreme Court handed down a decision in *Meza v. Portfolio Recovery Associates*, LLC, 6 Cal. 5th 844, regarding a somewhat esoteric question of procedure in the area of economic litigation for limited civil cases. This decision about a seemingly obscure procedure in small damage cases will have a tremendous impact on low-income consumers dealing with substantial personal debt.

The procedures for this type of litigation are covered in the Code of Civil Procedure (CCP) sections 90-100. The purpose of carving out this area of litigation from the rest of the Code of Civil Procedure is to provide a streamlined and efficient way to litigate cases with relatively small economic claims of no more than $25,000.00. Among the streamlined procedures is CCP section 98. This section allows for witness testimony to be presented by declaration instead of by live testimony in open court. The testimony can include experts and record custodians.

As one might expect, plaintiffs in consumer debt collection cases rely almost exclusively on these procedures to litigate the vast majority of their cases. Under these procedures, plaintiffs can obtain judgments in contested matters without ever having to put a witness on the stand. However, there must be strict adherence to the statutory requirements of CCP section 98 in order for this procedure to work. CCP section 98(a) requires that the declaration be served on the opposing party at least 30 days before trial and that the affiant must be available for service of process within 20 days of the trial at an address within 150 miles from the place of trial. The purpose of this procedure is to provide the defendant with a way to compel the appearance of the affiant. Alternatively, if the defendant fails to compel the appearance on the affiant, the defendant cannot object to the use of the declaration in lieu of testimony at trial.

Most records custodians for commercial creditors and debt collectors are not in California. Therefore, what it means to be available for service of process within 150 miles from the place of trial is a source of contention between plaintiffs and defendants. Plaintiffs' counsel wants to accept service of process on behalf of the affiant at their law office while defense counsel insists that the affiant must be physically present to receive service of process of a subpoena to appear at trial within 150 miles of the courthouse.

The *Meza* decision finally resolves this question. Looking at the history of CCP section 98 and the historical uses of subpoenas, the court conducts a thorough analysis of the purpose and intent of CCP section 98. The court found that CCP section 98 does not require that all witnesses must be personally served with process intended to compel their presence at trial. However, affiants who are not parties to the proceeding must be physically available within 20 days of trial and 150 miles of the court in order to receive process that is intended to compel attendance at trial. Therefore, a declaration of an out of state record custodian that states that s/he will be available for service of process at the plaintiff's counsel's office is deficient under *Meza*.

The *Meza* decision is a powerful tool to level the playing field for consumer debtors. Most indigent, low income, and senior consumers do not have any records of their old credit card, medical, and other debts. The pre-*Meza* use of CCP section 98 gave creditors an unfair advantage by putting the burden on the debtor to produce the opposing party's out of state affiants when they could not be personally served a subpoena to appear inside the state of California. Under *Meza,* creditors are now required to make affiants personally and physically available for service of process compelling attendance at trial. Now, consumers may challenge deficient declarations with motions *in limine*, among other means, in order to exclude them from evidence at trial.

Inland Counties Legal Services (ICLS) is committed to using cutting-edge developments in consumer law, such as the *Meza* decision, to help indigent, low income, and senior consumers in the Inland Empire defend against collection actions that they cannot handle themselves. ICLS's Consumer Practice Group meets with consumers to provide counsel and advice, document preparation and ultimately courtroom representation for income eligible consumers. Additionally, ICLS works to identify affirmative claims that clients may have against plaintiffs. When meritorious affirmative claims are discovered, ICLS will seek to partner with members of the private bar to pursue more involved litigation.

ICLS has provided free legal services to consumers in Riverside and San Bernardino counties for 60 years. In addition to helping in consumer cases, ICLS also provides free legal services in the areas of education, family law, healthcare, housing, immigration, public benefits, tax and bankruptcy, and impact litigation. ICLS estimates there are approximately 800,000 people eligible for our free services in the two counties. Based on the Judicial Council's 2018

Court Statistics Report, ICLS further estimates there may be as many as 8,300 or more limited civil cases per year in Riverside and San Bernardino courts involving consumers who are eligible for our services.

ICLS cannot meet this need alone. We are looking to the bar associations in San Bernardino and Riverside counties to help us reach this population. If you are interested in pursuing volunteer opportunities, including partnering with us on cases, please contact our pro-bono coordinator, Gabriela Perez at 951-774-4407 or by email at gperez@icls.org.

Gregory T. Armstrong is the director of the Consumer Practice Group at Inland Counties Legal Services, Inc.

The Leo A. Deegan Inn of Court

by L. Alexandra Fong

The Leo A. Deegan Inn of Court ("Deegan Inn") is a professional organization comprised of attorneys and judicial officers and organized under the American Inns of Court. The organization focuses on improving the skills and professionalism of the bench and the bar. Each month between September and May, the Deegan Inn holds a dinner meeting, during which a team of members presents a program that focuses on matters of ethics, legal skills, civility, and professionalism.

The Deegan Inn was named for the Honorable Leo A. Deegan, a legend of the Riverside legal community. The theme for the 2018-2019 program year was "Once Upon A Time: Not Your Typical Fairytale." Each team was assigned a morbid fairytale and teams were named for an author who is also an attorney.

For the first time in its history, the Deegan Inn formed two community service teams in its 2017-2018 program year. Continuing this call for service, the Deegan Inn formed one community service team for its 2018-2019 program year, which held its presentation on May 22, 2019.

At this final meeting of the 2018-2019 year, the Deegan Inn presented awards to members of the legal community for their professional accomplishments and contributions to the legal community. The Terry A. Bridges Award, which honors an outstanding attorney, was presented to Brian Unitt of Holstein, Taylor & Unitt.

The Deegan Inn also recognized two outstanding younger attorneys for their professionalism and dedication to the legal community with the Biddle Book Award. Biddle Book Award was awarded to Laurie Burns, an attorney who represents minors in juvenile dependency cases, and Goushia Farook, an attorney who practices family law. They each received an autographed copy of *Justice in Plain Sight: How A Small-Town Newspaper and Its Unlikely Lawyer Opened America's Courtrooms*, written by retired Riverside *Press-Enterprise* reporter, Dan Bernstein about two Riverside-based cases involving the First Amendment of the United States Constitution that were argued at the Supreme Court of the United States. The Press-Enterprise was represented by James D. Ward, John Boyd, and Sharon Waters of Thompson & Colegate.[1] The Riverside County Superior Court was represented by Gerald Geerlings, Glenn Salter, and Joyce Manulis Reikes of the Riverside County Counsel's Office.[2]

The 2019-2020 board of directors of the Deegan Inn are the following, Hon. Bambi Moyer (president), Sophia Choi (president-elect), Hon. Eric Keen (vice president), Abram Feuerstein (secretary-treasurer), Hon. Jennifer Gerard (financial secretary), Kiki Manti Engel (member-at-large), Stefanie Field (member-at-large), Gabriel White (member-at-large), and L. Alexandra Fong (past president).

The Deegan Inn is now accepting applications for membership. Membership is by invitation only, applications are due July 15, 2019, and decisions are made by August. Invitations to join are extended shortly thereafter and must be accepted by the deadline (mid-September).

Scholarships to assist covering the dues are also awarded. Members are required to be active members of Riverside County Bar Association (RCBA). If you have questions, please review the Deegan Inn's website at: https://deeganinnofcourt.org. The Deegan Inn's fiscal year runs from July 1 to June 30 of every year. Applications may be downloaded from the Inn's website or obtained at RCBA.

L. Alexandra Fong is a deputy county counsel with the County of Riverside, specializing in juvenile dependency law. Ms. Fong is president of the Leo A. Deegan Inn of Court and immediate past president of the Riverside County Bar Association.

1 James D. Ward would later become an associate justice of the California Courts of Appeal, Fourth District, Division Two. John Boyd is the managing partner at Thompson & Colegate. Sharon Waters would later become judge of the Superior Court of California, County of Riverside.

2 Joyce Manulis Reikes would later become a commissioner of the Riverside County Superior Court and law professor at California Southern Law School, where she taught constitutional law.

Opposing Counsel: Gary Geuss

by Betty Fracisco

So who is Gary Geuss, the City Attorney of Riverside, and where did he come from? That question prompted this article, and you will now have an opportunity to get to know Riverside's "top lawyer."

Gary Geuss was born and raised in the San Fernando Valley, the youngest of five children of parents who had come from St. Louis, Missouri. Gary's father, Sanford, worked in aerospace and his mother, Roberta, was a homemaker. There was no push to higher education, and his brother, Don, was the first in the family to attend a university.

In elementary school, Gary had one teacher who made a prophetic statement: "You will probably be an engineer, but you should be a lawyer." Amazing, since he had no aspirations regarding the practice of law until much later in life.

Gary graduated from Chatsworth High School, which he said had a good baseball team and lots of horses. He then graduated from Cal State Northridge with a BA in political science. Gary was still not anxious to enter the legal field because he felt that most attorneys were jerks. After graduation, Gary worked in the loan department of Union Bank for about a year and a half. It was a quiet bank and he found the job to be too dull. This led him to Southwestern Law School where he was in the traditional day program, a good segue to trial law. In his second year, Gary decided to run for president of the student body association. This was a challenge, because he was basically a shy person, and he had to talk to a lot of students to solicit votes. He won the election, but this put him in a position of discomfort, although it was good experience for the future. He graduated from Southwestern in 1986.

While at Southwestern, Gary had a summer intern position at an insurance defense firm, Lindberg & Watkins, who employed him until he passed the California State Bar exam and then hired him as an associate. He spent two years as an associate, but was always anxious if a case came close to going to trial, because he had no trial experience. He was not happy, and fortunately he had a relative who worked at the Los Angeles City Attorney's Office, so he took a job there, taking a pay cut.

Gary described his initial assignment at the Los Angeles City Attorney as a MASH unit, with 175 files to handle, making him a prime candidate for stress leave. His first trial involved three police officers, all with punitive damages. Gary knew he needed to do more, so he asked for a transfer to the criminal division and ended up in the criminal prosecution unit, where he tried 50 cases. On occasion, the trials would overlap. He remembers one time having a jury in the hall, while another jury was in the box, and a third jury was deliberating. He was in that unit for five years, trying cases for two and a half of those years, all but one a conviction. Then he spent eight to nine months trying to get back to the civil division.

Back in civil, Gary handled a variety of cases including, dangerous conditions, police civil rights, First Amendment, employment, and traffic accidents. No career path could have suited him as well. He always tells new hires that the city is a great place to work because there is a breadth of practice. In the late 1990s, he was first appointed to supervise a team of litigators. For two years, Gary was assistant to the head of the civil liability unit. A year later, Gary was promoted the head of the civil liability unit. In 2005, he became the branch chief of all civil, with over 100 lawyers under him. In 2013, he was named branch chief of the proprietary and risk management unit, which oversaw LAX, the Department of Water and Power, and the Port of Los Angeles. The Los Angeles City Attorney wanted a citywide risk manager. However, the citywide risk manager did not control departments like the police department. Plus, the city also had its own risk manager. The situation was frustrating.

At this point an opportunity appeared in Riverside: the city was looking for a city attorney. A colleague, the city attorney of Simi Valley, gave him the flyer. He reached out to the executive recruiter, and in time was interviewed by the Riverside City Council and with the mayor, Rusty Bailey. He had a long (over 26 years) successful career in the Los Angeles City Attorney's Office, leaving as chief assistant city attorney. But it was time for a change.

Riverside offered Gary the opportunity to be the city attorney and he has never regretted making the move to a smaller city. He feels he works with "the nicest people." He has found his staff and the larger "city family" to be open to change and ready to face challenges with him. Moreover, he has never worked with better lawyers. Their hearts are in the right place, and his attorneys and staff work hard to always do their best. Overall, he feels the Riverside City Attorney's Office is "awesome." He sees the office as an orchestra, with him as the conductor. He does not presume to know each job, because his attorneys and staff bring their own expertise to their jobs. The "music" is coming from the musicians.

When he started working in Riverside, Gary had two goals. The first was to reduce the use of outside counsel. The second was to improve livability in Riverside by integrating a process that had been successful in Los Angeles. The Los Angeles City Attorney's Office prosecuted misdemeanors by means of a neighborhood prosecutor. This had increased the quality of life in the neighborhoods by having a more localized approach to low level crimes. However, due to local opposition, this was not implemented in Riverside.

On a personal note, Gary is the father of two grown daughters, ages 29 and 31, who live in Chicago and Denver respectively. They are both graduates of the University of California system and have great careers, but are still able to make time to fly out for his birthday. Most exciting is the fact that in July, Gary will be a grandfather for the first time. As for hobbies, Gary is an avid runner and runs every day. He has run many marathons, including the ones in New York, Chicago, and Boston (which he has run 6 times). He is also a scuba diver, actually a dive master, and he has been a scuba instructor for two years.

Riverside is fortunate to have found a city attorney who is well rounded, experienced, and is happy with his attorneys and staff.

Betty Fracisco is an attorney at Garrett & Jensen in Riverside and a member of the RCBA Bar Publications Committee.

Avoiding Employment Antitrust Violations

by Jamie E. Wrage

In a tight job market, there can be a lot of pressure to hire and keep good employees, particularly employees with specialized skills. But wage fixing agreements and agreements not to solicit each other's employees (anti-poaching agreements) have been the target of increasing Department of Justice ("DOJ") antitrust enforcement over the last decade, making this yet another area for employment lawyers and human resources professionals to watch carefully.

In short, the DOJ takes the position that it is a violation of antitrust law to agree with a competitor not to poach each other's employees or to agree to fix pay rates for classes of employees because such practices harm the economy:

> Just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment. Consumers can also gain from competition among employers because a more competitive workforce may create more or better goods and services.[1]

After issuance, a guidance manual for human resources professionals on the topic in October 2016, the DOJ followed that up with numerous enforcement actions. This was one year after Adobe, Apple, Google, and Intel over $400 million to settle class action lawsuits over agreements between the technology companies not to cold-call each other's employees about job opportunities.

On April 3, 2018, the DOJ filed a civil antitrust lawsuit against Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation simultaneously with filing a civil settlement of the case ("*Knorr* settlement"). The complaint alleged that three companies, including the defendants, entered into no-poaching agreements starting in 2009 and continuing to 2015. It was alleged that the employers agreed not to hire one another's staff, artificially deflating salaries and injuring the employees as a result.

After the companies settled with the DOJ, private lawsuits by current and former employees of the companies followed quickly. The DOJ appeared in the consolidated civil lawsuits in support of the argument that naked no-poaching agreements between employers are a kind horizontal market allocation that should be assessed as per se violations of the Sherman Anti-Trust Act. Violations of the Act fall under the "per se rule" or the "rule of reason". A per se violation requires no further inquiry into the practice's actual effect on the market or the intentions of those engaged in the practice. With DOJ support, there is a strong risk that the courts will agree that no-poaching agreements fall under the per se rule, leaving employers caught engaging in such conduct with little in the way of a defense.

The DOJ followed the *Knorr* settlement by filing a statement of interest in a private no-poaching agreement lawsuit alleging that Duke University and the University of North Carolina entered into an illegal agreement not to poach each other's medical school faculty. This case, *Seaman, et al. v. Duke University, et al.*, 15-cv-00462 (M.D.N.C. March 7, 2019), is still pending. Again, the DOJ urged the court to apply the per se rule if it is determined that the universities entered into no-poaching agreement.

Other civil lawsuits are also pending that have caught the interest of the DOJ. Former employees of Auntie Anne's, Arby's, and Carl's Jr. have all argued that the franchisor and franchisees entered into illegal agreements that prohibited the franchisees from soliciting or hiring the employees of one another. The defendants have attempted to defeat the claims with an argument that the Sherman Anti-Trust Act does not apply to those with franchisor/franchises relationships. The DOJ again filed statements of interest in these civil actions, arguing that the franchisors and franchisees are not automatically deemed a single entity and they can conspire under the Act. The DOJ has also posited that that naked, horizontal no-poaching agreements between franchisee rivals are subject to the per se rule, while an agreement in the franchise agreement between the franchisor and franchisor is subject to the less restrictive rule of reason because it is a vertical restraint[2].

These cases are still pending, but the trend is clear. The DOJ has promised to "vigorously enforce the antitrust laws in labor market."[3] Between the DOJ and the rash of plaintiff's cases making the same claims, it is certainly not worth the risk. Employers must take steps to train their human resources staff to avoid no-poaching agreements and wage fixing agreements. Employers should also review any existing agreements with competitors to see if they have the effect of restricting the hiring of employees in either direction.

Jamie E. Wrage is a shareholder with Stream Kim Hicks Wrage & Alfaro, PC, with a practice focusing on employment and complex business litigation, and member of the RCBA Publications Committee.

1 Antitrust Guidance for Human Resource Professionals, Department of Justice, Oct. 2016, p.2, https://www.justice.gov/atr/file/903511/download.

2 *Harris v. CJ Star, LLC*, 2:18-cv-00247 (E.D. Wash. Mar. 8, 2019); *Richmond v. Bergey Pullman Inc.*, 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019); *Stigar v. Dough Dough, Inc.*, 2:18-cv-00244 (E.D. Wash. Mar. 8, 2019).

3 https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach.

Tenants' Rights in California

by Pablo Ramirez

Introduction

California is a gorgeous state with tremendous opportunities, but be ready to pay a high premium to live here. The cost of living continues to increase year-by-year. A 2016 report by the McKinsey Global Institute, found 50 percent of California households cannot afford the cost of housing in their local market. As the cost of living increases, families find it harder to buy a house and instead settle on renting.

The necessity to rent a property shines a spotlight on the demand for greater tenant protections. In some cases, tenants may be fortunate and find a landlord who takes care of the residential rental property, adheres to the contract, and follows the laws. In other cases, tenants may find themselves living a nightmare. It may be due to an uninhabitable residential rental unit that fails to comply with state and local codes or the landlord's constant refusal to repair the residential unit. The tenant should remember that the residential unit must include working plumbing facilities, a water supply that provides hot and cold water, working heating facilities, electrical lighting, or other habitability requirements.[1]

What's New in 2019? Governor Brown Signs Bill Giving Tenants More Time to Stave Off Eviction

In 2018, Governor Brown signed into law a bill by Assembly member David Chiu (D-San Francisco) to extend the notice period for tenants facing evictions.

AB 2343[2] is a great step forward as it will give tenants three court days to pay rent or comply with other terms of the lease and give them five court days to respond to an eviction lawsuit. The law changes calendar days to court days, ensuring that weekends and holidays are not counted under the timeline to respond to an eviction notice or breach of lease notice. The legislation will take effect on September 1, 2019.

The Eviction Process

It is first important to understand the current eviction process, rights, and protections. Landlords must take affirmative steps to evict a tenant. The first step is to issue the requisite notice, such as a three-day notice to pay rent or quit,[3] a thirty-day notice,[4] or sixty-day notice[5] to terminate the tenancy, a notice to perform or quit,[6] or other notices as required by state or local laws.

A landlord must follow the court process to evict the tenant. The landlord cannot take actions which would force the tenant to move out of the property prior to a court judgment. The illegal actions can include shutting off utilities, changing the locks on the doors, or removing the tenant's belongings from the property without a court order. This type of illegal activity is called "self-help" eviction. This conduct is illegal and attempts to circumvent the eviction process.

The compliance period may vary depending on the notice received. The tenant upon receiving the notice may pay the rent, cure the violation, or quit (move out). If the tenant fails to pay the rent, cure or quit, the landlord may move forward with the legal process. The landlord must have the tenant served with the legal documents. Unscrupulous landlords may attempt to avoid this process. A landlord may have a person over the age of 18, a process server, or a deputy sheriff complete service. The landlord cannot serve the documents themselves.

The tenant will then have five calendar days to file a response with the court. If the tenant fails to take prompt action, it may result in a default judgment being entered against the tenant and the eviction process will move much more quickly. The default judgment process exceeds the scope of this article.

Warranty of Habitability

The California Supreme Court established that every residential rental contract has an implied warranty of habitability.[7] This means that the landlord must repair damages which render the property unfit for human occupancy. Repairs include but are not limited to important repairs, such as broken heaters, all windows which are designed to be opened must be equipped with operable locking devices,[8] or plumbing or gas facilities must conform to applicable law in effect at the time of installation and maintained in good working order.[9] The landlord is unable to avoid the duty to repair by asking that the tenant sign an agreement waiving the right; the duty to repair cannot be waived.

1 Civil Code Section 1941.1; and/or Health and Safety Code Section 17920.3.
2 https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2343.
3 Cal. Code of Civ. Proc. § 1161(2).
4 Civil Code Section 1946.1(c).
5 Civil Code Section 1946.1(b).
6 Cal. Code of Civ. Proc. § 1161(3).
7 *Green v Superior Court* (1974) 10 Cal. 3d 616, 631-632.
8 CA Civil Code Sec. 1941.3.
9 Civil Code Section 1941.1; and/or Health and Safety Code Section 17920.3

Retaliation

A tenant has a right to live in a habitable unit. The tenant can ask that the habitability issues be repaired. If the landlord refuses to make the necessary repairs, the tenant can exercise their legal rights. The tenant's legal rights include reporting the habitable issues to the code enforcement agency, about the unsafe living conditions, joining or organizing a tenant union or exercising rights allowed by California or local law.

The landlord's conduct may be deemed retaliatory if, in response to the tenant's exercise of their legal right, the landlord takes adverse action. Adverse actions may include terminating the tenancy; increasing the rent; filing an eviction lawsuit; taking steps to prevent the tenant from accessing the agreed upon amenities, such as locking the laundry room. If the landlord takes a retaliatory action within 180 days of the date the tenant exercised their legal right; California law presumes that the conduct is retaliatory.[10]

Summary

In essence, the article conveys to the reader that tenants have protections and defenses. While this article is unable to convey each available defense or every eviction nuance, the article touches on important eviction processes and valuable defenses.

Pablo Ramirez is the director of the Housing Practice Group at Inland Counties Legal Services, Inc.

10 Civil Code Section 1942.5

Riverside County LAWYER

Riverside County Bar Association
4129 Main St., Ste. 100, Riverside, CA 92501
RCBA 951-682-1015 LRS 951-682-7520
www.riversidecountybar.com rcba@riversidecountybar.com

PRSRT STD
US POSTAGE
PAID
PERMIT #1054
RIVERSIDE, CA