



Litigation Update

Litigation Section News

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July 2013

Lawyer's Letter Viewed As A Threat.

Plaintiff brought an action against defendant, a lawyer, after defendant sent him a letter: "As you are aware, I have been retained to represent Media Print & Copy. We are in the process of uncovering the substantial fraud, conversion and breaches of contract that your client has committed on my client. ... To date we have uncovered damages exceeding \$75,000, not including interest applied thereto, punitive damages and attorneys' fees. If your client does not agree to cooperate with our investigation and provide us with a repayment of such damages caused, we will be forced to proceed with filing a legal action against him, as well as reporting him to the California Attorney General, the Los Angeles District Attorney, the Internal Revenue Service regarding tax fraud, the Better Business Bureau, as well as to customers and vendors with whom he may be perpetrating the same fraud upon." Defendant filed an anti-SLAPP motion pursuant to *Code of Civil Procedure* section 425.16, which the trial court denied while ordering defendant to pay attorney fees, and defendant appealed. Noting "the threat to report a crime may constitute extortion even if the victim did in fact commit a crime," the appellate court affirmed. *Mendoza v. Hamzeh* (Cal. App. Second Dist., Div. 1; April 22, 2013) 215 Cal.App.4th 799.

Approval Of Class Action Settlement Reversed.

A class action against credit agencies, which issued negative credit reports after debts were discharged, settled, and the district court approved the settlement. The Ninth Circuit reversed, explaining: "The settlement agreement, like others we have approved in the past, granted incentive awards to the class representatives for their service to the class. But unlike the incentive awards that we have approved before, these awards were conditioned on the class representatives'

support for the settlement . . . Because these circumstances created a patent divergence of interests between the named representatives and the class, we conclude that the class representatives and class counsel did not adequately represent the absent class members, and for this reason the district court should not have approved the class-action settlement." *Radcliffe v. Experian Information Solutions, Inc.* (Ninth Cir.; April 22, 2013) (Case No.'s 11-56376, 11-56387, 11-56389, 11-56397, 11-56400, 11-56440, 11-56482).

Trial Court Wrongly Analyzed Rees-Levering Act.

Plaintiff filed a class action pursuant to the Rees-Levering Motor Vehicle Sales and Finance Act [*Civil Code* section 2981] on behalf of those who had their vehicles repossessed by or voluntarily surrendered to a car dealership. Plaintiff had missed several car payments and voluntarily surrendered her car, whereupon she was sent a Notice of Intention to Dispose of Motor Vehicle [NOI]. The NOI stated plaintiff had the right to redeem the vehicle by paying the total outstanding amount due [\$19,420.55] or she had the right to reinstate the installment contract and obtain a return of the vehicle if she paid \$1,557.03 within 15 days. The NOI mentioned there were other costs and stated: "To learn the exact amount you must pay, call us at the telephone number listed above." More than 60 days later, the dealership sent a letter to plaintiff informing her the vehicle had been sold for \$6,187.50 and the balance due from her was \$5,574.65. The trial court denied plaintiff's motion to certify her class action, and the appellate court reversed and remanded the action, ordering the trial court to correctly analyze the Rees-Levering Act. *Ramirez v. Balboa Thrift and Loan* (Cal. App. Fourth Dist., Div. 1; April 22, 2013) 215 Cal.App.4th 765.

Worker's Comp Psychiatric Injury Award Annulled.

Labor Code section 3208.3, subdivision (h), states a psychiatric injury is not compensable "if the injury was substantially caused by a lawful nondiscriminatory, good faith personnel action." In this case, the worker sustained psychiatric injury after encountering trouble at work. An agreed medical evaluator concluded the injury was not substantially caused by personnel actions, and the Workers' Compensation Appeals Board awarded compensation. The appellate court concluded the factual basis of the evaluator's opinion did not constitute substantial evidence to support the opinion. The award was annulled and the matter remanded to the Board. *County of Sacramento v. Worker's Compensation Appeals Board* (Cal. App. Third Dist.; April 22, 2013) (As Mod. May 1, 2013) (Case No. C067739).

Water Damage Not Covered Under Insurance Policy.

Plaintiff noticed condensation and mold around the windows of his home. Upon inspection, a plumber discovered a slow water leak which pooled under the home. Plaintiff had purchased a "Farmers Next Generation Homeowners Policy" which had limited water damage coverage. The policy described what was not included in the limited water damage coverage: "... We do not cover any water, or the presence of water, over a period of time from any constant or repeating gradual, intermittent or slow discharge, seepage, leakage, trickle, collecting infiltration, or overflow of water from any source . . . whether known or unknown to any insured." For mold, the policy stated: "We do not insure loss or damage consisting of, composed of, or which is fungi. Further, we do not insure any remediation." The trial court granted summary judgment to the insurer in plaintiff's action for breach of contract and breach of the implied covenant of good faith and fair dealing. The

appellate court affirmed, noting the policy was not ambiguous when it referred to a leak “over a period of time.” *Brown v. Mid-Century Insurance Company* (Cal. App. Second Dist., Div. 1; April 2, 2013) (As Mod. April 24, 2013) 215 Cal.App.4th 841.

A Local Ordinance Is Not A Statute Within The Meaning Of Government Code section 810.

The Internal Revenue Service, following several adverse court decisions, announced in 2006 that it would cease collecting the federal excise tax on long distance and bundled services and allow federal taxpayers to obtain a refund by checking a box on their federal tax returns. In August 2006, plaintiff served a demand on the City and its officers to refund the money he asserted that the City had improperly collected on certain telephone services “during the prior two years.” The City Council amended its ordinance concerning telephone taxes by removing reference to a federal excise tax, and did so without seeking the approval of voters under article XIII C of the California Constitution, commonly known as Proposition 218. Plaintiff, a city resident brought a class action on behalf of himself and others challenging the city’s telephone user’s tax and seeking a refund of the taxes paid. The trial court dismissed his action, and the appellate court reversed. The California Supreme Court affirmed the Court of Appeal, finding a local ordinance is not a statute within the meaning of the Government Claims Act [*Government Code* section 810]. The court stated: “The issue here is not whether class actions for tax refunds should be permitted, but which level of government—the state or the local public entity—should define the procedures governing an action for refund of a local tax. We hold that except as to ‘[c]laims under the *Revenue and Taxation Code* or other statute prescribing procedures for the refund ... of any tax,’ the Legislature has determined that the Government Claims Act applies. (§ 905.)” *McWilliams v. City of Long Beach* (Cal. Sup. Ct.; April 25, 2013) 56 Cal.4th 613.

Plaintiff Calls It A Sidewalk; City Calls It A Trail. Plaintiff brought an action against a city after she was injured when she tripped over a pro-

truding tree trunk while taking a walk on a sidewalk. Others called the place where she took the walk a trail, saying it was used for horseback riding and hiking. *Government Code* section 831.4, subdivision (a), provides that public entities are not liable for injuries caused by the condition of trails used for certain recreational purposes, including “hiking.” The trial court granted summary judgment, noting the City Council had designated the pathway as a trail and that it had been treated as a trail. The appellate court affirmed, noting uncontroverted evidence the path was designed to be used for multiple recreational purposes and was landscaped to simulate a natural area. *Montenegro v. City of Bradbury* (Cal. App. Second Dist., Div. 4; April 25, 2013) 215 Cal.App.4th 924.

Attorney Disqualification Order Reversed.

In a Lemon Law case brought under the Song-Beverly Consumer Warranty Act [*Civil Code* section 1790], Ford Motor Company successfully moved to disqualify plaintiff’s lawyer on grounds the lawyer previously defended Ford in other Lemon Law cases. The appellate court reversed the disqualification order, stating: “The trial court abused its discretion in concluding that the prior cases were substantially related to the current case just because they involved claims under the same statute.” *Khani v. Ford Motor Company* (Cal. App. Second Dist., Div. 4; April 25, 2013) 215 Cal.App.4th 916.

Real Estate Agent Injured While Showing Foreclosed-Upon Home.

A loan services company owned a home which had been foreclosed upon. The home had been visited by more than 100 real estate agents. One of the features was an attic that had been converted into a bonus room by a previous owner, which room was accessed by using a pull-down stairway. The home had been inspected by a licensed contractor who had listed among the 50 items needing repair: “Stair-Remove and replace attic stair.” Three months after the inspection, plaintiff, a real estate agent, showed the home to some clients. A copy of the inspection report was on the kitchen counter. The plaintiff followed her clients up the ladder, and, just as she reached the point where she could look into

the attic, a hinge broke, the ladder failed and she fell and fractured her leg. The trial court granted summary judgment in the homeowner’s favor. The appellate court reversed, finding there was evidence that created a triable issue as to whether defendants knew or should have known that the stairway was a concealed danger. *Hall v. Aurora Loan Services* (Cal. App. First Dist., Div. 4; April 26, 2013) 215 Cal.App.4th 1134.

Information Is For Me, But Not For Thee.

Petitioner, a citizen of Rhode Island, makes his living by obtaining property records on behalf of his clients. He sought to obtain real estate tax records in Henrico County, Virginia, for a client, and his request was denied because he was not a Virginia citizen. He and another petitioner, with a similar experience, filed suit under 42 U.S.C. § 1983 seeking declaratory and injunctive relief for violations of the Privileges and Immunities Clause and the dormant Commerce Clause. The trial court granted Virginia’s motion for summary judgment, and the appellate court affirmed. The United States Supreme Court noted that like Virginia, several other states have enacted freedom of information laws that are available only to their citizens. *Virginia’s Freedom of Information Act* [Code Ann. § 2.2-3700] provides that “all public records shall be open to inspection and copying by any citizens of the Commonwealth.” Writing for the high court, Justice Alito’s opinion holds petitioners’ constitutional rights were not violated as no constitutionally protected privilege or immunity was abridged. The opinions also states: “The state Freedom of Information Act does not regulate commerce in any meaningful sense, but instead provides a service that is related to state citizenship.” *McBurney v. Young* (U.S. Sup. Ct.; April 29, 2013) 133 S.Ct. 1709, [185 L.Ed.2d 758].

Action Against Prison Doctor.

Plaintiff was a prisoner in state prison when he alleges he was negligently treated by a doctor. The trial court granted summary judgment for the doctor on plaintiff’s two causes of action: breach of fiduciary duty and professional negligence. The appellate court reversed, stating: “With respect to his breach of fiduciary duty claim, [plaintiff] alleged in his complaint that [the doctor]

breached his fiduciary duty by prescribing the drug interferon to [plaintiff] without first having obtained [plaintiff's] informed consent. [The doctor] failed to address this theory of liability in his moving papers, and thus failed to carry his burden of making a 'prima facie showing of the nonexistence of any triable issue of material fact.'" With respect to plaintiff's cause of action for medical negligence, the appellate court stated: "[Plaintiff's] professional negligence claim is not premised on a *failure to cure* [plaintiff], but rather, on the allegation that [the doctor] performed below the standard of care in *unnecessarily prescribing a medication* that had significant and damaging side effects at a time when [plaintiff] was not suffering from hepatitis." *Jameson v. Desta* (Cal. App. Fourth Dist., Div. 1; April 29, 2013) 215 Cal.App.4th 1144, [155 Cal.Rptr.3d 755].

Ordinance Does Not Conflict With State Law Or Constitutional Principle.

Defendants operated a marijuana collective in an agricultural zone, and the county brought an action for injunctive relief, seeking to stop a nonconforming use of property. A county ordinance related to the location of medical marijuana collectives and cooperatives [MMC's] states they "shall not be established or located in any zone in the County of Tulare, nor shall any building or land be used for such collectives or cooperatives, other than those located in a C-2 (General Commercial), C-3 (Service Commercial), M-1 (Light Manufacturing), or M-2 (Heavy Manufacturing) zone district." It also prohibits MMC's from being located within 1,000 feet of certain incompatible uses, such as schools, daycare facilities, places of religious worship, public parks, or other MMC's. The trial court issued an injunction, and defendants appealed, arguing the zoning ordinance is invalid because it conflicts with the state's general law and that it is unconstitutional. The appellate court affirmed, holding: "The zoning ordinance is a reasonable exercise of the County's power to enact local legislation (California Constitution, Article XI, section 7), and Defendants have failed to show any conflict with state law or constitutional principle." *County of Tulare v. Nunes* (Cal. App. Fifth Dist.; April 29, 2013) 215 Cal.App.4th

1188, [155 Cal.Rptr.3d 781].

Think Theories Through Before Filing Complaint!

Plaintiff, an attorney, represented a client, also an attorney, in a prior civil suit against the client's employer for discrimination, harassment, retaliation, wrongful termination, and other related claims. By motion, plaintiff withdrew from the case at the beginning of trial. The client could not find another attorney to represent her, and the trial court dismissed the suit. Later, plaintiff filed the present action, alleging that the client had breached the parties' retainer agreement. The complaint alleged that, under paragraph 5 of the agreement, plaintiff was entitled to a "combined hourly and contingency based rate," and under paragraph 7, he was entitled to costs. The complaint alleged that plaintiff "ha[d] been damaged in the sum of \$44,082.22, plus interest." On the fourth day of a five-day trial, after plaintiff rested, he moved to amend the complaint to conform to proof, seeking \$312,260 in attorney fees and \$16,851.95 in costs, for a total of \$329,111.95. The amendment was based on a new theory of liability: Under paragraph 9 of the retainer agreement—which was not mentioned in the complaint—plaintiff was entitled to recover for "all time spent" on the prior case because he had withdrawn for good cause. The client opposed the amendment. The trial court granted the motion to amend. The jury awarded plaintiff \$140,056.95. On appeal, the client contended that the trial court abused its discretion by permitting the amendment. The appellate court agreed and reversed the judgment and remanded the matter for a new trial. *Duchrow v. Forrest* (Cal. App. Second Dist., Div. 1; April 30, 2013) 215 Cal.App.4th 1359.

Total Amounts Of Medical Bills Not Relevant.

Two plaintiffs were passengers in a taxi cab when another vehicle collided with the cab and they were injured. The defendant, the driver of the other car, was convicted of fleeing the scene of an injury accident, and was sent to prison for three years. A jury found the passengers suffered \$1.8 and \$1.4 million in damages, awarded an additional \$20,000 each in punitive damages, and awarded one of their spouses \$75,000 for loss of consortium. On

appeal, defendant contended there was error in admitting the full amounts billed to plaintiffs for their medical care rather than the amounts actually paid and accepted as full payment by their medical providers. The appellate court concluded there was error in admitting the full amount of the medical bills because the full amounts were not relevant. The plaintiffs also appealed the trial court's denial of attorney fees sought under *Code of Civil Procedure* section 1021.4, which authorizes an attorney fee award to the prevailing party "in an action for damages against a defendant based upon the defendant's commission of a felony offense for which that defendant has been convicted." The appellate court affirmed the trial court's denial of fees, stating: "We conclude the court properly held that this action is not based on the felony offense for which [the defendant] was convicted." The case was remanded for a new trial limited to the issue of compensatory damages. *Corenbaum v. Lampkin* (Cal. App. Second Dist., Div. 3; April 30, 2013) (As Mod., May 13, 2013) 215 Cal.App.4th 1308.

In Some Instances, Attorney Client Privilege May Be Passed On To A Bankrupt Corporation's Insurer.

A bankrupt corporation which purportedly only existed as a shell through which personal injury claims were passed on to its insurer for resolution was sued for personal injury. Pursuant to its reorganization plan, the action was submitted to its insurers, who provided a defense. When discovery was propounded to the corporation, the corporation's attorney (who had been provided by the insurers) filed substantive responses to the discovery, but represented to the court that the responses could not be verified, as the corporation had no officer, director, employee, or agent who could verify the discovery responses. The personal injury plaintiff challenged the sufficiency of the discovery responses. The trial court agreed that, under the circumstances, no individual existed who could verify the responses, and, at the corporation's request, simply deemed them verified. The appellate court granted the plaintiff's petition for extraordinary writ, stating "the law provides that an attorney can verify responses on behalf of

a corporation, although such an act constitutes a limited waiver of the attorney-client and work product privileges with respect to the identity of the sources of the information contained in the response. In this case, the attorney argued that she could not verify the discovery responses because the corporation was the holder of the attorney-client privilege, but had no officer or director who could waive it. We conclude that the court could have directed that further effort be made to have a director elected or appointed on behalf of the corporation. It may, however, be that the corporation no longer exists and no director can be elected or appointed. If that is the case, we believe that the corporation's attorney-client privilege would be passed to its insurers, the de facto assignee of its policies and the claims against them." *Melendrez v. Sup. Ct. (Special Electric Company)* (Cal. App. Second Dist., Div. 3; April 30, 2013) 215 Cal.App.4th 1343.

Anti-SLAPP Motion Should Not Have Been Granted.

A landlord served a tenant with a three-day notice to cure or quit, and the tenant brought an action against the landlord requesting declaratory relief and alleging breach of contract and intentional interference with contract. The landlord filed an unlawful detainer action, and with regard to the tenant's complaint, filed an anti-SLAPP motion under *Code of Civil Procedure* section 425.16, which the trial court granted. The tenant appealed, and the appellate court reversed, explaining: "The dispositive issue on appeal is whether the causes of action asserted in [the tenant's] complaint arose out of [the landlord's] petitioning activity—protected under section 425.16, subdivision (b)(1)—of service of the three-day notice to cure or quit and the subsequent unlawful detainer action. We conclude that while the three-day notice might have triggered the complaint, the evidence in the record demonstrates the complaint was based on an underlying dispute over [the landlord's] repair and maintenance obligations under the sublease and other unprotected activities. We therefore reverse the order granting the anti-SLAPP motion and the order awarding [the landlord] attorney fees." *Copenbarger v. Morris Cerullo World Evangelism* (Cal. App. Fourth Dist., Div. 3; April 30, 2013) 215 Cal.App.4th 1237.

Insurer Cannot Avoid Its Contractual Duty. The United States Attorney for the Central District of California filed a grand jury indictment against a medical doctor alleging the doctor conspired with another doctor and employees to transplant a liver into the wrong patient. The doctor tendered the defense to the charges to his insurance company, which declined to defend pursuant to *Insurance Code* section 533.5. That statute provides: "No policy of insurance shall provide, or be construed to provide, any duty to defend . . . any claim in any criminal action or proceeding or in any action or proceeding brought pursuant to" California's unfair competition law under *Business and Professions Code* sections 17200 and 17500 "in which the recovery of a fine, penalty, or restitution is sought by the Attorney General, any district attorney, any city prosecutor, or any county counsel, notwithstanding whether the exclusion or exception regarding the duty to defend this type of claim is expressly stated in the policy." The trial court held that section 533.5 unambiguously bars coverage for criminal actions and proceedings. The appellate court reversed, stating: ". . . section 533.5, subdivision (b), does not preclude an insurer from agreeing to provide a defense for criminal actions against its insured brought by federal prosecutors. Therefore, the insurer in this case, which had agreed to provide its insureds with a defense in 'a criminal proceeding . . . commenced by the return of an indictment', 'even if the allegations are groundless, false or fraudulent,' cannot avoid its contractual duty to defend an insured against federal criminal charges by relying on section 533.5, subdivision (b)." *Mt. Hawley Insurance Company v. Lopez* (Cal. App. Second Dist., Div. 7; May 1, 2013) (As Mod. May 29, 2013) 215 Cal. App.4th 1385.

Common Law Presumption Of Regularity Does Not Satisfy Notification Requirement Of Code of Civil Procedure § 729.050 In Foreclosure Sale.

A homeowners association notified homeowners they were delinquent in paying their monthly assessment fees. After the homeowners disputed the debt, the association conducted a nonjudicial foreclosure sale. The homeowners brought an action to set aside the foreclosure and the trial court

granted summary judgment in favor of the association. The appellate court reversed, after rejecting the association's argument a nonjudicial foreclosure sale is accompanied by a common law presumption that it was conducted regularly and fairly, and concluding the association failed to demonstrate it notified the homeowners of their right to redemption pursuant to *Code of Civil Procedure* section 729.050. *Multani v. Witkin & Neal* (Cal. App. Second Dist., Div. 7; May 1, 2013) (As Mod. May 29, 2013) 215 Cal. App.4th 1428.

No New Trial On Issue Of Lost Profits.

A company obtained patents on a dental implant. It entered into an agreement for a university to conduct a clinical study of the implant. Later, the company brought an action against the university for failure to timely deliver the promised reports, asserting causes of action for breach of contract and various torts. Eventually the matter was heard in the California Supreme Court, which concluded the trial court acted within its discretion in excluding the company's testimony on lost profit damages. On remand, the company requested the appellate court to remand the matter back to the trial court, contending the Supreme Court announced a new rule governing a trial court's discretion over expert testimony and the means by which lost profits may be calculated. The university said there was no new law set forth. The appellate court declined to order the matter back to the trial court for a new trial, holding that in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, [288 P.3d 1237; 149 Cal. Rptr.3d 614], the Supreme Court did not announce a new rule, but instead relied on prior statutory and case law authority to evaluate foundational issues with expert testimony. The appellate court affirmed the judgment of the trial court. *Sargon Enterprises, Inc. v. University of Southern California* (Cal. App. Second Dist., Div. 1; May 2, 2013) 215 Cal.App.4th 1495.

Peanuts? Popcorn? First Amendment?

A Mayor proposed the city enter into an agreement with Immigration and Customs Enforcement [ICE] to have its police officers designated immigration agents. Members of the public were invited to comment at a City Council

meeting. Jim Gilchrist, co-founder of the Minuteman Project, was one of the first speakers. At the conclusion of his remarks, Gilchrist asked that anyone who favored what he had to say should stand. About 50 minutes later, a member of the public, the plaintiff herein, was visibly emotional and agitated when he spoke. When he finished, he also asked anyone who favored his remarks to stand, and the Mayor cut his time short. He called the Mayor “a racist pig” twice, and then “a f***ing racist pig,” and was removed from the meeting. [N.B. the proposal passed by a three to two vote of the Council.] Plaintiff brought an action under the First Amendment, and the district court dismissed his challenge to the city’s ordinance which makes it a misdemeanor for members of the public who speak at meetings to engage in “disorderly, insolent, or disruptive behavior.” The Ninth Circuit reversed the trial court’s constitutional ruling and found the ordinance facially invalid. *Acosta v. City of Costa Mesa* (Ninth Cir.; May 3, 2013) (Case No. 10-56854).

Police Officer Can Carry Gun After Battery Conviction. A deputy sheriff was convicted of violating *Penal Code* section 242, battery upon his live-in girlfriend, in 1993. He was placed on three years’ probation. His posttrial motion requesting an order granting him relief from the prohibition against possessing and owning a firearm under section 12021 was granted. He successfully completed probation and then successfully moved to have his battery conviction set aside pursuant to section 1203.4. In 2009, shortly after receiving an exemplary performance evaluation, he received a letter notifying him of the department’s intent to discharge him because he was disqualified from carrying a firearm under 18 U.S.C. § 922(g) (9), a federal gun control act. He unsuccessfully appealed his discharge to the Civil Service Commission, and then unsuccessfully sought extraordinary relief in superior court. In a two to one decision, the appellate court reversed, stating: “[W]e agree that plaintiff’s conviction for battery under *Penal Code* section 242, does not qualify as a predicate misdemeanor crime of domestic violence within the meaning of the federal statute, and therefore reverse.” The dissenting justice stated that “domestic abusers are

often prosecuted under general assault or battery statutes, and Congress could not have intended to preclude individuals who suffer convictions under those types of statutes from being brought within the ambit of the federal firearms prohibition.” *Shirey v. Los Angeles County Civil Service Commission* (Cal. App. Second Dist., Div. 8; May 6, 2013) 216 Cal.App.4th 1.

First Five Black Women Excused By Prosecutor; Judgment Of Death For Black Defendant. During jury selection in a robbery and murder case against a black man, the prosecutor used peremptory strikes to remove the first five black women in the jury box. Ultimately the jury included one black woman. The California Supreme Court affirmed a judgment of death. Justice Werdegar and Justice Liu dissented. Justice Liu stated that “[t]his court has put itself on the wrong side of a split among federal and state courts on how to treat a trial court’s denial of a defendant’s *Batson* motion when the trial court has not made clear on the record that it considered all relevant circumstances bearing on the issue of purposeful discrimination in jury selection.” *People v. Williams* (Cal. Sup. Ct.; May 6, 2013) 56 Cal.4th 630.

Bad News For Pot Shops. The City of Riverside declared by zoning ordinances that a medical marijuana dispensary is a prohibited use of land within the city and may be abated as a public nuisance. Invoking these provisions, the City brought a nuisance action against a facility operated by defendants. The trial court issued a preliminary injunction against the distribution of marijuana from the facility. The Court of Appeal affirmed the injunctive order. The California Supreme Court also affirmed, stating in its opinion that the Compassionate Use Act of 1996’s [CUA; Health & Safety code § 11362.5, added by initiative, Prop. 15 on November 5, 1996] proponents were motivated only “by a desire to create a narrow exception to the criminal law” for medical marijuana possession and use under the circumstances specified.” *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (Cal Sup. Ct.; May 6, 2013) 56 Cal.4th 729.

Seeking Lower Rates From A Court Reporter Must Be Done In Original, Not A New, Action. In a construction defect action, the plaintiff added a defendant to the action after 57 depositions had been taken. The new defendant requested copies of those 57 depositions, and the court reporter quoted \$2 per page, or \$16,000. The new defendant offered to pay \$30 flat rate in exchange for a computer disc containing uncertified copies of the transcripts and exhibits. The court reporter declined the offer, so the new defendant purchased copies of three depositions at the rate of \$2 per page, or \$1,200. It did not challenge the court reporter’s fee in that action. Four years later, the new defendant filed another action in superior court against the court reporter seeking restitution, alleging it was entitled to copies at a reasonable rate pursuant to *Code of Civil Procedure* section 2025.510 (c) and *Business and Professions Code* section 17200. The trial court sustained the court reporter’s demurrer without leave to amend. On appeal, the appellate court affirmed the dismissal, stating: “Reserving the issue to be subsequently determined by another judge would undermine the discretion vested in the original trial judge to control proceedings in his or her courtroom.” *The Las Canoas Company, Inc. v. Evelyn Hope Kramer* (Cal. App. Second Dist., Div. 8; May 7, 2013) 216 Cal.App.4th 96.

An Expert’s Dilemma. At issue here are two divergent legislative schemes: 1) An expert engaged to assist a lawyer in representation of a client is obligated to maintain the confidentiality of client communications. [*Evidence Code* sections 912 and 952.]; 2) Under the Child Abuse and Neglect Reporting Act [CANRA; *Penal Code* section 11164, *et seq.*], psychiatrists, psychologists, clinical social workers and other mental health professionals are “mandated reporters” and, as such, have an affirmative duty to report suspected child abuse or neglect to a child protective agency or other appropriate authority. Failure to report suspected abuse is a misdemeanor. [*Penal Code* section 11166, subdivision (c).] The duty to report is not excused or barred by the psychotherapist-patient privilege of *Evidence Code* section 1014. (*Penal Code* section 11171.2 subdivision (b); *People v.*

Stritzinger (1983) 34 Cal.3d 505, 512, [668 P.2d 738; 194 Cal.Rptr. 431]; *Evidence Code* section 1027.)

The lawyer for a juvenile accused of a crime requested the court to appoint a psychologist to assist in defending the juvenile. The court denied a request to appoint a psychologist who was not a member of the court's panel, whose members informed the juvenile's lawyer they would report to authorities any information of child abuse or neglect or *Tarasoff* threats. [See, *Tarasoff v. Regents of California* (1976) 17 Cal.3d 425, [551 P.2d 334; 131 Cal.Rptr. 14]. The juvenile court denied the motion. The appellate court reversed, stating: "The court erred in limiting [the juvenile's] choice of expert assistance in this manner. In the absence of clear legislative guidance, we decline to read into CANRA a reporting requirement that contravenes established law on confidentiality and privilege governing defense experts and potentially jeopardizes a criminal defendant's right to a fair trial. Accordingly, we grant his petition for a writ of mandate and direct the court to vacate its order denying the motion to appoint [a named psychologist who indicated she would abide by duty of confidentiality] as a defense expert and to issue a new order granting the motion." *Elijah W. v. Sup. Ct. (The People)* (Cal. App. Second Dist., Div. 7; May 8, 2013) 216 Cal.App.4th 140.

The Buck Stops With The District Attorney, Not The State Of California. A man who spent 24 years in prison after being convicted of murder because of the perjured testimony of a jailhouse informant, filed an action under 42 U.S.C. § 1983, claiming the Los Angeles County District Attorney's Office failed to create any system for deputy D.A.'s handling criminal cases to access information pertaining to the benefits provided to jailhouse informants. He further contended the office was on notice that jailhouse informants were falsely testifying. The district court granted a judgment on the pleadings in favor of the D.A.'s office because the district attorney acts on behalf of the state rather than the county in setting policy related to jailhouse informants. The Ninth Circuit reversed and remanded, stating: "[W]e conclude that California district attorneys act as local policymakers when

adopting and implementing internal policies and procedures related to the use of jailhouse informants." *Goldstein v. City of Long Beach and County of Los Angeles* (Ninth Cir.; May 8, 2013) (Case No. 10-56787).

All Children Are Dependents Of The Juvenile Court, Sons And Daughters, Even Though Only A Daughter Was Sexually Abused By Their Father.

The words of the California Supreme Court speak for themselves: "[W]e must decide whether a father's sexual abuse of his daughter supports a determination that his sons are juvenile court dependents when there is no evidence the father sexually abused or otherwise mistreated the boys, and they were unaware of their sister's abuse before this proceeding began. [¶] We conclude that a father's prolonged and egregious sexual abuse of his own child may provide substantial evidence to support a finding that all his children are juvenile court dependents." *Los Angeles County Department of Children and Family Services v. J.J.* (Cal. Sup. Ct.; May 9, 2013) 56 Cal.4th 766.

Delayed Discovery Rule Waived In Construction Contract.

The construction contract executed by the parties included a clause which provided that all causes of action relating to the contract work would accrue from the date of substantial completion of the project, abrogating the delayed discovery rule. The trial court concluded the clause was valid and enforceable, noting that the agreement "was one between sophisticated parties seeking to define the contours of their liability." Summary judgment was then granted for defendant after finding that plaintiff's action for latent construction defects was time-barred. In affirming grant of summary judgment on the issue of statute of limitations, the appellate court said that "public policy principles applicable to the freedom to contract afford sophisticated contracting parties the right to abrogate the delayed discovery rule by agreement." *Brisbane Lodging, L.P. v. Webcor Builders, Inc.* (Cal. App. First Dist., Div. 4; June 3, 2013) (Case No. A132555).

"Merely Calling Someone A Copyright Owner Does Not Make It So." Defendants posted articles online without authorization, which articles were from a news journal. Plaintiff brought an action for copyright infringement. The district court dismissed the action because the plaintiff lacked standing, and the Ninth Circuit affirmed because the plaintiff was not the legal or beneficial owner of the copyright under 17 U.S.C. § 501(b). *Righthaven LLC v. Hoehn* (Ninth Cir.; May 9, 2013) (Case No.'s 11-16751, 11-16776).

Consumer Protection Statutes Not Preempted By Federal Law.

Plaintiff brought an action under New Hampshire's consumer protection statutes alleging a towing company took his car, failed to notify him of its plan to auction it and sold it at auction, despite plaintiff's notice he wanted to reclaim it. The New Hampshire court granted summary judgment to the towing company, concluding the action was preempted by the Federal Aviation Administration Authorization Act of 1994 [FAAAA; 49 U.S.C. §14501(c)(1)]. The United States Supreme Court ruled the Act does not preempt state law claims stemming from the storage and disposal of towed vehicles. *Dan's City Used Cars, Inc. v. Pelkey* (U.S. Sup. Ct.; May 13, 2013) 133 S.Ct. 1769, [185 L.Ed.2d 909].

Patent Exhaustion Does Not Permit Farmer's Practice.

Plaintiff company invented and patented genetically altered soybean seeds. It sells the seeds to farmers pursuant to a licensing agreement. A farmer purchased the seeds for his first crop, following the terms of the licensing agreement. But for the next crop, the farmer planted ordinary soybeans and used plaintiff's alteration methods to achieve the same genetically altered result. Plaintiff brought an action for patent infringement, and the farmer raised the defense of patent exhaustion, a doctrine which limits a patentee's right to control what others can do with an article embodying or containing an invention. The United States Supreme Court held patent exhaustion does not permit a farmer to reproduce patented seeds through planting and harvesting without the patent holder's permission. *Monsanto*

Co. v. Bowman (U.S. Sup. Ct.; May 13, 2013) 133 S.Ct. 1761, [185 L.Ed.2d 931].

Fifteen Percent (15 %) Interest Not Usury. Plaintiff borrowed money from a mortgage lender secured by a deed of trust on certain real property. The interest rate was 15%, with interest-only payments from 2009 until 2012. When plaintiff defaulted, the lender foreclosed. Plaintiff filed suit against the lender claiming the interest rate on the loan exceeded the maximum allowed by the California Constitution and therefore the trustee's sale was void. In California, a loan secured by a lien on real property is exempt from the constitutional prohibition on usury if the loan is made or arranged by a licensed real estate broker. (*California Constitution*, Article XV, section 1; *Civil Code* section 1916.1.) Section 1916.1 explains that "a loan . . . is arranged by a person licensed as a real estate broker when the broker . . . acts for compensation or in expectation of compensation for soliciting, negotiating, or arranging the loan for another." The appellate court held: "In this case, we conclude that even when the lender on such a loan is a corporation that is wholly owned by the arranging broker, the broker can still be found to have arranged the loan 'for another' for purposes of section 1916.1. We also conclude that in such a situation, the broker may be found to have arranged the loan 'in expectation of compensation' even if the only compensation the broker will receive is the profit his wholly owned corporation reaps from the interest on the loan." *Bock v. California Capital Loans, Inc.* (Cal. App. Third Dist.; May 14, 2013) (As Mod. May 20, 2013) 216 Cal.App.4th 264.

Parties May Reserve Issue Of Prevailing Party In Settlement Agreement. The parties to a litigation settled their dispute pursuant to a written settlement agreement, which stated: "This Settlement Sum is exclusive of attorney's fees and costs. . . . [¶] [Plaintiff] shall apply to the Court by way of a motion for such attorney's fees and costs incurred in the Action pursuant to *California Civil Code* section 3426.4, and for costs incurred in the Action pursuant to Memorandum of Costs under *California Code of Civil Procedure* section 1033.5, and Defendants

reserve their right to oppose and tax same. No duplicate recovery will be allowed." The settlement agreement noted that "the Parties understand and agree that nothing in this Settlement Agreement is intended, or should be construed as an admission of any liability, misconduct, or wrongdoing by any Party herein." The parties further agreed that the Los Angeles Superior Court would retain jurisdiction pursuant to *Code of Civil Procedure* section 664.6 to enforce the settlement agreement. When plaintiff filed a memorandum of costs, the trial court struck it, and also denied plaintiff's motion for attorney fees. The appellate court reversed and remanded, stating: "Because we conclude that parties to a settlement agreement can validly specify that one party is potentially a prevailing party and reserve for later determination by the trial court whether that party did prevail, as well as other factual matters involved in making an award of statutory attorney fees, we reverse the trial court's orders and remand the matter to the trial court to consider the motions." *Khavarian Enterprises, Inc. v. Commline, Inc.* (Cal. App. Second Dist., Div. 4; May 14, 2013) 216 Cal.App.4th 310.

Allegations Of Breach Of Professional And Ethical Duties Against Lawyer. A lawyer, who was co-founder of a firm, resigned from the law firm after an internal dispute. Five days prior to the effective date of his resignation, he remotely accessed the law firm's document management system and spent several hours reviewing certain files relating to real estate transactions. Five months afterwards, one of the law firm's clients brought an action against the law firm for fraud. The next year, the law firm brought another action against the lawyer who had resigned for breach of fiduciary duty, among other causes of action, and it is that action involved here. The lawyer who resigned is accused of "systematically reviewing, downloading, and printing" the law firm's privileged and confidential file materials on multiple occasions without proper authorization or any legitimate purpose. The lawyer who resigned brought a special motion to strike the law firm's complaint pursuant to the anti-SLAPP statute [*Code of Civil Procedure* section 425.16], arguing that each cause of action arose from

constitutionally protected speech, namely his communications with the lawyers for the clients who sued the law firm. The trial court denied the motion to strike, and the appellate court affirmed, stating: "Although [the lawyer who resigned] characterizes the claims differently, [the law firm's] causes of action arise from an alleged breach of professional and ethical duties." *Castleman v. Sagaser* (Cal. App. Fifth Dist.; May 15, 2013) 216 Cal.App.4th 481.

Watch Out For That Nonsettling Party! In a construction defect case, a homeowners association settled with all but one party, a roofing company. After the settling parties signed the settlement agreement, one of the defendants dismissed its cross-complaint against the nonsettling party, mailing its written notice of dismissal on July 14, 2011. The nonsettling party filed a cost bill on August 2, 2011, 19 days later. The settling defendant moved to strike the cost bill on the ground it was untimely under *California Rule of Court*, rule 3.1700(a), which requires a cost bill to be filed within 15 days after the date of service of a written notice of entry of dismissal. The trial court granted the motion to tax costs. The appellate court affirmed, holding "if a written notice of judgment or dismissal is served by mail within the State of California, the time for filing a memorandum of costs is extended by five days." *Nevis Homes, LLC v. CW Roofing, Inc.* (Cal. App. Second Dist., Div. 1; May 15, 2013) 216 Cal.App.4th 353.

Tragedy On The Highway. A CHP officer stopped a car, and the two were parked on the right shoulder of a freeway. Meanwhile, another man was proceeding along the freeway with two dirt bikes strapped inside his truck bed. The bikes were strapped down by employees of a motorsports dealership. The bikes were "hopping around a little bit," and the truck driver glanced over his shoulder to assess the situation. As he did, he steered his truck to the right and into the car parked on the shoulder, killing the driver and partially paralyzing the CHP officer. The driver of the truck pled guilty to vehicular manslaughter while intoxicated, and was sentenced to 15 years in state prison. The CHP officer and his wife as well as the de-

cedent's mother sued the truck driver and the motorsports dealership for negligence and wrongful death. A jury assigned 67% of the fault to the truck driver and 33% to the dealership and awarded a total of \$49.6 million to plaintiffs. After remitters, the court entered judgment for \$14.84 million against the truck driver and \$7.3 million against the dealership, and against both defendants jointly and severally for \$13.01 million. The truck driver settled with all plaintiffs and the dealership settled with decedent's relatives, so the sole remaining plaintiffs are the CHP officer and his wife and the sole defendant is the dealership. On appeal, were the issues of the dealership's duty, who should decide whether the truck driver's negligence was a superseding cause and an expert witness's testimony. The appellate court held: "Does a commercial vendor owe a duty of care to persons on or near the roadway who are injured as a result of the vendor's negligence in loading and securing cargo in a vehicle in a way that distracts the vehicle's driver? Applying the controlling principles of California law, we conclude that such a duty exists and that a categorical 'no duty' exception for vendors should not be created. We also hold that the driver's negligence in driving under the influence of marijuana does not constitute a superseding cause as a matter of law; instead, the issue of superseding cause is one for the jury. We nevertheless determine that the trial court abused its discretion in not striking, for lack of foundation, expert testimony that the driver in this case was a 'chronic' marijuana user and thus, unlikely

to be impaired. Because the driver's impairment was crucial to the allocation of fault between the driver and vendor, we vacate the judgment and remand for a new trial." *Pedefferri v. Seidner Enterprises* (Cal. App. Second Dist., Div. 1; May 15, 2013) (As Mod. June 12, 2013) 216 Cal.App.4th 359, [156 Cal.Rptr.3d 673].

What Is "Reasonable Diligence" When Trying To Effect Service Of Process In Unlawful Detainer Cases?

Code of Civil Procedure section 415.45, provides that summons may be served on an unlawful detainer defendant by posting it on the premises, along with notice sent by certified mail to that address, if the court determines that "the party to be served cannot with reasonable diligence be served in any manner specified in this article [i.e., Article 3] other than publication . . ." Article 3 comprises sections 415.10-415.95. The dispute in this case involves the lengths to which a plaintiff must go in exercising "reasonable diligence" under this provision. Here a process server attempted personal service on five occasions at various times of the day at the rented residence. The landlord wrote letters to the residence. Apparently the tenant was on the East Coast, but when the landlord attempted to have its letters forwarded, was informed by the postal service it had been unable to do so. Eventually the landlord obtained a court order permitting it to serve the tenant by posting a copy of the summons and complaint on the rented premises and by mailing a copy to the ten-

ant's last known address, which it did. A month later, the landlord took possession of the residence and rented it to someone else. Six months later, the tenant, citing *Code of Civil Procedure* section 473, moved to vacate the default judgment and restore her to possession of the apartment, arguing the landlord had not used reasonable diligence to locate her. The superior court denied the motion and the appellate division of the superior court reversed. The Court of Appeal affirmed the superior court's denial of the motion to vacate, stating: "As summary proceedings, unlawful detainer actions do not afford defendants all the procedural advantages of ordinary disputes." *The Board of Trustees of the Leland Stanford Junior University v. Ham* (Cal. App. Sixth Dist.; May 15, 2013) 216 Cal.App.4th 330.

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