NEW STATUTES, NEW RULES, AND NEW CASES

WHAT EVERY BUSINESS LITIGATOR NEEDS TO KNOW IN 2021

Edmond M. Connor
Matthew J. Fletcher
Douglas A. Hedenkamp
Laura Lee Blake
Michael Sapira
Brian J. Hoops

CONNOR, FLETCHER & HEDENKAMP LLP

Orange County Bar Association
Business Litigation Section

SIGNIFICANT STATUTES
Enacted in 2020

SIGNIFICANT RULES
Adopted in 2020

SIGNIFICANT CASES
Decided in 2020

SIGNIFICANT STATUTES
Enacted in 2020

ATTORNEY PRACTICE

1. Agreements To Prevent Reporting Of Attorney Misconduct

Business & Professions Code § 6090.5 – The former version of section 6090.5 provides that an attorney can be suspended, disbarred, or disciplined for agreeing, or seeking to agree, to a settlement that would prevent attorney misconduct from being reported to the State Bar, whether the attorney is acting "as a party or as an attorney for a party." The 2020 revisions expand the section to include any contract, not just settlement agreements. In addition, the section now applies to attorneys "acting on their own behalf or on behalf of someone else, whether or not in the context of litigation."

2. Annual State Bar Fees

Business & Professions Code §§ 6140, 6140.03, 6141 – The annual license fee for active members has been reduced from $438 to $395. For inactive members, the annual fee has been reduced from $108 to $97.40. The additional fee for legal services (which attorneys may opt out of paying) has been increased from $40 to $45.

3. Client Security Fund

Business & Professions Code § 6140.5 – Existing section 6140.5 establishes the State Bar's Client Security Fund, which can be used to compensate victims of attorney misconduct. Amendments passed in 2020 allow the State Bar to file a "Notice of Payment of the Client Security Fund" with the Superior Court. The clerk of the Superior Court shall then immediately enter a judgment in conformity with the notice of payment, which can be enforced by the State Bar in the same manner as any other judgment. In addition, the amendments provide that a licensee may not assert the defense of laches to any payments or interest owed to the State Bar under this section. The amendments are retroactive.

4. Collection Of Disciplinary Costs

Business & Professions Code § 6086.10 – The statute authorizing the Supreme Court to impose costs on licensees subject to public reproval now authorizes the State Bar to collect such costs "through any means provided by law."

5. Collection Of Sanctions And Client Security Fund Payments From The Franchise Tax Board

Revenue & Taxation Code § 19280 – Amendments to section 19280 allow monetary sanctions and any payments from the State Bar's Client Security Fund to be referred by the State Bar or the Superior Court for collection by the Franchise Tax Board.

CIVIL PROCEDURE

6. Electronic Service And Filing

Code of Civil Procedure § 1010.6 – Several revisions have been made to C.C.P. § 1010.6, which governs electronic service and filing. First, towards the beginning of the COVID pandemic, the Judicial Council adopted Emergency Rule 12, which required represented parties to electronically serve and accept electronic service in all cases. That requirement was then codified in § 1010.6(e), and Emergency Rule 12 was repealed. Subdivision (e) applies to any documents that may be served in such an action by mail, express mail, overnight delivery, or facsimile transmission (but not documents that must be personally served). Subdivision (a)(2)(A)(ii) provides that service under subdivision (e) is authorized in actions filed after January 1, 2019.

In addition, the term "Electronic Filing" has been specifically defined in subdivision (a)(1)(D) as the electronic transmission of a document to a court for filing, but not the court's review and processing the document or the entry of the document into the court records. This definition was added to address a practice in the Imperial County Superior Court where the Court had mandated "Electronic Delivery" to evade the statutory requirement that any court mandating "Electronic Filing" must either provide electronic filing itself, or allow parties to select from at least two or more competing electronic filing service providers.

Subdivision (b)(2)(A) now provides that documents required to be signed not under penalty of perjury shall be deemed signed if either (1) the person required to sign the document is the person who files the document, or if the document has been signed pursuant to the Rules of Court pertaining to electronic signatures. (*See* Rule 2.257.)

Extensive provisions have been added to subdivision (b)(4) to spell out the duties of the Court, an electronic filing service provider, and an electronic filing manager with respect to electronic filing notices. Under these procedures, electronic filers are to receive notice of the receipt of an electronically filed document, confirmation of filing of the document, and notice of rejection of the document (including the reasons for rejecting and the date of the notice).

In addition, subdivision (b)(4)(E) now provides that if an electronically filed complaint or cross-complaint is rejected due to failure to complain with filing requirements or failure to pay the filing fee, any statute of limitations shall be tolled from the receipt of the document through notice of rejection, plus one additional day to allow the filer to correct the errors that caused the rejection. A filer taking advantage of this additional day may not make any changes to the document other than those necessary to correct the errors that caused the document to be rejected.

Other provisions require electronic filing service providers to waive fees for parties that are otherwise exempt from fees, and prohibit the court from charging electronic filing fees in excess of the court's actual costs.

7. Extension Of Trial Related Dates Upon Continuance Or Postponement Of Trial

Code of Civil Procedure § 599 – During the pendency of the Governor's declaration of emergency relating to the COVID-19 pandemic, a continuance or postponement of trials automatically extends all deadlines for discovery, mandatory settlement conferences, and summary judgment motions. This law expires 180 days after the state of emergency ends.

8. Remote Depositions

Code of Civil Procedure § 2025.310 – At the beginning of the COVID pandemic, the Judicial Council also adopted Emergency Rule 11, which allowed deponents to appear remotely at deposition. Like Emergency Rule 12, the provisions of Emergency Rule 11 were codified, and the rule was then repealed. Specifically, the amendments to section 2025.310 now specify that the deponent can appear remotely in a different location than the deposition officer (previously the rule specified that anyone other than the deponent could appear remotely). Another revision provides that any party or attorney of record may, but is not required to, be physically present at the deponent's location during the deposition.

9. Settlement Agreements – C.C.P. § 664.6 – Attorneys Can Now Sign On Behalf Of Parties

Code of Civil Procedure § 664.6 – In order for the trial court to retain jurisdiction to enforce a settlement agreement following dismissal of an action, C.C.P. § 664.6 requires a settlement agreement and request for retention of jurisdiction to be made either orally before the court, or in a writing signed by the parties themselves. Prior cases interpreting this section have held that an attorney's signature on behalf of a party does not satisfy this requirement. Revisions passed in 2020 now provide that a writing signed by an attorney for a party is deemed to be signed by the party. However, this new provision does not apply in civil harassment cases, cases in juvenile or dependency court, or in cases under the Family Code or Probate Code. In addition, an attorney who signs a writing on behalf of a party without the party's express authorization will, absent good cause, be subject to professional discipline.

10. Statute of Limitations for UCLA Sexual Assault Claims

Code of Civil Procedure § 340.16 – This amendment extends the statute of limitations to bring sexual assault actions against former UCLA doctor James Heaps, who was charged with 20 counts of sexual misconduct by seven former patients. He was a faculty member of UCLA's medical school from 1989 until 2018. The new statute of limitations allows cases to be filed by the end of 2021.

CONTRACTS

11. Senior Citizens Have An Additional Two Days To Cancel Certain Contracts

Business & Professions Code §§ 7150, 7159, and 7159.10; Civ. Code §§ 1689.5, 1689.6, 1689.7, 1689.13, 1689.20, 1689.21, and 1689.24; Streets & Highways Code §§ 5898.16 and 5898.17 – Assembly Bill 2471 has amended numerous code provisions to specify that persons aged 65 and older have five days (rather than the standard three days) to exercise their right to cancel home solicitation contracts, home improvement contracts, PACE assessment contracts, service and repair contracts, and seminar sales contracts.

12. Translation Of Contract Must Be Provided To Third Parties Signing The Contract

Civ. Code § 1632 – Section 1632 requires businesses that negotiate certain consumer contracts (such as auto sales and leases, personal loans, residential leases, reverse mortgages, attorney engagement agreements, and foreclosure consulting services agreements) in Spanish, Chinese, Tagalog, Vietnamese, or Korean, to provide the other party a version of the contract translated into the language in which it was negotiated. The 2020 amendment to this statute requires the translation to be provided to any other person who will be signing the agreement. The amendment was intended to ensure that co-signors also receive copies of the translation.

CORPORATIONS AND BUSINESS ENTITIES

13. Filing Fees For Nonprofits And Tax-Exempt Organizations

Health & Safety Code § 50650.5; Revenue & Taxation Code §§ 23701, 23701r, 23772, and 23778; Vehicle Code § 5168 – SB 934 made changes to numerous code sections relating to nonprofit entities in order to eliminate the filing fees for a tax-exempt status application and for the entity's annual return.

14. Naming Requirements

Corp. Code §§ 110, 201, 2601, 5008, 5122, 7122, 9122, 10010, 10013, 12214, 12302, 13409, 15901.08, and 17701.08 – Senate Bill 522 amended several parts of the Corporations Code to streamline the Code's entity naming requirements so that they are the same for corporations, LPs, and LLCs. Essentially, the new unified requirements are that: (1) a new entity is prohibited from having a name that is likely to mislead the public, as determined by the Secretary of State ("SOS"), and (2) the name must be distinguishable from another name in the records of the SOS for a similar business entity. Previous exceptions that were inconsistent with these requirements have been deleted.

15. Quota Of Underrepresented Directors For Publicly Traded Corporations Headquartered In The State Of California

Corp. Code §§ 301.3, 301.4, and 2115.6 – In 2018, the state enacted Corp. Code § 301.3, which requires any publicly traded corporation headquartered in California to have at least one woman on its board of directors if it has four or fewer directors, two women on its board if it has five

directors, and three women on its board if it has six or more directors. New Corp. Code § 301.4 expands on that requirement, by requiring the boards of publicly traded corporations headquartered in California to include directors from "underrepresented communities." This is defined as directors who self-identify as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, native Hawaiian, Alaskan native, gay, lesbian, bisexual, or transgender. Corporations with four or fewer directors must have at least one director from an underrepresented community, corporations with five to eight directors must have at least two directors from an underrepresented community, and corporations with nine or more directors must have at least three directors from underrepresented communities. Penalties for violating this mandatory quota are $100,000 for the first violation and $300,000 for any subsequent violation.

COURTS

16. Judicial Emergencies

Government Code § 68115 – Section 68115 authorizes the presiding judge of a superior court to request that the Chairperson of the Judicial Council order the court to take certain actions in emergency circumstances, such as war, terrorism, natural disasters or other threats to health and welfare. Those actions include, but are not limited to, transferring cases to other counties, holding sessions anywhere in the county, extending the time period to bring an action to trial, and extending the duration of a temporary restraining order. The 2020 amendments to this section provide that, if the Chairperson determines that emergency circumstances threaten more than one county, or render presence in or access to facilities unsafe, the Chairperson may issue an order *sua sponte* requiring multiple courts to take some of the actions authorized under § 68115.

DISCRIMINATION

17. New Sex-Based Discrimination Requirements For Colleges

Education Code §§ 66262.5 and 66281.8 – The definition of sexual harassment applicable to colleges and universities receiving state financial aid is updated in Ed. Code § 66262.5 to include sexual violence, sexual battery, and sexual exploitation. In addition, new section 66281.8 imposes a series of procedural requirements on such schools to address complaints of sexual harassment. These requirements include: (1) the dissemination of a non-discrimination notice, (2) the designation of at least one employee to coordinate the school's compliance with the act, (3) adoption of rules and procedures to prevent sexual harassment, (4) adoption and publication of grievance procedures, (5) publication of the name and contact information for the school's Title IX coordinator, (6) special training for employees engaged in the grievance procedure, (7) annual training for residential life staff, (8) notification to employees of reporting requirements, and (9) employee training on the identification of sexual harassment. A school's grievance

procedures must comply with an extensive list of requirements laid out in the statute. These include the requirement that "[a]ny cross-examination of either party or any witness shall not be conducted directly by a party or a party's advisor," and a requirement that either party may request to answer any questions by video from a remote location.

EMPLOYMENT AND LABOR

18. Attorney's Fees In Retaliation Claims

Labor Code § 1102.5 – Section 1102.5 has been amended to allow the court to award reasonable attorney's fees to a plaintiff who brings a successful action for a violation of the statute's provisions. Those provisions prohibit: (1) rules or policies prohibiting employees from reporting information to the government or a person with authority to investigate the information, (2) retaliation against employees for reporting information to the government or a person with authority to investigate the information, (3) retaliation against employees for refusing to violate state or federal statutes or regulations, and (4) retaliation against employees for exercising their rights under the statute in any former employment.

19. COVID And Workers' Compensation

Labor Code §§ 77.8, 3212.86, 3212.87, and 3212.88 – SB 1159 creates a "disputable presumption" that an illness or death resulting from COVID-19 arose out of and in the course and scope of employment. This presumption applies to all employees who test positive during an outbreak at work and whose employer has 5+ employees. If an employee is eligible for paid sick leave benefits "specifically available in response to COVID-19," the employee must use them before using any temporary disability benefits. If an employee has no sick benefits, then the employee must be provided with temporary disability benefits.

20. COVID Notifications

Labor Code § 6409.6 – Section 6409.6 has been added to the Labor Code to require employers who receive notice of potential exposure to COVID-19 to provide written notice to all employees (and the exclusive representative of such employees) who were on the premises at the same worksite with the potentially infected individual during the infectious period they may have been exposed to COVID-19. The notice must also include: (1) any information regarding COVID-19 related benefits to which the employee may be entitled, including sick leave, and (2) the employer's disinfection and safety plan. The section also prohibits retaliation for disclosing a positive COVID-19 test or order to quarantine or isolate.

21. COVID Sick Leave

Labor Code §§ 248, 248.1 – Labor Code sections 248 and 248.1 established additional paid sick leave for food service workers, healthcare providers, and emergency responders for absences caused by COVID-19. The provisions expired on December 31, 2020. AB 84 is currently under

consideration by the Legislature and would reinstate these provisions through September 30, 2021.

22. Employee Data Reporting Requirements For Employers With 100+ Employees

Government Code §§ 12930 and 12999 – Government Code § 12930 has been amended to allow the DFEH to investigate, mediate, and prosecute discriminatory wage rate claims in violation of Labor Code § 1197.5. Section 12999 has been added to the Government Code to require employers with 100+ employees to submit a pay data report to DFEH each year starting March 31, 2021. The report must, for example, identify the number of employees in various job categories and pay bands by race, ethnicity, and sex and provide certain pay and hours worked data. The DFEH has provided an online FAQ and guidance for employers, available here.

23. Labor Commissioner's Right To Represent Claimants In Arbitration

Labor Code § 98.4 – Under the preexisting version of section 98.4, when an employer appeals an order by the Labor Commissioner in response to an employee complaint under Labor Code §§ 98-98.2, the Commissioner may represent a financially destitute employee is asked to do so. Also, the Commissioner must represent a financially destitute employee if the employee is attempting to uphold the amount awarded by the Commissioner and is not objecting to any part of the final order. The 2020 amendment adds three more provisions: First, the Commissioner's discretion and duty to represent the claimant in subsequent proceedings applies whether those proceedings are in a judicial or arbitral forum. Second, if an employee filing a wage claim is unable to have the Labor Commissioner adjudicate the claim due to an order compelling arbitration, the employer may request that the Commissioner represent the claimant in arbitration, and the Commissioner shall do so if the claimant is unable to afford counsel and the claim has merit. A petition to compel arbitration of a claim pending before the Labor Commissioner must be served on the Commissioner, and the Commissioner may represent the claimant in proceedings to determine the enforceability of the arbitration agreement.

24. Mediation Pilot Program For Small Employer Family Leave Disputes

Government Code § 12945.21 – New section 12945.21 of the Government Code requires the DFEH to establish a small employer family leave mediation pilot program. The program applies to companies with 5 to 19 employees, and allows either an employee or an employer to request mandatory mediation for alleged violations of Gov. Code section 12945.2, which deals with family care and leave. The mediation takes place with the DFEH's dispute resolution division. If mediation is requested, the employee cannot pursue a civil action until the mediation is complete, but the statute of limitations on covered and related claims are tolled while the mediation is pending. The new statute expires in 2024.

25. No-Rehire Clauses In Settlement Agreements – Exceptions

Code of Civil Procedure § 1002.5 – Existing C.C.P. § 1002.5 provides that where an employee files a claim and settles with the employer, a settlement agreement in the action may not include a provision that restricts the employee from working for the employer in the future. The 2020 amendment to this statute provides that the prohibition only applies if the employee filed the claim in good faith. In addition, the existing law contains an exception that allows a prohibition on future employment where the employer has made a good-faith determination that the employee committed sexual harassment or sexual assault. The 2020 amendment provides that the employer must have made this determination before the employer filed the claim, and also expands the exception to apply where the employer determines that the employee engaged in "any criminal conduct."

26. Paid Leave Before Deployment Of Military Family Member

Unemployment Insurance Code §§ 3302 and 3307 – The laws governing paid family leave require employers to pay workers who take time off to care for a seriously ill family member or to bond with a child within one year of the child's birth or placement from adoption. The 2020 amendments to these statutes require an employer to provide paid family leave when an employee's spouse, domestic partner, child, or parent is called to active duty to engage in various activities specified in Unemployment Insurance Code § 3302.2, including, but not limited to, attending official ceremonies or family support programs, arranging alternative childcare or schooling, or making other necessary financial or legal arrangements.

27. Retaliation Against Domestic Workers For Evacuating

Labor Code §§ 6310, 6311, 6399.7, and 6311.5 – One cannot lay off or discharge an employee for refusing to violate safety standards when the violation would create a real and apparent hazard. "Employee" now includes domestic workers such as housekeepers except for publicly funded domestic workers. This amendment also makes it a crime for a person, after receiving notice to evacuate or leave, to willfully direct an employee to remain in or enter an area closed for certain health or safety reasons. This latter amendment was prompted by domestic workers showing up for work in fire-evacuated neighborhoods.

28. Time To File Complaints With The Labor Commissioner

Labor Code § 98.7 – Labor Code § 98.7 allows employees who have been discharged or discriminated against in violation of any law enforced by the Labor Commissioner to file a complaint with the Commissioner. The 2020 amendment to § 98.7 increases the time to file such a complaint from six months to one year following the occurrence of the violation.

29. Unpaid Leave – Expansion Of The Family Rights Act And New Parent Leave Act To Companies With 5 Or More Employees

Government Code §§ 12945.6 and 12945.2 – The existing New Parent Leave Act and Family Rights Act provided that employees in companies with at least 50 employees are entitled to up to 12 workweeks of unpaid leave to bond with a new child or care for themselves or a family member. The revisions to section 12945.2 expand this unpaid leave requirement to employers with at least 5 employees. It also provides that leave to care for family members now includes domestic partners, grandparents, grandchildren, siblings, and parents-in-law. A number of exceptions have been repealed, including: (1) an exception that allowed an employer to refuse a request for leave if the employer has less than 50 other employees within 75 miles of the employee's worksite, (2) an exception which applied in cases where both of a child's parents are employed by the same employer, and (3) an exception which allowed an employer to refuse to reinstate an employee returning from leave where the employee is among the highest paid 10 percent of employees, and the refusal is necessary to prevent "substantial and grievous economic injury." There are many detailed provisions of this new law, so anyone practicing in this area of law should carefully study SB 1383, available here.

ENVIRONMENTAL

30. CEQA Exemption For Sustainable Transportation Projects And Bicycle Transportation Plans

Pub. Resources Code §§ 21080.20, 21080.25 – New CEQA § 21080.25 establishes an exemption for: (1) pedestrian and bicycle facilities, such as bicycle parking and bikeways, (2) projects that improve customer information and wayfinding for transit riders, bicyclists, or pedestrians, (3) transit prioritization projects, (4) projects to convert existing highway lanes to bus-only lanes, (5) projects to institute or increase new bus rapid transit, bus, or light rail services on public rights-of-way, including the construction of stations, (6) projects to construct or maintain infrastructure to charge or refuel zero-emission transit buses, (7) utility maintenance, repair, relocation, replacement, or removal in connection with the foregoing, (8) any project that is a combination of the project in (1)-(7), and (9) projects by a city or county to reduce minimum parking requirements. Such projects are subject to other requirements set forth in detail in section 21080.25, including requirements for projects exceeding $100 million that the lead agency conduct "a project business case and a racial equity analysis," and hold specified public meetings both before applying the CEQA exemption, and during construction. This new exemption expires in 2023. In addition to the foregoing, an amendment to CEQA § 21080.20 extends an existing exemption for bicycle transportation plans, which was set to expire in 2021, to 2030. The amendment also removes a requirement for the preparation of a traffic and safety impact assessment.

GOVERNMENT

31. Brown Act Open Meeting Requirements And Social Media

Government Code § 54952.2 – New subdivision (b)(3) of Government Code § 54952.2 specifies that the Brown Act's open meeting requirements do not prohibit a member of a legislative body from engaging in conversations or communications on social media to answer public questions or solicit information from the public. However, the exception does not apply to the use of social media by a majority of the members to discuss matters within the legislative body's subject matter jurisdiction. In addition, members shall not respond directly to any social media post concerning the legislative body's subject matter jurisdiction if the post is made or shared by any other member of the legislative body. This new provision expires in 2026.

32. Electronic Filing Of Government Claims

Government Code §§ 915, 915.2, and 915.4 – The Government Claim Act (sometimes known as the Government Tort Claims Act) establishes procedures for filing a claim against a public agency. Under existing law, a claim was required to be served on the public agency in person or by mail. A recent executive order authorizes electronic filing of government claims, but it expires at the end of the COVID-19 state of emergency. Amendments to Gov. Code §§ 915, 915.2, and 915.4 allow electronic submission of claims where explicitly authorized by ordinance or resolution, specify that proof of electronic service will be governed by C.C.P. §§ 1013b and 1010.6, and provide that notices in response to an electronic claim may also be served electronically.

JUDGMENTS

33. Homestead Exemption Increase And Simplification

Code of Civil Procedure § 704.730 – California's homestead exemption, which was previously set at either $75,000, $100,000, or $175,000 depending on various factors has been streamlined and increased. The amendments to § 704.730 now provide that the homestead exemption is the greater of $300,000 or the countywide median sale price of a single-family home in the calendar year before the year in which the judgement debtor claims the exemption, not to exceed $600,000.

34. Principal Residence Protected From Levy Because Of Consumer Debt Judgment

Code of Civil Procedure §§ 699.730, 703.150, and 704.760 – New C.C.P. § 699.730 has been added to prohibit a judgment creditor on a consumer debt from forcing a sale of the judgment debtor's principal place of residence unless that debt was secured by that principal place of residence when it was incurred. The new statute also exempts unpaid debts for wages, taxes, child support, spousal supports, fines, and tort judgments, as well as debts other than student loans that are owed to financial institutions if: (a) the original judgment on which the lien is

based, and (b) the amount owed on the outstanding judgment at execution, are both greater than $75,000. Under section 703.150, the $75,000 minimum for the financial institution exemption shall be adjusted for inflation once every three years. Under § 704.760 a judgment creditor's application to a court for an order for sale of a dwelling must state that the judgment was secured by the debtor's principal place of residence when it was incurred or otherwise state the applicable exemption to 699.730.

35. ScholarShare College Savings Accounts Exemption And Increases In Other Exemptions

Code of Civil Procedure §§ 703.140, 704.010, 704.030, 704.040, 704.060, 704.080, 704.090, 704.100, and 704.105 – A California Golden State ScholarShare Trust Account is a tax-free college savings account established by the Golden State ScholarShare Trust Act. New subdivision (b)(12) in C.C.P. § 703.140 provides that money held in a ScholarShare account is exempt from attachment in bankruptcy proceedings, subject to specified limits depending on the date of the contributions and the annual gift tax exclusion. Other provisions in SB 898 have increased the monetary limits on various other judgment exemptions.

JURIES AND JURY TRIALS

36. Expanded Jury Pool

Code of Civil Procedure § 197; Revenue & Taxation Code §§ 19542, 19548.4, and 19585 – Currently, prospective jurors are summoned from lists of registered California voters and licensed drivers. Beginning January 1, 2022, the amendments in SB 592 are expected to add several million more names to the jury pool by including residents who are not registered to vote or drive, but who do file state tax returns.

37. Peremptory Challenge

Code of Civil Procedure § 231.7 – New § 231.7 establishes a comprehensive new regime to govern objections to peremptory challenges for discrimination on the basis of a prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation. Notably, however, the statute does not take effect until 2022, and civil actions are exempt from the statute until 2026. The major provisions of the new statute include: (1) a requirement that, following an objection to a peremptory challenge, the party exercising the challenge must immediately state the reason for the challenge, without any showing by the objecting party, (2) a new objective standard for evaluating objections by determining whether there is a substantial likelihood that an objective observer, aware of unconscious biases, would view one of the protected characteristics as a factor in the use of the challenge, (3) an extensive but non-exhaustive list of factors the judge may consider in evaluating an objection to a peremptory challenge, (4) a list of reasons that are deemed to be presumptively invalid unless the challenging party demonstrates with clear and convincing evidence that the reason is unrelated to a protected characteristic (examples include expressing a distrust of law enforcement, not being

an English speaker, and dress or personal appearance), (5) a second list of juror behaviors that are deemed presumptively invalid reasons for a challenge unless the judge is able to confirm that the behavior occurred, including inattentiveness, lack of rapport or problematic attitude, body language, or demeanor, and unintelligent or confused answers, and (6) a list of potential remedies for an improper challenge, including quashing the entire venire and starting jury selection over again (which is mandatory if requested by the objecting party), declaring a mistrial if the jury has been impaneled at the time of the objection, seating the juror, or providing the objecting party with additional challenges.

MISCELLANEOUS

38. CARES Act And Taxes

Revenue & Taxation Code §§ 17131.8 and 24308.6 – New sections 17131.8 and 24308.6 of the Revenue & Taxation Code conform state law to federal law by allowing taxpayers to exclude the amount of Paycheck Protection Program (PPP) loans provided to California small businesses under the CARES Act for personal and corporate income tax purposes. The sections provide that the business expense deduction does not apply to expenses that were paid for using forgiven loan funds.

39. Debt Collection Licensure Starting January 2022

Financial Code §§ 100000-100025 – The Debt Collection Licensing Act adds a new Division to the Financial Code that becomes effective January 1, 2022. The new statutes provide for the license and regulation of debt collectors collecting consumer debts, prohibit a person from engaging in collection of consumer debt without a license, and require compliance with extensive reporting, examination, and other oversight provisions. These provisions can be reviewed in Fin. Code § 100000-100025 or in SB 908. Some highlights include: (1) an application process including an application fee and a criminal background check with fingerprinting, along with investigation of owners/shareholders of any applicants that are entities, (2) provisions governing discipline and license revocation, (3) use of the Multistate Licensing System & Registry, (4) standards of conduct for licensees, (5) periodic examination of licensees' books, records, documents, and employees, and (6) an advisory committee to advise on debt collection or the debt collection business. In opposing this new law, the California Creditors Bar Association argued that "[t]here is no public policy justification for subjecting lawyers [who collect debts] to duplicative licensing by the Department of Business Oversight. . . . A second license for precisely the same representation of clients is unnecessary, redundant, and will raise costs to clients."

40. Price Gouging Following A Proclamation Of A State Of Emergency

Penal Code § 396 – Penal Code § 396 prohibits sellers from increasing prices more than 10% for thirty days following a proclamation of an emergency. Amendments to that section now bar

a seller who did not sell a product before the declared emergency from charging a price that is more than 50% greater than the seller's existing costs. In addition, the Governor or Legislature may extend the time period of the prohibition and authorize specified price increases greater than the amounts set by statute.

41. Third-Party Food Delivery Requires Use Of Tamper-Evident Methods

Health & Safety Code §§ 113982 and 113930.5 – When a restaurant uses a third-party food delivery platform like Uber Eats, Postmates, or DoorDash, the restaurant must enclose the food using a tamper-evident method before the food deliverer takes possession of the food, and the food must be transported in a clean holding area, protected from contamination, and maintained at a safe holding temperature during delivery.

REAL PROPERTY

42. COVID – Tenant, Homeowner, And Small Landlord Relief And Stabilization Act Of 2020

Civil Code §§ 1946.2, 1947.12, 1947.13, 798.56, 1942.5, 2924.15, and 789.4; Code of Civil Procedure §§ 1161, 1161.2 1161.2.5, and 116.223 – In August 2020, the governor signed AB 3088, which includes the COVID-19 Small Landlord and Homeowner Relief Act (the Homeowner Act) and the COVID-19 Tenant Relief Act (the Tenant Act). Then the governor signed SB 91 in January 2021, which extends these new acts into 2021, and enacts new provisions relating to COVID-19 rental debt. Generally, the Homeowner Act imposes notice requirements on mortgage servicers who deny a homeowner or small landlord's forbearance request, requires mortgage servicers who do grant a forbearance to review at least one post-forbearance "solution" consistent with federal guidelines, and extends the protection of the Homeowners Bill of Rights to small landlords. Generally, the Tenant Act provides procedures for tenants to demonstrate COVID-19 related financial hardship, prohibits tenants who do so from being evicted, permits debt arising from unpaid COVID-19 rent to be sought in small claims court, and imposes notice requirements on landlords. There are extensive provisions in these bills that go far beyond the scope of this summary, so anyone practicing in this area should read these two bills.

43. Right Of Refusal For Tenant Buyers And Right To Outbid For Other Eligible Bidders Up To 45 Days After A Foreclosure Sale Of Residential Property

Civil Code §§ 2929.3, 2924f, 2924g, 2924h, 2924n, and 2924m – In anticipation of a possible wave of foreclosures caused by the economic fallout from the COVID-19 pandemic, SB 1079 sets forth changes to the non-judicial foreclosure process in order to encourage owner-occupancy, and discourage the transfer of residential property from owner-occupants to corporate landlords. Generally, these new provisions allow tenants of a foreclosed residential property with 1-4 units to match the highest bid up to 45 days after a foreclosure sale takes place.

Certain other eligible bidders (including prospective owner-occupants who certify their intent to live in the property for at least a year, certain non-profit organizations, and any state or local government entities) may submit their own bids that must exceed the highest bid at the foreclosure sale up to 45 days after the foreclosure sale takes place. To be eligible to submit such a bid, a tenant buyer or other eligible bidder must give a non-binding notice of their intent to bid within 15 days after the foreclosure sale. If a tenant buyer matches the highest bid at the foreclosure sale, that tenant buyer is deemed to be the last and highest bidder. If there is no tenant buyer, the eligible bidder with the highest bid is deemed to be the last and highest bidder. In addition to the foregoing, numerous procedural requirements have been enacted, and the fine for failure to maintain vacant residential property has been increased from $1,000 per day to $2,000 per day for the first 30 days, up to a maximum of $5,000 per day thereafter. These provisions sunset in 2026.

UNFAIR BUSINESS PRACTICES

44. Cybersquatting

Business & Professions Code §§ 17525, 17526 – Several significant amendments have been made to the cybersquatting prohibition in Bus. & Prof. Code § 17525. First, the prohibition on registering or using a domain name in bad faith if the name is identical or confusingly similar to the name of another person has been expanded to include identical or confusingly similar subdomain names. (A subdomain name is the name that appears before the domain name in a web address. For example: http://subdomainname.domainname.com). Second, the statute now expressly lists misspellings of a domain or subdomain name as an example of confusingly similar names. Third, the statute now prohibits the bad faith use of a domain or subdomain name for the sale or resale of goods if the name is identical or confusingly similar to the name of a sports team, theme or amusement park, live event venue, or specific event, performance, or exhibit. Fourth, the statute also has been expanded to provide a civil action for any party who has been injured by a violation, and to provide that any party who violates the statute without consent is presumed to have done so in bad faith. Section 17526 provides the standards for determining whether bad faith exists under section 17525, and has been amended to add as an example of bad faith the intent to divert website traffic from an entity "either for commercial gain or with the intent to tarnish or disparage the entity by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site."

TORTS

45. Legal Guardian May Bring Wrongful Death Action

Code of Civil Procedure § 377.60 – Currently, the persons who may bring a civil action for wrongful death includes the decedent's parents if they were entitled to the decedent's property by intestate secession or if they were dependent on the decedent. The 2020 amendment to § 377.60

clarifies that legal guardians can bring a wrongful death action if: (a) the parents would have been able to bring the action, but the parents are deceased, or (b) the legal guardians were dependent on the decedent and the decedent's parents are deceased. This amendment is not intended to alter the conditions and requirements for bringing a wrongful death action. Instead, it is intended merely to allow a decedent's legal guardian to bring a wrongful death action in the same manner as a parent.

SIGNIFICANT RULES
Adopted in 2020

TITLE 2 – TRIAL COURT RULES

1. Contracts With And Responsibilities Of Electronic Filing Service Providers And Electronic Filing Managers

Rule 2.255(g) – An electronic filing service provider must allow an electronic filer to proceed with an electronic filing even if the electronic filer does not consent to receive electronic service. This provision applies only in cases where electronic service is authorized by express consent under rule 2.251(b).

2. Court Reporting Services In Civil Cases

Rule 2.956(c) – Where an official court reporter is not available, existing Rule 2.956(c) allows a party to arrange for a certified shorthand reporter to act as an official pro tempore reporter. The amendment to this rule requires the court to appoint the reporter to that pro tempore role, unless there is good cause to refuse to do so. In addition, existing Rule 2.956(c)(2) allowed parties with a fee waiver to request an official reporter in compliance with local rules. The amendment removes the requirement that the request comply with local rules, and, instead, provides that the request shall be made on Judicial Council form FW-020 at least 10 days before the hearing for which the reporter is requested. If such a request is for a trial, the amendment provides that the request shall remain in effect if the trial is continued. Finally, the amendment provides that the reporter's attendance is to be provided at no cost to a fee waiver recipient.

TITLE 8 – APPELLATE RULES

3. Proof Of Service

Rule 8.25 – Rule 8.25 requires all parties to an appeal to serve a copy of each document on all other parties before filing the document, and to attach a proof of service when the document is presented for filing. The 2020 amendment to this rule adds that, if a party is serving the document using an electronic filing service provider's automated electronic document service, the party may have the electronic filing service provide the proof of service. The 2020 amendment also strikes a statement that service must be accomplished "by any method permitted by the Code of Civil Procedure." Comments in the Judicial Council Rules Committee's agenda packet for this revision indicated that the phrase was too broad, since C.C.P. § 1017 allows for service by telegraph, which is not an authorized method of service in the Supreme Court and Court of Appeal.

4. Tolling Or Extending Time Because Of Public Emergency

Rule 8.66 – Rule 8.66 previously allowed the Chair of the Judicial Council to extend any deadlines under the Rules of Court, or authorize courts to extend such deadlines, by up to 14 days if made necessary by an earthquake, fire, or other public emergency. The amendment to this rule allows the Chair to order or authorize the deadlines to be "tolled" or "extended," and increases the maximum extension or tolling to 30 days. It also adds "public health crisis" to the list of reasons for tolling or extension. The Advisory Committee Comment on this rule explains that it applies "to all rules of court that govern finality in both the Supreme Court and the Courts of Appeal."

5. Accepting Electronic Service

Rules 8.72 and 8.78 – Rule 8.78 allows electronic service in the Supreme Court and Court of Appeal where provided for by law or court order, or where the recipient consents. The pre-existing version of this rule stated that a party consents to electronic service by filing a document electronically, unless the party serves a notice that it does not accept electronic service. The 2020 amendment provides that registering with the Court's electronic filing service provider (rather than filing electronically) is deemed to be a consent to receipt of electronic service, unless a notice to the contrary is served. Rule 8.72 was amended to add that an electronic filer must provide an electronic service address to accept receipts and filing confirmations.

6. Actions By The Court Upon Receipt Of Electronically Submitted Documents

Rule 8.77 – The language in Rule 8.77 was revised to clarify that a document submitted to the Court electronically is not electronically filed unless it complies with applicable filing requirements, but that, if it does, it is deemed filed on the date it is received by the Court, as stated in the confirmation of receipt.

7. Appellate Division – Record On Appeal – Appendices

Rules 8.830, 8.840, 8.843, 8.845, and 8.882 – The Rules of Court applicable to Limited Civil appeals in the Appellate Division of the Superior Court have been revised to allow the use of an appendix in place of the clerk's transcript. The detailed rules for such an appendix are set forth in Rule 8.845, and are similar to the rules governing appendices in the Court of Appeal.

TITLE 10 – JUDICIAL ADMINISTRATIVE RULES

8. Judicial Branch Policies On Workplace Conduct

Rule 10.351 – This new rule requires the judicial branch to adopt policies to prohibit harassment, discrimination, retaliation, and inappropriate workplace conduct based on a protected classification and establishes a complaint reporting process.

APPENDIX I – EMERGENCY RULES RELATED TO COVID-19

9. Unlawful Detainers

Emergency Rule 1 – The issuance of summons, entry of default, and setting of trial in unlawful detainer actions was restricted to those instances where necessary to protect public health and safety, but this rule expired on September 1, 2020.

10. Judicial Foreclosures – Suspension Of Actions

Emergency Rule 2 – All actions for judicial foreclosure on a mortgage or deed of trust were stayed, and the court was precluded from issuing any decision or judgment until September 1, 2020. In addition, the period of time for electing or exercising any right under the judicial foreclosure statutes (including the time to exercise any right of redemption) was extended through September 1, 2020.

11. Use Of Technology For Remote Appearances

Emergency Rule 3 – Courts may require remote proceedings, including the use of video, audio, and telephonic means for appearance, electronic exchange and authentication of documents, e-filing, e-service, and remote reporting and recording. This rule will remain in effect until 90 days after the Governor declares that the state of emergency due to the COVID-19 pandemic has ended.

12. Tolling Of Civil Statutes Of Limitations

Emergency Rule 9 – The statutes of limitations and repose for civil causes of action that exceed 180 days were tolled from April 6, 2020, until October 1, 2020. For those under 180 days, the tolling period lasted from April 6, 2020, to August 3, 2020.

13. Extension Of Time To Bring Action To Trial

Emergency Rule 10 – The five-year deadline to bring an action to trial under C.C.P. § 583.310 is extended by six months if the action was filed before April 6, 2020. Also, if a new trial is granted in a case filed on or before April 6, 2020, the three-year deadline to bring the action to trial again under C.C.P. § 583.320 is extended by six months as well.

14. Remote Depositions

Emergency Rule 11 – This rule allowed deponents to appear remotely at depositions, outside the presence of the deposition officer, but was repealed in November of 2020, following the enactment of SB 1146, which made the provisions in the rule permanent in Code of Civil Procedure 2025.310.

15. Electronic Service

Emergency Rule 12 – This rule required represented parties to electronically serve any party who requested such service, and required represented parties to accept electronic service. It was repealed in November of 2020, following the enactment of SB 1146, which made the provisions in the rule permanent in Code of Civil Procedure 1010.6(e).

SIGNIFICANT CASES
Decided in 2020

ALTERNATIVE DISPUTE RESOLUTION

1. Arbitrability – Exceeding Arbitrator's Authority – Arbitrator Exceeded His Authority By Enforcing A CC&R Provision That Required A Homeowner Vote Prior To Commencing A Construction Defect Arbitration Against A Developer.

Aldea Dos Vientos v. CalAtlantic Group, Inc. (2020) 44 Cal.App.5th 1073 – In *Aldea,* a plaintiff homeowner's association (the "HOA") brought an arbitration against the developer of a planned community (the "Developer"). The terms of the CC&Rs governing the HOA required a majority vote of the homeowners before filing the demand for arbitration. No such vote took place until after the arbitration was commenced. The arbitrator summarily dismissed the arbitration due to the lack of a pre-commencement vote. The trial court confirmed the dismissal of the arbitration, and the Court of Appeal reversed. The Court noted that a similar CC&R requirement was upheld by the Fourth Appellate District, Division Three, in *Branches Neighborhood Corp. v. CalAtlantic Group, Inc.* (2018) 26 Cal.App.5th 743. The Court disagreed with *Branches*, concluding that the requirement violated public policy. The Court also noted that after *Branches Neighborhood Corp.* was decided, the Legislature enacted Civil Code §5986(b), which expressly prohibited CC&R provisions requiring a homeowner vote prior to filing a claim against a developer.

2. Arbitration Agreements – Choice Of Arbitration Law – Provision Stating That Enforcement Of Arbitration Agreement Would Be Governed By The FAA Trumps More General Statements Regarding California Arbitration Law.

Victrola 89, LLC v. Jaman Properties 8 LLC (2020) 46 Cal.App.5th 337 – In *Victrola*, the arbitration clause in the parties' contract stated in one place that "[e]nforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act." In another place, however, the agreement stated that by initialing the provision the parties were agreeing that any dispute would be "DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW," and that if a party refuses arbitration, they "MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE CALIFORNIA CODE OF CIVIL PROCEDURE." The agreement also provided that "this Agreement shall be interpreted and disputes shall be resolved in accordance with the Laws of the State of California." After considering the competing provisions, the Court of Appeal held that the statements regarding application of California law were more general than the provision expressly stating that the FAA would govern enforcement of the arbitration agreement. Because a more specific provision controls over a more general one, the Court held that the procedural provisions in the FAA, and not the CAA, governed a motion to compel arbitration under the parties' agreement.

3. Arbitration Agreements – Qui Tam Actions – Arbitration Agreement Does Not Apply To Qui Tam Action, Because The State Is The True Plaintiff, And Is Not Party To The Agreement.

State ex rel. Aetna Health of California, Inc. v. Pain Management Specialist Medical Group (2020) 58 Cal.App.5th 1064 – In this case, the Plaintiff insurance company sued the Defendant surgical center for fraudulent billing practices under the Insurance Frauds Prevention Act (the "IFPA"). The IFPA allows private parties to assert *qui tam* claims, i.e. claims brought on behalf of the People of the State of California. In a qui tam claim under the IFPA, any monetary award belongs to the State, but the Plaintiff recovers a substantial percentage of the recovery as a bounty. The Defendant moved to compel arbitration of the IFPA claim based on the arbitration clause in its contract with the Plaintiff. The trial court denied the motion, and the Court of Appeal affirmed. Both courts explained that the State is the owner of, and the real party in interest in, the IFPA claim, and that the State cannot be compelled to arbitrate under a contract to which it is not a party. The Court of Appeal further likened the case to a PAGA (Private Attorneys General Act) claim, which courts have already held are not subject to private arbitration agreements. Accordingly, the Court of Appeal affirmed the order denying the motion to compel arbitration.

4. Arbitration Agreements – Standing To Enforce – Mere Common Ownership Of Defendant Companies Does Not Compel Plaintiff To Arbitrate Claims Against Non-Signatories To Arbitration Agreement.

Jarboe v. Hanlees Auto- Group et al. (2020) 53 Cal.App.5th 539 – In *Jarboe*, the Plaintiff employee signed an employment application, and later an employment agreement, both of which had arbitration provisions calling for arbitration between the Plaintiff and the "Company." The application was ambiguous as to what was meant by "Company," but the employment agreement defined the "Company" as Hanlees Toyota. After working for Hanlees Toyota for approximately one month, the Plaintiff was transferred to Hanlees Kia, where he worked for approximately four more months. The two companies were part of the "Hanlees Auto-Group," a group of auto dealerships organized as separate corporations with a common ownership. The Plaintiff sued each of the corporations in the group, as well as three individual owners. The Defendants moved to compel arbitration. The trial court granted the motion to compel only as to Hanlees Toyota, the signatory to the employment agreement, but denied arbitration as to the other Defendants. The remaining Defendants appealed, and the Court of Appeal affirmed. The Court explained that any ambiguity in the employment application as to the identity of the "Company" entitled to arbitration was resolved in the employment agreement, which clarified that Hanlees Toyota was the "Company." Accordingly, none of the other Defendants had standing as parties to the arbitration agreement. In addition, the Defendants failed to present evidence that they were intended third party beneficiaries of the arbitration agreement, and the auto group's common ownership structure, standing alone, was insufficient to enforce the arbitration agreement using equitable estoppel. The Court explained that equitable estoppel would have required the non-

signatories to show that the Plaintiff's claims were "intimately founded in and intertwined with" the contract containing the arbitration clause. Here, while a common ownership was established, there was no evidence showing how the entities operated with respect to each other's employees, nor any showing that by being hired by Hanlees Toyota, the Plaintiff concurrently worked for the other dealerships. Furthermore, the Plaintiff was not asserting any rights under the employment agreement against any of the remaining Defendants. Accordingly, those Defendants were unable to enforce the arbitration agreement, and the Court of Appeal remanded the case to the trial court.

5. Arbitration Agreements – Unconscionability – Two Deposition Limit And Carve-Out For Breach Of Confidentiality Claims Rendered Arbitration Provision In Employment Agreement Substantively Unconscionable.

Davis v. Kozak et al. (2020) 53 Cal.App.5th 897 – In *Davis*, the Plaintiff employee sued the Defendant employer and co-workers for age and sex-based harassment and hostile work environment claims. The Plaintiff signed an arbitration agreement when he began his employment 15 years prior, which specified that all disputes arising from his employment would be resolved in arbitration, *except for* disputes related to a confidentiality agreement that protected only the employer's confidential information. The agreement also placed a presumptive limit on discovery of two depositions per side, but allowed the arbitrator to order additional discovery upon a showing of "sufficient cause." In response to the suit, the Defendants each filed motions to compel arbitration. The trial court found that the arbitration agreement was procedurally and substantively unconscionable, and denied the motion. The Court of Appeal affirmed, holding that unconscionability must be evaluated on a sliding scale, so that the more substantively one-sided a contract is, the less evidence of procedural unconscionability is required to show that the contract is unenforceable. Here, the Court held that there was only a low degree of procedural unconscionability arising from the fact that the agreement was offered on a take it or leave it basis by the party with superior bargaining strength. However, there was a high degree of substantive unconscionability, because: (1) in the context of an employment dispute by a 15 year employee, the two deposition limit on discovery, and the absence of any provisions for written discovery or document productions was almost certainly inadequate to permit the fair pursuit of statutory rights, and (2) the carve out from the arbitration agreement for disputes under the confidentiality agreement was one sided, because the terms of the confidentiality agreement applied only to the employer's confidential information. While the agreement did allow the arbitrator to grant additional discovery, the Court explained that the extremely low amount of default discovery allowed would be likely to frustrate the Plaintiff's ability to prove his claims. Furthermore, while the party in the superior bargaining position is allowed to include provisions giving itself extra protections to address legitimate concerns, the Defendant employer made no attempt at all to provide a legitimate explanation for carving out disputes under the confidentiality agreement. In the absence of any such explanation, the carve out was

substantively unconscionable, and the Court of Appeal affirmed the trial court's decision to decline sending the case to arbitration.

6. Arbitration Awards – Judicial Review – Arbitration Clause Allowing Review Of Arbitrator's Rulings Of Law Did Not Allow Review Of Arbitrator's Interpretation Of Contract Based On Disputed Extrinsic Evidence.

Oakland-Alameda County Coliseum Authority v. Golden State Warriors, LLC (2020) 53 Cal.App.5th 807 – The Golden State Warriors filed an arbitration seeking a declaration that they were not required to continue servicing debt for the renovation of the Oakland-Alameda County Coliseum after they moved to San Francisco. The primary issue was whether or not a provision applicable upon termination was triggered when the team failed to exercise a renewal option and allowed the contract to lapse. The arbitrator ruled against the Warriors on this question, finding that the lapse of the agreement constituted a termination under the meaning of the agreement. The Warriors sought review in the trial court under an arbitration clause that allowed either party to seek "de novo review on all questions of law based on the arbitrator's finding[s] of fact." The trial court confirmed the arbitration award, and the Warriors appealed, arguing that: (1) the extrinsic evidence was undisputed, making the contract interpretation an issue of law, and (2) the arbitrator and trial court drew the incorrect inferences from the undisputed evidence. The Court of Appeal rejected these arguments, noting that the arbitrator heard extensive testimony regarding the meaning of the contract, and rejected some of the evidence proffered by the Warriors. Because the extrinsic evidence was in conflict, interpretation of the contract was an issue of fact, not law, and was not subject to review under the parties' arbitration clause allowing review only of issues of law. The Court also held that even if it were to review the issue de novo, it would have affirmed the trial court and arbitrator.

7. Arbitration Awards – Judicial Review – Arbitrator Exceeded His Powers By Enforcing Confidentiality Provision That Violated Business and Professions Code Section 16600 By Restricting The Plaintiff's Right To Work.

Brown v. TGS Management Co., LLC (2020) 57 Cal.App.5th 303 [**Aronson**, Moore, Goethals] – In *Brown*, the Defendant employer required the Plaintiff employee to sign an employment agreement with a confidentiality provision that barred the Plaintiff in perpetuity from disclosing or using "Confidential Information." The term "Confidential Information" was defined to essentially encompass all information that is usable in, or relates to, the Plaintiff and Defendant's line of business.

> "[Confidential Information] means information, in whatever form, used or usable in, or originated, developed or acquired for use in, or about or relating to, the Business."

Following contractual arbitration, the Arbitrator denied the Plaintiff's claims for declaratory and injunctive relief challenging the validity of the confidentiality provision, and granted the

Defendant's cross-claims based on the employee's violation of that provision. The trial court affirmed the award, and the Court of Appeal reversed. The Court first noted that arbitration awards are typically not subject to review for errors of fact or law, but that an exception exists under C.C.P § 1286.2. That exception applies when an arbitrator exceeds his authority by issuing an award that violates a party's unwaivable statutory rights or contravenes an explicit legislative expression of public policy. Here, the Court held that the confidentiality clause facially violated Bus. & Prof. Code § 16600 because they barred the Employee from using any information pertaining to his line of business, thereby effectively prohibiting the employee from ever working in that line of business again. Because this sort of non-competition agreement is expressly prohibited by section 16600, the award exceeded the arbitrator's powers, and was reversed by the Court of Appeal.

8. Arbitration Awards – Judicial Review – Arbitrator Exceeded His Powers By Inspecting Property That Was Not Discussed During The Arbitration Hearing.

California Union Square L.P. v. Saks & Co. LLC (2020) 50 Cal.App.5th 340 – In *California Union Square*, an arbitration took place to determine the fair market rental rate for the renewal of a commercial lease. The parties' arbitration agreement prohibited the parties from including new evidence in their closing briefs that was not mentioned in their opening briefs, and precluded the arbitrator from conducting his own "due diligence and other analysis." The agreement did, however, provide that the Arbitrator's scope of work would "include" inspection of the subject property and the parties' lease comparables. Following the close of evidence, the Arbitrator inspected the subject property and the comparables in San Francisco and Los Angeles, but also inspected several other properties located in New York. The arbitration award explicitly mentioned and relied on the inspection of the New York properties. The prevailing party argued that the Arbitrator was authorized to inspect the New York properties, because the word "include" meant that the Arbitrator's authority to inspect properties was not limited to the subject properties and the lease comparables. The trial court disagreed, and vacated the award because the Arbitrator exceeded the powers granted in the arbitration agreement. The Court of Appeals affirmed, but took a slightly more nuanced view of the arbitrator's authority. The Court held that the Arbitrator had to be given substantial deference in the interpretation of his own powers, and that giving him that deference, he was authorized to inspect those of the New York properties that were discussed during the arbitration hearing, even though not they were not explicitly listed as comparables. One of the New York properties, however, had not been discussed during the hearing, and was only mentioned in a closing brief in violation of the express prohibition on new evidence being raised in closing briefs. Accordingly, even giving substantial deference to the Arbitrator, the Court of Appeal held that the inspection of this property exceeded the powers granted under the parties' arbitration agreement. Because the Arbitrator exceeded his authority, the Court affirmed the trial court ruling vacating the arbitration award.

9. Arbitration Awards – Modification – 30-Day Limit For Modification Of Arbitration Award Does Not Apply To Ruling That Leaves Open The Amount Of Attorney's Fees And Costs.

Lonky v. Patel (2020) 51 Cal.App.5th 831 – In *Lonky*, a dispute over alleged misappropriation in a medical partnership was resolved in a three-phase arbitration. In phases one and two, the Plaintiffs were awarded compensatory and punitive damages and were determined to be eligible for attorney's fees. Prior to phase three, the Plaintiffs filed a motion to modify the existing rulings. The arbitrator addressed the motion to modify during the third phase of arbitration on the amount of attorney's fees and costs. Following the third phase (which was more than 30 days after the initial rulings), the arbitrator increased the amount of compensatory damages, and set the attorney's fees and costs. The Defendant filed a petition to correct the award in Superior Court, claiming that the arbitrator exceeded her powers by increasing the compensatory damages more than 30 days after the award was served in violation of C.C.P. § 1284. The trial court agreed with the Defendant, and reduced the compensatory damages back to the sum awarded in the original phase one ruling. The Plaintiffs appealed, and the Court of Appeal reversed. The Court held that the 30-day time limit to modify an arbitration award only applies to a final award—i.e. one that determines all issues necessary to the resolution of the parties' controversy. The Defendant argued that because the arbitration was trifurcated, each ruling should be considered a final award with respect to the phase of the arbitration it addressed. The Court rejected that argument, holding that what matters is "whether the ruling 'resolved the parties' *controversy*, not a question within the controversy." Because the rulings in phase one and two did not determine the amount of attorney's fees, they were not final awards, and were not subject to the 30-day time limit.

10. Arbitrators – Disqualification – Court Of Appeal Refused To Judicially Notice Existence Of #MeToo Movement Or Arbitrator's Twitter Posts To Show Bias.

Malek Media Group, LLC v. AXQG Corp. (2020) 58 Cal.App.5th 817 – After losing an arbitration against his business partner over the winding up of a partnership, the Plaintiff petitioned to overturn the award based on the Arbitrator's alleged bias and failure to disclose his affiliations. Specifically, the Plaintiff was a Catholic male, and had been accused by his business partner of various financial improprieties, as well as sexual harassment of one of the partnership's employees, thereby exposing the company to potential litigation. The Plaintiff argued that the Arbitrator's bias against a Catholic accused of sexual harassment was shown by his affiliation with GLAAD, along with his Twitter posts, GLAAD press releases, and the existence of the #MeToo movement and the phrase "a woman alleging sexual harassment must be believed." The trial court summarily rejected the Plaintiff's claims, and the Court of Appeal affirmed. The Court of Appeal denied judicial notice of the existence of the #MeToo movement and the quoted phrase, holding that "by their very nature, social movements do not have defined boundaries, and their scope, meaning, and influence are subjects of debate." Regarding the Arbitrator's Twitter posts, which supposedly showed his perspectives on "white privilege, men,

religion, abuse of women, and anything that does not comport with his social justice view of the world," the Court held that these posts were irrelevant to the Arbitrator's disclosure obligations, because the arbitration had nothing to do with social justice, religion, White privilege, or gender. Ultimately, the Court of Appeal found the appeal to be so frivolous, as to justify appellate sanctions of $46,000 to the opposing party and $10,000 to the clerk.

11. Discovery In Arbitration – Prehearing Discovery From Non-Parties Is Unavailable In Arbitrations Under The FAA, Or In Arbitrations Under the CAA Where The Parties Do Not Specifically Incorporate C.C.P. § 1283.05.

Aixtron, Inc. v. Veeco Instruments Inc. (2020) 52 Cal.App.5th 360 – The Claimant in an arbitration sought prehearing discovery from a non-party Deponent, in the form of a subpoena for production of business records. The Deponent refused to comply, and the Arbitrator granted motions to enforce and compel compliance with the subpoena. The Deponent then filed a motion for a protective order in the Superior Court, which was denied. The Court of Appeal reversed, finding that the arbitration agreement was ambiguous as to whether the Federal Arbitration Act ("FAA") or the California Arbitration Act ("CAA") applied, but that the subpoena was improper under either regime. Under the FAA, 9 U.S.C.S. § 7 allows subpoenas requiring the production of documents at an arbitration hearing, but there is a split in the Circuits as to whether or not this also allows pre-hearing subpoenas for production of documents outside the presence of an arbitrator. The Court in *Aixtron* adopted the 9th Circuit's position that pre-hearing subpoenas are not allowed. Under the CAA, arbitrators may essentially be granted the same broad discovery powers as a trial court under C.C.P. § 1283.05. However, under C.C.P. § 1283.1, that section is deemed to be incorporated only in disputes arising out of wrongful death or personal injury. Parties to any other dispute must specifically incorporate these provisions into their arbitration agreement. Here, the arbitration agreement did not reference those sections or the Civil Discovery Act, so C.C.P. § 1283.05 did not apply. The Claimant argued that C.C.P. § 1282.6 allowed the Arbitrator to issue subpoenas to non-parties, but the Court noted that this statute is limited to: (a) subpoenas for appearance and production at the hearing, (b) subpoenas for deposition testimony for use as evidence, *not* as discovery, where the deponent cannot be required to attend the hearing, or (c) other subpoenas where C.C.P. 1283.05 is applicable to the arbitration. Since none of those circumstances applied, the Arbitrator had no jurisdiction to issue a non-party subpoena. The Court also rejected the notion that the JAMS Rules of Arbitration conferred such jurisdiction, because the Deponent never consented to be bound by JAMS' rule set.

See also **Related Holding In Case # 21, below (a trial court's ruling on an arbitrator's discovery order against a non-party is appealable).**

12. Judicial Reference – Trial Court's Review Of Referee's Decision Following A General Reference Must Take Place After Entry Of Judgment In The Manner Of A Motion For New Trial.

Michael S. Yu, a Law Corp. v. Superior Court (2020) 56 Cal.App.5th 636 – In *Michael S. Yu*, the Plaintiffs were awarded $2 million in compensatory damages and $5 million in punitive damages by a Referee in a consensual judicial general reference under C.C.P. § 638. Before judgment could be entered, the Defendants filed motions in the trial court to set aside the Referee's decision based on erroneous conclusions of law. The trial court noted that it was unsure if it would be better practice to grant the motions as filed, or to first enter judgment and then grant a motion for new trial. However, the trial court concluded that the result would be the same either way, and simply granted the motion, and ordered a new trial to be conducted before the court. The Plaintiff filed a petition for writ of mandate, and the Court of Appeal granted the writ, though not with the result Plaintiff expected. The Court held that C.C.P. § 644 required the decision of a referee in a general reference to be treated as if it were the decision of the court, but that § 645 allowed the decision to be reviewed in the same manner as if it were the decision of the court. This meant that the trial court was simply ordered to vacate the order setting aside the referee's decision, enter judgment on that decision, and then enter a new order granting a new trial to be conducted by the trial court. The Plaintiff argued that any new trial had to be conducted before the Referee, but the Court of Appeal reviewed the parties' reference agreement, which did not authorize the Referee to participate in any further actions after filing his decision. Accordingly, the Referee's powers had been exhausted, and absent consent to a new reference, the new trial would have to be conducted before the trial court.

ANTI-SLAPP

13. Federal Preemption – The Anti-SLAPP Statute Is Not Preempted In Federal Claims Brought In State Court.

Patel v. Chavez (2020) 48 Cal.App.5th 484 – In *Patel*, an employer sued an employee for violation of 42 U.S.C. § 1983, based on the employee's allegedly false testimony in a proceeding before a Labor Commissioner. The employee filed an anti-SLAPP motion, which was granted. The employer appealed, arguing that the anti-SLAPP statute is preempted in cases asserting rights under federal law. The Court of Appeal affirmed, noting that state procedural law—like the anti-SLAPP statute—applies to federal claims when they are asserted in state court, unless: (1) the federal statute in question provides otherwise, or (2) the state procedure affects the plaintiff's substantive federal rights. Here, nothing in § 1983 imposes federal procedural law upon state courts trying civil rights actions. Moreover, because the anti-SLAPP statute allows discovery necessary to oppose an anti-SLAPP motion, and imposes a "low bar" of minimal merit on plaintiffs, it does not affect a plaintiff's substantive rights.

14. First Prong – Commercial Speech In Connection With A Public Issue May Still Be Protected Activity Depending On The Context.

Serova v. Sony Music Entertainment (2020) 44 Cal.App.5th 103 – In *Serova*, the Defendant published a posthumous Michael Jackson ("Jackson") album, and there was a public controversy over whether or not Jackson sang three of the songs on the album. The Plaintiff claimed that Jackson had not sang the songs, and that the album cover and advertisements falsely represented that he had. Prior to the Supreme Court's decision in *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, the Court of Appeal had decided that that the controversy over the songs was an issue of public importance, and thus the Plaintiff's claims challenging the cover art and ads relating to that issue were based on protected activity under the anti-SLAPP statute. In *FilmOn*, the Supreme Court held that the context of speech–including the identity of the speaker, the audience, and any commercial purpose–must be considered in deciding whether a statement was made "in furtherance" of free speech "in connection with" a public issue. The Supreme Court then ordered that *Serova* be reconsidered in light of that holding. Upon reconsideration, the Court in *Serova* held that the *FilmOn* ruling did not affect its prior holding. The Court acknowledged that the speech had a commercial purpose—to sell albums—which would ordinarily weigh against a finding of protected speech, but that other factors outweighed the commercial purpose. First, unlike the speech in *FilmOn*, the speech at issue in *Serova* was public, not private. Second, the audience—purchasers of the album—were interested in the public issue of whether or not Jackson sang the songs. Third, the product that was the subject of the commercial speech (music) is itself protected under the First Amendment, and the challenged speech "helped shape the experience of the music." After considering all of these factors, the Court affirmed its initial holding that the claims were based on protected speech "in furtherance" of free speech "in connection with" a public issue. **The California Supreme Court has granted review, but has not depublished the case.**

15. First Prong And Second Prong – Solicitation Of Funds For Lawsuit Was Protected Activity, But "Doxing" Claim Survived Scrutiny Under The Second Prong.

Dziubla v. Piazza (2020) 59 Cal.App.5th 140 – In an underlying Nevada lawsuit following a business deal gone wrong, the Defendant owner of a firearms training business sued the Plaintiff lenders to prevent foreclosure of the business. The Defendant then sent a 10-page manifesto to the 200,000 members of the business's website, which (1) gave an update about the Nevada litigation using forceful and even violent rhetoric, (2) sought funding of a "litigation war chest" to pursue the litigation, and (3) "doxed" the Plaintiffs by disclosing their names, home address, pictures of their house, and a closeup image of one of their faces. The Plaintiffs then filed this action in California asserting claims for defamation and harassment, among others. The trial court granted an anti-SLAPP motion against the claims arising from the publication of the manifesto. The Court of Appeal affirmed in part and reversed in part, holding that:
(1) publication of the manifesto was a protected activity because it relates to litigation, and was written and distributed in support of the Defendant's right to petition the Nevada courts for relief,

and (2) most of the claims arising from the manifesto are barred by the litigation privilege, except for the claims alleging that the Defendant "doxed" the Plaintiffs. With regard to that claim, the Court held that the litigation privilege does not cover portions of a litigation-related communication that are "substantially extraneous" to the court proceedings. There was no good reason related to the litigation for the Defendant to disclose the Plaintiffs' home address, images of their home, or close-up picture. Accordingly, the Court reversed the portion of the trial court's ruling that dismissed the claims arising from "doxing" the Plaintiffs.

16. First Prong – Statements By Hospital Peer Review Committees Qualified For Anti-SLAPP Protection As Important Contribution To Public Interest In Consumer Protection.

Yang v. Tenet Healthcare Inc. (2020) 48 Cal.App.5th 939 – In *Yang*, the question was whether statements made in connection with a hospital's peer review process were protected under C.C.P. § 425.16(e)(4), which protects "other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." The Court in *Yang* held that under *FilmOn.com Inc. v. DoubleVerify, Inc.* (2019) 7 Cal.5th 133, this question requires a two-step analysis, first determining what public issue is implicated by the speech, and then examining the functional relationship between the speech and the public issue. Here, the speech at issue consisted of statements made during a peer review process regarding a doctor's qualifications, competence, and professional ethics. The Court held that these were public issues, citing a case which held that members of the public have an interest in such matters as consumers of medical services. In so holding, the Court disagreed with *Dual Diagnosis Treatment Center, Inc. v. Buschel* (2016) 6 Cal.App.5th 1098, which held that the qualifications of a single medical provider are not a public issue. The Court noted that *Dual Diagnosis* was decided before the Court's guidance in *FilmOn*. The Court then held that the statements made during the peer review process directly contributed to the public discourse on the public issue, and were, therefore, protected under 425.16(e)(4).

17. Motion for New Trial – Time To File – Motion For New Trial Must Be Filed Within 15-Days Of The Order Granting The Anti-SLAPP Motion, Not Any Subsequent Judgment Of Dismissal.

Reyes v. Kruger (2020) 55 Cal.App.5th 58 – In *Reyes*, an appeal in an anti-SLAPP case was dismissed due to the untimely filing of a motion for new trial. Notice of the order granting the anti-SLAPP motion was served on November 29, 2016. A judgment of dismissal was entered two months later, and a motion for new trial was noticed several days after that. The motion for new trial was denied on March 30, 2017, and the Appellant appealed on April 14, 2017. The appeal was untimely, because an order granting the anti-SLAPP Motion is itself an appealable order, and service of that order (not the subsequent judgment) starts the 60-day time limit to file a notice of appeal. Nevertheless, the Appellant argued that the appeal was a timely appeal from the denial of his motion for new trial. The Appellant cited C.R.C. Rule 8.108, which allows an

appeal filed within 30 days of service of an order denying a "valid" motion for new trial. The Court of Appeal held that under Code of Civil Procedure, section 659, the time to file the motion for new trial was 15 days from the date of the "judgment" in question. However, section 664.5 defines "judgment" to include "any judgment, decree, *or signed order from which an appeal lies*." Since the order granting the anti-SLAPP motion was appealable, the time to move for new trial also commenced on service of that order. Because the motion for new trial was not filed until months after the anti-SLAPP order was served, it was untimely, and did not constitute a "valid" motion under Rule 8.108. Accordingly, the motion for new trial did not extend the time to file the notice of appeal.

18. Second Prong – Malicious Prosecution – Termination Of Case On Collateral Estoppel Is A Successful Termination On The Merits, If The Collateral Estoppel Itself Is Based on A Resolution On The Merits.

Alston v. Dawe (2020) 52 Cal.App.5th 706 [**Goethals**, O'Leary, Moore] – *Alston* involves an appeal from an order granting an anti-SLAPP motion in the final case of a three-act legal saga. In Case 1, a Tenant commenced arbitration against his Landlord, arguing that the company could not sue him for unlawful detainer unless he consented to the lawsuit in his capacity as 50% owner of the Landlord. The Court of Appeal ultimately terminated Case 1 by upholding the arbitrator's finding that the Landlord's other 50% owner had authority to select counsel and commence litigation against the Tenant. In Case 2, the Tenant sued the Landlord's Attorneys for declaratory relief that the Attorneys had no authority to represent the Landlord without his consent. That case was terminated when an anti-SLAPP motion was granted on collateral estoppel grounds, because the Landlord's authority to hire the Attorneys was already established in Case 1. In Case 3, the Attorneys sued the Tenant for malicious prosecution of Case 2. The trial court granted an anti-SLAPP motion, finding that the Attorneys could not satisfy the element of a favorable termination on the merits, because collateral estoppel is a procedural affirmative defense that does not depend on the merits. The Court of Appeal reversed, and created a split with an earlier case, holding that while collateral estoppel is a procedural defense that does not *necessarily* depend on the merits, it *may* constitute a favorable termination on the merits, depending on the facts of the case. Here, the Court reasoned that because Case 1 was fully litigated and resolved on the merits, the application of collateral estoppel in Case 2 amounted to a termination on the merits. Under these circumstances, a malicious prosecution claim was proper in Case 3 for the Tenant's prosecution of Case 2.

19. Second Prong – Malicious Prosecution – Defendant's Improper Withholding Of Documents In Prior Action Justifies Exception To Rule That An Adverse Summary Judgment Ruling In Prior Action Precludes A Malicious Prosecution Claim.

Roche v. Hyde (2020) 51 Cal.App.5th 757 – Ordinarily, the "interim adverse judgment rule" provides that where summary judgment is denied to the defendant in a prior action, the plaintiff's probable cause is established, and the defendant is precluded from suing for malicious

prosecution, even if he ultimately prevails. There is an exception to that rule, however, where the prior adverse ruling is obtained by means of fraud or perjury. In *Roche*, the Court of Appeal held that this exception applied where the Buyers of a winery, who were defendants in the malicious prosecution action, had improperly withheld exculpatory documents in discovery in the prior action. The prior action involved claims by the Buyers that the Seller of the winery had concealed seismic information regarding active fault lines on and around the property. In the prior action, the Buyers had engaged in sustained discovery misconduct and flagrant defiance of multiple discovery orders over the course of four and a half years, in order to conceal the fact that they had been in possession of the seismic report for the property all along. Before that fact was revealed, the Sellers brought and lost a motion for summary judgment. On the eve of trial, the Buyers finally produced the seismic report, and the Sellers brought a motion for terminating discovery sanctions. Rather than face that motion, the Buyers unilaterally dismissed the prior action. The Sellers then sued for malicious prosecution, and the Buyers filed an anti-SLAPP motion. The trial court denied the motion, finding that the Sellers established a probability of prevailing under the fraud exception to the interim adverse judgment rule. The Court of Appeals affirmed, holding that "in circumstances where we cannot say the record of a summary judgment proceeding 'imports verity' (ibid.)—because discovery misconduct has corrupted it—the fraud or perjury exception applies." Here, the Court held that the Seller would likely have prevailed as a matter of law on his summary judgment motion if the seismic report had been timely produced. Accordingly, the Seller established a probability of prevailing on the exception to the interim adverse judgment rule for the purposes of the second prong of the anti-SLAPP motion. The Court noted that this was a preliminary determination for the purposes of that motion, and not a final determination of the applicability of the exception, which would have to be decided at trial.

20. Frivolous Motions – Attorney's Fees – Amended Safe Harbor Provisions In C.C.P. § 128.5(f) Do Not Apply To Frivolous Anti-SLAPP Motions.

Changsha Metro Group Co., Ltd. v. Xufeng (2020) 57 Cal.App.5th 1 – Subdivision (c) of the anti-SLAPP statute provides that a plaintiff who defeats a frivolous anti-SLAPP Motion may obtain attorney's fees "pursuant to section 128.5," which allows courts to grant attorney's fees for opposing a party's frivolous litigation tactics. At the time the anti-SLAPP statute was enacted in 1992, section 128.5 did not have any express safe harbor provision. However, in 2017, section 128.5 was amended to add a safe harbor provision in subdivision (f). That provision requires a party seeking attorney's fees based on the filing of a motion to give the opposing party notice and 21 days to withdraw the frivolous motion, before a fee motion can be filed with the court. In *Changsha*, the Court of Appeal analyzed the amendment to section 128.5, and concluded that subdivision (f) need only be followed whenever possible, and that subdivisions (a)-(c) must be followed in all other cases. The Court then considered the short deadlines that accompany a typical anti-SLAPP motion, and concluded that it would be virtually impossible in most anti-SLAPP cases for a plaintiff seeking attorney's fees to comply with a 21-day safe harbor provision before filing an opposition that raises a claim of frivolity. Based on

this, the Court concluded that the anti-SLAPP statute was incompatible with subdivision (f), and that attorney's fee requests under the anti-SLAPP must, therefore, be brought using the procedures in subdivisions (a)-(c) of § 128.5. Those provisions allow an attorney's fee request to be made in the requesting party's "responding papers." Here, the Plaintiff requested attorney's fees in its opposition to the Defendant's anti-SLAPP motion. Accordingly, the Court of Appeal found that the request complied with § 128.5, and affirmed the trial court's order granting fees.

APPELLATE PROCEDURE

21. Appealability – A Trial Court's Ruling Affirming An Arbitrator's Discovery Order Against A Non-Party Is Appealable.

Aixtron, Inc. v. Veeco Instruments Inc. (2020) 52 Cal.App.5th 360 – The Claimant in an arbitration sought prehearing discovery from a non-party Deponent, in the form of a subpoena for production of business records. The Deponent refused to comply, and the Arbitrator granted motions to enforce and compel compliance with the subpoena. The Deponent then filed a petition for a protective order in the Superior Court, which was denied. The Claimant filed a separate petition to enforce the discovery order, which the trial court granted. The Deponent appealed both orders, which the Claimant argued were unappealable. The Court of Appeal rejected this argument and held that both of the trial court's orders were appealable under the one final judgment rule. The Court reasoned that both of the two Superior Court actions commenced by the Deponent and the Claimant were special proceedings, with their sole object being the resolution of the discovery dispute between them. Because the trial court fully and finally resolved that dispute, the orders were appealable as final judgments. The Claimant argued that the orders were not final because the matter was remanded to the Arbitrator for further proceedings. The Court of Appeal rejected this argument, noting that the trial court's orders denied any protective order, and required the Deponent to produce the documents at issue in 20 days. As with any final appealable judgment, then, nothing was left for future consideration except the fact of the Deponent's compliance or noncompliance.

See also **Related Holding In Case # 11, above (Arbitrator did not have jurisdiction to compel non-party discovery).**

22. Notice Of Appeal – Under Rule Of Liberal Construction, Appeal Of Attorney Sanction By Attorney's Client Was Construed As An Appeal By The Attorney.

K.J. v. Los Angeles Unified School Dist. (2020) 8 Cal.5th 875 – In *K.J.,* the trial court ordered monetary sanctions only against an attorney, and not against the attorney's client. Nevertheless the client, rather than the attorney, appealed the sanctions order. The Court of Appeal dismissed the appeal, concluding that the client lacked standing to challenge the sanctions order and that the notice of appeal could not be liberally construed to include the omitted attorney. The Supreme Court reversed, holding that it was clear from the record that the omitted attorney intended to participate in the appeal, and the respondent was not misled or prejudiced by the

attorney's omission from the notice of appeal. Under these circumstances, the rule of liberal construction compels that the notice of appeal be construed to include the omitted attorney.

23. Notice Of Appeal – Time To File – COVID-19 Closure – Where Time To File Would Have Expired While Superior Court Was Closed Due To COVID-19, Notice Was Due On The First Day The Court Reopened.

Rowan v. Kirkpatrick (2020) 54 Cal.App.5th 289 – The Napa County Superior Court was closed due to the COVID-19 pandemic from March 18, 2020 through May 29, 2020. Pursuant to Gov. Code § 68115(a)(4), and the orders of the court, the days of closure were deemed holidays. In addition, orders from the Court of Appeal extended by 30 days any deadlines occurring between March 18th to April 17th, and from April 17th to May 18th. In *Rowan*, the Court of Appeal construed these extensions and holidays to find that a notice of appeal was not timely filed. The appeal was from orders served on February 25 and 26, and March 6, 2020, and thus notices to appeal these orders would have ordinarily been due on April 27 and May 5, 2020. Since those days fell within the dates of the Court of Appeal's 30-day extension, these deadlines were extended to May 27 and June 4, 2020, respectively. In addition, due to the court closure, the May 27 deadline was extended to the next day that was not a holiday, which was June 1, 2020. The Appellant did not file her notice of appeal until June 14, 2020, arguing that (1) the Court's 30-day extension should be deemed to "toll" the time to file the notice of appeal, such that it would be due 30-days after the date the courts reopened, and (2) the time to file was extended by the filing of motions for reconsideration. The Court rejected these arguments, holding that: (1) the extension orders "authorized a 30-day extension, not tolling," and (2) the motions for reconsideration were invalid because they did not specify a statutory basis, and were untimely, and thus they did not extend the time to file the notices of appeal. Based on the foregoing, the Court dismissed the appeal.

24. Notice Of Appeal – Time To File – Deadline To Appeal An Appealable Order Is Not Extended By Motion For Reconsideration Where Order Amounts To A Judgment That Effectively Dismisses Entire Action.

Marshall v. Webster (2020) 54 Cal.App.5th 275 – In *Marshall*, the Defendant brought an anti-SLAPP motion, and the trial court granted the motion against all of the Plaintiffs' claims. The Plaintiffs filed a motion for reconsideration, and later filed a notice of appeal. The Defendant argued that the notice of appeal was untimely, because it was filed more than 60 days after notice of the order granting the anti-SLAPP motion. The Plaintiffs argued that the motion for reconsideration extended the time to appeal under Rules of Court 8.108, which applies where a party files a "valid motion to reconsider an appealable order" under C.C.P. § 1008. The Court of Appeal rejected the Plaintiffs' argument, and dismissed the appeal. The Court explained that a motion for reconsideration under § 1008 only applies only to *interim* orders, and cannot be filed after entry of judgment. Here, because the anti-SLAPP motion disposed of all of the claims in the action, the order granting that motion amounted to a final judgment on the merits even

though it did not explicitly dismiss the complaint. Accordingly, the order divested the trial court of jurisdiction to hear a motion to reconsider. Because the motion to reconsider was invalid, it did not extend the time to appeal under Rule 8.108.

25. Standard Of Review – Appellate Court Reviewing A Finding That Requires Clear And Convincing Evidence Must Take That Standard Into Account, Rather Than Applying An Ordinary Substantial Evidence Review.

Conservatorship of O.B. (2020) 9 Cal.5th 989 – In *Conservatorship of O.B.*, a limited conservatorship was granted over an 18-year-old with autism, which required a showing by clear and convincing evidence that the conservatorship was warranted. The Conservatee appealed, arguing that the order granting the conservatorship was not supported by sufficient evidence. The Court of Appeal affirmed the order using an ordinary substantial evidence standard of review. The Court of Appeal held that any requirement for "clear and convincing evidence" drops away once the case is on appeal, and that the appellate court is concerned only with whether there is *any* substantial evidence to support the challenged finding. The California Supreme Court reversed, and resolved a split in the appellate courts over the applicable standard of review when a trial court's finding requires clear and convincing evidence. In such cases, the appellate court must "account" for the clear and convincing evidence standard, while not reweighing the evidence for itself or failing to give due deference to the fact-finder's determinations. The Court summarized the appropriate standard of review as follows:

> When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true. In conducting its review, the court must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence.

Because the Court of Appeal believed that the clear and convincing standard "disappears" on appeal, the Supreme Court remanded the case for further consideration using the correct standard of review.

ATTORNEY'S FEES

26. Amount – "Wise Lawyers Keep Accurate Time Records."

Taylor v. County of Los Angeles (2020) 50 Cal.App.5th 205 – In *Taylor*, an Attorney who sought $300,000 in fees was granted only $17,326 by the trial court, which the Court of Appeal characterized as "a discretionary act of grace." The Attorney represented the Plaintiffs in the underlying action for only a month before the Plaintiffs fired him, after which the Attorney

refused to forward the client's case files. Two years after the first Attorney was fired, the Plaintiffs settled with the Defendants for $7 million, and the Attorney filed an attorney's lien seeking over $300,000 in fees. On different occasions, the Attorney sent the Plaintiffs differing sets of invoices for his work, seeking payment for either 130 hours, 180 hours, or 200 hours of work. One invoice stated 102.5 hours and 52.5 hours for the same work in different places on the same line. Because the latest set of invoices was provided over two years after the work was performed, and included daily time records that differed from the earlier invoices, the only reasonable inference was that the itemization was not a contemporaneous record, but a time reconstruction performed after years of delay. Given these discrepancies and the Attorney's refusal to forward the case file, the Court of Appeal found that the trial court's reduction was reasonable. The Attorney argued that the trial court abused its discretion by failing to consider his personal testimony regarding the hours he spent, citing *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 269. The Court of Appeal explained that *Mardirossian* only concerned the admissibility of such testimony, not its weight. While lawyers may testify from memory as to the hours they devoted to a case, that evidence may be of poor quality and may be discounted by the trier of fact. "For this reason," the Court concluded, "wise lawyers keep accurate time records."

27. Contractual Attorney's Fees – Postjudgment Action To Establish Alter Ego Liability For A Judgment On A Contract Is Also On The Contract For Purposes Of Civil Code § 1717.

MSY Trading, Inc. v. Saleen Automotive, Inc. (2020) 51 Cal.App.5th 395 [**Ikola**, Aronson, Fybel] – Civil Code § 1717 allows a non-party to a contract to recover reciprocal attorney's fees under that contract only if the non-party prevails on a claim "on the contract." The Plaintiff in *MSY Trading* sued automotive legend Steve Saleen to enforce a prior judgment for breach of contract against certain companies within the "Saleen family of companies." Though Steve was not a party to the judgment or the contract, the Plaintiff alleged that Steve was liable for the judgment as an alter ego of the judgment debtor companies. The trial court found that Steve was not an alter ego, and awarded Steve contractual attorney's fees under § 1717. The Plaintiff appealed, arguing that the judgment in the prior action subsumed and extinguished any contractual rights, and, therefore, the alter ego enforcement action could not be an action "on the contract." The Court of Appeal rejected that argument, noting that if an alter ego claim had been asserted in the underlying action, such a claim would clearly have been on the contract, and explaining that the timing of an alter ego claim (whether before or after judgment) is too arbitrary a consideration on which to base the right to reciprocal attorney's fees.

For a similar holding, *see also 347 Group, Inc. v. Philip Hawkins Architect, Inc.* (2020) 58 Cal.App.5th 209.

28. Contractual Attorney's Fees – Prevailing Party Status – Where Attorney's Fee Provision Grants Fees To "Non-Breaching Party," Provision Applies Also To Successful Defendant Who Defeats Independent Petition To Compel Arbitration.

Domestic Linen Supply Co., Inc. v. L J T Flowers, Inc. (2020) 58 Cal.App.5th 180 – In *Domestic Linen Supply*, the Plaintiff uniform rental company filed a petition to compel arbitration against the Defendant customer for past due rental fees. The Parties' agreement contained a one-sided fee provision which allowed a fee award only to a party who proves a breach of contract (and not to a defendant who successfully negates a breach of contract):

> "The judge or arbitrator shall include as part of the award all costs including reasonable attorney fees and arbitration fees of the non-breaching party where it is determined that one of the parties has breached the agreement."

The trial court denied the Plaintiff's petition to compel arbitration, on the grounds that the arbitration clause was inconspicuous, having been printed in small type on the reverse of the contract. The trial court also awarded the Defendant $32,757.04 in attorney's fees. The Plaintiff appealed, arguing that the fee provision only applied once a breach of the contract was found, and here all that happened was a denial of arbitration. The Court of Appeal affirmed, holding that: (1) under Civ. Code 1717, the one-sided fee provision must be interpreted to apply to the prevailing party in the action, whether that party is a successful plaintiff or a successful defendant, (2) where a petition to compel arbitration is brought as an independent action under the contract, the successful defeat of that petition makes the defendant the prevailing party in that action, entitled to a fee award. The Plaintiff cited *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, where the Court of Appeal reversed an attorney's fees award to a plaintiff for defeating a petition to compel arbitration, because the plaintiff lost the breach of contract claims on the merits, and only one party could be the prevailing party in the action. The Court of Appeal in this case distinguished *Frog Creek Partners*, because in this case the Plaintiff's petition to compel arbitration was an independent action. Thus when the petition was denied, the entire action was concluded, and there were no remaining claims on the merits. As such, by prevailing on the petition to compel arbitration, the Defendant prevailed in the entire action and was entitled to a fee award.

29. Contractual Attorney's Fees – Prevailing Party Status – Where Defendant Does Not Actually Tender Undisputed Sums Owed, Defendant's Settlement Offer Cannot Be Considered In Determining The Prevailing Party.

Waterwood Enterprises, LLC v. City of Long Beach (2020) 58 Cal.App.5th 955 – Following the expiration of a lease, the Plaintiff lessor sued the Defendant lessee for at least $150,000 in damage to the property. The Plaintiff offered to settle the case for $120,000 plus attorney's fees and costs, and the Defendant offered to settle the case for $40,001. Following a jury trial, the Plaintiff obtained an award of $45,050 in contractual damages. The trial court reasoned that the jury's award was $74,950 less than the Plaintiff's settlement offer, and only $5,050 more than

the Defendant's settlement offer. Based on these offers, the trial court concluded that the Defendant "clearly succeeded" in pursuing its litigation objectives, and the Plaintiff did not. The Court of Appeal reversed, holding that the trial court must determine the prevailing party under Civil Code § 1717 by comparing the relief awarded with the parties' demands. However, settlement offers cannot be considered in this determination, because they are not presented at trial, and thus cannot be used to show that a party's litigation objectives were different than the actual demands made in litigation. Here, while the Defendant offered $40,001, its pleadings denied any liability at all, and the Defendant maintained that denial throughout the trial. Thus the trial court erred in using a $40,001 liability as the Defendant's litigation objective. In addition, the Court of Appeal noted that Civil Code § 1717(b)(2) provides that a defendant who tenders an amount that is later determined to be the full amount owed is deemed to be the prevailing party. Here, no such tender was made, and the Defendant lost on the sole cause of action for breach of contract, and on every one of its affirmative defenses. Accordingly, there was no basis for concluding that the City was the prevailing party. The Court of Appeal remanded the case to the trial court to consider whether the Plaintiff was the prevailing party or there was no prevailing party.

30. Fee Motions – Time To File – There Is No Specific Time Limit For Motions Seeking Attorney's Fees Incurred After Entry Of Judgment.

George v. Shams-Shirazi (2020) 45 Cal.App.5th 134 – In *George*, the Appellant filed motions to set aside or modify a child custody order several months after entry of final judgment in the case. The Respondent defeated the motions. Several months after the motions were denied, the Respondent sought and obtained attorney's fees as sanctions under the Family Code. On appeal, the Appellant argued that the sanctions request was untimely. Under Rule of Court 3.1702(b)(1), a request for attorney's fees must be filed within time for filing an appeal (60 days following notice of entry of judgment, or 180 days following entry of judgment), yet that the sanctions motion in this case was not filed until 226 days after the Appellant's motions were denied. The Court of Appeal rejected this argument, holding that rule 3.1702(b)(1) applies exclusively to fees incurred up to and including the rendition of judgment, and that the rule contained no specific time limit for the recovery of postjudgment fees. Accordingly, the Court affirmed the sanctions award. Nevertheless, the Court held that a party seeking postjudgment fees may not delay indefinitely, as a postjudgment fee motion is still subject to the equitable time limitation of laches. (Note, Rule 3.1702(c)(1) does provide that postjudgment fees incurred on appeal must be sought within the time to file a memorandum of costs under Rule 8.278, which is 40 days after issuance of remittitur.)

31. Statutory Attorney's Fees – Private Attorney General Statute – Real Parties In Interest May Be Liable For Attorney's Fees In CEQA Or Other Mandamus Actions Under C.C.P. § 1021.5.

Save Agoura Cornell Knoll v. City of Agoura Hills (2020) 46 Cal.App.5th 665 – C.C.P. § 1021.5 allows successful plaintiffs to recover attorney's fees in certain actions brought in the public interest. Typically such fees are awarded against the defendant or respondent that is sued. In *Save Agoura Cornell Knoll*, attorney's fees were awarded against the real party in interest in a CEQA lawsuit that overturned the approval of a mixed-use development project. The real party in interest had held himself out as the owner of the property and as a project proponent, and had participated in the litigation to defend the project. The Court of Appeal affirmed the award of attorney's fees, holding that a real party in interest in a CEQA or mandamus action may be deemed to be the "opposing party" for purposes of § 1021.5, if the real party: (1) has a direct interest in the litigation more than a merely ideological or policy interest, and (2) actively participates in the litigation.

32. Statutory Attorney's Fees – Uniform Trade Secret Act Fee Award In Excess Of Amount Actually Paid By Client Belongs To Attorneys, Not Client.

Aerotek, Inc. v. Johnson Group Staffing Co., Inc. (2020) 54 Cal.App.5th 670 – *Aerotek* concerns a dispute between an Attorney and his client, the Defendant, following an award of statutory attorney's fees under the California Uniform Trade Secrets Act. The Defendant had agreed to pay only the Attorney's costs under a "modified pro-bono" arrangement. Once the Defendant prevailed in the Action and obtained an attorney's fee award of $735,781.27, a dispute arose over who should receive the fees, and the Attorney parted ways with the Defendant. The Attorney asked the trial court to modify the fee award, so that he would receive the portion of the award in excess of the amount paid by the Defendant. The trial court ruled in the Attorney's favor, and the Court of Appeal affirmed. The Court's analysis was largely based on and parallel to the analysis *Flannery v. Prentice* (2001) 26 Cal.4th 572, in which the California Supreme Court addressed the same question as to fees awarded under Government Code section 12965. The Court considered the statutory language, the legislative intent, and public policy arguments, all of which favored vesting an award of attorney's fees in the attorney who earned those fees (to the extent the fees exceed the amount actually paid by the client). Moreover, the Court held that the parties' "modified pro-bono" agreement did not suffice to override this general rule. First, even true "pro bono" attorneys may obtain reasonable fee awards under a fee shifting statute. Second, none of the other language in the contract was sufficient to alter the default rule. The Court also held that: (a) the dispute was not subject to the Mandatory Fee Arbitration Act, because disputes over fees determined pursuant to statute are exempted from that act under Bus. & Prof. Code § 6200, and (b) the Defendant was not entitled to a jury trial, because the issue was an equitable one.

ATTORNEY PRACTICE

33. Contempt – Attorneys Who Engage In Abusive And Unprofessional Conduct May Be Convicted Of Contempt Without A Previous Warning, But Attorney's Fees May Only Be Imposed Where Contempt Arises From The Breach Of A Court Order.

Moore v. Superior Court (2020) 57 Cal.App.5th 441 [**Goethals**, Bedsworth, Thompson] – In *Moore*, the Petitioner attorney was convicted of four counts of contempt of court for rude and unprofessional conduct at a mandatory settlement conference, which included: (1) persistently yelling at and interrupting the other participants, (2) accusing opposing counsel of lying without providing supporting evidence, (3) refusing to engage in settlement discussions, and (4) blocking the settlement officer from obtaining the judge's assistance by asserting that this would unlawfully divulge settlement information. The trial court also granted attorney's fees to the opposing party arising from the contempt proceedings. The Court of Appeal annulled the order in part, and sustained in part. First, the Court held that the Petitioner's due process rights were violated, because he was not given notice that he faced four distinct counts of contempt. Accordingly, the Court combined the four counts into a single count of contempt. Next, the Court rejected the Petitioner's argument that he was not adequately warned that his tone of voice could subject him to contempt charges. While the California Supreme Court has overturned a contempt conviction based on tone of voice for this reason, the Court of Appeal in this case noted that the Petitioner's behavior went far beyond mere tone of voice, and persisted for the entirety of the 15-minute settlement conference, despite requests from the other participants that Petitioner cease his behavior. Finally, the Court overturned the award of attorney's fees, holding that attorney's fees in contempt proceedings are authorized under C.C.P. § 1218(a) where the contempt is based on the violation of a court order. Here, the contempt did not concern the violation of a court order, and thus the fee award was annulled. While this reduced the Petitioner's fine to only $900, the Court also instructed the clerk to provide a copy of the opinion to the State Bar Association.

34. Discovery Abuse – Parties' Attorneys Not Jointly Liable For Discovery Sanctions Where Attorneys Did Not Advise Client To Engage In Abusive Conduct.

Cornerstone Realty Advisors, LLC v. Summit Healthcare REIT, Inc. (2020) 56 Cal.App.5th 771 [**Fybel**, Aronson, Thompson] – In *Cornerstone Realty Advisors*, the Plaintiffs engaged in extensive discovery abuse by, *inter alia*, refusing to produce their general ledger for three and a half years in violation of multiple orders compelling production. In opposition to a motion for discovery sanctions, the Plaintiff's attorneys submitted three declarations stating that they did not advise the client to engage in discovery abuse, and had sought to fully comply with discovery obligations in good faith. In addition to recommending sanctions against the Plaintiffs, the discovery referee recommended sanctions against the attorneys as well, after finding that the Plaintiffs' attorneys had not done enough to produce the ledger, which was "easy to obtain," and that the attorneys' stories about difficulties in obtaining the ledgers were "disingenuous at best,"

and had misled the referee and opposing counsel. Under these circumstances, the referee found that the attorneys' conduct was "tantamount to them advising their clients to withhold the ledgers." The trial court considered the referee's recommendations and the attorneys' declarations, and declined to award sanctions against the attorneys. The Defendant appealed, and the Court of Appeal affirmed. The Court explained that discovery sanctions against an attorney may only be granted under C.C.P. § 2023.030(a) where the attorney actually advised disobedience, and not where the attorney's actions were otherwise improper or merely contributed to disobedience. The burden is on the attorney to prove that the attorney did not advise disobedience. Here, the discovery responses prepared by the attorneys agreed to produce the general ledger, and the attorneys' declarations (which included e-mails to the client seeking the ledger), showed that it was the client who refused to actually produce them. The Court of Appeal found that this, along with the attorney's declarations that they did not advise the withholding of the ledger, was substantial evidence to support the trial court's finding that the attorneys did not advise disobedience, and thus were not subject to sanctions.

See also **Related Holding In Case # 66, below (affirming amount of sanctions against Plaintiff). For a similar holding, *see Kwan Software Engineering, Inc. v. Hennings* (2020) 58 Cal.App.5th 57.**

35. Disqualification – Advocate Witness Rule – Client Consent Does Not Necessarily Preclude Disqualification Of Attorney Likely To Testify As A Key Witness, And Disqualification Can Include Representation At Depositions.

Doe v. Yim (2020) 55 Cal.App.5th 573 – In *Yim*, an Attorney represented her own daughter in a lawsuit against the attorney's ex-husband (i.e. the Plaintiff's stepfather) for sexual abuse. The trial court granted a motion to disqualify the Attorney on the grounds that she was a key witness on the merits of the dispute, and thus barred from acting as an attorney under the "advocate-witness rule" in Rule of Professional Conduct 3.7. The disqualification applied even to pretrial activities, and was alternatively based on the Attorney's possession of confidential information obtained during her marriage to the Defendant. The Court of Appeal affirmed on both grounds. In addressing the advocate-witness rule, the Court explained that while Rule 3.7(a)(3) provides an exception where the attorney obtains informed written consent from the client, that exception is not absolute, and courts retain discretion to disqualify an attorney where there is a risk that the trier of fact will confuse the attorney's arguments at trial as evidence, given the attorney's status as a witness. The Court further held that while the rule specifies that it applies to representation "at trial," it also justifies disqualifying the attorney from participating in any pretrial activities "which carry the risk of revealing the attorney's dual role to the jury." The Court held that this specifically includes taking or defending a deposition.

36. Duty Of Candor – Attorney Sanctioned $5,320 For Failing To Inform Court Of Defendant's Payment Of Settlement Amount During Hearing On Motion To Enforce Settlement.

Levine v. Berschneider (2020) 56 Cal.App.5th 916 – In the underlying action, the Appellant was the attorney for tenants who filed suit against their landlord. The lawsuit settled, and the Appellant filed a motion to enforce the settlement agreement, complaining that the landlord was taking too long to pay the agreed-upon settlement amount. Four days before the June 7, 2019 hearing on the motion to enforce the settlement agreement, the landlord paid the settlement amount in full. The Appellant nevertheless appeared at the hearing, where the landlord's attorney was absent. The Appellant did not mention the payment, and told the trial court "I haven't received word from opposing counsel. I don't know—has there been any communication with the Court?" The trial court then granted the motion to enforce, found the tenant's attorney in contempt, and awarded sanctions of $4,630.30. Once informed of the fact that the settlement amount had been paid days before the hearing, the trial court reversed its prior orders, found the Appellant in contempt, and awarded sanctions against the Appellant in the amount of $5,310. On appeal, the Appellant argued that he made no false or misleading statement because the judge never specifically asked if he had received settlement checks. The Court of Appeal rejected this argument, holding that an attorney's duty of candor includes both: (a) the affirmative duty to inform the court when a material statement of fact or law has become false or misleading in light of subsequent events, and (b) the duty to refrain from concealments and half-truths. Here, the Appellant's decision not to tell the court he had received "word" from Respondent was a concealment and "half-truth" that violated the duty to be candid with the court. Accordingly, the $5,310 sanction was affirmed.

37. Malpractice – Burden Of Proof – Requirement Of Proof To "Legal Certainty" In Settle And Sue Cases Only Requires Proof By Preponderance Of Evidence.

Masellis v. Law Office of Leslie F. Jensen (2020) 50 Cal.App.5th 1077 – A "settle and sue" action is one in which a client settles the underlying action, and then sues for malpractice, claiming that the attorney's negligence caused the client to settle for less money than the client would have recovered if the case had proceeded to trial. In *Masellis*, the Plaintiff prevailed in a jury trial on a settle and sue claim, and the Defendant appealed, arguing that an incorrect burden of proof was used. The Defendant cited a line of cases holding that the plaintiff in a settle and sue case must prove "to a legal certainty" that he or she would have received more money at trial but for the defendant's negligence. The Court of Appeal began its analysis by noting that Evidence Code § 115 calls for the preponderance of the evidence standard, "except as otherwise provided by law." The Court then examined the line of cases cited by the Defendant, and noted that none of them used the term "legal certainty" in a way that clearly departed from the preponderance of the evidence standard, or that considered and established an exception to Evidence Code § 115. Accordingly, the Court concluded that in this context, the term "legal

certainty" meant only the ordinary level certainty required by law under the preponderance of the evidence standard. Based on this analysis, the Court affirmed the judgment for the Plaintiff.

38. Mandatory Fee Arbitration – An Attorney Who Wins A Mandatory Fee Arbitration Cannot Sue For Malicious Prosecution.

Dorit v. Noe (2020) 49 Cal.App.5th 458 – In *Dorit*, the Plaintiff attorney won a mandatory fee arbitration under the Mandatory Fee Arbitration Act ("MFAA"), following a fee dispute over the Plaintiff's services in medical malpractice suit. After neither party requested a trial de novo, the arbitrator's award became binding. The Plaintiff then sued the client for malicious prosecution, and the client filed an anti-SLAPP motion. The trial court denied the motion, but the Court of Appeal reversed. The Court noted that the tort of malicious prosecution is intended to: (1) prevent abuse of the court system, and (2) compensate wronged individuals. Allowing malicious prosecution claims arising from MFAA Arbitrations would not serve the first purpose, because MFAA arbitrations are pre-litigation tools that are intended to serve as a *substitute* for court litigation. It likewise would not do much to serve the second purpose, because the limited nature of MFAA arbitration and the expeditious nature of the proceedings limits a defendant's financial exposure. Finally, a successful defendant in a MFAA cannot establish the malicious prosecution element of successful termination of the underlying proceeding, because Bus. & Prof. Code § 6204(e) states that an MFAA award "shall not be admissible nor operate as collateral estoppel or res judicata in any action or proceeding." Based on these considerations, the Court of Appeal held that a malicious prosecution claim cannot be based on an arbitration under the MFAA.

39. Mandatory Disclosures To Clients – Fee Division Agreement Is Unenforceable Where Attorney Failed To Disclose Lack Of Professional Liability Insurance.

Hance v. Super Store Industries (2020) 44 Cal.App.5th 676 – The trial court enforced a fee-division agreement for a class action recovery even though the referring attorney lacked professional liability insurance, and failed to disclose this to the clients, as required by Rules Prof. Conduct, former rule 3-410(A) (current rule 1.4.2). The Court of Appeal reversed because condoning such a violation of the rules would be contrary to the goals of protecting the public and promoting respect and confidence in the legal profession. The Court held that the fee division agreement was unenforceable to the extent that it gave the uninsured referring attorney a percentage of the class-action fee award. However, the referring attorney could seek a reasonable fee in quantum meruit, because a rule violation does not necessarily require that all compensation be forfeited. The calculation of quantum meruit recovery is not limited to hours worked multiplied by hourly fee (the lodestar calculation) but instead may consider the reasonable value to the client or the class of the referral to an experienced class-action attorney. The matter was remanded to the trial court to determine whether a quantum meruit fee was warranted, and if so, the amount of such fee.

40. Pro Hac Vice Practice – Multiple Clients – Attorneys Admitted Pro Hac Vice To Represent Corporation In Litigation May Not Represent Individuals In Deposition Without Separate Admissions For Those Clients.

Big Lots Stores, Inc. v. Superior Court (2020) 57 Cal.App.5th 773 – In *Big Lots Stores*, Ohio attorneys were admitted pro hac vice to represent the Defendant Big Lots Stores in litigation in California. During the course of the litigation, those Ohio attorneys also attempted to represent current and former Big Lots managers at their depositions. When the trial court learned of this, the court revoked the pro hac vice admissions altogether. Big Lots filed a writ petition, and the Court of Appeal reversed. The Court explained that a pro hac vice admission to represent one client does *not* allow the out of state attorney to represent other clients in the same manner. Nevertheless, the Court held that the total revocation of the attorney's admission to represent Big Lots was not justified on the record, because the depositions occurred prior to the issue being raised by the Plaintiff's counsel. Instead of revoking the pro hac vice status as to Big Lots, the Court of Appeal held that the trial court could have prohibited any additional representation of current or former employee deponents absent a further court order. The trial court could have also set a further hearing to determine whether the Ohio attorneys engaged in any form of ethical misconduct in contacting prospective deponents. In the absence of any supported findings of such ethical misconduct, the circumstances did not justify depriving Big Lots of its counsel of choice. Accordingly, the Court of Appeal reversed the trial court's order, and remanded the matter for further proceedings.

41. Referral Fees – A Client's Acknowledgment Of Receipt And Understanding Of Letter Explaining Referral Fee Does Not Constitute Written Consent To Fee Required By Rules Of Professional Conduct.

Reeve v. Meleyco (2020) 46 Cal.App.5th 1092 – Former Rule of Professional Conduct 2-200 required (and current Rule 1.5.1 requires) client consent to an agreement to share fees between one attorney and another who is not a partner, associate, or shareholder in the first attorney's firm. In *Reeve*, the Plaintiff referring attorney referred a case to the Defendant contingent fee attorney, who agreed to pay 25% of his contingency fee as a referral fee. When the client objected to paying additional fees to the Plaintiff, the Defendant attorney sent the client a letter explaining that the referral fee would come out of the existing contingency fee, and would not increase the amount paid by the client. The client signed that letter at the bottom, beside a line which read: "I, [CLIENT], acknowledge receipt of this letter and understand the contents." After the case settled, the Defendant attorney refused to pay the referral fee to the Plaintiff. The trial court found for the Plaintiff on a breach of contract claim, and the Court of Appeal reversed. The Court explained that because the Former Rule 2-200 requires written consent, it could not be inferred from the client's silence. Accordingly, while the client's signature confirmed the client's "receipt" and "understanding" of the referral fee arrangement, it did not constitute "informed written consent." This was true despite the fact that the client subsequently testified that he had intended his signature to indicate his consent to the referral fee. The Court of Appeal

also found that the Plaintiff's claim for quantum meruit was barred by the two-year statute of limitations, and thus the Plaintiff was unable to recover anything at all.

42. Unauthorized Practice Of Law – Renewing Judgment Using Judicial Council Forms Does Not Constitute Unauthorized Practice Of Law.

Altizer v. Highsmith (2020) 52 Cal.App.5th 331 – In *Altizer*, 17 Plaintiffs sued the Defendants on several promissory notes, and the parties entered into a stipulation whereby a single judgment was entered in favor of the Plaintiffs in various amounts. Ten years later, an attorney representing the Plaintiffs renewed the judgment using the standard Judicial Council form. Ten more years after that, when the judgment was again set to be renewed, one of the Plaintiffs did so himself by again using the standard Judicial Council form. The Defendants then moved to vacate that renewal, arguing it was void to the extent that the Plaintiff purported to file the renewal on behalf of the others, which the Defendants claimed constituted the unauthorized practice of law. The trial court agreed and granted the Defendants' motion, but the Court of Appeal reversed. While Business and Professions Code section 6125 forbids a non-licensee from practicing law, the statute fails to elaborate what qualifies as the practice of law. Relying on interpretative precedent (some of which that had previously found a renewal to be an automatic and ministerial act accomplished by the court clerk), the Court of Appeal held that the renewing Plaintiff did not engage in the authorized practice of law because he did not: (i) hold himself out as an attorney; (ii) offer other plaintiff-creditors legal advice; and (iii) attempt to resolve any difficult or legal questions that might reasonably demand the application of a trained legal mind. Rather, the Plaintiff instead *acted in a clerical capacity*, or as a scrivener, in filling out a two-page standard Judicial Council form almost word for word based on the prior renewal completed by the Plaintiffs' attorney ten years prior.

CIVIL PROCEDURE

43. Costs – Court Affirmed Award Of Costs For (1) Copies Of Exhibits And Demonstratives Not Used At Trial; (2) Travel Costs For Two Attorneys To Attend Depositions In Japan; and (3) Interpreter Services For Witnesses Who Spoke English "With Ease," But Needed Interpreter To Ensure Accuracy.

Segal v. ASICS America Corp. (2020) 50 Cal.App.5th 659 – In *Segal*, the trial court and Court of Appeal took a rather permissive, yet pragmatic, approach to awarding costs to the prevailing party defendants. The Court in *Segal* noted divided authority on the recoverability of the cost of copying exhibits and demonstratives that are not ultimately used at trial. The Court sided with the cases allowing such costs, noting that trial is complicated and unpredictable, and that by coming to trial with copies of all exhibits and demonstratives reasonably anticipated for use, the parties expedite the proceedings even if all of the documents are not ultimately used. The Court also noted that some local rules require litigants to create exhibit binders with all exhibits that might reasonably be used at trial, and that advance preparation of these materials preserves the

valuable time of jurors during trial. The Court in *Segal* also affirmed the award of costs for two of the Defendants' attorneys to travel to depositions noticed by the Plaintiffs in Japan. The Court rejected the Plaintiffs' attempt to limit travel costs to one attorney, noting that no such limitation appears in C.C.P. § 1033.5(a)(3)(C), and that the Plaintiffs, themselves, had sent two attorneys to the depositions. Finally, the Court allowed interpreter fees for the deposition and trial testimony of a Japanese-speaking witness who was able to speak English "with ease," but: (1) regularly used interpreter services to "avoid making mistakes when [he is] speaking" and to "confirm what [he is] hearing," and (2) testified with an interpreter to ensure he could "hear the questions as accurately as possible" and "answer [the questions] accurately with appropriate expressions." The Court held that this was sufficient to support a finding that the witness did not "proficiently" speak and understand English, as required for the recovery of interpreter costs under C.C.P. § 1033.5 (a)(3)(B). **The California Supreme Court has granted review, but has not depublished the case.** The issue to be briefed and argued is limited to the following: May a party recover costs for preparing multiple sets of trial exhibits and closing slides that were not used at trial?

44. Default Judgment – Attorney's Fees Must Be Requested In Request For Default Or They Are Forfeited, But Forfeiture Does Not Apply To Postjudgment Proceedings To Overturn An Order Vacating The Default Judgment.

Vincent v. Sonkey (2020) 59 Cal.App.5th 160 – The Plaintiff in *Vincent* obtained a default judgment for breach of a written lease, but did not seek attorney's fees when she requested entry of default. The Defendant filed a motion to vacate the judgment based on her declaration claiming that she had not received actual notice in time to defend the action. The trial court initially granted the motion, but then reinstated the default judgment after the Plaintiff presented evidence disputing the veracity of the Defendant's declaration. The Plaintiff then moved for contractual attorney's fees under the terms of the lease, which the trial court denied. The Plaintiff appealed, and the Court of Appeal reversed. The Court first held that any fees incurred before entry of default were forfeited. Under long-standing authority, such fees must be sought when the plaintiff requests entry of default, since the defendant has no ability to contest such fees after default is entered. However, the Court then held that any fees incurred in the post-judgment proceedings were not forfeited because, once the trial court granted the Defendant's motion to vacate, the matter became a contested proceeding, in which the Plaintiff prevailed. If the Court held that the forfeiture applied to fees incurred after that point, it would "unfairly reward a defendant who made an unmeritorious attack on a valid judgment." Accordingly, the Court reversed the denial of the entirety of Plaintiff's attorney's fees, and remanded the case for further proceedings consistent with the opinion.

45. Default Judgment – Complaint In Accounting Action Must State A Specific Dollar Amount To Support A Default Judgment Granting Monetary Relief.

Sass v. Cohen (2020) 10 Cal.5th 861 – In *Sass*, the Plaintiff sued her former romantic partner for breach of the couple's *Marvin* agreement and an accounting of all property and income earned during the relationship. The complaint did not seek a specific dollar amount, but asked for an accounting and for damages in an amount to be proven at trial. The Plaintiff obtained a default judgment for approximately $2.7 million. The Defendant then appeared and sought to vacate the default and default judgment based on his lack of notice of the amount demanded in the complaint. The trial court denied relief, holding that under *Cassel v. Sullivan, Roche & Johnson* (1999) 76 Cal.App.4th 1157, no notice of the amount sought is required where the complaint seeks an accounting and alleges that the amount owed is in the defendant's possession. The Court of Appeal reversed, and the California Supreme Court granted review to resolve the conflict between that decision and *Cassel*. The Court sided with the Court of Appeal in this case, holding that notice of the amount sought is required to support a default judgment, even where a claim for an accounting is made. The Court explained that, while C.C.P. § 580 states that "the relief granted" in a default cannot exceed "that demanded" in the complaint, the broad term "relief" means the "amount" in cases seeking monetary relief, so that (a) the amount granted cannot exceed the amount demanded in the complaint, and (b) where no amount is demanded, no amount can be granted. The Supreme Court then held that no different result is justified in an action demanding an accounting because there is nothing preventing a plaintiff from providing at least an estimate of the amount sought in the complaint, and the balance of equities favors providing defendants with notice of the amount sought before subjecting them to default judgments. For these reasons, the Supreme Court disapproved of *Cassel* and the cases that followed it, and affirmed the Court of Appeal's holding that the default judgment must be vacated.

46. Demurrer – Failure To Meet And Confer Before Filing A Demurrer Is Not A Reason To Deny A Demurrer.

Dumas v. Los Angeles County Bd. of Supervisors (2020) 45 Cal.App.5th 348 – The Plaintiff sued the Defendants for civil rights violations. The Defendants demurred and attached a declaration stating that the Defendants' counsel sent a meet and confer letter to the Plaintiff but received no response. The trial court sustained the demurrer without addressing the Plaintiff's argument that the Defendants' counsel failed to satisfy the requirement to meet and confer in person or by telephone under C.C.P. § 430.41(a)(1). The Plaintiff appealed, and argued that the Defendants' insufficient meet and confer efforts required the trial court to overrule the demurrer. While C.C.P. § 430.41(a)(4) provides that "any determination" that the meet and confer process was insufficient is not grounds to overrule a demurrer, the Plaintiff argued that subdivision (a)(4) applies only after the demurring party files a declaration of inability to meet and confer in order to obtain an automatic 30-day extension under subdivision (a)(2) of §430.41. The Court of Appeal rejected that argument, explaining that nothing in the language of § 430.41 supported the

Plaintiff's interpretation, and the use of the words "any determination" in subdivision (a)(4) refuted the Plaintiff's argument. Accordingly, the Court upheld the order sustaining the demurrer despite the Plaintiff's claims of an insufficient meet and confer process.

47. Inexcusable Neglect – Trial Court Did Not Abuse Its Discretion In Denying Motion For Continuance Made On The First Day Of Trial And Excluding All Defense Evidence Where Defendant Did Not Participate In Discovery Or Pretrial Conferences.

Reales Investment, LLC v. Johnson (2020) 55 Cal.App.5th 463 – In *Reales*, counsel for the defendant and cross-complainant, Reales Investment, was relieved as counsel on November 15, 2018, and the parties stipulated to continue trial to January 11, 2019. Prior to trial, Reales failed to participate in discovery in that– none of its expert witnesses appeared for deposition, and Reales did not produce any documents or substantive responses to requests for admission or special interrogatories. Reales' new counsel did not file a substitution of attorney until the day trial was set to begin. Trial was then continued to the next court day (three days later). Reales's new attorney then orally requested another continuance of trial, which the trial court denied. In addition, before trial commenced, the trial court ruled that, apart from impeachment evidence, any document not disclosed during the mandatory pretrial conference would be excluded from evidence at trial pursuant to California Rules of Court rule 3401. Because Reales had not participated in any pretrial conferences, it was precluded from presenting any evidence or testimony at all. The trial court ultimately granted the Plaintiff's motion for nonsuit, entering judgment against Reales on its cross-complaint. Reales appealed, claiming the trial court abused its discretion by denying its counsel's oral request for a trial continuance, and by excluding all of its evidence and witness testimony at trial. The Court of Appeal rejected both arguments, affirming the trial court's ruling. The Court first held that the oral request for a continuance was untimely and was improper, since rule 3.1332(b) requires such requests to be in writing. The Court then held that the exclusionary order was well within the trial court's discretion, since Reales failed to participate in discovery and mandatory pretrial proceedings required by rule 3401.

48. Intervention – Leave To Intervene As A Matter Of Right May Not Be Conditioned On Abandonment Of Request For Private Attorney General Fees.

Carlsbad Police Officers Assn. v. City of Carlsbad, et al. (2020) 49 Cal.App.5th 135 – In *Carlsbad Police Officers Assn.*, several media organizations and a civil rights group moved to intervene in a "reverse PRA" case seeking to prevent public disclosure of police misconduct and use of force records. Under C.C.P. § 387, the Interveners were entitled to intervene as a matter of right, rather than permissively, because: (1) they had a protectable interest in the subject matter, (2) their ability to protect that interest could be impaired by the resolution of the action, and (3) their interests were not adequately represented by the existing parties. The Interveners' Complaints in Intervention sought attorney's fees under the private attorney general statute,

C.C.P. § 1021.5. The trial court granted leave to amend, but conditioned intervention on Interveners striking their requests for attorney fees, claiming the fee requests would "enlarge the issues in this case." The Interveners acquiesced, but appealed the requirement that they strike their fee requests following the entry of judgment in their favor. Addressing a case of first impression, the Court of Appeal held that the trial court cannot condition leave to intervene on the intervenor's agreement to forgo its request for private attorney general fees. The Court of Appeal noted that trial courts are allowed to place reasonable restrictions on leave to intervene even where, as here, intervention is allowed as a matter of right. However, those restrictions are limited, and "may not impair an intervener of right from presenting its interest in the same manner as an original party." The Court considered the policy considerations behind § 1021.5 (to further litigation in the public interest), and found that requiring a litigant to file a separate lawsuit to seek such fees would interfere with the objectives of intervention (to avoid delay and a multiplicity of suits). Accordingly, the Court held that the trial court in this case erred by conditioning intervention as a matter of right on the Intervenors' abandonment of their requests for private attorney general fees. The Court also implied, but did not hold, that the same rule would apply even in a case of permissive intervention.

49. Jurisdiction – Personal Jurisdiction – Italian Company's International Distribution Agreement With Distributor Formed In California But Headquartered In North Carolina Was Insufficient To Confer Personal Jurisdiction In California.

T.A.W. Performance, LLC v. Brembo, S.p.A. (2020) 53 Cal.App.5th 632 –The Plaintiff was a California LLC headquartered in North Carolina that agreed to distribute the Defendant's brake products throughout Mexico, the United States, and Canada. The Defendant was an Italian company headquartered in Italy. The parties agreed to litigate any dispute in New York only. The Defendant terminated the agreement by sending notice to the Plaintiff's North Carolina address. The Plaintiff sued in California, arguing that California had specific jurisdiction over the Defendant in this Action, because: (1) the Defendant significantly profited from the Plaintiff's resale of the Defendant's products in California,; (2) the Defendant knew it was entering into an agreement with a California entity; (3) the Defendant negotiated with the managing member of the Plaintiff and the Plaintiff's attorney, who were both located in California; (4) the Defendant maintained regular communication with the Plaintiff's staff and management in California; and (5) the Defendant targeted the California market. The trial court held that none of these allegations were sufficiently related to the claim for wrongful termination of the distribution agreement to confer special jurisdiction. The Court of Appeal affirmed, holding that the Defendant had not purposefully availed itself of the benefits and protections of the laws of California such that it had fair warning and should have anticipated being brought into California. Six months before and at the time of the execution of the agreement, the parties' relationship was no longer California-directed in any meaningful sense because the Plaintiff had moved its principal place of business to North Carolina and the distribution agreement was not limited to California. Moreover, the Defendant had made a commercially reasonable effort to

alleviate the risk of burdensome litigation in any portion of the designated distribution territory by including choice of law and forum selection clauses limiting the forum in which the Plaintiff could file a lawsuit to New York. Therefore, the purposeful availment prong of the jurisdictional analysis showed that California lacked specific personal jurisdiction over the Defendant.

50. Preliminary Injunctions – The Undertaking Requirement In C.C.P. § 529 Applies To Preliminary Injunctions In Actions Under The California Public Records Act.

Stevenson v. City of Sacramento (2020) 55 Cal.App.5th 545 – When the City of Sacramento announced that it would begin deleting older e-mails pursuant to a records retention policy, the Plaintiffs filed California Public Records Act ("PRA") requests, broadly seeking all of the e-mails scheduled for deletion, adding up to tens of millions of e-mails. The City refused this request as overbroad, and the Plaintiffs filed a PRA action. At the Plaintiff's motion, the trial court issued an injunction prohibiting the City from deleting the e-mails during the pendency of the action, but required the Plaintiff to post an undertaking that was initially set at $80,000, but then reduced to $2,349.50, to cover the costs of retaining the e-mails. The Plaintiffs appealed, contending that the general undertaking requirement for preliminary injunctions (set forth in C.C.P. § 529) was inconsistent with, and inapplicable to, actions under the PRA. The Court of Appeal rejected this argument, holding that while several statutes expressly exempt certain parties from the undertaking requirement, the PRA allows preliminary injunctions without mentioning the topic of undertakings at all. In the absence of any irreconcilable conflict, the Court held that the general undertaking rule applied. The Court also rejected several additional legal arguments raised by the Plaintiffs, holding that: (a) the mere fact that the PRA imposes certain fees on applicants for public records did not exempt those applicants from other generally applicable costs; (b) section 529 does not impair indigent access to public records, because it provides an exemption for indigent applicants; (c) while restrictions on access to public records are construed narrowly, that rule does not negate ordinary statutory requirements (such as court filing fees) that might incidentally burden access to public records; (d) there is no need for the PRA to expressly incorporate § 529 by reference, because application of § 529 is the default rule, not the other way around.

51. Reconsideration Of Summary Judgment – If A Court Denies A Motion For Summary Judgment And Grants A Motion For Reconsideration, The Opposing Party Is Entitled To 75-Days Notice And A Separate Statement.

Torres v. Design Group Facility Solutions, Inc. (2020) 45 Cal.App.5th 239 – In a personal injury lawsuit, the Defendant moved for summary judgment, which the trial court initially denied. The Defendant moved for reconsideration based on new evidence under section 1008, subdivision (a). At the hearing on the motion, the trial court granted reconsideration and, at the same time, granted the motion for summary judgment without allowing the Plaintiff to respond to the new evidence. The Court of Appeal reversed, holding that the trial court abused its discretion because the motion for reconsideration was essentially a renewed summary judgment

motion subject to the requirements of section 437c. Therefore, the Plaintiff was entitled to all of the procedural protections afforded to parties opposing summary judgment, including 75 days' notice and a separate statement of material facts.

52. Relief From Default – Delay In Moving To Vacate Default Was Reasonable, Because It Was Permissible For The Defendant To Seek Relief In Its Home State Before Filing A Motion To Vacate In California.

Luxury Asset Lending, LLC v. Philadelphia Television Network, Inc. (2020) 56 Cal.App.5th 894 [**Bedsworth**, Fybel, Goethals] – In the fall of 2015, the Individual Defendants, a high-powered Philadelphia lawyer, and a former Pennsylvania Congressman, fell for what has become known as the "Nigerian Prince" scam. This time, instead of a Nigerian prince, it was a former Libyan oil minister with a $350 million wealth fund located in Ghana. The Individual Defendants visited Ghana, paid $45,000 in "late storage fees" to take physical possession of three boxes that supposedly contained millions in 100 dollar bills. The boxes were then transferred to a supposed bank, which reported that the money was real, but that $2.4 million would need to be paid to remove invisible Arabic security marks before the money could be used. Once the $2.4 million had been raised, the $350 million was "seized" by the Central Bank of Ghana's money laundering unit, requiring payment of a $3.6 million fine to recover possession of the funds. The Plaintiff lender (whose investor Brian Roche also allegedly facilitated the transactions with the scammers in Ghana) provided the Individual Defendants with a series of loans totaling $540,000 to help fund the attempts to recover the ever-elusive wealth fund. In return for these loans, the Plaintiff required repayment of $3.3 million. To secure these loans, one of the Individual Defendants not only pledged his shares in a television broadcasting corporation (the "Corporate Defendant"), but purported to pledge all of the Corporate Defendant's assets as well. Of course, he did this without informing the Corporate Defendant, or any of the other shareholders.

In October of 2016, the Plaintiff lender sued the Individual Defendants and the Corporate Defendant for a range of claims including breach of contract and fraud. The summons to the Corporate Defendant was only served on the Individual Defendants, who, of course, did not inform the Corporate Defendant of the Action, resulting in a default judgment for $3,897,919.22, dated April 6, 2017. The Corporate Defendant only found out about the default judgment in May of 2018, when it discovered that the Plaintiff's assignee had filed an application to transfer the company's broadcast license to itself. For nearly a year after that, the Corporate Defendant challenged the transfer with the FCC, and attempted to challenge the default judgment in enforcement proceedings in Pennsylvania. On April 5, 2019, one day shy of two years after entry of the default judgment, the Corporate Defendant finally attempted to vacate and set aside the default judgment in the California Action. The trial court denied the motion as untimely, due to the Corporate Defendant's nearly year-long delay after it discovered the default judgment. The Court of Appeal reversed, noting that, under C.C.P. § 437.5, a motion to vacate a default where service did not result actual notice must be filed within a "reasonable time," but no later

than (a) two years after entry of the default judgment, or (b) 180 days after service of notice of entry of default and default judgment. Here, the Court of Appeal held that it was reasonable for the Corporate Defendant to delay seeking to vacate the judgment in California while it first attempted to pursue its challenges before the FCC and in the Pennsylvania courts. Accordingly, the motion was filed within a reasonable time (it was also filed within the maximum time limits). The Court also held that, even if the Corporate Defendant did not have grounds for a statutory challenge to the default and default judgment, they could be vacated on equitable grounds, because the Corporate Defendant had a meritorious defense, a satisfactory excuse for the default, and acted with due diligence in seeking to set aside the default after its discovery. For these reasons, the Court reversed the denial of the motion, and ordered the default and default judgment to be vacated.

53. Relief From Default – Equitable Relief From A Default Judgment Is Unavailable Where Default Is The Result Of The Defendant's Inexcusable Negligence And Failure To Act.

Kramer v. Traditional Escrow, Inc. (2020) 56 Cal.App.5th 13 [**Moore**, Bedsworth, Thompson] *Kramer* involved an attempt to set aside a default by the Defendants (a woman and a defunct corporation that served as her alter ego). The Defendants' attorney withdrew after the Defendants answered the initial complaint, and the Individual Defendant then changed her address without informing the Plaintiff or the Court. The Plaintiff served an amended complaint at the Defendants' former address on October 10, 2018. In November of 2018, the Plaintiff's counsel discussed the case with the Individual Defendant's divorce attorney (who was not affiliated with the case), and allegedly misrepresented that the Defendants were already in default. The Plaintiff's attorney provided the divorce attorney with a stipulation that would have allowed the Defendants to answer, which the Defendant executed on November 19, but failed to deliver or file. The Plaintiff then sought entry of default and a default judgment, serving the Defendants at the address of record, and serving the divorce attorney as well. Default judgment was entered on February 8, 2019. It was not until August 7, 2019, that the Defendants filed a motion to set aside the default on equitable grounds. The Individual Defendant claimed that she had not received service of any documents due to her change of address, and attempted to excuse her inattention to the case by explaining that she was involved in a contentious divorce, and that she did not understand that she could be personally liable in this action, which she thought was only against a "defunct entity." The trial court granted the motion to set aside the default, and the Court of Appeal reversed. The Court held that equitable relief required extraordinary circumstances, which could not be found where the Defendants chose to ignore the case and their responsibilities. Here, the Individual Defendant knew about the lawsuit, and simply chose not to participate, because she believed the case was against a defunct entity. Furthermore, the Defendants' lack of notice was due to their own failure to inform the Court and Plaintiff of the address change, and there was nothing to excuse the Defendants from taking action in November

when they received actual notice of the amended complaint. Under these facts, the Court of Appeal held that it was an abuse of discretion to grant relief from default.

54. Relief From Default – Mandatory Relief Under C.C.P. § 473(b) Based On Attorney Fault Is Not Available For A Failure To Appear At Trial.

Shayan v. Spine Care & Orthopedic Physicians (2020) 44 Cal.App.5th 167 – In *Shayan*, the Plaintiff filed an interpleader action to resolve claims by three claimants to a disputed sum. Two Absent Claimants had notice of the trial date, but failed to appear for trial. The trial court conducted trial, adjudicated the case on the merits, and entered judgment. The trial court later denied the two Absent Claimants' motion for mandatory relief from default based on attorney mistake, inadvertence, surprise, or neglect under Code of Civil Procedure section 473(b). The Court of Appeal affirmed, holding that the plain language of Code of Civil Procedure section 473(b) states that mandatory relief applies only to defaults, default judgments, and dismissals. Accordingly, mandatory relief could not be extended here, where there was a trial on the merits, and no default, default judgment, or dismissal. While the Court noted that earlier case law supported a broader application of the statute to all situations "analogous" to a default, more recent caselaw has found that this broader application is contrary to the unambiguous and controlling plain language of the statute. The Court reasoned that permitting freeform extensions of the statute would be a disservice, and with the heavy use of section 473(b) in trial courts, everyone would benefit from a clear, exact, and predictable rule.

55. Relief From Default – Mandatory Relief Under C.C.P. § 473(b) Based On Attorney Fault Is Not Available For A Failure To File Motion For Attorney's Fee Before Deadline Set By Court.

Hernandez v. FCA US LLC (2020) 50 Cal.App.5th 329 – The Plaintiff's attorney in *Hernandez* failed to file a motion for attorney's fees after settlement of the action. The parties settled on the first day of trial, and their settlement agreement provided that the Plaintiff could recover attorney fees and costs pursuant to an agreement of the parties or by noticed motion. Upon being notified of the settlement, the trial court set an OSC re dismissal 90 days later, and expressly stated that any fee motion was to be heard *prior to* that date. At the OSC, the trial court refused to continue the time to file an attorney's fee motion. The Plaintiff's attorney filed an ex parte application for relief under C.C.P. § 473(b) due to the attorney's mistake, inadvertence, or neglect, which the court denied and dismissed the case Four months later, Plaintiff's counsel filed a section 473 motion to set aside the dismissal. The trial court denied that motion and the Court of Appeal affirmed. The Court cited a line of cases clarifying that section 473(b)'s mandatory relief provision applies only when an actual dismissal is caused by an attorney's mistake, inadvertence, surprise or neglect. Here, the case was dismissed pursuant to the parties' settlement, and this dismissal was not caused by the error of Plaintiff's counsel. Accordingly, that error did not deprive Plaintiff of her day in court – but rather of her opportunity to file a motion to recover attorney fees and costs. Because the application of § 473(b) to these facts would broaden the

scope of the statute far beyond the intention of the legislature, the Court found granting relief under that provision was unwarranted.

56. Service Of Process – The Requirements Of The Hague Service Convention Do Not Apply Where Parties Specify The Manner Of Service By Contract.

Rockefeller Technology Investments (Asia) VII v. Changzhou SinoType Technology Co., LTD. (2020) 9 Cal.5th 125 – In *Rockefeller*, the parties, one of which was domiciled in China, entered into a Memorandum of Understanding ("MOU"), which specified that: (1) notice under the MOU was to be given "via Federal Express or similar courier, with copies via facsimile or email, and shall be deemed received 3 business days after deposit with the courier," (2) the parties consented to service of process in accordance with the notice provision, (3) the parties consented to the jurisdiction of the California state and federal courts, and (4) any disputes would be submitted to binding arbitration in Los Angeles. Four years later, the Plaintiff (the US based party) commenced arbitration, and sent summons to the Defendant (the China based party), by way of Federal Express at the address listed in the MOU, as well as by email. The Defendant did not respond, and the arbitrator entered a $400,000+ default award, which was confirmed in court. When the Plaintiff attempted to collect the judgment, the Defendant specially appeared in a motion to quash the default judgment based on failure to comply with the requirement of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. The trial court denied the Defendant's motion, but the Court of Appeal reversed. Review was granted by the California Supreme Court, which reinstated the trial court's ruling. The Supreme Court held that the Hague Service Convention applies only to service of documents in the technical sense involving a formal delivery of documents and that, per the Practical Handbook on the Operation of the Service Convention, the Convention does not determine which documents need to be served. Thus, if the law of the forum states that a notice is to be somehow directed to an address, without requiring *service,* the Convention does not have to be applied. Second, whether there is an occasion to transmit a judicial document for service abroad is determined by reference to the law of the sending forum – i.e. California. Here, per the terms of the MOU, the parties agreed to waive formal service of process, as permissible under California law, in favor of informal notification. Thus, the Court found that the facts underlying this dispute did not present an occasion to transmit a judicial document for service abroad within the meaning of Article 1 of the Convention. As such, Rockefeller properly abided the informal service requirements of the MOU, and SinoType's motion was denied.

57. Specific Personal Jurisdiction –The Defendant's Sales In California Did Not Confer Specific Jurisdiction In Action Challenging Indemnity Contract Executed In Texas, Even Though Claims Arising From The California Sales Were Indemnified.

Halyard Health, Inc. v. Kimberly-Clark Corp. (2019) 43 Cal.App.5th 1062 [*Publication Status Changed by the Court from Unpublished to Published on Jan. 2, 2020*] – In *Halyard Health, Inc.*, a Delaware corporation agreed to indemnify another Delaware corporation in a contract that

was negotiated and executed in Texas. Later, the Defendant claimed that the contract required the Plaintiff to indemnify the Defendant from damages awarded in California litigation arising from the sale of the Defendant's products in California. The Plaintiff sought declaratory relief in California, challenging the validity of the indemnity agreement. The Defendant moved to quash service of summons due to lack of personal jurisdiction, and the trial court granted the motion, holding that there was no connection between the forum and the dispute over the indemnity agreement. The Court of Appeal affirmed, holding that the sale of Defendant's products in California was not sufficiently related to the dispute over the indemnity agreement to give rise to specific personal jurisdiction over the Defendant in California. The Plaintiff argued that "but for" the Defendant's sale of gowns in California, there would be nothing to indemnify. The Court rejected the Plaintiff's "but for" test as overly mechanical and, instead, took a more practical view of the subject matter of the case, which was the parties' indemnity agreement executed in Texas, not the sale of products in California. The Plaintiff also argued that the indemnity agreement, itself, was "California-directed," since the California action was one of 27 actions specifically identified in the contract. The Court rejected that argument, explaining that the indemnity provisions were directed at liability in any forum, and there was no focus on the California action over actions in other states. Moreover, the choice of law provision identified Delaware law as controlling, which reflected a deliberate affiliation with Delaware, not California.

58. Statutes Of Limitation – Government Agency's Misleading Information In Notice Of Decision Tolled Statute Of Limitation For Judicial Review Of Agency Decision.

Alford v. County of Los Angeles (2020) 51 Cal.App.5th 742 – Code of Civil Procedure § 1094.6 provides that a writ petition for judicial review of a local agency's decision must be filed within 90 days after the decision becomes final. Written decisions become final under that statute on the date the decision is served by mail. In *Alford*, the LA County Department of Children and Family Services (the "Department") mailed a statement of decision, which first stated that "the decision is final," and then incorrectly stated that "the decision *will become final* 90 days from the date it is placed in the mail." Based on this second statement, the Petitioner in *Alford* believed he had 90 days from the date of mailing until the decision became final, and then another 90 days under § 1094.6 before his Petition needed to be filed. He filed the Petition 120 days after mailing, and the trial court dismissed his claim based on the statute of limitations. The Court of Appeal reversed, holding that, because the Department included confusing information that created doubt over the date of finality, the Department had failed to comply with § 1094.6's notice provisions. Because the Department did not comply with the statute, the statute of limitations did not bar the Plaintiff's Petition.

59. Summary Judgment – Continuances – Continuance Must Be Granted If Opposing Party States With Particularity Discovery Necessary To Oppose The Motion, Even If That Party Could Have Been More Diligent.

ALSO: Summary Judgment – Materiality – If A Fact Is Included In Separate Statement, The Moving Party Cannot Later Argue That The Fact Is Not Material.

Insalaco v. Hope Lutheran Church of West Contra Costa County (2020) 49 Cal.App.5th 506 – In *Insalaco*, one group of Plaintiffs requested a continuance of a summary judgment motion under 437c(h) to conduct a site inspection of property at issue in the Action. The request was supported by a detailed attorney declaration identifying the specific reasons why they needed the discovery and identified the type of discovery needed. The Defendant argued only that the Plaintiffs had been dilatory in prosecuting their case and could have conducted the inspection sooner. No trial date had been set, no depositions had been taken, and other than the summary judgment hearing, the only other pending court date was a case management conference. The trial court denied the request without explanation. The appellate court reversed, holding that when an attorney's declaration provides a specific factual explanation that meets the statutory elements, it is error to deny the request, even if the requesting party could have been more diligent.

The other group of Plaintiffs in *Insalaco* argued that the trial court erred in granting summary judgment against them because they submitted evidence disputing facts listed in the separate statement of material facts filed by the Defendant Church. The Defendant's reply brief in support of summary judgment argued that the disputed facts were not material, despite their inclusion in the separate statement. The trial court agreed that the facts were not material, and granted summary judgment. The Court of Appeal reversed, quoting with approval a passage from Weil & Brown, which states that "the separate statement effectively concedes the materiality of whatever facts are included." Since the Plaintiffs were able to dispute facts that the Defendant placed in the separate statement, the Court of Appeal held that the Defendant could not argue that the facts were immaterial, and the trial court erred in granting summary judgment.

60. Summary Judgment – Moving Party's Burden – An Expert's Bare Conclusion, Unsupported By Reasons Or Explanations, Is Insufficient To Meet The Moving Party's Burden In A Summary Judgment Motion.

McAlpine v. Norman (2020) 51 Cal.App.5th 933 – The Plaintiff sued the Defendant doctor after a colonoscopy resulted in a perforated colon with severe complications, including numerous surgeries. The Defendant filed a motion for summary judgment (the "MSJ"), which was supported by a declaration from a retained gastroenterologist. The declaration opined that the Doctor's treatments of the patient fell within the requisite standard of care, but was unsupported by any factual details or reasoned explanation of the basis for this opinion. The Plaintiff did not

submit any opposing expert declaration, and the trial court granted the MSJ. The Patient appealed, and the Court of Appeal reversed. The Court held that the declaration amounted to little more than a bare statement of the ultimate fact that treatment was within the standard of care, and this failed to meet the moving party's burden of persuasion that there is no triable issue of material fact. Even without an opposing expert declaration, then, the MSJ had to be denied.

61. Summary Judgment – Moving Party's Burden – Discovery Responses Consisting Of Improper Objections Do Not Shift The Burden To The Plaintiff Opposing A Summary Judgment Motion.

Bayramoglu v. Nationstar Mortgage LLC (2020) 51 Cal.App.5th 726 – In response to special interrogatories seeking "all facts supporting" each cause of action, the Plaintiffs in *Bayramoglu* cited C.C.P. § 2030.320 and objected to the preparation of a compilation or summary of documents. Instead of providing a substantive response, the Plaintiffs pointed the Defendant to a list of documents where responsive facts could be found. The Defendant moved for summary judgment, arguing that these responses were "factually devoid," and therefore shifted the summary judgment burden to the Plaintiffs to provide evidence supporting each element of their claims. The trial court agreed, holding that the Plaintiff's reliance on § 2030.320 was inadequate and that the Plaintiffs did not possess, and would be unable to obtain, evidence supporting their claims. The Court of Appeal disagreed and reversed. The Court assumed without deciding that the Plaintiffs' reliance on § 2030.320 was improper, yet held that this did not "effectively concede the absence of supportive facts." If the use of § 2030.320 was indeed improper, the Defendant's remedy was to file a motion to compel a further response. Because the Defendant failed to do so, it could not rely on the allegedly improper objections to meet its own burden of production in its summary judgment motion.

CORPORATIONS & BUSINESS ENTITIES

62. Alter Ego Liability – Alter Ego Liability May Be Imposed Even Where Corporation Was Not Undercapitalized, Where Owners Comingled Assets, And Used Corporate Assets To Pay Personal Expenses

Kao v. Joy Holiday (2020) 58 Cal.App.5th 199 – At issue in *Kao* was whether or not a married couple were the alter egos of their jointly owned and managed tour company. The couple used company funds to pay the rent on their personal home. They also paid the salary of the Plaintiff (one of the company's employees) out of their personal funds, and had the company reimburse them for this expense. When the Plaintiff sued the couple and their company for unpaid wages, the trial court imposed alter ego liability on the couple. The couple appealed, arguing that (1) the alter ego finding was based solely on their joint ownership and control of the company, which is an insufficient basis to find a unity of interest, and (2) there was no evidence that an unjust result would occur in absence of an alter ego finding because no evidence showed that the company was undercapitalized or was a mere shell or conduit for their own business. The Court of Appeal

upheld the trial court's imposition of alter ego liability. According to the court, the couple's commingling of assets, use of corporate funds to pay their personal rent, and used personal funds pay the Plaintiff's salary was enough to show unity of interest. The court also affirmed that such unity of interest was enough proof, in and of itself, for the trial court to reasonably conclude that it would be inequitable to refuse to disregard the corporate form and impose liability directly on the couple.

63. Derivative Claims – Compulsory Cross-Claims That Were Not Asserted By The Company In A Prior Action Could Not Be Asserted As Derivative Claims Even When The New Plaintiffs Were Not Parties To Prior Action.

Heshejin v. Rostami (2020) 54 Cal.App.5th 984 – The Plaintiffs in *Heshejin* had indirect ownership interests in a company called ALI. They asserted derivative claims on ALI's behalf against the Defendants. The derivative claims arose out of a business relationship gone bad. The Defendants, however, had asserted their own claims against ALI in a prior action arising out of the same relationship, and ALI had failed to assert any cross-claims. Accordingly, the Defendants demurred, arguing that the derivative claims were barred by the compulsory cross-claim rule in C.C.P. § 426.30. The trial court agreed and dismissed the derivative claims. The Plaintiffs appealed, arguing that § 426.30 did not apply to them because they were not parties in the prior action. The Court of Appeal rejected this argument and affirmed the dismissal, explaining that a derivative claim belongs to the corporation, and the corporation is the true plaintiff. Accordingly, the corporation may waive, forfeit, or adjudicate the claims by its own direct actions. The Court sympathized with the Plaintiffs, who claimed that they were not informed of the prior action when it was filed, but the Court noted that it would be inequitable to the Defendants to allow the Plaintiffs to assert compulsory cross-claims that were not asserted in the prior action because doing so would submit the Defendants to the exact type of piecemeal litigation that § 426.30 is designed to prevent.

64. Homeowner's Associations – Directors' Breach of Fiduciary Duty – HOA Directors May Be Liable For Breach Of Fiduciary Duty Even If They Are Not Acting In Their Own Self-Interest, And Even If They Do Not Benefit From The Breach.

Coley v. Eskaton (2020) 51 Cal.App.5th 943 – In *Coley*, the Developer of a planned community controlled a permanent majority of the seats on the board of directors of the community's homeowner's association (the "HOA") by virtue of the number of units the Developer owned and leased within the community. Two of the board members who were employees of the Developer (the "Directors") voted to allocate a larger portion of the HOA's costs to units not owned by the Developer. The Plaintiff homeowners sued the Directors and the Developer for breach of fiduciary duty and other claims. The trial court found the each of the Directors had a conflict of interest by virtue of their employment with the Developer, and that they breached their fiduciary duties by taking the challenged actions despite that conflict of interest. However, the trial court also found that only the Developer could be liable for that breach, because the

Plaintiff did not show that: (1) the Directors were motivated by their own self-interest; (2) the Directors benefited from their breach of fiduciary duty, or (3) that the actions of the Directors amounted to mismanagement of the HOA. The Court of Appeal reversed, holding that once a breach of fiduciary duty was found, the Directors were liable for the resulting damages, and that the trial court "asked for too much" by demanding more. The Court went on to specifically note that the Plaintiff was under no obligation to show that the Directors were motivated by their own self-interest, rather than their employer's, or that the Directors benefited from their breach. Finally, the Court held that while the Director's actions may not have been gross mismanagement, they constituted mismanagement to some degree.

65. Suspended Corporations – Defendant Forfeited His Defense That Plaintiff Lacked Capacity To Sue By Failing To Assert It Until The Conclusion Of Trial.

Rubinstein v. Fakheri (2020) 49 Cal.App.5th 797 – In *Rubenstein*, the Plaintiff lent money through two of his entities to the Defendant, and sued in his own name when the Defendant failed to repay the loans. While the entities' claims were assigned to the Plaintiff, the corporate powers of those entities, including the capacity to sue, had been suspended by the Secretary of State. The Defendant argued in his written closing argument that because the Plaintiff was acting as an assignee, he was subject to the same defenses as the assigning entities, and that he therefore "lacked standing" to sue. The trial court rejected this defense because it was not raised until trial, and the Plaintiff cured the defect and restored the entities' corporate powers following the Defendant's argument. The Defendant argued on appeal that the defense of standing may be asserted at any time, and could not be forfeited. The Court of Appeal affirmed, holding that the issue was not one of standing (which concern's a party's right to seek relief), but rather one of lack of capacity (which is a legal disability that deprives a party of the right to come into court). The Court held that lack of capacity is a disfavored defense that can be forfeited if it is not raised by the defendant "at the earliest opportunity." Because the Defendant did not raise the issue until the conclusion of trial, it was waived.

DISCOVERY

66. Discovery Sanctions – Terminating Sanctions Plus $586,600 In Monetary Sanctions Was Adequate, Even Where The Sanctioned Party Did Not Challenge At Least $875,000 In Attorney's Fees Arising From Discovery Abuse.

Cornerstone Realty Advisors, LLC v. Summit Healthcare REIT, Inc. (2020) 56 Cal.App.5th 771 [**Fybel**, Aronson, Thompson] – In *Cornerstone*, the Plaintiffs committed discovery abuse by, among other things, avoiding the production of their general ledger for three and a half years after it was requested in valid discovery requests. Their evasion included: (1) defiance of multiple orders compelling production, (2) a 1.8 million page "document dump" where Plaintiffs pointed to 4,000 separate documents that "referred or related to" general ledgers, none of which was actually a general ledger, (3) the production of numerous unusable Excel files purporting to

be the general ledger in native format, but that actually contained JPG images "haphazardly pasted" into the files, and that lacked even images of the pertinent portions of the general ledger, (4) submission of a false declaration that these Excel files were the native version in which the general ledger was ordinarily kept, and (5) the making of false claims that the original data files containing the general ledger were no longer available. Once it was finally established that the Plaintiffs had the general ledger data and could have easily produced it all along, the discovery referee recommended $186,000 in monetary sanctions (out of a requested $3.5 million), as well as certain issue sanctions. The trial court issued a tentative ruling that would have increased monetary sanctions to $1,011,456, and issued terminating sanctions. The Defendants then filed two requests for supplemental fees seeking nearly $1,000,000 more. In response to these additional requests, the trial court reexamined the initial sanctions motions, and found the attorney's fees requested to be unreasonable, reducing the total award to $586,600. The Defendants appealed, arguing that the trial court was required to grant sanctions in the amount of all of the Defendants' fees, and had "acted arbitrarily and shirked its duty" by reducing the fees in response to their supplemental requests. The Court of Appeal criticized the Defendants for impugning the integrity of the trial judge with no concrete evidence, and explained that while the court is under "compulsion" to enter a monetary sanction where sanctions are authorized and the opposing party did not act with substantial justification, such sanctions can only include costs, including attorney's fees that were "caused" by the discovery abuse, and must include only "reasonable" costs and fees. Thus, while the trial court in this case was required to grant monetary sanctions, it was not required to blindly accept the Defendants' requested sum. The Defendants also argued that $875,000 in fees had not been disputed by the Plaintiffs. Nevertheless, the Court of Appeal explained that this did not eliminate the trial court's discretion to evaluate the reasonableness of those fees on its own. The Court of Appeal also affirmed the trial court's decision to decline fees for preparing a summary judgment motion and for preparing for trial, noting that the motion and the trial preparations would have been required regardless of the discovery abuse. The Court did, however, find that one small category of fees was mistakenly excluded by the trial court based on a mistaken belief that they had already been awarded. Accordingly, the Court remanded for the trial court to determine the proper amount to be awarded for that category.

See also **Related Holding In Case # 34, above (sustaining trial court's refusal to impose sanctions on Plaintiff's counsel)**.

67. Expert Disclosures – Exclusion Of Expert Models Not Disclosed In Expert Report Or Deposition.

Ajaxo, Inc. v. E*Trade Financial Corporation (2020) 48 Cal.App.5th 129 – In *Ajaxo*, the Plaintiff alleged and proved that the Defendant breached an NDA and used the Plaintiff's trade secrets to develop a wireless stock trading platform. Following a prior appeal, a limited retrial was held to determine a reasonable royalty rate as damages on the Plaintiff's claim for misappropriation of trade secrets. During the retrial, the Plaintiff's expert testified to three

different royalty models on which a reasonable royalty could be based—a "value-added" model, an "enterprise use" model, and a "subscription" model. His pretrial expert report, however, disclosed only the value-added model. During his deposition, the expert testified regarding the value-added model, and disclosed that he "may" also testify regarding the subscription model, but failed to provide an estimate of the subscription model royalty. In the Plaintiff's trial brief, the Plaintiff proposed a royalty using the enterprise model, and an emergency deposition of the expert took place on the last business day before trial to address this new model. The trial court found that the expert's testimony on the "value-added" model was unreliable, and excluded any expert testimony on the other two models, because the Plaintiff failed to meet its obligations during pretrial discovery. As a result, the trial court awarded no royalty at all. The Court of Appeal affirmed, holding that the expert discovery statutes required the parties to "give fair notice of what an expert will say at trial." Here, that obligation was clearly not met. The Court also held that the provision of an emergency deposition on the last day before trial because it fell short of the reasonable and fair notice required by statute. Because this meant that the Plaintiff had no evidence to show the amount of a reasonable royalty, none was awarded.

68. Relevance – Circumstantial Evidence – Trial Court Should Have Compelled Response To Interrogatory Seeking Circumstantial Evidence Of The Defendant's Intent.

Sosa v. CashCall, Inc. (2020) 49 Cal.App.5th 42 [**Moore**, Bedsworth; Dissent-Aronson] – Under the Consumer Reporting Agencies Act (Civ. Code § 1785.1, et seq.), a lender may be held liable for a civil penalty for accessing a consumer's credit report without an intent to make a "firm offer of credit," i.e., an offer that the lender will honor if it is accepted by the consumer. The Plaintiff in *Sosa* sought such a penalty from the Defendant payday lender, after the Defendant accessed hundreds of thousands of credit reports and mass-mailed credit offers to consumers. In support of his claim that the Defendant did not actually intend to honor all of the offers if accepted, the Plaintiff moved to compel an interrogatory asking how many of the credit offers actually resulted in a loan being extended. The trial court denied the motion to compel as overbroad and irrelevant, and ultimately granted summary judgment based on the Plaintiff's failure to rebut the Defendant's conclusory declaration that the offers were "firm offers of credit." The Court of Appeal reversed, holding that the number of offers that resulted in actual loans was highly relevant circumstantial evidence as to whether or not the Defendants intended to honor the offers when accepted. Accordingly, the order denying the motion to compel was reversed. The Court further held that this erroneous discovery ruling prevented the Plaintiff from obtaining evidence to oppose the summary judgment, and thus the ruling on that motion was overturned as well.

EMPLOYMENT

69. Defamatory Termination – Employer Who Gave Employee Defamatory Reasons For Termination Was Liable For Defamation Under Theory That Employee Himself Was Compelled To Publish The Defamatory Reasons To Third Parties To Explain His Termination.

Tilkey v. Allstate Ins. Co. (2020) 56 Cal.App.5th 521 – The Plaintiff employee was terminated by the Defendant employer after the Plaintiff was arrested for charges that included domestic violence, which were later reduced to disorderly conduct. In response to the arrest, the Defendant informed the Plaintiff that he was being terminated for "engaging in threatening behavior and/or acts of physical harm or violence to any person." The employee asserted that, despite his arrest, he never threatened or committed any act of physical violence. He sued, asserting several claims, including "compelled self-published defamation to prospective employers." Following a jury trial, the Plaintiff was awarded over $1.7 million in damages for defamation, and $15.9 million in punitive damages. On appeal, the Defendant argued that allowing a claim for compelled self-published defamation under these circumstances would undermine at-will employment and have a chilling effect on communications between employer and employee. The Court of Appeal explained that the same arguments could be offered to support elimination of defamation claims against employers altogether, and that the risks of such claims would be mitigated by the requirements that the employee prove there was a strong compulsion to disclose the statement, a necessity to disclose the statement, and foreseeability of the repetition of the statement. The Court also explained that nothing about a compelled self-publication claim would interfere with an employer's right to arbitrarily terminate an at-will employee. Instead, the claim would only arise if the employer included false accusations of criminal conduct or other reprehensible characteristics or behavior in the statement to the employee regarding the reasons for termination. The Court also rejected the Defendant's challenge to the evidence supporting the finding that the Plaintiff was compelled to self-publish the Defendant's statements to his new prospective employers. The Court explained that a public record of his termination for cause was filed against his securities license, which prompted employers to seek an explanation. Furthermore, when the Plaintiff looked for jobs in other fields, he was asked if he was ever terminated, and would answer the question honestly, stating the given reasons for the termination and attempting to explain that he never threatened anyone. Given this evidence, the Court held that the jury's verdict on compulsion must be upheld. The Court did, however, reduce the punitive damage award to approximately $ 2.5 million, or 1.5 times the compensatory damages awarded for defamation.

70. Employment Status – Under ABC Test, People Have A Probability Of Prevailing In Establishing That Uber And Lyft Drivers Are Employees, Not Independent Contractors [Note-Superseded By Prop. 22].

People v. Uber Technologies, Inc. (2020) 56 Cal.App.5th 266 – In 2019, the Supreme Court's "ABC test" was codified in Lab. Code § 2775. The ABC test is used to determine whether a person is an employee or an independent contractor, based on the following three factors: (A) whether the person is free from the control and direction of the hiring entity, (B) whether the person performs work that is outside the usual course of the hiring entity's business, and (C) whether the person is customarily engaged in an independently established trade, occupation, or business. In this case, Uber and Lyft appealed from an order granting a preliminary injunction requiring them to treat their drivers as employees, based on a finding that the State was likely to prevail on the merits under the ABC test. While the case was basically overturned by Prop. 22, it still provides illumination as to how the ABC test is likely to be applied in other contexts. Specifically, the Court in *Uber Technologies* rejected two key defenses asserted by Uber and Lyft. The first was that the ABC test requires a threshold showing that the defendant is a "hiring entity." Uber and Lyft claimed this showing was not made, since their drivers render services to their riders, and not to Uber and Lyft. The Court rejected this defense, holding that it would add a fourth step to the "ABC" inquiry, and that it rested on a false dichotomy that the drivers could only render services *either* to the companies or to the riders, but not to both. Next, Uber and Lyft claimed that the drivers perform work outside of the companies' usual course of business, because their business is the software and technology behind matching riders and drivers, not transportation itself. The Court held that this was too narrow a frame of the companies' businesses because both Uber and Lyft solicit riders, screen drivers, set vehicle standards, track and collect information on drivers, use negative ratings to deactivate drivers, collect ride fees through their apps, and remit a portion of those fees to the drivers. Put simply, the Court held, the companies' businesses depend on riders paying for rides, and the drivers perform the service necessary for those businesses to prosper. Accordingly, the Court affirmed the preliminary injunction based on the ruling that the State was likely to prevail in showing that the drivers are employees, not independent contractors, under the ABC test.

71. Non-Compete Provisions – Business And Professions Code Section 16600 Does Not Invalidate A Provision That Prohibits An Employee's Competitive Actions While Still Employed.

Techno Lite, Inc. v. EMCOD LLC (2020) 44 Cal.App.5th 462 – In *Techno Lite*, the three Defendants were employed by the Plaintiff who produced lighting transformers, but also ran their own company producing custom lighting transformers. The parties agreed that the Defendants were allowed to continue their separate business, but that separate business would not sell the same parts as, or otherwise compete with, the Plaintiff. The Defendants secretly breached that agreement by competing with the Plaintiff and poaching its customers. The trial court found the Defendants liable for fraud and other causes of action. The Defendants appealed,

arguing that they could not be liable for fraud, because any promise they may have made not to compete with the Plaintiff was void under Bus. & Prof. Code § 16600. The Court of Appeal rejected that argument, holding that although Bus. & Prof. Code § 16600 has been construed to allow employees to "prepare to compete" before leaving their employment, that preparation must be done on the employee's own time, with their own resources, and does not include a right to solicit the employer's customers. The Court also held that nothing in section 16600 provides a right for an employee to actually compete with his or her employer while the employment is still in effect. Accordingly, the Court of Appeal affirmed the judgment against the Defendants on the fraud cause of action.

EVIDENCE

72. Declarations – Where Hearsay Testimony Is Offered Under The Business Records Exception, Be Careful To Establish Foundation.

Ducksworth v. Tri-Modal Distribution Services (2020) 47 Cal.App.5th 532 [On 02/24/2021, California Supreme Court retitled as *Pollack v. Tri-Modal Distribution Services, Inc.] – Ducksworth* was an employment case where the promotion dates of certain employees was at issue. The employer's vice president submitted a declaration in support of summary judgment stating that (1) he had "personal knowledge of each of the facts set forth herein," and (2) [in substance] he had looked at the employees' personnel files, and the promotion dates were before X date or were in X month for each employee. The Plaintiffs objected that the declaration was hearsay because the declaration did not establish the business records exception for the personnel file, and the declarant simply testified to the contents of the file. The trial court overruled the objection. The Court of Appeal affirmed the trial court's ruling, but explained that under these facts, it would have also affirmed if the trial court had sustained the objection. The trial court could have reasonably inferred that the testimony regarding the promotion dates was based on the declarant's personal knowledge of the dates, given the express representation of personal knowledge at the beginning of the declaration. However, an equally reasonable inference could have been that the declarant based his testimony about the promotion dates on the contents of the personnel file that he testified to reviewing. Since either inference was reasonable, either would have been affirmed on appeal using an abuse of discretion standard of review. The Court of Appeal cautioned litigators that it is "risky business" to omit the foundation for the business records exception in this sort of situation. **The California Supreme Court has granted review, but has not depublished the case**

73. Expert Testimony – Admissibility – Expert's "Uninformed Reliance" On A Financial Analysis Prepared By The Opposing Party's Former Director Of Finance Rendered Opinion Inadmissible.

S.F. Print Media Co. v. The Hearst Corp. (2020) 44 Cal.App.5th 952 – In *S.F. Print Media Co.,* the Plaintiff owner of a San Francisco newspaper sued the Defendant competing newspaper for

pricing its advertising below cost. In opposition to a summary judgment motion, the Plaintiff submitted testimony by an expert who calculated the Defendant's cost by including seven categories of costs as "direct costs" of advertising. However, the expert conceded that he had no understanding of several of these categories, and instead had relied on a 2010 cost analysis performed by the Defendant's former director of finance to allocate the costs to advertising. The former director of finance testified that he did not recall the reasons for allocating these categories to advertising. The Defendant successfully objected to the expert testimony, and the trial court granted the objections and granted summary judgment for the Defendant. The Court of Appeal affirmed, holding that under Evid. Code § 802, a court may inquire into both the type of materials on which an expert relies, whether that material provides a reasonable basis for the expert's opinion. Here, the Court of Appeal held that: (1) the expert's "uninformed reliance" on another's analysis is "not the mark of an opinion rooted in sound logic," and (2) there was no foundation to show that evidence of the 2010 analysis was "of a type that reasonably may be relied upon by an expert in forming an opinion."

74. Expert Testimony – Hearsay – Expert Witness May Rely On Non-Case Specific Hearsay, And May Relay The Fact Of That Reliance To The Jury In General Terms.

People v. Veamatahau (2020) 9 Cal.5th 16 – In *Veamatahau*, police officers arrested a fleeing suspect who unidentified pills on his person. The State called a criminalist as an expert witness to testify regarding "forensic testing of controlled substances." The expert testified that he could identify the contents of the pills by comparing the pressed logos on the tablets against a database, which he claimed was a generally accepted method of testing in the scientific community. Based on the database and markings on the pills, the expert identified the pills as alprazolam. The trial court convicted the defendant of possession of alprazolam, and the defendant appealed. On appeal, the defendant claimed the expert's testimony improperly relayed case-specific hearsay to the jury, in violation of the rule set forth in *People v. Sanchez* (2016) 63 Cal.4th 665. The Court of Appeal rejected the defendant's argument, finding that the only "case-specific" fact included in the expert's testimony concerned the markings on the pills, which was not hearsay because "it was based on [the expert's] personal observation." Although the pill database was not based on the expert's personal knowledge, the expert's testimony on the database "was not about the specific pills seized from [the defendant], but generally about what pills containing certain chemicals look like." Thus, although the information from the database was clearly hearsay, the Court of Appeal found it to be "the type of background information which has always been admissible under state evidentiary law." The Supreme Court reviewed the case and affirmed. The Court held that, per *Sanchez*, "in addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." The Court further clarified that experts can both rely on hearsay in forming their opinions and tell the jury *in general terms* that they did so. Here, the Court found that although

the expert's testimony regarding the pill logos constituted hearsay, it was not case-specific, but instead concerned general background information relied upon in the criminalist's field.

75. Hearsay – Testimony That Defendant's Name And Logo Appeared On Invoice Was Not Hearsay, Because Its Relevance Did Not Depend On The Truth Of Any Matter Stated On The Invoice.

Hart v. Keenan Properties, Inc. (2020) 9 Cal.5th 442 – During the 1970s, the Plaintiff installed pipes containing asbestos. During the lawsuit, the parties disputed whether the Defendant had supplied the pipes those many years ago. The Plaintiff sought to admit testimony from a foreman who observed the Defendant's name and logo on an invoice to prove that the Defendant supplied the pipes. The Defendant objected that the foreman's testimony of what was printed on the invoices was hearsay. The trial court rejected this argument, holding that the testimony was not offered to prove the truth of any statement contained in the invoice. Instead, the name and logo on the invoice were circumstantial evidence of Defendant's identity as the source of the pipes. The appellate court reversed, holding that the descriptions of the invoices were hearsay. The Supreme Court agreed with the trial court, explaining that the link between the Defendant and the pipes did not depend on the truth of any statement that the Defendant supplied the pipes. Instead, the link relied on several circumstances shown by the evidence: First, the foreman testified that when the pipes were delivered, the invoice matched the load delivered. Second, the employer's bookkeeper testified that she would not pay for a delivery without receiving paperwork from the foreman. Third, the Defendant's representative identified the logo, and testified that it was printed on the Defendant's invoices, which were then provided to customers. Taken together, this was circumstantial evidence (apart from the truth of the invoices) that was relevant to prove the disputed link between defendant and the pipes. The Court further explained that if the invoices said "Best Pipes on the Planet," rather than showing the name and logo, and the Defendant's representative testified that the Defendant placed that statement on its invoices, the presence of the statement would indicate that the pipes came from the Defendant, regardless of whether the pipes were the best on the planet.

GOVERNMENT

76. Bias – City Council Hearings – Counsel Member That Acted As An Advocate Against the Granting Of A Conditional Use Permit Should Have Been Recused.

Petrovich Development Co., LLC v. City of Sacramento (2020) 48 Cal.App.5th 963 – The Petitioner, an applicant for a gas station conditional use permit, obtained the planning commission's approval. The approval was appealed to the city council, which denied the permit. The Petitioner challenged the denial in the Superior Court, alleging that one city councilmember had an unacceptable probability of actual bias, because he acted as an advocate by taking affirmative steps to assist opponents of the permit and organizing the opposition at the hearing. The trial court ordered the City to rescind the decision on the conditional use permit and hold a

new hearing, and directed the councilmember to recuse himself from participating in the new hearing. The Appellate Court affirmed. The issuance of a conditional use permit is a quasi-judicial administrative action reviewed under administrative mandamus procedures, which require a fair trial. In such proceedings, councilmembers must be neutral and unbiased, and not prejudge the facts for or against any party. To prove that a proceeding was not fair, a petitioner need not prove bias, but instead need only show an unacceptable probability of bias based on concrete facts. Here, the Petitioner showed an unacceptable probability of actual bias, because there was evidence that the councilmember counted or "secured" votes against the project before the hearing on the project and communicated those votes to the mayor. He also prepared a compilation of facts that amounted to a presentation against the gas station, which he referred to as "Talking points," and he provided project opponents with suggestions for their prehearing presentations. These concrete facts established that the councilmember was probably biased.

77. Public Records Act – A Public Records Act Claim Against The State Or A State Agency, Seeking Records Located In Sacramento, May Be Brought In Any City Or County Where The Attorney General Maintains An Office.

The California Gun Rights Foundation v. Superior Court, et al. (2020) 49 Cal.App.5th 777 – Gov. Code § 6259 provides that an action under the Public Records Act may be brought in any county where all or some of the records sought are located. However, C.C.P. § 401 provides that whenever venue is proper in Sacramento County in an action against the State or a State agency or officer, the action may be commenced in any city or county in which the Attorney General maintains an office. In *California Gun Rights Foundation*, the Plaintiff filed a PRA action in Los Angeles against the California Department of Justice and the Attorney General (collectively, the "State"), seeking records located in Sacramento. The State moved to transfer the action to Sacramento under § 6259, and the trial court granted the motion. The Court of Appeal reversed, holding that the rule in § 6259 is a rule of venue, and is not jurisdictional. Since venue was proper in Sacramento under § 6259, C.C.P. § 401 applied and provided that venue was also proper in any city or county in which the Attorney General maintains an office. Since this includes Los Angeles, venue was proper in that county, and the motion to transfer should have been denied.

JUDGES

78. Disqualification – Peremptory Challenge Following Reversal – Peremptory Challenge Of Trial Judge Not Allowed Where Remand Is To Reconsider Motion That May Or May Not Lead To New Trial.

Akopyan v. Superior Court (2020) 53 Cal.App.5th 1094 – In *Akopyan*, the trial court denied a "*Batson Wheeler*" motion challenging the Defendant's exercise of peremptory challenges of six jurors due to apparent racial bias, but in doing so it only considered the Defendant's reasons for dismissing two of the jurors. Following a verdict in the Defendant's favor, the Court of Appeal

remanded the case for the trial court to reconsider the *Batson/Wheeler* motion in light of the Defendant's reasons for dismissing all six jurors. Only if the trial court granted the reconsidered *Batson/Wheeler* motion was the trial court to conduct a new trial. On remand, the Plaintiff moved to disqualify the trial judge under C.C.P. § 170.6(a)(2), which authorizes a peremptory challenge of a trial judge who is reversed on appeal "if the trial judge in the prior proceeding is assigned to conduct a new trial." The trial court granted the motion, and the Defendant filed a petition for writ of mandate challenging the disqualification. The Court of Appeal reversed, holding that § 170.6(a)(2) did not authorize a peremptory challenge where the original trial judge has not yet been assigned to conduct a new trial concerning the merits of the action. The *Batson/Wheeler* motion does not terminate the case or resolve its merits, but only evaluates whether an exercise of a peremptory challenge was motivated by discrimination. Moreover, policy considerations weigh in favor of having the original trial judge preside over the reevaluation of that motion, because the judge observed the demeanor of the jurors and the Defendant's counsel. Accordingly, the trial judge may only be disqualified when and if the reconsidered *Batson/Wheeler* motion is granted and the matter is set for a new trial on the merits. The Court of Appeal also implied that under these circumstances, a 170.6 motion could either be filed after the decision to conduct a new trial is made, or it could be filed before such a decision and held to be ruled on only after the trial court decides whether or not to conduct a new trial.

79. Disqualification – Each "Procedure" In A Coordination Proceeding Is Not A New "Proceeding" Giving Rise To A New Right To File A Peremptory Challenge Under C.C.P. § 170.6

Prescription Opioid Cases (2020) 57 Cal.App.5th 1039 – In *Prescription Opioid Cases*, several actions by government agencies across the state were filed against the manufacturers and distributors of opioid products. Those actions were coordinated under Rules of Court 3.501, *et seq*. The Plaintiffs made a peremptory challenge to the first Orange County judge assigned to rule on the coordination petition, and a second Orange County judge granted coordination and transferred the actions to Los Angeles, where a new judge was assigned. The Plaintiffs then filed a new peremptory challenge, which was denied because they had already used their only challenge. The Plaintiffs filed a writ petition in the Court of Appeal, but the Court of Appeal affirmed. The Plaintiffs noted that Rule of Court 3.501 defines a "coordination proceeding" as "any procedure authorized by [C.C.P. § 404 *et seq.*] and by the rules of this chapter." Based on this definition, the Plaintiffs argued that the petition to coordinate the actions was one authorized "procedure" or "proceeding," and the prosecution of the merits of the coordinated actions was another "procedure" or "proceeding." In their view, the Plaintiffs were allowed one peremptory challenge in each separate "proceeding." The Court of Appeal held that the relevant rules and statutes are not reasonably susceptible to this interpretation. While Rule 3.516 provides multiple potential triggers for a peremptory challenge—e.g. after the assignment of a trial judge, the assignment of a judge for all purposes, or the commencement of a hearing—nothing in the rule indicates an intention to overturn the well-established "one-challenge-per-side" limitation.

JUDGMENTS

80. Amendment Of Judgment To Name Alter Ego – Statute Of Limitations Does Not Apply To Petition To Add Alter Ego To Judgment.

Lopez v. Escamilla (2020) 48 Cal.App.5th 763 – In *Lopez*, the Plaintiff filed a petition to add an alter ego to a judgment six years after the judgment was entered. The petition was filed in a new action, rather than being filed as a motion under the original case number. The Defendant filed a motion for judgment on the pleadings, arguing that the proper procedure was to file a motion in the original case, and that any separate action was barred by the statute of limitation. The trial court agreed and dismissed the case, but the Court of Appeal reversed. The Court held that (1) the plaintiff could have made his request in a motion or a new complaint—all that really mattered was whether or not the Defendant was an alter ego, and (2) the new petition was not time-barred, because by adding an alter ego defendant, a court is not entering a new judgment, it is merely inserting the correct name of the real defendant, which the court may do at any time.

81. Motion To Vacate Judgment – Time To File – 15 Day Deadline To File Motion To Vacate Does Not Begin To Run Where Clerk's Notice Of Entry Of Judgment Does Not State That It Was Given Upon Order Of The Court Or Under § 664.5.

Simgel Co., Inc. v. Jaguar Land Rover North America, LLC (2020) 55 Cal.App.5th 305 – In *Simgel*, a special verdict form erroneously allowed a jury to award damages after making a factual finding that should have precluded any liability. The error was not discovered until after entry of judgment, and it was corrected by the trial court in a motion to vacate the judgment and enter a new judgment for the Defendants. The Plaintiffs appealed, arguing that the Defendants' motion was filed after expiration of the jurisdictional 15-day deadline under C.C.P § 663(a)(2). The Court of Appeal affirmed. The Court explained that the 15-day deadline may begin to run following service of notice of entry of the judgment either by the clerk or by a party. However, when the clerk serves notice of entry, the notice must explicitly state that it is being given either "upon order by the court," or "under section 664.5." Here, the only notice of entry of the judgment was served by the clerk. While the LA County Superior Court form used by the clerk had a reference to section 664.5 in small font on the bottom corner, the reference was ambiguous, and it did not affirmatively state that the notice was given "upon order by the court," or "under section 664.5." Accordingly, the Court of Appeal held that the time to file the motion to vacate did not commence upon service of the clerk's notice, and, therefore, the Defendants' motion was timely.

82. Res Judicata – Privity – Staffing Agency And Employer Are Not In Privity For Purposes Of Res Judicata In Successive Wage And Hour Lawsuits.

Grande v. Eisenhower Medical Center (2020) 44 Cal.App.5th 1147 –The Plaintiff in *Grande* was a nurse who had filed a previous wage and hour action against the temporary staffing agency that hired her. She settled that previous lawsuit, and then filed a second lawsuit alleging the

same wage and hour violations against the hospital where she had been assigned to work. The Defendant hospital argued that the claims were barred by res judicata. The trial court rejected that argument based on lack of privity between the Defendant hospital and the staffing agency that was sued in the prior lawsuit. The Court of Appeal affirmed, explaining that privity requires "'an identity or community of interest,' with 'adequate representation' of that interest in the first suit." While the Defendant argued that vicarious liability provided such a common interest, the Court held that joint employers are not vicariously liable for each other's conduct, but only liable for their own conduct. The Court further explained that the staffing agency's contractual obligation to indemnify the Defendant did not change the analysis, because an indemnity relationship only gives rise to privity for res judicata purposes where the indemnitor is sued in the first action *in its capacity as an indemnitor*. Here, the Plaintiff's claims in the initial lawsuit were based on the staffing agency's own conduct, not its status as the Defendant's indemnitor. The Court also noted that no agency relationship existed between the two companies, because the staffing agency's agreement specifically disclaimed any such relationship. Finally, the Court declined to follow *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262, which held that an employer and staffing agency are in privity for purposes of res judicata, because that case failed to articulate a legally sufficient basis for finding privity. **The California Supreme Court has granted review, but has not depublished the case. The issue to be briefed and argued is limited to the following: May a class of workers bring a wage and hour class action against a staffing agency, settle that lawsuit with a stipulated judgment that releases all of the staffing agency's agents, and then bring a second class action premised on the same alleged wage and hour violations against the staffing agency's client?**

See also **Related Holding In Case # 93, below (employer is not covered under standard released parties language in staffing agency's settlement agreement).**

83. Sister State Judgments – Res Judicata And Claim Preclusion Prevents A Court From Retrying Claims Fully Adjudicated In A Sister State Judgment.

Blizzard Energy, Inc. v. Schaefers (2020) 44 Cal.App.5th 295 – The Appellee obtained a $3.825 million judgment against the Appellant in an action in Kansas, and registered the judgment in California under the Sister State Money Judgment Act ("SSMJA"). The Appellant moved in California state court to vacate and stay the judgment, arguing that it was unenforceable under the SSMJA because the Appellee had engaged in "misconduct"—a defense to an SSMJA judgment—when it tricked a California trial court into dismissing certain claims in an earlier action. The trial court denied the motion to vacate, and the Court of Appeal affirmed, noting that the Appellant had not appealed the dismissal of his claims in the earlier California action, but had instead fully litigated them in the Kansas action. Under those circumstances, res judicata and issue preclusion barred the Appellant's claim that the dismissal of the claims in the California court was due to misconduct. Since there was no viable defense to the Kansas judgment, it was entitled to full faith and credit in California.

84. Stipulated Judgments – Unlawful Penalties – Where Stipulated Judgment For Amount Requested In Complaint Is To Be Entered Upon Breach Of Settlement Agreement, The Defendant Must Expressly Admit To Liability.

Graylee v. Castro (2020) 52 Cal.App.5th 1107 [**Moore**, Aronson, Goethals] – In *Graylee*, the Plaintiff sued for unlawful detainer, alleging that the Defendants owed $27,100 in unpaid rent. The parties entered into a stipulation for entry of judgment, in which the tenants agreed to vacate the property by a certain date, and agreed that if they failed to do so, the landlord would be entitled to enter judgment for $28,970 (including the amount prayed for in rent, plus fees and costs). The Court of Appeal held that this constituted a liquidated damages clause because the judgment would only be entered if the Defendants breached the stipulation. The clause was invalid because the amount bore no relation to the damages caused by the breach of the stipulation. In so holding, the Court distinguished *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635, where the parties' $341,628.77 settlement agreement provided for Defendants to lose a $17,500 "discount" from the settlement amount if any of the monthly payments were made late. The Court in *Graylee* explained that the loss of the $17,500 discount in *Jade Fashion* was not a "penalty" because the Defendants had expressly admitted liability for the entire $341,628.77 settlement amount.

JURIES AND JURY TRIALS

85. Jury Lists – Master List Of Prospective Jurors Is Discoverable In Support Of Fair Cross-Section Violation Claim, Because List Is A Public Record And Is Not Protected By Privacy Laws.

Alfaro v. Superior Court (2020) 58 Cal.App.5th 371 – In *Alfaro*, the Defendant in a capital murder case sought discovery of the County's master list of prospective jurors in support of his claim that the jurors in the County were not selected from a fair cross-section of the community. The trial court denied the request, and the Court of Appeal reversed, finding that the juror list is a discoverable public record, and is not protected by relevant privacy laws. The Court noted that judicial records are presumptively public, and that a 1984 case cited approvingly in California Supreme Court dicta held that jury lists are public records available to the public in general. The Jury Commissioner, who objected to the discovery, argued that subsequently enacted statutes have prohibited the disclosure of jury lists. The Court of Appeal disagreed. Specifically, the Court noted that C.C.P. § 197(c) prohibits disclosure of "names, addresses, and other identifying information" transmitted by the DMV to the Jury Commissioner for use in compiling the jury list. Nevertheless, the Court held that the legislative history of that section indicates that it was not intended to prevent public disclosure of the jury list itself. Other statutes cited by the Respondent possibly prohibited disclosure of certain information regarding jurors, but did not protect the limited information sought in discovery by the Defendant—i.e. the juror's names and zip codes. Furthermore, the Jury Commissioner failed to show that disclosure of the names and zip codes of the prospective jurors would infringe a significant privacy interest. Accordingly, the

Court of Appeal reversed the trial court, and ordered it to grant the Defendant's discovery motion.

86. Motion For New Trial – The Statement Of Reasons For An Order Granting A New Trial Must Discuss The Evidence Or Make Specific Factual Findings Going Beyond The Ultimate Facts.

Estes v. Eaton Corp. (2020) 51 Cal.App.5th 636 – *Estes* involved an appeal from an order granting a new trial in a mesothelioma lawsuit. The Plaintiff claimed that he had been exposed to asbestos contained in "arc shutes" (devices that prevent electricity from jumping from electrical contacts). The jury returned a verdict in favor of the Defendant, and judgment was entered in the Defendant's favor. The Plaintiff then moved for a new trial, which the trial court granted. The trial court explained that the evidence at trial showed that the Plaintiff worked with arc shutes manufactured by the Defendant, the arc shutes contained asbestos fibers, those fibers were released during Plaintiff's works in a level that posed a hazard, and may have been a substantial factor in the Plaintiff's injury. The trial court also held that the Defendant's evidence was insufficient to rebut this showing, and thus there was insufficient evidence for the jury's finding of no design defect, no failure to warn, and no negligence by the Defendant. The Court of Appeal reversed, explaining that these general findings on the ultimate facts were insufficient to meet the statutory requirement for a statement of reasons under C.C.P. § 657. The Court explained that the statute allowing the trial court to grant a new trial requires a discussion of the evidence, or at least specific factual findings that go beyond the "ultimate facts," to serve the dual purpose of facilitating appellate review, and encouraging careful exercise of the extraordinary discretion to grant a new trial. Here, the Court noted that the trial court did not discuss any evidence. Thus, for example, the Court of Appeal could not tell from the trial court's decision: (1) whether or not (and why or why not) the trial court credited any of the expert testimony, or (2) which of the Plaintiff's three theories of exposure was accepted by the trial court. The Court held that this frustrated the dual purposes of section 657, and reversed the order granting new trial, which had the effect of restoring the judgment in favor of the Defendant.

87. Right To Trial By Jury – Under California's More Holistic Analysis, State Unfair Competition Penalties Are Not Subject To Trial By Jury, Unlike Similar Penalties In Federal Court.

Nationwide Biweekly Administration, Inc. v. Superior Court (2020) 9 Cal.5th 279 – The California Supreme Court reversed a Court of Appeal decision, which held that the right to trial by jury under the California Constitution applied to claims for civil penalties under the Unfair Competition Law ("UCL") and False Advertising Law ("FAL") set forth in Bus. & Prof. Code §§ 17200 and 17500. The Court of Appeal's analysis was similar to a US Supreme Court analysis in *Tull v. United States* (1987) 481 U.S. 412, and was focused primarily on the remedy at issue. Consistent with *Tull*, the Court of Appeal held the civil penalty remedy was subject to jury trial under the common law of England at the time the California Constitution was adopted.

The California Supreme Court, however, noted that California's approach differs from the federal approach when determining whether the right to jury trial applies to novel causes of action. Instead of focusing primarily on the remedy, as federal courts do, California courts applying the California right to trial by jury take a more "holistic" approach to determine the "gist" of the action. While the California Supreme Court agreed that the civil penalty remedy might be characterized as legal, the broad and open-ended language and purpose of the UCL and FAL statutes "contemplates the exercise of the type of equitable discretion typically undertaken by a court of equity." Accordingly, the "gist" of these actions is equitable, and no trial by jury is available even where monetary penalties are sought.

88. Right To Trial By Jury – Fraudulent Transfers – No Jury Trial Right In Fraudulent Transfer Claim, Where Assets Transferred Are Intangible Assets Or An Indeterminate Sum Of Money Requiring An Accounting.

Moofly Productions, LLC v. Favila (2020) 46 Cal.App.5th 1 – In *Moofly*, the Court of Appeal rejected the Cross-Defendants' arguments that fraudulent transfer claims against them should have been tried to a jury. The Cross-Complainant was a judgment creditor who claimed that the assets of one company, including money, chattel (including computer equipment), and intangible assets (such as computer code, software, and trade secrets), where fraudulently transferred to a newly formed company after a judgment was entered imposing a constructive trust over those assets. The trial court conducted a bench trial, and awarded judgment to the Cross-Complainant. The Cross-Defendant appealed, arguing that under *Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, fraudulent transfer was a legal cause of action, for which a jury trial is guaranteed. The Court of Appeal affirmed, explaining that *Wisden* only applied where a fraudulent transfer could be remedied using legal remedies, such as damages for return of a "determinate sum of money," or replevin for the return of chattels. Where, as here, the sum of money to be returned was unknown, and the equitable remedy of accounting was required, or where the assets to be returned are intangibles, the claim for fraudulent transfer is an equitable claim to be tried by the Court.

REAL ESTATE, ENVIRONMENT, AND LAND USE

89. CEQA – Discovery From The Lead Agency, Project Proponent, And Outside Consultants Is Appropriate In CEQA Cases To Obtain Documents For Inclusion In The Administrative Record.

Golden Door Properties, LLC v. Superior Court (2020) 53 Cal.App.5th 733 – In *Golden Door*, the Plaintiff in a CEQA case served document demands and deposition subpoenas for the production of records in order to compile and produce the administrative record. Because the Defendant County of San Diego had deleted all e-mails over 60-days old pursuant to a document destruction policy, many of the records pertaining to the project were only available from the project proponent and the County's outside consultants. The discovery referee appointed in the

case first found that there was no evidence to support the Plaintiff's "bald assertion" that the County improperly destroyed documents that should have been in the administrative record. The referee then applied the strict requirements for admitting extra-record evidence to the Plaintiff's discovery requests, and found that no discovery was necessary or proper under those requirements. The trial court adopted the referee's rulings, and the Plaintiffs filed several writ petitions with the Court of Appeal, which were eventually consolidated. The Court of Appeal reversed, first finding that Government Code § 21167.6 required the County to maintain all of the documents that shall be included in the administrative record, including "[a]ll written evidence or correspondence submitted to, or transferred from" the public agency with respect to the project, and "all internal agency communications, including staff notes and memoranda" related to the project. Thus the Court concluded that the County's 60-day e-mail destruction policy was unlawful when applied to records in a CEQA proceeding. The Court then noted that the evidence clearly did support the Plaintiff's claim that the County improperly deleted e-mails belonging in the administrative record, citing example e-mails that the Plaintiff had obtained from other agencies who commented on the project, which were missing from the County's records. Turning to the discovery requests, the Court held that the discovery referee erred by considering the requests as if they were seeking evidence outside the record (which is strictly limited in CEQA cases). Instead, the discovery requests were seeking documents that were required to be included in the administrative record under § 21167.6, including correspondence to and from the lead agency, and internal agency communications regarding the project. This justified discovery both from the County itself, and the from the project proponent and consultants. Because the referee and trial court had denied all discovery based on broad legal principles, rather than ruling on particular requests and objections, the Court remanded the matter for reconsideration of the Plaintiff's motions to compel in light of the legal principles announced in the case.

90. Inverse Condemnation – Procedure – C.C.P § 1260, Which Allows Pretrial Motions To Determine Legal Issues In Eminent Domain Actions, Is Inapplicable In Inverse Condemnation Actions.

Weiss v. People ex rel. Dept. of Transportation (2020) 9 Cal.5th 840 – In *Weiss*, the Plaintiff property owners sued the Department of Transportation and the Orange County Transportation Authority for inverse condemnation arising out of the construction of freeway barriers. The Defendants filed a "Motion for Legal Determination of Liability re Inverse Condemnation Action," under C.C.P. § 1260.040, which allows the trial court to resolve "evidentiary or other legal issues" in eminent domain actions. Despite the Owners' argument that section 1260.040 only applies to eminent domain actions, the trial court granted the motion. The Court of Appeal reversed, and the California Supreme Court granted review, ultimately affirming the Court of Appeal's reversal. The Court held that while judges may fashion non-statutory procedures to govern the particular cases before them, they may not adopt procedures or policies that conflict with statutory law or the Rules of Court. Here, the Supreme Court found that the pretrial motion

procedure set forth in § 1260.040 is solely for use in eminent domain actions, but was used in this case to resolve a mixed question of fact and law that would ordinarily be presented in a motion for summary judgment or summary adjudication. Under ordinary summary adjudication procedures, the court would be precluded from weighing the evidence, the parties would be required to submit separate statements, and the court would be required to issue a statement of decision specifying the reasons for its decision with reference to the evidence. The Court held that the use of the § 1260.040 in this case was improper, because it supplanted these requirements and deprived the Plaintiff of their protections.

91. Duties Of Trust Deed Holder – Trust Deed Holder Has No Duty To Monitor Property Records To Discover And Correct Forged Deeds.

WFG National Title Ins. Co. v. Wells Fargo Bank, N.A. (2020) 51 Cal.App.5th 881 – When homeowners defaulted on their mortgage, a notice of sale was recorded, but the foreclosure sale did not actually take place. Fraudsters then forged a trustee's deed upon sale, and sold the house to a new buyer. The Plaintiff lender financed this sale, and was left with a worthless deed of trust when the forgery came to light. The Plaintiff sued a number of defendants, including Wells Fargo, who held that actual valid trust deed on the property. Wells Fargo moved for summary judgment, which the trial court granted. The Plaintiff appealed, arguing that Wells Fargo was estopped from denying the validity of the Plaintiff's trust deed, due to Wells Fargo's negligence in failing to discover and rescind the forged deed upon sale. The Court of Appeal cited an 1871 California Supreme Court case for the proposition that "a party whose conveyance is duly recorded is not obliged to thereafter keep constant watch of the records, lest some party, without his consent or authority, should fraudulently or feloniously attempt to convey away his property." Based on that case, the Court found that Wells Fargo had no duty to monitor or correct the public property records, and thus there was no basis for any finding of estoppel or negligence against Wells Fargo.

REMEDIES

92. Damages – Fraud By A Fiduciary –Benefit Of The Bargain Damages Are Available For Fraud By A Fiduciary In The Purchase, Sale, Or Exchange Of Property.

Moore v. Teed (2020) 48 Cal.App.5th 280 – In *Moore*, the Plaintiff homeowner sued the Defendant real estate agent, who falsely stated that he was an experienced contractor and falsely promised that if the Plaintiff purchased a home for $4.8 million, the real estate agent and his team could perform certain renovations, including a foundation for a basement, for $900,000. The costs of the renovation ended up being far higher, and the foundation subcontractor delivered a defective foundation that needed to be torn out and replaced completely. The Plaintiff prevailed at trial, and received both: (1) "out-of-pocket" damages for the cost of replacing the foundation, and (2) "benefit of the bargain" damages for the difference between the $900,000 renovation price promised, and the actual cost of completing the renovation. The

Defendant appealed, arguing that benefit of the bargain damages are not available in fraud cases. The Court of Appeal rejected this argument and affirmed the judgment. The Court noted that as a general rule, Civ. Code § 3343 provides that the "out-of-pocket" measure of damages, and not the "benefit-of-the-bargain" measure, applies in cases of fraud in the purchase, sale, or exchange of property. However, the California Supreme Court has held that the broader measure of damages in Civ. Code § 3333 applies in cases involving fraud by a fiduciary. That statute provides for a measure of damages that will compensate the plaintiff for "all the detriment proximately caused thereby." This somewhat ambiguous language has led to an unresolved split in the Court of Appeal as to whether or not § 3333 authorizes "benefit of the bargain" damages. The Court of Appeal in *Moore* examined the conflicting authorities and concluded that benefit of the bargain damages are appropriate in cases involving fraud by a fiduciary, because that measure ensures that the victim will be compensated for any and all detriment proximately caused by the fiduciary's fraud.

SETTLEMENT AND OFFERS TO COMPROMISE

93. Effect Of Settlement On Third Parties – Employer Is Not Covered Under Standard Released Parties Language In Staffing Agency's Settlement Agreement.

Grande v. Eisenhower Medical Center (2020) 44 Cal.App.5th 1147 – *Grande* is a cautionary tale on drafting release language. The Plaintiff in *Grande* was a nurse who had filed a previous wage and hour action against the temporary staffing agency that hired her. She settled that previous lawsuit, and gave the staffing agency a release that applied to the staffing agency and each of its:

> "present and former subsidiaries, affiliates, divisions, related or affiliated companies, parent companies, franchisors, franchisees, shareholders, and attorneys, and their respective successors and predecessors in interest, all of their respective officers, directors, employees, administrators, fiduciaries, trustees and agents, and each of their past, present and future officers, directors, shareholders, employees, agents, principals, heirs, representatives, accountants, auditors, consultants, insurers and reinsurers, and their counsel of record."

The Plaintiff then filed a second lawsuit alleging the same wage and hour violations against the hospital where she had been assigned to work. The trial court held that the release language did not include the hospital, and the Court of Appeal affirmed, because: (1) the hospital was not specifically named in the list of released persons, (2) "clients," "employers," or other categories that would include the hospital were not included in the list of released persons, and (3) the hospital did not qualify as an agent of the staffing agency or as any of the other categories of the related persons named in the release. **The California Supreme Court has granted review, but has not depublished the case. The issue to be briefed and argued is limited to the following: May a class of workers bring a wage and hour class action against a staffing agency, settle**

that lawsuit with a stipulated judgment that releases all of the staffing agency's agents, and then bring a second class action premised on the same alleged wage and hour violations against the staffing agency's client?

See also **Related Holding In Case # 82, above (staffing agency and employer are not in privity for purposes of res judicata).**

94. Entry Of Judgment On Breach – Stipulated Judgment Entered Following Breach Of Settlement Agreement Terminates The Settlement Agreement And The Releases Of Related Parties, Allowing The Released Parties To Be Added To Judgment As Alter Egos.

Butler America, LLC v. Aviation Assurance Co., LLC (2020) 55 Cal.App.5th 136 – In *Butler*, the Defendant LLC entered into a settlement agreement, stating that it had a financial interest in a contract with third party Scaled Composites, and would pay the Plaintiff the greater of $10,000 per month, or 50 percent of the monthly revenue from the Scaled Composites contract. The Defendant did not actually have any interest in the Scaled Composites contract, and only made 10 minimum monthly payments before defaulting. This resulted in the entry of a $1.2 million stipulated judgment. The Plaintiff then moved to add the individual owner of the Defendant, and several of his other companies (including the company that actually had the contract with Scaled Composites) to the stipulated judgment as the Defendant's alter egos. The trial court granted the motion, and the Alter Ego Defendants appealed, arguing that they were protected by the release in the settlement agreement, which applies to the Defendant's parents, subsidiaries, affiliates, members, and managers. The Court of Appeal rejected this argument for four reasons. First, under the terms of the settlement agreement itself, the releases do not apply to "any claim, cause of action or liability arising from a Party's breach of this Agreement." Because the stipulated judgment arose from the breach of the settlement agreement, the releases do not apply to that judgment. Second, because the Defendant breached the settlement agreement, neither the Defendant nor its intended beneficiaries could enforce its terms. Third, when the stipulated judgment was entered, the settlement agreement was terminated and merged into the judgment, eliminating the release provisions. Fourth, and finally, because the Defendant did not actually have any interest in the Scaled Composites contract, the Court concluded that the agreement was procured by fraud, and held that the Plaintiff could avoid a release induced by fraud without rescinding the rest of the agreement. For these reasons, the Court affirmed the order adding the Alter Ego Defendants to the stipulated judgment.

95. Anti-Trust/Unfair Competition – Prohibition Of Insurance Wrapping Services Was A Vertical Group Boycott And An Unlawful Restraint Of Trade Where Evidence Contradicted Insurance Pricing Guidelines Used To Justify The Prohibition.

Ben-E-Lect v. Anthem Blue Cross Life and Health Ins. Co. (2020) 51 Cal.App.5th 867 – The Plaintiff in *Ben-E-Lect* developed a medical expense reimbursement plan referred to as "wrapping" – whereby employers purchasing health insurance for their employees could combine inexpensive high-deductible healthcare plans from Anthem Blue Cross ("Anthem") with reimbursement plans provided by the Plaintiff to offset the high deductibles. The Defendant Anthem then prohibited any agents selling Anthem policies from advising employers to wrap any policies purchased from Anthem. Anthem also threatened the agents with loss of commission and termination of their relationship with Anthem if they violated this policy. In response to these actions, Plaintiff sued Anthem for violations of the Cartwright Act and other claims. The trial court found that Anthem's conduct amounted to "an illegal, coercive, vertical group boycott," and awarded $7.38 million in treble damages under the Cartwright Act. The Court of Appeal agreed and affirmed under the "rule of reason," which considers whether a vertical restraint of trade harms competition more than promoting it (a "vertical" restraint refers to restraints involving different levels of distribution, such as a producer and distributor, who combine to injure a competitor at one level of distribution). Here, Anthem argued that its policy against wrapping served a legitimate competitive purpose, because when employees' deductibles are reimbursed through a wrap plan, the employees' usage of healthcare services increases, throwing off the calculations used to determine the price of the healthcare plans, adversely impacting their profitability. The Court rejected this argument, because it was based on a general statistical set of insurance pricing guidelines, but was contradicted by the actual evidence applicable to the specific insurance policies in question, which showed that: (a) fewer than 5% of the employees covered by the Plaintiff's wrap plans ever exceeded the deductibles on their Anthem plans, and (b) even with wrapping, Anthem's high deductible plans were actually *more* profitable than projected. Accordingly, under the rule of reason, Anthem's prohibition on wrapping constituted an unlawful vertical restraint of trade.

96. Conversion And Negligence – Duty – Cryptocurrency Exchange Owes No Duty To Users To Provide Services Relating To "Forked" Cryptocurrencies.

Archer v. Coinbase, Inc. (2020) 53 Cal.App.5th 266 – Coinbase, Inc. ("Coinbase") is an online digital currency exchange platform that allows its users to purchase, store, and sell a number of cryptocurrencies, including Bitcoin. Cryptocurrencies use a ledger known as a "block chain" to record transactions. A cryptocurrency "fork" occurs when an individual or group copies an existing cryptocurrency's blockchain ledger, and creates a new currency with that ledger as its starting point, and with new transactions being recorded on the new "forked" blockchain ledger. In this way, the holders of the existing currency are essentially given an equivalent amount of the

new currency, which can be transferred separately from the original currency. This, however, requires the holder of the original currency to take affirmative action to claim the new currency. *Archer* arose from a dispute regarding a fork of Bitcoin know as "Bitcoin Gold." When the Bitcoin Gold fork was created, Coinbase announced that it would not be supporting this new cryptocurrency. Accordingly, Coinbase did not take action to claim the new Bitcoin Gold that would otherwise have been available to those who stored their Bitcoin with Coinbase. The Plaintiff, who had 350 Bitcoin stored with Coinbase, sued for conversion, breach of contract, and negligence when he was unable to obtain the Bitcoin Gold that he could have accessed if he held his Bitcoin personally. The trial court granted summary judgment, and the Court of Appeal affirmed, holding that: (i) the parties' contract did not require Coinbase to support or provide services for any particular digital currency created by a third party; (ii) conversion could not be based on a failure to take affirmative action to secure the Plaintiff's property where no duty to take such action existed; and (iii) the Plaintiff did not identify any non-contract duty on which a negligence claim could be based.

97. Defamation – Privilege – Employer Loses Common Interest Privilege When HR Rep Repeats Defamatory Statements About Employee From Unreliable Sources, And Makes Deliberate Decision Not To Investigate Contradictory Facts.

King v. U.S. Bank National Assn. (2020) 53 Cal.App.5th 675 – In *King*, the Defendant bank was sued by the Plaintiff former senior VP for defamation, wrongful termination and other claims. The Plaintiff alleged he was terminated after two subordinates falsely complained to an HR rep that the Plaintiff had failed to log his vacation time, ordered them to falsify various reports regarding meetings that never took place, and engaged in other misconduct. The HR rep repeated those allegedly false complaints to other employees of Defendant, resulting in the Plaintiff's termination. A jury found for the Plaintiff on both defamation and wrongful termination. The Defendant appealed, arguing that it was immune from defamation liability based on the HR rep's republication of the defamatory complaints under the common interest privilege in Civil Code § 47. The Court of Appeal held that while the common interest privilege generally does protect an employer's communications with its employees regarding breaches of another employee's responsibilities, that privilege only applies if the communications are made without malice. Here, the there was substantial evidence to support a jury finding of malice, because the HR rep: (1) knew that the complaining employees had performance issues, and were upset at Plaintiff over a performance review and being squeezed out of a deal, (2) took no action to inquire about the complaining employees' motives to lie, despite having a duty to determine witnesses veracity, (3) knew of facts contradicting some of the accusations, and (4) and made a deliberate decision not to investigate contradictory facts, including foregoing interviews of witnesses with knowledge of the facts, and stating that she did not care if a witness had information to refute the false allegations. Because the jury's finding of malice was supported by this substantial evidence, the verdict in favor of the Plaintiff on the defamation claim was affirmed.

98. Discrimination – Unruh Act Does Not Apply To Public School Districts.

Brennon B. v. Superior Court (2020) 57 Cal.App.5th 367 – In a case of first impression, the First District Court of Appeal considered whether a school district is subject to the provisions of the Unruh Civil Rights Act (Civil Code § 51), which bars discrimination by "business establishments." The Court explained that the California Supreme Court has considered whether various entities qualify as business establishments, but only in the context of private entities. The Court considered the historical context of the enactment of the Unruh, which arose from earlier public accommodation statutes that were specifically aimed at discrimination by privately owned services and enterprises. It also considered the legislative history of the statute itself, and the California Supreme Court decisions interpreting the statute, neither of which indicated that the statute was intended to apply to public entities. Furthermore, several of the indicia of a "business establishment" found by the Supreme Court in other cases are absent in the case of public school districts, such as: (1) an overall function to "enhance economic value," (2) the provision of a physical plant for patrons to use "at their convenience" for a fee, (3) "commercial transactions," (4) a functional equivalence to a "place of public accommodation or amusement," or (5) the sale of the "right to participate" in the basic educational programs they deliver. After a thorough and multi-layered analysis, the Court held that the Unruh Act does not apply to public school districts. **The California Supreme Court has granted review, but has not depublished the case.**

99. Fraudulent Transfer – Defendant's Payment Of Preexisting Debt To Sister Following $3.5 Million Adverse Statement Of Decision Is Not Fraudulent, Regardless Of Statutory Badges Of Fraud.

Universal Home Improvement, Inc. v. Robertson (2020) 51 Cal.App.5th 116 – Civil Code § 3439.04(b) sets forth 11 "badges of fraud" for courts to consider in determining whether a transfer was made with intent to hinder, delay, or defraud a creditor. Civil Code § 3432, however, states that a debtor may pay one creditor in preference to another, and Civil Code § 3439.08 states that a transfer is not voidable against a party who received the transfer in good faith for a reasonably equivalent value. In *Universal Home Improvement, Inc.*, Katherine Robertson ("Robertson"), her sister Carole Bennett ("Bennett") and four of their siblings each owned 1/6 interests in two family partnerships (the "Partnerships"), which owned and operated real estate assets. In 2007, Robertson received $650,000 in loans from Bennett and one of the partnerships. In 2010, Robertson was sued by the Plaintiff in a prior action for misappropriation of assets and fraud, and the trial court found Robertson liable for $3.5 million. About two and a half weeks after the court in the prior action announced its decision, Robertson transferred her equity in the Partnerships to Bennett in payment of her loans. The Plaintiff then sued Robertson, Bennett, and the Partnerships for fraudulent transfer, seeking to set aside the transfer of Robertson's partnership interests. Following trial, the trial court found in favor of the Defendants. The trial court issued a comprehensive statement of decision, finding that at the time of the transfer, Robertson owed Bennett $800,000 with interest, and the partnership interests

were worth $500,000. The Court also found that 7 of the 11 "badges of fraud" set forth in § 3439.04(b) were present. Nevertheless, the Court found that the transfer of the partnership interests was not a fraudulent transfer because: (1) Bennett held a bona fide prior debt, and § 3432 is still good law allowing Robertson to favor Bennett over other creditors, and (2) the value of the partnership interests was less than the amount of the debt to Bennett, meaning that reasonably equivalent value was given for the transfer under § 3439.08. The Plaintiff appealed, but the Court of Appeal affirmed the trial court, explaining that the decision was justified by the findings of fact and conclusions of law in the trial courts statement of decision.

100. Interference With Contract – Elements – Tortious Interference With An At-Will Contracts Requires The Plaintiff To Plead And Prove An Act Of Independent Wrongfulness.

Ixchel Pharma, LLC v. Biogen, Inc. (2020) 9 Cal.5th 1130 – The tort of interference with contract requires interference with a valid existing contract, but no showing of otherwise wrongful conduct by the defendant, while the tort of interference with prospective economic advantage does not require a valid existing contract, but does require a showing that the interference consisted of conduct that was independently wrongful. In *Ixchel Pharma*, the California Supreme Court examined the question of interference with an *at will* contract outside of the employment context. The Court had previously held in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140 that claims for interference with an at will employment contract do require a showing of independently wrongful conduct. However, the Plaintiff in *Ixchel* argued that *Reeves* should be limited to the employment context, because that decision was based on California's policy against restraints on employment. The Court recognized the role that this policy played in the *Reeves* decision, but held that its "broader logic" was persuasive outside the employment context as well. The Court explained that because future economic relations are not legally assured in at-will terminable contracts, such contracts are similar to prospective economic relationships. Moreover, allowing claims for interference with at-will contracts without a showing of independently wrongful conduct risks chilling legitimate competition. Accordingly, the Court held that to establish the tort of interference with an at-will contract, the plaintiff must show that the defendant engaged in some independently wrongful conduct.

101. Interference With Contract – Strangers To Contract – A Client Who Instructs A Contractor To Terminate A Subcontractor Is A Stranger To The Subcontract For Purposes Of Intentional Interference.

Caliber Paving Co., Inc. v. Rexford Industrial Realty & Management, Inc. (2020) 54 Cal.App.5th 175 [**Fybel**, Aronson, Ikola] – The Defendant in *Caliber Paving Co.* hired a contractor to perform improvements on its property, including repaving of a parking lot. The contractor retained the Plaintiff subcontractor to perform the repaving. After a dispute arose between the contractor and Plaintiff delaying the repaving, the Defendant allegedly instructed the contractor to replace the Plaintiff, which the contractor did. The Plaintiff then sued the

Defendant for intentional interference with the subcontract. The Defendant moved for summary judgment on the grounds that it was not a "stranger" to the subcontract, and therefore could not be held liable for interfering with it. The trial court agreed, citing the California Supreme Court's holding in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, that only "strangers" to a contract can be held liable for interfering with the contract, and reasoning that the Defendant was not a stranger to the subcontract because of its direct economic interest. The Court of Appeal reversed, citing numerous cases that have held that "stranger" is used interchangeably with "noncontracting parties" in *Applied Equipment*. The Court of Appeal also declined to follow *PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55, 65, which held that if a contract depended on a non-party's performance of a separate contract, then the noncontracting party had an economic interest in the contract and could not be liable for interfering with it. In addition to characterizing *PM Group* as an "outlier," the Court distinguished the case on its facts. In *PM Group*, the interference consisted of the noncontracting party's failure to perform its own contract. In the present case, the Plaintiff allegedly interfered not by failing to perform its own contract, but by directly instructing the contractor to remove the Plaintiff from the job. Accordingly, the Court found that because the Plaintiff was not a party to the subcontract, it was not immune from liability for interference.

102. Negligence – Duty – Banks Have No Duty To Depositors To Investigate Suspicious Accounts, Where Bookkeeper Set Up Account Using DBA "Income Tax Payments," And Used Account To Embezzle Funds.

Kurtz-Ahlers, LLC v. Bank of America, N.A. (2020) 48 Cal.App.5th 952 [**Aronson**, Moore, Thompson] – In *Kurtz-Ahlers*, the Plaintiff's bookkeeper set up an account at Bank of America (where the Plaintiff itself banked), using the fictitious business name "Income Tax Payments." Over the course of five years, the bookkeeper then instructed the Plaintiff to issue a total of over $700,000 in checks for income tax payments, and to make those checks payable to "Income Tax Payments," rather than the Internal Revenue Service or Franchise Tax Board. She then deposited those checks in her own account. The bookkeeper was sent to federal prison, and the Plaintiff sued Bank of America for negligence. The trial court held that Bank of America owed no duty to investigate the suspiciously named account, and the Court of Appeal affirmed. The Plaintiff argued that the case fell into an exception to the absence of duty that applies where a transaction is inherently suspicious. The Court of Appeal, however, explained that the exception has only been applied where a bank has allowed a person to deposit a check, payable to someone else, into a personal account, and that the duty only requires the bank to confirm that there is some objective indicia that could lead the bank to reasonably conclude that the transaction in legitimate. Here, the Court held that the "objective indicia" test was met because the checks were made payable to the very account in which they were deposited, and were endorsed by an authorized signatory. The Court also declined to create a new duty of inquiry owed by a bank to depositors to investigate where a check is made payable to a "generic" or "suspicious" fictitious business name.

103. Privacy – The Penal Code Bars Surreptitious Recording Of Conversations, Including One-Sided Recordings Of The Recording Party Only.

Gruber v. Yelp Inc. (2020) 55 Cal.App.5th 591 – In *Gruber*, the Plaintiff sued Yelp for surreptitiously recording his conversations with Yelp's ad sales representatives in violation of Penal Code sections 632, and 632.7, which prohibit recording certain communications "without the consent of all parties to a communication." (Penal Code § 637.2 authorizes civil actions for violation of these statutes, and provides for a $5,000 statutory penalty and treble damages.) Yelp brought a summary judgment motion where it established that it did not make any two-way recordings of the conversations between Plaintiff and its sales reps, but had made several recordings of just the sales representative's side of the recording. The trial court granted summary judgment, finding that the one-way recordings did not violate sections 632 and 632.7. The Court of Appeal reversed, noting that the statutes make no distinction between all or part of a communication, and no distinction between the speaker or listener. Instead, they treat the parties equally, requiring consent from all. Accordingly, the Court held that sections 632 and 632.7 prohibit recording a communication, in whole or in part, without the consent of all parties, *no matter the particular role or degree of participation that a party has in the communication*. For this reason, Yelp's one-sided recordings did violate the statutes, and summary judgment for Yelp was reversed.

104. Receipt Of Stolen Property – There Is Now A Split Over Whether Penal Code § 496 Applies To Ordinary Torts Of Fraud, Conversion, Or Theft By False Pretenses.

Siry Investment, L.P. v. Farkhondehpour (2020) 45 Cal.App.5th 1098 – Penal Code section 496 provides for an award of treble damages and attorney's fees against anyone who receives or withholds property obtained "in any manner constituting theft." Other statutes define theft to include fraud, conversion, and theft by false pretenses. Two prominent California cases, *Bell v. Feibush* (2013) 212 Cal.App.4th 1041, and *Switzer v. Wood* (2019) 35 Cal.App.5th 116, have applied the plain language of these statutes, and have affirmed awards of treble damages and attorney's fees in otherwise ordinary business tort cases involving fraud, conversion, and theft by false pretenses. These cases have based their holding on the principle that the plain language of a statute controls over any contrary indications of legislative intent unless the plain language would lead to absurdity. In *Siry Investments*, which involved improper diversion of partnership funds, the 2nd District broke with *Bell* and *Switzer*, noting that the Supreme Court has repeatedly "refused to 'presume that the Legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied.'" The Court held that applying section 496 in ordinary tort cases that do not involve "trafficking in stolen property" would overthrow existing tort law, without any intent to do so by the Legislature. Accordingly, the Court declined to follow the plain language of the statute, and held that the narrower legislative intent controlled over the broader language of the statute, and limited its application to cases involving stolen property. The Court did not specifically define what it believes would constitute "stolen property," nor did it explain why funds diverted from a

partnership through conversion would not qualify. **The California Supreme Court has granted review, but has not depublished the case.**