NEW STATUTES, NEW RULES, AND NEW CASES

WHAT EVERY BUSINESS LITIGATOR NEEDS TO KNOW IN 2018

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SIGNIFICANT STATUTES
Enacted in 2017

SIGNIFICANT RULES
Adopted in 2017

SIGNIFICANT CASES
Decided in 2017

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ALCOHOLIC BEVERAGES

1. Free Rides.

[AB 711] Business & Professions Code § 25600 – While the Alcoholic Beverage Control Act generally prohibits licensees from giving away premiums, gifts, or free goods to consumers in connection with the sale and distribution of alcoholic beverages, a new amendment to Business & Professions Code § 25600 allows beer manufacturers to provide free or discounted rides to consumers for the purpose of furthering public safety. The rides may not be conditioned on purchase of an alcoholic beverage, and a beer and wine wholesaler may not fund or underwrite the cost of the rides.

ALTERNATIVE DISPUTE RESOLUTION

2. Enforcement Of Arbitration Agreements – Exception For Bank Fraud.

[SB 33] Code of Civil Procedure § 1281.2 – In 2016, regulators uncovered a massive scheme by Wells Fargo employees attempting to game the company's employee incentive program by fraudulently opening over 1.5 million new deposit accounts and over 565,000 new credit card accounts for existing customers, without the customers' authorization. Wells Fargo was fined $100 million, and fired 5,300 employees, but repeatedly and successfully compelled arbitration in consumer actions to recover fraudulent fees and charges. In response to that scandal, SB 33 has amended the California Arbitration Act to provide for a new exception to the general rule requiring enforcement of valid arbitration agreements. Under the new provision, a trial court will not enforce an otherwise valid arbitration agreement in favor of a state or federally chartered depository institution, where the agreement is being applied to a purported contractual relationship that was created fraudulently, without the consumer's consent, and by the unlawful use of the consumer's personal identifying information.

ATTORNEY PRACTICE

3. Attorney-Client Privilege – Representation Relating To Medicinal And Adult-Use Cannabis.

[AB 1159] Civil Code § 1550.5, Evidence Code § 956 – The Civil Code has been amended to state that commercial activity relating to medicinal cannabis or adult-use cannabis that is in compliance with state and local law is a lawful object of contract, and not in violation of law or public policy. In addition, the crime-fraud exception to the attorney-client privilege has been amended to clarify that it does not apply to legal services rendered in compliance with state and local laws on medicinal or adult-use cannabis, and that communications relating to such services remain privileged, provided that the lawyer also advises the client regarding conflicts with federal law.

4. Attorney Misconduct – Reporting Immigration Status Of A Witness Or Party.

[AB 291] Business & Professions Code § 6103.7 – Under existing law, reporting the suspected immigration status of a party or witness because the party or witness exercised a right relating to his or her employment is cause for attorney suspension, disbarment, or other discipline. That provision has been expanded to include reporting suspected immigration status because a party or witness has exercised a right relating to the rental of real property.

5. Pro Bono Legal Assistance – Veterans And Their Families.

[AB 360] Business & Professions Code § 6074 – The Legislature has created a new program administered by the State Bar to coordinate pro bono assistance to veterans and their families who cannot afford legal services. Under the program, the State Bar will coordinate with local bar associations, legal aid organizations, and volunteers, and provide resources and educational materials to support their efforts. The Bar will also conduct a statewide survey of programs providing legal assistance to veterans in order to identify any need for legal advice clinics. A report and recommendations based on the survey will be posted on the Bar's website by December 31, 2018.

6. State Bar – Board Of Trustees And Membership Fee.

[SB 36] Business & Professions Code §§ 6001, et seq. – The Legislature is requiring changes to the governance of the State Bar. The Board of Trustees will transition from a 19-member board, with a president and vice president selected by the trustees, to a 13 member board, with a chair and vice chair appointed by the California Supreme Court. The Sections of the State Bar will be required to incorporate as a private nonprofit corporation, with its own board comprised of representatives from each section. The Sections will still be funded by voluntary dues included with the Bar's annual membership fee. Changes have also been made to require the Bar to evaluate the effectiveness of the bar exam, to align its purchasing policies with those of other state agencies, review the effectiveness of the Client Security Fund, and to make other miscellaneous administrative changes. The annual membership fee for 2018 shall not exceed $315.

7. State Bar – Disclosure Of Applicants Who Pass The Bar Examination.

[SB 690] Business & Professions Code § 6060.25 – A previous amendment subjecting the State Bar to the Public Records Act was interpreted by the Bar to prohibit (1) the public disclosure of the names of individuals who passed the bar examination, and (2) the provision of certain bar passage information to law schools, which is necessary for compliance with accreditation and regulatory requirements. The amendment to § 6060.25 set forth in SB 690 clarifies that these disclosures are not prohibited. It also specifies that the statute is not intended to impact currently pending litigation over researchers' access to bar passage information.

BUSINESS ENTITIES

8. Corporations – Dissolution – Shareholder Agreements.

[AB 1535] Corporations Code § 2000 – Existing law provides default procedures to govern shareholder buyouts in cases of involuntary dissolution of a corporation, and allows alternative procedures to be specified in a corporation's articles of incorporation. An amendment to § 2000 allows the alternative procedures to be set forth in a shareholder agreement, so that corporations need not re-file their articles every time they change the buyout agreement.

CIVIL PROCEDURE

9. Cost Recovery – Electronic Presentation Of Exhibits.

[AB 828] Code of Civil Procedure § 1033.5 – The list of items that are allowable as ordinary costs now includes the costs associated with the electronic presentation of exhibits, including costs of rental equipment and electronic formatting.

10. Electronic Filing And Service – Mandatory Electronic Service, And Consent To Permissive Electronic Service.

[AB 976] Code of Civil Procedure § 1010.6(a)(2) – The Legislature has continued its push towards full implementation of electronic service and filing. Orange County's special statutory authority to conduct its pilot program for mandatory electronic service and filing has been removed, and replaced with a general authorization for courts to require electronic service and filing in civil actions. That authorization now extends to non-parties, who may now be required to file, serve, and accept service electronically. However, in the absence of mandatory electronic service and filing, a party must affirmatively consent to accept service electronically, and in cases filed on or after January 1, 2019, a party is no longer deemed to consent to electronic service merely by electronically filing a document. The elimination of that implied consent has limited application in Orange County, since Rule of Court 2.251(c)(3) still provides that when a party is required by a rule of court to file documents electronically, they are also required to serve and accept service electronically (Orange County local rule 352 requires electronic service in all civil cases, with an exception for self-represented parties). Electronic service is not authorized where a document is required to be served by certified or registered mail, and self-represented parties are exempt from mandatory electronic filing and service.

11. Electronic Filing And Service – Time Of Completion Of Electronic Filing And Service, And Service Of Confidential Or Sealed Documents.

[AB 976] Code of Civil Procedure § 1010.6(a)(4), (b)(3) – Under the new provisions, service or filing of a document by 11:59:59 p.m. on a court day shall be deemed to be service or filing on that court day, and service or filing on any non-court day shall be deemed to be service or filing

on the following court day. In addition, confidential or sealed documents must be electronically served using encrypted methods to ensure that the document is not improperly disclosed.

12. Electronic Filing And Service – Signature Of Electronic Documents.

[AB 976] Code of Civil Procedure § 1010.6(b)(2) – Under the electronic filing revisions, the existing method of signing electronic documents is still valid (essentially, a paper copy of an electronic document must be signed and retained, and produced upon a demand by the court or another party). In addition, however, the Judicial Council has been instructed to adopt new procedures by January 1, 2019 to provide for signing documents by computer or other technology.

13. Electronic Filing And Service – Proof Of Service.

[AB 976] Code of Civil Procedure § 1013b – Section 1013b specifies the manner of providing proof of service of electronic documents. The new statute is generally similar to the existing provisions in § 1013a for proof of service of paper documents, and includes options for affidavits or certificates signed by either an attorney, or a non-attorney. However, under § 1013b, there is no requirement that a non-attorney serving the document must certify that he or she is not a party to the action. Moreover, a non-attorney attesting to electronic service must show that he or she is a resident or employee in the county "where the filing occurs." In addition, § 1013b requires a proof of electronic service to specify: (1) the electronic service address and the residence or business address of the person making the electronic service, (2) the date of electronic service, (3) the name and electronic service address of the person served, and (4) a statement that the document was served electronically.

14. Frivolous Actions Or Tactics.

[AB 984] Code of Civil Procedure § 128.5 – In 2014, the Legislature restored § 128.5, which allows trial courts to award attorney's fees as sanctions for misconduct not limited to the filing of frivolous motions and pleadings. The statute contained a January 2018 sunset, which has now been removed. The statute also now specifies that it requires both an objective showing of meritlessness, and a subjective showing of bad faith. In addition, the statute formerly required sanctions to be awarded consistently with the requirements of subdivisions (c), (d), and (h) of CCP § 128.7. The new amendments eliminate the incorporation by reference of the requirements of § 128.7, and instead specifically state the applicable rules and requirements. Those rules and requirements include: (1) a requirement that a motion for sanctions be made separately from any other motion or request, and must describe the specific action or tactic being challenged; (2) a 21-day notice and opportunity to cure if the bad faith action consists of the filing of a motion or pleading that can be withdrawn or appropriately corrected; (3) a discretionary attorney's fee provision for the party who prevails on the motion; (4) a provision that firms shall be jointly responsible for violations committed by its partners, associates, or employees, absent exceptional circumstance; and (5) a list of approved sanctions, including directives of a nonmonetary nature, penalties payable to the court, or an order directing payment to the moving party of some or all

of the attorney's fees incurred as a result of the bad faith action or tactic. Finally, the provision now specifies that it applies only to cases filed on or after January 1, 2015.

15. Intervention.

[AB 1693] Code of Civil Procedure § 387 – Amendments to § 387 spell out the procedures applicable in cases of intervention. While existing law required leave of court to file a complaint in intervention, the amendment clarifies that an intervenor must petition the court for leave to intervene in a noticed motion or ex parte application, with a copy of the proposed pleading included. In addition, the amendment expressly allows the option of filing an answer in intervention, rather than just a complaint in intervention. Finally, if leave is granted to intervene, the intervenor must serve all parties with notice of the order along with a copy of the pleadings in intervention.

16. Judgments Of Foreign Countries And Tribal Courts – Enforcement.

[AB 905] Code of Civil Procedure §§ 1710.10, et seq. – The rules for recognizing a money judgment issued by a tribal court or a court in a foreign country have been revised to adopt recommendations by the California Law Revision Commission. A prior sunset on the Tribal Court Judgment Act, which allows swifter recognition of tribal judgments, has been eliminated, and the Uniform Foreign Country Money Judgment Act (the "Uniform Act") has been amended to permanently exclude tribal court judgments from its scope. The Uniform Act has been amended to replace California's discretionary grounds for not recognizing foreign judgments based on defamation with a mandatory provision prohibiting courts from recognizing judgments that are not compatible with the federal SPEECH Act (28 U.S.C. § 4102). The SPEECH Act prohibits enforcement of defamation judgments based on laws that do not provide at least as much protection for free speech and free press as would be provided under the U.S. Constitution and the constitution of the state in which the court is located. The Uniform Act has also been amended to create a rebuttable presumption that a foreign country's judgment is not recognizable in a California court, and to state that a judgment may not be recognized if the foreign court lacked personal jurisdiction either under its own laws, or the principles of California law.

17. Meet And Confer Requirement – Motions to Strike And Motions For Judgment On The Pleadings.

[AB 644] Code of Civil Procedure § 435.5, 439 – In 2015, CCP § 430.41 was added to require parties to meet and confer before filing a demurrer. AB 644 has expanded that requirement to motions to strike and motions for judgment on the pleadings. The requirement does not apply, however, to special motions to strike under the anti-SLAPP statute. The meet and confer process must take place either in person or by telephone, and the moving party must identify all of the specific allegations it believes are subject to being stricken or subject to judgment on the pleadings, and identify the basis for the deficiencies with legal support. The opposing party must provide legal support for its position that the allegations are sufficient, or how the pleading could

be amended to cure any deficiencies. If the parties are unable to meet and confer at least 5 days before the motion is due, the moving party may file a declaration to obtain an automatic 30-day extension. A party filing a second motion to strike or motion for judgment on the pleadings may not include in the second motion any portion of the pleading on grounds that could have been, but were not, raised in the first motion. The new statutes state that a failure to conduct the meet and confer process is not grounds for denying a motion to strike or motion for judgment on the pleadings, but the Legislative history remarks that the court has authority to continue the motion and order the parties to meet and confer before ruling on the motion. Finally, the new provisions specify that a pleading may only be amended three times in response to a motion to strike or motion for judgment on the pleadings, and that if such a motion is denied, and the pleading is not amended, the moving party has preserved its right to appeal following a final judgment.

18. Pleadings – Amendments – Motion To Strike Cuts Off Time To Amend Without Leave Of Court.

[AB 644] Code of Civil Procedure § 472 – Existing law allows a party to amend its pleading once without leave of court before an answer is filed, or if a demurrer is filed, before the opposition is due. An amendment to that provision specifies that if a motion to strike the pleading is filed, an amendment without leave of court must be submitted before the opposition is due. Whether a demurrer or motion to strike is filed, the parties may stipulate to allow an amendment after the due date for the opposition.

19. Service Of Documents.

[SB 543] Code of Civil Procedure §§ 877.6, 2016.050, 2034.260 – SB 543 expands the ability of parties to personally serve certain documents in certain contexts. Specifically, prior to SB 543, the statute governing service of a notice of settlement and application for determination of good faith settlement required service by certified mail, but now allows personal service as well. Similarly, prior to SB 543, CCP § 2016.050, which specifies the acceptable methods for serving discovery or discovery motions, incorporated the provisions of § 1013, which only authorizes service by mail, overnight delivery, facsimile, or electronic service. Now, § 2016.050 also incorporates § 1011, which authorizes personal service. Finally, § 2034.260 formerly required an exchange of expert information to be mailed. It now specifies that such an exchange may be served in any of the manners allowed under §§ 1011 and 1013.

20. Service Of Process – Service At Private Mailbox.

[AB 1093] Code of Civil Procedure § 415.20 – The requirements for service of a summons and complaint have been revised to allow service at a private mailbox on a process server's first attempt, if the private mailbox is the only reasonably known address.

21. Transcripts – Electronic Delivery.

[AB 1450] Code of Civil Procedure § 271 – Court reporters are now required to provide transcripts in electronic format to the Court and any party entitled to a copy. Exceptions apply if a party requests a paper copy, or if the court or reporter lacks the required technical ability. The electronic transcript shall be deemed the official transcript unless a paper transcript is delivered pursuant to one of the exceptions.

COURTS

22. Judicial Council Employees – Collective Bargaining.

[AB 83] Government Code § 3524.50, et seq. – A new statutory framework has been enacted to allow collective bargaining by state-level Judicial Council employees. Trial court, Court of Appeal, and Supreme Court employees, judicial officers, and certain designated employees are exempted.

23. Judicial Council – Statutory References.

[AB 452] Numerous Codes – Statutory references to the Clerk of the Supreme Court have been changed to "Clerk/Executive Office of the Supreme Court" and references to the "Clerk/Administrator of the Court of Appeal" have been changed to "Clerk/Executive Officer of the Court of Appeal." In addition, Government Code § 68500.3 now specifies that references to the Administrative Office of the Courts refer to the Judicial Council.

DISCOVERY

24. Informal Discovery Conferences.

[AB 383] Code of Civil Procedure § 2016.080 – If parties are unable to resolve a discovery dispute after meeting and conferring, either party may now file a meet and confer declaration and request an informal discovery conference to discuss the dispute with the court. If the request is not granted within 10 days, it is deemed denied. If the requested is granted, the conference must take place within 30 days from the date the request is granted, and the court may toll the deadline for filing a discovery motion, or make "any other appropriate discovery order." The outcome of the conference does not bar a party from filing a discovery motion, nor prejudice the disposition of any discovery motions. If the conference does not actually take place within 30 days after the court granted the request for a conference, the request for a conference is deemed to be denied, and any tolling period previously ordered by the court shall continue to apply.

EMPLOYMENT AND LABOR

25. Discrimination – Criminal History.

[AB 1008] Government Code § 12952 – This new provision prohibits employers from inquiring into or considering an applicant's criminal history before a conditional offer of employment is made. Once such an offer is made, an employer may conduct a criminal background check, but may not consider arrests not followed by conviction, referrals to a diversion program, sealed, dismissed, or expunged convictions, misdemeanors for which no jail time can be imposed, infractions, misdemeanor convictions older than three years, felony convictions older than seven years. In the event an employer intends to rescind a conditional offer based on a prior conviction, the employer must make an individualized assessment that the conviction has a direct adverse relationship with the specific duties of the job, including consideration of the nature and gravity of the offense, the time that has passed, and the nature of the job. In addition, the employer must provide the applicant with notice and an opportunity to respond by challenging the accuracy of the information, or submitting evidence of rehabilitation or mitigating circumstances. The employer must then notify the applicant of any final decision to revoke the offer, and any applicable procedure for challenging the decision, including the right to file a complaint with the Department of Fair Employment and Housing.

26. Discrimination – Hostile Work Environment – Service Members.

[AB 1710] Military & Veterans Code § 394 – The existing prohibition of discrimination against military service members has been expanded to expressly prohibit discrimination in the "terms, conditions, or privileges of employment." This language conforms California law to the federal Uniformed Services Employment Reemployment Rights Act, and is intended to allow service members to pursue claims for hostile work environments.

27. Equal Pay – Application Of Equal Pay Laws To Government Employers.

[AB 46] Labor Code § 1197.5 – The Labor Code provisions barring unequal pay based on sex, race, or ethnicity, and allowing civil actions for violation of that prohibition have been expanded to apply to public (i.e. government) employers as well as private employers. The amendment specifies that the provision making violations of that prohibition a misdemeanor, however, do not apply to public employers.

28. Family Leave – New Parent Leave Act.

[SB 63] Government Code § 12945.6 – The New Parent Leave Act prohibits employers from refusing to allow an employee with more than 12 months service, and at least 1,250 hours worked in the previous 12 months, from taking up to 12 weeks of parental leave within one year of the birth, adoption, or foster placement of a child. During the leave, the employer is also prohibited from refusing to maintain and pay for coverage under a group health plan. The Act

also establishes a pilot mediation program that can be invoked by an employer accused of a violation.

29. Immigration Enforcement Protections.

[AB 450] Government Code §§ 7285.1, 7285.2, 7285.3, Labor Code § 90.2 – Under new Government Code provisions, employers are prohibited from voluntarily providing immigration enforcement agents with access to nonpublic areas at a place of labor, or access to employment records, without a subpoena or judicial warrant. Violators are subject to fines of $2,000-5,000 for the first violation, and up to $10,000 for subsequent violations, with exclusive authority to enforce the provisions vested in the Labor Commissioner and Attorney General. A new Labor Code provision requires employers to inform employees within 72 hours of receipt of notice of any inspection of employment eligibility forms or other employment records by an immigration agency. Employers are also required to give employees a copy of any notice that provides the results of such an inspection. The same fines specified above are applicable to violations of this new provision, collectible by the Labor Commissioner.

30. Retaliation – Injunctive Relief.

[SB 306] Labor Code §§ 1102.61, 1102.62 – Two new labor code sections allow plaintiffs filing retaliation claims against their employers to seek injunctive relief. Section 1102.62 specifies that any injunctive relief granted is not stayed on appeal, but shall not prevent the employer from disciplining or terminating the employee based on conduct unrelated to the retaliation claim. Other provisions in SB 306 relate to injunctive relief sought by the Labor Commissioner in retaliation cases.

31. Salary History Information – Employers Prohibited From Requesting Or Relying On Candidate's Salary History.

[AB 168] Labor Code § 432.3 – A new provision in the Labor Code prohibits employers from requesting salary history information regarding an applicant for employment, or using such information to either decide whether to employ the applicant, or determine what salary to offer the applicant. The statute states that it does not prohibit a candidate from voluntarily disclosing that information without prompting from the employer, and does not prohibit and employer from considering that voluntarily provided information.

ENVIRONMENTAL

32. CEQA – Exemptions – Bond Issuance, Capital Outlays, And Real Estate Transactions.

[AB 119] Public Resources Code § 21080.30 – A new CEQA exemption applies to any bond issuance, capital outlay project, or real estate transaction by the State Public Works Board or the Department of Finance.

33. Hazardous Waste Control Laws – Penalty Increase To $70,000 Per Day Of Noncompliance.

[AB 245] Health & Safety Code §§ 25188-25189.2 – Civil penalties for the violation of hazardous waste control laws, such as violation of orders by the Department of Toxic Substances Control (the "DTSC") or the unauthorized or negligent disposal, treatment, or storage of hazardous substances, have been increased from a maximum of $25,000 for each day of the noncompliance to a maximum of $70,000 for each day of noncompliance.

34. Proposition 65 – The Basis For A Certificate Of Merit Is Now Discoverable.

[AB 1583] Health & Safety Code § 25249.7 – Existing law requires a private plaintiff bringing a failure to warn claim in the public interest pursuant to Prop 65 to provide a notice of the violation at least 60 days before filing a lawsuit. The notice must include a certificate of merit that indicates that the plaintiff consulted with a person or persons with relevant experience, who determined that there is a reasonable and meritorious case. Upon a motion by the defendant, or on the courts own motion, a trial court may review the information that forms the basis for the certificate in camera, but under the law before amendment, that information was otherwise not subject to discovery. The amendment in AB 1583 now specifies that the basis for the certificate of merit is subject to discovery, to the extent that it is not otherwise protected by the attorney-client privilege, the attorney work product privilege, or any other legal privilege.

EVIDENCE

35. Irrelevance Of Immigration Status.

[AB 1690] Civil Code § 3339, Government Code § 7285, Health & Safety Code § 24000, Labor Code § 1171.5 – Amendments to the listed statutes each specify that, for the purposes of enforcing state labor, employment, civil rights, consumer protection, and housing laws, a person's immigration status is irrelevant to the issue of liability, and no inquiry shall be permitted into that status unless the inquiry is necessary to comply with federal immigration law.

36. Marital Declaration Of Disclosure – Admissibility.

[SB 217] Evidence Code § 217 – Parties in a marital nullity, dissolution, or legal separation matter are required to serve a declaration of disclosure that includes a characterization of all assets and liabilities. An amendment to § 217 provides that such declarations are admissible in evidence, even if they were prepared in connection with a mediation.

GOVERNMENT

37. Public Records Act – Exemptions – Government Employee E-mail Addresses.

[AB 119] Government Code § 6254.3 – The personal email addresses of government employees have now been added to the list of items excluded from the scope of the Public Records Act. The exclusion does not apply if the employee uses the personal email address to conduct public business, or the address is necessary to identify a person in an otherwise disclosable communication.

JURIES

38. Voir Dire.

[SB 685] Code of Civil Procedure § 222.5 – Numerous changes have been made to the statute governing voir dire: (1) The trial judge is now required to consider and discuss the form and subject matter of voir dire at the final status conference, or at the first practical opportunity prior to voir dire, whichever is earlier; (2) The parties may submit questions to the judge, which the judge may incorporate into his initial examination of the jurors, in his discretion; (3) A list of factors the court may consider in exercising his discretion is specified, including unique or complex elements in the case, the length of trial, the number of parties, the number of witnesses and whether the case is complex or a long cause; and (4) The court shall permit supplemental time for questioning based on: (a) individual responses that may evince attitudes inconsistent with suitability to serve as a juror, (b) the composition of the jury panel, or (c) an unusual number of for cause challenges. In addition, a provision formerly specifying that the court should provide parties time to review written responses to a jury questionnaire before commencing oral questioning now specifies that the court shall do so. Several other provisions remain but have been reorganized and renumbered, including provisions allowing the trial court to prescribe limits on the scope of questioning, allowing counsel to conduct voir dire without requiring prior submission of specific questions, and prohibiting the trial court from imposing unreasonable or arbitrary time limits.

MISCELLANEOUS

39. Autographed Collectibles – Warranty Requirements And Civil Penalties.

[AB 228] Civil Code § 1739.7 – The statutory rules applicable to the sale of autographed collectibles have been revised. A prior requirement to provide a certificate of authenticity has been revised to require an express warranty, and information regarding a witness to the autograph. A prior $5,000 civil penalty for providing a false certificate that injures a consumer has been revised to a $1,000 civil penalty for providing a false warranty, a $3,000 penalty or

treble damages for providing a false warranty as the result of gross negligence, and a $5,000 penalty, or five times actual damages for intentionally providing a false warranty. The penalties and enhanced damages may be recovered in a civil action by the consumer.

40. Inoperable Parking Meters.

[AB 1625] Vehicle Code § 22508.5 – Previously, § 22508 allowed local authorities to prohibit or restrict parking in a space with an inoperable parking meter. That provision has now been amended to allow parking in such a spot for up to the posted time limit. If there is no posted time limit for parking at an operable meter, a local authority may post a four-hour limit for parking in the event a meter is inoperable. If no time limit is posted, a vehicle may park in the spot without time limit, subject to any other applicable regulations.

41. Maintenance Of The Codes.

[AB 1516] Numerous Provisions – AB 1516 is the annual bill to maintain the codes by fixing clerical errors, making statutory language consistent, and correcting and updating cross-references.

42. Official State Things – The State Dinosaur And Fossil.

[AB 1540] Government Code § 425.7 – The official state dinosaur is the Augustynolophus morrisi, and the official state fossil is the sabre-toothed cat (Smilodon californicus).

43. Official State Things – The State Nut.

[AB 1067] Government Code § 422.3 – The almond (Prunus dulcis, Prunus amygdalus), walnut, pistachio, and pecan "are each the official state nut."

PROBATE

44. Litigation Procedures In Probate Actions.

[AB 308] Probate Code §§ 851, 851.1, 1000, 1720.1 – The notice requirements for a probate hearing have been revised to require a description of the property at interest in the hearing, whether the petition seeks attorney's fees and costs, a description of the relief sought, and a statement that any person interested in the property may file a response to the petition. In addition, amendments specify that a petitioner may commence discovery in a probate action in accordance with the same time periods specified in the Civil Discovery Act for a plaintiff to commence discovery (i.e. 10 days after service of the complaint for written discovery or 20 days for depositions), commencing at the time the petition and notice of hearing is served, or, if the discovery is served on the trustee, the earlier of the time the petition and notice of hearing is served or the time the trustee appears in the action.

REAL PROPERTY

45. Common Interest Developments – Volunteer Officer Liability.

[AB 1412] Civil Code § 5800 – The Davis-Stirling Common Interest Development Act limits the liability of a volunteer officer in a residential common interest development to the amount of insurance coverage provided by an insurance policy compliant with the statute. The amendment to that provision extends the liability limit to volunteer officers in a mixed use common interest development.

46. Federal Lands – State Lands Commission's Right Of First Refusal.

[SB 50] Government Code §§ 6223, 27338, Public Resources Code §§ 8560, 8561 – SB 50 provides that any transfer of federal lands within California is void ab initio, unless the State Lands Commission is offered a right of first refusal prior to the transfer. The new provisions in SB 50 also require any deed, instrument, or other document relating to the transfer of federal land to be titled "Federal Public Land Deed of Conveyance," and require anyone recording such a deed to provide a certificate of compliance from the State Lands Commission. County recorders are forbidden from recording such deeds without the required certificate. In the legislative history, the County Recorders Association of California argued that the provisions may be preempted by federal law, and that resulting litigation could ensnare buyers and title companies. The Senate Judiciary Committee report on the bill analyzed the preemption issue, and acknowledged that the federal government may challenge the bill, and that parts of the bill may be preempted, particularly on an as-applied basis to specific transfers. Nevertheless, the report noted that the provisions of the bill are expressly made severable, so that if the portion of the statute declaring federal conveyances to be void ab initio is struck down, county recorders will still be prohibited from recording documents to evidence the conveyances.

TORTS

47. Gender Based Price Discrimination – Demand Letter And Complaint Requirements.

[AB 1615] Civil Code § 55.62 – Existing law provides a civil cause of action for gender-based price discrimination in the provision of services by specified businesses, such as tailors, barbers, hair salons, and dry cleaners. Under new Civil Code § 55.62, an attorney who sends a demand letter or serves a complaint alleging gender price discrimination must also provide an advisory notice with specified language and pamphlet to be prepared by the Department of Consumer Affairs.

48. Housing Discrimination/Unlawful Detainer – Immigration Or Citizenship Status.

[AB 291] Civil Code §§ 1940.05, 1940.2, 1940.3, 1940.35, 1942.5, 3339.10, Code of Civil Procedure § 1161.4 – Numerous amendments and new statutes have been enacted to protect the immigration status of renters in California. Landlords are now forbidden from evicting tenants or commencing unlawful detainer actions because of the immigration or citizenship status of the tenant or anyone associated with the tenant. They are also forbidden from threatening to disclose that status in order to influence the tenant to vacate a dwelling, or from actually disclosing that status for the purposes of harassment, intimidation, or retaliation. Where a landlord does report a tenant or someone associated with the tenant to immigration authorities, without legal obligation to do so, and the tenant is not in default of rent, the landlord may not increase rent, recover possession, decrease any services, or cause the tenant to quit involuntarily for 180 days. Existing prohibitions on city and county laws requiring a landlord to take action based on a tenant's immigration or citizenship status has been expanded to all public agencies, including the State, districts, public agencies, or other political subdivisions. Finally, the amendments specify that the immigration or citizenship status of any person is irrelevant to any issue of liability or remedy relating to the rights of tenants.

49. Invasion Of Privacy – Protection Of Plaintiff's Identity.

[SB 157] Civil Code § 1708.85 – Section 1708.85 provides a private right of action where sexually explicit images, recordings, or other reproductions of a person are distributed without that person's consent. The amendment to § 1708.85 specifies that if a plaintiff brings such a claim under a pseudonym, all parties and attorneys must use the pseudonym in all pleadings, discovery documents, or other documents filed or served in the action, and in any hearings, trial or other court proceedings open to the public. Any references in litigation documents to the plaintiff's identifying characteristics or information must be redacted, and set forth only in a confidential information form to be served on the parties and filed with the court. The court is required to keep the information form confidential.

SIGNIFICANT RULES
Adopted in 2017

TITLE 2 - TRIAL COURT RULES

1. Electronic Filing And Service By Persons Other Than Parties.

Rules 2.250, 2.251, 2.252, 2.253 – The definitions applicable to rules relating to electronic filing and service have been revised to account for filing and service of documents by persons who are not parties to an action, and conforming changes have been made to the other electronic filing rules. Rule 2.251 states that courts may now require non-parties to file and serve electronically, as provided in the amendment to CCP § 1010.6.

2. Electronic Filing And Service – Time Of Filing.

Rules 2.250, 2.253, 2.259(c) – Rules specifying that documents electronically filed in courts after close of business are deemed filed the following day have been deleted, and replaced with a reference to CCP § 1010.6, which generally provides that documents electronically received by 11:59 p.m. on a court day are deemed filed that day.

3. Electronic Filing And Service – Court-Ordered Electronic Filing And Service In Courts With Optional Electronic Filing And Service Rules.

Rule 2.250(d), 2.253(c) – Former Rule 2.253(c) (which allowed judges in courts with permissive electronic filing and service rules to require electronic filing and service in any class action, consolidated actions, group of actions, coordinated actions, or complex actions) has been split into two rules, 2.250(d), which authorizes mandatory electronic service in such cases, and new Rule 2.253(c), which authorizes mandatory electronic filing in such cases.

4. Electronic Filing And Service – Completion Of Electronic Service.

Rule 2.250(i) – New rules specify when electronic service is deemed to be complete. The only special provision in the new rule is that where an electronic filing service provider is used to serve documents, service is complete when the service provider transmits the documents, or sends an electronic notification of service. Otherwise, service is deemed complete as provided for in CCP § 1010.6, which generally provides that: (a) service is complete when the document is transmitted, or at the time that an electronic notification of service is sent, (b) any document served between 12:00 a.m. and 11:59 p.m. on a court day shall be deemed served that day, (c) any period of notice or time to perform any act following electronic service is extended by two court days, except for the time to file a notice of intention to move for new trial, a notice of intention to move to vacate a judgment under § 663a, or a notice of appeal.

5. Electronic Filing And Service – Proof Of Electronic Service.

Rule 2.250(j) – Former rules specifying the means of providing proof of electronic service have been replaced with a reference to the requirements in CCP § 1013b. The rule also notes that under Rule 3.1300(c), proof of electronic service of moving papers must be filed with the court at least five court days before the hearing.

6. Electronic Filing And Service – Effect Of Filing Electronically.

Rule 2.252(c) – The former rule specifying that a document filed electronically has the same legal effect as one filed in paper has been deleted. The rule now states that electronic filing does not alter any filing deadline.

7. Electronic Filing And Service – Court's Responsibilities – Notice Of Problems With Electronic Filing.

Rule 2.254(b) – This rule specifies that if the court is aware of a problem that impedes or precludes electronic filing, it must promptly take reasonable steps to provide notice of the problem. A provision that limited this rule to problems precluding electronic filing during regular filing hours has been deleted.

8. Electronic Filing And Service – Signatures On Electronic Documents.

Rule 2.257 – The rules pertaining to the physical signature of electronically filed documents have generally been affirmed, with minor formatting changes. Those rules state that by filing a document electronically, the filer certifies that the original signed document is available for inspection and copying, and must produce the signed original on demand by the court or another party. In addition, an option has been added for electronically signing documents in accordance with procedures established by the Judicial Council, and set forth in the Trial Court Records Manual.

9. Interpreters – Court Appointment.

Rule 2.893 – Comprehensive rules governing the appointment of interpreters in court proceedings have been adopted in new Rule 2.893. The new rule specifies statements that must be made on the record when the appointment is made, rules governing when noncertified or nonregistered interpreters may be used, and rules governing the use of intermediary interpreters working between two languages other than English.

10. Language Access Services.

Rules 2.850, 2.851 – New rules have been adopted requiring courts to designate a language access representative, and to specify the manner of receiving and responding to language access complaints.

TITLE 8 - APPELLATE RULES

11. Record On Appeal – Electronic Transcripts.

Rule 8.130(f)(4) – The rule requiring reporters to provide electronic copies of transcripts upon request has been deleted, in light of the amendment to CCP § 271, which generally requires a reporter's transcript to be provided electronically.

12. Record On Appeal – Format.

Rule 8.144 – The rule specifying the format of the record on appeal has been reorganized to gather rules pertaining specifically to paper filing in subdivision (c). Additional requirements for electronic

reporter's transcripts are set forth in subdivision (d), including a requirement for such transcripts to be prepared electronically, rather than being scanned from a paper source, and for electronic page counter in the PDF file to match the page number on the transcript (among other requirements).

13. Record On Appeal – Settled Statements.

Rule 8.137 – The rules pertaining to the use of settled statements in lieu of a reporter's transcript have been amended to allow a settled statement to be used as a matter of right where the designated oral proceedings in the superior court were not reported by a court reporter, or the appellant has an order waiving his or her fees and costs. In other cases, an appellant may file a motion with the court to use a settled statement where a substantial cost savings would result, the oral proceedings cannot be transcribed, or a party who does not have a fee waiver is unable to pay for a reporter's transcript. The motion or election to use a settled statement must be made at the time the appellant files its designation of the record, and must satisfy several formal requirements set forth in the rule. If the oral proceedings were transcribed, the respondent in the appeal may elect to pay for the transcript within 10 days after service of the appellant's motion or election to use a separate statement. Extensive formal requirements for the separate statement itself, including provisions for an initial proposed statement, a response by the respondent, and the evaluation and decision of the court certifying the statement, are set forth in subdivisions (c) through (h).

14. References To The Clerk.

Numerous Rules – Reference to the clerk of the Court of Appeal and the clerk of the Supreme Court have been changed to the "clerk/executive officer" throughout Title 8.

TITLE 9 – LAW PRACTICE, ATTORNEYS AND JUDGES

15. One Time Expungement.

Rule 9.31(f)-(h) – The State Bar is now authorized to expunge the public record of a member's period of inactive enrollment due to failure to comply with the MCLE requirement, if the member has not received any previous expungement, the period of inactive enrollment was 90 days or less, the period of inactive enrollment occurred at least seven years before the date of expungement, and the member has no other record of suspension or involuntary inactive enrollment. Once the period is expunged from the record, the period is deemed not to have occurred for all purposes except for purposes of the member's eligibility for a judgeship under the California Constitution, article VI, section 15.

SIGNIFICANT CASES
Decided in 2017

ALTERNATIVE DISPUTE RESOLUTION

1. Arbitration Agreements – Amendments – Amendment To Scope Of Arbitration Agreement Given Retroactive Effect According To Its Terms.

State Farm General Insurance Co. v. Watts Regulator Co. (2017) 17 Cal.App.5th 1093 – In *Watts Regulator*, the Plaintiff insurer and Defendant manufacturer both independently signed an arbitration agreement prepared by an arbitration service provider for use by insurers and self-insured companies. In 2012, one of the Plaintiff's insureds suffered water damage caused by a defective supply line manufactured by the Defendant. In January 2015, the arbitration service provider amended the arbitration agreement to exclude products liability claims from the scope of mandatory arbitration, with the exception of arbitration claims already pending at the time of the amendment. The agreement gave either party the right to withdraw from the agreement upon 60 days notice, and neither party withdrew after receiving advance notice of the amendment in November 2015. In March 2015, the Plaintiff filed a subrogation claim against the Defendant arising from the 2012 water damage. Under these circumstances, the Court of Appeal affirmed the denial of the Defendant's motion to compel arbitration. In light of the notice of the impending amendment, and the fact that neither party decided to withdraw from the agreement, the Court found Defendant's argument regarding its lack of consent to "retroactive" application of the amendment unconvincing. Nothing in the original agreement or the amendment provided that the accrual date of a claim would control which agreement applied. Instead, the third party arbitration provider was allowed to make "unilateral" amendments under the terms of the original agreement. Accordingly, the accrual of a claim did not create a vested right to arbitrate, and the amended agreement, from which neither party withdrew, could be enforced according to its terms.

2. Arbitration Agreements – Breach – Award Of Damages For Breaching Arbitration Agreement By Filing Litigation Violated Statutory Right To Challenge Arbitration Agreement In Court.

Sargon Enterprises, Inc. v. Brown George Ross LLP (2017) 15 Cal.App.5th 749– In *Sargon Enterprises*, the engagement agreement between Plaintiff client and Defendant law firm contained an arbitration clause. Nevertheless, the Plaintiff filed a malpractice claim in court, instead of commencing arbitration. After the Defendant successfully compelled arbitration, the arbitrator summarily rejected the Plaintiff's malpractice claim, and awarded the Defendant $200,000 in damages on its breach of contract cross-claim, finding that the Plaintiff breached the arbitration agreement by filing litigation, instead of commencing arbitration on the malpractice claim. The Court of Appeal reversed the trial court's order confirming the arbitration award. The Court held that the constitutional right to petition includes the right to file litigation, and that the California Arbitration Act expressly allows parties to test the enforceability of their

arbitration agreements in court. The Court also held that a standard arbitration agreement specifying that claims "shall be settled by binding and final arbitration" does not expressly prohibit a party from filing litigation, and only requires a party to submit to arbitration *after* a court orders it to do so. Based on the foregoing, the Court held that the arbitration award for breach of contract was inconsistent with the contract, and violated the Plaintiff's statutory right to file its claims in court. The Court also held that because the award violated a "fundamental statutory right," it exceeded the arbitrator's powers, and the normal rules prohibiting review of arbitration awards did not apply. Accordingly, the Court corrected the arbitration award, by striking the portion relating to the Defendant's breach of contract claim, and confirming the portion relating to the Plaintiff's malpractice claim.

3. Arbitration Agreements – Enforceability – Agreement Is Enforceable Where Signatory Dies During "Cooling Off Period" Under CCP § 1295(c).

Baker v. Italian Maple Holdings, LLC (2017) 13 Cal.App.5th 1152 – In *Baker*, a decedent's heirs sued the Defendant nursing home for wrongful death. The Defendant moved to compel arbitration, under an arbitration agreement that the decedent had signed one week before her death. The trial court denied the motion on the ground that CCP § 1295(c), which governs arbitration in the medical field, provides a 30-day "cooling off" period for a signor to rescind the arbitration agreement, and that time period had not yet expired. The trial court relied on *Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461 to conclude that the arbitration provisions were not enforceable until the 30-day period had expired. The Court of Appeal reversed, holding that, under § 1295(c), the agreement was enforceable "unless or until rescinded." Because the patient never rescinded the arbitration agreement, it was enforceable. In so holding, the Court of Appeal acknowledged that this is contrary to the decision in *Rodriguez*, but it expressly stated that the Court of Appeal "respectfully disagree[s] with the *Rodriguez* opinion."

4. Arbitration Agreements – Enforceability – Cost Shifting Provision May Save Procedurally Unconscionable Agreement.

OTO LLC v. Kho (2017) 14 Cal.App.5th 691 – The Plaintiff filed a claim against the Defendant employer with the California Labor Commissioner for unpaid wages, and the Defendant moved to compel arbitration based on an agreement that the Plaintiff signed, which provided that a retired judge would arbitrate the matter in a manner similar to civil litigation. The trial court denied the motion to compel arbitration, holding that there was a high level of procedural unconscionability because the Plaintiff was not given an opportunity to review the agreement, was not given a copy of the agreement, and no explanation was given regarding the agreement. The trial court also found that there was substantive unconscionability because the agreement deprived the Plaintiff of an administrative remedy for wage claims before the Labor Commissioner, and would require the Plaintiff to pay for an attorney for the arbitration. The

Court of Appeal reversed, holding that, while there was procedural unconscionability, there was no substantive unconscionability because the arbitration would be "affordable and accessible," as required for employment arbitration under *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109. Arbitration would be affordable because the Defendant acknowledged that it must pay all costs of arbitration under the agreement for employment disputes. The Court of Appeal also held that the fact that the Plaintiff would have to retain legal counsel for arbitration – as opposed to relying on the Labor Commissioner – did not make the agreement unconscionable. Furthermore, the arbitration was no more inaccessible than civil litigation. Therefore, the arbitration agreement was enforceable.

5. Arbitration Agreements – Enforceability – Third Party May Enforce Employer's Arbitration Agreement Against Employee, Where Employee Alleges That Third Party Was A "Joint Employer."

Garcia v. Pexco (2017) 11 Cal.App.5th 782 [**Ikola**, Aronson, Thompson] – In *Garcia,* the Plaintiff asserted wage and hour claims against his employer, a temporary staffing agency, and Pexco, the company he was assigned to work for by his employer. The trial court granted Pexco's motion to compel arbitration based on the arbitration provision in the Plaintiff's employment agreement, despite the fact that Pexco was not a party to that agreement. The Court of Appeal affirmed, holding that the case presented two exceptions to the general rule that only signatories can enforce arbitration agreements. First, the Court held that equitable estoppel precluded the Plaintiff from refusing to arbitrate with Pexco, because: (1) the Plaintiff's labor-related claims were "intimately founded in and intertwined with" the employment agreement, which expressly included such claims within the scope of its arbitration provision, and (2) the Plaintiff was attempting to link Pexco with its employer in order to hold Pexco liable for his wage and hour claims. Second, the Court held that an agency exception also applied. While the Court noted that a plaintiff's boilerplate agency allegations are not necessarily sufficient to establish the exception, here, the Plaintiff's complaint went beyond boilerplate allegations, and actually alleged claims against Pexco as if it were a joint employer of Plaintiff. Accordingly, the Court held that by Plaintiff's own allegations, Pexco and the employer were agents for one another, such Pexco could enforce the employer's arbitration agreement against the Plaintiff.

6. Arbitration Agreements – Enforceability – The FAA Does Not Require Enforcement Of An Arbitration Agreement That Waives Assertion Of A Statutory Remedy In Any Forum.

McGill v. Citibank, N.A. (2017) 2 Cal.5th 945 – In *McGill,* the California Supreme Court explained that, when an arbitration agreement purports to waive a party's right to seek a statutory remedy in any forum (as opposed to one that merely requires the party to seek that remedy in arbitration), the agreement is void, and the Federal Arbitration Act will not save it. The Plaintiff in *McGill* was a consumer who sued the Defendant bank for false advertising and related claims

arising from the Defendant's credit protection plan. One of the remedies sought was "public injunctive relief" (i.e. injunctive relief that primarily seeks to protect the public, rather than to benefit an individual plaintiff) under California's Consumer Legal Remedies Act ("CLRA"), unfair competition law ("UCL") and false advertising law. The trial court ordered arbitration of all claims except the public injunction claims under the arbitration agreement in the credit protection plan. The Court of Appeals reversed, requiring arbitration of all claims. The Supreme Court then reversed the Court of Appeal, holding that a provision in the arbitration agreement that purported to bar the Plaintiff's right to seek public injunctive relief in *any forum*, including arbitration, violated public policy, and was, therefore, unenforceable under laws applicable to contracts in general. The Court distinguished the US Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333 (*Concepcion*), which held that the FAA preempts California's rule that waivers of class action procedures in arbitration agreements are unenforceable. The Court explained that the US Supreme Court distinguished waivers of procedural devices, such as class action procedures, from the waiver of the right to pursue a statutory remedy at all (*citing American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228.) Rules prohibiting the waiver of procedural devices apply to arbitration agreements in ways they do not apply to other contracts, and thus run afoul of § 2 of the FAA, which provides that arbitration agreements may only be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." Unlike a class action, a public injunction is a statutory remedy, rather than a mere procedural device. Accordingly, the waiver of the right to seek that remedy would render any contract unenforceable, and thus the portion of the arbitration agreement that contained such a waiver was invalid under § 2 of the FAA.

7. Arbitration Agreements – Enforceability – One-Sided Claim Exclusion Can Be Severed Where It Is The Only Unconscionable Provision.

Farrar v. Direct Commerce Inc. (2017) 9 Cal.App.5th 1257 – In *Farrar*, the Defendant employer moved to compel arbitration of the Plaintiff executive's employment related claims. Under California law, a court may refuse to enforce an agreement when it is both procedurally and substantively unconscionable, or may sever certain provisions to prevent an unconscionable result. (Civ. Code 1670.5). The trial court in *Farrar* refused to enforce the parties' arbitration clause after finding that (a) the clause was procedurally unconscionable due to changes in the clause between the initial offer letter and the final offer letter provided to the Plaintiff, and (b) it was substantively unconscionable due to a one-sided "carve-out" for all claims arising from the Defendant's confidentiality agreement. The Court of Appeal reversed, holding that there was only a small degree of procedural unconscionability, and the substantive unconscionability could be cured by severing the carve-out provision pursuant to Civil Code § 1670.5. The Court of Appeal held that severance was appropriate, because the carve-out provision was the only substantively unconscionable term, and it did not permeate the entire agreement. The Court of Appeal distinguished prior cases where severance was not appropriate and the agreement as a

whole was unenforceable, because a severance provision was more expansive, and/or there were other unconscionable terms, such as an unlawful damages provision.

8. Arbitration Agreements – Enforceability – Unconscionability – Take-It-Or-Leave-It Employment Arbitration Agreement With One-Sided Terms Is Procedurally And Substantively Unconscionable.

Baxter v. Genworth North America Corp. (2017) 16 Cal.App.5th 713 – In *Baxter*, Plaintiff sued her former employer for wrongful termination and related causes of action arising out of her employment. Defendant filed a motion to compel arbitration. The trial court denied the motion, finding that the arbitration agreement was both procedurally and substantively unconscionable. The Court of Appeal affirmed, holding that the arbitration agreement was procedurally unconscionable because it was presented to the employee as a condition of continued employment, with no opportunity to negotiate its terms, and without any meaningful choice in the matter. The Court also concluded that the arbitration agreement was substantively unconscionable because of provisions (1) prohibiting communications with other employees by the employee only, (2) limiting discovery in a factually complex case to an extent that would be inadequate to permit employee to fairly pursue her claims, (3) shortening the limitations period and leaving insufficient time to protect employee's right to vindicate her statutory rights, and (4) depriving an employee of her right to have an administrative investigation conducted before the employee was required to pursue statutory FEHA claims in an arbitration.

9. Arbitration Awards – Judicial Review – $30 Million Arbitration Award Vacated For Failure To Give Adequate Notice Of Punitive Damages Claim Prior To Uncontested Hearing.

Emerald Aero LLC v. Kaplan (2017) 9 Cal.App.5th 78 – The investor Plaintiffs obtained a $30 million arbitration award against the Defendant in an uncontested "default prove up" arbitration, while the Defendant was awaiting criminal sentencing. The award included an unspecified amount for punitive damages, but the original claim did not include a punitive damage request. Instead, less than 24 hours before hearing, the Plaintiffs served a brief, which increased their claimed damages tenfold and requested punitive damages, essentially increasing their requested relief by thirtyfold. On appeal, the entire award was reversed, because the Defendant did not have reasonable notice regarding the vastly increased damages prior to the hearing. The Court held that, while arbitration awards are typically insulated from review, CCP § 1286.2(a)(4), provides a narrow exception where the arbitrator exceeded his power and the award cannot be corrected. Under that exception, a remedy is improper where it "is in violation of specific restrictions (1) in the arbitration agreement; (2) the submission of the claim to the arbitrator; or (3) the rules of arbitration." In this case, the rules of the arbitration service provider required notice of any increase in damages requested. The Court held that service of a brief only 24 hours prior to the hearing did not satisfy the requirement for reasonable notice, particularly where the

e-mail transmitting the brief did not call attention to the increased damage request, and the brief was served after a deadline set by the arbitrator's order. Had the defendant been apprised of the vastly increased damages, he could have retained a new attorney to appear at the arbitration and challenge the punitive damage request. Accordingly, the award was vacated under § 1286.2(a)(4).

10. Arbitration Awards – Judicial Review – Courts Have No Jurisdiction To Review Or Confirm "Partial" Final Award.

Kaiser Foundation Health Plan, Inc. v. Superior Court (2017) 13 Cal.App.5th 1125 – Under CCP § 1283.4, an arbitrator's final award "shall include a determination of all the questions submitted to the arbitrators." In this case, the Plaintiff hospitals and the Defendant, Kaiser Foundation Health Plan, both agreed that the Court of Appeal had jurisdiction to review the merits of an arbitration panel's partial final award, but the Court of Appeal disagreed. The partial final award at issue was a denial of a motion by the Defendant to dismiss some, but not all, of the Plaintiff's claims on grounds of preemption and failure to exhaust administrative remedies. The award did not otherwise resolve the merits of those claims, the Plaintiffs' other claims, or any of the Defendants' cross-claims. While the trial court confirmed the arbitration award, the Court of Appeal held that, because the award did not determine all of the questions submitted to the arbitration panel as required by § 1283.4, the trial court did not have jurisdiction to confirm or vacate the award, and the order confirming the award was not an appealable judgment or order. The Court distinguished *Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, in which a partial final award was held to be subject to confirmation, because in that case, the arbitrator resolved all issues presented in the arbitration, and only reserved jurisdiction to address contingent matters that may arise while the final award was being carried out. Here, the arbitrators did not finally resolve any of the claims, and thus the "award" was not an award under the criteria in § 1283.4.

11. Arbitration Awards – Judicial Review – Language In Arbitration Agreement Dictates Standard Of Review Of Arbitration Award.

Harshad & Nasir Corp. v. Global Sign Systems (2017) 14 Cal.App.5th 523 – The Plaintiff, a company that repaired commercial signs, sued the Defendant to recover $114,823 owed on unpaid invoices. The parties thereafter agreed to arbitrate the dispute regarding the "services performed" by Plaintiff and entered into an arbitration agreement that provided as follows:

> "Arbitrator shall apply California law as though he were obligated by applicable statutes and precedents and case law... The decision of the arbitrator ... shall be reviewed on appeal to the trial court and thereafter to the appellate courts upon the same grounds and standards of review as if said decision and supporting findings of fact and conclusions of law were entered by a court..."

After the hearing, the arbitrator awarded the Plaintiff nearly $3 million, including lost profits for breach of an alleged agreement. The Defendants moved to vacate the award, arguing that the arbitrator exceeded the scope of the arbitration by awarding lost profits rather than just past due amounts, and that there was no evidence of any agreement for future services. The trial court confirmed the award on the grounds that arbitration awards may not be reviewed for errors of law. The trial court recognized that the parties can agree to expanded judicial review under *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1360, but held that the language in the arbitration agreement did not "explicitly and unambiguously provide for expanded judicial review" like the arbitration agreement in *Cable Connection*. The Court of Appeal reversed, noting that *Cable Connection* does not require parties to use any particular words, but, instead, requires only that the parties "make plain their intention that the award is reviewable for legal error." Here, the Court of Appeal held that the parties clearly expressed an intention to allow for review of errors of law, by specifying that the standard of review for the arbitration award shall be the same as the standard for review in an ordinary appeal, which would include de novo review of legal conclusions, and substantial evidence review of factual determinations. The Court then reviewed the arbitration award based on the proper standard of review, and concluded that the award must be vacated, because the arbitrator exceeded his authority, and the existence of a contract was not supported by substantial evidence.

12. Arbitration Procedures – CCP § 998 Awards – Post-Offer Costs Under CCP § 998 May Be Sought In Arbitration After An Award Is Issued.

Heimlich v. Shivji (2017) 12 Cal.App.5th 152 – Ordinarily, an arbitrator loses jurisdiction after issuing a final award. An offer under CCP § 998, however, may not be disclosed in trial or arbitration, such that a request for post offer costs under that statute may not be presented to the arbitrator until after the award is issued. That "catch 22" was resolved in *Heimlich*. In that case, six days after an arbitration award was issued, the Defendant attempted to present a cost request under § 998 to the arbitrator and, after the arbitrator declined to entertain the request, the Defendant asserted his request in the trial court, in a motion to confirm the arbitration award. The trial court ruled that the 998 issue should have been raised before the award was made, and that the court was powerless to rule on the request itself. The Court of Appeal reversed, holding that the Defendant was correct in not disclosing the § 998 offer to the arbitrator until after the award was issued. Once the award was issued, and the § 998 request was timely raised, the arbitrator had authority under the AAA commercial arbitration rules to correct his award by re-characterizing it as an interim award, and proceeding to consider the request. Because this was not an attempt to present new evidence on an issue that was already decided, the ordinary rule prohibiting arbitrators from reopening arbitration did not apply. The arbitrator's complete refusal to consider or resolve the request was grounds for reversing the arbitration award under CCP § 1286(a)(5). Accordingly, the Court of Appeal ordered the trial court to partially vacate the award, and either (a) remand the matter to the original arbitrator to determine the § 998 issue,

if the parties consented to such a remand, or (b) decide the § 998 issue itself, if the parties do not consent to returning to the original arbitrator.

13. Compelling Arbitration – Court May Refuse To Compel Arbitration Based On Possibility Of Conflicting Rulings, Where Arbitration Agreement Does Not Invoke Federal Arbitration Procedures.

Los Angeles Unified School District v. Safety National Casualty Corp. (2017) 13 Cal.App.5th 471 – In *LAUSD*, the Plaintiff school district sued 27 insurance companies for refusing to provide coverage for third party claims. One of the Defendant insurers moved to compel arbitration under an arbitration clause in its insurance policy. The trial court denied the motion, on the grounds that rulings in the arbitration could conflict with rulings in the litigation against the remaining insurers. The Defendant appealed, arguing that the Federal Arbitration Act does not allow courts to refuse to compel arbitration based on the possibility of conflicting rulings. The Court of Appeal affirmed, holding that, under the California Supreme Court's holding in *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, California procedural law applies in California courts in the absence of an express invocation of the procedural provisions of the Federal Arbitration Act ("FAA"). Under CCP § 1281.2(c), which is a procedural, rather than a substantive, rule, the trial court had discretion to refuse to compel arbitration in order to prevent inconsistent rulings. The Court also held that under *Cronus*, § 1281.2(c) was not preempted by the FAA, because it did not violate the letter of that act or conflict with its policy of encouraging arbitration.

14. Compelling Arbitration – Withdrawal Of Motion To Compel Individual Arbitration And Opposition To Class Certification Waives Right To Class Arbitration.

Sprunk v. Prisma LLC (2017) 14 Cal.App.5th 785 – After the Plaintiff exotic dancer sued the Defendant employer for wage and hour claims, including class allegations on behalf of other dancers, the Defendant moved to compel arbitration of the Plaintiff's claims, but withdrew the motion after the Plaintiff requested that the trial court order class-wide arbitration. Thereafter, the Plaintiff sought and obtained class certification, over the Defendant's opposition. The Defendant then moved to compel arbitration against the class members, arguing that it could not have waived its right to arbitrate against the class members, since they were not parties to the litigation until the class was certified. The trial court found waiver and denied the motion to compel arbitration. The Court of Appeal agreed, holding that the trial court did not have to ignore the practical realities of the litigation when deciding the waiver issue. Based on the sequence of events, it appeared that the Defendant abandoned its initial motion to compel arbitration in the hopes that it could defeat the action by opposing class certification. The Court explained that "[a]n attempt to gain a strategic advantage through litigation in court before seeking to compel arbitration is a paradigm of conduct that is inconsistent with the right to

arbitrate." Accordingly, the Court of Appeal agreed that the Defendant had waived the right to arbitrate. The Court also rejected the Defendant's argument that a motion to compel against Plaintiff was futile due to authority indicating that class-action waivers in arbitration agreements were unenforceable. The trial court and Court of Appeal noted that the motion to compel arbitration was not brought until over a year after that authority was overturned, supporting the notion that Defendants made a strategic decision to oppose class certification in the trial court, thereby waiving the right to arbitrate.

ANTI-SLAPP MOTIONS

15. First Prong – A Claim Arises From Protected Activity When The Protected Activity Comprises An Element Of A Claim.

Park v. Board of Trustees of the California State University (2017) 2 Cal.5th 1057 – The first prong of the anti-SLAPP statute requires the moving party to establish that the challenged claim arises from protected free speech activity relating to matters of public importance or official government proceedings. In *Park*, the Plaintiff professor was denied tenure, and sued the Defendant Board of Trustees of the California State University for discrimination. The Defendant filed an anti-SLAPP motion, arguing that the Plaintiff's claim arose out of protected speech in connection with the Defendant's tenure decision-making process, which is an official government proceeding. The trial court denied the motion, but the Court of Appeal agreed with the Defendant and reversed. The California Supreme Court granted review to clarify the nature of the first prong's requirement that a claim "arises from" protected activity. The Supreme Court held that a claim arises from a protected activity if the activity actually supplies one of the elements of the cause of action, as opposed to merely (a) leading up to an action that supplies one of the elements, or (b) providing evidence of an impermissible motive. Here, the relevant elements of the Plaintiff's claims were an adverse employment action, and a discriminatory motive. The Supreme Court explained that the adverse employment action was the denial of tenure, not any of the communications made in the tenure review process that led to that denial. Similarly, while those communications were evidence of an improper motive for the denial of tenure, that does not convert the communications, themselves, into the basis for liability. The Court disapproved of Court of Appeal authorities indicating that an adverse employment action arising from a review process was "inseparable" from the review process, itself. The Court also rejected the Defendant's claim that the denial of tenure itself was a protected activity, as the Defendant had presented no evidence or argument to show how its selection of tenured professors furthered its right to free speech.

16. First Prong – A Decision Made In Deliberations Following Protected Speech Is Not, Itself, A Protected Activity.

Shahbazian v. City Rancho Palos Verdes (2017) 17 Cal.App.5th 823 – In *Shahbazian*, the Court of Appeal applied the Supreme Court's holding in *Park v. Board of Trustees of California State*

University (2017) 2 Cal.5th 1057 in the context of the issuance of a building permit. As noted above, the Supreme Court in *Park* held that a claim is not subject to the first prong of the anti-SLAPP statute "simply because it contests an action or decision that was arrived at following" protected speech. In *Shahbazian*, the Plaintiff sued the Defendant city for issuing a building permit to the Plaintiff's neighbor to build a fence on their shared property line. While the permit was issued following public hearings and other petitioning activity, the lawsuit targeted the issuance of the building permit, which is not a protected activity, rather than the petitioning activity itself. Under *Park*, then, the lawsuit did not "arise from" protected activity as required by the first prong of the anti-SLAPP statute, and the Defendant's motion was properly denied.

17. First Prong – Court Of Appeal Rejects The "Gravamen" Approach To Determining Whether Protected Activity Is Merely Incidental To A Cause Of Action

Sheley v. Harrop (2017) 9 Cal.App.5th 1147 – In *Sheley*, the Cross-Complainant, a minority shareholder in a closely held corporation, cross-complained against the Plaintiffs, the majority shareholders, alleging claims for breach of fiduciary duties and other torts. The claims were based in part on the Cross-Defendant's use of corporate funds to prosecute the allegedly meritless complaint against the Cross-Complainant, and in part on other malfeasance not related to the lawsuit. The Cross-Defendants filed an anti-SLAPP motion, which was granted in part. The Court of Appeal modified the ruling to strike all allegations relating to the use of the corporation's money to fund the allegedly meritless complaint, which the Court held is an activity protected under the first prong of the anti-SLAPP statute. The Court acknowledged that mere contextual allegations of protected activities that are "incidental" to a claim do not trigger the protection of the anti-SLAPP statute, but the Court rejected an earlier test that examined the "principal thrust" or "gravamen" of a cause of action in order to determine whether an allegation is merely incidental. The Court held that the "gravamen" test is incompatible with *Baral v. Schnitt* (2016) 1 Cal.5th 376, which held that an anti-SLAPP motion allows the court to strike particular allegations, not just entire causes of action. Instead, under *Baral*, the question is whether or not an allegation purports to support a claim for recovery. Here, the allegations relating to the funding of the lawsuit did not merely provide context, they were expressly listed as one of the ways in which the Cross-Defendants breached their fiduciary duties and committed other torts. Thus the allegations purported to support claims for recovery, and were subject to being stricken, since the Cross-Defendant also failed to satisfy her burden under the second prong of the anti-SLAPP statute to substantiate her claim that the lawsuit was meritless.

18. First Prong – Court Of Appeal Revives The "Gravamen" Approach To Determining Whether Protected Activity Is Merely Incidental To A Cause Of Action

Okorie v. Los Angeles Unified School Dist. (2017) 14 Cal.App.5th 574 – In *Okorie*, the Second Appellate District, Division One, disagreed with the Third Appellate District's holding in *Sheley*, above, and held that the "gravamen" approach to determining whether or not allegations of protected activity are "incidental" retains vitality after *Baral*, at least in instances where an anti-SLAPP motion is directed to an entire cause of action, rather than to particular allegations within a cause of action. The Court reasoned that, in *Baral*, the Supreme Court merely held that an anti-SLAPP motion *can* be used to attack individual allegations within a cause of action or "count," but did not hold that it must be limited to portions of a cause of action, rather than an entire cause of action. Accordingly, the Court held that the "gravamen" approach remains viable where a party challenges an entire cause of action, without singling out particular allegations, and the court must determine whether or not the cause of action, as a whole, arises from protected activity. The Court then applied the gravamen test, and found that, while the discrimination claims at issue in the case were based in part on unprotected activity, the "bulk" of the allegedly discriminatory acts were protected statements relating to a school district's child molestation investigation, which the Plaintiff regarded as discriminatory harassment. As such, the protected activity formed the principal thrust or gravamen of the claims, and the Court affirmed the trial court's order granting the anti-SLAPP motion as to the entire complaint, not just the protected activity.

19. First Prong – Communications To Individual Subscribers Regarding Matter Of Public Importance Protected Under First Prong.

FilmOn.com v. DoubleVerify, Inc. (2017) 13 Cal.App.5th 707 – The Plaintiff in *FilmOn.com* was an online content provider, and the Defendant was a company that reviews and reports on the suitability of internet content for advertising agencies, marketers, ad networks, and others. The Plaintiff sued the Defendant for falsely classifying the Plaintiff's websites in the categories of "Copyright Infringement-File Sharing" and "Adult Content," and distributing those classifications to Plaintiff's advertisers. The Defendant filed an anti-SLAPP motion. The Plaintiff opposed, claiming that the reports were not protected under the first prong of the anti-SLAPP statute, because they were confidential reports made entirely in private to the Defendant's paying subscribers, and thus were not protected speech regarding an issue of public interest. The trial court granted the motion, and the Court of Appeal affirmed, holding that under CCP § 425.16(e)(4), the first prong protects conduct in furtherance of the "right of free speech in connection with a public issue or an issue of public interest," and noting that prior opinions have held that this protection applies even to private communications, so long as they concern a public issue. Here, the Court explained that the presence of adult materials and copyright infringement on the Internet has been the subject of numerous press reports, lawsuits, and regulatory actions,

and thus is an issue of public importance. Accordingly, the Defendant's reports on these matters were protected under the anti-SLAPP statute, regardless of the fact that they were confidential and distributed only to paying subscribers.

20. First Prong – Challenged Action, And Not The Means Of Communicating That Action, Must Be Protected Activity To Satisfy The First Prong.

Mission Beverage Co. v. Pabst Brewing Co., LLC (2017) 15 Cal.App.5th 686 – In *Mission Beverage*, the Defendant brewer sent a letter terminating its distribution contract with the Plaintiff beer distributer, and invoking a statutory arbitration provision applicable to beer distribution agreements. In response, the Plaintiff filed suit for breach of the distribution contract's termination-for-cause requirement and for declaratory relief. The Defendant responded with a motion to strike the entire complaint under the anti-SLAPP statute, arguing that the "linchpin" of Plaintiff's lawsuit was Defendant's invocation of the statutorily-mandated arbitration process. The trial court denied the motion, and the Court of Appeal affirmed, holding that, where a plaintiff's claim attacks the defendant's decision to undertake a particular act, the relevant question is whether the decision, itself, is protected under the anti-SLAPP statute, *not* whether the means of communicating that decision are protected. Here, the Court held that the Plaintiff's claims challenged the Defendant's decision to terminate the parties' distribution contract. That decision is not an exercise of free speech or the right to petition, and is protected under any provision of the anti-SLAPP statute. Accordingly, the Court of Appeal held that the communication of that decision in a letter invoking a statutory procedure does not "convert" the Plaintiff's claim into one arising from protected activity.

21. First Prong – Government Agency's Referral Of Violations To District Attorney Is A Protected Activity.

Santa Clara Waste Water Co. v. County of Ventura Environmental Health Division (2017) 17 Cal.App.5th 1082 – In *Santa Clara*, the Plaintiff, a nonhazardous waste treatment facility, received a notice of violation from the Defendant Environmental Health Division for possessing Petromax, allegedly a hazardous substance, without a permit. Rather than proceeding with formal administrative enforcement, itself, the Defendant referred the violation to the District Attorney and assisted in criminal enforcement proceedings. The Plaintiff filed a complaint, claiming that the Defendant was required to provide an administrative hearing before determining that Petromax was a hazardous substance and referring the matter to the District Attorney. The Defendant filed an anti-SLAPP motion, which the trial court denied. The Court of Appeal reversed, holding that "[e]ven the government has first amendment rights," and that the Plaintiff's claims arose from the exercise of those rights in providing information and assistance to the District Attorney in connection with a public issue. Because the Defendant expressly disclaimed any intention to take any other enforcement action, the Court rejected the argument that the claim arose out of a challenge to enforcement activities, rather than the

Defendant's free speech activity. The Court also held that the Plaintiff failed to satisfy the second prong of the anti-SLAPP statute because the applicable environmental regulations did not support the Plaintiff's right to an administrative hearing in the absence of formal administrative enforcement proceedings.

22. First Prong – Off-Camera Comments Regarding Actor Were Protected Speech Because They Were Part Of The Creative Process And Marketing Of Film.

Daniel v. Wayans (2017) 8 Cal.App.5th 367 – The Plaintiff, a movie extra, sued the Defendant Marlon Wayans, the director, actor, and producer of "A Haunted House 2," for racial discrimination based on several comments that the Defendant made while the cameras were not recording, including referring to him as "na," joking about his "afro," and posting a photo to Twitter comparing the Plaintiff to Cleveland Brown from the television series *Family Guy*. The trial court granted the Defendant's anti-SLAPP motion, holding that the comments were part of the creative process in the creation of the movie, and the tweet was to promote the film. The Court of Appeal affirmed, holding that the gravamen of the Plaintiff's complaint arose from conduct squarely arising from the Defendant's exercise of free speech in the creation of the film. Furthermore, the acts at issue arose out of protected activity. The on-set comments were protected free speech because they were made during the creation of a film, which is an exercise of free speech. The Defendant presented evidence to show that the film was created through improvisation, including when the cameras were not on, and the Defendant's comments to the Plaintiff were part of the creative process. Further, the speech was of public interest because the film was made by a popular and prolific entertainer. Finally, the tweets were protected as a statement made in a public forum, because it is a publicly accessible social media forum, and was a topic of public interest, because it pertained to the making of a film that would likely be popular. The Plaintiff also failed to show a probability of prevailing on the merits under the second prong of the anti-SLAPP analysis for all of the causes of action, so the anti-SLAPP motion was properly granted.

23. Second Prong – Anti-SLAPP Motion May Be Granted Based On Absence Of Subject Matter Jurisdiction.

Barry v. State Bar of California (2017) 2 Cal.5th 318 – After the California Supreme Court denied the Plaintiff attorney's request to review a stipulation regarding disciplinary charges, the Plaintiff sued the State Bar in Superior Court, alleging that her suspension was discriminatory and retaliatory. The trial court granted the Defendant's anti-SLAPP motion and awarded attorney's fees, concluding that the Plaintiff could not demonstrate a probability of success, because the Superior Court lacked subject matter jurisdiction to review disciplinary proceedings. The Court of Appeal reversed, holding that the trial court could not grant the anti-SLAPP motion and award attorney's fees if it did not have subject matter jurisdiction, because the motion required a ruling on the merits. The California Supreme Court reversed, holding that "a court

that lacks the power to answer one type of question in a case may nonetheless have the power to answer another type of question." The Supreme Court clarified that the second prong requires the trial court to consider whether there is a likelihood of success, which does not always require a decision on the merits. Here, a likelihood of success could not be established, because the trial court lacked jurisdiction—a determination that did not require a decision on the merits. Because a trial court has jurisdiction to determine its own jurisdiction, the decision to grant the anti-SLAPP motion was correct.

24. Second Prong – Fair and True Reporting Privilege Protects Counsel's Statement To Media That Fairly Reports The "Gist" Of A Complaint's Allegations.

Argentieri v. Zuckerberg (2017) 8 Cal.App.5th 768 – The Plaintiff attorney represented a client who attempted to assert an interest in Facebook by forging a contract with Mark Zuckerberg, and suing Zuckerberg and Facebook in a New York lawsuit. After the forgery was discovered and the New York case dismissed, Facebook and Zuckerberg sued the Plaintiff attorney for malicious prosecution, and Facebook's counsel issued a statement to the press claiming that that the Plaintiff knew that the New York case was based on forged documents, and pursued it anyway. The malicious prosecution case was then dismissed, because the allegations were too conclusory to state a claim, and the Plaintiff then sued Facebook, Zuckerberg, and their attorney for defamation, based on the press statement. The Defendants filed an anti-SLAPP motion, which the trial court granted. The Court of Appeal affirmed the dismissal, finding that the fair and true reporting privilege (Civ. Code § 47(d)) applies where an attorney communicates with a newspaper regarding a publicly-available complaint filed by the attorney's client. The Plaintiff argued that the statement to the press was not a fair and true report of the malicious prosecution action because it claimed that Plaintiff "knew" that the documents were forgeries, whereas the complaint alleged that the Plaintiff "knew or should have known" about the forgeries. The Court of Appeal rejected this argument, holding that a report to the press is not to be judged by the standards of accuracy that would be required of a "professional law reporter or a trained lawyer." Instead, a report is fair and true if it captures the "gist" of the action, as it would be understood by ordinary members of the community. Here, the Court held that the difference between "knew" and "knew or should have known" was not so great as to render the report unfair or untrue.

25. Second Prong – Statement That Investigation Of Plaintiff Was "Independent" Is Not Actionable Defamation.

Charney v. Standard General LP (2017) 10 Cal.App.5th 149 – The Plaintiff, founder of American Apparel, filed suit for defamation based on a press release issued by the Defendant, American Apparel, which stated that the Plaintiff had been terminated as the CEO after an "independent, third-party" investigation. The Plaintiff alleged that the press release was defamatory because the investigation was conducted by a law firm representing American

Apparel in an arbitration against the Defendant, and thus was not independent or impartial. The trial court granted the Defendant's anti-SLAPP motion, and the Court of Appeal affirmed, noting authorities that a statement is not defamatory if it cannot "'reasonably [be] interpreted as stating actual facts about an individual." Here, the Court held that the statement about the independence of the investigation was not defamatory because (a) it was a statement about the investigatory body, not the Plaintiff, and (b) it was a matter of opinion or subjective judgment, rather than a statement of fact.

26. Second Prong – Facebook's Placement Of Unrelated Advertisements Next To Users' Posts Regarding Plaintiff Did Not Violate Common Law Or Statutory Right To Publicity.

Cross v. Facebook (2017) 14 Cal.App.5th 190 – The Plaintiff musician, who goes by the alias Mikel Knight, sued Facebook for six causes of action, based on Facebook's failure to remove a user-created page titled "Families Against Mikel Knight." Facebook filed an anti-SLAPP motion. The trial court granted the motion in part, but denied the motion as to statutory and common law right to publicity claims and a derivative unfair competition claim. The trial court held that the Plaintiff showed a likelihood of prevailing on these claims. The Court of Appeal reversed, holding that the Plaintiff did not show a probability of success on the merits because there was no evidence that Facebook used his identity, which is a required element of both statutory and common law right of publicity claims. The Plaintiff argued that Facebook used his name and likeness because third-party advertisements were featured on the sidebar of the "Families Against Mikel Knight" page. However, those advertisements were not owned by Facebook and they did not feature the Plaintiff's likeness. Moreover, the page was created by users, not Facebook. This was insufficient to show that Facebook, itself, made an actionable use of the Plaintiff's name or likeness. Accordingly, the Court held that the anti-SLAPP motion should have been granted as against the right of publicity and derivative UCL claims.

APPELLATE LAW AND PROCEDURE

27. Appealability – Peremptory Writs Of Mandate – Remand To Administrative Body Is An Appealable Judgment.

Dhillon v. John Muir Health **(2017) 2 Cal.5th 1109** – In *Dhillon*, the Plaintiff doctor was ordered to attend anger management classes to avoid suspension of his clinical privileges at a hospital operated by the Defendant. The Plaintiff filed a writ petition in the trial court challenging the Defendant's denial of his request for a hearing before the hospital's judicial review committee. The trial court granted the Plaintiff's petition in part, and issued a peremptory writ directing the Defendant to conduct the hearing requested by Plaintiff. Defendant appealed, but the Court of Appeal dismissed the appeal, explaining that the trial court's order remanding the matter to Defendant was not a final appealable order. The Supreme

Court reversed, reasoning that a judgment is final, and therefore appealable, when it terminates the litigation between the parties on the merits and leaves nothing to be done but to enforce what has been determined. Since the trial court had construed Defendant's bylaws as requiring a hearing before the judicial review committee, and had ordered the hearing to occur without reserving jurisdiction to hear further matters, there was nothing left for the trial court to do except to determine compliance or noncompliance with the writ. As such, the judgment was final, and Defendant was entitled to an appeal.

28. Appealability – Denial Of A Statutory Motion To Vacate A Judgment Is Separately Appealable From Judgment On The Merits.

Ryan v. Rosenfeld (2017) 3 Cal.5th 124 – In *Ryan*, the trial court dismissed the Plaintiff's claims four years after the complaint was filed because the Plaintiff had abandoned the case. The Plaintiff filed a motion to vacate the judgment of dismissal pursuant to CCP § 663, arguing that he was hospitalized in Mexico at the time of the dismissal. The trial court denied the motion, and the Plaintiff appealed the dismissal and the denial of the § 663 motion. The Court of Appeal dismissed the appeal, holding that the deadline for appealing the dismissal had passed, and the order denying the § 663 motion was not appealable. The California Supreme Court reversed, holding that, under CCP § 904.1(a)(2), the denial of a § 663 motion is separately appealable as a post-judgment order, even if the issues on appeal were or could have been asserted an appeal from the judgment on the merits. The Supreme Court noted that it first held that a § 663 motion was appealable in *Bond v. United Railroads* (1911) 159 Cal. 270, 273. The Court then acknowledged that it did not permit an appeal of a denial of a § 663 motion in *Clemmer v. Hartford Insurance Company* (1977) 22 Cal.3d 865, but held that *Clemmer* should be treated "with more skepticism," because it was inconsistent with well settled law, and it provided no precedent or explanation. Therefore, the Court reaffirmed its holdings prior to *Clemmer* that the denial of a § 663 motion is appealable.

29. Appealability – Discovery Referee's $100,000 Sanction Order Under A "General" Reference Is Directly Appealable

Lindsey v. Conteh (2017) 9 Cal.App.5th 1296 [**Moore**, Ikola, Thompson] – In a shareholder derivative suit, the parties stipulated to a discovery referee pursuant to CCP § 638(a). The discovery referee imposed $100,000 in discovery sanctions on the Defendant in an order that was filed with the Court, but not confirmed or entered by the trial judge. In supplemental briefing, the parties were asked to determine whether the reference was a general reference or a special reference, in order to determine whether or not there was an appealable order. Under a general reference, the referee's order is immediately binding, whereas a special referee may only enter recommendations for the trial court to accept or reject. The Court of Appeal affirmed the discovery sanctions, holding that the discovery reference was a general reference, based on the language of the reference and the context of the action. The stipulation for the discovery referee expressly mentioned CCP § 638, subdivision (a), which is the statute pertaining to a general

reference. Moreover, the referee was given all the powers of a general referee, including setting any hearings, presiding over hearings, and ruling on discovery objections, motions, and other requests. Because the appointment in this case was general reference, the discovery referee's order stood as the decision of the court without further confirmation, and was thus appealable as a sanctions order over $5,000.

30. Appealability – Renewed Motions – Orders Denying Renewed Motions, Are Not Separately Appealable.

Chango Coffee, Inc. v. Applied Underwriters, Inc. (2017) 11 Cal.App.5th 1247 – In *Chango,* the Defendant's initial motion to compel arbitration was denied in the trial court. Instead of appealing the denial of that motion, however, the Defendant made a renewed motion under CCP § 1008(b), and then appealed the denial of the renewed motion. The Court of Appeal dismissed the appeal, holding that the denial of the renewed motion is not separately appealable. The Court rejected the Defendant's argument that the 2011 amendment to §1008 implied that such denials are separately appealable. The amended language expressly states that orders denying motions for reconsideration under § 1008(a) are not separately appealable, but may be reviewed in an appeal from the underlying order, if that order is, itself, appealable. The Defendant reasoned that because the amendment does not specifically mention denials of renewed motions under § 1008(b), it implies that such denials are separately appealable. The Court rejected this argument and held the Legislature was "presumed to have knowledge of existing judicial decisions when it enacts and amends legislation," such that the amendment left intact the common law rule that orders denying renewed motions are not separately appealable.

31. Appellate Briefs – Appellant's "Egregious Violations Of Basic Appellate Norms" Result In Affirmance Without Discussion Of Merits.

Ewald v. Nationstar Mortgage, LLC (2017) 13 Cal.App.5th 947 – The Plaintiff sued the Defendant for misrepresentation and breach of contract, and the trial court granted the Defendant's motion for summary judgment. The Plaintiff appealed, but the Court of Appeal summarily affirmed the trial court, holding that the Court need not consider the merits of the appeal due to "counsel's egregious violations of basic appellate norms." The Court's decision was based on several egregious deficiencies in the Plaintiff's brief: it failed to articulate the standard of appellate review; it failed to provide any legal authority to support the Plaintiff's argument; it cited one case in the statement of the case, but that case was not cited by the trial court in the final ruling; it did not state the holding of the lone cited case, or provide any analysis; and it did not state the elements for the causes of action on appeal.

32. Automatic Stay – Appeal Of Attorney's Fees And Costs Only Results In Automatic Stay Of Fee And Cost Award, Without Need For Bond Or Undertaking.

Quiles v. Parent (2017) 10 Cal.App.5th 130 – The Plaintiff in *Quiles* successfully sued the Defendant for $208,500 in damages, and was later awarded $689,310 in attorney's fees and $50,591 in costs. The Defendant paid the damages award, but did not pay or bond the attorney's fees or costs pending appeal of those awards. The Plaintiff then attempted to execute on the fee and cost award. The Court of Appeal issued a writ of supersedeas, staying enforcement. The Court noted that an appeal of a money judgment only results in a stay of enforcement of the judgment once an undertaking is given. That rule, however, is subject to a statutory exception for judgments of costs awarded under CCP § 1021 *et seq*. After an extensive analysis of the common law source of that exception, the Court ultimately concluded that the plain language of a 1993 amendment to the statutory exception (CCP § 917.1(d)) prevails, and clarifies any prior ambiguities. Under that statute, the exception applies to any appeal that is limited to costs awarded under CCP §§ 1021 to 1038. Since attorney's fees allowed by contract, statute, or law are awarded as costs under CCP § 1033.5, the Defendant's appeal stayed enforcement of the award, and supersedeas was proper.

33. Invited Error –Defendant Was Estopped From Appealing A Holding In A Proposed Order That Was Submitted To Secure An Appealable Order

Diaz v. Professional Community Management, Inc. (2017) 16 Cal.App.5th 1190 [**Ikola**, O'Leary, Aronson] – 11 days before trial, the Defendant in *Diaz*, applied ex parte for an order shortening time to hear its motion to compel arbitration. The trial court denied the application, and signed a proposed order prepared by Defendant. The Defendant's proposed order not only denied the request to hear the motion on shortened time, but also improperly denied the motion on the merits. Defendant promptly appealed from that order, staying the scheduled trial. The Court of Appeal affirmed the denial on the merits, holding that the doctrine of invited error precluded Defendant from appealing that denial, because Defendant knowingly submitted a proposed order that went beyond the trial court's actual ruling, solely in order to secure an appealable ruling. The Court considered the circumstances surrounding the ex parte hearing and rejected the Defendant's argument that the trial court did rule on the merits of the motion to compel at the hearing on the ex parte application. The Court presumed that the trial court was aware that it lacked jurisdiction to rule on a motion that had not been properly noticed for hearing on the date in question. Moreover, the denial of the application to shorten time for a noticed hearing on the motion was fundamentally at odds with a decision to actually decide the motion at the same ex parte hearing—the court cannot deny an application to shorten time to hear a motion, and at the same time rule on that motion. The trial court also issued a minute order in the wake of the ex parte hearing, which (a) made it clear that the court was only ruling

on Defendant's ex parte application, and (b) did not take the originally scheduled hearing date for the motion off calendar. While the trial court's comments at the hearing may have been illustrative of its thinking about the merits of the motion to compel, they did not constitute a ruling on the motion. Finally, even if the trial court made the decision to sign the proposed order knowing that it was denying the motion on the merits, it did so only because the Defendant asked it to deny the motion by submitting the Proposed Order. Accordingly, the denial of the motion was the result of Defendant's invited error, and the Defendant was estopped from challenging that error on appeal.

34. Law Of The Case – Grant Of Review Eliminates Law Of The Case As To All Points In An Opinion, Not Just Issues Reversed By The Supreme Court.

Crossroads Investors, L.P. v. Federal National Mortgage Assn. (2017) 13 Cal.App.5th 757 – In *Crossroads Investors*, the Court of Appeal had affirmed a trial court's order denying the Defendant's anti-SLAPP motion. The California Supreme Court granted Defendant's petition for review, depublished the Court of Appeal's original opinion, and transferred the matter back to the Court of Appeal to reconsider the appeal in light of *Baral v. Schnitt* (2016) 1 Cal.5th 376. On reconsideration, the Court of Appeal addressed the scope of review before turning to the merits of the anti-SLAPP motion. The Plaintiff contended that the scope of review was subject to the law of the case doctrine, and that the prior opinion continued to be the law of the case on all points it decided except the issues impacted by *Baral*, and that the scope of the current review was limited accordingly. The Court of Appeal disagreed, holding that when the Supreme Court grants review, the Court of Appeal's opinion is a nullity, and has no further force or effect, either as a judgment or an authoritative statement of the law. The Court distinguished a case in which an opinion retained its status as law of the case following the grant of certiorari by the US Supreme Court. The Court reasoned that the Supreme Court's jurisdiction over state courts is limited to issues relating to "the validity of a federal treaty or statute, the validity of a state statute under federal law, or a claim arising under federal law," and that matters in an opinion outside of the US Supreme Court's jurisdiction are not affected by the grant of certiorari.

35. Writ Review – Denial Of Trial By Jury Is Reviewable In An Extraordinary Petition For Writ Of Mandate.

Shaw v. Superior Court (2017) 2 Cal.5th 983 – The principal holding in *Shaw* is set forth below, in "Right To Trial By Jury – Jury Trial Of Common Law Claim Must Take Place Before Court Trial Of Statutory Claim, Where Statute Provides That It Does Not "Abrogate" Common Law Remedies." In addition to that holding, the California Supreme Court in *Shaw* explicitily overturned the oft-ignored holding in *Nessbit v. Superior Court* (1931) 214 Cal. 1, that a denial for a request for a jury trial cannot be reviewed in an extraordinary writ.

ATTORNEY'S FEES

36. Contractual Fee Provision – Contractual Fees May Be Awarded Where Contract Is Asserted As An Affirmative Defense.

Mountain Air Enterprises LLC v. Sundowner Towers LLC (2017) 3 Cal.5th 744 – The Defendants in *Mountain Air Enterprises* sought contractual attorney's fees after prevailing in an action to enforce an agreement to repurchase a building. The Defendants had prevailed by showing that the repurchase agreement was (a) unlawful and void, and (b) superseded by a subsequent option agreement providing the Defendant with the right, but not the obligation, to repurchase the same building. The trial court denied fees under the repurchase agreement, because the entire agreement was unlawful. The trial court also denied fees under the fee provision in the option agreement, which provided that:

> If any legal action or any other proceeding, including arbitration or an action for declaratory relief[,] is brought for the enforcement of this Agreement or because of an alleged dispute, breach, default, or misrepresentation in connection with any provision of this Agreement, the prevailing party shall be entitled to recover reasonable attorney fees

The trial court reasoned that the option agreement was only asserted as an affirmative defense, and that an affirmative defense is not a "legal action or other proceeding." Although the Supreme Court agreed that an affirmative defense is not a "legal action or other proceeding," it nonetheless held that the fee provision still applied because the Plaintiff's action on the purchase agreement was, itself, a legal action that was brought "because of an alleged dispute… in connection with" the option agreement. The Court found that, even though the Plaintiff's complaint did not reference the option agreement, the two agreements were inextricably intertwined, such that the Plaintiff's action "necessarily implicated the validity of both the repurchase agreement and the option agreement." Under those circumstances, the Court concluded that the action was brought because of a dispute over the validity of the option agreement, and thus contractual attorney's fees were available.

37. Contractual Fees – Attorney's Fees As Damages – Fees Sought As Damages In A Cross-Complaint Must Be Fixed By The Jury, Not By The Court In A Motion Under CCP § 1717.

Monster, LLC v. Superior Court (2017) 12 Cal.App.5th 1214 – In *Monster*, the Plaintiffs, an audio equipment manufacturer and its founder, sued the Defendant, the maker of "Beats by Dre" headphones, for fraudulently inducing them to sell back a minority interest in the Defendant shortly before Apple purchased the Defendant for $3 billion. The Defendant filed an answer and cross-complaint alleging that the Plaintiffs' claims were barred by releases in the parties' prior agreements, and that Plaintiffs had breached those agreements by filing their complaint. The

cross-complaint sought the Defendant's attorney's fees in the action as damages for breach of contract. The Defendant prevailed on a motion for summary judgment on the Plaintiff's claims based on the releases, and then asked the trial court to fix the attorney's fees for its breach of contract claim under Civil Code § 1717. The Plaintiff opposed this request, arguing that the issue must be decided by the jury in the trial of the cross-complaint. After further briefing, the trial court ordered that the amount of fees would be resolved through a noticed motion. The Court of Appeal granted a writ of mandate and reversed, holding that, where attorney's fees are recoverable as damages, the determination of the recoverable fees must be made by the trier of fact unless the parties stipulate otherwise. Under *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, a trial court has no authority to fix attorney's fees under § 1717 until the contract claim has been resolved. Accordingly, the Court held that, if the Plaintiff ultimately prevailed on its breach of contract claim, § 1717 would allow it to move for attorney's fees that it incurred litigating that claim in the trial court, but the statute would have no application to fees sought as the damages for the breach of contract claim. Those fees must be proven at trial, like any other item of damages. The Court concluded that, if the Defendant preferred to have its attorney's fees fixed by way of a noticed motion, rather than by jury trial, it could have pursued a motion for fees under § 1717 as the prevailing party on Plaintiffs' tort claims, rather than seeking the fees in a cross-complaint.

38. Contractual Fees – Fee Provision In 2010 Agreement Is Not Incorporated Into Parties' Prior 2001 Agreement In Absence Of A Clear Expression Of Such An Intent.

R.W.L. Enterprises v. Oldcastle, Inc. (2017) 17 Cal.App.5th 1019 – In *Oldcastle,* the Plaintiff dealer sued the Defendant masonry manufacturer for allegedly breaching a 2001 dealer agreement by distributing its products through other dealers. The trial court granted summary judgment in favor of Defendant, and awarded attorney's fees under a 2010 credit application signed by Plaintiff. The trial court held that the 2010 application and the 2001 distributor agreement could be construed together "as part of substantially one transaction" pursuant to Civil Code § 1642, such that the attorney's fee provision in the 2010 application was incorporated into the 2001 agreement. The Court of Appeal reversed, holding that agreements could not be deemed to incorporate each other's terms under § 1642 unless they clearly and unequivocally expressed that intent. Here, the 2010 application stated that its terms would become part of the parties' "purchase order contract." However, the 2001 agreement was not a purchase order contract; rather, it was essentially a marketing program that had little or nothing to do with specific sales or purchases of Defendant's products. The Court distinguished the case of *Boyd v. Oscar Fisher Co.* (1989) 210 Cal.App.3d 368, because the dealer agreement in that case expressly "required the dealer to 'pay invoices on terms established by [the] manufacturer.'" Thus, unlike the case here, the dealer agreement in *Boyd* clearly and unequivocally indicated an intent to incorporate the terms of future invoices into the parties' original agreement. Finally, the 2010 agreement contained an integration clause, which, when considered with the nine years

separating the execution of the two agreements, weighed "heavily against a finding that the parties intended to add terms to their prior agreement."

39. Contractual Fees – Prevailing Party Status – Defendant Is Not Necessarily Entitled To Fee Award After Dismissal For Forum Non Conveniens.

DisputeSuite.com, LLC v. Scoreinc.com (2017) 2 Cal.5th 968 – In *Scoreinc.com*, the Defendant moved to dismiss the Plaintiff's claims based on forum non conveniens, citing Florida forum selection clauses in the two agreements from which the action arose. The trial court granted the motion, and dismissed the case once the Plaintiff refiled in Florida. The Defendant then moved for contractual attorney's fees for enforcing the forum selection clause. The trial court determined that the Defendant was not yet a prevailing party, since the action was still underway in Florida. The Court of Appeal and the Supreme Court both affirmed. The Court noted that § 1717 requires the trial court to compare the relief awarded on the contract claim with the parties' demands and litigation objectives in order to determine which party is the prevailing party. Because the contract claims were still being litigated in Florida, the trial court could reasonably decide that neither party was yet the prevailing party. The Court further held that a mere interim or procedural victory, which allows the Plaintiff to continue litigating, or to refile at another time or in another court, does not make the Defendant the prevailing party as a matter of law. Instead, the trial court has discretion in such instances to consider the refiling of the litigation in another forum, and determine that the Defendant is not yet the prevailing party. The Court distinguished and disapproved of the reasoning in certain cases where fees were awarded following interim procedural victories, noting that, in those cases, it was uncertain whether or not the litigation would be refiled when the fees were awarded. The Court did not explicitly disapprove of the results in those cases, since they did not involve the same circumstances that were at issue in the case before it.

40. Statutory Fees – Davis-Sterling Act – Provision Allowing Defendants To Recover "Any Costs" In Frivolous Action Does Not Include Attorney's Fees.

Retzloff v. Moulton Parkway Residents' Assn. (2017) 14 Cal.App.5th 742 [**Moore**, O'Leary, Fybel] – The Plaintiffs sued the Defendant homeowners association for violations of the Davis-Sterling Act, but the action was dismissed with prejudice after the Plaintiffs twice failed to provide the required proof of attempts to resolve the dispute through ADR. The trial court awarded the Defendants its costs and attorney fees under Civil Code § 5235(c), which permits a prevailing homeowners association to recover "any costs if the court finds the action to be frivolous." The Court of Appeal affirmed the finding that the action was frivolous, because of the Plaintiffs' failure to provide a certificate of efforts to resolve the dispute informally. Nevertheless, the Court of Appeal reversed the award for attorney fees, holding that the statute

only expressly permits costs to be recovered. The Court of Appeal noted that several other sections of the Davis-Sterling Act expressly permit awarding attorney fees to prevailing parties, but the Legislature did not include attorney fees in § 5235(c). The Court reasoned that it could not "rewrite the statute to conform to an assumed intention that does not appear in its language."

41. Statutory Fees – FEHA – Restriction Of Defense Fee Awards To Frivolous Claims Applies To Individual Defendants As Well As Employers.

Lopez v. Routt **(2017) 17 Cal.App.5th 1006** – It is well established that California's Fair Employment and Housing Act ("FEHA") provides for attorney's fee awards to prevailing plaintiffs as a matter of course, but allows a discretionary award of attorney's fees to a prevailing defendant only upon a showing that the plaintiff's claims were frivolous. In *Lopez*, the prevailing Defendant was an individual coworker, who argued that this restriction applies only to employers, and that policy reasons required individual coworkers to be treated on par with individual plaintiffs. The Court of Appeal rejected that argument, holding that the Legislature specifically amended FEHA to allow harassment claims against individual coworkers, in response to *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, which held that non-supervisory coworkers could not be held liable for FEHA violations. This amendment indicated the Legislature's intent that the same policy considerations encouraging FEHA claims against employers apply to harassment claims against individual coworkers. Accordingly, the same restriction on fee awards in favor of employer defendants applies to individual defendants as well.

42. Statutory Fees – Public Records Act – Plaintiff Who Obtains Documents In Deposition Entitled To Attorney's Fees Despite Denial Of CPRA Petition.

Sukumar v. City of San Diego (2017) 14 Cal.App.5th 451 – The Plaintiff filed a petition for writ of mandate pursuant to the California Public Records Act ("CPRA") to force the City of San Diego to produce documents regarding the City code enforcement office's investigation of the Plaintiff's residence. After the City's attorney stated in court that all of the documents had been produced, more responsive documents – specifically, five photographs, a key e-mail, and 143 pages of other e-mails – were later produced at a court-ordered deposition of the City's person most knowledgeable. Thereafter, the trial court denied the writ because all of the documents had been produced, and denied the Plaintiff's request for attorney's fees because it found that the lawsuit had not motivated the City to produce the additional documents. The Court of Appeal reversed as to the attorney's fees, holding that the trial court's finding was not supported by substantial evidence. Under the undisputed facts of the case, the City claimed at the outset of the lawsuit that all documents had been produced, yet additional documents were then produced at the deposition sought by the Plaintiff. Under those facts, the Plaintiff was the prevailing party

entitled to attorney's fees, even though there was no judgment in his favor, and no bad faith by the City.

ATTORNEY PRACTICE

43. Attorney-Client Privilege – Fee Totals From Concluded Matters May Be Discoverable Under The Public Records Act.

County of Los Angeles v. Superior Court (2017) 12 Cal.App.5th 1264 – In *County of LA*, the trial court compelled disclosure of invoices from the Petitioner County's outside counsel, pursuant to the California Public Records Act (the "CPRA"). The Petitioner sought a writ of mandate that was initially granted, but was subsequently reversed and remanded for further proceedings by the Supreme Court in *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282. The Supreme Court held that there is no categorical bar to CPRA 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 contain attorney-client privileged information. On remand, the Court of Appeal applied the Supreme Court's reasoning to find that: (1) the trial court erred by ordering disclosure of invoices related to pending or ongoing litigation, which necessarily tend to reveal attorney-client privileged information, (2) the matter must be remanded for a hearing by the trial court to determine whether or not fee totals from the County's concluded matters must be disclosed or would impermissibly disclose privileged information regarding the legal representation, such as strategy, and (3) even as to the concluded matters, time entries describing the amount and nature of work performed remain protected by the attorney-client privilege.

44. Attorney Work Product Privilege – Law Firm, Not Individual Attorney, Is Holder Of Work Product Privilege For Work Produced By A "Non-Capital Partner."

Tucker Ellis LLP v. Superior Court (2017) 12 Cal.App.5th 1233 – In *Tucker Ellis*, the Plaintiff, a former "non-capital partner" at Defendant Tucker Ellis LLP, sued the firm for disclosing his work product in discovery responses without asserting the attorney work product privilege. The trial court granted a summary adjudication, finding that the Defendant owed Plaintiff a duty to take appropriate steps to protect Plaintiff's work product. The Court of Appeal granted a writ of mandate reversing the summary adjudication. The Court noted that the purpose of the privilege is to encourage attorneys to communicate openly with their clients, by eliminating the fear that the results of their efforts will be communicated to those outside the attorney-client relationship. Here, the e-mails in question were created for the purposes of assisting in litigation for one of the Defendant's clients, and were exchanged in the course of the Plaintiff's duties as an employee of the Defendant. Accordingly, the court held that the firm, and not the individual employee, was the "attorney" who possessed the attorney work product privilege. The court went on to explain

that a contrary rule would create anomalous results and interfere with the very purpose of the privilege, where documents are prepared by multiple employees. In such a situation, if the privilege were held by the individual attorneys, the firm would be required to obtain permission from, and resolve conflicts between, multiple employees or former employees in order to comply with requests for disclosure. By refusing to allow such a result, the Court explained that it was avoiding "undue intrusion" into the firm's sacrosanct duty of loyalty to its client.

45. Disqualification – Attorney May Be Disqualified For Use Of Privileged E-mail Inadvertently Disclosed By Client Outside Of Litigation.

McDermott Will & Emery LLP v. Superior Court (2017) 10 Cal.App.5th 1083 [**Aronson**, O'Leary, Thompson (Dissent)] – In this case, Petitioner Gibson Dunn & Crutcher was disqualified for improperly retaining and using an attorney-client privileged communication, under the rule set forth in *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 ("*State Fund*"), which requires attorneys to: (a) notify opposing counsel about inadvertently disclosed materials that appear to be privileged, and (b) refrain from using them until the privilege issue is resolved. What sets this case apart from typical cases under *State Fund* are the facts that: (1) in this case it was the client, not the attorney, who inadvertently disclosed the privileged e-mail, (2) the e-mail was inadvertently disclosed months before any litigation commenced, and (3) while the initial disclosure was inadvertent, there were multiple intentional disclosures following the initial inadvertent disclosure. Specifically, the Plaintiff initially forwarded the e-mail to his sister-in-law, who then shared the e-mail with her husband, who then shared the e-mail with four others, including one of the Defendants. When the document was later produced and referred to in the Defendant's deposition, Plaintiff's attorney objected and demanded the return of the document. The Petitioners refused to return the document, and continued using it in several subsequent depositions. The trial court first held that the document retained its privilege, despite its inadvertent production, and then disqualified Petitioners from continuing to represent the Defendants. The Court of Appeal affirmed. The Court first ruled that: (1) the client's disclosure of the e-mail to his sister-in-law did not waive the privilege, because it was inadvertent, and (2) the subsequent disclosures could not affect the privilege, since neither the sister-in-law nor her husband were the holders of the privilege. The Court then held that the *State Fund* rule is not limited to inadvertent disclosures by attorneys that occur in discovery, but applies equally to disclosures by clients, and disclosures that take place outside of litigation. The Court then held that substantial evidence supported the conclusions that: (1) Petitioners should have known that the *State Fund* rule applied once the objection was made at the Defendant's deposition, and (2) disqualification was necessary to protect the Plaintiff from future prejudice arising from Petitioners' exploitation of the e-mail's contents.

46. Disqualification – Closely Held Company's Former Attorney May Represent Insiders In Defense Against A Derivative Suit.

Beachcomber Management Crystal Cove, LLC v. Superior Court (2017) 13 Cal.App.5th 1105 [**Aronson**, O'Leary, Fybel] – In *Beachcomber Management Crystal Cove*, the trial court disqualified an LLC's former attorney from representing the LLC's managers in a derivative suit brought in the LLC's name. Ordinarily, successive representation rules prohibit a client's former attorney from representing an adversary in litigation that is substantially related to the attorney's prior representation of the former client, based on the notion that the attorney may use confidential information learned during the course of the representation against the former client. In the context of derivative suits, this usually means that a company's former attorney may not represent insiders against derivative claims brought on the company's behalf. Prior cases have established an exception in the context of closely held corporations, however, where the insiders have access to the same confidential information as the attorney. In *Beachcomber Management Crystal Cove*, the Court of Appeal applied this exception to overturn the trial court's disqualification, despite evidence that: (a) the company used outside accountants to prepare their financial records, and (b) the Defendant managers delegated certain tasks. The Court explained that this evidence did not establish that the Defendants did not have access to the same confidential information as the attorney, and thus the rationale for applying the ordinary successive representation rules did not apply.

47. Disqualification – Successive Representation – A "Potential" Attorney-Client Relationship Does Not Justify Disqualification.

Lynn v. George (2017) 15 Cal.App.5th 630 [**Fybel**, O'Leary, Bedsworth] – In *Lynn*, the Plaintiffs alleged that they formed a partnership with the Defendants to flip real estate, and sued for damages arising from that partnership. The Defendants claimed that Plaintiffs were simply retained as real estate brokers, and no partnership existed at all. The Plaintiffs moved to disqualify the Defendants' longstanding attorney on the grounds that the attorney previously represented the Plaintiffs regarding the alleged partnership. The trial court did not decide whether or not the alleged partnership existed, and held that the only legal advice given to Plaintiffs was given in their capacity as brokers for Defendants. Nevertheless, the trial court granted the motion, reasoning that, to the extent the partnership existed, the attorney's services "presumably" would have included representation of the partnership. The Court of Appeal reversed. Because of the trial court's refusal to find that the partnership even existed, the "potential attorney-client relationship" with the alleged partnership was insufficient grounds for depriving the Defendants with their choice of counsel for the action. Even if the Court of Appeal found that the partnership existed, the representation of the partnership would not necessarily require disqualification, absent a further finding that the attorneys represented the individual partners themselves. The Court of Appeal declined to imply such a finding, because it would

have been inconsistent with the express finding that the attorney's only advice to Plaintiffs was given in their capacity as Defendants' brokers.

48. Fee Disputes – Attorney's $114,000 Fee Lawsuit Dismissed Where Engagement Agreement Was Unsigned And Voidable, And Quantum Meruit Claim Was Time-Barred.

Leighton v. Forster (2017) 8 Cal.App.5th 467 – The Plaintiff attorney sued the Defendant former client for breach of contract and account stated for more than $114,000 in past due fees. The lawsuit was filed more than three years after the Plaintiff stopped doing work for the Defendant, the engagement agreement was never signed by the Defendant, and the previous partial payments were paid by the Defendant's deceased husband. The contract was e-mailed to the Defendant's husband, but the Plaintiff expressly told the husband that it need not be signed. The Defendant successfully moved for summary judgment, and the Court of Appeal affirmed, holding that an unsigned attorney fee contract is voidable by the client as a matter of law (Bus. & Prof. Code, § 6148(a)). The court noted that Business and Professions Code § 6148 permits an attorney to recover reasonable fees in quantum meruit where the fee agreement does not comply with the statute; however, the recovery is then limited to the two-year statute of limitations for an obligation not founded in writing (CCP § 339). Because the claim was brought more than three years after the Plaintiff stopped working for the Defendant, quantum meruit recovery was time barred. The Court also held that the four year statute of limitations for an account stated (CCP § 337(2)) only applies if the account is based on a written agreement to pay, and thus the account stated claim was also barred by the two year statute for an obligation not founded in writing.

49. Malpractice – Comparative Fault Instruction Proper Where Circumstances Indicate That Client's Action Contributed To Malpractice Damages.

Yale v. Bowne (2017) 9 Cal.App.5th 649 – In *Yale*, the Plaintiff sued the Defendant attorney for legal malpractice, where the Defendant's advice inadvertently transmuted the Plaintiff's separate property into community property. Upon the divorce of the Plaintiff and her husband, the Plaintiff settled the divorce for $260,000 in order to avoid having to pay a higher amount due to the Defendant's error. The jury found the Defendant 90% at fault and the Plaintiff 10% at fault. The Court of Appeal affirmed the comparative fault instruction, because, under the facts and circumstances of this case, it was appropriate. Notably, the Plaintiff had previously made a similar error in her previous divorce, which resulted in her ex-husband being awarded half of her estate due to the failure to maintain separate property. Accordingly, she had knowledge of the implications of community property, and was arguably negligent in failing to raise the issue with her counsel.

CIVIL PROCEDURE

50. Choice Of Law – Contractual Choice Of Law Partially Disregarded Where Chosen State's Law Would Enforce Pre-Dispute Jury Trial Waiver.

Rincon EV Realty LLC v. CP III Rincon Towers, Inc. (2017) 8 Cal.App.5th 1 – California law does not allow pre-dispute waivers of the right to trial by jury (outside of arbitration agreements), while New York law does. In *Rincon EV Realty*, the parties' agreement specified that New York law would govern, and that the parties waived any right to a jury trial in actions arising from or in connection with the agreement. The trial court granted the Defendants' motion to strike the Plaintiffs' jury demand, concluding that: (a) the choice-of-law clause was enforceable, because New York had a greater interest in the action, and (b) New York law permitted the pre-dispute jury waiver. The Court of Appeal reversed, holding that an otherwise valid choice of law provision is unenforceable if it is contrary to a fundamental policy of California, and California has a materially greater interest than the selected state in determining the particular issue at stake. Here, the California constitution specifically restricts the manner of waiving jury trials to those specified by the legislature. Based on that provision, and the Supreme Court's decision in *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, the Court of Appeal held that California has a fundamental policy that only the legislature may authorize pre-dispute jury waivers, which it has not done. The Court went on to hold that California's interest in determining how proceedings are conducted in its own courts are materially greater than New York's interest in protecting the expectations of parties who enter into contracts in that state, particularly since: (a) New York law would still apply to the substantive issues in the case, and (b) California's jury protections would not travel with the case if venue was moved to New York.

51. Complex Litigation – Due Process Requires Advanced Notice Before A *Cottle* Hearing To Determine Whether Plaintiff Can Establish A Prima Facie Case Prior To Trial.

Department of Forestry & Fire Protection v. Howell (2017) 18 Cal.App.5th 154 – In complex litigation, the trial court has discretion to initiate and conduct a so-called "*Cottle* Hearing" to determine whether a plaintiff can establish a prima facie case prior to trial. (*Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367.) In *Howell*, the Court of Appeal reversed a trial court's judgment of dismissal entered after such a hearing that was conducted over the course of three days, with only two days' notice that the hearing would be conducted, and no advance notice of the issues that would be challenged at the hearing. The Court of Appeal found this procedure deprived the Plaintiffs of procedural due process guaranteed by the federal and state Constitutions. While the court affirmed a trial court's "inherent equity, supervisory and administrative powers," and did not overturn the trial court's discretion to conduct *Cottle*

Hearings, it held that such hearings needed to be adequately noticed in advance with identification of the specific issues for which a prima facie showing was required. Specifically, the Court applied a balancing test set forth in *Matthews v. Eldridge* (1976) 424 U.S. 319, which requires consideration of (1) the private interested affected, (2) the risk of an erroneous deprivation of such interest through the procedures used, (3) the probable value of additional or substitute procedural safeguards, and (4) the Government's interest, including the fiscal and administrative burdens that additional safeguards would entail. The first factor was established since due process requires notice before a dismissal of a case is entered; otherwise, a party's right of access to the courts would be infringed. Second, the risk of erroneous deprivation was high given the lack of adequate advance notice of the issues the Plaintiffs would be asked to address at the pretrial hearing, unlike the original *Cottle* case, where "weeks or months" were provided to counsel to collect information and present a prima facie case on "select and enumerated issue[s]." Third, the value of advance notice was obvious in that it could have provided a meaningful opportunity to avoid dismissal of Plaintiffs' entire case. Fourth and finally, the only governmental interest impacted by requiring advance notice of the issues to be presented are the fiscal and administrative burdens of conducting trial as scheduled. However, this burden was slight, as the trial court could have avoided these consequences by merely identifying the issues for which it required a prima facie presentation "immediately following its review of the trial briefs," or two full weeks before trial was to commence. The Court of Appeal, finding all factors on balance favored the added advanced notice requirement, reversed the dismissal premised on the trial court's *Cottle* hearing.

52. Default Judgments – Default Cannot Be Entered Against Defendant Who Dies After Being Served, And Should Not Have Been Entered Based On Facially Meritless Complaint.

Grappo v. McMills (2017) 11 Cal.App.5th 996 – In an obviously meritless lawsuit, the Plaintiff sued the Defendant attorney and his law firm for money allegedly owed to a trust. The complaint did not allege the identity or relationships of any of the parties, including Plaintiff himself, and the Plaintiff clearly lacked standing, as the claims were based on alleged harm to a trust, rather than Plaintiff himself. In addition, none of the supposed claims were properly pleaded, and none stated a valid cause of action. The Defendants did not respond to the lawsuit, and the Plaintiff requested a default for over $9 million—an amount that was not alleged anywhere in the complaint. That request was denied. The Defendant attorney died, and the Plaintiff then filed a second request for default—this time for over $12 million. The application stated that no Defendant was given notice, because the Defendant attorney was deceased. Without holding a default prove-up hearing, the trial court granted a default judgment in the amount of $60,000. After the trustee of the Defendant attorney's estate became aware of the judgment, the trial court granted the Trustee's motion to vacate the default judgment. The Court of Appeal affirmed, holding that when a party dies during the pendency of an action, a judgment against him or her is void, or at least voidable. To obtain a valid judgment, the executor or

administrator for the party's estate must be substituted into the action. The Court also held that the underlying default judgment was improper and subject to reversal, because the complaint disclosed the Plaintiff's lack of standing on its face, and did not state any valid claim against the Defendant. Moreover, the $60,000 awarded did not bear any relation to the damages alleged in the complaint. Accordingly, the Court of Appeal stated that it published this decision to remind trial courts of their role to act as "gatekeeper" in default proceedings, in order to ensure that default judgments are not entered based on meritless complaints.

53. Demurrers – Demurrer Based On Statute Of Frauds Is Improper Where Extrinsic Evidence May Defeat The Defense.

Jacobs v. Locatelli (2017) 8 Cal.App.5th 317 – In *Jacobs*, the Plaintiff, a real estate broker, sued the Defendants for breach of contract for failure to pay a $200,000 commission for the sale of property. The Defendants demurred, arguing that only one of the Defendants, Locatelli, signed the contract authorizing the commission, so the Statute of Frauds bars the action. The Plaintiff argued that "owner" was defined as "Locatelli ... et al.," so it was ambiguous as to which signatures were necessary, and that Locatelli told the Plaintiff that he had the authority to sign for the others. The trial court sustained a demurrer as to all Defendants except Locatelli without providing any analysis. The Court of Appeal reversed, holding that the Statute of Frauds does not apply where the party seeking to enforce it acted fraudulently, and the Plaintiff may be able to discover evidence that the Defendants had a written agency agreement authorizing Locatelli to sign on their behalf. Therefore, the trial court should have allowed the case to proceed to allow the Plaintiff to conduct discovery regarding extrinsic evidence proving that the Statute of Frauds should not apply. Moreover, the Court of Appeal held that the parol evidence rule would not bar admission of a written agency agreement, because the definition of "owner" was ambiguous.

54. Five Year Rule – Five Year Rule Is Satisfied When Prospective Jury Panel Is Given Oath Of Truthfulness Before Voir Dire.

Stueve v. Buchalter Nemer (2017) 7 Cal.App.5th 746 [**Moore**, Ikola, Thompson] – Three days before expiration of the five-year time limit for bringing an action to trial (CCP § 583.310), a panel of prospective jurors was assembled in the court and sworn in by the court clerk. The court recessed for seven days, and the Defendant filed a motion to dismiss, arguing that the action was not "brought to trial" within five years, because the actual jury had not been selected and sworn to try the case. The trial court granted the motion, concluding that the action is brought to trial when the jury is "impaneled and sworn," and that occurs when the jurors are selected and sworn to the case. The Court of Appeal reversed, noting that the jury is "impaneled" when a panel of prospective jurors is assembled in a courtroom, and is actually sworn twice, once when the court administers the initial oath of truthfulness prior to voir dire, and once when the trial jurors swear to try the case. The Court held that: (a) voir dire is part of trial, and (b) the fact that a second oath is taken after jury selection does not detract from the fact that jury was impaneled and sworn when the first oath was taken.

55. Law And Motion – Incorporation By Reference – Trial Court Erred By Failing To Consider Prior Declarations Incorporated By Reference In Fee Motion.

Roth v. Plikaytis (2017) 15 Cal.App.5th 283 – In *Roth*, the Defendant sought fees under Civil Code § 1717 after prevailing on her breach of contract cross-claim at trial. As part of her motion for attorneys' fees, the Defendant incorporated by reference declarations and other documents she had filed with a previous motion for attorneys' fees that was denied without prejudice. The trial court awarded fees, but refused to consider the previously filed declarations and other documents as support for the amount of fees requested by the Defendant. The Court of Appeal reversed, holding that the trial court erred when it declined to consider the previously filed documents, because Rule of Court 3.1110(d) expressly allows incorporation by reference of such documents, so long as they are "referred to by date of execution and title." By incorporating the original declarations and other documents by reference from the first fee motion, and providing courtesy copies of those documents, the Defendant did enough to put them before the court. At a minimum, if the trial court felt that the Defendant's efforts were insufficient to rely on incorporation by reference, it could have permitted her to refile the documents.

56. Personal Jurisdiction – California's "Sliding Scale" Approach To Specific Jurisdiction Is Unconstitutional.

Bristol-Myers Squibb Co. v. Superior Court (2017) __ U.S. __, 137 S.Ct. 1773 – 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. The Defendant was incorporated in Delaware and headquartered in New York, with substantial operations in New York and New Jersey. The Defendant engaged in business activities in California and sold Plavix there, but did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for the drug in California. The United States Supreme Court reversed, holding that a defendant's general connections with the forum are not enough to establish specific jurisdiction, which requires a connection between the forum and the specific claims at issue. The United States Supreme Court rejected the use of the "sliding scale approach," which resembled a loose and spurious form of general jurisdiction. The Fourteenth Amendment limited a state court's personal jurisdiction such that a suit had to arise out of, or relate to the defendant's contacts with the forum. There was no adequate link between California and the nonresident Plaintiffs' claims, because they were not prescribed the drug in California, they did not purchase or ingest the drug in California, and they were not injured by the drug in

California. The fact that others were prescribed, obtained, and ingested the drug in California did not warrant specific jurisdiction over the nonresidents' claims. It was also irrelevant that the Defendant conducted research in California on matters unrelated to the drug. As such, the state court's exercise of specific jurisdiction over the nonresidents' claims violated the Fourteenth Amendment.

57. Relief From Default – Mandatory Relief Based On Attorney Declaration Of Fault Is Available Only From A Default, Default Judgment, Or Dismissal, Not Any "Analogous" Situations.

The Urban Wildlands Group, Inc. v. City of Los Angeles (2017) 10 Cal.App.5th 993 – In *Urban Wildlands*, the Petitioner in a proceeding for a writ of mandate failed to lodge the administrative record after its attorney hired a new legal assistant, who mistakenly believed the certification of the record meant that it had already been lodged with the court. At the hearing on the merits, the trial court denied the petition based on the lack of an adequate administrative record. The trial court then granted a motion for mandatory relief under CCP § 473(b), based on the attorney's mistake. The Court of Appeal examined two lines of cases, one of which holds that mandatory relief based on an attorney's mistake or neglect is available only from the three situations expressly mentioned in the statute--defaults, default judgments, and dismissals (*see, e.g., English v. IKON Business Solutions, Inc.* (2001) 94 Cal.App.4th 130, 147), and one which holds that mandatory relief may be had from other "analogous" situations as well (*Avila v. Chua* (1997) 57 Cal.App.4th 860, 866). The Court of Appeal disapproved of the second line of cases (which had originated in the same court), because those cases expanded the scope of the statute beyond its express language. The Court noted that its role is to determine what the legislature meant by the words it used, and that it may not extend the statute to situations "analogous" to those the statute explicitly addresses. Because a hearing on the merits took place, the judgment was not a default, default judgment, or dismissal, and the case did not present the circumstances expressly addressed in the mandatory relief provision of § 473, and mandatory relief from the attorney's mistake was not available.

58. Statement Of Decision – Failure To Issue A Requested Statement Of Decision Is Reviewed For Prejudicial Error.

F.P. v. Monier (2017) 3 Cal.5th 1099 – In *Monier*, the Supreme Court affirmed a trial court's judgment rendered after a bench trial, which found the Defendant had sexually molested the Plaintiff and owed $305,096 in damages. The Defendant had requested a written statement of decision, per CCP § 632, setting forth "the basis upon which" the court awarded various damages and lost wages, but the trial court failed to provide one. The Court of Appeal rejected the Defendant's theory that failing to issue a statement of decision was reversible per se, because Article VI, § 13, of the California Constitution precludes reversal absent a showing of "a miscarriage of justice." Given that the Defendant never raised the issue of apportionment of damages at trial, the absence of a statement of decision on that issue was of no consequence, and

the Court found no miscarriage of justice occurred in the trial court's failure to apportion general damages. In agreeing with the lower courts, the Supreme Court found the Legislature actually deleted prior language from § 632 that "the action must again be tried" if a requested statement of decision was not filed in time. Considering both the Constitutional provision, and the legislative history of § 632, no per se right to reversal exists absent some prejudicial error.

59. Statutes Of Limitations – Creditor's Equitable Subrogation Claim Is Subject To The Same Statute Of Limitations Applicable To The Underlying Right Subject To Subrogation.

Bank of New York Mellon v. Citibank, N.A. (2017) 8 Cal.App.5th 935 – In January of 2006, homeowners refinanced a home equity line of credit with the Defendant bank, who was the original lender. Two weeks later, the homeowners refinanced the same line of credit with a second lender, the Plaintiff bank. The Plaintiff deposited the payoff amount into escrow, along with instructions from the homeowners to terminate the original account. The escrow holder attempted to pay off and close the original line of credit, but was informed by the Defendant that that account had already been refinanced and closed. The escrow holder then used the funds to pay off the new line of credit with the Defendant, but the new account was then left open, since the homeowners had only signed instructions to close the original line of credit. In 2007, the homeowners then borrowed additional amounts from the new account with the Defendant, and in 2011, the Defendant began the foreclosure process. The Plaintiff sued for declaratory relief to establish the priority of its trust deed, which was recorded about two weeks after the Defendant's trust deed for the second line of credit. The trial court held that the action was time-barred by the three-year statute of limitations for violation of duty imposed by statute, and for fraud or mistake. (Code Civ. Proc., §§ 338(a), (d).) The Court of Appeal reversed. While the Court noted that a fraud-based claim would be barred, because the Plaintiff's escrow agent discovered facts in 2006 that should have put the Plaintiff on notice of the fraud, the Court held that the Plaintiff's claims actually sounded in equitable subrogation. Such a claim allows the subrogee (i.e. the Plaintiff) to assert the remedies available to a creditor (i.e. the Defendant), when the subrogee pays a debtor's obligations to protect the subrogee's own interests. Under this doctrine, the Plaintiff would have an equitable right to enforce the Defendant's trust deed, as if it were its own. The Court noted that both declaratory relief and equitable subrogation claims are derivative, and subject to the same statute of limitations applicable to the underlying right or remedy being enforced—here, the Defendant's trust deed for the second line of credit. Since the time to enforce that deed had not yet lapsed, the Plaintiff's equitable subrogation claim was not time barred.

60. Statutes Of Repose – Statute Of Repose For Fraudulent Transfer (Civ. Code § 3439.09(c)) Is Not Waived By Failure To Raise The Issue At Trial.

PGA West Residential Association, Inc. v. Hulven International, Inc. (2017) 14 Cal.App.5th 156 – The Plaintiff creditor sued the Defendants, a debtor and an entity he created, for conveying a deed of trust to the debtor's condominium to the entity, in order to shield that asset from the Plaintiff. The Defendants demurred, arguing that the action was filed after expiration of the seven-year limitation period specified in Civil Code § 3439.09(c), which is part of the Uniform Fraudulent Transfer Act ("UFTA"). The trial court overruled the demurrer, concluding that the deed of trust was not a "transfer," and found against the Defendants in a bench trial. On appeal, the Plaintiff argued that even if the initial ruling on the demurrer was incorrect, the Defendants waived the limitation period by not asserting it at trial. The Court of Appeal reversed, holding that: (a) the conveyance of the deed of trust was a transfer that commenced the period of limitations, and (b) the seven-year limitation period in § 3439.09(c) is a statute of repose, which completely extinguished the Plaintiff's rights, as opposed to a statute of limitations, which merely nullifies a Plaintiff's remedy. The Court noted that courts in some jurisdictions have held that a statute of repose is subject to waiver and tolling like a statute of limitations. Nevertheless, the Court adopted the contrary rule followed in a majority of jurisdictions, which holds that a statute of limitations may be waived or forfeited because it is merely a procedural provision, while a statute of repose may not be waived or forfeited, because it is a substantive provision, which "expressly qualifies the right which the statute creates." Accordingly, the Defendants did not waive the limitation period by failing to assert it at trial, and judgment was reversed.

61. Summons – Three Year Deadline For Service – Bankruptcy Filing By One Defendant Does Not Toll Time To Serve Summons On Unknown Doe Defendant.

Higgins v. Superior Court (2017) 15 Cal.App.5th 973 – In *Higgins*, the Plaintiff filed the underlying action in May of 2012. Due to a bankruptcy stay filed by the original named defendant, it was not until August of 2016 that the Plaintiff amended his complaint to identify a Doe Defendant, and served the Doe Defendant with summons. The Doe Defendant filed a motion to dismiss the Plaintiff's claims under CCP § 583.210(a), which requires summons to be served within three years after a complaint is filed against a defendant, and § 583.250, which states that an action "shall be dismissed" if service is not made within that limit. The dismissal under § 583.250 is mandatory and not subject to any non-statutory exceptions. The trial court denied the motion, finding that the automatic stay imposed due to the original named defendant's bankruptcy prevented prosecution of the action against the Doe Defendant, who was not involved in the bankruptcy. The Court of Appeal reversed, holding that: (a) the automatic stay applied only to claims against the named defendant who filed the bankruptcy, and not against any other defendants not involved in the bankruptcy, and (b) the Plaintiff's professed inability to

identify the Doe Defendant due to a lack of discovery from the named defendant is not a sufficient excuse for failing to comply with the statute.

62. Venue – Venue In Actions To Recover A Statutory Penalty Is Proper In The County In Which The Action Arose, Even If Injunctive Relief Is Also Sought.

Dow AgroSciences LLC v. Superior Court (2017) 16 Cal.App.5th 1067 – *Dow AgroSciences* involves the proper venue for failure to warn claims under Proposition 65. The Plaintiff sued for statutory penalties and injunctive relief based on the out-of-state Defendant's failure to warn individuals in Kern County regarding a soil fumigant known to cause cancer. Because the suit was filed in Alameda County, the Defendant filed a motion to transfer the case to Kern County pursuant to CCP § 393(a), which provides that the proper court for an action to recover a statutory penalty or forfeiture is the superior court in the county where the cause of action arose. The trial court denied the motion, finding that injunctive relief was the "main relief" sought, and was not a penalty or forfeiture, and thus the general venue statute, CCP § 395(a) applied. Under that statute, venue is proper in any county if the defendant is a nonresident with no principal place of business in California. The Court of Appeal granted the Defendant's petition for writ of mandate and reversed, holding that because § 393(a) requires a different venue than the defendant's residence, it supplants the general residence-based venue rule codified in § 395(a). The Court held that the "main relief" rule cited by the trial court and a related "local or transitory" relief analysis both apply only to venue questions in actions seeking relief relating to both personal rights and real property rights. Because the only rights asserted in this case were statutory, and a penalty was sought, the Court held that § 393(a) applies regardless of whether or not an injunction is also sought, and regardless of whether or not an injunction can be classified as a statutory penalty or forfeiture.

63. Venue – Forum Non Conveniens – A Foreign Litigant's Decision To Sue In California Is Not Entitled To A Presumption Of Convenience.

Fox Factory, Inc. v. Superior Court (2017) 11 Cal.App.5th 197 – In *Fox,* a Canadian Plaintiff sued Defendant bike manufacturer for products liability related claims arising from a bicycling accident that took place in Canada. The trial court denied the Defendant's motion to dismiss or stay the action pursuant to the forum non conveniens doctrine, holding that the Defendant was required to show that California was a "seriously inconvenient forum," and failed to meet that burden. The Court of Appeal reversed, noting that this heightened standard of decision was set forth in *Ford Motor Co. v Insurance Co. of North America* (1995) 35 Cal.App.4th 604, which dealt with a California plaintiff's decision to bring suit within the state. A California plaintiff's decision to file suit in California is entitled to a strong presumption of convenience. In the case at hand, however, the Plaintiff was a Canadian citizen that resided in British Columbia, and, as the California Supreme Court explained in *Stangvik v. Shiley Inc.* (1991) 54 Cal.3d 744, the forum choice of a foreign plaintiff is not entitled to a presumption of convenience. Accordingly,

the Court granted writ relief and directed the trial court to set aside its order denying the Defendant's motion to dismiss or stay under CCP § 410.30, and to rehear the motion without providing the Plaintiff with a presumption that the forum is convenient.

64. Venue – Forum Selection Clause – Court May Enforce Forum Selection Clause Invoked In Demurrer (But Such A Clause Should Be Invoked In A Separate Motion Under CCP § 410.30(a)).

Laboratory Specialists Internat., Inc. v. Shimadzu Scientific Instruments, Inc. (2017) 17 Cal.App.5th 755 [**Aronson**, O'Leary, Ikola] – In *Shimadzu*, the Plaintiff sued the Defendant for breach of contract and related claims. The Defendant demurred and included in the demurrer an objection based on a forum selection clause, which designated Maryland as the correct forum for all of the Plaintiff's claims. The Plaintiff appealed, arguing that under *Miller-Leigh LLC v. Henson* (2007) 152 Cal.App.4th 1143, the forum selection clause could not be invoked in a demurrer, and was waived by the failure to file a separate motion under CCP § 410.30(a) at or before the time the demurrer was filed. The Court of Appeal affirmed, explaining that the court in *Miller-Leigh* actually held that it was error for a trial court to grant a demurrer for lack of subject matter jurisdiction based on a forum selection clause, because such a clause is a matter of proper forum, rather than subject matter jurisdiction. The Court also held that under CCP § 410.30(a), the trial court is authorized to consider the forum selection issue on the merits on its own motion. Here, the trial court did exactly that, and thus its ruling was proper even though the procedure employed by the Defendant was not.

CLASS ACTIONS

65. Class Certification – Defendant Is Not Required To Create New Computer Programs To Identify Prospective Class Members.

Kendall v. Scripps Health (2017) 16 Cal.App.5th 553 – The Plaintiff sued the Defendant hospital under the Unfair Competition Law, Consumer Legal Remedies Act, and for declaratory relief, on the grounds that the Defendant improperly charged self-paying patients excessive amounts based on published "Charge Master" rates, which were greater than the amounts collected from governmental or private insurance companies. The Plaintiff moved to certify the class. The trial court denied the motion, and the Court of Appeal affirmed, concluding that: (a) the individual issues of law and fact prevailed over common issues with regard to the reasonableness of the amount charged for the treatment received by each self-paying patient, and (b) the class was not readily ascertainable, because the Defendant's existing computer system was not configured to create a list of self-pay patients who were charged Charge Master rates, nor was there any automated way to distinguish patients who paid those rates from those whose bills were subject to discounting or payment in full by insurers, governmental benefits providers, or charity. The Court held that the Defendant was not required to hire database experts or create

a new computer system to satisfy the Plaintiff's requests. Based on these factors, the Court of Appeal held that the trial court did not abuse its discretion in denying class certification. (*See also Hefczyc v. Rady Children's Hosp.* (2017) 17 Cal.App.5th 518 (plaintiff challenging Chargemaster rates could not establish ascertainability of the class, predominance of class issues over individual issues, or superiority of class action as means of resolving dispute).)

CONTRACTS

66. Contractual Shortening Of Statute Of Limitations – Two Year Contractual Period Of Limitations That Waives Discovery Rule Is Valid, But Subject To Claims Of Waiver And Estoppel.

Wind Dancer Production Group v. Walt Disney Pictures (2017) 10 Cal.App.5th 56 – The Plaintiff producers sued the Defendant, Walt Disney Pictures, for breaching an agreement regarding distribution of profits from the "Home Improvement" television series. The agreement contained an "incontestability" clause, wherein the Plaintiffs were required to object to the Defendant's quarterly statements in detail within 24 months, and to initiate legal action within six months from that 24-month period. The Plaintiffs objected to quarterly statements more than 24 months after they were sent, and the Defendant successfully moved for summary judgment on the grounds that the action was time-barred. The Court of Appeal reversed, holding that, while parties can contractually shorten a statute of limitations, and eliminate the discovery rule, a party to a contract may waive or be estopped from enforcement of a provision based on its words and conduct. Here there was evidence that the parties had a course of conduct of tolling the 24-month period, which created a triable issue of fact regarding whether the Defendant waived its right to enforce the incontestability clause. Moreover, the Plaintiffs presented evidence that the Defendant did not provide the underlying materials for an audit with sufficient time for the Plaintiffs to timely object, so there was a triable issue regarding whether the Defendant was equitably estopped from enforcing the incontestability clause.

67. Oral Agreements – Parole Evidence Rule – Integration Clauses Are Relevant, But Do Not Necessarily Bar Enforcement Of Oral Agreement.

Kanno v. Marwit Capital Partners II (2017) 18 Cal.App.5th 987 [**Fybel**, O'Leary, Bedsworth] – The Plaintiff in *Kanno* prevailed in a jury trial for breach of an oral agreement by the Defendants to buy back stock that was transferred to Plaintiff as consideration for the purchase of Plaintiff's companies. The Defendants argued that the Plaintiff's claims were barred by the integration clauses in three written contracts relating to the transaction. The Court of Appeal affirmed the judgment in the Plaintiff's favor, holding that the integration clauses were relevant, but not dispositive. Under California law, four factors had to be considered to determine whether to admit evidence of an alleged oral agreement: (1) whether the agreement appears to be complete on its face; (2) whether the oral agreement contradicts the written agreement; (3) whether the

oral agreement might naturally have been made as a separate agreement; and (4) whether evidence of the oral agreement would be likely to mislead the trier of fact. While the first written instrument appeared to be complete on its face, and the integration clauses weighed in favor of that factor, the oral agreement did not contradict the terms of the written instrument, and was one that would naturally have been made separately, since the parties were apparently trying to defer tax liabilities by transferring stock to the Plaintiff and orally agreeing to buy it back after three years. In addition, there were at least two other written instruments relating to the transaction, so that none of those instruments could be considered to be the exclusive embodiment of the parties' agreement. Finally, while there was a conflict of evidence regarding the oral agreement, the trial court impliedly found that the evidence did not confuse or mislead the jury. A mere conflict in the evidence was insufficient grounds to overturn that finding. In light of the foregoing, the Court held that the first written instrument did not preclude the oral contract. The Court made similar holdings for the other two written agreements (which were construed under similar Delaware law) and affirmed the judgment in favor of the Plaintiff.

68. Rescission – Plaintiff Who Fails To Establish Rescission Cannot Obtain Breach Of Contract Damages Under Civil Code § 1692's Provision Allowing Courts To "Adjust The Equities."

Guan v. Hu (2017) 12 Cal.App.5th 406 – In *Guan*, the Plaintiff initially brought a breach of contract claim, but added fraud and rescission related claims. A demurrer was then granted without leave to replead with regard to the breach of contract claim, and an amended complaint was filed omitting any breach of contract claim. Following a bench trial, the trial court held that the Plaintiff could not establish an entitlement to rescission, because he could not prove that the Defendant did not intend to perform her promises at the time they were made. Nevertheless, the trial court held that it had "equitable jurisdiction" under Civil Code § 1692 to "adjust the equities among the parties," and used that jurisdiction to: (a) find that the Defendant did breach the agreement, and (b) award the Plaintiff damages for that breach. The Court of Appeal examined the plain language of § 1692 and reversed. The Court noted that the last paragraph of § 1692 allows the court in a rescission action to "adjust the equities" only where rescission is granted. Since rescission was not granted, that provision did not apply. Furthermore, the second paragraph of § 1692, which applies when rescission is not granted, only allows the court to award any party "relief to which he may be entitled under the circumstances." The Court held that a party is only entitled to that relief "appropriate under the scope of his pleadings and within the facts alleged and proved," and that it was error to provide relief based on a breach of contract theory that was: (a) omitted from the operative complaint, and (b) dismissed without leave to replead following a demurrer.

69. Sale Of Partnership Interest – Contract For Sale Of Benefits Of Partnership Interest Enforceable Without Consent Of Other Partners.

SP Investment Fund I LLC v. Cattell (2017) 18 Cal.App.5th 898 – The Plaintiff investor sued the Defendant for breach of contract arising out of an agreement for the Defendant to sell his interest in a limited partnership. The trial court granted judgment on the pleadings on its own motion, holding that the agreement was one for the sale of a Partnership Interest, which could not take place without the consent of the other partners under Corporations Code § 15907.02(h). The Court of Appeal reversed, noting that while the parties' agreement called for the other partner's consent and a transfer of the partnership interest, it also specified that the Plaintiff could waive the consent requirement. Under the terms of the agreement, the Plaintiff would then be entitled to receive many of the benefits of the partnership interest, such as the right to receive dividends, before an actual transfer took place, or even if there was no transfer at all. Accordingly, even if the approval of the other partners was required for the actual transfer of a partnership interest, the lack of such approvals was not fatal to the Plaintiff's breach of contract claim.

CORPORATIONS & BUSINESS ENTITIES

70. Alter Ego – Corporation Formed For Legitimate Purposes May Be Disregarded Where Corporate Form Is Used To Perpetrate Fraud Or Inequity.

Turman v. Superior Court (2017) 17 Cal.App.5th 969 [**Fybel**, Aronson, Ikola] – In *Turman*, a group of restaurant employees sued their employer, Koji's Japan Incorporated, along with that entity's corporate parent, and its president, ironically named Mr. Parent. Following a partial bench trial, the trial court declined to apply the alter ego doctrine to hold Mr. Parent and the parent corporation liable for the employment law claims asserted against Koji's Japan. The trial court noted that "Koji's was a real business with real purpose and assets and not a sham corporate entity formed for the purpose of committing a fraud or other misdeeds." The Court of Appeal held that this indicated a misunderstanding of the second prong of the alter ego doctrine, which only requires that the corporate form be "<u>used</u> to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose," regardless of whether or not it was formed for legitimate reasons. Accordingly, the Court of Appeal reversed the trial court's alter ego ruling, and remanded the matter for the trial court to reconsider the evidence in light of the correct legal standard.

71. Derivative Lawsuits – Demand Futility – When Board Composition Has Changed, Derivative Claims In Amended Complaint Must Alleged Demand Futility At The Time Of Amendment.

Apple Inc. v. Superior Court (2017) 18 Cal.App.5th 222 – A shareholder's derivative claim must allege that either: (a) a demand was made on the corporation's board of directors to bring a direct claim on the corporation's behalf, or (b) such a demand would have been futile given the board members' interests or other improper considerations. In *Apple*, the Court of Appeal followed the Delaware Supreme Court's rule for determining whether a derivative shareholder claim adequately pleads demand futility. In particular, the Court of Appeal followed Delaware precedent in *Braddock v. Zimmerman* (2006) 906 A.2d 776. Under *Braddock*, if there are changes in the composition of a board of directors following the initial filing of a lawsuit, any amended derivative claims must allege that a demand on the board would be futile as of the date of filing of the amended complaint, unless: (1) the original complaint contained a well-pleaded derivative claim, (2) the original complaint adequately alleged demand futility, and (3) the amended complaint arises from essentially the same act or transaction as the original complaint. In *Apple*, the Plaintiff alleged that a demand would be futile as to 5 out of the 8 members of Apple's board of directors. However, a demurrer had been granted to the original complaint, and by the time the amended complaint was filed, 2 of those 5 board members had been replaced, thus taking away the majority held by the allegedly conflicted board members. Accordingly, the Court held that the amended complaint was defective, but instructed the trial court to grant leave to amend to correct the deficiency by alleging demand futility relating to the current board.

72. Limited Liability Companies – Unless Contracting Party Has Actual Knowledge Of A Manager's Lack Of Authority, The Manager's Signature Binds An LLC.

Western Surety Co. v. La Cumbre Office Partners LLC (2017) 8 Cal.App.5th 125 – After the Plaintiff sued to enforce an indemnity agreement signed by the Defendant LLC's manager, the Defendant asserted that the manager did not have actual authority to enter into the agreement. The trial court granted the Plaintiff's motion for summary judgment, concluding that the Defendant was bound by the signature on the agreement. The Court of Appeal affirmed, holding that an LLC is bound by a contract signed by a managing member, even if that managing member lacks actual authority, unless the other party to the contract has actual knowledge of the manager's lack of authority. (*See* former Corp. Code, § 17157(d) (now § 17703.01(d).) The Court of Appeal also rejected the Defendant's objections that the signature line of the contract misstated the position of the natural person signing on behalf of the manager (which was another LLC). The Court noted that there was no requirement that the signer's position be set forth on the signature page, and thus any mistake was immaterial.

73. Limited Liability Companies – Owner Of Limited Liability Company May Not Bring Individual Elder Abuse Claims Based On Harm To The Entity.

Hilliard v. Harbour (2017) 12 Cal.App.5th 1006 – In *Hilliard*, the Plaintiff, a 78-year old owner of controlling interest in limited liability companies, brought a lawsuit against Wells Fargo for financial elder abuse under Welfare & Institutions Code § 15610.30(a)(1). Plaintiff alleged that Defendant strung him along regarding a $2 million agreement to settle outstanding debt that was owned by the companies, while surreptitiously working to broker a deal to sell the loan to a party who then obtained a $17.5 million judgment enforcing the loans. The trial court sustained Wells Fargo's demurrer on the basis that the gravamen of Plaintiff's allegations was financial injury to the companies, not to the Plaintiff in his individual capacity, and thus the Plaintiff did not have standing to bring his claim in his individual capacity. While the Plaintiff argued that elder abuse is necessarily a personal claim, the Court rejected that argument, finding that his claim "does not originate in circumstances independent of his status as a shareholder in the Companies, and his claim therefore cannot be deemed personal."

74. Limited Liability Companies – Capacity To Sue – Dissolution Is Not Grounds For A Motion To Dismiss For Lack Of Standing.

The Rossdale Group, LLC v. Walton (2017) 12 Cal.App.5th 936 – In *Rossdale Group*, the Plaintiff was a Florida LLC, who sued using a registered fictitious business name. Subsequent to filing the action, the Plaintiff LLC was dissolved. The Defendant brought a motion to dismiss the action for lack of standing under CCP § 367. The trial court granted the motion, and the Court of Appeal reversed. The Court explained that § 367 only requires that an action be prosecuted by the real party in interest, and here, the Florida LLC was the Plaintiff, despite the use of a fictitious business name. The fact that the Florida LLC was dissolved did not affect its standing or status as the real party in interest, but only its capacity to sue. Capacity to sue is a plea in abatement that is disfavored, and must be strictly construed. It also can be waived if not asserted at the earliest opportunity. Here, because the Plaintiff was dissolved after the action was filed, the proper course would have been to request leave to amend the Defendant's answer to assert lack of capacity to sue. Because that is not what the Plaintiff did, and because the dissolution did not affect standing or jurisdiction, the trial court's order granting the motion to dismiss was reversed.

DISCOVERY

75. Methods Of Discovery – Trial Court Erred By Ordering Vocational Rehabilitation Examination, Which Is Not A Statutorily Authorized Form Of Discovery.

Haniff v. Superior Court (2017) 9 Cal.App.5th 191 – In *Haniff*, the Plaintiff was seriously injured during a motor vehicle accident with a car driven and owned by the Defendants, and had not returned to work since the accident. The Defendants sought to compel the Plaintiff to undergo a vocational rehabilitation examination by their vocation expert, to challenge the Plaintiff's claims for lost wages due to his alleged inability to work. The trial court granted the motion, rejecting the argument that it could not compel the examination because the method of discovery had no statutory authorization. The trial court found it fundamentally unfair that Plaintiff could rely on his own vocational rehabilitation expert, without giving the Defendants' expert an opportunity to conduct an examination. The Court of Appeal granted a writ of mandate overturning the trial court. The Court held that the six methods of civil discovery expressly authorized by the Civil Discovery Act are exclusive, and civil discovery cannot be expanded to new non-statutory discovery methods. The contention that a vocational rehabilitation examination should be an available discovery method as a matter of fundamental fairness in cases involving lost wages was better addressed to the Legislature than the courts.

76. Motions To Compel – First Amendment Protection Of Anonymity – Libel Plaintiff Must Make Prima Facie Showing Of Libel Before Obtaining Identity Of An Anonymous Internet Reviewer.

ZL Technologies v. Doe (2017) 13 Cal.App.5th 603 – In this action, Plaintiff ZL Technologies filed a motion to compel a third party website operator to disclose the identity of the Defendants, who posted anonymous reviews that were the subject of the Plaintiff's libel claims. The trial court denied the motion to compel on the basis that the reviews were generally opinions. The Court of Appeal reversed, holding that all but one of the reviews "declared or implied" assertions of fact, including assertions that "the company purposefully hired inexperienced personnel, paid below industry standards, publicly disparaged staff, and had high staff turnover rates." The Court of Appeal agreed with prior California and federal authorities holding that: (a) anonymity is an aspect of freedom of speech that is protected by the Constitution, and (b) a "party seeking discovery of matters protected by privacy interests must demonstrate a compelling need for discovery," to outweigh the privacy right. Because the identity of a defendant is essential to the fair resolution of a lawsuit, the Court held that a libel plaintiff seeking the identity of an anonymous defendant meets this burden by producing prima facie evidence of each element of a libel claim. Despite the fact that the defendant normally bears the burden of proving truth as a defense to libel, the Court held that, in this context, the plaintiff must also produce evidence of falsity as part of this prima facie showing. Once that showing is made, however, the Court held

that no further balancing of the anonymous defendant's interests is required. During this process, however, the Court held that "reasonable efforts" must be made to notify the defendants, perhaps through the third party website operator, in order to provide them with an opportunity to respond before their identities are revealed.

Similar holdings were also made in 2017 in *Glassdoor, Inc. v. Superior Court* (2017) 9 Cal.App.5th 623 (requiring plaintiff to make prima facie showing to support claim that online review breached nondisclosure agreement before compelling disclosure of reviewer's identity) and *Yelp Inc. v. Superior Court* (2017) 17 Cal.App.5th 1.

77. Motions To Compel – First Amendment Protection Of Anonymity – Plaintiff Must Identify Specific Actionable Statements Before Obtaining Identity Of Anonymous Internet Reviewer.

Glassdoor, Inc. v. Superior Court (2017) 9 Cal.App.5th 623 –As in *ZL Technologies*, the Plaintiff sought to compel a third party website operator to disclose the identity of an anonymous user named as a Defendant in the action. Also as in *ZL Technologies*, the court in *Glassdoor* held that the Plaintiff seeking such a disclosure must make a prima facie showing of the elements of the claim against that Defendant. The Court imposed an additional requirement where the Plaintiff's claim is based on the violation of a non-disclosure agreement. In such cases, the Plaintiff must also "clearly specify the statements claimed to be actionable, state the actionable meanings assertedly conveyed by them, and set forth, if necessary, evidence sufficient to sustain a finding that the statements were capable of conveying those meanings." The Plaintiff in *ZL Technologies* only described the actionable statements in a vague and conclusory summary, despite multiple requests by the website operator for specificity as to what statements were claimed to disclose confidential information. The Court of Appeal held that this fell well short of the showing required by the Plaintiff. However, because this requirement had not been articulated in any prior opinion, the Court allowed the Plaintiff to specify the actionable statements for the first time on appeal. After considering those statements, the Court held that the Plaintiff still failed to show that any of the statements contained actionable confidential information. Without demonstrating that the statements were actionable, the Plaintiff could not compel disclosure of the Defendant's identity.

78. Motions To Compel – First Amendment Protection Of Anonymity – Website Operator Has Standing To Assert User's First Amendment Rights In Challenging Subpoena.

Yelp Inc. v. Superior Court (2017) 17 Cal.App.5th 1 [**O'Leary**, Ikola, Thompson] – In *Yelp*, the Plaintiff accountant filed a lawsuit against the Defendant former client in connection with an anonymous and negative Yelp review of the Plaintiff written under the alias "Alex M." The Defendant served Yelp with a subpoena asking for documents that would identify the Yelp user Alex M. to confirm his belief that the name was an alias used by the Defendant, but Yelp

objected, arguing that the subpoena violated the free speech rights of the anonymous Alex M. The trial court granted the Plaintiff's motion, finding in part that Yelp lacked standing to enforce the anonymous reviewer's First Amendment rights. The Court of Appeal denied Yelp's petition for writ of mandate, but held that a website host such as Yelp has standing to assert the First Amendment rights of persons who post reviews anonymously on its site, as against an effort to compel Yelp to identify those persons. Yelp had a significant stake in vigorously protecting its reviewers' anonymity, because a failure to do so could affect its ability to maintain and broaden its client base.

79. Privileges – Stored Communications Act Prohibits Electronic Service Providers From Divulging The Contents Of Electronic Communications In Discovery.

Facebook, Inc. v. Superior Court (2017) 15 Cal.App.5th 729 – In *Facebook*, the Real Party in Interest criminal defendant served petitioner Facebook with a subpoena for the subscriber records and contents of the victim's social media account. Facebook filed a motion to quash the subpoena on the ground that the federal Stored Communications Act ("SCA") prohibited disclosure of the victim's account contents. The trial court denied the motion and ordered Facebook to produce the contents of the victim's account for in camera inspection. The Court of Appeal issued a peremptory writ of mandate directing the superior court to vacate its order denying Facebook's motion, and to enter a new order granting the motion, holding that the SCA expressly prohibits electronic communication service providers from knowingly divulging to any person or entity the contents of a communication. As such, the supremacy clause of the U.S. Constitution prohibits enforcement of the trial court's order, because California's discovery laws cannot be enforced in a way that compels a provider to make disclosures that would violate federal law.

80. Right To Privacy – Compelling Interest Is Not Always Required When Discovery Seeks Private Information.

Williams v. Superior Court (2017) 3 Cal.5th 531 – In *Williams*, the Plaintiff retail employee sought contact information for fellow California employees in discovery related to his representative action against his employer for wage and hour violations under the Private Attorney General Act of 2004 ("PAGA"). The Defendant resisted discovery, and the Plaintiff filed a motion to compel. The trial court granted the Plaintiff's motion as to employees of the store where the Plaintiff worked, and denied it as to employees of every other California store, conditioning any renewed motion for such discovery on the Plaintiff sitting for a deposition and showing some merit to his claims. The Court of Appeal denied the Plaintiff's petition for writ of mandate to compel the trial court to vacate its discovery order, holding that because third party privacy interests were implicated, the Plaintiff had to demonstrate a "compelling need" for discovery by showing the discovery sought was directly relevant and essential to the fair resolution of the lawsuit. The California Supreme Court reversed, holding that the burden is on

the party asserting a privacy interest to establish its extent and the seriousness of the prospective invasion. It is against that showing that the countervailing interests in favor of discovery must be weighed. The Court explained that while discovery that threatens "an obvious invasion of an interest fundamental to personal autonomy" requires a showing of a compelling interest, the interest required to justify less serious privacy interests varies with the seriousness of the threatened invasion. In this case, the Defendant made no showing of any burden that would be imposed by revealing the other employees' contact information, and thus the record did not support the denial of the Defendant's right to discovery. The Supreme Court expressly disapproved prior cases to the extent that they held that a party seeking discovery of private information must always establish a compelling interest or compelling need, without regard to the seriousness of the threatened invasion of privacy or other relevant factors.

81. Requests For Admission – Trial Court May Impose Attorney's Fees As Condition Of Withdrawing Admission.

Rhule v. Wavefront Technology, Inc. (2017) 8 Cal.App.5th 1223 – Under CCP § 2033.300, the trial court may relieve a party of an admission made in response to a request for admission, if the request was the result of mistake, inadvertence, or excusable neglect. The statute allows the court to "impose conditions on the granting of the motion that are just, including, but not limited to… An order that the costs of any additional discovery be borne in whole or in part by the party withdrawing or amending the admission." In *Rhule*, the Court of Appeal held that this language allows the Court to impose attorney's fees as a condition of withdrawing an admission, because (a) CCP §§ 1033.5(a)(10) and 2033.420 both treat attorney's fees as a subset of costs, and (b) even if attorney's fees were not included in the category of "costs," the trial court has discretion to impose any other conditions that may be just.

82. Sanctions – Failure To Attend Deposition Is Not A Violation Of Order Denying Stay Of Deposition, When Order Does Not Specifically Require Attendance.

Van v. Language Line Services, Inc. (2017) 8 Cal.App.5th 73 – In *Van*, the Plaintiff failed to appear at her noticed deposition, after losing her ex parte application to stay the deposition. The trial court found the Plaintiff in contempt, and imposed monetary discovery sanctions for failing to appear at deposition, disobedience of a court order, and discovery misuse. The Court of Appeal reversed, holding that contempt requires a clear violation of a specific court order, and the only order here was the denial of the Plaintiff's ex parte application for a stay. That order did not require the Plaintiff to attend the deposition, but merely stated "DENIED." For the same reason, there were no grounds for discovery sanctions based on disobedience of a court order. The Court also found that the discovery sanction based on failure to appear at deposition was improper, because such sanctions can only be granted when a motion to compel attendance is granted. Here, a motion to compel was filed, but the action was dismissed before it was heard.

The court remanded the matter for recalculation of sanctions attributable solely to other discovery misconduct.

83. Sanctions – Monetary Sanctions – $4,000 Per Day Monetary Sanction Affirmed For Outright Refusal To Comply With Discovery Order.

Padron v. Watchtower Bible & Tract Society of New York, Inc. (2017) 16 Cal.App.5th 1246 – In *Padron*, the trial court ordered the Defendant religious corporation to produce documents relating to internal reports relating to its appointees known to have committed child abuse. The Defendant informed the court that it would not comply with the order. The Plaintiff brought a motion for monetary sanctions against the Defendant for discovery abuse. The trial court awarded sanctions in the amount of $4,000 for each day the Defendant did not search for or produce documents. The Defendant appealed, arguing that under the Civil Discovery Act, monetary sanctions are limited to the Plaintiff's costs and expenses in seeking discovery (CCP § 2023.030(a)), and that the sanctions imposed by the trial court were punitive and harsh. The Court of Appeal affirmed, noting that the Defendant's position was inconsistent with the position it took in a previous appeal, where it argued that a monetary penalty for each day of non-compliance was a proper alternative to imposing terminating sanctions for an initial discovery violation. Accordingly, the Defendant was estopped from arguing that the trial court did not have jurisdiction to impose a daily sanction for non-compliance. Even if the Defendant was not estopped, the Court rejected the argument on its merits, holding that the sanctions provisions in the Civil Discovery Act did not preclude the trial court from exercising its inherent power to deal with litigation abuse by imposing such sanctions. Note that this last holding conflicts with the holding in *Howell*, below, which cited *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 809 for the proposition that California courts have "no inherent power to impose monetary sanctions for misconduct absent statutory authority."

84. Sanctions – Post-Judgment Terminating Sanctions Upheld, But Monetary Sanctions Not Limited To Fees Incurred "As A Result Of" Discovery Abuses Remanded For Recalculation.

Department of Forestry & Fire Protection v. Howell 18 Cal.App.5th 154 – In *Howell*, the Plaintiff Department of Forestry and Fire Protection ("Cal Fire") engaged in significant and persistent discovery abuses, including the destruction of investigatory field notes, production of fire investigation reports containing false statements, the provision of untruthful or evasive deposition testimony, and failure to produce responsive documents despite two previous court orders. In response, the trial court imposed monetary sanctions, and also imposed terminating sanctions after entering a judgment that was later overturned in another part of the opinion (*see* CIVIL PROCEDURE – Complex Litigation, above). The Court of Appeal upheld the order granting terminating sanctions, holding that it did not violate the one-final judgment rule, since the order is not a judgment, and the respondents whose judgment was reversed could now move for entry of judgment based on the sanctions order upon remand. The Court also affirmed that

there was sufficient evidence to support the trial court's holding that the discovery abuses were so egregious that any sanction less than termination would have been insufficient to protect the judicial process. With regard to monetary sanctions, however, the Court reversed the award for recalculation, finding that the amount of sanctions improperly included all of the fees and costs incurred by the Defendants, rather than just those caused by the discovery violations. The Court distinguished a federal case holding that a discovery sanction could include all of a defendant's fees, because California state courts do not have inherent authority to impose monetary sanctions absent statutory authorization, and the applicable statute, CCP § 2023.030, limits sanctions to the amount incurred "as a result of" the discovery abuse.

85. Sanctions – Terminating Sanctions – Bad Faith Not Required Where The Plaintiff Failed To Comply With Two Court Orders For Its Deposition.

Creed-21 v. City of Wildomar (2017) 18 Cal.App.5th 690 – The Plaintiff organization petitioned for writ of mandate regarding CEQA noncompliance by the Defendants City of Wildomar and Wal-Mart. The Defendants contended that the Plaintiff was a shell corporation for its attorneys, and noticed the deposition of the person most qualified of the Plaintiff to determine if the Plaintiff lacked standing. The deposition was originally scheduled for September, and was reset for October after the Plaintiff did not attend. The Plaintiff then refused to attend in October, and one of the Defendants filed a motion to compel. That motion was granted in January, along with monetary sanctions, but the Plaintiff still refused to reschedule the deposition. Instead, the Plaintiff twice sought ex parte relief to either avoid or postpone the deposition. The court denied the applications and ordered the deposition to take place on February 8th. Weeks after that date, the Plaintiff finally offered to attend the deposition on March 6th, just one day before the Defendant's brief on the merits was due in the trial court. The Defendant declined this date, filed its brief on the merits without the deposition, and requested an issue sanction to establish that Plaintiff did not have standing to bring the action. The trial court granted the issue sanction, reasoning that the Defendant should not have had to continue the briefing schedule in order to take the deposition that had been noticed many months before. The Court of Appeal affirmed, noting that monetary sanctions had been unable to compel the Plaintiff's compliance, and thus the trial court was justified in proceeding with issue sanctions that amounted to a terminating sanction. The Court rejected the Plaintiff's argument that a finding of bad faith is required to impose terminating sanctions, because the case relied upon for that premise predated the Civil Discovery Act of 1986, and the current discovery statutes have no such requirement.

EVIDENCE

86. Expert Witnesses – Objections to Expert Declaration Sustained Where Opinion Was Conclusory, Lacked Evidentiary Support And Ignored Analysis Of Opposing Expert.

Sanchez v. Kern Emergency Medical Transportation Corporation (2017) 8 Cal.App.5th 146 – In *Sanchez*, the Plaintiff sued the Defendant ambulance company for allegedly delaying his transportation to the hospital after he suffered a severe head injury. The Defendant moved for summary judgment. In opposition, the Plaintiff submitted an expert declaration that attributed Plaintiff's injuries to a "delay" that occurred between medical responder's first contact with Plaintiff and his departure in an ambulance to the hospital. The trial court sustained several objections to the Plaintiff's expert declaration, and thereafter granted summary judgment because there was no triable issue as to the causation element without the Plaintiff's expert opinions. The Court of Appeal affirmed, holding that an expert's opinion can be excluded if it is speculative or conjectural, based on assumptions of fact without evidentiary support, or lacking in a reasoned explanation connecting the factual predicates to the ultimate conclusion. Here, the expert blamed the Plaintiffs injuries on "delay," but did not define that term, or account for time spent taking reasonably necessary steps, such as an initial evaluation, and steps taken to stabilize the Plaintiff's spine for transport. Accordingly, the opinion was based on a factually unsupported assumption that the entire time between the Plaintiff's first contact with responders and his departure to the hospital was unnecessary delay. In addition, the expert did not even attempt to address an analysis of applicable medical literature by the Defendant's experts, which indicated that delays even longer than the Plaintiff's would have no clinical significance. Based on the foregoing, the Court of Appeal held that the trial court did not abuse its discretion in sustaining objections to the Plaintiff's expert declaration, and granting the motion for summary judgment based on a lack of causation.

GOVERNMENT

87. Administrative Agencies – Judicial Review – A Tie Vote That Leaves The Status Quo In Effect Is Subject To Judicial Review Under CCP § 1094.5.

Grist Creek Aggregates LLC v. Superior Court (Mendocino County Air Quality Management District) (2017) 12 Cal.App.5th 979 – In *Grist Creek*, the Plaintiff environmental group filed an administrative appeal of the Real Party In Interest's construction permit before the county's hearing board. The four members of the county's board evenly split on their vote on the appeal, resulting in no further action by the board. Under the applicable regulatory scheme, this left the Real Party's permit in place. The Plaintiff filed a petition for a writ of administrative mandate, arguing that the hearing board violated CEQA by failing to revoke the permit. A demurrer was

sustained on the basis that the hearing board's tie vote was tantamount to no action, i.e., no "order or decision," such that the trial court had nothing to review. The Court of Appeal reversed, noting that tie votes "mean different things in different contexts." Here, because the tie vote left the permit intact, the effect was a denial of the Plaintiff's administrative appeal, which was subject to subsequent judicial review. While other cases have noted that a tie vote usually means that "no action" is taken by an administrative agency, those cases do not support the proposition that the decision to refrain from taking action is immune to judicial review.

88. Government Claims Act – Claim Presentation – Equitable Estoppel May Excuse Failure To Satisfy Claim Presentation Requirement.

Santos v. Los Angeles Unified School Dist. (2017) 17 Cal.App.5th 1065 – In *Santos,* the Plaintiffs were struck by a Los Angeles School Police Department ("LASPD") vehicle that ran a red light, and amended their complaint against the LASPD to include Defendant Los Angeles Unified School District ("LAUSD"), after learning that the vehicle was insured by the LAUSD. The trial court granted summary judgment to the LAUSD based on the Plaintiffs' failure to satisfy the Government Claims Act's claim presentation requirement as to that entity. The trial court rejected the Plaintiff's equitable estoppel theory, because the Plaintiffs had not been expressly informed that filing a claim against LASPD "was tantamount to filing a claim with LAUSD." The Court of Appeal reversed, holding that a "public entity may be estopped from asserting the limitations of claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act." No intentional "factually misleading statements" are necessary, and concealment of facts suffices. Thus, equitable estoppel may be asserted where (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff was ignorant of the true facts, and (4) the plaintiff relied upon the conduct to this detriment. Here, the Plaintiffs were given a business card that indicated that the responsible driver was an LASPD employee, without mentioning his connection to LAUSD. In addition, the website on the card was www.laspd.com, which failed to mention anywhere on the page that LASPD was actually part of LAUSD and not a separate entity. Finally, the Plaintiffs called the number on the card and spoke with another LASPD employee who directed them to an LASPD government claims form that also failed to mention anything about LAUSD, or that claims against LASPD should be directed to LAUSD. Based on this evidence the Court of Appeal found that Plaintiffs' conduct in filing a claims form with LASPD was reasonable and that their equitable estoppel theory was sufficient to withstand summary judgment.

89. Government Claims Act – Claim Presentation – Presentation Requirement For Defamation Claim Not Satisfied By Employment Grievance Filing.

Olson v. Manhattan Beach Unified School Dist. (2017) 17 Cal.App.5th 1052 – In *Olson,* the Court of Appeal affirmed the dismissal of Plaintiff school employee's complaint for defamation

against Defendants the Manhattan Beach Unified School District and its superintendent, on the grounds that the Plaintiff failed to comply with the claim presentation requirement of the Government Claims Act. The Plaintiff argued that he substantially complied with the requirement by filing an internal grievance against Defendants, as part of his collective bargaining agreement with the school district. The Court held that (a) this document was not a claim, as specified in the Act, (b) failed to include several of the necessary elements of a claim, such as his notice address, the names of the public employees who defamed him, or the amount of his damages, (c) failed to describe a claim for defamation, and (d) failed to indicate that the Plaintiff would bring litigation if the claim was not resolved. As such, the grievance could not satisfy the claim presentation requirement under the substantial compliance doctrine or the "claim as presented doctrine," and the trial court correctly dismissed the Plaintiff's claims.

90. Government Claims Act – Claim Presentation Deadline Begins To Run When The Cause Of Action Becomes Actionable, Not When The Statute Of Limitations Begins To Run.

City of Pasadena v. Superior Court (2017) 12 Cal.App.5th 1340 – The Government Claims Act requires a plaintiff to present a claim to a government entity within six months of "the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto." (Gov. Code, § 901.) In *City of Pasadena*, the Court of Appeal anticipated the California Supreme Court's somewhat counter-intuitive holding in *Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, that this claim presentation period is not delayed by a special statute specifying an alternate date for the beginning of the statute of limitations period. The Plaintiffs in *City of Pasadena* asserted mesothelioma-related claims against the City, but failed to present their claims within 6 months after the mesothelioma diagnosis. Under CCP § 340.2, the statute of limitations on mesothelioma cases does not begin to run on the date of accrual. Instead, it begins to run after the plaintiff becomes disabled, which had not yet occurred in *City of Pasadena*. Nevertheless, the Court of Appeal held the claim was barred, because the "accrual" of a cause of action refers to the date on which the claim is "ripe" and can be brought in court (here, the date of mesothelioma diagnosis), not the date on which the period of limitations began to run. The Court of Appeal attributed the conflation of the concepts of "accrual" and the "the beginning of the limitations period" to the fact that, in the vast majority—but not all—cases, the date an action accrues is also the date the statute of limitations begins to run.

91. Illegal, Injurious Or Wasteful Spending – Standing To Challenge Local Government's Spending Under CCP § 526a Extends To Payers Of "Assessed Taxes," Not Just Property Taxes.

Weatherford v. City of San Rafael (2017) 2 Cal.5th 1241 – The Plaintiff in *Weatherford* filed a complaint to enjoin illegal expenditures by the City of San Rafael, and alleged that she had paid

various taxes in San Rafael, not including property taxes. A stipulated judgment of dismissal was entered based on appellate authorities holding that CCP § 526a requires a showing that the plaintiff paid or owed property taxes in order to establish standing to challenge wasteful spending. The California Supreme Court reversed. The plain language of the statute allows a claim by a resident citizen "who is assessed for and is liable to pay … or, has paid, a tax therein." While the concept of an "assessed tax" encompasses property taxes, it is not limited to property taxes. Accordingly, the Court held that standing exists under § 526a where the plaintiff has paid or is liable to pay to the defendant locality a tax that has been assessed by the defendant locality. Given the lack of factual development in the trial court regarding what taxes were actually owed or paid, the Supreme Court remanded the matter to the trial court to determine whether or not that requirement was met.

92. Public Contracts – Bidder Who Submitted Nonresponsive Proposal May Not Challenge Award Of Contract To Another Bidder.

SJJC Aviation Services LLC v. City of San Jose (Signature Flight Support Corp.) (2017) 12 Cal.App.5th 1043– In *SJJC*, the Plaintiff's bid for a contract to develop and operate aeronautical services facilities at an airport was disqualified by the Defendant City for failure to conform to the Defendant's request for proposals. The Plaintiff then sought to overturn the Defendant's decision to award the contract to the Real Parties, because of a change in the terms of the lease to the successful bidder after the contract had been awarded. The trial court sustained the demurrers to the Plaintiff's claims, and the Court of Appeal affirmed, holding that a bidder that submits a nonresponsive proposal has no beneficial interest that would entitle it to bring a petition for a writ of mandate challenging the city's decision to award a contract to a different bidder. The withdrawal of a proposed term of the lease to the successful bidder could not have altered the fact that the unsuccessful bid failed in nearly every respect to meet the conditions set forth in the request for proposals.

93. Public Records Act – Automated License Plate Reader Data Is Not Exempt From Disclosure.

American Civil Liberties Union Foundation v. Superior Court (2017) 3 Cal.5th 1032 – In *ACLU*, two organizations petitioned for a writ of mandate to compel disclosure of requested automated license plate reader ("ALPR") data pursuant to the California Public Records Act ("CPRA"). The ALPR data is collected by Real Parties in Interest police department and sheriff's department, whose systems conduct millions of scans per week and use character recognition software to almost instantly check license plate numbers against an investigative "hot list" of license plate numbers that have been associated with crimes, child abduction AMBER alerts, or outstanding warrants. The Petitioners sought disclosure of unaltered plate scan data, which included, "at a minimum," license plate number, date, time, and location information of each license plate recorded. The trial court denied the petition, concluding that the requested data was exempt from disclosure under both Government Code §§ 6254(f) and 6255(a). Section

6254(f) protects records of investigations conducted by any state or local police agency from disclosure. Section 6255(a) is a catchall public interest exemption, which permits a public agency to justify withholding any record by demonstrating that, on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record. The Court of Appeal affirmed the trial court's judgment based on § 6254(f) without reaching the § 6255(a) question. The California Supreme Court affirmed in part and reversed in part, and remanded for further proceedings. The Supreme Court first held that the bulk collection of raw ALPR data is not exempt from disclosure under § 6254(f). The process of ALPR scanning does not produce records of investigations under § 6254(f) because the scans are not conducted as part of a targeted inquiry into any particular crime or crimes. Rather, the scans are part of a bulk data collection conducted with an expectation that the vast majority of the data collected will prove irrelevant for law enforcement purposes. The Supreme Court however agreed with the trial court that the balance of interests under § 6255(a) weighed clearly against disclosure of raw ALPR scan data because of the threat to individuals' privacy in disclosing the specific locations of vehicles on specific dates and times. The Supreme Court remanded for further proceedings for additional factual development on whether anonymized or redacted plates scan data could be withheld.

94. Public Records Act – Government Employees' Personal E-Mail Accounts Are Subject To Disclosure.

City of San Jose v. Superior Court (2017) 2 Cal.5th 608 – After the Defendant city declined to produce communications sent and received on city employees' personal accounts in response to a California Public Records Act ("CPRA") request, the Plaintiff sued, seeking a declaration that the CPRA encompasses all communications about official business, including communications through personal accounts. The trial court ruled in the Plaintiff's favor, but the Court of Appeal reversed. The Supreme Court reversed the Court of Appeal and affirmed the trial court, holding that "when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under" the CPRA. The Supreme Court reasoned that the CPRA would be undermined if these communications were not subject to the act. The court rejected the Defendant's argument that the employees' privacy rights would be violated, because only those communications that relate in some substantive way to the conduct of public business must be produced, and personal information can be redacted in the production. Furthermore, the Supreme Court issued guidance for conducting searches, stating that an agency may rely on the employees' searches of their own devises for responsive materials.

JUDGMENTS

95. Judgment Debtor Examinations – Third Party Witness In Judgment Debtor Examination May Be Questioned Regarding Property Of The Debtor No Longer In The Witness's Possession.

Yolanda's, Inc. v. Kahl & Goveia Commercial Real Estate (2017) 11 Cal.App.5th 509 – In *Yolanda's,* a third party Witness was examined regarding the location of certain property that was formerly held by the Witness. The Witness acknowledged that it transferred the property to other parties, but refused to testify regarding the current location of the property, on the grounds that it was beyond the scope of a third party examination under CCP § 708.120. The trial court ruled that the questions were proper, and granted the Plaintiff permission to ask questions about the location of the property, and other issues relevant to the debtor examination. The Court of Appeal affirmed, noting that while CCP § 708.120 only allows a limited examination regarding debtor property in the possession or control of a third party, CCP § 708.130(a) is much broader, and allows a third party witness to be examined "in the same manner as upon the trial of an issue." Moreover, the Court held that even if § 708.130 did not apply, the trial court had inherent authority to allow the examination under CCP § 187, which confers upon trial courts "all the means necessary to carry [its jurisdiction] into effect." Accordingly, the trial court did not err by granting the Plaintiff permission to examine the third party witness regarding relevant matters going beyond debtor property in the witness's possession or control.

96. Res Judicata – Judgment Based On Mootness Due To Intervening Change In Law Is Not "On The Merits" For Purposes Of Res Judicata.

Association of Irritated Residents v. Department of Conservation (2017) 11 Cal.App.5th 1202 – In *Irritated Residents,* the Court of Appeal reversed a trial court's judgment of dismissal that was predicated on an improper application of res judicata. In the underlying action, the Plaintiff sued the Defendant government agency for its pattern and practice of approving "fracking" in oil wells without adequate compliance with the California Environmental Quality Act ("CEQA"). While that action was pending, the legislature enacted a new comprehensive regulatory scheme specifically applicable to fracking. The trial court dismissed claims relating to past practices as moot, since compliance with the old legal requirements addressed in the case was rendered irrelevant by the new legislation. The trial court then dismissed claims relating to future practices as unripe, since the new statute required analysis and other regulatory actions that had not yet taken place. Approximately 10 months later, the Defendant sued again, challenging specific permits that had been approved since the original case was dismissed. The trial court dismissed the new claims as being barred by res judicata. The Court of Appeal reversed, holding that res judicata may only be based on a judgment on the merits in a prior action, and that a dismissal based on mootness or lack of ripeness is not "on the merits" for the purposes of res judicata. The Court disagreed with the Defendant's contention that the court in the initial

action did determine the merits by making a statement regarding the law's effect on the Defendant's obligation to grant permits. Instead, the Court held that the trial court's statement was merely an example used to point out the fact that the law had changed so significantly that it would make no sense to attempt to address the past pattern and practice claims on the merits. Because the merits were never reached, res judicata did not apply, and the dismissal was reversed.

97. Res Judicata – Judgment Based On Statute Of Limitations Is Not "On The Merits" For Purposes Of Res Judicata.

Boyd v. Freeman (2017) 18 Cal.App.5th 847 – In Boyd, the Court of Appeal held that a prior defense judgment based on the statute of limitations is not "on the merits" for purposes of res judicata. The purpose of res judicata, or claim preclusion, is to promote judicial economy and avoid piecemeal litigation and the splitting a single cause of action, or relitigating the same cause of action on a different legal theory or for different relief. A judgment based on a demurrer sustained for mere technical or procedural defects, such as the applicable statute of limitations, is insufficient to trigger claim preclusion, since there has been no substantive termination of the action. By contrast, a demurrer sustained for failure of the facts alleged to establish a cause of action is a determination on the merits. As noted in *Mid-Century Ins. Co. v. Superior Court* (2006) 138 Cal.App.4th 769, the Legislature may enact statutes extending the limitations period for certain claims, and the doctrine of res judicata would not bar subsequent actions which were initially dismissed as time-barred. Thus, the trial court's order of dismissal was reversed, and Plaintiff was permitted to file a second action alleging new and additional facts related to the same primary right as the dismissed cause of action.

98. Res Judicata – Licensor-Licensee Relationship Establishes Privity For Res Judicata Purposes Where Licensee's Liability Is Entirely Derivative Of Licensor's Liability.

Cal Sierra Development, Inc. v. George Reed, Inc. (2017) 14 Cal.App.5th 663 – The Plaintiff gold mining company initiated an arbitration against a third-party with surface rights, for giving a license to the Defendant to operate an asphalt plant that interfered with the Plaintiff's gold mine. The Plaintiff prevailed in the arbitration with the third party licensor on a breach of contract claim, but was unsuccessful on its trespass, nuisance, and conversion claims. The Plaintiff then filed suit against the Defendant licensee for trespass and interference with contractual relations. The trial court ruled that the claim preclusion aspect of res judicata applied to bar the action, because the same trespass claim was involved in the arbitration and the lawsuit, and the Defendant was in privity with the third party licensor. The Court of Appeal affirmed, holding that the claims were barred in the second lawsuit, because (a) they involved the same primary right, and (b) the arbitration and the lawsuit were between Plaintiff and parties in privity. While a licensing agreement does not prove privity as a matter of law, the California Supreme Court has held that derivative liability is a form of privity. Here, the Defendant licensee's

liability was entirely derivative of the third party licensor's liability, because the Defendant located and operated its asphalt operations pursuant to the terms of the license. For this reason, the Defendant was in privity with the third party for the purposes of the claims that were adjudicated in the arbitration, even though they were separate companies joined only by a license agreement.

99. Res Judicata – Issue Preclusion/Collateral Estoppel – Issue Preclusion Does Not Apply Where An Issue Was Decided In The Trial Court, But Was Not Resolved On Appeal, Due To Alternative Grounds For Affirming The Underlying Judgment.

Samara v. Matar (2017) 8 Cal.App.5th 796 – As noted in the cases cited above, res judicata does not apply where an action is dismissed on procedural grounds. In an 1865 case, the California Supreme Court held that res judicata does apply where: (1) a trial court dismisses a case based on alternative rulings on the merits and on a procedural issue, and (2) an appellate court then affirms that dismissal based solely on the procedural issue, without addressing the merits. (*People v. Skidmore* (1865) 27 Cal. 287.) In *Samara*, the court held that this rule does not apply to the issue preclusion aspect of res judicata (i.e. collateral estoppel). There, claims against a Dentist's employee for negligent performance of oral surgery were dismissed by the trial court based on lack of causation and the statute of limitations. On appeal, the dismissal was affirmed based solely on the statute of limitations. The Dentist, who was alleged to be vicariously liable for the employee's negligence, argued that the resolution of the causation issue in favor of the employee precluded the Plaintiff's claims against him. The trial court agreed, and the Court of Appeal reversed, holding that issue preclusion does not apply to a substantive issue that was established in the trial court, but not addressed in the prior appeal. In doing so, the Court noted that several other courts have refused to extend *Skidmore* to issue preclusion, and suggested that the Supreme Court might wish to address the continuing validity of that case. On May 17, 2017, the California Supreme Court granted review, which may signal either the end of *Skidmore*, or its application to the doctrine of issue preclusion.

JURIES AND JURY TRIALS

100. Dismissal Of Juror – Juror's Dismissal Based On Inadequate Investigation Is Reversible Error.

Shanks v. Dept. of Transportation (2017) 9 Cal.App.5th 543 – In *Shanks*, the Plaintiffs sued a motorist and the Defendant State of California after a fatal car accident on the State's highway. After 90 minutes of deliberation, a juror reported to the court that Juror No. 7 had expressed a fixed conclusion about the case because she was not deliberating well, and she was "very adamant" during the deliberations. The trial court interviewed one other juror, then dismissed Juror No. 7 and replaced her with an alternate based on the testimony of two jurors and an

unverified report that Juror No. 7 slept during the Plaintiff's closing argument. After the verdict, the State moved for a new trial based on a declaration from Juror No. 7 that she did not sleep during the trial, she had not reached a fixed decision, and the two jurors who reported her carpooled together and were leaning for the opposite verdict. The trial court denied the motion, but the Court of Appeal reversed, holding that it was reversible error to dismiss a juror under these circumstances because the record did not show a "demonstrable reality" that Juror No. 7 failed to deliberate. The trial court erred, because it only accepted testimony from two jurors that were friendly with each other, deliberations were only ongoing for 90 minutes, the trial court did not question the foreperson or Juror No. 7, and the only testimony regarding the deliberations was that it was "not well," which is not grounds for the dismissal of a juror. Therefore, a retrial was appropriate.

101. Right To Trial By Jury – Jury Trial Of Common Law Claim Must Take Place Before Court Trial Of Statutory Claim, Where Statute Provides That It Does Not "Abrogate" Common Law Remedies.

Shaw v. Superior Court (2017) 2 Cal.5th 983 – In *Shaw,* the Supreme Court held that Plaintiff former healthcare employee did not have a right to a jury trial for a retaliatory termination claim brought under Health and Safety Code § 1278.5(g). Section 1278.5(g) allows healthcare whistleblowers who are victims of retaliation to seek reinstatement, "reimbursement" of lost income and legal costs, and "*any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law."* The Plaintiff argued that the language referring to applicable remedies under the "common law," included legal remedies that triggered a right to jury trial under the State Constitution. The Court rejected that argument, holding that even if that phrase referred to legal remedies, the phrase "any remedy deemed warranted *by the court*" clearly indicated that the trial court, and not the jury, was to hear claims under § 1278.5(g). The Court then noted that retaliation victims also have a common law claim for damages that does trigger a right to a jury trial. The general rule in cases involving both jury and non-jury claims is that the trial court may try the non-jury claims first, and any factual findings it makes will be binding on the jury claims, and possibly result in their dismissal and the elimination of the need for a jury trial. However, the Court pointed out that subdivision (m) of § 1278.5 states that "nothing in this section abrogates or limits any other theory of liability or remedy otherwise available at law." In order to avoid the possibility that a bench trial of a § 1278.5(g) claim could abrogate a whistleblower's right to a jury trial on a common law retaliation claim, the Court held that in this limited circumstance, a trial court must conduct the jury trial before the bench trial.

102. Right To Jury Trial – Law Of Forum Determines Right To Jury Trial, And In California, Shareholder's Breach Of Fiduciary Duty Claim Is Equitable, With No Right To Jury Trial.

Central Laborers' Pension Fund v. McAfee, Inc. (2017) 17 Cal.App.5th 292 – The Plaintiff filed a class action derivative suit against the board of directors and the CEO of McAfee, Inc. for breach of fiduciary duties arising out of the sale of McAfee. Because McAfee is a Delaware corporation, Delaware law applied to the substantive claims. The trial court held that no jury trial was required, because a breach of fiduciary duty suit under Delaware law was in equity. The Court of Appeal affirmed the order, but rejected the Defendants' argument that it was proper to use Delaware law to determine the nature of the claims for purposes of granting or denying a jury trial. Instead, the Court held that, despite the application of Delaware substantive law, procedural matters are governed by the law of the forum. Nevertheless, the Court of Appeal concurred with existing California case law establishing that a shareholder's breach of fiduciary duty claim is an equitable claim, for which a jury trial is not required, even when damages are sought. The Court distinguished from another case where a jury trial was required, because that case did not discuss whether an action for breach of fiduciary duty is an equitable or legal claim. (*Bainbridge v. Stoner* (1940) 16 Cal.2d 423.) The court did not foreclose the possibility that there may be a right to a jury trial in other shareholder derivative suits.

PRINCIPAL/AGENT RELATIONSHIP

103. Imputed Knowledge – Architect And Construction Professionals Are Not Agents Of, And Their Knowledge Of Defects Is Not Imputed To, Seller.

RSB Vineyards, LLC v. Orsi (2017) 15 Cal.App.5th 1089 – In *RSB Vineyards*, the Plaintiff sued Defendants claiming misrepresentations and omissions in connection with the sale of a vineyard, including a residence that Defendants had renovated and converted into a wine tasting room. After the sale, the Plaintiff learned that the renovated residence was structurally unsound for commercial use and had to be demolished. Defendants moved for summary judgment, arguing that there was no evidence that they knew of the building's defects. The Plaintiff demonstrated that the defects were so severe that Defendants' construction professionals should have been aware of them, and argued that this knowledge was imputed to the Defendants. The trial court granted summary judgment, and the Court of Appeal affirmed, holding that a principal is charged only with the knowledge of an agent acquired while the agent was acting in that role and within the scope of his or her authority as an agent. The court noted that under California law, an architect acts as an independent contractor when preparing plans and specifications, but as an agent of the employer when supervising construction. Here, the Defendant's architects and engineers would have acquired their knowledge of structural defects while performing their work as independent contractors, and there was no evidence that any of them acquired such knowledge

while performing any supervisory functions or other tasks in their capacity as the Defendants' agents.

PUNITIVE DAMAGES

104. Punitive Damages – Failure To Obey Court Order And Produce Evidence Of Financial Condition Forfeits Argument That Punitive Damages Are Unsupported By Same Evidence.

Fernandes v. Singh (2017) 16 Cal.App.5th 932 – In *Fernandes*, the Plaintiff successfully sued Defendants for wrongful eviction and related claims, and obtained an award of compensatory and punitive damages. The Defendants appealed, arguing that they should not be subject to punitive damages in the absence of evidence of financial condition. The Court of Appeal affirmed, holding that a party who disobeys a court order to produce evidence of his or her financial condition forfeits any argument that he or she should not be subject to punitive damages in the absence of such evidence. Because the punitive damages award was just under four times the compensatory damages award, the ratio of punitive damages to compensatory damages was not facially infirm.

REAL ESTATE AND LAND USE

105. Adverse Possession – Erection Of Fence Blocking Easement Is Not Necessarily A Hostile Occupation Sufficient To Support Prescriptive Termination.

Vieira Enterprises, Inc. v. McCoy (2017) 8 Cal.App.5th 1057 – In *Vieira Enterprises*, the Plaintiff sued a neighboring property owner to quiet title and extinguish the Defendant neighbor's right of way easement over a private road between the parties' properties. The Plaintiff contended it met the requirements for adverse possession of the easement which defeated Defendant's recorded right-of-way by prescriptive termination. In support of its claim for adverse possession, the Plaintiff contended that: (1) it maintained gates at the north and south end of its property limiting access to the private road; (2) it put up fences enclosing the private road onto its side of the property for approximately 140 feet; (3) it planted palm trees along this apparent boundary, maintained waste bins and parking spaces on parts of the private road; and (4) it paved the private road at a cost of $60,000 to itself. The trial court held after a bench trial that there was insufficient evidence to establish a prescriptive use which was sufficiently hostile and adverse to put the Defendant on notice of the Plaintiff's claim for adverse possession. The Court of Appeal affirmed, holding that the Plaintiff's uses of the private road were consistent with the existence of the easement. The Defendant believed they were meant limit public access and traffic to the private road, which the Defendant rarely used himself. The Defendant occasionally used the road when the gate was not locked, and there was never a request for a key

to the lock that was refused, which would have indicated an intent to exclude Defendant from the easement. Moreover, the planted palm trees, waste bins, and parking spaces did not prevent usage of the forty-foot-wide private road, and the paving of the road actually conferred an incidental benefit to Defendant. Thus, the Plaintiff's "evidence did not, as a matter of law, compel the conclusion that its occupation of the private road was sufficiently hostile to [Defendant's] right-of-way" as to terminate it by prescription.

106. Land Use Permit Conditions – Construction Of Project Forfeits Challenge To Permit Conditions.

Lynch v. California Coastal Commission (2017) 3 Cal.5th 470 – In *Lynch*, homeowner Plaintiffs sought a permit from the California Coastal Commission to rebuild a damaged seawall and staircase. The Coastal Commission issued a permit that allowed the seawall to be rebuilt, on the conditions that: (a) the staircase would not be rebuilt, and (b) the permit would expire in 20 years, which would require the seawall to be removed, or the permit extended. The Plaintiffs filed a petition for writ of administrative mandate to challenge the conditions, but simultaneously accepted the permit and built the seawall. The trial court issued a writ requiring the Coastal Commission to eliminate the two permit conditions, but the Court of Appeal reversed. On review, the Supreme Court affirmed the reversal of the trial court, finding that the Plaintiffs had forfeited the right to challenge the permit conditions by building the seawall while their petition was pending. The general rule is that permit holders are obliged to either accept the burdens of a permit along with its benefits, or wait until a challenge to a permit condition has been decided before proceeding with the project. This allows administrative agencies the opportunity to devise alternate mitigation measures before a project is completed in the event a permit condition is invalidated. While the Mitigation Fee Act (Gov. Code, § 66000 et seq.) allows developers to proceed with a project while simultaneously challenging the imposition of a permit fee, that act is limited to challenges of "fees, dedications, reservations, or other exactions." The Supreme Court declined the Plaintiff's request to expand the statutory language to allow landowners to accept the benefits of a permit under protest if challenged land use restrictions can be severed from the project's construction.

107. Public Dedication – Civil Code Section 1009(b) – Non-recreational Public Use Of Non-Coastal Private Property Cannot Ripen Into An Implied Dedication.

Scher v. Burke (2017) 3 Cal.5th 136 – The Plaintiffs sued their neighbors for a declaration stating that the Defendants had "acquiesced to the dedication" of routes across the Defendants' private property as public roadways. The trial court agreed, and held that Civil Code § 1009(b), which provides that "no use" of private noncoastal property shall give rise to "a vested right" in the public to continue using the property, does not apply to property used by the public for nonrecreational vehicle access. The Court of Appeal reversed, holding that the statute expressly "bars *all* public use, not just recreational use, from developing into an implied public

dedication," and the Supreme Court affirmed, based primarily on the plain language of the statute. While Civil Code § 1009(a) states that the primary concern of the Legislature in enacting § 1009 was the encouragement of public recreational use, subdivision (b) specifies that "no use" shall ripen into a vested right, without restricting the scope of that provision to recreational use only. Accordingly, the Court declined to read such a restriction into the statute based on a supposed legislative intent. The Court also rejected an argument that the Legislature had "acquiesced" in a contrary interpretation, because: (1) there was no "well developed body of law" construing § 1009, and (2) there were no amendments of § 1009 to support the notion that the Legislature agreed with existing judicial interpretations of the statute, and mere inaction alone is insufficient to show legislative acquiescence.

108. Vested Rights – Erroneous Issuance Of Development Permits Does Not Create A Vested Right.

Attard v. Board of Supervisors of Contra Costa County (2017) 14 Cal.App.5th 1066 – In *Attard*, the Defendant county revoked development permits, after the Plaintiff landowners had made substantial progress toward installing a foundation for a new home in reliance on the permits. The permits were revoked because the Plaintiffs had failed to obtain necessary approvals relating to the project's sewer system before the development permits were issued. The Plaintiffs filed a petition for writ of mandate challenging the revocation, claiming that the issuance of the permits created a vested right to develop the subject properties in accordance with their terms. The trial court denied the petition. The Court of Appeal affirmed, holding that the doctrine of vested rights does not apply where a project was unlawful at the time a permit was issued. Because the Plaintiff did not have the necessary regulatory approvals, the permits were unlawful, and did not create any vested rights. While the doctrine of equitable estoppel could theoretically apply even where a permit was unlawful at the time of issuance, the Plaintiffs could not invoke that doctrine because they were complicit in the unlawful issuance of the permits, and the hardship to the Plaintiffs would not outweigh the public policy against unpermitted sewer connections.

109. Co-ownership – Partition – Unless Parties Agree To Appraisal Method, Partition By Sale Must Be Accomplished With Public Notice.

Cummings v. Dessel (2017) 13 Cal.App.5th 589 – In *Cummings*, the Plaintiff sued the Defendants, who were tenants in common with Plaintiff, for partition of the parties' real property under CCP § 872.210. That section authorizes the court to order partition of real or personal property by one of three methods: (1) partition in kind (i.e., a physical division and distribution of the property amongst the co-owners (2) partition by sale, or (3) partition by appraisal. The law favors the first option, but it is not always preferably, due to zoning laws and other land use restrictions, and the possibility that the value of the divided parcels may not equal the value of the whole parcel before division. Accordingly, the second method of partition by sale may be used when stipulated to by the parties, or ordered by the court in the interests of equity. If, and

only if the parties stipulate, the property may be sold at an appraised price. The trial court in *Cummings* ordered a partition by sale, and used a valuation by the Plaintiff's expert to set a minimum bid of $125,000. The court then ordered that the parties could bid against each other, with the winner taking the property (subject to offsets for their equity in the property), or, if neither made the minimum bid, the property would be subject to a public sale. The Court of Appeal found error, holding that the trial court's procedure was incompatible with the statute. The first stage amounted to an attempt at a partition by appraisal, which was not authorized because the parties had not stipulated to that method of partition. The trial court's procedure could not be characterized as a permissible partition by sale, because a partition by sale requires that the public be given notice and an opportunity to bid on the property, and the partition in this case allowed the parties the option of purchasing the property at or above the appraised value before the public was allowed to participate. Despite this finding of error, the Court of Appeal actually affirmed the judgment, based on a finding of harmless error in a portion of the opinion not certified for publication.

110. Slander Of Title – Recordation Of A Trustee's Deed Upon Sale In A Nonjudicial Foreclosure Is A Privileged Act.

Schep v. Capital One N.A. (2017) 12 Cal.App.5th 1331 – In *Schep*, the Plaintiff borrower sued for slander of title based on the Defendant trustee's acts in a nonjudicial foreclosure, including the recordation of a notice of default, a notice of sale, and a trustee's deed upon sale. One Defendant successfully demurred, arguing that the three documents were all privileged and could not form the basis for a slander of title claim. The Plaintiff appealed, arguing that the trustee's deed upon sale is not a privileged document. The Court of Appeal affirmed, explaining that while Civil Code § 2924(d)(1) only lists the notice of default and notice of sale as expressly privileged documents under Civil Code § 47, § 2924(d)(2) extends the privilege of § 47 to the "[p]erformance of the procedures set forth in this article." Because the recordation of a trustee's deed upon sale is set forth in the referenced article, it is within the scope of the privilege, even though it is not expressly listed in subdivision (d)(1). The Court of Appeal also noted a split in authority over whether Section 2924's reference to Section 47 refers to the absolute privilege under § 47(b) or the qualified privilege under § 47(c), but did not take a position on that dispute, because the Defendant's acts were not malicious, and thus would be privileged under either the absolute or qualified privileges.

111. Title – Void Judgment Cancelling Deed Of Trust Is Not Enforceable By Subsequent Bona Fide Purchaser.

OC Interior Services, LLC v. Nationstar Mortgage, LLC (2017) 7 Cal.App.5th 1318 – In a previous action, a property owner obtained a default judgment against the Defendants, which canceled the Defendants' deed of trust on the property. The property owner then sold the property to the Plaintiff, a bona fide purchaser. After the sale of the property, the Defendants successfully moved to set aside the default judgment as void, because the property owner had not

provided notice of the action. In the instant action, Plaintiff filed suit to prevent Defendants from foreclosing on the property. The trial court denied the Defendants' motion for summary judgment and granted the Plaintiff's summary adjudication, concluding that the Plaintiff took title to the property free of the Defendants' deed of trust as a bona fide purchaser. The Court of Appeal reversed, holding that a judgment is a nullity for all purposes upon being adjudicated as void. To support its decision, the court relied on a California Supreme Court case from 1857, which held that a void judgment in the chain of title nullifies a subsequent transfer to a bona fide purchaser. Additionally, pursuant to Civil Code § 3543, the Court of Appeal held that the equities favored the Defendants, because the Defendants did nothing wrong, the property owner wrongfully obtained a default judgment, and the Plaintiff was in the best position to discover the property owner's scheme. (For a similar holding, *see Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513.)

SETTLEMENT

112. Code Of Civil Procedure § 664.6 – Court May Not Enforce Settlement Agreement Absent Request To Retain Jurisdiction Prior To Dismissal.

Sayta v. Chu (2017) 17 Cal.App.5th 960 – In *Sayta*, the Plaintiff settled claims against the Defendant landlord, and later brought a motion to enforce the settlement agreement pursuant to CCP § 664.6. The trial court found that there was no violation of the settlement agreement, and denied the motion. The Plaintiff appealed, and the Court of Appeal reversed the order, but without addressing the merits. Instead, the Court held that under long-standing case law, the summary enforcement procedure in § 664.6 cannot be invoked unless the parties ask the trial court to retain jurisdiction for the limited purpose of enforcing the settlement agreement, *before* the action is dismissed. Here, the parties failed to do so, and the court lost subject matter jurisdiction when the dismissal was entered. The court left open the possibility that the parties could seek relief under CCP § 473, expressing no view on that issue.

113. Releases – Release Of "Affiliates" Does Not Apply To Defendant's Landlord, Particularly Where Settlement Is Confidential.

Iqbal v. Ziadeh (2017) 10 Cal.App.5th 1 – In a previous action, the Plaintiff settled a personal injury suit against an auto repair shop when a car rolled over the Plaintiff. The confidential settlement agreement released all "affiliates" and anyone "affiliated" with the repair shop. The Plaintiff then sued the Defendant, who was the owner of the car, the lessor of the property where the injury occurred, and who had a consignment agreement with the repair shop to sell the car. The trial court granted the Defendant's motion for summary judgment based on the release in the settlement agreement, concluding that the Defendant was an affiliate of the repair shop. The Court of Appeal reversed, holding that "affiliate" means "one who is dependent upon, subordinate to, an agent of, or part of a large or more established organization or group." The term requires a closer association than an arm's length contractual relationship like a lease or

consignment agreement. Bolstering this interpretation was the fact that the settlement agreement was confidential. The Court noted that the fact that "contracting parties have bound themselves not to disclose their contract to third persons is strong evidence that they intended not to invest such persons with rights under it." Accordingly, the Defendant landlord could not assert the release of the repair shop to bar the Plaintiff's claims.

114. Unlawful Penalties – Stipulated Judgment Entered Only Upon Default Under Settlement Agreement Is Void As Unlawful Penalty.

Vitatech Internat., Inc. v. Sporn (2017) 16 Cal.App.5th 796 [**Aronson**, Bedsworth, Ikola] – In *Vitatech,* Plaintiff and Defendants settled a breach of contract lawsuit in which Plaintiff sought more than $166,000 in damages for a one-time payment of $75,000. As part of the settlement, Defendants stipulated to entry of judgment against them for the full prayer of the complaint, but Plaintiff agreed to "forbear" from filing the stipulation and to accept the $75,000 as full settlement of its claims against Defendants if they paid by the designated date. When Defendants failed to pay, Plaintiff filed the stipulation, and the trial court entered judgment against Defendants for more than $300,000, which included compensatory damages, prejudgment interest, attorney fees, and costs. The trial court denied a motion to vacate the judgment as void, concluding that the judgment's higher amount was not an unenforceable penalty, but rather that the reduced amount Plaintiff agreed to accept was merely a discount if Defendants paid their debt as agreed. The Court of Appeal reversed and remanded for the trial court to grant the motion and enter a new judgment for the $75,000 settlement amount plus costs, holding that the stipulated judgment was void as a penalty because the amount bore no reasonable relationship to the damages that could have been anticipated from failure to timely pay the settlement amount. The stipulation for entry of judgment was not merely a permissible discount provision because the stipulation compromised disputed claims and resolved pending litigation. Although Defendants stipulated to entry of judgment if they did not timely pay, they never admitted liability on the underlying claims or the amount of damages allegedly caused by the breach of the underlying contract.

SUMMARY JUDGMENT AND SUMMARY ADJUDICATION

115. Evidence – Failure To Comply With Expert Disclosure Procedures Bars Use Of Expert Declaration In Opposition To Summary Judgment.

Perry v. Bakewell Hawthorne, LLC (2017) 2 Cal.5th 536 – In *Perry*, the Plaintiff failed to designate expert witnesses in response to a request for exchange of expert witness information under CCP § 2034.210, but then submitted two expert declarations in opposition to the Defendants' summary judgment motion. The trial court sustained the Defendant's objection that the experts were not timely disclosed, and granted summary judgment. The Supreme Court agreed with the Court of Appeal and affirmed judgment, basing its decision on the language of the summary judgment rules set forth in CCP § 437c(d), which require parties to submit

"admissible evidence." Since the experts were not disclosed, they would not be allowed to testify at trial, and thus their opinions were not admissible. The Supreme Court also noted that any grounds for relief from the expert disclosure rules needed to be invoked "as soon as the party discovers the need to submit a declaration by a previously undisclosed expert." Plaintiff's failure to do so prior to filing the summary judgment opposition meant that his experts' declarations remained inadmissible for purposes of the summary judgment motion.

116. Continuance – Minor Lack Of Diligence Did Not Justify Denial Of Stipulated Continuance.

Hamilton v. Orange County Sheriff's Department (2017) 8 Cal.App.5th 759 [**Ikola**, O'Leary, Bedsworth] – In *Hamilton*, the Defendant filed a motion for summary judgment in an employment discrimination suit, and the trial court granted the Defendant's request to continue the trial due to the late hearing date for the motion for summary judgment. The Plaintiff served deposition notices for witnesses that submitted declarations in support of the Defendant's motion, but the depositions were delayed because of unavailability of the Defendant's counsel, and were further delayed by Defendants' counsel's failure to respond to scheduling inquiries. The parties stipulated to continue the hearing and trial for 60 days to allow for the depositions to occur, but the trial court denied the stipulation, finding that the stipulation was not supported by a showing of diligence. The Court of Appeal reversed, holding that good cause existed for the continuance, because the witnesses were essential to the determination of the motion, the depositions were noticed a month and a half prior to the opposition due date, and the need to reschedule was due to the Defendant's counsel's unavailability. The Court of Appeal agreed that the Plaintiff could have been somewhat more diligent by noticing the depositions earlier, or following up and seeking a continuance more diligently, but held that this minor lack of diligence did not justify the substantial injustice of granting an unopposed summary judgment motion. The Court also noted that the trial courts are under pressure due to the Trial Court Delay Reduction Act, but that the policy disfavoring continuances must give way where a continuance is necessary to avoid material injustice.

117. Separate Statement – Summary Judgment May Be Granted Based On Opponent's Failure To Use Pinpoint Cites In Separate Statement.

Rush v. White Corp. (2017) 13 Cal.App.5th 1086 – In *Rush*, the Plaintiffs filed a 155-page separate statement in opposition to a summary judgment motion. The separate statement failed to cite to specific page and line numbers in violation of California Rule of Court 3.1350, and instead cited to "multiple paragraphs of multiple declarations, and at times, every paragraph of nearly every declaration on file." In response to multiple requests by the trial court to submit a compliant separate statement, the Plaintiffs filed several supplemental separate statements. In the last of these, the Plaintiff disputed some of the moving party's material facts with proper pinpoint citations, but answered other material facts with cross-references to evidence compiled in support of the Plaintiff's own additional material facts. This apparent attempt at efficiency

resulted in the trial court having to flip back and forth through the lengthy papers in order to locate the evidence pertaining to each material fact—a burden not contemplated by Rule 3.1350. Ultimately, the trial court granted the motion due to the Plaintiff's failure to file a proper separate statement. The Court of Appeal affirmed, noting that where an opposing party's separate statement is not compliant with the Rules of Court, the trial court should ordinarily provide an opportunity to cure the deficiency. Nevertheless, the court held that where such an opportunity is provided, and the opposing party still fails to submit a compliant separate statement, the trial court does not abuse its discretion by granting the summary judgment motion based on that failure.

TORTS

118. Malicious Prosecution – Interim Adverse Judgment Rule – Denial Of Motion For Judgment Under CCP § 631.8 In Prior Action Bars Malicious Prosecution Claim.

Hart v. Darwish (2017) 12 Cal.App.5th 218 – In *Hart*, the Plaintiff tenants sued the Defendant landlord for malicious prosecution arising from the Defendant's prior unlawful detainer lawsuit. The trial court granted judgment on the pleadings in favor of the Defendant, on the grounds that the Defendant's claims in the prior lawsuit had survived a motion for entry of judgment under CCP § 631.8, and thus did not lack probable cause. The Court of Appeal affirmed. Under the "interim adverse judgment rule," a ruling by a court in the prior action denying a defendant's summary judgment motion or motion for nonsuit, or a plaintiff's victory at trial in the prior action conclusively establishes that the prior action had the minimal merit necessary to preclude a malicious prosecution claim. This is true even if the interim ruling is later overturned. The only requirement is that the prior ruling must be based on the merits, rather than on procedural or technical grounds, and must not be induced by fraud. The Court of Appeal in *Hart* extended this rule to include a ruling on a § 631.8 motion, which is granted in a bench trial if the court finds that the plaintiff has failed to sustain the burden of proof. The Court reasoned that the denial of such a motion necessarily embodies a finding that the plaintiff has sustained its burden of proof, at least enough to continue with the trial, thereby justifying application of the interim adverse judgment rule, and precluding a malicious prosecution claim.

119. Public Nuisance – Causation – City Is Not Liable For Animal Odors Where Its Conduct Was Not A Substantial Factor In Causing Harm.

Citizens for Odor Nuisance Abatement v. City of San Diego (2017) 8 Cal.App.5th 350 – The Plaintiffs sued the City of San Diego (the "City") for the public nuisance caused by the smell of sea lion excrement after the number of sea lions on certain rocks exponentially increased, allegedly due to the City's construction of a fence, which prevented humans from accessing the rocks where the sea lions would congregate. The City moved for summary judgment on the

grounds that the Plaintiff could not satisfy the causation element, and argued that it could never be liable for the conduct of wild animals. The Court of Appeal rejected the argument that a governmental entity could never be liable for the conduct of wild animals, and held that the correct inquiry was whether or not "the City's conduct was a substantial factor in causing the alleged harm." In the case before it, the City submitted evidence that the fence was built decades before the increase in the sea lions, and that the sea lion increase was caused by factors other than the existence of the City's fence. The Plaintiff submitted declarations from community members saying that the smell did not exist before the fence, and a declaration from a behaviorist, but the trial court sustained objections to many of the pertinent parts of the behaviorist's declaration. The Court of Appeal affirmed the trial court's holding that causation could not be established, because the Plaintiff's evidence did not show that the fence's existence led to the increase in sea lions or the foul odor.

120. Trespass And Nuisance – Emotional Distress Damages Recoverable.

Hensley v. San Diego Gas & Electric Co. (2017) 7 Cal.App.5th 1337 – The Plaintiff homeowners sued the Defendant for trespass and nuisance arising out of a fire that damage their property, and sought to recover emotional distress damages suffered by one of the Plaintiffs who was not present at the time of the fire. The trial court granted the Defendant's motion in limine to exclude evidence of emotional distress damages, concluding that they are not recoverable for trespass and nuisance. The Court of Appeal reversed, holding that plaintiffs can recover for emotional distress damages in trespass and nuisance actions, even where the plaintiffs were not physically present on the property at the time of the tort. The Court of Appeal distinguished *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, concluding that *Kelly* only stands for the rule that legal occupancy, such as that of a resident or commercial tenant, is required to recover damages for annoyance or discomfort in a trespass case. Additionally, the court concluded that the inability to recover emotional distress damages in cases of negligence and negligent breach of contract cases is inapposite, as neither nuisance nor trespass is founded in negligence.

UNFAIR COMPETITION

121. 17200 Claim May Be Based On Violation Of Alcoholic Beverage Control Act.

Wiseman Park, LLC v. Southern Glazer's Wine and Spirits, LLC (2017) 16 Cal.App.5th 110 – The Plaintiff, the operator of a restaurant licensed to serve alcohol by the Department of Alcoholic Beverage Control ("Department") sued the Defendant, its wholesale alcohol supplier, who is also licensed by the Department, for collecting late charges in excess of the amount allowed by statute. The trial court sustained the Defendant's demurrer, finding that the Department had exclusive jurisdiction over all matters related to the sale of alcohol, which barred the Plaintiff's breach of contract, unfair competition, and declaratory relief claims. The

Court of Appeal reversed, holding that: (a) neither the California Constitution nor the Alcoholic Beverage Control Act gave the department exclusive jurisdiction over commercial disputes between licensees, and (b) because the Department did not have exclusive jurisdiction, an unfair competition claim could be based on a violation of the Alcoholic Beverage Control Act, even though that act did not provide a private right of action. In addressing the unfair competition claim, the Court of Appeal distinguished the Supreme Court's holding in *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081. *Loeffler* held that an unfair competition claim under Business & Professions Code § 17200 cannot be based on a statutory violation, where the "statutory scheme provides the exclusive means for resolving [such] disputes." Here, because the Alcoholic Beverage Control Act did not provide exclusive jurisdiction to the Department, *Loeffler* did not apply, and the Plaintiff could "borrow" that statute to support a claim that the Defendant's business practices were unlawful.

122. Clothing Retailer Does Not Violate Consumer Protection Laws By Selling Lower Quality Items At Its Factory Outlet Stores.

Rubenstein v. The Gap, Inc. (2017) 14 Cal.App.5th 870 – The Plaintiff sued the Defendant under the Unfair Competition Law, the False Advertising Law, and the Consumer Legal Remedies Act, because the Defendant operated Gap and Banana Republic factory stores, which allegedly sold lower quality items than the traditional stores without disclosing this fact. The trial court sustained the Defendant's demurrer without leave to amend, concluding that the Plaintiff failed to allege a misrepresentation or actionable omission on the part of the Defendant. The Court of Appeal affirmed, holding that the Defendant's use of its own brand name labels on clothing that it manufactures and sells at its factory stores is not deceptive, regardless of the quality or whether it was ever sold at a traditional Gap or Banana Republic store. The Plaintiff failed to allege any facts showing that the Defendant misrepresented the quality of the clothing or that it failed to disclose any facts, because consumers could ask the Defendant's employees if it was ever sold at its traditional stores, and the customers had the ability to inspect the clothing before buying it. Therefore, because there was no fraudulent, unlawful, or unfair conduct by the Defendant, all of the causes of action failed.

123. Trademarks – The Federal Lanham Act's Anti-Disparagement Clause Violates The First Amendment.

Matal v. Tam (2017) 137 S.Ct. 1744 – In *Olson*, the U.S. Supreme Court affirmed the U.S. Court of Appeals for the Federal Circuit's judgment vacating the U.S. Patent and Trademark Office's ("PTO") refusal to register a rock group's name, "The Slants," as a trademark. The proposed trademark was found disparaging under the Lanham Act (15 U.S.C. § 1052(a)), which prohibits registration of trademarks that "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead." The PTO found the mark disparaging despite the band's insistence that it was trying to "reclaim" a historically derogatory term for Asian persons. Agreeing with the Federal Circuit's en banc decision, the Supreme Court held the Lanham's disparagement

clause is facially unconstitutional under the First Amendment's Free Speech Clause. The Court found that while the Free Speech Clause "does not regulate government speech," trademarks are private, not government speech. Nor are trademarks government subsidized-speech, as the PTO does not pay money to parties seeking registration of a mark. The mere fact that trademark registration provides a valuable non-monetary benefit does not transform the registration into a subsidy. Even under the relaxed scrutiny applicable to commercial speech, "a restriction of speech much serve 'a substantial interest' and be 'narrowly drawn.'" While there may be a substantial interest in protecting the orderly flow of commerce from trademarks that support invidious discrimination, that interest does not justify the disparagement clause's expansive scope, since even marks like "Down with racists," "Down with sexists," or "Down with homophobes" would be barred. In short, the clause is not a narrowly drawn anti-discrimination clause, "it is a happy-talk clause," that "goes much further than is necessary to serve the interest asserted." Accordingly, as written, the disparagement clause violated the First Amendment.