

No. 17-_____

In the Supreme Court of the United States

HAMID R. ASSADIAN,

Petitioner,

—v—

REZA “RAY” PARSI A/K/A MOHAMMAD REZA
TAGHIZADEH, TELE-FREE IRAN, MANATEL
COMMUNICATION & ENERGY, INC.,

Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner is a citizen of The United States of America. Petitioner has certain constitutional and civil rights protected by the U.S. constitution. Petitioner believes that there was a manifest error and therefore injustice in an award of \$346,000 in attorney fees for a mere \$9500 jury award and petitioner's constitutional and civil rights guaranteed by the constitution are ignored by The California Supreme Court.

The questions presented are:

1. Whether the California Supreme Court has denied Petitioner's civil and constitutional rights by denying hearing the underlying case?
2. Whether the California Supreme Court has undermined the judicial process impacting the civil and constitutional rights of individuals by allowing a second superior court judge to overturn the ruling of the first superior court trial judge?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the refusal of The California Supreme Court to review the decision of the Court of Appeal of The State of California Fourth Appellate District, Division Three. If the Court grants review, Petitioner asks the Court to remand with directions to consider all the facts and circumstances and to weigh the factors involving one superior court judge overruling the decision of another superior court.



OPINIONS BELOW

The February 28, 2018 denial of Petition for review by the Supreme Court of California is reproduced in the Appendix (App.1a). Petitioner filed a petition for rehearing on December 28, 2017. The Order Denying Petition for Rehearing by the Court of Appeal of The State of California Fourth Appellate District Division Three dated January 4, 2018 is reproduced in the Appendix (App.26a). The Opinion of the California Court of Appeal of The State of California Fourth Appellate District Division Three dated December 14, 2017 is reproduced in the Appendix (App.2a). The judgment of the California Superior Court dated March 21, 2016 is reproduced as App.21a. The Statement of Decision of the trial Judge of the California Supreme Court dated March 21, 2016 is reproduced as App.17a.



JURISDICTION

On February 28, 2018, the Supreme Court of California denied Petitioner's Petition for Review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.



CONSTITUTIONAL AND STATUTARY PROVISIONS

A. Constitutional Provisions

- U.S. Const. amend. I

...or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- U.S. Const. amend. XIV

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. California Statutory Provisions

- Civil Code § 1608

If any part of a single consideration for one or more objects, or of several considerations for a

single object, is unlawful, the entire contract is void.

- **Civil Code § 1717**

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.

Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.



STATEMENT OF THE CASE

A. Introduction

This case raises the question of whether citizens of the United States with unusual names or names associated with other religions other than Christianity receive the same treatment in the eyes of the law and the judicial process. Although this case is about the treatment of Petitioner and respondents in the State of California similar situations would exist in other states. Petitioner believes that the judicial process in the State of California has failed him to justifiably hear the case. Petitioner also believes that the judicial process should have protected Petitioner's Civil and Constitutional rights by not allowing one superior court judge to overrule the order of the first superior court, the trial judge. Petitioner believes that this would have never happened if Petitioner or other parties had generic names such as Richard Smith. Petitioner had relied on the ruling of the first superior court trial judge declaring the agreement null, void, illegal, and unenforceable but once the Hon. Judge Nakamura, the first trial judge, was assigned to a different court, Judge Scott, a newly appointed judge to the California Superior Court who was assigned to hear the attorney fee motion completely ignored the ruling of the first trial judge Nakamura and awarded attorney fees on a contract that was ruled to be void, illegal, and unenforceable.

B. Statement of Facts

Petitioner is a business consultant hired by respondent Reza "Ray" Parsi to perform consulting services. (CT1 94:2-3) Respondents Parsi and his company, Tele-Free Iran, signed a written agreement that provided petitioner was to be paid an initial fee of \$2,500 and \$125 per hour. Petitioner performed work for Parsi's other entity, Manatel Communication & Energy, Inc., who is also a respondent in this case. (CT1 94:4-12, 108)

The written agreement included an attorney's fees clause as follows:

"In the event of any litigation between the parties, the prevailing party will be entitled to reasonable attorney's fees and all costs incurred in enforcing this Agreement."

(CT1 108; emphasis added.)

The terms of payment were modified in September 2011 to provide for a monthly payment. This modification was memorialized in a written Memorandum of Understanding executed on November 13, 2012. (CT1 95:18-96:3, 109)

During the course of their relationship, petitioner billed respondents the sum of \$182,667.24, of which they paid \$109,350.00, leaving a balance of \$73,317.24. (CT1 96:11-21) The agreement was terminated in September 2013. (CT1 96:18-21)

Petitioner filed a Second Amended Complaint. (CT1 92-136) The First Cause of Action sought damages of \$73,317.24 for breach of the written Consulting & Fee Agreement. (CT1 101:1-16) Petitioner prayed for

attorney's fees pursuant to the written contract. (CT1 101:17-21; CT1 106:13-14, 108) In his Fourth Cause of Action, petitioner sought damages of \$73,317.24 pursuant to a theory of Quantum Meruit/Unjust Enrichment. (CT1 105:17-106:4)

The respondents filed their answer to the Second Amended Complaint, raising a defense that petitioner engaged in the unauthorized practice of law, and thus, the agreement was void. (CT1 137-142, 140:13-25) The answer did not raise any defense that the contract was voidable nor did it pray for attorney's fees. (CT1 137-142)

In his First Amended Cross-Complaint, respondent Parsi alleged petitioner breached the written Consulting & Fee Agreement, claiming damages in excess of \$50,000. (CT1 202:17-203:28) In his Second Cause of Action, respondent alleged petitioner had engaged in the unauthorized practice of law. (CT1 204:1-206:8) Respondent further alleged "no one," including petitioner, could recover for the unauthorized services, citing *Hardy v. San Fernando Valley Chamber of Commerce* (1950) 99 Cal. App. 2d 572. (CT1 206:1-4) Respondent sought damages for unfair business practices, including restitution, disgorgement and injunctive relief, pursuant to Business & Professions Code section 17200. (CT1 206:10-22)

In his Fifth Cause of Action, respondent Parsi sued for breach of contract and unpaid loans, alleging he made loans of \$9,500 to petitioner. (CT1 209:10-210:25) In his prayer, respondent requested "attorneys fees and costs to the extent authorized or permitted by law; . . ." (CT1 211:14)

C. Procedural History

In its Minute Order of December 16, 2015, the lower court, before the Honorable Kirk S. Nakamura, issued its tentative ruling that the written contract was “illegal and calls for practice of law. The Court will allow recovery on the quantum meruit cause of action.” (CT3 781) The trial court concluded “there is no valid contract and the quantum meruit will remain.” (CT3 781)

The case proceeded to trial on petitioner’s Fourth Cause of Action [quantum meruit] and respondent’s Fifth Cause of Action [unpaid oral loans]. (CT2 319-320) The trial court denied respondent’s claim for restitution or disgorgement for purported violations of Business & Professions Code § 17200. (CT2 319)

In its Minute Order dated February 4, 2016, the lower court again determined the contract was illegal, void and unenforced-able. (CT2 319-320) It stated:

“In this case, the court ruled that plaintiff/cross-defendant Assadian’s contract was illegal and unenforceable, but the evidence demonstrated that plaintiff/cross-defendant Assadian performed services that could be performed by a non-lawyer and thus was permitted to proceed on his cause of action based on quantum meruit. (See, 12-16-15 Minute Order.) Relatedly, cross-complainant Parsi failed to present substantial evidence of what constituted illegal legal services from services that could be performed by a non-lawyer. *See, Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal. App. 4th 664, 700. Instead, cross-complainant Parsi simply

seeks restitution/ disgorgement of all payments made to cross-defendant Assadian after deducting the \$9,500.00 awarded by the jury. The evidence demonstrates that many of the services rendered by cross-defendant Assadian could be performed by a non-lawyer and thus cross-complainant Parsi did not carry his burden of demonstrating what services constituted legal services that might be subject to restitution/d disgorgement. Further, the court finds that cross-complainant Parsi was a skilled business person and knowingly entered into this agreement with cross-defendant Assadian and thus other equitable factors do not support restitutionary relief in this case. See, [Olson] v. Cohen (2003) 106 Cal. App. 4th 1209, 1214."

(CT2 319-320; emphasis added.)

The jury rendered its verdict, finding petitioner had provided services to respondent, but it did not award him any additional amounts over what he had already been paid. (CT3 789:11-28) It also found in respondent's favor on the oral loans in his cross-complaint, awarding the sum of \$9,500. (CT1 790:1-20)

In the lower court's judgment of March 21, 2016, it concluded the contract was "illegal, void and unenforceable." (CT3 759-763, 762:4-5)

The respondents thereafter filed a Motion for Attorneys' Fees after Trial. (CT1 258-CT2 529) Respondents sought attorneys' fees of \$346,993.39, pursuant to California Code of Civil Procedure sections

1021, 1032 and 1033.5, and California Civil Code section 1717. (CT1 258-CT2 529, 259:2-15)

The respondents acknowledged the lower court “declared the contract containing the attorney’s fees provision void and illegal,” but argued they could recover attorney’s fees as prevailing parties under the contract, citing *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal. App. 4th 1077 and *Santisas v. Goodin* (1998) 17 Cal.4th 599. (CT1 271:7-272:4)

Petitioner filed his opposition to respondents’ motion for attorney’s fees. (CT2 530-CT3 708) He argued that since the contract was found to be illegal, void and unenforceable, no party could recover attorney’s fees.

The motion was assigned to Judge Nathan Scott, who did not preside over the trial. As such, the court did not have the benefit of observing the parties and witnesses or the evidence presented at trial. On July 18, 2016, Judge Scott enforced the contract and awarded respondents attorney’s fees of \$346,993.39. (CT3 766-767) It reversed the earlier ruling of Judge Nakamura, who found the contract to be entirely illegal and unenforceable. The trial court stated:

“Enforcing the written agreement reasonably precludes plaintiff Assadian from profiting from his unauthorized practice of law. (See *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal. App. 4th 1077, 1082-1083.)”

(CT3 766, CT3 793-797; emphasis added.)

The Court of Appeal affirmed the lower court's decision in an unpublished opinion. (See Opinion in Appendix.) It rejected the general rule in *Bovard v. American Horse Enterprises, Inc.*, *supra*, applying an exception based on the doctrine of *in pari delicto* that would be present in almost every illegal contract. It also affirmed the decision of the second trial court judge, who reversed or overturned the decision of the first trial court judge, who found the contract entirely illegal and unenforceable.

In the Petitioner's appeal, the Court of Appeal applied an exception to established law in *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal. App. 3d 832, a case that holds attorney's fees can-not be recovered by either party if the contract is deemed void, illegal and unenforceable.

Petitioner Hamid R. Assadian contends the Court of Appeal erred in refusing to follow this general rule, and instead, applied an exception based on the doctrine of *in pari delicto*. However, neither of the trial court judges conducted an analysis of the "relative culpability" of the parties, as required by law in *McIntosh v. Mills* (2004) 121 Cal. App. 4th 333, 349.

This Opinion has created a split between the districts, and a conflict with *Bovard v. American Horse Enterprises, Inc.*, *supra* [Third Appellate District], and *Geffen v. Moss* (1975) 53 Cal. App. 3d 215 [Second Appellate District], that needs to be resolved by this Court to secure uniformity of the law and to settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

The exception applied by the Court of Appeal threatens to swallow the general rule that neither

party can recover attorney's fees in an illegal contract. Other cases, as discussed below, have applied exceptions that vary from decision to decision.

The California Court of Appeal also violated fundamental jurisdictional rules by allowing a second superior court judge to enforce the attorney's fees provision in an illegal contract, thus overruling or reversing the trial court's judgment that the contract was void, illegal and unenforceable.

1. The Court of Appeal's Opinion Creates a Conflict Between the Districts by Holding the Attorney's Fees Provision in an Illegal and Unenforceable Contract Is Enforceable

At trial, Judge Nakamura determined the entire written contract between the parties was illegal, void and unenforceable, and refused to allow petitioner to present his claim for breach of contract to the jury. (CT2 319-320, CT3 762:3-4, 781)

After trial and during the motion for attorney's fees, Judge Scott, overruled or reversed Judge Nakamura's decision and enforced the written agreement because it "reasonably precluded [petitioner] Assadian from profiting from his unauthorized practice of law." (CT3 766)

While the Court of Appeal acknowledged controlling case law in *Bovard v. American Horse Enterprises, Inc.*, *supra*, that holds attorney's fees cannot be awarded in an illegal contract, it nonetheless found this case was subject to an exception because the parties were not *in pari delicto*. In *Bovard*, the court affirmed the trial court's order denying the

claim for attorney's fees, noting the trial court found the parties were *in pari delicto*.

Neither the trial judge nor the judge who presided over the hearing on the attorney's fees motion in this case made any express findings on the doctrine of *in pari delicto*. (*Id.* at p. 838.) On the contrary, the trial court found Parsi "was a skilled business person and knowingly entered into this agreement with cross-defendant Assadian and thus other equitable factors do not support restitutionary relief in this case. See, [*Olson*] v. *Cohen* (2003) 106 Cal. App. 4th 1209, 1214." (CT 319) The Court of Appeal rejected that finding, even though Judge Nakamura, as the trial judge, was in the best position to assess the parties' credibility and conduct.

In *Bovard*, the appellate court held that once the trial court concluded the contract was illegal, it had "a duty to refrain from entertaining an action to enforce the contract." (*Id.* at p. 838.) The rule in *Bovard* does not carve out an exception based on the doctrine of *in pari delicto*.

In this case, the doctrine of *pari delicto* was not applied by the trial court. "[A] determination of whether the parties are *in pari delicto* involves an analysis of the relative culpability of each." (*McIntosh v. Mills* (2004) 121 Cal. App. 4th 333, 349; *Cain v. Burns* (1955) 131 Cal. App. 2d 439, 443.) No such analysis was requested by the parties or made in this case.

Bovard is clear that neither party can enforce an attorney's fees provision. (*Id.* at p. 843; *Geffen v. Moss* (1975) 53 Cal. App. 3d 215, 227 "[T]he right to attorney's fees created by this provision never

matured”].) And yet the Court of Appeal rejected this general rule, finding an exception applied to support respondents’ request for attorney’s fees. *Emmons, Williams, Mires & Leech v. State Bar* (1970) 6 Cal. App. 3d 565 discussed the exceptions to the general rule, listing several factors:

“Where, by applying the rule [denying enforcement of illegal contracts], the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, . . .”

(*Id.* at p. 569.)

In its Opinion, the Court of Appeal noted “[c]ourts have recognized one such exception when both parties are not equally blameworthy.” (Opn., pg. 7.) In making this statement, the Court of Appeal did not consider or rely on any analysis of the moral blame of each party, except to the extent the petitioner created the contract that covered his unauthorized practice of law.

The Court of Appeal noted that *Bovard* involved a situation where the contracts entered into by the parties were “entirely unenforceable due to their illegal objects, specifically, the manufacture of drug paraphernalia.” (Opn., pg. 8.) That distinction disappears here because the lower court found the contract to be entirely unenforceable and illegal due to its illegal services.

The Court of Appeal was also incorrect in finding the contract in *Bovard* was illegal because of its "illegal objects." The court in *Bovard* determined the contract was contrary to public policy because the paraphernalia was used in the possession, use and transfer of marijuana. The court stated:

"The court acknowledged that the manufacture of drug paraphernalia was not itself illegal in 1978 when *Bovard* and Ralph contracted for the sale of American Horse Enterprises, Inc. However, the court concluded a public policy against the manufacture of drug paraphernalia was implicit in the statute making the possession, use and transfer of marijuana unlawful. (See Health & Saf. Code, §§ 11357, 11358, 11359, 11360.) The trial court held the consideration for the contract was contrary to the policy of express law, and the contract was therefore illegal and void. Finally, the court found the parties were *in pari delicto* and thus with respect to their contractual dispute should be left as the court found them."

(*Id.* at pp. 837-838.)

In reaching its decision, the court in *Bovard* relied on *Geffen v. Moss* (1975) 53 Cal. App. 3d 215, a case decided fourteen years earlier. In *Geffen*, the appellant, an attorney, sold the physical assets of his law practice to another attorney because his appointment as a U.S. magistrate precluded him from continuing to practice law. The lower court found several provisions of the agreement amounted to a sale of good will, which was contrary to public policy

and ethical rules. It further found both attorneys were *in pari delicto* and neither had been unjustly enriched at the expense of the other. (*Id.* at p. 221.)

As in *Bovard*, the appellate court in *Geffen* found the contract was not expressly illegal by statute or law, but was illegal by virtue of public policy and ethical rules. It concluded:

“Geffen argues that, if the contract is held to be illegal, the award of attorney’s fees in favor of Moss as the prevailing party would be improper. We must agree.”

(*Id.* at p. 227.)

As pointed out in *Yuba v. Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal. App. 4th 1077, a case upon which the Parsi respondents heavily relied, “*Bovard* and *Geffen* are distinguishable from this case because they involved contracts that were entirely unenforceable by either party due to their illegal objects.” (*Id.* at p. 1082.)

A similar argument can be applied here. Because the practice of law requires a license, neither party in this case could enforce the contract, even if they wanted to. Petitioner never pretended to be an attorney nor did he hold himself out as one. (CT2 541:26-542:1) Moreover, respondent knew petitioner was not a lawyer; respondent Parsi had retained numerous lawyers to help him, so the conclusion is that Parsi, who entered into such a contract, was “equally morally blameworthy.” (Opn., pg. 8.) Respondents and their numerous attorneys used petitioner’s services for a two-year period and did not raise the issue of illegality until after petitioner filed his complaint.

Because petitioner was supervised by respondents' attorneys, both Parsi and even the public, were always protected, especially since the trial court apparently viewed Assadian's transaction with Parsi as an isolated one. (CT2 535:23-536:7) The trial court also implied, in denying restitution and injunctive relief, that it did not consider that such remedies were necessary in order to protect the public. (CT2 319-320; CT3 796:6-9)

In *Yoo v. Jho* (2007) 147 Cal. App. 4th 1249, the court held the parties to an agreement to sell counterfeit goods was illegal, and as such, they could not ask the court to have their illegal objects carried out. The buyer was aware the business sold counterfeit merchandise and intended to sell them after the business was sold.

The court in *Yoo* found Civil Code section 1717 did not apply. Citing *Yuba*, the court stated, "Because the instant business purchase agreement is not legally enforceable due to its illegal object, 'there is no need for a mutual right to attorney fees since neither party can enforce the agreement.'" (*Id.* at p. 1256.) As a result, it found, "both parties entered into the business purchase agreement with the knowledge that the business was substantially involved in the sale of counterfeit goods, and buyer specifically intended to continue selling such merchandise after taking over the business." (*Id.* at p. 1255.)

The court in *Yoo* refused to grant relief, stating, "[t]he courts 'generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act.'" (*Id.* at p. 1255.) The court further stated:

“The reason for judicial refusal to enforce a contract which has an illegal object ‘is not that the courts are unaware of possible injustice between the parties, and that the defendant may be left in possession of some benefit he should in good conscience turn over to the plaintiff, but that this consideration is outweighed by the importance of deterring illegal conduct. Knowing that they will receive no help from the courts and must trust completely to each other’s good faith, the parties are less likely to enter an illegal arrangement in the first place.’”

(*Id.* at p. 1255, citing *Lewis Queen v. N.M. Ball Sons* (1957) 48 Cal. 2d 141, 150 and *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98 Cal. App. 4th 1077, 1082.)

The general rule in *Bovard* has been applied in numerous cases in the past: *Abbe v. Marr* (1859) 14 Cal. 210; *Bank of Orland v. Harlan* (1922) 188 Cal. 413, 422 [defendant entered into arrangement voluntarily and “assumed an equal moral responsibility with the plaintiff”]; *Domenigoni v. Imperial Live Stock & Mortgage Co.* (1922) 189 Cal. 467, 475-476; *Loving & Evans v. Blick* (1949) 33 Cal. 2d 603; *Prost v. More* (1870) 40 Cal. 347; *Bulson v. Moffatt* (1916) 173 Cal. 685; *Colby v. Title Ins. Trust Co.* (1911) 160 Cal. 632; *City of Los Angeles v. City Bank* (1893) 100 Cal. 18; *Wells v. Comstock* (1956) 46 Cal. 2d 528, 532 [“I]llegality which renders a bargain unenforceable has that effect whether the evidence of the illegality is produced by plaintiff or by defendant . . .” or raised by either party];

In this appeal, the Court of Appeal rejected petitioner's claim that the doctrine of *in pari delicto* should not be applied and also rejected any of his reasons that dealt with the issue of moral blame. It stated, "None of these persuade us that Assadian is not the far more blameworthy party here." (Opn., pg. 9.)

The Court of Appeal went on to state, "[Assadian] was the one whose activities resulted in the contract being found illegal." (Opn., pg. 8.) If the "exception" applied because one party performed the illegal activities, then the general rule in *Bovard* would be swallowed up by the exception because the parties agreed one party would perform illegal activities while the other party would reap the benefits of those services. If one party performs the unauthorized services and the other party knowingly accepts those services, then how can it be argued petitioner is more blameworthy because he performed the services that respondents requested and benefitted from?

The Court of Appeal continued, "[Petitioner] does not provide evidence or allege that defendants asked for, directed, encouraged, or insisted that he perform such activities." (Opn., pg. 9.) But this case was never tried on the theory that Parsi did not agree to or encourage such activities. What Parsi apparently did not agree on was the total fees ultimately billed to him.

Respondents and their attorneys certainly wanted petitioner's assistance. Petitioner was included in all attorney-client communications and meetings, and given assignments by Parsi's numerous attorneys, over a two-year period. (CT3 535:23-536:7) They never argued Parsi did not agree to the contract; he signed

two separate agreements that formed the basis of the services petitioner provided.

The issue of blameworthy conduct or moral fault will almost always come up in illegal contracts. In *McIntosh v. Mills* (2004) 121 Cal. App. 4th 333, a non-attorney sued an attorney to recover for breach of a fee-sharing agreement. The appellate court stated:

“The illegality of contracts constitutes a vast, confusing and rather mysterious area of the law.” (Strong, *The Enforceability of Illegal Contracts* (1961) 12 Hastings L.J. 347 (Strong).) Nevertheless, enacted as part of the original Field Codes, the contractual doctrine of illegality has been codified in this state since 1872, and appears as Civil Code section 1608: ‘If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void.’ Thus, where the illegal consideration goes to the whole of the promise, the entire contract is illegal. (1 Witkin, Summary of Cal. Law (9th ed. 1987) *Contracts*, § 429, p. 386.”

(*Id.* at p. 344.)

The court in *McIntosh* warned:

“[T]he courts should not be so enamored with the Latin phrase ‘*in pari delicto*’ that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and

the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.”

(*Id.* at p. 348; *see also Norwood v. Judd* (1949) 93 Cal. App. 2d 276, 289.)

Of particular interest in *Moss* is McIntosh’s argument that “his culpability” as compared to Moss is a question of fact. The court noted, “However, the level and degree of McIntosh’s own complicity in his admitted pernicious plot of deception to hide the fact that he was a party to a fee-sharing agreement demands a finding of *in pari delicto* as a matter of law.” (*Id.* at p. 352.)

This statement is particularly significant in this case because respondent Parsi knowingly entered into the contract, benefitted from petitioner’s services, and also withheld from his own attorneys the fact he was getting such services from the petitioner. (CT1 146:23-147:1, 193:24-194:2) If petitioner engaged in the unauthorized practice of law, then respondent assisted him in that endeavor as well as benefitting from petitioner’s services.

The Court of Appeal relied on *Medina v. Safe Guard Products* (2008) 164 Cal. App. 4th 105 to further support its application of the doctrine of *in pari delicto*. (Respondents’ Brief, pgs. 14-15.) In that case,

a consumer purchased a vehicle service contract from a company that was unlicensed to sell insurance in California, leaving the consumer out the money he paid for the contract and perhaps exposing him to a lack of insurance coverage and substantial losses should an automobile accident have occurred.

Medina was decided by the Fourth Appellate District, Division Three in an opinion written by Presiding Justice Sills, who noted that in appropriate cases an illegal contract may not be enforced by either party, “[b]ut when it comes to insurance contracts, there can be no doubt that the text of the licensing statute, and the policy behind that statute, require that a consumer who innocently purchased a policy from a company licensed in California may still enforce that insurance contract.” (*Id.* at p. 109; emphasis in original.)

This finding certainly makes sense in the context of insurance contracts. A consumer is required to have vehicle insurance in California. The defendant received money for a contract that could be considered an insurance policy, leaving the plaintiff without coverage and without any knowledge that he was not covered.

The appellate court in *Medina* limited its holding to insurance contracts and with good reason: insurance coverage protects not only an individual consumer, but the public as well. In addition, if the consumer suffers an injury and later finds he or she is not covered by any insurance, a substitute in the marketplace cannot be obtained. No insurance company would cover an individual for an insurable loss that has already occurred. And holding the contract to

be unenforceable would be “the worst possible remedy for the illegality of the insurer’s unlicensed status” and would result in a harsh result for the consumer. (*Id.* at p. 111.) Moreover, the court in *Medina* was not faced with declaring the entire contract to be illegal, while enforcing the attorney’s fees provision.

The Court of Appeal also relied on *Maudlin v. Pacific Decision Sciences Corp.* (2006) 137 Cal. App. 4th 1001, another case decided by the Fourth Appellate District, Division Three in an opinion written by Justice Ikola. In that case, the defendant sought to avoid paying the plaintiff his monthly deferred compensation from a stock redemption after the one corporation acquired another in a merger.

In *Maudlin*, the trial court made findings as to the theory of *in pari delicto*. It concluded the contract was made to avoid taxes and the plaintiff was *in pari delicto*. The appellate court held the plaintiff was not barred from enforcing the contract under this doctrine. It also found the contract was not illegal, although a distribution might be prohibited if the corporation did not have enough retained earnings to cover the payment.

Maudlin does not apply for a number of reasons: first, neither party in this case was aware the contract was illegal when it was performed. There was never any showing petitioner knew he was engaging in the unauthorized practice of law, especially when respondent Parsi was represented by numerous attorneys the entire time of their contract.

Maudlin addressed the illegality of a contract, which would only occur under certain conditions and not a situation where one provision in the contract is

held to be enforceable, while the entire contract is deemed illegal. As occurred in many of the cases cited by respondents, the trial court below analyzed the application of the doctrine of *in pari delicto*, which did not occur in this case.

The court in *Maudlin* was consistent with the purposes of refusing to enforce an illegal contract. It observed the rules “are intended to prevent the guilty party from reaping the benefit of his wrongful conduct, or to protect the public from the future consequences of an illegal contract. They do not necessarily apply to both parties to the agreement unless both are truly *in pari delicto*.” (*Id.* at p. 1013.) As noted above, petitioner did not reap any benefit from his written contract and there was no need to protect the public from this isolated transaction. In fact, Judge Nakamura rejected respondents’ request for injunction relief, finding there was no indication that Assadian’s unauthorized practice of law would be repeated.

The Court of Appeal cited California Supreme Court case, *Lewis and Queen v. N.M. Ball* (1957) 48 Cal. 2d 141, as further support in which the plaintiff, an unlicensed contractor, sought to enforce a contract that required it to be licensed. While the Court noted that sometimes “effective deterrence is best realized by enforcing the plaintiff’s claim rather than leaving the defendant in possession of the benefit; or the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality.” (*Id.* at p. 151.)

The Court of Appeal also cited *Yuba Cypress Housing Partners, Ltd. v. Area Developers* (2002) 98

Cal. App. 4th 1077, a case heavily relied upon by respondents, as setting forth the general rule of mutuality of remedies. In that case, a real estate purchaser filed an action to rescind and disaffirm a purchase agreement as being in violation of the Subdivided Lands Act. Pursuant to the Act, the landowners had the option to disaffirm a contract entered into with a developer who fails to comply with the Act. The plaintiff sought to recover monies he had already paid to the defendant on the contract. After an appeal and remand, the plaintiff also sought attorney's fees pursuant to Civil Code section 1717 under the written real estate contract.

The trial court in *Yuba* ruled the attorney fee clause of the contract was enforceable, but found the request to be untimely. Plaintiff appealed. The defendant cross-appealed, claiming plaintiff was not entitled to recover any fees because the contract was illegal.

The appellate court in *Yuba* reversed the order, finding the defendant was estopped from asserting its violation of the Subdivided Land Act voided the entire contract; "otherwise, defendant would benefit from its own wrong." (*Id.* at p. 1081.) The court held that contractual fees could be awarded to the plaintiff, even though the contract violated the Act, because the contract was simply "voidable" by the landowner; it was not illegal or void as being made against public policy.

The court in *Yuba* stated:

"In other words, the contract is voidable not void; since it does not have an illegal object, it is not one which neither party may

enforce such that an attorney fee clause contained therein also is unenforceable.”

(*Id.* at p. 1083.)

The court in *Yuba* quoted language from *Bovard v. American Horse Enterprises, Inc.*, *supra*, and cited *Geffen v. Moss*, *supra*. It confirmed, “Because courts generally will not enforce an illegal contract, there is no need for a mutual right to attorney fees since neither party can enforce the agreement.” (*Id.* at p. 1082.)

In *Yuba*, the court distinguished *Bovard* and *Geffen* “because they involved contracts that were entirely unenforceable by either party due to their illegal contracts.” (*Id.* at p. 1082.) In this case, the written contract at question was deemed illegal, void and unenforceable. It could not be enforced by either party. The contract was not simply voidable. Even so, the Parsi respondents never took the position they could validate or enforce the contract. They pursued the theory that the contract was illegal, void and unenforceable, and the trial court agreed with them.

The court in *Yuba* also concluded the importance of deterring illegal conduct outweighed any possible injustice between the parties in denying attorney’s fees to any part. The same distinction applies here.

The *Yuba* court writes in terms of “effective deterrence” and “in some cases.” (*Id.* at p. 1082.) The *Yuba* court further noted that “[i]n each such case, how the aims of policy can best be achieved depends on the kind of illegality and the particular facts involved.” (*Ibid.*) Included within these facts is a

consideration of whether the prevailing party is *in pari delicto*. (*Ibid.*)

The language in *Yuba* also suggests a punitive aspect when overriding the general rule that neither party can recover attorney's fees if the contract is illegal. Even the trial court that dealt with the motion for attorney's fees here raised an inference of a punitive aspect of its award when it concluded the award "precludes plaintiff Assadian from profiting from his unauthorized practice of law." (CT3 766, 793-797)

What can be gathered from reading *Yuba* is: (1) there are no firm guidelines for departing from the general rule that attorney's fees cannot be awarded in illegal contracts, and (2) there should be some misconduct by the losing party that justifies punishment. Even if this limited exception to *Bovard* is applied in this case, the courts will examine the prevailing party's conduct. As noted above, the rule in *Bovard* should be applied in this case because the written contract was declared to be illegal, unenforceable and void, and not merely voidable.

Petitioner contends the Court of Appeal erred in departing from the general rule that illegal contracts, including provisions for attorney's fees, will not be enforced by the courts. This area of law is ripe for review to secure uniformity of decisions and settle an important issue of statewide importance.

2. The Court of Appeal Erred in Affirming the Decision of One Trial Court That Overruled or Reversed the Order of the Trial Court Who Presided Over the Trial

As noted above, first trial court [Judge Nakamura] declined to enforce an “illegal” contract and allowed the petitioner to proceed through trial on the equitable theory of quantum meruit. The jury agreed petitioner was entitled to damages, but failed to award him a monetary amount, possibly believing petitioner had been fully compensated.

Typically, the same court would hear the attorney’s fees motion, but that is not what happened here. A new judge, Judge Scott, stepped in to hear respondents’ motion for attorney’s fees and petitioner’s motion to tax costs.

In essence, the second trial court acted as an appellate court and reviewed the decision of another trial court. But the power of one judge to vacate an order made by another judge is limited. “For one superior court judge, no matter how well intended, even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court . . . Stated slightly differently, because a superior court is but one tribunal an order ‘made in one department during the progress of a cause can neither be ignored nor overlooked in another department . . . ’” (*In re Alberto* (2002) 102 Cal. App. 4th 421, 428-428.)

The second trial court judge, Judge Scott, was bound to follow the decision made by Judge Nakamura. Instead, the lower court effectively overruled or

reversed the first trial court's earlier findings, reversing the first decision that the contract could not be enforced, and then allowed the contract to be enforced for the purpose of awarding attorney's fees.

Petitioner submits it violates fundamental jurisdictional principles, as well as being fundamentally unfair, to have one trial court declare the contract illegal and unenforceable, and then later, when the trial has been completed, to allow a second trial judge to reverse that decision and award attorney's fees.



REASONS FOR GRANTING THE PETITION

In Petitioner's appeal, the Court of Appeal in California applied an exception to established law in *Bovard v. American Horse Enterprises, Inc.* (1988) 201 Cal. App. 3d 832, a case that holds attorney's fees cannot be recovered by either party if the contract is deemed void, illegal and unenforceable.

Petitioner Hamid R. Assadian contends the Court of Appeal erred in refusing to follow this general rule, and instead, applied an exception based on the doctrine of *in pari delicto*. However, neither of the trial court judges conducted an analysis of the "relative culpability" of the parties, as required by law in *McIntosh v. Mills* (2004) 121 Cal. App. 4th 333, 349.

This Opinion has created a split between the districts, and a conflict with *Bovard v. American Horse Enterprises, Inc.*, *supra* [Third Appellate District], and *Geffen v. Moss* (1975) 53 Cal. App. 3d

215 [Second Appellate District], that needs to be resolved by this Court to secure uniformity of the law and to settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1).)

The exception applied by the Court of Appeal threatens to swallow the general rule that neither party can recover attorney's fees in an illegal contract. Other cases, as discussed below, have applied exceptions that vary from decision to decision.

The California Court of Appeal also violated fundamental jurisdictional rules by allowing a second superior court judge to enforce the attorney's fees provision in an illegal contract, thus overruling or reversing the trial court's judgment that the contract was void, illegal and unenforceable.

The issue of one superior court judge overruling the order of another superior court opens a can of worm for the already overloaded state courts where the weak, the underprivileged, unusually named parties such as the parties in this case, bear most of the injustice inflicted upon them. This is an important issue for all states and clear federal guidelines from this honorable US Supreme Court can provide a path for justice for all citizens of the United States irrespective of their religion, ethnicity, or background.



CONCLUSION

The issue of civil and constitutional rights under the constitution is of utmost importance to all citizens of the United States of America regardless of their religion, ethnicity, name, and background. Based on the foregoing, petitioner, Hamid R. Assadian, contends this Court should grant review to determine whether the California Supreme Court erred in denying Petitioner's Petition For Review and settle an important issue of nationwide importance on void, illegal, and unenforceable contracts. It is also a matter of great public importance for this honorable court to direct the state courts to correct a violation of jurisdictional procedure that requires one trial judge to honor another trial judge's orders.

Respectfully submitted,

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