



Litigation Update

Litigation Section News

December 2012

Laches applied in copyright claim. Works were registered with the Copyright Office in 1976 and assigned to a production company and then acquired by MGM who used them to make the film *Raging Bull* based on the life of a retired boxer, Jake LaMotta. Plaintiff acquired the renewal rights in the works and renewed the copyrights in 1991. In 2009, plaintiff sued MGM for infringing copyrights. The trial court applied the equitable doctrine of laches. The Ninth Circuit affirmed, noting it was undisputed plaintiff was aware of potential claims in 1991 and the reasons asserted for the delay, family illnesses and disabilities, were unsupported by the evidence. *Petrella v. Metro-Goldwyn-Mayer, Inc.* (Ninth Circuit, August 29, 2012) 695 F.3d 946, [104 U.S.P.Q.2D (BNA) 1144; Copy. L. Rep. (CCH) P30,310].

Two arbitration agreements signed...which will be upheld? Woman and her accountant/Oakwood Capital Management agreed any dispute between them would be decided under California law through arbitration in accordance with American Arbitration Association [AAA] rules. The agreement between the woman and Ameritrade provides for arbitration governed by Nebraska law in accordance with *Financial Industry Regulatory Authority* [FINRA] rules. The trial court denied the petitions for arbitration because of the risk of inconsistent rulings. Regarding Oakwood, the appellate court affirmed, finding there was a risk of duplicative or conflicting rulings. As to Ameritrade, the appellate court reversed, noting that unlike *California's Arbitration Act*, Nebraska law does not authorize a court to stay arbitration or refuse to enforce an arbitration provision to avoid duplicative or conflicting rulings. *Mastick v. TD Ameritrade* (Cal. App. Second Dist., Div. 6; October 9, 2012) 209 Cal.App.4th 1258.

No prevailing party fees for work done by "of counsel." May a law firm recover attorney fees under a prevailing party clause when the firm is a successful litigant represented by "of counsel?" An appellate court held that "because the relationship between a law firm and — 'of counsel' is close, personal, regular, and continuous, we conclude that a law firm and — 'of counsel' constitute a single, de facto firm, and thus, a law firm cannot recover attorney fees under a prevailing party clause when, as a successful litigant, it is represented by — 'of counsel'." *Sands & Assoc. v. Juknavorian* (Cal. App. Second Dist., Div. 1; October 10, 2012) (As. Mod., October 30, 2012) 209 Cal.App.4th 1269.

Same business, different name. Investor provided \$75,000 toward investment and was to receive 100 percent of the net cash receipts until his investment was recouped. Unbeknownst to him, the company formed another company doing the same kind of business under a different name. The court found the corporation could not escape liability by shifting assets and changing its name. The jury awarded \$3.8 million in compensatory damages and another million in punitive damages, and the appellate court affirmed. *Cleveland v. Johnson* (Cal. App. Second Dist., Div. 8; October 11, 2012) 209 Cal.App.4th 1315.

Body shop that endorsed insurance check held liable for conversion of credit union's interest in the proceeds. A credit union financed the purchase of a Bentley in the amount of \$136,126. The car was collateral for the loan and the owner was required to maintain insurance for the car. The owner did fulfill his obligation to have insurance but did not name the credit union as an additional insured on the policy. The owner took the Bentley to a shop for repairs and an insurance adjuster

appraised the damage and sent a check made out to the owner and the body shop, but not the credit union. The check was cashed after the body shop endorsed it at the owner's request, but the owner had not authorized any work on the car, and the body shop did no repair work, and did not receive any of the proceeds from the check. Both the trial court and the appellate court found that by assisting the owner to negotiate the insurance check, the body shop was liable for conversion of the credit union's interests, since the credit union had an equitable lien on the insurance proceeds. *Los Angeles Federal Credit Union v. Madatyan* (Cal. App. Second Dist., Div. 5; October 11, 2012) 209 Cal.App.4th 1383.

State not liable for accident caused by employee driving to work from a medical workers compensation appointment. Employee of a state prison who was injured on the job was driving to work after seeing a Workers Compensation doctor for the injury when she allegedly caused an accident which resulted in severe personal injuries to plaintiff. Following presentation of plaintiff's case, the trial court entered nonsuit in favor of the State. The appellate court affirmed, finding the employee was not in the course and scope of her employment when the accident occurred. *Fields v. State of California* (Cal. App. Fifth Dist.; October 11, 2012) 209 Cal.App.4th 1390, [77 Cal. Comp.Cases 856].

Supermarket not liable for selling beer to passenger of driver who killed another in car accident. A checker at a Safeway store sold a 12-pack of beer to a man under the age of 21, who was the passenger in a car that caused an accident a few minutes later, killing the son of plaintiffs. The checker asked for identification and was shown a forged California driver's license indicating the purchaser of the beer was over 21. Noth-

ing about the license alerted the checker it was not genuine. The driver/companion of the purchaser estimated he drank a half a bottle of beer while driving toward Sonoma State University prior to the accident. The parents of the deceased brought an action against Safeway alleging violation of *Business and Professions Code* §25602.1 which makes it illegal to sell alcohol to an obviously intoxicated minor. The trial court entered summary judgment in favor of Safeway. The appellate court affirmed, noting “the person to whom [Safeway] sold alcohol was not the person whose negligence allegedly caused the injury at issue. *Ruiz v. Safeway* (Cal. App. First Dist., Div. 5; October 12, 2012) 209 Cal.App.4th 1455.

Motion to compel arbitration denied. Employer revised its handbook to include an arbitration agreement. The employee charged with collecting signatures to the arbitration agreement, who is the plaintiff here, did not sign it herself, although she led the employer to believe she had. She sent an email to executives which included a question that “those who have not signed are inquiring about what it means to his, or her, status.” Shortly thereafter, plaintiff resigned, and it is undisputed she never signed the arbitration agreement and brought an action against the employer. Defendant employer demanded arbitration, and the trial court denied its motion. The appellate court found plaintiff was not equitably estopped from disputing her claim should be arbitrated, that there was no implied-in-fact agreement to arbitrate and that the trial court properly denied the motion to compel arbitration. *Gorlach v. The Sports Club Company* (Cal. App. Second Dist., Div. 4; October 16, 2012) 209 Cal.App.4th 1497.

Injunction against using automatic dialer to call cell phones. The district court granted a preliminary injunction motion and provisional class certification restraining a debt collection service from using an automatic dialer to place calls to debtors’ cellular telephones. The Ninth Circuit affirmed, finding the plaintiff demonstrated irreparable harm due to invasion of consumers’ rights of privacy under the *Telephone Consumer Protection Act* [TCPA, 47 U.S.C. §227] *Meyer v. Portfolio Recovery Associates* (Ninth Cir.; October 12, 2012) 696 F.3d 943.

Pregnancy discrimination verdict upheld. Woman employee was fired three hours after returning from pregnancy leave. In her action alleging wrongful termination and violation of the *California Fair Employment and Housing Act* [FEHA *Government Code* §12940], a jury awarded her \$10,000. After the verdict, the court granted her \$50,858.44 for attorney fees. The employer argued on appeal the trial court erred in permitting the employee to prove her pregnancy-related leave was “a motivating reason” for her discharge rather than the “but for” cause of her discharge. The employer also argued the trial court erred when it refused to permit it to avoid liability by proving it would have made the same decision even in the absence of a discriminatory or retaliatory motive. It also challenged the attorney fee award because the verdict form failed to specify whether the employee prevailed on the statutory or common law cause of action. The appellate court found no error in the jury instructions, and found the employer invited any error in the verdict form when it prepared it for the court. *Alamo v. Practice Management Information Corporation* (Cal. App. Second Dist., Div. 7; October 18, 2012) 210 Cal.App.4th 95.

Jury did not wrongfully consider insurance in a slip & fall case. After a defense verdict in a slip & fall case, the plaintiff moved for a new trial, attaching the declaration of one juror to her motion. The declaration stated in part: “the jury discussed the belief that the plaintiff, Jean Barboni, must have already been paid on a homeowner’s insurance claim by an insurance company for the slip and fall injury that was the subject of the case. The jury wondered aloud and was concerned that a verdict in plaintiff’s favor would be a double recovery.” The defense attached eight declarations, most claiming no recollection of discussions about insurance during jury deliberations. The trial court denied the motion for new trial, and the appellate court affirmed, deferring to the trial court’s conclusion no juror misconduct occurred. *Barboni v. Tuomi* (Cal. App. Fourth Dist., Div. 3; October 22, 2012) 210 Cal.App.4th 340.

Measure of damages decided in two pet cases. In the first case,

two dogs were barking at each other through a fence. One of the neighbors shot and wounded the other neighbor’s dog. A veterinarian had to amputate the wounded dog’s leg. In the second case, a vet nicked and cut a dog’s intestine during liver surgery, and then left a sponge inside the dog, resulting in internal injuries. The appellate court posed the question: “What is the measure of damages for the wrongful injury of a pet?” and answered: “We hold that a pet owner is not limited to the market value of the pet and may recover the reasonable and necessary costs incurred for the treatment and care of the pet attributable to the injury.” *Martinez v. Robledo* and *Workman v. Klause* (Cal. App. Second Dist., Div. 2; October 23, 2012) 210 Cal.App.4th 384.

What happens in a divorce proceeding stays in the divorce proceeding. During a divorce, one spouse allegedly made false statements about the other resulting in a libel action. The appellate court held the statements, whether true or false, whether made with or without malice, fall squarely within the litigation privilege [*Civil Code* §47]. *Holland v. Jones* (Cal. App. Second Dist., Div. 1; October 23, 2012) 210 Cal.App.4th 378.

Repaired instead of replaced. Plaintiff’s car was damaged in an accident. As provided in her insurance contract, her insurer elected to repair rather than pay for the damaged vehicle. She was unsatisfied with the result and sued her insurer, but lost in the trial court when she did not prove her vehicle could not be repaired to its pre-accident condition in her breach of contract cause of action. She also lost on her contention the insurance company breached its covenant of good faith and fair dealing by writing a contract which eliminates the need to cover diminution in value, which claim the appellate court called “nonsensical.” *Carson v. Mercury Insurance Co.* (Cal. App. Fourth Dist., Div. 3; October 23, 2012) 210 Cal.App.4th 409.

Qui tam action for insurance fraud not subject to motion to strike under anti-slapp statute. An employee of a biotechnology company signed an agreement with his employer which provided that any invention conceived by him while at the

company belonged to the company. While employed there, he invented a unique biotechnology process and started his own business to make a profit from his invention. The former employer and former employee became involved with litigation, and the former employee and his new company made a claim against their insurer. An employee of the new company brought a separate action on behalf of the public alleging the former employee and his new company engaged in insurance fraud. The trial court granted a special motion to strike under the anti-SLAPP statute [CCP §425.16]. The appellate court reversed, finding a qui tam action brought on behalf of the general public under *Insurance Code* §1871.7 falls within the public interest exception of CCP §427.17 (b). *The People ex rel. Michael Strathmann v. Acacia Research Corporation* (Cal. App. Fourth Dist., Div. 3; October 24, 2012) 210 Cal.App.4th 487.

Summary adjudication of issues in insurance bad faith cases reversed. In a fire damage/insurance bad faith case, the trial court granted defendants' motions for summary adjudication of issues. As to the plaintiffs who lost because they did not timely submit a proof of loss, the appellate court reversed, stating: "In order to enforce a defense based upon plaintiffs' failure to provide a timely proof of loss, [the insurance company] must show it suffered substantial prejudice as a result." Regarding the plaintiffs who lost because they delayed in giving a notice of loss, the appellate court reversed, finding the insurance company "forfeited the defense by not specifically objecting to the untimely notice of loss." With regard to the court's granting SAI to the plaintiffs who sued for unfair business practices because such an action is barred by *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, [758 P.2d 58; 250 Cal.Rptr. 116], the appellate court reversed "because this cause of action is not barred by *Moradi-Shalal*." As to the grant of SAI on the causes of action for joint venture and alter ego liability, the appellate court affirmed, stating the plaintiffs "failed to show the existence of a triable issue of material fact as to an inequitable result from treating the corporations as separate entities." *Henderson v. Farmers Group, Inc.*

(Cal. App. Second Dist., Div. 4; October 24, 2012) 210 Cal.App.4th 459.

Collection assignment valid. A creditor and a creditor assignee reached an agreement whereby the assignee agreed to collect a debt and pay the creditor \$5,000, \$100 per month until the \$5,000 was satisfied and 50 percent of the recovery. The trial court found the agreement to be void against public policy because it did not constitute a valid assignment of claims, but a joint venture whereby the creditor provided the causes of action and the assignee provided legal representation for the venture, and thus, violated *Business and Professions Code* §6125 which prohibits the unauthorized practice of law. The appellate court reversed stating the assignee's "agreement to split with [the creditor] any recovery he obtained in prosecuting those claims did not undermine the validity of the assignment of legal title to those claims. Such arrangements are legal in collection cases and do not create an attorney-client relationship between the assignor and the assignor." *Fink v. Shemtov* (Cal. App. Fourth Dist., Div. 3; October 24, 2012) 210 Cal.App.4th 599.

Burden of proof shifts in equitable contribution action. After a construction defect action settled, one insurer brought an action for equitable contribution against another insurer. The trial court ordered defendant to pay 43 percent of the defense costs and settlement as well as prejudgment interest. The appellate court stated "the burdens and proof are altered somewhat when one insurer with a defense duty does not join in the defense of the underlying action." It further stated the plaintiff did not have to prove actual coverage, only the potential for coverage. Nor did plaintiff have to establish covered damages in any amount, but merely that the claims in the construction defect suit were potentially covered. Defendant had the burden of proving the absence of actual coverage as an affirmative defense, and it did not meet that burden. It also forfeited its right to challenge the reasonableness of defense costs and amounts paid in settlement. Accordingly the appellate court found the trial court did not abuse its discretion and affirmed all of its rulings except the award of prejudgment interest. With regard to prejudgment interest,

the appellate court said *Civil Code* §3287, requires damages to be "certain, or capable of being made certain by calculation," and defendant was not able to compute the damages, so that portion of the judgment was reversed. *St. Paul Mercury Insurance Company v. Mountain West Farm Bureau Mutual Insurance Company* (Cal. App. Second Dist., Div. 3; October 25, 2012) 210 Cal.App.4th 645.

Lawyer may cross-complain against other lawyers who independently reviewed settlement. It started out the usual way. Lawyer had the temerity to sue client for fees, and client promptly cross-complained for legal malpractice in the handling of the underlying marital dissolution action. Lawyer turned around and cross-complained against other lawyers who gave counsel in the settlement of the underlying action. The trial court granted a motion to strike under the anti-SLAPP statute [CCP §425.16] and dismissed the lawyer's cross-complaint. The appellate court reversed the order striking the cross-complaint, stating "the claim does not involve activity protected by the anti-SLAPP statute." *Chodos v. Cole* (Cal. App. Second Dist., Div. 5; October 25, 2012) (As Mod., November 7, 2012) 210 Cal.App.4th 692.

Those running for judicial office beware! Judge was publicly admonished for violating the *Political Reform Act* [*Government Code* §§81000-91014.] when he ran for judicial office in 2008. At that time, he was an attorney-candidate. An audit of the judge's campaign committee by the Fair Political Practices Commission revealed violations of the Act. There was no evidence of any intent to conceal information from the public, and the violations were of the result of a failure to sufficiently oversee the work of an inexperienced campaign treasurer. The Commission on Judicial Performance ordered public admonishment of the judge. *In the Matter Concerning Judge Charles R. Brehmer* (Comm. on Judicial Performance; October 25, 2012)

Neighbor pays for "hack job" to tree. Another case involving a neighbor cutting down portions of a tree. The trial court awarded damages of \$22,530, which it doubled under *Civil Code* §3346 to total \$45,060. Under *Civil Code* §1029.8, the

court awarded an additional \$50,148 for attorney fees because the tree trimmer was unlicensed. Calling the tree cutting a “hack job,” the appellate court affirmed the damages award, but found section 1029.8 did not apply and reversed the attorney fee award. *Rony v. Costa* (Cal. App. First Dist., Div. 1; October 26, 2012) 210 Cal.App.4th 746.

But the parole board was wrong. Under *Penal Code* §3550, the Board of Parole Hearings denied medical parole to a quadriplegic inmate who requires 24-hour care. The Court of Appeal reversed, concluding it found no evidence showing the conditions of the inmate’s release would reasonably pose a threat to public safety. *In re Steven C. Martinez on Habeas Corpus* (Cal. App. Fourth Dist., Div. 1; October 26, 2012) 210 Cal.App.4th 800.

Service of process quashed. Plaintiff/tenant sued defendant/owner for constructive eviction and fraud. Plaintiff’s process server purportedly served defendant by substituted service by serving defendant’s mother at the California address provided by defendant for plaintiff to remit her monthly rental payments, and checking “home” on the proof of service. The trial court granted defendant’s motion to quash service. The appellate court affirmed, noting there was no evidence presented that defendant was other than a resident of England when service was attempted, and plaintiff was required to show that service of process on defendant comported with the Hague Convention, or a proper basis why the Hague Convention did not apply. *Lebel v. Mai* (Cal. App. Second Dist., Div. 8; November 6, 2012) 210 Cal.App.4th 1154.

Baby needs new shoes. Plaintiff brought an action to recover his funds after he entered into an oral agreement with defendant by which he transferred two sets of funds to defendant, one to play poker according to plaintiff’s specific instructions where it was legal to do so and the other as a loan for defendant’s living expenses. The trial court sustained defendant’s demurrer without leave to amend on public policy grounds because the contract involved a gambling consideration. The Court of Appeal reversed and remanded, stating: “In this case, we hold that an action lies to recover funds advanced by one party to an-

other, to enable the latter to engage in legal gambling where the agreement reserves the right of the party advancing the money to terminate the relationship and recover money not expended.” *Kyablue v. Watkins* (Cal. App. Second Dist., Div. 4; November 6, 2012) 210 Cal.App.4th 1288.

Fourth amendment violation for seizing homeless persons’ shopping carts. Nine homeless persons living on Skid Row filed suit against the City of Los Angeles, alleging their constitutional rights were violated when the City seized and destroyed their personal possessions temporarily left on public sidewalks while they attended to necessary tasks. The trial court issued an injunction against the City from performing regular “clean-ups,” and the Ninth Circuit affirmed, stating: “We conclude that the Fourth and Fourteenth Amendments protect homeless persons from government seizure and summary destruction of their unabandoned, but momentarily unattended, personal property.”

The dissenting judge conceded the homeless persons might very well have a property interest in the items seized, “but whether that interest is one that society would recognize as reasonably worthy of protection where the personal property is left unattended on public sidewalks” is the pivotal question. The dissenting judge quoted signs blanketing the area: “Please take notice that *Los Angeles Municipal Code* section 56.11 prohibits leaving any merchandise, baggage or personal property on a public sidewalk. The City of Los Angeles has a regular clean-up of this area scheduled for Monday through Friday between 8:00 and 11:00 am. Any property left at or near this location at the time of this clean-up is subject to disposal by the City of Los Angeles.” *Lavan v. City of Los Angeles* (Ninth Cir.; September 5, 2012) 693 F.3d 1022.

No fourth amendment violation for tasing suspect to death. In a bloody domestic violence situation, police used a taser on a suspect who would not release hold of a child. The suspect went into cardiac arrest and died. The district court granted summary judgment to the officers and the manufacturer. The Ninth Circuit affirmed, stating that courts must balance the nature and quality of the intrusion against the countervailing

governmental interests at stake. While there was significant intrusion upon the deceased’s Fourth Amendment rights, it was reasonable, the appeals court said. *Marquez v. City of Phoenix* (Ninth Cir.; September 11, 2012) (As Mod. October 4, 2012) 693 F.3d 1167.

Commissioner runs against judge and loses, both the election and her job. A temporary court commissioner challenged a sitting judge in an election and lost. Shortly thereafter, the executive committee of the superior court adopted a policy which rendered the commissioner ineligible to serve as a commissioner. After she lost her job, she brought a civil rights action under 42 U.S.C. §1983 alleging the policy was enacted in retaliation for her challenge to the incumbent judge in violation of her free speech rights under the First Amendment and the California Constitution. The Ninth Circuit stated: “While the timing and targeted effect of the Superior Court’s policy are certainly suspicious, we do not reach the merits of Schmidt’s federal or state law retaliation claims because the judges of the Superior Court’s Executive Committee enjoy legislative immunity for their decision to alter the minimum qualifications to serve as a temporary commissioner. We therefore affirm the district court’s grant of summary judgment to the Defendants.” *Schmidt v. Contra Costa County* (Ninth Cir.; September 10, 2012) 693 F.3d 1122.

He broke the sound barrier, but not the statute of limitations barrier. Plaintiff, a recognized figure in aviation history, brought an action in 2008 for invasion of privacy against persons who sell aviation-related memorabilia who posted information about plaintiff on their website in 2003. The district court granted summary judgment on the issue of statute of limitations. The Ninth Circuit affirmed, stating: “Yeager argues that the website was republished, and the statute of limitations restarted, each time the Bowlins added to or revised content on their website, even if the new content did not reference or depict Yeager. . . . We reject Yeager’s argument and hold that, under California law, a statement on a website is not republished unless the statement itself is substantively altered or added to, or the website is directed to a new audience.” *Yeager v. Bowlin* (Ninth

Cir.; September 10, 2012) 693 F.3d 1076.

Abortion prosecution. In a small town in Idaho, where abortion facilities are unavailable, an unemployed, unmarried woman with three children, ages 2, 11 and 18, ordered medication for a medication-induced abortion over the internet. The local prosecutor filed a felony complaint against her. The woman faced up to five years in prison. Four months later, the felony complaint was dismissed without prejudice, and the prosecutor would not commit, one way or the other, regarding whether it would be re-filed. The woman filed a class action complaint in federal district court against the prosecutor, and the district court issued a preliminary injunction restraining the prosecutor from enforcing Idaho's abortion statute. The prosecutor appealed to the Ninth Circuit, claiming the injunction was overbroad and there was an insufficient showing the woman would prevail on the merits. The Ninth Circuit reversed to the extent the injunction grants relief to anyone but the woman, and affirmed the trial court's determination the woman will likely succeed with her constitutional challenge to part of Idaho's abortion law. *McCormack v. Hiedeman* (Ninth Cir.; September 11, 2012) 694 F.3d 1004.

Dismissal of age discrimination/employment case reversed. The *Age Discrimination in Employment Act* [ADEA, 29 U.S.C. §621, *et seq.*] prohibits an employer from discharging an employee who is over forty years of age because of the employee's age. The district court dismissed a complaint alleging plaintiff was at least forty years old; her performance was satisfactory or better; she received consistently good performance reviews; she was discharged; and, five younger persons performing the same job kept their jobs. The Ninth Circuit reversed, stating: "Although Sheppard's complaint is brief, her allegations are sufficient to state a prima facie case of discrimination." *Sheppard v. David Evans and Associates* (Ninth Cir.; September 12, 2012) (Case No. 11-35164) 694 F.3d 1045, [115 *Fair Empl. Prac. Cas.* (BNA) 1665].

No qualified immunity for sheriff's officers; question of fact whether fourth amendment violation. A woman was shot in the jaw by her husband. Paramedics deter-

mined she needed to be transported by air ambulance, and had her in an ambulance to take her to the landing zone. A police sergeant at the scene refused to let the ambulance leave immediately because he viewed the area as a crime scene and thought the victim had to be interviewed. The ambulance was delayed somewhere between 5 and 12 minutes. The trip to the landing zone took 11 minutes, and the woman died en route. The deceased family brought an action against various Sheriff's officers under 42 U.S.C. §1983. The district court denied summary judgment. The Ninth Circuit affirmed, noting that normally Sheriff's officers could not be held liable under §1983 for an injury inflicted by a third party, but the danger exception applies when government officers affirmatively place a victim in a position of danger.

The deceased's father also sued the Sheriff's officers for violating the Fourth Amendment. At the scene, the sergeant had also ordered the parents separated. The father was outside pacing the driveway when he was informed his daughter died. He attempted to leave the driveway, find his wife and tell her about their daughter's death. He was sprayed with pepper spray, struck with a baton and handcuffed. The Ninth Circuit found there was a question of fact, and affirmed the district court's denial of summary judgment. *Estate of Kristen Marie Maxwell Bruce v. County of San Diego* (Ninth Cir.; September 13, 2012) 697 F.3d 941.

Facebook class action settlement approved. Facebook launched a program called "Beacon" which updated a member's profile to reflect actions the member took on websites belonging to companies contracting with Facebook. Thus, for example, if a member rented a movie through the participating website Blockbuster.com, Blockbuster would transmit information about the rental to Facebook, and Facebook would broadcast that information to everyone in the member's online network. Many members complained about dissemination of private information. A class action was filed and settled. The district court approved a \$9.5 million settlement; \$3 million was for attorney fees and costs and the remaining \$6.5 million was to set up a charity called Digital Trust Founda-

tion, DTF, to fund and sponsor programs designed to educate users and others relating to the protection of personal information from online threats. The Ninth Circuit affirmed, holding the district court properly limited its review of the settlement agreement to whether it was fair, adequate and free from collusion. *Lane v. Facebook* (Ninth Cir.; September 20, 2012) 696 F.3d 811.

Plaintiff, released after 19 years in prison, given leave to amend to allege coerced confession in violation of his fifth amendment rights. Plaintiff was 18 in 1984 when he witnessed a drive-by shooting. Under police protection for months, he testified for the prosecution. During those months, plaintiff formed a friendship with a detective who became a father figure to him. The next year, plaintiff and other neighbors gathered to watch police activity when two people in the neighborhood were murdered. Meanwhile, plaintiff was arrested for robbery and fearing retaliation for his previous testimony reached out to the detective. The detective arranged for separate jail housing where he was "a sitting duck for predatory informants." Jail informants concocted a story falsely implicating plaintiff with the murders. Four detectives, including the one who was his father figure, interviewed plaintiff about the murders, without advising him of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, [86 S.Ct. 1602, 16 L.Ed.2d 694], suggesting he would be in prison with the man he previously testified against, a member of the Bloods, a criminal street gang. He worried that if he did not cooperate, police would remove him from protective housing in the jail. The questioning lasted many hours without food or bathroom breaks. He signed a statement written by police, which he did not read, and was charged with the murders. No physical, or forensic evidence connected him to the murders. After he was convicted and spent 19 years in prison, he was released on a writ of habeas corpus, and brought an action for damages under 42 U.S.C. §1983. The trial court granted summary judgment to the City and the detectives. The Ninth Circuit reversed to give plaintiff an opportunity to amend to plead an explicit Fifth Amendment violation. *Hall v. City of Los Angeles* (Ninth Cir.; September 24, 2012) 697 F.3d 1059.

Claim against drug company dismissed. One-year-old died after receiving his vaccine shot. His parents received \$250,000 compensation from a government fund, and then brought action against the manufacturer of the vaccine. The federal district court dismissed the action on a motion for summary judgment, finding the claim was foreclosed by the *National Childhood Vaccine Injury Act* [42 U.S.C. § 300aa-22]. The Ninth Circuit affirmed. *Holmes v. Merck & Co.* (Ninth Cir.; September 25, 2012) 697 F.3d 1080.

No jurisdiction. Plaintiff brought an action against an Austrian-owned railway as a result of her attempting to board a moving train in Innsbruck. She purchased a Eurail pass in California from Rail Pass Experts, a company based in Massachusetts. When attempting to board the train, she fell to the tracks through a gap in the platform and suffered injuries that ultimately required the amputation of both legs above the knees. She filed a complaint for negligence, failure to warn and design defect in California against the Republic of Austria. The district court dismissed the action and the Ninth Circuit affirmed, noting the sole basis by which courts in the United States may obtain jurisdiction over foreign states is the *Foreign Sovereign Immunities Act* [28 U.S.C. §1602] and holding no exception applied. *Sachs v. Republic of Austria* (Ninth Cir.; September 26, 2012) 695 F.3d 1021.

Jeopardy attaches after an acquittal on contempt. Two employees of a waterproofing company quit and started a competing business. The em-

ployer brought an action against them which the parties settled, including a stipulated injunction, enjoining the two employees and their new company from contacting the employer's customers. The agreement provided the trial court would retain jurisdiction over the parties pursuant to *CCP* §664.6 to enforce the terms of the agreement. The employer filed an order to show cause to have the enjoined persons held in contempt for violating the injunction, as well as a motion to enforce the stipulated settlement. The court acquitted the enjoined parties in the contempt proceedings, and declined to enforce the stipulated injunction in the settlement agreement. On appeal, the appellate court concluded the double jeopardy clause precluded it from affording the employer relief on the contempt petition. With regard to the trial court's refusing to enforce the settlement agreement, however, the Court of Appeal reversed. *Wanke v. Keck* (Cal. App. Fourth Dist., Div. 1; October 4, 2012) (As Mod. October 29, 2012) 209 Cal.App.4th 1151, [147 Cal.Rptr.3d 651].

Dead Beat Dad Remark Protected. In the midst of a contentious paternity and child support dispute, defendant wrote on a Web site that the public should be careful in dealing with plaintiff because he is a criminal and a deadbeat dad, is into illegal activities, and that she wouldn't let him into her house. Plaintiff brought an action for defamation, and the trial court granted defendant's anti-SLAPP motion under *CCP* §425.16. Agreeing the claims arise from defendant's exercise of her free speech rights, the Court of Appeal affirmed. *Chaker v. Mateo*

(Cal. App. Fourth Dist., Div. 1; October 4, 2012) 209 Cal.App.4th 1138.

Dismissal for failing to date governmental claim reversed. Plaintiff was injured while exiting a bus. In her complaint, she alleged: "On January 15, 2010, Plaintiff filed a timely claim complying with the required claims statute. On or about January 19, 2010, a [Transit District] representative called Plaintiff's representatives stating there was no date on the claim and requested that date of the incident be provided. Plaintiff subsequently provided the date of the incident to said representative, thus complying with the requirements of the government tort claim statute." After sustaining the transit district's demurrer because "the claim filed by plaintiff lacked a date of the incident and was defective," the trial court dismissed the complaint. The appellate court reversed, stating "it is reasonable to interpret plaintiff's allegations to mean that she provided the date of the incident to Transit District's representative by amending the claim in accordance with the requirements for amendment set forth in [Government Code] section 910.6." *Perez v. Golden Empire Transit District* (Cal. App. Fifth Dist.; October 5, 2012) 209 Cal.App.4th 1228, [147 Cal.Rptr.3d 709].

Senior Editor

Eileen C. Moore, Associate Justice
California Court of Appeal, Fourth District

Managing Editor

Mark A. Mellor, Esq.

Executive Committee

Lisa Cappelluti, *Chair*
Robert Bodzin, *Vice-Chair*
Carol D. Kuluva, *Treasurer*
Reuben A. Ginsburg, *Secretary*
Michael Geibelson,
Immediate Past Chair
Farzaneh Azouri
Kathleen H. Brewer
David Enzlinger
Eric P. Geismar
Ruth V. Glick
Tahj E. Gomes
Tom Greene
Jewell Hargleroad
Rhonda T. Hjort
Megan A. Lewis
Karen J. Petrulakis
William R. Seligman
Michael R. Sohigian
Edward Torpoco

Hon. Eileen C. Moore
Hon. Ronald S. Prager
Hon. James L. Warren
Donald W. Barber
Charles Berwanger
Paul S. Chan
Tanya Darrow
Lynn Duryee
Elizabeth England
Michael Fabiano
Kevin Holl
Mark A. Mellor
Bradley Patterson
Norman Rodich
Jerome Sapiro, Jr.
e. bob wallach
Joan Wolff

Board of Trustees Liaison
David Pasternak

Section Coordinator
Mitch Wood (415) 538-2594
mitch.wood@calbar.ca.gov

Administrative Assistant
Ana Castillo (415) 538-2071
ana.castillo@calbar.ca.gov

Advisors

Hon. Victoria G. Chaney
Hon. Lawrence W. Crispo
Hon. Terry Friedman
Hon. J. Richard Haden
Hon. Jamie A. Jacobs-May

BRG BERKELEY RESEARCH GROUP
Global Expert Services and Consulting
www.brg-expert.com
877.696.0391

Complex Problems.
EXPERT ADVICE.