



Litigation Update

Litigation Section News

March 2014

Employer's Appeal Dismissed.

A welder prevailed before the Labor Commissioner, and the employer filed a notice of appeal which is the statutory prerequisite for obtaining a trial de novo in superior court. The welder filed a motion to dismiss the employer's appeal on the ground the employer failed to timely post an undertaking as is required by *Labor Code* section 98.2(b), which states: "As a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award." The superior court extended the employer's time to post the undertaking, and it was not actually posted until 66 days after the notice of appeal was filed. After a trial de novo, the superior court ruled that the welder was not an employee, but was an independent contractor and entered judgment in the employer's favor. The appellate court stated: "In essence, the question is this: is the requirement in section 98.2(b) to post an undertaking as a condition to filing an appeal a jurisdictional requirement, such that the trial court cannot extend the time for the posting beyond

the deadline for the filing of the notice of appeal?" The appellate court concluded the deadline for posting an undertaking is jurisdictional and cannot be extended by the trial court. It held the welder's motion to dismiss should have been granted, and reversed the judgment of the superior court. (*Palagin v. Paniagua Construction, Inc.* (Cal. App. First Dist., Div. 5; December 16, 2013) (As Mod. Jan. 15, 2014) 222 Cal. App.4th 124.)

Use Of Property Limited To Its Historic Use.

The same piece of property is the subject of both a lease and an easement. Plaintiffs own the property and defendants park their garbage trucks and place their storage bins on the property. The trial court ruled that, assuming the 22-year-old lease was valid, it had been abandoned because defendant "clearly disregarded the lease as soon as it was signed." With regard to the easement, the trial court limited defendant "to the historic use of the paved area and 10 feet beyond the paved area," and issued an injunction barring defendant from expanding its use beyond that area. Noting that in the 22 years since the lease was signed, defendant paid no taxes on the property as required by the terms of the lease, the trial court's judgment was affirmed. (*Rye v. Tahoe Truckee Sierra Disposal Company, Inc.* (Cal. App. Third; December 16, 2013) 222 Cal.App.4th 84.)

45 Years To Life In Prison For Juvenile Not Cruel Or Unusual.

A 17-year-old broke into a family home while the family slept. He shot and wounded one of the occupants. On appeal, he contended his 45-year-to-life sentence is cruel and unusual punishment within the meaning of the Eighth Amendment. The appellate court noted that in September 2013, Penal Code section 3051 was amended. The amended statute "requires the Board of Parole Hearings to conduct 'youth offender

parole hearings' to consider the release of offenders who committed specified crimes as juveniles and who were sentenced to prison." The appellate court affirmed, stating: "We therefore conclude defendant's sentence is constitutional because it is not the 'functional equivalent' of life without parole." (*People v. Martin* (Cal. App. Second Dist., Div. 6; December 16, 2013) 222 Cal.App.4th 98.)

Read The Contract!

The plaintiff filed a claim for long term disability benefits with an insurance company in a plan covered by ERISA [Employee Retirement Income Security Act of 1974; 29 U.S.C. § 1132(a)(1)(B)]. ERISA does not specify a statute of limitations for filing suit, but a cause of action does not accrue until the plan issues a final denial. In this case, plaintiff filed the ERISA action almost three years after the insurance company's final denial, but more than three years after proof of loss was due. The insurance policy, however, had a term requiring any suit to recover benefits under ERISA to be filed within three years after proof of loss is due. Both the trial and appeals court found in favor of the insurance company. The United States Supreme Court affirmed, pointing out that contractual limitations periods should be upheld, unless the period is unreasonably short or there is a controlling statute to the contrary. (*Heimeshoff v. Hartford Life & Accident Insurance Co.* (U.S. Sup. Ct.; December 16, 2013) 134 S.Ct. 604, [187 L.Ed.2d 529].)

But Don't Click On The Orange Button!

Class action plaintiffs claimed they were scammed on the internet after giving their credit card information. Allegedly unbeknownst to plaintiff, instead of making a one-time purchase, he somehow agreed to pay \$19.95 a month. The internet company moved to compel the matter into arbitration, contending that the named plaintiff "agreed to arbitration by

Membership in the ADR Subcommittee

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clicking the orange button.” Both the district court and the Ninth Circuit held that under Washington law, the plaintiff did not enter into a contract to arbitrate. (*Lee v. Intelius, Inc.* (Ninth Cir.; December 16, 2013) 737 F.3d 1254.)

No Request For Correction Means No General Or Punitive Damages Against Dr. Phil.

In a petition for writ of mandate, the real party in interest is the host of a television show. Petitioners are two men who are residents of Aruba who were questioned in connection with the 2005 disappearance of Natalie Holloway, an American teenager who disappeared while on a high school trip on Aruba. Real party’s television show broadcast an episode devoted to the disappearance. The videotape showed a petitioner indicating the teenager had sex with both of them. One of the petitioners contended he was not told the interview was being recorded, and that when asked about having sex with the teenager, he responded “no,” shaking his head. He claimed the videotape had been manipulated. After the episode aired, petitioners filed a complaint in superior court stating causes of action for defamation, defamation per se, invasion of privacy, NIED, IIED, fraud, deceit and other causes of action. The trial court granted real party’s motion in limine to prevent the introduction of much of petitioners’ evidence and requests for damages, based upon *Civil Code* section 48a’s requirement of a demand for correction. Before the Court of Appeal, petitioners contended the trial court erred in applying *Civil Code* section 48a to claims arising from or relating to the show because the statute is only meant to apply to media which are engaged in the business of immediate dissemination of news. In denying the writ, the appellate court stated: “A close examination of the cases reveals the scope of section 48a is determined by the type of media involved, and not upon specific content. Therefore we cannot conclude the statute only applies to visual and sound broadcasting which is engaged in the business of rapid and immediate dissemination of the news. The language of the statute clearly applies to all types of television shows. . . . Therefore, since petitioners did not send a request for correction, the trial court correctly granted the motion in

limine of real parties to bar evidence at trial of general or punitive damages.” (*Kalpo v. Sup. Ct. (Phillip C. McGraw)* (Cal. App. Second Dist., Div. 7; December 17, 2013) 222 Cal.App.4th 206.)

Arbitration Term Unenforceable.

The Ninth Circuit decided an arbitration agreement that eliminates all federal court review of arbitration awards, including review under § 10 of the Federal Arbitration Act [FAA; 9 U.S.C. § 10(a)], is not enforceable. (*In re Wal-Mart Wage and Hour Employment Practices Litigation* (Ninth Cir.; December 17, 2013) (Case No. 11-17718).)

Trial Court, Not The Arbitrator, Decides Whether Party Waived Right To Arbitrate By Pursuing Litigation.

The trial court denied defendant’s petition to compel arbitration. On appeal, defendant contended that whether or not a party has waived the right to arbitrate by pursuing litigation in the trial court should be decided by the arbitrator. Defendant cited language appearing in *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, [123 S.Ct. 588; 154 L.Ed.2d 491] “So, too, the presumption is that the arbitrator should decide ‘allegation[s] of waiver, delay, or a like defense to arbitrability.’” The appellate court affirmed the denial of the petition to arbitrate, stating: “Based upon the near-unanimous analysis of federal and state courts, we conclude the foregoing language in *Howsam* does not apply here. The trial court correctly ruled it, rather than an arbitrator, should decide the merits of the waiver by litigation conduct defense to arbitration asserted by plaintiffs. We affirm the order denying the motion to compel arbitration.” (*Hong v. CJ CGV America Holdings, Inc.* (Cal. App. Second Dist., Div. 5; December 18, 2013) 222 Cal. App.4th 240.)

Statute Of Limitations Does Not Bar Action Against Lawyers.

A trustee who is a lawyer and was a lifelong friend of the plaintiffs, a large family, allegedly teamed up with another lawyer and a law firm to “drain off” \$25 million from a composite family estate. The family brought an action against the lawyers for fraud, intentional and negligent misrepresentation, fraud by concealment,

constructive fraud, breach of fiduciary duty, conversion, professional negligence, negligent hiring and retention, violation of the prudent investor rule, violation of the Racketeer Influenced and Corrupt Organizations Act [RICO; 18 U.S.C. § 1961] and financial elder abuse. The trial court sustained the lawyers’ demurrer without leave to amend. The appellate court reversed, rejecting the contention the statute of limitations barred each cause of action. (*Stueve Bros. Farms, LLC v. Berger Kahn* (Cal. App. Fourth Dist., Div. 3; December 18, 2013) 222 Cal.App.4th 303.)

Conspiracy Allegations To Go Back Into Fraudulent Estate Planning Pleading.

In the same action, but in a separate appeal, the law firm convinced the trial court to strike all conspiracy allegations from the plaintiffs’ pleading because *Civil Code* section 1714.10 bars the action. *Civil Code* section 1714.10, was enacted to combat “the use of frivolous conspiracy claims that were brought as a tactical ploy against attorneys and their clients and that were designed to disrupt the attorney-client relationship.” The appellate court reversed, finding the prefiling requirement of section 1714.10 inapplicable because none of the causes of action arose from an “attempt to contest or compromise a claim or dispute” as is required by the statute. The appellate court

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explained: “Rather, [plaintiffs] say, the claims arose from transactional activities—siphoning off of assets through fraudulent estate planning, including the misappropriation of the Steuve’s assets through the diversion of those assets to entities created and controlled by the defendants.” (*McClamma Stueve v. Berger Kahn* (Cal. App. Fourth Dist., Div. 3; December 18, 2013) 222 Cal.App.4th 327.)

Double Recovery. Plaintiff, a bus driver for the County, filed a motion in the superior court seeking to have her disability retirement effective date as the day after she last received regular compensation, not when her workers’ compensation temporary disability pay period expired. The trial court entered an order stating her disability retirement was effective “the day following her last day of regular employment, with no offsets for sick leave or workers’ compensation temporary disability payments.” The appeal deals with effective date of her disability retirement. *Government Code* section 31724 states a disabled worker’s retirement becomes “effective on the expiration date of any leave of absence with compensation to which he shall become entitled.” In affirming the trial court’s order, the appellate court noted: “Had the Legislature intended to preclude a double recovery, we assume it would have done so as it did by providing in section 31724 that pension payments may not begin until after sick leave payments have ended.” (*Porter v. Board of Retirement of the Orange County Employees’ Retirement System* (Cal. App. Fourth Dist., Div. 3; December 18, 2013) 222 Cal.App.4th 335, [165 Cal.Rptr.3d 510].)

“Never Attempt To Win By Force What Can Be Won By Deception.”—NICCOLO MACHIAVELLI A Japanese corporation developed a drug to treat pulmonary arterial hypertension [PAH]. The company entered an agreement/license with a California-based company to develop and commercialize its drug in North America and Europe. Meanwhile, a Swiss corporation acquired the California-based company. BTW, did I mention the Swiss company also markets a drug to treat PAH? Once it acquired the California-based company which held the marketing license for the Japanese company’s PAH drug,

the Swiss company notified the Japanese company it “would discontinue development of [the Japanese company’s drug] for ‘business and commercial reasons.’” In the Japanese company’s action against the Swiss company for intentional interference with the License Agreement, interference with prospective economic advantage, breach of a confidentiality agreement and breach of confidence, the jury was not amused. The jury awarded nearly \$546.9 million in compensatory damages and found defendants acted with malice, oppression and fraud. Later more than \$30 million in punitive damages was awarded against individuals. The trial court denied a motion for new trial on damages, conditioned on the Japanese company’s acceptance of a remittitur on certain damage categories. On appeal, defendants contended any actions taken to interfere with the License Agreement were privileged and not actionable. The appellate court affirmed the awards. Regarding the individuals, the appellate court stated: “The jury reasonably could have determined that imposition of substantial punitive damages on the three senior [Swiss company] executives who had personally directed [the Swiss company’s] malicious or fraudulent activities would deter [the Swiss company] from committing similar misconduct in the future.” (*Asahi Kasei Pharma Corporation v. Actelion LTD.* (Cal. App. First Dist., Div. 5; December 18, 2013) (As Mod. January 16, 2014) (Case No. A133927).)

Bar Exam Scores A Matter Of Public Interest. Plaintiffs requested the State Bar provide them access to information contained in its bar admissions database, including applicants’ bar exam scores, law school attended, grade point averages, LSAT scores, and race or ethnicity “in order to conduct research on racial and ethnic disparities in bar passage rates and law school grades.” The California Supreme Court held: “We conclude that under the common law right of public access, there is a sufficient public interest in the information contained in the admissions database such that the State Bar is required to provide access to it if the information can be provided in a form that protects the privacy of applicants and if no countervailing interest outweighs the pub-

lic’s interest in disclosure.” (*Sander v. State Bar of California* (Cal. Sup. Ct.; December 19, 2013.) 58 Cal.4th 300, [314 P.3d 488; 165 Cal.Rptr.3d 250].)

Thought And Attention Needed For Calculating Time To File An Appeal. The court granted defendant’s motion for summary adjudication on June 27, 2012. On September 10, 2012, plaintiff filed a request for dismissal of the remaining causes of action. On April 16, 2013, a “Judgment by the Court Under *Code of Civil Procedure* section 437c” was filed by plaintiff. On May 6, 2013, plaintiff filed a notice of appeal from the April 16 judgment. Defendant filed a motion to dismiss the appeal, contending it was untimely. The Court of Appeal granted the motion to dismiss, stating: “We conclude that an appealable judgment was created when [plaintiff] filed a request for dismissal without prejudice of all of their causes of action that remained after a grant of summary adjudication against them.” (*Dattani v. Lee* (Cal. App. First Dist., Div. 3; December 19, 2013) (As mod. January 14, 2014) 222 Cal.App.4th 411.)

Obstruction Of Easement. An easement for ingress and egress across property was granted in 1942. More than 60 years later, plaintiff began improvements to the easement to gain easier access to plaintiff’s property, and defendant complained about the work being done on his property. A stop-work order was issued and plaintiff’s permit was revoked. Defendant refused to sign an agreement to permit plaintiff to continue construction; plaintiff’s houses were in the framing stage, with exposed wood and no roof and so they posed a fire hazard. Plaintiff filed an action seeking damages for interference with her easement and for injunctive relief. At trial, plaintiff adduced evidence that defendants committed the following four specific acts that she believed constituted interference with her use and enjoyment of the easement: [Defendant’s] (1) refusal to sign the covenant for community driveway; (2) refusal to sign a retaining wall permit which was a prerequisite to plaintiff’s occupancy certificate; (3) demands for money in exchange for granting plaintiff’s rights she already possessed in the easement; and (4)

statements that plaintiff lost her easement by creating the grading cut and burdening the easement. The jury found that defendants substantially and unreasonably interfered with plaintiff's use and enjoyment of her easement by acting or failing to act, and next that defendants breached the implied covenant of good faith and fair dealing contained in the easement's running covenant. The trial court entered judgment for plaintiff in the amount of \$713,927.96, but ordered her to remove a portion of a retaining wall, and permanently enjoined defendant from interfering with plaintiff's use of the easement. On appeal, the appellate court affirmed the judgment, stating the "conduct can constitute actionable interference with the use and enjoyment of an easement even when the conduct does not physically obstruct the servitude." (*Dolnikov v. Ekizian* (Cal. App. Second Dist., Div. 3; December 19, 2013) 222 Cal.App.4th 419, [165 Cal. Rptr.3d 658].)

Dementia Is A 'Mental Disorder' Under The LPS Act. An 83-year-old man shot and killed the handyman who came to fix the garbage disposal. He was charged with murder and he was found to be incompetent to stand trial. Doctors reported he suffered from "dementia of the Alzheimer's type." The superior court ordered the public guardian to petition for a conservatorship and to act as conservator under the Lanterman-Petris-Short Act [LPS Act; *Welfare and Institutions Code* section 5000 *et seq.*]. The public guardian informed the court it could not petition for conservatorship because dementia is not recognized as a recoverable mental illness and thus, does not meet the criteria for a conservatorship under the LPS Act. The superior court determined the public guardian's refusal to act as conservator was an abuse of discretion, and ordered the public guardian to

act as conservator. County counsel represented the public guardian and petitioned the Court of Appeal for a writ of mandate asking the appellate court to set aside the superior court's order. The appellate court denied the request for extraordinary relief, stating: "Upon independent review, we conclude that the trial court in this case correctly interpreted the LPS Act to provide that dementia is a 'mental disorder' within the LPS Act's meaning, contrary to the statutory interpretation urged by the public guardian." (*County of Los Angeles v. Sup. Ct. (The People)* (Cal. App. Second Dist., Div. 1; December 19, 2013) (As Mod. January 17, 2014) 222 Cal.App.4th 434.)

Shine The Light. *Civil Code* section 1798.83 [STL; The Shine The Light Law] and *Business and Professions Code* section 17200 [UCL; The Unfair Competition Law] were at issue in a matter where plaintiff, an internet subscriber who wanted to engage in fantasy football, baseball and basketball, provided his name, email address, date of birth and zip code on the website, owned by defendants. STL requires businesses that share customers' personal information with third parties for direct marketing to disclose, upon a customer's request, the names and addresses of third parties who have received personal information and the categories of personal information received. Plaintiff represents a class of people to whom defendant allegedly refused to provide the information STL requires. Defendant demurred, contending plaintiff cannot show it ever shared his personal information with anyone for marketing purposes. The trial court sustained the demurrer without leave to amend. The appellate court affirmed the dismissal pursuant to demurrer because plaintiff has no standing under either STL or UCL to bring this action. (*Boorstein v. CBS Interactive, Inc.* (Cal. App. Second Dist., Div. 4; December 19, 2013.) 222 Cal.App.4th 456, [165 Cal. Rptr.3d 669].)

If You Shoot At The King, Best Not To Miss. On March 18, 2013, the clerk of court notified the parties their case was assigned to a certain judge. On April 3, counsel for one of the parties faxed an affidavit of prejudice concerning that judge pursuant to *Code of Civil Proce-*

dure section 170.6 to the court's "central fax filing office." On May 14, counsel inquired about the affidavit and was informed it was lost. Counsel applied to the judge for a *nunc pro tunc* order deeming the affidavit filed as of April 3. The judge denied the application, stating: "Pursuant to *Code of Civil Procedure* [section] 170.6, the motion shall be made to the assigned judge or to the presiding judge. Fax-filing to the clerk's office is insufficient." In the petition for extraordinary relief, the Court of Appeal agreed with the trial judge, stating the challenge was improper because it was not made to the assigned judge, or presiding judge. (*Jack Fry v. Sup. Ct.* (Cal. App., Second Dist., Div. 1; December 19, 2013) 222 Cal.App.4th 475.)

New Trial Granted In Product Case With Sophisticated User Defense. Plaintiff, a maintenance worker, was using a power drill to drill a hole in a piece of angle iron when the drill bit bound and the drill counter rotated, twisting his arm and causing serious injuries. His theory at trial was that the drill should not have been used without a side handle, and that it was negligently and defectively designed because it did not include an interlock device that would prevent the drill from being used when the side handle was not attached. Defendant asserted that plaintiff was a sophisticated user of the drill, and any failure to warn was not a legal cause of plaintiff's injuries because plaintiff already knew or should have known of the dangers involved in the use of the product. Plaintiff's expert admitted that someone with plaintiff's background and experience should have known that a drill could bind, counter rotate, and injure the user. Another expert opined that, with his work experience, knowledge, and skill set, plaintiff would be aware of what the subject drill was capable of and that it did have a side handle. The jury, in a special verdict, found the drill was not negligently or defectively designed. The trial court granted plaintiff's motion for a new trial as to the failure to warn claims only, on the ground of insufficiency of the evidence to support the verdict. On appeal, defendant challenged both the grant of a new trial and the denial of its motion for summary adjudication based on its contention plaintiff was a sophisticated user. The Court of Appeal found no abuse of

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discretion on the part of the trial judge and affirmed. (*Buckner v. Mihuaukeee Electric Tool Corporation* (Cal. App. Fifth Dist.; December 20, 2013) 222 Cal.App.4th 522.)

Twister Interferes With “Clear Sailing” Agreement. The parties entered into a settlement agreement containing a “clear sailing” provision, which allowed class counsel to seek an award of attorney fees and incentive payment from the trial court with the assurance that defendant would not oppose, if the amount sought was less than or equal to an agreed amount. An additional clause required class counsel to accept either the maximum specified in the “clear sailing” provision, or the amount awarded by the trial court, whichever was less. The fee and incentive payment order of the trial court amounted to only a fraction of what was requested. Plaintiffs appealed and defendant argued the provision requiring plaintiffs to accept the less of the amount specified in the agreement, or the amount awarded by the trial court, constituted an implied waiver of their right to appeal from the trial court’s order. The appellate court agreed with the trial court, that, as a matter of law, the agreement did not amount of a waiver of the right to appeal because it was not explicit and unambiguous. Noting “there is an important policy distinction between counsel who enforce rights belonging to a large class, or the public in general, and contingency fee attorneys who litigate matters involving purely individual injuries or damages,” the appellate court reversed both the attorney fee award and the incentive payment order. Upon remand for the trial court to award fees and an incentive payment for the class representatives, the appellate court stated the trial court “shall have the discretion to include an additional amount, representing attorney fees for this appeal.” (*Ruiz v. California State Automobile Association Inter-Insurance Bureau* (Cal. App. First Dist., Div. 4; December 20, 2013) 222 Cal.App.4th 596.)

Bribery Of Public Officials Claimed. In a matter involving allegations of bribing members of a board of supervisors to obtain their approval of a litigation settlement, the California Supreme Court held: “Whether the offeror is guilty of aiding and abetting the receipt of the

bribe depends on whether there is evidence that, in addition to the offer or payment of the bribe, the offeror ‘with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.’” (*People v. Biane* (Cal. Sup. Ct.; December 23, 2013) 58 Cal.4th 381, [315 P.3d 106].)

Potato, Potahto, Tomato, Tomahto... Let’s Call The Whole Thing Off. A class representative plaintiff brought an action against a grower for allegedly mislabeling products as organic. Based on a preemption analysis, the trial court granted defendant’s motion for judgment on the pleadings. The appellate court affirmed, holding the Organic Food Production Act of 1990 [OFPA; 7 U.S.C. § 6501] precludes private enforcement through state consumer lawsuits in order to achieve its objective of establishing a national standard for the use of “organic” and “USDA Organic” in labeling agricultural products.” (*Quesada v. Herb Thyme Farms, Inc.* (Cal. App. Second Dist., Div. 3; December 23, 2013) 222 Cal.App.4th 642, [166 Cal.Rptr.3d 346].)

Rick’s Rights Under The First Amendment. Plaintiff Ricky Ross brought an action against defendant for misappropriating his name and identity. Plaintiff Ricky Ross first made a name for himself by selling cocaine; at the height of his operation, he sold as much as \$3 million worth of cocaine a day. Meanwhile, defendant, a former correctional officer, used the stage name Rick Ross in pursuing his rap music career. The lyrics of defendant Rick Ross’s songs frequently include fictional stories about running large-scale cocaine operations. The trial court granted defendant’s motion for summary judgment. The appellate court affirmed, finding “defendant’s First Amendment rights provide a complete defense to all of plaintiff’s claims.” (*Ricky D. Ross v. William Leonard Roberts II* (Cal. App. Second Dist., Div. 2; December 23, 2013) 222 Cal.App.4th 677, [166 Cal. Rptr.3d 359].)

En Banc Opinion Changes Everything. Last year, we reported

the following: No Fourth Amendment Protection In Hotel Registry Records. A Los Angeles City ordinance requires hotel operators to maintain certain registry information concerning guests, including their names, addresses and vehicle information, and to make the information available to police officers upon request. Motel operator challenged the ordinance, arguing it amounted to an unreasonable invasion of his private business records without a warrant. Both the trial court and the Ninth Circuit rejected the challenge, finding registry information was not private from the operator’s perspective and there was no reasonable expectation of privacy. (*Patel v. City of Los Angeles* (Ninth Cir.; July 17, 2012) 686 F.3d 1085.)

An *en banc* Ninth Circuit reconsidered the matter and stated: “We hold that [L.A. Mun. Code section] 41.49’s requirement that hotel guest records ‘shall be made available to any officer of the Los Angeles Police Department for inspection’ is facially invalid under the Fourth Amendment insofar as it authorizes inspections of those records without affording an opportunity to ‘obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.’ See, 387 U.S. at 545. Because this procedural deficiency affects the validity of all searches authorized by § 41.49(3)(a), there are no circumstances in which the record-inspection provision may be constitutionally applied. See, *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095; 95 L.Ed.2d 697 (1987). Facial invalidation of the provision, as plaintiffs have requested, is therefore appropriate.” (*Patel v. City of Los Angeles* (Ninth Cir. En Banc.; December 24, 2013) 738 F.3d 1058.)

Why Did The Mushroom Go To The Party? Because he’s a . . . In a trademark infringement action, a wholly owned subsidiary of a Japanese company brought an action against another company for violating its rights to marks under which it markets its Certified Organic Mushrooms, which are produced in the USA. Plaintiff claimed defendant wrongly imported and marketed mushrooms under its marks for Certified Organic Mushrooms, but which were cultivated in Japan under nonorganic standards. Defendant counterclaimed against plaintiff, challenging

the validity of the marks. The federal district court granted summary judgment in favor of plaintiff and granted a permanent injunction against defendant. The Ninth Circuit affirmed both the grant of summary judgment and the permanent injunction. (*Hokto Kinoko Co. v. Concord Farms, Inc.* (Ninth Cir.; December 24, 2013) 738 F.3d 1085.)

CHP Wins. Until it was determined he was not able to perform the tasks required of an officer, plaintiff was a police officer with the California Highway Patrol [CHP]. The officer was treated for wrist and arm pain and a back condition. In 2004, he applied for the position of public affairs officer [PAO], which meant he was not assigned a beat to patrol, but also meant it was not a limited duty position. A PAO could be assigned to perform road duty, and was subject to being able to perform 14 critical activities required by the CHP [including being able to extract a 200-pound victim from a vehicle and lift and carry and drag the victim 50 feet; physically subdue and handcuff a combative subject; change a flat tire; drive for extended periods of time; and, run up and down stairs]. The California Public Employees Retirement System [CalPERS] denied the officer's application for disability retirement. In his petition for a writ of mandate in the trial court, the CHP officer contended CalPERS erred in

measuring his disability against his assigned duties as a public affairs officer, rather than against the usual duties of a CHP officer, including the 14 critical tasks. The trial court agreed with the officer, and entered judgment against CalPERS, directing it to set aside its decision denying the officer's application for disability retirement. CalPERS appealed. Noting that it was undisputed the CHP directed plaintiff to leave the workplace because of his inability to perform the 14 tasks, the appellate court concluded the evidence was sufficient to support the trial court's factual finding the plaintiff was unable to carry out the usual duties of a CHP officer. (*Beckley v. Board of Administration of California Public Employees' Retirement System* (Cal. App. First Dist., Div. 4; December 26, 2013) 222 Cal. App.4th 691, [166 Cal.Rptr.3d 51].)

21st Century Family Complications. These are the facts: before baby Donald was born, his mother, Mary, married Roger, and it is Roger's name on Donald's birth certificate. Victor has never met Donald, who is now almost two years old, but Victor claims to be Donald's father. Victor petitioned the superior court to establish his fatherhood. Mary moved to dismiss the proceedings on the ground that Victor has no standing to bring the action. *Family Code* section 7611, sets out the rebuttable presumption that a man is the natural father of a child if he meets any of several conditions, including, most commonly, "(a) He and the child's natural mother are or have been married to each other and the child is born during the marriage . . ." or "(d) He receives the child into his home and openly holds out the child as his natural child." There is no question but that Roger qualifies as a presumed father of Donald under both alternatives, as the trial court held. The appellate court reversed, but warned: "The fact that Victor has standing to assert his claim to fatherhood does not mean that his claim necessarily has merit. Assuming that he can establish his biological paternity, he must also carry the burden of proving that he is entitled to the rights of a presumed father of Donald. Although he undoubtedly cannot establish that he has 'receive[d] the child into his home' as required by section 7011, subdivision (d), he may be able to prove that . . . that despite

his best efforts he was prevented by Mary from doing so and that he has nonetheless 'openly [held] out the child as his natural child' and attempted to assume the obligations of parenthood. If Victor can prove that he 'acted as promptly as was reasonably possible to establish that he is [Donald's] father, and that [Mary's] conduct had unilaterally precluded [him] from meeting the statutory requirements for the status of presumed father,' he will be entitled to the rights of a presumed father." (*V.S. v. M.L.* (Cal. App. First Dist., Div. 3; December 27, 2013) 222 Cal.App.4th 730, [166 Cal.Rptr.3d 376].)

No Alternative Dispute Resolution Here. A criminal defendant was charged with assault with a deadly weapon, among other crimes, after he punched a victim in the face and broke the windows of a car with a baseball bat while another victim was inside the car. The day before the preliminary hearing, defendant approached the victim he punched following prayer services at the victim's mosque. Defendant apologized and stated: "[W]e're both Muslims. That if we could just settle this outside the court in a more Muslim manner family to family, have our families meet and settle this out of court and not take this to court." On the day of the preliminary hearing, the victim told the prosecutor about his conversation with defendant and asked if the case could be handled in another way. *Penal Code* section 136.1, makes it a crime to attempt to prevent a witness from testifying when the attempt is made with knowledge and with intent to prevent the witness from testifying. In addition to being found guilty of the originally charged crimes, defendant was also found guilty of attempting to dissuade a witness from testifying. In affirming, the appellate court stated: "We conclude there was sufficient evidence to support the finding that [defendant] acted maliciously as well as knowingly under section 136.1 in attempting to persuade [the victim] from testifying at the preliminary hearing the next day." (*The People v. Abdullah Wahidi* (Cal. App. Second Dist., Div. 7; December 30, 2013) 222 Cal.App.4th 802, [166 Cal.Rptr.3d 416].)

Asylum Denied. A Chinese citizen testified in an immigration hearing she

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found she was pregnant with her second child one month after her husband's death and was forced to have an abortion. She also testified that during a Christian service at her home in China, police raided her home and arrested her and the other home church attendants. She said she was jailed for ten days, and interrogated with an "electric stick." After she paid a fine, she was released and required to report once a week to the police station. During her testimony, the woman gave conflicting information about various items, including the circumstances under which she received her Chinese passport. The immigration judge [IJ] denied her application for asylum. In the woman's petition for review, the Ninth Circuit was called upon to decide "whether an IJ may use the *maxim falsus in uno, falsus in omnibus* (i.e., false in one thing, false in everything.) The federal appeals court affirmed, stating: "We hold the *maxim falsus in uno, falsus in omnibus* may be used by an immigration judge, and we deny Li's petition." (*Li v. Holder* (Ninth Cir.; December 31, 2013) 738 F.3d 1160.)

Individuals Added As Judgment Debtors For Debt Of A Partnership. Plaintiff obtained a money judgment against a limited partnership. Unable to collect, plaintiff moved to add two natural persons as judgment debtors. The court found the natural persons were the alter egos of defendant. The trial court, however, denied the motion to add the natural persons as judgment debtors. In reversing, the appellate court noted that "the [two natural persons] used [defendant's] funds to pay their personal debts," and concluded: "Given the trial court's finding that the [two natural persons and defendant] are one and the same, it would be inequitable as a matter of law to pre-

clude [plaintiff] from collecting its judgment by treating [defendant] as a separate entity." The court ordered the judgment to be amended to add the two natural persons as judgment debtors. (*Relentless Air Racing, LLC v. Airborne Turbine LTD. Partnership* (Cal. App. Second Dist., Div. 6; December 31, 2013) 222 Cal.App.4th 811, [166 Cal. Rptr.3d 421].)

Constructive Discharge In Violation Of Public Policy Claim To Go Forward. Plaintiff brought an action against his employer for constructive discharge in violation of public policy and intentional infliction of emotional distress [IIED], after his employer, who allegedly required extensive use of plaintiff's vehicle, refused to reimburse him for mileage. On appeal, plaintiff contended the trial court abused its discretion in sustaining defendant's demurrer without leave to amend. In reversing on the constructive discharge cause of action, the appellate court discussed several public policy issues, such as the requirement to pay overtime and minimum wages. However, the reviewing court agreed with the trial court that failure to reimburse plaintiff for mileage was not sufficient to support a claim for IIED. Accordingly, the appellate court reversed the sustaining of the demurrer to the cause of action for constructive discharge and affirmed with regard to the cause of action for IIED. (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (Cal. App. Second Dist., Div. 4; December 31, 2013) 222 Cal. App.4th 819, [166 Cal.Rptr.3d 242].)

No Shortcut Around Collective Bargaining Agreement. An arbitrator ruled that a school district exceeded his powers when he ruled the district violated a public employee collective bargaining agreement by reducing the work year of certain classified employees without the consent of the union and the employees. The superior court confirmed the arbitration award, and the school district appealed. The appellate court found the school district had no statutory right to reduce a classified employee's work year in lieu of a layoff for lack of funds without complying with the collective bargaining agreement, and that mere compliance with *Education Code* sections 45308 and 45117

does not transform a reduction of hours or work year into a layoff, concluding that "calling the reduction of hours or work year a layoff does not make it one." (*Anaheim Union High School District v. American Federation of State, County and Municipal Employees, Local 3112, AFL-CIO* (Cal. App. Fourth Dist., Div. 3; January 3, 2014) 222 Cal.App.4th 887, [166 Cal.Rptr.3d 289].)

Will You Pick Up My Prescription For Me? A jury convicted a criminal defendant of possession and transportation of morphine and other drugs. Defendant was arrested on the campus of U.C. Davis after he was stopped for a traffic violation and was unable to provide identification. In his pocket was a prescription bottle containing 208 pills. Another man, who has prostate cancer and other medical conditions, testified he had packed his household belongings to move, and that defendant and other friends helped him do the packing and moving. During the move, the other man said his prescription bottle got crushed when he fell, and the group picked up the spilled pills, and he gave the retrieved pills to defendant to hold until they arrived at his new house. The sick man's caregiver testified she witnessed the spill of the pills, and that she went inside to look for anything they could put the pills in. She could find nothing, not even a plastic bag, because everything had been packed. She said defendant found something in his car. The caregiver also testified about how defendant assisted the ill man "a lot." At the time of defendant's offense, *Health and Safety Code* section 11350, subdivision (a), read: ". . . every person who possesses [certain controlled substances] unless upon the written prescription of a physician . . . shall be punished by imprisonment in the state prison." The appellate court affirmed, declining to interpret to expand the scope of the prescription defense to persons other than those for whom the prescription is written. (*The People v. Carboni* (Cal. App. Third Dist.; January 3, 2014) 222 Cal. App.4th 834, [166 Cal.Rptr.3d 427].)

Subpoenas Just What The Doctor Ordered. A physician with board certification in addiction medicine reviewed prescriptions issued by a California doctor. As a result of that review, the

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medical board issued subpoenas to a doctor for medical records of ten patients. The doctor refused to comply, so the medical board petitioned the superior court to compel the doctor to comply. The superior court ordered compliance, despite the doctor's many arguments, one of which is that the subpoenas were illegal because they were not supported by written patient releases. Noting that given the reviewing doctor's "training, education, and experience, the trial court did not abuse its discretion in relying on his expert opinion that there were significant irregularities," the appellate court affirmed the order granting the petition. (*Whitney v. Montegut* (Cal. App. Second Dist., Div. 5; January 6, 2014) (As mod. January 21, 2014) 222 Cal.App.4th 906, [166 Cal.Rptr.3d 455].)

Homeowner's Association Has Standing To Sue Developers.

The developers of an upscale condominium project entered into a parking license agreement, licensing the use of parking spaces appurtenant to the property "for the benefit of the residential homeowners association," [HOA] but before the homeowners association actually existed. According to the agreement, the license is "perpetual," "shall be at no cost," is "irrevocable" and "the terms and conditions of this Agreement shall be covenants that run with the land." Litigation by the HOA against the developers ensued because, early on, according to the HOA's pleading, while the HOA was dominated by representatives of the developers, the HOA was stripped of the rights it was afforded under the license agreement, including undertaking a financial obligation for the parking spaces. Finding the HOA lacked standing, the trial court sustained the developer's demurrer without leave to amend. Giving many reasons, among them *Code of Civil Procedure* section 1060's provision that allows any party with an interest in a contract to pursue a declaration of rights as to that instrument when an actual controversy occurs, the appellate court reversed. (*Market Lofts Community Association v. 9th Street Market Lofts, LLC* (Cal. App. Second Dist., Div. 2; January 7, 2014) (As mod. February 4, 2014) 222 Cal.App.4th 924, [166 Cal. Rptr.3d 469].)

Length Of Depositions. *Code of Civil Procedure* section 2025.290, subdivision (a), limits the deposition of a witness to "seven hours of total testimony," but the first sentence of that subdivision says: "The court shall allow additional time, beyond any limits imposed by this section, if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination." Subdivision (b) provides certain exceptions to the seven-hour limitation: (1) stipulation; (2) expert witnesses; (3) complex cases; (4) employee suing employer; (5) PMK deponents; and, (6) new parties to the action after deposition already taken. The Court of Appeal held: "We conclude that [the first sentence of subdivision (a)] requiring additional time applies not only to the seven-hour limit imposed by subdivision (a) but also the 14-hour limit imposed by subdivision (b)(3). The trial court, however, retains the discretion to limit a deposition in the interests of justice." (*Certainseed Corporation v. Sup. Ct. (William Hart)* (Cal. App. Second Dist., Div. 3; January 8, 2014) 222 Cal.App.4th 1053, [166 Cal.Rptr.3d 539].)

Interpretation Of Corporations Code section 1312(b).

Corporations Code section 1312 generally governs the rights of minority shareholders who dissent from mergers and buyouts. The court was faced with how section 1312(b), which involves buyouts when parties to a merger are under common control, interacts with section 1312(a) in light of the California Supreme Court's holding [*Steinberg v. Amplica, Inc.* (1986) 42 Cal.3d 1198, [729 P.2d 683, 233 Cal.Rptr. 249]] that 1312(a) limits the rights of dissenting minority shareholders to an independent appraisal of the value of their shares. In the instant case, the plaintiffs argued subdivision (b) allows dissenting shareholders all common law rights, including the right to sue the majority owners and collaborating board members for damages arising out of a breach of fiduciary duty. Defendants, however, contended dissenting minority shareholders, in addition to their right to an appraisal, have the right under subdivision (b) of having a merger set aside or rescinded. The trial court sustained defendant's demurrer. The appellate court affirmed in part and reversed in part, agreeing with the

trial court that plaintiffs are not entitled to seek damages. But the appellate court noted the plaintiffs alleged an alternative right to set aside the merger and remanded the matter to the trial court for resolution of that question. (*Busse v. United Paham Financial Corp.* (Cal. App. Fourth Dist., Div. 3; January 8, 2014) 222 Cal.App.4th 1028, [166 Cal.Rptr.3d 520].)

Shape Not Copyrightable.

A company registered its hookah-shaped water container design with the U.S. Copyright Office. A month later, it sued another company because it used the same shape. The federal trial court granted summary judgment in favor of the defendant. The Ninth Circuit affirmed, agreeing with the trial judge that the shape of the container is not conceptually separable from its utilitarian purpose. (*Inhale, Inc. v. Starbuzz Tobacco, Inc.* (Ninth Cir.; January 9, 2014) 739 F.3d 446.)

State Law Preempts Local Ordinance.

A criminal defendant was charged with violating a local ordinance that prohibits registered sex offenders from entering city parks without written permission of the police chief. The trial court sustained defendant's demurrer, concluding state law preempts prosecution under the local ordinance because the Legislature has enacted a comprehensive statutory scheme. The appellate court agreed, stating: "We conclude the state statutory scheme imposing restrictions on a sex offender's daily

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life fully occupies the field and therefore preempts the city's efforts." (*The People v. Nguyen* (Cal. App. Fourth Dist., Div. 3; January 10, 2014) 222 Cal.App.4th 1168, [166 Cal.Rptr.3d 590].)

Unimportant Details . . . Who Has Time To Read A Special Verdict Form?

In an action for hostile work environment brought under *Government Code* section 12900, *et seq.* [California Fair Employment and Housing Act; FEHA], a jury returned a plaintiff's verdict for \$160,000 and the court awarded him \$680,520 for attorney fees. In a motion for JNOV, defense counsel argued the parties and the court agreed on a verdict form at an afternoon meeting. In a declaration, counsel added: "The next morning when we returned to court, [plaintiff's counsel] showed me the revised, final special verdict form that he had prepared. I looked it over and it appeared to incorporate the revisions the court and counsel had discussed the previous day. [Plaintiff's counsel] asked me if I approved of the form and I said that I did. [¶] When I looked over the special verdict form that [plaintiff's counsel] gave me, I did not notice that after question 4, the verdict form stated 'If your answer to question 4 is yes, then skip ahead to question 10.' As the court and the attorneys had discussed and agreed the day before, the verdict form should have stated, 'If your answer to question 4 is yes, then answer question 5. If you answered no, then skip ahead to question 10.'" The trial court concluded defendant waived or forfeited his claim that the special verdict form was fatally defective because no objection was made before the jury was discharged. The appellate court agreed. (*Taylor v. Nabors Drilling USA, LP* (Cal. App. Second Dist., Div. 6; January 13, 2013) 222 Cal.App.4th 1228, [166 Cal. Rptr.3d 676].)

No Spot Zoning Removal Here.

A church desired to build a senior citizen living community in an unincorporated area of a county. The Board of Supervisors created a new zoning definition for senior residential housing, and determined the project was in compliance. Several community groups associated and challenged the Board in a petition for writ of mandate in the superior court, contending the Board

engaged in spot zoning. The trial court entered judgment in petitioners' favor and issued the requested writ. The appellate court reversed, stating: "Although the Board's actions constituted spot zoning, the spot zoning was permissible." (*Foothill Communities Coalition v. County of Orange (Roman Catholic Diocese of Orange)* (Cal. App. Fourth Dist., Div. 3; January 13, 2014) 222 Cal. App.4th 1302, [166 Cal.Rptr.3d 627].)

Disability Discrimination.

Before a recent law change, when extra time was given to subjects with cognitive or physical disabilities who take the Law School Admissions Test [LSAT], the person's score was identified and a letter sent to law schools notifying that an accommodation was granted and advising that the score should be interpreted with great sensitivity. In 2013, *Education Code* section 99161.5 became effective, which states in part: "The test sponsor of the [LSAT] shall not notify a test score recipient that the score of any test subject was obtained by a subject who received an accommodation pursuant to this section." The Law School Admission Council [LSAC], sponsor of the LSAT, challenged the constitutionality of section 99161.5, and the trial court granted a preliminary injunction ordering the State of California to refrain from enforcing the law because it violated the equal protection clause of the California Constitution. The appellate court reversed, stating: "Section 99161.5 does not violate LSAC's right to equal protection under the law because LSAC is not similarly situated to other testing entities for purposes of the law. . . Accordingly, it was an abuse of the trial court's discretion to issue the preliminary injunction." (*Law School Admission Council, Inc. v. State of California* (Cal. App. Third Dist.; January 13, 2014) (As mod. February 11, 2014) 222 Cal.App.4th 1265, [166 Cal. Rptr.3d 647].)

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Section Coordinator

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

Administrative Assistant

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