



# Litigation Update

Litigation Section News

January 2013

## **Without a license, contractor worked for nothing.**

A tribal corporation brought suit against a contractor for the return of funds it paid for work, alleging the contractor was not licensed. The trial court granted summary judgment in favor of the tribal corporation. The Court of Appeal found the trial court abused its discretion when it summarily sustained all 39 of the tribal corporation's objections to the contractor's evidence, stating that when a court issues a blanket ruling on numerous evidentiary objections without providing any reasoning there is no meaningful basis for review. Nonetheless, the trial court's error made no difference in the outcome for the contractor. The contractor claimed a license was not required for performing work on tribal land, that he should be given equity, that there was a triable issue of fact whether he was licensed, that he substantially complied with the license requirement and that the tribal corporation should be estopped from making its claims. None of the contractor's arguments were successful, and the appellate court affirmed. *Twenty-Nine Palms Enterprises Corporation v. Bardos* (Cal. App. Fourth Dist., Div. 2; November 8, 2012) 210 Cal.App.4th 1435.

## **Trial court erred when it reduced the size of easement.**

The configuration of a property was changed over the years after an easement across it had been granted. Based on all the changes and the present needs of present property owners, the trial court ruled "the reasonable requirements of the Barlow Parcel both presently and in the future do not require the full size and scope of the Gatchett Lane easement." The appellate court reversed, stating: "On appeal, Barlow asserts that no 'recognized rule of law . . . authorized [the trial court] to terminate [his] property rights' by reducing the size of his easement against his will, no matter what the evidence showed. We agree. Accordingly, we will re-

verse." *Cottonwood Duplexes v. Barlow* (Cal. App. Third Dist.; November 13, 2012) 210 Cal.App.4th 1501.

## **Arbitration decision vacated due to mistake of law.**

Plaintiff was fired because his employer thought he was misusing his leave time by working in a restaurant he owned. The arbitrator denied his claim, finding the employer based its action on an honest belief. The trial court denied plaintiff's motion to vacate the arbitrator's decision. The appellate court reversed, stating: "The honest belief defense accepted by the arbitrator is incompatible with California statutes, regulations and case law and deprived [the plaintiff] of his unwaivable statutory right to reinstatement under [Government Code] section 12945.2, subdivision (a). This clear legal error abridged [the plaintiff's] rights under CFRA—rights based on, and intended to further, an important public policy." *Richey v. Automation, Inc.* (Cal. App. Second Dist., Div. 7; November 13, 2012) 210 Cal.App.4th 1516.

## **The law is for thee, but not for me.**

The *Fair Credit Reporting Act* [15 U.S.C. §1681] is supposed to protect the privacy of consumers. Among other provisions, it says that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number *or* the expiration date upon any receipt," and imposes civil liability for violations. An attorney paid a \$350 federal court filing fee for a client using his own credit card on Pay.gov. His Pay.gov electronic receipt included the last four digits of his credit card *and* its expiration date. He sued the United States and the trial court dismissed his suit because of sovereign immunity. Tenacious the lawyer was. He took his claim all the way to the highest court in the land, but he lost there, too. *United States v. Bormes* (U.S. Supreme Ct.; November 13, 2012) 133 S.Ct. 12, [184 L.Ed.2d 317].

## **Couldn't get their stories straight.**

Owners of luxury car reported it stolen, and then gave several inconsistent versions of the history of the car prior to its disappearance. Their insurance company denied coverage, the insureds sued for bad faith and the trial court entered summary judgment in favor of the insurer. The appellate court affirmed, stating plaintiffs failed to raise a triable issue of material fact about whether the denial of their claim was justified under the terms of the policy, or whether the investigation was done in bad faith. *Hodjat v. State Farm* (Cal. App. Second Dist., Div. 8; November 15, 2012) 211 Cal.App.4th 1.

## **What he said to the IRS didn't stay with the IRS.**

A man had business dealings in both the United States and Japan. Representatives from the Internal Revenue Service [IRS] and Japan's National Taxing Authority [NTA] held a meeting in 1996 to discuss the man's taxes. During that meeting, they disclosed information to each other, but the man knew nothing about the meeting or the disclosures of his tax information. In 1999, the man and his company brought an action against the United States under 26 U.S.C. §7431(d) for wrongful disclosure of his tax returns, which must be kept confidential. The Ninth Circuit held "the statute of limitations begins to run when the plaintiff knows or reasonably should know of the government's allegedly unauthorized disclosures. We also conclude, in the circumstances presented by this case, that the statute of limitations did not begin to run when the plaintiffs became aware of a pending general investigation that would involve disclosures, but only later when they knew or should have known of the specific disclosures at issue." *Aloe Vera of America v. United States of America* (Ninth Cir.; November 15, 2012) 699 F.3d 1153.

**County must disclose billing records relating to attorney fees charged for defending county.**

A lawyer requested documents under the *California Public Records Act* [CPR, *Government Code* section 6250 *et seq.*], and the County argued the records were not subject to disclosure because they were attorney-client communications, they were attorney-work product and they were exempt under the CPR's pending litigation exemption [section 6254(b)]. After ordering the County to redact certain portions of its billing records, the trial court granted the lawyer's petition for writ of mandate. The appellate court affirmed, noting the redacted records excluded work product information, they were part of normal record keeping to facilitate the payment of attorney fees and members of the public have a right to inspect public records. *County of Los Angeles v. Sup. Ct. (Cynthia Anderson-Barker)* (Cal. App. Second Dist., Div. 8; November 16, 2012) 211 Cal.App.4th 57.

**You go first. No, after you.**

*Civil Code* section 910 requires a homeowner to serve notice of a construction defect claim to commence the prelitigation process before bringing a lawsuit. But section 912 requires the builder to provide certain documents. The homeowners claimed they needed the documents before they could comply with section 910, and the builder claimed it wasn't required to provide the documents until the homeowner complied with the prelitigation process. The trial court sided with the builder and stayed the action until the homeowners complied with section 910. The appellate court was presented with a question of first impression: "must homeowners serve notice of a construction defect claim under [*Civil Code*] section 910, subdivision (a), for a builder to be obligated to respond to their request for documents under section 912, subdivision (a)?" The Court of Appeal denied the homeowners' request for extraordinary relief, stating: "We conclude that a homeowner must serve notice of a construction defect claim under section 910, subdivision (a) to commence the statutory prelitigation procedure, and until such service the builder has no obligation to respond to a request for documents under section 912, subdivision (a)." *Darling*

*v. Sup. Ct. (Western Pacific Housing, Inc.)* (Cal. App. First Dist., Div. 5; November 16, 2012) 211 Cal.App.4th 69.

**Real estate commissioner looked at man's past crime rather than whether he had rehabilitated himself when broker's license was denied.**

A man who had been previously convicted of a misdemeanor, and who completed his probation and had his conviction expunged under *Penal Code* section 1203.4, applied for a real estate broker's license. A commissioner of the Department of Real Estate denied the man's application based on the "dishonest nature" of his prior conviction for theft by false pretenses and the concern that it would not be in the public interest to issue the license. The man petitioned for a writ of administrative mandamus under *Code of Civil Procedure* section 1094.5 to set aside the commissioner's decision. The trial court granted the man's petition and the commissioner appealed. The Court of Appeal affirmed, stating "the commissioner's decision to deny [the man] a broker's license was improperly based solely on the nature of his prior crime, rather than his inadequate rehabilitation." *Dave Singh v. Jeff Davi, As Real Estate Commissioner* (Cal. App. Third Dist.; November 19, 2012.) 211 Cal.App.4th 141.

**Disgruntled clients settle and then sue their lawyer.**

Clients settled eminent domain action with County for almost \$2.6 million, and later brought suit against their own lawyer for attorney malpractice and breach of fiduciary duty, claiming the lawyer failed to work up their case and properly prepare the experts. Their lawyer cross-complained for his legal fees in quantum meruit. The trial court awarded the clients \$574,000 for legal malpractice, and awarded the lawyer \$242,542.69 for his costs and legal fees. Noting the settlement took place when the clients were represented by a successor attorney, the appellate court reversed the award to the clients for legal malpractice because of a lack of evidence showing the lawyer's acts, or omissions, proximately caused the clients any injury, and affirmed the award to the lawyer for his costs and fees. *Filbin v. Fitzgerald* (Cal. App. First Dist., Div. 2; November 20, 2012) 211 Cal.App.4th 154.

**Defendant entitled to fees in defeating breach of contract claim, despite losing claim for promissory estoppel.**

The contract provided the prevailing party in any dispute between the parties shall recover attorney fees. A defendant successfully defeated a claim for breach of contract but lost on a claim of promissory estoppel, and the trial court denied his request for fees. The appellate court reversed, stating: "We hold such a defendant is entitled to recover attorney fees reasonably incurred in defeating the breach of contract claim. We therefore reverse the trial court's order and remand for further proceedings." *Barnhart, Inc. v. CMC Fabricators, Inc.* (Cal. App. Fourth Dist., Div. 1; November 20, 2012) 211 Cal.App.4th 230.

**Summary judgment reversed on issue of agency between auto club and tow truck company.**

Plaintiff was an Auto Club member who requested roadside assistance for a flat tire, and the Auto Club dispatched a flat bed car carrier to a "very dangerous, narrow, dark" section of the Long Beach freeway. The tow truck driver, a technician certified by Auto Club in 1998, decided to transport the disabled car to the next exit and change the tire off the freeway, so he instructed the plaintiff to get inside the tow truck. The next time the tow truck driver saw the plaintiff, he was lying next to the tow truck in the slow lane of the freeway, in a fetal position, after being struck by a motorist. Plaintiff suffered serious brain injuries and requires 24-hour skilled nursing care for life. After suit was filed, the Auto Club moved for summary judgment because the contract between the tow truck company and the Auto Club defines their relationship as that of independent contractor. The appellate court reversed, concluding there are triable issues of material fact whether the tow truck company assisting plaintiff is the actual or ostensible agent of Auto Club or whether it is an independent contractor. *Monarrez v. Automobile Club of Southern California* (Cal. App. Second Dist., Div. 2; November 20, 2012) (As Mod., December 12, 2012) 211 Cal.App.4th 177.

**Omission of a trustee on deed of trust does not prevent enforcement of the deed of trust.** After homeowners/borrowers fell more than \$90,000 behind in payments, the beneficiary of the deed of trust substituted an entity as trustee to initiate nonjudicial foreclosure proceedings. The homeowners sued to set aside the sale because the deed of trust failed to designate a trustee. Both the trial court and the appellate court held the omission of a trustee does not preclude nonjudicial foreclosure of the deed of trust. *Shuster v. BAC Home Loans Servicing, LP* (Cal. App. Second Dist., Div. 6; November 29, 2012) 211 Cal.App.4th 505.

**Attorney fees may be properly awarded under California Rules of Court Rule 2.30.** A party failed to inform the court the case was automatically stayed due to a filing for bankruptcy. The trial court declared a mistrial, dismissed the jury, conducted a sanctions hearing and awarded \$81,461.13 in sanctions. The appellate court affirmed in part and reversed in part, stating: “We conclude that [California Rules of Court, rule 2.30] does not authorize full compensation of all attorney fees incurred as a result of a rules violation, but only authorizes the court to award reasonable attorney fees incurred in connection with the proceedings in which the aggrieved party seeks sanctions.” *Sino Century Development Limited v. Farley* (Cal. App. Second Dist., Div. 3; December 3, 2012) 211 Cal.App.4th 688.

**Judge properly excluded expert testimony after concluding claimed damages were speculative.** A dental implant company sued a university for breach of contract involving clinical tests for a new implant the company patented. The implant company sought damages ranging from \$200 million to over \$1 billion. Following an evidentiary hearing, the trial court excluded as speculative the proffered testimony of an expert to that effect. The appellate court found the trial court erred in excluding the plaintiff’s expert’s testimony in that it was “better left for the jury’s assessment.” In affirming the decision of the trial court, the California Supreme Court stated “the trial

court has the duty to act as a ‘gatekeeper’ to exclude speculative expert testimony.” The Supreme Court reviewed the trial court’s decision based upon an abuse of discretion, to which great deference is given to a trial judge, not based upon a conclusion of law, which it would have reviewed de novo. *Sargon Enterprises, Inc. v. University of Southern California* (Cal. Sup. Ct.; November 26, 2012) 55 Cal.4th 747.

**Declaration sufficient to survive summary judgment.** In granting a summary judgment motion in favor of designers and manufacturers of a prosthetic hip device, the trial judge excluded portions of the plaintiff’s expert declaration opposing the motion after sustaining defendants’ objections on various grounds, including lack of expert qualification, lack of an explanation, or reasoning to support the expert opinion, lack of foundation and relevance. The Court of Appeal reversed, stating: “In this case, [plaintiff’s expert] declared that he ‘conducted extensive examinations of the portions of the prosthetic device that were removed from [plaintiff] using visual examination, optical microscopic examination, x-ray radiography, fluorescent dye penetrant examination, scanning electron microscopy, and such destructive testing as hardness testing, microhardness testing, microstructural analysis, and chemical analysis.’ He declared that he had determined, based on his examinations, that the fractured portion of the prosthesis was softer than the ‘minimum required hardness’ in two of the three ASTM specifications . . . and was less than the ‘expected hardness’ of the third specification. We believe that this explanation is sufficient to support his opinion for purposes of opposing the summary judgment motion. In our view, [plaintiff’s expert’s] failure to describe the particular testing processes that he used to arrive at his conclusions regarding the hardness of the prosthesis and his failure to more particularly describe the results of that testing do not in any manner indicate that his conclusions are speculative, conjectural, or lack a reasonable basis.” *Garrett v. Howmedica Osteonics* (Cal. App. Second Dist., Div. 3; November 27, 2012) 211 Cal.App.4th 389.

**Filing of lis pendens privileged.** A family home was foreclosed on pursuant to a forged or fraudulent second deed of trust. The alleged homeowners filed an action to quiet title to the property and recorded a lis pendens. The persons who purchased the property in good faith at a foreclosure sale filed an action for slander of title alleging that the recording of the lis pendens was unprivileged and wrongfully prevented them from being able to sell the property. The alleged homeowners filed a special motion to strike under *Code of Civil Procedure* section 425.16. The trial court granted the motion, finding the second deed of trust was void because it was forged. It also found the alleged homeowners were absolutely privileged under *Civil Code* section 47, subdivision (b), in filing the lis pendens. The appellate court affirmed. *La Jolla Group II v. Bruce* (Cal. App. Fifth Dist.; November 28, 2012) 211 Cal.App.4th 461.

**Summary judgment affirmed—no valid transfer of copyright.** The author of a work called *The Match* was also the owner of a copyright for the work. The lawyer for an entertainment agency proposed certain terms to the lawyer for the copyright owner and sent a writing: “Let me know if this is okay and we’ll send paperwork.” The lawyer for the owner of the copyright responded: “done . . . thanks!” A written agreement was sent, but never signed. When the parties later disagreed and litigation ensued, the entertainment agency claimed the parties had entered into a contract for the entertainment company to make a movie of *The Match*. The trial judge entered summary judgment against the entertainment agency because it failed to raise a triable issue of material fact that it had a valid transfer of copyright under 17 U.S.C. §204(a). The appellate court agreed, noting there was no evidence the purported transfer was signed by the author or his duly authorized agent “evidence of which was essential to each of a [the entertainment agency’s] causes of action.” *MVP Entertainment v. Mark Frost* (Cal. App. Second Dist., Div. 8; November 7, 2012) 210 Cal.App.4th 1333, [149 Cal. Rptr.3d 162].

## Attorney fees to demonstrators who carried pictures of aborted fetuses at protest.

Group carried pictures of aborted fetuses at a busy intersection in South Carolina, and a police officer informed them they would be ticketed for breach of the peace if graphic signs were not discarded. Eventually a petition was filed by the protestors alleging their First Amendment rights were being violated when police informed the group they would ticket again in the future if the group carried the signs at another demonstration. The trial court issued a permanent injunction against police “from engaging in content based restrictions on [petitioners’] display of graphic signs.” Both the trial and appeals courts declined to award the group its attorney fees because injunctive relief only did not render the petitioners a prevailing party under the *Civil Rights Attorney’s Fees Awards Act of 1976* [42 U.S.C. §1988]. In a *per curiam* opinion, the United States Supreme Court reversed and remanded, stating: “A plaintiff ‘prevails,’ we have held, ‘when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.’ And we have repeatedly held that an injunction, or declaratory judgment, like a damages award, will usually satisfy that test.” *Lefemine dba Christians For Life v. Wideman* (U.S. Sup. Ct.; November 5, 2012) (Case No. 12-168) 133 S.Ct. 9, [184 L.Ed.2d 313; 81 U.S.L.W. 4005; 23 Fla.L.WeeklyFed.S 527].

## Wallscape advertising in place since 1984 olympics approved by city, but, violates state law.

L.A. building, purchased in 1999, had 8,000 square feet of advertising space on its side. Permits from the City were located at the time of purchase, but no investigation was done to determine whether there were state-issued permits. The Department of Transportation [Caltrans] found the wallscape to be in violation of the *Outdoor Advertising Act* [Business and Professions Code section 5200, *et seq.*] The building’s owner unsuccessfully argued equitable estoppel and laches to both the trial and appellate courts. *West Washington Properties v. California Department of Transportation* (Cal. App. Second Dist., Div. 8; November

5, 2012) 210 Cal.App.4th 1136, [149 Cal. Rptr.3d 39].

## In good times and in bad times.

A union brought action against a city, alleging the city retracted its promise to pay 50 percent of its employees’ medical insurance premiums after retirement. The trial court sustained a demurrer without leave to amend the petition for writ of mandate. Applying the California Supreme Court’s 2011 opinion in *Retired Employees Assn. of Orange County v. Co. of Orange* (2011) 52 Cal.4th 1171, [266 P.3d 287, 134 Cal. Rptr.3d 779], the appellate court reversed and remanded, stating “the petition alleged that the MOUs ratified by the city council promised active employees that the City would pay 50 percent of their future retiree medical insurance premiums.” *International Brotherhood Of Electrical Workers, Local 1245 v. City of Redding* (Cal. App. Third Dist.; November 2, 2012) 210 Cal.App.4th 1114, [148 Cal.Rptr.3d 857].

**No duty to defend.** Company A advertised its product, which resembled and had a name similar to the product sold by Company B. Company A’s advertisement, however, did not identify Company B’s product expressly and did not disparage Company B’s product. When Company B sued, Company A made a demand on its insurer to defend under an insurance policy provision that provided coverage for “advertising injury,” defined as injury arising out of publication of material that disparaged a person’s or organization’s goods, products, or services. Because the advertisement did not identify Company B’s product, and contained no matter derogatory to Company B’s title to its property, its quality, or its business, no disparagement occurred. Therefore the insurance company concluded its policy did not provide a potential for coverage of this claim for damages because of advertising injury and it did not owe its insured a duty to defend. The trial court granted summary judgment to the insurance company, and the appellate court agreed and affirmed. *Hartford Casualty Insurance Co. v. Swift Distribution* (Cal. App. Second Dist., Div. 3; October 29, 2012) 210 Cal.App.4th 915, [148 Cal. Rptr.3d 679].

## Completed and accepted doctrine applied.

Under the “completed and accepted doctrine,” once a contractor completes work that is accepted by the owner, the contractor is not liable to third parties injured as a result of the condition of the work, even if the contractor was negligent in performing the contract, unless the defect in the work was latent or concealed. The plaintiff fell on stairs at a theater on the campus of Santa Monica Community College, and she alleges she fell due to a lack of contrast marking stripes on the stairs at the Main Stage, which marking stripes had been specified in the architectural plans. The trial court granted summary judgment in favor of the architect who designed the theater and observed its construction. The appellate court affirmed, noting the defect was patent as a matter of law. *Neiman v. Leo A. Daly Company* (Cal. App. Second Dist., Div. 1; October 30, 2012) (As Mod. November 14, 2012) 210 Cal.App.4th 962, [148 Cal.Rptr.3d 818].

## Mobile home park application for conversion improperly denied.

A mobile home park applied to a city to convert the park to resident ownership by subdividing the park into individual lots which would be offered for sale to residents. *Government Code* section 66427.5,

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required the park to conduct a “survey of support.” Only a handful of park residents completed the survey, and of those, 58 percent opposed conversion. The City denied the application, finding a lack of evidence the survey was not properly conducted. The park owners asked the court for extraordinary relief, which the trial court granted. The Court of Appeal affirmed, stating the City “could not deny the application based on the survey results unless they showed the conversion was a sham—intended solely to avoid rent control and not to transfer ownership to residents. The results of the Owner’s survey showed that the conversion, although it did not have majority support, was not a sham.” *Chino MHC, LP v. City of Chino (Lampighter Chino Homeowners Association)* (Cal. App. Fourth Dist., Div. 2; October 31, 2012) 210 Cal.App.4th 1049, [148 Cal.Rptr.3d 753].

**Deference should be given to prison authorities.** A finding that an inmate in state prison is a gang member or associate can result in the inmate’s placement in a security housing unit under *California Code of Regulations* Title 15, section 3023, subdivision (b). In this case, the inmate had several photocopied drawings containing symbols assertedly distinctive to the Mexican Mafia, and one of the drawings is signed by a validated associate of the Mexican Mafia gang. The Court of Appeal granted relief to the inmate, and the California Supreme Court reversed, finding the Court of Appeal erred when it did not grant the proper amount of deference to the California Department of Corrections

and Rehabilitation. *In re Elvin Cabrera on Habeas Corpus* (Cal. Sup. Ct.; October 29, 2012) 55 Cal.4th 683, [287 P.3d 72; 148 Cal.Rptr.3d 500].

**Don’t call me at home either.** In a class action, a plaintiff argues that a series of automated telephone calls placed to his home by Best Buy violated the *Telephone Consumer Protection Act* [TCPA, 47 U.S.C. §227]. The district court granted summary judgment for Best Buy and the Ninth Circuit reversed, rejecting Best Buy’s argument the calls were informational only. *Chesbro v. Best Buy Stores, L.P.* (Ninth Cir.; October 17, 2012) 697 F.3d 1230.

**No Fourth Amendment violation for seizing baby.** A mother took her baby to an emergency room when she had a high fever, was lethargic, not eating properly and looked ill. Doctors were concerned about meningitis. The baby’s mother was “hysterically crying” and refused to give consent for medical personnel to treat the baby. Doctors opined the baby was in imminent danger of serious bodily injury. Police officers removed the mother and placed her in a small room while doctors took care of the baby. There was “absolutely no evidence of abuse or neglect, and no allegation that either parent was in any way unfit.” As it turned out, the baby did not have meningitis. The parents brought an action against the police for a violation of their constitutional rights. The mother said her Fourth Amendment right against unreasonable search and seizure was violated when the baby was seized and separated

from her without a prior judicial hearing, or a warrant. The district court ruled the officers were entitled to qualified immunity and the Ninth Circuit agreed. *Mueller v. Auker* (Ninth Cir.; September 10, 2012) (As Mod. October 25, 2012) 700 F.3d 1180.

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