NEW STATUTES, NEW RULES, AND NEW CASES

WHAT EVERY BUSINESS LITIGATOR NEEDS TO KNOW IN 2014

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SIGNIFICANT STATUTES
Enacted in 2013

SIGNIFICANT RULES
Adopted in 2013

SIGNIFICANT CASES
Decided in 2013

SIGNIFICANT STATUTES
Enacted in 2013

ATTORNEYS

Admission To The Bar – Applicants Not Lawfully Present In The United States

Business & Professions Code § 6064 – Section 6064 now expressly allows the Supreme Court to admit applicants to the State Bar who are not lawfully present in the United States.

Annual Membership Fees Increase

Business & Professions Code §§ 6034, 6140, 6140.3 – The annual membership fee for active members of the State Bar will be $315, and the fee for inactive members shall be $75. Previously, $20 of that amount was allocated to free legal services, and members could opt out of paying that amount. This year, there is a $30 charge *in addition to* the base rate that will be allocated to free legal services. As before, members may opt out of paying this amount.

Communications With Lawyer Referral Services Now Privileged

Evidence Code §§ 912, 965-968 – New Evidence Code sections 965 and 966 establish a privilege for communications between a potential client and a lawyer referral service, similar to the attorney-client privilege. Section 967 requires the lawyer referral service to claim the privilege whenever the client has not consented to disclosure. Section 968 provides exemptions where the services were sought to aid a crime or fraud, or where disclosure is necessary to prevent a crime likely to result in death or bodily harm. Finally, revisions to section 912 indicate that the privilege may be waived in the same manner as the attorney-client privilege.

Retaliatory Immigration Reporting Now Cause For Suspension Or Disbarment

Business & Professions Code § 6103.7 – Attorneys are now subject to suspension, disbarment or other discipline for reporting or threatening to report the suspected immigration status of any witness, party, or family member of a witness or party in a civil or administrative action because the witness or party has exercised a right related to his or her employment.

CIVIL PROCEDURE

Court Reporter's Hearing Fees – Single Fee For All Hearings In A Case Lasting Less Than An Hour

Government Code § 68086 – The Government Code requires litigants to pay a $30 fee for court reporting services for hearings lasting less than one hour. Revisions to section 68086 require the fee to (a) be paid by the party who initiated the hearing, (b) be deposited no later than the conclusion of each day's court session, (c) be a single fee for all proceedings in the same case that collectively lasts an hour or less, (d) be deposited in the Trial Court Trust Fund, to be

distributed back to the court that collected it, and (e) be promptly refunded if no court reporting services are provided. The revisions also provide a waiver for parties with fee waivers.

Enforcement Of Judgments – Discharged Judgment Debtors Must Not Be Named In Applications For Renewal Or Writ Of Execution

Code of Civil Procedure §§ 683.140, 699.510 – The names of judgment debtors whose liability under a judgment has been discharged, as through bankruptcy or a satisfaction of judgment, must be omitted from applications for renewal of judgment or for a writ of execution.

Enforcement Of Judgments – Electronic Court Records May Be Used To Request Execution Of Judgment By Levying Officer.

Code of Civil Procedure § 687.010, Government Code § 68150 – Judgment creditors may now request a levying officer to execute a judgment lien based on a writ of attachment issued by the court as an electronic record or a document printed as an electronic record. Section 687.010 specifies the instructions that must accompany such a writ, and provides that the levying officer may proceed as if in possession of a paper version of the original writ, unless the officer has actual knowledge that the information in the electronic writ has been altered.

Enforcement Of Judgments – Personal Property Exemption Amounts Now Tied To Inflation

Code of Civil Procedure § 703.120 REPEALED – The California Law Revision Commission has been tasked with completing a decennial review of the amount of the personal property exemptions that apply to the enforcement of judgments. This year, the Commission completed its latest review, and recommended that the review provision be repealed, as a provision that was enacted in 2003 established automatic adjustments tied to inflation, and appears to be working well.

Enforcement Of Judgments – Exemption Form Must Be Served On Debtor

Code of Civil Procedure §§ 700.010, 706.103, 706.104 – Levying officers enforcing judgments must now serve on the judgment debtor a copy of a form that the judgment debtor may use to make a claim of exemption and a copy of the form used to provide a financial statement. The form must also be provided to employers served with orders to withhold earnings, who must, in turn, provide the form to the debtor/employee.

Judgment Interest – Lower Rate For Tax And Fee Claims Against The State

Civil Code § 3287, Government Code §§ 965.5, 970 – Judgments against public entities for fee or tax related cases now accrue pre- and post-judgment interest at a rate equal to the weekly average one-year constant maturity Treasury yield, with a 7% cap. Once such judgments become enforceable under the applicable statutes for enforcement of judgments against public entities, the rate increases by two percent, with the same 7% cap.

COURTS

Destruction Of Records – Civil Actions Retained 10 Years, Unlimited Civil Judgments Retained Permanently

Government Code §§ 68150-68152 – Amendments to the Government Code shorten the time for courts to retain court records after final disposition, and allow the clerk to certify copies of electronic records. Section 68152 still provides that records in civil actions are generally kept for 10 years, and unlimited civil judgments are retained permanently.

CORPORATIONS

Dissenter's Rights – No Ten Day Notice Period For Reorganizations Where Dissenters Have Right To Exchange Shares For Cash

Corporations Code § 603 – The Corporations Code gives dissenters the right to a ten-day notice prior to consummation of corporate actions taken without a meeting based on the written consent of less than all of the outstanding shares. The amendment to section 603 removes the notice period for reorganizations where the dissenting shareholders have a right to demand cash in exchange for their shares. Proponents argued that the notice period is unnecessary in such cases, because minority shareholders have no right to challenge or enjoin such transactions, as they are limited to exercising their exchange rights.

Emergency Powers – Corporations May Take Actions When Quorum Is Impracticable Due To Disaster

Corporations Code §§ 207, 212, 5140, 5151, 7140, 7151, and 9140 – New Corporations code provisions give directors and officers of for profit and nonprofit corporations various powers and immunities in order to carry out their operations during an emergency that preclude a quorum of the corporation's board of directors from being readily convened. The new rules allow for modified notice to directors, appointing officers as directors to reach a quorum, modifying corporate lines of succession, making donations, and entering into contracts, security agreements, and partnerships, among other things. "Emergencies" include natural catastrophes, attacks by enemies of the United States, and acts of terrorism or other extraordinary manmade disasters.

DISCOVERY

Reporters' Shield Law – Parties Must Give 5 Days' Notice Before Issuing Subpoena Seeking Reporter's Records From Third Party

Code of Civil Procedure § 1986.1 – The Reporters' Shield Law has been amended to require a 5 day notice to be provided to a journalist and his or her publisher or broadcaster before a party

may issue a subpoena seeking the journalist's records from a third party. At a minimum, the notice must state why the requested records will be of material assistance to the requesting party, and why alternate sources of information are not sufficient to avoid the subpoena.

Time To Move To Compel Runs From Verified Response

Code of Civil Procedure §§ 2030.300, 2031.310, 2033.290 – The 45-day period to file a motion to compel after receipt of responses to interrogatories, document demands, or requests for admission now runs only from the receipt of verified responses or verified supplemental responses. The ostensible reason for the change is "decrease abuses of the discovery process," and eliminate opportunities for "attempted games-playing by some practitioners." Unfortunately it may have the opposite effect, as a party who serves an initial verified response may now serve an unverified supplemental response, which may lead the requesting party to believe (perhaps incorrectly) that the time to move to compel has been reset.

DISCRIMINATION, EMPLOYMENT AND LABOR

Attorney's Fees – Prevailing Employers Must Show Bad Faith To Recover Fees In Actions For Non-Payment Of Wages And Benefits

Labor Code § 218.5 – The labor code provides for an award of attorney's fees to the prevailing party in actions for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions. The amendment to section 218.5 provides that an award of fees to a prevailing employer shall be conditioned on a finding that the employee brought the action in bad faith.

Gender Identity In Schools – Sex Segregated Activities Must Be Open To Students According To Their "Gender Identity"

Education Code § 221.5 – Sex-segregated activities and facilities in public schools, including athletic programs, are now required to be open to students consistent with the student's gender identity, irrespective of the gender listed in the student's records.

Recovery Periods – Employers May Not Require Employees To Work During Mandatory Cool Down Periods

Labor Code § 226.7 – The Labor Code prohibits an employer from requiring an employee to work during any meal or rest period mandated by an order of the Industrial Welfare Commission (IWC). Amendments to section 226.7 extend this protection recovery periods (i.e. cool down periods to prevent heat illness) mandated by any applicable statute or applicable regulation, standard, or order Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health. The provision also requires employers to pay an additional hour's worth of pay for each day that a meal, rest period or recovery period is not provided.

Personal Information Protected

Labor Code § 1024.6 – This new statute prohibits employers from terminating or retaliating against employees for updating or attempting to update their personal information, unless the changed information relates directly to the skill set, qualifications, or knowledge required for the job.

Retaliation Against Victims Of Crimes For Taking Time Off To Testify Prohibited

Labor Code § 230.5 – Under new section 230.5, it is unlawful for an employer to discharge or otherwise retaliate against an employee who is a victim of certain serious crimes for taking time off to testify in proceedings related to the crime. Requests for time off for this purpose must be honored by the employer upon reasonable advance notice.

Retaliation For Complaints Of Unpaid Wages Prohibited

Labor Code § 98.6 – Section 98.6 now specifies that an employee's complaint that he or she is owed unpaid wages is an activity protected against employer discrimination or retaliation, and adds that an employer who engages in prohibited discrimination or retaliation is liable for a civil penalty of up to $10,000 in addition to other existing remedies. The amendment also expands the scope of conduct prohibited by section 98.6 to include retaliation in addition to discrimination, which was already prohibited.

Sexual Harassment Need Not Be Motivated By Sexual Desire

Government Code § 12940 – The Fair Employment and Housing Act has been amended to specifically state that prohibited sexual harassment need not be motivated by sexual desire.

Immigration-Related Retaliatory Practices Prohibited

Labor Code § 1019 – New and amended statutes prohibit employers from engaging in certain immigration related activities against their employees, and provide penalties for violations. Section 1019 applies where (a) when the conduct is motivated by retaliatory purposes for the employee's exercise of protected rights, and (b) the conduct is not specifically authorized by federal law. The prohibited activity includes refusal to accept immigration status documents required under 8 U.S.C. 1324a(b), using the E-Verify system to check immigration status when not required by federal law, and threating to contact or contacting immigration authorities. If a prohibited activity takes place within 90 days of the employee's exercise of protected rights, there is a rebuttable presumption that the employer acted with retaliatory motive. Employees subjected to unfair immigration-related practices may bring private actions for damages, equitable relief, and penalties, and may recover attorney's fees and expert witness costs. Employers who engage in unfair immigration-related practices may be penalized by orders suspending all business licenses and permits for 14, 30, or 90 days.

Labor Code § 244 – New section 244 provides that reporting the immigration status of an employee, former employee or family member of an employee is an adverse employment action.

Business & Professions Code § 494.6 – New section 494.6 states that employers may be subject to revocation or suspension of business licenses for reporting immigration status in violation of section 244.

Victims Of Stalking And Domestic Violence – Discrimination Against Victims Prohibited

Labor Code § 230 – Discrimination and retaliation statutes have been expanded to specifically protect victims of stalking and domestic violence, both for discrimination based on their status as victims, and from retaliation for taking time off work to participate in proceedings relating to the stalking or domestic violence.

Whistleblowers – Reporting Violations of Local Law, Internal Complaints Protected From Retaliation; Persons Acting On Employer's Behalf Prohibited From Retaliating

SB 496 – Various procedural amendments have been made to clarify the procedures applicable to whistleblower claims. Most notably, the State Personnel Board must render a decision on consolidated complaints no later than six months after the order of consolidation, and such claims are now explicitly made exempt from ordinary government claims procedures. In addition, Labor Code section 1102.5, relating to retaliation against whistleblowers, has been strengthened to: (a) protect complaints about alleged violations of local law, as well as internal complaints, and (b) prohibit persons acting on behalf of an employer (in addition to the employers themselves, who were already included) from committing prohibited retaliation.

Workers' Compensation Exemption For Professional Athletes

Labor Code § 3600.5 – The Labor Code now contains exemptions from worker's compensation law for visiting professional athletes who work less than 20% of the time in California and are covered under the workers' compensation laws of another state. Visiting professional athletes may still be subject to the occupational disease or cumulative injury provisions of the workers' compensation laws if they worked for 2 or more seasons for a California-based team, or have worked for fewer than 7 seasons for out of state teams.

ENVIRONMENTAL

Environmental Leadership Projects – Fast Track To Court Of Appeal Eliminated, Provisions Extended To 2016

SB 743 – Amendments of AB 900 (enacted in 2011) repeal provisions giving the Court of Appeal original jurisdiction over CEQA actions challenging an "Environmental Leadership"

project, and requiring the court to issue a decision within 175 days. Instead, the new provisions require the Judicial Council to adopt new rules of court by July 1, 2014 that would mandate any lawsuits and appeals to be resolved within 270 days. The amendment also extends AB 900's June 1, 2014 sunset date to January 1, 2016.

Proposition 65 – Notice And Opportunity To Cure Now Required Before Filing Private Enforcement Action

Health & Safety Code § 25249.7 – Proposition 65 requires businesses to provide warnings before exposing consumers to carcinogens or reproductive toxins. Amendments effective October 2013 now require parties filing private enforcement actions to provide notice and a 14-day opportunity to cure a violation of Prop. 65. To take advantage of the cure opportunity, the violator must either post the required warning, or eliminate the exposure, and must also pay the noticing party a $500 civil penalty. Curing the violation in response to such a notice will not rule out prosecution by the Attorney General, a district attorney, or a prosecutor with jurisdiction over the violation.

PRIVACY

Medical Privacy – Private Action Extended To Cover Consumer Medical Software And Hardware Sellers

Civil Code § 56.06 – Existing medical privacy law, which includes a private right of action for compensatory and punitive damages, has been extended to cover any businesses that offer medical software or hardware to consumers.

Do Not Track Software – Website Disclosures Required

Business & Professions Code § 22575 – Amendments to the statute governing commercial websites and services that collect personally identifiable information now require such websites to disclose how they respond to "do not track" signals sent by web browsers. Such websites must also disclose whether third parties may collect personally identifiable information when a consumer uses the site.

REAL PROPERTY AND LAND USE

Anti-Deficiency Statutes – Underlying Debt Eliminated By Foreclosure

Code of Civil Procedure §§ 580b, 580d – California's anti-deficiency statutes have been amended to state that when a deficiency judgment is barred, for instance after the foreclosure of a residential purchase money mortgage, the underlying debt is no longer owed, and may not be collected.

Commercial And Industrial Common Interest Developments Established

SB 752 – A raft of new statutes and amendments have been enacted to establish a new common interest development law specifically applicable to commercial and industrial developments. The new law largely preserves the foundational provisions embodied in the Davis-Stirling Common Interest Development act relating to the establishment and definition of a common interest development, but renders most of the existing operational law inapplicable to commercial and industrial developments. The inapplicable operational law includes, for example, restrictions on governance, notice, architectural approvals, assessments, and other provisions that are more suited to residential developments.

Fence Construction, Maintenance, And Replacement – Adjoining Landowners Jointly Responsible

Civil Code § 841 – Section 841 has been repealed and replaced with a new statute that specifies that adjoining landowners are presumed to share an equal benefit from any fence between their properties, and absent a written agreement to the contrary, they are equally responsible for the reasonable cost of constructing, maintaining, and replacing the fence. A landowner intending to incur fence costs must provide 30 days-notice to the adjoining landowner with specified information. The adjoining landowner may challenge the presumption of equal benefit and responsibility based on the financial burden, the value of the property before and after the fence, financial hardship, the reasonableness of the particular fence project, and any other appropriate equitable factors.

Homeowner's Bill Of Rights – Exemption For Title Companies

Civil Code §§ 2924.25, 2924.26 – These new additions to the Civil Code exempt title companies from liability under the Homeowner's Bill of Rights, which specifies notice periods and other provisions that must be complied with before foreclosing on residential mortgages. The exemption only applies when the title company is acting in a ministerial capacity, recording documents on behalf of a trustee or beneficiary. It does not apply when the title company is acting as a trustee or beneficiary itself, and does not affect the liability of a requesting trustee or beneficiary.

Lawsuits In Support Of Affordable Housing – New Notice And Limitations Periods

Government Code § 65009 – Amendments to section 65009 specify new notice and limitations periods for challenges to zoning and planning decisions where an action is brought in support of affordable housing. Where the Department of Housing and Community Development has found that a housing element in a general plan complies with the law, notice for such an action challenging the housing element must be served on the legislative body within 270 days. Where the housing element has been found not to comply with the law, the notice must be served on the legislative body within 2 years. Notices of actions challenging other zoning and planning

decisions must be served within 180 days. Actions subject to the 270-day notice requirement must be filed within 6 months, actions subject to the 2 year notice requirement must be filed within one year, and actions subject to the 180 day limitation period must be filed within 180 days. The limitations period begins either 60 days after the notice is filed, or when the legislative body takes a final action in response to the notice, whichever occurs first.

Sellers Must Disclose Construction Defect Claims

Civil Code § 1102.6 – The mandatory disclosure form used for the sale of residential property has been revised to require the disclosure of construction defect and breach of warranty claims brought by the seller.

SECURED TRANSACTIONS

Lien Exemption For Consumers Of Licensed Works

Commercial Code § 9321 – A former section of the Commercial Code that protected consumers of licensed works has been temporarily reenacted after its automatic repeal. The provision states that *non-exclusive* licensees in the ordinary course of business take their license free of any liens. This acts to protect consumers of works, such as DVDs, from any liens on the license of those works held by the writers', directors', or performers' guilds or other stakeholders. Commercial distributors, who generally hold exclusive licenses, are still bound by such liens, which are used to enforce the stakeholders' rights to royalties. The provision has a sunset clause of 2015. In the meantime, the guilds are attempting to work out a more permanent solution with the interested distributors.

Uniform Commercial Code Revisions Adopted In California

AB 502 – Significant revisions to Article 9 of the Uniform Commercial Code relating to secured transactions have now been adopted into the California Commercial Code. The revisions take effect July 1, 2014. Among other things, the revisions: (a) revise certain definitions, (b) specify the requirements for determining whether a secured party has control of electronic chattel paper, (c) specify rules that apply to collateral when a debtor changes its location to a new address or where there is a successor by merger, (d) requires financing statements to provide the name of a debtor that is a registered organization, or where collateral is held in a trust, or a decedent's estate, (e) authorize secured parties to file an information statement if they believe an amendment to a financing statement was not authorized, (f) enact changes relating to the subordination of security interests, the assignment of security interests, and the refusal of a filing office to accept a record for filing, and (g) implement transitional rules for determining the perfection of a security interest.

TRUSTS AND ESTATES

Attorney's Fees Available In Elder Abuse, Undue Influence, And Attorney-In-Fact Cases

Probate Code §§ 859, 4231.5 – Section 859, which provides double damages in undue influence and elder abuse cases involving a conservatee, minor, elder, dependent adult, trust, or decedent's estate, now provides for a discretionary award of attorney's fees to a successful plaintiff. The discretionary attorney's fee provision is also added to section 4231.5, which involves claims against an attorney-in-fact, and is applicable where the attorney-in-fact has wrongfully taken property under a power of attorney, or has taken property under a power of attorney through undue influence or elder abuse.

Parole Evidence Rule Applies To Trust Instruments

Code of Civil Procedure § 1856 – The codified version of the Parole Evidence Rule has been amended to specifically state that it applies to trust instruments, in addition to deeds, wills, and contracts, which were mentioned specifically in the previous version of the statute.

Personal Representatives Participation In Distribution Proceedings

Probate Code § 11704 – Personal representatives (i.e. executors, administrators, public administrators or their equivalent) must now apply for leave of court before taking part in a proceeding to determine distribution rights from a decedent's estate.

UNFAIR COMPETITION

Made In California

Civil Code § 1770 – Falsely advertising a product as "Made in California" now constitutes unfair competition under Civil Code section 1770.

SIGNIFICANT RULES
Adopted in 2013

ETHICS STANDARDS FOR NEUTRAL ARBITRATORS IN CONTRACTUAL ARBITRATION

Applicability Of The Standards

Standard 3 – The Standards have been revised to exclude arbitrations governed by a securities self-regulatory organization (such as the NASD) under rules approved by the Securities and Exchange Commission. This change conforms the Standards to a federal court holding that federal law preempts the Standards in such arbitrations. Also, the newly adopted revisions discussed below do not apply to arbitrators appointed in arbitrations prior to July 1, 2014 in those arbitrations.

Definitions Of "Arbitrator" And "Member Of The Arbitrator's Extended Family"

Standard 2 – For purposes of the application of the ethical standards, where the context of a standard includes acts occurring before an appointment is final, the word "arbitrator" includes a person who has been served with notice of a proposed nomination or appointment. The new amendment to this rule specifies that it does not include nomination of a possible arbitrator by the Court under Code of Civil Procedure § 1281.6, which allows a court to propose nominees, and then to eventually appoint an arbitrator if the parties are unable to agree to either an arbitrator or a means of selecting an arbitrator. The definition of the arbitrator's "extended family" has been expanded to include the arbitrator's domestic partner.

Disclosure Of Professional Discipline

Standard 7 – Arbitrators must now disclose professional discipline, including (a) any disbarments or license revocations by the State Bar or other professional or occupational licensing bodies in California or elsewhere, (b) resignations while disciplinary charges were pending, and (c) any public disciplinary actions taken against the arbitrator within the preceding 10 years.

Disclosure Of Spouse's Association With Attorneys

Standard 7 – In addition to disclosing their own association with lawyers in the arbitration, arbitrators must now disclose whether the arbitrator's spouse or domestic partner was associated in the private practice of law with a lawyer in the arbitration within the preceding two years.

Disclosures In Consumer Arbitrations

Standard 8 – An arbitrator in a consumer arbitration may only rely on information supplied by the arbitration provider organization to make his disclosures if the provider organization represents that the information is current through the immediately preceding calendar quarter. Where an arbitrator makes a disclosure by reference to information available on the Internet, the

arbitrator must now give the address of the specific web page on which the information can be found. The disclosure standard for consumer arbitrations have also been amended to require the arbitrator to disclose if the provider organization has an interest in any party, despite the fact that the organization would be prohibited from administering the arbitration in such circumstances.

Disclosure Of Future Employment Offers Required In Consumer Arbitrations

Standard 12 – The preexisting Standards provide that an arbitrator must disclose to the parties whether he will entertain offers from the parties for employment or new professional relationships with any of the parties or attorneys in the arbitration (except for offers to serve as a lawyer, expert witness, or consultant, which the arbitrator is precluded from accepting). If the arbitrator disclosed that he would entertain such offers, the arbitrator was not required to disclose any actual offers made. New rules now state that in consumer arbitrations, the arbitrator must disclose if he subsequently receives or accepts such an offer while the arbitration is proceeding, while in all other arbitrations the arbitrator must inform the parties that he will not provide notice to the parties if he subsequently receives such an offer.

Solicitation By Arbitrators Not Allowed

Standard 17 – Revisions to Standard 17 provide that arbitrators may advertise a general willingness to serve as an arbitrator, and may convey biographical information and terms of employment, but may not solicit appointment in a specific case or cases. This prohibition does not include responding to a request from all parties for a proposal to provide arbitration services, or any inquiries concerning the arbitrator's availability, qualifications, experience, or fees.

RULES APPLICABLE IN ALL COURTS

Notifications To State Bar – Judge Or Justice Is Responsible For Notifying State Bar Of Misconduct

Rules 10.609, 10.1017 – When an order of contempt, sanctions order, or reversal of a judgment due to attorney misconduct is required to be reported to the State Bar under Business & Professions Code § 6086.7, the judge or justice issuing the order, or the justice authoring the opinion is responsible for the notification, but may delegate that responsibility to superior court staff, or the Clerk of the Court of Appeal. A notification must also be sent to the offending attorney.

Recycled Paper

Multiple Rules – The requirement that parties submit documents on recycled paper has been eliminated, and references to recycled paper throughout the Rules of Court have been removed.

RULES APPLICABLE IN APPELLATE COURTS

Civil Case Information Statement Must Be Filed Within 15 Days After Superior Court's Notice Of Filing Of Notice Of Appeal

Rule 8.100 – A civil case information statement must be filed in the Court of Appeal after the superior court clerk mails a notice of the filing of a notice of appeal. Changes to Rule 8.100 lengthen the amount of time to file the statement from 10 days to 15 days, but also eliminate the superior court clerk's duty to include a copy of the civil case information statement form, or a notice that the form must be filed with the Court of Appeal. Note that the time to file the statement runs from the date of mailing, and does not include any extension for service by mail.

Completion Of Record

Rule 8.149 – New rules spell out when the record on appeal is considered complete. The rules are fairly straightforward. In most cases, the record will be complete when the reporter's transcript is delivered to the reviewing court, and either the appellant elects to proceed by appendix or the clerk's transcript is certified.

Deposit For Cost Of Clerk's Transcript – Default Will Issue If Deposit Not Made

Rule 8.122 – Where an appellant does not timely submit a deposit for the cost of the clerk's transcript, the clerk must issue a notice of default under Rule 8.140.

Designation Of Reporter's Transcript – Identification Of Previously Transcribed Hearings Required

Rule 8.130 – An appellant's or respondent's notice designating proceedings in a reporter's transcript must now identify any proceeding for which a certified transcript has previously been prepared. In addition, the pre-existing rules required a deposit in the amount of $325 per fraction of a day that did not exceed three hours, and $650 per day or fraction of a day exceeding three hours. New provisions specify that for purposes of calculating this deposit, proceedings that have previously been transcribed are calculated at $80 per fraction of a day under three hours, and $160 per day or fraction of a day over three hours. There is also now a $50 fee that must be submitted to the superior court as compensation for holding the deposit for the reporter's transcript in trust while the transcript is being prepared. Finally, new procedures have been adopted for filing an application to the Transcript Reimbursement Fund by indigent litigants, and the rule now indicates that an appellant must comply with all deposit requirements regardless of any dispute over the cost of the transcript (which must be submitted to the Court Reporter's Board).

Electronic Copies Of The Reporter's Transcript Available On Request

Rule 8.336 – Upon request, and unless the trial court orders otherwise, the reporter must provide the Court of Appeal and any party with a computer readable copy of the transcript.

Electronic Submission Of Signed Documents – Original Signature Must Be Maintained By Filing Party

Rule 8.77 – New procedures are required where a document required to be signed under penalty of perjury is filed electronically. The document must be physically signed by the declarant before filing. By electronically filing the document, the filing party certifies that the document has been signed, and other parties may serve a demand for the production of the original signatures. Where multiple signatures must be acquired, the filing party must gather original or copy signatures from the other parties, and maintain the original signed document along with any copies of signature pages, and make them available for inspection and copying.

Number Of Copies Of Documents To Be Filed In The Supreme Court And Court Of Appeal

Rule 8.44 – In the Supreme Court, parties must file an original and 10-13 paper copies of most documents, depending on the type of document. Now parties have the option of filing an original plus 8 paper copies and one electronic copy of most documents, including a petition for review, an answer, a reply, a brief on the merits, an amicus brief, a petition for rehearing, a petition for a writ in the Court's original jurisdiction, an opposition or other response to such a petition, or a reply.

In the Court of Appeal, parties were previously required to submit proof of delivery to the Supreme Court of four paper copies or one electronic copy of any briefs. Now, one electronic copy must be filed with the Court of Appeal itself. In cases of hardship, four paper copies may still be served on the Supreme Court as an alternative. Local rules may provide for the submission of electronic copies in addition to, or as a substitute for paper copies.

Sealed Documents

Rule 8.45 – New Rule 8.45 establishes comprehensive procedures governing the use of sealed records in the Supreme Court and Court of Appeal. The procedures are applicable to documents used in the appellate record, as well as supporting documents accompanying a motion, petition, or other filing. Sealed documents must be kept separate from the rest of the record, must be submitted in a sealed container with appropriate labels, and must be listed by title on the record indices without disclosing and confidential matter. The new rule also has provisions that generally limit access to the record to the reviewing court and to the parties who had access to the record in the trial court.

Rule 8.46 – Changes to Rule 8.46 include deletion of former rules governing sealed records and the addition of references to new Rule 8.45. They also specific labelling requirements for conditionally filing documents under seal when (a) the documents were not filed in the trial court first, or (b) the documents are filed in connection with a motion to unseal a sealed record. Finally, there are new provisions requiring the filing of a redacted public version, and an unredacted sealed version of any application, brief, petition, or memorandum that refers to any sealed material.

Signatures Of Multiple Parties On Filed Documents – At Least One Original Signature Required

Rule 8.42 – A new rule requires at least one original signature to appear on a document filed in a reviewing court whenever the document requires the signatures of multiple parties (such as a stipulation).

RULES APPLICABLE IN TRIAL COURTS

Case Management – Emergency Exemption Now Available

Rule 3.720 – Superior courts may now establish categories or types of general civil actions that are exempt from the ordinary case management rules. Alternative local procedures must be posted on the court's website, and the provision is only a temporary emergency measure intended to deal with budget shortfalls. The new rule expires for any cases filed after 2016.

Conditional Settlement – Hearings Must Be Vacated Upon Notice Of Conditional Settlement

Rule 3.1385 – When a notice of conditional settlement is filed, the court must now vacate all hearings requiring the appearance of a party, other than a hearing on an order to show cause, sanctions, or a determination of good faith settlement. New hearings may not be set earlier than 45 days after the dismissal date specified in the notice of conditional settlement. Additionally, the filing of such a notice stops the running of the case disposition time.

Construction Related Accessibility Claims – Special Procedures

Rules 3.680 and 3.682 – New procedures have been established for early evaluation and mandatory evaluation conferences in construction related accessibility claims under Civil Code § 55.54. Under the new rules, notices of such conferences must be served by the requesting party within 10 days after they are issued by the court, and proofs of service must be filed at least 15 days before the date set for the conference.

Electronic Filing – Various Rules

Rule 2.252 – Several non-substantive revisions, such as subdivision renumbering, have been made to the rules governing general electronic filing procedures. In addition, Rule 2.252,

subdivision (b), now expressly authorizes courts to require electronic filing either directly with the court or through electronic filing service providers.

Rule 2.253 – This rule now specifies the types of actions in which electronic filing may be permitted or required by the court, which includes all civil cases. It also specifically provides that self-represented parties are exempt from electronic filing requirements, unless they specifically consent otherwise. Represented parties in an action involving self-represented parties may be required to electronically file and serve other represented parties. Subdivision (b)(4) provides that courts must excuse parties from electronic filing requirements where there is undue hardship or prejudice. In addition, electronic filing fees charged by the court cannot exceed the court's actual cost, and must be waived for parties who have received fee waivers. Finally, any document filed after close of business is deemed to have been filed the next court day, unless a local rule deems documents filed by midnight on a court day to be filed that court day. In Orange County, of course, our court has adopted such a rule.

Electronic Service – Various Rules

Rule 2.251 – Several revisions have also been made to the rule governing electronic service. First, electronically filing any document may be construed as consent to electronic service. A revision in subdivision (b)(1)(B) specifies that this does not apply to self-represented parties, who must affirmatively consent to electronic service. Next, subdivision (c) now specifies that courts may require electronic service by local rule or court order, and that unless statutes, rules, or orders require otherwise, a party required to file documents electronically must serve them electronically as well. Finally, when an electronic filing service provider is used for electronic service, service is deemed complete when the service provider transmits the document or an electronic notification of service.

Judgment – Clerk's No Longer Need Include Interest On Verdict In Judgment

Rule 3.1802 – A provision requiring the clerk of the court to include in a judgment the interest accrued since the entry of a verdict has been removed. Now the clerk need only include interest awarded by the court.

Telephonic Appearances – Eligible Hearings Expanded

Rule 3.670(c), (e) – The types of hearing for which telephonic appearances are acceptable has been expanded. Previously, telephonic appearances were only permitted for a specific list of hearing types. Now, such appearances are permitted for any hearing type, except for: (a) trials and proceedings at which witnesses are expected to testify, (b) hearings on temporary restraining orders, (c) settlement conferences, (d) trial management conferences, (e) hearings on motions in limine, and (f) hearings on petitions to confirm the sale of property under the Probate Code.

Telephonic Appearances – Ex Parte Applicants May Now Appear Telephonically

Rule 3.670(d), (h) – Applicants for ex parte relief may now appear telephonically, provided that the moving papers and a proposed order have been submitted by at least 10:00 a.m. two court days before the appearance. The Applicant must also place the phrase "Telephonic Appearance" below the title of the application papers. A party opposing an ex parte may appear by telephone even if the applicant has not satisfied this requirement, but must notify the court and all other parties of the intent to appear by telephone no later than 2:00 p.m. one court day before the hearing.

Telephonic Appearances – Fee Increased To $86

Rule 3.670(j) – The fee to appear by telephone has been increased from $78 to $86, and a late fee of $30 may now be charged to a party noticing an ex parte hearing if the request for telephonic hearing is not made by that party at least three days in advance.

SIGNIFICANT CASES
Decided in 2013

ANTI-SLAPP

First Prong – Attorney's Breach Of Fiduciary Duties Does Not Constitute Protected Activity

Castleman v. Sagaser (2013) 216 Cal.App.4th 481 – An attorney's breach of fiduciary duties owed to a current or former client does not constitute protected speech or petitioning within the meaning of section 425.16. In *Castleman*, the former clients sued their attorney for breach of fiduciary duty, breach of the duty of loyalty, conversion, and invasion of privacy, alleging that when the attorney left the law firm that represented the clients, he used their confidential information to aid their adversaries in litigation against them. The trial court denied the attorney's special motion to strike under the anti-SLAPP statute. The Court of Appeal affirmed, concluding that the clients' claims did not arise from protected litigation activity within the meaning of the anti-SLAPP statute, but rather arose from the attorney's alleged breach of professional and ethical duties. Though the alleged misconduct occurred in the context of litigation, the complaint described the attorney's behavior in terms of ethical violations, including breaches of the duties of loyalty and confidentiality owed under the State Bar Rules of Professional Conduct. The Court also noted that the veracity of the clients' allegations, the timing of the clients' lawsuit, and the clients' motives for bringing the claims were irrelevant to the anti-SLAPP motion.

First Prong – Meritless Claims Must Be Stricken If They Involve Both Protected And Unprotected Activity

Trapp v. Naiman (2013) 218 Cal.App.4th 113 – If a cause of action involves both protected and unprotected activity under the anti-SLAPP statute, the cause of action is subject to the statute and must be stricken, if the plaintiff cannot establish a probability of prevailing. In *Trapp v. Naiman*, the Defendant, attorney Randall Naiman, represented a client in nonjudicial foreclosure proceedings against the Plaintiff, Bennie Trapp, filing three separate notices to vacate and three separate unlawful detainer actions, which were ultimately dismissed. Trapp subsequently sued Naiman alleging causes of action for negligence, abuse of process, and wrongful foreclosure. In response, Naiman brought an anti-SLAPP motion to strike Trapp's claims, which the trial courted granted as to the negligence and abuse of process claim but denied as to the wrongful foreclosure claim. The Court of Appeal affirmed in part and reversed in part, holding that the anti-SLAPP motion should have been granted as to the wrongful foreclosure claims in addition to the negligence and abuse of process claims. It noted that while, in *Garretson*, the Court of Appeal held that the act of noticing a nonjudicial foreclosure sale does not qualify as protected activity under the anti-SLAPP statute, the gravamen of Trapp's complaint was his assertion that Naiman either fraudulently or negligently foreclosed on the property at issue. The Court also found that, where causes of action involve both protected and unprotected activity, all the causes of action are subject to the anti-SLAPP statute and must be stricken.

First Prong – Focus On Wrongful Act, Not Motive

Hunter v. CBS Broadcasting, Inc. (2013) 221 Cal.App.4th 1510 – In determining whether an activity is protected under the anti-SLAPP statute, courts must look to the alleged wrongful conduct itself, not the motives underlying the conduct. The Plaintiff, Kyle Hunter, brought a discrimination complaint alleging that CBS Broadcasting refused to hire him as a weather news anchor because of his age and gender. CBS filed an anti-SLAPP motion to strike, arguing that Hunter's claims arose out of an act in furtherance of its free speech rights. The trial court denied the motion on the grounds that CBS had not shown that its conduct was protected by the anti-SLAPP statute. The Court of Appeal reversed. In assessing whether a cause of action arises from protected activity, "courts must be careful to distinguish allegations of conduct on which liability is to be based from allegations of motives for such conduct." Here, the injury-producing conduct underlying Hunter's discrimination claims was CBS's decisions about how to staff weather news anchor positions. Courts have long recognized that both "reporting the news" and "creating a television show" both qualify as exercises of free speech, and CBS's choice of weather anchors "helped advance or assist" these forms of First Amendment expression. As weather reporting is a matter of public interest, CBS's conduct satisfied the anti-SLAPP statute's requirement that conduct be in furtherance of the exercise of free speech rights "in connection" with a public issue or issue of public interest. The case was remanded for a determination of whether Hunter met his burden of showing a reasonable probability of prevailing on the merits.

First Prong – Focus On Wrongful Act, Not Subsequent Damage

Renewable Resources Coalition Inc. v. Pebble Mines Corp. (2013) 218 Cal.App.4th 384 – In considering an anti-SLAPP motion, the court must focus on the allegedly wrongful conduct, not the damage which flows from such conduct. In *Renewable Resources Coalition***,** the Defendants were mining companies that allegedly purchased confidential documents from a professional fundraiser who had previously worked for the Plaintiff, an environmental organization. The Defendants then used those documents to initiate a campaign finance complaint relating to a clean water ballot initiative sponsored by the Plaintiff. The Plaintiff sued the Defendants for tortious interference for allegedly inducing the former fundraiser to reveal confidential documents. The Defendants filed an anti-SLAPP motion, arguing that their campaign finance complaint was protected under the anti-SLAPP statute. The trial court granted the motion, and the Court of Appeal reversed, holding that, in the context of the anti-SLAPP statute, courts must look to the gravamen of the complaint, which is defined by "the acts on which liability is based." Here, the Defendants' liability for tortious interference was based on the wrongful purchase of confidential documents, not the subsequent filing of the campaign finance complaint, which was merely the damage caused by the wrongful act. As the tortious interference itself was not an act in furtherance of the defendant's right of petition or free speech, it was not protected conduct under the anti-SLAPP statute.

First Prong – Threatening To Name Alleged Sexual Partners Is Not Extortion Per Se And Constitutes Protected Activity

Malin v. Singer (2013) 217 Cal.App.4th 1283 – A demand letter written by an attorney in anticipation of litigation generally is protected by the anti-SLAPP statute as long as it does not constitute criminal extortion. In *Malin*, Michael Malin filed an action for extortion after Martin Singer, an attorney of one of his business partners, sent a demand letter to him which accused Malin of using company resources to arrange sexual liaisons with older men, including a judge. The trial court denied the Defendant's anti-SLAPP motion, but the Court of Appeal reversed, holding that while the *Flatley* exception excluded from protection demand letters that constitute criminal extortion, a demand letter written by an attorney in anticipation of litigation is generally protected under the anti-SLAPP statute. The demand letter did not constitute criminal extortion because Singer did not expressly threaten to disclose the plaintiff's alleged wrongdoings to a prosecuting agency. Furthermore, Penal Code § 519 applied only to threats to disclose a secret affecting family members or relatives, and was therefore inapplicable because the demand letter only threatened to disclose secrets affecting an alleged sexual partner. Moving to the second step of anti-SLAPP analysis, the Court determined that the plaintiff had no probability of prevailing on the extortion claim because the demand letter was logically connected to litigation contemplated in good faith.

Second Prong – Improper Declarations; Prima Facie Case Of Malicious Prosecution

Jay v. Mahaffey (2013) 218 Cal.App.4th 1522 (**Moore**, Rylaarsdam, Bedsworth) **–** As a threshold procedural matter, the Fourth Appellate District, Division Three, reaffirmed the "general rule of motion practice" that new evidence in the form of supplemental declarations is not permitted with reply papers submitted in connection with an anti-SLAPP motion. Relying on Justice Rylaarsdam's oft-cited opinion in the *San Diego Watercrafts* case, the Court noted that reply declarations should not address substantive issues in the first instance, but should only fill in gaps in the evidence created by the other side's opposition papers. The Court found that the trial court did not err in sustaining objections to and excluding the Defendant's reply declarations. The Court then affirmed the trial court's denial of the Defendant's anti-SLAPP motion, holding that the limited partners Plaintiffs had satisfied all three elements of a malicious prosecution case: (1) favorable termination (even though it was in the form of a voluntary dismissal); (2) lack of probable cause because of the limitation on liability under the Corporations Code and the lack of any evidence that the Plaintiffs were parties to the lease or had transacted any business with the Defendants; and (3) and malice because of the strong inference that the limited partners had been used as pawns in an ongoing chess game against the partnership.

Second Prong – Litigation Privilege Bars Breach Of Settlement Claim

Vivian v. Labrucherie (2013) 214 Cal.App.4th 267 – The Court of Appeal reversed the trial court's denial of the Defendant's anti-SLAPP motion, holding that the litigation privilege barred plaintiff deputy's cause of action for breach of contract against defendant ex-wife, where deputy alleged that ex-wife breached the terms of a settlement agreement by making voluntary statements to the county sheriff's office that employed the deputy with respect to an internal affairs investigation regarding that deputy. Though the litigation privilege does not necessarily bar liability for breach of contract claims, application of the privilege requires consideration of whether doing so would further the policies underlying the privilege. The dispute in this case involved a significant public concern—a governmental investigation into inappropriate conduct by a police officer. Application of the privilege under these circumstances promotes full and candid responses to a public agency, which is very much the purpose of the privilege and in the public interest. Denying application of the privilege would have had exactly the opposite effect.

APPELLATE PROCEDURE

Conduct Dissuades Court From Exercising Discretion To Salvage Appeal

Good v. Miller (2013) 214 Cal.App.4th 472 – Plaintiff appealed from an order granting terminating sanctions for willful non-compliance with an order compelling discovery. The Court of Appeal dismissed plaintiff's appeal on the grounds that an order granting terminating sanctions is a nonappealable order under Code. Civ. Proc., § 904.1. Although acknowledging the Supreme Court's holding that reviewing courts generally should exercise discretion in favor of preserving the right to appeal, the Court of Appeal declined to exercise its discretion to salvage plaintiff's defective appeal for three reasons. First and foremost, plaintiff did not ask the court to do so. Second, defendant repeatedly raised the issue and plaintiff repeatedly ignored it. This was not merely a case of ignorance of appellate procedural rules, but stubborn refusal to follow the rules even after they had been explained. Third, plaintiff misstated the relevant facts in the "Appealability" section of his briefing, incorrectly asserting that the notice of appeal "was timely filed following the Entry of Judgment in this matter."

Corporate Reinstatement Renders Timely-Filed Notices of Appeal Valid

Bourhls v. Lord (2013) 56 Cal.4th 320 – Revival of corporate powers validated a suspended corporation's timely-filed notices of appeal. Although filing a timely notice of appeal is a jurisdictional requirement, all that is jurisdictionally required is that the notice be timely filed, not that it be filed by a corporation in good standing. The Court distinguished case law holding that revival of corporate powers did not affect the running of the statute of limitations. Revenue and Tax Code § 23305a provides that a corporation's reinstatement is without prejudice to any action, defense, or right that had accrued. The expiration of the time to file a valid notice of appeal does not provide an "action, defense or right" within the meaning of section 23305a.

Decision Resolving All Issues In A Pleading Constitutes Judgment Even If Not Denominated As Such

Frye v. County of Butte (2013) 221 Cal.App.4th 1051 – In *Frye v. County of Butte*, animal control officers from the County of Butte seized horses belonging to Plaintiffs Ellen Frye and Marlene Schultz pursuant to Penal Code section 597.1, which authorizes such removal when an animal control officer has "reasonable grounds to believe that very prompt action is required to protect the health or safety of the animal or the health or safety of others." The Plaintiffs each requested post-seizure hearings, as provided in section 597.1, to contest the validity of the seizures. Administrative hearing officers sustained the officer's actions in each case. The Plaintiffs then filed a mandamus petition. On September 28, 2010, the trial court judge in that action issued a document captioned "Statement of Decision" ordering new administrative hearings to determine the validity of the county's exercise of discretion in choosing between pre- and post-seizure remedies. After the seizures were sustained in the new hearings, the trial court issued an order stating that if the parties wanted to challenge the new findings, they had to file a new petition. The Plaintiffs then filed an original petition or write of mandate in the Court of Appeal, arguing that the trial judge had "refused to enter any judgment" in the matter. The Court of Appeal found that the Statement of Decision was an "inartfully worded" final judgment and denied the petition. At the Plaintiffs' request, the trial court judge then signed a document caption "Judgment," ordering the agency to set aside the first administrative decisions, remanding for new hearings, and awarding the Plaintiffs court costs "according to proof." The County filed a timely appeal from the purported judgment, and the Plaintiffs filed a timely cross-appeal from it. The Court of Appeals dismissed both appeals as untimely. It found that, because the "Statement of Decision" resolved all of the issues raised in the Plaintiffs' pleadings, it constituted a final judgment. The parties thus failed to timely appeal because more than 180 days had passed between the entry of the Statement of Decision on September 28, 2010 and the notices of appeal and cross-appeal.

D**isentitlement Doctrine Requires Dismissal Of Appeal For Failure To Comply With Out-Of-State Orders Relating To Enforcement Of California Judgment**

Stoltenberg v. Ampton Investments, Inc. (2013) 215 Cal.App.4th 1225 – The disentitlement doctrine permits an appellate court to dismiss a party's appeal when the party's refusal to comply with an order from an out-of-state court frustrates the enforcement of the California judgment. In *Stoltenberg*, the Defendants appealed a California judgment against them, but did not post a bond to stay enforcement of the judgment. The Plaintiffs attempted to enforce the judgment by serving a subpoena for financial information on the corporate Defendant in New York, and the Defendants were held in contempt after failing to comply with the New York subpoena. The Court of Appeal dismissed the Defendants' appeal under the disentitlement doctrine. The Court stated that, under the Full Faith and Credit Clause and 28 U.S.C. § 1738, there is no meaningful

distinction between disobeying a New York trial court order and a California trial court order relating to the enforcement of a California judgment. By refusing to comply with the New York trial court order, the Defendants' frustrated the enforcement of a California judgment, and therefore the Court in its discretion chose to dismiss the Defendants' appeal under the disentitlement doctrine.

Judgment Not Final Or Appealable When Parties Agree To Preserve Claims For Later Litigation

Kurwa v. Kislinger et al. (2013) 57 Cal.4th 1097 – In *Kurwa*, the California Supreme Court condemned the practice of dismissing causes of action without prejudice in order to expedite the appeal of other causes of action. The Plaintiff in *Kurwa* sued his partner in a former venture for breach of fiduciary duty and defamation, and the Defendant cross-complained for defamation. In rulings on pre-trial motions, the trial court found that the parties did not owe each other any fiduciary duties. The parties then agreed to (a) dismiss the breach of fiduciary duty claim with prejudice, (b) dismiss the defamation claims without prejudice so that the ruling on the existence of a fiduciary duty could be appealed, and (c) agree to toll the statute of limitations on the defamation claims so that they could be refiled after the resolution of the appeal. The Court of Appeal held that the judgment was "final and appealable" for purposes of the one final judgment rule, but the California Supreme Court reversed. Citing Code of Civil Procedure Section 904.1, the Court explained that "[a] judgment that disposes of *fewer* than all of the causes of action framed by the pleadings . . . is necessarily interlocutory . . . and not yet final as to any parties between whom another cause of action remains pending." It reasoned that where the parties by waiver of the statute of limitations or similar agreement have arranged for causes of action to be "resurrected upon completion of the appeal, they remain 'legally alive' in substance and effect," even if such waiver or agreement is not formally incorporated into the judgment. The Court distinguished cases in which a cause of action is voluntarily dismissed without prejudice and without an agreement to refile the claims after the resolution of an appeal or to extend the statute of limitations, because such a dismissal "includes the very real risk that an applicable statute of limitations will run before the party is in a position to renew the dismissed cause of action."

Order Compelling Non-Party To Produce Documents Is Final And Appealable

Macaluso v. Superior Court of San Diego County (2013) 219 Cal.App.4th 1042 – The Court of Appeal held that an order compelling a nonparty to produce documents in connection with a debtor's examination was an appealable order under Code of Civil Procedure Section 904.1(a)(2)). The Court distinguished other cases involving post-judgment discovery orders against parties, by noting that a non-party is not subject to further proceedings in the action apart from the discovery order, and that the discovery order is, therefore, a final resolution as to the non-party.

Sanctions Warranted On Appeal

Kleveland v. Siegel & Wollensky, LLP (2013) 215 Cal.App.4th 534 – Like any appellant, attorney appellants may be sanctioned for filing frivolous appeals. They may also be held to a somewhat higher standard when acting as appellants than ordinary litigants. In *Kleveland*, the Plaintiff brought a malicious prosecution action against the Defendants arising out of the Defendants' petition for breach of trust and removal. The breach of trust action had been resolved in favor of the Plaintiff, and the trial court noted in its decision that the petition was "filed and pursued in bad faith and for an improper purpose." After the Plaintiff filed the malicious prosecution claim against the plaintiffs in the underlying claim and their attorneys, the attorney Defendants moved to strike the malicious prosecution claim under the anti-SLAPP statute. The trial court denied the motion, finding that, while the malicious prosecution suit arose out of protected activity, the Plaintiff had met his burden of showing a probability of success on the merits—primarily because the court in the first action had already found that the first action had been pursued in bad faith. The attorney Defendants appealed, asserting a variety of arguments with no foundation in the record, and without citing the relevant findings against them. The Court of Appeal affirmed the denial of the anti-SLAPP motion, and granted appellate sanctions on its own motion, bemoaning the fact that neither the defendants nor their counsel—all "officers of the court"—had prevented the filing and prosecution of such a frivolous appeal.

Supreme Court Ruling Which Does Not Establish New Rule Of Law Becomes Law Of Case And Applies Retroactively

Sargon Enterprises, Inc. v. University of Southern California (2013) 215 Cal.App.4th 1495 – Under the law of the case doctrine, the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case. In Sargon, a manufacturer appealed judgment in its breach of contract action against a university arising out of a clinical trial of the manufacturer's dental implant under study at the university. The parties stipulated to entry of judgment to facilitate review of the evidentiary ruling. In a previous appeal, the Court of Appeal reversed as an abuse of discretion the trial court's eve-of-trial exclusion of the manufacturer's expert's trial testimony. The Supreme Court granted review and reversed, concluding that the trial court acted within its discretion in excluding the evidence, and remanded the matter to the Court of Appeal for further proceedings. On remand, the manufacturer submitted a supplemental brief arguing the that Supreme Court announced a new rule of evidentiary procedure, and asked the Court of Appeal to remand the matter to the trial court for a new trial to permit the manufacturer to present lost profit damages in conformity with this new standard. The Court of Appeal affirmed judgment of the trial court. The Supreme Court determined the trial court ruled correctly, thus foreclosing further action in the trial court on lost profit damages. In doing so, the Supreme Court did not announce a new

rule, but instead relied on prior statutory and case law authority to evaluate foundational issues with expert testimony.

Voluntary Dismissal Of All Claims Operates As Final Judgment Notwithstanding Entry Of Later Judgment

Dattani v. Lee (December 19, 2013) ___ Cal.App.4th ___, 2013 Cal. App. LEXIS 1022 – When a plaintiff dismisses all of her causes of action after an adverse ruling by the court, the dismissal may constitute an appealable final judgment. In *Dattani*, the Plaintiff, sued the Defendant, Lee, alleging numerous causes of action. The trial court granted Lee's motion for summary adjudication with respect to the first cause of action on June 27, 2010. On September 10, 2010, Dattani voluntarily dismissed the remaining claims. Some 19 months later, the Court entered a judgment on April 16, 2012, and Dattani appealed that judgment on May 6. Lee moved to dismiss the appeal on the grounds of untimeliness. The trial court granted the motion, and the Court of Appeal affirmed. A plaintiff that voluntarily dismisses an action after an adverse ruling by the court may be able to appeal, but must do so within 180 days of the dismissal. The Court noted that, ordinarily, a plaintiff's voluntary dismissal is deemed to be non-appealable on the theory that dismissal of the action is a ministerial action of the clerk, not a judicial act. However, the Court pointed out that a series of cases has recognized an exception to this rule and has allowed appeals by plaintiffs who dismissed their complaints after an adverse ruling by the trial court, on the theory the dismissals were not really voluntary, but only done to expedite an appeal. These cases stand for the propositions that an appeal will lie when a dismissal was requested after an adverse trial court ruling so that an appeal could be taken promptly, and the request for such dismissal operates as a request for an entry of judgment based on the adverse ruling. The reasoning of these cases has been extended to permit an appeal even though the record contained no judgment or order of dismissal and no indication that either was ever entered.

ARBITRATION AND ADR

Arbitration Agreements – After *Concepcion*, Agreements Waiving Procedural Rights Are <u>Not</u> Necessarily Unconscionable

Sonic-Calabasas A Inc. v. Moreno (2013) 57 Cal.4th 1109 – Employers may, as a condition of employment, require employees to waive the right to a Berman hearing, i.e., an administrative hearing before the California Labor Commissioner to resolve a wage claim. In *Sonic Calabasas A, Inc. v. Moreno* (2011) (*Sonic I*), the California Supreme Court held that it is "contrary to public policy and unconscionable for an employer to require an employee, as a condition of employment, to waive the right to a Berman hearing, a dispute resolution forum . . . to assist employees in recovering wages owed." The United States Supreme Court vacated the judgment and remanded the case for reconsideration in light of its decision in *AT & T Mobility LLC v. Concepcion*, which clarified states' abilities to enforce their own rules of unconscionability on

parties to arbitration agreements given the limitations imposed by the Federal Arbitration Act. On remand, the California Supreme Court reversed its prior decision, holding that the FAA preempts its prior ruling prohibiting waiver of a Berman hearing in employment contract arbitration agreements. Requiring an employee to waive the right to a Berman hearing is not per se unconscionable, but courts may continue to look to agreements that contain Berman waivers for unconscionability under the agreement's "substantive terms and the totality of the circumstances surrounding the formation of the agreement."

Arbitration Agreements – Agreement That Fails To Specify Manner Of Selecting Arbitrator Is Not Uncertain

HM DG, Inc. v. Amini (2013) 219 Cal.App.4th 1100 – An agreement to arbitrate may be valid under CCP Section 1281.6 even if the agreement neither identifies a specific arbitrator nor specifies a particular method for appointing an arbitrator. In *HM DG*, the defendants, a husband a wife, approached the plaintiff about remodeling their home. The parties signed an agreement containing an arbitration clause which outlined three options for arbitrating disputes. The Court of Appeal held that the clause was valid. Section 1281.6 expressly provides that when an arbitration agreement is silent as to the method for appointing an arbitrator or in the event of disagreement between the parties, the court shall appoint an arbitrator at the request of any party to the agreement. The Court also found that the presence of options in an arbitration agreement does not negate the parties' mutual consent to arbitrate disputes where the parties have had opportunity to negotiate, the language of the arbitration agreement is clear, and the parties signatures appear directly below the arbitration clause.

Arbitration Agreement – Failure To Specify Arbitration Award And Unilateral Amendment Clause Does Not Render Agreement Unconscionable

Peng v. First Republic Bank (2013) 219 Cal.App.4th 1462 – A failure to provide a party with arbitration rules, and a unilateral amendment clause does not necessarily invalidate an agreement to arbitrate. The trial court in *Peng* found that an arbitration provision in a plaintiff's employment agreement was both procedurally and substantively unconscionable in that it required plaintiff "to abide by a set of arbitration rules that were not provided to her" nor "identified with any clarity" and gave the defendant employer the power to unilaterally modify or terminate the agreement. The Court of Appeal reversed. While failing to include a copy of the arbitration rules may constitute procedural unconscionability where the arbitration forum limits the scope of relief, the plaintiff failed to "identify any feature of the AAA rules that prevent fair and full arbitration. Failure to attach the AAA rules, standing alone, was not sufficient to support a finding of procedural unconscionability. The unilateral modification provision was not substantively unconscionable because it did not allow for unilateral termination, as the lower court had found, and because the modification power was "subject to implied limitations such as the duty to exercise it in good faith and in accordance with fair

dealings." This implied covenant would prevent an employer from varying the terms of an arbitration agreement once a claim has become known to it, and the plaintiff presented no evidence that the defendant had modified the agreement.

Arbitration Agreements – Unilateral Amendment Clause Is Not Unconscionable

Serpa v. California Surety Investigations Inc. (2013) 215 Cal.App.4th 695 – A company's ability to unilaterally revise its employee handbook does not render an arbitration agreement illusory or unenforceable. In *Serpa*, the Plaintiff employee opposed a motion to compel arbitration, claiming that the arbitration agreement set forth in the Plaintiff's employee handbook was illusory, because the Defendant employer had the unilateral right to amend the handbook. The trial court denied the motion to compel arbitration. The Court of Appeal reversed, reasoning that the arbitration agreement was not illusory, because the covenant of good faith and fair dealing would prevent the Defendant from modifying the handbook in such a way that it would frustrate the Plaintiff's right to arbitrate existing disputes. The Court of Appeal also held that an attorney's fee provision was unconscionable where it purported to require the parties to bear their own attorney's fees regardless of the nature of the claim. The Plaintiff could not be required to waive her statutory right to attorney's fees under the Fair Employment and Housing Act. Nevertheless, the Court of Appeal found that the provision was severable and upheld the remainder of the arbitration Agreement.

Arbitration Agreements – No Arbitration Absent Proof Of Enforceable Agreement To Arbitrate And Unilateral Retroactive Amendment Of Arbitration Provision Is Not Permissible

Avery v. Integrated Healthcare Holdings, Inc. (2013) 218 Cal.App.4th 50 (**Aronson**, Rylaarsdam, Fybel) – While employers may reserve the right to unilaterally modify arbitration agreements in employment contracts, modifications must be made in accordance with the duties of good faith and fair dealing. In *Avery*, the Plaintiffs, employees of four hospitals acquired from Tenet Healthcare Corp. by the Defendant, Integrated Healthcare Holdings, filed a class action against Integrated for failure to pay overtime wages. Integrated moved to compel arbitration on an individual basis pursuant to a provision in Integrated's employee handbook waiving employees' rights to bring class actions against Integrated. The trial court denied the motion to compel arbitration on the grounds that the class action waiver was added to the handbook four months after the class action complaint was filed. The Court of Appeal affirmed. While an employer may reserve the right to unilaterally modify an arbitration agreement, it may do so only in accordance with the principles of good faith and fair dealing. Further, retroactive modifications that apply to known or accrued causes of action are impermissible. Here, Integrated not only sought to apply the class action waiver to pending litigation, but it failed to provide employees with a copy of the new handbook or to provide them with notice of its

existence. The Court was careful to base its decision on the insufficiency of Integrated's evidence, finding that the trial court's decision denying Integrated's motion to compel arbitration should be affirmed because the incomplete and confusing patchwork of documents Integrated submitted prevented the Court from finding an enforceable arbitration agreement.

Arbitration Awards – An Award May Be Reviewed De Novo To Determine If It Violates An Explicit Legislative Expression Of Public Policy

Ahdout v. Hekmatjah (2013) 213 Cal.App.4th 21 – Adhout, project owner, petitioned to vacate arbitration award to general contractor, Hekmatjah, alleging the arbitrators exceeded their authority by allowing Hekmatjah to keep payment for unlicensed contracting work. The trial court held it had no power to review the award unless the parties' contract was illegal in its entirety. The Court of Appeal determined it could review the award if it was based on an illegal contract *or* if the award violated an "explicit legislative expression of public policy." The Court then held that Business & Professions Code section 7031 (CA construction license law) embodies an explicit legislative public policy that unlicensed contractors may not collect payments for unlicensed work. As such, the arbitrators' failure to enforce that public policy would constitute grounds for judicial review, and the trial court should have reviewed the evidence *de novo* to determine whether or not the award violated section 7031 by allowing payment to an unlicensed contractor.

Class Action Waivers Are Enforceable Under The Federal Arbitration Act

American Express Co. v. Italian Colors Restaurant (2013) 133 S.Ct. 2304 – The United States Supreme Court has once again emphasized that courts must enforce arbitration agreements in the absence of extraordinary circumstances. In *American Express Co.*, the Respondents (merchants who accept American Express cards) brought a class action against Petitioner American Express for violations of federal antitrust laws. American Express moved to compel individual arbitration under the Federal Arbitration Act. The Respondents argued that the cost of expert analysis necessary to prove their claims would far exceed the potential recovery for any individual plaintiff. Based on this assertion, the Second Circuit found the class-action waiver unenforceable. The United States Supreme Court vacated that judgment and remanded the case to the Court of Appeals, which again found the waiver unenforceable. The United States Supreme Court reversed. It held that under the FAA, courts must "rigorously enforce" arbitration agreements according to their terms unless the FAA's mandate has been "overridden by a contrary congressional command." Here, no contrary congressional command required invalidation of the class action waiver provision because antitrust statutes do not guarantee an affordable remedy at law.

Compelling Arbitration – Parties To Arbitration Agreement Can Be Compelled To Arbitrate Unless Action Includes Non-Parties With Common Factual Or Legal Issues That Could Result in Conflicting Rulings

Acquire II Ltd. v. Colton Real Estate Group (2013) 213 Cal.App.4th 959 (**Aronson**, Fybel, Ikola**)** – In *Acquire II*, the Court of Appeal reversed the denial of a motion to compel arbitration. The Court held that the defendants' failure to request a statement of decision after denial of their motion to compel arbitration waived any objection to the trial court's failure to make necessary findings, and raised a presumption that "the trial court made all necessary findings supported by substantial evidence." As a result, the Defendants were limited to an argument that the evidence could not support the implied findings in favor of the denial of their motion to compel arbitration. Turning to the substance of the motion to compel, the Court of Appeal held that Code of Civil Procedure section 1281.2 presents three conditions that must be shown before a court may refuse to enforce a valid arbitration award: 1) at least one party to the contract must be litigating against a party that did not agree to arbitrate; 2) litigation must involve the same or related transactions; and 3) conflicting rulings must be possible if litigation and arbitration proceed separately. While some of the parties in the *Acquire II* action had agreed to arbitration, and some had not, their claims all related to different transactions, and thus there was no evidence of "a common factual or legal issue that would create the possibility of conflicting rulings between those Plaintiffs who agreed to arbitration and those who did not." As such, the Court of Appeal held that the trial court erred by refusing to enforce the arbitration agreements under section 1281.2. The Court remanded the case for further consideration as to (1) whether the conditions in CCP section 1281.2 (c) were satisfied so as is preclude arbitration as to certain claims or parties and (2) some or all of the claims subject to arbitration should be stayed until the litigation was completed, or vice versa.

Disclosures – Arbitrators Must Disclose When Counsel For A Party Is A Member Of The Arbitration Service Provider

Gray v. Chiu (2013) 212 Cal.App.4th 1355 – An arbitration award is properly vacated where a neutral arbitrator fails to disclose that counsel for one of the parties is a member of the administering dispute provider resolution organization (DRPO). In *Gray*, the Plaintiff and Defendant in a medical malpractice action agreed to arbitration before a three-member panel. Each party appointed an arbitrator, and the party arbitrators jointly selected a neutral arbitrator, Judge Alan Haber from ADR Services. Attorney Ginsburg, who represented the Defendant, announced after arbitration commenced that he would retire from litigation and become an arbitrator with ADR Services. He continued to represent the Defendant in the matter, however, and attended all arbitration sessions. At no time did the neutral arbitrator disclose Ginsburg's relationship with ADR Services to the Plaintiff. After judgment was entered in favor of the Defendants, the Plaintiff moved to vacate the award on the ground that the arbitrator violated the disclosure provisions of the California Arbitration Act and the California Ethics Standards for

Neutral Arbitrators in Contractual Arbitrations. The trial court denied the motion, but the Court of Appeal reversed. The California Arbitration Act requires disclosure of "[a]ny matters required to be disclosed by the ethics standards for neutral arbitrators," and the plain language of the Ethics Standards compels the arbitrator to disclose that a lawyer in the arbitration is a member of the administering DRPO, regardless of whether there is any significant affiliation between that lawyer and the neutral arbitrator. The Court of Appeal also held that because the Ethics Standards cannot be waived, the motion to vacate could not be defeated by claims that the Plaintiff knew or should have known that the Defendants' attorney was affiliated with ADR Services.

Disqualification – An Arbitrators' Use Of An Attorney As A Reference On A Resume Raises A Reasonable Suspicion Of Bias

Mt. Holyoke Homes LP v. Jeffer Mangels Butler & Mitchell LLP (2013) 219 Cal.App.4th 1299 – An arbitrator's use of an attorney as a reference on his resume raises a reasonable suspicion of bias in favor of that attorney's law firm. In *Mt. Holyoke Homes*, the Plaintiffs filed a legal malpractice action against Defendant law firm Jeffer Mangels Butler & Mitchell. Jeffer Mangels compelled arbitration pursuant to a clause in the parties' legal services agreement. After the arbitrator found in favor of Jeffer Mangels, the Plaintiffs moved to vacate the award, because the arbitrator failed to timely disclose his relationship with a partner in the firm (Robert Mangels), who was listed on the arbitrator's resume as a reference. The trial court denied the motion, but the Court of Appeal reversed and vacated the award. It held that a "reasonable person aware of the facts reasonably could entertain a doubt that [the arbitrator] could be impartial," based on the arbitrator's reliance on Mangels as a professional reference. The fact that the arbitrator's resume was readily available on the Internet did not discharge the arbitrator's disclosure requirement because it was undisputed that the Plaintiffs had no actual knowledge of the resume until after the conclusion of the arbitration.

Indigent Plaintiffs – Arbitration Agreement Is Unconscionable If It Conditions Arbitration On Payment Of Fees A Consumer Cannot Afford; Thus, Parties Compelling Arbitration Against Indigent Opponents Must Either Pay Up-Front Costs Or Lose Right To Arbitrate

Roldan et al. v. Callahan & Blaine et al. (2013) 219 Cal.App.4th 87 (**Rylaarsdam**, O'Leary, Moore) – Indigent plaintiffs cannot be denied the right to adjudicate their claims by arbitration agreements that do not provide for equal access to arbitration for clients of limited means. In *Roldan*, the Plaintiffs sued a law firm for alleged misconduct. When the Defendant law firm moved to compel arbitration, the Plaintiffs sought an order relieving them of the obligation to pay the "up front" costs of the arbitration. The trial court denied the motion, and the Court of Appeal reversed, holding that, while the trial court could not order the arbitration association to waive its fees, nor order the Defendant to pay the Plaintiffs' share of those fees, it could require

the Defendant to choose between either voluntarily paying the Plaintiffs' share, or waiving its right to arbitration and proceeding in court. The Court of Appeal remanded the case to the trial court for a determination of the Plaintiffs' financial ability to pay their share of the arbitration fees.

Judicial Reference – Reference Agreement Need Not Specifically Mention Waiver Of Right To Jury Trial

O'Donoghue v. The Superior Court of the County of San Francisco (2013) 219 Cal.App.4th 245 – A reference agreement under Code of Civil Procedure section 638 is enforceable even if it does not explicitly state that the parties are waiving the right to a jury trial. In *O'Donoghue*, the Defendants were sued for the breach of a guaranty executed in connection with a construction loan. The guaranty contained an agreement to resolve all disputes through judicial reference. When the Plaintiffs sought to enforce the reference provision, the Defendants objected on the grounds that the provision did not contain the words jury, trial, or waiver. The trial court granted the motion to compel judicial reference, and the Court of Appeal affirmed. Under section 638 of the Code of Civil Procedure, courts may transfer a dispute to a referee pursuant to a written agreement between the parties. Section 638 does not require an otherwise enforceable reference agreement to include an express waiver of the right to a jury trial. Further, the Court of Appeal found that the reference provision was not sufficiently procedurally and substantively unconscionable to render it unenforceable because the evidence showed that the provision was conspicuous, the Defendants were sophisticated parties, and burdensome costs were not shown.

Jurisdiction – Once Court Assumes Jurisdiction Over Motion To Compel Arbitration, Jurisdiction Is Retained For Motion To Vacate; Punitive Damage Awards In Arbitration Are Not Limited To Single Digit Ratio Cap

Mave Enterprises Inc. v. The Travelers Indemnity Co. of Connecticut (2013) 219 Cal.App.4th 1408 – The court held that where a trial court orders arbitration, it retains jurisdiction over the matter, and need not stay the case when one party moves to overturn the arbitration award after the arbitration is completed. The Plaintiff in Mave Enterprises originally sued in state court, but the parties then agreed to arbitrate their dispute. After arbitration, the Defendant filed a petition to vacate in federal court. The Plaintiff then filed a motion to confirm in the still pending state court action. The trial court denied the Defendant's motion to stay the state court case pending resolution of the federal action. The Court of Appeal affirmed, holding that the state court action was the first filed action, and there was no reason that the matter needed to be heard in federal court rather than state court. The Court expressly rejected the defendants' argument that the federal court action was the first filed action regarding the validity of the arbitration award, refusing to "segregate the parties' litigation into discrete procedural stages. In the Court of Appeal's view, the key issue was "which court first obtained jurisdiction over the subject matter—the parties' dispute."

Second, with respect to the arbitrator's award of $2.4 million in punitive damages (15 times the amount of compensatory damages), the court held that, in absence of a contractual provision allowing review of an award for legal error, an arbitration award of punitive damages could not be reversed for exceeding a single digit ratio of punitive to actual damages. Key to the Court of Appeal's decision was that judicial confirmation of an arbitration award involves only limited state action, and thus does not involve the same due process limitations applicable to court awards of punitive damages.

Sanctions Under § 128.7 Are Not Available For Filings In Arbitration

Optimal Markets Inc. v. Salant (2013) 221 Cal.App.4th 912– Sanctions may not be imposed under Code of Civil Procedure section 128.7 for conduct that occurs solely in arbitration. In *Optimal Markets Inc.*, the Court of Appeal affirmed the trial court's order (1) confirming an arbitration award in favor of the Defendants, and (2) denying a separate motion brought by some of the Defendants for an award of sanctions against Plaintiff's attorneys under Code of Civil Procedure section 128.7, on the grounds that the case was "pursued . . . for an improper purpose, and that the claims . . . were not supported by law, nonfrivolous extensions of the law, or fact." The trial court held that it could not award sanctions under section 128.7 because the Plaintiff's attorneys entered the case after the complaint was filed in court and after the action had been stayed pending binding arbitration and had therefore not "presented to the court" any pleadings or arguments, as is required by that section. The Court of Appeal agreed, holding that there was no authority to support applying section 128.7 if an attorney has presented a frivolous claim to an arbitrator rather than to the court. The arbitrator could have imposed sanctions if he found that the facts and circumstances supported such a decision, and chose not to do so. The trial court, with less familiarity with the case than the arbitrator, properly deferred to the arbitrator's discretion.

Parties To Arbitration Agreement – Allegation In Complaint That Defendants Are Each Other's Agents Is Not Binding For Determining Whether All Defendants Are Parties To An Arbitration Agreement

Barsegian v. Kessler & Kessler (2013) 215 Cal.App.4th 446 – Under Code of Civil Procedure section 1281.2(c), a court may refuse to compel arbitration if a party to an arbitration agreement is also a party to a pending action with a third party that arises out of the same transaction or occurrence and creates the possibility of inconsistent rulings. In *Bargesian*, the Plaintiff sued several parties, including the Defendant law firm Kessler & Kessler, for conduct related to a real property transaction. Kessler & Kessler moved to compel arbitration based on an arbitration provision in the parties' engagement agreement. The Plaintiff opposed the motion to compel arbitration based on the possibility that the rulings in an arbitration with Kessler & Kessler could conflict with the rulings in the case against the other defendants. Kessler & Kessler argued that the Plaintiff's allegation that all of the defendants were acting as agents of one another

constituted a binding judicial admission, and that, as each other's agents, all Defendants would be entitled to enforce each other's arbitration agreements, thereby eliminating the possibility of inconsistent decisions. The trial court denied the motion, and the Court of Appeal affirmed. A binding judicial admission is a factual allegation by one party that is admitted by the opposing party. Here, Kessler & Kessler made clear that they intended to dispute the Plaintiff's agency allegations, and thus the Court observed that it would be unfair to allow a party to invoke agency principles when it was to that party's advantage to do so, but to disavow those same principles when it was not. As the mutual agency of all Defendants was not a judicially admitted fact, it was proper to deny the request for arbitration under section 1281.2.

Waiver Of Arbitration – Issue of Waiver By Litigation Conduct Is Decided By Trial Court, Not Arbitrator

Hong v. CJ CGV America Holdings Inc. (December 18, 2013) ___ Cal.App.4th ___, 2013 Cal. App. LEXIS 1015 – A party waives the right to compel arbitration by engaging in substantial "litigation conduct" prior to filing the motion. In *Hong*, the Plaintiff shareholders filed a complaint against the Defendants for breach of fiduciary duty. The Defendants filed a demurrer, moved to require the Plaintiffs to furnish a bond pursuant to section of 800 of the Corporations Code, and filed a separate complaint against one of the Plaintiffs. The Defendants then moved to compel arbitration. The trial court denied the motion, and the Court of Appeal affirmed, holding that the Defendants had engaged in sufficient "litigation conduct" and had waived their right to compel arbitration. The Court of Appeal observed that California statutory and decisional authority recognized the issue of waiver by litigation conduct was ordinarily resolved by the trial court, not an arbitrator. While the Court agreed with Defendants that the case was subject to the Federal Arbitration Act because it involved interstate commerce, it rejected Defendants' argument that language from United States Supreme Court case law that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability applied to the case. Neither of the Supreme Court cases at issue involved whether the right to arbitrate was waived by participation in litigation. Thus, the cases were not controlling authority given the issue in the instant case. The Court also noted there were persuasive federal appellate court decisions holding issues of waiver by litigation conduct were decided by a court, not an arbitrator. Accordingly, the Court concluded that the trial court correctly ruled that it, rather than an arbitrator, should decide the merits of the waiver by litigation conduct defense to arbitration asserted by Plaintiffs.

ATTORNEY PRACTICE

Attorney-Client Privilege – Attorney Claiming Privilege Must Provide Evidence That Parties Involved In Communications Were Agents Of Client

Zimmerman v. Superior Court of San Diego County (2013) 220 Cal.App.4th 389 – In Zimmerman, the Petitioner public defender lodged certain evidence with the trial court that she

received from unidentified third parties. After the case was transferred to a new public defender, the prosecutor served discovery seeking facts about the circumstances under which the Defendant obtained the evidence, and the identity of the third parties who provided the evidence. The Petitioner refused to answer the discovery, citing the attorney-client privilege, and claiming that the third parties were agents of her client. The trial court found the Petitioner in contempt, because she had failed to establish the applicability of the privilege by providing evidence that the third parties were agents of her client. The Court of Appeal affirmed, holding that while "the attorney-client privilege can protect the information coming to an attorney from the client's agent as long as the agent is acting within the scope and authority of his agency," a criminal defense attorney's mere representation of agency, without more, is not sufficient to support an assertion of privilege.

Attorney-Client Privilege – Communications Between City And Developer Not Privileged Prior To Project Approval

Citizens for Ceres v. Superior Court (2013) 217 Cal.App.4th 889 – In a CEQA proceeding, the common interest doctrine does not protect otherwise privileged communications between the developer and the city made prior to project approval. In *Citizens for Ceres*, the Plaintiffs petitioned for writ relief because the administrative record for an environmental impact report did not contain any communications between the city and the developer. The Court of Appeal ruled for the Plaintiffs, reasoning that the interests of the lead agency and the project applicant are fundamentally divergent during the environmental review process. The lead agency is required to analyze the project's environmental impacts objectively, while the applicant is attempting to achieve approval on the least burdensome terms possible. Furthermore, prior to project approval, the lead agency cannot have an interest in producing a legally defensible environmental impact report. The purpose of the attorney-client privilege is to encourage candid communication between lawyers and clients; the attorney-client privilege does not exist to encourage strategizing between a private applicant and a government agency to respond to potential legal challenges by the public. The Court noted that its decision potentially conflicted with *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217.

Attorney Malpractice – Malpractice Claim May Be Assigned As Part Of Larger Commercial Transaction Between Insurance Companies

White Mountains Reinsurance Co. of America v. Borton Petrini LLP (2013) 221 Cal.App.4th 890 – While California generally bars the assignment of legal malpractice claims, an exception exists where such claims are part of a larger commercial transaction between insurance companies. Modern Services Insurance Company issued an auto insurance policy to Flora Cuison. Cuison was involved in an accident in which a third party was seriously injured. When the third party filed suit against Cuison, Modern's claims administrator retained the Defendant, Borton Petrini, LLP, to represent Cuison. Borton Petrini failed to respond to an offer to settle the

case for $100,000, and, after new attorneys were substituted in, the case was settled for $2.8 million. After multiple stock purchases, White Mountains assumed Modern's "gross direct obligations and liabilities and rights under and relating to" Modern's insurance business in California, including the Cuison policy. After the Cuison case was settled, White Mountains filed a legal malpractice action against Borton as the successor-in-interest to Modern Service. The trial court determined that White Mountains lacked standing to pursue the action against Borton because California bars the assignment of legal malpractice claims. The Court of Appeal reversed. It held that an exception to California's general rule barring the assignment of a legal malpractice cause of action exists where, as here, "(1) the assignment of the legal malpractice claim is only a small, incidental part of a larger commercial transfer between insurance companies; (2) the larger transfer is of assets, rights, obligations and liabilities and does not treat the legal malpractice claim as a distinct commodity; (3) the transfer is not to a former adversary; (4) the legal malpractice claim arose under circumstances where the original client insurance company retained the attorney to represent and defend an insured; and (5) the communications between the attorney and the original client insurance company were conducted via a third party claims administrator."

Client Communications With Opposing Party's Employees Is Permissible If Not Directed By Attorney

San Francisco Unified School District ex rel. Contreras v. First Student Inc. (2013) 213 Cal.App.4th 1212 – A party's direct communications with the opposing party's employees, who are potential parties within the meaning of Rules Prof. Conduct rule 2-100, did not violate rule 2-100 if the communications were not improperly directed by the Plaintiffs' counsel. In an action brought under the False Claims Act by former employees against Defendant company, the trial court issued an injunction barring the Plaintiffs from communicating with the Defendant's current employees. The Court of Appeal vacated the injunction, finding in part that it was not supported by evidence of Rules Prof. Conduct, rule 2-100 violations. There was no substantial evidence that counsel improperly directed the Plaintiffs' communications. There was no evidence that former employees were acting at the behest of counsel, or that counsel coached former employees in any way regarding communications with current employees, except to inform them they had the right to engage in such communications. Indeed, the record does not disclose that counsel was even aware that former employees planned to contact current employees before the contacts occurred. The Court also noted that reversal was also required by the policies reflected in the False Claim Act's prohibition against employer interference with employee communications in support of a False Claims Act action and that free speech principles raised serious concerns about the order's constitutionality.

Conflicts – Firm May Not Represent A City Both As An Advocate Defending A Termination, And As An Advisor Regarding Reinstatement

Sabey v. City of Pomona (2013) 215 Cal.App.4th 489 – If an agency uses a partner in a law firm as an advocate in a contested matter, it may not use a partner from the same firm as an advisor to the decision maker in the same contested matter. In *Sabey*, the City of Pomona engaged an attorney, Brown, to represent it in a non-binding arbitration proceeding concerning the termination of a police officer, Sabey. The arbitrator issued an opinion and award recommending that the City convert the termination into a suspension without pay. After the City Council received the arbitrator's decision, it asked Bray, a partner in Brown's firm, to serve as its legal advisor. Brown subsequently met with the City Council to discuss the recommended arbitration award, which the City Council rejected. Sabey filed a writ petition objecting to the City's decision on due process grounds. The trial court denied his petition, but the Court of Appeal reversed. It held that because law partners owe each other fiduciary duties and Bray was in the position to review Brown's work, there was "a clear appearance of unfairness and bias," despite the fact that the firm had implemented an ethical wall between Bray and Brown. In its opinion, the Court also clarified that the *Howitt* rule, which permitted two lawyers from the same county counsel's office to serve in advocacy and advisory roles in the same dispute with proper ethical screening, applies only to government lawyers, who do not owe each other fiduciary duties.

Disqualification – Attorney Barred From Successive Representation Of Adverse Parties Where Representations Are Substantially Related

Fiduciary Trust International of California v. Superior Court (2013) 218 Cal.App.4th 465 – An attorney is properly disqualified where he represents a client with interests that are potentially adverse to a former client and there is a substantial relationship between the subjects of the current and former representations. In *Fiduciary Trust International of California*, attorney Raymond Sandler of Sandler & Rosen LLP drafted separate wills for husband and wife Willet and Betty Brown. Willet's will provided for the majority of his estate to go to two trusts. After Willet and Betty died, approximately $100 million in taxes became due on the trusts, and a dispute over payment of the taxes arose between Willet's trustees and Betty's representative, Fiduciary Trust International of California. Fiduciary Trust moved to have Sandler & Rosen, counsel for the trustees of Willet's estate, disqualified based on its prior representation of Betty. The trial court denied the motion, but the Court of Appeal reversed. A disqualifying conflict of interest arises "in cases of successive representation, where an attorney seeks to represent a client with interests that are potentially adverse to a former client of the attorney" if "the client demonstrate[s] a 'substantial relationship' between the subjects of the antecedent and current representation." Here, Sandler & Rosen's representation of Betty in drafting her will was directly related to the tax dispute between her representative and the trustees of Willet's estate. As such, the trial court erred in denying Fiduciary Trust's disqualification motion.

Disqualification – Attorney Not Barred From Successive Representation Of Adverse Parties Where Representations Are Not Substantially Related

Khani v. Ford Motor Company (2013) 215 Cal.App.4th 916 – An attorney is not automatically disqualified from handling a case against his former client solely because the new case involves claims under the same statute that was at issue in the former representation. In *Khani*, the Plaintiff consumer sued Ford Motor Company and the car dealership that sold him his Lincoln Navigator under California's Lemon Law. Ford moved to disqualify the Plaintiff's attorney, based on a declaration that the attorney worked on lemon law cases for Ford at his prior law firm, and was privy to confidential client communications and information relating to the defense of such cases, as well as to pre-litigation strategies, tactics, and case handling procedures. The trial court granted the disqualification motion, but the Court of Appeal reversed. To disqualify an attorney in the case of successive representation of clients with adverse interests, the former client must show that the successive representations are substantially related. This analysis requires a comparison of the specific factual and legal similarities between the current case and the former representation. As such, the Court of Appeal held that a barebones declaration that the present case involves the same statute as the previous representations is insufficient to warrant disqualification, as are general allegations that the attorney is privy to the former client's general litigation philosophy or "overall structures and practices."

Disqualification – Delay Of Two Years In Bringing Motion To Disqualify Operates As Waiver

Liberty National Enterprises, L.P. v. Chicago Title Ins. Co. (2013) 194 Cal.App.4th 839 – An insurer's unreasonable delay in bringing a motion to disqualify the insured's counsel operated as a waiver because the delay was prejudicial to the insured. The insurer brought the motion to disqualify the insured's counsel after a trial had already occurred on coverage. The Court of Appeal affirmed the trial court's denial of the motion. The insurer had been on notice for two years of the alleged breach of confidentiality, which indicated that the alleged breach was not viewed as serious by the insurer. In addition, the unreasonableness of the delay was of such character and weight that the burden shifted to the insurer to justify the delay. Pursuant to Cal. Rules of Court 8.204(a)(1)(C), the Court also disregarded statements by the insurer's counsel that purported to be facts, but had no support in the record.

Disqualification – Firm May Simultaneously Represent Entity And Management In Action Against Minority Shareholders

Havasu Lakeshore Investments LLC v. Fleming (2013) 217 Cal.App.4th 770 (**Ikola**, Fybel, Thompson) – An attorney may jointly represent an LLC and its management against non-managing minority members. The law firm Hart, King & Coldren (HKC) represented an LLC, along with several entities and individuals that effectively acted as the LLC management. Two of the LLC's minority members, sued one of the managers for breach, misrepresentation, and

fraud. The management and the LLC filed a cross-complaint against the minority members, who then moved to disqualify HKC from representing the LLC. The trial court granted the disqualification motion based on the duty of loyalty, and the Court of Appeal reversed. It noted that disqualification on the grounds of the duty of loyalty requires, at a minimum, evidence of a potential, rather than merely hypothetical, conflict of interest. Here, the interests of the LLC and the management were "clearly allied" with respect to the cross-complaint, and were not adverse in the original claims against the management, because the LLC was not a party to that action. Further, there is no authority to support that proposition that an attorney may never jointly represent an LLC and its management against non-managing minority members without a showing of a violation of the duty of loyalty or duty of confidentiality.

Disqualification – Firm That Hires The Opposing Party's Former Expert Is Not Necessarily Disqualified

DeLuca v. State Fish Co., Inc. (2013) 217 Cal.App.4th 671 – Hiring the opposing side's former expert witness will not result in the disqualification of the counsel that hires and consults with the expert in the absence of evidence that the expert has material confidential information. In *DeLuca*, the parties were in a dispute over the ownership of a fish processing plant. At trial, the Defendant offered the testimony of Leo Vusich, an industrial real estate broker, who testimony ended up being favorable to the Plaintiffs. After a judgment in favor of the Defendant was reversed, the matter was remanded for retrial of certain claims. On remand, the Plaintiffs informed the Defendants that they intended to engage Vusich to inspect the plant. The Defendant moved to disqualify the Plaintiffs' counsel, arguing that Vusich had learned confidential information about the Defendant while he was retained as its expert witness, and that Plaintiffs' counsel gained access to that information by retaining Vusich. The trial court granted the disqualification motion, but the Court of Appeal reversed, holding that there was insufficient evidence to show that confidential information materially related to the proceedings was conveyed to Vusich in his earlier relationship. In order to satisfy that burden, a party seeking disqualification need not disclose the information that the expert had access to, but must "provide the court with the nature of the information and its material relationship to the proceedings." The Court of Appeal held that a conclusory declaration from the Defendant's counsel, asserting that he communicated "impressions, conclusions, opinions and theories" to Vusich was insufficient to meet that burden.

Malpractice – Causation – Plaintiff Must Prove That Default Judgment Would Have Been Collectible If It Had Been Renewed

Wise v. DLA Piper LLP (2013) 220 Cal.App.4th 1180 – If a plaintiff in a legal malpractice action does not offer sufficient evidence that a default judgment would have been collectible but for a defendant law firm's failure to renew that judgment, the defendant law firm will prevail. In *Wise*, the plaintiffs obtained a default judgment against a third party. Their law firm, DLA Piper,

advised them that the third party was insolvent but failed to advise them that the judgment would expire if not renewed within 10 years. After the expiration of the judgment, the plaintiffs brought a malpractice action against DLA Piper. The trial court ruled in favor of the plaintiffs, but the Court of Appeal reversed. In a professional malpractice action, plaintiffs bear the burden of establishing that they suffered actual loss or damage as a result of the professional's negligence. This requires a showing, based on actual circumstances, that the judgment could have been collected from the judgment debtor. Here, the plaintiffs offered no evidence of the judgment debtor's solvency; instead, they relied upon the speculation and assumptions of a single expert witness. Because plaintiffs failed to offer sufficient evidence on damages, DLA Piper was entitled to judgment in its favor.

Statute Of Limitations – Third Party Claims Against Attorneys Are Subject To One-Year Statute Of Limitations

Yee v. Cheung (2013) 220 Cal.App.4th 184 – The Fourth Appellate, Division One concurred with *Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, a 2011 opinion from the Second Appellate District, Division Eight, which held that the one year statute of limitations for actions against attorneys other than fraud applies to actions for malpractice brought against an attorney by non-clients. The Court in *Yee* also held that held that the denial of a nonsuit in an underlying action establishes the defense of probable cause in a subsequent malpractice action. (See page __, *infra*)

Tripartite Attorney-Client Relationship Arises Where Insurer Hires Attorney To Prosecute Claims On Behalf Of Insured With Reservation Of Rights

National Financial Lending, LLC v. Superior Court of San Diego County (December 18, 2013) ___ Cal.App.4th ___, 2013 Cal. App. LEXIS 1016 – A tripartite attorney-client privilege may arise when an insurer hires counsel to prosecute an action on the behalf of an insured, even if the insurer provides counsel under a reservation of rights. In *National Financial Lending,* Fidelity provided title insurance to Bank of America. When Bank of America tendered a claim under the policy, Fidelity hired the law firm of Gilbert, Kelly, Crowley & Jennett to prosecute the underlying lawsuit on Bank of America's behalf. The Defendant served a subpoena duces tecum on Fidelity's parent company, seeking documents that included communications between GKCJ and Fidelity. Bank of America moved to quash or modify the subpoenas to exclude communications between GKCJ and Fidelity, arguing that they were protected by the attorney-client privilege and/or the work product doctrine. The trial court denied the motion, but the Court of Appeal reversed. It held that a tripartite attorney-client relationship was established when Fidelity retained GKCJ to represent Bank of America pursuant to its policy obligations. The fact that Fidelity and GKCJ did not sign a formal retainer agreement is immaterial, as a formal contract is not a prerequisite to claiming attorney-client privilege.

ATTORNEY'S FEES

Contractual Fees Available Where Contract Is Relevant To Defense Against Non-Contractual Claim

Windsor Pacific LLC v. Samwood Co., Inc. (2013) 213 Cal.App.4th 263 – Where the interpretation of a contract is relevant in adjudicating a defense to an action, the prevailing defendant may obtain attorney's fees under a contractual clause that provides for attorney's fees "in any action or proceeding to enforce or interpret the provisions of this Agreement." In *Windsor Pacific*, the Defendant prevailed in an action to establish a prescriptive easement. The Defendant successfully argued that the Plaintiff was equitably estopped from claiming that its use of the easements was adverse, because the Defendant reasonably believed the use was permissive pursuant to an easement agreement with an attorney's fee clause. The Court of Appeal held that the Defendant was entitled to recover its attorney's fees, because the "action" involved the interpretation of the contract, even though the interpretation was only relevant to the defense of equitable estoppel. The term "action" referred to the entire action, not just the affirmative claims.

Fees For Petition To Compel Arbitration Must Await Resolution Of Causes Of Action

Roberts v. Packard, Packard & Johnson (2013) 217 Cal.App.4th 822 – In *Roberts*, the issue was whether the trial court was correct in awarding attorney fees to the Defendant law firm (former attorneys for the Plaintiff) on a petition to compel arbitration even though the resolution of the underlying causes of action would be determined by an arbitrator, and the prevailing party on those causes of action would not be known until arbitration was completed. The Court stated that since Civil Code section 1717 refers to "the" prevailing party, the statute envisions that only one side in a lawsuit may be the prevailing party, and that determination cannot be made until the parties' causes of action have been resolved in either a court or arbitration. Moreover, the Court reasoned that a petition to compel arbitration is not an "action" because the underlying causes of action must still be heard before the arbitrator. The Court continued that the legislature did not indicate any intention to provide for multiple attorney fee awards to multiple prevailing contracts in a single lawsuit on a single contract. *Roberts* is contrary to the decision in *Benjamin, Weil & Mazer v. Kors*, (2011) 195 Cal.App.4th 40, where the First District Court of Appeal held that defendants who prevail on a petition to compel arbitration filed in a pending lawsuit are routinely entitled to attorney fees. The *Roberts* court reasoned that the *Kors* court failed to adequately consider that the purpose of section 1717 is to award fees to the party "who recover[s] a greater relief in the action on the contract" and did not recognize that a petition to compel arbitration is not a "discrete proceeding" because the trial court retains jurisdiction over the matter.

Prevailing Party Is Party With Greatest Net Recovery Where Contractual Fee Provision Applies To "Any Dispute"

Maynard v. BTI Group, Inc. (2013) 216 Cal.App.4th 984 – In *Maynard*, the Plaintiff prevailed on a negligence claim, but lost on a breach of contract claim. The Plaintiff then sought recovery of attorney fees based on a contractual attorney's fee provision that applied to "any dispute." The Defendant countered that it was entitled to attorney fees under Code of Civil Procedure section 1717 because it prevailed on the breach of contract claim. The trial court granted the Plaintiff's request, and the Court of Appeal affirmed. Pursuant to section 1021, except where attorney's fees are specifically provided for by statute, the parties' agreement dictates the award of attorney's fees. Where, as here, an attorney's fee provision encompasses both contractual and non-contractual claims the prevailing party will normally be the party with the greatest net recovery. The Court of Appeal clarified that Section 1717, which defines prevailing party as the party who recovers a greater relief in the action on the contract, applies only to contractual agreements that limit recovery of attorney fees to the party prevailing in an action to enforce that contract.

Public Records Act – Fees Available To Partially Prevailing Petitioner

Garcia v. Governing Board of Bellflower Unified School District (2013) 220 Cal.App.4th 1058 – Plaintiff Garcia, a former employee of Defendant Bellflower Unified School District, alleged that she was exposed to mold during the course of her employment. She filed a request for eight categories of records under the California Public Records Act, which the District denied. Garcia then filed a petition for a writ of mandate seeking to compel the District to provide the requested records. The trial court granted Garcia's petition for three of the categories of records, and Garcia then successfully moved for an award of attorney's fees and costs. The Court of Appeal affirmed. It held that the trial court properly found that Garcia was the prevailing party because the litigation was "necessary to prompt [the District] to comply with the Public Records Act" and because Garcia achieved at least some of the benefit sought in the lawsuit.

Public Records Act – Mere Failure To Prevail Does Not Render Action Frivolous Under Statutory Fee Provision

Crews v. Williams Unified School District (2013) 217 Cal.App.4th 1368 – Mere receipt of documents pursuant to a public records act request does not automatically make the petitioner the prevailing party in an action under the Public Records Act, but a mere failure to prevail does not make the action frivolous. In *Crews*, a newspaper publisher requested emails from Williams Unified School District in connection with an investigation into misappropriation of public funds. There was a dispute over the format of the documents that would be produced, but the Petitioner indicated that format would not be a problem if the documents were produced in a reasonable amount of time. Shortly after a petition to compel production of the e-mails was filed under the California Public Records Act (in fact, later the same day), the Respondent began a

"rolling production," eventually producing 60,000 emails on compact disc in PDF format. The trial court found that the District had adequately complied with the request and awarded it attorney fees and costs on the grounds that the PRA petition was frivolous. The Court of Appeal rejected the Petitioner/Appellant's claim that he was the prevailing party simply because the documents had been produced, because it appeared that the documents would have been produced in absence of the Petition. The Court of Appeal reversed the award of attorney's fees, however, finding that the Petitioner's mere failure to prevail on his PRA claim did not support a finding that it was devoid of merit or brought solely for the purpose of harassment.

Sanction For Fee Motion

Ellis v. Toshiba America Information Systems, Inc. (2013) 218 Cal.App.4th 853 – Appellant, attorney Lori Sklar, represented the Plaintiffs in a class action against Toshiba America Information Systems. After the trial court granted preliminary approval of a settlement agreement, Sklar filed a petition requesting fees of over $12,000,000 plus expenses for Sklar Law Offices over $900,000. The trial court ultimately awarded Sklar Law Offices $176,900 in fees for work by Sklar Law Offices Staff during the merits phase, awarded nothing for Sklar's work, and subtracted $165,000 in sanctions, for a net award to Sklar Law Offices of $11,000. The Court of Appeal affirmed the sanction award. It held that monetary sanctions were appropriate because Sklar destroyed her original electronic billing records, disobeyed numerous court orders to allow experts to search her hard drive during the protracted fee litigation dispute and failed to meet and confer in good faith with Toshiba.

BANKING

Lenders May Owe Duty Of Care To Borrowers

Jolley v. Chase Home Finance LLC (2013) 213 Cal.App.4th 872 – The Court of Appeal applied a fact-intensive, multi-factor analysis to determine if Chase owed a duty of care to the borrower (Jolley), and ultimately refused to apply the general rule that financial institutions owe no duty of care to a borrower when its role in a loan transaction is limited to its conventional role as a lender. Chase was not entitled to summary judgment because triable issues of fact existed that a financial institution owes no duty of care, and therefore, whether it was potentially liable to the borrower for its alleged negligence.

CIVIL PROCEDURE

170.6 Motion – Time To File Expired In Special Proceeding That Is A Continuation Of The Underlying Action

National Financial Lending LLC v. Superior Court (December 18, 2013) ___ Cal.App.4th ___, 2013 Cal. App. LEXIS 1016 – A third party may not bring a preemptory challenge under Section

170.6 in a special proceeding if that special proceeding is a continuation of the underlying action. National Financial Lending (NFL) transferred funds to its parent company despite having been served with a notice of levy by the parent company's judgment creditor. After the parent company was placed in receivership, the judgment creditor brought suit against NFL for violation of the notices of levy.

NFL moved to quash the notices and to dismiss the trial judge pursuant to Code of Civil Procedure section 170.6. NFL's motions were denied and NFL filed a petition for a writ of mandate. The Court of Appeal affirmed the lower court's decision and denied the petition. Section 170.6 is not available after "trial has commenced or the trial judge has resolved a disputed issue of fact relating to the merits." These limitations apply to third parties, such as NFL, who are brought into an action or special proceeding after a factual issue has been determined. The Court of Appeal held that NFL's challenge was barred on one of two grounds. First, the Court of Appeal concluded that neither the Plaintiffs' Section 701.120 motion to impose liability on NFL for the transfer of assets nor NFL's motion to quash the notices of levy constituted "special proceedings" for the purposes of a section 170.6 challenge. Instead, they were merely "incidents of the underlying action" and therefore do not give rise to an independent right to a section 170.6 preemptory challenge. Alternatively, the Court noted that because a 170.6 challenge must be made before the commencement of trial, it may not be made in subsequent proceedings which are a continuation of the original proceedings. Here, even if the 701.120 motion and NFL's motion to quash were special proceedings, they were nonetheless a continuation of the receivership proceedings, which were part of the underlying action.

Anti-Suit Injunctions – Objections To Anti-Suit Injunctions Should Be Asserted In Court Issuing The Injunction

Proctor v. Vishay Intertechnology, Inc. (2013) 213 Cal.App.4th 1258 – Where a court issues an anti-suit injunction, arguments against that injunction should be made in the issuing court, not the court in which the injunction is enforced. In *Proctor*, the Plaintiffs, former minority shareholders of the Defendant corporation, were attempting to prosecute an action in California, when a similar action was being litigated in Delaware. The Delaware court held that it had jurisdiction over the California claims, and issued an injunction against the Plaintiffs pursuit of the claims in California. The superior court in the California action sustained demurrers to the Plaintiffs' complaint without leave to amend based on collateral estoppel. Plaintiffs challenged the ruling, contending that the Delaware injunction was void, because the court exceeded its subject matter jurisdiction by purporting to foreclose the California claims. The Court of Appeal affirmed, holding that the Delaware injunction would be void only if the Delaware court lacked subject matter jurisdiction entirely. Because the Delaware court had subject matter jurisdiction over at least some of the issues, but only arguably *exceeded* that jurisdiction by foreclosing the California claims, the injunction was only voidable, not void. The Court of Appeal agreed with applying collateral estoppel to the Delaware court's adjudication, noting that any arguments

against the injunction should have been raised in the Delaware court when it issued the injunction.

Class Actions – Mere Existence Of Standard Contracts Among Members Insufficient To Certify Class

Thompson v. Automobile Club of Southern California (2013) 217 Cal.App.4th 719 – A putative class is over inclusive when it contains members who would not be entitled to relief on any of the Plaintiff's causes of action. In *Thompson*, the Plaintiff challenged the Auto Club's practice of "backdating" renewals, and moved for class certification. The Court began its analysis by recognizing that its review is narrowly circumscribed under the abuse of discretion standard. The Court then reviewed the community of interest requirement factors for certifying class actions, which are: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; (3) class representatives who can adequately represent the class; (4) an additional criteria of the superiority of the class action procedure, which is sometimes considered. The Court found that the mere existence of the same standard contract among the putative class members was insufficient to determine that common issues predominate, and the Court refused to follow federal district court orders that certified classes based upon standard contracts. In addition, even if the Plaintiff could demonstrate the superiority of the class action method for the case, that alone did not warrant class certification.

Collateral Estoppel – Issues Resolved In Delaware Court May Not Be Re-Litigated In California.

Entente Design, Inc. v. Superior Court (2013) 214 Cal.App.4th 385 – For purposes of determining the timeliness of a challenge to a trial judge under Code of Civil Procedure § 170.6, the master calendar rule does not apply where an independent calendar court assigns a case to another courtroom for trial. In *Entente*, Defendants filed their section 170.6 challenge approximately an hour after the independent calendar court assigned the case to another courtroom for trial. The trial judge denied their challenge as untimely under the master calendar rule, which requires a 170.6 challenge to be filed immediately at the time a case is assigned for trial in a master calendar court. The Court of Appeal issued a writ of mandate directing the superior court to vacate its order and issue a new order granting the 170.6 challenge. Generally, a section 170.6 challenge is permitted any time before the commencement of a trial or hearing. The master calendar rule applies when the judge assigns trial-ready cases to trial-ready courtrooms, for it is this circumstance that justifies rule—when there is a trial judge ready and able to commence a trial, it is impracticable to allow litigants the time period permitted under the other rules to consider the advisability of making a section 170.6 challenge. In addition, by requiring litigants to make their challenges immediately upon assignment from the master calendar, the master calendar rule allows the judge in the master calendar courtroom to promptly utilize a challenged trial judge for another trial ready case. The instant case did not involve a

true master calendar assignment because the case was not ready for immediate trial when the original judge assigned it to the trial judge. The trial was to commence no earlier than two court days after the assignment. Where cases are assigned to a trial judge for a future trial, the justification for the master calendar rule does not exist and the rule does not apply. Even if the original judge was managing a true master calendar when he assigned this case to the trial judge, the master calendar rule does not apply unless the parties had advance notice the that original judge was acting as master calendar judge

Court Reporter Fees – Challenge To Fees Must Be Raised In Underlying Action

Las Canoas Co. Inc. v. Kramer (2013) 216 Cal.App.4th 96 – A non-noticing party who does not move for an order to determine the "reasonable rate" a court reporter may charge a "non-noticing" party for copies of deposition transcripts in the pending action may not bring a subsequent action to obtain restitution for "unreasonable" copy charges or obtain injunctive relief setting a "reasonable rate" to be charged by that court reporter in all future actions. Absent extraordinary circumstances, the court in the action in which the dispute arises is the only court to resolve the issue.

Electronic Filing – Last Minute Filing Results In Disaster

Anwar v. Johnson (9th Cir. 2013) 720 F.3d 1183 – The fact that our Superior Court now allows electronic filings until midnight does not mean that parties should wait until the last minute to file. As a cautionary example, the Plaintiff's counsel in *Anwar* failed to file a nondischargeability complaint until 38 minutes after the midnight deadline, and was not granted a retroactive extension. The Plaintiff's counsel had initiated the electronic filing process hours earlier at some time after 9:00 p.m., but was unable to file the complaint online until 12:38 a.m. due to computer problems in converting the file to the required PDF format. The Ninth Circuit applied the Federal Rules of Bankruptcy Procedure in finding that the bankruptcy court lacked discretion to retroactively extend the deadline for filing the complaint, and stated that it was "immaterial" that the deadline had been missed by less than an hour. In particular, the Court strictly followed the plain language of FRBP 4007(c), which requires parties seeking an extension to file a motion requesting an extension prior to the initial filing deadline. The Court then cited other Ninth Circuit precedents in finding that the bankruptcy court lacked equitable power to grant the Plaintiff relief for untimely filings. While state courts may have greater discretion to forgive late filings in some instances, there are some deadlines, such as the filing of a notice of appeal, that are not subject to extension.

Fax Filing – Failure To Include Processing Instructions Invalidates Filing

Fry v. Superior Court of Los Angeles County (December 19, 2013) ___ Cal.App.4th ___, 2013 Cal. App. LEXIS 1026 – A party who files a preemptory challenge under Code of Civil

Procedure Section 170.6 without processing instructions fails to comply with the requirements of the statute. In *Fry*, the Petitioners peremptorily challenged a judge for prejudice by faxing an affidavit to the court's "central fax filing office." The trial court denied the motion as untimely, and the Court of Appeal affirmed. Under Section 170.6, a party may make a preemptory challenge of an assigned judge by making an oral or written notice, supported by affidavit, to that judge or the presiding judge. Here, the Petitioners failed to include processing instructions indicating which judge was to receive the notice and affidavit. Because the plain language of Section 170.6 requires that notice be "made to" either the challenged judge or the presiding judge, the Petitioners failure to inform the clerk which judge it intended to receive the notice constituted noncompliance with the requirements of the section. As such, the petition was properly denied.

Five Year Rule – Partial Stay Does Not Toll Five Year Period

Gaines v. Fidelity National Title Insurance Co. (2013) 222 Cal.App.4th 25 – In computing the time within which an action must be brought to trial under Code of Civil Procedure § 583.340, the trial court may not exclude any time during which trial of the action was partially, rather than completely, stayed. In *Gaines*, the Plaintiff homeowners filed claims in 2006. The parties agreed to mediate the dispute in 2008, and the proceedings were partially stayed for 120 days. In 2012, the trial court granted the defendants' motion to dismiss the action under the five-year rule. The Court of Appeal affirmed. Under § 583.340, in computing the time within which an action must be brought to trial, a court shall exclude any time during which prosecution or trial of the action was stayed. Here, the original complaint was filed in November 2006 and the case was dismissed by the trial court in August 2012. The Court of Appeal rejected the Plaintiff's argument that the trial court should have excluded the 120 days during which the party tried to mediate because the relevant statute allows exclusion only for complete stays, not for partial stays. The 2008 stay was partial because it allowed for some discovery to proceed, rather than stopping "the prosecution of the action altogether."

Inter-American Convention On Letters Rogatory And Judgment Liens; No Restraining Orders Without Assignment Order Under Code Of Civil Procedure § 708.510, *Et Seq.*

Landstar Global Logistics Inc. v. Robinson & Robinson Inc. (2013) 216 Cal.App.4th 378 – In *Landstar*, the Court of Appeal decided two issues of first impression in California: (1) the Inter-American Convention on Letters Rogatory (the "Convention") does not authorize the issuance of a letter rogatory that has as its purpose the enforcement of a money judgment; and (2) Code of Civil Procedure § 708.520 requires a judgment creditor who applies for a restraining order to do so either at the same time as it applies for an assignment order under section 708.510 or at any time after it has done so.

The trial court made post judgment orders directing issuance of a letter rogatory requesting registration of judgment liens against properties of the judgment debtor in Mexico and restraining the debtor from transferring its right to payment upon the sale of those properties. The Court of Appeal reversed both orders. With respect to the first order, the Court held that a letter rogatory may not be used to request the registration of judgment liens in a foreign country because the Convention does not authorize use of a letter rogatory for enforcement purposes. The Convention only authorizes procedural acts of a merely formal nature. With respect to the second order, the Court held that a trial court may not issue an order restraining the disposition of a right to payment pursuant to Code of Civil Procedure § 708.520 when it has not previously or simultaneously issued an order assigning the right to payment pursuant to section 708.510 of that code.

Interest Accrues On Post-Judgment Fee Award Upon Entry Of The Award

Lucky United Properties Investment, Inc. v. Lee (2013) 213 Cal.App.4th 635 – In an earlier appeal, the Court of Appeal in *Lucky* had held that awards of pre-judgment fees and costs begin accruing interest as of the date of entry of the judgment, even when the amount of such fees is determined later, and incorporated into the judgment. In the most recent appeal, the Court affirmed that decision as law of the case, but held that awards of *post*-judgment fees and costs do not begin accruing interest until entry of the award.

Judgments – No Return Of Erroneous Distribution Of Judgment Proceeds

Adir International, LLC v. Superior Court of Los Angeles County (2013) 216 Cal.App.4th 996 – A court may not order a judgment creditor who received an erroneous disbursement pursuant to an execution lien to return the funds to the judgment debtor. In *Adir International*, the plaintiff was ordered to pay the defendants a judgment in excess of $90,000. The judgment creditor obtained a writ of execution and filed it with the Los Angeles County Sheriff, who then levied on the judgment debtor's bank account. The judgment debtor then filed a notice of appeal and provided the sheriff with a copy of its notice of appeal and appeal bond. Under CCP § 697.040, this should have extinguished the existing execution lien and the subject bank account should have been released to the judgment debtor. Subsequently, however, the sheriff released the levied funds to the judgment creditor. The judgment debtor filed an ex parte application, requesting that the court direct the judgment creditor to return the funds. The trial court denied the order, and the Court of Appeal affirmed. The Court of Appeal found that there was neither statutory nor case authority to support the proposition that a court can order a judgment creditor to return funds to a judgment debtor even if the funds were disbursed in error. Further, it noted that the judgment debtor could have sought a court order staying further enforcement of the judgment and directing the sheriff to return the levied funds but that the judgment debtor failed to do so before the funds were disbursed.

Leave To Amend – Leave Should Not Be Granted Where There Is Unreasonable Delay

Duchrow v. Forrest (2013) 215 Cal.App.4th 1359 – Motions for leave to amend to conform to proof at trial are often liberally granted, but it may be an abuse of discretion to grant such a motion where there has been unreasonable delay in amending. In *Duchrow*, the Plaintiff attorney sued a former client for breach of a retainer agreement. In the complaint, the plaintiff alleged that he was entitled to a combined hourly and contingency based fee in the amount of $44,082.22. On the fourth day of the five-day trial, however, the plaintiff moved to amend the complaint to conform to proof, arguing that he was entitled to recover for "all time spent" under a separate paragraph of the retainer agreement—in the amount of $329,111.95. The trial court granted the plaintiff leave to amend, but the Court of Appeal reversed. The Court held that amendments at trial should not be allowed when they raise new facts, rather than simply different legal theories, when there is unexplained delay in seeking to amend, and when the adverse party will be prejudiced by the proposed amendment. The Plaintiff had more than three years to file an adequately pleaded complaint, yet failed to raise the new theory of liability until immediately before the close of trial. This deprived the defendant of the opportunity to seek relevant information before the close of discovery or retain an expert to determine whether the claimed attorney fees were reasonable. As such, the trial court abused its discretion in allowing the midtrial amendment absent a "reasonable excuse" for the delay.

Memorandum Of Costs – Service By Mail Of Written Notice Of Judgment Or Dismissal Extends Time For Filing By Five Days

Nevis Homes LLC v. CW Roofing Inc. (2013) 216 Cal.App.4th 353 – If a written notice of judgment or dismissal is served by mail within the State of California, the time for filing a memorandum of costs is extended by five days.

Personal Jurisdiction – Mere Foreseeability Insufficient To Establish Minimum Contacts

Bombardier Recreational Products, Inc. v. Dow Chemical Canada ULC (2013) 216 Cal.App.4th 591 – Mere foreseeability that the product may enter California is not sufficient to establish minimum contacts with California. In *Bombardier*, a company was sued for personal injuries resulting from a defective fuel tank on a watercraft, and the company cross-complained against Dow Chemical, the successor of a company that manufactured the tank. The Court of Appeal affirmed the trial court's ruling that Dow Chemical lacked sufficient contacts with California to be subject to suit in California because the purposeful availment test was not met. Dow Chemical's predecessor never purposefully and voluntarily directed its activities toward the forum state (California) so as to expect to be subject to the court's jurisdiction because Dow Chemical's predecessor manufactured and sold the fuel tanks only within Canada, had never had any employees or offices in California, and had never advertised in California.

Personal Jurisdiction Not Established By Sending Petition To Opposing Counsel Via Certified Mail

Abers v. Rohrs (2013) 217 Cal.App.4th 1199 – Service of a petition by overnight mail in a new proceeding was insufficient to confer jurisdiction. In *Abers*, the Plaintiffs filed their petition to vacate an arbitration award in a separate case, but had purported to serve it on the opposing party by certified overnight delivery, which is normally appropriate only for motions in a pending case. The homeowners argued that service was sufficient to confer jurisdiction because the homeowner's arbitration agreement stated that written notices may be sent by certified mail, and Code of Civil Procedure § 1290.4 permits a petition to vacate an arbitration award to be served in a manner provided by the arbitration agreement. The Court of Appeal found the homeowner's reliance on § 1290.4 was misplaced because the provisions in the arbitration agreement applied only to the manner in which notices may be sent, and not to the method in which a party may be served with process. Since the arbitration agreement did not indicate the manner in which a petition to vacate an award may be served, the proper method pursuant to § 1290.4 was in the same manner provided for service of summons, and actual notice alone is not sufficient to confer personal jurisdiction. Moreover, despite the inconsistent statements of three other Court of Appeal opinions, the Court found inapplicable § 473, which permits a court to relieve a party of an order inadvertently caused by excusable neglect.

Personal Service – Substitute Service May Be Effectuated At UPS Store

Sweeting v. Murat (2013) 221 Cal.App.4th 507 – Personal service may be effectuated by personal delivery of a notice of motion to a private or commercial post office box if a party is not represented by counsel and does not have a permanent residence, and has listed the box as his address for service of notices. In *Sweeting*, the Plaintiff filed a notice of change of address form with the court that indicated that documents could be served at a rented mailbox at a UPS store. The form stated: "All notices and documents regarding the action should be sent to the above address." The Defendants personally served a summary judgment motion at the UPS store, and the Plaintiff did not file an opposition until two days before the hearing. The trial court refused to consider the opposition due to "extreme lateness," and entered summary judgment in favor of the Defendants. The Plaintiff appealed, arguing that personal service of the summary judgment motion was improper. The trial court denied the plaintiff's motion, and the Court of Appeal affirmed. Where service is effectuated at the only address on record with the court and that address is a private or commercial post office box, personal service at that post office box is sufficient under CCP section 1011.

Reconsideration – Depublication Of An Appellate Opinion Constitutes A Change In Law And May Warrant Reconsideration Of A Trial Court Order

Farmers Ins. Exchange v. Superior Court (2013) 218 Cal.App.4th 96 – The depublication of an appellate opinion may constitute a change in the law when the depublished opinion is the sole

basis for an order, thereby warranting reconsideration of the order. In *Farmers*, the trial court granted a class certification motion based upon single appellate opinion, and then that appellate opinion was subsequently depublished by the California Supreme Court. The trial court found that it was precluded from reconsidering the motion due to the Supreme Court's depublishing of the appellate opinion. The Court of Appeal disagreed. While the Court noted that the Supreme Court's depublication of an opinion does not necessarily constitute disapproval with the opinion, the depublishing of an opinion causes it to have no precedential value and to no longer be part of the law. Moreover, the depublishing of an opinion is similar to the grant of review by the Supreme Court; both cause the nullification of the opinion. It therefore was an abuse of discretion to deny reconsideration because the depublished opinion was the *sole* legal authority for the trial court's grant of class certification, and the trial court did not rely upon any independent legal analysis. In addition, other factors supported reconsideration, including the lack of delay in bringing the writ and the lack of prejudice to the other party.

Relief From Default – Mandatory Relief Requires Attorney Affidavit Of Fault, Even Where Client Claims Abandonment By Attorney

Las Vegas Land and Development Company, LLC et al. v. Wilkie Way, LLC (2013) 219 Cal.App.4th 1086 – In *Las Vegas Land and Development* Company, the Court of Appeal held that mandatory relief under Code of Civil Procedure section 473 requires an attorney affidavit of fault, and there is no exception where the client claims it was abandoned by the attorney. The remedy in such a circumstance is either (a) discretionary relief under section 473 or an action against the attorney. The Court of Appeal also noted a split in the Court of Appeal regarding whether the mandatory relief provision in section 473 applies to summary judgments, and sided with more recent cases holding that it does not.

Relief From Default – § 473 Does Not Apply To Lapse Of Statute Of Limitation

Alliance for the Protection of the Auburn Community Environment v. County of Placer (2013) 215 Cal.App.4th 25 – In *Alliance for the Protection of the Auburn Community Environment*, the Petitioner filed a CEQA action three days after expiration of the 30-day statute of limitations for CEQA actions. In response to a demurrer, the Petitioner filed a motion for relief under Code of Civil Procedure§ 473(b), claiming that the late filing resulted in a "miscommunication from its attorney service." The trial court denied the motion and the Court of Appeal affirmed. It found the California Supreme Court's decision in *Maynard* controlling. *Maynard* established that, in the absence of statutory authorization, statutes of limitation are mandatory, and may not be waived or extended under § 473. Because CEQA's statute of limitations makes no provision for extending the limitations period for good cause shown, § 473 was inapplicable and could not prevent the Petitioner from losing its action.

Res Judicata – Bankruptcy Plan Does Not Preclude Adjudication Of Claims Not Actually Adjudicated By Bankruptcy Court

Edwards v. Broadwater Casitas Care Center, LLC (2013) 221 Cal.App.4th 1300 – Plaintiff filed an employment discrimination claim against Defendants. Plaintiff lost in arbitration, and the trial court awarded costs and attorney fees to Defendants. Plaintiff subsequently filed for Chapter 13 bankruptcy. The bankruptcy court confirmed a debt adjustment plan under which Plaintiff would be required to pay Defendants 8% of the cost and attorney fee awards. Plaintiff then appealed the cost and fee award. Defendants moved to dismiss the appeal as moot, and the Court of Appeal denied the motion. It held that because the trial court's authority to impose costs and attorney fees was not actually litigated in the bankruptcy court, the bankruptcy court's confirmation of the Chapter 13 plan did not preclude Plaintiff's later challenge of the costs and attorney fee awards. Instead, because the Court of Appeal could determine if Plaintiff owed less or no money to Defendants, effectual relief was possible, and, if successful, Plaintiff would be able to seek modification of the confirmed bankruptcy plan.

Res Judicata – Claim Preclusion Is Based On Primary Right, Not Legal Theory Asserted

Federal Home Loan Bank of San Francisco v. Countrywide Financial Corp. (2013) 214 Cal.App.4th 1520 – Where a cause of action based on a federal statute is dismissed with prejudice, the dismissal is a bar to a similar claim brought under a state statute. Federal Home Loan Bank of San Francisco sued Countrywide Financial for "control person" liability under Section 15 of the Securities Act, but later dismissed that claim with prejudice. Subsequently, Federal Home Loan Bank sued Countrywide for similar control person liability under California Corporations Code section 25504. Under California's primary rights theory, the cause of action is based upon the harm suffered, not the legal theory asserted by the plaintiff. The gravamen of both the Section 15 and section 25504 claims was that Countrywide controlled a party who made misrepresentations regarding the same residential mortgage backed securities. As such, they sought to enforce the same "primary right," and constitute the same cause of action for purposes of claim preclusion. As a result, Federal Home Loan's previous dismissal with prejudice of the Section 15 claims barred it from later asserting the section 25504 claim.

Sanctions – Incorrectly Averring That Draft Agreement Is "True And Correct" Copy Is Not Sanctionable In Absence Of Bad Faith

Interstate Specialty Marketing, Inc. v. ICRA Sapphire, Inc. (2013) 217 Cal.App.4th 708 – Sanctions were inappropriate where an attorney wasted time and caused an unnecessary hearing by failing to attach the correct draft of a contract to a complaint. In *Interstate,* the Plaintiff filed a verified complaint and attached a document that the complaint averred was a "true and correct" copy of the contract. The attached document actually was an unsigned draft of the agreement, and only Defendant had retained a signed copy of the final agreement. Defendant brought a

motion for summary judgment based solely upon the non-final draft of the agreement. The trial court denied the motion, and then sanctioned the Plaintiff's counsel for $5,076 as a "cost allocation" to compensate Defendant for the cost of bringing a motion for summary judgment to address the wrong document. The Court of Appeal vacated the trial court's order for three reasons: First, the trial court incorrectly applied Code. Civ. Proc. § 128.7(c)(2), which provides for a 21-day safe harbor that runs from the date of service of an order to show cause threatening sanctions, as opposed to the date of filing a motion for summary judgment. Second, the Plaintiff's action of attaching a draft version of the agreement to the verified complaint is not sanctionable conduct because the Plaintiff only exhibited "lamentable inattention" as oppose to bad faith. Third, applicable precedent indicates that a trial court may not award § 128.7 monetary sanctions to an opposing party on the court's own motion. In addition, instead of filing for summary judgment, the civil and professionally correct thing to do would have been for the Defendant to inform the Plaintiff that the wrong document was attached to the complaint, and express a willingness to stipulate to an amendment.

Statement Of Decision – Time To Request A Statement Of Decision After A Bench Trial Runs From Issuance Of Decision On All Issues

Wallis v. PHL Associates Inc. (2013) 220 Cal.App.4th 814 – Where a trial court rules on some issues immediately after a bench trial, but reserves some issues for later determination, the time to request a statement of decision does not begin to run until a decision is reached on all of the issues. In *Wallis* after a jury trial, the trial court ruled on equitable claims, finding that the Defendant had been unjustly enriched, and imposing a constructive trust against the Defendant. The trial judge reserved the issues of prejudgment interest and the appointment of a receiver. After those issues were decided, the Defendant requested a statement of decision, which the trial court denied as untimely, as it was filed more than 10 days after the trial court decided the unjust enrichment and constructive trust issues. PHL appealed this decision, arguing that the request was filed within 10 days of the final resolution of the remaining issues. The Court of Appeal reversed the trial court, finding that the request was proper under Code of Civil Procedure Section 632, and that the 10 day period to request a statement of decision under that statute does not begin to run until a decision is announced on all issues.

Venue – Contractual Venue Selection Clause Is Valid If It Selects A Statutorily Permissible Venue

Battaglia Enterprises, Inc. v. Superior Court of San Diego County (2013) 215 Cal.App.4th 309 – A venue selection clause is valid and enforceable where it fixes venue in a statutorily permissible location. In *Battaglia Enterprises*, the plaintiff, a wholesale food distributor, filed a breach of contract action against Yard House in San Diego Superior Court. Yard House moved to transfer the venue to Orange County pursuant to the venue selection clause contained in the parties' contract. The trial court granted the motion and the Court of Appeal affirmed. It

rejected the plaintiff's argument that the California Supreme Court's opinion in *General Acceptance Corp. v. Robinson* (1929) 207 Cal. 285 established that all contractual venue selection provisions are void as contrary to public policy in California. It concluded instead that *General Acceptance* stands for the proposition that a venue selection clause is invalid only if it attempts to vest venue in a county that is not proper under the legislative scheme. Where, as here, parties agree to litigate actions in one of multiple permissible venues, the venue selection clause should be given effect by the court.

CONSTRUCTION DEFECT

Equitable Indemnity Claim – Prelitigation Notice Does Not Cause Accrual Of Equitable Indemnity Claim

Centex Homes v. Superior Court (City of San Diego) (2013) 214 Cal.App.4th 1090 – Where the original complaint did not encompass the claims for which builder sought indemnity from the city, the builder's claim for equitable indemnity did not accrue with the filing of the original complaint. In *Centex*, a homeowners' association (HOA) filed a complaint against a builder for alleged defects relating to a condominium building. The builder tendered a claim for indemnification to the City of San Diego approximately one year after receiving HOA's Civil Code Section 910 prelitigation notice, and the city denied the claim as untimely. The trial court then denied the builder's motion for leave to file a cross-complaint for equitable indemnity or partial indemnity against the City. The Court of Appeal directed the lower court to vacate its order. It held that the builder's claim accrued upon service of the HOA's first amended complaint, because the original complaint failed to allege waste line defects under Civil Code section 896(e). The fact that the prelitigation notice did identify waste line defects was irrelevant and did not cause the claim to accrue because it merely initiated preligitation procedures and is not equivalent to a complaint.

Right To Repair Act Is Not Exclusive Remedy Where Defects Cause Actual Damages

Liberty Mutual Insurance Co. v. Brookfield Crystal Cove, LLC (2013) 219 Cal.App.4th 98 (**Fybel**, Moore, Thompson) – The Right to Repair Act, Civil Code section 895 et seq., is not the exclusive remedy where construction defects have caused actual damages. In Brookfield, the Plaintiff insurance company brought a subrogation claim against the Defendant homebuilder to recover expenses it paid to its insured after a pipe burst and caused significant damage to the insured's home. The Defendant argued that the Plaintiff's action was time-barred under the right to repair act, and the trial court agreed. The Court of Appeal reversed, holding that the Right to Repair Act "grant[s] statutory rights in cases where construction defects caused economic damage" but "certainly does not derogate common law claims otherwise recognized by law."

The Plaintiff's action arose out of actual, not merely economic, damages and thus did not have to satisfy the requirements of the Right to Repair Act.

CONTRACTS

Incidental Third Party Beneficiaries May Not Enforce Contract

The H.N. and Frances C. Berger Foundation v. Perez (2013) 218 Cal.App.4th 37 – An incidental third party beneficiary to a contract does not have standing to sue to enforce the contract. In *The H.N. and Frances C. Berger Foundation v. Perez*, the Plaintiff owned two lots in Riverside. Desert Gold Ventures LLC (DGV) owned eight other lots in the area, and the Plaintiff held a deed of trust to six of those lots. DGV and the Riverside Transportation Department entered into improvement agreements and securities concerning the lots. DGV did not fulfill its obligations under the agreement, and the Foundation brought suit, seeking completion of the improvements. The trial court found that the Plaintiff was not a party to the improvement agreements between DGV and the Riverside Transportation Department and granted the Defendants' demurrer. The Court of Appeal affirmed. While Civil Code Section 1559 allows an intended third party beneficiary to enforce a contract at any time before it is rescinded by the parties, the Plaintiff was not named in the contract and did not make an adequate showing that the improvement agreements were specifically intended to benefit the Plaintiffs. As such, the Plaintiff was an incidental, rather than intended, third party beneficiary and had no right to seek enforcement of the agreements.

Parole Evidence Rule – The *Pendergrass* Limitation On The Fraud Exception Has Been Abrogated

RiverIsland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn. (2013) 55 Cal.4th 1169 – Supreme Court has overruled *Bank of Am. etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, which established a limitation on the fraud exception to the parole evidence rule. Under *Pendergrass*, parole evidence could not be used to establish that the defendant made a promise directly in variance with the terms of a written agreement. Instead, it could only be used to establish fraud as to some independent fact or as to the procurement of the contract itself (such as a false representation regarding the terms of the written agreement). The Court in *RiverIsland Cold Storage* held that this limitation was ill-considered and difficult to apply. While noting the considerations behind *stare decisis*, the Court held that "reconsideration of a poorly reasoned opinion is nevertheless appropriate," and expressly overruled *Pendergrass* to abrogate the limitation on the fraud exception to the parole evidence rule.

Riverisland's Abrogation Of The *Pendergrass* Rule Applies Equally To Sophisticated Parties

Julius Castle Restaurant, Inc. v. Payne et al (2013) 216 Cal.App.4th 1423 – In one of the first Court of Appeal decisions applying *RiverIsland Cold Storage*, the defendants argued that the *RiverIsland* decision left open the possibility that the *Pendergrass* limitation on the fraud exception still applies to "sophisticated parties." The First Appellate District, Division One, rejected that argument, and held that Supreme Court in *RiverIsland* sought consistency and simplicity by eliminating the *Pendergrass* rule altogether.

CORPORATIONS AND BUSINESS ENTITIES

Business Judgment Rule – Contracts With Members/Shareholders May Limit Application Of Business Judgment Rule

Scheenstra v. California Dairies, Inc. (2013) 213 Cal.App.4th 370 – A board of director's discretion under the business judgment rule may be limited by contractual obligations to the corporation's shareholders or members. In *Scheenstra*, the trial court found that the Defendant's Board of Directors exceeded its discretion when it adopted a quota program in breach of its contractual obligations to one of its members. The Defendant appealed, claiming that the business judgment rule insulated it from liability for the good faith decisions of its directors in the exercise of business judgment. The Court of Appeal affirmed the judgment against the Defendant. The Court of Appeal held that the business judgment rule does not give the board discretion to rewrite its contracts. Because the Board's action breached its contract with its member, the business judgment rule did not apply.

California's Survival Statute Does Not Apply To Dissolved Foreign Entities

Greb v. Diamond Int'l Corp. (2013) 56 Cal.4th 243 – The Court of Appeal dismissed a personal injury claim against a dissolved Delaware corporation, holding the claim was filed more than three years after the corporation's dissolution, in violation of Delaware General Corporation Law § 278. The Supreme Court affirmed and unequivocally denounced the assertion that dissolved foreign corporations may be sued in California after the incorporating state's limitations period has expired. In deciding the California survival statute did not apply to foreign corporations, the Supreme Court resolved a split among California appellate courts on the interpretation of Cal. Corp. C. § 2010, which governs the winding-up and survival of dissolved California corporations.

Corporate Veil – Business Enterprise Doctrine May Be Used To Pierce Corporate Veil To Satisfy Judgment Of Affiliated Companies

Toho-Towa Co., Ltd. v. Morgan Creek Productions, Inc. (2013) 217 Cal.App.4th 1096 – The business enterprise doctrine allows the court to pierce the corporate veil if separate yet affiliated companies operate with integrated resources in pursuit of a single business purpose. The Plaintiff sought recovery of a judgment from company A because neither of affiliated companies B or C satisfied the judgment. The trial court ruled that all three companies constituted a single business enterprise, and amended the judgment to add Company A to the judgment pursuant to Code Civ. Proc. § 187. The Court of Appeal affirmed. The Court stated that the business enterprise doctrine applied because the three companies (1) were all owned by the same person, who was the sole decision-maker for all entities, (2) the "work" of Companies B and C was performed by employees of Company A, and (3) Company A dominated the finances, policies, and practices of Companies B and C so that they merely were conduits through which Company A conducted business.

DEFAMATION

Litigation Privilege Does Not Cover Press Releases Issued On The Internet

GetFugu, Inc. v. Patton Boggs, LLP (2013) 220 Cal.App.4th 141 – An online press release issued by attorneys regarding a RICO lawsuit and a pending criminal investigation is not protected by the litigation privilege. In *GetFugu*, the Defendants, an attorney and his law firm, published a press release on the internet that claimed the Plaintiff corporation was the subject of a government investigation. In a fairly standard anti-SLAPP motion, the Court of Appeal held that the press release was not protected by the litigation privilege, because posting a press release on the internet is essentially the same as publishing it to the world. The Defendants argued that the litigation privilege has been expanded to encompass out of court republications to third parties with a substantial interest in the litigation. The Court of Appeal held that allowing this expansion to cover publications to the public in general would "swallow up" the general rule that the privilege does not generally cover republications to nonparties.

Litigation Privilege Does Not Protect Comments That Do Not Advance An Action.

City of Costa Mesa v. D'Alessio Investments, LLC (2013) 214 Cal.App.4th 358 (**Ikola**, Fybel, Thompson) (*Review denied.*) – Statements made in connection with informal executive proceedings are protected by the anti-SLAPP statute. In order to be protected by the litigation privilege, however, the statements must serve to advance actual litigation. In this case, the City of Costa Mesa sued D'Alessio, an office building landlord, to abate a public nuisance (prostitution at massage parlors, and unlawful medical marijuana clinics). After the trial court granted a preliminary injunction for the City, the City began refusing permits for additional

prospective tenants at the building. In addition, City employees allegedly told the prospective tenants that illegal activities take place at the property, and that D'Alessio had been convicted of a crime (a false statement). D'Alessio cross-complained for defamation. The Court of Appeal held the first prong of the anti-SLAPP statute was met, since the comments were made in connection with the City's permitting policy, which is an official executive proceeding, even if it is informal. Turning to the second prong, the Court of Appeal held that the litigation privilege did not protect statements to the tenants, because they did not function to advance the City's nuisance action. The Court of Appeal also held that Gov. Code sections 818.8 and 822.2, which relate to governmental immunity for misrepresentations, do not apply to claims based on reputational harm, such as defamation. The court therefore permitted the owner to proceed with his cross-action relating to the false statement that D'Alessio had been convicted of a crime.

DISCOVERY

Post-Judgment Discovery – Discovery Against Third Parties Is Limited

Fox Johns Lazar Pekin & Wexler APC v. Superior Court (Brewer Corp.) (2013) 219 Cal.App.4th 1210 – Postjudgment discovery from third parties is limited to the topics provided under Code of Civil Procedure section 708.120. The Petitioners in *Fox Johns Lazar Pekin & Wexler* represented a defendant with a judgment against it in favor if the Real Party in Interest. In connection with the enforcement of that judgment, the Real Party filed a motion to compel the Petitioners to: (a) answer certain questions in a section 708.120 third party postjudgment examination, and (b) produce documents in response to a subpoena duces tecum. The focus of the discovery was the identification of other clients of the Petitioners that may be alter egos of the judgment debtor. The Court of Appeal held that this discovery was impermissible, because it exceeded the scope of allowable post-judgment discovery from third parties allowed under section 708.120, which limits such discovery to determine whether the third party possesses the judgment debtor's property or owes the judgment debtor a debt in excess of $250.

Verification By Defunct Corporation

Melendrez v. Superior Court (2013) 215 Cal.App.4th 1343 – Where a company is no longer in existence, the company's attorney-client privilege passes to the insurance company responsible for defending claims on behalf of the company. Melendrez sued Special Electric Co. Inc. (SECO), a bankrupt corporation, for wrongful death allegedly resulting from exposure to mesothelioma in SECO's products. SECO's counsel, who had been retained by its insurer, filed unverified discovery responses, and argued that she could not provide a verified response because it would require a limited waiver of the attorney-client privilege, and there were no directors or officers who could waive the privilege. The Court of Appeal held if SECO was no longer in existence, the attorney-client privilege would pass to SECO's insurer as SECO's assign under Evidence Code section 953. It directed the trial court to first determine whether SECO

was still in existence and could appoint a new director who would hold SECO's attorney-client privilege and be able to verify discovery responses or allow its counsel to verify the responses by waiving the attorney-client privilege. If the trial court found SECO was not in existence, the Court of Appeal directed it to give SECO's insurer, as the new holder of the attorney-client privilege, an opportunity to grant a limited waiver of the attorney-client privilege to allow SECO's counsel to verify the responses.

EMPLOYMENT AND LABOR

Class Certification May Be Proper Where Claims Are Based On Company-Wide Discriminatory Policies

Williams v. Superior Court of Los Angeles County (2013) 221 Cal.App.4th 1353 – The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* ("*Dukes*") does not require decertification of a class of employees where claims are based on alleged company-wide policies. In *Dukes*, the Supreme Court held that 1.5 million female Wal-Mart employees could not join in a class action because each of the plaintiffs' claims was based upon the subjective intent of thousands of Wal-Mart managers rather than an alleged general policy of discrimination. In *Williams*, by contrast, the Petitioners, a class of Allstate Insurance Company auto field adjustors, filed suit against Allstate alleging that the company failed to pay overtime wages based on an alleged companywide policy and a routine practice by adjustors of working off-the-clock on a daily basis. After the United States Supreme Court handed down its decision in *Wal-Mart Stores, Inc. v. Dukes*, the trial court allowed Allstate to file a motion for decertification, which it subsequently granted. The Court of Appeal directed the trial court to recertify the class. It held that while a class action may be decertified if warranted by new law, the rationale underlying the *Dukes* decision was inapplicable where the issue was a company-wide policy, rather than the subjective intent of individual managers.

Employer-Employee Indemnification – Employee Has No Right To Independent Counsel Where Employer Provides Adequate Representation

Carter v. Entercom Sacramento, LLC (2013) 219 Cal.App.4th 337 – While an employee is entitled to indemnification for necessary expenditures incurred as a result of his employment, an employee is not necessarily entitled to select his own attorney in an action arising out of the employment. In *Carter*, the Plaintiff was sued in the underlying action for his role in a radio station contest, "Hold your wee for a wii," in which contestants drank water in order to win a Nintendo game consol. When one of the contestants died the contestant's family sued the Plaintiff and others in the underlying action. Plaintiff rejected the insurance defense attorney provided by his employer, and retained personal counsel in the underlying action. The Plaintiff then sued the employer for reimbursement of his attorney's fees under Labor Code § 2802, which provides for reimbursement of necessary employee expenses. The Court held that because

the employer offered a defense, it was not "reasonably necessary" for the employee to retain his own attorney, and thus the expense was not reimbursable. While the Plaintiff claimed that the insurance defense attorney appointed by his employer had a conflict of interest due to the possibility of punitive damages in the underlying action, the Court of Appeal held that the mere presence of punitive damages does not necessarily create a conflict of interest for insurance defense counsel that would entitle the employee to independent counsel.

FEHA Causation – Where Termination Would Have Occurred Even Without Discriminatory Motives, Plaintiff Cannot Recover Damages, But May Receive Attorney's Fees And Injunctive Relief

Harris v. City of Santa Monica (2013) 56 Cal.4th 203 – If a plaintiff establishes that his employment was terminated due to a combination of legitimate and discriminatory motives, the plaintiff may be entitled to attorney fees and costs and declaratory or injunctive relief. In *Harris*, the Plaintiff bus driver sued the City of Santa Monica alleging that she was fired because of her pregnancy in violation of the Fair Employment and Housing Act (FEHA). The City claimed that Harris had been discharged for poor job performance, and unsuccessfully asked the judge to instruct the jury that if it found both legitimate and discriminatory motives, the City could not be held liable if it had shown that a legitimate motive alone would have resulted in the employment decision. The Court of Appeal reversed, and the California Supreme Court affirmed in part. It held that under the FEHA, a court may not award damages, back pay, or an order of reinstatement when the employer has established that it would have made the same decision absent any discriminatory motives. In such cases, however, the plaintiff may be entitled to reasonable attorney fees and costs, and courts may award declaratory or injunctive relief and consistent with the FEHA's express purpose of deterring discriminatory practices.

Title VII Retaliation Claims Must Be Proven By But-For Causation

Univ. of Tex. Southwestern Med. Ctr. v. Nassar (2013) 133 S.Ct. 2517 – In a five-four decision, the U.S. Supreme Court held that Title VII retaliation claims had to be proved according to traditional tort principles of "but-for" causation instead of the "motivating factor" test that applies to Title VII discrimination claims. Plaintiff and Respondent Dr. Naiel Nassar resigned from employment after complaining of racial harassment from his immediate supervisor, and then wrote a letter to his colleagues explaining his resignation. The Court held that under the "but-for" causation test, Dr. Nassar would need to prove that his employer would not have taken the adverse action if Dr. Nassar had not complained about the alleged harassment. Dr. Nassar and the United States argued that since Title VII defines "unlawful employment practice" to include retaliation, and the "motivating factor" test in 42 U.S.C § 2000e-2(m) expressly applies to "unlawful employment practices," then the "motivating factor" test would apply to the unlawful employment practice of retaliation. The Court was unpersuaded, and reasoned that

Congress must have wanted to exclude retaliation claims from the "motivating factor" test because the text of 42 U.S.C § 2000e-2(m) "says nothing about retaliation claims."

Worker's Compensation Law Does Not Apply To Visiting Professional Athletes

Federal Insurance Company v. Workers' Compensation Appeals Board and Johnson (2013) 221 Cal.App.4th 1116 – California Workers' Compensation law does not apply to a claimant who had only minimal contacts with the state. Adrienne Johnson played for WNBA team the Orlando Miracle, which later became the Connecticut Sun. While playing for Orlando, Johnson sustained a knee injury. She filed a workers' compensation claim in Connecticut and received a $30,000 settlement. Johnson later filed an application for adjudication of a workers' compensation in California, complaining of discomfort in her knee, hip, and shoulder. The workers' compensation judge awarded disability indemnity, but the Workers' Compensation Appeals Board later rescinded it and returned the matter to the judge for further proceedings to apportion the compensation between the present injury and the knee injury for which she had already been compensated by the State of Connecticut. The Connecticut Sun and its insurer, Federal Insurance Company, petitioned for a writ of review. The Court of Appeal granted the writ and remanded the case with directions to dismiss Johnson's workers' compensation application. It held that because Johnson played only one WNBA game in California, was a resident of another state, and was injured in another state, she did not have a sufficient relationship with California to justify the application of California's workers' compensation law to her claim. Further, California was not required to apply any other state's workers' compensation law.

ENVIRONMENTAL LAW

CEQA – EIR May Not Omit Discussion Of Feasible Alternatives

Habitat and Watershed Caretakers v. City of Santa Cruz (2013) 213 Cal.App.4th 1277 – CEQA does not permit a lead agency to omit any discussion, analysis, or even mention of any alternatives that feasibly might reduce the environmental impact of a project on the unanalyzed theory that such an alternative might not prove to be environmentally superior to the project. In *Habitat and Watershed Caretakers*, the trial court denied appellant citizens' group mandate petition that contended that respondent city failed to comply with CEQA when it certified an EIR for a project. The project sought to amend the city's sphere of influence to include an undeveloped portion of a university campus so as to permit the city to provide extraterritorial water and sewer services to proposed new development there. The Court of Appeal reversed and remanded. The Court held that the city's draft EIR and final EIR adequately discussed and analyzed the impacts of the project, did not prejudicially misdescribe the project's objectives, and contained adequate mitigation measures and findings, and an adequate statement of

overriding considerations. Nevertheless, the city's draft EIR and final EIR were inadequate because they failed to discuss any feasible alternative, such as a limited-water alternative, that could avoid or lessen the significant environmental impact of the project on the city's water supply.

CEQA – Projects Consistent With Specific Plan Are Exempt From Environmental Review

Concerned Dublin Citizens v. City of Dublin (2013) 214 Cal.App.4th 1301 – Under Government Code section 65457, a residential development is exempt from environmental review if it is consistent with a broader specific plan for which an environmental impact report previously has been certified. The Defendants, City of Dublin and the City Council of the City of Dublin determined that AvalonBay Communities proposed development of a parcel within a larger mixed-use transit center qualified for exemption. The Court of Appeal affirmed. It found that the AvalonBay project was a residential development because the plan approved by the city included only residential units. The fact that AvalonBay retained the option to later convert residential units to retail space did not change that characterization for the purposes of section 65457 because exercising that option would subject the project to further city review. Further, the Court held that the AvalonBay project was consistent with the specific transit center plan because the transit center was designed to include both residential and commercial uses.

CEQA – Statute of Limitations

May v. City of Milpitas (2013) 217 Cal.App.4th 1307 – There is a thirty-day statute of limitation for challenging the approval of a residential development project that implements a specific plans already certified pursuant to an EIR. The statute of limitations is not extended by a public entity's filing of a notice of exemption. In *May v. City of Milpitas*, the city adopted a resolution amending a site development permits, thereby approving the development of 732 condominium units, and filed a notice of exemption from CEQA. The petitioners filed a writ of mandate challenging the city's position that amendments to the project were exempt from CEQA review. The petitioner argued that a supplemental EIR was required due to new information regarding toxic contaminants at the development site that had not available when the EIR was certified in 2008. The Court of Appeal sided with the city, finding that judicially noticed documents established that the project was consistent with the 2008 EIR and the project presented no possibility of significant environmental effects. In addition, the Court found that date of the approval of the residential development – and not the filing of the notice of exemption – triggered the thirty-day statute of limitations for a CEQA challenge. Accordingly, the petitioners' writ of mandate was untimely.

FRAUD

Pleading – Specificity Requires Plaintiff To Identify Employee Who Made Alleged Misrepresentations

Aspiras et al v. Wells Fargo Bank, N.A. (2013) 219 Cal.App.4th 948 – Fraud claims must be pled with specificity. In *Aspiras*, the plaintiff homeowners brought suit against their mortgagee, Wells Fargo, for fraud, alleging that Wells Fargo foreclosed on their home after telling plaintiffs that their previously denied loan modification application would be reopened if they submitted additional documents. The trial court granted a demurrer and dismissed the action for lack of specificity, because plaintiffs failed to identify the customer service representative who allegedly made the false statement about the loan modification, did not establish that the representative was authorized to speak on the bank's behalf, and made no allegations that would show that the bank was aware of the alleged misrepresentation. The Court of Appeal affirmed, and distinguished cases relaxing the specificity where "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy." The Court held that the pleadings in this case did not provide Wells Fargo with sufficient information to dispute the plaintiffs' claims.

Treble Damages And Attorney's Fees May Be Awarded In Fraud Action Even Without A Criminal Conviction

Bell v. Feibush (2013) 212 Cal.App.4th 1041 (**Fybel**, O'Leary, Aronson) – A somewhat obscure statute may allow plaintiffs to recover attorney's fees and treble damages in any ordinary fraud case. In *Bell*, the Court of Appeal found that a criminal conviction under Penal Code § 496(a) – which includes theft by false pretense – is not a prerequisite to treble damages under Penal Code § 496(c) in a civil action. In *Bell*, the Plaintiff filed an action for against the Defendant after the Defendant fraudulently induced the Plaintiff to loan him $202,000. The Defendant failed to repay the Plaintiff, and defaulted on the judgment against him. The trial court awarded the Plaintiff treble damages based upon Penal Code § 496. Subdivision (a) of section 496 specifies the criminal penalties for receiving, concealing or withholding property obtained in "any manner constituting theft," and subdivision (c) permits treble damages and an award of attorney's fees in a civil action brought by any party injured by such a violation of subdivision (a). In affirming the default judgment for treble damages, the Court of Appeal noted that Penal Code § 496 does not indicate that a criminal conviction is required for a private plaintiff to recover treble damages. The legislature believed that the deterrent effect of criminal punishment was insufficient to reduce thefts; treble damages recovery by any person injured by the purchase or withholding of stolen property would assist in drying up the market for stolen goods. Moreover, the Court stated that Penal Code § 484 defines "theft" to include theft by false pretense.

INSURANCE

Cumis Counsel Is Not Required After Insurer Withdraws Reservation Of Rights

Swanson v. State Farm General Ins. Co. (2013) 219 Cal.App.4th 1153 – An insurer is not required to pay the insured's *Cumis* counsel after the insurer's withdrawal of *Cumis*-triggering reservations eliminates the conflict that created the need for *Cumis* counsel. In *Swanson*, the Plaintiff's personal attorney asked State Farm if he could represent the Plaintiff in a negligence action, and State Farm agreed that the attorney could act as *Cumis* counsel contingent upon a reservation of State Farm's rights. Approximately sixth months later, State Farm waived its disqualifying coverage defenses and withdrew its reservations, which had initially created the *Cumis*-triggering conflict. The Court of Appeal noted that the necessity of *Cumis* counsel arises only if a disqualifying conflict exists, which causes the dual representation of the insured and insurer to not be ethically feasible for an attorney. In contrast, once a disqualifying conflict ceases to exist during the litigation, the ethical bar to dual representation is extinguished, and the insurer may take over the litigation and cease paying *Cumis* counsel. Accordingly, State Farm did not breach its duty to defend by taking control of the litigation and refusing to continue to pay the Plaintiff's *Cumis* counsel.

MALICIOUS PROSECUTION

Probable Cause – The Denial Of A Nonsuit Motion In The Underlying Action Precludes Malicious Prosecution Claim

Yee v. Cheung (2013) 220 Cal.App.4th 184 – The element of no probable cause in a malicious prosecution may be negated by a trial court's denial of a plaintiff's motion for nonsuit in the underlying action. Defendants Lin Wah Music Center, and its attorneys Jensen and Wong-Avery, sued Plaintiff Yee for fraud and conversion. Yee prevailed, and later brought suit against the Defendants for malicious prosecution. The trial court granted the Defendants' anti-SLAPP motion to strike, and the Court of Appeal affirmed. After noting that the claims against the attorney Defendants were barred by the applicable statute of limitations (see page __, *supra*), the Court found that Yee had not shown that the Defendants commenced the fraud and conversion action against him without probable cause. The probable cause inquiry is a fact sensitive inquiry into whether a reasonable attorney would conclude that the underlying action was legally tenable. Certain non-final rulings on the merits may serve as the basis for a determination that a suit was supported by probable cause. In the underlying action, the trial court denied Yee's motion for nonsuit, expressly concluding that the Plaintiffs had provided enough evidence to allow its case to go to the jury. The Court of Appeal found that this determination by the trial court was sufficient to establish that the underlying action "was not totally and completely without merit."

PRIVACY

Public Disclosure Of Private Facts – Writing Not Required

Ignat v. Yum! Brands Inc. (2013) 214 Cal.App.4th 808 (**Bedsworth**, Ikola, Thompson) – Disclosure in a writing is not required to maintain a cause of action for public disclosure of private facts. In *Ignat*, Plaintiff terminated employee sued defendants corporate parent and plaintiff's immediate supervisor for public disclosure of private facts based on supervisor's disclosure to plaintiff's employees of plaintiff's bipolar condition. The trial court granted summary judgment in favor of defendants, concluding that the right of privacy can only be violated by a writing, not by word of mouth, and plaintiff failed to produce any document disclosing private facts. The Court of Appeal reversed. The requirement that a public disclosure be in writing was the only basis for the trial court's ruling on respondents' motion for summary judgment. The Court also found that the trial court properly refused to evaluate the summary judgment motion for constitutional privacy, and held that alleging a violation of a person's common law right to privacy is not the equivalent of alleging a violation of the constitutional right to privacy.

The Shine The Light Act – Civil Claim Requires Actual Injury

Boorstein v. CBS Interactive, Inc. (December 19, 2013) ___ Cal.App.4th ___, 2013 Cal. App. LEXIS 1025 – A plaintiff does not have standing to sue under the Shine the Light (STL) Act, Civil Code section 1798.83 et seq., unless he has made or attempted to make a disclosure request. The STL provides that a business that has disclosed the customer's information for direct marketing purposes must disclose that fact to the customer at the customer's request. In *Boorstein*, the Plaintiff provided personal information to a website operated by CBS Interactive. He alleged that CBS violated the STL by failing to provide users with information about their privacy rights. The trial court granted CBS's demurrer, and the Court of Appeal affirmed. It held that in order for a plaintiff to obtain relief under the STL, the plaintiff must have suffered an injury caused by a violation of the statute. The STL does not provide a cause of action for a mere failure to comply with the STL. Here, Boorstein neither requested privacy disclosures from CBS, nor did he allege that he would have done so. As such, Boorstein did not suffer an injury due to CBS's noncompliance and had no standing to bring suit.

REAL PROPERTY

Adverse Possession – Adverse Possession Of Property Belonging To Public Benefit Corporations Does Not Require Payment Of Property Taxes

Hagman v. Meher Mount Corporation (2013) 215 Cal.App.4th 82 – Under *Hagman*, public benefit corporations are not immune from adverse possession, but adverse possessors may be excused from the requirement of paying taxes during their adverse possession, if no taxes are due

on property owned by such entities. The Plaintiff in that case sued a religious group to quiet title to a half acre of property. The trial court entered summary judgment for Hagman, and the Court of Appeal affirmed it, rejecting Mehar Mount's argument that, as a public benefit corporation, it is a public entity immune to adverse possession claims under California law. While "public entity" is not defined in the relevant provision of the California Code, the Court held that all public entities in California are "vested with some degree of sovereignty," while public benefit corporations such as Mehar Mount are not. The Court also rejected Mehar Mount's argument that Hagman's adverse possession claim should fail because Hagman did not pay any taxes "levied and assessed" upon the land in for a period of five years, as required by statute. For each of the years in question, Mehar Mount applied and qualified for the welfare exemption on its property, which precluded the assessment and levy of property taxes. An adverse possessor is not required to pay taxes when no taxes are levied or assessed.

Adverse Possession – Unclean Hands May Provide Defense

Aguayo v. Amaro (2013) 213 Cal.App.4th 1102 – Unclean hands may preclude an action for adverse possession. In *Aguayos*, the Plaintiff attempted to adversely possess property from owners, who died in 1993. Owners' heirs did not initiate probate proceedings until long after owners' death. Before the proceedings, the Plaintiff occupied the property, recorded a false quitclaim deed, paid back taxes on the property, and sued to quiet title once he met the adverse possession requirements. The trial court held the Plaintiff acted in bad faith by recording a false deed to divert property tax bills from the true owners to himself. The appellate court affirmed. Although intentional trespass does not defeat a claim of adverse possession, a defense of unclean hands may be based on bad faith conduct other than trespass, such as recording an improper quitclaim deed in order to redirect tax statements and prevent the rightful owners from defeating the claim adverse possession.

Easement – Scope Of Easement Determined By Historic Use

Rye v. Tahoe Truckee Sierra Disposal Co., Inc. (December 16, 2013) ___ Cal.App.4th ___, 2013 Cal. App. LEXIS 1003 – When a deed grants an easement in general terms, historic use establishes the extent of the easement. In *Rye*, the Defendant, Tahoe Truckee Sierra Disposal Company, used an area of the Plaintiffs' property to store garbage trucks and garbage bins pursuant to an easement. The Plaintiffs sought to bar Tahoe Truckee from expanding its use of the easement beyond historic uses. The trial court found in favor of the Plaintiffs, and the Court of Appeal affirmed. It held that when a deed grants an easement in "general terms, without specifying or limiting the extent of use," the court cannot infer an exclusive easement. Instead, use is established by past use after the easement has been used for a "reasonable time." Here, the area subject to the easement was specified, but the extent and location of the parking and storage on the easement was not. As such, the trial court properly found that Tahoe Truckee's use of the easement was limited to the area it historically used for parking and storage.

Home Affordable Mortgage Program – Lender Must Offer Permanent Mortgage Modification Where Borrower Complies With Trial Period Plan

West v. JPMorgan Chase Bank N.A. (2013) 214 Cal.App.4th 780 (**Fybel**, O'Leary, Moore) – Where a borrower complies with all the terms of a trial period plan under the federal Home Affordable Mortgage Program ("HAMP"), and the borrower's representations remain true and correct, the loan servicer must offer the borrower a permanent loan modification. In West, the trial court sustained lender's demurer to borrower's third amended complaint without leave to amend. The Court of Appeal affirmed in part and reversed in part. After borrower's home went into default, she agreed to a trial period plan ("TPP"), a form of temporary loan payment reduction under HAMP, with lender. Borrower complied with the terms of the TPP, and timely made every reduced monthly payment on her loan during the trial period and afterwards. Nonetheless, lender denied borrower a permanent loan modification and sold borrower's home at a trustee's sale. In holding that borrower stated a cause of action for breach of contract, the court agreed with the analysis and interpretation of HAMP from the recent opinion of the United States Court of Appeals for the Seventh Circuit in *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547. Because borrower complied with all the terms of the TPP, lender had to offer her a permanent loan modification. As a party to a TPP, a borrower may sue the lender or loan servicer for its breach.

Homeowner Associations – Board Of Directors Must Give Equal Access To Opposing Viewpoints

Wittenburg v. Beachwalk Homeowners Assn. (2013) 217 Cal.App.4th 654 – The equal-access provision of the Davis-Stirling Common Interest Development Act is triggered any time a member of a homeowners association, including a board member, advocates a point of view using association media. In *Wittenburg*, Plaintiff association members filed suit to void an amendment passed in an association election because the board refused to publish an article opposing the amendment in the newsletter, and refused a homeowner's request to use a common area for a rally opposing the amendment. The trial court found that the board had not violated the Davis-Stirling Common Interest Development Act § 1363.03(a)(1) because the board members were not "candidates or members" advocating for a point of view. The Court of Appeal disagreed. The trial court's erroneous construction of the statute would grant board members authority to use association media to exclude other viewpoints, thereby further empowering members already in power, and weakening those not in power. The trial court was incorrect in finding that board communications were informational rather than advocacy, given that the board stated that it "encouraged" homeowners to vote for the amendment. Accordingly, during an election, the board must either give equal access to opposing viewpoints or refrain from using association media to advocate its viewpoint.

Wrongful Foreclosure – Judicial Notice Cannot Be Taken Of Defendant's Compliance With Foreclosure Requirements

Intengan v. BAC Home Loans Servicing LB (2013) 214 Cal.App.4th 1047 – Judicial notice cannot be taken of a party's compliance with Civil Code section 2923.5, and a plaintiff's allegations that defendants did not comply with the statute are sufficient to state a cause of action for wrongful foreclosure. The trial court sustained corporate defendants' demurrer to plaintiff's third amended complaint without leave to amend. Plaintiff sought to preclude defendants from foreclosing on her property, contending that defendants lacked authority to foreclose because, in part, defendants did not contact her or attempt to contact her with due diligence as required by Civ. Code, § 2923.5. The Court of Appeal reversed the judgment of dismissal, concluding that judicial notice could not be taken of defendants' compliance with § 2923.5. Section 2923.5 requires not only that a declaration of compliance be attached to the notice of default, but that the bank actually perform the underlying acts (i.e., contacting the borrower or attempting such contact with due diligence) that would constitute compliance. While judicial notice could be properly taken of the existence of a declaration of compliance, it could not be taken of the facts of compliance asserted in the declaration, at least where plaintiff alleged and argued that the declaration was false and the facts asserted in the declaration were reasonably subject to dispute. At most, the declaration could create a factual dispute, which is an insufficient basis for a demurrer.

Wrongful Foreclosure – Judicial Notice May Be Taken Of Purchase Agreement Between FDIC And Asset Buyer

Scott v. JPMorgan Chase Bank N.A. (2013) 214 Cal.App.4th 746 – In affirming the trial court's ruling sustaining a demurrer to borrower's complaint without leave to amend, the Court of Appeal held that the trial court properly took judicial notice of the legal effect of a purchase agreement between the Federal Deposit Insurance Corporation ("FDIC") and the asset buyer. The transfer of assets was an official act (Evid. Code, § 452(c)), as was the FDIC's publication of the purchase agreement on its website. Moreover, the facts deriving from the legal effect of the purchase agreement or from the statements made therein were not reasonably subject to dispute and were capable of ready determination (§ 452(h)), particularly where borrower did not question with specificity the authenticity, completeness, or legal effect of the purchase agreement posted on the official FDIC website.

SETTLEMENT

998 Offers – Expert Fees Incurred After First Of Multiple Offers

Martinez v. Brownco Construction Co. (2013) 56 Cal.4th 1014 – Where a plaintiff makes two successive statutory offers pursuant to Code of Civil Procedure section 998, and the defendant does not obtain a judgment more favorable than either offer, the trial court may permit recovery

of expert fees incurred from the date of the first offer. In *Martinez*, Raymond Martinez and his wife sued the defendant for damages arising from an electrical explosion which injured Mr. Martinez. After plaintiffs served two 998 offers, Ms. Martinez obtained a judgment equal to her first 998 offer and greater than her second 998 offer. The trial court agreed with the Defendant that only the most recently rejected offer is operative, and all prior offers are extinguished by the subsequent offer. The Court of Appeal reversed, and the Supreme Court affirmed the Court of Appeal's decision. Section 998 was enacted to encourage settlement by imposing the burden of costs on parties who fail to obtain a result better than they could have achieved by accepting a reasonable settlement offer. Moreover, general contract principles were inapplicable because section 998's policy of encouraging settlements would be better served if subsequent offers do not entirely extinguish prior offers. In particular, if the benefits and burdens of section 998 offers ran only from the date of the last offer, then plaintiffs would be deterred from making early offers or later adjusting their offers, thereby inhibiting settlement.

998 Offers – Party Accepting 998 Offer May Accept By Filing Offer And Notice Of Acceptance

Rouland v. Pacific Specialty Ins. Co. (2013) 220 Cal.App.4th 280 – A settlement offer pursuant to Code of Civil Procedure § 998 which provides that the accepting party may accept by filing an Offer and Notice of Acceptance meets the statutory requirement that the offer allow for acceptance by signing a statement that the offer is accepted. While the Court noted that recent opinions invalidated section 998 offers due to non-compliance with acceptance requirements, the form entitled "Offer to Compromise and Acceptance Under Code of Civil Procedure Section 998" is not mandatory, and there is no "magic language" or specific format for accepting a section 998 offer. The 998 offer satisfied the acceptance provision of the statute because it described how to accept the offer (through filing the Notice with the court) and this means of acceptance constituted a valid method of acceptance (a writing signed by the acceptor's counsel). The Court stated further that although the offer did not expressly require written acceptance signed by the acceptor's counsel, such a requirement was implicit because filing a Notice with the court necessarily would have involved written acceptance signed by counsel. Finally, the Court reasoned that such an interpretation was consistent with section 998's goal of encouraging settlement while a formalistic approach could potentially invalidate written acceptances, thereby undermining the statutory purpose.

998 Offers – Voluntary Dismissal Without Prejudice Can Constitute A Failure To Obtain A More Favorable Judgment

Mon Chong Loong Trading Corp. v. Superior Court of the State of California, County of Los Angeles (2013) 218 Cal.App.4th 87 – A plaintiff's voluntary dismissal without prejudice constitutes a failure to obtain a more favorable judgment or award, and thus triggers the cost-shifting provisions of Code of Civil Procedure section 998. In *Mon Chong Loong Trading Corp.*

v. Superior Court, the Plaintiff, Defang Cui, sued the Defendant, Mon Chong Loong, for premises liability. Mon Chong Loong served a demand for an exchange of expert witness lists and reports and, shortly thereafter, made the Plaintiff an offer under Code of Civil Procedure Section 998 for $10,000. The Plaintiff did not respond to either the demand or the settlement offer. Mon Chong Loong subsequently moved to preclude Cui from offering any expert witness testimony. While that motion was still pending, Cui requested voluntary dismissal without prejudice, which the court granted. Mon Chong Loong then moved for an award of costs it incurred in preparing for trial, including expert witness fees. The trial court granted Cui's request to tax the expert witness and awarded Mon Chong Loong its remaining costs. The Court of Appeal vacated the trial court order to the extent that it taxed the expert witness costs. Under Section 998, if a settlement offer is rejected and the plaintiff fails to obtain a more favorable judgment, the court has the discretion to require the plaintiff to cover expert witness costs. A voluntary dismissal constitutes a failure to obtain a more favorable judgment because, in a voluntary dismissal, the plaintiff obtains no award at all. As such, Cui's dismissal triggered the trial court's ability to exercise its discretion in awarding expert witness fees and the trial court erred in granting Cui's request to tax such fees.

Settlement Agreement May Reserve Question Of Attorney's Fees For Later Court Determination

Khavarian Enterprises Inc. v. Commline Inc. (2013) 216 Cal.App.4th 310 – Parties to a settlement agreement can validly specify that one party is potentially a prevailing party and reserve for later determination by the trial court whether that party did prevail, as well as other factual matters involved in making an award of statutory attorney fees. In Khavarian, plaintiff and defendants entered into a settlement agreement in a trade secrets case. The agreement provided that plaintiff would voluntarily dismiss the action but maintain the right to file a motion for attorney's fees and costs under Civil Code § 3426.4 and a memorandum of costs under Code of Civil Procedure § 1033.5, subject to opposition. The trial court denied plaintiff's motion for attorney's fees and costs and granted defendants' motion to strike the cost memorandum, finding that it could not properly decide either motion because the matter was resolved by settlement agreement prior to trial. The Court of Appeal reversed and remanded. The Court concluded that the parties' settlement agreement was legally permissible and dictated that the trial court must exercise its discretion to determine whether plaintiff was the prevailing party, and, if so, to determine whether defendants engaged in willful and malicious misappropriation so as to justify an award of attorney fees and costs as authorized by section 3426.4.

TRIAL

Jury Instructions On Clear And Convincing Evidence Standard Need Only State That It Must Be "Highly Probable" That The Fact In Question Is True

Nevarrez v. San Marino Skilled Nursing and Wellness Centre, LLC (2013) 221 Cal.App.4th 102 – Jury instructions on the clear and convincing evidence standard need only state that it must be "highly probable that the fact is true." In *Nevarrez*, the Plaintiff patient filed a complaint against the Defendants, a nursing home and its operator, alleging elder abuse. At trial, the jury was instructed with CACI No. 201, which states that clear and convincing evidence means "that the party must persuade you that it is highly probable that the fact is true." On appeal, the Defendants argued that the phrase "highly probable that the fact is true" is misleading without additional language stating that clear and convincing evidence "requires a finding of high probability that the evidence be so clear as to leave no substantial doubt; sufficiently strong as to command the unhesitating assent of every reasonable mind." The Court of Appeal rejected the Defendants' position and affirmed the trial court's instruction. It held that CACI No. 201 is consistent with California case law and that additional language such as that proposed by the Defendants would make instructions on the clear and convincing standard "dangerously similar" to those describing the burden of proof in criminal cases.

UNFAIR COMPETITION

First Amendment Can Be A Defense To Misappropriation Of Identity Claims

Ross v. Roberts (December 23, 2013) ___ Cal.App.4th ___, 2013 Cal. App. LEXIS 1039 – A musician may continue to use another's name and identity where the use is transformative and adds new expression. In *Ross*, the Plaintiff, Ricky Ross, a notorious cocaine dealer, sued William Roberts, for unauthorized commercial use of his name and identity under Civil Code section 3344, unfair competition statutes, and the common law. The Defendant is a rapper who goes by the name of "Rick Ross" and whose lyrics frequently include fictional accounts of selling cocaine that bear a striking similarity to the Plaintiff's actual exploits. Ross alleged that Roberts misappropriated his name and identity for his financial benefit. The trial court granted summary judgment in favor of the Defendant, finding that the statute of limitations had run and that the Plaintiff's claims were barred by laches. The Court of Appeal affirmed the judgment on different grounds. It held that the Defendant's use of the name and persona of "Rick Ross" constitutes protected expression under the First Amendment because Roberts work is "transformative" and includes significant creative elements. Further, the Court held that the value of Roberts' work "does not derive primarily from plaintiff's fame" and is instead based on the "music and professional persona" that he created. As such, the First Amendment barred the Plaintiff's claims.

Misleading Advertising Is Prohibited Even If Truthful Disclosures Are Present In Footnote Links

Chapman v. Skype Inc. (2013) 220 Cal.App.4th 217 – Chapman, a consumer, filed a class action against Skype, alleging it committed fraud, and negligent misrepresentation, and violated unfair competition and false advertising laws by calling a subscription plan "Unlimited" when it was actually subject to a "Fair Usage Policy" that imposed limits on the number and lengths of calls allowed under the "unlimited" service. The trial court dismissed Chapman's suit, finding that a footnote to a disclaimer regarding the fair usage policy was binding on Chapman, and precluded findings that (a) the advertising was false or misleading, or (b) Chapman reasonably or actually relied on the advertising. The Court of Appeal reversed. It noted that both the UCL and the FAL prohibit misleading advertising even if it is truthful. A reasonable jury could conclude that consumers were likely to be deceived by Skype's use of the term "unlimited" and that the "Fair Usage Policy," linked to in a separate page, could fail to alert a reasonable consumer to the existence of fair usage limits. As to fraud, the Court of Appeal held that (a) Chapman had adequately alleged a misrepresentation of fact, in that the use of the term "unlimited" to refer to a calling plan that was not actually unlimited, and (b) the presence of the disclaimer went to the reasonableness of Chapman's reliance, and did not compel the conclusion that the reliance was unreasonable as a matter of law.

Statute Of Limitations Does Not Bar UCL Claim For Breach Of Continuing Duty.

Aryeh v. Canon Business Solutions, Inc. (2013) 55 Cal.4th 1185 – The Supreme Court resolved an appellate court split over applying common law accrual rules to the statute of limitations applicable to unfair competition claims under Business & Professions Code § 17200. Section 17200 broadly prohibits "unlawful, fraudulent or unfair" business acts or practices, and the statute of limitations in section 17208 only provides a claim must be filed within four years of "accrual." Because the Legislature was silent on the subject, the Court held that there is a presumption that ordinary common law tolling principals (including the continuous accrual rule applicable to continuing violations) apply to section 17208. As such, the Court found that the Plaintiff could recover for unfair or unlawful acts that occurred within the four year period, even if a part of the unfair or unlawful course of conduct commenced outside the limitations period.

Statute With No Private Action May Act As Predicate For Unfair Competition Claim

Rose v. Bank of America (2013) 57 Cal.4th 390 – In the companion case to *Zhang v. Superior Court*, the California Supreme Court clarified the scope of the Unfair Competition Law (Bus. & Prof Code § 17200), by holding that a UCL claim may be based on another predicate statute even after a private right of action under that statute has been repealed, so long as there is no indication that the legislature intended to bar indirect private remedies. In *Rose*, the plaintiffs

brought a class action suit against Bank of America, alleging unfair business practices based on violations of the federal Truth in Savings Act (TISA), which requires certain disclosures to bank customers. Prior to 2001, TISA had a provision that allowed claims for civil damages based on failure to comply with these requirements. While that provision was repealed, Congress preserved the savings clause, which "explicitly approved" the enforcement of state laws relating to the requirements of the TISA, as long as they are consistent with those requirements. This indicated that Congress did not intend to preclude states from borrowing the requirements of TISA as the predicate for a civil liability under a state statute like the UCL.

Unfair Insurance Practices Act Does Not Bar Unfair Competition Claims

Zhang v. Superior Court (2013) 57 Cal.4th 364 – The Unfair Insurance Practices Act does not bar claims against insurers brought under the Unfair Competition Law. The Plaintiff insured filed suit against the Defendant insurance company alleging breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the Unfair Competition Law (UCL) through false advertising and insurance bad faith. The Defendant demurred to the UCL claim, arguing that it was "an impermissible attempt to plead around *Moradi-Shalal [v. Fireman's Fund Ins. Companies]* bar against private actions for unfair insurance practices under section 790.03," the Unfair Insurance Practices Act. The trial court agreed, but the Court of Appeal reversed, holding that the Plaintiff's false advertising claim was a "viable basis" for her UCL complaint. The California Supreme Court affirmed. It held that *Moradi-Shalal* does not preclude UCL actions against insurers for conduct that violates both the UCL and the UIPA. If grounds independent from the UIPA are sufficient to plead a UCL cause of action, the UIPA does not operate to shield insurers from liability.