

LEGISLATIVE UPDATE — FINANCIAL INSTITUTIONS AND CONSUMER FINANCIAL SERVICES

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The following is a listing of 2007 bills that affect financial institutions, including those involved in providing financial services to consumers. It is not intended to be exhaustive. Moreover, only those bills noted as chaptered have been enacted into law. Please examine the full text of any measure of interest to you.

Attorneys

Assembly Bill No. 1723 (2007-2008 Reg. Sess.) (Assembly Judiciary Committee): Attorney's IOLTA Accounts

(Enacted: Chapter 422.) This bill defines an "IOLTA account" as an account or investment product that is established and maintained by a lawyer or law firm as required by law and that is: (1) an interest-bearing checking account; (2) an investment sweep product that is a daily (overnight) financial institution repurchase agreement or an open-end money-market fund; or (3) any other investment product authorized by California Supreme Court rule or order.

The bill requires attorneys and law firms to deposit or invest the specified client funds in IOLTA accounts and requires that the interest or dividends earned on the accounts be paid to the State Bar of California. The IOLTA account must be established and maintained with an eligible institution (a bank or such other financial institutions as are authorized by the Supreme Court) offering or making available an IOLTA account meeting specified interest or dividend paying requirements. This includes a rate of interest or dividends on the IOLTA account that is not less than that generally paid to non-attorney customers on similar accounts.

The bill does not require financial institutions to offer the specified IOLTA accounts. However, if an institution offers such accounts, it may only deduct reasonable service or maintenance fees in accordance with the customary practice of the institution for non-IOLTA customers. Such fees may be payable only from the interest or dividends on the account and would make any other fees or service charges the sole responsibility of the lawyer or law firm maintaining the IOLTA account. The bill requires an eligible institution's remittance statement to include the average balance for each account for each month and requires the financial institution to remit interest or dividends on the IOLTA account, less reasonable fees, to the State Bar at least quarterly. The statements transmitted by the financial institution must show (a) the name of the attorney or law firm for whom the remittance is sent; and (b) for each account (i) the rate of interest applied or dividend paid; (ii) the amount and type of fees deducted, if any; and (iii) the average balance of each account for each month of the period for which the report is made.

Consumer Financial Services

Assembly Bill No. 1122 (2007-2008 Reg. Sess.) (Duvall): Consumer Education

Existing California law requires the Superintendent of Public Instruction to develop a one-semester instructional program entitled "consumer economics" for use in schools for grades 7-12. This two-year bill requires the California Department of Education to develop information regarding the consumer credit system, including the history of credit, how credit is obtained, its proper use, as well as understanding, correcting, and improving credit reports.

Assembly Bill No. 1570 (2007-2008 Reg. Sess.) (Mendoza): Retail Consumer Credit

This two-year bill relates to retailers that offer a limited-term special price, sale, or interest rate on purchases that requires a consumer to apply for credit with the retailer. Where such special prices are in exchange for applying for credit with the retailer, the latter is required to honor the offered terms for an additional business day if the consumer's credit application cannot be verified before the limited term of the offer expires.

Senate Bill No. 500 (2007-2008 Reg. Sess.) (Corbett): Credit Service Organizations

(Enacted: Chapter 91.) Before this bill was enacted, the law prohibited a credit service organization from receiving consideration for referring a buyer to a retail seller or other credit grantor who might extend credit to the buyer on substantially the same terms as are generally offered to the public. This bill adds to the list of prohibitions by barring a credit services organization—*other than* a bank or a savings



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association (see Civil Code section 1789.12, subdivision (b)(2))—from (a) directly or indirectly extending credit to a buyer, (b) referring a buyer to a credit grantor that is affiliated with the credit service organization, and (c) assuring the credit grantor that an extension of credit to the buyer will be repaid.

Annuity Sales

Assembly Bill No. 267 (2007-2008 Reg. Sess.) (Calderon): Suitability of Annuity Sales to Seniors

This two-year bill was sponsored by the Association of California Health & Life Insurance Companies. It requires the insurance producer or insurer marketing an annuity to have reasonable grounds for believing the product is suitable for the senior consumer. It requires the producer or insurer to consider the senior consumer's investments, other insurance products, financial situation, and needs. It also requires the producer or insurer to make reasonable efforts to ascertain the consumer's financial status, tax status, and investment objectives.

Armed Service Members

Assembly Bill No. 7 (2007-2008 Reg. Sess.) (Lieu): Consumer Loans to Members of the Armed Services

(Enacted: Chapter 358.) The California Finance Lenders Law applies, among other things, to "refund anticipation loans" to covered borrowers. The latter are defined as regular or reserve members of the Army, Navy, Marine Corps, Air Force, or Coast Guard serving on active duty under a call or order that does not specify a period of 30 days or fewer, or such a member serving on Active Guard and Reserve duty, or the member's spouse, the member's child, or an individual for whom the member provided more than one-half of the individual's support for 180 days. It requires any state chartered bank or credit union that makes such refund anticipation loans to comply with the Talent Amendment to the federal National Defense Authorization Act of 2006. The Talent Amendment restricts the funding of several types of loans made to military personnel, including refund anticipation loans, vehicle title loans, and pay day loans. It places a 36% cap on all covered loans, inclusive of all fees. Covered loans include closed-end credit and credit subject to Regulation Z (neither overdrafts nor 401k loans are covered).

Assembly Bill No. 1528 (2007-2008 Reg. Sess.) (Lieu): Deceptive Marketing of Financial Products to Members of the Armed Services

(Enacted: Chapter 363.) This bill prohibits any person or entity licensed under certain code provisions from marketing financial services or products to current or former military per-

sonnel or their spouses in a misleading or deceptive manner that suggests that the marketer of the product is acting on behalf of, or is an affiliate of, one or more branches of the United States military or Department of Veterans Affairs. It also specifies that anyone violating the Act who is also licensed under any state licensing law shall be deemed to have violated the laws under which its license was issued. Notably, the bill does not apply to banks or credit unions.

Credit Cards

Assembly Bill No. 14 (2007-2008 Reg. Sess.) (Laird): Unruh Civil Rights Act and Song-Beverly Credit Card Act

(Enacted: Chapter 568.) This bill amends the Song-Beverly Credit Card Act to provide that a card issuer may not refuse to issue a credit card on the basis of disability, medical condition, marital status, or sexual orientation. Existing law provided only that a card issuer could not discriminate on the basis of a person's race, religious creed, color, national origin, ancestry, or sex.

Assembly Bill No. 262 (2007-2008 Reg. Sess.) (Coto): On-Campus Marketing of Credit Cards to Students.

(Enacted: Chapter 679.) This bill requires the Board of Trustees of the California State University and the Board of Governors of the California Community Colleges to take certain steps to protect students from perceived dangers associated with credit cards. It requests that the Regents of the University of California do the same. Namely, the entities are to (1) annually direct each campus to disclose all exclusive arrangements, excluding proprietary information, with banks or other commercial entities engaging in on-campus marketing of credit cards to students through solicitation activities in public campus areas, referred to as "tabling" activities; (2) prohibit banks and other commercial entities, including their third-party representatives, from offering gifts to students for completing student credit card applications during on-campus tabling activities; and (3) allow banks and other commercial entities, including their third-party representatives, to rely on the self-identification of students for purposes of complying with this provision. The bill also urges the U.C. Board of Regents to remove all exemptions from its policies guiding the on-campus marketing of credit cards to students.

Assembly Bill No. 1313 (2007-2008 Reg. Sess.) (Calderon): Credit Card Termination Notification Requirements

The terms and conditions of credit cards are regulated by state and federal law. Existing state law prohibits a card issuer from canceling a credit card until the issuer provides the cardholder 30

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²⁸ *In re Netsmart Technologies, Inc.* (Del. 2007) 924 A.2d 171.

²⁹ *Revlon, Inc. v. McAndrews & Forbes Holdings, Inc.* (Del. 1986) 506 A.2d 173.

³⁰ *Superior Vision Services, Inc. v. ReliaStar Life Insurance Company* (2006) 2006 Del. Ch. Lexis 160.

³¹ *Ryan v. Gifford* (Del. 2007) 918 A.2d 341.

³² *Aronson v. Lewis* (Del. 1984) 473 A.2d 805, 812.

³³ *Id.* at p. 354.

³⁴ *Id.* at pp. 355-356.

³⁵ *Tyson Foods* (Del. 2007) 919 A.2d 563.

³⁶ *Id.* at p. 593.

³⁷ *Id.*

³⁸ *Strategix, Ltd. v. Infocrossing West, Inc.* (2006) 142 Cal. App.4th 1068.

³⁹ *Id.* at p. 1073.

⁴⁰ *Id.*

⁴¹ *Id.* at p. 1074.

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days written notice. State law acknowledges some exceptions to this notice requirement. This two-year bill adds another exception to the notice requirement, i.e., when a card issuer terminates an entire class (or substantially the entire class) of a card issuer's private label credit card accounts. However, the statute requires the card issuer to provide notice within 60 days of the termination.

Mortgages

Assembly Bill No. 512 (2007-2008 Reg. Sess.) (Lieber): Foreign Language Term Summary Sheets for Mortgage Loans

This two-year bill requires supervised financial organizations, including banks and credit unions, to provide a summary sheet of loan terms in the language in which the loan was negotiated if it was negotiated in one of five identified foreign languages.

Assembly Bill No. 976 (2007-2008 Reg. Sess.) (Calderon): Mortgage Lending Discrimination

(Enacted: Chapter 403.) Existing Fair Employment & Housing Act (FEHA) law prohibits entities, including banks and mortgage companies, from discriminating against a person on various grounds, including race, color, religion, gender, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability. This measure adds citizenship and immigration status to the list.

Senate Bill No. 385 (2007-2008 Reg. Sess.) (Machado): Real Estate Mortgages

(Enacted: Chapter 301.) This bill makes findings and declarations regarding the importance of the federal *Nontraditional Mortgage Guidance and Statement on Subprime Lending*. The bill directs the Commissioner of the Department of Financial Institutions to apply the nontraditional mortgage product risk guidance to state-regulated financial institutions, including, but not limited to, privately-insured state-chartered credit unions.

The bill also directs the Commissioner of the Department of Corporations to apply the nontraditional mortgage product risk guidance (issued by the Conference of State Bank Supervisors (CSBS) and the American Association of Residential Mortgage Regulators (AARMR) in November 2006) to licensed finance lenders and residential mortgage lenders.

The bill also directs the Commissioner of the Department of Real Estate (DRE) to apply the CSBS/AARMR guidance to real estate brokers.

The bill authorizes all three commissioners to adopt emergency and final regulations to clarify the application of the guidance documents to their licensees as soon as possible. Finally, the bill requires the Secretary of Business, Transportation, and Housing to ensure that all three commissioners coordinate their policymaking and rulemaking efforts related to the guidance in order to ensure that it is applied consistently to all California entities engaged in the brokering, originating, servicing, underwriting, and issuance of nontraditional mortgage products.

Motor Vehicles

Assembly Bill No. 1575 (2007-2008 Reg. Sess.) (Richardson): Vehicle Liens

(Enacted: Chapter 121.) This bill adjusts the limits on vehicle liens for repair and storage to the cost of inflation over the past 20 years. It increases the liens for repairs from \$750 to \$1,500; increases the liens for storage from \$400 to \$1,025 for vehicles worth \$4,000 or less; and sets the lien for storage of vehicles worth more than \$4,000 at \$1,250. It also indicates that costs of storage are subject to Vehicle Code section 10652.5, which requires notice to the legal owner within 15 days of possessing the vehicle. It also prohibits a mechanic from removing repair parts added to the vehicle when the mechanic realizes the amount of the repair is subject to lien limits.

Senate Bill No. 67 (2007-2008 Reg. Sess.) (Perata): Vehicle Forfeiture

(Enacted: Chapter 727.) Existing law allows a peace officer to impound a motor vehicle used in a speed contest for up to 30

days. The vehicle may be released in certain circumstances. This bill extends existing law to apply to (a) persons engaged in reckless driving on highways or off-street parking facilities; and (b) those exhibiting excess speed on highways. The vehicle impounded must be released to the registered owner prior to the expiration of the 30 days if the registered owner demonstrates that s/he was neither the driver nor a passenger at the time of the alleged violation or was unaware that the vehicle was being used to engage in the recklessness or speed.

Financial Institutions and Operations

Assembly Bill No. 1502 (2007-2008 Reg. Sess.) (Lieu): Development District Program

This two-year bill creates a Banking Development District Program that promotes placing bank branches in areas of designated need. The bill requires the State Treasurer and the Department of Financial Institutions to adopt rules and regulations, including appropriate incentives, to banks to open branches in areas of demonstrated need.

Senate Bill No. 752 (2007-2008 Reg. Sess.) (Steinberg & Dutton): California Kids Investment Development Account (KIDS)

This two-year bill requires the state to deposit \$500 in a newly created account for every child born in California on or after January 1, 2008. The account grows on a state tax-free basis. Parents and others are permitted to contribute to the account. At age 18, the child is permitted to withdraw funds for education (including technical education or training), first time home ownership, or funding a retirement account. If funds are withdrawn in a manner not qualified, any earnings are included in the gross income of the account holder, and a 10% penalty is assessed. In addition, the account holder would have to repay the initial deposit of \$500 to the Franchise Tax Board.

Senate Bill No. 1037 (2007-2008 Reg. Sess.) (Senate Banking, Finance & Insurance Committee): Financial Institutions

(Enacted: Chapter 99.) This Department-sponsored bill adds a section to the Financial Code to define those activities that are *not* considered to be acting as a trust. It incorporates amendments to resolve confusion over the application of the fiduciary activities of national banks to state-chartered trust companies and trust departments. It also adds a section to the Financial Code that provides a blanket exemption from requiring persons to apply for a negotiating permit and order of exemption in instances where a bank is offering securities in a merger or acquisition of control situation.

Credit Unions

Assembly Bill No. 1418 (2007-2008 Reg. Sess.) (Arambula): Credit Union Advisory Committee

This two-year bill requires the Credit Union Advisory Committee of the Department of Financial Institutions to identify credit union best practices pertaining to community development, small business and micro-enterprise financing, and investment of credit union capital.

Assembly Bill No. 1518 (2007-2008 Reg. Sess.) (Assembly Banking & Finance Committee): Credit Unions

(Enacted: Chapter 148.) This bill authorizes credit union examination reports to be disclosed to internal and external auditors and to attorneys of the credit union that are retained by the subject, but only to the extent necessary for the auditors and attorneys to conform work related to issues addressed in the report. It authorizes a credit union to become a member of an organization composed of community economic development entities and business or trade organizations. The measure also changes the \$1,000 limit on credit union gifts or donations to \$25,000 and authorizes the board of directors of a credit union to establish a budget for gifts and donation.

The bill authorizes the board of directors of a credit union to appoint an executive committee to act as expressly approved by the board, and it delegates the power to approve applications for new membership to specified individuals as long as the board reviews a report of membership application at least quarterly. It further provides that a member who is withdrawing its membership in a credit union may be required to give specified notice of its intention to withdraw shares. Finally, it authorizes a credit union to issue shares and enter into obligations with nonmembers if they are a joint applicant or co-obligor with a member of the credit union.

Senate Bill No. 638 (2007-2008 Reg. Sess.) (Romero): Expansion of Services Permitted by Credit Unions

This two-year bill permits state-chartered credit unions to offer products and services, such as check cashing, money orders, wire transfers, and traveler's checks, to non-members for a fee.

Financial Privacy

Assembly Bill No. 372 (2007-2008 Reg. Sess.) (Salas): Data Security

This two-year bill makes technical and non-substantive changes to current law, which establishes data security procedures for businesses and requires businesses to notify customers should

there be a data security breach. Existing law also requires a business to offer an opt-in provision to a customer if it intends to share customer information to third parties. The author apparently intends to provide stiffer penalties for violations of the statute, and opposition resulted in this being made a two-year bill.

Assembly Bill No. 588 (2007-2008 Reg. Sess.) (De Leon): Credit Reports

This two-year bill permits a consumer to authorize a public or publicly owned utility that bills on an interval basis to release the consumer's payment history to a consumer credit reporting agency selected by the consumer. This bill expands the use of alternative payment history and potentially assists banks in determining whether to extend credit to a consumer with little or no traditional credit history.

Assembly Bill No. 703 (Ruskin): Social Security Numbers

This two-year bill prohibits a person or entity from publicly using a social security number as an identifier, except as required by state or federal law. It also requires records containing social security numbers be discarded or destroyed. It also requires that electronic files be encrypted or locked.

Assembly Bill No. 1168 (2007-2008 Reg. Sess.) (Jones): Truncation of Social Security Numbers on Public Records

(Enacted: Chapter 627.) This bill requires the truncation of social security numbers on public documents by certain governmental agencies. It provides that no person, entity, or government agency may present a document for recording or filing with the county recorder if it displays more than the last four digits of a social security number. It also requires the redaction of social security numbers from documents filed or recorded prior to August 1, 2007. In addition to these provisions, the measure also has provisions applicable to county recorders. It requires county recorders to establish a truncation program to create a public record version of each official record. The public record version is available in electronic form and is an exact copy of the official record version, except that the first five digits of any social security number are redacted from the record. These provisions apply to all documents recorded after January 1, 1980. Official records shall be made available only pursuant to subpoena or court order. The measure is funded by permitting county recorders to charge an extra dollar for recording the first page of all documents through December 31, 2017.

Assembly Bill No. 1677 (2007-2008 Reg. Sess.) (Calderon): Authentication of Internet Transactions

This two-year bill—not heard on the assembly floor—requires a business that provides banking or other financial services over the Internet to adopt reasonable policies and procedures

for verifying the legitimacy of consumer transactions, consistent with current industry best practices as proposed in the Federal Financial Institutions Examination Council Guidance Authentication in an Electronic Banking Environment. Failure to meet these guidelines could result in a civil penalty.

Senate Bill No. 30 (2007-2008 Reg. Sess.) (Simitian): Radio Frequency Identification Technology

This two-year bill requires public agencies that provide identification documents containing radio frequency identification technology to meet certain standards. It also requires those public entities and authorized third parties to protect any operational system keys and data transmitted remotely from unauthorized access or disclosure.

Senate Bill No. 388 (2007-2008 Reg. Sess.) (Corbett): Radio Frequency Identification

This two-year bill—not heard on the assembly floor—requires financial institutions to provide an extra disclosure to cardholders if the financial institution provides a credit or debit card containing a radio frequency identification tag that may be scanned for financial transactions. If the disclosures are not provided at all or do not comply with the requirements of the measure, the financial institution could be liable on a class action basis. The disclosures are required to include the type of information transferred from the card to the reader, the procedures used to protect the cardholder's personal information, and steps the cardholder may take to avoid having the card read remotely.

Senate Bill No. 596 (2007-2008 Reg. Sess.) (Harman): Anti-Sniffer Protection for Computerized Payment Systems

A “sniffer” is a program that allows unauthorized persons to monitor data transmitted over a network. This two-year bill requires any computerized payment system sold as new in California to include “anti-sniffer” protection.

Political Reform

Assembly Bill No. 78 (2007-2008 Reg. Sess.) (Torrico): Political Reform

This two-year bill requires banks to offer accounts similar to Interest on Lawyer Trust Accounts to political campaigns and committees.

Punitive Damages

Senate Bill No. 423 (2007-2008 Reg. Sess.) (Ackerman): Punitive Damages

This two-year bill would limit the amount of punitive damages available upon proof by clear and convincing evidence of fraud, oppression, or malice to three times the amount of compensatory damages.

Regulation

Assembly Bill No. 1508 (2007-2008 Reg. Sess.) (Lieu): Transmission of Money Abroad

(Enacted: Chapter 242.) This Department of Financial Institutions-sponsored bill eliminates agent authorizations and branch applications of agents and transmitters of money abroad (“TMA”) licensees. It requires that liquid assets be maintained by the TMA in an amount not less than the aggregate amount of all reported outstanding transmission money, provides for the filing of transmission of money abroad receipts with the commissioner within 10 days after their use, and requires new TMAs to obtain approval of receipts prior to their use. Finally, it enables the Department to immediately revoke or suspend a TMA when it is in the interests of the public.

Assembly Bill No. 1533 (2007-2008 Reg. Sess.) (Committee on Banking): Interest Rates on Registered Reimbursement Warrants

(Enacted: Chapter 336.) This bill amends several sections of the Government Code pertaining to the sale of registered reimbursement warrants by the state. Specifically, it permits the Pooled Money Investment Board (“Committee”) to fix a maximum rate of interest for warrants in one of two ways. First, the interest rate can be fixed according to the best bids for the warrants if they are sold at a public place, or the Committee can proscribe fixed or variable interest rates if the terms of the warrants are subject to negotiation.

Senate Bill No. 1007 (2007-2008 Reg. Sess.) (Machado): Regulation of Exchange Facilitators

This two-year bill licenses and regulates so-called exchange facilitators, i.e. those who facilitate, for a fee, an exchange of like-kind property by entering into a contract with a taxpayer for the contractual rights to sell the taxpayer’s relinquished property and to transfer a replacement property. The measure requires exchange facilitators to be licensed by the Department of Corporations. However, it exempts financial institutions from the licensing requirement. It does require financial institutions to notify the Department of Corporations of their status as exchange facilitators. The bill requires all exchange facilitators, including financial institutions, to post liability bonds or their equivalent and to maintain errors and omissions insurance coverage.

Trusts and Estates

Assembly Bill No. 341 (2007-2008 Reg. Sess.) (Spitzer): Estates & Trusts: Creditor’s Claims

(Enacted: Chapter 159.) This bill establishes, to the extent possible, a uniform regime for the treatment of creditors’ claims regardless of whether the decedent utilized a will or revocable trust

[Financial Institutions And Financial Services Legislative Update](#) as the primary estate planning instrument, while still preserving the substantive distinction between a probate proceeding and a trust administration for creditors. It does so in the following manner:

First, it defines “creditor” as a person with a claim against estate property and uses the term in place of the term “claimant.” The bill then increases from 30 to 60 days the time for a creditor to file a claim against an estate being distributed pursuant to a trust after receiving notice from the estate. This provides parity with time limits for filing claims in probate.

The measure also clarifies that a creditor’s claim cannot otherwise extend a statute of limitations and applies the process for filing late claims in probate proceedings to the late-filed claims in trust administration. It then corrects a reference for the time period given to the Franchise Tax Board (“FTB”) to file a claim against an estate in trust administration to conform to the time period allowed the FTB to file a claim against an estate in probate.

The bill also (a) requires a trustee to provide notice of the decedent’s death to the Director of Health Services if the decedent was a surviving spouse of a person who received Medi-Cal benefits; (b) provides that if property in a trust is distributed before expiration of the time for a public entity to file a claim, the public entity’s claim includes interest at a rate consistent with the rate charged in probate proceedings; and (c) requires that a decedent’s family members, who were supported in whole or in part by the decedent and who want to make a claim of exemption as a result, must use the exemption process for changed circumstances in cases where trust property is being levied by writ of attachment.

Assembly Bill No. 361 (2007-2008 Reg. Sess.) (Ma): Decedents’ Estates: Creditor Claims

(Enacted: Chapter 105.) This bill requires the general personal representative or attorney of a decedent’s estate to give notice of the administration of the estate to the Franchise Tax Board not later than 90 days after the date letters of administration are first issued. The bill applies to all decedents’ estates for which letters of administration are first issued on or after July 1, 2008.

Unclaimed Property

Senate Bill No. 86 (2007-2008 Reg. Sess.) (Committee on Budget and Fiscal Review): Unclaimed Property

(Enacted: Chapter 179.) This bill was an emergency response to an injunction entered by a federal court against the State Controller’s Office (SCO) regarding its Unclaimed Property Program. The injunction precluded the SCO from accepting any property from holders and from selling, converting, or disposing of any property in its possession. The federal court required legisla-

tive or regulatory action to be taken to improve the Unclaimed Property Program on both a pre-escheat and post-escheat basis. The bill creates a bifurcated escheat process. Reports continue to exist under existing law requirements. However, the bill creates a delayed period before property is sent to the SCO (no sooner than seven months and no later than seven months and 15 days from the October 31st deadline). This urgency statute took effect immediately upon signing by the governor.

Senate Bill No. 919 (2007-2008 Reg. Sess.) (Machado): Unclaimed Property

This two-year bill was also a response to an injunction entered by a federal court against the State Controller's Office regarding its Unclaimed Property Program. As stated in connection with Senate Bill No. 86 (2007-2008 Reg. Sess.), above, the injunction precluded the SCO from accepting any property from holders and from selling, converting, or disposing of any property in its possession. The federal court required legislative or regulatory action to be taken to improve the Unclaimed Property Program on both a pre-escheat and post-escheat basis. This measure concerns the SCO's management of unclaimed property. It also amends the civil penalty provisions set forth in Code of Civil Procedure section 1576 for persons who fail to report and/or deliver escheated property. It does so in two important respects. First, it deletes the requirement of a "willful" violation, meaning a civil penalty can be assessed against a person who fails to report or deliver escheated property on something other than a willful basis. It also increases the amount of a civil penalty by creating a threshold penalty, which is not to exceed \$25,000 plus 25% of the value of the property in question. Current law caps the amount of a penalty at \$50,000 and does not include a component for the value of the property. ■

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1024, 1029-30, *withdrawn*, 469 F.3d 1257 (9th Cir. 2006).) The Ninth Circuit granted an *en banc* hearing.

The court issued its lengthy, and contested, opinion in December 2006. (*Nagrampa, supra*, 469 F.3d at p. 1257 (en banc).) As an initial matter, the court addressed the jurisdictional issue of whether Ms. Nagrampa was challenging the validity of the franchise agreement as a whole or just challenging the validity of the arbitration provision itself. Relying on the Supreme Court's holdings in *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440 and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967) 388 U.S. 395, as well as a number of cases decided by other circuits, the court concluded that the former issue is to be resolved by the arbitrator while the latter issue is a "threshold" matter for the court

to resolve. Although Ms. Nagrampa claimed that the arbitration provision was procedurally unconscionable because the franchise agreement was adhesive, the court concluded that this was not actually an attack upon the agreement as a whole. Accordingly, the court found that it was required to determine whether the arbitration provision was unconscionable. (*Nagrampa, supra*, 469 F.3d at pp. 1268-77.)

The court first addressed the issue of whether the arbitration provision was procedurally unconscionable. Although the court noted that the evidence was "minimal," it nonetheless found that the arbitration provision was procedurally unconscionable because Ms. Nagrampa was "in a substantially weaker bargaining position than MailCoups" and was presented with the agreement on a take-it-or-leave-it basis. (*Id.* at pp. 1281-84.) The court rejected MailCoups' arguments that there were reasonable market alternatives and, thus, Ms. Nagrampa could have pursued other franchises or business opportunities, and that she was sophisticated and, therefore, there was no surprise. The court addressed each of MailCoups' arguments individually and found that each considered alone did not defeat Ms. Nagrampa's claim of procedural unconscionability. (*Id.*) In doing so, however, the court ignored the "totality" of the evidence supporting MailCoups' arguments that the provision was not procedurally unconscionable.

The court then turned to the substantive prong of the test. Ms. Nagrampa argued that the arbitration provision was substantively unconscionable because it: (i) was "one-sided;" (ii) included unconscionable fee-shifting and arbitable forum provisions; and (iii) did not "counteract the 'repeat player effect' thus failing to ensure an impartial arbitrator." The court rejected Ms. Nagrampa's arguments regarding the fee-splitting provision, noting that it was not substantively unconscionable *per se* under California law but could be unenforceable to the extent it impeded Ms. Nagrampa's ability to pursue "statutory" claims. The court also disposed of Ms. Nagrampa's repeat player effect theory on the grounds that it was unsupported by any evidence actually "demonstrating impartiality." (*Nagrampa, supra*, 469 F.3d at p. 1285.)

The court concluded, however, that the arbitration provision was one-sided because MailCoups was granted the right to seek provisional relief regarding its intellectual property in a judicial forum, while all of Ms. Nagrampa's claims had to be resolved in arbitration. (*Nagrampa, supra*, 469 F.3d at pp. 1285-87.) In reaching this decision, the court found that the specific language in MailCoups' agreement essentially gave it the right to obtain provisional relief with respect to any claim so long as it involved MailCoups service marks or proprietary information. The court