



# Litigation Update

Litigation Section News

June 2014

## Ninth Circuit Barred Removal Of Claim Against Employer.

Plaintiff brought a class action against his employer asking for civil penalties for failure to pay for overtime and provide for meal breaks and rest periods under California's Private Attorneys General Act of 2004 [*Labor Code* §§ 2698-2699.5; PAGA]. His employer removed the action to the federal district court. The Ninth Circuit was faced with the issue of whether the district court may exercise original jurisdiction over a PAGA action under the federal Class Action Fairness Act of 2005 [28 U.S.C. §§ 1332(d), 1453 & 1711-15; CAFA]. The Ninth Circuit determined the district court could not exercise jurisdiction over this removed PAGA claim under CAFA. (*Baumann v. Chase Investment Services Corporation* (Ninth Cir.; March 13, 2014) (Case No. 12-55644).

## Water Projects Halted; Southern And Central California Losing The Water Wars.

The Central Valley Project and the State Water Project "are perhaps the two largest and most important water projects in the United States. These combined projects supply water originating in northern California to more than 20,000,000 agricultural and domestic consumers in central and southern California." The source of the water is the lone habitat for the delta smelt, a threatened species under the Endangered Species Act [16 U.S.C. § 1531]. The United States Fish and Wildlife Service [FWS] prepared a report concluding that continued operations on these projects would jeopardize the smelt. Various water districts and agricultural consumers brought an action against various federal defendants to prevent them from acting on the FWS opinion. The district court invalidated the FWS opinion. The Ninth Circuit reversed, stating: "As the Supreme Court observed in *Tennessee Valley Authority v. Hill* (1978) 437 U.S. 153, [98 S.Ct. 2279, 57 L.Ed.2d 117]: 'It may

seem curious to some that the survival of a relatively small number of three-inch fish ... would require the permanent halting of a virtually completed dam,' but 'the explicit provisions of the Endangered Species Act require precisely that result.' Such species have been 'afforded the highest of priorities,' by Congress, even if it means 'the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds.' The law prohibits us from making 'such fine utilitarian calculations' to balance the smelt's interests against the interests of the citizens of California." (*San Luis & Delta-Mendota Water Authority v. Jewell* (Ninth Cir.; March 13, 2014) (Case No's. 11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660).)

## Another Water Issue; This One Involving Eminent Domain.

The State of California seeks to build a tunnel to transport water from the north to the south. Before condemning the land needed for the project, it desires to study the environmental and geological suitability of hundreds of properties on which the tunnel may be constructed. The question in this case is whether or not those precondemnation activities may themselves be a taking, and California has always required property to be directly condemned in a condemnation suit that provides the affected landowners with all of their constitutional protections against the exercise of eminent domain authority, including the determination by a jury of just compensation for the value of the property interest intentionally taken. Here, the State successfully petitioned the superior court for orders permitting it to enter the affected properties to conduct their studies, which effectively granted the State a one-year easement. But the superior court denied the State's request to conduct certain geologic studies. Both the State and the landowners petitioned for extraordinary relief. In granting relief to the landowners, the appellate court stated: "Em-

inent domain authority must be exercised in strict conformity to the constitutional protections and procedures that limit its operation. If a condemnor intends to take private property or intends to perform actions that will result in the acquisition of a property interest, permanent or temporary, large or small, it must directly condemn those interests, and pay for them, in a condemnation suit that provides the affected landowner with all of his constitutional protections against the state's authority. Based on that fundamental state constitutional doctrine, we affirm the trial court's order denying entry to conduct the geological activities, and

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we reverse the order granting entry to conduct the environmental activities. (*Property Reserve, Inc. v. Sup. Ct. (Department of Water Resources)* (Cal. App. Third Dist.; March 13, 2014) 224 Cal.App.4th 828, [168 Cal.Rptr.3d 869].)

**Red Light Camera Saga Continues.** *Vehicle Code* section 21455(b) requires a public announcement and a 30-day period of warning devices with respect to a camera that records a traffic violation. The issue in the present case, heard by the California Supreme Court, is whether the statute refers only to the first installation of a red light camera by a city, or also to each later installation of cameras. The high court concluded the statute's 30-day warning requirement applies each time such a camera is installed. (*People v. Gray* (Cal. Sup. Ct.; March 13, 2014) 58 Cal.4th 901, [319 P.3d 988, 168 Cal.Rptr.3d 710].)

**Non Opt-Out Provision In Class Action Violates Due Process.** The Americans with Disabilities Act [42 U.S.C. § 12132; ADA] and the Unruh Civil Rights Act [*Civil Code* section 51] require cities to make newly built and altered sidewalks readily accessible to individuals with disabilities. After the parties in this action agreed to certify a non opt-out class involving violations of California law and settle for an injunction and nominal damages, the trial court certified the class and approved the settlement. Meanwhile, other disabled persons sued the same city for similar violations in federal court, but also alleged violations under federal law. During the settlement hearing in the state court action, objections were raised regarding the inadequacy of the settlement as well as the non opt-out provision. The California Court of Appeal, in an appeal from the approval of the settlement in the state court action, reversed the orders granting class certification and approving the settlement, stating, "Strictly speaking, parties to an agreement cannot logically bind nonparties with a provision stating the parties agree the nonparty cannot deny the agreement. So the provision is of no effect absent some mechanism by which nonparties are made party to the agreement, i.e., an order certifying the class. The non opt-out provision is of no force absent such an order.

In that respect, then, the non opt-out class is best evaluated for whether certification was proper, not whether the settlement was fair." (*Carter v. City of Los Angeles* (Cal. App. Second Dist., Div. 1; March 13, 2014) 224 Cal.App.4th 808, [169 Cal.Rptr.3d 131].)

**Apportionment Of Fault In Product Liability Trial.** A vehicle traveling at a high rate of speed slammed into a line of vehicles stopped at an intersection, thus propelling a vehicle into the back of plaintiff's Nissan Frontier pickup truck. The force of the collision caused plaintiff's seatback to collapse and plaintiff to slide up the seat. Plaintiff's head struck her vehicle's back seat, and she suffered spinal injuries that rendered her a quadriplegic. Plaintiff brought an action for her injuries against various persons and entities including the only remaining defendants at trial, Ikeda Engineering Corporation (Ikeda), which participated in the design of her vehicle's seat, and Vintec Co. (Vintec), which manufactured her vehicle's seat. Plaintiff tried her strict products liability action to a jury on a consumer expectations design defect theory. The jury returned a verdict in plaintiff's favor in the amount of \$24,744,764, and found that defendants were 20 percent at fault for her injuries. After offsets for settlements with other defendants and an award of costs to plaintiff, the trial court entered judgment for plaintiff in the amount of \$4,606,926.68. The appellate court affirmed in part and reversed in part, stating: "Because Ikeda could not be held strictly liable for engineering services it provided and the trial court erred in barring defendants from apportioning fault for plaintiff's injuries to other manufacturers, we reverse the judgment and remand the matter for a retrial limited to the issue of apportionment of fault. The jury's finding of defendants' liability, except as to Ikeda, and its finding that plaintiff suffered damages of \$24,744,764 are affirmed and are not to be a part of the retrial." (*Romine v. Johnson Controls, Inc.* (Cal. App. Second Dist., Div. 5; March 17, 2014) 224 Cal.App.4th 990, [169 Cal.Rptr.3d 208].)

**Boris And Natasha Outdone.** The court's introduction says it all: "Defendant [] was charged with a number of drug offenses that exposed him to a maximum

of 11 years in state prison. How did defendant attempt to avoid those 11 years? By trying to kill the detective whose testimony was required to convict him, of course. None of the usual suspects such as Wile E. Coyote, Elmer Fudd or Yosemite Sam, not even Boris or Natasha, ever eclipsed what defendant did here. [¶] A jury convicted defendant of several drug offenses and four counts of attempted murder on Detective Charles Johnson. Defendant's efforts to kill the detective included attempting to fire a military rocket at the building where the detective worked, setting three boobytraps using panji boards and three more using zip guns. One of the zip gun boobytraps was attached to a fence gate and designed to shoot when the gate was opened. The other zip gun boobytraps were rigged underneath vehicles known to be driven by the detective. We publish this case because defendant's use of zip gun boobytraps requires us to decide whether his conduct qualifies as personal use of a firearm under *Penal Code* section 12022.53. We decide that setting a zip gun boobytrap so qualifies. [¶] In a way, defendant's attempts to kill the detective were successful. He no longer faced that 11 years. Instead, the court sentenced him to four consecutive life terms, plus an additional term of more than 40 years." (*The People v. Smit* (Cal. App. Fourth Dist., Div. 3; March 17, 2014) 224 Cal.App.4th 977, [169 Cal.Rptr.3d 199].)

**Trial Court Should Have Granted Domestic Violence Restraining Order.** Years after a domestic violence restraining order was granted during a divorce, the wife went back to court to request a permanent restraining order. The trial court concluded that "if nothing has happened in three years, I don't see how there is reasonable apprehensions," and relying on that comment as well as the holding in *Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, [10 Cal.Rptr.3d 387], the court denied the request. The appellate court reversed, noting that *Family Code* section 6345(a) expressly states that the restraining order "may be renewed upon the request of a party either for five years or permanently, without a showing of any further abuse since the issuance of the original order." The appellate court also stated: "Ritchie did not hold that a reasonable fear

of physical abuse was required. More importantly [*Family Code*] sections 6203 and 6320 do not limit the definition of abuse to physical injury.” (*Eneaji v. Ubboe* (Cal. App. Second Dist., Div. 7; March 18, 2014) 224 Cal.App.4th 1069, [169 Cal.Rptr.3d 106].)

### **Mandatory Relief Denied To Plaintiff Whose Attorney Had Cancer, Missed The Trial And Later Died.**

Plaintiff’s lawyer was properly notified of the trial date, but miscalendared the date, and on the date of the trial, the court granted a judgment of \$0 to the appearing defendant. Plaintiff’s counsel thereafter moved, pursuant to *Code of Civil Procedure* section 473(b), to set aside the judgment. The motion included a declaration explaining how the mistake was made and that he had “serious chronic health problems” and had lost his secretary. Due to the effects of recent chemotherapy, plaintiff’s counsel was unable to appear at the hearing on the motion. Plaintiff’s counsel later died of cancer. The trial court denied the motion. Plaintiff retained new counsel and filed an appeal. In affirming the denial of mandatory relief, the appellate court noted: “The record does not indicate the trial court granted judgment for defendant, let alone a dismissal, simply because plaintiffs failed to appear for trial. The trial court considered the ‘entire file’” before entering judgment for defendant. Nonetheless, the appellate court reversed because the

trial court did not consider whether or not plaintiff is entitled to the discretionary relief permitted under the statute. Perhaps revealing what the appellate court really thought about the situation, plaintiff was awarded costs on appeal. (*Noceti v. Whorton* (Cal. App. Third Dist.; March 18, 2014) 224 Cal.App.4th 1062, [169 Cal.Rptr.3d 251].)

### **Certain Fire Department Employees Entitled To Standard Overtime.**

Because of a statutory exemption in the Fair Labor Standards Act [29 U.S.C. § 207(a); FLSA], Los Angeles firefighters do not receive overtime pay for work over 40 hours in a workweek, but only after working 212 hours in a 28 day period. Certain dispatchers and helicopter paramedics contend they are entitled to standard overtime pay. The Ninth Circuit held: “Because Plaintiffs do not qualify as ‘employees engaged in fire protection’ as defined by § 203 (y0, 207(k)’s exemption does not apply =to dispatchers and aeromedical technicians. Because the City acted in willful violation of the law, we AFFIRM the district court’s findings that a three-year statute of limitations applies and liquidated damages are proper. And because the statutory language of section 207(h), as well as persuasive authorities, supports a workweek-by-workweek offset, we AFFIRM the district court’s holding that this method of calculation must be used.” (*Haro v. City of Los Angeles* (Ninth Cir.; March 18, 2014) 745 F.3d 1249.)

### **Ninth Circuit Reversed, Based On Longstanding Copyright Practices.**

Plaintiff, a stock photography agency, registered large numbers of photographs at a time. Plaintiff licensed a publishing company to use pictures it had registered, and brought an action against the publishing company based on the payment of inadequate fees. The district court dismissed the claims on the ground that the registrations of the photographs with the Register of Copyrights were contrary to a statutory requirement of titles and authors. The Ninth Circuit framed the issue as “whether the Register could prescribe a form and grant certificates extending registration to the individual photographs at issue where the names of each of the photographers were not provided, and titles for each of the photographs were not provided,

on the applications.” The appeals court noted that one can own a copyright without registering, as registration is permissive and not mandatory. The court stated: “Though an owner has property rights without registration, he needs to register the copyright to sue for infringement.” In reversing the district court’s dismissal, the Ninth Circuit stated: “The stock agencies through their trade association worked out what they should do to register images with the Register of Copyrights, the Copyright Office established a clear procedure and the stock agencies followed it. The Copyright Office has maintained its procedure for three decades, spanning multiple administrations. The livelihoods of photographers and stock agencies have long been founded on their compliance with the Register’s reasonable interpretation of the statute. Their reliance upon a reasonable and longstanding interpretation should be honored. Denying the fruits of reliance by citizens on a longstanding administrative practice reasonably construing a statute is unjust.” (*Alaska Stock, LLC v. Houghton Mifflin Harcourt Publishing Company* (Ninth Cir.; March 18, 2014) 747 F.3d 673.)

### **If You Want To Sue Under A Contract, It Would Be Wise To Perform Under It Yourself.**

This case involves “mixed use” property, or property improved for both residential and commercial buildings. Plaintiff is the seller, who sued the buyer for breach of a real estate purchase agreement. The trial court granted summary judgment in favor of the buyer because the seller, as a matter of law, was required to deliver a Transfer Disclosure Statement [TDS], and did not do so here. The appellate court affirmed, stating the seller “failed to demonstrate his own performance under the purchase agreement and [the buyer] was entitled to summary judgment.” (*Richman v. Hartley* (Cal. App. Second Dist., Div. 6; March 20, 2014) 224 Cal.App.4th 1182, [169 Cal.Rptr.3d 475].)

### **Statute Of Limitations In Employment Application Does Not Override FEHA Or Common Law That Otherwise Provides.**

Plaintiff brought an action against her former employer alleging claims under the Fair Employment and Hous-

### **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)).

ing Act [*Government Code* section 12900; FEHA] and two nonstatutory claims. The employer moved for judgment on the pleadings based on plaintiff's signed application for employment where she agreed that "any claim or lawsuit . . . must be filed no more than six (6) months after the date of the employment action." The trial court granted the motion and dismissed plaintiff's complaint. Finding the shortened limitations period would be against public policy, the appellate court reversed. (*Ellis v. U.S. Security Associates* (Cal. App. First Dist., Div. 2; March 20, 2014) 224 Cal.App.4th 1213, [169 Cal.Rptr.3d 752].)

**Litigation Privilege Protects Lab From Erroneous Paternity Results.** A laboratory conducted DNA paternity testing for a county as part of a paternity proceeding in superior court against a man who is a plaintiff in the instant civil action for negligence against the lab. The results were wrong, and unknown to the family for years. The superior court dismissed the lawsuit against the lab in a motion for summary judgment. Based upon the litigation privilege found in *Civil Code* section 47(b), the Court of Appeal affirmed. (*Falcon v. Long Beach Genetics, Inc.* (Cal. App. Fourth Dist., Div. 1; March 21, 2014) 224 Cal.App.4th 1263, [169 Cal. Rptr.3d 497].)

**Component Parts Doctrine.** In the underlying action, plaintiffs, husband and wife, asserted claims against defendants for injuries to husband allegedly resulting from his decades-long work as a mold maker and machine operator at a foundry. While employed, the husband worked with and around metals, plaster and minerals supplied by defendants. Plaintiffs' complaint for negligence, negligence per se, strict liability, and loss of consortium was dismissed after the trial court sustained defendants' demurrer without leave to amend on the ground that they failed under the component parts doctrine, as applied in *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, [136 Cal.Rptr.3d 630]. In *Maxton*, the appellate court found that some of the plaintiff's claims failed solely because his employer, who had bought many types of metal over a lengthy period, was necessarily a sophisticated purchaser, and defendants in the instant matter argued

that because the FAC alleges that the husband's employer had operated a foundry for a lengthy period, it must be regarded, as a matter of law, as a sophisticated purchaser. The appellate court reversed, stating: "With the exception of [plaintiffs'] claim for negligence per se, we conclude that the complaint states viable claims, and we respectfully disagree with the holding in *Maxton*. As we explain, the component parts doctrine does not shield a product supplier from liability when a party alleges that he suffered direct injury from using the supplier's product as the supplier specifically intended. We therefore affirm in part, reverse in part, and remand with directions to the trial court to enter a new order overruling [defendants'] demurrers to [plaintiffs'] claims, with the exception of the claim for negligence per se." (*Ramos v. Brenntag Specialties, Inc.* (Cal. App. Second Dist., Div. 4; March 21, 2014) 224 Cal.App.4th 1239, [169 Cal.Rptr.3d 513].)

**Government Runaround?** Petitioner, an American citizen who was born in Iran, was subjected to lengthy stops at the border when coming into the USA. He wrote a letter to the Department of Homeland Security [DHS] asking whether or not his name appears on a government terrorist watchlist, and how he can have it removed if his name is on such a list. In response, DHS stated it researched and reviewed the case, but it did not state petitioner's watchlist status and did not explain why he had been subjected to additional screenings at the border. The DHS letter did tell him that its conclusions were "reviewable by the United States Court of Appeals under 49 U.S.C. § 46110." But when petitioner filed a petition in the Ninth Circuit, that court stated: "We conclude that we lack jurisdiction over [petitioner's] claims and transfer this case to the United States District Court for the Central District of California for further proceedings." (*Arjmand v. U.S. Department of Homeland Security* (Ninth Cir.; March 24, 2014) 745 F.3d 1300.)

**Two Issues: Substantial Factor Analysis In Product Case And Whether There Should Be A Setoff Due To Potential For Future Settlements.** Plaintiffs' decedent died from mesothelioma caused by asbestos exposure. After trial,

a jury found defendant was ten percent (10%) responsible for plaintiffs' damages. On appeal, defendant argued: (1) plaintiffs failed to introduce expert testimony that defendant's asbestos *alone* (as opposed to acting in combination with others' asbestos) constituted a substantial factor in the development of decedent's mesothelioma; and (2) the trial court erred in not reducing the damages awarded against it to account for settlements plaintiffs *could* obtain from other potentially liable parties' bankruptcy trusts. The appellate court affirmed. Regarding the causation issue, the court said "the jury had a sufficient basis on which to conclude that decedent's exposure to [defendant's] asbestos products constituted a substantial factor in increasing his risk of mesothelioma." Regarding the potential for settling with bankrupt defendants and possible setoffs, the court said: "If a *later* settlement *subsequently* allows plaintiffs a double recovery, that does not retroactively make the instant judgment improper." (*Paulus v. Crane Co.* (Cal. App. Second Dist., Div. 3; March 24, 2014) 224 Cal.App.4th 1357, [169 Cal.Rptr.3d 373].)

**Kids Burning Bridges Behind Them.** After admitting he smoked marijuana shortly before coming to school, a student was transferred to a continuation high school during his senior year. He sought a writ of administrative mandate in the superior court, which the court denied. On appeal, he contended *Education Code* section 48432.5 demands reasonable exhaustion of all other means of correction before a student can be involuntarily transferred to a continuation school because such a transfer affects a fundamental vested right. Accordingly he argued the superior court should have exercised its independent judgment and not reviewed the matter for substantial evidence. The appellate court concluded the superior court properly reviewed the matter for substantial evidence. (*Nathan G. v. Clovis Unified School District* (Cal. App. Fifth Dist.; March 25, 2014) 224 Cal.App.4th 1393, [169 Cal.Rptr.3d 588].)

**Unfair Competition Action Decided By U.S. Supreme Court.** Plaintiff sells the only style of toner cartridges that work with the company's laser printers, but 'remanufacturers' acquire and refurbish used plaintiff's cartridges to

sell in competition. Thus, plaintiff gives its customers a discount on new cartridges if they agree to return empty cartridges to plaintiff. Each cartridge has a microchip that disables the empty cartridge unless plaintiff replaces the chip. Defendant developed a microchip that mimicked plaintiff's. So, in the good old American spirit, the parties sued each other. Plaintiff sued defendant for copyright infringement, and defendant sued plaintiff under the Lanham Act for false advertising which resulted in defendant losing sales and damage to its business reputation.

The purpose of the Lanham Act [15 U.S.C. § 1125(a)(1)(A)&(B)] includes "protect[ing] persons engaged in [commerce within the control of Congress] against unfair competition." At common law, unfair competition was understood to be concerned with injuries to business reputation and present and future sales, so under the Act, "a plaintiff must allege an injury to a commercial interest in reputation or sales."

The federal district court held that defendant lacked standing to bring a claim under the Act, and the circuit court of appeals reversed. The U.S. Supreme Court held that defendant adequately pleaded the elements of a Lanham Act cause of action for false advertising, stating: "The District Court emphasized that [plaintiff] and [defendant] are not direct competitors. But when a party claims reputational injury from disparagement, competition is not required for proximate cause; and that is true even if the [ ] aim was to harm its immediate competitors, and [a party] merely suffered collateral damage. Consider two rival carmakers who purchase airbags for their cars from different third-party manufacturers. If the first carmaker, hoping to divert sales from the second, falsely proclaims that the airbags used by the second carmaker are defective, both the second carmaker and its airbag supplier may suffer reputational injury, and their sales may decline as a result. In those circumstances, there is no reason to regard either party's injury as derivative of the others; each is directly and independently harmed by the attack on its merchandise." (*Lexmark Intern., Inc. v. Static Control Components, Inc.* (U.S. Sup. Ct.; March 25, 2014) 134 S.Ct. 1377, [188 L.Ed.2d 392].)

**Plaintiff Not Permitted To Voluntarily Dismiss To Avoid Adverse Decision.** Plaintiff's opposition to a demurrer was filed late, and the court gave plaintiff two choices: (1) the court would strike the opposition and go ahead with the hearing; or (2) the court could continue the hearing and order plaintiff to pay any costs incurred as a result of the continuance plus attorney fees and have counsel come back next time with a declaration as to fees. Instead, all defense counsel agreed to read the late opposition and that the court could hear the matter later that morning. However, plaintiff told the court: "I was wondering if it wouldn't be just wise to go ahead and dismiss this without prejudice and then refile with possibly an attorney to work on this for me." The court went ahead and heard the demurrer, and sustained it without leave to amend. Plaintiff's sole contention on appeal is that the trial court erred in denying his oral request at the hearing on the demurrer to voluntarily dismiss his case without prejudice pursuant to *Code of Civil Procedure* section 581. Noting that a plaintiff may not file a voluntary dismissal in order to avoid an impending adverse decision, the appellate court affirmed. (*Pielstick v. Midfirst Bank* (Cal. App. Second Dist., Div. 2; March 26, 2014) 224 Cal.App.4th 1452, [169 Cal. Rptr.3d 642].)

**Two Issues Decided: 1) 'Sophisticated User' Doctrine Not A Complete Defense To Plaintiff's Failure To Warn Claim; 2) Punitive Damages Issue To Go To Jury.** Plaintiff developed mesothelioma after being exposed to asbestos from brake and clutch repairs while operating services stations for 40 years. He brought an action against multiple defendants, alleging several causes of action. The matter proceeded to trial against Ford Motor Company only. A jury rendered a plaintiff's verdict on negligence and product liability claims, and the trial court denied Ford's JNOV. On appeal, Ford argued plaintiff was a "sophisticated user" and its JNOV should have been granted. On that issue, the appellate court affirmed, stating: "We conclude the sophisticated user doctrine did not constitute a complete defense to plaintiff's failure to warn claims because Ford failed to prove

the risks of automotive asbestos exposure should have been known by mechanics in the 1960's and early 1970's, when [plaintiff] began his career."

Plaintiff cross-appealed because the trial court effectively struck his demand for punitive damages, finding Michigan law, which does not permit punitive damages unless specifically authorized by statute, applied in this case. The appellate court reversed on that issue and remanded the matter to the trial court on the issue of punitive damages, stating: "Applying California's 'governmental interest' conflict of laws analysis, we conclude Michigan courts have no interest in seeing the application of this principle in the courts of California, which apply a contrary principle in allowing punitive damages." (*Scott v. Ford Motor Company* (Cal. App. First Dist., Div. 1; March 26, 2014) (As mod. April 23, 2014) 224 Cal. App.4th 1492, [169 Cal.Rptr.3d 823].)

**Same Gender Sexual Harassment.** Plaintiff, a heterosexual man, worked for a city, and filed an employment action, contending he was sexually harassed by two of his male supervisors and then retaliated against when he complained about the harassment. The trial court granted summary judgment in favor of the two supervisors and later granted the city's motion for judgment on the pleadings. Plain-

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tiff's retaliation claim proceeded to trial, and plaintiff testified about some extremely gross conduct and language on the part of one of the supervisors, and it was argued there was a course of conduct that supervisor was pursuing a romantic relationship with him. On plaintiff's retaliation claim, a jury returned a special verdict finding the city engaged in conduct that materially and adversely affected the terms and conditions of plaintiff's employment but the city's conduct did not cause plaintiff's harm. The court entered judgment in favor of all defendants. With regard to the two supervisors, the appellate court reversed the grant of summary judgment on one and affirmed the other, stating: "Under both Title VII and FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination because of sex." With regard to plaintiff's retaliation claim, the appellate court reversed for reasons which included error in the exclusion of evidence. (*Lewis v. City of Benicia* (Cal. App. First Dist., Div. 1; March 26, 2014) 224 Cal.App.4th 1519, [169 Cal.Rptr.3d 794].)

### **Diversity Issue: A National Bank Is Located Where Its Main Office Is.**

Plaintiffs, citizens of California, filed an action against a bank in the California superior court. The bank's main office is in South Dakota and its principal place of business is in California. The bank removed the action to a federal district court, asserting subject matter jurisdiction on the basis of federal questions and diversity of citizenship. Following an order to show cause why the case should not be remanded to state court for lack of diversity jurisdiction, the district court held that national banks are citizens of the state where their principal place of business is located as well as of the state where their main office is located as designated in their articles of association. The district court remanded the case back to the California superior court. Under 28 U.S.C. § 1348, national banking associations are "citizens of the States in which they are respectively located." The Ninth Circuit reversed, stating: "We conclude that under § 1348, a national bank is 'located' only in the state designated as its main office." (*Rouse v. Wachovia Mortgage, FSB* (Ninth Circuit; March 27, 2014) 747 F.3d 707.)

**Access To Emails Of Public Officials & Employees On Their Private Accounts.** A man asserted a right to inspect specified written communications, including email and text messages, sent to or received by public official and employees on their private electronic devices using their private accounts. The appellate court said the issue is whether those private communications, which are not stored on City servers and are not directly accessible by the City, are nonetheless "public records" within the meaning of the California Public Records Act [CPRA; *Government Code* section 6250], and concluded: "We conclude that the Act does not require public access to communications between public officials using exclusively private cell phones or email accounts." (*City of San Jose v. Sup. Ct. (Ted Smith)* (Cal. App. Sixth Dist.; March 27, 2014) (As mod. April 10 and 18, 2014) 225 Cal.App.4th 75, [169 Cal.Rptr.3d 840].)

### **eBay's Bidding System Does Not Violate California's Unfair Competition Laws.**

Plaintiff filed a class action against eBay, alleging violation of California's unfair competition laws and intentional interference with prospective business advantage. The federal district court dismissed the case. eBay uses an auction system whereby the bidder submits the maximum amount he is willing to pay and eBay's software enters bids on behalf of the bidder at predetermined increments above the current bid, until the user wins the auction or would need to exceed his maximum. Plaintiff contended eBay's automatic bidding system violates two provisions in eBay's User Agreement. With regard to the first user provision ["We are not involved in the actual transaction between buyers and sellers.,"], the Ninth Circuit stated: "We conclude that the provision can be plausibly read only as a general description of eBay's services intended to focus the user on the Limitation of Liability section." As to the second user provision at issue ["No agency, partnership, joint venture, employee-employer or franchiser franchisee relationship is intended or created by this agreement.,"], the Ninth Circuit stated the statement is not part of the User Agreement, and, therefore, not made in the contractual context. Dismissal was affirmed. (*Block v. eBay* (Ninth Cir.; April 1, 2014) 747 F.3d 1135.)

### **Everyone's Worst Nightmare.**

Survivors of a woman brought an action contending their wife and mother's remains were disfigured. In two causes of action, plaintiffs alleged decedent was prematurely declared dead, after which she was placed in a compartment in the hospital morgue while still alive, and that the disfigurement to her face happened while trying to escape until she ultimately froze to death. A third cause of action was styled as negligence and based on the factual premise that after the decedent died from cardiac arrest, her body was mishandled by hospital staff when placing it in the morgue. The trial court sustained defendants' demurrers to all causes of action without leave to amend, analyzing the action was untimely since it was filed more than a year after plaintiffs learned of decedent's death and disfiguring injuries to her face. In affirming with regard to the cause of action for mishandling the body after death, the appellate court stated: "Because the present action was filed more than one year after plaintiffs knew or reasonably suspected their injury, the negligence claim is barred." However, with regard to the two causes of action involving the factual scenario that decedent was still alive when she was sent to the morgue, the appellate court stated: "The facts alleged do not permit the conclusion, as a matter of law, that a reasonable investigation of all potential causes of the injury plaintiffs suspected at the time of decedent's death would have uncovered the factual basis for the negligence and wrongful death claims [within one year,] . . . and we reverse the orders dismissing those claims." (*Arroyo v. Plosay* (Cal. App. Second Dist., Div. 4; April 2, 2014) 225 Cal. App.4th 279, [170 Cal.Rptr.3d 125].)

### **Insureds Sue Insurance Adjuster For IIED And Misrepresentation.**

Insured husband and wife reported damage to their home after a 41-foot long, 7,300 pound tree limb crashed into it. As alleged, the behavior the adjuster displayed "can best be described as appalling." He altered the scene prior to taking photos of the damage, spoke derogatorily to the insureds, misrepresented the coverage and ordered them to clean up the mess, telling them clean-up was not covered. In following his orders, one of the insured was injured by broken glass. The insureds

also allege the adjuster conspired with an unlicensed contractor to create a false report. They brought an action against both the insurer and the adjuster, and the trial court sustained the defendants' demurrer without leave to amend. The appellate court reversed, holding "misrepresentation can be asserted against an insurance adjuster, and that such claim was adequately pleaded here. We also hold that the intentional infliction of emotional distress claim was not adequately pleaded, but that the trial court abused its discretion in denying leave to amend." (*Bock v. Hansen* (Cal. App. First Dist., Div. 2; April 2, 2014) 225 Cal. App.4th 215, [170 Cal.Rptr.3d 293].)

**Wings Of Frequent Flyer Clipped.** An airline's frequent flyer program contained a provision stating that an abuse of the program may result in cancellation of the member's account. After the airline cancelled a member's account, the member brought a class action alleging breach of the implied covenant of good faith and fair dealing. The United States Supreme Court held the Airline Deregulation Act of 1978 [49 U.S.C. § 41713] preempts plaintiff's state law claim. (*Northwest, Inc. v. Ginsberg* (U.S. Sup. Ct.; April 2, 2014) 134 S.Ct. 1422, [188 L.Ed.2d 538].)

**But The Sky's The Limit For Political Contributions.** In the Federal Election Campaign Act of 1971 [FECA; 2 U.S.C. § 441a], Congress imposed two types of limits on campaign contributions: base limits restrict how much money a donor may contribute to a particular candidate and aggregate limits restrict how much money a donor may contribute in total to all candidates or committees. Here, in the 2011-2012 election cycle, the appellant contributed to 16 different federal candidates, complying with the base

limits for each, and in his petition alleges the aggregate limits prevented him from contributing to 12 additional candidates. The United States Supreme Court concluded that the aggregate limits are invalid under the First Amendment. (*McCutcheon v. Federal Election Commission* (U.S. Sup. Ct.; April 2, 2014) 134 S.Ct. 1434, [188 L.Ed.2d 468].)

**Grant Of Summary Judgment Reversed Because Trial Court Erred In Not Admitting Plaintiff's Causation Testimony.** Plaintiff was treated with the drug Zometa for several months after a diagnosis of breast cancer and chemotherapy. She was thereafter treated for osteonecrosis of the jaw by two oral specialists. Following the dental treatment, plaintiff brought an action against the manufacturer of Zometa, and in that pursuit offered the testimony of an expert on the causal link between the treatment she received and her jaw condition. In ruling on defendant's motion for summary judgment, the district court, after finding plaintiff's expert testimony on causation to be irrelevant and unreliable, excluded the expert's causation testimony, and granted the motion. The Ninth Circuit reversed and remanded, stating: "[W]e have consistently recognized the difficulties in establishing certainty in the medical sciences;" and, "Given the difficulties in establishing a medical cause and effect relationship, 'causation can be proved even when we don't know precisely *how* the damage occurred, if there is sufficiently compelling proof that the agent must have caused the damage *somehow*.'" (*Messick v. Novartis Pharmaceuticals Corporation* (Ninth Cir.; April 4, 2014) 747 F.3d 1193.)

**Not-So-Brave New World We Live In!!** This is the situation: A woman, later the criminal defendant, apparently upset with another woman for being the successful bidder on a home defendant wanted to buy, impersonated the other woman, later the victim, by advertising online for sexual partners and "invited men who responded to the advertisement to appear at the victim's home unannounced to engage in 'freak show' sexual activity." A man responded to the ad with a nude frontal photo of himself and a message; "Hey I'm

25 and new to SD and I am looking for fun! I'm tall, attractive, fun, D&D free and I aim to please! I promise I'm a nice guy and not a weirdo or pervert (at least not the bad kind). I want to spoil a lucky lady with massages, making out, lots of oral, and some great sex! I got a nice tool, and I can use it very well!" The defendant wrote back, attaching a photo of the victim, and told the man to stop by "any Monday-Friday 9am-3pm." The man's return message is far too gross to include here. A second man also responded to the ad and was also told to stop by during the same times. In a later message, the defendant made some very gross statements to the second man. The second man went to the victim's home but the gate was locked. Defendant was charged with soliciting forcible rape and forcible sodomy, and the magistrate dismissed the charges. The appellate court reversed, stating; "Here, the requisite strong suspicion [defendant] intended sexual activity to be forcible is supplied by evidence [defendant] encouraged the men to surprise the victim, led them to believe the victim would be prepared to engage in 'freak show' sexual activity with them immediately upon arrival, and led them to believe the victim would be pleased if they were in the same state." (*The People v. Rowe* (Cal. App. Fourth Dist., Div. 1; April 4, 2014) 225 Cal.App.4th 310, [170 Cal. Rptr.3d 180].)

**Denial Of Arbitration In Class Action.** Plaintiff brought a class action lawsuit against DIRECTV. The trial judge denied defendant's petition to compel arbitration. The relevant arbitration provision is contained in section 9 of DIRECTV's 2007 customer agreement. Section 9 provides that "any legal or equitable claim relating to this Agreement, any addendum, or your Service" will first be addressed through an informal process and, if the claim is not resolved informally, then "any Claim either of us asserts will be resolved only by binding arbitration" under JAMS rules. Under the heading "Special Rules," section 9 of the agreement provides as follows: "Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS

### State Bar Section Rebates

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Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.” Section 10 of the 2007 customer agreement contains provisions addressing several miscellaneous matters, including the following provision concerning “Applicable Law”: “The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.” In affirming, the appellate court stated: “To summarize: Section 9 of the 2007 customer agreement provides that ‘if . . . the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.’ The class action waiver is unenforceable under California law, so the entire arbitration agreement is unenforceable. The superior court therefore properly denied the motion to compel arbitration.” (*Imburgia v. DIRECTV, Inc.* (Cal. App. Second Dist., Div. 1; April 7, 2014) 225 Cal.App.4th 338, [170 Cal.Rptr.3d 190].)

### **“A Nation Of Sheep Will Beget A Government Of Wolves,” Edward R. Murrow.**

A superior court refused to provide prompt access to newly filed unlimited civil complaints, making a news service wait days or weeks until the documents are fully processed. The news service brought an action for declaratory relief in federal court, and the trial judge declined to decide the matter because it implicates sensitive state interests. Noting the case presents an important First Amendment issue, the Ninth Circuit reversed, stating: “We conclude that the district court erred by abstaining and dismissing the action and, accordingly, reverse and remand.” (*Courthouse News Service v. Planet* (Ventura County Sup. Ct.) (Ninth Cir.; April 7, 2014) (750 F.3d 776).)

**County Failed To Prove Design Immunity.** A jury found plaintiff was injured as a result of a dangerous condition of public property, but also concluded

the county was immune based on design immunity and returned a defense verdict. On appeal, the court noted that design immunity is an affirmative defense that must be plead and proved, and that, while “numerous witnesses described the top-hat drain system and identified it as a standard system used in the county, the County introduced no evidence of a design or plan for the drain system.” The appellate court found that as a matter of law, there was insufficient evidence to support the jury’s finding of design immunity and reversed and remanded the matter for retrial. The appellate court also held the jury’s finding of a dangerous condition of public property is binding on retrial. (*Martinez v. County of Ventura* (Cal. App. Second Dist., Div. 6; April 8, 2014) 225 Cal.App.4th 364.)

### **After Three Appeals To Collect Breach Of Contract Judgment, Sureties Pay.**

Plaintiff obtained a judgment against defendants based upon breach of contract, and defendants appealed, obtaining a stay of execution by posting an undertaking. Later, they asked the appellate court to dismiss their appeal, but they failed to pay the judgment. Plaintiff made a motion in the trial court to enforce the undertaking, and the trial court entered judgment against the sureties. That time around, the sureties appealed and lost. Plaintiff then filed a motion for costs and attorney fees incurred in enforcing the judgment against the sureties. The trial court awarded costs, but denied fees. In the present appeal, the third one, the appellate court reversed the denial of fees and remanded the matter to award reasonable attorney fees. (*Rosen v. Legacyquest* (Cal. App. First Dist., Div. 1; April 8, 2014) 225 Cal.App.4th 375, [170 Cal.Rptr.3d 1].)

### **Attorney Fees: Is A Bird In The Hand Worth Two In The Bush?**

Creditor spent years trying to collect a judgment from a guarantor/debtor. Around the time the creditor started to see a light at the end of the tunnel, the debtor’s lawyer walked into the office of the creditor’s lawyer late on a Friday afternoon with a cashier’s check for almost \$13 million, covering the entire judgment as well as all accumulated interest. But the creditor felt it was also due almost \$3 million more for postjudgment attorney fees since it spent

that money to try to collect the judgment. What to do? The creditor did not present the check for payment until it filed a motion for attorney fees in the superior court. The trial court ruled the motion for postjudgment costs and fees was untimely and the creditor appealed. The appellate court stated: “To be timely, the motion must be made before the underlying judgment has been fully satisfied” in order “to avoid a situation where a judgment debtor has paid off the entirety of what he believes to be his obligation in the entire case, only to be confronted later with a motion for yet more fees.” The creditor argued, however, that a judgment paid with a check is not fully satisfied until the check is cashed, but the debtor argued the judgment was fully satisfied when the creditor accepted a cashier’s check. The appellate court discussed two California statutes, *Code of Civil Procedure* section 724.010, [“Where a money judgment is satisfied by payment to the judgment creditor by check or other form of noncash payment that is to be honored upon presentation by the judgment creditor for payment, the obligation of the judgment creditor to give or file an acknowledgement of satisfaction of judgment arises only when the check or other form of noncash payment has actually been honored upon presentation for payment.”] and *Commercial Code* section 3310 [“Unless otherwise agreed, if a certified check, cashier’s check, or teller’s check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment for the obligation.”] The appellate court affirmed the ruling of the trial court, stating: “When [the creditor] accepted the cashier’s check, which was subsequently honored, the effect was the same as if it had accepted cash.” With regard to what alternatives were available once the cashier’s check was tendered, the appellate court stated: “[H]ad [the creditor] rejected [debtor’s] payment with the intent to file a motion for postjudgment attorney fees before defendants returned with cash, no mischief would have been done on either side. [The creditor] could then have filed a timely motion for postjudgment costs, and interest on the judgment would have stopped accruing as defendant tendered full satisfaction of the outstanding judgment with accrued inter-

est.” (*Gray1 CPB, LLC v. SCC Acquisitions, Inc.* (Cal. App. Fourth Dist., Div. 3; April 9, 2014) 225 Cal.App.4th 410, [169 Cal. Rptr.3d 906].)

### **Seller’s Salesperson Has A Fiduciary Duty To Buyer In Real Estate Transaction.**

A broker represented both the buyer and the seller in a real property transaction through two different salespersons. A building permit lists the total square footage of a residence as 11,050 square feet, but the real estate listing stated the home “offers approximately 15,000 square feet of living areas.” Buyers made an offer and asked for verification of the square footage. When architectural plans were not available, the buyers requested a six-day extension to inspect the property. The sellers refused to grant the extension and cancelled the transaction. The salesperson who listed the property for the broker argued he had no fiduciary duty to the buyer, and the trial court granted his motion for nonsuit on that cause of action. The jury found that the salesperson who listed the property made a false representation to the buyer, but that the salesperson “honestly believed and had reasonable grounds for believing the representation was true when he made it,” and returned a defense verdict. The appellate court reversed, and remanded the matter for new trial after holding the seller’s salesperson had a fiduciary duty equivalent to the duty owed by the broker, stating: “When a broker is the dual agent of both the buyer and the seller in real property transaction, the salespersons acting under the broker have the same fiduciary duty to the buyer and the seller as the broker.” (*Horiike v. Coldwell Banker Residential Brokerage Company* (Cal. App. Second Dist., Div. 5; April 9, 2014) 225 Cal.App.4th 427, [169 Cal.Rptr.3d 891].)

### **Time For Appealing Issuance Of A Domestic Violence Restraining Order.**

In the midst of a divorce, the court ordered a domestic violence restraining order against the husband and in favor of the wife. Both the husband and his lawyer were in the courtroom when it was ordered. Neither the wife nor the court clerk served a document entitled “Notice of Entry” of the restraining order or a file stamped copy of the judgment,

showing the date of entry. Four months later, 119 days after the order was issued, the husband filed a notice of appeal from the order. The wife filed a motion to dismiss the appeal, contending it was untimely because it was not filed within 60 days. The appellate court denied the motion to dismiss the appeal, citing *California Rules of Court*, rule 8.104(a)(1), noting that neither the superior court clerk nor the wife served a file-stamped copy of the domestic violence restraining order in the manner required by the rules, and concluding the outside limit of 180 days applies. (*In Re: Marriage of Lin* (Cal. App. Fourth Dist., Div. 3; April 10, 2014) 225 Cal.App.4th 471, [170 Cal. Rptr.3d 34].)

### **Parents May Limit Court’s Jurisdiction In Adult Child Support Order, But They Didn’t Limit It Here.**

When a couple divorced in 2001, they reached an agreement to equally split the future college expenses for their three minor children. Eleven years later, their daughter began incurring significant expenses, but by then the [former] wife was disabled and had an income of less than \$23,000/year; whereas, the [former] husband’s income was over \$400,000. The trial court concluded it lacked jurisdiction to modify the judgment “because the marital settlement agreement did not refer to the obligation as ‘child support.’” The appellate court stated “the court’s jurisdiction to order adult child support under [*Family Code*] section 3587 derives entirely from the parents’ agreement to pay adult support and the statute grants the court limited authority ‘to make a support order to effectuate the agreement.’ Consistent with this grant of limited authority, in [*Family Code*] section 3651, the Legislature expressly made the court’s general authority to modify a support order ‘subject to’ 3587.” The appellate court concluded an order for adult child support pursuant to the parents’ agreement may be made non-modifiable by agreement as well to restrict the court’s jurisdiction, but, in this case, the parents did not limit the court’s jurisdiction to modify. The matter was reversed and remanded for the trial court to consider whether the agreement should be modified. (*Drescher v. Gross* (Cal. App. Second Dist., Div. 3; April 11, 2014) 225 Cal.App.4th 478, [169 Cal.Rptr.3d 918].)

### **Employer Says He Was Not An Employee And Doesn’t Pay Him, And Insurance Company Gets Off Because The Trial Court Said He Was An Employee.**

Appellant is one of two truck drivers paid a lump sum for a cross-country haul. While appellant was sleeping, the other driver was in a one-vehicle accident, and the truck company refused to pay the lump sum because he did not finish the trip. The company also informed him he was not eligible for worker’s compensation because he was not an employee. Appellant brought an action against the truck company for his injuries, and the company tendered the defense to its insurance company, the plaintiff and respondent in this appeal. The insurance company refused to defend and brought an action for declaratory relief, and the trial court granted the insurance company’s motion for summary judgment. The appellate court reversed, stating there are triable issues of fact whether appellant was an employee and whether he was eligible for worker’s compensation. (*Global Hawk Insurance Company v. Le* (Cal. App. First Dist., Div. 2; April 14, 2014) 225 Cal. App.4th 593, [170 Cal.Rptr.3d 403].)

### **Patient Authorization Not Required For Access To Prescription Database.**

The Medical Board of California issued investigative subpoenas in connection with the investigation of a doctor for prescribing excessive controlled substances. The investigator sent letters to five patients requesting release of their medical records, and the patients objected, so the doctor would not produce the requested information. The Board accessed a computerized database of controlled substance prescription records for both the doctor and the five patients, and thereafter filed a petition for an order compelling the doctor to comply with the subpoenas, using the computerized records to demonstrate good cause. The trial court granted the petition, limiting disclosure to records that “are relevant and material to the pending investigation.” On appeal, the doctor contended his patients’ privacy rights were violated when the Board accessed the computerized database. The appellate court affirmed the order, citing *Health and Safety Code* section 11150. (*Medical Board of California v.*

*Chiarottino* (Cal. App. First Dist., Div. 1; April 15, 2014) 225 Cal.App.4th 623, [170 Cal.Rptr.3d 540].)

## ADR Spotlight

### Developments in ADR Case Law

## US Supreme Court Ends Argentina's Long-Running Challenge to Investor Arbitration Award.

In *BG Group PLC v Republic of Argentina*, (U.S. Sup. Ct.; March 5, 2014) 134 S.Ct. 1198, [188 L.Ed.2d 220], (2014) the United States Supreme Court ended Argentina's decade-long challenge to an investment arbitration conducted under the UK-Argentina bilateral investment treaty that awarded \$185 million to BG Group after Argentina's 2001 determination to calculate tariffs in pesos rather than dollars. The question before the Court was when a treaty requires a precondition to arbitration, does a court or the arbitrator decide whether the precondition has been met where the treaty is silent on the allocation of jurisdiction. BG was the majority owner of MetroGas, a gas distributor created when the Republic of Argentina decided to privatize gas distribution in the early 90s. At the time, the Republic agreed that gas tariffs would be calculated in dollars. In 2001, the government, facing an economic crisis, decreed that tariffs would be calculated in pesos, which were then one-third the value of dollars. This decree prevented MetroGas from making a profit. BG, as majority owner of MetroGas, commenced arbitration against the Republic pursuant to the bilateral investment treaty between the United Kingdom and Argentina. The Republic objected to the arbitrators' jurisdiction because the treaty required that an arbitration could commence only if the dispute had not been resolved within eighteen months after the dispute was first submitted to a court of competent jurisdiction in Argentina, and BG had never filed in court. The arbitrators ruled that Argentina had waived the precondition because the President of Argentina had issued a decree staying for 180 days the execution of any of its courts' final judgments in suits claiming harm as a result of the new financial measures. The arbitrators then issued an \$185 million award in favor of BG. The District Court confirmed the award, but it was reversed by the District of Columbia

Circuit. The Supreme Court reversed. The Court noted that when ordinary contracts are at issue, the courts presume that the parties, absent a clear delegation clause, intend that courts, not arbitrators, decide disputes about arbitrability. These include questions such as whether parties are bound by a given arbitration clause or whether an arbitration clause applies to a particular type of controversy. On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular preconditions for the use of arbitration. These procedural matters include claims of waiver, delay, or like defenses to arbitrability and they also include prerequisites such as time limits, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate. The Court concluded that the provision in the UK-Argentina bilateral investment treaty is of the procedural variety. It determines when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all. The fact that the arbitration clause was found in a treaty did not change this analysis. A treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent.

## Navigating the Rough Seas: When the FAA Meets the CAA

On July 22, 2014 at noon, the Litigation Section, ADR Subcommittee will present a one-hour CLE approved Webinar about how to navigate between the Federal Arbitration Act and the California Arbitration Act. This Webinar is a must for attorneys who practice in arbitration or draft contracts that include arbitration agreements. Even though the FAA preempts state law that is inconsistent with its pro-arbitration purposes, there are procedural choices parties can make when drafting arbitration agreements that can, for example, determine whether the court will have discretion when deciding whether to refer a matter to arbitration, to first decide non-arbitrable claims, or to consolidate arbitrable and non-arbitrable claims in court. By selecting application of the FAA or CAA procedural rules, the parties also can decide whether the grounds for appeal of an arbitration award will extend beyond those available under

the FAA or whether a party will have the absolute right to disqualify an appointed arbitrator. This Webinar will also address how to effectively draft an arbitration agreement to make clear that the procedural aspects of the FAA or the CAA apply. [To sign up for this important Webinar Click Here.](#)

## 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) and **Don Fischer** (donald.fischer@fresno.edu).

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

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