



# Litigation Update

Litigation Section News

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**Plaintiff's Fourth Appeal.** Plaintiff was injured when the car in which she was riding collided with another car in an intersection and then hit a light pole, erected 18 inches from the curb, and owned by a utility company. In the first two appeals, the appellate court affirmed summary judgment in favor of a county and a city. In the third appeal, summary judgment in favor of the utility company was reversed because of triable issues of fact whether it owed a duty of care to motorists relative to the placement of street lights. On remand, the utility company successfully argued in a motion for judgment on the pleadings that the superior court lacked subject matter jurisdiction because the Public Utilities Commission [PUC] has exclusive jurisdiction, and plaintiff once again appeals. The appellate court reversed the granting of the utility company's motion for judgment on the pleadings, stating: "In conclusion, we find that while the PUC may have concurrent jurisdiction with the local entity relative to the placement of light poles, it did not, in this case, exercise that authority."

In another issue, the trial court sustained without leave to amend the city's demurrer to the utility company's cross-complaint because the utility company did not file a timely governmental claim against the city. The appellate court affirmed that ruling stating: "[W]e find that SCE's cross-complaint is based on facts outside of the pleadings, of which the City was a party, such that the cross-complaint is not solely defensive in nature. Because of this, compliance with the Government Claims Act was necessary." *Laabs v. Southern California Edison Company* (Cal. App. Fourth Dist., Div. 2; June 17, 2013) 217 Cal.App.4th 218.

**Turf And Surf Battle.** A development includes 125 luxury homes on an oceanfront slope situated between a newly created public park at the top of the slope

and a newly dedicated public beach at the bottom, with public access trails running through the residential portion. As the project neared completion, the city adopted an ordinance limiting hours of operation for the trails along with the installation of pedestrian gates on the trails. Several appeals to the Coastal Commission resulted and the Commission concluded the limited hours of operation for the trails and the gates require a coastal development permit. The city filed an action to set aside the Commission's decision and restrain the Commission from future attempts to exercise jurisdiction over it. The trial court invalidated the Commission's decision, and the appellate court agreed in part, stating "that before a municipality may obtain a writ of mandate restraining the Commission from exercising jurisdiction over development that the municipality has authorized pursuant to [Public Resources Code] section 30005, subdivision (b), the municipality must demonstrate that it has exercised its nuisance abatement powers in good faith, in that the municipality has not utilized these powers as a pretext for avoiding its obligations under its own local coastal program." The matter was remanded for those determinations. *City of Dana Point v. California Coastal Commission* (Cal. App. Fourth Dist., Div. 1; June 17, 2013) (As Mod. July 10, 2013) 217 Cal.App.4th 170.

**Ingenius Settlement May Be Anticompetitive Because Of The "Market Power Derived From The Patent."** A drug company patented a drug [drug company #1] and a generic drug manufacturer [drug company #2] filed applications for generic drugs modeled after the patented drug. #1 brought an action against #2 claiming patent infringement. After the Food and Drug Administration approved the generic product, #1 and #2 entered into a settlement whereby #2 would not bring its generic product to market for a specified number of

years and would promote the patented drug in exchange for millions of dollars. The Federal Trade Commission filed suit alleging violation of §5 of the Federal Trade Commission Act by unlawfully agreeing to abandon their patent challenges in order to share in #1's profits on the patented drug. The United States Supreme Court noted that because the settlement requires the patentee to pay the alleged infringer, rather than the other way around, this kind of settlement is often called a "reverse payment." The high court stated: "In sum, a reverse payment, where large and unjustified, can bring with it the risk of significant anticompetitive effects; one who makes such a payment may be unable to explain and to justify it; such a firm or individual may well possess market power derived from the patent." *Federal Trade Commission v. Actavis, Inc.* (U.S. Sup. Ct.; June 17, 2013) 133 S.Ct. 2223, [186 L.Ed.2d 343].

**DMV Records Can't Be Used To Solicit Clients.** The *Driver's Privacy Protection Act* of 1994 [DPPA; 18 U.S.C. §§ 2721-2725] regulates the disclosure of personal information contained in the records of state motor vehicle departments. An exception in the DPPA, 18 U.S.C. § 2721(b)(4), permits obtaining personal information for use "in connection with" judicial and administrative proceedings, including "investigation in anticipation of

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litigation.” South Carolina lawyers obtained personal contact information about drivers from the DMV and then sent over 34,000 solicitations to join a lawsuit against car dealerships. The United States Supreme Court held that solicitation of prospective clients is not a permissible use under the exception. *Maracich v. Spears* (U.S. Sup. Ct.; June 17, 2013) 133 S.Ct. 2191, [186 L.Ed.2d 275].

**State May Not Impose Additional Requirements For Voter Registration.** The National Voter Registration Act of 1993 [NVRA; 42 U.S.C. §1973gg-4(a)(1)] requires states to “accept and use” a federal form to register voters. The form requires only that an applicant state under penalty of perjury that he or she is a citizen. Arizona had an additional requirement for registration officials to reject the federal form applications not accompanied by documentary evidence of citizenship. The United States Supreme Court held the federal statute “precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself.” *Arizona v. The Inter Tribal Council of Arizona* (U.S. Sup. Ct.; June 17, 2013) 133 S.Ct. 2247, [186 L.Ed.2d 239].

**Homeowners Gone Wild.** Homeowners in a homeowners association transferred title to themselves as trustees for a family trust. Thereafter they submitted architectural plans to remodel the house, which were submitted to the HOA, and resulted in a dispute. The HOA denied the access to HOA’s board meetings to the lawyer for the trust because the HOA’s lawyer was of the opinion the lawyer for the limited liability company would be communicating with a represented party without permission from the party’s attorney in violation of the *Rules of Professional Conduct*, rule 2-100. The trust transferred title to a limited liability company, with one of the homeowners as its manager, but the HOA still would not permit the lawyer to attend its board meetings. The limited liability company sought injunctive relief, which the trial court denied. The appellate court affirmed, stating the lawyer for the limited liability company was not a member of the limited liability company, and that under *Corporations Code* sections 17150 & 17151, subdivision (a),

the business and affairs of a limited liability company must be managed by its members. *SB Liberty, LLC v. Isla Verde Association, Inc.* (Cal. App. Fourth Dist., Div. 1; May 22, 2013) (As mod. June 11, 2013) (Ord. Pub. June 18, 2013) 217 Cal.App.4th 272, [158 Cal.Rptr.3d 105].

**Convicted Attorney Is “Actually Innocent.”** 18 U.S.C. § 1346 states: “...the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” An attorney and trustee of private trusts pled guilty to honest services fraud after being accused of abusing his fiduciary obligations and position of trust through ambiguous loan arrangement which used trust funds as collateral and executing margin loans secured by trust assets. After serving almost four years in prison, he sought habeas corpus relief, claiming his conviction and sentence were invalidated by the Supreme Court’s decision in *Skilling v. United States* (2010) 130 S.Ct. 2896, [177 L.Ed.2d 619], in which the high court declined to give an expanded interpretation of section 1346’s proscription. In the instant case, the Ninth Circuit remanded the matter to the district court after pointing out the attorney stands convicted of an offense that is no longer criminal. *United States of America v. Avery* (Ninth Cir.; June 18, 2013) (Case No. 12-35209).

**Law Firm Should Not Have Been Disqualified.** The introductory paragraph to the opinion speaks for itself: “The trial court disqualified a law firm from simultaneously representing a limited liability company, its managing member (a partnership), and the person who managed that partnership (who was not himself a member of the company) in a lawsuit against two of the company’s minority members. The court found that the interests of the company and the nonmember individual potentially conflicted, and concluded the law firm could not jointly represent the company and the nonmember individual against the company’s minority members. The court based its ruling on rule 3-310(C) of the *State Bar Rules of Professional Conduct* and *Gong v. RFG Oil, Inc.* (2008) 166 Cal. App.4th 209, 214-216, [82 Cal.Rptr.3d 416, 420-421], both of which concern an

attorney’s duty of loyalty to simultaneously represented clients. Because no actual conflict of interest existed between the company and the individual who managed the company’s managing member, and there was no reasonable likelihood such a conflict would arise, we reverse the court’s ruling.” *Havasu Lakeshore Investments, LLC v. Fleming* (Cal. App. Fourth Dist., Div. 3; June 19, 2013) 217 Cal.App.4th 770.

**No Legal Duty On Part Of Supplier Of Medical Device.** In a wrongful death action, the family of the decedent brought an action against the supplier of a pacemaker. During the implantation of the pacemaker, at which the pacemaker sales person was present, the decedent’s right atrium and ascending aorta were perforated and she died shortly after surgery. The trial court granted summary judgment. The appellate court affirmed, noting the sales person did not instruct, or direct, the doctor where, or how, to implant the leads. *Smith v. St. Jude Medical, Inc.* (Cal. App. First Dist., Div. 5; June 19, 2013) 217 Cal.App.4th 313, [158 Cal.Rptr.3d 302].

**Charter City Must Arbitrate Furlough Grievances.** A charter city adopted a mandatory furlough program for its civilian employees. Employees lodged grievances, arguing furloughs violated duly ratified memorandums of understanding [MOUs] with their union. The grievances were denied and the employees requested arbitration. The city refused to arbitrate, and the superior court granted the union’s petition for an order compelling the city to arbitrate the furlough dispute. The Court of Appeal concluded the city could not be compelled to arbitrate because arbitration would constitute an unlawful delegation of discretionary policymaking powers vested with the City Council. Agreeing with the trial court, the California Supreme Court reversed the appellate court’s decision, concluding arbitration does not constitute an unlawful delegation of discretionary authority to an arbitrator and that the city is contractually obligated to arbitrate the dispute. *City of Los Angeles v. Sup.Ct. (Engineers & Architects Assoc.)* (Cal. Sup. Ct.; June 20, 2013) 56 Cal.4th 1086, [302 P.3d 194; 158 Cal.Rptr.3d 1].

## **“Putative Spouse” Defined For Wrongful Death Actions.**

*Code of Civil Procedure* section 377.60, provides that a wrongful death action may be brought by a decedent’s putative spouse and defines the putative spouse as “the surviving spouse of a void or voidable marriage who is found by the court to have *believed in good faith* that the marriage to the decedent was valid.” The Court of Appeal held the phrase in italics means “a subjective standard that focuses on the alleged putative spouse’s state of mind to determine whether he or she maintained a genuine and honest belief in the validity of the marriage. Good faith must be judged on a case-by-case basis in light of all the relevant facts, such as the efforts made to create a valid marriage, the alleged putative spouse’s background and experience, and the circumstances surrounding the marriage, including any objective evidence of the marriage’s invalidity. Under this standard, the reasonableness of the claimed belief is a factor properly considered along with all other circumstances in assessing the genuineness of that belief. The good faith inquiry, however, does not call for application of a reasonable person test, and a belief in the validity of a marriage need not be objectively reasonable.” *Ceja v. Rudolph & Sletten, Inc.* (Cal. Sup. Ct.; June 20, 2013) 56 Cal.4th 1113, [302 P.3d 211; [158 Cal.Rptr.3d 21].

## **Special Motion To Strike Denied In Defamation Action.**

The court appointed a reunification counselor in a custody dispute. The counselor concluded the father was emotionally and psychologically abusing the child by indoctrinating him to believe his mother was evil and never loved him and that the mother had kidnapped the child’s younger brother and was holding him hostage. The court removed the child from the father’s home and issued a domestic violence restraining order preventing the father from contacting the two children or the mother. In a defamation lawsuit, the counselor alleges the father made a number of defamatory statements online and over the radio following the issuance of the reunification report and removal of the child from the father’s physical custody. One of these statements, posted on CNN’s iReport Website, accused the counselor of “criminal fraud and modern day slavery using Parental

Alienation SCAM, enslavement of children for \$\$\$\$\$ in California.” The posting continued: “Corrupt Criminals like [the counselor] and their good-ol-network are today’s ‘modern slave traders’ trading ‘children’ with vindictive retribution and for money.” The posting also accused the counselor of “child abuse” and “financial extortion.” In another statement, made during an interview with a Sacramento area radio station, the father claimed the counselor “extorted money” from him. The father further asserted: “[The counselor] does not have any license to practice psychology in California. She’s got a diploma from some online mill. And on top of it, she makes DSM-[IV] diagnoses; she prescribed Benzodiazepine for my son. A person who is not even a psychologist or psychiatrist prescribing medication in California? That’s illegal.”

The father filed a motion to strike the defamation action under *Code of Civil Procedure* section 425.16, [the anti-SLAPP statute], which the trial court denied. The appellate court noted the counselor conceded that as a limited purpose public figure, in order to prevail on the merits, she must demonstrate not only the falsity of the statements at issue, but also that they were published with actual malice. The appellate court concluded the counselor demonstrated a probability of prevailing on the merits and affirmed the order denying the special motion to strike. *Burrill v. Nair* (Cal. App. Third Dist.; June 20, 2013) 217 Cal.App.4th 357, [158 Cal. Rptr.3d 332].

## **Zip Codes At Gas Pumps.**

Plaintiffs filed a class action for violation of the Song-Beverly Credit Card Act of 1971 [*Civil Code* section 1747.08], alleging Chevron violates the Act by sometimes requiring customers to provide their ZIP codes when buying gasoline with credit cards. The trial court granted summary judgment to Chevron and the appellate court affirmed, stating: “The undisputed facts show that Chevron requires ZIP codes only in pay-at-the-pump transactions at locations where there is a high risk of fraud, uses the information only to prevent fraud, and purges the information shortly after the credit card transactions are reconciled. We agree with the trial court that Chevron’s conduct does not violate the Act, because the personal

identification information ‘is required for a special purpose incidental but related to the individual credit card transaction,’ namely, the purpose of ensuring that the individual credit card transaction is not fraudulent.” *Flores v. Chevron U.S.A., Inc.* (Cal. App. Second Dist., Div. 1; June 20, 2013) 217 Cal. App.4th 337, [158 Cal.Rptr.3d 242].

## **I Pledge Allegiance To The Opposition Of Prostitution.**

Congress passed the Leadership Act in 2003 [22 U.S.C. § 7601 et seq.] to combat HIV/AIDS. The Act makes the reduction of HIV/AIDS behavioral risks a priority of all prevention efforts. The Department of Health and Human Services and the United States Agency for International Development [USAID] are the federal agencies primarily responsible of overseeing implementation. The agencies directed any recipient of funding to agree to be opposed to “prostitution and sex trafficking because of the psychological and physical risks they pose for women,” and have a policy explicating opposing prostitution and sex trafficking. Certain domestic organizations brought an action seeking a declaratory judgment because they are concerned that explicitly opposing prostitution may alienate certain host governments and diminish the effectiveness of their programs, and that the policy involves censorship of their publications. The United States Supreme Court stated: “The Policy Requirement compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program. In so doing, it violates the First Amendment and cannot be sustained.” *Agency for International Development v. Alliance for Open Society International* (U.S. Sup. Ct.; June 20, 2013) 133 S.Ct. 2321, [186 L.Ed.2d 398].

## **Appellate Court Affirmed Summary Judgment Based Upon Different Grounds Than Trial Court.**

A petitioner brought an action seeking to invalidate amendments to a survivor’s trust. The defendants’ answer alleged the claims were barred by statutes of limitation, *res judicata* and laches. The trial court granted summary judgment based upon collateral estoppel and statutes of limitation, and never reached the issue of laches. The appellate court affirmed the judgment,

but based its holding upon laches, which the opinion states is “a theory the parties briefed and argued in the trial court and on appeal,” despite the fact its grounds for affirmance differed from the grounds upon which the trial court based its ruling. *Drake v. Pinkham* (Cal. App. Third Dist.; June 21, 2013) 217 Cal.App.4th 400, [158 Cal.Rptr. 3d 115].

### **Primary Assumption Of The Risk Applies To A Weight Dropped On Plaintiff’s Head.**

Plaintiff was injured by a weight dropped by defendant, her teammate on the UCLA swim team, during a mandatory team workout session intended to strengthen the swimmers. Plaintiff filed an action alleging negligence against defendant, who successfully moved for summary judgment on the basis of the doctrine of primary assumption of the risk. Plaintiff argues primary assumption of the risk does not apply under the circumstances of this case. She says she did not assume the risk that defendant or anyone else would drop a weight on her head. She also argues the doctrine should not apply in this situation, when plaintiff and defendant were not co-participants in any competitive sport, but merely working out side by side. The appellate court relied on the holding in *Nalwa v. Cedar Fair, L.P.* (Cal. Sup. Ct.; December 31, 2012) 55 Cal.4th 1148, [290 P.3d 1158; 150 Cal.Rptr.3d 551] and affirmed the grant of summary judgment, stating: “First, as a factual matter, they were co-participants in a training session consisting of a circuit of three exercises for the purpose of adding strength as swimmers. Second, after the decision in *Nalwa*, it is of no moment whether the circuit training by [plaintiff] and [defendant] is characterized as a sport or recreation, as the doctrine of primary assumption of the risk applies to both types of activity.” *Cann v. Stefanec* (Cal. App. Second Dist., Div. 5; June 24, 2013) 217 Cal. App.4th 462, [158 Cal.Rptr.3d 474].

**Arbitration Agreement Procedurally Unconscionable, But Not Substantively Unconscionable.** The defendant/employer had a multi-level approach to addressing workplace concerns. The first step obligates the employee to bring concerns to the attention of management. If still unresolved, the second step requires a dispute to be presented

to a panel of three employees, with each side being given 30 minutes to present its position to the panel who will issue a nonbinding decision. If either side remains dissatisfied, the third step is mediation. The fourth and final step is arbitration, for which the employer “will pay the arbitrator’s fees and expenses, any costs for the hearing facility, and any costs of the arbitration service.” Plaintiffs/employees contend they were required to sign the arbitration agreement as a condition of employment, and that none of its terms were negotiable. They also contend the arbitration agreement is illusory since the employer may amend it at any time. The trial court found an employment arbitration provision to be unconscionable and denied the employer’s petition to compel arbitration. The appellate court reversed the order denying arbitration, stating that because plaintiffs were required to sign the arbitration agreement as a condition of employment and were unable to negotiate its terms, they had no meaningful choice in the matter, but concluding: “Although the arbitration agreement is procedurally unconscionable, none of its provisions is substantively unconscionable.” *Leos v. Darden Restaurants* (Cal. App. Second Dist., Div. 1; June 24, 2013) 217 Cal.App.4th 473, [158 Cal.Rptr.3d 384].

### **\$21 Million To Compensate For Woman’s “Horrorific” Injuries Tossed By United States Supreme Court.**

In 1978, an anti-inflammatory drug was approved by the Food and Drug Administration [FDA], and in 2004, the drug was prescribed for plaintiff to treat her shoulder pain. The United States Supreme Court noted: “The results were horrific. Sixty to sixty-five percent of the surface of [plaintiff’s] body deteriorated, was burned off, or turned into an open wound.” Plaintiff sued the drug company in New Hampshire. The drug insert warned the drug could cause “severe skin reactions,” but the plaintiff’s doctor admitted he had not read the box label or insert. A jury awarded plaintiff \$21 million in damages. Once a drug is approved by the FDA, a manufacturer is prohibited from making any major changes to the “qualitative or quantitative formulation of the drug product, including active ingredients or in the specifications provided in the approved application.” [21

C.F.R. §314.70(b)(2)(i)]. New Hampshire imposes a duty on manufacturers to ensure that the drugs they market are not unreasonably unsafe, and a drug’s safety is evaluated by reference to both its chemical properties and the adequacy of its warnings. In finding for the drug manufacturer, the high court stated: “When federal law forbids an action that state law requires, the state law is ‘without effect.’” *Mutual Pharmaceutical Company v. Bartlett* (U.S. Sup. Ct.; June 24, 2013) 133 S.Ct. 2466, [186 L.Ed.2d 607].

### **Employer Not Responsible For Actions Of A Co-Worker Toward Plaintiff.**

Plaintiff, an African American woman, brought an action against her employer alleging she had been subjected to a racially hostile work environment by a co-worker, who is a white woman. The trial court granted summary judgment in favor of the employer because the co-worker was not plaintiff’s supervisor and could not hire, fire, demote, promote, transfer or discipline plaintiff. The circuit court affirmed. In affirming the lower courts’ decisions in favor of the employer, the United States Supreme Court stated: “We hold that an employee is a ‘supervisor’ for purposes of Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.” *Vance v. Ball State University* (U.S. Sup. Ct.; June 24, 2013) 133 S.Ct. 2434, [186 L.Ed.2d 565].

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## Development Of Solar Project To Go Forward Despite Williamson Act Contract.

A county cancelled a Williamson Act contract [Government Code section 51200] and certified an Environmental Impact Report [EIR] for a proposed solar power plant. The trial court denied a petition for extraordinary relief challenging certification of the EIR and the cancellation of the contracts brought by environmental groups trying to halt the proposed development. Under a Williamson Act contract, a landowner is obligated to maintain land as agricultural for 10 or more years with resulting tax benefits. A public body or council may cancel such a contract by making requisite findings and determining the contract is not in the public interest. The appellate court affirmed, stating substantial evidence supports cancellation of the Williamson Act contracts, concluding there was no error in certifying the EIR or approving the solar project. *Save Panoche Valley v. San Benito County (PV2 Energy, LLC)* (Cal. App. Sixth Dist.; June 25, 2013) 217 Cal. App.4th 503, [158 Cal.Rptr.3d 719].

## Hate Crime Statute Applied Against Police Officers.

The Bane Act allows the Attorney General or any city or district attorney to sue in equity “[i]f a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state . . . .” (Civil Code section 52.1, subdivision (a)). Here, plaintiff, the manager of an apartment complex, asked police why they were arresting some tenants, and he was beaten and arrested himself. He was acquitted of all criminal charges and a jury in this later civil action awarded him \$523,000. The court awarded \$989,258 in attorney fees and refused to tax costs of \$24,103.75 for courtroom technology. On appeal, the appellate court rejected defendant county and police officers’ argument that as a matter of law, Fourth Amendment rights are not among the constitutional rights protected by the Bane Act, stating: “Here, the Bane Act applies because there was a Fourth Amendment violation – an ar-

rest without probable cause – accompanied by the beating and pepper spraying of an unresisting plaintiff, i.e., coercion that is in no way inherent in an arrest, either lawful or unlawful.” *Bender v. County of Los Angeles* (Cal. App. Second Dist., Div. 8; July 9, 2013) 217 Cal.App.4th 968.

## Homeowner’s Association Must Strictly Comply With Davis-Sterling Prior To Foreclosure.

A homeowner’s association [HOA] decided to replace all of the roofs in the development, and approved a special assessment of \$9,750 per unit after a special election by a majority of the voting members of the association. After homeowner/petitioner failed to pay her special assessment, the HOA recorded an assessment lien on her townhouse property and filed an action for judicial foreclosure. The homeowner moved for summary judgment on the ground the HOA could not foreclose because the assessment lien was not valid since the HOA had not complied with the pre-lien and pre-foreclosure notice requirements set forth in the Davis-Sterling Common Interest Development Act [Civil Code sections 1367.1 and 1367.4]. Finding the HOA had substantially complied with the Act, the trial court denied summary judgment. The Court of Appeal granted the homeowner’s petition for extraordinary relief, stating: “Since the Association’s failure to strictly comply with all of the statutory notice requirements is undisputed, we will issue a peremptory writ of mandate directing the trial court to vacate its order denying [the homeowner’s] motion for summary judgment and enter a new order granting the motion.” *Diamond v. Sup. Ct. (Casa Del Valle Homeowners Association)* (Cal. App. Sixth Dist.; July 12, 2013) 217 Cal.App.4th 1172.

## Service Of Notice To Vacate Arbitration Award Is Not Accomplished By Merely Sending Notice Pursuant To Leave Provision.

Condominium homeowners petitioned the superior court to vacate an arbitration award. The trial court dismissed the petition based on the homeowners’ failure to properly serve their petition to vacate on the owners of the development as required by *Code of Civil Procedure* section 1288. The homeowners argue they served

the petition in accordance with the requirements of the parties’ lease agreements. The appellate court affirmed the dismissal because “the lease provisions they rely upon as specifying the method for serving the petition to vacate apply only to the manner in which notices respecting the leases may be sent. Those provisions say nothing about the manner in which a party may be served with process in connection with a petition to vacate an arbitration award, to establish the court’s personal jurisdiction over the party. Merely providing a party with notice that a petition has been filed does not establish personal jurisdiction.” *Abers v. Robrs* (Cal. App. Fourth Dist., Div. 3; July 15, 2013) 217 Cal.App.4th 1199.

## No Private Right Of Action For Tenant.

Plaintiff was a tenant on property for which a bank took title at foreclosure. The bank served her with a three-day notice of termination and then immediately initiated an unlawful detainer action. Plaintiff contends the bank was required to serve a 90-day notice of termination prior to eviction. She filed an action against the bank in federal court, but the federal trial court concluded it lacked subject matter jurisdiction because the Protecting Tenants at Foreclosure Act of 2009 [Pub.L. No. 111-22, § 701-04; PTFA] did not provide a private right of action. The PTFA provides that any owner of a residence after a foreclosure on a federally-related mortgage loan assumes such interest subject to a 90-day notice to vacate to any bona fide tenant as well as subject to any bona fide lease in place prior to foreclosure proceedings. After noting the issue is one of first impression, the Ninth Circuit concluded the statute neither explicitly nor impliedly creates a private right of action allowing plaintiff to enforce the PTFA. [P.S.: the bank did dismiss its unlawful detainer action in state court without prejudice.] *Logan v. U.S. Bank* (Ninth Cir.; July 16, 2013) (Case No. 10-55671).

## DOMA Found Unconstitutional By High Court.

Two New York women were lawfully married in Canada in 2007. One of them died in 2009, leaving her entire estate to the survivor who sought to claim the estate tax exemption for surviving spouses. The Defense of Marriage Act [28 U.S.C. § 1738C ; DOMA] barred her

from succeeding on her exemption claim. § 3 of DOMA amends the Dictionary Act [1 U.S.C. § 7] to provide: “. . . the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” The high court, in an opinion authored by Justice Kennedy, and joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, noted that New York recognizes same-sex marriages, and stated DOMA violates basic due process and equal protection principles applicable to the federal government. The opinion further states: “DOMA’s unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”

In his dissent, joined by Justice Thomas, Justice Scalia stated the majority opinion is “jaw-dropping,” and “an assertion of judicial supremacy over the people’s Representatives in Congress and the Executive. It envisions a Supreme Court standing (or rather enthroned) at the apex of government,

empowered to decide all constitutional questions, always and everywhere ‘primary’ in its role.” *U.S. v Windsor* (U.S. Sup. Ct.; June 26, 2013) 133 S.Ct. 2675, [186 L.Ed.2d 808].

### **Sanctions Reversed & Vince Lombardi Approach To Litigation Rejected.**

This is the first paragraph of the opinion: “Sanctions are a judge’s last resort. At bottom, they are an admission of failure. When judges resort to sanctions, it means we have failed to adequately communicate to counsel what we believe the law requires, failed to impress counsel with the seriousness of our requirements, and failed even to intimidate counsel with the fact we hold the high ground: the literal high ground of the bench and the figurative high ground of the state’s authority. We don’t like to admit failure so we sanction reluctantly.” Plaintiff’s counsel attached what was apparently thought to be the contract to the complaint. Defendant brought a motion for summary judgment, attaching the real final contract. Three weeks prior to the motion, plaintiff filed a motion to amend the complaint. The judge announced he would rule on the motion to amend at the same time he ruled on the summary judgment motion. The court granted the motion to amend and denied the motion for summary judgment. On its own motion, the court set an order to show cause re dismissal and sanctions because plaintiff “attached and incorporated into its verified complaint a purported agreement between [plaintiff] and [defendant] that was not a true copy of the alleged actual agreement between the parties.” At the hearing, the court awarded defendant \$5,076 in sanctions pursuant to *Code of Civil Procedure* section 128.7. The appellate court reversed, noting defense counsel could have picked up the telephone or written a letter “and simply explained that [plaintiff] had the wrong document, expressed a willingness to stipulate to an amendment, and only if [plaintiff] had persisted in doing nothing, brought some sort of motion or other proceeding to correct the mistake. *That* would have been the civil and professionally correct thing to do. That seems to us to be what the authors of Section 583.130 had in mind thirty years ago when they wrote, ‘It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action *but*

*that all parties shall cooperate in bringing the action to trial or other disposition.*” In concluding its opinion, the appellate court rejected the “Vince Lombardi approach” [Winning isn’t everything; it’s the only thing]. *Interstate Specialty Marketing, Inc. v. ICRA Sapphire, Inc.* (Cal. App. Fourth Dist., Div. 3; June 27, 2013) 217 Cal.App.4th 708, [158 Cal. Rptr.3d 743].

### **Plaintiff’s Counsel Should Not Have Been Disqualified Because Of The Expert Witness He Hired.**

Plaintiff informed defendant he hired an expert who had previously testified on behalf of the defendant. Defendant claimed the expert possessed confidential attorney-client and work product information, and the trial court disqualified plaintiff’s counsel. The appellate court stated that even if attorney client work product conveyed to a consulting expert remains subject to work product protection, the defendant here failed in its burden to establish the expert possessed confidential information materially relevant to the pending proceedings and reversed. *Deluca v. State Fish Co., Inc.* (Cal. App. Second Dist., Div. 3; June 27, 2013) 217 Cal.App.4th 671.

### **Run Out Of Baggies?**

Police seized a package from a private shipping company after a shipping employee contacted the police department to report that the package smelled of marijuana and had been dropped off for shipment to an Illinois address. Without a warrant, police opened the box and found 444 grams of marijuana. The California Supreme Court held the defendant’s motion to suppress must be granted as the evidence was obtained as a result of a warrantless search. *Robey v. Sup.Ct. (The People)* (Cal. Sup. Ct.; June 27, 2013) 56 Cal.4th 1218, [302 P.3d 574; 158 Cal. Rptr.3d 261].

### **Partnership Not Entitled To An Offset For Income Tax Purposes.**

A company formed as a partnership which operates oil pipelines challenged ratesetting orders of the Public Utilities Commission [PUC]. The PUC decided the company is not entitled to an offset for income tax purposes. The company argued the PUC erroneously denied it a federal income tax allowance because it is a limited partnership instead of a corporation. The

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PUC's practice is to calculate income tax allowances on a stand-alone basis, without reference to corporate relationships such as holding companies, affiliates or subsidiaries. The appellate court, on a writ of review of a decision by the PUC, pointed out the PUC is not an ordinary administrative agency, but a constitutional body with far-reaching powers, duties and functions. It also stated: "The Internal Revenue Code (IRC) treats corporations and partnerships differently for tax purposes." The company's petition was denied. *SFPF, L.P. v. Public Utilities Commission (Chevron Products Company)* (Cal. App. Fourth Dist., Div. 3; July 1, 2013) 217 Cal.App.4th 784.

### **Order Disqualifying A Law Firm Reversed.**

A law firm simultaneously represented a limited liability company, its managing partner [a partnership] and the person who managed the partnership [who was not himself a member of the company] in a lawsuit against two of the company's minority members. The trial court found that the interests of the company and the nonmember individual potentially conflicted and concluded the law firm could not jointly represent the company and the nonmember individual against the company's minority members. The court based its ruling on rule 3-310(C) of the State Bar *Rules of Professional Conduct* and *Gong v. RFG Oil, Inc.* (2008) 166 Cal.App.4th 209, [82 Cal.Rptr.3d 416]. The appellate court reversed, stating: "Because no actual conflict of interest existed between the company and the individual who managed the company's managing member, and there was no reasonable likelihood such a conflict would arise, we reverse the court's ruling." *Havasu Lakeshore Investments v. Fleming* (Cal. App. Fourth Dist., Div. 3; July 1, 2013) 217 Cal. App.4th 770, [158 Cal.Rptr.3d 311].

### **Summary Judgment In Favor Of Manufacturer Affirmed.**

The warning on a grinder read: "WARNING: To avoid the risk of serious injury, NEVER use this grinder with cup wheels and/or saw blades." "WARNING: Never use any accessories other than those mentioned below. The use of any accessories other than those mentioned below or attachments not intended for use such as cup wheel, cut-off wheel, or saw blade is dangerous and may

cause personal injury or property damage." Plaintiff used the grinder with a saw blade and was injured. He brought action against the retailer hardware store for product liability and negligence. In his complaint, plaintiff alleged that defendants "recommended, selected, and sold" the products to be used together, and that "[u]sing a saw blade on a grinder is unsafe, because the saw blade is not guarded on a grinder, as opposed to a saw." Later, plaintiff amended his complaint to include the manufacturer of the grinder. The trial court granted summary judgment in the manufacturer's favor and the appellate court affirmed, concluding *O'Neil v. Crane Co.* (Cal. Sup. Ct.: January 12, 2012) 53 Cal.4th 335, [266 P.3d 987, 135 Cal. Rptr.3d 288], (a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products) resolves the matter. *Sanchez v. Hitachi Koki, Co., LTD.* (Cal. App. Second Dist., Div. 4; July 9, 2013) 217 Cal. App.4th 948.

### **Clash Of Publicly-Funded Health Clinics With California's Budget Woes.**

In 2009, California passed *Welfare and Institutions Code* section 14131.10, as a cost-cutting measure. The statute eliminated certain Medi-Cal benefits that the state deemed optional, including adult dental, podiatry, optometry and chiropractic services, and discontinued reimbursement for those services. The Ninth Circuit stated: "We hold that Medicaid prohibits the limitations adopted by the California legislature." *California Association of Rural Health Clinics v. Toby Douglas, Director of the California Department of Health Care Services* (Ninth Cir.; July 5, 2013.) (Case No.'s 10-17574, 10-17622).

### **GIS-Formatted Databases Are Public Records & Must Be Produced Upon Request At The Actual Cost Of Duplication.**

The California Supreme Court's opinion's first paragraph speaks for itself: "Like many counties in California, Orange County (the County) maintains a large database of information about land parcels in

a geographic information system (GIS) file format. With this database, called the OC Landbase, a user with appropriate software can create a layered digital map containing information for over 640,000 specific parcels of land in Orange County, including geographic boundaries, assessor parcel numbers, street addresses, and links to additional information on the parcel owners. The issue in this case is whether the OC Landbase is subject to disclosure in a GIS file format at the actual cost of duplication under the California Public Records Act or whether, as the County contends, it is covered by the statute's exclusion of "[c]omputer software" (*Government Code* section 6254.9, subdivision (a)) — a term that "includes computer mapping systems" (*Government Code* section 6254.9, subdivision (b)) — from the definition of a public record. We hold that although GIS mapping software falls within the ambit of this statutory exclusion, a GIS-formatted database like the OC Landbase does not. Accordingly, such databases are public records that, unless otherwise exempt, must be produced upon request at the actual cost of duplication." *Sierra Club v. Sup.Ct. (County of Orange)* (Cal. Sup. Ct.; July 8, 2013) 57 Cal.4th 157, [302 P.3d 1026; 158 Cal.Rptr.3d 639].

### **Plea Agreement In Criminal Case Analyzed Under Contract Law.**

In 1991, defendant entered a plea agreement in a case charging six lewd and lascivious acts upon a child under the age of 14. He pled *nolo contendere* to a single count in exchange for dismissal of the other counts. The written plea form, which he signed, recited that the maximum penalties for his conviction would be probation, participation in a work furlough program, fines, testing and registration as a sex offender. In 2004, the Legislature adopted "Megan's Law," which provides a means by which the public can obtain the names, addresses, and photographs of the state's registered sex offenders. Defendant filed a civil complaint in federal court asserting that requiring him to comply with the amended law's public notification provisions would violate his plea agreement. The district court concluded that publicly disclosing any of defendant's previously confidential sex offender registration information would violate the terms of his plea agreement. Thus, the federal trial

court issued an injunction barring the California Attorney General from disclosing defendant's information. The Attorney General appealed to the Ninth Circuit, which court directed a question to the California Supreme Court. The California Supreme Court accepted the request and rephrased the Ninth Circuit's question as follows: "Under California law of contract interpretation as applicable to the interpretation of plea agreements, does the law in effect at the time of a plea agreement bind the parties or can the terms of a plea agreement be affected by changes in the law?" The California Supreme Court answered the question as follows: "We respond that the general rule in California is that the plea agreement will be 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy....' (*People v. Gipson* (2004) 117 Cal.App.4th 1065, 1070, [12 Cal.Rptr.3d 478].) That the parties enter into a plea agreement thus does not have the effect of insulating them from changes in the law that the Legislature has intended to apply to them." *John Doe v. Kamala D. Harris, as Attorney General* (Cal. Sup. Ct.; July 1, 2013) 57 Cal.4th 64, [302 P.3d 598; 158 Cal.Rptr.3d 290].

**Enforcement Of Foreign Money Judgment Against A Church Is Not Repugnant To Free Exercise Clause Or Public Policy.** A church in Japan, which is a registered California religious corporation, as well as a man in Japan, who is a resident of Los Angeles, was sued by a Japanese woman in Japan after "they had tortuously induced her to transfer nearly all of her assets to the Church." The Japanese courts awarded her a \$1.2 million tort judgment. The woman took steps to enforce her judgment here. The church contends the judgment imposes liability for its religious teachings, in violation of its constitutional right to free exercise of religion and that it is "repugnant to the public policy" to permit enforcement here. The Ninth Circuit affirmed the enforcement of the judgment by the trial court, stating: "We hold, first, that the district court's recognition and enforcement of the Japanese money judgment does not constitute 'state action' triggering direct constitu-

tional scrutiny and, second, that neither the Japanese judgment nor the cause of action on which it was based rises to the level of repugnance to the public policy of California or of the United States that would justify refusal to enforce the judgment." *Ohno v. Yasuma, Saints of Glory Church* (Ninth Cir.; July 2, 2013) (Case No. 11-55081).

### **Fees For Prevailing In Motion To Compel Arbitration In Dispute Between Lawyers And Client Must Wait To See Who Prevails In The Arbitration.**

Plaintiffs brought an action against their former lawyers after the lawyers "settled several prior lawsuits brought on their behalf and did not allocate a sufficient amount of the settlement funds to the costs of suit, making plaintiffs liable to the former attorneys for costs that were actually recovered as part of the settlements." The lawyers petitioned for arbitration, which the trial court granted. The question on appeal is whether the trial court properly awarded attorney fees to the former attorneys as the prevailing parties on the petition to compel arbitration, which was filed in the pending lawsuit, even though the resolution of the underlying causes of action are to be determined through arbitration, and the prevailing party on those claims will not be known until arbitration is completed. The appellate court reversed, stating: "We conclude that because only one side—plaintiffs or their former attorneys—can prevail in enforcing the contingency fee agreement, the determination of the prevailing parties must await the resolution of the underlying claims by an arbitrator. Attorney fees can be awarded only to the parties that prevail in the 'action.'" (*See, Civil Code* section 1717, subdivisions (a), (b)(1).) It follows that the trial court erred in awarding interim attorney fees to the former attorneys for filing a successful petition to compel arbitration." *Roberts v. Packard, Packard & Johnson* (Cal. App. Second Dist., Div. 1; July 3, 2013) 217 Cal. App.4th 822.

**No Double Recovery When Plaintiff Dies After Suing Manufacturer And Son Brings Wrongful Death Claim.** Decedent brought an action against a cigarette manufacturer seeking damages for lung cancer,

but died while the verdict was on appeal. In the present case, decedent's son brought a wrongful death action against the tobacco company for his father's death and received \$12.8 million for loss of consortium. On appeal, the tobacco company contended the trial court erred in instructing the jury on the measure of damages in that "when a personal injury plaintiff who was fully compensated in a lawsuit for his injuries and resulting physical incapacity dies from those injuries, a surviving child's wrongful death loss of consortium damages are measured from the decedent's post-injury diminished condition at the time of death." The appellate court rejected the manufacturer's argument, stating it makes little sense since this is not a matter of double recovery and that: "According to [the tobacco company], had [the decedent] lived without lung cancer, but been killed instantly by some other tortious means, [the son] would have been entitled to recover against the tortfeasor; but because [the decedent] died a long, agonizing death caused by [the tobacco company], [the son] is entitled to no recovery. Or, as argued by [the son], under [the tobacco company's] contention, if two people are hit in a crosswalk by an automobile and one is killed instantly and the other dies in a week from severe injuries, the child of the first accident victim would be entitled to loss of consortium damages but the child of the second accident victim would not." *Boeken v. Philip*

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*Morris USA Inc.* (Cal. App. Second Dist., Div. 5; July 9, 2013) 217 Cal.App.4th 992, [159 Cal.Rptr.3d 195].

### **False Imprisonment Action Against Counties To Proceed.**

The allegations are that a man was stopped by police for driving while talking on a cell phone. He handed over his driver's license, which showed his name as Freddy Pantoja Rodriguez, his registration, and his proof of insurance. After the two officers held a discussion, appellant was told to step out of his car, and one of the officers said, "We got you now RAMOS." Appellant replied that his name was Rodriguez, not Ramos. One of the officers slammed him against a wall and asked if he had any weapons or tattoos, to which he replied "no." The officer then looked under his shirt, and placed him in the patrol car. It turns out that more than 20 years earlier, a no-bail bench warrant was issued by the Superior Court for the arrest of another man for a parole violation. The bench warrant stated the name as "RODRIGUEZ Alfredo Ramos." In jail, he was placed in a gang cell and feared for his life. After spending 11 days in jail, it was adjudicated that he was not the person named in the bench warrant. The man brought an action for false imprisonment against two counties, the one where he was arrested and the one where he was held. His case was dismissed after the trial court determined the defendants were immune from liability, following *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, [87 P.3d 1; 11 Cal. Rptr.3d 692], [sheriffs act on behalf of the state when performing law enforcement activities]. The appellate court reversed, following *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, [527 P.2d 865; 117 Cal. Rptr. 241], instead of *Venegas* [a county can be held vicariously liable for false imprisonment by county employees]. *Rodriguez v. County of Los Angeles* (Cal. App. Second Dist., Div. 2; July 2, 2013) 217 Cal.App.4th 806, [158 Cal.Rptr.3d 866].

### **Supreme Court Issues Prop 8 Opinion:**

On June 26, 2013, the Supreme Court of the United States issued its ruling on the Proposition 8 matter in an opinion authored by John Roberts, Chief Justice of the United States. After first noting the public is currently engaged in an

active political debate over whether same-sex couples should be allowed to marry, the high court explained the time-honored concern about keeping the judiciary's power within the proper constitutional sphere and that courts should put aside the natural urge to proceed directly to the merits of an important dispute to settle it. The opinion states that the doctrine of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." The high court went on to say that the individuals who brought the matter to them had no direct stake in the outcome of their appeal in that the lower federal court had not ordered them to do or refrain from doing anything. In order to be able to seek relief in federal court, the opinion states, a person must be injured in a personal and individual way. But the persons seeking relief in the case, the opinion continues, have no personal stake in defending the enforcement of Proposition 8 that is distinguishable from the general interest of every citizen of California.

The high court brushed aside the argument that the California Supreme Court determined the proponents of Proposition 8 were authorized to defend it. The United States Supreme Court said this "does not mean that the proponents become de facto public officials." Rather, the proponents may argue in court and participate in proceedings, but those rights merely underscore that their interest is generalized only, and that they have no standing to assert their interest in the United States Supreme Court.

Note that when the case was winding its way through the federal courts, the Ninth Circuit certified a question to the California Supreme Court, and in *Perry v. Brown* (2011) 52 Cal.4th 1116, [265 P.3d 1002; 134 Cal.Rptr.3d 499], the California Supreme Court answered the question of the federal appeals court. The California court said the initiative process is specifically intended to enable the people to amend the state Constitution or to enact statutes when government officials have declined to do so. Thus, the court said, the voters who have successfully adopted an initiative measure may reasonably harbor a legitimate concern that the public officials who ordinarily defend a challenged state law in court may not, in the case of an initiative measure, al-

ways undertake such a defense with vigor. As a consequence, the court stated, California courts have routinely permitted the official proponents of an initiative to intervene and defend a challenged voter-approved initiative measure in order to guard the people's right to exercise initiative power.

In the dissent of the current opinion of the United States Supreme Court, written by Justice Kennedy and joined by Justices Thomas, Alito and Sotomayor, Kennedy states: "The Court's reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials—the same officials who would not defend the initiative, an injury the Court now leaves unremedied." *Hollingsworth v. Perry* (U.S. Sup. Ct.; June 26, 2013) 133 S.Ct. 2652, [186 L.Ed.2d 768].

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