



Litigation Update

Litigation Section News

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October 2013

Judge Used As Pawn In Civil Extortion Settlement Demand?

In a squabble over the receipts of a consortium of restaurants, a demand letter was sent. The appellate opinion contains the letter, albeit with the name and photograph of the judge omitted. A portion quoted states: “*Because Mr. Moore has also received a copy of the enclosed lawsuit, I have deliberately left blank spaces in portions of the Complaint dealing with your using company resources to arrange sexual liaisons with older men such as ‘Uncle Jerry,’ Judge [name redacted] a/k/a ‘Dad’ (see enclosed photo), and many others. When the Complaint is filed with the Los Angeles Superior Court, there will be no blanks in the pleading.* [¶] My client will file the Complaint against you and your other joint conspirators unless this matter is resolved to my client’s satisfaction within five (5) business days from your receipt of this Complaint. . . .” (Italics added.) After he received the letter, plaintiff sued defendants for civil extortion, violation of

civil rights, IIED and NIED. Defendants moved to strike plaintiff’s complaint under the anti-SLAPP statute [*Code of Civil Procedure* section 425.16] The trial court denied the motion to strike, basing the ruling on how defendants allegedly obtained the information about the alleged sexual liaisons [wiretapping and computer hacking], and concluding such activities are illegal as a matter of law and not covered under *Code of Civil Procedure* section 425.16. The appellate court affirmed in part and reversed it part. As to plaintiff’s cause of action for civil extortion, the court ruled it “is subject to dismissal under the anti-SLAPP statute.” With regard to the causes of action for violation of civil rights, IIED and NIED, the court said they “are not subject to dismissal under the anti-SLAPP statute because they did not arise from protected activities.” *Malin v. Singer* (Cal. App. Second Dist., Div. 4; July 16, 2013) 217 Cal.App.4th 1283, [159 Cal.Rptr.3d 292].

Spiderman Not Able To Combat His Foes.

Plaintiff invented a SpiderMan toy that allowed a user to mimic the superhero with foam string. Thereafter a rival produced a similar SpiderMan role-playing toy. Plaintiff sued the rival for patent infringement. The parties settled while the underlying action was pending, with the rival agreeing to purchase the patent. Their agreement had no expiration date, and the parties co-existed for several years without problems. In 2006, plaintiff again brought suit against the rival, this time claiming breach of contract among other claims. The trial court ruled plaintiff could not recover royalties under the settlement agreement beyond the expiration of the patent. Following the holding in *Brulotte v. Thys Co.* (1964) 379 U.S. 29, [85 S.Ct. 176; 13 L.Ed.2d 99], the Ninth Circuit affirmed. *Kimble v. Marvel Enterprises Inc.* (Ninth Cir.; July 16, 2013) (Case No. 11-15605).

Long Time Employee Fired; Statute Of Limitations Issues.

Plaintiff worked for defendant since 1979 and was consistently praised for her work. In 2006, she began working under a new supervisor. The new supervisor made numerous “condescending” comments about plaintiff’s Hispanic heritage, criticized her work and told employees “that he did not want employees speaking Spanish around him. After a number of incidents, plaintiff was placed on disability for an industrial stress claim. When she returned to work, the supervisor “falsely” accused her of errors, and her treating physician again placed her on disability. The supervisor claimed plaintiff committed time-keeping irregularities, and plaintiff claimed discrimination and harassment by the supervisor. A Qualified Medical Examiner’s report stated plaintiff “has suffered a temporary and total industrial psychological disability as a result of an injury (stress) related to the harassment and disparagement of her by her immediate manager.” Plaintiff complained to the Department of Fair Employment and Housing [FEHA], and eventually the supervisor was transferred. Plaintiff returned to work. But plaintiff was fired for alleged timekeeping irregularities three or four years earlier. It ended up in court, with plaintiff alleging retaliation, disability discrimination, wrongful termination in violation of public policy and several non-statutory claims. Because of statute of limitation problems, the court sustained defendant’s demurrer without leave to amend. The appellate court affirmed on all claims except plaintiff’s retaliation under FEHA and wrongful termination in violation of public policy claims, noting defendant “did not show these claims were untimely as a matter of law.” *Acuna v. San Diego Gas & Electric Co.* (Cal. App. Fourth Dist., Div. 1; July 18, 2013) 217 Cal.App.4th 1402.

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No Evidence Disney's Procedures Amounted To A Lack Of Reasonable Accommodation. Disabled woman brought an action against Disney because Disneyland has a policy barring Segway devices from the park. The trial court granted summary judgment to Disney after finding it established that a Segway is an unstable two-wheeled device that could accelerate quickly, either forward or backward and injure the rider and/or others if the rider is bumped. The appellate court affirmed, stating: "The undisputed expert evidence showed Segways cannot be used safely in Disneyland crowds due to its method of operation. In all of the papers submitted, there is no evidence showing the Segway can be safely used at Disneyland except [plaintiff's] inconsequential declaration that she has never had an accident while using her Segway. There was no evidence that Disney's procedures amounted to a lack of a reasonable accommodation. Accordingly, no triable issue of fact remains." *Baughman v. Walt Disney World Co.* (Cal. App. Fourth Dist., Div. 3; July 18, 2013) (As Mod. July 31, 2013) 217 Cal.App.4th 1438.

Hippotherapy Not Covered By State of California Children's Services, CCS. Child, now approximately 12 years old, was born with severe orthopedic problems and requires physical therapy. She received hippotherapy, involving placement of the child upon a horse wherein a therapist uses the movement of the horse to provide sensory input. She thereafter applied to California Children's Services [CCS] to pay for hippotherapy she was receiving from a private company. The superior court denied her mother's petition for a writ of administrative mandate. The appellate court affirmed, stating: "Hippotherapy is not a medically necessary treatment as the benefit provided by hippotherapy can be obtained from other treatments received in a gym. We also conclude the services provided by the private companies selected by Mother do not meet the criteria for vendor services and that required services can be provided by CCS." *Natalie D. v. State Department of Health Care Services* (Cal. App. Fourth Dist., Div. 3; July 18, 2013) 217 Cal.App.4th 1449.

Department Of Industrial Relations Estopped From Claiming Cosmetologists Are Employees After Labor Commissioner Found Them To Be Independent Contractors. An administrative law judge concluded cosmetologists were independent contractors, and, therefore several salons were not liable for contributions for unemployment, employment training and disability as well as personal income tax withholdings along with penalties and interest. Nonetheless the Commissioner acting through the Division of Labor Standards, an entity within the Department of Industrial Relations [*Labor Code* section 79], issued citations and assessed penalties against the salons for paying their cosmetologists without giving them properly itemized pay statements. In a petition for extraordinary relief, the superior court denied relief, concluding the Division had properly issued the citations and assessed civil penalties. The appellate court reversed, stating: "We agree with Happy Nails that a final decision of the California Unemployment Insurance Appeals Board (the Board) that the cosmetologists are not employees collaterally estops the Commissioner from assessing those penalties." *Happy Nails & Spa v. Julie A. Su, as Labor Commissioner* (Cal. App. Fourth Dist., Div. 1; July 19, 2013) 217 Cal.App.4th 1459.

Names Of Police Officers Involved In Pepper Spraying Incident Ordered Released. A labor union representing University of California police officers filed a petition for writ of mandate from a trial court order requiring the release of unredacted reports containing the names of UC police officers under the California Public Records Act [CPRA; *Government Code* section 6250], to the Los Angeles Times and Sacramento Bee. The reports concern an incident on the UC Davis campus during which UC Davis police officers were videotaped pepper spraying demonstrators. The reports were produced, but with the names of about a dozen officers redacted. Agreeing with the trial court that the identities of the officers named in the reports must be disclosed because the information was not exempted under *Penal Code* section 832.7, the appellate court denied relief. *The Federated Uni-*

versity Police Officers Association v. Sup.Ct. (Los Angeles Times) (Cal. App. First Dist., Div. 4; July 23, 2013) 218 Cal.App.4th 18.

Defendant's Submitted A Different Arbitration Agreement To The Court, Not The One Signed By Plaintiffs. Defendant's petition to individually arbitrate plaintiff's wage and hour claims was denied by the trial court. The appellate court affirmed in light of evidence plaintiff signed an arbitration agreement issued by a previous owner, but the arbitration agreement defendant presented to the court had been subsequently revised. *Avery v. Integrated Healthcare Holdings* (Cal. App. Fourth Dist., Div. 3; July 23, 2013) 218 Cal.App.4th 50.

No Need To Show Action Frivolous In Order To Obtain Ordinary Costs In FEHA Action. The trial court granted a motion for summary judgment in favor of a fire department in a FEHA case [California Fair Employment and Housing Act; *Government Code* section 12900], and then ordered plaintiff to pay costs of \$5,368.88. On appeal, the court stated: "The issue presented is whether the District, as the prevailing party, must show that [plaintiff's] claim was frivolous, unreasonable, or groundless in order to recover costs in an action for employment discrimination under FEHA." The appellate court affirmed, finding the trial court correctly found the fire department was entitled to ordinary costs without a showing the action was frivolous, unreasonable or without foundation. *Williams v. Chino Valley Independent Fire District* (Cal. App. Fourth Dist., Div. 2; July 23, 2013) 218 Cal.App.4th 73.

Code of Civil Procedure section 998 Expert Costs For Defendant After Voluntary Dismissal Prior To Trial. Plaintiff was injured in a fall in a supermarket. Defendant's overtures toward settlement under *Code of Civil Procedure* section 998, as well as defendant's demand for exchange of expert witnesses were ignored by plaintiff. Defendant moved in limine to preclude the use of experts by plaintiff, and plaintiff dismissed the action prior to a ruling. Defendant filed a cost bill for its expert witness costs after the voluntary dismissal without

prejudice, and the trial court taxed the costs. The appellate court granted defendant's petition for extraordinary relief, stating: "We will hold that a voluntary dismissal constitutes the conclusion of the action and is therefore an appropriate precipitating event triggering the trial court's discretion as to the assessment of expert witness fees under section 998." *Mon Chong Loong Trading Corp. v. Sup. Ct. (Defang Cui)* (Cal. App. Second Dist., Div. 3; July 23, 2013) 218 Cal.App.4th 87.

U.S. Not "Substantially Justified" In Denying Social Security Claim, So Plaintiff Awarded Fees And Costs. In an action for Social Security disability benefits, the government prevailed at the administrative and trial court levels, but the claimant prevailed before the Ninth Circuit. The claimant then requested attorney fees and costs from the district court, but the court denied them after finding the government's position was substantially justified in that it prevailed in the lower courts. Again the Ninth Circuit reversed, stating the district court erred by considering the result at the administrative level as the administrative law judge's decision was not supported by substantial evidence. The appellate court remanded the matter to the trial court for an award of fees and costs. *Meier v. Carolyn W. Colvin, Commissioner of Social Security* (Ninth Cir.; July 23, 2013) (Case No. 11-35736).

Volunteer Police Officer Not An Employee Under FEHA. The city of Los Angeles deems those who serve as volunteer police reserve officers as employees for the limited purpose of extending workers' compensation benefits. The appellate court held: "The City's policy decision to extend workers' compensation benefits to these individuals, who voluntarily put themselves in harm's way on behalf of the community, does not transform the volunteers' status to that of 'employee' for purposes of FEHA [California Fair Employment and Housing Act; *Government Code* section 12900]." *Estrada v. City of Los Angeles* (Cal. App. Second Dist., Div. 3; July 24, 2013) 218 Cal.App.4th 143.

Gay Man Will Face Persecution If He Is Returned To His Native Country. A 37-year-old gay native and citizen of the Philippines was ordered removed from this country. The Ninth Circuit granted the man's petition for relief, stating: "Dennis Vitug, a native of the Philippines, petitions for review of the Board of Immigration Appeals (BIA) order vacating an immigration judge's ("U") grant of withholding of removal and protection under the Convention Against Torture ("CAT"). We have jurisdiction under 8 U.S.C. § 1252. The evidence compels that conclusion that Vitug will more likely than not be persecuted if he is removed to the Philippines." *Vitug v. Eric H. Holder, Jr., Attorney General* (Ninth Cir.; July 24, 2013.) (Case No.'s 07-74754, 08-71038, 08-72088).

Problem Tenant. A landlord leased property to a private school. At a certain point, the landlord listed the premises for sale with a real estate broker, and decided to have a building inspector "find out all the things that may or may not be wrong." The lease provided for the landlord to inspect "at reasonable times after reasonable notice," but the tenant's lawyer wrote to the landlord stating: "Please have NO DIRECT CONTACT with our client without the express permission of this office." Accordingly, the landlord's counsel wrote to the tenant's counsel stating: "Please advise who we are to contact regarding property inspections," but received no response. Several months later, the landlord's counsel sent to the tenant's counsel a notice of inspection on a date two months later. On that date, an inspection was conducted. Four days later, the tenant brought an action against the landlord. A jury returned a special verdict in favor of the landlord. The tenant appealed, contending the trial court erred when it denied the tenant's motion for a directed verdict. The appellate court affirmed the judgment in the landlord's favor as well as the trial court's award of \$124,997 in attorney fees. *Eucasia Schools v. DW August Co.* (Cal. App. Second Dist., Div. 6; July 24, 2013) 218 Cal.App.4th 176.

We Don't Need No Stinking Commercials. Fox Broadcasting Co. licenses its shows to companies which sell

Fox programs online or stream them over the internet. One such distributor is Dish Network, the third largest pay television service provider in the U.S. Dish retransmits Fox's broadcasts under a 2002 contract, which provides in part: "Dish shall not 'distribute' Fox programs on an 'interactive, time-delayed, video-on-demand or similar basis.'" Dish offers its customers Primetime Anytime, which permits storage of programs for a number of days, and in May 2012, Dish offered a feature called AutoHop, which permits viewers to skip over commercials. Fox sued Dish for copyright infringement and breach of contract and sought a preliminary injunction. The district court denied a preliminary injunction, finding Fox had not shown it would likely suffer irreparable harm. The Ninth Circuit affirmed, noting Fox had not shown a likelihood of succeeding on the merits on either its copyright or breach of contract causes of action; nor did Fox show irreparable harm. *Fox Broadcasting Company, Inc. v. Dish Network, LLC* (Ninth Cir.; July 24, 2013) (Case No. 12-57048).

Jury Verdict Reversed Because Trial Court Lacked Evidence To Grant A Motion In Limine. In a business dispute after a 20-year business relationship, goods were delivered by plaintiff to defendant, and the invoices correctly listed the agreed upon price of the goods. The trial court denied plaintiff's motion in limine to preclude evi-

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dence that would vary the express terms of 33 invoices, interest payments as late charges. But in purportedly denying the motion, the trial court stated that under section 2202 of the “*California Commercial Code*, it found an express agreement between the parties, requiring interest to be paid.” A jury awarded plaintiff \$439,792.99, \$180,672.49 of which represents interest. The appellate court disagreed with the trial court that the interest provision was a term of the contract and reversed, stating: “Here, there is no dispute that the parties’ entered into multiple contracts. [Defendant] agrees that it ordered goods from [plaintiff] and the invoices correctly list the agreed upon price of the goods. The issue at the heart of this appeal is whether the parties agreed to the interest provision. [*California Commercial Code*] Section 2207 is the appropriate mechanism to determine this issue. . . We conclude the trial court erred in ruling that the parties’ contracts included an interest charge for late payments . . . the court made this ruling as part of its consideration of [plaintiff’s] motions in limine, but did not appear to have a basis to do so on the record, and thus, we reverse the judgment. . . There simply was not enough evidence for the court to make that determination as a matter of law.” *Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (Cal. App. Fourth Dist., Div. 1; July 25, 2013) 218 Cal.App.4th 272.

County Plastic Bag Prohibition Upheld. The Marin County Board of Supervisors enacted Ordinance No. 3553 in January 2011. Effective January 1, 2012, the ordinance prohibits certain retail establishments from dispensing single-use plastic bags and requires retailers to impose a reasonable charge of not less than five cents for dispensing a single-use, recycled-content paper bag. An agricultural commissioner’s report stated that while paper bags are recycled at a much higher rate than plastic bags, paper bags generate “significantly larger [greenhouse gas] emissions and result in greater atmospheric acidification, water consumption and ozone production than plastic bags.” Plaintiff brought an action for writ of mandate, contending the ordinance should not have been enacted without an Environmental Impact Report. The trial court denied relief. Finding the ordinance is exempt from the California Air Quality

Act [CEQA; *Public Resources Code* section 21000], the appellate court affirmed. *Save the Plastic Bag Coalition v. County of Marin* (Cal. App. First Dist., Div. 3; July 25, 2013) 218 Cal.App.4th 209.

Conversion Action Against County Thrown Out. Sheriff’s deputies seized and destroyed approximately 1,500 pounds of marijuana under cultivation in a remote area of Humboldt County. Plaintiffs each has a written physician’s recommendation for up to two ounces of marijuana per day, sued the County for conversion and violation of their constitutional and statutory rights to be free from unreasonable search and seizure and deprivation of property without due process. On cross-motions for summary judgment, the trial court found the deputies had probable cause for the seizure, that the County lawfully destroyed the cannabis, and that plaintiffs failed to proffer admissible evidence that their possession was lawful. It accordingly granted the County’s motion and denied plaintiffs’ motion. In affirming the trial court, the appellate court stated: “Plaintiffs’ failure to proffer competent evidence showing they had a legal right to possess the seized marijuana was fatal to their common law, statutory and constitutional claims for interference with their property rights.” *Littlefield v. County of Humboldt* (Cal. App. First Dist., Div. 3; July 25, 2013) 218 Cal.App.4th 243.

CIGA Sent Packing In Workers’ Compensation Case. Applicant in a Workers’ Compensation action was on the payroll of a company, but was working as a personal assistant for the president of the company. The company had one insurer and the president of the company had homeowner’s insurance with another insurer. Of course, there were arguments about who employed her, but the parties were able to enter into a joint stipulation, with the company’s insurer to administer all benefits; the president’s homeowner’s insurer was to pay 25 percent of all benefits. After the settlement, the company’s insurer liquidated, and California Insurance Guarantee Association [CIGA] assumed administration of the claim. CIGA argued it should be dismissed since the company’s insurer did not provide workers’ comp coverage for do-

mestic employees, and the Workers’ Compensation Appeals Board [WCAB] permitted CIGA to pursue reimbursement against the president’s homeowner’s insurer. The Court of Appeal annulled the decision of the WCAB, concluding CIGA is barred by principles of res judicata. *State Farm General Insurance Company v. Workers’ Compensation Appeals Board, California Insurance Guarantee Association* (Cal. App. Second Dist., Div. 6; July 25, 2013) (As Mod. August 13, 2013) 218 Cal.App.4th 258.

Ninth Circuit Reversed Grant Of Summary Judgment In Excessive Force Action Involving The Death Of An Attorney. In response to a hang-up 911 call, police arrived at a home to find a delusional man, an attorney, sitting in the driveway. It took four officers to handcuff him. Even after being handcuffed, the man pumped his fists and kicked his feet and toes onto the asphalt. An officer kept his knee on the man’s upper back, and at some point, the man stopped moving and officers became concerned. He was dead when paramedics arrived. The man’s parents filed an action for excessive force, and their expert testified about a phenomenon called restraint asphyxia. At the close of plaintiff’s evidence, the defendant sought summary judgment as a matter of law. The trial court deferred a decision and submitted the case to the jury, which hung. At that point, the court granted summary judgment. Concluding the trial judge made impermissible credibility callings in granting summary judgment, the Ninth Circuit reversed. At the same time, the reviewing court declined to order reassignment to a different judge, as requested by the decedent’s parents. *Carole Krechman as the personal representative of Robert Albert Appel, deceased v. County of Riverside* (Ninth Cir.; July 25, 2013) (Case No. 12-55347).

County Granted Summary Judgment On Dangerous Condition Of Public Property Claim. A husband and wife were injured in an auto accident and brought an action against another motorist as well as the county for dangerous condition of public property. The complaint alleged the other driver was unable to see the plaintiffs as

they pulled out from one road onto another. The county moved for summary judgment based upon design immunity and the plaintiffs opposed, contending the county disregarded its own methodology regarding sight distance. The trial court granted summary judgment and the appellate court affirmed, stating: “[A] licensed civil and traffic engineer employed by the County approved the Plans prior to construction, that this engineer had the discretionary authority to approve the Plans, and that another licensed engineer employed by the County approved and signed the ‘as built’ plans after construction of the improvements, the County demonstrated the discretionary approval element of its design immunity defense as a matter of law.” *Hampton v. County of San Diego* (Cal. App. Fourth Dist., Div. 1; July 26, 2013) 218 Cal.App.4th 286.

Police Dog Had A History Of Sniffing Mistakes. While a victim sat in his car waiting for a traffic light to change, a young Hispanic man got out of a white Volkswagen and murdered him. A defendant was found guilty of first degree murder after a police dog named Reilly alerted to a scent showing the defendant’s scent was present on the front passenger seat of the VW. The defense was that another young Hispanic man shot the victim. The matter ended up in federal court on a writ of habeas corpus under 28 U.S.C. § 2254. The Ninth Circuit reversed the murder conviction, stating: “The prosecution did not disclose to the defense that Reilly had a history of making mistaken scent identifications, even though it had stipulated to Reilly’s mistaken identifications in a different trial several months earlier.” *Aguilar v. Jeanne S. Woodford, Director of California Department of Corrections* (Ninth Cir.; July 29, 2013) (Case No. 09-55575).

Now Explain It To A Jury. A nonprofit environmental group opposed a mine project through a ballot initiative, in order to preserve natural resources. In its venture, the nonprofit contracted with a fundraiser, and eventually the two had a financial dispute. The fundraiser gave confidential documents belonging to the nonprofit to the lawyers for the mine; the lawyers gave the fundraiser a check for

\$50,000. The lawyers thereupon filed a formal complaint with election officials, which maneuver succeeded in undermining the nonprofit. After the conclusion of the election issue, the nonprofit brought an action against the mine. Arguing it was exercising its right to petition when the complaint was made to election officials, the mine moved for a special motion to strike under the anti-SLAPP statute [*Code of Civil Procedure* section 425.16], which motion the trial court granted. The Court of Appeal reversed, noting the gravamen of the nonprofit’s action is not an act by the mine in furtherance of a petition or free speech, but the allegation the mine purchased its confidential documents. *Renewable Resources Coalition, Inc. v. Pebble Mines Corporation* (Cal. App. Second Dist., Div. 3; July 30, 2013) 218 Cal. App.4th 384.

Right To Repair Act Does Not Eliminate Homeowner’s Common Law Rights. A homeowner purchased a newly constructed home from defendant. A pipe burst, resulting in significant damage. The homeowner’s insurer, plaintiff, paid the expenses and repair costs and then brought an action in subrogation for recovery. The trial court found the subrogation action was time barred under the Right to Repair Act [*Civil Code* section 895], and sustained defendant’s demurrer. In reversing, the appellate court stated: “The Right to Repair Act was enacted to provide remedies where construction defects have negatively affected the economic value of a home, although no actual property damage or personal injuries have occurred as a result of the defects. We hold the Act does not eliminate a property owner’s common law rights and remedies, otherwise recognized by law, where, as here, actual damage has occurred. Accordingly, [plaintiff’s] complaint in subrogation, based on [the homeowner’s] right to recover actual damages, states causes of action.” *Liberty Mutual Insurance Company v. Brookfield Crystal Cove* (Cal. App. Fourth Dist., Div. 3; August 28, 2013) (Case No. G046731).

Another Dangerous Condition Of Highway Claim Rejected By Court. Plaintiffs were injured in car crash and brought an action against a county. The trial court granted

summary judgment in favor of the county and the appellate court affirmed, stating: “The evidence established that the accident was caused by [another driver’s] intentional act of crossing the double yellow line into oncoming traffic. With respect to any harm arising from the lack of a center median, respondent established its entitlement to design immunity, by showing that an authorized official exercised his discretionary authority to approve plans for the highway that included neither a median space nor a barrier.” *Curtis v. County of Los Angeles* (Cal. App. Second Dist., Div. 4; July 30, 2013) 218 Cal.App.4th 366.

“He’s A Sociopathic Narcissist”...Opinion Or Fact? Building owners brought a libel action against a former tenant who posted a review of the apartment building on a Website: “Sadly, the Building is (newly) owned and occupied by a sociopathic narcissist—who celebrates making the lives of tenants hell. Of the 16 mostly-long-term tenants who lived in the Building when the new owners moved in, the new owners’ noise, intrusions, and other abhorrent behaviors (likely) contributed to the death of three tenants (Pat, Mary, & John), and the departure of eight more (units 1001, 902, 802, 801, 702, 701, 602, 502) in very short order. Notice how they cleared-out all the upper-floor units, so they could charge higher rents? [¶] They have sought evictions of 6 of those long-term tenants, even though rent was paid-in-full, and those tenants bothered nobody. And what they did to evict the occupants of unit #902, who put many of tens of thousands of dollars into their unit, was horrific and shameful. [¶] This is my own first-hand experience with this building, and its owners. I know this situation well, as I had the misfortune of being in a relationship with one of the Building’s residents at

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the time, have spent many days and nights over many years in the Building, and have personally witnessed the abhorrent behavior of the owners of the Building. [¶] There is NO RENT that is low enough to make residency here worthwhile.” The trial court denied a special motion to strike brought by the defendant/former tenant under *Code of Civil Procedure* section 425.16, the anti-SLAPP statute. The appellate court affirmed, stating: “While many Internet critiques are nothing more than ranting opinions that cannot be taken seriously, Internet commentary does not *ipso facto* get a free pass under defamation law.” *Bently Reserve L.P. v. Papaliolios* (Cal. App. First Dist., Div. 1; July 30, 2013) 218 Cal.App.4th 418.

No Qualified Immunity For Deputies Who Shot Terminally Ill Man. In the early morning, a wife observed her terminally ill husband, who was suffering from brain cancer, go to his truck, retrieve his gun and load it with ammunition. She called 911, but he told her to hang up and she did. Police nevertheless responded, and the wife explained the situation. The husband came into view of the deputies. He held a pistol, barrel down, in one hand and his walker in the other as he appeared on a balcony of the home. The Ninth Circuit opinion states: “Soon after the deputies broadcast that [the husband] had a firearm, the dispatch log records ‘shots fired.’ [The husband] fell to the ground, and [a deputy] continued to shoot. Together the three deputies fired approximately nine shots.” The husband died. The wife brought an action under 42 U.S.C. § 1983 asserting two constitutional claims. The district court denied qualified immunity as well as the deputies’ motion for summary judgment, and the deputies appealed. The Ninth Circuit agreed the three deputies could be found to have violated the Fourth Amendment’s prohibition on excessive force. *George v. Morris* (Ninth Cir.; July 30, 2013) (Case No.’s 11-55956, 11-56020).

One Part Of Action To Be Arbitrated, But Not The Other. In a class action against both DirecTV and Best Buy, plaintiffs allege a scheme to deceive, involving the apparent sale of equipment that was actually only leased to customers. The district court ordered the

matter into arbitration. The Ninth Circuit found that DirecTV’s arbitration agreement is enforceable under the holding in *AT&T Mobility v. Concepcion* (2011) 131 S.Ct. 1740, [179 L.Ed.2d 742], but declined to hold that either equitable estoppel or a third party beneficiary doctrine permit Best Buy to enforce DirecTV’s arbitration agreement. *Murphy v. DirecTV* (Ninth Cir.; July 30, 2013) (Case No. 11-57163).

Sterilization Of Developmentally Disabled Woman Is Incidental To Medically Necessary Treatment Ordered By Court. A developmentally disabled woman suffers from numerous health problems, including an abnormally long and heavy menses and debilitating migraine headaches that usually coincide with the onset of her menses. After numerous other treatments for her severe menstrual bleeding and migraines failed, her doctors recommended a hysterectomy and oophorectomy. The trial court found *Probate Code* section 2357 and its provisions regulating court-ordered medical treatment governed the petition, rather than *Probate Code* section 1950 *et seq.* and its provisions regulating sterilization of developmentally disabled adults. In affirming, the appellate court stated it agreed section 2357 governs because the objective of the proposed surgery is to treat medical conditions, not to prevent the woman from bearing children, and stating: “Although the proposed surgery would result in [the woman’s] sterilization, that is the incidental effect of the medically necessary treatment.” Also, the appellate court noted the trial court incorrectly applied the preponderance of evidence standard of proof instead of the more stringent clear and convincing evidence standard, but concluded the error to be nonprejudicial because there was no indication the court would have reached a different conclusion if it had applied the proper standard. *Conservatorship of the Person and Estate of Maria B.* (Cal. App. Fourth Dist., Div. 3; July 31, 2013) 218 Cal.App.4th 514.

The End Of Company Christmas Parties??? An employee consumed alcoholic beverages at an employer hosted party and became intoxicated. The employee arrived home safely, but then

left to drive a coworker home. During that drive, the employee struck another car, killing its driver. The trial court granted summary judgment for the employer on the ground the employer’s potential liability under the doctrine of respondeat superior ended when the employee arrived home. The appellate court reversed, stating: “We hold that an employer may be found liable for its employee’s torts as long as the proximate cause of the injury (here, alcohol consumption) occurred within the scope of employment. It is irrelevant that foreseeable effects of the employee’s negligent conduct (here, the car accident) occurred at a time the employee was no longer acting within the scope of his or her employment. We also hold that no legal justification exists for terminating the employer’s liability as a matter of law simply because the employee arrived home safely from the employer hosted party.” *Purton v. Marriott International, Inc.* (Cal. App. Fourth Dist., Div. 1; July 31, 2013) 218 Cal.App.4th 499, [159 Cal.Rptr.3d 912].

Pretty Soon, They’ll Be Talking About Real Money. A male lawyer and a female married in 1985. In 2000, he entered into an “of counsel” relationship with a law firm specializing in securities litigation which entitled him to a referral fee of 10 percent in a class action. In 2003, the couple separated and the two entered into a marital settlement [MSA] agreement in 2007. At that time, the wife knew of the referral fee arrangement in that there had already been a recovery of approximately \$7.2 billion in settlement funds, and that the firm would be submitting a request for attorney fees in federal district court. As part of the MSA, the wife agreed to accept 10 percent of the fee in exchange for approximately \$7 million in other assets and debt relief, and judgment in the dissolution was entered in late 2007. In September 2008, the district court awarded \$688 million in fees, and in 2009 the wife “learned she was entitled to an additional \$1.560 million.” She retained a new lawyer and in November 2009 filed a motion to set aside the judgment of dissolution based on her mental incapacity. She later dismissed that action and in December 2010, she sued her former husband for breach of his fiduciary duty of disclosure

under *Family Code* section 1101. The trial judge granted a motion for summary adjudication, and the appellate court affirmed, stating: “Because the prospective referral fee was not concealed, but rather the parties litigated the issue and the judgment fully adjudicated the asset, [the wife’s] recourse was an action to set aside the judgment, or a portion thereof, within the one-year limitations period specified in the relevant portion of section 2122, subdivision (f). Because her action was untimely, the court lacked jurisdiction over the matter.” *Georgiou v. Leslie* (Cal. App. Fourth Dist., Div. 1; July 31, 2013) 218 Cal.App.4th 561.

Treble Damages To Salesman Who Had No Written Contract. Plaintiff agreed to use his experience and connections in the high-tech electronic industry to help grow a company owned by defendants. Plaintiff prepared a written document outlining the business relationship with defendants, which included his understanding he would receive 50 percent of the net profits from all sales resulting from his efforts and contacts. The parties never executed the document, but a jury later determined that defendants ultimately accepted its terms, based upon conduct. The jury awarded plaintiff \$2,065,702 for owed commissions, after determining defendants willfully failed to provide him with a written contract. Both the trial and appellate courts applied the Independent Wholesale Sales Representatives Contractual Relations Act of 1990 [*Civil Code* section 1738.10], which was created to protect sales representatives who receive commissions from, but are not employed by, a manufacturer. The appellate court affirmed, including the Act’s treble damages mandate, so the amount awarded arose to \$6,197,106. *Reilly v. Inquest Technology*

(Cal. App. Fourth Dist., Div. 3; July 31, 2013) 218 Cal.App.4th 536.

Public Interest In Free Expression Outweighs The Public Interest In Avoiding Consumer Confusion. Football player Jim Brown brought an action against the manufacturer of a video game that allegedly used his likeness in several versions of a game, for which he has never been compensated. The Lanham Act [15 U.S.C. § 1125(a) and § 43(a)] provides for a civil cause of action against: “Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any work, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.” The district court applied the Rogers test, a test based on *Rogers v. Grimaldi* (1989) 875 F.2d 994, which states that § 43(a) will not be applied to expressive works unless the use of identifying material has no artistic relevance to the underlying work whatsoever. The Ninth Circuit affirmed, stating: “As expressive works, the [] video games are entitled to the same First Amendment protection as great literature, plays, or books. Brown’s Lanham Act claim is thus subject to the *Rogers*’ test, and we agree with the district court that Brown has failed to allege sufficient facts to make out a plausible claim that survives that test. Brown’s likeness is artistically relevant to the games and there are no alleged facts to support the claim that [defendant] explicitly misled consumers as to Brown’s involvement with the games. The *Rogers*’ test tells us that, in this case, the public interest in free expression outweighs the public interest in avoiding consumer confusion.” *James “Jim” Brown v. Electronic Arts, Inc.* (Ninth Cir.; July 31, 2013) (Case No. 09-56675) [107 U.S.P.Q.2D (BNA) 1688; 41 Media L. Rep. 2276].

Use Of Likeness Of College Athletes Not Protected By First Amendment. Football players Samuel Keller, Edward O’Bannon, Jr., Byron Bishop, Michael Anderson, Danny Wimprine, Ishmael Thrower, Craig Newsome, Damien Rhodes and Samuel Jacobson brought a class action against a video game company asserting the company violated their right of publicity under *Civil Code* section 3344 and California common law. The video company moved to strike plaintiffs’ complaint under the anti-SLAPP statute [*Code of Civil Procedure* section 425.16], and the federal district court denied the motion. Applying California’s “transformative use” test, developed by the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, [21 P.3d 797, 106 Cal.Rptr.2d 126], the Ninth Circuit affirmed, stating the “use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment. We reject [defendant’s] suggestion to import the *Rogers* test into the right-of-publicity arena, and conclude that state law defenses for the reporting of information do not protect [defendant’s] use.” *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* Ninth Cir.; July 31, 2013) (Case No. 10-15387).

Moradi-Shalal Does Not Preclude UCL Claims. The California Supreme Court clarified one of the perceived limitations resulting from its holding in *Moradi-Shalal v. Fireman’s Fund* (1988) 46 Cal.3d 287, [758 P.2d 58, 250 Cal.Rptr. 116]. The case addresses whether insurance practices that violate the Unfair Insurance Practices Act [UIPA; *Insurance Code* section 790 *et seq.*] can support an Unfair Competition Law [UCL; *Business & Professions Code* section 17200 *et seq.*] action. The plaintiff alleges causes of action for false advertising and insurance bad faith, and the Supreme Court held: “We hold that *Moradi-Shalal* does not preclude first party UCL actions based on grounds independent from section 790.03, even when the insurer’s conduct also violates section 790.03.2 We have made it clear that while a plaintiff may not use the UCL to “plead around” an *absolute* bar to relief, the UIPA does not immunize insurers from UCL liability for conduct

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that violates other laws in addition to the UIPA.” *Zhang v. Sup. Ct.* (California Capital Insurance Company) (Sup. Ct.; August 1, 2013) 57 Cal.4th 364, [304 P.3d 163, 159 Cal.Rptr.3d 672].

Congress’s Repeal Of Federal Lawsuits Under Truth In Savings Act Does Not Preclude Actions Under California’s Unfair Competition Law (UCL).

The provision in the federal Truth in Savings Act [TISA; 12 U.S.C. § 4301] which permitted private civil actions was repealed in 1996. The California Supreme Court issued an opinion on the issue of whether or not California’s Unfair Competition Law [UCL; *Business & Professions Code* section 17200 *et seq.*] may be based on violations of that federal statute, even though Congress repealed the provision authorizing civil actions for damages. The Supreme Court noted: “Whether framed in terms of preemption or not, the issue before us is a narrow one. The Bank and the courts below have taken the position that Congress ruled out any private enforcement of TISA by repealing former section 4310. However, considerations of congressional intent favor plaintiffs. By leaving TISA’s savings clause in place, Congress explicitly approved the enforcement of state laws ‘relating to the disclosure of yields payable or terms for accounts . . . except to the extent that those laws are inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency.’ (section 4312). The UCL is such a state law.” The court points out that, here, plaintiffs are not suing to enforce TISA; nor do they seek damages for TISA violations, and that “Instead, they pursue the equitable remedies of restitution and injunctive relief, invoking the UCL’s restraints against unfair competition. Doing so is entirely consistent with the congressional intent reflected in the terms and history of TISA. Congress expressly left the door open for the operation of state laws that hold banks to standards equivalent to those of TISA.” The Supreme Court concluded: “We hold that TISA poses no impediment to plaintiffs’ UCL claim of unlawful business practice.” *Rose v. Bank of America* (Sup. Ct.; August 1, 2013) 57 Cal.4th 390, [304 P.3d 181, 159 Cal.Rptr.3d 693].

Side Agreement Between Bank And Developer Rendered Seller’s Agreement To Subordinate Its Security Interest To That Of The Bank’s Unenforceable.

The court’s first paragraph says it all: “This case involves competing claims of lien priority between the seller of real property, which took back a security interest on property sold to a developer, and the bank which financed development of the project through a construction loan. The issue is whether the seller’s agreement to subordinate its security interest to that of the bank is enforceable where the developer and the bank entered into a side agreement between themselves, to which the seller did not consent, about which it knew nothing, and which substantially impaired its security. We conclude that it is not. (*Gluskin v. Atlantic Savings and Loan Assn.* (1973) 32 Cal.App.3d 307, 314, [108 Cal.Rptr. 318, 323-324].) The trial court so held. We shall affirm.” *Citizens Business Bank v. Gevorgian, as Trustee* (Cal. App. Second Dist., Div. 4; August 1, 2013) 218 Cal.App.4th 602, [160 Cal.Rptr.3d 49].

National Rifle Association’s Preemption Argument On Gun Control Rejected.

Both the appellate and trial courts held a county ordinance which precludes the possession and use of guns in the county’s parks and recreational areas was not preempted by state law. In its amicus brief, the National Rifle Association argued the state of California has impliedly occupied the field and that “visiting Carry License holders will be confronted with a patchwork quilt of different firearm restrictions each time they enter another jurisdiction to enjoy the county parks. . .” The appellate court noted a county board of supervisors could well conclude a stricter standard of gun control is warranted in some areas. *Calguns Foundation, Inc. v. County of San Mateo* (Cal. App. First Dist., Div. 2; August 2, 2013) 218 Cal. App.4th 661.

Deaf/Hard Of Hearing Students Want To Follow Along With Classroom Discussions.

Through their parents, two deaf or hard of hearing public education students in different parts of California requested help

to follow classroom discussions through Communication Access Realtime Translation [CART], a word transcription service similar to court reporting in which a trained stenographer provides real-time captioning that appears on a computer monitor. In both situations, the school district denied the request, and both students were also unsuccessful in state administrative proceedings. They filed lawsuits in federal court, alleging violations of the Individuals with Disabilities Education Act [IDEA; 20 U.S.C. § 1400] and the Americans with Disabilities Act [ADA; 42 U.S.C. § 12101]. In each case, the district court granted summary judgment to the school district. The Ninth Circuit reversed and remanded, holding a school district’s compliance with its obligations to deaf or hard of hearing children under IDEA does not necessarily establish compliance with its obligations under the ADA. *K.M. ex rel. Bright v. Tustin Unified School District* (Ninth Cir.; August 6, 2013) (Case No.’s 11-56259, 12-56224).

Morphed Images = Sex Offender Registration For Life.

Defendant was convicted of possession of child pornography and sentenced to 90 days in custody, 36 months probation, a \$17,000 fine and must register as a sex offender for life. On appeal, defendant claimed some of the photographs were innocent images of children which were digitally altered or “morphed,” which often means they were created by superimposing an image of a real child’s head on someone’s body image. The Ninth Circuit affirmed his conviction, noting: “Morphed images are different from traditional child pornography because the children depicted may not have been sexually abused or physically harmed during the images’ production. But morphed images are like traditional child pornography in that they are records of the harmful sexual exploitation of children,” and holding: “Irrespective of whether the images are in fact morphed, [defendant’s] claim fails because there is no clearly established Supreme Court law holding that images of real children morphed to look like child pornography constitute protected speech.” *Shoemaker v. Taylor* (Ninth Cir.; August 6, 2013) (As Amended, September 13, 2013) (Case No. 11-56476).

“The Trouble With Law Is Lawyers”---Clarence Darrow.

A lawyer filed a class action lawsuit against Toshiba on behalf of a class of purchasers of laptops which had an electrostatic discharge problem. The trial court awarded \$165,000 in sanctions against the lawyer and awarded her no attorney fees, even though she requested \$24 million. The appellate court described in detail “the arduous procedural history” of the defendant’s attempts to obtain discovery and affirmed the award of sanctions and reversed the attorney fee award, but only to the extent of fees for work of a staff member. *Ellis v. Toshiba America* (Cal. App. Second Dist., Div. 1; August 7, 2013) (As Amended, September 10, 2013) 218 Cal.App.4th 853.

Defendant Did Not Waive Jury By Not Filing Jury Fees When A Fee Waiver Had Been Granted.

The trial court denied defendant a requested jury trial because no jury fees had been posted. The appellate court found error and reversed, stating “because defendant obtained a waiver of jury fees, he was not required to deposit the \$150 advance jury fees five days before the date set for trial.” *Kim v. De Maria* (Cal. App. Sup. Ct. L.A.; August 7, 2013) 218 Cal.App.4th Supp. 1.

Rock Band’s Unauthorized Use Of Artist’s Illustration In Concerts Fair Use Under Copyright Law.

An artist and illustrator created *Scream Icon*, a drawing of a screaming, contorted face. A defendant is a photographer who photographed a brick wall on Sunset Blvd. covered with graffiti and posters, including a weathered and torn copy of *Scream Icon*. That defendant was later engaged to create the lighting, effects and video backdrops for a rock band concert. One of the backdrops created for a song consisted of a four-minute video showing a brick alleyway covered in graffiti depicting *Scream Icon*. The artist brought an action for copyright infringement, and the federal district court granted summary judgment to the defendants. Finding the use of *Scream Icon* was “transformative and not overly commercial,” the Ninth Circuit concluded it was fair and affirmed judgment in favor of the defendants, but vacated an award of attorney fees. *Seltzer*

v. Green Day, Inc. (Ninth Cir.; August 7, 2013) (Case No.’s 11-56573, 11-57160).

Nurses: A Shot In The Arm.

The California Supreme Court decided who may administer insulin to diabetic students, in light of “a longstanding shortage of school nurses.” In 2007, California’s Department of Education stated that “trained school personnel who are not licensed health care providers may, when no nurse is available, administer insulin pursuant to medical orders of students’ treating physicians.” The American Nurses Association brought an action challenging the Department’s mandate as an unauthorized practice of nursing. Citing *Education Code* sections 49423 and 49423.6, the Supreme Court concluded “California law does permit trained, unlicensed school personnel to administer prescription medications, including insulin, in accordance with written statements of individual students’ treating physicians, with parental consent.” *American Nurses Association v. Tom Torlakson* (Cal. Sup. Ct.; August 12, 2013) 57 Cal.4th 570.

Let’s Split This? No, You Pay It All.

A man was injured in an auto accident and settled with the underinsured motorist who caused the collision. The injured man then claimed \$62,500 in loss under the uninsured motorist coverage in both of the two policies that covered himself. One insurance company relies on *Insurance Code* section 11580.2, subdivision (c)(2), to argue it owes nothing [“The insurance coverage provided for in this section does not apply either as primary or as excess coverage: (2) To bodily injury of the insured while in or upon or while entering into or alighting from a motor vehicle other than the described motor vehicle if the owner thereof has insurance similar to that provided in this section.”] The other insurance company argues it is section 11580.2, subdivision (d) [“(d) Subject to paragraph (2) of subdivision (c), the policy or endorsement may provide that if the insured has insurance available to the insured under more than one uninsured motorist coverage provision, any damages shall not be deemed to exceed the higher of the applicable limits of the respective coverages, and the damages shall be prorated between the applicable coverages as the limits of each coverage bear to

the total of the limits.”] that applies and the claim should be allocated between the two companies. Both the trial and appellate court found section 11580.2, subdivision (d), controls and both insurance policies are implicated. *Progressive Choice Insurance Company v. California State Automobile Association Inter-Insurance Bureau* (Cal. App. Second Dist., Div. 4; August 12, 2013) 218 Cal.App.4th 1145.

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