

# NEW STATUTES, NEW RULES, AND NEW CASES

WHAT EVERY BUSINESS LITIGATOR  
NEEDS TO KNOW IN 2015

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# SIGNIFICANT STATUTES

## Enacted in 2014

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**SIGNIFICANT STATUTES**  
**Enacted in 2014**

## **ALTERNATIVE DISPUTE RESOLUTION**

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### **1. Consumer Arbitration Information Disclosures**

*Code of Civil Procedure § 1281.96* – Private arbitration companies that conduct consumer arbitrations are required to collect and report information relating to such arbitrations, including the name of the non-consumer party, information regarding other arbitrations or mediations conducted with the non-consumer party, the amount of the arbitrator’s fee, and the nature and disposition of the arbitration. Amendments to section 1281.96 now require that this information be provided in a sortable database format, and be made available on the arbitration company’s website.

### **2. Common Interest Development ADR**

*Civil Code §§ 5910 and 5915* – The Davis-Sterling Common Interest Development Act requires an association to provide a fair dispute resolution procedure. Changes to that Act specify that agreements reached in such a procedure must be in writing and signed by both parties. In addition, either the member or the association may be represented by an attorney.

## **AMPHIBIANS**

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### **3. California Red Legged Frog**

*Government Code § 422.7* – The California Red Legged Frog is the new official state amphibian of the State of California.

## **ATTORNEYS**

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### **4. Annual Membership Fees**

*Business & Professions Code § 6140, 4140.03* – The State Bar may set annual dues at an amount not exceeding \$315 (no change from last year). The Bar is required to charge an additional \$40 (up from \$30 last year) as a voluntary contribution to free legal services, which may be deducted from the amount paid by any attorney who does not wish to make such a contribution.

## **CIVIL PROCEDURE**

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### **5. Deposit In Lieu Of Bond**

*Code of Civil Procedure §§ 995.710, 995.720, 995.740, and 995.760* – Cashier’s checks have been added to the forms of payment that can be deposited in lieu of a bond.

### **6. Exemptions To Enforcement Of Judgments – Assertion By Domestic Partner**

*Code of Civil Procedure § 703.020* – The spouse of a judgment debtor is authorized under existing law to assert exemptions from the enforceability of a judgment where the property subject to an exemption is community property. Section 703.020 now extends the right to assert such exemptions to domestic partners.

## **7. Interpreters – Availability Of Interpreters At No Cost To Parties**

*Evidence Code § 756, Government Code § 68092.1* – Trial courts are now authorized to provide interpreters in any civil action at no cost to the parties, regardless of the income of the parties. Until sufficient funds are appropriated to provide interpreters for every party who needs one, available funds must be allocated to certain classes of cases (such as family law and unlawful detainer proceedings) according to a priority list in Evidence Code section 756.

## **8. Interpreters – Court Findings**

*Government Code § 68561* – New provisions require a judge to make findings and statements on the record regarding interpreters, including statements regarding the name and certification or registration information of certified or registered interpreters, the verification of that information, and the reporter’s oath, as well as findings regarding the qualifications of non-registered or certified interpreters, and the lack of availability of registered or certified interpreters.

## **9. Jurisdiction Over Non-Parties**

*Code of Civil Procedure § 2025.510* – Section 2025.510 now provides that nothing in *Serrano v. Merli Plastering Co.* (2008) 162 Cal.App.4th 1014 shall alter the standards by which a court acquires jurisdiction over a nonparty to an action. The *Serrano* case involved a dispute over the reasonableness of fees charged by a court reporter for copies of deposition transcript. The *Serrano* court held that the trial court in the underlying action had jurisdiction over the court reporter, despite the absence of a summons, because the court reporter had made a general appearance by: (1) agreeing that the trial court should determine the reasonableness of the fee, and (2) requesting affirmative relief in the form of an order that the fee be paid. The original version of this bill, sponsored by the Deposition Reporters Association of California, stated that an attorney or party who challenged a reporter’s fees was required to file an independent action. After objections that this would only complicate things, the Senate amended the bill, to the current, somewhat more ambiguous language.

## **10. Notary Public Acknowledgments**

*Civil Code §§ 1189, 1185* – A notary public acknowledgment must now contain language, set apart in an enclosed box, that the verifies only the identity of the individual who signed the document, and not the truthfulness, accuracy, or validity of the document, itself.

## **11. Post-Verdict Motions**

*Code of Civil Procedure §§ 629, 659a, and 663a* – The motion papers for a motion for judgment notwithstanding the verdict or a motion to set aside and vacate a judgment must now be served and filed within the same time limits applicable to a motion for new trial. Specifically, the notice of motion must be made within 15 days of notice of entry of judgment or 180 days after entry of judgment, whichever is earlier. The moving brief is due 10 days after the notice of motion, the opposition brief is due 10 days after the moving brief, and the reply brief is due five days after the opposition brief. The court’s power to rule on these motions expires 60 days after notice of entry of judgment.



## **12. Sanctions**

*Code of Civil Procedure § 128.5* – The sanctions provisions of section 128.5, which were previously limited to cases filed on or before December 31, 1994, have been restored through 2018, at which time the provision will be reviewed. Section 128.5 now states that any sanctions shall be imposed consistently with the standards, conditions, and procedures set forth in subdivisions (c), (d), and (h) of section 128.7. The intent of this provision is to restore the courts’ ability to impose attorney’s fees as sanctions for acts of misconduct that are not limited to the filing of frivolous pleadings and motions, but which include, for example, the violation of court orders.

## **13. Service Of Process**

*AB 2256 (Various Government Code and Civil Code sections)* – Changes to various service of process statutes now provide that (a) any person (rather than any person over 18) may serve process in an action against a sheriff, (b) a process server no longer is required to identify the person to be served prior to obtaining access to a gated community (Civil Code § 415.21), and (c) fees charged by sheriffs and marshals for service of process are increased.

## **14. Witnesses – Local Agency Reimbursement**

*Government Code § 68096.1* – A subpoena requiring a local agency employee to attend a civil action or proceeding must now include \$275 (increased from \$150) as an estimate to reimburse the local agency for the employee’s salary and travel expenses. The amount may be adjusted if the expenses are more or less than \$275.

# **CONTRACTS**

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## **15. Civil Rights Waivers**

*Civil Code § 51.7, 52, 52.1* – A party may not condition a contract for the provision of goods or services on the waiver of statutory civil rights provisions protecting individuals from interference with the exercise of civil rights, and from violence or intimidation due to protected characteristics, such as sex or race. A party seeking to enforce a waiver of those provisions bears the burden of proving that such a waiver was knowing and voluntary, and not made as a condition on the provision of goods or services.

## **16. Non-Disparagement Provisions Invalid In Consumer Contracts**

*Civil Code § 1670.8* – Non-disparagement provisions in contracts for the sale or lease of consumer goods or services are prohibited. Civil penalties of \$2,500 to \$10,000 may be recovered by a consumer or public prosecutor where a business unlawfully attempts to enforce such a provision. This statute was inspired by a case in Utah in which a business attempted to impose a penalty on a consumer for posting a negative review to ripoffreport.com.

## **CORPORATIONS**

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### **17. Registration Requirements**

*SB 1041, Corporations Code, various sections* – Various changes have been made to the registration requirements for business entities. Among other things, the changes (a) require that the resignation of a registered agent for service of process or the cancellation of certain business entity registrations must be made on a form prescribed by the secretary of state, and (b) specify the requirements for changing the names of foreign LLCs, LPs, and LLCs.

## **EMPLOYMENT AND LABOR**

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### **18. Abusive Conduct Training**

*Government Code § 12950.1* – The sexual harassment training that must be provided by companies with more than 50 employees must now include training related to abusive conduct.

### **19. Discrimination and Harassment – Unpaid Interns**

*Government Code § 12940* – Discrimination and harassment of unpaid interns is now an unlawful employment practice under the Fair Employment and Housing Act.

### **20. Liquidated Damages For Payment Of Less Than Minimum Wage**

*Labor Code § 1194.2* – The Labor Code provides for liquidated damages consisting of unpaid wages plus interest for claims involving the payment of less than the minimum wage. A clarifying amendment specifies that a claim for liquidated damages may be brought at any time before the expiration of the statute of limitations for the underlying claim for unpaid wages.

### **21. National Origin Discrimination – Driver’s Licenses**

*Government Code § 12926* – Existing law requires the DMV to issue driver’s licenses to otherwise qualified applicants despite the fact that the applicant cannot submit proof of authorized presence in the United States. The Fair Employment and Housing Act now defines national origin discrimination to include discrimination based on possession of a driver’s license issued under that law.

### **22. Paid Sick Days**

*Labor Code §§ 245, et seq.* – Employers are now required to provide employees with paid sick days, to accrue at a rate of no less than one hour for each 30 hours worked. Employers may restrict the use of sick days to three days per year.

### **23. Rest and Recovery Periods**

*Labor Code § 226.7* – Section 226.7 now provides that any rest and recovery periods mandated by statute, regulation, standard, or order shall count as hours worked. The section states that it is declaratory of existing law.

## **24. Retaliation – Civil Penalty**

*Labor Code § 98.6* – The \$10,000 civil penalty for retaliation under Labor Code § 98.6 is now to be paid to the employee who suffered retaliation.

## **25. Unfair Immigration Related Practices**

*Labor Code § 1019* – The definition of unfair immigration related practices now includes filing or threatening to file false reports to any state or federal agency. Remedies for such practices now include a civil action for equitable relief, applicable damages or penalties, and orders suspending certain business licenses.

# **EVIDENCE**

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## **26. Privileges**

*Evidence Code §§ 912 and 917* – The evidentiary rules dealing with relationship-based privileges, such as the attorney-client privilege, and spousal privileges, have been updated to include the attorney referral service-client privilege and the human trafficking caseworker-victim privilege. Among other things, this means that a communication claimed to be subject to these disclosures will be subject to section 917’s presumption that the communication is confidential, and requirement that the party challenging the privilege bear the burden of proving that the privilege does not apply.

# **GOVERNMENT**

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## **27. Maintenance Of The Codes**

*SB 1304* – SB 1304 contains various non-substantive changes recommended by the Legislative Counsel.

# **JUDGMENTS**

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## **28. Judgments In The Appellate Division**

*Code of Civil Procedure § 77* – Judgments in the Appellate Division of the Superior Court must now contain a brief statement of the grounds for the judgment. A judgment stating “reversed” or “affirmed” is insufficient.

## **29. Judgment Debtor’s Right of Redemption**

*Code of Civil Procedure § 701.680* – Under existing law, sales of property levied to satisfy a money judgment generally may not be set aside for any reason. An amendment clarifies that this does not eliminate a judgment debtor’s equitable right of redemption. This is intended to codify the holding in *Lang v. Roche* (2011) 201 Cal.App.4th 254.

## **JURORS**

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### **30. Juror Misconduct – Electronic Research Or Communication**

*Penal Code § 166* – Previously, section 166 subjected jurors to criminal contempt for willfully disobeying a court admonishment relating to the prohibition of communication or research regarding a case. This provision has been eliminated, making the prohibited conduct subject only to civil contempt proceedings. This was necessary to prevent jurors from asserting the Fifth Amendment in response to questioning from the court regarding potential juror misconduct.

## **PRIVACY**

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### **31. Home Addresses of Government Officials**

*Government Code § 6254.21* – Section 6254.21 prohibits individuals from posting the home address or phone number of a public official on the Internet if the official makes a demand that the information not be disclosed. Amendments to that section allow a collective bargaining representative, District Attorney, or Deputy District Attorney to make the demand on behalf of the public official.

### **32. Privacy Policies**

*Government Code § 11019.9* – State departments and agencies must now post their privacy policies on their websites.

### **33. Invasions Of Privacy**

*Civil Code §§ 1708.8, 1708.9* – Changes to sections 1708.8 1708.9 expand prohibited privacy related conduct. Among other things, section 1708.8 now prohibits using any device (the prior law applied only to visual or auditory enhancing devices) to capture visual or auditory recordings of personal or familial activities where the subject has a reasonable expectation of privacy. Section 1708.9 prohibits interference with a person’s entry to or exit from a school or healthcare facility.

### **34. Personal Data Breaches**

*Civil Code §§ 1798.81.5, 1798.82* – Existing law requires businesses in California that own or license electronic personal data to provide notices of any security breaches if personal information was, or is reasonably believed to have been, obtained by an unauthorized person. Parties who maintain such data must provide a similar notification to the owner or licensee of the data. Amendments now require the person providing the notice to offer appropriate identity theft prevention and mitigation services at no cost for 12 months. The amendments also expand requirements regarding reasonable security procedures to businesses that maintain personal data (the existing provisions only apply to businesses that own or license such data).

### **35. Sale Of Social Security Numbers**

*Civil Code § 1798.85* – The sale, advertisement for sale, or offer to sell a social security number is now prohibited under Civil Code section 1798.85.

## **REAL PROPERTY AND LAND USE**

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### **36. CEQA – Residential Infill Exemption**

*Public Resources Code § 21159.24* – The definition of “residential” for the purpose of CEQA’s residential infill exception has been expanded to include residential projects with up to 25% (previously 15%) of the total square footage devoted to neighborhood-serving goods, services, or retail uses.

### **37. Common Interest Developments – Common Area Maintenance And Repairs**

*Civil Code § 4775* – Prior law was ambiguous regarding the responsibility to repair or replace portions of the common area of a development that is designated for the exclusive use of a particular homeowner. Section 4775 now provides that the homeowner is responsible for maintenance of such areas, while the homeowner’s association is responsible for repairing or replacing such areas.

### **38. Common Interest Developments – Drought Legislation**

*Civil Code § 4735* – Homeowners associations may not fine members for reducing or eliminating the watering of vegetation during any period in which the governor or the local government has declared a state of emergency due to drought, unless the association uses recycled water for irrigation. Associations also may not require pressure washing during droughts, nor prevent the use of low water using plants as a replacement for existing turf.

### **39. Commercial Real Property Listing Agents – Disclosure Requirements**

*Civil Code § 2079.13* – The disclosure requirements for residential real property listing and selling agents have been extended to commercial real property listing and selling agents.

### **40. Sale Of Real Property – Statute Of Frauds**

*Civil Code § 1624, Business & Professions Code § 10148* – Electronic communications of an “ephemeral nature” that is not designed to be retained in a permanent record, such as a text or an instant message, is not sufficient to constitute a writing for the purposes of creating a contract to convey real property, and a real estate broker is not required to keep records of any such communications under Business & Professions Code section 10148.

## **REMEDIES**

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### **41. Equitable Remedies For Civil Rights Violations**

*Civil Code § 52.1* – Equitable and declaratory relief are now available (in addition to previously available remedies) to eliminate a pattern or practice of interference with the exercise or enjoyment of any rights secured by the Constitution or laws of the United States or State of California.

## **SECURED TRANSACTIONS**

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### **42. Financing Statement – Debtor’s Name**

*Commercial Code § 9503, Civil Code §* Revisions to the Commercial Code provide that the name on a financing statement shall be the name that appears on the debtor’s unexpired driver’s license or identification card, if any. The revisions also provide that it is a violation of the Unruh Act for a secured lender to discriminate against borrowers who do not possess an unexpired driver’s license or identification card.

**SIGNIFICANT RULES**  
**Adopted in 2014**

## **TITLE 1 - RULES APPLICABLE TO ALL COURTS**

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### **Judicial Council Forms**

**Rules 1.34, 1.36** – The Judicial Council forms are available at the Judicial Branch’s new website: [www.courts.ca.gov/forms](http://www.courts.ca.gov/forms).

## **TITLE 3 - CIVIL RULES**

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### **CEQA Rules**

**Rules 3.2200, et seq.** – The rules for CEQA actions have been renumbered, and new rules have been adopted pertaining to environmental leadership projects under Public Resources Code sections 21182-21184. Formerly, environmental leadership projects were subject to original proceedings in the Court of Appeal. The new rules: (a) provide for original proceedings in the trial court rather than the Court of Appeal, (b) exempt actions challenging leadership projects from the complex rules, (c) place strict (and short) filing and hearing deadlines in such actions, (d) require electronic filing and service, and (e) establish other formal rules for such actions.

## **TITLE 8 - APPELLATE RULES**

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### **Appeals in CEQA Leadership Project Actions**

**Rules 8.700 et seq.; Former Rules 8.497 et seq.** – The former rules governing original CEQA proceedings in the Court of Appeal relating to environmental leadership projects have been repealed, and replaced with new rules governing appeals of trial court proceedings relating to environmental leadership projects. The new rules establish some very short filing deadlines, including a five day deadline for filing a notice of appeal following service of notice of entry of judgment, and a 25 day deadline for filing the opening brief following the notice of appeal.

### **Extensions of Time to File Briefs**

**Rule 8.212** – Rule 8.212(b)(1) allows parties to stipulate to extensions of up to 60 days for the filing of briefs in the Court of Appeal. A new amendment provides that the parties may not stipulate to further extensions if the time to file has previously been extended by order of the presiding justice.

### **Judicial Notice**

**Rule 8.252** – Where matter requested to be noticed in the Court of Appeal is not already in the record on appeal, copies must be provided with the motion for judicial notice. The amendment to Rule 8.252 requires the copies to be consecutively numbered, beginning with the number 1.



## **Sealed and Confidential Records**

**Rule 8.45** – A new advisory committee comment has been added to Rule 8.45, indicating that where another substantive law governs a particular sealed or confidential record, the specific requirements of that law supersede the Rules of Court in Title 8, Article 3.

## **TITLE 10 - JUDICIAL ADMINISTRATION RULES**

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### **Administrative Office of the Courts**

**Rules 10.80, 10.81** – The Administrative Office of the Court has been renamed the “Judicial Council Staff” to clarify that it is not a separate entity from the Judicial Council, but the staff that supports the work of the Judicial Council, itself.

### **Advisory Committee Meeting Requirements**

**Rule 10.75** – Formal requirements for the meetings of Judicial Council advisory bodies have been adopted, including provisions specifying the topics that may be discussed in open or closed sessions, the applicable notice requirements, the rules governing public comments, and other formal rules.

### **Advisory Committee on Providing Access and Fairness**

**Rule 10.55** – The membership of Advisory Committee on Providing Access and Fairness has been expanded to include at least one lawyer with expertise in access, fairness and diversity, one lawyer from a trial court self-help center, one legal services lawyer, an executive officer or trial court manager with experience with self-represented litigations, and one county law librarian or related professional.

### **Court Executives**

**Former Rule 10.49; Rule 10.48** -- The Conference of Court Executives in former rule 10.49 has been eliminated, and the rules governing the Court Executives Advisory Committee have been substantially revised.

### **New Advisory Committees**

**Rules 10.62-10.6 and 10.107** -- New Court Advisory Committees include a Facilities Advisory Committee, an Advisory Committee on Financial Accountability and Efficiency, a Trial Court Budget Advisory Committee, a Trial Court Facility Modification Advisory Committee, a Workload Assessment Advisory Committee, and a Judicial Branch Workers’ Compensation Advisory Committee. The former Trial Court Budget Working Group has been repealed.

### **Technology Committee**

**Rules 10.10, 10.16** – The Judicial Council has a new internal committee to develop timelines and recommendations for implementing information technology in the courts.

**SIGNIFICANT CASES**  
**Decided in 2014**

## ALTERNATIVE DISPUTE RESOLUTION

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### **1 Ancillary Judicial Proceedings – Court Action For Ancillary Injunction Cannot Be Voluntarily Dismissed Without Prejudice Once Arbitration Begins**

*Mesa Shopping Center-East, LLC v. Hill* (2014) 232 Cal.App.4th 890 [Ikola, O’Leary, Aronson] – In *Mesa Shopping Center-East*, the Plaintiffs filed an arbitration, and simultaneously filed an “ancillary” action in court for injunctive relief to preserve the status quo pending arbitration. The Plaintiffs brought and lost a motion for preliminary injunction in the trial court, and then stayed the court action pending the results of the arbitration. When an arbitration award was entered in favor of the Defendants, the Plaintiffs dismissed the trial court action without prejudice in order to avoid an award of contractual attorney’s fees. The trial court denied the Defendant’s motion to vacate the dismissal, and the Court of Appeal reversed. The Court reasoned that both the lawsuit and the arbitration action were based on the same causes of action, and held that this two-forum approach is authorized by the Code of Civil Procedure, where the final arbitration award would be ineffective without provisional relief. In such a dual tracked proceeding, however, the Court held that the commencement of arbitration constitutes the commencement of trial for the purposes of Code of Civil Procedure section 581, thereby terminating the Plaintiffs’ absolute right to voluntarily dismiss the court action without prejudice. Accordingly, the Court of Appeal held that the trial court erred in denying the Defendants’ motion to vacate the voluntary dismissal.

### **2 Arbitration Awards – High-Low Provision In Arbitration Agreement Is Enforceable Without The Need To Vacate Or Modify An Non-Compliant Award**

*Horath v. Hess* (2014) 225 Cal.App.4th 456 – In the underlying action, both Plaintiff and Defendant agreed to arbitrate a personal injury dispute, and that if the arbitrator found Defendant to be liable, Plaintiff’s award would be limited to a “high-low” provision with a minimum award of \$44,000 and a maximum award of \$100,000. The arbitrator – who was not informed of the agreement – awarded Plaintiff an award of \$366,527.22, which was affirmed by the trial court. Defendant paid \$100,000 and filed a motion of acknowledgment of satisfaction of judgment under Code of Civil Procedure section 724.050, which was denied by the trial court as an untimely motion to correct the award. The Court of Appeal held that the trial court erred in denying Defendant’s motion for acknowledgement of satisfaction of judgment. The Court determined that Code of Civil Procedure section 1281 applied as to the validity of the high-low provision. Section 1281 states that a written agreement to arbitrate a dispute is subject to the general rules of contract enforcement and interpretation, and would apply to written stipulations of arbitration agreements, such as the high-low provision. The Court of Appeal held that applying ordinary rules of contract interpretation, it appeared that the parties intended the high-low provision to be enforceable without the need to file a motion to correct or vacate the arbitration award.

### **3 Arbitration Awards – Revision – Arbitrator May Not Revise Award To Include Attorney’s Fees After Initially Denying Fee Award**

*Cooper v. Lavelly & Singer Professional Corp.* (2014) 230 Cal.App.4th 1 – In *Cooper*, the Plaintiff appealed a trial court’s decision to confirm an arbitrator’s “Revised Final Award,” which revised the initial final award to include attorney’s fees on the motion of the prevailing party. The Court of Appeal reversed, holding that an arbitrator may not revise a final award to include attorney’s fees after already making a substantive ruling denying those fees. The Court reasoned that Code of Civil Procedure section 1284 only allows arbitrators to correct their awards where: (a) there is an “evident miscalculation of figures,” or similar mistake, (b) the arbitrator has exceeded his authority, or (c) the award is imperfect in matter of form not affecting the merits. This precludes the arbitrator from reconsidering the merits of the original award and making a new award under the guise of a correction to the award. While courts have allows non-statutory revisions to correct a matter omitted from an award, the inclusion of attorney’s fees in *Cooper* did not qualify for such treatment, since attorney’s fees were denied, not omitted, in the original award. The Court of Appeal also noted that nothing in the JAMS arbitration rules that governed the arbitration permitted the arbitrator to disregard section 1284, as those rules state that any applicable law which conflicts with a particular rule will govern over the rule in conflict. The Court reversed the confirmation of the Revised Final Award, and directed the trial court to confirm the original final award.

### **4 Arbitration Agreement Enforceability – PAGA’s Prohibition of Contractual Waivers of Representative Actions Is Not Preempted by The FAA**

*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 – Defendant employed Plaintiff as a driver. As a condition of employment, Defendant required that Plaintiff waive the right to bring “representative actions,” including representative actions brought under the Labor Code’s Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698, et seq.). PAGA authorizes an employee to bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of the litigation going to the state. The California Supreme Court concluded that an arbitration agreement requiring an employee to give up the right to bring representative PAGA actions in any forum is contrary to public policy. The Defendant argued that the FAA preempted any state law precluding arbitration of a PAGA claim. The Court disagreed, holding that the Federal Arbitration Act’s goal of promoting arbitration as a means of dispute resolution pursuant to voluntary private agreements does not preclude the California Legislature from deputizing employees to prosecute Labor Code violations on the state’s behalf. Because (a) the state is the true holder of the claim and the real party in interest in a PAGA action, (b) the plaintiff is merely acting as the state’s proxy, and (c) the state never agreed to arbitrate its PAGA claims, the parties’ arbitration agreements do not apply, and the FAA is not implicated at all. Moreover, the Court held that the FAA is concerned with ensuring efficient resolution of private disputes, but that there is no indication that it was intended to apply to disputes between private individuals and the state in its law enforcement capacity.

## **5 Arbitration Agreement Enforceability – The *Broughton-Cruz* Rule, Which Prohibited Arbitration Of Injunctive Relief Claims Under Consumer Protection Statutes Is No Longer Valid**

*McGill v. Citibank, N.A.* (2014) 232 Cal.App.4th 753 [Aronson, Rylaarsdam, Thompson] – In *McGill*, the Fourth Appellate District held that the Federal Arbitration Act preempts California’s *Broughton-Cruz* rule, which prohibited arbitration of injunctive relief claims under California’s Unfair Competition Law (“UCL”), False Advertising Law (“FAL”), and Consumer Legal Remedies Act (“CLRA”). While the *Broughton-Cruz* rule was based on California Supreme Court precedent, it was no longer valid following that United States Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. (*AT&T Mobility*). The Court of Appeal noted that the Supreme Court in the *AT&T Mobility* decision held that the FAA preempts “all state law rules that prohibit arbitration of a particular type of claim because an outright ban...interferes with the FAA’s objective of enforcing arbitration agreements according to their terms.” (*McGill*, at p. 2). The Court of Appeal distinguished the so-called “effective vindication exception,” which excludes certain federal statutory claims from arbitration, by noting that Congress enacted both the federal statutory claims and the FAA, and thus only Congress can categorically exclude claims from the FAA. The Court of Appeal also distinguished the California Supreme Court’s decision in *Iskanian*, discussed above, by noting that unlike the PAGA claims at issue in *Iskanian*, there is no indication that the state is the real party in interest in UCL, FAL, and CLRA claims, even if they are brought in the public interest.

## **6 Arbitration Agreement Enforceability – Class Action Waiver Prohibition Is Not Pre-empted By FAA Where Parties Specifically Elect California Law To Govern The Enforceability Of Waiver.**

*Imburgia. v. DIRECTV, Inc.* (2014) 225 Cal.App.4th 338 – In *Imburgia*, the Plaintiff filed a class action complaint against the Defendant, alleging the Defendant violated the Consumer Legal Remedies Act (CLRA). The Court affirmed the trial court’s decision to deny the Defendant’s motion to compel arbitration. The customer agreement stated that if “the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.” Plaintiff argued, and the Court agreed, that the law of California (the CLRA) would have found the waiver unenforceable, notwithstanding *Concepcion*’s pre-emption of the *Discover Bank* rule. The Court observed that “the law of your state” would be interpreted by a reasonable reader to mean a person’s nonfederal State law. Even after *Concepcion*, the FAA does not prohibit parties from agreeing to use state laws to govern an arbitration policy, as the parties had done in this case. Thus, per its terms, the entire Section 9 – which was the Defendants’ arbitration policy – was rendered unenforceable.

## **7 Arbitration Agreement Enforceability – Non-signatories – Beneficiary To Trust Instrument Who Has Not Accepted Any Benefits Is Not Bound By Arbitration Clause**

*McArthur v. McArthur* (2014) 224 Cal.App.4th 651 – In *McArthur*, the settlor created an inter vivos trust naming her three daughters as coequal beneficiaries. She then amended the trust instrument, allocating a greater portion to one of her daughters (Kristi) and adding a provision requiring arbitration of all disputes. After the settlor’s death, one of the beneficiaries (Pamela) sued Kristi, alleging financial elder abuse and arguing that the trust amendments were invalid due to Kristi’s undue influence and the settlor’s lack of testamentary capacity. Kristi moved to compel arbitration, pursuant to the arbitration provision in the trust instrument, but the trial court denied the motion because Pamela was not a signatory to that agreement. Kristi appealed, and the Court of Appeal affirmed the trial court’s decision. The issue on appeal was whether an arbitration clause in a trust document binds a beneficiary. The Court noted that a nonsignatory cannot avoid arbitration if he or she has claimed or received some direct benefit from the agreement containing the arbitration clause. Here, Pamela did not accept benefits or attempt to enforce rights under the amended trust. To the contrary, she sought to have it set aside as invalid. Moreover, since Pamela did not manifest assent to the terms of the amended trust, she could not be bound to its arbitration provision by estoppel. Finally, the Court found the doctrine of delegated authority to consent from *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223 did not apply since there was no similar statutory scheme requiring a trust beneficiary to be bound by an arbitration clause in a trust instrument.

## **8 Arbitration Agreement Enforceability – Party Asserting FAA Preemption Must Show Involvement of Interstate Commerce**

*Lane v. Francis Capital Management, LLC* (2014) 224 Cal.App.4th 676 – The Court in *Lane* allowed Labor Code claims for unpaid wages, which were subject to arbitration under the terms of the employment agreement, to be heard in court under Labor Code § 229’s exemption from arbitration. The defendant sought to compel arbitration, and asserted that the Federal Arbitration Act preempted section 229. The Court of Appeal rejected that argument, because the defendant failed to produce any evidence that the employment agreement involved interstate commerce. In fact, the defendant failed to submit any declaration at all regarding the nature of its business or the plaintiff’s employment.

## **9 Arbitration Agreement Scope – Exclusion of Claims Under Labor Commissioner’s Jurisdiction Includes Wage and Hour Claims**

*Rebolledo v. Tilly’s, Inc.* (2014) 228 Cal.App.4th 900 [O’Leary, Ikola, Thompson] – Defendant-employer appealed from the trial court’s order denying its motion to compel arbitration of Plaintiff’s putative class action regarding statutory wage claims. The Court of Appeal affirmed. The parties generally agreed to arbitrate all employment disputes, but excluded from arbitration “matters governed by the California Labor Commissioner,” including “any matter within the jurisdiction of the California Labor Commissioner.” The Court of Appeal held

that the Plaintiff's statutory wage claims qualified as "matters governed by" and "matters within the jurisdiction" of the Labor Commissioner. As such, the parties' arbitration agreement expressly excluded statutory wage claims.

## **10 Arbitrator Disclosures – Forfeiture Of Right To Disqualify**

*United Health Centers of the San Joaquin Valley, Inc. v. Superior Court of Fresno County*, 229 Cal.App.4th 63 – Code of Civil Procedure section 1281.9 requires arbitrators to disclose certain information regarding prior relationships to the parties, including the date, prevailing party, and amount awarded in any arbitrations the arbitrator has conducted with any of the parties or their attorneys. In *United Health*, the Plaintiff challenged an arbitration award based on the arbitrator's failure to disclose the amount of the awards he granted in arbitrations involving the opposing parties' attorneys. In the trial court, the Defendant argued that this objection had been waived by the Plaintiff's failure to disqualify the arbitrator or request further information before the arbitration was conducted. The trial court refused to consider that argument, finding that under section 1281.85(c), an arbitrator's disclosure requirements could not be waived. The Court of Appeal reversed, holding that while the disclosure requirements cannot be waived in advance by contract, they can be forfeited by a party's failure to timely seek disqualification. The Court then remanded the matter to the trial court to determine whether the Plaintiff had forfeited her right to disqualify the arbitrator. (*See also* Writ Review, p. 20, below)

## **11 Appealability – A Trial Court Order Vacating An Arbitrator's Interim Award Re Arbitrability Is Not Appealable**

*Judge v. Nijjar Realty, Inc.* (2014) 232 Cal.App.4th 619 – If a trial court vacates an interim arbitration award, order is not appealable, even if the trial court lacked jurisdiction to do so. In *Judge*, the Plaintiff filed individual and class claims against the Defendants, her former employers. The Defendants moved to compel arbitration of the individual claims, based on an arbitration agreement signed during the employment, and but asked that class claims not be sent to arbitration. The Plaintiff argued that if the dispute was sent to arbitration, both the class claims and the individual claims should go. The trial court ordered only the individual claims to arbitration, and indicated that it did not believe the arbitration agreement included class claims. However, it also remarked that the Plaintiff was not foreclosed from raising that issue before the arbitrator. The arbitrator then issued a "clause construction award," interpreting the arbitration agreement, and ruling that it did encompass class claims. The Defendants filed a motion in the trial court to vacate this "clause construction award," on the grounds that the issue was already decided by the trial court. Despite the earlier statement that the Plaintiff was not precluded from raising the issue with the arbitrator, the trial court vacated the award, holding that the parties already submitted the issue to the court, and that the court's ruling stood. The Plaintiff appealed. The Court of Appeal held that because the "clause construction award" was not a final arbitration award of all the issues submitted to arbitration, it was not one of the orders listed in the California Arbitration Act as an appealable order. Because appellate jurisdiction is created by statute, this meant the trial court's order was not appealable and the appeal was dismissed. Ironically, the Court of Appeal noted that because there was no final arbitration award, the trial

court may have lacked jurisdiction to enter an order vacating the interim award, and even suggested that the Plaintiff may file a motion for reconsideration in the trial court.

## **12 Appealability – Denial Of A Motion To Stay Pending Arbitration Is Not Appealable Absent A Concurrent Motion to Compel Arbitration**

*Wells Fargo Bank, N.A v. The Best Service Co., Inc.* (2014) 232 Cal.App.4th 650 – As in the last case, the Court of Appeal in *Wells Fargo Bank* dismissed an appeal based on the lack of an appealable order. The order at issue in this case was the trial court’s denial of the Defendant’s motion to stay the litigation pending arbitration, which was not accompanied by any motion or petition to compel arbitration. While Code of Civil Procedure section 1294 allows appeals from orders denying a petition to compel arbitration, there is no provision that allows an appeal from an order denying a stay pending arbitration. The Defendant argued that the order denying the stay was the functional equivalent of denying a petition to compel arbitration, but the Court of Appeal disagreed. The Court pointed out that the Defendant specifically stated in the trial court that the motion was *not* a motion to compel arbitration, and noted that unlike the cases cited by the Defendant, the instant case did not involve any already pending arbitration, nor any attempt to compel the Plaintiff to commence arbitration. Accordingly, the Court dismissed the appeal.

## **13 Petition to Compel Arbitration – Lack of Ripeness Is Not A Defense To A Petition To Compel Arbitration**

*Bunker Hill Park Ltd. v. U.S. Bank National Assn.* (2014) 231 Cal.App.4th 1315 – In *Bunker Hill Park Ltd.*, Bunker Hill Park Limited (Bunker Hill) filed a petition to compel arbitration with its tenant, U.S. Bank National Association (U.S. Bank), to resolve the disagreement as to whether the sublease automatically terminates if the underlying lease between the parties terminates. The original lease enumerated that all disputes arising under or relating to the lease be subject to arbitration. The trial court denied the petition on the basis that the disagreement had not ripened into a justiciable controversy meriting declaratory relief. The Court of Appeal reversed and directed the trial court to grant the petition to compel arbitration. The Court held that the parties agreed to a broadly worded arbitration provision that obligated both parties to arbitrate all disputes arising under or relating to the lease. The Court noted that while a justiciable controversy is required in the courts, the parties had cited no authorities indicating that the same requirement applies to arbitration. Instead, arbitration is a creature of contract. Because the parties’ arbitration provision was broadly worded and devoid of any language suggesting a justiciability requirement, the Court of appeal declined to read such a requirement into the agreement.



## ANTI-SLAPP STATUTE

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### **14 Commercial Speech Exemption – Speech Aimed At Securing Advertising Revenue For A Website Is Exempt From Anti-SLAPP Protection**

*Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294 –The Plaintiff-restaurant owner sued Yelp claiming that Yelp misrepresented the abilities of the software it uses to filter restaurant reviews on its website, Yelp.com. Yelp filed a successful anti-SLAPP motion, which the restaurant owner appealed, claiming that Yelp’s representations were commercial speech exempted from the anti-SLAPP statute under section 425.17. The Court of Appeal reversed, holding that while Yelp’s restaurant reviews, themselves, were matters of public interest in a public forum, its representations regarding the abilities of its filtering software were commercial speech aimed at convincing advertisers to purchase advertising on Yelp.com. As such, they fell under the exemption for commercial speech, and did not satisfy the first prong of the anti-SLAPP statute.

### **15 Fee Award After Voluntary Dismissal Requires Showing That Anti-SLAPP Motion Would Have Been Successful**

*Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447 –The Plaintiff brought a putative class action under the Fair Debt Collection Practices Act. The Defendants, in turn, filed a special motion to strike pursuant to the anti-SLAPP statute. Eventually, the Plaintiff voluntarily dismissed his action against the Defendants but the Defendants still filed a motion for attorney fees. The trial court entered a judgment in favor of the Defendants, awarding attorney fees. On appeal, the Court of Appeal reversed the trial court’s decision to award attorney fees. The Court held that, while attorney’s fees for bringing an anti-SLAPP motion may still be granted when an action is voluntarily dismissed before the motion is heard, a prerequisite to such an award is a determination of the merits of the anti-SLAPP statute. After independently reviewing the merits of the motion, the Court of Appeal held that the Plaintiff’s claims were subject to the public interest exception to the anti-SLAPP statute, and thus attorney’s fees should not have been awarded.

### **16 First Prong – Declaratory Relief Action Filed In Response To A CLRA Notice Does Arise From Protected Activity**

*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th. 459 – Like *Gotterba*, the *Lunada* case also involved a declaratory relief claim brought in response to a prelitigation demand. The Court in *Lunada*, distinguished *Gotterba* by noting that the prelitigation demand was a Consumer Legal Remedies Act (“CLRA”) notice required under Civil Code section 1782, subdivision (a) prior to instituting a CLRA action. The Court noted that, in *Gotterba*, the declaratory relief claim arose from an underlying contractual dispute, and the demand letter was merely evidence of that dispute or the trigger for filing the lawsuit. By contrast, the Court in *Lunada* held that, because the CLRA notice is required before an action for damages can be filed, there would be no

controversy at all without the notice. As such, the action arose out of the notice itself. After making this determination, the Court also held that the plaintiff could not prevail on the merits, because, as a matter of law, a declaratory relief claim may not be brought against a consumer to preempt an anticipated CLRA claim.

### **17 First Prong – Declaratory Relief Action Filed In Response To A Prelitigation Demand Letter Does Not Arise From Protected Activity**

*Gotterba v. Travolta* (2014) 228 Cal.App.4th 35 –The Plaintiff filed a declaratory relief action against several Defendants including John Travolta. The Plaintiff was formerly employed as Travolta’s personal airline pilot, and made several salacious disclosures regarding Travolta to a number of newspapers. The Defendants’ counsel sent a letter citing the confidentiality provision of the Plaintiffs employment agreement, and demanding that the Plaintiff cease making statements regarding his prior employment. In response, the Plaintiff filed a declaratory relief action challenging the viability of the confidentiality provision of the employment contract, and that action was met with an anti-SLAPP motion. The Court of Appeal affirmed the denial of the motion, holding that the Plaintiff’s complaint was not based on the demand letter, itself, but on the purported invalidity of certain provisions of the employment agreement. The Court reasoned that an anti-SLAPP motion should be granted only if liability is based on speech or petitioning activity, itself. The Court concluded that the prelitigation letter may have triggered the Plaintiff’s complaint, but it was not the basis of the complaint.

### **18 First Prong – Non-Communicative Conduct In Furtherance Of Petitioning Rights Must Be Related To A Public Issue To Trigger The Anti-SLAPP Statute**

*Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.* (2014) 230 Cal.App.4th 859 – In order to trigger the protection of the anti-SLAPP statute, non-speech conduct must be connected to an issue of public importance. In *Old Republic Construction Program Group*, worker’s compensation insurer for the Plaintiff filed a claim against an insured individual and the individual’s attorney. The Plaintiff alleged that the Defendant lawyer wrongfully withdrew settlement funds from a third party motorist, and distributed them to the client, despite the insurer’s claim for reimbursement. The Defendant lawyer filed an anti-SLAPP motion to strike the Plaintiff’s claims. The lawyer contended that the suit was predicated on the lawyer’s protected petitioning activity, i.e. entering into a stipulation that any distribution would require authorization by the client and insurer. The trial court denied the motion to strike and the Court of Appeal affirmed the trial court’s decision. The Court of Appeal held that that, although entering into the stipulation may be a protected activity, the insurer’s claims were predicated on the withdrawal of settlement funds and not the entry into the stipulation. The Court then proceeded to determine whether the withdrawal activity was protected by the anti-SLAPP statute. The Court held that, under the express language of CCP § 425.16(e)(4), for non-communicative conduct to satisfy the first prong of the anti-SLAPP statute, the conduct, “in connection with a public issue or an issue of public interest.” Because the Defendant attorney’s

withdrawals were not related to a public issue, the Court of Appeal held that the trial court did not err in rejecting the lawyer's motion to strike.

## **19 First Prong – Statements Made During a Homeowners Association Board Meeting Are Not Protected by the Anti-SLAPP Statute**

*Talega Maintenance Corp. v. Standard Pacific Corp.* (2014) 225 Cal.App.4th 722 [Ikola, Moore, Thompson] –A homeowners association (HOA) sued two developers and their former employees who served on the HOA's board of directors. The HOA alleged that the Defendants committed fraud, constructive fraud, negligence, and breach of fiduciary duties as board members by voting to expend HOA funds on repairs that should have been made by the developer, and by falsely claiming at board meetings that the HOA was responsible for the repairs. The trial court denied anti-SLAPP motions brought by the Defendants, and the Court of Appeal affirmed on two grounds. First, the act of voting and expending HOA funds was not a protected speech activity. Second, the Defendants' speech activities at the HOA meetings were not protected under the anti-SLAPP statute, because an HOA meeting is not an official proceeding authorized by law, and the expenditure of funds on repairs is not a matter of public interest.

## **APPELLATE LAW & PROCEDURE**

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### **20 Appealable Orders – Order Awarding Appellate Attorney's Fees Following Remand For New Trial Is Directly Appealable**

*Apex LLC v. Korusfood.com* (2014) 222 Cal.App.4th 1010 [Fybel, O'Leary, Bedsworth] – Orders awarding attorney's fees are usually appealable as post-judgment orders under Code of Civil Procedure section 904.31(a)(2). In *Apex*, however, a prior appeal reversed the trial court's judgment, and remanded the matter for a new trial. The trial court then entered an order awarding attorney's fees to the appellant from the original appeal. That order was arguably *not* appealable as a post-judgment order, since the judgment had been vacated, and the new trial had not yet taken place. The Court of Appeal noted that the fee award "would not appear" to be appealable as a post-judgment order, but declined to resolve that question. Instead it held that the order could be directly appealed as a "collateral order" under *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368, because it was a final determination of a collateral matter that directed the payment of money or performance of an act.

### **21 Briefing – Appellant May Assert New Arguments On Appeal Where Demurrer Is Sustained Without Leave to Amend**

*Connerly v. State of California.* (2014) 229 Cal.App.4th 457 – While parties are usually precluded from asserting new arguments on appeal that they did not assert in the trial court, there are some exceptions to this general rule. One of those exceptions is 472c, subdivision (a), which provides that when a court grants a demurrer without leave to amend, the refusal to allow an amendment may be challenged on appeal even if no request to amend was made in the trial court.

The Court in *Connerly* held that, under this section, a plaintiff was allowed to raise a new legal theory for amending his complaint for the first time in his appellate brief.

## **22 Disentitlement Doctrine – Where Appellant Defies Trial Court Orders Enforcing Judgment, Appellate Court may Dismiss Appeal**

*Gwartz v. Weilert* (2014) 231 Cal.App.4th 750 – The Fifth Appellate Court held that an appellate court has the inherent power to dismiss an appeal by a party that refuses to comply with a lower court order. In *Gwartz*, the Plaintiffs obtained a \$1.5 million judgment against the Defendant couple for fraud and breach of contract in the sale of a horse ranch. The Defendants appealed, but did not post an undertaking. Instead, they attempted to evade enforcement of the judgment while the appeal was pending. The trial court entered post-judgment orders prohibiting transfers of certain assets, which the Defendants promptly violated. The Plaintiff filed a motion to dismiss the appeal. The Court of Appeal granted the motion, holding that doctrine of disentitlement is a discretionary tool that an appellate court may use to dismiss an appeal when the balance of equities makes dismissal an appropriate sanction. Because the Defendants did not deny transferring assets in violation of the trial court’s orders attempting to enforce the very judgment on appeal, the Court held that the balance of equities favored dismissal of the Defendants’ appeal. *The fascinating backstory of this Appeal, involving Friesian horse-breeding, a Fresno native posing as French royalty, and a fake death scam can be found on Google by searching for “Genevieve de Montremare.”*

## **23 Stay Pending Appeal – Failure To Oppose A Stay Motion Does Not Waive Requirement Of Undertaking Where Motion Does Not Request Stay To Be Issued Without Undertaking**

*Sharifpour v. Le* (2014) 223 Cal.App.4th 730 [Moore, Aronson, Thompson] –The Plaintiffs obtained a large six-figure judgment against the Defendants. The Defendants appealed and filed a motion for stay of the enforcement of the judgment pending resolution of the appeal. The Plaintiffs did not oppose the motion, but, at the hearing on the motion they requested that the trial court order an undertaking to secure the judgment amount, as required under CCP § 917.1(a). The trial court entered the stay, held that the Plaintiffs waived the requirement of an undertaking by failing to file an opposition, and did not require an undertaking. The Court of Appeal reversed, noting that the motion did not request a stay to be entered without an undertaking. To the contrary, the motion stated that, if an undertaking were ordered, the Defendants requested a reasonable amount of time to obtain one. Accordingly, the Court of Appeal held that it was error to construe the failure to oppose the motion as consent to the issuance of a stay without an undertaking. Because section 917.1(a) provides that a trial court has no power to enter a stay pending appeal without an undertaking unless the adverse party consents, the Court of Appeals reversed.

## **24 Writ Review – Writ Relief Is Appropriate Where An Arbitration Award Is Vacated And A New Arbitration Is Ordered.**

*United Health Centers of the San Joaquin Valley, Inc. v. Superior Court of Fresno County* (2014) 229 Cal.App.4th 63 – One of the questions that is usually asked anytime appellate justices speak at a bar function is “when will the court actually consider granting a writ petition?” In *United Health Centers of the San Joaquin Valley*, the Court answered that question, holding that, while an order vacating an arbitration award and ordering a rehearing is neither a final judgment nor appealable order, the cost and time that would be consumed to re-arbitrate was sufficient to justify review of the order in an extraordinary writ proceeding. The Court reversed the order vacating the arbitration, and remanded for further consideration by the trial court, as discussed on page 14, above.

## **25 Writ Review – Writ Relief Without Oral Argument Is Justified By Imminent Trial Date And Other Extraordinary Factors**

*Certainfeed Corp. v. Superior Court* (2014) 222 Cal.App.4th 1053 –The Court of Appeal granted writ relief from an order denying additional time to complete the Plaintiff’s deposition under Code of Civil Procedure section 2025.290. The preemptory writ was granted without oral argument, after the Court of Appeal gave the plaintiff a “*Palma* Notice,” i.e. notice of the possibility that a peremptory writ may be issued, and an opportunity to submit an informal opposition. The Court noted that, while this “accelerated *Palma* notice procedure is reserved for truly exceptional cases, that procedure was warranted to prevent a lengthy postponement of trial where (a) the trial court committed clear error by refusing to even consider extending the length of the Plaintiff’s deposition, (b) the Plaintiff was in a poor state of health, (c) the Plaintiff had a right to trial preference, and (d) the trial date was imminent.

## **ATTORNEY’S FEE AWARDS**

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### **26 Amount Of Fees – Trial Court Did Not Err In Relying On The Declaration Of Counsel Without Actual Time Records In Setting Fee Amount**

*Syers Properties III, Inc. v. Rankin* (2014) 226 Cal.App.4th 691 –The Plaintiff appealed the trial court’s award of attorney fees to the Defendants in an unsuccessful malpractice action. The Court of Appeal rejected the Plaintiff’s contentions that (a) the trial court erred by accepting the defense counsel’s declaration regarding the hours reasonably spent in the absence of actual time records, and (b) the trial court erred by adopting a “reasonable” attorney rate that exceeded the actual rates charged. The Court held that, because time records are not required under California law, the lower court did not abuse its discretion in finding the computation to be reasonable and accepting it as the basis for the fee award. As to the second contention, the Court held that the reasonable market value of the attorney’s services is the proper measure of a reasonable hourly rate, not actual rate billed. Accordingly, the Court of Appeal held that the trial court did not err in its decision to award attorney fees for the specified amount to the Defendants.

## **27 Amount Of Fees – Trial Court May Not Award Attorney’s Fee Based On An In Camera Review Billing Records**

*Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309 –The Defendants opposed a fee application based on attorney declarations of the amount of time spent on the litigation. When it appeared that the trial court was inclined to agree with the Defendants, the Plaintiffs submitted billing records for in camera review. The trial court reviewed the records, and granted the fee award, without providing the records to the Defendants. The Court of Appeal reversed. First, the Court explained that, while a fee award may be based on declarations, and need not be based on detailed time or billing records, a trial court has discretion to require more detailed records. However, the Court also explained that it is improper for the court to resolve the merits of a dispute based on an in camera review. Instead, the Defendants should have been given an opportunity to review and oppose the billing records.

## **28 Apportionment – Inability To Apportion Fees Between Defendants Does Not Bar Recovery**

*Hill v. Affirmed Housing Group* (2014) 226 Cal.App.4th 1192 –The managing member of an LLC prevailed in his defense against the Plaintiff’s claims, while the LLC did not. The trial court awarded contractual attorney’s fees to the managing member, without apportioning the defense costs between the LLC and the managing member, who were represented jointly by the same firm. The Court of Appeal affirmed, holding that (1) the fees could not be apportioned because the Defendants both asserted the same defenses, and (2) the fact that the LLC incidentally benefitted by sharing the same counsel with the managing member did not affect the managing member’s contractual right to recover attorney’s fees.

## **29 CEQA/Administrative Mandamus – Public Agency May Recover Attorney’s Fees Incurred As Costs To Prepare Administrative Record.**

*The Otay Ranch, L.P. v. County of San Diego* (2014) 230 Cal.App.4th 60 – Pursuant to Code of Civil Procedure section 1094.5, subdivision(a), and section 1094.6, subdivision (c), an agency preparing an administrative record in a CEQA mandamus action may recover the cost of doing so from the petitioner, and such costs may ultimately be recovered by the prevailing party. Where the particular nature of a case requires the use of attorneys to prepare the administrative record, the Court of Appeal in *Otay Ranch* held that the attorney’s fees incurred to prepare the record are recoverable costs.

### **30 Contractual Fees – Fees Are Not Available Under Civil Code § 1717 Where Contract Is Illegal And Both Parties Are In Pari Delicto – And – Affirmative Defense That A Contract Is A Novation Qualifies As A Legal Action To Enforce The Contract**

*Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2014) 231 Cal.App.4th 805 – Trial court denied attorney fees to the prevailing Defendants in a breach of contract case under the fee provisions in two separate agreements, a repurchase agreement, and a later option agreement. The Defendants prevailed in the trial court on two defenses: (1) the repurchase agreement that the Plaintiff sought to enforce was illegal because it involved the unlawful sale of real property without a subdivision map, and (2) the option agreement was a novation, extinguishing the repurchase agreement. In the first significant holding the Court of Appeal affirmed the trial court’s denial of attorney’s fees under the option repurchase agreement. The Court recognized that a defendant prevailing on a breach of contract claim by establishing the invalidity of a contract is generally entitled to any fees allowed under the contract pursuant to Civil Code section 1717, which ensures “mutuality of remedy” between plaintiffs and defendants. However, the Court noted that there is an exception where the contract is illegal, and both sides are equally at fault. In such circumstances, neither party would ever be allowed to enforce the agreement, so there is no need to provide a mutual remedy.

In the second significant holding, the Court of Appeal reversed the trial court’s denial of attorney’s fees under the option agreement. That agreement provided for fees “If any legal action or any other proceeding... is brought for the enforcement of this Agreement.” The Court of Appeal first rejected the notion that attorney’s fee provisions must be strictly construed, and held that the ordinary rules of contract interpretation apply. Under those rules, the Court held that (a) the words “legal action or any other proceeding” encompass an entire action, including the complaint and responsive pleadings, and (b) by establishing that the option agreement was a novation superseding the earlier repurchase agreement, the Defendant enforced the option agreement’s integration clause, which expressly stated that the option agreement supersedes the parties’ prior agreements.

### **31 Contractual Fees – Prevailing Party Is Not Required To File A Memorandum Of Costs To supplement Its Attorney Fees Motion.**

*Kaufman v. Diskeeper Corporation* (2014) 229 Cal.App.4th 1 – In an action seeking contract-based attorney fees, a prevailing party is not required to file a memorandum of costs in addition to a fee motion. In *Kaufmann*, the prevailing Defendant made a motion for attorney fees, relying on Civil Code section 1717 and Code of Civil Procedure section 1033.5. Additionally, the prevailing Defendant argued that rule 3.1702 of the California Rules of Court does not require the filing of a memorandum of costs to recover attorney’s fees and expenses. The Plaintiffs opposed the motion and contended that the Defendant was required to file a memorandum of costs, as specified in the rule 3.1700 of the California Rules of Court. The trial court denied the Defendant’s motion and held that a memorandum of costs should have been filed to establish attorney fees and costs. The Court of Appeal reversed, holding that the Defendant was correct

because neither section 1717 nor 1033.5 expressly mandates a memorandum of costs. The Court further held that section 1033.5, subdivision (c)(5), states that the minimum process to recover contractual attorney fees is filing an “item of costs.” In addition, The Court held that section 1717 pertained to attorney’s fees while rule 3.1700 applied to prejudgment costs. Moreover, the Court found that rule 3.1702 requires a memorandum of costs only when a fee motion is not required.

### **32 Interest – Attorney, And Not The Client, Is The Rightful Owner Of Interest On Attorney’s Fee Award**

*Hernandez v. Siegel* (2014) 230 Cal.App.4th 165 –The Plaintiff client agreed that the Defendant attorneys would receive the greater of either all of the attorney’s fees awarded, or 40% of the entire amount awarded in the underlying discrimination lawsuit. At the conclusion of the underlying action, the Plaintiff was awarded \$623,908.12 in attorney fees, which exceeded 40% of the total award. When the defendant in the underlying action paid \$658,606.91 to the Defendant law firm, representing the fee award plus post-judgment interest, the client asserted the right to recover the interest, based on the argument that the fee agreement did not explicitly give the Defendant law firm the right to post-judgment interest. When the law firm refused to distribute the interest to the Plaintiff, he sued for breach of fiduciary duty. The trial court and Court of Appeal agreed that interest on any judgment belongs to the party to whom the judgment is owed. The Court of Appeal reasoned that the absence of any specific provision in the fee agreement regarding post-judgment interest is not surprising given that post-judgment interest is automatic.

### **33 Quantum Meruit – Attorneys With No Written Fee Award Not Entitled To Lodestar Multiplier**

*Chodos v. Borman* (2014) 227 Cal.App.4th 76 –The Court of Appeal held that the trial court erred in allowing the jury to apply a lodestar multiplier in calculating the award for the Plaintiff-attorney. While the lodestar method applied to the Plaintiff’s quantum meruit claim against his former client, no multiplier was appropriate because (a) the attorney charged an hourly rate, and thus did not voluntarily assume a contingent risk to justify a multiplier, (b) the underlying dispute was an “unremarkable family law dispute” that did not require “an exceptionally skilled attorney,” and (c) it would inequitable to reward an attorney for violating the duty to obtain a written fee agreement by awarding a fee greater than the hourly fee he would have obtained under such an agreement.

### **34 Self-Representation – Law Firm Representing Itself May Not Recover Attorney Fees for Work Done by an Independent Contractor**

*Ellis Law Group, LLP v. Nevada Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244 – The appellant challenged an attorney fees award to the respondent-law firm, as the prevailing party on an anti-SLAPP motion to strike the appellant’s claim for breach of fiduciary duty. The Court of Appeal reversed the fee award, under *Trope v. Katz* (1995) 11 Cal.4th 274, which bars attorney fee awards to self-represented attorneys. The respondents argued that, despite the



holding in *Trope*, they should recover fees for a contract attorney who worked on the anti-SLAPP motion. The Court of Appeal rejected that argument, holding that the contract attorney was essentially a member of the firm, and that the attorney's status as an independent contractor for tax purposes was not dispositive. The holding was based on a number of factors, including the listing of the contract attorney as a member of the law firm on several documents filed in the trial court, as well as the fact that the firm's malpractice insurance covered the contract attorney.

### **35 Statutory Attorney's Fees – Plaintiff's Attorney Not Liable For Attorney's Fees In Government Claims Act Case**

*Suarez v. City of Corona* (2014) 229 Cal.App.4th 325 – Code of Civil Procedure section 1038 authorizes an award of costs, including attorney's fees and expert witness fees, where an action brought under the Government Claims Act is brought without reasonable cause. In *Suarez*, Plaintiff suffered injuries arising from a gas tank explosion at a fuel station owned by the City of Corona. The City moved for summary judgment, which the trial court granted. The City then moved to recover its defense costs against Plaintiff and Plaintiff's attorneys, pursuant section 1038. The trial court granted the City's motion. The Court of Appeal reversed in part, holding that section 1038 does not allow public entities to recover defense costs from an attorney representing a plaintiff.

### **36 Statutory Attorney's Fees – Surety Is Liable For Attorney's Fees Incurred In Action To Enforce Judgment Bond**

*Rosen v. LegacyQuest* (2014) 225 Cal.App.4th 375 – Notwithstanding Code of Civil Procedure section 685.040, which provides that attorney's fees incurred in enforcing a judgment are not recoverable unless otherwise provided by law, a judgment creditor who enforces a judgment bond against a surety is entitled to recover its attorney's fees incurred in doing so. Such fees are "otherwise provided by law" in section 996.480(a)(2).

### **37 Statutory Attorney's Fees – Third Party Transferees Are Liable For Attorney's Fees Incurred In Fraudulent Transfer Claim**

*Cardinale v. Miller* (2014) 222 Cal.App.4th 1020 – Code of Civil Procedure section 685.040 allows a judgment creditor to recover the costs enforcing a judgment. Where the underlying judgment includes attorney's fees, costs of enforcing a judgment include such fees as well. In *Cardinale*, the Court of Appeal held that this provision allows recovery of attorney's fees from third parties who participate in a fraudulent transfer, even though the third parties were neither (a) parties in the underlying action, nor (b) parties to the contract on which the underlying fee award was based.

## ATTORNEY PRACTICE

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### **38 Attorney-Client Privilege – Intra-firm Consultation With Firm’s In-House Counsel Regarding Dispute With Client Is Privileged**

*Edwards Wildman Palmer LLP v. Superior Court* (2014) 231 Cal.App.4th 1214 –The Court of Appeal held that the attorney-client privilege attaches to intra-firm communications when an attorney seeks legal advice from an in-house attorney concerning a dispute with one of the firm’s current clients. The Plaintiff former client filed a malpractice action against the Defendant law firm that had represented him in a separate legal matter. During the short-term relationship between the Plaintiff and firm, the Plaintiff sent several emails to his counsel questioning the firm’s handling of the legal matter and the firm’s billing practices. The Plaintiff’s counsel, in turn, consulted the Defendant firm’s general counsel regarding the Plaintiff’s disputes. Eventually, the Defendant firm withdrew and the Plaintiff obtained new representation in the matter. The Plaintiff then filed a malpractice action against the Defendant and sought to compel production of communications between his former attorney and the Defendant firm’s general counsel. The trial court granted the motion to compel. The Court of Appeal granted a writ petition and ordered the trial court to vacate its order compelling production. The Plaintiffs cited federal exceptions to the attorney-client privilege applicable where an attorney consults another attorney in his own firm regarding a dispute with one of the firm’s current clients. The Court of Appeal rejected that argument, holding that the attorney-client privilege in California is a legislative creation, and courts are not free to fashion new non-statutory exceptions.

### **39 Attorney’s Liens – Existence And Amount Of Lien Must Be Established In Action Against Former Client Before Enforcing Lien**

*Mohtahedi v. Vargas* (2014) 228 Cal.App.4th 974 –The Court of Appeal held that an attorney could not enforce his attorney fee lien solely by suing his former client’s current attorney for a share of the client’s settlement in the attorney’s trust account. To enforce such a lien, the attorney must also bring a declaratory relief claim against the former client to establish the existence and amount of the lien.

### **40 Bar Admissions – Undocumented Immigrants May Be Admitted To The State Bar**

*In re Garcia* (2014) 58 Cal.4th 440 – In 2013, the Legislature enacted Business & Professions Code § 6064(b), which allows the California Supreme Court to admit an applicant as an attorney at law, even if the applicant is not lawfully present in the United States. This year, the California Supreme Court admitted Sergio C. Garcia, who was certified to the Court by the Committee of Bar Examiners as qualified for admission. The Committee informed the court of Mr. Garcia’s status as an undocumented immigrant, and noted that to its knowledge, no other court had ever knowingly admitted an undocumented immigrant to the practice of law. The Supreme Court agreed with the Committee’s certification, holding that: (a) the enactment of section 6064(b) satisfied a federal statute that would otherwise have prohibited Mr. Garcia’s admission, (b)

unlawful presence in the United States does not involve moral turpitude, and (c) federal restrictions on the right to work do not prohibit all legitimate uses of a California law license, and are subject to change, in any event. In light of the foregoing, and in light of Mr. Garcia's particular personal qualifications, the Court granted the Committee's motion to admit Mr. Garcia to the practice of law.

#### **41 Malpractice – Causation – Malpractice Did Not Cause Loss Where Law Firm Advised Client To Settle**

*Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107 –The appellant filed a malpractice suit against two firms, Pittullo, Howington, Barker, Abernathy, LLP (“Pittullo”) and Stolar & Associates (“Stolar”). In a separate prior proceeding, Pittullo represented the appellant in a family law case. During the course of that proceeding, Pittullo recommended the appellant to accept a settlement offer because the appellant had a “50 percent chance” of prevailing in the matter. Eventually, the appellant substituted Stolar for Pittullo as her legal counsel. Stolar made the recommendation that it would be in appellant's interest in settling because the appellant had a much lower probability of 50 percent chance of prevailing. Ultimately, the appellant refused the settlement offer. At the conclusion of that matter, the court awarded the appellant no recovery. Then the appellant filed a legal malpractice suit against both Pittullo and Stolar. She argued that both Pittullo and Stolar's representations of probability of succeeding resulted in her turning down the settlement offer. After hearing the case, the trial court ruled in favor of Pittullo and Stolar. Upon appeal, Court of Appeal affirmed the lower court's decision, holding that there was no triable issue in the case. Additionally, the Court held that it was the Appellant's own decision, against the advice from both Pittullo and Stolar, to decline the settlement offer. The Court concluded because of the appellant's own decision, there was no causal connection between the alleged malpractice and appellant's loss as a matter of law.

#### **42 Malpractice – Judicial Error May Negate The Elements Of A Legal Malpractice Claim**

*Kasem v. Dion-Kindem* (2014) 230 Cal.App.4th 1395 –The Court of Appeals affirmed the trial court's decision to dismiss the Plaintiff's complaint against the Defendant without leave to amend. The Plaintiff brought a legal malpractice action against the Defendant, her former attorney, alleging that the Defendant negligently failed to hire an expert witness to testify whether sewage classified as a “hazardous material” in the underlying action. The Plaintiff's recovery in the prior proceeding was predicated on the argument that sewage was, in fact, a “hazardous material.” The Plaintiff alleged in her malpractice action that, because the trial court in the underlying matter refused to take judicial notice of statutory law denoting sewage being a hazardous material, the Defendant's conduct fell below the requisite standard of care by failing to call an expert witness. Upon review, the Court held that the Defendant-attorney's conduct did not fall below the standard of care threshold because it was the trial court that erred in its decision to refuse to take judicial notice of statutory law classifying sewage as a hazardous material. The Court held that the Defendant acted properly in relying on the request for judicial

notice rather than an expert witness. The Court held that a judicial error in an underlying trial can negate the elements of a legal malpractice claim because an appeal, and not a legal malpractice action, is the proper remedy for addressing trial court error. Accordingly, the Court affirmed the trial court's decision to sustain the demurrer to the malpractice action.

#### **43 Misallocation Of Settlement Funds – Trial Court's Retained Jurisdiction Under CCP § 664.6 Allows Temporary Restraining Order To Freeze Funds**

*Lofton v. Wells Fargo Home Mortgage* (2014) 230 Cal.App.4th 1050 –Two attorneys (class counsel) initiated class action litigation against Wells Fargo Home Mortgage (Wells Fargo) seeking damages for wage claims on behalf of thousands of home mortgage consultants who had allegedly been misclassified as exempt employees. Several years later, the Initiative Legal Group, APC (ILG) filed a similar putative class actions, and 600 individual actions in several different superior courts. Eventually, ILG, Wells Fargo and class counsel engaged in a mediation of all pending claims. This mediation resulted in Wells Fargo reaching a settlement with both ILG and class counsel on behalf of their respective clients. This mediation was referred to as the *Lofton* settlement. This settlement resulted in a common fund for the class actions and a separate fund to resolve the 600 individual actions filed on behalf of ILG's clients. Instead of distributing settlements to its clients from the individual action fund, ILG had its individual clients opt into the class settlement. ILG eventually agreed to also distribute limited sums to the individual plaintiffs from the individual claim fund, but intended to leave the bulk of the individual funds, approximately \$5 million, as its own attorney's fees. Despite the fact that a final judgment had been entered in the action pursuant to the settlement agreement, the trial court held that it retained jurisdiction under § 664.6, which allows parties to consent to the court's continuing jurisdiction to enforce the settlement. Accordingly, the trial court entered a temporary restraining order at the request of one of ILG's former clients, requiring the firm to deposit the purported attorney's fees in a court controlled trust account. The Court of Appeal agreed, holding that the jurisdiction under § 664.6 includes the trial court's equitable jurisdiction, and extends not only to the parties, but their attorney's as well. The Court of Appeal also held that the trial court did not abuse its discretion in ordering the TRO, as there were questions as to whether ILG was entitled to any fees at all for filing duplicative actions.

#### **44 Statute Of Limitation – Client's 15-Year-Old Claim For Withholding Settlement Funds Timely Where Attorneys Did Not Provide Accounting**

*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105 – Whenever an attorney distributes funds to his or her clients, it is a good practice to include a written accounting. In *Prakashpalan*, the Plaintiff clients filed a lawsuit against their former legal counsel for malpractice, breach of fiduciary duty, and fraud. The claims were based on, among other things, the withholding of settlement funds from the resolution of a group of property damage claims arising out of the Northridge earthquake that were asserted by the Defendant law firm on behalf of 93 plaintiffs, including the Plaintiff clients. The settlement occurred in 1997,

but the Plaintiffs did not learn of the wrongful withholding until February 2012, when they contacted others in the group of plaintiffs, and discovered that there were over \$22 million in settlement funds unaccounted for. The trial court granted a demurrer without leave to amend on other grounds, but the primary issue on appeal was the statute of limitation. The Court of Appeal held that the Plaintiffs' claims for malpractice and breach of fiduciary duty were controlled by the statute of limitations for fraud, CCP § 340.6. Under that provision a claim is barred the *earlier* of one year after discovery of the wrongful act or omission, or four years after the wrongful act or omission. As such, the fraud and malpractice claims based on the 1997 settlement funds were time barred. Section 340.6, however, does not apply to fraud claims. The general statute of limitations for fraud, CCP § 338, tolls the limitations period for fraud until the plaintiff discovers the facts that constitute the fraud. Moreover, the Court of Appeal held that settlement funds held by attorneys for their clients are express trusts. As such, the Plaintiffs' fraud claims relating to the settlement funds were subject to the limitations period in Probate Code § 16460. Under that statute, a claim is barred either (a) three years after the plaintiff receives an accounting that adequately discloses the grounds for the claim, or (b) three years after the plaintiff knew or should have known of the grounds for the claim. Because the attorneys never provided a sufficient accounting of the settlement funds, and because the Plaintiffs brought the claims within three years of their discovery, the Court of Appeal held that the Plaintiffs should be granted leave to amend to allege delayed discovery under section 16460.

## **CIVIL PROCEDURE**

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### **45 Costs – Cost To Photocopy Documents Produced In Response To A Business Records Subpoena Are Recoverable**

*Naser v. Lakeridge Athletic Club* (2014) 227 Cal.App.4th 571 – In *Naser*, the Plaintiff was injured in the Defendant's health club facility. The Plaintiff sued for negligence and the Defendant prevailed on a motion for summary judgment. After the Defendant filed a memorandum of costs, the Plaintiff moved to tax "deposition costs" that consisted of the cost to photocopy medical records produced in response to a business records subpoena. The Defendant argued that Code of Civil Procedure section 1033.5(a) does not allow recovery of photocopying costs. The trial court and Court of Appeal disagreed, and held that the photocopying charges were recoverable as deposition costs, because a business records subpoena is a "deposition" within the plain meaning of the Civil Discovery Act.

### **46 Federal Supplemental Jurisdiction – Parties Have A 30 Day "Grace Period" For Refiling In State Court After Federal Dismissal**

*City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618 – 28 U.S.C. § 1367 provides that where a state law claim is submitted to a federal court under its supplemental jurisdiction, and is subsequently dismissed, the statute of limitation is tolled during the pendency of the claim, and for a period of thirty days after the claim is dismissed. The California Supreme Court noted that there are two primary interpretations of the word "tolled" in this statute. One interpretation holds that the statute of limitations is suspended, and the time remaining under the statute of limitations

at the time the federal court action begins is “tacked on” 30 days after the federal court action is dismissed. Another holds that the *expiration* of the statute of limitations is abated while the federal court action is pending, and the plaintiff has a “grace period” of 30 days after the federal court action is dismissed to refile a claim that would otherwise have expired. The California Supreme Court has now adopted the second approach, holding that the “grace period” approach satisfied the statute’s purpose of preventing the loss of claims, while not unduly impinging on state sovereignty.

#### **47 Joinder – Joinder Of Nearly 1,000 Separate Plaintiffs In “Mass Action” Is Permissible Under CCP § 378**

*Petersen v. Bank of America* (2014) 232 Cal.App.4th 238 [Bedsworth, Thompson, Dissent by Fybel] – In *Petersen*, 965 Plaintiffs were joined in a “mass action” against the successors in interest to Countrywide Financial Corporation (“Countrywide”). Prior to the filing of litigation, each of the Plaintiffs had borrowed mortgage loans from Countrywide. The Plaintiffs’ 3,142 page complaint alleged that Countrywide engaged in a conspiracy using: (a) appraisers who artificially inflated housing prices, and (b) loan officers who made false assurances that loans were “affordable,” and hid loan terms such as balloon payments or negative amortization. The aim of this scheme was to place borrowers in loans that Countrywide knew the borrowers could not afford, with the intention of selling the loans to third parties before they were defaulted. This action may have been brought as a “mass action” rather than a traditional class action in an attempt to avoid the application of the Class Action Fairness Act (28 U.S.C. 1332), a federal statute that allows certain large class actions to be removed to federal court. The majority opinion held that CCP § 378’s requirement that joined claims must arise out of the “same transaction or series of transactions” should be construed broadly in light of California law’s affinity for judicial economies of scale, and the trial court’s ability to use the complex rules to manage large cases by breaking them down into subclaims or subclasses. Using this broad construction, the majority held that the Plaintiffs’ claims were properly joined. The dissenting opinion argued that joining so many plaintiffs in one action was unprecedented in state or federal courts, and that the “same transaction or series of transactions” requirement was not satisfied, because each loan was a different and separate transaction, and liability would not be subject to common proof.

#### **48 Personal Jurisdiction – Merely Doing Business In A State Is Not Sufficient To Create General Jurisdiction Over A Foreign Corporation**

*Young v. Daimler AG* (2014) 228 Cal.App.4th 855 – The United States Supreme Court recently addressed the issue of general jurisdiction (i.e. jurisdiction where the defendant’s contacts within the state are not related to the subject of the lawsuit) in *Daimler AG v. Bauman* (2014) 134 S. Ct. 746 (Bauman II). In *Young*, the Court of Appeal followed the Supreme Court’s holding that Daimler AG’s sales of cars in California through its subsidiary, Mercedes-Benz USA, LLC is not sufficient to confer general jurisdiction over Daimler, even if those sales are imputed to Daimler using agency principles. The Court of Appeal echoed the Supreme Court’s holding that general

jurisdiction arises only where a corporation is “essentially at home” in the forum state, and “[a] corporation that operates in many places can scarcely be deemed at home in all of them.”

#### **49 Personal Jurisdiction – The “Effects Test” Is Not The Sole Measure Of Purposeful Availment In Tort Cases**

*Gilmore Bank v. AsiaTrust New Zealand Ltd.* (2014) 223 Cal.App.4th 1558 [Ikola, O’Leary, Thompson] – A nonresident defendant is not required to have expressly aimed its intentional tortious conduct at the plaintiff in order to be subject to specific jurisdiction in California. Specific jurisdiction has three elements, the first of which is the defendant’s purposeful availment of the state’s benefits. In *Gilmore Bank*, nonresident Defendant AsiaTrust was sued for fraudulent transfer in connection trusts set up to protect a judgment debtor’s assets from collection. AsiaTrust moved to quash service, and argued that in tort actions, the so called “effects test” governs the purposeful availment element of specific jurisdiction, and requires a showing that the Defendant directed tortious conduct at the Plaintiff. The Court of Appeal disagreed, holding that the effects test required conduct directed at the forum state, not the Plaintiff, coupled with knowledge that the conduct would cause harm in the forum. The Court also held that the effects test is only one of several means to establish purposeful availment in tort cases, and that the “forum benefits test” may also be used. Under that test, a Defendant is subject to specific jurisdiction if it purposefully derives benefits from activities in California. AsiaTrust satisfied this test by (a) entering into a contract with California residents to administer the trust containing the judgment debtor’s assets, (b) receiving funds from, and distributing funds to California, (c) engaging in extensive communications directed to the California judgment debtor, and (d) receiving compensation for accepting, investing, managing, and shielding the California judgment debtor’s assets. Accordingly, the ordered the denial of AsiaTrust’s motion to quash service.

#### **50 Relief From Default – Mandatory Relief Under CCP 473(b) Does Not Apply Where Counsel Miscalendars Trial Date**

*Noceti. v. Whorton* (2014) 224 Cal.App.4th 1062 – Mandatory relief from default is not available under Civil Code section 473(b) when an attorney fails to appear at trial and judgment is entered after the uncontested trial. In *Noceti*, Plaintiffs’ attorney miscalendered the trial date, and the uncontested trial proceeded without the attorney. Consequently, Plaintiffs hired new counsel and filed an appeal, arguing that they were entitled to mandatory relief under section 473(b). The Court of Appeal disagreed, holding that mandatory relief under section 473(b) only applies to an entry of default or default judgment, and the entry of judgment after the uncontested trial in *Noceti*, was not equivalent to a default judgment, since the trial court “considered the entire file” before entering judgment. In an unpublished portion of the case, the Court of Appeal considered the discretionary relief provision in section 473(b), and then remanded the matter for the trial court to reconsider the issue of discretionary relief.

## **51 Res Judicata and Collateral Estoppel – A Natural Person May Be Bound By A Judgment Against A Non-Profit Organization**

*Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1499 – A person’s claim that a city provided defective notice of a public hearing was barred by res judicata because the issue was litigated in an earlier lawsuit and the person shared privity with the non-profit organization which brought the earlier lawsuit. Citizens for Responsible Equitable Environmental Development (“CREED”) brought an action alleging that the City of Rialto (the “City”) provided defective notice regarding a public hearing. The trial court denied CREED relief. Thereafter, Plaintiff filed a separate writ petition alleging defective notice. The Court of Appeal held that the Plaintiff was in privity with CREED for the purposes of res judicata, because both the Plaintiff and CREED were seeking to vindicate the same public interests, rather than any personal interest. As such, the Plaintiff’s claim was barred by res judicata.

## **52 Res Judicata and Collateral Estoppel – Foreign Court’s Incorrect Resolution Of Question Of Law Is Not Binding In Action Against New Defendant**

*Gottschall v. Crane Co.* (2014) 230 Cal.App.4th 1115 – In *Gottschall*, a decedent’s family lost a prior federal action against an asbestos producer based on the federal court’s application of the sophisticated user defense to products liability claims. In a second California action against a different asbestos producer, the Court of Appeal refused to apply res judicata or collateral estoppel, because the federal court’s resolution of the novel application of the sophisticated user defense was contrary to California law. The Court noted that the application of collateral estoppel to pure questions of law was questionable, and that public policy considerations may warrant an exception to the claim preclusion aspect of res judicata. The Court then resolved the novel issue of law involving the sophisticated user defense. (*See also* Products Liability – The Sophisticated Intermediary Doctrine, p. 57, below)

## **53 Res Judicata and Collateral Estoppel – Judgment Creditor Is Not Barred From Asserting Alter Ego As Grounds To Amend Judgment**

*Wells Fargo Bank, National Assn. v. Weinberg* (2014) 227 Cal.App.4th 1 – Neither res judicata nor collateral estoppel will preclude a court from adding a new party to an existing judgment under an alter ego theory. In *Weinberg*, the trial court amended a judgment to include a lawyer as a judgment debtor to a bank’s judgment against his law corporation. The Court held that the lawyer was a proper party to the judgment, because there was substantial evidence that the lawyer was operating as an alter ego of the law corporation, the matter had not been addressed or decided in the judgment, and the bank did not know of the facts supporting the alter ego theory until after entry of judgment. The Court also held that res judicata was inapplicable because the lawyer’s alter ego conduct was a separate and distinct harm from the law corporation’s breach of contract, which was the subject of the underlying lawsuit.



## **54 Res Judicata and Collateral Estoppel – Settlement Agreement In Underlying Action Does Not Bar Subsequent Fraudulent Transfer Claim**

*Fujifilm Corp. v. Yang* (2014) 223 Cal.App.4th 326 – In *Fujifilm Corporation*, the parties settled an underlying patent lawsuit (Federal Lawsuit No. 1). The settlement agreement provided that some of the underlying defendants would make payments in the amount of \$3.25 million, while Defendant Yang would become jointly liable only if the payments were not made, and only up to the amount of any transfers from the other defendants to Yang. When the payments were not made, the Plaintiff sought to enforce the settlement agreement against Yang in Federal Lawsuit No. 2, claiming that \$1.5 million had been transferred to her from one of the other defendants. The court denied relief in Federal Lawsuit No. 2, because the transfer took place before the effective date of the settlement agreement. In the action at issue in *Fujifilm Corp.*, the Plaintiff sued Yang for fraudulent transfer. The Court of Appeal held that res judicata and collateral estoppel based on the result of Federal Lawsuit No. 2 did not apply because (1) the tort of fraudulent transfer arises from a different “primary right” than the breach of the settlement agreement, and (2) joinder of the breach of settlement claim with the fraudulent transfer claim was permissive, not mandatory. In so holding, the Court of Appeal affirmed that under California law, the “primary rights” doctrine determines the scope of the preclusive effect of a judgment, rather than the more expansive federal “transaction” doctrine.

## **55 Sealed Records – Formal Requirements For Sealing Records Do Not Apply To Irrelevant Documents Submitted With Motions**

*Overstock.com, Inc. v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471 – In *Overstock.com*, the Court of Appeal decried the common and vexatious practices of submitting reams of irrelevant documents in connection with summary judgment motions, and propounding overly inclusive motions to seal purportedly confidential information. The Defendants moved for summary judgment, and the Plaintiff’s opposed, with 38 banker’s boxes of documents, thousands of pages of which had been marked “Confidential” or “Highly Confidential” pursuant to a protective order. Many of the documents were not cited at all in the opposition, and many of the documents that were cited were included in whole, despite the fact that only a page or two were relevant. The Defendants’ responded by filing motions to seal “copious amounts” of the materials, and the Plaintiffs and members of the media filed oppositions. The trial court largely denied both motions, but ordered a significant amount of material sealed. On appeal, the Court decried the tactics of the Plaintiffs in placing such an unreasonable burden on the trial court by filing large amounts of irrelevant material. The Court held that the rules for sealing court records in C.R.C. rules 2.550 and 2.551 do not apply to irrelevant or inadmissible materials, because such materials are unnecessary to the public’s understanding of the court’s judgment. Accordingly, the Court of Appeal held that rather than performing a formal evaluation of the merits of sealing the thousands of pages not cited in the opposition, the trial court should have simply stricken them from the record or sealed them if a party anticipated an appeal to challenge the determination that the documents were irrelevant. The Court of Appeal also encouraged the use of protective order provisions requiring parties to be as sparing as possible in the use of

confidential materials, and stated that trial courts should not hesitate to issue sanctions for egregious violations of such provisions. After making rulings as to several other categories of the purportedly confidential documents, the Court admonished the parties that on remand they may not simply dump the documents back onto the trial court. Instead, before they returned to the trial court for further proceedings on a revised motion to seal, they were required to review the discussion in the opinion, reach an agreement as to which documents are irrelevant, and should be struck from the record, and which documents are both relevant and contain actually confidential information as to which the trial court must make a sealing determination.

## **56 Service of Process – Proof Of Service On A Corporation Must Identify The Appropriate Manager Or Officer Served.**

*Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434 – In *Ramos*, Plaintiff served the summons and complaint on the person who identified herself as being in charge of a branch office of the Defendant corporation, and then mailed a copy to the corporation, but did not address the mail to a certain person. In addition, the proof of service failed to identify the name or position of the employee who was served at the Defendant’s office. Plaintiff obtained a default judgment against the corporation, and the corporation successfully moved to set aside the judgment. The Court of Appeal affirmed the trial court’s decision, finding that Plaintiff’s service did not substantially comply with the Code of Civil Procedure, because the process server failed to obtain the identity of the individual who received the summons and complaint, and none of the officers and managers on whom process may be served under section CCP § 416.10(b) resided at the branch office. In addition, the mailed notice did not comport with any of the statutory requirements of section 416.10, because the mail was not addressed to an appropriate officer, and there was no evidence that any appropriate officer received the mail.

## **57 Service Of Process – Service By Publication Proper**

*Giorgio v. Synergy Management Group, LLC* (2014) 231 Cal.App.4th 241 – Service by publication is proper where a defendant could not be serviced either personally or by mail, despite the Plaintiff’s reasonable diligence. Plaintiff sued Defendant for fraud. Plaintiff made numerous attempts to serve Defendant at an address associated with Defendant in Los Angeles as well as at an address in the Netherlands, and Plaintiff employed a company that specializes in difficult service of process. Thereafter, the trial court approved Plaintiff’s application for service of publication, and Plaintiff published the summons in the *Los Angeles Daily Journal* for four consecutive weeks. Plaintiff then filed a request for entry of default against Defendant, which was entered by the court clerk. Defendant filed a motion to set aside entry of default on the ground that service by publication was improper, which was denied by the trial court. The Court of Appeal affirmed, concluding that there was substantial evidence that Defendant could not with reasonable diligence be served personally or by mail. The Court was unmoved by Defendant’s contention that the summons was not published in a newspaper that would most likely give him actual notice. Though the Court acknowledged that it was unlikely that Defendant acquired actual notice of the lawsuit through the publication in the newspaper, such service was still

proper because Plaintiff had exercised reasonable diligence in attempting to serve him personally and by mail.

## **58 Setting Aside Judgments And Orders – Voluntarily Dismissal Based On Incorrect Legal Advice May Not Be Set Aside As Void**

*Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818 – In *Nixon Peabody LLP*, the Plaintiffs filed the same claims in three lawsuits against the Defendant law firm in three different venues. On the advice of their attorney, the Plaintiffs voluntarily dismissed two of the actions, including the action filed in California state court, without prejudice. The federal judge in the last remaining action held that under the federal two-dismissal rule, the voluntary dismissal of the California action operated as a dismissal on the merits, and barred the claims in the last action. The Plaintiffs then returned to California, and asked that their dismissal be set aside under CCP § 473(d) as void. The Plaintiffs argued that because their attorney told them the dismissal would not adversely affect their other actions, they did not give informed consent to the dismissal, rendering the dismissal void. The trial court granted the motion, and set aside the dismissal, but the Court of Appeal reversed on a petition for writ of mandate, holding that the Plaintiffs validly consented to the dismissal, and their attorney’s mistaken advice did not render the dismissal void. The Court of Appeal distinguished cases holding that dismissals are void without client consent by noting that those cases involved a lack of consent to the act of dismissal, not a mistake as to the consequences of dismissal. Finally, the Court noted that the more appropriate remedy would have been a motion for relief from mistake due to attorney fault under section 473(b), but that it was already past the 6 month time limit for such relief.

## **59 Summary Judgment – Preclusive Effect Of Discovery Admissions**

*Ahn v. Kumho Tire U.S.A., Inc.* (2014) 223 Cal.App.4th 133 – In *Ahn*, Defendants served several “state all facts” special interrogatories on Plaintiffs, and Plaintiffs’ counsel responded with statements indicating that “we don’t know” or “discovery is continuing.” Defendants moved for summary judgment, arguing that Plaintiffs’ interrogatory responses were factually devoid and thus Plaintiffs’ claims lacked any factual basis. In opposition to the motion, Plaintiffs submitted a declaration explaining both: (a) the factual bases of Plaintiffs’ claims, and (b) how the error was made in the earlier discovery responses. Nonetheless, the trial court granted Defendants’ motion for summary judgment. The Court of Appeal reversed, finding that the trial court misinterpreted the rule arising from *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-23 (the “*D’Amico*” rule”), which held that a party may not create a triable issue of fact in opposition to a summary judgment motion simply by contradicting prior discovery admissions without explanation. The Court of Appeal held that the *D’Amico* rule did not apply, because a trier of fact could have found the Plaintiff’s explanation for the mistaken admission credible.

## **60 Trial – Court Has Wide Discretion To Limit Length of Trial**

*California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12 – A trial court has wide discretion to impose time limits before a trial

commences and to expedite the proceedings. In *California Crane School*, the trial court informed both parties that the trial would be limited to twelve days. Nonetheless, the Plaintiffs exceeded the time allotted for opening statements, and spent seven days examining three witnesses. On the morning of the tenth day of trial, the court informed both parties that the case had to go to the jury by the next day in order to avoid losing a juror to a pre-planned vacation. The Plaintiff's counsel objected that they had not been permitted to rebut the Defendant's evidence or move exhibits into evidence. By the twelfth day, the jury deliberated and reached a verdict for the Defendant. Relying upon Evidence Code section 352, the Court of Appeal held that the trial court did not abuse its discretion in supervising the timing of the trial, including limiting the amount of time the Plaintiffs were permitted to put on their case. The trial court has discretion to institute time limits for the proceedings, taking into account the state of the pleadings, the issues, numbers of witnesses, and the court's trial schedule. The Court observed that it was the Plaintiffs' inability to manage their case-in-chief – and not the trial court's abuse of discretion – that prevented the Plaintiff from rebutting and moving additional exhibits into evidence.

## **CLASS ACTIONS**

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### **61 Class Certification – Commonality Of Class Members' Status As Independent Contractors Is Determined By Right To Control, Not Exercise Of Control**

*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522 – In *Ayala*, the trial court denied class certification to a group of newspaper carriers. The carriers claimed that they were incorrectly treated as independent contractors, and thus deprived of wage and hour protection provided to employees. The trial court held that common issues did not predominate, because independent contract status is determined primarily by the employer's control of the employee/contractor, and there was significant variation on how much control was exercised over the carriers. The Supreme Court affirmed the Court of Appeal's reversal of the trial court, holding that the correct consideration was not the employer's *exercise* of control, but its *right* to exercise control. Because the trial court focused on the actual exercise of control, and paid only cursory attention to the fact that the carriers were all subject to the same form contract (giving the employer the same right to control), the trial court's analysis was flawed, and the matter was remanded for further consideration.

### **62 Class Certification – Evidence That Class Members Executed Releases Should Not Have Been Considered In Numerosity Analysis**

*Hendershot v. Ready to Roll Transportation, Inc.* (2014) 228 Cal.App.4th 1213 – In *Hendershot*, the Plaintiffs filed a putative class action against the Defendant for failure to pay overtime wages. Before the motion to certify the class was heard, the Defendants then settled with 44 out of the 53 individuals in the putative class, and asserted those settlements in arguing that the remaining 9 member class was not sufficiently numerous to justify a class action. The trial court agreed, and the Court of Appeal reversed, holding that the trial court had improperly

ruled on the merits of the Defendants' affirmative defense of release, when it should have focused exclusively on whether or not the class, as defined in the complaint, is so numerous that it would be impracticable to bring the entire class before the court. The Court of Appeal left open the possibility that the settlement agreements could be considered in the analysis of whether the class representatives can adequately represent class members who executed releases, or whether the representatives' claims are typical of the class. The Court of Appeal also held that it was a violation of due process to allow the Defendants to assert the releases in opposition to the certification motion, when (a) the Defendants had not pled the defense of release in their answer, and (b) the Plaintiffs were not, therefore, afforded an adequate opportunity to conduct discovery regarding this defense, and address it in the certification motion.

### **63 Dissenting Class Members – Requirement That Dissenting Class Members Personally Attend Hearing Violates Due Process**

*Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877 – A notice requiring that any objector to a class action final approval hearing must physically attend the hearing violates the class member's due process rights. In *Litwin*, the trial court approved a class action settlement agreement which would result in Defendants creating a fund to reimburse class members for the purchase of a product. Class member Burt Chapa objected to the settlement, and appealed after the trial court finalized the settlement. Chapa alleged that the trial court violated his due process rights by imposing a requirement that objectors to the proposed settlement personally attend the final approval hearing in order to have their objections heard. The Court of Appeal agreed. Procedural due process requires that affected parties have the right to be heard at a meaningful time and in a meaningful manner. Chapa's due process rights were violated because objecting to the settlement required out-of-state class members to incur significant expenses or physical challenges to attend the final hearing given the possibly meager individual benefits these out-of-state class members receive by attending the final hearing. Instead, the objector should be permitted to file a written objection, as the cost to the parties would remain the same and the burden on the court to review these written objections would be minimal.

### **64 Statistical Sampling – Use Of Statistical Sampling Must Allow Defendant To Show Possible Individual Variations**

*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1 – While the California Supreme Court endorsed the possible use of statistical sampling in the determination of class actions, it determined that the implementation of statistical sampling in *Duran* was flawed, and required reversal. Specifically after certifying a class of 260 Plaintiffs claiming to have been incorrectly designated as exempt employees, the court used a random sample of 21 employees, heard testimony regarding their work habits, and used statistical analysis to extrapolate the habits of the remainder of the class. That analysis determined that all of the Plaintiffs were misclassified as exempt. As a result, the Defendant was precluded from presenting any evidence to show that particular members of the remainder of the class were exempt, and not entitled to any recovery. The Court held that statistical analysis could not be used to abridge the Defendant's substantive

rights in this way, and that future use of statistical analysis must allow defendants the opportunity to impeach the statistical model or reduce the defendants' liability.

## **CONSTRUCTION**

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### **65 Construction Defect – Architects Owe a Duty of Care to Future Homeowners in the Design of a Residential Building**

*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568 – In *Beacon*, a homeowners association sued various parties, including two architectural firms, for construction design defects that made the homes unsafe and uninhabitable for significant portions of the year. The architects allegedly designed the homes negligently, even though they did not participate in construction or make the final project decisions. The trial court sustained the Defendant architectural firms' demurrer, finding an absence of duty. However, the Court of Appeal reversed and the Supreme Court affirmed, finding that an architect owes a duty of care to future homeowners where the architect is a principal architect on the project. The Court defined a "principal architect" as one who provides professional design services and is not subordinate to other design professionals. The duty of care extends to architects who do not actually build the project or exercise ultimate control over construction, and they cannot escape liability on the ground that they did not make the final project decisions. A duty also arose because the architects knew the homeowners were relying on their specialized expertise. In reaching its conclusion, the Court noted that liability historically required privity, however the declining significance of privity has "found its way into construction law."

### **66 Mechanic's Liens – Prejudgment Interest Rate Is 7 Percent Where There Is No Privity Between Contractor And Liable Party**

*Palomar Grading & Paving, Inc. v. Wells Fargo Bank, N.A.* (2014) 230 Cal.App.4th 686 [Bedsworth, Rylaarsdam, Aronson] – In *Palomar Grading & Paving*, the two Plaintiff subcontractors worked with a contractor to develop a particular parcel of property for the Defendant corporate entities, but never entered into a contract directly with the Defendants. Eventually, the contractor failed to pay the Plaintiffs for substantial portions of their work, and the Plaintiffs sought to foreclose their mechanic's liens against the property owned by the Defendants. The trial judge awarded the subcontractors a prejudgment interest of 10 percent, pursuant to Civil Code section 3289, subdivision (b), which sets the prejudgment rate for breaches of contract. The Court of Appeal reversed, holding that section 3289(b) does not apply where there is no contract between the party seeking to enforce a mechanic's lien and the owner of the property being foreclosed. Instead, the correct interest rate is the default 7 percent rate specified in article XV, section 1, of the California Constitution.

### **67 Right of Repair Act – Emergency Repairs Of Catastrophic Damages Are Still Subject To The Requirements Of The Act**

*KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471 – In *KB Home*, the homeowner purchased a new home from KB Home. Years later, there was a water

leak that caused extensive damage. The homeowner made a claim to his insurer, Allstate Insurance Company (Allstate), which repaired the home and filed a complaint in subrogation against the home builder, KB Home. In the Court of Appeal, the issue was whether the pre-litigation procedures of the Right to Repair Act (Civ. Code, § 895 et seq.) applied – specifically, the section requiring a homeowner to provide written notice and an opportunity to repair a defect before the homeowner repairs the defect. The Court held that Allstate’s subrogation claim failed because it did not give KB Home any notice of the defect prior to repairing it. The Court rejected the insurer’s argument that the notice provisions do not apply in emergency situations involving catastrophic damages. The Court held that the builder was still entitled to reasonable notice in such cases, and that it need not determine exactly what would have constituted reasonable notice, since Allstate gave no notice at all until after the repairs were made. The Court also rejected Allstate’s argument that the time limits in the Act’s notice provision would allow a homebuilder to drag out the repair while further damage occurred, reasoning that the homebuilder would have no incentive to do so since the Act makes the builder liable for any property damage caused by the defect.

## **68 Right to Repair Act – Parties May Enter Into Valid Agreement To Deviate From The Statutory Repair Schedule**

*The McCaffrey Group, Inc. v. Superior Court* (2014) 224 Cal.App.4th 1330 – The Right to Repair Act (Civ. Code 895 et seq.) provides for informal dispute resolution procedures for construction defects in new residential construction, and give builders the right to attempt to repair defects prior to litigation. The procedures include certain time limits, notice requirements, the homeowner’s right to obtain certain documents, and a prohibition on conditioning repairs on a release or waiver from the homeowner. However, the Act also allows builders to opt out of those provisions by providing for their own informal dispute resolution procedures, which will govern as long as they are not unconscionable; if they are, the builder loses its right to attempt repair prior to litigation. In *McCaffrey*, the Defendant homebuilder provided home warranties with alternative dispute resolution procedures. The contractual procedures had different time limits and notice requirements, did not allow for document disclosures similar to the Right to Repair Act, and allowed the builder to obtain a release in exchange for attempting repair. The trial court found the contractual procedures were unconscionable because they lacked the strict deadlines “that are integral to the Right to Repair Act.” The Court of Appeal reversed, holding that the mere fact that the alternative procedures are not the same as the procedures in the Right to Repair Act does not mean they are unconscionable. Because the Plaintiff homeowners failed to meet their burden of establishing actual unconscionability, the dispute resolution procedures were enforceable, and the trial court was ordered to grant the Defendant’s motion to compel ADR.

## **69 Unlicensed Contractors – Bus. & Prof. Code § 7031 Does Not Preclude Reissue Of Existing Contractor’s License To A New Business Entity During Construction**

*E.J. Franks Construction, Inc. v. Sahota* (2014) 226 Cal.App.4th 1123 – The Court affirmed judgment entered in favor of plaintiff construction company and against defendant property owners awarding plaintiff quantum meruit damages after a jury trial for extra work performed while constructing a home. Defendants entered into a home construction agreement with a licensed sole proprietor. During the course of providing work, the sole proprietor incorporated his company and obtained a reissue of his general contracting license to the Plaintiff’s company during the construction period. Plaintiff filed a complaint against Defendants, seeking to foreclose on a mechanic’s lien after defendants failed to pay plaintiff for work performed by plaintiff. Defendants contended on appeal that Business & Professions Code section 7031(b) was a complete bar to Plaintiff’s quantum meruit claim, which precludes unlicensed contractors from maintaining actions for compensation. The Court held that section 7031 did not apply to Plaintiff’s unique circumstances. This case involved a licensed contractor and a change in business entity status. Proper licensure was in place at all times. Applying section 7031 to Plaintiff’s circumstances would lead to absurd results, as it would effectively preclude licensed sole proprietor contractors from lawfully incorporating and obtaining a reissue of a general contracting license to the new business entity at any time during the construction period. The purpose of section 7031 is to deter unlicensed contractors from recovering compensation for their work. It is not intended to deter licensed contractors from changing a business entity’s status, and obtaining a reissuance of the license to the new entity, during a contract period.

## **CONTRACTS**

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### **70 Electronic Signature – Authentication Is Required To Establish That An Electronic Signature Was The Act Of The Purported Signer**

*Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal.App.4th 836 – In *Ruiz*, the Defendant-employer appealed a trial court’s order denying its petition to compel arbitration of the Plaintiff-employee’s employment claims. The trial court denied the petition without a statement of decision, and none was requested. As a result, the Court of Appeal implied a finding that the Defendant had not proven that the electronic signature on the arbitration agreement at issue was actually placed there by the Plaintiff. The court found substantial evidence to support this finding, because the Defendant had offered only conclusory statements that the electronic signature belonged to Plaintiff, but none of the Defendant’s witness declarations explained how they ascertained that the electronic signature was Plaintiff’s act. For his part, the Plaintiff indicated that he recalled electronically signing some documents at the time of his employment, but did not recall signing an arbitration agreement, and was never given a copy. The Court of Appeal noted that pursuant to Civil Code § 1633.7(a), an electronic signature has the same legal effect as a handwritten signature, but under Evidence Code § 1401, any writing must be authenticated with evidence showing that it is what the proponent claims it to be. Because the Defendants failed to meet their burden of authentication with anything more than conclusory



assertions, the Court of Appeal affirmed the trial court's refusal to enforce the arbitration agreement.

### **71 Foreseeable Damages – Buyer and Escrow Company Are Not Liable to Seller For Tax Consequences Of Delay in Closing of Escrow**

*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258 – In *Ash*, the Defendant seller of real property breached the sales contract with the Plaintiff buyer, by delaying the close of escrow so that it did not take place on the agreed upon date in the contract. The sale was part of a special Internal Revenue Code transaction (26 U.S.C. section 1031) to defer the Plaintiff's capital gains tax on his sale of a different property. The Plaintiff placed the money payable on the sale in a segregated account with an exchange intermediary. However, on the business day after the sale was scheduled to close, the intermediary filed for bankruptcy and did not release Plaintiff's money until it was too late to qualify for deferral of taxes under section 1031. The Court of Appeal noted that contract damages are generally limited to those within the contemplation of the parties when the contract is entered, or at least reasonably foreseeable at that time. Moreover, the measure of damages is the amount that will compensate for all detriment proximately caused thereby. Here, there was no advance evidence that the intermediary would go bankrupt and freeze all segregated accounts. Since this scenario was not reasonably foreseeable, the amount of damages awarded by the trial court was unjustified. Finally, it was prejudicial error for the lower court to refuse instructing the jury on intervening and superseding causes.

## **CORPORATIONS**

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### **72 Derivative Claims – Shareholder May Not Use Discovery to Find the Basis of a Derivative Action Against a Delaware Corporation**

*Jones v. Martinez* (2014) 230 Cal.App.4th 1248 – In *Jones*, the trial court denied discovery to a derivative action plaintiff, who failed to satisfy the requirement to allege in his complaint either (a) particular facts showing that he made a demand on the board of directors to obtain the relief he is seeking, or (b) facts establishing that such a demand would have been futile. The Court of Appeal affirmed, reasoning that under Delaware law applicable to a corporation incorporated in Delaware, the Plaintiff was not entitled to take discovery until *after* he satisfied this pleading requirement. While the holding was based on Delaware's Rule 23.1, the Court of Appeal noted the similarity between Rule 23.1 and California Corporations Code § 800(b)(2).

### **73 Dissolutions – LLC Members Liable For LLC's Debts Following A “De Facto Dissolution”**

*CB Richard Ellis, Inc. v. Terra Nostra Consultants* (2014) 230 Cal.App.4th 405 [Ikola, O'Leary, Aronson] – While LLC members are generally not liable for the causes of action asserted against an LLC, Corporations Code § 17355 provides that when a dissolved LLC has distributed assets to the members, the members may be sued for any causes of action against the LLC up to the amount of their respective distributions. In *CB Richard Ellis*, the Plaintiff asserted

claims against the members of an LLC that had sold its only asset, and distributed the proceeds to its members. The trial court instructed the jury that the dissolution occurs when an LLC ceases operating in the normal course of business, with the intent not to resume ordinary business operations. Defendant LLC members argued that this instruction was in error, and that adissolution only occurs when one of three statutory preconditions is satisfied: (1) a dissolution event specified in the governing documents takes place, (2) the members vote for dissolution, or (3) a judicial decree of dissolution is entered. The Court of Appeal interpreted the relevant statutory scheme as a whole, and held that the purpose of section 17355 was to prevent unjust enrichment of the members by the distribution of LLC assets needed to pay the company’s liabilities. That purpose would be frustrated if the statute was interpreted to apply only where the statutory preconditions for actual dissolution are satisfied. As such, the Court of Appeal held that the jury was properly instructed on “de facto” dissolution. The Court of Appeal also analogized section 17355 and held that the trial court erred by refusing to grant contractual attorney’s fees against the members on the grounds that the LLC, and not the members, signed the contract with the fee provision.

#### **74 Minority Rights – Dissenting Shareholders in Common Control Mergers Limited To Accounting Or Rescission**

*Busse v. United PanAm Financial Corp.* (2014) 222 Cal.App.4th 1028 [**Bedsworth, Rylaarsdam, Moore**] – Corporations Code section 1312(a) generally limits the right of dissenting minority shareholders to challenge mergers and buyouts. Under *Steinberg v. Amplica, Inc.* (1986) 42 Cal.3d 1198, section 1312(a) limits minority shareholders to an action for an accounting, and prohibits actions for damages. Subdivision (b) of section 1312 provides an exception to subdivision (a) where both entities in a merger are subject to common control. The Court of Appeal in *Busse* construed subdivision (b) to allow minority shareholder in so-called “common control” situations to elect to seek rescission of the challenged transaction, but held that claims for damages are still barred.

#### **75 Suspended Corporations – Lack Of Capacity to Defend Does Not Deprive Court Of Jurisdiction To Accept Corporation’s Undertaking And Distribute It To Opposing Party**

*Tabarrejo v. Superior Court* (2014) 232 Cal.App.4th 849 – In *Tabarrejo*, the Petitioner filed claims with the Labor Commissioner against the Respondent corporation. After hearing the matter, the Labor Commissioner awarded the Petitioner \$131,096.77. The Respondent appealed to the Superior Court, and posted the required undertaking, despite the fact that its corporate status had been suspended, and thus it had no capacity to file a valid appeal. The Petitioner successfully moved to dismiss the appeal on the grounds of incapacity, and requested the release of the undertaking. The trial court granted the motion to dismiss, but ordered the undertaking to be distributed to the Respondent’s owners, on the theory that the appeal was void *ab initio*. The Court of Appeal reversed, and ordered the undertaking released to the Petitioner. The Court explained that the issue is one of capacity to sue, not standing. While the Respondent’s appeal was invalid when filed, it could have been retroactively validated if the Respondent had revived

its corporate powers. Therefore, the mere fact that the Respondent did not revive its powers before dismissal did not does retroactively deprive the trial court of jurisdiction to accept the appeal and the undertaking.

## **DAMAGES/REMEDIES**

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### **76 Punitive Damages – Dramatic Reduction of Compensatory Damages Does Not Mandate Reduction of Punitive Damages Where Damage Ratio Is Not Presumptively Invalid**

*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962 – In *Izell*, Defendant Union Carbide appealed a judgment in favor of the Plaintiffs for personal injuries and loss of consortium in an asbestos/mesothelioma case. At the outset of the underlying trial, the jury awarded the Plaintiffs \$30 million in compensatory damages (65% of which was attributed to Union Carbide) and awarded \$18 million in punitive damages against Union Carbide. The trial court issued a remittitur, which the Plaintiffs accepted, reducing the compensatory damage award to \$6 million, but the court declined to reduce the punitive damages. On appeal, Union Carbide asserted that punitive damages were excessive in light of the reduction of compensatory damages. The Court of Appeal affirmed, holding that where a reduction in the amount of compensatory damages awarded by a jury does not result in a ratio of punitive damages to compensatory damages that is presumptively invalid, the amount of punitive damages does not necessarily need to be reduced. The trial court’s remitter resulted in a ratio of 4.62 to 1. As such, the Court of Appeal reviewed the validity of the punitive damages under the normal standard of review for punitive damages, and affirmed the entire amount awarded.

### **77 Remedies – Difficulty in Ascertaining Damages Does Not Preclude Remedies For Breach of Fiduciary Duty**

*Meister v. Mensinger* (2014) 230 Cal.App.4th 381 – Where a trial court found that the Defendant officers, directors, and majority shareholders breached fiduciary duties to the Plaintiff minority shareholders, it was error for the trial court to fail to craft a remedy due to the difficulty of calculating damages. After finding expert testimony inconclusive, the trial court reviewed the subject company’s accounting records in camera, without the assistance of an expert. After this unassisted review, the court declined to award damages, because they could not be calculated in a “mechanical and undemanding” fashion. The Court of Appeal reviewed the remedies available for breach of fiduciary duty, including damages, restitution, disgorgement, and constructive trust, and held that it was error for the trial court to fail to craft a suitable remedy where liability and harm had been established, simply because a damage number could not be easily calculated. The Court of Appeal also held that it was error for the trial court to examine the accounting records without expert assistance.

## **78 Restitution and Disgorgement – Proper Measure of Restitution/Disgorgement for Unjust Enrichment**

*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451 – In *American Master Lease*, judgment was entered against the Defendants for aiding and abetting a breach of fiduciary duty, and the Plaintiff was awarded disgorgement of the Defendants’ profits from their wrongdoing, in the amount of the value of certain stock obtained by the Defendants. The Court of Appeal affirmed the availability of this remedy, but reversed the award for error in the jury instructions regarding the calculation of the value of the stock. To guide the trial court in giving proper instructions on remand, the Court advised that the proper measure of damages was the amount the Defendants profited from their wrong doing, and gave four specific instructions for the jury on remand: (1) the Defendants are entitled to credit for any amounts expended to acquire or preserve the property or run the business that is the subject of disgorgement; (2) the jury may consider the price paid for the stock at the time it was acquired, and, in addition, any evidence that the stock was worth more or less than that amount; (3) in evaluating whether any deductions may be made from the value of the stock, the jury may consider the Defendant’s asserted inability to collect the full value of the stock, or the possibility that the Defendants intentionally failed to collect the full value of the stock in order to minimize the damages in litigation; and (4) while the value of the stock is ordinarily calculated at the time it was acquired by the Defendants, the Plaintiff may recover “a higher value if this is required to avoid injustice where the property has fluctuated in value.” (*See also* Vicarious Liability – Aiding and Abetting, pp. 58-59 below.)

## **79 Unlawful Penalties – Distinction Between A Penalty And A Prompt Payment Discount**

*Purcell v. Schweitzer* (2014) 224 Cal.App.4th 969; *Jade Fashion & Co., Inc. v. Harkham Industries, Inc.* (2014) 229 Cal.App.4th 635 – Two cases decided in 2014 demonstrate the distinction between an unlawful penalty provision, and a (possibly) lawful prompt payment discount. In *Purcell*, the parties settled a prior lawsuit over an \$85,000 debt for \$38,000, with a provision that if one of the Defendant’s payments was late, the entire \$85,000 debt would be reinstated. The Court held that this was an unlawful penalty, because the \$47,000 difference bore no reasonable relationship to the plaintiff’s damages from a late payment, or even the cost of enforcing the settlement in court. In *Jade Fashion & Co.*, the parties entered into a payment plan that: (a) acknowledged the debtor’s entire \$341,628.77 debt, (b) provided that the debtor would make weekly \$25,000 payments, and (c) allowed the debtor to deduct \$17,000 from the final installment, if all prior payments were made on time. When the debtor made five of its payments three to twelve days late, and tendered the last payment with the discount deducted anyway, the creditor sued. The Court of Appeal held that the provision relating to the discount was not an unlawful penalty. The Court distinguished *Purcell* and similar cases by noting that the agreement acknowledged the entire debt, rather than compromising the debt and calling for its reinstatement upon breach. The Court also used this fact to distinguish *Harbor Island Holdings v. Kim* (2003) 107 Cal.App.4th 790, which held that an unlawful penalty cannot be made lawful simply by characterizing it as a “conditional waiver.” Despite the Court’s attempt

to distinguish *Harbor Island Holdings*, there seems to be some remaining tension between *Harbor Island* and *Jade Fashion*.

## **DISCOVERY**

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### **80 Deposition Time Limit – Extension Of Limit In Complex Cases**

*Certaineed Corp. v. Superior Court* (2014) 222 Cal.App.4th 1053 – Code of Civil Procedure section 2025.290(a) limits depositions in most cases to seven total hours of testimony, but provides that the trial court *shall* allow an extension of that time if needed to fairly examine the deponent. Subdivision (b)(3) provides that in complex cases, the limit shall be 14 total hours, and does not provide any specific authorization to extend that time period. In *Certaineed Corp.*, the Court of Appeal held that the extension provision in subdivision (a) also applies to the 14 hour limit in subdivision (b)(3), but that the trial court also retains its discretion to limit the deposition to prevent unwarranted annoyance, oppression, undue burden, or expense. (This case is also cited in Appellate Procedure – Writs – Circumstances Justifying Immediate Relief)

### **81 Electronic Discovery – A Nonparty May Be Compelled to Translate Any Data Compilations Responsive to a Subpoena into a Reasonably Usable Form**

*Vasquez v. California School of Culinary Arts, Inc.* (2014) 230 Cal.App.4th 35 – In *Vasquez*, the Court of Appeal affirmed the trial court’s order awarding the subpoenaing party attorney fees and expenses in denying a nonparty’s motion to quash. The Court held that, if necessary, a subpoenaed person, at the reasonable expense of the subpoenaing party, may be compelled to produce electronically stored information in a form specified by the subpoenaed party, even when it would require the subpoenaed person to create new code to format and extract that information from its existing systems. In doing so, the Court viewed the federal court’s decision in *Gonzales v. Google, Inc.* (2006) 234 F.R.D. 674 as persuasive precedent.

### **82 Expert Witness Disclosures – Where Both Sides Make Late Expert Witness Disclosures, Court Has Discretion To Exclude One Side’s Experts**

*Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401 – In *Cottini*, the Plaintiff objected to the Defendant’s expert witness disclosure demand, and refused to produce its expert witness disclosures based on a claim that the Defendant’s counsel should be disqualified for possessing confidential information belonging to the Plaintiff. On the date scheduled for the exchange, the Plaintiff filed a motion to disqualify the Defendant’s attorneys and stay discovery. Based on the Plaintiff’s unilateral refusal to disclose, the Defendant also refused to disclose its expert witnesses. The trial court denied the motion to disqualify. Several days later, after the expert exchange date, but before the discovery cut off, the Defendants served their expert witness disclosures. The Plaintiff persisted in refusing to make his disclosure, renewed his motion, and brought an (unsuccessful) appeal challenging the motion’s denial. After the appeal was denied, the Plaintiff finally made his expert witness disclosures. The Defendants brought a motion in

limine to exclude the Plaintiff's experts for failure to make the expert witness disclosures on time. The Plaintiff argued that the Defendant's disclosures were late as well, and under CCP § 2034.720, an expert witness must be excluded based on failure to make expert witness disclosures only if the complaining party made timely disclosures itself. The trial court and Court of Appeal both agreed that while § 2034.720 governs when exclusion is mandatory, it does not restrict the court from exercising its inherent powers to exclude witnesses when the requirements for mandatory exclusion have not been met. The courts both noted that the Defendant's disclosures were made while discovery was still open, and thus did not prejudice the Plaintiff, while the Plaintiff's disclosures were made long after discovery closed, and were withheld without any reasonable grounds. Based on these facts, the Court of Appeal held that the trial court did not abuse its discretion in granting the Defendant's motion in limine, and excluding the Plaintiff's expert witnesses.

### **83 Privilege – Common Interest Doctrine Applies To Communications Between HOA Attorney And Homeowners At Litigation Update Meetings**

*Seahaus La Jolla Owners Assn. v. Superior Court* (2014) 224 Cal.App.4th 754 – In *Seahaus La Jolla Owners Assn.*, the Defendant developers sought discovery of communications between counsel for Plaintiff homeowners' association and individual homeowners that occurred in the context of litigation update meetings held by the association. The trial court allowed discovery of the communications, and the Court of Appeal reversed. The Court examined the association's statutory duties and powers to communicate with the homeowners, and the circumstances of the meetings. The Court then concluded that that the litigation meetings were held to accomplish the purpose for which the Plaintiff's lawyers were consulted, and that the Plaintiff association, its counsel, and the individual homeowners maintained a reasonable expectation that information to be disclosed was confidential in nature. Accordingly, the common interest doctrine applied to the meetings, and the communications were protected under the attorney-client privilege, despite the fact that the homeowners themselves were not clients.

### **84 Privilege – Confidential Third Party Information May Be Disclosed To Parties' Respective Attorneys In An Attorney's Employment Discrimination Lawsuit**

*Chubb & Son v. Superior Court of San Francisco County* (2014) 228 Cal.App.4th 1094 – Plaintiff attorney filed an employment discrimination lawsuit against her law firm employer, as well as against petitioner insurer, whose insureds she represented. In response to Plaintiff's request for documents relevant to her job performance, insurer withheld or redacted documents, even from its own attorneys in the case, on the ground they contain privileged or confidential information of the third party clients for whom Plaintiff provided legal services. The insurer also insisted that none of the other parties were allowed to disclose confidential client information to their own attorneys. The trial court ordered that the documents in each party's possession could be disclosed to their respective attorneys, and required the insurer to provide its responsive documents to its attorneys in order to ascertain whether the material was privileged, and to

comply with its discovery obligations. The Court of Appeal denied insurer's petition for a writ of mandate, and held that, for the limited purposes ordered by the trial court, the court did not err in permitting the parties (and requiring insurer) to disclose the documents to their respective attorneys in the case. The disclosure of the documents would not be a public disclosure, but a disclosure solely to the attorneys representing the parties in the wrongful termination case. The disclosure was limited to information each party reasonably believed was necessary for counsel's preparation and representation in the case. Fundamental fairness required that Plaintiff be allowed to make a limited disclosure to her attorneys to the extent necessary to prepare her claims. If the attorneys representing Plaintiff were to assist her in avoiding impermissible public disclosure, it was essential for them to have complete knowledge of all potentially confidential information known to their client and relevant to the litigation.

### **85 Requests for Admission – Court May Not Deem Inadequate Responses To Only Certain RFAs Admitted On Motion Based On Failure To Serve Responses AND Qualified Admissions Are Not Improper**

*St. Mary v. Superior Court* (2014) 223 Cal.App.4th 762 – In *St. Mary*, the Court of Appeal explained that a party who serves RFAs may file three different types of motions: (1) a motion to deem the RFAs admitted due to the failure to serve any responses at all in a timely fashion, (2) a motion to compel further responses, and (3) a motion to deem RFAs admitted due to disobedience of an order compelling further responses. Where a propounding party files the first type of motion, the motion must be denied if the responding party serves “substantially compliant” responses before the hearing on the motion. The defendant in *St. Mary* brought the first type of motion, and the plaintiff served responses prior to the hearing. The trial court evaluated the response to each RFA to determine whether each response was substantially compliant with the statutory requirements. Those that were not, the trial court deemed to be admitted. The Court of Appeal held that this was error. The trial court's task was to determine whether the set of responses as a whole were in substantial compliance with the statute. If they were, then the propounding party would be required to bring the second two types of motions in order to have individual responses supplemented or deemed to be admitted. In this instance, the Court of Appeal held that the responses as a whole did substantially comply with the code requirements, because they were verified, 64 of the responses were unquestionably valid, and the remaining 41 responses contained meaningful substantive responses even if they were possibly objectionable. The Court of Appeal also rejected the notion that qualified or partial admissions or explanatory statements in addition to an admission or denial are always improper.

### **86 Sanctions – Attorney's Fees Awarded For Continuing To Pursue Motion to Quash After Subpoena Was Withdrawn**

*Evilsizor v. Sweeney* (2014) 230 Cal.App.4th 1304 – Code of Civil Procedure section 1987.2(a) allows courts to award attorney's fees where a motion to quash a subpoena is “made or opposed” without substantial justification. In *Evilsizor*, attorney's fees were awarded under that section against the third party Appellant, who had filed a motion to quash a subpoena asking a bank to

produce documents that included the Appellant’s financial information. The trial court and Court of Appeal both agreed that the motion was justified when it was made, but held that there was no justification for refusing to withdraw the motion once the subpoenaing party withdrew the initial subpoena and served and amended subpoena that excluded the Appellant’s financial records from its scope. No later than September 10, the subpoenaing party gave notice of the withdrawal of the original subpoena, and asked that the motion be withdrawn before the opposition was due. The Appellant did not withdraw the motion until September 27, after the opposition was submitted. The Court of Appeal affirmed the trial court’s grant of sanctions based on this conduct. Even though a motion is “made” when it is filed and served, the phrase in section 1987.2(a) may be construed broadly to include the refusal to withdraw a motion when the motion becomes unnecessary, since a motion is considered to be “pending” at all times from submission to decision.

### **87 Sanctions – Terminating Sanctions for Failure to Comply with Discovery Orders**

*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377 – The Defendants in *Los Defensores* initially failed to appear at their depositions, and refused to provide documents in response to a document demand, claiming that the case was subject to a bankruptcy discharge. In October of 2010, the trial court granted the motion to compel the depositions and document productions without sanctions. The Defendants then failed to produce documents, including financial records and a call log identified in their depositions, and failed to adequately respond to additional rounds of written discovery. In May of 2011, the trial court granted motions to compel and awarded sanctions in the amount of \$6,380. In November of 2011, the Plaintiff sought monetary, issue, and terminating sanctions, arguing that the Defendants had engaged in discovery misconduct and spoliation, because they still failed to produce the financial records and call log, and now claimed that no such records existed. The trial court found “an extremely severe and aggravated failure to comply with [its] order,” and entered the Defendants’ default as a discovery sanction. The Court of Appeal affirmed, finding that there was substantial evidence supporting a finding of willful failure to comply with the trial court’s discovery orders.

## **EMPLOYMENT, LABOR, AND DISCRIMINATION**

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### **88 Corporate Liability – A Parent Corporation May Be Liable For Wage And Hour Claims By Subsidiary’s Employees**

*Castaneda v. The Ensign Group, Inc.* (2014) 229 Cal.App.4th 1015 – The Court in *Castaneda* reversed summary judgment granted in favor of the defendant in a class action lawsuit seeking damages for nonpayment of minimum and overtime wages. The Court of Appeal held that triable issues of fact precluded summary judgment as to whether a parent company with no employees could be liable as an employer for alleged wage and hour violations by one of its subsidiaries, based on the parent’s control over how services were performed. Relevant factors in determining employer status included the parent’s full ownership of all stock in the subsidiary, the parent’s exercise of control over the subsidiary’s operations and the employees’ job functions



and hours, the employee's belief that the parent was his employer, the use of the parent's forms and logo, the parent's exercise of control over wages and responsibility for pension plans, and the parent's assumption of responsibility for employee discipline.

### **89 FEHA Discrimination – In Opposition To Summary Judgment Motion Plaintiff Does Not Bear Initial Burden Of Establishing Prima Facie Case**

*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954 [Aronson, O'Leary, Thompson] – In *Swanson*, the Plaintiff school teacher sued the Defendant-school district for discrimination. The Defendant brought a successful summary judgment motion, claiming that the teacher's contract was not renewed due to poor performance. In opposition to the Defendant's summary judgment motion, the Plaintiff presented evidence suggesting that when she informed the Defendant of her diagnosis of breast cancer, the District began to set her up for failure, by giving her more difficult assignments and withholding the resources necessary to succeed, so that it could use poor performance as a pretext for her termination. The Defendant claimed that this evidence did not create a triable issue of fact as to whether her non-renewal was discriminatory, because the Plaintiff was a non-tenured, probationary teacher with no right to have her contract renewed, and the Defendant had the discretion to give her any assignment it chose. The Court of Appeal disagreed, and held that none of these facts deprived the Plaintiff of FEHA's protection, or otherwise allowed the Defendant to engage in discriminatory activities. The Court also rejected the notion that the plaintiff in a discrimination action bears the initial burden of establishing a prima facie case in opposition to a summary judgment motion. Instead, the initial burden on summary judgment always lies with the moving party to negate an element of the plaintiff's claim. The plaintiff then need only establish a triable issue of fact regarding the element negated by the defendant—the plaintiff need not prove her entire case. The Court concluded that the Plaintiff's evidence of pretext satisfied that requirement, and reversed the summary judgment.

### **90 Reimbursement – Employee Is Entitled To Reimbursement Of Work Related Portion Of Cell Phone Bills**

*Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137 – Labor Code section 2802, subdivision (a) provides that an "employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties." The court in *Cochran* held that section 2802 requires reimbursement of a portion of employees cell phone bills, where the employees are required to use their personal cell phones for work-related calls. Even if the employees have cell phone plans with unlimited numbers, such that the work related calls do not increase their expenses, the employees are entitled to reimbursement of a reasonable percentage of their cell phone bills.

### **91 Retaliation/Failure To Accommodate – Undocumented Workers**

*Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407 – Plaintiff sued his former employer under the California Fair Employment and Housing Act alleging that Defendant employer failed to

reasonably accommodate his physical disability and refused to rehire him in retaliation for Plaintiff's having filed a workers' compensation claim. Thereafter, Defendant learned that the Plaintiff used another person's Social Security number to falsely establish eligibility to work in the United States. The Court of Appeal held that the Plaintiff's action was barred by the doctrines of after-acquired evidence and unclean hands. The California Supreme Court reversed, citing Senate Bill 1818, which states in part that workers in California are afforded all worker protections available under state employment or labor laws regardless of immigration status. The Supreme Court held that: (1) SB 1818 is not preempted by the Immigration Reform and Control Act, 8 U.S.C.S. § 1101 et seq., except to the extent that it authorizes an award of lost pay damages for any period *after* the employer's discovery of an employee's ineligibility to work in the United States, and (2) the doctrines of after-acquired evidence and unclean hands are not complete defenses to a worker's claim under FEHA, although they do affect the availability of remedies. Accordingly, the Court reversed and remanded the matter for further proceedings.

## **92 Wrongful Termination – Causation Standard For Wrongful Termination Based On FEHA's Public Policies Is Identical To Causation Standard For FEHA Claim**

*Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334 [Ikola, Bedsworth, O'Leary] – The Plaintiff in *Mendoza* complained that he was wrongfully terminated in violation of the public policy embodied in the Fair Employment and Housing Act for reporting sexual harassment by his superior. The Defendant claimed that the Plaintiff willingly participating in inappropriate sexual conduct with the supervisor at work, and fired both the Plaintiff and the supervisor. The trial court instructed the jury that to establish causation, the report of sexual harassment had to be “a” reason for the termination. While the case was pending on appeal, the California Supreme Court issued its ruling in the case in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, which dealt with, among other things, the standard of causation in FEHA claims. In light of the decision in *Harris*, the Court of Appeal held that the jury instructions in wrongful termination claim predicated on the public policies embodied in FEHA should require the plaintiff to show that that the unlawful consideration was a “substantial motivating factor,” rather than simply “a” motivating factor. The Court held that it would be nonsensical to provide one standard of causation in FEHA cases, and a different standard of causation in common law tort cases based on FEHA's public policies. In addition, the Court reminded employers faced with conflicting reports of sexual harassment of their obligation to conduct a thorough investigation and make a good faith decision based on that investigation. The Court then expressed the hope that its opinion “will disabuse employers of the notion that liability (or a jury trial) can be avoided simply by firing every employee involved in the dispute.”

## **93 Wrongful Termination In Violation Of Public Policy May Be Adequately Pled When Tethered To Theft And Fraud Statutes**

*Yau v. Allen* (2014) 229 Cal.App.4th 144 [O'Leary, Bedsworth, Aronson] – In *Yau*, the Fourth Appellate District, Division Three declined to follow the reasoning in *American Computer Corp. v. Superior Court* (1989) 213 Cal.App.3d 664, which held that where a plaintiff is dismissed for

reporting workplace criminal activity (specifically embezzlement) being committed against the employer itself, a termination in violation of public policy has not occurred, because the criminal activity only affects the rights of the private company. In *Yau*, the Plaintiff alleged he was fired from the Defendant car dealership for complaining to management about fraudulent warranty claims being submitted to Ford. The Court of Appeal noted that the validity of the decision in *American Computer* had been put into question by subsequent cases. After analyzing those cases, the Court declined to follow *American Computer*, and held that it was distinguishable, because the Plaintiff had complained about a crime against a third party (Ford), rather than a crime against the Defendant car dealership itself.

## **ENVIRONMENTAL**

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### **94 CEQA – Environmental Review Is Not Required Before Direct Adoption Of A Voter-Sponsored Initiative**

*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029 – California Elections Code section 9214 gives the legislative bodies of local governments the option to either submit a qualified initiative petition to a special election, or to directly adopt the initiative. In *Tuolumne*, Wal-Mart Stores, Inc. (Wal-Mart) sought to expand its store in the City of Sonoma (City). A draft environmental impact report for the expansion was circulated. Before the EIR could be completed and approved, an initiative petition to approve the expansion was submitted with the requisite percentage of signatures. Rather than hold a special election, the City Council adopted the initiative. In response, the Petitioner filed a writ petition alleging that the City Council was required to certify an EIR before approving the initiative. The trial court granted a demurrer, but the Court of Appeal reversed, holding that the adoption of an initiative petition that proposes a land use ordinance is subject to CEQA review. The California Supreme Court reversed, holding that initiatives are a “legislative battering ram” that may be used to tear through the exasperating tangle of traditional legislative procedure. The short timelines required for a city’s determination made it impossible to comply with both CEQA and Elections Code section 9214. Accordingly, in order to avoid a repeal by implication of the direct adoption provision in section 9214(a), the Supreme Court held that CEQA does not apply to the direct adoption of initiative petitions – even though CEQA was enacted after section 9214, and is arguably more specific.

## **EVIDENCE**

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### **95 Hearsay – Business Records Exception – General Testimony Sufficient To Establish Foundation**

*Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786 – In *Grail Semiconductor*, the trial court admitted certain documents under the business records exception to the hearsay rule. The foundation for the document was laid by an employee who testified that the documents had the “look and feel” of the business’s marketing documents, and that the URL for the documents indicated that they came from the business’s

website. The Court of Appeal held that while this testimony was general, and could have been the basis for excluding the evidence, the trial court did not abuse its discretion by admitting it. The Court also noted that the foundational evidence does not necessarily have to be presented by a custodian of records.

## **96 Hearsay – Hearsay Statement Is Admissible As An Admission Against Interest If It Exposes The Speaker Or The Speaker’s Employer To Possible Civil Liability**

*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736 – In this wrongful termination case, the Plaintiff presented a declaration in opposition to a summary judgment motion that indicated that the Plaintiff’s supervisor harbored discriminatory animus against older workers. The declarant was Diana Hendry, a fellow employee and friend of the Supervisor, Kim Bandelier. The declaration indicated that Ms. Bandelier stated to Ms. Hendry that “People are starting to notice I’m favoring the younger and pregnant ones.” The trial court excluded the declaration as “double hearsay.” The Court of Appeal acknowledged that the declaration was double hearsay, but reversed the ruling, because both layers of hearsay were permissible. First, Ms. Hendry’s declaration is an out of court statement offered to prove the matter asserted, but declarations under penalty of perjury are expressly authorized in motions practice, and contemplated in the summary judgment statute. Second, Ms. Bandelier’s statement to Ms. Henry was admissible under an exception to the hearsay rule in Evidence Code § 1230 for admissions against interest. The Court of Appeal held that Ms. Bandelier’s statement, if known, would (a) expose her employer to liability, and thereby jeopardize her own present and future employment, and (b) expose Ms. Bandelier herself to potential civil liability for discriminatory workplace harassment. Accordingly, the Court concluded that this evidence should have been admitted, and reversed the summary judgment in favor of the Defendant.

## **97 Tainted Evidence – Right To Exclude Evidence Compiled By Disqualified Counsel Waived By Unreasonable Delay**

*City & County of San Francisco v. Cobra Solutions, Inc.* (2014) 232 Cal.App.4th 468 – In *City & County of San Francisco*, the Defendant moved to disqualify the City Attorney’s Office from representing the plaintiff City of San Francisco, on the grounds that the City Attorney performed work for Cobra while he was in private practice. The motion was granted, and affirmed by the Supreme Court in 2006. In the interim, the City Attorney’s Office participated in certain investigations of the Defendant that may have provided evidence relevant to the action. Over five years later, shortly before trial was to commence in 2012, the Defendant filed a motion in limine seeking to exclude any evidence that relied on information that was compiled by the City Attorney’s Office between the 2003 disqualification and the Supreme Court’s 2006 affirmance of that order. The trial court denied the motion as untimely, and the Court of Appeal affirmed. The Court noted that correspondence between the Defendant and the City showed that the Defendant was aware that the City Attorney’s Office was involved in the City’s investigation in 2006, and thus knew that information the disqualified attorneys developed might be presented at trial. The Court also noted that the prejudice to the City would be extreme, given the difficulty of obtaining

new evidence regarding a decade-old transaction, and the fact that the City’s new counsel had been effectively lulled into failing to develop alternative evidence.

## **GOVERNMENT**

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### **98 Competitive Bidding – School Districts Not Required To Engage In Competitive Bidding For Lease-Leaseback Transactions**

*Los Alamitos Unified School Dist. v. Howard Contracting, Inc.* (2014) 229 Cal.App.4th 1222 [Fybel, Moore, Ikola] – In *Los Alamitos*, the Los Alamitos Unified School District (the District) entered into a lease-leaseback agreement with a third party contractor for a construction project to improve school property, without obtaining competitive bids. In a lease-leaseback transaction, a school district leases school property to a party who constructs improvements on the property, leases it back to the school district, and returns the property to the school district at the end of the lease term. The trial court and Court of Appeal both held that Education Code section 17406 exempts lease-leaseback transactions from competitive bidding requirements.

## **JUDGMENTS**

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### **99 Enforcement – Charging Forbearance Fees In Addition To Legal Interest Rate On Judgment Is Not Usury**

*Bisno v. Kahn* (2014) 225 Cal.App.4th 1087 – In *Bisno*, judgment debtors (“debtors”) argued that a judgment payment agreement’s inclusion of forbearance fees in addition to interest ran afoul of California’s usury laws. The agreement provided that the judgment would accrue interest at the statutory rate of ten percent, but would also charge a “forbearance fee” to forbear enforcing the judgment if the debtors paid after a certain agreed upon date. The debtors argued that this resulted in fees in excess of the maximum legal interest rate. The Court of Appeal disagreed, holding that usury law is exclusively a creation of statute, and that by its own terms, California’s usury law does not apply to agreements to forbear from enforcing a judgment. However, the Court also cautioned that while forbearance fees are not prohibited, they do not become part of the underlying judgment and is not an amount that must be paid to satisfy the judgment under the Enforcement of Judgments Law. Instead, forbearance agreements are contracts between creditors and debtors and operate separately from the judgment.

### **100 Enforcement – Uniform Fraudulent Transfer Act Does Not Authorize Duplicative Damages Against Judgment Debtors**

*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231 – Under the Uniform Fraudulent Transfer Act, a judgment creditor may sue the judgment debtor along with third parties who benefited from a transfer made to avoid paying a judgment. While a judgment in the amount of the debt may be entered against the third party transferees, the judgment creditor is not allowed to obtain a new judgment against the judgment debtor for the amount transferred. This is true even if the judgment debtor is the ultimate beneficiary of the fraudulent transfer. Such a judgment would amount to double recovery of the underlying judgment.

## JUDGES

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### **101 Disqualification – Challenge To Refusal To Recuse May Only Be Asserted In Writ, Not Appeal, And Trial Judge Is Not Required To Disclose Interests In Insurance Companies Not Party To An Action**

*Brown v. American Bicycle Group, LLC* (2014) 224 Cal.App.4th 665 – A trial judge is not required to disclose ownership interests in insurance companies, when none of the insurance companies are carriers of any of the parties in an action. In *Brown*, Plaintiff was injured in a bicycling accident, and sued the bicycle designer. After the jury returned a verdict against Plaintiff, the Plaintiff filed a motion for new trial, and then an appeal, claiming her due process right to a fair trial was violated because the trial judge did not disclose his financial ties to the insurance industry. The Court of Appeal held that: (a) a challenge to a trial judge’s failure or refusal to recuse himself may only be asserted in a petition for writ of mandate, not in an appeal, and (b) the trial judge was not required to disclose his ownership interests in the insurance industry because none of the insurance-related companies that the trial judge owned interests in were party to the case nor did they act as an insurance carrier for either party. The Court explained that there is no authority that supports the contention that a trial judge is required to make disclosures pursuant to Code of Judicial Ethics Canon 3(E)(2) in order to enable a party to file a peremptory challenge under Code of Civil Procedure section 170.6. Rather, the Court held that section 170.1, and by implication Canon 3(E)(2), relate solely to matters that would support the disqualification of a trial judge for cause.

### **102 Peremptory Challenges – Newly Joined Defendant Not Entitled To An Additional 170.6 Challenge, Without Substantially Adverse Interest To Defendant That Filed Prior Challenge**

*Orion Communications, Inc. v. Superior Court of San Diego County* (2014) 226 Cal.App.4th 152 – Each side of a lawsuit may only issue one peremptory challenge to a trial judge pursuant to Code of Civil Procedure section 170.6, unless the two defendants (or plaintiffs) demonstrate that their interests are sufficiently adverse. In *Orion*, the Plaintiff added a new entity, “Sameis” as a judgment debtor under an alter ego theory, after unsuccessful attempts to enforce the judgment against the original defendant, DTS. Sameis filed a section 170.6 peremptory challenge to the judge who awarded attorney’s fees against DTS, which the trial court granted, even though DTS had already filed an earlier peremptory challenge against another judge. Orion appealed, arguing that Sameis should not have been able to raise a peremptory challenge because DTS had used the allotted single challenge for their “side.” The Court of Appeal agreed, holding that Sameis had failed to present sufficient evidence that Sameis and DTS had substantially adverse interests and are therefore not on the “same side” within the meaning of section 170.6(a)(4). The fact that Sameis and DTS had separate counsel, and were potentially liable for the same sum was not enough, standing alone, to create an actual adverse interest. While Sameis also claimed that it possessed causes of action against DTS that it could choose to assert, it failed to carry its burden by explaining what those claims were.

## JURIES

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### **103 Special Verdict Forms – Waiver And Harmless Error Analysis Applies To Omission Of Findings On Special Verdict Form**

*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228 – The Second Appellate Court of Appeal held that a defective special verdict form is subject to harmless error analysis. In the underlying litigation, the Plaintiff alleged a hostile work environment sexual harassment claim against his former employer. Due to what by all accounts was a “typo” in the special verdict form, the jury was instructed to proceed to question 10, rather than question 5, after answering yes to the first four questions. The result of this error was that the jury made no finding on two of the elements of the hostile work environment claim: (1) whether the Plaintiff subjectively considered his work environment to be hostile, and (2) whether the hostile environment was a substantial factor in causing the Plaintiff harm. The trial court nevertheless entered judgment in favor of the Plaintiff and the Defendant appealed. The Court of Appeal first held that the error was waived, because the Defendant could have objected after the verdict was read, but before the jury was discharged, which would have allowed the error to be cured. As an alternate basis for its ruling, the Court held that the error in the verdict form, like other errors, is subject to harmless error analysis. Because of the jury’s findings on the other questions, the Court held that the judgment was “clearly right,” and that but for the typographical error, the jury would have answered both of the omitted questions in the affirmative.

## INSURANCE

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### **104 Duty To Defend – General Liability Policy Coverage For Disparagement Claims Does Not Necessarily Apply To Trademark Or Unfair Competition Claims**

*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277 – The California Supreme Court clarified and limited the scope of an insurer’s duty to defend a policyholder against a possible claim of disparagement, as that term is used in a commercial general liability policy. A claim of disparagement requires a plaintiff to show a false or misleading statement that (1) specifically refers to the plaintiff’s product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication. A reasonable implication in this context meant a clear or necessary inference; a statement that might conceivably or plausibly be construed as derogatory was insufficient. Product similarity, misleading statements, and puffing, while they may state a claim for trademark infringement or unfair competition, do not state a claim for disparagement in the absence of language that clearly derogates the competitor’s product. Because the facts and pleadings in the underlying action were not sufficient to support a possible claim of disparagement, there was no duty to defend under the commercial general liability insurance policy’s coverage for disparagement.

## REAL PROPERTY/LAND USE

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### **105 Antideficiency – Following Foreclosure, Lender Has No Interest In Debtor’s Property Damage Claims Against Third Parties**

*Thoryk v. San Diego Gas & Electric Co.* (2014) 225 Cal.App.4th 386 – In *Thoryk*, appellant-borrower defaulted on a mortgage loan after his property was damaged by the San Diego County wildfires of 2007. After the lender foreclosed on the second deed of trust on the property, the borrower sued numerous third party tortfeasors for the property damage caused by the fires. The junior lienholder intervened, and sued both (a) the third party tortfeasors for the property damages, and (b) the borrower for declaratory relief that the lender is entitled to a lien on any recovery against the third parties. The lender’s claims against the third parties were dismissed in an earlier appeal, because the property damage claims accrued before the foreclosure, and did not pass with ownership of the property. Nevertheless, the trial court granted declaratory relief in favor of the lender, and the Court of Appeal reversed. The Court held that the anti-deficiency statutes, namely Code of Civil Procedure section 580, subdivision (d), and section 726, barred the lender from appropriating the appellant’s recovery. The lender argued that the transaction fell within an exception of section 726, whereby a lender may look to other collateral to satisfy a deficiency after foreclosure. The Court denied that argument because general references made to “personal property, money held on deposit related to the real property, or rights relating to the real property” were insufficient to designate additional security, and did not include future tort recoveries under a reasonable reading of the trust deed.

### **106 Foreclosure – Homeowner May Seek Equitable Cancellation Of Foreclosure If The Trustee Fails To Comply With Conditions Precedent To The Right To Foreclose**

*Fonteno v. Wells Fargo Bank N.A.* (2014) 228 Cal.App.4th 1358 – In *Fonteno*, Plaintiffs gave Defendant Wells Fargo a deed of trust on the property to secure their loan. After Wells Fargo purchased the property at a nonjudicial foreclosure sale, Plaintiffs sought equitable cancellation of the trustee’s deed, alleging that Wells Fargo wrongfully caused a servicing company to record a notice of default and notice of trustee sale against the home. The Plaintiffs alleged that Wells Fargo violated paragraph 9 of the deed of trust, by failing to comply with the National Housing Act (NHA) and several other statutes that required the Defendant to secure approval from the Secretary of Housing and Urban Development (HUD) before commencing foreclosure proceedings. The Court of Appeal held that under paragraph 9 of the deed of trust, the lenders must comply with HUD servicing regulations including 12 U.S.C. § 1715u before initiating the foreclosure process, and that where such compliance is not present, the trustee’s deed following foreclosure may be cancelled even without tender of the amount owed.



## **107 Lender’s Duties – Bank Lender May Owe A Duty Of Care To The Borrower When It Agrees To Process Loan Modification**

*Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941 – Plaintiff borrowers filed suit against the Defendant lender, alleging that the Defendant was negligent in servicing and reviewing Plaintiffs’ applications for loan modification. The Plaintiffs alleged the Defendant breached their duty to exercise reasonable care by failing to process applications in a timely fashion, losing documents, and engaging in dual tracking where the lender would pursue foreclosure while evaluating applications. The Court of Appeal noted that generally, a financial institution “does not owe a duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role” as a lender. However, this no-duty rule is not a blanket rule, and whether a lender owes such a duty requires a balancing of the *Biakanja* factors: (1) the extent to which the transaction was intended to affect the plaintiff, (2) foreseeability of harm to the plaintiff, (3) degree of certainty that the plaintiff suffered an injury, (4) connection between defendant’s conduct and injury suffered, (5) moral blame attached to defendant’s conduct, and (6) policy of preventing future harm. The Court of Appeal paid particular attention to the fifth factor, finding it highly relevant that the bank holds “all the cards” in the loan modification process, whereas borrowers have little ability to protect their own interests. The Court held that the *Biakanja* factors weighed in favor of imposing a duty of care on the lender where the lender agreed to process a loan application, and where a subsequent legislative enactment indicated a public policy in favor of regulating the conduct complained of in the Plaintiffs’ complaint. The Court of Appeal also held that the Plaintiffs sufficiently alleged a breach of that duty by alleging that the improper handling of their loan modification applications prevented them from obtaining modifications for which they qualified.

## **108 Spot Zoning – Spot Zoning Is Not Impermissible Where It Serves Substantial Public Interests**

*Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302 [Fybel, Bedsworth, Moore] – In *Foothill Communities Coalition*, the Real Party (the Catholic Diocese of Orange County) sought to build a senior residential community within an area covered by a specific plan that designated the site as residential single-family. The Defendant County of Orange approved the project, and amended its specific plan to create a new zoning district for senior residential housing that included the project site, but was surrounded by residential single-family zoned property. The Plaintiff community group challenged the Board’s decision by filing a petition for writ of mandate, alleging that the Board’s act constituted impermissible spot zoning. While spot zoning typically consists of an island of property with *greater* land use restriction than the surrounding properties, the Court of Appeal held that an island of property with *fewer* land use restrictions also constitutes spot zoning. The Court held that this did not end the inquiry, however, as spot zoning is permissible when it serves a substantial public interest, even if it also provides a pecuniary benefit to a private landowner. Since the provision of housing for seniors is a substantial public interest recognized by the California Legislature, and the applicable general and specific plans, the Court of Appeal held that the spot zoning was

permissible. The Court also found that the spot zoning did not violate the establishment clause, because it had a secular purpose and did not entangle the state in religious affairs.

### **109 Transfer Disclosure Statements – Transfer Disclosure Requirements Apply To Sales Of Mixed-Use Properties**

*Richman v. Hartley* (2014) 224 Cal.App.4th 1182 – In *Richman*, the Plaintiff-seller alleged that the Defendant-buyer breached a real estate purchase agreement. The buyer refused to close escrow because the seller did not deliver a transfer disclosure statement (TDS) as required by Civil Code, section 1102.3. That statute applies to the sale of real property improved with one to four dwelling units, including both residential and commercial units. The improvements to the property at issue included two dwelling units. The Court rejected Plaintiff’s argument that the statute only applied to residential properties, and not to “mixed-use” properties. The statute unambiguously states that a TDS is required for “any transfer...of real property...improved with or consisting of not less than one nor more than four dwelling units.” The Court noted that if the Legislature wanted to limit the statute to residential properties, it would have added that word in the statute. Accordingly, the Court found in favor of the Defendant since the seller’s delivery of a TDS is a statutory condition precedent to the buyer’s duty to perform under the contract. Furthermore, the inclusion of an “as is” clause in the agreement does not waive the statutory disclosure requirement.

## **TORTS**

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### **110 Products Liability – The Sophisticated Intermediary Doctrine**

*Gottschall v. Crane Co.* (2014) 230 Cal.App.4th 1115 – The sophisticated user defense to a failure to warn case focuses on whether the plaintiff knew or should have known of the risk posed by a product that gave rise to the plaintiff’s injury. There is an extension of that defense known as the “sophisticated intermediary doctrine,” that applies to products supplied to a plaintiff through an intermediary. The Court of Appeal in *Gottschall* held that the intermediary’s knowledge alone is not sufficient to establish a sophisticated intermediary defense. There must be a sufficient reason for believing that the intermediary’s sophistication is likely to operate to protect the user. In addition, the Court of Appeal held that the mere fact that the intermediary is the user’s employee is *not* sufficient reason to infer that the intermediary will protect the user. (See also Res Judicata and Collateral Estoppel, p. 31, above.)

## **TRADE SECRETS**

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### **111 Trade Secrets – Protectable Design Concepts**

*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26 – In *Altavion*, the Plaintiff created a unique design concept and software algorithms for producing self-authenticating documents. The documents employ barcodes that incorporate data scanned from the documents themselves. After entering into a non-disclosure agreement and negotiations relating to this technology, the Defendant submitted its own patent applications

based on the Plaintiff's ideas. The Court of Appeal held that while the Plaintiff's algorithms were clearly protectable as trade secrets, they were not at issue, since they had not been disclosed to the Defendant. This left the Plaintiff's design concepts, which ordinarily would not constitute a trade secret because it could be observed by any user of the technology. The Court of Appeal held that the Plaintiff's design concepts were nevertheless protected in this instance, because the Plaintiff had not yet disclosed the concepts to any users by releasing the product.

## **TRUSTS AND ESTATES**

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### **112 Quitclaim Deed Executed Prior To Repeal Of Probate Code Section 21350 Is Considered A Donative Transfer If Given For Inadequate Consideration**

*Jenkins v. Teegarden* (2014) 230 Cal.App.4th 1128 – In *Jenkins*, the settlor quitclaimed a house to his Defendant caregiver (who prepared the quitclaim) in exchange for one dollar and her friendship. Defendant admitted this fact at her deposition, yet at trial she claimed the transfer was in exchange for improvements to the property, equity value in a different property, and her services. The Trustee sued, alleging the transfer was a “donative transfer” and invalid pursuant to former Probate Code section 21350. On appeal, the Court agreed that the quitclaim was invalid because it was a donative transfer, as a matter of law. Although Probate Code section 21350 has been repealed and replaced by Probate Code section 21380 et seq., former section 21350 still applies to instruments executed before January 1, 2011. The effect of section 21380 et seq. is the same as former section 21350 et seq.– a “donative transfer” above a certain minimum value to an unrelated drafter of the transfer instrument is invalid. This is the case even where the transferee disproves fraud, menace, duress, and undue influence – unless the instrument has been reviewed by an independent attorney or the court. Here, the quitclaim was a donative transfer under former Probate Code section 21350 since there was inadequate consideration. The Court noted that inadequate consideration means the price was not fair and reasonable under the circumstances. The mere fact that the recipient gave good consideration, sufficient to support a contract, does not prevent the transfer from being donative. Ultimately, the Court held that the value of the real property well exceeded the transfer in equity of another property and Defendant's services as a caretaker. The Court disregarded the Defendant's improvements on the real property because the improvements ultimately benefitted the Defendant. Finally, since the Defendant caregiver was the drafter, the quitclaim deed was invalid.

## **VICARIOUS LIABILITY**

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### **113 Aiding And Abetting – Independent Duty Not Required In Claim For Aiding And Abetting A Breach Of Fiduciary**

*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451 – Defendants were found liable for aiding and abetting a breach of fiduciary duty by the managers and members of an LLC and were ordered to pay restitution. The Court of Appeal held that

unlike liability for conspiracy to commit a breach of fiduciary duty, liability for aiding and abetting a breach of fiduciary duty does not require that the defendant possess the same fiduciary duty that is being breached. The Court reasoned that conspiracy liability is based on the defendant effectively adopting the tort of another, and thus requires that the Defendant be capable of committing that tort, while aiding and abetting is an independent tort, based on the intentional commission of acts that enable another's wrongdoing. Because aiding and abetting is an independent tort, there is no requirement that the defendant be legally capable of committing the underlying tort of breach of fiduciary duty. (*See also* Damages – Restitution and Disgorgement, p. 43, above.)

#### **114 Alter Ego – Individual Defendant Who Prevails At Trial May Still Be Liable As Alter Ego Of Defendant Found Liable At Trial**

*Danko v. O'Reilly* (2014) 232 Cal.App.4th 732 – In *Danko*, the Defendant attorney obtained a directed verdict in his favor, while the Plaintiff obtained a \$4.5 million judgment against the Defendant's law firm on various employment related claims. After the judgment became final, the Plaintiff moved to amend the judgment to name the Defendant attorney as a judgment debtor, based on allegations that the Defendant intentionally depleted the law firm's assets, and used them as his own, in order to deplete any assets that could be used if a judgment were entered in the Plaintiff's favor. The trial court granted the motion, and the Court of Appeal affirmed. The Defendant argued that the amendment was barred by res judicata because of the directed verdict entered in his favor. The trial court and Court of Appeal agreed that res judicata did not apply, because the parties had agreed that the issue of alter ego would not be presented to the jury, so that it was not actually decided in the prior proceedings. In addition, the Court of Appeal noted that alter ego is not itself a claim for new substantive relief, but an equitable method for enforcing an existing judgment, res judicata does not apply.

#### **115 Alter Ego – Wrongful Intent Is Not Required To Establish Alter Ego Liability**

*Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2014) 222 Cal.App.4th 811 – In order to establish alter ego liability, a judgment creditor must establish that an inequitable result would follow if the acts of the judgment debtor were not imputed to the alter egos, but this does not require a showing of wrongful intent on the alter ego's behalf. In *Relentless Air Racing*, the Plaintiff sued the Defendant, a limited partnership, over a contractual dispute. The Plaintiff prevailed and moved to amend the judgment to include additional judgment debtors when the Defendant proved unable to pay the judgment. The proposed additional debtors were the Fultons, the husband and wife that owned the Defendant, and two of their other companies. The Fultons disregarded corporate formalities, and withdrew significant amounts of money from the Defendant for their own use. The trial court found that the Defendant, the Fultons and their other companies were essentially one and the same, but that there was no inequitable result at risk, because there was no evidence that the Fultons acted with wrongful intent in withdrawing the funds from the Defendant. The Court of Appeal reversed, holding that because the parties were essentially one and the same, the fact that the Plaintiff's judgment would go unpaid if the alter

egos were not held liable was an inequitable result as a matter of law, and the Fulton's intent was irrelevant. The Court of Appeal also rejected the Fulton's argument that the Plaintiff was required to litigate the alter ego issue in the underlying trial.

### **116 Respondeat Superior – Existence Of Comprehensive Operating Procedures Does Not Make Franchisor Vicariously Liable For Acts Of Franchisee Employees**

*Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474 – In *Patterson*, the Plaintiff employee was allegedly sexually harassed by a supervisor at a Dominos pizza franchise. In addition to suing the harassor and the franchisee, she also sued the franchisor under a theory of respondeat superior. The California Supreme Court granted review to determine whether a franchisor has an employment or agency relationship with a franchisee and its employees, for purposes of vicarious liability. The Court held that a franchisor is potentially liable for actions of its franchisee's employees only if it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and other day-to-day aspects of the workplace behavior of the employees. Here, Dominos had established comprehensive operating standards for its franchisees, which were vigorously enforced by inspections. Nevertheless, the franchisee retained control over day-to-day operations, including hiring, firing, and employee discipline. Accordingly, there was no employment relationship between Dominos and the franchisee's employees that would support the Plaintiff's sexual harassment claim against Dominos.

## **UNFAIR COMPETITION**

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### **117 Lanham Act Allows Competitors To Sue One Another For Deceptive Naming And Labeling Of Food Or Beverage Products**

*Pom Wonderful LLC v. Coca-Cola Co.* (2014) 134 S.Ct. 2228 – In *POM Wonderful*, the United States Supreme Court decided whether an action brought under the Lanham Act, 15 U.S.C.S. § 1125(a), is precluded by the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C.S. § 301 et seq. The petitioner, POM Wonderful LLC. (POM), manufactures and sells pomegranate juice products. POM alleged that the Coca-Cola Company (Coca-Cola) violated the Lanham Act for false or misleading product descriptions in connection with a particular Coca-Cola beverage. POM alleged the Coca-Cola product label deceived consumers into believing that the product was predominantly a pomegranate-blueberry blend when in actuality it was almost entirely composed of apple and grape juices. The Lanham Act imposes civil liability on any person or entity who uses a false or misleading representation of fact of a particular product. Coca-Cola contended that POM's ability to enforce the Lanham Act was precluded by the FDCA which specifically prohibits misbranding food and beverages. Unlike the Lanham Act, the FDCA does not create a private cause of action and may only be enforced by the state. Nevertheless, the Supreme Court held that the statutory language of the Lanham Act and the FDCA did not expressly limit one another. The Court found that when "two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended

one federal statute to preclude the operation of the other.” The Court reasoned that the FDCA was not meant to create a national uniform standard in food and beverage labeling and was written only to preempt state statutes. The Court also held that both statutes were intended to represent different interests, with the Lanham Act protecting commercial interests against unfair competition while the FDCA was meant to safeguard public health. Therefore, the Lanham Act will allow one competitor to sue another for false or deceptive product descriptions on food and beverage labels.