



# Litigation Update

Litigation Section News

May 2014

**A Valentine Issue.** In a divorce proceeding, the court awarded the community business to the husband and issued an order restraining the wife from working in the same business, anywhere, for five years. The appellate court discussed that an *agreement* restraining someone from engaging in a lawful occupation is void pursuant to statute [*Business and Professions Code* section 16600], and considered whether or not a *court order* would also be prohibited under the statute. On February 14, the appellate court reversed the order of the trial court, noting that 16600 does not prohibit the issuance of a noncompetition order, but stating the state's public policy favors an individual's right to practice his or her chosen trade or profession and that any restrictions must be based upon evidence showing the restriction is reasonably necessary to preserve the value of an asset. The court concluded such evidence was not in the instant record on appeal. (*Greaux v. Mermin* (Cal. App. First Dist., Div. 4; February 14, 2014) 223 Cal.App.4th 1242, [167 Cal.Rptr.3d 881].)

**Government Claim Was Not Timely Filed.** A foster child alleged molestation by the foster father for two months during 2009, but now contends the cause of action against the county did not accrue until March, 2012 after legal counsel obtained an police investigator's follow-up report dated January 14, 2011. A government claim was filed in May 2012. The minor disclosed the molestation to minor's parents in December 2010, and county social workers caused a police investigation at that time, which led to the foster father's pleading guilty to child molestation. The trial court denied a petition for relief from the claim requirement set forth in *Government Code* section 945.4. The appellate court affirmed, stating that "because J.J.'s cause of action accrued at the latest in March 2011 and because J.J. did not submit a claim to the County until May 2012—more than a year

later—we are constrained to conclude the court properly denied her petition." (*J.J. v. County of San Diego* (Cal. App. Fourth Dist., Div. 1; February 14, 2014) (As Mod. March 7, 2014) 223 Cal.App.4th 1214, [167 Cal.Rptr.3d 861].)

**No Need To Look At Our Evidence; Take Our Word For It.** The trial court awarded \$350,000 in fees and costs to class counsel after approving a settlement. In making its determination, the court reviewed some of class counsel's billing records in camera, to which defendant did not object. On appeal, defendant contended class counsel failed to submit sufficient evidence to justify that the fee award was both necessary and nonduplicative and that the trial court's in camera review of class counsel's billing records to support the fee award denied defendant its due process. The appellate court reversed, stating there was no basis to bar defendant from full access to the evidence presented to the court and that "it was improper for the court to rely upon billing information not provided to [defendant]." (*Concepcion v. Amscan Holdings, Inc.* (Cal. App. Second Dist., Div. 7; February 18, 2014) 223 Cal.App.4th 1309, [168 Cal.Rptr.3d 40].)

**Surprise!!** Surgeons implanted a biliary stent in plaintiff during emergency abdominal surgery in 1996. Plaintiff alleges he was unaware it was there until August 2010 after he sought treatment for abdominal pain. In April 2011, plaintiff brought an action against the health care providers who treated him in 1996 and 1997. Defendants successfully demurred on statute of limitations grounds. The appellate court reversed, stating there was a tolling under the foreign body exception set forth in *Code of Civil Procedure* section 340.5.

On a separate issue, plaintiff alleged he requested access to his hospital medical records in 2010, and was denied access. The

hospital response stated, "Due to California Retention Laws, these records are no longer available." He alleged he was damaged under *Health and Safety Code* section 123110. In the trial court, plaintiff also argued he was entitled to his records in anticipation of litigation pursuant to *Evidence Code* section 1158. As damages, plaintiff sought an award of prelitigation attorney fees and investigation costs. The trial court sustained defendants' demurrer on this cause of action without leave to amend. The appellate court affirmed, holding section 123110 contemplates a proceeding to secure access to one's medical records and a discretionary award of attorney fees and costs to the prevailing party, and section 123120 does not authorize the remedy plaintiff sought. The appellate court noted plaintiff had a duty to mitigate his damages and he could have applied to the court under *Code of*

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*Civil Procedure* section 1985.7 for an order to show cause why the records should not be produced. (*Maher v. County of Alameda* (Cal. App. First Dist., Div. 1; February 18, 2014) 223 Cal.App.4th 1340, [168 Cal. Rptr.3d 56].)

### **The Law Says E.R. Doctors Have To Treat Patients, And The Doctors Want To Get Paid.**

The law imposes a duty on emergency room physicians to treat patients regardless of their ability to pay. When those patients are enrollees in health care service plans (HMOs), the law imposes an obligation on the HMOs to reimburse the physicians for emergency treatment provided to the enrollees, even when the physicians were not under contract to the HMOs. HMOs sometimes delegate their health care obligations to independent practice associations (IPAs); HMOs are statutorily permitted to delegate to IPAs their obligation to reimburse emergency physicians. In this case, the IPA failed to reimburse emergency room physicians, so the doctors sought payment from the HMOs. When payment was not forthcoming, the emergency room physicians brought an action against the HMOs, and the trial court granted defendants' demurrer. The appellate court reversed, holding that when an HMO knows or has reason to know the IPA would be unable to fulfill the delegated obligation, the loss should be borne by the HMO and not the physician who is obligated by statute to provide emergency care. (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (Cal. App. Second Dist., Div. 3; February 19, 2014) 223 Cal.App.4th 1366, [168 Cal.Rptr.3d 91] Superseded By Grant Of Rehearing (Cal. App. Second Dist., Div. 3; April 2, 2014) (Case No. B238867a).

### **Right To Repair Act Is Not The Exclusive Remedy In Construction Defect Cases.**

A construction company built a home, which was purchased from the developer by plaintiff. In her action against the builder and developer, plaintiff alleged the home suffered from numerous construction defects. The trial court granted defendants' summary adjudication of issues after defendants argued the Right to Repair Act

[*Civil Code* section 895, *et seq.*] provides the exclusive remedy for a homeowner seeking damages for construction defects and precludes common law causes of action for negligence and breach of implied warranty. The appellate court granted extraordinary relief, stating: "We hold that the Right to Repair Act does not provide the exclusive remedy for a homeowner seeking damages for construction defects that have resulted in property damage, as here." (*Burch v. Sup. Ct. (Premier Homes, LLC)* (Cal. App. Second Dist., Div. 3; February 19, 2014) 223 Cal.App.4th 1411, [168 Cal.Rptr.3d 81].)

### **No Intentional Interference With Prospective Economic Advantage.**

A beer importer disapproved of an agreement whereby one of its distributors agreed to sell its beer distributorship to another distributor. When the importer, pursuant to its contractual right, disapproved of the sale, the beer distributorship was sold to another distributor. The scorned distributor brought an action against the importer for intentional and negligent interference with prospective economic advantage. The trial court denied

the importer's motion for summary judgment, and the appellate court granted extraordinary relief, stating that for the tort of interference with prospective business advantage, courts require that the alleged interference must have been wrongful by some measure beyond the fact of the interference itself. Quoting from *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, [63 P.3d 937, 131 Cal.Rptr.2d 29], the court said it must be "unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." The appellate court rejected the scorned buyer from relying on *Business and Professions Code* sections 25000.9, 23300, or fraudulent concealment as the basis for an alleged wrongful act by the importer, and held the importer was entitled to summary judgment. (*Crown Imports, LLC v. Sup. Ct. (Classic Distributing & Beverage Group, Inc.)* (Cal. App. Second Dist., Div. 3; February 19, 2014) 223 Cal. App.4th 1395, [168 Cal.Rptr.3d 228].)

### **Hospital's Peer Review Process Meets Whistleblower Laws.**

A hospital terminated a doctor's

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staff privileges, using its quasi-judicial peer review procedure. In his tort action against the hospital and others, the doctor claimed he was terminated in retaliation for reporting substandard performance by the hospital's nurses. *Health and Safety Code* section 1278.5, declares it is the public policy of California to encourage members of the medical staff to notify government entities of suspected unsafe patient care and conditions. The trial court denied defendants' motion to dismiss on the ground that the doctor could not bring an action under section 1278.5 until he succeeded in mandamus in overturning the hospital's peer review action. Eventually the matter ended up in the California Supreme Court. The Supreme Court held: "We conclude that when a physician claims, under section 1278.5, that a hospital's quasi-judicial decision to restrict or terminate his or her staff privileges was itself a means of retaliating against the physician 'because' he or she reported concerns about the treatment of patients, the physician need not first seek and obtain a mandamus judgment setting aside the hospital's decision before pursuing a statutory claim for relief. Section 1278.5 declares a policy of encouraging workers in a health care facility, including members of a hospital's medical staff, to report unsafe patient care. The statute implements this policy by forbidding a health care facility to retaliate or discriminate 'in any manner' against such a worker 'because' he or she en-

gaged in such whistleblower action. (*Health & Saf. Code* § 1278.5, subd. (b).) It entitles the worker to prove a statutory violation, and to obtain appropriate relief, in a civil suit before a judicial fact finder." (*Fahlen v. Sutter Central Valley Hospitals* (Cal. Sup. Ct.; February 20, 2014) 58 Cal.4th 655, [168 Cal.Rptr.3d 165].)

**No Preemption If State Law Claims "Would Impose No Greater Burden Than Those Imposed By Federal Law."** In a class action complaint, pleading violations of California's consumer protection statutes, filed in federal court, plaintiff alleged the coating on sunflower seeds contained salt and that salt coating was not included in the sodium content per serving listed on the package. The district court granted defendant's motion to dismiss. The Ninth Circuit reversed, stating: "The sodium content of the edible coating added to sunflower seed shells must, under federal law, be included in the nutritional information disclosed on a package of sunflower seeds. Because plaintiff's state-law claims, if successful, would impose no greater burden than those imposed by federal law, her state law claims are not preempted." (*Lilly v. Conagra Foods, Inc.* (Ninth Cir.; February 20, 2014) 743 F.3d 662.)

**Serving A Corporation In California.** Our *Code of Civil Procedure* provides a number of ways to serve process on a corporation doing business in the state. The most common method is by service on the corporation's designated agent for service of process. (*Code of Civil Procedure* section 416.10, subdivision (a).) Otherwise, a corporation may be served by personally delivering a summons and complaint to those corporate officers, managers and employees identified in section 416.10, subdivision (b), or by delivering process to someone in charge of the office of one of the individuals identified in section 416.10, subdivision (b) and then mailing the individual a copy of the summons and complaint. (*Civ.Proc.* § 415.20.) In the present case, plaintiff simply left a summons and complaint with someone who was not identified on the proof of service and who was in charge of a branch office of the defendant corporation and then mailed a copy of the summons and com-

plaint to the corporation, rather than any individual officer or manager. Plaintiff thereafter obtained a default against the corporation and a \$254,000 default judgment. The trial court later set aside both the entry of default and the default judgment. Noting that strict compliance with the code's provisions for service is not required, and also that a corporation can only be served through service on some individual person, the appellate court agreed with the trial court that service was defective because plaintiff did not show substantial compliance, and affirmed setting aside the default. (*Ramos v. Homeward Residential, Inc.* (Cal. App. Fourth Dist., Div. 1; February 20, 2014) 223 Cal.App.4th 1434, [168 Cal.Rptr.3d 114].)

**C'mon . . . How Can You Say She Acted Outside The Course And Scope Of Her Employment?** A staffing company assigned one of its employees to work as a medical assistant at a customer's facility, and the medical assistant poisoned a coworker. According to the allegations, the medical assistant and the coworker had some sort of disagreement about how to stock supplies. Sometime later, the coworker drank from her water bottle and her tongue and throat started to burn and she vomited. The medical assistant admitted she poured carbolic acid into the water bottle, which acid she found in an examining room. The coworker brought an action against the staffing company for negligence, battery and other torts under a theory of respondeat superior. The trial court granted summary judgment in favor of the staffing company. The appellate court affirmed, concluding the employee acted outside the course and scope of her employment. (*Montague v. AMN Healthcare, Inc.* (Cal. App. Fourth Dist., Div. 1; February 21, 2014) (As Mod. March 13, 2014) 223 Cal.App.4th 1515, [168 Cal. Rptr.3d 123].)

**California Has Specific Jurisdiction & Defendant Must Defend Itself Here.** In an attempt to collect a judgment, a bank sued a New Zealand company for fraudulently transferring and sequestering the debtor's assets. The trial court granted the New Zealand company's motion to quash service of summons for lack of personal jurisdiction. On

### Membership in the ADR Subcommittee

The Litigation Section ADR Subcommittee, which is comprised of both ADR professionals and advocates, focuses on recent case law and legislative developments in the field of alternative dispute resolution. The ADR Subcommittee also provides educational programs on ADR issues. Members of the Litigation Section who wish to join the ADR Subcommittee should send an e-mail and resume to the co-chairs of the Committee: Jeff Dasteel ([Jeffrey.dasteel@gmail.com](mailto:Jeffrey.dasteel@gmail.com)) and Don Fischer ([donald.fischer@fresno.edu](mailto:donald.fischer@fresno.edu)).

appeal, the appellate court framed the issue as follows: “The primary issue presented is whether the test for specific jurisdiction in tort cases requires the defendant to have expressly aimed its intentional conduct at the plaintiff.” The appellate court discussed that when general jurisdiction is not established, a nonresident defendant may still be subject to California’s specific jurisdiction if a three-prong test is met. First, the defendant must have purposefully availed itself to the state’s benefits. Second, the controversy must be related to or arise out of the defendant’s contacts with the state. Third, considering the defendant’s contacts with the state and other factors, California’s exercise of jurisdiction over the defendant must comport with fair play and substantial justice. The appellate court stated that a plaintiff bears the burden of establishing the first two requirements, and, if plaintiff does, the burden shifts to the defendant to show that California’s exercise of jurisdiction would be unreasonable. In the present case, the appellate court decided plaintiff established the first two requirements, and concluded the defendant “failed to make a compelling case that California’s exercise of specific jurisdiction would be unfair and unreasonable.” (*Gilmore Bank v. Asiatrust New Zealand Limited* (Cal. App. Fourth Dist., Div. 3; February 21, 2014) 223 Cal. App.4th 1558, [168 Cal.Rptr.3d 525].)

### **Homeowner’s Insurance Company Did Not Comply With The Right To Repair Act Before Completing Repairs.**

When the owner purchased a home, he signed a document which advised him of the prelitigation procedures required in the Right to Repair Act [*Civil Code* section 895]. Six years later, when the home was vacant, a property manager discovered a water leak, and the owner notified his insurance company. The insurance company hired workers to repair the damage and then sent the home builder a notice of its intent to pursue its subrogation right to recover payment for the loss; it later sent a demand for \$80,984.61. When the builder did not respond, the insurance company filed a complaint in subrogation against the builder. The trial court ruled the prelitigation procedures set forth in the Right to Repair Act did not apply to the insurance company’s claim. The appel-

late court issued a writ of mandate, stating: “We conclude that [the builder] is entitled to summary judgment. There was a failure to comply with the notice requirements of the Act, depriving [the builder] of its right to inspect and repair a defect in a home subject to the Act. We shall grant the petition, directing the trial court to vacate its order and issue a new order granting [the builder’s] motion for summary judgment and denying [the insurance company’s] motion for summary judgment.” (*KB Home Greater Los Angeles, Inc. V. Sup. Ct. (Allstate Insurance Company)* (Cal. App. Second Dist., Div. 4; February 21, 2014) 223 Cal.App.4th 1471, [168 Cal. Rptr.3d 142].)

**Class Action Not Certified.** A home warranty provider, the defendant in this action, records all incoming and outgoing telephone calls. A customer placing an inbound call is told: “To ensure the highest quality service your call may be monitored or recorded.” Plaintiff filed a class action against the defendant alleging it violates *Penal Code* section 632 which prohibits the intentional recording of a confidential communication without the consent of all

parties to the communication. The trial court denied class certification. The appellate court affirmed, stating: “We affirm on the ground that the proposed class lacks the requisite community of interest and do not reach the court’s other bases for denying class certification.” (*Hataishi v. First American Home Buyers Protection Corporation* (Cal. App. Second Dist., Div. 3; February 21, 2014) 223 Cal.App.4th 1454, [168 Cal.Rptr.3d 262].)

### **Class Action Against Credit Repair Organization.**

Plaintiff brought a class action against defendant under 15 U.S.C. § 1679 [the Credit Repair Organizations Act; CROA]. The federal trial court entered summary judgment in favor of defendant, reasoning defendant did not make any promises of credit improvement but instead promised to provide consumers’ credit score. The Ninth Circuit reversed, finding defendant is a credit repair organization for purposes of CROA because defendant “through the representations it made on its website and in its television advertising, offered a service, in return for the payment of money, for the implied purpose of provid-

#### **Litigation Section Webinars**

### **The Moradi Case, Earthquake or Tremor? Employers’ Liability Exception to the “Going and Coming” Rule**

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Former Consumer Attorneys of Los Angeles and Consumer Attorneys of California President, and plaintiff’s attorney on the *Moradi* case, Wayne McClean, will discuss these issues from the plaintiff’s perspective, while Christina Morovati of Los Angeles defense firm Bragg & Kuluva will present the defense point of view. The webinar will be followed by a brief question-and-answer session with the presenters.

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ing advice or assistance to consumers with regard to improving the consumer's credit record, credit history, or credit rating." (*Stout v. Freescore, LLC* (Ninth Cir.; February 21, 2014) 743 F.3d 680.)

### Another Pathetic Situation For A Mentally Ill Person.

A social worker contacted the police about a "gravely disabled" mentally ill woman he wanted transported to a mental health facility. The woman reacted violently when police entered her home. She grabbed a knife, threatened to kill the officers and told them she did not want to go to a mental health facility. Officers shot her five or six times, and she survived to bring a civil rights action pursuant to 42 U.S.C. § 1983. The federal trial court granted summary judgment. The Ninth Circuit, finding the officers were initially justified in entering the woman's home, concluded there were questions of fact regarding reasonableness and excessive force, vacated summary judgment and remanded. (*Sheehan v. City and County of San Francisco* (Ninth Cir.; February 21, 2014) 743 F.3d 1211.)

### Liability For Serving Alcohol.

At common law, the rule was that the consumption of alcohol, not the service of alcohol, was the proximate cause of any resulting injury. In 1976, the California Supreme court in *Vesely v. Sager* (1971) 5 Cal.3d

153, [486 P.2d 151, 95 Cal.Rptr. 623] (Superseded by statute), held that sellers or furnishers of alcoholic beverages could be liable for injuries proximately caused by those who imbibed. Shortly thereafter, in 1978, the California Legislature largely reinstated the common law [*Business and Professions Code* section 25602, subdivision (c); *Civil Code* section 1714, subdivision (b)], in essence creating civil immunity for sellers and furnishers of alcohol in most situations. But the Legislature created some narrow exceptions when it enacted *Business and Professions Code* section 25602.1, and the California Supreme Court found one of those exceptions applied in the instant case, the exception being that one who sells alcoholic beverages to an obviously intoxicated minor loses his or her civil immunity and can be liable for resulting injuries or death. Here, defendant hosted a party at a vacant rental residence owned by her parents, without their consent. The party was publicized by word of mouth, telephone and text messaging, resulting in attendance of 40 to 60 people, the vast majority of them under 21 years of age. An admission fee of \$3 to \$5 per person was charged. One guest was visibly intoxicated upon arrival. Guests reported seeing him drink more at the party. He became aggressive and obnoxious and other guests escorted him outside. As he was driving away, he ran over and killed another guest. In reversing the grant of summary judgment in favor of defendant, the California Supreme Court stated: "We conclude the pleaded facts, which allege defendant charged an entrance fee to some guests (including the minor who caused the death), payment of which entitled guests to drink the provided alcoholic beverages, raise a triable issue of fact whether defendant sold alcoholic beverages, or caused them to be sold, within the meaning of section 25602.1, rendering her potentially liable under the terms of that statute as a person who sold alcohol to an obviously intoxicated minor." (*Ennabe v. Manosa* (Cal. Sup. Ct.; February 24, 2014) 58 Cal.4th 697, [319 P.3d 201, 168 Cal.Rptr.3d 440].)

**No Civil Enforcement Of Workplace Safety By Prosecutors Under Consumer Protection Statute.** Defendant manufactures plastic products. In 2009, a

water heater exploded, killing two workers instantly. After the incident, California's Division of Occupational Safety and Health (Cal/OSHA) opened an investigation and determined the explosion had been caused by a failed safety valve and the lack of "any other suitable safety feature on the heater" due to "manipulation and misuse." Based on its investigation, Cal/OSHA charged defendant with five serious safety violations. As required by *Labor Code* section 6315, Cal/OSHA forwarded its results to the district attorney, who filed felony charges against two persons, including defendant's plant manager. The district attorney also filed a civil action against defendant. One of the causes of action is an unlawful, unfair and fraudulent business practice under *Business and Professions Code* section 17200 and another alleges violation of section 17500, and the district attorney requested imposition of civil penalties of up to \$2,500/day per employee from November 29, 2007 through March 19, 2009 in each cause of action. Defendant demurred to these two causes of action, contending they were preempted under Fed/OSHA, because a prosecutor's pursuit of civil penalties under the UCL is not part of California's workplace safety plan approved by the Secretary. The trial court disagreed, and overruled the demurrer to the district attorney's two causes of action based on violations of the UCL. The trial court subsequently granted a request to certify the preemption issue as appropriate for early appellate review under *Code of Civil Procedure* section 166.1. Defendant filed a petition for writ of mandate, which the appellate court denied, but the California Supreme Court granted review and transferred the case back to the appellate court with directions to issue an order to show cause. The second time around, the appellate court granted the writ of mandate, stating: "California's workplace safety plan, as approved by the Secretary, does not include any provision for civil enforcement of workplace safety standards by a prosecutor through a cause of action for penalties under the UCL. Under controlling law, any part of a state plan not expressly approved is preempted." (*Solus Industrial Innovations, LLC v. Sup. Ct. (The People)* (Cal. App. Fourth Dist., Div. 3; February 24, 2014) 224 Cal.App.4th 17, [168 Cal.Rptr.3d 275].)

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**Express Oral Findings Sufficient For FEHA Attorney Fees Award.** Plaintiff was employed by a university and terminated due to his harassment of a female employee after being given several warnings. In his action under the California Fair Employment and Housing Act [*Government Code* section 12900; FEHA], he contended his termination for harassment was a pretext for racial discrimination. Other than testifying he believed he was discriminated against because of his “native ancestry,” plaintiff produced no evidence to support his discrimination claim. The court granted the university’s nonsuit on the FEHA cause of action, but permitted plaintiff’s retaliation and other causes of action to go to the jury. The jury returned a defense verdict within 15 minutes. The university incurred over \$235,000 in attorney fees defending the action, and the plaintiff opposed the motion on the ground that he was unemployed and destitute. Reasoning that attorney fees were not available in the non-FEHA causes of action, the trial court apportioned fees and awarded \$100,000 to the university. The appellate court affirmed, rejecting plaintiff’s argument that for an award of attorney fees in a FEHA action, express written findings are necessary (pursuant to the holding in *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, [110 Cal.Rptr.2d 903]), stating the court’s express oral findings demonstrate the court applied the correct legal standards. (*Robert v. Stanford University* (Cal. App Sixth Dist.; February 25, 2014) 224 Cal.App.4th 67, [168 Cal.Rptr.3d 539].)

**Duty Of Care To Four-Year-Old Guest Using Pool.** A four-year-old drowned in the pool of a home friends of his family rented. His parents brought an action against the homeowners and the property management company. The trial court granted defendants’ motion for summary judgment on the ground defendants owed no duty of care to a guest of the tenants. With regard to the property management company, the appellate court affirmed, but reversed with regard to the homeowners, stating: “We hold as a matter of law that the homeowners here, who knowingly rented a home with a maintained pool, owed a duty of reasonable

care to the four-year-old boy to protect him from drowning in the pool. We further hold there are triable issues of fact as to whether, one, the homeowners breached that duty by failing to install a fence around the perimeter of the pool or a self-closing or self-latching mechanism on the only door leading from the house to the pool and, two, whether any such breach was a substantial factor in bringing about the child’s death.” (*Johnson v. Prasad* (Cal. App Third Dist.; February 25, 2014) 224 Cal.App.4th 74, [168 Cal.Rptr.3d 196].)

**Judgment In Jury Trial Reversed Because Court Rejected Proposed Special Verdict Form.** Defendant in an automobile accident case submitted a special verdict form that would have required the jury to consider the fault of both parties, as well as a non-party, for purposes of allocating liability for plaintiff’s noneconomic damages. According to plaintiff, she was a passenger in the back seat of a car stopped at a yield sign on the off-ramp of a freeway when defendant rear ended the car she was in. According to defendant, the driver of the car plaintiff was in, a non-party to the action, stopped for no apparent reason after proceeding from the yield sign, and he was a cause of the accident. Defendant’s requested verdict form asked for special findings regarding: (1) whether defendant was negligent and, if so, whether her negligence was a cause of injury to plaintiff; (2) whether [the nonparty driver who defendant claimed stopped suddenly in front of her for no apparent reason] was negligent and, if so, whether his negligence was a cause of injury to plaintiff; and, if both drivers were found to be negligent, (3) the percentage of fault attributable to each driver. The trial court rejected defendant’s special verdict form. The jury returned a special verdict finding defendant’s negligence was the cause of injury to plaintiff and that plaintiff suffered \$661,000 in damages, \$575,000 of which was for noneconomic loss. The appellate court reversed, finding the rejection of defendant’s special verdict form constituted prejudicial error, but in doing so, the appellate court held that “the jury’s special verdict findings are affirmed, but the judgment is reversed and remanded for a new trial” regarding whether the non-party

driver of the other car was a negligent cause of plaintiff’s injuries, and, if so, in what percentage. (*Vollaro v. Lipsi* (Cal. App. Second Dist., Div. 4; February 26, 2014) 224 Cal.App.4th 93, [168 Cal.Rptr.3d 323].)

**Anti-Slapp Motion Apparently Viewed As A Tactic To Delay Plaintiff’s Case.** Plaintiff is a tenant in a building and alleges significant maintenance and repair issues, including airborne contaminants. According to the complaint, defendants had plaintiff evicted to perform significant repairs, but did not perform repairs, and would not permit plaintiff to take possession again. So, plaintiff brought an action for breach of warranty of habitability and several other causes of action.

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The essence of defendant's anti-SLAPP motion is that plaintiff's complaint was premised in material part upon defendant's pursuit of eviction proceedings and the claims are barred under the litigation privilege [Civil Code section 47]. The trial court denied the anti-SLAPP motion, concluding the complaint was not based upon protected activity. The first paragraph of the opinion reveals much about the appellate court's view of the situation: "Another appeal in an anti-SLAPP case. Another appeal by a defendant whose anti-SLAPP motion failed below. Another appeal that, assuming it has no merit, will result in an inordinate delay of the plaintiff's case and cause him to incur more unnecessary attorney fees. (*See, Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 1002-1003, [119 Cal.Rptr.3d 835, 854-855].) And no merit it has. We thus affirm, concluding, as did the trial court, that plaintiff's lawsuit is not based on protected activity." (*Moriarty v. Laramar Management Corporation* (Cal. App. First Dist., Div. 2;

February 26, 2014) 224 Cal.App.4th 125, [168 Cal.Rptr.3d 461].)

### **Claiming Uncovered Securities Are Backed By Covered Securities Does Not Prevent State Law Claims Under Litigation Act.**

Plaintiffs filed civil actions under state law contending defendants helped perpetrate a fraud, a Ponzi scheme, by falsely representing that uncovered securities were backed by covered securities. The federal district court dismissed an action pursuant to the Securities Litigation Uniform Standards Act of 1998 [Litigation Act; 15 U.S.C. § 87bb(f)(1)] because the Act forbids bringing securities class actions based upon violations of state law. When the case reached the United States Supreme Court, the high court held the Litigation Act does not preclude the plaintiff's state law class actions, stating: "There is not the necessary 'connection' between the materiality of the misstatements and the statutorily required 'purchase or sale of a covered security.'" (*Chadbourne & Parke LLP v. Troice* (U.S. Sup. Ct.; February 26, 2014) 134 S.Ct. 1058, [188 L.Ed.2d 88].)

**The Sky Is Falling!** Plaintiff, who describes itself as a nonprofit organization "committed to promoting a safe and healthful diet and to protecting consumers from food and drink that are dangerous or unhealthful," filed an action seeking injunctive and declaratory relief and civil penalties against seven chain restaurants alleging their grilled chicken created a chemical called PhIP, which appears on California's list of carcinogenic chemicals. According to the complaint, under the California Safe Drinking Water and Toxic Enforcement Act of 1986 [*Health and Safety Code* section 25249; Proposition 65], a "clear and reasonable warning" was required to be given to consumers. The implementing regulation for the statute requires that there be a "reasonable and meritorious case for the private action' [and] requires not only documentation of exposure to a listed chemical, but a reasonable basis for concluding that the entire action has merit. The certifier must have a basis to conclude that there is merit to each element of the action on which the plaintiff will have the burden of proof." (*Cal. Code Regs.*, Title 11, § 3101,

subd. (a).) The trial court sustained defendant's demurrer without leave to amend. The appellate court affirmed, agreeing with the trial court that plaintiff's certificates were inadequate. (*Physicians Committee for Responsible Medicine v. Applebee's International, Inc.* (Cal. App. Second Dist., Div. 1; February 27, 2014) 224 Cal.App.4th 166, [168 Cal.Rptr.3d 334].)

### **Discovery Of Portions Of Other Patient's Hospital Records Ordered.**

The sons of a woman who died after hip replacement surgery brought an action against the hospital and doctors. The post-operative order for decedent provided for morphine and Dilaudid as pain medication, but the form order left blank spaces for the doses and intervals for their administration, and did not provide whether the pain medications should be given for mild, moderate or severe pain. Decedent was found dead two hours after being given Dilaudid by IV push. The orthopedic surgeon testified his physician's assistant and he discussed what and how much medication to give the decedent. The trial court granted plaintiff's motion to compel production of 160 postoperative orders including provisions for the administration of opioids, split equally between surgeries performed by the physician before and after decedent's surgery, with personal information redacted. The physician sought extraordinary relief from the appellate court, contending the discovery order is unduly burdensome. The appellate court limited discovery "to the pain management provisions of the orders, including the type of surgery, date and signature fields, and directing that all other information be redacted." (*Snibbe v. Sup. Ct. (Bruce Gilbert)* (Cal. App. Second Dist., Div. 4; February 27, 2014) 224 Cal.App.4th 184, [168 Cal.Rptr.3d 548].)

### **Sad State Of First Amendment Affairs.**

In past years, a high school saw violence on Cinco de Mayo when "Mexican students had been walking around with the Mexican flag," and other students "hung a makeshift American flag on one of the trees on campus." In 2010, during a break, a group of Mexican students asked the assistant principal "why the Caucasian students get to wear their flag

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out when we don't get to wear our flag?" In response, the principal directed the students who wore shirts bearing the American flag to "either turn their shirts inside out or take them off. The students refused to do so." The American flag-wearing students brought a civil rights suit against the school and officials, alleging violations of their federal and state constitutional rights to freedom of expression. The federal trial court granted the summary judgment of the assistant principal. The Ninth Circuit noted, "We are asked again to consider the delicate relationship between students' First Amendment rights and the operational and safety needs of the schools," and concluded the policy does not violate the students' rights, affirming summary judgment. (*Dariano v. Morgan Hill Unified School District* (Ninth Cir.; February 27, 2014) 745 F.3d 354.)

### **Permit Condition Removed Because No Subdivision Of Land Involved.**

A city's municipal code states no grading permit shall be issued for a hillside site larger than 60,000 square feet unless a "tentative tract map" has been approved by a city planner. Here, a property owner sought a permit for construction of a three-residence family compound over hillside lots totaling 85,000 square feet. The trial court relieved the property owner of the permit condition because the project

involves no subdivision of land. The appellate court affirmed because no subdivision was involved. (*Tower Lane Properties v. City of Los Angeles* (Cal. App. Second Dist., Div. 1; February 28, 2014) 224 Cal.App.4th 262, [168 Cal.Rptr.3d 358].)

### **Trial Court Has Subject Matter Jurisdiction.**

Plaintiffs are the heirs of a man who was electrocuted while trimming trees. Defendants are a tree inspection company and a utility. The trial court granted the defendants' motion to dismiss "because this court lacks subject matter jurisdiction under *Public Utilities Code* section 1759." The appellate court reversed, stating: "We hold only that the superior court has jurisdiction over the matter, and that plaintiffs' claim for damages based on the allegation that PG&E breached its duty to maintain adequate clearance beyond the prescribed minimum does not rest on an issue within the exclusive jurisdiction of the PUC." (*Mata v. Pacific Gas and Electric Company* (Cal. App. First Dist., Div. 3; February 28, 2014) (As mod. March 26, 2014) 224 Cal.App.4th 309, [168 Cal.Rptr.3d 568].)

### **Press Access To Juvenile Courts.**

A blanket order in LASC's juvenile court provides that all members of the press "shall be allowed access" to dependency hearings unless there is a reasonable likelihood that access will be harmful to the child's best interests." The order further provides that no one may be denied access to a courtroom until an objection has been made, and until the objecting party has demonstrated that harm or detriment to the child is reasonably likely to occur as a result of permitting access. In the present matter, a reporter and an attorney for the Los Angeles Times were present at a pretrial hearing for a minor. The minor's counsel objected to their presence in the courtroom, and asked to continue the matter in order to brief the confidentiality issue. The court set a briefing schedule, and the minor's counsel argued the facts in the case are "particularly brutal," and that press access should be denied because "if the press is allowed to be present while children's counsel presents arguments regarding the sensitive nature of the case, then the sensitive information will have already been made public and there would be no point in the hearing." The ju-

venile court permitted access to the press, and declared the children dependents of the juvenile court. The appellate court reversed the order permitting press access, stating: "The blanket order interferes with the discretion [*Welfare and Institutions Code*] section 346 vests in the court to determine, on a case-by-case basis, whether a person may be admitted to the hearing based on a 'direct and legitimate interest in the particular case or the work of the court.' Accordingly, the blanket order is invalid and the juvenile court's order allowing access to The Times in this case is reversed." (*In re A.L.; Los Angeles County Department of Children and Family Services v. J.P.; Appellant Los Angeles Times Communications LLC* (Cal. App. Second Dist., Div. 1; March 3, 2014) 224 Cal. App.4th 354, [168 Cal.Rptr.3d 589].)

### **Trademark Not Abandoned.**

A bank acquired an insurance/financial services company and changed the name of the newly acquired company, but continued to display the former trademark in order to maintain the website and metatags and accept customer payments. A few years later, the bank did not renew registration of the mark. Former employees of the company the bank acquired launched a new company and used the mark. The bank brought an action against the new company, seeking a preliminary injunction, which the federal district court denied. The Ninth Circuit reversed, stating: "To prove abandonment of a mark as a defense to a claim of trademark infringement, a defendant must show that there was (1) discontinuance of trademark use and (2) intent not to resume such use." (*Wells Fargo v. ABD Insurance & Financial Services, Inc.* (Ninth Cir.; March 3, 2014) (Case No. 13-15625).)

### **I Told You About It; Now Forever Hold Your Peace.**

It's a family law case, and the commissioner presiding over the matter, who has post-judgment support matters still pending, has agreed to preside over the wedding of the wife's lawyer. The husband petitioned the appellate court for a writ of mandate, seeking disqualification of the commissioner under *Code of Civil Procedure* section 170.1, which says a judge is disqualified if "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial," after the trial court

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denied his motion to disqualify. The appellate court denied extraordinary relief noting in *People v. Carter* (2005) 36 Cal.4th 1215, [117 P.3d 544, 32 Cal.Rptr.3d 838], “the California Supreme Court found no appearance of partiality where the trial judge officiated at the wedding of the prosecutor’s daughter several months before the judge presided over the defendant’s death penalty trial.” Here, the appellate court stated: “Following *Carter*, we conclude that when a judge has no personal or social relationship with the attorney and the judge’s only role at the wedding is that of an officiant, disclosure is required (*California Code of Judicial Ethics*, canon 3(E)(2)(a)), but disqualification is not mandated absent additional facts.” (*Kenneth Wechsler v. Sup. Ct. (Kimberly Wechsler)* (Cal. App. Fourth Dist., Div. 1; March 4, 2014) 224 Cal. App.4th 384, [168 Cal.Rptr.3d 605].)

**Trial Court’s Denial Of Petition To Compel Arbitration Reversed.** The trial judge denied defendant employer’s petition to arbitrate in a wrongful termination case after finding the arbitration agreement was unconscionable. The arbitration agreement was presented to the plaintiff employee on a take-it-or-leave-it basis and his signature was a precondition to employment. But plaintiff contended he was already on the job working for over a week before the arbitration agreement was ever presented to him. The appellate court analyzed numerous provisions in the contract and concluded: “None of these provisions is unconscionable,” and reversed. (*Sanchez v. Carmax Auto Superstores California, LLC* (Cal. App. Second Dist., Div. 1; March 4, 2014) 224 Cal.App.4th 398, [168 Cal.Rptr.3d 473].)

**Sarbanes-Oxley Now Has Far Reaching Tenacles.** Petitioners/plaintiffs brought an action against their former employers, privately held companies that provide advisory and management services to a mutual fund company. The allegations are that after plaintiffs raised concerns about overstated expenses associated with operating the mutual funds, they suffered adverse actions. “No [public] company. . . or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend,

threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of [whistleblowing or other protected activity].” (18 U.S.C. § 1514A; Sarbanes-Oxley Act of 2002.) The question posed to the United States Supreme Court was whether this law shields only those employed by a public company, or employees of privately held contractors and subcontractors such as investment advisers, law firms and accounting enterprises who perform work for public companies, as well. The high court ruled: “We hold, based on the text of § 1514A, the mischief to which Congress was responding that the provision shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors.” (*Lawson v. FMR, LLC* (U.S. Sup. Ct.; March 4, 2014) 134 S.Ct. 1158, [188 L.Ed.2d 158].)

**No Equitable Tolling.** When a parent abducts a child and flees to another country, the Hague Convention requires that country to return the child immediately if the parent requests return of the child within one year. In this case, the mother and child disappeared from the United Kingdom in 2008, and the father did not locate them in New York until 2010, when he filed his action for return of the child. The United States Supreme Court held no equitable tolling to the one-year statute of limitations. (*Lozano v. Alvarez* (U.S. Sup. Ct.; March 5, 2014.) 134 S.Ct. 1224, [188 L.Ed.2d 200].)

**Jury Properly Instructed Prison Dentist’s Care May Be Considered In The Context Of Available Resources.** As soon as plaintiff arrived in prison, he sought dental care, complaining he had cavities and his gums were bleeding. He saw a dentist twice during the year, but was dissatisfied with the care he received and filed an action under 42 U.S.C. § 1983 for money damages against the prison dentist and others, claiming his rights under the Eighth Amendment were violated. The federal trial judge dismissed most of the defendants and a jury found in favor of the dentist, so the prisoner appealed, contending the jury was improperly instructed. The court had instructed the jury that “whether a dentist or

doctor met his duties to Plaintiff under the Eighth Amendment must be considered in the context of the personnel, financial, and other resources available to him or her or which he or she could reasonably obtain.” Noting there was plenty of evidence to support a finding that a lack of resources prevented the dentist from cleaning the prisoner’s teeth sooner, and that it was up to the jury to decide whether the dentist was deliberately indifferent in failing to put plaintiff on the emergency list, the Ninth Circuit concluded the district court did not abuse its discretion. The judgment was affirmed. (*Peralta v. Dillard* (Ninth Cir.; March 6, 2014) 744 F.3d 1076.)

**Although Outdated, Information Provided By Seller’s Broker Was Not Inaccurate.** The seller’s broker posted the following about a commercial parcel: “This parcel is in an earthquake study zone but has had a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist. Report available for serious buyers.” The report, however, was prepared in 1982, and it was posted in 2006 when buyer bid on the property and seller accepted. After the close of the transaction, when buyer began to try to develop the property, he discovered that the County of Riverside did not agree that the property was “ready to build” because the process of investigating fault hazards changed after the 1994 Northridge earthquake. In the end, the buyer could not feasibly move forward with his plans for building commercial property. The buyer brought an action against his own broker, the seller and the seller’s broker. The trial court found liability only on the part of the seller’s broker. In affirming, the appellate court stated: “Absent anything untrue or inaccurate about the statement seller’s broker actually made

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in the MLS [Multiple Listing Service], and absent damage to buyer from such falsity or inaccuracy, seller's broker is not liable under [*Civil Code*] section 1088." (*Saffie v. Schmeling* (Cal. App. Fourth Dist., Div. 2; March 7, 2014.) 224 Cal.App.4th 563, [168 Cal.Rptr.3d 766].)

### I ♥ Boobies Bracelets Not Lewd.

Middle school kids wore bracelets to school that said, "I ♥ boobies (KEEP A BREAST)" as part of a nationally recognized breast cancer awareness campaign. The school district banned the bracelets, relying on *Bethel School District No. 403 v. Fraser* (1986) 478 U.S. 675, [106 S.Ct. 3159, 92 L.Ed.2d 549], which held that a school district had authority to sanction a student for use of offensively lewd and indecent speech. A federal action was filed, and the district court issued a preliminary injunction. In the school district's appeal, the federal appeals court held that a school district could not restrict speech that could plausibly be interpreted as commenting on any political or social issue, and that the bracelets were not plainly lewd. The United States Supreme Court declined to take the case. (*Easton Area School District v. B.H.* (U.S. Sup. Ct.; March 10, 2014) (cert. denied) 134 S.Ct. 1515; [188 L.Ed.2d 450]; (prior case) *B.H. v. Easton Area School District* (2013) 725 F.3d 293.)

### Nonsignatory Beneficiary Of A Trust Cannot Be Compelled To Arbitration.

Plaintiff, a beneficiary of a trust which was amended to her detriment shortly before her mother's death, brought an action for financial elder abuse. The issue is whether an arbitration clause in a trust document can bind a nonsignatory beneficiary. The trial court denied a petition to compel arbitration. Noting that plaintiff beneficiary "has not either expressly or implicitly sought the benefits of a trust instrument containing the disputed arbitration provision," the appellate court affirmed. (*McArthur v. McArthur* (Cal. App. First Dist., Div. 5; March 11, 2014) 224 Cal. App.4th 651, [168 Cal.Rptr.3d 785].)

### Death Row Inmate Wants D.A.'S Records.

A prisoner sentenced to death seeks various records from the district attorney under the California Public Records Act [CPRA; *Government Code* section 6250] to assist in investigating

whether the district attorney impermissibly sought the death penalty based on the race of the defendant, the victim, or both. In ordering the records produced, the appellate court stated: "We conclude the public's interest in the fair administration of the death penalty is a longstanding concern in California, and it is inconceivable to us that any countervailing interest that the District Attorney could assert outweighs the magnitude of the public's interest." (*Weaver v. Sup. Ct. (The District Attorney's Office of San Diego)* (Cal. App. Fourth Dist., Div. 1; March 12, 2014) 224 Cal.App.4th 746, [168 Cal. Rptr.3d 864].)

### Information Sought In Discovery Involves Litigation Strategy.

The setting is a discovery dispute in a construction defect action. The trial court overruled the homeowner's association's claim of attorney-client privilege regarding efforts to depose individual homeowners regarding disclosures made at informational meetings about the litigation. The appellate court granted the association's petition for writ of mandate, stating: "To the extent this record reveals anything about the purpose of the requested discovery, it shows that counsel for Defendants is seeking to develop information about the litigation strategy of the Association's counsel, including the legal opinions formed and the advice given by the lawyers in the course of that relationship, and such disclosures would not likely lead to the discovery of admissible evidence." (*Seahaus La Jolla Owners Association v. Sup. Ct. (La Jolla View LTD., LLC)* (Cal. App. Fourth Dist., Div. 1; March 12, 2014) 224 Cal.App.4th 754, [169 Cal.Rptr.3d 390].)

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