### NINTH CIRCUIT COURT OF APPEALS

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Court</th>
<th>Division</th>
<th>Issue</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Galilea, LLC v. AGCS Marine Insurance Company</td>
<td>MT</td>
<td>Insurance Litigation</td>
<td>604</td>
<td></td>
</tr>
<tr>
<td>3123 SMB LLC v. Horn</td>
<td>C.D. CA</td>
<td>Civil Procedure</td>
<td>609</td>
<td></td>
</tr>
<tr>
<td>Wishnev v. The Northwestern Mutual Life Insurance Company</td>
<td>N.D. CA</td>
<td>616</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### SUPREME COURT OF CALIFORNIA

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Court</th>
<th>Division</th>
<th>Issue</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>McMillin Albany LLC v. Superior Court (Van Tassel)</td>
<td>C.A. 5th</td>
<td>Business Torts</td>
<td>622</td>
<td></td>
</tr>
</tbody>
</table>

### CALIFORNIA COURTS OF APPEAL

<table>
<thead>
<tr>
<th>Case Name</th>
<th>Court</th>
<th>Division</th>
<th>Issue</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duran v. U.S. Bank National Association</td>
<td>C.A. 1st</td>
<td>Class Actions</td>
<td>629</td>
<td></td>
</tr>
<tr>
<td>People v. Ovieda</td>
<td>C.A. 2nd</td>
<td>Criminal Law</td>
<td>638</td>
<td></td>
</tr>
<tr>
<td>People v. Mullins</td>
<td>C.A. 3rd</td>
<td>Criminal Law</td>
<td>644</td>
<td></td>
</tr>
<tr>
<td>People v. Arevalo</td>
<td>C.A. 4th</td>
<td>Criminal Law</td>
<td>651</td>
<td></td>
</tr>
</tbody>
</table>

---

### California Forms Books

- Business Litigation
- Employment Law
- Insurance Defense
- Medical Malpractice
- Products Liability

Download sample forms FREE at: [http://at.law.com/books](http://at.law.com/books)

---

All content in the California Daily Opinion Service is property of The Recorder and shall not be republished or photocopied without express written consent. Copyright 2018. ALM Media Properties, LLC. All rights reserved.

Before citing the California Daily Opinion Service, counsel should verify the continuing publication status of a case. Exhibits and appendices to opinions will be included whenever possible if they are reproducible and merit inclusion. While every effort is made to report accurately, minor errors may occur. To report errors, or for other inquiries, please contact: casesums@alm.com.

---

Supplement to The Recorder, San Francisco, CA
SUMMARIES

Business Torts

Right to Repair Act’s prelitigation procedures apply to claims for both economic loss and property damage (Liu, J.)

McMillin Albany LLC v. Superior Court (Van Tassel)

Cal.Sup.Ct.; January 18, 2018; S229762

The California Supreme Court affirmed a court of appeal decision. The court held that the prelitigation procedures of the Right to Repair Act apply to claims for both purely economic loss and property damage.

Carl Van Tassel and others were the owners of 37 homes constructed by McMillin Albany LLC. They sued McMillin and others for negligence and related causes of action, including violation of the building standards set forth in Civil Code §896, part of the Right to Repair Act. The homeowners alleged both economic loss and property damage. McMillin moved to stay litigation pending completion of the prelitigation process set forth in the Act. Under §910, a homeowner must give notice of the any claimed construction defects to the builder prior to filing suit, and give the builder an opportunity to repair the alleged defects. McMillin alleged that the homeowners in this case failed to provide notice prior to filing suit and it was thus entitled to a stay. The homeowners responded by dismissing their cause of action for violation of §896. They then argued they were no longer required to comply with the statutory prelitigation process because they no longer sought damages for economic loss under the Act. The trial court agreed and denied McMillin’s motion for stay.

The court of appeal granted McMillin’s petition for writ of mandate, holding that compliance with the Act is not conditioned on the pleading of a cause of action under the Act.

The California Supreme Court affirmed, holding that a stay was required pending compliance with the Act’s prelitigation procedures. At issue here was whether a common law action alleging both economic loss and property damage was subject to the Act’s prelitigation notice and cure procedures. The answer depended on the extent to which the Act was intended to alter the common law—specifically, whether it was designed only to supplement common law remedies with a statutory claim for purely economic loss, or to go further and supplant the common law with new rules governing the method of recovery in actions alleging property damage. Both the text of the Act and its legislative history indicated that the Legislature intended the broader displacement. Although the Legislature preserved common law claims for personal injury, it made the Act the virtually exclusive remedy not just for economic loss, but also for property damage arising from construction defects. The present suit for property damage was thus subject to the Act’s prelitigation procedures. Liu, J., joined by Cantil-Sakauye, C.J., and Chin, Corrigan, Cuéllar, Kruger, and Lui, sitting by assignment, JJ.

Civil Procedure

Evidence sufficed to establish diversity jurisdiction but not to eliminate possibility of jurisdictional manipulation (Nguyen, J.)

3123 SMB LLC v. Horn

9th Cir.; January 17, 2018; 16-55304

The court of appeals conditionally reversed a district court judgment of dismissal and remanded. The court held that the plaintiff presented sufficient evidence to establish diversity jurisdiction, but not to dispel the possibility of jurisdictional manipulation.

California residents Anthony and Mary Kling and various entities associated with their family, including 3123 SMB LLC, sued various parties for damage to property they owned in Santa Monica. 3123 SMB was a limited liability company registered in Missouri. Its sole member was Washington LLC, which was controlled entirely by Anthony Kling. Anthony and Mary were the only persons authorized to act on behalf of 3123 SMB; it had no officers, directors, or employees. After the real estate litigation ended, Mary incorporated Lincoln One Corporation. Lincoln One’s Missouri-based agent and corporate attorney, Alex Kanter, filed the articles of incorporation with the Missouri Secretary of State, listing his office in Clayton as Mary’s address. Once incorporated, Lincoln One acquired Washington LLC’s membership in 3123 SMB. Lincoln One’s sole business was “to provide direction to 3123 SMB.” One month following Lincoln One’s incorporation, it directed 3123 SMB to file a malpractice action against California attorney Steven Horn, who had represented the Klings and 3123 SMB in the real estate litigation.

The district court dismissed this action for lack of subject matter jurisdiction, finding that California was Lincoln One’s principal place of business, and 3123 SMB thus failed to establish diversity jurisdiction.

The court of appeals conditionally reversed, holding that 3123 SMB presented sufficient evidence to establish diversity. Anthony Kling testified that Lincoln One held its board meetings in Clayton, Missouri. The fact that Lincoln One had not yet held a board meeting did not in and of itself have jurisdictional significance if the meeting’s location had already been determined. Because 3123 SMB presented evidence that Lincoln One’s minimal activity was directed from board meetings in Missouri, that state appeared to be the corporation’s principal place of business. There was evidence, however, that 3123 SMB and Lincoln One were treated as alter egos, and that the Klings manipulated the ownership structure of the real property at the center of the lawsuit in
order to manufacture diversity. These were issues that the district court did not consider. The court accordingly conditionally reversed the district court’s jurisdictional dismissal and remanded so that it might consider in the first instance whether these entities were alter egos or there was jurisdictional manipulation that would warrant treating 3123 SMB as a California citizen. Judge Hurwitz dissented, holding that the majority erred in finding Lincoln One’s principal place of business was a state in which it had, to date, conducted no business whatsoever.

Class Actions

Survey data not reliable enough to support finding of common issues (Dondero, J.)

**Duran v. U.S. Bank National Association**

C.A. 1st; January 17, 2018; A148817

The First Appellate District affirmed a trial court order denying class certification. The court held that the trial court did not abuse its discretion in concluding that plaintiffs’ survey data was insufficiently reliable to support a finding of commonality.

Samuel Duran and Matt Fitzsimmons filed a putative class action employer U.S. Bank, N.A., alleging it had improperly classified them and other business banking officers (BBOs) as exempt employees under the outside salesperson exemption. The bank moved to deny class certification. In opposition to that motion, plaintiffs submitted the results of a 2015 survey conduct by survey expert Jon Krosnick. The results purported to show that 95.45 percent of the respondents reported spending 50 percent or less of their work time performing outside sales-related activities. The bank challenged those results with a declaration prepared by its expert, Andrew Hildreth, which criticized the 2015 survey and its methodology. Hildreth concluded the survey suffered from self-selection bias, as well as serious measurement and estimation errors. Notably, the results of the survey differed dramatically from the results of a 2008 survey of the same employees, also conducted by Krosnick, and Krosnick offered no explanation for the difference.

The trial court denied class certification, finding plaintiffs had failed to demonstrate common issues would predominate or that individual issues could be effectively managed.

The court of appeal affirmed, holding that the trial court did not abuse its discretion in ruling that the 2015 survey is unreliable for the purpose of showing that common issues would predominate at trial. The trial court noted the significant difference between the two surveys, as well as Krosnick’s failure to offer any scientific or tested explanation as to why such a dramatic difference would have been produced by surveying the same population with the same questions. On this record, the trial court reasonably concluded that the wide discrepancy between the 2015 and 2008 survey results demonstrated that the 2015 survey was unreliable, and served as tangible evidence that the survey results were tainted by bias. Substantial evidence thus supported the trial court’s finding that the survey data was unreliable as evidence of uniformity in how BBOs spent their time, and unreliable as statistical support for selecting a representative witness group to testify as to liability or restitution without causing the inquiry to devolve into a multiplicity of individual mini trials.

Criminal Law

Probation condition reasonably required probationer to obtain approval of her choice of residence (O’Leary, P.J.)

**People v. Arevalo**

C.A. 4th; January 17, 2018; G054483

The Fourth Appellate District affirmed a judgment. The court held that a probation condition was constitutionally valid that required the probationer to obtain her probation officer’s approval of her choice of residence.

A jury convicted Maria Arevalo of possessing methamphetamine for sale. The trial court suspended execution of sentence and granted three years formal probation on condition, among others, that she maintain a residence approved by her probation officer.

Arevalo challenged that condition as unconstitutionally overbroad and in violation of her right to travel and freedom of association.

The court of appeal affirmed, holding that the residence approval condition was constitutionally valid. There was nothing in the record to suggest the approval condition was designed to banish Arevalo from a particular neighborhood or stop her from living where she desired. The condition presumed that Arevalo’s probation officer would not withhold approval for irrational or capricious reasons and would also appreciate the limited housing options available to Arevalo in Orange County. The condition allowed the probation officer to supervise Arevalo’s residence, because the nature of her crime suggested a need for oversight. The probation officer could limit Arevalo’s exposure to sources of temptation for future criminality by, for example, not approving residences in close proximity to other drug dealers. And, if the probation officer disapproved of a particular residence for any arbitrary reason, Arevalo could file a petition for modification of her probation condition.
Criminal Law

Victims’ testimony established force and/or fear in ATM robberies (Nicholson, J.)

**People v. Mullins**

C.A. 3rd; January 17, 2018; C079295

The Third Appellate District affirmed judgments of conviction and sentence as corrected. The court held that the victims’ testimony established defendants’ use of force and/or fear in each of three separate ATM robberies.

Karre Mullins and Arturo Russell devised a scheme to rob ATM customers. They approached their intended victim at an ATM. One stood behind the victim. The other stood next to the victim, watching as the victim entered his PIN number. Once the victim completed his transaction, but before he was able to log out, the man next to him forced his way between the victim and the ATM. The victim, intimidated by the two men, who were both significantly younger, heavier, and taller than the victim, retreated. Because the victim had not logged out, the men were then able to use the victim’s PIN number to withdraw large amounts of cash from the victim’s account. Mullins and Russell used this scheme to rob three victims. They were tried before a jury and convicted of three counts of robbery.

They appealed, arguing the evidence was insufficient to establish the requisite element of force or fear.

The court of appeal affirmed the judgments as corrected, holding that force and/or fear was established in each of the three incidents. Victim No. 1 testified that Russell physically pushed him away from the ATM. The victim ran back to his car in fear, afraid to confront the men. This evidence established both force and fear. Victim No. 2 testified that he was afraid the two bigger men were going to assault him and take the money he had just withdrawn from the ATM. He jumped away, and when the two men moved up to the ATM he had been using, he was scared to intervene. This evidence established actions by the defendants that were reasonably calculated to produce fear, and which indeed produced fear. Finally, Victim No. 3 testified that when he completed his transaction, Russell pushed his body in front of him, pushed the victim’s hands away from the ATM, and said he was using the ATM. These facts supported a finding of both force and fear—force in pushing the victim’s hands away and intimidation meant to deter the victim from protecting his money.

Criminal Law

Protective sweep of home justified following alleged attempted suicide (Yegan, J.)

**People v. Ovieda**

C.A. 2nd; January 17, 2018; B277860

The Second Appellate District affirmed a judgment. The court held that the defendant’s Fourth Amendment rights were not violated by a protective sweep of his home after he allegedly tried to shoot himself.

A 911 caller notified police that Willie Ovieda was at home and suicidal, but had been disarmed by two friends who were with him. The caller identified herself as Ovieda’s sister. Officers surrounded the home. At their request, and accompanied by his friends, Ovieda voluntarily came outside, was frisked and promptly handcuffed. He was unarmed. He falsely denied suicidal thoughts or having guns. One of Ovieda’s friends told the officers that he had moved several guns into the garage, but did not know if there were more in the house. Two officers made a cursory search of the house to determine (1) if all weapons in the house were secure and (2) if there was anyone in the house who was hurt or needed help. The officers were concerned because Ovieda’s sister, who had made the call, was not at the scene. Inside the house, the officers found several automatic and semi-automatic weapons, as well as a laboratory for manufacturing concentrated cannabis.

After the trial court denied Ovieda’s motion to suppress the evidence seized from his home, Ovieda pleaded guilty to manufacturing concentrated cannabis and possession of an assault weapon. Ovieda appealed, challenging the trial court’s reliance on the “community caretaking” exception in denying his motion to suppress.

The court of appeal affirmed, holding that the trial court properly denied Ovieda’s motion to suppress because the officers’ entry into and search of the home had nothing to do with the gathering of evidence. When the officers arrived at the scene, one of Ovieda’s friends confirmed that Ovieda had tried to reach for a firearm and shoot himself. The friend feared that Ovieda would try to hurt himself and that there were other weapons or firearms in the house. Ovieda then lied about the firearms and his suicidal ideation. These combined circumstances created an on-going safety concern, warranting the officers’ entry into the house. The officers’ reasonable concern about the safety of both Ovieda and others took precedence over Ovieda’s Fourth Amendment rights. Justice Perren dissented, finding that, absent any indication that anyone else was in the house, the officers had no reason to conduct a “protective sweep.”
Insurance Litigation

Insurance policy and not insurance application determined contract between insureds and insurers
(Berzon, J.)

*Galilea, LLC v. AGCS Marine Insurance Company*

9th Cir.; January 16, 2018; 16-35474

The court of appeals affirmed in part and reversed in part district court orders and remanded. The court held that the terms of an insurance policy, and not the terms of the insureds’ application for coverage, embodied the contract between the parties.

Galilea, LLC submitted an application for insurance coverage for a yacht it owned. A policy issued with choice-of-law and forum selection provisions different from those in the application. The policy, unlike the application, identified federal maritime law as the choice of law applicable to the policy. It also expanded the scope of arbitration to “any and all disputes arising under this policy,” rather than “any dispute arising out of or relating to the relationship,” as stated in the application. A month after the policy issued, the yacht ran aground. When the underwriters denied Galilea’s claim, it filed suit in federal court in the District of Montana. The underwriters moved to compel arbitration.

The district court found the arbitration provision enforceable and granted the motion to compel arbitration as to two of Galilea’s claims, but denied it as to the others. The court also found that federal maritime law governed the parties’ contract. Both parties appealed.

The court of appeal affirmed in part and reversed in part, holding that the district court properly found that the policy, and not the application, embodied the contract between the parties, and thus determined both choice of law and arbitrability. The policy’s arbitration clause concerned a maritime transaction falling under the FAA. Because Montana law was inapplicable under both federal maritime law choice-of-law principles and the policy itself, it did not render the arbitration clause unenforceable. Further, the language of the arbitration clause in the policy showed a clear and unmistakable intent to resolve arbitrability questions in arbitration. Finally, under the terms of the arbitration clause, all of Galilea’s claims were subject to arbitration, and not merely the two identified by the district court. The court accordingly affirmed the district court’s order finding the policy’s arbitration clause enforceable, affirmed the district court’s order granting the underwriters’ motion to compel arbitration as to certain causes of action, reversed the district court’s order denying the underwriters’ motion to compel arbitration as to Galilea’s remaining causes of action, and remanded to the district court with instructions to grant the underwriters’ motion to compel arbitration in its entirety.
FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 604

GALILEA, LLC, Plaintiff-Appellant/Cross-Appellee,
v. AGCS MARINE INSURANCE COMPANY; LIBERTY MUTUAL INSURANCE COMPANY; TORUS NATIONAL INSURANCE COMPANY, Defendants-Appellees/Cross-Appellants.

Nos. 16-35474, 16-35475
United States Court of Appeals for the Ninth Circuit
D.C. No. 1:15-cv-00084-SPW
Appeal from the United States District Court for the District of Montana
Susan P. Watters, District Judge, Presiding
Argued and Submitted July 13, 2017
Portland, Oregon
Filed January 16, 2018
Opinion by Judge Berzon

COUNSEL
Joseph Gleason (argued), Gleason Law LLC, Atlanta, Georgia; Ross D. Tillman, Boone Karlberg P.C., Missoula, Montana; for Plaintiff-Appellant/Cross-Appellee.
Brian P. R. Eisenhower (argued) and Gerard W. White, Hill Rivkins LLP, New York, New York, for Defendants-Appellees/Cross-Appellants.

OPINION

BERZON, Circuit Judge:

“... the sea, although an agreeable, is a dangerous companion,” wrote Plato more than two millennia ago. Our case is about that danger; it concerns “a brave vessel . . . [d]ash’d all to pieces,” like the ship Prospero hexed in *The Tempest*.

William Shakespeare, *The Tempest* act 1, sc. 2.

Although the background has its drama, the primary legal issues are more mundane: Is an arbitration provision in a maritime insurance policy enforceable despite law in the forum state assertedly precluding its application? In addressing this question, we consider several questions concerning the intersection of the McCarran-Ferguson Act, 15 U.S.C. § 1012, which shields state insurance laws from federal preemption, and the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1–16, which provides for enforcement of arbitration provisions in maritime contracts. After doing so, we conclude that the arbitration clause should be given effect.

I. BACKGROUND

A. Contracting for Yacht Insurance

Montana residents Taunia and Chris Kittler are the sole members of Galilea, LLC (“Galilea”), a Nevada limited liability company. In 2014, Galilea purchased a sixty-foot yacht (“the Yacht”). This case concerns the scope of the insurance coverage Galilea bought for the Yacht.

About a year after purchasing the Yacht, the Kittlers submitted to Pantaenius America Ltd. (“Pantaenius”) an online request for an insurance quote. Pantaenius specializes in obtaining and administering yacht insurance policies, acting as an agent for insurance underwriters. Following the quote request, the Kittlers electronically exchanged several documents with Pantaenius. According to Galilea, the Kittlers spoke with a Pantaenius representative over the phone to discuss the materials needed to complete an insurance application. The Kittlers say they informed the Pantaenius representative on one call that it would be difficult to submit a hand-signed application because the Kittlers were, at the time, sailing the yacht in the Caribbean, en route from Florida to San Diego via the Panama Canal. Pantaenius nonetheless required a hand-signed application, so the Kittlers docked in Puerto Rico to locate the necessary equipment to print and scan a signed application.

The application for insurance listed three different underwriters: AGCS Marine Insurance Company, Liberty Mutual Insurance Company, and Torus National Insurance Company (collectively, “Underwriters”). The application noted that one or more of these Underwriters would “be assigned at the time of binding [insurance] coverage.”

The application also included arbitration and choice-of-law terms. The arbitration term provided, in relevant part:

Any dispute arising out of or relating to the relationship between Pantaenius America Ltd and/or our participat|ng underwriters and the insured shall be settled by arbitration administered by the American Arbitration Association [“AAA”] in accordance with its Commercial Arbitration Rules. . . . The dispute shall be submitted to one arbitrator. . . . The place of arbitration shall be New York, New York.

The application also provided that the “relationship” and the Agreement “shall be governed by the laws of New York.”

A day after Galilea submitted the signed application, Pantaenius issued an insurance binder providing preliminary coverage for up to two weeks from the date of application.

1. All three companies are appellees and cross-appellants here.
2. An insurance binder provides preliminary, temporary coverage, often reflecting the terms of a forthcoming formal insurance policy.
The binder set a coverage limit of $1,566,500, based on the “total agreed fixed value” of the Yacht; established a covered “Cruising Area” that extended south to 30.5 degrees north latitude; named the three Underwriters as the issuing insurance companies; incorporated the forthcoming policy’s terms and conditions; and attached a document with those anticipated terms.

The formal insurance policy issued a day later. Pantaenius formally signed the insurance policy on behalf of the three Underwriters. The policy provided that it would be “effective only when the insured vessel(s) are within the ‘crusing area’ specified.”

The choice-of-law and forum selection provisions in the policy’s terms and conditions were different from those in the application. Both the policy and the application called for arbitration in New York pursuant to AAA rules. But the scope of the choice-of-law provision and arbitration clause differed. The policy provided:

This insurance policy shall be governed by and construed in accordance with well established and entrenched principles and precedents of substantive United States Federal Maritime Law, but where no such established and entrenched principles and precedents exist, the policy shall be governed and construed in accordance with the substantive laws of the State of New York, without giving effect to its conflict of laws principles, and the parties hereto agree that any and all disputes arising under this policy shall be resolved exclusively by binding arbitration to take place within New York County, in the State of New York, and to be conducted pursuant to the Rules of the American Arbitration Association.

The policy thus differed from the application by (i) identifying federal maritime law and, to fill its gaps, New York law, as the choice of law applicable to the policy, and (ii) including different language concerning the scope of arbitrable disputes—“any and all disputes arising under this policy,” not “any dispute arising out of or relating to the relationship.”

B. The Parties’ Dispute and Procedural History

The Yacht ran ashore near Colón, Panama about a month after the insurance policy issued. Galilea submitted a claim for insurance coverage, but the Underwriters refused to pay it. Pantaenius explained that the Yacht had traveled south of the cruising area set forth in both the application and the policy. Galilea rejoined that the application and policy do not reflect the parties’ actual agreement, and that Pantaenius and the Underwriters misrepresented the scope of the written policy.

After Galilea requested reconsideration of the coverage denial, the Underwriters initiated arbitration proceedings in New York. Galilea submitted objections and counterclaims in the arbitration proceedings, but also filed a separate action in federal court in the District of Montana, along with a motion to stay the arbitration proceedings.

In its Montana complaint, Galilea asserted twelve causes of action, all of which substantially overlapped with its arbitration counterclaims. The Underwriters responded with a motion to dismiss for failure to state a claim and a motion to compel arbitration. Separately, in federal court in the Southern District of New York, the Underwriters filed a petition to compel arbitration.

The Montana district court issued two orders from which the parties have lodged certified interlocutory cross-appeals. See 28 U.S.C. § 1292(b). In those orders, the court held: (1) the arbitration provision in Galilea’s original insurance application was not relevant, because it was not included in the Underwriters’ demand for arbitration; (2) claims arising under the insurance policy come within admiralty jurisdiction, and under relevant choice-of-law principles, federal maritime law governs the contract; (3) the FAA applies and requires enforcing the policy’s arbitration provision; (4) questions relating to the enforceability and scope of the arbitration provision are properly determined by the court, not an arbitrator; and (5) the scope of the policy’s arbitration clause did not extend to cover ten of Galilea’s twelve claims. The district court thus granted the Underwriters’ motion to compel arbitration as to two of Galilea’s claims but denied it as to the others.

II. DISCUSSION

This case ultimately presents “gateway” arbitrability questions: whether a valid and enforceable agreement to arbitrate exists, and, if so, whether particular claims fall within the scope of the arbitration provision. See Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70 (2010). But, before we reach those questions, we must decide whether there is an agreement to which the federal law of arbitrability could apply. See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 (1967). We conclude the parties’ insurance policy is the governing contract and falls within the Federal Arbitration Act’s scope.

A. The FAA Applies to the Insurance Policy but Not the Insurance Application

The FAA cannot compel a party “to arbitrate the threshold issue of the existence of an agreement to arbitrate” unless there is an overarching agreement to do so within the FAA’s scope. Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1140–41 (9th Cir. 1991) (emphasis omitted); see also Granite Rock Co. v. Int’l Bhd. of Teamsters, 561 U.S. 287, 296–97 (2010). That is, “[a]lthough challenges to the validity of a contract with an arbitration clause are to be decided by the arbitrator, challenges to the very existence of the contract are, in general, properly directed to the court.” Kum Tat Ltd. v. Linden Ox Pasture, LLC, 845 F.3d 979, 983 (9th Cir. 2017) (internal citations omitted). Accordingly, we

“must first make a threshold finding that the document [evidencing an agreement] at least purports to be . . . a contract.” Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 476 (9th Cir. 1991).

1. The Insurance Application Is Not a Contract

As noted, Galilea submitted a signed application for insurance to the Underwriters. Among other terms, the application included choice-of-law and forum selection clauses. See p. 5, supra. The Underwriters suggest the application’s arbitration provision should govern this dispute under the FAA; Galilea maintains, to the contrary, that the application does not evidence mutual assent to a contract or to arbitration.

We agree with Galilea on this point. Under the law made applicable by the policy and application, the application was not a contract.

New York state law is made applicable under Galilea’s insurance application, and also, if no established substantive principle or precedent of federal maritime law applies, under the insurance policy’s choice-of-law provision. We have not uncovered any established federal maritime law rule on this issue, and so we proceed to the law of New York.

Under New York law, language from an application may be incorporated into an insurance policy only if the application was attached to the policy at the time of delivery. See Smith v. Pruco Life Ins. Co. of N.J., 710 F.3d 476, 479–80 (2d Cir. 2013) (per curiam) (citing N.Y. Ins. Law § 3204(a)); Cutler v. Hartford Life Ins. Co., 22 N.Y.2d 245, 250–52 (1968); Berkshire Life Ins. Co. v. Weinig, 290 N.Y. 6, 10 (1943); see also 16 Williston on Contracts § 49:41 (4th ed. 2017); 2 Couch on Insurance § 18:6 (3d ed. 2017). The insurance policy “shall contain the entire contract between the parties,” and no document may be incorporated by reference into the insurance contract unless a true copy is “endorsed upon or attached to the policy or contract when issued.” Smith, 710 F.3d at 479–80 (quoting N.Y. Ins. Law § 3204(a)(1)).

Here, it does not appear that the application was attached to the policy when issued. Instead, some of the information provided in the application was reprinted in the policy, but the forum-selection and choice-of-law provisions were not incorporated. Even if attached to the policy, the application is not named in the policy as an incorporated document. Thus, because the application was not a contractual agreement under New York law, the federal law of arbitrality cannot apply to its arbitration clause.3

2. The Insurance Policy Is a Contract Subject to the FAA

We now turn to whether the policy is subject to the FAA. Policies that insure maritime interests against maritime risks are contracts subject to admiralty jurisdiction and to federal maritime law. La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1025 (9th Cir. 2001). The insurance policy here is a maritime insurance contract and so would seem to be subject to federal maritime law.

Galilea asserts to the contrary—that under federal maritime law, the FAA does not apply to this contract, because Montana public policy overrides its arbitration provision and Montana law, preserved from federal preemption by the federal McCarran-Ferguson Act, precludes the FAA’s application. We disagree, and hold that the FAA does apply.


The Supreme Court long ago established that where an “insurance policy . . . is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction.” Wilburn Boat Co. v. Fireman’s Fund Ins. Co., 348 U.S. 310, 313 (1955). At the same time, Wilburn Boat instructed, “it does not follow . . . that every term in every maritime contract can only be controlled by some federally defined admiralty rule.” Id. Rather, held Wilburn Boat, as insurance is traditionally an area of state regulation, federal maritime law leaves room for state insurance regulation if there is no established federal maritime law rule or need for federal uniformity. Id. at 316, 321; see also id. at 323–24 (Frankfurter, J., concurring in the judgment).


Here, there is an established federal maritime law rule concerning the enforcement of arbitration provisions in insurance policies, namely, the Federal Arbitration Act. The FAA specifically applies to “maritime transaction[s].” 9 U.S.C. § 2. “Maritime transactions” include, among other types of agreements, “agreements relating to . . . repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction.” Id. § 1. The parties’ insurance policy relates both to collisions and to repairs to the Yacht, and, as Wilburn Boat holds, 348 U.S. at 313, a dispute concerning a maritime insurance policy comes within federal admiralty jurisdiction. As the parties’ dispute falls within the scope of the FAA and the FAA includes an applicable, specific federal

3. We do not consider the extent to which other representations made in the application are incorporated into the policy or may otherwise be considered when interpreting or enforcing the policy.

4. “[C]ontracts of employment of seamen” are excepted from the FAA’s coverage. 9 U.S.C. § 1.
maritime law rule, under Wilburn Boat, Montana state law
does not govern the validity of the agreement’s arbitration
provision.

b. Federal Maritime Law Is Not Precluded by
Montana Law under the McCarran-Ferguson
Act

Galilea first attempts to navigate around Wilburn Boat
with the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq.,
which precludes the application of federal statutes if (1) a
state law is “enacted . . . for the purpose of regulating the
business of insurance;” (2) the federal law does not “specifi-
cally relat[e] to the business of insurance;” and (3) the federal
statute’s application would “invalidate, impair, or supersede”
state insurance law. Humana Inc. v. Forrhythm, 525 U.S. 299,
307 (1999) (internal quotation marks omitted). Galilea points
to Montana’s Uniform Arbitration Act, which renders unen-
forceable arbitration clauses in “insurance polices or annu-
ity contracts except for those contracts between insurance
companies,” Mont. Code Ann. § 27-5-114(2)(c), and asserts
that the McCarran-Ferguson Act requires that, notwithstanding
Wilburn Boat, the Montana rule precluding arbitration of
consumer insurance disputes applies here. Galilea also cites
to non-maritime insurance cases holding arbitration agree-
ments unenforceable under state anti-arbitration laws saved
by the McCarran-Ferguson Act. See Am. Bankers Ins. Co. of Fla.
v. Inman, 436 F.3d 490, 492 (5th Cir. 2006); McKnight v.
Chicago Title Ins. Co., 358 F.3d 854, 855 (11th Cir. 2004)
(per curiam); Standard Sec. Life Ins. Co. of N.Y. v. West, 267
F.3d 821, 823–24 (8th Cir. 2001); Mut. Reinsurance Bureau
Cir. 1992).

This McCarran-Ferguson-based argument sails too far
ahead too fast. Slowing down the analysis, it becomes ap-
parent that there is no route for Montana law to apply as a
competitor to the FAA here.

Under Wilburn Boat, Galilea’s maritime insurance policy
is within federal admiralty jurisdiction and governed by ap-
plicable maritime law if such law exists. Applying an estab-
lished federal maritime law rule—such as the provision of
the FAA directly mandating the enforcement of arbitration
clauses in maritime transactions—thus does not “invalidate,
impair, or supersede any law enacted by any State for the
purpose of regulating the business of insurance.” 15 U.S.C.
§ 1012(b). Rather, given Wilburn Boat and its progeny, any
applicable maritime law rule is primary, and state law ap-
plies only if maritime law does not. Given the interstitial,
contingent nature of state law in this setting, state insurance
law is not “invalidate[d], impair[ed], or supersede[d],” id.,
by applying a maritime law rule when, as here, there is one.

Alternatively, one reaches the same conclusion if one ap-
plies established maritime choice-of-law principles to the in-
surance policy’s choice-of-law provisions. The parties here
agreed to a choice-of-law term in the insurance policy—
federal maritime law and, as needed, New York law. “[W]here
the parties specify in their contractual agreement which
law will apply, admiralty courts will generally give effect to
that choice,” Chan v. Soc’y Expeditions, Inc., 123 F.3d 1287,
1296–97 (9th Cir. 1997), absent, as relevant here, “a state
which has a materially greater interest than the chosen state . . .
and which . . . would be the state of the applicable law in the
absence of an effective choice of law,” Flores v. Am. Seafoods
Co., 335 F.3d 904, 917 (9th Cir. 2003) (quoting Restatement
(Second) of Conflict of Laws § 187(2) (1991)).

Montana does not have a materially greater interest than
federal maritime (or New York) law. There is no question that
Montana law has relatively little to do with this dispute. Gal-
ilea is a Nevada limited liability corporation, and the Insurers
have principal places of business or are incorporated under
the laws of Delaware, New Jersey, Illinois, and Massachu-
setts. Although Galilea’s members are Montana residents,
they were in Florida, Puerto Rico, and the Caribbean Sea
at the time of contracting, and the insured property appears
never to have been in Montana. Moreover, landlocked Mon-
tana has relatively weak interests in maritime insurance law,
particularly as compared to coastal states with more devel-
oped maritime law, including New York.

But, again—there is a federal maritime law rule here ap-
licable, the FAA. Under the FAA, the arbitration provision
is enforceable. The McCarran-Ferguson Act thus has no per-
tinence, as no state’s law is applicable in the first instance.

c. Federal Maritime Law Is Not Precluded by
Montana Law under the Bremen

Galilea also argues that the policy’s choice-of-law provi-
sion is unenforceable under M/S Bremen v. Zapata Off-Shore
Co. (The Bremen), 407 U.S. 1 (1972). We are not persuaded.

The Bremen held that federal maritime law makes forum
selection clauses presumptively enforceable. Id. at 13–14.
At the same time, “[u]nder the directives of the Supreme
Court in [The Bremen], we will determine a forum selection
clause is unenforceable ‘if enforcement would contravene a
strong public policy of the forum in which suit is brought,
whether declared by statute or by judicial decision.’” Doe 1 v.
AOL LLC, 552 F.3d 1077, 1083 (9th Cir. 2009) (per curiam)
(quoting The Bremen, 407 U.S. at 15) (emphasis omitted).

Galilea points to the strong public policy of Montana against
enforcement of arbitration agreements in the context of this
dispute, and argues that enforcement of the policy’s arbitra-
tion agreement would contravene the policy of the state in
which Galilea brought suit.

There are two critical problems with Galilea’s reliance on
The Bremen. First, that case did not discuss federal maritime
law rules about choice-of-law clauses, but rather about forum

Alternatively, one reaches the same conclusion if one ap-
plies established maritime choice-of-law principles to the in-
surance policy’s choice-of-law provisions. The parties here
agreed to a choice-of-law term in the insurance policy—
federal maritime law and, as needed, New York law. “[W]here
the parties specify in their contractual agreement which
law will apply, admiralty courts will generally give effect to
that choice,” Chan v. Soc’y Expeditions, Inc., 123 F.3d 1287,
1296–97 (9th Cir. 1997), absent, as relevant here, “a state
which has a materially greater interest than the chosen state . . .
and which . . . would be the state of the applicable law in the
absence of an effective choice of law,” Flores v. Am. Seafoods
Co., 335 F.3d 904, 917 (9th Cir. 2003) (quoting Restatement
(Second) of Conflict of Laws § 187(2) (1991)).

Montana does not have a materially greater interest than
federal maritime (or New York) law. There is no question that
Montana law has relatively little to do with this dispute. Gal-
ilea is a Nevada limited liability corporation, and the Insurers
have principal places of business or are incorporated under
the laws of Delaware, New Jersey, Illinois, and Massachu-
setts. Although Galilea’s members are Montana residents,
they were in Florida, Puerto Rico, and the Caribbean Sea
at the time of contracting, and the insured property appears
never to have been in Montana. Moreover, landlocked Mon-
tana has relatively weak interests in maritime insurance law,
particularly as compared to coastal states with more devel-
oped maritime law, including New York.

But, again—there is a federal maritime law rule here ap-
licable, the FAA. Under the FAA, the arbitration provision
is enforceable. The McCarran-Ferguson Act thus has no per-
tinence, as no state’s law is applicable in the first instance.

c. Federal Maritime Law Is Not Precluded by
Montana Law under the Bremen

Galilea also argues that the policy’s choice-of-law provi-
sion is unenforceable under M/S Bremen v. Zapata Off-Shore
Co. (The Bremen), 407 U.S. 1 (1972). We are not persuaded.

The Bremen held that federal maritime law makes forum
selection clauses presumptively enforceable. Id. at 13–14.
At the same time, “[u]nder the directives of the Supreme
Court in [The Bremen], we will determine a forum selection
clause is unenforceable ‘if enforcement would contravene a
strong public policy of the forum in which suit is brought,
whether declared by statute or by judicial decision.’” Doe 1 v.
AOL LLC, 552 F.3d 1077, 1083 (9th Cir. 2009) (per curiam)
(quoting The Bremen, 407 U.S. at 15) (emphasis omitted).

Galilea points to the strong public policy of Montana against
enforcement of arbitration agreements in the context of this
dispute, and argues that enforcement of the policy’s arbitra-
tion agreement would contravene the policy of the state in
which Galilea brought suit.

There are two critical problems with Galilea’s reliance on
The Bremen. First, that case did not discuss federal maritime
law rules about choice-of-law clauses, but rather about forum
contrast, Galilea and the Underwriters agreed to a kind of forum selection provision—arbitration—and also to a separate choice-of-law provision—federal maritime law, and where that law has gaps, New York law. And as we have already established, here there is no gap in federal maritime law to fill with law from any state, Montana included, as the FAA supplies the governing arbitration law for maritime transactions.

Second, and more foundationally, The Bremen considered whether the public policy of the forum where suit was brought—there, federal public policy as supplied by federal maritime law—outweighed the application of the law of other countries. *Id.* at 17–18. In other words, under the rule of The Bremen and its progeny, courts consider the application of the laws of otherwise equally situated fora in light of the “concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985). But here we encounter an unequal, hierarchical relationship between federal maritime law and state law; again, “[s]tate law governs disputes arising under marine insurance contracts only ‘in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice.’” *Kiernan v. Zurich Cos.*, 150 F.3d 1120, 1121 (9th Cir. 1998) (citations omitted).

It does not make sense to apply the federal maritime choice-of-forum rule of The Bremen to invalidate another established federal maritime rule specifically addressing the appropriate forum—here, arbitration—because of a conflict with a forum state’s public policy. Within federal admiralty jurisdiction, conflicting state policy cannot override squarely applicable federal maritime law. Applying The Bremen in the way Galilea requests would distort the basic, gap-filling principles underlying federal maritime law’s limited recognition of state insurance law. “[S]ince the effect of the application of [state] law here would be to invalidate the contract, this case can hardly be analogized to cases . . . where state law had the effect of supplementing the remedies available in admiralty for the vindication of maritime rights.” *Kossick v. United Fruit Co.*, 365 U.S. 731, 741–42 (1961) (citations omitted). We thus conclude that Galilea’s reliance on Montana law under The Bremen is misplaced.

For the foregoing reasons, Montana’s law simply does not apply to the dispute here. So it cannot act, through The Bremen or any other avenue, to trump the FAA as an established federal maritime law rule.

**B. The Parties Have Delegated Arbitrability Issues to an Arbitrator**

We conclude by addressing whether arbitrability issues have been delegated to an arbitrator under the parties’ agreement. Because the parties here are sophisticated, and because they incorporated AAA rules into their arbitration agreement, they have clearly and unmistakably indicated their intent to submit arbitrability questions to an arbitrator.

Under the FAA, “the usual presumption that exists in favor of the arbitrability of merits-based disputes is replaced by a presumption against the arbitrability of arbitrability.” *Cape Flattery Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 920 (9th Cir. 2011) (citing *First Options of Chi.*, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)); see also *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206–07 (2014) (summarizing the presumptions that guide “‘threshold’ questions about arbitration”). Because the question of who should decide arbitrability issues “is rather arcane,” ambiguity on this question cuts in favor of deciding the parties did not delegate these questions to an arbitrator. *First Options*, 514 U.S. at 945 (citation omitted). Presuming otherwise “might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.” *Id.* (citation omitted). Accordingly, the court maintains jurisdiction over these gateway arbitrability questions unless there is “‘clear and unmistakable’ evidence that the parties intended to delegate the arbitrability question to an arbitrator.” *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015).

In *Brennan*, we decided that, at least in a contract between sophisticated parties, the “incorporation of the AAA rules [into an arbitration agreement] constitutes clear and unmistakable evidence that parties agreed to arbitrate arbitrability.” *Id.* That is because the American Arbitration Association’s rules provide that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.” American Arbitration Association Commercial Arbitration Rule 7; accord *American Arbitration Association Consumer Arbitration Rule 14*.7

Here, the policy’s arbitration provision states, in relevant part, that “the parties hereto agree that any and all disputes arising under this policy shall be resolved exclusively by binding arbitration . . . conducted pursuant to the Rules of the American Arbitration Association.” This policy language is comparable to that in the provision in *Brennan*. See 796 F.3d at 1128 (quoting agreement that relevant disputes “‘be settled by binding arbitration in accordance with the Rules of the American Arbitration Association’”).

---

5. In the context of international arbitration, the Supreme Court has noted, “An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause.” *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974); see also *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 837 (9th Cir. 2010).

6. More generally, applying The Bremen in the manner Galilea requests—which could invalidate FAA-covered arbitration clauses, insurance-related or not, inconsistent with a state’s public policy against arbitration—would not be compatible with the contemporary law of domestic arbitration, which ordinarily disallows giving force to state law rules that “single[] out arbitration agreements for disfavored treatment.” *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1425 (2017).

7. Galilea contends that it is unclear which set of American Arbitration Association rules apply here. But the same result obtains as to arbitrability under either potentially applicable set of rules.
As in *Brennan* itself, we need not decide whether the *Brennan* rule applies when one or more party is unsophisticated. Both parties here are sophisticated with respect to contracting for insurance policies. The Underwriters are, obviously, sophisticated parties; they underwrite maritime insurance policies. But so are Galilea and the Kittlers. Although they are Montana residents, Taunia and Chris Kittler formed a limited liability company under Nevada law to own and maintain a yacht worth more than a million dollars. In addition, Chris Kittler owns and operates a financial services company, also incorporated under Nevada law. In light of Galilea’s and the Underwriters’ sophistication, the agreement to arbitrate according to AAA rules is sufficient to show clear and unmistakable intent to resolve arbitrability questions in arbitration, rather than federal court. The district court therefore erred by declining to send those questions to arbitration and instead construing the scope of the parties’ arbitration agreement itself.

III. CONCLUSION

The Underwriters’ argument that the insurance application supplies an enforceable arbitration agreement fails. The parties’ insurance *policy’s* arbitration clause concerns a maritime transaction falling under the FAA, and Montana law is inapplicable under both federal maritime law choice-of-law principles and the policy itself, so it does not render the arbitration clause unenforceable. We further agree with the Underwriters that the arbitration agreement shows a clear and unmistakable intent to resolve arbitrability questions in arbitration. We thus affirm the district court’s order finding the policy’s arbitration clause enforceable, affirm the district court’s order granting the Underwriters’ motion to compel arbitration as to certain causes of action, reverse the district court’s order denying the Underwriters’ motion to compel arbitration as to Galilea’s remaining causes of action, and remand to the district court with instructions to grant the Underwriters’ motion to compel arbitration in its entirety.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.
suit was filed, and its only act during those few weeks was to incorporate. Determining Lincoln One’s principal place of business is an existentialist exercise, yet one on which its entitlement to litigate in federal court depends.

We conclude, based on the slim record before us, that what little business Lincoln One conducted was done in Missouri—its state of incorporation—making both Lincoln One and its wholly-owned subsidiary, plaintiff 3123 SMB LLC, putative citizens of that state alone. Because defendant Steven Horn is a California citizen, there appears to be complete diversity between the parties.

There is evidence, however, that 3123 SMB and Lincoln One were treated as alter egos, and that Lincoln One’s owners manipulated the ownership structure of the real property at the center of this lawsuit in order to manufacture diversity—issues that the district court didn’t consider. We therefore conditionally reverse the district court’s jurisdictional dismissal and remand so that it may consider in the first instance whether these entities were alter egos or there was jurisdictional manipulation that would warrant treating 3123 SMB as a California citizen.

I.

This lawsuit, which involves a claim of legal malpractice, is part of a larger dispute regarding real property indirectly controlled by Anthony Kling and his mother, Mary Kling. The property is a building located at 3115–3125 Santa Monica Boulevard in Santa Monica, California.

In 2008, the Klings and various entities associated with their family sued several defendants in Los Angeles County Superior Court, claiming that a construction project next to the Santa Monica property caused subsidence damage due to inadequate methods of construction. See Kling v. Gabai Constr., No. B235367, 2012 WL 5458924, at *1 (Cal. Ct. App. Nov. 9, 2012) (unpublished). The Kling parties, which eventually included 3123 SMB, subsequently hired Horn to represent them. Horn is a resident of California.

The attorney-client relationship soured when the state court lawsuit was dismissed. According to 3123 SMB’s amended complaint in the instant case, Horn proffered 27 exhibits for a “long cause binder” that allegedly “were incomplete, inadequate, and did not allow the case to be properly prepared for trial.” 3123 SMB terminated Horn in October 2013. Its new counsel “attempted to augment and repair” the exhibit list that Horn had prepared. The state court refused to allow it and, finding the exhibit list inadequate, dismissed the case for failure to be brought to trial within five years. See Cal. Civ. Proc. Code § 583.310.

In July 2011, before Horn’s representation in the state court litigation ended, 3123 SMB was organized and registered as a limited liability company with the Missouri Secretary of State. At the time, its sole member was another limited liability company, Washington LLC, which in turn was controlled entirely by Anthony Kling. 3123 SMB gained ownership of the Santa Monica property and the litigation rights in a 2012 transfer. It became a party to the state court litigation in May 2013. See Kling v. Hassid, No. B261391, 2016 WL 538238, at *1 n.1 (Cal. Ct. App. Feb. 10, 2016) (unpublished).

3123 SMB’s sole activity is to manage the Santa Monica property. Because the building is uninhabitable, 3123 SMB has little business to transact other than litigation related to the property damage. Its listed place of business is the Clayton, Missouri office of its litigation attorney, David Knieriem. Anthony and Mary Kling are the only persons authorized to act on behalf of 3123 SMB. It has no officers, directors, or employees.

The Klings reside in California but claim to have longstanding connections to Missouri. Mary Kling is from St. Louis, and the Klings still have family there. Anthony Kling goes to St. Louis “all the time”—usually a couple of times each year, but it “[d]epends on how the Cardinals are doing.” He has operated “multiple” unnamed businesses in Clayton, Missouri, where he has unspecified real and intellectual property interests. He “regularly interact[s] with businesses [and] government entities, in . . . Missouri.” However, Anthony Kling has lived in Los Angeles his entire life other than to attend school in New York, and Mary Kling has resided in Los Angeles since at least the late 1990s.

In September 2014, nearly a year after Horn’s representation ended, Mary Kling incorporated Lincoln One. The corporation’s Missouri-based agent and corporate attorney, Alex Kanter, filed the articles of incorporation with the Missouri Secretary of State, listing his office in Clayton as Mary Kling’s address. Lincoln One acquired the single membership in 3123 SMB from Washington LLC. The following month, 3123 SMB filed this suit against Horn for legal malpractice.

Mary Kling is Lincoln One’s president and secretary. Initially, she was the sole board member. Subsequently, Anthony Kling joined the board. He owns 75% of the corporation’s shares, and Mary Kling owns the rest.

According to Anthony Kling, Lincoln One’s board meetings take place annually in Clayton, although none had been held at the time of the lawsuit. Subsequently, Lincoln One held a board meeting in October 2015. Anthony Kling attended in person, and Mary Kling attended telephonically.

1. Anthony Kling denied that 3123 SMB was named after the Santa Monica property, testifying at his deposition that it was “just a made up name.”

2. Although the record does not disclose when this occurred, 3123 SMB alleges in parallel state court litigation that it was on or about March 14, 2011. Complaint at 4, 3123 SMB LLC v. Horn, No. BC682318 (L.A. Cty. Super. Ct. filed Nov. 3, 2017).


4. In Missouri, as in many other jurisdictions, a corporation’s existence begins when its articles of incorporation are filed with the secretary of state. See Mo. Rev. Stat. § 351.075; Model Bus. Corp. Act § 2.03 (Am. Bar. Ass’n 2016).
due to health issues. Lincoln One’s corporate records are kept in Missouri at its attorneys’ office.

Lincoln One’s sole business, which it conducts at board meetings, “is to provide direction to 3123 SMB, LLC.” Currently, this direction is to prosecute the lawsuits concerning the damage to the Santa Monica property. Lincoln One does not conduct business anywhere else.

At the time of this lawsuit, Lincoln One had no “fundamental daily real estate business operations.” It did not directly own or manage any real estate. Its fundamental business operation was to hold a meeting each year in Clayton to approve the following year’s directors and officers and any modification to the bylaws or issuance of common stock.

The district court dismissed this action for lack of subject matter jurisdiction, concluding that California was Lincoln One’s principal place of business under Hertz.

II.

Our jurisdiction arises under 28 U.S.C. § 1291. We review the district court’s factual findings for clear error. Co-Efficient Energy Sys. v. CSL Indus., Inc., 812 F.2d 556, 557 (9th Cir. 1987) (citing Bruce v. United States, 759 F.2d 755, 758 (9th Cir. 1985)). “The ultimate legal conclusion that the underlying facts are insufficient to establish diversity jurisdiction is subject to de novo review.” Id.

III.

A.

For purposes of diversity jurisdiction, a limited liability company “is a citizen of every state of which its owners/members are citizens.” Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006). Therefore, Lincoln One’s citizenship determines whether Horn and 3123 SMB are diverse. If Lincoln One’s principal place of business is in California, then both sides of this dispute are citizens of the same state and the district court correctly dismissed the matter.

Under the “nerve center” test, a corporation’s principal place of business “should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination . . . and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).” Hertz, 559 U.S. at 93. A holding company, however, is not “normal.” It engages in little activity, so there is little to direct, control, or coordinate. Its purpose—holding interest in other companies, see 6A William Meade Fletcher, Cyclopedia of the Law of Corporations § 2821 (2017)—is passive.

Only one circuit has grappled with Hertz’s application to a holding company. In Johnson v. SmithKline Beecham Corp., the Third Circuit considered a corporation with “quite limited” activities, “consist[ing] primarily of owning its interest in [a limited liability company], holding intra-company accounts, issuing and receiving dividends, and paying taxes.” 724 F.3d 337, 342, 353 (3d Cir. 2013). The three-member board of directors held quarterly and special board meetings in Wilmington, Delaware, the holding company’s state of incorporation, with some members appearing telephonically. Id. at 342. The board alone was authorized to manage the company’s activities, id. at 343, although there was a dispute “about the extent of the actual decision-making that occurred at the meetings,” id. at 342. Other than the board meetings, the company’s presence in Wilmington was “minimal.” Id. It sublet a 10’ x 10’ office there to house its books and records, and the office was “rarely visited.” Id. at 343.

Johnson concluded that the holding company was a citizen solely of Delaware because its nerve center was in Wilmington, where the board meetings took place. Id. at 356. Acknowledging the Supreme Court’s dictum that a corporation’s nerve center is “normally . . . not simply an office where the corporation holds its board meetings,” Hertz, 559 U.S. at 93, the Third Circuit explained why it’s inapplicable to holding companies:

[T]he kind of board meetings denigrated in Hertz were being considered in the context of a case involving a sprawling operating company, with extensive activities carried out by 11,230 employees at facilities in 44 states. For a holding company . . . , relatively short, quarterly board meetings may well be all that is required to direct and control the company’s limited work . . . . [T]he board generally conducts three tasks at each meeting: (1) it approves or corrects the minutes from the previous meeting, (2) it reviews the company’s financial statements with [an] accountant . . . , and (3) it addresses any other business required to come before the meeting, such as authorizing agents to sign documents, making changes to the officers, paying a dividend, or, occasionally, restructuring the company’s holdings. Generally, such business is straightforward and takes little time, yet it constitutes [the holding company’s] primary activity: managing its assets. The location of board meetings is therefore a more significant jurisdictional fact here than it was in Hertz, and the meetings’ brevity does not necessarily reflect an absence of substantive decision-making.

Johnson, 724 F.3d at 354 (citation and internal quotation marks omitted). The court cited “numerous post-Hertz [district court] cases that have determined the principal place of business of a holding company by looking to the location in which its officers or directors meet to make high-level management decisions.” Id. n.19.

The First Circuit applied a similar analysis in the pre-Hertz case of Taber Partners, I v. Merit Builders, Inc., 987 F.2d 57 (1st Cir. 1993). Two holding companies, both incorporated in New York, formed a partnership to acquire and operate a hotel in Puerto Rico. Id. at 59. Each corporation’s “sole function” was “to hold or administer its respective interest in [the
partnership].” Id. at 60. They maintained corporate records and financial accounts in New York. Id. at 59. They made all policy decisions there as well, including the decision to invest in the partnership, the election of corporate officers, and the selection of accountants. Id. at 60. The day-to-day management of the partnership was delegated to an executive and assistant director. Id. at 59–60.

The district court concluded that both corporations had a principal place of business in Puerto Rico because they “were formed to act as owners of the [hotel]” and devoted “almost all of their corporate activity to administer their assets in the partnership.” Id. at 60. The First Circuit reversed. It explained that “in determining a corporation’s principal place of business, a district court’s inquiry must focus solely on the business activities of the corporation whose principal place of business is at issue.” Id. at 62–63. The partnership—not the corporations—managed the hotel’s operations. Because the corporations’ “sole corporate ‘activities’ . . . consist[ed] of holding or administering their assets in [the partnership],” their principal place of business was in New York. Id. at 63.

B.

The holding company in this case, Lincoln One, is even less active than those in Johnson and Taber Partners. Because diversity jurisdiction “depends upon the state of things at the time of the action brought,” Grupo Dataflux v. Atlas Glob. Grp., L.P., 541 U.S. 567, 570 (2004) (quoting Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824)), we must determine Lincoln One’s principal place of business as of its 25th day of existence. In that brief time, the only business that Lincoln One conducted was to incorporate.

In the somewhat analogous context of a company that is winding down, two circuits have held that a dissolved corporation has no principal place of business for diversity purposes, and is therefore a citizen only of its state of incorporation. See Holston Invs., Inc. B.V.I. v. LanLogistics Corp., 677 F.3d 1068, 1071 (11th Cir. 2012) (concluding that such a rule “aligns most closely with the Supreme Court’s analysis in Hertz”); Midlantic Nat’l Bank v. Hansen, 48 F.3d 693, 698 (3d Cir. 1995) (rejecting, pre-Hertz, “the notion that implicit in the statute’s terms is the requirement that all corporations be deemed to have a principal place of business”). But see Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 141 (2d Cir. 1991) (requiring inquiry into inactive corporation’s last principal place of business).

We have not decided whether an inactive corporation must have a principal place of business. In Co-Efficient Energy, we found “a certain perverse logic” in the proposition that “an inactive corporation . . . is only a citizen of the state of its incorporation.” 812 F.2d at 558. But we didn’t need to resolve the issue because we concluded that the corporation in question was indeed active. Id. The corporation’s director and sole shareholder “made business decisions, including the decision to contract with [the defendant] and file this action.” Id. The location where these decisions were made was deemed to be the corporation’s principal place of business. Id.; see also MacGinnitie v. Hobbs Grp., LLC, 420 F.3d 1234, 1240 (11th Cir. 2005) (concluding that the holding company was “not an ‘inactive’ corporation in the sense in which other circuits have used that term”).

Here, in contrast, Lincoln One did not engage in any activity during its first 25 days. This lawsuit was filed by 3123 SMB, not Lincoln One. In concluding that California was Lincoln One’s principal place of business, the district court appears to have conflated 3123 SMB’s management of its lawsuit, which the court reasonably assumed would be directed from California, where the Klings reside, with Lincoln One’s management of 3123 SMB at its annual meetings, which had not yet occurred and would take place in Missouri. Lincoln One’s first board meeting was not held until a year after 3123 SMB filed this lawsuit.

Johnson rejected the idea that a holding company’s nerve center is where the subsidiary limited liability company’s management is based, because that “ignores the well-established rule that a parent corporation maintains separate citizenship from a subsidiary unless it has exerted such an overwhelming level of control over the subsidiary that the two companies do not retain separate corporate identities.” Id. at 351; accord Taber Partners, 987 F.2d at 62–63; cf. Pyramid Sec. Ltd. v. IB Resolution, Inc., 924 F.2d 1114, 1120 (D.C. Cir. 1991) (refusing to impute subsidiary’s citizenship to its parent even where the parent is the “alter ego” of the subsidiary and “the parent corporation is being sued solely for the acts of its completely controlled subsidiary”). We adhere to this rule as well. See Danjaq, S.A. v. Pathé Commc’ns Corp., 979 F.2d 772, 775 (9th Cir. 1992) (“[T]he citizenship of a parent is distinct from its subsidiary where . . . there is no evidence of an alter ego relationship.”).

The district court may have believed that an alter ego relationship exists between Lincoln One and 3123 SMB. The two entities are managed by the same two individuals utilizing the same attorneys, with no one else involved. But Anthony Kling provided unimpeached deposition testimony and sworn declaration statements that Lincoln One’s only business is to provide general direction to 3123 SMB—at the moment, to continue prosecuting the property-related lawsuits—and that this direction is given exclusively at board meetings in Clayton, Missouri. To reach the conclusion that Lincoln One and 3123 SMB are alter egos, the court would need to reject this evidence, which it can’t do without explicitly finding Anthony Kling incredible. See Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977) (“[I]f a plaintiff’s proof is limited to written materials, it is necessary only for these materials to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss. . . . If the pleadings and other submitted materials raise issues of credibility or disputed questions of fact with regard to jurisdiction, the district court has the discretion to take evidence at a preliminary hearing in order to resolve the contested issues.” (citations omitted)).
The district court found it “completely implausible” that Lincoln One had “not taken any actions other than the single board meeting.” We disagree. It’s entirely plausible that Lincoln One, which doesn’t do much at all, did nothing for 25 days. Its sole directive is to provide general direction to 3123 SMB, and at that time 3123 SMB had little business to transact other than litigation related to the Santa Monica property. Moreover, the district court’s reference to the single board meeting in the context of Lincoln One’s “implausible” inactivity suggests that it was examining a time frame well beyond the 25 days. If so, it erred by “consider[ing] facts that arose after the complaint was filed in federal court.” In re Digimarc Corp. Derivative Litig., 549 F.3d 1223, 1236 (9th Cir. 2008). There may be valid reasons to doubt Anthony Kling’s testimony, but its substance—that Lincoln One’s activity was limited to board meetings in Missouri—isn’t one of them.

C.

The question remains how to classify the citizenship of a holding company such as Lincoln One that has engaged in no activity other than incorporation. We conclude that a recently-formed holding company’s principal place of business is the place where it has its board meetings, regardless of whether such meetings have already occurred, unless evidence shows that the corporation is directed from elsewhere.

The district court noted that Lincoln One’s sole officer, Mary Kling, resided in California, and it found “no evidence that any of the operations of Lincoln One are directed, controlled, or coordinated from Missouri or anywhere else other than California.” This was so, the court explained, because Lincoln One’s single board meeting in Missouri “occurred well after this case was filed.” The court’s reasoning assumes both that a holding company’s principal place of business is by default in the state where its officers live and that its principal place of business can change over time as the company holds a sufficient number of board meetings at its true nerve center. Neither of these assumptions withstands scrutiny.

The assumption that a holding company’s principal place of business is in the state where its officers reside is problematic for several reasons. To begin with, this approach looks to the state as a whole rather than the specific place within the state from which the officer presumably directs the company’s activity. The Supreme Court has cautioned that a corporation’s principal place of business “is a place within a State. It is not the State itself.” Hertz, 559 U.S. at 93. Corporations aren’t usually directed from their managers’ homes. Here, there’s no evidence that Mary Kling directed activity from her home as opposed to some other location in her home state.

In addition, “[a] corporation’s ‘nerve center’ . . . is a single place.” Id. (emphasis added). While that presents less of a problem in the instant case—Mary Kling was Lincoln One’s only officer and director at the time—holding companies often have more than one decision-maker living in more than one state. How is a district court to choose among them? The dissent doesn’t say, and its rule would be workable.

More generally, the connection between the state where a holding company conducts its business, on the one hand, and the states where its officers and directors reside, on the other, is tenuous. Corporations based in metropolitan areas spanning multiple states, such as New York, Chicago, or Kansas City, frequently have officers residing in a neighboring state. Many holding companies incorporate and hold board meetings in sparsely populated states like Delaware and Nevada, while their board members reside elsewhere. In Johnson, for example, the holding company had its board meetings in Delaware, while four of its six officers and directors were based in other jurisdictions—two in Pennsylvania and two in the United Kingdom. See 724 F.3d at 342–43 & n.9.

Equally problematic is the assumption that a corporation’s principal place of business can shift over time without any change to the corporation’s structure or operation. Such an approach “invites greater litigation and can lead to strange results.” Hertz, 559 U.S. at 94. Although here the corporate subsidiary is the plaintiff, in many cases it will be the defendant and, as such, unable to choose the lawsuit’s timing. In those cases, the district court’s subject matter jurisdiction would turn on happenstance. If the holding company or its subsidiary were sued before there were sufficient board meetings to establish a principal place of business, the residence of one or more officers or directors would determine its citizenship.

Prior to Hertz, when determining a corporation’s principal place of business, the circuits applied multiple overlapping tests that often lacked precision. See id. at 91–92 (describing the “growing complexity” in this area of the law). The Supreme Court chose the nerve center test over the various competing tests in large part due to its “administrative simplicity.” Id. at 94. Complex jurisdictional tests waste resources by encouraging gamesmanship and costly appeals while discouraging litigation of a dispute’s merits. Id. Simple jurisdictional rules, in contrast, benefit both courts and litigants. Courts, which have an independent obligation to ensure that subject-matter jurisdiction exists, “can readily assure themselves of their power to hear a case.” Id. (citing Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006)). Straightforward jurisdictional rules also offer greater predictability for corporations making business and investment decisions and for plaintiffs deciding whether to sue in state or federal court. Id. at 94–95.

A rule that forces courts to pick a nerve center from the potentially several states where corporate decision-makers reside and to determine whether there have been enough
board meetings to establish a different nerve center would be difficult to administer and generate unnecessary litigation on collateral issues. In contrast, a rule presuming that from inception a holding company directs its business from the place where it holds board meetings is easy to apply. See Johnson, 724 F.3d at 355 (“Even while cautioning courts to identify a corporation’s ‘actual center of direction and control, Hertz ‘place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible.’”) (quoting Hertz, 559 U.S. at 80)). And the latter rule rests on sound assumptions.

Missouri, like many states, allows a corporation to specify in its bylaws the location of annual meetings and, if none is designated, provides that the meetings by default will be held at the corporation’s registered office. See Mo. Rev. Stat. § 351.225(1); Mod. Bus. Corp. Act § 7.01(b) (Am. Bar. Ass’n 2016) (providing that corporation’s “principal office” as designated in its annual report is location of annual meetings if not otherwise specified); see also, e.g., Cal. Corp. Code § 600(a); N.Y. Bus. Corp. Law § 602(a). Here, Lincoln One’s registered office is in Clayton, Missouri. There’s no evidence that its bylaws prescribe that the annual meetings be held elsewhere, and Anthony Kling proffered uncontradicted testimony that they are in fact held in Clayton. Given the expectation that, absent evidence to the contrary, a corporation holds its annual meetings at its registered office, such meetings need not actually take place in order to establish the corporation’s principal place of business there. 7

D.

At the same time, courts must be alert to the possibility of jurisdictional manipulation. See Hertz, 559 U.S. at 97. There is evidence in the record here from which such an inference could be made. Lincoln One was incorporated roughly one month before this suit was filed, near the end of the statute of limitations. Prior to that time, 3123 SMB was a California citizen, precluding diversity jurisdiction. Lincoln One’s incorporation and acquisition of 3123 SMB rendered the parties nominally diverse just in time to file this lawsuit in federal court. Subsequently, 3123 SMB brought separate claims arising from the same conduct—Horn’s alleged professional mistakes—in parallel state court litigation.

However, the record also contains evidence suggesting that Lincoln One incorporated in Missouri for legitimate reasons. The Klings have deep ties to the state, and their attorneys reside there. And there’s nothing inherently problematic about a holding company and its subsidiary having the same officers. See 6A Fletcher, supra, § 2821 (citing Haskell v. McClintic-Marshall Co., 289 F. 405, 413 (9th Cir. 1923)). On remand, the district court may consider whether there has been jurisdictional manipulation. If so, it should “take as the ‘nerve center’ the place of actual direction, control, and coordination, in the absence of such manipulation.” Hertz, 559 U.S. at 97.

IV.

Anthony Kling testified that Lincoln One holds its board meetings in Clayton, Missouri. Whether that’s true is a matter of credibility to be determined by the district court. The fact that Lincoln One had not yet held a board meeting does not in and of itself have jurisdictional significance if the meeting’s location had already been determined.

Because 3123 SMB presented evidence that Lincoln One’s minimal activity was directed from board meetings in Missouri, that state appears to be the corporation’s principal place of business. Therefore, we reverse the district court’s jurisdictional dismissal. Our reversal is conditional. On remand, the district court is free to consider whether there is jurisdictional manipulation or an alter ego relationship between Lincoln One and 3123 SMB.

REVERSED and REMANDED.

HURWITZ, Circuit Judge, dissenting:

The Court today holds that a corporation’s principal place of business was located in a state in which the company had done absolutely no business at the time this lawsuit was filed. Although identifying the principal place of business of a holding company is not always an easy task, the “nerve center” cannot be in a state where the corporate EEG is flat. The district court correctly found that Lincoln One’s nerve center at the time this suit was filed was in California, where its shareholders and directors resided, and where the only corporate asset—an apartment complex—was located. I therefore respectfully dissent.

I.

I start, as does the majority, with the basics. For purposes of diversity jurisdiction, a corporation is a citizen both of its member was Washington LLC, which was controlled entirely by Anthony Kling, a California citizen. See Johnson, 437 F.3d at 899.
state of incorporation and the state “where it has its principal place of business.” 28 U.S.C. § 1332(c)(1). A party invoking federal jurisdiction bears the burden of establishing it. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) (“It is to be presumed that a cause lies outside [our] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.”) (citations omitted).

It is undisputed that Lincoln One was incorporated in Missouri. But, that is only half the battle. It is also plaintiff’s burden to establish the location of the corporation’s principal place of business, or its “nerve center.” See Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010).

Plaintiff failed to meet that burden. Rather, the district court found that Lincoln One’s principal place of business was in California, a factual determination we review for clear error. See Co-Efficient Energy Sys. v. CSL Indus., Inc., 812 F.2d 556, 557 (9th Cir. 1987). That finding was not clearly erroneous. Plaintiff conceded that there had been no corporate activity in Missouri between the day Lincoln One was incorporated and the filing of this suit. The district court found that Mary Kling, Lincoln One’s sole officer, is a California resident who had not travelled to Missouri during that period, and found implausible plaintiff’s assertion that the corporation had undertaken no actions anywhere in the critical time frame. And, because “the jurisdiction of the court depends upon the state of things at the time of the action brought,” Grupo Dataflux v. Atlas Glob. Grp., 541 U.S. 567, 570 (2004) (quoting Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824)), we cannot consider later activity, such as the board meeting held by Lincoln One in Missouri.

Indeed, even adopting the majority’s approach, it is undisputed that Lincoln One was completely inactive during the relevant period, the district court’s dismissal must be affirmed. A corporation’s principal place of business is “the place where a corporation’s officers direct, control, and coordinate the corporation’s activities.” Hertz, 559 U.S. at 92–93. Plaintiff presented absolutely no evidence that any such direction, control or coordination occurred in Missouri. Indeed, the only evidence on this issue was that Lincoln One’s sole officer was a California citizen who did nothing in Missouri between the date of incorporation and the filing of this suit.

II.

The majority relies heavily on Johnson v. SmithKline Beecham Corp. for the proposition that the nerve center of a holding company is where its board meetings are supposed to take place. 724 F.3d 337 (3d Cir. 2013). But in Johnson, the holding company actually held quarterly board meetings in Delaware before the suit was filed. Id. at 353–54. Thus, Johnson does not stand for the proposition that the state of incorporation is presumptively the principal place of business of a holding company even if no activity has occurred there. Rather, it faithfully applies Hertz by identifying the location in which the corporate “officers or directors meet to make high-level management decisions.” Id. at 354 n.19.

The majority’s reliance on Taber Partners, I v. Merit Builders, Inc., 987 F.2d 57 (1st Cir. 1993), is similarly misplaced. In Taber, during five years before the filing of the lawsuit, a “control-group” of twelve individuals maintained the holding company’s “corporate records and financial accounts” in New York. Id. at 60. There is no evidence here that Lincoln One’s sole officer did anything at all in Missouri before the suit was filed.

The majority also relies on Missouri law, which allows a corporation to specify where its annual meetings will be held, and Lincoln One’s articles of incorporation, which specify that those meetings will occur in Clayton, Missouri. Mo. Rev. Stat. § 351.225(1). But the Supreme Court rejected this type of formalism in Hertz. See 559 U.S. at 97 (“[W]e reject . . . that the mere filing of a form like the Securities and Exchange Commission’s Form 10–K listing a corporation’s ‘principal executive offices’ would, without more, be sufficient proof to establish a corporation’s ‘nerve center.’”). The inquiry focuses on the location of the corporate nerve center when the suit is filed, not on future, hypothetical actions. Indeed, under Missouri law, shareholders can by simple agreement change the specified location of the annual meetings, see Mo. Rev. Stat. § 351.225, 290, so the provision in the articles of incorporation did not assure that the meetings would take place in Clayton.

III.

Today’s decision gives rise to the very dangers of jurisdictional manipulation that Hertz eschews. Under the majority’s approach, a newly formed corporation is entitled, in the absence of other activity, to a presumption that its state of incorporation is also its principal place of business. But, the “nerve center” of a corporation may shift over time. Thus, Lincoln One, having established diversity simply by virtue of its state of incorporation, can hereafter safely conduct its business entirely in California but still invoke the limited jurisdiction of an Article III court.

I respectfully dissent.
SANFORD J. WISHNEV, individually and on behalf of all others similarly situated, Plaintiff-Appellee, v. THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant-Appellant.

No. 16-16037
United States Court of Appeals for the Ninth Circuit
D.C. No. 3:15-cv-03797-EMC
Appeal from the United States District Court for the Northern District of California
Edward M. Chen, District Judge, Presiding
Argued and Submitted October 16, 2017
San Francisco, California
Filed January 18, 2018
Before: Sandra S. Ikuta and Andrew D. Hurwitz, Circuit Judges, and Donald W. Molloy,* District Judge.

ORDER

We ask the California Supreme Court to resolve two open questions of state law that have significant effects on insurance companies and insureds in California.

An initiative measure enacted in 1918 (the Initiative), Cal. Civ. Code §§ 1916-1–5, limits the amount of interest lenders may charge, and provides that lenders may not compound interest “unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith” (hereafter, the “disclosure requirement”). Cal. Civ. Code § 1916-2. An amendment to the California constitution exempts certain lenders from some aspects of the Initiative. Cal. Const. art. XV, § 1. The state legislature has included insurance companies as an exempt lender. Cal. Ins. Code § 1100.1. It is not clear, however, whether the constitutional provision exempts lenders from the disclosure requirement, and courts considering this issue have reached different results.

Nor is it clear whether a lender that is an insurance company can satisfy the disclosure requirement of section 1916-2 by obtaining the borrower’s signature on an application for insurance, and then subsequently providing an insurance policy that includes a compound interest provision, even though the state legislature has provided that an insurance application and policy form a single contract. Cal. Ins. Code § 10113.

By addressing these open issues, the California Supreme Court will resolve the appeal before us. Sanford Wishnev, an insured who borrowed money from Northwestern Mutual Life Insurance Company and was assessed compound interest, is suing the insurance company on behalf of a putative class for a violation of the disclosure requirement in section 1916-2. Northwestern Mutual claims that it is exempt from complying with the disclosure requirement, and also claims that the application signed by Wishnev, which is attached to the insurance policy, satisfies the disclosure requirement. If Northwestern Mutual is correct on either of its claims, it is not liable to Wishnev or other members of the putative class for violating section 1916-2. If Northwestern Mutual is subject to section 1916-2’s disclosure requirement, and did not fulfill its obligation under California law, then Northwestern Mutual is potentially liable to Wishnev and any class members who have been charged compound interest without the required disclosure.

Accordingly, we certify the following two questions to the California Supreme Court:

1. Are the lenders identified in Article XV of the California Constitution, see Cal. Const. art. XV, § 1, as being exempt from the restrictions otherwise imposed by that article, nevertheless subject to the requirement in section 1916-2 of the California Civil Code that a lender may not compound interest “unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith”?

2. Does an agreement meet the requirement of section 1916-2 if it is comprised of: (1) an application for insurance signed by the borrower, and (2) a policy of insurance containing an agreement for compound interest that is subsequently attached to the application, thus constituting the entire contract between the parties pursuant to section 10113 of the California Insurance Code?

Our phrasing of the questions should not restrict the Court’s consideration of the issues involved. The Court may rephrase the questions as it sees fit in order to address the contentions of the parties. If the Court agrees to decide these questions, we agree to accept its decision. We recognize that the Court has a substantial caseload, and we submit these questions only because of their significance to the administration of insurance policy loans in the state of California, illustrated by the numerous cases involving these questions of state law.

I

The ambiguities before us today are a product of the development of California usury law. In 1918, the California voters approved the Initiative, which prevents lenders from
charging usurious interest rates. See Cal. Civ. Code §§ 1916-1–5.1 Section 1916-1 established that the interest rates for loans in California could not exceed 12 percent per year. Id. § 1916-1. Section 1916-2 prohibited lenders from compound-
ing interest “unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith.” Id. § 1916-2. Finally, the Initiative provided that every person “who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections” may sue to recover “treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery.” Id. § 1916-3(a).

In 1934, the voters amended the California Constitution “to abolish the inflexible, inadequate and unworkable provi-
sions of the usury law and to reestablish in the Legislature the power to enact laws affecting the business of lending money in this state.” Carter v. Seaboard Fin. Co., 33 Cal. 2d 564, 579 (1949).2 The amendment, now Article XV, lowered the maximum interest rate that could be charged by covered lenders. Cal. Const. art. XV, § 1. Paragraph 1 of Article XV set a 10 percent maximum interest rate on loans for “per-
sonal, family or household purposes.” Id. Paragraph 2 of Ar-
icle XV set a different interest rate for loans that were not for personal use, such as for the “purchase, construction or improvement of real property.” Id. In addition, paragraph 2 stated that “[n]o person . . . shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than the interest authorized by this section upon any loan or forbearance of any money, goods or things in action.” Id.

Paragraph 2 of Article XV also gave the state legislature the desired flexibility to set interest rates for particular lend-
ers. First, it exempted certain lenders from its prohibitions by providing that “none of the above restrictions shall apply to any obligations of, loans made by, or forbearances of, any incorpo-
rated admits insured.”

After the enactment of Article XV, the California Supreme Court decided several cases that addressed, either directly or indirectly, the extent to which the interest rate limitations in the Initiative and Article XV applied to exempt lenders. In Penziner v. Western American Finance Co., a non-exempt lender claimed that after Article XV was adopted, the Initiative became a dead letter. 10 Cal. 2d 160, 174 (1937). The California Supreme Court disagreed. It explained that a constitutional amendment repeals or supersedes “only those portions of prior acts repugnant to the later act.” Id. at 174–75 (approving the rule that a constitutional amendment “operates as an express limitation upon the extent to which it is intended that former acts shall cease to be operative, namely, only so far as they are actually inconsistent with the new act”). Accordingly, the portions of the Initiative that “are not repugnant to and inconsistent with the new act are to remain in force.” Id. at 175 (citation omitted).

Penziner then differentiated between exempt and non-ex-
empt lenders. According to Penziner, “the power granted to the legislature by the constitutional amendment is expressly limited in its scope to the regulation and control of the charges of the exempted classes of lenders.” Id. at 177. Specifically, the legislature has “control of the charges to be made by the exempted groups,” and that authority is inconsistent with the Initiative.4 Id. But “[a]s to the nonexempt classes of lenders, the legislature possesses no such power.” Id. Accordingly, “at least as to the non exempt classes of lenders,” the Initiative “was not repealed by the adoption of the constitutional provi-
sion, and plaintiff’s cause of action was not affected thereby.” Id. at 178. Penziner, however, did not address the Initiative’s disclosure requirement.

After Penziner indicated that under Article XV only the legislature had authority to impose interest rate limitations on exempt lenders, the California Supreme Court confirmed the broad scope of this exemption. See Carter, 33 Cal. 2d at 582. Carter raised the question whether a personal property broker who sold a truck secured by a security interest in the truck was subject to the maximum interest rate established

1. The full text of the 1918 Initiative appears in Appendix A.
2. The full text of Cal. Const. art. XV, § 1 appears in Appendix B.
3. Article XV was adopted in 1976 to replace a prior amendment, Article XX, section 22, which had nearly identical language. In 1979, Article XV was amended to give the state legislature power to expand the class of exempt lenders by statute.
4. Indeed, on the same day Penziner was decided, the California Supreme Court also held that personal property brokers, an exempt class, are not subject to the Initiative’s maximum interest rate provi-
sion. Wolf v. Pac. Sw. Disc. Corp., 10 Cal. 2d 183, 184 (1937) (‘The third paragraph of said section of the Constitution designated certain organizations and individuals which are exempt from the general prov-
sions of the usury law.’).
by Article XV. *Id.* at 568, 578. The plaintiff first noted that paragraph 1 of Article XV set a 10 percent maximum interest rate for loans involving personal, family or household purposes, while paragraph 2 set different interest rates for loans that were not for personal use. *Id.* at 578–79. The crucial language exempting certain lenders (i.e., stating that “none of the above restrictions shall apply”) to the exempt lenders listed in Article XV or “any other class of persons authorized by statute”) appears in paragraph 2. Cal. Const. art. XV, § 1. Accordingly, the plaintiff argued that paragraph 1 applied to all lenders, exempt and non-exempt, while paragraph 2 applied only to non-exempt lenders. *Carter*, 33 Cal. 2d at 579. Under this theory, even though a personal property broker was among the class of exempt lenders, it was still subject to the interest rate limits imposed by paragraph 1.

*Carter* rejected this argument. After reviewing the history of usury legislation in California, the Court concluded that the language of paragraph 2 (i.e., that “none of the above restrictions shall apply”) encompassed all the restrictions in Article XV, and therefore an exempt lender is exempt from all provisions in Article XV. *Id.* at 580. Moreover, the language authorizing the legislature to “in any manner fix, regulate or limit, the fees, bonuses, commissions, discounts or other compensation,” Cal. Const. art. XV, § 1, put such regulations “entirely within the control of the Legislature.” *Carter*, 33 Cal. 2d at 583. If the legislature does not act, an exempt lender “is subject to no restriction on interest rates or charges.” *Id.* at 582. Because a personal property broker was an exempt lender (and not subject to the rates set forth in Article XV), and because the legislature had not enacted applicable legislation affecting the interest and charges of personal property brokers, *Carter* rejected the plaintiff’s claim that the charges were usurious. *Id.* at 585–86.

The California Supreme Court has repeatedly confirmed that an exempt lender under Article XV is subject only to interest rate limitations imposed by the legislature. *W. Pico Furniture Co. v. Pac. Fin. Loans*, 2 Cal. 3d 594, 614 (1970) (“As to these exempt classes, there are no restrictions on the rates of interest charged unless the Legislature so provides.”); *Wolf v. Pac. Sw. Disc. Corp.*, 10 Cal. 2d 183, 184 (1937) (holding that “the legislature was given power to prescribe the maximum rate of interest” on loans by exempt lenders). Exempt lenders are not even subject to common law limits on rates, because “[a]ny other result would frustrate the constitutional amendment which was designed to place in the hands of the Legislature the control of the charges to be made by the exempted groups.” *W. Pico Furniture*, 2 Cal. 3d at 615.

Although the California Supreme Court has directly held that the legislature has plenary authority over the interest rates charged by exempt lenders, it has suggested in dicta that the legislature also has plenary authority over other aspects of exempt lenders’ operations. *See Heald v. Frits-Hansen*, 52 Cal. 2d 834, 838 (1959) (“[B]y exempting from its restrictions certain enumerated classes of persons . . . [Article XV] operates to exempt those classes from the restrictions in the *Usury Law.*”); *Ex parte Fuller*, 15 Cal. 2d 425, 434 (1940) (“As to the exempted groups, the legislature was reinvested with the same control over them as it had prior to the enactment of the *Usury Law.*”). Accordingly, it is an open question whether the Initiative’s disclosure requirement for compound interest, which regulates the procedures a lender must take before imposing a compound interest charge, is superseded by the legislature’s power over exempt lenders.⁵

II

This is an appropriate case in which to seek the California Supreme Court’s guidance on this issue because it squarely raises the question whether exempt lenders are subject to the Initiative’s prohibition against charging compound interest “unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith.” Cal. Civ. Code § 1916-2. We now turn to the facts and arguments.

The following allegations are derived from Wishnev’s First Amended Complaint and the four life insurance policies issued to Wishnev. *See Lee v. City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (holding that on a motion to dismiss, a court can consider documents that are not physically attached to the complaint, so long as “the documents’ ‘authenticity . . . is not contested’ and ‘the plaintiff’s complaint necessarily relies’ on them.” (alteration in original) (citation omitted)).

Northwestern Mutual is a Wisconsin corporation admitted in California.⁶ Northwestern Mutual issued Wishnev four life insurance policies between 1967 and 1976. These policies are “permanent” life insurance policies, which pay a benefit on the death of the insured and also accumulate a cash value during the insured’s lifetime. Northwestern Mutual’s policyholders may take out loans secured by a permanent life insurance policy’s cash value. Northwestern Mutual generally pays annual dividends to its policyholders, but when a policyholder borrows funds using the policy’s cash value as collateral, Northwestern Mutual applies the annual dividend to reduce the amount of the loan balance, including accrued interest.

Wishnev completed, submitted, and signed an application for each policy. None of these applications authorized Northwestern Mutual to charge compound interest, but each application asks: “Shall the PREMIUM LOAN provision, if available, become operative according to its terms?” Wishnev checked the box marked “Yes” on each application.

After Wishnev signed each application, Northwestern Mutual sent him the insurance policy. Paragraph 1 of “General Provisions” in each policy states: “This policy and the applic-

⁵. A depublished California Court of Appeal decision addressed this question, concluding that the legislature’s authority “to regulate ‘in any manner’ the interest charged by exempt lenders” includes the regulation of compound interest, and this authority supersedes any regulation of compound interest, including the disclosure requirement. *Thomason v. Bateman Eichler, Hill Richards, Inc.*, 245 Cal. Rptr. 319, 322 (Cl. App. 1988) (depublished opinion).

⁶. Under California Insurance Code section 24, the word “admitted” means “entitled to transact insurance business” in California.
cation, a copy of which is attached when issued, constitute the entire contract.” Paragraph 4 of “Loan Provisions” states: “Unpaid interest shall be added to and become part of the loan and shall bear interest on the same terms.”

Sometime after 1980, Wishnev took out four policy loans, secured by the cash value and death benefit value of each policy. Northwestern Mutual assessed compound interest on the loan balances. In addition, Northwestern Mutual reduced the amount of dividends paid to Wishnev due to the compound interest that had accrued.

Wishnev brought a class action lawsuit in state court on behalf of himself and “all others similarly situated” arising from Northwestern Mutual’s “pattern and practice of charging compound interest on life insurance policy and premium loans without a written agreement signed by the borrower providing for such compounding.” Wishnev claimed that Northwestern Mutual violated section 1916-2 of the California Civil Code by failing to obtain a clearly expressed writing signed by the borrower before charging compound interest. The complaint seeks repayment of dividends withheld from Wishnev and the putative class and treble damages under section 1916-3.

Northwestern Mutual removed the state court action to federal court pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). In a motion to dismiss, Northwestern Mutual argued that, as an insurance company, it is an exempt lender under section 1100.1 of the California Insurance Code, and therefore exempt from the Initiative’s disclosure requirement. Second, Northwestern Mutual argued that it complied with the disclosure requirement because the “contract,” comprised of the insurance application and insurance policy, Cal. Ins. Code § 10113, provides for assessment of compound interest.

The district court denied Northwestern Mutual’s motion. The district court held that because Article XV did not address disclosure of compound interest, the Initiative’s disclosure requirement was not repugnant to the California Constitution and therefore remained in effect. The court also reasoned that the legislature’s authority to regulate “fees, bonuses, commissions, discounts, or other compensation” of exempt lenders did not supersede the Initiative’s disclosure requirement, because “other compensation” included only “such things as loan fees and points, not compound interest.” The court then certified its order for interlocutory appeal.

III

On appeal, Northwestern Mutual first raises the question whether lenders that are exempt from the interest rate requirements of Article XV (providing that “none of the above restrictions shall apply to any obligations of, loans made by, or forbearances of” specified exempt lenders) and subject to the plenary authority of the legislature as to interest rates and “other compensation” are also exempt from the disclosure requirement of section 1916-2.

There is no dispute that Northwestern Mutual is an exempt lender for purposes of Article XV. See Cal. Ins. Code § 1100.1. Northwestern Mutual argues that Article XV, as interpreted by the California Supreme Court, supersedes the disclosure requirement for two main reasons. First, Northwestern Mutual asserts that the legislature’s plenary authority over insurers exempts them from all of the Initiative’s requirements. According to Northwestern Mutual, this interpretation is consistent with Carter, which noted that the regulation of exempt lenders “is entirely within the control of the Legislature,” 33 Cal. 2d at 583, and that an exempt lender “is subject to no restriction on interest rates or charges” until the legislature exercises its power under the amendment, id. at 582. Northwestern Mutual argues that this broad reading is consistent with the “objective” of Article XV, “to reestablish the power in the Legislature to enact laws affecting the business of lending money in [California].” Id. at 579.

Second, Northwestern Mutual argues that even if exempt lenders are subject to some provisions in the Initiative, they are not subject to the disclosure requirement because it is in direct conflict with Article XV. This argument proceeds through several steps. According to Northwestern Mutual, the regulation of compound interest falls squarely within the legislature’s exclusive power over exempt lenders because Article XV provides that the legislature may “in any manner fix, regulate or limit the fees, bonuses, commissions, discounts or other compensation” that the exempted class may “charge or receive” on a loan. Cal. Const. art. XV, § 1. Northwestern Mutual asserts that when lenders compound interest, they directly “charge” a borrower on the loan by increasing the loan payments at each interval. Moreover, the phrase “other compensation” is broad enough to cover compound interest. Indeed, Northwestern Mutual asserts, compound interest can be a form of interest. For instance, the California Supreme Court has held that compound interest is included in the interest rate calculation when looking at the total interest charged by a lender. See Heald, 52 Cal. 2d at 840 (citing numerous cases for the proposition that compounding at intervals of less than one year can make a transaction “usurious” when the effective interest rate exceeds the maximum interest rate). Thus, the legislature’s power to regulate compound interest is also derived from the power to

7. Wishnev also asserted claims for declaratory relief, violation of California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, money had and received, and unjust enrichment.

8. Northwestern Mutual also argued that Wishnev did not make any interest payments, and so lacked standing to sue. We reject this argument. A borrower that has paid interest assessed in violation of the Initiative may maintain a suit for treble the amount of “money so had and received.” Cal. Civ. Code § 1916-3. Wishnev effectively made interest payments when Northwestern Mutual applied the annual dividend to reduce the amount of his loan balance, including accrued interest. See Black’s Law Dictionary 1243 (9th ed. 2009) (defining “payment” as “[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation.”); see also Corwin v. Ward, 35 Cal. 195, 196, 198 (1868) (holding that offsetting two loans discharges a party’s obligation, even when money doesn’t change hands.).
“prescribe the maximum rate per annum” that the exempt lenders “may charge or receive” on a loan. Cal. Const. art. XV, § 1.

Northwestern Mutual next argues that the legislature’s power to regulate compound interest encompasses the procedures for charging compound interest, including any disclosure requirement. If exempt lenders were subject to a procedural disclosure requirement, Northwestern Mutual argues, the purpose of giving the legislature flexibility to regulate different categories of lenders would be hampered or defeated. Because the authority granted to the legislature under Article XV includes the regulation of compound interest, which encompasses the manner in which it is charged, Northwestern Mutual concludes that Article XV directly conflicts with, and therefore supersedes, the Initiative’s disclosure requirement.

In response, Wishnev argues that Penziner makes it clear that Article XV does not supersede the Initiative unless the two are “irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.” 10 Cal. 2d at 176. Because Article XV does not directly address the Initiative’s disclosure requirement, Wishnev argues the disclosure requirement is not irreconcilable or repugnant to the operation of Article XV. Wishnev also argues that compound interest is not “other compensation” a lender may receive or charge on a loan; rather, he contends, that term refers to “charges (and discounts), not methods of calculating interest” and is “best understood to refer to loan points and similar loan-related charges.”

Second, Wishnev argues that, even if the legislature has exclusive authority to regulate the compound interest charged by an exempt lender, this power does not include authority over procedural requirements, such as the disclosure requirement. Because the Initiative “merely imposes a procedural threshold of disclosure and consent,” it does not conflict with the legislature’s power to govern the amount of compound interest a lender can charge, and therefore remains in effect under Penziner.

Four federal district courts have addressed the issues raised in this certification order, reaching different conclusions. In this case, the district court held that exempt lenders are subject to the compound interest disclosure requirement. In contrast, three other district courts in the Ninth Circuit have held that exempt lenders are not subject to the Initiative’s disclosure requirement. See Washburn v. Prudential Ins. Co. of Am., 158 F. Supp. 2d at 176. Because Article XV does not directly address the Initiative’s disclosure requirement, Wishnev argues the disclosure requirement is not irreconcilable or repugnant to the operation of Article XV. Wishnev also argues that compound interest is not “other compensation” a lender may receive or charge on a loan; rather, he contends, that term refers to “charges (and discounts), not methods of calculating interest” and is “best understood to refer to loan points and similar loan-related charges.”

If the California Supreme Court determines that exempt lenders are subject to the Initiative’s disclosure requirement, a second unsettled question arises: Did the procedures in this case satisfy that requirement?

The Initiative provides that “interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith.” Cal. Civ. Code § 1916-2. Under California insurance law, the “entire contract” includes the life insurance policy and any “application” if the application is “indorsed upon or attached to the policy.” Cal. Ins. Code § 10113. The California Supreme Court has not determined whether a signature on an application for insurance, when later attached to the full insurance policy, satisfies section 1916-2.

The California Supreme Court has twice addressed whether a lender’s document satisfies the Initiative’s disclosure requirement—that “an agreement” stating the lender may charge compound interest “is clearly expressed in writing and signed by the party to be charged therewith.” See McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 21 Cal. 3d at 370. The Court held that “the customer’s agreement on its face does not clearly express an understanding that interest would be compounded,” and therefore did not satisfy the Initiative’s requirement that “the parties ‘clearly expressed in writing’ that defendant could charge compound interest.” Id. at 375. In McConnell II, the same brokerage house asserted that it complied with the Initiative’s requirement by sending monthly statements that “assertedly provided notice to [its customers] that compound interest was being charged on their accounts.” 21 Cal. 3d at 823. McConnell II explained that these follow-up monthly statements “would not satisfy the unequivocal requirement of [the Initiative] that the borrower must agree in writing to pay compound interest.” Id. Because “the documents relied on by defendant as providing notice to its customers do not satisfy the precise requirements” of the Initiative, the Court determined it was irrelevant whether the customers understood that the lender intended to charge compound interest.
Neither of these cases, however, considered whether a signed application for insurance, together with an insurance policy that clearly sets forth the lender’s intent to compound interest, constitutes an “agreement” that satisfies the requirement of the Initiative.

Northwestern Mutual argues that McConnell I and II do not provide guidance in this case, and instead we should rely on section 10113 of the California Insurance Code, which provides that an application attached to a policy shall be deemed to “constitute the entire contract between the parties.” Northwestern Mutual argues that the policy and the application together are one agreement, that Wishnev signed the agreement by signing the application, and that the agreement clearly states compound interest will be charged through language in the policy. Therefore, Northwestern Mutual asserts it complied with the plain language of the Initiative and California contract law, because the Initiative does not require disclosure “on the actual document signed by the borrower,” only that the “agreement” be signed and disclose sufficient information. See Lujan, 2016 WL 4483870, at *7.

Wishnev, by contrast, argues that the purpose of the Initiative’s requirement is to ensure that a borrower knows of the lender’s intent to charge compound interest before entering into an agreement with the lender, and this knowledge can be demonstrated only by signing the paper that actually contains those terms. Because the application did not contain the compound interest terms, and Wishnev signed only the application, the fact that Northwestern Mutual subsequently provided an unsigned policy does not satisfy the Initiative’s requirements any more than the subsequently provided monthly statements in McConnell II.

The district court here agreed with Wishnev. It read McConnell II as requiring a signature on the paper disclosing the lender’s intent to assess compound interest, and held Northwestern Mutual failed to comply with this requirement. Other district courts have rejected this reading of McConnell II and concluded that the insurance policy and the application constitute an agreement for purposes of the Initiative’s requirements. See Martin, 179 F. Supp. 3d at 957; Lujan, 2016 WL 4483870, at *6–7.

Resolution of both questions is essential to the more than 300 California insurers and millions of policyholders who have outstanding policy loans. Currently, the conflicting interpretations of state law create uncertainty around policy loans. Moreover, the Association of California Life and Health Insurance Companies claims that if insurers are subject to the Initiative’s disclosure requirement, and that requirement is not satisfied by the steps taken here, compliance would require an “overhaul of insurers’ business processes.” An authoritative interpretation of the California Constitution, the Initiative, and, if necessary, California contract law is needed to give insurance companies guidance on these critical issues of policy loan formation.
Supreme Court of California

McMILLIN ALBANY LLC et al., Petitioners,
v. THE SUPERIOR COURT OF KERN COUNTY, Respondent;
CARL VAN TASSEL et al., Real Parties in Interest.

No. S229762
In the Supreme Court of California
Cl.App. 5 F069370
Kern County Super. Ct. No. S-1500-CV-279141
Filed January 18, 2018

COUNSEL
Borton Petrini, Calvin R. Stead and Andrew M. Morgan for Petitioners.
Ulich Ganion Balmuth Fisher & Feld and Donald W. Fisher as Amici Curiae on behalf of Petitioners.
Donahue Fitzgerald, Kathleen F. Carpenter, Amy R. Gowan; Ware Law and Dee A. Ware for California Building Industry Association, Building Industry Legal Defense Foundation and California Infill Federation as Amici Curiae on behalf of Petitioners.
Ryan & Lifter, Jill J. Lifter; Chapman, Glucksman Dean Roeb & Barger and Glenn T. Barger for Association of Defense Counsel of Northern California and Nevada and Association of Southern California Defense Counsel as Amici Curiae on behalf of Petitioners.
Hirsch Closson, Robert V. Closson and Jodi E. Lambert for California Professional Association of Specialty Contractors as Amicus Curiae on behalf of Petitioners.
Newmeyer & Dillion, Alan H. Packer, J. Nathan Owens, Paul L. Tetzloff and Jeffrey R. Brower for Leading Builders of America as Amicus Curiae on behalf of Petitioners.
Epstein Grinnell & Howell, Anne L. Rauch; Berding & Weil and Tyler P. Berding for Consumer Attorneys of California as Amicus Curiae on behalf of Petitioners.

No appearance for Respondent.

Benson Legal, Susan M. Benson; Williams | Palecek Law Group and Jason P. Williams for The National Association of Subrogation Professionals as Amicus Curiae on behalf of Real Parties in Interest.

Law Offices of Brian J. Ferber, Brian J. Ferber; Benedon & Serlin, Gerald M. Serlin and Wendy S. Albers as Amici Curiae on behalf of Real Parties in Interest.

Horvitz & Levy, H. Thomas Watson and Daniel J. Gonzalez for MWI, Inc., as Amicus Curiae on behalf of Real Parties in Interest.


In Aas v. Superior Court (2000) 24 Cal.4th 627, 632 (Aas), this court held that the economic loss rule bars homeowners suing in negligence for construction defects from recovering damages where there is no showing of actual property damage or personal injury. We explained that requiring a showing of more than economic loss was necessary to preserve the boundary between tort and contract theories of recovery, and to prevent tort law from expanding contractual warranties beyond what home builders had agreed to provide. (Id. at pp. 635–636; see Seely v. White Motor Co. (1965) 63 Cal.2d 9, 18.) We emphasized that the Legislature was free to alter these limits on recovery and to add whatever additional homeowner protections it deemed appropriate. (Aas, at pp. 650, 653.)

Two years later, spurred by Aas and by lobbying from homeowner and construction interest groups, the Legislature passed comprehensive construction defect litigation reform. (Stats. 2002, ch. 722, principally codified at Civ. Code, §§ 895–945.5 (commonly known as the Right to Repair Act, hereafter the Act); all further unlabeled statutory references are to the Civil Code.) The Act sets forth detailed statewide standards that the components of a dwelling must satisfy. It also establishes a prelitigation dispute resolution process that affords builders notice of alleged construction defects and the opportunity to cure such defects, while granting homeowners the right to sue for deficiencies even in the absence of property damage or personal injury.

We are asked to decide whether the lawsuit here, a common law action alleging construction defects resulting in both economic loss and property damage, is subject to the Act’s prelitigation notice and cure procedures. The answer depends on the extent to which the Act was intended to alter the common law — specifically, whether it was designed only to abrogate Aas, supplementing common law remedies with a statutory claim for purely economic loss, or to go further and supplant the common law with new rules governing the method of recovery in actions alleging property damage. Based on an examination of the text and legislative history of the Act, we conclude the Legislature intended the broader displacement. Although the Legislature preserved common law claims for personal injury, it made the Act the virtually exclusive remedy not just for economic loss but also for property damage arising from construction defects. The present
suit for property damage is therefore subject to the Act’s pre-litigation procedures, and the Court of Appeal was correct to order a stay until those procedures have been followed.

I.

Plaintiffs Carl and Sandra Van Tassel and several dozen other homeowners (collectively the Van Tassels) purchased 37 new single-family homes from developer and general contractor McMillin Albany LLC (McMillin) at various times after January 2003. In 2013, the Van Tassels sued McMillin, alleging the homes were defective in nearly every aspect of their construction, including the foundations, plumbing, electrical systems, roofs, windows, floors, and chimneys. The complaint alleged the defects had caused property damage to the homes and economic loss due to the cost of repairs and reduction in property values.

McMillin approached the Van Tassels seeking a stipulation to stay the litigation so the parties could proceed through the informal process contemplated by the Act. (§§ 910–938.) That process begins with written notice from the homeowner to the builder of allegations that the builder’s construction falls short of the standards prescribed by the Act. (§ 910.) The builder must acknowledge receipt (§ 913) and thereafter has a right to inspect and test any alleged defect (§ 916). Following any inspection and testing, the builder may offer to repair the defect (§ 917) or pay compensation in lieu of a repair (§ 929). The Act regulates the procedures for any repair, authorizes mediation, and preserves the homeowner’s right to sue in the event the repair is unsatisfactory and no settlement can be reached. (§§ 917–930.) The Van Tassels elected not to stipulate to a stay and instead dismissed their section 896 claim. McMillin moved for a court-ordered stay. (§ 930, subd. (b) (“If the claimant does not conform with the requirements of this chapter, the builder may bring a motion to stay any subsequent court action or other proceeding until the requirements of this chapter have been satisfied.”).) In response, the Van Tassels argued that because the complaint now alleged any claim under the Act, the Act’s informal prelitigation process did not apply. The Van Tassels cited Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC (2013) 219 Cal.App.4th 98, 101 (Liberty Mutual), which held that the Act was adopted to provide a remedy for construction defects causing only economic loss and did not alter preexisting common law remedies in cases where actual property damage or personal injuries resulted.

The trial court denied the motion for a stay. It observed that the issues decided in Liberty Mutual might be the subject of further appellate inquiry, but concluded it was bound to follow the case. Recognizing that the question was not free from doubt, the trial court certified the issue as one worthy of immediate review. (Code Civ. Proc., § 166.1.) McMillin sought writ relief.

The Court of Appeal granted the petition and issued the writ, disagreeing with Liberty Mutual and another case that had followed it, Burch v. Superior Court (2014) 223 Cal. App.4th 1411. The court examined the text and history of the Act and concluded that the Act was meant to at least partially supplant common law remedies in cases where property damage had occurred. In the Court of Appeal’s view, “the Legislature intended that all claims arising out of defects in residential construction” involving post-2003 sales of new houses “be subject to the standards and the requirements of the Act.” Accordingly, the Court of Appeal held the Act’s prelitigation resolution process applied here even though the Van Tassels had dismissed their statutory claim under the Act. The court concluded that McMillin is entitled to a stay pending completion of the prelitigation process.

We granted review.

II.

In deciding whether a statutory scheme alters or displaces the common law, we begin with a presumption that the Legislature did not so intend. (Fahlen v. Sutter Central Valley Hospitals (2014) 58 Cal.4th 655, 669 (Fahlen); California Assn. of Health Facilities v. Department of Health Services (1997) 16 Cal.4th 284, 297 (Health Facilities).) To the extent possible, we construe statutory enactments as consonant with existing common law and reconcile the two bodies of law. (Verdugo v. Target Corp. (2014) 59 Cal.4th 312, 326; People v. Ceja (2010) 49 Cal.4th 1, 10.) Only “where there is no rational basis for harmonizing” a statute with the common law will we conclude that settled common law principles must yield. (Health Facilities, at p. 297.) Although the presumption against displacement of the common law is strong, abrogation of the common law does not require an express declaration; it is enough that “the language or evident purpose of the statute manifest a legislative intent to repeal” a common law rule. (Health Facilities, supra, 16 Cal.4th at p. 297; see Fahlen, supra, 58 Cal.4th at p. 669 [abrogation may be found “by express declaration or by necessary implication”].) In Martinez v. Combs (2010) 49 Cal.4th 35, for example, we canvassed the “full historical and statutory context” surrounding enactment of statutory minimum wage protections and concluded that it “show[ed] unmistakably” that the Legislature intended Industrial Welfare Commission definitions of the employment relationship to control, even when those definitions might depart from the common law. (Id. at p. 64; see Verdugo v. Target Corp., supra, 59 Cal.4th at pp. 326–327 [giving other examples where the Legislature clearly but implicitly abrogated the common law].)

As explained below, the statute here leaves the common law undisturbed in some areas, expressly preserving actions for breach of contract, fraud, and personal injury. (§ 943, subd. (a).) In other areas, however, the Legislature’s intent
to reshape the rules governing construction defect actions is patent. Where common law principles had foreclosed recovery for defects in the absence of property damage or personal injury (Aas, supra, 24 Cal.4th at p. 632), the Act supplies a new statutory cause of action for purely economic loss (§§ 896–897, 942–944). And, of direct relevance here, even in some areas where the common law had supplied a remedy for construction defects resulting in property damage but not personal injury, the text and legislative history reflect a clear and unequivocal intent to supplant common law negligence and strict product liability actions with a statutory claim under the Act.

A.

We begin with the text of the Act, which “comprehensively revises the law applicable to construction defect litigation for individual residential units” within its coverage. (Lantzy v. Centex Homes (2003) 31 Cal.4th 363, 382, fn. 16.) The Act adds title 7 to division 2, part 2 of the Civil Code. (§§ 895–945.5.) That title consists of five chapters. Chapter 1 establishes definitions applicable to the entire title. (§ 895.) Chapter 2 defines standards for building construction. (§§ 896–897.) Chapter 3 governs various builder obligations, including the warranties a builder must provide. (§§ 900–907.) Chapter 4 creates a prelitigation dispute resolution process. (§§ 910–938.) Chapter 5 describes the procedures for lawsuits under the Act. (§§ 941–945.5.)

Section 896, which codifies a lengthy set of standards for the construction of individual dwellings, begins with a preamble describing the intended effect of those standards. As relevant here, the preamble says: “In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder . . . shall, except as specifically set forth in this title, be liable for, and the claimant’s claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title. This title applies to original construction intended to be sold as an individual dwelling unit; but “[a]s to condominium conversions, this title does not apply to or does not supersede any other statutory or common law.” (Ibid.) The Act governs claims concerning stand-alone homes; for such disputes, the Act’s provisions do “supersede any other statutory or common law” except as elsewhere provided.

The Van Tassels argue that section 896 should be read to refer and apply only to claims concerning defects that have yet to cause damage. But no such limitation appears in the text, which says the Act applies to “any action seeking recovery of damages arising out of” construction defects. (§ 896.) The Van Tassels also object that if section 896 is read to apply broadly, the shorter limitations periods it imposes for certain types of defects (e.g., § 896, subds. (e)–(g)) may limit homeowners’ ability to recover. But there is nothing absurd about accepting these limitations periods at face value, and they supply no special reason to disregard the import of the remainder of the statute.


The provisions of chapter 5 make explicit the intended avenues for recouping economic losses, property damages, and personal injury damages. Section 944 defines the universe of damages that are recoverable in an action under the Act. (§ 944 (“If a claim for damages is made under this title, the homeowner is only entitled to damages for” a series of specified types of losses).) In turn, section 943 makes an action under the Act the exclusive means of recovery for damages identified in section 944 absent an express exception: “Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed.” (§ 943, subd. (a).) In other words, section 944 identifies what damages may be recovered in an action under the Act, and section 943 establishes that such
damages may only be recovered in an action under the Act, absent an express exception.

The list of recoverable damages in section 944 and the list of exceptions in section 943 have different consequences for recovery of economic losses, personal injury damages, and property damages:

Economic Loss. As noted, before the Act, tort recovery of purely economic losses occasioned by construction defects was forbidden by this court’s decision in Aas. (Aas, supra, 24 Cal.4th at p. 632.) Section 944 now specifies that various forms of economic loss are recoverable in an action under the Act. (§ 944 [listing among recoverable damages “the reasonable value of repairing any violation of the standards set forth in this title, the reasonable cost of repairing any damages caused by the repair efforts, . . . the reasonable cost of removing and replacing any improper repair by the builder, reasonable relocation and storage expenses, lost business income if the home was used as a principal place of a business licensed to be operated from the home, and reasonable investigative costs for each established violation . . .”].) Consequently, a party suffering economic loss from defective construction may now bring an action to recover these damages under the Act without having to wait until the defect has caused property damage or personal injury. Were there any doubt, section 942 makes clear that “[i]n order to make a claim for violation of the” Act’s standards, “[n]o further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard.”

Personal Injury. In contrast, personal injury damages are not listed as a category recoverable under the Act. (§ 944.) This omission places personal injury claims outside the scope of section 943, subdivision (a), which makes an action under the Act the exclusive remedy for those damages listed in section 944. To make the point even clearer, the Legislature also included personal injury claims in a list of claims that are exempt from the exclusivity of the Act. (§§ 931 [listing any action for “personal injuries” among the causes of action not covered by the Act], 943, subd. (a) [“this title does not apply to . . . any action for . . . personal injury . . .”].) Thus, common law tort claims for personal injury are preserved.

Property Damage. As with economic losses, the Act expressly includes property damages resulting from construction defects among the categories of damages recoverable under the Act. (§ 944 [a homeowner may recover “the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards”]; see § 896 [the Act applies to “recovery of damages arising out of, or related to” construction defects].) This places claims involving property damages within the purview of section 943, subdivision (a), which makes a claim under the Act the exclusive way to recover such damages. And unlike personal injury claims, negligence and strict liability claims for property damages are not among the few types of claims expressly excepted from section 943’s exclusivity. (§ 943, subd. (a); see § 931 [noting claims for personal injury, but not property damage, fall outside the Act’s coverage].)

To sum up this portion of the statutory scheme: For economic losses, the Legislature intended to supersede Aas and provide a statutory basis for recovery. For personal injuries, the Legislature preserved the status quo, retaining the common law as an avenue for recovery. And for property damage, the Legislature replaced the common law methods of recovery with the new statutory scheme. The Act, in effect, provides that construction defect claims not involving personal injury will be treated the same procedurally going forward whether or not the underlying defects gave rise to any property damage.

As with section 896, the Van Tassels argue that section 943, subdivision (a) should be read to make the Act the exclusive remedy only for claims concerning defects that have yet to cause damage. But this view cannot be reconciled with the portion of section 943, subdivision (a) making the Act the exclusive means of recovering any of the categories of damages listed in section 944 — categories that, as noted, include resulting damages from construction defects, not just economic loss. Moreover, if the only purpose of the Act’s creation of a statutory claim was to abrogate the Aas rule for negligence claims and provide for recovery of economic losses, the Act’s provisions would have had no effect on actions for breach of contract, fraud, or personal injury. Had that been the limit of the Legislature’s intent, the inclusion of an exception expressly preserving such claims would have been unnecessary. (§ 943, subd. (a) [“this title does not apply to any action by a claimant to enforce a contract or express contractual provision, or any action for fraud, personal injury, or violation of a statute”].)

Section 897, which applies to elements of construction not otherwise addressed in section 896, is also relevant. Although section 896 was intended to be comprehensive, section 897 provides a supplemental standard for any building components that section 896 may have overlooked: Any part not otherwise covered is defective and “actionable if it causes damage.” This use of damage to measure defectiveness is not unusual; many of the more specific standards in section 896 likewise use the causation of damage as part of the test for whether a given part is defective. (§ 896, subds. (a)(3), (6), (7), (9), (11), (12), (18), (c)(1).) Thus, a claim under the Act, whether predicated on a violation of section 896 or section 897, often may involve circumstances where an alleged defect has resulted in property damage.

The Van Tassels read section 897 as providing that any defect covered by that section can form the basis of a suit under the common law rather than under the Act. Again, the statutory text and context do not support this reading. First, when the Legislature intended to preserve common law claims as a complement to claims under the Act, it did so expressly. (§§ 931, 943, subd. (a); see Gillett v. Stewart (2017) 11 Cal. App.5th 875, 894.) No similar language appears in section 897 to suggest violations of its catchall standard may be pur-
sued in a common law negligence or strict liability action outside the parameters of the Act. Second, other parts of the Act treat sections 896 and 897 as a unified and connected whole. (See §§ 910 [requiring exhaustion of prelitigation procedures in all cases where “a violation of the standards set forth in Chapter 2 [§§ 896–897]” is alleged], 942 [establishing rules for “a claim for violation of the standards set forth in Chapter 2 [§§ 896–897]”].) Such treatment is at odds with the Van Tassels’ proposal that section 897, unlike section 896, may be enforced at common law. Were we to agree with the Van Tassels that a defect standard based on damage causation reflects a legislative intent to preserve a common law claim for such defects, this would create difficulties in applying section 896. That section measures defectiveness for some but not all building components by whether damage was caused and, under the Van Tassels’ reading, would support a common law claim for some but not all standard violations. (Compare § 896, subds. (a)(3), (6), (7), (11), (12), (18), (c)(1) [setting out standards for various components that depend on damage] with id., subds. (a)(4), (14)–(17), (b) (1)–(4), (d)–(f) [setting out standards for other components that do not depend on damage].) Had the Legislature intended such a selective preservation of common law remedies, we think it would have said so, as it did elsewhere.

Against these textual inferences, the Van Tassels point to other portions of the Act that purportedly preserve common law claims and confine the Act’s prelitigation procedures to statutory claims under the Act. (See §§ 910, 914, subd. (a), 942.) Central to their argument is section 910, which says: “Prior to filing an action against any party alleged to have contributed to a violation of the standards set forth in Chapter 2 (commencing with Section 896), the claimant shall initiate the following prelitigation procedures . . . .” The Van Tassels contend that this passage limits the applicability of the Act’s prelitigation procedures to cases where the complaint formally “allege[s]” the defendant has “contributed to a violation of the standards” set forth in the Act. A common law claim for property damage that does not contain such formal allegations, they argue, is exempt from the Act’s prelitigation procedures. But this reading of the statute is difficult to reconcile with section 943, subdivision (a), which says: “Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed.” In other words, section 943 disallows claims other than those predicated on the Act’s standards, with exceptions not applicable here. And if a claim for property damage alleges a violation of section 896 or section 897, then section 910 by its terms subjects the claim to the Act’s prelitigation procedures.

Finally, the Van Tassels argue that the presumption against abrogation of the common law requires an express statement that the Legislature intended to displace existing remedies. It does not. (Ante, at p. 5.) Moreover, both sides agree that the Legislature in passing the Act sought to abrogate the common law, even though the text contains no express statement of that intent. They differ only in degree: The Van Tassels contend that the Legislature sought only to overrule the common law limits on recovery identified in Aas, whereas McMillin contends that the Legislature went further in supplanting certain common law claims with statutory ones. As explained above, we agree with McMillin’s reading of the Act.

B.

The legislative history of the Act confirms that displacement of parts of the existing remedial scheme was no accident, but rather a considered choice to reform construction defect litigation.

First, language in the Legislature’s analyses of the Act’s effects reflects an intent that the Act would govern not only no damage cases, but cases where property damage had resulted. The Act’s standards were designed so that “except where explicitly specified otherwise, liability would accrue under the standards regardless of whether the violation of the standard had resulted in actual damage or injury.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, p. 4.) Both halves of this intended application are significant: Liability under the standards would attach even in the absence of actual damage, thus effectively abrogating Aas. And liability under the standards would also attach in cases of actual damage; in other words, the Legislature anticipated that passage of the Act would result in standards that governed liability even when violation of the standards had resulted in property damage. The Legislature thus recognized and intended that claims under the Act would cover territory previously in the domain of the common law.

Second, the Act “establishes a mandatory process prior to the filing of a construction defect action,” with the “major component of this process” being “the builder’s absolute right to attempt a repair prior to a homeowner filing an action in court.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, p. 5.) These purposes, the creation of a mandatory prelitigation process and the granting of a right to repair, would be thwarted if we were to read the Act to permit homeowners to continue to sue as before at common law, without abiding by the procedural requirements of the Act, for construction defect claims involving damages other than economic loss.

Third, although there is no doubt that the Act had the intended effect of overriding Aas’s limits on construction defect actions, that effect was treated in both the Assembly and Senate as one consequence of the overall reform package, not as the principal goal of the Act. The Assembly Committee on the Judiciary described as a “principal feature of the bill” the establishment of construction defect standards and then observed that one consequence of the “standards [is to] effectively end the debate over the controversial decision in the Aas case.” (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 26, 2002, p. 3; accord, Sen. Rules Com., Off. of Sen. Floor Anal-
yses, analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, p. 3.) In a similar vein, the Senate Committee on the Judiciary described the Act as creating standards that would “govern any action seeking recovery of damages arising out of or related to construction defects” and then noted that “[i]n addition” the rules for liability under the standards would “essentially overrule the Aas decision and, for most defects, eliminate that decision’s holding that construction defects must cause actual damage or injury prior to being actionable.” (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, p. 4.) If the Van Tassels’ interpretation of the Act were correct, then the legislative analyses certainly bury the lede.

In sum, the legislative history confirms what the statutory text reflects: the Act was designed as a broad reform package that would substantially change existing law by displacing some common law claims and substituting in their stead a statutory cause of action with a mandatory prelitigation process.

III.

Echoing an argument made by the Court of Appeal in Liberty Mutual, supra, 219 Cal.App.4th 98, the Van Tassels contend that the detailed prelitigation procedures and timelines set out in chapter 4 (§§ 910–938) cannot rationally be applied to defects that create a sudden loss requiring emergency repairs. From this, they infer that the Act and its procedures were never intended to extend to claims for defects resulting in actual damage. We are not presented with a case in which any party had to take emergency action. But the emergency scenario does not give us reason to doubt that the Act applies to property damage cases.

The Act requires a homeowner, before suing, to provide a builder with written notice and a general description of an alleged construction defect. (§ 910, subd. (a).) The Act then subjects the builder to a series of deadlines by which it must acknowledge receipt, supply relevant records, and, if it chooses, inspect, offer to repair the defect, and commence repairs. (§§ 912–913, 916–917, 921.) In nonemergency cases, there is no tension between these provisions and the portions of the Act that extend its application to cases involving property damage. In the absence of delay risking a worsening of any damage, a homeowner will have time to give the requisite notice and await the builder’s response. If the builder drags its feet in a way that exacerbates damage, the Act protects the homeowner. (See § 944 [builder is liable for “the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards”]; KB Home Greater Los Angeles, Inc. v. Superior Court (2014) 223 Cal. App.4th 1471, 1478 (KB Home) [“Since the builder is required to compensate the homeowner for consequential damages, including the cost of repair of actual property damage caused by a construction defect, any delay up to the statutory maximum risks increasing the builder’s liability.”].)

Defects that trigger sudden ongoing, escalating damage present a more difficult problem. The Act does not expressly address how its operation might change in such unusual circumstances. The minimal requirements of formal written notice and awaiting a builder response could be onerous in cases where a construction failure creates a need for emergency action by a homeowner or the homeowner’s insurer. But we need not read the notice requirement in isolation. The Act also imposes on homeowners a general duty to act reasonably in order to mitigate losses. (See § 945.5, subd. (b) [affording builders an affirmative defense where losses are the result of “a homeowner’s unreasonable failure to minimize or prevent those damages in a timely manner”].) A failure to give formal written notice before taking any other action might well be excused in circumstances where a homeowner has acted reasonably to mitigate losses and has provided informal notice, and subsequent written notice, in a manner that is as timely and effective as reasonably practicable under the circumstances. (See Lewis v. Superior Court (1985) 175 Cal. App.3d 366, 378 [construing statute of limitations for filing of complaint to permit an exception “based upon impossibility where catastrophic fire or earthquake or other events might render it physically impossible” to comply]; cf. KB Home, supra, 223 Cal.App.4th 1471 [notice requirement not excused where homeowner alerted insurer, but not builder, and insurer completed repairs three months later before finally notifying builder].)

A similar principle of reasonableness must be applied to the interpretation of the builder’s rights and obligations. Although the Act establishes various maximum time periods in which the builder may respond, inspect, offer to repair, and commence repairs (§§ 913, 916–917, 921), the builder avails itself of the full time allowed by the Act at its peril. The builder is liable for the damages its construction defects cause, and even when a homeowner has acted unreasonably in failing to limit losses, the builder remains liable for “damages due to the untimely or inadequate response of a builder to the homeowner’s claim.” (§ 945.5, subd. (b).) What constitutes a timely response will vary according to the circumstances, and the maximum response periods set forth by the Act do not necessarily insulate a builder from damages when the builder has failed to take remedial action as promptly as is reasonable under the circumstances. The Act’s liability provisions thus supply builders and homeowners clear incentives to move quickly to minimize damages when alerted to emergencies. (KB Home, supra, 223 Cal.App.4th at p. 1478.)

The Van Tassels highlight section 930, subdivision (a), which requires “[t]he time periods . . . in this chapter . . . to be strictly construed, . . . unless extended by the mutual agreement of the parties.” But this directive simply ensures that the time periods are followed when the parties have not agreed otherwise. It does not mean that the parties are necessarily immune from liability for failing to take swifter action when circumstances dictate.
Because this case does not involve a catastrophic occurrence or emergency repairs, we need not decide definitively how the Act would apply on such facts. But our review of the Act’s provisions reveals enough play in the joints to suggest that the Act can be adapted well enough to extreme circumstances. The tension between the Act’s timelines and the occasional need for expeditious action in exigent circumstances does not provide a sufficiently compelling reason to disregard the numerous indications in the Act’s text and history that the Legislature clearly intended it to govern cases involving actual property damage. We disapprove Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC, supra, 219 Cal.App.4th 98, and Burch v. Superior Court, supra, 223 Cal.App.4th 1411, to the extent they are inconsistent with the views expressed in this opinion.

IV.

The Van Tassels voluntarily dismissed without prejudice their cause of action for violation of section 896’s standards. Even so, the operative complaint includes claims resting on allegations that McMillin defectively constructed the foundations, plumbing, roofs, electrical conduits, framing, flooring, and walls of the plaintiffs’ homes. This suit remains an “action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction” of the plaintiffs’ homes (§ 896), and McMillin’s liability under the Van Tassels’ negligence and strict liability claims depends on the extent to which it violated the standards of sections 896 and 897. Thus, the Van Tassels were required to initiate the prelitigation procedures provided for in the Act. (See Elliott Homes, Inc. v. Superior Court (2016) 6 Cal.App.5th 333, 341 [“[W]here the complaint alleges deficiencies in construction that constitute violations of the standards set out in chapter 2 of the Act, the claims are subject to the Act, and the homeowner must comply with the prelitigation procedure, regardless of the theory of liability asserted in the complaint.”].)

In holding that claims seeking recovery for construction defect damages are subject to the Act’s prelitigation procedures regardless of how they are pleaded, we have no occasion to address the extent to which a party might rely upon common law principles in pursuing liability under the Act. Nor does our holding embrace claims such as those for breach of contract, fraud, or personal injury that are expressly placed outside the reach of the Act’s exclusivity. (§ 943, subd. (a).) That limit does not help the Van Tassels’ position here, for while the complaint includes breach of contract and breach of warranty claims, it also includes claims for strict liability and negligent failure to construct defect-free homes, to which no statutory exception applies. Accordingly, the Van Tassels must comply with the Act’s prelitigation procedures before their suit may proceed. Because the Van Tassels have not yet done so, McMillin is entitled to a stay. (§ 930, subd. (b).)

CONCLUSION

We affirm the judgment of the Court of Appeal and remand for further proceedings not inconsistent with this opinion.

LIU, J.

WE CONCUR: CANTIL-SAKAUYE, C. J., CHIN, J., CORRIGAN, J., CUÉLLAR, J., KRUGER, J., LUI, J.

Presiding Justice of the Court of Appeal, Second Appellate District, Division Two, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
California Courts of Appeal

Cite as 18 C.D.O.S. 629

SAMUEL DURAN et al., Plaintiffs and
Appellants,
v.
U.S. BANK NATIONAL ASSOCIATION,
Defendant and Respondent.

No. A148817
In The Court of Appeal of the State of California
First Appellate District
Division One
(Alameda County Super. Ct. No. 2001-035537)
Filed January 17, 2018

COUNSEL

Wynne Law Firm, Edward J. Wynne, for Plaintiffs and Appellants.

OPINION

In our second encounter with this class action case, plaintiffs Samuel Duran and Matt Fitzsimmons appeal from the trial court’s order denying class certification. This case is a wage and hour class action challenging whether defendant U.S. Bank National Association (Bank) had properly classified its business banking officers (BBOs) as exempt employees under the outside salesperson exemption. This exemption applies to employees who spend more than 50 percent of their workday engaged in sales activities outside their employer’s place of business. The trial court concluded plaintiffs failed to demonstrate that the case is manageable as a class action. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. BACKGROUND

The factual background behind plaintiffs’ claims and the procedural history of this case from its inception are well known to the parties and this court, and we will not repeat it here. In brief, the case centers on plaintiffs’ allegations that they were misclassified as outside salespersons when they allegedly actually spent the majority of their working hours inside Bank offices.1 Like the court below, we incorporate by reference pages 13 through 24 of the Supreme Court’s opinion in Duran, supra, 59 Cal.4th 1.) That decision affirmed our opinion reversing the judgment entered in favor of plaintiffs after a bench trial, leaving open that the trial court could “entertain a new class certification motion.” (Duran, at p. 50.) That new motion is the subject of the present appeal.

On July 7, 2014, the remittitur from Duran was filed and the case was reassigned to a new judicial officer on September 8, 2014, following the Bank’s challenge to the original trial judge.

II. MOTIONS REGARDING CERTIFICATION

On December 18, 2014, the Bank filed a motion to deny class certification.

On January 21, 2015, the trial court denied plaintiffs’ request to reopen discovery, finding that the prior discovery was “very extensive.”

Plaintiffs retained survey expert Jon A. Krosnick in connection with their opposition to the Bank’s motion. On February 1, 2015, Krosnick sent an “‘advance letter’ ” to putative class members, alerting them to an impending survey and the fact that they might be contacted. The letter enclosed $2 as a “thank you” and promised an additional $25 to $35 for answering a 20-minute phone survey that would be “completely confidential.”

On February 13, 2015, Ted Biggs, a senior vice president of the Bank, sent a letter to putative class members informing them of the Bank’s belief that Krosnick’s letter had been sent in connection with the pending lawsuit. Among other things, Biggs disputed a statement in Krosnick’s letter promising respondents that their identities would be kept confidential.

On February 27, 2015, the trial court granted, in part, plaintiffs’ ex parte application seeking, among other things, the authority to send a corrective mailing.2 The court denied the Bank’s corresponding ex parte application seeking to halt the survey and to bar further “ ‘unapproved’ ” communications with putative class members. The court found plaintiffs had a right to conduct the survey in order to support their opposition to the Bank’s motion. At the same time, the court observed it was unclear “how a survey of putative class members in this unique context could help resolve the manageability issues” identified by the Supreme Court in Duran.

On April 30, 2015, plaintiffs filed an opposition to the Bank’s motion to deny certification, characterizing their opposition as a cross-motion for class certification.3 In support of their motion, plaintiffs included, among other things, an

Order No. 40-2001, subd. (2)(m).) Here, there is no dispute that BBOs were primarily engaged in “sales.” (Duran v. U.S. Bank National Assn. (2014) 59 Cal.4th 1, 26 (Duran).) 2. Apart from allowing plaintiffs to depose the Bank’s senior vice president “in order to get to the bottom of what happened,” the trial court denied plaintiffs’ request to reopen discovery.

3. The parties submitted extensive evidence to the trial court in connection with the class certification issue, much of which the court found to be “incredibly redundant.”
April 2015 survey report prepared by Krosnick (2015 Survey). In his report, he indicated his task had been “to conduct a survey of members of the Duran class with which to generate a menu of margins of errors for various possible numbers of witnesses who could testify at trial and answer questions to reveal the average number of hours they worked per week, the proportion of their work hours that were spent performing sales-related activities, and the proportion of their work hours that were spent performing outside sales-related activities.” The 2015 Survey is described in more detail below.

On June 5, 2015, the trial court granted, in part, a motion to compel filed by the Bank, ordering plaintiffs to produce the identities of the 2015 Survey respondents and their survey responses. The court also ordered plaintiffs to produce the identities of those respondents to an earlier Krosnick survey (2008 Survey) who had also responded to the 2015 Survey, together with the 2008 Survey responses of those respondents. In its order, the court observed that the Bank had “realistic” expectations that BBOs could perform their job duties and meet the production goals of their position while spending more than half of their working time away from the office. As statistical evidence, they proposed using representative testimony with sample sizes ranging from 15 to 50 BBOs, having associated respective margins of error ranging from 11 percent to 5.53 percent. This liability phase would be followed by a restitution phase to determine the amount of money owed to the class, “[b]ased on the court’s findings of the average hours worked per week by the randomly chosen BBOs who testify at trial.” Plaintiffs proposed allowing the Bank to litigate its affirmative defense by calling BBOs outside the random sample, subject to the trial court’s discretion to cut off the Banks’ presentation of evidence under Evidence Code section 352.

On October 2, 2015, the Bank filed its reply brief, expanding the evidentiary record to include 66 additional declarations from BBOs who testified that they regularly spent the majority of their time outside Bank locations. The Bank also included a declaration prepared by its expert, Andrew Hildreth, which criticized the 2015 Survey and its methodology. In brief, Hildreth concluded the survey suffered from self-selection bias, as well as serious measurement and estimation errors.

On November 13, 2015, plaintiffs filed their reply in support of their cross-motion for class certification, along with a third Krosnick report that addressed Hildreth’s criticisms.

On March 25, 2016, the trial court, pursuant to Evidence Code section 730, appointed an independent expert, Kent D. Van Liere, to advise it on the survey science underpinning the parties’ motions. On March 29, 2016, the Bank submitted a second declaration from Hildreth addressing new material contained in the third Krosnick report.

### III. Denial of Class Certification

On May 19, 2016, the trial court filed its order denying class certification. In its order, the court concluded plaintiffs had failed to carry their burden of showing that common questions predominated. The court observed, “A primary factor in the Duran court’s finding that the class may have been improvidently certified the first time around was its conclusion that the trial court had ‘received no evidence establishing uniformity in how BBOs spent their time.’ ” The court concluded that, apart from shoring up plaintiffs’ trial plan, their statistical evidence “continues to fall short of the kind of showing of uniformity that the Duran court found necessary.” In spite of the voluminous evidence submitted by both parties, the court found “[t]he only new material of any importance lies in the disputes between Krosnick and Hildreth” (italics added). The court determined the certification issue based on its resolution of those disputes.

---

5. Evidence Code section 730 provides, in part: “When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court.” In a footnote in its order, the trial court asked that we give “further guidance on the use of [Evidence Code] Section 730 to appoint an expert as a court technical consultant,” citing to Diz-Barba v. Superior Court (2015) 236 Cal.App.4th 1470, 1490. The use of experts to assist the court as consultants can be beneficial in complex cases. We note Federal Rules of Evidence, rule 706 also applies to court-appointed expert witnesses. Cases addressing this rule may prove helpful to our trial courts. As was observed in Leesona Corp. v. Varta Batteries, Inc. (S.D.N.Y. 1981) 522 F.Supp. 1304, 1312: “[A] court expert serves not only as a witness on whose opinion the Court can rely for assistance, but also as both a second set of ears for the court and a teacher who, unaffected by his having been called as a witness by one side or the other, can explain the technical significance of the evidence presented. [¶] Naturally a court will rely heavily on and give great weight to the testimony of its own expert . . . . Nevertheless, although a scientifically difficult patent case such as this is ideally suited to the appointment of a court expert pursuant to Rule 706, the appointment of such an expert does not remove from the trial court’s shoulders the burden of understanding and becoming fully familiar with the technical questions in the case. The court expert serves to enhance the trial court’s understanding, but it is the court, and not its expert, that decides the case.” California courts have acknowledged the value in court-appointed assistance from experts, especially in complex cases presenting issues beyond a trial judge’s knowledge. (People ex rel. Brown v. Tri-Union Seafoods, LLC (2009) 171 Cal.App.4th 1549, 1573–1574; Mercury Casualty Co. v. Superior Court (1986) 179 Cal.App.3d 1027, 1032.)
Relying on Hildreth’s analysis, the trial court concluded that two central flaws in the 2015 Survey operated to defeat plaintiffs’ certification efforts: (1) “the issues arising from the differences between the responses to the 2008 Survey and the responses to the 2015 Survey,” and (2) “the related issue of Krosnick’s use of total average hours worked per week rather than average overtime hours worked per week.” As to the second point, the trial court surmised that Krosnick had failed to understand plaintiffs’ theory of liability.

In setting forth its reasoning, the trial court also indicated it was “initially satisfied” with how plaintiffs’ trial plan proposed addressing the Bank’s affirmative defenses. However, upon finding the 2015 Survey data to be unreliable “for any purpose” (italics added), the court determined plaintiffs could not rely on the survey instrument in establishing a prima facie case. Additionally, the court observed that representative sampling could not be used to establish an aggregate restitution award because the proposed sample sizes were not scientifically supportable for that purpose. The court also found it would not be able to adequately manage the Bank’s affirmative defense—that at least some class members worked most of their time outside the office—because the 2015 Survey failed to eliminate the need for “a host of ‘mini trials.’ “ In sum, the court concluded the pertinent factual questions “present severe manageability problems.” The court thus denied certification on the grounds that plaintiffs had failed to demonstrate common issues would predominate or that individual issues could be effectively managed. This appeal followed.

**DISCUSSION**

**I. STANDARD OF REVIEW FOR CLASS CERTIFICATION**

The party seeking class treatment must show (1) an ascertainable and sufficiently numerous class, (2) a well-defined community of interest, and (3) substantial benefits from certification that render proceeding as a class superior to the alternatives. (Ayala v. Antelope Valley Newspapers, Inc. (2014) 59 Cal.4th at p. 529–530 (Ayala); Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1021 (Brinker.).) The “community of interest” requirement encompasses three factors: predominant common questions of law or fact; class representatives with claims or defenses typical of the class; and class representatives who adequately represent the class. (Ayala, at p. 530; Brinker, at p. 1021.)

The certification question is a procedural one that does not focus on the merits of the case. (Brinker, supra, 53 Cal.4th at p. 1023; Sav-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 327 (Sav-On.).) In evaluating predominance, our Supreme Court explained: “[A court] must determine whether the elements necessary to establish liability are susceptible of common proof or, if not, whether there are ways to manage effectively proof of any elements that may require individualized evidence.” (Brinker, at p. 1024; accord, Ayala, supra, 59 Cal.4th at p. 533.) “The ‘ultimate question’ the element of predominance presents is whether ‘the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ “ (Brinker, at p. 1021; accord, Duran, supra, 59 Cal.4th at p. 28.) In addition, the trial court must consider whether individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. (Duran, at pp. 28–29; Washington Mutual Bank v. Superior Court (2001) 24 Cal.4th 906, 922–923; Martinez v. Joe’s Crab Shack Holdings (2014) 231 Cal. App.4th 362, 378 (Martinez).)

We review the class certification ruling for an abuse of discretion. (Ayala, supra, 59 Cal.4th at p. 530; Brinker, supra, 53 Cal.4th at p. 1022.) Trial courts are afforded great discretion in granting or denying certification because they are ideally situated to evaluate the efficiencies and practicalities of permitting group action. (Brinker, at p. 1022; Sav-On, supra, 34 Cal.4th at pp. 326–327.) Generally, the trial court’s ruling will not be disturbed unless it is unsupported by substantial evidence or rests on improper criteria or erroneous legal assumptions. (Ibid.; Linder v. Thrifty Oil (2000) 23 Cal.4th 429, 435–436.) In Ayala, our Supreme Court explained: “We review the trial court’s actual reasons for granting or denying certification; if they are erroneous, we must reverse, whether or not other reasons not relied upon might have supported the ruling.” (Ayala, at p. 530; accord, Alberts v. Aurora Behavioral Health Care (2015) 241 Cal.App.4th 388, 399; Martinez, supra, 231 Cal.App.4th at p. 373.)

**II. DURAN**

In Duran, our Supreme Court discussed the use of surveys and statistical sampling as evidence to prove class action claims. “[I]f sufficient common questions exist to support class certification, it may be possible to manage individual issues through the use of surveys and statistical sampling. Statistical methods cannot entirely substitute for common proof, however. There must be some glue that binds class members together apart from statistical evidence. While sampling may furnish indications of an employer’s centralized practices [citation], no court has ‘deemed a mere proposal for statistical sampling to be an adequate evidentiary substitute for demonstrating the requisite commonality, or suggested that statistical sampling may be used to manufacture predominate common issues where the factual record indicates none exist.’ “ (Duran, supra, 59 Cal.4th at p. 31; accord, Martinez, supra, 231 Cal.App.4th at p. 379; see Tyson Foods, Inc. v. Bouaphakeo (2016) 136 S.Ct. 1036, 1049 [“Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action.”].)

Our Supreme Court in Duran noted that “the outside salesperson exemption has the obvious potential to generate individual issues because the primary considerations are how and where the employee actually spends his or her work-
day.” (Duran, supra, 59 Cal.4th at p. 27.) The court stressed that “a statistical plan for managing individual issues must be conducted with sufficient rigor.” (Duran, at p. 31; accord, Mies v. Sephora U.S.A., Inc. (2015) 234 Cal.App.4th 967, 985 (Mies).) The court noted that “[i]f the variability [in the class] is too great, individual issues are more likely to swamp common ones and render the class action unmanageable.” (Duran, at p. 33.)

III. THE TRIAL COURT’S CONCLUSIONS REGARDING THE 2015 SURVEY

A. The 2015 Survey and Hildreth’s Criticism

Plaintiffs’ theory of liability is that the Bank’s uniform classification of the BBO position as exempt was unlawful because the position allegedly was designed as an inside sales/telemarketing job, and realistically could only be performed by spending the majority of time inside the bank. In its order denying certification, the court noted that plaintiffs’ trial plan reported “[t]he stated purpose of the Krosnick survey was to determine the appropriate size of a sample group of witnesses needed to testify at trial in order to prove, by statistical inference [citation], Plaintiffs’ theory of liability and an aggregate amount of restitution.”

The trial court found plaintiffs satisfied the requirements of ascertainability, numerosity, and adequacy of representation. But the court ruled plaintiffs failed to show common questions of law or fact predominated over individual issues. In addition, the court concluded class treatment was not superior to other means of resolving the claims because individual issues could not be properly managed. We find these conclusions are supported by substantial evidence, primarily in the form of Hildreth’s declarations.

Krosnick reported that 160 class members were randomly selected for the survey. A total of 87 interviews were completed and the response rate for the survey was 54 percent. He indicated that 95.45 percent of the respondents reported spending 50 percent or less of their work time performing outside sales-related activities. Ninety point ninety-one percent of respondents who stated they spent 50 percent or more of their work time performing sales-related activities also reported that they worked an average of 63.18 hours per week. Using the survey data, confidence intervals and margins of error were estimated for sample sizes relating to these findings, ranging from 15 to 50 people, with the results set forth in chart form. For example, as to the issue of time respondents had spent performing outside sales-related activities, a sample size of 15 people resulted in a margin of error of 11.01 percent, whereas a sample size of 50 people had a margin of error of 5.53 percent.

Hildreth summed up his opinion of the 2015 Survey by concluding Krosnick’s “proposed ‘menu’ of potential sample sizes and accompanying margins of error is completely in accurate. In reality, far larger sample sizes than those proposed would be required to approach the margins of error presented by Dr. Krosnick . . . .” Hildreth faulted the survey for having various forms of bias and error, as well as for its improper use of survey data. For example, Hildreth opined that the 2015 Survey was “a textbook example of self-selection bias” because it is based on a self-selected sample of respondents. By subtracting 40 hours from Krosnick’s weekly hour figures, Hildreth also showed that the 2008 Survey produced estimates alternatively calculated at 13.82 or 14.39 overtime hours per week, whereas the 2015 Survey produced estimates of 23 overtime hours per week. Hildreth observed: “This significant difference between the two surveys, from the same population, is of an order of magnitude that illustrates the degree to which the statistics produced by the Krosnick surveys are not reliable.” He also concluded that Krosnick had not offered any scientific or tested explanation as to why such a dramatic difference would have been produced by surveying the same population with the same questions.7

Hildreth opined that by comparing the total hours worked per week instead of average overtime hours per week, Krosnick had masked the extent to which the values in the two surveys differed. Krosnick’s methodology minimized the difference between the two surveys’ results and the associated estimated margins of error. Hildreth’s analysis demonstrated that a statistical comparison of the overtime hours only (versus total hours worked) showed that the responses given by the same respondents “are so different they might as well be completely unrelated.” He concluded that if Krosnick’s methodology were used to estimate the average hours of overtime worked per week, “testimony from the whole putative class would potentially be required to produce an acceptable relative or absolute margin of error . . . .”

B. The Trial Court’s Reasoning

The trial court started from the premise that in the absence of a viable “trial ready” trial plan, “certification must be denied.” The court first noted the need for plaintiffs to show predominance, which was contingent on the 2015 Survey data: “Plaintiffs need the survey to support selection of a sample size for the liability phase, to provide a basis for an aggregate restitution determination and also, in this case, to provide some comfort to the court that [the Bank’s] affirmative defense will not lead to a proliferation of mini[] trials in the first phase of the case.”

The trial court then focused on manageability, specifically, on the need for the trial plan to adequately address both liability with respect to plaintiffs’ prima facie case, as well as the Bank’s affirmative defense of the outside sales exemp-

---

6. As the trial court noted, most of the tables in the technical appendix show the number of respondents as 66 rather than 87.

7. Hildreth also reported that 18 individuals responded to both the 2008 Survey and the 2015 Survey. The average for the 18 matched responses from the same individuals shows an increase in the purported average hours worked per week by an average of 5.8 hours. All but two individuals had changed their estimates, with six people reporting fewer hours and 10 others increasing the hours they worked.
tion. While initially satisfied with the manner in which the proposed trial plan had anticipated addressing the Bank’s affirmative defense, the court concluded plaintiffs could not establish a prima facie case as to liability because the 2015 Survey data was unreliable for any purpose.

Second, even if the liability phase was allowed to proceed, the trial court determined that there was no manageable way to determine an aggregate restitution award using representative sampling because “the sample size is not scientifically supported for this purpose.” The damages phase of the trial would thus require testimony from each class member, leading to a “host of ‘mini trials.’” Finally, because of the unreliability suggested in the comparison between the 2008 and 2015 surveys, the court concluded that, as with the issue of restitution, “the affirmative defense [that at least some class members in fact worked most of their time outside the office] would [also] appear to require a host of ‘mini trials.’”

The trial court found the differences between the responses to the 2008 Survey and the responses to the 2015 Survey, along with Krosnick’s use of total average hours worked per week rather than average overtime hours worked per week, to be dispositive of the certification issue. The first court noted that the 2008 Survey solicited essentially the same information as the 2015 Survey with respect to the total hours worked per week, yet the responses to the 2008 Survey yielded an average of 53.76 hours, whereas the 2015 Survey yielded an average of 63.18 hours. We concur with the court’s observation that “[e]ven a non-mathematician can readily see that this is a difference of nearly ten hours per week, which is a large number in this context.”

The trial court found this discrepancy to be “tangible evidence” supporting Hildreth’s arguments regarding self-interest bias, tainting subject matter areas that were covered by the 2015 Survey only, namely, whether respondents spent most of their time inside or outside of the office. The bias identified by Hildreth could have skewed all the survey results upwards, potentially requiring a larger sample size for plaintiffs to prove their liability theory, as well as increasing the number of class members the Bank would call to establish its affirmative defense.

The trial court found that a separate problem arose from plaintiffs’ proposal to use the same randomly selected witness group for the fixing of aggregate damages. The court noted that Krosnick had used average total hours worked per week rather than average overtime hours worked per week in his calculations. This choice was problematic because the difference in total hours worked “yields significantly different variation calculations than a comparison between far smaller numbers—here, the overtime hours derived by subtracting 40 from the total hours.” The court agreed with Hildreth that in the context of restitution, the focus had to be on overtime hours, not total hours worked. The variation within the class would be much greater in the overtime context, and “the necessary sample size needed to achieve the relative margin of error found acceptable by the court in [Bell v. Farmers Ins. Exchange (2004) 115 Cal.App.4th 715 (Bell)] is driven up dramatically.”

The trial court concluded that the 2015 Survey results “do not support the conclusion that—given the small class size in this case—a sample group of any size smaller than the entire class could ever yield an aggregate restitution award ‘as a matter of just and reasonable inference.’ [Citation.] In other words, the experience of each class member would need to be tested not only to determine his or her individual share, but also to arrive at an aggregate amount of restitution in the first place. This, of course, has severe manageability implications.” Although the court found that a survey like the 2015 Survey could theoretically be used to support a finding as to whether the Bank’s policy of classifying all class members as exempt employees was lawful, it concluded that a comparison between the overlapping portions of the 2008 and 2015 surveys “demonstrates that the data from the 2015 Survey is not sufficiently reliable for Plaintiffs’ intended use.”

We agree with the trial court that, at this point, the viability of plaintiffs’ motion to proceed as a class action is critically dependent on the evidentiary value of the 2015 Survey. As the Duran court noted, the lower court in the prior trial “received no evidence establishing uniformity in how BBOs spent their time.” (Duran, supra, 59 Cal.4th at p. 32.) The disparity between the estimated overtime hours worked per week as reported in the 2008 and 2015 surveys (approximately 14 hours in 2008 versus 23 hours in 2015) is more than enough to convince us that substantial evidence supports the court’s decision to deny certification. The overtime figure nearly doubled in the 2015 Survey, with a difference of almost 10 hours per person per week on average. Plaintiffs do not satisfactorily explain this discrepancy, which the lower court found to have “taint[ed] the use of the 2015 Survey not only on the subject matter where the two surveys overlap but also on the subject matter covered only by the 2015 Survey— to wit, where respondents say they spent most of their time, whether it was inside or outside the office.” We conclude the court did not abuse its discretion in ruling that the 2015 Survey is unreliable for the purpose of showing that common issues would predominate at trial. We proceed to specifically address plaintiffs’ arguments on appeal.

**IV. PLAINTIFFS’ ARGUMENTS**

**A. Whether the Trial Plan Adequately Manages the Affirmative Defense**

As part of its ruling, the trial court stated that plaintiffs’ trial plan “fails to resolve the manageability issues posed by the affirmative defenses, and specifically the argument that at least some of the class members in fact worked most of their time outside the office.” Plaintiffs assert this passage indicates the court erroneously believed that a liability deter-

---

8. In Bell, the parties’ experts estimated average weekly overtime hours at 9.4 hours, with a plus/minus 0.9-hour margin of error. Bell involved a random sample of nearly 300 individuals. (Bell, supra, 115 Cal.App.4th at pp. 753, 755–756.)
mination in a misclassification case must identify which class members were misclassified. They claim their theory of the case, that the Bank did not have a realistic expectation that its BBOs would primarily engage in outside sales activities, is fully consistent with Duran, and assert any finding of liability on this point would be equally applicable to all BBOs.

Plaintiffs rely heavily on Justice Liu’s concurrence in Duran, supra, 59 Cal.4th 1 and on Martinez, supra, 231 Cal. App.4th 362 in asserting that “the ultimate question is: what are the realistic requirements of the job?” Plaintiffs argue that liability in a misclassification case is determined based not on how employees actually spend their time, but rather on whether the employer realistically expected employees to spend the majority of their time on exempt duties. In their view, if an employer did not realistically expect employees to spend the majority of their time on exempt duties, then its classification of the position as exempt is unlawful and liability is thereby established for the entire class, even for those class members who actually spent the majority of their time on exempt duties.

Justice Liu’s concurrence did not alter the Duran court’s conclusion that “the question is ‘first and foremost’ how the employee’s time is actually spent.” (Duran, supra, 59 Cal.4th at p. 27.) Instead, the concurrence was drafted “to further elucidate the proper inquiry at the class certification stage of an employee misclassification case and the duty of the trial courts to manage individual issues in a class action trial.” (Id. at p. 51.) Justice Liu sought to reemphasize that in some cases, an employer’s “realistic expectations” or the “realistic requirements of the job” may be shown by common proof. (Id. at pp. 52–53.) Specifically, he sought to address “[w]hat would it mean to ‘manage individual issues’ in the context of an employee misclassification case?” (Id. at p. 55.) He then set forth two ways for a trial court to frame a representative sampling approach to proving class liability. First, he advised that consideration of individual issues should inform the design of any sampling or similar statistical approach. Second, he acknowledged that a defendant is entitled to raise individual issues that challenge the results of a valid sampling plan as implemented. (Duran, at pp. 55–56.) It does not appear to us that the concurrence is inconsistent with the majority opinion or that it suggests a different standard should apply when analyzing certification motions.

In Martinez, the appellate court concluded the trial court abused its discretion by denying the plaintiffs’ motion for certification of a class of salaried managerial employees who had allegedly been misclassified. The plaintiffs alleged that the employer’s operations, hiring, training, and other practices were uniform throughout the restaurant chain. Because the restaurants were typically understaffed, managers routinely filled in where needed, working as cooks, servers, bussers, hosts, stockers, bartenders, and kitchen staff. (Martinez, supra, 231 Cal.App.4th at pp. 368–369.) Each of the plaintiffs’ declarants estimated he or she had spent the majority of time performing such hourly tasks, but later admitted they were unable to estimate the amount of time spent on exempt versus nonexempt tasks. (Id. at pp. 369, 371.) The trial court found all putative class members performed similar duties and responsibilities pursuant to a finite task list. (Id. at p. 371, fn. 12.) But it concluded the plaintiffs’ claims were not typical and they were inadequate class representatives because they were unable to estimate the number of hours spent on individual exempt and nonexempt tasks and their job duties varied from day to day. Common questions did not predominate because there were “significant individual disputed issues of fact relating to the amount of time spent by individual class members on particular tasks,” and such variability would require adjudication of the affirmative defense of exemption for each class member. (Id. at pp. 371–372.)

The Court of Appeal reversed. Citing Ayala, supra, 59 Cal.4th 522, Martinez cautioned that courts should “avoid focusing on the inevitable variations inherent in tracing the actions of individuals and to instead focus on the policies—formal or informal—in force in the workplace.” (Martinez, supra, 231 Cal.App.4th at p. 380.) The plaintiffs’ theory of liability—that by classifying all managerial employees as exempt, the employer had violated overtime laws—was “by its nature a common question eminently suited for class treatment.” (Ibid.) Significant common issues pervaded: the employer operated a chain of restaurants governed by the same policies and procedures; exempt employees were expected to work at least 50 hours per week; and the parties had identified a finite task list, suggesting jobs were “highly standardized.” (Ibid.) The “gist of plaintiffs’ claim” was that “regardless of the patina of managerial discretion expressed in their job description, they functioned consistently as utility workers, cross-trained in all tasks, who could be assigned to fill in where needed without affecting the labor budget or requiring overtime compensation. The crux of the matter, therefore, lies in whether a typically nonexempt task becomes exempt when performed by a managerial employee charged with supervision of other employees.” (Id. at p. 381, fn. omitted.)

Martinez also reasoned that under Sav-On, “courts in overtime exemption cases must proceed through analysis of the employer’s realistic expectations and classification of tasks rather than asking the employee to identify in retrospect whether, at a particular time, he or she was engaged in an exempt or nonexempt task.” (Martinez, supra, 231 Cal.App.4th at p. 382.) “The court here must ask whether [the employer’s] realistic expectations and the actual requirements of the job resulted in the exercise of supervisory discretion by managerial employees or instead relegated employees to [a] utility role.” (Id. at p. 383.) By focusing on the employees’ inability to identify what tasks they performed and for what purpose,

---

9. Indeed, in their reply brief plaintiffs assert that their appeal is centered on “how to interpret Justice Liu’s statement in Duran that an employee who exceeds the 50% outside-sales threshold should be classified as non-exempt—i.e., eligible for overtime pay—if devoting that much time to outside sales is not a realistic requirement of the job.” A concurrence is not the opinion of the court and is not binding. (People v. Amadio (1971) 22 Cal.App.3d 7, 14.)
Martinez concluded the trial court had failed to consider Sav-On’s explicit direction that courts need not assess an employer’s affirmative exemption defense against every class member’s claim before certification. (Ibid., citing Sav-On, supra, 34 Cal.4th at pp. 337–338.)

Martinez is distinguishable in that the central dispute here is where BBOs spent the majority of their time, and not on whether they spent the majority of their time on exempt tasks. Unlike Martinez, the crux of the matter here is not task classification. Instead, the issue is how much time each putative class member spent outside the Bank’s locations. As the trial court stated, “a declaratory judgment that the policy was unlawful would resolve nothing because to determine restitution each claimant would have to be called to testify as to where he or she spent most of their time and how much overtime they worked. Thus a declaratory judgment on the policy, standing alone, serves no purpose.” The court conceded that the result might have been different “if a bona fide statistical survey provided reason to believe that only a few class members may have been properly classified and those could be readily identified; but the survey evidence here provides no such assurance.”

In our view, the trial court properly focused on manageability issues pertaining to the affirmative defenses, while fully understanding plaintiffs’ theory of liability. In the portion of the court’s decision about which plaintiffs complain, the court observed that if “the vast majority of the class sample would credibly testify that most of their time was spent inside the office and the confidence interval was relatively narrow, then one might infer that the number of witnesses the defense would call on its affirmative defense would be relatively small. But if the results relied upon by Krosnick are as unreliable as suggested by a comparison of the 2008 and 2015 surveys, then the court cannot take much comfort in the notion that Plaintiffs’ trial plan adequately manages the affirmative defenses. As with the issue of restitution, the affirmative defense would appear to require a host of ‘mini trials.’”

Even if the trial court did err in its assessment of plaintiffs’ theory, in the same section of its decision containing the passage quoted above, the court also faulted their trial plan because, given the overall unreliability of the 2015 Survey, there was no way for plaintiffs to establish a prima facie case on the issue of liability. Additionally, the court concluded that even if the liability phase were to proceed, plaintiffs would not be able use representative sampling to establish an aggregate restitution award. Thus, the court found multiple flaws in plaintiffs’ trial plan.

It is established that even when the party proposing a class asserts “the employer consistently imposed a uniform policy or de facto practice on class members, the party must still demonstrate that the illegal effects of this conduct can be proven efficiently and manageably within a class setting.” (Duran, supra, 59 Cal.4th at p. 29; see Koval v. Pacific Bell Telephone Co. (2014) 232 Cal.App.4th 1050, 1060 (“existence of a uniform policy does not limit a trial court’s inquiry into whether class action treatment is appropriate”]) and Arenas v. El Torito Restaurants, Inc. (2010) 183 Cal.App.4th 723, 734 (“trial court concluded plaintiffs’ theory of recovery—that managers, based solely on their job descriptions, were as a rule misclassified—was not amenable to common proof” given evidence employees’ “duties and time spent on individual tasks varied widely”). “To the contrary, ‘courts have routinely concluded that an individualized inquiry is necessary even where the alleged misclassification involves application of a uniform policy.’” (Mies, supra, 234 Cal. App.4th at p. 984.)

Plaintiffs also fault the trial court for rejecting its proposal to address how to proceed if evidence on the average hours worked produced an unacceptable margin of error. In that case, they had proposed the parties could continue to submit evidence “until the margin of error reached an acceptable number.” The trial court rejected this proposal, stating that “it is too late in this litigation for another ‘provisional’ certification order that is subject to a further development of a trial plan.” Given that this case has lasted well over a decade and that one trial has already occurred and been reversed, and

10. The trial court accurately described plaintiffs’ theory of the case as follows: “Plaintiffs assert that because the BBO position was designed, managed and monitored as an inside sales job, and as a consequence is that how the BBOs uniformly spent their time, Defendant violated mandatory overtime wage laws by classifying all BBOs as exempt. They intend to show, if given the chance, that it was not realistic for Defendant to expect that putative class members would be able to perform the duties and meet the production goals of the BBO position by ‘customarily and regularly working’ more than half the working time away from the employer’s place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities’” [citation]. In other words, Plaintiffs intend to show that Defendant ‘had a consistently applied policy or uniform job requirements and expectations contrary to a Labor Code exemption.’ [Citation.] Under this theory, the focus of the liability inquiry would be on the ‘realistic requirements of the [BBOs] job’” [citation], i.e., whether it was realistic for Defendant to expect that the BBOs would be ‘outside’ more than half of the time, given the nature of their job duties and performance expectations. Such a finding would be based on evidence of the actual experiences of putative class members who were ‘getting the job done’ as to where they spent their time doing so.”

11. Trial courts must determine whether individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. The Supreme Court in Duran stated: “If statistical evidence will comprise part of the proof on class action claims, the court should consider at the certification stage whether a trial plan has been developed to address its use. A trial plan describing the statistical proof a party anticipates will weigh in favor of granting class certification if it shows how individual issues can be managed at trial.” (Duran, supra, 59 Cal.4th at pp. 31–32.) However, the court cautioned, “a class action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when these defenses turn on individual questions.” (Id. at p. 34.)

12. To the extent plaintiffs criticize the trial court for relying on Teamsters v. United States (1977) 431 U.S. 324, we find no error. The court did not rely on Teamsters in its decision, but instead was simply quoting a passage in Duran in which the Supreme Court criticized plaintiffs for relying on Teamsters.
that two appellate court decisions on this matter have already been issued, we fully support the trial court’s sentiment on this point. Additionally, the Supreme Court in Duran specifically stated: “The trial court is of course free to entertain a new certification motion on remand, but if it decides to proceed with a class action it must apply the guidelines set out here,” including assessing manageability of affirmative defenses. (Duran, supra, 59 Cal.4th at p. 33, italics added.)

B. Variation in Restitution

Plaintiffs also claim the trial court erred by finding that variation in restitution defeats certification. They start off on the wrong foot, however, by asserting that the trial court “held that plaintiffs satisfied the requirements for predominance and manageability with respect to liability.” Actually, the court found that the 2015 Survey, if it had been the only survey, might have been used to measure the extent of variation within the class on the issue of whether BBOs spent more than half of their time in the office. However, this observation was tempered by the court’s acceptance of Hildreth’s opinion that self-interest bias caused respondents to overestimate the time spent inside the office. This bias, the existence of which was supported by the discrepancies between the two Krosnick surveys, suggested to the court that individual variations would necessitate a larger sample size than plaintiffs suggested. Thus, even apart from restitution, the court did not find that the 2015 Survey supported a finding of predominance and manageability with respect to liability.

On the issue of restitution, plaintiffs assert the trial court erred in concluding the survey was going to be used as the sole basis for fixing the amount. However, even plaintiffs admit that the testimony of the randomly drawn sample “would have been a substantial factor in the court’s ultimate determination of the amount of restitution.” Plaintiffs proposed establishing aggregate restitution by using the trial court’s finding of average overtime hours worked by a representative witness group (the size of which would be based on the flawed 2015 Survey), which would then be extrapolated and applied in the second phase of trial to the individual BBOs’ payroll records to determine each individual’s recovery.

We cannot conclude the trial court committed legal error in its assessment of the impact the 2015 Survey evidence would have in the manageability of the restitution phase of trial. Whether the court was correct in concluding that no sample of any size less than the entire class could ever yield an aggregate restitution award, the fact remains that the 2015 Survey evidence offered by plaintiffs was seriously flawed, leaving the court with no alternative except to anticipate that every class member would need to testify. The court properly rejected Plaintiffs’ plan for determining aggregate restitution because the plan rested on a survey that was wholly unreliable.

Plaintiffs also contend the trial court erred by holding them to a higher standard than required by law with respect to the determination of an aggregate restitution award. Contrary to plaintiffs’ argument, the court was not holding them to a higher standard. Instead, it was stating its view of the state of the evidence, specifically, that the 2015 Survey was worthless as a sampling tool, necessarily requiring each class member’s testimony as to restitution.

V. REJECTION OF 2015 SURVEY

Plaintiffs use the final arguments in their opening brief to address the central issue in this appeal, namely, whether the trial court erred in rejecting the 2015 Survey. They first assert that the survey “satisfied all of Duran’s conditions for the use of statistical evidence in a class action.” As they note, however, one of these requirements is that the margin of error cannot be “intolerably high.” (Duran, supra, 59 Cal.4th at p. 46.)

The trial court rejected the 2015 Survey because of the difference between the average hours worked as reported in the 2008 Survey versus the 2015 Survey. Again, the 2008 Survey reported an average of approximately 54 hours per week, while the 2015 Survey reported an average of approximately 63 hours per week. Because the court could not reconcile the differences between the two surveys, it concluded the 2015 Survey estimate of the amount of time BBOs were engaged in outside sales work was also unreliable. Plaintiffs argue that in doing so “the trial court exercised its discretion in a way contrary to the internal rules governing statistical analysis.” Their arguments are not persuasive.

Plaintiffs first attribute the discrepancy in the memories of the class members to “the passage of time,” noting the class period goes back to December 1997. Thus, in 2015, members were being asked to recall events up to 17 years earlier. Plaintiffs appear to urge the differences do not matter here because these same discrepancies will occur whether the trial proceeds on an individual basis or a class action basis. We disagree. In individual actions, the effects of the passage of time upon each witness’s memory can be explored by the fact finder. In a class action, it is impossible to do so, and plaintiffs do not advance any scientific principles suggesting that statistical evidence can be used to accurately reflect the impact of the passage of time on survey respondents in a manner that can be extrapolated to the class as a whole. While plaintiffs argue again that the burden of uncertainty should not be shifted to them because the Bank failed to keep accurate records, the fundamental inquiry here is whether

13. Plaintiffs’ related argument that the burden should have been on the Bank as the employer to come forward with evidence as to the number of hours worked because it had kept inaccurate or incomplete records has been addressed previously in Duran, supra, 59 Cal.4th at p. 41.

14. The trial court was well aware of this point, noting the “gaps in the passage of time between the underlying events and the surveys and between the surveys themselves are unusually large . . . . Some of the problems here may be traced to this circumstance.”

15. As an aside, this argument does little to inspire confidence in the 2015 Survey results.
this matter can proceed as a class action, not which party is to blame for the fact that plaintiffs’ evidence fails to support a finding of commonality.

Plaintiffs also argue that the difference between the average hour estimates from the two surveys is not important because the estimates independently have low relative margins of error. They note the 2008 Survey had a relative margin of error of 13.50 percent while the corresponding margin of error in the 2015 Survey was 14.96 percent, observing that we approved a 9.57 percent relative margin of error in Bell, supra, 115 Cal.App.4th 715. However, the margins of error are artificially low because they are based on the total hours worked, and not overtime hours. Further, it is the comparison of the two surveys that reveals the inconsistency, irrespective of whether each survey is internally consistent within itself.

Plaintiffs’ final argument—that the Bank and its attorneys skewed the results of the 2015 Survey by sending the Biggs letter to putative class members—is not well taken. Plaintiffs do not cite to any evidence in the record suggesting that the letter “infuse[d] the survey with bias.”

In sum, the trial court did not abuse its discretion in concluding that the wide discrepancy between the 2015 and 2008 survey results demonstrated that the 2015 Survey was unreliable, and served as tangible evidence that the survey results were tainted by bias. Accordingly, substantial evidence supports the court’s finding that the survey data was unreliable as evidence of uniformity in how BBOs spent their time, and unreliable as statistical support for selecting a representative witness group to testify as to liability or restitution without causing the inquiry to devolve into a multiplicity of individual mini trials, especially in light of the Bank’s right to call witnesses outside the sample to establish its affirmative defense.  

16. After oral argument and the submission of this case, plaintiffs requested this court to consider an appellate case, now published, on employment class actions. The case is ABM Industries Overtime Cases (Dec. 11, 2017, A132387, A133077, A133695) ___ Cal.App.5th ___ [2017 WL 6887032] (ABM Industries). We have decided to review the case and find it clearly distinguishable from our matter.

First of all, ABM Industries involved the denial of class certification where the employees’ witness, Woolfson, the sole expert on either side concerning the issue of class certification, was found by the trial court to be unqualified. The employer had offered no expert to challenge the employees’ witness. Indeed, “ABM had failed to lodge a formal objection to the evidence [of the employees’ expert], move to strike the [expert’s] declaration, depose Woolfson on his credentials or conclusions, and/or provide their own contrary expert opinion.” (ABM Industries, supra, ___ Cal.App.5th ___ [2017 WL 6887032, at p. 5].) Based on the record, the appellate court concluded the trial court’s decision regarding the admissibility of the Woolfson materials—rested on improper criteria and erroneous legal assumptions, amounting to an abuse of discretion.” (ABM Industries, supra, ___ Cal.App.5th ___ [2017 WL 6887032, at p. 18].)

In contrast, our ruling enjoys the benefit of full review of the employment issues at U.S. Bank not only by this court on two occasions, but also the full assessment by our Supreme Court. In a word, we find the circumstances of the BBOs to be easily distinguishable from the circumstances of the janitors employed by ABM Industries discussed in plaintiff’s latest authority.

DISPOSITION

The order denying class certification is affirmed.

Dondero, J.

We concur: Humes, P. J., Margulies, J.
THE PEOPLE, Plaintiff and Respondent, v. WILLIE OVIEDA, Defendant and Appellant.

2d Crim. No. B277860
In The Court of Appeal of the State of California
Second Appellate District
Division Six
(Super. Ct. No. 1476460)
(Santa Barbara County)
Filed January 17, 2018

COUNSEL
Law Offices of Elizabeth K. Horowitz, under appointment by the Court of Appeal for Defendant and Appellant.
Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, Andrew S. Pruitt, Deputy Attorney General, for Plaintiff and Respondent.

OPINION

Over 50 years ago, wise and prescient Chief Justice Phil Ray

1. This phrase, “cursory search,” is coined by Chief Justice Gib-

POLICE may enter the residence to perform a “cursory search” pursuant to their “community caretaking” duty.

FACTS AND PROCEDURAL HISTORY

On the evening of June 17, 2015, appellant’s sister told a 911 operator that appellant was threatening to kill himself and had attempted suicide before. Santa Barbara Police Officer Mark Corbett responded to the 911 call. A second officer telephoned Trevor Case inside the house. Case was appellant’s friend. Case went outside and reported that appellant had threatened to commit suicide and tried to grab several firearms in his bedroom. Case and his wife had to physically restrain appellant to keep him from using a handgun and a rifle to kill himself. Case’s wife pinned appellant down as Case searched the bedroom for other firearms. Case moved a handgun, two rifles, and ammunition to the garage but did not know whether appellant had additional firearms or weapons in the house.

Appellant agreed to come outside, was detained, and falsely denied having made suicidal comments or that he had any firearms. Appellant said he was depressed because a friend committed suicide the week before. Officer Corbett described the situation as “emotional and dynamic.” He believed a cursory search was necessary because it was unknown how many more weapons were in the house, whether the weapons were secure, and whether anyone inside the house needed help. It was a concern because the person who made the 911 call, appellant’s sister, was not at the scene and the officers did not know anything for sure. Officer Corbett believed he was “duty bound” to make a safety sweep to make sure no one inside was injured or needed medical attention. A second officer, Officer Daniel Garcia, agreed a safety sweep was necessary to confirm that: 1. there were no other people in the house; 2. nobody else was hurt; and 3. there were no dangerous weapons or firearms left out in the open.

Officer Corbett and a second officer made a cursory sweep of the house and saw, in plain view, a rifle case, ammunition, magazines, and equipment to cultivate and produce concentrated cannabis.

There was a large, industrial drying oven with tubes, wires, and ventilation ducts that led to the garage, as well as marijuana and concentrated cannabis in plain view. Based on 15 years in narcotics-related investigations, Officer Corbett believed the marijuana lab posed an immediate danger because manufacturing concentrated cannabis is “a volatile process that involves heat and when mistakes are made explosions and fires can occur.”

Inside the garage, officers saw three rifles and a revolver in a tub. Two rifles were automatic or semi-automatic assault rifles that Officer Corbett believed were illegal. The officers also found four high capacity magazines for an assault style weapon, a firearm silencer, a long range rifle with a scope, more than 100 rounds of ammunition, equipment for a hash oil laboratory, butane canisters, miscellaneous lighters and
burners, a marijuana grow, and a bucket filled with marijuana shake. The firearms included a .50 caliber rifle, an Uzi sub-machine gun, a .357 caliber revolver, a pistol-grip 12 gauge shotgun, and a .223 caliber sub-machine gun.

Appellant brought a motion to suppress evidence. The prosecution argued that the entry into appellant’s residence was justified under the community caretaking exception and the protective sweep doctrine. The trial court ruled that the community caretaking exception is “what guides the Court’s decision” and denied the motion to suppress evidence. The trial court found the officers’ testimony credible as to “what they were concerned about and what they didn’t know. And so I [find] it credible that they wanted to remove firearms, they didn’t know if there were others in the residence, either victims or other people who might cause a harm.” It expressly found that the officers were “not required to accept Mr. Case’s word that he removed the firearm that Mr. Ovieda had reached for. . . . And I believe under these circumstances that the officers would be subject to criticism, in fact, if anything had occurred that they would be judged neglectful in not entering the residence and doing what was described as quick search. . . . looking in closets, looking for other people, and looking for other weapons.”

COMMUNITY CARETAKING EXCEPTION

Appellant argues that the entry into his residence violated the Fourth Amendment. On review, we defer to the trial court’s express and implied factual findings which are supported by substantial evidence and determine whether, on the facts so found, the search was reasonable under the Fourth Amendment. (E.g., People v. Glaser (1995) 11 Cal.4th 354, 362.) The trial court’s express factual findings are fatal to this appeal.

In Ray, supra, 21 Cal.4th 464, our Supreme Court stated that the community caretaking exception to the Fourth Amendment permits police to make a warrantless search of a home if the search is unrelated to the criminal investigation duties of the police. (Id. at p. 471.) “Upon entering a dwelling, officers view the occupant as a potential victim, not as a potential suspect.” (Ibid.) “Under the community caretaking exception, circumstances short of a perceived emergency may justify a warrantless entry” to preserve life or protect property. (Id. at p. 473.) Officers are expected to “aid individuals who are in danger of physical harm,” “assist those who cannot care for themselves,” “resolve conflict,” . . . and “provide other services on an emergency basis.” . . .’ [Citation.]” (Id. at p. 471.)

Such is the case here. Officer Corbett responded to the 911 call to help a suicidal person. The cursory search had nothing to do with a criminal investigation and no one claims the 911 call was a ruse or subterfuge to gain entry and search for evidence of a crime. “[C]ommunity caretaking’ . . . [is] ‘totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” [Citation.]” (Colorado v. Bertine (1987) 479 U.S. 367, 381.)

Appellant argues that Ray has no binding precedential value because it is only a plurality opinion. (See, e.g., People v. Kantis (1988) 46 Cal.3d 612, 632.) He contends the officers were required to leave when appellant denied that he was suicidal. The argument is premised upon the theory that a suicidal person has the Second Amendment right to possess and bear firearms and that officers responding to a 911 call that someone is threatening suicide must leave when the person comes outside and says there is no problem. We assess the reasonableness of the officer’s actions at the time they undertook them.

Officer Corbett responded to a 911 call from a concerned family member that appellant was about to take his life and had attempted suicide before. Appellant’s friend, Trevor Case, confirmed that appellant tried to reach for a firearm and shoot himself. Case feared that appellant would try to hurt himself and that there were other weapons or firearms in the house. There was an on-going safety concern because appellant lied about the firearms and his suicidal ideation. Appellant was detained and handcuffed. By his actions, apppellant put himself at risk, his friends at risk, and the responding officers at risk. (Adams v. City of Fremont (1998) 68 Cal. App.4th 243, 271 [Police officers providing assistance at the scene of a threatened suicide must concern themselves with more than simply the safety of the suicidal person. Protection of the physical safety of the police officers and other third parties is paramount]; see also Allen v. Toten (1985) 172 Cal. App.3d 1079, 1089, fn. 8.)

As discussed in Ray, “‘[o]ne is privileged to enter or remain on land in the possession of another if it is or reasonably appears to be necessary to prevent serious harm to . . . the other or a third person, or the land or chattels of either . . . ’ [Citations.]” (Ray, supra, 21 Cal.4th at p. 474.) It matters not whether a police officer, a fireman, an ambulance driver, or a social worker responds to the suicide call. As a matter of common sense, it would be anomalous to deny a police officer charged with protecting the citizenry the privilege accorded every other individual who intercedes to aid another or protect another’s property. (Ibid.) “A warrantless entry of a dwelling is constitutionally permissible where the officers’ conduct is prompted by the motive of preserving life and reasonably appears to be necessary for that purpose. [Citations.]” (Ibid.)

Pursuant to the community caretaking exception, police officers are expected to check on the welfare of people who cannot care for themselves or need emergency services. (Ray, supra, 21 Cal.4th at pp. 471-472.) “The policeman, as a jack-of-all-emergencies, has ‘complex and multiple tasks to perform in addition to identifying and apprehending persons...
committing serious criminal offences’; by default or design he is also expected to ‘aid individuals who are in danger of physical harm, ‘assist those who cannot care for themselves,’ and ‘provide other services on an emergency basis.’

If a reasonable and good faith search is made of a person for such a purpose, then the better view is that evidence of crime discovered thereby is admissible in court.” (LaFave, Search and Seizure (5th ed. 2012) § 5.4(c), pp. 263-264, Ins. omitted.)

Appellant contends that the community caretaking rule does not apply to residential searches. Surely a police officer may enter a residence to protect a suicidal person and secure the premises if firearms are believed to be present. (See, e.g., Brigham City v. Utah (2006) 547 U.S. 398, 400, 403 [officer may enter home without a warrant to render emergency assistance to an injured occupant or to protect occupant from imminent injury].) The officers had a duty to prevent the possibility that the firearms “would fall into untrained or . . . malicious hands.” (Cady v. Dombrowski (1973) 413 U.S. 433, 443.)

When it comes to choosing between the Fourth Amendment protection against warrantless searches and the preservation of life, the preservation of life controls. That was decided more than 50 years ago in Roberts, supra, 47 Cal.2d 374. There, officers were told that a suspect living in an apartment had missed work and was sickly. (Id. at p. 378.) After knocking on the door and receiving no response, the officers heard moans and groans that sounded like a person in distress. (Ibid.) The officers believed someone needed emergency assistance, made a warrantless entry, and saw a stolen radio on the kitchen table that resulted in defendant’s arrest for second degree burglary. Defendant argued that his Fourth Amendment rights were violated. The officers, however, believed a person in distress was inside the apartment and needed help. (Id. at pp. 378-379.) When asked about the moaning sounds, the officers said “it could be pigeons, pigeons moan. There are pigeons in the area.” (Id. at p. 378.)

Chief Justice Gibson wrote: “Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose. [Citations.]” (Roberts, supra, 47 Cal.2d at p. 377.)

In the course of conducting a cursory search, officers do “not have to blind themselves to what was in plain sight simply because it was disconnected with the purpose for which they entered. [Citations.”] (Id. at p. 379.)

Similarly, in People v. Payne (1977) 65 Cal.App.3d 679, a reliable informant reported that appellant was molesting children in a garage bedroom. (Id. at p. 681.) Officers saw a 10 to 12 year old boy enter the garage, were concerned that appellant would harm the boy, forced their way into the garage bedroom, and found a partially dressed boy on a bed in the garage. (Id. at p. 682.) Citing Roberts, the Court of Appeal held that the victim’s “‘right to physical and mental integrity [simply] [outweighed] the right of [appellant] to remain secure in his domestic sanctuary . . . .’ [Citation.]” (Id. at p. 684.)

The rules and rationale of Ray, Roberts and Payne dictate affirmation here. There, the officers were conducting criminal investigations. Here, they were not. This entry was a pure community caretaking entry and a fortiori, the community caretaking rule applies with more persuasive force.

The community caretaking rule is alive and well. So is appellant because he was saved by the intervention of friends and the police who confiscated his firearms. Principles of stare decisis require that we follow Ray and Roberts. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) To say that the officers were required to get a warrant before entering the house and garage would be at variance with common sense and violative of the letter and spirit the “community caretaking” rule. “There is no war between the Constitution and common sense.” (Mapp v. Ohio (1961) 367 U.S. 643, 657.)

**RESPONSE TO DISSENT**

The dissent’s bright line rule unreasonably stifles a police officer’s duty to proactively keep the peace for everyone in the community. The presenting situation posed an extreme danger for appellant, his friends, the police, and the neighbors. A literal and mechanical application of the letter of the Fourth Amendment would require the officers to walk away from appellant’s doorstep. But the courts must consider the reason for the exclusionary rule. Traditionally, the premise of the exclusionary rule is that it applies only if the police are enforcing the criminal law, i.e., they are entering a residence to search for evidence of crime. That did not happen here.

Here, the officers did not fully comprehend what was confronting them when they entered appellant’s residence. Police officers have a healthy skepticism about what they are told in a volatile situation preferring to conduct their own investigation. Here, they wanted to safeguard everyone and they wanted to separate appellant from his firearms. As factually found by the trial court, they were not required to believe that there was no one in the house and that the firearms were secured. Should they be allowed to enter a residence and defuse a “powder keg” waiting to explode when appellant would return to his residence? The answer is “yes.” Loaded firearms are inherently dangerous as a matter of law and even though it is constitutionally permissible to possess them in a residence, it is quite another thing to allow them to remain in the possession of a suicidal person. Our holding does not give the police carte blanche to indiscriminately enter a residence on whim or caprice. Where, as here, a defendant threatens to kill himself with a firearm in his house, he is in a poor posture to claim that the police may not enter it to safeguard everyone even if he is coaxed out of the house prior to entry.

The dissent acknowledges that “had” the officers believed appellant was a danger to himself, they could have confiscated his firearms. (Dissent at p. 6) The record does not expressly show that the officers believed this to be the case
because no one asked the question. But the inference that they entertained this belief is a reasonable inference. Suicidal persons are a danger to themselves. Every peace officer knows this. The only reason that appellant was not taken to a mental health facility was because, thereafter, probable cause developed for his arrest.

As Justice Gilbert said in his dissent in Unzueta v Ocean View School Dist. (1992) 6 Cal.App.4th 1689, 1705: “A mechanical, literal interpretation of the statute [or here, the Fourth Amendment] in the lifeless atmosphere of a vacuum creates a result contrary to public policy, contrary to legislative intent [or Constitutional intent], contrary to common sense, and contrary to our shared notions of justice.” We agree with the trial court that the officers would have been subject to criticism if they had not separated appellant from his firearms.

DISPOSITION

The judgment (order denying motion to suppress) is affirmed.

CERTIFIED FOR PUBLICATION.

YEGAN, J.

I concur: GILBERT, P. J.

PERREN, J., Dissenting.

I respectfully dissent.

Chief Justice Gibson’s “judicial seed” will not blossom in this fallow field.

Freedom from unreasonable government intrusion is at the core of the Fourth Amendment, which “draws ‘a firm line at the entrance to the house.’” (Kyllo v. United States (2001) 533 U.S. 27, 31, 40.) “[P]hysical entry of the home is the chief evil against which . . . the Fourth Amendment is directed.’ [Citation.] And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment.” (Welsh v. Wisconsin (1984) 466 U.S. 740, 748.) “[S]earches and seizures inside a home without a warrant are presumptively unreasonable.” (Payton v. New York (1980) 445 U.S. 573, 586.)

Relying on a “community caretaking” theory, the majority approves a warrantless intrusion into a home based solely upon police speculation about what they “could” find inside. The officers admittedly had no information that anyone, child or adult, was inside the house and required help. Indeed, everyone reported to be in the house was outside and completely under the officers’ control, including the person they came to rescue, appellant Ovieda. The officers did not believe that appellant was a danger to himself or others. Because the officers had no objectively reasonable belief that searching the home was imperative, I conclude that the trial court should have granted appellant’s motion to suppress evidence seized during the search.

The facts of this case are undisputed. A caller informed police that appellant was at home and suicidal, but had been disarmed by two friends who were with him. Officers surrounded the home. At their request, and accompanied by his friends, appellant voluntarily came outside, was frisked and promptly handcuffed. He was unarmed. He denied suicidal thoughts or having guns. The officers were told that one of the friends had moved guns into the garage. Although the officers had no reason to believe that anyone was in the house, two of them entered the home with guns drawn to conduct, in their words, a “protective sweep to secure the premises.” Inside, they found illegal weapons and a cannabis oil lab.

On these facts, the search was unreasonable under any theory, whether it be “community caretaking,” “emergency aid” or “exigent circumstances.” At the time of the search, the situation was stabilized, appellant was restrained, and everyone reported to have been in the house was outside and unharmed. The officers had no information that anyone was in the house nor did they suspect that a crime had been committed. Therefore, the police could not lawfully enter and search the premises absent consent or a search warrant.

Supreme Court cases authorizing police entry into a house without a warrant in an emergency are circumscribed by their facts. As I explain below, this case does not resemble the type of emergency or exigency that would justify a warrantless entry.

First, an emergency justifying the entry and search of a home may arise when objective evidence leads police to believe that they must render immediate aid because a person inside is injured or in distress.

In a factually distinguishable case relied upon by the majority, People v. Roberts (1956) 47 Cal.2d 374, 376, 378, police entered the home of someone reported to be “sickly” when they “heard several moans or groans that sounded as if a person in the apartment were in distress.” The warrantless entry “was lawful for the purpose of rendering aid.” (Id. at p. 380.) A report that a person is injured and bleeding, coupled with blood stains outside the home and a neighbor’s confirmation that an injured person is within, justify police kicking in the door to help the person. (Tamborino v. Superior Court (1986) 41 Cal.3d 919, 921-922, 924-925.)

The emergency aid theory applies when the police see shooting victims outside of a house, and believe that injured persons inside the house require immediate intervention. In People v. Troyer (2011) 51 Cal.4th 599, 607-609, 612, police responding to a report of shots fired found badly injured people on the porch of a home and blood on the front door, a clear emergency that justified immediate entry into the home to look for additional victims or a suspect. The court recognized the right of the police to enter without a warrant, given their objectively reasonable belief that an occupant was seriously injured. After a shooting victim was brought to a

---

3. The majority’s statement of facts focuses on what the officers found. The officers should not have been inside of appellant’s house in the first place.
hospital, as described in People v. Hill (1974) 12 Cal.3d 731, 754-755, officers found fresh bloodstains on the porch, fence and auto outside a house and saw blood on the floor inside the house, an exigency justifying an entry to locate wounded persons, because waiting for a warrant could have resulted in the loss of life.

Here there was no such evidence. At the time of this search, no one was in appellant’s house moaning and groaning, no gunshot reports were reported, and no bloodstains were seen. Instead, appellant was outside of his house, unarmed and unharmed. There was no justification for the officers to enter appellant’s house to render aid.

Second, an emergency may arise if police believe that a crime is in progress in a house. In People v. Ray (1999) 21 Cal.4th 464, police responded to a report that Ray’s front door was open and the inside was in shambles. On arrival, officers found the scene as described; believing that a burglary was in progress or just took place, they entered to look for possible victims. Using a “community caretaking” theory, the state Supreme Court emphasized that police authority to enter is narrowly limited by the need to ascertain whether someone in the house is in need of assistance and to provide that assistance. (Id. at p. 477.) No such facts were present in this matter.

In Brigham City v. Stuart (2006) 547 U.S. 398, 406, the U.S. Supreme Court allowed a warrantless entry when police saw a violent fracas inside a house; officers could enter to rescue a bleeding occupant and stop the violence. In Michigan v. Fisher (2009) 558 U.S. 45, police responding to reports of a domestic dispute saw the defendant inside his house with a cut on his hand, screaming and throwing things, and blood on his front door and his car; in the Court’s view, the police had an objectively reasonable belief that the defendant might be harming a child or spouse, or would hurt himself in his rage. This danger justified an immediate entry without a warrant and did not bar use of evidence obtained during the entry. (Id. at pp. 48-49.)

Here, the police did not see a crime or altercation unfolding inside the house before entering, nor did they believe that a crime had just taken place. Instead, they telephoned appellant inside the house and asked him to walk outside. He complied. Afterward, they searched the house. No immediate warrantless entry was justified once appellant was outside.

Third, the police may enter a house in an emergency to detain a suicidal person inside the house for a mental evaluation. The key to cases involving a potential suicide at a home is a pressing need for police to act but no time for them to secure a warrant. For example, in Sutterfield v. City of Milwaukee (7th Cir. 2014) 751 F.3d 542, police entered a home to detain a woman for a mental evaluation after she remarked to her psychiatrist, “I guess I’ll go home and blow my brains out.” (Id. at p. 545.) The court concluded that the officers had to act expeditiously by forcing entry during the unfolding crisis. (Id. at p. 566.)

In Fitzgerald v. Santoro (7th Cir. 2013) 707 F.3d 725, 728-729, officers forced a warrantless entry into the home of an apparently suicidal person to seize her for a mental evaluation. The entry was deemed justified based on exigent circumstances, because the officers objectively and reasonably believed when they entered the home that the occupant was in need of immediate assistance. (Id. at pp. 731-732.) A person with a gun who is threatening suicide may be frisked in the doorway of his home, to preserve the safety of everyone present. (United States v. Wallace (5th Cir. 1989) 889 F.2d 580, 582, citing Terry v. Ohio (1968) 392 U.S. 1, 23.)

Here, the officers—who had no reason to believe that an injured, endangered or suicidal person was in the house—entered to conduct a “protective sweep.” The People’s post-search rationale of “community caretaking” is entirely unsupported by this record. Appellant was standing on the sidewalk in handcuffs. The others known to be in the house were also outside. The emergency was over: the police were not justified in their search of appellant’s home—whether cursory or detailed—without his consent or a search warrant. (See State v. Hyde (N.D. 2017) 899 N.W.2d 671, 677 [police alerted to a possibly suicidal person by his relatives could not enter his house without a warrant because they lacked a reasonable basis to believe there was an ongoing emergency or immediate need to protect his life].)

Had police believed that appellant was a danger to himself or others they would have been justified to take him into custody. (Welf. & Inst. Code, §§ 5150 et seq. [police may take into custody someone who is gravely disabled or a danger to himself or others, for an assessment, evaluation and crisis intervention].) State law provides a detailed mechanism for seizing weapons if the police believed that someone is “5150.” The police may confiscate weapons belonging to persons detained for a mental health evaluation. (Welf. & Inst. Code, § 8102; City of San Diego v. Boggess (2013) 216 Cal.App.4th 1494, 1500 [“Section 8102 authorizes the seizure and possible forfeiture of weapons belonging to persons detained for examination under section 5150 because of their mental condition”].) A detention to evaluate a person’s mental condition permits the issuance of a search warrant to seize firearms. (Pen. Code, § 1524, subd. (a)(10).)

The police did not invoke these justifications to search appellant’s home or seize his guns. The majority infers that the officers believed appellant to be a danger to himself. (Maj. opn. ante, at p. 11.) Tellingly, however, neither the prosecutor nor the Attorney General argued that the police detained appellant because they felt he was a danger to himself or others and intended to transport him to a mental health facility pursuant to the Welfare and Institutions Code. The inference drawn by the majority is not supported by the record or by arguments offered in the trial court or on appeal.

Mere possession of guns is not a valid reason to search a home, unless the police determine that the gun owner must be dangerous, or to look for weapons to protect the home. (People v. Fitzgerald, supra, 707 F.3d at p. 729.)

4. An inapt theory that the People abandoned on appeal.
The totality of the circumstances in the present matter did not present an emergency justifying a warrantless entry. The officers were not faced with a tense, uncertain or evolving situation at the time of the search. No gunshots were reported before their arrival. They knew that appellant had been armed with a gun and were entitled to handcuff and frisk him when he walked outside and approached them, to preserve their safety and that of third parties. At that point, the need for the police to render emergency aid ceased.

Theories of “community caretaking,” “emergency aid,” or “exigent circumstances,” are inapposite on this record. The police had no information that anyone was in the home let alone someone who needed immediate assistance or protection, no weapons were accessible to the handcuffed Ovieda, and no crime was committed or in progress. Any emergency that might mandate swift action—without a search warrant to prevent imminent danger to life—ended when appellant voluntarily came out of the house, along with the friends who were assisting him.

The majority speculates that the police entered appellant’s home to seize his guns and save his life, because he might have shot himself once they left. The officers did not articulate any such fear for appellant’s safety during the suppression hearing.

I do not question the officers’ motives, honesty or sincerity. Their conduct, however, is circumscribed. In this situation, where a crisis has been averted, the officers have options: (1) they can seek consent to search; (2) they can seek a search warrant if the person’s mental health is so deteriorated that he presents a danger to himself or others; or (3) they can wait to see how or if the situation evolves. If the person’s ensuing conduct causes concern for his safety or the safety of others, they could seek a search warrant. The burden is on the State to demonstrate justification for the search. It has failed to do so.

The theme of the majority is that the police had to act. The officers’ collective lack of information that anyone was in jeopardy, that anyone was upon the premises or that anyone was injured or in peril belies the state’s theory. Ignorance of a fact, without more, does not raise a suspicion of its existence. The protection afforded by the Constitution would be sorely compromised if what is not known or reasonably suspected would suffice for probable cause. I conclude the police could not lawfully enter and search the premises absent consent or a search warrant. The search was unlawful under both the State and Federal Constitutions. Appellant’s motion to suppress evidence should have been granted. (Pen. Code, § 1538.5.)

CERTIFIED FOR PUBLICATION

PERREN, J.
Cite as 18 C.D.O.S. 644

THE PEOPLE, Plaintiff and Respondent, v. KARRE MULLINS et al., Defendants and Appellants.

No. C079295
In The Court of Appeal of the State of California
Third Appellate District
(Sacramento)
(Super. Ct. No. 14F02328)
APPEAL from a judgment of the Superior Court of Sacramento County, Thadd A. Blizzard, Judge. Affirmed as modified.
Filed January 17, 2018

COUNSEL
Sandra Gillies, under appointment by the Court of Appeal, for Defendant and Appellant Karre Mullins.
Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant Arturo Russell.
Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman, Jeffrey Grant, and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

Defendants Karre Mullins and Arturo Russell were convicted by jury of robbery involving bank customers at ATM’s. Defendant Mullins was also convicted on a count of conspiracy to commit petty theft. Sentenced to determinate terms, defendants appeal. On appeal, they argue: (1) the evidence was insufficient to support robbery convictions, (2) the existence of an identity theft statute precluded convictions for robbery because the identity theft statute is more specific, and (3) the trial court improperly used argumentative language to instruct the jury on robbery. Additionally, defendant Mullins argues: (4) the trial court abused its discretion by sentencing on the conspiracy conviction as a felony rather than as a misdemeanor. And defendant Russell argues: (5) the sentencing minute order and abstract of judgment fail to properly reflect the sentence imposed. We find merit only in the last contention. We therefore affirm and direct correction of the sentencing minute order and abstract of judgment.

BACKGROUND

To use a Bank of America ATM, the customer must put the ATM card into the machine and input the personal identification number (PIN). After the customer inputs the number, the card is returned to the customer before a transaction (deposit, withdrawal, and so on) is begun. After completing a transaction, the ATM asks whether the customer is finished or would like another transaction. If the customer chooses to begin another transaction, the customer must input the PIN again but need not reinsert the ATM card.

Defendants Mullins and Russell are both young men. Defendant Mullins is six feet tall and weighs 150 pounds. Defendant Russell is six feet tall and weighs 190 pounds.

On March 9, 2014, before the crimes in this case, Hayward police officers responded to a report of suspicious activity at the ATM’s at a branch of Bank of America. Defendants saw the officers and split up. Defendant Mullins discarded a list of ATM’s in the Hayward area and an ATM receipt. Both defendants were apprehended. Defendant Mullins had $2,360 in his possession, and defendant Russell had $745. Neither of them had a Bank of America ATM card.

Count One—Robbery of Sonhai Nguyen
At the time of trial, Sonhai Nguyen was 63 years old, about five feet, five inches tall, and weighed approximately 170 pounds. At trial, he testified through an interpreter.

On March 29, 2014, Sonhai went to a Bank of America branch located on Del Paso Boulevard at approximately 6:15 p.m. to deposit a $500 check through the ATM. There were two ATM’s. Sonhai approached the ATM on the right while defendant Mullins stood in front of the ATM on the left. Defendant Mullins was punching buttons on the ATM nonstop, like he was playing a video game.

Sonhai noticed defendant Russell behind him and to the right.

Sonhai inserted his card, input his PIN, and received the card back. He then deposited his check and was ready to push the button indicating he did not want another transaction, but before he had finished at the ATM defendant Russell pushed him aside, touching Sonhai’s arm very strongly, and took Sonhai’s place in front of the ATM. Perceiving that the situation was dangerous, Sonhai ran back to his car in fear. He was afraid to confront the men.

About $2,000 was taken from Sonhai Nguyen’s bank account.

Count Two—Robbery of Tom Nguyen
At the time of trial, Tom Nguyen was 61 years old, five feet, four inches tall, and weighed 138 pounds. He testified through an interpreter.

On the morning of April 7, 2014, Tom went to the Florin branch of Bank of America to withdraw $100. There were four ATM’s, and Tom approached the right-most ATM. He noticed defendant Mullins standing close to the ATM’s. Defendant Russell was standing at the adjacent ATM, but was looking at the screen of the ATM that Tom was using. Tom inserted his ATM card in the machine and put in his PIN and received the card back. He entered his transaction to withdraw
January 19, 2018

Defendants assert the evidence was insufficient to sustain the robbery convictions. They claim: (1) the victims did not have possession of the funds because the funds were in the ATM and were owned by the bank; (2) the funds were not in the immediate presence of the victims; and (3) there was insufficient force or fear. Defendant Mullins also claims: (4) the evidence of aiding and abetting was insufficient, and (5) the evidence of conspiracy was insufficient. We conclude there was sufficient evidence to convict on each of the counts.

**I. General Legal Principles**

In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. 

**A. Possession of the Money**

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. (Pen. Code, § 211.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. 

**B. Conclusion of Possession**

We reverse for lack of substantial evidence only if “upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” (People v. Kraft (2000) 23 Cal.4th 978, 1053.) We reverse for lack of substantial evidence only if “upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” (People v. Bolin (1998) 18 Cal.4th 297, 331.)

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. (Pen. Code, § 211.)

**B. Defendants’ Arguments**

**1. Possession of the Money**

Defendants contend the victims did not have possession of the money because the bank owned the money when defendants took it. To the contrary, the victims had each accessed their accounts by inserting their ATM cards immediately prior to the robberies, which access gave the victims the right to control the money taken by defendants. Because the victims were not permitted to “finish” with the ATM by pushing the appropriate button, the victims’ access and control continued through the time the money was taken from their accounts.
Thus the victims were in constructive possession of the money within their accounts during the time that those accounts were accessed by defendants.

“‘It has been settled law for nearly a century that an essential element of the crime of robbery is that property be taken from the possession of the victim.’ [Citation.] . . . [N] either ownership nor physical possession is required to establish the element of possession for purposes of the robbery statute . . .” (People v. Scott (2009) 45 Cal.4th 743, 749.)

There was no evidence any of the victims physically held the money taken by defendants. The money was not on their persons. Focusing on that fact, defendants argue that the money in the ATM did not belong to the victims; instead, it belonged to the bank, and the victims were merely creditors of the bank. For that view—that the money in the ATM belonged to the bank and the victims were merely creditors—there is authority. (See Chang v. Redding Bank of Commerce (1994) 29 Cal.App.4th 673, 681 [deposited money becomes property of bank, and bank is debtor of depositor]; Morse v. Crocker National Bank (1983) 142 Cal.App.3d 228, 232 [title to deposited money passes to bank].) However, the legal conclusion that the deposited money is the property of the bank does not control here because the bank gave the victims access to and the right to control the money by allowing the victims to withdraw money after inserting their ATM cards. This access and right to control amounted to possession for the purpose of the robbery statute.

As the trial court instructed the jury, “[a] person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.” (CALCRIM No. 1600.) The bank granted the victims the right to control money in the ATM, at least up to the amount withdrawn by defendants. Although the victims were not in actual possession of the money at the time they were robbed of it, they were in constructive possession of it because they used their ATM cards to gain entry to their accounts and obtained the right to control the money that was withdrawn by defendants.

2. Immediate Presence

A related question is whether the money was in the immediate presence of the victims. We conclude that the money was in the immediate presence of the victims because they were present and would have taken control of the money but for defendants’ interference.

Under the robbery statute, property is within the “immediate presence” of a victim if, but for the perpetrator’s use of force or fear, the victim would have retained possession of it. (People v. Abilez (2007) 41 Cal.4th 472, 507.) “The zone of immediate presence includes the area ‘within which the victim could reasonably be expected to exercise some physical control over his property.’ [Citations.]” (People v. Webster (1991) 54 Cal.3d 411, 440, quoting People v. Bauer (1966) 241 Cal.App.2d 632, 642.)

“The generally accepted definition of immediate presence . . . is that ‘[a] thing is in the [immediate] presence of a person, in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.’ [Citations.] Under this definition, property may be found to be in the victim’s immediate presence ‘even though it is located in another room of the house, or in another building on [the] premises.’ [Citations.]” (People v. Hayes (1990) 52 Cal.3d 577, 626-627.)

Here, the victims had transacted business at the ATM’s and were just beginning to leave when defendants interfered with the transaction between the victims and the bank through the ATM. Each victim would have stayed and indicated they were finished or, in the alternative, taken the money dispensed from their bank accounts but for the interference of defendants. They were in “‘an area within which [they] could reasonably be expected to exercise some physical control over [their] property.’ ” (People v. Hayes, supra, 52 Cal.3d at p. 627.) That the victims fled while defendants completed the theft does not negate the immediate presence element.

3. Force or Fear

Robbery is “accomplished by means of force or fear.” (Pen. Code, § 211.) This element is cast in the alternative; it may be accomplished either by force or by fear.

Defendants argue that the facts establish neither force nor fear in each of the incidents. We disagree.

To establish force for the purpose of a robbery conviction, “something more is required than just that quantum of force which is necessary to accomplish the mere seizing of the property.” (People v. Morales (1975) 49 Cal.App.3d 134, 139.) But the degree of force need only be sufficient to overcome the victim’s resistance. (People v. Clayton (1928) 89 Cal.App. 405, 411.)

To establish fear for the purpose of a robbery conviction under the circumstances of this case, there must be evidence the victim feared defendants would injure him. (CALJIC No. 1600.) The fear is sufficient if it facilitated the defendant’s taking of the property. Thus, any intimidation, even without threats, may be sufficient. (People v. Morehead (2011) 191 Cal.App.4th 765, 774-775.) In considering the fear element, the jury may consider factors such as the relative size of the defendant and the victim. (People v. Brew (1991) 2 Cal.App.4th 99, 104.)

a. Robbery of Sonhai Nguyen (Count One)

The facts supporting defendants’ conviction for robbing Sonhai Nguyen established both force and fear. Sonhai Nguyen, at various times, said that he was nudged or shoved away from the ATM. Defendant Russell touched
Russell after observing the victims input the number and (2) there was insufficient evidence to establish that defendant Mullins knew that defendant Russell intended to deprive the victims of their property by force or fear. The contentions are without merit.

To establish aiding and abetting, “the prosecution must show that the defendant acted ‘with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’” [Citation.] When the offense charged is a specific intent crime, the accomplice must ‘share the specific intent of the perpetrator’; this occurs when the accomplice ‘knows the full extent of the perpetrator’s criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator’s commission of the crime.’ [Citation.] Thus, [the Supreme Court] held, an aider and abettor is a person who, ‘acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.’” [Citations.]” (People v. Prettyman (1996) 14 Cal.4th 248, 259, italics omitted.)

Each of these aiding and abetting elements can be inferred from the evidence in this case. However, first we note that it was unnecessary for the prosecution to establish that defendant Mullins ever passed a PIN to defendant Russell. That is not a necessary element of aiding and abetting the robberies.

Defendant Mullins argues there was insufficient evidence that he knew the full extent of defendant Russell’s criminal purpose. To the contrary, the men went to a bank ATM, waited for much smaller, older people to approach and use the ATM, and either (or both) muscled in or pushed away the smaller person or simply intimidated the victim. The inference that defendant Mullins knew there would be force or fear used is easily and reasonably made. Even if defendant Mullins was not the person who provided force, he was there to intimidate the victims as two bigger, younger men against a smaller, older victim and thereby deprive them of their property.

5. Conspiracy

Defendant Mullins also contends there was insufficient evidence to sustain the conspiracy conviction. The crux of his argument is as follows: "The only suggestion that Mullins and [the unidentified male] conspired to commit theft when they went to the mall were the facts that Mullins and Russell had appeared to cooperate in the earlier incidents at Bank of America ATM[‘s] and that Mullins and [the unidentified male] visited the Bank of America ATM twice during their general cruising of the mall. While this evidence suggested Mullins and [the unidentified male] agreed, a suggestion is not sufficient evidence.” The argument is without merit.

“A conviction for conspiracy requires proof of four elements: (1) an agreement between two or more people, (2)
who have the specific intent to agree or conspire to commit an offense, (3) the specific intent to commit that offense, and (4) an overt act committed by one or more of the parties to the agreement for the purpose of carrying out the object of the conspiracy. [Citations.]” (People v. Vu (2006) 143 Cal. App.4th 1009, 1024.)

Here, there was substantial evidence defendant Mullins and the unidentified male conspired to use the same method of operation to take potential victims’ money at the Bank of America ATM’s in Arden Fair Mall as defendant Mullins and defendant Russell had already done on two occasions in the prior two weeks at other Bank of America ATM’s. When they entered the mall, they went straight to the Bank of America ATM’s and lingered there. When no victim appeared, they strolled the mall and returned later to take up their position again at the Bank of America ATM’s, which they did not leave until mall security escorted them out. From this behavior, the jury could reasonably infer that defendant Mullins and the unidentified male had conspired to commit theft when they engaged in the same scheme used by defendant Mullins and defendant Russell on at least two occasions within two weeks before the mall incident.

II

Identity Theft Statute

Defendants contend their convictions for robbery cannot stand because the Legislature has enacted a more specific law proscribing the use of personal identifying information for an unlawful purpose (identity theft). (See In re Williamson (1954) 43 Cal.2d 651, 654 (Williamson).) We conclude that the facts of this case go beyond a simple case of identity theft and therefore justify convictions on the more serious crime of robbery.

Penal Code section 211 provides: “Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.”

Penal Code section 530.5, subdivision (a) provides, in pertinent part: “Every person who willfully obtains personal identifying information [including a PIN] . . . of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense . . . .”

Defendants’ argument is premised on the Williamson rule, which provides “if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute. In effect, the special statute is interpreted as creating an exception to the general statute for conduct that otherwise could be prosecuted under either statute.” (People v. Murphy (2011) 52 Cal.4th 81, 86.) The Williamson rule “applies when (1) ‘each element of the general statute corresponds to an element on the face of the special statute’ or (2) when “it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute.”” (Ibid.) According to defendants, because section 530.5, subdivision (a) is a specific statute that criminalizes identity theft, they cannot be convicted of robbery for the same conduct. We disagree.

Defendants’ argument fails under both applications of the Williamson rule. First, each element of the robbery statute does not correspond to an element of the identity theft statute because the robbery statute requires force or fear to be used and the identity statute does not so require. And second, violations of the identity theft statute will not commonly result in a violation of the robbery statute for the same reason: the robbery statute requires proof that force or fear was used.

III

Jury Instructions

At the prosecutor’s request, the trial court modified the standard instruction on robbery (CALCRIM No. 1600) by adding guidance to the jury on the matters of force and immediate presence. Defendants contend the added language was argumentative and deprived them of due process and a fair trial. We conclude the added language was not argumentative and, in any event, any error was harmless.

“An instruction is argumentative when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. [Citation.] ‘A jury instruction is [also] argumentative when it is “of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.” [Citations.]’ [Citation.]” (People v. Campos (2007) 156 Cal.App.4th 1228, 1244.) Instructions should not “relate particular facts to a legal issue.” (People v. Wharton (1991) 53 Cal.3d 522, 570.) “In a proper instruction, “[what] is pinpointed is not specific evidence as such, but the theory of the defendant’s [(or the prosecution’s)] case.” [Citation.]” (People v. Santana (2013) 56 Cal.4th 999, 1012, bracketed text in original, italics omitted.)

The trial court made the following two additions to the standard robbery instruction:

- “‘Force’ is a relative concept. In determining if force was used, you may consider the victim’s physical characteristics as well as those of the defendant.”
- “Property is taken from the victim’s immediate presence if the victim leaves the vicinity of the property out of fear.”

Defendants do not argue that these were incorrect statements of law. Instead, they claim the statements improperly highlighted the facts favorable to the prosecution. As for the statement concerning force, defendants argue that the statement unfairly outlined the prosecution’s argu-
ment that the difference in size between defendants and the victims tended to establish force. This language tracks the holding in People v. Mungia (1991) 234 Cal.App.3d 1703, at page 1709, that relative sizes of the defendant and the victim may tend to establish force.

For their argument that this proper statement of law was improperly argumentative as a jury instruction, defendants rely on People v. Hunter (2011) 202 Cal.App.4th 261 (Hunter), at page 267 and pages 276 to 277. In that case, the trial court instructed the jury: “When a defendant commits a robbery by displaying an object that looks like a gun, the object’s appearance and the defendant’s conduct and words in using it in a way that could constitute sufficient circumstantial evidence to support a finding that it was a firearm. The victim’s inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt as a matter of law that the gun was a firearm.” (Id. at p. 267.) The appellate court found this instruction problematic because “the jury could just as accurately have been told the opposite, that when a defendant displays an object that looks like a gun, the object’s appearance and the defendant’s conduct may constitute sufficient circumstantial evidence to support a finding that it was not a firearm.” (Id. at p. 276, original italics.)

Defendants’ reliance on Hunter is misplaced. Unlike the instruction in Hunter, the instruction in this case did not make the prosecution’s argument. In Hunter, the instruction informed the jury that a victim’s inability to identify the object as a gun did not create a reasonable doubt. Here, there is no such intrusion into jury thinking. Instead, the court merely informed the jury that it could “consider” the physical characteristics of defendants and the victims in determining whether force was used.

Likewise, the statement concerning immediate presence was not argumentative. This statement was a proper statement of the law found in People v. Dominguez (1992) 11 Cal.App.4th 1342 (Dominguez), at pages 1348 to 1349. In that case, the defendants entered the victim’s apartment and brandished a gun. The victim fled. After the victim fled, the defendants detached a VCR from the wall and took it, as well as other electronics. The appellate court concluded that the electronics were taken from the immediate presence of the victim because the defendants scared her into fleeing. (Id. at p. 1346.)

Defendants’ argument concerning why this statement was an argumentative instruction is not clear. They argue, comparing this case to Dominguez: “This case presents a completely different factual scenario, with the argument coming down to whether or not [defendants’] mere physical presence should amount to fear, and whether the property in question was abandoned, with [defendants] arguing that the property was still in the possession of Bank of America, where it had been all along.” This argument seems to conflate the elements of possession and immediate presence. As we discussed above, the money in the ATM’s, at least up to the amount eventually withdrawn by defendants, was in the constructive possession of the victims because they had control over it. Immediate presence had to do with whether the victims were in the vicinity of the money. In any event, the statement concerning immediate presence in the court’s instruction did not make the prosecution’s argument. Instead, it set forth the legal principle for the jury to apply to the facts.

In any event, the two statements inserted into the robbery instruction were not prejudicial, even if we assume for the purpose of argument that they were argumentative. The giving of an argumentative instruction is evaluated for prejudice under the state harmless error standard, not under the federal harmless error standard. (People v. Santana, supra, 56 Cal.4th at p. 1012.) The evidence strongly indicated that defendants intentionally and successfully used force and intimidation to gain the advantage over their smaller victims and take their money. It is not probable that defendants would have obtained a better result if the challenged instructions had not been given. (People v. Watson (1956) 46 Cal.2d 818, 836.)

IV

Conspiracy as a Felony

Defendant Mullins contends that the trial court abused its discretion by not sentencing on the felony conspiracy count as a misdemeanor. We disagree.

Conspiracy to commit petty theft is a felony (a wobbler) that may be punished as either a felony or a misdemeanor. (Pen. Code, § 182, subd. (a); People Tatman (1993) 20 Cal. App.4th 1, 7.) Here, defendant Mullins argued for punishment of the conspiracy as a misdemeanor, but the trial court, after consideration, decided to impose felony sentencing.

The trial court said: “[C]onspiring to do a misdemeanor is more serious in terms of the law than the misdemeanor itself, and therefore it can be a felony. [¶] So if you plan and take action toward committing even a misdemeanor, there is a public policy and a reason in the law why that is more serious, because it creates the possibilities of greater risk to our society and to other people, in that other crimes will take place. [¶] ... So the Supreme Court has approved this thinking fairly recently, that even though the attempt seems less serious, conspiracy to commit it is a felony and for good reason. So I, having thought about that, decided that in fact the Count Four should be treated as a felony. [¶] So I did consider the fact that Mr. Mullins is young, does not have much of a record or prior criminal activities, one youthful theft of a bike, I believe.”

Penal Code section 17, subdivision (b) gives the trial court discretion to reduce certain felonies, often referred to as wobblers, to misdemeanors. (Pen. Code, § 17, subd. (b); People v. Douglas (2000) 79 Cal.App.4th 810, 812-813.) The statute does not specify the criteria a court should consider, but California appellate decisions have indicated the pertinent factors may include those relevant to sentencing decisions, such as the circumstances of the offense, the defendant’s ap-
preciation of and attitude toward the offense, and the defendant’s character as evidenced by the defendant’s behavior and demeanor at the trial. (People v. Superior Court (Alvarez) (1997) 14 Cal.4th 968, 978 (Alvarez), superseded by statute on other grounds as indicated in People v. Lynall (2015) 233 Cal.App.4th 1102, 1108.) We review the trial court’s ruling on a motion to reduce a felony to a misdemeanor pursuant to Penal Code section 17, subdivision (b) for an abuse of discretion and give deference to the trial court’s weighing of the relevant factors. (Alvarez, supra, at p. 981.) The appellant has the burden of showing that the denial of the motion was clearly irrational or arbitrary. (Id. at p. 977.)

Defendant Mullins contends the trial court’s denial of his motion to punish count four as a misdemeanor was an abuse of discretion because the trial court focused on the crime of conspiracy in the abstract and did not consider the circumstances of this case or defendant Mullins’s character. To the contrary, the trial court’s ruling was neither irrational nor arbitrary and, thus, was not an abuse of discretion. (Alvarez, supra, 14 Cal.4th at p. 977.)

While the trial court discussed the principle that a conspiracy is more serious than an attempt to commit a crime, that discussion was not divorced from the facts of this case. The discretion to sentence as either a felony or misdemeanor applies to all wobblers. Here, the trial court was noting that the actual crime committed in this case—conspiracy—is serious, even though it was conspiracy to commit a misdemeanor. The trial court demonstrated that it was aware of defendant Mullins’s youth and nonserious prior criminal record, but it still decided that felony sentencing was appropriate. No greater discussion of the specific circumstances of this case was required. There was no abuse of discretion.

V

Sentencing Minute Order and Abstract of Judgment

Defendant Russell argues, and the Attorney General agrees, that the sentencing minute order and the abstract of judgment must be modified to reflect the sentence imposed orally by the trial court. We also agree.

If the minute order or abstract of judgment is different from the oral pronouncement of judgment, the oral pronouncement controls. (People v. Mitchell (2001) 26 Cal.4th 181, 185–186.)

Here, the trial court orally imposed the middle term of four years on count one as to defendant Russell. However, the minute order and the abstract of judgment both reflect imposition of the upper term of six years. Also, the court orally imposed a consecutive 16 months each on counts two and three, as recommended by the probation report. However, the abstract of judgment reflects imposition of just a four-month term for counts two and three. Therefore, the minute order and abstract of judgment must be corrected to reflect the sentence actually imposed.

DISPOSITION

The judgments are affirmed. As to defendant Russell, the trial court is directed to (1) correct the sentencing minute order and the abstract of judgment to reflect that defendant Russell was sentenced to the middle term of four years on count one, (2) correct the abstract of judgment to reflect that defendant Russell was sentenced to a consecutive term of 16 months each on counts two and three, and (3) send a corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NICHOLSON, J. *

We concur: RAYE, P. J., DUARTE, J.

* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
THE PEOPLE, Plaintiff and Respondent, v. MARIA INES PINEDA AREVALO, Defendant and Appellant.

No. G054483
In The Court of Appeal of the State of California Fourth Appellate District Division Three (Super. Ct. No. 14NF1456)
Appeal from a judgment of the Superior Court of Orange County, Robert Alan Knox, Judge. Affirmed.
Filed January 17, 2018

COUNSEL
Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.
Xavier Becerra, Attorney General, Julie L. Garland, Senior Assistant Attorney General, Eric A. Swenson, Supervising Attorney General, Kristine Gutierrez and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION
A jury convicted Maria Arevalo of possessing methamphetamine for sale (Health & Saf. Code, § 11378). The trial court suspended execution of sentence and granted three years formal probation on several conditions. On appeal, Arevalo contends the probation condition requiring her to maintain a residence approved by her probation officer is unconstitutionally overbroad and violates her right to travel and freedom of association. She also requests that this court independently review the in camera hearing of her Pitchess motion. We find her first contention lacks merit, and the Attorney General agrees this court should review the confidential records. We have done so, and we affirm the judgment.

FACTS
In 2014, Orange County Sheriff’s Department Investigator Ashra Abdelmuti conducted a “controlled buy” between a confidential informant (CI) and Arevalo. After the CI purchased methamphetamine from Arevalo, deputies obtained a search warrant for Arevalo, her vehicle, and her apartment.
Abdelmuti spoke to Arevalo at her mother’s house in Anaheim. After learning the deputies intended to search her apartment, Arevalo gave them the keys. Inside Arevalo’s apartment, deputies found 5.6 ounces of methamphetamine, two large digital scales, a box of empty plastic baggies, a plastic sifter, and $1,116 in cash. The methamphetamine had a street value between $5,314 and $7,086. Abdelmuti opined the items seized indicated the methamphetamine was possessed for sale.
Arevalo testified in her defense. She stated she was afraid of her ex-boyfriend Daniel Jose Leon. Leon possessed two guns, and Arevalo once saw him hit a friend in the head with a gun.
Arevalo ended her relationship with Leon in the middle of 2013, but during their relationship, she had borrowed $1,500 from him and had not repaid the loan. In January 2014, Arevalo testified she was employed and dating someone new. Arevalo testified Leon was jealous about her new relationship and angry that she had not repaid him the money she owed. Arevalo claimed Leon gave her the methamphetamine and drug-related items detectives found in her apartment, and that he forced her to sell methamphetamine as a way to repay the money she owed him. She did not want to take the drugs but agreed to do so because she believed she and her family (including her then five-year-old daughter) were in danger. Leon threatened Arevalo by putting a nine-millimeter gun to her head. Leon was sometimes physically violent towards Arevalo, and he said he would hurt her and her daughter if she reported anything to the police.
Arevalo admitted she sold drugs to the CI. She drove her car to deliver the drugs but she did not collect any money from the CI. Arevalo claimed the buyer wanted to give the money directly to Leon. She explained the money found in her apartment was not related to selling drugs, but was money she was saving “for [her] new visa.” She admitted she did not ask her family for the money to repay Leon. She also never told her family or the police about Leon’s threats.
Deputies arrested Leon. During their search of his apartment, they found a nine-millimeter gun and a bag of ammunition.

DISCUSSION
I. PROBATION CONDITION
Arevalo maintains the probation conditions requiring her to maintain a residence approved by her probation officer are unconstitutionally overbroad and must be stricken. The Attorney General maintains the condition is narrowly tailored to serve the state’s interests in rehabilitation and reformation. We conclude the approval condition is constitutionally valid.
Generally, trial courts are given broad discretion in fashioning terms of probation in order to foster the reformation and rehabilitation of the offender while protecting public safety. (People v. Carbajal (1995) 10 Cal.4th 1114, 1120.) Therefore, we review the imposition of a particular condition of probation for abuse of that discretion. “As with any exercise of discretion, the court violates this standard when it imposes a condition of probation that is arbitrary, capricious or exceeds the bounds of reason under the circumstances. [Citation.]” (People v. Jungers (2005) 127 Cal.App.4th 698, 702.)
However, we review constitutional challenges under a different standard. Arevalo’s claim the probation term is un-
constitutionally overbroad presents a question of law, which we review de novo. (In re Sheena K. (2007) 40 Cal.4th 875, 888-889.) Not all terms that require a defendant to give up a constitutional right are per se unconstitutional. (People v. Mason (1971) 5 Cal.3d 759, 764-765, overruled on a different point as stated in People v. Lent (1975) 15 Cal.3d 481, 486, fn. 1.) “If a probation condition serves to rehabilitate and protect public safety, the condition may ‘impinge upon a constitutional right otherwise enjoyed by the probationer, who is “not entitled to the same degree of constitutional protection as other citizens.”’” (People v. O’Neil (2008) 165 Cal. App.4th 1351, 1355.)

A probation condition cannot be unconstitutionally overbroad. “A restriction is unconstitutionally overbroad . . . if it (1) ‘impinge[s] on constitutional rights,’ and (2) is not ‘tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.’ [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (In re E.O. (2010) 188 Cal. App.4th 1149, 1153.)

Although conditions requiring prior approval of a probationer’s residence may affect the constitutional rights to travel and freedom of association (People v. Bauer (1989) 211 Cal.App.3d 937, 944 (Bauer)), courts have the authority to do so if there is an indication the probationer’s living situation contributed to the crime or would contribute to future criminality. (People v. Soto (2016) 245 Cal.App.4th 1219, 1228.) A trial court may impose probation conditions that place limits on constitutional rights if they are reasonably necessary to meet the twin goals of rehabilitation of the defendant and protection of the public. (Bauer, supra, 211 Cal. App.3d at pp. 940-941.)

Arevalo relies upon the Bauer case, in which the appellate court struck a residence approval condition. (Bauer, supra, 211 Cal.App.3d at p. 945.) A jury found defendant guilty of false imprisonment and simple assault. (Id. at p. 940.) The trial court imposed the restriction to prevent defendant from living with his parents because they were overprotective. (Id. at p. 944.) Nothing in that record suggested defendant’s home life contributed to the crimes or that his residence was reasonably related to future criminality. (Ibid.) Defendant had no prior criminal history and the restriction was not proposed by the probation department. (Id. at p. 943.) While noting probation conditions requiring approval before traveling or moving can be appropriate under certain circumstances, the appellate court determined the restriction in this case impinged on defendant’s constitutional right to travel and freedom of association. “Rather than being narrowly tailored to interfere as little as possible with these important rights, the restriction is extremely broad. The condition gives the probation officer the discretionary power, for example, to forbid [defendant] from living with or near his parents—that is, the power to banish him. It has frequently been held that a sentencing court does not have this power. [Citations.]” (Id. at p. 944-945.)

Here, there is nothing in the record to suggest the approval condition was designed to banish Arevalo from a particular neighborhood or stop her from living where she desires. (See People v. Stapleton (2017) 9 Cal.App.5th 989, 995 (Stapleton) [distinguishing Bauer because “residence condition imposed here is not a wolf in sheep’s clothing; it is not designed to banish defendant”).) Moreover, the legal landscape has changed since publication of the Bauer opinion. Our Supreme Court stated in People v. Olguin (2008) 45 Cal.4th 375 (Olguin), “A probation condition should be given ‘the meaning that would appear to a reasonable, objective reader.’ [Citation.]” (Id. at p. 382.) The condition here presumes a probation officer will not withhold approval for irrational or capricious reasons (Id. at p. 383) and will appreciate there are limited housing options in Orange County. The approval condition allows the probation officer to supervise Arevalo’s residence, because the nature of her crime suggests a need for oversight. The probation officer can limit her exposure to sources of temptation for future criminality by, for example, not approving residences in close proximity to other drug dealers. Living in an area having easy access to drug suppliers could negatively affect her rehabilitation. And, if the probation officer disapproves of a particular residence for any arbitrary reason, Arevalo may file a petition for modification of her probation condition. (Pen. Code, §§ 1203.2, subd. (b) (1), 1203.3, subd. (a); see People v. Keele (1986) 178 Cal. App.3d 701, 708 [trial court retains jurisdiction to review probation officer’s actions].)

We are also mindful of the legal tenet, “[P]robation is a privilege and not a right, and adult probationers, in preference to incarceration, may validly consent to limitations upon their constitutional rights. [Citation.] For example, probationers may agree to warrantless search conditions or restrictions on their constitutional right of association. [Citations.]” (Stapleton, supra, 9 Cal.App.5th at p. 994.) “If a defendant believes the conditions of probation are more onerous than the potential sentence, he or she may refuse probation and choose to serve the sentence. [Citations.]” (Olguin, supra, 45 Cal.4th at p. 379.) For all of the above reasons, we conclude the residence approval condition is constitutionally valid.

II. REVIEW OF RECORD

During discovery, Arevalo requested and was granted review of confidential police personnel files. The court provided the witnesses’ names, addresses, and contact information regarding one incident. Arevalo requests we independently review the Pitchess hearing conducted by the trial court. The Attorney General agrees we may review the sealed transcript.

We can independently examine the record made by the trial court “to determine whether the trial court abused its discretion in denying a defendant’s motion for disclosure of po-
lice personnel records.” (People v. Prince (2007) 40 Cal.4th 1179, 1285.) We have reviewed the reporter’s transcript and conclude the trial court complied with the required Pitchess procedures. (People v. Mooc (2001) 26 Cal.4th 1216, 1225.) The custodian of records was present and placed under oath. The court independently reviewed the relevant personnel file. The proceedings were stenographically recorded. (Id. p. 1229.) Our independent review finds the trial court did not abuse its discretion in determining there was discoverable information with respect to only one incident. We conclude the remaining records in the personnel file were not related to false reports or dishonesty and were properly withheld from production.

DISPOSITION

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR: IKOLA, J., THOMPSON, J.