

## ■ Introduction/Summary of Update

Discovery is one of the most important phases of litigation—obtaining one critical piece of evidence can make or break a case. Thus, as the Second District Court of Appeal affirmed last year, litigators should not delay in filing their motion to compel further responses since a party's right to compel is waived if the motion is not filed within 45 days after service of the deficient responses.<sup>1</sup>

Litigators should also know when the gamesmanship in discovery should stop. Last year, the Third Appellate District Court affirmed a trial court's decision to grant terminating sanctions, agreeing that the sanctioned party went beyond typical game playing and such sanctions were necessary.<sup>2</sup>

In addition, last year, the Second District Court of Appeal issued a number of decisions involving discovery matters in wage and hour class actions, finding that plaintiffs are entitled to receive potential class members' contact information, even prior to certification of a class.<sup>3</sup>

The Fourth District Court of Appeal also concluded that parties who produce documents that are subject to the attorney-client privilege to federal agencies as part of a plea agreement do not waive their right to assert the privilege in other proceedings.<sup>4</sup>

Finally, in the only California Supreme Court case dealing with discovery last year, the high court unanimously decided that discovery disputes involving non-parties in an arbitration proceeding are to be decided by the arbitrator

in the first instance, and that the arbitrator's decisions in this regard are fully reviewable by the trial court.<sup>5</sup>

## Right to Compel Further Responses Waived if a Motion to Compel is Not Filed Within 45 Days

In *New Albertsons, Inc. v. Superior Court*,<sup>6</sup> plaintiff brought a negligence and premises liability action against New Albertsons, Inc. ("Albertsons"), claiming that he had been injured at an Albertsons store while shopping.<sup>7</sup> Plaintiff propounded requests for admission, form interrogatories and document requests on Albertsons. Among other things, plaintiff's requests asked Albertsons to admit that a photograph of the scene of the accident showed that a bag of ice could be seen lying in the aisle and that Albertsons identify and produce all photographs, films and/or videotapes depicting the incident. Albertsons admitted the request for admission and, subject to a number of objections, identified and produced seven photographs of the incident.<sup>8</sup> A few months later, while taking the deposition of Albertsons' on-site store director, plaintiff learned that Albertsons had video recordings, which typically were saved until the memory became full, after which the data was recorded over. Plaintiff filed a motion for discovery sanctions against Albertsons, claiming Albertsons willfully destroyed video recordings and photographs after plaintiff requested such evidence, evidence that would show that a bag of ice was laying in the aisle when the accident occurred.<sup>9</sup> The

1. See *New Albertsons, Inc. v. Superior Court*, 168 Cal. App. 4th 1403 (2nd Dist. Dec. 10, 2008).

2. See *Liberty Mutual Fire Ins. Co. v. LCL Administrators, Inc.*, 163 Cal. App. 4th 1093 (3rd Dist. Jun. 10, 2008).

3. See *Puerto v. Superior Court*, 158 Cal. App. 4th 1242 (2nd Dist. Jan. 15, 2008); *Crab Addison, Inc. v. Superior Court*, 169 Cal. App. 4th 958 (2nd Dist. Dec. 30, 2008); and *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325 (2nd Dist. Aug. 26, 2008).

4. See *Regents of the University of California v. Superior Court*, 165 Cal. App. 4th 672 (4th Dist. Jul. 30, 2008).

5. See *Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.*, 44 Cal. 4th 528 (Jul. 17, 2008).

6. 168 Cal. App. 4th 1403 (2nd Dist. Dec. 10, 2008).

7. *Id.* at 1408.

8. *Id.* at 1411-412.

9. *Id.* at 1412-413.

trial court granted plaintiff's motion, and precluded Albertsons from entering any portion of the videotapes into evidence. The court also ruled that because Albertsons destroyed the video recordings, the jury could infer that the videotape contained evidence unfavorable to Albertsons.<sup>10</sup>

During the depositions of the paramedics, Albertsons learned that the bag of ice in the photograph might have been a cervical collar bag. Accordingly, Albertsons filed a motion to withdraw the admission on the grounds that it had been mistaken, arguing that plaintiff would suffer no substantial prejudice as a result of the withdrawal of this admission.<sup>11</sup> The trial court denied Albertsons' motion. Albertsons sought writ of that ruling, as well as the imposition of evidence and issue sanctions that had been ordered against it for the misuse of the discovery process. Albertsons argued that the trial court had no authority to impose sanctions since Albertsons had not failed to obey a discovery order.<sup>12</sup>

The Second District Court of Appeal granted Albertsons' petition for writ on the ground that any doubts in ruling on a motion to withdraw or amend an admission must be resolved in favor of the moving party and since the record did not establish that Albertsons' mistake was inexcusable or that it would substantially prejudice the plaintiff, the discovery rules favored granting Albertsons' motion to withdraw. The appellate court noted that plaintiff had continued to vigorously pursue discovery regarding the condition of the floor even after the admission and did not explain what additional discovery he would have sought absent the admission.<sup>13</sup> Regardless, under C.C.P. §2033.300 (c), the trial court may permit additional discovery,

continue the trial if necessary or impose other conditions on granting the motion, in order to avoid prejudicing the plaintiff.<sup>14</sup>

The appellate court also concluded that Albertsons had no obligation to produce the video recordings because plaintiff did not timely move to compel such recordings.<sup>15</sup> The court found that the trial court did not have statutory authority to impose evidence or issue sanctions since the court had not ordered Albertsons to produce the video recordings.<sup>16</sup> The appellate court also held that the trial court's inherent power to control litigation did not justify sanctions in these circumstances because Albertsons' destruction was not egregious misconduct. Instead, Albertsons timely objected to the request and plaintiff failed to timely move to compel. "Absent a motion challenging those objections and an order compelling discovery, Albertsons had no obligation to produce the recordings."<sup>17</sup>

### **A Party Cannot File a Motion to Compel After the Motion Cut-Off Date Unless a Motion to Reopen Discovery is Filed First**

In *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc.*,<sup>18</sup> the Third District Court of Appeal held that a court could not hear and grant a motion to compel after the motion cut-off date without first deciding whether discovery should be reopened for that purpose.

Pelton-Shepherd Industries, Inc. ("Pelton") served document requests on Delta Packaging Products, Inc. ("Delta"), which were due three days beyond the discovery cutoff date. Delta did not respond and Pelton filed a motion for terminating sanctions against Delta for its

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10. *Id.* at 1415-416.

11. *Id.* at 1414.

12. *Id.* at 1417.

13. *Id.* at 1420-421.

14. *Id.* at 1421.

15. *Id.* at 1427-428.

16. *Id.* at 1428 (C.C.P. §§2031.310(e) and 2031.320(c) "authorize an evidence or issue sanction only if a party fails to obey an order compelling a further response or an order compelling an inspection").

17. *Id.* at 1434.

18. 165 Cal. App. 4th 1568 (3rd Dist. Aug. 19, 2008).

failure to respond to the document requests. Delta opposed Pelton's motion on the grounds that Pelton had not first obtained a court order requiring Delta to respond and Pelton's motion was time-barred because the deadline for hearing discovery motions had passed.<sup>19</sup> The court granted Pelton's motion and Delta appealed.

"Subdivision (a) of section 2024.020 specifies that '[e]xcept as provided in this chapter, any party shall be entitled *as a matter of right*...to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action.' ... By negative implication, a party who notices a discovery motion to be heard *after* the discovery motion cutoff date does not have a right to have the motion heard."<sup>20</sup> But, on the motion of any party, "the court may grant leave...to have a motion concerning discovery heard, closer to the initial trial date, or to reopen discovery after a new trial date has been set."<sup>21</sup> "[I]n exercising its discretion to grant or deny the motion the court must consider various factors, including (but not limited to) '[t]he necessity and the reasons for the discovery' and '[t]he diligence or lack of diligence of the party seeking ... the hearing of a discovery motion, and the reasons that ... the discovery motion was not heard earlier."<sup>22</sup> The court in *Pelton* found that the trial court did not consider any of the relevant factors as to whether discovery should have been reopened because it had not required Pelton to file a motion for leave to reopen discovery before hearing Pelton's motion to compel. Accordingly, "the trial court 'transgressed' the confines of the applicable principles of law."<sup>23</sup>

The appellate court was then left to decide

whether the trial court's decision to hear the belated motion to compel prejudiced Delta, i.e., "whether it is reasonably probable that a result more favorable to Delta would have been reached in the absence of the error."<sup>24</sup> The court concluded that it was reasonably probable that the trial court would have denied Pelton's motion to reopen discovery, since the case had been at issue for almost two years, and Pelton waited less than two months before trial to serve its document demands that were of little, if any, relevance to the case, without any explanation for the delay.<sup>25</sup> If the trial court would not have reopened discovery, then no monetary and terminating sanctions would have been imposed on Delta.<sup>26</sup> Accordingly, the appellate court reversed the trial court's judgment.<sup>27</sup>

### Terminating Sanctions Are Warranted When A Party Repeatedly Violates Discovery Orders

In *Liberty Mutual Fire Ins. Co. v. LCL Administrators, Inc.*,<sup>28</sup> the court again reminded litigators to take discovery obligations seriously, especially when the court compels responses. In *Liberty Mutual*, plaintiff filed a breach of contract action against defendant to recover workers compensation insurance premiums. Defendant answered and cross-complained.<sup>29</sup> During the discovery process, plaintiff propounded form interrogatory 15.1 asking defendant to provide the names of all witnesses, documents and evidence supporting the defendant's affirmative defenses and claims in the cross-complaint. After defendant provided a meaningless response and ignored plaintiff's meet-and-confer letter, plaintiff moved to compel further responses and requested monetary sanctions. The trial

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19. *Id.* at 1574.

20. *Id.* at 1586 (emphasis in original).

21. *Id.*

22. *Id.* at 1586-587.

23. *Id.* at 1588.

24. *Id.* at 1589 (citing C.C.P. §475; Cal. Const., art. VI, §13).

25. *Id.*

26. *Id.* at 1590.

27. *Id.* at 1591.

28. 163 Cal. App. 4th 1093 (3rd Dist. Jun. 10, 2008).

29. *Id.* at 1095-96.

court granted the motion to compel and imposed sanctions.<sup>30</sup> Defendant, however, provided the same meaningless responses, forcing the plaintiff to file another motion to compel. The court granted plaintiff's motion, imposed monetary sanctions, but gave the defendant one more opportunity to provide substantive responses.<sup>31</sup> Yet, the defendant provided another meaningless, albeit different, response. Accordingly, plaintiff filed a motion seeking terminating sanctions, which the trial court granted, ordered defendant's answer stricken, and entered a default judgment in favor of plaintiff.<sup>32</sup>

On appeal, defendant argued that the trial court's finding that it had willfully violated discovery orders was not supported by the evidence on the record, as it had provided plaintiff with all the evidence it possessed and had not concealed anything. The appellate court disagreed: "By listing as knowledgeable witnesses 65 employees, *none* of whom were associated with [defendant], and by specifying as supporting documents the entire compendium of [plaintiff's] workers' compensation files, [defendant's] responses were worthless."<sup>33</sup> The court concluded that no case law supported defendant's claim that evasiveness can only be found when a party has intentionally concealed evidence.<sup>34</sup> The court also found a number of other independent abuses of discovery warranting sanctions under C.C.P. §2023.010(i). For example, defendant repeatedly ignored plaintiff's meet and confer letters, and despite its promise, defendant failed to provide third supplemental responses.<sup>35</sup>

The court also rejected defendant's claim that plaintiff was not prejudiced by defendant's

discovery violations. "A party cannot intelligently defend itself against affirmative defenses or damage claims when the other side's discovery responses consist of legal double-talk and provide no useful information. Here, after numerous extensions of time and more than a year's worth of delay, [defendant] could still not provide an intelligible factual basis for their defenses and counterclaims. Prejudice is inherent in such tactics."<sup>36</sup>

The court also rejected defendant's claim that the terminating sanctions were excessive because such sanctions were designed to punish defendant and not further the purpose of discovery. "The trial court was not being punitive—it was exercising its broad authority to levy the ultimate sanction when prior efforts yielded no result...Here, [defendant] persisted in its pattern of failure or refusal to give meaningful responses to discovery. The trial court was not required to allow [defendant] to continue its stalling tactics indefinitely."<sup>37</sup>

Finally, the court rejected defendant's argument that past conduct that had previously been sanctioned could not be considered. "Post-1986 cases affirm that the sanctioned party's history as a repeat offender is not only relevant, but also significant, in deciding whether to impose terminating sanctions."<sup>38</sup>

### Discovery of Potential Class Members' Contact Information Prior to Certification is Permissible

The Second District Court of Appeal decided a number of cases last year, holding that employees bringing actions on behalf of those similarly situated are entitled to discovery regarding potential class members' contact information, even prior to certification of a class. Following the

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30. *Id.* at 1096.

31. *Id.* at 1097.

32. *Id.* at 1098-99.

33. *Id.* at 1102 (emphasis in original).

34. *Id.* at 1103.

35. *Id.* at 1103.

36. *Id.* at 1105.

37. *Id.* at 1105-06.

38. *Id.* at 1106.

California Supreme Court's decision in *Pioneer Electronics, Inc. v. Superior Court*,<sup>39</sup> the Second District repeatedly held that an employee's privacy rights are not violated by disclosing the employee's contact information to plaintiff's counsel.

In *Puerto v. Superior Court*,<sup>40</sup> plaintiffs initiated a class action against Wild Oats for its failure to pay its employees overtime compensation and its failure to pay employees for all hours worked as a result of misclassifying them as exempt employees. During discovery, plaintiffs propounded standard form interrogatory number 12.1 seeking the names, addresses and telephone numbers of all witnesses.<sup>41</sup> Wild Oats responded by providing the names and positions of over 2600 employees who worked with plaintiffs while they were classified as exempt employees, but refused to provide addresses and telephone numbers for these employees.<sup>42</sup> Plaintiffs moved to compel further responses. The trial court granted plaintiffs' motion, but required that the parties use an opt-in procedure with regard to this information. Specifically, the individuals identified by Wild Oats were to receive a letter notifying them of plaintiffs' request, and each employee would have to consent to the disclosure in writing. Plaintiffs immediately challenged the trial court's order requiring use of an opt-in letter by seeking a writ of mandate in the appellate court.<sup>43</sup>

The appellate court held that plaintiffs were statutorily entitled to the contact information of these witnesses without use of an opt-in letter, pursuant to C.C.P. §2017.010.<sup>44</sup> Although an opt-out letter had been used in *Pioneer*, the *Puerto* court held that an opt-out letter was also

not required under the circumstances because unlike in *Pioneer*, where plaintiffs were looking for people who wanted to participate in the lawsuit, here, plaintiffs were trying to locate percipient witnesses. Unlike participating in a lawsuit, which is voluntary, a percipient witness must participate in discovery.<sup>45</sup>

The court noted, however, that the right to witnesses contact information is not absolute, especially where privacy issues are involved. The need for the discovery must be weighed against the right to privacy. Relying on *Pioneer*, the court held that the determination as to whether plaintiffs are entitled to contact information "requires a careful evaluation of the privacy right asserted, the magnitude of the imposition on that right and the interests militating for and against any intrusion on privacy."<sup>46</sup> The court acknowledged that although Wild Oats current and former employees have a reasonable expectation of privacy in their contact information, this did not mean that they would not want it disclosed under these circumstances.<sup>47</sup> Again relying on *Pioneer*, the court found that similarly situated employees "may reasonably be supposed to want their information disclosed to counsel whose communications in the course of investigating the claims asserted in this lawsuit may alert them to similar claims they may be able to assert."<sup>48</sup>

The court also held that, as in *Pioneer*, "the requested information, while personal, [was] not particularly sensitive," and therefore disclosure of this information did not constitute a serious invasion of privacy.<sup>49</sup> Further, although the court did not need to consider the balancing factor of the test, the court went on to hold that the balancing test also tipped in favor of not requir-

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39. 40 Cal. 4th 360 (2007).

40. 158 Cal. App. 4th 1242 (2nd Dist. Jan. 15, 2008).

41. *Id.* at 1245-246.

42. *Id.* at 1246.

43. *Id.* at 1247.

44. *Id.* at 1251-52.

45. *Id.* at 1249-50 ("The disclosure of the names and addresses of potential witnesses is a routine and essential part of pretrial discovery.").

46. *Id.* at 1250.

47. *Id.* at 1252-53.

48. *Id.* at 1253.

49. *Id.*

ing an opt-in letter before the witnesses contact information could be disclosed to plaintiffs. The court found that by requiring an opt-in letter, plaintiffs were left significantly disadvantaged in conducting discovery because their right to discovery from percipient witnesses had been made dependent on the unreviewable decision of third-parties to participate or not, and generally, witnesses are not permitted to make such a decision.<sup>50</sup> The opt-in letter “exceeded the protections necessary to safeguard the legitimate privacy interests in the addresses and telephone numbers of the witnesses, and as such was an abuse of discretion.”<sup>51</sup>

In *Lee v. Dynamex, Inc.*,<sup>52</sup> plaintiffs filed a class action against Dynamex for misclassifying employees as independent contractors. Prior to class certification, plaintiffs sought the identity of and contact information for potential class members.<sup>53</sup> The trial court denied plaintiffs’ motion to compel the production of this information and subsequently denied plaintiffs’ motion for class certification. The appellate court reversed.<sup>54</sup> Relying on *Pioneer* and *Puerto*, the Second District held that Dynamex had not identified any privacy concern that would overcome the basic principle that “the location of witnesses is generally discoverable, and is neither unduly personal nor overly intrusive.”<sup>55</sup>

In *Crab Addison, Inc. v. Superior Court*,<sup>56</sup> plaintiff filed a class action against his former employer for misclassifying its employees as exempt.<sup>57</sup> Prior to class certification, plaintiff sought to identify potential class members. The defendant refused on the grounds that its

employees had a heightened expectation of privacy because the employees had signed forms stating that they did not want their contact information disclosed or they only wanted that information disclosed if they affirmatively consented to disclosure.<sup>58</sup> Plaintiff filed a motion to compel, which the trial court granted.<sup>59</sup> Relying on *Puerto*, the appellate court affirmed. Although the appellate court recognized that plaintiff was seeking not only the witnesses’ contact information but also the witnesses’ identities, the court held that “[d]isclosure of witnesses’ identities involves no greater invasion of privacy or revelation of personal information than the disclosure of their addresses and telephone numbers. Therefore, we can find no rationale for refusing to apply our holding in *Puerto* to the instant case.”<sup>60</sup>

The first issue the court addressed was whether public policy would support enforcing the release forms since they had “the effect of waiving an employee’s right to notice of a pending class action lawsuit concerning the employer’s alleged violations of overtime and wage statutes.”<sup>61</sup> Relying on the Supreme Court’s decision in *Gentry v. Superior Court*,<sup>62</sup> which addressed whether class arbitration waivers in employment agreements could preclude class arbitrations for wage and hour violations, the court held that the release forms were not enforceable.<sup>63</sup> Rather, like in *Gentry*, enforcing such a release may have the effect of waiving an employee’s right to notice of pending class action lawsuits concerning the employer’s violations of overtime and wage statutes, law-

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50. *Id.* at 1256.

51. *Id.* at 1259.

52. 166 Cal. App. 4th 1325 (2nd Dist. Aug. 26, 2008).

53. *Id.* at 1329.

54. *Id.*

55. *Id.* at 1337-38 (internal citations omitted).

56. 169 Cal. App. 4th 958 (2nd Dist. Dec. 30, 2008).

57. *Id.* at 961.

58. *Id.* at 961-62.

59. *Id.* at 965.

60. *Id.* at 969.

61. *Id.* at 970.

62. 42 Cal. 4th 443 (2007).

63. 169 Cal. App. 4th at 972.

suits which are “needed to assure the effective enforcement of statutory policies.”<sup>64</sup>

Second, the court addressed whether the release forms were procedurally conscionable. Again relying on *Gentry*, the Court held in order for the release forms to be procedurally conscionable, the employees had to sign them knowingly and voluntarily after a dispute had arisen.<sup>65</sup> In *Crab Addison*, although the release forms were signed after the case was filed, there was nothing in the record indicating that the employees did it “with knowledge of the pending litigation and the fact the release form would affect their ability to be included in the class.”<sup>66</sup> Thus, the court failed to give any effect to the release forms.<sup>67</sup>

### Disclosure to Federal Agencies Did Not Waive Attorney Client Privilege

In *Regents of the University of California v. Superior Court*,<sup>68</sup> the Fourth District had to decide for the first time “whether disclosure of privileged communications is free of coercion when, as a matter of policy, the federal government advised corporations under criminal and regulatory investigation that they might avoid indictment or regulatory sanctions if they fully cooperated in the government’s investigation and among other matters waived the attorney-client and attorney work product privileges.”<sup>69</sup>

In *Regents of the University of California*, plaintiffs filed a coordinated antitrust case against the defendants for unlawfully inflating the price of natural gas in California. In discovery, plaintiffs sought attorney-client communications and attorney work product, which defendants

had previously produced to federal agencies. Specifically, the information included the results of their outside counsels’ investigations regarding compliance with federal regulations and antitrust laws. Defendants provided this information to the federal agencies as a result of the Department of Justice’s policy that in determining whether to indict a corporation, it considers the corporation’s cooperation. One important indicia of cooperation is the corporation’s willingness to waive the attorney-client and attorney work product privileges when responding to the government’s subpoenas and requests for documents.<sup>70</sup>

In their motion to compel, plaintiffs argued that defendants waived the privileges because they made a business decision to produce the documents to the federal agencies and therefore could no longer assert the privileges to document demands from other parties.<sup>71</sup> In response, defendants argued that they were coerced into producing the documents by the Department of Justice’s policy and, therefore, under Evidence Code §912, they had not waived the privileges by producing the documents to the federal agencies.<sup>72</sup>

The trial and the appellate court agreed with defendants. Relying on cases where the privileges were not waived when privileged documents were produced in response to the request of government agencies or when documents were produced inadvertently in the course of civil discovery and the holder of the privilege had taken reasonable steps to prevent disclosure, the appellate court found that defendant had not waived any privileges

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64. *Id.* Class actions are particularly important in this context for a number of reasons: 1) potential recovery may be too small to warrant individual litigation, 2) individual litigation might not be a viable option due to the fear of retaliation, and 3) employees may be unaware of the violation of their rights and their right to sue. *Id.* at 971

65. *Id.* at 972.

66. *Id.* at 972.

67. *Id.* at 974.

68. 165 Cal. App. 4th 672 (4th Dist. Jul. 30, 2008).

69. *Id.* at 675.

70. *Id.* at 676.

71. *Id.* at 677.

72. *Id.* Under Evidence Code §912, waiver of the attorney client privilege that results from coercion may not be considered a waiver for purposes of civil action.

in this situation.<sup>73</sup> “The law does not require that the holder of the privilege take ‘strenuous or Herculean efforts’ to resist disclosure.”<sup>74</sup> “In sum, because of the dramatic impact failure to cooperate might have on the corporations and the absence of any cost-free redress, the trial court here correctly found that the defendants’ cooperation with the government did not waive the attorney-client and attorney work product privileges.”<sup>75</sup>

### **Arbitrators Must Resolve Discovery Disputes Concerning Non-Party Witnesses But Their Decisions are Entitled to Judicial Review**

In *Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P.*,<sup>76</sup> the California Supreme Court held that arbitrators must first resolve discovery disputes involving a nonparty witness, but the nonparty is entitled to full judicial review of the arbitrator’s discovery order.

In an arbitration proceeding, Berglund sought documents by serving a document subpoena on nonparty Arthroscopic & Laser Surgery Center of San Diego, L.P. (“ALSC”). ALSC asserted the documents were privileged and sought a protective order in the Superior Court.<sup>77</sup> The Superior Court denied the motion on the grounds that the arbitrator, not the court, had jurisdiction over Berglund’s discovery requests.<sup>78</sup> ALSC appealed. The Court of Appeal held that the arbitrator has authority to enforce discovery subpoenas under C.C.P. §1283.05(b) and “therefore the arbitration proceeding is the proper forum for a nonparty to challenge the discovery sought by a party to the arbitration.”<sup>79</sup> But, unlike the limitations on judicial review of an arbitrator’s decisions involving parties, there are no such limitations on nonparties.<sup>80</sup>

The Supreme Court agreed and held that although judicial review of arbitration decisions is really limited, the same limitation does not apply to an arbitrator’s decisions involving nonparties. “Unlike parties to the arbitration, nonparties, by definition, have not consented to arbitration and consequently have not agreed to the finality of arbitrator’s decisions.”<sup>81</sup>

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73. *Id.* at 683.

74. *Id.*

75. *Id.* at 684.

76. 44 Cal. 4th 528 (Jul. 17, 2008).

77. *Id.* at 533.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 539.