Section 45025 expressly does not apply to persons classified as temporary employees under Ed C §§44919 and 44929.25. The part-time adult education teachers were temporary employees under Ed C §44929.25 because they worked no more than 60 percent of the full-time schedule. Section 44919 need not have been considered because §44929.25 applied. *Peralta Fed'n of Teachers v Community College Dist.* (1979) 24 C3d 369, 155 CR 679.

Labor Code; Wage and Hour

Ninth Circuit holds that California's Labor Code applies to nonresidents.

Sullivan v Oracle Corp. (9th Cir, Nov. 6, 2008, No. 06–56649) 2008 US App Lexis 23394

Plaintiffs, each of whom resided outside of California, were employed by defendant as instructors. As part of their job duties, plaintiffs were required to travel to destinations throughout the country to train defendant's customers to use various software products. On occasion, plaintiffs conducted training sessions in California, even though they continued to reside in other states. Defendant classified plaintiffs as exempt employees, meaning that they were exempt from the overtime provisions of California's Labor Code and the Fair Labor Standards Act (FLSA) (29 USC §§201–219). Defendant later reclassified its instructors as nonexempt employees, but did not provide overtime payments for work performed before the reclassification. Plaintiffs filed this action seeking payment of overtime wages for work performed before their reclassification. The trial court granted defendant's motion for summary judgment finding, among other things, that California's Labor Code does not apply to nonresidents who work primarily in other states.

The U.S. Court of Appeals for the Ninth Circuit reversed. California's Labor Code governs all work performed within the state, regardless of the residence or domicile of workers, as previously determined by the California Supreme Court. *Tidewater Marine W., Inc. v Bradshaw* (1996) 14 C4th 557, 59 CR2d 186. Similarly, plaintiffs were entitled to proceed with their claims for violations of California's Unfair Competition Law (UCL) (Bus & P C §§17200–17210) because those claims were predicated on the underlying Labor Code violations. Finally, California's UCL does not apply to violations of the FLSA for work performed outside of California, and the trial court thus properly dismissed these claims.

Insurance Litigation

Bad Faith

Plaintiff's allegations of medical expert's intentional misconduct in creating genuine dispute about severity of insured's injury were sufficient to defeat insurer's demurrer.

Brehm v 21st Century Ins. Co. (2008) 166 CA4th 1225, 83 CR3d 410

Plaintiff was severely injured in a car accident caused by a Natalie Aguirre. After plaintiff settled with Aguirre's insurer for $10,000, plaintiff made a claim with defendant insurer under an underinsured motorist (UIM) provision, alleging that he had suffered a severe shoulder injury that would require surgery. Defendant's medical expert found that plaintiff only suffered a soft tissue injury, and defendant offered plaintiff $5,000. An independent doctor examined plaintiff and estimated that surgery would cost $19,175. Before submitting the matter for arbitration, plaintiff made a demand of $90,000 and defendant responded with a counteroffer of $5,000. Plaintiff rejected the counteroffer, and the arbitrator awarded plaintiff $91,186. Plaintiff then sued defendant insurer for bad faith handling of his UIM insurance claim, alleging that defendant had failed to make a good faith effort to resolve plaintiff's claim even though liability was clear. Plaintiff also alleged that defendant's medical expert intentionally minimized the seriousness of plaintiff's injury to create a genuine dispute. The trial court sustained defendant's demurrer, and plaintiff appealed.

The Second District Court of Appeal reversed. An insurer that delays or denies payment of policy benefits due to a genuine dispute over insurance coverage is not liable in bad faith, but a genuine dispute exists only if the insurer's position is maintained in good faith and on reasonable grounds. *Wilson v 21st Century Ins. Co.* (2007) 42 C4th 713, 723, 68 CR3d 746. An expert's testimony does not automatically insulate an insurer from a bad faith claim. *Chateau Chamberay Homeowners Ass'n v Associated Int'l Ins. Co.* (2001) 90 CA4th 335, 348, 108 CR2d 776. Here, plaintiff's allegations that defendant's medical expert intentionally minimized plaintiff's injuries to create a genuine dispute were sufficient to survive a demurrer. In addition, the reasonableness of defendant's counteroffer was not an issue to be decided at the pleading stage.

The results of an arbitration proceeding alone are not sufficient to determine whether an insurer has acted in good faith. In addition, an insurer's demand for arbitration under Ins C §11580.26(b) does not immunize an insurer from liability for bad faith handling of a UIM claim. See *Hightower v Farmers Ins. Exch.* (1995) 38 CA4th 853, 863, 45 CR2d 348. Here, although defendant had the right to arbitrate plaintiff's claim, defendant was still

obligated to act reasonably in attempting to settle a claim dispute.

COMMENT: The facts of this case show exactly why, in *Wilson,* the supreme court disposed of the "genuine dispute" doctrine. Here, the insurer made a low-ball offer of $5,000 when both the insured's pre-arbitration demand and the arbitration award were about $90,000. The insured then filed a bad faith claim and the insurer claimed a "genuine dispute" because it had based its offer on the opinion of a consulting doctor who said the claimant's injuries were minor. The court explained that bad faith exists when the delay of a claim is "unreasonable." It then explained that a genuine dispute "cannot be invoked to protect an insurer's denial or delay in payment of benefits unless the insurer's position was both reasonable and in good faith." In other words, a genuine dispute does not exist unless the insurer has not acted unreasonably as a matter of law, *i.e.,* has not acted in bad faith. The case thus confirms the holding in *Wilson* that there really is no "genuine issue" doctrine: it is merely a way for a court to say that there is no evidence of bad faith conduct as a matter of law.—*Arnold R. Levinson*

COMMENT: I'm not quite sure what Mr. Levinson means when he says that the California Supreme Court "disposed" of the "genuine dispute" doctrine in *Wilson*. To the contrary, the court *affirmed* the existence of the doctrine, albeit reminding us of the limits of that rule:

> The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only when the insurer's position is maintained in good faith and on reasonable grounds.

42 C4th at 723 (emphasis in original). It was this limitation on which the *Brehm* court relied to find that 21st Century could not avail itself of the rule in this demurrer proceeding: Because 21st Century had, according to the allegations of the complaint, hired a defense hack to produce a dishonest expert evaluation, it could not rely on that so-called expert's report to insulate it from a claim of bad faith.

The court's conclusion here is essentially a restatement and application of the Second District's warning in *Chateau Chamberay* that, although an insurer's opinion might be sufficient to create a "genuine dispute," "an expert's testimony will not *automatically* insulate an insurer from a bad faith claim based on a biased investigation." *Chateau Chamberay Homeowners Ass'n v Assoc. Int'l Ins. Co.* (2001) 90 CA4th 335, 347, 108 CR2d 776 (emphasis in original). In other words, if an insurer wants to rely on an expert's opinion in a bad faith case, it better make sure it has conducted a reasonable investigation and that the expert's opinion is legitimate and unbiased. While that much seems certain, what is unclear is whether an insurer will ever be able to meet that standard in the context of a demurrer.—*Susan M. Popik*