



Litigation Update

Litigation Section News

Established 2004 – Celebrating 10 Years

August 2013

If Petition Brought In Good Faith, Attorney Fees May Be Awarded.

The National Vaccine Injury Act of 1986 [NCVIA; 42 U.S.C. § 300aa] established a no-fault compensation system to stabilize the vaccine market and expedite compensation to injured parties. The petition is filed with the clerk of the Court of Federal Claims, and service is made upon the Secretary of Health and Human Services. Under the Act, an attorney may not charge a fee for services, but a court may award attorney fees and costs. Plaintiff developed multiple sclerosis, and filed a petition under the Act upon learning of a connection between MS and the hepatitis-B vaccine. The petition was ultimately found to be untimely because plaintiff did not file her petition within 36 months of her first MS symptoms. The United States Supreme Court held that a petition under the Act may qualify for an award of attorney fees, even if it is untimely, so long as it was brought in good faith. *Kathleen Sebelius v. Melissa Cloer* (U.S. Sup. Ct.; May 20, 2013) 133 S.Ct. 1886, [185 L.Ed.2d 1003].

Postjudgment Orders Reversed.

The appellate court's words say it all: "In this appeal from postjudgment orders directing issuance of a letter rogatory requesting registration of judgment liens against properties of the judgment debtor in Mexico and restraining the debtor from transferring its right to payment upon the sale of those properties, we must decide two issues of first impression in California. First, may a court request the registration of judgment liens in a foreign country via a letter rogatory issued pursuant to the Inter-American Convention on Letters Rogatory? Second, may a court issue an order restraining the disposition of a right to payment pursuant to *Code of Civil Procedure* section 708.520, when it has not previously or simultaneously issued an order assigning the right to payment pursuant to

section 708.510 of that code? We answer both questions in the negative and therefore reverse the challenged orders." The appellate court explained the Inter-American Convention on Letters Rogatory does not authorize issuance of a letter rogatory designed to enforce a judgment. It also stated section 708.520 does not authorize issuance of a restraining order in the absence of a corresponding assignment order issued under section 708.510. *Landstar Global Logistics, Inc. v. Robinson & Robinson, Inc.* (Cal. App. Fourth Dist., Div. 1; May 16, 2013) 216 Cal.App.4th 378, [156 Cal.Rptr.3d 687].

Employee Does Not Receive Salary And Is Not Exempt From Overtime.

California law provides that, absent an exemption, an employee must be paid time-and-a-half for work in excess of 40 hours per week. To be exempt from that requirement the employee must perform specified duties in a particular manner and be paid "a monthly salary equivalent to no less than two times the state minimum wage for full-time employment." [*Labor Code* section 515, subdivision (a)]. The question presented in this case is whether a compensation scheme based solely upon the number of hours worked, with no guaranteed minimum, can be considered a "salary" within the meaning of the pertinent wage and hour laws. The appellate court concluded that such a payment schedule is not a *salary* and, therefore, does not qualify the employee as exempt. *Negri v. Koning & Associates* (Cal. App. Sixth Dist.; May 16, 2013) 216 Cal.App.4th 392, [156 Cal. Rptr.3d 697].

Malicious Prosecution Action May Proceed.

Plaintiff received two checks from an insurance company in settlement of a claim. He took the checks to the bank where the checks were drawn, and the bank refused to cash one check. The bank manager called police and reported that

plaintiff threatened to blow up the bank. Plaintiff was charged with a crime, tried and acquitted by a jury. Plaintiff then sued the bank and its manager for malicious prosecution. The trial court entered judgment for defendants after granting a special motion to strike pursuant to *Code of Civil Procedure* section 425.16, [the anti-SLAPP statute]. The appellate court reversed, musing how, when there was "some belief that a misdemeanor is being committed [one] can make up evidence of an entirely different and much more serious crime." *Greene v. Bank of America* (Cal. App. Second Dist., Div. 5; May 16, 2013) 216 Cal.App.4th 454.

No Minimum Contacts. Plaintiff alleged he tried to start a personal watercraft manufactured by defendant, and the watercraft caught fire, causing him serious injuries. He claimed the manufacturer was negligent for failing to inform him of a recall of the watercraft for a defective fuel tank. The manufacturer cross-complained against the successor-in-interest of the manufacturer of the fuel tank, a Canadian company. The Canadian company never had a registered agent in California, never qualified to do business in California, never manufactured any products in California, never had any employees, offices, or facilities in California, and never advertised or sold any personal watercraft fuel tanks or fuel tank filler necks in California. The watercraft manufacturer argued the Canadian company had sufficient contacts with California because it knew its fuel tanks would be used on the watercrafts and would be sold in the U.S., including California, and had agreed to produce its fuel tanks in accordance with regulatory standards promulgated by the U.S. Coast Guard. The trial court quashed service of summons for lack of personal jurisdiction. The appellate court affirmed, stating the Canadian company and its successor "did not purposefully direct their activities toward the residents of California.

They created no substantial connection with California or continuing obligations between them and California. They did not deliberately engage in any significant activities within California. Because of their lack of contacts with California, they could not reasonably expect to be subject to California's jurisdiction." *Bombardier Recreational Products, Inc. v. Dow Chemical Canada ULC* (Cal. App. Third Dist.; May 17, 2013) 216 Cal.App.4th 591.

Use Of Declaration In Limited Jurisdiction Court Abuse Of Discretion.

The only evidence admitted by plaintiff bank in a limited jurisdiction action for breach of contract and common counts was a declaration admitted pursuant to *Code of Civil Procedure* section 98. Judgment of \$7,788.30 was entered for plaintiff. The declaration included a statement that the declarant was available for 20 days prior to trial for service of process through plaintiff's counsel. Within that time, counsel for defendant issued a civil subpoena for personal appearance at the trial along with a \$35 check payable to the declarant. But the process server, who had been authorized to effectuate personal service only, was not able to serve the declarant at the address given, and did not serve a person who said he could accept service on the declarant's behalf. On appeal, defendant, who wanted to cross-examine the declarant, argued section 98 contemplates service of a civil subpoena for personal appearance at trial, but plaintiff contended the declarant was available for service of process because defendant could have compelled her attendance at trial by serving its counsel with a notice to appear pursuant to *Code of Civil Procedure* section 1987(b). Section 98 provides, in relevant part: "A party may, in lieu of presenting direct testimony, offer the prepared testimony of relevant witnesses in the form of affidavits or declarations under penalty of perjury. The prepared testimony may include, but need not be limited to, the opinions of expert witnesses, and testimony which authenticates documentary evidence. To the extent the contents of the prepared testimony would have been admissible were the witness to testify orally thereto, the prepared testimony shall be received as evidence in the case, provided that either of the following applies: [¶] (a) A copy has been served

on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial." The appellate division of the Santa Clara superior court reversed, stating the declaration "did not comply with Section 98 as [the declarant] was not available for service of process within 150 miles of the courthouse. Thus, the trial court abused its discretion in admitting the declaration as evidence." *Target National Bank v. Rocha* (Sup. Ct. App. Div.; May 16, 2013) 216 Cal.App.4th Supp. 1.

Arizona's Abortion Law Held Unconstitutional.

Arizona passed a law that except in a medical emergency, abortion of a fetus determined to be of a gestational age of at least twenty weeks is prohibited. Three gynecologists who practice in Arizona filed suit in federal court seeking declaratory and injunctive relief against enforcement of the statute. The district court denied relief. The Ninth Circuit held that under *Roe v. Wade* (1973) 410 U.S. 113, [93 S.Ct. 705, 35 L.Ed.2d 147], "a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable." The court also stated that: "While the state may regulate the mode and manner of abortion prior to fetal viability, it may not proscribe a woman from electing abortion, nor may it impose an undue burden on her choice through regulation." The Ninth Circuit reversed the trial court's denial of relief. *Isaacson v. Tom Horne, Attorney General of Arizona* (Ninth Cir., Ariz.; May 21, 2013) (Case No. 12-16670).

No Civil Liability For Providing Alcohol To Someone Who Injures Another As A Result Of Intoxication.

Five young women, all under the age of 21, got into a car after partying all night (and drinking alcohol) at a friend's house. Driving on the wrong side of the road, the car collided with a bicyclist, who was seriously injured. The bicyclist and his wife sued, among others, all of the occupants of the car. During the evening, at one point or another, all four women went to the store to purchase alcohol which was consumed at the party. The trial court en-

tered judgments in favor of the four passengers. The question presented on appeal was whether the four women who were not driving, but who are alleged to have supplied some of the alcohol, can be held liable for the bicyclist's injuries. The appellate court affirmed, concluding "the Legislature, by enacting Civil Code section 1714 has precluded any liability claim against the women." *Rybicki v. Carlson* (Cal. App. Second Dist., Div. 4; May 22, 2013) 216 Cal.App.4th 758.

Entity Acting On Behalf Of Defunct Company May Enforce Arbitration Agreement.

A financial services company, sued for allegedly providing bad investment advice, was denied its petition to compel arbitration because the original entity, another financial services company, which entered into the arbitration agreement, was defunct. The appellate court reversed, holding the financial services company, as an agent of the defunct company and a third party beneficiary of the agreement, may enforce the arbitration clause. *Ronay Family Limited Partnership v. Tweed* (Cal. App. Fourth Dist., Div. 1; May 23, 2013) 216 Cal.App.4th 830.

Award For Overtime Pay Upheld.

After plaintiff was terminated by a grocery chain store, she brought an action to recover unpaid overtime pay because she regularly spent more than 50 percent of her work hours doing nonexempt tasks. The trial court entered judgment awarding her \$26,184.60 plus interest for overtime pay. The supermarket appealed, contending the trial court failed to account for hours spent simultaneously performing exempt and nonexempt tasks. The appellate court affirmed, rejecting the supermarket's argument that any time spent simultaneously performing exempt and nonexempt duties should be considered to fall on the exempt side of the ledger. *Heyen v. Safeway Inc.* (Cal. App. Second Dist., Div. 4; May 23, 2013) 216 Cal.App.4th 795.

Superior Court Cannot Require Posting Of Jury Fees When There Is A Fee Waiver.

In an unlawful detainer action, the trial court found that defendant had waived a jury trial because no jury fees had been posted, despite the fact the superior court had previously

granted a fee waiver. A court trial was held, and judgment was entered for the plaintiff. On appeal to the appellate division of the superior court, the defendant contended the court had the obligation to pay jury fees and expenses. The appellate division of the Los Angeles Superior Court reversed, stating: "The trial court deprived defendant of her constitutional right to a jury trial. Such deprivation constitutes a miscarriage of justice and reversible error per se without the need to demonstrate actual prejudice." *Munoz v. Silva* (Sup. Ct. App. Div.; May 23, 2013) 216 Cal.App.4th Supp. 11.

Elder Abuse Actions Not Limited To Custodial Care.

Plaintiffs' 83-year-old mother was not referred to a vascular surgeon over a two-year period during which her diminishing vascular flow worsened without treatment. She developed gangrene and her leg was amputated. Seven months later, she died. Defendants contend they cannot be liable for elder abuse because they treated decedent as an outpatient, and liability for elder abuse "requires assumption of custodial obligations." The trial court sustained defendants' demurrer without leave to amend. The appellate court reversed, stating: "In short, we find no support in the statute or the cases for the claim that a health care provider without custodial obligations is exempt from the Elder Abuse Act." Defendants also contend the conduct plaintiffs allege constitutes only professional negligence and, as a matter of law, does not amount to the "reckless neglect" required for a claim of elder abuse. Again, the appellate court rejected the argument, stating: "The jury may view defendants' failure to refer [the decedent] to a vascular specialist as deliberate indifference to her increasingly urgent medical needs without regard for the excessive risk to which they exposed her by their failure to seek appropriate specialized care—that is, as an 'egregious act[] of misconduct distinct from professional negligence' (*Covenant Care v. Sup.Ct. (Lourdes M. Inclan)* (2004) 32 Cal.4th 771 at p. 784, [86 P.3d 290, 297-298, 11 Cal.Rptr.3d 222, 230-231].)" *Winn v. Pioneer Medical Group* (Cal. App. Second Dist., Div. 8; May 24, 2013) 216 Cal.App.4th 875.

Declaratory Relief Action Properly Stayed.

The National Football League and its intellectual property marketing arm have been sued in multiple states by dozens of former players alleging lifelong brain damage from on-field injuries dating back to the 1950's. In this case the plaintiffs, National Football League and NFL Properties LLC, seek a Los Angeles Superior Court declaratory relief judgment regarding the coverage duties of 32 insurance carriers pursuant to some 187 commercial liability policies that were issued over a 50-60 year period. All the same entities are parties to parallel coverage actions filed by some of the insurers in New York state courts at approximately the same time as the California case. The insurer defendants sought a dismissal or stay of the California case on a theory of forum non conveniens. The California trial court ordered the California proceeding stayed pending the outcome of the New York actions. The appellate court affirmed, stating: "No strong presumption in favor of the NFL plaintiffs' choice of forum applied because plaintiffs are not California residents for purposes of a forum non conveniens analysis. The burden of proof on the defendant insurers, as the moving parties on the motion, did not include establishing California is a seriously inconvenient forum because such proof is not required to justify a stay of the California proceedings, as contrasted with a dismissal. The trial court's decision to stay the proceedings after weighing and balancing the relevant factors was well within its allowable discretion." *National Football League v. Fireman's Fund* (Cal. App. Second Dist., Div. 5; May 28, 2013) 216 Cal.App.4th 902.

Dismissal Of Predatory Lending Action Reversed.

Plaintiffs initiated an action against a loan broker and various financial institutions, claiming "pursuant to a scheme of predatory lending, [they] made material misrepresentations and fraudulent concealments of circumstances in the appraisal of the residence and in the terms of the loan in order to maximize their profit." They alleged they applied for a residential home loan, and later discovered they used an appraisal which was based upon outdated sales of homes that were not truly comparable in value, resulting in a significantly inflated appraisal of the property. The trial court sustained demurrers without leave to amend and granted a judgment on

the pleadings. The appellate court reversed, agreeing with plaintiffs that they sufficiently alleged delayed discovery of facts that defendants had purposely withheld from them in order to induce them to enter into now defaulted loans. *Fuller v. First Franklin Financial Corporation* (Cal. App. Third Dist.; May 1, 2013) (As Mod. June 24, 2013) 216 Cal.App.4th 955.

Broad Language In Contractual Attorney Fee Provision.

Plaintiff prevailed under her negligence cause of action, but did not recover under her cause of action for breach of contract containing an attorney fee provision. That provision states: "All parties to this agreement agree to mediate, in good faith, any dispute prior to initiating arbitration or litigation. The prevailing party in the event of arbitration or litigation shall be entitled to costs and reasonable attorney fees except that any party found in those proceedings to have failed to mediate in good faith shall not be so entitled." Defendant's post-trial motion for attorney fees was denied. The appellate court affirmed the trial court's order, stating: "Under the broad language of the attorney fee provision, the trial court correctly rejected defendant's request for attorney fees. Unlike some attorney fee provisions that restrict the right to recover attorney fees to the party prevailing on a breach of contract claim, in which case the outcome of other claims does not affect the right to recover attorney fees, the agreement in this case entitles the party who prevails in the overall dispute to recover its attorney fees. Under the terms of this provision plaintiff is the prevailing party although she recovered on a tort theory rather than a contract theory." *Maynard v. BTI Group, Inc.* (Cal. App. First Dist., Div. 3; May 29, 2013) 216 Cal.App.4th 984.

Writs Of Execution Can Get Complicated!

After the sheriff levied on funds in its bank account, pursuant to a writ of execution, a judgment debtor filed a notice of appeal and a sufficient appeal bond. The debtor gave notice of these documents to the sheriff in order to prevent the sheriff from disbursing the levied funds to the judgment creditor. Nonetheless, the sheriff then disbursed the levied funds to the creditor. It should be noted, the debtor

did not file a motion to quash the writ of execution. The debtor filed an ex parte application requesting the trial court to order the creditor to return the funds erroneously disbursed by the sheriff. The trial court denied the request on the basis it had no jurisdiction to do so once the funds had been delivered to the creditor. The debtor filed a petition for a writ of mandate challenging the trial court's order. The appellate court concluded the trial court was correct when it concluded it lacked authority to order a judgment creditor to return to a judgment debtor funds which had already been disbursed to the creditor by the levying officer. The appellate court noted: "However, the debtor had a more conclusive remedy; it could have sought an order from the court recalling and/or quashing the writ of execution and releasing the liens." *Adir International, LLC v. Sup.Ct. (Fusion Industries)* (Cal. App. Second Dist., Div. 3; May 29, 2013) 216 Cal.App.4th 996.

Bankers Sealed Their Lips, And Now They Are Defendants. Investors purchased a tenant in common ownership interest in a senior housing facility from a real estate investment company. The company did not disclose to the investors that its sole owner is a convicted felon, a violation of state securities law; nor did it disclose the existence of a second loan that grossly overleveraged the property. Consequently, the investors brought an action against the real estate investment company for violating state securities law and for fraud. Also named as defendants in the action are the investment bankers who structured the joint ventures between the investment company and various lenders, but which bankers had no involvement in the tenant in common ownership interest sale to plaintiffs. According to the pleading, the bankers knew the investment company did not disclose its owner's felony conviction or the second loan, and, thus, materially assisted in violating securities law and fraud by conspiring with the other defendants. The trial court sustained the demurrer of the investment bankers. The appellate court affirmed in part and reversed in part, stating: "We conclude the operative second amended complaint does not state a cause of action against the investment bankers for materially assisting in a securities law

violation under *Corporations Code* section 25504.1. However, we also conclude the facts as pleaded are minimally sufficient to state a cause of action against the investment bankers for common law fraud based upon a conspiracy to defraud the investors." *AREI II Cases* (Cal. App. First Dist., Div. 3; May 29, 2013.) 216 Cal.App.4th 1004.

Union Entitled To Home Addresses And Phone Numbers Of All Represented Employees, Including Those Who Have Not Joined Union. A union claimed it was entitled to obtain the home addresses and phone numbers of all represented employees, including those who have not joined the union. The California Supreme Court agreed that the union does have the right to that information, stating: "Whether the right to privacy under Article I, Section 1 of the California Constitution prohibits disclosure is a question of first impression. We conclude that, although the County's employees have a cognizable privacy interest in their home addresses and telephone numbers, the balance of interests strongly favors disclosure of this information to the union that represents them. Procedures may be developed for employees who object to this disclosure." However, the Supreme Court said, and the parties agreed, the Court of Appeal overstepped its authority by ordering the union to implement specific notice and opt-out procedures. Citing *Code of Civil Procedure* section 1094.5, the California Supreme Court noted that when reviewing administrative orders and decisions, a court can deny the writ or grant it and set aside the decision, "but it cannot 'limit or control in any way the discretion legally vested in' the agency." *County of Los Angeles v. Los Angeles County Employee Relations Commission (Service Employees International Union, Local 721)* (Cal. Sup. Ct.; May 30, 2013) 56 Cal.4th 905.

Danger In Permitting A Broker To Fill Out Insurance Application. The premises of a business was damaged by fire. An endorsement in the business insurance policy required as a condition of insurance that the insured premises contain automatic sprinklers. The application for insurance stated in the box entitled "FIRE PROTECTION (Sprinklers, Standpipes,

CQ/Halon Systems)," that the applicant had "SMOKE DETECTORS/FIRE EXTINGUISHING/SPRINKLERS." The insurer declined coverage, and the insured brought an action for coverage. The trial court entered summary judgment in favor of the insurance company because it was undisputed that the premises did not have an automatic sprinkler system. The insured business claimed on appeal there is a triable issue of fact because the insurance broker who prepared its insurance application was an actual or ostensible agent of the insurance company. The appellate court concluded that the evidence showed as a matter of law the broker was not an agent of the insurance company and affirmed judgment in favor of the insurer. *American Way Cellular, Inc. v. Travelers Property Casualty Company of America* (Cal. App. Second Dist., Div. 1; May 30, 2013) 216 Cal.App.4th 1040.

Death Penalty "Permanently Enjoined." The Department of Corrections and Rehabilitation promulgated regulations regarding the manner in which the death penalty is carried out. The trial court found the regulations substantially failed to comply with the California Administrative Procedure Act [*Government Code* section 11340 *et seq.*] and invalidated the regulations in their entirety. The gist of plaintiff's challenge to the regulations is the claim is that the use of one of the three drugs in the three-drug regulatory formula—pancuronium bromide, a neuromuscular agent that paralyzes the body's voluntary muscles—"is unnecessary and dangerous, and serves only to increase the risk that the condemned person will suffer excruciating pain" and "the rulemaking file makes clear that there are no countervailing benefits or compelling reasons to use pancuronium bromide as part of the execution process." The appellate court affirmed much of the trial court's decision, holding: "The judgment is affirmed insofar as it declares that the CDCR's lethal injection protocol (*California Code of Regulations*, Title 15, Sections 3349-3349.4.6) is invalid for substantial failure to comply with the requirements of the APA, and permanently enjoins the CDCR from carrying out the execution of any condemned inmate by lethal injection unless and until new regulations governing lethal injection execution are promulgated in compliance with the

APA.” *Sims v. Department of Corrections and Rehabilitation* (Cal. App. First Dist., Div. 2; May 30, 2013) 216 Cal.App.4th 1059.

No Creditor's Claim Required.

The executor of an estate filed a petition confirming the sale of decedent's real property. California Regional Water Quality Control Board filed an objection because the proceeds were subject to a stipulated court order that required the property owner to remediate a waste landfill. The executor argued the Water Board was barred because it failed to file a creditor's claim under *Probate Code* section 9100. Affirming, the appellate court agreed with the trial court that the sale proceeds were subject to payment under a court order, explaining: “In sum, respondents are not creditors of either estate to whom a debt is owed and they are not making a demand for another's benefit, as they are not demanding the payment of money to a creditor. Neither are they asserting that an obligation created by statute is exempt from the claims filing requirement. Instead, they simply are seeking to enforce the requirement in the Remediation Order that the assets pledged to satisfy the financial assurances requirement be used for that purpose.” *Estate of Rudy Bonzi* (Cal. App. Fifth Dist.; May 30, 2013) 216 Cal.App.4th 1085.

Jurors Watched Movie During Death Penalty Deliberations.

In a death penalty writ of habeas corpus, the California Supreme Court considered the declaration of a juror which stated: “I told the holdout jurors that if they wanted to understand what it was like in prison, they should watch the movie American Me. That is based on a true story. [¶] Two of the jurors rented the movie and watched it over the weekend. They finally understood that Mr. Boyette could kill again in prison if he was not sentenced to death. After they watched the movie, they changed their votes to death.” The high court denied relief, noting: “Although the movie may have been consistent with the prosecutor's argument that someone like petitioner could continue his violent life of crime in prison, the record shows the movie did not introduce any new facts or ideas into the jury room. A number of jurors had seen the movie before the trial and had argued at length during deliberations that petitioner would join a gang in

prison and continue to commit crimes. That the information contained in the movie was already before the jury diminishes the potential prejudicial impact of the misconduct despite its consistency with the prosecutor's closing argument.” *In re Boyette* (Cal. Sup. Ct.; May 30, 2013) 56 Cal.4th 866, [301 P.3d 530].

Look At The Forest As Well As The Trees!

In arguing about the content of a judgment after the trial court awarded damages for copyright infringement of a design, both sides argued about the appropriateness of an injunction. But the judgment issued by the court did not mention an injunction. Instead of appealing, the plaintiff filed a motion for a permanent injunction, which was denied as being a motion for reconsideration in disguise. Meanwhile, the time to appeal expired, and the Ninth Circuit dismissed plaintiff's appeal. *Classic Concepts, Inc. v. Linen Source, Inc.* (Ninth Cir.; May 30, 2013) (Case No. 07-56870).

Medicare Does Not Cover Dental Costs, Even If Problems Result From Physical Disease.

A plaintiff suffers from Sjogren's Syndrome, which has left her unable to produce saliva. As a result, she lost teeth, her gums deteriorated, and her bite collapsed. She is a Medicare beneficiary, and she received dental services to correct her problems. But the Secretary of The Department of Health and Human Services denied coverage [HHS]. The trial court upheld HHS's ruling, and the Ninth Circuit affirmed, citing 42 U.S.C. § 1395y(a)(12) which excludes coverage “for services in connection with the care, treatment, filling, removal, or replacement of teeth or structures directly supporting teeth.” *Fournier and Berg v. Kathleen Sebelius* (Ninth Cir.; May 31, 2013) (Case No. 12-15478).

First Words After An Arrest Are Now “Open Your Mouth So We Can Take A Swab Of Your DNA” When They Used To Be “You Have A Right To Remain Silent.” Justice Anthony Kennedy, writing for the majority, called taking a cheek swab from arrestees a legitimate police booking procedure. The opinion further states “an individual's identity is more than just his name or Social Security

number, and the government's interest in identification goes beyond ensuring that the proper name is typed on the indictment.” Justice Antonin Scalia wrote a dissent, and also stated from the bench: “This will solve some extra crimes, to be sure. But so would taking your DNA whenever you fly on an airplane — surely the TSA must know the ‘identity’ of the flying public. For that matter, so would taking your children's DNA when they start public school.” *Maryland v. King* (U.S. Sup. Ct.; June 3, 2013) 133 S.Ct. 1958, [186 L.Ed.2d 1].

No Issue Of First Amendment Protection When School Teacher Fired After Blasting “Zionist Jews.”

A substitute school teacher attended an “Occupy Los Angeles” rally and gave an interview to a reporter. During the interview, she said she worked for the Los Angeles Unified School District, and stated: “I think that the Zionist Jews who are running these big banks and our Federal Reserve, which are not run by the federal government, they need to be run out of this country.” When she attempted to find out her next teaching assignment on an automated system, she found out she was classified as inactive and that she should contact her supervisor. When she made contact, she was told her employment was terminated. The trial court sustained a demurrer to the teacher's third amended complaint for deprivation of her rights under 42 U.S.C. § 1983, wrongful discharge and negligent infliction of emotional distress. Analyzing various issues, mainly procedural roadblocks to the case, the appellate court affirmed the dismissal without discussing the First Amendment. *McAllister v. Los Angeles Unified School District* (Cal. App. Second Dist., Div. 2; June 3, 2013) 216 Cal. App.4th 1198.

Delayed Discovery Rule Waived In 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) 216 Cal.App.4th 1249, [157 Cal.Rptr.3d 467].

BMW Purchase Contract Permeated By Unconscionability.

A retail sales installment contract used to purchase an automobile that was one page, 8.5” wide and 26” long. There were numerous and extensive provisions on both sides. Plaintiffs were asked to sign, or initial, 12 places on the front side, but, no places on the back side. An arbitration clause was on the back side toward the bottom. Shortly after purchasing the car, plaintiffs experienced problems with it, including an intermittently inoperable window, inoperable headlamps, a repeatedly illuminated “check engine light,” sluggish acceleration, poor gas mileage, and a “knocking noise.” Plaintiffs took the car to a BMW dealership to be repaired, but the dealer did not correct the problems. One of the many provisions within the arbitration provision stated: “The arbitrator’s award shall be final and binding on all parties, except that in the event the arbitrator’s award for a party is \$0 or against a party is in excess of \$100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel.” Another provision stated: “If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable.” The trial court granted the motion to compel arbitration, and the appellate court reversed, finding the “sale contract does not require the arbitration of disputes between a purchaser and a car dealer because it is permeated by

unconscionability.” *Vargas v. SAI Monrovia B, Inc.* (Cal. App. Second Dist., Div. 1; June 4, 2013) 216 Cal.App.4th 1269.

You’ve Got Mail. A probationary school nurse was notified of her termination by email. Pursuant to *Education Code* section 44929.21, subdivision (b), the governing board of a school district must notify a probationary teacher on or before March 15 of the teacher’s second complete consecutive school year of employment of the decision to reelect or not reelect the teacher for the next succeeding year. If the notice is not given, the teacher is deemed reelected for the next school year and must be classified as a permanent employee of the district at the commencement of the year. After being unsuccessful within the school district process, the nurse filed a petition for extraordinary relief. The trial court found an email notice from the district’s head of human resources was sufficient notice and denied the writ of mandate. In affirming, the appellate court noted: “The purpose of the statute is to provide the probationary employee with ample notice to allow the employee an opportunity to find another job and plan for the future.” *Grace v. Beaumont Unified School District* (Cal. App. Fourth Dist., Div. 2; June 4, 2013) 216 Cal.App.4th 1325.

You Can’t Sue City Hall. Owners of property obtained approval to build a living facility for senior citizens. Neighbors were successful in having the planning commission’s approval of the project overturned by the city council. The property owners sued the city and the five city council members who voted to reject the project for nearly \$2 million in compensatory damages plus punitive damages, because of the vote. The trial court sustained defendants’ demurrer without leave to amend. Citing the California Tort Claims Act [*Government Code* sections 820.2, 821, 821.2.], which confers immunity from tort liability on public employees when they make basic policy decisions, the appellate court affirmed. *Freemy v. City of Buenaventura* (Cal. App. Second Dist., Div. 6; June 4, 2013) 216 Cal.App.4th 1333.

Elder Abuse And Patient’s Bill Of Rights. 79-year-old patient in a licensed nursing home fell nine times in 35 days while getting out of bed to go to the bathroom. On the ninth occasion, nurses

reached his room two minutes after the bed alarm went off. While one nurse was turning off the alarm and the other stood in the doorway, the patient lost his balance in the bathroom, hit his head on the wall and fell. After the fall, he had to undergo brain surgery for a subdural hematoma and later suffered a stroke. The patient filed an action alleging elder abuse [*Welfare and Institutions Code* section 15600], violation of the Patient’s Bill of Rights [*Health & Safety Code* section 1430], willful misconduct, and criminal elder abuse [*Penal Code* section 368]. The facility had self-reported the patient’s injury to the Public Health Department and an investigator issued a citation along with a list of deficiencies, both of which were admitted into evidence. A jury awarded the patient almost \$1.2 million for past medical expenses, \$200,000 for future medical expenses and \$300,000 for general damages. On appeal, the appellate court found the trial court erred when it admitted the citation and statement of deficiencies into evidence. Finding there was a miscarriage of justice as a result of the error, the elder abuse portion of the judgment was reversed, but because the error did not affect the jury verdict on the Patient’s Bill of Rights, that portion was affirmed. *Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (Cal. App. Second Dist., Div. 4; June 5, 2013) 216 Cal.App.4th 1349.

Violation Of Hospital’s By-laws In Denying Staff Privileges To Doctor “Not Material.”

A hospital made the decision to deny application for reappointment of a doctor to the hospital’s medical staff. The doctor filed an administrative writ petition in the superior court, which was denied by the trial court. The Court of Appeal reversed the trial court’s decision, finding the hospital’s bylaws precluded the Medical Executive Board from delegating its authority to select the participants in the hospital’s judicial review hearing. The California Supreme Court granted review in order to determine whether the delegation of by the hospital’s Medical Executive Committee to the hospital’s governing board the decision of selecting a hearing officer deprived the doctor of a fair hearing. The high court observed that a hospital’s decision to deny a physician staff privileges may have a significant effect on

the physician's ability to practice medicine, and for that reason, the physician is entitled to certain procedural protections. In reversing the judgment of the Court of Appeal, the Supreme Court stated: "We conclude that even if such a delegation violated Hospital's bylaws, the violation was not material and, by itself, did not deprive Dr. El-Attar of a fair hearing." *El-Attar v. Hollywood Presbyterian Medical Center* (Cal. Sup. Ct.; June 6, 2013) 56 Cal.4th 976, [301 P.3d 1146].

Mistake Of Arbitrator Not Enough To Invoke § 10 (a)(4) Of Federal Arbitration Act.

A medical doctor entered into a contract with a health plan. The doctor agreed to provide medical care to members of the health plan and the health plan agreed to pay the doctor. The doctor filed a class action in New Jersey alleging the health plan failed to make full and prompt payment to the doctors. The state court ordered the matter to arbitration, and the arbitrator determined the contract authorized class arbitration. The health plan twice filed a motion in federal court to vacate the arbitrator's decision on the ground that the arbitrator exceeded his powers. Both the federal district court and the court of appeals twice ruled against the health plan. The health plan sought relief from the United States Supreme Court, arguing that under section 10, subdivision (a) (4) of the Federal Arbitration Act [9 U.S.C. § 1, *et seq.*], the arbitrator exceeded his powers. The high court affirmed the lower federal courts, denying relief to the health plan, stating: "All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was 'arguably construing' the contract—which this one was—a court may not correct his mistakes under section 10, subdivision (a)(4)." *Oxford Health Plans LLC v. Sutter* (U.S. Sup. Ct.; June 10, 2013) 133 S.Ct. 2064, [186 L.Ed.2d 113].

Two Successive Code of Civil Procedure Section 998 Offers.

The California Supreme Court considered whether a later offer made under *Code of Civil Procedure* section 998, extinguishes a previous offer for purposes of that section's cost-shifting provisions. The court concluded "that where, as here, a plaintiff makes two successive statutory offers, and

the defendant fails to obtain a judgment more favorable than either offer, allowing recovery of expert fees incurred from the date of the first offer is consistent with section 998's language and best promotes the statutory purpose to encourage settlements." *Martinez v. Brownco Construction Company* (Cal. Sup. Ct.; June 10, 2013) 56 Cal.4th 1014, [301 P.3d 1167].

Riverisland Holding Applied.

The parties entered into a restaurant lease agreement which contained an integration clause. When they did a walk-through, the lessor told the lessee "if anything was not working, he would fix it," according to the lessee. There were significant problems with the equipment and plumbing and the restaurant closed after several months. The parties sued each other. The trial court permitted the introduction of terms and promises which allegedly induced the lessee to sign the lease. A jury awarded damages for negligent misrepresentation which the appellate court affirmed, following the California Supreme Court's recent decision in *Riverisland Cold Storage v. Fresno Madera Production* (2013) 55 Cal.4th 1169, [291 P.3d 316, 151 Cal. Rptr.3d 93], and stating: "Our conclusion that parol evidence is admissible as to fraud claims involving sophisticated parties does not create any injustice. A party claiming fraud in the inducement is still required to prove they relied on the parol evidence and that their reliance was reasonable. In the present case, the burden was on plaintiffs to prove that, notwithstanding both the Lease's integration clause and the —"as is" language with respect to the restaurant equipment, they reasonably relied on Payne's prior oral assurances in entering into the agreements. The jury concluded they met this burden, and substantial evidence supports the jury's findings." *Julius Castle Restaurant, Inc. v. Payne* (Cal. App. First Dist., Div. 1; June 10, 2013) 216 Cal.App.4th 1423, [157 Cal.Rptr.3d 839].

Hospital Failed To Meet Its Burden Of Proof To Collect On Its Lien.

Plaintiff suffered serious injuries in an accident and was taken to a hospital where he received treatment for seven days, incurring \$34,320.86 in bills which he did not pay. A jury awarded plaintiff \$356,587.92. Shortly after the verdict, a collection agency acting on behalf of the

hospital sent the third party's insurance company a lien under the Hospital Lien Act [*Civil Code* section 3045.1]. Faced with conflicting claims for the money, the insurance company interpleaded the funds. In the interpleader trial, four witnesses testified. The hospital's accounting department employee authenticated a copy of the hospital bill. A financial counselor who spoke with plaintiff while he was hospitalized testified plaintiff told him to bill the person who was responsible for the accident. The general manager of the collection agency said he served the insurance company with a notice of the unpaid bill, and said what the current balance was. The last witness was the lawyer who represented plaintiff against the third party, who testified he introduced the hospital's bill into evidence. The trial court entered judgment in favor of the hospital for \$34,320.86. On appeal, plaintiff argued the judgment must be reversed because the trial court erroneously relieved the hospital of its burden under the Hospital Lien Act to prove the charges were reasonable and necessary. The appellate court discussed how many patients pay discounted rates and concluded that because the hospital had a full and fair opportunity at trial to prove it was entitled to the interpleaded funds but did not do so, and because plaintiff's judgment against the third party shows he is entitled to the funds, plaintiff is entitled to judgment in his favor. The judgment for the hospital was reversed and the trial court was ordered to enter judgment in favor of plaintiff. *State Farm v. Huff and Pioneers Memorial Healthcare District* (Cal. App. Fourth Dist., Div. 1; June 11, 2013) 216 Cal.App.4th 1463, [157 Cal.Rptr.3d 863].

What's A Hardworking Robber To Do In This Electronic Age?

A victim of a robbery had a smart phone in her stolen handbag. The police located the phone at a particular intersection by "pinging" the phone's GPS system, which the victim and owner of the cell phone authorized the police to do. Defendant was arrested within 45 minutes of the robbery. He challenged the legality of the initial stop. The courts considered whether or not defendant had a reasonable expectation of privacy and concluded it was only the cell phone owner who legitimately had such a claim. The appellate court noted that a 1998 statute, *Penal Code* section 637.7, subdivisions (a)

and (b), is instructive. That statute states: “No person or entity in this state shall use an electronic tracking device to determine the location or movement of a person,” but then also provides, “This section shall not apply when the registered owner, lesser, or lessee of a vehicle has consented to the use of the electronic tracking device with respect to that vehicle.” The appellate court concluded: “Accordingly, we conclude that the use of GPS technology in ascertaining the location of the stolen cell phone, and thus, assisting in the locating of defendant was no violation of the Fourth Amendment.” *People v. Barnes* (Cal. App. First Dist., Div. 1; June 11, 2013) 216 Cal.App.4th 1508, [157 Cal.Rptr.3d 853].

Insured Entitled To Have Independent Counsel Representation.

Plaintiff hired a contractor to design and build a residence, and later brought an action against the contractor for breach of contract and several other causes of action. The contractor tendered its defense to its insurance company, which company appointed counsel and defended subject to a reservation of rights. The insurer filed a separate declaratory relief action against the contractor. The contractor hired a law firm to move to disqualify the firm hired by its insurance company and determine the contractor had a right to independent counsel. In the underlying action, plaintiff alleged the contractor acted through its employees; but in answers to interrogatories prepared by the firm hired by the insurance company, the contractor stated he primarily contracted with subcontractors in the project. The trial judge disqualified counsel who represented both the insured and the insurer appealed. The appellate court found no error, noting that it had to assume the firm hired by the insurer received confidential information concerning whether the contractor hired subcontractors. *Schaefer v. Elder (Castlepoint National Insurance Company, as Intervener)* (Cal. App. Third Dist.; June 12, 2013) 217 Cal.App.4th 1, [157 Cal.Rptr.3d 654].

Generic Drug Manufacturer Stays In The Case.

Plaintiff brought an action against the manufacturers of a brand-name drug as well as its generic equivalent. The generic drug company demurred, citing *PLIVA, Inc. v. Mensing* (2011) 131 S.Ct. 2567, [180 L.Ed.2d 580], in which

the United States Supreme Court held that claims a generic drug manufacturer should have included stronger warning labels than those approved for use on the equivalent brand-name drug are preempted by federal law. The trial court overruled the demurrer and the appellate court affirmed, stating: “In this case, in contrast, plaintiff alleged that the brand-name drug label was updated, but the generic drug manufacturers failed to update their labels accordingly. In other words, the generic drug labels did not match the brand-name drug label. Consequently, we conclude plaintiff’s claims in this regard are not preempted by federal law.” *Teva Pharmaceuticals USA, Inc. v. Sup.Ct. (Olga Pikerie)* (Cal. App. Fourth Dist., Div. 3; June 13, 2013) 217 Cal.App.4th 96.

DNA Not Patent Eligible.

Under the Patent Act [35 U.S.C. § 101], patents may be issued to whoever invests or discovers any new and useful composition of matter. The United States Supreme Court held that a naturally occurring DNA segment is a product of nature and is not patent eligible. But a synthetically created strand of DNA called cDNA is patent eligible. *Association For Molecular Pathology v. Myriad Genetics, Inc.* (U.S. Sup. Ct.; June 13, 2013) 133 S.Ct. 2107, [186 L.Ed.2d 124].

Error To Grant New Trial In Lemon Law Case.

In a lemon law action, the trial court denied the truck manufacturer’s motion in limine to exclude evidence of a repair done after the expiration of the warranty. A jury awarded plaintiff restitution value for the vehicle, and the trial court granted a new trial after concluding it erred in denying the motion in limine. The appellate court reversed, finding the trial court erred when it granted a new trial, noting the evidence was, indeed, relevant to establish the transmission was not repaired during the warranty period. The appellate court ordered the judgment against the manufacturer to be reinstated. *Donlen v. Ford Motor Company* (Cal. App. Third Dist.; June 14, 2013) (As Mod. July 8, 2013) 217 Cal.App.4th 138.

Asset Specifically Excluded In Guaranty Not Automatically Excluded When Surety Is Called To Answer For Its Guaranty. A 2007 surety specifically

excluded an asset from a continuing guaranty; the asset was a personal residence. The residence was sold in 2011 and the proceeds from the sale were held in a separate account. When the senior lender foreclosed in 2012, the surety failed to make good on his guaranty. The trial court denied the surety’s claim of exemption for the residence proceeds. The appellate court held that proceeds from the sale of that asset were not excluded when the surety was called to answer for its guaranty. In its holding the appellate court stated: “Our examination of the guaranty, together with other documents executed at the same times, shows that [the surety] could have inserted language extending the exclusion from the assets to the sale proceeds of those same assets. He simply failed to do so. Judicially correcting that omission would amount to an improper rewriting of the parties’ contract.” *Series AGI West v. Eves* (Cal. App. First Dist., Div. 2; June 14, 2013) 217 Cal. App. 4th 156.

Correction: *In the July 2013 issue we reported on Nevis Homes, LLC v. CW Roofing, Inc. (Cal. App. Second Dist., Div. 1; May 15, 2013) 216 Cal.App.4th 353. We stated that “The trial court granted the motion to tax costs.” This was in error. We should have stated that the “trial court held the cost bill was timely filed.” We apologize for the error.*

Senior Editor

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

Managing Editor

Mark A. Mellor, Esq.

Executive Committee

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

Jamie Errecart
Michael D. Fabiano
Hon. Elizabeth Feffers
Karen Frasier-Kolligs
Terry Barton Friedman
Hon. J. Richard Haden (Ret.)
Kevin Holl
Jamie A. Jacobs-May
Joel Kleinberg
Hon. Joan Lewis
Mark A. Mellor
Justice Eileen Moore
Bradley A. Patterson
Robin Pearson
Hon. Ronald S. Prager
Norm Rodich
Jerome Sapiro, Jr.
Hon. James L. Warren (Ret.)
e. robert (bob) wallach
Herb Yanowitz
Joan Wolff

Advisors

Donald Barber
Charles Berwanger
Hon. Suzanne Bolanos
Paul S. Chan
Justice Victoria Chaney
Hon. Lawrence W. Crispo (Ret.)
Tanja L. Darrow
Hon. M. Lynn Duryee
Elizabeth A. England

Board of Trustees Liaison

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

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