



Litigation Update

Litigation Section News

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November 2013

No Saving Bonds. The first few paragraphs of the Ninth Circuit’s opinion explain the setting: “Barry Bonds was a celebrity child who grew up in baseball locker rooms as he watched his father Bobby Bonds and his godfather, the legendary Willie Mays, compete in the Major Leagues. Barry Bonds was a phenomenal baseball player in his own right. Early in his career he won MVP awards and played in multiple All-Star games. Toward the end of his career, playing the San Francisco Giants, his appearance showed strong indications of the use of steroids, some of which could have been administered by his trainer, Greg Anderson. Bond’s weight and hat size increased, along with the batting power that transformed him into one of the most feared hitters ever to play the game. From the late-1990s through the early-2000s, steroid use in baseball fueled the unprecedented explosion in offense, leading some commentators to refer to the period as the “Steroid Era.” In 2002, the federal government, through the Criminal Investigation Division of the Internal Revenue Service, began investigating the distribution of steroids and other performance enhancing drugs (“PEDs”). The government’s purported objective was to investigate whether the distributors of PEDs laundered the proceeds gained by selling those drugs. [¶] . . . The government convened a grand jury in the fall of 2003 to further investigate the sale of these drugs in order to determine whether the proceeds of the sales were being laundered. Bonds and other professional athletes were called to testify. Bonds testified under a grant of immunity and denied knowingly using steroids or any other PEDs . . . The government later charged Bonds with obstructing the grand jury’s investigation. After a jury trial, Bonds was convicted of one count of obstruction of justice in violation of 18 U.S.C. § 1503.” In affirming Bonds’ conviction, the appeals court noted that when factually true statements are mislead-

ing or evasive, they can prevent the grand jury from obtaining truthful and responsive answers. (*United States of America v. Barry Lamar Bonds* (Ninth Cir.; September 13, 2013) 730 F.3d 890.)

Blackacre Wins Again! In 1960, a prior owner of real property [Blackacre] poured a concrete driveway encroaching on the neighboring property [Whiteacre] approximately 8 inches by 90 feet. The present owner of Blackacre bought the home in 1994. In 2009, the trust which now owns Whiteacre constructed a metal guardrail over the prescriptive strip. An action to quiet title followed. While the owners of Whiteacre prevailed in the trial court on a motion for summary judgment, the appellate court reversed, because the owners of Whiteacre did not prove the owners of Blackacre did not have a prescriptive easement [open and notorious use for five years which was continuous and uninterrupted, hostile to the true owner and under a claim of right]. The owners of Whiteacre argued they and their predecessors had not been in continuous possession of Whiteacre for five years, so they did not have to prove the elements of a prescriptive easement. The appellate court stated: “California law does not require the actual owners of the adversely used land to have been in continuous possession for five years.” (*King v. Wu* (Cal. App. Second, Div. 7; August 14, 2013) 218 Cal.App.4th 1211.)

Post-Riverisland [(2013) 55 Cal.4th 1169] World: “Estimates Can Support A Claim For Fraud.” After a tenant moved into a shopping center, its share of expenses for property taxes, insurance and common maintenance substantially exceeded the landlord’s pre-lease-signing estimates. The tenant sued for fraud, rescission based on mutual mistake, mistake of fact, breach of lease and breach of the implied covenant of

good faith and fair dealing. The trial court sustained the landlord’s demurrer without leave to amend, finding the negotiations constituted estimates and could not be statements of fact upon which a claim of fraud could be based, and the tenant failed to allege facts establishing innocent misrepresentation, mistake, breach of lease, and breach of the implied covenant. In reversing, the appellate court stated “estimates can support a claim for fraud.” (*Thrifty Payless, Inc. v. The Americana at Brand, LLC*. (Cal. App. Second, Div. 1; August 14, 2013) 218 Cal.App.4th 1230, [160 Cal.Rptr.3d 718].)

If You’re Going To Talk The Talk, You’ve Also Got To Walk The Walk. A woman was arrested for driving under the influence. An hour after she was pulled over, she took a breathalyzer test. The test result was 0.08 percent blood alcohol content. A few minutes later she took another test resulting in a 0.09 percent BAC. Twenty-five minutes later she took a

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blood test resulting in 0.095 percent BAC. The Department of Motor Vehicles suspended her license after conducting a hearing. The trial court denied a petition for a writ of mandate. On appeal, she contended the uncontradicted expert testimony at the hearing demonstrated her blood alcohol was rising throughout the three tests and thus below 0.08 percent at the time she was driving. The appellate court affirmed, stating its review is to determine whether the trial court's judgment is supported by substantial evidence, and here the trial court properly looked at circumstantial evidence, such as the woman's erratic driving and failed field sobriety tests. (*Coffey v. Jean Shiomoto, as Chief Deputy Director of the Department of Motor Vehicles* (Cal. App. Fourth, Div. 3; August 15, 2013) 218 Cal. App.4th 1288.)

Lawyers Representing Collection Agencies Sued By District Attorney For Unfair Business Practices.

A district attorney filed a civil action against a debt collection company and its lawyers alleging violations of the Rosenthal Fair Debt Collection Practices Act [*Civil Code* section 1788] and the *Federal Fair Debt Collection Practices Act* [15 U.S.C. § 1692]. The People set forth one cause of action, violation of California's Unfair Competition Law [*Business & Professions Code* section 17200 *et seq.*].

According to the People, the letters sent by the company's lawyers are misleading and unlawfully threaten postjudgment remedies to which the company is not entitled, and, in the collection actions, published personal information about the debtors, including social security numbers and driver's license numbers. The trial court concluded the complaint is barred by the litigation privilege because the alleged conduct consisted of communications and acts related to judicial proceedings, and sustained the defendants' demurrer without leaving to amend. Stating, "The People's unfair competition law claims that are specifically prohibited conduct are not barred by the litigation privilege," the appellate court reversed and remanded for further proceedings. (*People v. Persolve, LLC* (Cal. App. Fifth Dist.; August 15, 2013) 218 Cal.App.4th 1267, [160 Cal.Rptr.3d 841].)

Landlord, Whose Lease With A Bank Was Disaffirmed By FDIC In A Bank Takeover, Refused To Step Aside And Seized A Letter Of Credit; Landlord Has To Return Asset And Is Now On Hook For Attorney Fees.

In an imminent bank takeover, the Federal Deposit Insurance Corporation [FDIC] sold the assets of a failed bank to a takeover bank. Among the assets was a \$500,000 letter of credit which had been demanded by the failed bank's landlord to cover any future rents. As part of the takeover, the FDIC disaffirmed the failed bank's lease. Despite the sale of the failed bank's assets and the disaffirmance of its lease, the landlord drew down on the \$500,000 letter of credit, and the takeover bank's account was debited \$500,000. The takeover bank brought an action against the landlord, and the trial court entered judgment in favor of the landlord, awarding \$395,000 in attorney fees and costs to the landlord. The appellate court reversed. In its opinion, the court pointed out that the landlord's "real gripe" is the FDIC's disaffirmance of the lease and its right to collect future rents, and stated: "Simply put, once [the failed bank's] lease was disaffirmed, leaving no unpaid rent, [the landlord] had no claim for breach of lease and no claim for damages. It therefore was not entitled to claim the proceeds of the letter of credit,

which served as security in case of breach of the lease. The \$500,000 securing the letter of credit belonged to [the takeover bank] and [the landlord], in essence, wrongfully acquired it." The appellate court also stated "that if a landlord who was not permitted to seize a pledged asset in the hands of the FDIC as receiver were permitted to seize that asset as soon as the FDIC transferred it to a healthy bank, the FDIC's options would be limited and it would be hamstrung in its efforts to maximize the return of the failed bank's assets. This would not be consistent with FIRREA [Financial Institutions Reform, Recovery and Enforcement Act of 1989; 12 U.S.C. § 1821(d)]." With regard to the takeover bank's argument it is entitled to attorney fees against the landlord, the appellate court applied general assignment principles in the context of the letter of credit, and concluded the landlord breached its warranty to the letter of credit applicant under *Commercial Code* section 5110, subsection (a)(2). The opinion states the landlord "violated the terms of the lease . . . when it drew upon the letter of credit based on a claim for future rents that was not permitted under the law." (*California Bank & Trust v. Piedmont Operating Partnership* (Cal. App. Fourth, Div. 3; August 16, 2013) 218 Cal.App.4th 1322.)

County Likely To Face Jury In Suicidal Man's Death.

A neighbor heard screaming from a house and called police. When deputies arrived at the house, a man's girlfriend said the man tried to kill himself. Deputies entered the house and found the man standing in the kitchen. They ordered him to show his hands and as he did, he walked toward the deputies holding a large knife in his raised right hand. The two deputies simultaneously drew their guns and fired two shots each at the man, who died from gunshot wounds. The decedent's daughter brought an action in federal court, and the trial judge granted summary judgment to the county. The daughter appealed to the Ninth Circuit, who in turn asked the California Supreme Court to decide an issue as a matter of law pursuant to *California Rules of Court*, rule 8.548, which provides that "on request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth,

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the Supreme Court may decide a question of California law if: [¶] (1) The decision could determine the outcome of a matter pending in the requesting court, and [¶] (2) There is no controlling precedent.” The California Supreme Court restated the issue as “whether under California negligence law, liability can arise from tactical conduct and decisions employed by law enforcement preceding the use of deadly force.” California’s high court’s response was “liability can arise if the tactical conduct and decisions leading up to the use of deadly force was unreasonable.” (*Hayes v. County of San Diego* (Cal. Sup. Ct.; August 19, 2013) 57 Cal.4th 622, [305 P.3d 252, 160 Cal. Rptr.3d 684].)

Trial Court Lacked Subject Matter Jurisdiction In Attorney Disciplinary Action, But Ordered Sanctions. A member of the State Bar sought to vacate a stipulation she had entered with the State Bar regarding two disciplinary actions against her. The State Bar filed a special motion to strike under *Code of Civil Procedure* section 425.16 [antiSLAPP statute], which the superior court granted, along with \$2,575.04 in sanctions against the lawyer. The trial court determined a protected activity was involved, and the lawyer could not prevail on the merits because the trial court lacked jurisdiction. The appellate court reversed, stating that “in California, the inherent judicial power of the superior court does not extend to attorney disciplinary actions. That power is exclusively held by the Supreme Court and the State Bar, acting as its administrative arm.” (*Barry v. The State Bar of California* (Cal. App. Second, Div. 2; August 21, 2013) 218 Cal.App.4th 1435.)

En Banc Opinion Changes Everything. Last year, we reported the following: “*Whistleblowers Beware. . . Disclosures Made In The Course Of Official Duties Outside Protection Of First Amendment.*” A detective reported that another officer engaged in abusive interrogation tactics. He was told to stop sniveling and was thereafter placed on administrative leave. He filed a civil rights action under 42 U.S.C. § 1983. The trial court granted summary judgment and the Ninth Circuit affirmed. (*Dahlia v. Rodriguez* (Ninth Cir.;

August 7, 2012) 689 F.3d 1094; (Vacated by, Rehearing, en banc, granted by *Dahlia v. Rodriguez* (Ninth Cir.; December 11, 2012) 704 F.3d 1043.)

An en banc Ninth Circuit reconsidered the matter. The facts are that following an armed robbery at a bakery, plaintiff, a detective in the Burbank Police Department, was assigned to assist in the investigation. He observed a police lieutenant “grab a suspect by the throat with his left hand, retrieve his handgun from its holster with his right hand, and place the barrel of the gun under the suspect’s eye, saying ‘How does it feel to have a gun in your face Mother *****?’” Later that evening, plaintiff heard “yelling and the sound of someone being hit and slapped from inside a room” where another defendant, a sergeant, was interviewing another suspect. Plaintiff reported what he observed and heard to the lieutenant he was assisting. The lieutenant told plaintiff to “stop his sniveling.” At one point, the chief of police appeared at a briefing and upon learning not all of the robbery suspects were in custody stated: “Well then beat another one until they are all in custody.” Twice more, plaintiff met with his lieutenant and told him the beatings had to stop. Several months later, there was an internal affairs investigation and plaintiff was warned to keep quiet. After plaintiff was interviewed three times by internal affairs investigators, plaintiff was subjected to repeated threats and intimidation. The next month, investigators from the Los Angeles Sheriff’s Department interviewed plaintiff about the bakery investigation, and plaintiff answered questions truthfully. Four days later, plaintiff was placed on administrative leave pending discipline.

The *en banc* court overruled the holding in *Huppert v. City of Pittsburgh* (2009) 574 F.3d 696, the holding upon which the trial judge relied in granting the motion for summary judgment, and then reversed. The court stated: “Huppert erred in concluding that California broadly defines police officers’ duties as a matter of law for the purpose of First Amendment retaliation analysis.” (*Dahlia v. City of Burbank* (Ninth Cir.; August 21, 2013) (Case No. 10-55978).)

Associate Attorney Who Said She Was “Just Following Instructions,” As Well As Head Of Firm Kept In Malicious Prosecution Case. The trial court declined to dismiss a malicious prosecution action against lawyers and their clients who brought a special motion to strike under the antiSLAPP statute [*Code of Civil Procedure* section 425.16]. The underlying dispute relates to a long-term lease for property used as a mobilehome park. The owners of the property expressed a desire to sell or redevelop, but a long-term lease was an obstacle; the owners brought an action seeking to terminate the lease and the lessees cross-complained for breach of lease and prevailed. The plaintiffs in the malicious prosecution action are 12 limited partner lessees who were dismissed from the underlying case prior to trial. The appellate court affirmed, stating: “We agree with the trial court that the limited partners satisfied all three elements of malicious prosecution: favorable termination, lack of probable cause and malice, as to each defendant.”

One of the issues in the appeal had to do with an associate attorney who is a defendant in the malicious prosecution case. She claimed “she was an associate who was following [partner’s] instructions and nothing more.” The appellate court noted she signed 25 of the Roe amendments and her name appeared in captions of the five deposition notices served on the limited partners, and the court stated: “We recognize that an associate attorney is not in the same position as an attorney associating into a case. There is a clear imbalance of power between an often younger associate and an older partner or supervisor, and situations may arise where an associate is put into a difficult position by questioning a more experienced attorney’s choices. Nonetheless, however, every attorney admitted to practice in this state has independent duties that are not reduced or eliminated because a superior has directed a certain course of action. (See, *Business & Professions Code* section 6068.) Thus, the fact that she was following a superior’s instructions is not a valid defense to malicious prosecution.” (*Jay v. Mahaffey* (Cal. App. Fourth, Div. 3; August 23, 2013) 218 Cal.App.4th 1522.)

Athiest's Case Reversed On The Issue Of Damages.

Plaintiff was placed on parole in 2007 after pleading no contest in a methamphetamine case. One of his parole conditions was that he attend and complete a 90-day residential drug treatment program. He advised parole and correctional officers he is an atheist, and requested placement in a non-religious program, but he was sent to a religious-based program nonetheless. Plaintiff then filed an Inmate/Parolee Appeal to petition for a change in the conditions of parole, but his parole officer told him his parole would be revoked unless he continued with the religious-based program. The program presenters advised the parole officer plaintiff was acting in a passive aggressive manner, disrupting the class. Plaintiff was placed in jail and then prison. While re-incarcerated, his appeal was denied. Plaintiff then filed a complaint seeking damages and injunctive relief, alleging two causes of action, one under 42 U.S.C. § 1983 for violation of his First Amendment rights and the other for a taxpayer injunction under California law. A jury awarded plaintiff zero damages, and the district court denied his motion for new trial. The Ninth Circuit reversed and remanded, stating: "We hold that the district judge erred in denying [plaintiff's] motion for new trial based on the jury's failure to award damages, and therefore reversed." (*Hazle v. Department of Corrections* (Ninth Cir.; August 23, 2013) 727 F.3d 983.)

No Showing Reservation Of Rights By Insurers Creates A Conflict Of Interest.

A city brought an action against a dry cleaner under the *Comprehensive Environmental Response, Compensation and Liability Act* [CERCLA; 42 U.S.C. § 9601] for causing soil and groundwater contamination. The dry cleaner asserted a third party claim against the supplier of dry cleaning products, and the supplier tendered its defense to certain insurance companies. The insurers accepted the defense with a reservation or rights, and the supplier contended there was a conflict of interest and demanded the insurers pay for counsel of its choosing pursuant to *Civil Code* section 2860 "... when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the

insurer for the defense of the claim, a conflict of interest may exist.]. The trial court granted summary judgment in favor of the insurers. The appellate court concluded the supplier "failed to present evidence demonstrating a triable issue of material fact on the question of whether there exists a conflict of interest under section 2860," and affirmed. (*Federal Insurance Company v. MBL, Inc.* (Cal. App. Sixth Dist.; August 26, 2013) 219 Cal.App.4th 29.)

Unanticipated Consequences To Lawyers Having Arbitration Clause In Retainer Agreements.

Plaintiffs filed suit against their own lawyers based upon the inadequacy of a settlement in an underlying action. The lawyers successfully moved to compel the action to arbitration based upon an arbitration clause in the attorney retainer agreement. Plaintiffs filed a motion in the trial court seeking an order compelling the lawyers to advance the entire up-front cost of the arbitration, which the trial court denied. The appellate court reversed and remanded for the trial court to: 1) calculate the reasonable cost of the arbitration previously ordered; 2) determine whether the plaintiffs are financially able to pay their share of the anticipated costs; and 3) if any of the plaintiffs are unable to pay, issue an order specifying that the lawyers have the option of either paying or else waiving their right to arbitrate. (*Roldan v. Callahan & Blaine* (Cal. App. Fourth Dist., Div. 3; August 27, 2013) 219 Cal.App.4th 87.)

Where There's Smoking, There's Firing.

Plaintiff worked for the State of California and the California Assembly. He complained to his supervisor that another supervisor was smoking inside the working premises. Two weeks later, plaintiff was fired. Plaintiff brought an action for retaliatory discharge, and defendants demurred, arguing the court lacked jurisdiction because plaintiff failed to exhaust his administrative remedies pursuant to *Labor Code* section 98.7. The trial court sustained the demurrer. The appellate court affirmed dismissal of plaintiff's action, concluding that under the exhaustion rule reaffirmed in *Campbell v. Regents of California* (2005) 35 Cal.4th 311, [106 P.3d 976; 25 Cal.Rptr.3d 320], exhaustion is required.

(*MacDonald v. State of California* (Cal. App. Third Dist.; August 27, 2013) 219 Cal.App.4th 67.)

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) (As mod. Sept. 26, 2013) 219 Cal. App.4th 98.)

\$19 Million In Punitive Damages Reduced To \$350,000.

Plaintiff served in the U.S. Marines and is entitled to medical care at Veterans Administration hospitals at no cost. He was involved in an accident in 1997 and was paralyzed from the waist down and relies on a wheelchair. In 2008, he was involved in a wheelchair accident and suffered a broken leg, but had numerous internal complications and remained hospitalized for 109 days. He sent a claim to his insurance company. His policy contained an insuring clause which states: "Accidental Daily Hospital Confinement Benefit: We will pay the Daily Hospital Confinement Benefit stated on the Schedule Page for each day of Confinement due to a covered injury, beginning with the first day of Confinement. A Covered Person must be under the professional care of a Physician, and such Confinement

must begin within 90 days of the accident causing the injury.” The insurance company concluded hospitalization was necessary for only 18 days, and paid for those days only. Plaintiff’s doctor sent a letter to the insurer which stated: “The fracture was complicated by extensive swelling, infection, blistering, and muscle damage that required acute hospitalization, intravenous fluids and antibiotics, and full staff support including consultation with an orthopedic surgeon. The infection and blistering subsided as [plaintiff] completed his antibiotics on March 1, 2008. During this time, the right leg was placed in a Long Beach Splint, kept elevated and fully extended. [Plaintiff] was living alone and could not have been discharged safely at that time. The orthopedic consultants recommended that he remain supine in bed or gurney and did not clear him for wheelchair use until March 24, 2008. He did not have an available caregiver that could provide bedside care at home during this period. They also recommended that his fractured leg be kept fully extended in the splint (no flexion permitted) to allow healing. They did not lift this restriction until May 5, 2008. His home has narrow doorways and corners he could not have managed in his wheelchair if his leg was fully extended.” Eventually the matter ended up in trial where a jury awarded \$19 million in punitive damages against the insurer. The trial judge ordered a remittitur of that award to \$350,000 based on a ratio of punitive to compensatory damages of 10:1. In affirming, the appellate court stated: “After weighing all of the relevant factors and circumstances pursuant to *State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, [123 S.Ct. 1513; 155 L.Ed.2d 585] (*State Farm*) and *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, [113 P.3d 63; 29 Cal.Rptr.3d 379] (*Simon*), we hold the trial court’s remittitur of punitive damages was proper.” (*Nickerson v. Stonebridge Life Insurance Company* (Cal. App. Second Dist., Div. 3; August 29, 2013.) 219 Cal.App.4th 188.)

Reference Provision In Dispute Resolution Agreement Upheld. In a commercial real estate transaction, the parties each signed a personal continuing guarantee in favor of the lender, and the guaranty agreements

contained a provision authorizing dispute resolution through judicial reference. The trial court granted plaintiff’s motion for appointment of a referee, and defendant’s sought extraordinary relief through a writ petition. They argued the reference provision is unconscionable and unenforceable. In affirming the appointment of a referee, the appellate court stated: “Drawing on cases analyzing contractual arbitration provisions authorized under [*Code of Civil Procedure*] section 1280, *et seq.*, we conclude plaintiff did not waive its right to judicial reference. We reject defendants’ remaining arguments and accordingly deny the petition for writ of mandate/prohibition.” (*O’Donoghue v. Sup.Ct. (Performing Arts, LLC)* (Cal. App. First Dist., Div. 5; August 29, 2013) (As mod. Sept. 27, 2013) 219 Cal.App.4th 245.)

Law Prohibiting Sexual Orientation Change Efforts Does Not Infringe On First Amendment Or Other Fundamental Rights. The California Legislature passed a law banning state-licensed mental health providers from engaging in sexual orientation change efforts. In two cases, plaintiffs [National Association for Research and Therapy of Homosexuality and American Association of Christian Counselors, among others] sought to enjoin enforcement of the law, arguing it violates the First Amendment and infringes on several other constitutional rights. In one case, the trial court ruled plaintiffs were unlikely to succeed on the merits, and in the other case, the trial court granted a preliminary injunction. The Ninth Circuit reversed the order granting the preliminary injunction and affirmed the order of denial, stating the law is “a regulation of professional conduct, does not violate the free speech rights of SOCE [sexual orientation change efforts] practitioners or minor patients, is neither vague nor overbroad, and does not violate parents’ fundamental rights.” (*Pickup v. Brown* and *Welch v. Brown* (Ninth Cir., August 29, 2013) (728 F3d 1042.)

Landlord May Hold Open Houses. Tenant lives in a condominium subject to the Santa Monica rent control regulatory scheme. The landlord listed the property for sale, but the tenant would

not permit open houses on weekends, and would permit the property to be shown only pursuant to appointments. Frustrated, the landlord filed an action for declaratory relief. The trial court’s order was that two open houses per month be permitted with 10-days advance notice, and that the tenant “shall respond within 48 hours of receipt of same acknowledging the proposed dates or providing alternative weekend dates.” The tenant appealed, and the appellate court affirmed, concluding *Civil Code* section 1954 permits landlords to hold open houses on weekends with reasonable notice. (*Dromy v. Lukovsky* (Cal. App. Second Dist., Div. 3; August 30, 2013) 219 Cal.App.4th 278.)

State Trial Court Erred In Ordering Plaintiff To Remove An Action To Federal Court.

In a copyright infringement action, which also contained various state law claims, the trial court dismissed plaintiff’s complaint after plaintiff did not comply with the trial court’s order to remove the matter to federal court. In reversing the dismissal, the appellate court stated: “The court’s order of dismissal was based on two erroneous assumptions. The first was that [plaintiff] could remove the case to federal court. Only a defendant, however, can file a notice of removal. [¶] The superior court also assumed that plaintiff could not maintain concurrent state and federal actions arising out of the same facts and circumstances. Rather, the court concluded, plaintiff was required to litigate his entire lawsuit, including his state law claims, in federal court. This was error. [¶] We conclude that the superior court’s dismissal of plaintiff’s copyright infringement cause of action was not a miscarriage of justice because the federal courts have exclusive jurisdiction over such claims. We further conclude, however, that the superior court’s dismissal of plaintiff’s state

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law causes of action was reversible error because the court had subject matter jurisdiction and the plaintiff had the right to pursue those claims in state court.” (*Benitez v. Williams* (Cal. App. Second Dist., Div. 3; August 30, 2013) 219 Cal.App.4th 270.)

Attorney Fees & Costs Properly Awarded To Interpleader.

Wife is found dead in the street outside the home she shared with husband. Her death is investigated as a homicide. Husband, who is the sole beneficiary on wife’s life insurance policy, is a suspect. Life insurance company files an interpleader action and deposits the policy benefits plus interest with the trial court. Wife’s mother, who would be entitled to the policy benefits if husband were found to have feloniously and intentionally killed wife, defaults in the action. The court awards husband the interpleaded funds less attorney fees and costs requested by the life insurance company. Husband contends the attorney fees and costs award is erroneous because his right to the policy benefits never was in dispute and no potential for double liability existed, thus rendering the interpleader action unnecessary and the statutory requirements for attorney fees and costs unmet. In affirming, the appellate court concluded the life insurance company was entitled to file an interpleader action, and the court did not err by exercising its discretion to award attorney fees and costs. (*Farmers New World Life Insurance Company v. Rees* (Cal. App.

Second Dist., Div. 1; August 30, 2013) 219 Cal.App.4th 307, [161 Cal.Rptr.3d 678].)

Employee Sued As A Result Of Carrying Out His Duties Is Not Entitled To Attorney Of His Choice, And Employer Need Not Indemnify Him For His Costs Incurred In Hiring His Own Lawyer.

As the result of drinking too much water in an ill-conceived radio contest, a woman died. Plaintiff had helped conduct the contest as part of his duties as an employee of defendant, the company that owned the radio station. Although defendant told plaintiff it would provide legal counsel for him, plaintiff chose to hire his own attorney. When the woman’s family sued plaintiff (as well as defendant and others), plaintiff tendered defense of the action to defendant’s insurer. The insurer accepted the tender without any reservation of rights and appointed a different attorney to represent plaintiff. Plaintiff refused that attorney and insisted on being represented by the attorney he had chosen. When the insurer refused to pay for that attorney, plaintiff filed a cross-complaint against defendant seeking indemnity under *Labor Code* section 2802 for the fees and costs he incurred. Subdivision (a) of section 2802 requires an employer to indemnify its employee “for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.” The trial court found that none of the fees and costs incurred after the insurer appointed an attorney were necessary expenditures and therefore plaintiff was not entitled to indemnity. The appellate court affirmed, stating plaintiff did not have an absolute right to chose his own attorney to represent him, and that the fact that he faced liability for punitive damages and for a time criminal charges did not give him the right to insist that his employer or its insurer pay for the attorney of his choice. (*Carter v. Entercom Sacramento, LLC* (Cal. App. Third Dist.; September 3, 2013) 219 Cal.App.4th 337.)

Medicare Reimbursements.

Under 42 U.S.C. 1395y(b)(2)(B)(ii) a primary plan or an entity that receives payment from a primary plan shall reimburse Medicare once the primary plan’s

responsibility has been demonstrated by a judgment or settlement. A federal judge in Arizona enjoined the Secretary of Health and Human Services from seeking up-front reimbursement of Medicare secondary payments from beneficiaries who have received payment from a primary plan if they have unresolved appeals of their reimbursement calculations or unresolved requests for waiver of their reimbursement obligations. The trial court also enjoined the Secretary from demanding that attorneys withhold settlement proceeds from their clients until after Medicare is reimbursed. The Ninth Circuit reversed, concluding the Secretary’s payer provisions are reasonable. The appeals court vacated the injunctions and remanded for consideration of the beneficiaries’ due process claims. In its opinion, the court stated: “The complaint alleges only that the Secretary’s demand that attorneys withhold funds from their clients exceeds her authority under the secondary payer provisions. The Secretary’s authority to bring an action against an attorney who has disbursed the proceeds is not a controversy ripe for our review.” (*Haro v. Kathleen Sebelius* (Ninth Cir.; September 4, 2013) 729 F3d 993.)

Different Result Second Time Around In Pregnancy Discrimination Case.

Last year, we published the following:

“Pregnancy Discrimination Verdict Upheld.” Woman employee was fired three hours after returning from pregnancy leave. In her action alleging wrongful termination and violation of the California *Fair Employment and Housing Act* [FEHA, *Government Code* section 12940], a jury awarded her \$10,000. After the verdict, the court granted her \$50,858.44 for attorney fees. The employer argued on appeal the trial court erred in permitting the employee to prove her pregnancy-related leave was “a motivating reason” for her discharge rather than the “but for” cause of her discharge. The employer also argued the trial court erred when it refused to permit it to avoid liability by proving it would have made the same decision even in the absence of a discriminatory or retaliatory motive. It also challenged the attorney fee award because the verdict form failed to specify whether the employee prevailed on the statutory or common law

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cause of action. The appellate court found no error in the jury instructions, and found the employer invited any error in the verdict form when it prepared it for the court. (*Alamo v. Practice Management Information Corporation* (Cal. App. Second Dist., Div. 7; October 18, 2012) (Depublished) 210 Cal.App.4th 95, [148 Cal.Rptr.3d 151].)”

The California Supreme Court granted review, decided *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, [294 P.3d 49; 152 Cal.Rptr.3d 392], and then directed the appellate court to vacate its decision in this case and reconsider it in light of *Harris*. This time around the appellate court reversed the judgment in favor of the plaintiff and remanded the matter back to the trial court, stating: “In accordance with *Harris*, we now hold that the trial court prejudicially erred in instructing the jury with the former versions of CACI 2430, 2500, and 2507 because the proper standard of causation in a FEHA discrimination or retaliation claim is not ‘a motivating reason,’ as used in the CACI instructions, but rather ‘a substantial motivating reason,’ as set forth in *Harris*. We further hold that [defendant] was not entitled to an instruction on the mixed-motive or same decision defense because it failed to plead that defense or any other affirmative defense alleging that it had a legitimate, non-discriminatory or non-retaliatory reason for its discharge decision in the answer.” (*Alamo v. Practice Management Information Corp.* (Cal. App. Second Dist., Div. 7; September 5, 2013) 219 Cal.App.4th 466.)

Anti-SLAPP Motion Properly Denied With Regard To Allegations Not Protected By Statute When Each Cause Of Action Contains Allegations Protected By Statute With Conduct That Is Not. Plaintiff filed a sexual harassment action against defendant, a co-worker. The co-worker defendant filed a cross-complaint alleging defamation and intentional infliction of emotional distress. Plaintiff filed a special motion to strike pursuant to *Code of Civil Procedure* section 425.16, which the trial court granted in part and denied in part. In affirming, the appellate court stated: “Each of the causes of action in the cross-complaint combines allegations of conduct that is protected by the anti-SLAPP statute with conduct that is not. We are satisfied that the better view in such a case is that the trial court may strike the allegations in the cross-complaint attacking the protected activity while allowing the unprotected theories to remain. That is what the trial court did in this case.” (*Cho v. Chang* (Cal. App. Second Dist., Div. 4; September 6, 2013.) 219 Cal.App.4th 521.)

Doctrine Of Quasi-Judicial Immunity And The Litigation Privilege Preclude Man From Suing The Guardian Ad Litem Appointed By The Court During His Divorce Proceeding. After a husband’s lawyer informed the judge on the day trial was to begin that his client had checked himself into a hospital in Massachusetts for severe depression, the court refused to grant a continuance without evidence of the man’s condition. The next day the lawyer presented a letter from the man’s physician, and the judge, convinced the man could not act on his own behalf, appointed a guardian ad litem. Eventually all the marital issues were resolved and the family law court awarded fees to the guardian ad litem. At the time the fees were awarded, the man was recovered. The parties had been given ten days to object to the order of fees but there was no objection. The man thereafter brought a civil action against his former guardian ad litem for negligence, fraud, breach of fiduciary duty, breach of contract and intentional infliction of emotional distress. The grava-

men of his complaint was that the guardian’s actions allegedly resulted in the loss of custody of his children as well as financial losses. The trial court sustained the guardian’s demurrer without leave to amend. Concluding the doctrine of quasi-judicial immunity and the litigation privilege precluded the man’s civil action, the appellate court affirmed. (*McClintock v. West* (Cal. App. Fourth Dist., Div. 3; September 9, 2013) 219 Cal.App.4th 540.)

Autism Treatment Covered. A consumer group argued that non-licensed therapists who are certified by the Behavior Certification Board (BACB) who provide Applied Behavioral Analysis (ABA) to treat autism should be covered by the Department of Managed Health Care (DMHC) which has jurisdiction over health plans commonly known as health maintenance organizations. [In contrast, the Department of Insurance has jurisdiction over health plans commonly known as provider organizations or PPOs.] The appellate court concluded “BACB-certification has implicitly been recognized as an exception to the licensing laws and, therefore, DMHC can no longer uphold a plan’s denial of coverage for ABA on the basis that a BACB-certified provider is not licensed.” (*Consumer Watchdog v. Department of Managed Health Care* (Cal. App. Second Dist., Div. 3; September 10, 2013) 219 Cal.App.4th 593.)

Summary Judgment In Favor Of Insurance Company Reversed. A commercial property was vandalized while vacant. The owner brought an action against the property’s insurer. The policy stated: “Rent [¶] We will pay: [¶]a. your net loss of rental income; and [¶] b. rents accrued but rendered uncollectible by reason of a covered loss at a location described on the Declarations Page; and [¶] c. your extra expenses necessarily incurred to minimize your rental income loss, but only to the extent that the rental income loss we would otherwise pay is reduced.” The parties filed competing motions for summary judgment as to whether the insurer was liable for rent in the absence of a tenant. The trial court granted summary judgment in favor of the insurer, and the appellate court reversed, stating: “We hold that under the terms of the policy, recovery for lost rent did not require

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the owner to have an existing tenant, and there are triable issues of fact as to whether the property would have been rented but for the vandalism damage.” (*Ventura Kester, LLC v. Folksamerica Reinsurance Company* (Cal. App. Second Dist., Div. 5; September 11, 2013) 219 Cal.App.4th 633.)

Buyer Beware Of Lot Line Displacements Resulting From Ongoing And Gradual Earth Movements. In 1956, road construction by Los Angeles County in a then unincorporated area of the Palos Verdes Hills known as Portugese Bend accidentally reactivated a sub-surface prehistoric slide area. That incident sent just under one square mile of hillside property on an ongoing, slow-motion, downhill journey that inexorably leads to a bluff overlooking the Pacific Ocean. As a result, homes built in the area have moved along with the land, in some cases outside their original lot lines and on to neighboring parcels. Homeowners in the area have turned to innovative methods of anchoring their homes in place even as the landslide moves down the hill. Some landowners in the affected area have also accommodated each other over the years by treating the earth movements as a de facto readjustment of their respective property lines. The City of Rancho Palos Verdes incorporated in 1972 and includes the Portugese Bend area. The City then acquired title to the right of way for Palos Verdes Drive South, which cuts through the landslide area. In 1987, the City took title to a piece of land (Lot 1) in the slide area that sits directly south of the roadway of Palos Verdes Drive. Sometime between 1956 and 1987, two homes that were originally located north of the roadway on Lots 40 and 41 migrated approximately 300 feet south of the roadway and on to Lot 1. Those homes are now located at 40 and 41 Cherryhill Lane. In 2000, plaintiff purchased one of those homes and later brought an action to quiet title. The trial court entered summary judgment in favor of the City, and the appellate court affirmed, concluding the Cullen Earthquake Act [*Civil Code* section 751.50] “does not apply to lot line displacements resulting from ongoing and gradual earth movements.” (*Joannou v. City of Rancho Palos Verdes* (Cal. App. Second Dist., Div. 8; September 12, 2013) 219 Cal. App.4th 746.)

Ferris Bueller’s Days Off... What’s The Juvenile Court To Do With Truants? A 15-year-old is a habitual truant; he missed 255 school periods without a valid reason. He was declared a ward of the juvenile court. The court directed him to reside in the home of his parents, attend school daily, comply with a 6:00 p.m. curfew and not stay away from home overnight without permission of probation officer. Several weeks later, at a progress hearing, the probation officer reported the boy failed to attend school or abide by the curfew. The court ordered the boy attend Weekend Training Academy [WETA] three times. WETA is an alternative to detention and provides community service opportunities and social values training. He attended only one WETA meeting, continued to violate curfew, continued to miss school and left the state without permission. The boy’s lawyer informed the juvenile court it had no authority to incarcerate him. The juvenile court ordered the boy to juvenile hall for a weekend, and an appeal was taken from that order. The appellate court annulled the order because the juvenile court did not comply with statutory contempt procedures set forth in *Code of Civil Procedure* sections 1209-1222. (*In re M.R.* (Cal. App. First Dist., Div. 3; September 27, 2013) 220 Cal.App.4th 49.)

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