



# Litigation Update

Litigation Section News

April 2013

## Taxpayer Action Proves Underreporting Of Profits By Indian Tribes; Plaintiff Entitled To Fees.

A taxpayer action was brought against the California Gambling Control Commission and the California State Controller alleging they failed to discharge their mandatory duty to collect money derived from gambling owed to the state by various Indian tribes. It was determined the Indian casinos underreported their net earnings by over \$100,000,000, and that \$12.8 million had been underpaid to the State of California. The appellate court determined plaintiff proved her actions were the catalyst in the State's collecting much of what was underpaid and that she was entitled to attorney fees under *Code of Civil Procedure* section 1021.5. *Cates v. John Chiang, as State Controller* (Cal. App. Fourth Dist., Div. 1; February 7, 2013) 213 Cal.App.4th 791.

## Insufficient Evidence In Support Of Motion To Amend To Seek Punitive Damages Against Hospital.

A hospital was allegedly negligent with regard to two surgeries performed on a patient. Plaintiff moved to seek punitive damages, alleging three new causes of action: Violation of Health and Safety Code section 24170 [the Protection of Human Subjects in Medical Experimentation Act]; fraud; and negligence *per se*. Evidence submitted in support of the motion to amend to add punitive damages consisted of a declaration from plaintiff's counsel and three letters from the hospital's Institutional Review Board sent to the surgeon. The trial judge permitted the amendment, and the appellate court reversed, stating: "Because plaintiff's counsel's declaration and the three letters are insufficient as a matter of law to support the motion to amend the complaint to allege punitive damages, we direct respondent court to set aside its order and enter a new order denying the motion." *Pomona Valley Hospital v. Sup.Ct.*

(*April Christine Cabana*) (Cal. App. Second Dist., Div. 5; February 7, 2013) 213 Cal. App.4th 828.

## Trial Court Told To Give Its Reasons For Denying Arbitration Petition.

Plaintiffs invested in six separate funds created by defendant, some of them investing in all six funds and others in vesting in one or more of the funds. Some of the funds contained arbitration provisions, and some did not. The trial court denied all six petitions to arbitrate. The appellate court reversed and remanded, stating: "Because Defendants failed to request a statement of decision, we must presume the trial court found *Code of Civil Procedure* section 1281.2, subdivision (c)'s conditions were satisfied on each of Defendants' six motions. We must, however, reverse the trial court's decision because the record lacks substantial evidence to support the implied finding each of section 1281.2, subdivision (c)'s conditions were satisfied on each motion. We remand the matter for the court to consider each motion under section 1281.2, subdivision (c). As explained below, some groups of Plaintiffs may satisfy section 1281.2, subdivision (c)'s conditions, but we cannot make that determination on the current record." *Acquire II, Ltd. v. Colton Real Estate Group* (Cal. App. Fourth Dist., Div. 3; February 11, 2013) 213 Cal.App.4th 959.

## Summary Judgment Reversed.

Plaintiff entered into a construction loan agreement with a bank, but the bank failed to properly make fund disbursements. As plaintiff attempted to salvage the situation, the bank went into receivership. Later defendant purchased the bank's assets through a purchase and assumption agreement. Plaintiff stopped making payments and defendant took steps to foreclose. Two days prior to foreclosure, plaintiff brought an action against defendant alleging misrep-

resentation, breach of contract and negligence. Defendant moved for summary judgment, largely based on its theory it did not assume the bank's liabilities. The purchase and assumption agreement was placed before the court only by virtue of judicial notice. Plaintiff's expert witness declared the purchase and assumption agreement before the court was not complete. The trial court granted summary judgment without addressing plaintiff's evidence the document was incomplete. The appellate court reversed, stating it agreed with plaintiff's contentions the document was not authentic and because of misconduct by defendant. *Jolley v. Chase Home Finance, LLC* (Cal. App. First Dist., Div. 2; February 11, 2013) 213 Cal.App.4th 872.

## Special Topping At Burger King.

Plaintiff brought an action for damages after he was served a hamburger at Burger King tainted with a glob of saliva later traced by DNA back to an employee. The district court dismissed because Washington law does not permit relief for emotional distress absent physical injury. The Ninth Circuit reversed the grant of summary judgment and remanded so plaintiff has an opportunity to amend. *Bylsma v. Burger King* (Ninth Cir.; February 12, 2013) (Case No. 10-36125) [CCH Prod. Liab. Rep. P19,019].

## Grant Of JNOV Reversed.

A ship used for marine education was having a live-on-board program when an adult chaperone drowned after "free-diving" off the ship. A jury returned a verdict finding liability on the part of the ship's operator, but no negligence on the part of the ship's owner. The trial judge made a post-jury verdict finding there was uncontroverted evidence the ship's owner and the ship's operator were in a joint venture, making the ship's owner liable for the operator's negligence. The judge granted plaintiff's motion

for judgment notwithstanding the verdict. The appellate court reversed, stating: “The existence of a joint venture was not alleged in plaintiff’s complaint, it was not litigated at trial, the jury was not instructed on joint venture liability, and the special verdict form asked no questions concerning the existence of a joint venture. Moreover, the trial evidence did not establish that as a matter of law [the ship’s owner] and the trip operator were in a joint venture.” *Simmons v. Ware* (Cal. App. Fourth Dist., Div. 3; February 13, 2013) 213 Cal.App.4th 1035.

### **CHP Owed No Duty Of Care To Bus Passengers Involved In Highway Collision.**

An SUV was in a collision and came to rest on its side blocking at least one lane of SR 99 when a Greyhound bus came upon the scene and another collision occurred, resulting in the deaths of three bus passengers and three SUV occupants. In the litigation which followed, Greyhound cross-complained against the California Highway Patrol (“CHP”), alleging negligence because once the first accident was reported to the CHP, the operator failed to enter the code for lane blockage. The trial court sustained the CHP’s demurrer without leave to amend. The appellate court affirmed, noting the CHP owed no duty of care to the bus passengers. *Greyhound Lines, Inc. v. Department of the California Highway Patrol* (Cal. App. Fifth Dist.; February 14, 2013) (Case No. F063590).

### **Custody Case Of Member Of Military Not Moot.**

In an action involving the International Child Abduction Remedies Act [ICARA; 42 U.S.C. § 11601], a member of the U.S. Army filed for divorce shortly after he returned from deployment to Afghanistan. His wife, a citizen of Scotland was deported and took their child with her after a federal district court concluded the child’s habitual residence was Scotland because she had taken the child there while her husband was in Afghanistan. The Eleventh Circuit dismissed the father’s appeal on the ground that once a child has been returned to a foreign country, a United States court becomes powerless to grant relief. The United States Supreme Court reversed, stating: “The Hague Convention mandates the prompt return of children to their coun-

tries of habitual residence. But such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties’ respective claims.” *Chafin v. Chafin* (U.S. Sup. Ct.; February 19, 2013) (Case No. 11-1347) [81 U.S.L.W. 4059; 24 Fla.L.Weekly Fed.S 13].

### **Despite Providing Four Months Leave Mandated By The Pregnancy Disability Leave Act, An Employer May Nonetheless Be Liable For Other Violations Under The Fair Employment And Housing Act.**

Plaintiff brought an action under the California Fair Employment and Housing Act [*Government Code* section 12900; FEHA] alleging she was disabled due to a high risk pregnancy. Her employer granted her all permissible leave available under the Pregnancy Disability Leave Law [*Government Code* section 12945; PDL], then terminated her employment when she failed to report for work. The employer asserted that once the maximum four-month leave period specified in the PDL expired, plaintiff was entitled to no further protection under FEHA. The trial court sustained the employer’s demurrer without leave to amend. The Court of Appeal reversed, stating: “We conclude that [the employer’s] proposed construction is contradicted by the plain language of the PDL, which makes clear that its remedies augment, rather than supplant, those set forth elsewhere in the FEHA.” Additionally, the appellate court stated: “Under section 12940, a woman disabled by pregnancy is entitled to the protections afforded any other disabled employee – a reasonable accommodation that does not impose an undue hardship on her employer. As the caselaw makes clear, disability leave may in some circumstances exceed four months.” *Sanchez v. Swissport, Inc.* (Cal. App. Second Dist., Div. 4; February 21, 2013) 213 Cal.App.4th 1331.

### **Student Loan Gets Larger After Debtor Loses Suit For Harassing Debt Collection.**

Plaintiff brought an action against a debt collector under the Fair Debt Collection

Practices Act [FDCPA; 15 USC § 1601] alleging she was harassed and falsely threatened in order to collect a debt after she defaulted on her student loan guaranteed by Ed Fund, a division of the California Student Aid Commission. Both the trial and appellate courts rejected her arguments. Defendant was awarded \$4,543.03 in costs under *Federal Rules of Civil Procedure*, rule 54, subdivision (d), subsection (1), which gives district courts discretion to award costs to prevailing defendants unless a federal statute provides otherwise. The United States Supreme Court held the courts have discretion to award costs to a defendant under the FDCPA. *Marx v. General Revenue Corporation* (U.S. Sup. Ct.; February 26, 2013) 133 S.Ct. 1166, [24 Fla.L.Weekly Fed.S 60].

### **In A Motion For Class Certification In Securities Action, Proof Of Misrepresentations Or Misleading Omissions Is Not A Prerequisite.**

In a securities fraud action brought by retirement plans under section 10b of the Securities Exchange Act of 1934, plaintiffs sought to certify a class. In such an action, a plaintiff must prove reliance on a material misrepresentation or omission made by a defendant. Plaintiffs invoked the “fraud on the market” presumption which provides that the price of a security traded in an efficient market will reflect all publicly available information about a company, and accordingly, a buyer of the security may be presumed to have relied on that information in purchasing the security. Here, defendant contended that certification had to be denied unless plaintiffs proved its allegations that defendant’s misrepresentations and misleading omissions materially affected the price of the stock. The United States Supreme Court held that such proof is not a prerequisite to class certification. *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds* (U.S. Sup. Ct.; February 27, 2013) 133 S.Ct. 1184, [24 Fla.L.Weekly Fed.S 67].

### **California Corporations Commissioner May Issue An Administrative Subpoena Duces Tecum And Subpoena Witnesses To Investigate Violations Of The Corporate Securities Law.**

Believing that a corporation might be engaged in violations

of the Corporate Securities Law of 1968 [CSL; *Corporations Code* section 25000], the California Corporations Commissioner issued a *subpoena duces tecum* requiring the production of certain documents. When all of the documents were not forthcoming, the Commissioner subpoenaed the custodian of records, and the corporation refused to comply. The trial court ordered compliance, and the corporate defendant appealed. The appellate court affirmed, holding the California Corporations Commissioner properly exercised its statutory authority to issue an administrative *subpoena duces tecum* and subpoena witnesses for the purpose of investigating possible violations of the CSL. *The People ex rel. Jan Lynn Owen, as Corporations Commissioner v. Media One Direct, LLC* (Cal. App. Fourth Dist., Div. 1; February 27, 2013) 213 Cal. App.4th 1480.

**Fall Off Bed In Hospital Ordinary Negligence Governed By The Two-Year Statute Of Limitations.** A patient brought an action against a hospital for general negligence and premises liability after a bed rail collapsed causing her injuries when she fell to the floor nearly two years earlier. The trial court dismissed the action, ruling the action was one for professional negligence subject to the one-year statute of limitations [*Code of Civil Procedure* section 340.5]. The appellate court reversed, holding the action sounded in ordinary negligence subject to the two-year statute of limitations [*Code of Civil Procedure* section 335.1]. *Catherine Flores v. Presbyterian Intercommunity Hospital* (Cal. App. Second Dist., Div. 3; February 27, 2013) 213 Cal.App.4th 1386.

**Lawyer Must Produce Client's Tax Returns.** Tax returns prepared by an accountant were turned over to the civil tax lawyer for the person being investigated by the IRS. The civil lawyer turned them over to a lawyer for the firm providing representation for the criminal tax investigation. That lawyer turned them over to the partner in charge of the criminal defense. The IRS issued a summons to that partner for him to produce the client's tax records. The partner refused to produce them, claiming production would violate the client's rights under the

Fifth Amendment, and the IRS sought enforcement through the court. The district court, finding the documents fell within the "foregone conclusion" exception to the Fifth Amendment, ordered production. The Ninth Circuit affirmed, stating: "For the 'foregone conclusion' exception to apply, the government must establish its independent knowledge of three elements: the documents' existence, the documents' authenticity and respondent's possession or control of the documents." *United States of America v. Sideman & Bancroft, LLP* (Ninth Cir.; January 8, 2013) (Case No. 11-15930) [2013-1 U.S. Tax Cas. (CCH) P50,135; 111 A.F.T.R.2d (RIA) 460].

**Class Action Against Life Insurance Company Not Precluded.** Plaintiffs purchased life insurance policies. The death benefit payable to survivors varies with the performance of the funds each customer selects. Because the policyholder bears the risk associated with the investments, some federal circuits have held that the policies qualify as securities. Accordingly, the federal trial court dismissed the class action under the Securities Litigation Uniform Standards Act of 1998 [SLUSA; 15 U.S.C. §78bb(f)(1)] which bars private plaintiffs from bringing class actions under certain situations. The Ninth Circuit reversed the dismissal, stating: "Plaintiffs allege that their insurer promised one thing and delivered another. That's a straightforward contract claim that doesn't rest on misrepresentation or fraudulent omission. We therefore reverse the district court's dismissal of the two contract claims, on the condition that plaintiffs amend their complaint to remove any reference to deliberate concealment or fraudulent omission. We affirm the dismissal of the class claim for unfair competition in violation of California law." *Freeman Investments v. Pacific Life Insurance Company* (Ninth Cir.; January 2, 2013) 704 F.3d 1110.

**At Most, Only Indirect Or Incidental Aid By A City For Religious Purposes.** The plaintiffs are adults who are either lesbians or agnostics and who use two parks which are partially leased by the City of San Diego to a nonprofit corporation chartered by the Boy Scouts of America. Plaintiffs allege

the leases violate provisions of the California and federal Constitutions relating to the Establishment of Religion and the denial of Equal Protection of the laws because the Boy Scouts prohibit atheists, agnostics and homosexuals from being members or volunteers and require members to affirm a belief in God. The Ninth Circuit found the leases do not violate the Constitutions because they at most constitute indirect or incidental aid by the City for a religious purpose, and reversed the district court's grant of summary judgment in favor of the plaintiffs. *Mitchell Barnes-Wallace V. City Of San Diego, (Boy Scouts Of America-Desert Pacific Council)* (Ninth Cir.; December 20, 2012) 704 F.3d 1067.

**Lawyer Equitably Estopped From Claiming No Referral Fee Due.** A referring plaintiff's firm referred a potential class action case to a lawyer who specializes in class actions. The specialty lawyer promised to pay the referring firm one-third of any legal fees recovered. The client consented in writing to the referral fee. The specialty lawyer selected a different class representative than the one referred by the referring lawyer, and "threatened that if [the referring lawyer] tried to notify the new class representatives of the fee-splitting agreement, [the specialty lawyer] would consider such action to be tortious interference with defendants' attorney-client relationship." The specialty lawyer settled the class action, which settlement included \$13.5 million for attorney fees, and gave the referring lawyer nothing. During the trial of the case brought by the referring firm against the specialty lawyer, the specialty lawyer argued the promise to pay the referral fee was unenforceable under *California Rules of Court* rule 2-200, which per-

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mits an attorney to share legal fees with another lawyer only with the client's informed written consent. The Court of Appeal held: "In this case, we hold that an attorney may be equitably estopped from claiming that a fee-sharing contract is unenforceable due to noncompliance with rule 2-200 or rule 3.769, where that attorney is responsible for such noncompliance and has unfairly prevented another lawyer from complying with the rules' mandates." *Barnes, Crosby, Fitzgerald & Zelman v. Jerome L. Ringler* (Cal. App. Fourth Dist., Div. 3; December 19, 2012) (As Mod. January 16, 2013) 212 Cal.App.4th 172, [151 Cal.Rptr.3d 134].

### **Plaintiff's State Law Failure To Warn Claim About A Medical Device Is Not Preempted.**

Plaintiff had a pump and catheter surgically implanted in his abdomen to deliver pain relief medication directly to his spine, and he ended up a paraplegic. The opinion states defendant's device caused the paralysis. The district court concluded plaintiff's action was preempted by the Medical Device Amendment [MDA] to the Food, Drug, and Cosmetic Act [FDCA] and dismissed the action. The Ninth Circuit reversed, stating: "We conclude that the MDA does not preempt [plaintiffs'] state-law failure to warn claim contained in their proposed amended complaint." *Stengel v. Medtronic Incorporated* (Ninth Circuit; January 10, 2013) 704 F.3d 1224.

### **Eighth Amendment Allegations Sufficient To Proceed Against Prison Authorities.**

A state prison inmate brought an action against correctional officers who pepper sprayed him, allegedly when he attempted to explain he was a vegetarian due to his religion, and that he was given the wrong meal. The trial court granted summary judgment to the correctional officers. The Ninth Circuit reversed and remanded based on the inmate's claim under the Eighth Amendment "because the district court failed to draw all inferences in [the inmate's] favor." *Furnace v. Sullivan, Morales, Soto* (Ninth Cir.; January 17, 2013) 705 F.3d 1021.

**\$160,000,000 Judgment Tossed.** A jury awarded \$80,000,000 on a counterclaim in a trade secrets misappropriation case involving two toy manu-

facturers, and the trial judge added another \$80,000,000 in punitive damages. The Ninth Circuit reversed because the counterclaim was not compulsory and should not have been permitted. Even though the counterclaimant lost its damages judgment, it got to keep its attorney fees awarded by the trial judge under the Copyright Act [17 U.S.C. § 505], as it successfully defended itself. *Mattel, Inc. v. MGA Entertainment, Inc.* (Ninth Cir.; January 24, 2013) 705 F.3d 1108.

### **Nonsignatory To Arbitration Agreement May Not Compel Arbitration.**

Plaintiffs each own a 2010 Toyota Prius. They signed arbitration agreements with dealerships. The car manufacturer sought to compel arbitration under those agreements, and the district court denied the request because the manufacturer was a nonsignatory to the agreements, and because it waived any right to compel arbitration by vigorously litigating the action in district court for nearly two years. The Ninth Circuit agreed and affirmed. *Kramer v. Toyota Motor Corporation* (Ninth Cir.; January 30, 2013) 705 F.3d 1122.

### **Consumer Protection Statute Does Not Apply To Online Services.**

Apple, Inc. requested or required plaintiff to provide his address and telephone number as a condition of accepting his credit card as payment for online services. *Civil Code* section 1747.08 precludes requiring a consumer to provide personal information as a condition for accepting a credit card as payment for goods or services. In an earlier case, *Pineda v. Williams-Sonoma Stores* (2011) 51 Cal.4th 524, [246 P.3d 612; 120 Cal.Rptr.3d 531], the California Supreme Court held the statute was violated when a retailer requested and recorded a customer's zip code during a credit card transaction involving purchase of a physical product. In the instant case, the Supreme Court stated: "Upon careful consideration of the statute's text, structure, and purpose, we hold that section 1747.08 does not apply to online purchases in which the product is downloaded electronically." *Apple, Inc. v. Sup. Ct. (David Krescent)* (Cal. Sup. Ct.; February 4, 2013) 56 Cal.4th 128, [292 P.3d 883, 151 Cal.Rptr.3d 841].

**The Holder Rule Permits Action Against A Lender To The Same Extent An Action Could Be Brought Against The Seller Of A Mobile Home.** Plaintiffs bought a motor home that was financed with an installment contract. Shortly after the sale, the contract was assigned by the dealership to a bank. Plaintiffs assert the motor home was defective from the start. After months passed without the demanded repairs being made, plaintiffs disclaimed their ownership in the vehicle and sued the dealership. They also sued the bank on the ground the Holder Rule allows them to assert all claims against the bank they otherwise had against the dealer. The Holder Rule, set forth in title 16, section 433.2 of the Code of Federal Regulations requires the following language in 10-point (or larger) and bold typeface: "NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER." The trial court conclud-

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ed the Holder Rule did not allow plaintiffs to assert claims against the lender, entered judgment for the bank and awarded attorney fees to the bank. The appellate court reversed, stating the plaintiffs may assert all claims against the bank they might otherwise have against the dealership, but added: “Under the Holder Rule, however, the [plaintiffs] may recover no more than what they actually paid toward the installment contract.” *Lafferty v. Wells Fargo Bank* (Cal. App. Third Dist.; February 4, 2013) (As Mod. February 27, 2013) 213 Cal.App.4th 545.

### **Officer Should Have Clarified Woman’s Rights.**

A woman was arrested by the CHP when officers found her car stopped on a highway facing westbound in the eastbound lanes with an odor of alcohol on her breath, bloodshot and watery eyes, slurred speech and an unsteady gait. She refused to take a breath test at the scene. At the station, she was read the chemical test admonition verbatim and said she would submit to a blood test. A video of the scene demonstrates she asked to make a telephone call, and that the request was not acknowledged. A phlebotomist administered the blood test. After an administrative hearing, her driving privilege was suspended. She petitioned for a writ of mandate, which the superior court granted, stating: “The ‘fair meaning’ given to Ms. Hoberman-Kelly’s statements is that she is genuinely exasperated and confused by the conflict between her right to counsel as indicated on the wall of the police station and Officer Perry’s implicit and explicit refusal to permit her to call for an attorney. Officer Perry responds by reading the admonition mechanically and makes no effort to explain that the *Miranda* right does not apply to the chemical tests.” The appellate court affirmed, noting an officer is obligated to attempt to clarify an arrested person’s confusion over when the right to counsel arises. *Hoberman-Kelly v. Valverde* (Cal. App. First Dist., Div. 3; February 5, 2013) 213 Cal. App.4th 626.

### **No Unfettered Right To Cultivate Marijuana.**

Plaintiffs are a group of individuals who use marijuana for medical purposes. They petitioned the superior court to rescind a county ordinance which declares it a nuisance to cultivate more than

a certain number of plants depending on the size of the premises. The Ordinance also declares it a nuisance to cultivate any amount of marijuana within 1000 feet of any school, school bus stop, school evacuation site, church, park, child care center, or youth-oriented facility. The trial court sustained a demurrer without leave to amend. The appellate court affirmed, stating plaintiffs’ premise is flawed, and that neither the Compassionate Use Act nor the Medical Marijuana Program grants anyone an unfettered right to cultivate marijuana for medical purposes. *Browne v. County of Tehama* (Cal. App. Third Dist.; February 6, 2013) 213 Cal.App.4th 704.

### **No Damages Under FEHA When Plaintiff Proves Discrimination And Employer Proves It Would Have Made The Same Decision Absent Discrimination; But Plaintiff May Be Awarded Attorney Fees.**

Plaintiff bus driver brought an action against a City, alleging she was fired because she was pregnant, in violation of the Fair Employment and Housing Act [FEHA, Government Code section 12940]. The City claimed she was fired for poor job performance. At trial, the City asked the court to instruct the jury that if it found a mix of discriminatory and legitimate motives, the City could avoid liability by proving that a legitimate motive alone would have led it to make the same decision to fire her. The trial court refused the instruction, and the jury returned a substantial verdict for the employee. The California Supreme Court reversed the award of damages, stating: “We hold that under the FEHA, when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability. In light of the FEHA’s express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may

be eligible for reasonable attorney fees and costs.” The case was remanded to the trial court for further proceedings. *Harris v. City of Santa Monica* (Cal. Sup. Ct.; February 7, 2013) 56 Cal.4th 203.

### **Plaintiff Talked Himself Into Jail, And The Officer Talked Himself Into A Lawsuit.**

In a per curiam opinion, the Ninth Circuit reversed the grant of summary judgment to a police department in Washington and against the plaintiff, who was arrested, and later acquitted of violating a noise ordinance. On the way to the station, the plaintiff asked the officer why he was being arrested, and the officer responded: “The crime you’re going to jail for is the city noise ordinance. A lot of times we tend to cite and release people for that or we give them warnings. However . . . you acted a fool . . . and we have discretion whether we can book or release you. *You talked yourself—your mouth and your attitude talked you into jail.*” Plaintiff filed an action for civil damages against the police officer under 42 U.S.C. § 1983, alleging he was retaliated against for exercising his First Amendment right to freedom of speech. In reversing, the Ninth Circuit said plaintiff set forth sufficient evidence to demonstrate that the officer’s acts would chill or silence a person of ordinary firmness from future First Amendment activities. *Ford v. City of Yakima* (Ninth Cir.; February 8, 2013) (Case No. 11-35319).

### **District Court Told To Do Its Math.**

In a civil rights case, the district court vacated an award for attorney fees and reduced it from \$3.2 million to \$500,000, and reduced costs sought from \$900,000 to \$100,000 without explanation. The Ninth Circuit reversed, stating: “While it identified the correct rules, it provided no explanation for how it applied those rules in calculating the costs and attorney’s fees. Therefore, we vacate the district court’s award of costs and fees and remand to the district court for an explanation of how it used the lodestar method to reduce Padgett’s fees and how it calculated Padgett’s reduced costs.” *Padgett v. Loventhal* (Ninth Cir.; February 11, 2013) (Case No. 10-16533).

### **Unclean Hands Defense Defeats Claim Of Adverse Possession.**

Two years after the owner of a

residence died intestate leaving two sons, plaintiff and her husband changed the locks and placed a “No Trespassing” sign on the property which also indicated she was the owner. Plaintiff and her husband placed a fence around the property and commenced repairs. They recorded a quitclaim deed from the husband to both the husband and wife, a “wild deed.” They paid the property taxes and had all tax documents mailed to their private postal box. Plaintiff and the daughter of one of the sons, as the administrator of the Estate of the original owner, her grandmother, filed competing actions to quiet title. The trial court found in favor of the estate, stating in its statement of decision: “The evidence at trial showed that recording of a “wild deed” caused the property tax bills to be sent to the [plaintiff and her husband] and not the legal owner. The court is convinced that this “wild deed” was recorded to insure the legal owners would not receive tax bills and thereby be reminded that property taxes were due.” The appellate court affirmed, noting the trial judge had the discretion to apply the defense of unclean hands when a party claiming adverse possession engages in deceitful interference with the true owner’s ability to defeat the claim. *Aguayo v. Amaro* (Cal. App. Second Dist., Div. 3; February 14, 2013) (Case No. B231194).

**No Equitable Contribution From Employer’s Insurance Policies Until All Of The Tortfeasor Employee’s Policies Exhausted.** An employee caused injuries to another person while driving his car in connection with his employer’s business. Three insurance policies were in effect. Insurer #1 insured the negligent employee. Insurers # 2 and #3 insured the employer. After a settlement, Insurer #1 sought equitable contribution from #2 and #3, which the trial court ordered after granting a summary judgment. The appellate court reversed, stating “an employer is only vicariously liable for the actions of the tortfeasor employee, and therefore all of the insurance policies covering the tortfeasor employee, primary and excess, must be exhausted before the umbrella policy of an insurer that covered only the employer must make a contribution.” *Guideone Mutual Insurance Company v. Utica National Insurance Group*

(Cal. App. Fourth Dist., Div. 1; February 28, 2013) (Case No. D059833).

**Concealed Weapon Exception Narrowly Construed.** A trial court issued a peremptory writ directing the office of the District Attorney to afford a retired District Attorney investigator, who resigned from the D.A.’s office prior to retirement age, a hearing to determine if there is good cause to deny issuing him a certificate authorizing him to carry a concealed and loaded firearm. The D.A. appealed, and numerous state law enforcement associations filed amici curiae briefs in support of the appeal. A *Penal Code* statute [formerly section 12027 and presently section 25450] provides it is not a crime for an honorably retired peace officer to carry a concealed weapon. The appellate court reversed, noting “someone who quits or is fired before retirement age is not an honorably retired peace officer, even when they later reach retirement age and are entitled to collect their pension.” *Gore v. Reisig, as Yolo County District Attorney* (Cal. App. Third Dist.; February 28, 2013) (Case No. C068756).

**So Long As Corporation Was Reinstated, Plaintiff Corporation Was Permitted To Continue With Its Appeal, Despite The Fact Its Corporate Powers Were Suspended When The Appeal Was Filed.** Before trial, defendants learned that plaintiff corporation’s corporate powers had been suspended by the State of California due to nonpayment of taxes and moved for the trial court to preclude plaintiff from offering any evidence at trial. The court denied the motion contingent on the corporation’s reviving its corporate powers. Later, the court entered judgment in favor of the defendants, and plaintiff filed a notice of appeal. Defendants moved to dismiss plaintiff’s appeal because its corporate powers were still suspended, which motions the appellate court denied, and defendants filed petitions for review by the California Supreme Court. At some point, the plaintiff secured a reinstatement of its corporate status. The Supreme Court followed its earlier opinions from the 1970s which held that revival of corporate powers validates an earlier notice

of appeal, which holding permitted plaintiff to continue with its appeal. *Bourhis v. Lord* (Cal. Sup. Ct.; March 4, 2013) (Case No.’s S199887, S199889).

**Summary Judgment In Favor Of Medical Device Manufacturer Reversed.** Plaintiff had a prosthesis implanted in his femur, and reported pain in his thigh 18 months later. A fatigue fracture was discovered. Defendant manufacturers filed a motion for summary judgment, which included a declaration from an engineer stating the prosthesis was not defective in design or manufacture. Plaintiff’s opposition included the declaration of a metallurgist who said the portion of the device which suffered the fracture was too soft, and that the prosthesis was defective in manufacture and/or design which caused it to fail. After sustaining defense objections to plaintiff’s expert declaration because it “lacked a reasoned analysis and an adequate foundation,” the trial court granted the motion for summary judgment. The appellate court concluded defendants “cannot be strictly liable for a design defect under either the risk-benefit or consumer expectations test.” Nonetheless, the appellate court reversed after concluding plaintiff’s expert declaration created triable issues of fact as to the existence of a manufacturing defect and negligence. The trial court was directed to vacate its order granting summary judgment and enter a new order granting summary adjudication of the counts for failure to warn strict products liability, design defect strict products liability and breach of express warranty. *Garrett v. Howmedica Osteonics Corporation* (Cal. App. Second Dist., Div. 3; March 6, 2013) (Case No. B234368A).

**Warrantless Entry Into Curtilage Of Home Was An Unconstitutional Search.** Plaintiff was standing behind the gate at the entrance to her home when a police officer kicked it down and knocked her unconscious. The officer believed his warrantless entry into the curtilage of plaintiff’s home was justified by his pursuit of a suspect “who had committed at most a misdemeanor offense by failing to stop for questioning in response to a police order.” The district court dismissed plaintiff’s case after finding the offi-

cer was entitled to qualified immunity. The Ninth Circuit reversed after concluding the officer's actions amounted to an unconstitutional search, stating: "We hold that the law at the time of the incident would have placed a reasonable officer on notice that his warrantless entry into the curtilage of a home constituted an unconstitutional search, which could not be excused under the exigency or emergency exception to the warrant requirement." *Sims v. Stanton* (Ninth Cir.; December 3, 2012) (As Mod.; January 16, 2013) (Case No. 11-55401).

**Denial Of Conjugal Visits Claimed To Interfere With Prisoner's Practice Of His Religion.** A state prisoner asserts that denials by prison officials of his request for conjugal visit with his wife violated the *Religious Land Use and Institutionalized Persons Act* and the First Amendment by interfering with his practice of a tenet of his Islamic faith requiring him to marry, consummate his marriage, and father children. The district court denied a prison official's motion to dismiss the case based on the statute of limitations. Without going to the merits of the underlying claim, and only dealing with the statute of limitations issue, the Ninth Circuit affirmed. *Pouncil v. Tilton* (Ninth Cir.; November 21, 2012) (Case No. 10-16881).

**Corporations Code Section 2010 Does Not Apply To Foreign Corporations.** *Corporations Code* section 2010, provides in relevant part: "(a) A corporation which is dissolved nevertheless continues to exist for the pur-

pose of winding up its affairs, prosecuting and defending actions by or against it and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof." Plaintiffs' complaint alleged injuries from exposure to asbestos. Although defendant has been dissolved for many years, plaintiffs sought recovery from unexhausted liability insurance that covered defendant during the decades when it did business in California. Defendant demurred to plaintiffs' complaint, alleging that more than three years earlier, in July 2005, it had obtained a corporate dissolution pursuant to the laws of Delaware, defendant's state of incorporation. The trial court sustained the demurrer without leave to amend, and dismissed plaintiffs' complaint with prejudice. The Court of Appeal agreed, and so did the California Supreme Court which stated: "We granted review to resolve a conflict in the Courts of Appeal concerning interpretation of *Corporations Code* section 2010, which governs the winding-up and survival of dissolved corporations. We consider whether the statute applies to foreign corporations — those formed in states other than California — and conclude, consistently with the appellate court below, that it does not." *Greb v. Diamond International Corporation* (Cal. Sup. Ct.; February 21, 2013) (Case No. S183365).

**Injunction Enjoining Former Employees/Plaintiffs From Discussing Action With Current**

**Employees Vacated.** The trial court ordered plaintiffs in a qui tam action from discussing their case with current employees during the pendency of the lawsuit. On appeal, plaintiffs argue the order is unsupported by the evidence, violates policies underlying the False Claims Act [*Government Code* section 12650] and that it infringes the free speech rights of the individual plaintiffs. The appellate court vacated the injunction, noting among other things that "free speech rights cannot be defeated simply because a speaker's intended speech may make others uncomfortable." *San Francisco Unified School District v. First Student, Inc.* (Cal. App. First Dist., Div. 5; February 19, 2013) (Case No. A134405).

**Tenant Prevails In Unlawful Detainer Action.** Property owner raised the rent and the tenant refused to pay rental increases, arguing the increase violated the city's rent stabilization ordinance. A provision in the ordinance states that a tenant may refuse to pay rent greater than that allowed under the ordinance. The trial court agreed with the tenant and granted summary judgment, and the appellate court agreed with the trial court. *ABCO, LLC v. Eversley* (Cal. App. Second Dist., Div. 5; February 14, 2013) (Case No. B239347).

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