WHAT'S NEW IN 2013?

NEW STATUTES, RULES, AND CASES EVERY BUSINESS LITIGATOR NEEDS TO KNOW IN 2013

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SIGNIFICANT STATUTES
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ALTERNATIVE DISPUTE RESOLUTION

Arbitration of Easement Maintenance Costs

Cal. Civ. Code § 845 – Amended to authorize an owner of a shared easement to bring an action to recover maintenance costs against any other owner who, after a demand in writing, refuses or fails to pay that owner's share. Such an action may be brought before, during, or after maintenance work is performed. The action must be filed in superior court, unless the action can be brought in small claims court, and in absence of an agreement to the contrary, the action must be filed in the county in which the easement is located. All actions filed in superior court are subject to judicial arbitration.

Legal Representation in Arbitration

Cal. Code of Civ. Proc. § 1282.4 – Among other things, section 1282.4 allows out of state attorneys to represent parties in arbitration, after serving certain information upon the arbitrator, the parties, and the State Bar of California. This provision was scheduled to repeal automatically on January 1, 2013, but has now been amended to remain operative indefinitely.

ATTORNEYS

Annual Membership Fees

Cal. Bus. and Prof. Code §§ 6140, 6141 – The annual membership fee for active members of the State Bar will remain at $315 in 2013, and the fee for inactive members shall remain at $75, but a provision for a $10 rebate has been repealed.

Prosecution for License Related Offenses

Cal. Pen. Code § 802 – Pre-existing law provides that any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or any person acting or advertising themselves as a real estate broker, real estate salesperson, or mortgage loan originator without a license or license endorsement, is guilty of a misdemeanor. Pre-existing law also requires any person, including a person licensed to practice law, who performs a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation to provide a specified notice to the borrower concerning third parties arranging loan modifications. Also prohibited is certain conduct by that person including, among other things, demanding compensation before service is fully performed, taking a lien on property or a wage assignment, or taking a power of attorney from the borrower. Pre-existing law provides that a violation of these requirements or prohibitions is a misdemeanor with specified penalties. These provisions are amended to extend the time to commence a prosecution for such offenses to 3 years from the discovery of the commission of the offense, or within 3 years after the completion of the offense, whichever is later.

CIVIL PROCEDURE

Collections – Bankrupt Debtor Exemptions

Cal. Code of Civ. Proc. §§ 703.140, 703.150, 704.730 – Pre-existing law identifies the types and amount of property of a debtor that is exempt from all procedures for enforcement of a money judgment. Under section 703.140, a bankrupt debtor may elect different exemptions as an alternative to the exemptions available generally. Amendments increase the dollar amount of the alternative exemptions for a debtor's interest in motor vehicles, jewelry, and implements, professional books, or tools of the trade of the debtor or the debtor's dependent. They also specify that beginning, April 1, 2013, and every 3 years thereafter, the Judicial Council is also now required to submit to the Legislature the amount by which the dollar amounts of the homestead exemptions may be adjusted based on the change in the annual California Consumer Price Index for All Urban Consumers. The amount of homestead exemptions for persons 55 years of age or older who meet specified income criteria also increased.

Electronic Filing and Service of Documents

Cal. Code of Civ. Proc. § 1010.6 – Amendments to section 1010.6 authorize the Orange County Superior Court, until July 1, 2014, to establish a pilot project to require parties to eligible civil actions to electronically file and serve documents. The Judicial Council is required to conduct an evaluation of any pilot project established pursuant to this provision and must report evaluation results to the Legislature by December 31, 2013. The Judicial Council must also adopt uniform rules to permit mandatory electronic filing and service of documents in eligible civil actions by July 1, 2014. Upon the adoption of such uniform rules by the Judicial Council, the superior court is authorized to require mandatory electronic filing.

Fee Increases

SB 1021 – This bill contains extensive new and amended fee related provisions, including C.C.P. § 367.6, which specifies that new statewide uniform fees for telephonic appearances shall supersede any fees paid to vendors and courts under any previously existing agreements and procedures. It also amends C.C.P. § 631, to specify that each party requesting a jury must advance jury fees in the amount of $150, and that such fees are nonrefundable. The bill also deletes the automatic repeal date for certain preexisting supplemental filing fees. In addition, the $550 complex case fee is increased to $1,000, and the total limit on all fees collected from defendants, intervenors, respondents, and adverse parties in a complex case is increased from $10,000 to $18,000. Motion fees are also increased from $40 to $60, and the $500 fee for summary judgment motions and pro hac vice applications and renewals has been extended indefinitely. A new $30 court reporter fee is to be charged for each proceeding lasting less than one hour. Finally, appellate fees are increased as well, as reflected in the rule changes discussed above.

Motion for a New Trial

Cal. Code of Civ. Proc. § 659 – When a party files a notice of intention to move for a new trial before the entry of judgment, the filing must be done after the decision is rendered.

Motion to Set Aside and Vacate a Judgment

Cal. Code of Civ. Proc. § 663(a) – Section 663 has been amended to specify that a trial court's power to rule on a motion to set aside and vacate a judgment expires 60 days from service of notice of entry of judgment or, if that notice has not been given, then 60 days after filing of the first notice of intention to move to set aside and vacate the judgment. If the motion is not determined within the 60-day period, or within that period as extended, the motion will be considered denied without further order of the court. Further, a motion to set aside and vacate a judgment is not determined until an order ruling on the motion is either entered in the permanent minutes of the court or signed by the judge and filed with the clerk.

Service of Process – Access to Gated Communities by Private Investigators

Cal. Code of Civ. Proc. § 415.21 – Section 415.21 requires that a registered process server, or a representative of the county sheriff or marshall, be given access to a gated community for the purpose of serving process or a subpoena. The section has been amended to include private investigators among the individuals who must be granted access to serve process.

Service of Process – Procedures for Service on Financial Institutions

AB 2364 – AB 2364 amends numerous sections of the Code of Civil Procedure and Financial Code. Code of Civil Procedure section 684.115 requires a financial institution that has more than 9 branch offices in California to designate one or more central locations for service of legal process within the state, and authorizes a financial institution with fewer than 9 branch offices in California to do the same. The bill also sets forth detailed procedures in Sections 488.455, 488.460, 488.600, 488.610, 684.110, 684.115, 700.140, 700.150, 700.160, 701.030, and 703.570 of the Code of Civil Procedure, and Sections 1450 and 1620 of the Financial Code for service of process and execution of levies at a financial institution's central locations and other branches. Generally, these procedures require the judgment creditor to serve the financial institution with a specified written request for enforcement against an account or safe deposit box, and require that a levying officer give at least 3 days notice to the judgment creditor before opening and seizing the contents of a safe deposit box.

Vexatious Litigants

Cal. Code of Civ. Proc. §§ 391.1, 391.2, 391.3, 391.6 – The vexatious litigant statutes have been amended to authorize a defendant to move for an order to dismiss litigation if the plaintiff is a vexatious litigant subject to a prefiling order who was represented by counsel at the time the litigation was filed, and who became in propia persona after the withdrawal of his or her attorney. The defendant may combine such a motion with a motion for a bond (authorized under

the previously existing vexatious litigant statutes) in a single motion. The court must order the litigation dismissed if, after hearing evidence on the motion, the court determines the litigation has no merit and has been filed for the purposes of harassment or delay.

DISABILITY DISCRIMINATION

Disability Access Violations

SB 1186 – SB 1186 amends numerous sections of the Business Professions Code, Civil Code, Code of Civil Procedure, Government Code, and Health and Safety Code, in order to provide businesses with incentives to comply with the American with Disabilities Act (ADA) and fix disability access violations. Specifically, the bill reduces potential damages for disability access violations from a minimum of $4,000 to $1,000 if the business corrects violations within 30 to 60 days of receiving a complaint. The bill also bars attorneys from issuing pre-litigation "demands for money" and regulates complaints involving construction-related violations. Furthermore, Attorneys must send a notice letter, listing any alleged construction-related violations, at least 30 days before filing a lawsuit. Additionally, the bill requires a plaintiff to explain the need for multiple visits to the same business with a known uncorrected barrier to access. Also, the legislation requires landlords to disclose whether their buildings or properties are state certified and in compliance with ADA laws.

DISCOVERY

Depositions – Seven Hour Limitation

Cal. Code of Civ. Proc. § 2025.290 – Under section 2025.290, depositions of any person are now limited to 7 hours of total testimony. This provision may be overridden by stipulation or court order, including a case management order. The limitation does not apply to expert witness depositions, complex cases, employment actions, or to person most qualified depositions. In complex actions, if a witness submits a doctor's declaration that indicates there is substantial medical doubt of survival beyond six months, the deposition shall be limited to two days of no more than seven hours of testimony each day. The trial court is required to allow additional time if necessary to fairly examine the deponent, or if the deponent, another person, or any other circumstance impedes or delays the examination.

Depositions – Collection of Transcript Costs

Cal. Code of Civ. Proc. § 2025.510 – Section 2025.510 relating to transcriptions of depositions has been amended to require an attorney or party who requested a deposition to provide a service address to a deposition officer who has obtained a final judgment for payment of deposition services. The purpose of the service address is for the service of an order for a debtor's examination.

Document Productions – Privilege Logs

Cal. Code of Civ. Proc. § 2031.240 – Section 2031.240 codifies the concept of a privilege log. The section now requires that when that party objects to an inspection demand on the basis of privilege or work product, the party must provide sufficient factual information in its response for other parties to evaluate the merits of that claim of privilege, including, "if necessary," a privilege log. The statute states that it is intended to codify the concept of a privilege log as that term is used in California case law, and is not intended to change current law.

Electronic Discovery

SB 1574 – SB1574 amends numerous sections of the Code of Civil Procedure to specifically provide for discovery of electronically stored information. Generally, electronically stored information may be discovered through any methods of discovery applicable to documents or tangible things. The amendments also provide that electronically stored information must be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand. If a party objects to the format requested in the demand, or if no format is specified, the response must specify the form the party intends to produce. The information must be produced either in the form it is ordinarily maintained, or in a form that is reasonably usable, but a party is not required to produce the same information in more than one form. If a party objects on the grounds that information is not reasonably accessible because of undue burden or expense, the objecting party bears the burden of proving that the information is not reasonably accessible. Even if the objecting party makes such a showing, the Court may still order discovery for good cause, subject to any conditions imposed by the trial court, including an allocation of the expense of the discovery. Finally the amendments provide that the trial court is not required to impose sanctions for failure to provide discovery of information that has been lost, damaged, altered, or overwritten as the result of the routine operation of an electronic information system.

CORPORATIONS

Dissenting Shareholder's Rights

Corporations Code Sections 1300, 1301, 1302, 1304, and 1309 – The Corporations Code allows shareholders who dissent from approving a reorganization or short form merger to receive fair market value for their shares from the corporation in certain circumstances. Under the prior law, the fair market value was determined as of the day before the first announcement of the terms of the transaction. The recent amendment provides that fair market value will be determined as of the day of, and immediately prior to the first announcement. The amendment also removed the requirement that 5% or more of the shares must be dissenting before the right to recover fair market value arises. Finally, while this provision generally does not apply to publicly traded shares, the provision, as amended, now includes publicly traded shares where, as

a result of the transaction, the holder is entitled to receive anything other than publicly traded shares of another corporation or cash in lieu of fractional shares.

EMPLOYMENT AND LABOR

Discrimination – Breastfeeding Is Protected Activity Under FEHA

Cal. Gov. Code § 12926 – Under the California Fair Employment and Housing Act, it is unlawful to discriminate in employment or housing accommodations on the basis of sex. The term "sex" as defined in Section 12926 has been amended to specifically include breastfeeding or medical conditions related to breastfeeding.

Discrimination – Protections for Religious Dress and Grooming Practice

Gov. Code §§ 12926, 12940 – FEHA requires employers to reasonably accommodate the religious belief or observance of individuals unless the accommodation would be an undue hardship on the employer. The new amendment specifies that: (a) religious dress or grooming practices constitute beliefs or observances covered by this requirement, and (b) an accommodation for religious dress or grooming practices that requires the individual to be segregated from the public or other employees is not reasonable. The amendment also specifies that an accommodation is not required if it would result in the violation of anti-discrimination or civil rights laws.

Employee Records – Right to Inspect

Cal. Lab. Code § 1198.5 – Under preexisting law, an employee has the right to inspect the personnel records maintained by his or her employer relating to the employee's performance or to any grievance concerning the employee. This year's amendment requires employers to maintain such records for at least three years after termination of employment, and to provide the employee an opportunity to inspect and receive a copy of those records, unless there is a pending lawsuit with the employee relating to a personnel matter. An employer is not required to comply with more than 50 requests for a copy of the above-described records filed by a representative or representatives of employees in one calendar month. The amendment also provides that the employee may recover $750 penalty in the event of a breach, and also permits injunctive relief and recovery of attorney's fees.

Wage and Hour – Employer Copy of Itemized Statement of Employee Wages

Cal. Lab. Code § 226 – Pre-existing law requires employers to provide employees with an itemized wage statement showing certain specified information either bimonthly or at the time of each payment, and to maintain a "copy" of each statement for at least 3 years. Amendments specify that: (1) a copy includes computer generated records that accurately shows all of the required information, and (2) if the employer is a temporary services employer, the statement must include the rate of pay and the total hours worked for each assignment. The amendments

also provide that employees are eligible for the statutory penalty of up to $4,000.00 provided for by this statute if either no wage statement is provided, or certain information is omitted from the statement, and the employee cannot easily determine from the statement any of the following: the amount of gross or net wages paid, which deductions the employer made, the name and address of the employer, or the employee's name and the last four digits of the employee's social security number.

Wage and Hour – Overtime Wages

Cal. Lab. Code § 515 – Section 515 has been amended to provide that a fixed salary payment to a nonexempt employee is compensation only for the employee's regular, non-overtime hours, notwithstanding any private agreement to the contrary.

Wage and Hour – Requirements for Employment Contract Involving Commission

Cal. Lab. Code § 2751 – Under preexisting law, an employer entering into an employment contract involving a method of payment that includes commissions must place the employment contract in writing and set forth the method by which the commissions are to be computed and paid. Now exempted from this requirement are temporary, variable incentive payments that increase, but do not decrease, payment under the written contract.

GOVERNMENT

Brown Act – Procedures for Challenging Past Violations

Government Code § 54960.2 – The Brown Act, pertaining to open meetings of local agencies, has been amended to make it more difficult to bring a lawsuit based on past violations (as opposed to an action based on continuing or threatened Brown Act violations). Such a lawsuit may now only be filed after first submitting a cease and desist letter to the legislative body clearly describing the alleged violation, and allowing 30 days for the legislative body to issue an unconditional commitment to cease and desist from that violation. If an unconditional commitment to cease and desist is issued before a lawsuit is filed, no lawsuit may be filed. Moreover, if such a letter is issued after the lawsuit is filed, the lawsuit must be dismissed, although the plaintiff is then entitled to an award of costs and reasonable attorney's fees. If an unconditional commitment to cease and desist is issued, and the alleged violation is repeated, the repetition constitutes a separate violation of the Brown Act, and may be made the subject of a lawsuit without following the new cease and desist procedure. Amendments to Gov. Code §§ 54960, 54960.5, have also been made to conform preexisting law to the new procedure.

Witness Fees – Public Employee

Cal. Gov. Code § 68097.2 – Preexisting law provides for subpoenas to require peace officers, firefighters, or state, county, or court employees to attend and testify in civil actions. The cost for a party subpoenaing such attendance has now been increased from $150 to $275 per day.

Tort Claims Act

Gov. Code § 810 – The "Tort Claims Act" shall henceforth be referred to as the "Government Claims Act."

PERSONAL PROPERTY

Fraudulent Transfers of Personal Property

Cal. Civ. Code § 3440.1 – Pre-existing law provides generally that a transfer of personal property not accompanied by delivery and change of possession of the property is void against the transferor's creditors, except for certain specified transfers or types of property, including personal property that satisfies certain conditions. Cal. Civ. Code § 3440.1 is amended to include, among these conditions, a requirement that the transferor or the transferee file a financing statement prior to the date of the intended transfer.

REAL PROPERTY AND LAND USE

Foreclosures – Notice Requirements

AB 1599 – AB 1599 amends Cal. Civ. Code § 2924(f), repeals Cal. Civ. Code § 2924, and adds Cal. Civ. Code § 2923.4, relating to residential mortgages. The bill requires the lender or authorized agent to provide to the borrower a copy of information summaries attached to any recorded notice of default or notice of trustee's sale. The summary must be in English and five specified languages. These provisions are operative on April 1, 2013, or 90 days following the issuance of summary translations by the Department of Corporations, whichever occurs later.

Foreclosure – Notice to Rental Tenant

Civil Code §2924.8, Cal. Code of Civ. Proc. §§ 415.46, 1161b, 1161c, 1161.2 – Pre-existing law requires a tenant or subtenant in possession of a rental housing unit at the time property is sold in foreclosure to be provided 60 days' written notice to quit before the tenant or subtenant may be removed from the property. The amendment of section 1161b extends this period to 90 days for month to month tenants, and provides that tenants or subtenants with a fixed-term lease entered into before the foreclosure have the right to retain possession until the end of the lease term, except in specified circumstances. Additional amendments to the referenced statutes make minor changes to the information that must be included in various foreclosure and termination notices involving leased residential properties.

Foreclosure Reduction Act

AB 278/SB 900 – These bills make numerous changes to California's non-judicial foreclosure process as it applies to residential properties with less than 4 dwelling units, in an attempt to provide stability to California's housing market. Among other things, the bills mandate certain procedures that lenders must follow in offering and considering loan modification applications prior to commencing foreclosure. Lenders are also now prohibited from starting the home foreclosure process while a loan modification application is pending, and are required to give borrowers negotiating a loan modification a single point of contact. Where the new procedures are not followed, homeowners may seek an injunction blocking the sale of their foreclosed home, and intentional or reckless violations are subject to treble damages or up to $50,000.00 in statutory damages. Institutions that foreclosed on fewer than 175 homes the previous year are partially exempt.

Real Estate Licensees – Prohibited Conduct

Business & Professions Code §§ 10085.6 and 10130, Cal. Civ. Code § 2944.7 – Pre-existing law prohibits persons who perform residential loan modifications from demanding or receiving preperformance compensation, requiring security as collateral, or taking a power of attorney from the borrower, and prohibits real estate licensees in connection with a mortgage loan modification from demanding compensation before service is fully performed, taking a lien on property or wage assignment, or taking a power of attorney from the borrower. The amendments extend these provisions, which were scheduled to expire in 2013.

Notarization – Fingerprint Requirement for Documents Affecting Real Property

Cal. Gov. Code § 8206 – Preexisting law requires notaries to take a party's fingerprint before notarizing a deed, quitclaim deed, deed of trust affecting real property, or a power of attorney. The new amendment requires fingerprints for any other document affecting real property.

SETTLEMENTS

Settlement Agreements – Department of Consumer Affairs Licensees

Cal. Bus. and Prof. Code § 143.5 – A licensee regulated by the Department of Consumer Affairs, or its various boards, bureaus, or programs, is prohibited from including a provision in a civil dispute settlement agreement that prohibits the other party in that dispute from contacting, filing a complaint with, or cooperating with the department or its various boards, bureaus, or programs. Nor can the settlement agreement require the other party to withdraw a complaint from those entities. A licensee in violation of these provisions is subject to disciplinary action. A board, bureau, or program is also prohibited from requiring its licensees in a disciplinary action that is based on a complaint or report settled in a civil action to pay additional moneys to the benefit of any plaintiff in the civil action.

TRUSTS AND ESTATES

Construction of Instruments

Cal. Prob. Code § 21134 – Probate Code section 21134 extends existing interpretive rules regarding the disposition of funds where specifically gifted property is sold by (or taken in eminent domain from) a conservator or agent for an incapacitated principal. Generally, under these rules, the party who was supposed to receive the specific property is entitled to the amount for which the property was sold. The new amendments extend these rules to property that is sold by or taken in eminent domain from a trustee acting for an incapacitated settlor of a trust. They also provide that where such property is encumbered by a deed of trust, mortgage, or other instrument, the recipient is entitled to receive either the sale price of the property unreduced by the payoff of any such encumbrance, or the property itself as well as the amount of the unpaid encumbrance.

Revocable Trusts

Cal. Prob. Code § 15401 – Amended to allow revocation of a trust to be made by a writing signed by any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation.

Revocable Trusts

Cal. Prob. Code § 15410 – Under pre-existing law, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the trust contributed by that settlor, unless the trust instrument provides otherwise and except with respect to certain community property interests.

Notwithstanding these provisions, Cal. Prob. Code § 15410 specifies that a settlor may grant to another person, including his or her spouse, a power to revoke all or part of that portion of the trust contributed by that settlor, regardless of whether that portion was separate property or community property of that settlor, and regardless of whether that power to revoke is exercisable during the lifetime of that settlor or continues after the death of that settlor, or both. Furthermore, if a trust is revoked by the settlor, the trust property would be disposed of first as directed by the settlor, secondly, as provided in the trust instrument, and to the extent there is no direction by the settlor or in the trust instrument, to the settlor, or his or her estate. Lastly, if a trust is revoked by any person holding a power of revocation other than the settlor, the trust property would first be disposed of as provided in the trust instrument, secondly as directed by the person exercising the power of revocation, and to the extent there is no direction in the trust instrument or by the person exercising the power of revocation, to the person exercising the power of revocation, or his or her estate.

SIGNIFICANT RULES
Adopted in 2012

COURT OF APPEAL

Appellate Briefs – Attorney Contact Information

Rules 8.40, 8.204, 8.816, and 8.883 – Rule 8.204 is amended to specify that the cover of any brief must include the contact information required by rule 8.40(c). Rule 8.40(c) is amended to require the cover of a brief, or the first page of any document filed in the Court of Appeal, to include the name, mailing address, telephone number, fax number (if available), e-mail address (if available), and California State Bar number of each attorney filing or joining in the document. Additional provisions specify that where more than one attorney is joining in a document, a single attorney must be designated to receive notices from the court by placing an asterisk by that attorney's name. Similar rules apply in the Appellate Division of the Superior Court under revised Rules 8.816 and 8.883.

Appellate Briefs – Courtesy Copy of Briefs to Supreme Court

Rules 8.44 and 8.212 – Rules 8.44 and 8.212 previously required proof of delivery to the Supreme Court of four paper copies of any brief filed in the Court of Appeal. As amended, the rules now require proof of delivery of one electronic copy or, in case of undue hardship, four paper copies to the Supreme Court. The rules now also specify that for the purposes of service on the Supreme Court, the term "brief" does not include a petition for rehearing or an answer thereto.

Rule 8.212(c)(2), has also been amended to change the reference to the "Supreme Court's electronic *notification* address" to the Supreme Court's electronic *service* address." "Electronic service address" is defined in rule 8.70. The Supreme Court's electronic service address can now be found on the California Courts website at www.courts.ca.gov/appellatebriefs.htm.

Appellate Briefs – Notification of New Authorities

Rule 8.254 – New rule 8.254 has been added to specify the procedure for notifying the Court of Appeal of new authorities that were not available at the time of the party's last available brief. The rule specifies that the new authority may be set forth in a letter to the court that identifies the issue on appeal to which the authority pertains by citation to a page or pages in a brief on file. The rule specifies that no argument or other discussion of the authority is permitted. The rule specifies that the letter must be served and filed as soon as possible and before the court files its opinion, and that if the letter is filed after oral argument, it may only address authorities not available at the time of oral argument. Finally, the commentary to the rule states that it is not intended to preclude a party from seeking leave to file a supplemental brief under rule 8.200(a)(4).

Appellate Briefs – Time to File, Extensions

Rules 8.212 and 8.882 – Rules 8.212 and 8.882 have been amended to note that there may be statutory limitations on extensions of briefing time, such as the single 30-day extension provided for briefs in CEQA cases under Public Resources Code section 21167.6.

In addition, the comments to rule 8.212 have been revised to clarify that rule 8.216 addresses the sequence and timing of briefing when there is a cross-appeal. The comment also now states that the cross-appellant's combined respondent's brief and opening brief typically must be filed within the period for filing a respondent's brief. Similar changes were made to the comments to Rule 8.882 pertaining to appeals in limited civil cases.

Appellate Procedure – CEQA Challenges to Environmental Leadership Projects

Rule 8.497 – Rule 8.497 implements the Jobs and Economic Improvement Through Environmental Leadership Act, which provides for expedited judicial review of Environmental Impact Reports involving certain environmentally friendly projects resulting in at least $100,000,000.00 in investment in California (referred to as "environmental leadership developments," or "leadership projects"). The Court of Appeal has original jurisdiction over challenges to such EIRs, and the new rules set forth the procedures applicable to the judicial review process. These rules include provisions for a 10 day time limit for submitting the administrative record, 25 days for responding to an initial petition, 40 days for filing an initial brief, 30 days for filing an opposition brief, and 20 days for filing a reply brief. The rules also require the party who applied to certify the project as a "leadership project" to pay the Court of Appeal a $100,000 fee within 10 days after service of the petition, and to pay the costs of a special master or other contract personnel hired by the Court to work on the petition. If such costs are not timely paid, the Court of Appeal may transfer the action to the Superior Court to proceed in the manner of an ordinary CEQA action.

Filing Fees

Rule 8.100 – The filing fee that must accompany the notice of appeal under Government Code §§ 68926 and 68926.1(b) has increased from $655 to $775.

Filing Fees – Limited Civil Cases

Rule 8.821 – Rule 8.821 specifies that a notice of appeal in a limited civil case must be accompanied by the filing fee set in section 70621 of the Government Code ($330). The revision to this section includes an additional supplemental fee specified in Govt. Code § 70602.5 ($40).

Judicial Notice

Rules 8.252 and 8.809 – Rules 8.252 and 8.809 establish the procedures for requesting judicial notice in the Supreme Court or Court of Appeal and in the Superior Court Appellate Division, respectively. In addition to the general requirement established by rule 8.54 that motions state the grounds for the relief requested, these rules now require a party seeking judicial notice to state why the matter is subject to judicial notice under the applicable statutory standards if the trial court did not grant judicial notice.

Notice of Appeal – Time to File When Parties Waive Notice of Judgment

Rule 8.104 – Subdivision (a)(3) has been added to Rule 8.104 to specify that where parties agree to waive notice of a judgment, the notice of appeal must be filed 180 days from entry of judgment, unless

one of the parties serves notice of entry in order to commence the running of the 60 day time to file a notice of appeal. Similar changes are set forth in Rule 8.822 pertaining to limited civil appeals.

Notice of Appeal – Time to File After New Trial Motion

Rule 8.108(b) – Rule 8.108(b), governing the time to appeal after a new trial motion, has been revised with clarifying language, and a new subdivision (b)(2)(B) has been added to specify that where an additur or remittitur expires or is rejected, the time to file a notice of appeal is 30 days after the date on which the notice of rejection was served or the date on which the additur or remittitur expired, whichever is earlier. Similar changes are set forth in Rule 8.823 pertaining to limited civil appeals.

Record of Administrative Proceedings

Rule 8.123 – Rule 8.123 addresses records of administrative proceedings that were admitted in evidence, refused, or lodged in the superior court and that are subsequently designated for inclusion in the record in a civil appeal in a reviewing court. Under the previous rule, when an administrative record is designated for inclusion in the record on appeal, the party designating the record was required to send the record to the superior court and the superior court would submit it to the reviewing court. The rule now provides that when an administrative record is designated for inclusion in the record on appeal, the party to whom an administrative record has been returned must send that administrative record directly to the reviewing court, and the reviewing must return that record directly to that party on issuance of remittitur. This is similar to the procedure in rule 8.224 for transmission to the Court of Appeal of exhibits that were returned to a party. Additionally, rule 8.123 requires that a party make the designated administrative record available to the other parties in the case for copying within 15 days after the notice designating the record on appeal is served and lodge the administrative record with the reviewing court when at the time the last respondent's brief is due. Subdivision (c) of this rule was amended and re-lettered and adopted as subdivision (d). Further procedures for a party seeking an administrative record that was returned to another party is outlined in rule 8.123(d).

Recoverable Costs – Interest Expense Incurred in Obtaining Appeal Bond

Rules 8.278 and 8.891– Rule 8.278(d) lists the costs that may be recovered on appeal. The rule is amended to includ the fees and net interest expenses incurred to borrow funds to deposit as security for a bond, to obtain a letter of credit, or to deposit with the superior court in lieu of a bond or undertaking, unless the trial court determines the bond or deposit was unnecessary. This change appears to override the decision in *Rossa v. D. L. Falk Constr., Inc.* (2012) 53 Cal.4th 387 (discussed below), which held that the recoverable costs on appeal for an appeal bond are limited to direct charges for obtaining the bond, and do not include the interest expenses incurred in financing the bond. Similar rules apply in the Appellate Division of the Superior Court under revised Rule 8.891(d), relating to appeals in limited civil appeals.

TRIAL COURT

Change of Address – Service and Filing of Notice of Contact Information

Rule 2.200 – An attorney or self-represented party must notify the court and all parties of not only their change in address, but also any changes in telephone number, fax number, or email address (if it was provided under rule 2.111(1)).

Conditional Settlement – Effect on Pending Hearings

Rule 3.1385 – Rule 3.1385, regarding notices of conditional settlement, has been amended to provide that upon the filing of such a notice, the court must vacate all hearings and other proceedings other than proceedings relating to sanctions or good faith settlement determination. No other hearings may then be set until 45 days after the dismissal date specified in the notice of conditional settlement. The revisions to this rule also provide that the filing of a notice of conditional settlement stops the computation of time used to determine case disposition time.

Judicial Abritration – Arbitrator's Fees

Rule 3.819 – Rule 3.819 states generally that an arbitrator in judicial arbitration cannot be paid a fee until an award is issued. Subdivision (b) previously permitted an arbitrator to request payment from the court if the arbitrator devoted a substantial amount of time to a case that was settled without a hearing. As revised, rule 3.819(b) now provides more broadly that an arbitrator can request compensation if the arbitrator devoted a substantial amount of time to a case that was settled without a hearing or *with* a hearing but without a filing of an award. Rule 3.819(c), which addresses the contents of arbitrators' fee statements, is also amended. Previously this provision required that the statement include the date of "the arbitration hearing" and the date the "award settlement" was filed. The rule as amended requires that the statement now include the date of "any arbitration hearing," and the date the "award, notice of settlement or request for dismissal" was filed.

Judicial Arbitration – Request for Dismissal to Prevent Entry of Arbitration Award as Judgment

Rule 3.827 – Rule 3.827 previously provided that, in order to prevent entry of a judicial arbitration award as the judgment in the case, a Request for Dismissal must be filed in the form of a Request for Dismissal (form CIV-110) that: (a) dismisses the entire case or all parties to the arbitration, (b) is fully completed, and (c) includes the signatures of all those whose consent is required for dismissal. To make it clearer that rule 3.827 is not intended to imply that the plaintiff may unilaterally dismiss a case after a judicial arbitration award has been filed, rule 3.827 is now amended to specifically require that to prevent entry of the arbitration award as the judgment in the case, any request to dismiss the entire case must be signed by all parties to the case and any request to dismiss all parties to the arbitration must be signed by all those parties.

Voir Dire – General Procedure

Rule 3.1540 – Rule 3.1540 applies to voir dire in civil actions. Several provisions within the rule were inconsistent with or duplicative of provisions in C.C.P § 222.5 and were therefore deleted. Subdivision (b), "examination by the trial judge", is changed in two places. Subdivision (b) no longer requires the judge to examine prospective jurors orally or by written questionnaire. The statute already requires the judge to examine the prospective jurors, and no rule is needed to state which methods the judge is to use. Also, the last sentence, which provides that a judge "may" use the Judicial Council juror questionnaire form, is removed in light of the new provision in § 222.5 that a judge "shall not arbitrarily or unreasonably refuse to submit reasonable written questionnaires" when requested by the parties.

The last two sentences of subdivision (c), "additional questions and examination by counsel," are deleted because they duplicate provisions of the statute. The provision that the trial judge, on request of the parties, must permit counsel to question the jurors directly is contained in the first paragraph of § 222.5. The provision that the scope of the questioning must be within reasonable limits prescribed by the judge at his or her discretion is contained at the beginning of the third paragraph of § 222.5.

Moreover, that paragraph concludes with a new limitation on discretion added by AB 1403 in 2011, which provides that a trial judge shall not establish a blanket time limit for voir dire. Subdivision (d), "examination of juror outside the judge's presence," duplicates the provisions of the last paragraph of AB 1403 and was deleted in its entirety.

Voir Dire – Statements to the Jury Panel

Rule 2.1034 – Previously, a trial judge could permit brief opening statements by the parties to a panel prior to the examination of prospective jurors in any action under rule 2.1034. This rule has been repealed, as it is superseded in civil actions by a new statutory provision in C.C.P. § 222.5, which states that the trial court "should" allow such statements.

LOCAL RULES

Electronic Filing

Orange County Superior Court Local Rule 352 – Local Rule 352 previously required electronic filing in all complex civil, consolidated, and breach of contract actions. It has now been revised to require electronic filing in all limited, unlimited, and complex civil actions.

SIGNIFICANT CASES
Decided in 2012

SIGNIFICANT CASES
Decided in 2012

ALTERNATIVE DISPUTE RESOLUTION

Arbitration Awards – Award Procured by Undue Means

Maaso v. Signer (2012) 203 Cal.App.4th 362 – An arbitration award is properly vacated as procured by undue means where, while the award is pending, the (prevailing) Defendant's party arbitrator sent an ex parte post-arbitration brief to the neutral arbitrator without allowing Plaintiff an opportunity to respond. Such an act undermines the fairness and integrity of the arbitration process, because a fundamentally fair hearing requires notice, the opportunity to be heard and to present relevant and material evidence, argument before the decision-makers, and that Plaintiff "have the last word." Furthermore, the party arbitrator's statement that he did not rely on the improper brief was inadmissible under Evid. Code § 703.5, which generally bars arbitrators from testifying about their conduct in arbitration proceedings.

Compelling Arbitration – Failure to Pay Fees

Cinel v. Barna (2012) 206 Cal.App.4th 1383 – The trial court granted a petition to compel arbitration, but reasserted jurisdiction after several Defendants failed to pay their share of an arbitration deposit, and the remaining parties did not make up the difference. One paying Defendant filed a second petition to compel arbitration, arguing he had enforced his right to arbitrate by paying his own fees and continuing to seek arbitration. The Court of Appeal noted arbitration is a creature of contract and is subject to waiver. The paying and nonpaying parties waived arbitration through their collective repudiation by their refusal to agree on the payment of fees. Unless and until the paying parties agreed to pay the nonpaying parties' shares per the arbitration panel's order, there could be no arbitration.

Confirmation of Arbitration Award – Prejudgment Interest Accrues During Pendency of Appeal

Tenzera, Inc. v. Osterman (2012) 205 Cal.App.4th 16 – After obtaining an arbitration award against a contracting company and its owners, prevailing homeowners filed a petition to confirm the award. The trial court vacated the award, and the homeowners appealed. The Court of Appeal reversed and remanded. On remand, the trial court reinstated the award against one of the Defendants and awarded pre-judgment interest, but did not include any interest that would have accrued while the appeal was pending. The homeowners appealed again. The Court of Appeal reversed. The Court first observed that Civ. Code § 3287 provides for pre-judgment interest where damages are certain or capable of being made certain by calculation, and the right to recovery those damages is vested. The Court then cited established case law holding that § 3287 applies to arbitration awards, and that a prevailing party in arbitration is entitled to pre-

judgment interest from the date of the final award through entry of judgment. From these premises, and finding no applicable exceptions in § 3287, the Court held, as a matter of first impression, that where a trial court vacates an arbitration award and the Court of Appeal later reinstates that award, pre-judgment interest continues to accrue through the pendency of appeal.

Confirmation of Arbitration Award – Award May be Vacated for Legal Error Where Error Deprives Party of Unwaivable Statutory Right

Richey v. AutoNation (2012) 210 Cal.App.4th 1516 – An arbitrator denied Plaintiff employee's California Family Rights Act ("CFRA") claim against Defendant employer arising from Plaintiff's termination four weeks before his approved medical leave expired. The arbitrator relied on Defendant's honest belief, after a superficial investigation, that Plaintiff misused his leave. The trial court confirmed the arbitration award. The Court reversed, holding that the arbitrator committed clear legal error by relying on the honest belief defense. The CFRA and the Family and Medical Leave Act required that Defendant demonstrate evidentiary facts to carry its burden of proof. Defendant could not terminate Plaintiff without adequately investigating and developing sufficient facts to establish that Plaintiff actually engaged in misconduct warranting dismissal. The honest belief defense is incompatible with California statutes, regulations, and case law and deprived the employee of his unwaivable statutory right to reinstatement under Gov. Code § 12945.2(a). The Court held that the arbitrator's errors of law required the award be vacated, stating "where parties have agreed the arbitrator will resolve any claim 'solely upon the law' and the purported legal error goes to both express, unwaivable statutory rights (the guarantee of reinstatement) and the proper allocation of the burden of proof, judicial review is essential to ensure the arbitrator has complied with the requirements of CFRA. On these facts, granting finality to the arbitrator's decision would be inconsistent with the protection of the employee's statutory rights."

Disclosures by Arbitrators

Nemecek & Cole v. Horn (2012) 208 Cal.App.4th 641 – After losing an arbitration in a malpractice action the Defendant hired a private investigator who uncovered alleged undisclosed conflicts. Specifically, the arbitrator and the head of the Plaintiff's appellate department were both members of an L.A. Bar Association executive committee, the arbitrator and an expert witness had appeared together as panelists at various seminars and were members of the ABTL board of governors, the arbitrator worked for a law firm that had represented attorneys in malpractice actions, and the Plaintiff's attorneys had appeared before the arbitrator when he was a district court judge. When the Plaintiffs moved to confirm the arbitration award, the defendant opposed confirmation, and moved to vacate the award on the ground that the arbitrator failed to disclose these alleged conflicts. The trial court confirmed the award, and the Court of Appeal affirmed, holding that participation in panels or bar association committees do not provide a credible basis for inferring bias. The Court also held that no impression of bias could possibly be inferred from the fact that the arbitrator's firm represented attorneys in malpractice actions,

particularly where the arbitrator himself had not. Finally the Court held that it bordered on frivolous to suggest that the arbitrator was biased because the Plaintiff's attorneys had appeared before him during his years as a district court judge.

Binding Mediation – Constitutionality

Bowers v. Lucia (2012) 206 Cal.App.4th 724 – At issue is the constitutionality of a binding mediation term in a settlement agreement. The Constitution provides an inviolate jury trial right, but civil litigants may waive jury trial. Although binding mediation is not a method listed in Code of Civ. Proc. § 631 to waive jury trial, this does not render the settlement agreement unenforceable if the parties agreed to dispute settlement in a non-judicial forum through binding mediation. Section 631 relates only to *how* a party to a Court action can waive the right to demand a jury trial; it does not prevent parties from avoiding jury trial by not submitting their controversy to a Court in the first instance. Therefore, while § 631 applies to the validity of a pre-dispute jury trial waiver in a judicial forum, it does not invalidate a post-dispute jury trial waiver in an agreement to settle in a non-judicial forum.

Enforceability of Arbitration Agreement – Agreement Silent on the Issue of Class Arbitration

Kinecta Alternative Fin. Sol'ns, Inc. v. Superior Court (2012) 205 Cal.App.4th 506 – The trial court granted employer's motion to compel arbitration and denied its motion to dismiss class claims. The trial court therefore imposed class arbitration even though the employment agreement's arbitration provision was silent on the issue of class arbitration and limited arbitration to disputes between the individual employee and employer. The Court of Appeal reversed, holding a party may not be compelled to class arbitration unless it agreed to do so in the employment agreement. Here, because the agreement expressly limited arbitration to disputes between the individual employee and employer and neither referenced nor authorized class arbitration, the employer could not be compelled to arbitrate class claims.

Enforceability of Arbitration Agreement – Boilerplate Agency Allegation Allows Non-Signatory Defendants to Compel Arbitration

Thomas v. Westlake (2012) 204 Cal.App.4th 605 – While generally only a party to an arbitration agreement may enforce the agreement, the Court of Appeal in *Thomas* reversed the trial court's denial of the non-signatory Defendants' petition to compel arbitration because the Plaintiff's complaint contained boilerplate allegations of agency, stating each Defendant acted as an agent of the other Defendants in connection with investor's transactions. The Court of Appeal recognized that under the "alleged agency exception," when a plaintiff alleges a defendant was an agent of a party to an arbitration agreement, the defendant may enforce that agreement even though it is not a party to the agreement.

Enforceability of Arbitration Agreements – Certain Class Action Waivers are Still Invalid Post-*Concepcion*

Franco v. Arakelian Enterprises, Inc. (2012) 211 Cal.App.4th 314 – Employee filed class action against employer for failure to pay overtime and provide meal and rest periods. Employer moved to compel arbitration under the employment agreement that included a class action waiver. The Court denied employer's motion on the ground that the class action waiver was unenforceable under *Gentry v. Superior Court* (2007) 42 Cal.4th 443. The employer then filed a second petition to compel arbitration, arguing *Gentry* was overruled by *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (2010) 130 S.Ct. 1758. The Court of Appeal affirmed the trial court's denial of the second petition to compel arbitration, holding *Gentry* remains good law post-*Stolt-Nielsen*. Under *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740, if a state law automatically holds all class action waivers unconscionable, then the Federal Arbitration Act preempts state law. As *Concepcion* requires, *Gentry* does not establish a categorical rule against class action waivers. Instead, *Gentry* offers several factors to apply ad hoc to determine whether a class action waiver precludes employees from vindicating non-waivable statutory rights, *i.e.*, overtime pay and rest and meal periods. As such, the class action waiver was unenforceable, notwithstanding *Stolt-Nielsen* and *Concepcion*. *This does not appear to be the last word, however, as other similar cases are currently pending before the Supreme Court of California.*

Enforceability of Arbitration Agreements – Conflicting Agreements

Grey v. American Management Services (2012) 204 Cal.App.4th 803 – In *Grey*, the Plaintiff employee signed two agreements containing arbitration provisions. One was in an application packet containing an issue resolution agreement (IRA). The IRA provided that the applicant agreed to settle any and all previously unasserted claims by final and binding arbitration before a neutral arbitrator. The other was set forth in his employment contract, and was limited to disputes arising out of the employment agreement's breach. The employment agreement also contained an integration clause. Plaintiff appealed from a judgment of the trial court confirming an arbitration award in favor of Defendants, contending he was not required to submit his claims to arbitration under the terms of his employment contract, which was narrower than the original IRA. The Court of Appeal agreed with the Plaintiff. In light of the integration clause, the Court determined that the employment agreement superseded the IRA. The Court further found that Defendant could not use the IRA as extrinsic evidence that the parties did not intend the employment contract to be the sole agreement because it contradicts the plain terms of the contract's integration clause. The earlier agreement, having been superseded, was not a written agreement under which the employee could be compelled to arbitration under Code of Civ. Proc § 1281 et seq. Because the employee's lawsuit was based on statutory violations, not breach of contract, the narrower arbitration clause in the employment contract did not require employee to arbitrate his claims.

Enforceability of Arbitration Agreements – Court, not Arbitrator, Decides Unconscionability

Ajamian v. CantorCO2E, L.P. (2012) 203 Cal.App.4th 771 – Denying an employer's request to compel arbitration of an employee's claims, the Court of Appeal held that courts, not arbitrators, have the power to decide whether an arbitration agreement was unconscionable, even when an agreement is so broadly worded as to suggest that an arbitrator might have such authority. The issue of unconscionability is a matter for the courts unless an arbitration agreement provides clear and unmistakable evidence that the parties intend to delegate this authority to the arbitrator.

Enforceability of Arbitration Agreement – IIED Plaintiff not Bound by Victim's Arbitration Agreement

Bush v. Horizon West (2012) 205 Cal.App.4th 924 – In *Bush*, a nursing home patient sued the facility for elder abuse, and his daughter sued for intentional infliction of emotional distress. When Defendants moved to compel arbitration under a written agreement with Patient, the trial court exercised discretion under Code of Civ. Proc. § 1281.2(c) to deny the motions because only the patient was bound by the arbitration agreement, while the daughter was not. (*See* Code of Civ. Proc. § 1281.2(c) (trial court may deny petition for arbitration to avoid conflicting rulings).) The Court of Appeal affirmed, distinguishing *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, in which the Supreme Court held that under Code of Civ. Proc. § 1295, wrongful death claimants in medical malpractice cases are bound by arbitration agreements entered into by the decedent, where the agreement's language manifests an intent to bind such claimants. By contrast, no such statute applied in the context of IIED, and the daughter was not acting as a representative or heir of the party to the arbitration agreement, but was asserting her own personal claims. As such, she could not be bound by the patient's agreement to arbitrate.

Enforceability of Arbitration Agreement – Incidental Beneficiaries of Agreement With Arbitration Clause may not be Compelled to Arbitrate

Epitech, Inc. v. Kann (2012) 204 Cal.App.4th 1365 – A corporation's short-term secured creditors sued a financial advisor, alleging he fraudulently induced them to forbear from foreclosing on their security to their financial detriment. The advisor petitioned to compel arbitration on the basis that the secured creditors had been third party beneficiaries of his contract with the corporation, which contained an arbitration clause. But while the secured creditors would have benefited based upon performance of the subject contract, the advisor had not contracted to pay the secured creditors any money at all. The secured creditors thus were only incidental beneficiaries. A non-signatory to an arbitration contract cannot be compelled to arbitrate under a contract where the non-signatory is an incidental beneficiary. While the public policy favoring arbitration allows an arbitration agreement to be enforced against an *intentional*

beneficiary of the contract containing the arbitration agreement, the Court in *Epitech* held that this rule does not extend to merely incidental beneficiaries.

Enforceability of Abritration Agreement – No Implied Agreement to Arbitrate Where Employee Handbook Requires Employees to Sign Arbitration Agreement, and Employee Fails to Sign

Gorlach v. Sports Club Co. (2012) 209 Cal.App.4th 1497 – Employer revised employee handbook to include arbitration provision and required all employees sign as a condition of employment. Employee did not sign the agreement, but led the Employer to believe that she had. She then quit and sued Employer. Employer moved to compel arbitration, arguing that the Employee was either estopped from denying the agreement, or impliedly assented to arbitration by continuing to work after learning the agreement was a condition of employment. The trial court refused to compel arbitration, and the Court of Appeal affirmed. Equitable estoppel did not apply, because no detrimental reliance had taken place—the arbitration agreement was still being "rolled out," and other employees had not yet signed. The Court of Appeal also distinguished an implied agreement case in which employees were deemed to have consented to arbitration by continuing their employment after the employer sent a memorandum that unilaterally stated that the employer's arbitration policy "will govern all future legal disputes." Here, by contrast, the Employer's employee handbook stated that employees were required to sign the arbitration provisions in the handbook. Under such circumstances, an agreement to arbitrate could not be implied where the employee does not actually sign.

Enforceability of Arbitration Agreement – Declaration of Covenants, Conditions, and Restrictions

Pinnacle Museum Tower Assn. v. Pinnacle Market Development (2012) 55 Cal.4th 223– A homeowners association (HOA) filed the instant construction defect action against a condominium developer, seeking recovery for damage to its property and damage to the separate interests of the condominium owners who compose its membership. In response, the developer filed a motion to compel arbitration, based on a clause in the recorded declaration of covenants, conditions, and restrictions providing that the HOA and the individual owners agree to resolve any construction dispute with the developer through binding arbitration in accordance with the Federal Arbitration Act. The Court granted review to determine whether the arbitration clause is binding on the association, and if so, whether it must be invalidated as unconscionable. Even though the HOA did not exist as an entity independent of the developer when the declaration was drafted and recorded, it is settled under the statutory and decisional law pertaining to common interest developments that the covenants and terms in the recorded declaration reflect written promises and agreements that are subject to enforcement against the HOA. Thus, the Court concluded that the arbitration clause does bind the HOA.

Enforceability of Contractual Arbitration Clause – Unconscionability Defense

Samaniego v. Empire Today, LLC (2012) 205 Cal.App.4th 1138 – The Court refused to enforce an arbitration clause as procedurally and substantively unconscionable and rejected Defendant's argument that *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740 precluded this result. *Concepcion* explicitly reaffirmed that the Federal Arbitration Act permits the invalidation of arbitration agreements by generally applicable contract defenses, such as unconscionability. Thus, arbitration agreements remain subject to the unconscionability analysis post-*Concepcion*.

Enforceability of Contractual Arbitration Clause – Illusory Arbitration Contracts

Peleg v. Neiman Marcus Grp. (2012) 204 Cal.App.4th 1425 – The trial court granted Defendant employer's motion to compel arbitration and confirmed an arbitration award for the employer and against Plaintiff employee. The Court reversed the orders and remanded the matter. After determining that a court can resolve the question of whether the agreement was illusory, the Court stated that an arbitration contract containing a modification provision was illusory if an amendment, modification, or revocation applied to claims that accrued or were known to the employer. If a modification provision was restricted — by express language or by terms implied under the covenant of good faith and fair dealing — so that it exempted all claims, accrued or known, from a contract change, the arbitration contract was not illusory.

Mandatory Fee Arbitration Act – Demanding Arbitration Effectively Rejects Non-Binding MFAA Award

Rosenson v. Greenberg Glusker Fields Claman & Machtinger LLP (2012) 203 Cal.App.4th 688 – Law firm and client executed retainer agreement providing for binding arbitration of fee disputes. Subsequently, a fee dispute arose. Within thirty days of a non-binding Mandatory Fee Arbitration Act (MFAA) award executed in the client's favor, the law firm demanded binding arbitration under the retainer agreement. The client petitioned to confirm the MFAA award and the trial court affirmed. The Court of Appeal reversed. A law firm's arbitration demand under a binding arbitration provision within thirty days of an MFAA award precludes the award's finality. The law firm need not have filed a court action to reject a non-binding MFAA award; the firm's arbitration demand invoked the binding arbitration provision and rejected the MFAA award.

Multiple Arbitrations – Application of C.C.P. § 1281.2(c) to Separate Arbitration Agreements With Different Choice of Law Clauses

Mastick v. TD Ameritrade, Inc. (2012) 209 Cal.App.4th 1258 – While California law allows a trial court to deny a petition to compel arbitration to avoid a multiplicity of actions, applicability of that law turns on the choice of law provision in the arbitration agreement. In *Mastick*, the Plaintiff sued her investment advisor (Oakwood) and broker dealer (Ameritrade). Mastick had

two valid arbitration agreements, one with Oakwood, governed by California law, and the other with Ameritrade, governed by Nebraska law. Both Oakwood and Ameritrade petitioned to compel arbitration. To avoid piecemeal litigation, the CA trial court denied the petitions to compel arbitration under Code of Civ. Proc. § 1281.2(c), which permits a court to deny enforcement of an arbitration agreement to avoid conflicting rulings on common issues. The Court of Appeal, however held that Nebraska law, like the Federal Arbitration Act (FAA), does not have a provision like § 1281.2(c) that could authorize the trial court to deny the motion to compel arbitration. Thus the Court reversed the denial of Ameritrade's petition to compel arbitration. Nevertheless, the Court affirmed the denial of Oakwood's petition to compel arbitration, because the Oakwood agreement was governed by California law, and the FAA would not preempt the parties' express selection of state law. The Court of Appeal stated that the trial court could reevaluate the discretionary options available under § 1281.2 with regard to the Oakwood arbitration.

ANTI-SLAPP STATUTE

First Prong – Google Search Results Used to Demonstrate That Issue is One of Public Interest

Hecimovich v. Encinal School Parent Teacher Org. (2012) 203 Cal.App.4th 450 – The trial court denied Defendants' anti-SLAPP motion to strike a complaint alleging defamation relating to Plaintiff's removal as a volunteer basketball coach at an afterschool program, on the grounds that the speech at issue did not concern an issue of public interest, which is a requirement under the First Prong of the anti-SLAPP statute. The Court of Appeal reversed, referencing recent Google searches for "youth sports," "safety in youth sports," "problem parents in youth sports," and "problem coaches in youth sports," which returned 379,000,000 results, 66,800,000 results, 21,600,000 results, and 108,000,000 results, respectively, as evidence showing that Plaintiff's lawsuit involved subjects of tremendous public interest.

First Prong – Claims Against Attorneys by Non-Client Based On Actions Taken in Litigation

Thayer v. Kabateck Brown Kellner LLP (2012) 207 Cal.App.4th 141 – Plaintiff sued the law firm that represented her husband for alleged conversion and falsification of documents in connection with the settlement of an underlying class action. The law firm filed anti-SLAPP motion, arguing the suit arose from firm's constitutionally protected speech and activity on behalf of the class action clients. The trial court denied the motion, finding no protected activity. The Court of Appeal reversed, concluding that the anti-SLAPP statute applied to the complaint, reasoning any suit brought on the basis of statements made in a judicial proceeding was subject to § 425.16, subds. (e)(1) and (2). Though an exception to this rule exists for "garden variety" malpractice claims – *i.e.*, those brought by former client of attorney being sued – that exception did not apply here, because Plaintiff's spouse, not Plaintiff, was the former client. The Court of

Appeal also held that the spouse had no standing to assert claims against the attorneys, explaining it was "wary about extending an attorney's duty to persons who have not come to the attorney seeking legal advice and whom the attorney has never met."

First Prong – Act of Governance Mandated by Law is not a Protected Activity

Young v. Tri-City Healthcare Dist. (2012) 210 Cal.App.4th 35 – Plaintiff sought relief in administrative mandamus after allegedly wrongful summary suspension, which he claimed was unjustified and should be vacated. District filed anti-SLAPP motion, claiming Plaintiff's attempt to compel a hearing on the validation of his suspension arose out of protected free speech activity in the hospital peer review context. Even if public officials' conduct in discussing and voting on a public entity's action could constitute an exercise of rights protected under anti-SLAPP statute, this does not mean litigation challenging a public entity's action or decision always arises from protected activity. An act of governance mandated by law, without more, is not an exercise of free speech or petition. Indeed, not all decisions made through such procedures "arise" from protected activity within the meaning of the statute. The summary suspension cause of action did not arise from Defendant's acts in furtherance of the hospital's rights of petition or free speech in connection with peer review, but rather the substance of that claim arose from the statutory provision giving a right to judicial review of governmental decisions and the making of such a decision did not in itself amount to an exercise of free speech. The Court of Appeal thus held the district's decision was not protected.

First Prong – Claims Against Attorney – Equitable Indemnity for Malpractice

Chodos v. Cole (2012) 210 Cal.App.4th 692 – A malpractice cross-complaint was filed against appellant attorney in connection with his settlement of a divorce proceeding. The attorney cross-complained against respondent other attorneys for indemnification for any malpractice award against him because they independently reviewed the settlement. In reversing the trial court's judgment granting anti-SLAPP motions by other attorneys, the Court of Appeal held a lawyer sued for attorney malpractice in connection with a settlement of divorce proceeding may sue other lawyers who independently reviewed the settlement. The anti-SLAPP statute did not apply in such cases because a claim by an attorney against another attorney for equitable indemnity in connection with attorney malpractice is indistinguishable from a claim of attorney malpractice for the purposes of anti-SLAPP. The anti-SLAPP statute does not apply to attorney malpractice claims because they do not concern a right of petition or free speech.

First Prong – Filing of Insurance Claim is not Necessarily Protected Prelitigation Conduct

People ex rel. Fire Insurance Exchange v. Anapol (2012) 211 Cal.App.4th 809 – Attorneys represented insureds' pursuit of insurance claims. Farmers paid some claims, and often did not pay the full amount. Attorneys therefore filed bad faith actions. In the process, Farmers filed whistleblower lawsuit against Attorneys after uncovering what it believed to be an insurance

fraud ring, alleging that Attorneys submitted false claims. Attorneys unsuccessfully brought anti-SLAPP motion, arguing the submission of insurance claims was protected prelitigation communication. Submitting an insurance claim in the usual course of business does not constitute prelitigaiton conduct, but circumstances may exist such that submitting the claim is protected prelitigation conduct. Prelitigation conduct includes communication in preparation of litigation contemplated in good faith. Here, Attorneys argued submission of insurance claims constitute protected petitioning conduct because it was a necessary prerequisite to litigation. Although true, submission of claims was also a prerequisite to obtaining performance under the insurance policy. Thus, without more evidence, the mere fact of submission could not be used to determine whether the claim was submitted in anticipation of litigation. Thus, because Attorneys failed to show the claims submitted were in anticipation of litigation and contemplated in good faith, the anti-SLAPP motion was properly denied.

First Prong – Board of Director's Vote to Remove a Director is not a Protected Activity

Donovan v. Dan Murphy Found. (2012) 204 Cal.App.4th 1500 – Plaintiff filed a lawsuit contesting his removal from the board of directors of a non-profit organization, alleging his removal as a director was illegal and in retaliation for his efforts seeking compliance with California corporation and trust laws. Defendants filed a special motion to strike under California's anti-SLAPP statute, § 425.16. The Court of Appeal determined the conduct giving rise to the causes of action did not fall within the scope of the anti-SLAPP statute. Plaintiff's allegations did not implicate an act in furtherance of a person's right to free speech or petition. Furthermore, the mere act of voting is insufficient to demonstrate that conduct challenged in a cause of action arose from protected activity. A board of directors meeting by a nonprofit charitable organization is not an official proceeding authorized under law for purposes of Code of Civ. Proc. § 425.16 and the majority vote to remove Plaintiff was not conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public interest. Thus, the Court of Appeal reversed the trial court's granting of the directors' special motion to strike pursuant to § 425.16.

Procedure – Amended Complaint After Anti-SLAPP Motion is Denied But Before Appeal is Filed does not Moot Subsequent Appeal

Hecimovich v. Encinal School Parent Teacher Org. (2012) 203 Cal.App.4th 450 – After the Defendant's anti-SLAPP motion was denied, but before the Defendant appealed, the Plaintiff filed an amended complaint. When the Defendant appealed the denial of the anti-SLAPP motion, the Plaintiff attempted to augment the record by submitting the amended complaint. The Court of Appeal denied the motion to augment, holding that an "implied stay" prevents Defendants from rendering an appeal moot by amending the operative pleading before a notice of appeal is filed.

Second Prong – Parsing a Mixed Cause of Action

City of Colton v. Singletary (2012) 206 Cal.App.4th 751 – In *City of Colton*, the Court addressed the situation where a mixed cause of action includes an allegation of *unprotected* activity, on which the plaintiff has a probability of prevailing, and an allegation of *protected* activity, on which the plaintiff does *not* have a probability of prevailing. Despite long-standing authority holding that an anti-SLAPP motion goes only to an *entire* cause of action (*see Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328), the Court in *City of Colton* held that the meritless allegation of protected activity can be parsed and stricken, while the rest of the cause of action proceeds. The majority rested its opinion on an interpretation of a Supreme Court case, *Taus v. Loftus* (2007) 40 Cal.4th 683, that was set forth in *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169. The dissent, however, criticized the majority opinion for ignoring the fact that *Wallace* also held that the Supreme Court had reversed itself on this very point in a later authority, *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811.

ANTITRUST

Cartwright Act: Premerger Activity

Asahi Kasei Pharma Corp. v. Cotherix, Inc. (2012) 204 Cal.App.4th 1 – Even if two companies in anticipation of merger were capable of conspiring, premerger activities do not constitute conspiracy in restraint of trade under the Cartwright Act. The Court reasoned that, in the period between execution of an acquisition agreement and the consummation of the merger, no viable Cartwright Act claim was presented because there was no evidence of any premerger meeting of the minds specifically to restrain the trade of Plaintiff's product. Additionally, the rationale behind case law under the Cartwright Act – determining that the Cartwright Act was not intended to apply to situations in which one or more of the entities ceased to exist by virtue of purchase and sale, or merger – seemed to apply equally where parties in the process of merging reach agreement to do that which the combined entity may freely do.

APPELLATE LAW AND PROCEDURE

Appealability – Good Faith Settlement Determination: Split of Authority

Oak Springs Villas Homeowners Assn' v. Advanced Truss Sys., Inc. (2012) 206 Cal.App.4th 1304 – After HOA reached a court-approved settlement with Developers in construction defect suit, ATS, a non-settling Defendant, filed notice of appeal. Dismissing ATS' appeal, the Court of Appeal held that a good faith settlement determination is a non-appealable interlocutory ruling and immediate review of the merits of that determination is obtainable only by a timely writ under Code of Civ. Proc. § 877.6. The decision disagreed with *Cahill v San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939 where the non-settling Defendant had filed a timely writ under § 877.6, which was denied. The non-settling Defendant then filed a notice of appeal. When the settling parties objected, moved to dismiss the appeal and argued that the writ was the

sole means of challenging the trial court's determination, the Court of appeal disagreed and denied the motion to dismiss the appeal. The Court here declined to follow *Cahill* because it found its analysis on this issue was bare and provided no legal support for its conclusion. *Oak Springs* and *Cahill* represent split of authority as to whether a non-settling party may appeal from an order approving a good faith settlement.

Appealability – "One Final Judgment Rule" in Cases of Voluntary Dismissal

Abatti v. Imperial Irrigation Dist. (2012) 205 Cal.App.4th 650 – In a case where several CEQA issues were appealed, the parties stipulated to dismiss several non-CEQA claims prior to the entry of judgment from which they appeal. Appellants dismissed their non-CEQA claims without any waiver of the applicable statute of limitations as to the dismissed claims, and without any stipulation that would facilitate the potential future litigation of the dismissed claims. Before reaching the CEQA issues on appeal, the Court first addressed whether it had appellate jurisdiction pursuant to the one final judgment rule (Code of Civ. Proc. § 904.1), which prevents an appellate court from taking jurisdiction over a case until the trial court issues a judgment that is final as to all claims, in view of the fact that appellants dismissed several causes of action without prejudice prior to the entry of judgment from which they appeal. The Court found it had appellate jurisdiction over the case because the stipulation did not allow for future litigation of the dismissed claims. In the absence of such a stipulation and a resulting stipulated judgment, a judgment does not lack finality merely because some of the causes of action have previously been disposed of by way of a dismissal without prejudice. Simply put, claims dismissed, whether with or without prejudice, are not "pending" for purposes of the one final judgment rule. Thus, the court concluded that claims dismissed without prejudice are no less final for purposes of the one final judgment rule than are adjudicated claims, unless there is a stipulation between the parties that facilitates potential future litigation of the dismissed claims. *Note, a similar case is on review at the California Supreme Court:* Kurwa v. Kislinger, *case number* S201619, *addressing the issue of whether a judgment which dismissed most of the cause of action with prejudice and the remainder, pursuant to the parties' stipulation, without prejudice and with a waiver of the applicable statute of limitations, is an appealable judgment*.

Automatic Stay – Request for Reconsideration Stayed Upon Filing Notice of Appeal

Young v. Tri-City Healthcare Dist. (2012) 210 Cal.App.4th 35 – After the trial court granted Plaintiff's motion for reconsideration and amended its ruling in favor of Plaintiff on its own motion, Defendant moved for reconsideration, and while that motion was still pending, appealed the trial court's ruling. The trial court granted Defendant's motion, and Plaintiff appealed. The Court held that the trial court lost subject matter jurisdiction pursuant to Code of Civ. Proc. § 916(a), which states that an appeal stays proceedings in the trial court upon the matter appealed from. The filing and perfecting of Defendant's own appeal caused the trial court to lose its authority to resolve the motion, which was still pending when Defendant filed its appeal.

Though the trial court may correct its clerical errors after the appeal's filing, the ruling on Defendant's motion for reconsideration was not the type of collateral matter that the trial court may pursue.

Effect of Intervening Appellate Decision – Renewal of Motion to Compel Arbitration in Light of *Concepcion*

Phillips v. Sprint PCS (2012) 209 Cal.App.4th 758 – In consumer class action, trial court in 2006 denied Sprint's motion to compel arbitration on the grounds that class action waiver contained in arbitration agreement was unenforceable. In June 2011, after USSC decision in *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct.1740, Sprint renewed its motion to compel arbitration based upon the change in law. This time, the trial court granted Sprint's motion and ordered arbitration. Plaintiffs appealed. The Court of Appeals affirmed. First, the order compelling arbitration was not appealable, but the Court exercised discretion to consider the appeal as a writ. The death knell doctrine did not apply because the trial court did not rule on Sprint's request to dismiss the class claims before Plaintiff filed the appeal. Second, the trial court did not abuse discretion in allowing Sprint to renew its motion to compel after *Concepcion*, as the Plaintiffs had done little to advance the case to trial. Third, the prior order denying motion to compel was not res judicata. The arbitrability issue was raised and renewed by motion in a single lawsuit, making res judicata inapplicable because there is no prior judgment. Fourth, considering current law, Sprint did not waive its right to compel arbitration by not appealing denial of its original motion to compel, as an appeal would have been futile. Finally, the arbitrator should decide whether the contract as a whole, rather than just the class action waiver clause, was unconscionable and unenforceable before the court would get involved. The Plaintiff challenged provisions – a shortened SOL and a limitation on damages – that lay outside the arbitration clause and presumably would apply whether the matter went to arbitration or to court.

Mootness – Compliance With Trial Court Judgment Rendered Appeal Moot

Building A Better Redondo, Inc. v. City of Redondo Beach (2012) 203 Cal.App.4th 852 – City appealed the trial court's judgment, but also voluntarily complied with the writ of mandate compelling City to seek voter approval before passing proposed major changes in the allowable land use in the City. The City added the proposed changes to the 2010 ballot, the voters approved the ballot measure, and the proposed changes were implemented. The Court dismissed the City's appeal and ruled the City's actions complying with the judgment of the trial court had rendered its appeal moot. The City had had two options: (1) to accept the judgment and comply with it or (2) to appeal the judgment. The City had waived its right to challenge the judgment when it voluntarily complied with the judgment. Any reversal of the judgment would not effect the past election, and thus no actual controversy remained. Also, no exception to the mootness doctrine applied, as the Court would not give opinions on moot questions or abstract propositions or declare principles of law that cannot affect the issue on appeal.

Recoverable Costs – Interest for Borrowing Funds to Deposit to Secure Appeal Bond

Rossa v. D. L. Falk Constr., Inc.(2012) 53 Cal.4th 387 – According to Cal. Rule of Court 8.278(d)(1)(F), a prevailing appellant may recover cost to procure surety bond, including premium, and cost to obtain a letter of credit as collateral. Here, Court affirmed trial court's ruling that interest paid on funds borrowed to secure a letter of credit was not a recoverable cost included in Rule 8.278(d)(1)(F). The provisions allowing the recovery of costs historically have been strictly construed and the right to costs cannot be extended beyond the items allowed by the rule. The amendment to Rule 8.278, discussed above, appears to have abrogated this holding.

Remand – Issues Previously Decided may not be Retried on Remand

Ayyad v. Sprint Spectrum, L.P. (2012) 210 Cal.App.4th 851 – A trial court may address on remand those issues specified reviewing court's order. The reviewing court's order is contained in its remittitur, which defines the jurisdictional scope of the court to which the matter is returned. Thus, trial court may only act pursuant to reviewing court's direction, and if the reviewing court does not direct the trial court to take particular action or make particular determination, trial court is not authorized to do so. Therefore, here, trial court properly declined to retry Defendant's motion to compel arbitration of Plaintiff's claims, because it was not an issue the Court of Appeal specified for review on remand in the remittitur.

Sanctions – Re-raising Argument Rejected in Prior Appeal

Personal Court Reporters, Inc. v. Rand (2012) 205 Cal.App.4th 182 – Two lawyers appealed an order denying their anti-SLAPP motion. The appeal was based on a creative argument with little hope of success and which the lawyers had previously presented under similar circumstances and that had been rejected and sanctioned in another trial court and affirmed on appeal. The appellate Court not only agreed with the lower Court that the complaint did not arise from Defendant's protected activity, but it also sanctioned the lawyers for their frivolous appeal. Ordinarily, a court will not impose sanctions because an appeal is based on a creative argument with little hope of success. However, where as here, a party appeals and merely repeats an argument soundly rejected by another appellate panel, Courts have little difficulty concluding that the party lacked good faith in pursuing the appeal. Defendant's appeal was wholly without merit and litigation of the prior case should have made that point clear to them. The total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay. Thus, the Court imposed sanctions for frivolously appealing an anti-SLAPP denial.

Sanctions – "Viable Issue" Line Between Vigorous Advocacy and Sanctionable Conduct

Brown v. Wells Fargo Bank, N.A. (2012) 204 Cal.App.4th 1353– The Appellant borrower defaulted on a home mortgage loan secured by a deed of trust, and Respondent lender recorded a notice of trustee's sale. The trial court granted a preliminary injunction on condition that the

borrower deposit a monthly amount in a client trust account in lieu of a bond. Several months later, the lender filed an ex parte application to dissolve the preliminary injunction because the borrower failed to make the monthly payments and the deadline for the trustee sale was approaching. The borrower argued that the order should not issue ex parte. The trial court agreed and set a hearing date, and the borrower expressly waived any claim that the hearing was not properly noticed or was irregular. The trial court thereafter ordered the preliminary injunction dissolved. The borrower appealed, basing his argument on the fact that the order contained the words "ex parte" in the caption. After receiving calendar notice, the borrower's counsel asked the court to dismiss the appeal. The Court denied the request to dismiss the appeal, affirmed the order dissolving the preliminary injunction, and awarded costs on appeal to the lender, finding the appeal frivolous. The order was not ex parte, and the borrower's objection to the wording of the caption was a form over substance argument. The borrower abused the appellate process to delay the trustee's sale. The Court also ordered the clerk to send a copy of the opinion to the California State Bar for consideration for discipline. *Brown* draws a useful line between vigorous advocacy and sanctionable conduct for litigators to follow: without stating a viable issue, an appeal could fall within sanctionable conduct.

Standard of Review – Evidentiary Errors Only Warrant Reversal if They are Prejudicial

Twenty-Nine Palms Enterprises Corporation v. Bardos (2012) 210 Cal.App.4th 1435 – The trial court granted summary judgment in favor of Plaintiff after summarily sustaining Plaintiff's 48 pages of evidentiary objections submitted in opposition to a motion for summary judgment, without any reasoning in support of the ruling. Defendant appealed. Given the sweeping nature of the objections, and the problematic nature of some of the objections, the Court concluded that the trial court abused its discretion by issuing a blanket ruling sustaining all the objections. However, an erroneous evidentiary ruling requires reversal only if there is a reasonable probability that a result more favorable to the appealing party would have been reached in the absence of the error. Here, while the trial court abused its discretion in summarily sustaining the objections, the Court of Appeal held that there was no resulting prejudice. The error in the trial court's evidentiary rulings would not change the outcome on the summary judgment motion because Defendant failed to present any evidence creating a trial issue of fact.

ATTORNEY'S FEE AWARDS

Class Actions – Allocation of Attorneys Fees in Common Fund Case

Collins v. City of Los Angeles (2012) 205 Cal.App.4th 140 – Two class action representatives obtained judgment-based common fund recovery against City. Plaintiffs then requested fees under Code of Civ. Proc. § 1021.5. Affirming a judgment requiring 40% of the fees to be paid from the class restitution fund and only 60% to be paid by City, the Court of Appeal held that an attorney fee award under § 1021.5 is not necessarily an all-or-nothing proposition. A court may

deny or limit attorney fee award pursuant to necessity and financial burden of private enforcement requirements and "interests of justice" elements of Code of Civ. Proc. § 1021.5, especially where it is determined that fees should be paid by the opposing party rather than from common fund recovery. In so considering, a court should consider not only the actual monetary recovery but also any other direct financial benefits provided to the Plaintiff by the judgment.

Contractual Attorney's Fees – Allocation of Liability for Fee Award, and Consideration of Financial Impact of Attorney Fee Award on Opposing Party

Walker v. Ticor Title Co. (2012) 204 Cal.App.4th 363 – Plaintiff borrowers unsuccessfully brought an action against Defendant escrow holder and others alleging a conspiracy to fraudulently induce borrowers to take out real estate refinancing loans. The trial court awarded Defendant contractual attorney fees, allocating the award among the Plaintiffs pro rata according to their relative recoveries. The Court affirmed, finding adequate justification for the trial court's exercise of discretion in allocating attorney fees among Plaintiffs, rather than imposing joint and several liability. Although Plaintiff elected to bring suit together, they were not joint obligors on a single contract.

The Court of Appeal in *Walker* also vacated and remanded the trial court's decision reducing the amount of the fee award based on the Plaintiffs' limited ability to pay. While an award of contractual attorney fees may be subject to equitable considerations, a losing party's financial condition is not a permissible consideration. The Court distinguished contractual and statutory awards, holding that financial condition may be considered in making a statutory attorney fee award because Plaintiffs in those circumstances must risk an award of attorney fees in order to enforce statutory rights. Unlike statutory fees, contractual fees are voluntarily incurred. The award is a business risk assigned as a matter of mutual agreement by the parties and undertaken in return for the benefits of the contract.

Contractual Attorney's Fees – Award Determined at Market Rates Instead of at Rates Actually Incurred

Nemecek & Cole v. Horn (2012) 208 Cal.App.4th 641 – A former client initiated an arbitration proceeding against a law firm for legal malpractice. The arbitrator issued an award in the law firm's favor, which filed a successful petition to confirm the award. After confirming the award, the trial court granted the law firm's motion for attorneys' fees pursuant to a contractual fee provision that allowed the prevailing party to recover "reasonable" fees. Though its actual fees incurred, which had been paid by its insurance carrier, ranged $100 to $215 per hour, the law firm requested a fee award based on an hourly rate of over $400 per hour. The trial court granted the motion, and the former client appealed. The Court of Appeal affirmed, holding that because the parties' contract allowed for an award of "reasonable" attorneys' fees, the trial court was not limited to the actual fees paid in issuing its award. The trial court acted within its discretion

when it applied a market-based hourly rate rather than the discounted rate paid by the law firm's insurer.

Contractual Attorney's Fees – Fee Award Conditioned on Mediation

Cullen v. Corwin (2012) 206 Cal.App.4th 1074 – The trial court entered summary judgment against Plaintiff buyers and in favor of Defendant sellers, and awarded the sellers contractual legal fees. The parties' standard form purchase agreement provided for the prevailing party to recover legal fees, subject to a condition precedent that made fees unavailable to any party who refused to mediate on request. The buyers' attorney twice requested mediation, and sellers' counsel rejected both requests, asserting that buyers' failure to provide responses to discovery requests, which the sellers needed to pursue a motion for summary judgment, was a proper basis for his refusal to agree to mediation. The Court reversed the fee award, holding that the standard provision did not require that a mediation request precede the initiation of the litigation. Neither a lack of discovery responses nor a desire to pursue a motion for summary judgment excused the contractual requirement. Absent evidence of assent to the buyers' requests for mediation or a legally warranted reason to decline, the sellers could not recover their legal fees.

Contractual Attorney's Fees – Fees Awarded Under C.C.P. § 998

SCI California Funeral Services, Inc. v. Five Bridges Found. (2012) 203 Cal.App.4th 549 – Plaintiff sued Defendant for claims arising from a land sale contract, and Defendant counterclaimed. The contract between the parties provided that the "non-prevailing" party would pay all attorneys' fees and costs associated with the action. Prior to trial, Plaintiff made an offer to resolve the case via a Code of Civ. Proc. § 998 offer and defendant rejected the offer. Later, the trial court ruled for the Plaintiff on some issues and against it on others, ultimately awarding the Plaintiff damages in excess of the § 998. Plaintiff then moved for an award of attorney fees under C.C.C. § 1717 and § 998(d). The trial court denied both, finding that because both parties had prevailed on some issues, there was no "non-prevailing party" in the case. The Court of Appeal reversed as to § 998. Specifically, the Court of Appeal held that the trial court should have awarded the Plaintiff fees under § 998(d) because its recovery was greater than its rejected settlement offer, and the awardable costs referred to in § 998 include attorney fees like any other costs when authorized by contract. The fact that the trial court had denied Plaintiff's request for fees under § 1717 did not change this result.

Contractual Attorney's Fees – Fees for Petition to Compel Arbitration

Frog Creek Partners, LLC v. Vance Brown, LLC (2012) 206 Cal.App.4th 515 –Defendant filed two petitions to compel arbitration of the Plaintiff's claims. The first petition was unsuccessful, and but the second petition was successful, and the Defendant subsequently prevailed in the arbitration. The trial court awarded contractual attorney's fees under Civ. Code § 1717 to the Plaintiff in connection with the first petition, and to the Defendant in connection with the second petition. The Court of Appeal reversed, holding that the Plaintiff could *not* be considered a

prevailing party on the first unsuccessful petition for the purposes of § 1717. Under that statute, there can be only one prevailing party on the contract that is entitled to a fee award, and the prevailing party is entitled to fees incurred even in particular proceedings in which it was not successful. The Court did note, however, that the trial court has discretion to deny unreasonable fees. As such the Court reversed the award of partial fees to the Plaintiff for prevailing on the first petition to compel arbitration, affirmed the award of fees to the Defendant for the second petition, and remanded the matter to the trial court to determine whether the Defendant's fee award should include fees incurred in connection with the first petition.

Contractual Attorney's Fees – No Standing to Assert Contractual Fee Provision Under Assignment of Fraud Claim

Miske v. Coexter (2012) 204 Cal.App.4th 1249 – Defrauded limited partner treated as innocent third party and obtained $1.4M fraud compensatory verdict. Defrauded limited partner assigned fraud claim to another, which led trial court to award attorney's fees of another $1.34M to assignee based on a broad fee clause encompassing dispute contained in the limited partnership agreement (LPA). The Court of Appeal reversed fee award; assignor/defrauded partner assigned only the fraud claim, not the LPA rights that included the fee clause. Assignee was never a substitute limited partner from the assignment. The assignment agreement, as drafted, failed to allow the assignee the benefits of a potential fee recovery.

Contractual Attorney's Fees – Prevailing Party Determination

Kandy Kiss of California, Inc. v. Tex-Ellent, Inc. (2012) 209 Cal.App.4th 604 – The trial court award contractual attorney's fees to respondent seller after dismissing appellant buyer's breach of warranty complaint for lack of subject matter jurisdiction. The Court affirmed, reasoning that the seller completely prevailed on the contract claim by obtaining an unqualified dismissal. The buyer's ability to refile its action in another forum did not deprive the trial court of authority to award fees.

Contractual Attorney's Fees – Promissory Estoppel Action is not an Action On a Contract Under § 1717

Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc. (2012) 211 Cal.App.4th 230 – The trial court denied Defendant subcontractor's C.C. § 1717 attorney fees after a bench trial, despite the fact that the Defendant prevailed on Plaintiff's breach of contract claims, because the Plaintiff general contractor prevailed on its promissory estoppel claims. The Court of Appeal reversed, holding that a promissory estoppel claim was not a claim "on a contract" and therefore Plaintiff's success on that claim was irrelevant to the prevailing party determination under § 1717. As such, the Defendant, as the party prevailing on the contract, was entitled to recover attorney fees reasonably incurred in defeating the breach of contract claim.

Eligible Attorneys – Fee Award to Attorney Who is a Member of an Association That is a Prevailing Party

Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg (2012) 206 Cal.App.4th 988 – The Court of Appeal decided novel fee recovery case under Code of Civ. Proc. § 1021.5 (private attorney general doctrine) and CEQA. Petitioners successfully challenged City's certification of report and approvals for City development under CEQA. One Petitioners' member was attorney with CEQA litigation experience, and agreed to work on case on a contingent fee basis with other attorneys. The trial court granted Petitioners' petition for writ of mandate, and granted motion for fees under § 1021.5. On appeal, City contended the member/attorney was a named party in the action, and under CC § 1717, an attorney who litigates in pro per may not recover fees. Court of Appeal affirmed fee award, though acknowledged CC § 1717 doctrine that an attorney who litigates in pro per may not recover fees. The Court of Appeal noted that a member of an organization may recover fees under § 1021.5 as long as attorney meets requirements of private attorney general doctrine. The trial court here could reasonably conclude that each attorney had attorney-client relationship with organization and with other individual petitioners. Moreover, organization was large enough so there was no cause for concern the attorney member might be self-dealing. Thus, under circumstances, attorney's status as a party member did not preclude award of fees; member/attorney vindicated important public interest affecting general public.

Eligible Attorneys – Law Firm may not Recover Fees for "Of Counsel" Attorneys

Sands & Assoc. v. Juknavorian (2012) 209 Cal.App.4th 1269 – A law firm sought unpaid fees from a client in a mandatory fee arbitration proceeding. The firm was represented by two lawyers who had an "of counsel" relationship with the firm. After prevailing in the arbitration, the law firm successfully moved to confirm the award, and then moved to recover its attorneys' fees incurred in doing. The trial court granted contractual attorney's fees. The Court of Appeal reversed. Establishing a bright line rule, the Court of Appeal held that a law firm cannot recover attorney's fees for representation by its own "of counsel" attorneys. The Court based its decision on two well-established legal principles: (1) when a law firm is the prevailing party in a lawsuit and is represented by one of its partners, members, or associates, it cannot recover attorney's fees even though the litigation is based on a contract with a prevailing party clause, and (2) the relationship between a law firm and "of counsel" is "close, personal, continuous, and regular." The Court reasoned that because the relationship between a law firm and "of counsel" is close, personal, regular and continuous, it constitutes a single, de facto firm and thus the firm cannot recover attorney fees under a prevailing party clause when, as a successful litigant, it is represented by its own "of counsel."

Fee-Sharing Agreement – Equitable Estoppel Against Attorney Who Caused Non-Compliance With Ethical Requirements for Fee Sharing Agreement

Barnes, Crosby, Fitzgerald & Zeman LLP v. Ringler (Dec. 19, 2012) __ Cal.App.4th __, 2012 Cal.App.LEXIS 1290 (**Ikola**, Rylaarsdam, Aronson) – A law firm referred a potential class action suit to an attorney. In return, attorney promised to pay the law firm a third of any legal fees recovered. After the attorney later substituted new class representatives and refused to disclose the fee-splitting agreement to them or the Court, the law firm filed suit, seeking a declaration that a fee-splitting relationship existed between the law firm and the attorney. Finding in favor of the attorney, the trial court ruled that the law firm's noncompliance with the rule governing agreements to share legal fees (Rules Prof. Conduct, rule 2-200) rendered the referral fee agreement nonexistent. The Court of Appeal reversed, holding that an attorney may be equitably estopped from claiming that a fee-sharing contract is unenforceable due to noncompliance with Rules Prof. Conduct, rule 2-200, or Cal. Rules of Court, rule 3.769, where that attorney is responsible for such noncompliance and has unfairly prevented another lawyer from complying with the rules' mandates. The trial court should have allowed a trial on whether the contract applied to the class action and whether Defendants were equitably estopped from claiming the contract was unenforceable.

Private Attorney General Statute – Fees not Recoverable Where Plaintiff Pursued Its Own Financial Interests

Azure Ltd. v. I-Flow Corp. (2012) 207 Cal.App.4th 60 (**Ikola**, Bedsworth, Fybel) – The trial court denied Plaintiff's several fee motions under private attorney general doctrine, Code of Civ. Proc. § 1021.5. The Court of Appeal affirmed. To justify fees under § 1021.5, Plaintiff's action must result in enforcement of important right affecting public interest, Plaintiff must obtain ruling that confers significant benefit on general public, and necessity and financial burden of private enforcement make award appropriate. Here, although dispute between parties raised issue regarding a right important to the public, § 1021.5 did not authorize attorney fee award against Defendant because Plaintiff's primary concern was to pursue own financial interests. Furthermore, no evidence suggested Defendant took action to impact general public. Thus, merely advancing the state of law does not transform a private dispute over substantial economic losses into a § 1021.5 case in which fees may be awarded for serving the public interest as a private attorney general.

Private Attorney General Statute – Fees Recoverable Where Action Results in Published Opinion Conferring a Benefit on the General Public

Samantha C. v. State Dept. of Dev. Svcs. (2012) 207 Cal.App.4th 71 – Plaintiff appeals from an order of the trial court denying attorney fees under the private attorney general statute (Code of Civ. Proc. § 1021.5). The trial court denied fees because action only benefitted the Plaintiff, and not other members of the public. Ordinarily, the standard of review for denial of attorney's fees

under Code of Civ. Proc. § 1021.5 is abuse of discretion. Nevertheless, where, as here, the Court of Appeal's opinion provides the basis upon which the attorney fees are sought, an appellate court is in as good a position as the trial court to determine the issue, and de novo review is appropriate. Here, the plaintiff won an appeal that resulted in a published decision resulting in the enforcement of an important right affecting the public interest and thereby conferred a significant benefit on the general public. Thus, the trial court's denial of fees on the grounds that the action only benefitted the Plaintiff, and not other members of the public, was incorrect. As such, the Court of Appeal reviewed the denial of fees *de novo* and concluded Plaintiff is entitled to attorney fees under § 1021.5.

Statutory Fee Award – Award Payable to Attorney, not Client

Henry M. Lee Law Corp. v. Superior Court (2012) 204 Cal.App.4th 1375 – Client substituted herself in pro per after the trial court awarded damages for wage and hour violations. Client's former attorney sought to intervene and amend postjudgment order making attorney fees award payable to his firm. Court held, absent a contract determining a different disposition of an attorney fee award, fees awarded under Lab. Code in excess of fees already paid to the attorneys by the client, should be payable directly to attorney who provided legal services. The award to client was error.

Statutory Fee Award – Civil Code § 1363.09(b) Allows Fee Award to Prevailing Plaintiffs, not Defendants

That v. Alders Maint. Ass'n (2012) 206 Cal.App.4th 1419 (**Moore**, Bedsworth, Aronson) – Plaintiff homeowner filed suit against his homeowners association arising from an association election. The trial court sustained the association's demurrer without leave to amend, and the association sought its attorneys' fees under Civ. Code § 1363.09(b), which allows a prevailing homeowners association to recover its "costs" where the Plaintiff's claims are "frivolous, unreasonable, or without foundation." The trial court found that the action was frivolous and awarded fees to the association. The Court of Appeal reversed. The Court of Appeal held that, as used in § 1363.09(b), "costs" does not include attorneys' fees. This is despite the fact that § 1363.09(b) authorizes attorneys' fees for a prevailing homeowner. The Court observed that statutory attorney fee awards must be specifically authorized by the statute in question, and that § 1363.09(b) could not be read as including attorneys' fees in its use of the term "costs." The Court expressed sympathy for the Defendant and agreed that the legislature should amend the statute, but explained that it had no power to rewrite the statute itself.

Statutory Fee Award – Standard to Recover Fees for Trade Secret Claim Made in "Bad Faith"

SASCO v. Rosendin Electric, Inc. (2012) 207 Cal.App.4th 837 (**Ikola**, Rylaarsdam, Aronson) – Plaintiff sued a competitor and individual Defendants alleging misappropriation of trade secrets and related torts. After the Plaintiff dismissed its claims, the Defendants moved for attorneys'

fees under Civ. Code. § 3426.4, which permits a fee award to a prevailing Defendant in trade secret actions where the Plaintiff's claim was made in "bad faith." In support of their motion, the Defendants did not affirmatively prove that they had not misappropriated trade secrets, but rather established only the absence of any evidence of misappropriation in the record. The trial court granted the motion, and the Court of Appeal affirmed. The Court observed that, under existing law, "bad faith" as used in § 3426.4 includes "objective speciousness," which exists where the action superficially appears to have merit but there is a complete lack of evidence to support the claim. Under this standard, it is enough for the defense to point to the absence of evidence of misappropriation in the record. It is not required to conclusively prove the absence of misappropriation. The Court also noted that Code of Civ. Proc. § 128.7 does not set the standard for frivolousness in a trade secret case; Civ. Code. § 3426.4 and its associated case law does.

ATTORNEYS – GENERAL

Billing Records – Bills of a Public Agency's Attorneys are not Exempt from Disclosure Under the Public Records Act

County of Los Angeles v. Superior Court (2012) 211 Cal.App.4th 57 – An attorney sought disclosure of records under the California Public Records Act (CPRA). The records sought showed how much law firms representing the County in a separate action had charged the County in attorney fees. The County argued the documents were not subject to disclosure because they were exempt from disclosure under CPRA's protection for records pertaining to pending litigation. The trial court disagreed and ordered disclosure of invoices redacted to protect attorney work product, limited to "the hours worked, the identity of the person performing the work, and the amount charged." The Court of Appeal affirmed. The Court explained that, while under the CPRA every person has a right to inspect any public record, records pertaining to pending litigation in which a public agency is a party are exempt. Under this exemption, only documents specifically prepared for use in litigation are protected from disclosure. The Court held that bills submitted to state or local public agencies by attorneys for legal work are submitted for normal recordkeeping to facilitate the regular payment of fees, not for use in litigation. As a result, bills submitted public agencies are open to public review and copying and are not exempt from disclosure under CPRA's protection for "records pertaining to pending litigation."

Conflicts of Interest – Filing Suit Against Corporation While Also Representing Shareholder

Shen v. Miller (2012) 212 Cal.App.4th 48 – Miller and Shen owned Arnon Development Group Inc. (Arnon) as 50/50 shareholders. The pair eventually became embroiled in dispute, causing three related actions, all of which involved Miller, Shen, and Arnon. In one of the actions, Shen brought a derivative suit on behalf of Arnon. Attorney Walton represented Shen in all three

actions. Miller moved to disqualify Walton on the ground that he was representing Shen on one case against Arnon, while simultaneously representing Shen, purportedly on behalf of Arnon, in the derivative suit. The trial court denied the motion. The Court of Appeal affirmed, holding that the shareholder's motion to disqualify was properly denied because the attorney did not represent the corporation in the derivative action. An attorney-client relationship can only be created by express or implied contract when a party seeking legal advice consults an attorney and secures that advice. Here, Miller did not establish any facts of an implied attorney-client agreement between Walton and Arnon. Moreover, while a derivative action technically is brought "in right of" the corporation, the Court held that an attorney's mere filing of the derivative action does not create an attorney-client relationship with the corporation.

Malicious Prosecution – "Standby Counsel" Potentially Liable Despite Passive Role

Cole v. Patricia A. Meyer & Assoc., APC (2012) 206 Cal.App.4th 1095 – Plaintiff brought a malicious prosecution action against several attorneys for shareholders in an underlying fraud case. The Defendants included both lead counsel that handled the case on a day-to-day basis, and "standby counsel" – a firm that had been retained to try the case were it to go to trial, but had no involvement in the day-to-day handling of the case. The trial court granted standby counsel's special motion to strike under the anti-SLAPP statute, finding that because Standby counsel had played no active role in litigating the underlying case, they could not be liable for malicious prosecution. The Court of Appeal reversed. The Court observed that standby counsel had appeared on all of the pleadings and papers filed for the Plaintiffs in the underlying case, and were not insulated from liability for malicious prosecution simply because they took a passive role in the case as standby counsel. An attorney of record, the Court held, is obligated to investigate the merits of the case and to avoid frivolous or vexatious litigation, and cannot avoid these obligations by remaining ignorant of the relevant facts and law. The evidence was sufficient to show that standby counsel had made no "effort to independently investigate and research the validity" of their clients' claims, and instead "lent their names to the case with indifference to its actual merit." This evidence, the Court held, would be sufficient to support a malicious prosecution claim against standby counsel.

Malpractice – Statute of Limitations

Croucier v. Chavos (2012) 207 Cal.App.4th 1138 (**Ikola**, Rylaarsdam, Fybel) – Plaintiffs sued their former lawyers for legal malpractice in allegedly failing to enforce a default judgment. The trial court sustained the lawyers' demurrer based on the statute of limitations without leave to amend. The Court of Appeal affirmed. The Court held that the Plaintiffs had discovered the facts giving rise to their claims, and thus triggered the one year statute of limitations for claims against attorneys under Code of Civ. Proc. § 340.6, as soon as they hired new counsel and new counsel began to take the steps to enforce the judgment that the Plaintiffs contended the Defendant lawyers should have taken. Because that occurred more than a year before the

Plaintiffs filed suit, their claim was barred unless one of § 340.6's tolling provisions applied. In particular, the Court analyzed whether the Plaintiffs had suffered "actual injury" more than a year before filing suit. The Court found that they had, concluding that they suffered actual injury as soon as the Defendant attorneys negligently failed to enforce their judgment. Though the damages resulting from the malpractice might be impacted by subsequent events, including ongoing collection efforts, that did not change the fact that the Plaintiffs had sustained actual injury for purposes of tolling under § 340.6.

Malpractice Liability – High Standard of Proof in "Settle and Sue" Case

Filbin v. Fitzgerald (2012) 211 Cal.App.4th 154 – Husband and wife Plaintiffs sued their former attorney for legal malpractice, contending that the attorneys' alleged negligence caused them to receive a settlement in an underlying eminent domain case that was less favorable than it would have been absent the attorneys' negligence. Specifically, the Plaintiffs claimed that the attorney had made various errors in representing them and, after replacing the attorney with new counsel, were forced to accept an unfavorable settlement. Following a bench trial, the trial court entered judgment in the Plaintiffs' favor on the malpractice claim. The Court of Appeal reversed. The Court first explained that, in a "settle and sue" legal malpractice action such as this one, the plaintiff must prove that, but for the malpractice, she would *certainly* have received more money. Simply showing that the lawyer erred is not enough. The Court noted the requirement that a plaintiff need prove damages to a "legal certainty" is difficult to meet in "settle and sue" cases because claims of inadequate settlement are often inherently speculative because settlement involves a wide spectrum of considerations and broad discretion. While the Court backed away from a decision flatly prohibiting liability against former counsel for less favorable settlement, the Court nevertheless concluded that, under the facts before it, the Plaintiffs had failed to prove causation or damages as a matter of law.

Malpractice Verdicts – Offset for Settlement by Non-Attorney Co-Defendants

Oliveria v. Kiesler (2012) 206 Cal.App.4th 1349 (**Moore**, Bedsworth, Aronson) – A widow sued her stepsons, a law firm, a lawyer, and a paralegal relating to an estate plan that the widow claimed divested her of her joint tenancy interest in a marital estate. Before trial, the widow settled with her stepsons, who then filed a successful motion for determination of good faith settlement under Code of Civ. Proc. § 877. The widow then proceeded to trial against the remaining Defendants, and the jury awarded her $200,000 in damages. Over the widow's objection, the trial court then applied a § 877 offset for the stepsons' settlement, reducing the verdict to zero. The widow appealed, and the Court of Appeal affirmed. The Court held that a § 877 offset is properly applied where the tortious acts of the codefendants operate to produce a singular injury, irrespective of the legal theories asserted in the complaint. Moreover, when multiple defendants are responsible for the same compensatory damages, a double recovery cannot be allowed. Here, because (1) there was only one injury (the loss of anticipated survivorship interests caused by the estate plan), (2) the torts committed were part of a single

plan (decedent's son hired the law firm to instigate a change in his father's estate plan and the firm did what he hired it to do), and because legal professional may be joint tortfeasors with their clients, the Court found that the offset applied to the legal malpractice verdict was proper.

Work Product Protection – Applicability to Witness Statements and Identity of Witnesses

Coito v. Superior Court (2012) 54 Cal.4th 480 – In *Coito*, the California Supreme Court addreses the applicability of work product protection to recordings of witness interviews conducted by investigators employed by Defendant's counsel, and information concerning the identity of the witnesses from whom Defendant's counsel has obtained statements. Defendant objected to Plaintiff's request for discovery of these items, invoking the work product privilege. The trial court sustained the objection, concluding as a matter of law that the recorded witness interviews were entitled to absolute work product protection and that the other information sought was work product entitled to qualified protection. A divided Court of Appeal reversed, concluding that work product protection does not apply to any of the disputed items. The Supreme Court held that the recorded witness statements are entitled as a matter of law to at least qualified work product protection. Witness statements may be entitled to absolute protection if defendant can show that disclosure would reveal its attorney's impressions, conclusions, opinions or legal research theories. The Court noted that this may occur when a witness's statements are inextricably intertwined with explicit comments or notes by the attorney, or when the questions that the attorney has chosen to ask (or not ask) provide a window into the attorney's theory of the case or the attorney's evaluation of what issues are most important. The Court also noted that allowing discovery of such statements as a default rule would undermine the Legislature's policy behind the work product protection to: (a) preventing free riding on other attorney's work, and (b) encourage attorneys to thoroughly prepare and investigate their cases.

As to the identity of witnesses from whom defendant's counsel obtained statements, the Court held such information is not automatically entitled as a matter of law to absolute or qualified work product protection. In order to invoke the privilege, defendant must persuade the trial court that disclosure would reveal the attorney's tactics, impressions, or evaluation of the case (absolute privilege) or would result in opposing counsel taking undue advantage of the attorney's industry or efforts (qualified privilege). Based on this opinion, in conducting interviews, counsel could strategically gain attorney work product protection by laying a foundation of counsel's impressions, conclusions, opinions or legal research theories or be prepared to make specific showings.

Based on these holdings, the Supreme Court reversed the Court of Appeal, and remanded the matter to the trial court for further proceedings in light of the Court's direction.

CIVIL PROCEDURE

Capacity to Sue and Statute of Limitations – A Corporation's Lack of Capacity May Effectively Bar Lawsuit Even if it is not Asserted in Answer

V & P Trading Co., Inc. v. United Charter LLC (Dec. 19, 2012) ___ Cal.App.4th ___, 2012 Cal.App.LEXIS 1285 – Under Revenue & Taxation Code § 23301, a corporation that fails to pay its taxes may be suspended, and lose its capacity to sue. The defense of lack of capacity, however, is waived if it is not asserted in the defendant's answer. In *V & P Trading Co.*, the Plaintiff was suspended when the action was first filed. The Defendant failed to assert capacity to sue in its answer, but did assert the statute of limitations. By the time the Plaintiff realized the problem, paid its taxes, and had the suspension lifted, the statute of limitations had run, and the Defendant filed a motion for summary judgment. The Court of Appeal held that the filing of the complaint while the Plaintiff lacked standing to sue was not effective, and did not toll the statute of limitations. Moreover, because the statute of limitations was a separate defense, it did not matter that lack of capacity was not asserted in the Defendant's answer, and the trial court did not err in granting summary judgment on the grounds that the action was time-barred. The Court of Appeal reasoned that the statute of limitations defense relies on the fact that the corporate powers *were* suspended at the time the complaint was filed, while the defense of lack of capacity is based on the fact that the corporate powers *are currently* suspended. Because of this distinction, the Court held that the two defenses are not so intertwined that a Defendant cannot raise one defense without also raising the other.

Disqualification

Single Challenge Rule – Peremptory Challenges by Different Plaintiffs in Related Cases Held Valid

Pickett v. Superior Court (2012) 203 Cal.App.4th 887 – Two employees of the same employer filed separate lawsuits against the employer alleging similar claims for alleged labor code violations. The cases were deemed related and assigned to the same judge. The employee in the second action filed a peremptory challenge against the assigned judge under Code of Civ. Proc. § 170.6. The trial court rejected the challenge because the employee in the first action had previously filed a § 170.6 challenge. The Court found that § 170.6's one challenge per side limitation applied because the two employees alleged identical claims arising from the same alleged misconduct. The Court of Appeal granted a petition for writ of mandate directing the trial court to vacate its order and issue a new order accepting the second employee's peremptory challenge. The Court held that while the two employees alleged the same types of claims arising out of the same misconduct, they were nevertheless separate Plaintiffs, with separate claims, in separate actions. Accordingly, each employee had separate rights under § 170.6.

Time to Disqualify Judge on Remand Triggered by Assignment of Judge, not Remittitur

Ghaffarpour v. Superior Court (2012) 202 Cal.App.4th 1463 – Former Los Angeles County Superior Court local rule 7.5(f) required a successfully appealing party to file a peremptory challenge under Code of Civ. Proc. § 170.6 within 60 days of issuance of the remittitur. § 170.6 itself states that such a challenge must be filed within 60 days of the date the party or its attorney receives notice of the judge's assignment. In this case, the Plaintiffs successfully appealed an order by the trial court. The Court of Appeal issued its remittitur on August 26, 2010, but the Plaintiffs did not receive notice of assignment of the trial judge until over ten months later, on June 3, 2011. The Plaintiffs then filed a peremptory challenge under § 170.6 within 60 days of that notice. The trial court denied the challenge based on its local rule. The Court of Appeal issued a writ of mandate directing the trial court to vacate its order rejecting the challenge. The Court held that the L.A. Superior Court's local rule conflicted with § 170.6, and the provisions of § 170.6 prevailed.

Judicial Abstention Doctrine

Klein v. Chevron (2012) 202 Cal.App.4th 1342 – In a class action suit, Plaintiffs sued Chevron for violation of the Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA), alleging that Chevron overcharged California customers for gasoline based on the temperature at which Chevron sold the gasoline. The trial court granted Chevron's motion for judgment on the pleadings for the UCL and CLRA claims, concluding it should exercise judicial abstention because the California Energy Commission (CEC) had been asked by the Legislature to complete a cost/benefit analysis of requiring equipment that adjusts the price of gas depending on its temperature. The Court of Appeal reversed, holding that the trial court erred by invoking the judicial abstention doctrine at the pleading stage. The Court determined that abstention is appropriate where 1) Plaintiff's claims necessarily require the trial court to resolve complex policy issues and 2) there is an alternative mechanism to resolve Plaintiff's complaints. Here, however, the Court of Appeal found that it was not clear at the pleading stage that adjudicating Plaintiffs' claims would require the trial Court to resolve complex policy issues. The CEC was merely doing a cost/benefit analysis and had not taken further action to address the issue of adjusting the price of gas based on its temperature and other claims asserted by the Plaintiffs. Moreover, there was no existing, alternative means of addressing Plaintiffs' claims.

Jury Misconduct – Substantial Evidence Rule and Consideration of Insurance During Deliberations

Barboni v. Tuomi (2012) 210 Cal.App.4th 340 (**Moore**, Aronson, Fybel) – The Court affirmed the trial court's denial of Plaintiff's motion for new trial based on juror misconduct under Code of Civ. Proc. § 657(2). One juror declared that consideration of the parties' insurance status influenced the verdict, whereas the other eight jurors provided declarations agreeing that there was no extended discussion, no consideration of double recovery, and no impact on the verdict. The Court found that the case came down to a battle of the declarations, and therefore,

substantial evidence, and the trial court had substantial evidence to agree with the eight rather than the one. Though two jurors recalled mentions of insurance, mere mention does not constitute consideration.

Law and Motion – Time to File Motions After Bankruptcy Stay

Lewow v. Surfside III Condo. Owners Ass'n (2012) 203 Cal.App.4th 128 – In *Lewow*, the Plaintiff declared bankruptcy after losing his case against the Defendant condominium association. The Defendant prepared a motion for attorney's fees, but delayed filing it due to the bankruptcy stay. The ordinary 60 day period for filing the motion expired while the bankruptcy proceeding was pending. Thirty two days after mailing of the notice of dismissal the bankruptcy proceedings, Defendant filed the fee motion and the trial court awarded the requested fees. The Court of Appeal held that, contrary to the Defendant's understanding, the automatic bankruptcy stay did not toll the running of the 60-day period for filing the fee motion under Cal. Rules of Court rule 3.1702(b). Because rule 3.1702(b) is not a statute of limitation, Code Civ. Proc., § 356, which tolls the statute of limitation when the commencement of an action is stayed by injunction or statutory prohibition, was inapplicable. Accordingly, under 11 U.S.C. § 108(c)(2), the date for filing was only extended by 30 days after service of notice of the lifting of the automatic stay. As such, the Defendant's fee motion was filed two days too late. Nonetheless, the Court affirmed, holding that the trial court's acceptance of the Defendant's tolling argument was tantamount to a finding that good cause existed for relief from default under Code of Civ. Proc. § 473.

Personal Jurisdiction – Jurisdiction Over Defentant's Representative in His Individual Capacity

Canaan Taiwanese Christian Church v. All World Mission Ministries (2012) 211 Cal.App.4th 1115 – The trial court granted Plaintiff lessor's ex parte application and ordered Defendant lessee's pastor to sign a proposed written settlement agreement in his individual capacity. The Court reversed, first finding that Defendant had standing to appeal the order as a party to the litigation that had a valid interest in the accurate enforcement of the settlement agreement it reached with Plaintiff. The parties' oral settlement agreement did not require Defendant's pastor to release any personal claims against Plaintiff or sign a written agreement purportedly conforming to the oral settlement in his individual capacity. The pastor never made any representations affirmatively indicating that he was agreeing to the settlement agreement in other than his representative capacity. Further, the trial court lacked personal jurisdiction over the pastor, as he never made a general appearance in his individual capacity in the action. The mere fact that the pastor was present in the courtroom as Defendant's representative did not give the trial court personal jurisdiction over him as an individual.

Sanctions – Attorney's Fees are not a Permissible Sanction for Violation of the Rules of Court

Sino Century Dev. Ltd. v. Farley (2012) 211 Cal.App.4th 688 – The trial court sanctioned law firm and its client under Cal. Rules of Court rule 2.30 for failing to notify the respondent vendor of the automatic stay imposed by the client's bankruptcy filing, and awarded respondent its attorney fees incurred in preparing the sanctions motion and its expenses and attorney fees incurred in preparing for and during trial. The Court held that neither rule 2.30(b) nor rule 2.30(d) authorized the trial court to impose attorney fees as a monetary sanction for a rule violation. Although rule 2.30 authorized the trial court to award reasonable attorney fees incurred in connection with the motion for sanctions, the attorney fees incurred as a result of the underlying rule violation could not be awarded absent specific authorization or agreement of the parties.

Trial Procedure – Right to Due Process not Violated by Resuming Trial after Lunch Break in Party's Absence

Colony Bancorp of Malibu, Inc. v. Patel (2012) 204 Cal.App.4th 410 – The Court held that a defendant's right to due process was not violated by resuming trial after a lunch break without the presence of defense counsel. Code of Civ. Proc. § 594 authorizes a court to proceed with trial in the absence of a party provided that proper notice has been given. Further, counsel defense counsel did not object to the direct examination of a witness commenced during his absence, and there was no showing of prejudice, given that the testimony laid the foundation for admission of an exhibit as to which Defendant had no objection.

CONTRACTS

Assignment Agreement – Standing/Unauthorized Practice of Law Under Assignment of Claims to Pro Per Debt Collectors

Fink v. Shemtov (2012) 210 Cal.App.4th 599 (**Fybel**, Aronson, Ikola) – The Court reversed the trial court's judgment that Plaintiff, a creditor's assignee, did not have standing to pursue a collection action against Defendant purported debtors because the assignment of claims was invalid. The creditor made an absolute assignment of its claims to the assignee, who agreed to split with the creditor any recovery he obtained after prosecuting the assigned claims. The assignee did not agree to represent the creditor or to provide any legal advice to the creditor, and filed the collection action in his own name and was the sole Plaintiff. The creditor did not retain any control over, or the right to control, the litigation of the assignment claims following the assignment. The Court held that the assignment effectively vested legal title to the claims in the assignee, thereby enabling the assignee to file suit in his own name. The assignment agreement did not give rise to a joint venture, and the assignee did not engage in the unauthorized practice of law.

Intellectual Property: Transfer of Copyright Must be Signed by the Owner or Owner's Duly Authorized Agent

MVP Entm't., Inc. v. Frost (2012) 210 Cal.App.4th 1333 – In a copyright transfer dispute, the Court determined that an email to Plaintiff entertainment company from Defendant author's attorney stating "done. thanks" did not create a binding contract. Under 17 U.S.C. § 204 of the Copyright Act, copyright ownership cannot be transferred unless it is in writing and signed by the owner of the rights conveyed or the owner's duly authorized agent. Ostensible authority is insufficient to effectuate a transfer of copyright.

CORPORATIONS

Breach of Stock Option Agreement – Calculation of Value of Minority Interest

Maughan v. Correia (2012) 210 Cal.App.4th 507 – The Court found that the trial court incorrectly calculated respondent's minority interest in the parties' family run corporation for purposes of determining her damages. The award of damages included a 40 percent minority discount to account for the fact that respondent's interest in the corporation did not enable her to exercise control over the corporation. The Court explained that the trial court should have applied the 40 percent discount directly to the value of the additional minority interest respondent was entitled to purchase pursuant to the stock option agreement, so that respondent's damages would reflect the true intrinsic value of her stock option. Instead, the trial court had first deducted the contract price from the value of respondent's undiscounted minority interest, and then applied the minority discount, resulting in a windfall to respondent and prejudicing appellant.

Successor Liability of Corporation Taking Over an Unincorporated Line of Business

Cleveland v. Johnson (2012) 209 Cal.App.4th 1315 – The Court affirmed judgment on jury trial against Defendants, corporation and its president, which found them liable to Plaintiff investors for breach of contract based on successor liability and ratification theories. The jury also found a breach of fiduciary duty and awarded punitive damages. The investors provided capital to a company with the agreement that they would receive a percentage of profits from the line of business the company developed. The president and other controlling shareholders obtained assignments of equipment leases from the company and formed a new corporation to run the line of business, and the company became insolvent. The Court held that the doctrine of successor liability may be applied to a corporation that succeeds to the assets of an unincorporated, but clearly separate, line of business of another corporation. Moreover, evidence of fraud provides an additional ground for successor liability. The Court also held that a promoter and its corporation owed a fiduciary duty to their investors where the investors' position is

indistinguishable in any pertinent way from the position of stockholders, although the investors received no stock.

DISCOVERY

Motion to Compel – Failure to Timely Object to Lack of Capacity to Sue

V & P Trading Co., Inc. v. United Charter LLC (Dec. 19, 2012) ___ Cal.App.4th ___, 2012 Cal.App.LEXIS 1285 – In the same lack of capacity case discussed on page 41, above, the trial court denied Plaintiff corporation's motion to compel Defendants to answer a set of special interrogatories and awarded discovery sanctions to Defendants because Plaintiff was a suspended corporation that lacked the capacity to prosecute the action when it filed the motion to compel. The Court reversed the sanctions order, concluding that Defendants could not raise Plaintiff's lack of capacity as a basis for opposing the motion to compel because Defendants waived the argument by failing to timely raise it in the answer. Because Defendants based their opposition solely on lack of capacity, the trial court should have granted Plaintiff's motion to compel. Accordingly, the necessary predicate of an unsuccessful motion to compel did not exist to uphold the award of monetary sanctions against Plaintiff and its attorney.

Discovery Costs – Prevailing Party's Recovery of Class Notice-Related Costs

In Re Insurance Installment Fee Cases (2012) 211 Cal. App. 4th 1395 – The trial court dismissed insureds' causes of action disputing a service fee charged by their insurer for installment payments, and granted the insureds' motion to tax costs the insurer incurred in providing notice to putative class members regarding discovery. The Court reversed the postjudgment order and remanded to the trial court with directions to determine the reasonable amount of notice-related costs incurred by the insurer and to award those costs to the insurer as the prevailing party. The trial court abused its discretion in denying the insurance company notice-related costs because the discovery involved significant special attendant costs beyond those typically involved in responding to routine discovery, and the notice was necessary to protect the putative class members' privacy rights under the California Constitution and was required by Court order.

Sanctions – Terminating Sanctions for Discovery Misconduct Unavailable in Quiet Title Actions

Nickell v. Matlock (2012) 206 Cal.App.4th 934 – After imposing terminating sanctions on occupants of property as a consequence of their repeated failure to appear for depositions, the trial court entered a default judgment in favor of the claimant in a quiet title action. No evidentiary hearing was held prior to the entry of the default judgment. The Court of Appeal reversed the judgment, holding that the occupants were entitled to appear and participate in an open-court, evidentiary proceeding the merits of the Plaintiff's quiet title actions. The Court held that default judgments are prohibited in quiet title actions because Code of Civ. Proc. § 764.010

requires an evidentiary hearing to establish Plaintiff's title and hear evidence offered respecting the claims of any of the Defendants. The Court also held that the provision authorizing a judgment by default as a discovery sanction, Code of Civ. Proc. § 2023.030, was inapplicable because it was inconsistent with the quiet title provisions, Code of Civ. Proc. § 760.060.

EMPLOYMENT AND LABOR

Discrimination – Ministerial Exception

Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC (2012) 132 S.Ct. 694 – Do the Establishment and Free Exercise Clauses of the First Amendment bar an employment discrimination action when the employer is a religious group and the employee is one of the group's ministers? The Court answered yes. Under the Establishment and Free Exercise Clauses, courts have recognized a "ministerial exception" to employment discrimination laws that bars discrimination claims relating to religious organizations' selection of "ministerial" employees. While refusing to determine a rigid formula to decide when an employee qualifies as a minister, the Court here held a "called teacher" qualified as a "ministerial" employee because of the formal title the church gave to the teacher, the substance reflected in that title, the teacher's own use of that title, and the important religious functions she performed for the church. The Court narrowly held the ministerial exception bars an employment discrimination suit brought on behalf of a minister, challenging her church's decision to fire her.

Discrimination – Religious and National Origin Harassment Claims Intertwined

Rehmani v. Superior Court (2012) 204 Cal.App.4th 945 – Petitioner employee, a Muslim engineer born in Pakistan, filed a petition for writ of mandate as to claims for workplace harassment based on national origin and religion after respondent trial court granted summary adjudication on those claims. The Court granted the petition and directed the trial court to vacate its order granting summary adjudication of the harassment causes of action and enter a new order denying the motion as to real party in interest employer. The summary judgment evidence sufficiently established a triable claim against the employer for harassment based on national origin, including evidence of rudeness, taunting, and intimidation from Indian engineers toward non-Indian colleagues, the employer's failure to take appropriate steps despite the petitioner's multiple protests, and the employer's favoritism toward Indian engineers. Although the claim of harassment based on religion might have been less tenable, the Court could not regard that cause as independent of the evidence related to national origin, considering the international climate of tension between Muslims and non-Muslims and that factor's interaction with relations between various countries (including Pakistan and India).

FEHA Standing – Partner Has Standing to Sue for Harassment and Retaliation

Fitzsimons v. California Emergency Physicians Medical Grp. (CEP) (2012) 205 Cal.App.4th 1423 – Fitzsimons, a partner at CEP, alleged the partnership retaliated against her because she reported certain CEP officers and agents had sexually harassed female employees. The trial court entered judgment for CEP on the ground that a partner does not have standing to sue her partnership under FEHA (Gov. Code § 12900, *et seq.*). The trial court, relying on the decision in *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, agreed with CEP that § 12940(h) does not apply to retaliation by a partnership against a partner, because partners are not in an employer-employee relationship. The Court of Appeal reversed, reasoning § 12940(h) first prohibits a person from retaliating, and secondly states the retaliation must not be against a person who opposes discrimination or harassment of other employees. The Court determined *Jones* did not hold the second reference to a "person" in § 12940(h) excludes partners or others who are not the victim of harassment. The first reference to a "person" does not include non-employer individuals. The Court thus held that Fitzsimons, although a partner, is a person whom § 12940(h) protects from retaliation for opposing the partnership-employer's harassment against those employees.

FEHA – Standard of Causation

Alamo v. Practice Mgmt. Info. Corp. (2012) 210 Cal.App.4th 95 – Plaintiff employee sued Defendant employer for pregnancy discrimination and retaliation in violation of the California Fair Employment and Housing Act (FEHA) and wrongful termination in violation of public policy. The jury found in Plaintiff's favor, and the trial court awarded prevailing party attorney fees to the plaintiff. On appeal, the Defendant argued that the trial court committed prejudicial error in (1) instructing the jury that the employee had to prove her pregnancy-related leave was "a motivating reason" for her discharge rather than the "but for" cause of her discharge. While the California Supreme Court has not addressed whether the CACI instructions' use of the phrase "a motivating reason" accurately describes the standard of causation in a FEHA claim, the Court of Appeal affirmed the judgment of the trial court pending further guidance by the Supreme Court on this issue. While the language and legislative purposes of the ADEA requires a plaintiff to prove discriminatory animus was the "but for" cause of the adverse employment action, the same is not required of a plaintiff under FEHA, thus the trial court's use of the "motivating factor" standard of causation instructions was proper.

Hazardous Material Exposure –No Duty to Protect Employee's Family Members From Secondary Exposure

Campbell v. Ford Motor Co. (2012) 206 Cal.App.4th 15 – The trial court entered judgment for Plaintiff after a jury found Defendant car company liable for five percent of Plaintiff's damages arising from mesothelioma caused by exposure to asbestos from laundering the asbestos-covered clothing of family members who installed asbestos insulation during the construction of a plant.

The Court reversed, holding that employers owe no duty to protect family members of employees from secondary exposure to asbestos during the course of the employer's business. Further, strong public policy considerations counsel against imposing a duty for such secondary exposure, as the extensive class of secondarily exposed potential Plaintiffs produced a great burden on Defendants and costs to the community. The Court declined to issue a narrowly tailored opinion and instead issued a broader decision relevant to other claims of take home or secondary exposure to toxic materials as well as analyses of whether a duty of care exists in other contexts with similar policy considerations.

Jury Instructions – Business Judgment Instruction in Employment Discrimination Case

Veronese v. Lucasfilm Ltd. (2012) 212 Cal.App.4th 1 – The trial court entered judgment in favor of Plaintiff employee on her claims against Defendant employer for pregnancy discrimination, failure to prevent pregnancy discrimination, and wrongful termination. The Court reversed judgment and remanded the matter for retrial, holding, in part, that it was error to refuse the employer's proposed business judgment instruction. Under the law, the employer's supervising employee may exercise her business judgment, without second guessing. An employer could fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action was not for a discriminatory reason.

Noncompetition Agreement

Fillpoint, LLC v. Maas (2012) 208 Cal.App.4th 1170 (**Fybel**, O'Leary, Thompson) – The trial court granted nonsuit against Plaintiff, a buyer of a business, and for Defendants, former employee and shareholder, his new employer, and the new employer's owner, on buyer's claims of breach of employment agreement and interference with contract. The employee signed a stock purchase agreement that had a three year covenant not to compete, and an employment agreement containing one year covenant not to compete that did not commence until termination of employment. The covenant in the employment agreement extended both to existing and potential customers. The employment agreement also contained an integration clause providing that in the event of any conflicts between the two agreements, the terms of the purchase agreement would prevail. After working for the buyer three years and satisfying the covenant not to compete in the purchase agreement, the employee resigned. Less than a year later, he began working for a competitor, which gave rise to the Plaintiff employer's suit. The Court of Appeal held that he stock purchase agreement and the employment agreement must be read together as an integrated agreement under C.C. § 1642. Nevertheless, the covenant not to compete in the employment agreement was unenforceable because it targeted the fundamental right to pursue a profession, and was not limited to protecting the Plaintiff's existing goodwill.

Noncompetition Agreement in Stipulated Injunction

Wanke, Indus., Commercial, Residential, Inc. v. Superior Court (2012) 209 Cal.App.4th 1151 – Petitioner former employer sought a writ of mandate, challenging, in part, respondent trial court's order denying its motion to enforce a settlement agreement with real parties in interest, a former employee and his competing company, that incorporated a stipulated injunction enjoining the former employee and his company from soliciting certain of the petitioner's customers. The Court reversed the order and remanded the matter, holding that a party could not successfully defend against an alleged violation of a facially valid stipulated injunction that the trial court had jurisdiction to issue on the ground that the injunction was invalid. In the instant case, the stipulated injunction was facially valid. It protected the former employer's trade secrets, and one could not conclude from its face that it did not protect the former employer's trade secrets.

Privacy – Employee Rights to "Reverse-CPRA (California Public Records Act)" Action

Marken v. Santa Monica-Malibu Unified Sch. Dist. (2012) 202 Cal.App.4th 1250 – A public school teacher filed an action to prevent disclosure of personnel files after he was accused of sexually harassing a student. The Court held a third party may file a "reverse-CPRA" suit to prevent an agency's disclosing documents in response to a CPRA request if (1) an agency has made a determination to provide the contested records without judicial intervention and (2) the agency's disclosure of that information may be prohibited by law. While the Constitution guarantees an individual's right to privacy and the public's right of access to information concerning public business, the Court found that the public's right to know outweighed the teacher's privacy interests. Also, in the absence of joinder, the party requesting the disclosure of documents could file an appropriately noticed motion for leave to intervene in the reverse-CPRA action pursuant to Code of Civ. Proc. § 387.

Wage and Hour – Employer Recovery of Attorney's Fees for Split Shift and Reporting Time Claims

Aleman v. Airtouch Cellular (2012) 209 Cal.App.4th 556 – Court of Appeal affirmed summary judgment for employer in putative class action, issuing three notable holdings: (1) employer need not pay employees "reporting time pay" to attend work meetings when meetings are scheduled, and the employees work at least half the scheduled time, even if scheduled time is less than four hours; (2) employer does not owe employees "split shift" compensation if, when they work split shifts, they earned more than the required minimum wages; (3) employer could not recover attorneys' fees because claims arose under Lab. Code § 1194 (the one-way fee-shifting statute for minimum wage and overtime claims), not § 218.5 (allows either party to recover its fees when it succeeds in action for the nonpayment of wages). In March 2012, the Supreme Court granted review in *Aleman* pending decision in *Kirby v Immoos* (2012) 53 Cal.4th 1244. The SC decided *Kirby* in April and transferred *Aleman* to Court of Appeal for reconsideration. The Court of Appeal held again that Plaintiffs could not recover reporting time pay or split shift

compensation, but reversed on attorneys' fees in part. *Kirby* held Lab. Code § 226.7 claims for missed meal/rest periods are not subject to § 1194 because they are not minimum wage claims, nor are they subject to § 218.5 because they are claims for failure to provide meal and rest periods, not for nonpayment of wages. Applying this logic, *Aleman* Court held: (1) a split shift claim is one for minimum wages and is subject to § 1194, but (2) a reporting time pay claim is *not* a minimum wage claim, and is subject to § 218.5, rather than § 1194. The Court of Appeal remanded to award the Defendant only the fees attributable to the reporting time claims.

Wage and Hour – Nearest Tenth Rounding Timekeeping Policy

See's Candy Shops, Inc. v. Superior Court (2012) 210 Cal.App.4th 889 – After reviewing the US Dept. of Labor's rounding standard, the Court held employers in California are entitled to round employee in and out time punches to the nearest tenth of an hour, provided the policy is fair and neutral on its face and will not result in failure to compensate employees properly for the time they actually worked. Notably, the employer did not ask the trial court to find its policy lawful as a matter of law; rather, the employer opposed Plaintiff's motion for summary adjudication and asked the court to allow it to litigate its affirmative defenses at trial. Therefore, although a rounding policy is not a *per se* violation of CA wage laws, this decision does not validate blanket use of rounding policies.

Whistleblowers – Jury Instructions

Mize-Kurzman v. Marin Cmty. Coll. Dist. (2012) 202 Cal.App.4th 832 – The Court reversed the trial court's judgment after concluding it had erroneously instructed the jury at the trial of an employee's claims against a district for violations of the whistleblower protection provisions. Specifically, the trial court erred when it instructed the jury that: (1) the Plaintiff must prove that any disclosure was made in good faith and for the public good and not for personal reasons; (2) debatable differences of opinion concerning policy matters are not protected disclosures; and (3) information passed to a supervisor in the normal course of duties is not a protected disclosure. A whistleblower's motive is irrelevant to the consideration of whether the conduct is protected; the debatable policy matters limitation does not apply where whistleblower reasonably believed the policy violated statutes or regulations, and disclosure in the normal course of duties is not necessarily unprotected. The Court also found error in the admission into evidence the employee's retirement eligibility, as the admission was confusing and prejudicial. No error was found in the instructions that (1) reporting publicly known facts (2) and efforts to determine if a practice violates the law are not protected disclosures.

Wrongful Termination – Expiration of Employment Contract Cannot Give Rise to Wrongful Termination Claim

Touchstone Television Prod. v. Superior Court (2012) 208 Cal.App.4th 676 – Petitioner television production company sought writ review after the respondent trial court denied the petitioner's motion for directed verdict subsequent to declaring a mistrial in a wrongful

termination suit. The Court granted a peremptory writ of mandate compelling the trial court to vacate its order denying petitioner's motion. Real party in interest actress could not pursue a cause of action for wrongful termination in violation of public policy because she was not fired, discharged, or terminated. Rather, the petitioner only chose not to exercise its option to renew her contract. A decision not to renew a contract set to expire is not actionable in tort, even if the decision may have been influenced by her complaints about an unsafe working condition.

EVIDENCE

Admissibility – Expert Witness Testimony

Burton v. Sanner (2012) 207 Cal.App.4th 12 – The Court of Appeal held expert testimony of a retired police officer was inappropriate to determine the issue of reasonable self-defense conduct. Expert testimony is permitted only when the subject matter is sufficiently beyond common experience. Where the jury is as competent as the expert to consider the evidence, there is no need for expert testimony. The issue of self-defense is one of objective reasonable conduct. Because the expert did not raise an issue or circumstance the jury alone could not understand, the Court held the expert testimony usurped the jury's role by inappropriately drawing legal conclusions about the objective reasonableness of conduct. This decision draws a clear line between topics suitable for expert opinion – like certain police tactics – and issues left solely to the jury. It thereby reaffirms the jury's ability to evaluate lay conduct and reach decisions without expert help.

Physician-Patient Privilege – Applicability to Nurses

Duronslet v. Kamps (2012) 203 Cal.App.4th 717 – Physician-patient privilege set forth in Evid. Code § 994 does not apply to statements made to a nurse. Evid. Code § 990 does "physician" to include nurse or any other medical staff.

FIDUCIARY DUTY

Vicarious Liability of Supervising Real Estate Broker

Sandler v. Sanchez (2012) 206 Cal.App.4th 1431 – A salesperson, a corporate employee of a real estate brokerage company, committed tortious acts relating to a loan transaction. Investors sued for breach of fiduciary duty against the designated officer of the real estate brokerage, alleging the officer failed to supervise the salesperson, and the officer successfully demurred. The duty of supervision imposed on an officer who is a designated broker under Bus. and Prof. Code §§ 10159.2 and 10177 is owed not to third parties, but to the corporation. Moreover, the officer could not be vicariously liable under traditional agency principles for the torts of a corporate employee based solely on failure to supervise. Agents who lie to customers will be liable for their own conduct, and the supervising broker will be vicariously liable to the customer for the bad acts. But if supervising broker is a corporation supervising through a designated

officer, then only the corporation (not the officer) will be liable. Even if a principal-agent relationship exists between a designated officer and a real estate salesperson, which the Court did not decide, more would be needed to create such a unique agency relationship between two employees than the officer's mere inaction.

INSURANCE

Conversion – Lender's Equitable Lien on Insurance Proceeds

Los Angeles Fed. Credit Union v. Madatyan (2012) 209 Cal.App.4th 1383 – A car owner was contractually obligated to buy insurance and name his credit union as a loss payee. The owner bought insurance, but did not name the credit union as loss payee. The car was damaged, and the owner cashed a check from his insurance company, with an endorsement by a repair shop, despite the fact that he had not had the car repaired. The credit union sued for conversion of the check, and prevailed against the car owner, the shop owner, and shop manager. When a party contractually obligated to purchase insurance for the mutual benefit of itself and another party breaches that obligation by purchasing insurance solely for its own benefit, an equitable lien is created in the uninsured party's favor on any resulting insurance proceeds. Because credit union had an equitable lien on the insurance proceeds, with which Defendants interfered, the Defendants were liable for conversion. That Defendants did not know credit union had an interest in the car or insurance proceeds was immaterial to conversion action.

Duty to Defend – Additional Insureds

St. Paul Mercury Ins. Co. v. Mountain West Farm Bureau Mut. Ins. Co. (2012) 210 Cal.App.4th 645 – A general contractor's insurance carrier sued subcontractor's carrier where sub's policy named GC as additional insured and sub's insurer refused to defend GC. The Court of Appeal affirmed damages in favor of GC's carrier. The law of equitable contribution governs, and apportions costs among insurers covering the same insured at the same risk level where one insurer paid more than its share. In an equitable contribution action by one insurer against a nonparticipating insurer, the participating insurer only must prove potential for coverage under non-participating insurer's policy. The burden then shifts to non-participating insurer to prove no potential for coverage exists, and lack of coverage must be pled as an affirmative defense. On appeal, sub's carrier admitted it owed a defense duty to GC, but argued it satisfied the duty by defending the sub. The Court of Appeal rejected this argument and ruled sub's carrier owed a separate duty to defend GC as its additional insured. The Court did not limit indemnity to any allocation based on the sub's scope of work or the allegations against the sub. Once the Court determined that the sub's scope of work was widely implicated, the additional insured carrier was liable. Notably, sub's carrier did not defend GC. If it had and a later conflict over defense fees/indemnity arose, the trial court likely would have permitted sub's insurer to debate reasonableness of the defense, indemnity, and allocation.

Duty to Defend – Status of Trademark Infringement Claim Under Advertising Injury Coverage

Hartford Cas. Ins. Co. v. Swift Distrib. Inc. (2012) 210 Cal.App.4th 915 – Company A advertised its product, "Ulti-Cart," which resembled and was similarly named as Company B's product, "Multi-Cart." Company A's ad, however, neither expressly identified Company B's product nor disparaged it. When Company B sued, Company A tendered its defense to its insurer under its "advertising injury" coverage provision, which defined "advertising injury" as injury arising out of publication of material that disparage a person's or organization's goods, products, or services. Because the ad did not identify Company B's product and contained no matter derogatory to Company B's title to its property, quality, or business, the Court determined no disparagement occurred. Thus, no potential for coverage existed and the insured owed no duty to defend.

Duty to Defend – Responsibility of Excess Insurer

Federal Ins. Co. v. Steadfast Insurance Co. (2012) 209 Cal.App.4th 668 – The US sued insureds for discrimination under the Fair Housing Act (FHA). Primary insurance carriers insured against claims for "wrongful eviction," wrongful entry," and "invasion of the right of private occupancy." Excess and umbrella insurance carrier insured against those claims and specifically against discrimination claims. At different times in the FHA action, primary insurance carriers defended insureds. Excess carrier sought a determination that it had no duty to defend in the FHA action, arguing the housing discrimination allegations in FHA action constituted claims for wrongful eviction, wrongful entry, and invasion of the right of private occupancy and thus gave rise to a potential for coverage under the primary insurance carrier policies. Accordingly, because other insurers had a defense duty, excess carrier argues it did not have a duty to defend under excess and umbrella policies. The Court of Appeal rejected that argument and affirmed the trial court's judgment, holding that only the excess and umbrella insurance carrier had a duty to defend in the FHA action because it issued the only insurance policy that provided coverage for discrimination claims. Neither of the primary insurance carriers had a duty to defend because their policies did not cover the discrimination claims in the FHA action.

Proof of Loss – "Notice-Prejudice Rule" Applies to Late Submission of Proof of Loss

Henderson v. Farmers Grp., Inc. (2012) 210 Cal.App.4th 459 – The Court held an insurer may not deny property loss claims solely because of insured's failure to submit proof of loss within 60 days, absent a showing of prejudice by the insurer. Under California law, all fire insurance policies must include a standard form that describes the insured's duties, including giving written notice of any loss without unnecessary delay. While compliance with proof of loss provision is a necessary condition for insurer's obligation to pay benefits, it is not absolute. The purpose of the proof of loss requirement is to assist insurer's investigation of claims and to detect fraud. Here,

the insured's late submission did not compromise these objectives. Thus, the insurer could not use insured's failure to timely submit a proof of loss to justify denying claims without showing substantial prejudice.

Bad Faith – No Bad Faith Refusal to Settle Without a Duty to Indemnify

Dewitt v. Monterey Ins. Co. (2012) 204 Cal.App.4th 233 – Court of Appeal affirmed denial of insured's request to instruct jury on elements of bad faith claim for refusal to settle, holding trial court did not err in refusing Plaintiff's request for instruction on the elements of bad faith refusal to settle even though insurers did not accept an offer to settle underlying action for the policy limit because (1) Plaintiff failed to present substantial evidence that insurers had assumed duty to defend (thereby waiving right to contest coverage), (2) did not establish coverage was determined, and (3) did not request that the jury determine coverage in current action against insurers.

LAND USE AND ENVIRONMENT

Conservation Easements – Forfeiture

Wooster v. Dept. of Fish and Game (2012) 211 Cal.App.4th 1020– Seeking to rescind Dept. of Fish and Game's conservation easement on his property, property owner sued to quiet title, arguing Dept. forfeited easement when it failed to comply with easement's posting requirement condition. Conservation easements are negative easements that impose specific restrictions on property use. An easement may be conveyed on conditions subsequent and extinguished if they occur. A condition subsequent refers to a future event, which, upon occurrence, may make an obligation no longer binding. Generally, the law will interpret instruments to not destroy or extinguish "estates," including easements. Thus, no provision in a deed relied on to create a condition subsequent will be so interpreted if the provision's language bears any other reasonable construction. While there need not be precise phrasing for a condition subsequent, there must be express terms or clear implication. Here, the deed granting the conservation easement provided, as a "condition," the Dept. was to post no trespassing signs. The Court of Appeal held this was not a condition subsequent because the deed did not clearly designate it so. Other easement provisions listed as "conditions" could not be reasonably interpreted as conditions subsequent; merely listing requirements as a condition does not make it a condition subsequent. The Court thus held Dept. did not forfeit easement by not meeting posting requirement.

General Plan – City Must Adopt Timeline Dealing with Inconsistences When Updating General Plan Housing Element

Friends of Aviara v. City of Carlsbad (2012) 210 Cal.App.4th 1103 – In land planning case, City was required to revise housing element of general plan to make low-cost housing amendments. City approved general plan, but community group sued, contending plan was

internally inconsistent because City failed to make amendments. The Court of Appeal agreed the general plan needed to be internally consistent, but ruled Govt. Code § 65583(c)(7), which requires housing element to explain how municipality will make general plan consistent, plainly expresses legislative recognition that inconsistencies will arise and are permitted as long as the city provides a timeline to reconcile them.

Clean Water Act – Pollutants Indirectly Flowing into Waters of the United States

Garland v. Cent. Valley Reg'l Water Quality Control Bd. (2012) 210 Cal.App.4th 557 – Court upheld judgment fining developer for permit violations when polluted stormwater indirectly flowed from construction site into US waters. The Clean Water Act provides any addition of any pollutant into navigable waters is unlawful without proper permit. Under the Act, navigable waters are "waters of the United States." The developer argued he did not violate federal law because pollutants from his construction site entered into drainages, not "waters of the United States." The Court disagreed; even if pollutants did not directly enter waters of the United States, developer still violated the Act when pollutants indirectly flowed into rivers. Here, undisputed evidence showed that during high rainfall events, the drainages would eventually connect with navigable waters and thus, pollutants from developer's construction site would indirectly flow into waters of the United States.

CEQA – Documents to Include in Administrative Record

Consolidated Irrigation Dist. v. Superior Court (2012) 205 Cal.App.4th 697 – An agency responding to CEQA challenge should include in administrative record documents referenced in comment letter that were either previously submitted to agency or identified by specific web page address in the letter, as well as tape recordings of public agency hearings where written transcripts are not available. The agency need not include subconsultants' files that are not in the agency's possession and documents that are simply named in a comment letter or named along with a reference to a general website that have not been made readily available to the public agency. For purposes of Pub. Res. Code § 21167.6(e), (1) audio recordings of agency hearings qualified as "other written materials" included in record of proceedings under § 21167.6(e)(10); (2) the term "submitted," as used in § 21167.6(e)(7), means made readily available, and as such, referenced documents previously provided to city were included in record of proceedings; (3) documents identified by a general web page address have not been made readily available to the public agency and are not "written evidence...submitted" included in record of proceedings under § 21167.6(e)(7); (4) documents identified by a specific web page address were made readily available and are "written evidence...submitted" included in record of proceedings under § 21167.6(e)(7); and (5) subconsultant files were not in city's constructive possession under Public Records Act and not included in record.

CEQA – Agreement to Toll Statute of Limitations

Salmon Prot. and Watershed Network v. Cnty. of Marin (2012) 205 Cal.App.4th 195 – The Court here held that parties to a potential CEQA suit may agree to postpone the CEQA litigation and toll the statute of limitations to facilitate settlement. In holding so, the Court acknowledged that the 30-day statute of limitations for CEQA challenges implemented a public policy favoring prompt disposition of CEQA challenges. However, the Court also cited the equally strong public policy promoting settlement of controversies, and thus avoiding litigation, and concluded that the parties' tolling agreements were valid.

PUNITIVE DAMAGES

Plaintiff Can Pursue Tort Claim Solely to Obtain Punitive Damages

Fullington v. Equilon Enter. LLC (2012) 210 Cal.App.4th 667 – In an issue of first impression, the Court held a plaintiff can pursue a tort claim solely for the purpose of recovering punitive damages, when the plaintiff has already been compensated for his actual damages in an earlier action on a separate claim. The Plaintiff, Fullington, was a Shell station franchise owner. When Shell and Texaco merged, the companies' franchises and all associated real property were consolidated in a new entity, Equilon. In an earlier action, Fullington and other franchisees sued under Business and Professions Code § 20999.25, claiming that the transfer to Equilon gave them a right of first refusal to purchase the property on which their stations were located. Equilon settled this lawsuit by, among other things, refunding Fullington's rent. Fullington then brought a fraud claim in a new action, claiming that he was charged higher than fair market rent as a result of misrepresentations by an Equilon representative. The trial court granted summary adjudication of the fraud claim, on the grounds that Fullington's actual damages had been eliminated in the settlement of the first action, and that punitive damages could not be recovered in the absence of actual damages. The Court of Appeal reversed, holding that "the question relevant to determining whether a plaintiff may recover punitive damages is whether he or she suffered a tort for which the law permits the recovery of damages—not whether those damages have (or have not) already been paid." Because Fullington suffered actual damages when he paid the rent, the fact that the rent was later refunded was irrelevant to his ability to recover punitive damages.

Punitive Damages Award May Exceed Net Worth

Bankhead v. Arvinmeritor, Inc. (2012) 205 Cal.App.4th 68 – The Court upheld a punitive damages award, rejecting the Defendant's complaints that the punitive award was excessive because it exceeded the company's total net worth. The Defendant in *Bankhead* had a *negative* net worth of $1.023 billion, but had a net profit of $12 million, and $343 million in cash on hand. The Plaintiff was awarded $4.5 million, and the Defendant appealed. The Court of Appeal surveyed the case law on punitive damages and financial condition, and held that (a) net worth is not the only measure of financial condition that may be considered for purposes of punitive

damages, and (b) there is no *per se* rule that punitive damages be limited to 10% of a defendant's net worth. In addition, the Court noted that a company's net worth can easily be manipulated, and that the evidence showed that the defendant was financially sound and able to pay the punitive damage award. Thus, under California law, the punitive damages award, although large, was not so disproportionate to the company's ability to pay that the award was the result of passion or prejudice.

REAL PROPERTY AND LAND USE

Anti-Deficiency Statute is Applicable to Settlement Agreement That Modifies a Promissory Note

Weinstein v. Rocha (2012) 208 Cal.App.4th 92 – If a settlement agreement amends a promissory note subject to the anti-deficiency statute, the settlement agreement may itself be subject to that statute. In *Weinstein*, the buyers of real property sued the seller for failure to disclose housing code violations at the property. That lawsuit was settled in an agreement that called for a reduction in the buyer's promissory note to the seller, which was secured by a second trust deed. The settlement also specified that if the buyers defaulted, the seller could accelerated the entire amount owed, and foreclose on the property. The buyers defaulted on the notes underlying both of their trust deeds, and did not pay any of the amount called for in the settlement agreement. The holder of the first trust deed foreclosed on the property, exhausting the security, and the seller moved to enforce the settlement agreement under Code of Civ. Proc. § 664.6, seeking $200,000 under the agreement's acceleration clause. While the trial court entered judgment enforcing the settlement agreement, the Court of Appeal reversed, holding that the settlement agreement was, in effect, a modification of the promissory note, and, as such, was subject to the anti-deficiency statute (Code of Civ. Proc. § 580b. Because the security had been exhausted by the foreclosure of the first trust deed, the seller had no further remedy against the purchasers.

Easements – Valuation of Terminated Easement

SCI California Funeral Serv., Inc. v. Five Bridges Found. (2012) 203 Cal.App.4th 549 – The Court held that, in determining damages under Civ. Code § 3300 for the termination of an appurtenant easement, the trial court properly considered how much the owner of the servient property would likely have paid for the buyer to relinquish the easement. Freed from the restrictions of the easement, the servient property would have been adaptable to more profitable commercial use, making the easement uniquely valuable to the owner of the servient property. Both that unique value and the potential uses to which the unencumbered property could be put were proper factors to consider in determining what the owner of the servient property might have paid the purchaser for reconveyance of the easement. The Court's decision affirmed that an acceptable measure of damages for the termination of an appurtenant easement is the appreciation in value of the servient tenement, and that the measure of damages was not limited to the diminution in value of the dominant tenement caused by the loss of the easement.

Equitable Subrogation

JP Morgan Chase Bank, N.A. v. Banc of Am. Practice Solutions, Inc. (2012) 209 Cal.App.4th 855 (**Moore**, O'Leary, Thompson)– The Court of Appeal applied the doctrine of equitable subrogation to award priority to a refinance lender whose deed of trust was recorded two months after an intervening deed of trust. The Court took note of California's "first in time, first in right" system of lien priorities, however noted that the doctrine of equitable subrogation is an exception to the rule and applies in those situations where equity requires a different result. Thus, the Court found that Chase was to receive a first deed of trust and is entitled to equitable subrogation unless Chase is chargeable with culpable and excusable neglect, or superior or equal equities on Banc's part would be prejudiced by granting Chase equitable subrogation. The Court found that because Chase did not have actual knowledge of Banc's deed of trust, did not breach any duty owed to Banc, and had not been shown to have engaged in any misleading conduct, it was not chargeable with culpable and inexcusable neglect. In addressing whether Banc's equities were equal or greater than Chase's, the Court focused on the parties' intended priority positions. Chase intended to be in first priority position as it forbade loan disbursement if Chase's deed of trust would not be in first priority position. Chase also did not have actual knowledge of the intervening lien. In contrast, Banc knew of the prior two deeds of trust and anticipated and received a deed of trust subordinate to the two other deeds subsequently paid off by Chase. Thus, Banc was not prejudiced by the application of equitable subrogation because it received exactly what it bargained for – a deed of trust in third priority position. In this case, the Court found the application of equitable subrogation to the lien property suit because it provided both parties with exactly what each anticipated in making their respective loans.

Foreclosure – Borrowers May be Liability for Waste

Fait v. New Faze Dev., Inc. (2012) 207 Cal.App.4th 284 – Borrowers demolished a building with plans to redevelop the property, but, possibly as a result of the economic downturn, later defaulted on monthly payments. Lender then foreclosed on the property and sued the borrowers for "waste," claiming that demolishing the building was an impairment of security and thus the lender is entitled to damages. In their motion for summary judgment, borrowers contended that they did not act maliciously or recklessly by demolishing the building because they acted in a good faith belief that they would be able to redevelop the property. The Court of Appeals held that California anti-deficiency laws did not bar this action on summary judgment because the impairment of security that results from the destruction of a building is actionable waste unless the destruction itself was solely or primarily caused by the economic pressures of a depressed market. The Court further held that bad faith waste does not require proof of malice and includes only waste that is not the result of the economic pressures of a market depression.

Laches does not Bar a Claim of Prescriptive Easement

Connolly v. Traube (2012) 204 Cal.App.4th 1154 – The Court of Appeal held that the doctrine of laches is inapplicable in an action involving a claim for prescriptive title to an easement. In

holding so, the Court reasoned that a claim of an easement by prescription is a legal twin to a claim of adverse possession and the doctrine of laches simply cannot and does not apply where, among other things, the statutory requirements of open, notorious, continuous, adverse use, under claim of right, for a period of five years is satisfied. Here, the property owner's unpermitted improvement and use of the property for over five years fulfilled the statutory requirements for obtaining a prescriptive easement and, while delaying to file a lawsuit against the first buyer prevented the property owner from holding title to the disputed portion of the property, the Court determined that it in no way negated his right to a prescriptive easement.

Nonjudicial Foreclosure – Possession of Promissory Note not Necessary

Debrunner v. Deutsche Bank Nat'l Trust Co. (2012) 204 Cal.App.4th 433 – Numerous federal courts applying California law have held that a foreclosing lender need not physically possess the original promissory note in order to commence a non-judicial foreclosure. In *Debrunner*, the Court of Appeal agreed with the federal courts, and rejected a plaintiff's claims for declatory relief and quiet title on the grounds that the foreclosing parties did not have physical possession of the underlying promissory note. The procedures to be followed in a non-judicial foreclosure in California are set forth in Cal. Civ. Code § 2924, which does not require physical possession of original note in order to initiate foreclosure.

Non-judicial Foreclosure – Trust Deed Need not Name Trustee

Shuster v. BAC Home Loans Servicing LP (2012) 211 Cal.App.4th 505– In a wrongful foreclosure case, the Deed of Trust designated a beneficiary, but did not name a trustee. After borrowers defaulted, the beneficiary named another company as Trustee and assigned its beneficial interest in the Deed of Trust to the mortgage servicer. The new Trustee then recorded a Notice of Default and completed a Trustee's Sale. The borrowers sued to set aside the foreclosure sale, alleging that there was no authority to foreclose under the power of sale given by the Deed of Trust because no trustee had been named. The Court of Appeal rejected the borrowers' argument that the Deed of Trust's failure to designate a Trustee transformed the instrument into a mortgage that could be foreclosed only through judicial foreclosure. Based on traditional trust laws and real property statutes, Courts in other jurisdictions have concluded that a valid trust is created even when a deed of trust fails to designate a trustee. The naming of a trustee is irrelevant to the creation of the deed of trust, as long as a trustee is named prior to the foreclosure. Consequently, here, the fact that a trustee was not designed did not preclude the enforcement of the deed. It was sufficient that the beneficiary appointed a substitute trustee prior to foreclosure. Thus, in an issue of first impression, the Court held that a lender may utilize the non-judicial foreclosure process when the Deed of Trust fails to name a Trustee, provided that a Trustee is named prior to foreclosure.

Quiet Title – Judgment is not Binding On Party Voluntarily Dismissed Before Judgment

Deutsche Bank Nat'l Trust Co. v. McGurk (2012) 206 Cal.App.4th 201 – In *McGurk*, a property owner named her lender as a Defendant in quiet title action and recorded notice of lis pendens. Lender later declared bankruptcy and assigned its deed of trust to a assignee who took with notice of the owner's quiet title action. The property owner, unaware of the assignment, then dismissed the lender from her quiet title action, intending to pursue the lender in bankruptcy. Property owner thereafter obtained a quiet title judgment against the remaining Defendants. The Court here was concerned with the effect of the quiet title judgment on the assignee of the interest. The Court held that because of the lis pendens, the assignee would have been bound by the quiet title judgment *if* the judgment had been binding on the original lender. Because the lender was dismissed, the quiet title action did not adjudicate the lender's interest and the lender's assignee was not bound thereby.

SETTLEMENT AND OFFERS TO COMPROMISE

Attorney Fees and Costs After Settlement

Wohlgemuth v. Caterpillar Inc. (2012) 207 Cal.App.4th 1252 – In a case under the Song-Beverly Consumer Warranty Act, the Court addressed whether the Plaintiff was entitled to recover attorney's fees after a settlement that resulted in a payment to the Plaintiff, and a voluntary dismissal of the Defendant. The question was whether the Plaintiff qualified as a prevailing party. The Court held that under the circumstances, both parties met the definition of a prevailing party under Code of Civ. Proc. § 1032—the Defendant because a dismissal was entered in its favor, and the Plaintiff because he was the party with a net monetary recovery. As such, the trial court had discretion to determine that the Plaintiff was the prevailing party, and the Court of Appeal upheld the award of attorney's fees to Plaintiff under the Song-Beverly Act.

Common Law Release Rule – Supreme Court Repudiates Common Law Release Rule

Leung v. Verdugo Hills Hospital (2012) 55 Cal.4th 291 – The trial court entered judgment finding a hospital jointly and severally liable for economic damages allocated by the jury to the hospital and a pediatrician in a medical malpractice case. In reversing, the Court of Appeal agreed with the hospital that plaintiff's settlement with the pediatrician also released the nonsettling hospital from liability for plaintiff's economic damages under the common law release rule. Under the traditional common law rule, a plaintiff's settlement and release of one joint tortfeasor from liability also releases all other joint tortfeasors. The Supreme Court reversed and remanded, holding that the common law release rule is no longer to be followed in California, in light of its harsh results.

C.C.P. § 998 Offer – Denial of § 998 Cost Enhancements After Arbitration

Maaso v. Signer (2012) 203 Cal.App.4th 362 – Where a Code of Civ. Proc. § 998 offer is made in arbitration, it is important to make sure to place the issue of § 998 costs before the arbitrator. In *Maaso*, the Plaintiff received an award exceeding the Code of Civ. Proc. § 998 offer made by Plaintiff and rejected by Defendant. While Plaintiff put the panel on notice that a § 998 offer was made, he did not seek to present evidence on the issue or seek a ruling on costs under that section. The Court of Appeal affirmed the trial court's denial of all arbitration costs, holding Plaintiff was not entitled to § 998 costs because that issue was in the arbitrator's sole discretion, and a party's failure to request the arbitrator to determine a particular issue is not a basis for vacating or correcting an award.

C.C.P. § 998 Offer – Recovery of Pre-Offer Costs

Bates v. Presbyterian Intercommunity Hosp., Inc. (2012) 204 Cal.App.4th 210 – In *Bates*, the Court of Appeal affirmed an award of Code of Civ. Proc. § 998 costs that included pre-offer expert witness fees. Citing *Regency Outdoor Advertising, Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, the Court held that while the first sentence of Code of Civ. Proc. § 998(c)(1) limits recoverable costs to those incurred after the offer to compromise is served, the second sentence relating to expert witness fees contains no such limitation. Therefore, expert witness fees recoverable under Code of Civ. Proc. § 998 are not tied to the date the compromise offer was served, and may include pre-offer fees.

C.C.P. § 998 Offer – Recoverability of Costs – Expert Witness Fees and More

Chaaban v. Wet Seal, Inc. (2012) 203 Cal.App.4th 49 (**Bedsworth**, O'Leary, Fybel)– Code of Civ. Proc. § 998(c)(1), which covers offers made by Defendants to plaintiffs, contains no limitation on the source of an expert; costs incurred for "the services of expert witnesses" are recoverable without qualification as to the sponsoring side. Accordingly, the Court in *Chaaban* held that under § 998, the prevailing Defendant was entitled to expert witness fees incurred in deposing the Plaintiff's own expert. While this was an issue of first impression, the Court held that its decision was supported by the primary policy of § 998 – to encourage settlement by providing a strong financial disincentive to a party who fails to achieve a better result than the opponent's settlement offer. This decision also explains the various costs recoverable under § 998, which includes deposition expenses for coworkers and physicians, jury fees, Court reporter fees, photocopying costs, travel costs, and expedited fees so long as they are reasonably necessary to prepare for trial.

C.C.P. § 998 Offer – Strict Compliance with C.C.P. § 998

Perez v. Torres (2012) 206 Cal.App.4th 418– Parties must comply strictly with Code of Civ. Proc. § 998's requirements in order to enjoy its benefits. More specifically, a § 998 offer is invalid if it lacks the statutorily required provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted.

C.C.P. § 998 Offer – Unallocated 998 Offer to Married Plaintiffs is Valid

Farag v. Arvinmeritor, Inc. (2012) 205 Cal.App.4th 372 – In *Farag*, the Court considered the validity of an unallocated 998 offer to married plaintiffs. Ordinarily, an unallocated offer to multiple plaintiffs is not valid under Code of Civ. Proc. § 998. In the case of a husband and wife, however, the claims of either spouse that arise during marriage constitute community property under Family Code § 780, and either spouse has the authority to compromise such claims under Family Code § 1100. In a typical case, an unallocated joint offer to multiple plaintiffs may make it impossible for the trial court to determine whether the defendant obtained a more favorable result against any particular plaintiff, and puts a plaintiff who wishes to settle at the mercy of the other plaintiffs. In the case of spouses, neither of these concerns arise, because the entire judgment is community property, and either spouse can settle the claim without the other's consent. As such, the Court held that the Defendant's single, non-apportioned Code of Civ. Proc. § 998 offer to a personal injury plaintiff and his loss-of-consortium wife was valid, and affirmed the trial court's award of expert witness costs to the Defendant under § 998.

VICARIOUS LIABILITY

Agency – Potential Liability for Acts of an Independent Contractor

Monarrez v. Automobile Club of Southern California (2012) 211 Cal.App.4th 177– Plaintiff motorist suffered injuries when he was struck by a hit-and-run driver while receiving roadside assistance for a flat tire. On a claim that the tow truck driver was inadequately trained, the trial court granted summary judgment for Defendant AAA, who had dispatched the tow truck, finding that the tow truck company was an independent contractor. The Court of Appeal reversed, holding there were triable issues of fact as to whether the tow truck company assisting Plaintiff was AAA's agent under Civ. Code, §§ 2299 and 2300. The trial court relied on contractual language that indicated the tow truck company was AAA's independent contractor. However, the Court of Appeal determined that the contractual language did not create an open and shut case. Evidence of actual agency existed based on AAA's right to control the manner and means by which the tow truck company and its technicians accomplished their work. AAA trained technicians how to do the work, dispatched calls to them, and followed up with inspections and customer surveys to ensure that they were maintaining the proper physical appearance and using approved methods. The work performed by the technicians was part of AAA's regular business. If AAA recommended the discipline or termination of a technician, failure to follow this recommendation could cause the tow truck company's contract to be terminated or calls to be directed elsewhere. Furthermore, the evidence of ostensible authority included AAA's logo on the technicians' truck and uniforms, and the fact that technicians identified themselves to motorists with AAA's name to instill confidence. The Court of Appeal held that this evidence was sufficient for the Plaintiff to avoid summary judgment on the agency issue.