NEW STATUTES, NEW RULES, AND NEW CASES

WHAT EVERY BUSINESS LITIGATOR NEEDS TO KNOW IN 2016

Edmond M. Connor
Matthew J. Fletcher
Douglas A. Hedenkamp
Michael Sapira
John Rose
Lauren McKay

CONNOR, FLETCHER & HEDENKAMP LLP

OCBA Business Litigation Section
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SIGNIFICANT STATUTES
Adopted in 2015

SIGNIFICANT RULES
Adopted in 2015

SIGNIFICANT CASES
Decided in 2015

SIGNIFICANT STATUTES
Adopted in 2015

ATTORNEY'S FEES

Book Accounts – Fee Limitations

Civil Code § 1717.5 – Section 1717.5 provides for limited attorney's fees in any action on a contract based on a book account, where the contract does not provide for a fee award. The limits have been increased from $800 for book accounts maintained for personal, family, or household purposes, and $1,000 for book accounts maintained for all other purposes to $960, and $1,200, respectively. In either case, the amount awarded also cannot exceed 25% of the amount owed under the contract.

ATTORNEY PRACTICE

Abandoned IOLTA Funds – Public Interest Attorney Loan Repayment Funding

Business & Professions Code § 6032.5; Code of Civil Procedure § 1564.5 – Instead of going to the state's unclaimed property account, abandoned or unclaimed funds from IOLTA accounts will be used to fund the Public Interest Attorney Loan Repayment program to provide student loan repayment assistance to public interest attorneys.

State Bar – Annual Discipline Report And Auditing Requirements

SB 387 (Numerous Government Code and Business & Professions Code sections) – As a result of an audit that revealed underreporting of the backlog of attorney discipline cases, new reporting requirements relating to the backlog have been added to the State Bar's Annual Discipline Report. The Bar must also develop a workforce plan for its discipline system, and conduct a thorough analysis of its operating costs and develop a spending plan to determine a reasonable annual fee. Finally, the Bar must contract with the California State Auditor to conduct an in-depth financial audit.

State Bar – Membership Fee

Business & Professions Code § 6140 – The 2016 membership fee for the State Bar of California is $315.

State Bar – Open Meetings

Business & Professions Code § 6026.7 – The State Bar and all of its meetings are now subject to the Bagley-Keene Open Meeting Act, except for meetings of the Judicial Nominees Evaluation Commission and the Committee of Bar Examiners.

BUSINESS ENTITIES

Franchise Relations

AB525 (Business & Professions Code §§ 20000-20043) – California's franchise relations law has undergone significant revisions. "Good cause" to terminate a franchise is now limited to a failure to comply with the lawful requirements of a franchise agreement after being given notice and an

opportunity to cure. The opportunity to cure period shall be no less than 60 days, and no more than 75 days, unless there is an agreement to extend the period. Termination after a shorter 10 day cure period is allowed for violations of state and local law, and immediate termination without an opportunity to cure is allowed under certain circumstances, such as bankruptcy, abandonment, and repeated violations of the franchise agreement. The requirements relating to a franchisor's obligation to repurchase inventory and equipment upon termination of the franchise have been clarified to specify that they do not apply to: (a) personalized items, and items not required to conduct the business in accordance with the franchise agreement, (b) a termination due to a franchisee's failure to renew, (c) a complete withdrawal of the franchisor from the relevant geographic market area, or (d) inventory or equipment sold after the date of notice of termination. Additional provisions regulate the sale of a franchise, prohibiting a franchisor from unreasonably refusing to consent to a sale transfer or assignment of a franchise unless the recipient does not meet reasonable standards for approval of franchisees. Finally, where a franchise is unlawfully terminated, the franchisor would be liable for the fair market value of the franchise business and assets, plus any additional damages caused by the termination. These new provisions only apply to franchise agreements entered into or renewed after January 1, 2016, or to agreements of indefinite duration that may be terminated without cause.

Non-Profit Corporations – Dissolution

Corporations Code §§ 5008.9, 6610.5, 8610.5, and 9680.5 – The non-profit corporations law has been amended to (1) allow for the administrative dissolution or surrender of non-profit corporations that have been suspended for at least 48 months, (2) conform the voluntary dissolution procedures to the general corporations law, such that directors or incorporators may certify a voluntary dissolution where no memberships have been issued, and (3) allow the Franchise Tax Board to abate taxes, interest, and penalties, where a non-profit corporation certifies that it was not doing business at the time the taxes were incurred.

Non-Profit Corporations – Investment Standards

Corporations Code §§ 5240, 9250 – The boards of directors for nonprofit public benefit and religious corporations must follow certain investment standards. This amendment includes the Uniform Prudent Management of Institutional Funds Act as one of the applicable standards.

Secretary Of State Filings

Corporations Code §§ 201, 1155, 2601, 15911.06, 16906, 17701.09, 17702.03, 17707.08, and 17710.06 – The Corporations Code provisions relating to filings with the Secretary of State have been revised. Numerous technical and non-substantive revisions have been made to update the code and correct cross-references. Disparate code requirements for the conversion of business entities from one type of entity into another have been amended to consistently require that a statement of conversion must include the name, mailing address, and street address of the agent for service of process for the converted entity. Where an authorized corporation is designated as the agent for service of process, no address shall be included on the certificate. An additional change to the law governing limited liability

companies requires the managers to sign a certificate of cancellation of the articles of organization upon completion of the winding up of the affairs of the company.

CIVIL PROCEDURE

Costs – Interpreter Costs At Deposition

Code of Civil Procedure § 1033.5 – The cost of providing an interpreter for the deposition of a witness who does not proficiently speak or understand English has been added to the list of recoverable costs of suit in § 1033.5.

Court Holidays – Elimination Of Native American Day

Code of Civil Procedure § 135 – Native American Day (the fourth Friday in September) has been added to the list of California state holidays that are not court holidays.

Demurrers – Meet And Confer Requirement

Code of Civil Procedure §§ 472, 472a, 430.41 – A party must now satisfy the meet and confer requirement in section 430.41 before filing a demurrer. The meet and confer must be in person or by telephone, and the demurring party must identify all of the specific causes of action subject to the demurrer and identify the deficiencies "with legal support." The other party must provide legal support for position that the pleading is sufficient, or state how the pleading could be amended to cure any insufficiency. The meet and confer must take place at least five days before the responsive pleading is due, but an automatic 30 day extension is available where a party files a declaration that a good faith meet and confer was attempted but could not be completed. A meet and confer declaration must accompany the demurrer. However, a party's failure to meet and confer is not grounds for overruling or sustaining a demurrer. In addition to the meet and confer requirements, a party who successfully demurs to a pleading may not demur to an amended version of the pleading on any grounds that could have been raised in the earlier demurrer. A pleading may be amended once as a matter of right before the time for filing an opposition to the demurrer. A pleading may not be amended more than three times in response to demurrers without an offer to the court of the facts to be pleaded to create a reasonable possibility to cure the defect. The three amendment limit, however, does not include the initial amendment as a matter of right before the time to oppose a demurrer.

Electronic Signatures – Definition, Use By Courts

Code of Civil Procedure §§ 17 – Subdivision (b)(3) of CCP § 17 defines "electronic signature" as an electronic sound, symbol or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record. Section 34 of the C.C.P provides that an electronic signature by a court or judicial officer is as effective as an original signature.

Expedited Jury Trials

Code of Civil Procedure §§ 630.03, 630.20-630.30 – The provisions relating to voluntary expedited jury trial have been amended to specify that each party in such a trial has 5 hours to complete voir dire and present its case (previously, parties were allowed 3 hours). New provisions effective July 1, 2016 make expedited jury trials mandatory in limited civil cases, with opt out provisions in certain cases, including cases involving: punitive damages, damages in excess of insurance limits, insurance defense under a reservation of rights, allegations of moral turpitude that could affect professional licensing, intentional misconduct, and non-contractual attorney's fees. The expiration date for the voluntary expedited jury trial statutes has been removed, thereby extending those statutes indefinitely, while the mandatory provisions are subject to a July 1, 2019 expiration.

Filing Fees – Continuation Of Higher Fees

Government Code § 70602.6 – A $40 supplemental filing fee for first papers in civil actions, which was scheduled to expire in July of 2015, has been extended to July of 2018.

Government Code § 70616 – The $1,000 complex case fee is subject to a $18,000 aggregate limit on the total amount of fees collected from all parties in a complex case. On July 1, 2015, the $1,000 fee was set to decrease to $550, and the total fee limit was set to decrease to $10,000. The $1,000 fee and $18,000 limit have been extended to July 1, 2018.

Government Code § 70617 – The $60 motion fee was set to revert to $40 on July 1, 2015. It has been extended to July 1, 2018.

Immigration Status Of Minors – Not Relevant And Not Discoverable

Civil Code § 3339.5 – New section 3339.5 states that the immigration status of a minor child is generally irrelevant to issues of liability or remedy, and may not be inquired into except for except where the minor's claims put the child's immigration status directly at issue, or when necessary to comply with federal immigration law. The section states that it is declaratory of existing law, and that its applicability to minors does not imply that adults are not protected by existing law.

Juries – Peremptory Challenge – Impermissible Grounds

Code of Civil Procedure § 231.5 – Section 231.5 has been amended to incorporate by reference the list of characteristics in Government Code § 11135. This has the effect of adding ethnic group identification, age, genetic information, and disability to the list of impermissible grounds for the exercise of a peremptory challenge to a prospective juror. The list also includes the previously listed impermissible grounds: race, color, religion, sex, national origin, sexual orientation, and "similar grounds."

Oaths – Administration Of Oaths By Retired Judges And Justices

Code of Civil Procedure § 2093, Government Code § 1225 – Amendments to sections 2093 and 1225 allow retired judges or justices to administer oaths when they have been certified to do so by the Commission on Judicial Performance, and provide the requirements for such certification.

Offers To Compromise – Expert Costs Under CCP § 998

Code of Civil Procedure § 998 – In 2005, section 998 was amended to limit recoverable expert witness costs to "postoffer" costs. The limitation, however, was only placed in subdivision (d), which deals with the costs that may be awarded to a plaintiff, when the defendant fails to obtain a result more favorable than the plaintiff's offer. Subdivision (c)(1) has now been amended to clarify that the post-offer limitation also applies to the costs that may be awarded to the defendant when the plaintiff fails to obtain a result more favorable than the defendant's offer.

Paper Terrorism – Provisions Expanded To Private Persons And Entities

Code Of Civil Procedure § 765.030, 765.040, 765.060, and 765.010 – Existing statutes prohibit the filing of lawsuits, liens, lis pendens, and other encumbrances against public officers and employees when the filing is made with knowledge that it is false and with the intent to harass. These provisions have been expanded to include such filings against private persons and entities. "Harass" is defined as "engage in knowing and willful conduct that serves no legitimate purpose." Fast track provisions allow a trial court to issue an order to show cause why the lien or other encumbrance should not be stricken. Those provisions have been amended to specify that the hearing on such an order shall take place no earlier than 14 days after the order is issued. Violators are liable for a civil penalty of up to $5,000.

Statute Of Limitations – Actions Based On Serious Felony Offenses

Code of Civil Procedure § 340.3 – The time to file a civil action based on certain serious felonies is extended to 10 years following the defendant's discharge from parole under existing § 340.3. An exception to this rule has been added, so that it does not apply to a defendant who was unlawfully imprisoned and released after successfully prosecuting a writ of habeas corpus.

Summary Adjudication – Adjudication Of Issues That Do Not Dispose Of An Entire Cause Of Action

Code of Civil Procedure § 437c – In 2011, the summary adjudication statute was amended to allow parties to stipulate (subject to the court's agreement) to allow a motion for summary adjudication of a legal issue or claim for damages other than punitive damages, even if the issue does not completely dispose of a cause of action, affirmative defense, or issue of duty. The provisions were inadvertently allowed to expire in 2015 due to a sunset provision in the original amendment. The provisions have now been permanently reenacted, without an automatic sunset.

Summary Adjudication – Objections – Ruling Only Required As To Material Evidence

Code of Civil Procedure § 437c – Changes to the summary adjudication statute provides that a trial court need only rule on objections made to evidence that the court deems to be material to the disposition of the motion. Any objections not ruled on by the trial court are preserved for purposes of appellate review.

CRIMINAL LAW

Spoliation – Digital Images And Video Recordings

Penal Code §§ 135, 141 – Penal Code provisions prohibiting the destruction, concealment, alteration, modification, or planting of evidence to be used at trial or in other proceedings have been amended to include digital images or video recordings in the types of evidence that may not be tampered with.

DISCOVERY

Deposition Notices – Disclosure of Client Relationships With Deposition Officer

Code of Civil Procedure § 2025.220 – Deposition notices must now contain disclosures where either (a) the noticing party or a third party who is financing all or part of the action has a contractual relationship with the entity providing the services of the deposition officer to provide services beyond the noticed deposition, and/or (b) the noticing party has directed its attorney to use a particular deposition officer or entity to provide services for the deposition. The purpose of these requirements is to address complaints from the plaintiffs' bar about insurers and construction companies that establish long-term contracts with court reporting companies to obtain discounted rates, deposition databases, summaries, and expedited transcripts. The plaintiffs' bar has complained that these services give one side an unfair litigation advantage. The legislative history indicates that the notice will allow an opportunity to "object as allowed by existing law," but does not provide any new grounds for an objection.

DISCRIMINATION

Unruh Civil Rights Act

Civil Code § 51 – The protections of the Unruh Civil Rights Act, which provides that all persons are entitled to equal accommodations in business establishments, have been extended to persons regardless of their citizenship, primary language, or immigration status. Section 51 has also been revised to state that it does not require the provision of services or documents in a language other than English beyond what is otherwise required by law.

DROUGHT MEASURES

Artificial Turf And Water-Efficient Landscaping Measures

Civil Code § 4735 – The Davis-Sterling Common Interest Development Act has been amended to prohibit homeowner's association restrictions that prohibit the use of artificial grass, or require members to remove water-efficient landscaping measures installed in response to a state of emergency after the state of emergency has ended. An additional amendment provides that a homeowner's association may fine a homeowner who has received recycled water for failing to use that recycled water for landscaping irrigation.

EMPLOYMENT AND LABOR

Discrimination – Equal Pay

Labor Code § 1197.5 – Equal pay provisions in the Labor Code have been substantially revised. Previously, a plaintiff alleging unequal pay based on gender was required to show that he or she was not being paid the same rate for "equal work" as someone of the opposite sex at the same establishment. In the revised statute, the requirement that the employees be at the same establishment has been removed, and the employee need only show that the work is "substantially similar," based on a composite consideration of skill, effort, and responsibility. Once the plaintiff satisfies this burden, the burden shifts to the defendant employer to show that the entire wage differential is due to a seniority system, merit system, a system based on quality or quantity of production, or is based on a bona fide factor other than sex, such as education, training, or experience. The defendant must also show that the pay differential is due to a business necessity, and the plaintiff may rebut that showing by demonstrating that an alternative business practice exists that would serve the same purpose without the difference in wages.

Discrimination – Misuse Of Federal E-Verify System

Labor Code § 2814 – The federal E-Verify system is used by employers to verify a new hire's right to work in the United States. A 2014 law prohibited the use of the E-Verify system in order to retaliate against employees. New section 2814 now prohibits any use of the E-Verify system when not required by federal law or authorized by a federal agency. Section 2814 also requires employers to comply with federal employee notice requirements when the E-Verify system returns a tentative non-confirmation of the employee's right to work. The section provides for a civil penalty of $10,000 for any violation.

Employee Classification – Professional Sports – Cheerleaders

Labor Code § 2754 – Cheerleaders for major and minor league sports teams (including baseball, basketball, football, ice hockey, or soccer) are now specifically deemed to be employees for purposes of all state law provisions governing employment. This statute was enacted in response to a 2014 minimum wage lawsuit brought against the Oakland Raiders by members of the Raiderettes.

Rest And Recovery Periods – Payments To Piece Rate Workers

Labor Code § 226.2 – New Labor Code section 226.2 specifies the requirements for calculating the amount to be paid to piece rate workers for nonproductive time. Rest and recovery periods must be paid at the higher of the minimum wage, or the average hourly rate for non-overtime work. Other nonproductive work must be paid at least the minimum wage. The statute also contains detailed provisions regarding the requirements for compensation statements provided to employees, and a safe harbor provision for employers who make efforts to pay compensation owed for rest and recovery periods for time periods prior to December 31, 2015.

Retaliation – Family Members Of Those Who Engage In Protected Activity

Labor Code 98.6, 1102.5, 6310 – Existing statutes that prohibit workplace retaliation against protected activities under the Labor Code (such as whistleblowing, complaining about unpaid wages, or complaining about employee health or safety issues) have been amended to prohibit retaliation against an employee who is a family member of the person who engaged in such protected conduct.

Retaliation – Requests For Accommodation Of Disability Or Religious Belief

Government Code § 12940 – The Fair Employment and Housing Act has been amended to prohibit retaliation against an employee for requesting accommodation of his or her disability or religious beliefs, regardless of whether the accommodation request was granted.

Sick Days – Time Off For Victims Of Domestic Violence Or Sexual Assault

Labor Code § 233 – The Labor Code provision requiring employers to allow sick days to be used for care of relatives has been expanded to also include use of sick days by victims of domestic violence or sexual assault. Permissible activities include seeking injunctions or other relief, seeking medical or psychological care, seeking services from domestic violence program or rape crisis center, or taking safety related actions.

Time Off – Childcare Obligations

Labor Code § 230.8 – Existing law provides that an employer with 25 or more employees may not discharge or discriminate against a parent or guardian who takes up to 40 hours off each year for the purpose of participating in school activities. Revisions expand this provision to include addressing a child care provider or school emergency, and the finding, enrolling, or reenrolling of a child in a school or with a child care provider.

ENVIRONMENTAL

CEQA Exemptions – Minor Roadway Alterations

Public Resources Code § 21080.37 – A CEQA exemption for minor alterations to roadways by cities or counties with populations under 100,000 has been extended from January 1, 2016 to January 1, 2020.

Hazardous Substance Account Act – Recovery Actions By The Department Of Toxic Substances Control

Health and Safety Code §§ 25185.6, 25187.2, 25190, 25269.9, 25358.1, 25358.2, 25360, 25360.1, 25363, 25366.5, and 25367 – Various provisions of the Hazardous Substance Account Act ("HSAA") have been amended to: (1) specify that the DTSC may recover the costs of overseeing corrective actions or response actions, (2) specify the interest rates applicable to awards to the DTSC under the HSAA, (3) allow the DTSC to write off or write down uncollectible amounts, (4) regulate the DTSC's ability to seek and use information from parties with knowledge relating to releases of hazardous substances, and (5) extend the statute of limitations for a cost recovery action by the DTSC or a

Regional Water Quality Control Board to three years after completion of operation and maintenance in cases where operation and maintenance is required as part of the response or corrective action.

EVIDENCE

Hearsay Rule – Exception Where Party Procures The Unavailability Of Witness Extended

Evidence Code § 1390 – There is an existing statutory exception to the hearsay rule that applies when the hearsay evidence is offered against a party who engaged in or aided and abetted wrongdoing that procured the hearsay declarant's unavailability as a witness. That exception was scheduled to expire on January 1, 2016, but the expiration date has been repealed, thereby making the exception permanent.

GOVERNMENT

California Public Records Act – Catalog Of Enterprise Systems

Government Code § 6270.5 – The Public Records Act has been amended to require local agencies, except local educational agencies, to create a catalog of any enterprise systems used by the agency, including specified information about the system and its vendor, and to make that catalog available to the public. Enterprise systems are defined as software or computer systems that collect, store, exchange and analyzes information that is both: (A) a multidepartmental system or a system that contains information regarding the public, and (B) a system that serves as an original source of data. Certain systems are excluded from the definition of enterprise system, including security systems, infrastructure and mechanical control systems, video monitoring systems, 911 dispatch systems, and various other forms of restricted or sensitive systems.

INSURANCE

Residential Property Insurance – Discrimination

Insurance Code § 679.74 – A resident's source or level of income, or a resident's receipt of government or public assistance may not be used to refuse or cancel an insurance policy for residential property.

PRIVACY

Protection Of Personal Information – Definitions

Civil Code § 1798.81.5 – Existing law requires businesses in possession of personal information of California residents to implement reasonable security measures. The definition of personal information has been expanded to include health insurance information, and a username or e-mail address and password information for access to an online account.

Protection Of Personal Information – Form Of Notice Of Security Breach

Civil Code § 1798.82 – Existing law requires businesses in possession of personal information of California residents to give notice to any California resident whose information was or is reasonably believed to have been obtained by an unauthorized person. Amendments to section 1798.82 specify that the notice must be titled "Notice of Data Breach," and present the required information under specified headings. The amendment also includes a model form of notice.

REAL PROPERTY

Groundwater – Comprehensive Adjudication

Code of Civil Procedure §§ 830-871.7 – A new chapter has been added to the Code of Civil Procedure establishing a new action for the comprehensive adjudication of all of the groundwater rights in a basin, whether based on appropriation, overlying right, or other basis of right. Provisions in the new statutes include: (1) a requirement for notice by the plaintiff to certain persons including the city/county overlying the basin, and all overlying property owners, (2) a publication requirement, (3) a requirement that a draft notice and draft form answer be lodged with the complaint, (4) procedures for court approval of the notice and form of answer, (5) identification by the plaintiff of all assessor parcel numbers and physical addresses of all real property in the basin, as well as the names and address of all property owners, (6) authorization for government agencies to intervene, and (7) authorization for trial courts to issue a preliminary injunction against new or increased appropriations where the basin is in a condition of long-term overdraft. Senate Bill 226 also allows state intervention in a comprehensive groundwater adjudication (CCP § 837.5), and requires courts in a comprehensive groundwater adjudication action to minimize interference with a groundwater sustainability plan (Water Code §§ 10737-10737.8). Comprehensive revisions to the Water Code relating to groundwater sustainability and management were also passed in separate bills, Assembly Bills 617, 939 Senate Bill 13 and.

SECURITIES

Securities Fraud – Restoration Of Preexisting Language

Corporations Code § 25401 – Language mirroring Federal Securities and Exchange Commission Rule 10b-5, added to section 25401 in 2013, has been deleted and the prior version of section 25401 has been restored, due to concerns that California courts might apply federal interpretations of Rule 10b-5 that require plaintiffs to prove scienter. The current language provides that "It is unlawful to offer or sell a security in this state, or to buy or offer to buy a security in this state, by means of any written or oral communication that includes an untrue statement of a material fact or omits to state a material fact necessary to make the statements made, in the light of the circumstances under which the statements were made, not misleading.

TORTS

Fraudulent/Voidable Transfers – Uniform Voidable Transaction Act

SB 161 (Civil Code, Corporations Code, Probate Code, Public Utilities Code) – California has adopted most of the provisions of the new Uniform Voidable Transactions Act, to replace the Uniform Fraudulent Transfers Act. Some of the notable new provisions include: (1) renaming the Act the Uniform Voidable Transactions Act and substituting the word "fraudulent" with the term "voidable" throughout the Act in order to correct a misperception that fraud is a necessary element under the Act; (2) modifying existing definitions of terms such as "claim" and "person"; (3) adding new rules allocating the burden of proof and defining the standard of proof regarding claims and defenses (generally, a creditor seeking recovery must prove each element necessary for recovery, a party asserting an available defense must prove the elements of the defense, and a transferee has a burden of proving that it is a transferee in good faith); (4) creating a presumption of insolvency when a debtor is not paying debts as they become due, which shifts the burden of proof to the party seeking to disprove insolvency; (5) deleting the special definition of insolvency for partnerships, which gave the partnership credit for the full net worth of each of the general partners; and (6) providing that the law governing a claim under the Act is the law of the state at the time the transfer is made or the obligation is incurred.

Invasion Of Privacy – Paparazzi Drones

Civil Code § 1708.8 – The existing statue on invasion of privacy imposes liability on those who enter onto another's property without permission in order to capture images or sound recordings or private activity. The statute has now been expanded to include those who enter into the airspace above another's property without permission. This statute was specifically enacted due to the growing popularity of drones. Damages and other remedies under this statue include treble damages, punitive damages, and disgorgement of any proceeds or other consideration obtained from the violation. Violators are also subject to a civil penalty between $5,000 and $50,000.

Libel – Damage Limitations For Daily Newspapers Applicable To Weekly Online News Publications

Civil Code § 48a – The existing damage limitation restricts libel plaintiffs to special damages only, where the libel was published in a daily newspaper, unless the plaintiff requested a correction, and no correction was made. The limitation has been amended to apply to any libel published in a "daily or weekly news publication." The statement of legislative intent states that the amendment is intended to afford protection to weekly and online publications that publish breaking news, but not to publications that publish at longer than weekly intervals, nor to "casual postings" on Internet Web Sites.

SIGNIFICANT RULES
Adopted in 2015

TITLE 2 - TRIAL COURT RULES

Electronic Filing

Rule 2.10 – New rule 2.10 states that the trial court rules in Title 2 apply to documents filed both electronically and in paper form.

Rules 2.3, 2.102-2.108, 2.111, 2.113-2.115, 2.117, 2.130, 2.133, 2.134, – Non-substantive amendments have been made to the trial court rules to adapt them to electronic filing and service, for example by removing certain references to paper, replacing the word "type" or "typeface" with the word "font," and specifying that certain requirements, such as hole punching and single-sided printing, do not apply to electronically filed documents.

Rule 2.251 – Rule 2.251 has been amended to allow electronic service on courts where the court either serves a notice on all parties or adopts a local rule stating that the court accepts electronic service and including the electronic service address at which service will be accepted.

Sealed Electronic Records

Rule 2.550-2.551 – The rules for filing records under seal have been amended to recognize that records and notices may be transmitted electronically and kept by the court in electronic form.

TITLE 3 - CIVIL RULES

Case Management Rules

Rule 3.720 – Subdivision (b), which allows trial courts to exempt specified types of civil cases from the case management rules was set to expire on January 1, 2016. It has been extended to cases filed before January 1, 2020.

Electronic Filing

Rules 3.524, 3.544, 3.815, 3.823, 3.827, 3.1010, 3.1109, 3.1300, 3.1302, 3.1320, 3.1326, 3.1327, 3.1330, 3.1340, 3.1346, 3.1347, 3.1350, 3.1351, 3.1700, 3.1900, and 3.2107 – Non-substantive amendments have been made to the civil rules to adapt them to electronic filing and service, such as by replacing the word "mail" with "serve" or "send," restricting the requirement that pages be bound to documents filed on paper, and requiring electronic service to comply with the electronic service requirements in the CCP.

Electronic Signature of Judgment

Rule 3.1590 – This rule now expressly provides that a court's electronic signature on a judgment is as effective as an original signature.

Fee Waivers

Rules 3.55, 3.56, 8.818 – The fees and costs that must be waived upon granting of a fee waiver have been modified. The reporter's fees for attendance at hearings and trials are now only waived if the reporter is provided by the court, and the fees for a notice of appeal or a telephonic oral argument in a limited civil appeal have been eliminated from the list of costs that must be waived.

Judicial Arbitration

Rule 3.815 – The rule relating to selection of an arbitrator in a judicial arbitration has been amended to state that, where an arbitrator is not selected by stipulation, and there are no applicable local rules, the administrator shall "send" rather than "mail" the list of potential arbitrators to each side, and the sides shall have 10 days from the date the list was sent to reject one of the names.

Rule 3.823 – Documents and notices relating to evidence in judicial arbitrations may now be delivered by electronic means, which extends applicable time periods by two days.

Lodging Material

Rule 3.1302 – Rule 3.1302 now requires that where material is lodged electronically, it must clearly specify the electronic address to which the material may be returned.

Motions For Summary Adjudication – Evidentiary Objections

Rule 3.1354 – This rule formerly provided that a separate statement may reference evidentiary objections by the objection number. That permissive option is now a mandatory requirement. The rule still provides that the objections must not be restated or reargued in the separate statement.

This rule also contains examples of the formats in which objections may be submitted. One of the sample objections, based on relevance, has been deleted, in the hopes that the revision restricting the separate statement to material facts will reduce the number of objections based on relevance.

Finally, the rule now provides that a trial court may require a proposed order on evidentiary objections to be provided in electronic format.

Motions For Summary Adjudication – Separate Statement To Be Limited To Material Facts

Rule 3.1350 – A new definition of "material facts" has been added to the rules to clarify that the only facts to be included in a separate statement are those that "relate to the cause of action, claim for damages, issue of duty, or affirmative defense that is the subject of the motion and that could make a difference in the disposition of the motion." The rule now explicitly states that the separate statement should not include any facts not pertinent to the disposition of the motion.

Notice Requirement For Remote Participation In Depositions

Rule 3.1010 – A party's notice of intent to appear and participate in an oral deposition by telephone, videoconference, or other remote means may be served by e-mail in addition to the traditional means.

Notice Requirements For Telephonic Appearances

Rule 3.670 -- The rule setting forth the notice requirements for telephonic appearance at hearings other than hearings on ex parte applications has been amended to require a notice of intent to appear by telephone to be sent by any means authorized by law and reasonably calculated to ensure delivery to the parties at least two court days before the hearing. Previously, the amendment required notice to be given two court days before the appearance by a method reasonably calculated to ensure delivery by the close of the next business day.

The rule for notice of telephonic appearance at hearings for ex parte applications required notice to be given to the court by 2:00 p.m., and the parties by close of business the day before the hearing. The rule has been amended to require notice to be given to both the court and the other parties by the earlier of either 2:00 p.m. or close of business the day before the hearing. Close of business is defined in Rule 2.250(b)(10) as the earlier of 5:00 p.m., or the time at which the court stops accepting filings at its filing counter.

Service Lists

Rule 3.254 – The rule requiring the first named plaintiff to maintain a service list and requiring other parties to supply service information to the plaintiff has been amended to state "Except as provided under rule 2.251 for electronic service." Rule 2.251(d) provides that courts that permit electronic filing must maintain and make available the electronic service list, and Rule 2.251(f) requires parties who change their electronic service address to file a notice of change of address with the court, and serve the notice on all other parties.

TITLE 8 - APPELLATE RULES

Applications – Stamped And Addressed Envelopes

Rule 8.50 – The former rule that required an application in the Court of Appeal to be accompanied by a stamped and addressed envelopes for service on all parties has been repealed.

Electronic Access To Court Of Appeal Records

Rule 8.80-8.85 – A new article has been added to address electronic access to the records of the Court of Appeal. The rules specify which documents must be made electronically available "if feasible," including Court of Appeal dockets, calendars, and opinions, along with Supreme Court minutes and briefs from at least the preceding three years. Other documents may be made electronically available, but only on a case-by-case basis (i.e. no bulk downloading may be allowed), and there are some restrictions on documents in family law, civil harassment, and other sensitive cases. Unless electronically certified, documents obtained through this system are not deemed to be official records. The court may charge a fee for the service, and certain various other requirements are imposed relating to the means of access, conditions of use, and notices to be provided by the court to users of the system.

Electronic Filing And Service – General Revisions

Rules 8.10, 8.11, 8.40, 8.44, 8.144, 8.204, 8.224, 8.346, 8.380, 8.385, 8.386, 8.504, 8.512, 8.540, 8.548 – Non-substantive amendments have been made to the appellate rules to adapt them to electronic filing and service, such as by replacing the term "mail" with "send," the term "type" with "font," and the term "file-stamped" to "filed-endorsed," clarifying that the requirements as to number of copies and colors of covers only apply to paper documents, clarifying which other formatting requirements apply to electronically filed documents, and clarifying that records and exhibits need only be returned to a lower court if they were transmitted in paper.

Electronic Filing And Service – Local Requirements

Rule 8.44 – In addition to clarifying that the number of copies of briefs to be filed only applies to paper filings, the amendment to this rule specifies that appellate courts allowing electronic filing will specify any additional requirements in that court's electronic filing requirements published under rule 8.74.

Electronic Service Consent to Electronic Service

Rule 8.71 – The rule stating the ways in which a party may consent to electronic service has been amended to state that (a) electronic service is also permissible on a party when otherwise authorized by law or court order, and (b) electronic service on a non-party is permissible when the non-party consents or when electronic service is authorized by law or court order. This rule has also been amended to state that a court may consent to electronic service either by (a) serving a notice of that consent on all parties, or (b) adopting a local rule stating that the court accepts electronic service. In either case, the court must specify the e-mail address at which electronic service shall be accepted.

Electronic Signatures

Rule 8.42 – Signatures on electronically filed documents must comply with the requirements of rule 8.77, which essentially state that a document is deemed signed when it is filed electronically (with or without an electronic signature), and require that when a document is to be signed under penalty of perjury, a printout must be physically signed and retained by the filing party for inspection or filing upon demand.

Electronic Transmission Of Documents Under Seal

Rule 8.45, 8.46, 8.47 – Confidential or sealed documents that are transmitted electronically must be transmitted in a secure manner.

Notice Of Appeal – Electronic Fee Payment

Rule 8.100 – The rule relating to filing the notice of appeal has been amended to clarify that the appeal fee may be paid by credit cards, debit cards, electronic fund transfers, or debit accounts, where permitted by the court.

Recoverable Costs – Electronic Filing And Service Fees

Rule 8.278 – New advisory committee comments in the rule relating to recoverable costs on appeal indicate that recoverable filing and service costs include fees charged by electronic service providers for electronic filing and service.

SIGNIFICANT CASES
Decided in 2015

ALTERNATIVE DISPUTE RESOLUTION

Arbitration Agreement – Enforceability – Arbitration Agreement In Amended Country Club Bylaws Could Not Be Applied Retroactively

Cobb v. Ironwood Country Club (2015) 233 Cal.App.4th 960 **[Rylaarsdam, O'Leary, Bedsworth]** – In August of 2012, William Cobb and three other current and former members of the Ironwood Country Club brought a declaratory relief action against the club for disputes arising from a loan agreement. The trial court denied the country club's motion to compel arbitration because the motion was founded on an arbitration provision added to the country club's bylaws after the action was filed. The Court of Appeal affirmed the decision and held that Plaintiffs were not bound by the bylaw amendment merely because they were country club members. The Court of Appeal explained that the implied covenant of good faith and fair dealing bars a party from "making any unilateral changes to an arbitration agreement that apply retroactively to 'accrued or known' claims." Despite the strong public policy favoring arbitration provisions, there was no basis to conclude that Plaintiffs were given an opportunity to voluntarily agree to the new arbitration provision in advance, so the amended agreement could not constitute a legally enforceable agreement to arbitrate the already existing dispute.

Arbitration Agreement – Enforceability – CLRA Class-Action Anti-Waiver Provision Unenforceable Under *Concepcion*

Sanchez v. Valencia Holding Co., LLC (2015) 61 Cal.4th 899 – In a class action lawsuit arising from automobile sales, the trial court denied a motion to compel arbitration pursuant to a form automobile sales contract. The arbitration provision at issue included a class action waiver, but provided that, if the class waiver is unenforceable, then the entire arbitration agreement shall be unenforceable. The California Supreme Court found that while this agreement had some procedural unconscionability, it was not substantively unconscionable because it did not obviously favor the seller, and the purchaser presented no evidence of inability to afford arbitration filing fees and costs under the case-by-case analysis provided for in Code of Civil Procedure section 1284.3. While the Court recognized that the Consumer Legal Remedies Act provided an un-waivable right to file a class action, the Court held that the anti-waiver provision was unenforceable under the U.S. Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333.

Arbitration Agreement – Enforceability – Effect Of Non-Severability Provision On Agreement Containing Representative Action Waiver

Securitas Security Services USA, Inc. v. Superior Court (2015) 234 Cal.App.4th 1109 – In *Iskanian v. CLS Transportation* (2014) 59 Cal.4th 348, the California Supreme Court held that, while class action waivers in arbitration agreements are generally enforceable, waivers of representative actions under the Private Attorneys General Act of 2004 (PAGA), generally are not. The *Iskanian* Court invalidated the PAGA claim waiver, but did not decide whether the PAGA claim should be resolved in arbitration or in court. In *Securitas Security Services USA,*

the trial court ruled that a similar PAGA claim waiver was unenforceable, but issued an order compelling arbitration of all claims, including the PAGA claim. The Court of Appeals reversed, holding that the PAGA waiver rendered the entire arbitration agreement unenforceable, due to a non-severability provision, which immediately followed the class action and representative action waiver, and stated that "Notwithstanding any other clause in this Agreement, the preceding sentence shall not be severable from this Agreement in any case in which the dispute to be arbitrated is brought as a class, collective or representative action." The Court held that the non-severability provision essentially turned the arbitration agreement into an all or nothing proposition–if the class or representative action waivers are not enforceable, the entire agreement to arbitrate is unenforceable, and all disputes must be resolved in court.

Arbitration Agreement – Enforceability – Non-Severability Of Unconscionable Terms That Permeate The Entire Agreement

Carlson v. Home Team Pest Defense, Inc. (2015) 239 Cal.App.4th 619–The Court of Appeal affirmed a trial court's denial of the Defendant employer's motion to compel arbitration of the Plaintiff former employee's claims on the grounds of unconscionability. A finding of unconscionability requires both procedural and substantive unconscionability. The agreement in *Carlson* was procedurally unconscionable, because it was presented on a "take-it-or-leave-it" basis, forcing the Plaintiff to either sign it or lose both her job offer and her unemployment benefits. The agreement was also substantively unconscionable because: (a) the claims that were exempted from arbitration were those most likely to be brought by the Defendant, while the claims likely to be brought by the Plaintiff were subject to arbitration, (b) the agreement allowed the Defendant, but not the Plaintiff to recover attorney's fees, (c) the agreement required the Plaintiff, but not the Defendant, to submit to an unspecified dispute resolution procedure–without legal representation–before commencing arbitration, (d) the agreement effectively placed a 90-day statute of limitations on claims by the Plaintiff, but not on claims by the Defendant, and (e) the agreement imposed an impermissible filing fee on claims by the Plaintiff. The Court held that these unconscionable provisions permeated the entire agreement, such that they could not be severed without requiring the trial court to rewrite the agreement. Accordingly, the entire arbitration agreement was held to be unconscionable and unenforceable.

Arbitration Agreement – Failure To Establish Terms Of Arbitration Policy Does Not Invalidate Agreement

Cruise v. Kroger Co. (2015) 233 Cal.App.4th 390 – In *Cruise*, the Plaintiff employee sued her former employer for discrimination. The Defendant moved to compel arbitration, producing an employment application that contained an arbitration clause and incorporated by reference an arbitration policy setting forth applicable arbitration procedures. The Defendant produced an arbitration policy that was supposedly included in an employee handbook, but failed to submit evidence that the handbook was given to the Plaintiff, or that it even existed at the time of her employment. The Plaintiff denied that she ever received the handbook. The trial court denied the motion to compel arbitration, based in part on the Defendant's failure to establish the precise terms of the arbitration policy. The Court of Appeal reversed, holding that the parties

unquestionably agreed to arbitration in the employment application, which was set forth on the Defendant's letterhead, and signed by the Plaintiff. The Defendant's inability to establish the terms of the arbitration policy only meant that the default procedures in the California Arbitration Act applied–it did not affect the validity of the agreement to arbitrate.

Arbitration Agreement – Signed Statement That Employee Has "Read And Understands" Arbitration Policy Is Sufficient To Create An Enforceable Agreement

Serafin v. Balco Properties Ltd., LLC (2015) 235 Cal.App.4th 165 – In *Serafin*, the Plaintiff employee alleged that she had not consented to an arbitration policy because she had merely acknowledged that she "read and understand[s]" the mandatory arbitration policy. The Court of Appeal disagreed, noting that the mandatory arbitration policy was set forth in a short, easy-to-read document, which was clearly labeled "MANDATORY ARBITRATION POLICY," and a human resources representative was present to explain the terms of the policy that the Plaintiff then signed. The Court held that these facts did not suggest that the parties "intended the employee would be required to sign a separate and distinct document before an arbitration agreement would exist." The Court also held that the mandatory arbitration policy was not illusory merely because the employer retained the right to modify its personnel policies, because that right is subject to the implied covenant of good faith and fair dealing. The Court further held that it was immaterial that the employer had not executed a writing indicating that it agreed to be bound by the mandatory arbitration policy because the employer's conduct (including printing the arbitration policy on its own letterhead, and its use of arbitration to assert its own claim against the employee) evidenced an intent to be bound by it.

Motion To Compel Arbitration – Appeal Of Order Compelling Arbitration Lies From Stipulated Judgment Confirming Award

Ashburn v. AIG Financial Advisors, Inc. (2015) 234 Cal.App.4th 79 – Plaintiff investors sued Defendant investment advisor firm. The Defendant moved to compel arbitration, and the trial court granted the motion without an evidentiary hearing to resolve conflicting evidence. The matter was referred to arbitration, the arbitrators issued their award, and the trial court entered judgment confirming the award based on the parties' stipulation. The Court of Appeal first denied the successor investment firm's motion to dismiss the appeal, holding that (1) an appeal from a stipulated judgment is proper where the stipulation was merely to facilitate the appeal, and (2) the investors were not required to first move to correct or vacate the arbitration award where they were not challenging the award, itself, but were, instead, challenging the order granting the petition to compel arbitration. Turning to the merits, the Court held that the trial court abused its discretion under Code of Civil Procedure section 1290.2 by not holding an evidentiary hearing, because there was a significant factual dispute regarding the content of the purported arbitration agreements that the investors had signed.

Motion To Compel Arbitration – Case Is Not Subject To Stay Under CCP § 1281 During Appeal From Denial Of A Motion To Compel Arbitration

Montano v. The Wet Seal Retail Inc. (2015) 232 Cal.App.4th 1214 – In *Montano*, the trial court denied the Defendant's motion to compel arbitration and, at the same hearing, granted a motion compelling discovery responses against the Defendant. The Defendant challenged the denial of the motion to compel arbitration, and also argued that the motion to compel discovery should have been stayed under Code of Civil Procedure section 1281.4, which requires a case to be stayed while a motion to compel arbitration is "undetermined." The Court of Appeal in *Montano* affirmed the denial of the motion to compel arbitration, and also rejected the holding stated in *Smith v. Superior Court* (1962) 202 Cal.App.2d 128, that a motion to compel arbitration is "undetermined" for the purposes of section 1281.4 while a denial of the motion is on appeal. Instead, the motion to compel was decided when the trial court denied it, and there was no obligation to stay the case after that point.

Waiver – Pursuing Class Discovery And Class Settlement Waives Right To Compel Arbitration

Bower v. Inter-Con Security Systems, Inc. (2015) 232 Cal.App.4th 1035 – The trial court denied an employer's petition to compel arbitration of a putative wage and hour class action filed by Plaintiff employee, finding that the employer had waived its right to compel arbitration by engaging in litigation conduct inconsistent with the right to demand arbitration. The Court of Appeal affirmed, concluding that there was substantial evidence to support the trial court's finding of waiver, where the employer signaled its willingness to litigate class claims by propounding classwide discovery, and also by attempting to settle the case on a classwide basis. The employer's actions resulted in prejudice to the employee, as he suffered delay and incurred costs in litigation and attempting to settle class claims that the employer led him to believe would be encompassed within the litigation. The court also concluded that it was unnecessary to determine whether the Federal Arbitration Act or the California Arbitration Act applied, as there was no meaningful difference in the waiver principles under the state or federal statute.

ANTI-SLAPP STATUTE

Attorney's Fees For Frivolous Motion – Statement Of Reasons Required

Nunez v. Pennisi (2015) 241 Cal.App.4th 861 – In *Nunez*, the Defendant brought an anti-SLAPP motion that was ultimately unsuccessful as to one of the Plaintiffs. The trial court awarded attorney's fees as sanctions against the Defendant for the filing of a frivolous anti-SLAPP motion (attorney's fees are only awarded as a matter of course to a defendant who files a successful motion). The anti-SLAPP statute, at CCP § 425.16(c)(1) allows such fees to be awarded to a prevailing plaintiff as a sanction "pursuant to section 128.5." The Court of Appeal reversed the award because the trial court failed to "recite in detail the conduct or circumstances justifying the order," as required by CCP § 128.5(c). The Court remanded the matter to the trial court to reconsider the sanctions issue, and either specify the reason for the sanctions, or deny them. *See*

also Malicious Prosecution – Order Granting Nonsuit Constitutes Favorable Determination Unless Order Specifies Otherwise at p. 58, below.

First Prong – Allegations Of Plagiarism In A University Complaint Process And At Private Lecture Are Not Protected Activity

Bikkina v. Mahadevan (2015) 241 Cal.App.4th 70 – The Defendant brought a special motion to strike a researcher's complaint alleging defamation, intentional infliction of emotional distress, and negligence, based on statements claiming that the researcher had used a contaminated sample and had committed plagiarism. The statements were made during a university complaint process, to the Plaintiff's employer, and in a lecture to a small number of scientists at the Plaintiff's employer, Lawrence Berkeley National Laboratory. The trial court denied the motion, and the Court of Appeal affirmed, holding that the challenged conduct was not protected activity, because the statements were not made in a public forum subject to § 425.16(e)(3), and did not concern matters of public interest subject to § 425.16(e)(4). The Court of Appeal distinguished the private nature of the interests and communications at issue in this case with the public interest found in *Taus v. Loftus* (2007) 40 Cal.4th 683, where criticisms of a case study were leveled in published articles and in speeches at academic conferences, and concerned "a topic of 'substantial controversy' in the mental health field." In contrast, the specific allegations of plagiarism and use of a contaminated sample at issue in *Bikkina* were "only remotely related to the broader subject of global warming," and thus did not rise to the level of a matter of public interest.

First Prong – Registration Of Internet Domain Name Can Be A Protected Activity

Collier v. Harris (2015) 240 Cal.App.4th 41 **[Aronson, Moore, Thompson]** – Registration of domain names can be a protected activity "in furtherance of the right of free speech" under the first prong of the Anti-SLAPP statute. The Plaintiff and Defendant supported different candidates in a School Board election. The Defendant registered the Plaintiff's name, and the name of her advocacy group as internet domain names, and directing users to the website of the candidate he supported. The Plaintiff sued for false impersonation, and illegal use of a domain name. The trail court denied the Defendant's anti-SLAPP motion, and the Court of Appeal reversed. The Court of Appeal held that, while the registration of the domain names may not constitute speech, the First Prong of the anti-SLAPP statute is satisfied when the lawsuit is based on actions that "advance or facilitate the exercise of free speech rights," in connection with an issue of public interest.

First Prong – Violations Of An Attorney's Duty Of Loyalty Do Not Arise From Protected Activity

Sprengel v. Zbylut (2015) 241 Cal.App.4th 140 – The Court of Appeal affirmed the trial court's denial of a special motion to strike under Code of Civil Procedure section 425.16, because the Plaintiffs' claims did not arise from protected petitioning activity, where they were based on legal malpractice and violations of the duty of loyalty committed by an attorney who allegedly

provided legal services in connection with an action against his former firm's clients. The Court explained that a breach of loyalty can occur even when client confidences are not communicated to the new client, and thus the breach of an attorney's duty of loyalty "occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client." Accordingly, the claims did not arise from protected activity, despite the fact that protected activity features prominently in the factual background.

Leave To Amend – Leave To Amend To State Claim Based On Non-Protected Activity Is Not Permissible

Mobile Medical Services, etc. v. Rajaram (2015) 241 Cal.App.4th 164 **[Thompson, Moore, Ikola]** – The complaint in *Mobile Medical Services* was based on statements made regarding the Plaintiff to the Board of Registered Nursing, and was initially stricken in response to an anti-SLAPP motion. However, the trial court granted leave to amend "to allege[] breach(es) other than and not intertwined with the prior allegations of alleged false reports to the Nursing Board." The Plaintiff amended the complaint, and a second anti-SLAPP motion was denied. The Court of Appeal reversed, holding that it was error to grant leave to amend after finding that the original Complaint was based on protected activity. Doing so frustrates the quick remedy afforded by the anti-SLAPP statute by providing the Plaintiff with "a second opportunity to disguise the vexatious nature of the suit through more artful pleading."

SLAPPback Motions – Appellate Review by Writ Proceeding Only

West v. Arent Fox LLP (2015) 237 Cal.App.4th 1065 – In a straightforward application of the SLAPPback statute, Code of Civil Procedure section 425.18, the Court of Appeal refused to review an order granting an anti-SLAPP motion against a "SLAPPback" suit (i.e. a malicious prosecution action arising from a prior action that was dismissed under the anti-SLAPP statute) as to some, but not all, causes of action. Such orders are not immediately reviewable by appeal, like most orders granting or denying anti-SLAPP motions. Instead, the special review procedure set forth in the SLAPPback statute requires that review be sought in a peremptory writ petition filed within only 20 days after service of written notice of a ruling denying a motion or granting a motion as to less than all causes of action in a SLAPPback case.

APPELLATE LAW & PROCEDURE

Appealability – "Judgment" That Leaves Open Punitive Damages Is Not Appealable

Baker v. Castaldi (2015) 235 Cal.App.4th 218 **–** The Court held that a document entitled "judgment" which determined liability, but left the amount of punitive damages to be assessed in a later trial phase was not an appealable final judgment. In *Baker*, the Plaintiff sued Defendants for conversion, and the trial court issued a "judgment" after the first phase of the trial, which found that the Defendants jointly and severally liable, but reserved punitive damages to be determined in the second phase. The parties appealed the phase one "judgment." The Court of Appeal held that the judgment was not appealable, because a judgment is only final when there is

no issue left for future consideration except compliance with the judgment. The Court also refused to construe the notice of appeal as an appeal from the final judgment issued months later, holding that it is well "beyond liberal construction" to view an appeal from one order as an appeal from a "further and different order."

Disentitlement Doctrine

Blumberg v. Minthorne (2015) 233 Cal.App.4th 1384 **[Moore, Rylaarsdam, Thompson]** – In this dispute over a family trust, the trial court ordered the Defendant trustee to file an accounting and to quitclaim certain property to the Plaintiff successor trustee. The Defendant then filed a notice of appeal and, instead of quitclaiming the property to the Plaintiff as ordered by the trial court, she quitclaimed the property to her daughter and also failed to file the accounting. The Court of Appeal then dismissed the Defendant's appeal, under the disentitlement doctrine, which allows the Court of Appeal to dismiss an appeal where the appellant refuses to comply with the orders of the trial court. The doctrine applied to the Defendant's conduct in missing court dates, failing to keep her own promises, lacking candor in communications with the trial court, and ignoring the trial court's orders, which had frustrated the trial court's efforts to enforce its orders. The Appellate court explained that it was not up to the former trustee to decide to ignore the trial court's order regarding the conveyance of the property, and rejected the argument that the Defendant's appeal automatically stayed the trial court's order without the need for a bond. Having blatantly violated the trial court's orders, the Defendant was not permitted to seek relief from the Court of Appeal. For further discussion of the disentitlement doctrine, *see also Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259.

Disposition – Reversal Of Judgment Against One Of Two Plaintiffs Reverses Unallocated Cost Award As Well

Ducoing Management, Inc. v. Superior Court (2015) 234 Cal.App.4th 306 – In this case, a judgment on liability and a cost award were entered in favor of the Defendants against the two Plaintiffs. The cost award was not apportioned between the two Plaintiffs. In a prior opinion, the Court of Appeal reversed the judgment against one of the Plaintiffs, but affirmed the judgment against the other Plaintiff (the "Petitioner"). The disposition of the prior appeal stated that "The judgment against [the Petitioner] is affirmed. In all other respects, the judgment is reversed." The Defendants attempted to enforce the full cost award against the Petitioner, who then sought and obtained writ relief from the Court of Appeal. The Court of Appeal held that the reversal of the judgment "in all other respects" had the effect of reversing the unallocated cost award against both the Petitioner and the other Plaintiffs. The Court emphasized that a reversal of the judgment in favor of the other Plaintiff would automatically vacate the cost award even without express language to that effect.

Law Of The Case – Doctrine Does Not Apply To Factual Determinations

Investors Equity Life Holding Co. v. Schmidt (2015) 233 Cal.App.4th 1363 **[Rylaarsdam, O'Leary, Moore]** – The Defendant moved to dismiss the case for forum non conveniens. The trial court stayed the action pending resolution of the merits in a Hawaii court. In the first of two

appeals, the Plaintiff claimed that it was presumptively entitled to a California forum because it was a California resident. The Court of Appeal rejected that argument, characterizing the Plaintiff's claim that it was a California resident as "erroneous," and "doubtful." On remand, the Defendant moved to dismiss, rather than stay, the case, claiming that the Court of Appeal's decision that the Plaintiff was not a California resident was now law of the case. The trial court agreed, refused to admit additional evidence relating to residency, and dismissed the case. In the second appeal, the Court of Appeal held that its decision regarding the Plaintiff's residency was a factual determination, and that the doctrine of law of the case applies only to decisions of law. Thus, on retrial, the doctrine does not prevent a party from introducing new evidence, and before granting the Defendant's request for reconsideration based on new facts, the court "was obligated to consider whatever relevant evidence plaintiff offered in opposition to that request." The Court also addressed the question of when a case may be dismissed after a stay has been entered for forum non conveniens. *See also* Civil Procedure – Forum Non Conveniens – Dismissal After Stay at 36, below.

Notice Of Appeal – Time To File – Non-Substantive Amendment To Judgment Does Not Reset Time To Appeal

Ellis v. Ellis (2015) 235 Cal.App.4th 837 – In *Ellis*, a judgment dissolving a marriage was entered, and subsequently amended on two occasions to establish the timing of the remaining division of property and to set a deadline for an equalizing payment. The wife then filed a notice of appeal from the first amended judgment, more than 60 days after the filing of the original judgment. The Court of Appeal dismissed the appeal as untimely, holding that an amendment to a judgment only resets the time to appeal where the amendment materially affects the parties' rights in a way that would deprive a party of the right to appeal. While the wife claimed that the amendments to the judgment were substantive, she was unable to explain how any of the changes affected her right to receive payments, the amount to be paid, or any other right that could not have been protected by an appeal from the original judgment. Therefore the Court of Appeal determined that the amendments were non-substantive, and dismissed the appeal as untimely.

Recoverable Costs On Appeal – Interest Expense For Appeal Bond Or Deposit

Siry Investments, L.P. v. Farkhondehpour (2015) 238 Cal.App.4th 725–After a successful prior appeal in favor of Defendants, Defendants sought, among other things, the net interest they had incurred to borrow the funds they used as collateral for the appeal bonds. The Court of Appeal affirmed the trial court's award of this cost because newly amended Rule of Court 8.278 allows the prevailing party on appeal to collect the net interest expense incurred in borrowing funds for an appeal bond. The Court of Appeal explained that the amended version of rule 8.278 was not being applied retroactively because the prior appeal was still pending at the time the amendment took effect on January 1, 2013. In addition, the Court of Appeal found that there was sufficient evidence that Defendants were financing the collateral for their surety bonds with funds from a preexisting loan made to them, and there was no need for Defendants to prove that they borrowed those funds specifically to get funding for their surety bond. Note that the amendment

of Rule 8.278 was covered in our 2013 program, but this case is a good reminder that costs on appeal now include interest expense for the appeal bond–even if the appeal was already pending at the time the rule was amended.

Remand – Accrual Of Interest Following Decision – Interest Accrues From Date Of Original Judgment If The "Reversal" Effectively Modifies The Judgment

Chodos v. Borman (2015) 239 Cal.App.4th 707 – Where a judgment is reversed on appeal for the trial court to conduct new proceedings and enter a new judgment, interest generally runs from the date of entry of the new judgment. However, where a judgment is modified on appeal, interest runs from the date of entry of the original judgment. In *Chodos*, an attorney fee award, including a multiplier, was entered in favor of the Plaintiff. In a prior decision, the Court of Appeal held that the judgment was "reversed" with instructions to the trial court to enter a new award in the amount of the lodestar without the multiplier. The trial court entered the new amount, and specifically held that the Court of Appeal's decision effectively vacated the original judgment. The Plaintiff and his attorney appealed, arguing that the new judgment should have provided for interest accruing from the date of the original judgment. The Court of Appeal agreed, holding that an appellate decision must be evaluated from a practical standpoint to determine whether it constitutes a reversal or modification for purposes of the accrual of interest. Where, as here, the decision directs the court to enter judgment in a different amount without the necessity for further trial court proceedings, the decision is a modification, even if it is couched in terms of a reversal.

Standard Of Review – Mandatory Preliminary Injunction – No Reweighing of Evidence

Ryland Mews Homeowners Assn. v. Munoz (2015) 234 Cal.App.4th 705 **–** A Court of Appeal does not reweigh the evidence in evaluating a mandatory preliminary injunction, and will not reverse the injunction absent a showing of abuse of discretion by the trial court. In *Ryland Mews*, the HOA sued a Defendant-homeowner after the Defendant replaced his carpeted floors with hardwood, which caused noise impacts on the homeowners who were living in the condo beneath the Defendant. The trial court issued a preliminary injunction requiring the Defendant to (1) place rugs on 80 percent of the floor of Defendants' condo, and (2) propose a modification to the existing floor covering to the HOA's design review committee. The Defendant appealed, arguing that a heightened appellate scrutiny applies to mandatory preliminary injunctions, and that the evidence in the trial court showed that: (1) the HOA rule he allegedly violated did not exist when he installed the floors, and (2) the claims of noise problems were not credible. The Court of Appeal refused to reweigh the evidence on these matters, noting that even under the heightened scrutiny applicable to mandatory preliminary injunctions, its role was not to reweigh the evidence or evaluate the credibility of the witnesses. Instead, a preliminary injunction will only be overturned if the trial court has "exceeded the bounds of reason or contravened the uncontradicted evidence."

Stare Decisis – Prior Decision May Be Overturned Where Opinion Overlooks An Existing Statute

Fluor Corp. v. Superior Court (2015) 61 Cal.4th 1175 – In the 2003 case of *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934, the California Supreme Court upheld an anti-assignment clause in an insurance policy. In 2015, on almost identical facts, the Court overruled itself, because the opinion in *Henkel* failed to consider or discuss Insurance Code section 520, a statute dating as far back as 1872. The insurer argued that principles of stare decisis militate against overruling *Henkel*, but the Court rejected that argument, citing Witkin on California Procedure for the reasons that a court may overrule a prior decision. The Court agreed with Witkin's assessment that "probably the strongest reason" for not following a prior decision is that "it overlooked an existing statute." *See also* Insurance – Assignment – Clause Prohibiting Assignment Of Liability Insurance Claim Is Void If The Assignment Takes Place After The Occurrence Giving Rise To Liability at p. 49, below.

Writ Petitions – Response To Order To Show Cause Must Include Answer Or Demurrer To Preserve Factual Disputes

Dorsey v. Superior Court (2015) 241 Cal.App.4th 583 – The Court of Appeal in *Dorsey* granted an order to show cause in response to a petition for writ of mandate in a dispute over the damage limit in small claims court. The Respondent filed a return to the petition that included a verified "Procedural and Factual History," and a memorandum of points and authorities. The Court of Appeal granted the petition, and held that by failing to include either an answer or demurrer in the return, the Respondent was deemed to have admitted the factual allegations in the petition.

ATTORNEY'S FEE AWARDS

Amount – Trial Court's Discretion – Reduction Of Fee Award Will Not Be Reversed On Appeal Solely For Lack Of Explanation

Save Our Uniquely Rural Community Environment v. County of San Bernardino (A-Nur Islamic Center) (2015) 235 Cal.App.4th 1179 – In *Save Our Uniquely Rural Community Environment* ("*SOURCE*"), a successful CEQA petitioner sought attorney fees of $110,599 with a multiplier of 2, and $9,900 for work on the attorney's fees motion. The trial court awarded only $19,176, without explaining how this precise amount was reached. The Fourth Appellate District, Division Two affirmed, explaining that there were a number of reasons the trial court might have reduced the fee award, some of which the trial court mentioned, and some of which the trial court might properly have relied upon even if it did not mention them specifically. The trial court criticized *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, and held that, contrary to the holding in *Gorman*, a trial court's fee determination should not be reversed solely because of a lack of explanation by the trial court. Instead, there must be some indication that the trial court considered an improper factor or chose a number "from thin air."

Amount – Trial Court's Discretion – Trial Court Must Explain Basis For Reduction Greater Than 10%

Kerkeles v. City of San Jose (2015) 243 Cal.App.4th 88 – In *Kerkeles*, the Sixth Appellate District took an approach radically different from that adopted in *SOURCE*. In this case, the successful Plaintiff filed a motion for $1,448,397 in attorney's fees, based on 2,419.9 hours spent. The Plaintiff also requested a multiplier of 1.5 for contingent risk, and fees for filing the fee motion, which brought the total request to $2,350,848.75. The trial court awarded only $436,807.50, first significantly reducing the requested hourly rates, and then cutting the number of hours by 50%. The trial court's only explanation was that the Plaintiff's attorneys "expended far more time than a reasonable attorney could ever bill a paying client for." The Court of Appeal reversed, adopting a federal court decision that required a more detailed explanation for a reduction of more than 10% of the fee request. The court specifically stated that "If the record reveals no indication of the court's reasoning, the reviewing court may understandably conclude that the lower court, instead of independently reviewing counsel's records, merely 'threw up its hands' and simply relied on the opposing party's suggested percentage cut." The notable difference between *Kerkeles* and *SOURCE* is that the fees in *Kerkeles* were awarded under a federal statute (42 U.S.C. 1988), and the Court in *Kerkeles* relied primarily on federal authorities, while the fees in *SOURCE* were awarded pursuant to California's private attorney general statute. Nevertheless, fees under both statutes are calculated using the same "lodestar" method, and like California law, the federal statute expressly confers discretion on the trial court to determine the correct amount.

Contractual Attorney's Fee Provision – Scope – Interpretation Against Party Who Caused Ambiguity

Hemphill v. Wright Family, LLC (2015) 234 Cal.App.4th 911 **–** A broadly worded lease agreement entitles the tenant to an award of attorney's fees in both contract and tort. In *Hemphill*, Hemphill purchased a manufactured home and leased the homesite under a lease agreement with the Wright Family, LLC. Hemphill suffered serious injuries after falling into a drainage ditch that was negligently maintained by the Wright Family. A jury returned a verdict in favor of Hemphill, and Hemphill moved for an award of attorney's fees under his lease agreement, which provided that the prevailing party in any action arising out of the "homeowner's tenancy" is entitled to attorney fees and costs. Because the term "homeowner's tenancy" was not defined in the lease agreement, the Court of Appeal interpreted the language most strongly against the Wright Family, which caused the uncertainty to exist, and held that Hemphill's tort claims arose from his tenancy, and supported a fee award.

Contractual Fee Provision – Ambiguous Fee Provision Allowed Recovery For Intertwined Contract And Tort Claims

Calvo Fisher & Jacob LLP v. Lujan (2015) 234 Cal.App.4th 608 **–** In *Calvo Fisher & Jacob LLP*, the attorney's fee provision in an engagement agreement stated that "In the unlikely event that we are required to institute legal proceedings to collect fees and costs, the prevailing party

would be entitled to a reasonable attorney's fee and other costs of collection." The trial court awarded all of the attorney's fees incurred in a collection action against the firm's client, including fees for defending against non-contractual cross-claims for fraud and negligence. The Court of Appeal affirmed, holding that, where a contractual fee provision does not provide for fees on non-contract claims or is ambiguous on that point, fees for defending against non-contract cross-claims may still be had where "a defense against the noncontractual claim is necessary to succeed on the contractual claim."

Enforcement Of Judgment – Attorney's Fees Incurred To Enforce An Anti-SLAPP Judgment Are Recoverable Under CCP § 685.040

York v. Strong (2015) 234 Cal.App.4th 1471 **[Rylaarsdam, Moore, Aronson]** – In *York*, the Court of Appeal held that attorney's fees incurred to enforce a judgment for attorney's fees granted following an anti-SLAPP motion are recoverable under Code of Civil Procedure § 685.040. The statutory language is somewhat confusing, because it first indicates that attorney's fees for enforcing a judgment are recoverable where "otherwise provided by law," but then indicates that such fees are recoverable where attorney's fees were awarded in the underlying judgment pursuant to a contractual attorney's fee provision. The trial court held that the more specific provision controlled, and that the attorney's fee provision in the anti-SLAPP statute did not provide a basis for a fee award under section 685.040. The Court of Appeal reversed, holding that the second provision was added in an amendment intended only to preserve the right to recover enforcement fees in cases where a contract (and thus the attorney's fee provision) was extinguished by the judgment. Therefore, that provision could not be read to limit the recoverability of fees in cases where fees were otherwise provided by law.

Mutuality of Remedy – Statutory Fee Provision For Prevailing Parties Calls For Mutual Remedy

Tract 19051 Homeowners Assn. v. Kemp (2015) 60 Cal.4th 1135 **–** Civil Code section 5975 (formerly section 1354) provides for attorney's fees for the prevailing party in an action to enforce the governing documents in a common interest development ("CID"). In *Tract 19051*, the Plaintiff HOA sued the Defendant homeowner, claiming that his construction of a home violated the covenants of a CID. The trial court found that the covenants at issue expired and no CID existed. The California Supreme Court held that the Defendant was entitled to attorney's fees under the Civil Code, reasoning that, by using the words "prevailing party," the Legislature evidenced an intent to establish a reciprocal remedy. The Court rejected the argument that an attorney fee award could only be proper if a CID existed, noting that, if that were the rule, the Plaintiff would have been entitled to fees in this case if they had prevailed, while the Defendant would not be. The Court held that, if the Legislature had intended to deny equal treatment to prevailing plaintiffs and prevailing defendants, such an intent would have been expressed in the Legislative history.

Out Of State Attorneys – Fees For Out Of State Work Performed By Attorneys Not Admitted *Pro Hac Vice* Are Not Compensable

Golba v. Dick's Sporting Goods, Inc. (2015) 238 Cal.App.4th 1251 [**Fybel, Ikola, Thompson**] – In *Golba*, Class Counsel consisted of Chicago attorney Joseph Siprut and his firm, along with a local law firm hired by Siprut to act as local counsel. Early in the action, an application to admit Siprut *pro hac vice* was rejected for non-compliance with formal requirements. The attorneys incorrectly assumed the motion had been granted. They learned of their mistake shortly before a hearing to confirm a class settlement, and filed a new application. That application was also denied due to Siprut's filing of 11 other *pro hac vice* applications within the prior year. After the class settlement was approved, another local attorney hired as an associate of Siprut's firm filed an unopposed motion for attorney's fees on behalf of the class. The trial court denied all attorney's fees for Siprut and his firm–which amounted to the vast majority of all of the fees for Class Counsel. The Court of Appeal affirmed, rejecting the notion that a non-California licensed attorney's work is compensable so long as it is "filtered through a licensed in-state attorney, who is admitted to the local court and subject to its discipline." Instead, the Court focused on Siprut's lead role in the case, and held that his work on the case created an ongoing legal representation, and thus constituted the unlicensed practice of law in California, even though he was not present in the state.

Prevailing Party – Offsetting Fee Awards To Both Sides

Sharif v. Mehusa, Inc. (2015) 241 Cal.App.4th 185 – In *Sharif*, the Plaintiff employee prevailed on her claim for violations of the Equal Pay Act, but the Defendant employer prevailed on her claims for unpaid wages and overtime. The trial court awarded each side attorney's fees for the claims on which they prevailed, pursuant to the relevant Labor Code provisions. The Plaintiff appealed, arguing that she was clearly the prevailing party, since she obtained monetary relief. The Court of Appeal noted that, in cases involving statutory fee award, the prevailing party determination is not controlled by CCP § 1032's definition of prevailing party. Instead, in the absence of specific statutory guidance, the trial court must evaluate whether a party prevailed on a "practical level." The Court of Appeal upheld the trial court's ruling that the Defendants prevailed on a practical level with regard to the unpaid wages and overtime claim, despite their loss on the Equal Pay Act claim.

Statutory Attorney's Fees – Prevailing Party Status – Trial Court Has Discretion To Determine That There Is No Prevailing Party

James L. Harris Painting & Decorating, Inc. v. West Bay Builders, Inc. (2015) 239 Cal.App.4th 1214 – In *West Bay*, the Plaintiff subcontractor sued the Defendant Contractor for breach of prompt payment statutes, and the Contractor filed cross-claims. A jury held that both parties failed to perform and refused to award damages to either side, and the trial court thereafter declined to award attorney's fees to either side pursuant to the prompt payment statutes. On appeal, the contractor claimed that the prompt payment statutes do not give the trial court discretion to deny attorney's fees when the plaintiff asserts a claim under these statutes. The Court of Appeal held that, despite the statutory language stating that the prevailing party

"shall" be entitled to attorney's fees, the trial court retains the discretion to find that there is no prevailing party where the defendant "cannot in any realistic sense be said to have been successful." The Court of Appeal concluded that the trial court did not abuse its discretion by holding: "The Jury denied all relief. Fairness dictates that each side should pay its own attorney's fees."

ATTORNEY PRACTICE

Attorney-Client Privilege – Communications In The Course Of A Joint Representation Are Not Privileged In Malpractice Lawsuit By One Client

Anten v. Superior Court (2015) 233 Cal.App.4th 1254 – Evidence Code § 958 provides that in a lawsuit between an attorney and a client, based on an alleged breach of a duty arising from the attorney-client relationship, communications between the attorney and the client are not privileged. Case law has also established that in a lawsuit between two joint clients, the communications between the clients and their joint representative are not privileged. The Court in *Anten* dealt with the intersection of these two rules, and held that where one of two or more joint clients sues an attorney for malpractice, the communications between the attorney and the other joint clients are not privileged. The Court reasoned that because both the Plaintiff and the non-suing clients were joint clients of the Defendant law firm, the non-suing clients' communications with the law firm were not confidential as to Plaintiff. In addition, considerations of fundamental fairness underlying Evidence Code § 958 as a whole weighed strongly in favor of applying the statute's exception to the attorney-client privilege in this context.

Attorney Misconduct – Reversal of Jury Verdict

Martinez v. Department of Transportation (2015) 238 Cal.App.4th 559 **[Bedsworth, Moore, Thompson]** – Attorney misconduct can lead to devastating consequences, even if it is tolerated in the trial court. In *Martinez* the Court of Appeal reversed a jury verdict in favor of the Defendant, Caltrans, due to egregious misconduct by Defendant's counsel. The opinion describes a typical scenario from trial wherein the Defendant's counsel would ask an improper question besmirching the Plaintiff, an objection to the question would be sustained, and the Defendant's counsel would then ask the question again–a scenario that would then be repeated many times. The misconduct of Defendant's counsel included: (1) improper allusions to Caltrans' financial condition, (2) 22 questions in violation of an order in limine regarding Plaintiff's absenteeism at work to create an impression that the Plaintiff is lazy and irresponsible, (3) an attempt to associate the Plaintiff with Nazis through the logo of the Plaintiff's motorcycle group, which depicts a skull wearing a World War II German style military helmet, again in violation of an order in limine, (4) references in closing argument to the Plaintiff's uninsured status, and (5) further statements in closing arguments linking Plaintiff to Nazis. After the initial Nazi references, the Plaintiff moved for a mistrial. The trial court denied the motion, and the jury entered a verdict in the Defendant's favor. The Court of Appeal held that the misconduct

was egregious, intentional, and unquestionably prejudicial, and thus required reversal of the jury's verdict.

Attorney Misconduct – Terminating Sanctions

Crawford v. JPMorgan Chase Bank, N.A. (2015) 242 Cal.App.4th 1265 – *Crawford* provides a valuable lesson in how counsel should *not* conduct themselves. Plaintiff Crawford was an attorney representing himself in an action against the bank that set up an annuity for his mother. When the bank attempted to depose Crawford's brother, Crawford started the deposition by pointing a pepper spray canister at opposing counsel, and threatening to spray it if counsel got "out of hand." He then brandished a stun gun, stating "If that doesn't quell you, this is a flashlight that turns into a stun gun," and then discharging the stun gun close to opposing counsel's face. Opposing counsel then terminated the deposition, and filed a motion requesting terminating sanctions. In his opposition, Crawford sarcastically referred to opposing counsel as "Heavenly Father" and "Our Heavenly Father's only begotten son," referred to the trial court as the opposing counsel's lapdog, and requested the trial court to "rubber stamp" an order sentencing him to death and awarding sanctions of at least $265 million dollars. The trial court granted terminating sanctions, and the Court of Appeal affirmed, stating that it would have been an abuse of discretion to deny terminating sanctions under these circumstances.

Business Dealings With Clients – Focus Of Fairness Analysis Is On Agreement As A Whole At The Time Of The Transaction

Ferguson v. Yaspan (2014) 233 Cal.App.4th 676 – Probate Code section 16004 creates a presumption that business transactions between an attorney and his clients are voidable as the result of undue influence. The presumption can be rebutted by a showing of compliance with the requirements in Rules of Professional Conduct, rule 3-300, that (a) the terms of the transaction are fair and are disclosed to the client in writing, (b) the client is advised and given the opportunity to consult independent counsel, and (c) the client thereafter agrees in writing. When undertaking the fairness analysis, the focus must be on the agreement as a whole, at the time of the transaction. In *Ferguson*, the attorney and his wife entered into an agreement concerning the joint ownership of property with his clients, whereby the last surviving couple would have a right to buy out the other couple's interest at a predetermined price before ownership transferred to any heirs. Viewing the transaction as a whole, the Court of Appeal affirmed the trial court's ruling that this was a fair transaction, because it allowed the clients to retain 50% ownership of the property, while recovering nearly their entire investment. In addition, focusing on the time of the transaction, the court held that the agreement was fair because it was uncertain at that time which couple would live longer, and whether the value of the property would exceed the option price by the time of death. The Court declined to assign probabilities to these variables as part of the fairness analysis, because this would conflict with the "black letter" requirement that fairness be evaluated at the time of the transaction. Because the attorney in *Ferguson* met the other requirements of Rule 3-300, the Court of Appeal affirmed the judgment upholding the transaction.

Conspiracy Claims Against Attorneys – Pleading Hurdle In Civil Code § 1714.10 Applies To Claim Arising From Conflict Of Interest

Klotz v. Milbank, Tweed, Hadley & McCloy (2015) 238 Cal.App.4th 1339 – Civil Code section 1714.10 requires a plaintiff to obtain leave of court before filing a claim against an attorney for a civil conspiracy with the attorney's client based on the attorney's representation. In *Klotz*, the Court of Appeal held that this statute applies to a conspiracy claim brought by Plaintiff–the Defendant attorney's former client–based on the Defendant's representation of another client adverse to the Plaintiff. The Court of Appeal noted two exceptions to section 1714.10: (1) where the attorney has an independent legal duty to the plaintiff, and (2) where the attorney's acts go beyond the professional duty to the client and involve a conspiracy in furtherance of the attorney's financial gain. The Court of Appeal held that the first exception was not met, because a conflict of interest is not a duty independent of the attorney client relationship, and the second exception was not met because the conflict did not go beyond the attorney's professional duty to the second client. Accordingly, the Plaintiff's conspiracy claim was dismissed, though the Court of Appeal allowed the Plaintiff's non-conspiracy claims to go forward based on the same underlying conflict of interest.

Disqualification – Attorney May Represent Corporation And Managing Shareholder In Involuntary Dissolution Action

Coldren v. Hart, King & Coldren, Inc. (2015) 239 Cal.App.4th 237 **[Ikola, Rylaarsdam, Thompson]** – In *Coldren*, the Plaintiff sought an involuntary dissolution of an incorporated law firm, in which he held a 50% interest. The Defendants, i.e. the firm and its managing shareholder, were both represented by the same attorney, who asserted cross-claims against the Plaintiff on the corporation's behalf. The trial court ruled that due to the Plaintiff's 50% ownership interest, the attorney owed duties to the corporation that conflicted with the interests of the managing shareholder in defeating the litigation, and disqualified the attorney from continuing to represent the corporation. The Court of Appeal reversed, holding that (a) because the Plaintiff was not asserting any derivative claim on behalf of the corporation, and did not have a personal attorney-client relationship with the attorney, he did not have standing to disqualify the corporation's attorney; and (b) there was no conflict of interest, because the attorney's duty was to the corporation, not the shareholders, and the corporation's interest, if any, was in continuing its own existence. In opposing dissolution, the managing shareholder's interest was aligned with the corporation. If the managing shareholder elected to purchase the Plaintiff's shares to avoid dissolution under Corporations Code § 2000, then the Plaintiff would have no further interest in the corporation, and his interest in dissolution would be irrelevant. On the other hand, if the managing shareholder was in favor of dissolution, the corporation's shareholders would be unanimous in favor of dissolution, and the corporation's interests would "fall by the wayside."

Disqualification – Attorneys That Represented Client's Former Firm In Fee Dispute Disqualified From Other Representations Adverse To Client

Acacia Patent Acquisition, LLC v. Superior Court (2015) 234 Cal.App.4th 1091 **[Ikola, Aronson, Thompson]** – In *Acacia Patent Acquisition*, the Defendants were being sued by the Plaintiff patent expert for consulting fees claimed to be due as a result of the settlement of a prior patent action. The attorneys for the Plaintiff had also represented the Defendants' former attorneys in an action to recover attorney's fees incurred in the same underlying patent action. The Defendants moved to disqualify the Plaintiff's attorneys, due to the confidential information they had obtained in the prior action for attorney's fees. The trial court denied the motion to disqualify, and the Court of Appeal reversed. The Court considered a number of out of state cases, particularly a Wisconsin case that held that attorneys who represent other attorneys can be bound by the attorney-client's duties to their own clients. Agreeing with the out of state cases, the Court held that an attorney who represents a non-client's former attorney may be disqualified from representing the non-client's future adversaries where: (1) the first representation resulted in a broad disclosure of the nonclient's privileged information, and (2) there is a substantial relationship between the two matters. Because those two factors were present in *Acacia Patent Acquisition*, the Court found that the Plaintiff's attorneys had to be disqualified.

Disqualification – Ethical Wall Insufficient Where Attorney Obtained Confidential Information As Settlement Officer

Castaneda v. Superior Court (2015) 237 Cal.App.4th 1434 – The Plaintiff challenged an order of the trial court denying its motion to disqualify a law firm that was retained to represent the Defendant approximately six months after one of the law firm's attorneys served as a settlement officer in the case. Applying the standard set in *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, the Court of Appeal held that if an attorney receives confidential information from one of the parties to the action, that attorney's law firm may not subsequently agree to represent an opposing party in the same action, regardless of the efficacy of the screening procedures established by the law firm. Such procedures would be insufficient to preserve public trust in the justice system under the circumstances. Applying Canon 6D(11) and (12) of the California Code of Judicial Ethics, the Court found that there is no line of demarcation to be drawn between judicial officers and attorneys who may assist them in settlement conferences. Vicarious disqualification is mandatory for an attorney acting in a quasi-judicial capacity when confidential information has been disclosed. The Court of Appeal remanded the action for the trial court to determine whether the attorney was privy to any confidential information.

Litigation Privilege – Attorney Receipt Of Allegedly Stolen Hard Drive Is Protected By Privilege

Finton Construction, Inc. v. Bidna & Keys, APLC (2015) 238 Cal.App.4th 200 **[Moore, Aronson, Thompson]** – In *Finton Construction*, the Plaintiff construction company had been sued by one of its founders in an underlying lawsuit. Before leaving the company, the founder copied files onto a hard drive allegedly purchased with a company credit card, and then turned

that hard drive over to its litigation counsel, the Defendant law firm. The Plaintiff sued the Defendant for refusing to return the hard drive without first copying its contents. The trial court granted an anti-SLAPP motion, and the Court of Appeal affirmed. The Court held that all of the Defendants' activities took place in connection with the underlying lawsuit, thus satisfying the first prong. Turning to the second prong, the Court of Appeal held that the litigation privilege barred the Plaintiff's claims for conversion and receipt of stolen property, because the privilege applies to all torts other than malicious prosecution, and the transmission of potential evidence from client to attorney "is a communicative act relating to the preparation of the case." The Court also found that even if the litigation privilege did not apply, the Plaintiff had failed to satisfy the second prong, because it did not present any evidence to dispute the founder's claim that he was not required to seek permission to copy the files and take the hard drive.

Malpractice – Malpractice Claim Based On Conduct In Mediation Fails For Lack Of Evidence Due To Mediation Confidentiality

Amis v. Greenberg Traurig LLP (2015) 235 Cal.App.4th 331 – The mediation confidentiality provisions in Evidence Code sections 1119, 1126, and 1128 preclude a legal malpractice Plaintiff from proving that a law firm's acts or omissions caused the plaintiff damages when those acts or omissions occurred during mediation. In *Amis*, Amis sued Greenberg Traurig for legal malpractice for allegedly causing him to execute a mediated settlement agreement without properly advising him. During his deposition, Amis agreed that all recommendations he received from Greenberg Traurig where made during the mediation. Greenberg Traurig moved for summary judgment, which the trial court granted, finding that Amis could not establish an essential element of his claims because any advice was protected by mediation confidentiality. The Court of Appeal also held that the trier of fact could not draw any inference that the advice given or not given during mediation caused Amis to execute the settlement agreement, because Greenberg Traurig would be precluded from explaining the context or content of the advice due to the mediation confidentiality statutes.

Relief from Default For Attorney Mistake – Reconsideration Of Motion For Relief Requires Compliance With CCP § 1008

Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC (2015) 61 Cal.4th 830 – In *Even Zohar*, the Plaintiff obtained a default judgment against the Defendant, and the Defendant's counsel filed a motion to be relieved from the judgment based upon his excusable neglect. The trial court denied the motion because the explanation of Defendant's counsel was vague and not credible. The Defendant's counsel then filed a renewed application, along with an entirely different explanation for the default. Despite the fact that the new explanation could have been given the first time, the trial court reluctantly granted the renewed application. It explained that under *Standard Microsystems Corp. v. Winbond Electronics Corp*. (2009) 179 Cal.App.4th 868, the mandatory relief provision in CCP § 473(b) took precedence over CCP § 1008's requirement that a renewed motion be based on new facts and law. The Court of Appeal reversed the trial court's ruling, and the Supreme Court affirmed, holding that section 1008 expressly applies to *all* renewed applications for orders that the trial court has previously refused.

The Supreme Court noted that section 473(b) stated that it required mandatory relief from default "notwithstanding the requirements of *this section*" – the statute could have instead stated "notwithstanding any other law" or "notwithstanding section 1008," but it did not. The Supreme Court concluded that its holding would not impair the policies behind section 473(b), because an attorney who fully and candidly acknowledges the errors that have led a client into default will rarely have new or different facts to add in a renewed motion.

Statute of Limitations – One Year Statute For Claims Against Attorney Does Not Apply Where Claim Does Not Depend On A Violation Of A Professional Obligation

Lee v. Hanley (2015) 61 Cal.4th 1225 – In *Lee*, the Plaintiff sued her former attorney for refusing to return unearned fees. The trial court granted a demurrer, holding that the action was barred by the one year statute of limitations for claims arising from an attorney's performance of professional services. The Fourth Appellate District, Division Three, reversed as to the Plaintiff's claim for conversion, and the Supreme Court affirmed the reversal, reasoning that it was possible to state a valid conversion claim without relying on any breach of an attorney's professional obligations. The Court analogized the conversion claim to a claim for sexual battery by an attorney, as sexual battery and conversion are barred both by universally applicable laws and the Rules of Professional Conduct. The Court then held that whether a claim is subject to the one year statute of limitations "necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." The Court noted that the conversion claim might still be barred if it ultimately hinged on proof that the fee agreement was unconscionable under Rule 4-200, or on some other violation of professional ethics, but that conclusion was not supported based solely on the allegations in the complaint.

CIVIL PROCEDURE

Electronic Service – Time Extension for Electronic Service Applies Both to Serving Party and Party Served

Kahn v. The Dewey Group (2015) 240 Cal.App.4th 227 – The two-day extension for electronic service under Code of Civil Procedure section 1010.6(a)(4) applies to both the party on whom notice of entry of judgment is served and the party which serves the notice. In *Kahn*, the Plaintiff filed a motion to strike or tax costs, and contended that the Defendant's memorandum of costs was not timely filed, because the two-day extension for electronic service does not extend the time to file the memorandum of costs for the party who served the notice. The Court of Appeal disagreed, and cautioned against grafting requirements into section 1010.6 which were not included in its text. The Court of Appeal declined to apply *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc*. (2000) 85 Cal.App.4th 1042, which held that the five-day extension for service by mail in Code of Civil Procedure section 1013 does *not* extend the trial court's time to grant a motion for a new trial, where notice of entry of judgment was served by mail. The Court of Appeal noted that even if – as *Westrec* concluded – the

legislature had intended to limit the application of section 1013 to the party being served, the legislative history on section 1010.6 is silent on this issue. However, the Court of Appeal's ruling does not extend the time to file a motion for new trial under section 659, a motion to set aside and vacate a judgment under 663a, or a notice of appeal under Rule of Court, Rule 8.104.

Five-Year Statute – Stipulation To Continue Trial Waives Five Year Statute Without Expressly Mentioning Statute

Munoz v. City of Tracy (2015) 238 Cal.App.4th 354 – The trial court in *Munoz* dismissed the Plaintiff's claims pursuant to CCP § 583.310, for failure to bring the action to trial within five years. The parties had entered into a written stipulation to extend the time for trial to a date certain beyond the five-year period, but did not mention an extension of the five-year statute, or a waiver of the defendant's right to dismiss under that statute. The trial court held that this failure was a problem, and dismissed the case. The Court of Appeals reversed, holding that under the California Supreme Court's interpretation of the prior five-year statute, the stipulation to a trial date beyond the five-year limit *necessarily* waives the right to dismiss for failure to bring the action to trial within five years. The Court of Appeals noted that the Supreme Court's approach under the prior statute was consistent with the policies underlying the current statute as well.

Forum Non Conveniens – Dismissal After Stay Pending Resolution Of Foreign Action

Investors Equity Life Holding Co. v. Schmidt (2015) 233 Cal.App.4th 1363 **[Rylaarsdam, O'Leary, Moore]** – The Defendants moved to dismiss the case for forum non conveniens. The trial court stayed the action pending resolution of the merits in a Hawaii court. In the first of two appeals, the Court of Appeal affirmed the stay, relying in large part on: (1) a stipulation by the Defendants that the statute of limitations would be tolled for the purposes of an action brought by the Plaintiff in Hawaii, and the Defendants would not challenge personal jurisdiction in Hawaii, and (2) the fact that the action was stayed, rather than dismissed, in order to allow the trial court to retain jurisdiction in the event the matter could not be resolved on the merits in Hawaii. On remand, the Defendants moved to dismiss, rather than stay, the case, and the trial court granted the dismissal. The Court of Appeal reversed, holding that a stay, rather than a dismissal, is appropriate where there are uncertainties over whether or not an alternative forum will be suitable to resolve the action. Here, because nothing had occurred to resolve the uncertainties since the stay was affirmed in the first appeal, the trial court erred by dismissing the action rather than continuing the stay. The Court further held that "the trial court's concern about 'holding the California docket open for years to come, only to merely review what the [p]arties are doing in another state' does not provide any independent justification for dismissal. That is simply the nature of a stay." *See also* Law Of The Case – Doctrine Does Not Apply To Factual Determinations at p. 23, above.

Forum Non Conveniens – Motion To Dismiss Cannot Be Defeated By Inclusion Of A Nominal Defendant Whose Liability Is "Peripheral"

David v. Medtronic, Inc. (2015) 237 Cal.App.4th 734 **–** In order to prevail on a motion to dismiss for forum non conveniens, the moving party must show that a suitable alternative forum exists. In *David*, a group of patients sued various out of state medical companies for injuries arising from a bone-stimulating protein and bone regrowth framework (or "cage"). The Plaintiffs also named a California doctor who participated in the invention of the cage. The trial court granted a motion to dismiss the entire action for forum non conveniens, holding that the Doctor was a nominal defendant, whose presence in the action did not render out of state forums unsuitable. The Court of Appeal agreed that the doctor's presence did not prevent granting the motion to dismiss as to the other Defendants, but held that the proper course was to sever the case against the doctor, and allow it to proceed in California, while the main action was dismissed to be tried in another forum. The Court of Appeal also held that whether the doctor was a "nominal defendant" was not at issue, as it was not disputed in the trial court. The Court of Appeal did not give a specific formulation as to what constitutes a "nominal defendant," but quoted federal court decisions that refer to a defendant "who was in some manner peripherally involved in the alleged wrongdoing."

Forum Selection Clause – Party Seeking To Enforce Clause Must Prove That Foreign Court Will Apply California Law Regarding Non-Waivable Statutory Rights

Verdugo v. Alliantgroup L.P. (2015) 237 Cal.App.4th 141 **[Aronson, O'Leary, Ikola**] – In *Verdugo*, the Plaintiff employee signed an employment agreement with a forum selection and choice-of-law clause designating Texas courts and Texas law. Plaintiff filed a class action to enforce unwaivable statutory provisions in the California Labor Code, and the Defendant employer moved to dismiss or stay the action due to the forum selection clause. The Court of Appeal held that the forum selection clause was unenforceable because California courts do not enforce forum selection clauses if doing so would substantially diminish the rights of California residents in a way that violates California's public policy. The Court of Appeal further held that the Defendant had the burden to prove that enforcement of the forum selection clause would not in any way diminish the employee's unwaivable statutory rights, by showing that a Texas court would apply California law despite the choice-of-law provision, and found that the Defendant had failed to meet this burden.

Intervention – Timeliness – Time To File Motion Runs From Time Intervenor Knows That Its Interests Are Not Adequately Represented

Ziani Homeowners Assn. v. Brookfield Ziani LLC (G050284) 243 Cal.App.4th 274 **[Thompson, O'Leary, Rylaarsdam]** – In *Ziani Homeowners Association*, the Plaintiff homeowner's association filed suit against a condo developer for plumbing defects in the common areas and individual units. Nearly two years into the lawsuit, the Plaintiff and Defendant agreed to a settlement that would only pay for repairs in plastic piping, rather that the

copper piping used in the original project, and would not fully compensate the Plaintiff or the individual homeowners for all necessary repairs. Some homeowners filed a motion to intervene, claiming that they had a property interest in the subject matter of the litigation, their interests were not adequately represented in light of the settlement, and the action could have an adverse effect on their interests. The trial court agreed on these points, but denied the motion to intervene, holding that the motion was not "timely" as required by CCP § 387, because the Intervenors knew of the action when it was filed two years earlier. The Court of Appeal reversed, holding that the starting point of the timeliness analysis is the date on which the Intervenors knew, or should have known, that their interests were not being adequately represented by the Defendant. The Court then remanded the matter for reconsideration of the timeliness question based on the correct starting point.

Joinder – Necessary Parties – Joint Tortfeasors Who Actively Participate In The Allegations Of The Compliant Are Necessary Parties

Dreamweaver Andalusians, LLC v. Prudential Ins. Co. of America (2015) 234 Cal.App.4th 1168 – A joint tortfeasor who is an "active participant" in allegations in the complaint which are critical to the disposition of the issues is a necessary party to the action. In *Dreamweaver*, Somis Pacific expanded its agricultural operations onto a hillside, and the hillside collapsed onto the Plaintiffs' property. The Plaintiffs sued a number of parties, including two individuals and one corporation involved in engineering the hillside slope. The Defendants moved to dismiss for failure to join the Natural Resources Conversation Service, who prepared the plans which allegedly caused the landslide. The trial court granted the dismissal and the Court of Appeal affirmed. The Court cited federal precedents finding that a joint tortfeasor is a necessary party when it is an "active participant" in the key allegations of the complaint. The Court noted that if Plaintiffs obtained a favorable judgment, the Defendants could seek indemnification in an action in federal court, resulting in an unnecessary second suit.

Motions For New Trial – Time To File Does Not Begin To Run When Moving Party Serves Notice Of Entry Of Judgment

Maroney v. Iacobsohn (2015) 237 Cal.App.4th 473 – Under CCP § 659, a party moving for a new trial must file the motion within the earlier of either: 180 days after the entry of judgment, 15 days after mailing by the clerk of a notice of entry of judgment, or 15 days after "service upon him or her by any party of written notice of entry of judgment." The Court of Appeal in *Maroney* held that where the moving party is the party who serves the notice of entry of judgment, the 15 day period does not apply. The Plaintiff in Maroney filed a motion to tax costs, to which she attached a file-stamped copy of the judgment entered in the case. More than 15 days later, the Plaintiff moved for a new trial. The trial court held that it lacked jurisdiction to grant the motion, but granted the motion "conditionally," in the event that its jurisdictional ruling was overturned on appeal. The Court of Appeal held that the 15 day time period was not triggered because: (a) under the express language of section 659, service by a party of a notice of entry of judgment could only commence the time for filing a motion for new trial if the moving party was served, and (b) the moving party did not, and could not, serve herself with a notice of

entry of judgment. Nevertheless, the Court of Appeal also held that the trial court's "conditional" denial was a nullity, and that the trial court effectively denied the motion for new trial by failing to rule on it–a decision that could not be reversed based on the record before the Court.

Motion To Vacate Judgment – Statutory Time Limit In CCP § 663a Is Jurisdictional

Garibotti v. Hinkle (G048680) 243 Cal.App.4th 470 **[Aronson, O'Leary, Ikola]** – It is already well established that the 60-day time period for ruling on a motion for new trial under CCP § 660 is jurisdictional, and that any order entered after that period is void. The Court in *Garibotti* held that the same rule applies to the time limit for ruling on a motion to set aside and vacate a judgment under CCP §§ 663 and 663a. If the trial court fails to rule on such a motion within the 60-day period, the motion is deemed to be denied, and the court has no further jurisdiction to grant the motion.

Personal Jurisdiction – Specific Jurisdiction – Substantial Nexus – Lawsuit Against Insurer Relating To Out Of State Losses

Greenwell v. Auto-Owners Ins. Co. (2015) 233 Cal.App.4th 783 – In *Greenwell*, the Plaintiff obtained insurance from Defendant, a Michigan insurance company, to cover both the Plaintiff's business in California, and a building owned by the Plaintiff in Arkansas. The Plaintiff sued the Defendant in California in a dispute relating to a fire that damaged the building in Arkansas. On the Defendant's motion, the trial court quashed the summons for lack of personal jurisdiction, and the Court of Appeal affirmed. The Court held that by issuing an umbrella liability policy to a California business, which covered losses that could occur in California, the Defendant satisfied the purposeful availment prong of the specific jurisdiction test. Nevertheless, the Court held that the action lacked the requisite substantial nexus with the Defendant's contacts with California, because it concerned losses that occurred outside California.

Personal Jurisdiction – Unless Statement Is Targeted Toward California, Internet Defamation Of California Resident Is Insufficient To Support Personal Jurisdiction

Burdick v. Superior Court (2015) 233 Cal.App.4th 8 **[Fybel, Rylaarsdam, Ikola]** – The posting of defamatory statements about a person on a Facebook page, while knowing that person resides in the forum state, is insufficient in itself to create the minimum contacts necessary to support specific personal jurisdiction in a lawsuit arising out of that posting. In *Burdick*, the Plaintiffs filed an action against Douglas Burdick, an Illinois resident, arising from an allegedly defamatory posting made by Burdick on his personal Facebook page while in Illinois. Although the trial court denied Burdick's motion to quash for lack of personal jurisdiction, the Court of Appeal vacated the trial court's order. The Court of Appeal explained that for a nonresident defendant to be subject to personal jurisdiction, the nonresident defendant must (1) intentionally post the allegedly defamatory statement on the Facebook page while knowing that the plaintiffs are in the forum state; and (2) expressly aim or intentionally target his or her conduct at the

forum state, rather than merely at the plaintiff who resides in the forum state. Otherwise, every person placing information on the Internet may be subject to personal jurisdiction in every state. The Court of Appeal distinguished the U.S. Supreme Court's opinion in *Calder v. Jones* (1984) 465 U.S. 783, which held that a reporter based in Florida was subject to personal jurisdiction in California for publishing an allegedly defamatory article regarding a California-based actress in the *National Enquirer*. In *Calder*, the reporter's conduct was expressly aimed at California because the *National Enquirer* enjoyed its largest circulation in California. In contrast, in *Burdick*, the Defendant had not taken any steps to aim or intentionally target his conduct at California.

Pleading – Judicial Admissions – Allegations In Unverified Complaint May Be Binding Judicial Admissions

Womack v. Lovell (2015) 237 Cal.App.4th 772 **[Bedsworth, Aronson, and Fybel]** – In *Womack*, the Plaintiff-homeowner sued a contractor for defective construction work. The complaint alleged that the contractor was licensed, and sought recovery against the contractor's license bond. Late in the trial, the Plaintiff asserted that the issue of licensure had been controverted by the denial in the answer to the contractor's cross-complaint. The trial court reluctantly granted a motion for nonsuit on the cross-complaint, because the contractor was unable to quickly obtain a licensure certificate from the state licensing board. The Court of Appeal reversed, holding that the allegations in the Plaintiff's complaint constituted a judicial admission that the contractor was licensed, such that the issue was removed from the set of controverted issues. The general denial of the contractor's licensure set forth in the Plaintiff's answer to the contractor's cross-complaint was insufficient to create a genuine controversy, because the sham pleading doctrine prevented the Plaintiff from circumventing prior admissions without explanation. *See also Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.* (2015) 240 Cal.App.4th 763 for a similar holding, as well as a discussion of the invalidity of contractual choice of law provisions in contracts between California sub-contractors and out of state contractors.

Proof Of Service – Where Postmark Does Not Match Proof Of Service, The Presumption Of Invalidity Must Be Specifically Invoked By Motion

Simplon Ballpark, LLC v. Scull (2015) 235 Cal.App.4th 660 – Code of Civil Procedure section 1013a(3) allows a proof of service to state that a document was placed for collection and mailing on the day of service in the ordinary course of business. That section also provides that such service will be presumed invalid if the item is post-marked more than one day after the date of the proof of service. In *Simplon Ballpark*, the Defendant filed a motion for judgment notwithstanding the verdict, which was post-marked three days after the date on the proof of service. The Plaintiff objected and moved to strike the motion as untimely served but failed to specifically invoke the presumption in section 1013a(3). The trial court granted the motion for JNOV, without ruling on the objection or motion to strike. The Court of Appeal affirmed, holding that the presumption of invalidity in section 1013a(3) is rebuttable, and thus must be specifically invoked in a motion in order to provide the opposing party with an opportunity to

present evidence sufficient to show the validity of service. The Court of Appeal held that by failing to specifically invoke section 1013a(3)'s presumption in the trial court, the Plaintiff forfeited any right to rely on that presumption.

Reconsideration – Expert Opinion Based On Evidence Obtained Shortly Before Briefing On Underlying Motion Is Not New

Shiffer v. CBS Corp. (2015) 240 Cal.App.4th 246 – The Plaintiff in *Shiffer* received two documents on February 28, 2013. Two weeks later, on March 14, 2013, he filed an expert declaration in opposition to a motion for summary judgment, which did not mention the two documents. One week later, on March 22, 2013, a defense expert testified in a deposition regarding the two documents. The summary judgment motion was heard four days later, and granted on March 28, 2013. On April 5, 2013, the Plaintiff submitted a new expert declaration based on evidence in the two documents, in support of a motion for reconsideration of the order granting summary judgment. The trial court denied the motion for reconsideration, and the Court of Appeal affirmed, holding that the Plaintiff had the underlying evidence before the hearing on the motion for summary judgment, and should have timely presented the expert's opinion based on that evidence.

Reconsideration – Judge May Not Reconsider Order Made By Prior Judge Based On Mere Disagreement

In re Marriage of Oliverez (2015) 238 Cal.App.4th 1242 – The parties in *Oliverez* signed a settlement agreement, and the husband then moved for entry of a judgment based on the agreement. The wife opposed the motion, and the trial judge denied the motion, finding the agreement unenforceable. At some point, the case was transferred to another judge, and a bench trial was held about three years after the ruling on the settlement agreement. Following the trial, the new judge announced that he would reconsider the enforceability of the settlement agreement, allowed further briefing, and ruled that the denial of the husband's motion was erroneous, and not based on any evidence. The Court of Appeal reversed, citing the general rule that one trial judge may not reconsider the ruling of another trial judge. The Court noted that none of the exceptions to that rule applied where the original trial judge was still listed as an active judge in the superior court, and the ruling was not based on any new evidence or law. Interestingly, the Court of Appeal did not consider whether the original denial of the motion to enforce the settlement agreement was erroneous, but simply reversed the judgment based on the settlement agreement and remanded the matter to the trial court.

Relief From Default – Mandatory Relief – Finding Required To Deny Relief

Rodriguez v. Brill (2015) 234 Cal.App.4th 715 **–** In *Rodriguez*, the Plaintiff's attorney failed to timely respond to discovery responses, and then failed to respond to the trial court's order compelling discovery responses. The trial court dismissed the action as a discovery sanction. The court denied a motion for relief from default, but did not make an express finding that the dismissal was not due to the attorney's mistake or negligence. The Court of Appeal reversed, holding that where a motion for mandatory relief under Code of Civil Procedure section 473(b)

is based on an attorney's declaration of fault, the trial court may not deny relief without making an express finding that a default or dismissal was not caused by the attorney's mistake or neglect. The Court of Appeal made a number of additional useful holdings, including: (a) that a dismissal entered as a discovery sanction is eligible for relief under section 473(b), and (b) that a party seeking relief from such a sanction substantially complies with section 473(b)'s requirements by serving the discovery responses necessary to cure the default at or before the hearing on the motion.

Res Judicata/Claim Preclusion – Joint And Several Liability Under A Contract Does Not Establish Privity

DKN Holdings LLC v. Faerber (2015) 61 Cal.4th 813 – Claim preclusion does not bar separate lawsuits brought against parties who are jointly and severally liable under a contract. In *DKN*, a lessor sued one of three jointly and severally liable lessees for breach of contract and other claims. The lessor prevailed after a bench trial, but the lessor was unable to satisfy the judgment. Accordingly, the lessor commenced a second action against the other two lessees. The trial court and Court of Appeal dismissed the second action on demurrer, holding that the breach of contract claim invades a single primary right, such that the Plaintiff could not split the action into multiple claims. The Supreme Court disagreed. The Supreme Court explained a judgment in the first action will not bar a second action, even if it is on the same claim, unless the claim is against the same defendant, or a party in privity with the defendant. The mere fact that parties are jointly and severally liable for the same obligation is not sufficient to establish privity. However, because issue preclusion may be invoked by one who was not a party to the first action, issue preclusion may still bind a plaintiff to the resolution of issues (such as the amount of the rent due) that were actually decided in the proceeding action.

Sealed Records – Confidentiality Of Witnesses In NCAA Investigation Does Not Warrant Sealing Of Court Records

McNair v. National Collegiate Athletic Assn. (2015) 234 Cal.App.4th 25 – In *McNair*, former USC assistant football coach Todd McNair sued the NCAA for breach of contract and other claims arising from the investigation of improper player benefits at USC. The NCAA countered with an anti-SLAPP motion, and then moved to seal a broad swath of material submitted in McNair's opposition, including the investigation report, the NCAA's case summary, excerpts from witness testimony in the NCAA investigation, a notice of allegations, and McNair's response and appeal in the investigation. The trial court denied the motion to seal, and the Court of Appeal affirmed, holding that the NCAA could not establish the requisite overriding interest in sealing the records or substantial likelihood of prejudice if the records are not sealed. The Court specifically rejected the NCAA's claim that the confidentiality promised to witnesses in the investigation warranted an order sealing the records because: (1) witness confidentiality could not justify the "one-size-fits-all cloak of confidentiality" sought by the NCAA over documents going far beyond confidential witness statements, and (2) while public disclosure may discourage voluntary testimony by some in future NCAA investigations, it is just as likely to encourage truthful testimony grounded in specific examples, rather than gossip. The Court of

Appeal did recognize the need to seal records based on more traditional justifications, such as protection of trade secrets, protection of information within the attorney-client privilege, and enforcement of binding contractual obligations not to disclose.

Statute Of Limitations – Delayed Discovery Does Not Apply After Plaintiffs Are Put On Inquiry Notice

WA Southwest 2, LLC v. First American Title Ins. Co. (2015) 240 Cal.App.4th 148 **[Ikola, Rylaarsdam, Aronson]** – After the trial court sustained demurrers and entered judgments dismissing real estate investors' claims for breach of fiduciary duty, fraud, legal malpractice, and conversion arising from alleged misrepresentations, the investors appealed. The Court of Appeal affirmed the trial court's dismissal and found that the investors' claims were time-barred under Code of Civil Procedure sections 338(c), (d), 340.6, and 343. The Appellate Court explained that the investors were on inquiry notice of the falsity of any misleading communications because they received a private placement memorandum prior to making any investments that clearly disclosed the fees and expenses, as well as the risky nature of the investments. Thus, the investors could not rely on the delayed discovery rule. Moreover, since the memorandum disclosed the existence of a disputed fee, the investors' argument that they did not understand the nature of the fee until they consulted with tax and accounting experts after making the investments was meritless.

Temporary Judge – Constructive Consent To Temporary Judge Must Be Apparent On The Record

Michaels v. Turk (2015) 239 Cal.App.4th 1411– A Commissioner acting as a temporary judge entered a restraining order against the Defendant. The Defendant appealed, claiming that the order was void because she did not consent to the matter being heard by a commissioner. The Court of Appeal agreed and reversed. The Plaintiff argued on appeal that common practice is to post notice that a temporary judge was presiding over hearings on a particular day, and that appearing without objection constitutes constructive consent. Because the Defendant presented no evidence that such a constructive consent did not occur, the Plaintiff reasoned that the judgment should be upheld. The Court of Appeal rejected that argument, holding that where consent is to be implied based on the actions of counsel or a party, those actions must be apparent on the face of the record. Because the record contained no indication that the Defendant saw a sign regarding the hearing by a commissioner, there was no implied consent.

CONTRACTS

Electronic Signature – Printed Name At The Bottom Of An E-mail Is Not Necessarily An Electronic Signature

J.B.B. Investment Partners, Ltd. v. Fair (2014) 232 Cal.App.4th 974 – To be enforceable under the summary provisions of Code of Civil Procedure section 664.6, a settlement agreement must be signed by the parties to a lawsuit. In *J.B.B. Investment Partners,* the Court of Appeal held that this requirement was not satisfied by a party's printed name appearing at the bottom of his e-

mail. California's Uniform Electronic Transactions Act requires that an electronic mark be made with the intent to sign the document. (Civil Code section 1633.2(h).) The Court of Appeal noted that no evidence supported the conclusion that the party had intended to sign the e-mail when he printed his name at the bottom, and there was evidence to the contrary, as the parties expressly contemplated the preparation of a more formal agreement.

Indemnity – Contractual Indemnity Clause May Be Interpreted To Encompass First Party Claims

Hot Rods, LLC v. Northrop Grumman Systems Corp. (2015) 242 Cal.App.4th 1166 **[Moore, O'Leary, Fybel]** – In *Hot Rods*, the Defendant seller agreed to indemnify the Plaintiff purchaser for "damages, costs, losses" in addition to any "claims, demands, penalties, fees, fines, [and] liability." The Court of Appeal held that while "indemnity" usually covers only claims by a third party against the indemnitee, that rule does not apply where a contract uses the term to include direct liability as well. The Court then reasoned that the words "damages, costs, and losses" would be superfluous of "claims, demands, penalties, fees, and fines" if the indemnity was construed to relate solely to third party claims. *See also* Parole Evidence, below.

Parole Evidence – Contractual Provision Absolutely Barring Parole Evidence Is Enforceable

Hot Rods, LLC v. Northrop Grumman Systems Corp. (2015) 242 Cal.App.4th 1166 **[Moore, O'Leary, Fybel]** – The contract at issue in *Hot Rods* contained a standard integration clause, followed by a statement that: "The Parties further intend that this Agreement constitutes the complete and exclusive statement of its terms and that no extrinsic evidence whatsoever may be introduced in any judicial proceedings involving this Agreement." Both sides in the negotiation of the contract were represented by counsel, and the contract stated that it was entered into under "the normal and reasonable expectations of a sophisticated Seller and Buyer." Under these circumstances, the Court of Appeal held that it was error to admit any extrinsic evidence even to support a meaning that did not contradict the language of the agreement. As such, the Court of Appeal refused to consider any of the extrinsic evidence admitted below, and interpreted the contract based solely on the contractual language. *See also* Indemnity, above.

Rescission – Prejudice To Defendants Is Not Proper Grounds To Deny Rescission

Wong v. Stoler (2015) 237 Cal.App.4th 1375 – The trial court denied rescission and granted alternative relief to the buyers under Civil Code sections 1688, 1689(b)(1), 1691, and 1692 after finding that sellers of real property made misrepresentations with reckless disregard. The Court of Appeal reversed and remanded, holding that the buyers were entitled to unilateral rescission because negligent misrepresentation is a species of actual fraud and a form of deceit, and sufficient to satisfy the substantive requirements of Civil Code section 1692. The trial court erred in declining to effectuate rescission based in part on the prejudice to the sellers, which was an improper consideration, and in part on the complications of unwinding the transaction, which, while not easy, did not present insurmountable obstacles.

CONSTITUTIONAL LAW

Federal Preemption – Presumption Against Preemption Allows Private Action For False Labelling Of Organic Foods

Quesada v. Herb Thyme Farms, Inc. (2015) 62 Cal.4th 298 – The Plaintiff in *Quesada* sued an herb growing operation under the unfair competition and false advertising laws for including conventionally grown herbs in packages labelled as organic. The Court of Appeal held that the claims were preempted by the federal Organic Foods Act. The Supreme Court reversed, holding that there is a presumption against federal preemption of state law. The Court examined the federal Organic Foods Act, and found that it only expressly preempted state law in the area of defining what is organic and certifying organic products and producers. Nothing in the Act, however, expressly preempted state remedies for falsely claiming that a product is organic. While the act provided certain remedies for violation of federal standards, the act did not indicate that the remedies were intended to be exclusive. Nor were the Act's provisions likely to be hindered by private lawsuits. To the contrary, the Court found that private lawsuits for intentionally mislabeling products as organic would promote the purpose of the Act. Viewed through the lens of the presumption against preemption, the Plaintiff's claims were permissible.

Trial By Jury – Factual Issue Specifically Reserved For Jury May Not Be Decided By Court Based On Findings Made In Bench Trial

Darbun Enterprises, Inc. v. San Fernando Community Hospital (2015) 239 Cal.App.4th 399 – *Darbun Enterprises* involved an equitable claim for specific performance, and a legal claim for breach of contract. The trial court first conducted a bench trial to determine whether specific performance was available, and stated that it was reserving the issues of breach and contract damages for the jury. The trial court entered a nonsuit against the Plaintiff on specific performance, and the jury then found in favor of the Plaintiff and awarded damages for breach of contract. The trial court granted a motion for JNOV, on the grounds that its holdings in connection with specific performance (i.e. that there was no breach and that the contract was unenforceable) left nothing for the jury to determine. The Court of Appeal reversed, explaining that the trial court's assurances that the issue of breach would be decided by the jury deprived the Plaintiff of the opportunity to dismiss its equitable claim in order to protect its right to a jury trial on its breach of contract claim, thereby prejudicing the Plaintiff. In addition, the Court of Appeal held that a finding of unenforceability for the purposes of specific performance did not mean that the contract was necessarily unenforceable for a breach of contract claim, as specific performance requires a higher level of specificity.

DISCOVERY

Privilege Log – Boilerplate Objections And A Deficient Privilege Log Do Not Waive Privilege

Catalina Island Yacht Club v. Superior Court (2015) 242 Cal.App.4th 1116 **[Aronson, Bedsworth, Thompson]**– In *Catalina Island Yacht Club*, the Defendant Yacht Club responded to a set of document demands with boilerplate objections based on the attorney-client and attorney work product privileges. Beginning months later, the Defendant provided a series of privilege logs that did not contain even a minimal statement regarding the content of the allegedly privileged documents. The initial log contained 17 documents, which was eventually increased to 167 documents. The Plaintiff filed a motion to compel, arguing that: (1) the Defendants had waived the privilege by failing to provide a privilege log that allowed an evaluation of the claim of privilege, and (2) the documents should be ordered to be produced because the Defendants failed to present sufficient evidence to establish that the documents were privileged. The trial court agreed with the second argument, and ordered the documents to be produced. The Court of Appeal granted a writ of mandate reversing the trial court, holding that the order to produce the documents amounted to a forced waiver of the attorney-client privilege that was beyond the trial court's power to compel. The Court held that even a boilerplate objection was sufficient to preserve the privilege, and that instead of ordering the documents to be produced, the trial court only had the power to order: (a) the preparation of a more detailed privilege log sufficient to evaluate the claim of privilege, and (b) monetary sanctions. Once a sufficiently detailed privilege log was produced, the trial court must then evaluate the claim of privilege, and may only order the production of documents found not to be privileged. If, after the trial court's order, the Defendants still failed to produce a privilege log with sufficient detail to evaluate the claim of privilege, the trial court could consider issue, evidence, or terminating sanctions, but it still could not order the production of the assertedly privileged documents.

Punitive Damages – Discovery Of Financial Information

I-CA Enterprises, Inc. v. Palram Americas, Inc. (2015) 235 Cal.App.4th 257 **–** In *I-CA Enterprises*, the trial court entered non-suit on the Plaintiff's claim for punitive damages after refusing to compel production of the Defendant's financial information. The Court of Appeal affirmed on three grounds: (1) the Defendant was an out-of-state corporation, and under Code of Civil Procedure section 1989, the trial court lacked jurisdiction to compel an out of state witness to produce documents, (2) by "broadly requesting all balance statements, profit and loss statements, financial documents, and the like," the Plaintiff failed to propound requests with the requisite particularity, and (3) the Plaintiff failed to file a pretrial motion to seek discovery of financial information, and the trial court properly exercised its discretion to determine that the Plaintiff's discovery requests on the eve of the punitive damage phase came too late. *See also* Torts – Joint And Several Liability – Defendants Cannot Be Held Jointly And Severally Liable For Interference With Each Other's Contracts at p. 57, below.

Requests For Admission – Cost Of Proof

Grace v. Mansourian (2015) 240 Cal.App.4th 523 **[Thompson, Aronson, Ikola]** – The Plaintiff in *Grace* sued the Defendant after a car accident in which the Defendant allegedly ran a red light. The Defendant told an investigator that he believed the light was yellow when he entered the intersection, and he thought he could make it through the light. An eyewitness told the investigator that she saw the Defendant run the red light. The Plaintiff served requests for admission that the Defendant ran a red light and was negligent. The Defendant denied the RFAs, and the Plaintiff prevailed at trial. The trial court denied the Plaintiff's request for costs of proof based on the Defendant's refusal to admit the RFAs, and the Court of Appeal reversed. The Court explained that a party who fails to admit an RFA is liable for costs of proof where the subject of the admission is proven at trial, unless the party had a reasonable basis for believing that he would prevail on that issue at trial. The Court then held that in light of the eyewitness testimony and other evidence that the Defendant ran the red light, the Defendant's mere perception that he entered the light on a yellow was not a substantial basis for believing that he would actually prevail on that issue–no matter how firmly held that perception was. The question was not whether or not the Defendant reasonably believed that he ran the red light, it was whether or not he reasonably believed that he could prevail at trial on that issue.

Terminating Sanctions – Statement Of Damages Required Prior To Time To Oppose Motion For Sanctions

Behm v. Clear View Technologies (2015) 241 Cal.App.4th 1 – An investor made claims against a company for alleged false representations of officers and directors that induced her to invest in the company. The investor obtained terminating sanctions against the company after the company failed to produce discovery and to comply with court orders, and a default was entered against the company. The company then moved to vacate the default and default judgment. The Court of Appeal affirmed the trial court's holding that vacated the default. The Appellate Court found that due process requires a plaintiff moving for terminating sanctions and seeking punitive damages to serve a statement of the amount of damages pursuant to Code of Civil Procedure section 425.115(f). The statement must be served a reasonable time before the sanctions are awarded, so that defendant has fair notice of the full amount of damages sought by the time he or she needs to respond and oppose the motion. Here, since the statement of damages was served after the hearing on the order terminating sanctions, the company was not provided with sufficient notice, so the trial court did not err when it vacated the default judgment.

EMPLOYMENT, LABOR, AND DISCRIMINATION

Costs – Prevailing Defendant In A FEHA Action Only Recovers Costs If Action Was Objectively Groundless

Williams v. Chino Valley Independent Fire Dist. (2015) 61 Cal.4th 97 – Code of Civil Procedure section 1032 guarantees that the prevailing party in litigation shall recover its costs "except as otherwise expressly provided by statute." In *Williams*, the California Supreme Court held that Government Code section 12695(b) is an express exception to 1032. That section

provides that in an action under the Fair Employment and Housing Act, "the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs." The Court further held that the intent of this section, similar to the intent of federal civil rights legislation, is to make it easier for plaintiffs of limited means to bring meritorious actions. Accordingly, the discretion granted to the trial court must ordinarily be exercised to: (a) grant attorney's fees and costs to a prevailing plaintiff unless the circumstances of the case would render such an award unjust, and (b) deny attorney's fees and costs to a prevailing defendant, unless there is a showing that the plaintiff's claim was objectively without foundation or that the plaintiff continued to litigate after it became so.

EVIDENCE

Denials Of Requests For Admission Are Ordinarily Not Admissible At Trial

Gonsalves v. Li (2015) 232 Cal.App.4th 1406 – The Plaintiff, a salesperson for a BMW dealership, sued the Defendant for injuries caused when the Defendant crashed a BMW during a test drive. In response to a set of requests for admission, the Defendant responded that he lacked sufficient information and knowledge to admit or deny several RFAs relating to whether or not he was driving too fast, and similar topics. At trial, Plaintiff's counsel questioned Defendant about these responses over the Defendant's objections, arguing that the failure to admit the RFAs constituted evidence that the Defendant failed to take responsibility for his actions. The jury found in favor of the Plaintiff. The Court of Appeal held that the RFA responses were inadmissible, in light of California's statutory scheme that: (a) expressly allows for the use of *any* deposition or interrogatory responses at trial, but (b) only provides that *admissions* in response to RFAs are binding at trial, thereby implying that *denials* are not ordinarily admissible. The Court of Appeal also emphasized the unfair nature of the attorney's line of questioning regarding the RFAs in this particular case, as they essentially required the Defendant to opine on the spot, and without the benefit of advice from counsel, why he was unable to admit or deny the RFAs. Accordingly, the Court of Appeal held that the trial court's allowance of this line of questioning was unfair and prejudicial, and reversed the judgment in the Plaintiff's favor

Settlement Agreement – Co-Defendant's Settlement Agreement That Requires Co-Defendant To Participate In Trial Is Admissible To Show Bias And Prevent Collusion

Diamond v. Reshko (2015) 239 Cal.App.4th 828 – In *Diamond*, a taxicab and another automobile collided, causing serious injuries to the Plaintiff passenger. The passenger sued both the taxi cab company and the other automobile driver, and settled with the taxi cab company prior to trial. The settlement included a provision requiring the taxi cab company to appear and participate in the jury trial. The trial court excluded evidence of the settlement agreement at trial, and the Defendant driver appealed, arguing that the settlement agreement was admissible at trial to show bias or prejudice arising from the fact that the Plaintiff and the taxi cab company were now allied against the automobile driver. On appeal, the Court of Appeal agreed, and held that the trial court's decision to exclude the settlement agreement was an abuse of discretion. The

Court of Appeal explained that without evidence of the settlement agreement, the jury was prevented from assessing the credibility of witnesses, and evaluating the tactical motivations regarding presentations and arguments of the Plaintiffs and the taxi cab company.

Witnesses – Exclusion Of Witness Not Disclosed In Discovery Is An Abuse Of Discretion In Absence Of Violation Of Court Order Or Willful Omission

Mitchell v. Superior Court (2015) 243 Cal.App.4th 269 – In *Mitchell*, the Plaintiff auto accident victim identified only her passenger in response to Form Interrogatory 12.1, which requests the identity of any witnesses to the "INCIDENT." She later identified three additional witnesses to testify at trial regarding the physical limitations she suffered as a result of the accident. The trial court excluded these witnesses because they were not identified in response to the interrogatory, and the Court of Appeal granted a writ of mandate reversing the trial court. First, the Court of Appeal held that Form Interrogatory 12.1 should be read narrowly to only request witnesses to the actual accident, not witnesses to the subsequent impact of any injuries. Next, the Court of Appeal held that even if Form Interrogatory 12.1 could be read to apply to the Plaintiff's witnesses, it was an abuse of discretion to exclude those witnesses based on the interrogatory response where there was no evidence that the omission of the witnesses was willful or was in violation of a court order compelling discovery.

INSURANCE

Assignment – Clause Prohibiting Assignment Of Liability Insurance Claim Is Void If The Assignment Takes Place After The Occurrence Giving Rise To Liability

Fluor Corp. v. Superior Court (2015) 61 Cal.4th 1175 – In 2000, Fluor Corp., known as Fluor-2, received an assignment of all of the primary assets and liabilities of the original Fluor Corp., Fluor-1, in a corporate reorganization known as a reverse spin-off. This included significant liability for asbestos exposure, with approximately 2,500 asbestos cases currently pending against Fluor-2 and its related entities. Until 2009, Fluor-1's insurer, Hartford, provided defense and indemnity to Fluor-2 for asbestos claims triggered by occurrences within the term of Fluor-1's now expired policies. Then, in 2009, Hartford filed a cross-complaint against Fluor alleging that the assignment in the reverse spin-off violated the terms of Fluor-1's policies, which required Hartford's consent to any assignment. Under extremely similar circumstances, the Supreme Court had upheld such a consent requirement in *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934. This time, however, Fluor-2 cited Insurance Code section 520, a statute dating as far back as 1872, which was not pointed out in *Henkel*. Based on that statute, the Supreme Court overruled *Henkel*, and held that a provision prohibiting assignment of a third-party liability insurance claim is invalid if the assignment takes place after the event giving rise to the third party's claim. The Court rejected arguments by Hartford that section 520 should only be construed to apply to first party insurance policies, or to the assignment of claims already reduced to a money judgment or approved settlement. *See also* Appellate Law &

Procedure – Stare Decisis – Prior Decision May Be Overturned Where Opinion Overlooks An Existing Statute at p. 26, above.

Cumis Counsel Fees – Insurance Company May Seek Reimbursement Of Unreasonable Fees Directly From Cumis Counsel

Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C. (2015) 61 Cal.4th 988 – In *Hartford Casualty Ins. Co.*, the trial court ordered an insurance company to provide its insured with independent Cumis counsel in an underlying action, but provided that the insurer could later challenge and recover payments for "unreasonable and unnecessary" charges by counsel. After the underlying action was resolved, the insurer filed a cross-complaint in the coverage action seeking reimbursement for unreasonable fees directly from the Cumis counsel. The trial court granted a demurrer, and the Court of Appeal affirmed, based on arguments that (a) a malpractice action cannot be assigned, and (b) an insurer has no right to control the strategy or fee arrangement of independent Cumis counsel. The Supreme Court reversed, holding that by billing the insured for unreasonable fees, the law firm unfairly enriched itself at the insurer's defense, and owed an obligation to reimburse the insurer. The Court rejected the notion that a right to reimbursement would interfere with the independence of Cumis counsel, reasoning that attorney's fees are subject to third party scrutiny in a variety of other circumstances, such as cases involving fee-shifting statutes, or class action settlements. However, the Court limited its decision to the unique facts of the case, where there was a final order that allowed the insurer to recover unreasonable payments from someone. The Court explicitly declined to determine whether an insurer who wrongfully denied a defense could recover unreasonable fees at all in the absence of such an order.

JUDGMENTS

Motion To Set Aside Judgment – Default Judgment Is Void, Not Voidable, Where Complaint Does Not State The Amount Of Damages

Dhawan v. Biring (2015) 241 Cal.App.4th 963 – In *Dhawan*, the Plaintiff filed a complaint that did not specify the amount of damages, but served a statement of damages prior to obtaining a default judgment. Approximately seven years later, the Defendant filed a motion to set aside the default judgment, arguing that it was void under Code of Civil Procedure section 580 because the damages exceeded the amount demanded in the complaint. The trial court and Court of Appeal agreed with the Defendant. The Court of Appeal noted that a default judgment in excess of the trial court's jurisdiction is void, not voidable, if it exceeds the relief sought in the complaint. Such a void judgment could be set aside at any time, and the time to challenge it was not limited by the six month time period in Code of Civil Procedure section 473. Moreover, a default judgment cannot meet the requirements of section 580 where the plaintiff serves a statement of damages in lieu of an amended complaint, if the claims do not involve personal injury or wrongful death, and the judgment is not for punitive damages.

Satisfaction Of Judgment – Acceptance Of Cashier's Check Terminates Jurisdiction Over Post-Judgment Fee Motion

Gray 1 CPB v. SCC Acquisitions (2015) 233 Cal.App.4th 882 **[Moore, Rylaarsdam, Bedsworth]** – In *Gray 1 CPB*, Justice Moore posed the question of whether a bird in the hand is worth two in the bush. She was describing the dilemma of the judgment creditor being presented with a $13 million cashier's check that would fully satisfy an outstanding judgment, after accumulating an additional $3 million in attorney's fees in attempting to enforce the judgment. Under Code of Civil Procedure section 685.080, a motion to recover those fees must be filed *before* the judgment is paid. The Plaintiff in *Gray 1 CPB* chose the proverbial bird in the hand, and accepted the cashier's check, but did not deposit the check until after its attorneys had filed a motion for post-judgment fees. The trial court and Court of Appeal held that merely holding the check was not enough to preserve the right to file the fee motion. To do that, the Plaintiff would have had to actually reject the cashier's check, and file the motion before the Defendant could pay in cash. The Court was not moved by the sympathetic appeal of the Plaintiff's position, because (1) if the judgment amount was tendered in cash, the Plaintiff would not even have had the option of refusing the tender, and (2) the result was mandated by the plain language of the statute and the Plaintiff could have avoided it by bringing the motion earlier in the two years that had elapsed since the entry of judgment.

PUNITIVE DAMAGES

Proof Of Defendant's Financial Information – Sufficiency Of Evidence

Soto v. BorgWarner Morse TEC Inc. (2015) 239 Cal.App.4th 165 – Evidence of the defendant's financial condition is required to support an award of punitive damages. In *Soto*, the Plaintiff's financial expert opined on the net worth of the Defendant, BorgWarner Morse TEC, Inc. ("BWMT"), based solely on the publically filed financial statements of that company's parent, Borg Warner, Inc. The Court of Appeal rejected that testimony as inadequate, because the publically available financial information for the relevant period (2012) only allowed the expert to opine on the revenue stream associated with one of the lines of business engaged in by BWMT. The Court pointed out that this information did not shed any light on BWMT's liabilities or expenses. The Plaintiffs argued that historical net revenue information from 2002 could be used to extrapolate net revenue, and thereby shift the burden to the Defendant to prove that its margins changed in the intervening period. The Court rejected that argument, citing a prior case in which it found that testimony of the defendant's total assets *and* total liabilities was sufficient to shift the burden to the defendant, and holding that the Plaintiff's evidence fell far short of that standard since it only considered income, and not liabilities. The Court also held that the paucity of evidence was due to the Plaintiff's lack of diligence, rather than any recalcitrance on the part of the Defendant in responding to discovery. Accordingly, the award of punitive damages was reversed.

REAL PROPERTY, LAND USE AND ENVIRONMENTAL

CEQA – Exception Allows Public Entities To Enter Into Purchase Agreement Before Completing Environmental Review Of Proposed Use Of Property

Saltonstall v. City of Sacramento (2015) 234 Cal.App.4th 549 – A city council's approval of a nonbinding term sheet for the construction of a basketball stadium does not represent a commitment to a project requiring environmental review. In *Saltonstall*, the petitioner sued the City of Sacramento for allegedly committing to a project prior to conducting the required environmental review. The petitioner argued that a nonbinding term sheet approved by the City Council as well as the City's exercise of eminent domain over the proposed project area evidenced a commitment to move forward with the project. The Court of Appeal disagreed, holding that the nonbinding term sheet was merely an agreement to negotiate, and noted that (a) the term sheet stated that the final arena location remained to be determined, and (b) the city had the right to disapprove the project based upon its environmental review. The Court of Appeal similarly held that the City's exercise of eminent domain prior to environmental review was permitted under CEQA under the land acquisition exception in Guidelines section 15004(b)(2)(A). The Court also acknowledged that the legislature had enacted a specific statutory authorization for the City to acquire the proposed site without environmental review.

CEQA – Exemptions – "Unusual Circumstances" Exception

Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086 – The CEQA Guidelines, including sections 15303 and 15332, provide exemptions from CEQA for certain categories of projects that do not typically cause significant environmental impacts. Section 15300.2(c) contains an exception to these exemptions where there is "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." In *Berkeley Hillside Preservation* the Supreme Court granted review to resolve a split in the Court of Appeal over whether existence of a significant effect is, itself, an "unusual circumstance" sufficient to trigger the exception to the categorical exemptions. The Court answered the question in the negative, holding that the words "due to unusual circumstances" would be rendered meaningless if the very existence of an environmental impact were considered to be an unusual circumstance. Instead, the Court articulated a two-part test to determine whether the "unusual circumstances" exception applies: (1) First, the court must determine whether the project contains circumstances unusual for the projects in the class outlined in the relevant categorical exemption, and (2) if it does, the court must determine if those unusual circumstances create a "reasonable possibility" that the project will have a significant environmental effect. Rather than showing that a project as whole will have a significant effect on the environment, a project opponent must show that a project will have a significant effect on the environment *due to its specific unusual circumstances*.

CEQA – Mitigation Measures May Constitute Impermissible "Underground Regulations"

Center for Biological Diversity v. Department of Fish & Wildlife (2015) 234 Cal.App.4th 214 – CEQA mitigation measures may constitute impermissible "underground regulations," which are regulations adopted without complying with the notice and procedure requirement of the Administrative Procedure Act. In *Center for Biological Diversity*, the Department of Fish and Game certified an EIR with mitigation measures (a) requiring the Department to evaluate water bodies proposed for stocking under the Fishing in the City program (BIO-226) and (b) requiring private aquaculture facilities participating in the Department's Fishing in the City program to monitor and report the existence of invasive species at their facilities (BIO-229). The Court noted that the APA defines a regulation as a rule or standard of general application, which implements or interprets a specific law. The Department claimed that BIO-226 only applied to the Department because any impact on vendors who do not receive contracts to supply fish would be incidental. The Court of Appeal disagreed, finding that BIO-226 amounted to a directive to evaluate all water bodies in the Fishing in the City program in a particular manner, such that many water bodies would be eliminated from the program, thereby affecting citizens who run or use established fish stocking businesses. The Court held that because the mitigation measures would significantly affect others outside the agency, such a policy goes beyond the agency's internal management, and is subject to adoption as a regulation under the APA. The Court similarly held that BIO-229 did not merely reiterate or apply existing law in a ministerial manner, but instead imposes on a class of persons a new affirmative duty to monitor and report on a quarterly basis the existence of invasive species in their waters if they bid for, or receive, a contract to supply fish for the Fishing in the City program.

CEQA – Environmental Impacts – CEQA Does Not Generally Require Analysis Of Impact From Existing Conditions On Future Residents Of Project

California Building Industry Assn. v. Bay Area Air Quality Management District (2015) 62 Cal.4th 369 – CEQA requires government agencies to consider the impact of a project on the environment, not the impact of the environment on the project. In *California Building Industry Assn.*, the Supreme Court considered thresholds promulgated by the Bay Area Air Quality Management District for determining whether air quality impacts are significant under CEQA. The petitioners challenged thresholds of toxic air contaminant levels for "new receptors" (i.e. people who will be brought into the area as a result of a project under CEQA review), on the grounds that CEQA only requires consideration of impacts that a project makes on the environment, not the impacts that the existing environment will have on the project. The Court of Appeal rejected that argument, holding that the threshold has valid uses regardless of whether CEQA requires an analysis of impacts from the existing environment on future project residents or workers. The Supreme Court granted review solely to address the instances in which CEQA can require an analysis of how existing environmental conditions will impact future users. The Court then agreed that CEQA does not generally require such an analysis, with two exceptions: (1) several statutes specifically require such analysis for certain airport, school, and housing

projects, and (2) existing environmental impacts must be considered where the project risks exacerbating those impacts. However, the Court explicitly rejected an example in CEQA Guidelines § 15126.2, which stated that the earthquake risk to future residents is an environmental impact that must be considered when a subdivision is built astride an active fault line, because that is not an impact on the environment caused by the project. The Supreme Court reversed the Court of Appeal's decision, and remanded the matter for further consideration in light of the opinion.

Conditional Use Permit – 90 Day Statute Of Limitations Bars Challenge To Condition Based On Preempted Ordinance

City of Berkeley v. 1080 Delaware, LLC (2015) 234 Cal.App.4th 1144 **–** A conditional use permit remains enforceable based upon a subsequently pre-empted city housing ordinance if the permit is not timely challenged. In *1080 Delaware*, the City issued a use permit to a developer for a mixed-use building. "Condition 10" of the permit required compliance with the City's inclusionary housing ordinance, which was intended to promote affordable housing. After seven years of delay in the project, the developer executed a Regulatory Agreement with the City which dictated how many units would be used for low-income housing. Thereafter, *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396 held that a comparable ordinance in Los Angeles was pre-empted by the Costa Hawkins Act. The developer then indicated that he would not comply with Condition 10, and the City sued. All of the parties agreed that the inclusionary housing ordinance had been pre-empted by the Costa Hawkins Act. Nonetheless, the Court of Appeal held that the developer's exclusive remedy for challenging the propriety of the use permit – including Condition 10 – was Code of Civil Procedure 1094.6, which includes a 90-day statute of limitations. Any subsequent owners of the property were similarly barred from challenging Condition 10.

Conditional Use Permits – Estoppel May Prevent Municipalities From Revising Conditional Use Permits

HPT IHG-2 Properties Trust v. City of Anaheim (2015) 243 Cal.App.4th 188 **[Thompson, O'Leary, Moore]** – In this case, the Plaintiff developer obtained a conditional use permit from the Defendant City of Anaheim to develop two hotels. The plans for the hotels were designed to accommodate the construction of a planned overpass on a portion of the Plaintiff's property that was later taken by the Defendant by eminent domain, and included a two-story parking structure on a remnant parcel. After the property was taken, and the Plaintiff had spent $40 million to develop the project, the City issued a new conditional use permit that allowed only a surface parking lot, and had other disadvantageous changes. The Plaintiff sued, and the trial court found that the City was equitably estopped from altering the original conditional use permit. The Court of Appeal affirmed. The Court noted prior cases, which held that equitable estoppel will usually not bind governmental bodies "except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy." The Court held that this was such an unusual instance because (1) the Plaintiff would suffer a grave injustice in the form of impairment of the $40 million it had invested in reliance on the conditional use permit, and (2)

no strong public policy would be defeated, since the Plaintiff had followed all of the required procedures, and it was the City that was attempting to deviate from the standards otherwise applicable to the property.

Easements – Prescriptive Easements For Recreational Use Of Private Property Not Barred By Civil Code Section 1009

Pulido v. Pereira **(2015)** 234 Cal.App.4th 1246 **–** Civil Code section 1009, which prevents members of the public from establishing a prescriptive right to private property for recreational purposes, does not apply when a neighboring property owner passes over the property of another for the purpose of recreating on his or her own property. In *Pulido*, Pulido purchased Property A, which was adjacent to Property B. Pulido used a road that went through Property B to access Property A, which he used for recreational shooting, but on which he planned to later construct a residence. Property B was purchased by Pereira, and Pereira locked the gate to access the road. The trial court held that Pulido had a prescriptive easement to access his property, and Pereira appealed. The Court of Appeal affirmed, holding that Civil Code section 1009 is inapplicable because there is no question of public use. Pulido was not recreating on Pereira's property, nor was Pereira's property being passed over to reach a public recreational area; instead, Pulido was merely seeking a right-of-way easement to access his own property and recreate upon it.

SETTLEMENTS AND OFFERS TO COMPROMISE

998 Offers – Costs and Expert Witness Fees – Prevailing Defendant May Recover Costs Incurred Regardless Of Who Actually Paid

Litt v. Eisenhower Medical Center (2015) 237 Cal.App.4th 1217–This personal injury action involved two Defendants–a medical center that served a $15,000 offer under CCP § 998, and the operator of the medical center's cafeteria that did not make any 998 offer. The two Defendants were held jointly and severally liable for $3,000. The trial court awarded the medical center its costs and expert witness fees under section 998, but did not include any costs or witness fees incurred after the date that the cafeteria operator appeared in the action, because those costs were paid by the cafeteria operator under an indemnification agreement. The Court of Appeal reversed, and held that the medical center was entitled to recover all of the costs and expert witness fees incurred on its behalf, regardless of who was actually responsible for paying those costs. The Court of Appeal also noted that at least some of the costs and expert witness fees were incurred jointly by the medical center and cafeteria operator, but expressed no opinion as to how the joint costs should be allocated, leaving that issue to the discretion of the trial court.

998 Offers – Validity – Extraneous Non-Monetary Conditions Invalidate Offer

McKenzie v. Ford Motor Co. (2015) 238 Cal.App.4th 695 **[Rylaarsdam, O'Leary, Bedsworth]** – In a lemon law case, the Plaintiff rejected the Defendant's initial 998 offer that contained onerous non-monetary conditions. Months later, the Plaintiff accepted a new offer for the same monetary amount, but without the onerous non-monetary terms. Both settlement offers allowed

the Plaintiff to file a motion to recover attorney's fees. The trial court denied the Plaintiff's fees incurred after the initial 998 offer, and the Court of Appeal reversed. The Court held that the offer was rendered invalid by the non-monetary terms, which included: (1) an extraordinarily broad release, which applied to claims and persons outside of the litigation, (2) a confidentiality provision that was expressly prohibited by California's lemon law statute, and (3) an opt-out provision that allowed the Defendant to reject the settlement based on the condition of the Plaintiff's car upon its return. The Court of Appeal rejected the Defendant's argument that because the terms were unlawful and unenforceable, they were therefore immaterial, and should have been disregarded in considering the validity of the 998 offer. Instead, the Court held that the Plaintiff's rejection of the first offer was reasonable, and the trial court erred by denying the Plaintiff's fees incurred after that offer.

CCP § 664.6 – Court May Refuse To Enter Judgment Based On Settlement Agreement, But May Not Alter The Terms Of The Agreement

Leeman v. Adams Extract & Spice, LLC (2015) 236 Cal.App.4th 1367 **–** In *Leeman*, the parties reached a settlement of an action under Proposition 65, which included a stipulated award of attorney's fees. The parties moved to have a judgment approved pursuant to Health and Safety Code § 25249.7, and entered as a judgment under CCP § 664.6. The trial court reduced the attorney's fees award by 50 percent, and denied a subsequent motion by both Plaintiff and Defendant to increase the attorney's fees award to the original amount agreed upon by the parties. The Court of Appeal reversed, holding that Code of Civil Procedure section 664.6 only gives the trial court authority to either enter or refuse to enter judgment based on the settlement agreement; it does not give the trial court authority to alter the terms of the agreement. Likewise, Health and Safety Code section 25249.7 only allows the trial court to disapprove a settlement; it does not give the trial court authority to alter its terms.

Joint Tortfeasors – Allocation Of Settlement Proceeds – Allocation Method For Settlements Executed After Verdict

Hellam v. Crane Co. (2015) 239 Cal.App.4th 851 – In order to determine the amount by which a settlement will reduce a non-settling joint tortfeasor's liability, a trial court must allocate the settlement proceeds between economic and non-economic damages. If the settlement is reached before a verdict, the amount of the settlement is multiplied by the percentage of the eventual damage award attributable to the economic damages, and that amount is reduced from the economic damages in the verdict. If the settlement is reached after a verdict, the amount of noneconomic damages awarded against the settling defendant is deducted from the settlement amount, and any remaining settlement amount is deducted from the economic damages awarded against the non-settling defendant. The Court of Appeal in *Hellam* held that the trial court erred by using the pre-verdict method to allocate the proceeds of a settlement where the amount of the settlement was agreed to prior to the verdict, but the agreement was not finalized and executed until after the verdict. The Court of Appeal noted that there was nothing to stop the Plaintiff from renegotiating the amount after the verdict was reached, and that under those circumstances, it was an abuse of discretion to use the method for allocating a pre-verdict settlement.

Release – Construction – Broadly Worded Release Not Enforceable By Third Parties

Epic Communications, Inc. v. Richwave Technology, Inc. (2015) 237 Cal.App.4th 1342 – The trial court granted summary judgment, finding that a settlement agreement between the Plaintiff and one Defendant regarding a trade secret dispute released certain Codefendants who were not signatories to the settlement. Distinguishing the case from *Rodriguez v. Oto* (2013) 212 Cal.App.4th 1020, the Court of Appeal reversed. Although the release clause was broadly worded, the Court held that the agreement was ambiguous when read as a whole, because (a) the agreement was confidential, and not to be disclosed to the Codefendants, and (b) the agreement stated that it was not enforceable by third parties. The Court then held that based on the parties' course of conduct following execution of the agreement, it appeared that the parties to the settlement had not intended to extend the release to the Codefendants, as the Plaintiff continued its litigation against the Codefendants without objection by the other party to the settlement.

TORTS

Joint And Several Liability – Defendants Cannot Be Held Jointly And Severally Liable For Interference With Each Other's Contracts

I-CA Enterprises, Inc. v. Palram Americas, Inc. (2015) 235 Cal.App.4th 257 – In *I-CA*, the Plaintiff sued two Defendants for breach of contract, and intentional interference with contractual relations. At trial, the Plaintiff abandoned the breach of contract claims, and proceeded only on the interference with contract theory, claiming that each Defendant interfered with the Plaintiff's contract with the other Defendant. The trial court entered judgment in the Plaintiff's favor on these claims, but held that liability was several, not joint. The Court of Appeal affirmed, holding that: (a) because each Defendant could not be held liable for interference with their own contracts, the Defendant's interference with each other's contracts constituted independent torts, (b) the Plaintiff did not allege or prove a conspiracy, and (c) the damages from the Defendants' torts was not indivisible, since lost profits could be allocated between the two contracts. *See also* Discovery – Punitive Damages – Discovery Of Financial Information at p. 46, above.

Malicious Prosecution – Claim Is Premature When Severed Cross-Complaint Is Still Pending

Pasternack v. McCullough (2015) 235 Cal.App.4th 1347 – An element of the tort of malicious prosecution is the termination of the underlying action favor of the malicious prosecution plaintiff. A claim is premature under that rule even where the portion of the underlying action that is the subject of the claim has been resolved, but a cross-complaint is still pending. In *Pasternack*, a developer and a contractor filed collection-related claims against Plaintiff Pasternack in the underlying action. Pasternack then filed a cross-claim that was ultimately severed from the collection claim. The collection claim was resolved in Pasternack's favor, but Pasternack's own cross-complaint was still pending, and thus no final judgment was entered in

the underlying action. When Pasternack sued the developer, contractor, and their attorneys for malicious prosecution, his claim was dismissed in an anti-SLAPP motion, because he could not satisfy the element of successful termination. The Court of Appeal affirmed the dismissal, distinguishing cases staying–rather than dismissing–malicious prosecution claims where an appeal of the underlying judgment is filed after the malicious prosecution claim. In such cases, the claim is not premature when filed, it is rendered premature by the filing of the appeal. In *Pasternack*, the Court of Appeal held that the case was already premature when it was filed, and thus dismissal was the appropriate result.

Malicious Prosecution – Order Granting Nonsuit Constitutes Favorable Determination Unless Order Specifies Otherwise

Nunez v. Pennisi (2015) 241 Cal.App.4th 861 – In *Nunez*, the Defendant boat owner brought an underlying breach of contract action against the Plaintiff contractor, who had installed the refrigeration system on his boat. The underlying action was dismissed on a motion for nonsuit due to the Defendant's inability to prove causation. The Defendant argued that a nonsuit is not a favorable determination on the merits for the purposes of the first element of a malicious prosecution claim. The Court of Appeal disagreed, noting that under CCP § 581c(c), an order granting nonsuit is deemed to "operate as an adjudication upon the merits," unless the order otherwise specifies. *See also* Anti-SLAPP–Attorney's Fees For Frivolous Motion–Statement Of Reasons Required at p. 20, above.

UNFAIR COMPETITION

Business & Professions Code § 17200 – Standing – Advocacy Group Has Standing To Challenge Unlawful Practice

Animal Legal Defense Fund v. LT Napa Partners LLC (2015) 234 Cal.App.4th 1270 – In *ALDF*, the Plaintiff animal rights group sued a Napa restaurant under section 17200 based on violations of the foie gras ban which the California legislature recently enacted. The restaurant brought a motion to strike the Plaintiff's action as SLAPP, and the trial court denied the motion, concluding that the Plaintiff had shown a probability of prevailing on the merits. The Court of Appeal affirmed, without addressing the first prong of the anti-SLAPP statute. The Court focused on Proposition 64's requirement that a plaintiff bringing an unfair business practice claim must have lost money or property in order to have standing to sue. The Court noted that the Plaintiff claimed it had suffered injury in fact and had lost money due to the restaurant's conduct in serving foie gras, because it had diverted significant organizational resources to investigate the Defendants' continued illegal sales of foie gras, and had attempted to persuade law enforcement to halt the sales. In holding that the Plaintiff's conduct supported standing under section 17200, the Court stated that the Plaintiff had demonstrated a genuine and longstanding interest in effective enforcement of the foie gras ban, and in exposing violators.

VICARIOUS LIABILITY

Ostensible Agency – Written And Signed Disclaimer Of Agency Is Not Necessarily Sufficient To Defeat Ostensible Agency

Whitlow v. Rideout Memorial Hospital (2015) 237 Cal.App.4th 631–This wrongful death action involved claims against Rideout Memorial Hospital for the failure of the emergency room physician to diagnose and treat the decedent's brain hemorrhage. The trial court granted the hospital's motion for summary judgment, holding that the physician was not an ostensible agent of the hospital and therefore not liable for the physician's malpractice as a matter of law. However, the decedent's surviving children appealed and the Court of Appeal reversed the judgment. The Court found that the hospital's disclaimer of agency in its boilerplate admissions form signed by the decedent was not sufficient to conclusively indicate that the decedent should have known that the treating physician was not the hospital's agent. Even the additional posted signs and insignia on the doctor's clothing was not sufficient to require summary judgment. The Court emphasized the public policy concerns inherent in an emergency room setting, where a patient often arrives in pain and distress and cannot reasonably be expected to take time comprehending and evaluating a boilerplate admissions form stating that the emergency physician provided by the hospital is not the hospital's agent.