FEBRUARY 2020
Annotated California Bar Questions

Study edition | Original question pages with added highlights and reading pointers.

Practice first: attempt the clean question, then use the numbered notes and online sample responses to compare your reasoning. The full source packet is preserved, including its instructions and library.

Original, ungraded instructional commentary. Not official selected answers, scored student work, or a claim of attorney review.

Source: State Bar of California | 27 original pages, all retained.

Bar Exam Doctor | Published November 4, 2026

FEBRUARY 2020
ESSAY QUESTIONS 1, 2 AND 3

California Bar Examination

Answer all 3 questions; each question is designed to be answered in one (1) hour.

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

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

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

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

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

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

QUESTION 1

1 Paul, an actor, had small but memorable roles in two recent Hollywood blockbusters. Paul was also a first-year law student. He began having difficulty keeping up with his studies and became increasingly anxious about failing. He told his Legal Research and Writing professor, Dan, about his anxiety and doubts about his ability to timely complete a research paper Dan
2 had assigned. Dan noticed that Paul appeared unusually anxious and suggested he go see the school counselor.

Paul returned to the apartment that he shared with Jack, who was also enrolled in Dan's Legal Research and Writing class.

The day before the research paper was due, Jack looked for his paper in his room but could not find it. Later, after Jack returned home from school, he found the paper on his desk where he thought he had originally placed it. After submitting the paper, Jack became suspicious that Paul might have copied parts of Jack's paper on the day that it seemed to be missing. Jack went to Dan's office and told him about his suspicions. Dan pulled from a stack of submitted papers what he thought was Paul's paper. When Jack saw the paper, he recognized the footnotes and said that Paul had "copied all of the footnotes from my paper."

3 The next day, Dan told Jack and Paul's class that "I hope no other student has copied his footnotes from another student's paper like that two-bit actor Paul." Paul was in class and heard the statement. Deeply humiliated, Paul suffered a severe panic attack, but did not seek medical treatment.

Dan later discovered that he had inadvertently shown Jack his own paper and not Paul's paper and that Paul had not copied Jack's or any other person's materials.

Paul has sued Dan based on his statement to the class.

What claim(s) may Paul reasonably raise against Dan; what defenses may Dan reasonably assert; what damages, if any, may Paul recover; and what is the likely outcome? Discuss.

READING POINTERS

1 Fame has a scope

Small memorable roles do not conclusively establish general public-figure status. Ask whether the classroom plagiarism dispute is a public controversy.

2 Known susceptibility matters

Use Dan's prior knowledge when analyzing outrageousness and recklessness. A severe panic attack can be evidence of distress without medical treatment.

3 Fact, opinion, and damages

The accusation is factual even if the acting insult is opinion. Analyze slander per se carefully; dishonesty is not automatically an accusation of a qualifying crime.

QUESTION 2

1 Linda is a lawyer with experience in representing small businesses, both for-profit and nonprofit. Nonprofit, Inc. (Nonprofit) is a newly formed California nonprofit corporation with few assets and limited income. Nonprofit is governed by a volunteer board of three directors, one of whom holds the position of board chair. Nonprofit's only employee is Ellen, who has no official title.

3 Ellen contacted Linda and said that Nonprofit would like to retain Linda to help it develop a formal employment agreement with Ellen, to make Ellen officially the Executive Director of Nonprofit. Ellen's position as Executive Director would be as an officer of the company, but not as a board member. Linda agreed to accept the matter. Linda did not memorialize her retainer agreement in writing.

2 Ellen drafted an employment agreement that included a proposed salary and sent the agreement to Linda. Ellen told Linda that her proposed salary was data-driven from a survey of similar positions, but based in the for-profit field. Ellen asked Linda not to tell the Board about the source of the survey data. Linda saw many other provisions in the draft agreement that were more favorable to Ellen than those in a typical employment agreement. Linda arranged a meeting with the Nonprofit board to discuss the terms of Ellen's employment agreement. The board chair asked Linda to invite Ellen to attend the board meeting and join their discussions.

1. With whom did Linda establish an attorney-client relationship and what ethical violations, if any, did Linda commit at the time the attorney-client relationship was created? Discuss.

2. What are Linda's ethical obligations with regard to:

   a. Ellen's employment agreement? Discuss.

   b. Ellen's request for confidentiality regarding the source of the survey data? Discuss.

Answer according to California and ABA authorities.

READING POINTERS

1 Read the fee-rule exception

The ordinary California writing requirement has a corporate-client exception. Do not treat the lack of a retainer letter as an automatic violation.

2 Identify whose confidence

If Nonprofit is the client, Ellen cannot prevent counsel from giving relevant compensation information to the authorized board.

3 Authority and personal interests

Ellen's proposed officer role does not make her a director. Clarify the client, verify authority, and provide the board independent advice.

QUESTION 3

Barn Exports ("Barn") hired Sam, an up-and-coming artist whose work was recently covered in Modern Buildings Magazine, to paint a one-of-a-kind artistic design along the border of the ceiling in its newly renovated lobby. After discussing the work, Ed, the president of Barn, and Sam signed a mutually drafted handwritten contract, which states in its entirety:

1

> Sam shall paint a unique design along the entire ceiling border of all public areas of the first-floor lobby. Barn shall pay $75,000 upon completion of the work.

When Sam began work, he was surprised that the new plaster ceiling in the lobby had not been sanded and sealed. Sam complained, but was told by Ed that preparation was part of his responsibilities. Although Sam disagreed, he spent four days sanding and sealing the ceiling. When Sam finished painting, he submitted a bill for $78,000, having added $3,000 for labor and supplies used in preparing the ceiling. In response, Barn sent a letter to Sam stating that, because he had not painted the borders in the two public restrooms in the lobby, no payment was yet due. Barn's letter also stated that it had recently spoken to several artists who perform similar work and learned that "surface preparation" was typically the responsibility of the artist.

2

According to Sam, before the contract was signed, he told Ed that the restrooms could not be included because his paints were not suitable for the high humidity in those locations.

Sam sued Barn for breach of contract in the amount of $78,000.

3 Barn countersued for specific performance to have the borders in the bathrooms painted.

1. Is Sam likely to prevail in his breach of contract lawsuit against Barn and if so, what damages will he likely recover? Discuss.

2. Is Barn likely to prevail in its lawsuit seeking specific performance against Sam? Discuss.

READING POINTERS

1 Interpret before finding breach

Ask whether the bathrooms are within the agreed lobby scope. The prior humidity discussion may interpret an ambiguity rather than add a contradictory term.

2 Prove the usage

Trade usage can explain a silent term, but Barn must establish the asserted practice. Sam cannot create an extra-price agreement merely by sending a larger bill.

3 Personal services remain personal

The design's uniqueness supports inadequacy of damages but does not ordinarily justify an order compelling affirmative artistic work.

FEBRUARY 2020
ESSAY QUESTIONS 4 AND 5

California Bar Examination

Answer both questions; each question is designed to be answered in one (1) hour. Also included in this session is a Performance Test question, comprised of two separate booklets, which is designed to be answered in 90 minutes.

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

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If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

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

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READING POINTERS

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QUESTION 4

Des is on trial in a California superior court for possession with intent to distribute hundreds of pounds of cocaine from January through October in 2019.

At trial the prosecution called Carol, a severed co-defendant, who had pleaded guilty to reduced charges in exchange for testifying against Des. Carol testified that through 2019, she had acted as a "distributor" for a ring of cocaine dealers. In that role, Carol had sold hundreds of pounds of cocaine to many people, including Des, during the period of the charged crime. Carol further testified that all her customers agreed to sell cocaine. The prosecutor asked Carol to identify a notebook, which Carol testified was hers, and which she used to keep track of income and expenses related to the cocaine sales as each occurred. Carol testified that on pages 1 – 2 of the notebook were notations of sales of cocaine from January through April of 2019 by Carol to various people other than Des. She further testified that on pages 3 – 4 were notations of sales from May through October in 2019 to various people, including Des. The court admitted pages 1 – 4 into evidence.

On cross-examination, Des's attorney asked Carol if the prosecutor, Pete, had offered her a reduced sentence in exchange for her testimony. Carol answered, "No." Des's attorney then called Carol's attorney, Abe, to the stand and asked him the same question. Pete asserted attorney-client privilege. The court denied the assertion of privilege, and Abe testified that the reduction of charges against Carol had been in exchange for Carol agreeing to testify against Des.

Des took the stand and denied the charge. On cross-examination, Pete asked Des if it was true that eleven years earlier he had been convicted of forgery, a felony. Des answered, "Yes."

1. Assuming all credible objections were timely made, did the court properly admit:

   a. Pages 1 – 4 of the notes? Discuss.

   b. Evidence of Des's conviction for forgery? Discuss.

2. Did the court properly deny the assertion of attorney-client privilege? Discuss.

Answer according to California law.

READING POINTERS

1 Contemporaneous business records

Illegal activity can still generate qualifying business records. Apply regular practice, personal knowledge, timing, and trustworthiness rather than assuming the notebook is admissible merely because Carol testifies.

2 Use California's rule

Remoteness is a balancing factor. Do not import the federal ten-year conviction rule into this California criminal trial.

3 Terms are not private advice

The bargain with the prosecutor is distinct from confidential client-lawyer communications. Its terms expose bias without automatically opening all privileged discussions.

QUESTION 5

1 Andrew, Bob, and Christine are attorneys who formed a law firm. They filed no documents with the Secretary of State or any other state office. They equally share the firm's profits after paying all expenses and make all business and management decisions. Associate attorneys are paid a fixed salary, plus 25% of gross billings for any clients they bring to the firm. Senior attorneys are paid based upon the number of hours they bill plus an annual bonus if they bill more than 2,000 hours in a year. The senior
2 attorney bonus pool is equal to 5% of firm profits, which is split equally by the number of qualifying senior attorneys each year. Andrew, Bob, and Christine agreed to bestow the title "non-equity partner" on senior attorneys even though senior attorneys have no
3 management authority. The firm website and business cards for senior attorneys list their title as "partner."

Martha, a senior attorney, met Nancy at a social function. Nancy told Martha about her business's legal problems. Martha gave Nancy her business card. After looking at the card, Nancy asked Martha if as a "partner" she can agree to the firm handling her legal problems at a reduced hourly rate in return for a promise of future business. Martha was aware that the firm has a strict policy of not reducing hourly rates, but signed a written agreement for it to handle Nancy's legal matters at a reduced hourly rate.

1. What type of business entity is the firm using to conduct business? Discuss.

2. Are the associate attorneys employees, partners, members, or shareholders of the firm? Discuss.

3. Are the senior attorneys employees, partners, members, or shareholders of the firm? Discuss.

4. Is the firm bound by the agreement that Martha signed with Nancy? Discuss.

READING POINTERS

1 A partnership can arise by conduct

Equal net-profit sharing and joint management support a general partnership. Filing is required for the alternative formal entities, not for ordinary general partnership formation.

2 The compensation exception

A profit-based employee bonus does not necessarily create ownership. Evaluate services, management, capital, and the arrangement as a whole.

3 The firm created the appearance

Martha lacks actual discount authority, but Nancy can reasonably rely on the firm's partner representation unless she knows of the private restriction.

February 2020

California Bar Examination

Performance Test

INSTRUCTIONS AND FILE

READING POINTERS

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WESTERN INSURANCE COMPANY v. SECURETRADE, INC.

Instructions……

FILE

Memorandum to Applicant from Jessie Parker……..

Letter from Martin Chan to Jessie Parker……

Complaint……..

READING POINTERS

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WESTERN INSURANCE COMPANY v. SECURETRADE, INC.

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response. Since the time allotted for this session of the examination includes two (2) essay questions in addition to this performance test, time management is essential.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

READING POINTERS

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RAND SPIVEY LLP
202 First Street
Northport, Columbia

MEMORANDUM

To: Applicant
From: Jessie Parker
Date: February 25, 2020
Re: Western Insurance Company v. SecureTrade, Inc.

We represent both Western Insurance Company (Western) and Assurance North America Brokers and Administrators, Inc. (Assurance) in two actions against a company named SecureTrade, Inc. (SecureTrade). The two actions arise from two transactions. The material facts are set forth in our complaint in the Western-SecureTrade action.

SecureTrade sells consumers extended warranties for various products. SecureTrade has to have an insurance policy to back up these warranties to cover claims by consumers. To obtain the required insurance policy and to provide for review of consumer claims prior to approval or rejection, SecureTrade entered into a contract with Assurance (the Brokerage & Administration Agreement). The Brokerage & Administration Agreement contains an arbitration clause. Assurance in turn procured the required insurance policy (the Insurance Policy) for SecureTrade from Western, which is an insurance company affiliated with Assurance. SecureTrade entered into the Insurance Policy with Western. The Insurance Policy does *not* contain an arbitration clause.

In its action against SecureTrade, Assurance claims that SecureTrade breached the Brokerage & Administration Agreement. Invoking the arbitration clause in the Brokerage & Administration Agreement, SecureTrade successfully moved to submit the breach of contract claim to arbitration – the Assurance-SecureTrade arbitration.

READING POINTERS

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In its separate action against SecureTrade, Western claims that SecureTrade committed fraud with regard to the Insurance Policy.

Counsel for SecureTrade sent me a letter requesting that Western voluntarily submit its fraud claim to arbitration as part of the Assurance-SecureTrade arbitration in order to avoid wasting time and money on a motion to compel arbitration that he asserts the Superior Court would "doubtless" grant.

1 Please draft a letter for my signature in response, stating that Western will not voluntarily submit its fraud claim to arbitration and explaining why any motion by SecureTrade to compel arbitration would be denied and why counsel's contrary argument is unsound.

READING POINTERS

1 Match audience and purpose

Respond for Jessie Parker's signature. State the refusal and explain why the opponent's specific reading of Tuscany fails.

ALLEN & PROCTOR LLP
Three Emerson Center
Northport, Columbia

February 20, 2020

Jessie Parker
Rand Spivey LLP
202 First Street
Northport, Columbia

Re: *Western Insurance Company v. SecureTrade, Inc.*

Dear Ms. Parker:

On behalf of SecureTrade, Inc. (SecureTrade), we hereby request that Western Insurance Company (Western) voluntarily submit its fraud claim in the above-referenced action to arbitration as part of an arbitration that was initiated by Western's affiliate, Assurance North America Brokers and Administrators, Inc. (Assurance), and is currently pending before the Columbia Arbitration Board in *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.*

As you are aware, relying on an arbitration clause in a so-called Brokerage & Administration Agreement to which SecureTrade and Assurance were parties, SecureTrade requested Assurance to voluntarily submit a breach of contract claim it had brought in *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.* to arbitration before the Columbia Arbitration Board. Assurance refused. Because of Assurance's refusal, SecureTrade was forced to waste time and money to move the Superior Court — successfully — to compel Assurance to arbitrate.

We make our request that Western voluntarily submit its fraud claim to arbitration to avoid the waste of time and money that would be incurred if SecureTrade were again forced to move to compel arbitration. To expend time and money on such a motion

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would be needlessly wasteful. That is because the Superior Court would doubtless grant the motion.

The Columbia Arbitration Act reflects a strong policy in favor of compelling arbitration. *Tuscany Builders v. Norman Properties* (Colum. Supreme Ct. (2011)).

The Columbia Arbitration Act's strong policy operates to compel arbitration whenever an action is intertwined with an arbitration and whenever a party to an action has a preexisting relationship with a party to an arbitration. *Tuscany Builders.* So it is here: Western and Assurance are affiliates and as such have a preexisting relationship; the Brokerage & Administration Agreement Assurance entered into with SecureTrade and the Insurance Policy Western issued to SecureTrade are intertwined.

1 In any event, the Columbia Arbitration Act's strong policy operates to compel arbitration whenever a party in an action seeks or obtains a direct benefit from a signatory to a contract containing an arbitration clause. *Tuscany Builders*. So it is here: Western obtained a direct benefit from SecureTrade, a signatory to the Brokerage & Administration Agreement, which contains an arbitration clause, by obtaining a premium from SecureTrade for the Insurance Policy.

Please respond, in writing, by March 2, 2020, and inform us whether Western will voluntarily submit its fraud claim to arbitration. If Western declines to do so, please state its reasons so that we may inform the court when we file a motion to compel.

Very truly yours,

ALLEN & PROCTOR LLP

Martin Chan

_____

Martin Chan

READING POINTERS

1 The opponent changes the test

A benefit from a person who signed is different from a benefit under the contract containing arbitration. Trace the premium to the separate insurance policy.

Jessie Parker
RAND SPIVEY LLP
202 First Street
Northport, Columbia

Attorneys for Plaintiff
Western Insurance Company

SUPERIOR COURT OF THE STATE OF COLUMBIA
COUNTY OF SPRINGFIELD

WESTERN INSURANCE COMPANY, Plaintiff, v. SECURETRADE, INC., Defendant.	Case No.: 170717 **COMPLAINT FOR FRAUD**

By this Complaint, Plaintiff Western Insurance Company (Western) brings this action against Defendant SecureTrade, Inc. (SecureTrade), and alleges as follows:

THE PARTIES

1. Western is a Columbia corporation with its principal place of business at 59 Maiden Lane, Northport, Columbia.

2. SecureTrade is a Columbia corporation with its principal place of business at 360 Third Street, Northport, Columbia.

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JURISDICTION AND VENUE

3. Jurisdiction in this Court is proper under section 410 of the Columbia Code of Civil Procedure because SecureTrade maintains its principal place of business in the State of Columbia and the County of Springfield and does business there.

4. Venue in this Court is proper under section 395(a) of the Columbia Code of Civil Procedure because SecureTrade maintains its principal place of business in the State of Columbia and the County of Springfield and does business there.

GENERAL ALLEGATIONS

5. SecureTrade sells consumers extended warranties, which provide repair and replacement coverage for a variety of consumer products.

6. The extended warranties are contracts between SecureTrade and individual consumers. They are not insurance policies.

7. In general terms, an extended warranty provides a consumer with additional protection for certain forms of product failure or damage in addition to the standard warranty provided for by the manufacturer of the product.

8. SecureTrade is required to carry insurance from an insurer to back up its extended warranties.

9. Western and SecureTrade were parties to a Contractual Liability Insurance Policy (Insurance Policy). The Insurance Policy is a commercial insurance product that covers the contractual obligations of the insured – in this case SecureTrade – to consumers on extended warranties. SecureTrade paid a premium to Western for the Insurance Policy and Western issued the Insurance Policy to SecureTrade.

READING POINTERS

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Western and SecureTrade are the sole signatories to the Insurance Policy. The Insurance Policy does not contain an arbitration clause.

10. Assurance North America Brokers and Administrators, Inc. (Assurance) is an affiliate of Western. Assurance procured the Insurance Policy for SecureTrade pursuant to a contract referred to as a "Brokerage & Administration Agreement." Assurance and SecureTrade are the sole signatories to the Brokerage & Administration Agreement. The Brokerage & Administration Agreement contains an arbitration clause.

11. Subsequently, Assurance brought an action against SecureTrade in the Springfield County Superior Court, entitled *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.*, which raised a single claim for breach of the Brokerage & Administration Agreement. Under the Brokerage & Administration Agreement, SecureTrade engaged Assurance not only to obtain the Insurance Policy, but also to review consumer claims prior to approval or rejection. Under the Brokerage & Administration Agreement, SecureTrade obligated itself to provide Assurance with timely and accurate reports to enable it to approve all consumer claims that were supported and to reject all consumer claims that were not supported. SecureTrade, however, failed to provide Assurance with timely or accurate reports.

12. Invoking the Brokerage & Administration Agreement's arbitration clause, SecureTrade successfully moved to compel Assurance to submit its claim to arbitration before the Columbia Arbitration Board under the Columbia Arbitration Act. Thereupon, Assurance initiated an arbitration before the Columbia Arbitration Board, similarly entitled *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.* The arbitration remains pending.

13. SecureTrade sold millions of extended warranties to consumers directly. The Insurance Policy insured SecureTrade's contractual obligations on these extended warranties.

READING POINTERS

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14. Under certain conditions stated in the Insurance Policy, the extended warranties provide consumers with the right to seek reimbursement directly from Western. Among other things, the conditions impose claims-handling obligations on SecureTrade, requiring it to reasonably determine whether any consumer has presented a valid claim for product failure or damage and to certify in good faith whether Western is responsible for satisfying any such claim.

15. Over time, SecureTrade purportedly complied with its claims-handling obligations under the Insurance Policy, and so represented to Western, intending to induce its reliance. SecureTrade purportedly reasonably determined that more than 17,000 consumers had presented valid claims for product failure or damage totaling more than $36 million, and so represented to Western, intending to induce its reliance. And SecureTrade purportedly certified in good faith that Western was responsible for satisfying the claims, and so represented to Western, intending to induce its reliance. Having reasonably relied on SecureTrade's representations, Western satisfied all of these claims in timely fashion and in full.

16. In fact, however, SecureTrade did not comply with its claims-handling obligations under the Insurance Policy. Nor did SecureTrade reasonably determine that any of the more than 17,000 consumers had presented valid claims for product failure or damage totaling even a penny of the $36 million. Neither did SecureTrade certify in good faith that Western was responsible for satisfying any of the claims. In doing all of these things, SecureTrade acted fraudulently.

CLAIM

(Fraud)

17. Western incorporates by reference the allegations contained in the foregoing paragraphs.

18. SecureTrade represented to Western that SecureTrade: (1) complied with its claims-handling obligations under the Insurance Policy; (2) reasonably determined

READING POINTERS

Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.

that more than 17,000 consumers had presented valid claims for product failure or damage totaling more than $36 million; and (3) certified in good faith that Western was responsible for satisfying the claims.

19. SecureTrade's representations, however, were false.

20. SecureTrade knew that its representations were false when it made them.

21. SecureTrade intended that Western rely on its representations.

22. Western reasonably relied on SecureTrade's representations.

23. As a result, Western was harmed, in an amount equal to at least $36 million.

PRAYER FOR RELIEF

WHEREFORE, Western prays for the following relief:

A. An order requiring SecureTrade to pay damages, in an amount to be determined at trial but at least $36 million, to compensate Western for its damages incurred as a result of SecureTrade's acts of fraud;

B. An order requiring SecureTrade to pay punitive damages to Western as a result of SecureTrade's acts of fraud;

C. An order requiring SecureTrade to pay prejudgment and post-judgment interest on all sums that it is ordered to pay to Western;

D. The costs of bringing this action; and

E. Such other and further relief as the Court may deem just and proper.

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DATED: February 14, 2020

RAND SPIVEY LLP

Jessie Parker

By: _____

Jessie Parker
Attorneys for Plaintiff
Western Insurance Company

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February 2020

California Bar Examination

Performance Test

LIBRARY

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WESTERN INSURANCE COMPANY v. SECURETRADE, INC.

LIBRARY

Tuscany Builders v. Norman Properties
Columbia Supreme Court (2011) .....

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Tuscany Builders, et al. v. Norman Properties, et al.

Columbia Supreme Court (2011)

In this matter, we consider the trial court's denial of a motion to compel arbitration pursuant to an arbitration clause in a real estate purchase and sale contract — the Purchase and Sale Contract — and the Court of Appeal's affirmance of the denial. Both the trial court and the Court of Appeal concluded that the arbitration clause could not be invoked by a nonsignatory to the Purchase and Sale Contract. In so concluding, both erred.

This is a complex residential real estate development project gone almost-inconceivably wrong. Suffice it to say that a group of plaintiffs, including buyers, sellers, and government agencies, sued another group of defendants, including other buyers, sellers, and government agencies, when the development project collapsed. Although the plaintiffs' complaint raises sixteen disparate claims, it essentially prays for relief, including damages, for breach of the Purchase and Sale Contract. The defendants filed a motion to compel the plaintiffs to arbitrate their claims under the Columbia Arbitration Act pursuant to the arbitration clause of the Purchase and Sale Contract. The plaintiffs opposed the motion, noting that none of the defendants was a signatory to the Purchase and Sale Contract, and that, although some of the plaintiffs were signatories, others were not. The trial court denied the motion, and the Court of Appeal affirmed.

We granted review in this matter to answer two related questions of first impression in Columbia. First, may a party who is *not* a signatory to a contract with an arbitration clause compel a party who *is* a signatory to arbitrate under the Columbia Arbitration Act via the doctrine of equitable estoppel? Second, may a party who is *not* a signatory to a contract with an arbitration clause compel another party who is *not* a signatory to arbitrate under the Columbia Arbitration Act via the doctrine of equitable estoppel? As we shall explain, the answer to both questions is: Yes.

While the Columbia Arbitration Act reflects a strong policy in favor of arbitration, generally speaking, arbitration is nevertheless a matter of contract and a party cannot

READING POINTERS

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be compelled to arbitrate any dispute that he or she has not agreed to arbitrate.

As for the first question, we observe that sister-state courts have not been hesitant to allow a party who is *not* a signatory to a contract with an arbitration clause to compel a party who *is* a signatory to arbitrate under the doctrine of equitable estoppel. The doctrine rests on the premise that a signatory should not be permitted to avoid arbitrating claims of the very type that he or she agreed to arbitrate simply because a nonsignatory seeks to arbitrate such claims. These courts have therefore concluded that a nonsignatory may compel a signatory to arbitrate when the claims the nonsignatory is seeking to arbitrate are intertwined with the contract containing the arbitration clause. We agree with the reasoning of these courts and with their result. Thus, we conclude that a nonsignatory may compel a signatory to arbitrate under the Columbia Arbitration Act via equitable estoppel when the signatory raises claims against the nonsignatory that are intertwined with the contract containing the arbitration clause, *i.e.*, dependent on rights or duties under the contract.

1

It follows that, under the facts, even though they are not signatories to the Purchase and Sale Contract with its arbitration clause, the defendants may nevertheless compel the signatory plaintiffs to arbitrate the claims they raise in their complaint. The signatory plaintiffs expressly allege that the defendants "breached the Purchase and Sale Contract," that the "breach" subjected them to "injury," and that the "injury" entitles them to "damages." The signatory plaintiffs' claims are therefore intertwined with the Purchase and Sale Contract because they are dependent on rights granted to the signatory plaintiffs.

As for the second question, we observe that, in contrast, sister-state courts have indeed been hesitant to allow a party who is *not* a signatory to a contract with an arbitration clause to compel another party who is *not* a signatory to arbitrate under the doctrine of equitable estoppel. It is foreseeable and therefore reasonable that a party who has chosen to become a signatory to a contract with an arbitration clause might be compelled to arbitrate not only with other signatories but also with nonsignatories. But it

READING POINTERS

1 Intertwining is contract-specific

Distinguish a signatory plaintiff suing on the arbitration contract from nonsignatory Western asserting fraud concerning another agreement.

is not at all foreseeable or reasonable that a party who has *not* chosen to become a signatory to any contract with an arbitration clause might be compelled to arbitrate with anyone. These courts have therefore concluded that a nonsignatory may compel another nonsignatory to arbitrate only when the other nonsignatory has sought or obtained a direct benefit from the contract containing the arbitration clause — that is to say, only when the nonsignatory attempts to recover, or actually recovers, for breach of the contract as, for example, a third-party beneficiary. In so concluding, these courts have extended the settled rule that a *signatory* may compel a *nonsignatory* to arbitrate only when the *nonsignatory* has sought or obtained such a direct benefit from the contract containing the arbitration clause. On this point too, we agree with the reasoning of these courts and with their result. Thus, we conclude that a nonsignatory may compel another nonsignatory to arbitrate under the Columbia Arbitration Act via equitable estoppel, but only when the nonsignatory has sought or obtained such a direct benefit from the contract containing the arbitration clause.

We recognize that some sister-state courts have stated in dictum that a party who is not a signatory to a contract containing an arbitration clause may be said to seek or obtain a direct benefit from the contract if he or she alleges a preexisting relationship with one of the signatories. In this case, however, we need not and do not determine whether this dictum is sound. In any event, we believe that whether a nonsignatory has sought or determined a direct benefit from the contract should turn ultimately on what the nonsignatory *has done*, *i.e.*, effectively suing on the contract, rather than on what the nonsignatory *may be*, *i.e.*, factually or legally related to one of the signatories.

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It follows that, under the facts, even though they are not signatories to the Purchase and Sale Contract with its arbitration clause, the defendants may nevertheless compel the nonsignatory plaintiffs to arbitrate the claims they raise in their complaint. The nonsignatory plaintiffs' claims are obscure and convoluted. As a result, we are not quite sure on what basis the nonsignatory plaintiffs are attempting to recover for breach of the Purchase and Sale Contract. But we are quite sure that the nonsignatory plaintiffs are attempting to do so. Like the signatory plaintiffs, the

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1 Do not convert reserved dictum into a holding

The court declines to adopt affiliation alone as the test. What Western seeks under the contract matters more than its corporate relationship to Assurance.

1 nonsignatory plaintiffs expressly allege that the defendants "breached the Purchase and Sale Contract," that the "breach" subjected them to "injury," and that the "injury" entitled them to "damages."

For these reasons, we reverse the judgment of the Court of Appeal and remand the matter to that court to remand it, in turn, to the trial court to grant the motion to compel arbitration.

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1 Distinguish the actual holding

The Tuscany plaintiffs effectively sued on the very contract containing arbitration. Western seeks relief for fraud in the separate policy transaction.

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Official source page preserved. Use the highlighted pages and corresponding online response for added teaching commentary.