

JULY 2016

ESSAY QUESTIONS 1, 2 AND 3



California Bar Examination

Answer all 3 questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

Paul, a citizen of Mexico, was attending college in San Diego on a student visa. He drove to San Francisco to attend a music festival. While there, he bought and ate a bag of snacks from Valerie, a resident of San Francisco. The snacks had been manufactured in Germany by Meyer Corp., a German company with its sole place of business in Germany. The snacks contained a toxic substance and sickened Paul, who incurred medical expenses in the amount of \$50,000.

Paul filed an action pro se against Valerie and Meyer Corp. in the Superior Court of California in San Diego. In his complaint, he alleged that Valerie and Meyer Corp. should have known the snacks were contaminated and demanded \$50,000 in compensatory damages.

Paul drove to San Francisco where he personally handed Valerie a summons and copy of the complaint. He sent a summons and copy of the complaint to Meyer Corp. by ordinary mail to the company in Germany.

1. Did Paul validly serve the summons on:
 - a. Valerie? Discuss.
 - b. Meyer Corp.? Discuss.
2. Does the Superior Court of California in San Diego have personal jurisdiction over:
 - a. Valerie? Discuss.
 - b. Meyer Corp.? Discuss.
3. Does venue properly lie in the Superior Court of California in San Diego? Discuss.
4. Is Paul's action properly removable to federal court? Discuss.

QUESTION 2

Al owned a farm.

In 1990, Al deeded an easement for a road along the north side of the farm to his neighbor Ben. Ben immediately graded and paved a road on the easement, but did not record the deed at that time. Al and Ben both used the road on a daily basis. The easement decreased the fair market value of the farm by \$5,000.

In 2009, Al deeded the farm to his daughter Carol and she recorded the deed.

In 2011, Ben recorded his deed to the easement.

In 2012, Carol executed a written contract to sell the farm to Polly for \$100,000. The contract stated in part: "Seller shall covenant against encumbrances with no exceptions." During an inspection of the farm, Polly had observed Ben traveling on the road along the north side of the farm, but said nothing.

In 2013, Carol deeded an easement for water lines along the south side of the farm to Water Co., the local municipal water company. The water lines provided water service to local properties, including the farm. Water Co. then recorded the deed. The easement increased the fair market value of the farm by \$10,000.

In 2014, after long delay, Carol executed and delivered to Polly a warranty deed for the farm and Polly paid Carol \$100,000. The deed contains a covenant against all encumbrances except for the easement to Water Co. and no other title covenants. Polly recorded the deed.

In 2015, Polly blocked Ben's use of the road and objected to Water Co.'s construction of the water lines.

Ben has commenced an action against Polly seeking declaratory relief that the farm is burdened by his easement. Polly in turn has commenced an action against Carol seeking damages for breach of contract and breach of the covenant under the warranty deed.

1. What is the likely outcome of Ben's action? Discuss.
2. What is the likely outcome of Polly's:
 - a. Claim of breach of contract? Discuss.
 - and
 - b. Claim of breach of the covenant under the warranty deed? Discuss.

QUESTION 3

Dirt, a large excavating company, recently replaced all of its gas-powered equipment with more efficient diesel-powered equipment. It placed the old gas-powered equipment in storage until it could sell it.

On May 1, Builder, a general contractor for a large office development, and Dirt signed a valid written contract under which Dirt agreed to perform all the site preparation work for a fee of \$1,500,000. Dirt estimated its total cost for the job at \$1,300,000. The contract states: "Dirt hereby agrees to commence site work on or before June 1 and to complete all site work on or before September 1." Because no other work could begin until completion of the site preparation, Builder was anxious to avoid delays. To ensure that Dirt would give the job top priority, the contract also states: "Dirt agrees to have all of its equipment available as needed to perform this contract and shall refrain from undertaking all other jobs for the duration of the contract."

On May 29, an unusual high pressure weather system settled over the state.

As a result, on May 30, in an effort to reduce air pollution, the state banned use of all diesel-powered equipment.

On June 2, Dirt told Builder about the ban and stated that it had no way of knowing when it would be lifted. Builder told Dirt to switch to its gas-powered equipment. Dirt replied that using its old gas-powered equipment would add \$500,000 to its costs and asked Builder to pay the increased expense. Builder refused.

On June 4, seeing that no site work had begun, Builder emailed Dirt stating that their contract was "terminated."

On June 8, Builder hired another excavating company, which performed the work for \$1,800,000.

Dirt has sued Builder for terminating the contract. Builder has countersued Dirt for the \$300,000 difference between the original contract price and what it paid the new contractor.

1. Is Dirt likely to prevail in its suit? Discuss.
2. Is Builder likely to prevail in its countersuit? Discuss.



July 2016

**California
Bar
Examination**

**Performance Test A
INSTRUCTIONS AND FILE**

IN RE POTENTIAL WILDOMAR PROPERTY LITIGATION

Instructions

FILE

Memorandum to Applicant from Charles Drumm

Letter from Standish & Lobert LLP

Submission to Riverdale Regional Park District Board of Directors

Minutes of Riverdale Regional Park District Board of Directors

Riverdale Regional Park District Board of Directors Resolution No. 1995-165

Agreement for Purchase of Real Property

Grant Deed

Riverdale Regional Park District Board of Directors Resolution No. 2016-210

Dixon *Daily News* Article

IN RE POTENTIAL WILDOMAR PROPERTY LITIGATION

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no parameters on how to apportion your time, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

OFFICE OF THE COUNTY COUNSEL

COUNTY OF RIVERDALE

15000 CIVIC CENTER WAY

DIXON, COLUMBIA

TO: Applicant

FROM: Charles Drumm, Assistant County Counsel

DATE: July 26, 2016

RE: Potential Wildomar Property Litigation

We represent the Riverdale Regional Park District in this matter and our client contact is Pamela Walls, the District's General Manager.

The District has received a letter from counsel for Geraldine Santa Maria threatening litigation over the District's intended conveyance by sale to the City of Dixon of a parcel of land referred to as the "Wildomar Property."

It is the District's position that, under the Columbia Regional Park District Act ("Act"), real property is "actually dedicated" by a district, and thereby becomes subject to a requirement that it may validly be conveyed only with voter consent, only if the district's board of directors adopts a resolution dedicating the property. The District's Board of Directors never adopted a resolution dedicating the Wildomar Property, and accordingly never sought or obtained voter consent for its conveyance.

Santa Maria's position, in contrast, is that, under the Act, real property is "actually dedicated" simply by virtue of its acquisition.

Santa Maria is an environmental activist who has brought numerous lawsuits against small local public entities whom she believes have violated the law.

General Manager Walls is determined that Santa Maria will not prevail against the District.

Please draft a letter for my signature in response to Santa Maria's counsel's letter. In the letter, be sure to show:

(1) that the District's position that it may validly convey the Wildomar Property without satisfying the Act's voter-consent requirement is sound under the facts and the law;

and

(2) that Santa Maria's contrary position is unsound.

Begin the letter with a statement of the District's position and end the letter with a statement that the District will go forward with the conveyance notwithstanding the threatened litigation.

In drafting the letter, you should address all of the legal issues, preparing headings to separate your discussion of the District's position and Santa Maria's contrary position into distinct parts. You should use the facts persuasively in setting out the legal analysis, but you should not prepare a separate statement of facts. Finally, you should emphasize the law and facts supportive of the District's position, but you should also address and deal with any law or facts supportive of Santa Maria's position.

STANDISH & LOBERT LLP

ATTORNEYS AT LAW

1616 OAK STREET

DIXON, COLUMBIA

July 22, 2016

Pamela Walls

General Manager

Riverdale Regional Park District

1000 Independence Avenue

Dixon, Columbia

Re: Intended Conveyance of Wildomar Property

Dear Ms. Walls:

We have been retained by Geraldine Santa Maria, who is a resident of the Riverdale Regional Park District ("District"), to challenge the District's intended conveyance of the Wildomar Property ("Property") by sale to the City of Dixon ("City").

Under Section 40 of the Columbia Regional Park District Act ("Act"), a regional park district "may not validly convey any interest in any real property ... without the consent of a majority of the voters of the district voting at a special election called by the board and held for that purpose" if that interest has been "actually

dedicated and used for park purposes.” Under the common law, a real property interest may be “dedicated” by an offer by a private owner, and an acceptance by a public entity, having the character of a gift as well as a contract. See *Baldwin v. City of Lake Alston* (Colum. Supreme Ct. 1999). But under Section 65 of the Act, a real property interest is “dedicated” by a regional park district simply by acquisition: “The legal title to all property acquired by the district under the provisions of this Act ... is *dedicated* ... for ... the uses and purposes set forth in this Act” (Italics added).

It is indisputable that the Property has been “actually dedicated and used” so as to subject the District to the voter-consent requirement of Section 40, mandating that it must obtain the “consent of a majority of the voters of the district voting at a special election” before it may “validly convey” the Property.

As for “actual use,” the Property, although not developed into a regional park, has nevertheless functioned as such.

As for “actual dedication,” the matter is similar. To begin with, the Property has been “dedicated” under the common law. Separately and independently, the Property has been “dedicated” under Section 65.

Further, it is undisputed that the District has not satisfied the voter-consent requirement of Section 40, having failed even to seek the “consent of a majority of the voters of the district voting at a special election” for the conveyance of the Property.

As a consequence, because it is indisputable that the Property has been “actually dedicated” so as to subject the District to the voter-consent requirement of Section 40, and because it is likewise undisputed that the District has not satisfied that requirement, the District may not “validly convey” the Property.

We are aware that it is the District’s position that, under Section 40, a real property interest is “actually dedicated” by a district so as to trigger the voter-consent requirement only by the “adoption of a resolution by [the district’s] board of directors” dedicating the interest, and not simply by virtue of acquiring the interest under Section 65. The District’s position, however, is specious.

It is plain that “actually dedicated” in Section 40 and “dedicated” in Section 65 are identical. Indeed, unless “dedicated” in Section 65 were read as identical to “actually dedicated” in Section 40, Section 65 would be rendered meaningless.

Moreover, although the adoption of a resolution by a district’s board of directors is an *alternative* method of “actual dedication” for an “easement” under Section 40 *in addition to* simple “acquisition” under Section 65, it is *not* a method of “actual dedication,” additional or otherwise, for “any other” real property interest.

On August 1, 2016, we will file an appropriate action, on Ms. Santa Maria’s behalf, to prohibit the District from going forward with the intended conveyance of the Property to the City unless and until it satisfies the voter-consent requirement of Section 40.

As you are doubtless aware, over the years, Ms. Santa Maria has found it necessary to file several actions against various local public entities to compel them to comply with the law. As you are also doubtless aware, she has prevailed in all of those actions, either by settlement or by judgment. She is confident that she will prevail in any action that the District may force her to file.

Accordingly, should the District wish to respond to this letter in an attempt to render Ms. Santa Maria's coming action unnecessary—and in an effort to avoid incurring attorney's fees and related expenses that the District can ill afford in the current economic climate—we request that the District respond expeditiously. We wish to make Ms. Santa Maria's position clear: The only response by the District that will obviate her coming action is its formal and binding commitment not to proceed with the intended conveyance of the Property without voter consent.

Very truly yours,

Michael Standish

Michael Standish

**SUBMISSION TO THE BOARD OF DIRECTORS
RIVERDALE REGIONAL PARK DISTRICT**

From: Patricia Smith, General Manager

Date: June 5, 1995

Re: Purchase of Real Property, Wildomar

I recommend that the Board of Directors adopt a motion to the following effect:

1. Accept and execute the Agreement for Purchase of Real Property for 161.27 acres of real property in Wildomar, Columbia, identified as APN 362-180-004 ("Property"), from Lucille Potts;
2. Direct the Administrative Office to transfer \$980,000 for the purchase of the Property;
3. Approve the expenditure of \$950,000 for the acquisition of the Property and \$30,000 for escrow fees and related costs;
4. Authorize the District to accept as a gift the difference between the appraised value of the Property, \$1,370,000, and the purchase price of the Property, \$950,000, amounting to \$420,000;
5. Authorize the District to administer all necessary and appropriate documents to complete the purchase of the Property; and
6. Direct the Clerk of the Board to take all ministerial actions necessary and appropriate to complete the purchase of the Property.

**MINUTES OF THE BOARD OF DIRECTORS
RIVERDALE REGIONAL PARK DISTRICT**

On motion of Director Cisneros, seconded by Director Mullen and duly carried by unanimous vote, IT WAS ORDERED that the motion recommended by General Manager Smith, dated June 5, 1995, entitled "Purchase of Real Property, Wildomar," is adopted as recommended.

Ayes: Buster, Taglieri, Cisneros, Wilson, and Mullen

Noes: None

Abstain: None

Absent: None

Date: June 12, 1995

Gerald A. Maloney

Clerk of the Board

By *Laura Soto*

Deputy

**THE BOARD OF DIRECTORS
RIVERDALE REGIONAL PARK DISTRICT
RESOLUTION NO. 1995-165
AUTHORIZING PURCHASE OF REAL PROPERTY**

BE IT RESOLVED by the Board of Directors of the Riverdale Regional Park District, State of Columbia, in regular session assembled on July 18, 1995, that the purchase of 161.27 acres of real property in Wildomar, Columbia, identified as APN 362-180-004, from Lucille Potts for the sum of \$950,000, is approved, and the General Manager is authorized and directed to take the necessary and appropriate action to complete the purchase, including obtaining funds to pay the purchase price and the costs and expenses of the acquisition.

ROLL CALL:

Ayes: Buster, Taglieri, Cisneros, Wilson, and Mullen

Noes: None

Abstain: None

Absent: None

The foregoing is certified to be a true copy of a resolution duly adopted by said Board of Directors on the date therein set forth.

Gerald A. Maloney
Clerk of the Board

By Laura Soto
Deputy

AGREEMENT FOR PURCHASE OF REAL PROPERTY

Agreement dated this 19th day of July 1995, by and between Lucille Potts, hereinafter "Seller," and the Riverdale Regional Park District, hereinafter "Buyer."

1. The Property.

Seller and Buyer agree that Seller will sell and Buyer will buy 161.27 acres of real property in Wildomar, Columbia, identified as APN 362-180-004 ("Property").

2. Purchase Price.

The total purchase price to be paid by Buyer for the Property will be \$950,000.

3. Gift.

Buyer accepts as a gift from Seller the difference between the appraised value of the Property, \$1,370,000, and the purchase price of the Property, \$950,000, amounting to \$420,000.

4. Closing.

Closing will be held be on or about July 20, 1995, at a time and place designated by Buyer. Buyer shall choose the escrow, title and/or closing agent. Seller agrees to convey title by a deed.

___*Lucille Potts*_____

Lucille Potts

___*Patricia Smith*_____

Riverdale Regional Park District

GRANT DEED

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, Lucille Potts GRANTS to the Riverdale Regional Park District, State of Columbia, the 161.27 acres of real property in Wildomar, Columbia, identified as APN 362-180-004, for park purposes in perpetuity.

Dated: July 20, 1995

By _____*Lucille Potts*_____

Lucille Potts

**THE BOARD OF DIRECTORS
RIVERDALE REGIONAL PARK DISTRICT
RESOLUTION NO. 2016-210
NOTICE OF INTENT TO CONVEY REAL PROPERTY BY SALE**

WHEREAS the Riverdale Regional Park District, State of Columbia, acquired 161.27 acres of real property in Wildomar, Columbia, identified as APN 362-180-004 ("Property"), in 1995 with the hope of developing it into a regional park;

WHEREAS the Riverdale Regional Park District has been unsuccessful in obtaining the funds necessary to develop the Property into a regional park;

WHEREAS the Property has given rise to health and safety problems as the public has continued to frequent it without parking and restroom and other facilities;

BE IT RESOLVED by the Board of Directors of the Riverdale Regional Park District, in regular session assembled on July 14, 2016, and NOTICE IS HEREBY GIVEN pursuant to Section 63 of the Columbia Regional Park District Act, that this Board intends to convey the Property by sale, on or after 9:00 a.m. on August 15, 2016, to the City of Dixon for the sum of \$2,100,000.

BE IT FURTHER RESOLVED by the Board of Directors of the Riverdale Regional Park District, that this Board may validly convey the Property to the City of Dixon without the consent of a majority of the voters of this District voting at a special election called by this Board and held for that purpose because this Board has not "actually dedicated and used" the Property, within the meaning of Section 40 of the Columbia Regional Park District Act, because it never adopted a resolution dedicating the Property and never developed the Property.

ROLL CALL:

Ayes: Kim, Brady, Horstman, Chen, and Peters

Noes: None

Abstain: None

Absent: None

The foregoing is certified to be a true copy of a resolution duly adopted by said Board of Directors on the date therein set forth.

Myra R. Taylor

Clerk of the Board

By _____*Robert Gupta*_____
Deputy

DIXON DAILY NEWS

FRIDAY, JULY 15, 2016

“Wildomar Regional Park—Now You See It, Now You Don’t”

Since 1995, the sign posted at the end of Clayton Road promised, “The Future Site of Wildomar Regional Park.” Now, it appears, the promise will not be kept.

Last night, the Board of Directors of the Riverdale Regional Park District voted to issue a notice of its intent to sell the 160+-acre parcel at the end of Clayton Road to the City of Dixon. The district had purchased the property in 1995 for less than \$1 million, had never developed it, and is now selling it for more than twice as much.

District General Manager Pamela Walls and Dixon Mayor David Stokovich both expressed satisfaction that the deal, which had been negotiated in fits and starts over more than a year, was finally nearing completion. Stokovich stated that Dixon had long been seeking a location for a new community college campus to accommodate its growing population. “The property,” he said, “is beautiful and, what’s more, it’s ideally suited to our needs.” For her part, Walls stated that the district decided that the time had come to sell it. “We bought it in 1995,” she said, “hoping to develop it into a regional park with athletic facilities for games, trails for running and hiking and, of course, open space simply for enjoying. It turned out, however, the funds for development never materialized. The sale will give us funds we can use for our other regional parks.” Stokovich added, “It’s a win for everyone.”

But everyone does not agree. The property has long been popular with hikers, hunters, and birdwatchers because of its pristine beauty. Its former owner, Lucille Potts, never developed the land and never posted it to keep the public out, and neither did the district. As a result, hikers, hunters, and especially birdwatchers have continuously flocked to it. Geraldine Santa Maria, a local environmental activist who lives adjacent to the property, spoke out strongly against the sale at last night's meeting of the district's board of directors. She argued unsuccessfully that the board could not go ahead with the sale because it had not obtained the consent of the district's voters and was "just trying to make a quick buck." Questioned as she left the meeting, she stated that she would consider litigation unless the board were to change its mind.

District General Manager Walls did not discount the possibility of a lawsuit, but expressed confidence that the district would prevail if it were to find itself in court. "It's true we haven't obtained voter consent for the sale," she said, "but that's because we don't have to."

As for the "broken promise" of Wildomar Regional Park, Walls just shook her head. She denied that the board "was in it for the money." She went on: "Although the community college campus won't be a regional park, it'll have athletic facilities, trails, and open space, the kind of things we had hoped for. It's not perfect, but it's close enough." Whether the district's residents—including Santa Maria—agree, only time will tell.



July 2016

**California
Bar
Examination**

**Performance Test A
LIBRARY**

IN RE POTENTIAL WILDOMAR PROPERTY LITIGATION

LIBRARY

Osuna on Real Property, Dedication (5th Ed. 1995).....

**Selected Provisions of the
Columbia Regional Park District Act**.....

Teller Irrigation District v. Collins
Columbia Supreme Court (1988)

Baldwin v. City of Lake Alston
Columbia Supreme Court (1999)

OSUNA ON REAL PROPERTY

(5th Ed. 1995)

Dedication

Section 1. Introduction

Dedication Defined. Generally speaking, dedication is the application of private real property to a public use by the acts of its owner and a public entity. Any real property interest may be dedicated.

Kinds of Dedication. The two kinds of dedication are statutory dedication and common law dedication.

Statutory Dedication. Dedication is generally governed by statute. Statutory dedication is accomplished through compliance with the requirements specified by the statute in question, such as by the recordation of a map in substantial compliance with the Subdivision Map Act.

Common Law Dedication. Dedication in the absence of a statute is available under the common law. Normally, common law dedication does not involve any payment by the public entity to the private property owner and hence partakes of the character of a gift. Common law dedication entails, in substance, an offer by a private owner, and an acceptance by a public entity, of real property subject to a specified restricted public use in perpetuity. Common law dedication may be either express or implied. Accordingly, common law dedication may be found whenever there is a basis for finding an offer, either express or implied, by the property owner to give the property for perpetual public use, and an acceptance, either express or implied, by the public entity to receive the property for the same use. Although common law dedication therefore takes on the character of a contract, it does not lose any character it may have as a gift.

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SELECTED PROVISIONS OF THE COLUMBIA REGIONAL PARK DISTRICT ACT

Section 1. Purpose

The purpose of the Act is to foster the creation and preservation of regional parks for the enjoyment of the public.

Section 2. District Defined

“District,” as used in this Act, means any regional park district formed pursuant to this Act.

* * *

Section 27. Board of Directors

The government of each district shall be vested in a board of five directors. Directors shall be residents of the district.

The district may act only through its board of directors or through such officers, employees, or agents appointed by the board, subject to the authority the board confers upon any such officers, employees, or agents.

* * *

Section 40. Powers; Acquisition; Conveyance of Property; Consent of Voters

A district may take by grant, appropriation, purchase, gift, devise, condemnation,

or lease, and may hold, use, enjoy, and lease or dispose of real and personal property of every kind, and rights in real and personal property, within or without the district, necessary to the full exercise of its powers.

An easement or any other interest in real property may be actually dedicated for park purposes by the adoption of a resolution by the board of directors, and any interest so dedicated may be conveyed only as provided in this section.

A district may not validly convey any interest in any real property actually dedicated and used for park purposes without the consent of a majority of the voters of the district voting at a special election called by the board and held for that purpose.

* * *

Section 43. General Powers

A district may make contracts, employ labor, and do all acts necessary for the full exercise of its powers.

* * *

Section 47. Board of Directors; Mode of Action; Resolutions, Ordinances and Motions; Form and Requisites

The board of directors shall act only by ordinance, resolution, or a motion duly recorded in the minutes of the meeting. The ayes and noes shall be taken upon the passage of all ordinances or resolutions, and entered upon the journal of the proceedings of the board.

* * *

Section 63. Sale or Lease of Surplus Property; Disposition of Proceeds

If, in the opinion of the board, any real or personal property owned by the district, or any interest therein, becomes unnecessary for the purposes of the district, the board may, subject to the provisions of Section 40, sell such property, or interest therein. The proceeds of any sale of such property, or interest therein, shall be used for and applied to such purposes of the district as the board may, by resolution, determine.

* * *

Section 65. Property; Title to Vest in District

The legal title to all property acquired by the district under the provisions of this Act shall immediately and by operation of law vest in the district, and shall be held by the district in trust for, and is dedicated and set apart for, the uses and purposes set forth in this Act. The board may hold, use, acquire, manage, occupy, and possess such property, as provided in this Act.

* * *

TELLER IRRIGATION DISTRICT v. COLLINS

Columbia Supreme Court (1988)

Phyllis Mosier recovered a judgment against the Teller Irrigation District (District), a public entity created pursuant to the Columbia Irrigation District Act (Act), for damages the District caused by its negligence in flooding her land. The District, however, refused to satisfy the judgment. Mosier caused execution to issue on the judgment, directing Charles Collins, the Sheriff of Teller County, to levy upon and sell so much of the District's real and/or personal property as was necessary to satisfy the judgment.

The District then brought this action to restrain Sheriff Collins from levying upon and selling any of its property. The trial court refused to restrain Sheriff Collins and rendered judgment against the District. The District appealed.

It cannot be doubted that it was the duty of the District to satisfy Mosier's judgment. But the question here is whether the performance of that duty may be compelled by an execution, levy, and sale of the District's property.

All of the property owned by the District, both real and personal, was acquired by virtue of Section 13 of the Act, which declares that the "legal title to all property acquired under the provisions of this Act shall immediately and by operation of law vest in the district, and shall be held by the district in trust for and is hereby dedicated and set apart to the uses and purposes set forth in this Act"—that is, for irrigation.

Under Section 13 of the Act, the “legal title” to *all* of the District’s property is held “in trust” by the District and “is dedicated and set apart to the uses and purposes” specified, namely, irrigation.

Section 13 of the Act is similar to analogous provisions in dozens of analogous statutes creating districts—e.g., Section 34 of the Columbia Water Reclamation District Act and Section 65 of the Columbia Regional Park District Act. Such provisions have been held to create a public trust over all of the district’s property, with the district itself as the owner of the legal title, the residents of the district as the owners of the beneficial title, and the district’s board of directors as the trustees. *Merchants’ Bank v. Erickson Irrigation Dist.* (Colum. Ct. App. 1976). Public trusts have long been exempted from execution, levy, and sale, not because districts and their boards are considered incapable of wrongdoing, but solely to protect the districts’ residents. *Sannerville v. Itsell* (Colum. Supreme Ct. 1880).

Therefore, Section 13 of the Act creates a public trust over all of the District’s property, and the public trust so created is exempt from execution, levy, and sale.

We are not unaware that the District has come to court seeking equity in spite of its failure to do equity. But however blameworthy the District may be in refusing to satisfy Mosier’s judgment, it cannot be estopped from insisting that property that is in public trust and, as such, is exempted from execution, levy, and sale, must remain so for the protection of its residents.

Reversed.

BALDWIN v. CITY OF LAKE ALSTON

Columbia Supreme Court (1999)

The trial court entered a judgment granting a petition for writ of mandate by Skip Baldwin, a resident of the City of Lake Alston, in which Baldwin challenged the City's adoption of an ordinance providing for the sale of a seven-acre parcel of real property—the so-called Woodside Lot—to Human Habitat, a non-profit corporation, for use in constructing affordable housing. The judgment determined that, by an ordinance adopted years earlier, the City had dedicated the Woodside Lot to “public recreation purposes,” and had thereby deprived itself of the power to put the lot to any other use. The City appealed. We reverse.

In 1976, the South Plains Railroad Company proposed donation of the Woodside Lot to the City “for public recreation purposes,” “conditioned upon the City assuming the responsibility for removing rails and restoring streets where railroad tracks have previously been retired.” The City's Department of Recreation and Parks issued a report to the City Council, in which it noted that the lot had an estimated value of \$600,000 and that the total cost of removing tracks and restoring streets would total about \$200,000; it stated that acquisition of the lot would be profitable to the City; and it recommended that if the City Council were inclined to accept the lot, it should refer the matter to the City Attorney to work out the terms of an agreement with South Plains because “there may be legal problems relating to removal of the tracks and restoration of the streets”

In 1977, the City Council adopted Ordinance No. 1977-149. The ordinance provided that the City may “accept donation” of the Woodside Lot “upon payment by the South Plains Railroad Company of \$200,000.” South Plains sent a letter to the City Council, enclosing a conditional donation deed for the lot “for public

recreation purposes.” The letter stated that “Delivery of this instrument is conditioned upon receipt of a Certified Copy of the Resolution adopted by the City Council of the City of Lake Alston, accepting the Donation Deed.” The letter concluded that it was with pleasure that South Plains was able to “donate” the lot “for public recreation purposes.”

Between 1977 and 1979, the City apparently did nothing to respond to South Plains’ letter.

In 1980, in the course of routine review of files, the City Attorney discovered the unresponded-to South Plains letter. The City Attorney went on to discover that South Plains had not made the \$200,000 payment required by Ordinance No. 1977-149. The City Attorney sent a letter to South Plains inquiring about the \$200,000 payment. This time, it was South Plains that failed to respond.

In 1983, after the City had levied an assessment of about \$20,000 on the Woodside Lot and sought payment from South Plains, South Plains delivered an unconditional donation deed and the City excused payment of the assessment. The City did not request, and South Plains did not make, the \$200,000 payment required by Ordinance No. 1977-149.

Between 1983 and 1995, the City used the Woodside Lot for public recreation purposes.

In 1996, following a series of City Council hearings on the need for affordable housing in the general vicinity of the Woodside Lot, the City sold the lot to Human

Habitat to construct such housing.

Immediately thereafter, Baldwin filed a petition for writ of mandate challenging the sale of the Woodside Lot.

The sole issue on appeal is whether the City had dedicated the Woodside Lot to “public recreation purposes,” and had thereby deprived itself of the power to put the lot to any other use. That issue depends on whether the lot can be deemed to have been dedicated under the common law by force of Ordinance No. 1977-149.

“Common law dedication entails ... an offer by a private owner, and an acceptance by a public entity, of real property subject to a specified restricted public use in perpetuity”; it “may be either express or implied”; and it may have the character of a “gift” as well as a “contract.” *Osuna on Real Property*, Dedication, Section 1 (5th Ed. 1995). Therefore, unless the private owner’s offer is accepted by the public entity, there is no dedication of the property and hence no restriction on its use.

Cities are required to enact ordinances to enable the making of contracts for the acquisition and disposition of real property. *American-Hawaiian Steamship Co. v. Home Sav. and Loan Assn.* (Colum. Ct. App. 1974).

The rules for the construction of statutes apply equally to ordinances and other municipal measures. *Terminal Plaza Corp. v. City of St. Francis* (Colum. Ct. App. 1986). Under these rules, courts should read the provision in question

according to its plain language. *Ibid.* In addition, courts should *not* read the provision in such a way as to render any part surplusage. *Ibid.* And courts should read a provision authorizing particular action by particular means as *discretionary* for the *action* but *mandatory* for the *means*. *Ibid.*

The City of Lake Alston City Charter provides that the “City Council may make any contract for the acquisition and/or disposition of any real property or any interest in real property, as it may deem necessary and proper, by enacting an ordinance.” City of Lake Alston Munic. Charter, Section 73. Under the provision quoted, the City Council may choose to make any real property contract it wishes, but must make it by ordinance.

After review, we conclude that the Woodside Lot cannot be deemed to have been dedicated under the common law by force of Ordinance No. 1977-149. Although South Plains may have *offered* the lot under a perpetual restriction, the City did not *accept* it under that restriction. The ordinance states in plain language, which can hardly be treated as surplusage, that the City may “accept donation” of the Woodside Lot for public recreation purposes—but only “upon payment by the South Plains Railroad Company of \$200,000.” The ordinance’s language can reasonably be interpreted only as an acceptance of the “donation” conditioned on South Plains’ payment of \$200,000 payment. That condition, however, was never satisfied.

The trial court accordingly erred when it concluded that the City had dedicated the Woodside Lot to “public recreation purposes.”

Reversed.

JULY 2016

ESSAY QUESTIONS 4, 5 AND 6



California Bar Examination

Answer all 3 questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 4

State X has a valid contract with public school teachers providing a fixed salary schedule. State X recently passed legislation to address its failing public schools. Now, when a school falls below established standards, each teacher at that school has 10% of his or her salary withheld each pay period for a maximum of two years. The withholding ends, and the money is returned with interest, upon the completion of a ten-hour certification program or termination of employment.

City High is a public school in State X where salary withholding has begun.

Bob has been a teacher at City High for the past three years. Paige is a highly-regarded probationary teacher at City High. A probationary teacher may be terminated for any reason upon written notice within the first year of employment.

Bob and Paige have been outspoken opponents of the State X law and its application to City High, appearing at various community and school board meetings throughout the school year.

Shortly before the end of Paige's first year of employment, City High served her with written notice terminating employment, and refunded the money withheld with interest.

Bob and Paige have sued State X, the Attorney General of State X, and City High in federal court seeking damages and injunctive relief. State X and the Attorney General have moved to dismiss the suit based on standing and the Eleventh Amendment.

1. Did City High's termination of Paige without a hearing violate the procedural due process guaranty of the Fourteenth Amendment to the United States Constitution? Discuss.
2. How should the court rule on the State and the Attorney General's motion? Discuss.

QUESTION 5

In 2003, while planning their wedding, Harry and Wanda, a California couple, spent weeks discussing how they could each own and control their respective salaries. Sometime before their wedding, they prepared a document in which they stated, "After we marry, Wanda's salary is her property and Harry's salary is his property." At the same time, they prepared a separate document in which they stated, "We agree we do not need legal advice." They signed and dated each document. They subsequently married.

In 2004, Harry used his salary to buy a condominium and took title in his name alone. Harry and Wanda moved into the condominium.

In 2005, Harry and Wanda opened a joint savings account at their local bank. Each year thereafter, they each deposited \$5,000 from their salaries into the account.

In 2015, Harry discovered that Wanda used money from their joint account to buy rental property and take title in her name alone.

In 2016, Harry and Wanda permanently separated and Wanda moved out of the condominium. Wanda thereafter required emergency surgery for a medical condition, resulting in a hospital bill of \$50,000. Harry later filed a petition for dissolution of marriage.

What are Harry's and Wanda's rights and liabilities, if any, regarding:

1. The condominium? Discuss.
2. The joint savings account? Discuss.
3. The rental property? Discuss.
4. The hospital bill? Discuss.

Answer according to California law.

QUESTION 6

Len, an attorney, is a member of Equal Ownership Inc. (Equal), a nonprofit organization that seeks to help low-income families purchase homes throughout the state. Len does not represent Equal as an attorney. Equal helped to get a statute enacted that requires that all new residential developments contain a certain percentage of low-income housing.

ABC Development Corp. (ABC) is a corporation that wants to challenge the statute. Pat, the President of ABC, asked Len to represent ABC and Len agreed. Len does not personally agree with ABC's objective, but moves forward with the representation nonetheless by filing a complaint challenging the statute. Len personally thinks the statute is a good law and secretly hopes that ABC is not successful in its lawsuit.

During the course of Len's representation of ABC, Pat informs Len that he (Pat) has filed false reports with the State Environmental Protection Agency regarding the disposal of non-hazardous waste, and is planning to file another false report next month. Filing a false report makes a person and his or her employer liable for a substantial civil fine. Len does not take any action with respect to the impending filing of the false report.

What ethical violations, if any, has Len committed? Discuss.

Answer according to ABA and California authorities.



July 2016

**California
Bar
Examination**

**Performance Test B
INSTRUCTIONS AND FILE**

WONG v. PAVLIK FOODS, INC.

Instructions

FILE

Interoffice Memorandum to Applicant from Jeff Su

Transcript of Interview of Arnold Wong

Interoffice Memorandum to File from Jeff Su

WONG v. PAVLIK FOODS, INC.

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no parameters on how to apportion your time, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

LAW OFFICES OF JEFFREY SU
4130 Hellman Court, Suite 104
Riverdale, Columbia

INTEROFFICE MEMORANDUM

TO: Applicant
FROM: Jeff Su
DATE: July 28, 2016
RE: Wong v. Pavlik Foods, Inc.

Our client, Arnold Wong, was until recently the head bookkeeper and payroll administrator at Pavlik Foods, Inc., a large meat processor here in Riverdale. He was fired last week and has asked us to represent him in a suit against Pavlik to recover unpaid wages. I know we can sue to recover his unpaid wages and associated civil penalties for him individually.

In the course of the interview, Mr. Wong revealed information suggesting that Pavlik has for a number of years engaged in widespread wage and hour violations with respect to its meat processing employees.

According to Mr. Wong, Pavlik averages about 400 wage earners a year working in those occupations. It strikes me that we may have an opportunity to file a significant class or representative action on behalf of all those employees, and Mr. Wong is willing to be the class representative. There are two possibilities: (1) a class action under Columbia Business Code section 17200, called the Unfair Competition Law ("UCL"), and (2) a representative action under Columbia Labor Code section 2699, known as the Private Attorney General Act ("PAGA"). Each

possibility presents some legal impediments that I need your help in working through.

Please draft a memorandum explaining the following:

1. Will the facts available to us support certification of a class of current and former employees for recovery of back wages under the UCL?
2. What argument can be made that Wong can bring a representative claim under PAGA on behalf of current and former employees for *back wages* without having to satisfy class certification requirements?
3. As to what monetary relief we can obtain, the following questions remain:
 - (a) Under the UCL, who may recover civil penalties?
 - (b) Under PAGA, are there any prerequisites we need to satisfy before we can file suit?
 - (c) Under PAGA, do the employees get to keep all the civil penalties we might recover?

In drafting your memorandum, do not include a statement of facts, but be sure to use the facts in reaching and supporting your conclusions.

TRANSCRIPT OF INTERVIEW OF ARNOLD WONG

July 25, 2016

JEFF SU: Hello, Mr. Wong – Arnold. I'm glad you could come in to see me today. You can give me the details of what we talked about briefly in our telephone conversation a few days ago. So let's start at the beginning.

ARNOLD WONG: Well, Bruce Pavlik, the boss at Pavlik Foods, fired me last week because I kept questioning him about some of the payroll practices at the company.

SU: How long had you worked for Pavlik and what was your job there?

WONG: I worked there since about November 1996 – something like that. My job was always head bookkeeper, and then in the last few years I was also the payroll administrator. You know, calculating the weekly payrolls, making up the payroll summaries, and giving them to Mr. Pavlik so he could pay the employees – actually, he'd give the payroll to the different department heads, who would actually hand out the pay to the employees.

SU: Tell me a little about Pavlik's business.

WONG: It's a meat processing plant. They get the carcasses from local suppliers – beef, lamb, and pork – and butcher it for the market. They ship all over the states – some frozen, some fresh.

SU: Okay. You told me on the phone that you wanted me to help you get some unpaid wages that Pavlik owes you, right?

WONG: Yeah. I was supposed to be paid fifteen dollars an hour. In the last year or so, work got so busy that I worked straight through my one-hour lunch period, eating lunch at my desk. When I would turn in my timesheet, Mr. Pavlik would

deduct that hour and not pay me for it, telling me that I was supposed to take a lunch period and it wasn't his fault if I didn't.

SU: Is that it? Just non-payment for your lunch period?

WONG: No. I almost always worked nine or ten hours a day and most of the time, except around the year-end holidays, I worked six days a week – Sunday was my only day off. Sometimes he would give me a few dollars extra for, as he'd say, my "devotion" to work. But he never paid me for overtime like the law requires – at time and one-half.

SU: Were those the things that, when you questioned him about, he fired you for?

WONG: That was part of it. But I was also always being questioned by the plant workers about why they were being shorted. I mean, in the last couple of years I pointed out a number of things about payroll that I thought were wrong.

SU: Like what sorts of things?

WONG: Usually, he'd just tell me to do as I was told and not to make an issue of it – it was "none of my business," as he put it. But the things I questioned him about affected not just me, but almost all of the hourly plant workers. When he fired me, he told me that he was getting sick and tired of me questioning him all the time and, since I couldn't mind my own business, he told me to clean out my desk and leave. He didn't even pay me what he owed me for the last week's work.

SU: Well, first of all, how many hourly plant workers does Pavlik have?

WONG: It varies, but over a period of a year, I'd say about 350 to 400. It's hard to keep track because there's lots of turnover. My guess is that a lot of them are in the country illegally.

SU: Do you think the fact that they're illegals has anything to do with the payroll practices?

WONG: Absolutely. Mr. Pavlik can get away with a lot of stuff because the employees are afraid to complain. Anyone who does complain gets fired – that's why there's so much turnover.

SU: Okay. Tell me the kinds of payroll practices that you think were wrong at Pavlik.

WONG: There were so many things. He'd make little side deals with individual employees, so it's hard to say whether any one thing affected more than just a few of the hourly workers – maybe the carcass handlers would get one deal, the skimmers another deal, the deboners yet another deal, and so forth for all the different groups in the plant. Each week Mr. Pavlik would hand me some handwritten notes telling me how to figure the pay for some of them and different notes for others.

SU: Well, were there some things that generally affected all the hourly workers?

WONG: Yeah. One thing that was fairly common was that he wouldn't give them pay stubs that explained their pay, and they were always coming to me to try to get me to explain why they were paid one amount rather than what they thought they were entitled to.

SU: What else?

WONG: I can't say there was any one thing that applied to all the workers – as I said, Mr. Pavlik was always changing the deal for different groups. For example, the minimum wage is \$8.00 per hour. I know there were some workers, mostly the four- or five-person cleanup crew, who were paid less than the minimum wage. The most valuable workers were the butchers – they usually got paid overtime if they worked overtime, but nobody else did – and almost everyone worked overtime during different periods. I used to get calls from guys that Pavlik had fired wanting to know when they were going to get their final pay. He always made them wait at least a few days, and I know a lot of them never did get their final pay. Sometimes, Mr. Pavlik would pay them in cash about half of what he really owed them and

make them sign a release before he'd give them the money. Time off for lunch was pretty much a hit-and-miss proposition – again, some workers got time off, others didn't. All kinds of stuff like that happened all the time.

SU: Did Pavlik keep time and pay records?

WONG: Yeah, some, but not accurate ones. I know he had a set of books he'd show government officials, but they didn't reflect the real facts. I've kept records of my own and a lot of the handwritten notes he used to hand me about how to figure the pay for different employees. I mean, it varied a lot. I know a lot of the workers also kept records of the hours they worked – they'd show them to me when they complained about not getting paid for all their hours.

SU: Did any government agency ever take action against Pavlik?

WONG: I know a few employees complained to the Labor Board, but I don't think any action was ever taken. The processing plant is way out in Gaston County, so I don't think it was on the Labor Board's priority list.

SU: Well, we'll certainly go after Pavlik for the back wages and penalties he owes you. But would you be willing to be the lead plaintiff to go after Pavlik on behalf of all the other past and present employees?

WONG: What do you mean? What's a lead plaintiff?

SU: There's something called a class action, where one person – a lead plaintiff – can sue as a representative of all the other employees affected by the same types of labor law violations. It would be a major case and would take a lot of work to put together, but I think we could do it if you'd be willing to stand up for all the rest of the workers.

WONG: Yeah, I guess so. That's what started this whole thing because I was speaking up for them. I'd like to be able to get them their money too if there's any way to do it.

SU: All right. Give me a few days to do some research, and I'll get back to you. Later, we'll have to talk about the burdens on you if you become the lead plaintiff.

WONG: Sounds good.

LAW OFFICES OF JEFFREY SU
4130 Hellman Court, Suite 104
Riverdale, Columbia

INTEROFFICE MEMORANDUM

TO: File
FROM: Jeff Su
DATE: July 25, 2016
RE: Wong v. Pavlik Foods, Inc. – Possible Violations of Columbia
Labor Code

Based on preliminary information I obtained in my interview with Arnold Wong, I did some quick research to track the possible violations of the Columbia Labor Code at Pavlik Foods and the possible penalties that go along with the violations. Here they are:

- Section 201: Failure to pay all wages due upon discharge from employment
- Section 203: Additional wages up to 30 day's pay (waiting time penalty) for violation of Section 201
- Section 206.5: Unlawful to require release from employee as a condition to receiving wages due
- Section 226: Requirement for pay stubs showing hours, rate of pay, and wage calculation

Section 226.7: One hour's extra pay due for each missed meal period

Section 510: Requirement to pay time and one-half for overtime after 8 hours a day or 40 hours a week

Section 512: Requirement for meal period of specified length during work shift

Section 1194: Failure to pay minimum wage; liquidated damages up to twice the amount found due

Sections 210, 225.5, 558: These sections impose penalties to be assessed against the employer for violations of the foregoing sections; the penalties are between \$50 and \$100 per violation, per employee for the first violation, and between \$100 and \$200 per violation, per employee for subsequent violations.

These are all penalties for Labor Code violations. They can be recovered by the Labor Commissioner, who is the head of the Division of Labor Standards, which, in turn, is a subdivision of the Labor and Workforce Development Agency of the State of Columbia. The penalties listed above, as well as penalties specifically provided for in PAGA, are all recoverable under PAGA.

In addition, the UCL provides for a civil penalty of \$2,500 per violation, but I'm not sure how that works or who can recover it.

Hard to say, at this early stage, what the aggregate back wages and penalties could be, but certainly in the millions if Wong's information pans out.



July 2016

**California
Bar
Examination**

**Performance Test B
LIBRARY**

WONG v. PAVLIK FOODS, INC.

LIBRARY

**Excerpts from the Columbia Business Code
(Unfair Competition Law)**

**Excerpt from the Columbia Code of Procedure
(Class Actions)**

Excerpt from the Columbia Labor Code.....

**Private Attorney General Act
(Columbia Labor Code).....**

**Arentz v. Angelina Dairy, Inc.
Columbia Supreme Court (2009)**

**Westlund v. Palladin Farms, Inc.
Belden County Superior Court, State of Columbia (2001)**

**Talbott v. Euphonic Synthesizers, LLC
Columbia Court of Appeal (2010)**

EXCERPTS FROM THE COLUMBIA BUSINESS CODE

(Unfair Competition Law)

Section 17200. As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice.

Section 17203. The court may make such orders or judgments as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Procedure.

Section 17204. Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county counsel or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.

Section 17206. Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation, which shall be assessed and recovered in a civil action brought in the name of the people of the State of Columbia by the Attorney General.

EXCERPT FROM THE COLUMBIA CODE OF PROCEDURE

(Class Actions)

Section 382. When the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

EXCERPT FROM THE COLUMBIA LABOR CODE

Section 558.

- (a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in this code shall be subject to a civil penalty as follows:
 - (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.
 - (2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.
 - (3) Wages recovered pursuant to this section shall be paid to the affected employee.
- (b) If upon inspection or investigation the Labor Commissioner determines that a person had paid or caused to be paid a wage for overtime work in violation of any provision of this chapter, or any provision regulating hours and days of work in this code, the Labor Commissioner may issue a citation and obtain and enforce a judgment to recover the unpaid wages.
- (c) The civil penalties provided for in this section are in addition to any other civil or criminal penalty provided by law.

PRIVATE ATTORNEY GENERAL ACT

(Columbia Labor Code)

Section 2699.

- (a) Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of the Labor Code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.
- (b) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.
- (c) For all provisions of this code except those for which a civil penalty is specifically provided, the civil penalty for a violation of these provisions is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.
- (d) An aggrieved employee may recover the civil penalty described in subdivision (c) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs. Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.

- (e) Civil penalties recovered by aggrieved employees shall be distributed as follows:
75 percent to the Labor and Workforce Development Agency for enforcement of labor laws and 25 percent to the aggrieved employees.

Section 2699.3.

- (a) A civil action by an aggrieved employee pursuant to Section 2699 alleging a violation of any applicable provision of the Labor Code shall commence only after the following requirements have been met:
 - (1) The aggrieved employee or representative shall give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.
 - (2) The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 33 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699.

ARENTZ v. ANGELINA DAIRY, INC.

Columbia Supreme Court (2009)

The sole issue in this case is whether an employee who, on behalf of himself and other employees, sues an employer under the Unfair Competition Law (Business Code Section 17200, et seq.) for Labor Code violations must satisfy class action certification requirements, but that those requirements need not be met when an employee's representative action against an employer is seeking civil penalties under the Private Attorney General Act of 2004 (Labor Code Section 2699).

Jose A. Arentz sued his former employer, Angelina Dairy. In the first cause of action in the First Amended Complaint, Plaintiff alleged violations of the Labor Code *on behalf of himself as well as other current and former employees of Defendant*. The claim is that Defendant had violated the Labor Code by failing to pay all wages due, to provide itemized wage statements, to maintain adequate payroll records, to pay all wages due upon termination, to provide rest and meal periods, to offset proper amounts for employer-provided housing, and to provide necessary tools and equipment. In this cause of action, Plaintiff sought to recover under the Private Attorney General Act all statutory penalties associated with the Labor Code violations.

The second cause of action alleged violations of the Unfair Competition Law *on behalf of himself as well as other current and former employees of Defendant* based on Defendant's failures to credit Plaintiff for all hours worked, to pay overtime wages, to pay wages when due, to pay wages due upon termination, to provide rest and meal periods, and to obtain written authorization for deducting or offsetting wages.

The trial court granted Defendant's motion to strike the second cause of action on the ground that Plaintiff failed to comply with the pleading requirements for class actions. Plaintiff petitioned the Court of Appeal for a writ of mandate. That court held that the causes of action brought in a representative capacity alleging violations of the Unfair Competition Law, but not the representative claims under the Labor Code's Private Attorney General Act of 2004, were subject to class action certification requirements. We granted Plaintiff's petition for review.

Plaintiff contends the Court of Appeal erred in holding that to bring representative claims (that is, claims on behalf of others as well as himself) under the Unfair Competition Law, he must comply with class action requirements. We disagree.

In a class action, the plaintiff, in a representative capacity, seeks recovery on behalf of other persons. A party seeking certification of a class bears the burden of establishing that there is an ascertainable class and a well-defined community of interest among the class members. If the trial court grants certification, class members are notified that any class member may opt out of the class and that the judgment will bind all members who do not opt out. A class action cannot be settled or dismissed without court approval.

The Unfair Competition Law prohibits "any unlawful, unfair or fraudulent business act or practice." It provides that a private plaintiff may bring a representative action under this law only if the plaintiff has "suffered injury in fact and has lost money or property as a result of such unfair competition" and "complies with Section 382 of the Code of Procedure, which provides that "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all." This court has interpreted Section 382 of the Code of Procedure as authorizing class actions. The Unfair Competition Law also provides that "*Any person may pursue*

representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 of the Code of Procedure.” Read together, these provisions leave no doubt that a plaintiff seeking to maintain a class action under the Unfair Competition Law must satisfy the stringent requirements for showing community of interest among the represented parties, common issues of law and fact, adequate representation of the class interests by the nominal parties, and sufficient numerosity.

We turn now to the next issue – whether class action certification requirements must also be satisfied when an aggrieved employee seeks civil penalties for himself and other employees under the Labor Code’s Private Attorney General Act of 2004 for an employer’s alleged Labor Code violations.

In September 2003, the Legislature enacted the Private Attorney General Act of 2004 (Labor Code Section 2698, et seq.). The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.

Under this legislation, an “aggrieved employee” may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations. Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency, leaving the remaining 25 percent for the “aggrieved employees.”

Before bringing a civil action for statutory penalties, an employee must comply with Labor Code Section 2699.3, requiring the employee to give written notice of the alleged Labor Code violations to both the employer and the Labor and Workforce Development Agency, and the notice must describe facts and theories supporting the violation. If the agency notifies the employee and the employer that it does not intend to investigate (as occurred here), or if the agency fails to respond within 33 days, the employee may then bring a civil action against the employer.

Here, Plaintiff's first cause of action seeks civil penalties under the Private Attorney General Act of 2004 for himself and other employees of Defendant for alleged violations of various Labor Code provisions. Defendant challenges the Court of Appeal's holding here that to bring this cause of action, Plaintiff need *not* satisfy class action certification requirements.

The court relied on these three reasons: (1) Labor Code Section 2699, subdivision (a), states that “[n]otwithstanding any other provision of law” an aggrieved employee may bring an action against the employer “on behalf of himself or herself and other current or former employees”; (2) unlike the Unfair Competition Law's Section 17203, the Private Attorney General Act of 2004 does not expressly require that representative actions comply with Code of Procedure Section 382; and (3) a private plaintiff suing under this act is essentially bringing a law enforcement action designed to protect the public.

At issue here is whether such actions *must* be brought as a class action subject to the traditional class certification requirements.

Defendant urges us to construe the Private Attorney General Act of 2004 as requiring that all actions under that act be brought as traditional class actions. We decline.

An employee plaintiff suing, as here, under the Private Attorney General Act of 2004, does so as the proxy or agent of the state's labor law enforcement agencies. The Act's declared purpose is to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves. In a lawsuit brought under the Act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies – namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency. The employee plaintiff may bring the action only after giving written notice to both the employer and the Labor and Workforce Development Agency and 75 percent of any civil penalties recovered must be distributed to the Labor and Workforce Development Agency. Because collateral estoppel applies not only against a party to the prior action in which the issue was determined, but also against those for whom the party acted as an agent or proxy, a judgment in an employee's action under the Act binds not only that employee but also the state labor law enforcement agencies.

Because an aggrieved employee's action under the Private Attorney General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. The Act authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations, and an action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties. When a government agency is authorized to bring an action on behalf of an individual or in the public interest, and a private person lacks an independent legal right to bring the action, a person who is not a party but who is represented by the agency is bound by the judgment as though the person were a party. Accordingly, with respect to the recovery of civil penalties, nonparty employees as well as the government are bound by the judgment in an action brought under the Act.

As Defendant points out, there remain situations in which nonparty aggrieved employees may profit from a judgment in an action brought under the Private Attorney General Act of 2004. This is why: Recovery of civil penalties under the act requires proof of a Labor Code violation, and for some Labor Code violations there are remedies in addition to civil penalties (for example, lost wages and work benefits, unpaid overtime compensation, one hour of additional pay for missed meal periods, etc.). Therefore, if an employee plaintiff prevails in an action under the Act for civil penalties by proving that the employer has committed a Labor Code violation, the defendant employer will be bound by the resulting judgment. Nonparty employees may then, by invoking collateral estoppel, use the judgment against the employer to obtain remedies other than civil penalties for the same Labor Code violations. If the employer had prevailed, however, the nonparty employees, because they were not given notice of the action or afforded any opportunity to be heard, would not be bound by the judgment as to remedies other than civil penalties.

The potential for nonparty aggrieved employees to benefit from a favorable judgment under the act without being bound by an adverse judgment, however, is not unique to the Private Attorney General Act of 2004. It also exists when an action seeking civil penalties for Labor Code violations is brought by a government agency rather than by an aggrieved employee suing under the Private Attorney General Act of 2004, because an action under the Act is designed to protect the public, and the potential impact on remedies other than civil penalties is ancillary to the action's primary objective.

The judgment of the Court of Appeal is affirmed.

SUPERIOR COURT IN AND FOR THE COUNTY OF BELDEN

STATE OF COLUMBIA

ABEL WESTLUND, individually and on behalf of all others similarly situated, Plaintiffs, VS. PALLADIN FARMS, INC., Defendant.	Case No. CIV-39-14430-01 <u>DECISION DENYING CLASS</u> <u>CERTIFICATION</u>
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Plaintiff, Abel Westlund, a field foreman previously employed by defendant Palladin Farms, Inc., a row crop producer and packer in Belden County, brought this action to recover unpaid wages for himself and a class of employees described as consisting of “field and packing house workers employed by Palladin Farms during the 1999 and 2000 spring harvests.” Alleging numerous violations of the Columbia Labor Code, Plaintiff bases his claim for recovery upon Columbia Business Code Section 17200, et seq.

After conducting discovery on the composition of the class, Plaintiff moved for certification of the described class and for an order allowing him to maintain the action as a class action on behalf of all current and former employees in the class. In the

relevant period – the 1999 and 2000 spring harvests – there were approximately 150 field workers and 75 packing house workers, some employed for the entirety of each of the harvests and others for varying periods of time. Defendant opposed the motion for certification on the general ground that Plaintiff has failed to show that a class action is appropriate.

The complaint alleges that Defendant employed him, the field workers, and the packing house workers in violation of various sections of the Labor Code. For purposes of this motion, the court takes the allegations as being true. Plaintiff asserts that he was the only salaried employee in the proposed class and that Defendant unlawfully withheld portions of his weekly salary purportedly to cover expenses for rental and meals furnished to him.

The claim he asserts on behalf of the field workers is that Defendant routinely short-counted the piecework chits submitted by the fieldworkers, thus depriving them of payments for varying amounts of crops picked and turned in. The claims asserted on behalf of the packing house workers are that some of them were paid less than the minimum wage and that some of them were not paid for time spent at the beginning of each shift for assembling and otherwise preparing crates for the packing process and at the end of each shift cleaning up their work areas.

Defendant, in opposition to the motion for class certification, properly points out that the alleged pay practices involve a wide range of Labor Code sections and affect different employees in different ways, such that the claims are not susceptible of resolution on a class basis, i.e., that there are insufficient questions of law and fact common to the proposed class members.

DISCUSSION

Class actions in this state are authorized under Section 382 of the Columbia Code of Procedure. Our Supreme Court has held that this code section is to be applied and interpreted in the same way as Rule 23 of the Federal Rules of Civil Procedure is applied to class actions brought in the federal courts. See, *Campbell v. Omnibus Industries, Inc.* (Colum. Supreme Ct. 1999).

Rule 23 prescribes the following basic essentials for maintenance of class actions:

- (1) Numerosity: The class is so numerous that joinder of all members is impracticable;
- (2) Commonality: There are questions of law or fact common to the class;
- (3) Typicality: The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) Adequacy of Representation: The representative parties will fairly and adequately protect the interests of the class.

The number of potential class members satisfies the numerosity requirement, but the court finds that Plaintiff has failed to establish the remaining requirements for maintenance of this action as a class action. The kinds of wage violations alleged vary from group to group within the proposed class and the factual components necessary to establish the violations are likely to vary from individual to individual. The claim of plaintiff, Westlund, is not at all typical of the types of claims he asserts on behalf of the other members of the proposed class, and, because of those differences, it is not at all clear that Plaintiff will be able to fairly and adequately represent the diverse interests of the proposed class members.

Thus, the court is unable to find that questions of fact and law *common to class members* predominates over questions of fact and law affecting only *individual members*.

For that reason, Plaintiff's motion for class certification is denied.

Date: March 30, 2001

/s/ Alfred P. Simms

Alfred P. Simms

Judge of the Superior Court

TALBOTT v. EUPHONIC SYNTHESIZERS, LLC
Columbia Court of Appeal (2010)

In 2009, plaintiff, Lance Talbott, on behalf of himself and a class of employees, sued his employer Euphonic Synthesizers, LLC for wages unlawfully withheld in violation of the Columbia Labor Code. Plaintiff alleged two causes of action: one for restitution to the class under Columbia Business Code Section 17200, the Unfair Competition Law (UCL), and the other a representative claim under Columbia Labor Code Section 2699, the Private Attorney General Act (PAGA). In each, he sought to recover unpaid wages and statutory penalties.

Plaintiff moved the trial court to allow him to conduct discovery on the class issues relating to the Section 17200 claim, i.e., the names, addresses, job classifications, and wage records of current employees and former employees during the period of the applicable statute of limitations. The court denied the motion and, in addition, ruled that the suit could not be maintained as a class action, for the reason that the wage claims on behalf of the class appeared to lack merit. The trial court also dismissed Plaintiff's PAGA claim for the recovery of unpaid wages on behalf of the class.

We believe the trial court abused its discretion in denying Plaintiff's motion for discovery on the class issues. Whether the class claims lack merit is a question of fact based on the proof that Plaintiff might be able to bring to bear once the identity and circumstances of the class members are determined. Plaintiff should at least have the opportunity to produce the evidence, at which time the question of the merits can be tested.

Plaintiff urges this court also to reverse the trial court's dismissal of his representative PAGA claim for unpaid wages.

The seminal case is *Arentz v. Angelina Dairy, Inc.* (Colum. Supreme Ct. 2009). The Court held there that a plaintiff may maintain a representative action under PAGA to recover civil penalties without having to satisfy the traditional requirements for certification of a class. In response to the defendant's assertion that to allow such a representative action without the safeguards of a class action certification has adverse due process and collateral estoppel consequences upon the unnamed class members, the Court stated:

Because an aggrieved employee's action under the Private Attorney General Act of 2004 functions as a substitute for an action brought by the government itself, a judgment in that action binds all those, including nonparty aggrieved employees, who would be bound by a judgment in an action brought by the government. The Act authorizes a representative action *only for the purpose of seeking statutory penalties for Labor Code violations*, and an action to recover civil penalties is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.

Defendant, Euphonic Synthesizers, asserted in the court below that the italicized language foreclosed any claim that Plaintiff could assert for anything other than civil penalties, i.e., unpaid wages are not penalties, so, claims Defendant, they cannot be a component of any PAGA recovery.

Plaintiff, on the other hand, cites to Labor Code Section 2699 (d), a subsection of PAGA, which states, "Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part." Claims for recovery of unpaid wages, argues Plaintiff, are "other remedies" under the Labor Code and, therefore, can

be sought “concurrently with an action taken under [PAGA].” Moreover, Plaintiff cites Labor Code Section 558, which allows the Labor Commissioner, who is the head of the Division of Labor Standards, to issue citations for recovery of *both* unpaid wages and civil penalties.

Plaintiff also argues that the Legislature’s intent in enacting PAGA was to confer upon private parties the power theretofore reserved to state labor law enforcement agencies to bring representative actions to enforce Columbia’s wage and hour laws. Thus, argues Plaintiff, the logical conclusion to be drawn from the combination of Section 2699 (d) and Section 558 is that PAGA provides private individuals, standing in the shoes of the state labor law enforcement agencies, the representative action mechanism to recover unpaid wages through private enforcement of Section 558.

We believe the trial court misapprehended this question of first impression: whether one who brings a representative suit for civil penalties under PAGA can also maintain, in the same action, claims for unpaid wages for members of the class he purports to represent.

Accordingly, we reverse and remand with instructions to the trial court to allow Plaintiff to conduct reasonable discovery on the class issues. At that time, the trial court can reconsider its dismissal of Plaintiff’s PAGA claim for recovery of unpaid wages in light of the foregoing observations.