



## August 2003

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- Tax Planning and Litigation

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## Legal Alert

There are two recent California court decisions that we would like to bring to your attention. The first case will be of interest to all businesses that are using or thinking of using alternative dispute resolution provisions. The second case deals with environmental impact reports and will be of interest to those of you in the construction industry. We hope the information regarding these two recent cases will be of use to you.

### Environmental Impact Reports Must Now Contain a Water Analysis

By Julie Rose and Steve McNichols

A recent Southern California case demonstrates the increasing importance of a thorough water analysis in preparing environmental impact reports (EIRs). In *Santa Clarita Organization for Planning the Environment, et al. v. County of Los Angeles*, published on February 27, 2003, the appellate court determined that an EIR was inadequate because it failed to adequately address the water services portion of the plan.

In Santa Clarita, the County of Los Angeles certified a final EIR for a mixed commercial/residential development. The Santa Clarita Organization for Planning the Environment and the Friends of the Santa Clara River

(“SCOPE”) petitioned the court for a writ of mandate, requesting the court to order the county to vacate its resolution certifying the final EIR. SCOPE claimed that the EIR failed to properly address the availability of water as required by the California Environmental Quality Act (CEQA). The EIR addressed the water availability issue by referencing various water entitlements, including the incomplete State Water Project (SWP).

The court stated “the purpose of an EIR is to inform the public and its responsible officials of the environmental consequences of decisions before they are made”. “To be adequate, the EIR must include sufficient detail to enable those who did not participate

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### Alternative Dispute Resolutions Provision Enforceable

By Leslie Baxter and Steve McNichols

In a recent decision, a California court found enforceable a contract provision, requiring homebuyers who sue a builder to submit the dispute to judicial reference. In *Woodside Homes of California, Inc. v. Superior Court of the County of Riverside*, the buyers of a Woodside Homes residence sued the developer. Woodside then sought to compel the buyer to proceed with its case under a judicial reference, as provided for in the buyer’s purchase contract.

Under a judicial reference procedure, the parties to a dispute agree to have all or part of their case heard and decided by a referee, rather than a judge or a jury. The referee is usually a qualified attorney or a retired judge. This is one of several forms of alternative dispute resolution (ADR) which are gaining in

popularity. It is increasingly common in standard contracts to see provisions for arbitration, mediation or reference, including a waiver of any right to a trial, either before a jury or a judge.

The court in the Woodside case found that the contract provision referring the buyer’s dispute to a referee was valid and enforceable. While the provision was not in large print, it was preceded by a large caption, “JUDICIAL REFERENCE OF DISPUTES”, so that the buyer could not claim surprise. The court found no evidence that the buyer was coerced into agreeing to the reference provision, or that he lacked choice in the bargaining process. Buyer had argued that it was unfair to subject its dispute to a referee, whose fees would have to be paid equally by the buyer and Woodside,

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# Tax Update: Jobs & Growth Tax Relief Reconciliation Act of 2003

By Pamela Young and Suzanne Anastasio

On May 28, 2003, President Bush signed the Jobs Growth Tax Relief Reconciliation Act of 2003 (the "Act"). The Act contains tax relief for both corporate and individual taxpayers. Since the Act is in its fledgling stage, we can expect more guidance from Congress and the IRS in the near future.

## INDIVIDUAL MARGINAL RATES

The Act accelerates tax cuts from the 2001 Tax Act, including acceleration to 2003 of the reduction of the 27, 30, 35 and 38.6% marginal rate brackets to 25, 28, 33 and 35%, respectively. All rate cuts are retroactive to January 1, 2003, and all are subject to sunset provisions that will cause the rates to change to 15, 28, 31, 36 and 39.6% after 2010. All of the income tax bracket thresholds will be adjusted annually for inflation.

*Note: Taxpayers should consider whether they are able to decrease the amount withheld from their paychecks and use those funds to invest in a tax-deferred IRA or SEP (if they are sole proprietors). For eligible taxpayers, this would allow a double benefit: using the rate cut to create a deduction. Even taxpayers who are not able to take double advantage of the decrease can reduce the amounts withheld from their paychecks, or expect a refund or a larger refund than they would have received.*

## CHILD TAX CREDIT

The Act increases the child tax credit from \$600 to \$1,000, effective for 2003 and 2004, after which the credit falls to \$700 and then begins to rise again until, in 2010, the credit again is \$1,000. The increase will be paid in advance starting in July to those who have paid their 2002 taxes. The advance payment will be approximately \$400 per eligible child. The credit claimed on taxpayers' 2003 returns must be reduced by the advance payments distributed to them this year. The child tax credit phases out for taxpayers with certain adjusted gross income levels: \$75,000 for single filers, \$110,000 for joint filers, \$55,000 for married taxpayers, filing separately.

*Note: Since the advance payments will be calculated based upon 2002 information, eligible children born or adopted in 2003 will not be reflected in those payments. Instead, the higher credit (if applicable) will be reported on the 2003 return. Eligible taxpayers should consider whether they want to decrease the amount withheld from their paychecks in anticipation of the increased credit.*

## MARRIAGE PENALTY RELIEF

For 2003 and 2004, the standard deduction for married couples will be twice the amount of the standard deduction for single taxpayers. In 2005, the standard deduction for married taxpayers will fall to 174% of the standard deduction

### IRS CONSUMER ALERT:

New Tax Scam Targets Potential Recipients of Advance Child Tax Credit. The IRS has issued a consumer alert warning taxpayers about a new scam targeting potential recipients of the Advance Child Tax Credit. The IRS has seen isolated instances of this new scheme: A taxpayer may receive a telephone call from an individual who promises to speed up the payment of the Advance Child Tax Credit checks. The taxpayer must agree to a \$39.99 charge to a credit card. The IRS reminds taxpayers that no person or organization can "speed up" the payment of tax benefits. Taxpayers are urged to report this tax scam or other tax fraud or abuse to the nearest IRS office and, when in doubt, to seek help from the IRS or a tax professional. The IRS tax fraud hotline is available toll-free at 1-800-829-0433.

for single taxpayers, then gradually increase, so it will again be twice the standard single deduction by 2009. Specifically: for 2003, the deduction for single taxpayers is \$4,750, for married filing jointly the deduction is \$9,500. For 2003 and 2004, married taxpayers filing separately will use the same deduction as single taxpayers.

*Note: The increase in the standard deduction may influence some couples who would have itemized their deductions to take the standard deduction instead. A California taxpayer is allowed to use standard or itemized deductions on his or her state income tax return, regardless of the method for deductions used on the federal return.*

## ALTERNATIVE MINIMUM TAX (AMT) RELIEF

The Act raises the exemption for single taxpayers to \$40,250 (up from \$37,750) and the exemption for married couples to \$58,000 (up from \$49,000), but only for tax years 2003 and 2004. After 2004, the exemption amount falls to \$33,750 for single and \$45,000 for married filing jointly taxpayers.

## CAPITAL GAINS RATES

The Act puts capital gains rates on a roller coaster. It reduces the current maximum net capital gains tax rate from 20 to 15 percent. The current 10 percent capital gains rate for lower income tax payers falls to 5 percent. The effective dates for these rates are on or after May 6, 2003 through December 31, 2007, with the 15 percent rate continuing unchanged in 2008. In 2008, the five percent rate for low income tax

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## Happy Anniversary, 911 Emergency System

*By Scott W. Hovey, Alameda County 911 Trial Project director (retired), with help from his proud daughter-in-law, Leslie Baxter*

July 9, 2003 was the 25th birthday of the Alameda County 911 system. Alameda's 911 system was the first in the nation to use selective routing, to automatically route emergency 911 calls to the proper city or jurisdiction, based only on the installed location of the calling phone. Before the Alameda system, 911 calls were answered on the basis of the phone company's exchange, and central office boundaries. There were "overlap problems", because in most metropolitan areas, municipal boundaries and phone switching boundaries didn't line up. This was a major obstacle to the adoption of 911 throughout the nation. Before 1978, 911 was used only in communities having no overlap problem, generally due to the city's remoteness or a natural barrier. New York City installed 911 in 1968, the year that AT&T announced that number's availability for emergency use. The island City of Alameda was also able to implement basic 911 in the early 70's, and was one of only a handful of California cities with 911 services. The selective routing technology (and pioneering Caller ID for dispatch purposes) proved so successful in Alameda County that as "Enhanced 911" it now serves more than 95% of the nation's phones and every metropolitan area in the nation.

Enhanced 911 was developed by Bell Labs and implemented by Pacific Telephone with a grant Alameda County received from the Law Enforcement Assistance Administration. It selectively routed calls to the police departments of all 13 cities, the East Bay Regional Parks, the University of California Berkeley and the Alameda County Sheriff's Communication Center. If not a police emergency, the 911 call could be correctly transferred to the proper fire or ambulance dispatching organization with a press of a single "FIRE" or "MEDICAL" button. The 911 routing and one-button transfer data for each new phone is determined by the phone company when the phone is installed, using government-provided geographic and jurisdictional boundary information.

A portion of Alameda County was chosen as a test site, to determine if the system would prove cost-effective. After a two year preliminary study, the decision was made to employ selective routing throughout the county. Pacific Telephone (now part of SBC) completed the installations in time for a May 31, 1978 switchover, but a month's delay was introduced to allow the cities to reconsider their participation after the June 6 vote on California's Proposition 13. Even though Proposition 13, with its dire local budget impacts did pass, the first enhanced 911 system went into operation throughout all of Alameda County on Sunday July 9, 1978.

## Tax Update: cont...

*(Continued from page 2)*

payers drops to zero percent, but just for that year. The 15 percent rate remains the same in 2008 for all other tax payers. On January 1, 2009, the old rates of 20 and 10 percent return. With a May 6, 2003, effective date, the approach to reporting obligations will be complex. Consequently, the IRS will undoubtedly issue more guidance on how to account for various capital gains, losses, carry forwards and other events.

### DIVIDENDS

Under present law, dividends received by an individual are included in gross income and taxed as ordinary income at rates of up to 38.6%. Under the new law, dividends received by an individual shareholder from domestic corporations are taxed at the same rates that apply to net capital gain. This treatment applies for purposes of both the regular tax and the alternative minimum tax. Thus, under the provision, dividends will be taxed at rates of five and fifteen percent. Certain types of dividend income are specifically excluded from the definition of "qualified dividend income."

### BUSINESS AND CORPORATE RELIEF

The Act provides an additional first year depreciation

deduction equal to 50 percent of the adjusted basis of qualified property. In order to qualify for the 50 percent additional depreciation deduction, the property must be acquired after May 5, 2003, and before January 1, 2005. Property does not qualify if there was a binding written contract for the acquisition in effect before May 6, 2003. Property for which the 50 percent additional first year depreciation deduction is claimed is not eligible for the 30 percent additional first year appreciation deduction.

The Act also provides that the maximum dollar amount that may be deducted under Section 179 of the Code is increased to \$100,000.00 for property placed in service in taxable years beginning in 2003, 2004, and 2005. In addition, for purposes of the phase-out of the deductible amount, the current \$200,000.00 allowable deduction is increased to \$400,000.00 for property placed in service in taxable years beginning in 2003, 2004, and 2005. The provision also includes off the shelf computer software placed in service applicable to those same taxable years. The provision permits taxpayers to make or revoke these expensing elections on amended returns without the consent of the Commissioner of the IRS.

For further information regarding the Jobs Growth Tax Relief Reconciliation Act of 2003, contact Pamela Young or Suzanne Anastasio.

## "Memory and the Mediterranean"

Steve McNichols

The classical education that was forced upon me in high school and college has turned out to be a great benefit to me.

At the time I was being put through this experience, I considered the study of Greek and Roman civilization interesting, but academic and a very little practical value. As it turns out, this portion of my education has been a great help in trying to put some sense into contemporary events and has also been a source of a great deal of stimulating reading and discussion. That is why I was attracted to "**Memory and the Mediterranean**".

While browsing in a bookstore several weeks ago, I noticed a book written by a familiar author; French Historian, Fernand Braudel (1902-1985). I had been exposed to his most famous work, "The Mediterranean and The Mediterranean World in the Age of Phillip II". It had not been a memorable encounter. This book had been one of the most tedious works I have ever attempted to read. This two-volume tome was filled with minute detail regarding life in the Mediterranean from the Renaissance to the sixteenth century. After reading a very few pages, I was convinced that it contained far more detail than I wanted to know about that, or for that matter any other, period of history.

However, I knew that Braudel had revolutionized the historical method and was one of the greatest historians of the Twentieth Century. It was Braudel who brought history "down to earth." He changed the focus of the study of history: instead of spotlighting the actions of a few elites, for the most part powerful, rich men, Braudel chronicled the long-

term march of history through the detailed actions and habits of ordinary people, viewed in the context of the underlying geographical and social forces they faced. In short, Braudel believed that human society develops and changes at different rates because of different underlying forces, such as geography, weather, social customs, economics, battles, conquests, rulers, earthquakes, famines and diseases.

The book I was looking at was titled "**Memory and the Mediterranean**". As I browsed through the book, I saw that it was very readable, contained some interesting photographs and was supplemented by an appendix with great maps. Geography and maps have a particular fascination for me. So I decided to buy the book, and I am glad I did.

This book was written in 1969, but was not published until 1998 in French and 2001 in English. It exemplifies all of the ideas that Braudel believed in and developed during his life. Braudel looks at the Mediterranean as a historical phenomenon. He considers the Mediterranean in an extremely broad geographical context which includes civilizations in Iraq, Egypt, and even Russia and Germany. He begins with prehistory and takes the reader through Mesopotamia and Egypt, to Minoan Crete, the civilizations of the Aegean people and ends with the brilliant achievements of Greece and Rome.

The book focuses on the quality of life in these civilizations and emphasizes the development of basic skills and technology and the critical importance of language, writing and the exchange of ideas. This book is a fascinating, enthusiastic journey through the foundation of western civilization with one of the most influential historians of our time.

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## Clients on the Go! Clear Star Security Network

Our client ClearStar Security Network operates a website geared toward the professional security industry and the public which uses their services. ClearStar provides directories of locksmiths and safe-technicians to help the public in finding needed services. It also provides security checklists and gives feedback to consumers.

In addition, ClearStar provides trade listings for its members to use in making needed business-to-business connections with manufacturers and suppliers. ClearStar provides to its professional members with an online forum for discussing matters of common interest to locksmiths and safe-technicians where they can exchange technical information and know-how. This is all accomplished within a restricted-access environment requiring user-names and passwords. The website also provides security professionals with access to locksmith and safe resource and reference materials.

ClearStar is located at [www.clearstar.com](http://www.clearstar.com).

## Environmental Impact Reports cont...

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in its preparation to understand and meaningfully consider the issues raised by the proposed project”.

The Santa Clarita EIR was found to be inadequate because it relied heavily on SWP entitlements and made no attempt to calculate or discuss the differences between entitlement and actual supply. Though the EIR acknowledged a potential water deficit, the EIR failed to give a reasonably accurate estimate of SWP's ability to deliver water and therefore, it was impossible to judge how likely or how severe a water deficit might be. The appellate court determined the water services portion of the EIR was inadequate, and ordered the trial court to issue a writ of mandate vacating the certification of the EIR.

As water sources become more limited and demand continues to increase, the water analysis portions of EIRs may become more and more vulnerable to attack, potentially preventing certification of the EIR. An EIR's water analysis will need to contain a detailed explanation of the impact on water resources and a thorough explanation of the operation and reliability of water sources.

### Announcement!

Leslie Baxter and Nick Tooliatos have received their AV rating from Martindale Hubbell. The AV rating, which identifies a lawyer with very high legal ability and ethical standards, is a reflection of their expertise, experience, integrity and overall professional excellence. These ratings, established by attorneys for attorneys, clearly indicate that these attorneys demonstrate the highest professional and ethical standards.

## Alternative Dispute Resolutions cont...

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when there is “free” access to the court system. The court noted, however, that buyer made no showing that the fees he would pay through the reference procedure would be any greater than those which would accrue in litigation before a court. The court, in holding that the buyer validly waived his right to a jury trial, pointed out that the reference provision in the contract was clear in its effect, and balanced, because Woodside also waived its right to a jury trial. The court also upheld the confidentiality clause in the reference provision; ostensibly, it afforded both parties privacy, even though in practical terms Woodside would benefit more from confidentiality than would the buyer.

The court pointed out the obvious, that businesses such as Woodside prefer to have consumer cases heard by a neutral adjudicator rather than a jury because

they expect that, over the years, plaintiffs' recoveries through ADR will be less than juries would award. Even so, the court concluded that this does not make it unconscionable to require the buyer to waive his right to a jury trial.

The court in Woodside was careful to draft its opinion based on the particular contractual clause used by that developer, and based upon the evidence – or lack of it – presented by the buyer claiming that the clause affected him unfairly. While Woodside is good news for developers and other business with ADR and reference provisions in their contracts, care must always be taken in drafting a contract, with an eye to maximizing clarity and enforceability.

If you have questions or need additional information about these cases, please contact Julie Rose, Leslie Baxter or Steve McNichols at our office.

## Gong Places: Florida & Disney World

*By Theresa Muley*

For a family adventure that packs thrills and excitement with the opportunity to lighten your load via your wallet, nothing beats Disney World in Florida. I recently vacationed there with my 8-year old daughter, and I can personally attest that there is no better quality time with your child than zooming on a roller coaster at 50 miles per hour with the sound of your child's terrified screams piercing your eardrum. I particularly enjoyed the innocuous sounding Splash Mountain. I emerged dripping wet from head to toe, with most of the water landing strategically in my purse and camera bag. Luckily, our tickets got soaked and we had to wait a few hours before they dried out to go on the next ride. We killed that time by waiting in line for Space Mountain. I won't even mention getting slimed at the Alien Encounter.

We had a great time at the Animal Kingdom, although I did encounter what I consider to be deceptive advertising. While in “Dino-land”, we decided to have lunch at the “Restaurant-a-Saurus”. Surprisingly, all they serve are Happy Meals and Big Macs. Yes, they got us in by hiding the golden arches, and once we were in there was no going back. After lunch we went to the big attraction, the Dinosaur Experience, but it had just broken down and we were turned away.

The good news is that we didn't get sun-stroke, food poisoning or blistered feet. The bad news is that I bought the 4-day ticket, and after three days at Disney World, I felt that if I saw another audio-animatronic child singing It's a Small World, I would have to strangle it. (In legal terms that's called justifiable homicide). Instead, I decided to start our Ft. Lauderdale leg of the journey a day early, to lie by the pool and have cabana boys bring me drinks with colorful little umbrellas in them. Needless to say, I needed it. After three days at Disney World, my daughter was too exhausted to object.



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## Achieving Results Through Innovation®

### MROT Attorney to Assume Command of Army Brigade

Nick Tooliatos, a partner in McNichols, Randick, O'Dea & Tooliatos, was recently selected by a National Command Selection Board to command the 3<sup>rd</sup> Brigade (CS), 104<sup>th</sup> Division, in Vancouver, Washington. His effective date of command will be July, 2003.

Prior to this selection, Colonel Tooliatos served as the Assistant Chief of Staff (Financial Manager) for the Division for the past 18 months. Currently, he is the Chief Financial Officer for the US Army, 91<sup>st</sup> Division, and will be released from active duty in order to assume the command in early July. In order to obtain his new position, Colonel Tooliatos had to compete on a national board.

Nick has been awarded the Meritorious Service Award with three oak leaf clusters, the Army Commendation Medal with three oak leaf clusters, the Army Achievement Medal, the Army Reserve Components Achievement Medal with silver oak leaf cluster, the National Defense Service Medal with Bronze Star and the Armed Forces Reserve Medal with Silver Hourglass and "M" Device (2<sup>nd</sup> Award).

He will be returning to the firm in early July. He is a Certified Specialist in Probate, Estate Planning and Trust Law and he focuses on tax litigation and complex business and real estate transactions. Upon release from active duty and his return to the firm, he will lead the Business Transactions and Estate Planning Group of the firm.

#### "Seniors and the Law, a Guide for Maturing Californians"

The Foundation of the State Bar of California has funded the publication of "Seniors and the Law, a Guide for Maturing Californians." The Guide presents a practical discussion of health care, marriage & remarriage, grandparent rights, elder abuse and other issues that can be critical to our safety and well-being. The Guide is designed to be useful and interesting to anyone who is a senior, loves a senior, or hopes to become a senior.

We have a limited number of copies of the Guide available at no charge, upon request. Contact Annette Neuhart at [aneuhart@mcnicholslaw.com](mailto:aneuhart@mcnicholslaw.com) or call 925-460-3700 for a copy.