



Litigation Update

Litigation Section News

April 2014

No Jurisdiction In California.

Plaintiffs are 22 residents of Argentina who brought an action in federal court in California against a German manufacturer, claiming the company “collaborated with state security forces during Argentina’s 1976-1983 ‘Dirty War’ to kidnap, detain, torture, and kill certain [Mercedes-Benz Argentina] workers.” Plaintiffs pled claims under the Alien Tort Statute [28 U.S.C. § 1350] and the Torture Victim Protection Act of 1991 [106 Stat. 73, note following 28 U.S.C. § 1350]. The United States Supreme Court held the company is not amenable to suit in California for injuries allegedly caused by conduct that took place entirely outside the United States. The Court stated: “Even assuming for purposes of this decision, that [Mercedes Benz] USA qualifies as being at home in California, Daimler’s affiliations with California are not sufficient to subject it to the general jurisdiction of that State’s courts.” (*Daimler AG v. Bauman* (U.S. Sup. Ct.; January 14, 2014) 134 S.Ct. 746, [187 L.Ed.2d 624].)

Prisoner’s Allegations.

Plaintiff brought an action against prison personnel at the Arizona Department of Corrections for treatment he alleged he received while an inmate. He said he did not receive proper care for his mental illness and became suicidal, in violation of his rights under the Eighth Amendment. He also alleged deprivation of his rights under the First and Fourteenth Amendments, in that his “freedom of religion was violated because kosher food was not made available to him.” Plaintiff’s first amended complaint stated: “Plaintiff’s religion is premised upon a fundamentalist approach to the Old Testament. While Plaintiff does not consider himself ‘Jewish,’ he does adhere to teachings and practices that are part of the Jewish faith . . . Plaintiff has been forced to eat unclean and unholy foods that are forbidden by his religion.” The Ninth Circuit found plaintiff could maintain his claims for other than injunc-

tive relief, despite his release from prison, upheld the grant of summary judgment with regard to plaintiff’s medical claims, and reversed the dismissal of his claims under the First and Fourteenth Amendments for failure to exhaust his administrative remedies. (*Cano v. Taylor* (Ninth Cir.; January 14, 2014) 739 F.3d 1214.)

Employment Verdict Reversed For New Trial.

Plaintiff contended he was fired in retaliation for reporting allegations of sexual harassment and a jury awarded him \$238,328. The trial court instructed the jury with CACI No. 2430, the 2012 version. Citing *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, [294 P.3d 49, 152 Cal.Rptr.3d 392] the appellate court reversed for a new trial, stating: “The court should have instructed the jury to determine whether [plaintiff’s] report of sexual harassment was a substantial motivating reason for Mendoza’s discharge.” (*Mendoza v. Western Medical Center Santa Ana* (Cal. App. Fourth Dist., Div. 3; January 14, 2014) 222 Cal.App.4th 1334.)

Homeowners Association Must Accept Partial Payments.

A homeowners association notified a homeowner of a \$3,864.96 delinquency. Two weeks later, a lawsuit against the homeowner was authorized. During the following months, the sides reached an agreement regarding a payment plan, although the homeowner never signed the agreement. The homeowner did, however, make three payments totaling \$3,500, although the monthly payments of \$188 were not made. Many months after the notice of delinquency, the homeowner began paying the regular monthly homeowner fee of \$188/month. Over a year and a half after the first notice of delinquency, the homeowner tendered a check for \$3,500, but the association’s collection lawyer returned the check, stating the association was unable to accept

partial payments. A foreclosure trial followed, and the trial court awarded the association foreclosure as well as \$5,715.93 in damages. The appellate division of the superior court reversed, concluding the Davis-Stirling Common Interest Development Act [*Civil Code* section 1350, *et seq.*] compels a homeowner’s association to accept partial payments. (*Huntington Continental Town House Association, Inc. v. The JM Trust* (Cal. App. Sup. Ct.; January 13, 2014) 222 Cal.App.4th Supp. 13.)

Legal Capacity, Undue Influence, Financial Elder Abuse.

When defendant and decedent married in February 2005, decedent’s trust provided for his children, grandchildren and a former son-in-law. After the marriage, in May 2005, decedent executed a trust amendment providing defendant with 50 percent of decedent’s assets upon his death. Between 2005 and 2008, several other amendments were executed, resulting in defendant being left with most of decedent’s estate. The probate court voided the trust amendments executed after May 2005. The appellate court affirmed because the court’s decision was amply supported by the evidence, despite concluding the lower court applied the incorrect standard for legal capacity and failed to apply a presumption of undue influence to the interspousal transactions. (*Lintz v. Lintz* (Cal. App. Sixth Dist.; January 14, 2014) 222 Cal. App.4th 1346, [167 Cal.Rptr.3d 50].)

Task For Leaving The Gate Unguarded And Permitting Expert Testimony.

In an asbestos action in federal court, a jury awarded damages totaling \$10.2 million. An en banc Ninth Circuit vacated the judgment and remanded the matter for a new trial. The issue on appeal was the trial court’s permitting two expert witnesses to testify. The appeals court concluded: “The district court failed to make findings of relevancy and re-

liability before admitting into evidence the expert testimony of [two plaintiffs' experts] and expert testimony regarding the theory that 'every asbestos fiber is causative.' The district court's failure to make these gateway determinations was an abuse of discretion. The error was prejudicial because the erroneously admitted evidence was essential to the [plaintiffs'] case. Due to the district court's abdication of its role as gatekeeper and the severe prejudice that resulted from the error, the appropriate remedy is a new trial." (*Estate of Henry Barabin v. Scapa Dryer Fabrics, Inc.* (Ninth Cir.; January 15, 2014) 740 F.3d 457.)

Rating By Analogy In Workers' Compensation Case. An agreed medical examiner recommended characterizing a workers injury: "by analogy, it would be similar to an individual with a limp and arthritis." The Workers' Compensation Appeals Board found a doctor could rate an impairment by analogy to other impairments which are rated in the guide used in workers' compensation matters. The employer, a city, appealed, contending a rating of impairment by analogy to a different condition is impermissible. The appellate court affirmed the decision of the Board, noting the worker's condition is manifested only by his subjective experience of pain which calls for the physician's exercise of clinical judgment to assess the impairment most accurately. (*City of Sacramento v. Workers' Compensation Appeals Board* (Cal. App. Third Dist.; January 15, 2014) 222 Cal.App.4th 1360, [167 Cal.Rptr.3d 1].)

Attorney Fees Reversed In Action Brought In Public Interest Which Was Voluntarily Dismissed. Plaintiff brought a class action in a debt collection matter, but voluntarily dismissed it after defendant moved for a special motion to strike under the anti-SLAPP statute, *Code of Civil Procedure* section 425.16. After it was dismissed, defendant sought attorney fees under section 425.16. Plaintiff argued defendants would not have prevailed in the motion to strike because of the public interest exception to the statute, set forth in *Code of Civil Procedure* section 425.17. The trial court awarded fees of \$11,581. The appellate court reversed, stating the trial court was required to determine whether defendant would have prevailed on the motion to strike, and,

in this case, defendant would not have prevailed because plaintiff's action came under the public interest exception. (*Tourgeman v. Nelson & Kennard* (Cal. App. Fourth Dist., Div. 1; January 16, 2014) 222 Cal.App.4th 1447, [166 Cal.Rptr.3d 729].)

County's Easement Condition In Exchange For A Permit Upheld. Plaintiffs planned minor alterations to their residence. As a condition for obtaining a building permit, the county's general plan required them to provide an aircraft overflight easement. In this action, plaintiffs contend the easement requirement constitutes an unconstitutional taking of their property without just compensation. The trial court entered summary judgment in favor of the county. The appellate court affirmed, concluding the overflight easement did not as a matter of law effect a taking of private property or airspace under the Fifth Amendment or California law. (*Powell v. County of Humboldt* (Cal. App. First Dist., Div. 1; January 16, 2014) 222 Cal.App.4th 1424, [166 Cal.Rptr.3d 747].)

Trading In Unregistered Stock. The Securities and Exchange Commission disciplined a financial corporation for violating sections 59 and 5(c) of the Securities Act of 1933 [15 U.S.C. §§ 77e(a) and 77e(c)] which prohibit the sale or offer of sale of a security without filing a registration statement. Petitioners argued to the Ninth Circuit that the brokers' exemption applied to their transactions in unregistered stock, and that the SEC carried the burden to show the exemption was vitiated. Not so, the appellate court found, stating: "Because registration is so important to the protection of the investing public, exemptions to registration requirements are construed narrowly against the parties claiming the benefits." The court added that once it was shown the stocks were unregistered, "the burden shifted to Petitioners to show the applicability of . . . the brokers' exemption." (*World Trade Financial Corporation v. U.S. Securities & Exchange Commission* (Ninth Cir.; January 16, 2014) 739 F.3d 1243.)

Question Of Fact Whether Continuous Lighting Amounted To Cruel And Unusual Punishment. A Washington prisoner appealed the grant of summary judgment

in favor of prison officials who placed him in a special unit where he was monitored every 30 minutes. In the unit, each single-inmate cell is illuminated with three four-foot-long fluorescent tubes. Two of the three may be turned off by the inmate, but one of them is kept on 24 hours a day. According to the prison, "continuous illumination allows officers to assess the baseline behavior of offenders to ensure they are not at risk of harming themselves or making an attempt to harm staff, cause property damage or incite problem behavior from other offenders." On appeal, prison officials contended the prisoner's claim is barred by the Prison Litigation Reform Act [PLRA; 42 U.S.C. § 1997e(e)], but the Ninth Circuit disagreed because that statute "applies only to claims for mental and emotional injury." Here the prisoner argued the continuous lighting violated the Eighth and Fourteenth Amendments. The appeals court reversed the grant of summary judgment. (*Grenning v. Maggie Miller-Stout* (Ninth Cir.; January 16, 2014) 739 F.3d 1235.)

"If You Haven't Got Anything Nice To Say About Anybody Come Sit Next To Me." – Alice Roosevelt Longworth. Plaintiff was appointed as a bankruptcy trustee. Defendant published blog posts on several websites "accusing [plaintiff and his financial group] of fraud, corruption, money-laundering, and other illegal activities in connection" with the bankruptcy of a company. According to the opinion, defendant "has a history of making similar allegations and seeking payoffs in exchanged for retraction." Plaintiffs sent defendant a cease and desist letter, but she continued posting allegations, and a defamation suit ensued. A jury found in favor of plaintiffs, awarding \$2.5 million in damages. The Ninth Circuit reversed and remanded the matter for a new trial because the blog addressed a matter of public concern and the district court should have instructed the jury that it could not find defendant liable for defamation unless if found that she acted negligently, and "also should have instructed the jury that it could not award presumed damages unless it found that [defendant] acted with actual malice." (*Obsidian Finance Group, LLC v. Crystal Cox* (Ninth Cir.; January 17, 2014) 740 F.3d 1284.)

Designer Brand Counterfeit Knock-Offs. Defendants had a business of selling handbags, clothing and jewelry bearing the unauthorized names and logos of Chanel, Coach, Gucci, Louis Vuitton, Rock & Republic, Tiffany, True Religion, TAG Heuer, Rolex and Hublot, all of which brands have registered trademarks. Investigators seized over 13,000 such items from defendants' San Diego store. In separate criminal trials, two defendants were convicted of selling counterfeit goods. *Penal Code* section 350, subdivision (a), prohibits a person from willfully manufacturing, intentionally selling counterfeit marks, or knowingly possessing counterfeit marks for sale. On appeal, one of their many arguments was that their customers were not confused and that the prosecutor bore the burden of proving the marks were confusingly similar to the registered marks because federal law expressly requires a counterfeit mark to be likely to cause confusion or mistake, or to deceive. [15 U.S.C. § 1114 (1) and 18 U.S.C. § 2320 (f)(1)(A)(iv).] In affirming their convictions, the appellate court said the federal authorities relied upon by the defendants "offer us with no guidance in this matter." (*The People v. Vo Nghia Sy and The People v. Jacqueline Duenas Sy* (Cal. App. Fourth Dist., Div. 1; January 21, 2014) 223 Cal.App.4th 44, [166 Cal.Rptr.3d 778].)

Heightened Scrutiny Applies To Classifications Based On Sexual Orientation. The allegations are that drug company #1 licensed to drug company #2 the authority to market drug company #1's HIV drug. After it sold the license to its drug, drug company #1 increased the price fourfold. Meanwhile back at drug company #1, another HIV drug was being marketed at a much lesser cost, thus driving business to the lesser-priced HIV drug that drug company #1 was marketing itself. Drug company #2 brought an action against drug company #1 for breach of the implied covenant of good faith and fair dealing, violation of antitrust laws as well as other causes of action. During jury selection, one of the jurors self identified as being gay, and drug company #1 exercised its first peremptory challenge against that person. Drug company #2 challenged the peremptory strike, arguing it was imper-

missible under *Batson v. Kentucky* (1986) 476 U.S. 79, [106 S.Ct. 1712, 90 L.Ed.2d 69], in that the juror was excused on the basis of sexual orientation. The trial court permitted the strike, but indicated it would reconsider the ruling if drug company #1 struck other gay members of the venire. In the end, the jury returned a mixed verdict, not awarding everything requested by drug company #2, but awarding it \$3,486,240 in damages. Drug company #1 appealed, and drug company #2 cross-appealed, agreeing a retrial was needed due to the *Batson* violation. The Ninth Circuit reversed and remanded the matter, stating: "We hold that heightened scrutiny applies to classifications based on sexual orientation and that *Batson* applies to strikes on that basis. Because a *Batson* violation occurred here, this case must be remanded for a new trial." (*Smithkline Beecham Corporation v. Abbott Laboratories* (Ninth Cir.; January 21, 2014) 740 F.3d 471.)

Nice Try! A class of credit cardholders brought an action challenging fees, analogizing credit card fees to punitive damages imposed in the tort context, and arguing they were subject to the substantive due process analysis described in *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, [116 S.Ct. 1589, 134 L.Ed.2d 809]. The Ninth Circuit concluded that because constitutional due process jurisprudence does not prevent enforcement of excessive penalty clauses in private contracts and the fees are permissible under the National Bank Act [12 U.S.C. §21 85-86] and the Depository Institutions Deregulation and Monetary Control Act [12 U.S.C. § 1831d(a)], the district court did not err by dismissing the complaint. (*In Re: Late Fee And Over-Limit Fee Litigation* (Ninth Cir.; January 21, 2014) 741 F.3d 1022.)

Summary Judgment Reversed Despite Discovery Responses. Defendant moved for summary judgment after plaintiff responded to special interrogatories and requests for production by stating they did not know whether any facts or documents supported various allegations of their complaint. In opposing summary judgment, plaintiffs explained the initial discovery responses were "a mistake" in a declaration. The trial court

granted the motion for summary judgment after disregarding substantially all of the statements of fact in the declaration on the ground they were inconsistent with the initial discovery responses. The appellate court reversed, stating: "This was an overly broad and erroneous application of the D'Amico rule. [*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22-23. [520 P.2d 10, 25-26, 112 Cal.Rptr. 786, 801-802], In light of all the evidence adduced on the motion, a reasonable trier of fact could have credited counsel's explanation that the discovery responses were a mistake and found the contradictory statements in [plaintiff counsel's] declaration credible." (*Ahn v. Kumho Tires U.S.A., Inc.* (Cal. App. Fourth Dist., Div. 2; January 22, 2014) 223 Cal. App.4th 133, [166 Cal.Rptr.3d 852].)

Trial Court Not Relieved Of Considering Defendant's Youth When Sentencing Despite New Statute. A gang-member defendant committed manslaughter and attempted murder when he was 15 and 16 years old and was sentenced to a determinate term of 23 years as well as a consecutive indeterminate term of 80 years to life. The appellate court was faced with two unique questions. The first one concerned the fact that the bulk of defendant's sentence was for nonhomicide offenses, and most of the jurisprudence in this area has revolved around homicide offenses. With regard to that issue, the court stated: "We do not believe the constitution allows for the sentencing judge to ignore the holdings of [*Graham v. Florida* (2010) 560 U.S. 48, [130 S.Ct. 2011, 176 L.Ed.2d 825] and [*People v. Caballero* (2012) 55 Cal.4th 262, [282 P.3d 291, 145 Cal.Rptr.3d 286] because of a homicide that carries a maximum sentence far short of life without the possibility of parole. Under these distinctive facts, we determine that [defendant's] sentence violates the Eighth Amendment. The second question faced by the court was whether or not a new statute, *Penal Code* section 3051 [any prisoner who was under 18 years of age at the time of his or her controlling offense shall be afforded a youth offender parole hearing during the 15th year of incarceration], negates the need for an Eighth Amendment analysis. The appellate court held the analysis is still necessary be-

cause there is no guarantee the statute will remain in existence. Defendant's sentence was reversed and the matter was remanded for resentencing. (*In re Heard* (Cal. App. Fourth Dist., Div. 1; January 22, 2014) 223 Cal.App.4th 115, [166 Cal.Rptr.3d 824].)

Burden Of Proof In Patent Case Brought As A Declaratory Relief Action. The dispute revolves around a license given to licensee by licensor/patentee to practice certain of licensor's patents in exchange for royalty payments. Licensor contended licensee infringed the licensed patents, and licensee challenged that assertion of infringement in a declaratory relief action. The district court concluded licensor/patentee, as the party asserting infringement, had the burden of proving it. The appeals court acknowledged that a patentee normally bears the burden of proof, but concluded that where the patentee is a declaratory judgment defendant, the party seeking declaratory relief has the burden of proof. The United States Supreme Court held the burden of proving infringement rests upon the patentee. (*Medtronic, Inc. v. Mirowski Family Ventures, LLC* (U.S. Sup. Ct.; January 22, 2014) 134 S.Ct. 843, [187 L.Ed.2d 703].)

Moral Turpitude Felony Results In Disbarment. A member of the State Bar was admitted in 1994. In 2008, he was charged with three counts of knowingly possessing or controlling child pornography, and pleaded guilty to one felony count. He was placed on probation for three years, terms and conditions of which included 90 days in jail and lifetime registration as a sex offender. He violated probation by sending certain text messages and was sentenced to 183 days in jail. Meanwhile back at the State Bar, the Chief Trial Counsel cited *Business and Professions Code* section 6102, subdivision (c), which mandates summary disbarment following conviction of a felony involving moral turpitude. A hearing judge concluded the facts supported a conviction involving moral turpitude, but the Review Department found the evidence was insufficient to establish moral turpitude. The California Supreme Court determined felonious possession or control of child pornography involves moral turpitude in every case and ordered disbarment. (*In re Gary D. Grant on*

Discipline (Cal. Sup. Ct.; January 23, 2014) 58 Cal.4th 469, [317 P.3d 612].)

Court Did Not Exercise Its Discretion To Relieve A Tenant From Default In Unlawful Detainer Action. A landlord filed an unlawful detainer complaint against a tenant who didn't pay the rent. A default and default judgment were entered against the defendant tenant. The defendant/tenant brought a motion to set aside the default pursuant to *Code of Civil Procedure* sections 473 and 473.5, claiming he was not personally served with the complaint as stated on the proof of service, and that he only found the summons and complaint posted on his door three weeks later. Alternatively he based his motion on *Code of Civil Procedure* section 1179, stating he is elderly and disabled. The trial court denied the 473/473.5 motion, finding defendant was served, and refused to even conduct a hearing for relief from forfeiture under *Code of Civil Procedure* section 1179, which states: "The court may relieve a tenant against a forfeiture of a lease, or rental agreement, . . . whether or not the tenancy has terminated, and restore him or her to his or her former estate or tenancy, in case of hardship, as provided in Section 1174. The court has the discretion to relieve any person against forfeiture on its own motion." The appellate court reversed, stating: "Nothing in [*Code of Civil Procedure* section] 1179 precludes the trial court from exercising discretion to relieve a party against forfeiture due to the existence of a default judgment." (*SRO Housing v. Dyce* (Cal. App. Sup. L.A.; January 22, 2014) 223 Cal. App. 4th Supp. 1, [167 Cal. Rptr. 3d 394].)

The Evolution Of The Tort Of Conversion. An employee made several hundred thousand dollars in purchases on his employer's credit card, and the employer brought an action for conversion. Following a bench trial, the court entered judgment in plaintiff's favor for \$446,447.81. On appeal, the employee/defendant contended that the use of a credit card to obtain money did not constitute the tort of conversion. In its analysis, the appellate court noted the case of *Payne v. Elliot* (1880) 54 Cal. 339, which stated that at common law, trover was the remedy for conversion, and it was limited to tangible personal property, "capable of being identi-

fied and taken into actual possession." In the instant case, the appellate court affirmed, stating that "defendant's use of plaintiff's credit card on defendant's credit card terminal to transfer improperly specific sums of money to defendant's bank account was a conversion as pleaded by plaintiff." (*Welco Electronics, Inc. v. Mora* (Cal. App. Second Dist., Div. 5; January 23, 2014) 223 Cal. App.4th 202, [166 Cal.Rptr.3d 877].)

Lease Survives Foreclosure. Plaintiffs had rented space in a converted garage unit for several years when the residential property was foreclosed upon by a bank. The trial court granted the bank's motion for summary judgment based on its determination the foreclosure sale extinguished plaintiff's lease. Citing the Protecting Tenants Against Foreclosure Act of 2009 [PTFA; Pub.L. 111-22, Div. A, Title VII, §§702-704, the appellate court reversed, stating: "The PTFA causes a bona fide lease for a term to survive foreclosure through the end of the lease term subject to the limited authority of the immediate successor in interest to terminate the lease, with proper notice, upon sale to a purchaser who intends to occupy the unit as a primary residence. The Act impliedly overrides state laws that provide less protection, but, expressly allows states to retain the authority to enact greater protections. Bona fide tenancies for a term that continue by operation of the PTFA remain protected by California law." (*Nativi v. Deutsche Bank National Trust Company* (Cal. App. Sixth Dist.; January 23, 2014) 223 Cal.App.4th 261, [167 Cal.Rptr.3d 173].)

Res Judicata/Claims Preclusion Inapplicable. In 2005, plaintiff sued defendant in federal court for patent infringement, and the action was settled in 2007. In 2008, plaintiff sued defendant for breach of settlement agreement, once again in federal court. In 2010, plaintiff brought an action against defendant in state court, contending fraudulent transfer of assets in frustration of the settlement agreement. Defendant moved for summary judgment, arguing res judicata and claims preclusion barred the state court action. The trial court concluded a different primary right was involved in that, "This case in State court is about holding defendants accountable for allegedly frustrating plaintiff's ability to col-

lect on the obligation to pay money.” The appellate court agreed with the trial court and concluded res judicata and claims preclusion did not apply. (*Fujifilm Corporation v. Yang* (Cal. App. Second Dist., Div. 8; January 24, 2014) 223 Cal.App.4th 326, [167 Cal.Rptr.3d 241].)

Strict Construction. Plaintiff was severely injured while operating a power press in the manual mode because the material being shaped had to be moved onto and off of the die by hand. The press was equipped with a two-hand activator system for operation in manual mode, and the die would not strike unless the operator used both hands to press buttons located outside the point of operation. There was no evidence the employer removed or tampered with the safety system, yet the press activated while plaintiff was using it, crushing her hand. The employer moved for summary judgment, arguing there was no evidence other than the safety system was properly installed. In opposition, plaintiff produced evidence the press requires the use of safety blocks, small blocks to physically prevent the machine from striking whenever the operator’s hands are in the point of operation. The trial court granted summary judgment, stating there was no evidence the employer received any communication from the manufacturer regarding safety blocks. The appellate court affirmed, stating the action was brought under *Labor Code* section 4558, which allows an employee to bring an action for damages against an employer who knowingly removes or knowingly fails to install a point of operation guard on a safety press, and that the California Supreme Court in *LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 286, [282 P.3d 1242, 1247, 145 Cal. Rptr.3d 543, 550], held that statute must be narrowly construed. In the instant case, the court reasoned the safety blocks are not a guard or device. (*Gonzalez v. Seal Methods, Inc.* (Cal. App. Second Dist., Div. 4; January 24, 2014) 223 Cal.App.4th 405, [166 Cal.Rptr.3d 895].)

Play Nice Or Pay The Price. The trial court ordered the entry of default after finding discovery abuses, including the concealment and destruction of requested documents. At the prove-up

hearing, the trial court determined plaintiff was entitled to \$691,280 in damages. The appellate court affirmed, concluding defendants willfully failed to comply with court orders, and that defendants “willfully concealed or destroyed written documents and other records.” (*Los Defensores, Inc. v. Gomez* (Cal. App. Second Dist., Div. 4; January 24, 2014) 223 Cal.App.4th 377, [166 Cal.Rptr.3d 899].)

Part Of Plaintiff’s Claim Is Preempted; Part Is Not. Defendant manufactures a medical device, Infuse, used in surgery to strengthen the spines of individuals with degenerated vertebral discs. The Food and Drug Administration [FDA] granted approval for certain types of uses, but not for the type of use performed upon plaintiff, which was a posterior fusion. After plaintiff’s surgery, he suffered numbness and pain, and CT scans showed the collagen sponge had leaked, resulting in unwanted bone growth that encased the nerves in plaintiff’s spine. Plaintiff’s complaint alleges defendant “promoted the off-label use of Infuse while downplaying the risk of complications, violating both state and federal laws.” The trial court sustained defendant’s demurrer without leave to amend because his claims are preempted by federal law. The appellate court noted that FDA regulations prohibit a device manufacturer from promoting the use of a device in a manner inconsistent with premarket approval, and stated: “To avoid preemption, a plaintiff must state a cause of action based on state law that parallels a federal requirement. [] Here, because the requirements imposed by state law do not parallel the federal requirements, [plaintiff’s] off-label promotion failure to warn claim is expressly preempted.” The appellate court ruled: “The judgment is affirmed to the extent the trial court sustained the demurrer . . . as to the causes of action for fraud, intentional misrepresentation, violation of *Business and Professions Code* section 17200, concealment, and strict liability failure to warn on a theory of off-label promotion. The judgment is reversed to the extent the trial court sustained the demurrer . . . as to the causes of action for (1) strict liability failure to warn based on a failure to warn the FDA theory, (2) negligence, and (3) design defect. We remand the case for further

proceedings. (*Coleman v. Medtronic, Inc.* (Cal. App. Second Dist., Div. 5; January 27, 2014) (As mod. February 3, 2014) 223 Cal.App.4th 413, [167 Cal.Rptr.3d 300].)

Lack Of Legal Duty Not Fatal To Plaintiff’s Claim. Prior to and during a woman’s pregnancy, the baby’s father worked as an engineer for defendant. The baby was born with a number of birth defects, allegedly caused by the father’s exposure to toxic chemicals at defendant’s facility. The trial court granted summary judgment to defendant on plaintiff’s claims on the ground defendant owed no legal duty to plaintiff. Finding that duty is not an element of plaintiff’s strict liability claim, the appellate court stated: “We conclude [defendant] did not owe a preconception duty to [plaintiff]. However, we also conclude that lack of duty was not fatal to [plaintiff’s] strict products liability claim. Accordingly, we reverse the judgment with directions.” (*Elshef v. Applied Materials, Inc.* (Cal. App. Sixth Dist.; January 27, 2014) 223 Cal.App.4th 451, [167 Cal.Rptr.3d 257].)

The Past Catches Up With State Bar Applicant. When an applicant for membership in the California State Bar worked for The New Republic in the 1990’s, he fabricated magazine articles as well as supposedly supporting materials for the articles to delude fact checkers. The California Supreme Court concluded the applicant did not sustain his heavy burden of demonstrating rehabilitation and fitness for the practice of law. (*In Re: Stephen Randall Glass on Admission* (Cal. Sup. Ct.; January 27, 2014) 58 Cal.4th 500, [316 P.3d 1199, 167 Cal.Rptr.3d 87].)

American Cuisine On The Go. A catering company owned a fleet of food trucks which were leased to operators who drove from site to site selling food. One truck was leased by a husband and wife. That truck was equipped with two seats, two seat belts, and specially designed, built-in equipment including a deep fryer, grill, steam table, oven, refrigerator and coffee maker. Each day they returned the truck to the lessor, who kept the truck maintained and washed. One day, while the husband was driving, there was a collision and the wife was splashed with oil from the deep

fryer and burned. The present action is between the insurers for the lessor, who dispute with one another over coverage. The automobile insurer claims that the injury should be covered under the commercial general liability policy that, although excluding coverage for injuries arising out of the use of automobiles, covers —mobile equipment, defined as vehicles used for a primary purpose other than transporting persons or cargo. The commercial general liability insurer asserts that the primary purpose of the food truck was to transport persons and cargo so that it is not within the mobile equipment exception to the auto exclusion. The trial court granted summary adjudication in favor of the commercial liability carrier and denied the summary judgment motion brought by the automobile insurer. In reversing the judgment, the appellate court held that the primary purpose of the food truck was not to transport persons or cargo, and therefore the commercial general liability policy coverage for products liability applied in this case. (*American States Insurance Company v. Travelers Property Casualty Company of America* (Cal. App. Second Dist., Div. 5; January 27, 2014) 223 Cal.App.4th 495, [167 Cal.Rptr.3d 288].)

It's For Your Own Good...And Next We'll Report You To The IRS. An airline pilot's employment was to be terminated after he had an outburst during simulator training and did not complete the training. Other employees at the airline discussed two prior episodes involving other disgruntled airline persons who lashed out violently, and the other employees reported the pilot's name to the Transportation Security Administration [TSA], informing TSA they were "concerned about his mental stability and the whereabouts of his firearm." TSA responded by ordering the pilot's plane to return to the gate, and then boarding the plane and removing, searching and questioning the pilot about the location of his gun, which was in his home in another state. The next day, the airline fired the pilot. The pilot brought an action against the airline for defamation, and after a jury trial, he was awarded \$1.2 million. When Congress passed the Aviation and Transportation Security Act [ATSA; 49 U.S.C. § 44901 et seq.] in 2001, it gave airlines and their employees immunity against civil li-

ability for reporting suspicious behavior. But the immunity does not attach to "any disclosure made with actual knowledge that the disclosure was false, inaccurate, or misleading" or to "any disclosure made with reckless disregard as to the truth or falsity of that disclosure." When the case reached the United States Supreme Court, the high court stated: "The question before us is whether ATSA immunity may be denied. . . . without a determination that a disclosure was materially false. We hold that it may not. Because the state courts made no such determination, and because any falsehood in the disclosure here would not have affected a reasonable security officer's assessment of the supposed threat, we reverse the judgment of the Colorado Supreme Court." (*Air Wisconsin Airlines Corp. v. Hoepfer* (U.S. Sup. Ct.; January 27, 2014) 134 S.Ct. 852, [187 L.Ed.2d 744].)

Socks In The City. Steelworkers brought an action under the Fair Labor Standards Act [FLSA; 29 U.S.C. § 203(o)], alleging their employer violated the FLSA by failing to compensate them for time spent donning and doffing protective gear, a process involving donning a flame-retardant jacket, pants and hood, a hardhat, a snood, wristlets, work gloves, leggings, metatarsal boots, safety glasses, earplugs and a respirator. The federal district court granted defendant summary judgment, reasoning that donning and doffing protective gear amounted to changing clothes. In 1949, Congress amended the FLSA to state in part: "In determining for the purposes of the minimum wage and maximum hours sections of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes . . .," which language basically means that compensation for time spent changing clothes is a matter left to collective bargaining. The United States Supreme Court agreed with the trial court and affirmed, holding that donning and doffing protective gear amounted to changing clothes. (*Sandifer v. U.S. Steel Corp.* (U.S. Sup. Ct.; January 27, 2014) 134 S.Ct. 870, [187 L.Ed.2d 729].)

Grandparent Visitation After Divorce. A mother and a father had a child and later divorced. The mother later married someone else, and they had chil-

dren. The child's paternal grandmother, who was formerly the child's caregiver, petitioned the superior court for child visitation. *Family Code* section 3104, limits grandparent visitation when the parents are married and living together, but provides an exception where the child has been adopted by a stepparent. The trial court found 3104 violates equal protection principles because biological and adoptive parents are treated differently, and concluded the grandmother lacked standing to bring her petition. Concluding the Legislature had legitimate and rational reasons for the statute, the appellate court reversed. (*Finberg v. Manset* (Cal. App. Second Dist., Div. 6; January 28, 2014) 223 Cal.App.4th 529, [167 Cal.Rptr.3d 109].)

Employee Not Guaranteed No Loss Of Salary After Returning To Work. When injured on the job, a deputy sheriff earned a five percent (5%) differential for working the night shift. When he returned to work, he worked at full duty for a few months and was then placed on modified duty by a physician. He was assigned to the day shift and received no pay differential. *Labor Code* section 4850 provides that whenever a sheriff's deputy "a leave of absence while so disabled without loss of salary in lieu of temporary disability benefits." In this case, the deputy sheriff contended that section applies to guarantee no loss of salary to an employee who has returned to work, albeit on modified duty. The appellate court disagreed with the deputy sheriff: "A 'leave of absence' is a foundational prerequisite to the application of section 4850's no-loss-of-salary guarantee, and a person who has returned to work, even on modified duty, is not on a leave of absence." (*County of Nevada v. Workers' Compensation Appeals Board* (Cal. App. Third Dist.; January 29, 2014) 223 Cal.App.4th 579, [167 Cal.Rptr.3d 455].)

Settlement Bars Claim To Bing Crosby's Right Of Publicity. Entertainer Bing Crosby married Wilma, and he and his wife had four sons. When Wilma died in 1952, her will provided that her community property be distributed in trust to their four sons. Bing Crosby married Kathryn and remained married until he died in 1977. He left the

residue of his estate in trust for the benefit of Kathryn. On June 23, 2010, Wilma's Estate filed the present petition for an order stating that Wilma possessed a community property interest in Bing's right to publicity, and that Wilma's share of this interest passed to her heirs pursuant to the terms of her will. The trial court granted the motion. The appellate court reversed, recognizing that *Civil Code* section 3344.1, passed in 1984, did clarify the law by stating a deceased celebrity's right of publicity is both descendible and retroactive, but concluding Wilma's estate was barred by the doctrine of *res judicata* since there was a 1999 settlement. (*Bing Crosby v. HLC Properties, LTD.* (Cal. App. Second Dist., Div. 3; January 29, 2014) 223 Cal. App.4th 597, [167 Cal.Rptr.3d 354].)

Wards Under Welfare and Institutions Code Section 602 As Well As Dependents Under Welfare and Institutions Code § 300 Qualify For Status As Special Immigrant Juveniles. Petitioner in a writ of mandate proceeding was born in Mexico in 1995, brought to the United States by his mother when he was five years old and never returned to Mexico. Three years later, his mother abandoned him; she died in 2010. He got in trouble with the law, was declared a ward of the juvenile court pursuant to *Welfare and Institutions Code* section 602, in other words a delinquent, placed in foster care, and later placed on probation. He was thereafter transferred to an Office of Refugee Resettlement. The Immigration and Nationality Act [8 U.S.C. § 1101(a)(2)(J)] provides "abused, neglected, and abandoned unaccompanied minors . . . a process that allows them to become permanent legal residents." These Special Immigrant Juveniles [SIJ] must have been declared dependent on a juvenile court located in the United States. In the present case, petitioner's immigration lawyer requested the boy be given SIJ status. The superior court found petitioner did not qualify because he had been declared a ward [delinquent] and had not been declared a dependent of the court pursuant to *Welfare and Institutions Code* section 300. The appellate court granted the petition for writ of mandate, and ordered the trial court to make findings that would classify petitioner as an SIJ.

(*Eddie E. v. Sup. Ct. (The People of the State of California)* (Cal. App. Fourth Dist., Div. 3; January 29, 2014) 223 Cal.App.4th 622, [164 Cal.Rptr.3d 435].)

State Courts Have Concurrent Jurisdiction In Actions For Retaliation Under The False Claims Act. A medical doctor was fired after he allegedly complained about billing practices that he believed to be fraud against Medicare and Medi-Cal. The trial court sustained the demurrer without leave to amend on the doctor's cause of action under the False Claims Act [FCA; 31 U.S.C. § 3730(h)] for retaliation because of lack of subject matter jurisdiction. The appellate court granted the doctor's writ of mandate, stating: "We now conclude that state courts have concurrent jurisdiction over FCA retaliation claims." (*Driscoll v. Sup. Ct. (Todd Spencer)* (Cal. App. Fifth Dist., January 30, 2014) 223 Cal.App.4th 630, [167 Cal.Rptr.3d 364].)

California's Kin Care Law Meets ERISA And Is Not Preempted. California's Kin Care Law [*Labor Code* section 233] requires employers who provide paid sick leave to their employees to allow employees to use sick leave to care for family members. In this case, defendant, an airline, "seeks to avoid this state law obligation by the creation of an employee sick leave plan and trust, which [defendant] holds out as being subject to the Employee Retirement Income Security Act (ERISA) (29 U.S.C. §§ 1001 et seq.) and, thus exempt from state regulation." In a motion for summary judgment, the trial court determined that application of the Kin Care law was not preempted by ERISA. The appellate court agreed with the trial court, and held there was no preemption. (*Airline Pilots Association International v. United Airlines* (Cal. App. First Dist., Div. 4; January 31, 2014) 223 Cal.App.4th 706, [167 Cal.Rptr.3d 467].)

Trial Court Erred In Staying Enforcement Of Judgment Without An Undertaking. Judgment debtors argued they needed the court to stay enforcement of a judgment because there would be a setoff from the judgment once the trial against other defendants was concluded, and that prejudice would be

suffered if the entire amount were collected from them. The trial court ordered enforcement of the judgment stayed pending trial against other defendants. The appellate court reversed, finding the trial court "exceeded its powers in so ordering." (*Sharifpour v. Le* (Cal. App. Fourth Dist., Div. 3; January 31, 2014) 223 Cal.App.4th 730, [167 Cal.Rptr.3d 422].)

Summary Judgment Reversed In Age Discrimination Employment Case. From 1987 until she was discharged in 2008, at age 61, plaintiff worked at a hospital as a diet technician. She allegedly received the highest ratings until a new supervisor was hired in 2007 and thought plaintiff had numerous shortcomings on the job. In plaintiff's employment action against the hospital, which included a claim of age discrimination, the trial court granted summary judgment in favor of the employer. In reversing the grant of summary judgment, the appellate court noted that an employer does not conclusively establish the governing standard of competence in an employment discrimination action "merely by asserting that the plaintiff's performance was less than satisfactory," and that, in the instant case, the trial court concluded plaintiff failed to show competent performance "because the evidence showed that she 'made several mistakes on menus between January and May in 2008.'" In considering the evidence that the hospital prepared about 500 meals a day from 500 different processing menus, the appellate court further noted that "there was strong evidence before the court that the hospital, under its own written policies, anticipated and expected such mistakes, because, given the nature of the work, they are inevitable." Apparently frustrated with the manner in which motions for summary judgment are dealt with, the appellate court stated: "As too often happens, the merits of the case were obscured to the point of invisibility in the deluge of statements, counter-statements and objections, that mark modern summary judgment practice. The record clearly raises triable issues of fact with respect to whether plaintiff was performing adequately at the time of her discharge and whether the discharge was the product of a belief to the contrary, or of discriminatory animus against older workers on the part of plaintiff's im-

mediate supervisor. We will therefore reverse the judgment.” (*Cheal v. El Camino Hospital* (Cal. App. Sixth Dist.; January 31, 2014) (As mod. February 14, 2014) 223 Cal.App.4th 736, [167 Cal.Rptr.3d 485].)

Courts Don't Like Discovery Gotcha Tactics. Responses to requests for admissions [RFAs] were served four days late, subsequent to the responding party twice being ignored after requesting a two-week extension to respond. The requesting party moved the trial court to have all 119 RFAs deemed admitted pursuant to *Code of Civil Procedure* section 2033.280 (b). The court deemed 41 RFAs to be admitted and sanctioned the responding party. In reversing, as well as providing a primer for dealing with RFAs, the appellate court noted: “The purpose of the RFA procedure is to expedite trials and to eliminate the need for proof when matters are not legitimately contested. [] The RFA device is not intended to provide a windfall to litigants. Nor is the RFA procedure a “gotcha” device in which an overly aggressive propounding party—who rejects facially reasonable requests for a short discovery extension . . .” (*St. Mary v. Sup. Ct. (Thomas Schellenberg and Katherine Mills)* (Cal. App. Sixth Dist.; January 31, 2014) 223 Cal. App.4th 762, [167 Cal.Rptr.3d 517].)

Spousal Support When Domestic Violence Restraining Order Pending. The trial court denied a wife's request for spousal support pending the resolution of her application for a restraining order. *Family Code* section 6341(c) states in part: “If . . . no spousal support order exists, after notice and a hearing, the court may order . . . spousal support . . . the court shall consider whether failure to make any of these orders may jeopardize the safety of the petitioner, including safety concerns related to the financial needs of the petitioner.” The appellate court reversed, stating: “the trial court erred in ruling it did not have jurisdiction to award spousal support until after it found whether [the husband] abused [the wife].” (*In re Marriage of J.Q. v. T.B.* (Cal. App. Fourth Dist., Div. 3; January 31, 2014) 223 Cal. App.4th 687, [167 Cal.Rptr.3d 574].)

State Bar Contends Hearing Officer Not Tough Enough On Lawyer. The lawyer took his toddler for a walk and left his nine-month old alone and asleep in a crib for 40 minutes. He was convicted of misdemeanor child endangerment, and the State Bar hearing judge recommended a 120-day actual suspension subject to a one-year stayed suspension and two-year's probation. Before the State Bar Court of California, the State Bar requested the lawyer be disbarred. Both the hearing judge and the State Bar Court concluded the lawyer's actions did not involve moral turpitude. The State Bar Court recommended suspension from the practice of law for one year, that execution of that suspension be stayed, and that the lawyer be placed on probation for two years. (*In the Matter of Bradley Lynn Jensen* (Cal. Sup. Ct.; October 11, 2013) Case No. S155013.)

District Court Must Explain Why It Awarded Less Than Requested In Attorney Fees. Plaintiff requested \$22,585 in attorney fees and costs, but the district court awarded only \$14,268.50 without explanation. The Ninth Circuit reversed and remanded the matter, stating that it “requires that courts reach attorneys' fee decisions by considering some or all of twelve relevant criteria set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir.1975),” and that the *Kerr* factors are (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. (*Carter v. Caleb Brett, LLC* (Ninth Cir.: February 3, 2014) Case No. 12-16846.)

Can't Sue Family Court Child Custody Evaluator For Malpractice. In a protracted and acrimonious child custody battle, the mother brought an action against a psychologist

acting as a family court child custody evaluator for breach of contract, negligence and intentional infliction of emotional distress. The defendant demurred, citing *Civil Code* section 47, the litigation privilege and asserted the common law privilege for quasi-judicial acts. The trial court sustained the demurrer without leave to amend. In affirming, the appellate court stated: “In this case, all of the actions complained of were well within respondent's judicially delegated role as a family court child custody evaluator, whether or not such delegation was legally authorized, and in the absence of any objection by appellant.” (*Bergeron v. Boyd* (Cal. App. First Dist., Div. 4; February 4, 2014) 223 Cal.App.4th 877, [164 Cal.Rptr.3d 426].)

Diversity Jurisdiction Alleged On Information And Belief. Plaintiff filed an action in federal court asserting federal jurisdiction based on diversity. The trial court dismissed it without leave to amend because plaintiff failed to allege the citizenship of any of the defendants who are limited liability companies. The court did not accept a proposed amended complaint because plaintiff pled its jurisdictional allegations on information and belief. The Ninth Circuit reversed and remanded, stating in part that “the district court should not have dismissed the complaint for failure to plead allegations of citizenship affirmatively and on knowledge, rather than on information and belief, when the necessary information was not reasonably available to [plaintiff].” (*Carolina Casualty Insurance Co. v. Team Equipment, Inc.* (Ninth Cir.; February 4, 2014) 741 F.3d 1082.)

Stay Tuned CNN. The Greater Los Angeles Agency on Deafness sued the Cable News Network, CNN, in federal court under California's Disabled Persons Act [DPA; *Civil Code* section 54 et seq.] because the network does not caption all of the videos on its news web sites. After plowing through several constitutional issues and procedural matters, the Ninth Circuit requested the California Supreme Court answer the question whether the DPA applies to non-physical places like CNN.com, which is a virtual location on the Internet. (*Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.* (Ninth Cir.; February 5, 2014) (Corrected February 10, 2014) (Case No.

12-15807).) (Req. Granted by Cal. Sup. Ct.; March 26, 2014) (Case No. S216351).

Oh, What A Tangled Web We Weave.

A plaintiff was injured in a car accident and treated at first at Kaiser, and later at a surgery center on a “lien basis.” The bill for treatment at the surgery center was between \$40,000 and \$50,000. On the day of the surgery, the surgery center sold its account receivable and lien to a factor at a discount. The factor advised plaintiff it expected to be paid 100 percent. As it turned out, the president of the factoring company is plaintiff’s lawyer, and its vice-president is the brother of one of the owners of the surgery center. Meanwhile, back at court, the injured plaintiff sued the other driver, and lawyers for the other driver subpoenaed the factor’s business records. The trial court granted the factor’s motion to quash and awarded monetary sanctions of \$5,600 against the other driver and her counsel. The appellate court reversed, concluding the superior court abused its discretion, and that “the subpoena is reasonably calculated to lead to the discovery of admissible evidence relating to the amount of medical expenses [plaintiff] actually incurred.” (*Dodd v. Cruz* (Cal. App. Second Dist., Div. 3; February 5, 2014) 223 Cal.App.4th 933, [167 Cal.Rptr.3d 601].)

Jurisdiction To Enter A Nunc Pro Tunc Judgment.

A husband and wife were orally granted dissolution of their marriage and the court reserved jurisdiction on all other issues. Two weeks later, the husband died, and three days after that, the court entered the written dissolution of marriage. Counsel for the deceased husband requested the court enter the judgment nunc pro tunc to a date prior to his death, and the trial court, after concluding it had lost jurisdiction, denied the request. The appellate court granted a writ of mandate, holding the court did not lose jurisdiction to enter a *nunc pro tunc* judgment. (*Frederick v. Sup. Ct. (Martin)* (Cal. App. Second Dist., Div. 1; February 6, 2014) 223 Cal.App.4th 988, [167 Cal.Rptr.3d 773].)

Foreclosure In The United States Marine Corps.

Plaintiff, in the United States Marine Corps, took out a mortgage in 2007. Between 2008 and 2011, he was called up to active duty over-

seas three times, and failed to make all of his mortgage payments. The loan servicer began foreclosure proceedings in 2009; it rescinded the notice of default in 2010, but not the associated foreclosure fees. While plaintiff was overseas, the loan servicer pursued collection efforts for those fees. The Servicemembers Civil Relief Act [SCRA; 50 U.S.C. App. § 502(1)] was passed to enable servicemembers to devote their entire energy to the defense needs of the Nation. 50 U.S.C. App. § 533(d) provides in part that a “sale, foreclosure, or seizure of property for a breach of an obligation . . . [a mortgage that originated before the servicemember’s military service] shall not be valid if made during, or within one year after, the period of the servicemember’s military service” unless the foreclosure is approved by a court. Plaintiff’s action in federal court against the mortgage servicer was dismissed by the trial judge for failure to state a claim. The Ninth Circuit said the question was the scope of the term “foreclosure” for the purposes of the SCRA. It reversed the trial court, basing its ruling partially on California’s foreclosure statute [*Civil Code* section 2924] and partially on a holding of the United States Supreme Court [*Boone v. Lightner* (1943) 319 U.S. 561, [63 S.Ct. 1223, 87 L.Ed. 1587], which held that the SCRA should be liberally construed “to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.” The Ninth Circuit’s conclusion was that the plaintiff here alleges defendant attempted to collect foreclosure fees from him, and that, even though the mortgage servicer did not follow through with the foreclosure, the allegations were sufficient to proceed under the SCRA. (*Brewster v. Sun Trust Mortgage, Inc.* (Ninth Cir.; February 7, 2014) 742 F.3d 876.)

Underpaid, Under Pressure And Under Protected.

An employee went on stress leave one month after she filed a claim with the Department of Fair Employment and Housing for ongoing sexual harassment. When her doctor cleared her to go back to work, her lawyer had an electronic conversation with the employer’s lawyer regarding assurances the employee wanted before she returned to work. The employer’s lawyer characterized the request for assurances as the imposi-

tion of unreasonable conditions, fired her and then fought the employee’s request for unemployment insurance under the seldom-used “constructive voluntary quit” doctrine. The Unemployment Insurance Appeals Board denied her claim for benefits. Contending she had not constructively quit, the employee sought extraordinary relief in the superior court, and the trial court granted her administrative writ of mandate. The appellate court affirmed, noting the “constructive voluntary quit” doctrine does not apply to those situations in which an employee makes requests or inquiries about employment matters, “even though the employer may consider such speech irritating or ungracious.” (*Kelley v. California Unemployment Insurance Appeals Board (Merle Norman Cosmetics, Inc.)* (Cal. App. Second Dist., Div. 8; February 10, 2014) 223 Cal. App.4th 1067, [167 Cal.Rptr.3d 802].)

Senior Editor

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

Managing Editor

Mark A. Mellor, Esq.

Executive Committee

Robert Bodzin, *Chair*
Carol D. Kuluva, *Vice-Chair*
Reuben A. Ginsburg, *Treasurer*
Kathleen Brewer, *Secretary*
Lisa Cappelluti, *Immediate Past Chair*
Bruce P. Austin
Cynthia Elkins
Eric P. Geismar
Ruth V. Glick
J. Thomas Greene
Jewell J. Hargleroad
Rhonda T. Hjort
Megan A. Lewis
Karen J. Petrulakis
William Seligmann
Edward A. Torpoco
Klnh-Luan Tran
George Wallis

Judicial Advisors

Hon. Suzanne Bolanos
Justice Victoria Chaney
Hon. Lawrence W. Crispo (Ret.)
Hon. M. Lynn Duryee
Hon. Elizabeth Feffer
Hon. Terry B. Friedman
Hon. J. Richard Haden (Ret.)
Hon. Jamie A. Jacobs-May
Hon. Joan Lewis
Justice Eileen Moore
Hon. Ronald S. Prager

Hon. John Segal
Hon. James L. Warren (Ret.)

Advisors

Donald Barber
Charles Berwanger
Paul S. Chan
Tanja L. Darrow
Elizabeth A. England
Jamie Errecart
Michael D. Fabiano
Kevin J. Holl
Joel Kleinberg
Mark A. Mellor
Bradley A. Patterson
Norm Rodich
Jerome Sapiro, Jr.
c. robert (bob) wallach
Herb Yanowitz
Joan Wolff

Board of Trustees Liaison

Daniel Dean (District 1)
Craig Holden
Mark Shem (District 6)

Section Coordinator

Mitch Wood (415) 538-2594
mitch.wood@calbar.ca.gov

Administrative Assistant

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