

“Dude! Where’s my contract?”

**What the Courts of Appeal have done recently
with your and your clients’ contracts**

**What every commercial litigator and transactional lawyer
should know about recent cases in the area of contract
interpretation and enforcement**

**A Presentation for the Santa Clara County Bar Association
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**Peter M. Rehon, Esq.
REHON & ROBERTS
A Professional Corporation**

**Ten Almaden Boulevard
Suite 550
San Jose, California 95113
www.rehonroberts.com**

**Telephone: (408) 494-0900
Facsimile: (408) 494-0909
E-Mail: prehon@rehonroberts.com**

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I. RECENT CASES INVOLVING THE GENERAL RULES OF CONTRACT INTERPRETATION AND ENFORCEMENT

A. THE PAROL EVIDENCE RULE

1. Statutory authority.
 - a. Code of Civil Procedure section 1856.
 - b. Civil Code section 1625.
 - c. Commercial Code section 2202.
 - d. See also Civil Code sections 1635 - 56; Code of Civil Procedure sections 1859 - 66.

2. Important cases.
 - a. *Bank of America National Trust and Savings Ass'n. v. Pendergrass* (1935) 4 Cal.2d 258.
 - b. *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., Inc.* (1968) 69 Cal.2d 33.
 - c. *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18.
 - d. *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412.
 - e. *Banco Do Brasil, S. A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1011:

“We cannot leave this discussion without a general comment. We do not share the concern expressed in some circles that parties to a contract in California are not capable of drafting a written instrument which will fully and completely define a particular legal relationship. As we view it, it is the essence of the judicial function to contribute to legal certainty and reasonable predictability in the affairs of our citizens rather than to suggest that such goals are not attainable.

Parties to a business or commercial transaction, such as those in this case, should be able to clearly express their intent as to the nature and scope of their legal relationship and then be able to rely on that expression. If, as in this case, they agree that their entire understanding is completely set forth in a particular writing then they are both entitled and required to live with the agreed terms. The courts simply cannot permit clear and unambiguous integrated agreements, such as the one before us, to be rendered meaningless by the oral revisionist claims of a party who, at the end of the game, does not care for the result.”

3. Recent cases.

- a. *Wolf v. Superior Court* (Jan. 21, 2004), 114 Cal.App.4th 1343 [04 C.D.O.S. 508].
- b. *Casa Herrera, Inc. v. Beydoun* (Feb. 2, 2004), 32 Cal.4th 336 [04 C.D.O.S. 951].
- c. *Blackburn v. Charnley* (Apr. 8, 2004) 117 Cal.App.4th 758 [04 C.D.O.S. 3067].
- d. *Blitz v. Fluor Enterprises, Inc.* (Jan. 26, 2004) 115 Cal.App.4th 185 [04 C.D.O.S. 700], *ordered depublished* 8 Cal.Rptr.3d 833 [04 C.D.O.S. 4101].

B. **UNCONSCIONABILITY**

1. Statutory authority: Civil Code section 1670.5. See also Civil Code section 1671 (enforceability of penalty and liquidated damages provisions).
2. Important cases.
 - a. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.
 - b. *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064.

- c. *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519.
 - d. *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807.
3. Recent cases.
- a. *Greenbriar Homes Community v. Superior Court* (Mar. 8, 2004) 117 Cal.App.4th 337 [04 C.D.O.S. 2708].
 - b. *Jaramillo v. JH Real Estate Partners, Inc.* (Aug. 15, 2003) 111 Cal.App.4th 394 [03 C.D.O.S. 7411].
 - c. *Fitz v. NCR Corp.* (May 13, 2004) 118 Cal.App.4th 702 [04 C.D.O.S. 4153].

C. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

- 1. Statutory authority: Commercial Code section 1203. See also Commercial Code section 1208.
- 2. Important cases.
 - a. Regarding the General Scope of the Implied Covenant.
 - 1) *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342.
 - 2) *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654.
 - 3) *Silberg v. California Life Ins. Co.* (1974) 11 Cal.3d 452.
 - 4) *Storek & Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44.
 - b. Regarding Tort Liability for Breach of the Implied Covenant.
 - 1) *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal.4th 28.

2) *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85.

3) *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174.

3. Recent cases.

a. *Pasadena Live, LLC v. City of Pasadena* (Jan. 7, 2004) 114 Cal.App.4th 1089.

b. *Lundin/Weber Company LLC v. Brea Oil Company, Inc.* (Apr. 1, 2004) 117 Cal.App.4th 427.

D. **THE STATUTE OF FRAUDS**

1. Statutory authority.

a. Civil Code section 1624.

b. Civil Code section 1091.

c. Code of Civil Procedure sections 1971, 1974.

d. Commercial Code section 1206.

2. Important cases.

a. *Franklin v. Hansen* (1963) 59 Cal.2d 570.

b. *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793.

3. Recent cases.

Sterling v. Taylor (Nov. 26, 2003) 113 Cal.App.4th 931 [03 C.D.O.S. 10224]; *review granted and opinion superseded* by 11 Cal.Rptr.3d 510 [04 C.D.O.S. 2550].

II. RECENT CASES INVOLVING SPECIFIC CONTRACT PROVISIONS

A. JURY TRIAL WAIVERS

1. Statutory and Constitutional authority.
 - a. California Constitution, Article I, section 16.
 - b. Code of Civil Procedure section 631.
2. Important cases.
 - a. *Exline v. Smith* (1855) 5 Cal. 112.
 - b. *Trizec Properties, Inc. v. Superior Court* (1991) 229 Cal.App.3d 1616.
3. Recent cases.

Grafton Partners LP v. Superior Court (Feb. 6, 2004)
115 Cal.App.4th 700 [04 C.D.O.S. 1167]; *review granted and opinion superseded by* 12 Cal.Rptr.3d 287 [04 C.D.O.S. 3491].

B. VENUE SELECTION CLAUSES

1. Statutory authority: Code of Civil Procedure sections 392 - 97.
2. Important cases.
 - a. *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459 (Choice of law provisions).
 - b. *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906 (Choice of law provisions).
 - c. *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491 (Venue selection clauses).

3. Recent cases.

Alexander v. Superior Court (Dec. 19, 2003)
114 Cal.App.4th 723 [03 C.D.O.S. 11056].

C. **JUDICIAL REFERENCE CLAUSES**

1. Statutory authority: Code of Civil Procedure section 638.

2. Important cases.

- a. *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081.

- b. *Woodside Homes of Cal., Inc. v. Superior Court* (2003) 107 Cal.App.4th 723.

3. Recent cases.

Greenbriar Homes Community v. Superior Court
(Mar. 8, 2004) 117 Cal.App.4th 337 [04 C.D.O.S. 2708].

D. **ARBITRATION CLAUSES**

1. Statutory authority: Code of Civil Procedure sections 1281, 1281.2; Federal Arbitration Act, 9 U.S.C. section 2.

2. Important cases.

- a. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.

- b. *Ting v. AT&T* (9th Cir.2003) 319 F.3d 1126.

- c. *Cruz v. PacifCare Health Systems, Inc.* (2003) 30 Cal.4th 303.

3. Recent cases.

- a. *Liska v. The Arns Law Firm* (Mar. 30, 2004) 117 Cal.App.4th 275 [04 C.D.O.S. 2741].

- b. *Hedges v. Carrigan* (Apr. 6, 2004) 117 Cal.App.4th 578 [04 C.D.O.S. 3007]
- c. *Martinez v. Master Protection Corp.* (Apr. 29, 2004) 118 Cal.App.4th 107 [04 C.D.O.S. 3744].
- d. *Aguilar v. Lerner* (Apr. 22, 2004) 32 Cal.4th 974 [04 C.D.O.S. 3476].
- e. *Kalai v. Gray* (June 11, 2003) 109 Cal.App.4th 768 [03 C.D.O.S. 5059].
- f. *Lopez v. Charles Schwab & Co., Inc.* (May 24, 2004) 118 Cal.App.4th 1224 [04 C.D.O.S. 4445].
- g. *Fitz v. NCR Corp.* (May 13, 2004) 118 Cal.App.4th 702 [04 C.D.O.S. 4153].
- h. *Omar v. Ralphs Grocery Co.* (May 6, 2004) 118 Cal.App.4th 955 [04 C.D.O.S. 4340].

E. IMPLIED WARRANTY WAIVERS

- 1. Statutory authority: Commercial Code sections 2313 - 16; Civil Code sections 1792 - 1794.

- 2. Important cases.

Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal.3d 374.

- 3. Recent cases.

Hicks v. Superior Court (Jan. 22, 2004) 115 Cal.App.4th 77 [04 C.D.O.S. 578]; review granted and opinion superseded by 13 Cal.Rptr.3d 300 [04 C.D.O.S. 4100].

III. DRAFTING THE (HOPEFULLY) ENFORCEABLE CONTRACT.

A. THE USE OF FACTUAL RECITALS

- 1. Evidence Code section 622.

2. *Plaza Freeway Limited Partnership v. First Mountain Bank* (2000) 81 Cal.App.4th 616.
3. *Miner v. Tustin Avenue Investors* (Feb. 27, 2004) 116 Cal.App.4th 264 [04 C.D.O.S. 1793].

B. THE FORM AND PLACEMENT OF CONTRACT PROVISIONS

- a. See Commercial Code section 2316 regarding “conspicuousness”: print type, headings, placement.
- b. Language choice and use of initials.
- c. See Justice Johnson’s dissent in *Hicks v. Superior Court* (Jan. 22, 2004) 115 Cal.App.4th 77 [04 C.D.O.S. 578]; *review granted and opinion superseded by* 13 Cal.Rptr.3d 300 [04 C.D.O.S. 4100].
- d. The use of defined terms. See *Wolf v. Superior Court* (Jan. 21, 2004), 114 Cal.App.4th 1343 [04 C.D.O.S. 508].

C. THE NEED TO REVIEW OLD FORMS IN LIGHT OF NEW LAW

Example: Security Agreements, UCC-1’s and Commercial Code Sections 9502, 9509 - 10.