



# Litigation Update

Litigation Section News

October 2012

## Real estate department must pay for broker's fraud.

Plaintiffs obtained a judgment for \$280,000 against their broker after four fraudulent real estate transactions. Plaintiffs applied with the Department of Real Estate Recovery Account to pay what they could not collect from their broker. The Department paid \$50,000 and denied the remainder, finding some of the transactions were based on the broker's breach of fiduciary duty rather than fraud as required by Business and Professions Code §10471(a). Plaintiffs filed an action against the Department, and both the trial and appellate courts determined the broker's breach of fiduciary duty was based on intentionally fraudulent misrepresentations, so the Department of Real Estate must pay from the Recovery Account. *Worthington v. Jeff Davi, as Real Estate Commissioner* (Cal. App. Fourth Dist., Div. 3; August 7, 2012) 208 Cal.App.4th 263.

## Case against gun manufacturer to go to trial.

A police officer was shot in the back with his Glock 21 service weapon by his three-year-old son rendering him a paraplegic. The officer and his wife sued the manufacturers of the gun and holster alleging the gun has a light trigger pull without an appropriate safety mechanism to prevent accidental discharge and the holster fails to sufficiently protect the trigger or properly secure the gun. The trial court granted defendants' motions for summary judgment. The appellate court found the trial court erred because the defendants failed to carry their initial burden to demonstrate the officer cannot prove the lack of grip safety or the light trigger pull caused his injury. It further found there were triable issues of fact whether the officer's causes of action are barred under the *Protection of Lawful Commerce in Arms Act* [PLCAA; 15 U.S.C. §§ 7901-7903.] because there was a dispute whether or not the officer was using the gun in a manner consistent with

his training to provide protection while he was off duty. Regarding the holster, the appellate court said plaintiffs failed to demonstrate a triable issue of fact it was defective under either the risk-benefit test or the consumer expectation test, and that there are no triable issues of fact whether the holster caused the injuries. *Chavez v. Glock, Inc.* (Cal. App. Second Dist., Div. 7; July 24, 2012) 207 Cal.App.4th 1283.

## Petition to compel arbitration denied.

Defendant employer appealed from denial of its petition to compel arbitration of a wrongful termination claim. The arbitration clause was in an employee handbook which plaintiff acknowledged receiving. The appellate court affirmed, stating: "We hold that plaintiff is not bound by the arbitration clause because that clause was included within a lengthy employee handbook; the arbitration clause was not called to the attention of plaintiff, and he did not specifically acknowledge, or agree, to arbitration; the handbook stated that it was not intended to create a contract; the handbook provided that it could be amended unilaterally by defendant and thus, rendered any agreement illusory; the specific rules referred to in the arbitration clause were not provided to plaintiff; and the arbitration clause is unconscionable." *Sparks v. Vista Del Mar Child and Family Services* (Cal. App. Second Dist., Div. 5; July 30, 2012) (As Mod., August 20, 2012) 207 Cal.App.4th 1511.

## No duty on manufacturer to warn of risks not knowable.

After report of a disturbance, police went to a scene and found a man "either really high or crazy." The man struck the police vehicle with his hand and continued on his way. The situation deteriorated with the man breaking a fence, assuming a batter's position and swinging a two by four at officers. After the man ignored verbal commands,

police used a Taser on him. They continued to use the Taser as the man continued to resist. The man went into cardiac arrest and died. The man's family brought an action against the Taser manufacturer, claiming it should have warned that repeated use can cause fatal levels of metabolic acidosis. The trial court granted summary judgment in favor of the manufacturer and the Ninth Circuit affirmed, stating there was no duty to warn because the risk of acidosis was not knowable to the manufacturer at the time of the death. *Rosa v. Taser International, Inc.* (Ninth Cir.; July 10, 2012) 684 F.3d 941.

## No qualified immunity for police officers who caused injury.

Injured U.C. Davis student brought an action for violation of his Fourth Amendment right to be free from unreasonable seizure after police fired pepperball guns in an attempt to disperse a crowd and the student suffered serious eye injuries and a loss of his athletic scholarship. The Ninth Circuit affirmed the trial court's finding the student had a clearly established constitutional right, that right was violated, and the officers were not entitled to qualified immunity. *Nelson v. City of Davis* (Ninth Cir.; July 11, 2012) 685 F.3d 867.

## Interpleader proper when two colorable claims to policy proceeds.

Husband and wife bought life insurance on their minor child, and then they divorced, but the policy was not distributed in the dissolution proceedings. After the divorce, the wife removed the husband as a beneficiary. Then their daughter died. Both the husband and wife claimed the proceeds. The life insurance company interpleaded the policy proceeds with the district court. The district court found the wife was entitled to all the proceeds, and the husband did not appeal that decision. The wife asserted claims of bad faith against the insurance company, arguing the action in

interpleader was frivolous, but the district court granted summary judgment in favor of the company, finding an action in interpleader was appropriate. The Ninth Circuit affirmed, stating that interpleader is proper when a stakeholder has at least a good faith belief that there are conflicting colorable claims. *Michelman v. Lincoln National Life Insurance Company* (Ninth Circuit; July 12, 2012.) 685 F.3d 887.

### **Court dismisses appeal when corporate party filed a certificate of dissolution of corporation.**

One week after being served with appellant's opening brief, a corporation filed a certificate of dissolution with the California Secretary of State, indicating the corporation "has been completely wound up." The appellate court noted a dissolved corporation continues to exist for the purpose of winding up its affairs, but that "the continued pursuit of this lawsuit cannot be deemed part of the winding up process," and dismissed the appeal. *Mongols Nation Motorcycle Club, Inc. v. City of Lancaster* (Cal. App. Second Dist., Div. 3; August 2, 2012) 208 Cal.App.4th 124.

### **Class action and damages allegations out; equitable allegations in.**

Plaintiffs claimed wireless telephone companies made material misrepresentations regarding the number of usable minutes in subscriber plans. The trial court sustained defendants' demurrer to the class action allegations, but overruled it with regard to the causes of action seeking injunctive relief under the UCL [*Business and Professions Code* §17200 *et seq.*]. The court stated: "Regardless of whether Plaintiffs are able to pursue claims for individual damages or class restitution, the adequacy of Defendants' disclosures of the contested billing practice, and whether at least some members of the public are likely to be deceived are not issues that can be resolved as a matter of law on demurrer." *Tucker v. Pacific Bell Mobile Services* (Cal. App. First Dist., Div. 5; August 7, 2012) 208 Cal. App.4th 201.

### **No fourth amendment protection in hotel registry records.**

City ordinance requires hotel operators to maintain certain registry information

concerning guests, including their names, addresses and vehicle information, and to make the information available to police officers upon request. Motel operator challenged the ordinance, arguing it amounted to an unreasonable invasion of his private business records without a warrant. Both the trial court and the Ninth Circuit rejected the challenge, finding registry information was not private from the operator's perspective and there was no reasonable expectation of privacy. *Patel v. City of Los Angeles* (Ninth Circuit; July 17, 2012) 686 F.3d 1085.

### **Play discovery games and ignore a court order from a federal judge, and there will be consequences.**

The judge denied the first motion to compel production of documents because the parties had not met and conferred, but granted the second motion to compel, ordering the defendant to produce the documents. At a pretrial conference, the court was told the documents had not been produced, and again ordered their production. The day after trial was supposed to begin, a motion for sanctions was filed. On the day of the hearing, counsel informed the court everything he had was produced. One of the documents, a single page, page 20, was heavily redacted, but pages 1 through 19 nor any pages past 20 had not been produced. The court ordered an unredacted version of page 20 to be produced by the end of the day. Instead, an entirely different document, one that was responsive to the original request, was produced. The court ordered defendant's answer stricken, a default judgment entered and a jury trial to determine the amount of damages to be awarded to the plaintiff. The judgment totaled \$5,270,230.06. The Ninth Circuit affirmed all of the trial court's orders, except the one dismissing the plaintiff's claim for punitive damages, which it reversed. But that's not all it did. As to the defense lawyer, the appeals court stated: "Harold Gewerter appears to have committed numerous ethical violations. We recommend that the district court, in the exercise of its discretion report Mr. Gewerter to the state bar to determine whether disbarment or some other sanction is merited." *Hester v. Vision Airlines* (Ninth Circuit; July 18, 2012) 687 F.3d 1162.

### **Debt collection violation in mailing collection notice to debtors' place of employment in "care of" employer.**

The Ninth Circuit found class certification should have been granted in favor of plaintiffs when defendant debt collector violated the *Fair Debt Collection Practice Act's* [15 U.S.C. §1692c(b)] prohibition on communication with third parties by mailing debt collection notices in care of debtors' employer. *Evon v. Law Offices of Sidney Mickell* (Ninth Circuit; August 1, 2012) 688 F.3d 1015.

### **Same sex couple in child custody dispute.**

M.G. and L.M. are both women who lived together for five years as same-sex partners, but were not domestic partners pursuant to *Family Code* §297. M.G. adopted a baby and took maternity leave from work for his first three weeks of life. L.M. said she took leave for the next three weeks. Both participated in the child's care. In 2003, when the child was a little over three years old, the couple's relationship ended, and the child resided primarily with M.G. but spent the night at L.M.'s home several times a month. The child calls L.M. "mom" or "mommy," and L.M. refers to him as her son. In 2009, when the boy was nine years old, M.G. informed L.M. she planned to relocate to Europe with the child for 18 months because M.G.'s domestic partner would be temporarily assigned there for her job. L.M. filed a petition to establish a parental relationship with the boy pursuant to the *Uniform Parentage Act* [*Family Code* §7600 *et seq.*] The trial court adjudged L.M. to be a parent of the child because she received the child into her home and held him out to the world as her natural child. The court permitted M.G. to travel to Europe for the 2010-2011 school year with certain rights of visitation by L.M. and a follow-up hearing to determine whether the stay in Europe should be extended to the full 18 months. The appellate court affirmed. *L.M. v. M.G.* (Cal. App. Fourth Dist., Div. 1; August 2, 2012) 208 Cal.App.4th 133.

### **Statute of limitations bars suit against accounting firm.**

The president of a company forced to cease operation due to its liability for unpaid

payroll taxes sued its accounting firm for professional negligence. The accounting firm asserted the action was barred by the two-year statute of limitations in *Code of Civil Procedure* §339, and the trial court sustained its demurrer without leave to amend. The appellate court affirmed, stating the plaintiff “has not successfully pled around the two-year statutory bar, nor has he supplied a showing of any realistic possibility of successful amendment.” *Czajkowski v. Haskell & White, LLP* (Cal. App. Fourth Dist., Div. 1; August 3, 2012) 208 Cal.App.4th 166.

**Summary judgment in favor of bank reversed in identity theft case.**

Fraudulent accounts were opened in plaintiff’s name, so he advised credit reporting agencies which, in turn, notified various banks of the situation. Chase Bank USA did perform an investigation but continued to report a fraudulently opened account as lost or stolen and the thief’s address as plaintiff’s address. The trial court granted summary judgment in favor of defendants. The Ninth Circuit reversed, finding there were issues of material fact whether the bank violated its duties to protect consumers under 15 U.S.C. §1681i(a)(2). *Drew v. Equifax Information Services, LLC* (Ninth Circuit; August 7, 2012) 690 F.3d 1100.

**Hoist by its own petard.**

In an underlying suit, a worker sued a crane company for work-related injuries. The crane company cross-complained against

the worker’s employer, seeking indemnity. There had been a form contract between the crane company and the employer which specified that Pennsylvania law would be followed. The trial court found the indemnity agreement was inapplicable to the worker’s claim under Pennsylvania law, found in favor of the employer and ordered the crane company to pay \$161,669.87 for the employer’s attorney fees. On appeal, the crane company contended the trial court erred in applying Pennsylvania law. Unimpressed with the crane company’s arguments, the appellate court affirmed, stating: “Appellant Maxim Crane Works was hoist by its own petard when the trial court enforced an unfavorable choice-of-law provision in a form contract written by Maxim.” *Maxim Crane Works, L.P. v. Tilbury Constructors* (Cal. App. Third Dist.; August 8, 2012) 208 Cal.App.4th 286.

**All insurers pay.**

The California Supreme Court considered questions of insurance coverage in connection with a federal court-ordered cleanup of the Stringfellow Acid Pits waste site. The opinion reaffirmed “the ‘continuous injury’ trigger of coverage,” as that principle was explained in *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 655, [913 P.2d 878; 42 Cal.Rptr.2d 324] (*Montrose*) and the “all sums” rule adopted in *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 55-57, [948 P.2d 909; 70 Cal.Rptr.2d 118] (*Aerojet*), and conclude[d] that the principles announced in those cases apply to the insurers’ indem-

nity obligations in this case, so long as the insurers insured the subject property at some point in time during the loss itself.” The court concluded “the all sums approach to insurance indemnity allocation applies to the State’s successive property or long-tail first property loss” and “allocation of the cost of indemnification . . . should be determined with stacking.” *State of California v. Continental Ins. Co.*, (Cal. Supreme Ct.; August 9, 2012) 55 Cal.4th 186.

**Trial court must hold hearing on whether parties agreed to class arbitration.**

The trial court granted defendant’s motion to compel arbitration, but rejected its request that the court order individual arbitration. The appellate court granted defendant’s petition for extraordinary relief and ordered the trial court to vacate its order denying individual arbitration and provide the parties with an opportunity to submit evidence and argument on the issue of whether the arbitration contract reflects a mutual intent to permit class arbitration. *Truly Nolen of America v. Sup. Ct. (Alvaro Miranda)* (Cal. App. Fourth Dist., Div. 1; August 9, 2012) 208 Cal.App.4th 487.

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