



Litigation Update

Litigation Section News

August 2014

Life Insurance Policy In Dissolution Of Marriage Proceeding.

During a 20-year marriage, the husband used community property funds to purchase an insurance policy on his life, naming his wife as the policy's only owner and beneficiary. The trial court ruled the policy was community property because it was acquired during the marriage with community funds. The trial court awarded the policy to husband and ordered him to buy out the wife's interest in the policy by paying her \$182,500, representing one-half of the policy's cash value at the time of trial. The appellate court reversed, holding that the policy was the wife's separate property. In a unanimous opinion, the California Supreme Court reversed the intermediate appellate court, stating: "We conclude that, unless the statutory transmutation requirements have been met [under *Family Code* section 850 *et seq.*], the life insurance policy is community property." In reaching this conclusion, the court held that where the form of title presumption found in *Evidence Code* section 662 conflicts with the transmutation statutes, the latter apply, and the court left open the question of whether the form of title presumption would ever apply in a marital dissolution proceeding. In fact, Justice Chin's concurring opinion, joined by Justices Corrigan and Liu, posed the question: "What role, if any, does a common law rule codified in *Evidence Code* section 662 have in determining, in an action between the spouses, whether property acquired during a marriage is community or separate?" The concurring opinion answers its own question with: "*Evidence Code* section 662's common law presumption does not nullify the community property statutes." (*In re the Marriage of Frankie and Randy Valli* (Cal. Sup. Ct.; May 15, 2014) 58 Cal.4th 1396, [324 P.3d 274, 171 Cal. Rptr.3d 454].)

Second Hand Cancer. Plaintiff's uncle was employed by defendant from 1973 to 2007, and plaintiff contends he contracted mesothelioma due to exposure to asbestos that his uncle brought home from work on his clothing. At the beginning of trial, defendant moved for nonsuit, arguing it had no legal duty to prevent asbestos exposure to plaintiff under the rule announced in *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, [141 Cal.Rptr.3d 390]. The trial court concluded defendant had no duty to plaintiff. In reversing, the appellate court stated: "We do not believe that such a broad and unqualified limitation on an employer's duty accurately states the law. We accept the premise that the prospect of 'indeterminate liability' places a limitation on those to whom the duty of exercising reasonable care may extend. (*e.g.*, *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 392, [834 P.2d 745, 757-758, 11 Cal.Rptr.2d 51, 63-64].) We also recognize the difficulty in articulating the limits of that duty and the different conclusions that courts throughout the country have reached when considering claims for secondary exposure to toxics, particularly asbestos, emanating from the workplace. The duty of care undoubtedly does not extend to every person who comes into contact with an employer's workers, but we conclude that the duty runs at least to members of an employee's household who are likely to be affected by toxic materials brought home on the worker's clothing." (*Kesner v. Pneumo Abex, LLC* (Cal. App. First Dist., Div. 3; May 15, 2014) 226 Cal.App.4th 251.)

Different Result In Similar Case Decided A Few Weeks Later.

A case involving similar allegations was decided a few weeks later, this time with a different result. In the second case, it was the worker's wife who was exposed to asbestos which adhered to her husband's clothing when he worked for a railway during the 1970s. She sued on a theory of premises li-

ability, contending her husband was exposed to asbestos on defendant's premises. The trial court sustained her demurrer without leave to amend, and the appellate court affirmed "because absent a duty of care, there is no reasonable possibility that the defect can be cured by amendment." (*Haver v. BNSF Railway Co.* (Cal. App. Second Dist., Div. 5; June 3, 2014) (As mod. June 23, 2014) 226 Cal.App.4th 1104.)

Trial Court Lacked Authority To Decide Enforceability Of Arbitration Agreement.

Several years after she was hired, plaintiff signed an employment arbitration agreement. One of the agreement's provisions stated: "The Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including, but not limited to, any claim that all or any part of this Agreement is void or voidable." After plaintiff was fired and the employer petitioned to compel arbitration, the trial court determined the arbitration agreement was unconscionable and denied the petition. The appellate court reversed, stating: "We hold that the trial court lacked the authority on the enforceability of the agreement because the parties' delegation of this authority to the arbitrator was clear and is not revocable under state law." (*Tiri v. Lucky Chances, Inc.* (Cal. App. First Dist., Div. 4; May 15, 2014) 226 Cal.App.4th 231, [171 Cal.Rptr.3d 621].)

Trial Court Erred In Decertifying Class Action.

After granting class certification against a retail chain that did not supply chairs to its cash register employees, the trial court granted the chain's motion for decertification. The appellate court reversed, stating: "We conclude that, under the analytic framework promulgated by *Brinker Restaurant Corp. v. Superior*

Court (2012) 53 Cal.4th 1004, [273 P.3d 513, 139 Cal.Rptr.3d 315], the trial court erred when it decertified the class action because its decertification order was based on an assessment of the merits of Hall's theory rather than on whether the theory was amendable to class treatment. (*Hall v. Rite Aid Corporation* (Cal. App. Fourth Dist., Div. 1; May 16, 2014) 226 Cal.App.4th 278, [171 Cal.Rptr.3d 504].)

“Special Mission” Exception Not Applied To “Going And Coming Rule.”

Under the “going and coming rule,” travel to and from work ordinarily is not considered within the course and scope of employment, but travel undertaken as part of a special mission is. Here a prison employee would have ordinarily left work and traveled home after his regular shift ended at 10:00 p.m. on a Friday night, but he was held over to work another shift, which did not end until 6:00 Saturday morning. On the way home after that extra shift, he was killed in a car accident. His family claimed workers' compensation benefits and contended that because he worked an extra shift, the special mission exception applied. The Workers' Compensation Appeals Board (WCAB) denied the application for benefits, determining that the hold-over shift was not extraordinary because, among other things, it was assigned in accordance with procedures agreed upon by the prison administration and the officers' union and did not dramatically change his activities. The appellate court affirmed, stating: “We conclude the WCAB's decision involved weighing evidence and choosing among conflicting inferences that could be drawn from that evidence and, therefore, is properly characterized as a finding of fact. Under the standards for judicial review established by the *Labor Code*, we must up-

hold the finding of fact that the hold-over shift was not extraordinary because it is supported by substantial evidence.” (*Lantz v. Worker's Compensation Appeals Board* (Cal. App. Fifth Dist.; May 19, 2014) (As mod. June 9, 2014) 226 Cal.App.4th 298.)

Copyright Action Timely Filed.

In 1980, MGM released and registered a copyright in the film “Raging Bull,” and continues to market the film today. The owner of the screenplay copyrighted in 1963 filed a copyright infringement action against MGM in 2009. A federal district court granted summary judgment to MGM under the doctrine of laches, and the Ninth Circuit affirmed. The United States Supreme Court reversed, stating: “Congress provided two controlling time prescriptions: the copyright term, which endures for decades, and may pass from one generation to another; and 17 U.S.C. § 507(b)'s limitations period, which allows plaintiffs during that lengthy term to gain retrospective relief running only three years back from the date the complaint was filed.” (*Petrella v. Metro-Goldwyn-Mayer, Inc.* (U.S. Sup. Ct.; May 19, 2014) 134 S.Ct. 1962, [188 L.Ed.2d 979].)

Government Claim Required.

Plaintiffs brought an action against a city for alleged tortious conduct by a former member of the City Council. While a real estate project was making its way through the City's approval process, the City's mayor allegedly “extracted” \$38,000 from plaintiff in loans and refused to repay her and then prevented approval of plaintiff's project and threatened to kill her. Plaintiff also alleged the Mayor retaliated because she would not give him additional funds and rejected his sexual overtures. The trial court granted the City's demurrer and motion to strike. On appeal, plaintiff contended her claims did not require a government claim. The appellate court affirmed, finding plaintiff's claims for fraud, extortion, assault & battery and IIED were subject to the Government Tort Claims Act. (*Gong v. City of Rosemead* (Cal. App. Second Dist., Div. 5; May 20, 2014) 226 Cal.App.4th 363.)

Something More Than Negligence Required For Elder Abuse.

Plaintiff contended a transitional medical care unit was understaffed

and the staff was undertrained and the trial court sustained a demurrer of a hospital and health care system to the elder abuse cause of action. After being released from a hospital following surgery for a broken hip, a woman was sent to a transitional care unit where she fell and broke her arm and rebroke her hip. In affirming, the appellate court stated: “The Elder Abuse Act does not apply to simple or gross negligence by health care providers. [] To obtain the enhanced remedies of [*Welfare & Institutions Code*] section 15657 ‘a plaintiff must demonstrate by clear and convincing evidence that defendant is guilty of something more than negligence; he or she must show reckless, oppressive, fraudulent, or malicious conduct.’” (*Worsham v. O'Connor Hospital* (Cal. App. Sixth Dist.; May 20, 2014) 226 Cal.App.4th 331, [171 Cal.Rptr.3d 667].)

Game Playing In Expert Exchange Results In Preclusion Of Use Of Experts At Trial.

Neither plaintiff nor defendant timely disclosed experts pursuant to *Code of Civil Procedure* section 2034.260 in a medical malpractice case. Plaintiff instead filed a motion to disqualify defense counsel. Defendants offered to delay the expert exchange until after the court ruled on the disqualification motion. The trial court denied the motion and defendant made another demand for expert exchange. When plaintiff did not respond, defendant unilaterally produced expert information. Instead of disclosing his experts, plaintiff unsuccessfully appealed the denial of his disqualification motion. The trial court thereafter denied plaintiff relief from his tardy disclosure and precluded him from offering expert testimony. The appellate court affirmed the trial court's orders, finding plaintiff failed to demonstrate exceptional circumstances warranting his disclosure of expert witness information after the discovery cutoff date. (*Cottini v. Enloe Medical Center* (Cal. App. Third Dist.; May 21, 2014) 226 Cal.App.4th 401, [172 Cal.Rptr.3d 4].)

Health Care Provider Not Liable For Release Of Non-Medical Information.

A computer was stolen from a medical center in 2011, containing an index dating back to the 1980s of over 500,000 persons' names, medical record numbers, ages, dates of

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birth, and the last four digits of their Social Security numbers. The medical center informed those individuals of the theft. A few of the persons named in the index brought a class action against the medical center seeking damages of \$1,000 for each person named. The medical center moved for summary adjudication on the cause of action for violation of the Confidentiality of Medical Information Act [CMIA; *Civil Code* section 56], contending the theft of the computer did not result in a disclosure of medical information of any of the listed persons. It argued information about an individual's medical history, condition or treatment is saved only on servers located in its data center. The appellate court granted extraordinary relief, concluding the health care provider cannot be held liable "for the release of an individual's personal identifying information that is not coupled with that individual's medical history, mental or physical condition, or treatment." (*Eisenhower Medical Center v. Sup. Ct. (Carmen Malache)* (Cal. App. Fourth Dist., Div. 2; May 21, 2014) 226 Cal.App.4th 430, [172 Cal.Rptr.3d 165].)

Fair Market Value Of Hotel Inflated By Tax Man. The Ritz Carlton Half Moon Bay contends the county tax assessor inflated the value of the hotel by including \$16,850,000 in nontaxable intangible assets when assessing its fair market value. The appellate court agreed with the hotel, concluding "the income method at issue here violated [*Revenue & Taxation Code*] section 110, subdivision (d), by failing to remove the value of the hotel's workforce, the hotel's leasehold interest in the employee parking lot, and the hotel's agreement with the golf course operator prior to the assessment." (*SHC Half Moon Bay v. County of San Mateo* (Cal. App. First Dist., Div. 5; May 22, 2014) 226 Cal.App.4th 471, [171 Cal.Rptr.3d 893].)

Wealth-Based Classification Contention To Bring Action Against City & County Unsuccessful. Plaintiff brought an action against a city and county with respect to the impoundment of vehicles. Her complaint alleged she was a taxpayer under *Code of Civil Procedure* section 526a and had standing to sue because she had paid sales tax,

gasoline tax, and water and sewage fees, but she admitted she had not paid property taxes. The trial court entered a judgment of dismissal. On appeal, plaintiff claimed the requirement to have paid property taxes in order to have standing to sue is an unconstitutional wealth-based classification. The appellate court affirmed, stating: "We agree with existing appellate decisions that hold payment of an assessed property tax is required in order for a party to have standing to pursue a taxpayer action." (*Wheatherford v. City Of San Rafael* (Cal. App. First Dist., Div. 1; May 22, 2014) 226 Cal.App.4th 460, [171 Cal.Rptr.3d 912].)

Borrower Lacks Standing To Enforce Agreement Relating To Sale Of Promissory Note On Her Home. After defendant financial institution sold plaintiff's promissory note, plaintiff brought an action to quiet title of her residence in herself. Defendant demurred because plaintiff failed to allege tender to cure her default on the promissory note. The trial court sustained the demurrer without leave to amend. On appeal, the appellate court considered whether plaintiff should be given leave to amend to state a cause of action for wrongful foreclosure, but concluded plaintiff could not state a cause of action for wrongful foreclosure for the same reason she did not state one to quiet title in herself, stating: "Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note. [] An impropriety in the transfer of a promissory note would therefore affect only the parties to the transaction, not the borrower. The borrower thus lacks standing to enforce any agreements relating to such transactions." (*Yvanova v. New Century Mortgage Corporation* (Cal. App. Second Dist., Div. 1; May 22, 2014) 226 Cal.App.4th 495.)

New Trial Granted In Auto v. Truck Action. Plaintiffs brought an action against a truck driver and trucking company following injuries sustained in a traffic accident. There was evidence the truck was in both lanes as it maneuvered a turn, and there was also evidence the

18-year-old plaintiff and his friend were looking at a laptop when the plaintiff collided with the truck. In the ensuing negligence action, the jury returned a verdict finding the truck driver was negligent but that his negligence was not a substantial factor in causing harm to plaintiffs. The trial court denied plaintiffs' motion for new trial. On appeal, plaintiffs contend the verdict is fatally flawed because "a finding of causation flows automatically from the negligence finding." The appellate court found the special verdict was neither inconsistent nor unsupported by substantial evidence, and that the jury could have reasonably concluded that the collision was caused by plaintiff's inattentiveness to the road ahead of him rather than any act of negligence committed by the truck driver. Nonetheless, the appellate court noted that since the trial court expressly found the truck driver was negligent per se, the court should have granted plaintiff's motion for new trial. The judgment was reversed and the matter remanded for a new trial. (*David v. Hernandez* (Cal. App. Second Dist., Div. 6; May 22, 2014) 226 Cal.App.4th 578, 172 Cal. Rptr.3d 204].)

Investment Rating Service's Anti-SLAPP Motion Denied. An investment rating service brought an anti-SLAPP motion [*Code of Civil Procedure* section 425.16] in an action filed by the California Public Employees Retirement System [CalPERS] for its ratings of three structured investment vehicles [SIVs] which later collapsed and caused billions in losses. The trial court denied the motion. The appellate court affirmed, noting that the action was indeed speech, and, thus, based upon protected conduct, but that the investment service did not show a probability of prevailing on the merits. The appellate court stated: "We thus agree with CalPERS that the record supports an inference that the ratings were not merely predictions regarding the SIV's future value, but affirmative representations regarding the present state of their financial health and more specifically, regarding their capacity to provide payments to investors as promised." (*California Public Employees' Retirement System v. Moody's Investors* (Cal. App. First Dist., Div. 3; May 23, 2014) 226 Cal.App.4th 643, [172 Cal.Rptr.3d 238].)

Can't Blame Loss Of Property Value On Appraisal Done Seven (7) Years Earlier. After his home was placed in foreclosure in 2011, plaintiff brought an action to try to halt foreclosure proceedings. In it, he contended defendant made fraudulent misrepresentations or omissions by stating the appraised fair market value of the home in 2004 was increasing and that the appraisal was outrageously speculative. The trial court sustained defendant's demurrer without leave to amend. Noting that plaintiff "does not allege a correlation between his property value decline and defendants' alleged conduct related to the appraisal value," the appellate court affirmed. (*Graham v. Bank of America* (Cal. App. Fourth Dist., Div. 1; May 23, 2014) 226 Cal.App.4th 594, [172 Cal.Rptr.3d 218].)

A Promise Is A Promise. Plaintiff responded to a public announcement for a job with a state agency. He was offered the job and accepted, but the Friday night before he was told to report, he was notified the position had been eliminated. He brought an action for damages to recover the expenses he incurred, and the trial court granted the State's demurrer. The appellate court reversed with regard to plaintiff's cause of action under *Government Code* section 19257 which states: "Any person acting in good faith in accepting an appointment or employment contrary to this part or the rules prescribed hereunder, shall be paid by the appointing power the compensation promised by or on behalf of the appointing power or, in case no compensation is so promised, then, the actual value of any service rendered and the expense incurred in good faith under such attempted appointment or employment, and has a cause of action against the appointing power therefor." (*Piccinini v. California Emergency Management Agency* (Cal. App. First Dist., Div. 3; May 27, 2014) 226 Cal.App.4th 685, [172 Cal.Rptr.3d 315].)

No Fourth Amendment Violation. After a high speed chase, when the suspect's car was flush against a patrol car, the suspect continued to accelerate and the officer fired three shots into the suspect's car. Almost hitting an officer in the process, the suspect managed to drive away. Officers fired 12 more shots, striking the

suspect and his passenger, who both died. The suspect's minor child filed an excessive force action under 43 U.S.C. § 1983. The United States Supreme Court reversed the lower federal courts denial of qualified immunity to the officers, stating: "[T]he officers did not violate the Fourth Amendment. In the alternative, we conclude that the officers were entitled to qualified immunity because they violated no clearly established law. (*Plumbhoff v. Rickard* (U.S. Sup. Ct.; May 27, 2014) 134 S.Ct. 2012, [188 L.Ed.2d 1056].)

Remanded For Possible Fourth Amendment Violation.

During the strip search portion of an arrest, a suspect possibly feigned a seizure and was observed "pushing his finger in his anus attempting to conceal an item" in a plastic baggie. Paramedics took him to a hospital where a doctor unsuccessfully tried to remove the baggie by inserting his fingers into the suspect's rectum. Thereafter the suspect was sedated. When he regained his awareness, the suspect said he had a "big tube down my mouth and stuff kept coming out of me out my anal. . . .all I just seen was just blood on that bed and everything and my anal hurting so bad because I was bleeding a lot." Later testing showed that an intact plastic baggie removed from the suspect's rectum contained 8.99 grams of cocaine base, and he is currently serving an eight-year prison term for possession for sale. He filed an action under 42 U.S.C. § 1983 against police officers and the emergency room doctor and nurses. The district court granted summary judgment in favor of all defendants. The current appeal involves only the police officers and the Ninth Circuit reversed on the Fourth Amendment claim and remanded the matter to the trial court. (*George v. Edholm* (Ninth Circuit; May 28, 2014) 752 F.3d 1206.)

Employee's Evidence That "Failure To Perform Job Task Was Not Important" Is Rejected.

Plaintiff was terminated after failing to perform an important annual report for three years in a row. In the ensuing wrongful termination action, the employer moved for summary judgment, and plaintiff produced expert evidence that the failure to perform the important job function did not harm the employer. The trial court granted

summary judgment. The appellate court affirmed, stating: "We are asked to determine whether an employee who is terminated for failing to perform an important job function can avoid summary judgment by arguing, based on expert evidence obtained for the purpose of opposing a motion for summary judgment or summary adjudication, years after the employee's termination, that the failure to perform did not and would not result in any adverse consequences to the employer. We hold that after-acquired expert evidence that there were no adverse consequences from an employee's failure to perform does not create a triable issue of fact on the question whether the employee failed to perform his or her job duties and thus has limited relevance, if any, to the question of discrimination." (*Serri v. Santa Clara University* (Cal. App. Sixth Dist.; May 28, 2014) 226 Cal.App.4th 830, [172 Cal.Rptr.3d 732].)

Class Action Settlement Reversed.

Plaintiffs brought an action against defendants for advertising a bracelet as a revolutionary bracelet that uses the body's "biofield" to improve strength and wellness. Alleging the advertising claims were false, plaintiffs sought injunctive relief and damages on behalf of all persons in the United States who purchased a bracelet. Defendants agreed to settle the lawsuit, and the trial court approved a settlement agreement in which defendants would create a fund to reimburse class members for the purchase cost of the bracelet. Pursuant to the agreement, the trial court awarded \$215,000 in attorney fees. Appellant, a class member, objected to the settlement, alleging the trial court abused its discretion in awarding attorney fees and the notice afforded class members violated due process. The appellate court found no error in the award of fees, but reversed with regard to the notice issue, noting that if a class member had an objection to the settlement, the class member was required to come to court and that "[r]equiring any objector to attend the final approval hearing does not offer a meaningful opportunity to be heard, and therefore violates class members' due process rights." (*Litwin v. iRenew Bio Energy Solutions, LLC* (Cal. App. Second Dist., Div. 1; May 28, 2014) (As mod. May 29, 2014) 226 Cal.App.4th 877, [172 Cal.Rptr.3d 328].)

Flaws Found In Sampling Approach To Wage And Hour Case.

A wage and hour class action went all the way through to verdict. The trial court devised a plan to determine the extent of liability to all class members by extrapolating from a random sample. In the first phase of trial, the court heard testimony about the work habits of 21 plaintiffs, and defendant was not permitted to introduce evidence about work habits of anyone outside the sample group. Based upon the sample group, the court found the entire class had been misclassified. After the second phase of trial, which focused on testimony from statisticians, the court extrapolated the average amount of overtime reported by the sample group to the class as a whole, resulting in a verdict of \$15. The appellate court reversed stating: “A trial plan that relies on statistical sampling must be developed with expert input and must afford the defendant an opportunity to impeach the model or otherwise show its liability is reduced.” (*Duran v. U.S. Bank National Association* (Cal. Sup. Ct.; May 29, 2014) 59 Cal.4th 1, [325 P.3d 916, 172 Cal.Rptr.3d 371].)

Affirmed By California Supreme Court.

Previously We Reported:

Newspaper Entitled To Names Of Officers Involved In Shooting.

The Los Angeles Times made a request under California’s Public Records Act [*Government Code* section 6250] seeking the names of police officers involved in a December 2010 officer involved shooting in Long Beach as well as the names of officers involved in all shootings over the previous five years. The City initially said it intended to provide the information, but after it informed the Long Beach Police Officers Association, LBPOA asked for an injunction preventing disclosure. After initially issuing a temporary restraining order, the trial court granted the Time’s request to dissolve the order and denied a request for an injunction. Noting the public interest in the conduct of peace officers is substantial, the Court of Appeal affirmed, finding officers’ names are not personnel records or personal data and their disclosure would not amount to an invasion of privacy. (*Long Beach Police Officer’s Association v. City of Long Beach* (Cal. App. Second Dist., Div. 2; February

7, 2012) 203 Cal.App.4th 292, [136 Cal. Rptr.3d 868].)

The matter made its way to the California Supreme Court, and the court affirmed both the trial court’s and appellate court’s decisions, stating: “We do not hold that the names of officers involved in shootings have to be disclosed in every case, regardless of the circumstances. We merely conclude, as did the trial court and the Court of Appeal, that the particularized showing necessary to outweigh the public’s interest in disclosure was not made here, where the Union and the City relied on only a few vaguely worded declarations making only general assertions about the risks officers face after a shooting. The public records request by the Times is broadly worded and covers a wide variety of incidents. Thus, the Union and the City sought a blanket rule preventing the disclosure of officer names every time an officer is involved in a shooting. Such a rule would even prevent disclosure of the name of an officer who acted in a heroic manner that was unlikely to provoke retaliation of any kind, in which case officer safety would not be an issue. We reject that blanket rule.” (*Long Beach Police Officer’s Association v. City of Long Beach* (Cal. Sup. Ct.; May 29, 2014) 59 Cal.4th 59, [325 P.3d 460].)

Discrimination Allegations In Health Care To Deaf Woman.

Both husband and wife communicated through American Sign Language. The wife first went to a medical clinic in Nevada in 2007 and was told no sign language interpreter would be provided to interpret her communications with health care personnel. Each timeshe went to the clinic, she requested and was denied an interpreter. In late 2009, the wife died. The husband filed an action against the clinic and the doctor on September 1, 2010, alleging violations of the Americans with Disabilities Act of 1990 [42 U.S.C. § 12101] and Section 504 of the Rehabilitation Act [29 U.S.C. § 794], as well as NIED and IIED under Nevada law. The federal trial judge granted summary judgment on the statute of limitations issue. The Ninth Circuit reversed, stating: “Because each and every discrete discriminatory act causes a new claim to accrue under Section 504 of the Rehabilitation Act, any discriminatory acts that [the

clinic and the doctor] took after September 1, 2008 are actionable. All prior discrete discriminatory acts, however, are untimely filed and no longer actionable.” (*Ervine v. Desert View* (Ninth Cir.; May 29, 2014) (Case No. 12-15059) 29 Am. Disabilities Cas. (BNA) 1513.)

“Mothers All Want Their Sons To Grow Up To Be President, But They Don’t Want Them To Become Politicians In The Process.” — John F. Kennedy.

Under *Government Code* section 1090, which prohibits city officers from being financially interested in any contract made by them in their official capacity, a City sued members of its City Council and a City official seeking declaratory relief regarding personal financial interests involved with official duties. The defendants brought an anti-SLAPP motion pursuant to *Code of Civil Procedure* section 425.16, which the trial court denied. On appeal, the defendants contend the City’s action arises from protected activity. The appellate court affirmed, stating: “Here, the City’s claim . . . is based on the council members’ votes to approve a contract in which they had a financial interest. Their acts of voting represented the commitment of their legislative power to the approval of a city contract, which did not implicate their own right to free speech nor convey any symbolic message [], and therefore those acts fail to qualify as protected activity within the meaning of section 425.16.” (*City of Montebello v. Vasquez* (Cal. App. Second Dist., Div. 1; May 30, 2014) 226 Cal.App.4th 1084, [172 Cal. Rptr.3d 671].)

No Liability For Inducing Patent Infringement.

A patent claims a method of delivering electronic data using a content delivery network [CDN]. The exclusive licensee of that patent designates certain files, a process called tagging. Another technology company also operates a CDN and carries out several of the steps claimed in the patent, but instead of actually tagging, it provides instructions for customers to do their own tagging. The licensee brought an action for inducing patent infringement. The United States Supreme Court found no infringement, stating: “This case presents the question whether a defendant may be liable for inducing in-

fringement of a patent under 35 U.S.C. § 271(b) when no one has directly infringed the patent. . . . The statutory context and structure and our prior case law require that we answer this question in the negative.” (*Limelight Networks, Inc. v. Akamai Technologies, Inc.* (U.S. Sup. Ct.; June 2, 2014) 134 S.Ct. 2111, [189 L.Ed.2d 52].)

New Standard Set To Test Whether A Patent Is Ambiguous.

The United States Supreme Court remanded a patent case involving a heart rate monitor used with exercise equipment to the Federal Circuit to apply a new standard regarding whether or not a patent is ambiguous. The high court stated: “[W]e hold that a patent is invalid for indefiniteness if its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” (*Nautilus, Inc. v. Biosig Instruments* (U.S. Sup. Ct.; June 2, 2014) 134 S.Ct. 2120, [189 L.Ed.2d 37].)

Illegal Pyramid Scheme.

The Federal Trade Commission Act, § 5(a) [FTCA; 15 U.S.C. § 45(a)(1)] states that “unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” In that context, a marketing company offered participants the ability to become independent retailers of music and other merchandise as well as earn points redeemable for music or merchandise. In the alternative, participants could pay an additional fee and earn cash rewards. The Federal Trade Commission filed suit against the marketing company. The federal trial court granted a permanent injunction against the company, and the company appealed. The Ninth Circuit found the company had an “illegal pyramid scheme in violation of the FTCA because [the marketing company’s] focus was recruitment, and because the rewards it paid in the form of cash bonuses were tied to recruitment rather than the sale of merchandise.” (*Federal Trade Commission v. Burnlounge, Inc.* (Ninth Cir.; June 2, 2014) (Case No.’s 12-55926, 12-56197, 12-56228).)

Superior Court Lacks Jurisdiction.

Plaintiff filed an action in superior court seeking an injunction to stop members of the Public Utilities Commis-

sion [PUC] from proceeding with a meeting “since the commission would not permit her to attend the meeting because of her affiliation with the Sierra Club, the meeting violated the Bagley-Keene Open Meeting Act. (*Government Code* section 11120). The PUC opposed the application for an injunction, arguing the superior court did not have jurisdiction to grant it, and “regardless, the meeting did not violate the Act.” The superior court agreed that it did not have jurisdiction. The appellate court also agreed, stating: “We conclude a person desiring to commence such an action against the commission may only do so by filing a petition for writ of mandate in the Supreme Court or the Court of Appeal.” (*Disenhouse v. Peevey* (Cal. App. Fourth Dist., Div. 1; June 3, 2014) 226 Cal.App.4th 1096, [172 Cal.Rptr.3d 549].)

Law Didn’t Keep Up With Science [Or Didn’t Want To Keep Up With It].

In 2000, the Food and Drug Administration [FDA] approved the use of medications to perform abortions, and medication abortions now account for 41 percent of all first-trimester abortions performed at Planned Parenthood clinics nationwide. This less invasive procedure is particularly important for victims of rape or sexual abuse as well as women with medical issues which make surgical procedures more difficult. Arizona passed a statute and regulation which require doctors to adhere to the FDA-approved labeling instructions for administering the medication. Even before the FDA approved the drug’s labeling instructions, studies already showed that a different less rigorous regimen was safe and effective. Planned Parenthood Arizona, Inc. and others were denied their request to enjoin enforcement of Arizona’s statute, and the federal trial court denied the injunction request. The Ninth Circuit reversed, stating: “Here, the medical grounds thus far presented are not merely feeble. They are non-existent. On the current record, the Arizona law imposes an undue—and therefore unconstitutional—burden on women’s access to abortion. We therefore conclude, at this stage of the proceedings, that plaintiffs have shown that they are likely ultimately to succeed on the merits of their undue burden claim,” and ordering the trial court to issue the requested preliminary in-

junction. (*Planned Parenthood Arizona, Inc. v. Humble* (Ninth Cir.; June 3, 2014) (Case No. 14-15624).)

46 Months For Unsocial Media Postings & Stalking.

Criminal defendant sent sexually suggestive and threatening texts and emails to his former girlfriend and her friends. He created a Facebook page in her name and posted nude photos of her on it. A jury found him guilty of stalking in violation of 18 U.S.C. § 2261A (2)(A) & 2261 (b)(5). On appeal, defendant contends that 18 U.S.C. § 2261A is facially unconstitutional because it prohibits speech protected by the First Amendment, and that 18 U.S.C. § 2261A(2)(A) is overly broad because it does not define “substantial emotional distress” or “harassment.” The Ninth Circuit affirmed his conviction, noting the challenged terms are not esoteric or complicated, and stating defendant’s intent to harass and intimidate the victim and cause substantial emotional distress was not afforded First Amendment protection, as it was integral to his criminal conduct. (*U.S. v. Osinger* (Ninth Cir.; June 4, 2014) (As Corrected July 2, 2014) (Case No. 11-50338).)

Famous Last Words:

“I’ll prepare the order, Your Honor.” In a case where there was some confusion over the disbursement of settlement funds, the judge stated, “I’m going to issue an order to show cause,” and an attorney volunteered to prepare the order. That same day, the lawyer prepared the order for the court and sent a copy of it to all parties. The person who was ordered to show cause faxed the attorney an objection stating: “You are violating the automatic stay provisions of 11 U.S.C. §362,” the automatic bankruptcy stay. The party in bankruptcy thereafter filed a federal lawsuit alleging the lawyer and the judge violated the automatic stay. The judge filed a motion to dismiss, contending he was entitled to absolute judicial immunity, and the lawyer argued that, since he was following the judge’s order, he was entitled to absolute quasi-judicial immunity. The district court found the judge was entitled to immunity, but the lawyer was not because he volunteered to prepare the order. The Ninth Circuit affirmed, stating: “On the narrow question presented by this appeal, we con-

clude that an attorney preparing an order for a judge is not entitled to quasi-judicial immunity. We do not reach the question of whether such an action violated the automatic stay, or whether it was actionable under 11 U.S.C. § 362(k).” (*Burton v. Infinity Capital Management* (Ninth Cir.; June 4, 2014) (Case No. 12-15618) [59 Bankr. Ct.Dec. 162].)

“There Are Eight Million Stories In The Naked City. This Has Been One Of Them;” Another Contractor License Case. California has a goal of precluding unlicensed contractors from maintaining actions for compensation, in order to assure contracting is performed by licensed contractors. There have been legions of cases involving one peculiar situation after another. In the instant matter, plaintiff, the live person, became a licensed general building contractor in 1995, and operated a sole proprietorship. During the course of constructing a home for defendant couple, plaintiff incorporated his business, and in 2005 his contractor’s license was reissued to the corporation. Defendants contended they didn’t have to pay plaintiff, the corporation, for the work. Plaintiff prevailed in both the trial and appellate courts. After noting that at no time was work done on defendants’ home by an unlicensed contractor, the appellate court stated: “[W]e hold [*Business and Professions Code*] section 7031 does not apply to the unique situation here because to do so would not advance the statute’s goal of precluding unlicensed contractors from maintaining actions for compensation.” (*E.J. Franks Construction, Inc. v. Sabota* (Cal. App. Fifth Dist.; June 5, 2014) 226 Cal. App.4th 1123, [172 Cal.Rptr.3d 778].)

Traffic Camera Evidence Properly Admitted (Get Out Your Checkbook!). A woman was cited for failing to stop at a red light. Evidence against her was generated by an automated traffic enforcement system [aka red light traffic camera]. She objected to the admission of the traffic camera photograph and 12-second video on the basis of lack of foundation. At her infraction trial, a City investigator testified about the red light camera program that was first implemented in 2003, and explained how it worked. In

a unanimous opinion, the California Supreme Court held the evidence was properly authenticated, did not constitute hearsay and that there is no heightened requirement for red light camera traffic cases. (*The People v. Goldsmith* (Cal. Sup. Ct.; June 5, 2014) 59 Cal.4th 258, [326 P.3d 239, 172 Cal.Rptr.3d 637].)

Treatment For Eating Disorders Covered Under Health Care Plan. Plaintiffs suffer from eating disorders and are covered by defendant health care provider. Defendant declined to provide coverage to treat their eating disorders. *Health and Safety Code* section 1374.72 [the Parity Act] mandates that every health care service plan “provide coverage for the diagnosis and medically necessary treatment of severe mental illnesses . . . under the same terms and conditions applied to other medical conditions.” The trial court held the Parity Act does not specifically enumerate eating disorders, and ruled in favor of defendant. The appellate court reversed, stating: “We conclude the Legislature in crafting the Parity Act, which uses broad statutory language to mandate the provision of medically necessary services for mental health conditions, recognized that most mental health conditions have a physical basis.” (*Rea v. Blue Shield of California* (Cal. App. Second Dist., Div. 1; June 10, 2014) (As modified July 9, 2014) 226 Cal. App.4th 1209, [172 Cal.Rptr.3d 823].)

No Duty To Defend In Disparagement Case. An insurance company denied patent and trademark liability coverage to a manufacturer of goods and services because the suit did not allege the company disparaged its competitor. The appellate court agreed with the insurance company that it had no duty to defend. The case was eventually heard in the California Supreme Court which held: “We hold that a claim of disparagement requires a plaintiff to show a false or misleading statement that (1) specifically refers to the plaintiff’s product or business and (2) clearly derogates that product or business.” (*Hartford Casualty Insurance Company v. Swift Distribution, Inc.* (Cal. Sup. Ct.; June 12, 2014) 59 Cal.4th 277, [326 P.3d 253, 172 Cal. Rptr.3d 653].)

Lavish Life Style Ended When Couple Separated. An unemployed married couple lived the high life with monthly expenses averaging \$45,000, thanks to subsidies by the husband’s parents, who deducted the money from their son’s expected inheritance. When the couple separated, the husband’s annual income was about \$99,000, and the trial court ordered him to pay monthly permanent spousal support of \$2,000 and child support of \$1,235. Agreeing with the trial court that the husband’s parents could not be ordered to continue their cash advances, the appellate court affirmed. (*In re: Marriage of Williamson* (Cal. App. Second Dist., Div. 6; June 12, 2014) 226 Cal.App.4th 1303, [172 Cal.Rptr.3d 699].)

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