



# Litigation Update

Litigation Section News

May 2013

## Using A Drug-Sniffing Dog On A Homeowner's Porch Is A "Search" Within The Meaning Of The Fourth Amendment.

Police received a tip that marijuana was being grown in a home. A surveillance team went to the home and watched it for 15 minutes. Seeing no activity, a detective and a trained dog handler with his drug-sniffing dog approached the home. The dog had been trained to detect the scent of marijuana, cocaine, heroin and several other drugs. As the dog approached the front porch, he apparently sensed one of the odors he was trained to detect. Police left the home and on the basis of the dog's alert, officers obtained a search warrant of the residence. When the warrant was executed, a suspect attempted to flee and was arrested. A search of the home revealed marijuana plants, and the man was charged with trafficking in cannabis. At his trial, the suspect, who was the homeowner, moved to suppress the marijuana plants on the ground that the canine investigation was an unreasonable search. The case eventually wound its way to the United States Supreme Court. The Court held the search was unconstitutional, noting: "We need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz* [*Katz v. United States* (1967) 389 U.S. 347, [88 S.Ct. 507, 19 L.Ed.2d 576]]. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Florida v. Jardines* (U.S. Sup. Ct.; March 26, 2013) (Case No. 11-564).

## Political Party Has Standing To Challenge California Law Requiring Political Signature Gatherers To Be Registered Voters In Same County Where Signatures Gathered.

Plaintiff Libertarian Party of Los Angeles County brought an action against California's Secretary of State, seeking a holding that California's *Election Code* [§§ 8066 & 8451] violates the First and Fourteenth Amendments because it mandates that those persons who collect signatures for the nomination papers of political candidates must be "voters in the district or political subdivision in which the candidate is to be voted on." A federal district court dismissed plaintiff's complaint seeking an injunction after finding plaintiff had no standing. The Ninth Circuit reversed, stating First Amendment challenges "present unique standing considerations" and that "the inquiry tilts dramatically toward a finding of standing" because "the chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury." *Libertarian Party of Los Angeles County v. Debra Bowen, in her official capacity as Secretary of State of California* (Ninth Cir.; March 6, 2013) (Case No. 11-55316).

## No Copyright Infringement Over A Seven-Second Clip From The Ed Sullivan Show.

At the end of the first act of the musical *Jersey Boys*, a seven second clip from the old Ed Sullivan show is shown on a screen. The clip was used without permission of the holder of the license who brought an action for copyright infringement. The musical's production company claimed their use of the clip amounted to fair use under 17 U.S.C. § 107. A federal district court found in favor of the production company on summary judgment and awarded it \$155,000 for its attorney fees and costs. Concluding this situation "is a good example of why the 'fair use' doctrine exists," the Ninth Circuit agreed with the trial court and affirmed. *Sofa Entertainment, Inc. v. Dodger Productions, Inc.* (Ninth Cir.; March 11, 2013) (Case No.'s 10-56535, 10-57071).

## Cross-Complaint Against City Permitted To Stand, In Part.

City brought an action against commercial property owners to abate public nuisances, prostitution and operation of medical marijuana dispensaries. The trial court granted the city preliminary injunctions. Meanwhile, the property owners cross-complained against the city and several city employees for slander, trade libel and intentional interference with prospective economic advantage, centering around certain statements made to potential tenants and construction contractors. A portion of the city's anti-SLAPP motion under *Code of Civil Procedure* section 425.16 was granted. On appeal, the appellate court concluded the trial court should have granted additional, but not all, aspects of the anti-SLAPP motion, so it affirmed in part and reversed in part, requiring the city to continue to litigate the cross-complaint in part. *City of Costa Mesa v. D'Alessio Investments* (Cal. App. Fourth Dist., Div. 3; March 11, 2013) (Case No. G046397).

## Independent Calendar Court Did Not Function As A Master Calendar Court When 170.6 Challenge To Judge Assigned To Trial Presented.

A corporate dissolution action was assigned to one judge for all purposes. That judge advised counsel he would not be available on the trial date and "would tell them at trial call on November 9 which trial judge would be assigned the case" for trial. On November 9, the court informed counsel the name of the judge who would be trying the case and directed them to report to that judge's courtroom forthwith, which both counsel did and discussed the case with their newly assigned trial judge. The newly assigned judge ordered them to appear for trial on November 14. Within the next hour after leaving court on November 9, defense counsel filed a *Code of Civil Pro-*

cedure section 170.6, challenge to the newly assigned judge. That afternoon, the new judge's clerk telephoned defense counsel to inquire why the issue was not raised before either the former or new judge that morning. Defense counsel responded that he had not had an opportunity to discuss the matter with his clients and did not want to raise the possibility of a 170.6 challenge unless he was actually going to file one. The newly assigned judge denied the 170.6 challenge. The appellate court reversed and issued a writ of mandate, noting that "whether the master calendar rule applies depends on whether [the judge assigned for all purposes] was managing a true master calendar when he assigned the case" to another judge for trial, and that this case did not involve a true master calendar assignment because the case was not ready for immediate trial when it was assigned out. *Entente Design, Inc. v. Sup. Ct. (Leigh A. Pfeiffer)* (Cal. App. Fourth Dist., Div. 1; March 12, 2013) 214 Cal.App.4th 385.

**Summary Judgment For Employer Reversed On Workers' Compensation Defense.** Plaintiff functioned as a volunteer employee for defendant. Defendant's worker's compensation insurance policy provided coverage for volunteers. On the day of the incident, according to plaintiff, plaintiff was not acting as a volunteer, but went to defendant's business to visit a friend. Plaintiff claimed that while she was there, she was asked to go get somebody at the other end of the field, which she started to do, but was thrown off a forklift and severely injured. In ruling on defendant's motion for summary judgment, the trial court applied the doctrines of judicial estoppel, judicial admissions and evidentiary admissions, finding there was undisputed evidence plaintiff had successfully obtained workers' compensation benefits by asserting she was a volunteer/employee, and estopped plaintiff from claiming that she was not subject to the exclusive remedy provisions of workers' compensation. The appellate court reversed the grant of defendant's motion for summary judgment, noting defendant presented no evidence plaintiff ever presented a claim for workers' compensation. *Minish v. Hanuman Fellowship* (Cal. App. Sixth Dist.; March 12, 2013) 214 Cal.App.4th 437.

**Driving While Reading A Map.** *Vehicle Code* section 23123, states: "A person shall not drive a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving." The appellate court was asked to determine whether or not using a wireless phone solely for its map application while driving violates section 23123 after a man was convicted of reading a map on his phone while driving. Noting the drive behind the legislation was the concern about the interference with the driver's attention, the court affirmed the judgment of conviction after determining that "using a wireless phone solely for its map application function while driving violates *Vehicle Code* section 23123." *State of California v. Spriggs* (Sup.Ct. App., Fresno, March 21, 2013) (Case No. 0002345).

**Airline Faces Suit Under State Statutes, Even Though Disabilities Not Apparent And ADA Not Violated.** Plaintiff who has difficulty walking, due to osteoarthritis, collapsed spinal disc, knee replacement and another knee that needs replacement, flew United during both legs of a trip. She claims during both trips, United failed to provide her wheelchair assistance. Among her allegations: "United agents yelled at her, expressed skepticism that she actually needed a wheelchair, and twice directed her to stand in line (which she could not do because of her disabilities). At one point during her travels, a United agent whom she asked for assistance unilaterally rebooked her onto a later flight, telling her that 'this was what she got for refusing to stand in line.'" The trial court granted United's motion to dismiss under *Federal Rule of Civil Procedure* 12(b)(6), holding all plaintiff's California tort claims were preempted by the ACAA [Air Carrier Access Act]. The Ninth Circuit affirmed the trial court's dismissal of plaintiff's ADA claim, but reversed with regard to her state claims, stating: "The district court evaluated only whether the state-law claims were preempted. We, therefore, express no opinion on whether [plaintiff's] state-law claims would survive dismissal on other grounds." *Gilstrap v. United Air Lines, Inc.* (Ninth Cir.;

March 12, 2013) 709 F.3d 995.

**Injunction Issued Against Greenpeace.** A federal district court granted Shell Offshore, Inc. a preliminary injunction against Greenpeace, Inc., a California corporation, showing there is a likelihood of success on the merits of its claim that Greenpeace USA would commit tortious or illegal acts against Shell's Arctic drilling operation in the absence of an injunction and that the resulting harm would be irreparable. There was evidence that Greenpeace USA has the goal of stopping Shell's drilling for oil and "forcibly boarded an oil rig off the coast of Greenland in 2010 and used their bodies to impede a drilling operation." On appeal, Greenpeace argued the action is not justiciable, the district court lacked subject matter jurisdiction and that the court erred on the merits. The Ninth Circuit disagreed with all of Greenpeace's arguments and affirmed, stating the district court did not abuse its discretion. *Shell Offshore, Inc. v. Greenpeace, Inc.* (Ninth Cir.; March 12, 2013) (Case No. 12-35332).

**Husband Beater Got No Spousal Support.** In dissolution proceeding, husband requested relief from paying spousal support because of wife's domestic violence. He detailed 19 written police reports, five arrests, three criminal convictions, three criminal protective orders, one civil temporary restraining order, and three probationary periods. The trial court found wife was statutorily ineligible to receive spousal support based on her history of domestic violence, noting her violence created a rebuttable presumption under *Family Code* section 4325 that an award of spousal support was inappropriate. The appellate court affirmed. *Priem v. Priem* (Cal. App. First Dist., Div. 1; March 13, 2013) 214 Cal.App.4th 505.

**No Life Preserver To Save Appeal.** Plaintiff's case was dismissed as a terminating sanction following discovery abuse. Plaintiff appealed and defendant argued the appeal was from a non-appealable order. In his appellate brief, plaintiff told the appeals court his appeal "was timely filed following Entry of Judgment in this matter." Even though appellate courts often permit a premature appeal and treat it as timely filed, this appellate court did not

do so, giving three reasons: 1) plaintiff did not request the appeals court to treat his untimely notice of appeal as timely filed; 2) plaintiff ignored defendant's argument the appeal was from a non-appealable order; and, 3) plaintiff informed the court there was a judgment when there was none. The appeal was dismissed. *Good v. Miller* (Cal. App. Third Dist.; March 13, 2013) 214 Cal.App.4th 472.

**Union Permitted To Proceed With Allegations Of Corruption By Railway.** In the arbitration of a railway employee's wrongful discharge claim, a neutral arbitrator on the special adjustment board issued a draft award reinstating the employee. The railway representative said to the arbitrator: "If you are going to issue these kinds of opinions, you will never work for a Class One railroad again," whereupon the arbitrator recused herself and forwarded the matter to a different board for resolution. The next board found in favor of the railway. The United Transportation Union filed a Petition for Review in federal district court under the Railway Labor Act [45 U.S.C. §153(q)], arguing the railway received its favorable outcome through corruption and requesting the court to set aside the award and reinstate the draft award favorable to the employee. The district court granted the railway's motion to dismiss. The Ninth Circuit reversed, stating the district court was incorrect with its determination it lacked jurisdiction and with its finding the union failed to state a claim. *United Transp. Union v. BNSF Ry. Co.* (Ninth Cir.; March 13, 2013) (Case No. 11-35714).

**Business Competitor Alleging Injury Caused By Unfair Competition By An Internet Company With Whom There Had Been No Business Dealings May Pursue Unfair Competition Claim, Even Though A Consumer Could Not.** A law firm brought an unfair competition action [UCL; *Business & Professions Code* section 17200] against an online legal services provider based upon alleged unauthorized practice of law. The allegations include claims the internet provider undercut the competition by using unlicensed persons to

perform legal work, thereby saving on attorney costs, and by employing unbonded and unregistered legal document assistants, thereby saving on the costs of posting statutorily mandated bonds and paying registration fees. The trial court sustained defendant's demurrer without leave to amend, finding the law firm had no standing to bring the action. The Court of Appeal reversed and remanded the matter, stating "a business competitor who adequately alleges that he or she has suffered injury in fact and lost money or property as a result of the defendant's unfair competition is not necessarily precluded from maintaining a UCL lawsuit against the defendant just because he or she has not engaged in direct business dealings with the defendant. Nothing in this opinion is meant to suggest that we approve of the revival of shakedown lawsuits or that a consumer who has never done business with a company has standing to maintain a UCL action against it." *Law Offices of Mathew Higbee v. Expungement Assistant Services* (Cal. App. Fourth Dist., Div. 3; March 14, 2013) 214 Cal.App.4th 544.

**Substantive Grounds For Motions For Nonsuit, Directed Verdict And JNOV May Be The Same, But Their Procedural Requirements Are Not.** In an action involving strict liability and negligence, a jury found in favor of the plaintiffs on their failure to warn and negligence claims. After the jury was discharged, but before judgment was entered, the trial court granted defendant's pending pre-verdict motions for nonsuit and directed verdict, deeming those motions to be a motion for judgment notwithstanding the verdict [JNOV], and entered judgment for the defendant. The appellate court reversed, noting that although the substantive grounds for granting the motions are the same, their procedural requirements are not, and concluding the trial court's order granting the JNOV was procedurally impermissible in that it was premature, and lacked a written notice of motion and the notice required for a JNOV. The appellate court found the trial court also erred on substantive grounds, and ordered the judgment to be reinstated in plaintiff's favor. *Webb v. Special Electric Company, Inc.* (Cal. App. Second

Dist., Div. 1; March 14, 2013) (As Mod.; April 10, 2011) 214 Cal.App.4th 595.

**Borrower Who Complies With A Trial Period Plan Must Be Offered A Permanent Loan Modification.** After her home loan went into default, plaintiff agreed to a trial period plan [TPP], a form of temporary loan payment reduction under the Home Affordable Mortgage Program [HAMP]. Plaintiff complied with the TPP, making timely reduced monthly payments. Nonetheless, the bank denied her a permanent loan modification, and plaintiff's home was sold at a trustee's sale just two days after bank allegedly told her no foreclosure sale was scheduled. Plaintiff brought an action against the bank, and the trial court sustained the bank's demurrer without leave to amend. The appellate court reversed, holding that plaintiff stated causes of action for fraud, negligent misrepresentation, breach of written contract, promissory estoppels and unfair competition. The appellate court stated that core to its decision is "that when a borrower complies with all the terms of a TPP, and the borrower's representations remain true and correct, the loan servicer must offer the borrower a permanent loan modification. As a party to a TPP, a borrower may sue the lender or loan servicer for its breach." *West v. JPMorgan*

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*Chase Bank* (Cal. App. Fourth Dist., Div. 3; March 18, 2013) 214 Cal.App.4th 780.

### **Contractor Excluded From Making Bids On Public Works Projects For One Year.**

A general engineering construction company performed public works projects. The California Department of Industrial Relations, Division of Labor Standards Enforcement [DLSE] issued a civil wage and penalty assessment, including a disbarment period during which the company would be excluded from making bids on public work projects for one year, against the construction company based on allegations it violated prevailing wage laws in a manner that was willful and with the intent to defraud. The construction company filed a petition for writ of administrative mandate asking the trial court to set aside the one-year disbarment period. The trial court reviewed the administrative record and concluded there was no credible evidence to support a finding that the company violated prevailing wage laws *with intent to defraud*, and granted the petition. On appeal, DLSE argued the trial court failed to apply the correct legal standard which is the substantial evidence test, and that there was substantial evidence in the record to support the administrative finding of intent to defraud. The appellate court reversed the grant of the administrative writ by the trial court, concluding the evidence was sufficient to establish an intent to defraud, pointing out the testimony of one laborer who said he was paid \$15 an hour and worked 61 hours during a particular week. The construction company's records, however, show that laborer was paid the prevailing wage of \$36.10 an hour and worked only 25 hours that week. *Ogundare v. Department of Industrial Relations, Division of Labor Standards Enforcement* (Cal. App. Fifth Dist.; March 18, 2013) 214 Cal.App.4th 822.

### **Writing Not Required For Tort Of Invasion Of Privacy Based Upon Public Disclosure Of Private Facts.**

Plaintiff brought an action against her employer and immediate supervisor for public disclosure of private facts about her mental health. The plaintiff's allegations include statements about other employees avoiding and shun-

ning her, as well as one employee inquiring whether or not plaintiff might "go postal." The trial court granted summary judgment against the plaintiff on the ground the right of privacy can be violated only by a writing and not by word of mouth, and because the plaintiff had not produced any document disclosing private facts, she could not pursue her right of privacy cause of action. The appellate court reversed, stating "the 'rule' requiring a written publication as an element of a public disclosure of private facts privacy claim in California originated in dictum," and concluding "that limiting liability for public disclosure of private facts to those recorded in a writing is contrary to the tort's purpose, which has been since its inception to allow a person to control the kind of information about himself made available to the public – in essence, to define his public persona." *Ignat v. Yum! Brands, Inc.* (Cal. App. Fourth Dist., Div. 3; March 18, 2013) 214 Cal.App.4th 808.

### **Employment Arbitration Agreement Unconscionable.**

When plaintiff applied for a job as a property manager, she signed an arbitration agreement which was part of the employment application. It barred class action disputes, provided that all claims had to be filed within one year, was presented on a take it or leave it basis, and stated the employer "has implemented an arbitration procedure to provide quick, fair, final and binding resolution of employment-related legal claims." However, the agreement provided the employer was exempt from arbitrating trade secrets and unfair competition claims. The trial court granted the employer's petition to arbitrate plaintiff's class action complaint for various violations of *Labor Code* provisions governing payment of wages. The appellate court reversed, stating the agreement was unfairly one-sided, noting "the combined result of the [] terms is an arbitration provision that imparts a veneer of bilaterality by excluding from arbitration workers compensation, disability, and unemployment benefits claims, which have their own adjudicatory systems and are not proper subjects of arbitration. Once that veneer is stripped away, what remains is a one-sided provision that requires employees to arbitrate those claims most important to them within a much-shortened limita-

tions period, while leaving [the employer] free to litigate those claims most important to employers within the far longer statutory limitations periods." *Compton v. Sup. Ct. (American Management Services, LLC)* (Cal. App. Second Dist., Div. 8; March 19, 2013) 214 Cal.App.4th 873.

### **First Wife Joined Second Wife In Dissolution Proceeding.**

A first wife alleged her former husband fraudulently transferred property to his second wife, so the first wife joined the second wife as a third party to the dissolution proceedings and moved for attorney fees under *Family Code* section 2030, subdivision (d), ["Any order requiring a party who is not the spouse of another party to the proceeding to pay attorney's fees or costs shall be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party."] The first wife claimed she was entitled to \$628,333.33 in omitted community property assets, and the trial court ordered the second wife to pay the first wife \$131,750 in attorney fees. On appeal, the second wife argued that amount for fees was not reasonably necessary to be represented at the pleading stage, but the appellate court found the trial judge acted within the court's judicial discretion. *Bendetti v. Gunness* (Cal. App. Second Dist.,

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Div. 5; March 19, 2013) 214 Cal.App.4th 863.

### **U.S. Supreme Court Holds Copyright Not Infringed.**

An academic textbook publisher, who often assigns rights to publish its English language textbooks abroad, states in those books that they are not to be taken into the United States without permission. A Thai student moved to the United States to study mathematics. He asked friends and family to purchase copies of textbooks in Thailand, where they are sold for much less, and mail them to him in the U.S., where he sold them for a profit. The distributor filed suit against the student, claiming the student violated its exclusive distribution rights. The student contended he legitimately purchased the textbooks, thus the “first sale” rule permitted him to resell them without interfering with the distributor’s rights. A jury found against the student and awarded damages. A federal appeals court affirmed, finding the “first sale” rule does not apply to American copyrighted works manufactured abroad. Section 109(a) of the Copyright Act sets forth the “first sale” rule: “. . .the owner of a particular copy or phonorecord lawfully made under this rule . . .is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” (Emphasis added.) In copyright jargon, the “first sale” rule has exhausted the copyright owner’s exclusive distribution right. The United States Supreme Court gave the rule a nongeographical meaning, and held the “first sale” doctrine applies to copies of a copyrighted work lawfully purchased abroad. Thus, the owner of a copyrighted work, no matter where it was legitimately purchased, may dispose of it as he or she wishes. *Kirtsaeng v. John Wiley & Sons, Inc.* (U.S. Sup. Ct.; March 19, 2013) 133 S.Ct. 1351, [185 L.Ed.2d 392].

**The U.S. Supreme Court Curtails State’s Method For Seeking Reimbursement From Third-Party Tortfeasors For Medical Expenses Paid On Behalf Of A State’s Medicaid Beneficiaries...(Could Administrative Boards Deciding Amount Of Liens Be On The Horizon?).** Baby was born with multi-

ple birth injuries which require 12-18 hours of daily nursing care. The baby and her parents filed a medical malpractice action against the delivery doctor and the hospital where she was born. Although the plaintiffs presented evidence of damages in excess of \$42 million, they settled for \$2.8 million, largely due to insurance limits, and the settlement did not differentiate between medical and nonmedical claims. North Carolina’s Medicaid program pays part of the cost of her ongoing medical care. The trial court placed one-third of the settlement into escrow pursuant to North Carolina’s ir-rebuttable statutory one-third presumption that one-third is a reasonable amount owed to the State. The plaintiffs then brought a separate action in federal court seeking declaratory and injunctive relief, claiming the State’s reimbursement scheme violated the Medicaid anti-lien provision. The United States Supreme Court noted: “The task of dividing a tort settlement is a familiar one. In a variety of settings, state and federal courts are called upon to separate lump-sum settlements or jury awards into categories to satisfy different claims to a portion of the moneys recovered.” The high court advised: “The State thus has ample means available to allocate Medicaid beneficiaries tort recoveries in an efficient manner that complies with federal law. Indeed, if States are concerned that case-by-case judicial allocations will prove unwieldy, they may even be able to adopt *ex ante* administrative criteria for allocating medical and non-medical expenses, provided that these criteria are backed by evidence suggesting that they are likely to yield reasonable results in the mine run of cases. What they cannot do is what North Carolina did here: adopt an arbitrary, one size fits all allocation for all cases.” The Court held the scheme in question violated the anti-lien provision in 42 U.S.C. § 1396p (a)(1). *Aldona Wos, Secretary, North Carolina Department of Health and Human Services v. E.M.A., a minor*, (U.S. Sup. Ct.; March 20, 2013) 133 S.Ct. 1391, [185 L.Ed.2d 471].

**Court Enjoins Internet Company From Facilitating Downloads Of Copyright-Protected Works.** Defendants maintained websites which film studios plaintiffs contend facilitated internet users to download

copyright-protected works. A federal district court issued an injunction based upon “contributory copyright infringement.” The trial court also held defendants were not entitled to any of the safe harbor provisions contained in the Digital Millennium Copyright Act [DMCA; 17 U.S.C. § 512]. The Ninth Circuit affirmed, awarding costs to the plaintiffs. *Columbia Pictures Industries, Inc. v. Gary Fung* (Ninth Cir.; March 21, 2013) (Case No. 10-55946).

### **Dismissal Of Wrongful Foreclosure Action Reversed.**

The appellate court reversed the sustaining of a demurrer to plaintiff’s complaint for wrongful foreclosure. In support of the demurrer, defendants sought judicial notice, which was granted, of the notice of default, including the attached declaration of someone named Samantha Jones, which stated the bank “tried with due diligence to contact [plaintiff] in accordance with *California Civil Code* Section 2923.5.” Plaintiff’s opposition to the demurrer argues she never spoke with Jones or heard any recordings from Jones or the bank, communicated with Jones or received any communication from Jones. The appellate court noted: “*Civil Code* section 2923.5, requires not only that a declaration of compliance be attached to the notice of default, but that that the bank actually perform the underlying acts (i.e., contacting the borrower or attempting such contact with due diligence) that would constitute compliance. While judicial notice could be properly taken of the *existence* of Jones’ declaration, it could not be taken of the facts of compliance asserted *in* the declaration.” The court further pointed out that a demurrer is not the proper format for disposing of any evidentiary issues. The appeals court construed the allegations of the complaint broadly and concluded plaintiff stated a cause of action for wrongful foreclosure based on defendants’ noncompliance with section 2923.5. *Intengan v. BAC Home Loans Servicing LP* (Cal. App. First Dist., Div. 5; March 22, 2013) 214 Cal.App.4th 1047.

**First Amendment Retaliation After Police Officers’ Union Activities.** A police officer led a non-confidence vote of the police officers’ union against the police chief. Afterward, when

the police officer was due a five percent salary increase, the police chief delayed signing the certification for his increase. The officer brought an action under 42 U.S.C. § 1983 against both the police chief and the city, alleging an unconstitutional retaliation for the exercise of First Amendment rights. The trial court granted summary judgment in favor of the defendants. The Ninth Circuit reversed as to the officer's claim, finding the police officer established a *prima facie* case of First Amendment retaliation. It affirmed judgment in favor of the city, however, because there was no showing the officer was injured as a result of: 1) an expressly adopted official policy; 2) a longstanding practice or custom; or 3) the decision was made by a final policymaker. *Ellins v. City of Sierra Madre* (Ninth Cir.; March 22, 2013) (Case No. 11-55213).

### **Original Complaint Did Not Give Rise To A Builder's Claim For Equitable Indemnity Against A City.**

A homeowner's association's original complaint against a builder alleged various building violations. *Government Code* section 901 provides: "The date upon which a cause of action for equitable indemnity or partial equitable indemnity accrues shall be the date upon which a defendant is served with the complaint giving rise to the defendant's claim for equitable indemnity or partial equitable indemnity against the public entity." The builder contended it was not on notice of its potential indemnity claim until the HOA filed its Preliminary Statement of Claim as part of a case management order, stating the cast iron pipes leaked. Whereupon the builder presented the city with a government claim contending the cast iron pipes revealed crystallization as a result of gasses emitted from the city's sewer system. The trial court concluded the original complaint gave rise to the builder's claim for equitable indemnity against a city. The appellate court issued a writ of mandate reversing the trial court, stating: "we agree with [the builder] that there is nothing in section 901 that suggests that the Legislature intended for the service of a complaint to cause the accrual of an equitable indemnity claim seeking to apportion potential liability of a claim that is not pled in the complaint. Accordingly, the trial court erred in concluding

that the Association's April 2009 complaint gave rise to the claim for equitable indemnity contained in Centex's proposed cross-complaint." *Centex Homes v. Sup.Ct. (City of San Diego)* (Cal. App. Fourth Dist., Div. 1; March 25, 2013) 214 Cal.App.4th 1090.

### **No Cause Of Action Against Doctors Or Lasik Manufacturer.**

Two plaintiffs received laser eye surgery, LASIK. They brought an action against the machine manufacturer and various doctors because the laser machine used had not been approved by the Food and Drug Administration, even though they suffered no injuries during their surgeries. They assert claims under the Human Subjects Act [*Health and Safety Code* section 24271], which requires informed consent before a person can be subjected to any medical experiment. They also assert fraud by omission, a violation of the Federal Food, Drug and Cosmetic Act [FDCA] and request an injunction under the California Legal Remedies Act. The Ninth Circuit affirmed the district court's dismissal of the action, finding the plaintiffs were not subjects within the meaning of the Human Subjects Act, their claim under the federal act is impliedly preempted because it amounts to an attempt to privately enforce the FDCA, their fraud by omission claim is expressly preempted by the FDCA. The court noted there is a narrow gap through which a state-law claim must fit to escape preemption by the FDCA: "The plaintiff must be suing for conduct that *violates* the FDCA, but the plaintiff must not be suing *because* the conduct violates the FDCA." *Perez v. Nydek Co. LTD.* (Ninth Cir.; March 25, 2013) (Case No. 10-55577).

### **Teacher Accused Of Molestation To Keep His Job.**

Two different mothers of third graders complained a male teacher inappropriately touched their daughters. After three criminal trials, he was sentenced to seven concurrent 15-year-to-life prison terms. His convictions were reversed, and the prosecutor declined to retry him. The school district notified him he was terminated due to engaging in lewd and lascivious acts with students. The teacher requested a hearing with the Commission on Professional Competence which determined the school district had not proven

the teacher was unfit. The school district filed a petition for a writ of mandate with the superior court, and the superior court granted the petition and vacated the Commission's decision. The teacher appealed. For numerous reasons, including a lack of substantial evidence, the appellate court reversed the judgment of the superior court and remanded the case with directions to enter a new judgment denying the school district's petition for writ of mandate. The teacher is to recover his costs. *San Diego Unified School District v. Commission on Professional Competence (Thad Jespersen)* (Cal. App. Fourth Dist., Div. 1; March 26, 2013) 214 Cal.App.4th 1120.

### **Using A Drug-Sniffing Dog On A Homeowner's Porch Is A "Search" Within The Meaning Of The Fourth Amendment.**

Police received a tip that marijuana was being grown in a home. A surveillance team went to the home and watched it for 15 minutes. Seeing no activity, a detective and a trained dog handler with his drug-sniffing dog approached the home. The dog had been trained to detect the scent of marijuana, cocaine, heroin and several other drugs. As the dog approached the front porch, he apparently sensed one of the odors he was trained to detect. Police left the home and on the basis of the dog's alert, officers obtained a search warrant of the residence. When the warrant was executed, a suspect attempted to flee and was arrested. A search of the home revealed marijuana plants, and the man was charged with trafficking in cannabis. At his trial, the suspect, who was the homeowner, moved to suppress the marijuana plants on the ground that the canine investigation was an unreasonable search. The case eventually wound its way to the United States Supreme Court. The Court held the search was unconstitutional, noting: "We need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz* [*Katz v. United States* (1967) 389 U.S. 347, [88 S.Ct. 507, 19 L.Ed.2d 576]]. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Florida*

*v. Jardines* (U.S. Sup. Ct.; March 26, 2013) 133 S.Ct. 1409, [185 L.Ed.2d 495].

**Prayer At City Council Meetings.** City typically begins each of its city council meetings with a citizen-led invocation. The city's policy sets forth a two-step procedure for soliciting volunteers to lead the invocation. The city clerk compiles and maintains a database of religious congregations with an established presence in the city. Next, the clerk mails all of the listed religious groups an invitation to open a city council meeting with an invitation: "This opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. To maintain a spirit of respect and ecumenism, the City Council requests that the prayer opportunity not be exploited as an effort to convert others . . . nor to disparage any faith or belief different from that of the invocational speaker." The plaintiffs brought an action against the city under 42 U.S.C. § 1983 and Article I, Section 4 of the California Constitution for declaratory and injunctive relief, arguing that the invocations and the policy amounted to an establishment of

religion. The Ninth Circuit concluded the prayer policy did not constitute an unconstitutional establishment of religion. *Rubin v. City of Lancaster* (Ninth Cir.; March 26, 2013) 710 F.3d 1087.

**Joint Offer Pursuant To Section 998 Offer To Compromise Not Invalid.** The trial court awarded expert witness fees under *Code of Civil Procedure* section 998, to the prevailing defendant in a wrongful death lawsuit. The plaintiffs argued on appeal the offer was invalid because it was a single offer made to two plaintiffs. The appellate court affirmed the award of costs, stating: "In a wrongful death action, a single joint cause of action is given to all heirs and the judgment must be for a single lump sum. A unitary verdict can easily be compared to a joint offer to determine whether the offering party has achieved a more favorable judgment. Thus, there is little, if any, justification for invalidating a joint offer made in a wrongful death case." *McDaniel v. Asuncion* (Cal. App. Fifth Dist.; March 27, 2013) 214 Cal. App.4th 1201.

**Jury Verdict Overturned In Veterinarian Malpractice Action.** Defendants are doctors of veterinary medicine who were retained by plaintiff to perform prepurchase examinations on two performance horses, Syrus and Poncho. The report was that both horses were suitable for their intended uses as competition hunter jumpers, and based upon the report plaintiff purchased Syrus and Poncho. Afterward, the horses manifested physical

problems which interfered with their ability to compete, so plaintiff brought an action for veterinarian malpractice. A jury awarded plaintiff \$46,000 based upon a negligent prepurchase examination of Poncho. The appellate court reversed the judgment after concluding there was no evidence of an applicable standard of care. *Quigley v. McClellan* (Cal. App. Fourth Dist., Div. 1; March 28, 2013) 214 Cal.App.4th 1276.

**"Me-Too" Evidence Properly Excluded In Employment Discrimination Case.** Plaintiff alleged he was discriminated against by his employer because of his Japanese ancestry and Asian race. A jury found in favor of the employer. Plaintiff brought an unsuccessful motion for new trial, arguing the trial court erred in excluding evidence that a supervisor "openly favored employees of Arab ancestry." The appellate court affirmed, noting the trial court properly exercised its discretion under *Evidence Code* section 352, in excluding plaintiff's "me-too" evidence, and that plaintiff had pled his case as an anti-Asian case, not as an Arab favoritism case. *Hatai v. Department of Transportation* (Cal. App. Second Dist., Div. 3; March 28, 2013) 214 Cal.App.4th 1287.

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