



Litigation Update

Litigation Section News

July 2014

From The Halls Of Montezuma To A Class At Middle School.

Two months before the United States Marine Corps assigned a Marine to speak at a middle school on Career Day, the Marine had been court-martialed for sexually assaulting three female members of the Corps. The result of the court-martial was that he was retained in the Corps and assigned to recruitment detail awaiting discharge. On the day he came to the middle school wearing his Dress Blue uniform, after speaking to the class, he spotted one of the girls in the class walking home and offered her a ride. Instead of taking her home, he drove her around for a while, parked the car, kissed her, touched her breasts, asked her to touch his erect penis and eventually attempted sexual penetration. When the girl began to cry, he stopped, told her not to tell anyone about it and drove her home. More than two years later, the girl was subpoenaed as a witness in the sexual assault of another minor. It was at that time that the girl and her mother learned of his history of sexual assaults prior to being sent to the middle school. The girl then filed suit in federal court, and the trial judge dismissed her claim as untimely under the Federal Tort Claims Act [FTCA; 28 U.S.C. § 2401(b)] which has a two-year statute of limitations. The Ninth Circuit reversed and remanded the matter for the district court to consider equitable tolling. (*Gallardo v. United States of America* (Ninth Cir.; April 15, 2014) (As Amended, June 3, 2014) 749 F.3d 771.)

Appellate Courts Split On Which Statute Of Limitations Applies For Malicious Prosecution Against Attorneys.

When attorneys were sued for malicious prosecution 13 months after resolution of the underlying action, they brought a motion to strike, citing the one-year statute of limitations under *Code of Civil Procedure*

section 340.6 and *Vafi v. McCloskey* (2011) 193 Cal.App. 4th 874, [122 Cal.Rptr.3d 608], which held that the one-year statute applied in a malicious prosecution action against an attorney “rather than the two-year limitations period which applies to malicious prosecution actions generally,” and argued the action was time barred. The trial court granted the motion to strike. The appellate court reversed, holding the two-year statute of limitations applied, stating: “The applicable statute of limitations for malicious prosecution is [*Code of Civil Procedure*] section 335.1, irrespective of whether the party being sued for malicious prosecution is the former adversary [] or the adversary’s attorneys.” The Court of Appeal further stated: “Pursuant to the ‘start/stop’ computation refined by this court in *Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc.* (1988) 202 Cal.App.3d 330, [248 Cal. Rptr. 341], a cause of action for malicious prosecution accrues upon entry of judgment in the underlying action in the trial court. [] The statute of limitations begins to run upon accrual and continues to run until the date of filing a notice of appeal. [] The statute is then tolled during the pendency of the appeal because the plaintiff cannot truthfully plead favorable termination of the prior action, which is an element of the malicious prosecution cause of action. At the conclusion of the appellate process, that is, when the remittitur issues, the statute of limitations recommences to run.” (*Roger Cleveland Golf Company, Inc. v. Krane & Smith, APC* (Cal. App. Second Dist., Div.3; April 15, 2014) 225 Cal.App.4th 660, [170 Cal.Rptr.3d 431].)

Homeowners Association Meetings Fall Outside The Scope Of Official Meetings Within The Meaning Of The Anti-SLAPP Statute. The trails developed by a developer adjacent to a housing community were badly damaged

during rains and flooding in 2005. The home owners association brought an action against the developers for construction defects. The HOA also sued three former employees of the developers who were appointed by the developers to be members of the HOA during 2003. Defendants brought an anti-SLAPP motion to strike the causes of action for fraud, negligence and breach of fiduciary duty, contending they arise from protected statements made at the HOA board meetings. The trial court denied the motion. In affirming, the appellate court stated: “The breach of fiduciary duty, constructive fraud, and negligence claims are principally based on the Developer Board Members withholding information and improperly directing the expenditure of funds. These are not ‘written or oral statements’ [under the anti-SLAPP statute]. . . . The fraud cause of action presents a closer question.” The court concluded that homeowners association meetings fall outside the scope of official meetings within the meaning of the statute. (*Talega Maintenance Corporation v. Standard Pacific Corporation* (Cal. App. Fourth Dist., Div.3; April 15, 2014) 225 Cal.App.4th 722, [170 Cal.Rptr.3d 453].)

Claim Of Equitable Tolling Of Statute Of Limitations While Plaintiff Pursued Her Work Comp Case.

Plaintiff fell from an outdoor balcony at the offices of her employer. Immediately she began receiving workers’ compensation benefits and later filed a claim with the Workers’ Compensation Appeals Board seeking additional benefits. More than two years after the fall, she filed a superior court action for premises liability against the building owners. She alleged the statute of limitations was equitably tolled while she pursued her workers’ compensation claim. She also claimed defendants were equitably estopped from asserting a statute of limitations defense based

on settlement negotiations she claimed had taken place prior to filing her superior court action. The trial court held that neither equitable doctrine, equitable tolling or equitable estoppels, applied, concluded the action was time-barred and entered judgment for defendants. The appellate court reversed in part and remanded, stating: “We conclude that the trial court did not err in denying [plaintiff’s] request for a jury trial, and further conclude that there is substantial evidence to support the trial court’s determination that the doctrine of equitable estoppels does not apply. However, we conclude . . . that the matter must be remanded to the trial court for factual findings as to whether [plaintiff] demonstrated the elements of equitable tolling.” (*Hopkins v. Kedzierski* (Cal. App. Fourth Dist., Div.1; April 16, 2014) 225 Cal.App.4th 736, [170 Cal.Rptr.3d 551].)

Government Ordered To Pay Attorney Fees In Social Security Case. The administrative law judge disregarded competent lay witness evidence on plaintiff’s social security claim. The Ninth Circuit held that under the Equal Access to Justice Act [EAJA; 28 U.S.C. § 1291], the district court abused its discretion when it denied plaintiff his attorney fees, stating: “To avoid an award of EAJA fees. . . , the government must show that its position was substantially justified at each stage of the proceedings. . . . Because the government’s underlying position was not substantially

justified, we award fees, even if the government’s litigation position may have been justified.” (*Tobeler v. Colvin* (Ninth Cir.; April 18, 2014) 749 F.3d 830.)

Non-Disclosure Agreement: Whoever Keeps His Mouth And His Tongue Keeps Himself Out Of Trouble. Proverbs 21:23.

An inventor of a memory chip design brought an action against defendants alleging misappropriation of trade secrets, unfair competition, breach of contract and related causes of action, but the amended and operative pleading was only for breach of contract. A jury found the defendant breached the non-disclosure agreement signed at the outset of negotiations and that the plaintiff was harmed by that breach in the amount of \$123,898,889.00. On appeal, the defendant contended the court should have granted JNOV instead of a new trial on the issue of damages, and that, at the very least, the court should have granted a new trial on the issue of liability because of evidentiary errors. The plaintiff also appealed, arguing the court erred in not granting injunctive relief, which was the remedy provided for in the non-disclosure agreement. In affirming the court’s JNOV order, the appellate court stated: “It is beyond question here that [plaintiff] established every element of breach of contract, including resulting harm. The court did not find insufficient proof of the existence of damages; it ruled only that the amount of those damages was calculated incorrectly and therefore warranted a new trial using the correct measure of value.” With regard to the argued evidentiary errors in admitting evidence, the appellate court found there was no showing of prejudice, so the court did not err in not ordering a new trial on liability. As to the plaintiff’s appeal, the appellate court also affirmed, finding plaintiff did not carry his burden to show that damages would be insufficient to prevent any future harm. (*Grail Semiconductor, Inc. v. Mitsubishi Electric* (Cal. App. Sixth Dist.; April 22, 2014) 225 Cal.App.4th 786, [170 Cal.Rptr.3d 581].)

What Happens After Someone Drops A Dime? CHP officers observed nothing unusual, but pulled the pickup over anyway. They smelled marijuana

and searched the truck, finding 30 pounds of weed. They arrested the two men inside. The men moved to suppress the evidence, arguing the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. This case reached the United States Supreme Court, and this is what the high court said: “After a 911 caller reported that a vehicle had run her off the road, a police officer located the vehicle she identified during the call and executed a traffic stop. We hold that the stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated.” (*Navarette v. California* (U.S. Sup. Ct.; April 22, 2014) 134 S.Ct. 1683, [188 L.Ed.2d 680].)

Some Call It Democracy; Others Consider It Oppression.

In response to the United States Supreme Court’s 2003 decisions regarding Michigan’s university admissions policies, (*Gratz v. Bollinger* (2003) 539 U.S. 244, [123 S.Ct. 2411; 156 L.Ed.2d 257] and *Grutter v. Bollinger* (2003) 539 U.S. 982, [124 S.Ct. 35; 156 L.Ed.2d 694]), Michigan voters passed an initiative in 2006 adopting an amendment to its constitution prohibiting the state from granting certain preferences, including race-based preferences, in a wide range of actions and decisions. Several groups challenged the initiative, and the federal district court ruled in favor of Michigan, and the appellate court reversed. The U.S. Supreme Court reversed the appellate court, thus upholding the initiative, stating: “Democracy does not presume that some subjects are too divisive or too profound for public debate.” Joined by Justice Ginsburg, Justice Sotomayor dissented, stating: “We are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do.” (*Michigan v. Coalition to Defend Affirmative Actions* (U.S. Sup. Ct.; April 22, 2014) 134 S.Ct. 1623, [188 L.Ed.2d 613].)

Right To Retreat Back To Nonmanagerial Position After Being Fired From Managerial Position. After working for a

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).

state university for more than 20 years in a nonmanagerial position, plaintiff was hired as a manager. Things did not work out, and she was fired. She brought an action against the university. Prior to trial, the trial court granted defendant's summary adjudication of issues on plaintiff's contention she had a right to "retreat" back to her nonmanagerial position. The remainder of her claims went to a jury trial and defendant prevailed. The present appeal largely involves her claim that she was improperly denied her retreat rights. The appellate court agreed with plaintiff, finding the university "had an obligation to provide retreat rights to her" when she was terminated from the management position. The matter was remanded to give plaintiff an opportunity to have her claim of a right to retreat heard on the merits. (*Butts v. Bd. Of Trustees California State University* (Cal. App. Second Dist., Div. 8; April 23, 2014) 225 Cal.App.4th 825, [170 Cal.Rptr.3d 604].)

Permits For Tow Truck Companies. The question on appeal was whether tow truck companies and drivers must obtain a permit in each jurisdiction in which they tow cars. The appellate court concluded a city was only authorized to regulate those tow truck companies and drivers who maintain their principal place of business or employment in that city. (*California Tow Truck Association v. City and County of San Francisco* (Cal. App. First Dist., Div. 4; April 23, 2014.) 225 Cal.App.4th 846, [170 Cal.Rptr.3d 593].)

Possessing Child Pornography Could Be Expensive. As a component of 1994's Violence Against Women Act [18 U.S.C. § 2259], Congress requires district courts to award restitution for certain federal criminal offenses, including child pornography possession. A man pleaded guilty to possessing between 150 and 300 images of child pornography, which included two that depicted the sexual exploitation of a young girl who is now a woman and goes by the pseudonym "Amy." Amy sought restitution of nearly \$3 million from the man under § 2259. The federal appellate courts are split on whether § 2259 limits restitution to those losses proximately caused by the defendant's offense. The United States Supreme

Court held: "[W]here it is impossible to trace a particular amount of those losses to the individual defendant by recourse to a more traditional causal inquiry, a court applying § 2259 should order restitution in an amount that comports with the defendant's relative role in the causal process that underlies the victim's general losses. The amount would not be severe in a case like this, given the nature of the causal connection between the conduct of a possessor like [the man who possessed Amy's images] and the entirety of the victim's general losses from the trade in her images, which are the product of the acts of thousands of offenders. It would not, however, be a token or nominal amount. The required restitution would be a reasonable and circumscribed award imposed in recognition of the indisputable role of the offender in the causal process underlying the victim's losses and suited to the relative size of that causal role. This would serve the twin goals of helping the victim achieve eventual restitution for all her child-pornography losses and impressing upon offenders the fact that child-pornography crimes, even simple possession, affect real victims." (*Paroline v. U.S.* (U.S. Sup. Ct.; April 23, 2014) 134 S.Ct. 1710, [188 L.Ed.2d 714].)

Forbearance Fees Do Not Violate Usury Law. A debtor entered into a series of agreements in which he sought to delay enforcement of judgments. The creditor agreed not to enforce the judgments prior to a certain date in exchange for certain promises as well as the payment of a surcharge of \$500 per day for each day the judgments were not paid after that date. When the judgment was not satisfied, the debtor filed the present action for money had and received and sought treble damages for alleged usury. The appellate court stated: "We conclude the forbearance fees do not violate California's usury law. Usury liability is wholly a creature of statute. Because the usury law does not expressly prohibit a party from entering into an agreement to forbear collecting on a judgment, usury liability does not extend to judgment creditors who receive remuneration beyond the statutory 10 percent interest rate in exchange for a delay in enforcing a judgment." (*Bisno v. Kahn* (Cal. App. First Dist., Div. 3; April 25, 2014) 225 Cal.App.4th 1087, [170 Cal.Rptr.3d 709].)

Chutzpah. In 1985, the father of two children was ordered to pay child support, which he did until the mother of the children, his former wife, disappeared with the children, moved out of state and changed the children's names. The father did not see the children again for 15 years, almost their entire minority. In 1998, when the youngest was 16, he moved in with the father. In 2013, when the children were over 30 years old, the mother sought to enforce the 1985 child support order. The trial court refused to enforce the 25-year-old order. On appeal, the mother claimed there was an abuse of judicial discretion, and the appellate court called the mother's appeal "dead on arrival." (*Marr. of Boswell* (Cal. App. Second Dist., Div. 6; April 28, 2014) 225 Cal.App.4th 1172, [171 Cal.Rptr.3d 100].)

Tentacles Of Bank Failure Reach Wrongful Termination Case. When a bank failed, the Federal Deposit Insurance Corporation [FDIC] promptly published notices informing creditors where, when and how to file claims against the failed bank. Six months after the end of the time to file a claim, plaintiff filed his wrongful termination action against the failed bank. The takeover bank successfully moved to compel arbitration, and the arbitrator dismissed the case due to plaintiff's failure to exhaust his administrative remedy. The trial court confirmed the arbitration "award" of dismissal of the case. Plaintiff appealed, and the appellate court agreed with plaintiff's contention the arbitration agreement was unenforceable, but went a lot further than plaintiff wanted to go with that line of reasoning, concluding plaintiff's failure to timely comply with the administrative procedure created a complete jurisdictional bar to his claims. The matter was remanded to the trial court for dismissal due to a lack of subject matter jurisdiction. (*Saffer v. JP Morgan Chase Bank* (Cal. App. Second Dist., Div. 8; April 29, 2014) 225 Cal.App.4th 1239.)

U.S. Supreme Court Rules On Attorney Fee Issues In Two Patent Cases On The Same Day. 35 U.S.C. § 285 states: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." In 1982, Congress created the Fed-

eral Circuit Court and vested it with exclusive appellate jurisdiction in patent cases. For the next two decades, the Federal Circuit Court instructed district courts to consider the totality of the circumstances when making § 285 fee determinations. In a 2005 case [*Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc.* (2005) 393 F.3d 1378], the Federal Circuit Court held the statute authorized fees in only two circumstances: where there has been material inappropriate conduct or when the case is brought in subjective bad faith and is objectively baseless.

In one of the two recent cases, the parties manufacture exercise equipment. The one which owns a patent concerning elliptical machines never commercially sold the machine disclosed in its patent, but brought an action against the other manufacturer for patent infringement. The district court found no patent infringement and applied the *Brooks Furniture* reasoning when it denied the prevailing defendant's request for attorney fees. The United States Supreme Court stated: "The framework established by the Federal Circuit in *Brooks Furniture* is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts." The high court further stated: "We hold, then, that an 'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both

the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion, considering the totality of the circumstances." (*Octane Fitness, LLC v. ICON Health & Fitness, Inc.* (U.S. Sup. Ct.; April 29, 2014) 134 S.Ct. 1749, [188 L.Ed.2d 816].)

In the other recent case, a healthcare management company owns a patent covering utilization reviews. An insurance company brought an action for declaratory relief against the healthcare company contending its patent was invalid and unenforceable and that to the extent it is valid the insurance company was not infringing it. The healthcare management counterclaimed for patent infringement. The trial court entered judgment in favor of the insurance company, finding no infringement. The insurance company moved for fees under § 285, and the trial judge found the healthcare management company engaged in a pattern of vexatious and deceitful conduct throughout the litigation, and that it pursued the suit as part of a bigger plan to identify companies potentially infringing its patent under the guise of an informational survey in order to force those companies to purchase a license for its patent. The court ordered the healthcare management company to pay over \$5 million for fees and costs. The Federal Circuit Court applied the *Brooks Furniture* analysis and a de novo standard of review, and disagreed with some of the district court's reasoning. The United States Supreme Court held the Federal Circuit Court should have deferred to the district court absent an abuse of discretion because the district court is better positioned to decide whether the case is exceptional. (*Highmark, Inc. v. AllCare Health Management System, Inc.* (U.S. Sup. Ct.; April 29, 2014) 134 S.Ct. 1744, [188 L.Ed.2d 829].)

A Case Where A Contractor's License Was Not Required.

The project is the ICE [U.S. Immigration and Customs Enforcement] perimeter fence in El Centro. The prime government contractor brought in a subcontractor, and the subcontractor brought in a sub-subcontractor. The sub-subcontractor received only partial payment and the subcontractor was fired. The sub-subcontractor filed a com-

plaint invoking its rights under 40 U.S.C. § 3131-3134 [Miller Act] for the rest of its money. The district court dismissed the claim because the sub-subcontractor was not licensed as required by *California's Business and Professions Code* section 7031(a). The Ninth Circuit reversed, finding that California's licensing requirement was not a defense to a Miller Act claim. (*Technica LLC v. Carolina Casualty Ins. Co.* (Ninth Cir.; April 29, 2014) 749 F.3d 1149.)

Consumer Protection Statutes May Not Be Used To Fight Tax Overcharges By Retailers.

In a four to three decision, the California Supreme Court held that California's consumer protection statutes may not be utilized when a retailer charges tax on take-out coffee, which is contrary to law. The majority opinion states: "We conclude that the tax code provides the exclusive means by which plaintiffs' dispute over the taxability of a retail sale may be resolved and that their current lawsuit is inconsistent with tax code procedures." The dissent states: "Whether Target may charge sales tax on a cup of coffee is probably not the most gripping issue before the California Supreme Court this term. But this is not really a tax case. This is a case about the reach of consumer protection statutes that prohibit unfair business practices, including misrepresentations by a retailer as to what its customers are actually paying for. Today's decision weakens those statutes by blessing an arrangement that mutually benefits retailers and the state treasury at the expense of everyday consumers." The dissent also states: "In her amicus brief, the Attorney General notes that she 'receives thousands of complaints each year and is not in a position to investigate and prosecute all of them. Legitimate actions by private litigants are necessary to supplement law enforcement efforts and to vindicate consumers' rights.'" (*Loeffler v. Target Corporation* (Cal. Sup. Ct.; May 1, 2014) 58 Cal.4th 1081, [324 P.3d 50, 171 Cal.Rptr.3d 189].)

Attorney Fees Sought By Person Denied Social Services Who Prevails On A Writ.

If a person receives an unfavorable administrative decision when seeking social services, the exclusive remedy is a petition in the superior court. (*Welfare and Institutions Code*

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section 10962.) That statute also provides: “The applicant or recipient shall be entitled to reasonable attorney’s fees and costs, if he obtains a decision in his favor.” In this case, a county social services recipient was unsuccessful in the administrative hearing process, but prevailed in the superior court writ of mandate action. The recipient then moved for attorney fees incurred in the superior court and in the underlying administrative proceedings as well. The appellate court held: “[W]e determine section 10962 permits a party to recover reasonable attorney fees incurred in the writ of mandate proceeding, but not fees incurred in the administrative hearing process.” (*K.I. v. John A. Wagner, Director of Social Services* (Cal. App. Fourth Dist., Div. 1; May 2, 2014) 225 Cal.App.4th 1427, [171 Cal.Rptr.3d 673]; (Rev. Granted; July 23, 2014).)

Who Pays The Costs When Both Sides Prevail And The Judge Has Discretion?

The trial court awarded \$12,731.92 to the defendant for costs after the parties placed the following settlement on the record just before a jury panel was called: “[I]n consideration for dismissal with prejudice of the two claims of breach of contract and breach of covenant, Defendant will pay Plaintiff within 10 days \$23,500.” Defense counsel “will prepare a judgment on the remaining claims which references the dismissal with prejudice and which preserves the right of appeal of the rulings of this court on the remaining causes of action” “[T]he parties will not file any motions or memoranda for costs or attorney fees[,] holding off until the completion of the appeal” *Code of Civil Procedure* section 1032 states: “(b) Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding,” and subdivision (a)(4) provides a nonexclusive definition of ‘prevailing party,’ listing four categories. Three of the categories apply only to defendants, namely “a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant.” Only one category – “the party with a net monetary recovery” – is applicable to both defendants and plaintiffs. The

appellate court, after noting that both sides prevailed in some way and that the trial court exercised its discretion, ruled: “We will reverse the order awarding costs to Employer and denying costs to Employee, determining that, since the parties’ settlement was silent regarding costs, Employer’s payment of \$23,500 triggered mandatory costs as a ‘net monetary recovery’ under the plain language of the statute.” (*deSaulles v. Community Hospital of the Monterey Peninsula* (Cal. App. Sixth Dist.; May 2, 2014) 225 Cal.App.4th 1427, [171 Cal.Rptr.3d 673]; (Rev. Granted; July 23, 2014).)

Expert Witness In Federal Court Improperly Excluded.

In a case involving excessive chemical levels in a city’s water system, the city’s expert used a four-step methodology, which methodology was published in a manual commissioned by the Environmental Security Technology Certification Program of the U.S. Department of Defense. Based on his methodology, the expert gave his opinion of the dominant source of the chemical found in the water. The trial court granted defendant’s motion to exclude the expert’s testimony on the grounds that: (1) the opinions were subject to future methodological revisions and not yet certified; (2) the procedures he used had not yet been tested and were not subject to retesting; and (3) the reference database used by the expert was too small. The Ninth Circuit found the district court erred, stating: “Expert testimony may be excluded by a trial court under Rule 702 of the Federal Rules of Evidence only when it is either irrelevant or unreliable. Facts casting doubt on the credibility of an expert witness and contested facts regarding the strength of a particular witness are questions reserved for the fact finder.” (*City of Pomona v. SQM North America Corp.* (Ninth Cir.; May 2, 2014) 750 F.3d 1036.)

Defendants Held Liable For Aiding And Abetting Breach Of Fiduciary Duty To Plaintiff, Despite Not Owing Plaintiff A Fiduciary Duty.

The jury found defendants liable for aiding and abetting breach of fiduciary duty and awarded restitution in the amount of approximately \$5.8 million. A main issue in the appellate court was whether there can be liability for

aiding and abetting a breach of fiduciary duty against someone who does not owe a fiduciary duty. The appellate court stated: “There are two different theories pursuant to which a person may be liable for aiding and abetting a breach of fiduciary duty. One theory, like conspiracy to breach a fiduciary duty, requires that the aider and abettor owe a fiduciary duty to the victim and requires only that the aider and abettor provide substantial assistance to the person breaching his or her fiduciary duty. [O]n this theory, California law treats aiding and abetting a breach of fiduciary duty and conspiracy to breach a fiduciary duty similarly. . . . The second theory for imposing liability for aiding and abetting a breach of fiduciary duty arises when the aider and abettor commits an independent tort. This occurs when the aider and abettor makes ‘a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act.’ [¶] [Plaintiff] proceeded on the second theory of aiding and abetting liability. [Plaintiff] pleaded and proved that defendants had actual knowledge of the fiduciary duties [other defendants] owed to [plaintiff], that defendants provided the three fiduciaries with substantial assistance in breaching their duties, and that defendants’ conduct resulted in unjust enrichment. Thus, the trial court did not err in ruling, on demurrer and in connection with the jury instructions, that defendants could be liable for aiding and abetting a breach of fiduciary duty even though they did not have a fiduciary duty to [plaintiff].” (*American Master Lease, LLC v. Idanta Partners, LTD* (Cal. App. Second Dist., Div. 7; May 5, 2014) (As Mod. May 27, 2014) 225 Cal.App.4th 1451, [171 Cal.Rptr.3d 548].)

U.S. Supreme Court Held Prayer Permitted At Town Hall Meetings.

Following roll call and the Pledge of Allegiance, a small town in New York has a local clergyman deliver an invocation at its Town Board meetings. A typical prayer is: “Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless

the members of our community who come here to speak before the board so they may state their cause with honesty and humility. . . . Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen.” But sometimes ministers speak in a distinctly Christian idiom by including in their prayers something like: “We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter. . . .” Some attendees objected that the prayers violated their religious and philosophical views. At one meeting, someone admonished board members she found the prayers “offensive, intolerable and an affront to a diverse community.” Subsequently the objectors brought suit in federal court alleging the town violated the First Amendment’s Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers. They did not seek an end to the prayer practice, but rather requested an injunction that would limit the town to “inclusive and ecumenical” prayers that referred only to a “generic God” and would not associate the government with any one faith or belief. When the case reached the United States Supreme Court, the high Court stated: “To hold that invocations must be nonsectarian would force

legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town’s current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.” Citing to 1774 letters of John Adams and Abigail Adams, the Court noted that from the earliest days of this nation, invocations have been addressed to assemblies comprising many different creeds. The Court concluded: “The town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents.” (*Town of Greece v. Galloway* (U.S. Sup. Ct.; May 5, 2014) 134 S.Ct. 1811, [188 L.Ed.2d 835].)

Continued Confusion Over Government Claims.

These are the allegations: A man was released from a state mental hospital but was not provided his psychotropic medication or any guidance on how to obtain it. Twelve days later, he was discovered “unconscious, lying on his blood-soaked bed in a pool of his own blood,” after cutting off his own genitals with a knife because “the devil” told him to do it. Within six months his lawyer mailed a government claims form to the Victim Compensation and Government Claims Board. The Board affixed its stamp on the claim and assigned it a claim number, but the lawyer had not included the required \$25 filing fee. Receiving no response, the lawyer filed a complaint for medical negligence. Defendant State of California’s Department of State Hospitals filed a motion for judgment on the pleadings because plaintiff had not filed a “proper” claim. The trial court granted the motion and dismissed the action. The appellate court reversed, stating: “We hold the timely filing and apparent acceptance of a government claim for which plaintiff inadvertently did not pay the \$25 filing fee do not bar his claim.” (*Sykora v. State Department of State Hospitals* (Cal. App. Second Dist., Div. 6; May 6, 2014) 225 Cal.App.4th 1530, [171 Cal.Rptr.3d 583].)

Design Professionals’ Duty Of Care Extends To Future Residential Purchasers.

A homeowners association brought an action for construction defects which made the homes unsafe and uninhabitable. Two of the defendants are architectural firms which allegedly designed the homes in a negligent manner but did not make the final decisions regarding how the homes would be built. When the case reached the California Supreme Court on the issue of duty, the court stated: “Building on substantial case law and the common law principles on which it is based, we hold that an architect owes a duty of care to future homeowners in the design of a residential building where, as here, the architect is a principal architect on the project — that is, the architect, in providing professional design services, is not subordinate to other design professionals. The duty of care extends to such architects even when they do not actually build the project or exercise ultimate control over construction.” (*Beacon Residential Community Association v. Skidmore Owings & Merrill LLP* (Cal. Sup. Ct.; July 3, 2014) (Case No. S208173).)

Huge Award For Restitution And Penalties In Loan Modification Scheme.

The Attorney General brought an action seeking injunctive relief and restitution under California’s consumer protection statutes. The defendants operated a scheme by which they promised customers they would obtain loan modifications from lenders and prevent foreclosure of the customers’ homes. Although they represented to customers they never had a case in which a loan modification was not approved, there was no credible evidence they obtained a single loan modification or provided anything of value to customers. The trial court issued an injunction and ordered restitution of \$2,047,041.86 as well as civil penalties of almost \$2.5 million. Except with respect to the office manager who was found to be jointly and severally liable for up to \$147,869 for restitution and \$360,540 in penalties, the appellate court affirmed. As to the office manager, the appellate court struck the penalties and the matter was remanded to the trial court to recalculate her penalties. (*People v. Sarpas* (Cal. App. Fourth Dist., Div. 3; May

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6, 2014) 225 Cal.App.4th 1539, [172 Cal. Rptr.3d 25].)

Family Law Lawyers Sued For Malpractice & Won.

The husband in a dissolution action brought what the appellate court termed a “settle and sue” legal malpractice case against his former lawyers for recommending he pay his ex-wife permanent spousal support of \$7,000 per month. He alleged the settlement was excessive because the lawyers improperly calculated his permanent support obligation based upon DissoMaster guidelines instead of a forensic marital standard of living analysis. The trial court granted summary judgment in favor of the lawyers and the appellate court affirmed, stating: “*Family Code* section 4320 requires trial courts to consider the marital standard of living along with numerous other factors, in assessing the need for permanent spousal support.” (*Namikas v. Miller* (Cal. App. Second Dist., Div. 6; May 7, 2014) 225 Cal.App.4th 1574, [171 Cal.Rptr.3d 23].)

Tell Me About Your Invention; You Can Trust Me.

During negotiations, which were the subject of a nondisclosure agreement, an inventor described the invention of “digital stamping technology” [DST]. After negotiations failed, the inventor discovered the other party to the negotiations had filed for patents encompassing its DST. After a court trial, the court awarded the inventor damages, prejudgment interest and attorney fees. On appeal, defendant contended it was improper for the trial court to base its ruling on misappropriation of the DST concept as a whole, and any other trade secrets the court found misappropriated were not adequately identified in the court’s decision. Defendant further contended DST was not protectable as a trade secret, either as a combination secret or as particular design concepts, because ideas and design concepts are not protectable trade secrets. Moreover, defendant contended plaintiff did not show the ideas were kept secret, or had independent economic value. Noting that “Trade secret law allows the inventor to disclose an idea in confidential commercial negotiations certain that the other side will not appropriate it without compensation,” the appellate court affirmed the trial court’s judgment. (*Altavion, Inc. v. Konica Minolta*

Systems Laboratory (Cal. App. First Dist., Div. 5; May 8, 2014) 226 Cal.App.4th 26, [171 Cal.Rptr.3d 714].)

Can’t Assume What You Do In Private Is Private.

Plaintiffs brought actions under the Wiretap Act [18 U.S.C § 2511(3)(a)] and the Stored Communications Act [18 U.S.C §2702(a)(2)], alleging that Facebook, a social networking company, and Zynga Game Network, a social gaming company, disclosed confidential user information to third parties. The district court dismissed their claims with prejudice, and the Ninth Circuit affirmed, finding plaintiffs failed to state a claim because they did not allege the disclosure of the contents of a communication, a necessary element. (*In re Zynga Privacy Litigation* (Ninth Cir.; May 8, 2014) 750 F.3d 1098.)

And BTW, Can’t Assume You’re Covered Just Because You Have Insurance.

In 1989, plaintiff contracted spinal meningitis, resulting in the amputation of both hands at the wrists and both legs below the knees and was fitted for prostheses which were covered under her father’s insurance plan. Able to live independently with the prostheses, she was later covered under her employer’s medical insurance plan. In 2009, her prostheses began to fail, but found that the prostheses, although indisputably medically necessary, were not covered under the plan. The federal district court concluded the insurance company’s exclusion does not violate California law. Agreeing with the trial court that the policy expressly excluded coverage, the Ninth Circuit affirmed the grant of summary judgment in favor of the insurance company. (*Garcia v. Pacificare of California, Inc.* (Ninth Cir.; May 8, 2014) 750 F.3d 1113.)

Court’s Limiting Trial To Ten Days Upheld.

In an action involving the certification and training of crane operators and allegations of antitrust violations, the trial judge limited the trial to ten days. On appeal, the losing party claimed it had been unable to call all of its witnesses or present rebuttal evidence and were, therefore, deprived of fair trial. Apparently lacking sympathy for appellant’s argument, the appellate court stated: “Some litigants are of the mistaken opinion that when they are assigned to a court for trial they have camp-

ing rights.” The appeals court concluded the trial court did not abuse its discretion. (*California Crane School, Inc. v. National Commission for Certification of Crane Operators* (Cal. App. Fifth Dist.; May 8, 2014) 226 Cal.App.4th 12, [171 Cal.Rptr.3d 752].)

Arbitration Agreement Found Unconscionable [“Nothing in fine print is ever good news.” Andy Rooney].

Car wash employees brought a class action against car wash companies. On defendants’ petitions for arbitration, the trial court concluded the arbitration agreement was unconscionable and refused to enforce it. Agreeing the arbitration agreement “suffered from multiple defects demonstrating a systematic lack of mutuality that favored the car wash companies,” the appellate court affirmed. (*Carmona v. Lincoln Millennium Car Wash* (Cal. App. Second Dist., Div. 8; May 9, 2014) 226 Cal.App.4th 74, [171 Cal.Rptr.3d 42].)

Destroy Or Remove Fixtures From Foreclosed Property And Go To Jail.

Under Penal Code section 502.5, a borrower under a loan secured by real estate may not intentionally harm the lender by removing statutorily specified improvements from the encumbered premises. Defendants, a husband and wife, were convicted of violating section 502.5 by taking fixtures from their foreclosed home. A jury found an enhancement of “great taking” under *Penal Code* section 12022.6 to be true because they damaged property worth \$65,000. They were sent to jail for nine months and placed on probation for five years. The trial court instructed the jury with *Civil Code* section 660’s definition of “fixture.” On appeal, the defendants contended the word “fixture” is unconstitutionally vague in § 502.5. The appellate court didn’t buy the argument and affirmed the judgments of conviction. (*People v. Acosta* (Cal. App. Fourth Dist., Div. 3; May 12, 2014) 226 Cal.App.4th 108, [171 Cal. Rptr.3d 774].)

To Err Is Human, And To Blame It On A Computer Is Even More So -- Robert Orben.

Plaintiff was driving along and police made a “high risk” stop. They held her at gunpoint, handcuffed her, forced her to her knees and detained her for 20 minutes.

Turns out, the Automatic License Plate Reader [ALPR] made a mistake, and identified her car as a stolen vehicle. Eventually the police ran a check of her license plate and discovered the mistake. She brought a civil rights action, and the federal trial judge granted summary judgment in favor of the city, county, police department and individual officers. The Ninth Circuit said a rational jury could conclude there was a Fourth Amendment violation, and reversed. (*Green v. San Francisco* (Ninth Cir.; May 12, 2014) 751 F.3d 1039.)

Only One § 170.6 Challenge Per Side Per Action.

A creditor added a second judgment debtor. The recently added judgment debtor filed a challenge to the judge pursuant to *Code of Civil Procedure* section 170.6. The previous judgment debtor had already filed a section 170.6 challenge, and the creditor sought extraordinary relief contending the court erred when it granted the second challenge. “[S]ection 170.6 permits a party to an action or proceeding to disqualify a judge for prejudice based on a sworn statement, without having to establish prejudice as a fact to the satisfaction of a judicial body. [Citation.] If a peremptory challenge motion in proper form is timely filed under section 170.6, the court must accept it without further inquiry.” The statute permits one challenge for each side, and “contemplates that one side may consist of several parties, and a peremptory challenge by any party disqualifies the judge on behalf of all parties on that side.” Noting that the newly added judgment debtor did not show sufficient evidence showing it was not on the same side as the original judgment debtor who had already filed a challenge, the appellate court granted the petition and ordered the trial court to deny the challenge. (*Orion Communications, Inc. v. Sup. Ct. (Sameis Holdings, LLC)* (Cal. App. Fourth Dist., Div. 1; May 14, 2014) 226 Cal.App.4th 152, [171 Cal.Rptr.3d 596].)

Daddy Or Donor?? Jason and Danielle tried to have a baby both naturally and by means of in vitro fertilization [IVF] but were unsuccessful. The two began to live separately. Two or three years after their first attempt to conceive, Jason gave Danielle a letter in which he wrote that he was not ready to be a father, but if Danielle wanted to use his sperm to conceive, she had his

blessing as long as she did not tell others. Danielle used Jason’s sperm and conceived by use of IVF. In fact, Jason drove her to the fertility clinic, and on various clinic forms, Danielle wrote that Jason was the intended parent. Jason was active in the baby’s life for the first two and a half years, until Danielle terminated his relationship with the child. Jason filed a petition to establish a parental relationship, and the trial court ruled against him. *Family Code* section 7613(b) states: “The donor of semen provided to a licensed physician . . . is treated in law as if he were not the natural parent of a child thereby conceived, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child.” In *Steven S. v. Deborah D.* (2005) 127 Cal.App.4th 319, [25 Cal.Rptr.3d 482], the court held: “There can be no paternity claim from a sperm donor who is not married to the woman who becomes pregnant with the donated sperm, so long as it was provided to a licensed physician.” In the instant case, however, the appellate court confessed it should not have been so categorical “because we were not faced with a donor seeking to establish paternity under [*Family Code*] section 7611, the presumed parentage statute, and therefore had no occasion to consider whether section 7613(b) does not preclude a donor from establishing that he is a presumed father under 7611.” The appellate court reversed and remanded, finding section 7613(b) does not preclude Jason from establishing presumed parentage. (*Jason P. v. Danielle S.* (Cal. App. Second Dist., Div. 4; May 14, 2014) 226 Cal.App.4th 167, [171 Cal.Rptr.3d 789].)

Privacy Rights Of Nonparty In Copyright Infringement Action.

Defendant operates in internet service through which users may upload and retrieve digital music files. Plaintiff brought an action in the New York trial court, alleging defendant infringed on copyrights afforded under New York common law. A nonparty publishes an online newsletter and published an article reporting an artist accused defendant of copyright infringement. Following the article there were numerous reader comments, two of which were written by someone identified as “Visitor,” who gave information apparently relevant to the action. Under the auspices of the New York

court, defendant served a subpoena on the nonparty publisher to obtain “Visitor’s” identity. The nonparty refused to comply and defendant petitioned a California court pursuant to the Interstate and International Depositions and Discovery Act, [*Code of Civil Procedure* section 2029] for enforcement, and the California trial judge ordered the nonparty to comply. In a petition for extraordinary relief filed by the nonparty, it stated “Visitor’s” identify would not lead to discovery of admissible evidence in New York and that the information is protected by “Visitor’s” right to privacy. The appellate court agreed with both contentions and directed the trial court to vacate its order enforcing the subpoena. (*Digital Music News, LLC v. Sup. Ct. (Escape Media Group, LLC)* (Cal. App. Second Dist., Div. 1; May 14, 2014) 226 Cal.App.4th 216, [171 Cal.Rptr.3d 799].)

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mitch.wood@calbar.ca.gov

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