# NEW STATUTES, NEW RULES, AND NEW CASES

## WHAT EVERY BUSINESS LITIGATOR NEEDS TO KNOW IN 2017

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# SIGNIFICANT STATUTES
# Enacted in 2016

# SIGNIFICANT RULES
# Adopted in 2016

# SIGNIFICANT CASES
# Decided in 2016

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# ALTERNATIVE DISPUTE RESOLUTION

## 1. Arbitration – Certified Shorthand Reporters.

**[SB 1007] Code of Civil Procedure § 1282.5** – New Code of Civil Procedure § 1282.5 specifies that a party to arbitration has the right to have a certified shorthand reporter transcribe any deposition, proceeding, or hearing. The request for a reporter must be made either in a demand, response, answer, or counterclaim related to the arbitration, or at a pre-hearing scheduling conference. If the arbitration agreement does not provide for a reporter, the cost of the reporter is borne by the party requesting the transcript (except in the case of an indigent consumer in a consumer arbitration). A party whose request for a certified shorthand reporter is refused may petition the court for an order to compel the arbitrator to grant the party's request. The court may stay any hearing, deposition or proceeding in the arbitration pending the decision on the petition.

# BUSINESS ENTITIES

## 2. Corporate Fraud – Restitution.

**[AB 2759] Corporations Code §§ 2281, 2282** – Existing law establishes a state fund to provide restitution for victims of a corporation's fraud, misrepresentation, or deceit. Compensation from the fund is available in the amount of the victim's unpaid judgment against the corporation. The victim compensation fund has now been expanded to also provide restitution to victims who obtain a criminal restitution order against an agent of a corporation. The recent amendments also removed a requirement that the Secretary of State pay the victim interest when restitution is delayed due to a temporary lack of money deposited in the fund.

## 3. Limited Liability Company – Dissolution by Vote.

**[AB 1722] Corporations Code §§ 17707.01, 17707.02** – Previously, a vote of the majority of members was required to dissolve a limited liability company. That bar has now been lowered, so that an LLC may be dissolved upon the vote of 50% or more of the voting interests of the members. Similarly, when an LLC has not conducted any business, the LLC's articles of organization may now be cancelled upon the certification of 50% or more of the voting interests of the members or managers, or 50% or more of the persons signing the articles of organization if there are no members or managers.

## 4. Corporations, Partnerships, and LLCs – Tax Return Due Dates.

**[AB 1775] Revenue and Taxation Code §§ 18601, 18633, 18633.5, and 23281** – For taxable years beginning on or after January 1, 2016, partnerships and limited liability companies classified as a partnership are required to file an informational return on the 15th day of the 3rd month, following the close of its taxable year. Taxpayers subject to the Corporate Tax Law, but not including "S Corporations," must file the return on the 15th day of the 4th month, following the close of its taxable year. These changes conform California's due dates to the due dates for federal tax returns.

### 5. Security Breach – Disclosure.

**[AB 2828] Civil Code §§ 1798.29, 1798.82** – Existing law requires businesses that own or license computerized personal information to disclose a data breach to any California resident whose *unencrypted* personal information was acquired by an unauthorized person. That provision has now been expanded to also require disclosure where *encrypted* personal information is breached, whenever the encryption key or security credential has also been breached, so that the business has a reasonable belief that the encrypted information could be rendered readable.

## CIVIL PROCEDURE

### 6. Electronic Filing Fees – Payment Processing.

**[AB 2244] Code of Civil Procedure § 1010.6; Government Code § 6159** – New fee related legislation provides that the fee charged by the court, an electronic filing service provider, or an electronic filing service provider to process a payment cannot exceed the actual costs incurred for processing the payment. The legislation also authorizes electronic filing service providers to impose a fee for the use of a credit card, debit card, or electronic funds transfer, in an amount not to exceed the cost incurred in providing for payment by credit card, debit card, or electronic funds transfer.

### 7. Electronic Filing Fees – Recoverable As Costs.

**[AB 2244] Code of Civil Procedure § 1033.5** – This list of items recoverable by the prevailing party as ordinary costs of litigation has been expanded to include the costs of electronic service, filing, or hosting of documents where required or ordered by the court.

### 8. Notice Of Entry Of Judgment – Personal Service Authorized.

**[AB 2881] Code of Civil Procedure § 664.5** – Section 664.5 previously required a notice of entry of judgment to be served by mail. The recent amendment allows a notice of entry of judgment to be served either by mail or by personal service.

### 9. Official Transcripts – Extension Of Prohibition On Instant Visual Display Being Used As Official Transcript.

**[AB 2881] Code of Civil Procedure § 273** – Existing law provides that an official transcript is prima facie evidence of the testimony and proceedings transcribed, and that rough drafts and copies of the instant visual display of the transcript cannot be certified or used as the official transcript, or used to rebut or contradict the official transcript. These provisions were set to expire on January 1, 2017, and have been extended through January 1, 2022.

### 10. Public Notice Districts.

**[AB 2881] Various Sections of the Business & Professions Code, Civil Code, Code of Civil Procedure, Commercial Code, and Government Code –** Existing law provided that publication of notice in certain contexts (such as lien and mortgage sales) shall take place in the

various judicial districts of the state. Amendments passed in 2016 repealed those provisions, and established specific "public notice districts," which are smaller than the established judicial districts in most cases. The County of Orange, for example, has been broken up into 5 primary public notice districts, with a catchall provision to address notice in portions of the county outside the specified notice districts. (*See* Government Code § 6085.390.)

### 11. Service Of Process – Access To Gated Communities For Investigators Employed By Government Attorneys.

**[SB 1431] Code of Civil Procedure § 415.21 –** Existing law requires gated communities to give access to a county sheriff or marshal or a registered process server for the purposes of serving process or a subpoena. The recent amendment to § 415.21 also provides access to an investigator who is employed by an office of the Attorney General, a county counsel, a city attorney, a district attorney, or a public defender.

### 12. Unlawful Detainer – Access to Case Records.

**[AB 2819] Code of Civil Procedure §§ 1161.2, 1167.1** – Under the prior law, unlawful detainer records were made available to the general public 60 days after the complaint was filed, unless the defendant prevailed in the action within that 60 day period. Under the recent amendments, the records are only made available to the general public if the plaintiff prevails within 60 days of the filing of the complaint. If the plaintiff prevails at trial after more than 60 days from the filing of the complaint, the court may order the records to be made available to any person.

### 13. Writs of Attachment And Execution To Enforce Money Judgment – Delivery Of Documents And Fees To The Levying Officer.

**[AB 2211] Code of Civil Procedure §§ 488.080, 699.080, 706.108** – Where a registered process server levies on a writ of attachment or writ of execution, the process server is required to deliver certain documents (including the writ) and a fee to the levying officer. A 2016 amendment provides that the registered process server may have the documents and fee delivered to the levying officer by someone other than the process server himself.

## CONTRACTS

### 14. Online Entertainment Employment Service Provider – Publication of Age.

**[AB 1687] Civil Code § 1798.83.5** – Online entertainment employment service providers with paid subscribers are now prohibited from publishing information about the subscriber's age in an online profile of the subscriber. The provider must also remove certain information relating to the subscriber's age if requested. This statute was enacted in response to complaints that popular entertainment site IMDb.com was publishing subscribers' ages without their permission, and that this was enabling employers to commit age discrimination without having to ask prohibited questions. IMDb.com has filed suit claiming that the statute is unconstitutional.

# CRIMINAL LAW

## 15. Extortion/Computer Crimes – Introducing Ransomware To A Computer System Constitutes Extortion.

**[SB 1137] Penal Code § 523** – The statute that lists the computer crimes that constitute criminal extortion has been expanded to include introducing "ransomware" into a computer system. Ransomware is defined as an unauthorized computer contaminant or lock that restricts access to the computer, or any data therein, where a demand is made for the payment of money or other consideration to remove the ransomware. The section provides that where ransomware is installed with an intent to obtain money or consideration, it is punishable as if the money or consideration demanded was actually obtained by means of the ransomware. Under existing law, a civil action for treble damages and attorney's fees is available to victims of criminal extortion under Penal Code § 496(c). (*See Bell v. Feibush* (2013) 212 Cal.App.4th 1041.)

# DISCOVERY

## 16. Expert Witness Depositions – Production Of Documents Due Three Days Before Deposition.

**[AB 2427] Code of Civil Procedure § 2034.415** – An expert witness is now required to produce responsive documents and materials, including any electronically stored information, three business days prior to his or her expert deposition.

## 17. Production Of Electronically Stored Information At Deposition.

**[AB 2427] Code of Civil Procedure § 2025.280** – Where a deponent is served with a deposition notice or subpoena that calls for the production of electronically stored information, and any of that information is password protected or otherwise inaccessible, the deponent must provide either: (a) a means of gaining direct access to that information, or (b) a translation of that information into a reasonably usable form.

## 18. Search Warrant Of Business Records.

**[SB 1087] Evidence Code §§ 1560, 1561, 1563** – Changes to the Evidence Code specify that a custodian of business records may comply with a search warrant for business records by delivering documents with an affidavit similar to that required for compliance with a subpoena duces tecum. Such documents shall then be admissible in a criminal action in the same manner as business records produced in response to a subpoena.

## 19. Use Of Coroner's Photographs Or Recordings In Civil Actions.

**[AB 2427] Code of Civil Procedure § 129** – Existing law prohibits (with certain exceptions) the making or dissemination of copies of a coroner's photographs or video recordings of any portion of the body of a deceased person. A new exception to that prohibition allows the use of such

copies in a civil action relating to the deceased person's death if: (1) the coroner receives written authorization from a legal heir, or (2) a subpoena is issued by a party who is a legal heir of the deceased person in a pending civil action. This exception is intended to make it easier for heirs to obtain such copies for potential use in litigation without the necessity of commencing litigation first.

# EMPLOYMENT AND LABOR

## 20. Employment Agreements – Venue/Choice Of Law Provisions May Not Specify Out-Of-State Forum Or Law For Claims Arising In California.

**[SB 1241] Labor Code § 925** – New Labor Code § 924 prohibits provisions in employment contracts that: (a) require employees to adjudicate claims outside of California if the claims originate in California or (b) deprive the employee of substantive protections of California law with respect to any controversy arising in California. The statute applies only to contracts entered into, modified, or extended on or after January 1, 2017. The prohibited provisions are voidable upon the request of the employee, and disputes over the voided provision must be adjudicated in California under California law. The court is authorized to award an employee reasonable attorney's fees for enforcing his or her rights under the statute. Employment agreements are exempt from the statute if the employee was individually represented by legal counsel.

## 21. Discrimination – Equal Pay Statutes Expanded To Include Racial And Ethnic Pay Disparities.

**[SB 1063] Labor Code §§ 1197.5, 1199.5** – An employer is now prohibited from paying any of its employees a wage rate less than the rates paid to employees of another race or ethnicity for substantially similar work. Like the existing equal pay provisions relating to sex discrimination, this provision has exceptions that apply where the pay disparity is based on a seniority system, a merit system, a compensation system measured by quantity or quality of production, or another bona fide factor.

## 22. Discrimination – Equal Pay – Disparity Cannot Be Based Solely On Prior Salary.

**[AB 1676] Labor Code § 1197.5** – Under an additional amendment to § 1197.5, prior salary alone cannot be used to justify a wage disparity between workers of different sex, race, or ethnicity. The legislative history indicates that this provision was intended to prevent employees from being penalized for prior salaries that may have been discriminatory.

## 23. Discrimination – Reorganization Of Discrimination Statutes.

**[SB 1442] Various Sections Of The Government Code And Education Code** – The statutes relating to discrimination in employment, housing, and eligibility for government programs

have been reorganized, and regulatory authority over these areas has been consolidated in the Department of Fair Employment and Housing.

## 24. Discrimination And Harassment – Repeal Of Exemption For Disabled Workers Employed Under A Special License.

**[AB 488] Government Code §§ 12926, 12926.05** – Under current law, nonprofit sheltered workshops and rehabilitation centers may obtain a special license to employ disabled workers at less than the minimum wage. Prior law exempted employees under such licenses from the discrimination and harassment laws in FEHA. The recent amendments remove that exemption, except for employment actions that are specifically permitted by statute or regulation and necessary to serve employees with disabilities under a special license (such as the payment of wage rates below the minimum wage).

## 25. Discrimination and Retaliation – Notification Of Rights And Protections For Victims Of Domestic Violence, Sexual Assault Or Stalking.

**[AB 2337] Labor Code § 230.1** – Existing laws protect employees from discharge or discrimination when the employee is a victim of domestic violence, sexual assault, or stalking, and takes time off from work to address the domestic violence, sexual assault, or stalking. Amendments to § 230.1 provide that employers must now inform each new employee in writing of the rights established under these laws upon hiring. Existing employees must be informed of these rights upon request. These notice requirements will not become effective until the Labor Commissioner posts a form on the Internet that employers can use to comply with the requirements.

## 26. Minimum Wage – $15/Hour Minimum Wage.

**[SB 3] Labor Code § 1182.12** – The minimum wage ($10/hour as of January 1, 2016) has been increased to $10.50 for employers with 26 or more employees, and will rise by $1/hour each year until 2022, when it reaches $15/hour. The minimum wage for employers with 25 or fewer employees will be increased to $10.50 on January 1, 2018, and will rise by $1/hour each year thereafter until 2023, when it reaches $15/hour.

## 27. Workers Compensation – Exemptions by Written Waiver.

**[AB 2883] Labor Code §§ 3351, 3352, 6354.7** – The prior law exempting certain working shareholders and members of private companies from workers' compensation law has been amended. The new exemption applies to an employee if: (1) he or she is an officer or director of a corporation and is the owner of at least 15% of the issued and outstanding stock of the corporation, or an individual who is a general partner of a partnership or a managing member of a limited liability company, and (2) he or she elects to be excluded by executing a written waiver of his rights under the laws governing workers' compensation.

# ENVIRONMENTAL

## 28. California Land Reuse And Revitalization Act – Extension.

**[SB 820] Health and Safety Code § 25395.109 and 25395.110** – The California Land Reuse and Revitalization Act of 2004 provides limited immunity to innocent owners of "brownfield" sites, when they enter into a cooperative agreements with the agencies overseeing cleanup of their sites. The Act was scheduled to expire on January 1, 2017, but has been extended to January 1, 2027.

## 29. CEQA – Concurrent Record Of Proceedings.

**[SB 122] Public Resources Code § 21167.6.2** – The California Environmental Quality Act has been amended to allow a lead agency to elect to prepare a record of proceedings concurrently with the preparation of the environmental documentation for a project. The election may be made at the request of the project applicant. If such an election is made, all parts of the record must be made available online by the lead agency, and the costs must be borne by the project applicant. In addition, if this election is made, the cost of preparing the concurrent record is not a recoverable cost under CCP § 1032.

## 30. CEQA – Online Database Of Environmental Documents.

**[SB 122] Public Resources Code § 21159.9** – The State Office of Planning and Research is required to establish an online public database of environmental documents, notices of exemption, notices of preparation, notices of determination, and notices of completion. A report describing the implementation of this database is due July 1, 2017, and a status report is due July 1, 2019.

## 31. Judicial Review Of Decisions By State Water Resources Control Board And Regional Water Quality Control Boards – Procedures.

**[AB 2446] Health and Safety Code § 116700; Water Code § 13321, 13330, and 13361** – The Porter-Cologne Water Quality Control Act specifies the procedures for challenging decisions by the State Water Resources Control Board and Regional Water Quality Control Boards. Several significant revisions to those procedures have now been enacted. First, provisions relating to the exhaustion of administrative remedies have been clarified so that all administrative remedies must be exhausted before resorting to a challenge in the court. Next, the court's standard of review has been changed to eliminate a statement that the evidence in any challenge shall consist of all relevant evidence that, in the court's judgment, should be considered. However, the amended statute retains a statement that the "independent judgment" standard shall apply to a review of an action by the State Water Board. Finally, the amendments clarify an existing provision indicating that a showing of irreparable harm is not required in an action for a restraining order or injunction under the Porter-Cologne Act. The clarification indicates that this exception only applies to actions brought by the State Water Board or a regional water board.

# EVIDENCE

## 32. Personal Injury & Wrongful Death – Immigration Status Not Admissible Or Discoverable.

**[AB 2159] Evidence Code § 351.2** – In civil actions for personal injury or wrongful death, evidence of a person's immigration status is not admissible and discovery of a person's immigration status is not permitted.

# GOVERNMENT

## 33. Brown Act – Online Posting Of Legislative Agenda.

**[AB 2257] Government Code § 54954.2** – Beginning January 1, 2019, local legislative bodies of cities, counties, special districts, school districts and political subdivisions must post agendas for public meetings on the local agency's primary web site homepage. Agencies are exempted from this if they have an integrated agenda management platform that meets specified requirements.

## 34. California Victims Compensation Board – Decisions and Appeals.

**[AB 1563] Government Code § 13959** – Where a victim appeals a staff determination to deny victim's compensation, the California Victim Compensation Board must either decide the appeal, or determine that there is insufficient information to make a determination, within 6 months of the date the board received the appeal.

## 35. Claims Made In Advertisements – County Counsel May Demand Evidence Of Facts On Which Claim Is Based.

**[SB 1130] Business and Professions Code § 17508** – Existing law allows the Director of Consumer Affairs, the Attorney General, any city attorney, or any district attorney to request evidence of the facts on which an advertising claim is based, and seek to compel termination or modification of the claim if it is not adequately substantiated. The 2016 amendment has expanded this law to allow county counsel to request evidence and seek to compel termination or modification of advertising claims.

## 36. County Recorder –Documents May Be Rerecorded To Make Minor Corrections.

**[AB 1974] Government Code §§ 27201, 27288.1** – Illegible text may be corrected, and certain minor changes may now be made to recorded documents, by rerecording the original document along with a corrective affidavit that: (a) is attached to the original instrument to be rerecorded, (b) sets out the information corrected, (c) is certified under penalty of perjury, and (d) is acknowledged. Each rerecorded document must include a cover sheet stating the reason for rerecording.

## 37. Public Contracts – Certification Of Compliance With Discrimination Laws.

**[AB 2844] Public Contract Code § 2010** – A person that submits a bid or proposal to a state agency with respect to any contract in the amount of $100,000 or more must certify at the time the bid or proposal was submitted that they are in compliance with the Unruh Civil Rights Act and the California Fair Employment and Housing Act.

## 38. Public Contracts – Claim Resolution Process.

**[AB 626] Public Contract Code § 9204** – A new section has been added to the Public Contract Code, providing for a claim resolution process. The new process applies to payment disputes in connection with public works contracts entered into on or after January 1, 2017. Under the statute's terms, a public contractor may send a claim by registered or certified mail to non-exempt public entity, and the entity must review the claim and respond in writing within 45 days. The response must identify the disputed and undisputed portions of the claim, and the undisputed portions must then be paid within 60 days. The contractor may then demand an informal meet and confer conference, followed by non-binding mediation, with the costs to be shared equally. Any amounts that are not timely paid as required under the new statute accrue interest at 7%.

## 39. Public Information – Public Domain Status Of Legislative Information.

**[AB 884] Government Code §§ 10248.5, 9026.5** – Assembly Bill 884 has repealed provisions that prohibited the commercial or political use of television signals generated by the California Assembly. The Bill also specifies that information that the Legislative Counsel is required to provide to the public regarding legislation is in the public domain, and is not subject to any claim of copyright or other proprietary interest by the state.

## 40. Public Records Act – Exception For Personal Information Of Government Employees.

**[AB 2843] Government Code § 6253.2 and 6254.3** – Existing law provides that the home addresses and home telephone numbers of state employees and employees of a school district or county office of education are generally excepted from disclosure under the Public Records Act. The exception has now been expanded to employees of all public agencies. The information excepted from disclosure has also been expanded to include employees' personal cellular telephone numbers and birth dates.

## 41. Public Records Act – Exemption For Vendor Or Contractor Codes.

**[SB 441] Government Code § 6254.33** – Under the California Public Records Act, any identification number, alphanumerical character, or other unique identifying code used by a public agency to identify a vendor or contractor, or an affiliate of a vendor or contractor, is exempt from disclosure, unless the number or code is used in public bidding or an audit involving the public agency.

### 42. Public Records Act – Information Already Available On Website.

**[AB 2853] Government Code § 6253** – A public agency that posts a public record on its website may refer a member of the public that requests to inspect the public record to the agency's website where the record is posted. If a member of the public requests a copy due to an inability to access the document website, the public agency must promptly provide a copy.

## IDENTITY THEFT

### 43. Debt Collectors – Notice To Credit Reporting Agency Of Identity Fraud Dispute.

**[AB 1723] Civil Code § 1785.16.2 and 1788.18 –** Existing laws require debt collectors to cease collection efforts and conduct a review whenever a debtor submits a police report indicating that the debtor was the victim of identity fraud. Collection efforts can only be resumed if the collector makes a good faith determination that the debtor is responsible for the debt. Amendments now specify that the debt collector must notify a credit reporting agency of the disputed debt if the debt collector furnished adverse credit information to the agency. If, after review, the debt collector does not recommence debt collection, the debt collector has 10 days to notify the credit reporting agency to remove the adverse information. The amendments also specify that if a creditor receives notice that a debt collector has terminated collection activities under these provisions, the creditor is prohibited from selling the debt to any debt collector.

## LAW SCHOOLS

### 44. Accreditation – Public Disclosure.

**[SB 1281] Business and Professions Code § 6061.7** – In addition to the student disclosure statements required by existing law, an unaccredited law must now post on its website specified information, including tuition costs, class sizes, number of faculty, bar passage data, and employment outcomes for graduates. The State Bar is authorized to develop a standard information reporting template. Disclosure information must also be distributed by the school to all applicants being offered conditional scholarship at the time the scholarship offer is extended.

## LICENSURE

### 45. Unlicensed Contractors – Substantial Compliance.

**[AB 1793] Business and Professions Code § 7031** – Existing law prohibits unlicensed contractors from bringing actions to recover compensation for contracting work, and authorizes a person who utilizes an unlicensed contractor to bring an action to recover compensation paid to the unlicensed contractor. An exception exists for previously licensed contractors whose licenses have lapsed, where they can establish "substantial compliance" with licensing requirements. The factors required to show substantial compliance have been amended by the deletion of the factor requiring the contractor to show that he did not know or have reason to know that he was unlicensed during performance of the contract. The remaining factors are that

the contractor: "(1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure."

# MISCELLANEOUS

## 46. Alcoholic Beverages – Unlicensed Distribution At Barber Shops And Beauty Salons.

**Business & Prof. Code § 23399.5** – Barbershops and beauty salons may now serve a client twelve ounces of beer or six ounces of wine without a license from Department of Alcoholic Beverage Control, as long as there is no extra charge for the beverages and the business has a license in good standing with the State Board of Barbering and Cosmetology. Alcohol may not be served after 10 p.m.

## 47. Official State Fabric – Denim.

**[AB 501]** – Denim is now the official state fabric.

## 48. Space Day.

**[SB 1138] Government Code § 6726** – The first Friday in May of each year is now Space Day. The Governor shall encourage public schools and educational institutions to conduct suitable commemorative exercises on Space Day, and residents, businesses, and public entities are encouraged to dim or turn off their lights between 9 P.M. and 10 P.M. on Space Day.

# PUBLIC ACCOMODATIONS

## 49. All Gender Restrooms.

**[AB 1732] Health & Safety Code 118600** – Beginning March 1, 2017, all single-user toilet facilities in any business establishment, place of public accommodation, or government agency must be identified as all-gender facilities.

# REAL PROPERTY

## 50. Common Interest Development – Annual Notice.

**[SB 918] Civil Code § 4041** – An owner of a separate interest in a common interest development must annually provide the association with a written statement containing a notice address, a secondary address, the name of his legal representative, if any, and whether the separate interest is owned-occupied, rented out, developed but vacant, or undeveloped. If an owner fails to provide the required notice, the property itself is deemed to be the address at which notices shall be delivered by the association.

## 51. Common Interest Developments – Construction Defects – Extension Of Dispute Resolution Procedures.

**[AB 1963] Civil Code § 6000** – The Davis-Stirling Common Interest Development Act requires associations to engage in informal dispute resolution procedures before filing a claim for design or construction defects. Those provisions were scheduled to become inoperative on July 1, 2017, and be repealed on January 1, 2018. The provisions have been extended, so that they will be operative until July 1, 2024, and the provisions will be repealed on January 1, 2025.

## 52. Common Interest Development – Notice of Pesticide Use.

**[AB 2362] Civil Code § 4777** – A common interest development association or its authorized agent must provide notice to an owner and, if applicable, a tenant of separate interest, and under certain circumstances to owners and, if applicable, tenants of adjacent separate interests, if pesticide is to be applied without a licensed pest control operator to a separate interest or to a common area.

## 53. Disclosures – Occupant Death And HIV/AIDS Status.

**[AB 73] Civil Code § 1710.2** – Real property owners and real estate agents are not required to disclose to buyers the occurrence or manner of death of an occupant where the death has occurred more than three years ago, nor are they required to disclose that an occupant of the real property was living with HIV or died from AIDS-related complications.

## 54. Mortgage Servicer – Notice of Default Upon Death.

**[SB 1150] Civil Code § 2920.7** – New Civil Code § 2920.7 provides that a mortgage servicer may not record a notice of default after being notified of the borrower's death until it provides the person claiming to be the borrower's successor in interest with 30 days to provide documentation of the borrower's death, and 90 days to provide documentation demonstrating the claimant's interest in the real property. If a successor provides reasonable documentation, the mortgage servicer must provide information about the loan to the successor, and allow the successor to apply to assume the mortgage and to apply for foreclosure prevention alternatives. These provisions do not apply to servicers who have foreclosed on 175 or fewer mortgages in the previous year, and do not apply to a successor involved in a legal dispute over the ownership of the real property.

## 55. Notaries – Proof Of Identity.

**[AB 2566] Civil Code § 1185** – The list of acceptable forms of identification that may be accepted by notaries has been expanded to include a valid passport from the applicant's country of citizenship, or a valid consular identification document issued by a consulate from the applicant's country of citizenship. A prior requirement that foreign passports be stamped by the United States Citizenship and Immigration Services of the Department of Homeland Security has been eliminated.

# TORTS

## 56. Disability Discrimination – Commercial Leases – Certified Access Specialist Inspection.

**[AB 2093] Civil Code § 1938** – A commercial property owner or lessor must state on every lease form or rental agreement executed on or after January 1, 2017, whether or not the premises have been inspected by a Certified Access Specialist (CASp). If the premises have not been issued a disability access inspection certificate, a statement on the lease must be included stating that upon the request of the lessee, the property owner may not prohibit a CASp inspection of the subject premises. There is now a presumption that making repairs or modifications necessary to correct violations of construction-related accessibility standards that are noted in the report is the responsibility of the commercial property owner unless otherwise agreed upon by the parties. If the prospective tenant is not given the opportunity to review any CASp report prior to execution of the lease, and if the report is not provided at least 48 hours prior to execution of the lease, the prospective lessee has the right to rescind the lease for 72 hours after execution.

## 57. Disability Discrimination – Construction-Related Accessibility Standards.

**[SB 269] Civil Code §§ 55.53, 55.56; Government Code §§ 4459.7, 4459.8, 8299.06, 65941.6, 65946 et seq.** – California law specifies that violations of the Americans With Disabilities Act shall constitute violations of Civil Code §§ 54 and 54.1, which subject defendants to treble actual damages and minimum statutory damages of $4,000. New amendments mitigate these statutory damages by: (1) establishing a rebuttable presumption that certain technical violations relating to signage and parking space striping do not cause a plaintiff to experience difficulty, discomfort, or embarrassment, and (2) providing that a defendant is exempt from liability for minimum statutory damages based on a violation of construction related accessibility standards, if the structure or area at issue was inspected by a certified access specialist before the plaintiff gave notice of a violation, and the violation was corrected within 120 days of the inspection.

## 58. Eavesdropping.

**[AB 1671] Penal Code § 637.2** – New Penal Code § 637.2 provides a private right of action to victims of violations of the state's electronic eavesdropping laws, which make it a crime to eavesdrop upon or record a confidential communication by means of an electronic amplifying or recording device without the consent of all parties to the confidential communication. A plaintiff in such an action may seek injunctive relief, and may recover the greater of $5,000 per violation, or treble actual damages. The plaintiff is not required to show any actual damages.

# WILLS AND TRUSTS

## 59. Power Of Appointments – Recast Of Statutory Provisions.

**[AB 2846] (Numerous Probate Code sections)** – The law pertaining to powers of appointment, (which grant to a designated person the authority to direct the disposition of specified property) has been recast, to conform to select provisions of the Uniform Powers of Appointment Act. The

"donee" of the power of appointment is now designated as the "powerholder." Requirements are specified for the instrument creating the power of appointment, which, among other things, must manifest the donor's intent to create in the powerholder the power of appointment over the donor's property. The revisions also provide that property subject to a limited power of appointment (which prohibits the powerholder from giving the property to himself) is not subject to the claims of powerholder's property, and specify when property subject to a general power of appointment may be subject to claims of the donor's creditors.

## 60. Digital Assets Act – Disposition Of Decedent's Electronic Communications And Digital Assets.

**[AB 691, SB 873] Probate Code §§ 870 *et seq.*** – The Revised Uniform Fiduciary Access to Digital Assets Act enacted in AB 691 establishes rules governing the disposition of a decedent's electronic communications and digital assets. Under these rules, a user of an electronic service may give directions regarding the disposition of his or her electronic assets in an online tool managed by the custodian of those assets, or in a will, trust, power of attorney, or other record. The custodian of the records generally must comply with the user's instructions. Instructions provided via an online tool take precedence over instructions in a testamentary document. The Act provides immunity to a custodian for acts or omissions taken in good faith and in compliance with the Act. An amendment enacted in SB 873 specifies that immunity does not apply in a case of gross negligence or willful or wanton misconduct.

## 61. Trustee – Notice of Proposed Action.

**[AB 1700] Probate Code § 16501** – Current trust law allows trustees to provide a notice of proposed action in certain circumstances. A trustee is not liable to beneficiaries for taking the proposed action where the trustee does not receive written objections in response to the notice. The prior law excluded preliminary and final distributions of trust assets from the list of actions that could be included in a notice of proposed action. That exclusion has now been removed, and the statute has been clarified to specify that the trustee's own discharge is not an action that can be included in a notice of proposed action.

# SIGNIFICANT RULES
# Adopted in 2016

# TITLE 1 – RULES APPLICABLE TO ALL COURTS

## 1. Protection Of Privacy – Rule Renumbered.

**Rule 1.201, Former Rule 1.200(b)** – The rule regarding protection of privacy has been renumbered.

# TITLE 2 - TRIAL COURT RULES

## 2. Filing Electronic Documents Under Seal.

**Rule 2.551** – The rule relating to filing documents under seal has been amended to account for electronic filing. When a motion to file documents under seal has been denied, and the submitting party does not notify the clerk to file the documents unsealed, the existing rule required the clerk to return the documents. The rule now adds that the clerk shall permanently delete the documents if they were filed electronically. In addition, where documents are accepted to be filed under seal, appropriate access controls must be established to ensure that only authorized persons can access the electronic files.

## 3. Format Of Documents – Electronically Filed Documents Must Be Text Searchable.

**Rules 2.100**, **2.114, 2.140, and 2.256** – Documents and exhibits filed electronically must comply with Rule 2.256(b). Rule 2.256(b) has been amended to require electronically filed documents to be text searchable when technologically feasible. The advisory comment states that "technologically feasible" does not require more than standardly available OCR software.

## 4. Format Of Documents – Pagination Must Commence On First Page.

**Rules 2.109** – The page numbering on all documents submitted to the trial court must now begin with the first page and use only Arabic numerals (e.g., 1, 2, 3). The page number may be suppressed and need not appear on the first page.

## 5. Format Of Documents – Minor Revisions.

**Rules 2.103, 2.104, 2.105, and 2.110** – Minor non-substantive changes were made to the rules relating to the format of papers filed in a trial court. For example, rule 2.110 changes the word "type" to "font."

## 6. Format Of Documents – Listing Attorney Email Address On Caption Page Is Now Mandatory.

**Rule 2.111** – Rule 2.111 previously provided that an attorney's e-mail address must appear on the caption page with the attorney's name and address, "if available." The words "if available" have been stricken from the rule, making the attorney's e-mail address a required element of the caption page.

### 7. Format Of Documents – Clerk May Not Reject Papers Based On Minor Variation In Font Size.

**Rule 2.118** – The clerk cannot reject papers solely because the font size is not exactly 12 points, because minimal variation may occur when converting documents to PDF.

### 8. Proof Of Electronic Service Requirements.

**Rule 2.251**– Rule 2.251 has been amended to: (1) state that a proof of electronic service does not need to state that the person making the service is not a party, and (2) eliminate the requirement that a proof of electronic service state the time at which service occurred.

### 9. Proof Of Fax Service Requirements.

**Rule 2.306** – Rule 2.306 was amended to remove the requirement that proof of service by fax include the time at which service occurred.

### 10. Trial Court Procedures For Requesting An Interpreter.

**Rule 2.895** – New rule 2.895 requires superior courts to publish the procedures for requesting an interpreter and to track each request for an interpreter. The rule also requires the attorney for a party requesting an interpreter to notify the court if the party will not be appearing at the proceeding.

## TITLE 3 - CIVIL RULES

### 11. Electronic Filing – General Revisions.

**Rules 3.250 and 3.1302 –** Minor changes were made to the rules to accommodate electronic service and filing. Rule 3.250, which requires parties to retain the original of a document that is served, but not filed (such as a discovery response), has been amended to state that the retained original must have a proof of service that meets the requirements for electronic service, if applicable. Rule 3.1302 provides that rather than returning lodged documents, the clerk may delete those documents if they were lodged electronically.

### 12. Electronic Service.

**Rule 3.751** – This rule has been amended to state that a party may consent to electronic service or a court may require it by local rule or court order.

### 13. Judicial Arbitration – Delivery Of Evidence To Be Used In Arbitration Hearing.

**Rule 3.823** – The rule requiring delivery of certain evidence to be used in a judicial arbitration has been amended to delete the specific extension times applicable to service of documents by various means (e.g., two days for electronic service, five days for service by mail) and replacing them with cross-references to the same extension times set forth in the Code of Civil Procedure.

## 14. Judicial Notice – Procedure For Requesting Notice Of Electronic Court Files.

**Rule 3.1306** – Where a party seeks judicial notice of matter in the court file, the requesting party must either: (a) make arrangements to have the file present at the hearing, or (b) confirm that the file can be electronically accessed by the court at the hearing.

## 15. Motion Papers – Major Formatting Changes.

**Rule 3.1110, 3.1113** – Two major changes have been implemented to the rules governing the format of motions in the trial court. First, page numbering must be consecutive, beginning on the first page of a motion or other document. Only Arabic numerals may be used, and the page number need not appear on the first page. Prior pagination requirements for supporting memoranda have been eliminated, including the requirement for the use of lower case Roman numerals for the pagination of the table of contents and table of authorities, and the requirement that Arabic pagination commence on the first page of text of the memoranda. However, the page limit for a memorandum of points and authorities still excludes the caption page, notice of motion, motion, and tables.

Second, exhibits submitted in support of a motion must include an index that briefly describes the exhibits and lists the exhibit numbers or letters. Electronically submitted exhibits must be text searchable, and bookmarked with the exhibit number or letter and brief description.

A third minor change states that if a judge requests copies of authorities, and a party submits them electronically, the authorities must be electronically bookmarked.

## 16. Motion To Be Relieved As Counsel.

**Rule 3.1362** – Minor amendments were made to Rule 3.1362 to allow electronic service of a motion to be relieved as counsel.

## 17. Expedited Jury Trials – Procedures In Cases With Mandatory Expedited Jury Trials.

**Rule 3.1546** – The pretrial procedures for limited civil cases set forth in C.C.P. §§ 90-100 are now applicable in cases with mandatory expedited jury trials, as are the ordinary case management rules in C.R.C. rules 3.720-3.735

## 18. Expedited Jury Trials – Procedures In Cases With Voluntary Expedited Jury Trials.

**Rules 3.1547 and 3.1548** – The rules for consent orders and pretrial submissions in cases with expedited jury trials have been amended to limit their applicability to voluntary expedited jury trials, and not mandatory expedited jury trials.

## 19. Expedited Jury Trials – Repeal Of Time Limit On Voir Dire.

**Rule 3.1549** – The one hour limit on voir dire in cases with expedited jury trial has been eliminated.

## 20. Expedited Jury Trials – Increased Time Limit In Expedited Jury Trials.

**Rule 3.1550** – Each side in an expedited jury trial is now allowed five hours to present its case instead of three, with a goal of concluding the trial in two trial days, rather than one full day. However, the five hour limit now includes the time spent by the party on voir dire.

## 21. Expedited Jury Trials – Evidence And Case Presentation.

**Rules 3.1551 and 3.1552** – Rules 3.1551 and 3.1552 have been amended to specify that the time to exchange evidence, and any alterations to the rules of evidence, may be set forth in a consent order or an agreement of the parties.

## 22. Expedited Jury Trials – Temporary Judges Must Be Appointed By Court In Cases With Voluntary Expedited Jury Trials.

**Rule 3.1553** – Existing Rule 3.1553 specifies that the presiding judge is responsible for assigning a judicial officer in a case with an expedited jury trial, and that he may appoint a temporary judge. The previous version of this rule stated that a temporary judge requested by the parties may not be appointed to conduct an expedited jury trial. The amendment specifies that this restriction only applies to voluntary jury trials.

# TITLE 8 - APPELLATE RULES

## 23. Citation Of Appellate Opinions.

**Rules 8.1105, 8.1115** – The rules relating to publication of opinions have been amended to state that the grant of review by the Supreme Court does not affect the publication of an opinion by the Court of Appeal. However, published versions of an opinion for which review has been granted must be accompanied by a notice advising that review has been granted. While Supreme Court review is pending, the underlying opinion has no precedential value, and may be cited for its persuasive value only. After the Supreme Court's decision has been rendered, the underlying Court of Appeal opinion remains citable, and has precedential effect, except where it is inconsistent with the Supreme Court's opinion.

## 24. Electronic Filing – Major Revisions.

**Rules 8.70-8.79 –** The article on electronic filing in the Court of Appeal was amended to reflect that e-filing is no longer an optional pilot project, but is mandatory in the Supreme Court and Courts of Appeal. Exceptions from electronic filing may be granted for hardship. In addition, trial courts and unrepresented parties are exempt from the electronic filing requirement.

Electronically filed documents must be text-searchable, and page numbering must begin with the first page or cover page and only use Arabic numerals. The page number need not appear on the cover page.

The rule regarding delayed delivery of electronically filed documents was amended. If a party fails to meet a filing deadline because of a failure in the electronic filing of a document, the party may file it as soon as practicable with a motion to accept the document as timely filed, and the court may permit the filing upon good cause. Formerly, the court was required to accept the document if the party demonstrated that he or she attempted to file the document on the day it was due.

The electronic service rules, Rules 8.71 and 8.73 have been renumbered 8.78 and 8.79. In addition, a party who electronically files a document is deemed to accept electronic service, unless the party serves a notice on all parties and the court that the party does not accept electronic service. The court may require some or all parties to serve or accept all documents electronically, but it cannot require a self-represented party or a trial court to serve or accept service electronically.

## 25. Format Of Briefs In The Court Of Appeal.

**Rules 8.200 and 8.204** – Minor changes were made to Rules 8.200 and 8.204. The changes alter a cross-reference to another subsection of the rule, and require that page numbering begin with the cover page as page 1. Briefs filed in paper form must now be filed unbound unless otherwise provided by local rule or order.

## 26. Privacy – Protection Of Privacy In Documents And Records.

**Rule 8.41** – New rule 8.41 applies the provisions of protection of privacy in Rule 1.201 to all documents and records under this title.

## 27. Privacy – Protection Of Privacy In Opinions.

**Rule 8.90** – New rule 8.90 regarding privacy in appellate court opinions was adopted, recommending that certain parties (such as juveniles, crime victims, and patients in mental health proceedings) should be referred to by their first names and last initials to protect privacy.

## 28. Procedure – Time To Appeal.

**Rule 8.104** – The rule governing the time to file a notice of appeal now specifies that an order signed electronically has the same effect as an order signed on paper.

## 29. Record On Appeal – General Provisions.

**Rules 8.124, 8.130, 8.144, and 8.150** – Rule 8.144 was amended to require that computer-readable reporter's transcripts must be text-searchable. Minor changes to rules were made to update cross-references. An advisory comment was added to rule 8.150 stating that the superior court clerk may send the record to the reviewing court in electronic form.

# TITLE 10 – JUDICIAL ADMINISTRATION RULES

## 30. Minimum Education Requirements For Judicial Council.

**Rule 10.491** – The minimum education requirements for Judicial Council employees have been recast. Among other changes, all employees of the Judicial Council are now required to complete 20 hours of continuing education every two years.

## 31. Superior Court Financial Policies And Procedures.

**Rule 10.804** – The Judicial Council has adopted the *Trial Court Financial Policies And Procedures Manual* for regulating the budget and fiscal management of trial courts.

## 32. Superior Court Records Sampling Program.

**Rule 10.855** – The rule requiring the superior courts to preserve court records for historical reference was amended. The amendment eliminated the requirement that all judgment books, minute books, and registers of action must be preserved forever. Instead, superior courts must maintain all noncapital cases in which the California Supreme Court has issued a written opinion. Additional technical changes have been made to the methods and means of sampling and storing court records.

# SIGNIFICANT CASES
# Decided in 2016

# ALTERNATIVE DISPUTE RESOLUTION

## 1. Arbitrability – "But For" Test Does Not Apply To Determine Whether Or Not Claim "Arises Out Of" Contract With Narrow Arbitration Clause.

***Rice v. Downs*** (2016) 248 Cal.App.4th 175 – *Rice v. Downs* involved a Defendant attorney who formed a limited liability company with some of his clients. The clients sued the attorney for breach of the LLC's operating agreement, and also asserted various tort claims based on the attorney's undisclosed and unwaived conflicts of interest in entering into business transactions with his clients. The trial court ordered the entire case to arbitration under the operating agreement's narrow arbitration clause, which applied to disputes "arising out of this Agreement." On appeal, the Defendant attorney argued that the tort claims would not exist "but for" the existence of the operating agreement. The Court of Appeal rejected the "but for" test as an overly-simplistic, sweeping standard. The Court held that a narrow arbitration clause *could* encompass tort claims, if those claims have their "roots" in the relationship created by the contract, or if the dispute has its "origin or genesis in the contract." However, the Court held that the three tort claims before it: (a) had their roots in the attorney-client relationship, which predated the operating agreement, and (b) were based on violations of duties independent of the operating agreement. Because the tort claims did not arise out of the operating agreement, the Court of Appeal reversed the trial court's judgment compelling arbitration and affirming the arbitration award as to the tort causes of action.

## 2. Arbitrability – Class Action Claims – Arbitrator, Not Court Must Decide Whether Class Action Claims May Be Asserted In Arbitration.

***Sandquist v. Lebo Automotive Inc.*** (2016) 1 Cal.5th 233 – In *Sandquist*, the Plaintiff employee sued the Defendant automotive company, asserting class and individual claims for racial discrimination. The trial court compelled arbitration based on broad arbitration provisions, and dismissed the Plaintiff's class claims, on the basis that the agreements did not permit class arbitration. The Court of Appeal reversed, and held that the arbitrator – not the trial court – must decide whether or not the arbitration agreement allows class arbitration under California law. The California Supreme Court affirmed the Court of Appeal's decision. The Court first held that there is no hard and fast rule to determine whether this issue is decided by the arbitrator or the court, but that the matter must be resolved under state law based on the language of the parties' arbitration agreement. Here, the arbitration agreements were extremely broad, which suggested, but did not conclusively establish, that the arbitrability of class claims must be resolved by the arbitrator. The Court then examined two other principals of state contract law: (1) where there is a close question of whether an arbitration agreement allocates a particular dispute to the arbitrator or the court, the doubt is resolved in favor of arbitration, and (2) where there is ambiguity in a contract, it is resolved against the drafter. Since the Defendant was the

drafter, both of these principals of state law weighed in favor of referring the permissibility of class arbitration to the arbitrator. Accordingly, the California Supreme Court affirmed the reversal of the trial court's order dismissing the class action claims.

## 3. Arbitrability – Class Action Claims – Arbitrator, Not Court Must Decide Whether Class Action Claims May Be Asserted In Arbitration.

***Nguyen v. Applied Medical Resources Corp.*** (2016) 4 Cal.App.5th 232 (Moore, Bedsworth, Fybel) – The Court of Appeal in *Nguyen* granted writ review to reverse a trial court's dismissal of class action claims in an order compelling arbitration. The Court of Appeal applied the holding in *Sandquist v. Lebo Automotive Inc.* (2016) 1 Cal.5th 233, above, to a similarly broadly worded arbitration provision, which called for arbitration of "all disputes and claims arising out of or relating to the submission of [Plaintiff's employment] application" and "all disputes … which might arise out of or relate to [Plaintiff's] employment with the Defendant]." Like the Court in *Sandquist*, the Court of Appeal held that under this sort of broad language, the question of whether or not class claims may be arbitrated is, itself, a question for the arbitrator. *See also* APPELLATE LAW AND PROCEDURE – Appealability, p. 50 below.

## 4. Arbitration Agreements – Enforceability – Agreement Attached To Employee Handbook Is Impliedly Consented To By Continuing Employment.

***Harris v. TAP Worldwide LLC*** (2016) 248 Cal.App.4th 373 – The Plaintiff employee sued his former employer, alleging wrongful termination and other causes of actions. The Defendant employer moved to compel arbitration on the basis that the Plaintiff agreed to the arbitration agreement that was attached as Appendix A to the Employer Handbook. The Plaintiff argued that the arbitration agreement was unenforceable because, he did not read or sign the agreement but merely acknowledged having received it. The Court of Appeal noted that the arbitration agreement expressly stated that if the employee begins his employment without signing the agreement, the employee is deemed to have knowingly and voluntarily consented to and accepted all of the terms and conditions set forth in the arbitration agreement. Based on the employee's admitted receipt of the agreement, the Court of Appeal held that the employee consented to the agreement by commencing employment, and it was legally irrelevant whether or not he chose to actually read the handbook and arbitration agreement. Accordingly, the Court reversed the trial court's order denying the motion to compel arbitration.

## 5. Arbitration Agreements – Enforceability – Arbitration Provision In Employee Handbook Is *Not* Enforceable, Despite Signed Acknowledgment Of Receipt.

***Esparza v. Sand & Sea Inc.*** (2016) 2 Cal.App.5th 781 – The Court of Appeal in *Esparza* faced a situation similar to that faced in *Harris*, above, but reached the opposite conclusion, due to a

couple key factual differences. First, unlike the arbitration agreement in *Harris*, neither the employee handbook nor the arbitration agreement in *Esparza* expressly stated that the employee would be deemed to agree to arbitration by voluntarily continuing in her employment. Second, in *Esparza*, the introduction to the handbook expressly stated that the handbook was not intended to create any legally enforceable obligations. While the Plaintiff employee in *Esparza* signed a statement acknowledging that she had received a copy of the handbook, that acknowledgment contained no statement indicating that she agreed to be bound by its terms. Under these facts, the Court of Appeal refused to create a binding legal agreement where the parties had not.

## 6. Arbitration Agreements – Enforceability – Inconspicuous Link To "Terms of Use" Does Not Create A Binding Agreement.

***Long v. Provide Commerce Inc.*** (2016) 245 Cal.App.4th 855 – The existence of an agreement to arbitrate is decided under ordinarily applicable principals of contract law. In *Long*, a website contained a link to "Terms of Use" that contained a purported agreement to arbitrate. The trial court refused to enforce the agreement, because the Plaintiff claimed he had not noticed, read, or agreed to the terms of use. The Court of Appeal examined the "placement, color, size and other qualities" of the link, and decided that it was too inconspicuous to provide constructive notice of the terms of the purported agreement. While the Court held that this alone negated the enforceability of the agreement, the Court also agreed with 9th Circuit authority holding that website terms of use only constitute an enforceable contract where there is a textual notice "to advise consumers that continued use of a Web site will constitute the consumer's agreement to be bound by the Web site's terms of use." The Court also refused to enforce venue provisions in the Terms of Use, on the same grounds. *See also*, CIVIL PROCEDURE – Venue, p. 67 below, and CONTRACTS – Mutual Assent, p. 68 below.

## 7. Arbitration Agreements – Enforceability – Indiana Venue Clause And One-Sided Arbitrator Selection Clause Rendered Agreement Unconscionable.

***Magno et al v. The College Network Inc.*** (2016) 1 Cal.App.5th 277 – Plaintiffs were Licensed Vocational Nurses who were sold a program by Defendant The College Network (TCN). The program allowed Plaintiffs to take Registered Nurse classes online through Indiana State University and complete clinical programs through California State University. The contract was a two-sided 11 x 14 sheet of paper that included an arbitration clause that required arbitration in Indiana. TCN's salespeople solicited California students and pressured them to purchase the program and sign the agreement on the spot. The trial court denied TCN's motion to compel arbitration, and the Court of Appeal affirmed, holding that there was procedural and substantive unconscionability that invalidated the arbitration agreement. The Court held that there was procedural unconscionability due to the rushed nature of negotiation and the unequal bargaining power between the parties. The Court then held that substantive unconscionability existed because arbitration in Indiana would not have been within young, college-aged students'

reasonable expectations, and would put them at a disadvantage in the arbitration. In addition, the agreement allowed TCN to select the arbitrator, and shortened the statutes of limitation applicable to the Plaintiffs' claims. For a similar analysis of procedural and substantive unconscionability, *see also* ***Penilla v. Westmont Corporation*** (2016) 3 Cal.App.5th 205.

## 8. Arbitration Agreements – Enforceability – Mutual Injunctive Relief Carve-Out Does Not Amount To Substantive Unconscionability.

***Baltazar v. Forever 21 Inc.*** (2016) 62 Cal.4th 1237 – The Plaintiff employee initially refused to sign an arbitration agreement that included provisions that: (1) the parties can seek preliminary injunctive relief, and (2) if the American Arbitration Association (AAA) rules were unenforceable, the California Arbitration Act (CAA) rules would apply in arbitration. The Defendant employer told her that she had to sign it or she would not get the job, and she signed. She later sued the Defendant for discrimination. The Defendant moved to compel arbitration, and the trial court denied the motion on the basis that the agreement was unconscionable. The Court of Appeal reversed, and the Supreme Court affirmed the Court of Appeal. Unconscionability requires that an agreement be both procedurally and substantively unconscionable. The Supreme Court acknowledged that the adhesive nature of the arbitration clause was somewhat procedurally unconscionable. However, it held that the agreement was not substantively unconscionable. The provision that the parties can obtain injunctive relief merely restates a statute on the matter, and was not unfairly one-sided because it applied equally to both parties. The Supreme Court also held that provisions protecting the employer's confidential information (but not the employee's) were not unfairly one-sided, because the employee did not dispute the legitimate commercial need for the agreement to address the employer's valuable trade secrets and proprietary information.

## 9. Arbitration Awards – Standard Of Review – Award May Be Reversed For Refusal To Hear Material Evidence Even Without A Violation Of Applicable Rules

***Royal Alliance Associates Inc. v. Liebhaber*** (2016) 2 Cal.App.5th 1092 – *Royce Alliance Associates* involved the Plaintiff brokerage firm's attempts to expunge allegations of misconduct that the Defendant client made against one if its employees. After agreeing to submit the dispute to arbitration, the Defendant lost, and petitioned to vacate the award, arguing that the arbitrators refused to allow her to introduce her own live evidence and to cross-examine the employee, who was allowed to give informal oral testimony. The Plaintiff argued that the award must be confirmed, because the arbitrators allowed written submissions from both sides in compliance with the applicable arbitration rules. The Court of Appeal rejected that argument, holding that the pertinent question under CCP § 1286.2(a)(5) is whether or not the arbitrators prevented a party from fairly presenting its case and prejudiced the party's rights as a result. While the CAA allows parties to be limited to written submissions rather than live testimony, if an opportunity to be heard is extended, it must be extended to all parties equitably. Accordingly, the Court of

Appeal held that the Defendant was deprived of a fair opportunity to present her case, since the Plaintiff and its employee were allowed to present live evidence, while she was not. The Court also held that this was prejudicial, since the arbitrators could not fully weigh the credibility of the employee's statements without the opportunity for cross-examination.

## 10. Arbitration Awards – Unconfirmed Arbitration Award Is Entitled To Res Judicata Effect.

***Bucur v. Ahmad*** (2016) 244 Cal.App.4th 175 – In *Bucur*, the Court of Appeal affirmed a trial court's orders dismissing an action and imposing sanctions under Code of Civil Procedure section 128.7. The sanctions were awarded after the Plaintiffs filed a fifth lawsuit arising from the same hauling contract with FedEx. The Court of Appeal held that the dismissal and sanctions were justified, because an unconfirmed arbitration award had been granted against the Plaintiff in one of the prior actions involving virtually identical claims. The Court of Appeal held that, for the purposes of res judicata, even an unconfirmed arbitration award is equivalent to a final judgment. Given the existence of res judicata, along with other doctrines that barred the Plaintiff's claims (including judicial estoppel, judicial admissions, consent to arbitrate, and other rulings in the various prior cases), the Court held that the Plaintiff's claims were objectively frivolous, and awarded appellate sanctions in addition to the trial court sanctions.

## 11. Choice Of Law – Federal Or California Arbitration Act – Venue Provision Is Not Sufficient To Invoke California Arbitration Act.

***Scott v. Yoho*** (2016) 248 Cal.App.4th 392 – In *Scott v. Yoho*, the trial court invalidated an arbitration clause in a medical services agreement for failure to comply with the notice and opt out provisions of CCP § 1295. The Court of Appeal reversed, using a broad construction of the commerce clause to conclude that the agreement involved interstate commerce, and was thus subject to the Federal Arbitration Act, which preempts California law. The plaintiff argued that the agreement's venue provision, which stated that "any lawsuit or arbitration… will be tried in Pasadena, California," constituted a generic choice of law provision, which had the effect of making the Federal Arbitration Act unenforceable. The Court of Appeal contrasted the venue provision with genuine choice of law provisions that had been considered in prior cases involving conflicts between the Federal Arbitration Act and the California Arbitration Act. Accordingly, the Court held that the venue provision was not sufficient to prevent application of the Federal Arbitration Act, and there was no need to address the larger question of whether or not a generic choice of law provision is sufficient to incorporate state arbitration law.

## 12. Compelling Arbitration – Opposition To Motion To Lift Arbitration Stay Should Be Accompanied By Motion Compelling Resumption Of Arbitration.

***Gastelum v. Remax International, Inc.*** (2016) 244 Cal.App.4th 1016 – *Gastelum* provides a cautionary example for parties seeking to compel arbitration. There, the Defendant employer obtained an order compelling arbitration and staying litigation proceedings on the Plaintiff employee's complaint. Plaintiff contended that Defendant was required to pay the arbitration fee under *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, but Plaintiff refused. As a result, the arbitration provider terminated the arbitration proceedings, and the Plaintiff employee moved to lift the litigation stay. The trial court granted the Plaintiff's motion, and the Defendant appealed. The Court of Appeal dismissed the appeal, noting that an order lifting a litigation stay (unlike an order denying a motion to compel arbitration) is not among the orders made appealable by statute. While such an order may be reviewed in the appeal from another appealable order, the Court noted that no other appealable order existed, since arbitration was granted. The Court also specifically noted that no motion or petition for resumption of arbitration was filed. Accordingly, the appeal was dismissed. Had the Defendant filed a motion to resume arbitration, a denial of that motion would likely have been appealable, which would have allowed the Defendant to seek review of both that denial, and the order lifting the litigation stay.

## 13. Compelling Arbitration – Prima Facie Burden – Party Seeking Arbitration Need Not Authenticate Arbitration Agreement Unless Challenged.

*Espejo v. Southern California Permanente Medical Group* (2016) 246 Cal.App.4th 1047 – In this wrongful termination action, the Defendant employer sought to compel arbitration. The initial documents in support of the petition to compel arbitration simply stated that the Plaintiff had electronically signed the agreement to arbitrate. After the Court in *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836 rejected an attempt to compel arbitration based on a similar conclusory declaration regarding an electronic signature, the Defendant submitted a supplemental declaration containing more detailed factual allegations. The trial court found the supplemental declaration was untimely, and denied the petition. The Court of Appeal reversed, holding that in the unique context of a petition to compel arbitration, the authentication was not required to be submitted with the opening papers. Instead, the party seeking to compel arbitration need only authenticate the agreement if the party opposing arbitration challenging the agreement's authenticity. *See also* EVIDENCE – Authentication, p. 72, below.

## 14. Disqualification – Disclosure Requirements Under The MFAA Are Equivalent To The CAA Requirements, And Arbitrator's History Of Expert Witness Services Does Not Raise Inference Of Bias.

***Baxter v. Bock*** (2016) 247 Cal.App.4th 775 – After an adverse decision in an arbitration under the Mandatory Fee Arbitration Act ("MFAA"), attorney Joseph Baxter challenged the decision based on: (1) the arbitrator's failure to disclose facts relating to his consulting practice, in which he audited legal bills, and (2) the arbitrator's perceived bias against attorneys based on various articles and promotional materials. The Court of Appeal first held that while the California Arbitration Act's disclosure requirements do not directly apply to the MFAA, the requirements under the two statutory schemes are equivalent, such that case law decided under the CAA can be used to analyze cases under the MFAA. The Court of Appeal then held that the consulting practice did not raise a reasonable doubt as to his impartiality, and thus was not required to be disclosed, because he performed work for both parties challenging legal bills, and for parties justifying legal bills. While Baxter also claimed that the various writings showed the arbitrator's bias against "block billing," the Court of Appeals also noted that criticism of block billing is common, and held that there was no evidence that the arbitrator prejudged the issue by applying a per se rule of exclusion. Finally, the Court held that if Baxter had wished to exclude any arbitrator with particular beliefs, "he was required to perform his own investigation."

## 15. Preemption – The Party Asserting Federal Arbitration Act Preemption Must Present Evidence Of An Agreement's Impact On Interstate Commerce.

***Carbajal v. CWPSC Inc.*** (2016) 245 Cal.App.4th 227 (Aronson, Bedsworth, Ikola) – In *Carbajal*, the Court of Appeal held that an arbitration agreement was both substantively and procedurally unconscionable—and thus unenforceable—because (1) the agreement was part of an adhesion contract, and failed to specify which arbitration rules would govern the arbitration, and (2) the agreement required the Plaintiff to arbitrate all claims and waive attorney's fee rights under the Labor Code, but allowed the Defendant to seek injunctive relief in court, while also relieving the Defendant from the obligation to post a bond to obtain preliminary injunctive relief. Accordingly, the arbitration agreement was unenforceable under California law. The more notable holding (at least from a cautionary perspective), however, was the Court's decision that the Federal Arbitration Act did not preempt California's unconscionability analysis. The Court declined to apply the FAA because the Defendant had failed to meet its burden to establish a link to interstate commerce. While such a link presumably would have been relatively easy to establish, the Defendant had not presented *any* evidence regarding its business or the Plaintiff's employment.

# ANTI-SLAPP STATUTE

## 16. First Prong – Attorney's Representation Of Clients Is Protected Conduct Under The Anti-SLAPP Statute.

***Contreras v. Dowling*** (2016) 5 Cal.App.5th 394 – In *Contreras*, the Plaintiff sued her landlords based on their alleged illegal entries into her apartment, and filed an amended complaint that named the landlord's attorney as a Defendant, alleging that he had aided and abetted the landlords. The Defendant attorney filed an anti-SLAPP motion, which the trial court denied, ruling that the Plaintiff sought to hold the Defendant liable not for his activities as an attorney, but only for the underlying wrongful conduct of the landlords. The Court of Appeal reversed, holding that the only actions committed by the attorney ("giving advice to a client and writing a letter to opposing counsel,") were clearly protected activities under the first prong of the anti-SLAPP statute. The Court also held that the Plaintiff could not establish a probability of prevailing, because that conduct was also protected by the litigation privilege.

## 17. First Prong – City Council Votes Allegedly Made In Exchange For Bribes Are Protected Activity, And Illegal Activity Must Be Conceded Or Conclusively Demonstrated To Defeat Anti-SLAPP Protection.

***City of Montebello v. Vasquez*** (2016) 1 Cal.5th 409 – The City of Montebello sued three of its former council members and a former city administrator, claiming they accepted bribes in exchange for voting for a waste hauling contract. The Court of Appeal affirmed the trial court's denial of the Defendants' anti-SLAPP motion, holding that the Defendants' votes on the contracts were not protected activity under CCP § 421.16. The Supreme Court reversed, reasoning that section 425.16(e) expressly protects any written or oral statement or writing made before a legislative proceeding, which would include the Defendants' votes. The Supreme Court acknowledged that under *Flatley v. Mauro* (2006) 39 Cal.4th 299, activity that is illegal as a matter of law is not entitled to anti-SLAPP protection, but held that this exception only applies where the alleged illegal conduct has been admitted by the defendant or conclusively proven by the evidence. Here, while accepting bribes would obviously be illegal, the Defendants denied any quid pro quo arrangements, and thus the record did not allow application of the *Flatley* exception.

## 18. First Prong – Right Not To Speak – Concealment of Facts In Settlement Negotiations Is A Protected Activity.

***Suarez v. Trigg Laboratories, Inc.*** (2016) 3 Cal.App.5th 118 – The Plaintiff in *Suarez* was a consultant hired to increase the Defendant company's profits and prepare it for sale. The Plaintiff initially sued the company for quantum meruit. During settlement negotiations in the quantum meruit action, the Defendant company and the Defendant owner of the company received an offer to purchase the company. The Defendants did not disclose this offer, and took

actions to ensure that the Plaintiff would not learn of the offer before agreeing to a settlement of the quantum meruit action. After the settlement, the Plaintiff learned of the offer, and sued for rescission based on fraudulent concealment. The Defendants filed an anti-SLAPP motion. The trial court granted the motion, and the Court of Appeal affirmed. In the first prong of the two-step anti-SLAPP analysis, the Court of Appeal held that the concealment of facts during litigation is protected litigation activity. The Court noted that the First Amendment and the California Constitution protect the right to speak as well as the freedom to choose not to speak. Accordingly, choosing not to speak is a protected activity under the first step of the anti-SLAPP analysis. The Court of Appeal did not assess whether Suarez demonstrated a probability of prevailing on the claim because Suarez did not challenge the trial court's finding in his brief or reply.

## 19. First Prong – The Identity Of Carson's Exclusive Agent In Negotiations With The NFL Is Not An Issue Of Public Importance.

***Rand Resources LLC v. City of Carson*** (2016) 247 Cal.App.4th 1080 – Rand Resources (Rand) entered into an agreement with the City of Carson to be the City's exclusive agent in attempting to lure an NFL team to Carson. The City allegedly began using another agent to negotiate with the NFL on its behalf, while taking actions to conceal this breach from Rand. Rand sued the City for fraudulent breach of contract, promissory fraud and other claims, and sued the new agent for tortious interference. The City and the new agent filed an anti-SLAPP motion, which the trial court granted after finding that the NFL deal was a matter of public interest, and the Defendants' statements and actions were thus protected activities. The Court of Appeal reversed, holding that while some speech was involved in Rand's claims, the basis for the claims was the City's non-compliance with the exclusive agency agreement, not any statements made regarding the NFL deal. The Court also noted that while the deal itself was a matter of public interest, the identity of the agent being used by the City to conduct that deal was not. Finally, the Court held that certain statements alleged to be fraudulent were not made in connection with the City's official consideration of the renewal of Rand's contract, because they occurred a year or more before the contract expired. Because the statements and actions that formed the basis for Rand's claims did not relate to any official proceeding or any public issue, they were not protected activities under the first prong of the anti-SLAPP statute. [NOTE: The Supreme Court has granted review in this case, without depublishing the opinion of the Court of Appeal.]

## 20. First Prong And Second Prongs – Public Communications Regarding Issues In Lawsuit *Are Not* Necessarily Protected Activity, And *Are Not* Privileged Under CCP § 47.

***Abuemeira v. Stephens*** (2016) 246 Cal.App.4th 1291 – The dispute in *Abuemeira* had its origin in a traffic confrontation that turned violent. After the Plaintiffs sued the Defendants for damages arising from the incident, the Defendants displayed allegedly edited video recordings of the incident to friends, family, law enforcement, and news agencies, and described the incident

as a hate crime against homosexuals. The Plaintiffs then amended their complaint to allege defamation and intentional infliction of emotional distress based on the allegedly edited videotape and statements regarding the incident. The trial court and Court of Appeal both agreed that the conduct was not protected activity under the first prong of the anti-SLAPP statute, because the dispute was not a "public issue," and the Defendants own efforts to publicize the incident could not transform it into a public issue. This seems directly counter to the California Supreme Court's holding in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 that communications made in connection with an issue under consideration in a lawsuit are protected activities, even if there is no separate showing that the issue is one of public importance. Despite finding that the first prong was not satisfied, the Court of Appeal in *Abuemeira* went on to hold that the statements were also not protected under the litigation privilege of Civil Code section 47 (which is ordinarily a consideration that arises under the second prong), because the privilege "does not apply to publications to the general public through the press." This holding may be at least partially inconsistent with the provisions of Civil Code section 47(d)(1), which protects "fair reports" to the public of statements made in judicial proceedings. *See also* ***J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP*** (2016) 247 Cal.App.4th 87, directly below.

## 21. Second Prong – Fair Public Communications Regarding Issues In Lawsuit *Are* Privileged Under CCP § 47.

***J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP*** (2016) 247 Cal.App.4th 87 – In *J-M Manufacturing Co.*, the Court of Appeal reached the opposite conclusion as the court in *Abuemeira* based on similar facts. The Defendant law firm in *J-M Manufacturing* issued a press release after obtaining a verdict on behalf of their clients against the Plaintiff manufacturing company. The headline of the press release stated that the jury found the Plaintiff's pipes to be "faulty," while the body of the press release explained that the jury found that the Plaintiff had "lied about whether its pipe met strength and durability standards required by government specifications." The Plaintiff alleged that the press release's description of the pipes as "faulty" implied that the pipes contained manufacturing defects that rendered them unserviceable, which constituted a gross misrepresentation of the jury's finding in the underlying action. The Plaintiff conceded that the press release was protected under the first prong of the anti-SLAPP statute, but argued that it could establish a probability of prevailing under the second prong, because false reports are not privileged. The Court of Appeal held that the press release, when read as a whole, was an accurate description of the substance of the jury's findings, which meant that it was privileged under Civil Code section 47(d)(1).

## 22. Second Prong – Conclusory Assertions Of Falsity In A Declaration Do Not Satisfy The Plaintiff's Burden To Demonstrate A Probability Of Prevailing.

***Industrial Waste and Debris Box Service Inc. v. Murphy*** (2016) 4 Cal.App.5th 1135 – The Plaintiff in *Industrial Waste and Debris Box Service Inc.* sued a competitor's consultant for defamation and related claims arising from a report the consultant wrote challenging the accuracy of the Plaintiff's publicly reported recycling rates. The trial court held that the Defendant met its burden of establishing that the claims arose from protected activity. However, the trial court then held that the Plaintiff had met its burden of establishing a probability of prevailing on its claims, by producing declarations attesting that the statements in the consultant's reports were false. The Court of Appeal reversed, noting that a defamation plaintiff in a case involving an issue of public concern bears the burden of pleading and proving the substantial falsity of the defamatory statement. The Court then held that the Plaintiff's declarations were insufficient to do so, because they denied the consultant's specific claim that the Plaintiff's recycling rates were not credible, but failed to state the true facts regarding the Plaintiff's recycling rates. The Court held that without knowing the actual rates, it was impossible to tell whether or not the consultant's claims about the reported rate were substantially true or substantially false. The Court also held that statements in the declaration claiming that data in the consultant's report was portrayed "out of context" actually implied that the data was factually correct. Accordingly, the Court concluded that the Plaintiff's evidence failed to support the prima facie case of falsity necessary to prevail on the Plaintiff's claims, and the anti-SLAPP motion should have been granted.

## 23. Second Prong – In a "Mixed" Cause of Action, the Plaintiff Must Show a Probability of Prevailing on the Portion of the Claim Based on Protected Activity.

***Baral v. Schnitt*** (2016) 1 Cal.5th 376 – The California Supreme Court has reversed *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, the seminal anti-SLAPP case concerning "mixed" causes of action. In *Mann*, the Court of Appeal held that where a cause of action is based on both protected and non-protected activity, the entire cause of action will remain if the plaintiff can demonstrate a probability of prevailing on any portion of the cause of action—even if the probability of prevailing is based solely on non-protected activity. After other courts disagreed with *Mann*, the Supreme Court took up the issue, and held that "when the defendant seeks to strike particular claims supported by allegations of protected activity that appear alongside other claims within a single cause of action, the motion cannot be defeated by showing a likelihood of success on the claims arising from unprotected activity" In so holding, the Court noted the confusion that frequently surrounds the use of the term "cause of action," and rejected the notion that the so-called "primary rights" doctrine should be used to construe the meaning of the term "cause of action" in the SLAPP context. Instead, where a claim for relief

based on protected activity is mixed in the same "count" with a claim for relief based on unprotected activity, the allegations of protected activity must be stricken from the complaint, unless those allegations support a claim on which the Plaintiff has a probability of prevailing.

### 24. Time To File – Amended Complaint Does Not Reset Time To File Anti-SLAPP Motion Where Protected Activity Was Alleged In Prior Complaint.

***Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*** (Nov. 30, 2016) 6 Cal.App.5th 1207 (Fybel, O'Leary, Bedsworth) – An anti-SLAPP motion must be filed "within 60 days of the filing of the complaint" or at a later date at the court's discretion. The Fourth District, Division Three, has decided that the 60 day deadline is extended upon the filing of an amended complaint only if the amended complaint alleges a new cause of action based on protected activity. In *Newport Harbor Ventures*, the Defendants failed to file an anti-SLAPP motion within 60 days of the original, first amended, or second amended complaints, but did file an anti-SLAPP motion within 60 days of the third amended complaint. The anti-SLAPP motion addressed four causes of action, each of which arose from the signing of the same settlement agreement. The trial court denied the motion as untimely, holding that the action had been pending for over two years, and every version of the complaint referenced the prior settlement agreement. The Court of Appeal affirmed the trial court with respect to two of the claims, because those two claims had been asserted in prior complaints, which contained the same allegations of protected activity (i.e. the signing of the settlement agreement). The other two claims, however, were not asserted in prior pleadings. The Court held that barring an anti-SLAPP motion on claims that had not been asserted in prior complaints would allow the Plaintiffs to circumvent the anti-SLAPP statute by holding back claims until the 60 days ran on the original complaint. Accordingly, the Court held that the anti-SLAPP motion was timely only as to the claims that were asserted for the first time in the third amended complaint.

## APPELLATE LAW & PROCEDURE

### 25. Appealability – Death Knell Doctrine – Order Compelling Arbitration Is Not Appealable When Non-Arbitrable PAGA Claim Remains.

***Nguyen v. Applied Medical Resources Corp.*** (2016) 4 Cal.App.5th 232 (Moore, Bedsworth, Fybel) – Ordinarily, an order compelling arbitration is not an appealable final judgment. Such orders may be appealed under the "death knell" doctrine, when the order also eliminates any non-arbitrable class action claims, leaving the plaintiff with a *de minimis* individual claim and ringing the proverbial death knell for the claims of the absent class members. In *Nguyen*, the court dismissed the class claims, and referred the individual claims to arbitration, but retained jurisdiction over the Plaintiff's representative claim under the Labor Code's Private Attorney General Act ("PAGA"). The Court of Appeal held that the remaining PAGA claim provided the

Plaintiff with adequate incentive to continue pursuing the absent class members' claims, and prevented application of the death knell doctrine. Nevertheless, the Court ultimately resolved the appeal on the merits, after holding that writ review was appropriate to prevent a costly arbitration from proceeding based on an erroneous legal ruling that was reversible *per se*. *See also* ALTERNATIVE DISPUTE RESOLUTION – Arbitrability, p. 40 above.

## 26. Moot Appeals – Where Appellant's Action Moots Appeal, Appeal Is Dismissed Without Reversing Judgment.

***La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles*** (2016) 2 Cal.App.5th 586 – In this case, Real Party in Interest Target appealed a judgment that overturned specific plan exemptions that were granted to allow a Target store to be built over 75 feet tall. After the appeal was filed, Target was able to get the Respondent City of Los Angeles to amend the specific plan so that the exemption was no longer necessary. The Court of Appeal noted that when an appeal becomes moot, the Court may either (1) reverse the judgment with instructions for the trial court to dismiss the case, or (2) dismiss the appeal, allowing the judgment to become final. The Court then held that where the appellant itself has caused the appeal to become moot, the proper course is to dismiss the appeal. To support this holding, the Court quoted a 9th Circuit opinion, which held that "a dissatisfied litigant should not be allowed to destroy the collateral consequences of an adverse judgment by destroying his own right to appeal."

## 27. Preserving Issues For Appeal – Two Steps Are Required To Obtain Statement Of Decision That Preserves Issues On Appeal.

***Thompson v. Asimos*** (2016) 6 Cal.App.5th 970 – Code of Civil Procedure sections 632 and 634 establish a two-step procedure for ensuring that a statement of decision will be adequate for appellate review. The *Thompson* case illustrates why both stages are necessary. First, section 632 requires a party to submit a request for a statement of decision that identifies the controverted issues. Then, after a statement of decisions is prepared, section 634 requires a party to submit objections that identify any ambiguities or omissions in the statement. If <u>both</u> steps are not followed, the Court of Appeal will imply any omitted findings and construe any ambiguities against the appellant. In *Thompson*, the respondent requested a statement of decision under section 632, and the appellant then filed objections to the statement of decision under section 634, going beyond the issues specified by the respondent in the original notice under section 632. The Court of Appeal held that this was insufficient to avoid the doctrine of implied findings, and implied findings against the appellant on each of the issues that were omitted from the statement of decision.

### 28. Stare Decisis – Supreme Court's Statements For Guidance On Remand Are Binding On Inferior Courts, Whether Characterized As Holdings Or Dicta.

***People v. Superior Court (Tejeda)*** (2016) 1 Cal.App.5th 892 (O'Leary, Aronson, Thompson) – Typically, only the holdings necessary to an appeal are given binding precedential force, while unnecessary dicta is not. The boundaries between a holding and dicta are explored in *Tejeda*. There, the Fourth Appellate District, Division Three, disagreed with the reasoning of a Supreme Court opinion relating to peremptory challenges, and urged the Supreme Court to reconsider that opinion. The Court of Appeal explained that the relevant portion of the Supreme Court opinion was contained in 14 pages of analysis and statements intended to guide the parties and trial court on remand. As such, the statements were not strictly "necessary" to the resolution of the appeal before the Supreme Court, and might be considered dicta, rather than a true holding. However, the Court of Appeal also noted that: (a) other cases have characterized statements made for guidance on remand as holdings, rather than dicta, and (b) even the dicta of the Supreme Court should ordinarily be followed. The Court then concluded that the Supreme Court's detailed 14 pages of analysis and conclusions "cannot simply be discarded by an inferior court." Accordingly, the Court of Appeal held that it was bound by the Supreme Court's decision, even though it ultimately disagreed with it. Justice Thompson dissented, arguing that the Supreme Court's decision was legally and factually distinguishable. *See also* JUDGES – Peremptory Challenges – Blanket Challenges, p. 75, below.

## ATTORNEY'S FEES

### 29. Private Attorney General Fees – Fees Denied Where Defendant Was A Suspended Corporation When Answer Was Filed

***City of San Diego v. San Diegans for Open Government*** (2016) 3 Cal.App.5th 568 – Nonprofit corporation San Diegans for Open Government (SDOG) filed an answer challenging the City of San Diego's complaint in a validation action, at a time when SDOG and its attorneys knew that SDOG was a suspended corporation. SDOG and an individual co-defendant prevailed in the validation action, and sought their attorney fees under CCP § 1021.5. The City discovered that SDOG had been suspended at the time the answer was filed, and opposed any award to SDOG, arguing that the answer was invalid. SDOG argued that its suspension was resolved prior to the motion for attorney's fees, thereby validating its prior invalid actions. The Court of Appeal disagreed, holding that restoration of SDOG's corporate status only validated "procedural steps" taken by the organization, but could not affect substantive defenses, such as the statute of limitations. Because the applicable statute expired before SDOG's corporate status was restored, SDOG's entire participation in the action was invalid, and it could not obtain any attorney's fees. The judgment on the merits was not reversed, however, because the individual co-Defendant was still entitled to judgment invalidating the City's actions.

## 30. Private Attorney General Fees – Fees Denied Where Intervention Is Not Necessary.

***San Diego Municipal Employees Assn. v. City of San Diego*** (2016) 244 Cal.App.4th 906 – In *San Diego Municipal Employees Assn.*, a city employee's labor union intervened in an action brought against the city by the city employee's retirement system. The Intervenors filed venue and discovery motions and opposed a summary judgment motion that was withdrawn by the City before the case settled. After the case settled, the Intervenors sought $1,785,147 in attorney fees pursuant to California's private attorney general doctrine (Cal. Code Civ. Proc. § 1021.5). The Court of Appeal affirmed the trial court's denial of the Unions' fee request, because the Unions failed to establish that the venue and discovery motions that they had filed had any significant impact on the litigation or its outcome, and also failed to show that their summary judgment opposition was integral to the litigation. The Court of Appeal explained that Section 1021.5 requires a private party to demonstrate that its private enforcement efforts were necessary. Where a private party litigates on the same side as a non-volunteer public entity, 1021.5 requires the private party to make a significant showing that its participation was material to the result of the case, and that its contributions were not duplicative. Since the Intervenors were unable to make that showing, they were not entitled to any fee award.

## 31. Private Attorney General Fees – Preventing Reduction Of Property Value Is A Financial Interest That Can Disqualify A Party From A Fee Award Under CCP § 1021.5.

***Millview County Water Dist. v. State Water Resources Control Bd.*** (2016) 4 Cal.App.5th 759 – To be eligible for an award of private attorney general fees under CCP § 1021.5, the cost of litigation must outweigh a party's private financial interests in bringing litigation. In *Millview County Water District*, the Court of Appeal reversed a fee award, finding that the prevailing Plaintiffs had financial interests that precluded a fee award, despite the fact that the Plaintiffs did not seek any monetary damages in the action. Specifically, the Court held that if the Plaintiffs had not filed their action to overturn a ruling by the State Water Resources Control Board ("Board") limiting their water rights, the ruling would have significantly reduced the value of their property. Two of the Plaintiffs faced a potential $1,600,000 reduction in the sale price of their property if the Board's order was not overturned, while the third Plaintiff faced the loss of a $500,000 deposit it had invested in the property, which would become worthless if the Board's order stood. The Court of Appeal held that these financial interests were not outweighed by the attorney's fees incurred in the action ($339,000 by the first two Plaintiffs, and $247,028 by the third Plaintiff). Accordingly, none of the Plaintiffs were eligible for a fee award under CCP§ 2021.5.

### 32. Reasonable Amount Of Fees – $100,000 Fee Award For Recovery Of $6,620 In Damages Is Not An Abuse Of Discretion.

***Almanor Lakeside Villas Owners Assn. v. Carson*** (2016) 246 Cal.App.4th 761 – The Defendant homeowners owned property that was subject to the Covenants, Conditions and Restrictions (CC&Rs) of the Plaintiff homeowner's association. The Plaintiff sued, seeking $54,000 in fines spread between 88 CC&R infractions. The trial court concluded that only eight out of 88 of the fines were reasonable and ordered the Defendants to pay $6,620 in damages. Both parties claimed to be the prevailing party and filed motions to recover reasonable attorney's fees as mandated by the Davis-Stirling Act. The trial court awarded the Plaintiff $101,803.15 as reasonable attorney's fees, and the Court of Appeal affirmed. The Court held that the trial court did not abuse its discretion by declaring the Plaintiff to be the prevailing party, because the Plaintiff prevailed on what was arguably the central issue in the case—the Plaintiff's authority to promulgate and enforce reasonable CC&Rs. The Court also held that while the trial court could have reduced the fee award to account for the Plaintiff's limited success and small monetary recovery, the trial court was not required to do so, and the award was not so disproportionate as to constitute and abuse of discretion.

## ATTORNEY PRACTICE

### 33. Attorney-Client Privilege – Attorney Invoices Are Not Automatically Exempt Under PRA And Are Not Wholly Privileged.

***Los Angeles County Bd. of Supervisors v. Superior Court*** (2016) 2 Cal.5th 282, 283 –The ACLU sent a Public Records Act ("PRA") request for legal invoices to ascertain the amounts that the County of Los Angeles spent in legal fees for excessive force suits. The County refused to provide invoices for six pending cases. The ACLU sued to compel the County to provide the invoices. The trial court held that the County failed to show the invoices were privileged and ordered disclosure. The Court of Appeal granted a writ of mandate holding that the invoices were categorically privileged, and thus exempt from the PRA. The Supreme Court reversed, holding that the attorney-client privilege does not automatically apply to all confidential communications between a client and its attorney. Instead, such communications must have a nexus to legal consultation. The Court held that legal invoices are not provided for the purpose of legal consultation, they are provided to ensure proper payment. Nevertheless, the information contained in an invoice may fall within the scope of the privilege. Information in an invoice regarding the nature and amount of work performed on a particular issue falls in the "heartland" of the privilege. Furthermore, where a matter is currently pending, even the aggregate amount of fees may be privileged, as an uptick in spending might tend to reveal investigative efforts and trial strategy. Once an action is concluded, however, that same information may no longer be privileged, "because it no longer provides any insight into litigation strategy or legal consultation." In the end, the Court held that there is no categorical bar to PRA requests for

legal invoices, and that the County is required to disclose any reasonably segregable portion of the invoices after deletion of the portions that are exempted by law.

The Court's opinion also opens the door to inquiries into other types of attorney-client communications, noting that e-mails between an attorney and a client providing business advice, or conveying information about a fund raiser or office move are not for the purposes of legal consultation. Given these sorts of statements, it is reasonable to expect that the scope of the attorney-client privilege will be a hot topic over the next several years.

## 34. Attorney-Client Privilege – Court May Not Conduct In Camera Review Of Allegedly Privileged Documents To Determine If Privilege Exists.

***DP Pham LLC v. Cheadle*** (2016) 246 Cal.App.4th 653 (Aronson, Rylaarsdam, Bedsworth) – The Defendant executor filed a motion to disqualify counsel for the Plaintiff due to the improper use of documents protected by the attorney-client privilege. The documents were letters from the decedent's attorney to the decedent that had been cc'd to the decedent's assistant. The decedent's assistant disclosed those letters to the Plaintiff, who then used them in a summary judgment opposition. The trial court examined the letters in camera, and found that they were not privileged, because they did not contain any "advice, counsel, or sharing of information." Accordingly, the trial court denied the motion to disqualify. The Court of Appeal reversed, holding that under Evidence Code § 915, the trial court was barred from conducting an in camera review to determine whether or not the privilege exists. The Court also held that the decedent's disclosure of the documents to his assistant did not create a waiver of the attorney-client privilege, and that an in camera review could not be used to determine whether or not a waiver occurred. The Court of Appeal then remanded the matter to the trial court to determine whether disqualification was appropriate given the use of the privileged documents.

## 35. Attorney-Client Relationship – Attorney-Client Relationship Exists Where Attorney Provides Legal Services, Without Providing Legal Advice.

***City of Petaluma v. Superior Court*** (2016) 248 Cal.App.4th 1023 – In *City of Petaluma*, the Court of Appeal held that there was an attorney-client relationship that gave rise to attorney-client privilege where an outside law firm prepared an investigative report for the Defendant City. The retainer agreement stated that there was an attorney-client relationship, and that the attorneys would "use our employment law and investigation expertise to assist you in determining the issues to be investigated and conduct impartial fact-finding." However, the agreement also stated that the outside counsel would "not render legal advice as to what action to take as a result of the findings of the investigation." The trial court found that the outside counsel were acting as fact-finders, rather than attorneys, and thus their report was not privileged. The Court of Appeal reversed, noting that the statutory definition of a client in Evidence Code section 951 is a person who retains an attorney for securing "legal services *or*

advice." The Court explained that the engagement agreement not only expressly stated that an attorney-client relationship existed, it called for outside counsel to employ their legal expertise in conducting a factual investigation. Accordingly, the Court held that the dominant purpose of the relationship was the provision of legal services, which created an attorney-client relationship sufficient to support the claim of attorney-client privilege. *See also* EMPLOYMENT – Avoidable Consequences Defense, p. 72 below.

## 36. Claims Against Attorneys – One Year Statute Of Limitations Applies To Claims Against Attorney Arising From Nonlegal Professional Services.

***Foxen v. Carpenter*** (2016) 6 Cal.App.5th 284 – The Plaintiff client in *Foxen* sued her former attorneys for misallocation of settlement funds and other misconduct occurring during the course of the Plaintiff's underlying personal injury action. The trial court held that the claims were all barred by the one year statute of limitations for claims arising out of an attorney's provision of professional services. (CCP § 340.6.) The Plaintiff argued that (a) under *Lee v. Hanley* (2015) 61 Cal.4th 1225, section 340.6 only applies to actions arising from a breach of a professional obligation, and (b) she was suing the Defendants for breaches of nonprofessional obligations owed by all persons, not breach of any professional obligation. The Court of Appeal disagreed, noting that attorneys are called upon to perform a variety of nonlegal professional services, "such as accounting, bookkeeping, and holding property in trust." The Court then held that the Plaintiff could not prevail on her misallocation claims without establishing that the Defendants violated their professional obligations by either incorrectly calculating the settlement distributions, or intentionally manipulating various charges. Accordingly, the Plaintiff's claims were all subject to the one year statute of limitations.

## 37. Claims Against Attorneys – Statute Of Limitations For Malpractice Claim Asserted By Successor Trustee Is Tolled During Continuous Representation Of Predecessor Trustee.

***Kelly v. Orr*** (2016) 243 Cal.App.4th 940 – The Defendant attorneys in *Kelly* were sued for malpractice by the Plaintiff trustee, based on actions taken while Defendants represented the trustee's predecessor. The malpractice occurred prior to 2012, and the lawsuit was not filed until 2014, well beyond the applicable one year statute of limitations for claims by clients against attorneys. However, the Defendants represented the predecessor trustee continuously through 2013—less than a year before the action was filed. The trial court sustained a demurrer based on the statute of limitations, and the Court of Appeal reversed. The Court of Appeal held that the Defendants represented the predecessor in her capacity as trustee, thus the Plaintiff successor trustee was entitled to the benefit of the tolling that occurred while the predecessor was continuously represented by Defendants, even though the Defendants never represented the predecessor trustee himself. The Court also held that the tolling period did not end when the

successor trustee first attempted to remove and replace the predecessor trustee, because the Defendants continued to represent the predecessor to resist her removal, and that representation was "intertwined" with their representation of the predecessor in her capacity as trustee.

## 38. Claims Against Attorneys – Unilateral Withdrawal E-mail Terminated Representation For Purposes Of Statute Of Limitation.

***GoTek Energy, Inc. v. SoCal IP Law Group, LLP*** (2016) 3 Cal.App.5th 1240 – The Plaintiff client in *GoTek Energy* claimed that the Defendant law firm was negligent in failing to file patent applications. On November 7, 2012, after receiving notice that the Plaintiff intended to file a malpractice action, the Defendant sent the Plaintiff an e-mail withdrawing as counsel. Over a year later, the Plaintiff filed its malpractice action. The Plaintiff argued that its claim was timely because the one year statute of limitations was tolled under the continuous representation exception. The trial court rejected that argument, and the Court of Appeal affirmed. The Court explained that, while the notice of withdrawal was unilateral, the Plaintiff consented to the withdrawal by acknowledging the e-mail and requesting that its files be forwarded to its new attorneys. Even if the Plaintiff had not consented, the Court held that the representation ends for purposes of the statute of limitations when the client "actually has or reasonably should have no expectation that the attorney will provide further legal services." The Defendant's unilateral e-mail put the Plaintiff on notice that the Defendant would be providing no further legal services. Transferring files to the new law firm was a clerical, ministerial task, and not a continuation of legal services.

## 39. Discretionary Relief For Excusable Neglect – Attorney's Unrecognized Cognitive Impairment Is Excusable Neglect.

***Minick v. City of Petaluma*** (2016) 3 Cal.App.5th 15 – In a suit about hazardous government property, the Defendant City of Petaluma moved for summary judgment, and the Plaintiff's attorney filed an opposition that was "strikingly not well written." After the City's motion for summary judgment was granted, the Plaintiff's attorney moved for discretionary relief under CCP § 473(b) for excusable neglect. The attorney had health conditions that, combined with his medication, affected his cognitive abilities without his knowledge. He later learned of his cognitive impairments, and the motion for relief was granted. The Court of Appeal affirmed and held that the trial court did not abuse its discretion by granting the motion. The trial court had specifically found that the relevant neglect was the attorney's failure to recognize his cognitive impairment; the neglect was not merely a deficient legal strategy or a failure of legal skill.

## 40. Disqualification – Automatic Disqualification Is Proper Where Law Firm Represents Class Plaintiffs With Conflicting Interests In Two Separate Actions.

***Walker v. Apple, Inc.*** (2016) 4 Cal.App.5th 1098 – The Plaintiffs in *Walker* appealed the trial court's order disqualifying their attorneys in a putative class action suit against their former employer, Apple, Inc. The Court of Appeal affirmed, and held that automatic disqualification was required because the firm had a conflict of interest, which arose from its concurrent representation of: (1) the putative class in *Walker*; and (2) the certified class in another wage-and-hour class action pending against Apple (the "First Action"). Specifically, the Plaintiffs in *Walker* claimed that Apple wrongfully withheld final wage statements from terminated employees. The Court noted that the manager responsible for providing those statements was a class member in the First Action, and thus one of the firm's clients. While the manager did not have any direct interest in *Walker*, she would presumably be cross examined by the firm regarding the wage statements, and would either have to (a) testify against her own employer regarding their improper employment policies, or (b) be portrayed as a poor manager for failing to carry out proper policies. The Court of Appeal held that this created a conflict of interest between the Plaintiffs and the manager, and that it would be unseemly for the manager's own attorneys to force this Hobson's choice on her. Accordingly, an actual conflict of interest existed, and automatic disqualification of the firm was required.

## 41. Disqualification – Concurrent Representation – Firm May Not Represent Both Corporation And Director In Derivative Lawsuit, But May Continue To Represent Director.

***Ontiveros v. Constable*** (2016) 245 Cal.App.4th 686 – In *Ontiveros*, a law firm was disqualified from concurrently representing the company and the majority shareholders in a derivative action. The Court of Appeal affirmed the order disqualifying the law firm from continuing to represent the company, but reversed the order disqualifying the firm from representing the shareholder defendants (who were the first to retain the firm). The disqualification from representing the company was correct, because the derivative claims created a conflict of interest that could not be waived without the minority shareholder's consent. However, this did not require the disqualification of the firm from representing the shareholder/director defendants, because in the context of the case, the firm could not have learned any confidential information during its representation of the company that it could not have learned directly from the shareholder/director defendants themselves. While a conflict of interest requires automatic disqualification in a case of concurrent representation, disqualification is only required in cases of successive representation when necessary to protect client confidentiality. Here, once the firm was disqualified from representing the company, the case transformed from a concurrent representation to a successive representation.

# CIVIL PROCEDURE

## 42. Costs – Costs Incurred By Jointly Represented Prevailing And Non-Prevailing Parties Cannot Be Allocated On A Straight Percentage Basis.

***Charton v. Harkey*** (2016) 247 Cal.App.4th 730 (Aronson, Moore, Fybel) – In *Charton*, the trial court awarded the prevailing Defendant only 25% of her costs, effectively allocating the other 75% of her cost request to her three non-prevailing and jointly represented Co-Defendants. The Court of Appeal reversed this across-the-board reduction. The Court explained that while the trial court had discretion to reduce costs incurred by jointly represented prevailing and non-prevailing parties, that reduction could not be made on a simple percentage basis. Instead, the trial court must consider whether each individual cost was reasonable and necessary to the prevailing party's case.

## 43. Doe Defendants – Amendment Invalid Where Based On Discovery Of Facts Similar To Those Already Known By Plaintiff.

***McClatchy v. Coblentz, Patch, Duffy & Bass, LLP*** (2016) 247 Cal.App.4th 368 – In *McClatchy*, the Petitioner trust beneficiary filed a Petition against the former trustee for mismanagement of the trust. After discovering trust filings identifying the trustee as the partner of a law firm, the Petitioner filed a doe amendment under CCP § 474 to add the firm as Doe No. 2. The firm filed a motion to quash the summons, arguing that the Plaintiff knew that the trustee had used the firm's address and letterhead in conducting trust business when the original Petition was filed. The trial court and Court of Appeal agreed. The Petitioner argued that a defendant's identity is known for purposes of § 474 only when a plaintiff is aware of facts making liability "probable," while the facts he knew at the time the Petition was filed only gave rise to a mere "suspicion" that the firm might be vicariously liable. The Court of Appeal rejected this argument, noting that the later discovered facts were merely "more of the same," and holding that a doe amendment cannot be based on "discovery of an additional fact when that fact does not add anything to the theory of liability apparent at the time of the original pleading." The Court held that this was true regardless of whether or not the theory of liability has probable validity.

## 44. Five Year Rule – Partial Stay That Did Not Affect Discovery Response Deadlines Did Not Toll Time To Bring Case To Trial.

***Gaines v. Fidelity National Title Ins. Co.*** (2016) 62 Cal.4th 1081 – In *Gaines*, the Plaintiff and the Defendants agreed to vacate a trial date, and stay the action for 120 days while they attempted to mediate their dispute. The parties also agreed that responses to pending discovery requests would not be stayed during that period. Years later, the trial court dismissed the action for failure to bring the case to trial within five years. The Plaintiff appealed, arguing that the five-year rule was tolled under CCP § 583.340(b) while the action was stayed. The Supreme Court affirmed the dismissal, holding that the 120 day stay of the action did not qualify for

tolling under § 583.340(b), because that section only applies to a *complete* stay of litigation, while the stipulation in this case allowed discovery to continue during the stay, and the parties' mediation itself was a step in the litigation. Finally, the Court also held that the five year period was not equitably tolled due to an inability to bring the case to trial during the stay, because the stay was not inordinately long, and did not prevent the Plaintiff from conducting its own trial preparations.

## 45. Five-Year Rule – Voluntary Mediation Does Not Extend Five Year Period To Bring Case To Trial Under CCP § 1775.7(b).

***Castillo v. DHL Express (USA)*** (2016) 243 Cal.App.4th 1186 – At a case management conference approximately four years and six months after litigation was filed in *Castillo*, the parties informed the court that they would be attending private mediation, and the court issued a standard case management order indicating that the case was "referred" to mediation. Five years and one month after the action was filed, the Defendant filed a motion to dismiss under the five year rule in CCP § 583.310. The trial court granted the motion, and the Plaintiff appealed, arguing that the five year period should have been tolled during the mediation under CCP § 1775.7, which tolls the five year period during when the parties participate in a court sponsored mediation program during the last six months of the five year period. The Court of Appeal affirmed the trial court, because the Parties voluntarily participated in private mediation, which is not covered by section 1775.7. The trial court's order merely noted the Parties' agreement to participate in arbitration; it did not order the parties to arbitration because: (a) the LA County court sponsored mediation program had been shut down, (b) the court did not make any determination that the amount in controversy was less than $50,000, which is a requirement for non-voluntary arbitration, and (c) the parties did not file any stipulation to participate in arbitration under CRC 3.891(a)(2).

## 46. Interpleader – Answer Must Allege Specific Facts Showing Claim To Interpleaded Funds.

***Southern California Gas Co. v. Flannery*** (2016) 5 Cal.App.5th 476 – This case was an interpleader action to determine the disposition of funds to be paid for damages arising from a wildfire. One of the claimants, Flannery, filed a deficient answer that (1) had a general denial, which effectively denied the interpleader's allegation that he had an interest in the funds, and (2) contained only a conclusory allegation that the entire amount of the funds on deposit belonged to him. The trial court disbursed interpleaded funds to other claimants in response to several motions, after a hearing with no court reporter. Flannery objected, claiming that his right to due process was violated because the funds were disbursed without a trial or summary judgment. The Court of Appeal held that Flannery's answer was legally inadequate to state a conflicting claim to the interpleaded funds, so Flannery could not complain about the lack of a trial. In addition, because there was no reporter's transcript for the hearing on the other claimant's motion, the court presumed that Flannery had an opportunity to present evidence at the hearing,

and waived any objection to the court proceeding based on the motions and declarations in the record.

## 47. Interpleader – Court Is Not Required To Order Losing Party To Reimburse Attorney's Fees Paid Out Of Interpleaded Funds.

***Wertheim, LLC v. Omidvar*** (2016) 3 Cal.App.5th 921 – In *Wertheim*, two unscrupulous parties were fighting over a royalty stream previously belonging to a song-writer's elderly widow. Both parties obtained their claims under conditions that constituted elder financial abuse. The royalty payors interpleaded the royalties, and obtained a discretionary attorney's fee award of nearly $250,000. Ultimately, one of the parties prevailed, and the interpleaded funds were released to it. The Court ordered that the royalty payors' attorney's fees would be deducted from the interpleaded funds, without any contribution from the non-prevailing party. The Court of Appeal upheld that order, explaining that the court in an interpleader action has discretion to allocate the interpleader's attorney's fees to the losing party, but that the court is not required to do so. Here, the trial court did not abuse its discretion in declining to allocate fees to the losing party, because the losing party had a colorable claim to the funds, and the prevailing party could have avoided the necessity for the interpleader by posting a bond.

## 48. Injunctive Relief – Scope – Injunctive Relief May Run Against Nonparty To Action.

***Hassell v. Bird*** (2016) 247 Cal.App.4th 1336 – The Plaintiff in *Hassell* sued the Defendant for a negative review on the Yelp.com website, and obtained a default judgment finding that the review is defamatory. The judgment also ordered the Defendant and non-party Yelp to remove the defamatory review. Yelp filed a motion to vacate the judgment and order on the grounds that it did not have notice and an opportunity to be heard. The trial court denied the motion, and the Court of Appeal affirmed, finding that Yelp is not an aggrieved party under the judgment as a whole, because it is akin to a mere bulletin board, rather than an actual publisher of speech, and thus had no interest in the determination of whether or not the review was defamatory. The Court found that Yelp did have standing to challenge the portion of the judgment ordering Yelp to remove the defamatory review. As to that portion of the judgment, however, the Court held that trial courts may validly order nonparties to comply with injunctions in order to prevent the defendant from violating the injunction "with or through others," and that Yelp's business interests and First Amendment rights did not allow it to continue to post the Defendant's review after it was adjudicated to be defamatory.

## 49. Motion For New Trial – New Trial On Liability And Damages Was Required Where Jury Awarded Tort Measure Of Damages For Breach Of Contract.

***Ryan v. Crown Castle NG Networks, Inc.*** (2016) 6 Cal.App.5th 775 – In *Ryan*, the Plaintiff employee sought the value of promised stock options as the measure of damages for breach of an employment contract, and his lost earnings as the measure of damages for various tort claims. At trial, the jury found in the Plaintiff's favor on the breach of contract claim, and found against the Plaintiff on the tort claims. Nevertheless, the jury awarded the Plaintiff his lost earnings, valued at $73,522, rather than the value of the stock options, which was established by expert testimony to be $326,250. The trial court refused to grant the Plaintiff a new trial on the grounds of inadequate damages, holding that he could not second guess the jury's determination as to damages suffered by the Plaintiff. The Court of Appeal reversed, holding that the trial court had a duty to reweigh the evidence independently of the jury's determination, and grant a new trial if the evidence was insufficient to support the verdict. Here, the only expert testimony was that the options were worth $326,250, and there was no evidence to support a finding that they were worth only $73,522. Moreover, the special verdict form awarded the $73,522 in the space for lost earnings, while the space for the value of the options was left blank, indicating that the jury either misunderstood the form and the jury instructions or agreed to a compromise verdict. Under these circumstances, a retrial on both liability and damages was required. The Court of Appeal concluded the opinion in this case with a lengthy comment on the advisability of using a general verdict, rather than a special verdict form, and speculated that the verdict in this case would not have been questionable had a general verdict been employed.

## 50. Personal Jurisdiction – Filing Anti-SLAPP Motion Concurrently With Motion to Quash Does Not Waive Personal Jurisdiction.

***ViaView, Inc. v. Retzlaff*** (2016) 1 Cal.App.5th 198 – ViaView, a California corporation, filed a petition for a workplace violence restraining order against a Texas resident, for harassing comments made online. The Defendant filed a motion to quash for lack of personal jurisdiction, and then filed an anti-SLAPP motion before the motion to quash was heard. The trial court ruled that the anti-SLAPP motion constituted a general appearance and denied the motion to quash. The court also denied the anti-SLAPP motion, and granted a permanent injunction on the same day. The Court of Appeal reversed, holding that under Code of Civil Procedure § 418.10(e), no act by a party who filed a motion to quash will constitute a general appearance until a written order is issued denying the motion, and any writ review has been concluded. Since the trial court never issued a written order denying the motion to quash, nothing filed concurrently or after the motion to quash constituted a general appearance. While the Defendant also incorrectly filed a notice of appeal, rather than a petition for writ review, the Court construed the notice of appeal as a petition for writ of mandate, due to the unusual circumstances (i.e., that the Court decided the merits of the action and the motion to quash on the same day).

## 51. Personal Jurisdiction – Specific Jurisdiction – Where Contacts With State Are Extensive, A Minimal Relationship To The Litigation Will Establish Jurisdiction.

***Bristol-Myers Squibb Co. v. Superior Court*** (2016) 1 Cal.5th 783 – Numerous Plaintiffs from California and 33 other states sued Bristol-Myers Squib ("BMS") for claims relating to the development, marketing and sale of the prescription drug Plavix. BMS argued that California courts did not have personal jurisdiction over BMS for purposes of the non-residents' claims, because BMS's contacts with the State of California had no relation to those Plaintiffs' claims. The California Supreme Court rejected that argument, noting that it applied a sliding scale to specific jurisdiction, so that the broader the defendants' contacts are with the state, the weaker the link needs to be between the contacts and the litigation. Here, BMS had extensive research and development facilities in California (although they were not involved with Plavix), and BMS had extensive sales and distributions operations in California that did distribute Plavix. The Court held that these constituted broad contacts with California. These broad contacts were sufficiently related to the non-resident Plaintiffs' claims to establish jurisdiction, since the California operations were part of: (a) a "common nationwide course of distribution," wherein the same allegedly false and misleading claims about Plavix were made in each state, and (b) a course of conduct of negligent research and design. The Court went on to explain that the relatedness test for specific jurisdiction does not require the defendant's California contacts to be substantively relevant to the action.

## 52. Preliminary Injunctions – Altering The Status Quo Was Appropriate In "Extreme Case" Where One Party Held Source Code Hostage For A Larger Settlement.

***Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.*** (2016) 6 Cal.App.5th 1178 – *Integrated Dynamic Solutions, Inc.* involved a contract dispute between the Plaintiff software developer, and the Defendant client. The Plaintiff sued after the Defendant refused to pay for custom software developed by the Plaintiff. The Defendant filed a cross-complaint alleging that the software was incomplete, and that the Plaintiff had refused to deliver source code and technical documentation as required by the contract. The trial court issued a preliminary injunction requiring the Plaintiff to turn over the source code and technical documents, and the Plaintiff appealed. The Court of Appeal held that preliminary injunctions altering the status quo are closely scrutinized on appeal, and are limited to "extreme cases" where the right to injunctive relief is "clearly established." Here, the Defendant's right to the injunction was clearly established where the contract expressly required delivery of the source code. Moreover, the balance of harms favored the Defendant, who was unable to use the software without the source code, causing substantial harm to its business. Delivery of the source code would only harm the Plaintiff by impairing its "negotiating position," by preventing the Plaintiff from holding the

software hostage for a larger settlement. The Court of Appeal agreed with the trial court that this "harm" was legally irrelevant.

## 53. Statute of Limitations – Insurer's Optional Appeals Process Does Not Toll Statute Of Limitations On Doctor's Quantum Meruit Claim.

***Vishva Dev, M.D., Inc. v. Blue Shield of California Life & Health Ins. Co.*** (2016) 2 Cal.App.5th 1218 – The Plaintiff doctor provided emergency medical services, and billed the recipients' insurers. The Defendant insurers issued explanation of benefits letters indicating that they would pay only a fraction of the bills. The Plaintiff then sought higher payments in the insurers' voluntary appeals processes. After those appeals were exhausted, the Plaintiff sued, and the Defendant insurers filed a summary judgment motion asserting the statute of limitations. The Plaintiff argued that the period of limitations should be calculated from the rejection of his appeal, rather than the date of the explanation of benefits letters. The trial court granted summary judgment, and the Court of Appeal affirmed, holding that the explanation of benefits letters were unequivocal in their refusal to pay the requested amounts, and only offered to consider other evidence in an informal appeal as a courtesy. The Court held that the courtesy offer to consider other evidence did not render the letters uncertain. Accordingly the Plaintiff had knowledge of the facts giving rise to his claims when the letters were issued, which was sufficient to commence the running of the statute of limitations.

## 54. Statute Of Limitations – Action To Quiet Title Based On Fraud Must Be Brought Within Three Year Statute Applicable To Fraud Claims.

***Walters v. Boosinger*** (2016) 2 Cal.App.5th 421 – The Plaintiff's father, Randy, held a property in joint tenancy with the Defendant, his former girlfriend. Randy sued to sever the joint tenancy but died before the suit reached judgment. The Plaintiff then sued Defendant to quiet title, basing the claim on allegations that the grant deed was void ab initio. The Defendant demurred on the grounds that the claim was time-barred under Code of Civil Procedure section 338. The trial court agreed with the Plaintiff's argument that a quiet title claim may be brought "at any time." The Court of Appeal reversed, holding that even though there is no single statute of limitations applicable to a quiet title action, the court must use the limitations period applicable based on the gravamen of the action. Here, the gravamen was fraud, so the court must apply the three-year statute of limitations period applicable to fraud claims. The Court also held that an action by one joint tenant against the other challenging the validity of the grant deed does not sever the joint tenancy.

## 55. Statute Of Limitations – Continuous Accrual For Breach Of Recurring Obligation To Pay Royalties.

***Gilkyson v. Disney Enterprises, Inc.*** (2016) 244 Cal.App.4th 1336 – In 2013, the heirs of Terry Gilkyson sued Disney for allegedly breaching its obligations to pay royalties with respect to the

song "Bare Necessities" used in various releases of the movie *The Jungle Book*, which took place both before and after 2007. The trial court dismissed the lawsuit after holding that the claims were barred by the applicable four-year statute of limitations. The Court of Appeal reversed, holding that the continuous accrual doctrine applied, because there was a continuous breach of a recurring obligation to pay the royalties, and each breach triggered a new limitations period. The heir's causes of action were timely as to those breaches occurring within the four year limitations period preceding the filing of the original lawsuit.

## 56. Statute of Limitations – Filing Of Complaint Tolls Statute Of Limitations For Both Compulsory And Permissive Cross-Complaints.

***ZF Micro Devices v. TAT Capital Partners*** (2016) 5 Cal.App.5th 69 – Witkin's California Procedure states that the filing of a complaint suspends the statute of limitations for any cross-claims that a defendant may bring, while the Rutter Group's Civil Procedure Before Trial states that the filing of a complaint only suspends the statute of limitations for compulsory cross-complaints. In *ZF Micro Devices*, the Court of Appeal resolved this difference of opinion in favor of Witkin, by examining California Supreme Court authority under the now abolished counter-complaint statutes. In these old cases, the Supreme Court held that the filing of a complaint tolled the statute of limitations for *any* counter-claim. Because these cases were decided after the former counter-claim statute had been amended to embrace related and unrelated claims, the Court in *ZF Micro Devices* held that the same rule should be applied to cross-claims under the modern statutory regime.

## 57. Relief From Default – Attorney's Affidavit Of Fault Need Not Include A Detailed Explanation Of Reasons For Neglect.

***Martin Potts and Associates, Inc. v. Corsair, LLC*** (2016) 244 Cal.App.4th 432 – A default judgment was entered against the Defendant after the Defendant failed to file any pleadings in the case. The Defendant moved to set aside the default judgment under C.C.P. § 473(b), and its attorney submitted a somewhat conclusory affidavit stating that the default judgment was due to his "failure to protect the interest" of his client. The trial court granted the motion, and the Court of Appeal affirmed. The Court of Appeal held that C.C.P. § 473(b) requires a trial court to grant the motion when the attorney submits an affidavit attesting to his "mistake, inadvertence, surprise or neglect." While the Court of Appeal stated that it is probably good practice for the attorney to state the reasons for his "mistake, inadvertence, surprise or neglect" in his affidavit, the attorney does not need to provide an explanation of his mistake under law. The affidavit submitted in this case was detailed enough to constitute substantial evidence of attorney neglect, because it "unequivocally spell[ed] out that [the attorney] was [the Defendant's] lawyer; he received plaintiff's filings from [Defendant]; he did nothing with those papers; and his decision to do so was his and his alone."

## 58. Relief From Default – Discretionary Relief For Excusable Neglect – C.C.P. § 473(b) Motion Does Not Require Signature Under Penalty of Perjury.

***Austin v. Los Angeles Unified School District*** (2016) 244 Cal.App.4th 918 – In *Austin*, the Plaintiff sought reconsideration of a summary judgment entered against her on the grounds that her attorney had abandoned her, despite her poor mental state, and that she would retain a new attorney. The trial court properly construed the motion as a request for discretionary relief for excusable neglect under CCP § 473(b), but refused to consider the motion on the merits, because it was not verified under penalty of perjury. The Court of Appeal reversed and held that the trial court abused its discretion. Section 473(b) expressly states that "no affidavit or declaration of merits shall be required of the moving party," and thus it was error for the trial court to require one.

## 59. Res Judicata and Collateral Estoppel – Issue Preclusion Does Not Apply Where Record Does Not Disclose What Factual Issues Were Actually Litigated.

***Patel v. Crown Diamonds Inc.*** (2016) 247 Cal.App.4th 29 (Aronson, Rylaarsdam, Fybel) – After a group of business partners allegedly defrauded the Plaintiff out of over $600,000, one of those partners declared bankruptcy. The Plaintiff's adversary action in the bankruptcy was dismissed. The Plaintiff then sued the other partners (but not the bankrupt partner) for fraud. The Defendants requested terminating sanctions, which the trial court granted, on the grounds that Plaintiff's claims were barred by res judicata and collateral estoppel due to the bankruptcy proceeding. The Court of Appeal reversed, holding that claim preclusion did not exist because the Defendants were not in privity with their bankrupt partner. The Court then explained that claim preclusion requires the party asserting it to establish all of its elements, including the element that "the issue necessarily decided in the prior adjudication is identical to the one that is sought to be relitigated." Here, that element was not established, because the record did not provide any evidence of the grounds on which the adversary action was dismissed, and there were a variety of possible reasons for the dismissal that would not have negated the Defendants' liability.

## 60. Res Judicata – Challenge To Service Of Process In Out-Of-State Action Should Have Been Raised In That Action.

*Hawkins v. SunTrust Bank* (2016) 246 Cal.App.4th 1387 – *Hawkins* involved a prior action in South Carolina to foreclose the Plaintiff homeowner's home. A year after the judgment in the South Carolina action, the homeowner appealed, claiming that she had not been served properly with summons. The appeal was dismissed due to deficiencies in the notice of appeal, and the South Carolina judgment became final. Prior to dismissal of her appeal, the homeowner also filed a wrongful foreclosure claim in California. The trial court dismissed the California case,

and the Court of Appeal agreed, holding that the homeowner's claims were barred by collateral estoppel and res judicata. The Court of Appeal rejected the homeowner's argument that the South Carolina judgment was void for lack of service of process, holding that the homeowner's special appearance to challenge jurisdiction constituted an agreement to be bound by the South Carolina court's determination of that issue. Accordingly, the homeowner was barred by collateral estoppel from challenging a finding in the South Carolina court's judgment, which stated that the homeowner had been properly served.

### 61. Venue – Contractual Provisions – Presumption of Validity Accorded To Venue Provisions Cannot Establish The Existence Of An Agreement.

***Long v. Provide Commerce Inc.*** (2016) 245 Cal.App.4th 855 – As noted above, the Court of Appeal in *Long* refused to enforce the arbitration agreement in a website's "Terms of Use," because the link to the terms of use was inconspicuous, and there was no textual notice that the use of the website would be construed as an agreement to the terms. The Plaintiff argued that even if the arbitration agreement was unenforceable, the venue provision in the Terms of Use should be enforced, due to the presumption of validity that is accorded to venue provisions. The Court of Appeal rejected that argument, holding that the presumption only applies to venue provisions in otherwise enforceable agreements and cannot be used to establish the existence of the agreement itself. *See also*, ALTERNATIVE DISPUTE RESOLUTION – Arbitration Agreements, p. 41 above, and CONTRACTS – Mutual Assent, p. 68 below.

## CONTRACTS

### 62. Indemnity – Standard Indemnity Clause Does Not Allow Attorney's Fees To Be Awarded In First Party Claim For Breach Of Contract.

***Alki Partners v. DB Fund Services*** (2016) 4 Cal.App.5th 574 – In *Alki Partners*, the trial court awarded contractual attorney's fees to the prevailing party on a breach of contract claim, based on a standard indemnity clause. The clause provided for indemnity of any claims, damages, liabilities (etc.) "resulting in any way from the performance or non-performance of [the Plaintiff's] duties hereunder." The Court of Appeal reversed the award of attorney's fees, holding that the clause only allowed indemnity to satisfy a loss or damage suffered by a third party. The Court recognized that some indemnity clauses may include indemnity for first party damages suffered by the parties to the contract. However, the Court distinguished cases in which first party indemnity was awarded, by noting the much broader language in the indemnity provisions at issue in those cases.

## 63. Indemnity – Allegations In Third Party's Complaint Against Indemnitee Do Not Control Validity Of Claim For Indemnification.

***Aluma Systems Concrete Construction of California v. Nibbi Bros., Inc.*** (2016) 2 Cal.App.5th 620 – In this case, the Plaintiff contractor sued the Defendant client for contractual indemnity, after being sued by the Defendant's employee for negligence. The Defendant demurred, arguing that: (a) the employee's complaint only alleged that the Plaintiff contractor was negligent, and (b) the indemnity clause in the contract between Plaintiff and Defendant excluded claims and damages caused by the Plaintiff's sole negligence. The Court of Appeal disagreed, holding that the Contractor's indemnification claim was not restricted by the allegations of the employee's complaint. The Defendant argued that the language of the indemnity provision allowed indemnification of "claims," which indicates that the Employee's allegations control the applicability of the provision. However, the Court pointed out that the provision's language also allowed indemnification of "damages" and "losses," which meant the applicability of the provision turned on the damages actually awarded rather than the damages alleged in the Employee's complaint.

## 64. Mutual Assent – "Browsewrap Agreements" Are Not Enforceable Without A Textual Notice That Use Of A Website Constitutes Agreement To The Site's Terms Of Use.

***Long v. Provide Commerce Inc.*** (2016) 245 Cal.App.4th 855 – As noted on page 41 above, the Court of Appeal in *Long* declined to enforce of a website's "Terms of Use" where those terms appeared in a hyperlink on the website, which led to a purported agreement, which provided that the user's use of the website constituted assent to the contract. This sort of agreement, referred to as a "Browsewrap Agreement" is distinguished from a so-called "Clickwrap Agreement," which requires a user to click a button to manifest his or her affirmative assent to the agreement before being able to access a website or piece of software (these names have their origin in the "Shrinkwrap Agreements" that often accompany store-bought software, and provide that the user agrees to the terms of use by breaking the shrinkwrap seal on the software). In the case of a "Browsewrap Agreement," the Court in *Long* held that to demonstrate an enforceable manifestation of the user's assent to the agreement, the hyperlink to the terms of use must: (a) be conspicuous enough to provide constructive notice to a reasonable user, and (b) be accompanied by a textual notice informing the consumer that continued use of the site would be construed as assent to the terms of use provided for in the hyperlinked document. *See also*, ALTERNATIVE DISPUTE RESOLUTION – Arbitration Agreements, p. 41 above, and CIVIL PROCEDURE -- Venue, p. 67 above.

## 65. Prejudgment Interest – Dispute Over Liability, Rather Than Amount Of Damages, Does Not Create Uncertainty Or Preclude Award Of Prejudgment Interest.

***Watson Bowman Acme Corp. v. RGW Construction Inc.*** (2016) 2 Cal.App.5th 279 – In *Watson Bowman Acme Corp.*, the Plaintiff supplier sued the Defendant contractor for an increase in the cost of expansion joints, after Caltrans rejected the joints specified in the original contract documents, and required more expensive joints. The trial court found in favor of the Plaintiff, and awarded the increased cost, but did not award prejudgment interest. The Court of Appeal reversed the denial of prejudgment interest. The Court of Appeal noted that Civil Code § 3287(a) allows for prejudgment interest when the amount of damages is certain. Here, RGW could have determined the amount owed to Watson from "reasonably available information," so prejudgment interest was appropriate. The Court held that a dispute about liability, rather than the amount of damages, does not create uncertainty for the purposes of section 3287.

# CORPORATIONS AND BUSINESS ENTITIES

## 66. Corporate Records – Right To Inspect Records Under Corporations Code § 1601 Does Not Require Records To Be Available In California.

***Innes v. Diablo Controls Inc.*** (2016) 248 Cal.App.4th 139 – Plaintiff shareholders filed a petition to inspect the records of the Defendant corporation, which were kept in Illinois. The Defendant made certain records available at its counsel's office in California, but argued that the remainder of the records were available in Illinois. The trial court denied the petition on the basis that section 1601 of the Corporations Code requires a corporation to make its records available for inspection, but does not require the records to be made available in California. The Court of Appeal affirmed. There was nothing in section 1601 that would suggest that records must be available in California. The Court noted that other sections of the Corporations Code require certain records to be made available in California, but section 1601 does not, which shows the Legislature did not intend to require the records specified in section 1601 to be available in California.

## 67. Defunct Corporations – Service Of Process – Service On Defunct Corporation's Agent For Service Of Process Constitutes Actual Notice.

***Pulte Homes Corp. v. Williams Mechanical Inc.*** (2016) 2 Cal.App.5th 267 – The Plaintiff in *Pulte Homes Corp*. ("Pulte") sued a defunct corporation, and served the summons and complaint on the attorney who was listed as the Defendant's last agent for service of process. The attorney took no action to notify the former directors or officers of Defendant. After a default judgment, the Defendant's liability insurer moved for relief under CCP § 473.5, and the trial court granted it. The Court of Appeal reversed, noting that § 473.5 only grants relief when there is no actual notice. The Court held that while actual notice of an active corporation may require service on a

director or president, an inactive corporation has no officers or directors. Accordingly, service on the registered agent for service for a defunct corporation constitutes actual notice. The Court of Appeal also held that relief under section 473 was untimely, and equitable relief was inappropriate, because there was no excuse for the agent's failure to even attempt to contact the Defendant.

### 68. Minority Shareholder Buyout – Trial Court Erred By "Confirming" And Averaging Three Disparate Appraisals.

***Goles v. Sawhney*** (2016) 5 Cal.App.5th 1014 – The trial court in *Goles* was called to determine the share price for a minority shareholder buyout under Corporations Code § 2000(c). Three appraisers were appointed, and gave three disparate appraisals of the shares: $69,000, $150,000, and $200,000. The trial court "confirmed" all three appraisals, and awarded the average of the three as the price for the minority shares: $139,666.67. The Court of Appeals reversed, holding that the trial court had the power to either: (a) reject the appraisals and decide the share price de novo, or (b) confirm a price on which at least two of the appraisers agreed. Instead it "confirmed" all three disparate appraisals, which is not authorized by the statutory procedure. In addition, the appraisals all had to be recalculated, because none of the appraisals accounted for the value of pending derivative claims as required, and two of the appraisals improperly applied a discount for lack of control, which is not permissible when minority shares are being acquired by a party who already possesses control.

## DISCOVERY

### 69. Document Demands – *Calcor Space Facility* Does Not Support Party's Refusal To Take Any Efforts To Locate Responsive Documents.

***Lopez v. Watchtower Bible and Tract Society of New York Inc.*** (2016) 246 Cal.App.4th 566 – The opinion in *Calcor Space Facility v. Superior Court* (1997) 53 Cal.App.4th 216 is often cited by litigants in oppositions to motions to compel the production of documents. In *Lopez*, the Court of Appeal noted that *Calcor Space Facility* concerned a business records subpoena that was addressed to a third party, did not reasonably specify the documents sought, and contained six pages of complex definitions. The Court held that *Calcor Space Facility* did not support a responding party's objections where: (1) the responding party was the Defendant in the case and had superior knowledge of its own files, (2) the evidence showed that at least some responsive documents could be identified, and (3) the responding party still took no efforts at all to produce even the readily identifiable documents. The Court of Appeal also held that privilege claims and third party confidentiality claims did not warrant reversal of an order compelling production where the order expressly allowed production of a privilege log and the redaction of third party identifying information. Notably, however, the Court also overturned an order imposing terminating sanctions, even though the responding party had made no effort to comply with an order compelling production. The Court based this ruling on the lack of any evidence that a

lesser sanction would have either achieved compliance or remedied the discovery violation. *See also* DISCOVERY – Party Affiliated Deponents, immediately below.

## 70. Party Affiliated Deponents –Party Seeking Deposition Must Show That Opposing Party Can Direct "Managing Agent" To Appear For Deposition.

***Lopez v. Watchtower Bible and Tract Society of New York Inc.*** (2016) 246 Cal.App.4th 566 – Under CCP § 2025.280, deposition notices, rather than subpoenas, are effective to obtain the depositions of "an officer, director, managing agent, or employee of a party." The Court of Appeal in *Lopez* applied a three-pronged test to determine whether a witness who failed to appear for deposition was a "managing agent," even though he was not an officer, director or employee. The three factors are: "(1) does the person exercise judgment and discretion in dealing with the party's matters; (2) can the person be expected to comply with the party's directive to appear; and (3) can the person be anticipated to identify himself or herself with the party's interests." After examining the particular facts before it, the Court of Appeal in *Lopez* held that a witness was not a managing agent of the Defendant, because the Plaintiff had only established that the witness had discretionary judgment over the Defendant's operations, but had not shown that the Defendant had any authority or ability to direct the witness to appear for deposition. The Court stressed that a managing agent does not necessarily have to be an officer, director, or employee, but where a witness is not an officer, director, or employee, there must be some independent evidence of the party's ability to direct that witness to appear before the witness will be deemed a party affiliated managing agent. *See also* DISCOVERY – Document Demands, immediately above.

## 71. Tax Return Privilege – Exceptions – Refusal To Produce Relevant Non-Privileged Financial Information.

***Li v. Yan*** (2016) 247 Cal.App.4th 56 – California's statutory privilege for tax returns is not absolute. Disclosure of tax returns may be ordered where a plaintiff establishes that: (1) the defendant has refused to produce relevant nonprivileged financial records; (2) the defendant has improperly obstructed efforts to obtain nonprivileged records; and (3) less intrusive methods to obtain the financial records have been unsuccessful. The Court in *Li* found that such a showing had been made, justifying disclosure of the Judgment Debtor's tax returns, where the Debtor claimed suspicious transfers to his relatives, repeatedly (and unbelievably) claimed that he could not remember basic information during multiple sessions of his debtor's examination, and was admonished by the bankruptcy court for suspicious family member claims in his bankruptcy. In light of these facts, the Court of Appeal held that the trial court did not abuse its discretion by ordering the Debtor to produce his tax returns.

# EMPLOYMENT

## 72. Avoidable Consequences Defense – Assertion Of Defense Does Not Waive Privileges Covering Post-Termination Investigations.

***City of Petaluma v. Superior Court*** (2016) 248 Cal.App.4th 1023 – In employment harassment cases, the avoidable consequences defense applies when an employee fails to take advantage of the employer's procedures that could have prevented some of the damages flowing from workplace harassment. In *City of Petaluma*, the trial court compelled the Defendant employer to produce an investigation report prepared by outside counsel following the resignation of the Plaintiff employee. The trial court reasoned that the Defendant put its investigatory procedure at issue by asserting the avoidable consequences defense, thereby waiving the attorney-client and attorney work product privileges. The Court of Appeal reversed, holding that the avoidable consequences defense only put at issue the Defendant's actions taken *prior* to the employee's resignation, and thus did not waive the privileges applicable to an investigation taken *after* resignation. *See also* ATTORNEY PRACTICE – Attorney-Client Relationship, p. 55 above.

# EVIDENCE

## 73. Authentication – Electronic Signature – Specific Factual Testimony Regarding Security Procedures Met Burden Of Authenticating Electronic Signature.

***Espejo v. Southern California Permanente Medical Group*** (2016) 246 Cal.App.4th 1047 – In this wrongful termination action, the Defendant employer sought to compel arbitration. The Plaintiff employee was required to log in to a website and electronically agree to an arbitration agreement as part of the employment process. The initial documents in support of the petition to compel arbitration simply stated that the Plaintiff had electronically signed the agreement. After the Court in *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836 rejected an attempt to compel arbitration based on a similar conclusory declaration regarding an electronic signature, the Defendant submitted a supplemental declaration. The new declaration contained specific factual allegations regarding: (1) the unique password and ID given only to Plaintiff; (2) the process required to log in and consent to the arbitration agreement that could only have been completed by Plaintiff, and (3) the manner in which the final agreement was prepared, and stamped with the date, time, and IP address of the electronic signature. The Court of Appeal held that this evidence was sufficient to meet the Defendant's burden of authenticating the electronic signature. *See also* ALTERNATIVE DISPUTE RESOLUTION – Compelling Arbitration – Prima Facie Burden, p. 44, above.

## 74. Declarations – A Declaration Filed By A Party In A Summary Judgment Motion Is Admissible In Later Proceedings.

***Hearn Pacific Corp. v. Second Generation Roofing, Inc.*** (2016) 247 Cal.App.4th 117 – In *Hearn Pacific Corp.*, the Cross-Complainant submitted a declaration in support of a motion for summary adjudication, and then objected when the Cross-Defendant attempted to submit that same declaration in support of a later motion. The trial court excluded the declaration, citing *Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, which held that a separate statement of undisputed facts was not a pleading, and thus could not be used to establish a judicial admission. The Court of Appeal reversed, explaining that *Myers* did not bar the use of summary judgment declarations in subsequent proceedings. While such declarations were not pleadings, and do not establish a judicial admission, they do constitute admissible evidence because they are executed under penalty of perjury, unlike the separate statements at issue in *Myers*. *See also* JUDGMENTS – Judgment Debtors, p. 78, below.

## 75. Expert Witnesses – Physician From Mexico Can Testify To Standard Of Care In Medical Malpractice Case.

***Borrayo v. Avery*** (2016) 2 Cal.App.5th 304 – In this medical malpractice action, the Plaintiff patient opposed the Defendant doctor's summary judgment motion with an expert witness declaration from a doctor who practices in Mexico. The trial court granted the motion for summary judgment and sustained an objection to the declaration on the grounds that the foreign doctor could not testify to the standard of care in the United States. The Court of Appeal reversed, noting that, at one time, medical malpractice plaintiffs had to establish the standard of care in a specific locality, but "[m]ore recently, however, the Supreme Court has formulated the standard of care as that of physicians in similar circumstances rather than similar locations." Here, the Defendant failed to offer any evidence to show how the circumstances of treatment in Mexico would differ from the circumstances in the United States. Accordingly, it was error to exclude the declaration.

## 76. Hearsay And Opinion Testimony – Witness's Impression Of Consensus Reached At Meeting Is Admissible Lay Opinion, Not Hearsay.

***In re Automobile Antitrust Cases I and II*** (2016) 1 Cal.App.5th 127 – In an antitrust case concerning automakers' collusion to stop grey market imports from Canada, the trial court excluded deposition testimony of Toyota of Canada's general counsel regarding a trade association meeting. The general counsel testified that he could "remember comments being made" about a consensus to stop cars from being exported to the US, and that "there was general support for the approach." The Court of Appeal held that this was not hearsay, because the general counsel was not testifying about any particular out of court statement, "he was simply recounting generally his impressions and conclusions based on his participation in the meeting." The Court then held that while this was opinion testimony, it was admissible because it was

based on his personal observations of the appearance and demeanor of the other meeting participants, and concrete observations of the subtle and complex interactions could not otherwise be conveyed. *See also* UNFAIR COMPETITION, p. 88, below.

# GOVERNMENT

## 77. Administrative Record – Cost Recovery – Preparation of Administrative Record Is Allowable Cost Under C.C.P. § 1094.5(a).

***No Toxic Air Inc. v. Lehigh Southwest Cement Co.*** (2016) 1 Cal.App.5th 1136 – Code of Civil Procedure § 1094.5(a) specifies that if the prevailing party in an administrative mandamus action has borne the expense of preparing the administrative record, that expense shall be taxable as costs. In *No Toxic Air*, the successful Real Party in Interest sought recovery of its costs from the unsuccessful Petitioner, but the trial court struck the request for attorney and paralegal fees incurred to prepare the record, finding that the fees were reasonable and necessary, but that no appellate authority supported a grant of attorney's fees. The Court of Appeal reversed and held that § 1094.5(a) allows for recovery of labor costs, making the labor costs of attorneys and paralegals just as recoverable as the labor costs of an agency staff. For a similar holding allowing recovery of administrative record costs by the Real Party in a CEQA lawsuit, *see* ***Citizens for Ceres v. City of Ceres*** (2016) 3 Cal.App.5th 237.

## 78. California Public Records Act – Inadvertent Disclosure Does Not Waive Privilege.

***Newark Unified School District v. Superior Court*** (2016) 245 Cal.App.4th 887 – The Plaintiff school district sought injunctive relief to require the return of attorney-client and attorney work product privileged documents that were inadvertently produced in response to a CPRA request. The trial court held that the disclosure of the documents in response to the CPRA request waived any applicable privileges under Government Code § 6254.5. The Court of Appeal reversed, holding that the language of § 6254.5 was ambiguous because the words "disclosure" and "waiver" in the statute could be construed to have a requirement of intent. The Court then examined the legislative history of the statute, finding that the Legislature intended the statute to address "selective" disclosure, where a public entity makes records available to some members of the public, but not others. The Court noted that inadvertent production does not involve a selection at all, and thus does not fall within the object of the statute. Accordingly, the Court construed § 6254.5 in harmony with Evidence Code § 912, which has long been construed to prevent waiver of privileges through inadvertent disclosure. *See also* ***Ardon v. City of Los Angeles*** **(2016) 62 Cal.4th 1176**, in which the California Supreme Court adopts the reasoning and holding of *Newark Unified School District.*

# INSURANCE

## 79. Bad Faith – Offer Of Policy Limits Is Not Sufficient, In Itself, To Defeat Bad Faith Claim.

***Barickman v. Mercury Casualty Co.*** (2016) 2 Cal.App.5th 508 – Mercury Casualty Co. insured an intoxicated driver who ran a red light and struck two pedestrians. Mercury offered the pedestrians $15,000, the driver's policy limit, and the pedestrians agreed but wanted to insert additional language stating that the payment would not include court-ordered restitution, which Mercury would not agree to. The driver was convicted in criminal court and was ordered to pay $165,000 in restitution. The pedestrians then sued the driver and the parties reached a $3 million stipulated settlement. Subsequently, the driver assigned her rights against Mercury to the pedestrians, prompting an action for breach of contract and breach of the covenant of good faith and fair dealing. The trial court ruled in favor of the pedestrians for $3 million plus interest against Mercury. The Court of Appeal affirmed the trial court's finding that Mercury breached the implied covenant of good faith and fair dealing by unreasonably refusing to accept the modified release language, which was essentially a recitation of existing law. The Court noted that even though Mercury began negotiations in good faith by offering the policy limit, it ultimately acted in bad faith, and its initial good faith offer did not discharge its obligation to continue to make reasonable efforts to reach a settlement.

## 80. Duty To Defend – Standing – Parent Company Lacks Standing To Sue Insurers To Establish Duty To Defend Subsidiary.

***D. Cummins Corp. v. United States Fidelity & Guaranty Co.*** (2016) 246 Cal.App.4th 1484 – In *D. Cummins Corp.*, the corporate parent of an insured company joined as a co-plaintiff in a lawsuit by its subsidiary against the subsidiary's insurers. The lawsuit sought a declaration of the insurers' duty to defend asbestos lawsuits, and the parent's joinder was likely motivated by a desire to avoid federal diversity jurisdiction. The trial court and Court of Appeal both held that the parent company lacked standing to pursue the declaratory relief claim because it was not a party to the insurance contracts, and it was not otherwise interested in their performance. The parent company's indirect interest as the majority shareholder was insufficient to confer standing.

# JUDGES

## 81. Peremptory Challenges – Blanket Papering – Precedent Requires Court To Grant § 170.6 Motions Despite Evidence Of "Blanket Papering."

***People v. Superior Court (Tejeda)*** (2016) 1 Cal.App.5th 892 (O'Leary, Aronson, Thompson (dissent)) – In *Tejeda*, the Orange County Superior Court rejected a peremptory challenge by the District Attorney's office. In doing so, the trial court took judicial notice of facts indicating that

the District Attorney's Office has engaged in "blanket papering" of one of the court's criminal judges, and has thereby interfered with the orderly administration of justice. The Court of Appeal issued a split opinion reversing the denial of the challenge. The majority held that the Supreme Court's opinion in *Solberg v. Superior Court* (1977) 19 Cal.3d 182 already decided that a blanket challenge pursuant to § 170.6 does not violate the doctrine of the separation of powers or impair the independence of the judiciary. The majority indicated that they disagreed with that holding in light of the complexities of modern court administration, but the holding was nevertheless binding. The dissent argued that the holding in *Solberg* was limited to the facial constitutionality of section 170.6, and was not applicable to an as-applied challenge to the use of the statute to engage in blanket papering. *See also* APPELLATE LAW & PROCEDURE – Stare Decisis, p. 52, above.

## 82. Peremptory Challenges – Challenge In One Of Two Related Cases Does Not Require Transfer Of Both Cases.

***Rothstein v. Superior Court*** (2016) 3 Cal.App.5th 424 – During an action to dissolve the marriage of a husband and wife, the wife's LLC filed a civil action relating to a debt that had also been raised as an issue in the dissolution proceedings. The two actions were deemed related and the civil case was assigned to the existing family court judge, but the cases were not consolidated. The wife's company then filed a preemptory challenge in the civil action, and the original judge transferred both cases to a new judge. The husband then requested reconsideration, which the trial court denied. The Court of Appeal reversed, holding that only the new civil action should have been transferred. The Court noted that proceedings on the merits had already occurred in the dissolution proceeding, so that transfer of the dissolution proceeding would frustrate § 170.6's statutory policy against the use of peremptory challenges after a judge has ruled on disputed issues of facts relating to the merits of the case.

## 83. Peremptory Challenges – No Second Peremptory Challenge Is Allowed After Successful Appeal Of Interim Decision

***McNair v. Superior Court*** (2016) 6 Cal.App.5th 1227 – A party who prevails on appeal is ordinarily allowed an opportunity to disqualify the judge who was overturned on appeal even if the party already used a peremptory challenge, but that rule is not absolute. In *McNair*, the Plaintiff filed a suit with seven causes of action against the NCAA. The NCAA then used its peremptory challenge under CCP § 170.6 to disqualify the assigned judge. After another trial judge was assigned, the NCAA brought an anti-SLAPP motion, which was denied by the trial court as to all causes of action, allowing the action to proceed. The NCAA appealed, and the Court of Appeal reversed as to two out of the seven causes of action. On remand, the NCAA moved under CCP § 170.6(a)(2) to disqualify the judge that denied the anti-SLAPP motion. The trial court disqualified the trial judge, and the Court of Appeal reversed, holding that under § 170.6(a)(2), a successful appellant is only allowed a new peremptory challenge if the appeal is taken from a final judgment, rather than an interim order. Since the trial court denied the

NCAA's anti-SLAPP motion, its order was not a final judgment, and the successful appeal from that order did not provide an opportunity for a second 170.6 challenge.

### 84. Peremptory Challenges – Time To File 170.6 Challenge – One-Judge Court Deadline.

***Jones v. Superior Court*** (2016) 246 Cal.App.4th 390 – Code of Civil Procedure section 170.6(a)(2) states that a peremptory challenge to a judge must be filed within 30 days of the filing party's first appearance, if the Action is pending in a court where only one judge has been authorized. In *Jones*, a peremptory challenge was filed in the Truckee Branch of the Nevada County Superior Court within the ordinary deadlines, but outside of the 30-day deadline for a one-judge court. The trial court denied the peremptory challenge, because there was only one judge assigned to the Truckee Branch. The Court of Appeal reversed, holding that the Truckee Branch is only one branch of the Nevada County Superior Court, and there are six judges authorized for that court under Government Code § 69590.7. Accordingly, the one-judge court deadline did not apply. Currently, there are no courts where only one judge has been authorized.

## JUDGMENTS

### 85. Exemptions From Judgment – Educational Savings Accounts Under 26 U.S.C. § 529 Are Not Exempt From Judgments.

***O'Brien v. AMBS Diagnostics LLC*** (2016) 246 Cal.App.4th 942 – The Judgment Creditor in *O'Brien* sought to levy on the Judgment Debtor's investment accounts. The Debtor filed claims of exemption for his individual retirement accounts, and his "529 Savings Accounts" for his children's qualified higher education expenses. The trial court granted the exemptions and the Court of Appeal reversed, holding that: (a) educational savings accounts under 26 U.S.C. § 529 are not covered by any statutory exemption from judgment under California law, and (b) the trial court erred by exempting the Debtor's retirement accounts while refusing to first consider the facts that the Debtor was still many years from retirement, was in good health, and had earned a significant salary in the past. Regarding the educational savings accounts, the Court held that exemptions from judgment are creatures of statute, and that the Court was powerless to create a new exemption from whole cloth, "no matter how persuasive the policy reasons that might support it."

### 86. Judgment Debtors – Default Judgment Can Be Amended To Add Successor Corporation, But Not Alter Ego.

***Wolf Metals, Inc. v. Rand Pacific Sales, Inc.*** (2016) 4 Cal.App.5th 698 – After unsuccessfully attempting to collect a default judgment against the Defendant, the Plaintiff in *Wolf Metals* moved to amend the judgment to add the Defendant's president as the Defendant's alter ego, and another company as the Defendant's successor corporation. The trial court granted the motion,

and added both the president and the new corporation as judgment debtors. The Court of Appeal reversed in part, holding that due process precluded the amendment to add the president as an alter ego. The Court held that to add an alter ego to a judgment, due process requires a showing that the alter ego controlled the defense of the action, and thus had the opportunity to present his or her defenses. The Court noted prior Supreme Court authority indicating that where a default judgment was entered, there was no defense to control, and the alter ego cannot be summarily added to the judgment without the opportunity to appear and present its defenses. Accordingly, the Defendant's president could not be added to the Judgment as the Defendant's alter ego. The Court of Appeal reached the opposite conclusion with regard to the successor company, holding that where a new corporation is a "mere continuation" of the Defendant under a different name, it could not complain that its interests were not represented in the action.

## 87. Judgment Debtors – Insurer Who Unsuccessfully Prosecutes Claim In Its Insured's Name May Be Added As Judgment Debtor On Fee Award

***Hearn Pacific Corp. v. Second Generation Roof, Inc.*** (2016) 247 Cal.App.4th 117 – In *Hearn Pacific Corp.*, the Cross-Complainant contractor sued the Cross-Defendant subcontractor for indemnity, and subsequently assigned the cross-claim to its insurer. The insurer continued to prosecute the cross-claim in the contractor's name pursuant to CCP § 368.5. The Cross-Defendant defeated the cross-claim and obtained an award of contractual attorney's fees against the Cross-Complainant. The Cross-Defendant then filed a motion to substitute the insurer as the judgment debtor on the judgment. The trial court denied the Cross-Defendant's motion, holding that § 368.5 specifically allowed the action to proceed in the original Cross-Complainant's name. The Court of Appeal reversed. The Court held that § 368.5 allows an assignee to continue an action in the original party's name while the action is pending, but it is not to be used as a shield from liability. The insurer could not accept the benefits of the Cross-Complainant's contract and prosecute an indemnity claim under that contract, without also accepting the burden of the attorney's fees clause. Accordingly, the Court of Appeal held that the trial court should have granted the Cross-Defendant's motion to amend the judgment to correctly reflect that the insurer was liable for the fee award. *See also* EVIDENCE – Declarations, p. 73, above.

## 88. Judgment Debtors – Opposition To Motion To Add Alter Ego To Judgment Must Show Both Delay And Prejudice.

***Highland Springs Conference & Training Center v. City of Banning*** (2016) 244 Cal.App.4th 267 – In *Highland Springs*, four Judgment Creditors jointly moved to amend judgments to add a corporation as an additional Judgment Debtor, on the grounds that the corporation was the alter ego of the original Judgment Debtor. The trial court denied the motion, holding that the Judgment Creditors' four year delay in bringing the motion amounted to a failure to act with due diligence. The Court of Appeal reversed, reasoning that a motion to add an alter ego to a judgment is subject to the defense of laches, but that laches requires a showing of both: (a) the Judgment Creditors' lack of diligence in bringing the motion, and (b) the prejudice suffered by

the alter ego as a result of the delay. Here, there was no showing of prejudice as a result of the delay. The Court of Appeal held that by denying the motion based solely on the passage of time, the trial court essentially imposed a non-existent statute of limitations on the alter ego motion.

# REAL PROPERTY

## 89. Anti-Deficiency Statute – Short Sales – The Anti-Deficiency Statute Applies To Short Sales And May Not Be Waived By The Borrower.

***Coker v. JPMorgan Chase Bank, N.A.*** (2016) 62 Cal.4th 667 – In *Coker*, the California Supreme Court held that the anti-deficiency statute for purchase money residential mortgages (CCP § 580b) applies to short sales conducted with the lender's consent. The borrower in *Coker* defaulted on her loan and negotiated a short sale with the lender's approval to avoid foreclosure. The lender's approval was given in exchange for the borrower's express agreement that she would be liable for any deficiency. After completion of the short sale, the lender demanded the unsatisfied balance of the loan, and the borrower sought declaratory relief that the anti-deficiency protections applied. The trial court sustained a demurrer to the borrower's claim, and the Court of Appeal reversed. The Supreme Court affirmed the Court of Appeal's reversal, holding that: (a) § 580b prohibits the lender from obtaining a deficiency judgment after a short sale as long as the loan at issue is a standard purchase-money mortgage, and (b) the borrower could not waive the protections of § 580b.

## 90. Encroachment – Equitable Easement Is Not Available As Alternative To Removal Of Encroachment Where Encroachment Is Willful Or Negligent.

***Nellie Gail Ranch Owners Assn. v. McMullin*** (2016) 4 Cal.App.5th 982 (Aronson, Bedsworth, Thompson) – In *Nellie Gail Ranch Owners Assn.*, the Defendant homeowners built a retaining wall and other improvements on common area that was adjacent to their home, and was owned by the Plaintiff Homeowner's Association. The Plaintiff brought an action for injunctive relief to require the Defendants to remove the encroachment. The trial court granted the requested relief, and the Homeowners appealed contending that the court should have granted damages, rather than ordering removal of the encroachments. The Court of Appeal affirmed, noting that a trial court can deny an injunction and award damages for an encroachment only where the three requirements for an equitable easement are satisfied: (1) the encroachment is innocent, (2) the encroachment will not harm the public, and (3) the hardship caused by removal of the encroachment is "greatly disproportionate" to the harm caused by the maintenance of the encroachment. Here, the Defendants were found to have knowledge of their property line, failed to mark it, and began construction of the encroachments without the Plaintiff's approval. The Court of Appeal held that these facts justified a finding that the Defendants were not innocent and were not entitled to an equitable easement.

## 91. Foreclosure Sale – Equitable Cause Of Action To Set Aside Foreclosure May Be Based On Unconscionability Of Home Loan.

***Orcilla v. Big Sur, Inc.*** (2016) 244 Cal.App.4th 982 – The trial court granted a demurrer against a cause of action to set aside a trustee's sale, and the Court of Appeal reversed. The Court of Appeal summarized the elements of an equitable cause of action to set aside a foreclosure sale as: (1) the trustee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a deed of trust; (2) the party attacking the sale was prejudiced or harmed; and (3) in cases where the trustor challenges the sale, the trustor tendered the amount of the secured indebtedness or was excused from tendering. The Court found the first element of illegality was adequately pled by allegations that the loan was unconscionable because, *inter alia*, Plaintiffs possessed limited English fluency and education, the terms were on standard, pre-printed forms in English, and the monthly loan payments exceeded their monthly income by more than $1200. The Court then liberally construed Plaintiffs' pleadings and found that the Plaintiffs had adequately alleged both the second element of harm (the sale of Plaintiffs' home of 18 years), and the third element of excuse from tender (because the underlying loan was unconscionable).

## 92. Lis Pendens – Expungement –Lis Pendens Recorded Without Proof Of Service Is Void.

***Rey Sanchez Investments v. Superior Court*** (2016) 244 Cal.App.4th 259 **–** In *Rey Sanchez,* the Intervenor in a real property case moved to expunge a lis pendens, arguing that the lis pendens was completely void because (a) no proof of service was recorded with the lis pendens as required under CCP § 405.23, and (b) the lis pendens was not served on the Intervenor once he became a party to the action as required by CCP § 405.22. In denying the motion, the trial court cited *Biddle v. Superior Court* (1985) 170 Cal.App.3d 135, and concluded that the petitioner had actual notice and had waived any service irregularities. The Court of Appeal reversed, and held that the lis pendens was completely void and therefore subject to expungement because of the failure to record a proof of service, and the failure to serve the Intervenor. The Court of Appeal further held that the exception to the strict service requirements in *Biddle* only applied when there was at least substantial compliance, which did not exist here, because the real party in interest had not made *any* effort to serve the lis pendens.

## 93. Mortgages – Lenders Owe Duty Of Care To Borrowers In Action For Negligent Processing Of Failed Loan Modification.

***Daniels v. Select Portfolio Servicing Inc.*** (2016) 246 Cal.App.4th 1150 – California courts have recognized a "general rule" that a lender does not owe any duty of care to borrowers when the lender is acting within the scope of a traditional moneylending role. Some courts have applied that to find that lenders owe no duty of care to borrowers when processing a request for a loan modification. In *Daniels,* the Court of Appeal for the Sixth District broke from those cases.

Rather than relying on the "general rule," the court considered the six factors identified in *Biakanja v. Irving* (1958) 49 Cal.2d 647 for determining when a party owes a legal duty in the absence of contractual privity. The Court found, under the facts before it, four factors supported the imposition of a duty of care: (1) the transaction was specifically intended to benefit the borrower; (2) there was a foreseeable risk of harm to the borrower if the transaction was mishandled; (3) there was a degree of certainty that the borrowers were injured by the lender's conduct; and (4) there was a somewhat close connection between the lender's conduct and the borrower's injuries. Because the other two factors (the lender's blameworthiness, and the policy of preventing future injury) were neutral, the Court held that the factors as a whole supported imposition of a duty of care on the lender. Accordingly, the Court of Appeal reversed the trial court's order granting a demurrer to the borrower's claim for negligent processing of a loan modification application.

# REMEDIES

## 94. Injunctions – Courts May Not Grant Injunctions That Prevent A State Agency From Performing A Legitimate Statutory Duty.

***Jamison v. Department of Transportation*** (2016) 4 Cal.App.5th 356 – In *Jamison,* the Plaintiff property owner placed blocks within the right of way bordering a state highway to prevent the his water from flowing into a culvert running parallel to the highway. After Caltrans repeatedly removed the blocks, the Plaintiff sued for injunctive relief preventing Caltrans from continuing to remove the blocks. The trial court found that the Plaintiff had a likelihood of prevailing and issued a preliminary injunction. The Court of Appeal reversed, holding that California law generally does not allow courts to issue injunctions that would restrain a state agency from performing its statutory duty. Because Caltrans has a statutory duty to issue encroachment permits and to remove unauthorized encroachments from the state right of way, the general rule applied. While there are exceptions to the rule, the Plaintiff could not argue that Caltrans had exceeded its legitimate authority, because he never applied for an encroachment permit from Caltrans.

## 95. Injunctions – Voluntary Cessation Does Not Necessarily Defeat Claim For Injunctive Relief.

***Robinson v. U-Haul Company of California*** (2016) 4 Cal.App.5th 304 – The trial court in *Robinson* issued a permanent injunction prohibiting U-Haul from enforcing an illegal non-competition provision in its dealer agreements. U-Haul argued that it had voluntarily ceased enforcement of the clause in California, and amended its agreement to state that the provision was "void where prohibited." The trial court found that the non-competition provision should have been stricken from the California agreements, and that the "void where prohibited" language was insufficient to solve the problem. In addition, the trial court noted that U-Haul only agreed to stop enforcing the provisions after it was faced with a possible injunction. The

Court of Appeal affirmed, holding that while voluntary cessation of activity may be considered by the trial court in ruling on injunctive relief, it does not mandate the denial of such relief, particularly where there is "reason to doubt the bona fides of [the Defendant's] newly established law-abiding policy."

## 96. Lost Earning Capacity – Student Must Demonstrate Reasonable Probability Of Achieving A Career To Use That Career's Income Level As Measure Of Lost Earnings.

***Licudine v. Cedars-Sinai Medical Center*** (2016) 3 Cal.App.5th 881 – In *Licudine*, the Plaintiff sued for diminution in her earning capacity after suffering an injury during a gallbladder surgery. At trial, she presented evidence that she had been accepted to law school but needed to defer because of her condition. The jury awarded $730,000 in lost earning capacity. The trial court granted a motion for new trial on damages, and the Court of Appeal affirmed, holding that a plaintiff's damages for future earning capacity is limited to the amount that is "reasonably probable" the plaintiff would have earned but for the injury. Where future earning capacity is based on a career that the plaintiff has not yet achieved, the plaintiff must show that it is reasonably probable that he or she would have become fit and qualified for that career. The Court of Appeal noted that the Plaintiff in *Licudine* failed to introduce any evidence of "her likelihood of graduating from Suffolk Law School, her likelihood of passing the Bar, or her likelihood of obtaining a job as a lawyer." Even if she had, she also failed to submit evidence of the salary earned by lawyers.

## 97. Punitive Damages – Constitutional Limit – "Brandt" Fees Are Included In Punitive-Compensatory Damages Ratio, Even Where Determined By Court After Trial.

***Nickerson v. Stonebridge Life Ins. Co.*** (2016) 63 Cal.4th 363 – Under *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 568 (*Gore*), Punitive damage awards exceeding a single digit ratio to compensatory damages are constitutionally suspect, and may be deemed excessive and unconstitutional. In *Nickerson*, the Plaintiff insured obtained compensatory damages against the Defendant insurer in the amount of $35,000 for emotional distress suffered by bad faith denial of benefits, and $19 million in punitive damages on the bad faith claim. Pursuant to the parties' stipulation, the trial court decided the amount of *Brandt* fees (attorney's fees incurred obtaining the wrongfully denied benefits) after trial, awarding $12,500. The trial court then awarded a new trial unless the Plaintiff would consent to a reduction of the punitive damages to $350,000—10 times the emotional distress damages awarded for bad faith. The Plaintiff rejected the reduction and appealed, arguing that the $12,500 in *Brandt* fees should have been added to the compensatory damages for purposes of computing the permissible ratio of compensatory to punitive damages. The Court of Appeals affirmed the trial court, and the California Supreme Court reversed, noting that *Brandt* fees are an element of compensatory damages in bad faith

cases, and must be determined by the trier of fact, unless the parties stipulate otherwise. The Court then explained that the presumptive punitive damages ratio in *Gore* is not a procedural constraint on the jury's decision-making process. Instead, it is the basis for the trial court's "independent determination whether the amount of the award exceeds the state's power to punish." As such, it made no difference that the *Brandt* fees were decided after the jury awarded punitive damages. The *Brandt* fees were an element of compensatory damages and should have been included in the Court's calculations.

# SANCTIONS

## 98. Motion For Sanctions Under New CCP § 128.5 Need Not Comply With Safe Harbor Requirements Of § 128.7(c)(1) & (2).

***San Diegans for Open Government v. City of San Diego*** (2016) 247 Cal.App.4th 1306 – In *San Diegans for Open Government*, a sanctions motion under new CCP § 128.5 was brought against the Plaintiff based on the filing of a claim that had been dismissed in 2014. Section 128.5 was made effective commencing in 2015, and was intended to allow sanctions for a broader range of conduct than § 128.7, which is limited to the filing of frivolous pleadings and motions. Subdivision (f) of the new section 128.5 expressly requires any sanctions to be imposed consistently with the standards, conditions, and procedures set forth in subdivisions (c), (d), and (h) of section 128.7. Nevertheless, the Court of Appeal in *San Diegans for Open Government* held that a motion for sanctions under section 128.5 need not comply with the "safe harbor" requirements of subdivisions (c)(1) & (2) of § 128.7, which require a party seeking sanctions to provide the opposing party with a copy of the sanctions motion and an opportunity to withdraw an improper filing *before* the sanctions motion can be filed. The Court reasoned that it was "inconceivable" that the Legislature intended to incorporate the safe harbor provisions of (c)(1) & (2) without specifically mentioning them. The Court also reasoned that the safe harbor provisions would make no sense in sanctions motions that challenged conduct other than the filing of frivolous pleadings and motions. Accordingly, the Court held that the incorporation of subdivision (c) included only the top-level provisions in that subdivision, but not further subdivisions (1) & (2). The Court also held that section 128.5 applies to litigation conduct that occurred prior to 2015, as long as the case was still pending after the 2015 effective date of the statute.

## 99. Terminating Sanctions May Be Ordered As First Sanction For Repeated Violations Of Court Orders.

***Osborne v. Todd Farm Service*** (2016) 247 Cal.App.4th 43 – In *Osborne,* the Plaintiff's attorney failed to timely designate an expert, and lost several motions in limine excluding evidence favorable to the Plaintiff. The Plaintiff's attorney repeatedly made reference to the excluded evidence in his opening statement, and attempted to elicit excluded testimony during trial, despite multiple rulings from the trial court clarifying the prior evidentiary exclusions. After

several violations, the trial court entered terminating sanctions against the Plaintiff under the court's inherent powers. The Court of Appeal affirmed, holding that the trial court was justified in its belief that the Plaintiff's attorney would continue to feign ignorance of its rulings in an attempt to improperly influence the jury. The Court also rejected the Plaintiff's argument that the trial court was required to attempt monetary or other lesser sanctions before imposing terminating sanctions.

# SETTLEMENTS AND OFFERS TO COMPROMISE

## 100. 998 Offers – Offer Is Invalid If It Contains A General Release And 1542 Waiver.

***Ignacio v. Caracciolo*** (2016) 2 Cal.App.5th 81 – The Defendant made a $75,000 offer to compromise under CCP § 998, but the offer required the Plaintiff to execute a general release with a waiver of unknown claims under Civil Code §1542. The Plaintiff declined the offer and obtained a $70,000 judgment at trial. The trial court denied the Defendant's motion to tax costs and to obtain her own costs under CCP § 998. The Court of Appeal affirmed, holding that the release invalidated the § 998 offer. The Defendant argued that *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899 established that a general release does not necessarily invalidate a 998 offer, but the Court of Appeal held that *Goodstein's* holding was based on a narrow "historical" definition of the term "general release" that included only known and unknown claims that arise from the claim underlying the litigation. Accordingly, the case did not apply to a general release of *all* known and unknown claims that includes claims unrelated to the litigation. The Court of Appeal held that such a broadly worded general release made it impossible to value the 998 offer and determine whether or not the Plaintiff's recovery exceeded the offer.

## 101. 998 Offers – Offer Is Invalid If It Requires Execution Of Settlement Agreement With Unspecified Terms.

***Sanford v. Rasnick*** (2016) 246 Cal.App.4th 1121 – In *Sanford*, the Defendant made a 998 offer of $130,000, which was conditioned on the execution of a written settlement agreement and general release. The trial court awarded the Defendant post-offer costs and expert fees when the Plaintiff was unable to beat the 998 offer at trial. The Court of Appeal reversed, holding that while 998 offers may validly require a release, no published case indicated that a 998 offer could validly require execution of a settlement agreement. Because a settlement agreement could have a wide variety of terms going beyond a simple release, and would ordinarily be subject to significant negotiations, the condition that Plaintiff execute a written settlement agreement with undefined terms invalidated the Defendant's 998 offer, and Defendant was not entitled to any post-offer costs or fees.

## 102. Enforcement Of Settlement Agreement – Disqualification Of Judge Invalidates Settlement Agreement Influenced By Void Rulings.

***Hayward v. Superior Court of Napa County*** (2016) 2 Cal.App.5th 10 (review granted, but not depublished) – In a contentious marital dissolution case, the parties, Hayward and Osuch, stipulated to the appointment of a private judge pro tempore, who failed to make required disclosures of prior relationships with the parties' attorneys. After the private judge issued several adverse rulings against Hayward, the parties entered into a Memorandum of Agreement (the "MOA") to settle the case. Hayward later argued that she had entered into the MOA under economic duress. While a motion to enforce the MOA under CCP § 664.6 was pending, Hayward learned of the private judge's failure to disclose, and filed a request to disqualify the private judge. After disqualification was granted, the Court of Appeal held that the private judge's rulings were void as a result of the disqualification, and that the MOA was invalid, since Hayward's willingness to enter into the settlement was influenced by the void rulings against her. In so holding, the Court of Appeal explained that the legal correctness of the void rulings was irrelevant, and that the proper inquiry was "whether a person aware of the facts might reasonably entertain a doubt that, in the absence of the void rulings, the parties would have agreed to the terms of the MOA."

## 103. Enforcement Of Settlement Agreement – Satisfaction Of Liens Is Not A Prerequisite To Payment Of Settlement Funds Absent A Contractual Condition.

***Karpinski v. Smitty's Bar Inc.*** (2016) 246 Cal.App.4th 456 – In *Karpinski*, the Plaintiff and Defendant settled a personal injury action for $40,000. The recovery in the action was subject to medical liens under the California Victims of Crime program and Medicare. The settlement provided that the Plaintiff would satisfy any liens, and would indemnify the Defendant for claims arising under any unsatisfied liens. The Defendant then refused to issue a settlement check unless the Plaintiff satisfied the liens first, or accepted a check with Plaintiff and the lienholders all listed as recipients. The trial court issued a judgment enforcing the settlement agreement under CCP § 664.6, and ordering the Defendant to pay the settlement amount, and the Court of Appeal affirmed. The Court held that: (a) the express language of the contract did not require the Plaintiff to satisfy the liens before receiving payment, (b) nothing in the applicable lien statutes constituted a statutory condition precedent to payment of the settlement amount, and (c) the indemnification provision gave the Defendants an adequate remedy in the event the Plaintiff failed to satisfy the liens. The Court also noted that if Defendants wanted to ensure payment of the liens before payment of the settlement, they should have negotiated for such a term in the settlement agreement.

## 104. Enforcement Of Settlement Agreement – Where Settlement Payment Is Rescinded In Bankruptcy, Co-Defendants Remain Liable For Settlement Amount.

***Coles v. Glaser*** (2016) 2 Cal.App.5th 384 – In *Coles*, the Plaintiff loaned funds to the Defendant investment company, with guarantees by the company's president and vice president. When the investment company failed to repay the loan, the Plaintiff sued the company and the guarantors. The company then repaid the loan, and the parties entered into a settlement agreement that required repayment of the loan by the Defendants, acknowledged the Plaintiff's receipt of the payment from the company, and released all of the Defendants from further liability. Shortly thereafter, the company declared bankruptcy, and a portion of the loan repayment had to be returned to the bankruptcy trustee when it was declared to be an illegal preferential transfer. The Plaintiff then sued the two guarantors to recover the balance of the payment required under the settlement agreement. The guarantors argued that the settlement was satisfied and they were released from liability when the company paid off the loan, notwithstanding the fact that the payment was later rescinded by the Bankruptcy Court. The trial court and Court of Appeal disagreed, holding that the Bankruptcy Court's order voided the payment, *nunc pro tunc*, so that it was as if the payment had never been made. As such, the guarantors were in violation of the settlement agreement, and could be ordered to pay the balance owed.

## 105. Offers To Compromise – Defendants May Only Recover Post-Offer Expert Fees Under CCP § 998.

***Toste v. CalPortland Construction*** (2016) 245 Cal.App.4th 362 – In 2015, section 998 was amended to clarify that expert witness fees can only be awarded under that statute if they are incurred *after* a qualifying offer to compromise, regardless of whether the costs are incurred by the plaintiff or defendant (previously, the statute only expressly limited the plaintiff's recovery to post-offer fees). The Court of Appeal in *Toste* held that the amendment applies to cases that were pending on appeal when the amendment was enacted.

## 106. Cost Awards – Where Settlement Does Not Discuss Costs, Plaintiff Who Dismisses Case In Exchange For Payment Is The Prevailing Party.

***DeSaulles v. Community Hospital of the Monterey Peninsula*** (2016) 62 Cal.4th 1140 – In *DeSaulles*, the parties entered into a settlement agreement calling for the Defendant to pay $23,500 to the Plaintiff, in exchange for a dismissal with prejudice of the Plaintiffs two remaining contract claims. After the claims were dismissed, the trial court awarded the Defendant costs as the prevailing party. The Court of Appeal and the Supreme Court both disagreed with the trial court, holding that a Plaintiff who dismisses a claim in exchange for a settlement payment has obtained a "net monetary recovery," and thus is the prevailing party under CCP § 1032(a)(4). Accordingly the Plaintiff, and not the Defendant was entitled to recover costs. In so holding, the Supreme Court disapproved of *Chinn v. KMR Property*

*Managem*ent (2008) 166 Cal.App.4th 175, which held that a voluntary dismissal is considered a judgment in the defendant's favor. The Supreme Court explained that the cases that *Chinn* relied on all involved voluntary dismissals that were *not* accompanied by a settlement payment, and thus were not applicable where the plaintiff obtained a monetary recovery in the form of a settlement payment. The Court also noted that it was only declaring the default rule, and that the parties to a settlement are free to expressly allocate costs as they see fit.

# TORTS

## 107. Breach Of Fiduciary Duty – Dual Agency – Seller's Agent Owes Fiduciary Duties To Buyer, Where Buyer And Seller Are Represented By The Same Brokerage Firm.

***Horiike v. Coldwell Banker Residential Brokerage Co.*** (2016) 1 Cal.5th 1024 – In *Horiike*, the Plaintiff homebuyer was represented by an agent from Coldwell Banker. The Defendant, another Coldwell Banker agent, represented the seller, and gave Plaintiff square footage information that was inconsistent with information on the building permit for the house. The Plaintiff then sued Coldwell Banker and the seller's agent for breach of fiduciary duty. The trial court held that the Defendant agent did not owe any fiduciary duties to the Plaintiff. The Court of Appeal reversed, and the Supreme Court affirmed the reversal. The Court noted that Coldwell Banker is the licensed broker, and permissibly represented both the buyer and seller under California's dual agency statutes. (Civ. Code, §§ 2079.14, 2079.16, 2079.17). Both the seller's agent and the Plaintiff's own agent were actually associate licensees. The Court held that associate licensees owe fiduciary duties that are "equivalent to" the primary licensee for whom they act—in this case, Coldwell Banker. Accordingly, Defendant (i.e. the seller's agent) owed the Plaintiff a fiduciary duty to learn and disclose material information. The Court acknowledged concerns that its decision could require a fiduciary to harm his original client by disclosing information to his second client, but the Court held that these concerns were inherent in the dual agency relationship. The Court also stated that while the Legislature had approved of dual agency without addressing such concerns directly, it undoubtedly understood that a "dual agent's loyalty must extend to both parties."

## 108. Fraud – Allegations Of Trade Usage And Course Of Conduct Must Be Credited For Purposes Of Demurrer To Fraud Claim.

***Tenet Healthsystem Desert, Inc. v. Blue Cross of California*** (2016) 245 Cal.App.4th 821 – A hospital treated a patient following an automobile accident where the patient had tested positive for cannabis and had a blood alcohol level of 0.235. During the treatment, the administrator of the patient's insurance provider "authorized" numerous treatments. Ultimately, the insurance provider denied payment for the patient's care under a drinking and driving exclusion. The hospital sued the administrator for fraud, negligent misrepresentation, and unfair business

practices, alleging that under trade custom and usage and the Parties' regular course of dealing, the "authorizations" constituted representations that the services were covered under the insurance policy. The trial court sustained multiple demurrers on the grounds that the hospital had not alleged a single specific misrepresentation that the patient was covered. The Court of Appeal reversed, holding that for purposes of demurrer, the trial court should have credited the hospital's allegations about the trade custom and usage, the Parties' regular course of dealing, and the meaning of the "authorizations."

### 109. Intentional Interference With Contract – Third Party Can Be Liable for Interference Even If It Has A Legitimate Interest In The Contract.

***Popescu v. Apple Inc.*** (2016) 1 Cal.App.5th 39 – In *Popescu*, the Plaintiff was an engineer employed by an aluminum company supplying products for Apple. As part of his employment, he interacted with Apple in order to develop a custom extruded aluminum alloy for use in the iPhone. After a dispute over allegedly anti-competitive terms in a development agreement proposed by Apple, Apple convinced the Plaintiff's employer to terminate his employment. The Plaintiff then sued Apple for intentional interference with contractual relations, and for intentional interference with prospective economic advantage. The trial court granted a demurrer to the claims, and the Court of Appeal reversed, finding that: (1) Apple could be held liable for intentional interference with the Plaintiff's employment contract, even though Apple had a legitimate interest in the employment contract, (2) no independently wrongful act was required to support the claim for intentional interference with contract, and (3) an independently wrongful act was alleged for purposes of the interference with prospective advantage claim, because the Plaintiff alleged that his termination was part of Apple's anti-competitive scheme.

## UNFAIR COMPETITION

### 110. Restraint Of Trade – Evidence Sufficient To Substantiate Sherman Act Claim.

***In re Automobile Antitrust Cases I and II*** (2016) 1 Cal.App.5th 127 – In a consolidated class action, the Plaintiffs filed an antitrust suit against numerous car manufacturers for conspiring to restrict the import of cheaper Canadian cars into the United States. The trial court granted summary judgment for the two final Defendants in the case, Ford US and Ford Canada. The Court of Appeal affirmed as to Ford US and reversed as to Ford Canada. The Court noted that a plaintiff in an antitrust conspiracy case must present evidence that "tends to exclude … the possibility that the alleged conspirators acted independently rather than collusively." The Plaintiffs did not meet their burden with regard to Ford US, because a parent company cannot collude with a wholly-owned subsidiary, and there was no evidence of collusion with entities other than Ford US's subsidiaries. The Plaintiffs did meet their burden with regard to Ford Canada, however, because: (1) there was evidence that Ford Canada sent a fax to other manufacturers to develop an industry-wide approach to ending exports of Canadian cars to the

US; (2) an alleged co-conspirator's stated in deposition testimony that there was a "consensus" reached by car manufacturers at an industry convention to prevent the export of cars to the United States; (3) there were actions taken to further the collusion; and (4) there was evidence of an economic motive to conspire. *See also,* EVIDENCE – Hearsay and Opinion Testimony, p. 73, above.