

Daily Journal

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TAXATION: Although the fate of the estate tax is unknown, pushing estate planning decisions to the backburner is a bad idea. By Los Angeles lawyer Scott Tansey, **PAGE 5**

BOOK EXCERPT: Two hundred years later, *Gibbons v. Ogden* continues to define the growth of federal power. By Herbert A. Johnson of the University of South Carolina, **PAGE 6**

CONSTITUTIONAL LAW: The new majority of baby boomers on the U.S. Supreme Court will tackle modern issues such as informational privacy and video game violence. By San Francisco attorneys Ben Feuer and Michael Gadeberg, **PAGE 7**

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Farmers Agrees to Pay \$545 Million To End Claims it Overcharged Policyholders

Settlement Will Net \$90 Million in Fees For Plaintiffs' Lawyers, Led by Tom Girardi

By Ciaran McEvoy
Daily Journal Staff Writer

LOS ANGELES — Farmers Group Inc. has agreed to a \$545 million settlement of a nationwide class action that alleged the insurance company overcharged several million policyholders.

According to the proposed settlement, all claims against Farmers Group and its parent, Swiss insurance company Zurich Financial Services Group, dating back to 1999 would be resolved, wrapping up years of costly litigation.

Thomas V. Girardi of Girardi & Keese in Los Angeles was lead plaintiffs' lawyer.



Daily Journal file photo

Thomas V. Girardi

derwriting practices. Farmers is a leading insurance company in California in several markets, including automobile, home and life insurance.

The plaintiffs alleged the unauthorized fees resulted in the companies receiving "staggering profits" during the years 2000 to 2003, according to the lawsuit. The complaint dealt primarily with fees added to automobile and homeowners' policies.

The terms of the agreement call for Farmers Group to pay \$455 million to 13 million policyholders who may qualify for the money, a company news release stated. The affected policyholders would receive an average of \$35 per class member. The company also said it would pay up to \$90 million in plaintiffs' attorneys' fees.

The agreement appears to bring to an end the long-running lawsuit that was filed in Los Angeles County Superior Court in

August 2003. The settlement is subject to the approval of Judge William F. Highberger. *Fogel v. Farmers Group Inc.*, BC300142

According to a news release, Zurich Financial Chief Executive Officer Martin Senn said the lawsuit wasn't about Farmers customers' premiums, but about management services fees paid by policyholders to the Los Angeles-based Farmers Group. The company rejected the argument that the fees were unreasonable, but elected to settle the class action to avoid additional legal bills and "the logistics involved in defending itself against allegations from claims filed up to a decade ago," the company stated.

"We wanted to settle the case to reduce damaging our reputation and business," Senn said in a statement, adding the settlement would have no effect on Farmers' business.

Zurich said it expects a charge of \$295 million from the settlement to be reflected in its third-quarter net earnings, which are scheduled to be released next month.

The lawsuit was brought on behalf of policyholders of Farmers Exchanges — three insurance companies owned by policyholders. The exchanges are "unincorporated associations of subscribers who exchanged agreements to insure one another," the lawsuit states.

In addition to Girardi, plaintiffs' counsel included: Engstrom, Lipscomb & Lack in Los Angeles, and Austin, Texas lawyers Philip K. Maxwell and Joe K. Longley, according to an amended complaint filed in February 2009. The Gallagher Law Firm and Burrow & Parrott in Houston, Texas also worked on the case.

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Dole Lawyers Accused Of Bribery In Banana Case

By Ciaran McEvoy
Daily Journal Staff Writer

LOS ANGELES — Attorneys for Dole Food Co. allegedly bribed a key witness whose false testimony led to the dismissals of three high-profile lawsuits against the company over sterilization claims, according to plaintiffs who filed a complaint Thursday with the California Bar.

The 15-page complaint was filed by Steve Condie, an Oakland appellate lawyer who represented six plaintiffs at a summer hearing in Los Angeles on whether to dismiss the last remaining lawsuit in the long-running litigation. In the case, plaintiffs alleged the food giant sterilized Nicaraguan banana farm workers by using a dangerous pesticide in the 1970s.

The new complaint alleges Scott A. Edelman of Gibson, Dunn & Crutcher, C. Michael Carter, Dole's general counsel and Rudy R. Perrino, a former Dole in-house lawyer now with Fulbright & Jaworski, violated legal ethics rules by offering a witness — known in court papers as John Doe 17 — \$1,500 a month in cash and a free stay in a luxury hotel in Costa Rica to get the witness to give false testimony against the plaintiffs' lawyers in the case.

Condie also alleged Dole and its lawyers failed to disclose the payments to the court and their opposing counsel. The complaint

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'We wanted to settle the case to reduce damaging our reputation and business.'

MARTIN SENN

CEO, ZURICH FINANCIAL SERVICES GROUP

"I am very pleased with the settlement," he said. "I think it is very fair to the class."

The defense lawyers, Ralph C. Ferrara of Dewey & LeBoeuf in Washington, D.C., and Raoul D. Kennedy of Skadden, Arps, Slate, Meagher & Flom in San Francisco, referred comments to Farmers.

The lawsuit alleged Farmers Group breached its fiduciary duties to policyholders and violated California's business code by tacking on unfair and unnecessary "management fees" to the cost of various types of insurance policies though its un-

Old-School Antitrust Lawyer Makes Waves

By Rebecca Beyer
Daily Journal Staff Writer

SAN FRANCISCO — To executives at United and Continental, two of the country's largest airlines whose merger was finalized last week, Joseph M. Alioto, an attorney who filed suit to block the deal, must have seemed something like a tiny fly on the expansive fuselage of a passenger plane — not even worth a tilt of the wings.

After United and Continental — now combined under Chicago-based United Continental Holdings Inc. — announced their plans to merge in May, Alioto filed suit in June to block the deal under a provision of an antitrust statute that lets private plaintiffs enforce competition laws. Last month, after a hearing in which the chief executives of both companies were hauled into court to testify, Alioto lost his motion to preliminarily enjoin the merger from taking place. U.S. District Judge Richard Seeborg ruled Alioto, among other failures, hadn't proved the deal would actually harm consumers he represented.

Alioto wasn't fazed. A few days after Seeborg's ruling, the 67-year-old attorney filed a notice that he would appeal the decision.

Companies "don't like to be reminded that in this country we're based on com-

See Page 8 — OLD-SCHOOL

GUEST COLUMN

Next generation cars offer a wave of new possibilities, but their increasing complexity also poses regulatory challenges. By **Jonathan Michaels** of Michaels Law Group.

It's fascinating when you think about it, but the day has actually arrived where the average commuter car has more software code in it than existed in the Apollo 11 spacecraft that put the first man on the moon. Just how far have we progressed? The Apollo 11 Lunar Module of 40 years ago was run by "top-secret" IBM punch cards that were mated to binary mainframe computers. Today, the average Kia has some 100 million lines of software code running through 70 on-board microprocessors, operating everything from intermittent windshield wipers to regenerative braking systems. And, we've not seen anything yet.

Thus far, automotive software applications have mostly been related to either replacing mechanical systems, such as throttle cables and ignition systems,

or adding features of obvious convenience, such as entertainment systems and integrated controls. But get ready, because Car 2.0 is coming. Ford has recently announced its partnership with Microsoft to develop the "Hohm Energy Management Application" — a cloud-based system that will seamlessly transfer information between your home and your Ford vehicle. You like syncing between your mobile phone and your desktop? Try syncing between your daily driver and your house. One can imagine the possibilities. Transfer the movies from your home entertainment system to the video screens in the backs of the headrests for the kids; or how about transferring energy between your home and your car? It is not that far off.

Tesla has perhaps one of the most intriguing prod-

ucts soon to hit the market. Its touted Model S completely dispenses with traditional controls, dials, knobs and instrument clusters altogether. In their place is a touch screen computer monitor that can not only sync with every mobile application you can think of, but can also be upgraded or reprogrammed remotely. Want to offer consumers the next version of the coolest electronic gadget? Just send out a download for the reprogram. Have a recall notice that you need to get to consumers? No problem, simply send out a message that will display on every on-board monitor until addressed.

We have certainly traveled quite a way since the first on-board computer that was introduced on the 1978

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DAILY APPELLATE REPORT

CIVIL LAW

Civil Rights: Officers have probable cause to arrest and use reasonable force on suspect who was delusional after using crack cocaine. *Luchtel v. Hagemann*, U.S.C.A. 9th, DAR p. 15669

Constitutional Law: Severely depressed individual is precluded from possessing firearm on finding by preponderance of evidence that he would not likely use firearms in safe and lawful manner. *People v. Jason K.*, C.A. 4th/1, DAR p. 15645

Environmental Law: New housing subdivision is not exempt from California Environmental Quality Act requirements where it constitutes project not 'within city limits' of municipality. *Tornlinson v. County of Alameda (Wong)*, C.A. 1st/5, DAR p. 15621

Insurance: In action for equitable contribution, insurer who indemnified and defended insured bears burden of showing coverage under non-participating co-insurer's policy. *Arrowood Indemnity Co. v. Travelers Indem-*

nity Co. of Connecticut, C.A. 2nd/4, DAR p. 15603

Insurance: Insured must seek judicial review of decision by Dept. of Insurance to decline jurisdiction over challenge to approved rate, rather than pursuing civil action. *MacKay v. Superior Court (21st Century Insurance Co.)*, C.A. 2nd/3, DAR p. 15583

Labor Law: Nonexempt hourly workers, who were represented by union and deprived of their second meal periods, may seek recovery from their former employers. *Lazarin v. Superior Court (Total Western Inc.)*, C.A. 2nd/7, DAR p. 15650

Real Property: Broker has duty to disclose substantial risk that seller could not transfer title free and clear of monetary liens and encumbrances. *Holmes v. Summer*, C.A. 4th/3, DAR p. 15614

Torts: Failure to warn that new steel gas pipes adsorb odorant in natural gas is not cause of accident because plaintiffs were unable to acquire warning. *Huitt v. Southern*

California Gas Co., C.A. 5th, DAR p. 15661

Torts: Claim under Civil Code Section 51.7 for right to be free from threat of violence must involve intimidation to state cause of action. *Ramirez v. Wong*, C.A. 2nd/8, DAR p. 15593

CRIMINAL LAW

Criminal Law and Procedure: Omission of standard burden of proof instruction warrants reversal of conviction if error was not harmless beyond reasonable doubt. *People v. Aranda*, C.A. 4th/1, DAR p. 15597

Criminal Law and Procedure: Board of Parole Hearing's denial of parole is improperly based on petitioner's parole plan to attend substance abuse program far from his house. *In re Powell*, C.A. 1st/3, DAR p. 15629

Juveniles: Probable cause for arrest exists where officers witnessed defendants running, seemingly after someone, with objects that could be used as deadly weapons. *J.G., a Minor*, C.A. 4th/3, DAR p. 15601

MORE NEWS



Beyond Academe

Overseeing traffic court provides him with a flurry of activity, but Judge Blizard has his sights on more intellectual pursuits and an appellate post. **PAGE 2**

BRIEFLY

A federal grand jury indicted Orange County attorney Gerald L. Wolfe on wire fraud charges for allegedly running a multi-million dollar real estate scheme that involved a dozen properties throughout Southern California. Wolfe, of The Law Offices of Gerald Wolfe in Irvine, did not return calls seeking comment.

Steamboat Case Redefined Boundaries Of Federal Power

By Herbert A. Johnson

Gibbons v. Ogden is one of the most famous and frequently-cited cases of the early Supreme Court. Beginning as a spat between entrepreneurs (rival steamship lines), it evolved into a key moment in the economic history of the nation, leading to federal regulation of airlines, pipelines, telecommerce, and more. Author Herbert A. Johnson discusses its impact on both commerce in the Early Republic and the understanding and growth of federal power during the next 200 years.

Chapter 2

Landmark cases that leave their imprint on U.S. constitutional history are quite rare. Even in the early nineteenth century, it was expensive to carry appeals to the United States Supreme Court, and most private litigants were compelled to either settle their cases or, alternatively, abandon the opportunity to appeal. Only matters that involved great promise of profit made extended litigation an acceptable business proposition.

BOOK EXCERPT

Perhaps the only exception to that economically determined result was a case in which a "matter of principle" was involved, and most matters of principle were closely intertwined with personal animosity. The situation that gave birth to the Steamboat Case was unique in that it combined all three: the potential for vast profit, an antimonopoly principle strongly supported by public opinion, and animosity, if not outright hatred, between Thomas Gibbons and his onetime partner, former governor Aaron Ogden.

American enthusiasm for an improved system of transportation dated from the end of the American Revolution. Independence brought liberation from English restrictions on commercial and industrial enterprise. It also nearly doubled the land area of the United States through Britain's 1783 cession of western territory stretching from the Appalachian Mountains to the Mississippi, and that vast landmass was doubled again by the 1803 Louisiana Purchase. This territorial acquisition laid open a vast and virtually unexplored empire. Its potential for economic development was both challenging and inspiring. And it created a desperate need for adequate and cheaper means of transportation. Historian Merrill Jensen pinpoints the impact of transportation enthusiasm on national behavior: "Americans got together as they had never done before in creating societies for social and economic improvement, digging canals, building bridges, and improving roads." Yet it also was a major challenge in the east, where road transportation was prohibitively expensive and unreliable for marketing agricultural products to the major population centers. Transportation historian George Taylor estimated that two-thirds of South Carolina's market crops were raised within five miles of a river, and the remaining third were harvested not more than ten miles from a river. River transport, in turn, was only feasible for downstream transport; return trips could not draw on sailing vessels to any substantial degree because of the uncertainty of wind patterns. As Louis Hunter, the historian of western steamboating, emphasized, "The urgent need of the time was for a source of power by which vessels could be propelled quickly and cheaply both up stream and down on our great inland waterways."

Even greater obstacles lay in the path of those seeking to transport goods in the west. The short-lived Livingston-Fulton monopoly of steamboating in the Orleans Territory was mainly operative between New Orleans and Natchez, where oceangoing vessels were also able to

navigate. It was left to Henry Shreve to begin the redesign of vessels for the shallow waters of the Mississippi and its tributaries to the north, and with the judicial invalidation of the Orleans monopoly grant in 1817, the entire length of the river was again available for commerce in goods and passengers. So great was the demand for free navigation that it seems likely that public opinion would have soon secured the repeal of the Livingston-Fulton monopoly had the courts not intervened. When the news of the Orleans monopoly reached the midwestern states and territories, the reaction was strong. Inhabitants of towns on the Ohio River were highly incensed, and mass meetings of protest in Ohio and Kentucky petitioned Congress to cancel the territorial grant.

Professor Hunter points out that a difficulty in the path of western steamboat monopolies was the fact that because many western rivers were the boundaries between states and territories, no one legislature could issue an exclusive monopoly for steamboat operation. In addition, the expense of litigation and legislative lobbying sapped the strength of original grantees in their attempts to protect their legal monopoly. Even with Louisiana territorial and state law protecting the Orleans monopoly, these economic factors virtually eliminated any advantage the Livingston-Fulton licensees enjoyed in western waters. Hunter asserts that seven years before the U.S. Supreme Court decision in *Gibbons*, the western rivers were freely available to all who wished to operate steamboats.

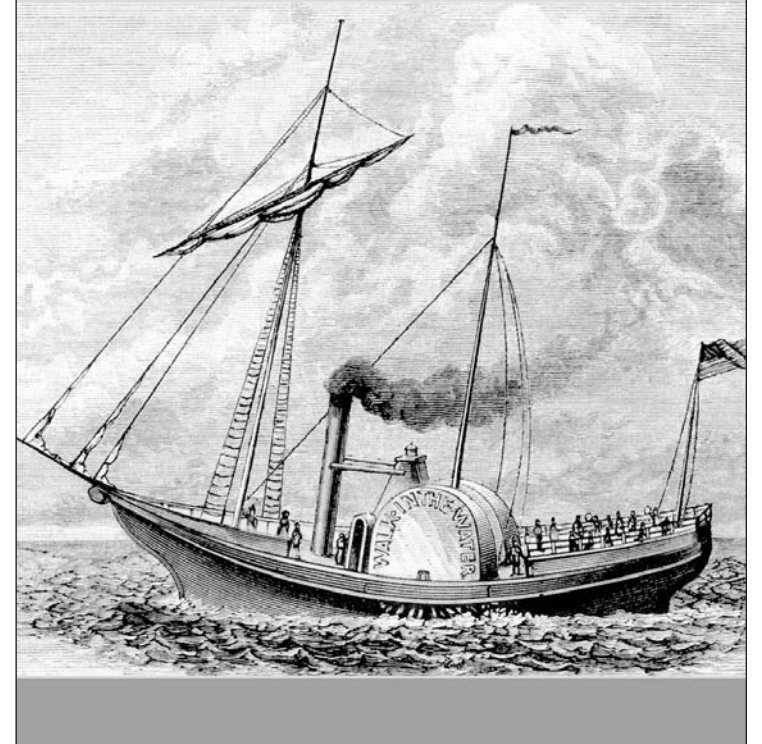
Antimonopoly sentiment was also operative in New York State. A year after the 1824 decision in *Gibbons v. Ogden*, the legislature repealed all steamboat monopoly grants within the internal waters of the state. There was a rapid increase in steamboat traffic, primarily in the transport of passengers rather than cargo. Shorter distances between farm and market, coupled with a denser population in the east, resulted in continued reliance on land transportation of goods, but in the west, rivers remained the principal avenue of commercial transport and a critical component of economic prosperity.

Western river navigation by steamboats was the backbone of economic development throughout the vast Mississippi River drainage basin. Not surprisingly, it was navigation of western rivers that stimulated the evolution of steamboat design throughout the United States. The need for shallow draft vessels by 1838 led to a ship that needed only thirty inches of water, and by 1841 the minimum draft was reduced to twenty-two inches. As Taylor comments, "little wonder that western river men boasted that for successful navigation their steamboats needed only a heavy dew." It was the west that developed the now-familiar stern wheel, which was more efficient in pushing barges and riverboats, and

Herbert A. Johnson

Gibbons v. Ogden

John Marshall, Steamboats, and the Commerce Clause



also developed increased speed by exposing more water to the thrust of the paddles. One year after Chief Justice Marshall's decision in *Gibbons*, steamboats on the Mississippi River were making an average of a hundred miles per day, thanks to the design innovations encouraged by the elimination of the Orleans monopoly in 1817 and the enthusiasm of western steam navigation entrepreneurs.

This was a case destined to enrich the reputations and the pocket-books of leading American lawyers. Fueled with the malice and conflicting personalities of two individuals of widely different backgrounds, it was the climax of a long and exhausting contest between monopoly rights, inherited privilege, and political influence, on one hand, and free competition, energetic pursuit of new wealth, and demands for equality and economic opportunity in a rapidly developing young republican society, on the other hand. Yet in normal times and with more reasonable principal litigants, it might never have arrived at the door to the Supreme Court's chamber in the basement of the Capitol in Washington.

Excerpted from "Gibbons v. Ogden," by Herbert A. Johnson. Published by University Press of Kansas © 2010. Used by permission.

Herbert A. Johnson, Distinguished Professor of Law Emeritus at the University of South Carolina, is author of "The Chief Justiceship of John Marshall," former editor of the multivolume "Papers of John Marshall."

Ghost in the Machine

Continued from page 1

Cadillac to display fuel economy. But, with progress can come challenge, and nowhere is that more apparent than with software applications in automobiles. The world held its breath as engineers peered into Toyota's maligned runaway car problem, wondering if it could possibly be that the problem was actually caused by a software glitch. The concern had less to do with Toyota, and more to do with the realization that we could have spent the last several years creating technology that we now may not be able to control.

The results for Toyota appear to be inconclusive, and therein lies much of the problem. With software becoming more complex by the minute, detecting problems can prove to be a near impossible task. Consumers may think that the problem is mitigated by requiring automotive manufacturers to adhere to stringent regulations before unleashing their ground breaking software developments on the public; but they would be wrong.

You may be surprised to learn that the National Highway Traffic Safety Administration (NHTSA), the regulatory agency responsible for ensuring motor vehicle safety, does not require the software systems contained in vehicles to meet any specific safety level. It is even more concerning when it is understood that for a current production automobile, about 45 percent of the manufacturing cost is devoted to electronics — systems that are independently made by different subcontractors that are expected to perform properly when combined together in a single automobile.

One may think that the reason the NHTSA does not regulate electronics is because it is unable to do so. But, this too would be incorrect. Other industries have long regulated the development and implementation of software and electronics to ensure that the systems are safe and reliable.

Consider aviation, and the approach taken by the Federal Aviation Administration (FAA). The FAA applies a rigid set of standards to software applications, officially called DO-178B "Software Considerations in Airborne Systems and Equipment Certification." DO-178B was developed by the Radio Technical Commission for Aeronautics and the European Organization for Civil Aviation Equipment, and has been adopted by the FAA as a guiding document to evaluate software reliability. Part of the program is a safety assessment process and hazard analysis, which examines the effects of a failure condition in the system. If



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a system fails, what impact will this have on the aircraft; is it simply a matter of consumer inconvenience, or will it threaten the integrity of the aircraft? Before certifying the software for use, the FAA satisfies itself that the software is reliable, and it understands that if there is a malfunction, what the resulting impact will be.

In fairness, one could say that the automobile industry is not an exacting comparison with aviation. After all, Boeing and Airbus aren't exactly rushing to come out with the newest version of a Facebook application that will integrate with the cockpit. But, the point remains

that some type of minimum standards are necessary to prevent a catastrophic event.

In the wake of the Toyota scare, Congress began to vet an auto safety bill that would require brake override systems for all vehicles and provide more funding for NHTSA. However, as the Toyota situation began to fade from recent memory, the urgency of the legislation quelled and the bill is now an item that Congress plans on addressing at a later time. In the interim, one can only hope that the urgency of the legislation is not something that is reignited by yet another catastrophic event.



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