California 2014 Case Law

A LOOK BACK TO 2014

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Stone | Dean LLP
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Arbitration

Bunker Hill Park Limited v. U.S. Bank National Association
(2014) 231 Cal.App.4th 1315
December 1, 2014

Plaintiff Bunker Hill Park Limited ("Bunker Hill") filed a petition to compel arbitration with its tenant, defendant U.S. Bank National Association ("U.S. Bank"), to resolve the parties' dispute over whether subleases automatically terminate if the underlying lease between Bunker Hill and U.S. Bank terminates. The trial court denied the petition on the grounds that the parties' disagreement had not ripened into a justiciable controversy meriting declaratory relief. Bunker Hill appealed.

The Court of Appeal determined that the trial court's putative ripeness requirement was inconsistent with the broadly worded arbitration agreement between the parties, which gave either party the right to demand arbitration of any disagreement regarding the lease terms, and therefore reversed and remanded with directions to grant the petition.

Cooper v. Lavely & Singer Professional Corporation
(2014) 230 Cal.App. 4th 1
September 26, 2014

Jeffrey Cooper retained law firm Lavely & Singer Professional Corporation ("L & S") to represent him in litigation against third parties. Cooper's retainer agreement required him to submit any claims arising thereunder, including malpractice claims, to binding arbitration. When the litigation terminated unfavorably to Cooper, he commenced arbitration against L & S, asserting claims for breach of contract, breach of fiduciary duty, and professional negligence. L & S purportedly tendered defense of the action to its malpractice insurer, Lloyd's, London and Companies. Lloyd's, in turn, purportedly retained L & S to represent its own interests in the arbitration. The arbitration resulted in a final award in favor of L & S. In that award, the arbitrator specifically denied L & S's request for attorney's fees. Six days later, L & S submitted a motion for "correction, modification and/or reconsideration" of the final award. L & S relied on JAMS rule 22(d), directing the arbitrator to afford the parties the opportunity to present material and relevant evidence, and JAMS rule 24(j), which provides that "within seven calendar days after service of the award … any party may … request that the arbitrator correct" any "computational, typographical or other similar error in an award …" L & S argued that the declaration of one of its partners, which had accompanied its prior fee request, constituted admissible evidence establishing that Lloyd's had, in fact, specifically retained L & S to represent its own interests. The arbitrator granted L & S's motion and issued a revised final award that included $225,677 in attorney's fees. The trial court granted the law firm's motion to confirm the revised final award.

The Court of Appeal reversed the judgment and remanded. The Court held that once an arbitrator has issued a final award, he or she may not "correct" that award so as to yield a different outcome on the merits.

Hyundai Amco America, Inc. v. S3H, Inc.
2014 S.O.S. 5737
December 17, 2014

Hyundai Amco America, Inc. (Hyundai Amco), and S3H, Inc. (S3H), entered into a subcontractor services agreement. Their agreement provided that disputes would be subject to arbitration. Hyundai Amco sued S3H for breaching the agreement, as well as for other related causes of action. S3H filed a motion to compel arbitration; the trial court denied the motion on the ground that S3H had failed to allege, prior to filing the motion (1) it demanded arbitration and (2) Hyundai Amco refused.

The Court of Appeal reversed. Under *Code of Civil Procedure* §1281.2, a party requesting a court order for arbitration must prove the existence of a written agreement to arbitrate, and that the other party refuses to arbitrate their controversy. S3H unquestionably established the existence of the parties' written agreement contained an arbitration provision; Hyundai Amco did not dispute this fact. The Court held that S3H was not required to make a formal demand for arbitration because Hyundai Amco's filing of a complaint invoked the protections and procedures of the court system, and thus was an effective refusal of arbitration. S3H met its burden under §1281.2.

Judge v. Nijjar Realty, Inc.
2014 S.O.S. 5740
December 18, 2014

Germaine Judge sued her employer in one lawsuit for employment-related and *Labor Code* causes of action ("individual/Private Attorneys General Action"), and in another related lawsuit for similar causes of action on behalf of herself and other employees ("class action"). The trial court granted defendants' petitions to compel arbitration of plaintiff's individual claims only, and stayed the two cases. The arbitrator then issued a "clause construction award", concluding that the arbitration agreement permitted arbitration of class and representative claims. She labeled the award as "a partial final award on the construction of the arbitration clause." Next, the court ruled that the arbitrator exceeded her powers by deciding the issue of whether the parties agreed to arbitrate class or representative claims, because the issue had been submitted to the court earlier for determination. (Confusion had arisen because in an earlier ruling, the trial court seemed to be saying that these issues could be brought to the attention of the arbitrator).

Although an order vacating a final arbitration award can be appealed *under Code of Civil Procedure* §1294, subdivision (c), the order from which the Judge appealed vacated a "clause construction award" that did not resolve the entire arbitration. Instead, the arbitrator's award

determined only, as a threshold matter, that Judge's class and representative claims were subject to arbitration. The clause construction award did not rule on the merits of those claims.
The Court of Appeal concluded that, because the arbitrator had not ruled on any of the substantive issues in the arbitration, the order from which Judge appealed did not vacate a final arbitration award and is not appealable. The Court therefore dismissed the appeal.

McGill v. Citibank, N.A.
(9^{th} Cir. 2014) 745 F.3d 1249
December 19, 2014

Plaintiff Sharon McGill sued defendant Citibank, N.A. for unfair competition and false advertising in offering a credit insurance plan she purchased to protect her credit card account. Citibank thereafter petitioned to compel McGill to arbitrate her claims according to the arbitration provision in her account agreement, and the trial court granted the petition on McGill's claims for monetary damages and restitution, but denied the petition on the injunctive relief claim.

Denial of the petition on the injunctive relief claim was reversed by the California Court of Appeals and remanded for the trial court to order all of plaintiff's claims to arbitration, where: 1) under the Broughton-Cruz rule, arbitration provisions are unenforceable as against public policy if they require arbitration of Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act injunctive relief claims brought for the public's benefit; but 2) the Federal Arbitration Act ("FAA") preempts the Broughton-Cruz rule; and 3) the FAA preempts all state-law rules that prohibit arbitration of a particular type of claim because an outright ban interferes with the FAA's objective of enforcing arbitration agreements according to their terms.

Mesa Shopping Center-East, LLC v. O Hill et al.
2014 S.O.S. 5860
December 23, 2014

Mesa Shopping Center-East, LLC ("Plaintiff") sought declaratory and injunctive relief against Robert O Hill et al. ("Defendants") in this action. The complaint explicitly acknowledged it was secondary to contemplated private arbitration of disputes arising out of the parties' contractual relationship. The trial court denied plaintiffs' motion for a preliminary injunction and the parties stipulated to stay the action "pending arbitration." Plaintiffs voluntarily dismissed this action (purportedly without prejudice) after the claims were submitted to an arbitrator for final resolution and the arbitrator issued an interim award in favor of defendants. The interim arbitral award was made final without substantive revision, except for adding plaintiff's attorney's fees and costs incurred in the arbitration. The trial court denied defendants' motion to vacate the dismissal, reasoning that the arbitration and this lawsuit were separate proceedings and that plaintiffs had dismissed this action before trial commenced.

After its review, the Court of Appeal disagreed with this reasoning and reversed: the lawsuit was based on the same causes of action submitted to the arbitrator; it differed only in the remedies sought. Once the hearing on the merits of the parties' dispute commenced at the arbitration, it was too late for plaintiffs to dismiss this action without prejudice and thereby avoid an attempt by defendants to recover attorney's fees as the prevailing party in this action.

Nguyen v. Barnes & Noble, Inc.
(9th Cir. 2014) 763 F. 3d 1171
August 18, 2014

Kevin Nguyen purchased two Hewlett-Packard Touchpads on a Barnes & Noble ("B&N") website at a significantly discounted price. The next day, B&N notified Nguyen that his order had been cancelled due to unexpectedly high demand. Nguyen sued B&N in California state court for deceptive business practices and false advertising. B&N removed the action to federal court and moved to compel arbitration based upon the website's Terms of Use that were viewable via a hyperlink located at the bottom of each page of the website. Nguyen claimed he never clicked on the hyperlink and, therefore, did have notice of the arbitration provision in the Terms of Use. The district court denied the motion to compel arbitration because B&N did not provide reasonable notice of its Terms of Use.

The Ninth Circuit Court of Appeals affirmed. Contract principles require mutual manifestation of assent to the terms of the agreement. Here, B&N did not produce any evidence that Nguyen had actual notice of and agreed to the arbitration agreement. As to constructive notice, Internet contracts fall into two categories: "browsewrap" and "clickwrap" (also known as "clickthrough") agreements. The B&N website used a "browsewrap" agreement where the terms are posted via a hyperlink at the bottom of the screen. If a hyperlink is conspicuously placed on every page, but there is no prompting to take action, constructive notice does not necessarily result. On the other hand, clickwrap agreements require users to click on an "I agree" box after being presented with a list of terms and conditions of use. Where websites use a clickwrap agreement, courts have been more amenable to enforcing the websites' terms and condition. Since B&N did not use a clickwrap agreement, and B&N did not provide any evidence that Nguyen had actual notice of the arbitration provision, the district court was correct in denying the motion to compel arbitration.

Ruiz v. Moss Bros. Auto Group, Inc.
2014 S.O.S. 5866
December 23, 2014

Ernesto Ruiz sued employer Moss Bros. Auto Group, Inc. for failure to pay overtime and other wages. Moss Bros. petitioned to compel arbitration, citing a 2011 arbitration agreement containing an electronic signature purported to be that of Ruiz. Moss Bros. proffered the declaration of business manager Mary Main, who summarily asserted that Ruiz "electronically signed" the agreement "on or about September 21, 2011," and that the same agreement was presented to “all persons who seek or seek to maintain employment” with Moss Bros. or its affiliates. In opposing the petition, Ruiz argued Moss Bros. failed to meet its burden of proving the parties had a valid agreement to arbitrate the controversy for purposes of *Code of Civil Procedure* §1281.2 because it did not prove that the electronic signature on the proffered agreement was an “act attributable” to Ruiz, as required under *Civil Code* §1633.9(a). Ruiz stated he did not recall signing any arbitration agreement on September 21, 2011, or at any other time, and if he had been presented with an agreement that limited his ability to sue Moss Bros, he would not have signed it. The trial court denied the petition to compel arbitration, finding that Moss Bros. failed to establish the existence of an arbitration agreement.

The Court of Appeal affirmed the trial court order denying a petition to compel arbitration. The Court held that Moss Bros. failed to show that the electronic signature on the arbitration agreement was “the act of” Ruiz.

United Health Centers of the San Joaquin Valley, Inc. v. Superior Court (Vradenburg-Haworth)
(2014) 229 Cal.App.4th 63
December 23, 2014

United Health Centers of the San Joaquin Valley, Inc., (“UHC”) hired Jennifer Vradenburg-Haworth (“Haworth”) as a part-time physician. Haworth’s employment agreement included an arbitration clause. After her termination, she filed suit for wrongful termination and retaliation. UHC compelled arbitration. The parties selected Retired Judge Howard Broadman to arbitrate the matter, who issued an arbitration award in favor of UHC. Haworth moved to vacate the award under *Code of Civil Procedure* §1285.2 based upon Judge Broadman’s failure to comply with the mandatory disclosure requirements of §1281.9 and the ethics standards for arbitrators. UHC argued that Haworth was aware of facts that gave her the right to object to Judge Broadman before the arbitration hearing. Because she did not, she waived her right to object. The trial court agreed with Haworth and vacated the award.

UHC filed a petition for writ of mandate, which was granted. A party aware that an arbitrator’s disclosure is incomplete, or otherwise fails to meet the statutory disclosure requirements, cannot passively reserve the issue for consideration after the arbitration award is issued. Rather, the party must disqualify the arbitrator before the arbitration hearing commences. Here, a factual question existed as to whether Haworth’s attorneys had actual knowledge of a basis upon which to disqualify Judge Broadman before the arbitration hearing. [The trial court was ordered to make that factual determination.] If Haworth’s attorneys were aware of grounds to disqualify the arbitrator, Haworth waived her right to object, and the trial court must grant UHC’s petition to confirm the award. If the attorneys did not have that actual knowledge, then the trial court must grant Haworth’s petition to vacate the award.

Wells Fargo Bank, N.A. v. The Best Service Co., Inc.
2014 S.O.S. 5781
December 17, 2014

Wells Fargo Bank, N.A. filed suit against The Best Service Co., Inc.("Best") for declaratory and injunctive relief. Best sent Wells Fargo a demand for mediation and arbitration pursuant to a dispute resolution provision in the parties' contract. Wells Fargo rejected Best's mediation and arbitration demand. Best moved to stay the action pending compliance with the arbitration demand. It argued to the court that its motion sought a stay only and was not a motion to compel arbitration. The trial court denied the motion. Best appealed.

The Court of Appeal dismissed the appeal, holding that the trial court's denial of Best's motion for a stay was not an appealable order. *Code of Civil Procedure* §1294(a) provides that an aggrieved party may appeal from "an order dismissing or denying a petition to compel arbitration." §1294.2 provides for appellate review of "any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party." Neither of those provisions allows for an appeal from a stay order that is unaccompanied by a motion or petition to compel arbitration. The Court rejected Best's contention that its appeal of the order denying the stay was an appeal from an order denying arbitration. Best never filed a motion or petition to compel arbitration, and it made clear in its motion that it sought a stay only and did not seek to compel arbitration. The Court also rejected Best's contention that an order denying a stay pending arbitration is the equivalent of an order refusing to compel arbitration. Best relied on *Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94. But *Henry* involved a motion to stay a pending arbitration, not a motion to stay proceedings. Here, unlike *Henry*, there was no pending arbitration. There was no motion or petition to compel arbitration, just as there was no order dismissing or denying such a motion. There was thus no functional equivalent of an order dismissing or denying a petition or motion to compel arbitration.

Anti-SLAPP

Drell v. Cohen
(2014) 232 Cal.App.4th 24
December 6, 2014

Defendants Bob M. Cohen and Bob M. Cohen and Associates Law Corporation represented nonparty Paul Slack in a personal injury action on a contingent fee basis. They withdrew from the representation and plaintiff Michael Drell took over Mr. Slack's case. Defendants asserted an attorney's fee lien, informing one of the insurers in the personal injury case that any payment of funds to Mr. Slack was subject to a lien for their fees incurred during their representation. Plaintiff negotiated the settlement of Mr. Slack's case, but the insurer made the check payable to plaintiff and defendants. Drell subsequently filed this declaratory relief action, to determine the status of defendants' lien. Defendants filed a special motion to strike the complaint, averring it arose from their protected activity of asserting a lien in a demand letter that threatened litigation. (*Code of Civil Procedure* §425.16, (b)(1).) The trial court denied the motion, finding the gravamen of the complaint was not protected activity. The trial court also denied plaintiff's request for attorney's fees.

On appeal, defendants contended that the trial court erred in denying their motion, reasoning the assertion of their lien was a statement made in anticipation of litigation, and that plaintiff's declaratory relief action therefore targeted protected activity. (*Code of Civil Procedure* §425.16, subd. (b)(1).) Although plaintiff did not cross-appeal, he contends the trial court erred when it denied his attorney's fees in opposing defendants' motion, and urged that the court should award his fees for defendants' "frivolous" motion and appeal. The Court of Appeal agreed with the trial court that the lawsuit did not arise from protected activity, and affirmed the trial court's order. The Court also denied plaintiff's request for attorney's fees.

Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC
(2014) 230 Cal.App.4th 244
October 14, 2014

Nevada City Sugar Loaf Properties LLC ("Sugar Loaf") challenged an award of $14,553.50 in attorney's fees to Ellis Law Group LLP ("ELG") as the prevailing party on a special motion to strike pursuant to *Code of Civil Procedure* §425.16 ("anti-SLAPP motion"). Sugar Loaf contended the trial court erred in awarding attorney's fees for work on the anti-SLAPP motion performed by attorney Joseph R. Major because Major was a member of ELG on whose behalf the motion was filed. Relying on case law holding self-represented law firms may not be awarded attorney's fees for an anti-SLAPP motion; Sugar Loaf argued that the fee award must be reversed. ELG countered that Major acted as an independent contractor to that law firm because he had no billable hour requirements, did not accrue vacation time, received no health care benefits, and was paid by the hour without deduction for taxes. The trial court agreed with

ELG that Major's status as an independent contractor to ELG allowed the law firm to receive attorney's fees under the anti-SLAPP statute.

The Court of Appeal reversed the decision and concluded that the trial court erred in awarding fees to ELG under the anti-SLAPP statute. With only a single exception, Major was listed as a member of ELG in the caption of documents filed in support of ELG's anti-SLAPP motion. Moreover, Major signed documents for ELG's anti-SLAPP motion as an attorney with ELG. Major did not file a notice of association or substitution to indicate he was acting as outside counsel to ELG. Also, when Major contacted opposing counsel regarding the filing of a document concerning the anti-SLAPP motion, he used an e-mail address and signature that identified him as a member of ELG. The possibility that Major was paid in a manner different than a regular "employee" of ELG may render him an independent contractor for taxation purposes, but did not make him separate counsel for ELG for purposes of attorney's fees under the anti-SLAPP statute.

Lennar Homes of California, Inc. v. Stephens
2014 S.O.S. 5783
December 18, 2014

Defendants and respondents Stella Stephens, Timothy Young, and Melissa Young purchased homes from plaintiff and appellant Lennar Homes of California, Inc. ("Lennar"). The agreements between Lennar and Stephens and between Lennar and the Youngs contained identical indemnity clauses. Lennar attempted to enforce those indemnity clauses, seeking to recover attorney's fees and costs incurred in defending a class action lawsuit brought initially by Stephens, and later joined by Timothy Young, but not Melissa Young. The trial court granted the defendants' special motion to strike the complaint as a strategic lawsuit against public participation ("anti-SLAPP motion") pursuant to *Code of Civil Procedure* §425.16 (the "anti-SLAPP statute").

Lennar challenged the trial court's ruling that the indemnity clause at issue was unenforceable under California law, and precluded Lennar from demonstrating a probability of success on the merits. Lennar also disagreed with the trial court's finding that Lennar's claim against Melissa Young arose from activity protected under the anti-SLAPP statute. Finding no reversible error, the Court of Appeal affirmed the trial court's decision, and permitted defendants to recover their costs on appeal.

Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.
(2014) 230 Cal.App.4th 859
June 27, 2014

In the course of his employment, Albert Carabello was injured in a car accident. He submitted a claim to his employer's workers' compensation insurer, Old Republic Construction Program Group ("Old Republic"). Old Republic alleged paid benefits in excess of $100,000. Carabello also retained counsel and sued the third party who allegedly caused the accident. Old Republic filed a complaint in intervention, asserting a right to reimbursement of the benefits paid on Carabello's behalf. Carabello and the other driver settled the case for that driver's $100,000 policy limits. The driver's insurer made the check payable to Carabello, Carabello's attorney, and Old Republic. Carabello's attorney and Old Republic entered into a stipulation that the settlement proceeds would "be deposited into an interest bearing account" and that "signatures of both parties will be required to withdraw any money." It was apparently understood that the funds would be placed in counsel's client trust account. The settlement check was duly endorsed and deposited. The attorney, John Stein of Boccardo Law Firm, Inc., later disbursed the entire settlement proceeds to Carabello without Old Republic's knowledge or approval. Old Republic sued Stein, the law firm, and Carabello for breach of contract, alleging that the attorney breached the parties' prior agreement by disbursing the settlement proceeds without Old Republic's signature or consent. Old Republic also alleged causes of action for fraudulent inducement, conversion, and breach of fiduciary duty, negligence, and declaratory relief. The trial court sustained counsel's demurrer to the causes of action for conversion and breach of fiduciary duty, and further held that an attorney's alleged unauthorized disbursement of settlement proceeds was a non-communicative act that fell outside the protection of the anti-SLAPP statute.

Defendants appealed the order denying their motion under the anti-SLAPP law (*Code of Civil Procedure,* §425.16) to strike three causes of action asserted against them by plaintiff Old Republic. The question presented was whether the statute applied to claims alleging that defendants wrongfully withdrew settlement funds derived from a now defunct lawsuit, which they had deposited in their trust account pursuant to a stipulation requiring Old Republic's consent to any withdrawal. In answering the question, the California Court of Appeal applied two principles: (1) in determining whether a cause of action arises from conduct protected by the statute, the focus is on the wrongful, injurious conduct identified in the complaint, and whether that conduct comes within the statute's description of protected conduct and (2) unless the wrongful conduct is communicative in character, it is protected by the statute only if it was undertaken in connection with an issue of public importance. The Court of Appeal affirmed the trial court's order because the withdrawal of funds underlying the causes of action at issue was neither communicative nor related to an issue of public interest; the trial court properly denied a motion to dismiss those causes of action.

People v. McGraw-Hill Companies, Inc.
(2014) 228 Cal.App.4th 1382
August 18, 2014

The State of California charged McGraw-Hill Companies, Inc., and Standard & Poor's Financial Services LLC (collectively, "McGraw-Hill"), with statutory violations that arose out of their alleged business practice of inflating their credit ratings of various structured finance securities. The complaint alleged, among other things, that McGraw-Hill violated the California False Claims Act ("CFCA"). McGraw-Hill specially moved to strike the CFCA allegations under *Code of Civil Procedure* §425.16(b), the anti SLAPP statute. The trial court denied the motion, finding that the CFCA charges were exempt from being struck under §425.16(d), which provides that the anti-SLAPP statue does not apply to state enforcement actions. McGraw-Hill appealed. The People moved to dismiss the appeal, contending that under §425.16(d), the appellate court lacked jurisdiction to review the denial. McGraw-Hill opposed the People's motion, arguing that its appeal was expressly authorized by §425.16(d)(i) because its anti-SLAPP motion had been denied.

The Court of Appeal dismissed the appeal, holding that under §425.16(d), the denial of McGraw-Hill's anti-SLAPP motion could not be appealed. The court explained that §425.16(b) is the linchpin of the anti-SLAPP statute in that it authorizes the motion to strike procedure that is intended to protect acts in furtherance of the constitutional rights to free speech and petition. But §425.16(d) completely exempts public enforcement actions from the §425.16(b) motion to strike procedure. Thus, for example, a §425.16(d) order would not require any judicial assessment of the nature of the defendant's conduct or any substantive evaluation of the merits of the plaintiff's lawsuit. Rather, under §425.16(d), the anti-SLAPP remedy in §425.16(b) is unavailable to a defendant in an action brought by the People. In addition, the direct appeal right created by §425.16(d)(i) unequivocally applies to an order granting or denying a special motion to strike pursuant to the procedures promulgated to implement §425.16(b).The direct appeal provision in §425.16(d)(i) could not be stretched to apply to a trial court finding that an action was exempt from the anti-SLAPP statute under §425.16(d). Rather, §425.16(d)(i) authorizes a direct appeal from a ruling on the merits of a §425.16(b) anti-SLAPP motion. But a §425.16(d) order is not a finding on the merits of an anti-SLAPP motion, but is instead a finding that the entire anti-SLAPP procedure does not apply to the case. The Court opined that interpreting §425.16(d)(i) as authorizing an immediate appeal from a §425.16(d) finding would undermine the very function of the §425.16(d) exemption. The People's action would thus be subject to a specific type of judicial scrutiny that the exemption expressly prohibited. Moreover, McGraw-Hills's over-broad construction of §425.16(d)(i) would render that exemption meaningless. The Court stated that anti-SLAPP statute is not ambiguous when its subdivisions are considered together rather than at odds with each other.

Zucchet v. Galardi
(2014) 229 Cal.App.4th 1466
September 25, 2014

In 2003, strip club owner Michael Galardi, two City of San Diego council members, and others were the subjects of a federal indictment for fraud and other crimes stemming from a purported scheme to overturn a city ordinance that restricted Galardi's business. A superseding indictment was filed in 2004. As against council member Michael Zucchet, the superseding indictment alleged 33 counts of honest services wire fraud, one count of conspiracy to commit honest services wire fraud, and three counts of extortion. The case against Zucchet was tried to a jury in May through July 2005. During that trial, Zucchet and his attorney learned for the first time that Galardi now claimed to have made a $10,000 payoff to Zucchet in April 2003. It was undisputed that Galardi did not mention this payment in his interviews with the government until sometime shortly prior to trial. The payment was not mentioned in either of the two versions of the federal indictment. After a lengthy trial, the jury acquitted Zucchet of 28 of the 37 counts against him.

The trial court granted Zucchet's motion for a judgment of acquittal as to seven of the remaining nine counts against him. It also granted Zucchet a new trial as to the remaining two counts, finding, among other things, that Galardi's testimony was not credible concerning the $10,000 payment and it unfairly surprised Zucchet at trial. The government later voluntarily dismissed the two remaining counts. Zucchet sued Galardi for malicious prosecution, alleging that Galardi's testimony regarding the purported $10,000 payment was false. Galardi filed a special motion to strike the complaint under the anti-SLAPP statute. The trial court granted the motion, finding that Galardi failed to rebut Zucchet's allegation that Galardi's conduct was illegal and therefore not protected by the anti-SLAPP statute. The trial court also found Zucchet had established a probability of prevailing on malicious prosecution claim.

The Court of Appeal reversed the trial court's order. The Court held that witness testimony constitutes protected activity under the anti-SLAPP statute, even if alleged to be false, unless the witness concedes or there is conclusive proof that the testimony was false.

Business and Corporate Law

American Master Lease LLC v. Idanta Partners, Ltd.
(2014) 225 Cal.App.4th 1451
September 22, 2014

In the late 1990's, real estate investor Neal Roberts ("Roberts") developed a proprietary business method by which real estate owners who wanted to retire from active real estate management could exchange their properties for tenancy-in-common interests in a larger entity, in tax-advantaged transactions. Roberts formed American Master Lease LLC ("AML") to facilitate these transactions, with Roberts and related family trusts holding majority interests in AML and three of Roberts' business associates holding the remaining minority interests. Roberts was the managing member of AML, but the minority group was in charge of AML's daily operations. AML's operating agreement included a noncompetition covenant. A few years after formation, Roberts' relationship with the minority group began to sour. In 2004, the minority group formed a competing entity and granted it a nonexclusive license to use AML's business method. Idanta Partners, Ltd. (Indanta) acquired an 85% ownership interest in the competing entity and provided financing for several transactions based on the licensed business method. The trial court found that there was evidence that Idanta's principals had actual knowledge that the minority group owed fiduciary duties to AML and that Idanta provided the minority group with substantial assistance in breaching those duties and was unjustly enriched by doing so. Indanta appealed.

The Court of Appeal held that a defendant can be liable for aiding and abetting a breach of fiduciary duty if the defendant either knew that the other person's conduct constituted a breach of fiduciary duty or substantially assisted or encouraged the breach. As the court explained, civil liability for aiding and abetting a breach of fiduciary duty does not require that the defendant owe an independent duty to the plaintiff. Unlike liability based on a conspiracy, liability for aiding and abetting is distinct from primary liability for breach of duty. Liability attaches because the defendant behaves in a way that enables the primary violator to commit the underlying tort.

California Bank & Trust v. Del Ponti
2014 S.O.S. 5580
December 9, 2014

Del Ponti obtained a construction loan from Vineyard Bank (which was later assigned to California Bank & Trust)("Bank") to develop a townhome project, with guaranties from two principals of the borrower. When the market tanked the loan-to-value ratio exceeded 75%. Bank stopped funding payment applications, but did not provide a notice of default to Del Ponti. Instead, Bank engaged in negotiations with the borrower and general contractor, documented in numerous e-mails, in an attempt to mitigate the parties' losses. Bank eventually foreclosed on the project, and sued the guarantors for the deficiency. The general contractor sued the borrower and the bank. The trial court awarded judgment in favor of the general contractor, finding that some of the bank's e-mails during workout negotiations constituted promises and agreements that the bank had breached. Further, the trial court found that by refusing to fund the loan the bank breached the loan agreement, thus exonerating the guarantors.

The Court of Appeal affirmed, finding that there was substantial evidence to support the trial court's finding that the bank materially breached the loan agreement by refusing to honor four payment applications that had been approved. Because the loan agreement required the bank to give the borrower a notice of default and 15 days to cure upon any event of default, the bank was not justified in refusing the payment applications, and thus had breached the loan agreement. In addition, the bank led the guarantors to believe they would be released from liability if they performed all items listed in the summary e-mail from the bank.

The bank did not challenge the trial court's factual findings, but instead argued that judgment was in error because the guarantors waived all of their defenses under the guaranty agreements. The Court of Appeal disagreed. *Civil Code* §2856 provides that any guarantor or other surety, including a guarantor of a note secured by real property, may waive rights and defenses that would otherwise be available to the guarantor. But "a guarantor cannot be held liable where a contract is unlawful or contravenes public policy."

The Court of Appeal also found the waiver at issue was a pre-default waiver of the bank's own misconduct, which was not expressly waived in the guaranty agreement. The Court of Appeal agreed with the trial court that "public policy precluded an interpretation of the guaranty agreement that resulted in a waiver of all defenses." In applying the rule of strict construction, the Court of Appeal held that "a guarantor's waiver of defenses is limited to legal and statutory defenses expressly set out in the agreement." The Court of Appeal refused to deem a waiver of statutory defenses as a waiver of all defenses, "especially equitable defenses, such as unclean hands, where to enforce the guaranty would allow a lender to profit by its own fraudulent conduct."

CB Richard Ellis, Inc. v. Terra Nostra Consultants
(2014) 230 Cal.App.4th 405
October 7, 2014

In 2004, CB Richard Ellis Inc. ("CBRE") entered into a real property listing agreement with Jefferson 38 LLC ("Jefferson"). Jefferson agreed to pay CBRE a 6% sales commission upon the successful closing on a piece of land. Jefferson began negotiating with a potential buyer, who eventually purchased the property for a multi−million dollar sum. Jefferson failed to pay CBRE any commission on the sale. Subsequently, CBRE initiated arbitration against Jefferson to seek payment of its contractual commission. After successfully obtaining an award against Jefferson, CBRE filed a complaint against the individual members of Jefferson to enforce the award as the LLC had been dissolved. CBRE asserted claims for breach of contract and sought other forms of relief as well. The jury found that Jefferson breached the contract with CBRE by failing to pay the promised commission. The jury also found that the LLC had been purposely dissolved and that a financial distribution had been made to the LLC members upon the dissolution. The jury awarded CBRE $354,000 and the court subsequently concluded that each LLC member was liable up to the amount distributed upon dissolution of the LLC. However, the trial court denied CBRE's motion for attorney's fees, finding that such an award was not authorized as a matter of law.

CBRE appealed the decision denying attorney's fees and the Court of Appeal reversed. The Court noted that pursuant to former *Corporations Code* §17355(a)(1)(B), causes of action against a dissolved limited liability company may be enforced against its members, if any of the assets of the dissolved company have been distributed to members upon dissolution. Based on the jury's finding that Jefferson was dissolved and that the assets were distributed to its members, the court of appeal reasoned that the LLC members became parties to the contract with CBRE as a matter of law. On this basis, the Court of Appeal concluded that attorney's fees were recoverable pursuant to former *Corporations Code* §17355.

Feresi v. The Livery, LLC
(2014) 232 Cal.App.4th 419
December 15, 2014

During their marriage, James Mesa and Renee Feresi acquired a 25% interest in The Livery, LLC (the "LLC"). Mark Hartley's family trust was an investor in the LLC, and he served as the LLC's president and managing member. A judgment dissolving the marriage awarded Renee one-half of the LLC share. James' other obligations to wife were secured by his LLC share. Renee did not file a UCC Financing Statement, but gave Hartley and other LLC members written notice. Amendments to the LLC's records and its tax returns showed her interest. James defaulted on his obligations to Renee. Hartley loaned James $200,000 from his pension plan, secured by the same membership share pledged to Renee. Hartley did not disclose the loan or his security interest to Renee. Renee notified Hartley that she intended to take the LLC share and sued to foreclose "judicial liens" created by the dissolution judgment. Hartley determined that she had not filed a financing statement and filed his own. A court ordered James to transfer his share to Renee. He complied. James failed to repay the Hartley loan; the pension plan published "Notice of Disposition" announcing the sale of James' LLC interest to satisfy the debt. The trial court declared that Renee has a 25% membership interest, not encumbered by the Hartley claims.

The Court of Appeal affirmed. Where a perfected security interest is created by breaching a fiduciary duty owed to another, equitable principles may give priority to an earlier unperfected security interest.

HH Computer Systems, Inc. v. Pacific City Bank
(2014) 231 Cal.App.4th 221
November 6, 2014

HH Computer Systems, Inc. salvaged computer parts. Jennifer Kim was an HH accounting manager. Kim's duties included receiving customers' checks payable to HH and depositing those checks in HH's account at Hanmi Bank. Kim stole numerous such checks and cashed them at check-cashing companies after she endorsed them with the purported signature of an HH officer. Following its discovery of Kim's thefts, HH sued Oksun USA, MH Brothers, and DDK Express (collectively, Oksun), the three check-cashing companies at which Kim cashed the checks. HH's complaint also named Hanmi. In addition, HH sued the banks at which Oksun deposited or otherwise cashed the checks that it had cashed for Kim. Pacific City Bank, US Metro Bank, and Wilshire State Bank. HH alleged that under Commercial Code §3405, the banks did not exercise ordinary care in allowing the checks presented by Oksun to be deposited or cashed. The banks demurred, contending they had no duty to HH, which was not its customer. The banks also argued that they were non-depositary banks that only processed the checks that Oksun had already negotiated. The trial court sustained the demurrer without leave to amend. HH appealed, contending that the banks were negligent under §3405.

The Court of Appeal reversed the judgment. The Court held that a bank which accepted stolen and forged checks from a check-cashing company had a statutory duty of care to the victim to verify that all endorsements were valid.

In re NVIDIA Corporation Securities Litigation
(9th Cir. 2014) 768 F.3d 1046
October 2, 2014

Shareholders of NVIDIA Corporation, a semiconductor manufacturer, sued the company for alleged securities fraud in three separate lawsuits. According to the shareholders, in late 2006 NVIDIA detected problems with certain of its semiconductor products, and those issues eventually began manifesting themselves in laptop computers that utilized NVIDIA components. The laptop manufacturers, such as Hewlett-Packard and Dell Computer, investigated the issue and worked with NVIDIA to determine the cause. By mid-2008, NVIDIA issued product change notifications to its customers, explaining that it had reverted to a prior manufacturing method in order to avoid the problem. In the meantime, between November 2007 and May 2008, NVIDIA did not include information about the product defects in mandatory filings that it had provided to the Securities and Exchange Commission ("SEC"). In late May 2008, NVIDIA did disclose the defects, followed about a month later by a further disclosure that it would take a $150-$200M to cover costs associated with the defects. NVIDIA's stock plummeted after the disclosures. According to the shareholders, the omissions from NVIDIA's SEC filings resulted in the filings containing materially false and misleading statements. In particular, the shareholders, who had invested in NVIDIA stock between November 2007 and July 2008, alleged that NVIDIA knew of the product defects, which was information material to the company's investors, so that its failure to disclose the problems made the company's other statements in its SEC filings misleading. The district court consolidated the actions. In a consolidated complaint, the shareholders alleged that NVIDIA and its chief executive officer ("CEO") violated *Securities and Exchange Act of 1934* §10(b) and SEC Rule 10b-5. They also alleged that the CEO violated *Securities and Exchange Act* §20(a). The court ultimately dismissed the complaint for failure to sufficiently plead scienter as to each count.

The Court of Appeals affirmed a district court judgment of dismissal. The Court held that the district court was not required to consider shareholders' allegations of securities fraud scienter in the context of Item 303 of Regulation S-K where Item 303 creates no actionable duty to disclose under *Securities and Exchange Act* of 1934 §10(b) and Rule 10b-5.

Mega RV Corporation v. HWH Corporation
(2014) 225 Cal.App.4th 1318
April 30, 2014

John and Dawn Ertz purchased a motor home from retailer Mega RV Corporation. Citing alleged defects in the motor home, the Ertzes sued Mega RV Country Coach, L.L.C., the manufacturer of the motor home, and the bank that financed the transaction. The Ertzes relied on the *Song-Beverly Consumer Warranty Act* (the "Act"). Mega RV sought defense and indemnification from Country Coach, as provided for both under the terms of its contract with Country Coach and under Civil Code §1792, part of the Act, which provides that a retailer sued under the Act "shall have a right of indemnity against the manufacturer." Unfortunately, Country Coach became the subject of involuntary bankruptcy proceedings that left Mega RV with neither defense nor indemnification. Mega RV turned instead to HWH Corporation, which manufactured hydraulic components incorporated by Country Coach into the Ertzes' motor home. Mega RV filed a cross-complaint against HWH, seeking total or partial indemnification from HWH under the Act. HWH, in turn, cross-complained against Mega RV for damages. The trial court granted judgment in favor of HWH on both Mega RV's cross-complaint and its own, awarding it $166,000 in damages against Mega RV.

The Court of Appeals affirmed the judgment with a modification to reflect that the action had been properly dismissed as against Mark Hartley, individually. The Court held that a component parts manufacturer had no duty under the Song-Beverly Consumer Warranty Act to indemnify a retailer sued for the sale of a defective product.

Meister v. Mensinger
(2014) 230 Cal.App.4th 381
October 6, 2014

Over a four-year period beginning in 2000, Robert, Janice and Kathryn Meister invested more than $2.1M in Sesame Technologies, Inc., for which they received a 38% ownership interest in the company. Their interest gave them no voting rights or role in managing Sesame. In mid-2004, after prolonged financial difficulties, Sesame's chief financial officer, Duane Mensinger, and chief executive officer, Carl Koppel, determined Sesame had only two options: a Chapter 7 bankruptcy liquidation; or a sale of its assets to a new company created by Mensinger. They chose to pursue the latter option. In May 2004, Mensinger and Koppel formed ExtraView Corporation at Sesame's address. Initially, Mensinger and Koppel each took a 50% interest in the new entity, but Koppel later sold his shares to Mensinger, who became ExtraView's sole owner. Koppel was named president, secretary and chief executive officer of ExtraView and Mensinger was named chief financial officer. In June 2004, the IRS placed a lien on Sesame's assets due to its failure to pay the back payroll taxes. In July 2004, Koppel appointed Mensinger to join him on Sesame's board of directors. The following day, Mensinger and Koppel voted to transfer Sesame's assets to ExtraView pursuant to an asset purchase agreement ("APA"). The board further resolved that once the APA was completed, Sesame would dissolve. Sesame's board and a majority of Sesame's employee-shareholders with voting rights approved the APA. At the time of the vote, Koppel controlled over 60% of Sesame's voting shares. By July 31, 2004, Sesame's assets were transferred to ExtraView. The Meisters were not advised about the APA until after it had been approved and Sesame's assets transferred. Following the transfer of Sesame's assets to ExtraView, Sesame filed for Chapter 7 bankruptcy. The bankruptcy trustee concluded there were "no assets to administer for the benefit of creditors." The trustee subsequently obtained a discharge of bankruptcy. The Meisters sued Mensinger and Koppel for breach of fiduciary duty and related causes of action.

At trial, the Meisters' expert, Terry Lloyd, testified Sesame was worth between $9.8M and $11.3M in May 2004. Lloyd also estimated ExtraView's value as of December 2009 to be approximately $12.2M. Mensinger and Koppel disputed these valuations, submitting evidence that Sesame had been insolvent since at least October 2001 and remained insolvent at the time of the APA. The trial court found that Mensinger and Koppel had breached a fiduciary duty to the Meisters, but that damages were uncertain. The court found an accounting of ExtraView's net worth and profit/loss status was necessary to determine whether any monies were owed to the Meisters to prevent Mensinger and Koppel's unjust enrichment. In order to perform the accounting, the trial court ordered Mensinger and Koppel to produce ExtraView's 2004 to 2009 QuickBooks records for its review. The trial court rejected the Meisters' suggestion that it appoint a referee to review those records, indicating it would review them itself.
Following its review, the trial court entered judgment in favor of Mensinger and Koppel, finding they had breached a fiduciary duty owed to the Meisters, but the Meisters had failed to satisfy their burden of proof on the issue of damages.

The Court of Appeal reversed, holding that the trial court erred in failing to fashion a remedy for the Meisters. The Court found that the apparent complexity of ascertaining damages did not preclude an award of damages. The Court also found that the trial court needed to reexamine the question of whether ExtraView was subsequently profitable or whether Koppel and Mensinger were subsequently enriched in some way. The trial court determined that the Meisters were not entitled to an award based on unjust enrichment because such an award could not be calculated in a "mechanical and undemanding" fashion. The Court of Appeal held that the trial court's in camera review of ExtraView's financial records, without assistance or input from qualified experts, was improper. The Court of Appeal remanded for retrial on the issue of damages only.

Merritt v. Countrywide Financial Corp.
2014 S.O.S. 09-17678
July 16, 2014

David and Salma Merritt took out an adjustable rate mortgage and a home equity line of credit ("HELOC") with Countrywide Financial Corporation ("Countrywide") when they bought a home in California. According to the Merritts, they entered into the loan transaction after Countrywide's agent obtained an inflated appraisal on the property and misled them about the interest rate on their loan, which was merely a "teaser" rate that would expire and leave them with a much higher rate in its place. A Countrywide representative then coerced them into signing the loan documents without a chance to read them and with key loan information left blank. Countrywide later failed to send documentation clarifying the loan's terms after the Merritts sought more information. Some three years into the loan, the Merritts became unable to afford their monthly payments, so they attempted to refinance the mortgage or modify it into a conventional loan. Countrywide refused. Several months later the Merritts notified Countrywide that they wished to rescind the loan, but Countrywide responded only by offering to modify the loan under terms that the Merritts still could not afford. The Merritts sued Countrywide, alleging violations of numerous federal statutes. The district court dismissed the complaint in its entirety, with prejudice. In pertinent part, the court dismissed the Merritts' claim for rescission of the loan under the *Truth in Lending Act* ("TILA") and their claims under §8 of the *Real Estate Settlement Practices Act* ("RESPA").

The Court of Appeals reversed in part and vacated in part the district court judgment. The Court held that TILA plaintiffs were not required to allege in their complaint their ability to tender the value of their loan in order to state a claim for the loan's rescission. The court held further that the Real Estate Settlement Practices Act's statute of limitations on §8 claims was subject to equitable tolling.

Oregon Public Employees Retirement Fund v. Apollo Group Inc.
2014 S.O.S. 12-16624
December 16, 2014

The Oregon Public Employees Retirement Fund and other investors sued Apollo Group Inc. on class action securities fraud claims. The claims were grouped into a consolidated class action, with the investors representing a class of those who purchased Apollo stock during a specified class period. Apollo was a for-profit education company that owned and operated educational institutions in the United States. According to the investors, Apollo's officers and directors violated federal securities laws by making false and misleading statements regarding Apollo's enrollment and revenue growth, financial condition, organizational values, and business focus, among other things. The investors also alleged unlawful insider trading. The district court dismissed the action for failure to state a claim.

The Court of Appeals affirmed the district court's order of dismissal for failure to state a claim. In particular, plaintiff failed to allege loss causation, unlawful omission of material information nor specific statements. The Court held that the heightened pleading standard of *Federal Rule of Civil Procedure* 9(b) applies to all elements of a securities fraud action, including loss causation.

Police Retirement System of St. Louis v. Intuitive Surgical, Inc.
2014 S.O.S. 12-16430
July 16, 2014

Intuitive Surgical, Inc. was a corporation that designed, manufactured, and marketed robotic devices used for minimally invasive surgeries. The Police Retirement System of St. Louis ("PRS") was a public pension fund that purchased shares of Intuitive stock. Share price grew continuously for several years, but then fell significantly. The PRS brought a class action against Intuitive on behalf of purchasers of Intuitive common stock. The PRS alleged violations of §10(b) and 20(a) of the *Securities Exchange Act and Securities and Exchange Commission* ("SEC") Rule 10b-5. The PRS also named several Intuitive executives as defendants. The PRS alleged that through its executives, Intuitive knowingly issued false and misleading statements about its growth and financial health that caused an artificial inflation of its share price during a one-year class period and resulted in losses to class members. The district court dismissed the PRS complaint with prejudice after it was amended twice for failure to state a claim under *Federal Rules of Civil Procedure* §9(b) and (12)(b)(6). The PRS appealed.

The Court of Appeals affirmed the judgment of the district court. The Court held that a corporation's optimistic statements about its growth and financial health were not actionable securities fraud.

Rosenbloom v. Pyott
(9th Cir. 2014) 765 F.3d 1137.
June 2, 2014

The Delaware Corporation Allergan, Inc. manufactures the pharmaceutical Botox, which produces a local and temporary reduction of muscle or gland activity after injection. From 1989 to 2010, the federal Food and Drug Administration (FDA) approved Botox for just a few medical needs. In 2010, Allergan entered into a settlement with the United States and third parties after facing three qui tam actions and a criminal investigation by the FBI. The lawsuits and investigation focused on Allergan's efforts to market Botox for off-label uses in violation of federal law. Allergan ultimately paid a total of $600M, in part for civil settlements and in part as a criminal fine. Allergan shareholders brought derivative suits against the company in California and Delaware. In the California suit, the shareholders alleged that Allergan's Board of Directors knew about the limits on promotion of off-label uses; that the Board was aware that violations of the federal marketing rules could result in significant penalties; and that Allergan nonetheless repeatedly violated federal laws and regulations from 1997 to 2010, creating a number of programs to promote Botox for off-label uses, such as spasticity, pain, headaches, and migraines. The California trial court granted Allergan's motion to dismiss for failure to adequately allege demand futility. In Delaware, however, the trial court held that the shareholders had established demand futility, so that the shareholders were not required, as a prerequisite to bringing the derivative action, to make a demand on Allergan's Board requesting that Allergan bring the derivative claims in its own name. The Delaware Supreme Court reversed on the ground that the shareholders there were collaterally estopped from asserting their claims in light of the earlier dismissal in the California case. The shareholders appealed the dismissal of the California suit, alleging that the normal obligation to make a demand on Allergan's Board was excused here.

The Court of Appeals reversed the district court judgment and remanded the action for further proceedings. The Court held that shareholders demonstrated that their obligation to make demand on a company's board of directors before bringing a derivative action was excused as futile where their particularized factual allegations showed that the board either did nothing despite knowledge of corporate wrongdoing, or knowingly adopted a business plan premised on illegal conduct.

U.S. Bank National Association v. Yashouafar
2014 S.O.S. 5733
December 17, 2014

Various entities executed a note in favor of German American Capital Corporation ("GACC") in the principal sum of $62,000,000. To secure repayment of their debt, the borrowers executed a deed of trust assigning their interests in certain real property. Both the note and the deed of trust contained provisions for a prepayment fee. Massoud Yashouafar and Solyman Yashouafar executed a guaranty and indemnity agreement for the outstanding obligations owed by the borrowers on a promissory note. The borrowers defaulted. On June 24, 2011, the trustee sent the borrowers a letter declaring the entirety of the debt to be due and payable immediately. When the borrowers failed to pay the balance due on the note, GACC's successor in interest, U.S. Bank National Association, brought an action to enforce the guaranty. The trial court granted summary judgment in favor of U.S. Bank and awarded it a sum that included a $14M prepayment fee, calculated from the date of the trustee's letter.

The Court of Appeal reversed the judgment and remanded. The Court held that a conflict in the terms of a note and the underlying deed of trust had to be resolved in favor of the note, with the result that a prepayment fee was not due until such time as payment was made.

Vathana v. EverBank
2014 S.O.S. 12-15587
October 31, 2014

EverBank issued "WorldCurrency" certificates of deposit ("WC-CDs") that were denominated in foreign currency. Thus, the principal could rise or fall over the term of the WC-CD based on the strength of the foreign currency relative to the U.S. dollar. EverBank's terms and conditions ("T&C") for its WC-CDs provided that the exchange rate used to convert a customer's initial investment into the foreign currency was within a specified percentage of the wholesale spot price that EverBank paid for the customer's chosen currency. The wholesale spot price was the currency's price in the wholesale currency market when the customer opened the CD. The WC-CD T&C also provided that WC-CDs were automatically renewable with specified customer options and subject to a specified exception. Among other things, customers could choose to roll over their WC-CD principal and interest in the same currency and for the same maturity at the current interest rate. However, EverBank did not actually exchange the invested currency for the physical foreign currency of denomination. Instead, EverBank purchased forward contracts that allowed EverBank to acquire a set amount of foreign currency on a specified date at a set price that was based on the currency's wholesale spot price when EverBank purchased the contract. EverBank thus was assured delivery of the currency from which to pay its customers on the date that the WC-CDs matured if those customers chose to liquidate their CDs. Ek Vathana purchased two EverBank WC-CDs that were denominated in Icelandic króna (ISK) and that matured between October 8 and December 31, 2008.

Before Vathana's WC-CDs matured, Iceland experienced a financial crisis. EverBank could not find parties willing to offer forward contracts for ISK. As a result, EverBank decided not to roll over its ISK-denominated WC-CDs that were set to mature in early October. Instead, EverBank paid the proceeds of its matured WC-CDs in U.S. dollars, the value of which was calculated by using the available wholesale spot price.

Before Vathana's first WC-CD matured, he instructed EverBank to roll it over. In late October, EverBank located a party willing to offer an ISK/Euro forward contract from which EverBank could calculate a wholesale conversion rate for U.S. dollars. However, the exchange rate was much worse than the rate at which Vathana had opened his first WC-CD. Nonetheless, EverBank closed Vathana's WC-CD, converted his ISK at that available rate, and credited Vathana with the resulting amount in U.S. dollars at a loss for Vathana. In December, EverBank closed Vathana's second WC-CD at a rate that was also worse than the rate at which Vathana opened the WC-CD and Vathana sustained another loss. Vathana filed a class action against EverBank for breach of contract on behalf of all WC-CD customers whose ISK-denominated WC-CDs matured in the same period as Vathana's. Vathana alleged among other things that EverBank breached the T&C by closing the WC-CDs without consent and by delivering the value of the closed WC-CDs in U.S. dollars at the exchange rate that EverBank obtained in the wholesale market.

The district court granted summary judgment to EverBank on Vathana's claim as to EverBank's payment of WC-CD proceeds in U.S. dollars at the wholesale spot price. The court agreed with EverBank that the T&C conversion rate applied to all conversions applicable to an account, including when the account was opened and when it was closed. On Vathana's claim as to EverBank's unilateral closing of the WC-CDs when they matured, the court found that EverBank was released from the T&C provision regarding automatic renewal and honoring customers' instructions by another T&C provision which provided that EverBank could close an account without notice to the customer if it believed that was necessary to limit losses to either itself or the customer. The court thus found that EverBank did not breach the T&C because there was no factual dispute as to whether EverBank acted in good faith under the limit-loss provision. Vathana appealed.

The Ninth Circuit Court of Appeals affirmed in part and reversed in part the judgment of the district court, and remanded. The Court held that a bank that exercised its discretion to close certificates of deposits to limit losses to itself or its customers could not reasonably be found to have acted in bad faith.

Discovery

Department of Fair Employment and Housing v. Ottovich
(2014) 227 Cal.App.4th 706
July 1, 2014

The Department of Fair Employment and Housing sued Harvey Ottovich for housing discrimination after he allegedly declined to rent an apartment based upon an individual's familial status. The trial court eventually granted the Department's motion for terminating sanctions after Ottovich failed to comply with discovery requests, violated the trial court's orders compelling discovery, and had been found in contempt for failing to attend a case management conference. The court ordered that Ottovich's answer be stricken and entered default. The court subsequently entered judgment in the Department's favor. Ottovich successfully challenged the judgment on the ground that the Department had not served a statement of damages on him before default was taken, as required by *Code of Civil Procedure* §425.11. The Department conceded, and the court vacated the default judgment. The Department sought summary judgment, contending that Ottovich's failure to answer the allegations of its complaint resulted in a judicial admission of their truth. The court agreed, rejecting Ottovich's argument that his answer had been reinstated as a matter of law when the court earlier vacated the default judgment that was rendered against him. A jury trial on damages resulted in an award against Ottovich, but the damages awarded by the jury were far less than those asserted by the Department.

The Court of Appeal affirmed. The Court held in the published portion of its opinion that the trial court was not required to reinstate a defendant's stricken answer when it vacated the default judgment rendered at the same time as a sanction for abusive discovery tactics.

Negro v. Superior Court (Navalimpianti USA, Inc.)
(2014) 230 Cal.App.4th 879
October 21, 2014

Navalimpianti U.S.A., Inc., sued Matteo Negro and other former officers and employees ("Negro") in Florida state court. The company alleged that Negro had committed breaches of duty pursuant to a conspiracy to enter into business competition. Navalimpianti applied to the Florida court for authority to take the deposition of Google, Inc., and obtain documents from Google, in California. According to Navalimpianti, Negro had a Gmail account that he used for business during relevant time periods. Navalimpianti therefore sought all emails between Negro and certain persons or entities from any Gmail account belonging to Negro during a specified one-year period. The Florida court granted the motion. Navalimpianti obtained California counsel, who issued a deposition subpoena to Google. Google objected on various grounds, including §2702(a) of the federal Stored Communications Act ("SCA"), which prevented Google from disclosing the content of electronic communications pursuant to a subpoena. Google suggested Navalimpianti direct its request to the account holder, who could be subject to document requests as a party to litigation. Through California counsel, Negro petitioned to quash the subpoena under the Interstate and International Depositions and Discovery Act. Back in Florida, Navalimpianti sought a court order directing Negro to execute a release authorizing Google to produce the requested records. Navalimpianti also issued a deposition notice to Google in California. The trial court ultimately denied Negro's petition to quash and directed Google to produce the materials sought to a third party who could make an accurate copy and report about the quantity of material produced. Google moved to vacate or amend the order, contending that the SCA did not allow private parties to compel disclosure of a user's e-mail account via subpoena or court order. Google noted that it could voluntarily produce the requested materials if it obtained Negro's consent.

Negro petitioned for a writ of mandate setting aside the order denying his motion to quash and directing the trial court to grant the motion. The Court of Appeal issued an order to show cause why that relief should not be granted. The Court of Appeal granted the petition, holding that the trial court's order denying the motion to quash was careless when entered, but that subsequent events took the contemplated production outside the scope of the SCA.

Vasquez v. California School of Culinary Arts, Inc. (Sallie Mae, Inc.)
(2014) 230 Cal.App.4th 35.
September 16, 2014

Former culinary students Daniel Vasquez and others sued the California School of Culinary Arts, Inc. and Career Education Corporation for fraud, breach of contract, and other causes of action. They alleged the defendants defrauded them into enrolling in culinary school by numerous misrepresentations about graduation rates, employment prospects after graduation, and anticipated income levels. The students issued a business records subpoena to Sallie Mae, Inc., which serviced the student loans obtained by some of the students to attend the culinary program. The subpoena sought electronically stored information consisting of 44 specific data fields on student loans for 786 plaintiffs. The subpoena requested that the information be produced "on digital data disk(s) in a reasonably usable form, i.e., in a format that is electronically searchable and sortable." The subpoena also requested a cost estimate for complying with the subpoena before Sallie Mae produced the electronically stored information. Sallie refused to produce either the cost estimate or the files. Instead, it filed a motion to quash the subpoena, arguing, among other things, that the subpoena improperly imposed on Sallie Mae an affirmative duty to do something other than produce existing documents and records and it shifted the cost and burden of the students' litigation efforts to Sallie Mae. Sallie Mae also argued the subpoena was unduly burdensome and was outside the proper scope of discovery, in that it would require Sallie Mae to perform research, implement information technology programming, and create a spreadsheet. The trial court denied the motion to quash. It ordered Sallie Mae to comply with the subpoena and awarded the students $11,487 in attorney's fees and costs incurred in opposing Sallie Mae's motion to quash, finding that the motion was without substantial justification in law or fact. Sallie Mae appealed, challenging the fee award.

The Court of Appeal affirmed the trial court's order. The Court held that a nonparty to litigation was without legal or factual justification in opposing a business records subpoena seeking electronic data.

Insurance

Baek v. Continental Casualty Company
(2014) 230 Cal.App.4th 356
October 7, 2014

In May 2010, a client sued Heaven Massage and Wellness Center ("HMWC") and massage therapist Luiz Baek for sexual assault. The client alleged that Baek sexually assaulted her while giving her a massage. Baek tendered defense of the claim to HMWC's comprehensive general liability insurer, Continental Casualty Company. Continental denied coverage, finding that Baek was covered by the Continental policy only for acts within the scope of his employment by HMWC or while performing duties related to the conduct of HMWC's business. Baek's alleged sexual assault of a client, Continental maintained, was not within the scope of his employment. Baek sued Continental for breach of contract and related causes of action, alleging he was either a partner or employee of HMWC and was thus covered under its policy. The trial court sustained Continental's demurrer without leave to amend.

The Court of Appeal affirmed the trial court's judgment and order. The Court held that a massage therapist's alleged assault on a client was not within the scope of his employer's liability coverage for acts committed within the scope of his employment or related to the conduct of the employer's business.

Douglas v. Fidelity National Insurance Co.
(2014) 229 Cal.App.4th 392
August 29, 2014

Homeowners Jerry and Betty Douglas operated a licensed residential care facility out of their home; they provided room and board to mentally ill clients. In December 2010, the Douglases went to a Cost-U-Less Insurance store to purchase homeowners insurance. The store personnel contacted the Douglases, by telephone, with an InsZone Insurance Services employee who, in turn, assisted them in obtaining a homeowner's insurance policy with Fidelity National Insurance Company.

In March 2011, there was a fire at the Douglases' home. Fidelity refused to pay the Douglases' claim, saying that they had failed to disclose, in their application, that they operated a business out of their home and had persons living there who were not members of their family.
The Douglases sued Fidelity for breach of contract and related causes of action. InsZone employee Robert Lockefeer testified at trial that he was an insurance producer who was licensed by the state to sell property casualty insurance, including homeowner policies. Approximately 90 – 95% of Lockefeer's customers were referred by Cost-U-Less. He would receive a call or an email from an employee at a Cost-U-Less store regarding a potential customer. He would then speak with the individual about the risks they were seeking to insure. Lockefeer did not recall having spoken with the Douglases. However, he did not have any reason to doubt InsZone's

identification of him as the producer who had placed the Douglases' policy. Lockefeer explained that if a customer wanted to purchase coverage from Fidelity, Lockefeer would fill out an online application using Fidelity's website. The online form required answers to 43 questions. Among the questions was whether there were any boarders in the home. It was Lockefeer's practice to ask the customer each the questions appearing on Fidelity's website. All 43 questions had to be answered in order for the application to be transmitted successfully. Lockefeer testified that he would not have been able to generate an accurate quote by asking a customer only three questions. He also testified that he would never have submitted answers to the online application that were not authorized by the client. He stated he had never falsified an application. Douglas recalled their experience differently. According to Betty, the man on the telephone asked them only three questions: the year the house was built, the home's square footage, and whether the electric panel used fuses or circuit breakers. Following the telephone conversation, a Cost-U-Less employee provided them with a blank contract, which Jerry signed.

It was undisputed that the Douglases had boarders in their home in December 2010 and at the time of the fire, and that they were operating a business out of their home. It was also undisputed that these facts, if known, would have prevented them from obtaining a homeowners' policy. The trial court instructed the jury that if it found the Douglases made a false representation in their application for insurance, then it could properly find that no insurance contract was created. In order to prove this claim, the trial court instructed, Fidelity had to show, among other things, that the Douglases knew that one or more of the representations they made in their application for insurance was untrue. The trial court declined Fidelity's request that it instruct the jury that the insurance contract would be void (1) even if the concealment of a material fact was unintentional and (2) regardless of whether the Douglases or InsZone was responsible for the concealment of a material fact. The jury rendered its verdict in favor of the Douglases.

The Court of Appeal reversed the judgment. The Court held that an insurer was prejudiced by a trial court's instructions that improperly ignored the role of a middleman in submitting materially false information in an application for insurance.

Ellena v. Department of Insurance
(2014) 230 Cal.App.4th 198
October 1, 2014

The County of Sonoma purchased a group disability policy from Standard Insurance Company. County employee Cassaundra Ellena developed lupus and was no longer able to work. She filed a disability claim with Standard. Standard denied the claim, finding that regardless of whether Ellena was able to perform her own occupation, she did not show she could perform no occupation under the "any occupation" provision of the policy. Therefore, she was not eligible for disability benefits under the county's policy. Ellena sued Standard and its parent company, alleging that the policy definition of disability was deceptive and in violation of state law. Ellena also stated a cause of action for mandamus against Department of Insurance and the Commissioner of the Department of Insurance (collectively, "DOI"), alleging that the DOI breached a mandatory duty to review the disability policy for compliance with state law prior to approving it. Ellena sought a writ of mandate to force the DOI to revoke and/or withdraw approval of the “Definition of Disability” form that was part of the policy. The trial court sustained the DOI’s demurrer without leave to amend and dismissed it from the lawsuit, finding Ellena failed to allege a violation of a specific mandatory duty.

The Court of Appeal reversed the judgment dismissing a cause of action for mandamus. The Court held that the DOI had a mandatory duty to review a new group disability insurance policy form for compliance with state law prior to approving the policy for distribution in the state.

Jon Davler, Inc. v. Arch Insurance Company
(2014) 229 Cal.App.4th 1025
September 16, 2014

A company manager discovered a used sanitary napkin on the floor of the company bathroom. She confronted the company’s female employees and demanded to know which of them was currently menstruating. When no response was forthcoming, she demanded that each of the employees be physically inspected. She ordered the female employees to line up outside the bathroom while another employee escorted them, one by one, into the bathroom. There, they were told to pull down their pants and underwear and expose their vaginal area for inspection. The employees were threatened with termination if they refused to comply. The female employees sued their employer, Jon Davler, Inc., for sexual harassment, invasion of privacy, and false imprisonment. Jon Davler submitted defense of the claims to its insurer, Arch Insurance Company. The Arch policy included coverage for personal and advertising injury, which was defined as “injury, including consequential ‘bodily injury,’ arising out of” seven categories of offenses, one of which was “false arrest, detention or imprisonment …” Arch denied coverage, citing a policy exclusion for employment-related practices. This exclusion stated that the coverage for personal and advertising injury did not apply to an injury arising out of any refusal to employ a person, termination of a person’s employment, or “employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person...” Jon Davler sued Arch for breach of contract and related claims. The trial court sustained Arch’s demurrer without leave to amend, finding that all of the underlying claims fell within the policy exclusion for employment-related practices.

The Court of Appeal affirmed the judgment. The Court held that a commercial general liability policy’s exclusion for employment-related practices clearly applied to a company supervisor’s alleged false imprisonment of female employees.

Najah v. Scottsdale Insurance Company
(2014) 230 Cal.App.4th 125
September 30, 2014

Jamshid Najah and Mark Akhavain sold a commercial property to Orange Crest Realty Corporation. Orange Crest made a partial payment for the property by borrowing $2.021M from a third party. The loan was secured by a first deed of trust on the property. Najah and Akhavain also took back a promissory note and a second deed of trust for an additional $2.55M Najah and Akhavain later purchased the first deed of trust to prevent that lender from foreclosing. At about the same time, they visited the property and discovered at least $500,000 in damage to the building that occupied the site. Among other things, they observed electrical wires hanging from the ceiling; broken mirrors, furniture and bathroom fixtures; damaged walls, ceilings and carpets; and interior doors removed and left lying on the floor. In addition, a number of items that had been in place and functional at the time of the sale were missing, including air conditioning and heating units, kitchen appliances and equipment, breaker panels, the main water heater, commercial laundry equipment, light poles, mailboxes, furniture, tiles and drywall. They reported the damage to the police and submitted a claim to Scottsdale Insurance Company, which had issued coverage for the property. Najah and Akhavain were listed on the policy as mortgage holders. Six months later, Najah and Akhavain foreclosed on the second deed of trust. At the foreclosure sale, they acquired the property themselves by bidding $2,878,060.25, the full amount of the unpaid debt on the second promissory note, including interest, fees, and the costs of foreclosure. Najah and Akhavain later sued Scottsdale for failing to pay their damage claim. The case was tried by the court, which rendered judgment in favor of Scottsdale.

The Court of Appeal affirmed the judgment. The court held that mortgage holders' full credit bid at a foreclosure sale barred them from any subsequent recovery for pre-foreclosure damage to the property.

Mercury Casualty Company v. Chu
(2014) 229 Cal.App.4th 1432
September 25, 2014

Tu Pham was injured while a passenger in a car owned and driven by Hung Chu. Pham and Chu were college students and roommates. They lived together in a house belonging to relatives of Chu. Pham sued Chu for his injuries. Chu tendered defense of the lawsuit to his automobile liability insurer, Mercury Casualty Company. Mercury defended the lawsuit under a reservation of rights. Pham prevailed at trial and was awarded a $333,300 judgment. Mercury filed a declaratory relief action against Chu, seeking a determination that the policy issued to Chu excluded coverage for Pham. Mercury relied on a liability coverage exclusion for persons who were "insureds" under Chu's policy. The policy defined insureds as, among others, the named insured, relatives of the named insured, and "residents." The policy defined resident as any individual "who inhabits the same dwelling as the named insured". Because Chu and Pham both acknowledged that they were roommates, Pham qualified as an insured under Chu's liability policy and was thus excluded from coverage, Mercury argued. The trial court agreed and rendered judgment in favor of Mercury.

The Court of Appeal reversed the judgment. The Court held that an automobile liability policy exclusion for persons who resided with, but were unrelated to, the named insured was unenforceable.

Scottsdale Indemnity Company v. National Continental Insurance Company
(2014) 229 Cal.App.4th 1166
September 18, 2014

Manuel Lainez was an independent commercial truck driver who owned his own truck and trucking business. Lainez bought a $1M trucker's liability policy with Scottsdale Indemnity Company that covered his specific tractor and any attached trailer. Lainez entered into a motor carrier agreement with Western Transportation Services, which contracted for pick-up and delivery of loads by independent owner/operators. For its part, Western Transport had a commercial assigned risk policy from National Continental Insurance Company ("NCI"). The policy was denominated "1 Trucker for Hire-Excess," did not describe a specific vehicle, and was rated on an excess cost of hire basis. Lainez was involved in a fatal collision that resulted in various wrongful death actions. Scottsdale accepted NCI's tender of the defense of Western Transport. Two years into the litigation, Scottsdale demanded indemnification from NCI for its pro rata share of defense costs as a co-primary insurer pursuant to *California Insurance Code §11580.9*. NCI refused. NCI contributed to an eventual mediated settlement, with Scottsdale paying the bulk of the settlement amount. Scottsdale then sued for declaratory relief against NCI, contending that the latter had the duty to defend and the duty to indemnify, and was liable for equitable contribution for defense costs and indemnification. On cross-motions for summary judgment, the trial court granted NCI's motion and denied Scottsdale's. The court found that Scottsdale provided primary coverage and NCI provided excess coverage under §11580.9(d) and (h).

The Court of Appeal affirmed the judgment. The Court held that under a plain application of conclusive statutory presumptions embodied in the California Insurance Code, where two policies afforded liability coverage for an accident involving a tractor/trailer rig, the policy that specifically described the vehicle was primary to the policy that did not describe any vehicle. The court held further that the statutory presumption of co-primary coverage did not apply merely because a tractor/trailer rig was involved, as that presumption applies only where separate policies cover the tractor and the trailer involved in an incident giving rise to liability.

Snyder v. California Insurance Guarantee Association
(2014) 229 Cal.App.4th 1196
September 18, 2014

Western Asbestos Company and associated entities ("Western Companies") distributed asbestos-containing building materials. The Western Companies filed voluntary Chapter 11 bankruptcy petitions in 2002 and sought to establish an asbestos claimants' trust. As a result, in 2004 the bankruptcy court ordered creation of the Western Trust, which was funded with settlement proceeds from insurers. Western Trust assumed the Western Companies' liabilities and had authority to seek additional insurance proceeds related to asbestos claims. In late 2004, the Western Trust and Western Companies filed suit in California state court against Zurich-American Insurance Company and related entities, contending that Zurich was responsible for asbestos claims under policies issued by the by-then insolvent Home Insurance Company ("Home"). The complaint also sought declaratory relief as against the California Insurance Guarantee Association ("CIGA"), which is responsible to satisfy certain claims of insolvent insurers. The action went dormant but remained pending while Western Trust sought recovery in separate liquidation proceedings regarding Home. In 2011, Western Trust reached a settlement with Home's liquidator. Western Trust agreed to dismiss its complaint against CIGA without prejudice at that time. Two years later, Western Trust filed a complaint for declaratory relief against CIGA. CIGA demurred, contending that Western Trust's suit was barred by limitations. The trial court agreed that the complaint was barred and sustained the demurrer without leave to amend.

The Court of Appeal reversed the judgment of dismissal and remanded the action for further proceedings. The Court held that a cause of action against the CIGA for breach of statutory duties does not accrue until all of the events necessary to create a covered claim have occurred, giving rise to the insured's right to demand payment from CIGA.

Alexander v. FedEx Ground Package System, Inc.
(9th Cir. 2014) 765 F.3d 981
August 27, 2014

Dean Alexander ("Alexander") and other former FedEx Ground Package System, Inc. ("FedEx") drivers filed class actions against FedEx in federal district court in California. According to Alexander, FedEx improperly classified its drivers as independent contractors and thus deprived them of employment expenses and wages they would enjoy under the *Labor Code* if properly classified as employees. Alexander also brought related claims under the federal *Family and Medical Leave Act* ("FMLA"). FedEx removed the action to the Northern District of California. Similar cases had been filed in recent years in some 40 states, leading to consolidation of the actions into multidistrict litigation proceedings ("MDL") in the District Court for the Northern District of Indiana ("MDL Court"). The MDL Court certified a class for Alexander's claims under California law. Plaintiffs in all the MDL cases moved for partial summary judgment to establish their status as employees as a matter of law. Evidence showed that the operating agreement ("OA"), which governed FedEx's relationship with its drivers, purported to leave its drivers, as independent contractors, sole discretion to determine the manner and means of meeting their business objectives, including hours of work, breaks, routes to follow, and other details of performance. However, the OA required drivers to pick up and deliver packages within their assigned service areas, with deliveries every day FedEx was open, and with every package to be delivered on its assigned day. FedEx assigned drivers work to fill their workdays, expected them to be at work during various periods, maintained control over their service areas, trained them how to perform their jobs and interact with customers, and carried out performance evaluations. FedEx also imposed mandatory safe driving standards, as well as detailed vehicle, equipment and personal appearance requirements, including a uniform requirement. The MDL Court denied Alexander's summary judgment motion and granted a cross-motion filed by FedEx. The action was remanded for resolution of the FMLA claims, which were settled. After the district court entered final judgment, Alexander appealed the MDL court's grant of summary judgment to FedEx on the issue of employment status.

The Court of Appeal reversed the district court judgment and remanded the action with instructions. The Court held that former FedEx drivers were the company's employees, not independent contractors, as a matter of law under California's right-to-control test.

Andersen v. DHL Retirement Pension Plan
(9th Cir. 2014) 766 F.3d 1205
September 15, 2014

Randal Andersen and certain other former employees ("Andersen") of Airborne Express, Inc., participated in Airborne's defined benefit pension plan ("Retirement Income Plan") and its defined contribution plan ("Profit Sharing Plan"). The Retirement Income Plan was a floor-offset plan which calculated benefits based on a participant's final average compensation and years of service, with an offset for any account balance in the Profit Sharing Plan. In 2003, DHL acquired Airborne. When subsequently merging the companies' retirement plans, DHL eliminated the right to transfer account balances from the Profit Sharing Plan to the Retirement Income Plan. As a result, many participants in the plans received reduced overall periodic benefits. Andersen sued DHL, contending that the elimination of the transfer option violated the "anti-cutback" rule of the *Employee Retirement Income Security Act of 1974* (ERISA), *29 United States Code* §1054(g). The anti-cutback rule prohibits any amendment of an employee benefits plan that would reduce a participant's "accrued benefit." The district court granted DHL's motion to dismiss, citing First Circuit authority in a similar action. In that case, the First Circuit relied upon a United States Department of the Treasury regulation (Regulation A-2) which expressly permits elimination of a transfer right, even where it may reduce or eliminate protected benefits.

The Court of Appeal affirmed the district court judgment of dismissal. The court held that a pension plan's decision to eliminate former employees' right to transfer their account balances from a defined contribution plan to a defined benefit plan did not violate the "anti-cutback" rule of the *Employee Retirement Income Security Act*.

Araquistain v. Pacific Gas & Electric Company
(2014) 229 Cal.App.4th 227
August 27, 2014

Ignacio Araquistain, David Page, and Douglas Girouard were hourly employees of defendant Pacific Gas & Electric Company. They were members of a union and the terms of their employment were set forth in a collective bargaining agreement. That agreement provided, among other things, that employees who worked shifts of eight consecutive hours "shall be permitted to eat their meals during work hours and shall not be allowed additional time therefore at company expense." The employees sued PG&E for failing to provide them an off-duty meal break, as required under *Labor Code* §512(a). That section requires an employer to provide an employee who works more than five hours "a meal period of not less than 30 minutes." PG&E moved for summary judgment, arguing that §512(a) does not apply to employees of an electrical or gas corporation who are covered by a valid collective bargaining agreement that "expressly provides for meal periods for those employees." The trial court agreed and granted summary judgment.

The Court of Appeal affirmed the judgment. The Court held that a collective bargaining agreement that provided merely for employees to eat their meals during work hours, but did not provide for specified, off-duty "meal breaks," fell within an express exception to *Labor Code* requirements pertaining to meal breaks.

Ayala v. Antelope Valley Newspapers, Inc.
(2014) 59 Cal.4th 522.
June 30, 2014

Maria Ayala, Rosa Duran, and Osman Nuñez (collectively, “Ayala”) worked as newspaper carriers for Antelope Valley Newspapers, Inc. Ayala signed a preprinted independent contractor distribution agreement with Antelope Valley to deliver the newspaper to subscribers’ homes. However, Ayala maintained that she was an employee because Antelope Valley had the right to control the performance of her work. Ayala filed a class action against Antelope Valley that alleged violations of the Labor Code related to overtime wages, meal breaks, rest breaks, reimbursement of expenses, deductions from wages, itemized wage statements, and accurate payroll records, as well as a claim for unfair business practices. Ayala moved to certify a class of carriers who signed the form distribution agreement with Antelope Valley. In opposition, Antelope Valley contended that the threshold independent contractor/employee (“IC/E”) issue was not subject to common proof because the manner and means by which carriers accomplished their work varied widely. The trial court denied certification, finding that individualized inquiries were required to resolve the IC/E issue and that Ayala’s overtime, meal, and rest-break claims required individualized inquiries due to the wide variation in hours and days worked by carriers. Ayala appealed contending that the trial court improperly denied class certification based solely on its finding that the IC/E issue was not amendable to class treatment.

The Court of Appeal affirmed the trial court’s decision. The Court held that where the issue in a case was whether workers should have been classified as employees, rather than as independent contractors, class certification hinged not on variations in the manner in which the employer exercised control over those workers, but on the uniformity of its right to exercise that control.

Baumann v. Chase Investment Services Corp.
2014 S.O.S. 12-55644
March 14, 2014

Joseph Baumann sued his employer, Chase Investment Services Corporation, under the California *Labor Code* and *Private Attorneys General Act of 2004* (“PAGA”). Baumann alleged that he and other Chase financial advisors (“Baumann”) had not been paid for overtime, and that they did not receive meal breaks, rest periods, and timely reimbursement of expenses. Baumann alleged that his potential share of any statutory civil penalties recovered for each alleged violation would be less than $75,000. Chased removed the action, citing diversity jurisdiction and claiming that the amount in controversy exceeded $75,000 if all potential penalties and attorneys fee awards were aggregated. Chase also invoked *Class Action Fairness Act of 2005* (“CAFA”) jurisdiction under *28 United States Code* §1332. Aggregating the potential claims and finding subject matter jurisdiction under §1332(a), the district court denied Baumann’s motion to remand. The court certified its order for Baumann’s interlocutory appeal.

The Court of Appeal reversed the district court order denying a motion to remand a removed action. The Court held that the district court lacked federal subject matter jurisdiction over a removed PAGA case because it was not a "class action" for purposes of CAFA.

Bradford v. Union Pacific Railroad Company
2014 S.O.S. 12-16469
September 16, 2014

Robert Bradford, Jr., was a longtime employee of Union Pacific Railroad Company when he was fired in mid-2006 for failing a mandatory drug test. Bradford was reinstated, however, after he admitted his violation of the company's drug and alcohol policy ("Policy") and agreed to seek treatment. In late 2007, the Federal Railroad Administration subjected Bradford to a random drug test via a urine sample. Hours later, after his train arrived at its destination, Bradford was injured after he slipped while at work. That subjected him to a "for cause" drug test, also by urine sample. The initial urine sample results were positive for amphetamines, but the later sample results, from the same day, were negative for drugs and alcohol. The positive drug test led to Union Pacific's initiation of disciplinary procedures in keeping with the collective bargaining agreement ("CBA") between the railroad and the United Transportation Union ("Union"), which represented Bradford. A subsequent test of a hair sample from Bradford by an independent lab was negative for drugs, suggesting that Bradford had not used amphetamines during the preceding 90 to 120 days. In keeping with the CBA's disciplinary procedures, a Union Pacific Hearing Officer convened an on-property investigative hearing to develop evidence surrounding Bradford's termination. The Hearing Officer admitted two positive test results from the first urine sample provided by Bradford, which had been split into a test sample and a separate sample held for later testing confirmation, if necessary. He also admitted the negative test result from the second sample, but not the negative hair sample test obtained by Bradford. The superintendent who received the evidence sustained the charge against Bradford and dismissed him from employment with Union Pacific. On Bradford's appeal to a convened Public Law Board, the Board concluded that Union Pacific demonstrated that Bradford violated the conditions of his return to employment and Union Pacific's Policy. The district court affirmed.

The Court of Appeal affirmed the district court judgment. The Court held that a terminated railroad worker suffered no violation of his due process rights in an on-property investigative hearing where the railroad was merely a private actor to whose conduct the guarantees of the Fifth and Fourteenth Amendments did not apply.

Castaneda v. The Ensign Group, Inc.
(2014) 229 Cal.App.4th 1015
September 15, 2014

John Castaneda worked as a certified nursing assistant for Cabrillo Rehabilitation and Care Center. In 2009, Cabrillo was purchased by The Ensign Group, Inc. Castaneda sued Ensign on behalf of himself and other certified nursing assistants for unpaid minimum and overtime wages.

He alleged Ensign was Cabrillo's alter ego, and its "corporate veil should be pierced". The trial court granted summary judgment in favor of Ensign, finding it was not Castaneda's employer.

The Court of Appeal reversed and held that triable issues of fact were presented as to whether a corporation acted as the employer of the staff that worked for a corporation it owned.

Cruise v. Kroger Co.
(2014) 229 Cal.App.4th 215
August 27, 2014

In 2007, Stephanie Cruise applied for a job at Kroger Co. Cruise completed and signed an employment application that contained an arbitration clause that required arbitration of employment-related disputes. The application also incorporated by reference, but did not attach, Kroger's mediation and binding arbitration policy. Cruise was hired then terminated in 2012. She sued, alleging employment discrimination under the Fair Employment and Housing Act ("FEHA") and at common law. Kroger moved to compel arbitration of all Cruise's claims pursuant to both the arbitration clause in Cruise's employment application and Kroger's arbitration policy. Cruise opposed, contending among other things that she never signed an arbitration agreement with Kroger. The trial court denied the motion, finding that Kroger failed to establish there was an arbitration agreement.

The Court of Appeal reversed the order with directions. The Court held that an arbitration clause in an employment application was itself sufficient to establish that an employee and employer had agreed to arbitrate their employment-related disputes.

Dilts v. Penske Logistics, LLC
(9th Cir. 2014) 769 F.3d 637
September 8, 2014

Mickey Dilts and others (collectively, Dilts) worked as delivery drivers for motor carriers Penske Logistics, LLC, and Penske Truck Leasing Co., L.P. (collectively, "Penske"). Dilts filed a class action against Penske in California state court alleging that Penske routinely violated state meal and rest break laws. Penske removed the case to federal court. The district court granted Penske summary judgment, finding that the California laws as applied to motor carriers are preempted under *49 United States Code* §14501(c)(1) of the *Federal Aviation Administration Authorization* Act ("FAAAA"). §14501(c)(1) prohibits state regulations "related to a price, route, or service of any motor carrier with respect to the transportation of property." In particular, the district court found that the meal and rest break laws imposed "fairly rigid" timing requirements that dictated "exactly when" and "for exactly how long" drivers had to take breaks and thus restricted the routes that a motor carrier could select. Dilts appealed.

The Court of Appeal reversed the judgment of the district court and remanded the matter. The Court held in an amended opinion that California's labor laws pertaining to rest and meal breaks are not “related to” employers’ prices, routes, or services and thus are not preempted by the FAAAA.

Duran v. U.S. Bank National Association
(2014) 59 Cal.4th 1
May 29, 2914

Sam Duran and others were employed by U.S. Bank National Association (“USB”) as a business banking officers (“BBOs”). USB’s BBOs were tasked to develop and manage small business customer relationships. USB applied a uniform wage exemption to the BBOs, categorizing them as exempt outside salespersons ineligible for overtime and related wages. The BBOs filed a class action against USB, alleging that USB misclassified the BBOs as exempt for purposes of California’s overtime wage laws. Over USB’s opposition, the trial court granted class certification to a class of some 260 persons. The trial court thereafter devised a plan to determine the extent of USB’s 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. USB was not permitted to introduce evidence about the work habits of any plaintiff outside this sample. Nevertheless, based on testimony from the small sample group, the trial court found that 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 approximately $15M and an average recovery of over $57,000 per person.

The Court of Appeal reversed the judgment. The Court held that the sampling methodology utilized by the trial court in a class action suit for unpaid overtime wages was so profoundly flawed as to undermine the reliability of the resulting verdict.

Dynamex Operations West, Inc. v. Superior Court (Lee)
(2014) 230 Cal.App.4th 718
October 16, 2014

Charles Lee and Pedro Chevez (collectively, “Lee”) were hired as drivers by delivery service Dynamex Operations West, Inc., to deliver packages to Dynamex customers. In 2004, after Lee and Chevez were hired, Dynamex converted the status of all drivers from employee to independent contractor. In 2005, Lee filed a class action against Dynamex. Lee alleged that Dynamex drivers continued to perform the same tasks as they had when they were classified as employees, with no substantive changes to the means of performing their work or the degree of control exercised by Dynamex. As a consequence, Lee alleged, the reclassification of drivers violated, among other things, state wage and hour laws and Wage Order No. 9-2001 (“W.O. 9”) of the Industrial Welfare Commission (“IWC”). Lee sought to represent several hundred California drivers who were engaged by Dynamex as independent contractors. The trial court certified the proposed class. Dynamex later twice moved unsuccessfully to decertify the class. Dynamex then petitioned the appellate court for writ of mandate, arguing that the trial court erred by using the definition of “employee” in IWC wage orders to ascertain the status of class members, as approved in *Martinez v. Combs* (2010) 49 Cal.4th 35. Rather, Dynamex contended, the correct test of employee or contractor status was the common law test in *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341. Dynamex argued that under the *Borello* test, the class had to be decertified because the predominance of individual issues relevant to that test would make it infeasible to litigate Lee’s claims as a class action.

The Court of Appeal granted in part and denied in part a petition for writ of mandate. The Court held that whether employees whose employer reclassified them as independent contractors could be certified as a class required evaluation in light of the differences in the employer’s right to exercise control rather than variations in how that right was exercised. The Court decided that the trial court did not err in allowing certification based on the IWC definition of “employee” as to claims that fell within the scope of W.O. 9 in *California Code of Regulations Title 8*, §11090. The decisions cited by Dynamex as rejecting *Martinez* actually confirmed its broad sweep. Other decisions cited by Dynamex arose in contexts that were not subject to IWC wage orders and were thus outside the scope of *Martinez*. The Court was not persuaded that the trial court erred as a matter of law in denying Dynamex’s motion to decertify the class as to claims that fell within the scope of W.O. 9. Rather, the trial court correctly applied *Martinez* in determining that some drivers were employees within the meaning of that order. However, in light of *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, the trial court had to reevaluate whether class certification remained appropriate by focusing its analysis on differences in Dynamex’s right to exercise control, rather than on variations in how that right was exercised. In particular, it was by not clear at this stage of the proceedings that all of Lee’s claims under *Labor Code* §2802 and Lee’s related claims for unfair or unlawful business practices would, if proved, constitute violations of W.O. 9. Nonetheless, the court acknowledged that several provisions of W.O. 9 arguably related to Lee's claim under §2802 that Dynamex failed to fully compensate drivers for business expenses. Specifically, under §11090(8), employers may not deduct from the employee’s wages or require reimbursement for “any cash shortage, breakage, or loss of equipment.” Under §11090(9)(A), the employer must provide and maintain uniforms worn by the employee as a condition of employment. Under §11090(9)(B), necessary tools and equipment shall be provided and maintained by the employer. To the extent that the reimbursement sought by Lee in his §2802 claim was confined to these items, the IWC definition of “employee” had to be applied under *Martinez*. However, claims for reimbursement for the rental or purchase of personal vehicles used in performing delivery services, even if viable under §2802, appeared to be outside the ambit of W.O. 9. Were that so, then the determination whether a class was properly certified to pursue those claims had to be made under the common law definition of “employee” as discussed in *Ayala* and *Borello*. That evaluation was most appropriately to be made by the trial court.

Edwards v. Lake Elsinore Unified School District
(2014) 230 Cal.App.4th 1532
October 31, 2014

In 2003, Lori Edwards was hired by the Lake Elsinore Unified School District (“LEUSD”) as a teacher for that school year. Edwards worked during that year and the next and became a permanent employee. Edwards voluntarily resigned in 2006 after the 2005 school year. Edwards applied for re-employment with LEUSD in January 2007. The LEUSD notified Edwards of a reasonable assurance of her employment for the 2007 school year. In May, Edwards signed the notice form, acknowledging that she sought employment as a substitute teacher. Later in May, Edwards signed another LEUSD form that effectively acknowledged her status as a substitute teacher. In June, the LEUSD hired Edwards as a substitute teacher. Edwards then taught for the entire 2007 year as substitute for Maria Guillen, who was a categorically funded employee who was on indefinite medical leave. Throughout the year, Edwards signed LEUSD substitute timesheets that further noted that she was substituting for Guillen. The LEUSD paid Edwards in accord with its substitute salary schedule. At the end of the school year, Edwards protested that she had been paid incorrectly as a substitute and that she should have been paid as a permanent tenured employee. At that time, Edwards wrote on her final timesheet that she signed it only because she needed at least part of the pay to which she was entitled to sustain herself until the LEUSD adjusted her misclassification and paid her correctly under the Education Code. The LEUSD rejected Edwards' claim of misclassification and incorrect pay. The LEUSD explained that it was not required to rehire Edwards in 2007 because she had resigned in 2006. The LEUSD also stated that under §44918, Edwards was entitled to priority in any regular teaching-positon vacancy for the 2008 school year because she served more than a specified portion of the 2007 year as a substitute. The LEUSD thus placed Edwards in such a vacancy. Further, she was advised, under §44931, she had been restored to permanent status as of August. Edwards filed a grievance that alleged that she was misclassified for the 2007 school year. The LEUSD denied Edwards' claim. Edwards then petitioned for writ of mandate. Edwards alleged that the LEUSD misclassified and underpaid her as a substitute teacher during the 2007 year. Edwards claimed the LEUSD should have given her a retroactive salary increase after she was rehired as a regular teacher for the 2008 year. The trial court denied the petition, finding among other things that Edwards' employment during the 2007 school year was not a reappointment under §44931. The court also found that Edwards was not entitled to a retroactive salary increase for 2007 under §44918. The court observed Edwards was aware that she was serving as a substitute teacher during the 2007 year. Edwards appealed.

The Court of Appeal affirmed the judgment. In the published portion of its opinion, the court held that a public school teacher who resigned and was then rehired to fill the position of a regularly employed teacher who was on medical leave was not misclassified as a substitute teacher, notwithstanding that she provided teaching services during the entire school year.

Godfrey v. Oakland Port Services Corp.
(2014) 230 Cal.App.4th 1267
October 29, 2014

Lavon Godfrey and Gary Gilbert worked as truck drivers for Oakland Port Services Corp., doing business as AB Trucking. Godfrey and Gilbert drove trucks that were owned by AB between the Port of Oakland and AB's nearby yard. They also delivered freight to AB customer locations elsewhere in the state. Godfrey and Gilbert filed a class action lawsuit against AB, alleging, among other things, that AB did not pay its drivers for all hours worked, misclassified some drivers as non-employee trainees not entitled to pay, and did not provide meal and rest breaks as required by state law. The trial court certified a class of drivers employed by AB. At bench trial, the drivers prevailed on most of their claims. On appeal, AB contended that state-law meal and rest-break requirements, as applied to motor carriers, were preempted by the *Federal Aviation Administration Authorization Act of 1994* ("FAAAA").

The Court of Appeal affirmed the judgment. The Court held that the FAAAA does not preempt California meal and rest-break laws as applied to motor carriers.

Haro v. City of Los Angeles
(9th Cir. 2014) 745 F.3d 1249
March 18, 2014

The Los Angeles City fire department employed dispatchers to receive emergency calls, dispatch emergency response vehicles, and support field employees when additional on-scene resources were required. Dispatchers did not, however, handle firefighting equipment or enter the field to physically undertake fire or rescue operations. Records indicated that no dispatcher had worked at a fire scene for at least ten years. The City also employed air ambulance paramedics who primarily administered medical care in response to incidents that resulted in injured victims. Their other responsibilities could include scene security, rescue operations, and helicopter equipment maintenance. Groups of dispatchers and aeromedical technicians ("Workers") sued the City for failure to pay overtime compensation as required by the Fair Labor Standards Act ("FLSA"). The City classified the Workers as employees "engaged in fire protection" under the FLSA, so that they were entitled to overtime only after working 212 hours in a twenty-eight-day period. This was in contrast to standard overtime, which employees earned for all hours worked over forty in one workweek. The district court concluded that the Workers were not "engaged in fire protection" because they were not responsible for fire suppression under the ordinary meaning of the term. The court also held that a three-year statute of limitations applied for purposes of the Workers' overtime wages claim, and that the Workers were entitled to liquidated damages because the City had willfully violated the FLSA.

The Ninth Circuit Court of Appeals affirmed the district court judgment. The Court held that City of Los Angeles fire department dispatchers and aeromedical technicians were entitled to standard overtime wages because they did not fall within a FLSA exemption for employees "engaged in fire protection."

Harris v. Amgen, Inc.
(2014) 134 U.S. 2870
October 30, 2014

Certain current and former employees ("Employees") of Amgen, Inc. ("Amgen") and its subsidiary Amgen Manufacturing, Limited ("AML"), participated in two employer-sponsored pension plans. The Plans were employee stock-ownership plans that qualified as "eligible individual account plans" ("EIAPs") under *29 United States Code* §1107(d)(3)(A). All of the Employees' EIAPs included holdings in the Amgen Common Stock Fund, one of the investments available to plan participants. The Amgen Common Stock Fund, in turn, held only Amgen common stock. After the value of Amgen common stock fell because of safety concerns about some of the company's pharmaceutical products, the Employees filed an *Employee Retirement Income Security Act* ("ERISA") class action against Amgen, AML, Amgen's board of directors, and the Fiduciary Committees of the Plans (Amgen defendants), alleging that the Amgen defendants breached their fiduciary duties under ERISA. In pertinent part, the Employees contended that the AMGEN defendants acted imprudently, and thereby violated their duty of care under *29 United States Code* §1104(a)(1)(B), by continuing to provide Amgen common stock as an investment alternative when they knew or should have known that the stock was being sold at an artificially inflated price. The Amgen defendants responded that they were entitled to a "presumption of prudence" under *Quan v. Computer Sciences Corp.*, (9th Cir. 2010) 623 F.3d 870 so that their action in continuing to provide Amgen stock as an investment alternative was prudent. The district court dismissed Amgen as a defendant from the suit on the ground that it was not a fiduciary. It dismissed the complaint against the other Amgen defendants, who were fiduciaries, after applying the "presumption of prudence" articulated in *Quan*. Alternatively, even assuming the absence of the presumption, it dismissed on the ground that the Amgen defendants did not violate their fiduciary duties. The Amgen defendants petitioned for a writ of certiorari. The Supreme Court granted certiorari, vacated, and remanded for reconsideration by the Ninth Circuit.

The Court of Appeal reversed the district court judgment and remanded the action for further proceedings. The Court held that ERISA plan participants stated a claim that the plan's fiduciaries violated their duty of care by continuing to offer the company's common stock as an investment alternative even when they knew or should have known that the stock's price was artificially inflated. The court held further that, in keeping with the intervening Supreme Court decision, the participants did not have to overcome a presumption that the plan fiduciaries acted prudently.

Indio Police Command Unit Association v. City of Indio
(2014) 230 Cal.App.4th 521
September 15, 2014

In March 2012, the City of Indio's police chief notified the Indio Police Command Unit Association ("PCU"), the designated bargaining unit for the department's commanding officers that he intended to implement a "strategic reorganization" of the department's command structure that would eliminate the captain and four lieutenant positions. The reorganization plan was to become effective July 1, 2012. In response to inquiry by the PCU's legal counsel, counsel for the city's police department stated that whether reorganization took place was not subject to collective bargaining under the *Meyers-Milias-Brown Act* ("MMBA") because reorganization of the department's command structure was a management right. The department nonetheless agreed to meet with the PCU regarding the "impacts" of the planned reorganization.

On April 19, the city gave the affected employees written notification of the changes to their employment status. On May 18, the PCU filed a petition for writ of mandate challenging the city's implementation of the reorganization plan. The PCU later moved to permanently enjoin the city from implementing the reorganization plan until it complied with the MMBA's good faith meet and confer requirements. The PCU argued the reorganization plan was not motivated by the city's dire financial straits but was instead concocted as a means to eviscerate the separate bargaining unit for supervisory command staff: all three elected officers of the PCU would be adversely affected and the total remaining command staff eligible for membership in the PCU would be reduced to nine. The trial court issued a judgment granting an injunction. The court found the city was required to meet and confer before instituting the reorganization plan and had made insufficient effort to do so. The trial court subsequently granted the PCU's motion for attorney's fees under *Code of Civil Procedure* §1021.5, the private attorney general doctrine.

The Court of Appeal affirmed the trial court judgment and post-judgment order. The Court held that a city breached its meet and confer obligations under the MMBA by making a decision to reorganize its police department command staff without conferring with the command staff's designated bargaining unit.

Irving v. California Unemployment Appeals Board (Los Angeles Unified School District) (2014) 229 Cal.App.4th 946.
September 12, 2014

The Los Angeles Unified School District ("District") dismissed truck driver Jim Irving after Irving accumulated a number of unsatisfactory service notices as a probationary employee. The conduct documented in the notices included issues such as loitering, exceeding allowable 20-minute break periods, taking break periods at improper times, and falsifying time records. The Employment Development Department concluded that Irving was discharged for reasons that did not constitute "misconduct" connected with his work. Irving therefore qualified for unemployment compensation benefits. The District appealed. At an administrative hearing, District personnel testified about Irving's violations of District rules governing breaks and lunch, and his falsifying of time records. In addition to taking breaks or lunch at improper times, Irving violated the District's policy against taking breaks outside District boundaries. Irving admitted that he had been trained on the District's policies and that he had committed policy violations. The administrative law judge (ALJ) rejected Irving's contention that he was instructed to falsify his time records, finding the claim untenable on the available evidence. The ALJ concluded that Irving was discharged for misconduct connected with his work and thus was disqualified from receiving unemployment compensation benefits. Proceeding pro se, Irving petitioned for a writ of mandate. Upon hearing, the trial court concluded that Irving testified credibly that he filed incorrect work records because his supervisors told him to, as his work schedule would not always match his posted schedule and they wanted his time records to match what was posted. The court ruled that Irving established that any false timekeeping resulted from a good faith misunderstanding about his job duties and responsibilities, so that he was eligible for unemployment compensation benefits.

The Court of Appeal reversed the order granting a writ of mandate with directions. The Court held that a former employee was ineligible for unemployment compensation benefits where he committed “misconduct” by exceeding his break times on four separate occasions and then falsified his time sheets.

Jimenez v. Allstate Insurance Company
2014 S.O.S. 12-56112
September 3, 2014

Jack Jimenez worked in California for Allstate Insurance Company as a claims adjuster. In 2005, Allstate shifted all of its California claims adjusters to hourly status from exempt, or salaried, positions. Before that reclassification, adjusters often worked more than 8 hours per day or 40 hours per week. After the reclassification, adjusters' workload was substantially the same, but their compensation was still referred to as an annual salary. Jimenez filed a class action against Allstate that alleged that Allstate did not pay overtime to its adjusters in violation of state law. Jimenez also alleged that Allstate violated California law by not paying adjusters for missed meal breaks. Jimenez alleged that Allstate had a practice or unofficial policy that required adjusters to work unpaid off-the-clock overtime. In addition, Jimenez alleged Allstate’s failure to timely pay wages when employment was terminated and Allstate’s engagement in unfair competition. The district court certified a class of several hundred adjusters (collectively, Jimenez) with respect to Jimenez’s claims for unpaid overtime, timely payment, and unfair competition. The district court found among other things that under *Federal Rules of Civil Procedure* §23(a)(2), Jimenez’s evidence showed three common questions that included whether class members generally worked overtime without receiving compensation as a result of Allstate’s unofficial policy of discouraging reporting of such overtime, its failure to reduce class members’ workload after the reclassification, and its policy of treating their pay as salaries for which overtime was an “exception” under California law. Allstate appealed, contending among other things that the class certification order did not comply with Rule 23 because the common questions it identified would not resolve class-wide liability issues.

The Court of Appeal affirmed the order of the district court and remanded. The Court held that a class of claims adjusters sufficiently alleged their commonality based on an insurer’s requirement that they work unpaid overtime in violation of state law.

Jong v. Kaiser Foundation Health Plan, Inc.
(2014) 226 Cal.App.4th 391
May 20, 2014

Henry Jong worked for Kaiser Foundation Health Plan, Inc., and Kaiser Foundation Hospitals as an outpatient pharmacy manager (“OPM”). Jong was classified as a salaried employee who was exempt from various wage and hour requirements. In 2009, Kaiser OPMs were reclassified as non-exempt hourly employees entitled to overtime premium compensation based on the settlement of a class action (Lopez-action) that alleged that OPMs were misclassified.

Subsequently, Jong and two other OPMs (collectively, “Jong”) brought a putative class action against Kaiser. Jong alleged numerous wage and hour violations that included a claim under *Labor Code* §1194 for Kaiser’s failure to pay overtime compensation for hours worked off-the-clock. Jong alleged that following the 2009 settlement, Kaiser policy forbade overtime premium compensation for OPMs without adjustment of their duties and responsibilities. Kaiser’s own data, Jong alleged, including surveys of Lopez-action class members, indicated that before they were reclassified, such OPMs routinely worked overtime in order to meet Kaiser’s requirements. Accordingly, Jong alleged, OPMs had to work “off-the-clock” in order not to incur forbidden overtime premium pay and still meet Kaiser’s requirements. Kaiser moved for summary judgment. The trial court granted the motion as to Jong individually, finding that he lacked evidence that Kaiser failed to pay overtime wages for hours he worked that Kaiser knew or should have known he worked. In particular, the trial court found much of Jong’s evidence inadmissible and that his evidence failed to show that he (as distinguished from OPMs generally) was working off-the-clock. Jong appealed, contending that the trial court erred as to his claim for unpaid overtime compensation.

The Court of Appeal affirmed the judgment. The Court held that a hospital employee who claimed he was not paid for overtime hours he worked failed to present sufficient evidence to create a triable issue as to whether his employer had actual or constructive knowledge that he worked hours in addition to the hours he reported.

Kao v. University of San Francisco
(2014) 229 Cal.App.4th 437
October 6, 2014

In January 2008, the coworkers of University of San Francisco (“USF”) math professor John Kao began noticing disturbing changes in his personality. He had episodes of sudden and apparently uncontrollable rage that terrified those around him. Fellow math professor Paul Zeitz was subjected to one of Kao’s outbursts at a meeting in January 2008. Witnesses to a similar outburst in February described Kao screaming, “shaking with anger,” and throwing things. In April, USF Dean Jennifer Turpin attempted to exchange pleasantries with Kao after encountering him in the parking lot. She was shocked when he became “enraged” and turned on her, standing over her with clenched fists and yelling. After investigating repeated reports of Kao’s coworkers being frightened by such incidents, USF Assistant Vice President for Human Resources Martha Peugh-Wade met with Kao in June 2008. She requested that he submit to a “fitness for duty” (“FFD”) evaluation conducted by a psychiatrist. The consent form Peugh-Wade provided Kao made clear that the only information that would be transmitted to the university following the examination would be a statement that Kao was or was not fit for duty, along with a specification of any functional limitations. Diagnostic analyses would not be part of the evaluating psychiatrist’s report. When Kao refused to submit to the examination, he was placed on a leave of absence. When later efforts to persuade Kao to submit to examination proved futile, he was terminated from his employment. The February 2009 termination letter cited as grounds Kao’s failure “to carry out the work-related instructions of the University to cooperate with an independent medical evaluation.” Kao sued USF for violations of the *Fair Employment and*

Housing Act ("FEHA"), the *Unruh Civil Rights Act*, and the *Confidentiality of Medical Information Act*, and other causes of action. Following a jury trial, a verdict was entered in favor of USF.

The Court of Appeal affirmed the judgment. The Court held that a university professor who had terrified coworkers with repeated and unpredictable outbursts of rage was properly terminated for refusing to submit to a psychiatric evaluation of his fitness for duty.

Landers v. Quality Communications, Inc.
(9th Cir. 2014) 771 F.3d 638
November 12, 2014

Greg Landers was employed by Quality Communications, Inc., as a cable services installer. Landers filed a putative class action against Quality and two individuals (collectively, "Quality"), alleging that Quality failed to pay him minimum wages and overtime wages in violation of the *Fair Labor Standards Act* ("FLSA"). Landers further alleged that he was subjected to a "piecework no overtime" wage system in which he worked in excess of 40 hours per week without being compensated for his overtime. In the alternative, Landers alleged that even if he were paid some measure of overtime, such payment was less than required by the FLSA. Quality moved to dismiss the complaint under *Federal Rules of Civil Procedure* §8(a)(2) and §12(b)(6). The district court granted the motion, finding that Landers failed to state a plausible claim for unpaid minimum wages and overtime wages. In particular, the court found that Landers did not make factual allegations as to the approximate number of overtime hours worked, his hourly wage, or the amount of unpaid overtime wages. Landers appealed.

The Court of Appeal affirmed the judgment of the district court. The Court held that an employee who did not allege a specific week in which he was entitled to, but was not paid, overtime wages did not state a plausible claim under the FLSA.

Lane v. Francis Capital Management LLC
(2014) 224 Cal.App.4th 676
September 9, 2014

Martin Lane worked as an analyst for Francis Capital Management LLC ("FCM"). Upon being hired he executed an agreement that provided for the binding arbitration of "all claims, disputes and controversies arising out of, relating to or in any way associated with [Lane's] employment by [FCM] or the termination of that employment," except for worker's compensation claims and certain administrative claims. After working for FCM for one year and allegedly not receiving a promised bonus, Lane complained and was terminated. He sued FCM for wrongful termination in violation of public policy; breach of oral contract; failure to pay wages; unpaid overtime wages; unpaid meal and rest period wages; waiting time penalties; itemized wage statement violations; and unfair competition. FCM moved to compel arbitration. The trial court denied the motion.

The Court of Appeal reversed the judgment in part. The Court held that state law does not bar the arbitration of labor claims other than those for due and unpaid wages.

McLean v. State of California
(2014) 228 Cal.App.4th 1500
August 20, 2014

Janis McLean worked for the State of California as a deputy attorney general when she retired in 2010. McLean did not receive her final wages on her last day of employment or within 72 hours of that date. The correct amount of her wages for unused leave and vacation time were not transferred into her supplemental retirement plan within 45 days of the last day of her employment, as she requested. She did not receive wages that she had elected to defer to 2011 by February 1, 2011. McLean brought a class action against the State and the California State Controller's Office, contending that the defendants failed to make prompt payments required by *Labor Code* §202 to the class consisting of state employees who resigned or retired from their employment within a designated time period, and who did not receive prompt payment of wages in keeping with §202. The complaint alleged violations of §202 and §203. The State and the Controller's Office demurred, contending that because McLean retired, rather than quit, there was no basis for her §203 penalties claim and she stated no claim under §202. The trial court sustained the demurrer without leave to amend, concluding that §203 did not authorize penalties for employees who retired.

The Court of Appeal affirmed the judgment in part, reversed in part, and remanded the action for further proceedings. The Court held that the California *Labor Code's* prompt payment requirements and waiting time penalties that apply to employees who "quit" also apply to employees who quit to "retire."

Metal Workers' Int'l Assoc., Local 104 v. Duncan (Russ Will Mechanical, Inc.)
(2014) 229 Cal.App.4th 192
August 28, 2014

A contractor hired Russ Will Mechanical, Inc. to provide the heating, ventilation and air conditioning ("HVAC") for a public works project in Santa Clara County. Their subcontract provided that Will was required to "furnish all labor, materials, equipment, services and supplies necessary to complete" the HVAC work. All work was to be done in accordance with the specifications of the prime contract for the project. Will had, for more than a decade, fabricated all materials at a permanent, offsite facility it operated in Hayward. The offsite facility was not established for this particular project, but was instead utilized to manufacture items for various private and public projects. Will did not sell the materials it fabricated to the general public. Will employee Steve Neves filed a complaint with the Department of Industrial Relations, Division of Labor Standards Enforcement ("DLSE") alleging he should have been paid prevailing wages for work related to the project. Neves fabricated various ducts, flashing, square rounds, and fittings for use in the project. Neves never worked at the project site in Santa Clara County. DLSE issued a civil wage and penalty assessment against Will for failing to pay prevailing wages for the fabrication work performed in its Hayward facility. Will requested a review of the assessment pursuant to *Labor Code* §1742(a). At the invitation of DLSE, Sheet Metal Workers' International Association, Local 104 submitted a position statement in support of DLSE's assessment. The department issued a coverage determination in which it concluded that Russ Will was required to pay prevailing wages for the offsite fabrication work associated with the project.

The Court of Appeal reversed the judgment. The Court held that a subcontractor's offsite fabrication of materials used in a public works project was not covered by the prevailing wage law where it took place at a permanent, offsite manufacturing facility and the location and existence of that facility was determined without regard to the particular project.

Nasrawi v. Buck Consultants LLC
(2014) 231 Cal.App.4th 328.
November 6, 2014

Retired Stanislaus County public employees sued the Stanislaus County Employees Retirement Association and actuaries Buck Consultants LLC and Harold Loeb for negligence and breach of fiduciary duties resulting in the dramatic underfunding of the public pension trust administered by the association. As to the association, the retirees alleged the association breached its fiduciary duties by failing to file a malpractice action against Buck and Loeb for their negligent preparation of the January 2007 actuarial valuation. As to Buck and Loeb, the retirees asserted a claim for aiding and abetting a breach of fiduciary duty. In a separate action (the O'Neal action), the retirees also alleged the association's breach of fiduciary duty based on its use of an "unrealistic and imprudent" assumed actuarial rate of return of 8.16%; its adoption of a schedule of negative amortization of the system's unfunded liability for earned benefits; its intentional management of the pension fund to ensure that it was always less than 90%funded, thereby avoiding certain employer contributions such as cost-of-living adjustments; its use of pension fund assets to substitute for the county's employer contributions; and its transfer of assets from non-valuation reserves to valuation reserves. The retirees' claims against Buck and Loeb were based on their alleged aiding and abetting of the breaches of fiduciary duty alleged in the O'Neal action. The trial court sustained the defendants' demurrers without leave to amend. The court sustained the association's demurrer on three grounds: the retirees' failure to demonstrate compliance with the *Government Claims Act*; the association's immunity under *Government Code* §815.2 for its alleged breach of a discretionary duty to pursue a negligence claim against Buck and Loeb; and the retirees' failure to allege legally cognizable damages. The court sustained Buck and Loeb's demurrer on the theory that the retirees' failure to state a breach of fiduciary duty claim against the association was fatal to their claim against Buck and Loeb. The court reasoned that the retirees' aiding and abetting claim was "predicated" on their breach of fiduciary claim against the association and thus "necessarily" failed.

The Court of Appeal reversed the judgment of dismissal and remanded. The Court held that an actuarial firm could be held liable to retired county employees for aiding and abetting the county retirement association's alleged breach of fiduciary duty with regard to the retirees' pension fund.

Network Capital Funding Corporation v. Papke
(2014) 230 Cal.App.4th 503
October 9, 2014

Erik Papke began working for Network Capital Funding Corporation in 2011. At that time, he executed an employment agreement that required him to submit to binding arbitration any and all disputes arising out of his employment. Two years later, Papke initiated arbitration proceedings against Network Capital by serving a demand for class arbitration. Papke's demand alleged wage and hour claims under the *Labor Code* and the Unfair Competition Law. Network Capital sued for declaratory relief, arguing that the arbitration agreement did not authorize class arbitration. Network Capital sought a judicial declaration that it was the trial court's responsibility to decide whether the arbitration agreement authorized class arbitration, and the arbitration agreement prohibited class arbitration. The trial court rendered judgment in favor of Network Capital, finding that the issue of whether the agreement required arbitration of class actions was one for the court. The court further determined that the parties' agreement allowed for individual arbitration only.

The Court of Appeal affirmed the judgment. The Court held that the trial court properly determined that it, and not the arbitrator, was charged with deciding whether an arbitration agreement encompassed class claims; and properly determined that the agreement did not encompass such claims.

Pacific Shores Hospital v. United Behavioral Health
2014 S.O.S. 12-55210
August 20, 2014

Wells Fargo & Company employee "Jane Jones" was admitted to Pacific Shores Hospital ("PSH") for acute inpatient treatment for anorexia nervosa. Jones was covered under the Wells Fargo Health Plan, an Employee Retirement Income Security Act of 1974 ("ERISA") plan administered by third-party claims administrator United Behavioral Health ("UBH"). Under the Plan, UBH level-of-care guidelines provided that acute inpatient care was warranted when any of six criteria were met, including serious and imminent risk of harm to self or others due to a behavioral health condition, and recommended behavioral health treatment of a member with a serious medical condition that required 24-hour care. UBH's separate guidelines for "continued service" included ten criteria that had to be met in order to maintain a member's current level of care. UBH initially authorized four days of inpatient hospital treatment for Jones. According to UBH's early case notes, Jones was suicidal, extremely underweight, abusing laxatives, purging by self-induced vomiting, and suffering pneumonia. Jones was noted to have the intent to overdose or starve to death. UBH authorized additional inpatient treatment for several days as PSH kept Jones under close supervision and attempted to stabilize her. Some two weeks after

Jones was admitted, UBH Regional Director Dr. Murray Zucker spoke with Jones's attending physician by phone. The physician indicated that Jones required additional inpatient care for stabilization, suicide risk, and further weight gain. Several days later, after another telephone meeting with Jones's physician, Dr. Zucker terminated Jones's inpatient care authorization, and UBH notified PSH that it would not pay for further inpatient treatment. PSH sought urgent appeal, which was referred to Dr. Barbara Center. Dr. Center spoke by telephone with Jones's physician and, noting among other things that Jones was not suicidal, recommended termination of inpatient hospital care. At approximately the same time, UBH Assistant Medical Director Dr. William Barnard denied PSH's appeal, essentially quoting the conclusions in Dr. Center's report. A month after her admission to PSH, and eleven days after UBH stopped paying for her treatment, Jones was discharged. Jones assigned to PSH her right to payment under the Plan. PSH sued UBH under 19 *United States Code* §1132(a)(1)(B), contending that UBH and the Plan had wrongfully denied benefits to Jones. The district court entered judgment in favor of UBH, stating that despite numerous errors in Dr. Zucker's and Dr. Center's reports, the administrative record provided a reasonable basis for determining that acute inpatient care was not necessary after the date UBH ended authorization.

The Court of Appeal reversed the District Court judgment. The Court held that a health plan's third-party claims administrator abused its discretion in denying further additional inpatient hospital treatment to a covered member where it relied in substantial part on obvious mistakes by its physician decision makers during their superficial review of the member's medical history and condition.

Pedro v. City of Los Angeles
(2014) 229 Cal.App.4th 87
August 26, 2014

On two occasions in November 2009, City of Los Angeles police Officer Jason Pedro, while on duty and in uniform, used an unmarked police car to drive a female friend, a minor, to a medical clinic. A protester outside the clinic, which provided abortion services, reported Pedro to his superiors. He also complained that Pedro cursed at him. On one of the two occasions, Sergeant Rodney Peacock was sent to the clinic to investigate the matter. He encountered Pedro outside, where they exchanged pleasantries. Peacock did not tell Pedro he had been sent to investigate; he said instead that he was in the neighborhood to go to a nearby store. When Peacock asked what Pedro was doing there, Pedro allegedly lied, telling Peacock he was conducted a "follow-up" with a victim. An administrative complaint was served on Pedro on December 20, 2010, charging him with four counts of misconduct: two counts of using a city vehicle inappropriately to transport a member of the public in order to conduct personal business while on duty; one count of making a discourteous statement to a member of the public while on duty; and one count of making a misleading statement while on duty to a police department supervisor conducting an official investigation. Each incident was alleged to have occurred in November 2009. Pedro was temporarily relieved from duty on December 21, 2010. A Board of Rights hearing commenced on April 29, 2011; the board ultimately concluded that at least three of the four counts were barred by the applicable one-year statute of limitations. The Board forwarded the complaint to Chief of Police Charles Beck for amendment to remove the time-barred counts. Chief Beck disagreed that the three counts were time-barred and demanded that the hearing go forward. The Board thereafter sustained all four charges and recommended a 22-day suspension. The trial court granted Pedro's petition for writ of mandate and directed that the board's findings be set aside as to all four counts.

The Court of Appeal affirmed the judgment. The Court held that the Board erred in deferring to a police chief's decision regarding the application of the statute of limitations to a police officer's alleged acts of misconduct.

Professional Engineers in California Government v. Brown
(2014) 229 Cal.App.4th 861
September 12, 2014

In 2008 and 2009, then-governor Arnold Schwarzenegger issued executive orders requiring the unpaid furloughs of most state employees, including close to 16,000 engineers and scientists represented by Professional Engineers in California Government ("PECG") and the California Association of Professional Scientists ("CAPS"). Pursuant to those executive orders, employees were subjected to two unpaid furlough days per month from July 1, 2009 to June 30, 2010. In a subsequent order, these furlough days were increased to three per month and extended, for PECG and CAPS members, through March 2011. PECG and CAPS filed petitions for writ of mandate challenging the mandatory furloughs. The trial court granted the writ petitions. The court found, among other things that imposition of mandatory furloughs on PECG and CAPS-represented employees in positions involving hazardous waste remediation and management on military bases violated provisions of the Water and Health and Safety Codes prohibiting the Controller and Department of Finance from imposing "any … personal services limitations" on those positions. The court found that furloughs of employees covered by those statutes violated the California Constitution's single subject rule.

The Court of Appeal affirmed in part and reversed in part. The Court held that the imposition of mandatory furloughs on state employees working in positions involving hazardous waste remediation and management on military bases did not violate the single subject rule.

Quintanar v. County of Riverside
(2014) 230 Cal.App.4th 1226
October 24, 2014

The County of Riverside and the Riverside County Sheriff's Department demoted Deputy Jose Quintanar as a result of an incident in which Quintanar allegedly used excessive force. Pursuant to the applicable memorandum of understanding ("MOU"), Quintanar filed an administrative appeal. This triggered an evidentiary hearing before an impartial hearing officer. The hearing officer agreed that Quintanar had used excessive force and upheld the demotion. Quintanar filed a petition for writ of mandate challenging that decision. The trial court questioned whether the hearing officer was required to exercise independent judgment with respect to the nature of the discipline to be imposed, and if so, whether he had, in fact, done so. It remanded the matter to the hearing officer with directions to clarify whether he had exercised independent judgment. The hearing officer responded that he had reviewed the case de novo in determining whether Quintanar had engaged in misconduct. Finding that Quintanar had engaged in misconduct, the hearing officer then reviewed the discipline imposed by the department to determine if that discipline was appropriate. On receiving the hearing officer's reply, the trial court determined he had not exercised independent judgment with regard to discipline and issued a writ commanding him to do so. The department appealed.

The Court of Appeal reversed the judgment. The Court held that an administrative hearing officer's failure to exercise independent judgment in determining the appropriate discipline for a deputy sheriff found to have used excessive force was not prejudicial.

Rosenfeld v. Abraham Joshua Heschel Day School, Inc.
(2014) 226 Cal.App.4th 886
May 29, 2014

Ruth Rosenfeld worked as a teacher for Abraham Joshua Heschel Day School, Inc. From 1972 until 2005, she taught full time, amounting to 25 hours per week. In the 2005-2006 school year, enrollment at Heschel declined, leading to a reduction in the number of available teaching hours. Rosenfeld's hours for the 2005-2006 school year were reduced from 25 to 20 hours per week. In the 2006-2007 school year, enrollment declined further, with the result that Rosenfeld's teaching hours were reduced once again, from 20 to 15 hours per week. The school nonetheless paid Rosenfeld for a 17-hour work week, so that she could keep her health coverage. Enrollment for the 2007-2008 school year again declined, and, in May 2007, the school advised Rosenfeld that it would need to reduce her hours accordingly, from 15 to 10 hours per week. The school advised her, however, that it would notify her immediately if additional hours became available. The school also advised Rosenfeld that she would be compensated $14,658 for the 7-hour loss. Rosenfeld initially accepted the offer, but, on August 24, 2007, three days before classes were to begin, Rosenfeld notified the school that she was forced to resign her employment because her work environment had become intolerable.

Shortly after the school received the letter, five more teaching hours became available, which would have increased Rosenfeld's hours to the same level as the previous school year. Rosenfeld later testified in deposition that this number of hours would have been acceptable to her. Following Rosenfeld's hasty resignation, the school rushed to hire a new teacher. Rosenfeld was replaced by a woman in her mid-fifties, only slightly younger than Rosenfeld. That woman taught the 15 hours that would have been taught by Rosenfeld. After filing a charge of age discrimination with the California Department of Fair Employment and Housing, Rosenfeld filed suit, alleging, among other things, age discrimination and constructive wrongful termination. At the commencement of trial, Rosenfeld filed a trial brief indicating she would be proceeding on a disparate impact theory of age discrimination, in addition to a disparate treatment theory. The school objected, arguing this was an entirely different theory than was presented in Rosenfeld's pleadings and that it would be prejudiced if Rosenfeld were permitted to pursue this new theory at trial. The trial court ruled that Rosenfeld would not be allowed to pursue her disparate impact theory at trial. The trial court also ruled that the school would be allowed to present evidence that Rosenfeld failed to pursue the school's internal grievance procedure before filing suit. The jury rendered a verdict in favor of the school, specifically finding that Rosenfeld's age was not "a motivating reason for the reduction of her working hours."

The Court of Appeal affirmed the judgment. The Court held that, where a plaintiff failed to give the defendant notice of her intent to pursue anything other than a disparate treatment theory of discrimination, the trial court properly precluded her from switching to a disparate impact theory at the outset of trial.

Santa Clara County Correctional Peace Officers' Ass'n, Inc. v. County of Santa Clara
(2014) 224 Cal.App.4th 1016.
March 18, 2014

Effective June 2, 2008, the County of Santa Clara and the Santa Clara County Correctional Peace Officers' Association, Inc. entered into a written memorandum of understanding ("MOU") that created three different work schedules for the officers that staffed the county's jails. In order to reduce the county's total budget for fiscal year 2012 (July 1, 2011 through June 30, 2012) while avoiding layoffs, the county's Department of Corrections ("DOC") proposed, among other things, a reduction of one of the three schedules from 85.75 hours biweekly to 80 hours. The county and the association met twice in early June 2011 before the county's board of supervisors adopted a proposed budget on June 15, 2011 that included the modified plan. After the budget was adopted, the parties met again and the association's members voted on the county's proposals. On July 22, 2011, the association filed a verified petition for writ of mandate, alleging that the county, in modifying the plan, had breached duties to meet and confer and to bargain in good faith under the MOU, the *Meyers-Milias-Brown Act* ("MMBA"), and the county's code. The trial court denied the association's petition, finding that the vote by the association's members established both that they preferred the county's modified plan and that the county had met and conferred in good faith.

The Court of Appeal affirmed the judgment. The Court held that the County of Santa Clara satisfied its obligation to meet and confer prior to reducing the working hours of its correctional officers.

Serri v. Santa Clara University
(2014) 226 Cal.App.4th 830
May 29, 2014

From 1992 to 2007, Conchita Serri worked as the Director of Affirmative Action for Santa Clara University. The university terminated Serri's employment in 2007 because she failed to produce affirmative action plans for three consecutive years, even though her job required that she produce such plans annually. The university also terminated Serri's employment because she made misrepresentations about the plans that she had failed to prepare. Serri sued the university for wrongful termination and other causes of action. She alleged she was terminated due to her race and ethnic origin. Serri was Puerto Rican. The university moved for summary judgment, arguing the Serri was terminated solely for her performance. In opposition, Serri did not contest the university's claim that she had failed to prepare the affirmative action plans. She instead proffered expert testimony to show that her failure to prepare the plans had not, and would not, result in any adverse consequences for the university. Serri argued that the university's claim that she was terminated for failing to prepare the plans was thus necessarily pretextual. The trial court granted the university's motion for summary judgment, finding that the undisputed evidence showed that Serri had been terminated due to her failure to perform the tasks required of her.

The Court of Appeal affirmed the judgment. The Court held that an employer's subsequent failure to suffer adverse consequences as the result of an employee's failure to perform her duties did not render the employee's termination for nonperformance, before the consequences of her actions could be known, pretextual.

Solus Industrial Innovations, LLC v. Superior Court (People)
(2014) 224 Cal.App.4th 17
September 23, 2014

The explosion of an electric water heater killed two workers at a manufacturing plant operated by Solus Industrial Innovations, LLC. After investigation, California's Division of Occupational Safety and Health referred the case to the Orange County District Attorney for prosecution. The district attorney filed a criminal complaint against Solus's plant manager and maintenance supervisor. The district attorney also filed a four-count civil complaint, seeking recovery of, among other things, penalties for Solus's violation of California's Unfair Competition Law ("UCL"). Solus demurred to the causes of action seeking penalties under the UCL, arguing they were preempted by the federal Occupational Safety and Health Act of 1970. The trial court disagreed and overruled the demurrers.

The Court of Appeal granted a petition for writ of mandate. The Court held that federal law preempted a district attorney's recovery of civil penalties under California's Unfair Competition Law based on an employer's alleged violation of workplace safety standards.

Spinedex Physical Therapy USA, Inc. v. United Healthcare of Arizona, Inc.
2014 S.O.S. 12-17604
November 17, 2014

United Healthcare ("United") acted as claims administrator for many health plans ("Plans") and insured the benefits offered under most, but not all, of the Plans. Spinedex Physical Therapy USA, Inc., was a physical therapy provider who offered services to patients, including those with health insurance coverage under the Plans. Spinedex's patients signed forms that included an assignment of benefits ("Assignment") that gave Spinedex its patients' rights and benefits under their respective Plans. Patients also signed an authorization and representation form ("Authorization") stating that Spinedex was authorized to represent patients in administrative or civil proceedings in pursuit of payment of benefits under health insurance plans. Spinedex submitted patient coverage claims to United. United paid some of the claims and denied others in whole or part. Spinedex sued United for payment of the denied claims. The Arizona Chiropractic Society ("ACS"), along with individual Plan beneficiaries, joined the suit as plaintiffs in an amended complaint that alleged improper denials of benefits as well as breaches of fiduciary duty. The district court granted summary judgment to United. In pertinent part, the court concluded that Spinedex, as an assignee of its patients' claims for payment of benefits, lacked Article III standing to bring those claims.

The Court of Appeal reversed the district court judgment in part, affirmed in part, vacated in part, and remanded the action for further proceedings. The Court held that a health care provider had Article III standing, as assignee of its patients, to bring health insurance benefit claims against an ERISA claims administrator.

Tamosaitis v. URS Energy & Construction, Inc.
2014 S.O.S. 12-35924
November 7, 2014

Dr. Walter Tamosaitis worked for URS Energy & Construction, Inc. ("URS E&C"), which was a subcontractor of Bechtel National, Inc. for work on the Hanford Nuclear Site Waste Treatment Plant ("WTP"). Tamosaitis recommended extending a deadline to solve a technical issue associated with the WTP, but doing so would have jeopardized Bechtel's fee. When Bechtel rejected his advice and announced closure of the issue, Tamosaitis objected and provided a lengthy list of environmental and safety concerns to Bechtel and URS. Two days later, Tamosaitis was fired from the WTP project and reassigned to a basement office in a URS facility. On July 30, 2010, Tamosaitis filed a discrimination action with the Department of Labor, Occupational Safety and Health Administration ("DOL-OSHA") pursuant to the anti-retaliation – or whistleblower – provision of the Energy Reorganization Act ("ERA"), 42 United States Code §5851. Tamosaitis named URS, Inc., as respondent and claimed workplace discrimination based on protected activities. URS Corporation ("URS Corp.") responded to the complaint. Tamosaitis added the federal Department of Energy ("DOE") as a respondent on December 15, 2010, while on September 7, 2011, he changed the employer defendant from URS, Inc. to URS Corp. and URS E&C. Also on September 7, he gave notice that he intended to bring suit in federal court pursuant to the ERA's opt-out provision. DOL-OSHA dismissed the agency complaint. Tamosaitis filed suit in November 2011, naming as defendants URS Corp., URS E&C, and DOE. Tamosaitis alleged violations of the ERA whistleblower protection provision, and he sought a jury trial. The district court granted DOE's motion to dismiss, ruling that Tamosaitis did not wait a full year after naming DOE in his agency complaint and so did not exhaust his administrative remedies against DOE. The court granted summary judgment in favor of URS Corp. and URS E&C for the same lack of administrative exhaustion. The court also granted summary judgment for URS Corp. and URS E&C on alternate, substantive grounds. Finally, the court granted the URS defendants' motion to strike Tamosaitis' jury demand, concluding that he had no statutory or constitutional right to a jury trial in his case.

The Court of Appeal affirmed in part and reversed in part the district court judgment. The Court held that an employee satisfied the Energy Reorganization Act's one-year administrative exhaustion "opt-out" period where he brought suit in federal district court more than one year after adequately identifying his employer as the respondent on his whistleblower claims. The court held further that the employee had no statutory jury trial right on his whistleblower claims under the Act, but that he did have a constitutional jury trial right for his claims seeking money damages.

The Retail Property Trust v. United Brotherhood of Carpenters and Joiners of America
2014 S.O.S. 12-56427
September 23, 2014

Retail Property Trust owned a mall in Brea, California ("Mall"). The Mall sued United Brotherhood of Carpenters and Joiners of America and others ("Union") in California state court, alleging that dozens of Union members violated the Mall's rules governing public use of common areas after one of the Mall's tenants contracted with non-Union subcontractors for renovations. The Mall was privately owned but had time, place and manner restrictions in keeping with the California Constitution's protections for speech and petitioning in shopping centers. According to the Mall, the Union members undertook an ongoing disruptive protest that included marching, yelling, hitting and kicking a construction barricade, and otherwise creating an intimidating and disruptive environment for the Mall and its tenants. The Mall alleged state-law claims for trespass and nuisance and sought declaratory and injunctive relief. The Union removed the action to federal district court, contending that the Mall had alleged unlawful secondary boycott activity in violation of §303 of the *Labor Management Relations Act* ("LMRA"). The Union maintained that the Mall's claims were preempted by federal law and the Mall had effectively stated a federal cause of action. The district court denied the Mall's requests to remand and ultimately granted in part and denied in part the Union's motion to dismiss pursuant to *Federal Rule of Civil Procedure* 12(b)(6). The court granted the motion as to the Mall's state-law trespass, private nuisance, and injunctive relief claims but denied dismissal as to a claim under §303 that the Mall had added in an amended complaint. The Mall obtained approval to dismiss that claim voluntarily. The Mall appealed, contending that the district court erred in holding that a state-law action for trespass and private nuisance was preempted by §303 merely because the invasion of property happened to involve a secondary boycott by a union.

The Court of Appeal affirmed the district court order granting a motion to dismiss in part, reversed in part, and remanded the action for further proceedings. The Court held that §303 of the Labor Management Relations Act did not preempt state-law claims for trespass and private nuisance related to union conduct that might also constitute secondary boycott activity.

United Brotherhood of Carpenters and Joiners of America v. Building and Construction Trades Department
AFL-CIO, 2014 S.O.S. 12-36049
October 28, 2014

According to the labor union, United Brotherhood of Carpenters and Joiners of America ("UBC"), its former umbrella labor organization, the Building and Construction Trades Department, AFL-CIO ("Building Trades"), undertook a campaign to force the UBC's re-affiliation. As part of the campaign, Building Trades convinced the Metal Trades Department, AFL-CIO, to "kick out" the UBC by dissolving a solidarity agreement between them. Among other things, the UBC said, Metal Trades breached its duty of fair representation by stripping the UBC's members of their preferential positions as union stewards. The UBC sued Metal Trades and an affiliated union for the alleged breach. The district court dismissed the complaint for failure to state a claim, citing the UBC's failure to provide sufficient factual support for its allegations.

The Court of Appeal affirmed the district court's order of dismissal. The Court held that the duty of fair representation does not require an umbrella labor organization to appoint and to remove stewards without regard to their individual union affiliation.

Yau v. Santa Margarita Ford, Inc.
(2014) 229 Cal.App.4th 144
August 27, 2014

Eddie Yau worked as an auto mechanic and later as service manager for Santa Margarita Ford, Inc. ("SMF"). In 2007, Yau apparently first complained to SMF owner James Graham and general manager Mike Mamic that fraudulent warranty repair claims were being submitted to Ford Motor Company. According to Yau, SMF service director Robert Selff, to whom Yau reported, instigated and directed the warranty fraud. Yau also asserted the involvement of SMF parts director Robert Cira and customer relations manager Gina Allen. In 2009, SMF terminated Yau's employment. Yau filed a complaint against SMF that alleged that he was wrongfully terminated in violation of public policy. Among other statutory citations, Yau alleged that his termination violated the fundamental public policy against conspiracy as defined in Penal Code §182. Yau also named Mamic, Graham, Selff, Cira, and Allen as defendants. Yau alleged that the individual defendants intentionally inflicted emotional distress on Yau in connection with the fictitious warranty repair scheme. The trial court sustained the defendants' demurrers, finding that Yau did not allege either violation of a public policy or a nexus between his termination and the alleged public policy violation. The trial court also found that Yau did not allege any extreme and outrageous conduct by Selff. Following Yau's futile submission of two amended complaints, the trial court sustained demurrers to Yau's operative complaint without leave to amend and dismissed his action. Yau appealed.

The Court of Appeal affirmed in part and reversed in part the judgment and remanded. The Court held that an employee who alleged that he was terminated for his objections to his employer's submission of fraudulent warranty repair claims to an auto manufacturer adequately alleged wrongful termination in violation of public policy.

ASARCO, LLC v. Union Pacific Railroad Company
(10th Cir. 2014) 755 F.3d 1183
August 27, 2014

ASARCO, LLC, conducted mining operations in the Coeur d'Alene River watershed. Union Pacific Railroad Co. and Union Pacific Corp. (collectively, "UPRR") transported ASARCO mining products by rail. Subsequently, the government designated a Coeur d'Alene superfund site under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").During cleanup efforts, the State of Idaho and the Coeur d'Alene Tribe each filed various claims against ASARCO and others for response costs and natural resource damages at the Coeur d'Alene site. At trial of those consolidated actions in 2003, the district court apportioned liability based on the volume of mining waste released into the basin's waterways. Before that litigation was finished, ASARCO filed for chapter 11 bankruptcy protection. UPRR filed a proof of claim that included payment of freight charges and CERCLA response costs at the Coeur d'Alene site. In 2008, ASARCO and UPRR made the UP settlement that resolved "all the claims by UPRR or claims that UPRR could have filed against ASARCO" and allowed UPRR a general unsecured claim in a specified amount. The bankruptcy court approved the UP settlement. The government also filed proofs of claim in ASARCO's bankruptcy case that asserted that ASARCO was liable for a specified amount in cleanup costs at the Coeur d'Alene site. In 2009, the government and ASARCO made the CDA settlement that resolved ASARCO's liability for all remaining response costs and natural resource damages at the Coeur d'Alene site. ASARCO agreed to a specified amount of general unsecured claims to which the government would be entitled. The government agreed not to sue ASARCO for further CERCLA costs "with respect to the Coeur d'Alene site." The bankruptcy court approved the CDA settlement.

In 2012, ASARCO sued UPRR for contribution to the amount that ASARCO paid under the CDA settlement. ASARCO alleged that it had paid more than its allocable share of costs and demanded UPRR's payment of its share of that overpayment. Shortly later, ASARCO filed a first amended complaint (FAC) to expand its definition of the Coeur d'Alene site to include an area that its original complaint excluded. UPRR moved to dismiss ASARCO's FAC under *Federal Rules of Civil Procedure* 12(b)(6), arguing that ASARCO's claim was barred by, among other things, 42 *United States Code* §9613(g)(3) of the CERCLA, which limits to three years the period for contribution claims after entry of a judicially approved settlement. The district court rejected UPRR's limitation period argument. However, the district court found that ASARCO's action was barred by the release provisions of the UP settlement. The district court then dismissed ASARCO's action without addressing UPRR's other defenses. ASARCO appealed.

The Court of Appeal reversed the judgment of the district court and remanded. The Court held that a mining company's claim against a railroad for a share of CERCLA cleanup costs at a superfund site was not barred by a prior settlement of the company's claims against the railroad at the same site.

Bui v. Nguyen
(2014) 230 Cal.App.4th 1357
October 29, 2014

Vien Bui allegedly suffered injury as the result of negligently performed dental work. He sued dental clinic Hi-Tech Dental, Inc. and clinic owner Trang Nguyen for intentional misrepresentation based on (1) Hi-Tech advertising in which Nguyen falsely held herself out to be a dentist and (2) patient interactions in which Nguyen wore a white dentist's coat and undertook to perform various tasks which only a licensed dentist was qualified to perform. A jury found in Bui's favor and awarded him $150,000 against Hi-Tech and $50,000 against Nguyen.

Bui thereafter sought and obtained a permanent injunction requiring Nguyen (1) to identify herself as a dental assistant, not a dentist, in all Hi-Tech advertising and (2) to refrain from wearing a white dental lab coat. After judgment was entered, Bui moved for more than $500,000 in attorney's fees under *Code of Civil Procedure* §1021.5. He claimed he had acted in the role of a private attorney general in obtaining injunctive relief that was beneficial to a large group of dental patients potentially seeking the dental clinic's services. In support of his motion, Bui relied on the declarations of clinical law professor Scott Mauer, consumer protection attorney William Kennedy, malpractice attorney Paul Nathan, and dental expert Richard Kinsel. Mauer opined that "low-income, non-English speaking consumers are extremely hesitant to file complaints with police or public agencies" and that it was "extremely unlikely that any public entity would have sought or obtained the injunction… obtained in this case." Kennedy opined that "instances of fraudulent conduct such as was exhibited by Hi-Tech Dental are rarely challenged in court, particularly when the offending conduct is directed towards immigrant communities." Nathan stated that "the risk to patients of misleading advertising is grave and is rarely the subject of enforcement actions." Finally, Kinsel opined that Bui's case was "an example of the inadequate enforcement efforts of the California Dental Board towards advertising by non-dentists." The court granted Bui's motion, finding that Bui had presented evidence of "various unsuccessful efforts to involve the dental regulatory authorities." The court found "there had apparently been prior complaints filed, all of which had resulted in no action being taken or insufficient evidence being adduced to allow action to be taken." This inaction, the court concluded, warranted private enforcement. The court awarded Bui $126,974.13.

The Court of Appeal reversed the award of fees. The Court held that declarations regarding the likely futility of complaints to authorities regarding a dental clinic's alleged unlawful business practices were insufficient to show that public enforcement was inadequate and that private enforcement was necessary.

CACH LLC v. Rodgers
2014 S.O.S. 3878
August 27, 2014

Kathleen Rodgers opened a revolving credit account with Washington Mutual/Chase Bank. She failed to pay. The bank sold the delinquent debt to CACH, LLC. CACH sued Rodgers to recover the amount owed. After Rodgers was served, CACH filed a declaration, pursuant to *Code of Civil Procedure* §98, stating CACH's intention to introduce documentary evidence in lieu of the direct testimony of the declarant. The declaration, authored by "Magic West," stated that West resided out-of-state, but had authorized service to be accepted on his behalf at the office of CACH's attorney, which office was located within 150 miles of the courthouse. Rodgers attempted unsuccessfully to serve West at the address provided. The reason for failure of service stated: "Deft. Does Not Work at This Address - Personal Service Only For Civil Subpoena". Rodgers filed a pretrial brief objecting to the introduction of the documentary evidence pursuant to §98. The trial court overruled Rodgers's objection and allowed CACH's documentary evidence to be introduced at trial. CACH also called Rodgers as a witness. She denied having any recollection of most of the events referenced in her examination. The trial court rendered judgment in favor of CACH.

The Appellate Division of the Ventura County Superior Court reversed the judgment. The Court held that an out-of-state declarant's failure to make himself available for service within 150 miles of the courthouse precluded admission of his declaration in lieu of direct testimony over the objection of the opposing party.

Carter v. Caleb Brett LLC
(9th Cir. 2014) 757 F.3d 866
March 10, 2014

Rick Carter sued Caleb Brett, LLC and others. He sought $22,585 in attorney's fees and costs. He supported his petition with his attorney's billing statement, which reflected hourly charges of $500 per hour for senior counsel and $300 per hour for associates. The total number of billable hours was 60.9. The district court awarded him $14,268.50. In reducing the award to that amount, the court noted the "disproportionate relationship between the amount of fees incurred ($22.585.00) and the amount at stake in the litigation ($3,220.20)." The court selected a blended hourly rate of $400 and reduced the number of compensable hours from 60.9 to 35.

The Court of Appeal vacated the district court order and remanded. The Court held in an amended opinion that the district court erred as a matter of law in reducing a fee award without sufficiently explaining its rationale for the reduction.

Cooper v. Lavely & Singer Professional Corporation
(2014) 230 Cal.App.4th 1
September 26, 2014

Jeffrey Cooper retained law firm Lavely & Singer Professional Corporation ("L & S") to represent him in litigation against third parties. Cooper's retainer agreement required him to submit any claims arising thereunder, including malpractice claims, to binding arbitration. When the litigation terminated unfavorably to Cooper, he commended an arbitration against L & S, asserting claims for breach of contract, breach of fiduciary duty, and professional negligence. L & S purportedly tendered defense of the action to its malpractice insurer, Lloyd's, London and Companies. Lloyd's, in turn, purportedly retained L & S to represent its own interests in the arbitration. The arbitration resulted in a final award in favor of L & S. In that award, the arbitrator specifically denied L & S's request for attorney's fees. Six days later, L & S submitted a motion for "correction, modification and/or reconsideration" of the final award. L & S relied on JAMS rule 22(d), directing the arbitrator to afford the parties the opportunity to present material and relevant evidence, and JAMS rule 24(j), which provides that "within seven calendar days after service of the award…any party may…request that the arbitrator correct" any "computational, typographical or other similar error in an award…" L & S argued that the declaration of one of its partners, which had accompanied its prior fee request, constituted admissible evidence establishing that Lloyd's had, in fact, specifically retained L & S to represent its own interests. The arbitrator granted L & S's motion and issued a revised final award that included $225,677 in attorney's fees. The trial court granted the law firm's motion to confirm the revised final award.

The Court of Appeal reversed a judgment and remanded. The Court held that once an arbitrator has issued a final award, he or she may not "correct" that award so as to yield a different outcome on the merits.

Cutler v. Franchise Tax Board
(2014) 229 Cal.App.4th 419
September 2, 2014

In 1998, Frank Cutler sold stock in an internet start-up company and used some of the proceeds to purchase stock in several other small businesses. The stock he sold did not meet the California property and payroll requirement. Cutler nevertheless deferred that part of the gain from the sale that he invested in three other small businesses on his 1998 California tax return. The Franchise Tax Board disallowed the deferral. Cutler paid the $442,000 assessment under protest and appealed to the State Board of Equalization. The board denied Cutler's appeal. Cutler sued for a refund, claiming the California property and payroll requirement violated the commerce clause. The trial court granted summary judgment in favor of the board, and Cutler appealed.
In *Cutler v. Franchise Tax Board* (2012) 208 Cal.App.4th 1247, the Court of Appeal reversed and remanded, finding the statute was discriminatory on its face and could not stand under the commerce clause. After Cutler became final, the board issued a notice dated December 21, 2012,

outlining how it planned to rectify its past enforcement of the unconstitutional elements of *Revenue & Taxation Code* §18152.5 and §18038.5. The board's notice stated that, for tax years before January 1, 2008, because of the statute of limitations, "the only way to place similarly situated taxpayers in the same position is to allow the exclusion/deferral to taxpayers who meet the requirements of the statutes other than the unconstitutional California property and payroll requirements." The notice stated that after January 1, 2008, the board intended to disallow all exclusions and deferrals and thus to issue notices of proposed assessments to taxpayers who had benefited from the discriminatory exclusions and deferrals.

In February 2013, Cutler filed a motion for attorney's fees under *Code of Civil Procedure* §1021.5, the private attorney general doctrine. He submitted evidence that he incurred $685,868 in attorney's fees litigating this case for a refund of at most $442,000. He contended he vindicated a constitutional right of a large class of California taxpayers by obtaining a ruling that ended the discriminatory treatment of taxpayers who invest in small businesses with more than 20% of assets or payroll outside California, allowing a large class of similarly situated taxpayers who, like Cutler, had invested in multi-state and out-of-state small businesses to request a refund of taxes that were unconstitutionally levied. The trial court denied Cutler's motion, finding it was "speculative" that the lawsuit conferred any benefit on the general public or a large class of people. On the second point, the court found an award was not appropriate because Cutler sought a refund of "a significant sum of money" ($442,000), so, even though he incurred attorney's fees of more than $685,000, he had an incentive to bring the litigation, and any benefit he conferred on the public was incidental. In October 2013, while Cutler's appeal was pending, the Legislature enacted Assembly Bill No. 1412 which eliminated the need for the retroactive tax assessments anticipated by the board.

The Court of Appeal reversed the judgment. The Court held that the significant public benefit conferred by tax litigation warranted an award of fees under the private attorney general doctrine.

Seahaus La Jolla Owners Association v. Superior Court (La Jolla View Ltd., LLC)
(2014) 224 Cal.App.4th 754
March 13, 2014

The Seahaus La Jolla Homeowners Association Board of Directors decided to sue the developers and builders of the complex, La Jolla View Ltd., LLC, and others, for construction defects. The board retained counsel. The board, with counsel present, thereafter conducted meetings with Seahaus residents to apprise them of the status and goals of the litigation. The meetings were limited to the board members, the Seahaus residents, counsel, and various experts who came to advise them. At one such meeting, in accordance with the association's declaration of covenants, conditions and restrictions ("CCRs"), the board sought and obtained majority approval by the homeowners to pursue the action. The association thereafter filed suit against the developers. In the course of discovery, the developers sought to depose the individual Seahaus residents both as to their beliefs regarding damages and as to the source of those beliefs, including any information conveyed to them by the association's attorneys at the board's litigation update meetings. The association objected, arguing that the subject matter of the meetings was privileged as attorney-client communications. The trial court ultimately overruled the objection and granted the developers' motion to compel. The association petitioned the court of appeal for a writ of mandate challenging that order.

The Court of Appeal granted a petition for writ of mandate. The Court held that because the attendance of common interest development residents at meetings with their board of directors and the board's retained counsel was reasonably necessary in order for the board to pursue civil action based on faulty construction, their presence at those meetings did not result in waiver of attorney-client privilege as to the matters discussed in those meetings

Evilsizor v. Sweeney
(2014) 230 Cal.App.4th 1304.
October 29, 2014

Keri Evilsizor initiated divorce proceedings against her husband, Joseph Sweeney. In the course of those proceedings, Sweeney issued a subpoena for Keri's bank records. Unbeknownst to Sweeney, Keri's father John Evilsizor also had an interest in the accounts, and some of his financial information was contained in the records. John moved to quash the subpoena. Sweeney promptly responded by amending the subpoena to exclude information about John's account activities. John did not, however, withdraw the motion to quash. One week after the amended subpoena was served on the bank, Sweeney filed a response to the motion to quash. Eight days later, and five days prior to the scheduled hearing on John's motion to quash, counsel for John contacted the trial court to withdraw his motion. Counsel also requested that the motion be taken off calendar. Hearing on the motion to quash went forward as scheduled. The sole subject of the hearing was Sweeney's entitlement to attorney's fees for John's failure to withdraw the motion to quash as soon as the amended subpoena was served on the bank. The trial court ordered John to pay Sweeney $2,225 in attorney's fees. The court found John's motion to quash was filed in good faith, but his subsequent delay in withdrawing the motion for more than two weeks after Sweeney's amendment of the subpoena warranted sanctions.

The Court of Appeal affirmed the trial court order. The Court held that a trial court may impose sanctions against a litigant for delaying the withdrawal of a motion to quash that, even though legitimately filed, was rendered unnecessary by the subsequent amendment or withdrawal of the subpoena.

Family PAC v. Ferguson
(9th Cir. 2014) 745 F.3d 1261
May 19, 2014

As a continuing political committee organized under Washington state law, Family PAC brought a federal lawsuit against various state defendants ("State") alleging that certain provisions of state election law violated the First Amendment as applied to ballot measure committees. The district court granted in part and denied in part Family PAC's summary judgment motion. On appeal, the court of appeal affirmed on all issues. Because each side had been partly successful on appeal, the court stated that each party would bear its own costs of appeal. On Family PAC's motion, the court transferred consideration of attorney's fees on appeal to the district court. On remand, Family PAC sought an award of attorney's fees and expenses, including costs and fees on appeal, pursuant to *42 United States Code* §1988. The district court granted the motion.

The Court of Appeal affirmed in part and reversed in part a district court's order awarding attorneys' fees and costs. The Court held that the term "costs" under Rule 39 of the Federal Rules of Appellate Procedure does not include attorney's fees recoverable as part of costs under *42 United States Code* §1988 and similar statutes

Garcia v. Lacey
(2014) 231 Cal.App.4th 402
Nov. 13, 2014

Guillermo Garcia was a state prisoner. Garcia filed a civil complaint against prison warden B.A. Lacey and several other prison officials. Garcia alleged that among other things, guards entered his cell on several occasions and confiscated or damaged his personal property. That property included Garcia's typewriter, reading glasses, shoes, and magazines. Garcia further alleged that guards made false "write ups" against Garcia in order to justify his actions. Lacey moved for a declaration that Garcia was a vexatious litigant and that he be required to post security under the vexatious litigant law ("VLL") in *Code of Civil Procedure* §§391–391.8. Lacey also requested judicial notice of court records that allegedly showed that Garcia brought and lost nine pro se civil litigations in the preceding seven years. Garcia opposed the motion, contending among other things that under §391(b)(1), five of his prior cases were not "litigations" that were "finally determined adversely" against him. In particular, Garcia argued that five of the nine cases cited by Lacey were federal cases in which Garcia had applied to proceed in forma pauperis ("IFP"), the district court had denied his IFP application, and thus his complaint was never filed. The trial court granted the motion, finding among other things that Garcia was a vexatious litigant based on at least five unsuccessful pro se litigations in the preceding seven years. The court also ordered Garcia to post security for his action. Garcia failed to post such security. The court dismissed Garcia's action. Garcia appealed.

The Court of Appeal reversed the judgment. The Court held that federal cases in which a prisoner applied to proceed in forma pauperis but the applications were denied and the complaints were never filed were not “litigations” that were “finally determined adversely” to him under California’s vexatious litigant law.

Hernandez v. Siegel
(2014) 230 Cal.App.4th 165
October 1, 2014

Attorneys Dan Siegel and Ann Weills represented plaintiff Nimachia Hernandez in an employment discrimination action. Hernandez prevailed at trial and received a net damage award of $194,458. Siegel and Weills were awarded $623,908.12 in attorney’s fees and $26,932.84 in costs. The defendant sent Siegel a check for $658,606.91, representing $623,908.12 in attorney’s fees and $34,698.79 in post-judgment interest on those fees. When Siegel refused Hernandez’s demand that he disburse the fees and interest to her, she sued both attorneys and their law firm, Siegel & Yee, alleging causes of action for breach of fiduciary duty and intentional tort. Hernandez argued she was entitled to the entire fee award, plus interest, as well as the costs yet to be paid by the defendant. The law firm cross-complained for breach of its fee agreement. The trial court rendered judgment in favor of the law firm. Hernandez appealed, arguing that she did not agree, in her fee agreement with the law firm, to give it any interest on the fees it earned. She contended further that there was no mention of an award of interest to the law firm in the trial court order.

The Court of Appeal affirmed the judgment. The court held that post-judgment interest paid on an award of attorney’s fees following successful litigation was the property of the attorney who earned the fees, and not of the client.

John v. Superior Court (Chan)
(2014) 231 Cal.App.4th 347
November 10, 2014

Landlord Sylvia Chan initiated an unlawful detainer action against tenant Aleyamma John. In April 2012, the jury returned a verdict in favor of Chan. At about the same time, also in April 2012, Division Three of the Second Appellate District, after considering John’s filings in an unrelated case, declared John to be a vexatious litigant. The court entered a prefiling order against her under *Code of Civil Procedure* §391. Landlord Sylvia Chan initiated an unlawful detainer action against tenant Aleyamma John. In April 2012, the jury returned a verdict in favor of Chan. At about the same time, also in April 2012, Division Three of the Second Appellate District, after considering John’s filings in an unrelated case, declared John to be a vexatious litigant. The court entered a pre-filing order against her under *Code of Civil Procedure* §391.7(a). Representing herself, John filed two notices of appeal from the unlawful detainer action to the appellate division of the superior court. The first, filed in June 2012, challenged the underlying judgment. The second, filed in July 2012, challenged a post-judgment award of attorney's fees that was also entered against her in the underlying case. In May 2014, after briefing had been completed in the Chan v. John appeals, the appellate division presiding judge stayed all further proceedings in the case, observing that John was a vexatious litigant subject to a pre-filing order. John was instructed to apply for a pre-filing order. John moved for a pre-filing order, which the appellate division denied, finding that John had failed to establish the merit of her appeals. The court dismissed John's appeals.

The Court of Appeal granted the petition for writ of mandate. The Court held that the pre-filing order requirements to which a vexatious litigant is subject do not apply to a self-represented defendant appealing from an adverse judgment.

Judicial Council of California v. Superior Court (Bean)
(2014) 229 Cal.App.4th 1083
September 17, 2014

Mari Bean was allegedly injured while riding in an elevator at the Clara Shortridge Foltz Criminal Justice Center in Los Angeles. The elevator was allegedly owned and operated by the Judicial Council of California and the Administrative Office of the Courts ("AOC"). Bean filed a claim with the California Victim Compensation and Government Claims Board. She named both the Judicial Council and the AOC in the claim. Bean later sued both the Judicial Council and the AOC for negligence and a dangerous condition on public property. The Judicial Council and the AOC moved for summary judgment, arguing that Bean's lawsuit was barred for failure to comply with the claims presentation requirements of *Government Code* §915(c) and (e). §915(c) identifies how a government claim may be served on a judicial branch entity by mail or personal delivery. In this case, the Judicial Council and AOC contended, Bean's claim needed to be mailed or personally delivered to the Secretariat of the Judicial Council §915(e)(4) states that even if a government claim is not mailed or personally delivered, it is sufficient if it is actually received. The Judicial Council and AOC contended that, in this case, Bean's claim not only was not mailed or personally delivered to the secretariat, but was also not received by it.
The trial court denied summary judgment. The Judicial Council and AOC petitioned the court of appeal for a writ of mandate challenging the trial court's ruling.

The Court of Appeal granted the petition for writ of mandate. The Court held that a government claim naming either the Judicial Council or the Administrative office of the Courts must be presented to the Secretariat of the Judicial Council; presentation to the Victim Compensation and Government Claims Board will not satisfy statutory claims presentation requirements.

Kaufman v. Diskeeper Corporation
(2014) 229 Cal.App.4th 1
April 21, 2014

Alexander Godelman and Marc LeShay sued former employer Diskeeper Corporation for wrongful termination. They retained attorney Barry Kaufman to represent them. The parties reached a settlement agreement. The agreement required Godelman and LeShay to return certain property to Diskeeper. It also imposed nondisclosure obligations on both them and Kaufman. Finally, the agreement required that any further disputes be submitted to binding arbitration. When Godelman and Kaufman purportedly failed to comply with the agreement, Diskeeper commenced arbitration. The arbitrator decided in favor of Diskeeper and against both Godelman and Kaufman. The arbitrator awarded Diskeeper $70,000 in damages, $297,000 in attorney's fees, and $88,034.69 in costs and expenses. The trial court granted Diskeeper's motion to confirm the award. Diskeeper thereafter moved for an award of attorney's fees and costs as the prevailing party in the arbitration confirmation proceeding. Relying on *Civil Code* §1717 and *Code of Civil Procedure* §1033.5, Diskeeper requested attorney's fees totaling $183,419, plus $878 for other costs and expenses. Godelman and Kaufman opposed, arguing that Diskeeper had failed to file a memorandum of costs, as required under *California Rule of. Court.*, Rule 3.1700. The trial court denied Diskeeper's motion, concluding that under the controlling statutes and rules of court, a memorandum of costs had to be filed in order to establish an entitlement to costs, including attorney's fees.

The Court of Appeal reversed the trial court order and remanded. The Court held that a party seeking attorney's fees under *Civil Code* §1717 need not, in addition to filing a noticed motion, file a memorandum of costs.

Martinez v. Aero Caribbean
(9th Cir. 2014) 764 F.3d 1062
August 21, 2014

Lorenzo Cervantes was killed aboard a commercial passenger airplane that crashed in Cuba. The airplane was designed and manufactured by Avions de Transport Régional ("ATR"), a French corporation. Lorenzo Martinez and other heirs of Cervantes (collectively, "Martinez") sued ATR and several Cuban entities in federal court in California. Martinez alleged that ATR's defective design and construction of the airplane caused the crash. Martinez served the summons and complaint on ATR at its headquarters in France. ATR moved to dismiss for lack of personal jurisdiction. During a period of limited jurisdictional discovery ordered by the district court, Martinez served an ATR officer who was in California on behalf of ATR. The district court granted ATR's motion, finding that it could not exercise personal jurisdiction over ATR consistent with federal due process. Martinez appealed, contending that his in-state service on the ATR officer created general personal jurisdiction over ATR under *Burnham v. Superior Court*, 495 (1990) U.S. 604.

The Court of Appeal affirmed the judgment of the district court. The Court held that personal service of process on an officer of a French corporation within a forum state did not create general personal jurisdiction over the corporation.

Pope v. Babick
(2014) 229 Cal.App.4th 1238
September 18, 2014

Leo Pope and Judi Nightingale were injured when 19-year old driver Debbie Sert lost control of her car on the freeway, when it spun and flipped over, impacting their car. According to Sert and her passengers, the accident was triggered when driver Thomas Stanley, without warning, suddenly attempted to merge into her lane. She swerved to avoid him and thereafter lost control of her car. According to other witnesses, Sert herself was attempting to change lanes when she had the near collision with Stanley and lost control of the car. Pope and Nightingale sued Stanley and, among others, Matthew Babick, who owned the car Sert was driving. The case went to trial against Stanley and Babick alone. The trial court granted Pope and Nightingale's pretrial motion to exclude the testimony of responding Highway Patrol Officer Michael Earl regarding his conclusions as to the cause of the accident. During Earl's later testimony, he was questioned by Babick's attorney, Gregory Kane. He began by asking about Earl's investigation of alcohol use among Sert and her friends. He then asked if Earl had come to a conclusion as to how the accident had occurred and what had caused the accident. When Earl answered affirmatively, Kane continued: "And what were your conclusions?" Earl responded, "I concluded that Debbie Sert made an unsafe lane change." At that point, Pope and Nightingale's counsel objected. The trial court denied their motion for a mistrial, but directed that the testimony be stricken and instructed the jury that it had determined, prior to trial, that Officer Earl did not have the training or qualifications to offer an opinion as to the cause of the accident, and that the parties had been instructed not to ask him questions about his opinions. The court went on to state that because Babick's attorney had violated that order, the court was instructing the jury not to consider Earl's opinion and conclusions in determining who was legally responsible for Pope and Nightingale's damages. The court stated that the jury was "not to consider or rely upon Officer Earl's opinions or conclusions as to the cause of the automobile collision." The jury later returned a unanimous verdict finding Stanley not negligent. The trial court denied Pope and Nightingales' motion for a new trial, and Pope and Nightingale appealed.

The Court of Appeal affirmed the judgment. The Court held that the trial court's instruction to the jury was sufficient to remedy trial counsel's misconduct in eliciting testimony the trial court had previously determined to be inadmissible.

Van Zant v. Apple Inc.
(2014) 229 Cal.App.4th 965
September 12, 2014

In 2009, plaintiffs filed federal multi-district class action complaint against Apple, Inc. and AT&T Mobility LLC. The complaint alleged that Apple and AT&T, acting in concert, knowingly misrepresented to consumers that the new iPhone 3G was "Twice as Fast" when compared to the 2G EDGE network on which the earlier iPhone operated. The plaintiffs alleged that both Apple and AT&T profited by selling iPhone 3G devices without the appropriate infrastructure in place and in the presence of defective hardware and software in the iPhone 3G. Both Apple and AT&T allegedly knew or should have known that they were trying to sell more iPhone 3G devices than the existing AT&T 3G network could handle, and the iPhone 3G itself suffered from defective hardware and software. The plaintiffs' contracts with AT&T included an arbitration agreement with a class action waiver. When that agreement was found to be valid and binding against them, the federal plaintiffs attempted to dismiss AT&T as a defendant and to bring their action against Apple alone. The district court granted Apple's motion to dismiss the amended complaint, finding AT&T was an indispensable party. The court explained that, despite removal of all reference to AT&T from the complaint, the gravamen of the complaint was unchanged. It was still "based on the core allegation that the 3G network could not accommodate iPhone 3G users," and the plaintiffs were deceived into paying higher rates for service which could not be delivered on the 3G network. The court ordered the plaintiffs to file an amended complaint naming both Apple and AT&T as defendants.

On December 19, 2011, the federal plaintiffs filed a fifth amended complaint naming both Apple and AT&T as defendants. Both Apple and AT&T moved to compel arbitration on an individual, non-class basis. The district court granted both motions and stayed the proceedings pending arbitration. As of September 12, 2014, none of the plaintiffs had yet agreed to arbitrate.

In July 2010, while the federal litigation was ongoing, Ingrid Van Zant filed a California court class action lawsuit against Apple only, alleging that hardware and software flaws inherent in the iPhone 3G prevented it from performing as advertised.

The trial court dismissed the action for failure to join AT&T as a necessary party. The Court of Appeal then reversed the judgment. The Court held that findings that a party was indispensable to certain federal court litigation did not compel a finding that this party was also indispensable to a state court action that alleged similar, but not identical, claims.

Pleadings

Brown v. American Bicycle Group, LLC
(2014) 224 Cal.App.4th 665
March 11, 2014

Shelley Brown was injured in a bicycle accident that involved Brown's riding partner Ronald Voigt. Voigt was riding in front of Brown when the front fork on his bike failed. Voigt fell. Brown was unable to avoid Voigt and also crashed. Brown sued American Bicycle Group, LLC (ABG), which designed and distributed the bicycle fork. A jury returned a verdict in favor of ABG. The trial court denied Brown's motion for new trial. Brown appealed. Brown contended among other things that the trial judge erred in not disclosing his ownership interests in various insurance companies and that she would have peremptorily challenged the judge had he made such disclosures.

The Court of Appeal affirmed the judgment. In the published portion of its opinion, the Court held that a trial judge was not required to disclose ownership interests in insurance companies that were not parties to a product liability action or carriers of the defendant.

Bowman v. California Coastal Commission
2014 S.O.S. B243015
October 23, 2014

Walton Emmick owned approximately 400 acres in San Luis Obispo County. When he purchased the property, it had a single family residence and a barn. The residence was uninhabitable and the barn was in disrepair. The property includes approximately one mile of shoreline one mile distant from the house and barn. In March 2002, Emmick applied to the county for a coastal development permit ("CDP") to connect an existing well to the house. He later added two items to the CDP application: replacement of the existing septic tank and rehabilitation of the house. In June 2002, while the CDP application was pending, Emmick obtained over-the-counter permits authorizing dry-rot removal and roof and deck repairs. Emmick began that work. Emmick died in March 2003. The SDS Family Trust succeeded to the property. In March 2004, the county approved Emmick's CDP application on condition that SDS dedicates a lateral easement for public access along the shorefront portion of the property. SDS did not appeal that decision, but also took no action to improve the property. In December 2004, SDS applied to the county for another coastal development permit. This application included all the items previously approved in the initial CDP, as well as construction of a barn to replace the existing barn, which had collapsed. The application also requested the removal of the condition requiring dedication of a lateral coastal access easement. The county approved the application in its entirety, including removal of the coastal access condition. The Sierra Club and others appealed the county's decision to the California Coastal Commission.

The commission found the easement condition was permanent and binding, and removal of the easement condition would violate the policy favoring public access to coastal resources. The Commission conditioned SDS's permit on implementation of the easement condition.
The trial court denied SDS's petition for writ of mandate challenging the commission's decision.

The Court of Appeal reversed the judgment. The Court held that it would be inequitable to apply collateral estoppel to require a party to dedicate a coastal easement as a condition of obtaining a coastal development permit.

Butler v. National Community Renaissance of California
2014 S.O.S. 11-55806
September 12, 2014

On April 17, 2009, Zina Butler filed a one-page complaint against National Community Renaissance Corporation ("National CORE"). Butler alleged that on April 18, 2007, an apartment manager allowed a §8 investigator and city employee and sheriff deputies access to her apartment for a search of the premises without her consent. Butler added the Housing Authority of the County of Los Angeles ("HACoLA") as a defendant in a first amended complaint filed several days later. The district court dismissed the complaint absent a clear indication whom Butler intended to sue. On June 17, 2009, Butler filed a second amended complaint that identified National CORE and HACoLA as defendants and described allegedly unlawful actions by specific civilian and law enforcement personnel. The court again dismissed on the same grounds. On August 12, 2009, Butler filed a third amended complaint that named National CORE, HACoLA, the City of Palmdale, Oscar Barraza and "Mr. Derrico" as defendants. The court granted a motion to dismiss filed by Palmdale and Barraza, concluding that Butler's claims against them were untimely and did not relate back to any of her prior pleadings. In March 2010, Butler filed a fourth amended complaint, naming as defendants National CORE, HACoLA, Palmdale, Barraza and Lee D'Errico. The complaint once again centered on the warrantless search of Butler's apartment on April 18, 2007. The district court granted dismissal with prejudice as to Butler's claims against Palmdale, Barraza, HACoLA, and D'Errico. The court reasoned that neither HACoLA, D'Errico, Palmdale nor Barraza were sufficiently identified as defendants in the original complaint, and Butler's claims against them did not relate back because Butler sufficiently knew of their existence and roles in the events of which she complained. The court also found no basis to apply equitable tolling in Butler's favor.

The Court of Appeal affirmed the district court judgment of dismissal. The Court held that a federal civil rights plaintiff's amended complaints did not relate back to her original complaint under state or federal law, and thus were not timely filed as to newly-added defendants, where the plaintiff knew the names or identities of the additional defendants when she filed her original suit, and none of the additional defendants knew or should have known that the suit would have been brought against them but for her mistake.

Connerly v. State of California
(2014) 229 Cal.App.4th 457
September 3, 2014

Ward Connerly and the American Civil Rights Foundation sued the State of California, the state auditor, and the California Citizens Redistricting Commission, alleging the statutory method for selecting members of the Commission violated Proposition 209 because it gave improper preferences based on race, ethnicity, and gender. The state and state auditor demurred, arguing that Prop 209 does not apply to the selection of public officers, only public employees.
The trial court sustained the demurrer without leave to amend. On appeal, Connerly and the Foundation abandoned their original contention and argued instead that the selection process violation the federal equal protection clause. The state and state auditor argued that Connerly and the Foundation were precluded from arguing a new theory of the case for the first time on appeal.

The Court of Appeal reversed the judgment. The Court held that a plaintiff may assert a new theory of the case on appeal from a trial court order sustaining the defendants' demurrer without leave to amend.

Cottini v. Enloe Medical Center
(2014) 226 Cal.App.4th 401
May 21, 2014

Patrick Cottini allegedly suffered injury while being treated at Enloe Medical center. He sued Enloe for negligence and other causes of action. Enloe served Cottini with a demand for "simultaneous exchange of information concerning each party's expert trial witnesses."
On the date scheduled for the exchange, Cottini moved to disqualify Enloe's attorney, citing a purported conflict of interest. Enloe agreed to delay the exchange of information pending hearing on Cottini's motion. The trial court denied the motion to disqualify. The following day, Enloe renewed its demand for a simultaneous exchange of expert witness information. Receiving no response by the date specified in this second demand, Enloe unilaterally disclosed its expert witness information the following day. On the discovery cutoff date, Cottini still had not disclosed his expert witnesses. After an unsuccessful appeal of the trial court's ruling on the disqualification issue, Cottini finally disclosed his expert witnesses. He also moved the trial court to reopen discovery, continue the trial, and grant him relief from the tardy disclosure. The trial court denied these motions and ultimately precluded Cottini from offering expert testimony.
A jury trial resulted in a judgment in favor of Enloe.

The Court of Appeal affirmed a judgment. In the published portion of its opinion, the Court held that where one party completely, but untimely, complied with statutory requirements for the disclosure of expert witness information, that party's delay did not deprive the trial court of its inherent authority to sanction the opposing party's complete and unreasonable failure to comply with the same requirements prior to the discovery cutoff date.

DeSaulles v. Community Hospital of the Monterey Peninsula
(2014) 225 Cal.App.4th 1427
May 2, 2014

After she was terminated from her employment, Maureen DeSaulles sued former employer Community Hospital of the Monterey Peninsula for failure to accommodate, retaliation, and related causes of action. The trial court granted summary adjudication as to one cause of action, leaving six remaining. The court also granted several motions in limine barring DeSaulles' introduction of certain types of evidence. DeSaulles and Community thereafter reached an out-of-court settlement in which DeSaulles agreed to dismiss with prejudice two of the remaining causes of action with prejudice in exchange for Community's payment of $23,500. They placed that settlement on the record. As to the four remaining causes of action, the trial court found that DeSaulles would be unable to present any evidence to support those causes of action and should, for that reason, recover nothing from Community. Upon competing motions for costs, the trial court deemed Community the prevailing party and awarded it $12,731.92. The court denied DeSaulles's request.

The Court of Appeal reversed the trial court order. The Court held that the plaintiff's receipt of a monetary settlement in exchange for her dismissal of two causes of action qualified as a "net monetary recovery" in her favor, entitling her to a mandatory award of costs.

Ducoing Management Inc. v. Superior Court (Winston & Associates Insurance Brokers, Inc.)
(2014) 229 Cal.App.4th 1252
September 19, 2014

Ducoing Management, Inc. ("DMI") and Ducoing Enterprises, Inc. ("DEI") suffered substantial losses when a dishonest payroll manager embezzled more than $90,000. Upon discovering that their insurance coverage did not include employee dishonesty coverage, the two companies sued insurance broker Winston & Associates Insurance Brokers, Inc. and others (collectively, Winston) for failing to procure for them the coverage they had been promised. At the close of their case-in-chief, the trial court granted nonsuit as to both plaintiffs. The trial court awarded Winston costs of $50,089. On appeal from that judgment, the court of appeal affirmed the judgment of nonsuit as to DMI, but reversed the judgment "in all other respects" and remanded to the trial court for further proceedings. The case was set for retrial of DEI's claims against Winston. Meanwhile, Winston began trying to execute against DMI alone on the full $50,089 cost award. The trial court denied DMI's motion to deem its prior judgment for costs against DMI to be unenforceable. The court construed the appellate disposition affirming the judgment against DMI to include the cost award of $50,089. DMI petitioned the court of appeal for a writ of mandate challenging the trial court's ruling.

The Court of Appeal granted the petition for writ of mandate. The Court held that its prior disposition in this case, in which it reversed the underlying judgment in "all" respects other than a grant of nonsuit, included reversal of an underlying award of costs.

Giorgio v. Synergy Management Group, LLC
(2014) 231 Cal.App.4th 241
October 14, 2014

On May 6, 2011, Synergy Management Group, LLC sued John Giorgio for conversion and related causes of action. On May 7, 2011, Synergy personally served Giorgio with the original complaint at a North Carolina airport. On June 13, 2011, Synergy filed its first amended complaint and, on the same date, mailed the amended complaint to an address in the Netherlands believed to be Giorgio's residence. Giorgio never responded to either the original or the amended complaint. On August 29, 2011, Synergy filed a request for entry of default against Giorgio. Default was entered the same day. In February 2012, Giorgio moved to set aside the default on grounds that he was never properly served. In March 2012, the trial court granted Giorgio's motion to set aside the default. Synergy thereafter undertook a search for Giorgio's current address. An online search yielded a Los Angeles address: 1109 South Wooster Street. A search by investigators in the Netherlands, where Giorgio had previously resided, indicated that he had left the Netherlands in October 2011 and moved to the Los Angeles. According to the investigators, Giorgio's last known address was 1109 South Wooster Street. Synergy thereafter mailed a written request to the U.S. Postal Service to provide any forwarding or change of address for Giorgio at the Wooster address. The postal service response dated June 29, 2012, verified that Giorgio continued to receive mail at the Wooster address and there was no change of address on file for Giorgio.

Using process servers, Synergy attempted more than a dozen times to serve Giorgio at the Wooster address. The attempts were unsuccessful because no one would answer the door. In September 2012, the trial court granted Synergy's application for service by publication. Service by publication was completed in November. Giorgio's response was due on or before December 3, 2012. On December 4, 2012, Synergy filed a request for entry of default against Giorgio, which was entered by the court clerk on the same day. On February 1, 2013, Synergy filed its request for entry of default judgment. In support of the request for default judgment, Synergy included a November 15, 2011 invoice from Giorgio to Synergy listing the Wooster address as his current address. On February 6, 2013, Giorgio filed a motion to set aside entry of default and any subsequent default judgment on the grounds that the service by publication was improper. Giorgio contended he had neither lived nor worked in California since October 1, 2009, and was not in California at the time the summons was published in the Los Angeles Daily Journal. The trial court heard and denied Giorgio's motion in March 2013, finding that Giorgio had "made a deliberate tactical decision to not respond to this matter." The court entered default judgment in favor of Synergy for $254,687.11 in damages and costs.

The Court of Appeal affirmed the judgment. The Court held that substantial evidence supported a trial court finding that the defendant in the underlying action deliberately avoided service at his place of residence so as to warrant service by publication.

Hoyt v. Foster
(2014) 230 Cal.App.4th 928
October 21, 2014

Lawrence Foster, a physician, performed plastic surgery on Kathi Weakly-Hoyt. Subsequently, Weakly-Hoyt filed a medical malpractice complaint against Foster. Foster did not answer the complaint, but apparently notified Weakly-Hoyt that he had filed a bankruptcy proceeding. Weakly-Hoyt obtained an order from the bankruptcy court that relieved her from the automatic stay so long as any recovery was limited to available insurance. Foster's default was then entered by the trial court. The court also set a default hearing. Weakly-Hoyt served Foster's insurer with notice of that hearing and a statement of damages. At the default hearing, the court found that Weakly-Hoyt proved her case and awarded her damages and costs. Foster appealed, contending among other things that Weakly-Hoyt was required to serve him with a statement of damages before she requested entry of default.

The Court of Appeal affirmed the judgment. The Court held that a bankruptcy debtor physician surgeon did not have to be served with a statement of damages in a state-court malpractice action filed by a patient whose relief from the automatic stay extended only to available insurance proceeds.

Islamic Shura Council of Southern California v. Federal Bureau of Investigation
2014 S.O.S. 12-55305
March 18, 2014

During the course of its Freedom of Information Act litigation against the Federal Bureau of Investigation, the Islamic Shura Council of Southern California's ("Shura Council") moved for sanctions under Federal Rules of Civil Procedure §11(c). The Shura Council averred that the FBI had either made a frivolous filing or had otherwise made contentions for an improper purpose. The district court had been notified, prior to the filing of the motion, that the FBI had corrected the challenged pleadings. In an "in camera" proceeding, the FBI provided the court all the information it was obligated to provide. However, the court took the position that the FBI should have provided that information to the court at the pleading stage of the litigation, when the agency initially responded to the Shura Council's FOIA complaint with redacted documents. Accordingly, the trial court ordered the FBI to pay Rule 11 sanctions.

The Court of Appeal reversed a district court order awarding Rule 11 sanctions. The Court held that Rule 11 sanctions against a government agency were not warranted where the agency had corrected the challenged pleadings and provided relevant information to the district court in "in camera" proceedings prior to the filing of the Rule 11 motion for sanctions.

Johnson v. City of Shelby
(2014) 135 U.S. 346
November 10, 2014

Former Shelby, Mississippi police officers Tracey Johnson and others sued the city for violation of their Fourteenth Amendment due process rights. They alleged they were fired by the city's board of aldermen, not for deficient performance, but because they brought to light criminal activities of one of the aldermen. They sought compensation from the city. The district court granted summary judgment against the former officers for failure to invoke *42 United States Code* §1983 in their complaint. The U.S. Court of Appeals for the Fifth Circuit affirmed on appeal, holding that the invocation of §1983 was not merely a pleading formality, but was required to alert the defendants to, among other things, the unavailability of respondeat superior liability, which bore on the issue of qualified immunity.

The U.S. Supreme Court reversed a judgment of the U.S. Court of Appeals for the Fifth Circuit and remanded. The Court held that a civil rights complaint for violation of due process rights did not need to include an explicit reference to *42 United States Code* §1983.

Maxwell v. Dolezal
(2014) 231 Cal.App.4th 93
November 4, 2014

Jordan Maxwell sued Josef Dolezal for "invasion of privacy," breach of contract, and other claims. Specifically, Maxwell alleged that Dolezal used Maxwell's photograph and website to advertise and sell merchandise without Maxwell's authorization or consent. Dolezal demurred to all Maxwell's claims, contending that none was adequately pleaded and that the contract claim did not indicate whether the agreement was written, oral, or implied by conduct. The trial court sustained the demurrer without leave to amend as to all Maxwell's claims, finding that none was actionable. The court reasoned that the allegations related to an agreement that Maxwell allegedly made with Dolezal that Maxwell acknowledged was "unauthorized" and "unallowable" under Maxwell's contract with his manager. The court concluded that Maxwell's allegations were insufficient to support a contractual or tort duty to Maxwell that was breached by Dolezal, since Maxwell essentially alleged that Dolezal failed to protect Maxwell from himself. Maxwell appealed as to his privacy and contract claims.

The Court of Appeal reversed the judgment and remanded. The court held that a celebrity's breach of contract claim against a former associate adequately stated a claim even though the complaint allegations acknowledged that an agreement with a business associate was "unauthorized and unallowable" under the celebrity's contract with his manager.

Nixon Peabody LLP v. Superior Court (Cabot Golf CL-PP 1, LLC)
(2014) 230 Cal.App.4th 818
October 17, 2014

In 2007, Cabot Golf CL-PP 1, LLC, and others (collectively, “Cabot”) purchased interests in two Florida golf clubs. Nixon Peabody LLP represented Cabot in the transaction. On April 27, 2012, Cabot sued Nixon Peabody and others in California state court. Cabot alleged that the private placement memorandum that was used was false and misleading and that Nixon Peabody failed to ensure that specified disclosures were made to Cabot. On April 28, Cabot filed a nearly identical action in federal court in California. Two days later, Cabot filed another, nearly identical action in a Texas federal court. Cabot actively litigated all three actions until November 2012. At that time, Cabot dismissed its state and federal actions in California. Nixon Peabody then moved to dismiss Cabot’s Texas action under the two-dismissal rule in *Federal Rules of Civil Procedure* §41(a)(1)(B), contending that Cabot’s second voluntary dismissal operated as a dismissal on the merits. Nixon also claimed that the Texas case was thus barred by res judicata. The district court granted the motion and dismissed Cabot’s Texas action with prejudice. Cabot appealed, but the 5th Circuit affirmed. Cabot also unsuccessfully moved to reopen its federal case in California. Cabot filed an appeal that was pending in the 9th Circuit. In 2013, Cabot moved to vacate and set aside its voluntary dismissal of the California state action under *Code of Civil Procedure* §473(d), contending that the dismissal was void because Cabot did not provide “informed consent.” Cabot asserted that its counsel, Michael Hull, had mistakenly advised Cabot that its decision to voluntarily dismiss the two actions would have no adverse impact on its related federal action in Texas. The trial court granted the motion. Nixon Peabody petitioned for writ of mandate, contending that Cabot’s dismissal was not void because Cabot fully consented to it, notwithstanding that Cabot did not authorize the negative result of that consent.

The Court of Appeal granted the petition for writ of mandate. The Court held that a corporation’s consent to the voluntary dismissal of its action based on erroneous legal advice from its counsel was not a proper ground for voiding the dismissal order under *Code of Civil Procedure* §473(d).

Noceti v. Whorton
(2014) 224 Cal.App.4th 1062
March 18, 2014

Anthony and Carol Noceti contracted to buy Rex Whorton’s interest in real property near Stockton. When Whorton allegedly failed to complete the purchase agreement, the Nocetis sued him for specific performance and breach of contract. Some two years later, the trial court granted a default judgment against Whorton. Eighteen months after that, Whorton successfully moved to set aside the judgment. Trial was set, and the Nocetis were notified of the trial date. They did not, however, appear for trial. Whorton, who did appear, moved for judgment. The trial court “reviewed the entire file” and granted judgment for Whorton for $0. The Nocetis moved to set aside the judgment pursuant to *Code of Civil Procedure* §473(b). The motion included a declaration by the Nocetis’ attorney that he erroneously calendared the trial date for the following week because of serious chronic health problems and the loss of his secretary. The trial court denied the §473(b) motion. The Nocetis appealed.

The Court of Appeal affirmed the judgment in part and reversed in part. The Court held in the published portion of its opinion that properly noticed plaintiffs who failed to appear for trial because their attorney calendared the wrong date were not entitled to mandatory relief from judgment under *Code of Civil Procedure* §473(b).

People v. Grewal
(2014) 224 Cal.App.4th 527
March 7, 2014

Internet cafe owners and operators Kirnpal Grewal, Phillip Walker, and John Stidman offered their customers the opportunity to play a computer game program that simulated the look and feel of a slot machine or other game of chance. According to the owners, the outcome of each game was predetermined by the player's entry number. Nothing that the player did affected the outcome. The owners described the games as a promotional sweepstakes. The People of the State of California, by and through the Kern County District Attorney, filed civil actions under the unfair competition law seeking to enjoin the cafes from continuing to engage in practices that allegedly violated the gambling prohibitions set forth at *Penal Code* §319, 330a, 330b and 330.1, pertaining to, among other things, lotteries and unlawful slot machines. Over the business owners' objections, the trial court granted the People's requests for preliminary injunctions.

The Court of Appeal affirmed the trial court orders. In these consolidated cases, the Court held that a customer's inability to predict the results of an Internet sweepstakes game brought the game within the scope of laws pertaining to unlawful slot machines.

People v. McGraw-Hill Companies, Inc.
(2014) 228 Cal.App.4th 1382
August 18, 2014

The People charged McGraw-Hill Companies, Inc., and Standard & Poor's Financial Services LLC (collectively, "McGraw-Hill"), with statutory violations that arose out of their alleged business practice of inflating their credit ratings of various structured finance securities. The complaint alleged among other things that McGraw-Hill violated the *California False Claims Act* ("CFCA"). McGraw-Hill specially moved to strike the CFCA allegations under *Code of Civil Procedure* §425.16(b), the anti SLAPP statute. The trial court denied the motion, finding that the CFCA charges were exempt from being struck under §425.16(d), which provides that the anti-SLAPP statue does not apply to state enforcement actions. McGraw-Hill appealed.

The Court of Appeal dismissed the appeal. The Court held that an appeal of a denial of an anti-SLAPP motion to strike charges that were made as part of a state enforcement action against providers of financial ratings services was precluded by the express language of the anti-SLAPP statute.

Rosebrock v. Mathis
(9th Cir. 2014) 745 F.3d 963
March 14, 2014

In 1973, the Department of Veterans Affairs ("VA") promulgated *38 Code of Federal Regulations* §1.218. That regulation prohibited the posting of materials on VA property except when authorized or when the posting of materials was part of authorized government activities. Robert Rosebrock was a veteran. Rosebrock objected to the VA's failure to use a VA facility's lawn for the benefit of veterans. The facility was the Los Angeles campus ("LAC") of the VA Greater Los Angeles Healthcare System ("VAGLA"). Rosebrock and other veterans protested weekly outside the locked fence that surrounded the LAC's lawn to draw attention to that failure by the VA. At those protests, Rosebrock hung the American flag up on the fence. When Rosebrock did that, the VAGLA did not enforce §1.218. However, when Rosebrock hung the flag union down on the fence, §1.218 was enforced. Rosebrock filed a civil rights action under the First Amendment against the chief of police and the director of the VAGLA. Rosebrock sought declaratory and injunctive relief. Apparently in response, an official of the VAGLA e-mailed the chief with the instruction that §1.218 was to be consistently enforced. The district court granted summary judgment to Rosebrock on his declaratory relief claim, finding that the VAGLA violated Rosebrock's rights by engaging in viewpoint discrimination. However, the district court found among other things that Rosebrock's request for injunctive relief was moot based on the VAGLA's e-mail to the chief. Rosebrock appealed.

The Court of Appeal affirmed the judgment of the district court. The Court held that the government's voluntary cessation of its inconsistent enforcement of a regulation related to posting materials on government property mooted a protestor's request for injunctive relief.

Torts

***AmeriGas Inc. v. Landstar Ranger, Inc*.**
(2014) 230 Cal.App.4th 1153
October 24, 2014

Motor carrier Landstar Ranger, Inc. hired experienced commercial truck driver Steven King to transport a load of empty propane tanks for delivery to AmeriGas, Inc. Upon delivery, it was AmeriGas's responsibility to unload the tanks. AmeriGas employee David Jones mishandled the tanks, causing one to fall on King, seriously injuring him. King and his wife sued both AmeriGas and Landstar for damages. AmeriGas cross-complained against Landstar for indemnification and contribution. The Kings settled their action against AmeriGas. The action proceeded to a bench trial on AmeriGas's cross-complaint, in which AmeriGas asserted that it was entitled to equitable indemnification because Landstar violated *Federal Motor Carrier Safety Regulation* ("FMCSR") §391.13, among others, which mandates that carriers ensure their drivers are adequately trained or have sufficient experience to transport cargo safely. The trial court entered judgment in favor of Landstar.

The Court of Appeal affirmed the judgment. In the published portion of its opinion, the Court held that substantial evidence supported the trial court's finding that a shipping company did not FMCSR and thus, could not be held liable for its driver's injuries during cargo unloading.

Colombo v. BRP US Inc.
(2014) 230 Cal.App.4th 1442
October 30, 2014

Mission Bay Jet Sports rented personal watercrafts ("PWCs"), including PWCs manufactured by Bombardier Recreational Products, Inc. and BRP US Inc. (collectively, "BRP"). Mission Bay employee Brett Kohl took two friends for a ride on a Mission Bay three-passenger PWC manufactured by BRP. Neither Kohl nor his two passengers was aware that wetsuits were recommended for safety while using PWCs. During their ride, Kohl accelerated precipitously, causing both his passengers to fall off the rear of the PWC into the path of the PWC's jet-thrust nozzle. The powerful jet stream caused both passengers permanent and devastating injuries. Colombo and Slagel sued Mission Bay, Kohl, and BRP for their injuries, alleging, as to BRP, that its failure to provide adequate warnings of the risk of using its products without wetsuits was the cause of their injuries. At trial, evidence was introduced that the PWC involved in the accident had a single warning label affixed to the front console below the handlebars. That label stated that severe injuries to body cavities could occur as a result of falling into water or being near the jet thrust nozzle. The label also stated that normal swimwear would not adequately protect against the forceful water entry into the lower body openings of males or females. The label stated finally: "All riders must wear a wet suit bottom or clothing that provides equivalent protection."

Plaintiffs' experts testified that a single warning label on a three-person PEC was inadequate, as it would be visible to the operator only. Passengers would not see the label when mounting the PWC from the rear, nor would they be able to see it once on the PWC, as the operator's body would block their view. An additional warning label, which could be inexpensively affixed to the rear of the PWC, would provide the necessary warning to any passengers. Both Colombo and Slagel testified that, had they seen the warning label, they would not have ridden the PWC without protective clothing. The jury awarded damages of almost $4M to Colombo and more than $1M to Slagel, and found BRP, Kohl, and Mission Bay each one-third liable. The jury also awarded each plaintiff an additional $1.5M in punitive damages against BRP, finding under federal maritime common law that BRP's conduct showed a "reckless or callous disregard for the rights of others."

The Court of Appeal affirmed the judgment. The Court held that a personal watercraft manufacturer's failure adequately to warn passengers of the risk of severe injury from the craft's jet-thrust nozzles constituted conduct manifesting a reckless or callous disregard for the rights of others, warranting the imposition of punitive damages under federal maritime law.

Fiorini v. City Brewing Company, LLC
(2014) 231 Cal.App.4th 306
November 6, 2014

Brett Fiorini sued City Brewing Company, LLC, and others for negligence and strict liability arising from the death of his son, Ron Fiorini. Ron was fatally shot by police after drinking two cans of Four Loko, which was an alcoholic beverage, brewed and distributed by City Brewing. According to Fiorini, a single can of Four Loko contained as much alcohol as five to six 12-ounce cans of beer and as much caffeine as approximately four cans of Coca-Cola. Fiorini maintained that combining alcohol, a depressant, with caffeine and other stimulants created a product that had unreasonably dangerous propensities because it masked the intoxicating effect of the alcohol and increased the risk of violent and other high-risk behavior. Fiorini described Four Loko as the quintessential alcoholic energy drink marketed to promote overconsumption by college-age consumers like Ron. In Ron's case, his roommates summoned police when he began wielding a shotgun and exhibiting other unusual and erratic behavior after drinking the two cans of Four Loko. The police shot Ron when he appeared outside a house with the shotgun. The trial court granted judgment on the pleadings in favor of City Brewing, concluding the company was protected by the civil immunity in California's dram shop statutes because Four Loko was fit for beverage purposes, and City Brewing furnished the beverage to Fiorini.

The Court of Appeal reversed the judgment and remanded the action for further proceedings. The Court held that the manufacturer of an alcoholic energy drink did not enjoy civil immunity from liability under California's dram shop statutes where it did not "furnish" its product to a consumer who was killed by police after he drank the product and engaged in violent behavior. The court held further that the statutory immunity against product liability claims for alcohol, as an inherently unsafe consumer product, did not apply where the manufacturer's product allegedly included a dangerous combination of alcohol and stimulants.

Gottschall v. Crane Co.
(2014) 230 Cal.App.4th 1115
October 8, 2014

Kimbra Gottschall and other heirs and family (collectively, "Gottschall") of decedent Robert Gottschall sued Crane Co., alleging that Robert's work with materials that contained asbestos in various shipyards and other similar facilities caused Robert to develop mesothelioma and later to die from its effects. Gottschall later filed a wrongful death and survival action in federal court in California against defendants that were not named in her state-court action, including General Dynamics Corp. Gottschall's federal claims sounded in negligence and strict liability under California law and were similar to the claims in her state-court case. Gottschall alleged that Robert was exposed to asbestos while working on U.S. Navy vessels. Gottschall's federal action was transferred to a Pennsylvania district court that was designated as the venue for multi-district litigation (MDL court). General Dynamics successfully moved for summary judgment. The MDL court found that, under California law, the Navy was a sophisticated user of asbestos-containing material. Accordingly, Gottschall's claims against General Dynamics failed. Crane then moved for summary judgment in the California trial court, contending that it had also supplied asbestos products to the Navy. Crane argued that Gottschall was collaterally estopped from re-litigating the sophisticated-user defense that had been applied by the MDL court. The trial court granted the motion. Gottschall appealed.

The Court of Appeal reversed the judgment and remanded. The Court held that collateral estoppel did not apply to a California action as a result of a prior decision by a Pennsylvania federal court where the Pennsylvania court based its ruling on the sophisticated-user defense but failed to apply California law as to that defense.

Honeycutt v. Meridian Sports Club, LLC
(2014) 231 Cal.App.4th 251
November 6, 2014

Tonya Honeycutt suffered a knee injury during a kickboxing class at Meridian Sports Club, LLC. At the time, Honeycutt was being assisted by instructor Hakeem Alexander. Honeycutt sued Meridian for her injury. Honeycutt alleged that she was a guest at Meridian when she decided to take Alexander's class, although she had never participated in the sport. Honeycutt alleged that Alexander negligently manipulated her and caused her knee to snap, which resulted in injury that required surgery. Meridian moved for summary judgment. The trial court granted the motion, finding among other things that Honeycutt's action was barred by her primary assumption of the risk. Honeycutt appealed, contending that Alexander's conduct increased the risk inherent in kickboxing and amounted to gross negligence.

The Court of Appeal affirmed the judgment. The Court held that a health-club guest's action for an injury she sustained when a kickboxing instructor grabbed her leg was barred by the guest's primary assumption of the risk.

Izell v. Union Carbide Corporation
(2014) 230 Cal.App.4th 1081
October 22, 2014

Bobbie Izell owned a construction business that built approximately 200 homes in southern California from 1964 until 1994. Izell did not work as a laborer or supervisor on these projects, but he regularly visited and walked through the construction jobsites. During his visits to the jobsites, Izell was regularly exposed to dust from premixed joint compound and gun plastic cement. Izell later recalled seeing four different brands of joint compound on his jobsites and two brands of gun plastic cement. Of the joint compound brands, Izell believed Georgia Pacific was the most common brand because it was the "dominate seller in those days," followed by Hamilton Red Dot, Kaiser Gypsum, and Kelly-Moore's Paco brand. Izell also saw his workers use Riverside and Colton gun plastic cement. At varying times from 1970 to 1978, Union Carbide Corporation supplied asbestos to each of the four joint compound manufacturers and to Riverside for use in its gun plastic cement. In July 2011, at the age of 85, Izell was diagnosed with mesothelioma.

Izell and his wife Helen sued various product manufacturers and asbestos suppliers for their injuries, including Union Carbide, joint compound manufacturer Kaiser Gypsum, two gun plastic cement manufacturers, and a stucco manufacturer. The case was tried before a jury.
At trial, the Izells produced evidence that both Kaiser Gypsum and Union Carbide learned, in 1965 and 1967 respectively, that exposure to asbestos could cause cancer, but nonetheless continued to sell asbestos or asbestos-containing products without any safety warnings for more than a decade thereafter. After hearing percipient witness and expert medical and scientific testimony, the jury returned a special verdict finding all defendants liable on all theories of strict product liability and negligence. The jury awarded the Izells $30M in compensatory damages. The jury apportioned 65% of the fault to Union Carbide, 20% to Kaiser Gypsum, 10% to the gun plastic cement and stucco manufacturers, and 5% to various non-defendant manufacturers and suppliers. The jury also found Union Carbide and Kaiser Gypsum acted with "malice, oppression or fraud." The issue of punitive damages was tried as to Union Carbide only, which stipulated to a present net worth of $4.2B. The jury awarded punitive damages against Union Carbide in the amount of $18M. The trial court reduced the compensatory damage award from $30M to $6M, but declined to reduce the punitive damage award. Union Carbide appealed.

The Court of Appeal affirmed the judgment. The Court held that the evidence supported a multi-million dollar compensatory and punitive damage award against an asbestos supplier that sold asbestos without any safety warnings for more than a decade after its own studies concluded that even brief and low-level exposure could cause cancer.

Kasem v. Dion-Kindem
(2014) 230 Cal.App.4th 1395
October 29, 2014

Jean Kasem subleased a commercial space on the lower level of a multi-story building. Her inventory was damaged by sewage leaking from the upper level. Kasem retained counsel and sued the sublessor for refusing to compensate her for her damages, citing §29 of the sublease, which provided that the sublessor was required to indemnify her for all losses and expenses, including damage to property, resulting in whole or in part from the "release, threatened release, discharge or generation of Hazardous Materials" into the sublet premises from other parts of the building. At bench trial, Kasem's attorney requested that the trial court take judicial notice of several state and federal statutes that defined sewage as hazardous waste. The trial court refused to do so. The trial court rendered judgment in favor of the sublessor. In its statement of decision, the trial court faulted Kasem for failing to introduce expert testimony on the issue of whether sewage constitutes "hazardous waste." Kasem did not appeal. She instead filed a malpractice action against attorney Peter Dion-Kindem, faulting him, as the trial court had, for not introducing expert testimony on the issue of hazardous waste after the trial court refused to take judicial notice of the relevant statutes. After affording Kasem multiple opportunities for amendment, the trial court sustained Dion-Kindem's demurrer without further leave to amend and dismissed the complaint.

The Court of Appeal affirmed the judgment. The Court held that an adverse ruling suffered by the plaintiff in an underlying breach of contract action was the result of trial court error and not attorney malpractice.

Kight v. CashCall, Inc.
(2014) 231 Cal. App. 4th 112
November 5, 2015

In 2006, borrowers Amanda Kight and others sued lender CashCall, Inc., alleging CashCall monitored their telephone conversations with customer service representatives without their knowledge or consent. Although CashCall contended that it provided customers with an automated call monitoring disclosure, many of the borrowers denied ever having heard such a disclosure. Over CashCall's objections, the trial court certified a class on the borrowers' claim of alleged violation of *Penal Code* §632, which imposes liability on a "person" who intentionally eavesdrops upon or records a confidential communication without the consent of all parties. After class certification, CashCall successfully moved for summary adjudication on the §632 claim. The trial court found as a matter of law a corporation does not violate the statute when one of its supervisory employees secretly monitors a conversation between a customer and another corporate employee, reasoning that two employees are a single "person" within the meaning of the statute.

The Court of Appeal affirmed the judgment. The Court held that the trial court did not abuse its discretion in concluding that customers' claims of unauthorized eavesdropping by a business would require individualized analysis sufficient to preclude their lawsuit from proceeding as a class action.

Larson v. UHS of Rancho Springs, Inc.
(2014) 230 Cal.App.4th 336
October 2, 2014

Wayne Earl Larson filed suit against UHS of Rancho Springs, Inc. ("UHS"), and Richard Shuman, M.D., after Larson underwent surgery for kidney stones at UHS's hospital. Larson alleged that Shuman, who was the anesthesiologist for the procedure, forcefully grabbed and twisted Larson's arm during a pre-operative exam, and also forcefully pried open his mouth and performed other actions that injured Larson's face. Two months later, Larson amended his complaint to drop his claims for medical and professional negligence, substituting instead claims for assault, battery, and intentional infliction of emotional distress. The underlying factual allegations remained the same. Shuman and UHS successfully demurred on the ground that Larson failed to show he did not consent to Shuman's conduct because the alleged injuries happened while Shuman was providing medical care. Rather than amending his pleading, Lawson voluntarily dismissed the suit.

Eight months later, Larson again filed suit against UHS and Shuman, alleging claims for battery and intentional infliction of emotional distress. The complaint omitted many facts alleged in Larson's earlier action, and simply alleged as to both defendants that Shuman "forcefully grabbed [Larson's] arm, pried open [his] mouth, violently punched, lifted and grabbed [Larson's] chin, face and mouth," and Larson "suffered pain, bruising, swelling, soreness and emotional trauma and distress." The trial court granted UHS's and Shuman's demurrers without leave to amend because Larson's claims were barred by the one-year statute of limitations of *Code of Civil Procedure* §340.5 for claims based on a health care provider's professional negligence. The court entered two judgments dismissing Larson's claims. Larson appealed, contending that the two-year limitations period generally applicable to personal injury claims governed because he alleged intentional tort claims, not claims for professional negligence.

The Court of Appeal affirmed the trial court's judgments. The Court held that a surgery patient's claims for battery and intentional infliction of emotional distress were time-barred as based upon a health care provider's professional negligence where the claims were properly construed in light of allegations made by the plaintiff in a prior lawsuit against the defendant hospital and anesthesiologist.

Lawrence v. La Jolla Beach and Tennis Club, Inc.
(2014) 231 Cal.App.4th 11
October 31, 2014

Jeff and Nan Lawrence stayed at the La Jolla Beach and Tennis Club Hotel during a family vacation. Nan opened the window of the family's ocean front hotel room, which was on the second floor of the hotel, so that she could hear the ocean. One of the couple's children, five year-old Michael, fell from the window onto pavement below, suffering serious head and brain injuries. Evidence indicated that Michael knocked out the hotel room's window screen when he fell. The windowsill was some 25 inches above the floor and four to six inches deep. Michael later stated that he put his foot on the windowsill and fell when he leaned forward to look at something.

Jeff and Nan sued the hotel and La Jolla Beach and Tennis Club Partners, L.P., alleging negligence, dangerous condition of property, and negligent infliction of emotional distress. Michael, through Nan as guardian ad litem, filed a separate complaint alleging the same claims. The actions were consolidated. The trial court granted the hotel's motions for summary judgment, concluding that the hotel did not breach its duty of care and that the accident did not result from its failure to install a safety device on the window. The court deemed the accident unforeseeable. Among other things, the court noted that building code requirements were met, Nan opened the window, she and Jeff were nearby but distracted, the window was not in a common area over which the hotel had sole control, and there were no prior incidents of a similar nature.

The Court of Appeal reversed the trial court's grant of summary judgment. The Court held that an ocean-front hotel failed to show that it had no duty of care to take measures to prevent a small child from falling from an open upper story hotel room window that was equipped with nothing more than a screen intended to keep out insects.

Lobo v. Tamco
(2014) 230 Cal.App.4th 438
September 10, 2014

Law enforcement officer Daniel Lobo was killed while on duty when his motorcycle collided with an auto driven by Luis Del Rosario as Del Rosario left the premises of his employer, Tamco. Daniel's widow and others (collectively, "Lobo") sued Del Rosario and Tamco, alleging wrongful death. Lobo alleged that Del Rosario was acting within the course and scope of his employment by Tamco at the time of the collision. Tamco moved for summary judgment, arguing that the evidence showed as a matter of law that Del Rosario was not acting in the course and scope of his employment, but was merely leaving work and going home in his own auto at the end of his workday. The trial court granted summary judgment in favor of Tamco. The court of appeal reversed and remanded as to Lobo's claims for negligence and negligent operation of a motor vehicle, holding that there was a triable issue as to whether Del Rosario was acting in the course and scope of his employment. On remand, a trial was held solely on that issue. The jury returned a special verdict that Del Rosario was not so acting. Lobo appealed, contending that that there was no evidence in support of the verdict.

The Court of Appeal affirmed the judgment. In the published portion of its opinion, the Court held substantial evidence established that a motorist who collided with a motorcycle patrol officer while leaving his employer's premises did not do so while acting in the course and scope of his employment.

Mark Tanner Construction, Inc. v. Hub International Insurance Services, Inc.
(2014) 224 Cal.App.4th 574
March 10, 2014

Compensation Risk Managers of California, LLC ("CRM") administered a self-insured worker's compensation program for contractors. The program was known as the Contractors Access Program of California ("CAP"). Diversified Risk Insurance Brokers, predecessor in interest to HUB International Insurance Services, Inc., marketed and sold CAP to Mark Tanner Construction, Inc., and Mt. Lincoln Construction, Inc. CAP later failed, leaving the two construction companies exposed to considerable liability. The companies sued HUB for professional negligence and constructive fraud. After discovery was completed and while HUB's motion for summary judgment was pending, the construction companies obtained a copy of an agreement between CRM and Diversified that they had not been provided in discovery. The companies believed the agreement "significantly altered the legal landscape" in their action. They argued the agreement established that rather than acting as broker for them, Diversified instead had been acting as the broker for CAP. Further, they argued, the agreement revealed Diversified was part of a joint venture with CRM. These relationships had not been disclosed to them.

Relying on *Code of Civil Procedure* §437c(h), the construction companies moved for a continuance of the pending summary judgment hearing so that they could conduct additional discovery. In his supporting declaration, counsel stated his belief that the newly discovered document was "but the tip of the iceberg" with regard to HUB's liability. He stated his clients would seek to learn what other documents had not been produced "which implicate HUB's role with CRM and CAP and the ultimate failure of the CAP program." They would also seek "documentation and oral testimony relating to compliance with the requirements placed on HUB and arising out of the [agreement]." Finally, they would pursue further discovery, through interrogatories and depositions, "to determine what the relationship was between CAP and the Defendants." The trial court denied the motion and grant summary judgment for HUB.

The Court of Appeal affirmed the judgment. In the published portion of its opinion, the Court held that a motion to continue a pending summary judgment hearing so as to allow the moving parties to conduct additional discovery must state, with specificity, what facts they hoped to discover and how those facts were essential to opposing summary judgment.

Narayanan v. British Airways
(9th Cir. 2014) 747 F.3d 1125
March 19, 2014

Panansam Narayanan ("Panansam") suffered from an advanced-stage lung disease. While aboard a British Airways (“BA”) international flight in December 2008, Panansam was allegedly denied supplemental oxygen. Panansam died in June 2009. In March 2011, Panansam’s widow, Susheela Narayanan (“Narayanan”), individually and on behalf of the heirs and estate of Panansam, filed a lawsuit against BA in California state court under the Montreal Convention (“MC”). Narayanan alleged that the denial of oxygen hastened Panansam’s death. BA removed the case to federal court. The district court dismissed Narayanan’s complaint as untimely, finding that MC article 35(1) required her claim to be filed within two years of the date the BA aircraft arrived. Narayanan appealed.

The Ninth Circuit Court of Appeal affirmed the judgment of the district court. The Court held that under the plain language of the MC, a wrongful death claim that had not yet accrued when the two-year limitation period was triggered was nonetheless barred by that limitation.

Parrish v. Latham & Watkins
(2014) 229 Cal.App.4th 264
August 27, 2014

FLIR Systems, Inc. and Indigo Systems Corporation (collectively, “FLIR”) sued former employees William Parrish and E. Timothy Fitzgibbons for misappropriation of trade secrets. The trial court denied the employees’ motion for summary judgment. The employees prevailed at trial. Moreover, they obtained a ruling that the misappropriation of trade secrets claim had been brought against them in bad faith. FLIR was ordered to pay the employees their attorney’s fees and costs in an amount exceeding $1.6M. That order was affirmed on appeal. The employees thereafter sued the attorneys who had represented FLIR in the underlying action, Latham & Watkins LLP and Daniel Schecter (collectively, “Latham”) for malicious prosecution. Latham moved to strike the complaint under *Code of Civil Procedure* §425.16, arguing that the employees were unable to establish a probability of prevailing on their malicious prosecution action because the action was untimely brought under §340.6. The trial court agreed and granted the motion.

The Court of Appeal reversed the judgment. The Court held that, in a malicious prosecution action, the underlying trial court’s finding of plaintiffs’ bad faith prosecution of their claim precluded application of the interim adverse judgment rule to that court’s prior denial of the defendants’ summary judgment motion.

Romine v. Johnson Controls, Inc.
(2014) 224 Cal.App.4th 990
March 17, 2014

Jaklin Romine suffered catastrophic injury when her driver’s seatback collapsed backward during a rear-end collision. Romine sued the driver who caused the collision and others, including Johnson Controls, Inc., successor in interest to Ikeda Engineering Corporation, which participated in the design of her vehicle’s seat, and Vintec Co, which manufactured the seat.

The case went to trial before a jury, which returned a verdict in Romine's favor in the amount of $24,744,764, and found that Ikeda and Vintec were 20% at fault for her injuries.

The Court of Appeal affirmed in part and reversed in part the judgment and remanded. The Court held that the collapse of a driver's seat during a rear-end collision was not so far beyond the average consumer's experience or expectation as to render jury instruction on the consumer expectations test inappropriate.

Saffie v. Schmeling
(2014) 224 Cal.App.4th 563
March 7, 2014

In 2006, real estate broker Anthony Burton listed an undeveloped commercial parcel for sale. Included in the multiple listing service ("MLS") listing was the following language: "This parcel is in an earthquake study zone but has had a Fault Hazard Investigation completed and has been declared buildable by the investigating licensed geologist. Report available for serious buyers." Burton failed to disclose that the report had been completed more than 20 years prior, in 1982. George Saffie made an offer to purchase the property. Property owner Robert Schmeling made a counter-offer, which Saffie accepted. During escrow and prior to the close of the transaction, Burton gave Saffie's broker a copy of the fault hazard investigation report. The date of the report was clearly displayed on its cover. After the transaction closed, when Saffie began to try to develop the property, he discovered that the property was not, in fact, "ready to build." The county where the property was located no longer accepted fault hazard investigation reports performed under 1982 standards. The significant additional geological investigation that would now be required by the county for approval rendered Saffie's intended use of the property impractical. Saffie sued Burton and others for damages. Saffie argued that Burton's statement in the MLS regarding the fault hazard investigation report was false or inaccurate because it failed to specify the age of the report and thereby gave a false impression that the report was current and valid. Following a bench trial, the court rendered judgment in favor of Burton.

The Court of Appeal affirmed the judgment. The Court held that a seller's broker did not provide inaccurate information when he described the results of a 1982 geological survey in a 2006 property listing without disclosing the date of the report.

Scott v. C.R. Bard, Inc.
(2014) 231 Cal.App.4th 763
November 19, 2014

In February 2007, gynecologist Tillaikarasi Kannappan attended a one-day training session sponsored by C.R. Bard, Inc. Bard manufactured a transvaginal mesh kit called Avaulta Plus that was used to treat pelvic organ prolapse. Participants at the training session were shown the proper technique for implanting Avaulta. They were not instructed on removing mesh or diagnosing when mesh should be removed. According to Kannappan, she was told there could be complications but that they were minimal. She recalled being told Avaulta could cause minimal erosion but that the problem could be dealt with as an outpatient procedure in the office by trimming the mesh. Kannappan's overall impression was that Avaulta was very safe to use and was a superior product. She was not informed that Avaulta should not be used in sexually active women or for a mild prolapse. Patient Christine Scott later consulted Kannappan regarding treatment for mild vaginal prolapse of the bladder and rectum. Kannappan recommended the surgical insertion of two Avaulta Plus kits. She performed surgery to implant the kits in January 2008. Scott experienced complications immediately. She could not urinate, had to self-catheterize, and was in pain. Kannappan and a colleague had to perform four addition surgeries, none of which resolved Scott's problems. Scott consulted a different surgeon. Three additional surgeries were performed. Following these procedures, Scott suffered excruciating pain due to nerve damage, suffered additional pain during sexual intercourse, and lost control of her bowels. Scott sued Bard for negligence, strict product liability, negligent misrepresentation and fraud. The trial court directed a verdict in favor of Bard on Scott's cause of action for fraud. The cause of action for negligence was submitted to the jury, which was instructed on three theories of negligence: negligent training, and negligent misrepresentation. The jury found in favor of Scott on the cause of action for negligence and awarded her $5.5M in damages. The jury found, however, that physician Kannappan, who was not a party, was 40% liable for Scott's injuries. The trial court reduced Scott's damage award accordingly. Both parties appealed.

The Court of Appeal affirmed the judgment. In the published portion of its opinion, the Court held that the evidence supported the submission to the jury of three alternate theories of negligence by the manufacturer of a medical product.

Sykora v. State Department of State Hospitals
(2014) 225 Cal.App.4th 1530
May 6, 2014

Former Atascadero State Hospital patient Eric Sykora filed a government tort claim with the Victim Compensation and Government Claims Board, alleging medical malpractice. He did not include the required $25 filing fee. The board affixed its stamp on the claim and assigned it a claim number. After receiving no response from the board, Sykora later filed a negligence action against the State Department of State Hospitals. More than one year after the claim was filed, the department challenged the claim in a motion for judgment on the pleadings, noting Sykora's failure to pay the $25 filing fee. Sykora opposed the motion, arguing that the board never gave him notice that his claim was deficient or would not be considered. The trial court granted the department's motion and dismissed Sykora's action. The court found that the board was not required to give Sykora notice that his claim was deficient.

The Court of Appeal reversed the judgment. The Court held that, where the Victim Compensation and Government Claims Board failed to notify a claimant that he had failed to provide the required $25 filing fee, that failure could not later be used as a basis for challenging the sufficiency of the claim.

Verdugo v. Target Corporation
(2014) 59 Cal.4th 312
June 23, 2014

Mary Ann Verdugo suffered sudden cardiac arrest while shopping at a store owned by Target Corporation. Store personnel promptly called 911, but by the time emergency personnel reached Verdugo, she was dead. There was no automatic external defibrillator ("AED") on the store premises. Verdugo's family sued Target Corporation, alleging that as a commercial property owner, Target had a common law duty to maintain an AED onsite. Ruling that Target had no such duty, the district court dismissed the Verdugos' claim. The Verdugos appealed.

The Court of Appeals certified to the California Supreme Court the following question of law: In what circumstances, if ever, does the common law duty of a commercial property owner to provide emergency first aid to invitees require the availability of an AED for cases of sudden cardiac arrest?

The California Supreme Court held that Target's common law duty of care to its customers did not include a duty to acquire and make available an AED for use in a medical emergency. The Court of Appeals accordingly affirmed the judgment of dismissal, holding that the district court's ruling was in accord with California law.

Willemsen v. Mitrosilis
(2014) 230 Cal.App.4th 622
September 24, 2014

Ron Willemsen agreed to purchase a property lot from Avista Development, LLC. Willemsen applied for financing from Farmers and Merchants Bank. The bank retained AppraisalPacific, Inc., to determine the value of the property. The written purchase agreement between Willemsen and Avista contained numerous contingencies to allow Willemsen to determine whether the property was suitable for his intended purpose. However, the agreement did not include an appraisal contingency. Subsequently, Willemsen discovered that earthquake fault lines crossed the property and that the city in which the property was located intended to run roads across it. Willemsen sued numerous parties involved in the deal. In particular, Willemsen alleged a claim against AppraisalPacific for negligent misrepresentation. Willemsen alleged among other things that AppraisalPacific knew that he would rely on the appraisal to determine the value of the property and that AppraisalPacific intended for him to rely on the valuation in obtaining financing from the bank. Willemsen further alleged that the appraised property value exceeded the true value, that AppraisalPacific did not account for the fault lines or the planned road, and that his reliance on the appraisal was a substantial factor in causing him monetary harm. AppraisalPacific moved for summary judgment, contending among other things that Willemsen was not the intended beneficiary of the appraisal, that he could not show that he justifiably relied on the appraisal, and that neither AppraisalPacific nor the bank intended the appraisal to influence Willemsen's decision to buy the property. The trial court granted the motion, finding that the evidence showed that the appraisal was prepared for the bank's underwriting purposes and that Willemsen was only an incidental beneficiary. Willemsen appealed, contending among other things that AppraisalPacific intended for him to rely on its valuation in obtaining financing.

The Court of Appeal affirmed the judgment. The Court held that a land purchaser who alleged misrepresentation against his lender's appraiser failed to show that the appraiser intended to supply information to influence his decision to buy the land.

Young v. United States
2014 S.O.S. 13-35287
October 17, 2014

Donna and Gerald Young, together with their minor daughter J.Y., visited the Mount Ranier National Park in 2010. Like most visitors to the Park, they visited the Jackson Visitor Center ("JVC"), which was located in an area of the Park known to be "one of the snowiest places on the planet." J.Y. walked away to explore snowfield and found a small hole in the snow. When she asked Donna to come look at it, the snow collapsed. Donna fell some twelve feet before landing on a concrete pad supporting a nearby transformer. National Park Service ("NPS") personnel noted that the transformer's heat had melted a small cavern in the snow that had accumulated around and above it. The NPS had installed the transformer to power the visitor center when the JVC was constructed in 2008. The unit was placed approximately 150 feet from the visitor center building in a field across a road that serviced the area. The snowfield by the transformer typically had more snow than other areas because the NPS's road-plowing operations put snow there in the winter. The transformer's locations were not marked, nor were warning signs in place, at the time of Donna's accident. The Youngs sued the federal government under the *Federal Tort Claims Act* ("FTCA"), contending that the NPS negligently failed to warn about a known, latent hazard that it had created. The district court granted the government's motion to dismiss for lack of subject matter jurisdiction, concluding that the claim was barred by the FTCA's discretionary function exception. In particular, the court reasoned that the NPS's decisions about Park maintenance, and about protecting visitors and warning them about hazards, were policy-driven decisions protected under the exception.

The Court of Appeal reversed the district court judgment of dismissal and remanded the action for further proceedings. The Court held that the discretionary function exception of the FTCA did not shield the National Park Service's decision not to warn of a hazard that it knew of and had created near a popular park visitor center.