



STEVEN H. KRUIS, ESQ.



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ADR Case Update – The Power of Apology in Mediation

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Studies show that doctors who give apologies in serious medical malpractice claims pay less to settle their claims compared to cases without apologies.

Economists Benjamin Ho and Elain Liu conducted two studies on the effect of apology in medical malpractice claims. They examined whether state-level apology laws had any impact on malpractice lawsuits and settlements. These laws encourage physician apologies by making them inadmissible to prove liability. Ho and Liu found an overall decrease of 12.8% in average malpractice payments in cases involving severe injuries. Less severe injuries resulted in fewer claims, although the settlement amounts were not reduced. In short, doctors who apologized for their malpractice faced fewer claims in cases of less severe injuries, and paid less on average in cases involving severe injuries, than those doctors who did not apologize [[read Daily Journal Article](#)].

Ninth Circuit holds the Federal Arbitration Act preempted California’s Assembly Bill 51, which was enacted to protect employees from “forced arbitration” by making it a criminal offense for an employer to require an employee to consent to arbitrate specified claims as a condition of employment (AB 51 criminalized only contract formation, yet stated an arbitration agreement executed contrary to this law was enforceable).

In *Chamber of Commerce of the U.S. v. Rob Bonta*, 2023 WL 2013326 9th Cir. Feb. 15, 2023), a panel of the Ninth Circuit affirmed the district court’s grant of a preliminary injunction in favor of plaintiffs, a collection of trade association and business groups. The panel held that the Federal Arbitration Act preempted California’s Assembly Bill 51. The panel noted the oddity that AB 51 criminalized only contract formation, yet an arbitration agreement executed in violation of this law was enforceable. California took this approach to avoid conflict with U. S. Supreme Court precedent, which holds that a state rule that discriminates against arbitration is preempted by the FAA. Under Section 433 of the California Labor Code, an employer who violates AB 51 has committed a misdemeanor. But to avoid preemption by the FAA,



the California legislature included a provision ensuring that if the parties did enter into an arbitration agreement, it would be enforceable under Section 432.6(f). State rules (like AB 51) that burden the formation of arbitration agreements stand as an obstacle to the FAA and are, therefore, preempted.

Defendant's failure to timely pay arbitration fees was a material breach of the arbitration agreement thereby allowing plaintiff to withdraw from the arbitration and proceed in court.

In *De Leon v. Juanita's Foods*, 2022 WL 17174498 (Cal. Ct. App., Nov. 23, 2022), plaintiff filed suit against his former employer. Defendant successfully moved to compel arbitration, but failed to pay the arbitration fees 30 days after they were due. The trial court concluded that defendant materially breached the arbitration agreement, and allowed plaintiff to proceed with his claims against defendant in court. The Court of Appeal concluded that the trial court correctly ruled that defendant was in material breach of the arbitration agreement. [Code of Civil Procedure, Sections 1281.97(a)(1) and 1281.98(a)(1).]

Ninth Circuit holds AB 5, as amended, violated the Equal Protection Clause for those engaged in app-based ride-hailing and delivery services.

In *Olson v. State of California*, WL 2544853 (9th Cir., Mar. 17, 2023), a panel of the Ninth Circuit held that Assembly Bill 5 (that codified the "ABC" test for independent contractors promulgated in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903), as amended by Assembly Bill 2257, violated the Equal Protection Clause for those engaged in app-based ride-hailing and delivery services. Food delivery services and drivers brought an action alleging that California law extending employee classification status to some independent contractors violated Equal Protection Clauses, Due Process Clauses, Contract Clauses, and Bill of Attainder Clauses of the United States and California Constitutions. The Central District Court granted the State's motion to dismiss and Plaintiffs appealed. The panel held: (1) Plaintiffs plausibly alleged that AB 5, as amended, violated the Equal Protection Clause for those engaged in app-based ride-hailing and delivery services; (2) Plaintiffs plausibly alleged that the primary impetus for the enactment of AB 5 was the disfavor with which the architect of the legislation viewed Uber, Postmates, and similar gig-based business models; and (3) Plaintiffs plausibly alleged that their

"AB 5 was the disfavor with which the architect of the legislation viewed Uber, Postmates, and similar gig-based business models."



exclusion from the wide-ranging exemptions, including for comparable app-based gig companies, could be attributed to animus rather than reason.

The *Olson* court concluded that the district court erred by dismissing Plaintiffs' Equal Protection claims, but correctly dismissed Plaintiffs' Due Process, Contract Clause and Bill of Attainder claims. The district court's order denying Plaintiffs' motion for a preliminary injunction was remanded for reconsideration of Plaintiffs' allegations regarding facts—namely the passage of AB 2257 and Proposition 22—that did not exist when the Initial Complaint was filed.

Prop 22 (“Protect App-Based Drivers and Services Act”) violates separation of powers principles and is invalidated by First District Court of Appeal.

In *Castellanos v. State of California*, 2023 WL 2473326 (Cal. Ct. App., Mar. 13, 2023), the First District Court of Appeal granted a petition for writ of mandate presented by ride-share drivers seeking a declaration Proposition 22 (called the “Protect App-Based Drivers and Services Act”) violated state constitutional provisions governing workers' compensation law, initiative power, and separation of powers.

The court stated: “We agree that Proposition 22 does not intrude on the Legislature’s workers’ compensation authority or violate the single-subject rule, but we conclude that the initiative’s definition of what constitutes an amendment violates separation of powers principles.”

The court also found the initiative violates the separation of powers principles by limiting lawmakers’ ability to enact amendments such as allowing gig workers to unionize. It severed that portion of the initiative and will “allow the rest of Proposition 22 to remain in effect, as the voters indicated they wished.” (i.e., the right to join a union and collectively bargain remains intact.)

Steven H. Kruis, Esq. *has mediated thousands of matters throughout Southern California since 1993, and is with the San Diego Office of ADR Services, Inc. He may be reached at skruis@adrservices.com.*

“Proposition 22 ... violates separation of powers principles.”