# The Supreme Court Cases Californians Should Be Watching

***Ben Feuer, The Recorder***

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United States Supreme Court

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One feature—or perhaps a bug?—of the U.S. Supreme Court under Chief Justice John Roberts Jr. is that the biggest and most newsworthy cases tend to come at the very end of each term in June. Court-watchers barely have time to digest last term's blockbusters before we have to wrench our attention to the next batch of cases that, by June 2016, will no doubt be making their own headlines.

And there are plenty of major cases pending on the court's docket to excite, outrage and divide the public. Over the next few weeks, you'll no doubt hear that this term, the court may eliminate affirmative action in college admissions once and for all; order states to redraw their voting districts to account only for registered voters (a move that would substantially boost the Republican Party in virtually every major election); and set up additional hurdles for public labor unions that wish to engage in political speech.

This article is not about those blockbuster cases. Instead, it will discuss a few cases you may not hear so much about—ones that might not make headlines, but are significant cases arising from California that could end up being important for Californians.

## Snapping California Courts Into Line on Arbitration Class Action Waivers

Way back in 2011, the Supreme Court held in *AT&T v. Concepcion* that the Federal Arbitration Act preempts state laws that disallow waivers of class actions in commercial contracts that contain arbitration clauses. The ruling sent shockwaves through the class action bar, effectively creating a roadmap to the elimination of all class actions arising from consumer contracts. Plaintiffs lawyers naturally hated it, and California courts, particularly the Court of Appeal, bristled at the federal tromping of a traditionally sovereign state determination. California courts carved exception after exception to the *Concepcion* rule, even after the U.S. Supreme Court affirmed the ruling in 2013's *American Express v. Italian Colors Restaurant* and the California Supreme Court stepped in to acknowledge federal supremacy in 2014's *Iskanian v. CLS Transportation*.

But California can be stubborn when it comes to protecting its citizens. To make its point ever-clearer, the U.S. Supreme Court has now reached down and plucked a case to review directly from the California Court of Appeal—one that earned neither California Supreme Court's nor the Ninth Circuit's attention. In *DirectTV Inc. v. Imburgia,* the Court of Appeal held that where the parties to a contract containing a class action arbitration waiver specifically reference state law in the contract, that indicates the parties chose to opt out of the federal arbitration regime, and thus federal preemption does not apply. Therefore, California's own rule preventing class action arbitration waivers is effective in such a contract. The Court of Appeal had a tough row to hoe, however, as the Ninth Circuit had already interpreted the same contract not to constitute such an "opt out" in a different case—a problem the Court of Appeal sidestepped by simply declaring the Ninth Circuit's analysis "unpersuasive."

Look for the Supreme Court to use Imburgia as an opportunity to hammer another nail in the coffin of state laws that limit class action arbitration waivers. While the court's conservatives, who tend to approve of the liberty to contract as one sees fit, may permit parties to expressly opt out of the federal arbitration law should they choose, expect the court to require such an election to be clear and unambiguous.

## Privacy Actions Without Actual Damages

Anyone who used to think personal data is safe on the Internet has likely learned a thing or two in the past few years. This term, in a case that may have marked effects on the future of litigation arising from corporate data breaches, the court will consider whether an individual who found his name on a background-check website, along with piles of incorrect "background" information about him, has standing to bring a lawsuit where he cannot allege he suffered any actual, concrete damages arising from the incorrect information reported.

In *Spokeo Inc. v. Robins*, the court will review a ruling by one of the Ninth Circuit's most conservative judges, Diarmuid O'Scannlain, which found such a plaintiff does have constitutional standing. The Ninth Circuit concluded that, where Congress creates a right (here, a right under the Fair Credit Reporting Act to have only accurate information reported about one's background), and a defendant allegedly violates that right, an injury-in-fact exists, along with causation and redressability, by virtue of the alleged violation of the right created by Congress.

While nominally about credit-related background information, Spokeo's big impact may be on privacy cases down the road, where the law requires corporations to secure data from breaches but situations involving actual harm may be tough to come by (not including, perhaps, for exposed subscribers to illicit websites like Ashley Madison). The case is a surprising one for the court to have taken, in part because the justices requested the views of the U.S. solicitor general as to the suitability of the case for review, and the solicitor general encouraged the court not to take the case—a perspective the court tends to listen to.

The court took it anyway, and it's hard to predict what it will do. Will it follow the lead of Judge O'Scannlain, who found in favor of a plaintiff in an opinion the Obama administration concluded did not merit review? Will it heed the petrified cries of the business lobby, which fears mega-class actions based on statutory violations that caused no tangible harm? Or might it sidestep the question entirely, dismissing the case as improvidently accepted in the first place?

## Mooting an Action by Offering to Pay In Full

*Campbell-Ewald Co. v. Gomez*, another Ninth Circuit case, presents a question that's almost so simple one wonders how it hasn't come up before: If a defendant offers to pay a plaintiff's claimed damages in full, and all the plaintiff seeks are damages, does a "case or controversy" still exist? Or is the case moot for lack of any additional redress a court can give?

In this case, Jose Gomez received a single, unsolicited text message from a company hired by the U.S. Navy to drum up recruitment. A federal statute provides for statutory damages of $1,503 for every unsolicited marketing call or text made to a cellphone, and so Gomez filed suit alleging both individual and class action claims. The marketing company offered to settle Gomez's claims by paying him the full $1,503 and, when he turned down the offer, the company sought to dismiss the case as moot, but the Ninth Circuit found that an offer to settle doesn't moot either individual or class action claims if the plaintiff turns the offer down.

That the court granted certiorari on the question is something of a surprise, since reversing would allow corporate defendants to defeat virtually every class action claim by offering the lead plaintiff the amount of his personal damages—usually very little—thereby mooting his claim and eliminating his ability to represent the class whether he takes the offer or not. That seems an unlikely place for the court to go, since class actions do serve a valuable public policy goal of punishing small but widespread malfeasance.

Thus, it's hard to predict how the court might come out in Campbell-Ewald. Look for a possible affirmance, or perhaps a ruling based on a secondary question presented: whether the fact that the defendant was a contractor for the Navy entitles it to some form of sovereign immunity.

## Turning The Tables on the Franchise Tax Board

Gilbert Hyatt, one of the inventors of the microprocessor, did something lots of folks wish they could do themselves: He sued California's Franchise Tax Board for an allegedly overaggressive audit, and won a judgment of nearly $500 million. The only problem? He did it in Nevada state court.

Generally speaking, if you want to sue your state and collect your judgment, you have to do so in the state's own courts, subject to the state's own rules for waiving its sovereign immunity. The Eleventh Amendment prohibits the federal courts from hauling a state into federal courtrooms without the state's consent. A half-dozen common law doctrines, from comity to sovereign immunity to forum non conveniens, generally work against bringing suit against a state in another state's courts.

But according to a U.S. Supreme Court decision from 1979—ironically, one in which a California citizen successfully brought suit against a Nevada-owned car company in California state court for damages resulting from a car accident—the Constitution does not prohibit suits against a state in another state's court. Nor does it require the forum state to import defenses to the suit that the defendant-state agency might have in its own state's courts. The court affirmed this rule in 2003, as part of the exact same Hyatt case, when, at the very outset of Hyatt's aggressive audit lawsuit, the Franchise Tax Board futilely attempted to require that Nevada offer it the same sovereign immunity defense it could assert in California courts.

Now that the suit is over and Hyatt has won a massive judgment (one that, though cut from its initial half-billion by the Nevada Supreme Court, is still significant), the Franchise Tax Board is asking the U.S. Supreme Court to revisit its prior rulings that allow an arm of one state to be sued in the state courts of another state. The court's rulings since 2003, California contends, evince such greater respect for state sovereignty than before that they call the entire 1979 doctrine into question.

The fact that the court took the suit at all is cause for Hyatt to be fairly concerned. The concept of suing a sovereign state in another sovereign state's home courts is laden with structural constitutional problems. It's almost self-evident that a foreign state will get less of a shake than the home state in those courts. That's why diversity jurisdiction exists for individual litigants who need to sue a party in a foreign state. It's also why the Constitution gives the Supreme Court original jurisdiction over "[c]ontroversies between two or more states."

Given the unusual difficulties brought to the surface by his lawsuit, Hyatt may face an unfriendly audience when he makes it to One First Street. It's hard to understand why the court would take the case otherwise.

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