fabrication subcontract's specifications. However, under direct benefits estoppel, a non signatory plaintiff cannot be compelled to arbitrate on the sole ground that, but for the contract containing the arbitration provision, it would have no basis to sue. The work to be performed under a second tier subcontract will inherently be related to and defined by contracts higher in the chain. Thus, a non signatory should be compelled to arbitrate a claim only if it seeks, through the claim, to derive a direct benefit form the contract containing the arbitration provision.

In its quantum meruit claim against MacGregor, KBR sought payment for services rendered. KBR provided services pursuant to its contract with Unidynamics. KBR's asserted right to payment stems directly from the KBR Unidynamics contract, not the fabrication subcontract. The fabrication subcontract included no provision for paying KBR and it precluded KBR from asserting rights under that contract, which expressly provided that "approved use of any subcontractor creates no contractual relationship between the subcontractor and MacGregror. The court found that the court of appeals abused its discretion in compelling KBR to arbitrate its quantum meruit claim against MacGregor. With respect to KBR's lien validity claims, MacGregor's sole argument for compelling arbitration was that the claims required a determination of ownership, and thus, they were based on the Title Agreement within the fabrication subcontract. When the arbitration award resolved the ownership dispute, it eliminated the only rationale that MacGregor asserts for arbitrating the liens' validity. There may have been other arguments to compel KBR to arbitrate the validity of its liens but the court deferred those matters to the trial court.

MISCELLANEOUS

STATE LAWS PROHIBITING DIRECT PURCHASE OF WINE FROM OUT-OF-STATE VINEYARDS VIOLATE COMMERCE CLAUSE

Granholm v. Heald, 125 S. Ct. 1885 (2005).

FACTS: In Michigan, in-state wineries were allowed to ship their wine directly to consumers and by-pass the wholesaler, while out-of-state wineries must ship their wine to an in-state wholesaler to be distributed to the retailers and then to the consumers. An out-of-state winery and state residents brought action challenging Michigan laws governing distribution of alcohol as violative of the commerce clause, alleging that state thereby discriminated against out-of-state wineries by preventing them from shipping wine directly to Michigan consumers. The plaintiffs contended that this system of channeling was an unnecessary added cost of the wine for the end consumer. The United States District Court for the Eastern District of Michigan granted summary judgment in favor of the state and the Sixth Circuit reversed, finding violation of the dormant Commerce Clause.

States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.

In New York, an out-of-state winery may ship directly to New York consumers only if it became a licensed New York winery. Proprietors of out-of-state wineries and in-state wine consumers brought action challenging constitutionality of New York State's laws governing direct shipment to in-state consumers of out-of-state wine. They also stated that this New York "branch" requirement also added unnecessary costs to the wine. The United States District Court for the Southern District of New York granted summary judgment in favor of the consumers and wine makers and the Second Circuit reversed, upholding the state's law.

The Supreme Court consolidated both cases and granted certiorari. Both cases involved states offering preferential treatment to in-state wineries and imposing additional costs on out-of-state wineries or a complete bar with regards to the distribution of wine to end consumers.

HOLDING: Affirmed as to judgment of the Sixth Circuit Court of Appeals; reversed and remanded as to judgment of the Second Circuit Court of Appeals.

REASONING: The court concluded that state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefited the former and burden the latter. The court states that in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.' The mere fact of non-residence should not foreclose a producer in one State from access to markets in other States. States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.

The rule prohibiting state discrimination against interstate commerce follows from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests. Laws of this type deprive citizens of their right to have access to the markets of other States on equal terms. The Commerce Clause of the US Constitution was designed to avoid this type of discrimination.

LAWYER WHO FAILED TO EITHER INFORM A CLIENT THAT A SECURITY INTEREST USED AS COLLATERAL IN THE SALE OF A COMPANY NEEDED TO BE RENEWED OR RENEW IT HIMSELF MAY BE HELD LIABLE FOR LEGAL MALPRACTICE

Barnes v. Turner, 606 S.E.2d 849 (Ga. 2004).

FACTS: In late 1996, William Barnes Jr. sold his auto parts company, part of which was paid at closing, and the rest was secured by a ten-year promissory note secured by a blanket lien on the buyers' assets. David Turner, Barnes' attorney, perfected the security interest by filing UCC financing statements. However, Turner failed to inform Barnes that the financing statements needed to be renewed after the expiration of their five year term. Since no renewals were filed, the original statements lapsed. Without Barnes' knowledge, the buyers pledged the same collateral to two other institutions. These institutions filed financing statements, putting them in a senior position to Barnes when the buyers filed a petition for bankruptcy. Barnes sued Turner for malpractice for failing to renew the financing statement. The trial court granted Turner's motion to dismiss, and the court of appeals affirmed the ruling based on the running of the four year statute of limitations. The Georgia Supreme Court granted Barnes' petition for certiorari.

HOLDING: Reversed.

REASONING: The court held that an attorney in Turner's position must at least file the original financing statements, absent specific direction from the client, because an attorney has a duty to act with ordinary diligence and skill in representing his clients. The attorney also has a duty with regard to renewal of financing statements because statements that are allowed to lapse leave the client without the protection he bargained for. The court rejected the dissent's contention that the client must specifically request the attorney to file the renewal documents. They reasoned that a client cannot be expected to be aware of a legal requirement. The court instead stated that an attorney must either inform the client of the need to file a renewal or to file the renewal himself. The court imposed this duty because safeguarding a security interest is not an unexpected duty imposed on the lawyer. The duty went to the very heart of why Turner was retained: to sell Barnes' business in exchange for payment.

LIMITATIONS PERIOD WAS NOT TOLLED BY APPLICATION OF THE DISCOVERY RULE AND APPELLEES WERE NOT EQUITABLY ESTOPPED FROM ASSERTING LIMITATIONS

Dean v. Frank W. Neal & Associates, Inc., 166 S.W.3d 352 (Tex. App. - Fort Worth 2005).

FACTS: In late 1995, William and Madelyn Dean entered into a contract with an architect and David Lewis Builders, Inc. ("DLBI") for the construction of a home. The architect hired Frank W. Neal & Associates, Inc. to design the home's foundation. When preparing the design, Neal used some information prepared by HBC Engineering, Inc. During construction, the Deans noticed some cracks in the foundation. After they moved in, the Deans noticed cracks in various places in the house. By October 1997, more cracks had appeared, and later that month their architect met with Neal, Lewis, and Ralph Barnes of HBC to discuss how to mitigate the problem. Mrs. Dean was aware of this meeting and its purpose. Because of initial attempts to repair the foundation by Neal, DLBI, Lewis, and HBC (collectively, "Builders"), and attempts by HBC to have an insurance company pay for the more extensive repairs, the Deans believed that some or all of the Builders would pay for any necessary repairs to the home's foundation. But at a meeting in January 2002, the Deans discovered that there was no general agreement among the Builders to pay for such repairs. The Deans then filed suit against the Builders asserting negligence, breach of warranty, breach of contract and fraud-related claims. The Builders subsequently filed separate motions for summary judgment contending that all of the Deans' claims were barred by the applicable statutes of limitations. The Deans alleged that the discovery rule applied to their claims and that the Builders were equitably estopped from asserting limitations because their conduct induced the Deans not to file suit. The trial court granted separate summary judgments in favor of each of the Builders.

HOLDING: Affirmed.

REASONING: The discovery rule "tolls limitations only until a claimant learns of a wrongful injury. Thereafter, the limitations clock is running, even if the claimant does not yet know: the specific cause of the injury; the party responsible for it; the full extent of it; or the chances of avoiding it." *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 93-94 (Tex. 2004). The evidence showed the Deans knew or should have known of the injury to their home no later than October 1997. Therefore, the statute of limitations began to run at that time so that by the time the Deans filed suit in January 2002, the limitations period had expired on all of their claims.

Absent fraud or bad faith, statements made during settlement negotiations do not waive a defendant's right to assert limitations.

The doctrine of equitable estoppel requires (1) a false representation or concealment of material facts; (2) made with knowledge, actual or constructive, of those facts; (3) with the intention that it should be acted on; (4) to a party without knowledge or means of obtaining knowledge of the facts; (5) who detrimentally relies on the representations. *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 515-16 (Tex. 1998). Estoppel in avoidance of limitations may be invoked in two ways: either a potential defendant conceals facts that are necessary for the plaintiff to know he has a cause of action, or the defendant engages in conduct that induces the plaintiff to forego a timely suit regarding a cause of action that the plaintiff knew existed. *Rendon v. Roman Catholic Diocese of Amarillo*, 60 S.W.3d 389, 391 (Tex. App.–Amarillo 2001). The court did not find any cases in which the mere making of repairs, without more, estopped a defendant from asserting limitations. Further, absent fraud or bad faith, statements made during settlement negotiations do not waive a defendant's right to assert limitations. *Lockard v. Deitch*, 855 S.W.2d 104, 105-06 (Tex. App.–Corpus Christi 1993). The court did not believe that HBC's seeking insurance coverage was conduct that could have reasonably induced the Deans into delaying suit.

JURY MAY GIVE CONSIDERATION TO THE DEFENDANT'S FINANCIAL CONDITION IN DETERMINING PUNITIVE DAMAGES

Simon v. San Paolo U.S. Holding Co., Inc., 29 Cal.Rptr.3d 379 (Cal. 2005).

FACTS: Prospective buyer of office building sought damages for breach of contract and fraud against seller. The superior court entered judgment on a jury award for $5,000 in compensatory damages and $1.5 million in punitive damages. Seller appealed and prospective buyer cross appealed. The Court of Appeals affirmed.
HOLDING: Reversed.
REASONING: The buyer contended that a substantial reduction in punitive damages will make the punitive damages so small as to be written off by the seller as a cost of doing business, preventing the state's interest in deterring defendant's conduct of oppression, fraud or malice.

Where the defendant's oppression, fraud or malice has been proven by clear and convincing evidence, California law permits the recovery of punitive damages. Civ. Code, 3294. Deterrence will not occur if the wealth of the defendant allows him to absorb the award with little or no penalty. *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 928. Punitive damage awards should not be a routine cost of doing business that an entity can simply pass on the cost to its customer through price increases. *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 427. Thus, the defendant's financial condition remains a legitimate consideration in setting punitive damages. *State Farm v. Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408. Although the three Supreme Court guideposts cannot be abandoned or ignored, the reviewing court can give consideration to the defendant's financial condition. *Bardis v. Oates* (2004), 119 Cal.Ap.4th 26.

Punitive damage awards should not be a routine cost of doing business that an entity can simply pass on the cost to its customer through price increases.

Here, the reprehensibility of the defendant's conduct is relatively low and the state's interest in punishing it and deterring its repetition is low. Thus, even in light of California's interest in punishing and deterring fraudulent conduct, the jury's award of $1.7 million in punitive damages is grossly excessive. Therefore the court concluded that $50,000 is the maximum award of punitive damages that is consistent with due process.