dice was presented and overturned the trial court on that ground.—*Arnold R. Levinson*

COMMENT: Reading Mr. Levinson's comments on the *Great American* case, one could only conclude that the case is thoroughly insignificant, to be brushed away as so much lint on the sleeve of California jurisprudence. Although it is true that the case does not break new ground, its critical holding that "a stay is not required if the court in the coverage action may resolve the coverage question as a matter of law without making any factual determinations that would prejudice the insured in the third party action" is one that is frequently more honored in the breach than in the observance. See *GGIS Ins. Servs., Inc. v Superior Court* (2008) 168 CA4th 1493, 1505, 86 CR3d 515. The court of appeal's cogent analysis of the issue will thus be of critical import in helping trial courts understand the limits of their discretion in staying declaratory actions pending resolution of underlying tort claims.

As the court makes clear, the key question in determining whether an action seeking a declaration of noncoverage must be stayed is "whether there are any issues to be resolved in the declaratory relief action which would overlap with issues to be resolved in the underlying action, such that proceeding on the declaratory relief action could prejudice the insureds in the trial of the underlying action," *i.e.,* whether facts developed in the coverage action might support the underlying plaintiff's claim of liability. 178 CA4th at 233. Thus, "if the declaratory relief action can be resolved without prejudice to the insured in the underlying action—by means of undisputed facts, issues of law, or factual issues unrelated to the issues in the underlying action—*the declaratory relief action need not be stayed.*" 178 CA4th at 235 (emphasis added).

Despite these settled rules, trial courts too often reflexively stay coverage actions without even attempting to determine whether there is any real overlap between the issues to be litigated in the two actions, or if there is, whether the declaratory action can be resolved without deciding issues of fact that are implicated in the tort action. The result is prejudice to the insurer, which is required to continue to defend the underlying lawsuit through to conclusion, despite the fact it may well have no duty to do so. Although a court must stay a declaratory action when a case cannot be resolved without resolving facts at issue in the underlying injury action, if that scenario does not exist, the court should not automatically stay the coverage action. Rather, "in a case in which there is no factual overlap with the issues to be resolved in the underlying case, the trial court must exercise its discretion on a motion for stay, balancing the insured's interest in not fighting a two-front war against the insurer's interest in not being required to continue paying defense costs which it may not owe and likely will not be able to recoup." 178 CA4t at 237. Thus, although not breaking new ground, the court's thorough explication of the rules governing stays in the context of insurance coverage actions must be viewed as a significant and welcome addition to California law.—*Susan M. Popik*

ERISA

ERISA does not preempt state's practice of disapproving insurance policies with "discretionary" clauses.

Standard Ins. Co. v Morrison (9th Cir 2009) 584 F3d 837

The Montana State Insurance Commissioner contends that state law requires disapproval of contracts that grant an insurer the discretion to construe and interpret the terms and provisions of its plans ("discretionary clauses"). When the insurer in this case submitted for approval its proposed disability insurance forms to the commissioner, he denied the request because the forms contained "discretionary clauses." The insurer sued, and the district court upheld the decision of the commissioner.

The Ninth Circuit Court of Appeals affirmed. The insurer contended that the commissioner's practice violates the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §§1001–1461), which preempts state laws "insofar as they . . . relate to any [covered] employee benefit plan." 29 USC §1144(a). However, the ERISA scheme "saves" from preemption state laws regulating insurance, banking, and securities. 29 USC §1144(b). Here, the commissioner's practice qualifies as a state regulation of insurance that is saved from preemption by §1144(b) because it is (1) specifically directed at insurance companies and (2) substantially affects risk pooling arrangements by increasing the likelihood that an insurer must cover certain losses. See *Kentucky Ass'n of Health Plans, Inc. v Miller* (2003) 538 US 329, 342, 155 L Ed 2 468, 481, 123 S Ct 1471.

The insurer also contended that the commissioner's practice violates the purpose and policy of the ERISA remedial scheme because it effectively eliminates abuse of discretion review by the courts of decisions denying ERISA benefits. However, the Supreme Court has explicitly accepted de novo review of cases involving the denial of benefits under ERISA. *Firestone Tire & Rubber v Bruch* (1989) 489 US 101, 111, 103 L Ed 2d 80, 92, 109 S Ct 948. Because the commissioner's practice does not create a new cause of action or authorize new or different relief, it does not conflict with ERISA. *Rush Prudential HMO, Inc. v Moran* (2002) 536 US 355, 379, 153 L Ed 2d 375, 397, 122 S Ct 2151.

COMMENT: One of the most outrageous inequities of ERISA is that an insurer may insert into its policy a clause providing that an insured may not obtain the benefits of the contract by proving simply that those benefits were wrongfully denied. The insured must prove that the insurer denied the claim arbitrarily and capriciously. This type of clause is permitted by one of the numerous United States Supreme Court decisions on ERISA that are entirely devoid of rationale or logical analysis. In *Firestone Tire & Rubber Co.,* 489 US at 111, the Supreme Court held that ERISA permits insurers to protect themselves when they wrongfully deny claims simply by inserting into the policy the right to deny claims in their discretion. The basis for this decision was that an insurer should be enti-

tled to the same protections as a trustee under trust law. Go figure that one out.

In response, some states have created legislation that bars such discretionary clauses. Here, an insurer challenged such a Montana law, arguing it was preempted by ERISA, because ERISA preempts everything in sight that relates to ERISA with certain exceptions. One such exception is laws that regulate insurance. The Supreme Court (again with an extraordinary lack of rationale) has defined laws regulating insurance as laws that are both directed solely toward insurers and that affect the risk spreading function. Here, the Ninth Circuit held that state laws barring discretionary clauses are laws that regulate insurance and, thus, are saved from preemption. The holding is quite significant to those states that choose to pass such laws. In California, there has been interest in such regulation, but it has been largely dependent on the political views of the elected Insurance Commissioner. I suspect that such laws or regulations will eventually become the law of California.—*Arnold R. Levinson*❖

Arbitration and Mediation

Award

Signature of defendants' attorney on arbitration stipulation, standing alone, did not constitute substantial evidence that defendants agreed to arbitrate.

Toal v Tardif (2009) 178 CA4th 1208, ___ CR3d ___

A dispute arose between plaintiffs and defendants following the sale of defendants' house to plaintiffs. Each couple's attorney signed a stipulation to resolve the dispute through private arbitration; the parties themselves did not sign the stipulation, but the document stated that the attorneys' signatures were "for" their clients. Following arbitration, the arbitrator entered an award in plaintiffs' favor. Plaintiffs petitioned the court for confirmation of the award; they attached a copy of the arbitration stipulation to their petition, but presented no evidence that defendants had consented to or ratified the stipulation. The court granted plaintiffs' petition and entered judgment on it. On appeal, defendants challenged the judgment confirming the arbitration award.

The Fourth District Court of Appeal reversed. Plaintiffs did not prove a basic prerequisite of private arbitration, *i.e.,* the existence of a valid arbitration agreement. See CCP §1281.2 (party petitioning to compel arbitration must allege "the existence of a written agreement to arbitrate a controversy . . ."); *Rosenthal v Great W. Fin. Sec. Corp.* (1996) 14 C4th 394, 402, 414, 58 CR2d 875. As with any other contract, the parties' consent is a basic element of an enforceable arbitration agreement. See CC §1550. Because an attorney lacks apparent authority to sign an arbitration agreement on his or her client's behalf, the signature of defendants' attorney on the arbitration stipulation, standing alone, did not constitute substantial evidence that defendants agreed to arbitrate the dispute. On remand, the trial court must determine whether defendants consented to or ratified the arbitration stipulation.

Contractual Arbitration

Arbitrator's exclusion of material evidence that substantially prejudiced party warranted vacation of contractual arbitration award.

Burlage v Superior Court (2009) 178 CA4th 524, 100 CR3d 531

Petitioner buyers and real party in interest seller arbitrated a dispute over the sale of a house next to a country club. After escrow closed, the buyers learned that the swimming pool and a wrought iron fence on the property encroached on land owned by the country club. Two years after the sale, but before the arbitration was held, the title company paid the country club about $11,000 for a lot-line adjustment that gave the buyers clear title to the encroaching land. The buyers nonetheless sought damages for the diminution in value of their property and for the costs they might incur of moving the fence and the pool that were on the encroaching land they now owned.

Arguing that damages must be measured from the date escrow closed, the buyers moved in limine to exclude evidence of the lot-line adjustment. The arbitrator granted the motion, heard the buyers' experts' testimony about the effect of what had become a nonexistent encroachment and the cost of moving a pool and fence, neither of which had to be moved, and awarded the buyers $1.5 million in damages and costs. The trial court granted the seller's motion to vacate the award under CCP §1286.2(a)(5), ruling that the refusal to admit evidence of the lot-line adjustment substantially prejudiced the seller's ability to dispute the amount of damages suffered by the purchasers. The buyers petitioned for writ of mandate.

In a 2–1 decision, the Second District Court of Appeal denied the petition and affirmed the trial court's order vacating the arbitration award. Section 1286.2(a)(5) provides that a court "shall" vacate an award when a party's rights are substantially prejudiced by the arbitrator's refusal to hear material evidence. It is a safety valve that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case.

The trial court found on substantial evidence that the ruling excluding evidence substantially prejudiced the seller and undermined §1286.2(a)(5)'s basic principle that an arbitrator must consider material evidence. Evidence of an absolute defense—that the problem was fixed, and that there were no damages—was material. Without the crucial excluded evidence, the arbitration was akin to a default hearing in which the purchasers were awarded $1.5 million in damages they may not have suffered.

Class action waiver in consumer contract is unconscionable and unenforceable despite inclusion of "premium" payment provision.

Laster v AT&T Mobility LLC (9th Cir 2009) 584 F3d 849

Plaintiffs filed this class action claim against defendant phone company alleging that defendant's offer of a "free"